

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAVID WAYNE ALLEN,

Petitioner-Appellant,

v.

BETTY MITCHELL, Warden,

Respondent-Appellee.

No. 02-4145

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 99-01067—Paul R. Matia, District Judge.

Argued: October 15, 2019

Decided and Filed: March 24, 2020

Before: SILER, MOORE, and BUSH, Circuit Judges.

COUNSEL

ARGUED: John J. Ricotta, Cleveland, Ohio, for Appellant. Brenda S. Leikala, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** John J. Ricotta, Cleveland, Ohio, Henry J. Hilow, Cleveland, Ohio, for Appellant. Charles L. Wille, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

BUSH, J., delivered the opinion of the court in which SILER, J., joined. MOORE, J. (pp. 12–22), delivered a separate opinion concurring only in the judgment.

OPINION

JOHN K. BUSH, Circuit Judge. David Wayne Allen was convicted of aggravated robbery and aggravated murder in 1991. He was sentenced to death. Allen's present appeal seeks review of the district court's denial of a writ of habeas corpus under 28 U.S.C. § 2254. Allen argues that the trial court in the Ohio state proceedings violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by failing to excuse a juror who demonstrated she could not be fair and unbiased. Because our review of a denial of habeas corpus under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254, imparts a great level of deference to state court factual determinations, and because the determination of whether to seat a juror is an exercise of discretion by the trial court, we **AFFIRM** the district court's denial of Allen's petition for a writ of habeas corpus.

I.

David Wayne Allen was convicted of aggravated robbery and aggravated murder for the death of 84-year-old Chloe English, whom he knew through a prison ministry program. English was found stabbed, beaten, and strangled to death in her home. Allen's thumbprint was found on the inside of one of the lenses of England's glasses, and cigarette butts consistent with Allen's brand (Dorals) and saliva (type O secretor) were found in English's trash can. The coroner put English's time of death at between midnight and six a.m. on January 25, 1991. A bus driver remembered picking up Allen near English's home a little after six in the morning on that same date. Later that year Allen was convicted of all charges and sentenced to death. The Ohio Court of Appeals affirmed Allen's convictions and sentence in 1993, *State v. Allen*, No. 62275, 1993 WL 366976 (Ohio Ct. App. Sept. 9, 1993), and the Ohio Supreme Court affirmed in 1995, *State v. Allen*, 653 N.E.2d 675 (Ohio 1995). The Ohio Supreme Court denied Allen's application to reopen his direct appeal. *State v. Allen*, 672 N.E.2d 638 (Ohio 1996) (per curiam). Allen filed a petition for post-conviction relief in September 1996. The trial court denied the petition without an evidentiary hearing, and the Ohio Court of Appeals affirmed. *State v. Allen*, No. 72427, 1998 WL 289418 (Ohio Ct. App. June 4, 1998).

Allen first filed a petition for a writ of habeas corpus in 1999. The district court denied the petition in 2002, and granted Allen a certificate of appealability as to his claim that a biased juror served on the jury. In April 2006, Allen filed a motion to hold briefing in abeyance pending the completion of DNA analysis. This court granted the motion. The state court proceedings concluded in 2017, when the Ohio Supreme Court denied review of the denial of Allen's motion for a new trial. *State v. Allen*, 82 N.E.3d 1175 (Ohio 2017) (table).

We denied Allen's motion to expand the certificate of appealability to include a *Brady* claim and a claim for ineffective assistance of counsel. We also denied Allen's petition for rehearing, and set a briefing schedule. *Allen v. Mitchell*, 757 F. App'x 482 (6th Cir. 2018).

Allen's habeas petition now before us alleges that he was denied the right to a fair trial and due process of law because Patricia Worthington, one of the jurors who sat at his capital trial, initially indicated during voir dire that she was not sure that she could be fair and impartial. To address Allen's argument, we review the full context of Worthington's statements to the trial court.

Before voir dire, the trial court told prospective jurors to let the bailiff know if they had a specific problem with serving on the jury. Worthington told the trial court her brother had been shot and killed two years earlier. The trial court explained that it was inquiring about issues like physical disabilities or other reasons someone could not serve, and that it would address other issues—such as moral or philosophical reasons as to why one could not serve on the jury—in general voir dire.

The trial court then conducted a general voir dire to determine if any potential jurors had any moral or philosophical beliefs that would impair their ability as jurors at the sentencing phase. When Worthington was called, the trial court asked her if she had “any philosophical, moral, or religious beliefs that would prevent or substantially impair her ability to accept the court's instructions of law with regard to sentencing,” and, if Allen was convicted, to recommend the death penalty, or life imprisonment without parole for twenty or thirty years. Worthington responded no to this inquiry.

However, during her individual voir dire, Worthington initially expressed some hesitation as to whether she could be an impartial juror. She told the trial court that the man charged with

murdering her brother was acquitted and she did not feel justice was done. She agreed with the trial court's suggestion that she had some feelings of bitterness and resentment because of the outcome of the trial. The trial court asked her if she could set aside those feelings and reach a verdict based solely on the evidence that came out in open court, and Worthington said she could.

She also disclosed that two of her friends were police officers, and that she got to know a detective and the prosecutor from her brother's case. The detective and the prosecutor from her brother's case kept in contact with her mother. Worthington told the prosecutor she would try to set aside the experience of her brother's case and evaluate Allen's case solely on the evidence, follow the law as instructed, and come to a fair and impartial verdict. Allen's counsel stated that witnesses from the coroner's office who testified at her brother's trial would testify at Allen's trial, and asked Worthington whether she would be able to hold back an emotional response to their testimony. Worthington said she did not know whether she could, because her brother's trial was too recent. She agreed that she was a little bit anxious but denied that her reaction to hearing some of the same kind of evidence from some of the same witnesses might substantially impact her ability to concentrate on Allen's case.

Allen—who had exhausted the last of his peremptory strikes—challenged Worthington for cause. He argued that, because the trial of the person accused of murdering her brother was close in time to Allen's trial and Worthington was familiar with the witnesses and type of testimony, she would be emotionally involved and was not detached. The trial court found that Worthington “unequivocally stated that she could be fair and impartial. . . . [T]he jury [sic] was very straightforward. She understands the responsibility here and I don't see a problem with her serving.” R. 189-15, at *219. The trial court denied Allen's motion, and Worthington was called to fill the twelfth spot on the jury.

The Ohio Supreme Court, in a four-to-three ruling, affirmed the trial court's decision to seat Worthington. *Allen*, 653 N.E.2d at 681. The court held that the trial court's finding that Worthington was unbiased was supported by her testimony, and that the trial court could legitimately validate her statements because it saw and heard her. *Id.* Three justices dissented, asserting that Worthington should have been excused for cause. *Id.* at 691–92 (Wright, J., dissenting).

The district court denied Allen's habeas claim on the merits. The court found that Worthington showed some reluctance about being a juror, but stated repeatedly that her brother's murder and trial would not impact her decision in Allen's case. R. 189-23 at PageID 45. The court concluded that, because nothing in the record overtly indicated bias against Allen or an inability to act impartially, it was required to defer "to the trial judge who sees and hears the juror." *Id.* at 45–46 (quoting *Wainwright v. Witt*, 469 U.S. 412, 426 (1985)). The district court held that the Ohio Supreme Court did not unreasonably apply established Supreme Court precedent. *Id.* at 46. Allen filed a timely appeal.

II.

We review a district court's denial of a habeas petition de novo. *See Cleveland v. Bradshaw*, 693 F.3d 626, 631 (6th Cir. 2012). The district court's findings of fact are reviewed for clear error, and its legal conclusions on mixed questions of law and fact are reviewed de novo. *See Gumm v. Mitchell*, 775 F.3d 345, 359–60 (6th Cir. 2014). "[T]he habeas petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings were correct." *Henley v. Bell*, 487 F.3d 379, 384 (6th Cir. 2007) (citing 28 U.S.C. § 2254(e)(1)) (other citations omitted).

We review this case through two deferential lenses. First, because the determination of juror impartiality is "essentially one of credibility, . . . the trial court's resolution of such questions is entitled . . . to special deference." *Patton v. Yount*, 467 U.S. 1025, 1038 (1984) (internal quotations omitted). Second, review of this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under AEDPA, if a state court has adjudicated the petitioner's claims on the merits, a writ of habeas corpus may not be granted unless the state court's adjudication of the claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

“For purposes of 28 U.S.C. § 2254(d)(1), clearly established law as determined by [the Supreme] Court ‘refers to the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions as of the time of the relevant state-court decision.’” *Yarborough v. Alvarado*, 541 U.S. 652, 660–61 (2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). A decision of the state court is an “unreasonable application” when “the state court identifies the correct governing legal rules from [the Supreme] Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case.” *Hill v. Hofbauer*, 337 F.3d 706, 711 (6th Cir. 2003) (quoting *Williams*, 529 U.S. at 407). A federal court may not find a state adjudication to be “unreasonable” “simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” *Williams*, 529 U.S. at 411. Under this deferential standard, we do not ask “whether the state court’s determination was incorrect, but rather whether fair-minded jurists could disagree about whether the state court’s decision conflicts with existing Supreme Court caselaw.” *Dewald v. Wriggelsworth*, 748 F.3d 295, 301 (6th Cir. 2014) (citing *Harrington v. Richter*, 562 U.S. 86, 101 (2011)).

Further, state-court factual determinations must stand unless they are objectively unreasonable in light of the evidence presented in state court. 28 U.S.C. § 2254(d)(2); *Harrington*, 562 U.S. at 100. A federal habeas court may not characterize state-court factual determinations as unreasonable “merely because [we] would have reached a different conclusion in the first instance.” *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) (alteration in original) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)).

III.

Allen makes two arguments as to why he is entitled to habeas relief. First, he asserts that the trial court’s decision to empanel juror Worthington deprived him of his Sixth Amendment right to a trial by an impartial jury. Second, he maintains that his Sixth Amendment right to a trial by an impartial jury was violated because the trial court failed to ask constitutionally compelled questions during Worthington’s voir dire. We address each argument in turn.

A.

The Sixth Amendment grants criminal defendants “[a] right to a speedy and public trial, by an impartial jury. . . .”, U.S. Const. amend. VI. An adequate voir dire is part of that guarantee. *See Morgan v. Illinois*, 504 U.S. 719 726–27 (1992). The party seeking to exclude a juror because of bias must demonstrate that the potential juror lacks impartiality. *Wainwright v. Witt*, 469 U.S. 412, 423 (1985). When a juror’s impartiality is at issue, the pertinent question is whether the juror swore “that [she] could set aside any opinion [she] might hold and decide the case on the evidence, and should the juror’s protestation of impartiality have been believed.” *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). The trial court’s resolution of these questions is a matter of historical fact which is entitled to a presumption of correctness under 28 U.S.C. § 2254(d)(2). *Id.* at 1036–38; *see Williams v. Bagley*, 380 F.3d 932, 944 (6th Cir. 2004) *see also Wainwright*, 469 U.S. at 426 (noting that in determining whether a juror is biased, “deference must be paid to the trial judge who sees and hears the juror”). Therefore, a trial court’s finding of impartiality may be overturned only for “manifest error.” *Hill v. Brigano*, 199 F.3d 833, 843 (6th Cir. 1999) (quoting *Patton*, 467 U.S. at 1031). The question for this Court is simply “whether there is fair support in the record for the state court’s conclusion that the juror[] here would be impartial,” *Patton*, 467 U.S. at 1038, not whether it was right or wrong in its determination of impartiality. *Wainwright*, 469 U.S. at 424.

Although jurists on the Ohio Supreme Court disagreed on the issue of whether Worthington should have been seated as a juror, we cannot say that the decision of the majority of the Ohio Supreme Court was based on an unreasonable application of clearly established law or an unreasonable determination of the facts under the AEDPA standard. It is arguable that the trial court may have overstated Worthington’s testimony when it found that she unequivocally stated that she could be fair and impartial. Her responses were somewhat unclear and equivocal, and she expressed dissatisfaction with the result of her brother’s murder trial. Worthington noted that she got to know a detective and a prosecutor from her brother’s case, and that the detective and prosecutor kept in touch with her mother. But nonetheless, Worthington said she could set aside her feelings, decide the case based only on the evidence presented in court, follow the law as instructed, and come to a fair and impartial verdict. Worthington acknowledged she did not know

if she could control her emotions upon hearing the testimony of witnesses from the coroner's office, some of whom also testified at Worthington's brother's murder trial. She denied, however, that hearing this evidence would substantially impact her ability to concentrate on Allen's case.

Even when a potential juror's statements during voir dire are ambiguous, we still defer to the trial court's ruling in the absence of clear record evidence to the contrary. *See Patton*, 467 U.S. at 1039–40 (noting that “while the cold record arouses some concern, only the trial judge could tell which of these answers was said with the greatest comprehension and certainty”). It was not unreasonable for the Ohio Supreme Court to accord such deference in Allen's case.

In *White v. Mitchell*, we granted a writ of habeas corpus when a state court failed to strike a juror who, although she affirmed that she could be impartial, was nonetheless “unable to lay aside her impression or opinion and render a verdict based on the evidence presented in court.” 431 F.3d 517, 542 (6th Cir. 2005) (cleaned up). Though the juror constantly used words such as “fair,” “truth,” and “honesty,” that alone did not make her an impartial juror when the totality of the circumstances suggested that she “had a strong inclination toward imposing the death penalty, . . . [and] that she was looking forward to participating in the imposition of this particular defendant's sentence.” *Id.* at 541–42. Notwithstanding the deference we normally afford to trial judges, there the transcript revealed that the juror was “simply unbelievable as an impartial juror.” *Id.* at 542. The transcript reflected “internally inconsistent and vacillating” statements, “including statements of strong doubt regarding impartiality and merely a few tentative or cursory statements that she would be fair.” *Id.*

By contrast, here, nothing in the record indicates any bias against the defendant. The record shows that Worthington was truthful in her responses. Though she was certainly hesitant and sometimes equivocal in her answers, her voir dire revealed a juror who thought through her views aloud and, in the end, stated that she could be a fair and impartial juror. Without anything in the record clearly demonstrating Worthington's inability to act impartially, or raising serious concerns about whether her statements of impartiality should be believed, we must defer to the trial court. *Wainwright*, 469 U.S. at 426. Indeed, in order to grant a writ, a habeas court must conclude that the trial court's credibility findings “lacked even fair support in the record.” *Patton*, 467 U.S. at 1037 (cleaned up). And Worthington stated time and time again that she could be a fair and

impartial juror. *See, e.g., Miller v. Francis*, 269 F.3d 609, 618–19 (6th Cir. 2001) (noting that “the trial court cannot be faulted for not disqualifying for cause a juror who consistently says she thinks she can be fair”). The Ohio Supreme Court determined on direct appeal: “[T]he trial court found Worthington unbiased, a finding supported by Worthington’s testimony. Allen argues that the juror’s belief in her own impartiality is insufficient support, but the trial court saw and heard Worthington and could legitimately validate her statements.” *State v. Allen*, 653 N.E.2d 675, 681 (Ohio 1995).

The Ohio Supreme Court’s ruling—that the trial court did not abuse its discretion in empaneling Worthington—was neither contrary to clearly established federal law, nor based on an unreasonable determination of the facts. Consistent with directives from the U.S. Supreme Court, the trial court examined Worthington to determine if she was impartial. After Worthington stated several times that she could set aside her feelings from her brother’s case and decide Allen’s case based on the facts, the trial judge found that Worthington could be an impartial juror and empaneled her. Especially in light of the special deference owed to the trial court’s determination of juror impartiality as well as the deferential standard for reviewing factual findings under § 2254, we cannot say that the Ohio Supreme Court’s ruling on this issue was an unreasonable application of clearly established federal law or an unreasonable determination of the facts.

B.

Allen also claims that the trial court’s voir dire of Worthington was inadequate because the trial court failed to ask her how the trial concerning her brother’s murder would affect her ability to follow the court’s instructions impartially, evaluate the evidence, and impose the death penalty. He contends that a reasonable jurist would suspect that Worthington had the potential to seek vengeance for her brother’s murder, and possibly be an “automatic death penalty juror.” Pet’r Br. at 8. Allen, however, did not raise this argument on direct appeal to the Ohio Supreme Court, nor did he raise it in his habeas petition.

Principles of comity require that we not seek to upset a state court conviction on the basis of an alleged constitutional violation that the state court never had an opportunity to correct. *See Rose v. Lundy*, 455 U.S. 509, 518 (1982). “Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.” *Lyons v. Stovall*, 188 F.3d 327, 331–32 (6th Cir. 1999) (quoting *Picard v. Connor*, 404 U.S. 270, 276 (1971)). “[I]f an unexhausted claim would be procedurally barred under state law, that claim is procedurally defaulted for purposes of federal habeas review.” *Awkal v. Mitchell*, 613 F.3d 629, 646 (6th Cir. 2010) (en banc) (quoting *Alley v. Bell*, 307 F.3d 380, 385 (6th Cir. 2002)). Allen never argued before the state courts that the trial court’s voir dire of Worthington was inadequate because it failed to ask a constitutionally compelled question. Though this argument is defaulted, in any event we find it would be meritless.

An adequate voir dire to identify unqualified jurors is integral to the right to trial by an impartial jury. *See Morgan*, 504 U.S. at 729. When a state court refuses to pose “constitutionally compelled” questions, the voir dire is inadequate and merits habeas relief. *Mu’Min v. Virginia*, 500 U.S. 415, 425–26 (1991). “Questions are constitutionally compelled only if ‘the trial court’s failure to ask these questions . . . render[s] the defendant’s trial fundamentally unfair.’” *Hodges v. Colson*, 727 F.3d 517, 527 (6th Cir. 2013) (quoting *Mu’Min*, 500 U.S. at 425–26).

Allen has not shown that his trial was fundamentally unfair because of the trial court’s failure to ask how her brother’s trial would impact her ability to impose the death penalty. The trial court asked Worthington whether she could set aside her feelings from her brother’s case and reach a verdict based solely on the evidence that came out in open court. She said she could. The trial court asked Worthington whether she had any beliefs that would prevent her from following the trial court’s sentencing instructions. She said no. Finally, the trial court asked Worthington whether she could follow the court’s instructions of law and recommend an appropriate sentence, be it the death penalty or life imprisonment without parole for 20 or 30 years. She said she could. Nothing in Worthington’s responses suggested that her feelings about her brother’s murder meant she would automatically recommend the death penalty if the jury convicted Allen. *See Morgan*, 504 U.S. at 735–36 (holding that an adequate voir dire requires a defendant to be able to determine

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whether a juror would automatically vote for the death penalty). The trial court's voir dire of Worthington did not deprive Allen of a fundamentally fair trial.

IV.

For these reasons, we AFFIRM the district court's judgment denying Allen's petition for a writ of habeas corpus.

CONCURRING IN THE JUDGMENT

KAREN NELSON MOORE, Circuit Judge, concurring in the judgment. I agree that we must affirm the district court's denial of petitioner David Allen's 28 U.S.C. § 2254 petition because our review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is restricted. I concur only in the judgment, however. In *Patton v. Yount*, the Supreme Court fashioned a two-part inquiry for juror-bias claims: "did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, *and should the juror's protestation of impartiality have been believed.*" 467 U.S. 1025, 1036 (1984) (emphasis added). The majority skips the second part of the inquiry, which requires analyzing the full context of juror Patricia Worthington's voir dire, including its most disconcerting aspects. Whether the state court was unreasonable in concluding that Worthington was not biased is a difficult and close question, and were we on direct review, I would conclude that Allen's claim warrants relief. Nevertheless, careful consideration of Supreme Court precedent and our cases granting habeas relief on juror-bias claims and ineffective-assistance-of-counsel claims relying on counsel's failure to strike biased jurors demonstrates that Allen cannot meet AEDPA's high bar.

In a case that turns upon a juror's voir dire responses, it is crucial to provide the responses themselves. The relevant exchanges between the trial court, the prosecution, and the defense with Worthington, therefore, are provided here.

Allen was tried and sentenced in June and July 1991. Once the prospective jurors were duly sworn, the state trial court invited them to come forward with "specific," "personal problem[s] with regard to jury service," which the trial court meant to refer to disabilities, work conflicts, and prearranged trips. *See* R. 189-14 (Voir Dire Tr. at 130–45). At this time, Worthington came forward:

The Court: Mrs. Worthington, you've indicated you have some problem with service. Could you tell us about that?

Ms. Worthington: Well, I didn't know it was a criminal case. My brother, he was shot and killed about two years ago in the middle of the street on 75th and Kinsman.

