No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JASON DUHAMEL
_____ — PETITIONER
(Your Name)

VS.

MICHELE MILLER, Warden,
Ohio Department of Rehabilitation & Correction
_____ — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

CUYAHOGA COUNTY COURT OF COMMON PLEAS (OHIO TRIAL COURT)

EIGHTH DISTRICT COURT OF APPEALS (OHIO APPELLATE COURT)

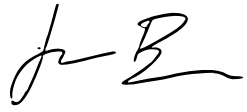
☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☒ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____
_____, or

☐ a copy of the order of appointment is appended.



(Signature)

COUNSEL FOR PETITIONER

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jason Ahamel, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 22.00	$ 0	$ 22.00	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify): _____	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ 22.00	$ 0	$ 22.00	$ 0

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Belmont Correctional (Inmate / Porter)	68518 Bannock Uniontown RD St. Clairsville Oh 43950	(Incarcerated) 2-25-14	$ 22.00
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
	$	$
	$	$
	$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 0	$ 0
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Other: _____	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$ 0
Installment payments		
Motor Vehicle	$ 0	$ 0
Credit card(s)	$ 0	$ 0
Department store(s)	$ 0	$ 0
Other: _____	$ 0	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify): _____	$ 0	$ 0
Total monthly expenses:	$ 0	$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I have been incarcerated since 2014. My only income is my state pay of $22 a month. They don't give us health care items, we have to buy them and most of my pay goes to that.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 14, 2018

Joseph Palamel
(Signature)

Charles S Haggerty
NOTARY

CHARLES S. HAGGERTY
Notary Public, State of Ohio
My Commission Expires May 15, 2019

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JASON DUHAMEL,
Petitioner.

v.

MICHELE MILLER, Warden,
Ohio Department of Rehabilitation & Correction,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted

/s/ Jack Boland
Jack Boland OH 65693
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Broadview Heights, Ohio 44147
jackboland34@gmail.com
216.236.8080 ph

Member, Supreme Court Bar
Counsel for Petitioner

QUESTIONS PRESENTED

Whether the Sixth Circuit correctly applied this court's guidance from *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003) and *Buck v. Davis*, 137 S. Ct. 759 (2017) regarding Petitioner's Request for a Certificate of Appealability.

Despite this guidance, this petition presents the following questions:

1. Did the Sixth Circuit impose an unduly burdensome Certificate of Appealability (COA) standard in contravention of precedent?
2. Did the Sixth Circuit improperly justify its denial of petitioner's COA on the issues presented by adjudication of the actual merits of petitioner's case instead of properly limiting its inquiry into a threshold examination of the merits of the case and assessing whether the issues presented by petitioner were debatable?
3. Did the Sixth Circuit improperly ignore relevant facts in fashioning their determination that the issues in petitioner's case are not debatable?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition arises from a habeas corpus proceeding in which petitioner sought and received habeas corpus review in the United States District Court for the Northern District of Ohio. He then appealed the denial of a certificate of appealability to the Sixth Circuit Court of Appeals.

At every stage of this proceeding in federal court, MICHELE MILLER, Warden of the Ohio Department of Rehabilitation and Corrections, her predecessors and any successors was the Respondent.

Petitioner asks the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

RULE OF 29.6 STATEMENT

Petitioner is not a corporate entity

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TABLE OF AUTHORITIES

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SUPREME COURT OF THE UNITED STATES

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v.

MICHELE MILLER, Warden,
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Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Jason Duhamel respectfully petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

On September 28, 2018, the United States Court of Appeals for the Sixth Circuit issued an Opinion denying relief on Petitioner's claims via denying his request for a certificate of appealability. That opinion is attached as Appendix A. The opinion of the District Court denying petitioner's habeas petition and denying a certificate of appealability ("COA") is attached as Appendix B. The decision of Ohio's Eight District Court of Appeals denying petitioner's appeal is attached as Appendix C.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the habeas petition pursuant to 28 U.S.C.A. §2241(a). The Sixth Circuit Court of Appeals had jurisdiction over the issues presented in the application for certificate of appealability. This court has jurisdiction pursuant to 28 U.S.C.A. §1291 and 2253.

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented implicate the Fifth Amendment to the United States Constitution which provides in pertinent part:

"[n]o person…shall be deprived of life, liberty or property, without due process of law" and "nor shall [any person] be compelled in any criminal case to be a witness against himself…." U.S. CONST. amend. V.

This matter also involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the states. U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

A. Procedural History

Petitioner was indicted on November 29, 2012. On February 12, 2013 petitioner moved the court for the appointment of an expert at state's expense attaching an affidavit of indigence. The unopposed motion was granted on April 25, 2013. On October 17, 2013, the court ordered payment by the state to the court appointed expert of fees for work performed. Petitioner sought additional expert fees in a subsequent motion dated June 18, 2013. That motion contained a detailed justification for the additional expert work. The court granted an additional $1,000 for

the defense expert, an amount short of the request and what was necessary to utilize the expert. On December 18, 2013, Petitioner filed an additional motion for expert fees which was denied.

Petitioner filed a motion to suppress on January 8, 2014 which was denied after a hearing on February 24, 2014. Without necessary expert witness funds, Petitioner was unable to afford to present a computer expert during that hearing. That hobbling proved disastrous for Petitioner. Petitioner was tried on February 25, 2014. On February 28, 2014 the jury found Petitioner not guilty of counts 1, 2, 9, 31, 32, 33, 34, 35, but guilty of counts 3-30, 36, 37. Petitioner was sentenced on April 1, 2014 to fifteen (15) years in prison.

A timely notice of appeal was filed to Ohio's Eighth District Court of Appeals on April 11, 2014. After an initial dismissal of his appeal for reasons unrelated to Petitioner, he timely re-filed his appeal on December 15, 2014.

His conviction was affirmed by the Eighth District Court of Appeals on August 6, 2015. He timely sought review of that decision in the Ohio Supreme Court. The Ohio Supreme Court declined to review his case in a decision without opinion published on January 20, 2016. Petitioner filed his petition of certiorari to the United States Supreme Court on April 7, 2016. The court declined jurisdiction by summary order on June 13, 2016.

Petitioner timely sought review of the state's actions by habeas petition to the Northern District of Ohio. That court denied Petitioner's petition and declined to grant a certificate of appealability on April 12, 2018. On September 28, 2018 the Sixth Circuit Court of Appeals denied petitioner's request for a certificate of appealability.

B. Facts

Ohio ICAC investigators used privately-held, specially designed software tools to remotely search and seize property from Duhamel's computer. These tools are not available to the general public. Following that remote search and seizure, law enforcement obtained a search warrant to physically search Duhamel's residence. During the search of Duhamel's residence he was ordered to sit at the dining room table and was videotaped while he was interrogated. During the interrogation he was denied several requests to get up from the table including the denial of a request to use the phone to call his mother. After his interrogation was underway for some period of time, he was told he did not have to answer questions. The investigation culminated in an indictment November 29, 2012, trial and verdicts as noted above.

GROUNDS FOR RELIEF PRESENTED TO THE SIXTH CIRCUIT COURT OF APPEALS

Petitioner submitted the following grounds for relief to the Sixth Circuit Court of Appeals in his request for a COA.

1. Petitioner's statements made during his interrogation were admitted at trial in violation of his Fifth Amendment rights.
2. Petitioner was denied adequate expert witness funds resulting in a violation of his right to a Fair Trial under the Fifth Amendment to the U.S. Constitution.
3. Every state witness admitted that the state failed to produce any evidence of an essential element of the offenses for which Petitioner was convicted (mens rea) yet the state permitted the matter to be submitted to the jury in violation of his Fair Trial rights.

APPLICABLE LAW TO PETITIONER'S CERTIFICATE OF APPEALABILITY PETITION

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Petitioner meets that standard simply by showing that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

GROUND 1
PETITIONER'S STATEMENTS MADE DURING HIS INTERROGATION WERE ADMITTED AT TRIAL IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS

The Sixth Circuit deferred to the state's fact finding when evaluating this ground. However, the Sixth Circuit elevated deference to deference to the law as well. Petitioner was entitled to Miranda warnings if he was interrogated while in police custody. *Oregon v. Mathiason*, 429 U.S. 492, 494-95 (1977) (per curiam). There is no dispute he was interrogated. The focus of this ground is whether his circumstance while being interrogated constituted being in custody. What makes this ground debatable and one that reasonable jurists can, *and do*, disagree on is the state court's analysis of irrelevancies.

This court's precedent on this determination diverges from that applied by the Sixth Circuit.

Under *Miranda v. Arizona*, 384 U.S. 436 (1966) a person who is taken into custody or otherwise "deprived of his freedom in any significant way" and subjected to interrogation by law enforcement officials must be informed of certain constitutional rights and make a knowing and intelligent waiver of those rights before statements obtained during the interrogation will be admissible as evidence against him. *State v. Maresh*, 2014-Ohio-3410.

In determining whether an interrogation is custodial, the Sixth Circuit, instead, considered the following:

"(1) the location of the interview;

(2) the length and manner of the questioning;

(3) whether there was any restraint on the individual's freedom of movement; and

(4) whether the individual was told that he or she did not need to answer the questions." *United States v. Hinojosa*, 606 F.3d 875, 883 (6th Cir. 2010).

This court has held that in judging whether an individual has been placed into custody the test is whether, under the totality of the circumstances, a "reasonable person would have believed that *he was not free to leave*." *United States v. Mendenhall* (1980), 446 U.S. 544, 554 (plurality opinion). Accord Florida v. Bostick (1991), 501 U.S. 429, 439. Emphasis added. The state's witnesses testified that they refused to permit Petitioner to leave not just his residence, but refused to permit him to leave his seat at the dining room table. The interrogators even admitted that had Petitioner asked to simply get up and walk out of the residence and down the street, they would have prohibited him from doing so. Even their subjective understanding of the situation was that Petitioner was *not free to leave*. His circumstance is on point with *Mendenhall* and yet, the state courts simply highlighted other irrelevant facts while ignoring this one in finding Miranda was not triggered.

The Sixth Circuit deferred to the state court's fact finding as noted on p. 3 of its decision. However, the Sixth Circuit's error here is that it failed to notice how the state's fact finding found facts largely unrelated to those relevant to determining whether Petitioner was in custody. When the state did inadvertently collide with a relevant fact, it found other facts more significant. This

approach supports that the state courts' analysis is at the very least debatable and that reasonable jurists could come to different conclusions. The Sixth Circuit has apparently determined that deference to state court fact finding means deference to the state as having found *the only facts that matter*. Petitioner pointed out a host of other facts in the record, undisputed, that the state simply ignored as inconvenient when mapped over its conclusion.

As to the factors from *Hinojosa* the Sixth Circuit outlined above, Petitioner was interrogated at his dining room table. This fact is seemingly one in favor of not indicating to a reasonable person that he is in custody. However, the dining room table here was in an environment more akin to a hostage taking than a Normal Rockwell holiday dinner. What the state ignored from the record (and not apparently important to the Sixth Circuit) was that this particular dining room table was surrounded by two individuals with firearms and badges. This dining room table was regularly walked past by other officials with guns and badges. The state courts do not mention why the "length of time of the questioning" weighs in law enforcement's favor given that the entire interrogation was nearly an hour on a warm summer day in a non-air conditioned small house. Finally, the state court reports the fact that Petitioner was told he did not have to answer questions. Was the calculation that three out of four is sufficient to determine he is not in custody? No precedent from this court admits of such a calculus. Are all four factors weighted equally? Given that the analysis here was whether Petitioner was reasonable to believe he was *in custody* it seems that a focus on the limitations on his freedom of movement would be paramount. For the state courts, however, that was not the case. The calm, soft voiced "factors" above provided to a startled, woken up at sunset, Petitioner with no criminal record, told to sit and "hang tight" in a location in his cramped home do not overcome the reality of such an

interaction. It is likely that no judge reading these facts, nor this court, have ever had the pleasure of such a dawn raid by gun carrying law enforcement officials. This is an environment that is purposely bewildering, assaultive to the senses and designed to break down otherwise hearty and normal logical decision making by suspects. It worked to perfection here. The key facts of this interaction were that Petitioner was restrained in his liberty consistent with an arrest. The recitation of factors from *Hinojosa* fails to counteract this reality for Petitioner. Whether this court agrees with this analysis or not, the facts of this case provide at least a debatable circumstance where Petitioner should have been issued his Miranda warnings before being interrogated.

