No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2017

GERALD HAND,
Petitioner,

v.

TIM SHOOP, WARDEN, CHILLICOTHE CORRECTIONAL INSTITUTION
Respondent.

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

APPENDIX

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871 F.3d 390
United States Court of Appeals,
Sixth Circuit.

Gerald HAND, Petitioner-Appellant,
v.
Marc C. HOUK, Warden, Respondent-Appellee.

No. 14-3148
|
Argued: January 26, 2017
|
Decided and Filed: September 8, 2017
|
Rehearing En Banc Denied October 18, 2017

Synopsis

Background: Following affirmance in state court of his conviction for aggravated murder, and his death sentence, petitioner filed federal petition for writ of habeas corpus. The United States District Court for the Southern District of Ohio, No. 2:07-cv-00846, Sandra S. Beckwith, J., 2014 WL 617594, adopting report and recommendation of Michael R. Merz, United States Magistrate Judge, 2014 WL 29508, denied petition. Petitioner appealed.

Holdings: The Court of Appeals, Boggs, Circuit Judge, held that:

[1] claims regarding adequacy of voir dire at trial to screen jurors disqualified on basis of pretrial publicity were procedurally defaulted;

[2] appellate counsel was not ineffective in failing to raise argument that trial counsel was ineffective for failing to question certain prospective jurors about pretrial publicity;

[3] claim that trial counsel was ineffective in failing to present expert psychological testimony during sentencing was procedurally defaulted;

[4] appellate counsel was not ineffective in failing to raise argument that trial counsel was ineffective for failing to present expert psychological testimony at sentencing;

[5] trial counsel was not ineffective in failing to present mitigation evidence during sentencing; and

[6] trial counsel's alleged deficiency in failing to object to introduction of all guilt-phase evidence during sentencing did not prejudice petitioner.

Affirmed.

***396** Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 2:07-cv-00846—Sandra S. Beckwith, District Judge.

Attorneys and Law Firms

ARGUED: Jeanne M. Cors, TAFT, STETTINIUS & HOLLISTER, LLP, Cincinnati, Ohio, for Appellant. Charles L. Wille, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. ON BRIEF: Jeanne M. Cors, TAFT, STETTINIUS & HOLLISTER, LLP, Cincinnati, Ohio, Jennifer M. Kinsley, KINSLEY LAW OFFICE, Cincinnati, Ohio, for Appellant. Brenda S. Leikala, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

Before: BOGGS, CLAY, and ROGERS, Circuit Judges.

OPINION

BOGGS, Circuit Judge.

This case presents a habeas petitioner who has been convicted of two counts of aggravated murder and sentenced to death. Over the span of nearly thirty years, petitioner Gerald Hand married four women. Three of those women would die, two of them victims of violent, unsolved home invasions. The death of Hand's fourth and final wife, however, revealed a different story. At home at the time of her death, Hand allegedly confronted and shot the intruder, who turned out to be his friend and employee Lonnie Welch. Subsequent police investigation uncovered a decades-long plot conducted by Hand and Welch to murder Hand's wives in order to collect their lucrative insurance policies. Having been convicted in state court and having exhausted his state appeals, Hand now brings this habeas corpus petition. The district court denied the petition, and for the following reasons, we affirm.

I

A

In March 1976, Hand's first wife Donna was found strangled to death in the basement ***397** of their home. She had also been struck on the head. There were no signs of forced entry, but some items in the house had been disturbed. Hand filed for and received $67,386 in life insurance proceeds and $50,000 from the Ohio Court of Claims victims-compensation fund. Hand married his second wife, Lori, just over a year later in June 1977. They had one son together, Robert Jr. Like Donna, Lori was found strangled to death in the basement of their home. Lori had also been shot twice. Just as with Donna's murder, police found no signs of forced entry but some items in the house had been disturbed. Hand also filed for and received over $126,000 in life insurance proceeds. Although Hand was a suspect, neither Donna's nor Lori's murder was solved. Hand married a third time, but that marriage ended in divorce.

Hand married his fourth wife, Jill, in 1992. Hand moved into her house, and they remained married until her death on January 15, 2002. On the night of her death, Hand called police and reported that a home intruder had shot his wife and that he had shot the intruder in self-defense. The home intruder was later identified as Lonnie Welch.

The Supreme Court of Ohio best describes the police investigation that followed:

> Police found Welch's body lying face down on Hand's neighbor's driveway. Inside Hand's house, Jill's body was found lying between the living room and the kitchen. Hand told police that he had shot the intruder but did not know his identity. He also gave police two .38-caliber revolvers that he used to shoot him. On the way to the hospital, Hand saw the intruder's vehicle and told Mark Schlauder, a paramedic, that "it could have belonged to somebody that worked for" Hand.
>
> Around 8:00 p.m. on January 15, Detective Dan Otto of the Delaware County Sheriff's Office interviewed Hand at the hospital. Hand said that after arriving home, he had dinner with Jill and then went to the bathroom. Upon exiting, Hand heard Jill scream, "Gerald," heard two gunshots, and saw a man in a red and black flannel shirt at the end of the hallway. Hand then retrieved two .38 caliber revolvers from the master bedroom. Hand started down the hallway firing both guns at the intruder, but had trouble shooting because the guns were "misfiring" and "missing every other round." Hand followed the intruder out the front door and continued firing at him as he ran toward his car, and then the intruder fell on the neighbor's driveway.
>
> During the interview, Hand repeated that he did not recognize the gunman, but recognized Welch's car in the driveway. Hand said he "didn't know [Welch] that well; that he did odd jobs around the shop; that he was a thief; that he was a cocaine addict; that he * * * [came] in to the shop area from time to time." Hand also said that it had been a year since he had had any contact with Welch, and Welch had no reason to be at his home that night.
>
> Investigators found no sign of forced entry at Hand's residence. Blood spatters were found inside the front door and on the front-door stoop. The top of the storm door was shattered, and particles of glass extended 13 feet into the front yard. All the glass fragments were found on top of the blood spatters. Police also found a black jacket on the front stoop, a spent bullet and glass fragments on top of the jacket, and a tooth outside the front door.
>
> According to Agent Gary Wilgus, a crime-scene investigator, the blood spatters indicated that the victim was bleeding ***398** and "blood was dropping from his body" as he was moving away from the house. A bloody trail led onto the sidewalk and through the front yard and ended where Welch was lying in the driveway. Welch was wearing cloth gloves, and a knit hat with two eyeholes and a mouth hole was next to his head. Police also found a .32-caliber revolver on the front lawn.
>
> Inside the house, police found glass fragments and bloodstains extending two to three feet from the front door and another tooth just inside the front door. Jill's body was 12 feet from the front door, her legs pointed towards the front door, and she was wearing a nightgown. Jill had been shot in the middle of her forehead. A second bullet deflected off the floor and was found on the carpet next to Jill's head.
>
> Investigators found a bullet in the living room ceiling, and a second bullet was found in the living room window frame. While investigators could not determine the exact trajectory of the two bullets, they determined

that they most likely originated from gunshots in the hallway area. No evidence of gunplay was found elsewhere in the house.

On January 17, 2002, Detective Otto reinterviewed Hand, and Hand provided a different version of events. Hand stated that after his wife was shot, he retrieved two guns from the master bedroom, went into the hallway, and saw Welch "coming down the hallway towards the master bedroom at him." Hand and Welch then began firing at each other in the hallway and were within four feet of each other during the gun battle. Hand repeated that he chased Welch outside the house but "couldn't get his guns to fire; that he was missing every other round and * * * they weren't firing." When asked about the .32-caliber revolver in the front yard, Hand stated that he did not know who owned it.

During the second interview, Hand said, "I was misquoted on the first interview at the hospital" about not knowing Welch. Hand said that he had known Welch, a former employee, for over 20 years. However, Hand continued to give the impression that they were not close. When asked about a wedding photo showing Welch as his best man, Hand said he "couldn't find anybody else to stand in as [his] best man." Hand repeated that "the only thing he saw" on the night of the murder was an unknown person in "red and black flannel," and he had "no clue who this unknown person was." Hand also said that "Jill had never met Lonnie; Lonnie's never been to Walnut Avenue; he had no idea why he was there."

In discussing his financial situation, Hand said he sold his radiator shop in October 2000 and received $ 300,000, and later received $ 33,000 from the sale of his share of the business and its inventory, and $ 140,000 from somewhere else. Hand said he "always needed money, but if he needed money, he could get some; that he had money." Hand also told police that he was "hiding the money and that he was considering filing bankruptcy; that that was against Jill's wishes." Later, Hand said that he "wasn't going to file for the bankruptcy * * * and they were going to work it out." When asked if he had any offices, Hand said that his office was in a bedroom in the house. However, Hand failed to disclose that he kept business records at another location.

On January 19, 2002, the police seized several boxes containing Hand's business and personal records from the storage area above a hardware store near Hand's former radiator shop. These records ***399** included credit cards, credit-card-and life-insurance-account information, payment receipts, a list of credit card debt prepared by Jill, and other information about Hand's finances.

Heather Zollman, a firearms expert, testified that the .32-caliber revolver found in the front yard was loaded with two fired and three unfired .32-caliber Smith and Wesson ("S & W") Remington-Peters cartridges. Bullet fragments removed from Jill's skull were consistent with being an S & W .32-caliber bullet. In testing the .32-caliber revolver, Zollman found that "on more than 50 percent of [her] testing, the firearm misfired" as a result of "a malfunction of the firearm." The stippling pattern shown in Jill's autopsy photographs indicated that "the muzzle to target distance was greater than six inches, and less than two feet."

Zollman tested the two .38-caliber revolvers and found that they were both in proper working order, and neither weapon showed any tendency to misfire. A bullet removed from Welch's right forearm was "consistent with the .38 caliber." Zollman also concluded that the bullet and fragments recovered from Welch's mouth and his lower back had rifling class characteristics corresponding with the S & W .38-caliber revolver. Further, gunshot residue around the bullet hole on the back of Welch's shirt revealed a muzzle-to-target distance greater than two feet from the garment but less than five feet.

Jennifer Duvall, a DNA expert, conducted DNA testing of bloodstains found on the shirt Hand was wearing on the night of the murders. Five of the bloodstains were consistent with the DNA profile of Welch. The odds that DNA from the shirt was from someone other than Welch was "one in more than seventy-nine trillion in the Caucasian population; one in more than forty-four trillion in the African-American population, and one in approximately forty-three trillion in the Hispanic population."

Michele Yezzo, a forensic scientist, examined bloodstain patterns on Hand's shirt. There were more than 75 blood spatters of varying sizes on the shirt.

Yezzo concluded that the shirt was "exposed to an impact" that "primarily registered on the front of the garment." Yezzo also examined glass fragments collected from Hand's residence and "found tiny fragments of clear glass" on Hand's shirt, trousers, tee-shirt, and pair of socks that he was wearing on the night of the murders. However, she found no glass fragments on Welch's boots. Yezzo conducted a fiber analysis of the bullet from Welch's mouth, but found "no fibers suitable for comparison."

Ted Manasian, a forensic scientist, found particles of lead and barium on both gloves that Welch was wearing, and these are "highly indicative of gunshot residue." Manasian could not determine how the gunshot residue got on the glove, just that it was there. Thus, Welch could have fired the gun, or was in the proximity of the gun when it was discharged, or handled an item that had gunshot residue on it.

Detective Otto testified that $ 1,006,645.27 in life insurance and state-benefit accounts were in effect at the time of Jill's death. This amount included $ 113,700 in Jill's Ohio Public Employees Retirement System account and $ 42,345.29 accumulated in the Ohio Public Employees Deferred Compensation program.

Dr. Keith Norton, a forensic pathologist in the Franklin County Coroner's office, conducted the autopsy of Jill and Welch. He concluded that Jill died from a single ***400** gunshot wound to the head. Dr. Norton found that Welch had been shot five times: in his mouth, left upper chest, left forearm, right shoulder, and lower back. The gunshot wound to Welch's lower back went into the spinal cord and would have paralyzed his legs. However, the gunshot wound to the chest was the cause of death.

According to Kenneth Grimes Jr., Hand's former cellmate in the Delaware County Jail, Hand told him that he "killed his wife and the man he was involved with." Hand said he hired a man and they had "been doing business together for years." Hand said he "hired the man to kill his wife and, in turn, the deal went sour. He wanted more money, so he killed two birds with one stone. He got both and didn't have to pay anything." Hand said he had agreed to pay $ 25,000 to have his wife killed, and the man "wanted it doubled." Hand said he was going to claim self-defense. He also said the evidence against him was "circumstantial and there were many witnesses that didn't have * * * any actual, proof."

State v. Hand, 107 Ohio St.3d 378, 840 N.E.2d 151, 165–68 (2006).

In sum, Hand's conflicting statements about the night of Jill's death, in conjunction with forensic evidence and statements of other members of the community, strongly implicated Hand and Welch in a plot to kill Jill in order to collect her lucrative insurance policy and pensions. When Welch reneged on the deal and demanded more money, Hand allegedly killed him and staged the scene in order to claim self-defense.

Armed with this information, Ohio prosecutors sought and received a grand-jury indictment in state court against Hand on six counts. Counts One and Two charged Hand with the aggravated murder of Jill and Welch and included several death-penalty specifications: two " 'course of conduct' specification[s]," (one for each count) *id.* at 170 (citation omitted), because the murders were part of a course of conduct involving the murders of two or more people; "three specifications of murdering Welch to escape detection for Hand's complicity in the murders of Donna, Lori, and Jill Hand; and two specifications of murdering Welch for the purpose of preventing his testimony as a witness in the murders of Donna and Lori Hand." *Ibid.* Counts Three, Four, and Five charged Hand with conspiracy to commit the aggravated murder of Jill, and Count Six charged Hand with escape for his involvement in an attempt to escape police custody after he was arrested. [1] *Ibid.*

Hand pleaded not guilty. The jury found Hand guilty of all of the charges listed in the indictment. At the sentencing hearing, psychologist Dr. Daniel Davis testified about Hand's background and his ability to adjust to life in prison; Hand's son and another witness also testified on his behalf, and Hand submitted an unsworn statement. *Id.* at 188–89. The jury recommended the death penalty for both murders. *Id.* at 170. The judge accepted the jury's recommendation and sentenced Hand to death for Counts One and Two of the indictment. The judge also sentenced Hand to consecutive sentences of three years for two of the remaining counts of conviction.

***401** B

Hand filed a notice of appeal to the Supreme Court of Ohio in 2003, raising therein thirteen "propositions of law" for relief:

PROPOSITION OF LAW NO. 1

Where the State fails to prove by clear and convincing evidence that a witness is unavailable due to a criminal defendant's wrongdoing, and the proposed evidence does not meet standards of reliability, it is constitutional error to admit this evidence against the defendant.

PROPOSITION OF LAW NO. 2

The introduction and admission of prejudicial and improper character and other acts evidence and the failure of the trial court to properly limit the use of the other acts evidence denied Gerald Hand his rights to a fair trial, due process and a reliable determination of his guilt and sentence as guaranteed by the United States Constitution, Amends. V, VI, VIII, AND XIV; Ohio Const. Art. I, §§ 10 and 16.

PROPOSITION OF LAW NO. 3

It is prejudicial error for a trial court to join the unrelated charge of escape with charges of aggravated murder and conspiracy in violation of O.R.C. § 2941.04, thus prejudicing Appellant in violation of his constitutional protections.

PROPOSITION OF LAW NO. 4

Where the State has failed to present any evidence that a criminal defendant planned to break his detention, a conviction on the charge of escape is constitutionally infirm due to the insufficiency of the evidence to prove each element of the offense.

PROPOSITION OF LAW NO. 5

When the State proceeds on a theory that the defendant is the principal offender of an aggravated murder, it is error for the trial court to instruct the jury on complicity. U.S. Const. VI, XIV.

PROPOSITION OF LAW NO. 6

The trial court's failure to give the required narrowing construction to a "course-of-conduct" specification in a capital case creates a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner in violation of the United States Constitution. U.S. Const. Amends. VIII & XIV.

PROPOSITION OF LAW NO. 7

Where trial counsel's performance at voir dire and in the trial phase in a capital case falls below professional standards for reasonableness, counsel has rendered ineffective assistance, thereby prejudicing the defendant in violation of his constitutional rights.

PROPOSITION OF LAW NO. 8

Where trial counsel put on a very brief and skeletal presentation at the penalty phase, fail to argue residual doubt and fail to make any closing argument to the jury, counsel's performance is substandard and a capital defendant is prejudiced thereby. U.S. Const. amends. VI, VIII, and XIV.

PROPOSITION OF LAW NO. 9

The capital defendant's right against cruel and unusual punishment and his right to due process are violated when the legal issue of relevance is left to the jury regarding sentencing considerations. U.S. Const. amends. VIII, XIV.

PROPOSITION OF LAW NO. 10

A capital defendant's right against cruel and unusual punishment under the Eighth and Fourteenth Amendments is denied when the sentencer is precluded from considering residual doubt of guilt as a mitigating factor. The preclusion of residual doubt from a capital sentencing proceeding and the trial court's refusal to instruct the jury to consider it also ***402** violate the Defendant's due process right to rebuttal under the Fourteenth Amendment. The preclusion of residual doubt may also infringe a capital defendant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments. U.S. Const. Amends. VI, VIII, XIV; Ohio Const. Art. I, §§ 9, 10, 16.

PROPOSITION OF LAW NO. 11

> Gerald Hand's death sentence must be vacated by this Court as inappropriate because the evidence in mitigation was not outweighed by the aggravating circumstances.
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> **PROPOSITION OF LAW NO. 12**
>
> A capital defendant's right to due process is violated when the State is permitted to convict upon a standard of proof below proof beyond a reasonable doubt. U.S. Const. amend. XIV; Ohio Const. Art. I, § 16.
>
> **PROPOSITION OF LAW NO. 13**
>
> Ohio's death penalty law is unconstitutional. Ohio Rev. Code Ann. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Gerald Hand. U.S. Const. amends. V, VI, VIII, [a]nd XIV; Ohio Const. Art. I, §§ 2, 9, 10, [a]nd 16. Further, Ohio's death penalty statute violates the United States' obligations under international law.

On January 18, 2006, the Ohio Supreme Court affirmed Hand's convictions and sentence. *State v. Hand*, 840 N.E.2d at 161. Hand filed a Motion for Reconsideration with the Ohio Supreme Court on January 30, 2006, in which he re-raised the first two propositions of law that the Ohio Supreme Court rejected on direct appeal. The court denied the motion on April 29, 2006.

While Hand's Motion for Reconsideration was still pending with the Ohio Supreme Court, Hand obtained new counsel who filed an application to reopen his direct appeal.[2] His application raised three new claims for relief:

> **PROPOSITION OF LAW NO. 1**
>
> Appellate counsel was ineffective for failing to raise the claim that appellant Hand's conviction was against the manifest weight of the evidence because the state failed to prove the underlying aggravating circumstances and specifications of Count 2, specifications 2-6, beyond a reasonable doubt. The conviction was, therefore, contrary to th[e Ohio Supreme] Court's holding in *State v. Odraye Jones*, 91 Ohio St.3d 335, 744 N.E.2d 1163 (2001).
>
> **PROPOSITION OF LAW NO. 2**
>
> Appellate counsel was ineffective for failing to motion the court to supplement their brief to include relevant and previously unavailable juror bias issues.
>
> **PROPOSITION OF LAW NO. 3**
>
> Appellate counsel was ineffective for failing to raise the issue that the trial court committed error by failing to conduct a constitutionally adequate inquiry to determine bias of jurors due to pre-trial publicity.

Hand's application, filed on April 18, 2006, was denied by the Ohio Supreme Court on August 2, 2006. *State v. Hand*, 110 Ohio St.3d 1435, 852 N.E.2d 185 (2006) (unpublished table decision).

While Hand's application to reopen his direct appeal was still pending, he also filed a petition for a writ of certiorari from ***403** the Ohio Supreme Court's original denial of his direct appeal with the United States Supreme Court. The Court denied Hand's petition on October 10, 2006. *Hand v. Ohio*, 549 U.S. 957, 127 S.Ct. 387, 166 L.Ed.2d 277 (2006).

Hand filed a second application to reopen his direct appeal pursuant to Ohio Supreme Court Practice Rule XI on September 24, 2007. Hand argued that his appellate counsel was ineffective for failure to raise the following three claims:

> 1) whether the death penalty specifications related to the murder of Hand's first wife were barred by the doctrine of collateral estoppel; 2) whether trial counsel were ineffective for failing to object to questions, testimony, and evidence regarding Hand's bankruptcy attorney on the grounds of attorney-client privilege; and 3) whether the trial court erred in denying Hand's motion to dismiss the specifications relating to the murders of Hand's first two wives under Evid. R. 404(b).

Because Hand's application, filed over a year after his direct appeal had concluded, fell outside of the 90-day filing deadline, the Ohio Supreme Court denied it on December 12, 2007. *State v. Hand*, 116 Ohio St.3d 1435,

877 N.E.2d 987 (2007). This ended Hand's unsuccessful direct appeal.

C

On December 27, 2004, while Hand's direct appeal was still pending, he filed a petition for state post-conviction relief in the Delaware County Court of Common Pleas. His petition initially included ten claims for relief, but he subsequently amended his petition on February 9, 2005, to include two additional claims. In total, he raised the following twelve claims in state post-conviction relief:

Ground for Relief No. 1

Petitioner's conviction and sentence are void or voidable because the trial court failed to conduct a constitutionally adequate inquiry to determine juror bias due to pre-trial publicity. The court's error violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments ***404** of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.

Ground for Relief No. 2

Petitioner's conviction and sentence are void or voidable because he was denied the effective assistance of counsel when trial counsel failed to adequately question prospective jurors with regards to their awareness of pre-trial publicity. The failure to act by defense counsel violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.

Ground for Relief No. 3

Petitioner's conviction and sentence are void or voidable because he was denied the effective assistance of counsel when defense counsel failed to make a motion for a change of venue. The failure to act by defense counsel violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.

Ground for Relief No. 4

Petitioner's conviction and sentence are void or voidable because his trial counsel failed to present compelling expert psychological evidence in his defense during the penalty phase of his capital trial. This inaction violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

Ground for Relief No. 5

Petitioner's convictions and sentence are void or voidable because his trial counsel failed to reasonably investigate and present compelling evidence, through family and friends, to mitigate the sentence of death. Therefore, Petitioner's rights were denied under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 2, 5, 9, 10, 16, and 20 of Article I of the Ohio Constitution.

Ground for Relief No. 6

Petitioner's convictions and sentence are void or voidable because his trial counsel failed to reasonably investigate and present compelling evidence that was vital mitigation after Petitioner testified poorly during his trial and was convicted of aggravated murder. Therefore, Petitioner's rights were denied under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 2, 5, 9, 10, 16, and 20 of Article I of the Ohio Constitution.

Ground for Relief No. 7

Petitioner's judgment and sentence are void or voidable because a juror failed to follow this court's instruction regarding the weighing process necessary to determine Petitioner's death sentence. As a result, Petitioner was denied his right to due process, and a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 2, 5, 9, 10, 16, and 20, Article I of the Ohio Constitution.

Ground for Relief No. 8

Petitioner's conviction and sentence are void or voidable because his trial counsel failed to present compelling evidence about his third wife during the penalty phase of his capital trial. As a result, Petitioner

was denied his right to effective assistance of counsel, due process, and a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 2, 5, 9, 10, 16, and 20, Article I of the Ohio Constitution.

Ground for Relief No. 9

Petitioner's conviction and sentence are void or voidable because the death penalty as administered by lethal injection in the state of Ohio violates his constitutional rights to protection from cruel and [un]usual punishment and to due process of law. U.S. Const. amends. VIII, IX, XIV; Sections 1, 2, 5, 9, 10, 16, and 20, Article I of the Ohio Constitution; *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 [118 S.Ct. 1244, 140 L.Ed.2d 387] (1998) (five justices holding that ... the Due Process Clause protects the "life" interest at issue in capital cases).

Ground for Relief No. 10

Petitioner's judgment and sentence are void or voidable because, assuming *arguendo* that none of the grounds for relief in his post-conviction petition individually warrant the relief sought from this court, the cumulative effects of the errors and omissions presented in the petition's foregoing paragraphs have been prejudicial and have denied Petitioner his rights secured by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.

Ground for Relief No. 11

Petitioner's conviction and sentence are void or voidable because he was denied the effective assistance of counsel when trial counsel failed to act upon and utilize ***405** Petitioner's timely report of an escape attempt at the Delaware County Jail. The failure to act by defense counsel violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.

Ground for Relief No. 12

Petitioner's convictions and sentence are void or voidable because the State withheld material evidence —investigation in 2001 by the Columbus Police Department of the murders of Petitioner's first two wives—in violation of his rights to due process and a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 1, 2, 5, 9, 10, 16, and 20, Article I of the Ohio Constitution.

On May 27, 2005, the state trial court dismissed Hand's petition for post-conviction relief, holding that his ninth and tenth grounds for relief failed on the merits, his seventh ground for relief was based on evidence that violated Ohio evidence rules, and his remaining claims should have been raised on direct appeal and were therefore precluded by *res judicata*.

On June 23, 2005, Hand appealed the state trial court's dismissal of his petition for post-conviction relief, raising the following three assignments of error:

Assignment of Error No. 1

The trial court erred by dismissing appellant's post-conviction petition where he presented sufficient operative facts and supporting exhibits to merit an evidentiary hearing and discovery.

Assignment of Error No. II

Ohio's post-conviction procedures neither afford an adequate corrective process nor comply with due process and equal protection under the Fourteenth Amendment.

Assignment of Error No. III

Considered together, the cumulative errors set forth in Appellant's substantive grounds for relief merit reversal or remand for a proper post-conviction process.

The Ohio Court of Appeals affirmed the trial court's decision on April 21, 2006. *State v. Hand*, No. 05CAA060040, 2006 WL 1063758 (Ohio Ct. App.). Of relevance to this appeal, the court held that Hand was not entitled to an evidentiary hearing because the trial court correctly determined that Hand's first, second, third, fourth, fifth, sixth, eighth, eleventh, and twelfth claims were precluded by *res judicata* because he failed to raise them properly on direct review. *Id.* at *3. The court also held that, even if not precluded, Hand's ineffective-assistance-of-counsel claims based on

his counsel's performance during sentencing—claims four, five, six, eight, and eleven—were all meritless. *Id.* at *5.

Hand filed a notice of appeal to the Supreme Court of Ohio on June 5, 2006, raising four propositions of law, but the court declined review. *State v. Hand*, 110 Ohio St.3d 1468, 852 N.E.2d 1215 (2006) (unpublished table decision). Hand then filed a petition for certiorari to the United States Supreme Court, which was also denied. *Hand v. Ohio*, 549 U.S. 1217, 127 S.Ct. 1271, 167 L.Ed.2d 94 (2007). This ended Hand's unsuccessful attempt to obtain state post-conviction relief.

D

Hand then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in federal district court on August 22, 2007. He raised fifteen claims for relief, several of which contained additional sub-claims. The district court granted Hand an ***406** evidentiary hearing, which was held in February 2010. After the magistrate judge entered a report and recommendation and a supplemental report recommending that the district court deny Hand's petition—both swiftly followed by Hand's strenuous objections—the district court adopted the magistrate judge's report and denied Hand's petition in its entirety. *Hand v. Houk*, No. 2:07-cv-846, 2013 WL 2372180 (S.D. Ohio May 29, 2013).

The district court granted Hand a Certificate of Appealability (COA) on six of those claims and associated sub-claims, and we expanded the COA to include an additional ineffective-assistance-of-appellate-counsel claim with three sub-claims. Hand's claims and sub-claims for habeas relief are:

Claim I

Whether trial counsel's failure to further question jurors regarding pretrial publicity constituted ineffective assistance of counsel?

Claim II

Whether *res judicata* bars Hand's claim that the trial court conducted an inadequate voir dire into pretrial publicity?

Claim III

Whether appellate counsel's failure to (i) challenge the sufficiency of the evidence as to the aggravating circumstances and specifications of count two, specifications two through six; (ii) amend the brief to include juror bias issues; and/or (iii) allege that the trial court's inquiry into potential juror bias resulting from extensive pretrial publicity was constitutionally defective constituted ineffective assistance of counsel?

Claim IV

Whether trial counsel's failure at sentencing to (i) present expert psychological testimony; (ii) properly investigate, prepare and present mitigation evidence; and/or (iii) object to the reintroduction of all guilt-phase evidence constituted ineffective assistance of counsel?

Claim V

Whether the trial court failed to give the appropriate narrowing construction to the course of conduct specification?

Claim VI

Whether Hand fairly presented his federal constitutional 404B prior bad acts claim in state court?

Claim VII

Whether the jury convicted Hand of escape based on insufficient evidence? Appellant's Br. at 1–2.

For the purpose of clarity, we will group some of Hand's claims together when analyzing them because they involve similar underlying issues. We will also address them in an order different from that in which he presents them.

II

[1] We review a district court's habeas corpus decisions under a mixed standard of review, "examin[ing] the district court's legal conclusions *de novo* and its factual findings under a 'clearly erroneous' standard." *Kelly v. Lazaroff*, 846 F.3d 819, 827 (6th Cir. 2017) (alteration in original) (citations omitted).

[2] **[3]** **[4]** Because Hand's habeas petition was filed after 1996, it is subject to the Antiterrorism and Effective

Death Penalty Act (AEDPA). *See* 28 U.S.C. § 2254. AEDPA commands that, with exceptions not relevant here, "[a]n application for a writ of habeas corpus ... shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b). AEDPA's exhaustion requirement gives "state courts the first opportunity to correct alleged violations of their prisoner's ***407** rights," *King v. Berghuis*, 744 F.3d 961, 964 (6th Cir. 2014) (citation omitted), and 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). Because the exhaustion requirement "refers only to remedies still available at the time of the federal petition," *Gray v. Netherland*, 518 U.S. 152, 161, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996) (citation omitted), a petitioner whose claims are barred by *res judicata*, and are thus procedurally defaulted, has satisfied AEDPA's exhaustion requirement. "However, the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default." *Kelly*, 846 F.3d at 828 (quoting *Gray*, 518 U.S. at 162, 116 S.Ct. 2074).

[5] **[6]** Determining whether a claim has been procedurally defaulted is a four-step inquiry:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that petitioner failed to comply with the rule.... Second, the court must decide whether the state courts actually enforced the state procedural sanction.... Third, the court must decide whether the state procedural ground is an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim.... Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate... that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Ibid. (quoting *Stone v. Moore*, 644 F.3d 342, 346 (6th Cir. 2011)). To inform this inquiry, "we look to the 'last explained state court judgment,' to determine whether relief is barred on procedural grounds." *Stone*, 644 F.3d at 346 (quoting *Munson v. Kapture*, 384 F.3d 310, 314 (6th Cir. 2004)).

When the state court has evaluated the petitioner's claim on the merits, AEDPA requires federal courts sitting in habeas review to grant the state court's decisions great deference. We are instructed not to grant habeas relief unless the state court's adjudication of the claim either "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 "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).

[7] **[8]** **[9]** **[10]** **[11]** This is no easy task for the habeas petitioner. In determining what constitutes "clearly established" federal law, we are limited strictly to the holdings of the Supreme Court, excluding any dicta. *White v. Woodall*, —— U.S. ——, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014) (citations omitted). Moreover, in order to grant habeas relief on this ground, a state 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." *Harrington v. Richter*, 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). "[E]ven clear error will not suffice" to grant habeas relief. *Moritz v. Woods*, No. 16-1504, 692 Fed.Appx. 249, 253-54, 2017 WL 2241814, at *4 (6th Cir. May 22, 2017) (citation omitted). Similarly, a state court's ***408** findings of fact are unreasonable only where they are "rebutted by 'clear and convincing evidence' and do not have support in the record." *Pouncy v. Palmer*, 846 F.3d 144, 158 (6th Cir. 2017) (quoting *Matthews v. Ishee*, 486 F.3d 883, 889 (6th Cir. 2007)). In addition, our review is limited to the record that was before the state court that adjudicated the claim on the merits in the first instance. *Cullen v. Pinholster*, 563 U.S. 170, 180, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011).

[12] Only when the petitioner's claim was not procedurally defaulted (or if the procedural default was

excused) *and* the state court never evaluated the claim on the merits do we analyze the petitioner's claim under the pre-AEDPA standard of review, which asks us to evaluate questions of law *de novo* and questions of fact for clear error. *See Robinson v. Howes*, 663 F.3d 819, 823 (6th Cir. 2011); *Brown v. Smith*, 551 F.3d 424, 428, 430 (6th Cir. 2008).

III

Hand raises several claims involving the adequacy of the voir dire at his trial to screen jurors disqualified on the basis of pretrial publicity. In his second claim, he argues that Ohio's *res judicata* rules do not bar him from challenging the adequacy of the trial court's voir dire on habeas review. In his first claim, he argues that his trial counsel's failure to further question prospective jurors regarding pretrial publicity constituted ineffective assistance of counsel. In sub-parts (ii) and (iii) of his third claim, he argues that his appellate counsel on direct appeal was constitutionally ineffective for failing to amend his brief to include juror-bias issues or to challenge the trial court's inquiry into potential juror bias. We will analyze the voir dire claims in this order.

A

Hand's second claim is that the trial court's voir dire did not adequately screen jurors for bias due to extensive pre-trial publicity, thereby violating his constitutional right to a fair trial. The district court held that this claim was procedurally defaulted because the Ohio courts determined that it was barred by *res judicata*. The district court was correct.

[13] **[14]** **[15]** **[16]** As this court has previously discussed, Ohio employs a bifurcated system of appellate review. *See McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 751 (6th Cir. 2013) ("Ohio law appears to contemplate two kinds of [appellate] claims, those based only on evidence in the trial record and those based in part on evidence outside the record."). For the first type of claim—those based only on evidence contained in the trial record—a convicted defendant is expected to raise the claim on direct appeal or else the claim is barred by the doctrine of *res judicata*. As the Ohio Supreme Court stated in the syllabus of *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), and reiterated in *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982):

> Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment or conviction, *or on an appeal* from that judgment.

Cole, 443 N.E.2d at 171. Only claims involving evidence outside the trial record may first be raised in a petition for state post-conviction relief. *See McGuire*, 738 F.3d at 751–52; *Cole*, 443 N.E.2d at 171 ***409** ("Generally, the introduction in [a state post-conviction] petition of evidence *dehors* the record ... is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of *res judicata*.").

[17] It is undisputed that Hand first raised this claim in his state post-conviction proceeding, having failed to raise it previously on direct appeal. *See supra* Part I.B–C, pp. 7–14. The post-conviction trial court held, and the Ohio Court of Appeals affirmed, that the claim was barred by *res judicata* because claims of juror bias can be raised on direct appeal with evidence gathered from the trial record, such as the voir dire transcript. *Hand*, 2006 WL 1063758, at *4. We have previously held that an Ohio court's application of the *res judicata* doctrine is an adequate and independent state ground that bars federal habeas relief. *See Hanna v. Ishee*, 694 F.3d 596, 614 (6th Cir. 2012). The only question Hand raises on appeal is whether the Ohio courts correctly applied this procedural bar in light of the fact that he sought to introduce newspaper articles that were outside of the record in support of his claim. Not only was this argument raised by Hand before the Ohio courts and rejected, *see Hand*, 2006 WL 1063758, at *4 ("Appellant's attachment of exhibits demonstrating pre-trial publicity to the post-conviction relief petition, though admittedly outside the original trial record, merely supplements appellant's argument which was capable of review on direct appeal on the then extant record."), it finds no support elsewhere in Ohio case law. *See, e.g.*, *State v. Franklin*, No. 19041, 2002 WL 1000415, at *3

(Ohio Ct. App. May 17, 2002) ("Whether a trial court abused its discretion in unfairly limiting the scope of voir dire will ordinarily be ascertainable from the record.").

[18] Because the Ohio courts correctly applied the doctrine of *res judicata* and because Hand did not argue cause and prejudice to excuse his default,[3] we hold that Hand procedurally defaulted his second claim for habeas relief.

B

Hand's first claim is that his trial counsel was constitutionally ineffective for failing to question two specific jurors regarding their exposure to pre-trial publicity. The district court held that this claim, like his second claim, was procedurally defaulted because the Ohio courts determined that it was barred by *res judicata*. Just as with his second claim, the district court was correct.

[19] **[20]** It is undisputed that Hand failed to raise this ineffective-assistance-of-trial-counsel claim on direct appeal, first raising this claim in his petition for state post-conviction relief.[4] Just as with his voir dire claim, *see supra* Part III.A, pp. 19–20, the post-conviction trial court held that this claim was barred by *res judicata*, and the Ohio Court of Appeals affirmed the trial court's judgment. ***410** *Hand*, 2006 WL 1063758, at *4–5. Ohio's rules regarding its bifurcated appellate system—requiring claims based upon evidence contained within the trial record to be brought on direct review—apply with equal force to ineffective-assistance-of-trial-counsel claims. Hand's claim, based on his trial counsel's performance during voir dire, could have been raised on direct appeal with the evidence contained within the trial record, just as he could have raised his analogous voir dire claim regarding the trial court. *Id.* at *5 ("We find the [ineffective-assistance-of-trial-counsel] claims presented were cognizable and capable of review on direct appeal.... We note the record on direct appeal was supplemented with the jury questionnaires which appellant asserts merit review under post[-]conviction relief herein."). And as previously discussed, it is established law in this circuit that an Ohio court's application of the doctrine of *res judicata* is an independent and adequate state ground sufficient to bar habeas relief. *See Hanna*, 694 F.3d at 614.

[21] **[22]** **[23]** **[24]** However, Hand argues that the procedural default of his ineffective-assistance-of-trial-counsel claim, unlike his voir dire claim concerning the trial court's conduct, may be excused because his appellate counsel was constitutionally ineffective for not raising it. *See* Appellant's Br. at 39–44. Although Hand is correct that ineffective appellate counsel can excuse a petitioner's procedural default, *see Murray*, 477 U.S. at 492, 106 S.Ct. 2639, his appellate counsel was not constitutionally ineffective. The constitutional standard for counsel is governed by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which says that in order to succeed in an ineffective-assistance-of-counsel claim, a claimant must show that counsel acted "outside the wide range of professionally competent assistance" such that the claimant was prejudiced. *Id.* at 690, 104 S.Ct. 2052. This is an extremely deferential standard, as "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Ibid.* Mere failure to raise a potentially viable claim is not enough, as "[a]ppellate counsel need not raise every non-frivolous claim on direct appeal." *Sanders v. Curtin*, 529 Fed.Appx. 506, 521 (6th Cir. 2013). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

[25] **[26]** **[27]** Hand's counsel on direct appeal raised thirteen claims for relief, including an array of state and federal constitutional claims. *See supra* Part I.B, pp. 7–11. The thrust of Hand's claim is that his appellate counsel should have also argued that his trial counsel was ineffective for failing to question certain prospective jurors about pretrial publicity, which turns on the substance of his underlying juror-bias-pretrial-publicity claim. But, as Supreme Court precedent makes clear, succeeding on a juror-bias challenge is no easy task. To demonstrate actual prejudice, the publicity and the voir dire testimony must show that "a fair trial was impossible," *White v. Mitchell*, 431 F.3d 517, 532 (6th Cir. 2005) (citation omitted). A mere preconceived notion as to the guilt or innocence of the accused is not enough to rebut the presumption of a prospective juror's impartiality. *Irvin v. Dowd*, 366 U.S. 717, 722–23, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Moreover, a reviewing court is instructed to give the trial court's assessment of a juror's impartiality deference

because of the unique ability of the trial judge to assess "the prospective juror's inflection, sincerity, demeanor, candor, ***411** body language, and apprehension of duty." *Skilling v. United States*, 561 U.S. 358, 386, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). Although both of the jurors that Hand argues were influenced by pretrial publicity indicated that they held preconceived notions about his case, both also made clear during voir dire that they could set aside any opinions that they might have held and decide the case on the evidence presented in court. Given the number and strength of the other claims Hand raised on direct appeal, the voir dire claim that Hand now alleges his counsel improperly omitted was not so strong that his counsel acted "outside the wide range of professionally competent assistance" by failing to raise it.

Because Hand has not demonstrated that his appellate counsel was ineffective for failing to raise his first claim on direct appeal in state court, the claim is not only procedurally defaulted, but Hand has also not shown sufficient cause and prejudice to excuse the default.

C

In sub-parts (ii) and (iii) of his third claim, Hand raises independent ineffective-assistance-of-appellate-counsel claims regarding his voir dire, alleging that his counsel on direct appeal was constitutionally ineffective for (ii) failing to amend his brief to include juror-bias issues and (iii) failing to allege that the trial court's inquiry into potential juror bias resulting from pretrial publicity was defective. The district court concluded that neither claim was defaulted, but both lacked merit.

[28] The district court was correct for the same reason that Hand cannot excuse the procedural default of his previous claim: Hand has not demonstrated that his appellate counsel's conduct fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. Strategic decisions of counsel, including whether to raise some non-frivolous claims over others, fall well within the range of professional competence. In fact, "the process of 'winnowing out weaker arguments on appeal' is 'the hallmark of effective appellate advocacy.' " *Monzo*, 281 F.3d at 579 (quoting *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). As discussed above, *see supra* Part III.B, pp. 20–22, Hand's voir dire challenges were not "clearly stronger" than the 13 claims Hand's counsel did raise on direct appeal. *Monzo*, 281 F.3d at 579. For this reason, we hold that sub-parts (ii) and (iii) of Hand's third claim for habeas relief are meritless. This resolves Hand's voir dire claims.

IV

In his fourth claim, Hand raises a trio of ineffective-assistance-of-trial-counsel sub-claims based upon his trial counsel's performance during sentencing. He argues that his counsel was constitutionally ineffective for failing to (i) present expert psychological testimony, (ii) properly investigate, prepare, and present mitigation evidence, and (iii) object to the reintroduction of all guilt-phase evidence. The district court concluded that the first sub-claim was procedurally defaulted or, alternatively, failed on the merits and that the remaining sub-claims could not overcome AEDPA deference. The district court was correct.

A

In his first sub-claim, Hand argues that his trial counsel was constitutionally ineffective for failing to present expert psychological testimony during the sentencing phase. The thrust of Hand's argument is that his trial counsel failed to take full advantage of the services of Dr. Daniel ***412** Davis, a forensic psychologist who testified on Hand's behalf during sentencing. Appellant's Br. at 56, 62–70. In advance of testifying, Dr. Davis administered to Hand a number of psychological tests, including the Minnesota Multiphasic Personality Inventory ("MMPI"). The MMPI is a psychological test that assesses a patient's personality traits and psychopathology and is primarily used to test those who are suspected of having mental-health issues. Hand's test did not indicate that he suffered from an antisocial personality disorder as previously thought, but rather that he struggled with internalizing his feelings. Based on these results, Dr. Davis diagnosed Hand with hypochondria, depression, and anxiety. *Id.* at 68. Although Dr. Davis testified on Hand's behalf during sentencing, trial counsel never asked Dr. Davis questions about Hand's MMPI results, instead focusing Dr. Davis's testimony on Hand's ability to adjust to prison life if he were sentenced to life in prison without parole.[5] *Ibid.* Hand now argues that, had Dr. Davis testified as to his

mental-health afflictions, the jury would likely have been swayed to spare his life.

[29] Although Hand raised arguments on direct appeal that his trial counsel was constitutionally ineffective during sentencing, *see supra* Part I.B, pp. 7–11, he did not raise this particular argument until he filed his petition for post-conviction relief in state court, *see supra* Part I.C, pp. 11–14. As previously discussed, Ohio requires convicted defendants presenting claims based on evidence contained in the record to advance those claims on direct appeal or risk forfeiting them under principles of *res judicata*. *Cole*, 443 N.E.2d at 171. The state post-conviction court denied Hand's claim for relief on this ground, noting that this was a claim that should have been raised on direct appeal. *Hand*, 2006 WL 1063758 at *5. This is an independent and adequate state ground sufficient to bar habeas relief. *See Hanna*, 694 F.3d at 614.

Hand raises two arguments on appeal for why we should evaluate this claim on the merits: (1) his claim depends on evidence outside of the trial record and, thus, is not barred by Ohio's *res judicata* rules, and (2) his constitutionally ineffective counsel on direct appeal can excuse any procedural default. Neither argument has merit. As the district court noted, Ohio's *res judicata* rules are designed to prevent a convicted defendant from raising claims that could have been raised on direct appeal in subsequent claims for relief. *Hand*, 2013 WL 2372180, at *45. Claims based on extra-record evidence are not barred by *res judicata* on the premise that a convicted defendant cannot be expected to raise a claim based on such evidence within the filing period for direct appeal. It is undisputed that the allegedly unavailable outside-of-the-record evidence Hand points to in support of his claim—namely, his MMPI results and the information contained within Dr. Davis's post-conviction affidavit—were available to Hand *during trial* and easily accessible to his appellate counsel. Ohio's *res judicata* rules were therefore correctly applied in this case.

[30] Although Hand is correct to suggest that ineffective assistance of appellate counsel can excuse a procedural default, *see Murray*, 477 U.S. at 492, 106 S.Ct. 2639, Hand's appellate counsel did not fall "outside the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052, for many of the same reasons discussed above. *See supra* ***413** Part III.B, pp. 20–22. Here, the claim that Hand contends his appellate counsel should have raised on direct appeal is that his trial counsel was constitutionally ineffective for failing to introduce specific psychological evidence at sentencing. Hand points to only two cases—*Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), and *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)—to support the proposition that the failure to present mitigating evidence at sentencing constitutes ineffective assistance of counsel, and neither case applies to the facts before us. In *Glenn*, a pre-AEDPA habeas case, we held that trial counsel was constitutionally ineffective where "the lawyers made virtually no attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty" and "[o]nly one of Glenn's lawyers did any preparatory work at all following the verdict." 71 F.3d at 1207. In *Williams*, trial counsel similarly "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." 529 U.S. at 395, 120 S.Ct. 1495. Hand's trial counsel, by comparison, investigated Hand's psychological background and made the strategic decision to emphasize his ability to adjust to life in prison and mentor other inmates. In light of the relevant case law, it cannot be said that Hand's ineffective-assistance-of-trial-counsel claim was "clearly stronger" than the thirteen claims that Hand's counsel presented on direct appeal such that his appellate counsel violated constitutional standards of representation by failing to raise it. Therefore, this first sub-claim was procedurally defaulted.

B

[31] In his second sub-claim, Hand argues that his trial counsel was constitutionally ineffective for failing to properly investigate, prepare, and present mitigation evidence at sentencing. Unlike his first sub-claim, Hand properly presented this ineffective-assistance-of-trial-counsel claim on direct appeal. The Ohio Supreme Court denied the claim on the merits, and we are therefore required to give its adjudication of this issue deference under AEDPA. *See supra* Part II, pp. 16–18. In addition, because the underlying claim is an ineffective-assistance-of-counsel claim, we are also required to defer to the reasoned decisions of Hand's trial counsel. *See Strickland*, 466 U.S. at 690, 104 S.Ct. 2052 ("[C]ounsel is strongly

presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."). In practice, this amounts to a "doubly deferential standard of review that gives both the state court *and* the defense attorney the benefit of the doubt." *Burt v. Titlow*, —— U.S. ——, 134 S.Ct. 10, 13, 187 L.Ed.2d 348 (2013) (citation omitted) (emphasis added). "Stated differently, AEDPA requires us to 'take a highly deferential look at counsel's performance through the deferential lens of § 2254(d).' " *Kelly*, 846 F.3d at 832 (quoting *Pinholster*, 563 U.S. at 190, 131 S.Ct. 1388).

[32] Hand cannot overcome this deferential standard of review. He argues that his trial counsel's mitigation strategy was constitutionally defective for several reasons: (1) failing to present his mother and sister as witnesses; (2) failing to present any witnesses or testimony about his military service or performance in school; (3) relying heavily on Hand's unsworn statement to the jury; and (4) failing to present a closing argument to the jury. Appellant's Br. at 57–62. The Ohio Supreme Court held that these decisions fell within the category of "tactical decisions" of trial ***414** counsel that are "virtually unchallengeable" on review. *Hand*, 840 N.E.2d at 188–92. The record reflects that Hand's trial counsel employed a mitigation specialist, an investigator, and a psychologist during sentencing. *Id.* at 188. The record also reflects that Hand's trial counsel presented several witnesses, including the psychologist, a former acquaintance of Hand's, and Hand's son, in a coherent trial strategy aimed at convincing the jury that Hand would be an asset and a role-model prisoner in Ohio's prison system. Appellant's Br. at 56, 61. Based on this evidence, trial counsel's performance did not fall below constitutional standards during sentencing, and much less did the Ohio Supreme Court adjudicate the issue so inadequately as to merit reversal under AEDPA. Therefore, this second sub-claim also fails on the merits.

C

In his third sub-claim, Hand argues that his trial counsel was constitutionally ineffective for failing to object to the reintroduction of all guilt-phase evidence during sentencing. Like his second sub-claim, Hand raised this claim on direct review, and the Ohio Supreme Court denied the claim on the merits. *Hand*, 840 N.E.2d at 190–91. Because this is an ineffective-assistance-of-counsel claim and because the state court adjudicated the claim on the merits, this claim is also due the "doubly deferential" standard of review that we gave to his second sub-claim. *See supra* Part IV.B, pp. 26–27.

[33] Although this is a somewhat closer question, Hand cannot overcome this deferential standard of review. The thrust of his argument is that his trial counsel failed to object to the introduction of a number of graphic trial exhibits at sentencing, including photos and autopsy reports of his deceased wives and Walter Welch. Appellant's Br. at 70–73. The Ohio Supreme Court held that Hand's trial counsel was not ineffective for failing to object because (1) Ohio's evidence rules permit the reintroduction of guilt-phase exhibits at sentencing and (2) Hand did not specify which exhibits he believed prejudiced him. *Hand*, 840 N.E.2d at 190–91 (citing R.C. 2929.03(D)(1)). As the district court noted below, however, Ohio evidence law does not relieve the trial court of its duty to determine the relevance of any evidence when the admission of that evidence is challenged at sentencing. *See State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253, 263 (1995) (listing five general categories of potentially relevant guilt-phase evidence, including "(1) any evidence raised at trial that is relevant to the aggravating circumstances specified in the indictment of which the defendant was found guilty, (2) any other testimony or evidence relevant to the nature and circumstances of the aggravating circumstances specified in the indictment of which the defendant was found guilty, (3) evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant, (4) the presentence investigation report, where one is requested by the defendant, and (5) the mental examination report, where one is requested by the defendant").

[34] The Ohio Supreme Court never ruled on each individual piece of guilt-phase evidence that Hand's trial counsel permitted to be introduced at sentencing. Even if we were to hold, however, that the Ohio Supreme Court applied the wrong evidentiary law in analyzing Hand's ineffective-assistance-of-trial-counsel claim, it is not entirely clear that Hand either properly exhausted this precise claim before the Ohio courts or suffered prejudice from his trial counsel's alleged error. Although Hand now specifies in his habeas petition ***415** the specific evidentiary exhibits that he claims prejudiced him during sentencing, he failed to specify a single exhibit in his direct appeal before the Ohio Supreme Court. *Hand*,

840 N.E.2d at 190. It follows that this precise variation of his claim was never properly presented to the Ohio courts and exhausted, as Hand did not specify the exhibits that prejudiced him on direct appeal and failed to raise his more precise claim in any subsequent petition for relief. Because Hand does not raise an argument for why this procedural default should be excused, the claim is procedurally defaulted.[6] Even if we were to evaluate Hand's more specific claim on the merits, it is not at all clear that Hand was prejudiced by his trial counsel's failure to object to the introduction of guilt-phase evidence. The graphic photos and autopsy reports were relevant to the death-penalty specifications that Hand's murders included the use of a firearm and were committed during a course of conduct while attempting to kill two or more people. *See Gumm*, 653 N.E.2d at 263. In any event, the jury had already seen the exhibits during the guilt phase of the trial. We cannot conclude, based on this evidence, that Hand was prejudiced by his trial counsel's alleged error in failing to object to the introduction of all guilt-phase evidence during sentencing.

This resolves Hand's ineffective-assistance-of-trial-counsel claims based upon his counsel's performance during sentencing.

V

In the first sub-part of his third claim, Hand argues that his counsel on direct appeal was constitutionally ineffective for failing to challenge the sufficiency of the evidence as to certain aggravating circumstances and death-penalty specifications. In particular, Hand argues that his appellate attorneys should have challenged the sufficiency of the evidence supporting the death-penalty specification that Hand killed Welch in order to prevent him from revealing Hand's involvement in his wives' murders. Appellant's Br. at 50–53. The district court held that the claim was not procedurally defaulted but nonetheless failed on the merits. The district court was correct.

It is undisputed that Hand first raised this claim in his April 18, 2006 application to reopen his direct appeal. *See supra* Part I.B, pp. 7–11. Under Ohio law, a convicted defendant may file an application to reopen his direct appeal and introduce new claims on the ground that his initial appellate counsel was constitutionally ineffective, and we have previously treated such applications as ineffective-assistance-of-counsel claims. *See Kelly*, 846 F.3d at 831 (treating an application filed pursuant to Ohio Rule of Appellate Procedure 26(B)[7] as an ineffective-assistance-of-appellate-counsel claim). The Ohio Supreme Court denied the application summarily. *Hand*, 852 N.E.2d at 185.

[35] **[36]** **[37]** Hand argues that, because the Ohio Supreme Court denied his application ***416** without comment, he is entitled to *de novo* review. Appellant's Br. at 50–51. That is incorrect. The Supreme Court has instructed us to presume that when a federal claim has been presented to a state court and the state court denies relief, "the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Richter*, 562 U.S. at 99, 131 S.Ct. 770. This is true even where, as is the case here, the state court does not offer an explanation for its decision. *Ibid.* Stated in AEDPA's terms, "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Id.* at 98, 131 S.Ct. 770. If "there is reason to think some other explanation for the state court's decision is more likely," we permit a habeas petitioner to rebut the presumption that the state court's decision was on the merits. *Id.* at 99–100, 131 S.Ct. 770. But Hand offers no reason to rebut the presumption in this case, and thus AEDPA deference applies. We may therefore grant relief only if the state court decision was unreasonable.[8]

[38] Moreover, because Hand's claim is an ineffective-assistance-of-counsel claim, which itself demands deference to the strategic decisions of counsel, we must evaluate Hand's claim under a "doubly deferential" standard of review. *Burt*, 134 S.Ct. at 13. To establish ineffective assistance of appellate counsel, a petitioner must show that his appellate counsel's failure to raise a claim was objectively unreasonable and that he was prejudiced as a result. *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. A petitioner can demonstrate that his appellate counsel's performance was objectively unreasonable where the unraised claim was "clearly stronger" than those presented. *Monzo*, 281 F.3d at 579. Here, the underlying unraised claim is a sufficiency-of-the-evidence challenge to the specification that Hand murdered Welch in order to cover up his previous wives' murders. To have succeeded on this claim, Hand's counsel would have had

to prove that, after reviewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the contested death-penalty specifications beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). At trial, several witnesses testified regarding statements Welch made about killing Hand's previous wives for money, and one jailhouse informant testified that Hand killed Welch because their deal to kill Jill went sour over money. *Hand*, 840 N.E.2d at 162, 168. Based on this evidence and the standard of review, we cannot hold that Hand's appellate counsel acted unreasonably by failing to raise this sufficiency-of-the-evidence challenge on direct review, much less that counsel's failure to do so was so obvious that the Ohio Supreme Court's denial of Hand's ineffective-assistance-of-counsel claim was unreasonable under AEDPA. We therefore deny the claim.

VI

In his fifth claim, Hand argues that the trial court failed to give the appropriate narrowing construction to the course-of-conduct specification for the death penalty, in violation of his rights under the Eighth ***417** and Fourteenth Amendments. The district court held that the claim was procedurally defaulted because Hand had failed to object to the jury instructions at trial and the Ohio Supreme Court had enforced its contemporaneous-objection rule. The district court went on to conclude that, even if the claim were not procedurally defaulted, it still failed on the merits. The district court was correct—Hand's claim was procedurally defaulted.

[39] Hand first raised his course-of-conduct claim on direct appeal. His argument focused on the death-penalty specifications associated with the aggravated murders of Jill and Welch, which required the jury to determine that each murder "was part of a course of conduct involving the purposeful killing of two or more persons by the defendant." *Hand*, 840 N.E.2d at 183. The crux of Hand's argument is that the trial court's course-of-conduct instructions were insufficiently clear because they permitted the jury to infer guilt from Hand's involvement in his previous wives' deaths—i.e., that the jury could conclude that the "two or more persons" element of the death-penalty specification was satisfied by the deaths of Donna and Lori. Problematically, however, Hand failed to object to the trial court's course-of-conduct instruction during trial. Under Ohio law, this means Hand "waived all but plain error" review. *Ibid.* The Ohio Supreme Court concluded that under this standard of review, Hand's claim was meritless. *Id.* at 183–84.

We have previously held that an Ohio court's enforcement of the contemporaneous-objection rule is " 'an independent and adequate state ground' of decision" sufficient to bar habeas relief. *Wogenstahl v. Mitchell*, 668 F.3d 307, 336 (6th Cir. 2012) (citation omitted). The mere fact that the Ohio Supreme Court conducted "plain error review does not constitute a waiver of the state's procedural default rules and resurrect the issue." *Keith v. Mitchell*, 455 F.3d 662, 673 (6th Cir. 2006). Therefore, Hand is barred from raising this claim for relief in a habeas petition unless he can demonstrate cause and prejudice to excuse the default.

Hand argues that this default can be excused because his "appellate counsel's failure to raise the present claim on direct appeal fell below an objectively reasonable standard, causing [the] default and resulting in prejudice." Appellant's Br. at 79. But Hand misunderstands the state procedural posture of his case. His *appellate* counsel's error is not what caused him to default this claim. Rather, his *trial* counsel's failure to object to the trial court's instruction is what caused his claim to be procedurally defaulted. Even if we were to construe Hand's brief to allege ineffective assistance of trial counsel—or even ineffective assistance of appellate counsel for failing to raise an ineffective-assistance-of-trial-counsel claim—his argument for cause and prejudice would itself be procedurally defaulted. *See Edwards v. Carpenter*, 529 U.S. 446, 451–52, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) ("[I]neffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim.... *[T]hat* constitutional claim, like others, [must] be first raised in state court."). Even though Hand had ample opportunity to raise either ineffective-assistance claim before the Ohio courts on appeal, he failed to do so. Therefore, any argument that Hand's procedurally defaulted course-of-conduct claim could be excused is itself defaulted, and we deny the claim.

VII

In his sixth claim, Hand argues that the state trial court improperly admitted five ***418** instances of prior-bad-acts evidence, thereby violating his rights secured by the Fifth, Seventh, Eighth, and Fourteenth Amendments. The district court held that although Hand invoked constitutional provisions in support of his claim, his argument was grounded on Ohio evidence law. Because he did not "fairly present" his federal constitutional claim to the Ohio courts, the claim was procedurally defaulted. In the alternative, the district court held that four of his five prior-bad-acts claims were procedurally defaulted because he failed to object at trial and that his fifth claim was meritless. The district court was correct on both counts —Hand did not fairly present his constitutional claims to the Ohio courts, and, in any event, the claims are either procedurally defaulted or meritless.

Hand's prior-bad-acts claim on direct appeal pointed to five instances where he alleges evidence was improperly admitted: (1) the prosecutor argued during closing argument that Hand's failure to pay taxes demonstrated disrespect for the law and a willingness to lie and deceive; (2) witnesses testified about Hand's reaction to the deaths of his first two wives, Donna and Lori; (3) a witness testified that Hand once told him "he was a horny old man" but Lori didn't want sex as often as he did, and another witness testified that Hand was infatuated with a friend's daughter; (4) a childhood friend of Hand testified that he liked to read "true crime" stories; and (5) the prosecution introduced evidence that he forced his father out of business and was obsessed with money. *Hand*, 840 N.E.2d at 176–79. Because Hand failed to object at trial to each allegedly improper instance except instance (2), the Ohio Supreme Court reviewed four of the five instances for plain error. The court ultimately denied each instance of Hand's claim under Ohio evidence law. *Ibid.*

[40] **[41]** Hand argues that this was sufficient to present the substance of his federal claim to the Ohio courts, as every prospective habeas petitioner is required to do under federal law. *See Baldwin v. Reese*, 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) ("To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court ... thereby alerting that court to the federal nature of the claim." (citations omitted)). To determine whether a petitioner has fairly presented a claim in state court, we ask whether the petitioner: (1) relied upon federal cases employing constitutional analysis; (2) relied upon state cases employing federal constitutional analysis; (3) phrased the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleged facts well within the mainstream of constitutional law. *See McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000). "While a petitioner need not cite 'chapter and verse' of constitutional law, 'general allegations of the denial of rights to a "fair trial" and "due process" do not "fairly present claims" that specific constitutional rights were violated.' " *Slaughter v. Parker*, 450 F.3d 224, 236 (6th Cir. 2006) (quoting *Blackmon v. Booker*, 394 F.3d 399, 400 (6th Cir. 2004)).

[42] In his brief on direct appeal to the Ohio Supreme Court, Hand broadly alleged that the introduction of these instances of prior-bad-acts evidence violated "his rights to a fair trial, due process and a reliable determination of his guilt and sentence" as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution. In support of this claim, however, Hand almost exclusively cited Ohio cases that address Ohio evidence law. At no point did he connect the trial court's alleged misapplication of state evidence ***419** law to rights secured to him by the United States Constitution. In fact, the only federal case that Hand cited in this entire section of his state appellate brief was *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and only for the limited purpose of defining "harmless error." Even if we were to construe Hand as having cited *Chapman* generally in support of his claim, it would do him no good. *Chapman* dealt with a defendant's Fifth Amendment right to silence, which has nothing to do with the prior-bad-acts claims that Hand raised before the state court. Based on the foregoing, Hand did not fairly present his federal constitutional claims to the state court on direct appeal, and those claims are therefore procedurally defaulted. Because Hand does not allege cause and prejudice to excuse the default, this concludes the analysis of his sixth claim of relief. [9]

VIII

In his seventh, and final, claim for habeas relief, Hand argues that the prosecution presented insufficient evidence to prove each of the elements of escape under Ohio law. The district court held that the Ohio Supreme Court applied the correct standard of review and concluded that

there was sufficient evidence for a rational juror to find Hand guilty of escape beyond a reasonable doubt. The district court was correct.

Hand first raised this claim on direct appeal. *See supra* Part I.B, pp. 7–11. He argued that there was no evidence that he was involved in planning the escape attempt or that he directly assisted in cutting the emergency door lock. *Hand*, 840 N.E.2d at 181. He also argued that the testimony that he was acting as a lookout, even if true, was insufficient to convict him of the crime. The Ohio Supreme Court disagreed. The court began by explaining the standard of review: "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.* at 180–81 (alteration in original) (citation omitted). Pointing to the record, the court noted the wealth of witness testimony that implicated him in the escape attempt, including testimony that linked him to planning the escape. *Id.* at 181. The court also referred to the circumstantial evidence that supported Hand's guilt, including "some torn-up teeshirt material and a pencil with a piece of teeshirt tied around it" that was found in Hand's cell—items that were "consistent to what was tied to the saw blades and ... to what inmates do to hide things." *Ibid.* Even if the evidence established only that Hand was acting as a lookout, the court concluded, there was sufficient evidence for a rational juror to find that Hand was an accomplice in the escape attempt, who Ohio law commands "shall be prosecuted and punished as if he were a principal offender." *Ibid.* (quoting Ohio Rev. Code Ann. § 2923.03(F)).

[43] As the Ohio Supreme Court addressed this claim on the merits, we are required to grant that decision AEDPA deference on review. *See supra* Part II, pp. 16–18. AEDPA only permits us to grant habeas relief if the state court's adjudication of the petitioner's claim either "resulted in a decision that was contrary to, or involved an unreasonable application ***420** of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Because the Ohio Supreme Court did not misstate the law or unreasonably interpret the facts in the record of this case, we deny Hand's sufficiency-of-the-evidence claim.

IX

Based on the foregoing, the claims in Gerald Hand's habeas petition are all either procedurally defaulted or meritless. We therefore AFFIRM the decision of the district court.

All Citations

871 F.3d 390

Footnotes

1 On November 26, 2002, while Hand was incarcerated in the Delaware County jail, correction officers discovered that Hand and three other inmates had attempted "to cut through the lock on the rear emergency exit of the cell block and through a cell bar." *Hand*, 840 N.E.2d at 168. Hand allegedly served as lookout and advised one of the inmates "on how to cut through the metal bar." *Ibid.*

2 *See* Ohio S. Ct. Prac. R. XI, § 6. Ohio permits an appellant in a death-penalty case to apply to reopen his direct appeal based on a claim of ineffective assistance of appellate counsel.

3 Although ineffective assistance of appellate counsel can excuse a procedural default, *see Murray v. Carrier*, 477 U.S. 478, 492, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), and Hand alleges in his habeas petition that his counsel on direct appeal was ineffective for failing to raise this very issue, he does so as part of a separate substantive claim for relief and not as cause to excuse this procedural default. In any event, Hand's claim of ineffective assistance of appellate counsel is meritless. *See infra* Part III.B–C, pp. 20–23.

4 Although Hand did raise *an* ineffective-assistance-of-trial-counsel claim related to voir dire on direct appeal, he did not raise *this* one. Hand concedes that his direct-appeal claim "related to a different juror, supported by different allegations of bias, and did not assert ineffectiveness related to pretrial publicity." Appellant's Br. at 40 n.2.

5 Specifically, Dr. Davis testified that Hand had positive qualities that would enable him to contribute to society while imprisoned, including his intelligence, vocational skills, and his absence of past drug abuse.

6 Were we to hold otherwise, a criminal defendant could raise a vague generic version of a claim before a state court only to raise a more specific claim in a federal habeas petition, effectively bypassing the deference to state courts commanded by AEDPA.

7 Although Hand filed his application pursuant to Ohio Supreme Court Practice Rule XI, the two rules are substantively identical. Rule XI was promulgated to give criminal defendants who have been sentenced to death, and who therefore appeal their conviction and sentence directly to the Ohio Supreme Court, the same opportunity to reopen their direct appeal as criminal defendants who must first appeal their case to Ohio's intermediate appellate courts.

8 Hand argues that our decision in *McKenzie v. Smith*, 326 F.3d 721 (6th Cir. 2003), permits us to hear his claim *de novo*. Not only does this decision predate *Harrington*, it is distinguishable on its facts. In that case, there was evidence suggesting that the Michigan state trial court wrongly "believed that the [state] court of appeals had already considered the claim." *Id.* at 727. There is no such evidence in this case.

9 Even if Hand did argue that ineffective assistance of appellate counsel might excuse this default, he procedurally defaulted that claim by failing to raise his prior-bad-acts claim in either of his applications to reopen his direct appeal. *See Edwards*, 529 U.S. at 452–53, 120 S.Ct. 1587.

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No. 14-3148

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GERALD HAND,

Petitioner-Appellant,

v.

MARK HOUK, Warden,

Respondent-Appellee.

O R D E R

Before: BOGGS, CLAY, and ROGERS, Circuit Judges.

Gerald Hand, an Ohio prisoner under sentence of death, appeals the district court judgment that denied his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Hand moved for a certificate of appealability (COA). The district court granted Hand a partial COA with respect to two full claims and four partial claims. Hand has applied to this court to expand the COA to include five additional claims and sub-claims.

Upon review, we expand the COA to include claims designated E(4), E(5), and (E)(6) in Hand's COA application and deny the application with respect to all other claims. The case will proceed on the claims certified by this court and the district court. The clerk is directed to establish a briefing schedule.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: January 12, 2016

Ms. Jeanne Marie Cors

Ms. Jennifer M Kinsley

Ms. Brenda Stacie Leikala

Re: Case No. 14-3148, *Gerald Hand v. Marc Houk*
Originating Case No. : 2:07-cv-00846

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Leon T. Korotko
Case Manager
Direct Dial No. 513-564-7014

Enclosure

2014 WL 617594
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio,
Western Division.

Gerald HAND, Petitioner,
v.
Marc HOUK, Warden, Respondent.

No. 2:07–cv–846.
|
Feb. 18, 2014.

Attorneys and Law Firms

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Holly E. Leclair Welch, Charles L. Wille, Seth Patrick Kestner, Office of the Ohio Attorney General, Columbus, OH, for Respondent.

ORDER

SANDRA S. BECKWITH, Senior District Judge.

***1** The Magistrate Judge has issued a Report and Recommendation concerning Petitioner's motion for a certificate of appealability. (Doc. 144) Objections to the Report were due to be filed by January 21, 2014, and none have been filed to date. This Court has reviewed the Report and the Magistrate Judge's recommendations de novo, and agrees with all of them.

As fully discussed in the Court's order denying habeas relief (see Doc. 118), petitioner Gerald Hand was convicted by an Ohio state court jury of the aggravated murders of his wife, Jill Hand, and of his friend and former employee, Walter Lonnie Welch. The same jury recommended that Hand be sentenced to death. After unsuccessful attempts to challenge his conviction and his sentence in state courts, he filed a petition for a writ of habeas corpus in this court, raising fifteen claims for relief. This Court denied all of his claims.

Hand then filed a motion seeking a certificate of appealability on Grounds One, Two, Four, Five, Six, Eight, Nine and Eleven of his petition. (Doc. 142) Respondent opposed Hand's motion, and urged the Court to deny a COA on all claims. (Doc. 143) The Magistrate Judge recommended that a COA issue with respect to Ground Two (the fair presentation issue only); sub-claim 2 of Ground Four; sub-claims 2, 6 and 7 of Ground Five; Ground Six; Ground Eight; and sub-claim 2 of Ground Nine.

In order to obtain a certificate of appealability, Hand must demonstrate that reasonable jurists would debate whether his petition states a valid claim of the denial of his constitutional right. And if a petition is dismissed on a procedural ground, the petitioner must demonstrate that reasonable jurists would debate whether the basis for the Court's dismissal was correct. *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

With respect to Ground One of Hand's petition, the Court agrees that no certificate of appealability should be granted. Hand's confrontation and due process rights were not violated by the admission of testimony from various individuals about Welch's incriminating statements. The cases Hand cites, both in his petition and his motion for a COA, are distinguishable on their facts and, as the Magistrate Judge aptly noted, are completely inapposite to the facts of Hand's case. Hand argues that the testimony about Welch's statements was extremely damaging to his defense. That is likely true, but that does not make the testimony inadmissible on any constitutional ground.

In Ground Two of his petition, Hand asserted that the admission of five discrete instances of character evidence deprived him of due process and a fair trial. This Court found that Hand did not fairly present this constitutional claim to the Ohio Supreme Court, but recognized that the issue is often a close one on which jurists may disagree. The Magistrate Judge recommended that a COA be granted on the fair presentation issue, but denied on the substantive due process and procedural default issues discussed in the Court's order. The Court agrees with this recommendation; Hand cites no cases finding that the admission of this sort of evidence amounts to a due process violation. And with respect to default, there is no dispute that Hand failed to object to the admission of four out of the five of the incidents he complains of here. Ohio's contemporaneous objection rule is an adequate

and independent state ground upon which to deny habeas relief, as a legion of cases have found. The Court adopts the Magistrate Judge's conclusion regarding Ground Two.

***2** Ground Four of the petition raised eleven sub-claims of ineffective assistance of trial counsel. Hand sought a certificate of appealability on each of them. The Magistrate Judge recommended that a COA issue only with respect to sub-claim 2, trial counsel's failure to further question two of his trial jurors who admitted they had seen some pre-trial publicity about Hand's crimes and his upcoming trial. The Court agrees that reasonable jurists could disagree with this Court's conclusion on this question, and that a COA should issue. With respect to the balance of his ineffective assistance claims, however, the Court agrees with the Magistrate Judge. Sub-claim 1 asserted his trial counsel's failure to object to testimony from his bankruptcy attorney. This Court found the claim procedurally defaulted, and that Hand's ineffective assistance of appellate counsel argument was itself defaulted and could not excuse the default. The Magistrate Judge's Report exhaustively analyzes the default issue and explains why Hand's argument about his counsel's alleged conflict of interest is meritless. Even if this sub-claim was not defaulted, Hand waived his attorney-client privilege by voluntarily testifying about his discussions with a bankruptcy attorney. Sub-claim 3 alleged trial counsel's failure to move for a change of venue, which the Court found was procedurally defaulted due to a failure to raise it on direct appeal. Hand's contention that the exhibits he filed with his post-conviction petition (a collection of newspaper articles) preserved this claim was rejected by this Court. Hand has not explained how reasonable jurists could debate this conclusion.

Sub-claim 4 of Ground Four concerned Hand's alleged report to his trial lawyer about other prisoners who were plotting to escape from the jail where he was being held pending trial. The Ohio court of appeals found this sub-claim was defaulted in its order rejecting his post-conviction petition. Hand has not shown any basis upon which reasonable jurists could debate this conclusion. Sub-claim five alleged a failure to exclude a trial juror whom Hand argued was biased against him. The Ohio Supreme Court rejected this sub-claim on the merits, and this Court found that decision was not contrary to nor an objectively unreasonable application of clearly established federal law. Hand's motion suggests that this juror had a "close family connection" to Jill Hand; the record belies any such conclusion, as the Magistrate Judge notes. During voir dire, this juror explained that her husband had known Jill Hand through his work, and that she had heard about Jill's death through that professional connection. This juror also gave many positive responses to questions posed to her, strongly supporting a conclusion that Hand's trial counsel made a considered judgment to leave her on the jury.

Sub-claim 6 contends that trial counsel failed to object to the admission of certain of Welch's statements as co-conspirator's statements. The Ohio Supreme Court rejected this argument, because the challenged statements were independently admissible as statements against Welch's penal interest, and because there was sufficient independent evidence of the existence of a conspiracy between Welch and Hand. Similarly, sub-claim 7 alleged a failure to object to certain other-acts evidence. The Ohio Supreme Court rejected this sub-claim because Hand was not prejudiced by the evidence; as a result, his attorney's failure to object to the evidence did not prejudice Hand's defense, a conclusion with which reasonable jurists would not disagree.

***3** Sub-claim 8 argued that trial counsel failed to present evidence of self-defense during the in limine hearings, held by the trial court to determine whether certain of Welch's statements would be admitted at trial. Hand contends that his lawyer should have argued self defense to counter the state's contention that Hand killed Welch to prevent him from testifying against Hand. The Ohio Supreme Court found that Hand would have been required to testify himself in order to raise self defense. If Hand made the decision not to do so, there was no ineffective assistance of counsel; and if his lawyer made the decision, it was a tactical one that Hand could not attack on direct appeal. Hand suggests that there are no facts in the record to support a conclusion that he refused to testify or that his attorneys made a considered decision about this issue. He suggests that it is just as plausible to conclude that his lawyers simply overlooked the importance of a self-defense strategy. This is sheer speculation; moreover, as the Magistrate Judge aptly observed, "no trial lawyer would have willingly given the prosecutor what would have amounted to a pre-trial deposition of his client on the crux of the defense case if he could avoid it." (Doc. 144 at 22)

Sub-claim 9 of Ground Four argued that trial counsel should have called Philip Anthony as a defense witness. During an in limine hearing, Anthony testified about certain statements that Welch made to him. Anthony's testimony was partially helpful to Hand, as it contradicted some of the testimony the state presented about the method by which the killer entered the home and murdered Hand's first two wives. However, much of Anthony's testimony was very harmful to Hand's defense. Counsel's decision not to put Anthony on the stand as a defense witness was clearly a reasoned one, and reasonable jurists would not disagree with this Court's conclusion on that point. Subclaim 10 contended that trial counsel failed to request limiting instructions to the jury regarding "other acts" evidence and the definition of "course of conduct." The Ohio Supreme Court rejected this sub-claim, finding that Hand had not been prejudiced, a decision this Court found did not contravene federal law. Hand has not shown that the Court's conclusion is subject to reasonable debate.

Therefore, the Court agrees with the Magistrate Judge that a COA will be granted on sub-claim 2 of Ground Four of the petition, and denied on the rest of the sub-claims raised there.

Ground Five of the petition alleged ineffective assistance of counsel at sentencing, raising seven sub-claims. The Magistrate Judge notes that sub-claim 1 of Hand's motion for a COA was not separately raised in his petition; the Magistrate Judge refers to the sub-claims as they are numbered in the motion. This Court will do the same, with cross-references to the Court's discussion of the issue in its order denying habeas relief. The Magistrate Judge recommends that a COA issue with respect to sub-claims 2, 6, and 7 (as denominated in Hand's motion) but denied on the remaining sub-claims.

***4** Sub-claim 2 addresses trial counsel's failure to elicit additional testimony from Dr. Davis, Hand's forensic psychologist, regarding Hand's characteristics and lack of an antisocial personality disorder. (This issue is raised as sub-claim A of Hand's petition.) The state court found the claim barred by res judicata; this Court agreed, and alternatively found that the claim lacked merit. Hand does not contest the res judicata holding, but argues that the omitted evidence-Dr. Davis' MMPI test results and his opinion that Hand did not have an anti-social personality disorder-could have altered the outcome of his sentencing proceeding. The Magistrate Judge notes that appellate courts "have shown a distinct tendency to consider omitted mitigation evidence closely," and citing *McGuire v. Warden,* 738 F.3d 741, 2013 U.S.App. LEXIS 25767, ——28–47, 2013 WL 6840197 (6th Cir., Dec.30, 2013). The Court agrees with the Magistrate Judge's observation that this omitted evidence is not of the same magnitude as that involved in *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); however, it is true that the evidence was entirely omitted from Hand's trial. The Court agrees that reasonable jurists could debate its importance and relevance, and that a COA should issue on this sub-claim (discussed in the Court's order denying habeas relief, Doc. 118 at pp. 76–81).

Sub-claim 3 contends that counsel should have presented testimony from Hand's family members about his dysfunctional family background, instead of presenting this evidence through Dr. Davis. (This issue is sub-claim B of the petition.) He does not quarrel with the substance of the testimony presented by Dr. Davis, but contends it would have been more effective coming from his family members. Sub-claim 4 (subclaim C of the petition) argued that his lawyers should have presented evidence about his purported inability to effectively communicate with the jury during his testimony and in reading his statement. The Magistrate Judge notes that his post-conviction claim on this issue argued that counsel should have called his friends to testify that he was a poor speaker; in his habeas petition, he argued that his poor speaking was the result of medication he was taking while awaiting trial, although there was no medical evidence or expert testimony regarding the latter contention. This Court rejected both of these sub-claims on the merits (Doc. 118 at 81–85). Reasonable jurists would not dispute either conclusion.

Sub-claim 5 (sub-claim D of the petition) concerns the lack of testimony regarding Hand's third wife, Glenna, whom he divorced. Hand argues that his son and sister should have testified about his only marriage that did not end when his wife was murdered. In denying this sub-claim, the Court noted that Hand testified about Glenna and their divorce, and found it would be speculative to conclude that additional testimony would have altered the result (Doc. 118 at 85–87). Reasonable jurists would not dispute this conclusion.

***5** Sub-claim 6 is a broad challenge to trial counsel's mitigation investigation and preparation (sub-claim E of his petition). Sub-claim 7 (sub-claim F of the petition) alleges trial counsel's failure to object to the admission of all of the state's guilt-phase evidence at the sentencing hearing (see Doc. 118 at 94–96). As with sub-claim 2, arguments of insufficient mitigation investigation and evidence have been subject to heightened scrutiny in the appellate courts. The Court agrees with the Magistrate Judge that a certificate of appealability should issue with respect to these two subclaims, along with sub-claim 2. A COA is denied with respect to the rest of the subclaims in Ground Five.

Ground Six of the petition contends that the trial court's voir dire regarding prejudicial pretrial publicity was constitutionally inadequate. The issue was not raised on direct appeal, and the post-conviction state court found it was barred by res judicata. This Court agreed, finding that the issue should have been raised on direct appeal due to the numerous references to and questions about publicity during voir dire. The Court alternatively denied this claim on the merits. Hand seeks a certificate of appealability only with respect to the res judicata/procedural default aspect of the Court's ruling. He notes that the Ohio court of appeals stated that the newspaper articles were outside the direct appeal record, but nevertheless denied the claim. The Magistrate Judge recommends that a certificate issue on this aspect of Ground Six. This Court agrees that reasonable jurists could debate whether the Ohio court properly applied the res judicata bar.

Ground Eight argued that there was a lack of evidence to support Hand's conviction for escape. The Ohio Supreme Court rejected the claim on the merits, and this Court found no error in that decision. The Magistrate Judge recommends that a certificate be granted on this issue, because the crux of Hand's claim requires a weighing of the testimony in favor of and against his conviction. That is a judgment question on which reasonable jurists may well disagree. The Court will grant a COA with respect to Hand's evidentiary challenge to his conviction for escape.

Ground Nine of the petition asserted several sub-claims regarding the trial court's jury instructions. With regard to sub-claim one, the court's instruction on complicity to murder, this Court found that the Ohio Supreme Court's rejection of Hand's arguments was not contrary to federal law. Hand complained about the timing of the state's amendment to the bill of particulars on this subject, but not the content of the amendment. In addition, Hand did not identify any prejudice he suffered, and his motion for a certificate of appealability also fails to do so. The Court agrees that a certificate should not issue on this sub-claim. Hand's second sub-claim regarding instructions argued that the "course of conduct" capital specification was not sufficiently defined by the trial court, resulting in an unconstitutionally vague jury instruction. The Ohio Supreme Court found this sub-claim was procedurally defaulted for lack of a contemporaneous objection, and that there was no plain error in the instruction given to the jury. This Court agreed with both conclusions. Hand primarily relies on the dissent in *State v. Scott,* 101 Ohio St.3d 31, 800 N.E.2d 1133 (2004), which opined that the majority decision failed to adopt a constitutionally proper standard for determining a "course of conduct" involving the killing two or more persons. The Magistrate Judge recommends that a certificate of appealability should issue on this claim, because reasonable jurists could disagree on whether or not the Ohio specification is unconstitutionally vague. The Court agrees with this recommendation.

***6** Sub-claim 3 of Ground Nine argued that the trial court gave a fatally infirm reasonable doubt instruction. The Ohio Supreme Court summarily rejected this argument, citing numerous cases upholding substantially similar instructions. This Court found that decision did not contravene federal law, citing numerous Sixth Circuit cases rejecting similar habeas challenges. A certificate of appealability will not issue on this sub-claim.

Ground Eleven of Hand's petition alleged ineffective assistance of appellate counsel, raising six separate sub-claims. The Magistrate Judge recommended that a certificate be denied with respect to all of them. Sub-claim 1 alleged a failure to preserve Hand's collateral estoppel argument (which was based upon an award he obtained from the Ohio victims' compensation fund following Donna's murder); subclaim 2 alleged a failure to appeal his trial counsel's failure to object to the testimony from Hand's bankruptcy attorney (discussed more fully with respect to the claim of trial counsel error in Ground Four); and sub-claim 3 alleged a failure to appeal the trial court's denial of Hand's motion to dismiss the specifications relating to the murders of Donna and Lori Hand. This Court rejected all three sub-claims as procedurally defaulted because each of them was not timely and properly raised in the state proceedings.

Moreover, each sub-claim would fail on the merits if it was not defaulted. Hand presents no cogent reasons to suggest that the Court's conclusions on these subclaims would be subject to reasoned debate.

Sub-claim 4 argued that appellate counsel failed to raise a sufficiency of the evidence challenge to his complicity with respect to the murders of Donna and Lori, in that Hand was charged with killing Welch to prevent his testimony about those murders. This Court rejected this sub-claim on the merits, citing the abundant evidence supporting the charge based on Welch's statements over the years. In his motion, Hand repeats the argument presented in his petition that this charge rested almost entirely upon the testimony of Kenneth Grimes. This Court rejected that assertion in denying habeas relief, and it is plainly insufficient to justify the issuance of a certificate of appealability.

Sub-claim 5 alleged that his appellate attorneys failed to amend his merit brief with respect to the juror bias issues raised in Ground Four regarding ineffective assistance of trial counsel. Sub-claim 6 alleged a failure to appeal the question of the trial court's voir dire on pretrial publicity. This Court found that Hand failed to show that either of these sub-claims was stronger than the underlying claims regarding trial counsel, which were raised on appeal and rejected on the merits. Hand has not shown that reasonable jurists would disagree with this Court's conclusions on these subclaims.

CONCLUSION

For all of the foregoing reasons, the Court adopts the Magistrate Judge's Report and Recommendations (Doc. 144) in full. Pursuant to 28 U.S.C. § 2253(c), Petitioner Gerald Hand is granted a certificate of appealability on Ground Two (fair presentation issue only); Ground Four, sub-claim 2; Ground Five, sub-claims 2, 6, and 7; Ground Six; Ground Eight; and the merits of sub-claim 2 of Ground Nine. As to each of these claims, the Court finds that reasonable jurists could reach different conclusions on the constitutional issues raised, or whether this Court was correct in its procedural rulings. The Court denies a certificate of appealability on the rest of Hand's petition.

***7** The Clerk shall enter a final judgment denying Hand's petition for a writ of habeas corpus, and granting him a certificate of appealability as stated herein.

SO ORDERED.

THIS CASE IS CLOSED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 617594

2014 WL 29508
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio, Eastern Division.

Gerald HAND, Petitioner,
v.
Marc HOUK, Warden, Respondent.

No. 2:07–cv–846.
|
Jan. 3, 2014.

Attorneys and Law Firms

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REPORT AND RECOMMENDATIONS ON MOTION FOR CERTIFICATE OF APPEALABILITY

MICHAEL R. MERZ, United States Magistrate Judge.

***1** This capital habeas corpus case is before the Court on Petitioner's Motion for Certificate of Appealability (Doc. No. 142) which the Warden opposes (Doc. No. 143). Petitioner's time to file a reply in support expired December 23, 2013, and the Motion is therefore ripe for decision.

District Judge Sandra S. Beckwith, to whom this case is assigned, entered an Order on May 29, 2013, dismissing Petitioner Hand's Petition for Writ of Habeas Corpus including all claims made in the Petition (Doc. No. 118). [1] On November 18, 2013, Judge Beckwith denied Hand's Motion to Alter the Judgment (Order, Doc. No. 141). Thus the case is ripe for appeal after decision of the instant motion.

Standard for Certificate of Appealability

A petitioner seeking to appeal an adverse ruling in the district court on a petition for writ of habeas corpus or on a § 2255 motion to vacate must obtain a certificate of appealability before proceeding. 28 U.S.C. § 2253 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub.L. No 104–132, 110 Stat. 1214) (the "AEDPA"), provides in pertinent part:

> (c)
>
> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

District courts have the power to issue certificates of appealability under the AEDPA in § 2254 cases. *Lyons v. Ohio Adult Parole Authority,* 105 F.3d 1063 (6th Cir.1997); *Hunter v. United States,* 101 F.3d 1565 (11th Cir.1996) (en banc). Likewise, district courts are to be the initial decisionmakers on certificates of appealability under § 2255. *Kincade v. Sparkman,* 117 F.3d 949 (6th Cir.1997) (adopting analysis in *Lozada v. United States,* 107 F.3d 1011, 1017 (2nd Cir.1997). Issuance of blanket grants or denials of certificates of appealability is error, particularly if done before the petitioner requests a certificate. *Porterfield v. Bell,* 258 F.3d 484 (6th Cir.2001); *Murphy v. Ohio,* 263 F.3d 466 (6th Cir.2001).

To obtain a certificate of appealability, a petitioner must show at least that "jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right." *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). That is, it must find that reasonable jurists would find the district court's assessment of the petitioner's constitutional claims debatable or wrong or because they warrant encouragement to proceed further. *Banks v. Dretke,* 540 U.S. 668, 705, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004);

Miller–El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). If the district court dismisses the petition on procedural grounds without reaching the constitutional questions, the petitioner must also show that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack,* 529 U.S. at 484. The procedural issue should be decided first so as to avoid unnecessary constitutional rulings. *Slack,* 529 U.S. at 485, *citing Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). The first part of this test is equivalent to making a substantial showing of the denial of a constitutional right, including showing that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further, *Slack v. McDaniel,* 529 U.S. 473 at 484, 120 S.Ct. 1595, 146 L.Ed.2d 542, *quoting Barefoot v. Estelle,* 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). The relevant holding in *Slack* is as follows:

> ***2** [W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

529 U.S. at 478.

The standard is higher than the absence of frivolity required to permit an appeal to proceed *in forma pauperis. Id.* at 893.

> Obviously the petitioner need not show that he should prevail on the merits ... Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'

Id. n. 4. *Accord, Miller–El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). A certificate of appealability is not to be issued *pro forma* or as a matter of course. *Id.* at 1040. Rather, the district and appellate courts must differentiate between those appeals deserving attention and those which plainly do not. *Id.* A blanket certificate of appealability for all claims is improper, even in a capital case. *Frazier v. Huffman,* 348 F.3d 174 (6th Cir.2003), *citing Porterfield v. Bell,* 258 F.3d 484 (6th Cir.2001). Because the decisions of a district court may be debatable among reasonable jurists as to some issues but not as to others, a court should consider appealability on an issue-by-issue basis. See 28 U.S.C. § 2253(c)(3).

Both parties recite the relevant standard in terms not inconsistent with what is set out here. Hand cites authority from other circuits that the severity of the penalty may be considered in resolving any doubt on whether to issue a certificate. (Motion, Doc. No. 142, PageID 15715, *citing Miller v. Johnson,* 200 F.3d 274, 280 (5th Cir.2000), and *Petrocelli v. Angelone,* 248 F.3d 877, 884 (9th Cir.2001).) This Court agrees that consideration is appropriate in capital cases.

Analysis

The Petition contains fifteen grounds for relief. Hand seeks a certificate of appealability on Grounds One, Two, Four, Five, Six, Eight, Nine, and Eleven (Motion, Doc. No. 142, PageID 15713). The Warden opposes a certificate on each of these Grounds (Opposition, Doc. No. 143, PageID 15796–97). Thus the Grounds for Relief will be considered *seriatim.*

Ground One: Denial of Confrontation Clause and Due Process Rights

The murdered victims in this case were Jill Hand, Petitioner's fourth wife, and Lonnie Welch. In his First Ground for Relief, Hand asserts his due process and Confrontation Clause rights were violated when the trial court admitted testimony from eight different witnesses about statements Welch had made to them before he himself was killed by Hand.

***3** In denying habeas relief on this claim, Judge Beckwith adopted the Magistrate Judge's analysis that admission of this testimony did not violate the Confrontation Clause

because Welch's statements were not testimonial or, alternatively, that Hand had forfeited his right to confront Welsh by killing him (Order, Doc. No. 118, PageID 2824–28). Although Hand claims reasonable jurists could disagree with these two conclusions, he has cited no case in which any judge has found statements such as those admitted in this case to have been testimonial. In fact, under the Due Process prong of this claim, Hand argues the testimony about Welch's statements is unreliable because made by Hand's friends and relatives. That logic completely undercuts Hand's assertion that Welch's statements were testimonial. Welch was not trying to get Hand convicted, he was boasting to friends and relatives how he made money helping Hand kill his wives for the insurance.

Most of Hand's argument on the First Ground is directed to the asserted Due Process violation in admitting supposedly unreliable testimony. On that claim, Judge Beckwith noted that the Supreme Court of Ohio "rejected the substance of Hand's due process challenge when it thoroughly reviewed the reliability of the challenged testimony and the veracity of the witnesses, in affirming the trial court's admission of the testimony. That decision is not contrary to clearly established federal law." *Id.* at PageID 2830.

To show this conclusion is debatable among reasonable jurists, Hand cites *Ege v. Yukins,* 485 F.3d 364 (6th Cir.2007); *Manson v. Brathwaite,* 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); and *United States v. Hamad,* 495 F.3d 241 (6th Cir.2007) (Motion, Doc. No. 142, PageID 15716–19). These cases are completely inapposite.

In *Ege,* the only testimony that purported to identify Ege as the murderer was the opinion of a bite mark expert that the Ege was the only person among 3.5 million people in the greater Detroit area who could have made the bite mark found on the victim. The district court had found the statistical portion of the testimony "carried an aura of mathematical precision pointing overwhelmingly to the statistical probability of guilt, when the evidence deserved no such credence." Quoted at 485 F.3d 376.

In *Manson,* the Supreme Court did indeed confirm the inadmissibility under the Due Process Clause of unreliable identification testimony and listed factors to be considered in determining reliability. However, it reversed the grant of the writ, finding no substantial likelihood of irreparable misidentification in that case. In *Hamad,* the Sixth Circuit ruled on direct appeal that Fed.R.Crim.P. 32[2] prohibited a district judge's reliance on undisclosed *ex parte* evidence in increasing a sentence.

None of these cases involve the reliability of witness testimony about out-of-court statements by a deceased co-conspirator who has become a victim. Most of them were friends or relatives of Lonnie Welch and Hand emphasizes their motive to punish him for Welch's murder (Motion, Doc. No. 142, PageID 15722.) But Hand has not presented a single case in which a judge has found that a witness's motive to lie was so great as to make his or her testimony unconstitutionally unreliable.

***4** There is no doubt this testimony was very damaging to Hand because it tended to prove the existence of a long-term conspiracy between Hand and Welch to murder not just Hand's current wife, Jill, but two of his prior wives. But the fact that evidence is very strong does not make it "prejudicial."

Hand's Motion for a certificate of appealability on Ground One should be denied.

Ground Two: Character and Other Acts Evidence

In his Second Ground for Relief, Hand asserts that admission of character and other acts evidence deprived him of due process, a fair trial, and a reliable determination of his guilt and sentence. The instances complained of were (1) Hand's repeated tax cheating (failing to withhold on employees' wages, failing to file a personal return), (2) Hand's reported lack of grief in reaction to news of the deaths Donna, Lori, and Jill Hand, (3) Hand's lack of sexual satisfaction in his marriage to Lori, (4) Hand's interest in "true crime" stories, and (5) Hand's harsh treatment of his father.

In dismissing this Ground for Relief, Judge Beckwith accepted the Magistrate Judge's conclusion that Hand failed to fairly present this claim as a constitutional claim to the Supreme Court of Ohio (Order, Doc. No. 118, PageID 2834–37). The question whether an issue has been fairly presented as a constitutional claim to the state courts is often a close one in the case law. (Note the competing precedent cited by Judge Beckwith.) While the Magistrate Judge is persuaded this Court has correctly decided this question, he agrees that reasonable jurists could find

it debatable. Hand should be granted a certificate of appealability on the fair presentation issue.

In the alternative, assuming fair presentation *arguendo,* Judge Beckwith found Hand had failed to show a deprivation of due process or that Hand had procedurally defaulted on all but one of these claims by failure to object. *Id.* at 2837–40.

In his Motion for Certificate of Appealability, Hand argues that much of this bad character evidence was found to be of questionable relevance by the Ohio Supreme Court. Judge Beckwith found that, when considered in the context of a trial with seventy-five witnesses, "the five incidents Hand cites, when considered within the totality of the evidence presented at Hand's trial, are not the sort of damaging and prejudicial testimony that was involved in *Mackey [v. Russell,* 148 Fed. Appx. 355 (6th Cir.2005)]." (Order, Doc. No. 118, PageID 2838.)

Hand can obtain relief on this claim only if he can show admission of this testimony violated clearly established Supreme Court precedent. The Sixth Circuit has held "[t]here is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Bugh v. Mitchell,* 329 F.3d 496, 512 (6th Cir.2003), noting that the Supreme Court refused to reach the issue in *Estelle v. McGuire.* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Nowhere in the instant Motion does Hand cite any law to the contrary.

***5** Nor does Hand cite any law to show Judge Beckwith's procedural default holding would be debatable among reasonable jurists. On all the complained-of instances but one, the Supreme Court of Ohio found lack of a contemporaneous objection and conducted plain error review. The Sixth Circuit has repeatedly upheld Ohio's contemporaneous objection requirement as an adequate and independent state ground of decision. See, e.g., *Hinkle v. Randle,* 271 F.3d 239, 244 (6th Cir.2001); *Scott v. Mitchell,* 209 F.3d 854 (6th Cir.2000), *citing Engle v. Isaac,* 456 U.S. 107, 124–29, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). It has also held a state appellate court's review for plain error is enforcement, not waiver, of a procedural default. *Wogenstahl v. Mitchell,* 668 F.3d 307, 337 (6th Cir.2012); *Jells v. Mitchell,* 538 F.3d 478, 511 (6th Cir.2008); *Lundgren v. Mitchell,* 440 F.3d 754, 765 (6th Cir.2006); *White v. Mitchell,* 431 F.3d 517, 525 (6th Cir.2005); *Biros v. Bagley,* 422 F.3d 379, 387 (6th Cir.2005).

It is therefore recommended that Hand be granted a certificate of appealability on his fair presentation claim, but denied a certificate on the merits of his Second Ground for Relief and on the Court's finding of procedural default.

Ground Four: Ineffective Assistance of Trial Counsel in the Guilt Phase

In his Fourth Ground for Relief, Hand claims he was denied the effective assistance of trial counsel during the guilt phase of his trial in eleven particular ways, each treated by Judge Beckwith as a sub-claim. Hand seeks a certificate of appealability on each of these sub-claims, although he does not separately argue the cumulative ineffectiveness eleventh sub-claim. The sub-claims will be treated here *seriatim.*

Sub-claim One: Failure to Object to Testimony from Hand's Bankruptcy Attorney that was Protected by Attorney–Client Privilege

In the first sub-claim, Hand asserts his trial attorney was ineffective for failing to object to testimony by his bankruptcy attorney that was protected by the attorney-client communication privilege.

Judge Beckwith found this sub-claim was procedurally defaulted under Ohio's criminal *res judicata* rule because it depended on evidence of record on direct appeal and therefore had to be raised in that proceeding, but was not in fact raised until Hand moved for the second time to reopen the direct appeal (Order, Doc. No. 118, PageID 2843–44). She also found the *res judicata* rule was an adequate and independent state ground of decision. *Id.*

Hand acknowledges that this was a claim that could have been raised on direct appeal but was not. He then asserts it was ineffective assistance of appellate counsel not to raise the claim on direct appeal. Ineffective assistance of appellate counsel can act as cause to excuse a procedural default at the appellate level, but only if that claim itself is not procedurally defaulted. *Edwards v. Carpenter,* 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000).

Hand was represented on direct appeal by Assistant Ohio Public Defenders Stephen Ferrell, Pamela Prude–Smithers, and Wendi Dotson (See Doc. No. 133, PageID

5182). Counsel who filed his petition for post-conviction relief under Ohio Revised Code § 2953.21 was Assistant Ohio Public Defender Susan Roche. She was joined in filing the first application for reopening in the Ohio Supreme Court on April 28, 2006, by Assistant Ohio Public Defender Veronica Bennu. Together they pled three claims of ineffective assistance of appellate counsel on direct appeal against their colleagues Ferrell, Prude–Smithers, and Dotson. (App. Vol. 9 at 28–39.) However they omitted the ineffective assistance of appellate counsel claim at issue here; it was never raised in the Ohio courts until pled in the second application for reopening filed by current counsel on September 24, 2007, after Hand had filed his Petition for Writ of Habeas Corpus in this Court.

***6** The Supreme Court of Ohio summarily denied both of Hand's applications for reopening. *State v. Hand,* 110 Ohio St.3d 1435, 852 N.E.2d 185 (table) (2006) (2006 application); *State v. Hand,* 116 Ohio St.3d 1435, 877 N.E.2d 987 (table) (2007) (2007 application). Ohio S.Ct.Prac.R. XI(6) only permits one application for reopening. *Jones v. Bradshaw,* 489 F.Supp.2d 786, 795 (N.D.Ohio 2007), *citing State v. Jones,* 108 Ohio St.3d 1409, 841 N.E.2d 315 (2006) (table); *Issa v. Bradshaw,* No. 1:03–cv–280, 2007 WL 7562139 at *12–13 (S.D.Ohio Dec.20, 2007) and *Issa v. Bradshaw,* No. 1:03–cv–280, 2008 WL 8582098 at *49 (S.D.Ohio Nov.5, 2008), both citing *State v. Issa,* 106 Ohio St.3d 1407, 830 N.E.2d 342 (2005) (table). Furthermore, under the same Rule, any such application must be filed within ninety days of issuance of the mandate by the Supreme Court of Ohio. In Hand's case, that mandate was issued January 18, 2006 (Judgment Entry, Doc. No. 133–9, PageID 6184). Thus the first application for reopening was timely, but the second application, raising the claim at issue here, was not. Thus Hand committed two procedural defaults in presenting this claim to the Ohio courts, missing the time deadline and presenting the claim in a second application.