The Court: Okay. Right now we're dealing with issues relating to people who have a physical disability or some type of reason why they can't serve. Those issues we'll address in general voir dire.

Ms. Worthington: Okay.

The Court: Okay. Thank you.

Id. at 141–42.

During general voir dire, the twelfth juror was stricken upon Allen's last peremptory challenge, and the trial court began to question Worthington. R. 189-15 (Voir Dire Tr. at 449). Eventually, the murder of Worthington's brother was addressed.

The Court: Have you, your family members, or close friends ever been the victim of a crime or accused of a crime?

Ms. Worthington: Yes.

The Court: And could you tell me about that?

Ms. Worthington: My brother was shot and killed at 75th and Kinsman in 1986.

The Court: Was anyone ever arrested or prosecuted for that offense?

Ms. Worthington: Yes.

The Court: What's your brother's name?

Ms. Worthington: Stephen Rogers.

The Court: Was there a trial held with regard to that shooting?

Ms. Worthington: Yes.

The Court: Were you called as a witness in any way with regard to that case?

Ms. Worthington: No. But I was in court every day.

The Court: Do you feel that justice was done during the course of that case?

Ms. Worthington: No.

The Court: Would it be fair to say that you have some feelings of bitterness and resent[ment] because of the outcome of that trial and what happened in that case?

Ms. Worthington: Yes. Because he was found not guilty.

The Court: I certainly understand your feelings about that particular case and I feel very sorry for you and your family. Do you think you can set aside those feelings of bitterness from your experiences there and evaluate this defendant and reach a verdict with regard to this defendant based solely on the evidence that comes out in open court?

Ms. Worthington: Yes. Because the prosecution did everything that they could.

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The Court: You're talking about your other case?

Ms. Worthington: Yes, my brother's.

The Court: And I'm sure counsel for the defense will ask you some questions in this area, as well. And it's very hard to get 100 percent assurance on anything, but you understand how important it is at this time to let us know if you can't do this.

Ms. Worthington: Yes.

The Court: And you'll let me know or the prosecutor or the defense attorney if you feel you're not up to serving on this particular case?

Ms. Worthington: Yes.

The Court: I'm not trying to browbeat you one way or the other. Okay?

Ms. Worthington: Okay.

Id. at 450–53. Worthington also stated that she had two friends who were Cleveland police officers and that she knew the detective and prosecutor in her brother's case. *Id.* at 453–54.

After this exchange, the prosecution and the defense questioned Worthington. The following questions and answers are between the prosecutor and Worthington:

[Prosecutor]: And from what I understood you to say to the Judge was that in spite of what happened back in –was it [19]86?

Ms. Worthington: [19]88.

[Prosecutor]: [19]88. In spite of what happened there, that you will make every effort as humanly possible to set aside that experience and judge this case solely on whatever evidence is here. You'll forget what took place in the courtroom then and rely only on what takes place in the courtroom now; is that correct?

Ms. Worthington: Yes.

[Prosecutor]: And in doing so, you could follow the law that Judge Cleary will tell you the law is in this case, apply it to the evidence that you have heard in the courtroom, and come to what in your mind will be a fair and impartial verdict; you can do that?

Ms. Worthington: Yes.

Id. at 455–56. The prosecution did not challenge Worthington for cause. *Id.* at 456.

The defense then questioned Worthington, starting with her relationship with her two police-officer friends. At the time, Worthington had known these officer friends for ten years. *Id.* at 456–57. Worthington further stated that the prosecutor and detective in the trial for her brother's

murder continued to check up on her mother. *Id.* at 457–58. In response to defense counsel’s later question whether her “mother lives someplace nearby,” Worthington answered, “[y]es.” *Id.* at 461. And in response to whether Worthington “ha[s] regular contact with her [mother],” Worthington answered, “[o]h, every day.” *Id.* at 461–62.

Defense counsel also addressed the issue of Worthington’s brother’s murder and the subsequent trial:

[Defense counsel]: You say you were down here every day during that trial.

Ms. Worthington: Yes.

[Defense counsel]: And you watched all the testimony?

Ms. Worthington: Yes.

[Defense counsel]: Obviously this is a different case. There’s going to be different testimony. But as the prosecutor mentioned earlier, there are going to be some people here from the coroner’s office . . . and there are going to be people from the trace evidence department at the coroner’s office and they may be some of the same people that testified in your brother’s trial. Do you remember the trace evidence people in your brother’s trial?

Ms. Worthington: Yes.

[Defense counsel]: Now, when these people take the witness stand, are you going to be able to hold back any kind of an emotional rush that’s going to occur when you see these ladies here testifying about the same kind of things they did in your brother’s trial?

Ms. Worthington: I don’t know.

[Defense counsel]: You don’t know?

Ms. Worthington: I can’t say right now.

[Defense counsel]: That could be a little bit of a problem for you, though, couldn’t it?

Ms. Worthington: Because it’s too close.

[Defense counsel]: It’s pretty close?

Ms. Worthington: It just happened.

[Defense counsel]: I mean, even today you’re . . . a little bit anxious about the fact that this is a capital homicide case and that was a pretty traumatic and awful thing in your life, wasn’t it?

Ms. Worthington: Yes.

[Defense counsel]: Do you feel that it might substantially impact on your ability to develop complete concentration on this case, hearing some of the same kind of evidence from some of the same witnesses?

Ms. Worthington: No.

[Defense counsel]: You don't think it will impact on the case?

Ms. Worthington: No.

Id. at 458–60.¹

Upon defense counsel challenging Worthington for cause, the judge and the attorneys had a sidebar conference. *Id.* at 462. The judge listened to defense counsel's arguments to exclude Worthington for cause but ultimately rejected the challenge. *See id.* at 462–64. Defense counsel relied on the fact that Worthington's experience with her brother's case was too close in time, that she had familiarity with the evidence that would be presented, and that she was too emotionally involved to be detached, and defense counsel stressed that other jurors were available. *See id.* at 462–63. The trial judge stated that Worthington "when questioned, unequivocally stated that she could be fair and impartial. Obviously, she's had a terrible tragedy in her family. . . . But the jury [sic] was very straightforward. She understands the responsibility here and I don't see a problem with her serving." *Id.* at 463. Allen had no remaining peremptory challenges, so Worthington was seated on the jury.

We review de novo a district court's denial of a habeas petition, as well as its factual determinations when, as here, its decision is based upon a transcript. *Holder v. Palmer*, 588 F.3d 328, 337 (6th Cir. 2009). AEDPA provides that a federal court cannot grant habeas relief unless a state-court decision of a federal claim on the merits "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Under § 2254(d)(1), an unreasonable application of Supreme Court precedent "must be 'objectively unreasonable,' not

¹Defense counsel attempted to ask, "[y]ou won't think back to your own family's case when you hear the trace evidence experts, for instance," but the state trial court sustained the prosecution's objection on relevancy grounds. *Id.* at 461. It is difficult to imagine what could have been more relevant to Worthington's ability to sit as a fair and impartial juror.

merely wrong; even ‘clear error’ will not suffice.” *White v. Woodall*, 572 U.S. 415, 419 (2014) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003)).² “[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (citing § 2254(d)(2)).³ This includes credibility determinations. *See Rice v. Collins*, 546 U.S. 333, 341–42 (2006). A state court’s factual findings “are presumed correct absent clear and convincing evidence to the contrary.” *Miller-El*, 537 U.S. at 340 (citing 28 U.S.C. § 2254(e)(1)).⁴

“The Sixth and Fourteenth Amendments to the Constitution guarantee a criminal defendant the right to be tried by impartial and unbiased jurors.” *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001) (citing *Morgan v. Illinois*, 504 U.S. 719 (1992)); *see also Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (“In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors,” and “[a] fair trial in a fair tribunal is a basic requirement of due process.” (citation omitted)). The crucial question in juror-impartiality cases is “did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, *and should the juror’s protestation of impartiality have been believed.*” *Yount*, 467 U.S. at 1036 (emphasis added). The state trial court’s determination about a juror’s impartiality based on credibility and demeanor is given “special deference.” *Id.* at 1038. “A trial court’s findings of juror impartiality may ‘be overturned only for “manifest error.””” *Mu’min v. Virginia*, 500 U.S.

²The state supreme court’s decision did not explicitly characterize Allen’s juror-bias claim as a constitutional claim, *see State v. Allen*, 653 N.E.2d 675, 680–81 (Ohio 1995), but we presume “that the state court adjudicated the claim on the merits [absent] any indication or state-law procedural principles to the contrary,” *English v. Berghuis*, 900 F.3d 804, 811 (6th Cir. 2018) (alteration in original) (quoting *Harrington v. Richter*, 562 U.S. 86, 99 (2011)). There is no such indication here. Allen presented his claim as a federal constitutional claim, R. 189-10 (Pet. Ohio Supreme Court Br. at 495–96), and the state supreme court appears to have treated the claim as one of juror bias, despite its reliance only on Ohio precedent regarding the standard for reviewing trial-court rulings on challenges for cause, *Allen*, 653 N.E.2d at 681; *see also id.* at 691 (Wright, J., dissenting) (characterizing the claim as a constitutional claim).

³The Ohio Supreme Court relied upon the state trial court’s factual findings about Worthington’s credibility, and so the proper subject of review pursuant to § 2254(d)(2) is the state trial court’s factual findings. *See State v. Allen*, 653 N.E.2d 675, 681 (Ohio 1995); *see also Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (holding that federal habeas courts look to “the last related state-court decision” that adjudicated a petitioner’s federal claim).

⁴The Supreme Court has not yet decided what the relationship is between subsections (d)(2) and (e)(1). *See Carter v. Bogan*, 900 F.3d 754, 768 n.5 (6th Cir. 2018).

415, 428–29 (1991) (quoting *Yount*, 467 U.S. at 1031). But even though “determinations of demeanor and credibility [] are peculiarly within a trial judge’s province,” juror-credibility determinations are “‘factual issues’ that are subject to” the statutory presumption of correctness. *Wainwright v. Witt*, 469 U.S. 412, 428–29 (1985) (referring to 28 U.S.C. § 2254(d) (1982)). In other words, a state trial court’s juror-credibility determinations, despite the unique deference afforded to them, ultimately are like all factual determinations in that the “presumption of correctness” afforded to them on habeas review is rebuttable with clear and convincing evidence pursuant to § 2254(e)(1). *See Yount*, 467 U.S. at 1038; *Witt*, 469 U.S. at 427–30; *see also Williams v. Bagley*, 380 F.3d 932, 944 (6th Cir. 2004).⁵

First, Allen argues that the trial court’s failure to dismiss Worthington deprived him of his constitutional right to an impartial jury, resulting in an unreasonable application of clearly established federal law pursuant to § 2254(d)(1). Second, he contends that “the trial court’s decision not to dismiss Mrs. Worthington for cause was based on an unreasonable determination of the facts” in violation of § 2254(d)(2). Appellant Br. at 11–19.⁶ Whether an unreasonable application of clearly established law or an unreasonable determination of fact, Allen cannot

⁵We must take great care in applying pre-AEDPA Supreme Court precedent, such as *Yount* and *Witt*, to habeas petitions governed by AEDPA. The majority states that § 2254(d)(2)’s presumption of correctness applies and provides the standard that the Supreme Court set forth in *Yount*: “whether there is fair support in the record for the state court’s conclusion that the juror[] here would be impartial.” Majority Op. at 7 (citing *Yount*, 467 U.S. at 1038). However, post-AEDPA, the presumption of correctness resides in § 2254(e)(1). And *Yount* drew its “fair support” language from the pre-AEDPA statute’s presumption of correctness, 28 U.S.C. § 2254(d)(8) (1982), *see* 467 U.S. at 1038 (citing § 2254(d)(8) (1982)), which has been replaced with AEDPA. *See also* § 2254(d)(8) (1982) (“[A determination after a hearing on the merits of a factual issue, made by a State court . . . , shall be presumed to be correct . . . unless that part of the record of the State court proceeding . . . is produced as provided for hereinafter, and the Federal court . . . concludes that such factual determination *is not fairly supported by the record* . . .” (emphasis added)). *Yount* and *Witt* were decided with an earlier statutory framework for habeas petitions in mind. *See Witt*, 469 U.S. at 426, 430; *Yount*, 467 U.S. at 1038. Therefore, we must thoughtfully transpose their holdings to today’s statutory framework. We have not always done so, at times dodging the issue by simply pointing to § 2254 as a whole and avoiding a statement of the standard for rebutting the presumption, *see, e.g., Holder*, 588 F.3d at 339, and other times we have simply hedged our bets by citing § 2254(e)(1)’s presumption *and* quoting the “fair support” standard, *see, e.g., Dennis v. Mitchell*, 354 F.3d 511, 520 (6th Cir. 2003). The Supreme Court has not yet clarified AEDPA’s impact on *Witt* and *Yount*, nor the post-AEDPA standard for juror-impartiality claims.

⁶Allen also argues that the state trial court failed adequately to examine Worthington, *id.* at 15, but the majority’s conclusion that Allen procedurally defaulted this claim is inescapable, Majority Op. at 9–10. Any further discussion as to the merits of Allen’s claim is mere dictum. *See Richmond Health Facilities v. Nichols*, 811 F.3d 192, 201 n.8 (6th Cir. 2016) (defining dicta as “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).” (*Obiter Dictum*, BLACK’S LAW DICTIONARY (10th ed. 2014)).

demonstrate that the state trial court unreasonably found Worthington's assurances of impartiality credible or that the state supreme court's decision resulted in an unreasonable application of *Yount* or *Witt*.

Worthington's voir dire raises serious concerns as to her ability to remain impartial. First, Worthington responded to the state trial court's invitation for those with "personal problem[s] with regard to jury service" to come forward. R. 189-14 (Voir Dire Tr. at 130–45). She stated that her brother was murdered, *id.* at 141–42, which is important because Allen was on trial for murder. The trial court elicited more information from Worthington about her experience with this tragedy, which should have deepened concerns. In response to the state trial court's question whether she could be fair and impartial, she gave an ambiguous and equivocal answer that "[y]es," she could be impartial "[b]ecause the prosecution did everything that they could" in the trial for her brother's murder. *Id.* at 452. Already, Worthington had indicated that she had a problem with serving on the jury, her personal circumstances mirrored the events giving rise to Allen's trial, and she gave only equivocal assurances of impartiality.

She subsequently gave assurances as to her ability to be fair and impartial, *id.* at 455–56, 460, but we must also ask whether the trial court should have believed her. *Yount*, 467 U.S. at 1036; *Wolfe v. Brigano*, 232 F.3d 499, 503 (6th Cir. 2000) ("In the absence of an affirmative *and believable* statement that [individual] jurors could set aside their opinions and decide the case on the evidence and in accordance with the law, the failure to dismiss them was unreasonable." (emphasis added)). To determine whether the trial court should have believed a juror, we look at the entire voir dire. *Hughes v. United States*, 258 F.3d 453, 459 (6th Cir. 2001) (explaining that courts do so because "jurors are reluctant to admit actual bias."); *Miller*, 269 F.3d at 618–19 (explaining that a state court will not "be faulted for not disqualifying for cause a juror who consistently says that she thinks she can be fair," but only after "[t]aking the [juror's] statements in context with the other statements made . . . during voir dire"). We also ask whether the juror's circumstances are "'extreme' or 'exceptional'" such that they demonstrate "the 'potential for substantial emotional involvement, adversely affecting impartiality.'" *United States v. Frost*,

125 F.3d 346, 379–80 (6th Cir. 1997) (citations omitted).⁷ Therefore, we must consider Worthington’s voir dire in its entirety to determine whether the state court should have believed her assurances and whether Allen has rebutted the state court’s credibility determination with clear and convincing evidence. If we fail to undertake this endeavor, we fail to provide constitutionally adequate judicial review.

The majority cabins itself to Worthington’s later assurances without considering any of the other concerning information that Worthington’s voir dire responses offered. *See* Majority Op. at 8–9.⁸ In addition to coming forward in response to the state trial court’s question whether any potential juror had a personal problem serving on the jury, Worthington stated that she was present every day of the trial for her brother’s murder; she agreed that justice was not done and that she was bitter and resentful “[b]ecause [the defendant] was found not guilty.” R. 189-15 (Voir Dire Tr. at 451–52). She also admitted to having anxiety about Allen’s case because of her brother’s murder and the subsequent trial. *Id.* at 460. She noted that the detectives from her brother’s case continued to check up on her mother, to whom she is close. *Id.* at 453–54, 461–62. Worthington also stated that she could not say if she would be able to hold back her emotions at Allen’s trial

⁷This court has examined implied or presumed juror bias on habeas review before. *See, e.g., Miller*, 269 F.3d 618; *Quintero v. Bell*, 256 F.3d 409, 413 (6th Cir. 2001) (granting habeas relief and concluding that the doctrine of implied bias predated the petitioner’s 1989 petition and so *Teague v. Lane*, 489 U.S. 288 (1989), was no bar to relief), *cert. granted, vacated on other grounds, and remanded*, *Bell v. Quintero*, 535 U.S. 1109 (2002), *judgment reinstated*, *Quintero v. Bell*, 368 F.3d 892, 893 (6th Cir. 2004) (Mem.), *cert. denied*, *Bell v. Quintero*, 544 U.S. 936 (2005); *Wolfe*, 232 F.3d at 502–03. *But see Johnson v. Luoma*, 425 F.3d 318, 325–27 (6th Cir. 2005) (failing to address these cases).

The Supreme Court has held that juror bias “may be actual or implied,” *United States v. Wood*, 299 U.S. 123, 133 (1936), and no subsequent Supreme Court decision has eroded this holding. *See Smith v. Phillips*, 455 U.S. 209, 223 (1982) (O’Connor, J., concurring) (concurring on the grounds that “the [majority] opinion does not foreclose the use of ‘implied bias’ in appropriate circumstances”); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556–57 (1984) (Blackmun, Stevens, and O’Connor, JJ., concurring); *id.* at 558, (Brennan and Marshall, JJ., concurring in the judgment). Other circuits have continued to recognize the vitality of the implied bias doctrine on habeas review. *See, e.g., Sanders v. Norris*, 529 F.3d 787, 791–92 (8th Cir. 2008) (noting conflicting circuit case law); *Brooks v. Dretke*, 444 F.3d 328, 329 (5th Cir. 2006); *Conaway v. Polk*, 453 F.3d 567, 587 (4th Cir. 2006).

⁸The majority relies on *White v. Mitchell*, 431 F.3d 517 (6th Cir. 2005), to distinguish Allen’s case, Majority Op. at 8–9, but *White* is of little assistance. In *White*, we focused on *Yount*’s second inquiry, concluding that the juror was biased, but we did not need to look beyond the juror’s assurances as to her impartiality to reach this conclusion. *See White*, 431 F.3d at 541–42. The juror’s assurances were contradictory and equivocal, and she stated that she thought that the defendant should be punished, she would like to be a part of the jury that imposed the death penalty, and the outcome would be a guilty verdict. *Id.* It is undisputed that Worthington’s responses are not as alarming as the juror’s in *White*. However, this does not mean that we do not scrutinize the voir dire transcript beyond Worthington’s assurances of impartiality to determine, pursuant to *Yount*, if the state court unreasonably believed her.

when the same expert witnesses testified about the same type of evidence as in the trial for her brother's murder because she felt that the trial for her brother's murder "had just happened" and was "too close." *Id.* at 458–59. Worthington's voir dire indicated that her brother's murder and the subsequent trial remained at the forefront of her mind and that she possessed a heightened degree of emotion about Allen's trial for this reason.