One final fact on this ground shows the need for the court's intervention to allow this appeal to be fully heard. At the conclusion of Petitioner's interrogation, the official interrogating him then provides Petitioner his full Miranda rights and then some. That official goes further into providing legal advice to Petitioner far beyond his Miranda rights warning. This move makes it obvious that the state knew at the time it was interrogating Petitioner that it was well trained in circumnavigating this court's precedent to extract a confession despite the burden of Miranda.

GROUND 2
THE STATE CHARGED PETITIONER WITH A COMPUTER CRIME AND THEN DECLINED TO PROVIDE HIM SUFFICIENT FUNDS TO DEFEND THAT COMPUTER CRIME

"[T]he State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (emphasis added).

The Sixth Circuit and District Court deferred again to the state's found facts on this ground. That deference is notable for the undisputed facts in the record that are ignored.

It is undisputed that Petitioner's initial request for state funds to pay for a computer expert was accompanied by an affidavit of indigence. The state trial court granted Petitioner's request for funds. Later in the litigation, upon a showing that the initial funds were insufficient to afford to pay an outside computer expert for necessary work, the state trial court again approved additional expert witness funds. Petitioner's indigent status was not questioned and did not change. Neither the state nor the court argued that Petitioner was now, somehow, able to afford to retain a computer expert to assist in his defense in a computer crime case.

The state appeals court's finding, however, without citation to any court decision or statute, was that upon Petitioner's third request "[t]he trial court did not find Duhamel indigent, and no affidavit of indigence was filed at the time the court denied Duhamel's third request for additional funds to pay his expert." Duhamel, 2015 WL 4656547, at *9. Ohio state law does not require an ongoing re-iteration by affidavit of Petitioner's indigence. This move by the appellate court is the highlighting of a fact which is irrelevant to the law. The court did not request nor does the law require Petitioner to serially restate in affidavit or any other form that, by the way, he is still indigent.

The District and Circuit court cited to this fact in deferred and held that the state appellate court's factual findings are presumed correct, and Duhamel has failed to rebut that presumption. 28 U.S.C. §2254(e)(1). To put a fine point on it, the district court found against Petitioner here because he failed to rebut a presumption on a fact that is not relevant to the legal issue. It is a fact that he did not file, at the time of the third request for funds, an affidavit re-iterating that he was

still indigent. This fact is beside the point. Nowhere in this record does anyone assert that Petitioner somehow was elevated out of his indigent status at the time of his third request for funds. This is after-the-fact reasoning to support a decision that is without legal support or logical coherence. It is at least debatable among reasonable jurists as to whether the state can affirm this decision of the trial court to deny Petitioner necessary funds by asserting a fact that is legally irrelevant, that he did not file repetitive affidavits of indigence. It is notable that the state never argued that Petitioner's financial status had changed at any point in his case up to and including this filing.

GROUND 3 AND 4
THE STATE ADMITTED HAVING NO EVIDENCE AS TO MENS REA, AN ESSENTIAL ELEMENT OF THE CONVICTED OFFENSES

Petitioner was indicted on 37 counts, the 37th of which was a forfeiture count. Counts 1 and 2 involved Ohio Revised Code (R.C.) §2907.322(A)(2). Counts 3-35 involved R.C. §2907.322(A)(1). Count 36 involved R.C. §2907.323(A)(1). Counts 1-35, however, involved the same language relevant to Duhamel's Rule 29 motions.

"...did with **knowledge** of the character of the material or performance involved…." R.C. §2907.322(A)(1) and (A)(2). Emphasis added.

Each of the state's witnesses testified that the only means by which Duhamel could have obtained the "knowledge of the character of the material or performance involved" in the 36 files involved in the indictment is to open and view those files. Each of the state's witnesses testified that the state had no evidence that Duhamel opened and viewed any of the 36 files involved in the indictment. Therefore, the state presented no evidence that Duhamel had "knowledge of the character of the material or performance" involved in the 36 computer video files in this case.

Despite this fact, the court permitted the matter to go to the jury. The jury then determined that Duhamel did have "knowledge of the character of the material or performance involved" in some, but not all of the 36 computer video files.

The jury found Duhamel not guilty of counts 1, 2, 9, 31, 32, 33, 34, 35, but guilty of counts 3-30, 36, 37. The not guilty counts were all related to filenames that did not imply by their names that the files contained child pornography content.

Count 9 - Delic, D-E-L-I-C, 3 video (4);

Count 31 - $R26X0W4

Count 32 - $R6ZG1Q1

Count 33 - $R1 -- probably I -- RIWVQPI

Count 34 - $R1DO3L4

Count 35 - $RXC7H3I

The files for which the jury found the state had proved Petitioner had knowledge of their contents, however, all had filenames suggesting their content. It is clear, therefore, that the jury determined that, beyond a reasonable doubt, Duhamel had "knowledge of the character of the material or performance involved" in those files in the indictment *that had filenames implying the files contained child pornography*. The question then becomes, what was the testimony of the state's witnesses as to whether a filename containing text implying it is child pornographic is even circumstantial evidence that the contents of that file are, in fact, child pornography? All of the state's witnesses testified that filenames are not circumstantial evidence of the contents of the so named files. In light of that universal rejection of the argument that filenames of computer files provide circumstantial evidence of their content, the trial court permitted the jury to

conclude that filenames do provide circumstantial evidence of their content. This is precisely the error that Petitioner's trial motions for a directed verdict and to reject the jury verdict as against he manifest weight of the evidence highlighted.

The state's evidence on this point was not neutral on this issue of whether filenames provide circumstantial evidence of a file's contents. The state's evidence was entirely contradictory to the notion, the precise notion that the trial court permitted the jury to draw from the evidence. The state's witnesses testified that a filename which implies the file contains child pornography **is not evidence that Duhamel had "knowledge** of the character of the material or performance involved" in that particular file.

All of the convictions in this matter involved the claim that Petitioner had knowledge of the contents of various computer video files. The state's witnesses all testified that the only way to obtain "knowledge of the character of the material or performance" involved in the computer video files related to each count of the indictment was to **open and view those files**. All of the state's witnesses admitted they did not uncover any evidence that Petitioner had opened and viewed any of the indicted files. The state's witnesses further admitted that the state had no evidence that Duhamel had "knowledge of the character of the material or performance involved" in any of the computer video files related to any of the 36 counts in the indictment. This admission negates the ability of a jury to find the contrary, that is, that somehow, Petitioner did have this knowledge - a required element the state must prove to convict.

The above contradiction is precisely why both state and federal Rule 29 motions exists. They exist in situations in which the government presents no evidence on a material element of an offense. They exist so that juries do not arrive at conclusions of guilt unsupported by any

evidence that the government is required to provide. The result of this case is that Petitioner was convicted reliant on a finding by the jury of his knowledge despite the state's witnesses admitted that it had uncovered no evidence of his knowledge.

The peer to peer software the state claimed Duhamel used to download child pornography in this case was called ARES. Officer Frattare admitted you cannot open and view a file on ARES before downloading it.

Q Now when you first saw this list of files in that browse at the IP address which ended up at my client's residence, you didn't open those files using Ares because the Ares program doesn't allow you to just open a file looking at it in that format. Correct?
A. Correct. TR. at 372.

Frattare testified that even once a user downloads a file with a name potentially indicating it is child pornography, that person still does not have knowledge of the character of the material or performance in that video file.

Q And once you've downloaded that file to your computer, or in this case the automated system sort of downloaded it, you still don't know at that moment what the content is or the character of the material or performance that could be in that file at that moment?
A *You wouldn't know until you go into your folder and view it, yes*. TR. at 376. Emphasis added.

The state's witnesses admitted that Petitioner did not admit to ever opening and viewing any of the indicted files. "A. That's correct, he did not." TR. at 314-315. The state's witness also admitted that "[Petitioner] did not admit knowing having knowledge of the character or material or performance in [the 36 files in the indictment] to you, at least to you?

A Right, to me." TR. at 425.

The state's computer expert, Howell, testified that *he found no evidence that Duhamel had knowledge* of the character of the material or performance in any of the 36 computer video files connected to the 36 counts of the indictment.

Q But the bottom line is, you found no evidence that he had knowledge of the character of the material or performance in any of the files related to the first 36 counts of the indictment; true?
A I couldn't say if he had knowledge of it or not. TR. at 634.

Howell went further at TR. 584 admitting he cannot say that Duhamel ever opened any of the files related to the 36 counts of the indictment. "I cannot say those files were ever opened by that netbook computer or that Windows 7 operating system." TR. at 584.

Howell testified that the name of a video file (or any type of computer file) is insufficient to know the character of the material or performance in a video file. State computer expert Howell testified that to have knowledge of the character of the material or performance in the indicted files in this case, "[Petitioner] would have to open and view [them]." TR. at 589. "I would say, yes, you'd have to open and view it." Id.

As to all of the 36 files in the indictment, Howell admitted that "I couldn't say if [any of them were] opened or not opened." TR. at 611. Despite the court overruling Petitioner's Rule 29 motions and permitting the jury to evaluate the issue of knowledge, state computer expert Howell testified in complete contradiction to what the trial court permitted the jury to find.

"Q There's just no way to know, based on those dates, anything about what happened to that file as far as opening it or accessing it before it landed there? A Correct." TR. at 611. See also TR. at 625.

Knowledge was an essential element of the indicted offenses. The state presented no evidence as to this essential element for each of the 36 counts. Therefore, the court should have granted Duhamel's Rule 29 motion on those counts.

The District and Circuit Court adopted the state's conclusion that prosecutors offered circumstantial evidence of Petitioner's knowledge. It is superfluous for a court to mention that "[c]ircumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt." *United States v. Lowe*, 795 F.3d 519, 522-23 (6th Cir. 2015) (quoting *United States v. Algee*, 599 F.3d 506, 512 (6th Cir. 2010)).

In adopting the state court's sidestep analysis, the district and circuit courts developed a new standard of law contrary to Ohio's and this court's precedent. That new standard is that Petitioner can be convicted of having knowledge of the contents of computer video files even when all of the state's evidence is, he did not have knowledge of the contents of those computer video files. The reasoning relied on by the District and Circuit court in finding no debatable issue in the appeal was simply that the filenames themselves are circumstantial evidence of Petitioner's knowledge. This conclusion is not only against all of the evidence the state presented, it is contrary to simple logic. A person can name a file anything they want. That filename does not have to conform to any valid representation of the file's contents. The courts have ignored the state's witnesses' testimony, including its experts, who have testified that filenames offer zero circumstantial evidence of the contents of a file. Files traverse the internet that are accidentally or intentionally named in ways that obscure their content.