Where a state court is entirely silent as to its reasons for denying requested relief, as when the Ohio Supreme Court denies leave to file a delayed appeal by form entry, the federal courts assume that the state court would have enforced any applicable procedural bar. *Bonilla v. Hurley,* 370 F.3d 494, 497 (6th Cir.2004), *citing Simpson v. Sparkman,* 94 F.3d 199, 203 (6th Cir.1996).

Hand claims he comes within an exception to the *res judicata* rule based on the identity of the lawyers involved: "Hand could not exhaust the [claim of] the ineffectiveness of his appellate counsel because his post-conviction counsel were members of the same law office, and attorneys are not expected to raise their own ineffectiveness nor that of their colleagues." (Motion, Doc. No. 142, PageID 15731–32, *citing State v. Cole,* 2 Ohio St.3d 112, 113 n. 1, 443 N.E.2d 169 (1982); *Combs v. Coyle,* 205 F.3d 269, 276 (6th Cir.2000); *Jamison v. Collins,* 100 F.Supp.2d 521, 572 (S.D.Ohio 1998); and *State v. Lentz,* 70 Ohio St.3d 527, 639 N.E.2d 784 (1994)).

The source of the criminal *res judicata* doctrine in Ohio is *State v. Perry,* 10 Ohio St.2d 175, 226 N.E.2d 104 (1967):

> 7. Constitutional issues cannot be considered in postconviction proceedings under Section 2953.21 et seq., Revised Code, where they have already been or could have been fully litigated by the prisoner while represented by counsel, either before his judgment of conviction or on direct appeal from that judgment, and thus have been adjudicated against him....
>
> 9. Under the doctrine of *res judicata,* a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial,* which resulted in that judgment of conviction *or on an appeal* from that judgment.

***7** *Perry,* 10 Ohio St.2d at 176, 226 N.E.2d 104 (syllabus) (emphasis *sic*). However, Ohio law has recognized for at least forty years that a lawyer cannot be expected to raise his own ineffectiveness. *State v. Carter,* 36 Ohio Misc. 170, 304 N.E.2d 415 (Mont. Cty CP 1973) (Rice, J.). The Supreme Court of Ohio then recognized an exception to *Perry:* "Where a defendant, represented by new counsel on direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, *res judicata* is a proper basis for dismissing defendant's petition for post-conviction relief." *State v. Cole,* 2 Ohio St.3d 112, 443 N.E.2d 169 (1982) (syllabus, modifying *State v. Hester,* 45 Ohio St.2d 71, 341 N.E.2d 304 (1976). In *State v. Lentz,* 70 Ohio St.3d 527, 639 N.E.2d 784 (1994), the court found that the *res judicata* exception recognized in *Cole* was "highly personal," and thus would only apply when the same person was counsel at trial and on appeal. *Lentz* applied *res judicata* where two

different attorneys from the same public defender's office represented the defendant at trial and on appeal. *Lentz* left open the possibility of an exception if an actual conflict of interest were shown.

In *Combs v. Coyle,* 205 F.3d 269 (6th Cir.2000), a capital habeas corpus case from this Court, the Sixth Circuit recognized the temporal dimensions of Ohio's criminal *res judicata* rule. The State had argued that *res judicata* applied where Combs was represented on direct appeal by one of his trial attorneys and one new attorney. The state appellate court accepted that defense on the basis of *Ohio v. Zuern,* 1991 Ohio App. LEXIS 5733 (1st Dist.1991), which held:

> Unless we presume ... that new co-counsel entering upon a criminal case at the appellate level would deliberately not exercise his professional judgment or duty to assert the ineffectiveness of his co-counsel at trial if the record demonstrated a basis for such a claim, a presumption we adamantly reject, we perceive no reason why the reference in *Cole* to 'new counsel' would not embrace new co-counsel as well as new independent counsel.

Id. at * 12. The Sixth Circuit went on to note that, while the *Zuern* decision had been repeatedly followed by Ohio courts since it was handed down, "*Zuern* was not decided until after the court of appeals had ruled on Combs' direct appeal." In a footnote, the Sixth Circuit questioned whether *Zuern* was firmly established even as of 2000:

> Even today, it is not clear that the *Zuern* rule would qualify as a firmly established state procedural rule. The Ohio Supreme Court has never spoken on the issue, and not all the courts of appeals agree with the outcome in *Zuern.* Furthermore, the reasoning in *Zuern* seems to be in tension with that of the Supreme Court of Ohio in *Lentz. Lentz* can be read for the proposition that if a new attorney represents a defendant on appeal, *res judicata* applies unless there is an actual conflict. There may well be an actual conflict in a situation in which trial counsel is simply joined by a new attorney on direct appeal, thus suggesting that the per se rule of *Zuern* is the incorrect approach.

***8** *Combs,* 205 F.3d at 277, n. 3.

In *State v. Hutton,* 100 Ohio St.3d 176, 797 N.E.2d 948 (2003), a case not cited by Hand, the Supreme Court of Ohio held "that the doctrine of *res judicata* does not apply to bar a claim of ineffective assistance of appellate counsel not previously raised in an appeal where the defendant was represented on appeal by the same attorney who allegedly earlier provided the ineffective assistance, even where the defendant was also represented on that appeal by another attorney who had not represented the defendant at the time of the alleged ineffective assistance." *Id.* at ¶ 42, 797 N.E.2d 948, adopting the position of the Ohio Sixth District Court of Appeals in *Evans, supra,* counter to the *Zuern* rule.

In *Landrum v. Mitchell,* 625 F.3d 905 (6th Cir.2010), the Sixth Circuit followed *Hutton* and found that *res judicata* did not apply to persons in Landrum's situation (trial counsel continues on appeal, but new co-counsel joins the case). *Id.* at 920. Landrum had also completed his direct appeals before *Zuern* was decided. *Id.* at 221.

Hand cannot bring his claim within the actual conflict of interest exception recognized in *Lentz* because his post-conviction counsel from the Ohio Public Defender office actually did assert the ineffective assistance of their colleagues when they filed the first application for reopening. If there was no actual conflict of interest in bringing the three ineffective assistance of appellate counsel claims made in the first application, there could hardly have been a conflict of interest as to the fourth ineffective assistance of appellate counsel claim, the one relevant to this ineffective assistance of trial counsel sub-claim. Hand was represented in his first application for reopening by a different lawyer from the attorneys who handled his direct appeal, but they were all from the same office. Hand has presented no case law showing any reasonable jurist would disagree with this analysis and therefore should be denied a certificate of appealability on this sub-claim.

Assuming arguendo the procedural default had been excused, Judge Beckwith went on to find on the merits that there was no actual ineffective assistance of trial counsel because Hand had waived the attorney-client protection by himself taking the stand and testifying at length about his bankruptcy plans and discussion of them with an attorney (Order, Doc. No. 118, PageID 2845–46). Hand makes no argument that reasonable jurists would disagree with this conclusion.

Hand should therefore be denied a certificate of appealability on this sub-claim.

Sub-claim Two: Failure to Adequately Question Prospective Jurors Regarding Their Awareness of Pretrial Publicity.

In his second sub-claim, Hand asserts his trial counsel were ineffective for failure to ask further questions of Jurors Ray and Finnamore.

Judge Beckwith found Hand was not prejudiced by trial counsel's failure to ask more questions of these two jurors nor by appellate counsels' failure to include this as a specific subclaim on appeal (Order, Doc. No. 118, PageID 2852).

***9** The question of whether pretrial publicity was prejudicial and whether voir dire was sufficient to remove any taint from the jurors who actually served is very fact-specific. Reasonable jurists could disagree with this Court's evaluation of those facts and Hand should be granted a certificate of appealability on sub-claim two.

Sub-claim Three: Failure to Move for a Change of Venue and Exercise All Available Peremptory Challenges.

In his third sub-claim, Hand asserts he received ineffective assistance of trial counsel when his counsel did not move for a change of venue in light of adverse pretrial publicity and did not exercise all available peremptory challenges. Judge Beckwith found that these claims were barred by *res judicata* as the state court of appeals had held on post-conviction (Order, Doc. No. 118, PageID 2853–54). Hand does not seek a certificate of appealability on the peremptory challenges point, but asserts the default of the change of venue point is debatable among reasonable jurists.

Ohio's criminal *res judicata* doctrine, outlined above, plainly precludes raising in a postconviction petition an issue which could have been decided on the record on direct appeal. Hand claims to come within an exception to that rule because he filed exhibits with the post-conviction petition—newspaper articles about the case—which were not part of the direct appeal record.

A petitioner in a post-conviction proceeding is not automatically entitled to an evidentiary hearing, but must present sufficient documentary evidence *dehors* the record to show entitlement to a hearing. *State v. Jackson,* 64 Ohio St.2d 107, 413 N.E.2d 819 (1980). The rule in *State v. Jackson* is an adequate and independent state ground for procedural default purposes. *Sowell v. Bradshaw,* 372 F.3d 821 (6th Cir.2004), *citing Lorraine v. Coyle,* 291 F.3d 416, 426 (6th Cir.2002). The state court of appeals held the newspaper articles were not sufficient because they all existed and were all publicly available at the time of trial, so they could have been made part of the record on direct appeal. Judge Beckwith accepted this argument (Order, Doc. No. 118, PageID 2854) and Hand has not shown any way in which that conclusion would be debatable among reasonable jurists. He should therefore be denied a certificate of appealability on subclaim three.

Sub-claim Four: Failure to Act Upon and Utilize Hand's Report of an Escape Attempt at the Delaware County Jail.

In his fourth sub-claim Hand asserts he received ineffective assistance of trial counsel when his attorneys did not use a report he made to them about an escape attempt at the Delaware County Jail. This claim was first raised in post-conviction and rejected by the Ohio courts on the same basis as sub-claim three: lack of sufficient evidence outside the record to avoid the *res judicata* bar. *State v. Hand,* 2006–Ohio–2028, ¶ 21, 2006 Ohio App. LEXIS 1865, 2006 WL 1063758 (5th Dist. Apr. 21, 2006). Judge Beckwith found this sub-claim was procedurally defaulted on the basis cited by the state court (Order, Doc. No. 118, PageID 2856).

***10** In his Motion for Certificate of Appealability, Hand presents no basis on which reasonable jurists could disagree with this conclusion. In particular, the court of appeals found Hand's affidavit only repeated his trial testimony to the same effect and stated its reasons why such an affidavit, if accepted, would completely defeat the

res judicata doctrine. Hand should be denied a certificate of appealability on this sub-claim.

Sub-claim Five: Failure to Exclude Biased Prospective Jurors

In his fifth sub-claim, Hand asserts he received ineffective assistance of trial counsel when his trial attorneys failed to exclude Juror Lombardo.[3] The Ohio Supreme Court reached this claim on the merits and held against Hand. Judge Beckwith found the Ohio Supreme Court's decision was neither contrary to nor an objectively unreasonable application of clearly established United States Supreme Court precedent (Order, Doc. No. 118, PageID 2856–61).

Hand argues that this conclusion would be debatable among reasonable jurists, but the Magistrate Judge disagrees. Hand argues that "[d]ue to her numerous experiences with violent crime and her close family connection to the victim in this case, there was no reasonable strategy for allowing Juror Lombardo to remain on the jury." (Motion, Doc. No. 142, PageID 15740.) This sentence grossly overstates Juror Lombardo's connection to Jill Hand: her husband was acquainted with Jill Hand because she worked at the Ohio Bureau of Motor Vehicles and he was an investigator with the Ohio Attorney General's Office (Trial Trans. Vol. 5 at 697). That is not a "close family connection."

More importantly, Juror Lombardo's experience with violent crime was uniquely favorable to Hand. Hand's defense was that he had shot Lonnie Welch in self-defense. About thirty years before the trial, Ms. Lombardo had witnessed an intruder at her place of work pull a gun on her employer and her employer shoot the intruder. Ms. Lombardo had testified in the employer's defense at his murder trial, which ended in an acquittal on the basis of self-defense.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court's leading case on ineffective assistance of trial counsel, requires the lower courts to defer to strategic decisions of trial counsel. The Sixth Circuit has recently held

> When evaluated under § 2254(d), a court's review of a *Strickland* claim is "doubly deferential." *Knowles v. Mirzayance,* 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009). The state court's own *Strickland* analysis must receive the benefit of the doubt, and "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland* 's deferential standard." *Harrington v. Richter,* —— U.S. ——, ——, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011).

Washington v. McQuiggin, 529 Fed. Appx. 766, 770, 2013 U.S.App. LEXIS 14165, 2013 WL 3466439 (6th Cir.2013). Reviewed under this doubly deferential standard, it is easy to see why a trial attorney faced with a choice like this in a capital case where self-defense was the key issue would want to keep Ms. Lombardo. Reasonable jurists would not disagree and Hand should be denied a certificate of appealability on this fifth sub-claim.

Sub-claim Six: Failure to Object to the Admission of Co–Conspirator Statements

***11** In his sixth sub-claim, Hand asserts trial counsel was ineffective for not objecting to the admission of statements of Welch as co-conspirator statements because, he claims, there was no independent proof of the conspiracy's existence. The Ohio Supreme Court concluded the statements were admissible under Ohio R. Evid. 804(B)(3) as statements against Welch's penal interest, but also that there was independent proof of the conspiracy. Therefore, it concluded, Hand suffered no prejudice from what his trial attorneys did with respect to this evidence. *State v. Hand,* 107 Ohio St.3d 378, ¶¶ 100–102, 216, 840 N.E.2d 151.

It cannot be prejudicial ineffective assistance of counsel to fail to make a particular objection to the admission of certain evidence if (1) the objection would not have been well taken or (2) the evidence was admissible on another ground. The Ohio Supreme Court, applying Ohio evidence law, found both of these points satisfied. In the absence of prejudice, there can be no valid claim of ineffective assistance of trial counsel. Reasonable jurists would not disagree, so Hand should be denied a certificate of appealability on this sub-claim.

Sub-claim Seven: Failure to Object to Other Bad Acts Evidence and Argument

In his seventh sub-claim, Hand asserts he suffered ineffective assistance of trial counsel when his trial attorneys failed to object to other-acts evidence (Motion, Doc. No. 142, PageID 15742). The Supreme Court of Ohio rejected this claim on the basis that Hand had shown no prejudice. *State v. Hand, supra,* at ¶ 217.

Judge Beckwith agreed and also found the evidence was admissible (Order, Doc. No. 118, PageID 2862–63).

Hand argues at some length in his instant Motion about the importance of not convicting people on the basis of propensity or bad character evidence[4] (Doc. No. 142, PageID 15743–45). He offers no citation of law, however, to contravene the Sixth Circuit's conclusion in *Bugh v. Mitchell,* 329 F.3d 496, 512 (6th Cir.2003), quoted above with respect to Ground Two, that the United States Supreme Court has never held the use of bad character or other acts evidence to be unconstitutional. Furthermore, the Supreme Court of Ohio found all of the objected-to other-acts evidence was in fact admissible under Ohio law, a conclusion which is binding on the federal courts. It cannot be ineffective assistance of trial counsel to fail to object to evidence which is admissible. Finally, Judge Beckwith weighed this evidence with the large amount of evidence of guilt presented at trial and found no prejudice (Order, Doc. No. 118, PageID 2862). Hand has not shown how reasonable jurists would disagree and should therefore be denied a certificate of appealability on this sub-claim.

Sub-claim Eight: Failure to Present Evidence of Self–Defense at Hearsay Hearings

The trial court held three hearings *in limine* on the question of whether the victim Lonnie Welch's statements could be admitted against Hand under Ohio R. Evid. 804(B)(6). To succeed, the prosecution had to show that Hand killed Welch to make him unavailable to testify. In this eighth sub-claim, Hand asserts he received ineffective assistance of trial counsel when his attorneys failed to raise the claim of self-defense at those hearings. The Supreme Court of Ohio decided that the issue could not have been raised without Hand testifying personally at the hearing and the record before that court did not establish whether Hand or his counsel made the decision that he would not testify at the hearing. The court determined that if Hand himself decided not to testify at that point, his ineffective assistance of trial counsel claim was foreclosed. On the other hand, if the lawyers made the decision, this would have been an appropriate tactical decision to avoid early cross-examination by the prosecutor. *State v. Hand,* 110 Ohio St.3d at ¶¶ 218–20, 852 N.E.2d 1176. Judge Beckwith found this ruling was neither contrary to nor an objectively unreasonable application of clearly established Supreme Court precedent (Order, Doc. No. 118, PageID 2864).

***12** In seeking a certificate of appealability on this sub-claim, Hand argues his counsel were "ineffective for not putting forth evidence of self-defense in rebuttal to the prosecutor's arguments for the admittance of multiple hearsay statements [by Welch]" (Motion, Doc. No. 142, PageID 15746). This argument begs the question on which the Ohio Supreme Court's decision turned: what evidence, other than Hand's own testimony?

Hand faults the Ohio Supreme Court's evaluation of the evidence on this point:

> There were no facts in the record from which the court could have determined that Hand refused to testify pretrial or that his attorneys considered the decision not to have him testify as trial strategy. In fact, it was equally as plausible that Hand's counsel did not present him as a witness at the hearsay hearings because they did not recognize the need to rebut the prosecution's theory. As such, the Ohio Supreme Court's opinion is buttressed by unreasonable factual determinations which reasonable jurists could conclude entitled Hand to relief under § 2254(d)(2).

Id. This argument elides an important part of § 2254(d)(2): to qualify for relief under that section, the determination of the facts must be unreasonable "in light of the evidence presented in the State court proceeding." Hand points to no place in the record of these hearings where he asked to testify nor to any place in the post-conviction record where he says he was prepared to testify at that point. If, as Hand argues, it is equally plausible that the lawyers just did not think about it as that they made a tactical decision, the trial attorneys are entitled to the benefit of the doubt. The Ohio courts are also entitled to the benefit of the doubt. As has been noted above,

> When evaluated under § 2254(d), a court's review of a *Strickland* claim is "doubly deferential." *Knowles v. Mirzayance,* 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009). The state court's own *Strickland*

analysis must receive the benefit of the doubt, and "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter,* —— U.S. ——, ——, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011).

Washington v. McQuiggin, 529 Fed. Appx. 766, 770, 2013 U.S.App. LEXIS 14165, 2013 WL 3466439 (6th Cir.2013).

And finally, the ignorance hypothesis is not equally plausible. Any trial lawyer would have known presenting self-defense required Hand to testify—there were no other witnesses. And no trial lawyer would have willing given the prosecutor what would have amounted to a pre-trial deposition of his client on the crux of the defense case if he could avoid it.

Reasonable jurists would not find Judge Beckwith's conclusion on this sub-claim debatable and Hand should therefore be denied a certificate of appealability.

Sub-claim Nine: Failure to Call Philip Anthony as a Defense Witness

In his ninth sub-claim, Hand claims he received ineffective assistance of trial counsel when his attorneys did not call Philip Anthony as a defense witness at trial. Anthony was a cousin of Welch to whom Welch had made statements incriminating both himself and Hand in the murders of all three of Hand's deceased wives. During the *in limine* proceedings, the prosecution obtained court permission to elicit Welch's statements from Anthony but then did not call him as a witness at trial. Hand's attorneys attempted to have the judge call Anthony as a court's witness because they said they could not "vouch" for him. [5] The trial judge refused and counsel then declined to call Anthony.

***13** As Judge Beckwith's decision makes clear, Anthony had some testimony about the mode of entry of the person who murdered Donna and Lori that might have been helpful to Hand's self-defense theory (Order, Doc. No. 118, PageID 2866–70). However, much of what Anthony had to say would have been harmful to Hand's case, particularly because he had admissions from Welch about the murder of all three wives. Based on the doubly deferential standard cited as to sub-claims five and eight, there is little question that the decision not to call Anthony was a reasonable tactical decision by counsel. Judge Beckwith's decision to defer would not be debatable among reasonable jurists and a certificate of appealability should be denied on this sub-claim as well.

Sub-claim Ten: Failure to Request Certain Jury Instructions

In his tenth sub-claim, Hand asserts he received ineffective assistance of trial counsel when his counsel failed to request limiting instructions on the "other acts" evidence and a definition of "course of conduct" as used in the capital specifications. Judge Beckwith rejected this claim on the merits, deferring to the Ohio Supreme Court's conclusion that Hand had not shown prejudice from omission of these instructions or that it would have been reasonable for counsel to call the jury's attention to the other acts evidence by requesting an instruction (Order, Doc. No. 118, PageID 2875). As to the omitted "course of conduct" instruction, Judge Beckwith found no error in its omission and therefore no ineffective assistance of trial counsel in failing to request it.

Hand has presented no basis on which Judge Beckwith's conclusions would be debatable among reasonable jurists. He should therefore be denied a certificate of appealability on this sub-claim.

Sub-claim Eleven: Cumulative Effect of Ineffective Assistance of Trial Counsel

Hand makes no request for a certificate of appealability on this sub-claim (See Motion, Doc. No. 142, PageID 14750).

Ground for Relief Five: Ineffective Assistance of Trial Counsel at the Sentencing Phase of Trial

As with Ground for Relief Four, Hand presents a number of specific claims of ineffective assistance of trial counsel at the sentencing phase of the trial. These will also be considered *seriatim.*

Sub-claim Two [6]: Failure to Present Additional Expert Psychological Testimony

Hand's counsel hired a forensic psychologist, Dr. Davis, who testified in mitigation that Hand would adjust well to prison life. In this sub-claim Hand asserts his counsel should also have elicited testimony from Davis that Hand was "truthful, open, and cooperative; that his test results did not reveal characteristics similar to those of an antisocial personality disorder; and that

Hand's psychiatric profile was not consistent with the typical traits of a 'cold calculating antisocial personality.' " (Order, Doc. No. 118, PageID 2877, quoting Petition at ¶ 86.)

On direct appeal Hand had discussed Dr. Davis in the broader context of his counsel's lack of preparation for mitigation. When he attempted to present this specific claim in post-conviction, the Ohio court of appeals found it barred by *res judicata. State v. Hand,* 2006–Ohio–2028, ¶ 33, 2006 Ohio App. LEXIS 1865, 2006 WL 1063758 (5th Dist. Apr. 21, 2006). Alternatively, it found no ineffective assistance of trial counsel *Id.* at ¶ 35.

***14** In this Court, Hand objected that the Ohio court of appeals was in error in finding he did not include material *dehors* the record on this claim, to wit, Dr. Davis' Affidavit reporting his Minnesota Multiphasic Personality Inventory ("MMPI") test results. Judge Beckwith found that the record showed Davis had given these results to trial counsel before testifying and the subclaim should therefore have been raised on direct appeal and was accordingly barred by procedural default (Order, Doc. No. 118, PageID 2878). Alternatively, she found the claim was without merit, concluding it was very unlikely the jury would have spared Hand's life just because he was not diagnosed with antisocial personality disorder. *Id.* PageID 2879–81.

In the instant Motion, Hand does not request a certificate of appealability on the *res judicata* issue and none should be granted on that issue. Instead, he attempts to bring the facts of this case within the ambit of *Glenn v. Tate,* 71 F.3d 1204 (6th Cir.1996), and *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (Motion, Doc. No. 142, PageID 15753–58). The omitted MMPI results here are nowhere near the omitted evidence in those cases. Nonetheless, the appellate courts have shown a distinct tendency to consider omitted mitigation evidence closely. See, e.g., *McGuire v. Warden,* 738 F.3d 741, 2013 U.S.App. LEXIS 25767 *28–47, 2013 WL 6840197 (6th Cir., Dec. 30, 2013). Such detailed attention bespeaks debate among reasonable jurists. Therefore, it is respectfully recommended that a certificate of appealability be issued on the merits of this sub-claim.

Sub-claim Three: Failure to Present Evidence of Hand's Family Dysfunction and Abysmal Childhood Through Family and Friends

In his third sub-claim, Hand asserts he received ineffective assistance of trial counsel when his trial attorneys failed to submit evidence concerning his dysfunctional family background and "abysmal" childhood. This claim was raised on direct appeal where the claim was phrased as failure to call family members to testify about the "chaotic, abusive home in which hand was raised" and to call long-term friends to testify to his generosity. The Ohio Supreme Court noted that Dr. Davis had testified about his alcoholic father, his placement in Childrens' Services, and his military service. The claim was also reviewed on the merits in postconviction.

Judge Beckwith denied this sub-claim, finding that it was a reasonable tactical decision to present the substance of this evidence through Dr. Davis. She found the decision "comports with a strategy of attempting to personalize Hand to the jury, and of demonstrating not only that he could adequately respond to life in prison, but that he could also contribute to improving other inmates' lives." (Order, Doc. No. 118, PageID 2883.)

In the instant Motion, Hand refers to the same evidence but contends it would have been much more persuasively presented if it had come in through family and friends instead of Dr. Davis. Essentially Hand quarrels not with the substance of the evidence presented, but with the strategic use made of the evidence.

***15** By the time this evidence was being presented, the jury had already convicted Hand in the murders of Jill Hand and Lonnie Welch and had heard testimony from which it could reasonably have inferred that Hand conspired with Welch to murder former wives Donna and Lori. The self-defense claim had failed to persuade the jury. It was certainly not unreasonable to attempt to persuade the jury to recommend life without parole, and both Davis' testimony and Hand's unsworn statement were directed to that end. Hand has presented no case law which persuades the Magistrate Judge that reasonable jurists would not apply the doubly deferential standard of *Harrington v. Richter* to this sub-claim, on which a certificate of appealability should be denied.

Sub-claim Four: Failure to Present Pharmacological and Lay Witness Testimony to Explain Hand's Demeanor While Testifying

In his fourth sub-claim, Hand argues he received ineffective assistance of trial counsel when his trial

attorneys did not present pharmacological evidence and lay witness testimony to explain his "confusing and discombobulated manner of communicating" (Motion, Doc. No. 142, PageID 15761).

Judge Beckwith denied this sub-claim on the merits, noting Hand had presented no proof that this additional evidence would probably have changed the result (Order, Doc. No. 118, PageID 2885).

In seeking a certificate of appealability on this sub-claim, Hand quotes four excerpts of his confusing testimony, then his deficiencies in speaking clearly "were likely symptoms of the psychotropic drugs he was administered at the time." (Motion, Doc. No. 142, PageID 15761.) However, as this claim was argued in post-conviction, it was that trial counsel should have presented friends as witnesses to testify he was always a poor speaker (Appendix, Vol. 10 at 101). Which is it—a short-term effect of psychotropic drugs or long-term inability to speak? And where is the evidence to link the psychotropic drugs actually prescribed (Buspar for anxiety and Trazadone for depression) to poor ability to communicate?

Reasonable jurists would not find judge Beckwith's disposition of this claim on the merits to be debatable, and no certificate of appealability should be issued.

Sub-claim Five: Failure to Present Testimony Regarding Hand's Third Wife

Hand's third wife, Glenna, was not murdered. Instead, Hand divorced her after they had been married several years. He claims prejudice from the failure to let the jury hear from his son and sister about his one marriage that did not end in murder.

This claim was first raised in post-conviction and supported by affidavits from Sally Underwood, Hand's sister, and his son, Robert, describing Glenna's abusive personality. Judge Beckwith denied this sub-claim on the merits, agreeing with the Magistrate Judge that it would be extremely speculative to conclude this testimony would have changed the result, given that Hand himself testified about his marriage with Glenna (Order, Doc. No. 118). Reasonable jurists would not find this conclusion debatable, and a certificate of appealability should not issue on this sub-claim.

Sub-claim Six: Failure to Investigate and Present an Effective Mitigation Strategy and Failure to Give a Penalty Phase Closing Argument

***16** In his sixth sub-claim, Hand presents a more general failure to investigate mitigating evidence claim. This claim was raised on direct appeal and rejected on the merits by the Supreme Court of Ohio which described the investigation and preparation that had been done. That court also found the mitigation strategy of presenting hand as a potential model inmate if his life was spared was a reasonable strategic decision. *State v. Hand,* 107 Ohio St.3d at ¶¶ 224–29, 837 N.E.2d 1188. Judge Beckwith found the state court decision was not an unreasonable application of clearly established federal law (Order, Doc. No. 118, PageID 2894).

While the Magistrate remains persuaded of the correctness of this decision, the tendency of the appellate courts to scrutinize trial counsels' mitigation presentations, mentioned above, suggests this conclusion is debatable among reasonable jurists and a certificate of appealability should be issued on this sub-claim.

Sub-claim Seven: Failure to Object to the Admission of All Guilt–Phase Evidence at the Sentencing Phase

At the close of the sentencing hearing, the state moved to admit all the guilt-phase exhibits (except for those related to the escape attempt) into evidence in the sentencing phase. Hand's counsel did not object and the trial judge admitted the exhibits. The Ohio Supreme Court rejected this claim on the merits. Judge Beckwith noted the failure of appellate counsel to identify any exhibits that were irrelevant to sentencing and independently found that the complained-of exhibits would have been relevant to sentencing.

Because this is a determination made in the first instance in this Court, reasonable jurists could debate the issue and a certificate of appealability should be issued.

Ground Six: Inadequate Trial Court Voir Dire on Pretrial Publicity

In his Sixth Ground for Relief, Hand contends the trial judge's voir dire regarding pretrial publicity was constitutionally inadequate. This claim was omitted from the direct appeal. It was included as an improperly omitted assignment of error in the April 2006 application for

reopening which was summarily denied. *State v. Hand,* 110 Ohio St.3d 1435, 852 N.E.2d 185 (2006) (table). It was also presented in post-conviction with copies of the newspaper coverage of the case. The Fifth District Court of Appeals found the claim barred by *res judicata. State v. Hand,* 2006–Ohio–2028, ¶ 23, 2006 Ohio App. LEXIS 1865, 2006 WL 1063758 (5th Dist. Apr. 21, 2006). Judge Beckwith agreed, the basis in the direct appeal record Hand would have had to raise this issue there (Order, Doc. No. 118, PageID 2897–2901). She offered an alternative analysis on the merits. *Id.* at PageID 2901–02.

Hand seeks a certificate of appealability only on the procedural default issue (Motion, Doc. No. 142, PageID 15769). In contrast to the usual rule requiring federal courts to defer to state court rulings on state law issues, when the record reveals that the state court's reliance on its own rule of procedural default is misplaced, federal habeas review is not be precluded. *White v. Mitchell,* 431 F.3d 517, 527 (6th Cir.2005), *citing Hill v. Mitchell,* 400 F.3d 308 (6th Cir.2005); *Greer v. Mitchell,* 264 F.3d 663, 675 (6th Cir.2001).

***17** In support of his Motion, Hand notes that the court of appeals determined that the newspaper articles submitted in post-conviction were outside the record on direct appeal. Since all of those clippings would have been available to include in the appeal record, this issue is one that could have been raised on direct appeal. Nevertheless, whether the court of appeals was correct in its *res judicata* ruling is debatable among reasonable jurists and a certificate of appealability should be granted on this issue.

Ground Eight: Insufficient Evidence to Support Escape Conviction

In his Eighth Ground for Relief, Hand asserts there was insufficient evidence presented at trial to support his conviction for escape. The claim was raised on direct appeal and rejected by the Supreme Court of Ohio, applying the appropriate Fourteenth Amendment standard enunciated in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *State v. Hand,* 107 Ohio St.3d 378, ¶¶ 172–77, 840 N.E.2d 151. Judge Beckwith rejected this claim, applying the doubly deferential standard of review required in habeas for sufficiency of the evidence claims (Order, Doc. No. 118, PageID 2907, citing *Brown v. Konteh,* 567 F.3d 191, 205 (6th Cir.2009). See also *Coleman v. Johnson,* 566 U.S. ——, ——, 132 S.Ct. 2060, 2062, 182 L.Ed.2d 978, (2012) (*per curiam*).

In seeking a certificate of appealability, Hand again emphasizes the evidence opposed to his conviction. The gist of the argument is that the witnesses against his conviction must, as a matter of constitutional law, be given sufficient credibility to create a reasonable doubt. The standard under *Jackson* is that the evidence must be construed most strongly in favor of the prosecution. The Magistrate Judge continues to believe this Ground for Relief was properly rejected, but the weighing of evidence is a matter of judgment on which reasonable jurists could disagree. Therefore it is respectfully recommended that a certificate of appealability be granted on the Eighth Ground for Relief.

Ground Nine: Improper Jury Instructions

In his Ninth Ground for Relief, Hand asserts the trial court committed constitutional error in its jury instructions in three particulars.

Sub-claim One: Complicity Instruction

With respect to the murder of Jill Hand, the State amended the bill of particulars after the close of the evidence to allege complicity in her death as an alternative to Hand's being the principal offender. On the basis of this amendment, the trial judge instructed the jury on complicity. Error with respect to both of these trial court decisions formed the basis of Hand's Fifth Proposition of Law on direct appeal. Relying on Ohio R.Crim. P. 7(D), the Supreme Court of Ohio rejected both claims. *State v. Hand,* 107 Ohio St.3d 378, ¶¶ 178–84, 840 N.E.2d 151 (2006). Judge Beckwith concluded this decision was not contrary to or an objectively unreasonable application of clearly established federal law (Order, Doc. No. 118, relying on *Hill v. Perini,* 788 F.2d 406 (6th Cir.1986), and *Stone v. Wingo,* 416 F.2d 857 (6th Cir.1969)).

***18** In seeking a certificate of appealability on this Ground for Relief, Hand relies on his Sixth Amendment right to be notified of the nature and cause of the accusation (Motion, Doc. No. 142, PageID 15774). Essentially he complains about the timing of the notice, not its content. Judge Beckwith noted in her decision, "Hand has not identified how the purported lack of notice prejudiced his defense, and he failed to seek a continuance after the amendment was granted." (Order, Doc. No.

118, PageID 2912.) Hand has not cured that deficiency in his Motion for Certificate of Appealability. Nor has he made any specific complaint about the content of the complicity instruction, as opposed to the amendment to the bill of particulars. Hand has not shown his entitlement to a certificate of appealability on this sub-claim.

Sub-claim Two: Failure to Narrow the Course–of–Conduct Specification

Hand was charged with a course-of-conduct capital specification, to wit, that Jill Hand and Lonnie Welch were killed as part of a course of conduct which involved the killing of two or more people. In his Ninth Ground for Relief, Hand claims the jury instruction did not sufficiently define "course of conduct" which was therefore "an unconstitutionally vague criteria [sic] upon which to determine application of the death penalty." (Motion, Doc. No. 142, PageID 15776.)

Ohio Revised Code § 2929.04(A)(5) provides in relevant part that a person may be executed if the State proves beyond a reasonable doubt that "the offense at bar [aggravated murder] was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender." A specification under § 2929.04(A)(5) was appended to the counts of the indictment charging Hand with the murder of Jill Hand and Lonnie Welch. The trial judge charged the jury on the meaning of the course-of-conduct language and Hand did not object. When this claim was raised on direct appeal, the Ohio Supreme Court found it procedurally defaulted under Ohio's contemporaneous objection rule. *State v. Hand,* 107 Ohio St.3d 378 ¶ 191, 840 N.E.2d 151 (2006). Judge Beckwith enforced this procedural default against Hand (Order, Doc. No. 118, PageID 2912–13). Hand offers no argument as to why that ruling would be in any way debatable among reasonable jurists and therefore no certificate of appealability should be issued on the Court's procedural default ruling.

Having enforced the contemporaneous objection waiver, the Ohio Supreme Court also ruled there was no plain error. *Id.* ¶¶ 192–98, 840 N.E.2d 151. Judge Beckwith concluded this ruling was neither contrary to nor an unreasonable application of Supreme Court precedent (Order, Doc. No. 118, PageID 2919–20.) In particular, she concluded that the course-of-conduct specification here was much more closely tied to the facts of the case as presented than were the facts in *State v. Scott,* 101 Ohio St.3d 31, 800 N.E.2d 1133 (2004), a case in which the defendant was also denied habeas relief (Order, Doc. No. 118, PageID 2913–20, adopting the reasoning of *Scott v. Houk,* 2011 U.S. Dist. LEXIS 133743, 2011 WL 5838195 (N.D.Ohio Nov. 18, 2011.)

***19** In arguing for a certificate of appealability, Hand cites *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). In that case the Supreme Court rejected as unconstitutionally vague a Florida capital specification which permitted execution of a person found to have committed a murder which was "especially wicked, evil, atrocious, or cruel." *Id.* at 1081.

In his dissent in *State v. Scott, supra,* Justice Pfeiffer complained of his colleagues' failure to adopt "an appropriate standard for determining what constitutes a course of conduct involving the purposeful killing of or attempt to kill two or more persons." 101 Ohio St.3d 31 at 51, 800 N.E.2d 1133. He noted that he had voted to affirm course-of-conduct convictions on a number of occasions and he concurred in affirming Hand's conviction at issue here. Nevertheless, his opinion on the vagueness of the specification shows that reasonable jurists could disagree on that point and Hand should be granted a certificate of appealability on merits prong of Judge Beckwith's decision on this sub-claim.

Sub-claim Three [7]: Improper Instruction on Reasonable Doubt

In his third sub-claim, Hand complains of the trial court's reasonable doubt instruction in three particulars, to wit, inclusion of the descriptors of "willing to act," "firmly convinced," and "moral evidence." (Motion, Doc. No. 142, PageID 15780–86.) The Supreme Court of Ohio summarily rejected this claim on the basis of *stare decisis. State v. Hand,* 107 Ohio St.3d 378, ¶ 261, 840 N.E.2d 151 (2006). Judge Beckwith concluded this decision was neither contrary to nor an unreasonable application of Supreme Court precedent (Order, Doc. No. 118, PageID 2923, *citing Byrd v. Collins,* 209 F.3d 486 (6th Cir.2000); *Thomas v. Arn,* 704 F.2d 865 (6th Cir.1983); *White v. Mitchell,* 431 F.3d 517 (6th Cir.2005); and *Coleman v. Mitchell,* 268 F.3d 417 (6th Cir.2001)).

Hand has not shown this conclusion is debatable among reasonable jurists. He cites only *Victor v. Nebraska,* 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), where the

Supreme Court approved a reasonable doubt instruction including the moral evidence language which was qualified with "[m]oral evidence, in this sentence, can only mean empirical evidence offered to prove such matters—the proof introduced at trial." (Quoted at Motion, Doc. No. 142, PageID 15785.) But it does not follow logically from the Supreme Court's approval of one reasonable doubt instruction that a different instruction under a different State's pattern jury instructions would be disapproved. A certificate of appealability should be denied on this sub-claim.

Ground Eleven: Ineffective Assistance of Appellate Counsel

In his Eleventh Ground for Relief, Hand contends he received ineffective assistance of appellate counsel in six particulars. Judge Beckwith denied all six and Hand seeks a certificate of appealability as to each of them (Motion, Doc. No. 142, PageID 15786–92). The sub-claims will be considered *seriatim.*

Sub-claim One: Failure to Preserve Collateral Estoppel Claim

***20** Hand was awarded $50,000 from the Ohio victims' compensation fund as a result of the murder of Donna Hand. Trial counsel moved to dismiss the specification to Count Two of the indictment for complicity in Donna's murder on the grounds of collateral estoppel, since the award required a finding that Hand was not at fault for her death. The trial judge denied the motion and raised a concern that Hand may have committed fraud on the Ohio Court of Claims in obtaining the award. This claim was not raised on direct appeal.

Judge Beckwith found this sub-claim (as well as the next two) procedurally defaulted because it was first raised in Hand's second application to reopen his direct appeal in September 24, 2007, which was rejected by the Ohio Supreme Court because it was untimely (Order, Doc. No. 118, PageID 2926–32). She concluded the Supreme Court's deadline for filing such applications was firmly established and regularly followed and therefore entitled to preclusive effect. *Id.* Hand makes no argument as to why this conclusion by Judge Beckwith would be subject to debate among reasonable jurists (see Motion, Doc. No. 142, PageID 15787–88). Therefore no certificate of appealability should issue as to the procedural default ruling on this sub-claim.

On the merits of this claim, Judge Beckwith found that it was in no way stronger than the issues raised on direct appeal in that Hand had not made the required showing that the issue had been actually litigated before the Court of Claims (Order, Doc. No. 118, PageID 2933). In his Motion, Hand makes no attempt to show that that conclusion would be debatable among reasonable jurists; indeed, he makes no comparison of this claim with other claims raised on direct appeal, but merely reargues the merits of the collateral estoppel claim (Motion, Doc. No. 142, PageID 15787–88). Therefore no certificate of appealability should be issued on the merits conclusion of this sub-claim.

Sub-claim Two: Failure to Claim Ineffective Assistance of Trial Counsel Based on the Trial Attorney's Failure to Protect the Attorney–Client Communication Privilege with Hand's Bankruptcy Counsel.

In his second[8] sub-claim on Ground Eleven, Hand claims he received ineffective assistance of appellate counsel when his appellate attorneys failed to claim he had received ineffective assistance of trial counsel when his trial attorney did not protect the privilege for his communications with his bankruptcy attorney. Judge Beckwith found this sub-claim procedurally defaulted on the same basis as sub-claim one and Hand makes no argument to show this conclusion would be debatable among reasonable jurists. He is accordingly not entitled to a certificate of appealability on the procedural default ruling.

On the merits, Judge Beckwith found Hand had waived the privilege by testifying himself about communications with the bankruptcy attorney (Order, Doc. No. 118, PageID 2933 and discussion supra of Ground 4, sub-claim A). Since the underlying claim has no merit, *a fortiori* it is weaker than claims actually raised on appeal. Hand makes no argument to show that this conclusion is debatable among reasonable jurists and should therefore be denied a certificate of appealability on the merits of this sub-claim.

Sub-claim Three: Failure to Challenge the Trial Court's Denial of the Motion to Dismiss Specifications Relating to the Murder of Hand's First Two Wives

***21** In sub-claim three, Hand claims it was ineffective assistance of appellate counsel to fail to challenge the trial court's denial of the motion to dismiss the specifications

relating to the murders of Donna and Lori Hand. Judge Beckwith dismissed this sub-claim as procedurally defaulted on the same basis as the first two sub-claims under Ground Eleven (Order, Doc. No. 118, PageID 2932). Hand offers no basis on which reasonable jurists would debate this conclusion and he should therefore not receive a certificate of appealability on this procedural default ruling.

On the merits, Judge Beckwith concluded this argument was no stronger than Hand's direct attack on the admission of other acts evidence (Order, Doc. No. 118, PageID 2933–34). Hand essentially concedes this point by re-arguing the Ohio R. Evid. 404(B) claim in his Motion. No certificate of appealability should issue on the merits of this third sub-claim.

Sub-claim Four: Failure to Challenge the Sufficiency of the Evidence on the Aggravating Circumstances and Specifications Two through Six of Count Two

In this sub-claim Hand claims he received ineffective assistance of appellate counsel when his appellate attorney did not challenge the sufficiency of the evidence to prove that he was complicit in the murders of Donna and Lori. [9] This sub-claim was properly preserved for consideration on the merits, but Judge Beckwith found it was without merit because of the evidence supporting complicity from Welch's statements over the years to his family and friends (Order Doc. No. 118, PageID 2935).

In seeking a certificate of appealability, Hand again claims, as he did on the merits of his Petition, that the evidence against him "rested almost entirely upon jailhouse informants." (Motion, Doc. No. 142, PageID 15791.) Later in the same paragraph he refers to this informant, Kenneth Grimes, as the "sole witness offered to prove the aggravating circumstance...." *Id.* Hand offers no reason why, assuming Welch's statements were admissible, they cannot count in the *Jackson v. Virginia* analysis of sufficiency. *Id.* No certificate of appealability should issue on this sub-claim.

Sub-claim Five: Failure to Amend the Brief on Appeal to Include Juror Bias Issues

In this sub-claim, Hand asserts he received ineffective assistance of appellate counsel when his appellate attorneys did not seek to amend their merit brief after they had obtained leave to supplement the appellate record with the juror questionnaires. Judge Beckwith denied this claim on the merits, noting the separate claim of inadequate voir dire on the same issues (Order, Doc. No. 118, PageID 2935–36). Hand makes no argument as to why this sub-claim would have been stronger than Ground Four, sub-claim (B). *A fortiori* he has not shown Judge Beckwith's conclusion that it was not stronger would be debatable among reasonable jurists. Therefore Hand should be denied a certificate of appealability on this sub-claim.

Sub-claim Six: Failure to Appeal the Scope of the Trial Court's Voir Dire on Juror Bias from Pretrial Publicity.

***22** As with the prior sub-claim, Judge Beckwith found Hand had not shown this claim of ineffective assistance of appellate counsel was stronger than the underlying claims of ineffective assistance of trial counsel or trial court error (Order, Doc. No. 118, PageID 2936). A certificate of appealability should be denied on this sub-claim on the same basis as sub-claim five.

Conclusion

In accordance with the foregoing analysis, Hand should be granted a certificate of appealability on the fair presentation issue in Ground Two; on sub-claim two of Ground Four; on sub-claims 2, 6, and 7 of Ground Five; on Grounds Six and Eight; and on the merits only of subclaim 2 of Ground Nine. All other requests for a certificate of appealability should be denied.

All Citations

Not Reported in F.Supp.3d, 2014 WL 29508

Footnotes

1 Judge Beckwith's decision is publicly reported at 2013 U.S. Dist. LEXIS 75378 and 2013 WL 2372180, but is cited hereinafter to the place where it appears on the docket of this Court.

2 The court avoided a due process ruling by construing Fed.R.Crim.P. 32 to avoid constitutional doubt. 495 F.3d at 247–48.

3 While the claim is phrased in the plural as if it related to multiple jurors, in fact only the failure to exclude Juror Lombardo is at issue.

4 In the Motion, Hand states he is complaining in this sub-claim about "other-acts evidence in this case relating to escape and the prior murders of Donna and Lori Hand." Doc. No. 142, PageID 15742. However nothing about any such other acts evidence is part of this sub-claim. Instead, both here and in the Supreme Court of Ohio, the claim was about fraudulent business practices, emotional reactions to Donna and Lori's deaths, sex-related testimony, childhood interest in "true crime" stories, and forcing his father out of business. *State v. Hand, supra,* ¶¶ 110–161, 852 N.E.2d 185.

5 At common law, a party was said to "vouch" for the witnesses that party called and could not impeach them. IIIA Wigmore § 896 (Chadbourn Rev.1970). The policy behind that rule was seriously questionable, *id.,* and it was abolished in federal practice with the adoption of Fed.R.Evid. 607 in 1975 and in Ohio practice on adoption of Ohio R. Evid. 607 in 1980. Hand would have been permitted to impeach Anthony had he called him, but witnesses are still identified in the lay mind with the party that calls them and this may have been on counsel's mind.

6 A section of the Motion labeled "1" argues generally about counsel's lack of preparation. *Id.* at PageID 15752. It is not argued as a separate sub-claim. Nevertheless, this Report retains the numbering used in the Motion for ease of reference.

7 Hand has numbered two of his Ninth Ground sub-claims as "2." (Motion, Doc. No. 142, PageID 15776, 15780.) The Magistrate Judge here labels the second of those sub-claims as "Three" for clarity of presentation.

8 Hand has made two sub-claims under Ground Eleven which he has numbered "3." The analysis here relates to the first of those, which appears at PageID 15788 and is renumbered "second" for clarity of presentation.

9 Hand was not charged directly with complicity in the murders of Donna and Lori, but with killing Welch to prevent him testifying about those murders.

2013 WL 2372180
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio,
Western Division.

Gerald HAND, Petitioner,
v.
Marc HOUK, Warden, Respondent.

No. 2:07–cv–846.
|
May 29, 2013.

Attorneys and Law Firms

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ORDER

SANDRA S. BECKWITH, Senior District Judge.

***1** Petitioner, Gerald Hand, was convicted by an Ohio jury of the aggravated murders of his wife, Jill Hand, and of his friend and former employee, Walter Lonnie Welch. The same jury recommended that Hand be sentenced to death. After unsuccessful attempts to challenge his conviction and his sentence in state courts, he filed a petition for a writ of habeas corpus in this court. The Magistrate Judge has recommended that his petition be denied, a recommendation to which Hand has objected. For the following reasons, the Court overrules Hand's objections.

FACTUAL BACKGROUND

The Ohio Supreme Court described at length the particular facts and circumstances that led to Hand's indictment on two counts of aggravated murder (and other charges), as they were presented in his jury trial held in May–June 2003:

State's Case

Murder of Donna Hand. On the evening of March 24, 1976, Hand notified police that his wife had been murdered at their home on South Eureka Avenue in the Hilltop section of Columbus. According to Hand, he returned home after being out with his brother but was unable to open his front door because it was double latched from the inside. Hand entered the house through a side door and found Donna's body.

The police found Donna's fully clothed body at the bottom of the basement stairway. She had a bag over her head and it was tied with a spark-plug wire. The police found no sign of forced entry. Drawers in the upstairs bedroom had been removed and turned over, but the room did not appear to have been ransacked. Moreover, no property was missing from the house.

Dr. Robert Zipf, then a Franklin County Deputy Coroner, examined Donna's body at the scene and found blood around the head where the body was lying. However, no blood spatters or other bloodstains were found on the stairs, which indicated that Donna had not hit her head falling down the steps.

During the autopsy, Dr. Zipf found "three chop wounds to the back of [Donna's] head" that were caused by "some type of blunt object, maybe a very thin pipe or a dull hatchet." However, Dr. Zipf determined that Donna had died from strangulation caused by the spark-plug wire around her neck.

During the fall of 1975, Donna told Connie Debord, her sister, that she planned to divorce Hand and move back to their parents' home. Donna felt that "everything was over" and "feared for her life." About two weeks before she was killed, Donna told Evelyn Latimer, another sister, that she was going to file for divorce.

Hand received $ 67,386 in life insurance following Donna's death. Hand also filed a claim for reparations after Donna's death and received $50,000 from the Ohio Victims of Crime Compensation Division of the Court of Claims.

During 1975 or 1976, Teresa Fountain overheard [Lonnie] Welch talking to Isaac Bell, Fountain's boyfriend, about "knocking his boss's wife off to get some insurance money." Sometime after Donna's murder, Welch told Fountain, "I hope you didn't hear anything and * * * you keep your mouth shut, * * * you didn't hear anything."

***2** *Murder of Lori Hand.* Hand married Lori Willis on June 18, 1977, and Welch was the best man at the wedding. Hand and Lori lived in the home on South Eureka Avenue in which Donna had been murdered.

By June 1979, Hand's marriage to Lori was falling apart. Lori told her friend, Teresa Sizemore, that she was unhappy with her marriage and was making plans to file for a divorce. Sizemore also saw Lori and Hand interact, but she "didn't see any warmth there because [Lori] wasn't happy."

Around 8:30 a.m. on September 9, 1979, Hand and his baby, Robby, left home so that Lori could clean the house for a bridal shower planned for that afternoon. Steven Willis, Lori's brother, picked up Hand at his house. The three of them then spent the next few hours visiting a flea market, a car show, and Old Man's Cave in Hocking Hills. They also went go-cart racing.

Around 9:30 a.m., Lois Willis, Lori's mother, arrived at Hand's home to help Lori prepare for the bridal shower. After Lois knocked and did not get an answer, she left and returned about an hour and half later. Upon returning, Lois noticed that the front door was ajar and entered the house. Alarmed, she called Hand's family, who found Lori's body in the basement.

Police discovered Lori's body on the basement floor with a plastic sheet wrapped around her head. Lori's pants were unfastened with the zipper down, and her blouse was pulled up against her breast line. Bloodstains and blood spatters were found on the wall near Lori's body, and a spent lead projectile was found near her body. Lori had been shot twice in the head, but neither gunshot killed her. Dr. Patrick Fardal, a Franklin County Deputy Coroner, determined that strangulation was the cause of death.

Lori's vehicle had been stolen from Hand's garage. Police recovered her vehicle about three blocks from the Hand home.

Police found the first and second floor levels of the house in disarray, with drawers and other items of property dumped on the floor. Nevertheless, the house did not appear to have been burglarized, because there were no signs of forced entry and the rooms were only partially ransacked. Investigators also seized a cash box containing credit card slips, currency, and a .38 caliber handgun from the trunk of Hand's car parked in the garage.

After he learned of Lori's death, Hand returned home. Hand told police that he had been out of the house with Steve and his young son when Lori was murdered. Hand said that "everyone, including * * * his brothers and help at the shop would have known" that he was going to be gone from the house that morning.

Hand told police that he was very possessive of Lori. He admitted having sexual problems with Lori because he "wanted sex at least once a night and she didn't want to do that." When asked about insurance, Hand said that he had in the past year doubled its value and that it should pay off both of his mortgages. Hand received $126,687.90 from five separate life insurance policies after Lori's death.

***3** On September 10, 1979, the police recovered a pair of gloves near where Lori's vehicle was found. The fingers of the gloves were bloody, and the gloves had been turned inside out. Human bloodstains were found on the gloves, and debris from inside the gloves was preserved.

On October 9, 1979, the police reinterviewed Hand. Hand provided the names of Welch and others who worked for him and said that he did not trust any of them. He told police that everyone, including all of his neighbors, was aware that he had received $ 50,000 after his first wife's murder. Hand also said that his wife was not planning to separate from or divorce him and that they were "extremely in love with each other."

During the fall of 1979, Welch went to the home of Pete Adams, Welch's first cousin, and told Adams

that he had "killed Donna and Lori Hand" and had done it for Bob Hand. Adams did not notify police about this conversation until after Welch's death in 2002.

During 1979 and 1980, Betty Evans, Welch's sister, observed that Welch had a "wad of money," cars, and a girlfriend who wore a mink jacket, a diamond necklace, and rings. Around the same time, Welch told Evans that if she "knew anything, not to say anything because him and Bob had a pact and if anything got out, they were going to kill each other's mother."

In the 1980s and 1990s, Welch intermittently worked as a mechanic at Hand's radiator shop in Columbus. Hand also provided Welch with extra money on a frequent basis and gave him cars and a washer and dryer. In the late 1980s, Welch started using crack cocaine and spent a lot of money on it.

Sometime after Lori's death, Hand met and married Glenna Castle. They were married for seven to eight years and then divorced.

Hand's marriage to Jill and his financial problems. In October 1992, Hand married Jill Randolph, a widow, and moved into Jill's home on Walnut Avenue in Galena, Delaware County. Jill was employed at the Bureau of Motor Vehicles in Columbus and was financially secure. Hand was the beneficiary of Jill's state retirement and deferred-compensation accounts in the event of her death, and he was the primary beneficiary under her will.

By 2000, Hand's radiator shop had failed, and he was deeply in debt. During the 1990s and early 2000, Hand obtained thousands of dollars by making credit card charges payable to Hand's Hilltop Radiator. By January 2002, Hand had amassed more than $ 218,000 in credit card debt.

At some point, Jill found out about the extent of Hand's debt. During 2000, she learned that Hand had charged more than $ 24,000 on a credit card in her name. Jill was upset and told her daughter, Lori Gonzalez, that "[s]he was going to have Bob pay off that amount that he had charged up with the sale from his business."

In October 2000, Hand sold his radiator shop and the adjoining buildings. In May 2001, Hand started working as a security guard in Columbus and earned $ 9.50 an hour. Despite his enormous debt, Hand continued to pay on several credit cards to maintain life insurance coverage on his wife, including payments in December 2001 and January 2002.

***4** Hand and Jill grew increasingly unhappy with one another. During 2001, Hand told William Bowe, a friend of Hand's, that he was "quite tired of her." Abel Gonzalez, Jill's son-in-law, lived at the Hand home from April to June 2001. Abel said that Hand and Jill's marriage was "on the down slope. * * * There was no warmth there. * * * It seemed everything Bob would do would antagonize Jill, and she made it real clear that she was upset."

Plans to murder Jill Hand. In July or August 2001, Welch asked Shannon Welch, his older brother, if he had a pistol or could get one. Welch also asked, "Do you know what I do for extra money?" He continued, "Well, I killed Bob's first wife and * * * I got to kill the present wife and I'll have a lot of money after that." Welch said he was going to be well off enough to retire and talked about buying an apartment complex. Thereafter, Welch asked Shannon about a pistol "maybe once a week, sometimes twice a week."

Between December 21, 2001, and January 3, 2002, Welch was in jail for various motor vehicle violations. During that time, Welch told his cellmate, David Jordan Jr., that he planned to "take somebody out for this guy named Bob" and mentioned that he had "put in work for him before." Welch said he needed a driver because his eyes were "messed up." He asked Jordan if he wanted the job and offered to pay him between $5,000 and $6,000. Welch said this job was supposed to happen in January, and he gave Jordan his phone number.

During December 2001, Shannon asked Hand whether he could provide bond money to get Welch out of jail. Hand said, "Well, I can't have no contact with Lonnie * * * because we got business" and refused to give him any money.

On January 14, 2002, Welch told Tezona McKinney, the daughter of Welch's common-law wife, that he

was going to buy a car for her mother. Welch said he "was going to get the money the next day" and would buy the car "because [he] didn't buy her anything for Christmas because [he] was in jail."

Around 5:00 p.m. on January 15, 2002, Welch attended a family gathering at Evans's home in Columbus to celebrate Evans's birthday. Welch told Shannon that he had to "be ready * * * to see Bob because [he] might be taking care of * * * business tonight." Before leaving, Welch told Evans that he "was going to pick up some money and he'd be right back."

Murder of Jill and Welch. Around 6:45 p.m. on January 15, 2002, Hand arrived home from work. At 7:15 p.m., Hand made a 911 call to report that his wife had been shot by an intruder. Hand also reported that he had shot the intruder.

Police found Welch's body lying face down on Hand's neighbor's driveway. Inside Hand's house, Jill's body was found lying between the living room and the kitchen. Hand told police that he had shot the intruder but did not know his identity. He also gave police two .38–caliber revolvers that he used to shoot him. On the way to the hospital, Hand saw the intruder's vehicle and told Mark Schlauder, a paramedic, that "it could have belonged to somebody that worked for" Hand.

***5** Around 8:00 p.m. on January 15, Detective Dan Otto of the Delaware County Sheriff's Office interviewed Hand at the hospital. Hand said that after arriving home, he had dinner with Jill and then went to the bathroom. Upon exiting, Hand heard Jill scream, "Gerald," heard two gunshots, and saw a man in a red and black flannel shirt at the end of the hallway. Hand then retrieved two .38 caliber revolvers from the master bedroom. Hand started down the hallway firing both guns at the intruder, but had trouble shooting because the guns were "misfiring" and "missing every other round." Hand followed the intruder out the front door and continued firing at him as he ran toward his car, and then the intruder fell on the neighbor's driveway.

During the interview, Hand repeated that he did not recognize the gunman, but recognized Welch's car in the driveway. Hand said he "didn't know [Welch] that well; that he did odd jobs around the shop; that he was a thief; that he was a cocaine addict; that he * * * [came] in to the shop area from time to time." Hand also said that it had been a year since he had had any contact with Welch, and Welch had no reason to be at his home that night.

Investigators found no sign of forced entry at Hand's residence. Blood spatters were found inside the front door and on the front-door stoop. The top of the storm door was shattered, and particles of glass extended 13 feet into the front yard. All the glass fragments were found on top of the blood spatters. Police also found a black jacket on the front stoop, a spent bullet and glass fragments on top of the jacket, and a tooth outside the front door.

According to Agent Gary Wilgus, a crime-scene investigator, the blood spatters indicated that the victim was bleeding and "blood was dropping from his body" as he was moving away from the house. A bloody trail led onto the sidewalk and through the front yard and ended where Welch was lying in the driveway. Welch was wearing cloth gloves, and a knit hat with two eyeholes and a mouth hole was next to his head. Police also found a .32–caliber revolver on the front lawn.

Inside the house, police found glass fragments and bloodstains extending two to three feet from the front door and another tooth just inside the front door. Jill's body was 12 feet from the front door, her legs pointed towards the front door, and she was wearing a nightgown. Jill had been shot in the middle of her forehead. A second bullet deflected off the floor and was found on the carpet next to Jill's head.

Investigators found a bullet in the living room ceiling, and a second bullet was found in the living room window frame. While investigators could not determine the exact trajectory of the two bullets, they determined that they most likely originated from gunshots in the hallway area. No evidence of gunplay was found elsewhere in the house.

On January 17, 2002, Detective Otto re-interviewed Hand, and Hand provided a different version of events. Hand stated that after his wife was shot, he retrieved two guns from the master bedroom, went into the hallway, and saw Welch "coming down the hallway towards the master bedroom at him." Hand and Welch then began firing at each other in the

hallway and were within four feet of each other during the gun battle. Hand repeated that he chased Welch outside the house but "couldn't get his guns to fire; that he was missing every other round and * * * they weren't firing." When asked about the .32–caliber revolver in the front yard, Hand stated that he did not know who owned it.

***6** During the second interview, Hand said, "I was misquoted on the first interview at the hospital" about not knowing Welch. Hand said that he had known Welch, a former employee, for over 20 years. However, Hand continued to give the impression that they were not close. When asked about a wedding photo showing Welch as his best man, Hand said he "couldn't find anybody else to stand in as [his] best man." Hand repeated that "the only thing he saw" on the night of the murder was an unknown person in "red and black flannel," and he had "no clue who this unknown person was." Hand also said that "Jill had never met Lonnie; Lonnie's never been to Walnut Avenue; he had no idea why he was there."

In discussing his financial situation, Hand said he sold his radiator shop in October 2000 and received $300,000, and later received $33,000 from the sale of his share of the business and its inventory, and $140,000 from somewhere else. Hand said he "always needed money, but if he needed money, he could get some; that he had money." Hand also told police that he was "hiding the money and that he was considering filing bankruptcy; that that was against Jill's wishes." Later, Hand said that he "wasn't going to file for the bankruptcy * * * and they were going to work it out." When asked if he had any offices, Hand said that his office was in a bedroom in the house. However, Hand failed to disclose that he kept business records at another location.

On January 19, 2002, the police seized several boxes containing Hand's business and personal records from the storage area above a hardware store near Hand's former radiator shop. These records included credit cards, credit-card-and life-insurance-account information, payment receipts, a list of credit card debt prepared by Jill, and other information about Hand's finances.

Heather Zollman, a firearms expert, testified that the .32–caliber revolver found in the front yard was loaded with two fired and three unfired .32–caliber Smith and Wesson ("S & W") Remington–Peters cartridges. Bullet fragments removed from Jill's skull were consistent with being an S & W .32–caliber bullet. In testing the .32–caliber revolver, Zollman found that "on more than 50 percent of [her] testing, the firearm misfired" as a result of "a malfunction of the firearm." The stippling pattern shown in Jill's autopsy photographs indicated that "the muzzle to target distance was greater than six inches, and less than two feet."

Zollman tested the two .38–caliber revolvers and found that they were both in proper working order, and neither weapon showed any tendency to misfire. A bullet removed from Welch's right forearm was "consistent with the .38 caliber." Zollman also concluded that the bullet and fragments recovered from Welch's mouth and his lower back had rifling class characteristics corresponding with the S & W .38–caliber revolver. Further, gunshot residue around the bullet hole on the back of Welch's shirt revealed a muzzle-to-target distance greater than two feet from the garment but less than five feet.

***7** Jennifer Duvall, a DNA expert, conducted DNA testing of bloodstains found on the shirt Hand was wearing on the night of the murders. Five of the bloodstains were consistent with the DNA profile of Welch. The odds that DNA from the shirt was from someone other than Welch was "one in more than seventy-nine trillion in the Caucasian population; one in more than forty-four trillion in the African–American population, and one in approximately forty-three trillion in the Hispanic population."

Michele Yezzo, a forensic scientist, examined bloodstain patterns on Hand's shirt. There were more than 75 blood spatters of varying sizes on the shirt. Yezzo concluded that the shirt was "exposed to an impact" that "primarily registered on the front of the garment." Yezzo also examined glass fragments collected from Hand's residence and "found tiny fragments of clear glass" on Hand's shirt, trousers, tee-shirt, and pair of socks that he was wearing on the night of the murders. However, she found no glass fragments on Welch's boots. Yezzo conducted a fiber analysis of the bullet from Welch's mouth, but found "no fibers suitable for comparison."

Ted Manasian, a forensic scientist, found particles of lead and barium on both gloves that Welch was wearing, and these are "highly indicative of gunshot residue." Manasian could not determine how the gunshot residue got on the glove, just that it was there. Thus, Welch could have fired the gun, or was in the proximity of the gun when it was discharged, or handled an item that had gunshot residue on it.

Detective Otto testified that $1,006,645.27 in life insurance and state-benefit accounts were in effect at the time of Jill's death. This amount included $113,700 in Jill's Ohio Public Employees Retirement System account and $42,345.29 accumulated in the Ohio Public Employees Deferred Compensation program.

Dr. Keith Norton, a forensic pathologist in the Franklin County Coroner's office, conducted the autopsy of Jill and Welch. He concluded that Jill died from a single gunshot wound to the head. Dr. Norton found that Welch had been shot five times: in his mouth, left upper chest, left forearm, right shoulder, and lower back. The gunshot wound to Welch's lower back went into the spinal cord and would have paralyzed his legs. However, the gunshot wound to the chest was the cause of death.

According to Kenneth Grimes Jr., Hand's former cellmate in the Delaware County Jail, Hand told him that he "killed his wife and the man he was involved with." Hand said he hired a man and they had "been doing business together for years." Hand said he "hired the man to kill his wife and, in turn, the deal went sour. He wanted more money, so he killed two birds with one stone. He got both and didn't have to pay anything." Hand said he had agreed to pay $25,000 to have his wife killed, and the man "wanted it doubled." Hand said he was going to claim self-defense. He also said the evidence against him was "circumstantial and there were many witnesses that didn't have * * * any actual, proof."

***8** *Attempted jail escape.* Hand was incarcerated in the Delaware County jail beginning on August 8, 2002. On November 26, 2002, correction officers discovered an escape attempt in Hand's cell block.

An attempt had been made to cut through the lock on the rear emergency exit of the cell block and through a cell bar. Officers searching Michael Beverly's cell found two saw blades. Police also seized some torn-up tee-shirt material and a pencil with a teeshirt tied around it from Hand's belongings in his neighboring cell.

Michael Beverly and Wedderspoon, another inmate, came up with the idea for the escape. Beverly said that he obtained two hacksaw blades and began cutting through the rear-exit lock and one cell bar. Dennis Boster, another inmate, was the lookout, and once in a while Hand would relay messages to Beverly that a guard was coming. Hand also advised Beverly on how to cut through the metal bar.

According to Grimes, Beverly and Hand discussed escaping through the front of their cell block. The plan was that while Hand distracted the guards and nurses by requesting his medication, Beverly would apprehend a guard, and they would escape through the front door. Grimes also identified Hand as a lookout.

Defense Case

Sally Underwood, Hand's sister, was a bartender in the Columbus Hilltop area from 1992 until 1994. During that time, Welch frequently came into the bar selling televisions, stereos, and other electronic equipment. When asked where he obtained this property, Welch said that he "had just stolen it from a house down the street ." Underwood could tell that Welch was "on something" when he entered the bar.

According to Terry Neal, another inmate in Hand's cell block, Hand was not involved in the escape attempt. Dennis Boster, who was convicted of escape, also testified that Hand was not involved in the escape attempt and never served as a lookout.

Hand testified in his own behalf. He said, "I did not kill my wife or have anything to do with the planning of killing my wife, either." Hand also denied conspiring with Welch or anyone else to kill Donna or Lori. Hand did not remember "too much" about the day Donna was killed.

When Hand married Lori, Welch was the best man at the wedding because his brother backed out at the last minute. Hand said that he had a great sexual relationship with Lori before his son, Robert,

was born, but thereafter, they started having sexual problems. However, his business was going well, and his financial condition was "great."

During his marriage to Lori, Hand took over his father's radiator shop, purchased the underlying property, and bought some extra lots. Welch worked part-time at the radiator shop and was paid under the table. Around this time, Hand embarked on a credit card scheme. He used personal credit cards, charged them to his business, and used this money to finance his business and purchase real estate.

The wedding shower at his home on September 9, 1979, had been planned weeks in advance. When he learned that Lori had been killed, Hand "didn't believe it at first" and then went "hysterical." Hand later told police that he suspected that his brother, "Jimbo," had killed Lori because they were not "getting along that good and he had the keys to [Hand's] house."

***9** Shortly before Hand and Jill were married in 1992, he moved into her Delaware County home. After they had been married for a couple of years, Jill found out about Hand's credit card scheme. Hand said, "She didn't like it; * * * She just didn't want no part of it ." She also learned about Hand's debt, which at one point, was close to a million dollars. Jill was also aware that Hand had life insurance on her through his credit cards.

In 2000, Jill learned that Hand used her credit card to pay for repairs to one of Hand's properties. Jill was upset and wanted a "total refinance of everything." Hand then "started selling everything * * * and then paying the credit cards and the mortgages and everything down." In 2001, Hand sold his radiator shop. By May 2001, Hand had sold all his properties, had paid thousands of dollars on his credit card debt, and had gone to work as a security guard.

According to Hand, he arrived home from work around 6:45 p.m. on January 15, 2002. Hand was coming out of the bathroom when he heard Jill shout, "Gerald, Gerald." He then heard a couple of shots and saw a man dressed in red flannel. Hand retrieved two guns from the bedroom dresser, and as he came out of the bedroom, he saw the intruder coming down the hallway. Hand started "firing, and * * * assumed [the intruder] was firing." However, Hand thought his guns were "misfiring because [the intruder] wasn't going down." Hand said he chased the intruder out the front door and continued firing at him until the intruder fell on the driveway. He then returned to the house and called 911.

Hand did not know how many shots he fired. He retrieved the guns and started firing, later explaining, "I wanted to protect myself * * * and shoot him, the son-of-a-bitch that shot my wife." Hand did not recognize the intruder, but recognized Welch's car in the driveway. He had no idea why Welch had come to his house that night.

Hand denied telling Grimes that Welch was already in the house when he came home from work, denied telling him that Welch wanted to renegotiate his fee, and denied telling him that he killed his wife and then killed Welch. As for the escape, Hand said that he tried to stay away from Beverly as much as possible. Beverly asked Hand if he wanted to join in the escape, and Hand told him "no, and just get away." Hand also claimed that he did not aid Beverly in any way. Finally, he said that the string found in his cell was used for hanging a bag with food items to keep out the ants.

State v. Hand, 107 Ohio St.3d 378, 379–389, 840 N.E.2d 151 (2006).

Hand was indicted in August 2002. Count One charged him with Jill Hand's murder with prior calculation and design, and with a course-of-conduct death penalty specification. Count Two charged him with Welch's murder with prior calculation and design, and six specifications: course of conduct; three separate specifications for murdering Welch in order to escape detection for the murders of Donna, Lori, and Jill Hand, respectively; and two specifications of murdering Welch to prevent him from testifying against Hand regarding the murders of Donna and Lori. Counts Three, Four and Five charged Hand with conspiracy to murder Jill, and each count included use of a firearm specification. Count Six charged him with escape. [1] The jury returned guilty verdicts on all six counts of the indictment, and recommended that the court impose the death sentence for the two aggravated murders. The trial court accepted that recommendation, imposing the death penalty for Counts One and Two, together with three years on the escape charge and three years on the firearm specifications.

***10** Hand appealed his conviction and sentence to the Ohio Supreme Court, raising 13 propositions of law. The court rejected all of Hand's contentions and affirmed his conviction and sentence (in the decision cited above) on January 18, 2006. Hand filed an application to reopen his direct appeal on April 18, 2006 to raise three claims of ineffective assistance of appellate counsel, which the court summarily denied. Hand's petition for certiorari was subsequently denied by the United States Supreme Court. In September 2007 (after he filed his habeas petition in this case), Hand filed a motion to reopen his direct appeal to raise three additional claims of ineffective assistance of appellate counsel. The Ohio Supreme Court denied that motion as untimely.

Hand also pursued post conviction relief in the state trial court in December 2004, eventually raising twelve claims for relief. The court rejected them all and dismissed the petition on May 27, 2005. Hand's appeal from that order, which raised three assignments of error, was rejected by the Ohio Fifth District Court of Appeals. The Ohio Supreme Court declined review, and certiorari was denied by the United States Supreme Court.

Hand filed his habeas petition in this district on August 22, 2007, raising fifteen claims, some with several subparts. (Doc. 11) The Magistrate Judge granted in part Hand's motion to conduct discovery with respect to his third claim, alleging *Brady* violations, and with respect to his claims of ineffective assistance of counsel. After an evidentiary hearing and the submission of post-hearing briefs, the Magistrate Judge issued his initial Report, recommending that this Court deny Hand's petition. (Doc. 101) Hand filed objections (Doc. 108), and the Magistrate Judge's Supplemental Report addressed those objections (Doc. 111). Hand then filed his omnibus objections to all of the Magistrate Judge's recommendations. (Doc. 117) The Magistrate Judge also granted Hand's motion to postpone briefing on a certificate of appealability until after this Court's decision on his objections. (Doc. 113) Hand's omnibus objections are therefore ripe for review.

DISCUSSION

Standard of Review

Hand's petition is governed by the requirements of the Antiterrorism and Effective Death Penalty Act. Under that statute, a federal court may not grant habeas corpus relief to a state prisoner unless it concludes that the state court's adjudication on the merits of the prisoner's 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). "A state court renders an adjudication 'contrary to' clearly established federal law when it 'arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law' or 'decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.' " *Carter v. Mitchell,* 443 F.3d 517, 524 (6th Cir.2007), citing *Williams v. Taylor,* 529 U.S. 362, 412–13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court unreasonably applies clearly established federal law when it "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.*

***11** In order to find that the state court's application of federal law is "objectively unreasonable," it must be more than simply incorrect. "To conclude that a state court's application of federal law was unreasonable, the Court must decide that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents.' " *Jackson v. Bradshaw,* 681 F.3d 753, 759 (6th Cir.2012), quoting *Harrington v. Richter,* — U.S. ——, ——, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011). The Supreme Court has emphasized that "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington,* 131 S.Ct. at 786 (quoting *Jackson v. Virginia,* 443 U.S. 307, 332, n. 5, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (Stevens, J., concurring in judgment).

The doctrine of procedural default bars a habeas petitioner from raising claims that were not properly presented to the state court. If a state court previously dismissed a state prisoner's federal claim because the prisoner failed to comply with a state procedural rule,

a federal court ordinarily cannot consider the merits of that claim. See *Coleman v. Thompson,* 501 U.S. 722, 729–731, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). This doctrine bars habeas review of such claims if: (1) the petitioner failed to comply with a state procedural rule; (2) the state court clearly enforces that rule; (3) the rule is an adequate and independent state ground for denying review of the federal constitutional claim; and (4) the petitioner cannot show cause and prejudice that would excuse the default. *Guilmette v. Howes,* 624 F.3d 286, 290 (6th Cir.2010 (en banc) (internal quotations omitted); *Maupin v. Smith,* 785 F.2d 135, 138 (6th Cir.1986).

Under the fourth prong, a petitioner can excuse a default by establishing good cause for the default, and that he was actually prejudiced by the constitutional error irrespective of the default. *Maupin,* 785 F.2d at 139. Alternatively, a petitioner may establish that the state court outcome amounts to a fundamental miscarriage of justice that requires habeas relief. This is a rare situation, such as when petitioner comes forward with new evidence demonstrating that a constitutional violation has probably resulted in his conviction despite his actual innocence. *Moore v. Mitchell,* 708 F.3d 760, 775 (6th Cir.2013), citing *Murray v. Carrier,* 477 U.S. 478, 495–96 (1986).

After the evidentiary hearing in this case, the Supreme Court held in *Cullen v. Pinholster,* —— U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) that a federal habeas court's review of a state court's merits decision must be based upon the record that was before the state court at the time of that decision. In *Robinson v. Howes,* 663 F.3d 819, 823 (6th Cir.2011), the Sixth Circuit explained that after *Pinholster,*

> ... a federal habeas court may not rely on evidence introduced for the first time in that court and reviewed by that court in the first instance to determine that a state court decision was 'contrary to' or an 'unreasonable application of' clearly established federal law.... However, if the claim was never 'adjudicated on the merits' in state court, the claim does not fall under 28 U.S.C. § 2254(d) and *Pinholster* does not apply. In such cases, a federal habeas court may order an evidentiary hearing, provided the threshold standards for admitting new evidence in federal district court are met, see 28 U.S.C. § 2254(e)(2), and decide the habeas petition under pre-AEDPA standards of review. See *Pinholster,* 131 S.Ct. at 1401 ("Section 2254(e)(2) continues to have force where 2254(d)(1) does not bar federal habeas relief.... [N]ot all federal habeas claims by state prisoners fall within the scope of 2254(d), which applies only to claims 'adjudicated on the merits in State court proceedings.' ")

***12** With these standards in mind, the Court addresses Hand's objections to the Magistrate Judge's recommendations on each of his claims.

Ground One

Hand contends that his constitutional rights were violated when the trial court admitted testimony from eight different witnesses, each of whom testified about certain statements that Lonnie Welch had made to each of them before Welch was killed. Hand alleges that the admission of this testimony violated his Due Process and Confrontation Clause rights. Hand raised this claim as his first proposition of law in his direct appeal, contending that the testimony violated Ohio's evidence rules and the federal Confrontation Clause. The Ohio Supreme Court discussed Hand's claim and summarized the disputed testimony as follows:

> Over defense objection, the trial court admitted Welch's statements to various witnesses describing Welch's complicity with Hand in the murders of Donna, Lori, and Jill. First, Pete Adams, Welch's cousin, testified that a week or two after Lori's murder in the fall of 1979, Welch came to his home and told him that he "killed Donna and Lori Hand" and "did it for Bob."
>
> Second, Shannon Welch, Welch's brother, testified that during July or August 2001, Welch asked Shannon "if [he] had a pistol or if [he] could get one." Welch then asked, "Do you know what I do for extra money?" Welch continued, "Well, I killed Bob's first wife and * * * I got to kill the present wife and I'll have a lot of money after that." About a week and a half before Jill's and Welch's murders, Welch told Shannon that he "might get to take care of his business with Bob tonight." On January 15, Welch told Shannon, "Well, I got to go take a shower and change clothes and be ready to go to see Bob because I might be taking care of my business tonight."

Third, Barbara McKinney, described in the record as Welch's common-law wife, testified that Welch told her that he had visited Hand's home in Delaware [Ohio] and "Bob showed him the house." When Welch was in jail between December 2001 and January 2002, Welch directed Barbara on the phone, "Call my friend and see if he'll pay my bond to get me out of jail." Welch identified his friend as Bob Hand and said, "[D]on't say his name on the phone any more."

Fourth, Tezona McKinney, Barbara's daughter, testified that on January 14, 2002, the day before the murders, Welch told her, "Well, if I get this little money * * * tomorrow, I want to buy your mother this car because I didn't buy her anything for Christmas ." Welch then pointed out the car to Tezona and said, "I want your mother to have that car. And if I can, I'm going to try to make sure I get it for her, if I get this money." On another occasion, Welch told Tezona that "Bob Hand killed his first two wives."

Fifth, Betty Evans, Lonnie Welch's sister, testified that around 1979 or 1980, Welch told her that if she "knew anything, not to say anything because him and Bob had a pact and if anything got out, they were going to kill each other's mother." On the evening of the murders, Welch told Evans that "he was going to pick up some money and he'd be right back; that he was sorry he didn't have anything for [her] birthday; that when he comes back, he'll take care of it."

***13** Sixth, Teresa Fountain, Shannon Welch's ex-girlfriend, testified that during 1975 or 1976, she overheard Lonnie Welch "talking to [her boyfriend] Isaac all about insurance money and knocking his boss's wife off to get some insurance money." Later, Welch told Fountain, "I hope you didn't hear anything and * * * you keep your mouth shut, * * * you didn't hear anything."

Seventh, Anna Hughes, a friend of Lonnie Welch, testified that although Welch often missed work, he was not fired from his job working for Hand. On one occasion, Welch said to her, "I didn't go to work * * * [but] I got it like that." Sometime around 1998, Welch mentioned to Hughes that he was "going out to Bob's." He added, "I've got to get me a hit and I ain't got no money."

Finally, David Jordan Jr., Welch's Franklin County Jail cellmate, testified that during December 2001, Welch said that he was "going to take somebody out for this guy named Bob" and added, "I've put in work for him before." Welch offered Jordan between five and six thousand dollars to be his driver. Welch also said the murder would "happen sometime in January" and gave Jordan his phone number.

State v. Hand, 107 Ohio St.3d at 390–391, 840 N.E.2d 151.

The trial court conducted an evidentiary hearing outside of the jury's presence to determine the admissibility of all of this testimony. All eight of these witnesses, along with Phillip Anthony (another of Welch's cousins), [2] were examined about Welch's statements to each of them. The trial court then held that the state had shown "... by a preponderance of the evidence under Rule 804, that, number one, the witness, accomplice, victim, Lonnie Welch's death was caused by the defendant, and it's obviously by virtue of that to cause his unavailability." *State v. Hand,* 107 Ohio St.3d at 391, 840 N.E.2d 151. The Ohio Supreme Court rejected Hand's contention on appeal that the admission of the eight witnesses' testimony violated Ohio Evid. Rule 804(B)(6):

> First, Hand argues that the trial court should have used the clear-and-convincing standard of proof, rather than a preponderance-of-the-evidence standard, in proving the predicate facts. However, the majority of United States Courts of Appeals applying the federal rule have followed the preponderance-of-the-evidence standard in ruling on preliminary determinations of admissibility under Fed.R.Evid. 804(b)(6).... Thus, the trial court properly applied the preponderance-of-the evidence standard in ruling on admissibility."
>
> *Id.* at 392, 840 N.E.2d 151. The court also rejected Hand's second argument, that the trial court failed to consider Hand's self-defense arguments in ruling on the admissibility of the testimony, because Hand did not offer any self-defense evidence during the evidentiary hearing.

Hand's third argument was that the state failed to show that Hand killed Welch in order to eliminate him as a witness, a finding required for admissibility under Rule 804(B)(6). The Supreme Court noted that the Rule extends to potential witnesses, and that the lack of charges against

Hand at the time of Welch's killing did not preclude admission of the statements. Nor is there a requirement that the state show that Hand's sole motive was to eliminate Welch as a witness; the state only needed to show that Hand "was motivated *in part* by a desire to silence the witness." *Id.* at 392, 840 N.E.2d 151, quoting *United States v. Houlihan,* 92 F.3d 1271, 1279 (1st Cir.1996) (emphasis in original). The court specifically cited the testimony of Kenneth Grimes, Hand's pre-trial cellmate, who testified that Hand admitted he killed Welch to eliminate him as a potential witness.

***14** In addition, the Supreme Court rejected Hand's arguments that the statements were unreliable and that the trial court erred in concluding otherwise. Hand claimed that all of the witnesses were Welch's friends and family members, and one was Welch's cellmate (while Welch was in jail on unrelated charges just before Jill's murder). He argued that Welch's family and friends were angry at him for killing Welch, and Jordan was trying to negotiate a bargain for himself, rendering their testimony unreliable. The trial court found that each of the witnesses who testified were credible, a decision the Supreme Court noted was well within the trial court's discretion. The Supreme Court further observed that there was no evidence that the friends and family members or the cellmate were lying, and any bias they may have harbored was a proper subject for cross-examination: "Indeed, courts generally hold that 'where a declarant makes a statement to someone with whom he has a close personal relationship, such as a spouse, child, or friend, ... that ... relationship is a corroborating circumstance *supporting* the statement's trustworthiness.... Moreover, the testimony of Welch's friends and family members was corroborated by Jordan, Welch's cellmate, and Grimes, who testified that Hand admitted hiring Welch to kill Jill." *Id.* at 393 (internal citations omitted). For all of these reasons, the Supreme Court concluded that the trial court did not abuse its discretion in admitting the testimony of these witnesses under Ohio Evid. Rule 804(B)(6).

The Supreme Court alternatively considered Hand's objections under other state evidence rules. Welch's statements to several of the witnesses that he was involved in the murders of all three of Hand's wives were admissible as statements against Welch's interest under Rule 804(B)(3), as the statements would clearly subject Welch to criminal liability such that "... a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true." The court noted that Welch volunteered these statements to family and friends, and did not try to shift blame to anyone else. These circumstances clearly supported the conclusion that the statements were trustworthy. Welch's statement to Shannon that "I got to kill the present wife and I'll have a lot of money after that," as well as his statement that he was going to see Hand "because I might be taking care of my business tonight," were admissible under Ohio Evid. Rule 803(3), as a statement of current intent to take future action. His statements to Evans and to Jordan just before Jill's murder were also admissible under this Rule. The Supreme Court also found that some of Welch's statements to Shannon and Jordan were admissible as statements of a co-conspirator. Grimes' testimony provided "independent proof of the conspiracy's existence.... Hand called Welch a business partner and said he had hired Welch to kill his wife. The facts show that by July 2001, Hand and Welch had entered into a conspiracy to murder Jill." *State v. Hand,* 107 Ohio St.3d at 395, 840 N.E.2d 151.

***15** The Supreme Court then addressed Hand's contention that the admission of Welch's statements violated his Sixth Amendment right of confrontation. Hand relied on *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which overruled *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) and held that testimonial statements of an unavailable witness are not admissible absent a prior opportunity for cross-examination. The Supreme Court observed that *Crawford* "... explicitly preserved the principle that an accused has forfeited his confrontation right where the accused's own misconduct is responsible for a witness's unavailability." *State v. Hand,* 107 Ohio St.3d at 395, 840 N.E.2d 151. After the hearsay evidentiary hearing and prior to presenting the testimony to the jury, the trial court concluded that Hand killed Welch to prevent him from testifying against Hand. Hand admitted as much to his cellmate Grimes. Given those findings, the Supreme Court concluded that Hand forfeited his constitutional confrontation rights because of his own misconduct in killing Welch. This conclusion did not depend on the specific state evidentiary rule upon which the trial court had admitted any of the challenged statements. *Id.* at 396, 840 N.E.2d 151.

In his Report, the Magistrate Judge considered whether Welch's statements attributed to him by the trial witnesses

were "testimonial" for purposes of the Confrontation Clause analysis under *Crawford.* He cited the Sixth Circuit's lengthy analysis of the issue in *Miller v. Stovall,* 608 F.3d 913 (6th Cir.2010), which reaffirmed the standard set forth in *United States v. Cromer,* 389 F.3d 662, 675 (6th Cir.2004): "The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime."

After reviewing the challenged trial testimony and these authorities, the Magistrate Judge concluded that the various statements attributed to Welch were **not** "testimonial" under *Crawford* and its progeny. Seven of the eight challenged witnesses were Welch's relatives, friends or acquaintances, and one was his cellmate (Jordan). Welch's statements were informal and they were not made within the context of any formal proceedings. For instance, Welch told his cousin, Pete Adams, that he killed Donna and Lori Hand; he asked his brother, Shannon Welch, if Shannon knew how he made extra money, then volunteered that he killed Hand's first wife. He told his common law wife, Barbara McKinney, that he had been to Hand's home, and asked her to call Hand to get bail money for him when he was arrested before Jill's murder. Jordan testified that Welch told him he was "going to take somebody out" and that he was doing the work "for a guy named Bob ...". Welch said he had known "Bob" for years, and "the money is good." And Welch offered Jordan money to drive him to this "job" which was going to happen in January. (Trial Trans. Vol. 16 at 2820–2821) Nothing in any of the statements, or about the circumstances under which Welch made any of the challenged statements, reflects any intent by Welch to "bear testimony" against Hand. There is nothing in this testimony or in the record raising the possibility that any of these witnesses would cooperate or were cooperating with any investigation at the time Welch made any of the statements.

***16** The Ohio Supreme Court did not expressly determine if Welch's statements were "testimonial" under *Crawford,* as the Court found that Hand forfeited his confrontation rights by his own misconduct in murdering Welch. But this Court agrees with the Magistrate Judge's conclusion that the challenged statements (as summarized by the Magistrate Judge in his Report at pp. 50–51) were not "testimonial" under *Crawford.* The Sixth Circuit has often noted that statements made to friends and family are more reliable, both for hearsay and Confrontation Clause analyses, than statements that are made to law enforcement personnel or officials. See, e.g., *United States v. Gibson,* 409 F.3d 325, 337–38 (6th Cir.2005) (describing statements as nontestimonial where the "statements were not made to the police or in the course of an official investigation ... [nor in an attempt] to curry favor or shift the blame...."); *United States v. Johnson,* 581 F.3d 320, 326–327 (6th Cir.2009) (statements made to a friend and confidant, someone the defendant saw every day for meals and at social activities, were not testimonial); *United States v. Franklin,* 415 F.3d 537, 545–548 (6th Cir.2005) (statements by non-testifying co-defendant to a friend, implicating both defendant and the co-defendant in an armed robbery, were not testimonial and bore sufficient indicia of reliability under *Crawford*).

Even if the challenged hearsay statements were "testimonial," the Magistrate Judge alternatively concluded that Hand forfeited his confrontation rights by killing Welch to prevent him from testifying against Hand. After the evidentiary hearing held during Hand's trial, the trial court orally ruled that the government had satisfied its burden of showing that Hand killed Welch to cause his unavailability as a witness. (Trial Trans. Vol. 14 at 2331–2336) The trial court concluded its ruling by stating: "... Mr. Hand has waived his confrontation issues. The statements made are not facially unreliable. The court does not find the statements so lacking in reliability that a conviction would violate due process, ...". (*Id.* at 2336) The Ohio Supreme Court affirmed this conclusion, stating that Hand "... killed Welch to eliminate him as a potential witness. Indeed, Hand admitted to Grimes that he killed Welch to achieve that purpose (i.e., to prevent him from being a witness against him)." *State v. Hand,* 107 Ohio St.3d at 396, 840 N.E.2d 151. The Magistrate Judge cites Grimes' testimony at the evidentiary hearing and again in front of the jury, that Hand said he "took care" of both Jill and Welch, and that "anybody who messed with him would disappear." (Trial Trans. Vol. 14 at 2251) Grimes also testified that Hand told him he had "hired the man to kill his wife and, in turn, the deal went sour. He wanted more money, so [Hand] killed two birds with one stone. He got both and didn't have to pay anything." (Trial Trans. Vol. 16 at 3025)

***17** The Magistrate Judge also noted that after *Crawford,* the Supreme Court revisited the common law "forfeiture by wrongdoing" doctrine in light of *Crawford*'s distinction between testimonial and non-testimonial statements. In *Giles v. California,* 554 U.S. 353, 367–368, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008), the court held that the doctrine permits the admission of unconfronted testimonial statements only when the trial court finds that the defendant's wrongdoing was specifically intended to prevent the declarant from testifying against the defendant. *Giles* was decided in 2008, two years after the Ohio Supreme Court affirmed Hand's conviction. The Magistrate Judge found that under *Teague v. Lane,* 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), *Giles* most likely would not apply retroactively to the review of Hand's habeas claims. *Crawford* was the Supreme Court's controlling authority at the time Hand's direct appeal was decided, and the Ohio Supreme Court expressly applied *Crawford* to reject Hand's arguments. As the Ohio Supreme Court noted, *Crawford* held that "[t]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability." *State v. Hand,* 107 Ohio St.3d at 396, 840 N.E.2d 151, quoting *Crawford,* 541 U.S. at 62. The court's determination that Hand deliberately killed Welch is sufficient under *Crawford* to admit the challenged testimony. Even under *Giles,* the Magistrate Judge cited the Supreme Court's affirmance of the trial court's finding that Hand killed Welch to eliminate him as a potential witness, a finding that would also satisfy *Giles.*

Hands objects to the Magistrate Judge's conclusions. In his initial objections, he argues that, to the extent Welch's statements "are deemed to be testimonial," it was error to admit them under the forfeiture by wrongdoing exception as limited by *Giles.* He notes that the Sixth Circuit has not specifically decided whether *Teague v. Lane* bars the retroactive application of *Giles.* Hand further contends there is no evidence in the record supporting the Magistrate Judge's conclusion that Hand killed Welch for the purpose of preventing Welch from testifying against him, or that Hand even anticipated that Welch might testify. At the time of Welch's and Jill's murders, Hand had not been charged with Donna's or Lori's murders, and there is no evidence suggesting that Hand or Welch knew that those murders were under investigation. Responding to these objections in his Supplemental Report, the Magistrate Judge notes that the Supreme Court has held that *Crawford* itself does not apply retroactively; see *Whorton v. Bocking,* 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007). There is no cogent reason to think that the Supreme Court might reach a different conclusion with respect to *Giles.* And this Court notes that *Greene v. Fisher,* —— U.S. ——, 132 S.Ct. 38, 181 L.Ed.2d 336 (2011), decided after the Magistrate Judge's Report was issued, counsels against such a conclusion. *Greene* reaffirmed the principle that a habeas court's review of a state court's merits decision under Section 2254(d)(1) must apply controlling Supreme Court precedent when the claim was adjudicated on the merits, and not when the conviction became final.

***18** In his objections to the Supplemental Report (Doc. 117 at 2), Hand argues that it is impossible to evaluate whether many of the hearsay statements were in fact testimonial. He asserts that he lacked access to the Columbus Police Department's "cold case" investigation file, and suggests that something in that file might show that some of the admitted statements were testimonial, particularly those by Jordan, Welch's cellmate. This speculation does not persuade the Court to reject the Magistrate Judge's conclusion that the statements are non-testimonial, and the trial transcript clearly supports his conclusion. Welch freely made these statements to Barbara McKinney, his common law wife with whom he lived for many years, and to her daughter Tezona; his sister, Betty Evans, and his brother Shannon; Shannon's girlfriend, Teresa Fountain; his cousin Pete Adams; and his friend Anna Hughes, who testified that she had known him since childhood and that they grew up together. (Trial Trans. Vol. 16 at 2801–2802) Jordan testified at the evidentiary hearing that he played chess with Welch while they were both held in the county jail, that he previously served time with Shannon Welch in Lucasville, and that he was in jail again in late 2001 for burglary and facing a six-year sentence. Sometime after Welch's murder, Jordan was incarcerated at the Chillicothe prison, and read a newspaper article reporting that Welch was killed during a burglary attempt. Jordan later appeared in court for a post-conviction hearing, and he told a deputy sheriff about his conversations with Welch in the county jail, saying "Lonnie went there to kill somebody" not to "pull no burglary." He also wrote to the Columbus prosecutor, saying that he "wanted help" on his own sentence, and had information about Welch's murder. (*Id.* at 2822–2825) Jordan was vigorously cross-examined about his story as well as his statement that he wanted help on his own case,

and the trial court observed that the ultimate evaluation of Jordan's credibility was a matter for the jury to determine. The trial court also noted that the controlling issue for admitting his testimony was not Jordan's motive in revealing the statements; the controlling issue was the declarant's (Lonnie Welch) state of mind at the time of the statements. (*Id.* at 2855) Jordan's testimony does not fairly support a conclusion that Welch's statements to Jordan while they were in jail together were "testimonial" under *Crawford.*

Hand also objects to the Magistrate Judge's conclusions that he failed to present a federal due process claim to the Ohio Supreme Court, and that the admission of Welch's statements did not violate Hand's due process rights under the Fourteenth Amendment. He argues that he did present a due process claim but the Ohio Supreme Court did not address it, and confined its discussion to state evidentiary law. Hand's first proposition of law on direct appeal alleged: "When the State fails to prove by clear and convincing evidence that a witness is unavailable due to a criminal defendant's wrongdoing, and the proposed evidence does not meet standards of reliability, it is constitutional error to admit this evidence against the defendant." (Apx. Vol. 6 at 269) The last sentence of the introductory section for the arguments supporting this proposition states that the testimony violated his constitutional rights "under the Confrontation Clause of the Sixth Amendment to the United States Constitution as well as his rights to due process and a fair trial guaranteed by the Fourteenth Amendment." (*Id.* at 269–270) In the body of the brief, he argued that the admission of Welch's statements under Ohio Evid. R. 804(B)(6) was error, and in the concluding section argued that the statements violated his Confrontation Clause rights. (*Id.* at 277–278) The passing reference in the introductory section, with no mention of due process in the proposition itself and no substantive argument or citation of authorities on that subject, is not sufficient to "fairly present" a federal claim to the state court.

***19** The Magistrate Judge also observed that in his brief on appeal, Hand referred to the "probable" due process requirement that hearsay statements are found to be reliable, and he argued that the trial court erred in finding that Welch's statements were reliable. (*Id.* at 273–277) The Ohio Supreme Court expressly addressed the reliability of the statements at some length, and held that the trial court acted well within its discretion in determining that each witness was credible. The court stated that "No evidence supports Hand's allegations that Welch's friends and family members were not telling the truth, and their bias could have been explored on cross-examination.... Moreover, the testimony of Welch's friends and family members was corroborated by Jordan, Welch's cellmate, and Grimes, who testified that Hand admitted hiring Welch to kill Jill." *State v. Hand,* 107 Ohio St.3d at 393, 840 N.E.2d 151. The Supreme Court did not use the words "due process" nor explicitly conduct its reliability analysis with reference to the Due Process Clause or the 14th Amendment. But in *Harrington v. Richter,* —— U.S. ——, —— – ——, 131 S.Ct. 770, 784–785, 178 L.Ed.2d 624 (2011), the Supreme Court clearly held that a state court is not required to write a detailed opinion explaining the state court's reasoning on a claim in order for the decision to be entitled to deferential review under Section 2254(d). And as the Magistrate Judge further observed, Hand does not identify any substantive difference between a 14th Amendment Due Process reliability analysis, and the state court's reliability analysis in the context of Evid. Rule 804(B)(6). This Court also finds no meaningful distinction to be made.

It is clear that the Ohio Supreme Court rejected the substance of Hand's due process challenge when it thoroughly reviewed the reliability of the challenged testimony and the veracity of the witnesses, in affirming the trial court's admission of the testimony. That decision is not contrary to clearly established federal law. Therefore, this Court agrees with the Magistrate Judge's analysis with respect to Hand's first ground for relief, and overrules Hand's objections.

Ground Two

Hand contends that the admission at his trial of certain character and "other acts" evidence violated Ohio Evid. Rule 404(b), as well as his constitutional rights to due process, a fair trial, and a reliable determination of his guilt. Hand also contends that the trial court erred in failing to give a limiting instruction to the jury about this evidence. Hand raised this claim as his second proposition of law on direct appeal, citing five separate incidents involving "other acts" evidence:

(1) **The State's closing argument.** Hand's accountant, Allen Peterson, prepared Hand's business income tax returns for his radiator business. Over Hand's objection, Peterson testified for the state that Hand's business had sustained

losses before it was finally closed. Hand's business tax returns were also admitted over Hand's objection, and the trial court granted Hand's request for a limiting instruction regarding the returns. (Trial Trans. Vol. 10 at 1462) The trial court instructed the jury that "... exhibits that were admitted, being the tax returns from yesterday, those are admitted solely for showing a motive. They are not to be construed by [sic] in any other way, for any other purpose, such as how record keeping may have taken place, strictly on that sole issue." (Trial Trans. Vol. 11 at 1470) Later in the trial, Hand testified in his own defense and said that he had paid Welch and Adams (Welch's cousin) "under the table" to avoid withholding taxes. Hand also admitted that he had not filed a personal tax return for at least 15 years.

***20** The prosecutor's closing argument included the following comments:

> And did you catch his statement * * * about he and his father like to save on their taxes by paying employees under the table in cash? We all know that tax avoidance is common in this country, but what he calls saving on taxes is actually fraud. The fact that he so breezily engaged in that kind of behavior * * * *tells us much about his respect for the law and his willingness to lie and deceive* . This wasn't just a rinky-dink, every once in a while practice, that the defendant engaged in during the slow season of his business. Exhibit 275, prepared by Detective Otto, indicates that the defendant billed more than one hundred thousand dollars fraudulently to his own business on his own credit cards. *This was fraud on a massive scale, and it exemplifies the way in which this man operates* .

State v. Hand, 107 Ohio St.3d at 397, 840 N.E.2d 151 (emphasis in original). The Supreme Court held that most of the prosecutor's statements were "fair comment" on Hand's credibility, but that the statement that Hand committed "fraud on a massive scale" was an overly broad and improper comment on his character. Nevertheless, as there had been no objection to these comments at trial, the Supreme Court reviewed only for plain error and found none, "in view of the overwhelming evidence of Hand's guilt." *Id.* at 398, 840 N.E.2d 151.