This context is troubling, but only in "extreme" or "exceptional" situations regarding a juror's personal circumstances, *Frost*, 125 F.3d at 379, have we granted habeas relief on the basis of juror bias. Typically, a juror's circumstances raise doubts as to the juror's credibility when the juror has a close personal relationship with those involved in the defendant's trial, such as a friendship with the victim's family, *see Wolfe*, 232 F.3d at 502–03 (indicating that the juror was friends with the victim's family and knew the family's theory of the victim's death); *cf. Miller*, 269 F.3d at 611–12, 616–17 (determining that counsel was not ineffective for failing to challenge a juror for bias when the juror was the welfare caseworker for the victim's mother); or has significant knowledge of some aspect of the defendant's trial, *see Quintero*, 256 F.3d at 413 (presuming bias when seven of the jurors for petitioner's escape trial had served as jurors for his co-escapees' trials and convicted them and when neither the lawyers nor the court asked the jurors questions about this); *cf. Miller*, 269 F.3d at 616–17 (determining that counsel was not ineffective for failing to challenge a juror for bias when the juror did not have "extensive or detailed knowledge" about the case). Worthington did not have a close personal relationship with anyone involved in Allen's trial, nor did she have any knowledge of an aspect of his trial.⁹

For these reasons, Allen has failed to satisfy either § 2254(d)(1) or § 2254(d)(2). He has not pointed to enough evidence to rebut with clear and convincing evidence the state trial court's credibility determination of Worthington, which is afforded special deference. Nor has he demonstrated that the state supreme court's "decision to reject his claim 'was so lacking in

⁹On direct review, some federal courts have determined that a "juror's equivocal statements regarding her ability to be impartial, coupled with 'the similarity between her traumatic familial experience and the defendant's alleged conduct,' warranted reversal of the defendant's conviction 'under either an express or implied bias theory.'" *United States v. Mitchell*, 568 F.3d 1147, 1152 (9th Cir. 2009) (quoting *United States v. Gonzalez*, 214 F.3d 1109, 1114 (9th Cir. 2000)). Although Worthington's experience has similarities with Allen's alleged conduct, her subsequent statements were not equivocal. *Cf. Gonzalez*, 214 F.3d 1113 (explaining that the juror never gave an unequivocal response). In any case, we are sitting in habeas review.

justification that there was an error well understood and comprehended in existing law *beyond any possibility* for fairminded disagreement.” *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (emphasis added) (quoting *Richter*, 562 U.S. at 103). Therefore, under the law as it exists today, I cannot conclude that state supreme court’s decision resulted in an unreasonable application of *Yount* and *Witt*.

Allen’s case is close, however, even on habeas review. The dissent for three of the seven state supreme court justices in Allen’s appeal to the Ohio Supreme Court demonstrates as much:

I do not see how any fair-minded individual can suggest that Ms. Worthington did not indicate a state of mind and view that cast the most serious sort of question on her ability to render an impartial verdict. . . . While it is true that the state made every effort to extract a statement to the effect that this juror believed herself capable of rendering an impartial verdict, I cannot think of a situation similar to this where this court or any other court has indicated that a juror with experience and perspective similar to Ms. Worthington should not have been excused for cause.

Allen, 653 N.E.2d at 692 (Wright, J., dissenting). On direct review, I would reverse the trial court.

At the same time, “‘even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review,’ and ‘does not by definition preclude relief.’” *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) (quoting *Miller-El*, 537 U.S. at 340). Accordingly, courts cannot point to the deference given to a trial court’s juror-credibility determinations and fail to undertake the other necessary part of its review—here, the second inquiry in *Yount*: should the juror’s assurances have been believed. 467 U.S. at 1036. In Allen’s case, this required plumbing the voir dire transcript beyond Worthington’s assurances that she could be fair and impartial. After the full inquiry required by *Yount*, I concur in the judgment only.

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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

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

DAVID WAYNE ALLEN,)
) JUDGE PAUL R. MATIA
Petitioner,)
)
v.) CASE NO. 1:99CV1067
)
BETTY MITCHELL, WARDEN,) MEMORANDUM OF OPINION AND
) ORDER
Respondent.)

David Wayne Allen has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Petitioner challenges his conviction and sentence of death entered by the Court of Common Pleas of Cuyahoga County, Ohio.

For the following reasons, the petition for a writ of habeas corpus is denied.

I. PROCEDURAL HISTORY

On February 1, 1991, David Wayne Allen, Petitioner, was indicted on the following three charges: (1) aggravated murder with prior calculation and design in violation of Ohio Revised Code § 2903.01(A); (2) aggravated murder while committing, attempting to commit, or while fleeing immediately after attempting to commit aggravated robbery in violation of Ohio Revised Code § 2903.01(B); and (3) aggravated robbery in

violation of Ohio Revised Code 2911.01. The original indictment did not include capital specifications but on March 22, 1991, Petitioner was re-indicted by a Cuyahoga County grand jury on the identical charges except that counts one and two contained capital specifications pursuant to Ohio Revised Code § 2929.04(A)(7).

On June 12, 1991, the jury trial against Allen commenced. Allen was represented by John O'Toole and Michael E. Murman. Thereafter, on June 15, the jury returned a guilty verdict as to all charges and specifications. Counts one and two merged and the mitigation phase of trial began on July 10, 1991. After deliberations, the jury recommended that a sentence of death be imposed, and the trial court subsequently accepted the jury's recommendation. The trial court also sentenced Allen to fifteen (15) to twenty-five (25) years for the count three conviction.

Allen filed a timely notice of appeal to the Court of Appeals for the Eighth Appellate District. Represented by Kathleen A. McGarry and Jane P. Perry, Petitioner raised the following twenty-two assignments of error:

1. The trial court erred in failing to instruct the jury on an essential element of the felony-murder aggravating circumstance defined in R.C. 2929.04(A)(7), to wit: that either the defendant was the principal offender in the aggravated murder or if not the principal offender, committed the aggravated murder with prior calculation and design.
2. The weight and sufficiency of the evidence

presented by the state does not meet the legal requirements to sustain a conviction for aggravated murder or aggravated robbery.

3. The trial court erred in denying expert assistance to appellant Allen in violation of the Sixth and Fourteenth Amendments to the United States Constitution.
4. The trial court erred in allowing the admission of evidence concerning appellant Allen's prior incarceration.
5. The trial court erred in failing to excuse a juror for cause after voir dire indicated she could not be fair.
6. The trial court erred in allowing two state's expert witnesses to give "expert testimony" without any basis and having no relevance.
7. The trial court erred in allowing the admission of state's exhibits that were not properly authenticated.
8. The trial court erred in admitting cumulative and irrelevant evidence which consisted of photographs depicting physical exhibits and the exhibits themselves.
9. The trial court erred to the prejudice of appellant Allen by admitting into evidence inflammatory, duplicative and gruesome photographs and videotape.
10. Errors in the trial court opinion, filed pursuant to R.C. 2929.03(F), mandate vacation of appellant Allen's death sentence.
11. The trial court erred by allowing all of the state's exhibits to go to the jury at the penalty phase of appellant Allen's capital trial.
12. The use of a single photograph for identification purposes was impermissibly suggestive and destroyed any reliability of the identification.
13. The trial court erred to the prejudice of Mr.

Allen by failing to instruct or giving erroneous instruction to the jury during Mr. Allen's trial.

14. The prosecutor's misconduct during closing argument in the guilt-innocence phase and throughout the penalty phase of appellant Allen's capital trial denied him his right to due process of law.
15. The trial court erred in communicating with the jury during its deliberations outside the presence of the defendant or his counsel.
16. The trial court erred in allowing the admission of victim character evidence in the guilt-innocence phase of Mr. Allen's trial.
17. The trial court erred by merging the two aggravated murder counts rather than vacating one count.
18. The trial court erred in excusing for cause two jurors that were death scrupled and in allowing the state to use a peremptory challenge to excuse a death scrupled juror.
19. The trial court's use of the word "recommendation" (when describing the jury verdict), in the voir dire and penalty phase of jury instructions denied Mr. Allen of a fair determination of his sentence by the jury.
20. Appellant Allen was denied a fair trial and his rights as guaranteed by the Sixth and Fourteenth Amendments due to the failure of his defense counsel to act and make appropriate and timely objections.
21. The trial court erred in denying defense counsel's motion to prohibit display of evidentiary exhibits until admitted.
22. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10, and 16, Article I, of the Ohio Constitution establish the requirements for a valid death penalty scheme. Ohio Revised Code, section 2903.01, 2929.02, 2929.021, 2929.022, 2929.023,

2929.03, 2929.04, and 2929.05, Ohio's statutory provisions governing the imposition of the death penalty, do not meet the prescribed requirements and thus are unconstitutional, both on their face and as applied.

(Respondent Appendix 1637.) The Eighth District affirmed Allen's conviction and sentence on September 9, 1993. *State v. Allen*, No. 62275, 1993 WL 366976 (Ohio Ct. App. Sept. 9, 1993).

Represented again by Kathleen McGarry and Jane P. Perry, Allen filed a timely notice of appeal to the Ohio Supreme Court, raising the following twenty-three propositions of law:

1. A prospective juror should be removed for cause when she discloses by her answer that she cannot be a fair and impartial juror or if the court has any doubt as to the juror's being entirely unbiased.
2. Defense counsel should be permitted to question prospective jurors concerning their views on capital punishment and the trial court should not excuse a juror for cause based on views concerning capital punishment until such questioning is allowed and unless those views prevent or substantially impair the performance of their duties.
3. The existence of a prior offense is such an inflammatory fact that it should not be revealed to the jury unless specifically permitted under statute or rule.
4. A conviction cannot stand when the state fails to present sufficient evidence to meet the legal requirements to sustain a conviction.
5. Evidentiary exhibits, sought to be introduced into evidence, should not be displayed to the jury prior to their admission.
6. Victim character evidence is inadmissible in the guilt-innocence phase of a capital trial.

7. A trial court should not admit evidentiary exhibits absent proper authentication.
8. Expert testimony should be excluded from evidence when no basis or foundation for such testimony is established and its admission is irrelevant.
9. The use of a single photograph for identification purposes is impermissibly suggestive and destroys any reliability of the identification.
10. Duplicative and repetitive gruesome photographs are inadmissible in a capital prosecution.
11. When the state admits actual physical exhibits into evidence, the introduction of photographs of those items, having no independent evidentiary value, is error since it only serves to [sic] cumulative the quantity or evidence and overstate the state's case.
12. Misconduct by the prosecuting attorney in either guilt-innocence or penalty phase of a capital trial case will serve as the basis of a reversal if it denies the capital defendant a fair determination of either his guilt or innocence or the appropriate sentence in the case.
13. A jury in a criminal case must be instructed to find every element of the offense beyond a reasonable doubt.
14. Erroneous jury instructions in either the guilt-innocence or penalty phase of a capital case mandate reversal of the conviction and/or death sentence.
15. An indigent defendant is entitled to the appointment of a defense expert, at the state's expense, to assure he has a fair opportunity to present his defense.
16. The state may re-admit evidence from the guilt-innocence phase of a capital case into the penalty phase only if they are relevant to the death penalty specifications of which appellant was found guilty.

17. A trial court's use of the word "recommendation" (when describing the jury verdict), in voir dire and penalty phase jury instructions denies a capital defendant a fair determination of his sentence by the jury.
18. A trial court should not engage in communications with a deliberating jury without notice to and consultation with the parties involved.
19. A capital defendant is entitled to the effective assistance of counsel throughout all stages of the capital prosecution.
20. When a capital defendant is indicted and later convicted under both sections of R.C. 2903.01 when there is but one victim, the trial court should sentence the defendant under only one of the counts and vacate the other.
21. When a trial court opinion in a capital case is replete with errors and fails to correctly weigh the aggravating circumstances and mitigating factors the appropriate remedy is vacation of the death penalty.
22. A capital appellant is constitutionally entitled to an independent review of his conviction and death sentence by both the Court of Appeals and the Ohio Supreme Court.
23. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution establish the requirements for a valid death penalty scheme. Ohio Revised Code, Section 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, 2929.05, Ohio's statutory provisions governing the imposition of the death penalty, do not meet the prescribed requirements and thus are unconstitutional, both on their face and as applied.

(Respondent Appendix 2093.) On September 6, 1995, the Ohio Supreme Court affirmed Allen's conviction and death sentence. *State v. Allen*, 653 N.E.2d 675 (Ohio 1995). Allen filed a

petition for certiorari with the United States Supreme Court. The Court, however, denied the petition. *Allen v. Ohio*, 516 U.S. 1178 (1996).

On December 5, 1995, Allen filed an application to reopen his direct appeal pursuant to Ohio Rule of Appellate Procedure 26(B). Represented by Michael Benza and J. Joseph Bodine, Allen alleged eight assignments of appellate counsel's error for failing to raise the following issues:

1. The trial court erred to the prejudice of appellant Allen by failing to permit trial counsel to voir dire prospective jurors on their views and beliefs on the death penalty.
2. The trial court erred in instructing the jury that the death penalty was mandatory.
3. The trial court erred in refusing to instruct the jury that the burden of proof in a capital case is proof beyond all doubt.
4. Mr. Allen's convictions and sentences are invalid as he was denied the effective assistance of counsel at his trial.
5. Mr. Allen's convictions and sentences are invalid due to the prejudicial impact of prosecutorial misconduct.
6. The trial court erred to the prejudice of appellant Allen by failing to control the proceedings so that the record was adequately made and preserved.
7. The trial court erred to the prejudice of appellant Allen in admitting evidence that was altered from its original state.
8. The trial court erred by simultaneously sentencing Mr. Allen both on the charges of felony murder and on the same substantive underlying felony charges

in violation of the Double Jeopardy Clause of the United States Constitution.

(Respondent Appendix 2608.) The Eighth District Court of Appeals denied Allen's application on March 29, 1996. *State v. Allen*, No. 68819, slip op. (Ohio Ct. App. Mar. 29, 1996). Allen appealed this decision to the Ohio Supreme Court on July 15, 1996, raising the following propositions of law:

1. When a court of appeals denies an application to reopen based upon its independent assessment of facts which are conspicuously inaccurate, a capital appellant is denied the right to an adequate and effective appeal and due process of law.
2. When a court of appeals denies an application to reopen on the merits without briefing and oral argument, a capital appellant is denied the right to an adequate and effective appeal and due process of law.

(Return of Writ at 10.) The Ohio Supreme Court affirmed the decision of the Eighth District Court of Appeals. *State v. Allen*, 672 N.E.2d 638 (Ohio 1996).

On September 20, 1996, Allen filed a post-conviction petition pursuant to Ohio Revised Code § 2053.21 in the Cuyahoga County Court of Common Pleas. (Respondent Exhibit at 2679.) Thereafter, Allen filed a motion for the recusal of the trial court judge with the Ohio Supreme Court. (Respondent Exhibit at 2921.) The court denied the motion. *State v. Allen*, No. CR264901, S.C. No. 96-AP-179, slip op. (Ohio Jan. 2, 1997).

In his post-conviction petition, Allen raised nine claims

for relief as follows:

1. Petitioner Allen's conviction and sentences are void and/or voidable because the State withheld exculpatory, impeaching, or mitigation evidence from the defense in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2, 5, 9, 10, and 16 of the Ohio Constitution.
2. The judgment against Petitioner Allen is void or voidable because he was denied the right to effective assistance of counsel in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution. Specifically, counsel failed to request or utilize an expert forensic pathologist in order to investigate, prepare, and present valuable forensic evidence.
3. The judgment against Petitioner Allen is void or voidable because he was denied the right to a trial before a fair and impartial judge in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution. Specifically, the trial court refused to allow counsel to effectively utilize expert psychological and mitigation investigators in order to investigate, prepare, and present valuable psychological evidence about David Allen which could have served as the basis for a sentence less than death.
4. The judgment against Petitioner Allen is void or voidable because he was denied the effective assistance of counsel in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution. Specifically, counsel failed to effectively utilize expert psychological assistance in order to investigate, prepare, and present valuable

psychological evidence about David Allen which could have served as a basis for a sentence less than death.

5. Petitioner's conviction and sentence are void or voidable because Petitioner did not receive effective assistance of counsel within the meaning of the Sixth Amendment during his capital trial.
6. Petitioner Allen's conviction and/or sentence are void or voidable because the capital punishment statutes in Ohio are unconstitutional on their face and as applied to Petitioner because the decision on whether to capitally indict a defendant is left in the unfettered discretion of the prosecutor.
7. Petitioner Allen's convictions and sentences are void and/or voidable because Ohio's reviewing courts failed to fulfill their statutory obligation to engage in a meaningful review of the proportionality of Petitioner Allen's death sentence.
8. Petitioner Allen's convictions and sentences are void and/or voidable because he was denied a fair and impartial review of his death sentence.
9. Petitioner's convictions and/or sentences are void or voidable because death by electrocution constitutes a blatant disregard for the value of human life, entails unnecessary and wanton infliction of pain and diminishes the dignity of man.

(Respondent Appendix 2679.) The trial court issued its findings of fact and conclusions of law on April 4, 1997, concluding that Allen's petition was without merit. *State v. Allen*, No. CR 264901, slip op. (Ohio Ct. Common Pleas Apr. 4, 1997). Allen appealed the decision, alleging five assignments of error:

1. A capital Petitioner has the right to a fair and impartial judge.

2. Failure of the trial court to actually review the record of proceedings before ruling upon a petition for post-conviction relief denies a capital petitioner the right to a fair proceeding and due process of law.
3. Ohio's post-conviction scheme is not an adequate corrective process.
4. The trial court erred by dismissing Allen's petition without first conducting an evidentiary hearing.
5. Allen set forth sufficient evidentiary support to merit a hearing on his post-conviction claims.

State v. Allen, No. 72427, 1998 WL 289418, at *1 (Ohio Ct. App. June 4, 1998). The Eighth District affirmed the trial court. *Id.*

On July 15, 1998, Allen filed a notice of appeal and Memorandum in Support of Jurisdiction to the Ohio Supreme Court, raising the following propositions of law:

1. A capital petitioner has the right to a fair and impartial judge.
2. Failure of the trial court to actually review the record of proceedings before ruling upon a petition for post-conviction relief denies a capital petitioner the right to a fair proceeding and due process of law.
3. Ohio's post-conviction scheme is not an adequate corrective process.
4. The trial court erred by dismissing Allen's petition without first conducting an evidentiary hearing.
5. Allen set forth sufficient evidentiary support to merit a hearing in his post-conviction claims.

(Respondent Appendix 3160.) On October 7, 1998, the Ohio Supreme

Court declined jurisdiction and dismissed the appeal. *State v. Allen*, 700 N.E.2d 331 (Ohio 1998).

II. HABEAS PROCEEDING

On May 5, 1999, Allen filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 2.) Concurrently, Petitioner filed a Motion to Appoint Counsel. (Doc. No. 3.) The Court granted the motion, appointing Henry J. Hilow and John J. Ricotta to represent Petitioner. (Doc. No. 10.) Petitioner next filed a motion to stay execution, (Doc. No. 14), which the Court granted. (Doc. No. 15.)

Petitioner filed a motion to conduct discovery on March 28, 2000. (Doc. No. 44.) The Court denied the motion without prejudice on May 17, 2000. (Doc. No. 53.) Petitioner also filed a pro se motion to remove appointed counsel and a pro se motion to conduct discovery. (Doc. No. 55, 60.) The Court denied these motions. (Doc. No. 41, 56, 62.)

Petitioner moved the Court to amend the petition. (Doc. No. 4.) The Court granted the motion, (Doc. No. 9), and after one extension of time, the Amended Petition was filed on November 10, 1999. (Doc. No. 21.) Respondent filed the Return of Writ on January 10, 2000, (Doc. No. 22), to which Petitioner filed a Traverse on May 12, 2000. (Doc. No. 51.) Respondent filed the Sur-Reply on May 30, 2000. (Doc. No. 54.)

III. GROUNDS FOR RELIEF

Set forth below are the grounds for relief Allen asserts in the Petition:

1. David Allen was denied the right to a fair trial and due process of law because one of the jurors who sat at his capital trial stated during voir dire that she could not be fair and impartial.
2. David Allen was denied his right to a fair trial, due process of law and to equal protection of laws because the trial court excused two jurors who had some concerns about the imposition of the death penalty and because it permitted the prosecution to perempt a juror who had some concerns about the imposition of the death penalty.
3. David Allen was denied the right to a fair trial and to due process of law because the trial court permitted evidence of his prior incarceration to be presented to the jury.
4. David Allen was denied the right to a fair trial and to due process of law because the state did not produce sufficient evidence to convict Allen of aggravated murder.
5. David Allen was denied the right to a fair trial and to due process of law because evidentiary exhibits were displayed to the jury prior to their admission.
6. David Allen was denied the right to a fair trial and to due process of law because the trial court permitted victim character evidence to be introduced at trial.
7. David Allen was denied the right to a fair trial and to due process of law because exhibits were admitted without proper authentication.
8. David Allen was denied the right to a fair trial and to due process of law because expert testimony was admitted without basis or foundation.
9. David Allen was denied the right to a fair trial and to due process of law because only one photograph was used for identification purposes.