In addition, this ruling is a potentially damaging one for future prosecutions, state and federal. If Petitioner is not permitted to appeal this debatable issue, prosecutors would be left

with the inability to prosecute future possessors of contraband images if that defendant simply insures that the filenames of the files containing that content are such that they do not imply contraband. In this way, a future defendant can defeat a knowledge claim citing to this case for the proposition that filenames implying child pornography provide circumstantial evidence, therefore, filenames implying non-contraband content, also provide circumstantial evidence that a given defendant did not know the file at issue contained contraband. This illogic cuts both ways. Given that a filename does not determine a file's contents, is it the case that a filename implying contraband provides circumstantial evidence that a person in possession of that file knew that it contained contraband? Moreover, can a jury rightfully conclude that Petitioner had knowledge of the contents of the indicted files despite the state's witnesses universally testifying that opening and viewing is the only way to obtain knowledge and Petitioner did not open and view the files? In the end, these grounds represents at least a debatable issue supporting the encouragement of this court for the matter to go forward to a full appeal.

CONCLUSION

Petitioner respectfully requests this court grant his certificate of appealability to the Sixth Circuit Court of Appeals on the grounds contained herein.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on all parties by operation of the court's electronic filing system. I further certify that I have transmitted this 21st day of December 2018 a copy of this filing via email and regular mail to:

STEPHANIE L. WATSON (0063411) Principal Assistant Attorney General
Criminal Justice Section
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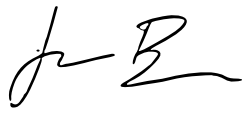

/s/ Jack Boland
Jack Boland (0065693)

APPENDIX A

No. 18-3401

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JASON DUHAMEL,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	O R D E R
	)	
DAVID GRAY,	)	
	)	
Respondent-Appellee.	)	

Jason Duhamel, an Ohio prisoner proceeding through counsel, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. He has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1).

Based on child pornographic videos that he downloaded to his digital devices, Duhamel was indicted on thirty-seven counts. A jury convicted him of seventeen counts of pandering sexually oriented matter involving a minor, in violation of Ohio Revised Code § 2907.322(A)(1) and (A)(2) (Counts 3 through 8 and 10 through 30); one count of illegal use of a minor in nudity-oriented material, in violation of Ohio Revised Code § 2907.323(A)(1) (Count 36); and possession of criminal tools, in violation of Ohio Revised Code § 2923.24(A) (Count 37). The trial court imposed an aggregate prison sentence of fifteen years. The Ohio Court of Appeals affirmed, *State v. Duhamel*, No. 102346, 2015 WL 4656547 (Ohio Ct. App. Aug. 6, 2015), and the Ohio Supreme Court denied leave to appeal. The United States Supreme Court denied certiorari.

In 2016, Duhamel filed this counseled § 2254 petition, raising five grounds for relief: (1) the trial court erred in denying his pretrial motion to suppress his statements to police; (2) the trial court denied him sufficient funds to retain a computer expert, in violation of his right to due

process; (3 & 4) the State presented insufficient evidence to support the knowledge element of his convictions under section 2907.322(A), in violation of his rights to due process and a fair trial; and (5) his fifteen-year sentence amounted to cruel and unusual punishment, in violation of his rights under the Eighth Amendment. After the warden filed a response, the magistrate judge entered a report recommending that Duhamel's petition be denied on the merits. Over Duhamel's objections, the district court adopted the report and recommendation, denied Duhamel's petition, and declined to issue a COA.

In his COA application, Duhamel reasserts the merits of his first, second, third, and fourth grounds for relief. He has forfeited review of his fifth ground by failing to argue this claim in his COA application. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Ground 1. Duhamel argues that the trial court admitted his statements to law enforcement officers in violation of his Fifth Amendment rights because his custodial interrogation was not preceded by the warnings required in *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). As Duhamel acknowledges, a defendant is entitled to *Miranda* warnings only if he is interrogated while in police custody. *Oregon v. Mathiason*, 429 U.S. 492, 494-95 (1977) (per curiam). In determining whether an interrogation is custodial, this court considers "(1) the location of the interview; (2) the length and manner of the questioning; (3) whether there was any restraint on the individual's freedom of movement; and (4) whether the individual was told that he or she did not need to answer the questions." *United States v. Hinojosa*, 606 F.3d 875, 883 (6th Cir. 2010).

In denying Duhamel relief on this claim, the Ohio Court of Appeals found that he was interviewed by a detective at his dining room table while other officers searched his home. *Duhamel*, 2015 WL 4656547, at *2. The state appellate court further reasoned:

> Duhamel argues that a reasonable person in his position would have believed his liberty was restrained to the same extent as a formal arrest because police entered his home with guns drawn and prohibited him from calling his mother and from going to his bedroom to retrieve a cough drop. However, [the detective] testified that prior to posing any questions, he informed Duhamel that he was not under arrest. [The detective] also testified, and the video of the interview shows, that [the detective] reminded Duhamel several times that he did not have to answer any questions if he did not want to.
>
> Moreover, there was nothing accusatorial about the interview. There were no threats, nor were the police overbearing. The video of the interview shows that the tenor of the conversation was nonthreatening. Duhamel was never handcuffed and police spoke in a casual manner. Duhamel did not appear overly nervous and initiated the conversation at times.
>
> Although the officers refused to allow Duhamel to go to his bedroom to get a cough drop, 13 police officers were searching the house at the time. . . . [A] reasonable person would conclude that while he was not under arrest, he could not go to the bedroom because his presence would interfere with police business.

Id. at *6. The state appellate court's factual findings are presumed correct on habeas review, and Duhamel has failed to rebut that presumption with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Under these circumstances, reasonable jurists could not debate the district court's determination that Duhamel's interview was non-custodial. Duhamel has therefore failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Ground 2. The trial court awarded Duhamel a total of $3500 to retain an expert but denied his third request for additional funds. Duhamel argues that this denial violated his rights to due process, a fair trial, and effective assistance of counsel. "[T]he State must, as a matter of equal protection, provide *indigent* prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (emphasis added). Here, the Ohio Court of Appeals found that "[t]he trial court did not find Duhamel indigent, and no affidavit of indigency was filed at the time the

court denied Duhamel's third request for additional funds to pay his expert." *Duhamel*, 2015 WL 4656547, at *9. Again, the state appellate court's factual findings are presumed correct, and Duhamel has failed to rebut that presumption. 28 U.S.C. § 2254(e)(1). Under these circumstances, reasonable jurists could not debate the district court's determination that Duhamel was not entitled to additional funds. Duhamel has therefore failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Grounds 3 & 4. Duhamel argues that the State presented insufficient evidence to support the knowledge element of his convictions under section 2907.322(A) in violation of his rights to due process and a fair trial. Duhamel's argument is based on witness testimony that an individual would not know the nature of a video file's contents until it was downloaded and opened, and the lack of evidence that Duhamel ever opened the files in question. In reviewing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt." *United States v. Lowe*, 795 F.3d 519, 522-23 (6th Cir. 2015) (quoting *United States v. Algee*, 599 F.3d 506, 512 (6th Cir. 2010)).

Section 2907.322(A) required the State to prove that Duhamel pandered child pornography "with knowledge of the character of the material or performance involved." Under Ohio law,

> A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

Ohio Rev. Code § 2901.22(B).

In denying Duhamel relief on this claim, the Ohio Court of Appeals reasoned that the file names for the videos supporting Duhamel's convictions put him on notice of their subject matter.

Duhamel, 2015 WL 4656547, at *8. Indeed, the file names for the majority of the videos in question unambiguously indicated their child pornographic contents. Three examples suffice: "-(sdpa) alicia 10 yo pthc little girl loves adult sex(2)(2)(2).avi" (Count 3); "(pthc) johanna 9 yr. swallows cum[] slct.avi" (Count 16); and "10 years old forced sex(2).mpg" (Count 21).[1] *Id*. at *3-4. The file names for the videos supporting Counts 29 and 30, however, were less descriptive: Count 29 was based on a file named "air.mpg" and Count 30 was based on a file named "kley_full.mpg." *Id*. at *3. Nevertheless, both "air.mpg" and "kley_full.mpg" were found on Duhamel's external hard-drive in a folder labeled "kid," which also contained a child pornographic video file named "! ! ! new ! ! ! (pthc) linda—a little extra 217 avi—(spda) linda—10 anos mamando y tomando semen.avi." *Id*. at *3-4. Under these circumstances, reasonable jurists could not debate the district court's conclusion that a reasonable jury could find that Duhamel knew the video files in question contained child pornography. Duhamel has therefore failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

For these reasons, the COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

[1] "In the video of the search of Duhamel's home, Duhamel . . . . explained that the search term 'pthc' refers to 'preteen hardcore.'" *Duhamel*, 2015 WL 4656547, at *7. An investigator also testified that "the search term 'PTHC' stands for 'preteen hard-core,' and '9' combined with the letters 'yo' indicates 'nine years old.'" *Id*. at *2.

APPENDIX B

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

Jason Duhamel,

Petitioner,

-vs-

Warden Mary Potter,

Respondent.

Case No. 1:16 CV 2758

JUDGMENT ENTRY

JUDGE JACK ZOUHARY

The Objections (Doc. 11) are each overruled. This Court adopts the R&R (Doc. 10) and denies the Petition (Doc. 1) on the merits. Further, this Court certifies an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c).

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

April 12, 2018

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

JASON DUHAMEL,	)	CASE NO. 1:16 CV 2758
	)	
Petitioner,	)	JUDGE JACK ZOUHARY
	)	
v.	)	MAGISTRATE JUDGE
	)	WILLIAM H. BAUGHMAN, JR.
WARDEN MARY POTTER,	)	
	)	
Respondent.	)	**REPORT & RECOMMENDATION**

Introduction

Before me[1] is the petition of Jason Duhamel for a writ of habeas corpus under 28 U.S.C. § 2254.[2] Duhamel was convicted by a Cuyahoga County Common Pleas jury in 2012 of pandering sexually-oriented matter involving a minor, illegal use of a minor in nudity oriented material or performance, and possession of criminal tools.[3] He is serving a sentence of 15 years[4] and is currently incarcerated at the Belmont Correctional Institution in Belmont, Ohio.[5]

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[1] This matter was referred to me under Local Rule 72.2 by United States District Judge Jack Zouhary by non-document order dated November 14, 2016.

[2] ECF # 1.

[3] ECF # 8, Attachment 1 at 157.

[4] *Id*.

[5] https://appgateway.drc.ohio.gov/OffenderSearch

In his petition, Duhamel raises five grounds for habeas relief.[6] The State has filed a return of the writ arguing that the petition should be dismissed as it is without merit.[7] Duhamel has not filed a traverse.

For the reasons that follow, I will recommend Duhamel's petition be denied.

Facts

A. Underlying facts, conviction, and sentence

The facts that follow come from the decision of the appeals court.[8]

Duhamel was charged with 37 sex-related offenses.[9] Counts 1 through 35 of the indictment charged Duhamel with pandering sexually oriented matter involving a minor.[10] Counts 36 and 37 charged Duhamel with one count each of illegal use of a minor in sexually-oriented material and possession of criminal tools.[11] The charges stemmed from a search of

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[6] ECF # 1.

[7] ECF # 8.

[8] Facts found by the state appellate court on its review of the record are presumed correct by the federal habeas court. 28 U.S.C. § 2254(e)(1); *Mason v. Mitchell*, 320 F.3d 604, 614 (6th Cir. 2003) (citing *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981)).

[9] ECF # 8, Attachment 1 at 260.

[10] *Id*.