(2) **Hand's reaction to his wives' deaths.** The state presented testimony from Sam Womeldorf, a retired Columbus homicide detective who initially investigated the deaths of Donna and Lori Hand. Over Hand's objection that Womeldorf was offering an improper opinion testimony, he described Hand's demeanor when Hand was told about Lori's death, stating that Hand "wasn't crying; there were no tears." The Supreme Court found the testimony satisfied the requirements for a lay opinion; Womeldorf had personally observed Hand, and the "lack of grief was relevant in showing Hand's strange reaction after learning that Lori had been killed." *Id.* at 398, 840 N.E.2d 151. The court also rejected Hand's contention that Abel Gonzalez, Hand's son-in-law, should not have been permitted to testify that after Jill's death, Hand did not show remorse. Gonzalez described Hand's demeanor as "just a matter of fact. It was more like just a business conversation, let's say." Gonzalez testified that he "can't say [Hand] was sad; no." The Supreme Court noted that Hand's emotions were of "questionable relevance." But no objection had been made to Gonzalez's testimony, and the court found no plain error in its admission. *Id.* at 399, 840 N.E.2d 151.

3. **Sex-related testimony.** Detective Womeldorf testified that Hand had described himself during an interview as "... a horny old man" and that Hand "wanted sex at least once a night and [Lori] didn't want to do that." *Id.* at 399, 840 N.E.2d 151. The court found the testimony was relevant to Hand's possible motive for Lori's murder. Barbara McKinney testified that Hand had come to her house frequently over the years to pick up Welch, and that Hand "had an infatuation, I guess, for my youngest daughter." The court found this non-responsive remark was harmless, noting that it had not been repeated.

***21** 4. **Hand's interest in "true crime" stories.** William Bowe, Hand's childhood friend, testified that when they were young, Hand like to read "perfect crime" stories. While noting the marginal relevance of such testimony, there had been no objection and the court held its admission was not plain error.

5. **Hand's obsession with money and his treatment of his father.** Bowe had previously worked for Hand for about ten years, when Hand and his father owned the radiator business together. Bowe testified that Hand had an argument or disagreement of some sort with his father, after which Bowe heard Hand tell his father he had "three days to move out of here." When Hand's father left, Bowe left with him and worked for the father's business. The Supreme Court found this testimony of "highly questionable relevance" but due to a lack of a contemporaneous objection, held its admission did not constitute plain error. Bowe's testimony that Hand had always wanted to make a lot of money, and that "his quest in life is money," was admissible as a lay opinion and was relevant to Hand's financial motives. *Id.* at 400–401, 840 N.E.2d 151.

6. **Lack of limiting instruction.** Hand also argued that the trial court erred in failing to give a limiting instruction with respect to all of this "other acts" evidence. The Supreme Court noted that the trial court granted Hand's request for a limiting instruction regarding the tax returns. But Hand did not ask for additional limiting instructions, and the failure to provide them did not rise to the level of plain error. The court also found nothing in the record suggesting that the jury used any of this evidence to convict Hand "on the theory that he was a bad person." *State v. Hand,* 107 Ohio St.3d at 401, 840 N.E.2d 151.

The Magistrate Judge recommended that this claim be denied because Hand did not fairly present a federal constitutional argument on these issues to the Ohio Supreme Court on direct appeal. He notes that Hand's brief made only cursory references to "due process" or to the constitution, and his arguments were framed by and presented under state law. The Magistrate Judge correctly described Hand's direct appeal brief. Proposition of Law No. 2 alleged: "The introduction and admission of prejudicial and improper character and other acts evidence and the failure of the trial court to properly limit the use of the other acts evidence denied Gerald Hand his rights to a fair trial, due process and a reliable determination of his guilt and sentence as guaranteed by the United States Constitution, Amends. V, VI, VII and XIV; Ohio Const. Art. I, §§ 10 and 16." (Apx. Vol. 6 at 279) Section 2 of the discussion contains Hand's arguments on admissibility of other acts evidence; it spans three paragraphs and cites Ohio case law, Ohio Evid. Rule 404(A) and (B), and R.C. 2945.59. In Section 5, Hand addressed the trial court's failure to give additional limiting instructions and cited only Ohio cases. Section 6 addressed harmless error and cited one federal case, *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The conclusion section generally asserted that he was denied a fair trial in violation of the Fourteenth Amendment's Due Process clause. (Apx. Vol. 6 at 285)

***22** Hand objects, contending that his brief expressly argued that his fair trial and due process rights "as guaranteed by the United States Constitution" had been violated. He contends that the Ohio Supreme Court's failure to address the federal claims should not result in a default. Hand cites *Carter v. Bell,* 218 F.3d 581 (6th Cir.2000), a habeas case (arising pre-AEDPA) in which the petitioner contended that Tennessee's statutory definition of aggravating circumstances was unconstitutionally vague and violated the Eighth Amendment. The district court found the federal claim was defaulted because it was not presented to the state court. The Sixth Circuit disagreed because Carter's post-conviction petition (which he filed pro se) argued that the

> ... entire statute failed to genuinely narrow the class of death-eligible murders. Even if we agreed with the district court that such allegations were 'bald' or 'general,' we find that they are substantively the same claim as that made to us. We do not require word-for-word replication of the state claim in the habeas corpus petition in order to address the merits therein, only that the petitioner 'fairly present' the substance of each of his federal constitutional claims to the state courts.... A petitioner 'fairly presents' his claim to the state courts by citing a provision of the Constitution, federal decisions using constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns.

Id. at 606–607 (internal citations omitted).

In a later case, the Sixth Circuit reiterated these principles:

> Federal courts do not have jurisdiction to consider a claim in a habeas petition that was not 'fairly presented' to the state courts. A claim may only be considered 'fairly presented' if the petitioner asserted both a factual and legal basis for his claim in state court.... Although general allegations of the denial of a 'fair trial' or 'due process' have been held

> insufficient to 'fairly present' federal constitutional claims, ... a petitioner need not recite 'book and verse on the federal constitution.' A petitioner can take four actions in his brief which are significant to the determination as to whether a claim has been fairly presented: (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.

Newton v. Million, 349 F.3d 873, 877 (6th Cir.2003) (internal citations omitted). There, the court rejected the state's argument that the petitioner failed to fairly present his federal due process claim to the state court. He had requested his trial court to instruct the jury about his right to defend himself against two aggressors, and not limit the instruction to the one individual of whose murder the petitioner was charged and convicted. He argued that the evidence at trial supported his claim that both individuals attacked him and he acted to defend himself from both of them. His state appeal brief had included a detailed recitation of the facts adduced at trial and argued that the failure to instruct the jury violated his right to due process of law under the Fifth and Fourteenth Amendments. The Sixth Circuit found that this was sufficient to present his claim and avoid default.

***23** In contrast, in *McMeans v. Brigano,* 228 F.3d 674 (6th Cir.2000), the court found that the petitioner (charged and convicted of rape) did not fairly present his federal Confrontation Clause claim raised in his habeas petition to the state court in his direct appeal. The issue was the trial court's limitation on questioning his accuser about her subsequent rape accusations against other men. On direct appeal, he argued that the limitation violated his "... right to a fair trial, and to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution ...". *Id.* at 678. The Sixth Circuit affirmed the district court's conclusion that he failed to fairly present a Confrontation Clause claim:

> In his direct appeal, the petitioner focused entirely on the applicability of Ohio's rape shield law, Ohio Rev.Code Ann. § 2907.02. He did not cite any federal precedent and his appellate brief only alleges that the trial judge's limitation on cross-examination denied him a "fair trial" and "due process." As this court recognized in *Franklin [v. Rose, 811 F.2d 322 (6th Cir.1987)*], this is not sufficient to alert a state court that an appellant is asserting the violation of a specific constitutional right. While it is true that a few of the state cases cited by the petitioner on direct appeal contain references to the Confrontation Clause, the majority of those cases were concerned with Ohio evidence law. We do not think that a few brief references to the Confrontation Clause in isolated cases is enough to put state courts on notice that such a claim had been asserted. Thus, we hold that the petitioner failed to "fairly present" his Confrontation Clause claim to the Ohio courts.

Id. at 682.

The Court reaches the same conclusion with respect to Hand's claim. Hand argued in state court that the admission of the challenged testimony created a reasonable probability that the jury convicted him because of his bad character, or that "he was the type of person who could have committed" the murders. (Apx Vol. 6 at 284) While his Proposition of Law cited "fair trial" and "due process" rights, as well as the 5th, 6th, 7th and 14th Amendments, no constitutional analysis under any of these amendments was included in the brief. And in this Court's opinion, the five incidents of which Hand complains do not, individually or collectively, clearly fall within "the mainstream of constitutional law" regarding due process or fair trial rights. As the Magistrate Judge observed, the substance of this claim was presented, argued, and addressed by the Ohio Supreme Court under Ohio evidence law and not as a federal constitutional violation.

But even if the reference to the federal amendments in the Proposition itself was enough to present and preserve

a due process or fair trial challenge, Hand has failed to show how these five instances actually deprived him of due process or the presumption of innocence. The five incidents about which Hand complains—the prosecutor's comment about the way he operates, Wolmendorf's description of Hand's demeanor, his own admission to police that he was a "horny old man," his childhood interest in "true crime" stories, and the description of his dispute with his father—were all brief statements or passing comments in a lengthy trial in which over 75 state witnesses appeared. Moreover, as the Magistrate Judge notes, Hand did not object to most of this testimony, resulting in plain error review by the Supreme Court, which is another basis upon which to find the claim defaulted. Where he did object (to Wolmendorf's description of his demeanor), the trial court properly admitted it as a lay opinion. This Court would conclude that no due process violation resulted from an experienced detective testifying to his firsthand observations of Hand's demeanor upon learning that his wife had been murdered. The Court would also conclude that none of the other incidents raised in this claim are the sort of evidence that, either individually or collectively, seriously impugned the fundamental fairness of the proceedings or denied Hand due process or a fair trial.

***24** With regard to the failure to give limiting instructions on any of the five incidents he raises in this ground for relief, Hand cites *Mackey v. Russell,* 148 Fed. Appx. 355 (6th Cir.2005) (unpublished) in his petition. There, the Sixth Circuit affirmed the grant of habeas relief based upon ineffective assistance of counsel due, in part, to counsel's failure to request a limiting instruction. At petitioner's murder trial, the state court allowed the state to cross-examine his girlfriend about his prior bad acts, in order to impeach her testimony that he was not a jealous or violent person. On appeal, the state court found no error in permitting the questioning under Ohio's evidence rules, and the Sixth Circuit held that "[t]his reasonable conclusion evinces no constitutional error." *Id.* at 361. However, the court of appeals also concluded that trial counsel was ineffective in failing to request a limiting instruction about the testimony, admitted under Rule 404(A) (3) to attack the girlfriend's character for truthfulness or motive. The facts of that case and the nature of the disputed testimony differ substantially from the testimony at issue in this ground for relief. The petitioner, Mackey, and his girlfriend had a verbal altercation with an off-duty police officer in a bar. They left the bar to avoid any further confrontation, but they claimed that the officer and his friend followed them out and that the officer drew his gun; Mackey then drew his own gun and shot and killed the officer. Mackey was charged with murder and asserted that he acted in self-defense, because the officer drew his gun first. The only two witnesses were Mackey's girlfriend and the deceased's friend, neither of whom was able to testify with certainty which gun was drawn first. The Sixth Circuit noted that the entire case revolved around the jury's evaluation of credibility of both Mackey and his girlfriend. It found that counsel's failure to request a limiting instruction on the girlfriend's testimony combined with his failure to object (1) to the state's evidence about Mackey's extensive gun ownership, (2) to the prosecutor's questions to Mackey about his post-arrest silence, and (3) to the prosecutor's unchallenged and unsupported assertion to the jury that the deceased officer was "legally permitted" to carry his gun into the bar that evening, all resulted in substantial prejudice to Mackey's defense:

> It should be noted that cases such as this one, where there are no witnesses and no physical evidence that would cast any light upon the central question in the case, are rare.... [W]here a case is as close as Mackey's was, with so little evidence, the teaching of *Strickland,* that counsel's effectiveness must be evaluated in light of the 'totality of the evidence,' means that we ... must scrutinize more closely than usual the cumulative effects of such errors such as those made here.

Id. at 370.

Here, in contrast, the five incidents Hand cites, when considered within the totality of the evidence presented at Hand's trial, are not the sort of damaging and prejudicial testimony that was involved in *Mackey.* The Court concludes that the lack of a limiting instruction on any of the challenged testimony did not render Hand's trial fundamentally unfair or deprive him of due process.

***25** For all of these reasons, the Court agrees with the Magistrate Judge's conclusion that Hand failed to fairly

present this federal claim to the Ohio court. Alternatively, even if he did, the Court would deny this ground for relief on the merits.

Ground Three

Hand contends in his third ground for relief that the state failed to disclose exculpatory material it was required to disclose under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This claim arose from an episode of a cable television program called "American Justice," broadcast in July 2004, after Hand's trial and while his direct appeal was pending. That episode, entitled "The Black Widower," was about Hand and the murders of his wives. The program apparently alluded to the fact that, sometime before Jill's death, the Columbus Police Department had re-opened a "cold case" investigation into the deaths of Donna and Lori. This claim was raised in Hand's post-conviction petition; it was denied by the state trial court on res judicata grounds and because the claim was not supported by the record that Hand submitted. The Ohio Court of Appeals affirmed solely on res judicata grounds:

> Constitutional error results when the State withholds material evidence favorable to the defendant if it is reasonably probable the evidence would lead to a different result in the proceeding. *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Again, appellant's claim of a violation of his due process rights is barred by the doctrine of res judicata, if nothing precluded him from directly appealing the issue.
>
> Upon review, the files of the Columbus Police Department were turned over to appellant's counsel, and appellant had access to the information. Further, the issue was cognizable and reviewable on direct appeal, therefore, precluded by res judicata.

State v. Hand, 5th Dist. No. 05CAA060040, 2006–Ohio–2028, at ¶¶ 48–49.

The Magistrate Judge concluded that the state courts misapplied Ohio's res judicata doctrine, because Hand specifically asserted that he did not know about the existence of this "cold case" investigation until the television episode aired in July 2004, which was one year after he filed his direct appeal. Because the state courts incorrectly applied a procedural bar, the Magistrate Judge reviewed its merits. This Court agrees with and adopts the Magistrate Judge's analysis and conclusions with respect to the application of res judicata (See Doc. 101 at 60–62), and will also review the merits of Hand's claim. [3]

The Magistrate Judge granted Hand leave to conduct discovery on this issue, including the deposition of Detective Graul of the Columbus Police Department. Hand submitted several deposition transcripts prior to the evidentiary hearing, but did not file depositions of anyone from the Columbus Police Department involved with the "cold case" investigation. As the Magistrate Judge observed, "... this Court has given Mr. Hand every opportunity to learn what he didn't know with respect to his *Brady* claim, [but] he has failed to provide this Court with any facts to support his claim." (Doc. 101 at 63) The record does not show what the allegedly withheld evidence may have been, or how the lack of that evidence would have caused Hand any actual prejudice. The Magistrate Judge therefore recommended that this claim be denied.

***26** Hand objects, arguing that he specifically described the exculpatory evidence: the contents of the CPD's cold-case investigation file. He suggests that its contents would point to "alternative suspects and/or theories" about the murders that would clearly be exculpatory. And he contends that he was actually prejudiced by the file's nondisclosure. He notes that the state's case rested on its theory of a Hand–Welch conspiracy, and any different theory that may have been investigated by the police would undercut the existence of a conspiracy, and would demonstrate a reasonable probability of a different result at trial. Detective Graul did not testify at his criminal trial, and nothing about the "cold case" investigation or its existence was disclosed before 2004. He further suggests that it would be manifestly unjust to give the state the benefit of the uncertainty created by the failure to disclose the investigative file, even if the reason for nondisclosure was simple negligence.

Hand does not respond to the Magistrate Judge's straightforward observation that he was granted leave to take discovery and to depose Detective Graul, but that he has failed to proffer any facts that the deposition or his discovery efforts uncovered. As the Magistrate Judge aptly notes in his supplemental report, "simply describing a file does not prove its contents or that they would have been exculpatory." (Doc. 111 at 12) This Court cannot grant habeas relief based simply on Hand's speculation

that "something" in the file "might" have suggested the possibility of an alternate suspect or theory about the murders that might have led to exculpatory evidence that might have led to a different result at trial. Ground Three of his petition is therefore denied.

Ground Four

In this ground for relief, Hand raises a number of sub-claims of ineffective assistance of trial counsel during the guilt phase of his trial.

(A) Failure to object to testimony from Hand's bankruptcy attorney that was protected by attorney-client privilege. This issue was first raised in Hand's application to reopen his direct appeal filed in September 2007, where Hand was represented by his federal habeas counsel. The Ohio Supreme Court denied that application because it was not timely filed. The Magistrate Judge concluded this sub-claim is procedurally defaulted because it should have been, and was not, raised on direct appeal. Ohio's res judicata doctrine requires a claim to be raised at the first opportunity or it is waived. This doctrine is clearly recognized as an adequate and independent state ground upon which to find a habeas claim defaulted. And there is little doubt that the Ohio courts would enforce this rule, as it did so with several other claims that Hand raised for the first time in his post-conviction petition.

The Magistrate Judge also rejected Hand's argument that he established cause for the default and actual prejudice resulting from a constitutional error. Procedural default may be excused by such a showing, or by a demonstration that the failure to review the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson,* 501 U.S. 722, 749, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Hand contends that he was represented by the state public defender's office on direct appeal and for his post-conviction proceedings. But the public defender did not represent him at trial, and no conflict prevented his new appellate lawyers from raising any claim of ineffective assistance of trial counsel in his direct appeal. The fact that the public defender's office also represented him in post-conviction proceedings does not affect that conclusion.

***27** He also contends that he has shown cause for the default based on ineffective assistance of appellate counsel. Because his appellate lawyers were all from the public defender's office, Hand argues that his earliest opportunity to raise an appellate counsel claim was in his untimely petition to reopen his direct appeal. He suggests that his testimony about the advice he received from his bankruptcy lawyer, which was elicited by the state during Hand's cross-examination, was not only prejudicial, it was "devastating" because it strengthened the state's argument that Hand had a financial motive to kill Jill.

As discussed below with respect to sub-claim (B) of Hand's Eleventh Ground for relief, Hand's ineffective assistance of appellate counsel sub-claim regarding this issue is procedurally defaulted. The Ohio Supreme Court summarily rejected Hand's 2007 motion to reopen his direct appeal which included this sub-claim because his motion was untimely. Hand's ineffective appellate counsel claim is therefore itself defaulted, and it cannot serve as good cause for his admittedly defaulted ineffective assistance of **trial** counsel sub-claim.

Moreover, even if the claim is not defaulted, the testimony at issue concerned State Exhibit 70, a letter from a local bankruptcy law firm addressed to Hand to confirm an appointment at the firm. Earlier in the trial, the judge read the parties' stipulation about that letter to the jury: "If called [as a witness], a records custodian of the law firm Semons and Semons would testify that the appointment book for their law firm would indicate an appointment for the defendant regarding bankruptcy issues for May 19th, 2001, and that the defendant did not keep this appointment, but re-scheduled it. The witness would further testify that the defendant never kept the appointment and did not consult with any attorney in the law firm." (Trial Trans. Vol. 11 at 1470–1471) Later on, during his direct testimony in his defense case, Hand explained that Jill Hand was upset when she learned about the fact that he had a very large credit card debt, and that they had worked out a plan to reduce his debt. He testified that "... some of [the plan] consisted of a bill consolidation, Chapter 13, or something, ... where they consolidate it, make an agreement, lower your payment, lower what you owe them, and then pay it off in a so many year program. We was going to file bankruptcy; I was going to file bankruptcy by myself on all these bills." (Trial Trans. Vol. 19 at 3471) He said that he was not concerned about filing for bankruptcy, because he did not have anything to protect, and Jill owned her own home and his creditors could not touch her assets. (*Id.* at 3472) Hand's lawyer questioned him how the idea of bankruptcy first came to him, asking "... was that something you talked to about with anybody?" Hand responded that he

talked to several people about bill consolidation, to stop creditors from calling him at home; he also admitted that his name and phone number were "in the book" at the law firm. (*Id.* at 3475) Then on cross-examination, Hand was asked about the letter from the bankruptcy law firm. Hand remembered going to an appointment, and said he had talked to a lawyer on two occasions. The prosecutor asked if that lawyer told him that he could not eliminate his debt through bankruptcy, and Hand answered: "He did not say that; no, sir. He just told me what he wanted-that he wanted W–2 forms from me, since I wasn't including Jill in the bankruptcy." (*Id.* at 3531) Hand also testified that he never actually filed a bankruptcy petition.

***28** Hand voluntarily disclosed the fact that he had contemplated filing for bankruptcy protection, and the letter from the law firm was admitted by stipulation. Moreover, the Court doubts that his testimony describing what the lawyer told him about the kind of documents needed in order to prepare a bankruptcy petition revealed privileged information. This Court would conclude that this brief testimony did not prejudice Hand's defense or result in a fundamentally unfair trial, even if Hand could overcome his default of this sub-claim.

(B) Failure to adequately question potential jurors about pretrial publicity. Hand contends that his trial counsel failed to adequately question two jurors about their exposure to pre-trial publicity. This sub-claim was not raised on direct appeal, but was raised in Hand's post-conviction petition. The trial court found it was barred by res judicata, and the Ohio Court of Appeals affirmed because Hand did not offer "... any new evidence outside the record, precluding the application of res judicata. We note the record on direct appeal was supplemented with the jury questionnaires which [Hand] asserts merit review under post conviction relief herein." *State v. Hand,* 2006–Ohio–2028 at ¶ 33. [4]

Hand contends he can establish cause for this default, based on his appellate counsel's failure to amend his direct appeal merit brief to specifically present this sub-claim. This sub-claim is related to sub-parts (E) and (F) of Hand's ineffective assistance of appellate counsel claims (raised in his Eleventh Ground for Relief), and the Magistrate Judge concluded that those sub-claims were not defaulted. Because ineffective assistance of appellate counsel can serve as good cause to excuse a procedural default, the Magistrate Judge addressed whether Hand was prejudiced by appellate counsel's failure to raise this issue on appeal. If not, then Hand has not shown that he can avoid the procedural bar of the state court's application of res judicata. In order to do so, Hand must establish that his trial counsel was deficient in failing to specifically question the two jurors about their responses to the juror questionnaires indicating that they had seen some pre-trial publicity, and that he was actually prejudiced by that failure (and thus by his appellate lawyer's failure to appeal the issue). After reviewing the record, the Magistrate Judge found that Hand has not satisfied that burden.

The juror questionnaires asked the prospective jurors if they had seen or heard anything about the case, and if so, "What impression did [the article] leave in your mind?" Ms. Ray responded that she had seen a local newspaper article in April 2003 that left her "wondering." (Apx. Vol. 10 at 213) She also stated that despite the article, she had no opinion on whether Hand was guilty, that she could put the article out of her mind, and could follow the court's instructions. She reported that she believed in the death penalty but thought it was not appropriate for most murder cases. *Id.* at 215. Hand's counsel did not directly question Ms. Ray about her questionnaire response in voir dire.

***29** Juror Finamore stated in her questionnaire that she had seen articles and news reports about the case two or three times, which left her with the impression that Hand was probably involved in the murder, and was guilty. She also stated that she would be able to put that information out of her mind, and base a decision on the evidence and the court's instructions. She responded that she would have no trouble following the instruction to avoid news media during the trial. Answering a question about the death penalty, she stated that life in prison was a greater punishment than the death penalty in some cases, and that the death penalty was not appropriate for most murder cases. She was not directly questioned during voir dire about her responses concerning the articles and news reports.

The trial court conducted voir dire by posing initial questions to small groups of potential jurors, excusing jurors who would face financial hardships or would not be available for the projected length of the trial, and then considering challenges for cause within the small group. In the initial questioning of the small group of seven that included Ray and Finamore, the trial court asked a few

preliminary questions, and then asked if anyone in the group had any changes to their responses to the written questionnaires; all seven answered in the negative. (Trial Trans. Vol. 4 at 301–305) The judge reminded the group that any verdict must be based on evidence presented in the courtroom, and "not on the basis of what you may have read, heard or seen in the news media. Is there anything that you may have read, heard or seen that caused you to form an opinion as to the defendant's guilt or innocence that you could not put aside?" (*Id.* at 306) All jurors responded negatively; and the court asked again, "Any of you?" and again there were no responses. The court asked, "So were you all able to put aside anything you saw, heard or read in the media and decide this case strictly on evidence that's presented within the walls of this courtroom?" (All answered in the affirmative.) "Does anybody have any concerns about that?" There were no responses. "No, all right. I'm sure none of you want to reach a significant and important decision in your lives based on something you might have seen in the news, is that fair?" All of the jurors answered yes. (*Id.* at 306–307)

Hand's counsel then asked Ms. Ray if she would be able to consider a verdict other than death; she replied "Yes, you know, if it leaned that way. It depends on the evidence, the law that is presented." She said that the state would have to prove that the sentence was appropriate. (*Id.* at 320) Defense counsel then asked the group about the "eye for an eye" adage, and Ms. Ray said she did not believe in that, explaining that "I believe in the New Testament and not the Old." Ms. Finamore responded that she agreed "to a certain extent, but again, you hear about turning the other cheek also. I don't necessarily think that if someone kills a person, their life should be taken. I don't think it's an automatic death penalty." (*Id.* at 322) Finamore felt the same way about someone who committed more than one murder. (*Id.* at 323) The prosecutor also asked Ms. Finamore about her feelings about the death penalty, noting that she wrote in her questionnaire, "I see more shades of gray rather than black and white." She explained: "I would want to be absolutely certain. I mean, I don't know the details of the situation, but I believe it was in Illinois that recently everybody was taken off death row because they have found that there were people on death row that were not guilty and that kind of thing bothers me some. I would not want to sentence someone to death and find out later that they were innocent." (*Id.* at 331) She said she understood the law and that the death penalty is appropriate in many situations, but she would want to be "firmly convinced." (*Id.* at 332) The prosecutor then asked the entire group of seven, "I take it nobody has any views on the pre-trial publicity questions from yesterday that cause you any trouble? You don't have any particular views that apply in this group of seven based on things you've heard?" All of the group, including Finamore and Ray, answered no. (*Id.* at 323–324)

***30** The Magistrate Judge concluded that Hand has not shown actual prejudice resulting from his trial counsel's failure to further question Ray or Finamore about publicity. With regard to Ms. Ray, her exposure to publicity was minimal and she said that it left her "wondering" about the case. Her other responses to both the questionnaire and to the voir dire questions were clear: she believed she was able to put that article out of her mind and to follow the court's instructions. Moreover, she may have been a very favorable juror, given her responses to questions about the death penalty and her rather firm rejection of the "eye for an eye" adage. Ms. Finamore's questionnaire answers raised a greater concern than Ms. Ray's, especially her comment that the media stories she had seen led her to think that Hand was guilty. Despite that statement, the Magistrate Judge concluded that she had been rehabilitated during voir dire. She repeatedly affirmed that she would be able to put all of her initial impressions and exposure to publicity out of her mind, and would follow the court's instructions. And like Ms. Ray, many of her responses, particularly regarding the death penalty, strongly suggested she would be a favorable juror. For example, she stated that even if a defendant killed more than one person, the death penalty would not be automatic in her mind, and that any sentence would depend upon the evidence presented.

Hand objects to the Magistrate Judge's conclusion, arguing that he did not understand the legal basis of this sub-claim, which Hand contends is ineffective assistance of counsel, not a "biased jury" claim: "Hand does not claim, as the Magistrate [Judge] implies, that his jury was not fair and impartial or comprised of a fair cross-section of his peers, but instead faults his attorneys for not adequately questioning Jurors Ray and Finamore to determine whether they should be the subject of peremptory challenges." (Doc. 108 at 11) Hand cites *Quintero v. Bell,* 256 F.3d 409, 414 (6th Cir.2001), affirming the grant of habeas relief due to trial counsel's failure to adequately examine potential jurors.

The petitioner in that case escaped from prison with a group of several other prisoners. He was eventually caught and tried on the charges. Seven of his trial jurors had served on the jury that two months earlier had convicted one of his fellow escapees. His trial counsel did not object to the presence of these jurors, and there were no questions asked during voir dire about the jurors' ability to serve due to their exposure to the prior trial. The state courts found that his claims of a biased jury and ineffective assistance of counsel were procedurally defaulted. The federal district court granted his habeas petition and the Sixth Circuit affirmed, noting that the case raised two prejudice inquiries: prejudice resulting from the tainted jury, and prejudice caused by ineffective assistance of counsel. The court concluded that the tainted jury was itself a Sixth Amendment violation that rose to the level of structural error. And the court found good cause to excuse the procedural default of that claim, due to the ineffective assistance of petitioner's trial counsel in failing to question or challenge in any way the seating of those jurors. Despite the petitioner's admission at his trial that he had escaped from prison (which the state argued established that no prejudice resulted), the court concluded that including the jurors who participated in the previous case undermined the fundamental fairness of petitioner's entire trial.

***31** The facts at issue here do not come close to structural error, much less a Sixth Amendment violation. Indeed, Hand admits that he is **not** claiming that his jury was biased or lacked impartiality; nevertheless, he contends that he has shown actual prejudice because his trial counsel should have questioned the two jurors more extensively. To be entitled to habeas relief on this claim, Hand must demonstrate that he was actually prejudiced by counsel's failure to ask more questions, not simply raise the possibility that additional questions might have elicited additional or different responses than those the jurors gave to the court's questions. Moreover, as the Magistrate Judge noted, these jurors gave very favorable responses to issues concerning the applicability of the death penalty.

Given the extent of the voir dire that was actually conducted of these two jurors and of the small group they were questioned with, the Court must conclude that Hand has not shown that he was actually prejudiced by trial counsel's failure to further question these jurors, or by appellate counsel's failure to amend his direct appeal brief to specifically raise this sub-claim. Therefore, as the Magistrate Judge concluded, Hand has not satisfied the cause-and-prejudice requirements that would excuse his procedural default of this ineffective assistance of trial counsel sub-claim.

(C) Counsel's failure to move for a change of venue and to exercise all available peremptory challenges. Based on the pre-trial publicity about his case, Hand alleges that trial counsel should have sought a change of venue, and should have exercised all of his allotted peremptory challenges in order to move for a change of venue. Respondent argues that this claim is procedurally defaulted; Hand raised the claim in his post-conviction petition, and the state court held it was barred by res judicata. The Magistrate Judge agreed, finding that the state court properly applied res judicata. In his post-evidentiary hearing brief filed in this case, Hand argued that ineffective assistance of appellate counsel excuses his default. The Magistrate Judge rejected that contention due to the lack of argument and evidence with respect to this sub-claim. (See Doc. 101 at 80–82)

In his objections, Hand asserts that he properly presented this sub-claim in his post-conviction petition because he submitted evidence outside the trial record, thereby precluding application of Ohio's res judicata doctrine. [5] In rejecting Hand's post-conviction petition, the Ohio Court of Appeals held:

> Claim One challenges the jury venire. Appellant argues the trial court should have made further inquiry of the jury concerning the effects of pretrial publicity. Upon review, appellant was not precluded from directly appealing the issue, as the issue could be determined by reviewing the voir dire transcript. The record clearly demonstrates the trial court discussed the pretrial publicity during voir dire and discussed the same with the jurors. Appellant's attachment of exhibits demonstrating pre-trial publicity to the post-conviction relief petition, though admittedly outside the original trial record, merely supplements appellant's argument which was capable of review on direct appeal on the then extant record. Accordingly, we agree with the trial court [that] res judicata applies.
>
> ***32** *State v. Hand,* 2006–Ohio–2028, at ¶ 23. The court of appeals also rejected Hand's second and third claims, the third mirroring this habeas claim alleging ineffective assistance of trial counsel for failing to move for change of venue and to exhaust peremptory

challenges. The court of appeals court held: "We find the claims presented were cognizable and capable of review on direct appeal. Appellant does not offer any new evidence outside the record precluding the application of res judicata." *Id.* at ¶ 33.

Hand does not identify what evidence outside the record he presented, other than the series of newspaper articles that the court of appeals expressly rejected as sufficient to overcome the res judicata bar. These articles were all available to Hand at the time of trial, along with the jury questionnaires which clearly established the fact that extensive publicity had occurred. This issue should have been raised on direct appeal. This Court agrees with the Magistrate Judge that Hand has not established a basis upon which to overcome the procedural default on this issue, and therefore this sub-claim is rejected.

(D) Hand's report to his lawyer about the escape attempt. Hand contends that while he was held at the Delaware County jail before trial, he told his attorneys about the plan by Beverly and several other inmates to escape from the jail. He argues that his lawyers were ineffective because they failed to disclose his report to the authorities, arguing that if they had done so, it would have supported his claim at trial that he did not participate in the escape plan. He also suggests that if this information had been revealed before trial, the jury could not have been instructed to consider his participation as evidence of his consciousness of guilt of the murders. Hand raised this sub-claim as Claim 11 in his amended post-conviction petition (Apx. Vol. 11 at 9–11), supported by Hand's affidavit describing a conversation he had with his attorneys, in which they advised him to stay away from Beverly and not participate in any escape plans. (*Id.* at 15–16) The court of appeals found this sub-claim was barred by res judicata: "The record clearly demonstrates appellant himself testified at trial as to his statements to counsel; therefore, appellant's claim does not provide new evidence outside the record and the Supreme Court could have considered the argument on direct appeal." *State v. Hand,* 2006–Ohio–2028, at ¶ 38.

The Magistrate Judge concluded that this claim is defaulted, and that Hand has not established cause or prejudice to excuse the default. Hand objects, arguing that his attorneys did not independently disclose his report until after trial, which he asserts is itself evidence outside the trial record. He further argues that if the attorneys had told the authorities about the escape plan, it "would have effectuated a more reasonable mitigation strategy" by supporting the argument that Hand would be able to adapt to life in prison. (Doc. 108 at 12)

***33** This Court agrees with the Magistrate Judge that this claim is defaulted. Simply presenting "additional" evidence in a post-conviction petition is not sufficient to avoid Ohio's res judicata bar, as was true with respect to sub-claim (C) above. Hand testified at trial that he told his attorneys about Beverly's plan to escape. (Trial Trans. Vol. 19 at 3497) As the Ohio Court of Appeals explained in rejecting Hand's post-conviction claim, "... the evidence presented outside the record 'must meet some threshold standard of cogency; otherwise it would be too easy to defeat the res judicata doctrine by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis [.]' " *State v. Hand,* 2006–Ohio–2028 at ¶ 21 (quoting *State v. Lawson,* 103 Ohio App.3d 307, 315, 659 N.E.2d 362 (12th Dist.)). Hand's post-conviction affidavit essentially reiterated his own trial testimony. The court of appeals also noted that at trial, Hand denied his involvement in the escape attempt, but that other inmates testified to the opposite. The fact that Hand's attorneys did not tell jail authorities or the prosecutor about Hand's report does not establish that he was actually prejudiced. It is simply speculative to assume that if the information had been disclosed, he would not have been charged and/or convicted of escape, or that he would have received a sentence other than death on the murder charges. This sub-claim is therefore denied.

(E) Failure to exclude a biased juror. Hand contends his trial counsel were ineffective in failing to strike Juror Lombardo from the panel. He raised this claim in his direct appeal, and the Ohio Supreme Court rejected it on the merits.

During voir dire, Lombardo revealed that she had learned about the case when she and her husband were at a function at her husband's company (he was an investigator for the Ohio Attorney General's office). She said that her husband was acquainted with Jill Hand, and that they had worked together "on and off for about 12 years. She was with DMV and he was with the Attorney General's Office." (Trial Trans. Vol. 5 at 697) Hand's counsel asked Lombardo about her questionnaire response, stating that she was "not sure" if she had formed any opinions about Hand's guilt or innocence; he asked if she believed that

"Mr. Hand is entitled to a fair and just trial." (*Id.*) She responded that "He absolutely is." (*Id.* at 699, 659 N.E.2d 362) Counsel also asked Lombardo whether, if the jury found Hand guilty of a premeditated murder with specifications, she would be able to follow the law and consider a sentence other than death. Lombardo responded "Yes." (*Id.* at 700–701, 659 N.E.2d 362) Lombardo also revealed that she "lost a daughter in the past and I pretty much went through a lot of stuff. I felt very sad, but I really didn't pursue it. I just really have a yearning to know more about it. Of course, I had feelings about it, sadness. I would still need to know more about what happened." (*Id.* at 698, 659 N.E.2d 362)

***34** Hand argued on direct appeal that counsel failed to explore Lombardo's potential bias based upon her husband's relationship with Jill Hand, and the circumstances surrounding her daughter's death. The Ohio Supreme Court concluded that the juror's answers indicated that her husband's position would not influence her as a juror. She responded that it would not be difficult for her to keep the events of the trial separate from her relationship with her husband. Noting Lombardo's firm affirmation that Hand was "absolutely" entitled to a fair trial, the court held that "trial counsel's decision not to question Juror Lombardo any further about the loss of her daughter, a very personal issue, was a proper exercise of discretionary judgment." *State v. Hand,* 107 Ohio St.3d at 408, 840 N.E.2d 151.

Hand raised a third issue with respect to this juror, her disclosure that about 30 years earlier, she witnessed her employer confront an intruder at her workplace. Her employer was charged with murder after he shot and killed the intruder. During voir dire, Lombardo explained that the incident occurred when she was 18 and working in an auto body shop. A man came into the shop to see her boss, and she could see that the man was obviously very drunk and angry, and he was carrying a gun. He walked right past her and into the garage area where her boss was working. She heard shouting and gunshots, and she quickly ran out of the shop. She later testified on his behalf at his trial, and the jury acquitted him, finding that he acted in self defense. She stated that her experience would not make it difficult for her to serve as a juror. (*Id.* at 711–712, 840 N.E.2d 151) Hand's counsel asked her if she believed "... that a person who has been put in danger, or his life is threatened should have the right to defend himself or herself?" and she responded "Yes," stating that was the very situation she dealt with during the incident with her employer, "... it was considered self-defense, is the way the verdict was." (*Id.* at 727, 840 N.E.2d 151) The Ohio Supreme Court found that these views were favorable to Hand's contention that he killed Welch in self defense. The court rejected Hand's ineffective assistance claim based on the failure to challenge Lombardo for cause or utilize a peremptory challenge to remove her from the panel.

Hand contends that because the state supreme court did not cite or discuss federal law when it rejected this claim, de novo review should apply. The Magistrate Judge concluded that the lack of federal case law in the state court's opinion did not control because the relevant question for habeas review is whether the state court's decision contradicts clearly established federal law. The Magistrate Judge addressed the issue at length, quoting extensively from the voir dire of Lombardo, particularly her statement describing how she learned about Hand's case when attending a social function at her husband's workplace. After discussing that incident as well as the loss of her daughter, Hand's counsel questioned her about the importance of evidence that a murder was premeditated. Lombardo said that was "very important. That has a lot to do with my thinking on that.... That's very important to me, whether it will be proven it's premeditated or not or whether ... whether he would maybe do it again. Those things would be important to me." (Trial Trans. Vol. 5 at 696–701) Counsel also asked her how she felt about the fact that the law does not require every premeditated murder to result in the death penalty; she stated "I'm OK with it," and that she would be able to apply that law to Hand's case. (*Id.*)

***35** The Magistrate Judge concluded that there was no indication in any of Lombardo's answers and statements that she was prejudiced against Hand. She was not personally acquainted with Jill Hand, and her husband's relationship with Jill was at best a professional one. There was no information provided about the cause of Lombardo's daughter's death, and Hand is simply speculating that her death may have been caused by a criminal act. While Lombardo witnessed an incident that resulted in a shooting death, Lombardo's responses about that incident were very favorable to Hand's self-defense claim, as she had first-hand knowledge of someone who acted in self defense yet was charged with murder. Finally, the Magistrate Judge noted Lombardo's

favorable responses to questions about Hand's right to a fair trial and the fact that the death penalty was not an automatic outcome for her, even for a premeditated murder. Her responses to counsel's questions and to those of the trial court gave no indication that she was biased, or that she could not be an impartial juror. The Magistrate Judge therefore concluded that Hand's counsel was not ineffective in failing to challenge this juror for cause or to peremptorily excuse her, and that the state court's decision was not contrary to or an unreasonable application of federal law.

Hand objects, urging the Court to review this sub-claim de novo. He contends that the Magistrate Judge failed to address Supreme Court precedent requiring an attorney to "expose potential juror bias," and citing *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), and *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). *Wainwright* clarified the standard by which to determine "... when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's view would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright,* 469 U.S. at 424 (internal citation omitted). There is nothing in her voir dire responses that would suggest that Juror Lombardo should have been excused under this standard. To the contrary, Lombardo stated that the death penalty may not be appropriate even for a pre-meditated murder, a view that does not suggest she would be substantially impaired in performing a juror's duties. *Morgan v. Illinois* involved the trial court's blanket denial of a defendant's request for voir dire. At the time of defendant's trial, Illinois law required the trial court to conduct the entire voir dire. The court granted the state's motion and questioned the venire if any of them were opposed to the death penalty no matter what the facts might be. But the court denied the defendant's motion to question the jurors whether they would automatically vote to impose the death penalty upon a conviction. The Supreme Court held that defendant's due process rights to a fair and impartial jury were violated by the trial court's refusal to grant defendant's request, because that question could have uncovered prejudicial bias that would not be disclosed by an answer to the state's question.

***36** Here, in contrast, Hand's counsel questioned Juror Lombardo about her knowledge of Jill Hand and the case, and whether or not she could follow the judge's instructions. Her answers regarding self-defense and the death penalty were on balance very favorable to Hand. The entire voir dire record shows that Hand's trial counsel engaged in significant voir dire of this juror, and that her answers to all of the questions put to her did not exhibit bias or prejudice. Even applying de novo review of this issue, this Court could not conclude that Juror Lombardo was biased or prejudiced against Hand. For that reason, the Court finds that Hand's counsel was not ineffective in failing to challenge Juror Lombardo for cause or to peremptorily excuse her, and that the Ohio Supreme Court's rejection of this sub-claim was not contrary to nor an unreasonable application of established federal law.

(F) Failure to object to Welch's statements to friends and family members as co-conspirator statements. This sub-claim is grounded in the facts relating to the first ground for relief, the admission of the testimony from Welch's friends and family members about Welch's statements to them. On direct appeal, Hand argued that the state failed to prove the existence of a conspiracy, making the statements inadmissible as a co-conspirator's statements pursuant to Ohio Evid. R. 801(D)(2). The Ohio Supreme Court concluded (as an alternative ground) that Welch's statements to Shannon Welch and David Jordan (Welch's cellmate) were properly admitted under Rule 801(D)(2)(e).[6] Grimes' testimony provided independent proof of the conspiracy's existence, and Welch's statements to Shannon about needing a gun and murdering Jill, and his statements to Jordan about his involvement, were within the scope of Welch's conspiracy with Hand. *State v. Hand,* 107 Ohio St.3d at 395, 840 N.E.2d 151. Based on this conclusion, the Supreme Court rejected this ineffective assistance of counsel claim because Hand suffered no prejudice. *Id.* at 410, 840 N.E.2d 151. The Magistrate Judge reached the same conclusion.

Hand objects, and incorporates his arguments that the admission of these hearsay statements violated his Confrontation Clause rights, an argument rejected on the merits with respect to Ground One discussed above. This Court agrees with the Ohio Supreme Court and the Magistrate Judge, that Hand has not shown any actual prejudice from counsel's failure to object to the statements that fell within the co-conspirator rule. This sub-claim is therefore denied.

(G) Failure to object to other "bad acts" evidence. This subpart of Hand's ineffective assistance claim is related to his Second Ground for Relief, the admission of "other acts" evidence: Hand's reaction to learning of Jill's death; his relationship with his father; his obsession with money; his "horny old man" comment to the investigator and McKinney's reference to his "infatuation" with McKinney's daughter; and the prosecutor's closing argument comments. Hand's counsel did not object to any of this testimony or to the state's closing argument, which Hand contends was ineffective assistance of counsel. The Ohio Supreme Court rejected this claim on direct appeal, relying on its conclusion that Hand was not prejudiced by any of the testimony or by the closing argument. The Magistrate Judge reached the same conclusion, based on his recommendation with respect to Ground Two.

***37** Hand objects, relying on the same arguments he raised in Ground Two to argue that he has established actual prejudice under *Strickland.* This Court concluded that the admission of the challenged testimony did not violate any of Hand's constitutional rights and that he was not actually prejudiced by the testimony. The Court rejects this sub-claim for the same reason, that Hand has not shown actual prejudice resulted from his counsel's failure to object. This sub-claim is denied.

(H) Failure to present self-defense evidence at the hearsay hearing. In this sub-claim, Hand contends his trial counsel was ineffective by failing to present evidence during the hearsay evidentiary hearing to support Hand's contention that he shot Welch in self defense. The Ohio Supreme Court rejected this claim on the merits in Hand's direct appeal. The court cited Grimes' testimony that Hand claimed he was going to plead self-defense, but later changed his story and told Grimes that he killed Jill and Welch, "... [because] anybody that messed with him would disappear." After Grimes told Hand that he could be convicted based solely on circumstantial evidence, Hand said "If there's no witnesses, there's no case." (Trial Trans. Vol 14 at 2254) The Ohio Supreme Court concluded:

> ... it is highly speculative whether the presentation of additional evidence of self-defense would have made any difference in the trial court's ruling on the admissibility of Welch's statements. Moreover, it is almost certain that Hand would have had to testify at the hearing in order to raise the issue of self-defense. The record does not show whether Hand or his counsel made the decision to forgo Hand's testimony during the evidentiary hearing.

State v. Hand, 107 Ohio St.3d at 410–411, 840 N.E.2d 151. The court found that either of those alternatives would foreclose Hand's argument: it was either Hand's own decision not to testify, or it was his counsel's tactical decision to avoid an early cross-examination by the prosecutor, a decision that the court would not second-guess. [7]

The only issue before this Court is whether the state court's determination runs afoul of 28 U.S.C. § 2254(d). It does not. If Hand had come forward with some evidence that credibly suggested he shot Welch in self-defense (and he has not identified what that might have been, other than his own testimony), and the trial court had so found, Welch's statements may have been excluded. Alternatively, the subsequent admission of Welch's hearsay statements may have violated some of the Ohio evidence rules discussed in the Supreme Court's decision. But as the Magistrate Judge observed, because none of the statements in question were testimonial statements under *Crawford* (as discussed in Ground One above), there was no federal constitutional error resulting from their admission. That is, under pre-*Crawford* law, Welch's statements to family and friends bore sufficient indicia of reliability to be admitted under *Ohio v. Roberts;* and under *Crawford,* they were not testimonial and did not implicate the Confrontation Clause.

***38** The Magistrate Judge alternatively concluded that even if the testimony about Welch's statements had been excluded because Hand had come forward with some credible evidence of self-defense during the hearsay hearing, significant probative evidence that was otherwise admitted at trial amply supported Hand's convictions. This includes the evidence and testimony that there were no signs of forced entry at Hand's home; Hand's financial difficulties and the large amount of Jill's life insurance of which Hand was the sole beneficiary; the forensic evidence that contradicted Hand's version of how he shot Welch; Grimes' testimony that Hand admitted killing both Welch and Jill; Hand's inconsistent statements about his and

Jill's relationships with Welch; and the evidence regarding Hand's plan to reduce his debts and file bankruptcy.

Hand objects to the Magistrate Judge's conclusion, relying on his Confrontation Clause and due process arguments that this Court rejected with respect to Ground One. He also objects to the alternate conclusion that sufficient evidence supported the verdicts against him even if Welch's statements had been excluded. He argues that the state would have had no direct evidence of his guilt without Welch's statements, and would have been forced to rely much more heavily on Grimes' testimony. He cites *Ege v. Yukins,* 485 F.3d 364 (6th Cir.2007), where the Sixth Circuit affirmed the grant of habeas relief based on the admission of questionable "bite mark" identification testimony from an expert who was later found to be totally unreliable by the county prosecutor, and who was barred from testifying for the state. The Sixth Circuit noted that habeas relief for a due process claim is warranted only if an evidentiary ruling is "so egregious that it results in a denial of fundamental fairness." That question turns upon "whether the evidence is material in the sense of a crucial, critical highly significant factor." *Id.* at 375 (internal citations and quotations omitted). The expert in question not only identified a mark on the victim's cheek as a bite mark based solely upon his review of photographs (and directly contradicting the coroner's opinion at the time of the autopsy); he further opined that the "bite mark" could only have been made by the petitioner, and not by any one of the other 3.5 million Detroit residents. Labeling the expert's opinion as "complete bunk," the Sixth Circuit held that his testimony substantially prejudiced the outcome of the trial despite the admission of other circumstantial evidence pointing to the petitioner's guilt. Moreover, the state habeas court had concluded that the admission of the expert's testimony was an error, but denied relief because trial counsel failed to object. The Sixth Circuit found that the lack of objection amounted to ineffective assistance of trial counsel that excused the procedural default, concluding that it was objectively completely unreasonable for counsel not to object to an opinion that so completely lacked any statistical or scientific support. *Id.* at 379–380. The court also noted the state court's expression of concern about the "troubling" conviction of the defendant, how many other "logical suspects" existed, and the long delay by the state in charging the petitioner, in concluding that habeas relief was properly granted.

***39** The evidence against Hand, unlike the circumstantial evidence described in *Ege,* included forensic analyses of bullet fragments found inside and outside of Hand's home, as well as some removed from Welch's body. Hand did not challenge any of this evidence. The Ohio Supreme Court concluded that the forensic evidence contradicted Hand's story about the timeline of events on the night of the murders. In addition, Hand's story of the events of that night changed over time in his interviews with the police. Even without Welch's statements, the Court agrees with the Magistrate Judge's alternative conclusion that sufficient evidence would support the verdicts. This sub-claim is therefore denied.

(I) Failure to call Phillip Anthony as a defense witness. In this sub-claim, Hand argues that Phillip Anthony, Welch's cousin, should have testified on Hand's behalf. Anthony testified during the hearsay evidentiary hearing that sometime in 1986 or 1987, Welch admitted that he had killed Donna and Lori. According to Anthony, Welch "... explained to me how he snuck into a basement window and that all the doors and windows in the house were sealed and locked, and how he put her in the chair and made the second murder identical to the first, and that's about all he really told me." (Trial Trans. Vol. 14 at 2275) The trial court found Anthony's testimony was admissible

(along with the other eight witnesses presented during the hearing), but the state chose not call him to testify during its case. Hand contends that his lawyers should have called Anthony in the defense case, and that they were ineffective in failing to do so. Hand contends that Welch's statement to Anthony about entering the house through a basement window contradicted the state's evidence that there was no sign of forced entry found during the investigations into Donna's and Lori's murders.

The Ohio Supreme Court rejected this claim on direct appeal. The court noted that Anthony had also testified in the hearing that in early 2002, Welch asked Anthony to find him a gun because "the guy I did that thing for ... said he wants me to do another one.... I need this [gun] now ... I can't wait a week, I can't wait a day, I really need this now, I've got something to do." *State v. Hand,* 107 Ohio St.3d at 409, 840 N.E.2d 151. On the night before the murders, Welch asked Anthony again about a gun, and Anthony said he could not find one. Welch said he was uneasy about going to meet Hand alone, and asked Anthony to give him

a ride and "watch his back a little bit." Anthony said that Welch told him he wasn't "going up there to kill nobody. The deal was ... they were going up there to iron it out. How much, where, how, when, type of situation, ... [to] talk to Mr. Hand, iron out all the specifics of the murder, and that's it...." *Id.* The Supreme Court concluded:

> Trial counsel were not deficient by choosing not to call Anthony as a defense witness even though some of his testimony might have helped the defense case. Welch's comments to Anthony showed a sense of urgency to obtain a weapon to murder Jill that was not otherwise in evidence. Moreover, Welch's statements show that he did not intend to murder Jill when he went to Hand's home on the evening of January 15. Anthony's testimony undermined Hand's claim that Welch was an intruder who entered his home and murdered his wife. Such testimony would have contradicted Hand's self-defense theory. Thus, trial counsel made a legitimate tactical decision to not call Anthony as a defense witness.

***40** *State v. Hand,* 107 Ohio St.3d at 409–410, 840 N.E.2d 151.

The Magistrate Judge concluded that while Anthony's statements about access through a basement window in Hand's home may have contradicted the police investigators' testimony, the bulk of Anthony's testimony was clearly detrimental to Hand's defense, and would only have bolstered the state's case that Hand and Welch conspired to kill Jill. Counsel's decision not to call Anthony was not strategically unreasonable, and therefore the Ohio Supreme Court's decision was not contrary to established federal law. Hand objects, arguing that there is nothing in the record to support the conclusion that his counsel's failure to call Anthony was a strategic decision, as opposed to an oversight or a lack of foresight.

The Magistrate Judge quoted extensive excerpts of Anthony's testimony during the hearsay hearing under questioning by the state and by the defense. (Doc. 101 at 101–110) Anthony testified about a conversation with Welch approximately twenty years before Jill's murder, in which Welch described how he killed both Donna and Lori using a plastic dry cleaning bag. Welch said that he got into the house through a basement window, and that Hand paid him to kill both of his wives. Anthony described a "falling out" between Welch and Hand that occurred some years earlier. But he said that Welch told him that the early 2002 contact from Hand was different, and that "it didn't feel right ...". When Welch spoke to Anthony in early January, Welch said that Hand told him: "This is what the deal is, I've got another wife I need to get rid of her, ... let's work out the details, you know." Welch told Anthony that "Hand wanted to talk to him, wanted to meet with him, to iron out the details on offing his next wife, on having his wife murdered." But Welch was uneasy about meeting Hand and he "didn't feel safe" going to meet Hand without a gun. When Anthony told him he could not find a gun, Welch asked Anthony, "Well, why don't you take me up there, you know, and watch my back a little bit, ... Well, I've got to find my way up there again somehow, because he keeps calling me and I got to see what he wants ...". In Anthony's last conversation with Welch, Welch said he "was planning to go up, talk to Mr. Hand, iron out all the specifics of the murder, and that's it.... He said it was [at] Mr. Hand's house. Take him up [to] Delaware to his house." (Doc. 101 at 103–107, quoting Trial Trans. Vol. 14 at 2271–2290) On cross-examination by Hand's counsel, Anthony said that as far as he knew, Welch was not cooperating with the police in January 2002 and was not planning on testifying against Hand.

The Court notes that prior to the evidentiary hearing in which Anthony testified, the state presented testimony from retired detectives Robert Britt and Sam Wolmendorf, both of whom were involved in investigating the murders of Donna and Lori. Both testified that the contemporaneous investigation reports noted no signs of forced entry at the home on either occasion, in particular with respect to windows in the basement where both bodies had been found. (See Trial Trans. Vol. 13 at 2091, Britt testimony noting that basement windows were locked; and at 2152 and 2157, Wolmendorf testimony confirming there were no signs of forced entry on either occasion.) Later in Hand's trial, after the evidentiary hearing and the court's ruling permitting Anthony and

the other witnesses to testify, the state recalled Detective Otto to the stand. Otto was the principal investigator into the Jill and Welch murders and had already testified. At the close of Otto's direct testimony, an unreported sidebar conference was held, after which defense counsel objected to the court's sidebar ruling, and did not ask Otto any questions. (Trial Trans. Vol. 18 at 3234) Later, during a recess and out of the presence of the jury, the trial court took up the sidebar conference issue on the record, explaining that Hand had asked "to cross-examine Detective Otto concerning a hearsay statement made to another witness that Detective Otto interviewed concerning a window and what that witness would have said about what [was] said by the declarant, which is Lonnie Welch [sic]." (*Id.* at 3253–3254, 840 N.E.2d 151) Hand's counsel explained that he asked for the sidebar to avoid mentioning in front of the jury that he wanted to cross-examine Otto about Anthony's statement to Otto during an interview Otto conducted, in which Anthony described Welch's statement that he "snuck into" Hand's house through the basement window to kill Donna and Lori. The trial court had denied counsel's request to pursue that line of cross-examination during the unreported sidebar, which he affirmed on the record. Counsel then requested the trial court, pursuant to Ohio Rule 614, to call Anthony as a court witness

> ***41** ... because I can't vouch for his veracity. The prosecution brought him in here, and you held that he was reliable and probative, and now they're not calling him, and I—it would be my opportunity through Phillip Anthony to cross-examine him and impeach the credibility of Lonnie Welch. Throughout this whole trial, you've let all this hearsay in about what Lonnie Welch had to say about the homicide and, through Phillip Anthony, if we're permitted to cross-examine him as a court witness, we believe we can impeach the declarant's statements through the physical evidence.... I think, in the name of justice, and throughout this whole trial, we were led to believe that he was going to come in. We commented on the windows in our opening statement throughout the whole cross-examination, and we believe that that's a very important aspect to determine the credibility of the declarant, being Lonnie Welch, and to you letting in all that hearsay about Lonnie Welch.

(*Id.* at 3254–55, 840 N.E.2d 151)

The trial court denied Hand's request, noting that both the state and Hand were free to call the witnesses they chose to call, and that Hand had wide latitude to cross-examine the state's witnesses in order to impeach Welch. Hand's counsel then made a specific offer of proof as to Anthony's anticipated testimony about Welch's description of the basement windows:

> And that is the specific area that we wish to pursue with Mr. Anthony, we wish to impeach at the scene of Lonnie Welch because, physically, that cannot be so. Physically, it could not have happened the way that Lonnie Welch told Phillip Anthony the way it happened, ... we're not impeaching Phillip Anthony at this point, and we're not impeaching Lonnie Welch's character, we're just impeaching a specific method of entry and exit as a barometer by which Lonnie Welch-did he really commit these offenses or not.... I can't vouch for the credibility of Phillip Anthony, because I think he's not credible, but I think I have a right to do that, and you, in your position as a trier of fact, have the authority to bring him in and let both sides cross-examine so that it would further the cause of justice....

(*Id.* at 3257–58, 840 N.E.2d 151) The state opposed the request, noting that Hand could call Anthony if he wanted to. The court denied the request, and Hand's counsel did not present Anthony during the defense case. Hand now

contends that failure amounts to ineffective assistance of counsel, and that the Ohio Supreme Court erroneously assumed that counsel made a strategic decision to avoid calling Anthony as a defense witness.

The Supreme Court has cautioned that, in reviewing ineffective assistance of counsel claims:

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

***42** *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (internal quotations and citations omitted). It is clear to this Court that presenting Anthony as a defense witness in view of the entirety of his hearing testimony would have posed a serious risk to Hand's primary claim that he acted in self-defense. Hand's trial counsel argued that he could not vouch for Anthony's credibility given his admitted criminal background, which led counsel to seek permission to cross-examine Detective Otto about Anthony's interview statements. When that request was denied, counsel asked the trial court to call Anthony as a court witness. Given the complete history of the circumstances involving Anthony and the eloquent proffer that Hand's counsel made to the trial court, it is extremely unlikely that counsel simply "forgot" about Anthony or overlooked him, as Hand suggests. Rather, the record supports the Magistrate Judge's conclusion that a decision not to have Anthony testify was a strategic decision that did not amount to ineffective assistance of counsel. Anthony's harmful testimony, in the Court's view, far outweighs any potential favorable impact of Anthony's statement about the basement windows. The Court therefore concludes that the Ohio Supreme Court's rejection of this sub-claim was not contrary to nor an unreasonable application of clearly established federal law.

(J) Failure to request jury instructions. Hand alleges that his lawyers should have requested limiting instructions on the "other acts" evidence admitted at trial, and an instruction specifically defining the phrase "course of conduct" as used in the first specification for Counts One and Two (the murders of Jill and Welch, respectively). Hand raised this claim on direct appeal; the Supreme Court rejected it, relying on its conclusion with respect to Hand's second proposition of law (concerning admission of the other acts evidence), and his sixth proposition of law, Hand's challenge to the course of conduct instructions that were given by the trial court. The Supreme Court found that Hand was not prejudiced by the lack of any additional instructions, and this lack of prejudice barred his ineffective assistance of counsel claim.

The Magistrate Judge concluded that Hand did not sufficiently "federalize" this sub-claim in his direct appeal. Hand's merit brief framed his arguments within the parameters of state evidence law, and summarily cited only two U.S. Supreme Court cases: *McCleskey v. Kemp,* 481 U.S. 279, 305, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), and *Godfrey v. Georgia,* 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Both of those cases involved challenges to Georgia's capital sentencing scheme. Both generally held that a state must establish "... carefully defined standards that must narrow a sentencer's discretion to impose the death sentence ..." (*McCleskey,* 481 U.S. at 304), and that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey,* 446 U.S. at 427.

***43** Hand objects to the Magistrate Judge's conclusion, arguing that ineffective assistance of trial counsel "is by its very nature a federal claim, [because] alleging that defense counsel failed to preserve a defendant's rights under state law necessarily raises a Sixth Amendment issue." (Doc. 108 at 16) In *Moreland v. Bradshaw,* 699 F.3d 908 (6th Cir.2012), the Sixth Circuit found that a habeas petitioner did not default his claim by failing to sufficiently federalize that claim in state court. The petitioner's brief to the Ohio Supreme Court argued

that the trial court erred by conducting an inadequate evidentiary hearing on the competency and admissibility of an eleven year old witness's testimony against him, and by excluding his expert testimony. The Sixth Circuit noted that the petitioner's appeal brief stated that the trial court's errors violated his rights under the "Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution," a statement that the court found sufficient to preserve his federal claim. *Id.* at 921, n. 4.

Here, Hand's second proposition of law in his direct appeal brief alleged that the failure to give a limiting instruction violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. And his sixth proposition alleged that the failure to give a narrowing instruction on the course of conduct specification violated his rights under the Eighth and Fourteenth amendments, and he cross-referenced the argument presented in support of his second proposition. The Court also notes that the Ohio Supreme Court began its discussion of Hand's Proposition of Law VII, raising ineffective assistance of counsel based on the failure to request these instructions, by citing *Strickland*' s two-prong requirement. *State v. Hand,* 107 Ohio St.3d at 407, 840 N.E.2d 151. Out of an abundance of caution, and in view of *Moreland,* the Court will assume that this sub-claim is not defaulted for failing to properly federalize it in Hand's direct appeal.

However, the Court concludes that this sub-claim lacks merit. To satisfy *Strickland*' s standards, Hand must show that his counsel's failure to seek a limiting instruction not only fell below an acceptable performance standard, but must also establish that he was prejudiced by that failure. In his habeas petition, Hand alleges that the jury "likely considered the other acts evidence presented by the state as affirmative evidence of Hand's guilt ...". (Doc. 11 at ¶ 81) But the Ohio Supreme Court specifically rejected that contention, holding that "nothing suggests that the jury used other-acts evidence to convict Hand on the theory that he was a bad person." *State v. Hand,* 107 Ohio St.3d at 401, 840 N.E.2d 151. Moreover, given the brief references in the testimony that Hand argues were impermissible "other acts" evidence, it is just as likely that counsel did not wish to call the jury's attention to or to over-emphasize many of these statements. It is sheer speculation to assume that if Hand's trial counsel had requested a limiting instruction regarding any or all of the "other acts" testimony (and the trial court had so instructed the jury), that instruction would reasonably have resulted in a different outcome.

***44** With regard to counsel's failure to request a specific instruction defining the meaning of "course of conduct" specifications, Hand's Ninth Ground for Relief (discussed below) contends that the trial court erred in failing to give a specific or limiting construction on the meaning of the "course of conduct." As is fully discussed below with regard to that claim, there was no error in the trial court's instructions on this issue. For the reasons discussed in the Ninth Ground, the Court also concludes that Hand has not shown that he was prejudiced by his counsel's failure to request such a limiting instruction. This sub-claim is therefore denied.

(K) Cumulative impact of errors. Hand alleges that the cumulative impact of all of these ineffective assistance sub-claims actually prejudiced his defense. Hand did not raise a cumulative impact claim on direct appeal. The Magistrate Judge found this claim to be procedurally defaulted as a result, citing *Lorraine v. Coyle,* 291 F.3d 416, 447 (6th Cir.2002), holding that a procedurally defaulted cumulative error claim is not cognizable in habeas actions.

Hand argues that he did raise a cumulative impact argument in his post-conviction petition. But that is not sufficient under Ohio's res judicata rules; the cumulative impact of the individual errors that he did raise on direct appeal is an issue that should have been raised at the same time. In addition, as the Magistrate Judge notes, there is no Supreme Court precedent recognizing a distinct constitutional claim based on the effect of cumulative trial error. In *Sheppard v. Bagley,* 657 F.3d 338, 348 (6th Cir.2011), the Sixth Circuit held that post-AEDPA, a cumulative error claim is not cognizable in habeas proceedings, citing *Moore v. Parker,* 425 F.3d 250, 256 (6th Cir.2005). Hand's cumulative impact sub-claim is therefore denied.

For all of these reasons, the Court overrules Hand's objections, and denies the Fourth Ground for Relief and each sub-claim contained therein.

Ground Five

Hand raises a number of penalty-phase ineffective assistance of trial counsel sub-claims as his Fifth Ground for Relief.

(A) Failure to present additional expert psychological testimony. Hand's trial counsel applied for and received funds to hire a forensic psychologist, Dr. Davis, to assist with his mitigation case. Hand contends that his attorneys unduly restricted Davis's mitigation testimony to the issue of Hand's ability to adjust to prison life. Hand's petition argues that Dr. Davis should have testified that Hand was "truthful, open, and cooperative; that his test results did not reveal characteristics similar to those of an anti-social personality disorder; and that Hand's psychiatric profile was not consistent with the typical traits of a 'cold calculating antisocial personality.' " (Doc. 11 at ¶ 86) This sub-claim was not specifically raised on direct appeal (although Hand discussed Dr. Davis in the context of his broader claim that his trial counsel did not reasonably investigate and present mitigation evidence). Hand raised this sub-claim in his post-conviction petition, where he argued that capital defendants "... frequently manifest anti-social personality disorder characteristics in the MMPI test results. Prosecutors will then capitalize on these findings and use that information against the defendants during cross-examination of the defense's psychologist. That was not the case with Petitioner." (Apx. Vol. 10 at 81, post-conviction petition at ¶ 11) Hand included Dr. Davis's affidavit, which reported his MMPI test results, with his post-conviction petition. (Apx. Vol. 10 at 352–56) The state court of appeals found that this claim was barred by res judicata:

> ***45** A review of appellant's direct appeal indicates he specifically raised numerous claims of ineffective assistance of counsel, including: ineffective assistance of counsel during voir dire; failure to call witnesses during both the guilt and mitigation phases of trial; failure to investigate, prepare and present evidence during both phases; and failure to form a reasonable trial strategy. However, [Hand] asserts, without evidence gathered outside the record, there was insufficient evidence available in the record to assert [these] claims on direct appeal. We disagree.

State v. Hand, 2006–Ohio–2028 at ¶ 33. The court also stated that "assuming arguendo" that res judicata did not apply, the decision to call a witness and the scope of questioning is largely a matter for defense counsel's discretion. *Id.* at ¶ 35. The court ultimately concluded that "the record demonstrates the issues were cognizable and capable of review on direct appeal." *Id.* at ¶ 36.

The Magistrate Judge observed that "at first blush," it appears as if the Ohio Court of Appeals addressed the merits of this sub-claim, in which case it would not be defaulted. (Doc. 101 at 116) However, he concluded that the state court's brief discussion of counsel's trial strategy regarding the witness was merely an alternative analysis, not a decision on the merits. The court of appeals did not analyze the question in depth, and relied on its basic conclusion that the issue should have been raised in Hand's direct appeal. The Magistrate Judge ultimately concluded that this claim is defaulted because Hand has not shown cause for the default. Hand objects, arguing that the Ohio Court of Appeals was incorrect in stating that he failed to include material outside the trial record in support of this claim, because he proffered Dr. Davis' affidavit reporting his MMPI results.

Ohio's res judicata doctrine applies to claims that were raised or could have been raised on direct appeal. *State v. Perry,* 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967). Hand clearly knew about his own MMPI tests well before the jury's verdict. Dr. Davis' post-conviction affidavit states that the day before he testified, he told Hand's trial lawyers about those results. Davis averred that counsel "seemed to only focus on how well [Hand] would be able to adapt to prison life if the jury sentenced him to life without parole." (Apx. Vol. 10 at 354, Davis Affidavit at ¶ 7) The affidavit clearly shows that this evidence was available during the trial and that Hand was aware of it. This sub-claim should have been raised on direct appeal.

But even assuming that res judicata does not apply and the claim is not defaulted, Hand argues that his situation falls "within the gambit" of *Glenn v. Tate,* 71 F.3d 1204 (6th Cir.1995), a pre-AEDPA decision finding that counsel's complete failure to discover and present any relevant mitigation evidence amounted to ineffective assistance of counsel. Hand also cites *Williams v. Taylor,* 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), where the Supreme Court granted habeas relief based on defense counsel's failure to investigate the petitioner's

truly nightmarish childhood. The fact that Hand's MMPI results were not discussed by Dr. Davis during his trial testimony does not come close to the magnitude and significance of the utter failure to investigate a defendant's background that was addressed in both *Glenn* and *Williams.* If Dr. Davis had testified that Hand does not suffer from a manifest anti-social personality disorder, an area of cross-examination might have been eliminated as Hand argued in his post-conviction petition. But Dr. Davis does not opine or even suggest that Hand was psychologically incapable of committing the murders, or of conspiring with Welch to commit them. The state's primary theory was that Hand killed Jill because he badly needed money, and he killed Welch to eliminate him as a witness to Jill's murder. The fact that the jury did not learn that Hand was *not* diagnosed with anti-social personality disorder is not the sort of powerful mitigating evidence, such as the type of evidence discussed in *Williams,* that supports a reasonable likelihood that the jury would not have imposed the death penalty if Dr. Davis had discussed those test results.

***46** Recent Supreme Court authorities support the conclusion that trial counsel's failure to elicit this testimony from Dr. Davis does not amount to ineffective assistance of counsel. In *Bobby v. Van Hook,* 558 U.S. 4, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009), the Court vacated the Sixth Circuit's grant of habeas relief to petitioner Van Hook, which was based on a claim that trial counsel failed to conduct a thorough mitigation investigation. Even under pre-AEDPA review standards, the Court noted that "it was not unreasonable for his counsel not to identify and interview every other living family member.... This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, ... or would have been apparent from documents any reasonable attorney would have obtained." *Id.* at 19 (internal citations omitted). In contrast, in *Porter v. McCollum,* 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), the Court affirmed a district court's grant of habeas relief based on ineffective assistance at sentencing. After spending the night drinking, Porter killed his former girlfriend and her new boyfriend. His lawyer presented one mitigation witness, Porter's ex-wife, and read a small part of a deposition. The lawyer told the jury that Porter was not "mentally healthy" and had "other handicaps," but he did not investigate Porter's background and did not introduce any evidence of an illness or handicap. In his state post-conviction proceeding, Porter presented extensive evidence and testimony about his extremely violent and abusive childhood. He enlisted in the Army at age 17 to escape his violent family; he then served in the Korean War under extremely difficult conditions, was seriously injured twice, and received several commendations including two Purple Hearts. He presented expert testimony that he suffered serious post-traumatic stress syndrome and brain damage from his service that could cause impulsive, violent behavior. His doctor also opined that Porter was substantially impaired in his ability to conform his conduct to law and that he suffered from an extreme mental disturbance, two of Florida's statutory mitigating circumstances. The Supreme Court affirmed the grant of habeas relief, finding that his lawyer had done nothing to advocate for Porter and that the deficiency was clearly prejudicial. The Court found that Porter's case was **not** one in which the additional mitigating evidence "would barely have altered the sentencing profile presented to the sentencing judge ...". *Id.* at 454 (quoting from *Strickland,* 466 U.S. at 700).

Even if Dr. Davis had testified that Hand did not have an antisocial personality disorder, or that he had depression and anxiety, that testimony would not establish a reasonable probability that Hand would have received a life sentence in lieu of the death penalty. Even if this claim is not barred by res judicata, as the Ohio Court of Appeals found, it would fail on its merits.

***47 (B) Failure to present family and friends as mitigation witnesses.** Hand alleges in this sub-claim that his trial counsel failed to present "comprehensive" testimony from his family and friends. He argues that other family members would have painted a portrait of the "chaotic, abusive home in which Hand was raised. In addition, several of Hand's long-term friends also were willing to testify about his generosity." (Doc. 11 at ¶ 90) Hand raised this claim on direct appeal as his eighth proposition of law, and the Ohio Supreme Court held that counsel's decision not to present his mother and sister as witnesses, or to call someone to testify directly about his military service, was not ineffective assistance. The court noted that Dr. Davis told the jury about Hand's alcoholic father, and that Hand had been removed from his mother's care for a time and placed with Children's Services. Davis also reviewed the records of Hand's military service. Hand's

son Robert testified about his father's character and their positive relationship.

Hand also raised this claim in his post-conviction petition as his fifth claim, arguing that the state presented testimony during the trial about his generosity to Lonnie Welch and Welch's family, intending to imply to the jury "... that Hand was only doing this to keep Welch quiet about the alleged murderous work he had done for Petitioner." (Apx. Vol. 10 at 98) Hand offered affidavits from several of his good friends, attesting that Hand would do anything for a friend, that he was a "straight arrow," and was always doing kind things for others without being asked. (*Id.*) The Ohio Court of Appeals affirmed the trial court's denial of relief, concluding that Hand did not demonstrate prejudice: "[R]ather, appellant merely speculates the outcome of the trial would have been different, but for counsel's failure to call the witnesses." *State v. Hand,* 2006–Ohio–2028 at ¶ 37. While the court of appeals found that res judicata barred review of many of Hand's ineffective assistance claims, it addressed this issue (albeit briefly) on the merits, and did not expressly rely on res judicata.

In view of the state court's discussion, the Magistrate Judge reviewed the merits and recommended that this sub-claim be denied. He describes Dr. Davis' testimony to the jury describing his extensive interviews with several of Hand's family members, including his mother and sister. Davis informed the jury that Hand's father was a chronic alcoholic, which caused considerable strife and abuse between Hand's parents. They eventually divorced, and for a time Hand and his siblings were removed from the home and placed with his aunt. Davis informed the jury that Hand served in the United States Army and received an honorable discharge. The Magistrate Judge found that Dr. Davis provided the jury a comprehensive picture of Hand's upbringing and his family's dysfunction. In addition, Frank Haberfield testified in the penalty phase; Haberfield was Hand's friend and knew him from serving as a Boy Scout troop leader. Haberfield described Hand's efforts to organize the troop, and said that Hand took troop members on field trips. Haberfield never heard anything negative about Hand. Mr. Hand's son Robert testified about their good relationship, that he looked up to his father, and that Hand had pushed him to finish school. Robert said that Hand got involved in the Boy Scouts and organized the troop for Robert's benefit.

***48** Hand suggests that if the jury had heard directly from his mother, his siblings, or other family members about his upbringing, that testimony would have swayed the jury to impose life in prison instead of a death sentence. He notes that none of the actual records from Children's Services were admitted in evidence, and that his family members would have described the dismal climate of his childhood in much more detail than did Dr. Davis. Hand submitted evidence with his post-conviction petition that many of his friends would have testified that he was a generous person, and that he often bought gifts for younger family members when their parents were unable to do so. And he contends that his own sworn mitigation statement to the jury was unhelpful, as it focused entirely on the issue of whether he would be a "model inmate." He argues this assertion lacked credibility after the jury had convicted him of escape.

As the Supreme Court held in *Bobby v. Van Hook, supra,* this is not a case where Hand's attorneys "... failed to act while potentially powerful mitigating evidence stared them in the face." A decision not to overemphasize Hand's childhood difficulties comports with a strategy of attempting to personalize Hand to the jury, and of demonstrating not only that he could adequately respond to life in prison, but that he could also contribute to improving other inmates' lives. Hand must demonstrate that his counsel's decision to present this evidence through Dr. Davis, rather than through his mother or siblings, fell below an acceptable performance standard, and also that he was actually prejudiced by that decision. The Court concludes that he has not done so, and therefore this sub-claim is denied.

(C) Failure to present testimony about Hand's demeanor at trial . Hand alleges that when he testified at his trial, he was taking prescribed medications which influenced his demeanor and hampered his ability to clearly present his testimony. He suggests that the lack of evidence about these medications must have affected the jury's evaluation of his credibility. This issue was first raised as his sixth claim in his post-conviction petition. The Ohio Court of Appeals found this claim (as well as his fourth and eighth claims) barred by res judicata, because Hand did not offer admissible evidence that was outside of the trial record: "Rather, the record demonstrates the issues were cognizable and capable of review on direct appeal." *State v. Hand,* 2006–Ohio–2028 at ¶ 36. The Magistrate Judge

concluded that this claim is defaulted, and that Hand did not show cause to excuse the default.

Hand objects, arguing that the essence of this claim is that his attorneys failed to introduce evidence about the medications and their alleged negative effect on his demeanor and his ability to testify. As this claim would necessarily rely on evidence outside the trial record (records concerning the medications), he contends that he properly presented it in his post-conviction petition. Hand submitted an affidavit with that petition from a mitigation specialist, describing her conversation with one of Hand's jurors, who reported that Hand's testimony was "awful," that Hand seemed very nervous, and that he kept changing his story. (Apx. Vol. 10 at 380) Aside from the obvious hearsay problem, a juror's subjective impression of testimony offered at trial is inadmissible under Ohio's Evid. Rule 606(B), as the Ohio Court of Appeals held. Hand also submitted medical records from the time he was held in the Delaware County Jail before his trial, documenting administration of Buspar (for anxiety) and Trazadone (an anti-depressant). (*Id.* at 388–431) He argued that if his friends had been called as witnesses, they would have testified that he always had trouble "expressing himself" and was a "poor speaker." (Apx. Vol. 10 at 101) But Hand does not dispute the fact that all of this evidence was available at the time of trial. As the Ohio Court of Appeals held, the issue was cognizable and capable of review on direct appeal.

***49** In his Supplemental Report, the Magistrate Judge further concluded that even if the claim is not barred by res judicata, the claim should be rejected on the merits. Even if Dr. Davis had testified that Hand's medications, his anxiety, or his general "social ineptness" contributed to his difficulty in expressing himself, or if his friends had testified about that difficulty, it is sheer speculation to assume that any of that testimony would have altered the outcome. (Doc. 111 at 19–20) The Court agrees with this alternate conclusion. In order to demonstrate prejudice resulting from ineffective assistance, Hand must demonstrate a reasonable probability of a different result, not simply identify additional evidence that could have been presented, or testimony that other witnesses might have given. This sub-claim is therefore denied.

(D) Failure to present testimony about Hand's third wife. Hand contends in this sub-claim that his trial counsel did not introduce evidence about Hand's third wife, to whom he was married for several years. He contends that his third wife, Glenna, was alcoholic, abusive and abrasive, and he eventually divorced her. Hand claims he was prejudiced by the fact that the jury did not hear evidence about his one marriage that did not end in a murder. He did not raise this claim on direct appeal but included it in his post-conviction petition. Hand submitted affidavits from his sister, Sally Underwood, and his son, Robert, describing Glenna's abusive personality to support this claim, but the Ohio Court of Appeals found that he did not offer evidence outside the record. Despite that statement, the Magistrate Judge concluded that it was unclear if the state court actually applied res judicata to this sub-claim, noting that the state court also found that if res judicata did not bar review, the court would deny the claim on the merits: "Upon review, we find appellant has not demonstrated the trial outcome would have been different had his trial counsel decided to call the witnesses; rather, any such alleged prejudice would be speculative." *State v. Hand,* 2006–Ohio–2028 at ¶ 35. Since the court appeared to address the merits of the claim in some fashion, the Magistrate Judge concluded that it was not defaulted.

Hand testified at trial about how he met and married Glenna, and about their divorce some years later. He said that Glenna had a drinking problem, and that she was the one who insisted on a divorce over his objection. He testified that Glenna knew about his credit card scheme and his financial difficulties, and that she gave up some rights to his real estate in connection with their divorce. (Trial Trans. Vol. 19 at 3450–3455) The jury learned through Hand's own testimony that he did not conspire to murder Glenna in order to end their marriage. Hand also testified that Glenna was "very good" at raising his son Robert; yet Robert's post-conviction affidavit described Glenna as an abusive alcoholic. The Magistrate Judge concluded that it would be extremely speculative to conclude that testimony from Sally and Robert about Glenna's problems would have altered the jury's decision, especially because the affidavits Hand offered partially contradicted his own testimony.

***50** Hand objects, contending that evidence of Glenna's abuse was critical to demonstrate that Hand was capable of withstanding a difficult marriage without resorting to murder. But the state did not contend that Hand killed Jill to get out of a difficult marriage; it argued his primary motivation was to profit from her death and avoid his own financial difficulties. The Court agrees that Hand

has failed to show that his counsel was ineffective in not providing additional evidence about Glenna's problems and personality, which Hand himself described in his testimony, because he has not demonstrated a reasonable probability of a different outcome.

(E) Failure to develop an effective mitigation strategy and to present a penalty phase closing argument. Hand contends that his lawyers did not properly investigate and present mitigation evidence about his difficult childhood and his psychological profile. Instead, defense counsel framed their mitigation arguments around the strategy of presenting Hand as a likely model inmate. He contends this was woefully inadequate. He also contends that his counsel failed to argue residual doubt, and waived closing argument at the sentencing hearing, prejudicing his defense.

Hand raised this two-pronged claim on direct appeal, arguing that his lawyers had not spent enough time preparing for sentencing. The Ohio Supreme Court noted:

> ... the defense employed a mitigation specialist, an investigator, and a psychologist. Each of these individuals began working on Hand's case several months before the penalty phase. The defense reviewed Hand's military records, his school records, and his medical records prior to the penalty phase. Dr. Davis, the defense psychologist, testified that "one of the attorneys conducted extensive interviews of a variety of individuals who knew Mr. Hand and obtained background information." Thus, the record shows that the defense thoroughly prepared for the penalty phase of the trial.

State v. Hand, 107 Ohio St.3d at 411–412, 840 N.E.2d 151. The court also rejected Hand's assertion that his lawyers spent too little time on a mitigation investigation, because the record demonstrated that significant efforts had been made to gather records and interview witnesses. Hand failed to show what additional information his family might have provided to his lawyers at an earlier stage of the case that would have meaningfully assisted his defense. The Supreme Court also rejected his argument that his counsel's mitigation strategy amounted to ineffective assistance. The defense theory, that Hand would be a model prisoner and would have value in prison society, "... although unsuccessful, was coherent and fit into the testimony of the witnesses. Thus, counsel made a 'strategic trial decision' in presenting the defense theory of mitigation, and such decision 'cannot be the basis for an ineffectiveness claim.' " *Id.* at 413, 840 N.E.2d 151 (internal citations omitted).

In addition, the Supreme Court rejected Hand's argument (raised again here) that defense counsel was ineffective because he was unwilling to spend more time in front of the jury during the mitigation hearing. Counsel stated in his opening remarks that the evidence he intended to present "... won't be very long. We'll be done in a couple of hours. I don't want to delay this case more than it needs to be, so I've elected to tell you the things that I think you [ought] to think about now, rather than waiting until closing arguments." *Id.* Hand criticized his lawyer's statement that he was not "going to insult" the jury by arguing that Hand's childhood led him to commit the crimes, as "that would be intellectually dishonest.... What we will be telling you and are telling you is that imposing a death sentence on Bobby, you're going to be saying, he has nothing left to give; he has nothing of value; he's an empty box with nothing for anything." The court found that these remarks were "a means of maintaining the defense's credibility and focusing the jury's attention on the mitigating factors supporting a life sentence." *Id.* at 414, 840 N.E.2d 151. It rejected Hand's argument that his lawyers should have taken more time to present more witnesses, including individuals to testify about his military service, his school performance, or his placement with children's services during his childhood. As noted previously, Dr. Davis's testimony adequately presented all of this information to the jury; the choice not to present additional witnesses covering the same information did not rise to the level of constitutionally ineffective assistance, because Hand has not shown a reasonable probability that the outcome would have been affected.

***51** Finally, the Supreme Court rejected Hand's argument that his counsel was ineffective by his failure to make a mitigation closing argument. The court quoted at length from counsel's opening statements at sentencing, which summarized the mitigating evidence that would be presented, and urged the jury to "temper justice with mercy." The court held that counsel's choice did not fall below an objective standard of reasonableness, as it prevented the state from making a vigorous rebuttal argument to anything that defense counsel may have said in a closing summation. That fact strongly suggests that counsel made a strategic decision to include all of the

mitigation points in his opening statement. (See Trial Trans. Vol. 22 at 3849–3857) Furthermore, even if it was an unreasonable decision, Hand did not demonstrate that the result would have been different if his lawyer had given a closing argument. *State v. Hand,* 107 Ohio St.3d at 415–416, 840 N.E.2d 151.

The Magistrate Judge found that the Supreme Court's decision with respect to all of these mitigation arguments was not contrary to nor an unreasonable application of federal law. *Strickland* sets a high bar for a habeas petitioner to demonstrate ineffective assistance. Hand did not identify any specific evidence that the additional witnesses might have presented that would have been different from what the jury heard. The facts about his childhood, his Army service (which Hand also testified about in the guilt phase), his lack of criminal record, and his volunteer activities, were all placed before the jury through the testimony of the mitigation witnesses that were presented, particularly Dr. Davis. Counsel's opening statement summarized the mitigation evidence that would be presented, offered a coherent mitigation theory, and explicitly asked the jury to show mercy to Hand. The state did not present any testimony during mitigation, and only briefly cross-examined Hand's witnesses. This Court will not second-guess counsel's decision to forego a closing argument, thereby depriving the state of the opportunity for what likely would have been a forceful summation and reminder of the aggravating circumstances already found by the jury beyond a reasonable doubt. The Court notes that in his closing argument, the prosecutor did not dwell on the evidence supporting the aggravating circumstances, but argued that the mitigating evidence did not outweigh those circumstances. (Trial Trans. Vol. 22 at 3898–3904) A defense closing summation would have allowed the prosecutor to revisit the evidence surrounding the murders in great detail. As the Ohio Supreme Court concluded, Hand failed to show a reasonable probability that he would have received a different sentence if a closing argument had been made.

Finally, Hand argues that his counsel should have argued residual doubt during the mitigation hearing. The Ohio Supreme Court rejected this contention, citing what the court described as a "settled issue" of Ohio law that "residual or lingering doubt as to the defendant's guilt or innocence is not a factor relevant to the imposition of the death sentence because it has nothing to do with the nature and circumstances of the offense or the history, character, and background of the offender." *State v. Hand,* 107 Ohio St.3d at 417, 840 N.E.2d 151, citing *State v. McGuire,* 80 Ohio St.3d 390, 403, 686 N.E.2d 1112 (1997). The Magistrate Judge notes that the United States Supreme Court has held that the Constitution does not require or forbid the presentation of a residual doubt argument, citing *Franklin v. Lynaugh,* 487 U.S. 164, 173, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988). The Magistrate Judge therefore concluded that the Ohio Supreme Court's decision on this sub-claim was not contrary to clearly established federal law.

***52** In his objections, Hand argues that the Magistrate Judge incorrectly analyzed this sub-claim, focusing only on the number of witnesses instead of the overall mitigation strategy and presentation of evidence. He contends that the Magistrate Judge did not address the evidence submitted with his post-conviction petition or his argument that counsel's mitigation strategy was unreasonable in view of his conviction on the escape charge. He notes his trial lasted for several weeks and involved some 90 witnesses, yet the mitigation hearing spanned a single morning. He suggests that if his lawyers concluded that evidence about his upbringing and childhood was truly irrelevant, they would not have presented Dr. Davis' testimony about those issues in what Hand asserts was an extremely truncated fashion. He further contends that the failure to give a closing argument, standing alone, amounts to a total abandonment of defense counsel's duties.

Hand cites a number of cases in which habeas relief was granted based on counsel's ineffective presentation of mitigation evidence and/or arguments. In *Carter v. Bell,* 218 F.3d 581 (6th Cir.2000), the court found that a closing argument spanning six transcript pages and that was primarily about defense counsel, was insufficient. In *Dobbs v. Turpin,* 142 F.3d 1383 (11th Cir.1998), counsel's failure to ask for mercy or for life in prison was enough to demonstrate ineffective assistance. But the facts of those cases distinguish them from the facts at issue here. In *Carter,* defense counsel did almost nothing to meaningfully investigate potential mitigation evidence. In his habeas case, Carter adduced evidence showing that his childhood was extremely violent and unstable. He had been beaten as an infant; his mother was an alcoholic and would use her welfare checks to buy liquor, letting her children go hungry; and he had very limited schooling and a low to borderline IQ. A corrections

department physician had recommended that he be considered for psychiatric hospitalization, and he was diagnosed as schizophrenic in 1991. Another psychologist found symptoms consistent with paranoid schizophrenia or an organic delusional disorder. Carter's jury heard none of this evidence, because his lawyers relied entirely on residual doubt of guilt during his sentencing hearing. Given the utter lack of any meaningful investigation and the quantum of evidence that could have been presented to the jury, the Sixth Circuit found that Carter received ineffective assistance and granted the conditional writ, requiring the state to conduct a new penalty hearing.

And in *Dobbs v. Turpin,* defense counsel did not investigate Dobbs' background despite admitting to the jury in closing argument that he knew many people from Dobbs' hometown. Counsel believed that the controlling law at that time prohibited the admission of mitigating evidence about Dobbs' childhood at the penalty phase. He also believed that any helpful evidence offered during the penalty hearing would simply allow the state to impeach Dobbs with his adult criminal convictions. Instead of giving a mitigation argument to the jury, he presented a "lecture" about the unfairness of the death penalty; he told the jury that the U.S. Supreme Court had struck down Georgia's previous death penalty statute and would likely do the same with the current version. He also minimized the jury's duty to meaningfully consider a proper sentence, telling the jury of his personal belief that no executions were likely to occur in Georgia. The Eleventh Circuit affirmed the district court's grant of the conditional writ, finding that Dobbs was entitled to a new penalty hearing.

***53** Here, Hand's counsel did conduct an investigation, and did present significant evidence about Hand's background and his family history. Hand suggests that Dr. Davis' testimony was "extremely truncated" and did not fully address Hand's mental health. He argues that counsel's failure to give a closing argument deprived him of an opportunity to ask the jury to render mercy at the very end of the hearing, which Hand asserts amounts to a total abandonment of counsel's duties. The Court disagrees. The Ohio Supreme Court reviewed at some length the mitigation arguments and evidence that were presented at Hand's trial; it noted that counsel specifically asked the jury to spare his life and to show him mercy, and he emphasized Hand's value and his ability to contribute to prison life and to his son's life. Counsel's decision to present mitigation evidence in the fashion chosen, and to waive a closing argument, were legitimate tactical decisions that the Supreme Court refused to second guess.

This Court concludes that the Supreme Court's decision was not contrary to, nor an unreasonable application, of clearly established federal law. This sub-claim is therefore denied.

(F) Failure to object to the introduction of guilt-phase evidence in the penalty phase hearing. At the close of the sentencing hearing, the state moved to admit its exhibits from the guilt phase of the trial, except for those pertaining to the escape charge. Hand's counsel did not object. Hand contends that many of the exhibits were unduly inflammatory, including gruesome photographs of the victims, bullet fragments, and autopsy reports. He argues that these exhibits were irrelevant to the jury's sentencing determination. This claim was raised and rejected in Hand's direct appeal. The Ohio Supreme Court found that Hand did not specifically identify the exhibits that he believed had prejudiced him. And it concluded that counsel was not ineffective by failing to object because an Ohio statute, R.C. 2929.03(d)(1), specifically permits the reintroduction of guilt-phase evidence at sentencing. *State v. Hand,* 107 Ohio St.3d at 415, 840 N.E.2d 151.

The Magistrate Judge concluded that any error in the admission of these exhibits was an error of state procedural or evidentiary law, and thus not cognizable in this habeas proceeding. He further notes that while R.C. 2929.03 permits the introduction of this evidence, the statute does not relieve the trial court of its duty to determine the relevancy of any evidence admitted at the sentencing hearing. In *State v. Gumm,* 73 Ohio St.3d 413, 653 N.E.2d 253 (1994) (syllabus), the court identified five general categories of potentially relevant guilt phase evidence that are admissible in the penalty hearing pursuant to the statute:

> (1) any evidence raised at trial that is relevant to the aggravating circumstances specified in the indictment of which the defendant was found guilty, (2) any other testimony or evidence relevant to the nature and circumstances of those aggravating circumstances, (3) evidence rebutting the existence of any statutorily defined or other mitigating factors

> first asserted by the defendant, (4) the presentence investigation report, and (5) the mental examination report.

***54** Here, the trial court did not make a separate ruling on each guilt-phase exhibit that was admitted at Hand's sentencing hearing. Even if this failure amounts to an error under the Ohio statute, it was not a prejudicial error that affected the outcome of the sentencing hearing under Ohio law. See, e.g., *State v. Getsy,* 84 Ohio St.3d 180, 201, 702 N.E.2d 866 (1998); *State v. LaMar,* 95 Ohio St.3d 181, 203, 767 N.E.2d 166 (2002), finding no error in admission (over defendant's objection) of victim photographs and demonstrative exhibits depicting the weapons used during the murders. The Magistrate Judge also cited *Cowans v. Bagley,* 624 F.Supp.2d 709, 811–814 (S.D.Ohio 2008), *aff'd* 693 F.3d 241 (6th Cir.2011), where the district court reached a similar conclusion. [8]

Hand objects, contending that this sub-claim does not arise solely under state law, but involves a federal constitutional claim of ineffective assistance of counsel. But assuming that Hand's trial counsel should have objected to some of the guilt-phase exhibits, or to the trial court's failure to determine the relevance of each exhibit prior to its admission, the Ohio Supreme Court found that Hand failed to identify any particular exhibit that was irrelevant to the jury's consideration of his sentence. In pleadings in this case, he identifies victim photographs, bullets and bullet fragments, the autopsy reports, and a tooth found in Hand's yard, as unduly prejudicial. (Doc. 32 at 71–73) Some of this evidence was undoubtedly graphic, such as photographs of Jill Hand or portions of the autopsy reports. However, the death penalty specifications in the indictment included use of a firearm, and an aggravated murder committed during a course of conduct or while attempting to kill two or more people. The cited exhibits would be relevant to the use of a firearm, as the photographs and autopsy reports would illustrate and describe entrance and exit wounds, and the manner of death from use of a firearm. The autopsy reports from all three of Hand's wives would be relevant to the course of conduct specification. Even if it was error for trial counsel not to object to the admission in toto of this evidence, this Court cannot conclude that the error was so egregious that Hand's right to fundamental fairness guaranteed by the due process clause was violated. He has not demonstrated actual prejudice as a result. This sub-claim is therefore denied.

(F) Cumulative error in mitigation phase. Hand contends that the cumulative impact of these errors prejudiced the result of his sentencing hearing, thereby violating his constitutional right to the effective assistance of counsel. Hand did not raise this cumulative error claim on direct appeal, and the Magistrate Judge concluded that it was defaulted. Moreover, as with his cumulative error claim raised in Ground Four with respect to the guilt phase of the trial, the Supreme Court has never recognized a cumulative error claim. Since none of the alleged errors individually warrant relief, the Magistrate Judge recommended that this cumulative error claim also be rejected.

***55** Hand objects, arguing that he raised this claim in his post-conviction petition. That is true, and the Ohio Court of Appeals rejected it based on its analysis and disposition of the errors he raised in his petition. *State v. Hand,* 2006–Ohio–2028 at ¶¶ 50–51. Even if this sub-claim is not defaulted to the extent it was raised in post-conviction, this Court agrees that Hand has not shown that the cumulative effect of his allegations of ineffective assistance of counsel at the mitigation stage resulted in a fundamentally unfair trial. The Court has rejected each of his claims, and also rejects his contention that the cumulative impact of these errors actually prejudiced him. As noted previously, in *Sheppard v. Bagley,* 657 F.3d 338, 348 (6th Cir.2011), the Sixth Circuit held that a cumulative error claim is not cognizable in federal habeas proceedings post-AEDPA.

This sub-claim and each of the sub-claims raised in Ground Five are therefore denied.

Ground Six

In this ground for relief, Hand contends that the trial court erred in failing to conduct an adequate colloquy to determine whether any prospective jurors were biased by exposure to pretrial publicity. This claim is related to one of the sub-claims raised in Ground Four, alleging ineffective assistance of trial counsel regarding the inadequate voir dire of Jurors Ray and Finamore (who stated in their questionnaires that they had seen some pretrial publicity about the case). As was discussed with respect to that sub-claim, the trial court asked each of the small group of potential jurors during voir dire if any of them had anything different to add to their

questionnaire responses. Jurors Ray and Finamore, along with all other potential jurors, said they did not. They also responded negatively to the court's question whether they had read, heard or seen anything that caused them to form an opinion about Hand's guilt or innocence. Hand contends that the trial court erred in failing to conduct a more detailed inquiry of the entire venire about exposure to pretrial publicity.

Hand did not raise this ground for relief in his direct appeal. He raised the claim in his April 2006 application to reopen (Apx. Vol. 9 at 36–38), which the Ohio Supreme Court summarily denied. (*Id.* at 43) He also presented it in his post-conviction petition, supported by copies of the newspaper articles about the murders and his upcoming trial. The Ohio Court of Appeals found the claim barred by res judicata:

> ... the issue could be determined by reviewing the voir dire transcript. The record clearly demonstrates the trial court discussed the pretrial publicity during voir dire and discussed the same with the jurors. Appellant's attachment of exhibits demonstrating pre-trial publicity to the post-conviction relief petition, though admittedly outside the original trial record, merely supplements appellant's argument which was capable of review on direct appeal on the then extant record.

***56** *State v. Hand,* 2006–Ohio–2028 at ¶ 23.

The Magistrate Judge concluded that this claim is procedurally defaulted because the state court of appeals expressly relied on the res judicata doctrine. As the Magistrate Judge observed, that doctrine bars Hand from raising an issue that was raised **or could have been raised** on direct appeal. See *Williams v. Bagley,* 380 F.3d 932, 967 (6th Cir.2004) (citing *State v. Perry,* 10 Ohio St.2d 175, 226 N.E.2d 104 (Ohio 1967)). The issue of the venire's exposure to pretrial publicity could have been raised on direct appeal based on the jury questionnaires and the many references to and questions about that publicity in the voir dire transcript. The state court specifically relied on the doctrine in rejecting his claim. A petitioner cannot avoid the res judicata bar by simply attaching additional material to a post-conviction petition; that would permit easy circumvention of the rule. The Magistrate Judge also concluded that Hand had not established cause for the procedural default.

Hand objects, citing the court of appeals' acknowledgment that the newspaper articles he submitted with his post-conviction petition were "admittedly outside the original trial transcript." He contends that the court of appeals erred in applying res judicata, and that this Court should review this claim on the merits. Hand notes that ten out of the twelve jurors who were eventually seated as trial jurors reported in their questionnaires that they had seen some news coverage of the murders. The trial court did not question any of these jurors individually about the coverage they had seen or heard.

The newspaper articles submitted with Hand's post-conviction petition were published primarily in two newspapers in the Columbus area, beginning shortly after Jill's murder and through the time of Hand's May 2003 trial. (Apx. Vol. 10 at 113–204) On the day jury selection began, the Columbus Dispatch published an article quoting inflammatory statements by Jeff Ray, Welch's cousin, who was asked to comment about Hand's escape charges. Ray reportedly said: "Certainly an innocent man would have just sat his time out. I think his actions speak for him. I'll just put this in God's hands. He'll have to answer to God." [9] Hand argues that the voir dire transcript alone would not reveal the extent or the content of this pretrial publicity, and therefore the state court erred in applying res judicata to this sub-claim. He cites *Hill v. Mitchell,* 400 F.3d 308 (6th Cir.2005), where the Sixth Circuit held that the state court misapplied Ohio's res judicata bar with respect to a claim of ineffective assistance of counsel, based on the contention that his trial counsel first contacted his mitigation psychologist just before the psychologist was scheduled to testify at the sentencing hearing. This late contact did not permit sufficient time to fully prepare his testimony (which addressed the petitioner's drug addiction and "cocaine psychosis" when he committed a murder). The post-conviction state appellate court concluded: "While we are puzzled by counsel's seeming inattention [to the psychologist's preparation], Hill's claim is res judicata because it could have been raised on direct appeal." *Id.* at 314. The Sixth Circuit disagreed, and affirmed the district court's conclusion that because Hill presented

evidence outside the trial record—the affidavit of his mitigation psychologist attesting to the late contact and the manner in which it hampered his testimony—the state court erroneously applied res judicata, and the claim was not defaulted.