10. David Allen was denied the right to a fair trial and to due process of law because the trial court admitted gruesome and repetitive photographs at trial.
11. David Allen was denied the right to a fair trial and to due process of law because the trial court permitted the state to introduce photographs of physical evidence that was already admitted into evidence.
12. David Allen was denied the right to a fair trial, a reliable sentencing determination and to due process of law because of prosecutorial misconduct that occurred during the trial and penalty phases of Allen's capital trial.
13. David Allen was denied the right to a fair trial, a reliable sentencing determination and to due process of law because the jury was not instructed on an element of the aggravating circumstance of which Allen was convicted.
14. David Allen was denied the right to a fair trial, a reliable sentencing determination and to due process of law because the jury instructions issued during his capital trial were constitutionally deficient.
15. David Allen was denied the right to a fair trial, a reliable sentencing determination and to due process of law because he was denied assistance of expert witnesses.
16. David Allen was denied the right to a fair trial, a reliable sentencing determination and to due process of law because evidence unrelated to the aggravating circumstances was admitted during the penalty phase of the trial.
17. David Allen was denied the right to a fair trial, a reliable sentencing determination and to due process of law because of the trial court's use of the word "recommendation" during the penalty phase instructions.
18. David Allen was denied the right to a fair trial, a reliable sentencing determination and to due

process of law because the trial court engaged in discussions with the jury during its deliberations without notifying the parties.

19. David Allen was denied the right to a fair trial, a reliable sentencing determination and to due process of law because he was denied the effective assistance of counsel.
20. David Allen was denied the right to a fair trial, a reliable sentencing determination and to due process of law because the trial court's opinion and independent penalty assessment were constitutionally deficient.
21. Petitioner Allen's convictions and sentences are void and/or voidable because the state withheld exculpatory, impeaching, or mitigation evidence from the defense in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.
22. The judgment against Petitioner Allen is void or voidable because he was denied the right to effective assistance of counsel in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.
23. The judgment against Petitioner Allen is void or voidable because he was denied the right to a trial before a fair and impartial judge in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.
24. The judgment against Petitioner Allen is void or voidable because he was denied the effective assistance of counsel in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.
25. Petitioner's conviction and/or sentencing are void or voidable because Petitioner did not receive effective assistance of counsel within the meaning

of the Sixth Amendment during his capital trial.

26. Petitioner Allen's conviction and/or sentence are void or voidable because the capital punishment statutes in Ohio are unconstitutional on their face and as applied to Petitioner because the decision on whether to capitally indict a defendant is left in the unfettered discretion of the prosecutor.
27. Petitioner Allen's convictions and sentences are void and/or voidable because Ohio's reviewing courts failed to fulfill their statutory obligation to engage in a meaningful review of the proportionality of Petitioner Allen's sentence.
28. Petitioner Allen's convictions and sentences are void and/or voidable because he was denied a fair and impartial review of his death sentence.
29. Petitioner's convictions and/or sentences are void or voidable because death by electrocution constitutes a blatant disregard for the value of human life, entails unnecessary and wanton infliction of pain and diminishes the dignity of man.
30. Petitioner's convictions and/or sentences are void or voidable because [] he was denied the right to a fair and impartial judge during the state, collateral review process in violation of the Sixth and Fourteenth Amendments to the United States Constitution.
31. Petitioner's convictions and/or sentences are void or voidable because Ohio's collateral review process is constitutionally inadequate.
32. Petitioner's convictions and/or sentences are void or voidable because Ohio's collateral review process is constitutionally inadequate.¹
33. Allen's rights under the U.S. Const. Amends. V, VI, VIII and XIV were violated because Ohio's

¹ Although claims 31 and 32 are titled identically, they allege distinct constitutional violations.

death penalty statute is unconstitutional on its face and as applied to Allen.

IV. FACTS

The facts of this case were related by the Ohio Supreme Court in ruling on Allen's appeal as a matter of right. *State v. Allen*, 653 N.E.2d 675 (Ohio 1995). This Court repeats that factual history here, using the Ohio Supreme Court's language:

In June, 1991, a Cuyahoga County jury returned guilty verdicts in the trial of appellant, David W. Allen ("Allen"), for the aggravated robbery and aggravated murder of eighty-four-year-old Chloie English ("English") of Bedford, Ohio. English knew Allen through her participation in a prison ministry program. English ministered to five convicted felons, including Allen. She visited and corresponded with Allen while he was in prison and they stayed in touch after his release in 1989. On January 9, 1991, English received a phone call from someone named "David." According to English's daughter, the conversation left English shaking.

English was last seen alive at 5:45 p.m. on January 24, 1991, by her friend Judy Sperry ("Sperry") who had visited English in her home. At 6:45 p.m. the next day, English's friend Cathy Curry found English lying dead in her living room. The doors to English's

house were unlocked, which was unusual because English always locked her doors and never opened them to strangers.

After English's body was found, Bedford police officers secured, photographed, and searched the house. Detective Gerry Artl found English's eyeglasses on the floor and noted a large thumb print on the inside of the left lens. That thumb print turned out to belong to David Allen. Police recovered ten cigarette butts from English's kitchen garbage. Saliva tests showed that five of the butts had been smoked by a Type O secretor. (The rest lacked sufficient saliva for testing.) Two of the butts still had the "Doral" brand name on them. Allen is a Type O secretor, and there was evidence that he smoked Dorals. English disapproved of smoking and was a Type O non-secretor.

Although English's last known visitor was a woman, someone had left the toilet seat up in English's bathroom. Moreover, the coffee pot in the kitchen, empty when Sperry left, was half full when English's body was discovered. Police found several items burnt in the fireplace, including remains of English's purse and wallet, a broken ashtray, a broken coffee cup, a broken drinking glass, a wine bottle, and a knife with

its handle burnt off.

Police found no money in the house, even though English always kept about \$50 in her wallet for emergencies. English's credit cards and checkbook were also missing.

Detective Timothy Oleksiak ("Oleksiak") obtained the names of prisoners with whom English had corresponded. All but Allen were still in prison. Oleksiak and Artl had the print on the eyeglasses compared with Allen's; when the print was identified as Allen's, Oleksiak got an arrest warrant.

On January 29, Allen was arrested. He was wearing a denim jacket with a stain on one of the sleeves. That stain turned out to be Type O blood, the same type Allen and English shared. Allen was carrying a bus transfer issued between 6:04 and 7:00 a.m., at the stop 1.3 miles from English's house.

Allen also had a refund receipt for a Greyhound bus ticket. There was no record of when the ticket was sold, but Allen got the refund on January 25, at 11:28 p.m. Moreover, when Detective Artl searched Allen's bedroom, he found two packed suitcases under Allen's bed.

State v. Allen, 653 N.E.2d at 679-80.

V. STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), Pub. L. 104-132 § 104, amending 28 U.S.C. § 2254 became effective on April 24, 1996. The AEDPA significantly altered the standard of review a habeas court must apply, requiring increased deference to a state court's decision. The relevant statute states:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).

Before interpreting this statute, this Court must determine whether it is applicable to the instant case. In *Lindh v. Murphy*, 521 U.S. 320 (1997), the United States Supreme Court held that amended § 2254(d) does not apply to habeas corpus cases that were "pending" when the AEDPA was passed. In *Williams v. Coyle*, 167 F.3d 1036, 1040 (6th Cir. 1999), the Sixth Circuit determined that a habeas case can only be "pending" for purposes of applying

the AEDPA once the petition is filed. The court first determined that the word must be given its ordinary meaning. *Id.* at 1038 (citing *Moskal v. United States*, 498 U.S. 103, 108 (1990)). Noting the similarities between the filing of a habeas petition and the filing of a civil complaint, the court noted that Federal Rule of Civil Procedure 3 states that "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

The Sixth Circuit also looked to the language contained in § 2254 to support its finding. Specifically, § 2254(e) refers to "a proceeding instituted by an application for a writ of habeas corpus." Moreover, section 1914(a) of Title 28 provides that the "district court shall require the parties instituting any civil action, suit or proceeding . . . to pay a filing fee of \$150, except that on an application for a writ of habeas corpus the filing fee shall be \$5." Thus, the statutes associate the commencement of a habeas corpus proceeding with the filing of the application or petition. Consequently, the Sixth Circuit determined that a habeas case "commences" when the petition is filed. Thus, for purposes of applying the AEDPA, a case may only be "pending" after it commences, or after the filing of the petition. *Id.*

In the instant case, Allen filed his Petition May 5, 1999, over three years after the AEDPA's effective date. Consequently,

this Court will utilize the standard of review set forth in amended 28 U.S.C. § 2254(d).

The United States Supreme Court interpreted this statute in *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000).¹ According to *Williams*, the phrases "contrary to" and "unreasonable application of" must be given independent meanings. *Id.* at 404-5. A state court decision can be "contrary to" a Supreme Court decision by one of two means: (1) "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law," and (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" that decision. *Id.* at 405. Because the word "contrary" "is commonly understood to mean "diametrically different, opposite in character or nature, or mutually opposed," the Court noted, § 2254 "suggests that the state court's decision must be substantially different from the relevant precedent of [the Supreme Court]." *Id.* (citation

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This decision supplants the Sixth Circuit's prior interpretations of the statute in *Nevers v. Killinger*, 169 F.3d 352, 361-62 (6th Cir. 1998), *cert. denied*, 527 U.S. 1004 (1999) and *Maurino v. Johnson*, 210 F.3d 638, 643-44 (6th Cir. 2000), *cert. denied*, 531 U.S. 979 (2000). See *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000) (holding that "[i]n light of the Supreme Court's decision in *Williams*, we find that *Nevers* and *Maurino* no longer correctly state the law on the issue of the appropriate standard under 28 U.S.C. § 2254(d).").

omitted).

The Court then went on to find that a state court makes an "unreasonable application" of Supreme Court law, and thus a habeas court may grant relief, only if "the state identifies the correct legal principle from this Court's decision but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 365. The Court held that "for purposes of today's opinion, the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 422 (emphasis in original). See also *Cone v. Bell*, - U.S. - , 122 S.Ct. 1843, 1852 (2002) (holding that, for petitioner to succeed on a habeas claim, "he must do more than show that he would have satisfied [the applicable Supreme Court] test if his claim were being analyzed in the first instance, because under 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state court applied [Supreme Court precedent] incorrectly" "Rather, he must show that the [state court] applied [Supreme Court precedent] to the facts of his case in an objectively unreasonable manner.").

Finally, the *Williams* Court provided guidance on how to interpret "clearly established holdings of the Supreme Court." *Id.* at 412. The Court stated that this statutory phrase "refers to holdings, as opposed to its dicta, of this Court's decisions

as of the time of the relevant state-court decision." *Id.* The *Williams* Court also looked to *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny to help guide federal courts as to what qualifies as "clearly established Federal law." *Williams*, 529 U.S. at 412. The Court opined that "[w]hatever would qualify as an 'old rule' under *Teague* will constitute 'clearly established Federal Law, as determined by [this] Court.'" *Id.* (citation omitted). Pursuant to *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." 489 U.S. at 301.

In addition to reciting the standard the Court will employ in this case, the Court should address the arguments raised in both Petitioner's and Respondent's briefs on the standard of review issue. Allen argues that, to the extent the AEDPA attaches new legal consequences to the outcome of his petition, it is unconstitutionally retroactive. Allen claims that the AEDPA's alteration of the existing habeas corpus statutes must be subjected to a retroactivity analysis pursuant to *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994). Allen asserts that he is entitled to a *Landgraf* analysis because his conviction, direct appeal, and filing for post-conviction relief all became final prior to the AEDPA's enactment. Thus, claims Allen, this Court's usage of the AEDPA amendments creates new legal consequences for him.

The Court will not undertake a *Landgraf* retroactivity analysis as the Sixth Circuit case *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000), dispenses with this issue. In that case, the petitioner's appeals were completed prior to the AEDPA's passage and the petitioner claimed applying the AEDPA amendments to her case would result in an unconstitutional, retroactive application of new legislation to her case. *Id.* at 871. The Sixth Circuit disagreed, and, citing *Lindh*, determined that "the fact that [petitioner's] state criminal appeals were completed prior to the effective date of the AEDPA is of absolutely no consequence in ascertaining whether the AEDPA is or is not applicable." *Id.* Instead, the court opined, the date on which the petitioner filed her petition for habeas relief is determinative. Accordingly, Allen's retroactivity argument must fail.

VI. EXHAUSTION AND PROCEDURAL DEFAULT

A. EXHAUSTION

A state prisoner must exhaust his state remedies before bringing his claim in a federal habeas corpus proceeding. 28 U.S.C. § 2254 (b), (c); *Rose v. Lundy*, 455 U.S. 509 (1982). A federal court will not review a question of federal law decided by a state court if the state court's ruling is based on a state law ground that is independent of the federal question and is adequate to support the judgment. *Coleman v. Thompson*, 501 U.S.

722, 729 (1991). This rule applies regardless of whether the state court's decision was based on substantive or procedural issues of law. *Id.*

A habeas petitioner satisfies the exhaustion requirement when the highest court in the state in which the petitioner has been convicted has had a full and fair opportunity to rule on his or her claims. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). If the petitioner still has a remedy in the state courts in which the state court would have the opportunity to rule on the federal constitutional claims in petitioner's case, exhaustion has not occurred. *Rust v. Zent*, 17 F.3d at 160.

B. PROCEDURAL DEFAULT

For purposes of comity, a federal court may not consider "contentions of federal law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). If a "state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v.*

Thompson, 501 U.S. 722, 749 (1991).

In *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), the Sixth Circuit Court of Appeals set out the analytical framework for determining the defaulted status of a claim: "When a state argues that a habeas claim is precluded by the petitioner's failure to observe a state procedural rule, the federal court must go through a complicated [four-prong] analysis." *Id.* at 138. Specifically, the Sixth Circuit stated:

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

Id. (citations omitted).

The Respondent asserts this Court must not review some of the claims Allen raises in the Petition because they are procedurally defaulted.² Allen attacks Respondent's assertions

² Respondent alleges that Petitioner has defaulted the following claims: part of 2, 5, 6, 7, 8, 9, 10, 11, part of 12, 13, 16, 17, 22, and 24.

of procedural default on three grounds. The Court will address each individual claim of procedural default when it analyzes Allen's distinct claims for relief. At this juncture, however, the Court will address Allen's general counter-arguments to Respondent's allegations of procedural default.

1. The *Perry* Rule

a. not consistently applied

Allen argues that this Court may address on the merits any claim Respondent asserts is barred by the *Perry* doctrine³ because it is not "adequate." A procedural rule is not "adequate" unless, among other things, it is regularly and consistently applied. See *Warner v. United States*, 975 F.2d 1207, 1213 (6th Cir. 1992), cert. denied, 507 U.S. 932 (1993) (stating that the rule only applies to "firmly established and regularly followed state practices") (citing *Ford v. Georgia*, 498 U.S. 411, 422 (1991)). Thus, concludes Allen, because of the Ohio courts' inconsistent application of *Perry*, this Court need not defer to an Ohio court's finding of a *Perry* violation.

To support his argument, Allen cites to several capital cases in which the Ohio Supreme Court, on direct appeal, *sua*

³ *State v. Perry*, 226 N.E.2d 104 (Ohio 1967) (holding that any claim that was raised or could have been raised on direct appeal is barred from review on post conviction under the doctrine of res judicata).

sponte addressed the merits of claims that the Court of Appeals had concluded were barred by *res judicata*, or considered claims that had not even been raised in the Court of Appeals and, thus, *should have been* barred by *res judicata*.

Some of the cases upon which Allen relies clearly do not support his argument and are, in fact, inapposite. For instance, in each of the following three cases, a well-established exception to the *res judicata* doctrine applied, or the court did not actually engage in a merits review. Allen cites *State v. Buell*, 489 N.E.2d 795, 811 (Ohio 1986). In *Buell*, the court analyzed the constitutionality of the imposition of the death penalty in light of the recently decided United States Supreme Court decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1987), even though the appellant did not raise the issue at trial, or in his appeal to the Ohio Supreme Court. The reason the Ohio Supreme Court considered the claim *sua sponte* was that it *could not have been raised before*. *Caldwell* was decided in 1985, after *Buell's* appeal had been filed and resolved by the Ohio Court of Appeals.

Similarly, in *State v. Huertas*, 553 N.E.2d 1058 (Ohio 1990), the Ohio Supreme Court resolved an issue and ultimately granted relief on the basis of a Supreme Court opinion, *Booth v. Maryland*, 482 U.S. 496 (1987), overruled by *Payne v. Tennessee*, 501 U.S. 808 (1991), which was issued after the appellant's trial

and after the appeal had been filed, but before the appellate court issued its decision. *Id.* *Booth* held that the use of victim impact evidence during the penalty phase of a capital trial is unconstitutional. There is no indication in the opinion itself that the petitioner had failed to raise a claim based on the use of victim impact statements. Thus, it is possible that the *claim* had been raised below, even if the appellant could not have obtained relief based on *Booth*. Thus, *Huertas* is unhelpful to Allen.⁴

Allen's reliance on *State v. Rogers*, 512 N.E.2d 581 (Ohio 1987), suffers from the same defect. The court considered a claim based on the prosecutor's evidentiary use of the petitioner's post-*Miranda* exercise of his right to silence, in violation of the recently decided *Wainwright v. Greenfield*, 474 U.S. 284 (1986). As in *Huertas* and *Buell*, the United States Supreme Court decision was issued after the appellant's direct appeal to the Court of Appeals, and, thus, the appeal to the Ohio Supreme Court presented the earliest opportunity for raising the claim.

In other cases, however, the Ohio Supreme Court did appear

⁴ For many of the same reasons, *State v. Post*, 513 N.E.2d 754 (Ohio 1987), does not support Allen's argument. As the Ohio Supreme Court itself noted, *Booth* had just been decided during the time in which the appellant's appeal to the Ohio Supreme Court was pending.

to ignore the res judicata bar and address the appellant's claims on the merits without explaining why it was doing so. See *State v. Williams*, 528 N.E.2d 910 (Ohio 1988) ("Because of the gravity of the sentence that has been imposed on appellant, we have reviewed the record with care for any errors that may not have been brought to our attention. In addition, we have considered any pertinent legal arguments which were not briefed or argued by the parties."); *State v. Hamblin*, 524 N.E.2d 476 (Ohio 1988) ("Because this is a capital case, we will review all five arguments [even those not raised below] relating to the claim of ineffective assistance of counsel."); *State v. Esparza*, 529 N.E.2d 192 (Ohio 1988) (considering issue of jury venire, even though it was "challenge[d] for the first time on appeal"); *State v. Barnes*, 495 N.E.2d 922 (Ohio 1986) (stating, "since the instant argument was neither raised before, nor ruled on by, the court of appeals, this court is not required to address it on the merits," but addressing the claim anyway).

That the Ohio Supreme Court occasionally chooses to address the merits of the claims that are otherwise barred from review on the basis of res judicata does not mean that Ohio's law of res judicata is so inconsistent as to be inadequate, however. Rather, these are the exceptions that prove the rule. As the Fourth Circuit has held, "[c]onsistent or regular application of a state rule of procedural default does not require that the

state court show an 'undeviating adherence to such rule admitting of no exception.'" *Yeatts v. Angelone*, 166 F.3d 255, 263-64 (4th Cir. 1999), cert. denied, 526 U.S. 1095 (1999) (quoting *Wise v. Williams*, 982 F.2d 142, 143 (4th Cir. 1992)). Rather, the procedural rule is adequate, if, as "a general rule, [it has] been applied in the vast majority of cases." *Plath v. Moore*, 130 F.3d 595, 602 (4th Cir. 1997) (internal quotation marks omitted), cert. denied, 523 U.S. 1143 (1998).

While the Ohio courts of appeal may not be paradigms of consistency, they do not ignore or arbitrarily decline to apply Ohio's procedural bars, including the *Perry* rule, on a regular basis. Indeed, the procedural bar is applied in the vast majority of cases, both capital and non-capital. Moreover, there has been no showing that, because of the above-mentioned exceptions, Allen or other capital habeas petitioners reasonably came to believe that the *Perry* rule had been abandoned in capital cases. Thus, there was no basis to conclude that the exception had become the rule, or that it would have been reasonable for a petitioner to assume it had.⁵

⁵ The Ohio Supreme Court has expressly rejected the argument that procedural bars are or should be less strictly enforced in capital cases:

The mere fact that punishments differ provides no basis to assert that procedural rules should differ in their application to the crime charged. We hold that capital

Moreover ,the Sixth Circuit has specifically held that Ohio's application of the res judicata doctrine under *Perry* is an adequate and independent state ground. *Buell v. Mitchell*, 274 F.3d 337, 349 (6th Cir. 2001) ("This court has held that [the *Perry* rule] is regularly and consistently applied by Ohio courts as required by the four-part *Maupin* test.") (citing *Byrd v. Collins*, 209 F.3d 486, 521-22 (6th Cir. 2000)). See also *Mapes v. Coyle*, 171 F.3d 408, 420 (6th Cir. 1999), cert. denied, 528 U.S. 946 (1999) (noting that the *Perry* rule has been consistently applied); *Brooks v. Edwards*, 96 F.3d 1448 (Table), 1996 WL 506505, at *5 (6th Cir. Sept. 5, 1996) ("The procedural rule [of res judicata] applicable to petitioner's claims is an adequate and independent state ground for refusal to hear the claim by the Ohio Supreme Court."). Consequently, this Court holds that any claim the Ohio courts refused to address based on *Perry* is procedurally defaulted and barred from habeas review absent a showing of cause and prejudice.

b. post-conviction system violates due process

defendants are not entitled to special treatment regarding evidentiary or procedural rules . . . We will utilize the doctrine of waiver where applicable; yet we must also retain the power to *sua sponte* consider particular errors under exceptional circumstances.