[11] *Id*. at 260-61

Duhamel's home in which investigators found digital files containing child pornographic evidence on his computer.[12]

In preparation for trial, Duhamel filed a motion to suppress evidence of any statements he made to police during the search of his home.[13] At a hearing on the motion, investigator David Frattare ("Frattare") of the Cuyahoga County Prosecutor's Office and the Ohio Internet Crimes Against Children ("ICAC") Task Force testified that he identified an IP address suspected of sharing 66 files of child pornography via the Ares peer-to-peer file sharing network.[14]

File sharing networks allow program users to share filed on their personal computers with other program users.[15] The IP addresses Frattare identified in this case were linked to a computer located in a residence on West 126th Street in Cleveland, Ohio.[16] Investigators connected directly to Duhamel's computer and browsed numerous files with titles such as "Alicia 10 yo pthe little girl loves adult sex," and "10 yr boy with 12yr girl bufing." Investigators downloaded two of the files and confirmed that they both contained child pornography.[17]

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[12] *Id.* at 261.

[13] *Id*.

[14] *Id.*

[15] *Id*.

[16] *Id*. at 261-62.

[17] *Id*. at 262.

Further investigation revealed that three adults live in the house associated with the IP Address, but investigators did not know which of the adults was pandering pornography.[18] Pursuant to a search warrant, investigators searched Duhamel's house early one morning.[19] Duhamel was the only adult in the home at the time of the search.[20]

A Cuyahoga County Sheriff's Office detective interviewed Duhamel while other officers searched the house.[21] A video recording of the interview was played for the court and made part of the record.[22] The detective testified that before he posed any questions, he advised Duhamel that he was not under arrest and that he was not required to answer any questions if he did not want to.[23] Yet, Duhamel spoke freely with police and, at times, initiated conversation.[24]

After hearing the testimony and reviewing the video of the interview, the trial court determined that because Duhamel was not in custody when he made statements to the police,

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[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *Id*.

Miranda warnings were not required.[25] Accordingly, the trial court denied the motion to suppress.[26]

The evidence presented at the suppression hearing was reintroduced for the jury at trial.[27] Duhamel admitted to the detective that he had files that he knew were illegal.[28] He told police that whenever he downloaded files from Ares, he downloaded multiple files at once, transferred the downloaded files to folders on an external hard drive, and sorted through them later.[29] He denied looking at the downloaded files before transferring them to the external hard drive.[30] But, he advised the detective that any questionable material on his devices would likely be found in either folder titled "finished" that was within a folder titled "other" on the external hard drive, or within a folder titled "kid"or "young" that was within a folder called "movies."[31]

Investigator, Jason Howell ("Howell") of the Cuyahoga County Prosecutor's Office and the Ohio ICAC Task Force, testified that he performed on-scene forensic scans of numerous digital devices in Duhamel's home during the search in order to confiscate only

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[25] *Id*. at 263.

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*. at 263-64.

[31] *Id*. at 264.

those devices that contained child pornography.[32] Investigators seized six items, all of those items were found in Duhamel's bedroom.[33]

After the search, Howell conducted a more thorough forensic investigation of the devices in the lab, where he discovered more files of child pornography in addition to comics and animated videos of children having sex.[34]

Duhamel moved for acquittal under Crim.R.29 after the state rested its case.[35] The court denied the motion, and the case was submitted to the jury.[36] The jury found Duhamel guilty on Counts 3 through 8, 10 through 30, 36, and 37, and not guilty of Counts 1, 2,9, and 31 through 35.[37]

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[32] *Id.*

[33] *Id.*

[34] *Id*. at 266.

[35] *Id*. at 267.

[36] *Id*.

[37] *Id*.

B. Direct Appeal

1. Ohio Court of Appeals

Duhamel, through counsel, filed a timely[38] notice of appeal[39] with the Ohio Court of Appeals. In his brief, Duhamel raised six assignments of error:

1. The court erred in denying Duhamel's motion to suppress the statement extracted from him while in custody but in absence of Miranda warnings.[40]

2. The court erred in denying Duhamel's Rule 29 motions.[41]

3. The trial court erred in denying Duhamel additional funds for his computer forensics expert.[42]

4. The jury's verdict was against the manifest weight of the evidence.[43]

5. The State's evidence was insufficient to support a verdict of guilty on Counts 1-36 of in the indictment.[44]

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[38] Under Ohio App. Rule 4(A), to be timely, a party must file a notice of appeal within 30 days of the judgment being appealed. *See*, *Smith v. Konteh*, No. 3:04CV7456, 2007 WL 171978, at *2 (N.D. Ohio Jan. 18, 2007) (unreported case). Duhamel's conviction and sentence were journalized on April 1, 2014 (*id.* at 58) and the notice of appeal was filed on April 11, 2014. *Id.* at 62.

[39] *Id.*

[40] *Id*. at 71.

[41] *Id*. at 81.

[42] *Id*. at 87.

[43] *Id*. at 91.

[44] *Id*. at 92.

6. The sentence in the matter was a violation of Duhamel's Eighth Amendment protection against cruel and unusual punishment.[45]

The state filed a brief in response,[46] to which Duhamel replied.[47] The Ohio appeals court *sua sponte* dismissed Duhamel's appeal for lack of a final appealable order and reinstated the case to the trial court's active docket[48]

On December 10, 2014, the trial court sentenced Duhamel to a 15 year aggregate sentence.[49]

2. Direct appeal from resentencing

On December 15, 2014, Duhamel, through counsel, timely filed[50] a notice of appeal[51] with the Ohio Court of Appeals. In his brief, Duhamel raised seven assignments of error:

1. The court erred in denying Duhamel's motion to suppress the statement extracted from him while in custody but in absence of Miranda warnings.[52]

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[45] *Id*. at 93.

[46] *Id.* at 105.

[47] Id. at 143.

[48] *Id.* at 155.

[49] *Id*. at 157.

[50] Duhamel's conviction and sentence were journalized on December 10, 2014 (*id.* at 157) and the notice of appeal was filed on December 13, 2014. *Id.* at 159.

[51] *Id*.

[52] *Id*. at 168.

2. The court erred in denying Duhamel's Rule 29 motions.[53]

3. The trial court erred in denying Duhamel additional funds for his computer forensics expert.[54]

4. The jury's verdict was against the manifest weight of the evidence.[55]

5. The State's evidence was insufficient to support a verdict of guilty on Counts 1-36 of in the indictment.[56]

6. The sentence in this matter was a violation of Duhamel's Eighth Amendment protection against cruel and unusual punishment.[57]

7. The imposition of costs and fines on Mr. Duhamel was unconstitutional.[58]

The state filed a brief in response,[59] to which Duhamel replied.[60] The Ohio appeals court overruled all seven assignments of error and affirmed the decision of the trial court.[61]

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[53] *Id*. at 183.

[54] *Id*. at 190.

[55] *Id*. at 193.

[56] *Id*. at 194.

[57] *Id*. at 195.

[58] *Id*. at 199.

[59] *Id*. at 202.

[60] *Id*. at 245.

[61] *Id*. at 258.

3. The Supreme Court of Ohio

Duhamel, through counsel, thereupon filed a timely[62] notice of appeal with the Ohio Supreme Court.[63] In his brief in support of jurisdiction, he raised six propositions of law:

1. The court erred in denying Duhamel's motion to suppress.

2. The court erred in denying Duhamel's Rule 29 motions.

3. The trial court erred in denying Duhamel additional funds for his computer forensics expert.

4. Verdict was against the manifest weight of the evidence.

5. The State's evidence was insufficient to support a verdict of guilty on Counts 1-36 in the indictment.

6. The sentence in this matter was a violation of Duhamel's Eighth Amendment protection against cruel and unusual punishment under the Ohio and U.S. Constitutions.[64]

The State filed a memorandum in response.[65] On January 20, 2016, the Supreme Court of Ohio declined to accept jurisdiction of the appeal under S.Ct.Prac. Rule 7.08(B)(4).[66]

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[62] *See* Ohio S.Ct.Prac.R. 7.01(A)(5)(b) (To be timely, a notice of appeal must be filed within 45 days of entry of the appellate judgment for which review is sought.); *See*, *Applegarth v. Warden*, 377 F. App'x 448, 450 (6th Cir. 2010) (discussing forty-five day limit) (unreported case). The court of appeals affirmed the decision of the trial court on August 6, 2015. *Id.* at 258. Duhamel filed his notice of appeal with the Supreme Court of Ohio on September 17, 2015, thus it is timely. *Id*. at 289.

[63] *Id.*

[64] *Id*. at 293.

[65] *Id*. at 304.

[66] *Id*. at 318.

Duhammel, through counsel, filed a petition for writ of *certiorari* to the United States Supreme Court which was denied on June 13, 2016.[67]

C. Petition for writ of habeas corpus

On November 12, 2016, Duhamel, through counsel, timely filed[68] a federal petition for habeas relief.[69] He raises five grounds for relief:

GROUND ONE:	The State Ohio rulings were in direct conflict with the U.S. Supreme Courts Jurisprudence regarding custodial interrogations.[70]
GROUND TWO:	State's failure to provide expert witness fees violated petitioner's due process rights.[71]
GROUND THREE:	State's failure to present any evidence as to petitioner's knowledge violated petitioner's fair trial rights.[72]
GROUND FOUR:	The State's evidence was insufficient to sustain the conviction of petitioner.[73]

[67] *Id*. at 319.

[68] The present petition for federal habeas relief was filed on November 12, 2016. ECF # 1. As such, it was filed within one year of the conclusion of Duhamel's direct appeal in the Ohio courts and so is timely under 28 U.S.C. § 2254(d)(1).

[69] ECF # 1.

[70] *Id*. at 11.

[71] *Id*. at 24.

[72] *Id*. at 27.

[73] *Id*. at 37.

GROUND FIVE: The sentence in this matter was a violation of petitioner's Eighth Amendment protection against cruel and unusual punishment under the Ohio and U.S. Constitutions.[74]

Analysis

A. Preliminary observations

Before proceeding further, I make the following preliminary observations:

1. There is no dispute that Duhamel is currently in state custody as the result of his conviction and sentence by an Ohio court, and that he was so incarcerated at the time he filed this petition. Thus, he meets the "in custody" requirement of the federal habeas statute vesting this Court with jurisdiction over the petition.[75]

2. There is also no dispute, as detailed above, that this petition was timely filed under the applicable statute.[76]

3. In addition, my own review of the docket of this Court confirms, that this is not a second or successive petition for federal habeas relief as to this conviction and sentence.[77]

4. Moreover, it appears that these claims have been totally exhausted in Ohio courts by virtue of having been presented through one full round of Ohio's established appellate review procedure.[78]

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[74] *Id*. at 38.

[75] 28 U.S.C. § 2254(a); *Ward v. Knoblock*, 738 F.2d 134, 138 (6th Cir. 1984).

[76] 28 U.S.C. § 2254(d)(1); *Bronaugh v. Ohio*, 235 F.3d 280, 283-84 (6th Cir. 2000).

[77] 28 U.S.C. § 2254(b); *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006).

[78] 28 U.S.C. § 2254(b); *Rhines v. Weber*, 544 U.S. 269, 274 (2005); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999).

5. Finally, Duhamel is represented by counsel, and has requested an evidentiary hearing to develop the factual bases of his claims.[79] As is detailed below, because all claims may be resolved on the current record, I deny the motion for evidentiary hearing.

B. Standards of review

1. AEDPA review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[80] codified at 28 U.S.C. § 2254, strictly circumscribes a federal court's ability to grant a writ of habeas corpus.[81] Pursuant to AEDPA, a federal court shall not grant a habeas petition with respect to any claim adjudicated on the merits in state court unless the state adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal 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 [s]tate court proceeding.[82]

The Supreme Court teaches that this standard for review is indeed both "highly deferential" to state court determinations,[83] and "difficult to meet,"[84] thus, preventing petitioner and

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[79] 28 U.S.C. § 2254(e)(2).