***57** Hand argues the same result should apply here to his claim that the trial court failed to further voir dire each juror about the publicity. This Court disagrees. The written questionnaires that were completed by each potential juror before voir dire included a series of questions about media publicity about the case. That section began by stating: "This case received a significant amount of publicity in the media." It described the state's allegations, and quoted remarks made in some news reports, such as "three wives murdered", "murder for hire plot," and other similar references. The jurors were asked to describe any media coverage they may have seen, how often they had seen it, and what impressions it left in their minds. They were also asked if media exposure had led them to think that Hand was guilty of the crimes charged, and whether they would be able to put all such information aside and base a decision solely on the evidence and the court's instructions. (See Apx. Vol. 14 at 1–12, the juror questionnaire completed by Juror No. 481.)

As discussed above, the trial court conducted voir dire in small groups of seven to nine jurors, and the trial court's method of examining these groups was basically repeated each time. After initial questioning about the length of the trial (and excusing jurors from the group for that reason), the trial court asked the remaining group members if they had any different responses to anything they put in the questionnaires. The court reminded each group that Hand was presumed innocent unless and until the jury would conclude that he was guilty beyond a reasonable doubt based on evidence presented at trial, and "not on the basis of what some journalist may have said. I'm sure none of you would want to make significant life-changing decisions in your life based upon some news account, and it's no different here. Is there anything that you may have read, heard, seen that caused you to form an opinion as to the Defendant's guilt or innocence that you could not put aside? Anybody? ... Are you all able to put aside anything you saw, heard, read and decide this case solely on evidence presented within the walls of this courtroom?" (Trial Trans. Vol. 4 at 166–167) [10] Clearly the issue of pre-trial publicity was directly addressed by the trial court with each group of jurors. This claim should have been raised on direct appeal.

Even if this claim is not defaulted, however, Hand has not shown that his constitutional rights were violated by the trial court's questioning of the venire. A criminal defendant is constitutionally entitled to an impartial jury, and

> ... voir dire is designed to protect [this right] by exposing possible biases, both known and unknown, on the part of potential jurors.... [T]he necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.... [W]hen a juror's impartiality is at issue, the relevant question is did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed.

***58** *Dennis v. Mitchell,* 354 F.3d 511, 520 (6th Cir.2003) (internal citations and quotations omitted). Hand admits with respect to sub-claim (B) of Ground Four that he is not claiming that his jury lacked impartiality; nevertheless, he argues here that the trial court should have questioned each juror more carefully to flush out any potential bias based on exposure to pretrial publicity. The record shows that the trial court specifically asked each juror, within each of the small groups questioned, if each of them were able to set aside anything that they may have read or heard about the case, and to reach a verdict solely upon the evidence at trial. All jurors responded that they could do so.

The Court concludes that there was no error in the trial court's voir dire that violated Hand's right to an impartial jury or to a fundamentally fair trial. If not procedurally defaulted, this ground for relief is denied.

Ground Seven

For his seventh ground for relief, Hand contends that the joinder for trial of the escape charge with Hand's aggravated murder charges violated his due process rights and deprived him of a fair trial. The escape charge

was brought by separate indictment almost ten months after his original indictment, and the trial court denied his motion to sever this charge from the rest of the charges. He raised this claim on direct appeal in his third proposition of law. The Ohio Supreme Court rejected it, finding that his participation in the escape attempt was evidence of flight, and therefore admissible to show consciousness of guilt. It rejected Hand's argument that the lapse of time between the murders and the escape attempt (approximately nine months) warranted separate trials. The relevance and admissibility of evidence of flight do not depend upon the time between the offense and the attempted flight, as any flight prior to a conviction may give rise to the same inference of guilt. The Supreme Court also found that there was ample evidence to support Hand's convictions of the murders and of the escape attempt, concluding that the state did not improperly "... attempt to prove one case simply by questionable evidence of other offenses." *State v. Hand,* 107 Ohio St.3d at 402, 840 N.E.2d 151, quoting *State v. Jamison,* 49 Ohio St.3d 182, 187, 552 N.E.2d 180 (Ohio 1990).

The Magistrate Judge concluded that Hand failed to sufficiently "federalize" his improper joinder claim on direct appeal because he couched his argument exclusively in state law, rendering it unreviewable by this Court. Hand objects, noting that he specifically argued that joinder of the offenses "was unconstitutional" and cited the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments. The Court notes that the segment of Hand's direct appeal brief on this issue spanned eight pages, and argued that joinder of the offenses was improper under Ohio Criminal Rules and statutes. He also argued that he was prejudiced by the failure to sever, again citing Ohio criminal and evidentiary rules. The last sentence of the conclusion of this section asserted that joinder "... was unconstitutional and the convictions and sentences for all charges must be reversed. U.S. Const. Amends. V, VI, VIII, IX, XIV; Ohio Const. Art I, 1, 2, 5, 9, 10, 16, 20." (Apx. Vol. 6 at 293) Unlike Hand's sub-claim (J) in the fourth ground for relief discussed above, where Hand's proposition of law included an express constitutional argument and a reference to specific amendments, Proposition of Law No. 3 in Hand's direct appeal did not allude to any specific constitutional deprivation, but simply contended it was "constitutional error." (*Id.* at 246, 552 N.E.2d 180)

***59** Hand also suggests that he sufficiently federalized this claim because several of the Ohio cases he cited in the brief analyzed the issue from a constitutional perspective, including *State v. LaMar,* 95 Ohio St.3d 181, 767 N.E.2d 166 (Ohio 2002), *State v. Coley,* 93 Ohio St.3d 253, 754 N.E.2d 1129 (2001), and *State v. Bey,* 85 Ohio St.3d 487, 709 N.E.2d 484 (1999). The Court notes that Hand cited these cases because they were distinguishable from his own. *LaMar* was a prosecution for several counts of aggravated murder against an Ohio inmate, stemming from the Lucasville riot. The defendant argued that the trial court should have severed one of the counts because the facts and circumstances differed substantially from the facts surrounding the other eight counts (the murder in questioned happened two days after the riot was quelled). The Court has reviewed the Ohio Supreme Court's opinion rejecting LaMar's appeal, and cannot glean any "constitutional analysis" undertaken by that court. Rather, the court analyzed LaMar's claim under Ohio Crim. R. 8, permitting joinder of offenses that "are of the same or similar character," or the same act or transaction, or part of a course of conduct. Severance may be granted if a defendant establishes prejudice resulting from joinder, and appellate review of a trial court's decision on that issue is for abuse of discretion. The same is true with respect to *State v. Coley,* 93 Ohio St.3d 253, 259–261, 754 N.E.2d 1129 (2001), which rejected an improper joinder claim by discussing cases permitting joinder when similar "other-acts" evidence is introduced, and relying exclusively on Ohio law.

However, even assuming that Hand's conclusory citation to federal constitutional amendments was sufficient to "federalize" his claim, Hand has not articulated how the Ohio Supreme Court's decision runs afoul of Section 2254(d). In his habeas petition, he argued that joinder was improper because it greatly prejudiced his defense on the murder charges, arguing that the jury "was more likely to convict Hand for aggravated murder due to its belief that he participated in the escape plot." (Doc. 11 at ¶ 116) And he suggests that joinder created an undue prejudicial risk that the jury convicted him of murder because he had a propensity to commit crimes, rather than because the evidence established his guilt beyond a reasonable doubt, thereby depriving him of a fair trial. The only federal case cited in his petition is *United States v. Lane,* 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986), which involved father-and-son defendants federally indicted on several counts of mail fraud and conspiracy stemming from an arson scheme. They had unsuccessfully moved to sever their cases,

arguing that a joint trial would violate Fed. R.Crim. Proc. 8(b). The Fifth Circuit vacated their convictions, concluding that misjoinder under the Rule is prejudicial per se. The Supreme Court reversed, holding that harmless error review should apply to misjoinder claims, and that Rule 8's standards are not of constitutional magnitude standing alone. Rather, misjoinder of defendants "would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *Id.* at 446, n. 8. And that would occur only if misjoinder had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 449 (internal citation omitted). The Supreme Court found that misjoinder in that case was harmless, because any error in refusing to sever the cases did not have a constitutionally improper substantial influence on the verdict.

***60** In *Davis v. Coyle,* 475 F.3d 761 (6th Cir.2007), the Sixth Circuit applied *Lane* to find that joinder for trial of aggravated murder and possession of a firearm under disability charges did not violate petitioner's constitutional rights, thus did not warrant habeas relief. The petitioner argued that joinder of the offenses would result in the jury learning about his prior homicide conviction, which was admissible only to prove that he could not legally possess a firearm. The trial court's denial of his motion led to his decision to waive a jury and opt for a trial before a three-judge panel. The Sixth Circuit agreed that while a risk of prejudice clearly existed, joinder of the offenses did not result in an unfair trial or a deprivation of petitioner's due process rights. The court also noted that it would not substitute its own judgment for that of the state court regarding the appropriate application of a state criminal rule, even though another method "may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Id.* at 778 (internal citation omitted).

Applying these standards, this Court cannot conclude that joinder of the escape charge had a "substantial and injurious effect" on Hand's trial or deprived him of his due process rights. As the Ohio Supreme Court found, the evidence concerning his participation in the escape scheme, if accepted by the jury, could properly be considered to reflect consciousness of guilt. The Ohio Supreme Court's decision was not contrary to the standards discussed in *United States v. Lane,* or in *Davis v. Coyle,* and did not unreasonably apply any clearly established federal law. This ground for relief is therefore denied.

Ground Eight

Hand contends there was insufficient evidence introduced at his trial to support his conviction for escape. Hand raised this claim on direct appeal, and it was rejected on the merits by the Ohio Supreme Court, applying the standards set forth in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), as adopted in *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991): "[T]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Hand,* 107 Ohio St.3d at 402–403, 840 N.E.2d 151. Moreover, as the Magistrate Judge noted, even if the court concludes that a "... rational trier of fact could not have found a petitioner guilty beyond a reasonable doubt, on habeas review, we must still defer to the state appellate court's sufficiency determination as long as it is not unreasonable." *Brown v. Konteh,* 567 F.3d 191, 205 (6th Cir.2009).

The Ohio Supreme Court cited Beverly's trial testimony that Hand served as a lookout, gave him advice on how to cut cell bars, and came up with the alternate escape plan. The court also cited circumstantial evidence, including the torn-up teeshirt material and a pencil that was found in his cell. A county detective testified that these materials were "consistent to what inmates do to hide things ... so they can be easily accessed by pulling on this after tying something to it, i.e., saw blades." Moreover, even if Hand merely acted as Beverly's lookout, the Court concluded that he would be guilty as a accomplice. *Id.* at 403.

***61** The Magistrate Judge found that this claim lacks merit, reciting Beverly's trial testimony concerning specific details of the escape attempt. Kenneth Grimes testified that he overheard Beverly and Hand talking one evening when Hand presented his alternate escape plan (to go through the front of the cell). Grimes admitted that when he first gave a statement to police after the escape plan was detected, he did not mention Hand's involvement. Terry Neal testified that he knew about Beverly's involvement but he did not believe that Hand was involved, and Neal told investigators about his belief. Dennis Boster admitted that he was involved in the plan (he pled guilty to the charge), but he testified that Hand was not involved, that he never heard Hand say he wanted to be involved, and

that Hand did not act as a lookout for Beverly. During Boster's own plea hearing, he told the court that Hand had nothing to do with the escape attempt. Hand testified in his own defense that he tried to stay away from Beverly, and told Beverly he did not want to involve himself with an escape. He said that all of the inmates used torn tee shirts as wash rags or towels, and that he used strips of shirts to hang his commissary purchases over his bed in order to keep ants out. The Magistrate Judge notes that while some of this testimony supported Hand's claim of non-involvement, Beverly and Grimes clearly implicated him in the scheme. The jury was under no obligation to accept the favorable testimony (or, in Neal's case, his somewhat equivocal statement that he did not "believe" that Hand was involved), and was entitled to give more weight to the inculpatory testimony and evidence that the state presented. That testimony and evidence was more than sufficient to lead a rational juror to conclude beyond a reasonable doubt that Hand was guilty.

In his objections, Hand contends that the two witnesses against him, Beverly and Grimes, lacked all credibility, and that the Magistrate Judge ignored "overwhelming evidence" of his innocence. (Doc. 117 at 38) He notes that when Beverly's escape plan was discovered and he was first questioned by the police on November 26, 2002, Beverly did not tell the authorities that Hand was involved. Beverly was interviewed the next day by a detective, and it was the detective who asked Beverly if Hand was involved. (Trial Trans. Vol. 16 at 3002) This fact was stressed by Hand's counsel during his cross-examination of Beverly; he also questioned Beverly about the relatively low sentence he ultimately received for the escape attempt. (*Id.* at 2998–3003) Similarly, Grimes admitted that when he was first questioned by the police, he said that Beverly and two inmates from Cell E–6 were involved in the plot; Hand was housed in Cell E–7. Beverly and the two inmates who kept watch were, according to Grimes' initial statement, the "guys on the escape." (Trial Trans. Vol. 17 at 3045) This subject was fully explored by Hand's trial counsel during Grimes' cross-examination; Grimes was also questioned extensively about his own criminal record and the favorable sentence he received after he gave his statements to the detectives. (*Id.* at 3036–3060)

***62** Hand's claim essentially rests on a challenge to the jury's evaluation of the credibility of these witnesses. This is an insufficient basis upon which the Court could grant habeas relief. Hand's trial counsel cross-examined both of these witnesses, pointing out inconsistencies in their stories and their potential biases that Hand relies on as the "overwhelming evidence" of his innocence. For these reasons, the Court agrees with the Magistrate Judge's recommendation, and denies Ground Eight of Hand's petition.

Ground Nine

In his ninth ground for relief, Hand raises a number of constitutional challenges to the trial court's jury instructions.

(A) Complicity instruction. At the close of the evidence and over Hand's objections, the trial court granted the state's motion to amend the bill of particulars to charge Hand with complicity in Jill's death. The pre-trial bill of particulars regarding Count One alleged that Hand "... did, purposefully and with prior calculation and design, cause the death of Jill J. Hand by means of a firearm." The amended bill alleged that Hand killed Jill "by firing that weapon himself, or by soliciting or procuring Walter 'Lonnie' Welch to commit the offense, and in either case, the defendant acted purposely and with prior calculation and design." *State v. Hand,* 107 Ohio St.3d at 403–404, 840 N.E.2d 151. Hand also objected to the trial court's intent to instruct the jury on complicity to commit murder, which the trial court overruled.

Hand raised both the amended bill of particulars and the complicity instruction objections on direct appeal as his fifth proposition of law. The Ohio Supreme Court rejected his claims by citing Ohio Crim. R. 7(D), which states in relevant part: "The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged." The Supreme Court held that the amendment did not run afoul of this Rule. It also rejected Hand's argument that the trial court did not give him proper notice that it would instruct the jury on complicity. The court cited R.C. 2923.03(F), which states that a complicity instruction may be given "even when the charge is drawn in terms of the principal offense." The statute itself clearly provides any defendant with adequate notice that complicity may be an issue submitted to the jury, citing Ohio case law that in turn relied on *Hill v. Perini,* 788 F.2d 406 (6th Cir.1986). In that case, the Sixth Circuit held: "... this

court has expressly acknowledged that a defendant may be indicted for the commission of a substantive crime as a principal offender and convicted of aiding and abetting its commission, although not named in the indictment as an aider and abettor, without violating federal due process. *Stone v. Wingo,* 416 F.2d 857 (6th Cir.1969)." *Hill,* 788 F.2d at 407–408.

***63** The Ohio Supreme Court also found that Hand failed to demonstrate that the amended bill of particulars caused him prejudice or hampered his defense. Hand consistently denied any involvement in Jill's murder, and he claimed that he shot Welch in self-defense. His defense theories would not have changed even if the state had originally alleged both principal and complicitor liability in the first bill of particulars. Hand did not identify any new evidence or any new arguments he would have raised if the amendment had been sought prior to or earlier in his trial. And he did not seek a continuance from the trial court after it granted the state's motion to amend, which he could have done if he truly required additional time to prepare a defense to the complicity charge. The court ultimately concluded that Hand was not misled or prejudiced by the amended bill of particulars, and that there was no error in instructing the jury on complicity.

The Magistrate Judge concluded this sub-claim lacks merit, observing that Hand has not explained how he would have defended himself differently if the bill of particulars had alleged complicity from the start. The Magistrate Judge also cites *Hill v. Perini,* holding that a complicity conviction (or for aiding and abetting a crime) does not violate due process even though the indictment does not accuse a defendant of complicity or aiding and abetting liability. Hand objects, arguing that broadening the bill of particulars unconstitutionally broadened the indictment.

For the reasons amply addressed by the Ohio Supreme Court and by the Magistrate Judge, Hand's argument is rejected. Hand was originally charged with Jill's murder, committed with prior calculation and design by use of a gun. The amended bill charged him with the same crime, murder with prior calculation and design by use of a gun. Whether he fired the gun himself, or hired Welch to fire the gun, does not change or broaden that crime in a manner that violated any of Hand's constitutional rights. As the Sixth Circuit long ago observed, "... a variance [in an indictment] is not material unless it misleads the accused to his prejudice in making his defense, or may expose him to the danger of being again put in jeopardy for the same offense." *Stone v. Wingo,* 416 F.2d 857, 864 (6th Cir.1969). Moreover, Hand has not identified how the purported lack of notice prejudiced his defense, and he failed to seek a continuance after the amendment was granted. Hand's jury was properly instructed on complicity. The Ohio Supreme Court's decision on this issue is not contrary to or an unreasonable application of established federal law. This sub-claim is therefore denied.

(B) Course-of-conduct narrowing instruction. Hand was charged with a course-of-conduct death penalty specification for the aggravated murders of Jill Hand and of Lonnie Welch. Hand alleges in his petition that the instruction on the course of conduct specification that the trial court gave to his jury "... was unconstitutionally vague, and it failed to adequately achieve the genuine narrowing function for death eligibility factors mandated by the Eighth and Fourteenth Amendments." (Doc. 11 at ¶ 133) Hand did not object to the instruction at trial. Hand raised this claim on direct appeal, which the Supreme Court reviewed only for plain error and found none. The court enforced Ohio's contemporaneous objection rule, and as the Magistrate Judge noted, that alone is an adequate and independent state ground for procedural default of this claim. See *Biros v. Bagley,* 422 F.3d 379, 387 (6th Cir.2005).

***64** However, as the Magistrate Judge further noted, the Supreme Court also addressed the substantive issue of the course of conduct specification of which Hand was convicted in light of *State v. Sapp,* 105 Ohio St.3d 104, 822 N.E.2d 1239 (2004), which had been decided after the briefing in Hand's appeal was complete. *Sapp* discussed the quantum of evidence the state must produce in order to support a conviction on the course-of-conduct statutory aggravating factor. Applying *Sapp* to Hand's contentions, the Supreme Court held that the state is required to:

> ... establish some factual link between the aggravated murder with which the defendant is charged and the other murders or attempted murders that are alleged to make up the course of conduct .... [t]he trier of fact must discern some connection, common scheme, or some pattern or psychological threat that ties

> [the offenses] together. That factual link might be one of time, location, murder weapon, or cause of death.... [W]hen two or more offenses are alleged to constitute a course of conduct under R.C. 2929.04(A)(5), all the circumstances of the offenses must be taken into account.

State v. Hand, 107 Ohio St.3d at 405–406, 840 N.E.2d 151 (internal citations and quotations omitted). The court concluded that the facts adduced at Hand's trial about the murders of Jill and Welch satisfied this criteria, because the murders were related by time, place, and motive. On that basis, the court rejected Hand's contention that the jury instructions did not clearly specify that only Jill and Welch were the subject of the course-of-conduct specifications. Those specifications accompanied the only two murder counts in the indictment, one for Jill and one for Welch; there were no murder charges brought against Hand for the murders of Donna or Lori. The court found no plain error because the jury could not have been misled about the specific charges to which the specification applied.

Hand's habeas petition argues that there is little state law guidance on what constitutes a "course of conduct" for purposes of the Ohio specification. He observes that his trial attorneys could not offer a definition of "course of conduct" when asked to do so by the trial court. (Trial Trans. Vol. 19 at 3308) The Court notes that this exchange occurred during the hearing on Hand's Rule 29 motion, in which he sought dismissal of the course of conduct specifications. The trial court stated "... I'm not sure there is a definition for course of conduct, and I'd like counsel to find me the definition of course of conduct." Hand's counsel, Mr. Cline, responded: "We've tried." After this exchange, the trial court went on to conclude:

> In any event, the evidence would show, of course, there are two killings which took place based upon reasonable inference. The jury certainly could decide that killing of two different people involved a course of conduct, especially since there's evidence of some planning that took place in order for that to occur. So we would deny Rule 29 on that specific issue.

***65** (Trial Trans. Vol. 19 at 3308–3309) The trial court's observation about the absence of a specific legal definition did not substantively affect the court's conclusion that there was sufficient evidence to submit the issue to the jury, as the transcript reflects.

Hand's petition cites the dissenting opinion in *State v. Scott,* 101 Ohio St.3d 31, 800 N.E.2d 1133 (2004). In that case, however, the Ohio Supreme Court affirmed a jury's verdict on a course of conduct death specification for two murders that appeared to be unrelated, occurred 19 days apart, and involved two unrelated individuals. The defendant in that case shot a man (Green) who had called him "bitch" while they were talking on the street, and afterwards the defendant bragged about the killing to others. A short time later, defendant told a friend that he wanted to test drive a car and kill the owner during the drive. About a week after that, defendant arranged to test drive a car and then shot the owner (Stoffer, who was sitting in the front seat) in the head. He was indicted (among other charges) for Stoffer's aggravated murder with a course of conduct death penalty specification; the jury returned guilty verdicts and imposed the death penalty. On appeal, he argued that there was insufficient evidence introduced by the state to prove a nexus between the two murders, contending that he had "spontaneously killed Green without robbing him, but he planned to kill Stoffer and take his vehicle." *Id.* at 36, 800 N.E.2d 1133. The Supreme Court rejected his argument, holding that the specification applies to:

> ... multiple murders that an offender commits as part of a continuing course of criminal conduct, even if the offender does not necessarily commit them as part of the same transaction.... While Scott argues that killing Green was separate and distinct from killing Stoffer, the pattern of conduct he exhibited in the spontaneous execution of Green for no apparent reason, his bragging about that killing, and the threats he made to those who could report it, combined with his forecast of the Stoffer murder,

> the cold-blooded manner in which he carried it out, the threats he made surrounding that killing, and his bragging to Jewell about it, all suggest a deliberate effort by Scott to earn a reputation as an indiscriminate killer bent on enhancing his influence in the community by causing others to fear him. Accordingly, construing the evidence most strongly in favor of the state, a rational trier of fact could have found Scott guilty of the course-of-conduct specification ...

Id. at 37–38, 800 N.E.2d 1133 (internal citation omitted). This decision does not support Hand's arguments. As the Ohio Supreme Court found, there was sufficient evidence for Hand's jury to conclude beyond a reasonable doubt that the murders of Jill and Welch were part of Hand's course of conduct, and that the murders were related by time, place and motive, a more substantive nexus between the two crimes than the facts that were discussed in *State v. Scott.*

***66** In his Report, the Magistrate Judge quotes the course of conduct jury instructions that were actually given at Hand's trial. In the guilt phase, the trial court instructed the jury with respect to Count One (Jill's murder) that they "must find beyond a reasonable doubt that the aggravated murder of [Jill] was part of a course of conduct involving the purposeful killing of two or more persons by the defendant." With regard to Count Two and the specification for Welch's murder, the instruction required the jury to "find beyond a reasonable doubt that the aggravated murder of [Welch] was part of a course of conduct involving the purposeful killing of two or more persons by the defendant." (Trial Trans. Vol. 20 at 3760 and 3772) In the penalty phase, the court instructed the jury that the aggravating circumstance for each of these two counts was "a course of conduct involving the purposeful killing of [Jill] and [Welch] by the defendant, Gerald R. Hand." (Trial Trans. Vol. 22 at 3842, 3907)

Hand suggests that because the penalty phase instructions specifically cited the killing of Jill and Welch as the murders constituting the course of conduct, the guilt phase instructions (which did not include that specific reference) were unconstitutionally vague. The Magistrate Judge observed that throughout the 59 pages of guilt phase instructions (Trial Trans. Vol. 20 at 3748–3807), the trial court consistently and exclusively referred to the killings of Jill Hand and Lonnie Welch, particularly in the specification instructions. (*Id.* at 3760 and 3772, 800 N.E.2d 1133) In contrast, Donna and Lori Hand were mentioned only regarding the additional specifications on Count Two. The second specification was that Welch's murder "was committed by the defendant for the purpose of escaping detection, apprehension, trial or punishment for another offense, complicity to the murder of Donna A. Hand ..." (*Id.* at 3773, 800 N.E.2d 1133). The third specification was that Welch's murder was committed "for the purpose of escaping detection, apprehension, trial, or punishment for another offense, the complicity to the murder of Lori Hand ..." (*Id.* at 3775, 800 N.E.2d 1133). The trial court also instructed the jury that the "only difference" between specifications two and three on Count Two "is the reference to Lori L. Hand in this [third] specification, rather than Donna A. Hand, as in the [second] specification." (*Id.*) Donna and Lori were again specifically mentioned in the instructions for specifications five and six. The court instructed for specification five that: "(a) the victim of the aggravated murder, Walter Lonnie Welch, was a witness to the murder of Donna A. Hand, and (b) Walter Lonnie Welch was purposely killed by the defendant to prevent Lonnie Welch from testifying in any criminal proceedings, and (c) the aggravated murder of Walter Lonnie Welch was not committed during the murder of Donna A. Hand." (*Id.* at 3776–3777, 800 N.E.2d 1133) The same instruction was given for specification six, substituting Lori Hand for Donna Hand. (*Id.* at 3777, 800 N.E.2d 1133) This Court agrees with the Magistrate Judge that there is no reasonable possibility that the jury could not understand or was confused about the fact that the course of conduct specification applied only to Counts One and Two relating to the murders of Jill and Welch.

***67** In his objections, Hand contends that even if a rational juror would not misinterpret the instructions in that fashion, the trial court failed to explain "what circumstance the jury was to consider under this specification" because the court did not specifically define "course of conduct." (Doc. 117 at 41–42) In *Scott v. Houk,* 2011 U.S. Dist. LEXIS 133743, 2011 WL 5838195 (N.D.Ohio, Nov. 18, 2011), the district court rejected the merits of a substantially identical habeas claim.[11] In that case, the court observed that the U.S. Supreme

Court "has given states wide latitude in determining the means by which to narrow" the class of death-eligible offenders. The district court quoted at length from *State v. Benner,* 40 Ohio St.3d 301, 533 N.E.2d 701 (1988), which this Court also quotes here, where the Ohio Supreme Court rejected the argument that R.C. 2929.04(A)(5) was unconstitutionally vague:

> We believe that if appellant's vagueness argument is based on the possibility of differing interpretations of the term "course of conduct," it is misdirected since such a possibility is not the correct test for vagueness in capital cases. Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia* [408 U.S. 238 (1972)] ...
>
> The R.C. 2929.04(A)(5) course-of-conduct specification is not the type of "open-ended" statute struck down in *Maynard [v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)], and *Godfrey v. Georgia* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). In *Godfrey,* the court found that an aggravating circumstance for murders that were "outrageously or wantonly vile, horrible or inhuman" did not adequately channel jury discretion: "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible or inhuman.' " *Id.* at 428–429. Similarly, in *Maynard,* the court struck down an aggravating circumstance provision referring to "especially heinous, atrocious or cruel" murders, on the basis that "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous .' " 486 U.S. at 364.
>
> Turning to the statute assailed sub judice, it is clear that no one could reasonably believe that every murder is "part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender." Thus, we find that the specification R.C. 2929.04(A)(5) does not give the sentencing court the wide discretion condemned in both *Godfrey* and *Maynard.* Therefore, we hold that the course-of-conduct specification is not void for vagueness under either the Eighth Amendment of the United States Constitution or Section 9, Article I of the Ohio Constitution. The language of the statute is definitive and is circumscribed to cover only those situations which it fairly describes.

***68** *State v. Benner,* 40 Ohio St.3d at 305, 533 N.E.2d 701 (quoted in *Scott v. Houk,* at ——61–64). Based on that discussion, the district court in *Scott* held:

> Using the established United States Supreme Court standards, the Ohio Supreme Court found that R.C. 2929.04(A)(5) sufficiently directed a capital sentencer about what facts it must find in order to find a defendant guilty of the course-of-conduct aggravating circumstance. Thus, the court found it complied with the requirements of the Eighth Amendment by sufficiently narrowing the class of capital defendants who would be eligible to have this aggravating circumstance found.
>
> *Scott v. Houk,* 2011 U.S. Dist. LEXIS at *64, 2011 WL 5838195.

This Court agrees with and fully adopts the analysis and the conclusion reached by the district court in *Scott.* The course of conduct instructions to Hand's jury mirrored the statute defining the specification: "... the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender." R.C. 2929.04(A)(5). Neither the Ohio statute nor the instructions given to Hand's jury are unconstitutionally vague. The instructions did not deprive Hand of a fair trial or violate the Eighth Amendment. This Court therefore concludes that the Ohio Supreme Court's

rejection of Hand's argument was not contrary to nor an unreasonable application of established federal law. This sub-claim is denied.

(C) Trial court's failure to properly instruct on use of guilt phase evidence during sentencing. In sub-claim (F) of Ground Five discussed above, Hand alleges that the trial court erred in admitting the guilt-phase exhibits at sentencing. In this sub-claim, he argues that the trial court failed to properly instruct the jury about which portions of those exhibits they should consider in weighing the aggravating and mitigating factors. Respondent's traverse argues that this sub-claim is procedurally defaulted because Hand never raised it in state court. He did present an ineffective assistance of trial counsel claim based on counsel's failure to object to the admission of the guilt phase evidence, but that is a substantively different claim than this one. The Magistrate Judge agreed with Respondent, and concluded that this sub-claim is procedurally defaulted.

In his objections, Hand concedes that he did not present this claim to the state court. But he argues he can establish good cause to excuse the default due to ineffective assistance of **appellate** counsel in failing to include this issue in Hand's direct appeal. But Hand never presented an ineffective assistance of **appellate** counsel claim on this ground to the state courts, and it therefore cannot serve as adequate cause to excuse the default of the underlying claim of trial error. This Court agrees with the Magistrate Judge that this claim is procedurally defaulted.

(D) Reasonable Doubt Instruction. In this sub-claim, Hand contends that the trial court's reasonable doubt instruction was improper and unconstitutional. During the guilt phase, the trial court instructed the jury:

> ***69** Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge. Reasonable doubt is a doubt based upon reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence, is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

(Trial Trans. Vol. 20 at 3750) An almost identical instruction was given at the close of the mitigation phase. (Trial Trans. Vol. 22 at 3906–07) These instructions were based on R.C. 2901.05(D), Ohio's statutory definition of reasonable doubt:

> 'Reasonable doubt' is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs.

Hand contends there are three infirmities in the trial court's instructions. First, the phrase "would be willing to rely and act" in the last sentence of the instruction is too lenient and does not properly guide the jury. He cites several cases adopting "... a preference for defining proof beyond a reasonable doubt in terms of a prudent person who would hesitate to act when confronted with such evidence." (Doc. 11 at ¶ 141) Second, he contends that the phrase "firmly convinced" represents a clear and convincing evidentiary standard, not a proper criminal standard. Third, he argues that the phrase "moral evidence" is highly subjective, and its use in the instructions amounts to structural error.

He raised this claim on direct appeal, and the Ohio Supreme Court summarily rejected its merits. The Magistrate Judge recommends that this sub-claim be denied because the Sixth Circuit has approved virtually identical reasonable doubt instructions based upon the

language of R.C. 2901.05 on numerous occasions. See *Byrd v. Collins,* 209 F.3d 486, 527 (6th Cir.2000): "Petitioner's challenge to the judge's instruction defining reasonable doubt must also fail. The trial judge's instruction was taken virtually verbatim from the statutorily required definition of reasonable doubt that the judge was required to give under Ohio law.... This Circuit has previously upheld the constitutionality of this instruction. See *Thomas v. Arn,* 704 F.2d 865, 869 (6th Cir.1983)." See also, *White v. Mitchell,* 431 F.3d 517, 534 (6th Cir.2005), rejecting a habeas challenge to an essentially identical instruction: "We have specifically ruled that Ohio's articulation of the reasonable doubt standard does not offend due process. *Buell v. Mitchell,* 274 F.3d 337, 366 (6th Cir.2001). Moreover, we rejected an identical challenge to the reasonable doubt instruction in *Coleman v. Mitchell,* 268 F.3d 417, 437 (6th Cir.2001)."

***70** Hand objects and cites *Holland v. United States,* 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954), involving an appeal from a tax evasion conviction in which the appellants attacked the reasonable doubt instruction given to their jury. The entirety of the Supreme Court's discussion on this issue is as follows:

> Even more insistent is the petitioners' attack, not made below, on the charge of the trial judge as to reasonable doubt. He defined it as "the kind of doubt ... which you folks in the more serious and important affairs of your own lives might be willing to act upon." We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, see *Bishop v. United States,* 71 App. D.C. 132, 137–138, 107 F.2d 297, 303, rather than the kind on which he would be willing to act. But we believe that the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some. A definition of a doubt as something the jury would act upon would seem to create confusion rather than misapprehension. "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," *Miles v. United States,* 103 U.S. 304, 312, 26 L.Ed. 481, and we feel that, taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury.

Id. at 140. This discussion does not conflict with or undermine the merits of the Ohio Supreme Court's rejection of Hand's claim. While other phrasings of a reasonable doubt instruction might be acceptable or preferable to that set forth in Ohio's statutory definition, as suggested in *Holland,* the Supreme Court held in that case that the instructions as a whole did not mislead the jury. Given the wealth of subsequent federal cases affirming the constitutionality of reasonable doubt instructions that are essentially identical to those given at Hand's trial, the Ohio Supreme Court's summary rejection of this sub-claim was not contrary to or an unreasonable application of federal law.

Therefore, this sub-claim and each of the sub-claims raised in Ground Nine are denied.

Ground Ten

Hand contends in his tenth ground for relief that the jury did not properly weigh the aggravating and mitigating factors during its penalty phase deliberations. He raised this claim in his post-conviction petition, supported by an investigator's affidavit describing a juror's statements about the jury's sentencing deliberations. The Ohio Court of Appeals affirmed the trial court's dismissal of this claim because the affidavit was impermissible hearsay, and because the juror's statements were incompetent and inadmissible pursuant to Ohio Evid. Rule 606(B). *State v. Hand,* 2006–Ohio–2028 at ¶ 44.

The Magistrate Judge quotes the affidavit in question that was signed by Jennifer Cordle, a mitigation specialist with the Ohio Public Defender's Office. Ms. Cordle met with the juror in December 2004, when the juror told her that the jury returned a death sentence because "they had to because Mr. Hand was guilty of an aggravated murder and they had to follow the judge's instructions ...". (Doc. 101 at 165, quoting from Cordle Affidavit, Apx. Vol. 10 at 379.) The Magistrate Judge aptly labeled the affidavit "classic hearsay," offered to prove the truth of what the juror told Cordle, and thus inadmissible. Moreover, the affidavit is barred by the aliunde rule incorporated in Ohio's Evid. Rule 606(B), and mirrored in Fed.R.Evid. 606(B). There is nothing in the affidavit suggesting that any improper outside information reached the jury, that any juror engaged in conduct that violated the instructions, or that any extraneous prejudicial information was brought to their attention during deliberations.

***71** Hand objects, arguing that the jury failed to consider his character, history, and background in reaching its

decision. Even if the affidavit had some admissible evidentiary value, it does not fairly suggest that this was the case. Rather, the juror told Ms. Cordle that Hand was guilty and they "had to follow the judge's instructions." Hand simply has not shown why or how the Ohio Court of Appeals' rejection of this claim was contrary to or an unreasonable application of clearly established federal law. The Court therefore denies Ground Ten of Hand's petition.

Ground Eleven

For his eleventh ground for relief, Hand contends he received ineffective assistance of appellate counsel, raising six sub-claims. Sub-claims A, B, and C were included in Hand's habeas petition but had not previously been presented to the state courts. This case was stayed to permit Hand to exhaust these sub-claims by filing a motion to reopen his direct appeal, which the Ohio Supreme Court denied as untimely. The Magistrate Judge concluded that sub-claims A, B and C are procedurally defaulted based on that ruling. The Court will consider these three sub-claims together, along with Hand's objections to the Magistrate Judge's recommendations with respect to each of them.

(A) Failure to appeal collateral estoppel argument. Hand filed a claim for reparations from the Ohio Victims of Crime Compensation Division, administered by the Ohio Court of Claims, after Donna Hand's murder. The state found that he was not at fault for her murder, and he received an award of $50,000. At Hand's criminal trial, the state presented testimony from the administrator of the Ohio Court of Claims, and a copy of the Court of Claim's written award to Hand was received in evidence as State Exhibit 45. As part of his Rule 29 motion to dismiss at the close of the state's case, Hand's trial counsel moved to dismiss the second death penalty specification on Count Two of the indictment (complicity in Donna's murder), arguing that collateral estoppel precluded the state from alleging that Hand was responsible for or complicit in Donna's murder. (Trial Trans. Vol. 19 at 3294–3295) The trial court denied the motion, and noted its concern that Hand may have committed a fraud on the Court of Claims, which would permit a finding that its judgment should be set aside. The trial court ruled that "... there's at least some evidence of fraud on that court and, therefore, this court would not give credence to the Court of Claims in terms of the issue of preclusion that was argued here today, and I would deny the motion on Rule 29 on that count ...". (*Id.* at 3309–3310) This ruling was not raised in Hand's direct appeal.

(B) Failure to appeal trial counsel's failure to object to the testimony of Hand's bankruptcy attorney. In Ground Four, sub-claim A (discussed infra), Hand argued that he received ineffective assistance of trial counsel due to the failure to object to Hand's testimony about his communications with a bankruptcy attorney. The Court found that claim was procedurally defaulted, and that Hand has not shown cause for the default. In this sub-claim, Hand contends that his appellate counsel should have raised this issue in his direct appeal.

***72 (C) Failure to appeal the denial of Hand's motion to dismiss the specifications relating to the murders of Donna and Lori Hand.** Trial counsel filed a pre-trial motion to exclude "other acts" evidence under Evid. Rule 404(B), and specifically evidence relating to the murders of Donna and Lori. (Apx. Vol. 1 at 232) The trial court denied the motion in a written judgment entry, noting that the state could not prove the specifications relating to those murders without evidence that Hand was involved in the murders. (Apx. Vol. 1 at 390) This ruling was not raised on direct appeal.

The Magistrate Judge concluded that these three sub-claims are procedurally defaulted. All three were raised in state court for the first time in Hand's 2007 motion to reopen his direct appeal. The Ohio Supreme Court denied that motion because "Appellant failed to comply with the 90–day filing deadline in S.Ct. Prac. R. XI(6)(A)." (Apx. Vol. 9 at 207) The Supreme Court actually enforced this Ohio procedural rule. The Magistrate Judge concluded that the rule is an adequate and independent state ground, by reviewing in some detail the history of the Ohio courts' enforcement of this rule (and its counterpart in Ohio Crim. Rule 26(B)) as discussed in several Sixth Circuit cases. In *Franklin v. Anderson,* 434 F.3d 412 (6th Cir.2006), the Sixth Circuit found that the Ohio Supreme Court had not actually and regularly enforced the 90–day time limit for filing motions to reopen pursuant to Ohio Civil Rule 26(B), from sometime in 2000 until 2004. At that point, the Supreme Court apparently had resumed a pattern of strict enforcement of the timeliness rules, because three recent reported cases from the Supreme Court had enforced the rule and rejected untimely motions to reopen. Given the prior history of inconsistent enforcement, and the fact that the petitioner (Franklin) had filed his motion

to reopen the day **before** Ohio's Civil Rule 26(B) took effect on July 1, 1993, the Sixth Circuit held that the rule did not constitute an adequate and independent state ground precluding habeas review of Franklin's ineffective assistance of appellate counsel claim. *Franklin,* 434 F.3d at 418–421.

A few years later, in *Fautenberry v. Mitchell,* 515 F.3d 614 (6th Cir.2008), the Sixth Circuit again considered whether a habeas petitioner's claim was procedurally defaulted due to his untimely motion to reopen his direct appeal. Fautenberry's direct appeal had been originally denied in February 1994, and his application to reopen was filed in July 1996. The court found that he had shown good cause to excuse the delay between February 1994 and January 1996, when new appellate counsel was appointed to represent him. But that new lawyer waited six months after his appointment to file the motion to reopen. Moreover, the lawyer had filed a motion to reconsider the denial of his direct appeal in March 1996, well within 90 days of his appointment. Fautenberry did not explain why a motion to reopen was not or could not have been timely filed in the same time frame. Fautenberry relied on *Franklin* to argue that Rule 26(B)'s 90–day limit was not regularly enforced by the state courts, but the Sixth Circuit rejected his argument, finding that *Franklin* was factually distinguishable. The court also stated that *Franklin* did not adopt an "all encompassing, ever-applicable legal proposition that will forever (or at least for a very long time) bar the federal courts from finding that an ineffective assistance of appellate counsel claim has been procedurally defaulted where the state court refused to address the merits of that claim because of the time constraints in Ohio App. R. 26(B)." *Fautenberry,* 515 F.3d at 641. Rather, the court held that the "adequate and independent state ground" analysis must be conducted on a case by case basis, and premised upon the time that the petitioner should have filed the motion to reopen.

***73** Cases subsequent to both *Franklin* and *Fautenberry* confirm this case-by-case analytic requirement. For example, in *Landrum v. Mitchell,* 625 F.3d 905 (6th Cir.2010), the petitioner's Rule 26(B) reopening application was filed in 1998 and denied as untimely. The Sixth Circuit held that the habeas claim raised in that application was procedurally defaulted because in 1998, Ohio law on the timeliness requirement of the Rule was well established. The court rejected Landrum's reliance upon *Franklin:*

> In *Franklin,* we considered whether Rule 26(B) was an adequate and independent state procedural bar and held that it was not firmly established and regularly followed.... We bolstered our conclusion by describing the Ohio Supreme Court's "erratic" handling of untimely Rule 26(B) applications in capital cases.... However, this analysis is inapplicable here for two reasons. Both turn on the fact that Franklin's motion was filed June 30, 1993, one day before Rule 26(B) went into effect. First, because we concluded in *Franklin* that applying Rule 26(B)'s timeliness requirement to cases filed before the effective date of the rule would give the rule impermissible retroactive effect, *Franklin*' s discussion of the Ohio Supreme Court's subsequent treatment of Rule 26(B) is thus dicta. Second, the "firmly established and regularly followed" requirement is measured as of the time Rule 26(B) was to be applied.... As *Fautenberry* ... emphasized, although Rule 26(B) was not firmly established in 1993, it had become firmly established by 1996.

Landrum, 625 F.3d at 917 (internal citations and quotations omitted).

In *Hoffner v. Bradshaw,* 622 F.3d 487 (6th Cir.2010), the petitioner committed a murder in September 1993. He was eventually charged, convicted and sentenced to death, and the Ohio Court of Appeals rejected his direct appeal on March 23, 2001. The Ohio Supreme Court affirmed his conviction in a July 14, 2004 decision. He filed a Rule 26(B) application to reopen with the Court of Appeals on June 6, 2006, asserting ineffective assistance of appellate counsel claims. That court found that his petition was untimely, but it also reviewed his ineffective

assistance of appellate counsel claims and rejected them on the merits. He appealed that decision to the Ohio Supreme Court, which affirmed solely on the ground that the petition was untimely. The Supreme Court rejected his arguments that his lack of appellate counsel or his own lack of legal knowledge constituted good cause to excuse his failure to comply with the 90–day requirement, and held: "Consistent enforcement of the rule's deadline by the appellate courts in Ohio protects on the one hand the state's legitimate interest in the finality of its judgment and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved." *State v. Hoffner,* 112 Ohio St.3d 467, 468–469, 860 N.E.2d 1021 (2007), quoting *State v. Gumm,* 103 Ohio St.3d 162, 163, 814 N.E.2d 861 (2004). In his subsequent habeas petition, Hoffner raised the same ineffective assistance of appellate counsel claims, and the Sixth Circuit found them to be procedurally defaulted because the time requirements of Rule 26(B) were firmly established and regularly followed by the Ohio courts in June 2006. It rejected Hoffner's reliance on *Franklin,* noting that *Franklin* held that Rule 26(B) could not be applied retroactively, a situation that did not apply to Hoffner.

***74** Finally, in *Webb v. Mitchell,* 586 F.3d 383 (6th Cir.2009), the Sixth Circuit again addressed a petitioner's claim that Rule 26(B)'s timeliness requirement was not an adequate state ground to bar habeas review. Webb's direct appeal had been denied by the Ohio court of appeals on May 24, 1993, which was before the effective date of Rule 26(B). After his appeal to the Ohio Supreme Court was rejected, he filed an application to reopen in 1998, which was denied as untimely and on the merits by the state court of appeals. The Sixth Circuit concluded that Webb

> ... did not procedurally default the appellate-counsel claim by filing an untimely Rule 26(B) motion. We have previously held that the time limitation in Rule 26(B) is not an independent state ground that the Ohio courts have enforced for capital-sentence petitioners whose direct appeal had concluded, and whose post-conviction relief proceedings were initiated, after *Murnahan.* See *Franklin,* 434 F.3d at 420–21; cf. *Beuke v. Houk,* 537 F.3d 618, 632 (6th Cir.2008). Ohio's Rule 26(B) time bar accordingly does not satisfy one of the *Maupin* requirements for procedural default. *Franklin,* 434 F.3d at 420.

Webb, 586 F.3d at 398. The court then rejected Webb's appellate counsel claims on the merits under AEDPA's deferential standard of review.[12] *Webb* is consistent with *Franklin* in concluding that Ohio law and the Rules governing ineffective assistance of appellate counsel claims were in flux in the early 1990's, and especially before the adoption of Rule 26(B).

Considering all of these authorities, it is clear that the specific dates that are relevant to Hand's state court appeal must control the analysis of whether these sub-claims are defaulted. The Ohio Supreme Court denied Hand's direct appeal on January 18, 2006. He filed a motion to reconsider on January 30, 2006, which was denied on March 29, 2006. Hand's first motion to reopen, filed by his new appellate counsel, was filed on April 18, 2006, within 90 days of the denial of his direct appeal. (Apx. Vol. 9 at 28–39) The Supreme Court summarily denied that motion on August 2, 2006. (*Id.* at 43) Hand did not file his second motion to reopen with the Ohio Supreme Court until September 24, 2007. Hand relies on *Franklin* to excuse his default, but *Franklin* is clearly distinguishable, as the Sixth Circuit held in both *Fautenberry* and in *Hoffner.* This Court finds that the timeline of relevant dates at issue in *Hoffner* is very similar to the timeline of Hand's appeal. And in *Hoffner,* the Ohio Supreme Court articulated the important state goals that are fostered by enforcement of the rules regarding timely appeals and motions to reopen. The Magistrate Judge also cited five additional decisions from the Ohio Supreme Court from October 2004 through November 2007 that uniformly enforced the 90–day rule and rejected untimely motions to reopen. (See Doc. 101 at 170–171)

***75** Based on all of these authorities, this Court finds that *Hoffner* fully supports the Magistrate Judge's conclusion that these three sub-claims are procedurally defaulted. Whatever inconsistency may have existed in the Ohio Supreme Court's consideration of untimely Rule 26 petitions in the first years of the last decade, it had clearly dissipated by late 2004 or 2005. Since then, as noted in *Hoffner,* the Supreme Court has consistently enforced its

timeliness rules, and clearly did so with respect to Hand's motion.

But even if these three sub-claims were not procedurally defaulted, the Court would find them meritless. To establish ineffective assistance, Hand must show that his appellate counsel made an objectively unreasonable decision when choosing the issues to raise in his direct appeal, and that the omitted issues were "clearly stronger" than the issues that counsel did present. See *Smith v. Robbins,* 528 U.S. 259, 286–288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). The trial court's collateral estoppel ruling was not "clearly stronger" than the issues that were raised in Hand's direct appeal, particularly the objections to the testimony about Welch's statements. The Court of Claims opinion awarding victim benefits to Hand states in pertinent part that the assault on Donna (which caused her death)

> ... was reported to the Columbus Police Department immediately upon discovery. **Lacking any evidence to the contrary,** it will be presumed, therefore, that neither the Applicant nor the decedent had such relationship with the person or persons responsible for the death as would preclude an award under R .C. 2743.60(B). (emphasis added). [13]

As the Warden's traverse argues, Hand made no attempt to satisfy the prerequisites for the proper application of collateral estoppel, or issue preclusion, to the question of his complicity in Donna's murder that was at issue in his criminal trial. A fundamental requirement for the proper application of the estoppel doctrine is to show that the parties to the prior proceeding had a full and fair opportunity to litigate the specific issue in a prior proceeding; that is, the party asserting preclusion "... must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action." *Goodson v. McDonough Power Equipment, Inc.,* 2 Ohio St.3d 193, 201, 443 N.E.2d 978 (1983). The issue of Hand's complicity was not actually litigated or directly determined in the prior proceeding; the Court of Claims simply "presumed" that Hand was not involved because there had been no evidence uncovered at that time suggesting otherwise. The State of Ohio was not precluded from criminally prosecuting Hand on the specifications involving Donna's murder merely because the state had not discovered evidence linking Hand to her murder when the Court of Claims issued its decision.

The Court would also conclude that the sub-claim regarding the allegedly privileged testimony from Hand's bankruptcy attorney lacks merit. The underlying claim is procedurally defaulted, as the Court discussed previously with respect to sub-claim (A) of Ground Four. This sub-claim was not "clearly stronger" than the claims that were raised, given Hand's actual testimony and the likelihood that the information Hand voluntarily disclosed was not in fact privileged.

***76** Regarding sub-claim C, the trial court's denial of Hand's motion to dismiss the death penalty specifications relating to the murders of Donna and Lori, the motion was based on Evid. Rule 404(B)'s limitations on the admission of "other acts" evidence. Hand argued that the state sought to improperly taint the jury's impression of Hand's character through this evidence. Hand's appellate counsel directly challenged the admission of the "other acts" evidence under the Rule, as fully discussed with respect to Hand's other grounds for relief, challenging the admission of testimony and statements linking him to the murders. Moreover, the Ohio Supreme Court specifically found that nothing in the record suggested that the jury used any "other acts" evidence to convict Hand "on the theory that he was a bad person." *State v. Hand,* 107 Ohio St.3d at 401, 840 N.E.2d 151. The trial court's denial of the pre-trial motion to exclude the evidence was not a "clearly stronger" issue than the direct attack on the admission of the evidence, and the Ohio Supreme Court would likely have reached the same conclusion regarding the trial court's pre-trial ruling.

For all of these reasons, the Court agrees with the Magistrate Judge's conclusion that these three sub-claims are defaulted. Moreover, even if they were not, this Court would conclude that they each lack merit.

(D) Counsel's failure to challenge the sufficiency of the evidence on the aggravating circumstances and specifications 2 through 6 of Count Two. Hand argues in this sub-claim that his appellate lawyers should have raised an insufficient evidence claim regarding the state's contention that he killed Welch to prevent him from disclosing information about Donna and Jill's murders,

or from testifying against Hand. The Magistrate Judge found that this sub-claim was not procedurally defaulted. It was raised in Hand's first application to reopen his direct appeal filed on April 18, 2006, which the Ohio Supreme Court summarily denied (but not on the basis that it was untimely). However, the Magistrate Judge concluded that the sub-claim lacks merit.

The standards for a sufficiency-of-the-evidence challenge are set forth in the Court's analysis of Ground Eight of Hand's petition: viewing the evidence in the light most favorable to the prosecution, could any rational juror have found the essential elements of the offense beyond a reasonable doubt. Hand contends that the "only" evidence with respect to his murder of Welch to eliminate him as a witness is in Grimes' testimony. The Court disagrees; Welch's own statements about Hand's involvement in the first two murders to his friends and family members, and his statements before Jill's murder that Hand asked him to kill her, were all evidence bearing on this question and were sufficient to support the jury's verdict. Hand does not raise a particular objection to the Magistrate Judge's conclusion but incorporates his objections with regard to Ground Eight (his sufficiency of the evidence challenge to the escape charge).

***77** This Court agrees with the Magistrate Judge, in view of the extensive evidence about Welch's statements to his friends and family about the murders of Hand's first two wives and about Welch's relationship with Hand. Combined with Grimes' testimony—Hand told Grimes that Hand was going to have Jill killed by a man he was "involved with ...," a "business partner ..."—a rational juror could have found Hand guilty of the specifications beyond a reasonable doubt. The state court's summary rejection of Hand's argument was not contrary to nor an unreasonable application of clearly established federal law.

(E) Failure to amend Hand's appellate brief to raise juror bias . Hand also raised this claim in his April 2006 motion to reopen his direct appeal. While it is not defaulted, the Magistrate Judge concluded that it lacks merit. This Court rejected Hand's contention (raised in Ground Four, sub-claim (B)) that Hand's defense counsel did not thoroughly question the jurors about their exposure to pretrial publicity. And as previously noted, Hand does not contend that his jury was actually biased or prejudiced. (See Doc. 117 at 13) For the same reasons discussed in Ground Four, the Court concludes that appellate counsel's failure to amend the appellate brief to specifically raise a separate claim of juror bias does not amount to constitutionally ineffective assistance of appellate counsel.

(F) Failure to appeal the scope of the trial court's inquiry into juror bias. The claim underlying this sub-claim was rejected in Ground Six, and a similar argument with respect to the two jurors in Ground Four, sub-claim B. As discussed there, the trial court's inquiries to the jurors generally, and to the two jurors Hand particularly challenges, were adequate and did not violate Hand's constitutional rights. Neither of the jurors answered any questions which would have fairly warranted additional inquiry from trial court, and there is simply no evidence that Hand's right to a fair trial was violated by the trial court's questioning of the entire panel, or by any of the pre-trial publicity. This sub-claim is therefore rejected, because the state court's decision is not contrary to nor an unreasonable application of clearly established federal law.

For all these reasons, Ground Eleven of Hand's petition is denied.

Ground Twelve

In this ground for relief, Hand brings a facial constitutional challenge to Ohio's death penalty statutes, citing what he identifies as eight separate deficiencies in those statutes. The Ohio Supreme Court summarily rejected his claims on direct appeal, relying on prior authorities affirming the constitutionality of Ohio's death penalty law. *State v. Hand,* 107 Ohio St.3d at 417, 840 N.E.2d 151. The Magistrate Judge reviewed Hand's claims and found them all to lack merit. (Doc. 101 at 178–180)

In his objections, Hand concedes that the Ohio statutes have been upheld in the federal courts on numerous occasions in the face of similar constitutional challenges. He states that he raises this ground for relief solely to preserve the record in the event of a change in law. Therefore, the Court finds that no extended discussion of the substance of his claims is warranted, as the Court agrees with and adopts the Magistrate Judge's conclusions in toto. Ground Twelve of the petition is denied.

Ground Thirteen

***78** Hand argues that the exclusion of residual doubt as a mitigating factor at sentencing, and specifically the trial court's refusal to instruct the jury that they may consider residual doubt of his guilt in determining his sentence, violated the Eighth Amendment's prohibition on cruel and unusual punishment, as well as his due process and fair trial rights.

Hand requested that the trial court give the following instruction to the jury in the penalty phase:

> "Residual doubt" exists when a juror is not convinced beyond all possible doubt that the defendant committed the offenses for which he was convicted. You will recall that the burden on the State of Ohio is to prove its case beyond a reasonable doubt, not beyond all possible doubt. By your verdicts of guilty, you found that the State has met its burden of proof in this case. If any juror believes that residual doubt exists in this case, that juror may consider his or her residual doubt as a mitigating factor to be weighed against the aggravating circumstance on each count. The weight, if any, to be given such residual doubt is to be determined by each individual juror.

(Apx. Vol. 3 at 207) The trial court declined to give this instruction, relying on *State v. McGuire,* 80 Ohio St.3d 390, 402–404, 686 N.E.2d 1112 (1997). In *McGuire,* the Ohio Supreme Court noted that the issue of residual doubt could be considered by a jury in mitigation. But because it is not a statutorily-defined mitigating factor, the court held that a defendant is not entitled to a residual doubt instruction. The Ohio Supreme Court summarily rejected this claim in Hand's direct appeal, also relying on *State v. McGuire.*

The Magistrate Judge concluded this claim lacks merit, citing *Franklin v. Lynaugh,* 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988). There, the U.S. Supreme Court held that there is no constitutional right to have a capital jury consider residual doubt of guilt as a mitigating factor, because "[s]uch lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or a 'circumstance of the offense.' " *Id.* at 174 (internal citations omitted).

Hand objects, contending that the Magistrate Judge overlooked his arguments and the body of federal law cited in his traverse brief. He contends that because he raised self-defense at his trial, his situation is substantively different from the situation presented to the Supreme Court in *Franklin.* In the guilt phase, Hand testified that he acted in self defense in killing Welch. The trial court instructed the jury that In order to succeed on that defense, Hand had to prove:

> ... (A) ... he was not at fault in creating the situation giving rise to the death of Walter Lonnie Welch; and (B) he had reasonable grounds to believe and held an honest belief that he was in imminent or immediate danger of death or great bodily harm, or he acted in defense of another, Jill J. Hand, who he believed in danger of death or great bodily harm, and that his only means of retreat or escape or withdrawal from that danger was by the use of deadly force; and (C) did not violate any duty to retreat or escape or withdraw to avoid the danger. If the defendant was assaulted in his own home, or if the home was attacked, the defendant had no duty to retreat or escape or withdraw, and he could use such means as are necessary to repel the assailant from the home, or to prevent any forcible entry to the home, even to the use of deadly force, provided that he had reasonable grounds to believe and held an honest belief that the use of deadly force was necessary to the assailant [sic] or to prevent the forcible entry.

***79** (Trial Trans. Vol. 20 at 3764–3765, excerpt of trial court's guilt-phase instructions on self-defense.) Hand presented mitigating evidence at the sentencing hearing about his character, and he notes that he was entitled to

present evidence about the circumstances of the offense, including whether the victim induced or facilitated the offense, and whether he was under duress at the time, all of which are statutory mitigating factors under R.C. 2929.04(B). Hand then suggests that the nature of a self defense claim "inherently" places at issue these statutory mitigating circumstances. He further speculates that it is "possible" that the jury found that he had proved one or two of the elements of his self defense claim. And if the jury did so, for example by concluding that he did not create the violent situation with Welch, then a residual doubt instruction would have permitted the jury to consider his self-defense testimony during the penalty phase. He therefore argues that the trial court's refusal to instruct the jury on residual doubt during the penalty phase of his trial violated the Eighth Amendment.

Hand does not cite any case, state or federal, that holds or even suggests that a defendant who asserts self defense in a capital case is constitutionally entitled to a separate residual doubt instruction at sentencing. Moreover, the instructions that **were** given in the penalty phase of Hand's trial include a specific instruction to the jury that they should consider all mitigating factors and all the evidence raised at both phases of Hand's trial. The instructions included the following passage:

> Mitigating factors are factors about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigating factors are factors that lessen the moral culpability of the defendant, or diminish the appropriateness of a death sentence. You must consider all of the mitigating factors presented to you. Mitigating factors include, but are not limited to, the history, character, and background of the defendant, and any other factors that weigh in favor of a sentence other than death. This means you are not limited to the specific mitigating factors that have been described to you. You should consider any other mitigating factors that weigh in favor of the sentence other than death.... [Y]ou shall consider all the testimony and evidence relevant to the aggravating circumstance the defendant was found guilty of committing and mitigating factors raised at both phases of the trial, the testimony or statements of the defendant, Gerald R. Hand, and arguments of counsel.

(Trial Trans. Vol. 22 at 3908–3910) The trial court did not limit Hand's ability to present any mitigating evidence in the penalty phase, as he implicitly admits. Hand was free to argue to the jury any mitigating factors and any evidence introduced at the trial that he believed weighed in favor of a life sentence, including any element of his claim of self defense.

***80** Moreover, this Court sees no meaningful or relevant distinctions between Hand's claim of self defense, and the mistaken identity and "other causes of death" defenses raised by the petitioner in *Franklin.* Franklin was charged with aggravated murder, and incriminating physical evidence matching the victim was found in his home and his car. Franklin claimed that he had lent his car and his clothes to a friend on the evening of the murder. He argued that the jury should have been instructed on residual doubt of his guilt during the penalty phase of his trial, based on his claim of mistaken identity and his contention that a hospital's substandard medical care led directly to the victim's death. The Supreme Court noted that it "... has never held that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation." *Franklin,* 487 U.S. at 172–173. While a capital jury cannot be precluded from considering any mitigating evidence of a defendant's character or the circumstances of the offense, the court held that the rule "... in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt." *Id.* at 174.

The Supreme Court recently re-emphasized that "[t]he starting point for cases subject to Section 2254(d)(1) is to identify the 'clearly established Federal law, as determined by the Supreme Court of the United States' that governs the habeas petitioner's claims." *Marshall v. Rodgers,* 569 U.S. ——, 133 S.Ct. 1446, 1447, 185 L.Ed.2d 540 (2013) (citing *Williams v. Taylor,* 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). The only "clearly

established" Supreme Court authority on this issue, *Franklin v. Lynaugh,* contradicts Hand's claim that he was constitutionally entitled to a residual doubt instruction at sentencing. See also, *Oregon v. Guzek,* 546 U.S. 517, 525, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006), rejecting the argument that the Eighth Amendment provides a capital defendant the right to introduce evidence of "residual doubt" of the crime of conviction at sentencing, and citing *Franklin.* Hand has cited no contrary controlling authority. The Court therefore denies this ground for relief.

Ground Fourteen

Hand alleges as his fourteenth ground for relief that Ohio's lethal injection procedure amounts to an unconstitutional imposition of cruel and unusual punishment. The Ohio Court of Appeals rejected this claim raised in his post-conviction petition, finding that it had no legal basis. In his post-evidentiary hearing brief filed in this case, Hand acknowledged recent cases upholding the lethal injection procedure, and indicated that he wished to preserve the claim for the record. (See Doc. 90 at 42, n. 9) In view of the decisions in *Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), and *Cooey v. Strickland,* 589 F.3d 210 (6th Cir.2009), the Magistrate Judge concluded that the claim lacks merit.

***81** However, Hand has objected to the Magistrate Judge's conclusion because Ohio's lethal injection protocol has changed from the three-drug regime reviewed in *Baze,* and from the single-drug protocol using sodium thiopental reviewed in *Cooey.* The current Ohio protocol uses pentobarbital, a drug commonly used to euthanize animals. Hand contends that the state's switch to pentobarbital was due solely to the increasing unavailability of sodium thiopental, and he argues that the effect of pentobarbital on humans has not been sufficiently studied. Hand does not identify any specific risks that are or may be encountered in using pentobarbital that were not presented by the prior single-drug protocol addressed in *Cooey.* In that case, the Sixth Circuit reviewed a challenge to Ohio's single-drug protocol that also specified two backup drugs to be used in the event that an IV injection site for administration of the sodium thiopental could not be achieved or had to be abandoned. *Cooey* reviewed the "ground rules" articulated by the Supreme Court in *Baze* for analyzing a challenge to an execution protocol:

> Capital punishment is constitutional, ... death-row inmates cannot use method-of-execution challenges to prohibit what the Constitution allows, ... the Constitution does not demand a pain-free execution, ... and an inmate cannot question a state's execution protocol without providing feasible, readily implemented alternatives that significantly reduce a substantial risk of severe pain.... Significantly, the Constitution does not allow the federal courts to act as a best-practices board empowered to demand that states adopt the least risky execution protocol possible.... Within this framework, the Supreme Court has never held that an inmate met the heavy burden of demonstrating that a state's execution protocol is cruelly inhumane in violation of the Constitution.

Cooey, 589 F.3d at 220–221 (internal citations and quotations omitted).

Hand's general objection to the use of pentobarbital by the State of Ohio does not specifically address any of these "ground rules." He simply argues that "until more is known about the effects of pentobarbital on humans," the Court should find that its use is unconstitutional. (Doc. 117 at 62) Reaching that result based on Hand's argument would effectively put the Court in the position of the proverbial "best-practices board" that the Supreme Court specifically warned against in *Baze.* Hand's petition generally alleged that prior experience with lethal injection reveals that the procedure is "... at the very least more likely than not a torturous, painful, barbaric, and, hence, unconstitutional means of extinguishing life ...". (Doc. 11 at 53) In his reply to Respondent's traverse brief, Hand cited newspaper articles describing incidents of equipment malfunction, or difficulties in locating an inmate's veins. He also acknowledged that his challenge to Ohio's procedure was made for the purpose of preserving the record. (Doc. 32 at 159–160) He has not sought

discovery or pursued the development of a factual record concerning this claim in this proceeding.

***82** The Court therefore concludes that Hand has not demonstrated that the state court's rejection of this claim is contrary to or an unreasonable application of clearly established federal law on the overall constitutionality of the state's lethal injection procedure. [14] This habeas claim is therefore denied.

Ground Fifteen

For his final claim, Hand raises a claim of cumulative error based on all of the cited errors at his trial, sentencing, and on direct appeal. The Magistrate Judge recommends that this claim be dismissed because there were no constitutional errors during the proceedings that, individually or cumulatively, warrant habeas relief. The Magistrate Judge also cites several cases noting that the Supreme Court has never recognized a distinct constitutional claim premised upon cumulative error.

Hand objects, citing *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) for the proposition that the court must consider the entirety of the record in order to determine if the errors had a substantial injurious effect on the outcome. If they did, considered together, the errors could not have been harmless. This Court has rejected each of the alleged constitutional errors that Hand has raised and found that none of them entitle Hand to relief. The Court also rejects his cumulative error claim. Considering the entirety of the record, and aggregating all of the alleged errors discussed above, the Court concludes that Hand's constitutional rights were not violated and that he was not deprived of a fundamentally fair trial. This ground for relief is denied.

CONCLUSION

As required by 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b), the Court has conducted a de novo review of the record in this case. Upon such review, the Court finds that Hand's omnibus objections to the Magistrate Judge's Report and to his Supplemental Report are not well taken, and are therefore overruled. For all of the foregoing reasons, Hand's petition for a writ of habeas corpus, and each Ground for Relief contained therein, is denied.

This case is referred to Magistrate Judge Merz for a Supplemental Report and Recommendation concerning Hand's motion for a certificate of appealability, which has been stayed pending this Court's order addressing Hand's objections to the Magistrate Judge's recommendations on the merits of his petition.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 2372180

Footnotes

1 The escape charge was included in a separate indictment returned in December 2002. A subsequent indictment returned in January 2003 charged him with conspiracy but expanded the time frame to include the months preceding Jill's death. All three indictments were consolidated for trial, and the counts are described here as they were by the Ohio Supreme Court in its opinion on Hand's direct appeal.

2 Anthony, who was not called as a witness by the state, testified at the hearing that shortly before Jill's murder, Welch asked Anthony to help him get a gun, and said he needed a gun because Hand wanted Welch to murder Hand's current wife.

3 The Magistrate Judge further noted that when a state court does not address the merits, the habeas court conducts an independent review which "is not a full, de novo review" but a deferential one, in keeping with AEDPA's requirements. Doc. 101 at 35–36.

4 The record reflects the fact that the Ohio Supreme Court granted Hand's unopposed motion to unseal the questionnaires and to supplement the direct appeal record on April 19, 2004. (Apx. Vol. 6 at 57) Hand's merit brief was filed on May 3, 2004. (*Id.* at 245–386)

5 Exhibit 1 to the post-conviction petition (Apx. Vol. 10 at 113–204) is a collection of pre-trial newspaper articles about the murders and Hand's indictment.

6 The court had already concluded that these statements were properly admitted as Welch's statements against interest under Evid. Rule 804(B)(3).

7 As the Magistrate Judge notes, any testimony of Hand's trial counsel taken during these proceedings that might bear on this question must be disregarded, pursuant to *Cullen v. Pinholster.*

8 It appears that a COA was not granted on this issue, because it is not directly addressed in the Sixth Circuit's decision.

9 See Doc. 32 at 76, quoting from May 1, 2003 Dispatch article entitled “Murder Trial Might Provide Answers in Two Other Slayings” (Apx. Vol. 10 at 187).

10 The second small group of seven were questioned later the same day, and the trial court asked the same questions (Trans. Vol. 4 at 305–307). Ms. Finamore and Ms. Ray were in this second group. The same was true for the third group (Vol. 4 at 417–418). The procedure was repeated on Monday, May 5 (Vol.5), and the jury was finally selected on Tuesday, May 6 (Vol.6).

11 The habeas petitioner in that case was the defendant in *State v. Scott,* discussed infra at pp. 115–116, 800 N.E.2d 1133.

12 *Beuke v. Houk,* cited in *Webb,* dealt with a pre-*Murnahan* procedure for raising ineffective assistance claims that applied only within Ohio's First District Court of Appeals. The Sixth Circuit found that the claims were procedurally defaulted because the petitioner failed to follow that well-established procedure in 1989, when the denial of his direct appeal was final. At that time, the procedure required him to present his claims in a motion for reconsideration in the court of appeals. *Beuke* is not directly relevant to the facts concerning Hand's 2007 motion to reopen.

13 This opinion was admitted at Hand's trial as State's Exhibit 45.

14 The Court recognizes that Hand is a plaintiff in the case pending in this district before Judge Frost, *In Re Ohio Execution Protocol Litigation,* No. 2:11–cv–1016. Nothing in this Order is intended to affect or interfere with Hand's participation in that case.

2011 WL 2446383
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio, Eastern Division.

Gerald HAND, Plaintiff,
v.
Marc HOUK, Warden, Defendant.

No. 2:07–CV–846.
|
April 25, 2011.

Attorneys and Law Firms

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REPORT AND RECOMMENDATIONS

MERZ, Magistrate J.

***1** This is a habeas corpus action brought by Petitioner Gerald Hand pursuant to 28 U.S.C. § 2254 and seeking relief from both his conviction for aggravated murder with death specifications and his resulting death sentence.

Mr. Hand is represented in this proceeding by appointed counsel who did not represent him in any direct appeal proceedings. [1]

Statement of Facts

The Supreme Court of Ohio described the facts and circumstances leading to Mr. Hand's indictment, trial, convictions, and adjudged sentence of death as follows:

> On March 24, 1976, Hand notified police that he found the strangled body of his wife, 28–year–old Donna Hand, in the basement of their Columbus home.
>
> On September 9, 1979, while Hand was out of town, family members found the strangled body of Hand's second wife, 21–year–old Lori Hand, in the basement of the same home. The murders of Donna and Lori Hand remained unsolved for more than 20 years.
>
> Sometime before January 15, 2002, Hand hired Walter "Lonnie" Welch, a longtime friend, to kill his wife, 58–year–old Jill Hand. On the evening of January 15, Hand shot and killed Jill at their Delaware County home and then shot and killed Welch when he arrived there. Subsequent investigation showed that Hand had previously hired Welch to kill Donna and Lori Hand.
>
> Hand was convicted of the aggravated murders of Jill and Welch and sentenced to death. The evidence established that Hand's marriage to Jill had soured, Hand had accumulated more than $200,000 in credit card debt, and Hand stood to collect more than $1,000,000 in life insurance and other benefits on Jill's death. Before his death, Welch had told various friends and family members that Hand hired him to kill Jill and that Hand had previously hired him to kill Donna and Lori. Hand admitted that he had shot Welch, and forensic evidence established that Hand's claim that he acted in self-defense on the night of the murders was unsupported by the evidence. Forensic evidence established that Welch was shot in the back at close range. Hand also admitted to a cellmate that he had shot Jill and Welch.

State's Case

> Murder of Donna Hand. On the evening of March 24, 1976, Hand notified police that his wife had been murdered at their home on South Eureka Avenue in the Hilltop section of Columbus. According to Hand, he returned home after being out with his brother but was unable to open his front door because it was double latched from the inside. Hand entered the house through a side door and found Donna's body.
>
> The police found Donna's fully clothed body at the bottom of the basement stairway. She had a bag over her head and it was tied with a spark-plug wire. The police found no sign of forced entry. Drawers in the upstairs bedroom had been removed and turned over, but the room did not appear to have been ransacked. Moreover, no property was missing from the house.
>
> Dr. Robert Zipf, then a Franklin County Deputy Coroner, examined Donna's body at the scene and found blood around the head where the body

was lying. However, no blood spatters or other bloodstains were found on the stairs, which indicated that Donna had not hit her head falling down the steps.

***2** During the autopsy, Dr. Zipf found "three chop wounds to the back of [Donna's] head" that were caused by "some type of blunt object, maybe a very thin pipe or a dull hatchet." However, Dr. Zipf determined that Donna had died from strangulation caused by the spark-plug wire around her neck.

During the fall of 1975, Donna told Connie Debord, her sister, that she planned to divorce Hand and move back to their parents' home. Donna felt that "everything was over" and "feared for her life." About two weeks before she was killed, Donna told Evelyn Latimer, another sister, that she was going to file for divorce.

Hand received $67,386 in life insurance following Donna's death. Hand also filed a claim for reparations after Donna's death and received $50,000 from the Ohio Victims of Crime Compensation Division of the Court of Claims.

During 1975 or 1976, Teresa Fountain overheard Welch talking to Isaac Bell, Fountain's boyfriend, about "knocking his boss's wife off to get some insurance money." Sometime after Donna's murder, Welch told Fountain, "I hope you didn't hear anything and * * * you keep your mouth shut, * * * you didn't hear anything."

Murder of Lori Hand. Hand married Lori Willis on June 18, 1977, and Welch was the best man at the wedding. Hand and Lori lived in the home on South Eureka Avenue in which Donna had been murdered.

By June 1979, Hand's marriage to Lori was falling apart. Lori told her friend, Teresa Sizemore, that she was unhappy with her marriage and was making plans to file for a divorce. Sizemore also saw Lori and Hand interact, but she "didn't see any warmth there because [Lori] wasn't happy."

Around 8:30 a.m. on September 9, 1979, Hand and his baby, Robby, left home so that Lori could clean the house for a bridal shower planned for that afternoon. Steven Willis, Lori's brother, picked up Hand at his house. The three of them then spent the next few hours visiting a flea market, a car show, and Old Man's Cave in Hocking Hills. They also went go-cart racing.

Around 9:30 a.m., Lois Willis, Lori's mother, arrived at Hand's home to help Lori prepare for the bridal shower. After Lois knocked and did not get an answer, she left and returned about an hour and half later. Upon returning, Lois noticed that the front door was ajar and entered the house. Alarmed, she called Hand's family, who found Lori's body in the basement.

Police discovered Lori's body on the basement floor with a plastic sheet wrapped around her head. Lori's pants were unfastened with the zipper down, and her blouse was pulled up against her breast line. Bloodstains and blood spatters were found on the wall near Lori's body, and a spent lead projectile was found near her body. Lori had been shot twice in the head, but neither gunshot killed her. Dr. Patrick Fardal, a Franklin County Deputy Coroner, determined that strangulation was the cause of death. Lori's vehicle had been stolen from Hand's garage. Police recovered her vehicle about three blocks from the Hand home.

***3** Police found the first and second floor levels of the house in disarray, with drawers and other items of property dumped on the floor. Nevertheless, the house did not appear to have been burglarized, because there were no signs of forced entry and the rooms were only partially ransacked. Investigators also seized a cash box containing credit card slips, currency, and a .38 caliber handgun from the trunk of Hand's car parked in the garage.

After he learned of Lori's death, Hand returned home. Hand told police that he had been out of the house with Steve and his young son when Lori was murdered. Hand said that "everyone, including * * * his brothers and help at the shop would have known" that he was going to be gone from the house that morning.

Hand told police that he was very possessive of Lori. He admitted having sexual problems with Lori because he "wanted sex at least once a night and she didn't want to do that." When asked about insurance, Hand said that he had in the past year doubled its value and that it should pay off both of his mortgages.

Hand received $126,687.90 from five separate life insurance policies after Lori's death.

On September 10, 1979, the police recovered a pair of gloves near where Lori's vehicle was found. The fingers of the gloves were bloody, and the gloves had been turned inside out. Human bloodstains were found on the gloves, and debris from inside the gloves was preserved.

On October 9, 1979, the police reinterviewed Hand. Hand provided the names of Welch and others who worked for him and said that he did not trust any of them. He told police that everyone, including all of his neighbors, was aware that he had received $50,000 after his first wife's murder. Hand also said that his wife was not planning to separate from or divorce him and that they were "extremely in love with each other."

During the fall of 1979, Welch went to the home of Pete Adams, Welch's first cousin, and told Adams that he had "killed Donna and Lori Hand" and had done it for Bob Hand. Adams did not notify police about this conversation until after Welch's death in 2002.

During 1979 and 1980, Betty Evans, Welch's sister, observed that Welch had a "wad of money," cars, and a girlfriend who wore a mink jacket, a diamond necklace, and rings. Around the same time, Welch told Evans that if she "knew anything, not to say anything because him and Bob had a pact and if anything got out, they were going to kill each other's mother."

In the 1980s and 1990s, Welch intermittently worked as a mechanic at Hand's radiator shop in Columbus. Hand also provided Welch with extra money on a frequent basis and gave him cars and a washer and dryer. In the late 1980s, Welch started using crack cocaine and spent a lot of money on it.

Sometime after Lori's death, Hand met and married Glenna Castle. They were married for seven to eight years and then divorced.

Hand's marriage to Jill and his financial problems. In October 1992, Hand married Jill Randolph, a widow, and moved into Jill's home on Walnut Avenue in Galena, Delaware County. Jill was employed at the Bureau of Motor Vehicles in Columbus and was financially secure. Hand was the beneficiary of Jill's state retirement and deferred-compensation accounts in the event of her death, and he was the primary beneficiary under her will.

***4** By 2000, Hand's radiator shop had failed, and he was deeply in debt. During the 1990s and early 2000, Hand obtained thousands of dollars by making credit card charges payable to Hand's Hilltop Radiator. By January 2002, Hand had amassed more than $218,000 in credit card debt.

At some point, Jill found out about the extent of Hand's debt. During 2000, she learned that Hand had charged more than $24,000 on a credit card in her name. Jill was upset and told her daughter, Lori Gonzalez, that "[s]he was going to have Bob pay off that amount that he had charged up with the sale from his business."

In October 2000, Hand sold his radiator shop and the adjoining buildings. In May 2001, Hand started working as a security guard in Columbus and earned $9.50 an hour. Despite his enormous debt, Hand continued to pay on several credit cards to maintain life insurance coverage on his wife, including payments in December 2001 and January 2002.

Hand and Jill grew increasingly unhappy with one another. During 2001, Hand told William Bowe, a friend of Hand's, that he was "quite tired of her." Abel Gonzalez, Jill's son-in-law, lived at the Hand home from April to June 2001. Abel said that Hand and Jill's marriage was "on the down slope. * * * There was no warmth there. * * * It seemed everything Bob would do would antagonize Jill, and she made it real clear that she was upset."

Plans to murder Jill Hand. In July or August 2001, Welch asked Shannon Welch, his older brother, if he had a pistol or could get one. Welch also asked, "Do you know what I do for extra money?" He continued, "Well, I killed Bob's first wife and * * * I got to kill the present wife and I'll have a lot of money after that." Welch said he was going to be well off enough to retire and talked about buying an apartment complex. Thereafter, Welch asked Shannon about a pistol "maybe once a week, sometimes twice a week."

Between December 21, 2001, and January 3, 2002, Welch was in jail for various motor vehicle violations. During that time, Welch told his cellmate, David Jordan Jr., that he planned to "take somebody out for this guy named Bob" and mentioned that he had "put in work for him before." Welch said he needed a driver because his eyes were "messed up." He asked Jordan if he wanted the job and offered to pay him between $5,000 and $6,000. Welch said this job was supposed to happen in January, and he gave Jordan his phone number.

During December 2001, Shannon asked Hand whether he could provide bond money to get Welch out of jail. Hand said, "Well, I can't have no contact with Lonnie * * * because we got business" and refused to give him any money.

On January 14, 2002, Welch told Tezona McKinney, the daughter of Welch's common-law wife, that he was going to buy a car for her mother. Welch said he "was going to get the money the next day" and would buy the car "because [he] didn't buy her anything for Christmas because [he] was in jail."

***5** Around 5:00 p.m. on January 15, 2002, Welch attended a family gathering at Evans's home in Columbus to celebrate Evans's birthday. Welch told Shannon that he had to "be ready * * * to see Bob because [he] might be taking care of * * * business tonight." Before leaving, Welch told Evans that he "was going to pick up some money and he'd be right back."

Murder of Jill and Welch. Around 6:45 p.m. on January 15, 2002, Hand arrived home from work. At 7:15 p.m., Hand made a 911 call to report that his wife had been shot by an intruder. Hand also reported that he had shot the intruder.

Police found Welch's body lying face down on Hand's neighbor's driveway. Inside Hand's house, Jill's body was found lying between the living room and the kitchen. Hand told police that he had shot the intruder but did not know his identity. He also gave police two .38–caliber revolvers that he used to shoot him. On the way to the hospital, Hand saw the intruder's vehicle and told Mark Schlauder, a paramedic, that "it could have belonged to somebody that worked for" Hand.

Around 8:00 p.m. on January 15, Detective Dan Otto of the Delaware County Sheriffs Office interviewed Hand at the hospital. Hand said that after arriving home, he had dinner with Jill and then went to the bathroom. Upon exiting, Hand heard Jill scream, "Gerald," heard two gunshots, and saw a man in a red and black flannel shirt at the end of the hallway. Hand then retrieved two .38 caliber revolvers from the master bedroom. Hand started down the hallway firing both guns at the intruder, but had trouble shooting because the guns were "misfiring" and "missing every other round." Hand followed the intruder out the front door and continued firing at him as he ran toward his car, and then the intruder fell on the neighbor's driveway.

During the interview, Hand repeated that he did not recognize the gunman, but recognized Welch's car in the driveway. Hand said he "didn't know [Welch] that well; that he did odd jobs around the shop; that he was a thief; that he was a cocaine addict; that he * * * [came] in to the shop area from time to time." Hand also said that it had been a year since he had had any contact with Welch, and Welch had no reason to be at his home that night.

Investigators found no sign of forced entry at Hand's residence. Blood spatters were found inside the front door and on the front-door stoop. The top of the storm door was shattered, and particles of glass extended 13 feet into the front yard. All the glass fragments were found on top of the blood spatters. Police also found a black jacket on the front stoop, a spent bullet and glass fragments on top of the jacket, and a tooth outside the front door.

According to Agent Gary Wilgus, a crime-scene investigator, the blood spatters indicated that the victim was bleeding and "blood was dropping from his body" as he was moving away from the house. A bloody trail led onto the sidewalk and through the front yard and ended where Welch was lying in the driveway. Welch was wearing cloth gloves, and a knit hat with two eyeholes and a mouth hole was next to his head. Police also found a .32–caliber revolver on the front lawn.

***6** Inside the house, police found glass fragments and bloodstains extending two to three feet from the front door and another tooth just inside the front

door. Jill's body was 12 feet from the front door, her legs pointed towards the front door, and she was wearing a nightgown. Jill had been shot in the middle of her forehead. A second bullet deflected off the floor and was found on the carpet next to Jill's head.

Investigators found a bullet in the living room ceiling, and a second bullet was found in the living room window frame. While investigators could not determine the exact trajectory of the two bullets, they determined that they most likely originated from gunshots in the hallway area. No evidence of gunplay was found elsewhere in the house.

On January 17, 2002, Detective Otto reinterviewed Hand, and Hand provided a different version of events. Hand stated that after his wife was shot, he retrieved two guns from the master bedroom, went into the hallway, and saw Welch "coming down the hallway towards the master bedroom at him." Hand and Welch then began firing at each other in the hallway and were within four feet of each other during the gun battle. Hand repeated that he chased Welch outside the house but "couldn't get his guns to fire; that he was missing every other round and * * * they weren't firing." When asked about the .32–caliber revolver in the front yard, Hand stated that he did not know who owned it.

During the second interview, Hand said, "I was misquoted on the first interview at the hospital" about not knowing Welch. Hand said that he had known Welch, a former employee, for over 20 years. However, Hand continued to give the impression that they were not close. When asked about a wedding photo showing Welch as his best man, Hand said he "couldn't find anybody else to stand in as [his] best man." Hand repeated that "the only thing he saw" on the night of the murder was an unknown person in "red and black flannel," and he had "no clue who this unknown person was." Hand also said that "Jill had never met Lonnie; Lonnie's never been to Walnut Avenue; he had no idea why he was there."

In discussing his financial situation, Hand said he sold his radiator shop in October 2000 and received $300,000, and later received $33,000 from the sale of his share of the business and its inventory, and $140,000 from somewhere else. Hand said he "always needed money, but if he needed money, he could get some; that he had money." Hand also told police that he was "hiding the money and that he was considering filing bankruptcy; that that was against Jill's wishes." Later, Hand said that he "wasn't going to file for the bankruptcy * * * and they were going to work it out." When asked if he had any offices, Hand said that his office was in a bedroom in the house. However, Hand failed to disclose that he kept business records at another location.

On January 19, 2002, the police seized several boxes containing Hand's business and personal records from the storage area above a hardware store near Hand's former radiator shop. These records included credit cards, credit-card-and life-insurance-account information, payment receipts, a list of credit card debt prepared by Jill, and other information about Hand's finances.

***7** Heather Zollman, a firearms expert, testified that the .32–caliber revolver found in the front yard was loaded with two fired and three unfired .32–caliber Smith and Wesson ("S & W") Remington–Peters cartridges. Bullet fragments removed from Jill's skull were consistent with being an S & W .32–caliber bullet. In testing the .32–caliber revolver, Zollman found that "on more than 50 percent of [her] testing, the firearm misfired" as a result of "a malfunction of the firearm." The stippling pattern shown in Jill's autopsy photographs indicated that "the muzzle to target distance was greater than six inches, and less than two feet."

Zollman tested the two .38–caliber revolvers and found that they were both in proper working order, and neither weapon showed any tendency to misfire. A bullet removed from Welch's right forearm was "consistent with the .38 caliber." Zollman also concluded that the bullet and fragments recovered from Welch's mouth and his lower back had rifling class characteristics corresponding with the S & W .38–caliber revolver. Further, gunshot residue around the bullet hole on the back of Welch's shirt revealed a muzzle-to-target distance greater than two feet from the garment but less than five feet.

Jennifer Duvall, a DNA expert, conducted DNA testing of bloodstains found on the shirt Hand was wearing on the night of the murders. Five of the bloodstains were consistent with the DNA profile of

Welch. The odds that DNA from the shirt was from someone other than Welch was "one in more than seventy-nine trillion in the Caucasian population; one in more than forty-four trillion in the African–American population, and one in approximately forty-three trillion in the Hispanic population."

Michele Yezzo, a forensic scientist, examined bloodstain patterns on Hand's shirt. There were more than 75 blood spatters of varying sizes on the shirt. Yezzo concluded that the shirt was "exposed to an impact" that "primarily registered on the front of the garment." Yezzo also examined glass fragments collected from Hand's residence and "found tiny fragments of clear glass" on Hand's shirt, trousers, tee-shirt, and pair of socks that he was wearing on the night of the murders. However, she found no glass fragments on Welch's boots. Yezzo conducted a fiber analysis of the bullet from Welch's mouth, but found "no fibers suitable for comparison."

Ted Manasian, a forensic scientist, found particles of lead and barium on both gloves that Welch was wearing, and these are "highly indicative of gunshot residue." Manasian could not determine how the gunshot residue got on the glove, just that it was there. Thus, Welch could have fired the gun, or was in the proximity of the gun when it was discharged, or handled an item that had gunshot residue on it.

Detective Otto testified that $1,006,645.27 in life insurance and state-benefit accounts were in effect at the time of Jill's death. This amount included $113,700 in Jill's Ohio Public Employees Retirement System account and $42,345.29 accumulated in the Ohio Public Employees Deferred Compensation program.

***8** Dr. Keith Norton, a forensic pathologist in the Franklin County Coroner's office, conducted the autopsy of Jill and Welch. He concluded that Jill died from a single gunshot wound to the head. Dr. Norton found that Welch had been shot five times: in his mouth, left upper chest, left forearm, right shoulder, and lower back. The gunshot wound to Welch's lower back went into the spinal cord and would have paralyzed his legs. However, the gunshot wound to the chest was the cause of death.

According to Kenneth Grimes Jr., Hand's former cellmate in the Delaware County Jail, Hand told him that he "killed his wife and the man he was involved with." Hand said he hired a man and they had "been doing business together for years." Hand said he "hired the man to kill his wife and, in turn, the deal went sour. He wanted more money, so he killed two birds with one stone. He got both and didn't have to pay anything." Hand said he had agreed to pay $25,000 to have his wife killed, and the man "wanted it doubled." Hand said he was going to claim self-defense. He also said the evidence against him was "circumstantial and there were many witnesses that didn't have * * * any actual, proof."

Attempted jail escape. Hand was incarcerated in the Delaware County jail beginning on August 8, 2002. On November 26, 2002, correction officers discovered an escape attempt in Hand's cell block.

An attempt had been made to cut through the lock on the rear emergency exit of the cell block and through a cell bar. Officers searching Michael Beverly's cell found two saw blades. Police also seized some torn-up tee-shirt material and a pencil with a tee-shirt tied around it from Hand's belongings in his neighboring cell.

Michael Beverly and Wedderspoon, another inmate, came up with the idea for the escape. Beverly said that he obtained two hacksaw blades and began cutting through the rear-exit lock and one cell bar. Dennis Boster, another inmate, was the lookout, and once in a while Hand would relay messages to Beverly that a guard was coming. Hand also advised Beverly on how to cut through the metal bar.

According to Grimes, Beverly and Hand discussed escaping through the front of their cell block. The plan was that while Hand distracted the guards and nurses by requesting his medication, Beverly would apprehend a guard, and they would escape through the front door. Grimes also identified Hand as a lookout.

Defense Case

Sally Underwood, Hand's sister, was a bartender in the Columbus Hilltop area from 1992 until 1994. During that time, Welch frequently came into the bar selling televisions, stereos, and other electronic equipment. When asked where he obtained this property, Welch said that he "had just stolen it from a house down

the street." Underwood could tell that Welch was "on something" when he entered the bar.

According to Terry Neal, another inmate in Hand's cell block, Hand was not involved in the escape attempt. Dennis Boster, who was convicted of escape, also testified that Hand was not involved in the escape attempt and never served as a lookout.

***9** Hand testified in his own behalf. He said, "I did not kill my wife or have anything to do with the planning of killing my wife, either." Hand also denied conspiring with Welch or anyone else to kill Donna or Lori. Hand did not remember "too much" about the day Donna was killed.

When Hand married Lori, Welch was the best man at the wedding because his brother backed out at the last minute. Hand said that he had a great sexual relationship with Lori before his son, Robert, was born, but thereafter, they started having sexual problems. However, his business was going well, and his financial condition was "great."

During his marriage to Lori, Hand took over his father's radiator shop, purchased the underlying property, and bought some extra lots. Welch worked part-time at the radiator shop and was paid under the table. Around this time, Hand embarked on a credit card scheme. He used personal credit cards, charged them to his business, and used this money to finance his business and purchase real estate.

The wedding shower at his home on September 9, 1979, had been planned weeks in advance. When he learned that Lori had been killed, Hand "didn't believe it at first" and then went "hysterical." Hand later told police that he suspected that his brother, "Jimbo," had killed Lori because they were not "getting along that good and he had the keys to [Hand's] house."

Shortly before Hand and Jill were married in 1992, he moved into her Delaware County home. After they had been married for a couple of years, Jill found out about Hand's credit card scheme. Hand said, "She didn't like it; * * * She just didn't want no part of it." She also learned about Hand's debt, which at one point, was close to a million dollars. Jill was also aware that Hand had life insurance on her through his credit cards.

In 2000, Jill learned that Hand used her credit card to pay for repairs to one of Hand's properties. Jill was upset and wanted a "total refinance of everything." Hand then "started selling everything * * * and then paying the credit cards and the mortgages and everything down." In 2001, Hand sold his radiator shop. By May 2001, Hand had sold all his properties, had paid thousands of dollars on his credit card debt, and had gone to work as a security guard.

According to Hand, he arrived home from work around 6:45 p.m. on January 15, 2002. Hand was coming out of the bathroom when he heard Jill shout, "Gerald, Gerald." He then heard a couple of shots and saw a man dressed in red flannel. Hand retrieved two guns from the bedroom dresser, and as he came out of the bedroom, he saw the intruder coming down the hallway. Hand started "firing, and * * * assumed [the intruder] was firing." However, Hand thought his guns were "misfiring because [the intruder] wasn't going down." Hand said he chased the intruder out the front door and continued firing at him until the intruder fell on the driveway. He then returned to the house and called 911.

***10** Hand did not know how many shots he fired. He retrieved the guns and started firing, later explaining, "I wanted to protect myself * * * and shoot him, the son-of-a-bitch that shot my wife." Hand did not recognize the intruder, but recognized Welch's car in the driveway. He had no idea why Welch had come to his house that night.

Hand denied telling Grimes that Welch was already in the house when he came home from work, denied telling him that Welch wanted to renegotiate his fee, and denied telling him that he killed his wife and then killed Welch. As for the escape, Hand said that he tried to stay away from Beverly as much as possible. Beverly asked Hand if he wanted to join in the escape, and Hand told him "no, and just get away." Hand also claimed that he did not aid Beverly in any way. Finally, he said that the string found in his cell was used for hanging a bag with food items to keep out the ants.

State v. Hand, 107 Ohio St.3d 378, 378–89, 840 N.E.2d 151 (2006).

State Court Proceedings

On or about August 9, 2002, in Case 02CR–I–08–366, Mr. Hand was indicted by the Grand Jury of Delaware County, Ohio, for the following: one count of Aggravated Murder (Count One of the Indictment), in violation of O.R.C. § 2903.01(A) for the death of Jill J. Hand; one count of Aggravated Murder (Count Two of the Indictment), in violation of O.R.C. § 2903.01(A) for the death of Walter M. "Lonnie" Welch; and two counts of Conspiracy to Commit Aggravated Murder (Counts Three and Four of the Indictment), with the listed accomplice being Walter M. "Lonnie" Welch and the intended victim being Jill J. Hand, a violation of O.R.C. § 2923.01(A)(1). Appendix to Return of Writ, Vol.1 at 55–59 (hereinafter "App."). All four counts of the indictment carried a specification for using a firearm during the course of the indicted crime. *Id.*

Additionally, Counts One and Two of the Indictment contained a capital specification for committing Aggravated Murder during a course of conduct of killing or attempting to kill two or more people. Count Two of the Indictment, involving the murder of Mr. Welch, also contained capital specifications for the following: that the Aggravated Murder was committed for the purpose of escaping detection, apprehension, trial or punishment for another crime committed by the offender, being complicity to commit the murder of Donna Hand (Specification Two); that the Aggravated Murder was committed for the purpose of escaping detection, apprehension, trial or punishment for another crime committed by the offender, being complicity to commit the murder of Lori L. Hand (Specification Three); that the Aggravated Murder was committed for the purpose of escaping detection, apprehension, trial, or punishment for another crime committed by the offender, being complicity to commit the murder of Jill J. Hand (Specification Four); that the victim, Mr. Welch, was a witness to an offense, being the murder of Donna A. Hand, and was purposely killed to prevent the victim's testimony in any criminal proceeding (Specification Five); that the victim, Mr. Welch, was a witness to an offense, being the murder of Lori L. Hand, and was purposely killed to prevent the victim's testimony in any criminal proceeding and that the aggravated murder was not committed during the commission of the offense for which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding (Specification Six). *Id.*

***11** On August 14, 2002, Mr. Hand entered a plea of not guilty to the Indictment. App. Vol. 1 at 65–66. The court appointed Terry Sherman as lead counsel and Richard Cline as co-counsel. *Id.* at 69–70, 840 N.E.2d 151. Both attorneys were certified to be appointed to capital cases pursuant to Rule 20 of the Ohio Supreme Court Rules of Superintendence. *Id.*

On December 6, 2002, in Case 02CR–I–12–643, the Grand Jury of Delaware County, Ohio, indicted Mr. Hand for one count of Escape, in violation of O.R.C. § 2921.34(A)(1). App. Vol. 4 at 17–18. Mr. Hand pled not guilty to that charge on December 12, 2002. *Id.* at 37–38, 840 N.E.2d 151. On January 10, 2003, in Case 03CR–I–01–014, the Grand Jury for Delaware County, Ohio indicted Mr. Hand for one count of Conspiracy to Commit Aggravated Murder, in violation of O.R.C. § 2923.01(A)(2). App. Vol. 5 at 17–18. This conspiracy charge was similar to the two original charges contained in Counts Four and Five of the August 9, 2002, Indictment but expanded the time frame of the Indictment to include the eight-plus month period prior to Jill Hand's death. *Id.* Mr. Hand pled not guilty on January 21, 2003. *Id.* at 28–29, 840 N.E.2d 151. All three cases were consolidated for trial. *Id.* at 44–45, 840 N.E.2d 151.

Jury selection began on May 1, 2003, and continued through May 6, 2003. Trial Transcript, Vols. 3 through 6 (hereinafter "Trial Tr."). [2] After the court's preliminary instructions and a jury view on May 7, 2003, the jury began hearing testimony in the guilt phase of Mr. Hand's trial on May 8, 2003. Trial Tr. Vols. 7 and 8. On May 30, 2003, the jury found Mr. Hand guilty of the charges in the Indictment including all of the specifications. App. Vol. 3 at 183–203; *see also,* Trial Tr. Vol. 20 at 3815–3818.

The mitigation phase of Mr. Hand's trial began on June 4, 2003, and on that same date, the jury determined that the aggravating factors outweighed the mitigating factors and recommended that the court sentence Mr. Hand to death. App. Vol. 3 at 208–15; *see also,* Trial Tr. Vol. 21 at 3926–3945. On June 4, 2003, in open court, the court accepted the jury's recommendation and sentenced Mr. Hand to death for Counts One and Two of the Indictment. App. Vol. 3 at 216–19; *see also,* Tr. Vol. 22 at 3945–3954. On June 5, 2003, the court filed its Judgment Entry of Sentence in which it sentenced Mr. Hand to death for Counts One and Two of the Indictment. App. Vol. 3 at

216–219. The court did not impose a sentence for Counts Three and Four of the Indictment, the accompanying counts of Conspiracy to Commit Aggravated Murder. *Id.* The court also sentenced Mr. Hand to three years incarceration for the one count of Escape to be served consecutive to Counts One and Two of the Indictment, as well as to a three-year term of incarceration for the two firearms specifications which the court ordered to run concurrent with each other but consecutive to the other charges for which Mr. Hand was convicted. *Id.* On June 16, 2003, the court filed its Opinion and Judgment Entry Pursuant to R.C. 2929.03(F). *Id.* at 221–34, 840 N.E.2d 151.

***12** Mr. Hand filed a notice of appeal to the Supreme Court of Ohio on July 30, 2003. App. Vol. 6 at 6–8. In support of his appeal, Mr. Hand raised the following Propositions of Law:

PROPOSITION OF LAW NO. 1

Where the State fails to prove by clear and convincing evidence that a witness is unavailable due to a criminal defendant's wrongdoing, and the proposed evidence does not meet standards of reliability, it is constitutional error to admit this evidence against the defendant.

PROPOSITION OF LAW NO. 2

The introduction and admission of prejudicial and improper character and other acts evidence and the failure of the trial court to properly limit the use of the other acts evidence denied Gerald Hand his rights to a fair trial, due process and a reliable determination of his guilt and sentence as guaranteed by the United States Constitution, Amends. V, VI, VIII and XIV; Ohio Const. Art. I, §§ 10 and 16.

PROPOSITION OF LAW NO. 3

It is prejudicial error for a trial court to join the unrelated charge of escape with charges of aggravated murder and conspiracy in violation of O.R.C. § 2941.04, thus prejudicing Appellant in violation of his constitutional protections.

PROPOSITION OF LAW NO. 4

Where the State has failed to present any evidence that a criminal defendant planned to break his detention, a conviction on the charge of escape is constitutionally infirm due to the insufficiency of the evidence to prove each element of the offense.

PROPOSITION OF LAW NO. 5

When the State proceeds on a theory that the defendant is the principal offender of an aggravated murder, it is error for the trial court to instruct the jury on complicity. U.S. Const. VI, XIV.