State v. Greer, 530 N.E.2d 382, 394 (Ohio 1988).

Allen also asserts a broad challenge to the constitutionality of Ohio's post-conviction system, contending that Ohio's post-conviction bar of res judicata does not satisfy due process requirements. According to Allen, Ohio's post-conviction system is designed to create procedural defaults for the sake of judicial convenience, and provides no meaningful opportunity for petitioners to identify, investigate, or prove constitutional violations. The thrust of his argument seems to be that Ohio's post-conviction practice makes compliance with its procedural requirements so difficult that petitioners are set up for failure.⁶ This argument is unpersuasive.

In support of his argument, Allen relies on *Easter v. Endell*, 37 F.3d 1343, 1345 (8th Cir. 1994); *Harmon v. Ryan*, 959 F.2d 1457, 1462 (9th Cir. 1992); and *Kim v. Villalobos*, 799 F.2d 1317, 1321 (9th Cir. 1986). None of these cases supports Allen's argument that Ohio's application of res judicata in post-conviction proceedings violates due process.

In *Easter*, the petitioner pleaded guilty to various crimes in an Arkansas state court in December of 1989. At the time, Arkansas did not allow those who pleaded guilty to appeal; in

⁶ Allen attempts to bolster his argument that the post-conviction process is inadequate by pointing to the record of its results. Thus, Allen notes that, at the time he prepared his Traverse, only one death-sentenced individual had been granted post-conviction relief. Traverse at 30.

addition, Arkansas had no real post-conviction system in place. A year after Easter's guilty plea and conviction, Arkansas erected a post-conviction procedure (Rule 37) that allowed for the review of guilty pleas. However, petitions containing such challenges were required to be filed within ninety (90) days of judgment. The Arkansas Supreme Court subsequently held that individuals who had pleaded guilty during the period in which Rule 37 was not in effect had a right to challenge their guilty pleas under the rule. *State v. Fox*, 832 S.W.2d 244 (Ark. 1992). The Arkansas Supreme Court also said, however, that such challenges still had to be made within the ninety (90) day period. Easter filed a Rule 37 petition, and it was denied as untimely. Easter raised a challenge to his guilty plea on federal habeas review, and the district court held that the claim was procedurally defaulted.

The Eighth Circuit Court of Appeals reversed. The Court held that the *Fox* procedural bar was not adequate *as to Easter*,⁷ because it was not a firmly established rule when applied to him.⁸ In this case, Allen has not shown that any of his

⁷ The Court was careful to point out that "Arkansas' post-conviction procedures as embodied by *Fox* are not *in themselves* constitutionally infirm." *Easter*, 37 F.3d at 1346.

⁸ This was an application of the Supreme Court's decision in *Ford v. Georgia*, 498 U.S. 411 (1991) (holding that a state procedural rule that was not clearly defined before the

procedural defaults were due to a procedural rule that was not firmly established at the time it was applied to him.

Harmon also offers no support for Allen's claim. In *Harmon*, the district court dismissed the petitioner's habeas corpus petition because he had failed to pursue a direct appeal in the Arizona Supreme Court first. The Ninth Circuit reversed, holding, basically, that the Arizona Supreme Court had misled the petitioner about what he needed to do to exhaust his state remedies. The Ninth Circuit held that the petitioner's default was due to the fact that, prior to its occurrence, the Arizona Supreme Court expressly held that "[o]nce the defendant has been given the appeal to which he has a right [*i.e.*, in the state intermediate appellate court], state remedies have been exhausted.'" *Harmon*, 959 F.2d at 1463 (quoting *State v. Shattuck*, 684 P.2d 154, 157 (Ariz. 1984)). Thus, the Ninth Circuit concluded, in light of *Shattuck*, it was reasonable for an Arizona defendant to believe that an appeal to the Arizona Appeals Court was all that was needed to exhaust his state remedies before pursuing a federal habeas action, and the failure to appeal to the Arizona Supreme Court was excused. Here, Allen has not pointed to a single decision which misled him about his obligations.

default is not an adequate state ground for purposes of determining procedural default).

Likewise, *Kim* does not assist in Allen's argument. In *Kim v. Villalobos*, 799 F.2d 1317, 1321 (9th Cir. 1986), the Ninth Circuit held that, where a *pro se* prisoner's failure to plead his claims with particularity resulted in his being unable to pursue post-conviction relief, the procedural default would be excused. Here, there is no such obstacle to Allen, who was represented by counsel throughout his appeal and post-conviction proceedings.

Finally, Allen asserts that this Court should excuse any procedural default for claims barred by the *Perry* doctrine if they are based on evidence *de hors* the record. The Court declines to express a general conclusion regarding this issue and will address this argument as it is raised in regard to Allen's individual grounds for relief.

2. Contemporaneous objection and plain error analysis

Allen next asserts that Ohio's contemporaneous objection rule, which requires that defense counsel raise certain issues as they arise during trial, does not bar this Court from addressing the merits of his claims. Specifically, Allen contends that the plain error review that Ohio appellate courts utilize when analyzing a claim in which there has been no contemporaneous objection during trial is not independent of federal law. Thus, Allen argues, this Court may conduct a merit review of these claims.

Ohio courts have determined that a failure to

contemporaneously object to an alleged error constitutes procedural default. *State v. Williams*, 364 N.E.2d 1364 (Ohio 1977). If a defendant fails to object to a trial error that would affect a substantial right, then the appellate courts will conduct a plain error analysis of that claim. *State v. Slagle*, 605 N.E.2d 916, 925 (Ohio 1992).⁹ Allen contends that because plain error review is grounded in the *federal* due process concept of a fundamentally fair trial, it fails the third prong of the *Maupin* test outlined above, i.e., that a habeas court may review the merits of a claim because the state finding of procedural default is not based on a ruling independent of federal law. Therefore, Allen concludes, this Court need not show deference to Ohio's contemporaneous objection rule and the plain error analysis it invites.

Allen cites *Knuckles v. Rogers*, 983 F.2d 1067 (Table), 1993 WL 11874 (6th Cir. Jan. 21, 1993), to support his opinion. The Sixth Circuit questioned the precedential effect of that case in *Scott v. Mitchell*, 809 F.3d 854 (6th Cir. 2000), *cert. denied*, 531 U.S. 1021 (2000). In *Scott*, the court found that Ohio's contemporaneous objection rule was an independent state ground.

⁹ Additionally, Ohio Rule of Criminal Procedure 52(B) states:

(B) Plain error

Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Id. at 867. Moreover, the *Scott* court noted that an alternative holding in which the state court performs a plain error analysis does not constitute a waiver of the state procedural bar preventing a habeas court from reviewing the claim. *Id.* at 867-68.

Finally, in *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000), the court explicitly rejected Allen's assertion, stating "[c]ontrolling precedent in our circuit indicates that plain error review does not constitute a waiver of state procedural default rules." Thus, the Court finds that any claim that the Ohio Supreme Court addressed pursuant to a plain error analysis is procedurally defaulted. To be entitled to a merit review of those claims, Allen must demonstrate cause and prejudice to excuse the default.

3. Miscarriage of justice exception

Allen next argues that, to the extent any of his claims are procedurally defaulted and the Court does not find cause and prejudice to excuse them, the Court should utilize the miscarriage of justice exception to a procedural bar because he is actually innocent. Pursuant to the miscarriage of justice exception to the procedural default bar, a habeas petitioner's actual innocence of a crime entitles that petitioner to a merit review of his or her claims. *Schlup v. Delo*, 513 U. S. 298, 314-15 (1995).

In *Schlup*, the Supreme Court determined that the petitioner in that case should have been afforded a merit review of his claims after evidence suggested that he had been the victim of mistaken identity in the murder of a prison inmate. The Court went on to discuss the standard to be applied when a habeas petitioner asserts actual innocence. The *Schlup* Court held that, where a petitioner seeks to utilize claims of actual innocence as a gateway to assert he was wrongly convicted of the crime, rather than merely objecting to the death sentence, the petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 327 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). To constitute the necessary "probability," the petitioner must show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* The *Schlup* Court described the specific analysis the district court must employ when faced with a petitioner's allegation of actual innocence:

It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Id. at 329.

Significantly, the Supreme Court in *Schlup* reaffirmed an earlier finding that where a petitioner claims he is actually innocent of the death penalty, as opposed to the underlying crime, a more rigorous standard applies, a standard in which a petitioner "must show by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." *Id.* 513 U.S. at 323 (citing *Sawyer v. Whitley*, 505 U.S. 333 (1992)) (internal quotation marks and citations omitted).

In the instant case, Allen presents no new evidence in an attempt to persuade the Court that he is actually innocent and actually innocent of the death penalty. Instead, Allen merely asserts that "he is innocent and at least he is innocent of the death penalty, and as such he is entitled to enter this gateway through any procedural default." *Traverse* at 36. As *Schlup* dictates, however, this Court cannot supplant its own judgment for the jury's determinations. Without new evidence to suggest that a properly instructed jury would find otherwise, this Court cannot utilize the *Schlup* gateway. Thus, this means of excusing procedural default is unavailable to Allen.

VII. ANALYSIS OF GROUNDS FOR RELIEF

First and Second Grounds for Relief - Juror Bias

Allen's first and second grounds for relief are that he was denied due process and the right to a fair trial because of

venire members who were both included and excluded from the jury. The Court will review these claims individually but sets forth the applicable law below.

In *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968), the Supreme Court invalidated a capital sentence when the trial court excused all jurors who expressed a conscientious objection to the death penalty. The Court reasoned that the proper inquiry was not whether a prospective juror opposed the death penalty generally, but whether the juror's religious, moral or philosophical beliefs would prevent him or her from following the court's instructions. *Id.* at 514 n.7 ("[E]ven a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the laws of the State.").

The Court revisited this issue after lower court confusion arose over how to apply the *Witherspoon* standard, determining:

[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Adams v. Texas, 448 U.S. 38, 45 (1980); see also *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (affirming *Adams* standard). Given the subjective nature of any such determination, the Court cautioned that "deference must be paid to the trial judge who sees and hears the juror." *Witt*, 469 U.S. at 426.

In addition to providing trial courts instruction on how to select jury members, the Supreme Court has guided reviewing courts on how to conduct their analyses. In *Gray v. Mississippi*, 481 U.S. 648 (1987), the Court determined that because the right to an impartial jury was so intrinsic to the right to a fair trial, a harmless error analysis could not remedy such a trial defect. *Id.* at 668. Instead of employing a harmless error analysis or permitting the reviewing court to substitute its own decision for that of the trial court, the reviewing court must determine "whether [the trial court's] findings are supported by the record." *Wainwright v. Witt*, 469 U.S. 412, 434 (1985). Thus, a reviewing court must undertake an independent review of the record when determining whether the trial court's decision to include or exclude a juror was proper.

Although a reviewing court independently reviews the record, the Supreme Court cautioned that screening out every outside influence that could possibly affect a juror's vote is not required to afford a criminal defendant due process. Rather, "[d]ue process means a jury capable and willing to decide the

case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

A. First ground for relief

Allen first claims that he was denied due process and a fair trial when the trial court permitted prospective juror Patricia Worthington to be empaneled on the jury. During voir dire, Worthington stated that her brother had been murdered two years before and that the person whom the state indicted for the murder was acquitted during trial. She further stated that she remained bitter about the trial's outcome. (V.D. Tr. 451-2.) Finally, Worthington stated that the investigators and prosecutors associated with her brother's case remained in sporadic contact with her mother. (V.D. Tr. 458.) These admissions, Allen claims, demonstrate Worthington's inability to be impartial.

While juror Worthington expressed some reluctance about the prospect of being a juror in a criminal case, she stated repeatedly in response to questions from the trial court and defense counsel that her brother's murder and trial would not impact her decision in Allen's case (V.D.Tr. 454; 460.) Thus, nothing in the record overtly indicates any bias against Allen. Moreover, without any brazen statements clearly demonstrating Worthington's inability to act impartially, this Court must, as stated above, show "deference . . . to the trial judge who sees

and hears the juror." *Witt*, 469 U.S. at 426.

Finally, the Ohio Supreme Court determined on direct appeal: "[T]he trial court found Worthington unbiased, a finding supported by Worthington's testimony. Allen argues that the juror's belief in her own impartiality is insufficient support, but the trial judge saw and heard Worthington and could legitimately validate her statements." *State v. Allen*, 653 N.E.2d 675, 681 (Ohio 1995). That court's analysis is not an unreasonable application of *Witt*. Thus, this Court finds Allen's first ground for relief is without merit.

B. Second ground for relief

Allen's second ground for relief is that the trial court improperly excused two prospective jurors because they expressed an adversity to imposing the death penalty. Additionally, Allen contends, the prosecution improperly utilized a peremptory challenge to excuse a third prospective juror with similar reservations.

As noted above, a conscientious objection to imposing the death penalty will not prohibit a venire member from serving on a capital jury if he or she can apply the applicable law to the case despite any objection. *Adams v. Texas*, 448 U.S. 38, 45 (1980). Thus, a trial court need only determine whether the prospective juror can follow the trial court's instruction. In both instances to which Allen cites, the prospective jurors

expressed unequivocal reservations about imposing the death penalty under any circumstances.

First, venire member Mary Skufka stated that, because of her Catholic upbringing, she could never impose the death penalty. (V.D. Tr. 174-75.) Similarly, prospective juror Maynard Washington stated that he could not sign a verdict form imposing the death penalty, even in a properly proven case. (V.D.Tr. 181.) Thus, the trial court properly dismissed these venire members.

Finally, Allen claims that the state improperly exercised a peremptory challenge to excuse prospective juror Carmella Colston because she equivocated, when questioned, about her ability to impose the death penalty. The Ohio Supreme Court noted that Allen waived this argument by not raising it during trial. Thus, this issue is procedurally defaulted.¹⁰

**Third, Sixth, Seventh, Eighth, Tenth, Eleventh, and Sixteenth
Grounds for Relief - Admission of Evidence**

Several of Allen's grounds for relief relate to the trial

¹⁰ Were the Court to reach the merits of the issue, however, it would not be well-taken. As the Ohio Supreme Court stated in its plain error analysis: "[P]rosecutors can exercise a peremptory challenge for any reason, without inquiry, and without a court's control, apart from excluding jurors based on race or sex." *State v. Allen*, 653 N.E.2d at 629-30. This reasoning is in compliance with United States Supreme Court precedent. *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Batson v. Kentucky*, 476 U.S. 79 (1986).

court's admission of evidence. The Court groups them together because it must subject each of these claims to a due process analysis. Admission of evidence is a matter of state law, and alleged error, such as improper admission of evidence, usually does not support a writ of habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). A state law violation, however, may rise to the level of a due process violation if it created a serious risk of convicting an innocent person. *Neumann v. Jordan*, 84 F.3d 985, 987 (7th Cir. 1996). Barring this circumstance, a federal court must defer to the state court's interpretation of its own rules of evidence and procedure. *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989). A federal court does not act as an additional court of appeals to review a state court's interpretation of its own laws. *Id.* Mindful of this law, the Court now turns to Allen's individual claims for relief.

A. Third ground for relief

Allen's third ground for relief is that the trial court erred when it permitted the jury to hear evidence that he was previously incarcerated. The state sought to introduce evidence of Allen's prior incarceration to demonstrate the origins and nature of English's relationship with Allen. Upon considering Ohio Rules of Evidence 403 and 404(b), the trial court admitted this evidence but ordered the state to excise any reference

concerning the reason for Allen's prior incarceration. (Tr. 246.) Allen now alleges that this admission was unduly prejudicial, denying him due process.

The Court disagrees. The Ohio Supreme Court cogently analyzed this claim pursuant to state law:

Evid.R.404(B) allows "other acts" evidence as proof of identity. Since English was apparently killed by someone she knew, the prior-imprisonment evidence was relevant to explain that English knew Allen through visiting him in prison.

Allen's argument under Evid.R.403(A) also fails. Pursuant to Evid.R.403(A), the court is required to weigh the probative value of the evidence against the danger of unfair prejudice, confusion of the issue, or misleading the jury. . . . Allen never denied English knew him, and the state had other evidence of the fact. However, the judge took steps to minimize unfair prejudice, forbidding the state to mention why Allen had been in prison and instructing the jury: "[Y]ou may not infer that the defendant is guilty of these offenses because he may have been convicted and incarcerated in the past." Thus, the trial court did not abuse its discretion by finding that potential unfair prejudice did not substantially outweigh the relevance of the testimony.

State v. Allen, 653 N.E.2d 675, 683 (Ohio 1995).

Initially, the Court notes that the Ohio Supreme Court's analysis underscores the state-law nature of this claim. Furthermore, the admission of Allen's prior incarceration did not create a serious risk that Allen was wrongfully convicted. *Neumann v. Jordan*, 84 F.3d 985, 987 (7th Cir. 1996). Finally, the Ohio Supreme Court did not unreasonably apply United States Supreme Court precedent in its analysis. Thus, the Court's

inquiry ends. Allen's third ground for relief is without merit.

B. Sixth ground for relief

Allen alleges in his sixth ground for relief that he was denied due process when the trial court permitted the state to introduce evidence about English's character. Specifically, Allen objects to the following testimony regarding English's character: (1) English did not drink or smoke; (2) English was an immaculate housekeeper; (3) English was religiously devoted. She prayed every morning, went to prayer meetings, and taught Sunday school at her church.

Respondent alleges this claim is procedurally defaulted. The Ohio Supreme Court found that, because Allen did not object to the introduction of this testimony during trial, he waived the right to assert this claim on appeal. Consequently, that court conducted a plain error analysis. As stated in section VI., B., 2., *supra*, this Court finds any claim reviewed pursuant to that analysis to be procedurally defaulted. Although Allen contends the Ohio Supreme Court dispensed with this procedural bar by reviewing the claim on the merits, this Court disagrees. Compatible with the plain error analysis, the Ohio Supreme Court merely reviewed the claim for manifest error. Thus, ground six is procedurally defaulted.

The Court finds this claim would be without merit in any event. First, this claim is, in essence, a state-law claim

uncognizable by a federal habeas court. Moreover, even when viewed under Ohio Rules of Evidence law, the trial court had a satisfactory ground on which to admit this evidence because it all pertained to developing the crime scene. First, the fact that English neither drank nor smoked was relevant because an open bottle of wine and cigarettes were found in her apartment after she was murdered. Second, English's housekeeping and habit of praying every morning was relevant to demonstrate the time of death, because a neighbor noticed that her garbage was not set out, something English routinely did in a timely fashion after morning prayer. The fact that English did not set out her garbage on the morning of January 25th tended to support the state's theory as to her time of death. Finally, the fact that English taught Sunday school and regularly attended prayer meetings demonstrated the origins of English's relationship with Cathy Curry and Constance Dickson, the individuals who testified about English's habits.

In his traverse, Allen attempts to persuade the Court that the admission of this evidence permitted the jury to consider "improper aggravating factors" during the penalty phase of trial. Traverse at 61. This argument is unpersuasive because the bulk of the testimony about which Allen complains was adduced during the guilt phase of the trial. Thus, this evidence did not directly impact the jury's deliberations during the penalty

phase. Moreover, as the Ohio Supreme Court stated: "The evidence that Allen complains about was not offered to elicit sympathy from the jury; rather, the testimony related directly to the circumstances of the murder and the robbery." *State v. Allen*, 653 N.E.2d at 684. Nothing contained in the Ohio Supreme Court's holding applies federal law, much less unreasonably applies it. Accordingly, this claim is not well-taken.

C. Seventh ground for relief

Allen's seventh claim is that the trial court admitted several exhibits into evidence without proper authentication. Allen alleges that his blood type evidence, some articles of clothing he was wearing when arrested, and a bus ticket found in his possession were neither properly authenticated before admission nor was a chain of custody established to ensure their integrity. Noting that Allen did not object to the admission of these exhibits during trial, the Ohio Supreme Court found that Allen had waived this claim and conducted a plain error analysis. Consequently, this Court finds claim seven procedurally defaulted.