[80] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[81] *See* 28 U.S.C. § 2254 (2012).

[82] 28 U.S.C. § 2254(d) (2012).

[83] *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citation omitted).

[84] *Id.* (citation omitted).

federal court alike "from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts."[85]

a. "Contrary to" or "unreasonable application of" clearly established federal law

Under § 2254(d)(1), "clearly established Federal law" includes only Supreme Court holdings and does not include dicta.[86] In this context, there are two ways that a state court decision can be "contrary to" clearly established federal law:[87] (1) in circumstances where the state court applies a rule that contradicts the governing law set forth in a Supreme Court case,[88] or (2) where the state court confronts a set of facts that are materially indistinguishable from a Supreme Court decision, but nonetheless arrives at a different result.[89] A state court's decision does not rise to the level of being "contrary to" clearly established federal law simply because that court did not cite the Supreme Court.[90] The state court need not even be aware of the relevant Supreme Court precedent, so long as neither its reasoning nor its result contradicts it.[91] Under the "contrary to" clause, if materially

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[85] *Rencio v. Lett*, 559 U.S. 766, 779 (2010).

[86] *Howes v. Fields*, 132 S.Ct. 1181, 1187 (2012) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

[87] *Brumfield v. Cain*, 135 S.Ct. 2269, 2293 (2015).

[88] *Id.*

[89] *Id.*

[90] *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (per curiam).

[91] *Id.*

indistinguishable facts confront the state court, and it nevertheless decides the case differently than the Supreme Court has previously, a writ will issue.[92] When no such Supreme Court holding exists the federal habeas court must deny the petition.

A state court decision constitutes an "unreasonable application" of clearly established federal law when it correctly identifies the governing legal rule, but applies it unreasonably to the facts of the petitioner's case.[93] Whether the state court unreasonably applied the governing legal principle from a Supreme Court decision turns on whether the state court's application was objectively unreasonable.[94] A state court's application that is "merely wrong," even in the case of clear error, is insufficient.[95] To show that a state court decision is an unreasonable application, a petitioner must show that the state court ruling on the claim being presented to the federal court "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[96] Under the "unreasonable application" clause, the federal habeas court must grant the writ if the State court adopted the correct governing legal principle from a Supreme Court decision, but unreasonably applied that principle to the facts of the petitioner's case.

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[92] *See id.*

[93] *White v. Woodall*, 134 S.Ct. 1697, 1699 (2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 407 (2000).

[94] *Id.*(quoting *Lockyear v. Andrade*, 538 U.S. 63, 75-76. (2003).

[95] *Id.*

[96] *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

b. "Unreasonable determination" of the facts

The Supreme Court has recognized that § 2254(d)(2) demands that a federal habeas court accord the state trial courts substantial deference:[97] Under § 2254(e)(1), "a determination of a factual issue made by a [s]tate court shall be presumed to be correct."[98] A federal court may not characterize a state court factual determination as unreasonable "merely because [it] would have reached a different conclusion in the first instance."[99] While such deference to state court determinations does not amount to an "abandonment or abdication of judicial review"or "by definition preclude relief,"[100] it is indeed a difficult standard to meet. "The role of a federal habeas court is to guard against extreme malfunctions in the state criminal justice systems, not to apply *de novo* review of factual findings and to substitute its own opinions for the determination made on the scene by the trial judges."[101]

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[97] *Brumfield*, 135 S.Ct. at 2277.

[98] 28 U.S.C. § 2254(e)(1) (2012).

[99] *Brumfield*, 135 S.Ct. at 2277 (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010).

[100] *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("If reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's determination.") (internal quotation marks omitted)).

[101] *Davis v. Ayala*, 135 S.Ct. 2187, 2202 (2015) (citation omitted).

2. Miranda-custodial interrogation

Miranda v. Arizona[102] requires that a person subjected to a custodial must be warned of certain rights.[103] Miranda warnings are not required in non-threatening and non-confining interrogation situations, which are non-custodial in nature.[104] *Miranda* defines the nature of a 'custodial' interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way."[105] This is further dependent on whether the suspect is formally under arrest or if the subject's movement is restrained to the degree that it is the equivalent of an arrest.[106]

Further, when deciding if an interrogation was custodial, courts look at "how a reasonable man in the suspect's position would have understood his situation."[107] The Supreme Court of Ohio instructs that, "[i]n judging whether an individual has been placed into custody the test is whether, under the totality of the circumstances, a 'reasonable

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[102] *Miranda v. Arizona*, 384 U.S. 436 (1966)

[103] A suspect must be warned that he may remain silent, that anything he says may be used against him, that he has a right to an attorney, and that one will be appointed for him if he cannot afford to pay. *Id*.

[104] *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977).

[105] *Miranda*, 384 U.S. at 444.

[106] *California v. Beheler*, 463 U.S.1121, 1127 (1983).

[107] *State v. Mason*, 82 Ohio St. 3d 144, 154, 694 N.E.2d 932, 946 (1998) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)).

person would have believed that he was not free to leave.'"[108] The Sixth Circuit, relying on Supreme Court precedent, uses a totality of the circumstances approach as well, looking at the "objective circumstances of the interrogation," rather than "the subjective views harbored by either the interrogating officers or the person being questioned."[109]

3. Sufficiency of the evidence

Despite the general prohibition against federal habeas corpus review of issues of state law,[110] a claim that a petitioner was convicted with insufficient evidence is cognizable under 28 U.S.C. § 2254[111] because the Due Process Clause of the Fourteenth Amendment "forbids a State from convicting a person of a crime without proving the elements of that crime beyond a reasonable doubt."[112]

In that regard, the United States Supreme Court teaches that substantial evidence supports a conviction if, after viewing the evidence in the light most favorable to the prosecution, the reviewing court can conclude that any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.[113] This standard does

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[108] *State v. Gumm*, 73 Ohio St. 3d 413, 429, 653 N.E.2d 253, 268 (1995) (quoting *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980)).

[109] *Stansbury v. California*, 511 U.S. 318, 323 (1994); *Mason*, 320 F.3d at 631.

[110] *See*, *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990).

[111] *Brown v. Palmer*, 441 F.3d 347, 351 (6th Cir. 2006).

[112] *Fiore v. White*, 531 U.S. 225, 228-29 (2001).

[113] *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

not permit the federal habeas court to make its own *de novo* determination of guilt or innocence; rather, it gives full play to the responsibility of the trier of fact to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to the ultimate fact.[114]

Moreover, in addressing an argument about the sufficiency of the evidence, it must be remembered that an attack on the credibility of a witness is simply a challenge to the quality of the prosecution's evidence, and not to its sufficiency.[115] Further, as the Sixth Circuit has stated, the review for sufficiency of the evidence must be viewed as containing two levels of deference toward the state decision: first, the deference set forth in *Jackson*, whereby the evidence is to be viewed most favorably to the prosecution, and next, "even if [the court] to conclude that a rational trier of fact could not have found the petitioner guilty beyond a reasonable doubt, on habeas review, we must still defer to the state appellate court's sufficiency determination as long as that is not unreasonable."[116]

4. Eighth Amendment-cruel and unusual punishment

The Eighth Amendment to the U.S. Constitution provides that "cruel and unusual punishments [shall not be] inflicted" and Eighth Amendment is binding upon the states through the Fourteenth Amendment's Due Process Clause.[117] To pass Eighth Amendment

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[114] *Herrera v. Collins*, 506 U.S. 390, 401-02 (1993).

[115] *Martin v. Mitchell*, 280 F.3d 594, 618 (6th Cir. 2002).

[116] *Moreland v. Bradshaw*, 699 F.3d 908, 916-17 (6th Cir. 2012) (citations omitted).

[117] *Robinson v. California*, 370 U.S. 660 (1962).

scrutiny, the Supreme Court has determined that strict proportionality between a crime and its punishment is not required.[118]

The Sixth Circuit has adopted the *Harmenlin* "narrow proportionality principle" and a sentence must be grossly disproportionate to the conduct being punished to violate the Eighth Amendment.[119] State trial court judges are given great discretion in determining a defendant's sentence and substantial deference is given to a sentencing court's decision and the legislature's broad authority to enact criminal penalties.[120] Outside the context of capital punishment, successful federal constitutional challenges to the length of a sentence alone are rare.[121] A sentence that falls within the maximum penalty set by state statute generally does not constitute cruel and unusual punishment and a sentence is authorized by law if it does not exceed the maximum terms that the trial court is permitted to impose by statute.[122] Furthermore, consecutive sentencing is constitutionally permissible.[123]

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[118] *Harmelin v. United States*, 501 U.S. 957, 959-960 (1991).

[119] *U.S. v. Brooks*, 209 F.3d 577 (6th Cir. 2000).

[120] *Solem v. Helm*, 463 U.S. 277 (1983).

[121] *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

[122] *Hamelin v. Michigan, 501 U.S.* at 959*; Austin v. Jackson*, 213 F.3d 298, 302 (6 th Cir. 2000); *U.S. v. Layne*, 324 F.3d 464, 474 (6th Cir. 2003).

[123] *Oregon v. Ice*, 555 U.S. 160 (2009); *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *State v. Vasquez*, 18 Ohio App.3d 92, 481 N.E. 2d 640 (1984).

C. Application of standards

1. Ground one: The Ohio State rulings were in direct conflict with the U.S. Supreme Court's jurisprudence regarding custodial interrogations.

The trial court denied Duhamel's motion to suppress statements that he made to police officers as they executed a search warrant on his home.[124] Duhamel asserts that he was in custody whenever he spoke with police[125] but did not receive *Miranda* warnings.[126] He contends that the interview that took place at his home, as well as the admission of the recording of that interview at the trial, violated his rights under *Miranda*.[127]

As the state appeals court noted, police entered Duhamel's home with guns drawn and did not allow him to call his mother or enter his bedroom to retrieve a cough drop.[128]

But as the state appeals court also noted, Detective Jamie Bonnette, the detective that interviewed Duhamel while police searched his home,[129] testified that the police refused to permit Duhamel to go to his bedroom because they thought he might try to hide something they were looking for.[130] The police also held concern for everyone's safety.[131]

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[124] ECF # 1 at 17.

[125] *Id*. at 11-17.

[126] *Id*. at 13.

[127] *Id*. at 11-22.

[128] ECF # 8, Attachment 1 at 270.

[129] *Id*. at 262.

[130] *Id*. at 271.

[131] *Id*.

In addition, several factors demonstrate that Duhamel's interview was non-custodial in nature. First, the state appeals court found that there was nothing accusatorial about the interview.[132] Second, Bonnette testified that prior to posing any questions, he informed Duhamel that he was not under arrest.[133] Finally, Bonnette testified, and the video recording of the interview shows, that he reminded Duhamel several times that he did not have to answer any questions if he did not want to.[134]

In sum, as the police searched Duhamel's home, his freedom was not restricted beyond what was reasonable to ensure that the officers could execute the search warrant thoroughly and safely. In addition, Duhamel's interview with the police was non-accusatorial, he was told that he was not under arrest, and he was reminded that he did not have to answer any questions if he did not want to. All of these factors made the interview non-custodial in nature. Under Supreme Court precedent,[135] *Miranda* warnings need not be given in this situation. The trial court's admission of statements during the interview is not "contrary to" or an "unreasonable application of" Supreme Court precedent.

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[132] *Id*. at 270.

[133] *Id*.

[134] *Id*.

[135] *Stansbury*, 511 U.S. at 323.