PROPOSITION OF LAW NO. 6

The trial court's failure to give the required narrowing construction to a "course-of-conduct" specification in a capital case creates a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner in violation of the United States Constitution. U.S. Const. Amends. VIII & XIV.

PROPOSITION OF LAW NO. 7

Where trial counsel's performance at voir dire and in the trial phase in a capital case falls below professional standards for reasonableness, counsel has rendered ineffective assistance, thereby prejudicing the defendant in violation of his constitutional rights.

PROPOSITION OF LAW NO. 8

Where trial counsel put on a very brief and skeletal presentation at the penalty phase, fail to argue residual doubt and fail to make any closing argument to the jury, counsel's performance is substandard and a capital defendant is prejudiced thereby. U.S. Const. amends. VI, VIII and XIV.

PROPOSITION OF LAW NO. 9

The capital defendant's right against cruel and unusual punishment and his right to due process are violated when the legal issue of relevance is left to the jury regarding sentencing considerations. U.S. Const. amends. VIII, XIV.

PROPOSITION OF LAW NO. 10

***13** A capital defendant's right against cruel and unusual punishment under the Eighth and Fourteenth Amendments is denied when the sentencer is precluded from considering residual doubt of guilt as a mitigating factor. The preclusion of residual doubt from a capital sentencing proceeding and the trial court's refusal

to instruct the jury to consider it also violate the Defendant's due process right to rebuttal under the Fourteenth Amendment. The preclusion of residual doubt may also infringe a capital defendant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments. U.S. Const. Amends. VI, VII, XIV; Ohio const. Art. I, §§ 9, 10, 16.

PROPOSITION OF LAW NO. 11

Gerald Hand's death sentence must be vacated by this Court as inappropriate because the evidence in mitigation was not outweighed by the aggravating circumstances.

PROPOSITION OF LAW NO. 12

A capital defendant's right to due process is violated when the State is permitted to convict upon a standard of proof below proof beyond a reasonable doubt. U.S. Const. amend. XIV; Ohio Const. Art. I, § 16.

PROPOSITION OF LAW NO. 13

Ohio's death penalty law is unconstitutional. Ohio Rev.Code Ann. §§ 2903.01, 2929.02, 2929.021, 2929.22, 2929.023, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Gerald Hand. U.S. Const. amends. V, VI, VIII, [a]nd XVI; Ohio Const, Art. I, §§ 2, 9, 10, [a]nd 16. Further, Ohio's death penalty statute violated the United States' obligations under international law.

App. Vol. 6 at 245–386.

On January 18, 2006, the Ohio Supreme Court affirmed Mr. Hand's conviction and sentence. *State v. Hand,* 107 Ohio St.3d 378, 840 N.E.2d 151 (2006); *see also,* App. Vol. 8 at 316–77. Mr. Hand filed a Motion for Reconsideration with the Ohio Supreme Court on January 30, 2006, which the court denied on April 29, 2006. App. Vol. 9 at 1–10.

On April 18, 2006, Mr. Hand, who was represented by new counsel, sought to reopen his direct appeal by filing an Application for Reopening Pursuant to Ohio S.Ct. Prac. R. XI, Section 6 in which he raised the following claims:

PROPOSITION OF LAW I

Appellate counsel was ineffective for failing to raise the claim that appellant Hand's conviction was against the manifest weight of the evidence because the state failed to prove the underlying aggravating circumstances and specifications of Count 2, specifications 2–6, beyond a reasonable doubt. The conviction was, therefore contrary to this Court's holding in *State v. Odraye Jones,* 91 Ohio St.3d 335, 744 N.E.2d 1163 (2001).

PROPOSITION OF LAW II

Appellate counsel was ineffective for failing to motion the court to supplement their brief to include relevant and previously unavailable juror bias issues.

PROPOSITION OF LAW III

Appellate counsel was ineffective for failing to raise the issue that the trial court committed error by failing to conduct a constitutionally adequate inquiry to determine bias of jurors due to pre-trial publicity.

***14** App. Vol. 9 at 28–39. The Supreme Court of Ohio denied Mr. Hand's Application for Reopening on August 2, 2009. *State v. Hand,* 110 Ohio St.3d 1435, 852 N.E.2d 185 (table) (2006); *see also,* App. Vol. 9 at 43. On June 27, 2006, Mr. Hand filed a petition for a writ of certiorari with the United States Supreme Court, App. Vol. 9 at 45, which the Court denied. *Hand v. Ohio,* 549 U.S. 957, 127 S.Ct. 387, 166 L.Ed.2d 277 (2006).

On September 24, 2007, after he had filed his Petition for Writ of Habeas Corpus in this Court, Mr. Hand filed with the Ohio Supreme Court a Motion to Reopen Appeal on the Basis of Ineffective Assistance of Appellate Counsel. App. Vol. 9 at 47–61. Mr. Hand raised the following claims which he alleged should have been raised in his direct appeal:

A. The death penalty specifications relating to the murder of Hand's first wife were barred by the doctrine of collateral estoppel.

B. The trial court erred in denying Hand's motion to dismiss the specifications regarding the murder of Hand's first two wives on Evid.R. 404(B) grounds.

C. Trial counsel provided ineffective assistance in failing to object to privileged testimony regarding Hand's bankruptcy attorney.

Id. On December 12, 2007, the Ohio Supreme Court denied Mr. Hand's Motion to Reopen on the procedural ground that Mr. Hand had failed to comply with the 90–

day filing deadline of that court's S.Ct.Prac.R. XI(6)(A). *Id.* at 207.

On December 24, 2004, Mr. Hand filed his Petition for Post Conviction Relief in the Delaware County Court of Common Pleas. App. Vol. 10 at 77–111. In his Petition, Mr. Hand raised the following grounds for relief:

Ground for Relief No. 1

> Petitioner's conviction and sentence are void or voidable because the trail court failed to conduct a constitutionally adequate inquiry to determine juror bias due to pre-trial publicity. The court's error violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.

Ground for Relief No. 2

> Petitioner's conviction and sentence are void or voidable because he was denied the effective assistance of counsel when trial counsel failed to adequately question prospective jurors with regards to their awareness of pre-trial publicity. The failure to act by defense counsel violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.

Ground for Relief No. 3

> Petitioner's conviction and sentence are void or voidable because he was denied the effective assistance of counsel when defense counsel failed to make a motion for a change of venue. The failure to act by defense counsel violate Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.

Ground for Relief No. 4

> ***15** Petitioner's conviction and sentence are void or voidable because his trial counsel failed to present compelling expert psychological evidence in his defense during the penalty phase of his capital trial. This inaction violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I. Sections 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

Ground for Relief No. 5

> Petitioner's conviction and sentence are void or voidable because his trial counsel failed to reasonably investigate and present compelling evidence, through family and friends, to mitigate the sentence of death. Therefore, Petitioner's rights were denied under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 2, 5, 9, 10, 16, and 20 of Article I of the Ohio Constitution.

Ground for Relief No. 6

> Petitioner's conviction and sentence are void or voidable because his trial counsel failed to reasonably investigate and present compelling evidence that was vital mitigation after Petitioner testified poorly during his trial and was convicted of aggravated murder. Therefore, Petitioner's rights were denied under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 2, 5, 9, 10, 16, and 20 of Article I of the Ohio Constitution.

Ground for Relief No. 7

> Petitioner's conviction and sentence are void or voidable because a juror failed to follow this court's instruction regarding the weighing process necessary to determine Petitioner's death sentence. As a result, Petitioner was denied his right to due process, and a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 2, 5, 9, 10, 16, and 20, Article I of the Ohio Constitution.

Ground for Relief No. 8

> Petitioner's conviction and sentence are void or voidable because his trial counsel failed to present compelling evidence about his third wife during the penalty phase of his capital trial. As a result, Petitioner was denied his right to effective assistance of counsel, due process, and a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the

United States Constitution and Sections 2, 5, 9, 10, 16, and 20, Article I of the Ohio Constitution.

Ground for Relief No. 9

Petitioner's conviction and sentence are void or voidable because the death penalty as administered by lethal injection in the state of Ohio violates his constitutional rights to protection from cruel and unusual punishment and to due process of law. U.S. Const. amends. VIII, IX, XIV; Sections 1, 2, 5, 9, 10, 16, and 20, Article I of the Ohio Constitution; *Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998) (five justices holding that the Due Process Clause protects the "life" interest at issue in capital cases).

Ground for Relief No. 10

***16** Petitioner's conviction and sentence are void or voidable because, assuming *arguendo* that none of the grounds for relief in his post-conviction petition individually warrant the relief sought from this court, the cumulative effects of the errors and omissions presented in the petition's foregoing paragraphs have been prejudicial and have denied Petitioner his rights secured by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.

Id.

On February 9, 2005, Mr. Hand filed an amendment to include the following Grounds for Relief:

Ground for Relief No. 11

Petitioner's conviction and sentence are void or voidable because he was denied the effective assistance of counsel when trial counsel failed to act upon and utilize Petitioner's timely report of an escape attempt at the Delaware County Jail. The failure to act by defense counsel violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.

Ground for Relief No. 12

Petitioner's conviction and sentence are void or voidable because the State withheld material evidence —investigation in 2001 by the Columbus Police Department of the murders of Petitioner's first two wives—in violation of his rights to due process and a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 1, 2, 5, 9, 10, 16, and 20, Article I of the Ohio Constitution.

App. Vol. 11 at 8–14.

On May 27, 2005, the Delaware County Court of Common Pleas granted the state's Motion to Dismiss and dismissed Mr. Hand's petition for post-conviction relief. *Id.* at 158–65.

Mr. Hand filed a notice of appeal of the Delaware County Common Pleas Court's decision on June 23, 2006. App. Vol.12 at 12–13. In that appeal, Mr. Hand raised the following assignments of error:

Assignment of Error No. I

The trial court erred by dismissing appellant's post-conviction petition where he presented sufficient operative facts and supporting exhibits to merit an evidentiary hearing and discovery.

Assignment of Error No. II

Ohio's post-conviction procedures neither afford an adequate corrective process nor comply with due process and equal protection under the Fourteenth Amendment.

Assignment of Error No. III

Considered together, the cumulative errors set forth in Appellant's substantive grounds for relief merit reversal or remand for a proper post-conviction process.

Id. at 80–128.

On April 21, 2006, the Ohio Fifth District Court of Appeals affirmed the judgment of the trial court. *State v. Hand,* No. 05CAA060040, 2006 WL 1063758 (Ct.App. Delaware Cnty. Apr. 21, 2006); App. Vol. 12 at 360–74.

Mr. Hand filed a notice of appeal to the Supreme Court of Ohio on June 5, 2006. App. Vol.13 at 3–5. In his Memorandum in Support of Jurisdiction, Mr. Hand raised the following propositions of law:

Proposition of Law No. 1

***17** The Court of Appeals erroneously upheld the trial court's determination that all but appellant's seventh post-conviction claim was barred by the doctrine of *res judicata,* thereby violating appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 2, 9, 10, 16, and 20 of the Ohio Constitution.

Proposition of Law No. 2

The Court of Appeals erred when it determined that there was insufficient evidence presented in support of the Seventh Ground for Relief to grant relief or discovery and an evidentiary hearing.

Proposition of Law No. 3

The Court of Appeals erred by dismissing appellant's post-conviction petition, where he presented sufficient operative facts and supporting exhibits to merit an evidentiary hearing and discovery.

Proposition of Law No. 4

Ohio's post-conviction procedures neither afford an adequate corrective process nor comply with due process and equal protection under the Fourteenth Amendment.

Id. at 29–74.

The Supreme Court of Ohio declined to accept Mr. Hand's appeal. *State v. Hand,* 110 Ohio St.3d 1468, 852 N.E.2d 1215 (2006). Mr. Hand then filed for certiorari to the United States Supreme Court (App. Vol. 13 at 96) which was denied on February 20, 2007. *Hand v. Ohio,* 549 U.S. 1217, 127 S.Ct. 1271, 167 L.Ed.2d 94 (2007).

Proceedings in this Court

On March 1, 2007, Mr. Hand filed a Motion for Leave to Proceed in Forma Pauperis, Notice of Intention to File Habeas Corpus Petition, and a Motion for Appointment of Counsel for Habeas Corpus. (Doc. 1). This Court granted Mr. Hand's Motion for Leave to Proceed in Forma Pauperis and for Appointment of Counsel. (Doc. 2). On August 22, 2007, Mr. Hand filed his Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus in which he raised the following claims:

GROUNDS FOR HABEAS RELIEF

I. The admission of unreliable hearsay evidence, absent clear and convincing evidence that Hand was at fault for the declarant's unavailability at trial, violated Hand's right to due process.

II. The introduction of prejudicial character and other acts evidence, and the failure of the trial court to appropriately limit the evidence, violated Hand's right to due process, a fair trial, and a reliable determination of his guilt and sentence.

III. The State failed to disclose material exculpatory evidence to the defense at trial in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Hand's Fifth and Fourteenth Amendment rights.

IV. Hand was denied the effective assistance of counsel during the guilt phase of his trial in violation of his Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendment rights.

A. The failure to object to testimony from Hand's bankruptcy attorney that was protected by the attorney-client privilege;

B. The failure to adequately question prospective jurors regarding their awareness of pretrial publicity;

C. The failure to make a motion for change of venue;

***18** D. The failure to act upon and utilize Hand's report of an escape attempt at the Delaware County jail;

E. The failure to exclude prospective jurors who were biased against the defense;

F. The failure to object to the admissibility of co-conspirator statements;

G. The failure to object to other bad acts evidence and argument;

H. The failure to present evidence of self-defense at the hearsay hearings;

I. The failure to call Phillip Anthony as a defense witness;

J. The failure to request jury instructions;

K. The cumulative impact of defense counsel's errors.

V. Hand was denied the effective assistance of counsel at the sentencing phase of his trial in violation of his Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendment rights.

A. The failure to present expert psychological testimony in mitigation;

B. The failure to investigate and present mitigation through family and friends regarding Hand's abysmal childhood and dysfunctional family background;

C. The failure to present pharmacological and lay witness testimony to explain Hand's demeanor during his guilt-phase testimony;

D. The failure to present testimony regarding Hand's third wife;

E. The failure to investigate and present an ineffective [sic] mitigation strategy, coupled with the failure to give a penalty phase closing argument;

F. The failure to object to the admission of all guilt phase evidence;

G. Cumulative error of ineffectiveness in mitigation.

VI. The trial court's failure to conduct an adequate colloquy to determine whether prospective jurors were biased from their exposure to pretrial publicity violated Hand's Fifth, Sixth, Ninth, and Fourteenth Amendment rights.

VII. The joinder of an unrelated escape charge with Hand's aggravated murder trial violated Hand's rights to due process and a fair trial.

VIII. Hand was convicted of escape absent sufficient evidence of his guilt in violation of the Fifth and Fourteenth Amendments.

IX. The trial court improperly instructed the jury in violation of Hand's Sixth and Fourteenth Amendment rights.

A. Hand's Sixth and Fourteenth Amendment rights were violated when the trial court instructed the jury on complicity despite the State's theory that Hand was the principal offender.

B. The trial court failed to give the appropriate narrowing construction to the course of conduct specification.

C. The trial court failed to appropriately instruct the jury on the relevance of the guilt phase exhibits at sentencing.

D. The trial court failed to appropriately instruct the jury as to the definition of reasonable doubt.

X. The jury's failure to properly conduct the weighing process before imposing the death penalty violated Hand's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

XI. Hand was deprived of the effective assistance of counsel on direct appeal in violation of his Sixth and Fourteenth Amendment rights.

A. The failure to preserve the collateral estoppel argument;

***19** B. The failure to raise an ineffective assistance of counsel challenge to the fact that trial counsel did not object to the testimony of Hand's bankruptcy attorney on the grounds of attorney-client privilege;

C. The failure to challenge the trial court's ruling denying Hand's motion to dismiss the specifications relating to the murder of Hand's first two wives;

D. The failure to challenge the sufficiency of the evidence as to the aggravating circumstances and specifications of count two, specifications two through six;

E. The failure to amend the brief to include juror bias issues;

F. The failure to allege that the trial court's inquiry into potential juror bias resulting from extensive pretrial publicity was constitutionally defective.

XII. The Ohio death penalty statutes are facially unconstitutional.

XIII. The exclusion of residual doubt as a mitigating factor violated Hand's right against cruel and unusual punishment and rights to due process and a fair trial.

XIV. Ohio's use of the lethal injection procedure to administer executions constitutes cruel and unusual punishment in violation of Hand's Eighth, Ninth, and Fourteenth Amendment rights.

XV. The cumulative errors at Hand's trial, sentencing, and on direct appeal command issuance of a writ of habeas corpus.

(Doc. 11).

Mr. Hand admitted that he had failed to exhaust the claims contained in Ground XI Subsections A–C and alleged that "exhaustion in state court would be futile." *Id.* at 54. However, Mr. Hand advised the Court that he would file a motion to stay and abey the case pending his attempt to exhaust those issues in state court. *Id.* Indeed, on August 23, 2007, Mr. Hand filed a Motion to Hold Petition for Writ of Habeas Corpus in Abeyance Pending Exhaustion of Appellate Ineffectiveness Issues. (Doc. 12).

The Court granted Mr. Hand's motion to the extent that it would hold in abeyance those issues which Mr. Hand was attempting to exhaust in the state courts but that it would not hold in abeyance proceeding on the remaining issues. (Doc. No. 18.) As noted above, Mr. Hand filed a motion to reopen his appeal on the basis of ineffective assistance of appellate counsel which the Ohio Supreme Court denied on the procedural ground that he had failed to comply with the 90–day filing deadline of that court's S.Ct.Prac.R. XI(6)(A).

On May 23, 2008, Mr. Hand filed a Motion for Discovery as to his Third, Fourth, Fifth, and Eleventh Grounds for Relief. (Doc. 33). This Court summarized Mr. Hand's Motion as follows:

Petitioner seeks discovery related to Claims III, IV, V, and XI in his Petition. The discovery sought is outlined below:

In Claim III, Petitioner alleges the prosecution withheld exculpatory material from him at the time of trial in violation of his rights under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, he alleges the Columbus Police conducted an investigation in 2001 into the deaths of his first two wives but did not disclose the content of that investigation to him. He alleges that the investigation may have uncovered exculpatory evidence because the investigation began several months prior to the deaths of Jill Hand and Lonnie Welch, the victims in the case in suit. Petitioner theorizes that suspects other than Petitioner and Mr. Welch must have been targets or potential targets of the investigation because "[t]he Columbus police had no suspicion of a Welch/Hand conspiracy until after Welch's January 15, 2002, death." (Motion, Doc. No. 33, at 4).

***20** 1. The right to issue a subpoena duces tecum to the A & E Cable Network for all documents, interviews, video and audio tapes, and reporter's notes regarding the 2001 investigation of the deaths of Hand's first two wives created in connection with "The Black Widower" program that aired on July 14, 2004;

2. Conduct a deposition of Detective Graul of the Columbus Police Department's Unsolved Case Review Team related to his 2001 investigation into the Deaths of Donna Hand and Lori Hand;

3. Conduct a deposition of Detective Dan Otto of the Delaware County Sheriff's Department related to the information and documents he received from Detective Graul and the Unsolved Case Review Team regarding the deaths of Donna Hand and Lori Hand; and

4. Conduct depositions of Mr. Hand's trial counsel, Terry K. Sherman and Richard Cline, to document what, if anything they knew about the 2001 investigation before trial.

Id. at 5–6.

In his fourth and fifth Claims for relief, Petitioner asserts he received ineffective assistance of trial counsel in several respects. To develop those claims, he desires to depose his trial counsel, Terry K. Sherman and

> Richard A. Cline, and his mitigation specialist Debra Gorrell. *Id.* at 8.
>
> Finally, in his eleventh Claim for Relief, Petitioner asserts he received ineffective assistance of appellate counsel. To provide evidence in that regard he, seeks to depose Stephen A. Ferrell, Pamela J. Prude–Smithers, and Wendi Dotson who represented him on direct appeal, and Susan M. Roche and Veronica N. Bennu, who represented him in state post-conviction proceedings.

(Doc. 41 at 2–3).

This Court ultimately granted in part and denied in part Mr. Hand's Motion stating:

> Petitioner's theory as to what would be disclosed by examining the files of the Columbus Police Unsolved Crimes Team is somewhat vague, but Brady violation claims often are: a petitioner doesn't know what he doesn't know. In this case the Petitioner has provided more than mere speculation by showing from investigation already done that the Columbus Police had "reopened" investigations into the deaths of Petitioner's first two wives before the deaths of the victims in this case. Therefore, Petitioner may depose Detective Graul and Petitioner's trial attorneys regarding that investigation. A deposition of Detective Dan Otto is denied in the basis that Dr. Graul can readily testify on what he gave Detective Otto. Should Detective Graul have a memory lapse on this point, the Court will reconsider.
>
> Petitioner is also denied leave to depose the A & E Cable Network. *Brady* applies to information in the possession of the State, not the media. Here, again, if Detective Graul has a memory lapse on what he gave A & E, the Court will reconsider, but only to the extent of A & E's governmental sources.
>
> Petitioner may also depose his trial attorneys and mitigation specialist on his claim of ineffectiveness of trial counsel....
>
> ***21** Petitioner may also depose his appellate counsel, Mr. Ferrell, Ms. Prude–Smithers, and Ms. Dotson. The Court does not understand what Petitioner expects to discover by deposing his post-conviction counsel.... Petitioner is denied permission to depose Susan M. Roche and Veronica N. Bennu [state post-conviction counsel]....
>
> Petitioner's Motion for funds for a pharmacological expert is granted on the following conditions:
>
> ...
>
> 2. The Court has not ruled that any evidence derived from such an expert would be admissible at any evidentiary hearing in this case ...
>
> 3. The Court has also not ruled on Respondent's assertion that the Claim for Relief to which this Motion relates is procedurally defaulted.

Id. at 4–6.

On June 11, 2009, Mr. Hand filed the Affidavit of Eljorn Don Nelson, PharmD. and the depositions of Terry Sherman, Richard Cline, Debra Gorrell Wehrle, Stephen Ferrell, Pamela Prude–Smithers, and Wendi Overmeyer. (Doc. 55, 56, 57, 58, 59, 60, 61). Also on June 11, 2009, Mr. Hand filed a Motion to Expand the Record or in the Alternative for an Evidentiary Hearing. (Doc. 62). On September 3, 2009, the Court granted Mr. Hand's Motion to Expand the Record to include the seven tendered items insofar as the Court considered those items in support of Mr. Hand's alternative Motion for Evidentiary Hearing. (Doc. 69). In addition, the Court granted the Motion for evidentiary hearing and in doing so noted:

> Petitioner seeks to present evidence on Grounds IV, V, and XI which allege ineffective assistance of trial counsel in both the guilt and penalty phases of the trial and on direct appeal....
>
> ... Petitioner states he wishes to present testimony as to three subclaims of ineffective assistance of trial counsel at the guilt phase, specifically
>
> > his attorney's failure to, *inter alia,* 1) question and excuse jurors who were ultimately seated on the jury but expressed predetermined notions of guilt or other reservations in their questionnaires (Petition, pp. 22–23, 25), 2) act upon Hand's report of an escape attempt at the Delaware County Jail (*Id.,* pp. 24–25), and 3) present evidence of self-defense at preliminary hearing to determine the admissibility of voluminous unreliable hearsay statements (*Id.,* pp. 27–28).
>
> ...

> The Court concludes that the intended testimony is potentially relevant to and may be helpful in deciding claims in the Petition which on their face3 state claims of constitutional violations....
>
> As to the claims of ineffective assistance of trial counsel at the mitigation phase and ineffective assistance of appellate counsel, Petitioner desires to present the testimony of his trial and appellate attorneys, his mitigation specialist, and Dr. Nelson.... As with ineffective assistance of trial counsel at the guilt phase, the intended testimony may be helpful in deciding what is, on its face, a valid constitutional claim....

Id. at 6–7. The Court also determined that testimony from Dr. Nelson would be helpful in determining whether it was ultimately ineffective assistance of trial counsel to fail to seek access to pharmacological advice as to medications Mr. Hand was taking at the time of trial and sentencing. *Id.* at 8.

***22** On February 11 and 12, 2010, the Court heard testimony from Stephen Ferrell, Eljorn Don Nelson, Richard Cline, Debra Gorrell Wehrle, and Terry Sherman. (Doc. 81, 82, 87, 88). The parties have filed post-hearing briefs, (Doc. 90, 92, 94), and the case became ripe for decision.

Standard of Review

I. *Antiterrorism and Effective Death Penalty Act of 1996*

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104–132, 110 Stat. 1214 (Apr. 24, 1996) ("AEDPA") applies to all habeas cases filed after April 24, 1996. *Herbert v. Billy,* 160 F.3d 1131 (6th Cir.1998), *citing, Lindh v. Murphy,* 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Since Mr. Hand filed his Petition well after the AEDPA's effective date, the amendments to 28 U.S.C. § 2254 embodied in the AEDPA are applicable to his Petition.

Title 28 U.S.C. § 2254, as amended by the AEDPA, provides:

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

The AEDPA also provides that a factual finding by a state court is presumed to be correct, and a petitioner must rebut the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e). In addition, pursuant to the AEDPA, before a writ may issue on a claim that was evaluated by the state courts, the federal court must conclude that the state court's adjudication of a question of law or mixed question of law and fact was "contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

A state court's decision is contrary to the Supreme Court's clearly-established precedent if: (1) the state court applies a rule that contradicts the governing law as set forth in Supreme Court case law; or (2) the state court confronts a set of facts that are materially indistinguishable from those in a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. *Williams v. Taylor,* 529 U.S. 362, 405–06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court's decision involves an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal rule [from Supreme Court cases] but unreasonably applies it to the facts of the particular state prisoner's case", "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply[,] or [if the state court] unreasonably refuses to extend that principle to a new context where it should apply." *Williams,* 529 U.S. at 407–08. For a federal court to find a state court's application of Supreme Court precedent unreasonable, the state court's decision must have been more than incorrect or erroneous; it must have been "objectively unreasonable." *Wiggins v. Smith,* 539 U.S. 510, 520–21, 123 S.Ct. 2527, 156

L.Ed.2d 471 (2003); *Williams,* 529 U.S. at 407, 409. An *unreasonable* application of federal law is different from an *incorrect* application of federal law. *Id.* at 410 (emphasis in original). In sum, Section 2254(d)(1) places a new constraint on the power of a federal court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. *Id.* at 412 (Justice O'Connor, concurring).

***23** A state court decision is not "contrary to" Supreme Court law simply because it does not specifically cite Supreme Court cases. *Early v. Packer,* 537 U.S. 3, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002). Indeed, "contrary to" does not even require awareness of Supreme Court cases, so long as neither the reasoning nor the result of the state-court decision contradicts them. *Id.* at 8. The AEDPA prohibits the overturning of state decisions simply because the federal court believes that the state courts incorrectly denied the petitioner relief:

> By mistakenly making the "contrary to" determination and then proceeding to a simple "error" inquiry, the Ninth Circuit evaded Section 2244(d)'s requirement that decisions which are not "contrary to" clearly established Supreme Court law can be subjected to habeas relief only if they are not merely erroneous, but "an unreasonable application" of clearly established federal law, or based on "an unreasonable determination of the facts".

Id. at 11.

For the purposes of the AEDPA, the court reviews the last state court decision on the merits. *Howard v. Bouchard,* 405 F.3d 459, 469 (6th Cir.2005), *cert. denied,* 546 U.S. 1100, 126 S.Ct. 1032, 163 L.Ed.2d 871 (2006).

The AEDPA standard of review applies only to "any claim that was adjudicated on the merits in State court proceedings." *Danner v. Motley,* 448 F.3d 372, 376 (6th Cir.2006). A state court's failure to articulate reasons to support its decision is not grounds for reversal under the AEDPA. *Williams v. Anderson,* 460 F.3d 789, 796 (6th Cir.2006), *citing, Harris v. Stovall,* 212 F.3d 940 (6th Cir.2000), *cert. denied,* 432 U.S. 947 (2001). Where the state court fails to adjudicate a claim on the merits, the habeas court conducts an independent review of a petitioner's claims. *Williams, supra.* That independent review, however, is not a full, *de novo* review of the claims, but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA. *Williams, supra.*

II. *Procedural Default*

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

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause of the default and actual prejudice as a result of the alleged violation of federal law; or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 749, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *see also, Simpson v. Jones,* 238 F.3d 399, 406 (6th Cir.2000). That is, a petitioner may not raise on federal habeas a federal constitutional right he could not raise in state court because of procedural default. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Engle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Absent cause and prejudice, a federal habeas petitioner who fails to comply with a state's rules of procedure waives his right to federal habeas corpus review. *Boyle v. Million,* 201 F.3d 711, 716 (6th Cir.2000); *Murray v. Carrier,* 477 U.S. 478 (1986); *Engle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright,* 433 U.S. at 87.

***24** The Sixth Circuit Court of Appeals requires a four-part analysis when determining whether a habeas claim is barred by procedural default. *Reynolds v. Berry,* 146 F.3d 345, 347–48 (6th Cir.1998), *citing Maupin v. Smith,* 785 F.2d 135, 138 (6th Cir.1986); *accord Lott v. Coyle,* 261 F.3d 594 (6th Cir.2001), *cert. denied,* 534 U.S. 1147, 122 S.Ct. 1106, 151 L.Ed.2d 1001 (2002).

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.

...

Second, the court must decide whether the state courts actually enforced the state procedural sanction, citing *County Court of Ulster County v. Allen,* 442 U.S. 140, 149, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.

Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin, 785 F.2d at 138.

Analysis

GROUND I

The admission of unreliable hearsay evidence, absent clear and convincing evidence that Hand was at fault for the declarant's unavailability at trial, violated Hand's right to due process.

In his First Ground for Relief, Mr. Hand alleges that the state violated his due process rights when the trial court admitted into evidence certain statements which Lonnie Welch made to various individuals. Mr. Hand's position is that the admission into evidence of testimony from Pete Adams, Betty Evans, Teresa Fountain, Anna Hughes, David Jordan, Barbara McKinney, Tezona McKinney, and Shannon Welch violated his due process rights as well as his rights under the Sixth Amendment's Confrontation Clause.

Mr. Hand raised this claim on direct appeal to the Ohio Supreme Court which addressed it as follows:

Admissibility of Welch's statements. In proposition of law I, Hand argues that the trial court erred in admitting Welch's statements about his complicity with Hand to murder Hand's wives. Hand argues that the testimony was not admissible under Evid.R. 804(B)(6), forfeiture by wrongdoing, or any other hearsay exception. Additionally, Hand argues that such evidence violated his Sixth Amendment right "to be confronted with the witnesses against him." Sixth Amendment to the United States Constitution.

Over defense objection, the trial court admitted Welch's statements to various witnesses describing Welch's complicity with Hand in the murders of Donna, Lori, and Jill. First, Pete Adams, Welch's cousin, testified that a week or two after Lori's murder in the fall of 1979, Welch came to his home and told him that he "killed Donna and Lori Hand" and "did it for Bob."

***25** Second, Shannon Welch, Welch's brother, testified that during July or August 2001, Welch asked Shannon "if [he] had a pistol or if [he] could get one." Welch then asked, "Do you know what I do for extra money?" Welch continued, "Well, I killed Bob's first wife and * * * I got to kill the present wife and I'll have a lot of money after that." About a week and a half before Jill's and Welch's murders, Welch told Shannon that he "might get to take care of his business with Bob tonight." On January 15, Welch told Shannon, "Well, I got to go take a shower and change clothes and be ready to go to see Bob because I might be taking care of my business tonight."

Third, Barbara McKinney, described in the record as Welch's common-law wife, testified that Welch told her that he had visited Hand's home in Delaware and "Bob showed him the house." When Welch was in jail between December 2001 and January 2002, Welch directed Barbara on the phone, "Call my friend and see if he'll pay my bond to get me out of jail." Welch identified his friend as Bob Hand and said, "[D]on't say his name on the phone any more."

Fourth, Tezona McKinney, Barbara's daughter, testified that on January 14, 2002, the day before the murders, Welch told her, "Well, if I get this little money * * * tomorrow, I want to buy your mother this car because I didn't buy her anything for Christmas." Welch then pointed out the car to Tezona and said, "I want your mother to have that car. And if I can, I'm going to try to make sure I get it for her, if I get this money." On another occasion, Welch told Tezona that "Bob Hand killed his first two wives."

Fifth, Betty Evans, Lonnie Welch's sister, testified that around 1979 or 1980, Welch told her that if she "knew

anything, not to say anything because him and Bob had a pact and if anything got out, they were going to kill each other's mother." On the evening of the murders, Welch told Evans that "he was going to pick up some money and he'd be right back; that he was sorry he didn't have anything for [her] birthday; that when he comes back, he'll take care of it."

Sixth, Teresa Fountain, Shannon Welch's ex-girlfriend, testified that during 1975 or 1976, she overheard Lonnie Welch "talking to [her boyfriend] Isaac all about insurance money and knocking his boss's wife off to get some insurance money." Later, Welch told Fountain, "I hope you didn't hear anything and * * * you keep your mouth shut, * * * you didn't hear anything."

Seventh, Anna Hughes, a friend of Lonnie Welch, testified that although Welch often missed work, he was not fired from his job working for Hand. On one occasion, Welch said to her, "I didn't go to work * * * [but] I got it like that." Sometime around 1998, Welch mentioned to Hughes that he was "going out to Bob's." He added, "I've got to get me a hit and I ain't got no money."

Finally, David Jordan Jr., Welch's Franklin County Jail cellmate, testified that during December 2001, Welch said that he was "going to take somebody out for this guy named Bob" and added, "I've put in work for him before." Welch offered Jordan between five and six thousand dollars to be his driver. Welch also said the murder would "happen sometime in January" and gave Jordan his phone number.

***26** Admissibility under Evid.R. 804(B)(6). Under Evid.R. 804(B)(6), a statement offered against a party is not excluded by the hearsay rule "if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying." Evid.R. 804(B)(6) was adopted in 2001 and is patterned on Fed.R.Evid. 804(b)(6), which was adopted in 1997. Staff Notes (2001), Evid.R. 804(B)(6). To be admissible under Evid.R. 804(B)(6), the "offering party must show (1) that the party engaged in wrongdoing that resulted in the witness's unavailability, and (2) that one purpose was to cause the witness to be unavailable at trial." Id.; see, also, *United States v. Houlihan* (C.A.1, 1996), 92 F.3d 1271, 1280.

Before admitting Welch's statements under Evid.R. 804(B)(6), the trial court conducted an evidentiary hearing outside the jury's presence. Welch's cousins, Pete Adams and Phillip Anthony Jr., testified that Welch told them that he had killed Donna and Lori for Hand. Anthony also testified that shortly before Jill's murder, Welch told him that he needed a gun because Hand wanted him to murder his present wife. [1] The trial court also considered the testimony of Hand's cellmate, Kenneth Grimes, that Hand had admitted killing Welch to eliminate him as a possible witness.

Based on evidence at the trial and at the evidentiary hearings, the trial court found, "The state has shown, by a *preponderance of the evidence* under Rule 804, that, number one, the witness, accomplice, victim, Lonnie Welch's death was caused by the defendant, and it's obviously by virtue of that to cause his unavailability." (Emphasis added.) The trial court then ruled that Welch's statements were admissible. After conducting further evidentiary hearings with other witnesses, the trial court admitted the remainder of Welch's statements.

Hand alleges several reasons why the trial court erred in admitting Welch's statements under Evid.R. 804(B)(6). First, Hand argues that the trial court should have used the clear-and-convincing standard of proof, rather than a preponderance-of-the-evidence standard, in proving the predicate facts. However, the majority of United States Courts of Appeals applying the federal rule have followed the preponderance-of-the-evidence standard in ruling on preliminary determinations of admissibility under Fed.R.Evid. 804(b)(6). See *Cotto v. Herbert* (C.A.2, 2003), 331 F.3d 217, 235; *United States v. Scott* (C.A.7, 2002), 284 F.3d 758, 762; *United States v. Cherry* (C.A.10, 2000), 217 F.3d 811, 820; *United States v. Zlatogur* (C.A.11, 2001), 271 F.3d 1025, 1028; see, also, *Steele v. Taylor* (C.A.6, 1982), 684 F.2d 1193, 1202 (preponderance standard in making preliminary findings in waiver-by-misconduct cases); *State v. Boyes, Licking* App. Nos.2003CA0050 and 2003CA0051, 2004 Ohio 3528, 2004 WL 1486333, P54–56 (applying the preponderance standard in determining whether the foundational requirements for *Evid.R. 804(B)(6)* were met). Thus, the trial court properly applied the preponderance-of-the-evidence standard in ruling on admissibility.

***27** Second, Hand argues that the trial court erred in admitting Welch's statements without first considering Hand's affirmative defense of self-defense. However, Hand failed to offer any evidence of self-defense during the evidentiary hearing, although the defense had the opportunity to do so. Thus, the trial court made the appropriate ruling based on the evidence before the court.

Third, Hand contends that Welch's statements were not admissible under Evid.R. 804(B)(6), because the state failed to show that Hand's purpose in killing Welch was to make him unavailable as a witness. Hand argues that when Welch was killed, there were no pending charges and no evidence that Welch intended to testify against him at trial. We reject this argument.

Evid.R. 804(B)(6) "extends to potential witnesses." Staff Notes (2001), Evid.R. 804(B)(6); *United States v. Houlihan,* 92 F.3d at 1279 (rule applies with "equal force if a defendant intentionally silences a *potential* witness." (Emphasis sic.) Thus, the absence of pending charges against Hand at the time he killed Welch did not preclude the admissibility of Welch's statements. Moreover, the state need not establish that Hand's sole motivation was to eliminate Welch as a potential witness; it needed to show only that Hand "was motivated *in part* by a desire to silence the witness." (Emphasis sic.) *Id.* at 1279; *United States v. Dhinsa* (C.A.2, 2001), 243 F.3d 635, 654. Hand's admissions to Grimes clearly established that one of Hand's purposes was to eliminate Welch as a potential witness.

Finally, Hand argues that the trial court erred in admitting Welch's statements because they were not reliable. Hand claims that the witnesses were not credible because they were Welch's friends, family members, and a cellmate. Moreover, Hand contends that Welch's friends and family members were angry at him for killing Welch.

Following the evidentiary hearings and before admitting Welch's statements under Evid.R. 804(B)(6), the trial court found that each witness was credible. The decision whether to admit these hearsay statements was within the trial court's discretion. See *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus (the admission of relevant evidence rests within the sound discretion of the trial court); cf. *State v. Landrum* (1990), 53 Ohio St.3d 107, 114, 559 N.E.2d 710 ("The determination of whether corroborating circumstances are sufficient to admit statements against penal interest, as a hearsay exception, generally rests within the discretion of the trial court").

No evidence supports Hand's allegations that Welch's friends and family members were not telling the truth, and their bias could have been explored on cross-examination. Indeed, courts generally hold that "where a declarant makes a statement to someone with whom he has a close personal relationship, such as a spouse, child, or friend, * * * that * * * relationship is a corroborating circumstance *supporting* the statement's trustworthiness." (Emphasis sic.) *State v. Yarbrough,* 95 Ohio St.3d 227, 2002 Ohio 2126, 767 N.E.2d 216, P53; see, also, *United States v. Tocco* (C.A.6, 2000), 200 F.3d 401, 416 (declarant's statements to his son in confidence considered trustworthy); *Latine v. Mann* (C.A.2, 1994), 25 F.3d 1162, 1166–1167 (reasoning that statements made to a perceived ally rather than to a police officer during an interrogation are trustworthy). Moreover, the testimony of Welch's friends and family members was corroborated by Jordan, Welch's cellmate, and Grimes, who testified that Hand admitted hiring Welch to kill Jill.

***28** Based on the foregoing, we find that the trial court did not abuse its discretion in admitting Welch's statements under *Evid.R.* 804(B)(6).

Admissibility under other evidentiary rules. We further find that Welch's statements were admissible as statements against interest (Evid.R.804(B)(3), as a statement of intent (Evid.R.803(3)), and as a co-conspirator's statement (Evid.R.801(D)(2)(e)).

First, Evid.R. 804(B)(3) provides a hearsay exception where the declarant is unavailable as a witness. This rule states: "(3) *Statement against interest.* A statement that * * * at the time of its making * * * so far tended to subject the declarant to civil or criminal liability * * * 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 trustworthiness of the statement."

Welch's statements admitting his involvement in murdering Hand's wives qualified for admissibility under Evid.R. 804(B)(3). Welch's statements to Adams, Shannon, and Jordan implicating Hand in the murders were also admissible. [2] *State v. Madrigal* (2000), 87 Ohio St.3d 378, 2000 Ohio 448, 721 N.E.2d 52, paragraphs one and three of the syllabus (out-of-court statements made by an accomplice that incriminate the defendant may be admitted as evidence if the statement contains adequate indicia of reliability); see, also, *State v. Issa* (2001), 93 Ohio St.3d 49, 60, 2001 Ohio 1290, 752 N.E.2d 904; *Lilly v. Virginia* (1999), 527 U.S. 116, 134, 119 S.Ct. 1887, 144 L.Ed.2d 117, fn. 5. As in *Issa,* Welch's statements were voluntarily made to family and friends. Moreover, in his statements, Welch did not attempt to shift blame from himself, because he admitted his role as the shooter in multiple killings. *Issa,* 93 Ohio St.3d at 61, 752 N.E.2d 904. Thus, the circumstances surrounding Welch's statements did render Welch particularly worthy of belief. See id.

Second, Evid.R. 803(3) creates a hearsay-rule exception for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed."

Under Evid.R. 803(3), statements of current intent to take future actions are admissible for the inference that the intended act was performed. See *Yarbrough,* 95 Ohio St.3d 227, 2002 Ohio 2126, 767 N.E.2d 216, P33; *Sage,* 31 Ohio St.3d at 182–183, 31 OBR 375, 510 N.E.2d 343; see, generally, *Mut. Life Ins. Co. of New York v. Hillmon* (1892), 145 U.S. 285, 295, 12 S.Ct. 909, 36 L.Ed. 706. Not all of Welch's statements were admissible under this rule. However, Welch's statement to Shannon, "I got to kill the present wife and I'll have a lot of money after that," was admissible under Evid.R. 803(3) to prove that Welch later acted in conformity with that intention. Welch's statement to Shannon, "I got to * * * be ready to go to see Bob because I might be taking care of my business tonight," was also admissible as evidence of his intention. Similarly, Welch's statement to Evans on the night of the murders that "he was going to pick up some money and he'd be right back" was admissible to help show that Welch intended to meet with Hand and collect money from him for shooting Jill. Finally, Welch's statement to Jordan that he intended to "take somebody out for * * * Bob" and planned to do so "sometime in January" was admissible to help prove that Welch later went to Hand's home to carry out this plan.

***29** Third, Evid.R. 801(D)(2)(e) provides: "A statement is not hearsay if * * * the statement is offered against a party and is * * * a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." Statements of coconspirators are not admissible under Evid.R. 801(D)(2)(e) until the proponent of the statement has made a prima facie showing of the existence of the conspiracy by independent proof. *State v. Carter* (1995), 72 Ohio St.3d 545, 1995 Ohio 104, 651 N.E.2d 965, paragraph three of the syllabus. However, explicit findings of a conspiracy's existence need not be made on the record. *State v. Robb* (2000), 88 Ohio St.3d 59, 70, 2000 Ohio 275, 723 N.E.2d 1019.

Welch's statements to Shannon and Jordan were admissible under Evid.R. 801(D)(2)(e). Hand's statements to his cellmate, Grimes, provided independent proof of the conspiracy's existence. See *State v. Duerr* (1982), 8 Ohio App.3d 396, 400, 8 OBR 511, 457 N.E.2d 834 (defendant's own statements can provide "independent proof" of the conspiracy). Hand called Welch a business partner and said he had hired Welch to kill his wife.

The facts show that by July 2001, Hand and Welch had entered into a conspiracy to murder Jill. During that period of time, Welch began asking Shannon whether he had a pistol so that Welch could kill Hand's wife. Welch's ongoing requests for a pistol and his conversations with Shannon about murdering Jill were within the scope of the conspiracy. Further, Welch's December 2000 and January 2001 jailhouse conversations with Jordan about the murder were also within the scope of the conspiracy.

Right to Confrontation. Hand contends that the admission of Welch's statements under Evid.R. 804(B)(6) violated his Sixth Amendment right to confrontation. In making this argument, Hand relies upon the Supreme Court's recent decision in *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. However, we reject Hand's claims.

In *Crawford,* the Supreme Court held that it is a violation of the Confrontation Clause to admit "testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53–54, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (overruling *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, which held that statements from an unavailable witness may be admissible without violating the Confrontation Clause if the statements had been found to be reliable).

However, *Crawford* explicitly preserved the principle that an accused has forfeited his confrontation right where the accused's own misconduct is responsible for a witness's unavailability. *Id.* at 62, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 ("the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability"). See, also, *Reynolds v. United States* (1879), 98 U.S. 145, 158, 25 L.Ed. 244 (if a witness is unavailable because of the defendant's own misconduct, "he is in no condition to assert that his constitutional rights have been violated").

***30** The trial court's preliminary determination that Welch's statements were admissible included a finding that Hand killed Welch to eliminate him as a potential witness. Indeed, Hand admitted to Grimes that he killed Welch to achieve that purpose (i.e., prevent him from being a witness against him). Thus, Hand forfeited his right to confront Welch because his own misconduct caused Welch's unavailability. See *United States v. Garcia–Meza* (C.A.6, 2005), 403 F.3d 364, 369–370 (defendant forfeited his right to confront his wife because his wrongdoing —i.e., his murder of her—was responsible for her unavailability).

Finally, the admission of Welch's statements on the basis of Evid.R. 804(B)(3), Evid.R. 803(3), or Evid.R. 801(D)(2)(e) would not violate Hand's Sixth Amendment right to confront witnesses, because he killed Welch and thereby made him unavailable to testify. Such waiver by misconduct is consistent with *Crawford,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. Indeed, *Crawford's* affirmation of the "essentially equitable grounds" for the rule of forfeiture shows that the rule's applicability does not hinge on the evidentiary basis for the testimony's admissibility. *Id.* at 62, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. See *Garcia–Meza,* 403 F.3d at 370–371; *United States v. Thompson* (C.A.7, 2002), 286 F.3d 950, 963, citing *United States v. Cherry* (C.A.10, 2000), 217 F.3d 811, 820 (applying waiver-by-misconduct rule to co-conspirator).

Based on the foregoing, we overrule proposition of law I.

Hand, 107 Ohio St.3d at 389–96, 840 N.E.2d 151.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI. This right is incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

The Sixth Circuit recently addressed the issue of the Confrontation Clause is *Miller v. Stovall,* 608 F.3d 913 (6th Cir.2010), and the court noted:

> For over twenty years, courts analyzed confrontation challenges using *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), under which hearsay statements were admissible so long as they bore sufficient "indicia of reliability," that is, if they fell into a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Id.* at 66. In *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d

> 177 (1994), the Supreme Court revised its understanding of the confrontation right.... The Court held that if a hearsay statement is testimonial, it can be admitted against a criminal defendant only if the declarant is unavailable for trial and the defendant had a prior opportunity to cross-examine the declarant. *Id* at 59. Although the Court left unanswered whether *Roberts* still governs nontestimonial hearsay, *id.* at 68, it later held that the Confrontation Clause did not apply at all to such statements, abrogating *Roberts* in full, *see Davis v. Washington,* 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

***31** 608 F.3d at 918.

There is no dispute that Mr. Welch was not available to testify at trial nor is it disputed that Mr. Hand never had the opportunity to cross-examine Mr. Welch. Rather, the first question is whether the various statements Mr. Welch made to the persons who testified at Mr. Hand's trial were "testimonial" in nature thereby implicating the Confrontation Clause.

> In *Crawford,* the Supreme Court declined to "spell out a comprehensive definition of 'testimonial." ' 541 U.S. at 68. It began at the extremes, noting that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51. It then listed three "formulations" of th [e] core class of testimonial statements," drawn from court filings and pervious cases:
>
> > [(1)] *"ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; [(2)] "extrajudicial statements ... contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois,* 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); [(3)] "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. at *Amici Curiae* 3.

Id. at 51–52. The Court noted that "all share a common nucleus." *Id.* at 52. It also declared that testimony at a preliminary hearing, grand jury proceeding, or former trial and statements in police interrogations are testimonial under any definition, *id.* at 52, 68, and that business records and statements in furtherance of a conspiracy are not testimonial "by their nature," *id.* at 56.

In *Davis v. Washington,* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Court delivered a refined definition of "testimonial," but only for a subset of cases involving police interrogation.... The Court explicitly cautioned that it did not mean "to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial," because the Framers did not intend "to exempt from cross-examination volunteered testimony or answers to open-ended questions." *Id.* at 822 n. 1. In its most recent case on the Confrontation Clause, the Court appeared to discuss the three formulations as more than merely possible definitions. *See Melendez–Diaz v. Massachusetts,* —— U.S. ——, ——, 129 S.Ct. 2527, 2531, 174 L.Ed.2d 314 (2009))(stating that in listing the three formulations, *Crawford* "described the class of testimonial statements covered by the Confrontation Clause"); *id.* at 2532 (in holding that drug-analysis certificates are testimonial, noting that "[o]ur description of [the core class of testimonial statements] mentions affidavits twice").

***32** The Sixth Circuit had adopted a standard for applying the Supreme Court's ruling in *Crawford.* In *United States v. Cromer,* 389 F.3f 662 (6th Cir.2004), this court offered the following guidance for determining whether a statement in testimonial:

> The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying 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.* at 675; *see also United States v. Hinton,* 423 F.3d 355, 359–60 (3rd Cir.2005) (adopting the *Cromer* standard). Applying this standard, we held that a confidential informant's statements to a police officer, relating the name identification and physical description of the defendant, were testimonial. *Id.* at 677–79. This court has consistently applied the *Cromer* standard. *See, e.g., United States v. Mooneyham,* 473 F.3d 280, 286–87 (6th Cir.2007) (co-conspirator's statements to undercover police officer were not testimonial because he would not have believed they would be used a trial); *United States v. Johnson,* 440 F.3d 832, 843 (6th Cir.2006) (statement to twenty-five year acquaintance was not testimonial when declarant had no reason to suspect acquaintance's cooperation with law enforcement); *United States v. Barry–Scott,* 251 F. App'x. 983, 989–90 (6th Cir.2007) (unpublished opinion) (confidential informant's statements to police officer were testimonial).

Miller, 608 F.3d at 923–24.

The Supreme Court has refined *Crawford* with respect to the "wrongdoing of a party" exception to the hearsay rule vis-a-vis the Confrontation Clause. In *Giles v. California,* 554 U.S. 353, 128 S.Ct. 2678, 2682, 171 L.Ed.2d 488 (2008), the Court held that the Confrontation Clause does not contain an exception "permit[ting] the use of a witnesses's unconfronted testimony if a judge finds ... that the defendant committed a wrongful act that rendered the witness unavailable to testify at trial." The Court reasoned that under the common law, "the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Id.* at 2683 (emphasis in original).

Mr. Hand's First Ground for Relief fails for two reasons. First, under *Crawford,* the statements about which Mr. Hands complains do not raise Confrontation Clause issues because they were nontestimonial. Second, even if the statements were testimonial, the *Crawford/Giles* exception applies because, as the Ohio court found, Mr. Hand engaged in conduct that was *designed* to prevent Mr. Welch from testifying.

Each of the witnesses who testified as to Mr. Welch's statements were either his relative, friend, or acquaintance. The witnesses and their relationships to Mr. Welch were: (1) Pete Adams, his cousin (Trial Tr. Vol. 14 at 2217; 2385);[3] (2) Shannon Welch, his brother (Trial Tr. Vol. 15 at 2518; 2640); (3) Barbara McKinney, his common law wife[4] (*Id.* at 2479; 2692); (4) Tezona McKinney, Barbara's daughter (*Id.* at 2254; 2745); (5) Betty Evans, his sister (*Id.* at 2600; 2769); (6) Teresa Fountain, Shannon's former girlfriend (*Id.* at 2576; Trial Tr. 18 at 3112); (7) Anna Hughes, a friend (Trial Tr. Vol. 16 at 2801; 2869); and (8) David Jordan, Jr., his Franklin County Jail cellmate (*Id.* at 2817; 2904–05). These were not formal statements made to government officials. Mr. Welch did not make them in the course of a police interrogation, at a preliminary hearing, during grand jury proceedings, or at a previous trial. Rather, Mr. Welch made the statements to his relatives, friends, and acquaintances. There is absolutely nothing that would indicate that Mr. Welch made the statements with the intention of bearing testimony against Mr. Hand. Nor is there any indication that Mr. Welch would have anticipated that the statements would be used against Mr. Hand in the prosecution of any crime. Additionally, there is nothing to indicate that Mr. Welch had any reason to suspect that the individuals to whom he made the various statements were, or would be, cooperating with law enforcement personnel in the investigation of any crimes. Rather, Mr. Welch made the statements to people whom he most likely trusted and in whom he confided.

***33** Because the statements about which Mr. Hand complains are not testimonial in nature, there are no Sixth Amendment confrontation rights implicated in their admission into evidence. Nevertheless, even assuming that the statements are testimonial, Mr. Hand forfeited any Sixth Amendment confrontation rights because, as noted, he engaged in conduct that was designed to prevent Mr. Welch from testifying.

Testimony at the hearsay hearing as well as at Mr. Hand's trial indicated that Mr. Hand killed Mr. Welch to eliminate him as a potential witness as to the killings of Mr. Hand's first and second wives as well as his wife Jill. Indeed, Kenneth Grimes, Mr. Hand's former cellmate in the Delaware County jail testified that Mr Hand told him that he killed Mr. Welch to achieve that purpose (*i.e.,* prevent him from being a witness against him). Mr. Grimes testified at the hearsay hearing that Mr. Hand

"wasn't satisfied with his wife, he thought she was being permiscuous [sic]" and that "he was going to have her knocked off", and that his description of what happened to his wife changed over time in that it went from self-defense to "him doing the actual crime." Trial Tr. Vol. 14 at 2246–47. Mr. Grimes testified further that Mr. Hand told him that the man who supposedly killed his wife was a business partner, that "he was hired to do that job", that the job didn't turn out as it was supposed to, and that the other man was renegotiating and therefore "Mr. Hand took care of them both." *Id.* at 2247. Mr. Grimes also testified at the hearing that Mr. Hand told him he had "[taken] care of both of them; he shot the man and his wife...." *Id.* at 2248. Mr. Grimes testified that Mr. Hand told him that "anybody who messed with him would disappear." *Id.* at 2251. In the presence of the jury, Mr. Grimes gave similar testimony. According to Mr. Grimes, Mr. Hand told him that he "killed his wife and the man he [sic] was involved with." Trial Tr. Vol. 16 at 3025. Mr. Hand also told Mr. Grimes that he had hired a man, with whom he had "been doing business ... for years", to kill his wife, that the deal went sour because he wanted more money, and so he killed two birds with one stone and didn't have to pay anything. *Id.*

Although *Giles* was not decided until more than two years after the Ohio Supreme Court affirmed Mr. Hand's convictions and sentences and arguably would not apply to Mr. Hand's current Petition, *see, Teague v. Lane,* 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the Ohio Supreme Court's conclusion that that trial court properly determined that Mr. Hand killed Mr. Welch to eliminate him as a potential witness certainly satisfies the heightened *Crawford* standard as announced in *Giles.* Moreover, the simple fact that Mr. Hand killed Mr. Welch without considering his motive for doing so satisfies the pre-*Giles* standard of *Crawford.* In other words, Mr. Hand forfeited his Sixth Amendment confrontation right under both tests.

***34** In his direct appeal to the Ohio Supreme Court, Mr. Hand claimed that the statements as offered from Mr. Welch's family and friends, did not meet due process requirements of reliability. Mr. Hand argues that the Ohio Supreme Court failed to address his due process argument. However, contrary to Mr. Hand's argument, the Ohio Supreme Court did address his due process claim by finding that the statements were indeed reliable, that the trial court properly admitted the statements at issue, and that their admissions were not violations of Mr. Hand's Sixth Amendment confrontation rights. While the Ohio Supreme Court may not have specifically used the term "due process", a review of its decision reveals that it considered the overall constitutional implications of the admission of the testimony.

For the same reasons that this Court discussed with respect to the statements at issue being nontestimonial, the Court concludes that the Ohio Supreme Court's properly determined that the statements were reliable and therefore their admission did not violate Mr. Hand's due process rights. Specifically, Mr. Welch made the statements to his relatives, friends, and acquaintances, individuals with whom he had close, personal relationships. Further, there is no evidence which indicates that any of the witnesses were not telling the truth. Indeed, any alleged bias could have been brought out on cross-examination.

In addressing Mr. Hand's allegations of violations of his Sixth Amendment Confrontation Clause and due process rights, the Ohio Supreme Court's findings and decision are not contrary to nor an unreasonable application of, clearly established federal law. Therefore Mr. Hand's Ground I should be rejected.

GROUND II

The introduction of prejudicial character and other acts evidence, and the failure of the trial court to appropriately limit the evidence, violated Hand's right to due process, a fair trial, and a reliable determination of his guilt and sentence.

Mr. Hand argues in Ground II that the trial court erred by admitting certain allegedly prejudicial character and other acts evidence. Mr. Hand also argues that assuming that the trial court properly admitted the evidence, it erred by failing to give a limiting instruction to the jury that the evidence could not be used to demonstrate his guilt, but only to illustrate his motive in the crime. Mr. Hand raised this claim on direct appeal and the Ohio Supreme Court rejected it saying:

> *Other evidentiary issues.* In proposition of law II, Hand argues that the prosecutor's closing argument improperly mentioned evidence of Hand's fraudulent business practices and improperly presented "other acts" evidence. Hand also argues that the trial court

failed to provide the jury with adequate limiting instructions. However, except where mentioned, the defense failed to object and waived all but plain error. See *State v. Wade* (1978), 53 Ohio St.2d 182, 7 O.O.3d 362, 373 N.E.2d 1244, paragraph one of the syllabus; *State v. Childs* (1968), 14 Ohio St.2d 56, 43 O.O.2d 119, 236 N.E.2d 545, paragraph three of the syllabus.

***35** 1. Mentioning fraudulent business practices during closing argument. Allen Peterson, Hand's accountant, prepared the corporate income tax returns for Hand's radiator business and testified that the business suffered financial losses for a number of years before going out of business.

The defense objected to evidence of Hand's tax returns as irrelevant and moved to strike Peterson's entire testimony. In overruling the defense objection, the trial court provided the jury with the following limiting instruction: "Exhibits that were admitted, being the tax returns from yesterday, those are admitted solely for showing a motive. They are not to be construed * * * in any other way, for any other purpose, such as how record keeping may have taken place, strictly on that sole issue."

Hand testified in his own behalf and stated that he paid Welch and Adams "cash under the table" to avoid paying withholding taxes and to avoid a paper trail. Hand also admitted that he had not filed a personal federal income tax return for at least 15 years.

During the closing argument, the prosecutor reviewed evidence of Hand's business practices and made the following argument:

"And did you catch his statement * * * about he and his father like to save on their taxes by paying employees under the table in cash? We all know that tax avoidance is common in this country, but what he calls saving on taxes is actually fraud. The fact that he so breezily engaged in that kind of behavior * * * *tells us much about his respect for the law and his willingness to lie and deceive.* This wasn't just a rinky-dink, every once in a while practice, that the defendant engaged in during the slow season of his business. Exhibit 275, prepared by Detective Otto, indicates that the defendant billed more than one hundred thousand dollars fraudulently to his own business on his own credit cards. *This was fraud on a massive scale, and it exemplifies the way in which this man operates."* (Emphasis added.)

Hand concedes that evidence of his financial situation was proper to prove motive. However, Hand contends that the prosecutor improperly argued that his illegal business practices showed that he did not hesitate to violate the law in general.

The prosecution is entitled to significant latitude in its closing remarks. The prosecutor may comment on " 'what the evidence has shown and what reasonable inferences may be drawn therefrom." ' *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293, quoting *State v. Stephens* (1970), 24 Ohio St.2d 76, 82, 53 O.O.2d 182, 263 N.E.2d 773. As to defense witnesses, including the defendant, the prosecutor may comment upon their testimony and suggest the conclusions to be drawn therefrom. The prosecutor may state that "the evidence supports the conclusion that the defendant is not telling the truth, is scheming, or has ulterior motives for not telling the truth." See *State v. Finkes* (Mar. 28, 2002), Franklin App. No. 01AP310, 2002 Ohio 1439, P45, 51, 2002 WL 464998, *9; *State v. Draughn* (1992), 76 Ohio App.3d 664, 670, 602 N.E.2d 790.

***36** Hand's credibility was at issue because he testified in his own defense. The prosecutor's characterization of Hand's behavior as fraud and his argument that Hand's illegal business practices showed his "willingness to lie and deceive" represented fair comment on Hand's credibility. However, the argument that Hand committed "fraud on a massive scale, and it exemplifies the way in which this man operates" represented an overly broad comment on Hand's character. Nevertheless, we find no plain error in view of the overwhelming evidence of Hand's guilt. Cf. *State v. Rahman* (1986), 23 Ohio St.3d 146, 154–155, 23 OBR 315, 492 N.E.2d 401.

Reaction to wives' deaths. Hand contends that testimony about his reaction to news about Lori's and Jill's murder was improper "other acts" evidence. Sam Womeldorf, a now retired Columbus homicide detective, was involved in the murder investigations of Donna and Lori. Womeldorf described Hand's demeanor after Hand was notified of Lori's death:

"A: In dealing with Bobby on the * * * death of his first wife, I noticed that Bobby carried on; he was not exactly honest with me * * * in particular things. * * * And I noticed that when Bobby came this time, he was very similar to the first time, he carried on, and *

* * stomping and * * * demanding to go in the house and the same thing he did on the other one. And you would think he was crying, however, * * *—

"Mr. Sherman: I'm going to object. This is all opinion.

"The Court: Overruled.

" * * *

"A: I noticed he wasn't crying; there were no tears."

Evid.R. 701, which governs opinion testimony by lay witnesses, provides: "If the witness is not testifying as an expert, his 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 his testimony or the determination of a fact in issue."

Womeldorf's testimony satisfied both requirements of Evid.R. 701. Womeldorf personally observed Hand's demeanor, and the lack of grief was relevant in showing Hand's strange reaction after learning that Lori had been killed. See *State v. Griffin,* Hamilton App. No. C–020084, 2003 Ohio 3196, 2003 WL 21414664, P37–38 (testimony that defendant "began to cry and sob, but there were no tears" admissible as lay opinion); cf. *State v. Stojetz* (1999), 84 Ohio St.3d 452, 463, 1999 Ohio 464, 705 N.E.2d 329 (testimony that witness appeared "scared" and "not able to think" admissible as lay opinion). We find that the trial court did not abuse its discretion in admitting this testimony. See *Sage,* 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus.

Hand also claims that Abel Gonzalez, Hand's son-in-law, improperly testified that Hand failed to show remorse following Jill's death. Two to three weeks after Jill's death, Abel talked to Hand about Jill's estate. During his testimony, Abel was asked about Hand's demeanor:

***37** "Q: What was his demeanor when you had this conversation with him?

"A: It was just a matter of fact. It was more like just a business conversation, let's say.

"Q: Did he ever say he missed Jill?

"A: No.

"Q: Did he act sad about what had happened?

"A: I can't say he was sad; no."

Hand's emotional reaction two to three weeks after Jill's death was of questionable relevance. However, we find that Gonzalez's testimony did not constitute outcome-determinative plain error in view of the compelling evidence of Hand's guilt.

3. Sex-related testimony. At trial, Womeldorf testified that Hand told him: "[Lori] was cold and he was a horny old man. * * * [He] wanted sex at least once a night and she didn't want to do that." Hand argues that this testimony was improperly admitted.

The admission of Hand's statement about his sexual relations with Lori was a matter of relevancy. Evid.R. 401 provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." We find that testimony about Hand's frequent desire for sex and his wife's lack of that interest was relevant as a possible motive for Lori's murder.

Hand also argues that testimony that he was infatuated with Barbara McKinney's daughter was improper other-acts evidence. Barbara's testimony included the following questioning:

"Q: Did you ever see Lonnie Welch and Bob Hand get together when you lived at the home on King Edward Avenue?

"A: Bob Hand used to come to our house and pick Lonnie up frequently. And he also had an infatuation, I guess, for my youngest daughter."

Barbara's nonresponsive remark was harmless, and her testimony was not repeated. Given the overwhelming evidence of Hand's guilt, we find that this isolated remark did not result in outcome-determinative plain error.

4. Interest in "true crime" stories. Hand also claims that testimony that he read "true crime" stories was improperly admitted. William Bowe, a childhood friend of Hand, testified, "When we [were] younger," Hand

liked to read about "the perfect crime and stuff like that."

Hand's childhood interest in crime stories was only marginally relevant in showing that Hand may have used information about police work to manipulate the crime scene at his Delaware home. However, we find that the testimony did not result in outcome-determinative plain error.

5. Forcing his father out of business and Hand's obsession with money. Hand contends that the state improperly introduced evidence that he forced his father out of his radiator business and was obsessed with money. Bowe worked for ten years at Hand's radiator shop. During his testimony, Bowe explained why he left the shop:

"Q: And you said you worked there about ten years, until 1980, I gather?

"A: Yeah; * * * he bought the building—

***38** "Q: You mean—

"A: Bob.

"Q: Okay; the defendant.

"A: He kicked his dad out of there.

"Q: What do you mean?

"A: Well, I don't know. They had an argument or something, and the next thing I know, he's smashing the windows out of the shop and said you got three days to move out of here.

"Q: Who is he saying that to?

"A: To his dad.

"Q: I see.

"A: So we did move, and I went with his dad."

This evidence established that Hand took over the radiator business and then hired Welch to work for him. Testimony that Hand fired his father and gave him three days to leave the shop was of highly questionable relevance. But we find that the evidence did not result in outcome-determinative plain error.

Hand also argues that testimony that he was obsessed with money was improperly introduced. Here, Bowe testified:

"Q: * * * Do you have any knowledge about the defendant's views toward money, finances?

"A: No; everybody knows Bob, and that's been his big thing in life is how much money he can get in his pocket. He's a money person.

"Q: And why do you say that?

"A: Ever since we was kids, * * * his quest in life is money."

We find that Bowe's opinion testimony was admissible under Evid.R. 701 because it was based upon his lifelong relationship with Hand, and Bowe's opinion helped to explain Hand's financial motives.

6. Limiting instructions. Hand argues that the trial court erred by not providing limiting instructions on the admissibility of "other acts" evidence. As discussed earlier, the trial court provided the jury with limiting instructions on the consideration of Hand's tax returns. However, the defense did not request any further limiting instructions at the end of the guilt-phase evidence. Hand's failure to request such instructions waived all but plain error. In any event, nothing suggests that the jury used other-acts evidence to convict Hand on the theory that he was a bad person. Thus, we find that the trial court's failure to give further limiting instructions did not constitute plain error. See *State v. Grant* (1993), 67 Ohio St.3d 465, 472, 1993 Ohio 171, 620 N.E.2d 50.

Based on the foregoing, proposition of law II is overruled.

Hand, 107 Ohio St.3d at 396–401, 840 N.E.2d 151.

Federal habeas corpus is available only to correct federal constitutional violations. 28 U.S.C. § 2254(a); *Lewis v. Jeffers,* 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990); *Smith v. Phillips,* 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); *Barclay v. Florida,* 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to

deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

A federal constitutional claim must be "fairly presented" to the state courts in a way which provides them with an opportunity to remedy the asserted constitutional violation, including presenting both the legal and factual basis of the claim. *Williams v. Anderson,* 460 F.3d 789, 806 (6th Cir.2006); *Levine v. Torvik,* 986 F.2d 1506 (6th Cir.) *cert. denied,* 509 U.S. 907, 113 S.Ct. 3001, 125 L.Ed.2d 694 (1993), *overruled in part on other grounds, Thompson v. Keohane,* 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995); *Riggins v. McMackin,* 935 F.2d 790 (6th Cir.1991). The claim must be fairly presented at every stage of the state appellate process. *Wagner v. Smith,* 581 F.3d 410, 418 (6th Cir.2009). Merely using talismanic constitutional phrases like "fair trial" or "due process of law" does not constitute raising a federal constitutional issue. *Slaughter v. Parker,* 450 F.3d 224, 236 (6th Cir.2006); *Franklin v. Rose,* 811 F.2d 322, 326 (6th Cir.1987); *McMeans v. Brigano,* 228 F.3d 674, 681 (6th Cir.2000), *cert. denied,* 531 U.S. 958 (2001), *citing Petrucelli v. Coombe,* 735 F.2d 684, 688–89 (2d Cir.1984). "A lawyer need not develop a constitutional argument at length, but he must make one; the words 'due process' are not an argument." *Riggins v. McGinnis,* 50 F.3d 492, 494 (7th Cir.), *cert. denied sub. nom., Riggins v. Washington,* 515 U.S. 1163, 115 S.Ct. 2621, 132 L.Ed.2d 862 (1995).

***39** Mr. Hand argues that the Ohio Supreme Court failed to address his other acts evidence claim under federal constitutional law and that this Court should therefore address the claim *de novo* rather than under the AEDPA standard.

It is true that the Ohio Supreme Court did not analyze this claim under federal constitutional law. However, when Mr. Hand raised this issue on direct appeal to the Ohio Supreme Court, he raised it as a question of state law with only cursory mentions of due process and the United States Constitution. App. Vol. 6 at 279–85. Specifically, Mr. Hand argued that, "[t]he improper admission of 'other acts' evidence in the present case destroyed the presumption of innocence that should have been accorded to Hand and denied him his right to a fair trial in violation of the Due Process Clause of the Fourteenth Amendment." Mr. Hand did not raise any constitutional arguments and he cited to one federal case, *Chapman v. California,* 386 U.S. 18, 26, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), for the proposition that, "[t]he State cannot demonstrate that the admission of this evidence and consideration of their improper argument were harmless beyond a reasonable doubt." App. Vol. 6 at 284. Aside from *Chapman,* the fourteen cases Mr. Hand cited on direct appeal are Ohio cases which address the appropriateness of prior acts evidence under Ohio statute and rules of evidence. Mr. Hand's arguments on direct appeal focused solely on the trial court's alleged errors of state law in admitting the other acts evidence and with respect to its limiting jury instruction. In other words, Mr. Hand failed to "federalize" his claim on the issue of other acts evidence.

Mr. Hand's presentation to the Ohio Supreme Court of his claim with respect to other acts evidence was inadequate to put that court on notice of a federal claim. Therefore, this claim is not cognizable in federal habeas corpus because it deals with a matter of state law and Ground II should be dismissed.

GROUND III

The State failed to disclose material exculpatory evidence to the defense at trial in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Hand's Fifth and Fourteenth Amendment rights.

In his Ground III, Mr. Hand argues that the state failed to disclose exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Mr. Hand's position is that the state failed to turn over Colombus Police Department files which contained information about the 2001 investigation into the deaths of his first two wives. The Respondent argues that this claim is procedurally defaulted. Mr. Hand argues in response that this claim is not procedurally defaulted because he supported the claim with evidence outside the record and therefore the post-conviction court improperly determined that he should have brought the claim on direct appeal. Mr. Hand concludes that the state court erred by determining the claim was barred by *res judicata.*

As noted above, Mr. Hand raised this claim as his Ground for Relief No. 12 in his post-conviction petition and the trial court rejected the claim on the basis of *res judicata* as

well as on the basis that the claim was not supported by the record stating:

> ***40** Here, the Defendant's arguments are not supported by the material on the record regarding discovery matters. First, the case was reopened as a matter of routine. Second, the Columbus Police Department did turn over the files in response to defense counsel's discovery requests. The Defendant had access to any information the State could use in the trial including any alternative theories that could lead to a different outcome. Therefore, this information was readily available and was not withheld from the Defendant. Even if the information were not made available to the Defendant, this issue should have been raised on appeal. Since the Defendant did not raise it on appeal, he is now barred from raising it under the doctrine of res judicata. The Court denies the twelfth claim for relief.

App. Vol. 11 at 164–65.

In support of his *Brady* claim, Mr. Hand submitted to the post-conviction court a transcript or video of a July 14, 2004, episode of *American Justice* titled *The Black Widower* which the A & E cable network aired.[5] Mr. Hand's position is that it was not until that television program was brought to his attention that he knew or had reason to know that the investigation into the deaths of his first two wives had been opened and therefore he could not have raised his *Brady* claim on direct appeal.

It is generally true that "a federal habeas court sitting in review of a state-court judgment should not second guess a state court's decision concerning matters of state law." *Greer v. Mitchell,* 264 F.3d 663, 675 (6th Cir.2001). However, when the record reveals that the state court's reliance upon its own procedural rule is misplaced, federal courts are "reluctant to conclude categorically that federal habeas review of the purportedly defaulted claim is precluded." *Id.*

While it is true that, generally, a *Brady* claim is properly brought on direct appeal, in view of the facts of this case, it was not possible for Mr. Hand to do so. As this Court haa noted, Mr. Hand filed his direct appeal on July 30, 2003. The evidence upon which Mr. Hand based his post-conviction *Brady* claim did not come into existence until July 14, 2004. In addition, the evidence was outside the record.

After carefully reviewing Mr. Hand's post-conviction petition, this Court concludes that the Delaware County Common Pleas Court's reliance on the doctrine of *res judicata* was misplaced as was the reliance of the court of appeals. *See State v. Hand,* 2006 Ohio 2028, 2006 Ohio App. LEXIS 1855 (Ohio App. 5th Dist. Apr. 21, 2006). Therefore, Ohio's procedural rule of *res judicata* is not applicable to Mr. Hand's *Brady* claim and his claim in not procedurally defaulted.

Because the Ohio state courts did not adjudicate Mr. Hand's *Brady* claim on the merits, there is no state court decision to which this Court can defer pursuant to 18 U.S.C. § 2254(d). When there are no results, let alone reasoning, to which a federal habeas court can defer, any attempt to determine whether the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law would be futile. *McKenzie v. Smith,* 326 F.3d 721, 727 (6th Cir.2003), *cert. denied,* 540 U.S. 1158, 124 S.Ct. 1145, 157 L.Ed.2d 1057 (2004). Therefore, if the state court does not rule on a federal claim before it, federal review of that claim is *de novo,* rather than deferential. *Hawkins v. Coyle,* 547 F.3d 540, 546 (6th Cir.2008), *cert. denied,* —— U.S. ——, 130 S.Ct. 553, 175 L.Ed.2d 385 (2009) (citations omitted); *see also, See, Nields v. Bradshaw,* 482 F.3d 442, 449–50 (6th Cir.2007), *cert. denied sub nom., Nields v. Hudson,* 552 U.S. 1118, 128 S.Ct. 919, 169 L.Ed.2d 761 (2008), *citing, Danner v. Motley,* 448 F.3d 372, 376 (6th Cir.2006).

***41** The State has a duty to produce exculpatory evidence in a criminal case. If the State withholds evidence and it is material, the conviction must be reversed. *Brady, supra.* "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Impeachment evidence as well as exculpatory evidence falls within the rule. *Id.*

"There are three essential components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

As noted above, this Court granted leave for Mr. Hand to engage in discovery on several issues including his *Brady* claim. (Doc. 41). Specifically, the Court granted Mr. Hand leave to depose Det. Graul of the Columbus Police Department with respect to the *Brady* claim.

As noted above, on June 11, 2009, Mr. Hand filed the following depositions: Terry Sherman and Richard Cline, his trial counsel; Debra Gorrell Wehrle, the mitigation specialist in his case; and Stephen Ferrell, Pamela J. Prude–Smithers, and Wendi Dotson Overmeyer, his direct appeal counsel. (Doc. 56, 57, 58, 59, 60, 61). Mr. Hand never filed a deposition of Det. Graul or any other member of the Columbus Police Department who was associated with the unsolved crimes team or who was involved in the reopening of the investigation of the deaths of Mr. Hand's first two wives. In addition, none of the witnesses who testified at the February, 2010, evidentiary hearing in this Court offered testimony on the issue which is the subject of Mr. Hand's *Brady* claim.

While this Court has given Mr. Hand every opportunity to learn what he didn't know with respect to his *Brady* claim, he has failed to provide this Court with any facts to support his claim. In spite of his previous assurances to the Court that his "description of the exculpatory evidence and the prejudicial effect of its nondisclosure [would] become more specific through the discovery process", (Petitioner's Reply, Doc. 32 at 26; PAGEID# : 532), Mr. Hand has not described the allegedly exculpatory evidence nor has he explained the prejudicial effect of its nondisclosure. In addition, Mr. Hand either did not depose Det. Graul or he chose not to file his deposition with this Court. Further, a review of the deposition transcripts which Mr. Hand did file reveals that Mr. Hand did not examine any of the witnesses about facts related to his *Brady* claim. (Doc. 56, 57, 58, 59, 60, 61). The same is true of the witnesses who testified during the evidentiary hearing before this Court. (Doc. 87, 88).

***42** This Court concludes that Mr. Hand has simply failed to support his *Brady* claim. Therefore, his Ground III should be rejected.

Ground IV

Hand was denied the effective assistance of counsel during the guilt phase of his trial in violation of his Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendment rights.

In Ground IV, Mr. Hand alleges that his trial counsel were constitutionally ineffective for several reasons.

The right to counsel guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. *McMann v. Richardson,* 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763, (1970) (citations omitted). "The Supreme Court set forth the test for ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 ... (1984)". *Eley v. Bagley,* 604 F.3d 958, 968 (2010).

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

Strickland, 466 U.S. at 687. In other words, "[t]o establish ineffective assistance, a defendant 'must show both deficient performance and prejudice." ' *Berghuis v. Thompkins,* — U.S. ——, ——, 130 S.Ct. 2250, 2255, 176 L.Ed.2d 1098 (2010), *quoting, Knowles v. Mirzayance,* 556 U.S. ——, ——, 129 S.Ct. 1411, 1413, 173 L.Ed.2d 251 (2009).

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

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

Strickland, 466 U.S at 689, *quoting, Michel v. State of Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955).

As to the second prong, the Supreme Court said:

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

***43** *Strickland,* 466 U.S. at 694; *see also, Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *Wong v. Money,* 142 F.3d 313, 319 (6th Cir.1998).

Subclaim A

The failure to object to testimony from Hand's bankruptcy attorney that was protected by the attorney-client privilege

In his first Subclaim of Ground IV, Mr. Hand claims that his trial counsel were ineffective for failing to object to testimony from his bankruptcy attorney that was protected by the attorney-client privilege.

The Respondent argues first that this claim is procedurally barred. Mr. Hand essentially acknowledges the default, but argues that he is able to establish cause and prejudice to excuse the default. Mr. Hand's position is that he was represented by attorneys from the same office, *i.e.,* the Ohio Public Defender, on appeal and in post-conviction and the similarity of the defense and appellate teams can serve as good cause for failing to raise an ineffective assistance of counsel claim.

When a defendant is represented by different counsel at trial and on direct appeal, the vehicle for raising an ineffective assistance of trial counsel claim is direct appeal. *See, Hicks v. Collins,* 384 F.3d 204, 211 (6th Cir.), *cert. denied,* 544 U.S. 1037, 125 S.Ct. 2260, 161 L.Ed.2d 1066 (2994). Mr. Hand first raised this ineffective assistance of counsel claim in his Application for Reopening that he filed with the Ohio Supreme Court on September 27, 2008, App. Vol. 9 at 55–56, which that court denied on the basis that he had failed to comply with the ninety-day filing deadline in S.Ct.Prac.R. XI(6)(A). *Id.* at 207.

Ohio law provides that an appellant must raise his claims on appeal at the first opportunity to do so. *See, Jacobs v. Mohr,* 265 F.3d 407, 417 (2001); *see also, State v. Broom,* 40 Ohio St.3d 277, 288–89, 533 N.E.2d 682 (1988), *cert. denied,* 490 U.S. 1075, 109 S.Ct. 2089, 104 L.Ed.2d 653 (1989) (noting that in Ohio, the failure to present a claim to either the state court of appeals or to the Ohio Supreme Court constitutes a waiver of the claim). This Court must assume that Ohio courts would follow their own procedural rules and bar this claim on the basis of *res judicata. See, Simpson v. Sparkman,* 94 F.3d 199, 203 (6th Cir.1996)(applying the presumption that the state court "would not have ignored its own procedural rules and could have enforced the procedural bar"). The assertion of *res judicata* to bar claims not raised at the earliest opportunity is an adequate and independent ground upon which Ohio may rely to foreclose habeas review. *Jacobs,* 265 F.3d at 417. Ohio's *res judicata* rule has been repeatedly upheld in the Sixth Circuit as an adequate and independent state ground to justify default. *Carter v.*

Mitchell, 443 F.3d 517, 538 (6th Cir.2006), *cert. denied,* 549 U.S. 1127, 127 S.Ct. 955, 166 L.Ed.2d 730 (2007).

The first three prongs of *Maupin's* test are satisfied. First, Mr. Hand failed to comply with Ohio's procedural rule of raising an effective assistance of trial counsel claim on direct appeal when represented by different counsel at trial and on direct appeal. Second, the state courts would have enforced those rules if they had been given the opportunity to do so. Third, the waiver doctrine and *res judicata* constitute an adequate and independent state ground upon which the state courts would foreclose review of the issue in Subclaim A.

***44** With respect to the fourth *Maupin* prong, the Court is not persuaded by Mr. Hand's argument that he has established cause for the default of this claim. The fact that Mr. Hand was represented by counsel from the same office on direct appeal and during post-conviction is irrelevant. That is because, as noted, when the defendant was represented by different counsel at trial and on direct appeal, the vehicle for raising an ineffective assistance of trial counsel claim is direct appeal. Therefore, Mr. Hand has not established cause for the default and the fourth *Maupin* prong is satisfied.

The claim of ineffective assistance of trial counsel that Mr. Hand has raised in Subclaim A of Ground IV is procedurally defaulted.

Subclaim B

The failure to adequately question prospective jurors regarding their awareness of pretrial publicity

In Subclaim B of Ground IV, Mr. Hand argues that his trial counsel were constitutionally ineffective for failing to question potential jurors about their awareness of pretrial publicity. Mr. Hand alleges that two of the individuals, Alma Ray and Charlene Finamore, who served on the jury that convicted him were exposed to pre-trial publicity which made them unable to serve impartially and that counsel were ineffective for failing to more closely question Ms. Ray and Ms. Finamore as to the publicity.

Respondent argues first that this claim is procedurally defaulted. Mr. Hand's position is that the claim is not procedurally defaulted because the state courts relied on evidence outside the record and therefore those courts erred in concluding that the claim was barred by *res judicata.*

Mr. Hand presented this claim to the Delaware County Common Pleas Court in his second ground for relief in his post-conviction petition. App. Vol.10 at 88–90. That court determined that Mr. Hand's second ground for relief was barred by *res judicata* because his claim that counsel was constitutionally ineffective because of they failed to question the jurors about pretrial publicity was based on the record and therefore should have been raised on direct appeal. *Id.,* Vol. 11 at 160–61. The court of appeals agreed saying:

> Appellant claims the trial court erred in finding the doctrine of res judicata barred the consideration of claims one, two, three, four, five, six, eight, eleven, and twelve in his petition for post-conviction relief. We disagree.
>
> ...
>
> Appellant's second, third, fourth, fifth, sixth, eighth and eleventh grounds for relief assert ineffective assistance of appellant's trial counsel.
>
> The Sixth Amendment right to effective counsel should be raised on appeal and cannot be re-litigated in a post-conviction petition if the basis for raising the issue of ineffective counsel is drawn from the record. *State v. Lentz* (1994), 70 Ohio St.3d 527, 639 N.E.2d 784. In *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus, the Supreme Court of Ohio held the following:
>
> > In a petition for post-conviction relief, which asserts ineffective assistance of counsel, the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness.
> >
> > ***45** Broad assertions without a further demonstration of prejudice do not warrant a hearing for all post-conviction petitions. General conclusory allegations to the effect that a defendant has been denied effective assistance of counsel are inadequate as a matter of law to impose an evidentiary hearing. See *Rivera v. United States* (C.A.9, 1963). 318 F.2d 606.

Because appellant's claims are based upon ineffective assistance of counsel, we will use the following standard set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768. Appellant must establish the following:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 621; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)
>
> 3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

A review of appellant's direct appeal indicates that he specifically raised numerous claims of ineffective assistance, including: ineffective assistance of counsel during voir dire; failure to call witnesses during both the guilt and mitigation phases of trial; failure to investigate, prepare and present evidence during both phases; and failure to form a reasonable trial strategy. However, appellant asserts, without evidence gathered outside the record, there was insufficient evidence available in the record to assert the claims at issue on direct appeal. We disagree.

In the second and third claims, appellant asserts counsel was ineffective for failing to question members of the venire who demonstrated knowledge of pre-trial publicity, and failing to use all of the peremptory challenges necessary to make a valid claim a change of venue should be granted.

We find that the claims presented were cognizable and capable of review on direct appeal. Appellant does not offer any new evidence outside the record precluding the application of res judicata. We note the record on direct appeal was supplemented with the jury questionnaires which appellant asserts merit review under post conviction relief herein.

Hand, 2006 WL 1063758 at *3–5; App. Vol. 12 at 366–68.

Ohio's doctrine of *res judicata* provides, in relevant part, that a final judgment of conviction bars a convicted defendant from raising in any proceeding, except an appeal from that judgment, any issue that was raised, or could have been raised, at trial or on appeal from that judgment. *Williams v. Bagley,* 380 F.3d 932, 967 (6th Cir.2004), *cert. denied sub nom., Williams v. Bradshaw,* 544 U.S. 1003, 125 S.Ct. 1939, 161 L.Ed.2d 779 (2005), *citing, State v. Perry,* 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). With respect to a procedural default analysis, Ohio's doctrine of *res judicata,* is an adequate and independent state procedural ground. *Williams, citing, Monzo v. Edwards,* 281 F.3d 568, 577 (6th Cir.2002). Further, the Sixth Circuit has rejected claims that Ohio has failed to apply the doctrine of *res judicata* consistently. *Williams, citing, Greer v. Mitchell,* 264 F.3d 663, 673 (6th Cir.2001), *cert. denied,* 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002). In other words, as noted above, Ohio's *res judicata* rule has been repeatedly upheld in the Sixth Circuit as an adequate and independent state ground to justify default. *Carter,* 443 F.3d at 538.

***46** The first and second prongs of the *Maupin* test have been satisfied with respect to this claim. First, as the court of appeals noted, *supra,* in Ohio, whether trial counsel were constitutionally ineffective for failing to question potential jurors about their awareness of pretrial publicity can be determined by reviewing the voir dire transcript. Second, when Mr. Hand attempted to raise this issue in his post-conviction proceedings, Ohio courts specifically relied on *res judicata* in rejecting his claim. As noted, Ohio's *res judicata* rule has been repeatedly upheld in the Sixth Circuit as an adequate and independent state ground to justify default.

As to the third *Maupin* prong, Mr. Hand argued, for the first time, in his post-hearing briefing in this Court that even if this claim is procedurally defaulted, he can establish cause for the default. Specifically, Mr. Hand argues that his appellate counsel were ineffective for failing to amend his direct appeal to include this claim. Ineffective assistance of appellate counsel may constitute cause for a procedural default, *Murray v. Carrier,* 477 U.S. 478 (1986), unless that claim is also procedurally defaulted. *Edwards v. Carpenter,* 529 U.S. 446, 450–51, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000).

This claim is intertwined with Mr. Hand's ineffective assistance of appellate counsel claim contained in Ground XI Subclaims E and F, *infra.* In those Subclaims, Mr. Hand argues that his appellate counsel were ineffective for failing to move to amend his appellate brief to raise issues of juror bias. As noted in the discussion of that claim, although Respondent argues that it is procedurally defaulted, this Court concludes that it is not. Accordingly, the Court will address the merits of the juror bias issues because whether Mr. Hand's appellate counsel were ineffective for not amending his brief to include those issues resolves the question of whether the present claim (Subclaim B of Ground IV) is procedurally barred.

"[T]he requirement that every defendant in a criminal case receive a fair trial by a panel of impartial, indifferent jurors ... is a basic requirement of due process." *United States v. Rigsby,* 45 F.3d 120, 122 (6th Cir.), *cert. denied,* 514 U.S. 1134, 115 S.Ct. 2015, 131 L.Ed.2d 1013 (1995) (internal quotation marks and citation omitted).

In *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), *superseded on other grounds by statute as stated in Moffat v. Gilmore,* 113 F.3d 698 (7th Cir.1997), the United States Supreme Court expounded on the right to a jury untainted by pretrial publicity as follows:

> [T]he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver,* 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 [(1948)]....
>
> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.
>
> ***47** This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his [or her] impression or opinion and render a verdict based on the evidence presented in court. *Spies v. People of State of Illinois,* 123 U.S. 131 (1887); *Holt v. United States,* 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910); *Reynolds v. United States,* [98 U.S. 145 (1878)].

Irvin, 366 U.S. at 722–23.

As an initial matter, this Court notes that the jury selection process for Mr. Hand's trial took several days. *See,* Trial Tr. Vols. 3, 4, 5, 6. The prospective jurors were divided into groups of between six and nine individuals and the court and counsel questioned each group separately. *See,* Trial Tr. Vol. 1 at 3–4. After an initial round of challenges for cause, the court asked the remaining members of the group to return to the courtroom for additional *voir dire. See, Id.*

During its questioning of the group of prospective jurors to which Ms. Ray and Ms. Finamore were assigned, the court asked the prospective jurors, "Is there anything that you may have read, heard or seen that caused you to form an opinion as to the defendant's guilt or innocence that you could not put aside?" to which all of the prospective jurors answered in the negative. Trial Tr. Vol. 4 at 306. The Court then asked, "Any of you?", and again all of the prospective jurors answered in the negative. *Id.* The Court continued by asking, "So are you all able to put aside anything you saw, heard or read in the media and decide this case strictly on evidence that's presented within the walls of this courtroom?". *Id.* All of the prospective jurors answered in the affirmative. *Id.* The court then asked, "Anybody have any concerns about that?", and the prospective jurors answered in the negative. *Id.* Finally, the court said, "No, all right. I'm sure none of you want to reach a significant and important decision in your lives based on something you might have seen in the news; is that fair?" and the prospective jurors all answered in the affirmative. *Id.* at 306–07.

The following dialogue took place between Mr. Hand's counsel and Ms. Ray:

> Mr. Cline: We talked briefly about an adage, and I believe it's a biblical adage, an eye for an eye. How many people have heard that?
>
> ...

I think everybody on the jury has heard that. Ms. Ray, what does that mean to you?

Ms. Ray: Well, supposedly, if somebody does something to you, you're to do it back.

Mr. Cline: Okay. And I take it from your response that that's not a belief that you personally hold?

Ms. Ray: No. I believe in the New Testament and not the Old.

Mr. Cline: All right,....

...

Mr. Cline: Is there anyone on the panel who has life insurance on their own life?

***48** ...

Ms. Ray: Yes.

...

Mr. Cline: Ms. Ray, I think you were one. Is that similar —did you get it [life insurance] through work or—

Ms. Ray: Now that I don't have any family to take care of I do need to have burial expenses.

...

And they keep getting higher and higher.

Mr. Cline: ... Is that something you bought yourself, or is that something you got through an employment or some association?

Ms. Ray: No, I bought it.

Mr. Cline: You had to buy it?

Ms. Ray: Yes.

...

Id. at 322–23; 350–51.

Ms. Ray completed a juror questionnaire prior to trial. App. Vol. 10 at 205–16. In response to questions on her juror questionnaire, Ms. Ray reported that she had seen one news article in the April 30, 2003, Delaware Gazette and in answer to the question, "What impression did it leave in your mind?", Ms. Ray responded "wondering". *Id.* at 213. Ms. Ray also indicated on her questionnaire that: (1) based on her exposure to pre-trial publicity, she did not know whether Mr. Hand was guilty and that she had no opinion either way; (2) she would be able to put any and all information she obtained by way of media coverage out of her mind and base her decision solely on the evidence presented in the courtroom and the instructions of law given to her by the court; and (3) that if selected as a juror, she would not have any difficulty following the court's instructions not to read, listen, or watch any accounts of the case reported by the media. *Id.* at 213–14. With respect to the death penalty, Ms. Ray reported that she believed in it and thought that is was appropriate in some murder cases but inappropriate in most murder cases. *Id.* at 215.

During voir dire, Mr. Hand's counsel and Ms. Finamore had the following exchange:

Mr. Cline: Ms. Finamore, how about you; do you subscribe to an eye for an eye philosophy?

Ms. Finamore: To a certain extent, but, again, you hear about turning the other cheek also. I don't necessarily think that if someone kills a person, their life should be taken. I don't think it's an automatic death penalty.

Mr. Cline: Okay. What about a circumstance where the state proved that the defendant had taken more than one person's life; have they crossed the line at that point, or are you still willing to listen to the rest of the evidence?

Ms. Finamore: Are you talking in regards to the penalty, the death penalty?

Mr. Cline: Yes.

Ms. Finamore: It would depend on the evidence and the circumstances. It would not be an automatic.

...

Mr. Cline: ... If during the course of three different marriages, each wife was murdered, is there anyone who believes that the husband is probably guilty? That's all you know. Anyone believe that?

...

Ms. [Finamore], no?

...

Ms. Finamore: If I heard that, I would lean toward that because I've always heard that the first—

***49** Mr. Cline: That's a natural reaction; isn't it?

Ms. Finamore: uh-huh.

Mr. Cline: ... If the state proves to you that three wives were murdered, but they don't prove anything else, would you convict that person?

Ms. Finamore: If they were murdered but not murdered by him?

Mr. Cline: Exactly. You understand the question correctly. That's right, all they prove is that these three women were murdered.

Ms. Finamore: Okay, and what am I deciding?

Mr. Cline: The guilt or innocence of the husband.

Ms. Finamore: But they didn't prove that he did it, just that they were murdered?

Mr. Cline: Right. You couldn't find him guilty, could you?

Ms. Finamore: No.

...

Mr. Cline: ... Is there anyone here who had either heard or read about post-traumatic stress disorder?

Ms. Finamore: Heard of it.

...

Mr. Cline: Miss Finamore, you've heard—I was you nodding your head. I did hear you say yes.

...

Ms. Finamore: It's just if someone suffers a very traumatic event in their life, they could be plagued with either physical or mental problems afterward, recurring.

...

Mr. Cline: ... Some people feel that it's unfair to bring that kind of evidence into the courtroom. Would you be offended if that kind of evidence was presented to you?

...

Would you judge it with the same rules and the same requirements of proof that you would any other evidence?

...

Ms. Finamore: Yes.

Trial Tr. at 322–23, 343–45.

Ms. Finamore also completed a juror questionnaire prior to trial. App. Vol. 10 at 217–28. In response to questions on that form, Ms. Finamore reported that she had been exposed to pre-trial publicity two to three times and that the exposure was by way of articles in the Columbus Dispatch or reports on the television news about the investigation and Mr. Hand's arrest. *Id.* at 225. Ms. Finamore also reported that the media exposure left her with the impression that Mr. Hand was probably involved. *Id.* In addition, Ms. Finamore reported that based on her exposure to media reports, she thought that Mr. Hand was guilty. *Id.* Ms. Finamore reported further that: (1) she would be able to put any and all such information out of her mind and base her decisions solely on the evidence presented in the courtroom and the instructions of law given by the court; (2) she would be able to put any and all information she obtained by way of media coverage out of her mind and base her decision solely on the evidence presented in the courtroom and the instructions of law given to her by the court; and (3) that if selected as a juror, she would not have any difficulty following the court's instructions not to read, listen, or watch any accounts of the case reported by the media. *Id.* at 225–26. With respect to her views about the death penalty, Ms. Finamore reported that while she believed in it in certain instances, she thought that life in prison was a greater punishment and that she thought it was appropriate in some murder cases, but inappropriate in most murder cases. *Id.* at 227.

***50** After carefully reviewing the voir dire as to both Ms. Ray and Ms. Finamore as well as their responses to the questions on each juror's respective questionnaire, this Court concludes that Mr. Hand's counsel were not

ineffective for failing to question either Ms. Ray or Ms. Finamore with respect to pre-trial publicity.

First, with respect to Ms. Ray, the answers she provided on the juror questionnaire clearly indicate that she was exposed to pre-trial publicity. However, her exposure was, at most, minimal. As noted, Ms. Ray reported that she had seen one newspaper article and that the article simply left her "wondering". Further, even in view of that minimal exposure, Ms. Ray did not know whether Mr. Hand was guilty and that she would be able to put any and all information she obtained by way of media coverage out of her mind and base her decision solely on the evidence. Further, Ms. Ray's answers to the court's questions during voir dire again made it clear that she would base any decision on the evidence presented in the courtroom, would follow the law as the court gave it, and that she would not base a decision on what she had learned by way of the media.

Several of the answers which Ms. Ray gave on the juror questionnaire as well as during voir dire indicate that, arguably, she may have been a favorable juror for Mr. Hand. For example, Ms. Ray testified that she did not subscribe to the "an eye for an eye" adage. Ms. Ray also testified that she herself had bought her own life insurance indicating that she understands the need for that insurance and suggesting that the mere existence of such a policy is not in and of itself suspect. Finally, with respect to the death penalty, Ms. Ray reported on her juror questionnaire that she thought that is was appropriate in some murder cases but inappropriate in most murder cases.

Turning to Ms. Finamore, the Court notes that initially her responses on her juror questionnaire appear somewhat problematic. Specifically, after reporting that she had been exposed to pre-trial publicity, Ms. Finamore reported that as a result of that exposure she thought Mr. Hand was guilty. However, Ms. Finamore's responses to other questions on the form as well as her testimony during voir dire indicate that in spite of her initial impression about Mr. Hand's guilt, she was rehabilitated as a juror. Specifically, and similar to Ms. Ray, Ms. Finamore's answers to other questions on the juror questionnaire as well as her voir dire testimony made it clear that she was able to put aside her initial impression and base her decision on only the evidence presented in the courtroom and that she would apply the law as the court gave it to the jury and that she would not have any difficulty following the court's instructions not to read, listen, or watch any accounts of the case reported by the media.

Again similar to Ms. Ray, Ms. Finamore was arguably a juror favorable to Mr. Hand with respect to her views about the death penalty. As noted above, Ms. Finamore reported that although she believed in the death penalty in certain instances, she thought that life in prison was a greater punishment and that she thought it was appropriate in some murder cases, but inappropriate in most murder cases.

***51** When Mr. Hand attempted to raise this issue before the post-conviction court, he submitted numerous examples of the pre-trial publicity about his case. App. Vol. 10 at 113–204. First, the Court notes that some of the articles which Mr. Hand submitted were printed after the jury selection in his case had started. The articles are from different sources but primarily The Delaware Gazette and The Columbus Dispatch. The articles essentially follow the discovery and investigation of the crimes as well as Mr. Hand's arrest. Indeed, over time, the articles became somewhat repetitious as to what they reported. Nevertheless, while there are numerous media reports, it is clear that neither Ms. Ray nor Ms. Finamore were so poisoned by pre-trial media reports that they should not have served on the jury.

At this juncture, this Court notes that is not persuaded by Mr. Hand's argument that this claim is not procedurally defaulted on the basis that the state court relied on evidence outside the record. While it is true that the post-conviction court of appeals referred to the jury questionnaires attached to Mr. Hand's direct appeal brief, the court did so "in passing". In other words, the court simply acknowledged that Mr. Hand had submitted those documents during his direct appeal. The court did not use those documents for the purpose of addressing the substance of Mr. Hand's claim. This Court also notes that while the state court of appeals cited *Strickland,* as well as other ineffective assistance of counsel authorities, it stopped short of addressing the merits of Mr. Hand's ineffective assistance of counsel claim.

This Court concludes that Mr. Hand has not satisfied the "cause and prejudice" standard of *Maupin.* Even if Mr. Hand had established cause for the default, he has not satisfied the prejudice prong of the *Maupin*

test because the claim is without merit. Accordingly, this Court concludes that Subclaim B of Ground IV is procedurally defaulted and, in the alternative, is without merit.

Subclaim C

The failure to move for a change of venue
Mr. Hand argues in Subclaim C of Ground IV that his trial counsel were ineffective for failing to file a motion for a change in venue. Mr. Hand also claims that his counsel were ineffective because they failed to exercise all of the allotted peremptory challenges particularly with respect to jurors who had obvious, in-depth knowledge of the publicity surrounding his case. Respondent argues that this claim is procedurally defaulted. Mr. Hand does not challenge the Respondent's position. However, Mr. Hand argued, for the first time in his post-hearing briefing that that his appellate counsel were ineffective for failing to raise the claim on direct appeal thereby establishing cause for the default.