Allen would not succeed on this claim even if this Court were to conduct a merit review. As with his other admission of evidence claims, this claim is a state-law claim not cognizable by a federal habeas court. Moreover, the admission of this evidence did not create a serious risk that Allen was wrongfully

convicted. *Neumann v. Jordan*, 84 F.3d 985, 987 (7th Cir. 1996).

As the Ohio Supreme Court stated:

Although probative, the admission of these items into evidence did not alter the outcome of the case. The blood sample was used to link Allen's blood type to that found on the cigarette butts in English's wastebasket. This evidence was not determinative of the case because the trace evidence examiner testified that forty-five percent of whites have Type O blood and, of that forty-five percent, seventy-two percent are secretors. The jeans jacket, shoes and bus transfer ticket are also not determinative of the case. These items were introduced as the items worn by Allen when he was arrested. The jeans jacket had Type O blood on it; however, both Allen and English had Type O blood. The shoes had an unidentified black substance on them, possibly ash from English's fireplace, and the bus transfer placed Allen at a bus stop 1.3 miles from English's home. Given the ample evidence of Allen's guilt in addition to these items, we do not find plain error in the admission of these items.

653 N.E.2d at 685. Nothing in the Ohio Supreme Court's analysis involves an unreasonable application of United States Supreme Court precedent. Allen's seventh ground for relief is not well-taken.

D. Eighth ground for relief

In Allen's eighth ground for relief he claims that two expert witnesses testified on the state's behalf without a proper foundation, prejudicing him thereby. Specifically, trace evidence expert Kay May testified that, although there was no blood found on the knife retrieved from English's fireplace, there could have been blood on it at some point. Additionally, May testified that the black spots on the bottom of Allen's shoes

could have been ash. Finally, fingerprint expert Edward Walsh testified that he normally would not "walk[] around with a fingerprint on [his] eyeglasses." (Trial Tr. 727.)

Allen's claims are wholly without merit. First, during May's testimony when answering the prosecutor's questions during re-direct examination, she merely testified that it was "possible" that there was blood on the knife retrieved from English's home and that the black spots on Allen's shoes were ash. (Trial Tr. 581.) This statement is far from providing an expert opinion on the matter. Second, when Walsh stated he would wipe off any fingerprint on his glasses, he was merely testifying as to his personal habits, not rendering a professional opinion as to the general practices of eyeglass wearers. Thus, the Ohio Supreme Court did not unreasonably apply United States Supreme Court precedent when rejecting this claim. This claim is without merit.

E. Tenth ground for relief

In this ground for relief, Allen alleges that multiple photographs during trial were unduly prejudicial, thereby denying him the right to a fair trial. Specifically, Allen alleges that the trial court should have excluded photographs depicting the victim's head and body, both before and after being cleansed. Additionally, Allen objects to the introduction of a videotape of the crime scene.

The admission of the photographs Allen alleges are prejudicial was within the sound discretion of the trial court. Admission of gruesome photographs in a murder case typically does not justify collateral relief, even if cumulative and likely to inflame the jury. *Gonzalez v. DeTella*, 127 F.3d 619, 621 (7th Cir. 1997), *cert. denied*, 523 U.S. 1032 (1998). There is no evidence in this case, other than Allen's mere allegation, that the photographs introduced violated his right to a fair trial. Moreover, there was ample evidence adduced at trial of Allen's guilt to provide this Court with confidence that the trial court did not convict an innocent person. The Ohio Supreme Court correctly denied this claim on direct appeal.

The Court finds Allen's videotape sub-claim is procedurally defaulted. The Ohio Supreme Court noted on direct appeal that Allen failed to object to its introduction during trial. Thus, Allen waived the right to assert his objection on direct appeal and for a merit review by this Court. Allen's tenth ground for relief is not well-taken.

F. Eleventh ground for relief

Allen's eleventh claim is that the trial court improperly admitted photographs of evidence even though the item depicted in the photograph had been admitted into evidence. The Ohio Supreme Court reviewed this claim for plain error because Allen failed to object to these photographs during trial. Thus, this Court finds

this claim procedurally defaulted.

This claim lacks merit in any event. As the Ohio Supreme Court stated: "[W]e find that the photographs were admissible because they show the items that were admitted into evidence in the location where they were found. The photographs serve to show the condition of the items when they were discovered and to authenticate the items." *State v. Allen*, 653 N.E.2d at 686. That court's finding was not an unreasonable one. Thus, Allen's eleventh claim is without merit.

G. Sixteenth ground for relief

Finally, in Allen's sixteenth ground for relief, he claims that the trial court erred when it admitted all evidence adduced during the guilt phase of trial into the penalty phase. Although Allen raised this claim as his sixteenth proposition of law before the Ohio Supreme Court, that court declined to address the merits of the claim. Because Allen raised this claim and the Ohio Supreme Court had a full and fair opportunity to address it, the Court finds this claim is not procedurally defaulted and will address the merits of the claim.

In his Petition, Allen asserts that the case *State v. DePew*, 528 N.E.2d 542 (Ohio 1988) holds that introducing guilt-phase evidence during the penalty phase is tantamount to an invalid aggravating factor. The Court disagrees with Allen's interpretation of *DePew*. Instead of finding that a trial court

should be reluctant to introduce guilt-phase evidence during the mitigation phase of trial, the *DePew* court found that

the introduction of photographs, even if gruesome in the penalty stage is not error and is indeed authorized by R.C. 2929.03(D)(1), which provides in part that during the penalty the trial jury *shall* consider . . . any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing. . . .

State v. DePew, 528 N.E.2d 542, 551 (Ohio 1988). Moreover, the *DePew* court opined, because the prosecution often will comment on guilt-phase evidence during the opening and closing arguments of the penalty phase, the guilt-phase evidence must be included for the prosecution's remarks to be considered proper. *Id.* at 551-552.

Allen attempts to convert this fundamentally state-law claim into a federal one by arguing in his Traverse that the introduction of the guilt-phase evidence in mitigation contradicts the holdings in *Stringer v. Black*, 503 U.S. 222 (1992) and *Clemmons v. Mississippi*, 494 U.S. 738 (1990). In *Clemmons*, the Court held that a death sentence could be upheld on appeal even when the jury had considered an invalid or improperly defined aggravating factor. *Clemmons* 494 U.S. at 745. In *Stringer*, the Court further clarified the state appellate reweighing process necessary to uphold a death sentence resulting from a constitutionally impermissible aggravating circumstance.

Both the *Stringer* and *Clemmons* opinions dealt with legal

consequences that occur when a jury finds the existence of a statutory aggravating factor that was later found to be unconstitutional. Neither case, however, addresses the question raised in this claim, i.e., whether it is unconstitutional to admit guilt-phase evidence during the penalty phase of trial for fact-finding purposes. Thus, *Stringer* and *Clemmons* are inapposite. Allen's sixteenth ground for relief is not well-taken.

Fourth Ground for Relief - Insufficient Evidence

Allen's fourth ground for relief is that there was insufficient evidence to convict him of aggravated murder. Allen claims that the state neither proved that he committed murder with prior calculation and design nor that he committed murder during the commission of a felony. Allen notes the fact that the only direct evidence linking him to the crime is a partial thumb print found on English's glasses. He also states that none of the items missing from English's home were found in his possession.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the United States Supreme Court determined the correct standard of review that a habeas court must employ when reviewing a sufficiency of evidence claim. It concluded that the habeas court must determine "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." *Id.* at 319. The Sixth Circuit determined in *York v. Tate*, 858 F.2d 322, 330 (6th Cir. 1988), cert. denied, 490 U.S. 1049 (1989), that a habeas court must apply only the *Jackson* standard when reviewing a sufficiency of evidence claim, rather than be guided by Ohio common law.

In complying with this mandate, this Court must limit itself to evidence adduced during trial, as a "sufficiency of evidence review authorized by *Jackson* is limited to 'record evidence.' *Jackson* does not extend to non-record evidence, including newly discovered evidence." *Herrera v. Collins*, 506 U.S. 390, 402 (1993) (citing *Jackson*).

When viewing the evidence in a light most favorable to the prosecution, as it must, the Court finds this claim cannot withstand a *Jackson* review. The Court finds ample evidence exists, such as Allen's thumb print on the victim's glasses, the fact that the brand of cigarettes he smoked were found in English's trash can and contained Type O Secretor saliva on them, and the fact that English likely knew her murderer are sufficient to prove Allen's prior calculation and design. Moreover, the fact that English's purse and wallet were found without money or credit cards in contrast to testimony that she typically kept at least fifty dollars on her person, is sufficient to support a jury's conclusion that a robbery took place.

The Ohio Supreme Court noted the above-cited evidence, as well as a multitude of other evidence adduced during trial that would supports the jury's guilty verdict. The Ohio Supreme Court did not unreasonably apply *Jackson*. Thus, the Court finds this claim to be without merit.

Fifth Ground for Relief - Display of Exhibits

Allen's fifth ground for relief is that the trial court permitted the state to display its exhibits prior to the admission of these exhibits into evidence, inflaming the jury and prejudicing him thereby. The Ohio Supreme Court found that Allen waived this argument because he failed to object to it during trial. As this Court stated in section VI., B., 2., *supra*, any Ohio Supreme Court plain error review bars a review on the merits by this Court.

Were this claim not procedurally defaulted, the Court would find it to be without merit. First, this claim is, in essence, a state-law claim based on Ohio Rule of Evidence 611, which gives the trial court discretion as to the means by which trial evidence is displayed. Moreover, the Court finds no error occurred here because all of the displayed exhibits eventually were admitted into evidence. Thus, any error that occurred by displaying the state's exhibits prior to their admission was harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (holding that test for harmless error is whether the error had a

"substantial and injurious effect" on the jury's verdict).¹¹ Allen has failed to make such a showing of actual prejudice. Thus, this claim is not well-taken.

Ninth Ground for Relief - Prejudicial Identification

In his ninth ground for relief, Allen claims that the trial court should have suppressed the bus driver, Gilbert Pittman's identification of him as a passenger on his bus the morning of the murder because it was unduly suggestive. Allen contends that because police showed Pittman only his photograph, Pittman's identification of him as the individual who rode his bus on the morning of January 25 was unreliable. Allen stipulated to Pittman's identification of him before trial and failed to file a motion to suppress it. Consequently, the Ohio Supreme Court found that Allen waived this claim and subjected it to a plain error review. Accordingly, this Court finds Allen's ninth ground procedurally defaulted.

¹¹ Recently, the Sixth Circuit "confirmed that the *Brecht* test continues to apply after the enactment of the Antiterrorism & Effective Death Penalty Act of 1996, and that if a habeas petitioner satisfies the *Brecht* standard, 'he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt ... resulted from an unreasonable application of *Chapman*.'" *Bulls v. Jones*, 274 F.3d 329, 335 (6th Cir. 2001) (quoting *Nevers v. Killinger*, 169 F.3d 352, 371-72 (6th Cir.1999), *rev'd on other grounds*, *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000) (further citations omitted).

This claim is without merit in any event. An alleged violation of a petitioner's due process rights by virtue of a pretrial identification is subjected to a two-part inquiry. First, the petitioner must establish that the procedure was unduly suggestive. *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972). If so, the court must evaluate the "totality of the circumstances to determine whether the identification was reliable, despite the unduly suggestive procedure utilized in the identification." *Id.* Factors to consider in determining whether the identification was impermissibly suggestive are: (1) the witness's opportunity to view; (2) the degree of attention; (3) the accuracy of the description; (4) the witness's level of certainty; and (5) the time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (citing *Biggers*, 409 U.S. at 199-200).

In analyzing this claim, the Ohio Supreme Court determined:

Allen boarded the bus near a streetlight, was the only passenger for seven minutes, and conversed with Pittman. Moreover, Pittman's identification of Allen is verified by Allen's possession of the transfer slip. Accordingly, we find that under the totality of the circumstances the identification was reliable

State v. Allen, 653 N.E.2d at 684. This Court finds that the Ohio Supreme Court's decision was not clearly contrary to *Biggers* and *Manson*. Therefore, Allen's ninth claim for relief is without merit.

Twelfth Ground for Relief - Prosecutorial Misconduct

In his twelfth ground for relief, Allen maintains that the prosecutors violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights as a result of their misconduct. In the Petition, Allen alleges eleven instances in which the prosecutor acted inappropriately. Allen contends the prosecutors violated his due process rights by:

1. stating in closing remarks that the evidence presented in the case was "unrefuted"
2. stating that the fact that Allen obtained a refund for his bus ticket proved that he had "guilty knowledge"
3. using the plural "aggravating circumstances" numerous times during the penalty phase although there was only one aggravating circumstance in the case
4. improperly cross examining the defense's mental health expert about Allen's possible organic brain damage
5. asking whether Allen previously had pleaded not guilty by reason of insanity to prior offenses he committed
6. stating during closing argument that Allen did not suffer from any post-traumatic distress disorder
7. commenting on the fact that Allen provided an unsworn statement
8. commenting that Allen was not mentally ill because he knew his constitutional rights
9. stating that Allen's psychologist was merely trying to "ride on [the] emotions" of the jurors
10. stating that the mitigating evidence did not begin to tip the scales in favor of the defendant
11. admonishing the jury to "do your duty" and sentence Allen to death

Of these eleven sub-claims, the Ohio Supreme Court refused to address eight of them because Allen failed to object to these statements during trial. The Ohio Supreme Court conducted a plain error analysis of these sub-claims. Consequently, as stated above, this Court finds these sub-claims procedurally defaulted and will not address them on the merits.¹²

After reviewing the remaining sub-claims, the Court finds they lack merit. To successfully assert a prosecutorial misconduct claim in a habeas proceeding it "is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). This question must be answered in light of the totality of the circumstances in the case. *Lundy v. Campbell*, 888 F.2d 467, 473 (6th Cir. 1989),

¹² Specifically, the Court finds sub-claims 1,2,3,6,8,9,10, and 11 are procedurally defaulted. In addition, the Court finds these claims to be without merit pursuant to the law of prosecutorial misconduct outlined below. None of the statements to which Allen objects was improper, let alone "flagrant." Most were made during the course of the state's closing argument. The trial court instructed the jury that opening and closing arguments did not constitute evidence to be considered by the jury. (Trial Tr. 1154.)

cert. denied, 495 U.S. 950 (1990). The prosecutor's comments must be so egregious as to render the trial fundamentally unfair. *Fussell v. Morris*, 884 F.2d 579 (6th Cir. 1989) (Table), 1989 WL 100857, at *4 (6th Cir. Sept. 1, 1989).

Recently, the Sixth Circuit reaffirmed its prior jurisprudence on prosecutorial misconduct. In *Boyle v. Million*, 201 F.3d 711 (6th Cir. 2000), the court determined that a district court should first determine whether the challenged statements were, in fact, improper, and if so, to determine whether the comments were "flagrant," thus requiring reversal. *Id.* at 717. "Flagrancy is determined by an examination of four factors: 1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of evidence against the accused." *Id.* (internal quotation marks and citation omitted.)

Allen complains in sub-claims four and five that the prosecutor commented on his lack of organic brain damage and on the fact that he previously had not pleaded not guilty by reason of insanity to prior offenses. In both of these instances the trial court sustained counsel's objection to these statements. While the prosecutor may have intentionally placed these statements before the jury, they were two isolated statements.

Moreover, the Court cannot find with certainty that these statements were misleading. Finally, given the strength of the evidence presented against Allen during trial, the Court finds that these statements were not "flagrant" and, thus, did not render the trial fundamentally unfair.

Finally, Allen complains in sub-claim seven that the prosecutor improperly commented on the fact that Allen provided an unsworn statement. The Ohio Supreme Court found that the prosecutor's statement was not improper "because the prosecutor merely commented that Allen's statement was not made under oath, in contrast to testimony of all the other witnesses." *State v. Allen*, 653 N.E.2d 675, 688 (Ohio 1995). The Ohio Supreme Court's determination does not run afoul of United States Supreme Court precedent.

Moreover, this Court finds that any harm caused by the prosecutor's statements regarding Allen's failure to take an oath was harmless. *Lorraine v. Coyle*, 291 F.3d 416, 443 (6th Cir. 2002). As stated above, to find harmful error, a habeas court must determine that the error had a "substantial and injurious effect" on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Here, the prosecutor merely stated:

Prosecutor: Every witness who walked into
this courtroom, walked in like
this, walked up to Judge
Cleary, put their arm up -

Defense counsel: Objection.

The Court: Overruled.

Prosecutor: - and swore and took an oath to tell the truth, so help them God. Everyone but one person. And let's see who that one person is. It's David Allen.

Defense counsel: Objection.

The Court: Overruled.

Prosecutor: He's not subject to cross-examination.

(Trial Tr. 1167.) The above comments were limited, not pervasive. Moreover, they correctly stated the law regarding unsworn statements. The Court finds that any error the prosecutor may have committed in making these statements was harmless. Allen's twelfth ground for relief is not well-taken.

**Thirteenth, Fourteenth, and Seventeenth Grounds for Relief -
Jury Instructions**

Allen's thirteenth, fourteenth, and seventeenth grounds for relief are that the trial court improperly instructed or failed to instruct the jury. Because jury instruction errors typically are matters of state law, the standard for demonstrating that a jury instruction caused constitutional error in a habeas proceeding "is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). A habeas petitioner's "burden is especially heavy [when] no [affirmatively] erroneous instruction was given An omission, or an incomplete instruction, is

less likely to be prejudicial than a misstatement of the law." *Id.* at 155. Mindful of these restrictions, the Court now turns to Allen's individual claims for relief.

A. Thirteenth ground for relief

Allen first claims that the trial court improperly omitted part of the aggravated murder instruction. Specifically, the trial court was supposed to instruct the jury that it could not find Allen guilty of aggravated murder if they did not first find that he was either the principal offender or committed the aggravated murder with prior calculation and design. In this case, the trial court failed to instruct the jury concerning this finding when it charged the jury on felony murder.

Because defense counsel did not object to this instruction during trial, the Ohio Supreme Court reviewed this claim pursuant to a plain error standard. As stated above, this Court finds that any claim reviewed for plain error is procedurally defaulted. Thus, the Court finds this claim to be defaulted and will not subject it to a merit review.¹³

¹³ The Court finds this claim is without merit in any event. In its review, the Ohio Supreme Court found that no harmful error occurred from the trial court's failure to instruct. It stated:

The trial court's omission does not constitute plain error, because the jury actually did find prior calculation and design in this case. The jury convicted Allen of aggravated murder, R.C. 2903.01(A),

B. Fourteenth ground for relief

In his fourteenth ground for relief, Allen asserts that the trial court, in numerous instances, improperly instructed the jury thereby denying him a fair trial. First, Allen claims that the trial court's refusal to provide the jury with a lesser-included offense instruction as to Count Two of the indictment was erroneous.¹⁴

In *Beck v. Alabama*, 447 U.S. 625 (1980), the United States Supreme Court held that it is unconstitutional to impose a death penalty when a "jury [is] not permitted to consider a verdict of guilty of a lesser included non-capital offense, and when the evidence would have supported such a verdict." *Id.* at 627. In that case, the Court found that the jury's fact-finding function was impermissibly impinged by its inability to consider the lesser-included offense of felony murder when the defendant's intent was disputed during trial.

on Count One, and the judge expressly told the jury that it had to find prior calculation and design if it found him guilty of that count.

Allen, 653 N.E.2d at 688. The reasoning the Ohio Supreme Court utilized does not run afoul of United States Supreme Court precedent. Thus, this claim is without merit.

¹⁴ The trial court did charge the jury on the lesser-included offense of murder for Count One, aggravated murder.

Two years later, in *Hopper v. Evans*, 456 U.S. 605 (1982), the Court revised the *Beck* decision, placing limits on its applicability. The *Hopper* defendant testified during mitigation that he felt no remorse for the murder he committed, and would return to a life of crime if he were ever freed. *Id.* at 607. The *Hopper* Court determined that the decision whether to provide the jury with a lesser-included offense charge was a fact specific one. Noting the defendant's testimony, the Court held that a lesser-included offense charge was not warranted in that case.

In its review of this claim, the Ohio Supreme Court made the following observations:

The lesser-included offense instruction for Count Two in this case was required if the jury could reasonably have found that Allen killed English, but not while trying to rob her. See *id.*

Assuming arguendo that the trial court did err in failing to give the lesser-included offense instruction on Count Two, that error was harmless, because the jury actually did find that a robbery took place when it convicted Allen on Count Three- aggravated robbery. Given that the jury did find Allen guilty of aggravated robbery, it follows that the jury would have convicted Allen of aggravated murder on Count Two even if given the lesser-included offense option. Any error in not giving the lesser-included-offense instruction did not enhance "the risk of an unwarranted conviction" on Count Two. See *Beck v. Alabama* (1980), 447 U.S. 625, 638.