2. Ground Two: State's failure to provide expert witness violated petitioner's due process rights

The trial court denied Duhamel's request for additional funds to have his expert examine the state's computer evidence.[136] Duhamel contends that the constitutional right to due process entitles him to a "fair and adequate opportunity" to defend against (and utilize) expert testimony.[137] Further, he argues that the constitutional right to equal protection also requires that expert assistance be provided in this case.[138]

In *Britt v. North Carolina*,[139] the Supreme Court held that "[t]he state must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners.

Although the Supreme Court has held that states must provide indigent defendants with the basic tools for an adequate defense, as the state appeals court noted, the trial court did not find Duhamel indigent, and no affidavit of indigency was filed at the time the court denied Duhamel's third request for additional funds to pay his expert.[140] Thus, consistent with the Supreme Court's ruling in *Britt*, the trial court did not need to provide Duhamel

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[136] ECF # 1 at 26.

[137] *Id*. at 25 (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 302 (1973).

[138] *Id*.

[139] *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)-emphasis mine

[140] ECF # 8, Attachment 1 at 277.

additional funds to pay his computer expert. The state appellate decision clearly was not "contrary to" or an "unreasonable application of" Supreme Court precedent.

3. Ground three: State's failure to provide any evidence as to petitioner's knowledge violated petitioner's due process rights.

Duhamel argues that the state never presented evidence proving that he knew that the files on his computer contained child pornography.[141] Duhamel contends that the state was required offer evidence that he had possessed the files "with knowledge of the character of the material or performance involved."[142] Duhamel asserts that the state's failure to meet this legally mandated requirement violated his state and federal fair trial rights.[143]

As noted by the state appeals court, R.C. 2901.22(B) defines "knowledge." The statute states in relevant part, that "[a] person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact."[144]

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[141] ECF # 1 at 27-37.

[142] *Id*. at 28 (citing to R.C. 2907.322(A)(1) and (A)(2)).

[143] *Id*. at 29.

[144] ECF # 8, Attachment 1 at 274-75.

Under this definition the evidence presented proves that Duhamel knew that it was likely that the files referenced in the indictment contained child pornography.[145] For example, in the video of the search of Duhamel's home, Duhamel is seen explaining to police where child pornography may be found.[146] Duhamel also admitted he was familiar with certain search terms that locate child pornographic files.[147] Moreover, Duhamel admitted to police during the execution of the search warrant that he possessed illegal files.[148]

The state appeals court determined that the state did present evidence sufficient to prove that Duhamel had knowledge (based on the definition of knowledge as set forth by Ohio statute) that certain files on his computer contained child pornography. The federal habeas court must follow the rulings of the state's highest court with respect to state law. Based on the state appeals court's interpretation of state law, the state did in fact demonstrate that Duhamel knew that it was likely that the files referenced in the indictment contained child pornography. Thus, Duhamel certainly did not demonstrate that a fundamental principle of fairness was violated in his trial.

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[145] *Id*. at 274-76.

[146] *Id*. at 274.

[147] *Id*.

[148] *Id*. at 276.

4. Ground four: The State's evidence was insufficient to sustain the conviction of petitioner

This ground restates the argument made to support the third ground. Sufficient evidence exists to support a conviction consistent with the Due Process Clause of the Fourteenth Amendment, in viewing the evidence in favor of the prosecution, the reviewing court can conclude that a rational trier of fact could find the elements of the offense proved beyond a reasonable doubt.[149] The evidence introduced of Duhamel's knowledge satisfies this standard. The state appeals court ruling was not an unreasonable applicatio of the Supreme Court precedent.

5. Ground five: The sentence in this case was a violation of petitioner's Eighth Amendment protection against cruel and unusual punishment under the Ohio and U.S. Constitutions.

As the state appeals court noted, Duhamel's sentence fell within the statutory range.[150] Since Duhamel's conviction fell within the statutory range allowed by law it was not excessive or cruel and unusual punishment according to Supreme Court precedent. Therefore, the fact that Duhamel was sentenced to a fifteen year prison term was not "contrary to" or an "unreasonable application of" Supreme Court precedent.

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[149] *Jackson*, 443 U.S. at 324.

[150] *Id*. at 284.

Conclusion

For the foregoing reasons, I recommend that the petition of Jason Duhamel for a writ of habeas corpus be denied as set forth above.

Dated: February 2, 2018

s/ William H. Baughman, Jr.
United States Magistrate Judge

Objections

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.[151]

[151] *See*, *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also*, *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).

APPENDIX C

[Cite as *State v. Duhamel*, 2015-Ohio-3145.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102346

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JASON DUHAMEL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-568965-A

BEFORE: E.T. Gallagher, J., Jones, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: August 6, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Jason Duhamel ("Duhamel"), appeals the denial of a motion to suppress as well as his convictions and sentence. He assigns the following errors for our review:

> 1. The court erred in denying Duhamel's motion to suppress the statement extracted from him while in custody but in the absence of *Miranda* warnings.
>
> 2. The court erred in denying Duhamel's Rule 29 motion.
>
> 3. The trial court erred in denying Duhamel additional funds for his computer forensics expert.
>
> 4. The jury's verdict was against the manifest weight of the evidence.
>
> 5. The state's evidence was insufficient to support a verdict of guilty on Counts 1-36 in the indictment.
>
> 6. The sentence in this matter was a violation of Duhamel's Eighth Amendment protection against cruel and unusual punishment.
>
> 7. The imposition of costs and fines on Defendant-appellant was unconstitutional.

{¶2} We find no merit the appeal and affirm.

I. Facts and Procedural History

{¶3} Duhamel was charged with 37 sex-related offenses. Counts 1 through 35 of the indictment, charged Duhamel with pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(2) and 2907.322(A)(1). Counts 36 and 37 charged Duhamel with one count each of illegal use of minor in nudity-oriented material,

in violation of R.C. 2907.323(A)(1), and possession of criminal tools, in violation of R.C. 2923.24(A). The charges resulted from a search of Duhamel's home in which investigators found digital files of child pornographic videos on his computer.

{¶4} In preparation for trial, Duhamel filed a motion requesting funds to retain an expert computer examiner, and the court awarded him $2,500. A few months later, Duhamel filed another motion requesting additional funds for his expert, and the court awarded him another $1,000. Duhamel later filed a third motion requesting more money for the expert but, this time, the trial court denied the motion.

{¶5} Duhamel also filed a motion to suppress evidence of any statements he made to police during the search of his home. At a hearing on the motion, Investigator David Frattare ("Frattare") of the Cuyahoga County Prosecutor's Office and the Ohio Internet Crimes Against Children ("ICAC") Task Force, testified about his investigation that led to the search. Specifically, he identified an IP address suspected of sharing 66 files of child pornography via the Ares peer-to-peer file sharing network. An IP address is a string of numbers associated with the internet connection of a particular service provider. (Tr. 44.) Frattare described it as the "street address for your internet service." (Tr. 307.)

{¶6} File sharing networks allow program users to share files on their personal computers with other program users. (Tr. 297-299.) The IP address Frattare identified in this case was linked to a computer located in a residence on West 126th Street in Cleveland, Ohio. Investigators connected directly to the suspect's computer and browsed numerous files with titles such as "Alicia 10 yo pthc little girl loves adult sex,"

"10 yr boy with 12 yr girl bufing," and "Johanna 9 yr swallows cum." Investigators downloaded two of the files, and confirmed that they both contained child pornography.

{¶7} Further investigation revealed that three adults lived in the house associated with the IP address, but investigators did not know which of the adults was pandering the pornography. Pursuant to a search warrant, 13 investigators searched Duhamel's house early one morning. Duhamel was the only adult in the home at the time of the search.

{¶8} Detective Jamie Bonnette ("Bonnette"), of the Cuyahoga County Sheriff's Office, interviewed Duhamel while other officers searched the house. A video recording of the interview, which occurred at the dining room table, was played for the court and made part of the record. Bonnette testified that before he posed any questions, he advised Duhamel that he was not under arrest and that he was not required to answer any questions if he did not want to. Throughout the interview, Bonnette reminded Duhamel that he was not required to answer any questions. Yet, Duhamel spoke freely with police and, at times, initiated conversation.

{¶9} After hearing the testimony and reviewing the video of the interview, the trial court determined that because Duhamel was not in custody when he made statements to police, *Miranda* warnings were not required. Accordingly, the court denied the motion to suppress.

{¶10} The evidence presented at the suppression hearing was reintroduced for the jury at trial. In addition, Frattare explained how individuals search for and download files and described several popular search terms used to find child pornography. For

example, the search term "PTHC" stands for "preteen hard-core," and "9" combined with the letters "yo" indicates "nine years old." According to Frattare, child pornography files generally contain descriptive titles and many titles expressly indicate that they contain child pornography. (Tr. 429.)

{¶11} Duhamel admitted to Bonnette that he had files that he knew were illegal. (Tr. 425.) Duhamel also told police that he had learned about the search term "raygold" from a former coworker at Toys "R" Us, but stopped using it after three searches led to inappropriate material involving nine-year-old girls. Duhamel denied using the search terms "PTHC" or "pedo," but knew that "pedo" was associated with child pornography.

{¶12} Duhamel told police that whenever he downloaded files from Ares, he downloaded multiple files at once, transferred the downloaded files to folders on an external hard drive, and sorted through them later. He denied looking at the downloaded files before transferring them to the external hard drive. However, he advised Bonnette that any questionable material on his devices would likely be found in either a folder titled "finished" that was within a folder titled "other" on the external hard drive, or within a folder titled "kid" or "young" that was within a folder called "movies." Duhamel told investigators that he generally did not keep downloaded files on his computer.

{¶13} Investigator Jason Howell ("Howell"), of the Cuyahoga County Prosecutor's Office and the Ohio ICAC Task Force, testified that he performed on-scene forensic scans of numerous digital devices in Duhamel's home during the search in order to

confiscate only those devices that contained child pornography. Investigators seized six items from the residence: an HP USB drive, a Seagate external hard drive, a Toshiba external hard drive, a Western Digital external hard drive, a Dell notebook computer, and an Antech external hard drive. All of these items were found in Duhamel's bedroom. Howell bookmarked the files of child pornography on the devices wherever they were found.