A petitioner may avoid procedural default only by showing that there was cause for the default and prejudice resulting from the default, or that a miscarriage of justice will result from enforcing the procedural default in the petitioner's case. See [*Wainwright v. J. Sykes,* 433 U.S. [72,] 87 ... [1977]. A showing of cause requires more than the mere proffer of an excuse. Rather, "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Habeas petitioners cannot rely on conclusory assertions of cause and prejudice to overcome procedural default; they must present affirmative evidence or argument as to the precise cause and prejudice produced. *See Tinsley v. Million,* 399 F.3d 796, 806 (6th Cir.), *certi. denied,* 546 U.S. 1044, 126 S.Ct. 760, 163 L.Ed.2d 591 (2005) (citing *Northland Ins. Co. v. Stewart Title Guar. Co.,* 327 F.3d 448, 452 (6th Cir.2003) ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at a developed argumentation, are deemed waived.") (quotation marks omitted)). *Lundgren v. Mitchell,* 440 F.3d 754, 763–64 (6th Cir.2006).

***52** Mr. Hand offers only a conclusory assertion that his appellate counsels' ineffectiveness is cause for his default of this claim. Indeed, he has not offered any affirmative evidence or argument as to his appellate counsel's ineffectiveness with respect to this claim. Most notably, Mr. Hand has not raised appellate counsel's ineffectiveness for failure to amend his direct appeal brief to include a claim of trial counsel's failure to move for a change of venue in his present Petition.

In addition, Mr. Hand did not raise a claim of ineffectiveness of appellate counsel for failing to raise trial counsel's ineffectiveness for failing to move for a change of venue claim on either of his applications to reopen his direct appeal. App. Vol. 9 at 28–39; *Id.* at 47–61. Accordingly, Mr. Hand's underlying ineffectiveness of appellate counsel claim is itself defaulted. Therefore, that claim of ineffective assistance of appellate counsel cannot serve as cause for default of his claim of ineffective assistance of trial counsel with respect to the change of venue. *Carpenter, supra.*

Subclaim D

The failure to act upon and utilize Hand's report of an escape attempt at the Delaware County jail
Mr. Hand argues in Subclaim D that he was denied the effective assistance of trial counsel because counsel failed to provide to the jail authorities information Mr. Hand gave counsel related to the planning of an escape attempt by other inmates. Mr. Hand's position seems to be that if counsel had provided that information to the jail authorities, it would have established that he did not participate in the attempt and he would not have been charged with attempted escape. Mr. Hand suggests that as a result, the trial court would not have instructed the jurors that they could consider his participation in the attempted escape as showing consciousness of guilt and his conviction for attempted escape would not have undermined his primary mitigation argument that he would adapt to prison life.

Respondent argues that this claim is procedurally barred.

Mr. Hand raised this claim for the first time in his post-conviction petition as his eleventh ground for relief. App. Vol. 11 at 8–14. The trial court determined that the claim was barred by *res judicata* because it was based on the trial

record and therefore should have been raised on direct appeal. *Id.* at 160–61. The court of appeals agreed:

> We further find the trial court did not err in dismissing appellant's eleventh ground for relief relative to statements he made to counsel about the attempted escape of other inmates. The record clearly demonstrates appellant himself testified at trial as to his statements to counsel; therefore, appellant's claim does not provide new evidence outside the record and the Supreme Court could have considered the argument on direct appeal.

Hand, 2006 WL 1063758; App. Vol. 12 at 369–70.

The trial transcript reveals that Mr. Hand indeed testified about the escape plans and that he told his counsel that inmates were planning an escape. Trial Tr. Vol. 26 at 3496–99.

***53** As noted above, Ohio's doctrine of *res judicata* has been repeatedly upheld in the Sixth Circuit as an adequate and independent state ground to justify default. *Carter,* 443 F.3d at 538 The first and second prongs of the *Maupin* test have been satisfied with respect to this Subclaim. First, as the court of appeals determined, Mr. Hand's allegation about his trial counsel and the information he gave than about a planned escape could be determined by reviewing the trial transcript. Second, when Mr. Hand attempted to raise this issue in his post-conviction proceedings, Ohio courts specifically relied on *res judicata* in rejecting his claim. As noted, Ohio's *res judicata* rule has been repeatedly upheld in the Sixth Circuit as an adequate and independent state ground to justify default. The third prong of *Maupin* is satisfied because Mr. Hand has not shown that there was cause or prejudice with respect to the default.

This Court concludes that Subclaim D of Ground IV is procedurally defaulted.

Subclaim E

The failure to exclude prospective jurors who were biased against the defense

In Subclaim F of Ground IV, Mr. Hand argues that his trial counsel were constitutionally ineffective for failure to adequately question a prospective juror who served on the jury regarding her professional relationship with the victim, Jill Hand, as well as the impact of her own daughter's death on her ability to serve. Mr. Hand did not identify this juror in his Petition, but identified her as Juror Lombardo in his Reply. Mr. Hand first argues that in addressing this claim, the Ohio Supreme Court did not cite *Strickland* or any other United States Supreme Court case therefore this Court is not bound by the standards of § 2254(d) and should review his claim *de novo.* Mr. Hand then argues that Juror Lombardo was biased because her husband had previously worked with Jill Hand, because she had witnessed workplace violence, and because she lost a daughter and therefore was the mother of a victim. Mr. Hand concludes that his trial counsel were ineffective for not thoroughly questioning Ms. Lombardo on those issues and for failing to ultimately eliminate her from the jury.

Mr. Hand raised this issue in the Ohio Supreme Court which rejected it as follows:

> Voir dire of Juror Lombardo. Hand claims that his counsel were ineffective for failing to explore the bias of Juror Lombardo, a seated juror, and strike her from the jury. However, " 'the conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked." ' [*State v.] Cornwell,* [1999] 86 Ohio St.3d [560,] ... 568, 715 N.E.2d 1144, quoting *State v. Evans* (1992), 63 Ohio St.3d 231, 247, 586 N.E.2d 1042. Moreover, "counsel is in the best position to determine whether any potential juror should be questioned and to what extent." *State v. Murphy* (2001), 91 Ohio St.3d 516, 539, 2001 Ohio 112, 747 N.E.2d 765.
>
> ***54** Hand contends that his counsel failed to explore Juror Lombardo's bias after she disclosed that her husband had worked with Jill Hand. Juror Lombardo stated that her husband, an investigator with the Ohio Attorney General, "had worked with [Jill] on and off for about 12 years. She was with DMV [Division of Motor Vehicles] and * * * he had an investigation regarding the DMV." Thereafter, Juror Lombardo was asked whether she would be able to fairly consider the testimony of witnesses who worked with the Attorney General's Office. Juror Lombardo stated that she would "listen to their testimony separate from [her]

husband's work, absolutely." Juror Lombardo also assured counsel that "it would not be difficult at all" to separate what happens at trial from her husband. Thus, counsel did question Juror Lombardo about her bias, and her responses indicated that her husband's job would not influence her performance as a juror.

Hand also argues that his counsel were deficient by failing to inquire further about the death of Juror Lombardo's daughter. This segment of voir dire occurred as follows:

> Mr. Cline: In the course of listening to whatever comments were made, how did you feel about what you were hearing?
>
> Ms. Lombardo: Well, I lost a daughter in the past and I pretty much went through a lot of stuff. I felt very sad, but I really didn't pursue it. I just really have a yearning to know more about it. Of course, I had feelings about it, sadness. I would still need to know more about what happened.
>
> Mr. Cline: On your questionnaire, the question was asked if you had started to form any opinions and I think you marked, "Not sure." Then your next comment was, "Mr. Hand is entitled to a fair and just trial."
>
> Ms. Lombardo: He absolutely is.

Hand argues that Ms. Lombardo's response about her daughter's death raised issues of potential bias that his counsel was obligated to pursue. However, Hand's claim of potential bias is speculative. Juror Lombardo had earlier assured the court that she could decide the case solely upon the evidence and agreed to set aside her personal beliefs and follow the law in deciding the case. Moreover, the follow-up question eliciting Juror Lombardo's reaffirmation that Hand was entitled to a fair trial diminished the likelihood that her daughter's death was a potential source of bias. Given these circumstances, we find that trial counsel's decision not to question Juror Lombardo any further about the loss of her daughter, a very personal issue, was a proper exercise of discretionary judgment. See *State v. Lindsey* (2000), 87 Ohio St.3d 479, 490, 2000 Ohio 465, 721 N.E.2d 995.

Finally, Hand argues that his counsel were deficient in failing to challenge Juror Lombardo for bias after she disclosed that she had witnessed workplace violence. About 30 years earlier, Juror Lombardo had seen her boss confront an intruder where she worked. She later learned that her boss had shot the man. Juror Lombardo was a witness in the subsequent murder trial, and her testimony supported the jury's decision that her boss had acted in self-defense. During a follow-up question, the trial counsel asked Juror Lombardo, "Do you believe that a person who has been put in danger, or his life is threatened should have the right to defend himself or herself?" Juror Lombardo answered, "Yes."

***55** Here, Juror Lombardo's views about self-defense were favorable to the defense because Hand claimed that he killed Welch in self-defense. Thus, we reject Hand's claim that his counsel was ineffective by failing to challenge Juror Lombardo for cause or peremptorily because of her prior experience with workplace violence. See *State v. Vrabel,* 99 Ohio St.3d 184, 2003 Ohio 3193, 790 N.E.2d 303, P54–56.

Hand, 107 Ohio St.3d at 407–08, 840 N.E.2d 151.

First, as this Court noted above, a state court need not specifically cite Supreme Court cases so long as neither its reasoning nor its result contradicts them. *Early,* 537 U.S. at 8. Therefore, this Court is not persuaded by Mr. Hand's argument that the Court should address this claim *de novo* on the basis the Ohio Supreme Court did not specifically cite to any United States Supreme Court cases in addressing this claim.

As noted above, that every defendant in a criminal case receive a fair trial by a panel of impartial, indifferent jurors is a basic requirement of due process. *Rigsby,* 45 F.3d at 122. The ultimate question is whether a juror swore that he or she could set aside any opinion that he might hold and decide the case on the evidence and whether that juror's protestation of impartiality should have been believed. *Patton v. Yount,* 467 U.S. 1025, 1036, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). "The question of whether a trial court has seated a fair and impartial jury is a factual one, involving an assessment of credibility." *Gall v. Parker,* 231 F.3d 265, 308 (6th Cir.2000), *cert denied,* 533 U.S. 941, 121 S.Ct. 2577, 150 L.Ed.2d 739 (2001), *superseded by statute on other grounds as stated in Bowling v. Parker,* 344 F.3d 487, 501 n. 3 (6th Cir.2003), *cert. denied sub nom., Bowling v. Haeberlin,* 543 U.S. 842, 125 S.Ct. 281, 160 L.Ed.2d 68 (2004), *citing, Patton,* 467 U.S. at 1038. On habeas review,

the inquiry is "whether there is fair support in the record for the state courts' conclusion that the jurors [ ] would be impartial." *Gall, supra, citing, Patton, supra.* A trial court's finding of impartiality is a factual determination entitled to 28 U.S.C. 2254(e)'s presumption of correctness. *Dennis v. Mitchell,* 354 F.3d 511, 520 (6th Cir.2003), *cert. denied,* 541 U.S. 1068, 124 S.Ct. 2400, 158 L.Ed.2d 971 (2004).

During voir dire, the following dialogue took place between Mr. Hand's trial counsel, and Ms. Lombardo:

Mr. Cline: Ms. Lombardo ...

Ms. Lombardo: Yes.

Mr. Cline: When we talk about the publicity in this case, I found it interesting that you noted that there was some publicity, yes, you heard some people talking about it, maybe; does that sound right?

Mr. Lombardo: Yes.

Mr. Cline: Tell me how you felt when you heard those people talking about this case? At that point, of course, you did not know that you would be here and asked to bare your soul in front of all these people, but tell me how you felt?

Ms. Lombardo: I don't know if it makes a difference in the jury selection or not but the way I heard about the case was my husband had worked with Mrs. Hand. We were at function with his company, his staff and that's where I heard about it. My husband was acquainted with Mrs. Hand.

***56** Mr. Cline: Did your husband know Mrs. Hand personally or only in a brief, working—

Ms. Lombardo: Well, he had worked with her on and off for about 12 years. She was with DMV and he was with the attorney general's office. And he had an investigation regarding the DMV. That's how I heard about the case.

...

Mr. Cline: During the course of listening to whatever comments were made, how did you feel about what you were hearing?

Ms. Lombardo: Well, I lost a daughter in the past and I pretty much went through a lot of stuff. I felt very sad, but I really didn't pursue it. I just really have a yearning to know more about it. Of course, I had feelings about it, sadness. I would still need to know more about what happened.

Mr. Cline: On your questionnaire, the question was asked if you had started to form any opinions and I think you marked, "not sure." then your next comment was, "Mr. Hand is entitled to a fair and just trial."

Ms. Lombardo: He absolutely is.

Mr. Cline: Do you think that this process that we're going through today helps ensure that?

Ms. Lombardo: Yes, I do.

Mr. Cline: I'm going to ask you to consider the possibility that there's been proof beyond a reasonable doubt of a premeditated murder and a specification, at least one, that the judge will explain to you. And there's no reasonable doubt at all that the murder was premeditated, planned in advance, and now we are over here. How important is it to you that the murder was premeditated?

Ms. Lombardo: It's very important. That has a lot to do with my thinking on that.

...

That's very important to me, whether it will be proven it's premeditated or not or whether ...

Mr. Cline: Whether what?

Ms. Lombardo: Whether he would maybe do it again. Those things would be important to me.

Mr. Cline: If we ever got past this barrier on a premeditated murder charge, then you must at that point have decided that the murder was, in fact, premeditated; right?

Ms. Lombardo: Yes.

Mr. Cline: Logically, if the charge says premeditated murder and we're over here, you've already concluded, haven't you, beyond a reasonable doubt, that it was premeditated; correct?

Ms. Lombardo: Yes.

Mr. Cline: And you've also concluded that whatever single or multiple specifications are proven beyond a reasonable doubt; right?

Ms. Lombardo: Yes.

Mr. Cline: So now we're over here and we know it's premeditated and we know that there's a specification, but the law says that not every premeditated murder results in the death penalty. Because if it did, this arrow would go straight over there. But the arrow stops and we have this whole gray section two [sic]. Are your feelings about premeditated murder—let me ask it differently. Knowing that the law says that not every premeditated murder results in the death penalty, how does that make you feel about the law?

Mr. Lombardo: I'm OK with it.

***57** Mr. Cline: You're OK with that concept?

Ms. Lombardo: Yes.

Mr. Cline: And do you feel that you would be able to apply that concept and consider this individual case on its merits?

Ms. Lombardo: Yes.

Mr. Cline: Can I hold you to that?

Ms. Lombardo: Yes.

...

Trial Tr. Vol. 5 at 696–701.

As voir dire continued, the trial court inquired of the panel, including Ms. Lombardo, as follows: (1) whether anyone was "possessed of the state of mind evincing ill-will or bias either against the State of Ohio or this Defendant so that it would be impossible for [ ] you to be fair and impartial", to which the prospective jurors answered in the negative; *Id.* at 706; (2) if anyone was "possessed of the state of mind evincing favoritism or bias towards either the State of Ohio or this Defendant", to which the prospective jurors again answered in the negative; *Id.;* (3) if there was "any reason whatsoever ... that would render it impossible for you to be a fair and impartial juror in this case", to which the panel again answered in the negative; *Id.* at 707–08; (4) if members of the panel "all agree[d] to follow the law as I explain it to you, as opposed to the law as what you think it is or what you think it ought to be" to which the panel members answered in the affirmative; *Id.* at 708.

Mr. Yost, the prosecutor in Mr. Hand's case, engaged in the following dialogue with Ms. Lombardo during voir dire:

Mr. Yost: Miss Lombardo, I noticed on your jury questionnaire, you were a witness when you were 18, I guess?

Ms. Lombardo: A time ago.

Mr. Yost: ... What happened there?

Ms. Lombardo: I was employed by an auto-body shop and a person came into the auto-body shop to see my boss who was back in the garage part working on some automobiles. He was, obviously to me, very drunk and angry and I could see that he was carrying a gun. And he kind of pushed by me and went back into the garage area where my boss was working. And I heard shouting and gunshots. And I ran out. My father worked downtown. I ran out from where it was happening to my father's office and later found out that my boss had shot the man who had come in where I was working. So I had to testify as to his condition. I mean, it was just the three of us there that day. His condition, his temperament, whether or not he was carrying a gun, that sort of thing.

Mr. Yost: It must have been a very unsettling event for a young person.

Ms. Lombardo: I think my mother had a harder time with it than I did. It just felt like I was there for a reason.

Mr. Yost: Was there anything about that experience that would make it difficult for you to serve as a juror in this case:

Ms. Lombardo: Not really, no.

...

Mr. Yost: ... Life insurance, anybody have life insurance policies?

...

How many do you have, Miss Lombardo?

Ms. Lombardo: I have one on myself, my two children and my husband.

***58** Mr. Yost: Is that one policy, two policies?

Ms. Lombardo: Separate policies.

Mr. Yost: But one each?

Ms. Lombardo: Yes.

Id. at 711–12; 718–19.

Mr. Cline again inquired of Ms. Lombardo and they engaged in the following dialogue:

Mr. Cline: ... What does it mean to you when I say give the defendant the presumption of innocence?

Ms. Lombardo: He's innocent until the fact that he's proved not.

Mr. Cline: Okay. So a person, who is the defendant, is innocent until the facts are proven beyond a reasonable doubt?

Ms. Lombardo: Correct.

...

Mr. Cline: These people are making the accusation in this case. They are accusing Mr. Hand. Isn't it fair that we ask them to prove it?

Ms. Lombardo: Yes.

...

Mr. Cline: ... Ms. Lombardo, you described a pretty harrowing event that happened to you a few years ago; right?

Ms. Lombardo: A lot longer than a few years ago. It's really difficult for me to remember it that well.

Mr. Cline: To remember it?

Ms. Lombardo: Yes.

Mr. Cline: Because it's been a while?

Ms. Lombardo: Yeah, but, you know, it's part of the questionnaire.

Mr. Cline: Okay, If I understood your explanation correctly, your boss actually ended up shooting the person who you observed and the reason you were in court was to help explain the circumstances that surrounded the shooting by your boss of this other person?

Ms. Lombardo: Yes.

Mr. Cline: I want to make sure I got that right. I was a little confused. Did I get it right?

Ms. Lombardo: I was testifying on behalf of the person who shot. I was testifying on his behalf.

Mr. Cline: Do you believe that a person who has been put in danger, or his life is threatened should have the right to defend himself or herself?

Ms. Lombardo: Yes.

Mr. Cline: Is that sort of what you were dealing with in that circumstance years ago?

Ms. Lombardo: Yes, it was considered self-defense, is the way the verdict was.

Id. at 723; 725; 726–27.

Contrary to Mr. Hand's argument, Ms. Lombardo did not give any indication that she was prejudiced against him or that she should not have served on the jury for any other reason.

First, although Ms. Lombardo indicated that her husband was acquainted with Jill Hand and had contact with her in a professional setting on and off for about twelve years, that is the extent of her familiarity with Mrs. Hand. Ms. Lombardo herself had never met Jill Hand, did not have any contact with her whatsoever, did not know her, had never interacted with her, and certainly did not have any kind of ongoing relationship with her. Her husband's relationship with Mrs. Hand was, at most, professional and superficial.

Second, while Ms. Lombardo testified that she had "lost a daughter", there is no indication what caused that loss. Mr. Hand suggests that Ms. Lombardo's daughter's death was attributable to a crime and therefore, as the relative of a victim of a crime, Ms. Lombardo should have been excluded from the jury. However, there is nothing in

the record to support that suggestion. Ms. Lombardo's daughter could very well have died as the result of a devastating illness as of a crime.

***59** Third, while it is true that several years ago, Ms. Lombardo was the witness to a shooting incident at her then-place of employment, her responses to counsel's questions revealed that she testified on behalf of her employer who had apparently been charged criminally with shooting another individual. Ms. Lombardo explained that her employer had acted in self-defense and that the verdict in the case reflected the self-defense theory. Mr. Hand's version of the events which resulted in Jill Hand's and Lonnie Welch's deaths essentially involved an allegation of self-defense. If anything, it would be to Mr. Hand's benefit to have Ms. Lombardo, an individual who understands and accepts the defense of self-defense on his jury.

Lastly, and perhaps most importantly, Ms. Lombardo testified that she: (1) believed that Mr. Hand was entitled to a fair and just trial; (2) knew that the law provided that not every premeditated murder required the imposition of the death penalty, that she was "O.K." with that; (3) understood that each individual case should be considered on its merits and she could do that; (4) did not have any ill-will or bias either against or in favor of either the State of Ohio or Mr. Hand; (5) knew of no reason why she could not be a fair and impartial juror; (6) would follow the law as the judge gave it to the jury; (7) believed that a person was innocent until proven guilty; and (8) believed that it was fair that the state should be required to prove the allegations it had made against Mr. Hand. There is simply nothing in the record to indicate that Ms. Lombardo was not impartial, had pre-conceived opinions about the case, was acquainted with any of the individuals involved in the case the including Jill Hand, could not follow the court's instructions, had any opinions about the law which would cause her to ignore the court's instructions, or that she did not accept the theory of self-defense. In other words, there was no reason that Ms. Lombardo could not serve as a fair and impartial juror in Mr. Hand's case. Because there was no reason why Ms. Lombardo should not have been seated as a juror, Mr. Hand's counsel were not ineffective for failing to challenge her for cause or to exercise a peremptory challenge to remove her from the jury.

The claims contained in Mr. Hand's Subclaim E of Ground IV are without merit. Therefore, the Ohio Supreme Court's finding with respect to the issue raised in Subclaim E of Ground IV is not contrary to nor an unreasonable application of, clearly established federal law.

Subclaim F

The failure to object to the admissibility of co-conspirator's statements

In Subclaim F, Mr. Hand argues that his trial counsel were ineffective for failing to object to the admissibility of Lonnie Welch's statements to various individuals. Mr. Hand raised this claim on direct appeal and the Ohio Supreme Court rejected it as follows:

> Failure to object to Welch's statements under Evid.R. 801(D)(2)(e). Hand argues that his counsel were deficient by failing to argue that Welch's statements to friends and family members were not admissible as statements of a co-conspirator until the prosecutor had made a prima facie case showing the existence of the conspiracy by independent proof. However, as we discussed in proposition of law I, Welch's statements were properly admissible under Evid.R. 804(B)(6). Thus, Hand suffered no prejudice.

***60** *Hand,* 107 Ohio St.3d at 410, 840 N.E.2d 151.

When the claim underlying an ineffective assistance of trial counsel claim fails, a petitioner cannot show prejudice and his claim of ineffective assistance of trial counsel based on that claim also fails. *See, Goff v. Bagley,* 601 F.3d 445, 482 (6th Cir.2010).

This Court has already considered and rejected the claim underlying Mr. Hand's ineffective assistance of counsel claim as presented in this Subclaim. Specifically, in addressing Mr. Hand's Ground I, *supra,* this Court concluded that the trial court did not err in admitting into evidence various statements that Lonnie Welch made to several individuals. Since the Court has rejected the underlying claim, Mr. Hand cannot establish prejudice and his claim of ineffective assistance of trial counsel based in Subclaim F must fail. Accordingly, the Ohio Supreme

Court's finding with respect to the issue raised in Subclaim F of Ground IV is not contrary to nor an unreasonable application of, clearly established federal law.

Subclaim G

The failure to object to other bad acts evidence and argument

In Subclaim G of Ground IV, Mr. Hand alleges that his trial counsel were ineffective for failing to object to the admission of certain bad acts evidence.

Mr. Hand raised this issue on direct appeal and the Ohio Supreme Court wrote:

> Failure to object to other-acts evidence and argument. Hand also argues that his counsel were deficient by failing to object to testimony about Hand's reaction to Jill's death, that Hand forced his father out of business, that Hand was obsessed with money, that he enjoyed reading true-crime stories, and that he was infatuated with Barbara McKinney's [* * *187] daughter. Further, Hand argues that his counsel were deficient by failing to object to the prosecutor's argument that his illegal business practices showed his propensity to commit the charged offenses. However, as we discussed in proposition of law II, Hand was not prejudiced by counsel's failure to object to any of this testimony or the prosecutor's argument.

Hand, 107 Ohio St.3d at 410, 840 N.E.2d 151.

As with the claim Mr. Hand raised in Subclaim F, *supra,* of Ground IV, this Court has considered and rejected the claim underlying this claim of ineffective assistance of counsel. That is, in Ground II, *supra,* the Court determined that it was not error for the trial court to admit into evidence character and other acts evidence. Again, since the Court has rejected the underlying claim, Mr. Hand cannot establish prejudice and his claim of ineffective assistance of trial counsel as he has raised in Subclaim G must fail. *Goff, supra.* Therefore, the Ohio Supreme Court's finding with respect to the issue raised in Subclaim G of Ground IV is not contrary to, nor an unreasonable application of, clearly established federal law.

Subclaim H

The failure to present evidence of self-defense at the hearsay hearing

In this Subclaim, Mr. Hand argues that his counsel were ineffective for failing to present evidence of self-defense at the hearsay hearing. Mr. Hand's position is that counsel should have presented his testimony on the issue of self-defense to show that he was not responsible for Lonnie Welch's unavailability to testify at trial. Mr. Hand argues that if it had been established that he was not the cause of Mr. Welch's unavailability at trial, then the trial court would not have admitted testimony about the statements Mr. Welch made to several individuals.

***61** Mr. Hand raised this claim on direct appeal and the Ohio Supreme Court rejected it as follows:

> Hand contends that his counsel were deficient in failing to present evidence of self-defense during the evidentiary hearings on the admissibility of Welch's statements under Evid.R. 804(B)(6). Hand argues that such evidence was necessary to show that Welch's unavailability was not due to Hand's misconduct.
>
> During the evidentiary hearing, Grimes testified that when Hand first discussed the murders, Hand said that he was "going to plead self-defense." Subsequently, Hand's story changed, and he admitted to "offing them both * * * [because] anybody that messed with him would disappear." Thus, it is highly speculative whether the defense presentation of additional evidence of self-defense would have made any difference in the trial court's ruling on the admissibility of Welch's statements.
>
> Moreover, it is almost certain that Hand would have had to testify to raise the issue of self-defense during the evidentiary hearing. The record does not show whether Hand or his counsel made the decision to forgo Hand's testimony during the evidentiary hearing. However, if Hand made the decision, he has no grounds to attack his counsel's effectiveness. If it was counsel's decision, then counsel made a tactical decision that should not be second-guessed. Indeed, trial counsel

could have reasonably decided not to put Hand on the stand so that the prosecutor could not cross-examine Hand and learn details of his defense. Thus, we find that trial counsel made a legitimate tactical decision in not presenting additional evidence of self-defense during the evidentiary hearing. *State v. Bradley,* 42 Ohio St.3d at 144, 538 N.E.2d 373; see, also, *State v. Adams,* 103 Ohio St.3d 508, 2004 Ohio 5845, 817 N.E.2d 29, P29–32 (failure to file motion to suppress pretrial statements constituted "tactical judgment" and not ineffective assistance of counsel).

Hand, 107 Ohio St.3d at 410–11, 840 N.E.2d 151.

At the evidentiary hearing before this Court, the Court took testimony from Mr. Cline and Mr. Sherman, Mr. Hand's trial counsel. It is now evident from *Cullen v. Pinholster,* 563 U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), that this testimony should not have been admitted and it is not further considered in this Report.

As this Court noted in its discussion of Ground I, *supra,* the admission into evidence of Mr. Welch's statements did not raise Confrontation Clause issues because the statements were nontestimonial. Therefore, assuming that counsel had introduced credible testimony that Mr. Hand killed Mr. Welch in self-defense and Mr. Welch's statements were therefore inadmissible because Mr. Hand had *not* engaged in conduct that was *designed* to prevent Mr. Welch from testifying and the trial court nevertheless admitted the statements into evidence, while it may have been an error of state law for the trial court to do so, it was not an error of constitutional magnitude. Further, even if counsel had presented evidence of self-defense at the hearsay hearing and the trial court did not admit Mr. Welch's testimony into evidence, there was enough other evidence introduced to support the jury's verdicts and the imposition of the death penalty. For example: (1) there was no sign of forced entry into the Hand's residence; (2) there was evidence that Mr. Hand was having financial difficulties; (3) there was evidence that there was $1,006,645.27 in life insurance and other benefits in effect at the time of Jill Hand's murder which would be payable to Hand in the event of her death; (4) there was forensic evidence that there were bloodstain patterns on Mr. Hand's shirt which had DNA consistent with Mr. Welch's and which indicated that Mr. Hand had been exposed to an impact of blood and which contradicted his version of the events which included his chasing Mr. Welch during a gun battle; (5) there was testimony from Mr. Grimes that Mr. Hand told him he had killed his wife and the man he had hired to kill her; (6) Mr. Hand's inconsistent statements about his knowing Mr. Welch and his relationship with him; (7) the inconsistency between Mr. Hand's statement that Jill Hand had never met Mr. Welch and the photograph of Mr. Welch serving as best man at Mr. and Mrs. (Jill) Hand's wedding; and (8) Mr. Hand's inconsistent statements about his intention to file for bankruptcy.

***62** Because Mr. Hand is not able to establish that he was prejudiced by any alleged error that counsel may have made, his claim contained in Subclaim H of Ground IV is without merit. Accordingly, the Ohio Supreme Court's finding with respect to the issue raised in Subclaim H of Ground IV is not contrary to nor an unreasonable application of, clearly established federal law.

Subclaim I

The failure to call Phillip Anthony as a defense witness
In Subclaim I of Ground IV, Mr. Hand alleges that his trial counsel were constitutionally ineffective for failing to call as a defense witness Mr. Welch's cousin Phillip Anthony.

Mr. Hand raised this claim on direct appeal and the Ohio Supreme Court rejected it as follows:

Failure to call a defense witness. Hand also argues that his counsel were ineffective by failing to call Phillip Anthony, Welch's cousin, as a defense witness.

During the evidentiary hearing on the admissibility of Welch's statements, Anthony testified that sometime during 1986 or 1987, Welch admitted killing Donna and Lori. Welch also told Anthony that he had "snuck into a basement window and that all the doors and windows in the house were sealed and locked, * * * and made the second murder identical to the first." Retired Police Detective Sam Womeldorf, the investigator of Donna's death, had earlier testified that the basement "windows were locked on the inside. It appeared that no entry was made through either of these windows." Retired Police Lieutenant Robert Britt, who had been an investigator into Lori's death, also testified that the basement windows were locked.

The trial court ruled that Anthony's testimony was admissible, but the state decided not to call Anthony as

a witness. However, Hand argues that his counsel was deficient by not calling Anthony as a witness, because Welch's statements contradicted police testimony that the basement windows were not the entry point for the killer.

"Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh* (2001), 90 Ohio St.3d 460, 490, 2001 Ohio 4, 739 N.E.2d 749; *State v. Hughbanks,* 99 Ohio St.3d 365, 2003 Ohio 4121, 792 N.E.2d 1081, P82. Welch's statement to Anthony that he entered the basement window to kill Donna and Lori appears to contradict police testimony. However, Anthony's testimony would have also strengthened the state's case.

During the evidentiary hearing, Anthony testified that Welch discussed the plans to kill Jill. During the first two weeks of January 2002, Welch asked Anthony to find him a gun. Anthony testified that Welch said he needed a gun, explaining, " '[T]he guy I did that thing for * * * said he wants me to do another one." ' Welch told him, "I need this [gun] now * * * I can't wait a week, I can't wait a day, I really need this now, I've got something to do." On the night before the murders, Welch asked whether Anthony had found him a gun, and Anthony told him no. Welch expressed his unease about meeting Hand and asked Anthony for a ride to Hand's house to "watch [his] back a little bit." Welch indicated that he "wasn't going up there to kill nobody. The deal was * * * they were going up there to iron it out. How much, where, how, when, type of situation." Thus, Welch was "planning to go up, talk to Mr. Hand, iron out all the specifics of the murder, and that's it."

***63** Trial counsel were not deficient by choosing not to call Anthony as a defense witness even though some of his testimony might have helped the defense case. Welch's comments to Anthony showed a sense of urgency to obtain a weapon to murder Jill that was not otherwise in evidence. Moreover, Welch's statements show that he did not intend to murder Jill when he went to Hand's home on the evening of January 15. Anthony's testimony undermined Hand's claim that Welch was an intruder who entered his home and murdered his wife. Such testimony would have contradicted Hand's self-defense theory. Thus, trial counsel made a legitimate tactical decision to not call Anthony as a defense witness. *State v. Bradley,* 42 Ohio St.3d at 144, 538 N.E.2d 373.

Hand, 107 Ohio St.3d. 408–410.

As noted above, *Strickland* requires that the defendant must overcome the presumption that, under the circumstances, counsel's challenged action "might be considered sound trial strategy." *Strickland,* 466 U.S. 689. Counsel's tactical decisions are particularly difficult to attack. *O'Hara v. Wigginton,* 24 F.3d 823, 828 (6th Cir.1994). Indeed, strategic choices by defense counsel are "virtually unchallengeable." *Buell v. Mitchell,* 274 F.3d 337, 359 (6th Cir.2001), quoting *Meeks v. Bergen,* 749 F.2d 322, 328 (6th Cir.1984). Reasonable lawyers may disagree on the appropriate strategy for defending a client. *Bigelow v. Williams,* 367 F.3d 562, 570 (6th Cir.2004), quoting *Strickland,* 466 U.S. at 689. The strategy "need not be particularly intelligent or even one most lawyers would adopt, but it must be within the range of logical choices an ordinarily competent attorney handling a death penalty case would assess as reasonable to achieve a 'specific goal" '. *Cone v. Bell,* 243 F.3d 961, 978 (6th Cir.2001), *rev'd on other grounds,* 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

Mr. Anthony testified at the hearsay hearing that he was Mr. Welch's cousin, they had a close relationship, they could have open discussions, and that they were "real close." Trial Tr., Vol. 14 at 2270–71. Mr. Anthony testified further that Mr. Welch had spoken with him about Mr. Hand's wives and that on one occasion when they were at Mr. Anthony's home, in referring to a plastic dry cleaner bag, Mr. Welch told him (Mr. Anthony), that the bag made a good weapon. *Id.* at 2273–74. The following exchange then took place between Mr. Anthony and David Gormley, counsel for the state:

> Mr. Anthony: Basically, like I said, we was sitting there, and he said "that's a good weapon there". And I said, "What?" and he said, "the cleaning bag". And he'd tell me about he snuck in, this man—offered him this money to take out his wife, said he'd do it, he snuck in the place, and he used the bag to suffocate her. And he told me that he—he told him to ask him to do it again, you know, some years later. And he did it the exact same way, same place and everything.

***64** Mr. Gormley: Did he talk about the names? Did he mention names of this man or these women?

Mr. Anthony: He just said—yeah, he mentioned Mr. Hand but, other than that, he didn't, you know, let me know that's who he was doing it for.

...

Mr. Gormley: ... Did Lonnie Welch mention the names of these wives?

Mr. Anthony: He might have, but it was probably so insignificant I didn't pay attention, but I don't believe he did.... He just said Mr. Hand's wives and, you know, he explained to me how he snuck into a basement window and that all the doors and windows in the house were sealed and locked, and how he put her in the chair and made the second murder identical to the first, and that's about all he really told me. And he kind of laughed about the police, how—

Mr. Gormley: And he was talking about—is it a dry cleaner bag? Is that what you're calling it?

Mr. Anthony: Yeah; it's sort of like a swan heavy dry cleaning bag. You know, the kind you get your trench coats back. It's kind of a thicker grade than, you know, like the one we use now. It's kind of thin like—but it was a thicker grade, almost like a travel bag, you know, one of those suit travel bags that are clear, but not that thick.

...

Mr. Gormley: Did Lonnie talk at all about why he had done this?

Mr. Anthony: Money.... He didn't say any amounts or anything like that. He just said money, you know.

Mr. Gormley: Did he way who paid him?

Mr. Anthony: Yeah.

Mr. Gormley: Who was that?

Mr. Anthony: He said Bob Hand was paying him. He didn't say he had paid him, He said he was paying him.

Mr. Gormley: Was paying him?

Mr. Anthony: Yeah.

Mr. Gormley: As if it was on-going. Did you say anything in response when Lonnie told you about this?

Mr. Anthony: No, I didn't. It kind of set me back; kind of shocked me a little, you know. Because he didn't seem like that kind of person.

Mr. Gormley: Did you ever tell anyone about the conversation?

Mr. Anthony: No.

Mr. Gormley: Did you ever consider going to the police or consider asking Lonnie to do so?

Mr. Anthony: No.

Mr. Gormley: And why not?

Mr. Anthony: Just —— just kind of looking back, I just didn't know how to take it or what to do with that type of information.

Mr. Gormley: I want to focus next on the first two weeks of January, 2002, just before Lonnie died on January 15th, 2002. Did you talk with Lonnie during those last few days of his life?

Mr. Anthony: Yes, I did.

Mr. Gormley: And can you tell us about the first conversation that you had with him?

Mr. Anthony: The first conversation—Lonnie came over, it was—I can't say it was late, but it was dark out, because I was on my computer, so I was really lost on time. But he came in and said something, “Do me a favor”. And I said, “What's up”? he said, “I need to find a gun”. And then I said, “Well, this is not really a good time to be looking for guns, there's no guns out there”, you know, “I don't know where to find any”. He said, “Well, can you look for me”? I said, “Well, why do you need a gun, Lonnie”? He said, “Well, I'm getting calls from”—and kind of just, did kind of like a little motion, like, “The guy I did that thing for, and he said he wants me to do another one”. I said, “That's not too smart, you all had a falling out”? He's like, “Well, that's what the gun's about”. I said, “If you're worried about it, don't even mess with him”. He said, “Well, you know, I got to do what I go to do”. I said, “Okay, I'll look for you”. And, pretty much, that was about it. And he left

and he said, "I'll come back to check you out in a couple of days and see what we've got". A couple days came and—

***65** ...

Mr. Gormley: Was anyone else present besides you and Lonnie?

Mr. Anthony: No.

Mr. Gormley: And you talked about a falling out, or he did. Can you elaborate on what he said and what you said there?

Mr. Anthony: Well, no. I knew that Lonnie and Bob had fell out, you know, years before, you know. And ... he's talking about this gun and he's telling me. you know, he didn't trust what was going on and it didn't seem right, you know, I was—it's—I don't know, its kind of hard to explain, I mean, you know, it was like —he was around all my life, you get feelings more so than, you know, you got to say things verbally, you know, you could—and it was kind of a, just—just kind of weird.

Mr. Gormley: Okay. So, it was your understanding there had been some sort of falling out.

Mr. Anthony: Yeah, yeah....

Mr. Gormley: So this [falling out] was tied to the radiator business?

Mr. Thomas: Yeah....

Mr. Gormley: So, the night in January of 2002, Lonnie said that he was talking to Bob Hand again, I gather?

Mr. Thomas: Yeah; he said that Hand had tried to get in contact with him; he had called several different people there; he got in contact with him; he had talked to Hand, you know, and Hand had explained to him, you know, "This is what the deal is, I've got another wife I need to get rid of her", you know, can—let's work out the details, you know. And that's all he kept telling Lonnie, so that's basically where he was[; th]at is all I know.

...

Mr. Gormley: And what was said about a gun?

Mr. Thomas: He just asked me if I could secure one for him, because he couldn't find and, you know; and I told him, I said I want—now, I'd look for him, but I said I couldn't—at the time, I couldn't find nothing, you know, because I had other people ask me, too.

Mr. Gormley: And did Lonnie tell you when he needed this gun or what was going to happen going forward?

Mr. Thomas: He said he needed it like today. And he told me when—that was a couple days before he passed, he said, "You know, I need this now, you know; I can't wait a week, I can't wait a day, I really need this now, I've got something to do". I told him, "Hey, it's going to take me a couple days, and I'll see what I can work for you".

Mr. Gormley: Did Lonnie talk at all about meeting with the defendant, Bob Hand?

Mr. Thomas: Yes.

Mr. Gormley: Tell us about that.

Mr. Thomas: We, what he was telling me is that Hand wanted to talk to him, wanted to meet with him, to iron out the details on offing his next wife, on having his wife murdered. All right? Like several times, you know —I'd be seeing him talk on the phone too much—and, most of this I'm getting from what Lonnie told me.... But, the conversations, you know, weren't coming like they were before, so, you know, he was just—I think that's probably what's going on, but that's, you know, basically what he was telling me. You know, it wasn't the same as before, you know, but, I don't know.

***66** Mr. Gormley: So Lonnie said that these arrangements with Bob Hand were not like before, meaning the first wives?

Mr. Thomas: Yeah, the first two wives; yeah.

Mr. Gormley: So did he explain what was different?

Mr. Thomas: He just said it didn't feel right, just, you know, saying the way the man was talking and kind of, you know, getting him to come here, go there type stuff, and ... he was uneasy, just very uneasy.

Mr. Gormley: Did he talk at all about where this murder or meeting was not take place?

Mr. Thomas: Yeah; the second time he asked me if I would take him up there, and I said I couldn't do that. He said, "take me up there by the zoo". I said, "I can't do that; it's too far", and he's like, "Oh, well, I'll find a way".

Mr. Gormley: And you mentioned there, this was at a second meeting?

Mr. Thomas: Yeah; this was like the night of or the night before he went up there.

Mr. Gormley: And tell us where this conversation—

Mr. Thomas: This also happened in my front room in the house.

...

Mr. Gormley: And what did Lonnie say at the second meeting?

Mr. Thomas: He—Basically, he just came and said, "Did you find me a gun yet"? And I was like, "No, there's nothing out there, like I told you". I said—but I told him the best I could find for him was an antique double-barrel four-foot shotgun or a starter pistol. And I said, I "won't give you a starter pistol, cuz, because I don't want to see you get killed and you know you can't use a shotgun". And he said, "Okay", and he sat down, and he said, "Well, why don't you take me up there", you know, "and watch my back a little bit"? And I said, "No, that's too far, and if you're worried about your back being watched, what you need to do is write stuff down and put it in an envelope and put it up somewhere with somebody so that you've got your back secured"—and he said, "Well, I've got to find my way up here again somehow, cuz, because he keeps calling me and I got to see what he wants". I said, "Okay". Well, he went up there to go meet with him and iron out the details.

...

Mr. Gormley: Did Lonnie talk at all about why he needed this gun?

Mr. Thomas: Because he didn't—it didn't feel right; he didn't feel safe going up there without nothing.

Mr. Gormley: So the gun, it was your understanding, was to protect Lonnie as to opposed to actually killing the wife?

Mr. Thomas: When Lonnie was going up, he wasn't going up there to kill nobody. The deal was at that time was they were going up there to iron it out. How much, where, how, when, type of situation.

Mr. Gormley: And so he wanted a gun just to have a gun?

Mr. Thomas: Yeah, because he thought—because, you know, you've got this man's son calling and looking for you about this matter, and he just didn't feel right about it.

Mr. Gormley: And neither of these conversations that you had with Lonnie in January, 2002, was there any mention of money?

***67** Mr. Thomas: He mentioned how as going to get paid; no amount was ever given, you know. That's one thing he never talked about was the amounts.

Mr. Gormley: Now, did you ever locate a gun for Lonnie?

Mr. Thomas: No.

Mr. Gormley: And did you agree to drive Lonnie up to wherever he needed to go?

Mr. Thomas: No, No.... My last conversation [with Lonnie] he was planning to go up, talk to Mr. Hand, iron out all the specifics of the murder, and that's it. No money or anything was talked about, exchanging hands that day; nothing, from the way he told me.

Mr. Gormley: And what was your understanding as to where this place was that Lonnie was going to?

Mr. Thomas: He said it was Mr. Hand's house. Take him up in Delaware to his house.

Mr. Gormley: Did he use the word "Delaware"?

Mr. Thomas: Yeah; and I was like, "Where the hell is Delaware"? He said, "Up by the zoo". I said, "That's really too far".

...

Id. at 2071–2290.

When Mr. Hand's counsel cross examined Mr. Anthony, the following colloquy took place:

Mr. Sherman: ... [Lonnie] told you that with respect to each wife, he entered the residence through the basement window; correct?

Mr. Anthony: Correct.

Mr. Sherman: And he told you that he then went upstairs; am I right? He told you he went upstairs?

Mr. Anthony: I didn't—he didn't say that, but I assumed that; yeah.

Mr. Sherman: Well, in one of your statements, you said he told you he put each girl in a chair; didn't he tell you that?

Mr. Anthony: Yeah. He said he put them in a chair to make them identical.

Mr. Sherman: And the only thing he told you is he suffocated them with a swan cleaner bag?

Mr. Anthony: Right.

Mr. Sherman: He didn't say anything about any other weapons?

Mr. Anthony: No.

...

Mr. Sherman: And then you said, a couple of days before Lonnie's death he talked to you again?

Mr. Anthony: Correct.

Mr. Sherman: And he wanted a gun?

Mr. Anthony: Correct.

...

Mr. Sherman: ... Now, Lonnie Welch told you a couple days before his death that he was going to go see Bob Hand; correct? Is that right?

Mr. Anthony: Correct.

Mr. Sherman: And he was worried about Bob Hand; correct?

Mr. Anthony: He was worried about the way the situation was coming about; yes.

Mr. Sherman: And you knew that—and he was looking for a gun, so you knew he was going to see Bob Hand; right?

Mr. Anthony: Not like that; not he's looking for a gun to go see Bob Hand. He was looking for a gun for his protection when he went to see Bob Hand.

...

Mr. Sherman: Just so I'm clear. At the time that Lonnie Welch was killed he was not, in fact, to your knowledge, cooperating with the police department?

Mr. Anthony: Correct.

Mr. Sherman: At the time Lonnie Welch was killed, he was not going to testify against Bob Hand?

***68** Mr. Anthony: Correct.

Mr. Sherman: And the only thing that could independently verify what Lonnie told you was that he went through the windows, he crawled through the basement windows of 191 South Eureka where these women lived. That would be the only independent verification that he told you anything, right?

Mr. Anthony: That would be the only indication—I guess, yeah.

...

Mr. Sherman: And he told you clearly, each time he went through the basement window?

Mr. Anthony: In fact, he said he went in the exact same way—

Mr. Sherman: Each time was the basement window; correct?

Mr. Anthony: Correct.

Mr. Sherman: And he killed each one of these women while they were seated in a chair; correct?

Mr. Anthony: Well, he pretty much said they were in a chair when he left them, with the bag—

> Mr. Sherman: He left them in the bag in the chair. Both times. Left them in the bag in the chair?
>
> Mr. Anthony: Right.

Id. at 2295–2308.

It is clear that Mr. Anthony's testimony that Mr. Welch had told him that when he killed Donna Hand and Lori Hand he had entered the house through the basement window and that he had left both Donna Hand and Lori Hand in a chair. That, of course, contradicted the state's evidence that, with respect to both Donna Hand's and Lori Hand's murders, it did not appear that entrance to the house had been through a basement window and that both women were found on the basement floor. However, if Mr. Hand's counsel had called Mr. Anthony to testify before the jury, in addition to disputing the state's evidence on those two facts, the jury would have heard testimony which was detrimental to Mr. Hand's defense. Specifically, the jury would have heard that Mr. Welch told Mr. Anthony: (1) that a plastic dry cleaner bag made a good weapon (police found Donna Hand's body with a plastic bag over her head and police found Lori Hand's body with a plastic sheet wrapped around her head); (2) he had murdered Mr. Hand's first two wives for money; (3) Mr. Hand asked him to "do another one"; (4) Mr. Hand said, "I've got another wife I need to get rid of her."; (5) that he was going to meet Mr. Hand, not to kill anybody, but to "iron it out. How much, where how, when, type of situation .... to talk about the specifics of the murder"; (6) he and Mr. Hand had previously had a falling out; (7) he asked Mr. Anthony for a ride to Mr. Hand's house so he could "watch [his] back a little bit."; and that (7) he was looking for a gun for his own protection when he went to see Mr. Hand.

Mr. Anthony's potential testimony would have indicated that Mr. Welch was not an intruder into Mr. Hand's home as Mr. Hand claimed but, rather, had gone to Mr. Hand's home to "iron out" the details of Jill Hand's murder. In addition, it would have contradicted Mr. Hand's theory of self-defense. Further, Mr. Anthony's potential testimony would have given credence to the state's theory that Mr. Welch and Mr. Hand had conspired to kill Jill Welch.

***69** In view of the testimony Mr. Anthony gave at the hearsay hearing, this Court concludes that it was a reasonable trial strategy to conclude that it was a bad idea to have Mr. Anthony testify on Mr. Hand's behalf. Accordingly, the state court's decision was a reasonable application of *Strickland.*

Subclaim H

The failure to request jury instructions
In this Subclaim, Mr. Hand alleges that his trial counsel were ineffective for failing to request limiting instructions on other acts evidence and a separate instruction defining course-of-conduct for one of the death specifications.

Mr. Hand raised this claim on direct appeal and the Ohio Supreme Court rejected it as follows:

> Failure to request jury instructions. Hand argues that his counsel were deficient in failing to request a limiting instruction regarding "other acts" evidence and by failing to request a jury instruction defining "course of conduct." As we discussed in connection with proposition of law II, Hand was not prejudiced by his counsel's failure to request limiting instructions on "other acts" evidence. Similarly, as we discussed in proposition of law VI, Hand was not prejudiced by trial counsel's failure to submit an instruction defining "course of conduct."

Hand, 107 Ohio St.3d at 411, 840 N.E.2d 151.

Mr. Hand's trial counsel requested that the trial court deliver to the jury certain instructions. App. Vol. 2 at 288; 307–327; App. Vol. 3 at 176–77; App. Vol. 4 at 211; App. Vol. 5 at 228–245. In addition, following the jury charge conference, Mr. Hand's counsel filed written objections to the proposed jury instructions. App. Vol. 3 at 172–76.

In addressing Ground II above, this Court noted that federal habeas is available only to correct federal constitutional violations and that a federal constitutional claim must be "fairly presented" to the state courts in a way which provides them with an opportunity to remedy the asserted constitutional violation including presenting

both the legal and factual basis of the claim. That discussion is applicable to this claim as well.

In raising this ineffective assistance of counsel claim before the Ohio Supreme Court, Mr. Hand couched the claim as a purely state law question and raised to no federal constitutional arguments at all. App. Vol. 6 at 316–18. Although Mr. Hand did cite two United States Supreme Court cases, he relied on them for the general proposition that a state must tailor and apply its death penalty law in a manner that avoids the arbitrary and capricious infliction of the death penalty and that it must properly narrow its application. *Id.*

Mr. Hand's presentation to the Ohio Supreme Court of his claim that his counsel were ineffective for failing to request certain jury instructions was inadequate to put that court on notice of a federal claim. [6] In other words, Mr. Hand failed to federalize his claim. Additionally, the claim addresses a matter of state law. Therefore, Subclaim H of Ground IV is not cognizable in federal habeas corpus.

Subclaim I

The cumulative impact of defense counsel's errors

***70** In his final Subclaim of Ground IV, Mr. Hand alleges that the cumulative effect of his trial counsels' errors prejudiced him.

First, the Court notes that Mr. Hand did not raise a "cumulative error" claim before the Ohio Supreme Court and therefore any such claim is procedurally defaulted. *Lorraine v. Coyle,* 291 F.3d 416, 477 (6th Cir.2002), *cert. denied,* 538 U.S. 947, 123 S.Ct. 1621, 155 L.Ed.2d 489 (2003) (claim of cumulative error with respect to ineffective assistance of counsel claims and prosecutorial misconduct claims not raised in the state procedurally defaulted). Moreover, assuming that the claim is not procedurally defaulted, as the *Lorraine* court noted, the Supreme Court has never held that distinct constitutional claims can be cumulated to grant habeas relief. *Id.*

Therefore, the claims Mr. Hand raises in Ground IV should be rejected.

GROUND V

Hand was denied the effective assistance of counsel at the sentencing phase of his trial in violation of his Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendment rights.

In his Ground V, Mr. Hand alleges that his trial counsel were ineffective in several ways during the mitigation phase of his trial.

The right to effective assistance of counsel and the principles of *Strickland* apply to the mitigation phase of a capital trial. *See, Wiggins* 539 U.S. at 522–23; *see also, Eley,* 604 F.3d at 968.

Subclaim A

The failure to present expert psychological testimony in mitigation

In Subclaim A of Ground V, Mr. Hand argues that his trial counsel were ineffective for failing to introduce expert psychological testimony during the mitigation phase of his trial. Specifically, Mr. Hand claims that although the defense received court-approved funds to hire forensic psychologist Dr. Daniel Davis, counsel restricted Dr. Davis' testimony to the issue of Mr. Hand's ability to adjust to prison life if he were sentenced to life without parole. Mr. Hand's position is that Dr. Davis could have provided valuable mitigating testimony about Mr. Hand's psychological profile including testimony that: (1) Mr. Hand was truthful, open, and cooperative; (2) his test results did not reveal characteristics similar to those of an individual with an anti-social personality disorder; and (3) his psychiatric profile was not consistent with the typical traits of a "cold calculating antisocial personality."

Respondent argues that this claim is procedurally barred from federal habeas review and Mr. Hand has not responded to that argument.

Mr. Hand did not raise this specific claim on direct appeal to the Ohio Supreme Court. Although Mr. Hand did mention in direct appeal Dr. Davis' testimony, he did so in the context of a general claim that counsel were ineffective for failing to reasonably investigate and prepare for mitigation and not as a failure to introduce Dr. Davis' testimony with respect to Mr. Hand's psychological profile. App. Vol. 6 at 319–27.

The first time that Mr. Hand raised this specific claim was as his fourth ground for relief in his post-conviction petition. App. Vol. 10 at 94–96. In denying Mr. Hand's Petition, the Delaware County Court of Common Pleas held that the fourth ground was barred by *res judicata* as it should have been raised on direct appeal. App. Vol. 11 at 160–61. In affirming the trial court, the court of appeals said:

> ***71** Appellant claims the trial court erred in finding the doctrine of res judicata barred the consideration of claims one, two, three, four, five, six, eight, eleven, and twelve in his petition for post-conviction relief. We disagree.
>
> ...
>
> Appellant's second, third, fourth, fifth, sixth, eighth and elevenths grounds for relief assert ineffective assistance of appellant's trial counsel.
>
> The Sixth Amendment right to effective counsel should be raised on appeal and cannot be re-litigated in a post-conviction petition if the basis for raising the issue of ineffective counsel is drawn from the record. *State v. Lentz* (1994), 70 Ohio St.3d 527, 1994 Ohio 532, 639 N.E.2d 784. In *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus, the Supreme Court of Ohio held the following:
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> > In a petition for post-conviction relief, which asserts ineffective assistance of counsel, the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness.
> >
> > Broad assertions without a further demonstration of prejudice do not warrant a hearing for all post-conviction petitions. General conclusory allegations to the effect that a defendant has been denied effective assistance of counsel are inadequate as a matter of law to impose an evidentiary hearing. See *Rivera v. United States* (C.A.9, 1963), 318 F.2d 606.
>
> Because appellant's claims are based upon ineffective assistance of counsel, we will use the following standard set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768. Appellant must establish the following:
>
> > 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.).
> >
> > 3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.
>
> A review of appellant's direct appeal indicates he specifically raised numerous claims of ineffective assistance of counsel, including: ineffective assistance of counsel during voir dire; failure to call witnesses during both the guilt and mitigation phases of trial; failure to investigate, prepare and present evidence during both phases; and failure to form a reasonable trial strategy. However, appellant asserts, without evidence gathered outside the record, there was insufficient evidence available in the record to assert the claims at issue on direct appeal. We disagree.
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> ***72** ...
>
> Claims four, five, six, eight and eleven allege ineffective assistance of counsel in the penalty mitigation phase.
>
> Initially, we note, assuming arguendo the claims are not barred by the doctrine of res judicata, we would not find counsel's performance ineffective trial strategy. The decision to call or not call a witness is squarely within the notion of trial strategy. *State v. Phillips* (1995), 74 Ohio St.3d 72, 85, 1995 Ohio 171, 656 N.E.2d 643. The decision to call additional witnesses is a matter of trial strategy as well. *State v. Clayton* (1985), 45 Ohio St.2d 49. Likewise, the scope of questioning is generally a matter left to the discretion of defense counsel. *State v. Singh* (2004), 157 Ohio App.3d 603, 2004 Ohio 3213, 813 N.E.2d 12. Upon review, we find appellant has not demonstrated the trial outcome would have been different had his trial counsel decided to call the witnesses; rather, any such alleged prejudice would be speculative.

> Upon review of the record, appellant does not offer evidence outside the record precluding the application of res judicata as to the fourth, sixth, and eighth grounds for relief. Rather, the record demonstrates the issues were cognizable and capable of review on direct appeal.

Hand, 2006 WL 1063758 at *4–5; App. Vol. 12 at 366–69.

Supreme Court law does not preclude a finding that a state procedural rule was actually enforced where the state court decision also relies on an alternative ground. *Scott v. Mitchell,* 209 F.3d 854 (6th Cir.), *cert. denied,* 531 U.S. 1021, 121 S.Ct. 588, 148 L.Ed.2d 503 (2000)

At first blush, it appears that in rejecting the claim that Mr. Hand has raised in Subclaim A of Ground V, the state post-conviction appeals court addressed the merits of that claim. In other words, for purposes of a procedural default analysis, it initially appears that the state court did not actually enforce its procedural rule of *res judicata.* In that case, this Court would not be precluded from addressing the merits of Mr. Hand's claim. However, on closer analysis, the Court finds that to the extent that the state appellate court may have rejected Petitioner's claim on the merits, it did so as an alternative ruling.

In addressing this claim, the state court noted that Mr. Hand had raised on direct appeal numerous claims of ineffective assistance of counsel. The court stated that it disagreed with Mr. Hand's argument that there was insufficient evidence in the record to assert the present claim on direct appeal. Indeed, the court noted that Mr. Hand failed to gather any evidence outside the record. In contrast, the court's alternative ruling simply relied on the principle of "trial strategy" without any extensive analysis of that principle and how it applied to Mr. Hand's claim.

This Court concludes that the three prongs of the *Maupin* test have been satisfied with respect to this claim. First, as the appeals court noted, *supra,* in Ohio, this claim of ineffective assistance of counsel could have properly been brought on direct appeal. Second, when Mr. Hand attempted to raise this issue in his post-conviction proceedings, the Ohio courts relied on *res judicata* in rejecting his claim. As noted, Ohio's *res judicata* rule has been repeatedly upheld in the Sixth Circuit as an adequate and independent state ground to justify default. Finally, Mr. Hand has not addressed Respondent's argument that this claim is procedurally defaulted and therefore has not attempted to argue, let alone establish, cause for the default.

***73** This Court concludes that Subclaim A of Ground V is procedurally defaulted.

Subclaim B

The failure to investigate and present mitigation through family and friends regarding Hand's abysmal childhood and dysfunctional family background

In Subclaim B of Ground V, Mr. Hand alleges that his trial counsel were ineffective for failing to investigate and present evidence about his family background. Mr. Hand's position is that counsel failed to present testimony from family members which would have shown "a compelling portrait of the chaotic, abusive home in which [he] was raised" as well as testimony from long-term friends about his generosity.

Respondent argues that this claim is procedurally defaulted. This Court disagrees. Although Mr. Hand raised this claim on direct appeal as part of his proposition of law VIII, *see,* Subclaim E, *infra,* Mr. Hand again raised this claim in post-conviction as his fifth claim for relief. App. Vol. 10 at 97–99. In affirming the trial court's denial of Mr. Hand's petition, the court of appeals stated:

> Appellant claims the trial court erred in finding the doctrine of res judicata barred the consideration of claims one, two, three, four, five, six, eight, eleven, and twelve in his petition for post-conviction relief. We disagree.
>
> ...
>
> Appellant's fifth claim for relief asserted ineffective assistance of trial counsel for failing to present testimony of appellant's friends and family at the mitigation phase. Upon review, we conclude the trial court did not err in dismissing appellant's fifth claim for relief, as appellant has not demonstrated prejudice as a result of trial counsel's claimed ineffective assistance; rather, appellant merely speculates the outcome of the trial would have been different, but for counsel's failure to call the witnesses.

Hand, 2006 WL 1063758 at *4–5; App. Vol. 12 at 369.

In contrast to disposing of Mr. Hand's fourth ground for relief on the basis of *res judicata* as well as on an alternative ground, in addressing Mr. Hand's fifth ground for relief, the appellate court made a finding as to the merits of Mr. Hand's claim. That is, the court specifically found that Mr. Hand failed to establish the prejudice requirement of a claim of ineffective assistance of counsel. Therefore, the appellate court did not enforce the state's procedural rule of *res judicata* and addressed the merits of Mr. Hand's claim. This Court will do the same.

Although it is true that Mr. Hand's trial counsel did not call as witnesses any of his family members to testify about Mr. Hand's childhood and family background, the jury nevertheless heard testimony about Mr. Hand's background. For example, psychologist Dr. Davis testified at the mitigation phase that he had reviewed the reports of extensive interviews of a variety of individuals, personally interviewed Mr. Hand's mother and sister, and that he had reviewed Mr. Hand's military records, his school records, his medical records, and children's services records. Trial Tr. Vol. 22 at 3869–71. Dr. Davis testified further that Mr. Hand came from a family where his father was an alcoholic, there was considerable strife and abuse between the husband and wife, and where his father left and his parents divorced when he was a child. *Id.* at 3871. Dr. Davis also testified that the family came to the attention of children's services when there was an allegation of Mr. Hand's mother openly cohabitating with men in front of the children, that at one time Mr. Hand and his siblings were removed from the home and placed temporarily in a receiving center, then placed with an aunt. *Id.* Dr. Davis testified that Mr. Hand had attended a number of different elementary schools during his early years which was disruptive to his education, he left high school, joined the United States Army, served in Vietnam, and that he received an honorable discharge from the Army. *Id.* at 3871–72.

***74** Frank Haberfield testified at the mitigation phase that he knew Mr. Hand through the Boy Scouts, that Mr. Hand was a volunteer Boy Scout troop leader, he organized the troop and took them on field trips, he advocated on behalf of the members of his troop, and that he (Mr. Haberfield) never heard anything negative about Mr. Hand. *Id.* at 3883–84.

Robert Hand, Mr. Hand's son, testified that Mr. Hand was the only close family member he ever had to look up to, that Mr. Hand provided for him and pushed him through school, and that Mr. Hand became involved with the Boy Scouts after he (Robert) graduated from the Cub Scouts to the Boy Scouts. *Id.* at 3887–90.

First, the Court notes that the jury had before it the kind of testimony which Mr. Hand claims counsel did not present. That is, while it is true that Mr. Hand's mother, siblings, and friends did not testify at the mitigation phase, Dr. Davis' testimony provided a comprehensive review of Mr. Hand's life. As noted, Dr. Davis testified as to the chaotic childhood, family life, and education that Mr. Hand experienced as a child. In addition, Dr. Davis' testimony included Mr. Hand's service in the United States Army including his combat experience in Vietnam and his honorable discharge from the Army. Mr. Haberfield testified about Mr. Hand's volunteer leadership work with the Boy Scouts as well as the fact that he (Mr. Haberfield) had never heard anything negative about Mr. Hand. Finally, Mr. Hand's son testified about the warm, supportive relationship he has with his father. Second, Mr. Hand merely speculates as to how the result of his trial would have been different if counsel had presented additional witnesses who would have also testified about information that the jury already had by way of Dr. Davis, Mr. Haberfield, and Robert Hand. Specifically, Mr. Hand simply alleges that if the jury had been confronted with additional witnesses there is a reasonable probability that at least one juror would have struck a different balance.

The state court's decision on this claim is a proper application of *Strickland* and is not contrary to nor an unreasonable application of, clearly established federal law.

Subclaim C

The failure to present pharmacological and lay witness testimony to explain Hand's demeanor during his guilt-phase testimony

Mr. Hand argues in this Subclaim that his trial counsel were ineffective during the mitigation phase for failing to introduce evidence which would have allegedly explained to the jury his demeanor at trial. Mr. Hand's position is that when he testified during the guilt phase of his trial he was under the influence of several medications which the jail physicians had prescribed for him and that they influenced his behavior and demeanor on the stand in that he was not able to present information clearly. Mr.

Hand claims that this inability affected his credibility with the jury. Respondent argues first that this Subclaim is procedurally defaulted and Mr. Hand has not addressed that argument.

***75** Mr. Hand did not raise this issue on direct appeal to the Ohio Supreme Court. The first time Mr. Hand raised this claim was in his post-conviction petition as his sixth ground for relief. App. Vol. 10 at 100–02. The trial court determined that Mr. Hand's sixth ground was barred by *res judicata.* App. Vol. 11 at 160–61. The court of appeals agreed on the same basis that the court determined that the trial court properly disposed of the claim Mr. Hand raised in Subclaim A of Ground V, *supra.* That is, the court of appeals determined that the claim Mr. Hand raised in his sixth ground for relief was barred by the doctrine of *res judicata. Hand,* 2006 WL 1063758 at *4–5; App. Vol. 12 at 366–69. The Court notes that, again as with Subclaim A of Ground V, the court of appeals made an alternative ruling based on the principle of "trial strategy" without any extensive analysis of that principle and how it applied to Mr. Hand's claim. *Supra.*

As with Subclaim A of this Ground, this Court concludes that the three prongs of the *Maupin* test have been satisfied with respect to this Subclaim. Specifically, this claim of ineffective assistance of counsel could have properly been brought on direct appeal, when Mr. Hand attempted to raise this issue in his post-conviction proceedings, the Ohio courts relied on *res judicata* in rejecting his claim and Ohio's *res judicata* rule has been repeatedly upheld in the Sixth Circuit as an adequate and independent state ground to justify default, and Mr. Hand has not addressed Respondent's argument that this claim is procedurally defaulted and therefore has not attempted to argue nor has he established cause for the default.

This Court concludes that Subclaim C of Ground V is procedurally defaulted.

Subclaim D

The failure to present testimony regarding Hand's third wife

Mr. Hand alleges in this Subclaim that his trial counsel were constitutionally ineffective because they failed to introduce evidence about his third wife. Mr. Hand's position is that extensive evidence was presented throughout his trial about his first, second, and fourth wives, but that there was little mention of his third wife. Mr. Hand argues that the state's theory was that he killed his wives for insurance proceeds and so it should have been shown that he divorced his third wife. Additionally, Mr. Hand argues that Glenna Hand was the most abusive and overbearing of his wives and therefore the most likely to be the target of violence if he did in fact murder his spouses. Mr. Hand claims that he was prejudiced by his counsel's ineffectiveness "because the jurors never got to hear about his one marriage that did not end in murder."

Respondent argues that this claim is procedurally defaulted. Mr. Hand indirectly acknowledges that he did not bring this claim on direct appeal by arguing that the state post-conviction court erroneously relied on *res judicata* in denying this claim because in bringing it, he relied on evidence outside the record.

***76** Mr. Hand raised this claim in his post-conviction petition as his eighth ground for relief. App. Vol. 10 at 105–06. In support of his claim, Mr. Hand submitted to the post-conviction court the December 20, 2004, affidavit of his sister Sally Underwood and the December 20, 2004, affidavit of his son Robert Lee Hand, both of which described the alcoholic and abusive nature of Glenna Hand's personality. Vol. 10 at 468–71. The court of common pleas rejected the claim on the ground it was barred by *res judicata.* App. Vol. 11 at 160–61. The court of appeals affirmed the trial court and held that Mr. Hand did not offer evidence outside the record precluding the application of *res judicata* as to his eighth ground for relief and that the record demonstrated the issue was cognizable and capable of review on direct appeal. *Hand,* 2006 WL 1063758 at *5; App. Vol. 12 at 369. In addition, and as before, the court of appeals made the alternative finding that counsels' performance was not constitutionally ineffective on the basis of trial strategy. *Id.*

Although the state court of appeals seemed to say that Mr. Hand did not offer evidence outside of the record, it is likely that the court determined that Mr. Hand did not offer evidence outside the record which precluded the application of *res judicata.* In other words, the court may very well have concluded that the affidavits which Mr. Hand submitted in support of his eighth ground did not, in and of themselves, provide a basis for considering the claim in the merits. However, because it is not entirely clear as to whether the state court erroneously determined

that Mr. Hand did not provide evidence outside the record or whether it determined that the affidavits Mr. Hand did submit were insufficient to bar the application of *res judicata,* it is not clear to this Court whether the state court properly applied *res judicata.* Therefore, because death is different, this Court will address the merits of this Subclaim.

Contrary to Mr. Hand's position that the jury was deprived of information regarding his third wife, Glenna, Mr. Hand himself testified at his trial about her. Trial Tr. Vol. 19 at 3451–55. Specifically, Mr. Hand testified about how he met Glenna, that they dated for about two or three months before he moved in with her, and that they lived together for about seven or eight years before they married. *Id.* Mr. Hand also testified that Glenna was very good at raising Robbie although others thought she was too strict and abusive with him. *Id.* Mr. Hand testified further that it was Glenna's idea to get a divorce, she wanted it because she thought that Mr. Hand "was boring", and that he did not want a divorce because he cared for her. *Id.* Additionally, Mr. Hand testified that Glenna was aware of his credit card scheme and how he was managing finances, that at the time of the divorce, there was about $100,000.00 in credit card debt, and that at the time of the divorce, Glenna signed away her dower rights with respect to certain real estate. *Id.*

***77** Contrary to Mr. Hand's current argument, the jury indeed was presented with testimony about Mr. Hand's third wife, Glenna. As noted above, that information included the fact that Mr. Hand thought that Glenna was very good with his son Robbie, that it was she who wanted the divorce, that he did not want to divorce her, and that he cared for her. The clear inference of Mr. Hand and Glenna divorcing is that he did not kill her or conspire with anyone to kill her in order to get out of the marriage. It is simply not clear what additional testimony counsel could have presented on the issue of Mr. Hand's marriage to and subsequent divorce from Glenna that would have changed the outcome of the mitigation phase of Mr. Hand's trial.

Further, in contrast to the affidavit testimony which Mr. Hand submitted to the post-conviction court from his sister Sally Underwood and his son Robert Hand both of whom portrayed Glenna Hand as an abusive alcoholic, Mr. Hand testified that he thought Glenna was "very good" at raising his son and that he didn't want to divorce her because he cared for her. In other words, the testimony in the affidavits contradicts Mr. Hand's own trial testimony. It was, therefore, reasonable trial strategy for counsel to not present testimony which would contradict their client's own testimony.

This Court concludes that Subclaim D of Ground V is without merit.

Subclaim E

The failure to investigate and present an ineffective [sic] mitigation strategy, coupled with the failure to give a penalty phase closing argument

Mr. Hand argues in Subclaim E that his counsel were ineffective for failing to investigate and present an effective mitigation strategy and for failing to give a penalty phase closing argument. Mr. Hand's position is that counsel should have investigated and presented evidence about his abysmal childhood and his psychological profile rather than pursuing the strategy that he would be a model prisoner which was an unreasonable strategy since the jury had convicted him of escape. Mr. Hand also claims that counsel were ineffective for failing to make a residual doubt argument and that they wholly abdicated their responsibility to plead for his life by waiving closing argument.

Mr. Hand raised this claim on direct appeal and the Ohio Supreme Court rejected it stating:

> Failure to investigate and prepare for mitigation. Hand contends that his counsel failed to spend sufficient time preparing for the penalty phase of the trial. Hand argues that his counsel's billing sheets show that counsel spent fewer than 30 hours preparing for mitigation, family members were not interviewed until the day before the start of the trial's penalty phase, and his counsel filed an insufficient number of pretrial motions relative to mitigation. However, we find no merit in this argument.
>
> The presentation of mitigating evidence is a matter of trial strategy. *State v. Keith* (1997), 79 Ohio St.3d 514, 530, 1997 Ohio 367, 684 N.E.2d 47. "Moreover, 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ' *State v. Bryan,* 101 Ohio St.3d 272, 2004 Ohio 971, 804 N.E.2d 433, P189, quoting *Wiggins v. Smith* (2003), 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471.

***78** Here, the defense employed a mitigation specialist, an investigator, and a psychologist. Each of these individuals began working on Hand's case several months before the penalty phase. The defense reviewed Hand's military records, his school records, and his medical records prior to the penalty phase. Dr. Davis, the defense psychologist, testified that "one of the attorneys conducted extensive interviews of a variety of individuals who knew Mr. Hand and obtained background information." Thus, the record shows that the defense thoroughly prepared for the penalty phase of the trial.

Hand's assertion that billing records show that his counsel spent fewer than 30 hours on mitigation appears to be based on billing records between May 30 (the date of the guilty verdict) and June 4 (the start of the mitigation hearing). Hand fails to recognize the time that his counsel, the mitigation specialist, the investigator, and his psychologist spent in preparing for mitigation before the end of the guilt-phase proceedings on May 30. Indeed, "the finding as to whether counsel was adequately prepared does not revolve solely around the amount of time counsel spends on the case or the numbers of days which he or she spends preparing for mitigation. Instead, this must be a case-by-case analysis." *State v. Lewis* (Fla.2002), 838 So.2d 1102, 1114, fn. 9.

Hand provides no evidence supporting his claim that his attorneys did not begin interviewing his family members until the day before the penalty phase. Defense records show that several months before trial Debra Gorrell, the mitigation specialist, contacted Hand's mother, his two sisters, and his son. Even assuming that his counsel did not interview family members until the day before the penalty phase, Hand fails to show what additional information family members could have provided earlier, or how such testimony could have aided him in sentencing.

We also reject Hand's argument that the lack of defense pretrial motions on mitigation shows that his counsel were ineffective. The defense filed pretrial motions to obtain Hand's childhood records with Franklin County Children Services, his military records, and his records as a Scoutmaster. Hand's counsel also filed a motion for penalty-phase instructions and proposed instructions on residual doubt. Finally, Hand fails to mention what additional motions his counsel should have submitted that would have made a difference in the outcome of his case.

2. Failure to form a reasonable trial strategy. Hand claims that his counsel's trial strategy was ineffective by focusing on his "future value behind bars."

Judicial scrutiny of counsel's performance must be highly deferential, and reviewing courts should refrain from second-guessing tactical decisions of trial counsel. *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674.

The trial counsel's strategy was to convince the jury that Hand should receive a life sentence by showing that he would be a model prisoner and would have value in prison society. The trial counsel emphasized that Hand's "got intelligence; he's got mechanical ability; he loves children; [and] Bobby can continue to be a source of support and guidance to his son, Robby, and his grandchildren." Trial counsel also pointed out that as a prisoner "he will not be a predator; he will not be a source of violence with respect to other inmates; * * * he has skills; he can work in the prison auto shop; he can teach other inmates mechanical skills, and then they can leave the system with a skill * * *." Finally, the defense argued that Hand's life should be spared on the basis of mercy.

***79** In support of the defense strategy, Dr. Davis testified that Hand should do well in prison because he adjusted to the structured setting of the army, he has no prior criminal record, he has no substance-abuse problems, and he is older. Robert, his son, also testified that he would stay in contact with Hand in prison and continue to look to him for guidance. Finally, Hand said in an unsworn statement, "If allowed to live, I swear to each of you, I will be a model inmate; I will help anyone and everyone that I can help; I would devote my life to my son and his children; I will volunteer for any program to further the cause of man." The defense theory, although unsuccessful, was coherent and fit into the testimony of the witnesses. Thus, counsel made a "strategic trial decision" in presenting the defense theory of mitigation, and such decision "cannot be the basis for an ineffectiveness claim." *State v. Bryan,* 101 Ohio St.3d 272, 2004 Ohio 971, 804 N.E.2d 433, P190; see, also, *State v. Mason* (1998), 82 Ohio St.3d 144, 169, 1998 Ohio 370, 694 N.E.2d 932.

Hand also argues that his counsel failed to form a reasonable mitigation strategy because of his counsel's unwillingness to spend more time in presenting the defense mitigation case. Hand points to counsel's remarks during his penalty-phase opening statement.

> The mitigation evidence that we're about to present to you won't be very long. We'll be done in a couple of hours. I don't want to delay this case more than it needs to be, so I've elected to tell you the things that I think you [ought] to think about now, rather than waiting until closing arguments.
>
> * * *
>
> Now, I've been a lawyer for 30 years. Yes, I have been involved in a number of mitigation hearings. In some of those hearings, I presented evidence how the defendant was raised; if he was abused and neglected, if drugs were involved. But I'm not going to insult you by telling you the events of Bobby's childhood led him to commit these offenses; that would be intellectually dishonest. I'm not doing that. What we will be telling you and are telling you is that imposing a death sentence on Bobby, you're going to be saying, he has nothing left to give; he has nothing of value; he's an empty box with nothing for anything.

Trial counsel's comment about not delaying the case was a means of maintaining the defense's credibility and focusing the jury's attention on the mitigating factors supporting a life sentence. Indeed, the trial counsel's opening statement forcefully pointed out numerous mitigating factors that justified a life sentence. Trial counsel's remark about not relying on "the events of Bobby's childhood" was also aimed at maintaining the defense's credibility during the penalty phase. We find that counsel's decision to present this theory of mitigation represented a legitimate "tactical decision." See *State v. Hartman* (2001), 93 Ohio St.3d 274, 296, 2001 Ohio 1580, 754 N.E.2d 1150; See, also, *State v. Ballew* (1996), 76 Ohio St.3d 244, 256, 1996 Ohio 81, 667 N.E.2d 369.

***80** Failure to adequately present mitigating evidence. Hand contends that his counsel were deficient by failing to present his mother and sister as witnesses, failing to present any witnesses from the army or evidence about his military service, failing to present any witnesses or evidence about his performance in school, and failing to present any witnesses or evidence from Franklin County Children Services. He also claims that his counsel were deficient in presenting his unsworn statement.

However, "the decision to forgo the presentation of additional mitigating evidence does not itself constitute proof of ineffective assistance of counsel." *Keith,* 79 Ohio St.3d at 536, 684 N.E.2d 47. Moreover, " '[a]ttorneys need not pursue every conceivable avenue; they are entitled to be selective." ' *State v. Murphy,* 91 Ohio St.3d at 542, 747 N.E.2d 765, quoting *United States v. Davenport* (C.A.7, 1993), 986 F.2d 1047, 1049.

Dr. Davis's testimony presented information to the jury about Hand's military, education, and Franklin County Children Services records. Dr. Davis testified that Hand's father was an alcoholic and his parents were divorced when he was a child. Franklin County Children Services removed Hand from his home, but he was later reunited with his family. Dr. Davis also testified that Hand attended five different elementary schools, but left high school to join the army. He stated that Hand served in Vietnam and received an honorable discharge from the army. Robert Hand, the defendant's son, also testified in Hand's behalf. We find that counsel's decision not to call additional family members as mitigation witnesses was a "tactical choice" and did not result in ineffective assistance of counsel. See *Ballew,* 76 Ohio St.3d at 256–257, 667 N.E.2d 369.

Finally, Hand argues that his counsel were deficient in presenting his unsworn statement because Hand's plea for a life sentence focused on his ability to serve as a model inmate. However, "the decision to give an unsworn statement is a tactical one, a call best made by those at the trial who can judge the tenor of the trial and the mood of the jury. * * * While subject to debate, that decision largely is a matter of style, and is a tactical decision that does not form the basis for a claim of ineffective assistance." *Brooks,* 75 Ohio St.3d at 157, 661 N.E.2d 1030. Here, Hand's unsworn statement was consistent with the defense strategy to convince the jury that Hand should receive a life sentence because he would be a model prisoner and has future value to his family and prison society. Moreover, Hand fails to indicate any additional matters he might have presented in his unsworn statement and thus failed to show that any alleged deficiencies made any difference in the

outcome of the case. *Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus.

...

5. Failure to make a closing argument. Hand also asserts that his counsel were ineffective by failing to present a penalty-phase closing argument.

***81** During his penalty-phase opening statement, counsel informed the jury, "I've elected to tell you the things that I think you [ought] to think about now, rather than waiting until closing arguments." The trial counsel then summarized the mitigating evidence:

> The evidence * * * will show you that Bobby does know how to live in orderly fashion behind prison walls: he's got intelligence; he's got mechanical ability; he loves children; that Bobby can continue to be a source of support and guidance to his son, Robby, and his grandchildren.

In his opening statement, counsel also made a plea for a life sentence:

> Collectively, we believe that [the penalty phase] will tell you Bobby is not a commodity, a useless commodity; he's a human being. And, although convicted of heinous crimes, we hope to show you that Bobby still can have value.
>
> " * * *
>
> Robby * * * by losing his mother, he was a victim once and by sentencing his father to death, he would be a victim twice. * * * By a death verdict, not only are you going to be punishing Bobby, but you're going to be punishing Robby.
>
> * * *
>
> Bobby can conform to prison life. He will not be a predator; he will not be a source of violence with respect to other inmates; * * * He can teach other inmates mechanical skills, and then they can leave the system with a skill * * *.
>
> * * *
>
> I believe that if Bobby is given a life sentence, he would still be in a position to contribute to mankind.
>
> Mr. Yost is right; I am going to be asking you to consider mercy as a mitigating factor because mercy is the dearest privilege that a person on this earth can be, is merciful. * * * I'm asking you to consider mercy and to temper justice with mercy.

Here, the trial counsel's decision to present the defense case and plea for a life sentence during opening statement rather than closing argument represented a "tactical decision" that did not fall below an objective standard of reasonable representation. Moreover, waiving closing argument may have been a "tactical decision" made by the defense counsel to prevent the state from splitting closing argument and staging a strong rebuttal. See *State v. Hoffner,* 102 Ohio St.3d 358, 2004 Ohio 3430, 811 N.E.2d 48, P47; *State v. Burke* (1995), 73 Ohio St.3d 399, 405, 1995 Ohio 290, 653 N.E.2d 242. Finally, we find that Hand has failed to prove that a reasonable probability exists that his sentence would have been different had counsel made a closing argument. See *Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus.

For the foregoing reasons, we reject proposition of law VIII.

Hand, 107 Ohio St.3d at 411–16, 840 N.E.2d 151.

The Eighth Amendment requires a jury to consider the circumstances of the crime and the defendant's character and background during the sentencing phase of a capital trial. *Austin v. Bell,* 126 F.3d 843, 848 (6th Cir.1997), *cert. denied,* 523 U.S. 1079, 118 S.Ct. 1526, 140 L.Ed.2d 677 (1998), *citing, Boyde v. California,* 494 U.S. 370, 377–78, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) and *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The Constitution also requires defense counsel to reasonably investigate a defendant's background and present it to the jury. *Austin,* 126 F.3d at 848. Failure to investigate or present mitigating evidence at sentencing may constitute ineffective assistance of counsel. *Id., citing, Glenn v. Tate,* 71 F.3d 1204, 1206–08 (6th Cir.1995), *cert. denied,* 519 U.S. 910, 117 S.Ct. 273, 136 L.Ed.2d 196 (1996).

***82** First, the Court notes that the state did not present any additional evidence or call any witnesses to testify at the mitigation phase of Mr. Hand's trial. Trial Tr. Vol. 22 at 3857. Rather, the state relied on the jury's determination

during the guilt phase of the trial with respect to the aggravating circumstances of the murders of which the jury convicted Mr. Hand. *Id.* at 3846.

In contrast, Mr. Hand's counsel called three witnesses to testify in addition to presenting Mr. Hand's unsworn statement. In addressing Subclaim B of this Ground, the Court reviewed the testimony which the three mitigation witnesses offered. *See, supra.* For example, the Court noted that psychologist Dr. Davis testified he had reviewed the reports of extensive interviews of a variety of individuals, personally interviewed Mr. Hand's mother and sister, and reviewed various records including Mr. Hand's military records, school records, medical records, and children's services records. Trial Tr. Vol. 22 at 3869–71. Additionally, as noted above, Dr. Davis testified as to Mr. Hand's family background including the facts that Mr. Hand came from a family where his father was an alcoholic, there was considerable strife and abuse between the husband and wife, his father left and his parents divorced when he was a child, that the family came to the attention of children's services when there was an allegation of Mr. Hand's mother's openly cohabitating with men in front of the children, at one time Mr. Hand and his siblings were removed from the home and placed temporarily in a receiving center, then placed with an aunt, that Mr. Hand had attended a number of different elementary schools during his early years which was disruptive to his education, he left high school, joined the United States Army, served in Vietnam, and that he received an honorable discharge from the Army. *Id.* at 3871–72.

Again as noted above, Frank Haberfield testified at the mitigation phase that he knew Mr. Hand through the Boy Scouts, Mr. Hand was a volunteer Boy Scout troop leader, he organized the troop and took them on field trips, he advocated on behalf of the members of his troop, and that he (Mr. Haberfield) never heard anything negative about Mr. Hand. *Id.* at 3883–84.

Finally, Mr. Hand's son Robert Hand testified about the close relationship that he had with Mr. Hand, that Mr. Hand provided for him and pushed him through school, that he continued to rely on Mr. Hand for advice, and that he would maintain his close relationship with Mr. Hand if he were incarcerated for life and would encourage his (Robert's) son to maintain a relationship with Mr. Hand. *Id.* at 3887–90.

Mr. Hand does not identify any additional evidence which counsel should have pursued and presented during the mitigation phase. While it is true that counsel did not have any of Mr. Hand's other relatives or friends testify, Dr. Davis adequately described to the jury Mr. Hand's family and childhood background. Mr. Hand has not come forth with anything additional about his "abysmal childhood" which counsel failed to present to the jury. In addition, Mr. Hand has not pointed to any additional evidence about his background or family relationships such as physical or sexual abuse, drug use, or serious mental illnesses which counsel should have presented to the jury.

***83** Mr. Hand focuses on counsel's failure to present a closing argument to the jury. However, Mr. Hand's counsel presented an opening statement during which he pointedly told the jury about several mitigating factors. Those factors included Mr. Hand's value to his family and to a prison community, his intelligence and skills, and his ability to adjust to prison life. Counsel also asked the jury to be merciful toward Mr. Hand. After Mr. Hand's counsel presented his opening statement, the state did not present any dramatic or impressive testimony which Mr. Hand's counsel had to rebut or challenge in a closing argument. Indeed, as noted above, the state did not present any testimony during the mitigation stage of the trial. Finally, by not giving a closing argument, Mr. Hand's counsel did not give the state the opportunity to rebut anything they said and re-state the aggravating factors and portray Mr. Hand as a cold, heartless killer just before beginning deliberations.

Mr. Hand also argues that his counsel were ineffective during the mitigation phase of his trial because they failed to argue residual doubt. Mr. Hand's argument fails.

The United States Supreme Court neither requires nor disallows consideration of "residual doubt" as a mitigating factor in a capital crime. *See, e.g., Franklin v. Lynaugh,* 487 U.S. 164, 173, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988). However, Ohio has determined that residual doubt cannot be used as a mitigating factor:

> Residual or lingering doubt as to the defendant's guilt or innocence is not a factor relevant to the imposition of the death sentence because it has nothing to do with the nature and

> circumstances of the offense or the history, character, and background of the offender.

McGuire v. Ohio, 80 Ohio St.3d 390, 403, 686 N.E.2d 1112 (1997), *cert. denied,* 525 U.S. 831, 119 S.Ct. 85, 142 L.Ed.2d 66 (1998), habeas corpus denied sub nom, *McGuire v. Mitchell,* No. 3:99–cv–140, 2007 WL 1893902 (July 2, 2007), *aff'd,* 619 F.3d 623, 2010 WL 3396849 (Aug. 31, 2010). The Sixth Circuit has approved this approach. *See, Coleman v. Mitchell,* 268 F.3d 417, 447 (6th Cir.2001), *cert. denied,* 535 U.S. 1031, 122 S.Ct. 1639, 152 L.Ed.2d 647 (2002).

The Ohio Supreme Court's decision on this Subclaim was not contrary to nor an unreasonable application of, clearly established federal law. Therefore, Subclaim E of Ground V is without merit.

Subclaim F.

The failure to object to the admission of all guilt phase evidence

In Subclaim F of Ground V, Mr. Hand alleges that counsel were ineffective at mitigation for failing to object to the admission of all of the evidence that was admitted during the guilt phase of his trial. Mr. Hand's position is that the evidence included autopsy photographs and reports, crime scene evidence, and exhibits relating to the escape all of which were irrelevant to the issue of whether he should be sentenced to life or death. In his Reply, Mr. Hand identifies the allegedly offending exhibits as primarily autopsy reports, photographs, including autopsy photographs of Jill Hand, Walter "Lonnie" Welch, and Donna Hand, and certain demonstrative exhibits such as bullet fragments, a mannequin, and a tooth. (Doc. 32 at 71–73; PAGEID# 577–79).

***84** Mr. Hand raised this claim on direct appeal and the Ohio Supreme Court rejected it as follows:

> 4. Failure to object to the readmission of guilt-phase evidence. Hand argues that, with the exception of the exhibits involving the escape charge, his counsel were ineffective by failing to object to the reintroduction of all guilt-phase exhibits. Hand does not specify which exhibits he believed prejudiced him. Moreover, counsel were not ineffective by failing to object to this evidence, because the reintroduction of guilt-phase evidence is permitted by R.C. 2929.03(D)(1). *State v. DePew* (1988), 38 Ohio St.3d 275, 528 N.E.2d 542, paragraph one of the syllabus; *State v. Foust,* 105 Ohio St.3d 137, 2004 Ohio 7006, 823 N.E.2d 836, P157.

Hand, 107 Ohio St.3d at 415, 840 N.E.2d 151.

As previously noted, it is not the province of a federal habeas court to reexamine state court determinations on state law questions. *Estelle,* 502 U.S. 67–68.

> In Ohio, trial courts have considerable discretion in determining what evidence is relevant to the penalty phase and reviewing courts are loath to interfere with the exercise of that discretion. *Cf., State v. Hancock,* 108 Ohio St.3d 57, 76, 840 N.E.2d 1032 (2996) (noting that trial judges are "clothed with a broad discretion" in determining the relevancy of trial phase evidence to the penalty phase); see also *State v. Jackson,* 107 Ohio St.3d 53, 71072, 836 N.E.2d 1173 (2995) (finding no error in readmission or guilt phase testimony from surviving victims because testimony was relevant to course-of-conduct aggravating circumstance); *State v. Ahmed,* 103 Ohio St.3d 27, 43, 813 N.E.2d 166 (2002) (finding no error in readmission of photographs or demonstrative exhibits demonstrating the weapons used because evidence "bore some relevance to" the nature and circumstances of the course-of-conduct aggravating circumstance): *State v. Fears,* 86 Ohio St.3d 329, 345–45, 715 N.E.2d 136[sic], 86 Ohio St.3d 329, 715 N.E.2d 136 (1999)(holding that even though a trial court should exclude evidence irrelevant to the penalty phase, the trial court in this case was not required to exclude the evidence of the killings, including gruesome photographs, because § 2929.03(D)(1) requires the trial court to consider the nature and circumstances of the offense and permits repetition of much or all that occurred during the guilty stage (citing [*State v.] DePew,* 38 Ohio St.3d [275] at 282–83, 528 N.E.2d 542 [(1988)]. The Ohio Supreme Court has clarified, however, that even though R.C. § 2929.03(D)(1) and (2) permit repetition of much or all of what happened

during the culpability phase, trial courts are not relieved [of] their duty to determine which culpability phase evidence is relevant to sentencing issues, See *State v. Getsy,* 84 Ohio St.3d 180, 201, 702 N.E.2d 866 (1998) (holding that *State v. Summ,* 73 Ohio St.3d 413, 653 N.E.2d 253, syllabus (1994) "appears to require the trial court to determine what evidence is relevant"); see also *State v. Lindsey,* 87 Ohio St.3d 479, 484–85, 721 N.E.2d 995 (2000) (holding that it was error for trial court to readmit guilt-phase evidence in toto without determining which evidence was relevant to penalty phase issues).

***85** *Cowans v. Bagley,* 624 F.Supp.2d 709, 811–12 (S.D.Ohio 2008), aff'd., —— F.3d ——, 2011 U.S.App. LEXIS 8171 (Apr. 21, 2011) (citations omitted).

In this case, the trial court readmitted in the mitigation phase all of the evidence that had been introduced in the guilt phase with the exception of the state's exhibits which involved the escape charge as well as two of Mr. Hand's exhibits. Trial Tr. Vol. 22 at 3830. The court did not address each exhibit separately nor did it make a finding as to the mitigation phase relevance of each exhibit. *Id.* Even if the trial court committed error as a matter of state law when, prior to admitting it at the penalty phase, it failed to determine whether the guilt phase evidence was relevant to any penalty phase issues, as noted above, an error of state procedural or evidentiary law is not cognizable in federal habeas. However, as the *Cowans* court noted, even in the face of such an error, Ohio "state law dictates that the error could not possibly have prejudiced the outcome of petitioner's sentencing hearing and was therefore harmless." *Id.* at 813. It follows, then, that if there was no prejudicial error in admitting the guilt phase evidence in the penalty phase that counsel were not constitutionally ineffective for failing to object to the admission of that evidence.

The state court's decision on the issue Mr. Hand raises in Subclaim E was not contrary to nor an unreasonable application of, clearly established federal law.

Subclaim F

Cumulative Error of Ineffectiveness in Mitigation
Mr. Hand argues in this Subclaim that the cumulative impact of his trial counsels' errors so prejudiced him as to result in a sentence that was obtained in violation of his constitutional rights. Respondent argues that this claim is procedurally defaulted. Mr. Hand has not addressed this argument.

Mr. Hand did not raise in state court a cumulative error claim with respect to counsels' alleged mitigation phase ineffectiveness. App. Vol. 6 at 319–27. Therefore, this claim is procedurally defaulted. *Lorraine,* 219 F.3d at 447. Moreover, the Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief. *Id.* Finally, there simply are no mitigation phase counsel error to cumulate.

Mr. Hand's Subclaim F is without merit.

For the foregoing reasons, Mr. Hand's Ground V should be rejected in its entirety.

GROUND VI

The trial court's failure to conduct an adequate colloquy to determine whether prospective jurors were biased from their exposure to pretrial publicity violated Hand's Fifth, Sixth, Ninth, and Fourteenth Amendment rights.
Mr. Hand claims in Ground VI that the trial court failed to conduct an adequate colloquy of jurors regarding pretrial publicity to determine whether any of the prospective jurors were biased which resulted in violations of his constitutional rights.

Respondent argues first that this claim is procedurally defaulted and second, that even assuming it is not procedurally defaulted, the claim has no merit. Mr. Hand argues that the claim is not procedurally defaulted because the post-conviction court relied on evidence outside the record to reject his claim.

***86** This claim is strikingly similar to the claim that Mr. Hand raised in Subclaim B of Ground IV, *supra.* Mr. Hand did not raise the present claim on direct appeal to the Ohio Supreme Court. He did, however, raise it in post-conviction as well as in his application to reopen his appeal. *See,* App. Vol. 9 at 32–34; App. Vol. 10 at 85–87. The Ohio Supreme Court denied Mr. Hand's application to reopen his appeal. App. Vol. 9 at 43.

The Delaware County Court of Common Pleas rejected Mr. Hand's pre-trial publicity claim on the basis that *res*

judicata barred it. App. Vol. 11 at 159–60. The court of appeals agreed saying:

> Appellant claims the trial court erred in finding the doctrine of res judicata barred the consideration of claims one, two, three, four, five, six, eight, eleven, and twelve in his petition for post-conviction relief. We disagree.
>
> Claim one challenges the jury venire. Appellant argues the trial court should have made further inquiry of the jury concerning the effects of pretrial publicity. Upon review, appellant was not precluded from directly appealing the issue, as the issue could be determined by reviewing the voir dire transcript. The record clearly demonstrates the trial court discussed the pretrial publicity during voir dire and discussed the same with the jurors. Appellant's attachment of exhibits demonstrating pre-trial publicity to the post-conviction relief petition, though admittedly outside the original trial record, merely supplements appellant's argument which was capable of review on direct appeal on the then extant record. Accordingly, we agree with the trial court res judicata applies.

Hand, 2006 WL 1063758 at *3–4; App. Vol. 12 at 366.

As this Court noted in addressing Ground IV, Subclaim B, Ohio's doctrine of *res judicata* provides, in relevant part, that a final judgment of conviction bars a convicted defendant from raising in any proceeding, except an appeal from that judgment, any issue that was raised, or could have been raised, at trial or on appeal from that judgment. *Williams,* 380 F.3d at 967. With respect to a procedural default analysis, Ohio's doctrine of *res judicata,* is an adequate and independent state procedural ground. The Sixth Circuit has rejected claims that Ohio has failed to apply the doctrine of *res judicata* consistently. *Id.* In other words, Ohio's *res judicata* rule has been repeatedly upheld in the Sixth Circuit as an adequate and independent state ground to justify default. *Carter,* 443 F.3d at 538.

Similar to Subclaim B of Ground IV, the first and second prongs of the *Maupin* test have been satisfied with respect to this claim. First, as the appeals court noted, *supra,* in Ohio, whether pretrial publicity resulted in a partial jury can be determined by reviewing the voir dire transcript. Second, when Mr. Hand attempted to raise this issue in his post-conviction proceedings, Ohio courts specifically relied on *res judicata* in rejecting his claim. As noted, Ohio's *res judicata* rule has been repeatedly upheld in the Sixth Circuit as an adequate and independent state ground to justify default.

***87** With respect to the third prong of the *Maupin* test, Mr. Hand has not attempted to argue, let alone establish, cause for the default. Rather, and similar to the argument he raised in Ground IV Subclaim B, Mr. Hand's position is that this claim is not procedurally defaulted because the post-conviction court relied on evidence outside the record. Again, the Court is not persuaded by this argument. It is true that the court of appeals referred to the exhibits which Mr. Hand had attached to his post-conviction petition in support of his argument. However, the court of appeal's references to those exhibits were for purposes of explaining that their attachment did not defeat the application of *res judicata.* Those courts did not use those exhibits for the purpose of rejecting the merits of Mr. Hand's claim.

This Court concludes that the pre-trial publicity claim Mr. Hand has raised in Ground VI is procedurally defaulted. Therefore, Ground VI should be rejected.

GROUND VII

The joinder of an unrelated escape charge with Hand's aggravated murder trial violated Hand's rights to due process and a fair trial.

In Ground VII, Mr. Hand argues that the trial court violated his rights to due process rights and a fair trial when it joined the escape charge with his aggravated murder trial. The Warden essentially argues that Mr. Hand has raised purely a question of state law and therefore his claim is not cognizable in federal heabeas.

Mr. Hand raised this claim on direct appeal and the Ohio Supreme Court rejected it stating:

> *Joinder of escape charge.* In proposition of law III, Hand contends that the trial court erred in denying his motion to sever Count Six, the escape charge, from the rest of the charges.
>
> Under Crim.R. 8(A), two or more offenses may be charged together if the offenses "are of the same or similar character * * * or are based on two or more acts or transactions connected together or constituting

parts of a common scheme or plan, or are part of a course of criminal conduct." In fact, "the law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged 'are of the same or similar character." ' *Lott,* 51 Ohio St.3d at 163, 555 N.E.2d 293, citing *State v. Torres* (1981), 66 Ohio St.2d 340, 343, 20 O.O.3d 313, 421 N.E.2d 1288.

A defendant requesting severance has the "burden of furnishing the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial." *Torres,* 66 Ohio St.2d at 343, 20 O.O.3d 313, 421 N.E.2d 1288. A defendant claiming error in the denial of severance must affirmatively show that his rights were prejudiced and that the trial court abused its discretion in refusing separate trials. *Id.* Here, the trial court did not abuse its discretion in denying the motion to sever. Nor was Hand prejudiced by the joinder.

First, Hand's participation in the escape attempt was evidence of flight and was admissible as tending to show his consciousness of guilt. Indeed, an accused's " 'flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." ' *State v. Eaton* (1969), 19 Ohio St.2d 145, 160, [*402] 48 O.O.2d 188, 249 N.E.2d 897, quoting 2 Wigmore on Evidence (3d Ed.1979) 111, Section 276; see, also, 1 Giannelli & Snyder, Evidence (2d Ed.2001) 167–170, Section 401.9.