Allen, 653 N.E.2d at 687. This opinion is not an unreasonable application of *Beck* or *Hopper*. Thus, this sub-claim is without merit.

Allen next claims that the trial court erroneously instructed the jury regarding reasonable doubt. At the close of the culpability phase of trial, the court read the standard definition of reasonable doubt found in Ohio Revised Code § 2901.05.¹⁵ The Sixth Circuit has ruled that Ohio's statutory definition of reasonable doubt does not offend due process. *Thomas v. Arn*, 704 F.2d 865, 867-69 (6th Cir. 1983). To offend due process, the instruction must be of the type that could mislead the jury into finding no reasonable doubt when in fact there was some. *Id.* at 868; *Holland v. United States*, 348 U.S. 121, 140 (1954). In the present case, the trial court merely read the statutory jury instruction that has been found constitutional. The instruction cannot be considered misleading.

¹⁵ That statute reads:
(D) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

Ohio Rev. Code § 2901.05(D).

This sub-claim lacks merit.

Allen next claims that the court omitted a portion of the circumstantial evidence instruction. The trial court omitted the emboldened portion of the Ohio Jury Instruction charge, which reads in part:

Circumstantial evidence is the proof of facts and circumstances **by direct evidence** from which you may reasonably infer other related or connected facts which naturally and logically follow, according to the common experience of mankind.

4 O.J.I. 405.10(4). Allen claims that this was a crucial omission. The Court disagrees. The jury was provided with a practical definition of circumstantial evidence. This definition did not so substantially mislead the jury as to deny Allen a fair trial. This sub-claim lacks merit.

Allen next asserts that the trial court erroneously led the jury to believe that it must be unanimous in its decision to impose a life sentence. In charging the jury during the penalty-phase, the court stated:

Because this is a criminal case, the law requires that all 12 of you be in agreement before you can consider that you have reached a verdict.

(Trial Tr. at 913.)¹⁶

¹⁶ This charge comports with Ohio Revised Code § 2929.03(D)(2), which reads in pertinent part:
If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh

The Sixth Circuit recently found an instruction similar to the one above to be constitutional. *Scott v. Mitchell*, 209 F.3d 854, 876 (6th Cir. 2000), *cert. denied*, 531 U.S. 1021 (2000). The Sixth Circuit found that "nothing in [the language of the instruction] could be reasonably taken to require unanimity as to the presence of a mitigating factor." *Id.* (quoting *Coe v. Bell*, 161 F.3d 320, 338 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999)). Without so requiring, the court noted, there simply is no constitutional violation. Because Allen's trial court did not require the jury to find unanimously the presence of each mitigating factor, the Court finds the instruction was proper and this sub-claim to be not well-taken.

Allen next complains that even though the trial court instructed on a lesser-included offense in Count One, aggravated murder, the trial court told the jury that: "If you find the defendant not guilty of aggravated murder, you will then proceed with your deliberations and determine whether . . . the defendant is guilty or not guilty of murder." (Trial Tr. 915.) Because Allen failed to object to this instruction during trial, the Ohio Supreme Court conducted a plain error review of the claim.

the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender.
Ohio Rev. Code. § 2929.03(D)(2).

Consequently, this sub-claim is procedurally defaulted.¹⁷

Allen next claims that the trial court should have admonished the jury during their overnight sequestration that they were not permitted to discuss the case among themselves or with their families. The court did so admonish the jury during the penalty phase of trial. Allen does not allege that he incurred any prejudice because of the trial court's omission.¹⁸ Without proof that this failure undermined due process in his case, the Court finds this claim to be utterly, totally, and

¹⁷ This claim also lacks merit. When utilizing its plain-error analysis of this claim the Ohio Supreme Court determined:

Although not ideal, this instruction does not require unanimous acquittal on the crime charged before the jury can move on to consider the lesser included offense. The *Thomas* court [State v. *Thomas*, 40 Ohio St. 3d 213, 219-220 (1988)] found an instruction substantially similar to the one given in this case acceptable.

653 N.E.2d at 687 (footnote and further citations omitted). Allen can point to no United States Supreme Court case that is contrary to this decision.

¹⁸ Moreover, in Allen's petition, he merely asserts that the court failed to instruct the jury "when they were outside the jury room, even if all twelve of them were together, they could not discuss the case." Allen does not allege that the trial court never admonished the jury about discussing the case.

abysmally without merit.

Allen's next sub-claim is that the trial court misstated the reasonable doubt instruction during the penalty phase. The trial court read the initial portion of the jury instruction that states: "reasonable doubt is present when . . . you cannot be sure you are firmly convinced of the truth of the charge." Allen complains that because the jury already had found him guilty, it would be convinced of the truth of the charge. The Court finds that this alleged impropriety does not rise to the level of a constitutional violation. The Court previously stated that this instruction is constitutional. The reading of this portion of the instruction during the penalty phase of trial does not undermine the Court's finding. This sub-claim is not well-taken.

Allen next complains that the trial court improperly denied defense counsel's request for an instruction informing the jurors that they could consider mercy and sympathy from the mitigating evidence when making their sentencing determination. In analyzing this claim, the Ohio Supreme Court determined:

The jury's decision should not be based on sympathy or mercy, which are not mitigating factors and are thus irrelevant to sentencing. Permitting the jury to consider sympathy and mercy would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner. *California v. Brown*, (1987), 479 U.S. 538, 541.

653 N.E.2d at 687. That court's opinion is not an unreasonable application of United States Supreme Court precedent. Thus, this

sub-claim is not well-taken.

Finally, Allen claims that the trial court erred when it instructed the jury that "if the State of Ohio has proved by evidence beyond a reasonable doubt that the aggravating circumstances of which you found the defendant guilty of outweighs any factor or factors in mitigation, you must recommend the imposition of the death penalty." (Trial Tr. 1191.) This instruction is a correct statement of Ohio law. The United States Supreme Court has accepted this death penalty scheme. *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). Thus, this claim lacks merit. For the foregoing reasons, Allen's fourteenth ground for relief is not well-taken.

C. Seventeenth Ground for Relief

In his seventeenth ground for relief, Allen argues that the trial court's admonishments to the jurors that any death verdict was only a recommendation unconstitutionally diminished the jury's responsibility for imposing the death penalty. Respondent alleges this claim is procedurally defaulted because Allen did not raise it at any juncture of his state-court proceedings. Thus, the Court finds this claim procedurally defaulted and will not address it on the merits.¹⁹

¹⁹ This claim lacks merit in any event. Allen contends this instruction unconstitutionally misled the jury, because it impermissibly alleviated the jury's responsibility in rendering its decision, citing *Caldwell v.*

Fifteenth Ground for Relief - Expert Assistance

Allen claims in his fifteenth ground for relief that he was denied the assistance of experts in violation of the right to due process. While the trial court appointed a psychologist to examine Allen, that court later denied Allen's motion for the appointment of a neurologist to test for organic brain damage.

Allen's appointed psychologist, Dr. Robert Kaplan, provided the trial court with conflicting views regarding whether Allen suffered from organic brain damage. Although in the administration of the Rorschach Ink Blot test Dr. Kaplan determined that there was a possibility that Allen had organic brain damage, he also stated that the causes for his test results also might derive from inorganic origins. Upon administering the Bender Visual-Motor test, a test specifically designed to screen for organic brain damage, Dr. Kaplan found that there was little likelihood that Allen had any organic brain impairment. Inexplicably, in an affidavit Dr. Kaplan presented to the trial

Mississippi, 472 U.S. 320 (1985). The *Caldwell* Court concluded that the defendant's death sentence was unconstitutional, because "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. Allen cannot prevail on this claim, however, because, unlike *Caldwell*, the trial judge's instructions did not mislead the jury and was an accurate statement of Ohio law.

court shortly after his initial findings, he suggested to the court that it should appoint a neurologist to perform MRI and CAT tests to determine whether Allen suffered from organic brain damage. This affidavit did not persuade the trial court, which denied Allen's motion for the appointment of a neurologist.

If declared indigent, a criminal defendant possesses the right to obtain a competent psychiatrist if the defendant's sanity is at issue. *Ake v. Oklahoma*, 470 U.S. 68 (1985). The Supreme Court has declined to extend the indigent defendant's rights beyond this scope. Although the *Ake* Court required states to provide an indigent defendant with psychiatric evaluation, it limited this right concluding: "That is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Id.* at 83.

In the instant case, Allen received a court-appointed psychiatrist. Moreover, Allen's counsel obtained Dr. Kaplan's testimony during mitigation. Allen is not constitutionally entitled to more. Finally, on direct appeal, the Ohio Supreme Court determined that the trial court had not abused its discretion in denying Allen a neurologist because the Bender test specifically indicated that Allen did not suffer from organic brain damage. *Allen*, 653 N.E.2d at 690-91. This decision is not contrary to the *Ake* holding because *Ake* does not extend the right

to psychiatric evaluation to require that a criminal defendant be entitled to a team of psychiatric experts. Significantly, Allen does not now allege that he actually suffers from brain damage. The Court finds this claim to be without merit.

Eighteenth Ground for Relief - Trial Court Interaction with Jury

Allen's eighteenth ground for relief is that he was denied a fair trial because the trial judge interacted with the jury without the knowledge or presence of defense counsel. During the mitigation-phase deliberations, the jury asked the court for a copy of the DSMIII-R²⁰ and a dictionary. The judge responded to the request without first notifying counsel. The response stated: "You have received all of the exhibits that have been received into evidence and you may not receive any others. No extraneous research may be done (i.e., looking up words in a dictionary, etc.)." *State v. Allen*, 653 N.E.2d 675, 682 (Ohio 1995).

Allen raised this claim to the Ohio Supreme Court on direct appeal. That court found that while, generally, a trial court should not communicate with the jury in defense counsel's absence, "if the communication is not 'substantive,' the error is

²⁰ The DSM III-R stands for the Third Edition of the Diagnostic and Statistical Manual of the American Psychiatric Association. It is a reference book used for classifying psychiatric and emotional diseases and disorders.

harmless.'" *Id.* Allen does not allege that this holding is in violation of United States Supreme Court precedent. Thus, the Court could end its inquiry with this conclusion.

Out of an abundance of caution, however, the Court subjects the trial court's actions to its own harmless error test. As stated above, the Supreme Court in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), held that the test for harmless error is whether the error had a "substantial and injurious effect" on the jury's verdict. Thus, a petitioner must establish that the error resulted in "actual prejudice." *Brecht*, 507 U.S. at 637 (citing *United States v. Lane*, 474 U.S. 438, 449 (1986)); see also *Chapman v. California*, 386 U.S. 18 (1967).

Although Allen attempts to persuade the Court that the only reason for which the jury would request a DSMIII-R would be because the prosecutor made a reference to it in his closing argument that supposition is mere speculation. The Court cannot engage in speculation as to why the jury asked for these items. Allen cannot demonstrate that the note the trial court returned to the jury actually prejudiced the jury's deliberations. This ground for relief is not well-taken.

**Nineteenth, Twenty-second, Twenty-fourth, and Twenty-Fifth
Grounds for Relief - Ineffective Assistance of Counsel**

In the above grounds for relief, Allen contends that counsel were constitutionally deficient at both phases of trial. The Court will address each of Allen's claims pursuant to the two-

prong test for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the petitioner must show that he or she was prejudiced by counsel's errors. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

To successfully assert an ineffective assistance of counsel claim, a petitioner must point to specific errors in counsel's performance. *United States v. Cronin*, 466 U.S. 648, 666 (1984). Thereafter, a reviewing court must subject the allegations to rigorous scrutiny, determining "whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A reviewing court must strongly presume that counsel's conduct was reasonable and might be part of a trial strategy. *Id.* at 689. "Judicial scrutiny of counsel's performance must be highly deferential" and . . . 'every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Cone v. Bell*, - U.S. - , 122 S.Ct.

1843, 1852 (2002) (quoting *Strickland*, 466 U.S. at 689).

To ascertain whether counsel's performance prejudiced a criminal proceeding, a reviewing court does not speculate whether a different strategy might have been more successful, but a court must "focus[] on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

A. Nineteenth ground for relief

Allen's nineteenth ground for relief is that counsel were constitutionally ineffective for numerous reasons at all stages of the trial. The majority of these sub-claims were raised as discreet claims elsewhere in the petition and found to be without merit. Because Allen is unable to demonstrate, as he must, that counsel's unreasonable behavior prejudiced him, the Court need not readdress those sub-claims here. The Court also will refrain from addressing other sub-claims because they are too vague to assert a constitutional violation.²¹

The remaining sub-claims are without merit. First, Allen alleges that counsel were inadequately prepared before filing a motion to suppress evidence. During the course of their

²¹ Specifically, Allen claims that counsel failed to object to state exhibits that had no relevance and that the court erroneously instructed the jury. Without more details, the Court cannot address these sub-claims.

investigation, the police searched Allen's apartment and found several cigarette butts smoked by a type O secretor. Allen's counsel moved to suppress this evidence but withdrew their motion during the hearing because the state provided counsel with evidence that it had obtained a search warrant. Allen claims that counsel's ignorance about the warrant constitutes constitutionally ineffective assistance.

The Court disagrees. In addressing this claim on direct appeal, the Ohio Supreme Court noted that it could not address counsel's investigation prior to moving for suppression because those actions were not on the record before it. However, the Ohio Supreme Court correctly noted that, "Allen has not shown how he was prejudiced. Since a warrant existed, defense counsel's knowledge of it is inconsequential." *Allen*, 653 N.E.2d at 688. This analysis is a correct application of *Strickland*. Thus, this sub-claim has no merit.

Allen next alleges counsel's ineffectiveness because counsel failed to challenge the constitutionality of Ohio's death penalty statutes even though they had not yet been upheld by the federal courts. It is unclear whether this sub-claim is procedurally defaulted. In the absence of respondent asserting this defense, however, the Court will address this sub-claim on the merits. As with the above sub-claim, this claim lacks merit because Allen cannot demonstrate that he was prejudiced by counsel's inactions.

Since the time of his conviction and direct appeal, the federal courts have upheld Ohio's death penalty scheme. This sub-claim is not well-taken.

Finally, Allen claims that his counsel's performance was deficient because counsel asked Allen's expert, Dr. Kaplan, whether he was treatable. (Trial Tr. 1117.) This question, in turn, Allen argues, enabled the prosecutor to ask Dr. Kaplan whether he thought Allen would kill again. Dr. Kaplan responded that it was possible. (Trial Tr. 1118.) Allen claims counsel essentially invited this response to the state's question by asking the initial rehabilitation question.

When analyzing this claim on direct appeal, the Ohio Supreme Court opined, "The asking of this question constituted neither deficient performance nor was it prejudicial. This question was of some benefit to Allen because Kaplan answered that it was possible that Allen's condition was treatable." 653 N.E.2d at 689. That analysis does not constitute an unreasonable application of *Strickland*. Thus, this sub-claim, and Allen's nineteenth ground for relief generally, is not well-taken.

B. Twenty-second ground for relief

Allen asserts in his twenty-second ground for relief that counsel were ineffective for failing to fully investigate English's time of death. During trial, the coroner Carlos Santoscoy testified that English's time of death was between

midnight and 6:00 a.m. on January 24th. After the prosecutor reminded him that January 25th was a Friday, and that he received English's body on Saturday, January 26th, Dr. Santoscoy changed his testimony, stating that the time of death was actually between midnight and 6:00 a.m. on January 25th.

The Court finds this claim is procedurally defaulted because Allen did not raise it until his post-conviction relief proceedings. That court found that it was barred by res judicata. *State v. Allen*, No. 72427, 1998 WL 289418, at *8 (Ohio Ct. App. June 4, 1998). Thus, this Court will not address the claim on the merits.²²

C. Twenty-fourth ground for relief

Allen complains in this ground for relief that counsel failed to adequately prepare for the mitigation phase of trial. Respondent alleges this claim is procedurally defaulted because Allen failed to raise it on direct appeal. Allen raised this claim as part of his fourth claim for relief during post-conviction proceedings. The post-conviction court found claim four barred by res judicata. *State v. Allen*, No. 72427, 1998 WL

²² Were the Court to do so, it would find this claim to be not well-taken. As Respondent notes, the coroner's initial testimony was merely a misstatement. Allen provides the Court with no evidence to suggest to the contrary. Thus, counsel's failure to investigate this issue was neither unreasonable nor prejudicial to him.

289418, at *8 (Ohio Ct. App. June 4, 1998). Thus, this Court will not address the merits of the claim.²³

D. Twenty-fifth ground for relief

Allen's twenty-fifth ground for relief contains sub-claims that were raised and addressed in the above three ineffective assistance of counsel claims. The Court will not readdress these arguments. This claim is without merit.

Twentieth Ground for Relief - Sentencing Opinion

In his twentieth ground for relief Allen claims that the trial court's sentencing opinion contains numerous factual and legal errors that deprived him of a fair trial. Allen alleges that the trial court found several erroneous facts, incorrectly

²³ This claim is without merit in any event. When asserting counsel's deficient investigation prior to mitigation, Allen fails to state with specificity what mitigating background information counsel failed to present; i.e., how counsel's inadequate performance prejudiced him. Allen states in the Traverse: "For further arguments on the evidence which did exist but that was not discovered and/or presented to the jury, see the claim for relief demonstrating that mitigating evidence existed but was not presented to the jury." Traverse at 135-56. A review of the Petition reveals, however, that no other claim concerning the presentation of mitigating evidence is contained within it. Without more detail about how counsel's failure to investigate and present mitigating evidence during the penalty phase altered the outcome of that proceeding, the Court finds this claim to be without merit.

identified the facts as aggravating circumstances, and improperly weighed the mitigating factors.

On direct appeal, the Ohio Supreme Court noted that the trial court's opinion did, in fact, contain two minor factual errors.²⁴ The court found these errors to be inconsequential. Moreover, the court noted that its own independent review would correct any trial court errors. Allen points to no United States Supreme Court precedent that the Ohio Supreme Court unreasonably applied in reaching its decision. Consequently, the Court finds this ground for relief is not well-taken.

Twenty-first Ground for Relief

In this ground for relief, Allen contends that the prosecution withheld pertinent evidence in ten instances, violating *Brady v. Maryland*, 373 U.S. 83 (1963). To establish a claim under *Brady*, "the petitioner has the burden of establishing that the prosecutor suppressed evidence; that such evidence was favorable to the defense; and that the suppressed evidence was

²⁴ First, the trial court erroneously stated that the cigarette butts found in Allen's bedroom were Doral brand. While this fact is untrue, there was evidence presented during trial that Allen smoked Doral brand cigarettes, the same brand found in English's home. Second, the trial court stated that Allen boarded a bus that was less than one mile from English's home. In fact, when arrested, Allen was in possession of a transfer ticket that was 1.3 miles from English's home.

material." See *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000) (citing *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972)). "The inquiry is objective, independent of the intent of the prosecutors." *Id.* (citing *Brady*, 373 U.S. at 87.)

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome of the proceeding." *United States v. Bagley*, 473 U.S. 667, 676 (1985). There is no *Brady* violation "where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose." *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998), cert. denied, 528 U.S. 842 (1999) (citation and internal quotation marks omitted).

The Supreme Court has expounded on the prejudice or "reasonable probability" prong of *Brady*. In *Strickler v. Greene*, 527 U.S. 263, 296 (1999), the Court found that, although the prosecutor had violated the first two prongs of *Brady* by failing to provide exculpatory information to the defense, the petitioner did not sufficiently demonstrate that "there [was] a reasonable probability that his conviction or sentence would have been

different had these materials been disclosed." In that case, the principal witness positively identified the petitioner during trial. In fact, she provided specifics of the petitioner's abduction of the victim and how she was able to remember such detail. *Id.* at 272. Upon obtaining the interviewing detective's handwritten notes from initial interviews with the witness, however, her credibility was undercut significantly. The Court determined that, even if the witness's testimony had been impeached entirely, there was ample other evidence to convict, and, thus, provide the Court with sufficient assurance that the wrongfully excluded evidence would not have upset the trial's outcome. *Id.* at 296.

The Court now turns to Allen's individual *Brady* sub-claims. Allen's first sub-claim stems from a statement police obtained from English's neighbor, Julie Walker. In that statement, Walker relayed that a black male had approached English's home on either Wednesday, January 23rd or Thursday, January 24th, between the hours of 4:00 and 4:30 p.m. Allen alleges that this individual had an opportunity to commit English's murder and, thus, the prosecution should have provided him with Walker's statement.