{¶14} Howell created a PowerPoint presentation containing the files he bookmarked during his on-scene forensic examinations. Each slide of the presentation corresponded to a separate count of the indictment and included the file, title, date the file was created, and file pathway. A DVD containing the presentation was admitted into evidence. As relevant to this appeal, the list of titles for each count in the Power Point presentation was as follows:

Count 3 "-(sdpa) alicia 10 yo pthc little girl loves adult sex(2)(2)(2).avi"
Count 4 "-(sdpa) mom - old sister and little kid – family sex pthc.mgp"
Count 5 "!!!!! hot hot hot !!!! - 13y bondage.avi"
Count 6 "(pthc) notta 9 yo girl & men.mpg"
Count 7 "pthc-real dad & toddler daughter sex.wmx"
Count 8 "tara 007 pthc jan 07 masterbation and penetration(2).mpg"
Count 9 "delic video (4).wmv"
Count 10 "! new ! (pthc) veronika nuevo 2 (11 yo) nenas-all(2).mpg"
Count 11 "! new pthc dark studio fully.avi"
Count 12 "((hussyfan)) pthc-colombia-girl-sexo infantil-desvergacion!avi"
Count 13 "(pthc)(japanese loli) kikuko 10 y 12.avi"
Count 14 "(pthc) boy mom 5.mpg"
Count 15 "(pthc) brazil – 10 yr boy with 12 yr girl bufing 04-01-2005.mpg"
Count 16 "(pthc) johanna 9 yr. swallows cum" slct.avi"
Count 17 "(pthc) asian_loli.avi"
Count 18 "(ptsc)-(unverified) 0 23 27.mpg"

Count 19 "-(sdpa) alicia 10 yo pthc little girl loves adult sex(2)(2)(2).avi"[1]
Count 20 "-(sdpa) mom - old sister and little kid – family sex pthc.mgp"
Count 21 "10 years old forced sex(2).mpg"
Count 22 "8 yr orgasm and anal fuck hard! new! (Pthc) 2007 new girl img 0004(2).wmv"
Count 23 "pthc – 7 yr lesbian twin sisters"
Count 24 "pthc – open – euro family young sex education for very young girl.mpg"
Count 25 "ptsc bella!!- (webcam) - 11 yo-girly avi - moscow-mafia-pthc-hussyfan-webcam-2006.avi"
Count 26 "07 taboo – father and his daughter 9 y old.mpg"
Count 27 "2009 webcam pt – xxcaliaxx2.avi"
Count 28 "! ! ! new ! ! ! (pthc) linda - a little extra 217 avi - - (spda) linda - 10 anos mamando y tomando semen.avi"
Count 29 "air.mpg"
Count 30 "kley_full.mpg"
Count 31 "$R26XWOW4.avi"
Count 32 "$R6ZG1QL.mpg"
Count 33 "$RIWVQPI.avi"
Count 34 "$R1D03L4.mpg"
Count 35 "$RXC7H3I.wmv"
Count 36 "lolicon hentai girl nude.avi"

{¶15} Howell testified that Counts 5 through 8 and 10 through 26 were found in the folder titled "kid" that was within the folder titled "movies," on the Western Digital external hard drive. Counts 9 through 27 were found in a folder titled "sex folder" that was also located in the "movies" folder on the Western Digital external hard drive. Counts 28 through 30 and 36 were found in another folder titled "kid" that was within a folder titled "new folder" on the Western Digital external drive. The files represented in

[1] This count involves the same video as the video in Count 3, but it was downloaded to two different devices.

Counts 31 through 35 were found in the Windows recycle bin of the Dell notebook computer.

{¶16} After the search, Howell conducted a more thorough forensic investigation of the devices in a lab, where he discovered 20 more files of child pornography in addition to comics and animated videos of children having sex. Howell testified that he bookmarked 19 "thumbnails" of child pornography. He explained that a "thumbnail" is "a still frame of, or an image of one frame of the video," and that Duhamel must have created the thumbnails by playing the video files on the computer. Howell described the organization of the folders on Duhamel's devices and stated that the file folders were named "incest," "lolicon bondage," "rape," "sex," "furry," "hentai," "hottails," "JAB comic big collection," "mom," and "naruto." Each folder contained additional folders that corresponded to the name of the larger folder. For example, a folder titled "cartoon," contained animation, and the files found in the "kid" folder had titles indicative of child pornography.

{¶17} Duhamel moved for acquittal pursuant to Crim.R. 29 after the state rested its case. The court denied the motion and the case was submitted to the jury. The jury found Duhamel guilty on Counts 3 through 8, 10 through 30, 36, and 37, and not guilty of Counts 1, 2, 9, and 31 through 35. The court sentenced Duhamel to three years in prison on Counts 3 and 4, to be served concurrently; four years in prison on Counts 5 through 8, 10 through 30, and 36, to be served concurrently; and one year in prison on Count 37. However, the court ordered that the three-year sentence on Counts 3 and 4, the four-year

sentence on Counts 5 through 8 and 10 through 27, the four-year sentence on Counts 28 and 29, and the four-year sentence on Counts 36 and 37, were to be served consecutively for an aggregate 15-year prison term. This appeal followed.

II. Law and Analysis

A. Motion to Suppress

{¶18} In his first assignment of error, Duhamel argues the trial court erred in denying his motion to suppress evidence of statements he made to police when they executed the search warrant of his home. He contends the police should have given him *Miranda* warnings before questioning him because, although he was not under arrest, he was, for all intents and purposes, in police custody.

{¶19} Appellate review of a motion to suppress involves a mixed question of law and fact. "In a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility." *State v. Curry*, 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 (8th Dist.1994). The reviewing court must accept the trial court's findings of fact in ruling on a motion to suppress if the findings are supported by competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. Accepting the facts as true, the reviewing court must then independently determine as a matter of law, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard. *Id.*

{¶20} The Fifth Amendment to the U.S. Constitution provides that an individual shall not "be compelled in any criminal case to be a witness against himself." In

Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court applied the Fifth Amendment right against self-incrimination to police interrogations of individuals in custody, and held:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom * * * in any significant way and is subjected to questioning, * * * [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. * * * [U]nless and until such warnings * * * are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Id. at 478-479.

{¶21} *Miranda* warnings are only required when the accused is subjected to custodial interrogation. *Id*.; *State v. Biros*, 78 Ohio St.3d 426, 440, 678 N.E.2d 891 (1997). In determining whether police questioning constitutes "custodial interrogation" for *Miranda* purposes, the inquiry is whether a reasonable person would feel free to leave the interview under the totality of the circumstances presented at that time. *Biros* at *id*.

{¶22} However, the determination of what constitutes "custody" does not depend on the subjective feelings of the accused or the subjective, unarticulated goals of police. *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *State v. Hopfer*, 112 Ohio App.3d 521, 545-546, 679 N.E.2d 321 (8th Dist.1996). The focus is on the perception a reasonable person would have under the circumstances. *Stansbury v. California*, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994). Indeed, "[t]he ultimate inquiry is whether there is a 'formal arrest or restraint on freedom of movement'

of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983). *See also State v. Barnes*, 25 Ohio St.3d 203, 207, 495 N.E.2d 922 (1986).

{¶23} Duhamel argues that a reasonable person in his position would have believed his liberty was restrained to the same extent as a formal arrest because police entered his home with guns drawn and prohibited him from calling his mother and from going to his bedroom to retrieve a cough drop. However, Bonnette testified that prior to posing any questions, he informed Duhamel that he was not under arrest. Bonnette also testified, and the video of the interview shows, that Bonnette reminded Duhamel several times that he did not have to answer any questions if he did not want to.

{¶24} Moreover, there was nothing accusatorial about the interview. There were no threats, nor were the police overbearing. The video of the interview shows that the tenor of the conversation was nonthreatening. Duhamel was never handcuffed and police spoke in a casual manner. Duhamel did not appear overly nervous and initiated the conversation at times. *Miranda* does not affect the admissibility of "volunteered statements of any kind." *Miranda* at 478.

{¶25} Although the officers refused to allow Duhamel to go to his bedroom to get a cough drop, 13 police officers were searching the house at the time. Under these circumstances, a reasonable person would conclude that while he was not under arrest, he could not go to the bedroom because his presence would interfere with police business. Bonnette testified they refused to permit Duhamel to go to his bedroom because they

thought he might try to hide something they were looking for. The police were also concerned for everyone's safety.

{¶26} Because Duhamel was not subject to custodial interrogation and his statements to police were voluntary, the officers were not required to give Duhamel *Miranda* warnings before speaking with him during the search of his home.

{¶27} The first assignment of error is overruled.

B. Sufficiency and Manifest Weight of the Evidence

{¶28} In the second and fifth assigned errors, Duhamel argues his convictions are not sustained by sufficient evidence. In the fourth assignment of error, Duhamel argues his convictions are against the manifest weight of the evidence because there was no evidence that Duhamel had "knowledge of the character of the material or performance involved" in any of the downloaded files listed in the indictment.

{¶29} Although the terms "sufficiency" and "weight" of the evidence are "quantitatively and qualitatively different," we address these issues together because they are closely related, while applying the distinct standards of review to Duhamel's arguments. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶30} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶31} In contrast to sufficiency, "weight of the evidence involves the inclination of the greater amount of credible evidence." *Thompkins* at 387. While "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, * * * weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins* at 386-387. "In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's?" *Id.* The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses to determine "'whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983).

{¶32} Duhamel was charged with pandering sexually oriented material involving a minor, in violation of R.C. 2907.322(A)(1), and illegal use of a minor, in violation of R.C. 2907.323(A)(1). R.C. 2907.322 provides, in relevant part:

> (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
>
> (1) Create, record, photograph, film, develop, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

R.C. 2907.323(A)(1) provides that no person shall "create * * * or transfer any material or performance that shows the minor in a state of nudity."

{¶33} Duhamel argues there was no evidence that he knew any of the 36 files referenced in the indictment contained child pornography. In support of his argument, he cites the testimony of Detectives Frattare and Howell, who stated that an Ares user cannot determine the contents of a file with certainty before downloading it because files cannot be opened until after they have been downloaded.

{¶34} Howell admitted on cross-examination that Duhamel's files, alone, do not contain reliable evidence of dates and times on which the files were opened or that they were ever opened by Duhamel's family computer or its Windows 7 operating system. (Tr. 584.) Howell further admitted that file names do not necessarily represent the contents of a file accurately. When asked if he would be comfortable testifying under oath that he "knows the character of the material or performance in the file just by looking at the file name," he replied: "No, not by the file name." Therefore, Duhamel argues, it was impossible for him to have had knowledge of the character of the material or performance of any of his files until after the act of pandering was committed by downloading the files.

{¶35} However, circumstantial evidence belies Duhamel's claimed ignorance. In the video of the search of Duhamel's home, Duhamel is seen explaining to police where child pornography may be found. Duhamel also admitted he was familiar with certain search terms that locate child pornographic files. He explained that the search term

"pthc" refers to "preteen hardcore," and that "raygold" refers to pornographic material involving nine-year old girls. The video shows that Duhamel had both knowledge and experience locating child pornography.

{¶36} R.C. 2901.22(B) defines "knowledge," and states, in relevant part, that

> [a] person has knowledge of circumstances when the person is aware that such *circumstances probably exist*. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a *high probability of its existence* and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

(Emphasis added.) Thus, to have knowledge, a person need only believe that certain circumstances probably exist, not that they exist with 100% certainty. Howell testified that child pornographic files generally have descriptive titles, such as "-(sdpa) alicia 10 yo pthc little girl loves adult sex(2)(2)(2).avi," and sometimes include icon-type pictures illustrating the subject of the files. (Tr. 449.) A person viewing the files sees the titles and images before he downloads them.

{¶37} The jury returned guilty findings only on those counts where the file had a descriptive title that described the file's contents and acquitted him of all counts related to files with non-descriptive titles. The jury's findings comport with the statutory definition of "knowledge" because the file titles indicated they likely contained child pornographic material. They also included specific search terms with which Duhamel was familiar.

{¶38} Further, the jury found that Duhamel possessed at least 28 files of child pornographic material. Possession of such a large number of downloaded child

pornography files cannot be a coincidence, especially since most of the files had titles indicative of child pornography. Duhamel transferred the files to external hard drives and saved them in separate folders that he categorized and named according to the type of files contained therein. Many of the same files were saved on more than one hard drive. The fact that Duhamel categorized a large number of pornographic files into separate folders further demonstrates his knowledge of the material.

{¶39} Moreover, Duhamel confessed to police during the execution of the search warrant that he possessed illegal files. This confession shows he had knowledge of the contents of his files. (Tr. 425.) Therefore, there was sufficient evidence that Duhamel knew he was downloading child pornographic material when he downloaded the files, and Duhamel's convictions were not against the manifest weight of the evidence, and the evidence was sufficient to support them.

{¶40} Accordingly, the second, fourth, and fifth assignments of error are overruled.

C. Additional Funds for Expert

{¶41} In the third assignment of error, Duhamel argues the trial court erred in denying his third request for funds to pay his expert witness.