***88** The defense did not challenge instructions on evidence of flight at trial. However, Hand now contends that his minimal participation in the escape attempt would not have been admissible as evidence of flight if he had had a separate murder trial. We reject that argument because Hand was actively involved in the escape attempt. Beverly testified that Hand served as a lookout when Beverly was sawing through the cell bars, Hand provided advice on how to cut through the metal bars, and Hand talked to Beverly about alternative ways of escaping. Moreover, Grimes testified that Hand and Beverly devised a plan to escape through the front of the cell block. Under this plan, Hand would "sidetrack the nurses and guards and Mr. Beverly would go and apprehend one of the guards * * * and they would go through the front door, because time was getting near for both of them, and the door wasn't ready to come through."

Hand also argues that joinder was not justified, because more than nine months elapsed between the murders (January 15, 2002) and the escape attempt (October 30, 2002, through November 26, 2002). However, admissibility of evidence of flight does not depend upon how much time passes between the offense and the defendant's flight. See *State v. Alexander* (Feb. 26, 1987), Cuyahoga App. No. 51784, 1987 Ohio App. LEXIS 7187, 1987 WL 7079, *2. Indeed, flight on the eve of trial can carry the same inference of guilt as flight from the scene. *Id.* Here, Hand's escape attempt occurred while pretrial hearings were underway. Thus, this argument also lacks merit.

Finally, the evidence of Hand's guilt is "amply sufficient to sustain each verdict, whether or not the indictments were tried together." *Torres,* 66 Ohio St.2d at 344, 20 O.O.3d 313, 421 N.E.2d 1288. In this case, circumstantial evidence, forensic testimony, Welch's statements, and Hand's own statements proved Hand's guilt of the murders. Additionally, Grimes's and Beverly's testimony provided independent evidence of Hand's guilt of escape. Thus, the strength of the state's proof "establishes that the prosecution did not attempt to prove one case simply by questionable evidence of other offenses." *State v. Jamison* (1990), 49 Ohio St.3d 182, 187, 552 N.E.2d 180.

Based on the foregoing, we overrule proposition of law III.

Hand, 107 Ohio St.3d at 401–02, 840 N.E.2d 151.

As with his Ground II, *supra,* when Mr. Hand raised this issue on direct appeal to the Ohio Supreme Court, he raised the claim as a question of state law with only cursory mentions of due process and the Constitution. App. Vol. 6, at 286–93. Specifically, Mr. Hand argued that, "... judicial economy cannot overwrite the constitutional protections of due process and the requirements for a reliable and fair sentence" and he concluded his arguments by stating, "[t]herefore, joinder was unconstitutional and the convictions and sentences for all charges must be reversed. U.S. Const. amends. V, VI, VIII, IX, XIV; Ohio Const. art. I §§ 1, 2, 5, 9, 10, 16, 20." *Id.* Mr. Hand did not raise any constitutional arguments nor did he cite to any federal cases. The fifteen cases that Mr. Hand cited on direct appeal are Ohio cases on the subject of the appropriateness of joinder

under Ohio's statutes and criminal rules and his arguments focused solely on the trial court's alleged errors of state law. *Id.* In other words, Mr. Hand failed to "federalize" his claim on the issue of improper joinder.

***89** Accordingly, Mr. Hand's presentation to the Ohio Supreme Court of his claim with respect to the joinder of the escape charge with the aggravated murder charge was inadequate to put that court on notice of a federal claim. Therefore, this claim is not cognizable in federal habeas corpus because it deals with a matter of state law and Ground VII should be dismissed.

GROUND VIII

Hand was convicted of escape absent sufficient evidence of his guilt in violation of the Fifth and Fourteenth Amendments.

Mr. Hand alleges in Ground VIII that the evidence introduced at trial was insufficient to sustain his conviction of escape. Mr. Hand raised this claim on direct appeal and the Ohio Supreme Court rejected it as follows:

> *Sufficiency of the evidence of escape.* In proposition of law IV, Hand challenges the sufficiency of the evidence for his conviction of escape in Count Six.
>
> In reviewing a claim of insufficient evidence, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.
>
> Hand argues that the evidence of escape was insufficient because there was no evidence that he planned the unsuccessful escape attempt or directly assisted in cutting the locks or hiding the tools. Hand also contends that the testimony that he was acting as a lookout, if true, was insufficient to convict him.
>
> The record refutes Hand's claims. Testimony showed that Hand served as a lookout when Beverly was sawing through the cell bars, provided advice to Beverly on cutting through the cell bars, and helped devise an alternative plan to escape through the front door of the jail. Moreover, circumstantial evidence supported Hand's guilt. This evidence consisted of some torn-up teeshirt material and a pencil with a piece of teeshirt tied around it found in Hand's cell after the aborted escape attempt. According to Delaware County Detective Brian Blair, "[t]hese pieces of cloth are consistent to what was tied to the saw blades and it's consistent to what inmates do to hide things * * * so they can be easily accessed by pulling on this after tying something to it, i.e., saw blades." Thus, the evidence established that Hand actively participated in the escape attempt.
>
> Finally, even assuming that the evidence established only that Hand was acting as a lookout, Hand was an accomplice in the attempted escape. See *State v. Lett,* 160 Ohio App.3d 46, 2005 Ohio 1308, 825 N.E.2d 1158, P29, citing *State v. Trocodaro* (1973), 36 Ohio App.2d 1, 5, 65 O.O.2d 1, 301 N.E.2d 898 (aiding and abetting established by overt acts such as serving as a lookout). Under R.C. 2923.03(F), an accomplice "shall be prosecuted and punished as if he were a principal offender." See, also, *State v. Bies,* 74 Ohio St.3d 320, at 325, 658 N.E.2d 754, 1996 Ohio 276.
>
> ***90** Based on the foregoing evidence, viewed in the light most favorable to the prosecution, we find that sufficient evidence supports Hand's conviction for escape. Thus, we overrule proposition of law IV.

Hand, 107 Ohio St.3d at 402–03, 840 N.E.2d 151.

An allegation that a verdict was entered upon insufficient evidence states a claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Johnson v. Coyle,* 200 F.3d 987, 991 (6th Cir.2000); *Bagby v. Sowders,* 894 F.2d 792, 794 (6th Cir.)(en banc), *cert. denied,* 496 U.S. 929, 110 S.Ct. 2626, 110 L.Ed.2d 646 (1990). In order for a conviction to be constitutionally sound, every element of the crime must be proved beyond a reasonable doubt. *In re Winship,* 397 U.S. at 364.

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt....

> This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts.

Jackson v. Virginia, 443 U.S. at 319; *United States v. Paige,* 470 F.3d 603, 608 (6th Cir.2006). This rule was adopted as a matter of Ohio law at *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), *superseded by state constitutional amendment on other grounds as stated in, State v. Smith,* 80 Ohio St.3d 89, 103 n. 4, 684 N.E.2d 668 (1997). Of course, it is state law which determines the elements of offenses; but once the state has adopted the elements, it must then prove each of them beyond a reasonable doubt. *In re Winship, supra.*

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

***91** *Brown v. Konteh,* 567 F.3d 191, 205 (6th Cir.Ohio 2009), *cert. denied,* —— U.S. ——, 130 S.Ct. 1081, 175 L.Ed.2d 888 (2010). In a sufficiency of the evidence habeas corpus case, deference should be given to the trier-of-fact's verdict under *Jackson v. Virginia* and then to the appellate court's consideration of that verdict, as commanded by AEDPA. *Tucker v. Palmer,* 541 F.3d 652 (6th Cir.2008). *cert. denied,* —— U.S. ——, 130 S.Ct. 109, 175 L.Ed.2d 72 (2009).

After a thorough review of the trail testimony, this Court concludes that Mr. Hand's sufficiency of the evidence of the claim in Ground VIII is without merit.

Michael Beverly testified at Mr. Hand's trial that he was in the Delaware County jail at the same time as Dennis Boster, Thomas Hines, and Gerald Hand. Trial Tr., Vol. 16 at 2975–3006. Mr. Beverly also testified that he had pled guilty to escape and that the idea to escape was his as well as another inmate's whose last name was Wedderspoon but who had gone home in October before law enforcement discovered the escape plan. *Id.* Mr. Beverly testified further that: he had obtained hacksaw blades by way of a friend of Mr. Wedderspoon's who had mailed them to Mr. Hines; there was a piece of white fabric attached to the blades so he could hide the blades under the sink in your cell and he could retrieve the blades by pulling on the string; his role was mainly cutting the lock at the jail's back exit; at one time he had attempted to cut through the bars of Mr. Hines' and Mr. Boster's cell, but that the bars had roller bars inside and he couldn't get through them so he abandoned that plan; the whole process took about six weeks from the beginning of October until November 26, when they got caught; while he was cutting the lock on the back door, usually two inmates would serve as lookouts and stand by the [correction officers'] observation window; usually Mr. Boster stood by the window and either Mr. Hines or Mr. Hand would help; that if Mr. Hand helped it was basically as a lookout; sometimes Mr. Hand would give

him advice on how to break one of the saw blades so he could use it to cut through the bar; he and Mr. Hand discussed alternative ways of getting our of the jail; Mr. Hand's role as lookout was necessary to the plan; everyone in the cell block knew that he was cutting the locks; Mr. Hand did not bring in any saw blades, cut any bars, hide the saw blades; when he gave the police a statement on November 26, he probably did not mention Mr. Hand's name and didn't mention it until the police asked him if Mr. Hand was involved; there were some inmates who did not participate; and that he did not expect Mr. Hand to leave with him if the escape attempt was successful. *Id.*

Kenneth Grimes testified that he was Mr. Hand's cellmate while he was in the Delaware County jail. *Id.,* Vol. 16 at 3007–34; Vol. 17 at 3036–65. Mr. Grimes testified further that: while he was in the jail, there was an escape attempt that Mr. Beverly organized; Mr. Beverly had a hacksaw blade and was sawing the back door; the main characters involved were Mr. Boster and Mr. Hines and all the inmates knew about it; he did not participate in the attempt and when Mr. Beverly worked on the door he (Mr. Grimes) would go to his cell; one evening Mr. Beverly approached Mr. Hand and they comprised [sic] an idea of going through the front of the jail; the idea was that Mr. Hand would sidetrack the nurses and guards and Mr. Beverly would go and apprehend one of the guards at the same time and they would go through the front door; Mr. Hand worked as a lookout and would tell Mr. Beverly when someone was coming; there were times when Mr. Hand prevented Mr. Beverly from getting caught; when the investigation started, he (Mr. Grimes) was worried about being charged with escape; and that when the investigation began, he gave the police a statement which didn't mention Mr. Hand. *Id.*

***92** Terry Neal testified at Mr. Hand's trial that he was in the Delaware County jail in the fall of 2002, from November 18, through December, that he knew Mr. Hand, Mr. Beverly, and Mr. Grimes, and that he was aware that Mr. Beverly was involved in an escape attempt. *Id.,* Vol. 19 at 3346–70. Mr. Neal also testified that there were three people involved in the plan, he didn't believe Mr. Hand was involved, he told investigators that Mr. Hand didn't have anything to do with the plan, and that while he was in the jail, if someone even mentioned the plan to him he would not want to talk about it, and that he didn't want anything to do with it. *Id.*

Dennis Boster testified at trial that he was in the Delaware County jail with Mr. Hand, he was involved in the escape and pled guilty to escape, he and Mr. Hines would be the lookouts and Mr. Beverly would do the cutting, and that everyone else just basically sat back and didn't want anything to do with it. *Id.,* at 3370–85. Mr. Boster also testified that he was pretty sure that everyone knew about the plan, that Mr. Hand did not involve himself at all and did not act as a lookout, and that he never saw Mr. Hand express a willingness to be involved. *Id.* Mr. Boster testified further that when he pled guilty, the judge asked him what Mr. Hand had to do with the escape and he told the judge that Mr. Hand hd nothing to do with it. *Id.* Additionally, Mr. Boster testified that his only function was as lookout, Mr. Beverly was using saw blades that had pieces of string made from tee shirts and that blades were frequently stored in the walls and under sinks. *Id.*

With respect to the escape, Mr. Hand testified that he tried to stay away from Mr. Beverly as much as possible, when Mr. Beverly asked him if he wanted to go when he escaped, Mr. Hand told him he did not, and that he told Mr. Beverly several times to get away from him. *Id.* at 3496–99. Mr. Hand testified further that everyone knew that Mr. Beverly had saw blades and was trying to get out and that he did not aid Mr. Beverly in any way. *Id.* Mr. Hand also testified that the investigators recovered some strings from his pockets, that they were made from tee shirts, that everyone tore up tee shirts to use as wash rags and hand towels and things like that, and that he used the strings to hang plastic bags containing his commissary purchases over the side of his bed to keep the ants out of the bags. *Id.*

The Ohio Revised Code reads in relevant part, "No person, knowing the person is under detention or being reckless in that regard, shall purposely break or attempt to break the detention ...". O.R.C. § 2921.34(A)(1). In addition, the Code provides, "No person, acting with the kind of culpability required for the commissioner of an offense, shall do any of the following: ... (2) Aid or abet another in committing the offense;.... (F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender...." Ohio Revised Code § 2923.03(A)(2) and (F).

***93** As noted above, Mr. Hand testified that he had did not participate in the attempted escape plan and

Mr. Boster testified that Mr. Hand did not participate in the escape. Mr. Neal's testimony about Mr. Hand's involvement was, at best, equivocal about Mr. Hand's involvement (he "did not believe" that Mr. Hand participated). While this testimony may support Mr. Hand's claim that he did not participate in the escape, the jury was, of course, under no obligation to accept Mr. Hand's, Mr. Boster's, or Mr. Neal's testimony as truthful. In contrast, there is sufficient testimony that indicates that Mr. Hand actively participated in the escape. For example, Mr. Beverly and Mr. Grimes both testified that Mr. Hand participated in the escape in various ways. That is, both Mr. Beverly and Mr. Grimes testified that Mr. Hand functioned as a lookout while Mr. Beverly was sawing the back door lock. In addition, both Mr. Beverly and Mr. Grimes testified that Mr. Hand gave Mr. Beverly various advice on pursuing escape. Finally, the testimony that Mr. Hand had in his possession some strings that were made from tee shirts and which were similar to the strings which were attached to the hacksaw blades which Mr. Beverly used in the escape attempt certainly suggested that Mr. Hand played a part in the attempted escape.

Even assuming that Mr. Hand did not intend to leave the jail once an escape was underway, a finding that he participated in the execution or the planning of the escape was sufficient to find him guilty of escape. *See,* O.R.C. § 2923.03(A)(2) and (F)

It was, of course, the jury's responsibility to resolve conflicts in the evidence, to determine the credibility of the various witnesses, to weigh the evidence, and to draw reasonable inferences from the testimony. In viewing the trial testimony in the light most favorable to the prosecution, any rational trier of fact could have found that the prosecution established the essential elements of the crime of escape beyond a reasonable doubt.

The Ohio Supreme Court's finding that there was sufficient evidence to convict Mr. Hand of escape is not contrary to nor an unreasonable application of, clearly established federal law. Therefore, Mr. Hand's Ground VIII should be rejected.

Ground IX

The trial court improperly instructed the jury in violation of Hand's Sixth and Fourteenth Amendment rights.

In Ground IX, Mr. Hand challenges four of the jury instructions which the trial court gave to the jury.

To warrant habeas relief, the challenged jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair. *Scott,* 209 F.3d at 882 (citation omitted). Allegations of trial error raised in challenges to jury instructions are reviewed for harmless error by determining whether they had a substantial and injurious effect or influence on the verdict. *Id.* (citation omitted). The challenged instruction is not to be judged in isolation; it must be considered in the context of the entire jury charge. *Hardaway v. Withrow,* 305 F.3d 558, 565 (6th Cir.2002), *cert. denied,* 538 U.S. 1036, 123 S.Ct. 2078, 155 L.Ed.2d 1068 (2003).

Subclaim A

Hand's Sixth and Fourteenth Amendment rights were violated when the trial court instructed the jury on complicity despite the State's theory that Hand was the principal offender.

***94** In Subclaim A of Ground IX, Mr. Hand alleges that the trial court prejudiced him by providing a complicity instruction to the court of aggravated murder associated with Jill Hand. Coupled with an argument about the State's bill of particulars, Mr. Hand raised this argument on direct appeal. The Ohio Supreme Court rejected Mr. Hand's proposition stating:

> *Amended bill of particulars.* In proposition of law V, Hand argues that the trial court erred in permitting the state to amend the bill of particulars at the close of the evidence and argue that Hand was a complicitor. He also argues that the trial court erred in instructing the jury on complicity.
>
> Before trial, the state provided the defense with a bill of particulars that set forth in Count One that "on or about the 15th day of January, 2002, the Defendant did, purposefully and with prior calculation and design, cause the death of Jill J. Hand by means of a firearm." On May 28, 2003, at the close of the evidence and prior to final instructions, the state provided the defense

with an amended bill of particulars. The amendment to Count One stated that Hand killed Jill "by firing that weapon himself, or by soliciting or procuring Walter 'Lonnie' Welch to commit the offense, and in either case, the defendant acted purposely and with prior calculation and design." The defense objected to the proposed complicity instructions because of the late notice of complicity in the amended bill of particulars. Thereafter, the trial court instructed the jury on complicity to commit murder.

Crim.R. 7(E) states: "[Upon timely request or court order], the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires." Crim.R. 7(D) authorizes the court to amend a bill of particulars "before, during, or after a trial," provided that "no change is made in the name or identity of the crime charged."

Hand argues that because the original bill of particulars indicated that he was the principal offender on Count One, he lacked notice that the trial court would instruct on complicity on that count. However, this claim lacks merit. R.C. 2923.03(F) states: "A charge of complicity may be stated in terms of this section, or in terms of the principal offense." This provision adequately notifies defendants that the jury may be instructed on complicity, even when the charge is drawn in terms of the principal offense. See *State v. Keenan* (1998), 81 Ohio St.3d 133, 151, 1998 Ohio 459, 689 N.E.2d 929, citing *Hill v. Perini* (C.A.6, 1986), 788 F.2d 406, 407–408.

Additionally, for the amendment to constitute reversible error, Hand must demonstrate that the amendment hampered his defense or prejudiced him. See *State v. Chinn* (1999), 85 Ohio St.3d 548, 569, 1999 Ohio 288, 709 N.E.2d 1166. Hand fails to point out how he could have defended himself differently, given notice that complicity would also be an issue as to Count One. From the beginning of the police investigation into Jill's murder, Hand claimed that he was not involved in Jill's murder. Hand asserted that Welch was an intruder into his home and that Welch shot Jill. Hand's denial of involvement in Jill's murder would not have changed the main thrust of his defense regardless of whether the state proceeded on the theory that Hand was the principal or a complicitor. See *State v. Herring* (2002), 94 Ohio St.3d 246, 251, 2002 Ohio 796, 762 N.E.2d 940 (rejecting defense claims of prejudice from late notice of the state's complicity theory). Thus, we find that Hand's claims of prejudice are speculative and lack merit.

***95** Moreover, we reject Hand's complaint about lack of notice because Hand did not request a continuance upon receiving the amended bill of particulars. Clearly, the defense could have requested a continuance if counsel needed additional time to prepare a defense to the complicity theory.

In sum, Hand was not misled or prejudiced by the state's notification of complicity in the amended bill of particulars. Moreover, the trial court did not err in instructing on complicity. Thus, proposition of law V is overruled.

Hand, 107 Ohio St.3d at 403–404, 840 N.E.2d 151.

The thrust of Mr. Hand's argument is that he was initially charged with the aggravated murder of Jill Hand with prior calculation and design and that throughout its case-in-chief the state's theory was that he was the person who actually killed Jill Hand, yet that at the end of its case, the state amended the bill of particulars essentially alleging that perhaps it was Mr. Welch who killed Jill Hand and that the court's instruction on complicity followed. Mr. Hand complains of the late notice as to the state's theory about who killed Jill Hand. Mr. Hand does not argue that the evidence did not support his conviction under the instruction for complicity. Nor has he suggested any ways in which he would have differently presented his defense if he had initially been indicted for complicity

Ohio statutory and case law put Mr. Hand on notice that although he was charged as a principal, he could be convicted of complicity, conspiracy, or aiding and abetting. O.R.C. § 2923.03. The Sixth Circuit has rejected an argument similar to the one Mr. Hand has made here:

> While it is not customary for a person to be charged apparently as a principal offender and subsequently to be found guilty as an accomplice to the alleged crime, we find no federal law or rule which prohibits this practice. In fact, this court

> has expressly acknowledged that a defendant may be indicted for the commission of a substantive crime as a principal offender and convicted of aiding and abetting its commission, although not named in the indictment as an aider and abettor, without violating federal due process. *Stone v. Wingo,* 416 F.2d 857 (6th Cir.1969).

Hill v. Perini, 788 F.2d 406, 406–07 (6th Cir.), *cert. denied,* 469 U.S. 934 (1984).

Based on the authority of *Perini,* this Court concludes that the Ohio Supreme Court's findings and conclusions with respect to the Mr. Hand's allegations in Subclaim A of Ground IX are not contrary to nor an unreasonable application of, clearly established federal law.

Subclaim B

The trial court failed to give the appropriate narrowing construction [sic] to the course of conduct specification.
In Subclaim B of Ground IX, Mr. Hand seems to allege that the course-of-conduct instruction the trial court gave to the jury was unconstitutionally vague. Mr. Hand's argument seems to be that the trial court failed to specify that the killings of Jill Hand and Lonnie Welch were the only factors that the jury was to consider in determining course-of-conduct. The Ohio Supreme Court rejected this claim as follows:

> ***96** *Course-of-conduct instructions.* In proposition of law VI, Hand argues that the course-of-conduct instruction was defective in failing to specify the names of the murder victims covered by the specification. He also attacks the course-of-conduct instruction as unconstitutionally vague.
>
> Constitutional challenge. "The course-of-conduct specification set forth in R.C. 2929.04(A)(5) is not void for vagueness under either the Eighth Amendment to the United States Constitution or Section 9, Article I of the Ohio Constitution." *State v. Benner* (1988), 40 Ohio St.3d 301, 533 N.E.2d 701, 535 N.E.2d 315, syllabus. Accord *State v. Cornwell* (1999), 86 Ohio St.3d 560, 569, 1999 Ohio 125, 715 N.E.2d 1144; *State v. Brooks* (1996), 75 Ohio St.3d 148, 155, 1996 Ohio 134, 661 N.E.2d 1030. We find no basis to overturn that ruling.
>
> Trial court's course-of-conduct instruction. The bill of particulars specified that the course of conduct set forth in Specification One of Count One and Count Two involved the murders of "Jill J. Hand and Walter M. 'Lonnie' Welch, and the course of conduct began and ended on January 15, 2002." The guilt-phase instructions on course of conduct in Specification One of Count One stated:
>
> > "Before you can find the defendant guilty of Specification One, under the first count of the indictment, you must find beyond a reasonable doubt that the aggravated murder of Jill [J.] Hand was part of a course of conduct involving the purposeful killing of two or more persons by the defendant."
>
> The guilt-phase instructions on course of conduct in Specification One of Count Two stated:
>
> > "Before you can find the defendant guilty of Specification One, under the second count of the indictment, you must find beyond a reasonable doubt that the aggravated murder of Walter Lonnie Welch was part of a course of conduct involving the purposeful killing of two or more persons by the defendant."
>
> The defense never objected to either of these instructions and thus waived all but plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332, syllabus.
>
> First, Hand complains about the lack of guidance for determining whether two or more murders occurred as part of a course of conduct. However, after the completion of briefing in this case, we decided *State v. Sapp,* 105 Ohio St.3d 104, 2004 Ohio 7008, 822 N.E.2d 1239, which sets forth a test for course of conduct: "The statutory phrase 'course of conduct' found in R.C. 2929.04(A)(5) requires that the state *establish some factual link* between the aggravated murder with which the defendant is charged and the other murders or attempted murders that are alleged to make up

the course of conduct. In order to find that two offenses constitute a single course of conduct under R.C. 2929.04(A)(5), the trier of fact 'must * * * discern some connection, common scheme, or some pattern or psychological thread that ties [the offenses] together." ' (Emphasis added.) *Id.* at the syllabus, quoting *State v. Cummings* (1992), 332 N.C. 487, 510, 442 S.E.2d 692. Moreover, "the factual link might be one of time, location, murder weapon, or cause of death." *Sapp* at P52. Ultimately, "when two or more offenses are alleged to constitute a course of conduct under R.C. 2929.04(A)(5), all the circumstances of the offenses must be taken into account." *Id.* at P56, 822 N.E.2d 1239.

***97** The facts surrounding the murders of Jill and Welch meet *Sapp's* criteria for course of conduct. The two murders occurred at the same time and place, and Hand had related motives for the murders. Hand's motive in murdering Jill was to collect her life insurance and pay off his massive debts. Hand's motive in murdering Welch was to eliminate the witness against him for Jill's murder and the murders of his previous two wives. Thus, the two offenses were related by time, place, and motive and establish a single course of conduct.

Second, Hand contends that the instructions were deficient by failing to specify Jill's and Welch's murders as the subject of the course-of-conduct specifications. Hand argues that this lack of specificity resulted in prejudicial error because the jury might have also considered Donna's and Lori's murders as part of the course of conduct. The two course-of-conduct specifications accompanied the murder counts for Jill's and Welch's murders. However, there were no murder counts for Donna's and Lori's murders. Under these circumstances, the jury was not misled and could reasonably find that the course-of-conduct related only to Jill's and Welch's murders. Thus, we find no plain error.

Moreover, there was no risk that the defense suffered any prejudicial error. During the penalty-phase instructions, the trial court advised the jury:

> "The aggravating circumstance that you shall consider as to Count One of the indictment involving the death of Jill Hand is that this offense was part of a course of conduct involving the purposeful killing of Jill J. Hand and Walter Lonnie Welch by the defendant."

Thus, the penalty-phase instructions clearly stated that Jill's and Welch's murders were the subject of the course-of-conduct aggravating circumstance. See *State v. Loza* (1994), 71 Ohio St.3d 61, 79, 1994 Ohio 409, 641 N.E.2d 1082 ("[i]t is presumed that the jury will follow the instructions given to it by the judge"). Thus, there was no risk that the jury sentenced Hand to death for the murders of Donna and Lori.

In sum, we find no outcome-determinative plain error, and proposition of law VI is overruled.

Hand, 107 Ohio St. at 405–07, 140 N.E. 344.

At the end of the guilt phase, the trial court instructed the jury as follows:

> Before you can find the defendant guilty of Specification One, under the first count of the indictment, you must find beyond a reasonable doubt that the aggravated murder of Jill [J.] Hand was part of a course of conduct involving the purposeful killing of two or more persons by the defendant.
>
> ...
>
> Before you can find the defendant guilty of Specification One, under the second count of the indictment, you must find beyond a reasonable doubt that the aggravated murder of Walter Lonnie Welch was part of a course of conduct involving the purposeful killing of two or more persons by the defendant.

Trial Tr. Vol. 20 at 3760; 3772.

At the beginning of the mitigation phase the court gave the jury the following instruction:

> ***98** In this case, the aggravating circumstance in count one is that the aggravated murder of Jill J. Hand was part of a course of conduct involving the purposeful killing of Jill J. Hand and Walter Lonnie Welch by the defendant, Gerald R. Hand.

Trial Tr. Vol. 22 at 3842. The court delivered the following instruction at the close of the mitigation phase:

> The aggravating circumstance that you shall consider as to count one of the indictment involving the death of Jill Hand is that this offense was part of a course of conduct involving the purposeful killing of Jill J. Hand and Walter Lonnie Welch by the defendant.

Id. at 3907, 140 N.E. 344.

Mr. Hand failed to plead in his Petition how the court's guilt phase instruction was so vague that it did not provide the jury with any guidance as to how it was to determine if the specification had been met. However, in his Reply he seems to argue that the court's mitigation phase instructions were "better" than the guilt phase instructions because they specified what killings the jury was to consider in its course-of-conduct deliberations to wit: the killings of Jill Hand and Lonnie Welch and therefore the guilt phase instructions were unconstitutionally vague.

In determining whether the instruction has caused a constitutional violation, a reviewing court seeks to determine how a reasonable juror could have interpreted the instruction. *See, Sandstrom v. Montana,* 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Review of a claimed deficient jury instruction requires that the instruction be viewed in the context of the overall charge. *Cupp v. Naughten,* 414 U.S. 141, 146–47, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe,* 431 U.S. 145, 155, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977).

Even assuming that the mitigation phase instructions the court gave the jury were "better" than the ones the court gave at the close of the guilt phase, that, of course, does not establish that the guilt phase instructions somehow violated the constitution. Rather, the question, is how a reasonable juror could have interpreted the instruction.

A review of the trial court's guilt phase instructions, which take approximately fifty-nine pages in the trial transcript, reveals that the court consistently referred to the killings of Jill Hand and Walter "Lonnie" Welch. *See, e.g.,* Trial Tr. Vol 20 at 3755, 3758–62, 3766–69, 3771–72, 3774–76, 3779–83. When the court instructed the jury on the course-of-conduct specifications, the court referred only to the killings of Jill Hand and Walter "Lonnie" Welch. Trial Tr. Vol. 20 at 3760, 3772.

While the court's instructions did briefly refer to the killings of Donna A. Hand and Lori L. Hand, those references were with respect to specifications five and six under the second count of the indictment. Trial Tr. Vol. 20 at 3776; 3777. Of the fifty-nine transcript pages of jury instructions, the instructions with respect to Donna A. Hand and Lori L. Hand for purposes of the elements related to specifications five and six under the second count of the indictment are just over one page in length. Indeed, the instructions are about thirty-six transcript lines in length.

***99** Considering the instructions about which Mr. Hand complains in the context of the overall instructions the trial court gave the jury, this Court concludes that no reasonable juror would interpret the trial court's instructions to permit the jury to take into consideration any other killings other than those of Jill Hand and Lonnie Welch in resolving the course-of-conduct issue. Stated differently, the trial court's guilt phase instructions on the issue of course-of-conduct were not unconstitutionally vague.

Accordingly, the Ohio Supreme Court's findings and decision as to Subclaim B are not contrary to or an unreasonable application of clearly established federal law.

Subclaim C

The trial court failed to appropriately instruct the jury on the relevance of the guilt phase exhibits at sentencing.

Mr. Hand argues in Subclaim C that the trial court erred by readmitting into evidence during the mitigation phase the exhibits which the court admitted during the guilt phase. The Respondent argues that this claim is procedurally barred because this is the first time Mr. Hand has raised it outside the context of an ineffective assistance of counsel claim. Mr. Hand has not challenged Respondent's argument.

Mr. Hand never raised in the Ohio state courts the claim contained in Subclaim C as a free-standing claim. App. Vol. 6 at 245–386; *Hand,* 107 Ohio St.3d 378, 840 N.E.2d

151; App. Vol X at 77–111 App. Vol 11 at 8–14; App. Vol. 12 at 80–128; *Hand,* 2006 WL 1063758; App. Vol. 13 at 29–74. Although he had the opportunity to do so, Mr. Hand failed to raise this alleged trial court error as he now raises it in Subclaim C.

As noted above in the Court's analysis of Ground IV Subclaim A, Ohio law provides that an appellant must raise his claims on appeal at the first opportunity to do so. *Jacobs,* 265 F.3d at 417; *Broom,* 40 Ohio St.3d at 288–89, 533 N.E.2d 682. As also noted, this Court must assume that Ohio courts would follow their own procedural rules and bar this claim on the basis of *res judicata, Simpson* 94 F.3d at 203, assertion of *res judicata* to bar claims not raised at the earliest opportunity is an adequate and independent ground upon which Ohio may rely to foreclose habeas review. *Jacobs, supra,* and Ohio's *res judicata* rule has been repeatedly upheld in the Sixth Circuit as an adequate and independent state ground to justify default. *Carter,* 443 F.3d at 538.

The first three prongs of *Maupin's* test are satisfied because Mr. Hand failed to comply with Ohio's procedural rules, the state courts would have enforced those rules if they had been given the opportunity to do so, and the waiver doctrine and *res judicata* constitute adequate and independent state grounds upon which the state courts would foreclose review of the issue in Subclaim C. Finally, the fourth *Maupin* prong is satisfied because Mr. Hand has not suggested that there is cause for him to fail to follow Ohio's procedural rule. In fact, as noted above, Mr. Hand has not addressed the Respondent's procedural default argument.

***100** This Court concludes that Subclaim C of Ground IX is procedurally defaulted.

Subclaim D

The trial court failed to appropriately instruct the jury as to the definition of reasonable doubt.

In Subclaim D, Mr. Hand argues that the trial court's instruction on reasonable doubt was improper because the language of Ohio Revised Code § 2901.05 on which the instruction was based is flawed for three reasons: (1) the "willing to rely and act" language did not guide the jury because it was too lenient; (2) the "firmly convinced" language represents only a clear and convincing standard; and (3) the use of the phrase "moral evidence" was improper.

Mr. Hand raised this claim on direct appeal and the Ohio Supreme Court rejected it stating:

> *Reasonable doubt.* In proposition of law XII, Hand challenges the constitutionality of the instructions on reasonable doubt during both phases of the trial. However, we have repeatedly affirmed the constitutionality of R.C. 2901.05(D). See *State v. Jones* (2001), 91 Ohio St.3d 335, 347, 2001 Ohio 57, 744 N.E.2d 1163; *State v. Goff* (1998), 82 Ohio St.3d 123, 132, 1998 Ohio 369, 694 N.E.2d 916. Proposition of law XII is overruled.

Hand, 107 Ohio St.3d at 417, 840 N.E.2d 151.

The trial court instructed the jury at the close of the guilt phase as follows:

> Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge. Reasonable court is a doubt based upon reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence, is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

Trial Tr. Vol. 20 at 3750.

At the close of the mitigation phase, the trial court delivered the following instruction to the jury:

> Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced that the aggravating circumstance of which the Defendant was found guilty outweighs the mitigating

> factors. Reasonable doubt is doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most [ ] of his or her own affairs.

Trial Tr. Vol. 22 at 3906–07.

The Ohio Revised Code reads in relevant part:

> Presumption of innocence; proof of offense; of affirmative defense; as to each; reasonable doubt
>
> ...
>
> (C) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.
>
> ***101** (D) As used in this section:
>
> ...
>
> (E) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs.

O.R.C. § 2901.05(D). [7]

The Sixth Circuit has explicitly approved of giving, in both phases of a capital trial, the reasonable doubt instruction based on Ohio Revised Code § 2901.05. *Thomas v. Arn,* 704 F.2d 865, 870 (6th Cir.1982); *Byrd v. Collins,* 209 F.3d 486, 527 (6th Cir.), *cert. denied,* 531 U.S. 1082, 121 S.Ct. 786, 148 L.Ed.2d 682 (2000); *White v. Mitchell,* 431 F.3d 517, 534 (6th Cir.2005), *cert. denied sub nom., Houk v. White,* 549 U.S. 1047, 127 S.Ct. 578, 166 L.Ed.2d 457 (2006), *citing, Buell v. Mitchell,* 274 F.3d 337, 366 (6th Cir.2001).

The instructions which the trial court gave at the close of both the guilt phase and the mitigation phase of Mr. Hand's trial were based on the language of Ohio Revised Code § 2901.05. In view of the above-cited authorities, the Ohio Supreme Court's findings and decision on Mr. Hand's challenge to the reasonable doubt instructions are not contrary to or an unreasonable application of clearly established federal law.

For the foregoing reasons, Mr. Hand's Ground IX should be dismissed in its entirety.

GROUND X

The jury's failure to properly conduct the weighing process before imposing the death penalty violated Hand's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

In his Ground X, Mr. Hand argues that the jury failed to properly conduct the weighing process before imposing the death penalty thereby violating his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Mr. Hand's position is that a particular juror failed to follow the trial court's instructions regarding the weighing process necessary to determine his death sentence. Mr. Hand raised this claim in his post-conviction petition and the Delaware County Court of Common Pleas rejected his claim and the court of appeals affirmed as follows:

> Appellant's seventh ground for relief asserted in his petition for post-conviction relief asserts juror misunderstanding and misapplication of the trial court's instructions. The trial court dismissed the claim finding the affidavit relied upon by appellant was hearsay.
>
> In support of his claim for relief, appellant attached and cited the affidavit of Mitigation Specialist, Jennifer Cordle, interpreting the misunderstanding of a juror.
>
> Evidence Rule 606(B) governs the issues, and provides:
>
> Competency of juror as witnesses
>
> "(B) Inquiry into validity of verdict or indictment

> ***102** "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or an other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment concerning his mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However, a juror may testify without the presentation or any outside evidence concerning any threat, and bribe, any attempted threat or bribe, or any improprieties of any officer of the court. His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes."
>
> Appellant's claim attempts to admit the affidavit of a non-juror regarding statements of a juror, which is prohibited by Evid.R. 606. Accordingly, the trial court properly dismissed appellant's claim finding the affidavit impermissible hearsay, and finding the claim unsupported by additional evidence outside the record.

Hand, 2006 WL 1063758 at *6; App. Vol. 12 at 370–71.

"By the beginning of this century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict." *Tanner v. United States,* 483 U.S. 107, 117, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) (citation omitted).

> Let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed ... in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. 264, 267–68, 35 S.Ct. 783, 59 L.Ed. 1300 (1915). Exceptions to this rule were recognized only in situations in which an "extraneous influence" was alleged to have affected the jury. *Tanner,* 483 U.S. at 117, *citing, Mattox v. United States,* 146 U.S. 140, 149, 13 S.Ct. 50, 36 L.Ed. 917 (1892).

> Lower courts used this external/internal distinction to identify those instances in which juror testimony impeaching a verdict would be admissible. The distinction was not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place; rather, the distinction was based on the nature of the allegation. Clearly a rigid distinction based only on whether the event took place inside or outside the jury room would have been quite unhelpful. For example, under a distinction based on location a juror could not testify concerning a newspaper read inside the jury room. Instead, of course, this has been considered an external influence about which juror testimony is admissible. *See United States v. Thomas,* 463 F.2d 1061 (C.A.7 1972). Similarly, under a rigid locational distinction jurors could be regularly required to testify after the verdict as to whether they heard and comprehended the judge's instructions, since the charge to the jury takes place outside the jury room. Courts wisely have treated allegations of a juror's

> inability to hear or comprehend at trial as an internal matter. *See Government of the Virgin Islands v. Nichols,* 759 F.2d 1073 (C.A.3 1985); *Davis v. United States,* 47 F.2d (CA5 1931)[*cert. denied,* 284 U.S. 646 (1931)](rejecting juror testimony impeaching verdict, including testimony that jurors had not heard a particular instruction of the court).

***103** *Tanner,* 483 U.S. at 117–18.

The Court notes that the affidavit on which Mr. Hand relied in support of his argument on post-conviction is the affidavit of Jennifer Cordle, a mitigation specialist who is employed by the Ohio Public Defender. App. Vol. 10 at 379–80. Ms. Cordle's affidavit reflects that she met with juror Bret Bravard on December 13, 2004, and that when she asked him why the jury had returned a sentence of death, he said that, "they had to because Mr. Hand was guilty of an aggravated murder and they had to follow the judge's instructions". *Id.*

First, the Court observes that Ms. Cordle's affidavit is a classic example of hearsay as to what Mr. Bravard said to her. Specifically, it is an out of court statement offered as evidence "to prove the truth of the matter asserted." *See,* Ohio Evid. R. 801(C); *see also,* Fed.R.Evid.R. 802. Second, this Court's review of that affidavit reveals that it does not support Mr. Hand's allegation that the jury did not properly engage in the weighing process before reaching a death sentence. Indeed, Ms. Cordle's affidavit makes it clear that Mr. Bravard indicated to her that the jury followed the trial judge's instructions.

These observations aside, the affidavit at issue sets forth information internal to the jury deliberations. The affidavit deals specifically with the mind-set and the behavior of the jurors as allegedly described by Mr. Bravard to Ms. Cordle. As such, the affidavit cannot properly be considered or used to challenge the verdict. Ohio Evid. R. 606(B); Fed.R.Evid. 606(b). There are not allegations of juror misconduct or other external influences which arguably would take Mr. Bravard's presumptive testimony outside the rules prohibiting its admission. Additionally, even assuming that Mr. Bravard did not understand or comprehend the trial judge's instructions, that would be an internal matter and any testimony on that issue would be, and is, prohibited. *Tanner, supra.*

Mr. Hand's claim that the jury failed to properly conduct the weighing process before imposing the death penalty is not supported by the facts upon which he would rely. More importantly, however, the Ohio courts' conclusion as to Mr. Hand's claim in Ground X is not contrary to nor an unreasonable application of, clearly established federal law. Accordingly, Mr. Hand's Ground X should be rejected.

GROUND XI

Hand was deprived of the effective assistance of counsel on direct appeal in violation of his Sixth and Fourteenth Amendment rights.

In his Ground XI, Mr. Hand has raised six claims of ineffectiveness of appellate counsel.

By way of review, and as noted above, at the time he filed his present Petition, Mr. Hand conceded that he had failed to exhaust in state court three of his ineffective assistance of appellate counsel claims, but he alleged that exhaustion in state court would be futile. However, after filing this Petition, Mr. Hand filed with the Ohio Supreme Court a motion to reopen his appeal on the basis of ineffective assistance of appellate counsel. The Ohio Supreme Court denied Mr. Hand's motion on the procedural ground that he had failed to comply with the 90–day filing deadline of that court's S.Ct.Prac.R. XI(6)(A).

***104** Ohio law provides that an individual convicted of a capital offense has an appeal as a matter of right to the Ohio Supreme Court. O.R.C. § 2929.05(A); *see also,* Ohio Const. Art. IV, § 2. "A first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey,* 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Ineffective assistance of appellate counsel claims are governed by the same *Strickland* standard as claims of ineffective assistance of trial counsel. *Shaneberger v. Jones,* 615 F.3d 448, 2010 WL 2794195 *3 (6th Cir. July 16, 2010), citing, *Smith v. Robbins,* 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

An attorney need not advance every argument, regardless of merit, urged by the appellant. *Jones v. Barnes,* 463 U.S. 745, 751–52, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."). Effective appellate advocacy is rarely characterized by presenting every non-frivolous argument which can be made. *Williams v. Bagley,* 380 F.3d 932, 971 (6th Cir.2004), *cert. denied sub nom., Williams v. Bradshaw,* 544 U.S. 1003, 125 S.Ct. 1939, 161 L.Ed.2d 779 (2005). However, failure to raise an issue can amount to ineffective assistance. *McFarland v. Yukins,* 356 F.3d 688 (6th Cir.2004), *citing, Joshua v. Dewitt,* 341 F.3d 430, 441 (6th Cir.2003); *Lucas v. O'Dea,* 179 F.3d 412, 419 (6th Cir.1999); and *Mapes v. Coyle,* 171 F.3d 408, 427–29 (6th Cir.), *cert. denied,* 528 U.S. 946, 120 S.Ct. 369, 145 L.Ed.2d 284 (1999). Counsel's failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *McFarland,* 356 F.3d at 699, *citing, Greer v. Mitchell,* 264 F.3d 663, 676 (6th Cir.2001), *cert. denied,* 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002). "Counsel's performance is strongly presumed to be effective." *McFarland,* 356 F.3d at 710, *quoting Scott,* 209 F.3d at 880. To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must show that appellate counsel ignored issues which are clearly stronger than those presented. *Smith v. Robbins,* 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (citation omitted).

Therefore, to prevail on his ineffective assistance of appellate counsel claims, Mr. Hand must show that counsels' performance was deficient and that as a result he was prejudiced. *See, Shaneberger, supra, citing, Strickland,* 466 U.S. 687.

Subclaim A

The failure to preserve the collateral estoppel argument
In his first Subclaim of Ground XI, Mr. Hand alleges that his appellate counsel were ineffective for failing to preserve the collateral estoppel argument with respect to his recovery from the Ohio victim's fund following his first wife Donna Hand's death. Mr. Hand's position that at trial, his counsel elicited testimony that as a prerequisite to the victim's fund monetary award, the state found that he was not at fault for Donna's murder, that subsequently counsel moved the court to dismiss the second death penalty specification on count two on the basis of collateral estoppel, and that the trial court denied that motion. Mr. Hand contends that appellate counsel was ineffective for not preserving that issue. Respondent argues that this claim is procedurally defaulted and Mr. Hand has not addressed that argument.

***105** This Court finds that Mr. Hand's Subclaim A of Ground XI is procedurally defaulted. First, there is a state procedural rule that is applicable to Mr. Hand's claim, to wit: the timeliness requirement of Ohio's S.Ct.Prac.R. XI.6. Second, the Ohio Supreme Court actually enforced the timeliness requirement (90–days) of its rule of practice.

The question becomes, then, whether the Ohio S.Ct.Prac.R. XI.6 is an adequate and independent state ground.

As noted above, the Ohio Supreme Court denied Mr. Hand's direct appeal on January 18, 2006, and his application to reopen his direct appeal on April 18, 2006. At the time Mr. Hand filed his application to reopen his direct appeal, he did not include in his ineffective assistance of appellate counsel claim the claim which he raises in this Subclaim. It was not until September 24, 2007, when Mr. Hand filed his Motion to Reopen Appeal on the Basis of Ineffective Assistance of Appellate Counsel, that Mr. Hand raised this particular claim. App. Vol. 9 at 47–61. As noted above, on December 12, 2007, the Ohio Supreme Court denied Mr. Hand's Motion to Reopen on the procedural ground that he failed to comply with the 90–day filing deadline of S.Ct.Prac.R. XI(6)(A). *Id.* at 207.

"Because capital defendants whose crimes were committed after January 1, 1995, appeal their conviction and sentence directly to the Ohio Supreme Court, rather than to the Ohio Court of Appeals, [Ohio S.Ct. Prac. R. XI(6)(A)] was meant to provide such defendants a forum in which to assert ineffective assistance of appellate counsel." *Stallings v. Bagley,* 561 F.Supp.2d 821, 832 n. 2 (N.D.Ohio 2008). Of course, prior to the availability of direct appeal to the Ohio Supreme Court, capital defendants appealed their convictions to the intermediate court of appeals. It was to those courts that an application to reopen an appeal to raise ineffectiveness of appellate counsel claims were brought. *See, State v. Murnahan,* 63

Ohio St.3d 60, 584 N.E.2d 1204 (1992); *see also,* Ohio App. R. 26(B).

In death penalty habeas litigation, for purposes of procedural default analysis, the Sixth Circuit Court of Appeals has noted in the past that in the past the Ohio Supreme Court had been erratic in its enforcement of the timeliness requirement respecting applications to reopen direct appeals. *Franklin v. Anderson,* 434 F.3d 412, 420 (6th Cir.2006), *cert. denied sub nom., Houk v. Franklin,* 549 U.S. 1156, 127 S.Ct. 941, 166 L.Ed.2d 781 (1997). The *Franklin* court noted that "[f]or several years following the enactment of ... Rule 26(B), the Ohio Supreme Court regularly enforced the rule's timeliness requirements," citing nine cases spanning the years between 1995 and 2000. *Franklin,* 434 F.3d at 420. The court went on to observe, however, that in 2000, the state supreme court began addressing applications to reopen on their merits in spite of their untimeliness, even when a state appellate court had already denied the application on timeliness grounds. *Franklin,* 434 F.3d at 420–21 (citing nineteen Ohio Supreme Court decisions from 2000 to 2004 in support). The Ohio Supreme Court, however, again began to affirm dismissals of applications to reopen in capital cases on timeliness grounds in more recent years. *Id.* at 421 (citing three 2004 Ohio Supreme Court cases in support). The court concluded that in light of the fluctuating treatment of Rule 26(B) applications by the Ohio Supreme Court, at the time Mr. Franklin filed his motion to reopen, the timeliness component of Ohio's rule permitting reopening of a direct appeal was not firmly established and regularly followed by the Ohio Supreme Court, and that it consequently was not an independent and adequate state procedural rule upon which to premise the procedural default of a claim in habeas corpus. *Id.*

***106** Subsequently, in *Fautenberry v. Mitchell,* 515 F.3d 614, 641 (6th Cir.), *cert. denied,* —— U.S. ——, 192 S.Ct. 412 (2008), the Sixth Circuit declined to recognize "an all-encompassing, ever-applicable legal proposition that [would] forever (or at least for a very long time) bar the federal courts from finding that an ineffective assistance of appellate counsel claim has been procedurally defaulted where the state court refused to address the merits of that claim because of the time constraints in Ohio App. R. 26(B)." The court noted that "the 'firmly established and regularly followed' inquiry cannot be made once and for all", and that "instead we must consider whether the 'adequate and independent state procedural bar ... (was) firmly established and regularly followed *by the time as of which it (was) to be applied.*" ' *Id., citing, Ford v. Georgia,* 498 U.S. 411, 424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991)(emphasis in original). In other words, the question is "whether, at the time of the petitioner's actions giving rise to the default, the petitioner could ... be deemed to have been apprised of the rule's existence." *Fautenberry,* 515 F.3d at 641 (citation omitted).

This Court concludes that at the time Mr. Hand filed his September, 24, 2007, motion to reopen his appeal and at the time the Ohio Supreme Court denied that motion, the Ohio Supreme Court had been consistently enforcing Ohio App. R. 26(B) and, more importantly, its counterpart, S.Ct.Prac.R. XI(6)(A). *See, State v. Cassano,* 103 Ohio St.3d 1475 (table), 2004 WL 2289693 (Oct. 13, 2004); *State v. Bryan,* 103 Ohio St.3d 1490 (table), 2004 WL 2387327 (Oct. 27, 2004); *State v. Ahmed,* 105 Ohio St.3d 1450 (table), 2005 WL 488752 (Mar. 2, 2005); *State v. Cunningham,* 114 Ohio St.3d 1503 (table), 2007 WL 2446222 (Aug. 29, 2007); *State v. Turner,* 116 Ohio St.3d 1408 (table); 2007 WL 4118971 (Nov. 21, 2007).

The Court is aware that in the case of *Issa v. Bradshaw,* No. 1:03–cv–280, 2007 WL 7562139, Report and Recommendations, Dec. 20, 2007 (Doc. 134 at 21–22) (PAGEID# 2817–18), this Court concluded that a claim of ineffective assistance of appellate counsel was not procedurally defaulted because Ohio's time limits for reopening a direct appeal for bringing ineffective assistance of appellate counsel claims was not an adequate and independent state ground for purposes of *Maupin.* The Court relied on *Franklin, supra,* in reaching that conclusion with respect to Mr. Issa's claim. However, since *Franklin,* the Sixth Circuit has decided *Fautenberry* which makes it clear that *Franklin* is not the law for time eternal. The Court concludes that since it decided *Issa,* and since the Sixth Circuit decided *Fautenberry,* the Ohio Supreme Court has consistently enforced the time requirements of Ohio App. R. 26(B) and, more importantly, its counterpart, S.Ct.Prac.R. XI(6)(A) Accordingly, this Court concludes that the second prong of *Maupin* is satisfied.

***107** With respect to the third prong of the *Maupin* test, Mr. Hand has not argued nor established cause for the default.

Subclaim B

The failure to raise an ineffective assistance of counsel challenge to the fact that trial counsel did not object to the testimony of Hand's bankruptcy attorney on the grounds of attorney-client privilege

As with Subclaim A of Ground XI, Mr. Hand did not raise this claim until he filed his September 24, 2007, Motion to Reopen Appeal on the Basis of Ineffective Assistance of Appellate Counsel, that Mr. Hand raised this particular claim. App. Vol. 9 at 47–61. Respondent argues that this claim is procedurally defaulted and Mr. Hand has not addressed that argument.

For the same reasons that Subclaim A is procedurally defaulted, this Subclaim is procedurally defaulted.

Subclaim C

The failure to challenge the trial court's ruling denying Hand's motion to dismiss the specifications relating to the murder of Hand's first two wives

As with Subclaims A and B of Ground XI, Mr. Hand did not raise this claim until he filed his September 24, 2007, Motion to Reopen Appeal on the Basis of Ineffective Assistance of Appellate Counsel, that Mr. Hand raised this particular claim. App. Vol. 9 at 47–61. Respondent argues that this claim is procedurally defaulted and Mr. Hand has not addressed the Respondent's argument.

For the same reasons that Subclaims A and B are procedurally defaulted, this Subclaim is procedurally defaulted as well.

Subclaim D

The failure to challenge the sufficiency of the evidence as to the aggravating circumstances and specifications of count two, specifications two through six

In Subclaim D, Mr. Hand alleges that his appellate counsel were ineffective for failing to raise an insufficiency of the evidence claim with respect to the state's theory that he killed Mr. Welch to prevent him from disclosing information about the murder of his (Mr. Hand's) first two wives. Respondent argues that this claim is defaulted because Mr. Hand did not properly bring it in state court.

Contrary to Respondent's claim, a review of Mr. Hand's Application for Reopening Pursuant to S.Ct.Prac.R. XI, Section 6 which he filed in the Ohio Supreme Court on April 18, 2006, shows that he did raise this claim in state court. App. Vol. 9 at 28–39. Specifically, in Proposition of Law I, Mr. Hand argued that his appellate counsel were ineffective for failing to raise the claim that his conviction was against the manifest weight of the evidence because the state failed to prove beyond a reasonable doubt the underlying aggravating circumstances and specifications of Count 2, specifications 2–6. *Id.* The Ohio Supreme Court denied Mr. Hand's April 18, 2006, Application without reasoning. App. Vol. 9 at 43. Therefore, because the Ohio Supreme Court did not adjudicate Mr. Hand's claim on the merits, this Court will address the claim *de novo*. *Hawkins,* 547 F.3d at 546; *Nields v. Bradshaw,* 482 F.3d at 449–50.

***108** The basis of Mr. Hand's claim is that there was insufficient evidence to convict him of the death specifications contained in Count Two of the Indictment. Mr. Hand's position is that the only evidence which supports his conviction of the aggravating circumstances and specifications of Count Two, specifications two through six, was the testimony of Mr. Grimes, a jailhouse informant. Mr. Hand claims that Mr. Grimes provided the only evidence demonstrating that he (Mr. Hand) sought to silence Mr. Welch to avoid apprehension for the deaths of his first two wives. Mr. Hand further claims that Mr. Grimes' testimony was inconsistent because in addition to testifying that Mr. Hand told him he had killed Mr. Welch to silence him, he also testified that Mr. Hand told him he killed Mr. Welch because he suspected he was having an affair with Lori Hand.

In reviewing the state court proceedings in this matter, the Court noted that the state charged Mr. Hand in a four count Indictment and that the second count addressed the killing of Mr. Welch. The Court further noted:

> Count Two of the Indictment, involving the murder of Mr. Welch, also contained capital specifications for the following: that the Aggravated Murder was committed for the purpose of escaping detection, apprehension, trial or punishment for another crime committed by the offender, being complicity to commit the murder of Donna Hand (Specification Two); that the Aggravated Murder was committed

> for the purpose of escaping detection, apprehension, trial or punishment for another crime committed by the offender, being complicity to commit the murder of Lori L. Hand (Specification Three); that the Aggravated Murder was committed for the purpose of escaping detection, apprehension, trial, or punishment for another crime committed by the offender, being complicity to commit the murder of Jill J. Hand (Specification Four); that the victim, Mr. Welch, was a witness to an offense, being the murder of Donna A. Hand, and was purposely killed to prevent the victim's testimony in any criminal proceeding (Specification Five); that the victim, Mr. Welch, was a witness to an offense, being the murder of Lori L. Hand, and was purposely killed to prevent the victim's testimony in any criminal proceeding and that the aggravated murder was not committed during the commission of the offense for which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding (Specification Six).

See, App. Vol. 1 at 55–59.

In addressing Ground VIII, this Court discussed the applicable law with respect to a claims of sufficiency of the evidence. That discussion is incorporated herein by reference.

In *State v. Jones,* 91 Ohio St.3d 335, 346–47, 744 N.E.2d 1163, *cert. denied,* 534 U.S. 1004, 122 S.Ct. 483, 151 L.Ed.2d 396 (2001), the Ohio Supreme Court stated:

> R.C. 2929.04 sets forth the criteria for imposing the sentence of death for the commission of a capital offense. The statute provides that the death penalty may be imposed when it is proven beyond a reasonable doubt that the capital offense "was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense *committed by the offender.*" (Emphasis added.) R.C. 2929.04(A)(3). Appellant contends that, under this statute, the state must prove that the defendant committed the offense for which he sought to avoid apprehension by proof beyond a reasonable doubt. We agree.

***109** It is clear, then, that in order for Mr. Hand to have been convicted of specifications two through six of Count Two of the Indictment, the state was required to proved beyond a reasonable doubt that he killed Mr. Welch for the purpose of silencing him to avoid apprehension for the deaths of his first two wives.

First, the Court notes that contrary to Mr. Hand's argument, Mr. Grimes' testimony was not the only evidence the state produced with respect to Mr. Hand's murder of Mr. Welch. Specifically, as noted in the Court's discussion of Ground I, the trial court properly admitted into evidence the numerous statements which Mr. Welch made to several individuals regarding his complicity with Mr. Hand in Donna's and Lori's, as well as Jill's, murders. In addition, and again contrary to Mr. Hand's position, Mr. Grimes' testimony did not require one to conclude that Mr. Hand killed Mr. Welch because he suspected Mr. Welch was having an affair with Jill Hand. As noted above, Mr. Grimes did testify that Mr. Hand told him that "wasn't satisfied with his wife, he thought she was being permiscuous [sic]" and that "he was going to have her knocked off", but he did not identify Mr. Welch as the individual with whom Jill Hand was allegedly having an affair. Indeed, Mr. Grimes testified that Mr. Hand told him that he "killed his wife and the man *he* was involved with." Trial Tr. Vol. 16 at 3025 (emphasis supplied). Additionally, Mr. Grimes testified further that Mr. Hand told him that the man who supposedly killed his wife was a business partner, that he was hired to do that job, that "took care of them both", and that "he shot the man and his wife ...".

This Court concludes that viewing the trial testimony in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime related to the second through sixth specifications of Count Two of the Indictment beyond a reasonable doubt. *Jackson,* 443 U.S. at 319. Therefore, because Mr. Hand's conviction is supported by sufficient evidence, his

appellate counsel were not ineffective for failing to raise the claim on direct appeal.

Mr. Hand's Subclaim D of Ground XI is without merit and should be denied.

Subclaim E

The failure to amend the brief to include juror bias issues
In Subclaim E of Ground XI, Mr. Hand argues that his appellate counsel were ineffective for failing to amend the direct appeal brief to include issues of alleged juror bias. Respondent argues first that this claim is procedurally defaulted.

As with Subclaim D, and again contrary to Respondent's claim, a review of Mr. Hand's Application for Reopening Pursuant to S.Ct.Prac.R. XI, Section 6 which he filed in the Ohio Supreme Court on April 18, 2006, shows that he did raise this claim in state court. App. Vol. 9 at 28–39. A review of Mr. Hand's Application reveals that in Proposition of Law II, Mr. Hand argued that his appellate counsel were ineffective for failing to amend his appellate brief to include juror bias issues. *Id.* For the same reasons that this Court addressed Mr. Hand's Subclaim D *de novo,* it addresses this Subclaim *de novo.*

***110** Although Mr. Hand's Subclaim E is not procedurally defaulted, it fails. Specifically, as this Court concluded in addressing Subclaim B of Ground IV, Mr. Hand's claim with respect to pre-trial publicity and alleged juror bias is without merit. For the same reasons given as to Subclaim B of Ground IV, Mr. Hands claims in this Subclaim E should also be denied.

Subclaim F

The failure to allege that the trial court's inquiry into potential juror bias resulting from extensive pretrial publicity was constitutionally defective.
In Subclaim F, Mr. Hand alleges that his appellate counsel were ineffective for failing to raise the claim that the trial court failed to properly question the prospective jurors regarding their exposure to pretrial publicity and other potential biases. Respondent first argues that this claim is procedurally defaulted.

Again, as with Subclaims D and E of this Ground, a review of Mr. Hand's April 18, 2006, Application for Reopening which he filed with the Ohio Supreme Court, he raised this claim as Proposition of Law III.App. Vol. 9 at 28–39. For the same reasons this Court addressed Subclaims D and E *de novo,* this Court addresses Subclaim F *de novo.*

Mr. Hand has raised similar claims with respect to specific jurors and pre-trial publicity in Subclaim B of Ground IV. In addressing that Subclaim, this Court reviewed the law which is applicable to the requirement of a fair trial by a panel of impartial, indifferent jurors as well as the law with respect to pre-trial publicity. That law is also relevant to this claim.

Although not procedurally barred, Mr. Hand's Subclaim F fails on the merits. In discussing Mr. Hand's claims in Ground IV Subclaim B, this Court noted that the court divided the panel of potential jurors into small groups. This Court then reviewed the trial court's *voir dire* of the potential jurors who were in the same group as Ms. Ray and Ms. Finamore were in. A review of the trial transcript reveals that the court asked similar questions of each group of potential jurors. Trial Tr. Vol. 4 at 166–67; 306–07; 417–18; Trail Tr. Vol. 5 at 521; 658–59; 755–56. Nobody in the pool of potential jurors testified that she or he was unable to set aside anything she or he had seen or heard in the media about Mr. Hand's case. Indeed, not one prospective juror testified that he or she could not base a decision solely on the evidence presented in the court room. Moreover, none of the potential jurors gave any testimony during the court's *voir dire* which would should have led the court to ask additional questions about pre-trial publicity. Further, there is nothing in the record which would indicate that any of the jurors who served in Mr. Hand's case had been exposed to such an enormous amount of pre-trial publicity which so infected her or his deciding process that she or he was improper juror resulting in a violation of Mr. Hand's right to a fair trial.

Mr. Hand's Subclaim F of Ground XI is without merit and should be denied.

GROUND XII

The Ohio death penalty statutes are facially unconstitutional.

***111** In this Ground, Mr. Hand argues that the Ohio death penalty scheme is facially unconstitutional for various reasons. However, Mr. Hand concedes that courts have upheld the constitutionality of the Ohio death penalty statutes on numerous occasions and he has raised the issue here solely for the purpose of preserving the record. *See, e.g.,* Doc. 11 at 50 n. 3; Doc. 32 at 116 n. 7.

In rejecting his challenge to the constitutionality of the Ohio death penalty statutes, the Ohio Supreme Court wrote:

> In proposition of law XIII, Hand attacks the constitutionality of Ohio's death-penalty statutes. However, we also reject this claim. *State v. Carter* (2000), 89 Ohio St.3d 593, 607, 2000 Ohio 172, 734 N.E.2d 345; *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, paragraph one of the syllabus.

Hand, 107 Ohio St.3d at 417, 840 N.E.2d 151.

As an initial matter, this Court notes that the Sixth Circuit has continued to reject challenges to the constitutionality of Ohio's death penalty statutes including many of the challenges Mr. Hand raises in this Petition. *See Buell,* 274 F.3d at 337; *Scott,* 209 F.3d at 884–85. The Court turns to Mr. Hand's specific challenges to the Ohio death penalty statutes.

Mr. Hand's first claim is that the Ohio death penalty statutes allow for the imposition of the death penalty in racially disparate ways. The United States Supreme Court has held that in order for this claim to succeed, the petitioner must demonstrate "purposeful discrimination" in his own case. *See, McCleskey v. Kemp,* 481 U.S. 279, 293–94, 107 S.Ct. 1756, 95 L.Ed.2d 262, (1987). Mr. Hand has failed to acknowledge this standard, let alone show purposeful discrimination in his case.

Next, Mr. Hand argues that Ohio's death penalty scheme imposes the unconstitutionally vague duty on the jury to weigh the aggravating circumstances and mitigating factors against each other to determine the appropriate sentence. This argument has been rejected by the United States Supreme Court. *See, Tuilaepa v. California,* 512 U.S. 967, 979, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), and *Proffit v. Florida,* 428 U.S. 242, 257–59, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Mr. Hand claims that the Ohio death penalty scheme burdens the right to a jury trial by permitting defendants who plead guilty or no contest to request that a judge dismiss the death specifications in the interests of justice whereas no similar benefit is afforded to defendants who plead not guilty and are tried by a jury. The United States Supreme Court rejected this argument in *Corbitt v. New Jersey,* 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978).

Mr. Hand's fourth challenge to the Ohio death penalty statutes is that they violate the constitutional right to due process by requiring that pre-sentence reports and mental evaluations be submitted to the fact-finder once requested by the defense. Rejection of this same claim was affirmed by the Sixth Circuit Court of Appeals in *Byrd,* 209 F.3d at 539.

Next, Mr. Hand argues Ohio's felony-murder death penalty provision violates the constitutional requirement that States must narrow the range of offenders eligible for the ultimate sentence and it violates equal protection requirements because it automatically qualifies the defendant for the death penalty. Contrary to Mr. Hand's argument, the Sixth Circuit has upheld the constitutionality of Ohio's felony murder provision. *Scott,* 209 F.3d at 884–85.

***112** Mr. Hand claims that the Ohio death penalty statutes are unconstitutionally vague because they permit the jury to consider the statutory mitigating factor of the nature and circumstances of the offense as an aggravator. The United States Supreme Court has previously rejected this argument. *Tuilaepa,* 512 U.S. at 976.

Mr. Hand argues that the Ohio's system of proportionality and appropriateness review is inadequate and incomplete both at the trial and appellate levels. The Sixth Circuit rejected a similar challenge to Ohio's system of proportionality and appropriateness review in *Cooey v. Coyle,* 289 F.3d 882 (6th Cir.2002), *cert. denied,* 528 U.S. 947 (2003).

Mr. Hand's final challenge to the constitutionality of Ohio's death penalty scheme in his twelfth ground is that it violates various international law, charters, treaties, and conventions. However, the Sixth Circuit has addressed

this claim and found that Ohio's death penalty scheme does not violate international law as applicable to the States through the Supremacy Clause. *Buell,* 274 F.3rd at 367.

The Ohio Supreme Court's findings and decision with respect to Mr. Hand's challenges to the constitutionality of Ohio's death penalty scheme contained in this ground for relief are not contrary to nor an unreasonable application of, clearly established federal law. Therefore Mr. Hand's Ground XII should be dismissed.

GROUND XIII

The exclusion of residual doubt as a mitigating factor violated Hand's right against cruel and unusual punishment and rights to due process and a fair trial.
Mr. Hand raised this claim on direct appeal and the Ohio Supreme Court rejected it as follows:

> In proposition of law X, Hand contends that the trial court's refusal to instruct on residual doubt as a mitigating factor violated his constitutional rights. However, we summarily reject that argument. See *State v. McGuire* (1997), 80 Ohio St.3d 390, 1997 Ohio 335, 686 N.E.2d 1112, syllabus; see, also, *State v. Brinkley,* 105 Ohio St.3d 231, 2005 Ohio 1507, 824 N.E.2d 959, *State v. Cunningham,* 105 Ohio St.3d 197, 2004 Ohio 7007, 824 N.E.2d 504.

Hand, 107 Ohio St.3d at 417, 840 N.E.2d 151.

The United States Supreme Court has stated:

> Our edict that, in a capital case, " 'the sentencer ... [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense," ' *Eddings v. Oklahoma,* 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (quoting *Lockett [v. Ohio*], 438 U.S. [586,] ... 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 [(1978)]), in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

***113** *Franklin v. Lynaugh,* 487 U.S. 164, 174, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988).

Based on the authority of *Franklin,* Mr. Hand does not have a constitutional right to have residual doubt considered as a mitigating factor. The Ohio Supreme Court's conclusion on Mr. Hand's claim about residual doubt is not contrary to or an unreasonable application of, clearly established federal law. Therefore Mr. Hand's Ground XIII should be rejected.

GROUND XIV

Ohio's use of the lethal injection procedure to administer executions constitutes cruel and unusual punishment in violation of Hand's Eighth, Ninth, and Fourteenth Amendment rights.
In this Ground, Mr. Hand argues Ohio's use of the lethal injection for executions constitutes cruel and unusual punishment in violation of his various constitutional rights. However, as he did with respect to his Ground XII, Mr. Hand concedes that courts have upheld the constitutionality of the Ohio death penalty statutes on numerous occasions and that he has raised the issue here solely for the purpose of preserving the record. *See, e.g.,* Doc. 32 at 137 n. 8, PAGEID# 643; Doc. 90 at 42 n. 9, PAGEID# 2149.

Mr. Hand raised this claim as his Ninth Ground for Relief in his post-conviction petition. App. Vol. 10 at 107–09. In rejecting the claim, the post-conviction court, citing *State v. Carter,* 89 Ohio St.3d 593, 734 N.E.2d 345 (2000), determined that the claim on had no legal basis.

Mr. Hand has not cited any case which supports his allegation that the lethal injection procedure is unconstitutional.

Based on the authority of *Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (three-drug protocol) and *Cooey v. Strickland,* 589 F.3d 210 (6th Cir.2009),

cert. denied, —— U.S. ——, 103 S.Ct. 826 (2009) (one-drug protocol), Mr. Hand's Ground XIV should be dismissed.

GROUND XV

The cumulative errors at Hand's trial, sentencing, and on direct appeal command issuance of a writ of habeas corpus.

In this Ground, Mr. Hand argues that the cumulative errors he claims occurred during his trial, sentencing, and appeal violated his constitutional rights to the extent that this Court should grant his Petition.

The Constitution entitles a criminal defendant to a fair trial, not a perfect one. *Delaware v. VanArsdall,* 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Indeed, there can be no such thing as an error-free, perfect trial. *United States v. Hastings,* 461 U.S. 499, 508–09, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983).

As noted above, the Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief. *Lorraine,* 291 F.3d at 447. "[W]e have held that, post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief." *Moore v. Parker,* 425 F.3d 250, 256 (6th Cir.2005), *cert. denied. sub nom. Moore v. Simpson,* 549 U.S. 1027, 127 S.Ct. 557, 166 L.Ed.2d 424 (2006), citing *Scott v. Elo,* 302 F.3d 598, 607 (6th Cir.2002), *cert. denied,* 537 U.S. 1192, 123 S.Ct. 1272, 154 L.Ed.2d 1026 (2003) and *Lorraine v. Coyle,* 291 F.3d 416, 447 (6th Cir.2002)

***114** First, there were no errors of a constitutional magnitude which can be accumulated. for purposes of this Ground. Moreover, Mr. Hand's "cumulative error" is not cognizable in federal habeas. Therefore, his Ground XV should be rejected.

Conclusion

Mr. Hand's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, (Doc. 11), should be denied. It is therefore respectfully recommended that judgment be entered in favor of the Respondent and against the Petitioner dismissing the Petition with prejudice. Any recommendation on a certificate of appealability is reserved for a supplemental report.

NOTICE REGARDING OBJECTIONS

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

All Citations

Not Reported in F.Supp.2d, 2011 WL 2446383

Footnotes

1 Anthony was not called as a prosecution witness during the state's case-in-chief.

2 Tezona McKinney's testimony, "Welch told me that Bob Hand killed his first two wives," is not a statement against Welch's interest and is therefore not admissible under Evid.R. 804(B)(3).

1 The Court notes that present counsel represented Mr. Hand in his attempt to exhaust claims contained in Section XI (A–C) of his habeas Petition which attempt he made after he filed his Petition. See, *infra.*

2 Each state court trial transcript which Respondent filed in this action reflect two volume numbers; one which is the volume number as filed in this Court and one which is the volume number in the state court. For example, Respondent filed the trial court's Trial Transcript Vol. I as Trial Transcript Volume 3 in this habeas action. (Doc. 27). This Court's citations to the Trial Transcript Volume number are to the volume numbers as filed in this Court.

3 Each of these eight witnesses testified twice; once in the Ohio Evid.R. 804(B)(6) hearing outside the presence of the jury and once in the jury's presence.

4 The Court notes that Ohio has adopted a statute that prohibits common law marriages although there is a grandfather clause for those common law marriages that were valid on the statute's effective date of October 10, 1991. *See* Ohio Revised Code Sec. 3105.12.

5 It is not clear from the record before this Court whether Mr. Hand submitted a transcript or a video of the program. *See* App. Vol. 11 at 12. However, for purposes of this discussion, the form of the evidence Mr. Hand submitted does not matter.

6 It is questionable, at best, as to whether Mr. Hand has raised a federal constitutional claim before this Court. *See,* Doc. 11 at 28–29, PAGEID# 72–73; Doc. 32 at 52–54, PAGEID# 536–38. It is also questionable as to whether Mr. Hand addressed the question of how he may have been prejudiced by any alleged ineffectiveness of counsel with respect to the jury instruction claim contained in Subclaim H of Ground IV. *Id.*

7 O.R.C. § 2901.05 was amended in 2008 by Sub. S.B. 184. 2008 Ohio Laws File 92 (Sub.S.B.184) (eff.Sept. 9, 2008). However, the only effect the amendment had on the definition of reasonable doubt was to reflect gender-neutral language. With that exception, the language cited here is as it was at the time of Mr. Hand's trial. In other words, the substance of the definition of reasonable doubt was the same then as it is now.

107 Ohio St.3d 378
Supreme Court of Ohio.

The STATE of Ohio, Appellee,
v.
HAND, Appellant.

No. 2003–1325.
|
Submitted July 26, 2005.
|
Decided Jan. 18, 2006.

Synopsis

Background: Defendant was convicted, in the Court of Common Pleas, Delaware County, Case No. 02CRI–08–366, of two counts of aggravated murder, with multiple capital and firearm specifications, conspiracy to commit aggravated murder, with firearm specifications, and escape, and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court, Lundberg Stratton, J., held that:

[1] victim's statements to third parties were admissible under "wrongdoing of a party" exception to rule against hearsay;

[2] defendant forfeited his Sixth Amendment right to confront victim as adverse witness;

[3] any error in prosecutor's trial-phase closing arguments did not rise to level of plain error;

[4] any error in admission of trial-phase evidence and testimony was not outcome-determinative plain error;

[5] trial court did not abuse its discretion in denying defendant's motion to sever escape charge;

[6] evidence was sufficient to support escape conviction;

[7] defendant had adequate notice that jury could be instructed on complicity;

[8] evidence was sufficient to warrant trial-phase "course of conduct" instruction;

[9] defense counsel did not provide ineffective assistance in trial or penalty phase;

[10] aggravating circumstances outweighed mitigating factors; and

[11] death penalty was not disproportionate.

Affirmed.

Attorneys and Law Firms

****161** David A. Yost, Delaware County Prosecuting Attorney, Marianne T. Hemmeter and Frank P. Darr, Assistant Prosecuting Attorneys, for appellee.

David H. Bodiker, State Public Defender, Stephen A. Ferrell, Pamela J. Prude–Smithers, and Wendi Dotson, Assistant State Public Defenders, for appellant.

Opinion

LUNDBERG STRATTON, J.

***378** {¶ 1} In this appeal, defendant-appellant, Gerald R. Hand, raises 13 propositions of law. We find that none of his propositions of law have merit and affirm Hand's convictions. We have also independently weighed the aggravating circumstances against the mitigating factors as to each count and have compared Hand's sentence of death to those imposed in similar cases, as R.C. 2929.05(A) requires. As a result, we affirm Hand's sentence of death.

{¶ 2} On March 24, 1976, Hand notified police that he found the strangled body of his wife, 28–year–old Donna Hand, in the basement of their Columbus home. ***379** On September 9, 1979, while Hand was out of town, family members found the strangled body of Hand's second wife, 21–year–old Lori Hand, in the basement of the same home. The murders of Donna and Lori Hand remained unsolved for more than 20 years.

{¶ 3} Sometime before January 15, 2002, Hand hired Walter "Lonnie" Welch, a longtime friend, to kill his wife, 58–year–old Jill Hand. On the evening of January

15, Hand shot and killed Jill at their Delaware County home and then shot and killed Welch when he arrived there. Subsequent investigation showed that Hand had previously hired Welch to kill Donna and Lori Hand.

{¶ 4} Hand was convicted of the aggravated murders of Jill and Welch and sentenced to death. The evidence established that Hand's marriage to Jill had soured, Hand had accumulated more than $200,000 in credit card debt, and Hand stood to collect more than $1,000,000 in life insurance and other benefits on Jill's death. Before his death, Welch had told various friends and family members that Hand hired him to kill Jill and that Hand had previously hired him to kill Donna and Lori. Hand admitted that he had shot Welch, and forensic evidence established that Hand's claim that he acted in self-defense on the night of the murders was unsupported by the evidence. Forensic ****162** evidence established that Welch was shot in the back at close range. Hand also admitted to a cellmate that he had shot Jill and Welch.

State's Case

{¶ 5} **Murder of Donna Hand.** On the evening of March 24, 1976, Hand notified police that his wife had been murdered at their home on South Eureka Avenue in the Hilltop section of Columbus. According to Hand, he returned home after being out with his brother but was unable to open his front door because it was double latched from the inside. Hand entered the house through a side door and found Donna's body.

{¶ 6} The police found Donna's fully clothed body at the bottom of the basement stairway. She had a bag over her head and it was tied with a spark-plug wire. The police found no sign of forced entry. Drawers in the upstairs bedroom had been removed and turned over, but the room did not appear to have been ransacked. Moreover, no property was missing from the house.

{¶ 7} Dr. Robert Zipf, then a Franklin County Deputy Coroner, examined Donna's body at the scene and found blood around the head where the body was lying. However, no blood spatters or other bloodstains were found on the stairs, which indicated that Donna had not hit her head falling down the steps.

{¶ 8} During the autopsy, Dr. Zipf found "three chop wounds to the back of [Donna's] head" that were caused by "some type of blunt object, maybe a very ***380** thin pipe or a dull hatchet." However, Dr. Zipf determined that Donna had died from strangulation caused by the spark-plug wire around her neck.

{¶ 9} During the fall of 1975, Donna told Connie Debord, her sister, that she planned to divorce Hand and move back to their parents' home. Donna felt that "everything was over" and "feared for her life." About two weeks before she was killed, Donna told Evelyn Latimer, another sister, that she was going to file for divorce.

{¶ 10} Hand received $67,386 in life insurance following Donna's death. Hand also filed a claim for reparations after Donna's death and received $50,000 from the Ohio Victims of Crime Compensation Division of the Court of Claims.

{¶ 11} During 1975 or 1976, Teresa Fountain overheard Welch talking to Isaac Bell, Fountain's boyfriend, about "knocking his boss's wife off to get some insurance money." Sometime after Donna's murder, Welch told Fountain, "I hope you didn't hear anything and * * * you keep your mouth shut, * * * you didn't hear anything."

{¶ 12} **Murder of Lori Hand**. Hand married Lori Willis on June 18, 1977, and Welch was the best man at the wedding. Hand and Lori lived in the home on South Eureka Avenue in which Donna had been murdered.

{¶ 13} By June 1979, Hand's marriage to Lori was falling apart. Lori told her friend, Teresa Sizemore, that she was unhappy with her marriage and was making plans to file for a divorce. Sizemore also saw Lori and Hand interact, but she "didn't see any warmth there because [Lori] wasn't happy."

{¶ 14} Around 8:30 a.m. on September 9, 1979, Hand and his baby, Robby, left home so that Lori could clean the house for a bridal shower planned for that afternoon. Steven Willis, Lori's brother, picked up Hand at his house. The three of them then spent the next few hours visiting a flea market, a car show, and Old Man's Cave in Hocking Hills. They also went go-cart racing.

****163** {¶ 15} Around 9:30 a.m., Lois Willis, Lori's mother, arrived at Hand's home to help Lori prepare for

the bridal shower. After Lois knocked and did not get an answer, she left and returned about an hour and half later. Upon returning, Lois noticed that the front door was ajar and entered the house. Alarmed, she called Hand's family, who found Lori's body in the basement.

{¶ 16} Police discovered Lori's body on the basement floor with a plastic sheet wrapped around her head. Lori's pants were unfastened with the zipper down, and her blouse was pulled up against her breast line. Bloodstains and blood spatters were found on the wall near Lori's body, and a spent lead projectile was found near her body. Lori had been shot twice in the head, but neither gunshot killed her. Dr. Patrick Fardal, a Franklin County Deputy Coroner, determined that strangulation was the cause of death.

***381** {¶ 17} Lori's vehicle had been stolen from Hand's garage. Police recovered her vehicle about three blocks from the Hand home.

{¶ 18} Police found the first and second floor levels of the house in disarray, with drawers and other items of property dumped on the floor. Nevertheless, the house did not appear to have been burglarized, because there were no signs of forced entry and the rooms were only partially ransacked. Investigators also seized a cash box containing credit card slips, currency, and a .38 caliber handgun from the trunk of Hand's car parked in the garage.

{¶ 19} After he learned of Lori's death, Hand returned home. Hand told police that he had been out of the house with Steve and his young son when Lori was murdered. Hand said that "everyone, including * * * his brothers and help at the shop would have known" that he was going to be gone from the house that morning.

{¶ 20} Hand told police that he was very possessive of Lori. He admitted having sexual problems with Lori because he "wanted sex at least once a night and she didn't want to do that." When asked about insurance, Hand said that he had in the past year doubled its value and that it should pay off both of his mortgages. Hand received $126,687.90 from five separate life insurance policies after Lori's death.

{¶ 21} On September 10, 1979, the police recovered a pair of gloves near where Lori's vehicle was found. The fingers of the gloves were bloody, and the gloves had been turned inside out. Human bloodstains were found on the gloves, and debris from inside the gloves was preserved.

{¶ 22} On October 9, 1979, the police reinterviewed Hand. Hand provided the names of Welch and others who worked for him and said that he did not trust any of them. He told police that everyone, including all of his neighbors, was aware that he had received $50,000 after his first wife's murder. Hand also said that his wife was not planning to separate from or divorce him and that they were "extremely in love with each other."

{¶ 23} During the fall of 1979, Welch went to the home of Pete Adams, Welch's first cousin, and told Adams that he had "killed Donna and Lori Hand" and had done it for Bob Hand. Adams did not notify police about this conversation until after Welch's death in 2002.

{¶ 24} During 1979 and 1980, Betty Evans, Welch's sister, observed that Welch had a "wad of money," cars, and a girlfriend who wore a mink jacket, a diamond necklace, and rings. Around the same time, Welch told Evans that if she "knew anything, not to say anything because him and Bob had a pact and if anything got ****164** out, they were going to kill each other's mother."

***382** {¶ 25} In the 1980s and 1990s, Welch intermittently worked as a mechanic at Hand's radiator shop in Columbus. Hand also provided Welch with extra money on a frequent basis and gave him cars and a washer and dryer. In the late 1980s, Welch started using crack cocaine and spent a lot of money on it.

{¶ 26} Sometime after Lori's death, Hand met and married Glenna Castle. They were married for seven to eight years and then divorced.

{¶ 27} **Hand's marriage to Jill and his financial problems**. In October 1992, Hand married Jill Randolph, a widow, and moved into Jill's home on Walnut Avenue in Galena, Delaware County. Jill was employed at the Bureau of Motor Vehicles in Columbus and was financially secure. Hand was the beneficiary of Jill's state retirement and deferred-compensation accounts in the event of her death, and he was the primary beneficiary under her will.

{¶ 28} By 2000, Hand's radiator shop had failed, and he was deeply in debt. During the 1990s and early 2000, Hand obtained thousands of dollars by making credit card

charges payable to Hand's Hilltop Radiator. By January 2002, Hand had amassed more than $218,000 in credit card debt.

{¶ 29} At some point, Jill found out about the extent of Hand's debt. During 2000, she learned that Hand had charged more than $24,000 on a credit card in her name. Jill was upset and told her daughter, Lori Gonzalez, that "[s]he was going to have Bob pay off that amount that he had charged up with the sale from his business."

{¶ 30} In October 2000, Hand sold his radiator shop and the adjoining buildings. In May 2001, Hand started working as a security guard in Columbus and earned $9.50 an hour. Despite his enormous debt, Hand continued to pay on several credit cards to maintain life insurance coverage on his wife, including payments in December 2001 and January 2002.

{¶ 31} Hand and Jill grew increasingly unhappy with one another. During 2001, Hand told William Bowe, a friend of Hand's, that he was "quite tired of her." Abel Gonzalez, Jill's son-in-law, lived at the Hand home from April to June 2001. Abel said that Hand and Jill's marriage was "on the down slope. * * * There was no warmth there. * * * It seemed everything Bob would do would antagonize Jill, and she made it real clear that she was upset."

{¶ 32} **Plans to murder Jill Hand**. In July or August 2001, Welch asked Shannon Welch, his older brother, if he had a pistol or could get one. Welch also asked, "Do you know what I do for extra money?" He continued, "Well, I killed Bob's first wife and * * * I got to kill the present wife and I'll have a lot of money after that." Welch said he was going to be well off enough to retire and talked about buying an apartment complex. Thereafter, Welch asked Shannon about a pistol "maybe once a week, sometimes twice a week."

***383** {¶ 33} Between December 21, 2001, and January 3, 2002, Welch was in jail for various motor vehicle violations. During that time, Welch told his cellmate, David Jordan Jr., that he planned to "take somebody out for this guy named Bob" and mentioned that he had "put in work for him before." Welch said he needed a driver because his eyes were "messed up." He asked Jordan if he wanted the job and offered to pay him between $5,000 and $6,000. Welch said this job was supposed ****165** to happen in January, and he gave Jordan his phone number.

{¶ 34} During December 2001, Shannon asked Hand whether he could provide bond money to get Welch out of jail. Hand said, "Well, I can't have no contact with Lonnie * * * because we got business" and refused to give him any money.

{¶ 35} On January 14, 2002, Welch told Tezona McKinney, the daughter of Welch's common-law wife, that he was going to buy a car for her mother. Welch said he "was going to get the money the next day" and would buy the car "because [he] didn't buy her anything for Christmas because [he] was in jail."

{¶ 36} Around 5:00 p.m. on January 15, 2002, Welch attended a family gathering at Evans's home in Columbus to celebrate Evans's birthday. Welch told Shannon that he had to "be ready * * * to see Bob because [he] might be taking care of * * * business tonight." Before leaving, Welch told Evans that he "was going to pick up some money and he'd be right back."

{¶ 37} **Murder of Jill and Welch**. Around 6:45 p.m. on January 15, 2002, Hand arrived home from work. At 7:15 p.m., Hand made a 911 call to report that his wife had been shot by an intruder. Hand also reported that he had shot the intruder.

{¶ 38} Police found Welch's body lying face down on Hand's neighbor's driveway. Inside Hand's house, Jill's body was found lying between the living room and the kitchen. Hand told police that he had shot the intruder but did not know his identity. He also gave police two .38-caliber revolvers that he used to shoot him. On the way to the hospital, Hand saw the intruder's vehicle and told Mark Schlauder, a paramedic, that "it could have belonged to somebody that worked for" Hand.

{¶ 39} Around 8:00 p.m. on January 15, Detective Dan Otto of the Delaware County Sheriff's Office interviewed Hand at the hospital. Hand said that after arriving home, he had dinner with Jill and then went to the bathroom. Upon exiting, Hand heard Jill scream, "Gerald," heard two gunshots, and saw a man in a red and black flannel shirt at the end of the hallway. Hand then retrieved two .38 caliber revolvers from the master bedroom. Hand started down the hallway firing both guns at the intruder, but had trouble shooting because the guns were "misfiring" and "missing every other round." Hand followed the intruder

out the ***384** front door and continued firing at him as he ran toward his car, and then the intruder fell on the neighbor's driveway.

{¶ 40} During the interview, Hand repeated that he did not recognize the gunman, but recognized Welch's car in the driveway. Hand said he "didn't know [Welch] that well; that he did odd jobs around the shop; that he was a thief; that he was a cocaine addict; that he * * * [came] in to the shop area from time to time." Hand also said that it had been a year since he had had any contact with Welch, and Welch had no reason to be at his home that night.

{¶ 41} Investigators found no sign of forced entry at Hand's residence. Blood spatters were found inside the front door and on the front-door stoop. The top of the storm door was shattered, and particles of glass extended 13 feet into the front yard. All the glass fragments were found on top of the blood spatters. Police also found a black jacket on the front stoop, a spent bullet and glass fragments on top of the jacket, and a tooth outside the front door.

{¶ 42} According to Agent Gary Wilgus, a crime-scene investigator, the blood spatters indicated that the victim was bleeding ****166** and "blood was dropping from his body" as he was moving away from the house. A bloody trail led onto the sidewalk and through the front yard and ended where Welch was lying in the driveway. Welch was wearing cloth gloves, and a knit hat with two eyeholes and a mouth hole was next to his head. Police also found a .32-caliber revolver on the front lawn.

{¶ 43} Inside the house, police found glass fragments and bloodstains extending two to three feet from the front door and another tooth just inside the front door. Jill's body was 12 feet from the front door, her legs pointed towards the front door, and she was wearing a nightgown. Jill had been shot in the middle of her forehead. A second bullet deflected off the floor and was found on the carpet next to Jill's head.

{¶ 44} Investigators found a bullet in the living room ceiling, and a second bullet was found in the living room window frame. While investigators could not determine the exact trajectory of the two bullets, they determined that they most likely originated from gunshots in the hallway area. No evidence of gunplay was found elsewhere in the house.

{¶ 45} On January 17, 2002, Detective Otto reinterviewed Hand, and Hand provided a different version of events. Hand stated that after his wife was shot, he retrieved two guns from the master bedroom, went into the hallway, and saw Welch "coming down the hallway towards the master bedroom at him." Hand and Welch then began firing at each other in the hallway and were within four feet of each other during the gun battle. Hand repeated that he chased Welch outside the house but "couldn't get his guns to fire; that he was missing every ***385** other round and * * * they weren't firing." When asked about the .32-caliber revolver in the front yard, Hand stated that he did not know who owned it.

{¶ 46} During the second interview, Hand said, "I was misquoted on the first interview at the hospital" about not knowing Welch. Hand said that he had known Welch, a former employee, for over 20 years. However, Hand continued to give the impression that they were not close. When asked about a wedding photo showing Welch as his best man, Hand said he "couldn't find anybody else to stand in as [his] best man." Hand repeated that "the only thing he saw" on the night of the murder was an unknown person in "red and black flannel," and he had "no clue who this unknown person was." Hand also said that "Jill had never met Lonnie; Lonnie's never been to Walnut Avenue; he had no idea why he was there."

{¶ 47} In discussing his financial situation, Hand said he sold his radiator shop in October 2000 and received $300,000, and later received $33,000 from the sale of his share of the business and its inventory, and $140,000 from somewhere else. Hand said he "always needed money, but if he needed money, he could get some; that he had money." Hand also told police that he was "hiding the money and that he was considering filing bankruptcy; that that was against Jill's wishes." Later, Hand said that he "wasn't going to file for the bankruptcy * * * and they were going to work it out." When asked if he had any offices, Hand said that his office was in a bedroom in the house. However, Hand failed to disclose that he kept business records at another location.

{¶ 48} On January 19, 2002, the police seized several boxes containing Hand's business and personal records from the storage area above a hardware store near Hand's former radiator shop. These records included credit cards, credit-card-and life-insurance-account information, payment

****167** receipts, a list of credit card debt prepared by Jill, and other information about Hand's finances.

{¶ 49} Heather Zollman, a firearms expert, testified that the .32-caliber revolver found in the front yard was loaded with two fired and three unfired .32-caliber Smith and Wesson ("S & W") Remington–Peters cartridges. Bullet fragments removed from Jill's skull were consistent with being an S & W .32-caliber bullet. In testing the .32-caliber revolver, Zollman found that "on more than 50 percent of [her] testing, the firearm misfired" as a result of "a malfunction of the firearm." The stippling pattern shown in Jill's autopsy photographs indicated that "the muzzle to target distance was greater than six inches, and less than two feet."

{¶ 50} Zollman tested the two .38-caliber revolvers and found that they were both in proper working order, and neither weapon showed any tendency to misfire. A bullet removed from Welch's right forearm was "consistent with the .38 caliber." Zollman also concluded that the bullet and fragments recovered ***386** from Welch's mouth and his lower back had rifling class characteristics corresponding with the S & W .38-caliber revolver. Further, gunshot residue around the bullet hole on the back of Welch's shirt revealed a muzzle-to-target distance greater than two feet from the garment but less than five feet.

{¶ 51} Jennifer Duvall, a DNA expert, conducted DNA testing of bloodstains found on the shirt Hand was wearing on the night of the murders. Five of the bloodstains were consistent with the DNA profile of Welch. The odds that DNA from the shirt was from someone other than Welch was "one in more than seventy-nine trillion in the Caucasian population; one in more than forty-four trillion in the African–American population, and one in approximately forty-three trillion in the Hispanic population."

{¶ 52} Michele Yezzo, a forensic scientist, examined bloodstain patterns on Hand's shirt. There were more than 75 blood spatters of varying sizes on the shirt. Yezzo concluded that the shirt was "exposed to an impact" that "primarily registered on the front of the garment." Yezzo also examined glass fragments collected from Hand's residence and "found tiny fragments of clear glass" on Hand's shirt, trousers, tee-shirt, and pair of socks that he was wearing on the night of the murders. However, she found no glass fragments on Welch's boots. Yezzo conducted a fiber analysis of the bullet from Welch's mouth, but found "no fibers suitable for comparison."

{¶ 53} Ted Manasian, a forensic scientist, found particles of lead and barium on both gloves that Welch was wearing, and these are "highly indicative of gunshot residue." Manasian could not determine how the gunshot residue got on the glove, just that it was there. Thus, Welch could have fired the gun, or was in the proximity of the gun when it was discharged, or handled an item that had gunshot residue on it.

{¶ 54} Detective Otto testified that $1,006,645.27 in life insurance and state-benefit accounts were in effect at the time of Jill's death. This amount included $113,700 in Jill's Ohio Public Employees Retirement System account and $42,345.29 accumulated in the Ohio Public Employees Deferred Compensation program.

{¶ 55} Dr. Keith Norton, a forensic pathologist in the Franklin County Coroner's office, conducted the autopsy of Jill and Welch. He concluded that Jill died from a single gunshot wound to the head. Dr. Norton found that Welch had been shot five times: in his mouth, left upper chest, left forearm, right shoulder, and lower ****168** back. The gunshot wound to Welch's lower back went into the spinal cord and would have paralyzed his legs. However, the gunshot wound to the chest was the cause of death.

{¶ 56} According to Kenneth Grimes Jr., Hand's former cellmate in the Delaware County Jail, Hand told him that he "killed his wife and the man he was ***387** involved with." Hand said he hired a man and they had "been doing business together for years." Hand said he "hired the man to kill his wife and, in turn, the deal went sour. He wanted more money, so he killed two birds with one stone. He got both and didn't have to pay anything." Hand said he had agreed to pay $25,000 to have his wife killed, and the man "wanted it doubled." Hand said he was going to claim self-defense. He also said the evidence against him was "circumstantial and there were many witnesses that didn't have * * * any actual, proof."

{¶ 57} **Attempted jail escape.** Hand was incarcerated in the Delaware County jail beginning on August 8, 2002. On November 26, 2002, correction officers discovered an escape attempt in Hand's cell block.

{¶ 58} An attempt had been made to cut through the lock on the rear emergency exit of the cell block and through a cell bar. Officers searching Michael Beverly's cell found two saw blades. Police also seized some torn-up tee-shirt material and a pencil with a tee-shirt tied around it from Hand's belongings in his neighboring cell.

{¶ 59} Michael Beverly and Wedderspoon, another inmate, came up with the idea for the escape. Beverly said that he obtained two hacksaw blades and began cutting through the rear-exit lock and one cell bar. Dennis Boster, another inmate, was the lookout, and once in a while Hand would relay messages to Beverly that a guard was coming. Hand also advised Beverly on how to cut through the metal bar.

{¶ 60} According to Grimes, Beverly and Hand discussed escaping through the front of their cell block. The plan was that while Hand distracted the guards and nurses by requesting his medication, Beverly would apprehend a guard, and they would escape through the front door. Grimes also identified Hand as a lookout.

Defense Case

{¶ 61} Sally Underwood, Hand's sister, was a bartender in the Columbus Hilltop area from 1992 until 1994. During that time, Welch frequently came into the bar selling televisions, stereos, and other electronic equipment. When asked where he obtained this property, Welch said that he "had just stolen it from a house down the street." Underwood could tell that Welch was "on something" when he entered the bar.

{¶ 62} According to Terry Neal, another inmate in Hand's cell block, Hand was not involved in the escape attempt. Dennis Boster, who was convicted of escape, also testified that Hand was not involved in the escape attempt and never served as a lookout.

{¶ 63} Hand testified in his own behalf. He said, "I did not kill my wife or have anything to do with the planning of killing my wife, either." Hand also ***388** denied conspiring with Welch or anyone else to kill Donna or Lori. Hand did not remember "too much" about the day Donna was killed.

{¶ 64} When Hand married Lori, Welch was the best man at the wedding because his brother backed out at the last minute. Hand said that he had a great sexual relationship with Lori before his son, Robert, was born, but thereafter, they started having sexual problems. However, his ****169** business was going well, and his financial condition was "great."

{¶ 65} During his marriage to Lori, Hand took over his father's radiator shop, purchased the underlying property, and bought some extra lots. Welch worked part-time at the radiator shop and was paid under the table. Around this time, Hand embarked on a credit card scheme. He used personal credit cards, charged them to his business, and used this money to finance his business and purchase real estate.

{¶ 66} The wedding shower at his home on September 9, 1979, had been planned weeks in advance. When he learned that Lori had been killed, Hand "didn't believe it at first" and then went "hysterical." Hand later told police that he suspected that his brother, "Jimbo," had killed Lori because they were not "getting along that good and he had the keys to [Hand's] house."

{¶ 67} Shortly before Hand and Jill were married in 1992, he moved into her Delaware County home. After they had been married for a couple of years, Jill found out about Hand's credit card scheme. Hand said, "She didn't like it; * * * She just didn't want no part of it." She also learned about Hand's debt, which at one point, was close to a million dollars. Jill was also aware that Hand had life insurance on her through his credit cards.

{¶ 68} In 2000, Jill learned that Hand used her credit card to pay for repairs to one of Hand's properties. Jill was upset and wanted a "total refinance of everything." Hand then "started selling everything * * * and then paying the credit cards and the mortgages and everything down." In 2001, Hand sold his radiator shop. By May 2001, Hand had sold all his properties, had paid thousands of dollars on his credit card debt, and had gone to work as a security guard.

{¶ 69} According to Hand, he arrived home from work around 6:45 p.m. on January 15, 2002. Hand was coming out of the bathroom when he heard Jill shout, "Gerald, Gerald." He then heard a couple of shots and saw a man dressed in red flannel. Hand retrieved two guns from the

bedroom dresser, and as he came out of the bedroom, he saw the intruder coming down the hallway. Hand started "firing, and * * * assumed [the intruder] was firing." However, Hand thought his guns were "misfiring because [the intruder] wasn't going down." Hand said he chased the intruder out the front door and continued firing at him ***389** until the intruder fell on the driveway. He then returned to the house and called 911.

{¶ 70} Hand did not know how many shots he fired. He retrieved the guns and started firing, later explaining, "I wanted to protect myself * * * and shoot him, the son-of-a-bitch that shot my wife." Hand did not recognize the intruder, but recognized Welch's car in the driveway. He had no idea why Welch had come to his house that night.

{¶ 71} Hand denied telling Grimes that Welch was already in the house when he came home from work, denied telling him that Welch wanted to renegotiate his fee, and denied telling him that he killed his wife and then killed Welch. As for the escape, Hand said that he tried to stay away from Beverly as much as possible. Beverly asked Hand if he wanted to join in the escape, and Hand told him "no, and just get away." Hand also claimed that he did not aid Beverly in any way. Finally, he said that the string found in his cell was used for hanging a bag with food items to keep out the ants.

Indictment and Trial Result

{¶ 72} The grand jury indicted Hand on two counts of aggravated murder. Count ****170** One charged Hand with the aggravated murder of Jill with prior calculation and design. Count Two charged Hand with the aggravated murder of Welch with prior calculation and design. Count One included a "course of conduct," R.C. 2929.04(A)(5), death-penalty specification. Count Two included six death-penalty specifications: one "course of conduct," R.C. 2929.04(A)(5), specification; three specifications of murdering Welch to escape detection for Hand's complicity in the murders of Donna, Lori, and Jill Hand, R.C. 2929.04(A)(3); and two specifications of murdering Welch for the purpose of preventing his testimony as a witness in the murders of Donna and Lori Hand, R.C. 2929.04(A)(8). Additionally, Hand was charged with conspiracy to commit the aggravated murder of Jill in Counts Three, Four, and Five. Counts One through Five each contained a firearm specification. In Count Six, he was also charged with escape, which encompasses attempted escape.

{¶ 73} Hand pleaded not guilty to all charges. However, the jury found Hand guilty as charged, and he was sentenced to death.

{¶ 74} Hand now appeals to this court as a matter of right.