{¶42} We review the trial court's denial of a motion for funds to obtain an expert witness for an abuse of discretion. *State v. Mason*, 82 Ohio St.3d 144, 150, 694 N.E.2d 932 (1998). An abuse of discretion connotes that the trial court's attitude was

unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶43} In *Mason*, the Ohio Supreme Court held that

> due process * * * requires that an *indigent* criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial.

Mason at 150. (Emphasis added.) Thus, according to *Mason*, only *indigent* criminal defendants are entitled to state funds to retain an expert, and only if certain conditions are met.

{¶44} The trial court did not find Duhamel indigent, and no affidavit of indigency was filed at the time the court denied Duhamel's third request for additional funds to pay his expert. Without a finding of indigency, Duhamel was not entitled to any state funds. *Id., see also State v. Wagner*, 5th Dist. Licking No. 03 CA 82, 2004-Ohio-3941, ¶ 28.

{¶45} Furthermore, the trial court awarded Duhamel $3,500 for an expert even though he was not indigent. Duhamel has not demonstrated that the court's denial of additional funds deprived him of a fair trial. Therefore, we cannot say that the trial court abused its discretion when it denied Duhamel's request for more funds.

{¶46} The third assignment of error is overruled.

D. Cruel and Unusual Punishment

{¶47} In the sixth assignment of error, Duhamel argues the consecutive sentence he received violates his Eighth Amendment protection against cruel and unusual punishment.

{¶48} R.C. 2953.08(G)(2) provides that an appellate court may reverse, vacate, or modify a consecutive sentence if (1) the sentence is "otherwise contrary to law" or (2) the appellate court, upon its review, clearly and convincingly finds that the record does not support the sentencing court's findings under R.C. 2929.14(C)(4). Obviously, an unconstitutional sentence is contrary to law.

{¶49} The Eighth Amendment's prohibition on "cruel and unusual punishments" requires that the punishment for a crime be proportionate to the offense. *Weems v. U.S.*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910). "'[C]ases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person.'" *State v. Weitbrecht*, 86 Ohio St.3d 368, 371, 715 N.E.2d 167 (1999), quoting *McDougle v. Maxwell*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964). "'[A]s a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.'" *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 21, quoting *McDougle*.

{¶50} Duhamel does not argue that any of his individual sentences exceed the statutory range for his convictions. He argues his sentence is cruel and unusual because

the trial court erroneously ordered consecutive prison terms and failed to merge allied offenses.

1. Consecutive Sentences

{¶51} There is a presumption in Ohio that prison sentences should be served concurrently, unless the trial court makes the findings outlined in R.C. 2929.14(C)(4) to justify the imposition of consecutive sentences. R.C. 2929.41(A). R.C. 2929.14(C)(4) requires the court to find that (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) at least one of the three findings set forth in R.C. 2929.14(C)(4)(a)-(c) applies. As relevant here, R.C. 2929.14(C)(4)(b) provides as a finding that the court consider whether

> at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

{¶52} In *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29, the Ohio Supreme Court held that

> a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld.

The failure to make the findings, however, is "contrary to law." *Id.* at ¶ 37.

{¶53} At the sentencing hearing, the trial court expressly found that "a prison sentence is consistent with the rules and principles" of sentencing. In imposing the consecutive sentences, the trial court stated, in relevant part:

> I believe consecutive sentences are necessary to protect the public from future crimes and to punish you. They're not disproportionate to the seriousness of [your] conduct and danger you pose.
>
> I do find that this was part of a course of conduct inasmuch as, again, as I indicated, happened on June 10th, June 24th, June 25th, June 29th, July 1st. So, I feel that these are appropriate, necessary sentences.

(Tr. 859.) Thus, the trial court made all the findings necessary for the imposition of consecutive sentences.

{¶54} Furthermore, the record supports the court's findings. In *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), the U.S. Supreme Court recognized the government's interest in safeguarding the physical and psychological well-being of children and in preventing their sexual exploitation. *Id.* at 756-757. Every video or image of child pornography on the internet constitutes a permanent record of that particular child's sexual abuse. The harm caused by these videos is exacerbated by their circulation. *Id.* The videos in Duhamel's library show eight, nine, and ten-year old girls being vaginally raped by adult men. Adult men are seen video-recording and photographing young girls while they are being molested, raped, and abused.

{¶55} These videos are far worse than solitary photographs of naked children, which are themselves harmful to the child victims. Duhamel downloaded the videos at

different times as part of a course of conduct. Therefore, the record supports the court's finding that consecutive sentences are proportionate to the seriousness of Duhamel's crimes, are necessary to punish Duhamel for his multiple downloads of child pornographic material, and to protect the public.

2. Allied Offenses

{¶56} Duhamel argues his sentence is cruel and unusual because the trial court erred in failing to merge allied offenses of similar import.

{¶57} "R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23. Under R.C. 2941.25(A), when the same conduct by the defendant "can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." However, R.C. 2941.25(B) provides

> Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶58} The Ohio Supreme Court recently clarified the test courts should employ when deciding whether two or more offenses are allied offenses that merge into a single conviction under R.C. 2941.25 in *State v. Ruff*, Slip Opinion No. 2015-Ohio-995, ¶ 25. In *Ruff*, the court stated that its decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, which directed courts to focus on the defendant's conduct when evaluating whether offenses are allied, was "incomplete." *Id.* at ¶ 16.

{¶59} In accordance with *Johnson*, the *Ruff* court maintained that when determining whether there are allied offenses that merge into a single conviction, the court must first examine the defendant's conduct. *Ruff* at ¶ 25. The court further held that multiple offenses do not merge if (1) the offenses are dissimilar in import or significance, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation. *Id.* at syllabus. With respect to the first factor, the court explained that two or more offenses are dissimilar within the meaning of R.C. 2941.25(B) "when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at syllabus.

{¶60} This court has previously held that "multiple convictions are allowed for each individual image because a separate animus exists every time a separate image or file is downloaded and saved." *State v. Mannarino*, 8th Dist. Cuyahoga No. 98727, 2013-Ohio-1795, ¶ 53. Although the defendant may have obtained images around the same time, the acquisition of each file constitutes a new and distinct crime because the

"mere fact that the crimes occurred in quick succession does not mean that they were not committed separately or with separate animus." *State v. Eal*, 10th Dist. Franklin No. 11AP-460, 2012-Ohio-1373, ¶ 93. The selection of each individual video or image is a separate decision.

{¶61} Moreover, the children depicted in the images or videos are the victims of pandering sexually oriented material involving a minor offenses. *State v. Meadows*, 28 Ohio St.3d 43, 49, 503 N.E.2d 697 (1986). Each video presents a different child or group of children. Individuals who view or circulate child pornography harm the child in several ways (1) by perpetuating the abuse initiated by the creator of the material, (2) by invading the child's privacy, and (3) by providing an economic motive for producers of child pornography. *U.S. v. Norris*, 159 F.3d 926 (5th Cir.1998). As previously stated, the dissemination of child pornography exacerbates and continues the exploitation and victimization of the individual child. *Ferber*, 458 U.S. 747 at 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113; *See also U.S. v. Sherman*, 268 F.3d 539, 545 (7th Cir.2001) (even a "passive consumer who merely receives or possesses the images directly contributes to this continuing victimization.").

{¶62} Therefore, Duhamel's convictions were not allied offenses of similar import because he downloaded each file of child pornography with a separate animus, and each downloaded file was a crime against a separate victim or victims.

{¶63} Duhamel's sentence is not cruel or unusual. The sentence falls within the statutory range, the trial court made all the required statutory findings for the imposition

of consecutive sentences, and none of Duhamel's convictions were allied offenses of similar import.

{¶64} Accordingly, the sixth assignment of error is overruled.

E. Costs and Fines

{¶65} In the seventh assignment of error, Duhamel argues the trial court's imposition of fines and court costs was unconstitutional because he is indigent. He contends the collection methods used by the Ohio Department of Rehabilitation and Correction violate his constitutional right to Equal Protection.

{¶66} The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." Ohio's Equal Protection Clause, Article I, Section 2 of the Ohio Constitution, similarly states that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit."

{¶67} Thus, the guaranty of equal protection prevents the government from treating people differently under its laws on an arbitrary basis. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 681, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (Harlan, J., dissenting). The equal protection provisions of the Ohio and U.S. Constitutions are functionally equivalent and are subject to the same analysis. *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶ 11, citing *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 59, 717 N.E.2d 286 (1999).

{¶68} Courts apply varying levels of scrutiny to equal protection claims depending on the rights at issue and the alleged discriminatory classifications created by the law. *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St.3d 104, 2010-Ohio-4908, 936 N.E.2d 944, ¶ 18. Statutes involving fundamental rights, or that make classifications based upon a suspect class, are subject to strict scrutiny. *Thompson* at ¶ 13. Suspect classes have traditionally been defined as classifications based on race, sex, religion, and national origin. *Adamsky v. Buckeye Local School Dist.*, 73 Ohio St.3d 360, 362, 653 N.E.2d 212 (1995). Recognized fundamental rights include the right to vote, the right of interstate travel, rights guaranteed by the First Amendment to the U.S. Constitution, the right to procreate, and other rights of a uniquely personal nature. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed. 2d 520 (1976).

{¶69} In this case, Duhamel challenges his classification as an indigent prisoner. Indigent prisoners do not belong to any traditionally defined suspect class. Further, Duhamel does not argue that the collection of court costs and fines from his prison account violates a fundamental right. Where a statute or regulation involves neither a suspect class nor a fundamental right, it comports with equal protection if it is rationally related to a legitimate government interest. *Menefee v. Queen City Metro*, 49 Ohio St.3d 27, 29, 550 N.E.2d 181 (1990); *Brooks v. Ohio Bd. of Embalmers & Funeral Dirs.*, 69 Ohio App.3d 568, 573, 591 N.E.2d 301 (10th Dist.1990) (holding that an administrative

regulation is constitutional if it bears a rational relationship to a legitimate governmental interest.).

{¶70} Ohio Adm.Code 5120-5-03(D) authorizes the garnishment of an inmate's account to satisfy the inmate's obligations to the court as long as the account retains $25 for inmate expenditures.[2] Duhamel argues this regulation violates equal protection because it deprives indigent inmates of the gifts deposited into their prison accounts by family and friends.

{¶71} "'[C]osts are taxed against certain litigants for the purpose of lightening the burden on taxpayers financing the court system.'" *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 14, quoting *Strattman v. Studt*, 20 Ohio St.2d 95, 102, 253 N.E.2d 749 (1969). "Although costs in criminal cases are assessed at sentencing and are included in the sentencing entry, costs are not punishment, but are more akin to a civil judgment for money." *Id.* Thus, the purpose of Ohio Adm. Code 5120-5-03 is the collection of a valid judgment to relieve the burden taxpayers would have to pay as a result of the convict's criminal actions. Therefore, Ohio Adm. Code 5120-5-03 is rationally related to a legitimate government interest and comports with equal protection. *See State v. Haynie*, 157 Ohio App.3d 708, 2004-Ohio-2452, 813 N.E.2d 686, ¶ 31 (3d Dist.2004) (holding that Ohio Adm. Code 5120-5-03 does not violate equal protection.).

{¶72} Accordingly, the seventh assignment of error is overruled.

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[2] R.C. 5120.133(A) also permits the Ohio Department of Rehabilitation and Correction to deduct payments toward a certified judgment from a prisoner's account without any other required proceeding in aid of execution.

{¶73} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.
The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

PATRICIA ANN BLACKMON, J., CONCURS;
LARRY A. JONES, SR., P.J., CONCURS IN JUDGMENT ONLY