Trial Issues

{¶ 75} ***Admissibility of Welch's statements***. In proposition of law I, Hand argues that the trial court erred in admitting Welch's statements about his complicity with Hand to murder Hand's wives. Hand argues that the testimony was not admissible under Evid.R. 804(B)(6), forfeiture by wrongdoing, or any ***390** other hearsay exception. Additionally, Hand argues that such evidence violated his Sixth Amendment right "to be confronted with the witnesses against him." Sixth Amendment to the United States Constitution.

{¶ 76} Over defense objection, the trial court admitted Welch's statements to various witnesses describing Welch's complicity with Hand in the murders of Donna, Lori, and Jill. First, Pete Adams, Welch's cousin, testified that a week or two after Lori's murder in the fall of 1979, Welch came to his home and told him that he "killed Donna and Lori Hand" and "did it for Bob."

{¶ 77} Second, Shannon Welch, Welch's brother, testified that during July or August 2001, Welch asked Shannon "if [he] had a pistol or if [he] could get one." Welch then asked, "Do you know what I do for extra money?" Welch continued, "Well, I killed Bob's first wife and * * * I got to kill the present wife and I'll have a lot of money after that." About a week and a half before Jill's and Welch's murders, Welch told Shannon that he "might get to take care of his business with Bob tonight." On January 15, Welch told Shannon, "Well, I got to go take a shower and change clothes and be ready to go to see Bob because I might be taking care of my business tonight."

{¶ 78} Third, Barbara McKinney, described in the record as Welch's common-law wife, testified that Welch told her that he had visited Hand's home in Delaware and "Bob showed him the house." When Welch was in jail between December 2001 and January 2002, Welch

directed Barbara on the phone, "Call my friend and see if he'll pay my bond to get me out of jail." Welch identified his friend as Bob Hand and said, "[D]on't say his name on the phone any more."

{¶ 79} Fourth, Tezona McKinney, Barbara's daughter, testified that on January 14, 2002, the day before the murders, Welch told her, "Well, if I get this little money * * * tomorrow, I want to buy your mother this car because I didn't buy her anything for Christmas." Welch then ****171** pointed out the car to Tezona and said, "I want your mother to have that car. And if I can, I'm going to try to make sure I get it for her, if I get this money." On another occasion, Welch told Tezona that "Bob Hand killed his first two wives."

{¶ 80} Fifth, Betty Evans, Lonnie Welch's sister, testified that around 1979 or 1980, Welch told her that if she "knew anything, not to say anything because him and Bob had a pact and if anything got out, they were going to kill each other's mother." On the evening of the murders, Welch told Evans that "he was going to pick up some money and he'd be right back; that he was sorry he didn't have anything for [her] birthday; that when he comes back, he'll take care of it."

{¶ 81} Sixth, Teresa Fountain, Shannon Welch's ex-girlfriend, testified that during 1975 or 1976, she overheard Lonnie Welch "talking to [her boyfriend] Isaac all about insurance money and knocking his boss's wife off to get some ***391** insurance money." Later, Welch told Fountain, "I hope you didn't hear anything and * * * you keep your mouth shut, * * * you didn't hear anything."

{¶ 82} Seventh, Anna Hughes, a friend of Lonnie Welch, testified that although Welch often missed work, he was not fired from his job working for Hand. On one occasion, Welch said to her, "I didn't go to work * * * [but] I got it like that." Sometime around 1998, Welch mentioned to Hughes that he was "going out to Bob's." He added, "I've got to get me a hit and I ain't got no money."

{¶ 83} Finally, David Jordan Jr., Welch's Franklin County Jail cellmate, testified that during December 2001, Welch said that he was "going to take somebody out for this guy named Bob" and added, "I've put in work for him before." Welch offered Jordan between five and six thousand dollars to be his driver. Welch also said the murder would "happen sometime in January" and gave Jordan his phone number.

{¶ 84} **Admissibility under Evid.R. 804(B)(6).** Under Evid.R. 804(B)(6), a statement offered against a party is not excluded by the hearsay rule "if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying." Evid.R. 804(B)(6) was adopted in 2001 and is patterned on Fed.R.Evid. 804(B)(6), which was adopted in 1997. Staff Notes (2001), Evid.R. 804(B)(6). To be admissible under Evid.R. 804(B)(6), the "offering party must show (1) that the party engaged in wrongdoing that resulted in the witness's unavailability, and (2) that one purpose was to cause the witness to be unavailable at trial." Id.; see, also, *United States v. Houlihan* (C.A.1, 1996), 92 F.3d 1271, 1280.

{¶ 85} Before admitting Welch's statements under Evid.R. 804(B)(6), the trial court conducted an evidentiary hearing outside the jury's presence. Welch's cousins, Pete Adams and Phillip Anthony Jr., testified that Welch told them that he had killed Donna and Lori for Hand. Anthony also testified that shortly before Jill's murder, Welch told him that he needed a gun because Hand wanted him to murder his present wife. [1] The trial court also considered the testimony of Hand's cellmate, Kenneth Grimes, that Hand had admitted killing Welch to eliminate him as a possible witness.

{¶ 86} Based on evidence at the trial and at the evidentiary hearings, the trial court found, "[T]he state has shown, by a *preponderance of the evidence* under Rule 804, that, number one, the witness, accomplice, ****172** victim, Lonnie Welch's death was caused by the defendant, and it's obviously by virtue of that to cause his unavailability." (Emphasis added.) The trial court then ruled that Welch's statements were admissible. After conducting further evidentiary hearings with other witnesses, the trial court admitted the remainder of Welch's statements.

[1] ***392** {¶ 87} Hand alleges several reasons why the trial court erred in admitting Welch's statements under Evid.R. 804(B)(6). First, Hand argues that the trial court should have used the clear-and-convincing standard of proof, rather than a preponderance-of-the-evidence standard, in proving the predicate facts. However, the majority of United States Courts of Appeals applying

the federal rule have followed the preponderance-of-the-evidence standard in ruling on preliminary determinations of admissibility under Fed.R.Evid. 804(B)(6). See *Cotto v. Herbert* (C.A.2, 2003), 331 F.3d 217, 235; *United States v. Scott* (C.A.7, 2002), 284 F.3d 758, 762; *United States v. Cherry* (C.A.10, 2000), 217 F.3d 811, 820; *United States v. Zlatogur* (C.A.11, 2001), 271 F.3d 1025, 1028; see, also, *Steele v. Taylor* (C.A.6, 1982), 684 F.2d 1193, 1202 (preponderance standard in making preliminary findings in waiver-by-misconduct cases); *State v. Boyes,* Licking App. Nos. 2003CA0050 and 2003CA0051, 2004-Ohio-3528, 2004 WL 1486333, ¶ 54–56 (applying the preponderance standard in determining whether the foundational requirements for Evid.R. 804(B)(6) were met). Thus, the trial court properly applied the preponderance-of-the-evidence standard in ruling on admissibility.

[2] {¶ 88} Second, Hand argues that the trial court erred in admitting Welch's statements without first considering Hand's affirmative defense of self-defense. However, Hand failed to offer any evidence of self-defense during the evidentiary hearing, although the defense had the opportunity to do so. Thus, the trial court made the appropriate ruling based on the evidence before the court.

[3] {¶ 89} Third, Hand contends that Welch's statements were not admissible under Evid.R. 804(B)(6), because the state failed to show that Hand's purpose in killing Welch was to make him unavailable as a witness. Hand argues that when Welch was killed, there were no pending charges and no evidence that Welch intended to testify against him at trial. We reject this argument.

[4] **[5]** {¶ 90} Evid.R. 804(B)(6) "extends to potential witnesses." Staff Notes (2001), Crim.R. 804(B)(6); *United States v. Houlihan,* 92 F.3d at 1279 (rule applies with "equal force if a defendant intentionally silences a *potential* witness." (Emphasis sic.) Thus, the absence of pending charges against Hand at the time he killed Welch did not preclude the admissibility of Welch's statements. Moreover, the state need not establish that Hand's sole motivation was to eliminate Welch as a potential witness; it needed to show only that Hand "was motivated *in part* by a desire to silence the witness." (Emphasis sic.) Id. at 1279; *United States v. Dhinsa* (C.A.2, 2001), 243 F.3d 635, 654. Hand's admissions to Grimes clearly established that one of Hand's purposes was to eliminate Welch as a potential witness.

[6] {¶ 91} Finally, Hand argues that the trial court erred in admitting Welch's statements because they were not reliable. Hand claims that the witnesses were not credible because they were Welch's friends, family members, and a cellmate. ***393** Moreover, Hand contends that Welch's friends and family members were angry at him for killing Welch.

****173** {¶ 92} Following the evidentiary hearings and before admitting Welch's statements under Evid.R. 804(B)(6), the trial court found that each witness was credible. The decision whether to admit these hearsay statements was within the trial court's discretion. See *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus (the admission of relevant evidence rests within the sound discretion of the trial court); cf. *State v. Landrum* (1990), 53 Ohio St.3d 107, 114, 559 N.E.2d 710 ("[T]he determination of whether corroborating circumstances are sufficient to admit statements against penal interest, as a hearsay exception, generally rests within the discretion of the trial court").

{¶ 93} No evidence supports Hand's allegations that Welch's friends and family members were not telling the truth, and their bias could have been explored on cross-examination. Indeed, courts generally hold that "where a declarant makes a statement to someone with whom he has a close personal relationship, such as a spouse, child, or friend, * * * that * * * relationship is a corroborating circumstance *supporting* the statement's trustworthiness." (Emphasis sic.) *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 53; see, also, *United States v. Tocco* (C.A.6, 2000), 200 F.3d 401, 416 (declarant's statements to his son in confidence considered trustworthy); *Latine v. Mann* (C.A.2, 1994), 25 F.3d 1162, 1166–1167 (reasoning that statements made to a perceived ally rather than to a police officer during an interrogation are trustworthy). Moreover, the testimony of Welch's friends and family members was corroborated by Jordan, Welch's cellmate, and Grimes, who testified that Hand admitted hiring Welch to kill Jill.

{¶ 94} Based on the foregoing, we find that the trial court did not abuse its discretion in admitting Welch's statements under Evid.R. 804(B)(6).

{¶ 95} **Admissibility under other evidentiary rules**. We further find that Welch's statements were admissible as statements against interest (Evid.R. 804(B)(3)), as a statement of intent (Evid.R. 803(3)), and as a co-conspirator's statement (Evid.R. 801(D)(2)(e)).

[7] {¶ 96} First, Evid.R. 804(B)(3) provides a hearsay exception where the declarant is unavailable as a witness. This rule states: "(3) *Statement against interest*. A statement that * * * at the time of its making * * * so far tended to subject the declarant to civil or criminal liability * * * 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 ***394** unless corroborating circumstances clearly indicate the trustworthiness of the statement."

{¶ 97} Welch's statements admitting his involvement in murdering Hand's wives qualified for admissibility under Evid.R. 804(B)(3). Welch's statements to Adams, Shannon, and Jordan implicating Hand in the murders were also admissible.[2] *State v. Madrigal* (2000), 87 Ohio St.3d 378, 721 N.E.2d 52, paragraphs one and three of the syllabus (out-of-court statements made by an accomplice that incriminate the defendant may be admitted as evidence if the statement contains adequate indicia of reliability); see, also, ****174** *State v. Issa* (2001), 93 Ohio St.3d 49, 60, 752 N.E.2d 904; *Lilly v. Virginia* (1999), 527 U.S. 116, 134, 119 S.Ct. 1887, 144 L.Ed.2d 117, fn. 5. As in *Issa,* Welch's statements were voluntarily made to family and friends. Moreover, in his statements, Welch did not attempt to shift blame from himself, because he admitted his role as the shooter in multiple killings. *Issa,* 93 Ohio St.3d at 61, 752 N.E.2d 904. Thus, the circumstances surrounding Welch's statements did render Welch particularly worthy of belief. See id.

{¶ 98} Second, Evid.R. 803(3) creates a hearsay-rule exception for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed."

[8] **[9]** {¶ 99} Under Evid.R. 803(3), statements of current intent to take future actions are admissible for the inference that the intended act was performed. See *Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 33; *Sage,* 31 Ohio St.3d at 182–183, 31 OBR 375, 510 N.E.2d 343; see, generally, *Mut. Life Ins. Co. of New York v. Hillmon* (1892), 145 U.S. 285, 295, 12 S.Ct. 909, 36 L.Ed. 706. Not all of Welch's statements were admissible under this rule. However, Welch's statement to Shannon, "I got to kill the present wife and I'll have a lot of money after that," was admissible under Evid.R. 803(3) to prove that Welch later acted in conformity with that intention. Welch's statement to Shannon, "I got to * * * be ready to go to see Bob because I might be taking care of my business tonight," was also admissible as evidence of his intention. Similarly, Welch's statement to Evans on the night of the murders that "he was going to pick up some money and he'd be right back" was admissible to help show that Welch intended to meet with Hand and collect money from him for shooting Jill. Finally, Welch's statement to Jordan that he intended to "take somebody out for * * * ***395** Bob" and planned to do so "sometime in January" was admissible to help prove that Welch later went to Hand's home to carry out this plan.

[10] **[11]** {¶ 100} Third, Evid.R. 801(D)(2)(e) provides: "A statement is not hearsay if * * * [t]he statement is offered against a party and is * * * a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." Statements of co-conspirators are not admissible under Evid.R. 801(D)(2)(e) until the proponent of the statement has made a prima facie showing of the existence of the conspiracy by independent proof. *State v. Carter* (1995), 72 Ohio St.3d 545, 651 N.E.2d 965, paragraph three of the syllabus. However, explicit findings of a conspiracy's existence need not be made on the record. *State v. Robb* (2000), 88 Ohio St.3d 59, 70, 723 N.E.2d 1019.

[12] {¶ 101} Welch's statements to Shannon and Jordan were admissible under Evid.R. 801(D)(2)(e). Hand's statements to his cellmate, Grimes, provided independent proof of the conspiracy's existence. See *State v. Duerr* (1982), 8 Ohio App.3d 396, 400, 8 OBR 511, 457 N.E.2d 834 (defendant's own statements can provide "independent proof" of the conspiracy). Hand called Welch a business partner and said he had hired Welch to kill his wife.

{¶ 102} The facts show that by July 2001, Hand and Welch had entered into a conspiracy to murder Jill. During that period of time, Welch began asking Shannon whether he had a pistol so that Welch could kill Hand's wife. Welch's ongoing **175 requests for a pistol and his conversations with Shannon about murdering Jill were within the scope of the conspiracy. Further, Welch's December 2000 and January 2001 jailhouse conversations with Jordan about the murder were also within the scope of the conspiracy.

[13] {¶ 103} **Right to Confrontation**. Hand contends that the admission of Welch's statements under Evid.R. 804(B)(6) violated his Sixth Amendment right to confrontation. In making this argument, Hand relies upon the Supreme Court's recent decision in *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. However, we reject Hand's claims.

{¶ 104} In *Crawford,* the Supreme Court held that it is a violation of the Confrontation Clause to admit "testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Id. at 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (overruling *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, which held that statements from an unavailable witness may be admissible without violating the Confrontation Clause if the statements had been found to be reliable).

{¶ 105} However, *Crawford* explicitly preserved the principle that an accused has forfeited his confrontation right where the accused's own misconduct is *396 responsible for a witness's unavailability. Id. at 62, 124 S.Ct. 1354, 158 L.Ed.2d 177 ("[t]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability"). See, also, *Reynolds v. United States* (1879), 98 U.S. 145, 158, 25 L.Ed. 244 (if a witness is unavailable because of the defendant's own misconduct, "he is in no condition to assert that his constitutional rights have been violated").

{¶ 106} The trial court's preliminary determination that Welch's statements were admissible included a finding that Hand killed Welch to eliminate him as a potential witness. Indeed, Hand admitted to Grimes that he killed Welch to achieve that purpose (i.e., prevent him from being a witness against him). Thus, Hand forfeited his right to confront Welch because his own misconduct caused Welch's unavailability. See *United States v. Garcia–Meza* (C.A.6, 2005), 403 F.3d 364, 369–370 (defendant forfeited his right to confront his wife because his wrongdoing—i.e., his murder of her—was responsible for her unavailability).

{¶ 107} Finally, the admission of Welch's statements on the basis of Evid.R. 804(B)(3), Evid.R. 803(3), or Evid.R. 801(D)(2)(e) would not violate Hand's Sixth Amendment right to confront witnesses, because he killed Welch and thereby made him unavailable to testify. Such waiver by misconduct is consistent with *Crawford,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. Indeed, *Crawford*'s affirmation of the "essentially equitable grounds" for the rule of forfeiture shows that the rule's applicability does not hinge on the evidentiary basis for the testimony's admissibility. Id. at 62, 124 S.Ct. 1354, 158 L.Ed.2d 177. See *Garcia–Meza,* 403 F.3d at 370–371; *United States v. Thompson* (C.A.7, 2002), 286 F.3d 950, 963, citing *United States v. Cherry* (C.A.10, 2000), 217 F.3d 811, 820 (applying waiver-by-misconduct rule to co-conspirator).

{¶ 108} Based on the foregoing, we overrule proposition of law I.

[14] {¶ 109} ***Other evidentiary issues***. In proposition of law II, Hand argues that the prosecutor's closing argument improperly **176 mentioned evidence of Hand's fraudulent business practices and improperly presented "other acts" evidence. Hand also argues that the trial court failed to provide the jury with adequate limiting instructions. However, except where mentioned, the defense failed to object and waived all but plain error. See *State v. Wade* (1978), 53 Ohio St.2d 182, 7 O.O.3d 362, 373 N.E.2d 1244, paragraph one of the syllabus; *State v. Childs* (1968), 14 Ohio St.2d 56, 43 O.O.2d 119, 236 N.E.2d 545, paragraph three of the syllabus.

{¶ 110} **1. Mentioning fraudulent business practices during closing argument.** Allen Peterson, Hand's accountant, prepared the corporate income tax returns for Hand's radiator business and testified that the business suffered financial losses for a number of years before going out of business.

*397 {¶ 111} The defense objected to evidence of Hand's tax returns as irrelevant and moved to strike Peterson's

entire testimony. In overruling the defense objection, the trial court provided the jury with the following limiting instruction: "Exhibits that were admitted, being the tax returns from yesterday, those are admitted solely for showing a motive. They are not to be construed * * * in any other way, for any other purpose, such as how record keeping may have taken place, strictly on that sole issue."

{¶ 112} Hand testified in his own behalf and stated that he paid Welch and Adams "cash under the table" to avoid paying withholding taxes and to avoid a paper trail. Hand also admitted that he had not filed a personal federal income tax return for at least 15 years.

{¶ 113} During the closing argument, the prosecutor reviewed evidence of Hand's business practices and made the following argument:

{¶ 114} "And did you catch his statement * * * about he and his father like to save on their taxes by paying employees under the table in cash? We all know that tax avoidance is common in this country, but what he calls saving on taxes is actually fraud. The fact that he so breezily engaged in that kind of behavior * * * *tells us much about his respect for the law and his willingness to lie and deceive*. This wasn't just a rinky-dink, every once in a while practice, that the defendant engaged in during the slow season of his business. Exhibit 275, prepared by Detective Otto, indicates that the defendant billed more than one hundred thousand dollars fraudulently to his own business on his own credit cards. *This was fraud on a massive scale, and it exemplifies the way in which this man operates*." (Emphasis added.)

{¶ 115} Hand concedes that evidence of his financial situation was proper to prove motive. However, Hand contends that the prosecutor improperly argued that his illegal business practices showed that he did not hesitate to violate the law in general.

[15] **[16]** {¶ 116} The prosecution is entitled to significant latitude in its closing remarks. The prosecutor may comment on " 'what the evidence has shown and what reasonable inferences may be drawn therefrom.' " *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293, quoting *State v. Stephens* (1970), 24 Ohio St.2d 76, 82, 53 O.O.2d 182, 263 N.E.2d 773. As to defense witnesses, including the defendant, the prosecutor may comment upon their testimony and suggest the conclusions to be drawn therefrom. The prosecutor may state that "the evidence supports the conclusion that the defendant is not telling the truth, is scheming, or has ulterior motives for not telling the truth." See *State v. Finkes* (Mar. 28, 2002), Franklin App. No. 01AP–310, 2002 WL 464998, *9; *State v.* ****177** *Draughn* (1992), 76 Ohio App.3d 664, 670, 602 N.E.2d 790.

[17] **[18]** **[19]** ***398** {¶ 117} Hand's credibility was at issue because he testified in his own defense. The prosecutor's characterization of Hand's behavior as fraud and his argument that Hand's illegal business practices showed his "willingness to lie and deceive" represented fair comment on Hand's credibility. However, the argument that Hand committed "fraud on a massive scale, and it exemplifies the way in which this man operates" represented an overly broad comment on Hand's character. Nevertheless, we find no plain error in view of the overwhelming evidence of Hand's guilt. Cf. *State v. Rahman* (1986), 23 Ohio St.3d 146, 154–155, 23 OBR 315, 492 N.E.2d 401.

[20] {¶ 118} **2. Reaction to wives' deaths**. Hand contends that testimony about his reaction to news about Lori's and Jill's murder was improper "other acts" evidence. Sam Womeldorf, a now retired Columbus homicide detective, was involved in the murder investigations of Donna and Lori. Womeldorf described Hand's demeanor after Hand was notified of Lori's death:

{¶ 119} "A: In dealing with Bobby on the * * * death of his first wife, I noticed that Bobby carried on; he was not exactly honest with me * * * in particular things. * * * And I noticed that when Bobby came this time, he was very similar to the first time, he carried on, and * * * stomping and * * * demanding to go in the house and the same thing he did on the other one. And you would think he was crying, however, * * *—

{¶ 120} "Mr. Sherman: I'm going to object. This is all opinion.

{¶ 121} "The Court: Overruled.

{¶ 122} " * * *

{¶ 123} "A: I noticed he wasn't crying; there were no tears."

{¶ 124} Evid.R. 701, which governs opinion testimony by lay witnesses, provides: "If the witness is not testifying as an expert, his 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 his testimony or the determination of a fact in issue."

{¶ 125} Womeldorf's testimony satisfied both requirements of Evid.R. 701. Womeldorf personally observed Hand's demeanor, and the lack of grief was relevant in showing Hand's strange reaction after learning that Lori had been killed. See *State v. Griffin,* Hamilton App. No. C–020084, 2003-Ohio-3196, 2003 WL 21414664, ¶ 37–38 (testimony that defendant "began to cry and sob, but there were no tears" admissible as lay opinion); cf. *State v. Stojetz* (1999), 84 Ohio St.3d 452, 463, 705 N.E.2d 329 (testimony that witness appeared "scared" and "not able to think" admissible as lay opinion). We find that the trial court did not abuse its discretion in admitting this testimony. See *Sage,* 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus.

[21] ***399** {¶ 126} Hand also claims that Abel Gonzalez, Hand's son-in-law, improperly testified that Hand failed to show remorse following Jill's death. Two to three weeks after Jill's death, Abel talked to Hand about Jill's estate. During his testimony, Abel was asked about Hand's demeanor:

{¶ 127} "Q: What was his demeanor when you had this conversation with him?

{¶ 128} "A: It was just a matter of fact. It was more like just a business conversation, let's say.

****178** {¶ 129} "Q: Did he ever say he missed Jill?

{¶ 130} "A: No.

{¶ 131} "Q: Did he act sad about what had happened?

{¶ 132} "A: I can't say he was sad; no."

{¶ 133} Hand's emotional reaction two to three weeks after Jill's death was of questionable relevance. However, we find that Gonzalez's testimony did not constitute outcome-determinative plain error in view of the compelling evidence of Hand's guilt.

{¶ 134} **3. Sex-related testimony**. At trial, Womeldorf testified that Hand told him: "[Lori] was cold and he was a horny old man. * * * [He] wanted sex at least once a night and she didn't want to do that." Hand argues that this testimony was improperly admitted.

[22] {¶ 135} The admission of Hand's statement about his sexual relations with Lori was a matter of relevancy. Evid.R. 401 provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." We find that testimony about Hand's frequent desire for sex and his wife's lack of that interest was relevant as a possible motive for Lori's murder.

[23] {¶ 136} Hand also argues that testimony that he was infatuated with Barbara McKinney's daughter was improper other-acts evidence. Barbara's testimony included the following questioning:

{¶ 137} "Q: Did you ever see Lonnie Welch and Bob Hand get together when you lived at the home on King Edward Avenue?

{¶ 138} "A: Bob Hand used to come to our house and pick Lonnie up frequently. And he also had an infatuation, I guess, for my youngest daughter."

{¶ 139} Barbara's nonresponsive remark was harmless, and her testimony was not repeated. Given the overwhelming evidence of Hand's guilt, we find that this isolated remark did not result in outcome-determinative plain error.

[24] {¶ 140} **4. Interest in "true crime" stories.** Hand also claims that testimony that he read "true crime" stories was improperly admitted. William Bowe, a ***400** childhood friend of Hand, testified, "[W]hen we [were] younger," Hand liked to read about "the perfect crime and stuff like that."

{¶ 141} Hand's childhood interest in crime stories was only marginally relevant in showing that Hand may have used information about police work to manipulate the crime scene at his Delaware home. However, we find that the

testimony did not result in outcome-determinative plain error.

[25] {¶ 142} **5. Forcing his father out of business and Hand's obsession with money**. Hand contends that the state improperly introduced evidence that he forced his father out of his radiator business and was obsessed with money. Bowe worked for ten years at Hand's radiator shop. During his testimony, Bowe explained why he left the shop:

{¶ 143} "Q: And you said you worked there about ten years, until 1980, I gather?

{¶ 144} "A: Yeah; * * * he bought the building—

{¶ 145} "Q: You mean—

{¶ 146} "A: Bob.

{¶ 147} "Q: Okay; the defendant.

{¶ 148} "A: He kicked his dad out of there.

{¶ 149} "Q: What do you mean?

****179** {¶ 150} "A: Well, I don't know. They had an argument or something, and the next thing I know, he's smashing the windows out of the shop and said you got three days to move out of here.

{¶ 151} "Q: Who is he saying that to?

{¶ 152} "A: To his dad.

{¶ 153} "Q: I see.

{¶ 154} "A: So we did move, and I went with his dad."

{¶ 155} This evidence established that Hand took over the radiator business and then hired Welch to work for him. Testimony that Hand fired his father and gave him three days to leave the shop was of highly questionable relevance. But we find that the evidence did not result in outcome-determinative plain error.

[26] {¶ 156} Hand also argues that testimony that he was obsessed with money was improperly introduced. Here, Bowe testified:

{¶ 157} "Q: * * * Do you have any knowledge about the defendant's views toward money, finances?

{¶ 158} "A: No; everybody knows Bob, and that's been his big thing in life is how much money he can get in his pocket. He's a money person.

{¶ 159} "Q: And why do you say that?

***401** {¶ 160} "A: Ever since we was kids, * * * his quest in life is money."

{¶ 161} We find that Bowe's opinion testimony was admissible under Evid.R. 701 because it was based upon his lifelong relationship with Hand, and Bowe's opinion helped to explain Hand's financial motives.

[27] {¶ 162} **6. Limiting instructions**. Hand argues that the trial court erred by not providing limiting instructions on the admissibility of "other acts" evidence. As discussed earlier, the trial court provided the jury with limiting instructions on the consideration of Hand's tax returns. However, the defense did not request any further limiting instructions at the end of the guilt-phase evidence. Hand's failure to request such instructions waived all but plain error. In any event, nothing suggests that the jury used other-acts evidence to convict Hand on the theory that he was a bad person. Thus, we find that the trial court's failure to give further limiting instructions did not constitute plain error. See *State v. Grant* (1993), 67 Ohio St.3d 465, 472, 620 N.E.2d 50.

{¶ 163} Based on the foregoing, proposition of law II is overruled.

{¶ 164} ***Joinder of escape charge***. In proposition of law III, Hand contends that the trial court erred in denying his motion to sever Count Six, the escape charge, from the rest of the charges.

{¶ 165} Under Crim.R. 8(A), two or more offenses may be charged together if the offenses "are of the same or similar character * * * or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." In fact, "[t]he law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged 'are of the same or similar character.' "

Lott, 51 Ohio St.3d at 163, 555 N.E.2d 293, citing *State v. Torres* (1981), 66 Ohio St.2d 340, 343, 20 O.O.3d 313, 421 N.E.2d 1288.

[28] {¶ 166} A defendant requesting severance has the "burden of furnishing the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial." *Torres,* 66 Ohio St.2d at 343, 20 O.O.3d 313, 421 N.E.2d 1288. A defendant claiming error in the denial of ****180** severance must affirmatively show that his rights were prejudiced and that the trial court abused its discretion in refusing separate trials. Id. Here, the trial court did not abuse its discretion in denying the motion to sever. Nor was Hand prejudiced by the joinder.

[29] **[30]** {¶ 167} First, Hand's participation in the escape attempt was evidence of flight and was admissible as tending to show his consciousness of guilt. Indeed, an accused's " 'flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.' " ***402** *State v. Eaton* (1969), 19 Ohio St.2d 145, 160, 48 O.O.2d 188, 249 N.E.2d 897, quoting 2 Wigmore on Evidence (3d Ed.1979) 111, Section 276; see, also, 1 Giannelli & Snyder, Evidence (2d Ed.2001) 167–170, Section 401.9.

{¶ 168} The defense did not challenge instructions on evidence of flight at trial. However, Hand now contends that his minimal participation in the escape attempt would not have been admissible as evidence of flight if he had had a separate murder trial. We reject that argument because Hand was actively involved in the escape attempt. Beverly testified that Hand served as a lookout when Beverly was sawing through the cell bars, Hand provided advice on how to cut through the metal bars, and Hand talked to Beverly about alternative ways of escaping. Moreover, Grimes testified that Hand and Beverly devised a plan to escape through the front of the cell block. Under this plan, Hand would "sidetrack the nurses and guards and Mr. Beverly would go and apprehend one of the guards * * * and they would go through the front door, because time was getting near for both of them, and the door wasn't ready to come through."

[31] {¶ 169} Hand also argues that joinder was not justified, because more than nine months elapsed between the murders (January 15, 2002) and the escape attempt (October 30, 2002, through November 26, 2002). However, admissibility of evidence of flight does not depend upon how much time passes between the offense and the defendant's flight. See *State v. Alexander* (Feb. 26, 1987), Cuyahoga App. No. 51784, 1987 WL 7079, *2. Indeed, flight on the eve of trial can carry the same inference of guilt as flight from the scene. Id. Here, Hand's escape attempt occurred while pretrial hearings were underway. Thus, this argument also lacks merit.

[32] {¶ 170} Finally, the evidence of Hand's guilt is "amply sufficient to sustain each verdict, whether or not the indictments were tried together." *Torres,* 66 Ohio St.2d at 344, 20 O.O.3d 313, 421 N.E.2d 1288. In this case, circumstantial evidence, forensic testimony, Welch's statements, and Hand's own statements proved Hand's guilt of the murders. Additionally, Grimes's and Beverly's testimony provided independent evidence of Hand's guilt of escape. Thus, the strength of the state's proof "establishes that the prosecution did not attempt to prove one case simply by questionable evidence of other offenses." *State v. Jamison* (1990), 49 Ohio St.3d 182, 187, 552 N.E.2d 180.

{¶ 171} Based on the foregoing, we overrule proposition of law III.

{¶ 172} ***Sufficiency of the evidence of escape.*** In proposition of law IV, Hand challenges the sufficiency of the evidence for his conviction of escape in Count Six.

{¶ 173} In reviewing a claim of insufficient evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found ****181** the essential elements of the crime ***403** proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 174} Hand argues that the evidence of escape was insufficient because there was no evidence that he planned the unsuccessful escape attempt or directly assisted in cutting the locks or hiding the tools. Hand also contends that the testimony that he was acting as a lookout, if true, was insufficient to convict him.

[33] {¶ 175} The record refutes Hand's claims. Testimony showed that Hand served as a lookout when Beverly was sawing through the cell bars, provided advice to Beverly on cutting through the cell bars, and helped devise an alternative plan to escape through the front door of the jail. Moreover, circumstantial evidence supported Hand's guilt. This evidence consisted of some torn-up tee-shirt material and a pencil with a piece of tee-shirt tied around it found in Hand's cell after the aborted escape attempt. According to Delaware County Detective Brian Blair, "[t]hese pieces of cloth are consistent to what was tied to the saw blades and it's consistent to what inmates do to hide things * * * so they can be easily accessed by pulling on this after tying something to it, i.e., saw blades." Thus, the evidence established that Hand actively participated in the escape attempt.

[34] {¶ 176} Finally, even assuming that the evidence established only that Hand was acting as a lookout, Hand was an accomplice in the attempted escape. See *State v. Lett,* 160 Ohio App.3d 46, 2005-Ohio-1308, 825 N.E.2d 1158, ¶ 29, citing *State v. Trocodaro* (1973), 36 Ohio App.2d 1, 5, 65 O.O.2d 1, 301 N.E.2d 898 (aiding and abetting established by overt acts such as serving as a lookout). Under R.C. 2923.03(F), an accomplice "shall be prosecuted and punished as if he were a principal offender." See, also, *State v. Bies*, 74 Ohio St.3d at 325, 658 N.E.2d 754.

{¶ 177} Based on the foregoing evidence, viewed in the light most favorable to the prosecution, we find that sufficient evidence supports Hand's conviction for escape. Thus, we overrule proposition of law IV.

{¶ 178} ***Amended bill of particulars***. In proposition of law V, Hand argues that the trial court erred in permitting the state to amend the bill of particulars at the close of the evidence and to argue that Hand was a complicitor. He also argues that the trial court erred in instructing the jury on complicity.

{¶ 179} Before trial, the state provided the defense with a bill of particulars that set forth in Count One that "on or about the 15th day of January, 2002, the Defendant did, purposefully and with prior calculation and design, cause the death of Jill J. Hand by means of a firearm." On May 28, 2003, at the close of the evidence and prior to final instructions, the state provided the defense with an amended bill of particulars. The amendment to Count One stated that Hand ***404** killed Jill "by firing that weapon himself, or by soliciting or procuring Walter 'Lonnie' Welch to commit the offense, and in either case, the defendant acted purposely and with prior calculation and design." The defense objected to the proposed complicity instructions because of the late notice of complicity in the amended bill of particulars. Thereafter, the trial court instructed the jury on complicity to commit murder.

{¶ 180} Crim.R. 7(E) states: "[Upon timely request or court order], the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically ****182** the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires." Crim.R. 7(D) authorizes the court to amend a bill of particulars "before, during, or after a trial," provided that "no change is made in the name or identity of the crime charged."

[35] {¶ 181} Hand argues that because the original bill of particulars indicated that he was the principal offender on Count One, he lacked notice that the trial court would instruct on complicity on that count. However, this claim lacks merit. R.C. 2923.03(F) states: "A charge of complicity may be stated in terms of this section, or in terms of the principal offense." This provision adequately notifies defendants that the jury may be instructed on complicity, even when the charge is drawn in terms of the principal offense. See *State v. Keenan* (1998), 81 Ohio St.3d 133, 151, 689 N.E.2d 929, citing *Hill v. Perini* (C.A.6, 1986), 788 F.2d 406, 407–408.

[36] {¶ 182} Additionally, for the amendment to constitute reversible error, Hand must demonstrate that the amendment hampered his defense or prejudiced him. See *State v. Chinn* (1999), 85 Ohio St.3d 548, 569, 709 N.E.2d 1166. Hand fails to point out how he could have defended himself differently, given notice that complicity would also be an issue as to Count One. From the beginning of the police investigation into Jill's murder, Hand claimed that he was not involved in Jill's murder. Hand asserted that Welch was an intruder into his home and that Welch shot Jill. Hand's denial of involvement in Jill's murder would not have changed the main thrust of his defense regardless of whether the state proceeded on the theory that Hand was the principal or a complicitor. See *State v. Herring* (2002), 94 Ohio St.3d 246, 251, 762

N.E.2d 940 (rejecting defense claims of prejudice from late notice of the state's complicity theory). Thus, we find that Hand's claims of prejudice are speculative and lack merit.

{¶ 183} Moreover, we reject Hand's complaint about lack of notice because Hand did not request a continuance upon receiving the amended bill of particulars. Clearly, the defense could have requested a continuance if counsel needed additional time to prepare a defense to the complicity theory.

***405** {¶ 184} In sum, Hand was not misled or prejudiced by the state's notification of complicity in the amended bill of particulars. Moreover, the trial court did not err in instructing on complicity. Thus, proposition of law V is overruled.

{¶ 185} ***Course-of-conduct instructions***. In proposition of law VI, Hand argues that the course-of-conduct instruction was defective in failing to specify the names of the murder victims covered by the specification. He also attacks the course-of-conduct instruction as unconstitutionally vague.

{¶ 186} **1. Constitutional challenge**. "The course-of-conduct specification set forth in R.C. 2929.04(A)(5) is not void for vagueness under either the Eighth Amendment to the United States Constitution or Section 9, Article I of the Ohio Constitution." *State v. Benner* (1988), 40 Ohio St.3d 301, 533 N.E.2d 701, syllabus. Accord *State v. Cornwell* (1999), 86 Ohio St.3d 560, 569, 715 N.E.2d 1144; *State v. Brooks* (1996), 75 Ohio St.3d 148, 155, 661 N.E.2d 1030. We find no basis to overturn that ruling.

{¶ 187} **2. Trial court's course-of-conduct instruction**. The bill of particulars specified that the course of conduct set forth in Specification One of Count One and Count Two involved the murders of ****183** "Jill J. Hand and Walter M. 'Lonnie' Welch, and the course of conduct began and ended on January 15, 2002." The guilt-phase instructions on course of conduct in Specification One of Count One stated:

{¶ 188} "Before you can find the defendant guilty of Specification One, under the first count of the indictment, you must find beyond a reasonable doubt that the aggravated murder of Jill [J.] Hand was part of a course of conduct involving the purposeful killing of two or more persons by the defendant."

{¶ 189} The guilt-phase instructions on course of conduct in Specification One of Count Two stated:

{¶ 190} "Before you can find the defendant guilty of Specification One, under the second count of the indictment, you must find beyond a reasonable doubt that the aggravated murder of Walter Lonnie Welch was part of a course of conduct involving the purposeful killing of two or more persons by the defendant."

[37] {¶ 191} The defense never objected to either of these instructions and thus waived all but plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332, syllabus.

[38] {¶ 192} First, Hand complains about the lack of guidance for determining whether two or more murders occurred as part of a course of conduct. However, after the completion of briefing in this case, we decided *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239, which sets forth a test for course of conduct: "The statutory phrase 'course of conduct' found in R.C. 2929.04(A)(5) requires that the state *establish some factual link* between the aggravated ***406** murder with which the defendant is charged and the other murders or attempted murders that are alleged to make up the course of conduct. In order to find that two offenses constitute a single course of conduct under R.C. 2929.04(A)(5), the trier of fact 'must * * * discern some connection, common scheme, or some pattern or psychological thread that ties [the offenses] together.' " (Emphasis added.) Id. at the syllabus, quoting *State v. Cummings* (1992), 332 N.C. 487, 510, 442 S.E.2d 692. Moreover, "the factual link might be one of time, location, murder weapon, or cause of death." *Sapp* at ¶ 52. Ultimately, "when two or more offenses are alleged to constitute a course of conduct under R.C. 2929.04(A)(5), all the circumstances of the offenses must be taken into account." Id. at ¶ 56.

{¶ 193} The facts surrounding the murders of Jill and Welch meet *Sapp*' s criteria for course of conduct. The two murders occurred at the same time and place, and Hand had related motives for the murders. Hand's motive in murdering Jill was to collect her life insurance and pay off his massive debts. Hand's motive in murdering Welch was to eliminate the witness against him for Jill's murder and the murders of his previous two wives. Thus, the

two offenses were related by time, place, and motive and establish a single course of conduct.

[39] {¶ 194} Second, Hand contends that the instructions were deficient by failing to specify Jill's and Welch's murders as the subject of the course-of-conduct specifications. Hand argues that this lack of specificity resulted in prejudicial error because the jury might have also considered Donna's and Lori's murders as part of the course of conduct. The two course-of-conduct specifications accompanied the murder counts for Jill's and Welch's murders. However, there were no murder counts for Donna's and Lori's murders. Under these circumstances, the jury was not misled and could reasonably find that the course-of- ****184** conduct related only to Jill's and Welch's murders. Thus, we find no plain error.

[40] {¶ 195} Moreover, there was no risk that the defense suffered any prejudicial error. During the penalty-phase instructions, the trial court advised the jury:

{¶ 196} "The aggravating circumstance that you shall consider as to Count One of the indictment involving the death of Jill Hand is that this offense was part of a course of conduct involving the purposeful killing of Jill J. Hand and Walter Lonnie Welch by the defendant."

{¶ 197} Thus, the penalty-phase instructions clearly stated that Jill's and Welch's murders were the subject of the course-of-conduct aggravating circumstance. See *State v. Loza* (1994), 71 Ohio St.3d 61, 79, 641 N.E.2d 1082 ("[i]t is presumed that the jury will follow the instructions given to it by the judge"). Thus, there was no risk that the jury sentenced Hand to death for the murders of Donna and Lori.

***407** {¶ 198} In sum, we find no outcome-determinative plain error, and proposition of law VI is overruled.

{¶ 199} ***Ineffective assistance of counsel.*** In proposition of law VII, Hand raises numerous instances of ineffective assistance of counsel during the guilt phase. Reversal of a conviction for ineffective assistance of counsel "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." *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus.

{¶ 200} **1. Voir dire of Juror Lombardo.** Hand claims that his counsel were ineffective for failing to explore the bias of Juror Lombardo, a seated juror, and strike her from the jury. However, " '[t]he conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked.' " *Cornwell*, 86 Ohio St.3d at 568, 715 N.E.2d 1144, quoting *State v. Evans* (1992), 63 Ohio St.3d 231, 247, 586 N.E.2d 1042. Moreover, "counsel is in the best position to determine whether any potential juror should be questioned and to what extent." *State v. Murphy* (2001), 91 Ohio St.3d 516, 539, 747 N.E.2d 765.

[41] {¶ 201} Hand contends that his counsel failed to explore Juror Lombardo's bias after she disclosed that her husband had worked with Jill Hand. Juror Lombardo stated that her husband, an investigator with the Ohio Attorney General, "had worked with [Jill] on and off for about 12 years. She was with DMV [Division of Motor Vehicles] and * * * he had an investigation regarding the DMV." Thereafter, Juror Lombardo was asked whether she would be able to fairly consider the testimony of witnesses who worked with the Attorney General's Office. Juror Lombardo stated that she would "listen to their testimony separate from [her] husband's work, absolutely." Juror Lombardo also assured counsel that "[i]t would not be difficult at all" to separate what happens at trial from her husband. Thus, counsel did question Juror Lombardo about her bias, and her responses indicated that her husband's job would not influence her performance as a juror.

[42] {¶ 202} Hand also argues that his counsel were deficient by failing to inquire further about the death of Juror Lombardo's daughter. This segment of voir dire occurred as follows:

{¶ 203} "Mr. Cline: In the course of listening to whatever comments were ****185** made, how did you feel about what you were hearing?

{¶ 204} "Ms. Lombardo: Well, I lost a daughter in the past and I pretty much went through a lot of stuff. I felt very sad, but I really didn't pursue it. I just ***408** really have a yearning to know more about it. Of course, I had feelings

about it, sadness. I would still need to know more about what happened.

{¶ 205} "Mr. Cline: On your questionnaire, the question was asked if you had started to form any opinions and I think you marked, 'Not sure.' Then your next comment was, 'Mr. Hand is entitled to a fair and just trial.'

{¶ 206} "Ms. Lombardo: He absolutely is."

{¶ 207} Hand argues that Ms. Lombardo's response about her daughter's death raised issues of potential bias that his counsel was obligated to pursue. However, Hand's claim of potential bias is speculative. Juror Lombardo had earlier assured the court that she could decide the case solely upon the evidence and agreed to set aside her personal beliefs and follow the law in deciding the case. Moreover, the follow-up question eliciting Juror Lombardo's reaffirmation that Hand was entitled to a fair trial diminished the likelihood that her daughter's death was a potential source of bias. Given these circumstances, we find that trial counsel's decision not to question Juror Lombardo any further about the loss of her daughter, a very personal issue, was a proper exercise of discretionary judgment. See *State v. Lindsey* (2000), 87 Ohio St.3d 479, 490, 721 N.E.2d 995.

[43] {¶ 208} Finally, Hand argues that his counsel were deficient in failing to challenge Juror Lombardo for bias after she disclosed that she had witnessed workplace violence. About 30 years earlier, Juror Lombardo had seen her boss confront an intruder where she worked. She later learned that her boss had shot the man. Juror Lombardo was a witness in the subsequent murder trial, and her testimony supported the jury's decision that her boss had acted in self-defense. During a follow-up question, the trial counsel asked Juror Lombardo, "Do you believe that a person who has been put in danger, or his life is threatened should have the right to defend himself or herself?" Juror Lombardo answered, "Yes."

{¶ 209} Here, Juror Lombardo's views about self-defense were favorable to the defense because Hand claimed that he killed Welch in self-defense. Thus, we reject Hand's claim that his counsel were ineffective by failing to challenge Juror Lombardo for cause or peremptorily because of her prior experience with workplace violence. See *State v. Vrabel,* 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 54–56.

[44] {¶ 210} **2. Failure to call a defense witness**. Hand also argues that his counsel were ineffective by failing to call Phillip Anthony, Welch's cousin, as a defense witness.

{¶ 211} During the evidentiary hearing on the admissibility of Welch's statements, Anthony testified that sometime during 1986 or 1987, Welch admitted killing Donna and Lori. Welch also told Anthony that he had "snuck into a basement window and that all the doors and windows in the house were sealed ***409** and locked, * * * and made the second murder identical to the first." Retired Police Detective Sam Womeldorf, the investigator of Donna's death, had earlier testified that the basement "windows were locked on the inside. It appeared that no entry was made through either of these windows." Retired Police Lieutenant Robert Britt, who had been an investigator into Lori's death, also ****186** testified that the basement windows were locked.

{¶ 212} The trial court ruled that Anthony's testimony was admissible, but the state decided not to call Anthony as a witness. However, Hand argues that his counsel were deficient in not calling Anthony as a witness, because Welch's statements contradicted police testimony that the basement windows were not the entry point for the killer.

{¶ 213} "Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh* (2001), 90 Ohio St.3d 460, 490, 739 N.E.2d 749; *State v. Hughbanks,* 99 Ohio St.3d 365, 2003-Ohio-4121, 792 N.E.2d 1081, ¶ 82. Welch's statement to Anthony that he entered the basement window to kill Donna and Lori appears to contradict police testimony. However, Anthony's testimony would have also strengthened the state's case.

{¶ 214} During the evidentiary hearing, Anthony testified that Welch discussed the plans to kill Jill. During the first two weeks of January 2002, Welch asked Anthony to find him a gun. Anthony testified that Welch said he needed a gun, explaining, " '[T]he guy I did that thing for * * * said he wants me to do another one.' " Welch told him, "I need this [gun] now * * * I can't wait a week, I can't wait a day, I really need this now, I've got something to do." On the night before the murders, Welch asked whether Anthony had found him a gun, and Anthony told him no. Welch expressed his unease about meeting Hand and

asked Anthony for a ride to Hand's house to "watch [his] back a little bit." Welch indicated that he "wasn't going up there to kill nobody. The deal was * * * they were going up there to iron it out. How much, where, how, when, type of situation." Thus, Welch was "planning to go up, talk to Mr. Hand, iron out all the specifics of the murder, and that's it."

{¶ 215} Trial counsel were not deficient by choosing not to call Anthony as a defense witness even though some of his testimony might have helped the defense case. Welch's comments to Anthony showed a sense of urgency to obtain a weapon to murder Jill that was not otherwise in evidence. Moreover, Welch's statements show that he did not intend to murder Jill when he went to Hand's home on the evening of January 15. Anthony's testimony undermined Hand's claim that Welch was an intruder who entered his home and murdered his wife. Such testimony would have contradicted Hand's self-defense theory. Thus, trial ***410** counsel made a legitimate tactical decision to not call Anthony as a defense witness. *State v. Bradley,* 42 Ohio St.3d at 144, 538 N.E.2d 373.

{¶ 216} **3. Failure to object to Welch's statements under Evid.R. 801(D)(2)(e).** Hand argues that his counsel were deficient by failing to argue that Welch's statements to friends and family members were not admissible as statements of a co-conspirator until the prosecutor had made a prima facie case showing the existence of the conspiracy by independent proof. However, as we discussed in proposition of law I, Welch's statements were properly admissible under Evid.R. 804(B)(6). Thus, Hand suffered no prejudice.

{¶ 217} **4. Failure to object to other-acts evidence and argument**. Hand also argues that his counsel were deficient by failing to object to testimony about Hand's reaction to Jill's death, that Hand forced his father out of business, that Hand was obsessed with money, that he enjoyed reading true-crime stories, and that he was infatuated with Barbara McKinney's ****187** daughter. Further, Hand argues that his counsel were deficient by failing to object to the prosecutor's argument that his illegal business practices showed his propensity to commit the charged offenses. However, as we discussed in proposition of law II, Hand was not prejudiced by counsel's failure to object to any of this testimony or the prosecutor's argument.

{¶ 218} **5. Failure to present evidence of self-defense at evidentiary hearing**. Hand contends that his counsel were deficient in failing to present evidence of self-defense during the evidentiary hearings on the admissibility of Welch's statements under Evid.R. 804(B)(6). Hand argues that such evidence was necessary to show that Welch's unavailability was not due to Hand's misconduct.

[45] {¶ 219} During the evidentiary hearing, Grimes testified that when Hand first discussed the murders, Hand said that he was "going to plead, self-defense." Subsequently, Hand's story changed, and he admitted to "offing them both * * * [because] anybody that messed with him would disappear." Thus, it is highly speculative whether the defense presentation of additional evidence of self-defense would have made any difference in the trial court's ruling on the admissibility of Welch's statements.

{¶ 220} Moreover, it is almost certain that Hand would have had to testify to raise the issue of self-defense during the evidentiary hearing. The record does not show whether Hand or his counsel made the decision to forgo Hand's testimony during the evidentiary hearing. However, if Hand made the decision, he has no grounds to attack his counsel's effectiveness. If it was counsel's decision, then counsel made a tactical decision that should not be second-guessed. Indeed, trial counsel could have reasonably decided not to put Hand on the stand so that the prosecutor could not cross-examine Hand and learn details of his defense. Thus, we find that trial counsel made a legitimate tactical decision in ***411** not presenting additional evidence of self-defense during the evidentiary hearing. *State v. Bradley,* 42 Ohio St.3d at 144, 538 N.E.2d 373; see, also, *State v. Adams,* 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 29–32 (failure to file motion to suppress pretrial statements constituted "tactical judgment" and not ineffective assistance of counsel).

{¶ 221} **6. Failure to request jury instructions**. Hand argues that his counsel were deficient in failing to request a limiting instruction regarding "other acts" evidence and by failing to request a jury instruction defining "course of conduct." As we discussed in connection with proposition of law II, Hand was not prejudiced by his counsel's failure to request limiting instructions on "other acts" evidence. Similarly, as we discussed in proposition of law VI, Hand was not prejudiced by trial counsel's failure to submit an instruction defining "course of conduct."

{¶ 222} In conclusion, none of Hand's claims establish ineffective assistance of counsel, and we overrule proposition of law VII.

Penalty-phase Issues

{¶ 223} ***Ineffective assistance of counsel***. In proposition of law VIII, Hand argues that his counsel were ineffective in presenting mitigation evidence and argument through failure to (1) investigate or prepare for mitigation, (2) develop a reasonable mitigation strategy, (3) present adequate mitigating evidence, (4) object to the readmission of guilt-phase evidence, and (5) present a closing argument.

{¶ 224} **1. Failure to investigate and prepare for mitigation**. Hand contends that his counsel failed to spend sufficient time preparing for the penalty phase of ****188** the trial. Hand argues that his counsel's billing sheets show that counsel spent fewer than 30 hours preparing for mitigation, family members were not interviewed until the day before the start of the trial's penalty phase, and his counsel filed an insufficient number of pretrial motions relative to mitigation. However, we find no merit in this argument.

[46] {¶ 225} The presentation of mitigating evidence is a matter of trial strategy. *State v. Keith* (1997), 79 Ohio St.3d 514, 530, 684 N.E.2d 47. "Moreover, 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.' " *State v. Bryan,* 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 189, quoting *Wiggins v. Smith* (2003), 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471.

[47] {¶ 226} Here, the defense employed a mitigation specialist, an investigator, and a psychologist. Each of these individuals began working on Hand's case several months before the penalty phase. The defense reviewed Hand's military records, his school records, and his medical records prior to the penalty phase. Dr. Davis, ***412** the defense psychologist, testified that "one of the attorneys conducted extensive interviews of a variety of individuals who knew Mr. Hand and obtained background information." Thus, the record shows that the defense thoroughly prepared for the penalty phase of the trial.

[48] {¶ 227} Hand's assertion that billing records show that his counsel spent fewer than 30 hours on mitigation appears to be based on billing records between May 30 (the date of the guilty verdict) and June 4 (the start of the mitigation hearing). Hand fails to recognize the time that his counsel, the mitigation specialist, the investigator, and his psychologist spent in preparing for mitigation before the end of the guilt-phase proceedings on May 30. Indeed, "the finding as to whether counsel was adequately prepared does not revolve solely around the amount of time counsel spends on the case or the numbers of days which he or she spends preparing for mitigation. Instead, this must be a case-by-case analysis." *State v. Lewis* (Fla.2002), 838 So.2d 1102, 1114, fn. 9.

[49] {¶ 228} Hand provides no evidence supporting his claim that his attorneys did not begin interviewing his family members until the day before the penalty phase. Defense records show that several months before trial Debra Gorrell, the mitigation specialist, contacted Hand's mother, his two sisters, and his son. Even assuming that his counsel did not interview family members until the day before the penalty phase, Hand fails to show what additional information family members could have provided earlier, or how such testimony could have aided him in sentencing.

[50] {¶ 229} We also reject Hand's argument that the lack of defense pretrial motions on mitigation shows that his counsel were ineffective. The defense filed pretrial motions to obtain Hand's childhood records with Franklin County Children Services, his military records, and his records as a Scoutmaster. Hand's counsel also filed a motion for penalty-phase instructions and proposed instructions on residual doubt. Finally, Hand fails to mention what additional motions his counsel should have submitted that would have made a difference in the outcome of his case.

{¶ 230} **2. Failure to form a reasonable trial strategy**. Hand claims that his counsel's trial strategy was ineffective by focusing on his "future value behind bars."

[51] {¶ 231} Judicial scrutiny of counsel's performance must be highly deferential, ****189** and reviewing courts should refrain from second-guessing tactical decisions of

trial counsel. *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674.

[52] {¶ 232} The trial counsel's strategy was to convince the jury that Hand should receive a life sentence by showing that he would be a model prisoner and would have value in prison society. The trial counsel emphasized that Hand's "got intelligence; he's got mechanical ability; he loves children; [and] Bobby can ***413** continue to be a source of support and guidance to his son, Robby, and his grandchildren." Trial counsel also pointed out that as a prisoner "[h]e will not be a predator; he will not be a source of violence with respect to other inmates; * * * he has skills; he can work in the prison auto shop; he can teach other inmates mechanical skills, and then they can leave the system with a skill * * *." Finally, the defense argued that Hand's life should be spared on the basis of mercy.

{¶ 233} In support of the defense strategy, Dr. Davis testified that Hand should do well in prison because he adjusted to the structured setting of the army, he has no prior criminal record, he has no substance-abuse problems, and he is older. Robert, his son, also testified that he would stay in contact with Hand in prison and continue to look to him for guidance. Finally, Hand said in an unsworn statement, "If allowed to live, I swear to each of you, I will be a model inmate; I will help anyone and everyone that I can help; I would devote my life to my son and his children; I will volunteer for any program to further the cause of man." The defense theory, although unsuccessful, was coherent and fit into the testimony of the witnesses. Thus, counsel made a "strategic trial decision" in presenting the defense theory of mitigation, and such decision "cannot be the basis for an ineffectiveness claim." *State v. Bryan,* 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 190; see, also, *State v. Mason* (1998), 82 Ohio St.3d 144, 169, 694 N.E.2d 932.

[53] {¶ 234} Hand also argues that his counsel failed to form a reasonable mitigation strategy because of his counsel's unwillingness to spend more time in presenting the defense mitigation case. Hand points to counsel's remarks during his penalty-phase opening statement.

{¶ 235} "The mitigation evidence that we're about to present to you won't be very long. We'll be done in a couple of hours. I don't want to delay this case more than it needs to be, so I've elected to tell you the things that I think you [ought] to think about now, rather than waiting until closing arguments.

{¶ 236} "* * *

{¶ 237} "Now, I've been a lawyer for 30 years. Yes, I have been involved in a number of mitigation hearings. In some of those hearings, I presented evidence how the defendant was raised; if he was abused and neglected, if drugs were involved. But I'm not going to insult you by telling you the events of Bobby's childhood led him to commit these offenses; that would be intellectually dishonest. I'm not doing that. What we will be telling you and are telling you is that imposing a death sentence on Bobby, you're going to be saying, he has nothing left to give; he has nothing of value; he's an empty box with nothing for anything."

***414** {¶ 238} Trial counsel's comment about not delaying the case was a means of maintaining the defense's credibility and focusing the jury's attention on the mitigating factors supporting a life sentence. Indeed, the trial counsel's opening statement forcefully pointed out numerous mitigating factors that justified a life sentence. Trial counsel's remark about not relying ****190** on "the events of Bobby's childhood" was also aimed at maintaining the defense's credibility during the penalty phase. We find that counsel's decision to present this theory of mitigation represented a legitimate "tactical decision." See *State v. Hartman* (2001), 93 Ohio St.3d 274, 296, 754 N.E.2d 1150; See, also, *State v. Ballew* (1996), 76 Ohio St.3d 244, 256, 667 N.E.2d 369.

[54] {¶ 239} **3. Failure to adequately present mitigating evidence**. Hand contends that his counsel were deficient by failing to present his mother and sister as witnesses, failing to present any witnesses from the army or evidence about his military service, failing to present any witnesses or evidence about his performance in school, and failing to present any witnesses or evidence from Franklin County Children Services. He also claims that his counsel were deficient in presenting his unsworn statement.

{¶ 240} However, "[t]he decision to forgo the presentation of additional mitigating evidence does not itself constitute proof of ineffective assistance of counsel." *Keith,* 79 Ohio St.3d at 536, 684 N.E.2d 47. Moreover, " '[a]ttorneys need not pursue every conceivable avenue; they are entitled to be selective.' " *State v. Murphy,* 91 Ohio St.3d at 542, 747

N.E.2d 765, quoting *United States v. Davenport* (C.A.7, 1993), 986 F.2d 1047, 1049.

{¶ 241} Dr. Davis's testimony presented information to the jury about Hand's military, education, and Franklin County Children Services records. Dr. Davis testified that Hand's father was an alcoholic and his parents were divorced when he was a child. Franklin County Children Services removed Hand from his home, but he was later reunited with his family. Dr. Davis also testified that Hand attended five different elementary schools, but left high school to join the army. He stated that Hand served in Vietnam and received an honorable discharge from the army. Robert Hand, the defendant's son, also testified in Hand's behalf. We find that counsel's decision not to call additional family members as mitigation witnesses was a "tactical choice" and did not result in ineffective assistance of counsel. See *Ballew,* 76 Ohio St.3d at 256–257, 667 N.E.2d 369.

[55] {¶ 242} Finally, Hand argues that his counsel were deficient in presenting his unsworn statement because Hand's plea for a life sentence focused on his ability to serve as a model inmate. However, "the decision to give an unsworn statement is a tactical one, a call best made by those at the trial who can judge the tenor of the trial and the mood of the jury. * * * While subject to debate, ***415** that decision largely is a matter of style, and is a tactical decision that does not form the basis for a claim of ineffective assistance." *Brooks,* 75 Ohio St.3d at 157, 661 N.E.2d 1030. Here, Hand's unsworn statement was consistent with the defense strategy to convince the jury that Hand should receive a life sentence because he would be a model prisoner and has future value to his family and prison society. Moreover, Hand fails to indicate any additional matters he might have presented in his unsworn statement and thus failed to show that any alleged deficiencies made any difference in the outcome of the case. *Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus.

[56] {¶ 243} **4. Failure to object to the readmission of guilt-phase evidence.** Hand argues that, with the exception of the exhibits involving the escape charge, his counsel were ineffective by failing to object to the reintroduction of all guilt-phase exhibits. Hand does not specify which exhibits he believed prejudiced him. Moreover, counsel were not ineffective by ****191** failing to object to this evidence, because the reintroduction of guilt-phase evidence is permitted by R.C. 2929.03(D)(1). *State v. DePew* (1988), 38 Ohio St.3d 275, 528 N.E.2d 542, paragraph one of the syllabus; *State v. Foust,* 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 157.

[57] {¶ 244} **5. Failure to make a closing argument**. Hand also asserts that his counsel were ineffective by failing to present a penalty-phase closing argument.

{¶ 245} During his penalty-phase opening statement, counsel informed the jury, "I've elected to tell you the things that I think you [ought] to think about now, rather than waiting until closing arguments." The trial counsel then summarized the mitigating evidence:

{¶ 246} "The evidence * * * will show you that Bobby does know how to live in orderly fashion behind prison walls: he's got intelligence; he's got mechanical ability; he loves children; that Bobby can continue to be a source of support and guidance to his son, Robby, and his grandchildren."

{¶ 247} In his opening statement, counsel also made a plea for a life sentence:

{¶ 248} "Collectively, we believe that [the penalty phase] will tell you Bobby is not a commodity, a useless commodity; he's a human being. And, although convicted of heinous crimes, we hope to show you that Bobby still can have value.

{¶ 249} "* * *

{¶ 250} "Robby * * * by losing his mother, he was a victim once and by sentencing his father to death, he would be a victim twice. * * * By a death verdict, not only are you going to be punishing Bobby, but you're going to be punishing Robby.

{¶ 251} "* * *

***416** {¶ 252} "Bobby can conform to prison life. He will not be a predator; he will not be a source of violence with respect to other inmates; * * * He can teach other inmates mechanical skills, and then they can leave the system with a skill * * *.

{¶ 253} " * * *

{¶ 254} "I believe that if Bobby is given a life sentence, he would still be in a position to contribute to mankind.

{¶ 255} "Mr. Yost is right; I am going to be asking you to consider mercy as a mitigating factor because mercy is the dearest privilege that a person on this earth can be, is merciful. * * * I'm asking you to consider mercy and to temper justice with mercy."

[58] {¶ 256} Here, the trial counsel's decision to present the defense case and plea for a life sentence during opening statement rather than closing argument represented a "tactical decision" that did not fall below an objective standard of reasonable representation. Moreover, waiving closing argument may have been a "tactical decision" made by the defense counsel to prevent the state from splitting closing argument and staging a strong rebuttal. See *State v. Hoffner,* 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 47; *State v. Burke* (1995), 73 Ohio St.3d 399, 405, 653 N.E.2d 242. Finally, we find that Hand has failed to prove that a reasonable probability exists that his sentence would have been different had counsel made a closing argument. See *Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus.

{¶ 257} For the foregoing reasons, we reject proposition of law VIII.

[59] **[60]** {¶ 258} ***Instructions on readmitted evidence***. In proposition of law IX, Hand contends that the trial court erred by readmitting the guilt-phase evidence ****192** and then advising the jury to consider the "evidence admitted in the trial phase that is relevant to the aggravating circumstance and to any of the mitigating factors." However, the defense failed to object to these instructions and waived all but plain error. *State v. Underwood*, 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332, syllabus. Moreover, the defense's proposed instructions included the language that he now contends was erroneous. Thus, Hand cannot complain, because he invited the error. *State v. Bey* (1999), 85 Ohio St.3d 487, 493, 709 N.E.2d 484; *State v. Seiber* (1990), 56 Ohio St.3d 4, 17, 564 N.E.2d 408.

[61] **[62]** {¶ 259} To the extent that the jury may have interpreted the instructions as allowing them to determine relevancy, the trial court erred. *State v. Getsy* (1998), 84 Ohio St.3d 180, 201, 702 N.E.2d 866. Nevertheless, much of the guilt-phase evidence was relevant to the aggravating circumstances and the mitigating factors. Further, properly admitted evidence supports the jury's finding that the aggravating circumstances outweigh the mitigating factors. See ***417** *State v. Bryan,* 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 208. Thus, we find no plain error and reject proposition of law IX.

Settled Issues

[63] {¶ 260} ***Residual doubt***. In proposition of law X, Hand contends that the trial court's refusal to instruct on residual doubt as a mitigating factor violated his constitutional rights. However, we summarily reject that argument. See *State v. McGuire* (1997), 80 Ohio St.3d 390, 686 N.E.2d 1112, syllabus; see, also, *State v. Brinkley,* 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 160; *State v. Cunningham,* 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶ 112.

{¶ 261} ***Reasonable doubt***. In proposition of law XII, Hand challenges the constitutionality of the instructions on reasonable doubt during both phases of the trial. However, we have repeatedly affirmed the constitutionality of R.C. 2901.05(D). See *State v. Jones* (2001), 91 Ohio St.3d 335, 347, 744 N.E.2d 1163; *State v. Goff* (1998), 82 Ohio St.3d 123, 132, 694 N.E.2d 916. Proposition of law XII is overruled.

{¶ 262} ***Constitutionality***. In proposition of law XIII, Hand attacks the constitutionality of Ohio's death-penalty statutes. However, we also reject this claim. *State v. Carter* (2000), 89 Ohio St.3d 593, 607, 734 N.E.2d 345; *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, paragraph one of the syllabus.

{¶ 263} Hand also argues that Ohio's death-penalty statutes violate international agreements to which the United States is a signatory. However, we have rejected similar arguments. See *State v. Bey,* 85 Ohio St.3d at 502, 709 N.E.2d 484; *State v. Phillips* (1995), 74 Ohio St.3d 72, 103–104, 656 N.E.2d 643.

Weighing the evidence

{¶ 264} In proposition of law XI, Hand argues that the death penalty must be vacated because the aggravating circumstances do not outweigh the mitigating factors.

We shall address this argument during the independent sentence evaluation.

INDEPENDENT SENTENCE EVALUATION

[64] {¶ 265} ***Aggravating circumstances***. The evidence established beyond a reasonable doubt that Hand was properly convicted of a course of conduct in killing two or more people (Jill and Welch), R.C. 2929.04(A)(5), in Count One, and murder for the purpose of escaping detection, apprehension, trial or punishment for his complicity in the murders of Donna, Lori, ****193** and Jill Hand, R.C. 2929.04(A)(3), in Count Two. Under Count Two, the trial court merged the R.C. 2929.04(A)(5) specification, the three ***418** R.C. 2929.04(A)(3) specifications, and the two R.C. 2929.04(A)(8) specifications into a single R.C. 2929.04(A)(3) specification.

[65] {¶ 266} However, Hand argues, in proposition of law XI, that we should not sentence him to death based on evidence that largely consists of Welch's hearsay statements. As we discussed in proposition I, Welch's hearsay statements were admissible under Evid.R. 804(B)(6), and thus entitled to full consideration in weighing the aggravating circumstances against the mitigating factors.

{¶ 267} ***Mitigation evidence***. Hand called three mitigation witnesses, made an unsworn statement, and introduced documentary evidence for the jury's consideration.

{¶ 268} Dr. Daniel Davis**,** a psychologist, testified that Hand's "father was an alcoholic; there was considerable strife and potentially abuse between the husband and wife; * * * his father left the family; there was a divorce when he was a child." Because his mother was allegedly cohabiting with men in front of her children, Hand was removed from the home and "placed temporarily in * * * Franklin Village, which was a receiving center for Franklin County Children's Services. [The children] were * * * placed with an aunt and then returned back to the family."

{¶ 269} Hand attended five elementary schools and attended high school, but then left school and joined the army. Dr. Davis testified that Hand did well in the army. Hand was trained in electronics, served in Vietnam, and received an honorable discharge. Hand then trained as an auto mechanic, worked at a radiator-repair shop, and later managed his own business on the west side of Columbus.

{¶ 270} In the early 1990s, Hand was treated for multiple physical complaints and was deemed to have an anxiety disorder. Dr. Davis's testing "confirmed that he's a person that has a chronic depression and anxiety that shows itself primarily in physical symptoms."

{¶ 271} Dr. Davis testified that Hand would function well in a structured environment because Hand has no other criminal record and performed well in the army. Hand is also reasonably intelligent, possesses vocational skills, and has no history of substance-abuse problems. Moreover, "Hand has qualities that could be drawn upon in a prison setting. Even in a maximum security setting, they have community service projects that are appropriate * * *." Hand is unlikely to pose a risk as a violent inmate because of his age, lack of history of assaults, and the absence of substance-abuse problems.

{¶ 272} Frank Haberfield, past post commander and district commander of a Columbus American Legion post, testified that during the early 1990s, Hand was a Scoutmaster for a Boy Scout troop sponsored by his American Legion post. ***419** Haberfield heard nothing bad about Hand as a Scoutmaster, and Hand seemed to care about the Scouts.

{¶ 273} Robert Hand, the defendant's son, testified that Hand is "the only close family member [he's] ever had, the only one [he's] had to look up to, and to take care of [him]." Robert's mother was Lori. However, Robert said his mother's family has "kind of pushed [him] away."

{¶ 274} Robert told the jury, "I don't want him to die. I don't. He's the only thing I have to look up [to] and * * * guide me." Robert has maintained communication with Hand since he has been in ****194** jail. Hand has told Robert to be strong and has helped guide him through the trauma of the murders. Robert said that he and his son would "most definitely" maintain contact with Hand if he were to receive a life sentence.

{¶ 275} **Hand's unsworn statement**. Hand told the jury, "I don't want to die. Like most men, I fear death. I've always wanted my life to have a purpose. * * * The state says my life has no purpose no longer * * * and that I should be killed. I don't want to be useless even in jail."

{¶ 276} Hand also said, "To kill me would end all that I am or that I could ever be, and to give me a life sentence will punish me in ways you can never imagine, but behind prison walls, I will be a man whose life is not useless. If allowed to live, I swear to each of you, I will be a model inmate; I will help anyone and everyone that I can help; I would devote my life to my son and his children; I will volunteer for any program to further the cause of man. I will do this not only for you, but for me. So that maybe in the eyes of God, I can right the wrong that I was * * * convicted of."

Sentence evaluation

{¶ 277} We find nothing in the nature and circumstances of the offenses to be mitigating. On January 15, 2002, Hand brutally murdered Jill and Welch as part of a course of conduct. Moreover, Hand murdered Welch to eliminate the primary witness against him for Hand's complicity in murdering Donna, Lori, and Jill Hand.

[66] {¶ 278} Although Hand's character offers nothing in mitigation, his history and background provide some mitigating features. Hand had a disruptive childhood and appears to have been raised in a dysfunctional family. Hand provided lifelong support to his son, who continues to depend on him for guidance. He also served as his son's Scoutmaster. Hand has a long work record and served honorably in the military and in Vietnam.

{¶ 279} The statutory mitigating factors are generally inapplicable, including R.C. 2929.04(B)(1) (victim inducement); (B)(2) (duress, coercion, or strong provocation); ***420** (B)(3) (mental disease or defect); (B)(4) (youth of the offender; Hand was 52 at the time of the two murders); and (B)(6) (accomplice only).

[67] {¶ 280} The R.C. 2929.04(B)(5) factor (lack of a significant criminal record) is entitled to significant weight in mitigation. The record discloses no history of criminal convictions. See *State v. Mitts* (1998), 81 Ohio St.3d 223, 236, 690 N.E.2d 522 (absence of criminal record entitled to significant mitigating weight); *State v. Reynolds* (1998), 80 Ohio St.3d 670, 687, 687 N.E.2d 1358 (lack of substantial criminal record entitled to relatively significant weight). However, this factor is diminished by the evidence presented at trial that he may have committed two other murders, even though he escaped prosecution for them.

[68] {¶ 281} We also give weight to mitigating factors under R.C. 2929.04(B)(7). This evidence includes Hand's long work history, his honorable military service, his work as a Scoutmaster, and Robert's testimony that Hand has been a supporting and loving father. We also give some weight to evidence that Hand will adapt well to prison. *Madrigal,* 87 Ohio St.3d at 397, 721 N.E.2d 52.

[69] {¶ 282} Finally, we give modest weight to testimony that Hand suffers from chronic depression and anxiety as a mitigating "other factor." See *State v. Foust,* 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 199 (defendant's depressive disorder entitled to some weight in mitigation). However, no evidence exists ****195** of any significant connection between Hand's mental disorders and his murders of Jill and Welch. Nor does the evidence suggest any other (B)(7) mitigating factors.

[70] {¶ 283} We find that the aggravating circumstance under each count outweighs the mitigating factors beyond a reasonable doubt. As to Count One, Hand's course of conduct in killing Jill and Welch is a grave aggravating circumstance. As to Count Two, Hand's murder of Welch to eliminate the primary witness against him for his complicity in the murders of Donna, Lori, and Jill Hand is a very serious aggravating circumstance. In contrast, Hand offered no substantial mitigation to weigh against the aggravating circumstance in either Count One or Count Two. Thus, we find that the death penalty is appropriate.

[71] **[72]** {¶ 284} Finally, we find that the death penalty in Count One is proportionate to death sentences approved for other course-of-conduct murders. *Foust,* 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 203; *State v. Gapen,* 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 182; *State v. Mink,* 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 130. Furthermore, the death penalty in Count Two is appropriate when compared to death sentences approved for other murders to avoid detection, apprehension, trial, or punishment. *State v. Wilson* (1996), 74 Ohio St.3d 381, 400–401, 659 N.E.2d 292; *State v. Lawson* (1992), 64 ***421** Ohio St.3d 336, 353, 595 N.E.2d 902; *State v. Stumpf* (1987), 32 Ohio St.3d 95, 108, 512 N.E.2d 598.

{¶ 285} Accordingly, we affirm the convictions and sentence, including the death penalty.

Judgment affirmed.

MOYER, C.J., RESNICK, PFEIFER, SINGER, O'DONNELL and LANZINGER, JJ., concur.

ARLENE SINGER, J., of the Sixth Appellate District, sitting for O'CONNOR, J.

All Citations

107 Ohio St.3d 378, 840 N.E.2d 151, 2006 -Ohio- 18

Footnotes

1 Anthony was not called as a prosecution witness during the state's case-in-chief.

2 Tezona McKinney's testimony, "Welch told me that Bob Hand killed his first two wives," is not a statement against Welch's interest and is therefore not admissible under Evid.R. 804(B)(3).

August 23, 2006

110 Ohio St.3d 1468
(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Ohio Motion Tables".)
Supreme Court of Ohio

State
v.
Hand

NO. 2006-1092

APPEALS NOT ACCEPTED FOR REVIEW

Opinion
Delaware App. No. 05CAA060040, 2006-Ohio-2028.

O'CONNOR, J., not participating.

All Citations

110 Ohio St.3d 1468, 852 N.E.2d 1215 (Table), 2006 -Ohio- 4288

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2006 WL 1063758

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Fifth District, Delaware County.

STATE of Ohio Plaintiff-Appellee
v.
Gerald R. HAND Defendant-Appellant.

No. 05CAA060040.
|
Decided April 21, 2006.

Appeal from the Delaware County Court of Common Pleas, Criminal Case No. 02-CR-I-08-366, Affirmed.

Attorneys and Law Firms

David A. Yost/Marianne Hemmeter, Delaware County Prosecutor's Office, Delaware, for Plaintiff-Appellee.

David H. Bodiker/Susan M. Roche, Ohio Public Defender's Office, Columbus, for Defendant-Appellant.

HOFFMAN, J.

***1** {¶ 1} Defendant-appellant Gerald R. Hand appeals the May 27, 2005 Judgment Entry of the Delaware County Court of Common Pleas dismissing his petition for post-conviction relief. Plaintiff-appellee is the State of Ohio.

STATMENT OF THE FACTS AND CASE

{¶ 2} On March 24, 1976, appellant notified police he found the strangled body of his wife, 28-year-old Donna Hand, in the basement of their Columbus home. On September 9, 1979, while Hand was out of town, family members found the strangled body of Hand's second wife, 21-year-old Lori Hand, in the basement of the same home. The murders of Donna and Lori Hand remained unsolved for more than 20 years.

{¶ 3} Sometime before January 15, 2002, Hand hired Walter "Lonnie" Welch, a longtime friend, to kill his wife, 58-year-old Jill Hand. On the evening of January 15, Hand shot and killed Jill at their Delaware County home and then shot and killed Welch when he arrived there. Subsequent investigation showed Hand had previously hired Welch to kill Donna and Lori Hand.

{¶ 4} Hand was convicted of the aggravated murders of Jill and Welch, and on June 5, 2003 was sentenced to death. The evidence established Hand's marriage to Jill had soured, Hand had accumulated more than $200,000 in credit card debt, and Hand stood to collect more than $1,000,000 in life insurance and other benefits on Jill's death. Before his death, Welch had told various friends and family members Hand hired him to kill Jill and Hand had previously hired him to kill Donna and Lori. Hand admitted he had shot Welch, and forensic evidence established Hand's claim he acted in self-defense on the night of the murders was unsupported by the evidence. Forensic evidence established Welch was shot in the back at close range. Hand also admitted to a cellmate he had shot Jill and Welch.

{¶ 5} On May 3, 2004, appellant filed a direct appeal from his conviction and sentence with the Ohio Supreme Court. Via Judgment Entry entered January 18, 2006, the Supreme Court affirmed appellant's conviction and sentence.

{¶ 6} On December 27, 2004, appellant filed a petition for post conviction relief, pursuant to R.C. Section 2953.21. On February 28, 2005, the State moved the trial court to dismiss appellant's motion. On May 27, 2005, the trial court granted the State's motion, dismissing appellant's petition. Appellant now appeals from that dismissal, assigning as error:

{¶ 7} "I. THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S POST-CONVICTION PETITION WHERE HE PRESENTED SUFFICIENT OPERATIVE FACTS AND SUPPORTING EXHIBITS TO MERIT AN EVIDENTIARY HEARING AND DISCOVERY.

{¶ 8} "II. OHIO'S POST-CONVICTION PROCEDURES NEITHER AFFORD AN ADEQUATE CORRECTIVE PROCESS NOR COMPLY WITH DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT.

{¶ 9} "III. CONSIDERED TOGETHER, THE CUMULATIVE ERRORS SET FORTH IN APPELLANT'S SUBSTANTIVE GROUNDS FOR RELIEF MERIT REVERSAL OR REMAND FOR A PROPER POST-CONVICTION PROCESS."

I

***2** {¶ 10} In his first assignment of error, appellant maintains the trial court erred in dismissing his petition for post-conviction relief because he raised constitutional issues for relief, noted sufficient operative facts supporting relief and meriting an evidentiary hearing, and demonstrated grounds for relief supported by evidence outside the record. Specifically, appellant challenges the trial court's denial of his post-conviction relief petition without an opportunity for discovery and/or evidentiary hearing.

{¶ 11} R.C. Section 2953.21 governs petitions for post-conviction relief, stating, in pertinent part:

{¶ 12} "(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶ 13} " * * *

{¶ 14} "(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

{¶ 15} "(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

{¶ 16} " * * *

{¶ 17} "(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

***3** {¶ 18} " * * *

{¶ 19} "(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court."

{¶ 20} A criminal defendant who seeks to challenge his conviction through a petition for post-conviction relief is not automatically entitled to an evidentiary hearing. *State v. Calhoun,* 86 Ohio St.3d 279, 282, 714 N.E.2d

905, 1999-Ohio-102. "Pursuant to R.C. 2953.21(C), a trial court properly denies a defendant's petition for post-conviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." Id. at paragraph two of the syllabus. A trial court's decision to grant or deny the petitioner an evidentiary hearing is left to the sound discretion of the trial court. See id. at 284, 714 N.E.2d 905 (stating that the post-conviction relief statute "clearly calls for discretion in determining whether to grant a hearing").

{¶ 21} "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Szefcyk,* 77 Ohio St.3d 93, 96, 671 N.E.2d 233, 1996-Ohio-337, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. However, the presentation of competent, relevant, and material evidence outside the record may preclude the application of res judicata. *State v. Lawson* (1995), 103 Ohio App.3d 307, 315, 659 N.E.2d 362, citing *State v. Smith* (1985), 17 Ohio St.3d 98, 101, fn. 1, 477 N.E.2d 1128. The evidence presented outside the record "must meet some threshold standard of cogency; otherwise it would be too easy to defeat the res judicata doctrine by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis[.]" *Lawson* at 315, 659 N.E.2d 362, citing *State v. Coleman* (Mar. 17, 1993), Hamilton App. No. C-900811.

{¶ 22} Appellant claims the trial court erred in finding the doctrine of res judicata barred the consideration of claims one, two, three, four, five, six, eight, eleven, and twelve in his petition for post-conviction relief. We disagree.

***4** {¶ 23} Claim one challenges the jury venire. Appellant argues the trial court should have made further inquiry of the jury concerning the effects of pretrial publicity. Upon review, appellant was not precluded from directly appealing the issue, as the issue could be determined by reviewing the voir dire transcript. The record clearly demonstrates the trial court discussed the pretrial publicity during voir dire and discussed the same with the jurors. Appellant's attachment of exhibits demonstrating pre-trial publicity to the post-conviction relief petition, though admittedly outside the original trial record, merely supplements appellant's argument which was capable of review on direct appeal on the then extant record. Accordingly, we agree with the trial court res judicata applies.

{¶ 24} Appellant's second, third, fourth, fifth, sixth, eighth and elevenths grounds for relief assert ineffective assistance of appellant's trial counsel.

{¶ 25} The Sixth Amendment right to effective counsel should be raised on appeal and cannot be re-litigated in a post-conviction petition if the basis for raising the issue of ineffective counsel is drawn from the record. *State v. Lentz* (1994), 70 Ohio St.3d 527. In *State v. Jackson* (1980), 64 Ohio St.2d 107, syllabus, the Supreme Court of Ohio held the following:

{¶ 26} "In a petition for post-conviction relief, which asserts ineffective assistance of counsel, the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness."

{¶ 27} "Broad assertions without a further demonstration of prejudice do not warrant a hearing for all post-conviction petitions. General conclusory allegations to the effect that a defendant has been denied effective assistance of counsel are inadequate as a matter of law to impose an evidentiary hearing. See *Rivera v. United States* (C.A.9, 1963), 318 F.2d 606."

{¶ 28} Because appellant's claims are based upon ineffective assistance of counsel, we will use the following standard set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶ 29} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v.. Lytle* [1976],

48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶ 30} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

***5** {¶ 31} A review of appellant's direct appeal indicates he specifically raised numerous claims of ineffective assistance of counsel, including: ineffective assistance of counsel during voir dire; failure to call witnesses during both the guilt and mitigation phases of trial; failure to investigate, prepare and present evidence during both phases; and failure to form a reasonable trial strategy. However, appellant asserts, without evidence gathered outside the record, there was insufficient evidence available in the record to assert the claims at issue on direct appeal. We disagree.

{¶ 32} In the second and third claims, appellant asserts counsel was ineffective for failing to question members of the venire who demonstrated knowledge of pre-trial publicity, and failing to use all of the peremptory challenges necessary to make a valid claim a change of venue should be granted.

{¶ 33} We find the claims presented were cognizable and capable of review on direct appeal. Appellant does not offer any new evidence outside the record precluding the application of res judicata. We note the record on direct appeal was supplemented with the jury questionnaires which appellant asserts merit review under post conviction relief herein.

{¶ 34} Claims four, five, six, eight and eleven allege ineffective assistance of counsel in the penalty mitigation phase.

{¶ 35} Initially, we note, assuming arguendo the claims are not barred by the doctrine of res judicata, we would not find counsel's performance ineffective trial strategy. The decision to call or not call a witness is squarely within the notion of trial strategy. *State v. Phillips* (1995), 72 Ohio St.3d 85. The decision to call additional witnesses is a matter of trial strategy as well. *State v. Clayton* (1985), 45 Ohio St.2d 49. Likewise, the scope of questioning is generally a matter left to the discretion of defense counsel. *State v. Singh* (2004), 157 Ohio App.3d 603. Upon review, we find appellant has not demonstrated the trial outcome would have been different had his trial counsel decided to call the witnesses; rather, any such alleged prejudice would be speculative.

{¶ 36} Upon review of the record, appellant does not offer evidence outside the record precluding the application of res judicata as to the fourth, sixth, and eighth grounds for relief. Rather, the record demonstrates the issues were cognizable and capable of review on direct appeal.

{¶ 37} Appellant's fifth claim for relief asserted ineffective assistance of trial counsel for failing to present testimony of appellant's friends and family at the mitigation phase. Upon review, we conclude the trial court did not err in dismissing appellant's fifth claim for relief, as appellant has not demonstrated prejudice as a result of trial counsel's claimed ineffective assistance; rather, appellant merely speculates the outcome of the trial would have been different, but for counsel's failure to call the witnesses.

***6** {¶ 38} We further find the trial court did not err in dismissing appellant's eleventh ground for relief relative to statements he made to counsel about the attempted escape of other inmates. The record clearly demonstrates appellant himself testified at trial as to his statements to counsel; therefore, appellant's claim does not provide new evidence outside the record and the Supreme Court could have considered the argument on direct appeal.

{¶ 39} Appellant's seventh ground for relief asserted in his petition for post-conviction relief asserts juror misunderstanding and misapplication of the trial court's instructions. The trial court dismissed the claim finding the affidavit relied upon by appellant was hearsay.

{¶ 40} In support of his claim for relief, appellant attached and cited the affidavit of Mitigation Specialist, Jennifer Cordle, interpreting the misunderstanding of a juror.

Evidence Rule 606(B) governs the issues, and provides:

{¶ 41} Competency of juror as witness

{¶ 42} "(B) Inquiry into validity of verdict or indictment

{¶ 43} "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes."

{¶ 44} Appellant's claim attempts to admit the affidavit of a non-juror regarding statements of a juror, which is prohibited by Evid. R. 606. Accordingly, the trial court properly dismissed appellant's claim finding the affidavit impermissible hearsay, and finding the claim unsupported by additional evidence outside the record.

{¶ 45} We further find the trial court did not err in denying appellant's ninth ground for relief, as the same was raised on direct appeal.

{¶ 46} On direct appeal to the Supreme Court appellant attacked the constitutionality of Ohio's death-penalty statutes. In rejecting the claim, the Court cited *State v. Carter* (2000), 89 Ohio St.3d 593. Accordingly, appellant's ninth claim for relief is barred by the doctrine of res judicata.

{¶ 47} In his twelfth ground for relief, appellant argues the State withheld material evidence in violation of his rights to due process and a fair trial. Specifically, appellant argues the State failed to disclose a Columbus, Ohio detective opened the cold case files on the murders of appellant's first two wives.

***7** {¶ 48} Constitutional error results when the State withholds material evidence favorable to the defendant if it is reasonably probable the evidence would lead to a different result in the proceeding. *United States v. Bagley* (1985), 473 U.S. 667, 682. Again, appellant's claim of a violation of his due process rights is barred by the doctrine of res judicata, if nothing precluded him from directly appealing the issue.

{¶ 49} Upon review, the files of the Columbus Police Department were turned over to appellant's counsel, and appellant had access to the information. Further, the issue was cognizable and reviewable on direct appeal; therefore, precluded by res judicata.

{¶ 50} Finally, appellant's tenth ground for relief argues the cumulative errors on the prior grounds for relief resulted in a fundamentally unfair proceeding; therefore, the judgment should be reversed.

{¶ 51} Based upon our analysis and disposition set forth above, we find the trial court did not err in dismissing appellant's tenth claim for relief.

{¶ 52} Therefore, we conclude the trial court did not abuse its discretion in denying appellant's motion for post-conviction relief without holding a hearing. Appellant's first assignment of error.

II

{¶ 53} In his second assignment of error, appellant argues Ohio's post-conviction procedures are unconstitutional. Specifically, appellant cites the lack of discovery in post-conviction proceedings.

{¶ 54} The Ohio Supreme Court has addressed this issue holding, although post-conviction relief is deemed a collateral civil action, the liberal rules of civil discovery do not apply. *State ex. rel. Love v. Cuyahoga County Prosecutor's Office* (1999), 87 Ohio St.3d 158, 159. The Court specifically held there is no requirement of civil discovery in post-conviction proceedings. This Court held in *State v. Ashworth* (Nov. 8, 1999), discovery is not contemplated by R.C. 2953.21; therefore, the lack thereof does not amount to a constitutional violation under state or federal law.

{¶ 55} Accordingly, we overrule appellant's second assignment of error.

III

{¶ 56} In the third assignment of error, appellant maintains the cumulative errors set forth in his substantive grounds for relief merit reversal or remand for a proper post-conviction process.

{¶ 57} Based upon our analysis and disposition of appellant's first and second assignments of error, we overrule the third assignment of error.

{¶ 58} The May 27, 2005 Judgment Entry of the Delaware County Court of Common Pleas dismissing appellant's petition for post-conviction relief is affirmed.

WISE, P.J. and EDWARDS, J. concur.

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the May 27, 2005 Judgment Entry of the Delaware County Court of Common Pleas dismissing appellant's petition for post-conviction relief is affirmed. Costs to appellant.

All Citations

Not Reported in N.E.2d, 2006 WL 1063758, 2006 -Ohio- 2028

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

STATE OF OHIO, :

Plaintiff, :

-vs- : Case No. 02CR-I-08-366

GERALD R. HAND, :

Defendants. :

JUDGMENT ENTRY DENYING DEFENDANT'S POST CONVICTION RELIEF PETITION AND GRANTING THE STATE'S MOTION TO DISMISS

This matter is before the Court upon the Defendant's petition for post conviction relief and request for oral hearing filed on December 27, 2004. The Defendant amended the petition on February 9, 2005. The State filed a response to the petition on February 11, 2005. The State now moves to dismiss or summarily dispose of the petition for post conviction relief pursuant to R.C. 2953.21.

I. Standard of Review for Post-Conviction Relief Petition

A person convicted of a criminal offense may file a post-conviction petition for relief and have a judgment rendered void or voidable if the person can prove a denial or infringement of the person's rights. R.C. § 2953.21(A)(1). "The court shall consider a petition that is timely filed…even if a direct appeal of the judgment is pending." R.C. § 2953.21(C). A trial court shall not grant a hearing on a petition unless their exists substantive grounds for relief. R.C. § 2953.21(C) & (E). In determining whether a hearing is necessary, the Court shall consider the petition, supporting material, and the Court files and record. *Id.*, § 2953.21(C). The Court should dismiss a petition if the record does not support the petitioner's claims or if the petitioner asserts insufficient

facts. *State v. Cole* (1982), 2 Ohio St.3d 112,113. The doctrine of res judicata further bars a convicted defendant from raising and litigating in any proceeding, except an appeal from judgment, any defense or lack of due process that was raised or could have been raised at the trial resulting in conviction or on an appeal from that conviction. *State v. Perry* (1967), 10 Ohio St.2d 175, 180.

II. Facts

The Defendant, Gerald R. Hand, was convicted of aggravated murder on May 29, 2003, and sentenced to death by a jury of his peers. The Defendant then appealed his conviction to the Ohio Supreme Court. The Defendant, while awaiting a hearing of the appeal, has filed this post-conviction relief petition citing twelve grounds for relief.

III. Denial of the Defendant's Post Conviction Relief Petition

This Court finds that R.C. § 2953.21(C) allows this court to consider a post-conviction relief petition even if a direct appeal of the judgment is still pending. The Defendant's direct appeal of the judgment entry is pending in the Supreme Court of Ohio, but this Court can decide the post-conviction relief notwithstanding the pending appeal under the Ohio statute.

a. Defendant's First claim for Relief is Barred by Res judicata and the Record

The Defendant's first claim for relief that the Court should have made further inquiry of the jury concerning the effects of pretrial publicity is barred by res judicata. An issue is barred by res judicata if nothing precludes an appellant from directly

appealing an issue. *State v. Palmer* (Oct. 20, 1999), 7th Dist. No. 96 BA 70, *3 unreported. Whether pretrial publicity resulted in a partial jury can be determined by reviewing the voir dire transcript. *Id.* at *6. Simply attaching exihibits to a post-conviction relief petition that contain facts outside of the record does not defeat the application of res judicata. *Id.* "The exhibits must show that the petitioner could not have appealed his claim based upon the information in the original record." *Id.*

Here, the Defendant failed to raise these challenges on appeal. The exhibits submitted with the petition do not prove that this issue could not have been raised on appeal. Therefore, since the Defendant failed to raise the issue on appeal when it could have been raised, the first claim for relief is denied based on the doctrine of res judicata.

b. Defendant's Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Claims for Relief are Barred by Res Judicata

The Defendant's second, third, fourth, fifth, sixth, eighth, and eleventh claims are barred by res judicata. Again, res judicata applies to post-conviction petitions and bars the defendant from raising and litigating issues that could have been or have been raised at trial or on appeal. *Perry*, 10 Ohio St.2d 175, at paragraph two of the syllabus. In each of these claims the Defendant argues that he had ineffective assitance of counsel including ineffective counsel during jury selection and the penalty phase. However, the Sixth Amendment right to effective counsel should be raised on appeal and cannot be relitigated in a post-conviction relief petition if the basis for raising the issue of ineffective counsel is drawn from the record. *State v. Lentz* (1994), 70 Ohio

St.3d 527, 529-30. All of the Defendant's grounds can be found in the record. The Defendant has also raised these same arguments on appeal. Since the issues were properly raised on appeal and they are based on the trial record, the Defendant's second, third, fourth, fifth, sixth, eighth, and eleventh claims of the post-conviction relief petition are hereby denied on the basis of res judicata.

c. Defendant's Seventh Ground for Relief is Based on Information Prohibited by Ohio Evidence Rule 801 and Ohio Evidence Rule 606, and is Not Factually Supported by the Record

The Defendant's seventh ground for relief is based on information prohibited by Ohio Evidence Rule 801 and Ohio Evidence Rule 606, and is not factually supported by the record. First, the use of the affidavit is prohibited by Ohio Evidence Rule 801(C). Ohio Evidence Rule 801(C) prohibits hearsay, which is an out of court statement offered as evidence "to prove the truth of the matter asserted." Ohio Evid. R. 801(C). Here, the statement by Juror Bravard to a mitigation specialist at the Office of the Ohio Public Defender is contained in Ms. Cordle's affidavit. (Def.'s Mot. Ex. 17.) This is an out of court statement being offered as evidence for the truth of the matter asserted. Also, this statement does not fall within any of the hearsay exceptions enumerated under the Ohio Evidence Rules. Therefore, the hearsay contained in the affidavit is not admissible, and this Court will not consider it when ruling on the post-conviction relief petition.

Second, the alleged statement may not be used as a basis for a post conviction relief petition because it is prohibited under Ohio Evidence Rule 606(B). Ohio Evidence

Rule 606(B) states that,

> [u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or to dissent from the verdict or indictment or concerning his mental processes in connection therewith. Ohio Evid. R. 606(B).

The rule goes on to say that "[h]is affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes." *Id.* The Ohio Supreme Court has emphasized this last sentence by explicitly prohibiting any affidavit that contains juror statements to a nonjuror concerning juror deliberations from being allowed into evidence. *Tasin v. SIFCO Indus., Inc.* (1990), 50 Ohio St.3d 102, 108. Here, the Defendant is trying to admit the affidavit of a non-juror regarding statements of a juror. This is prohibited by Ohio Evid. R. 606(B) and the *Tasin* decision.

Finally, even if the affidavit was considered, the Defendant's position is not factually supported by the record. The Defendant argues that the affidavit of Ms. Cordle indicates Juror Bravard thought once the Defendant was found guilty of aggravated murder, then the jury had to support a verdict of death. However, the Defendant misconstrues the facts. To the contrary, the affidavit indicates that Mr. Bravard specifically supported a verdict of death because the jury was following the Judge's instructions in deciding the sentence. Additionally, the Defendant has failed to argue that these instructions were incorrect either in the post-conviction relief petition or on appeal to the Supreme Court of Ohio. Therefore, the Defendant must believe that

the instructions were correct, and according to Mr. Bravard's statement he merely followed the instructions. The Defendant's seventh ground for relief is denied because the affidavit is prohibited by Ohio Evidence Rules 801(C) and 606(B), and the argument lacks factual support.

d. Defendant's Ninth Ground for Relief Lacks Legal Basis

The Defendant argues in his ninth ground for relief that execution by lethal injuection is cruel and unusual punishment. However, the Defendant's argument has no legal basis. The Supreme Court of Ohio specifically rejected this argument in *State v. Carter* (2000), 89 Ohio St.3d 593. Therefore, this Court denies the ninth ground of relief.

e. Defendant's Tenth Ground for Relief is Factually Unsupported

The Defendant argues in his tenth ground for relief that the cumulative errors of the prior nine grounds for relief resulted in the proceeding being fundamentally unfair. The cumulative error doctrine says a court may reverse a judgment if cumulative errors deprive a defendant of his constitutional rights even if the rights looked at individually are not prejudicial. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 196. Additionally, if there is not a single instance of error demonstrated then there cannot be multiple instances of error. *State v. Garner* (1995), 74 Ohio St.3d 49,64. Here, as the previous discussion indicates, there was no single instance of error in the proceedings. Therefore, the Defendant's tenth ground for relief fails for lack of a factual basis.

f. Defendant's Twelfth Ground for Relief is Unsupported By the Record and Barred By Res Judicata

The Defendant argues in his twelfth ground for relief that the State withheld material evidence in violation of his rights to due process and a fair trial as set forth in the United States Constitution. U.S. Const. Amend. V, VI, VIII, & XIV. The Defendant argues that the State failed to disclose that a Columbus detective had opened the cold case files on the Defendant's two previous wives' murders and therefore prejudiced the Defendant. The United States Supreme Court ruled that the prosecution has an affirmative duty to disclose evidence favorable to a defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Constitutional error results when the state withholds material evidence favorable to the defendant if it is reasonably probable that the evidence would lead to a different result in the proceeding. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Additionally, a defendant's claim of a violation of his due process rights is barred by the doctrine of res judicata if nothing precludes the appellant from directly appealing that issue. *Perry*, 10 Ohio St.2d at 180.

Here, the Defendant's arguments are not supported by the material on the record regarding discovery matters. First, the case was reopened as a matter of routine. Second, the Columbus Police Department did turn over the files in response to defense counsel's discovery requests. The Defendant had access to any information the State could use in the trial including any alternative theories that could lead to a different outcome. Therefore, this information was readily available and was not withheld from the Defendant. Even if the information were not made available to the

Defendant, this issue should have been raised on appeal. Since the Defendant did not raise it on appeal, he is now barred from raising it under the doctrine of res judicata. The Court denies the twelfth claim for relief.

IV. Conclusion

Because there are no substantive grounds for relief, the Court DENIES the Defendant's request for an oral hearing and DENIES the Defendant's post-conviction relief petition and GRANTS the State's motion to dismiss the petition.

Dated: May 26, 2005

EVERETT H. KRUEGER, JUDGE

cc: David Yost, 140 N. Sandusky St., Third Floor, Delaware, OH 43015, Attorney for State
Susan M. Roche, Office of Ohio Public Defender, 8 East Long St., 11th Floor, Columbus, OH 43215-2998, Attorney for Defendant

The Clerk of this Court is hereby ORDERED to serve a copy of this Judgment Entry upon all parties or counsel by ☑ Regular U.S. Mail ☐ attorney mailbox at the Delaware County Courthouse ☐ Facsimile transmission.

This document sent to each attorney/party by:
☑ ordinary mail
☐ fax
☑ attorney mailbox
☐ certified mail
Date: 5/27/05 By: MM

No. 14-3148

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 18, 2017
DEBORAH S. HUNT, Clerk

GERALD HAND,

Petitioner-Appellant,

v.

MARC C. HOUK, WARDEN,

Respondent-Appellee.

O R D E R

BEFORE: BOGGS, CLAY, and ROGERS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: October 18, 2017

Ms. Jennifer M Kinsley
Kinsley Law Office
P.O. Box 19478
Cincinnati, OH 45219

Re: Case No. 14-3148, *Gerald Hand v. Marc Houk*
Originating Case No. : 2:07-cv-00846

Dear Ms. Kinsley,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Jeanne Marie Cors
Ms. Brenda Stacie Leikala
Mr. Charles L. Wille

Enclosure