In examining this sub-claim during Allen's post-conviction proceedings, the Eighth District Court of Appeals found it to be without merit. That court determined that because the coroner established English's time of death as between midnight and 6:00

a.m. on Friday, January 25th, and because English's friend, Judy Sperry testified that she was with English from 2:30 to 5:45 p.m. on January 24th, the existence of a man approaching the victim's home during the suggested times was inconsequential. Thus, the Court of Appeals found that information was neither exculpatory nor material. *State v. Allen*, No. 72427, 1998 WL 289418, at *6 (Ohio Ct. App. June 4, 1998). That court's application of *Brady* was not an unreasonable one. Thus, this Court finds that Allen's first sub-claim is not well-taken.

Allen next complains that the state should have revealed a statement that Sperry provided to police, in which she stated that English was apprehensive about two individuals, a male that was taking medication for a mental disorder named Paul and his brother, who was in prison. The Court of Appeals found that this sub-claim lacked merit. First, it noted that, as is the case here, Allen does not sufficiently explain how this statement would exculpate him. Furthermore, because Allen has a brother named Paul who was in a mental facility at the time of the police investigation, "this information would be anything but beneficial to [Allen's] case." *Id.* Because the Court of Appeals correctly identified and applied *Brady* to this sub-claim, the Court finds it lacks merit.

Allen's third sub-claim is that the state violated *Brady* when the prosecution failed to provide defense counsel with two

statements made by Cathy Curry, English's friend. In these statements, Curry told police that English had made Curry's husband a cake on Wednesday, January 23rd. Police found evidence to corroborate this statement in English's trash during their investigation. Allen contends that because evidence that English had prepared a cake two days prior to her murder was in her trash, the cigarette butts also found in her trash could also be from Allen's alleged visit during the same time period.²⁵

The Court of Appeals rejected this claim stating, "We fail to see how this evidence would exculpate petitioner. Moreover, as testified by detective who interviewed petitioner, petitioner denied having seen the victim for several months, not several days, before the murder." *Allen*, 1998 WL 289418, at *6. The Court finds the Court of Appeals' reasoning to be a reasonable application of *Brady*. Thus, this sub-claim is not well-taken.

Allen's fourth *Brady* claim is that the state did not disclose one of two statements English's daughter, Janet English, provided to police. Respondent alleges that Janet English gave only one statement to police and that the state disclosed the contents of this statement to defense counsel. Allen cannot

²⁵ Although when initially questioned by police Allen indicated that he had not seen English in several months, Allen later told police in an attempt to explain his thumb print on her eyeglasses that he had visited her a few days prior to her murder.

successfully challenge respondent's assertions. Thus, the Court of Appeals' determination that the state did not withhold evidence in this instance is a reasonable one. This sub-claim lacks merit.

In Allen's fifth sub-claim, he asserts that the state withheld a taped interview of his wife, Elda Allen, in which she recants her prior statement that would have supported Allen's alibi. Although Elda Allen initially told police that she was at a local motel with Allen at the time of the murder, she recanted this statement after hearing of Allen's arrest. Thereafter, Elda Allen stated that Allen had been out drinking the night of the murder. She claimed she initially did not inform police of Allen's true whereabouts during the murder because Allen's parents would disapprove of his drinking. This recantation, Allen asserts, supports his alibi. The Court of Appeals disagreed stating, "We do not find a lie by appellant's wife to be exculpatory or otherwise beneficial to his case." *Id.* at *7. This Court agrees with the Court of Appeals and finds this claim is not well-taken.

Allen next asserts that the state improperly withheld statements by the owner of the Italian Café bar and its bartender that Allen frequented that establishment and, on one occasion, became so intoxicated that the bartender would not permit him to purchase more alcohol. Allen contends that these statements

demonstrate that he abused alcohol and that they could have been used as mitigating evidence during the penalty phase of trial.

The Court of Appeals rejected this claim:

We do not find this evidence to have any material mitigatory effect. Merely because appellant was a regular customer and was intoxicated on one occasion does not equate with alcohol abuse. Moreover, other evidence of alcohol abuse was presented from which the trial court could consider its mitigatory effect.

Allen, 1998 WL 289418, at *7. The Court of Appeals' application of *Brady* was not an unreasonable one. This sub-claim is not well-taken.

Allen's eighth *Brady* claim is that the state withheld the statements of Judith Kukla, one of English's friends, and Linda Lawyer, Allen's former girlfriend. Kukla told police that English had stated that a man young enough to be her grandson expressed a desire to marry her. Kukla believed the young man to whom English referred was Allen. Lawyer told police that Allen may have ransacked an apartment they had shared. Allen claims that these two statements could have been used in mitigation to demonstrate that he often became involved in aberrational relationships.

Applying *Brady*, the Court of Appeals found this claim meritless as both statements were based on speculation. Furthermore, the court found that evidence that Allen formed unhealthy relationships was presented during trial. Because the Court of Appeals did not unreasonably apply *Brady*, the Court

finds this claim to be without merit.

Allen next claims that the preliminary report of the coroner, Dr. Santoscoy, was improperly withheld from the defense. The preliminary report, however, was merely a verbal report later reduced to written form that was disclosed to the defense as the final report. The Court of Appeals found nothing material contained in the initial, verbal report. This Court agrees and finds this sub-claim is without merit.

Finally, Allen alleges that the state should have disclosed the contents of a taped statement from his mother, Elsie Allen. In examining this claim, the Court of Appeals noted that Allen not only could not identify what exculpatory information was divulged during this interview, he could not even demonstrate that such an interview ever occurred. Thus, that court found no improper suppression. *Id.* at *8. This Court finds the Court of Appeals' reasoning on this claim to comport with *Brady*. Accordingly, this sub-claim, and Allen's twenty-first ground for relief generally, is not well-taken.

Twenty-third Ground for Relief

Allen's twenty-third ground for relief combines other grounds asserted in his petition. As in his fifteenth ground for relief, Allen claims that the trial court improperly denied him the right to psychological experts when it denied his motion for the appointment of a neurologist. In this claim, however, Allen

adds that the trial court was somehow biased in making this decision. Allen also asserts that the trial court's decision caused defense counsel to conduct an inadequate mitigation investigation as asserted in Allen's twenty-fourth ground for relief. Allen failed to raise this claim at any juncture in state court. Thus, the Court finds the claim to be procedurally defaulted and will not address it on the merits.²⁶

Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth, and Thirty-third grounds for relief - Unconstitutionality of the Death Penalty

In the above grounds for relief, Allen argues that Ohio's death penalty statutes are unconstitutional in various respects. The Court is not swayed by any of Allen's allegations. The Court will list each of Allen's claims below in italics, and, thereafter will address each claim in summary fashion.

- *Ohio's scheme is unconstitutionally arbitrary because it allows for prosecutorial discretion to determine whether to seek a capital indictment. The Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976), rejected this argument under a similar death penalty statute, condoning the discretionary system.*
- *Ohio's scheme provides an inadequate proportionality review. Proportionality review is not constitutionally required. Pulley v. Harris, 465 U.S. 37, 50-51 (1984). See also McQueen v. Scroggy, 99 F.3d 1302, 1333-34 (6th Cir. 1996), cert. denied, 520 U.S. 1257 (1997) ("There is no federal constitutional requirement that a state appellate court*

²⁶ The Court finds this claim is without merit in any event. Other than reasserting claims that this Court found lacked merit elsewhere in this Opinion, Allen presents no evidence of the trial judge's bias.

conduct a comparative proportionality review."). By statute, however, Ohio requires the appellate courts to engage in a proportionality review. Ohio Rev. Code § 2929.05(A).

Because Ohio law requires appellate courts to engage in proportionality review, the review must be consistent with constitutional requirements. *Kordenbrock v. Scroggy*, 680 F. Supp.2d 867, 899 (E.D. Ky. 1988) (citing *Evitts v. Lucey*, 469 U.S. 387 (1985)). Nonetheless, when the state courts have engaged in a proportionality review, the district court's review is limited. The district court is to examine the state's proportionality review only to determine whether the imposition of death on the petitioner is patently unjust or "shocks the conscience; the court is not to second-guess the state court's comparison of other cases in which the death penalty was imposed." *Id.* (citing *Moore v. Balkcom*, 716 F.2d 1511, 1517 (11th Cir. 1983)). See also *Spinkellink v. Wainwright*, 578 F.2d 582, 604 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979) (same). Moreover, the Sixth Circuit in a recent opinion stated that because "proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison." *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001).

- *Imposing the death penalty through the use of electrocution constitutes cruel and unusual punishment.* The state of Ohio has now eliminated electrocution. Am. H.B. 362, 124th Gen. Assem., Reg. Sess. (Ohio 2001) (enacted). Thus, this claim is moot.
- *Ohio's scheme is unconstitutional because it fails to require that the State prove the absence of any mitigating factors.* This argument was specifically rejected in *Walton v. Arizona*, 497 U.S. 639, 649-50 (1990). There the Court held a death penalty scheme requiring the defendant to establish mitigating factors by a preponderance of evidence is constitutionally acceptable burden shifting. This aspect of the *Walton* holding is unaltered by the recent Supreme Court decision *Ring v. Arizona*, - U.S. - , 122 S.Ct. 2428 (2002). In that case, the Court overruled *Walton* because it found *Walton* irreconcilable with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a case in which the Court held that the Sixth Amendment does not permit a judge to impose a sentence that would exceed the maximum sentence to which the defendant would be exposed if punished pursuant to the facts

found by the jury. Thus, because *Walton* found Arizona's capital sentencing constitutional even though it permitted a judge alone to find aggravating factors and impose a death sentence, the *Ring* Court overruled it. The Court limited its holding, however, overruling *Walton* only "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. *Ring*, 122 S.Ct. at 2430. Consequently, the portion of *Walton* finding it permissible to require defendants to establish mitigating factors by a preponderance of evidence remains intact.

- Ohio's scheme is unconstitutional because the aggravating circumstances are established during the guilt phase of trial.* The Supreme Court has articulated clearly the constitutional mandates for imposing the death penalty. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court held that any death penalty statute must allow the sentencer to review all mitigating evidence during the penalty phase, thereby fashioning a sentence befitting the individual defendant. Because death "is so profoundly different from all other penalties," the Court reasoned, it cannot be imposed without individualizing the sentence. *Id.* at 605. The Court further refined the statutory limiting requirement in *Zant v. Stephens*, 462 U.S. 862 (1983). In that case, the Court concluded that any death penalty statute must narrow the class of death-eligible defendants from those not death eligible. *Id.* at 177. Specifically, a state may choose either to legislatively limit the definition of death-eligible crimes, or it may broadly define capital offenses but narrow the defendants who actually receive a death sentence by using aggravating circumstances during the penalty phase. *Lowenfeld v. Phelps*, 484 U.S. 231, 246 (1987).

Ohio's death penalty scheme complies with these mandates. First, § 2929.04(B) and (C) allow the defendant to present, and the fact finder to consider, all statutorily enumerated mitigating factors. Moreover, § 2929.04(B)(7) permits a fact finder to consider all mitigating factors in addition to those enumerated in the statute. Finally, the Ohio death penalty scheme satisfies the *Zant* requirements by requiring the fact finder to find the existence of at least one aggravating circumstance set forth in § 2929.04(A).

- Ohio's scheme is unconstitutional because it imposes a risk of death on those capital defendants who choose to exercise*

their right to trial. In *United States v. Jackson*, 390 U.S. 570, 582 (1968), the Supreme Court determined that a legislative body cannot produce a chilling effect on a defendant's Fifth Amendment right not to plead guilty and Sixth Amendment right to demand a jury trial. In that case, the Court struck down the capital portions of a federal kidnapping statute because it authorized only the jury to impose the death sentence. Conversely, in Ohio "a sentence of death is possible whether a defendant pleads to the offense or is found guilty after a trial." *State v. Buell*, 489 N.E.2d 795, 808 (Ohio 1986). Consequently, the Ohio scheme comports with constitutional mandates.

- *Ohio's scheme is unconstitutional because a three-judge panel is not required to identify and articulate the existence of mitigating factors and aggravating circumstances.* While the Supreme Court does "require that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed," *Gardner v. Florida*, 420 U.S. 349, 361 (1977), there is no actual criterion stating that the trial judge must identify and articulate the specific factors used to formulate the decision. Furthermore, Ohio Revised Code § 2929.03(F) requires that a trial judge make a written finding as to the existence of specific mitigating factors and aggravating circumstances, and why the aggravating circumstances outweigh the mitigating factors. By making a record of these determinations, the appellate court is able to make an "independent determination of sentence appropriateness." *State v. Buell*, 489 N.E.2d 795, 807 (Ohio 1986), cert. denied, 479 U.S. 871 (1986). Thus, no constitutional infirmity exists.
- *Ohio's scheme is unconstitutional because the jury is not permitted to consider the appropriateness of the sentence.* No such constitutional mandate exists. Moreover, the Ohio scheme provides for an appropriateness review on direct appeal.
- *Ohio's scheme is unconstitutional because it requires that the pre-sentence report be submitted to the jury once the defendant requests it.* Although the Fifth Amendment would be violated if a court orders a defendant to undergo a psychiatric examination, without informing the defendant that his statements can be used against him, and then admits his statements into evidence during the sentencing phase in order to prove statutory aggravating circumstances, see *Estelle v. Smith*, 451 U.S. 454 (1981), the Fifth Amendment

will not be violated if the defendant requests the psychiatric evaluation himself. This reasoning is explained in *Buchanan v. Kentucky*, 483 U.S. 402 (1987):

A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. This statement leads logically to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence of such an evaluation, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Id. (citations omitted).

- *Ohio's scheme is unconstitutional because it precludes the jury from imposing a life sentence when the aggravating factors outweigh the mitigating circumstances. The Supreme Court rejected a similar argument in Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

Thirtieth, Thirty-first, and Thirty-second grounds for relief - post-conviction relief

In these grounds for relief Allen complains about various aspects of his post-conviction relief proceedings and alleges that the Ohio post-conviction system is generally infirm. First, Allen claims that the post-conviction judge was biased because she could not impartially decide Allen's post-conviction claim that the trial court erroneously permitted a biased juror and denied Allen the right of expert assistance. Allen alleges that the trial judge was a potential witness to these claims and should have recused herself from Allen's post-conviction proceeding. Furthermore, Allen alleges that the trial court

violated Ohio Revised Code § 2953.21 (C) and (E) because it did not review the entire trial record before dismissing his post-conviction petition.

The Court declines to address the merits of these claims. A habeas forum is an improper forum in which to grant Allen relief. Post-conviction proceedings are civil rather than criminal proceedings, hence there can be no constitutional violation at this juncture of appeal. *Murray v. Giarratano*, 492 U.S. 1, 13 (1989). Allen fails to articulate any infringement for which a federal habeas corpus court can grant relief. *Kirby v. Dutton*, 794 F.2d 245 (6th Cir. 1986) ("The[] courts have concluded . . . that the writ is not the proper means by which prisoners should challenge errors or deficiencies in state post-conviction proceedings . . . because the claims address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration."). Although "the result of the habeas petition need not necessarily be reversal of the conviction . . . the petition must directly dispute the fact or duration of the [petitioner's] confinement." *Id.* at 248 (citation omitted). Even if the Court were to consider the merits of Allen's claims, it would not serve to refute or reduce Allen's conviction or sentence. Consequently, these claims are not well-taken.

VIII. CONCLUSION

The Court now must determine whether to grant a Certificate

of Appealability (hereinafter "COA") for any of Allen's claims. In two recent decisions, the Sixth Circuit has determined that neither a blanket grant or denial of a COA is an appropriate means by which to conclude a capital habeas case as it "undermine[s] the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability." *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001); see also *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001) (remanding motion for certificate of appealability for district court's analysis of claims). Thus, in concluding this Opinion, this Court now must consider whether to grant a COA as to any of the claims Allen presented in his Petition pursuant to 28 U.S.C. § 2253.

That statute states in relevant part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253. This language is identical to the requirements set forth in the pre-AEDPA statutes, requiring the habeas

petitioner to obtain a Certificate of Probable Cause. The sole difference between the pre- and post-AEDPA statutes is that the petitioner must now demonstrate he was denied a constitutional right, rather than the federal right that was required prior to the AEDPA's enactment.

The United States Supreme Court interpreted the significance of the revision between the pre- and post-AEDPA versions of that statute in *Slack v. McDaniel*, 529 U.S. 473 (2000). In that case, the Court held that § 2253 was a codification of the standard it set forth in *Barefoot v. Estelle*, 463 U.S. 880 (1983), but for the substitution of the word "constitutional" for "federal" in the statute. *Id.* at 483. Thus, the Court determined that

[t]o obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further."

Id. at 483-4 (quoting *Barefoot*, 463 U.S. at 893 n.4).

The Court went on to distinguish the analysis a habeas court must perform depending upon its finding concerning the defaulted status of the claim. If the claim is not procedurally defaulted, then a habeas court need only determine whether reasonable jurists would find the district court's decision "debatable or wrong." *Id.* at 484. A more complicated analysis is required, however, when assessing whether to grant a COA for a claim the

district court has determined procedurally defaulted. In those instances, the Court opined, a COA should only issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* (emphasis supplied).

After taking the above standard into consideration, the Court finds that only one issue even arguably merits further review. The Court issues a COA as to claim one - the juror bias claim.

The Court finds no other claims to be debatable among jurists of reason as no other ground for relief comes even marginally close to presenting a federal constitutional or legal violation. Moreover, many claims involve time-worn legal arguments that this Court as well as established precedent have found to be without merit. Consequently, the Court DENIES a COA as to all other claims presented in this Opinion.

IT IS SO ORDERED.



JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

The Clerk of Court shall send a copy of this Judgment Entry to John J. Ricotta, Esq., 425 Lakeside Avenue, West, 1st Floor, Cleveland, OH 44113; Henry J. Hilow, Esq., McGinty, Gibbons, Hilow & Spellacy, 1300 Rockefeller Bldg., 614 West Superior Avenue, Cleveland, OH 44113; Paul Anthony Mancino, Jr., Esq.; Mancino & Mancino, 75 Public Square, Ste. 1016, Cleveland, OH 44113; and Stephen E. Mayer, Office of the Attorney General, Capital Crimes Section, 30 E. Broad Street, 23rd floor, Columbus, Ohio 43215.

653 N.E.2d 675

(Cite as: 73 Ohio St.3d 626, 653 N.E.2d 675)

Page 1

The STATE of Ohio, Appellee,

v.

ALLEN, Appellant.

No. 93-2377.

Supreme Court of Ohio.

Submitted April 25, 1995.

Decided Sept. 6, 1995.

Defendant was convicted in the Common Pleas Court, Cuyahoga County, of aggravated robbery and aggravated murder, and was sentenced to death. Defendant appealed. The Court of Appeals affirmed, and defendant again appealed. The Supreme Court, Cook, J., held that: (1) trial court properly declined to excuse for cause juror whose murdered brother's alleged killer was acquitted; (2) judge's note to jury outside defendant's presence did not deprive defendant of fair trial; (3) evidence was sufficient to support convictions; (4) evidence of victim's habits was properly admitted; (5) any error in jury instructions was harmless; (6) defendant was not entitled to court-appointed neurologist at penalty phase; and (7) death penalty was proper.

Affirmed.

Wright, J., issued dissenting opinion in which Moyer, C.J., and Pfeifer, J., concurred.

[1] CRIMINAL LAW $\S$ 1134(3)

110k1134(3)

Supreme Court is not required to discuss each and every proposition of law raised by parties on review of capital case. R.C. § 2929.05.

[2] JURY $\S$ 97(1)

230k97(1)

Trial court properly denied capital murder defendant's challenge for cause to juror whose murdered brother's alleged killer was acquitted, and who had two friends who were police officers; even though juror admitted to some bitterness, she said she could set aside her feelings and vote solely on evidence, and she answered "no" when asked if her feelings would "impact" on case.

[2] JURY $\S$ 97(2)

230k97(2)

Trial court properly denied capital murder defendant's challenge for cause to juror whose murdered brother's alleged killer was acquitted, and who had two friends who were police officers; even though juror admitted to some bitterness, she said she could set aside her feelings and vote solely on evidence, and she answered "no" when asked if her feelings would "impact" on case.

[3] CRIMINAL LAW $\S$ 1158(3)

110k1158(3)

Trial court's ruling on challenge for cause will be affirmed if supported by substantial evidence.

[4] JURY $\S$ 131(4)

230k131(4)

Trial court did not improperly restrict capital murder defendant's questioning of venireperson who was stricken from venire after she stated that she could not impose death penalty; defense counsel questioned venireperson after she made that statement and, although court did excuse her only after two questions by defense, defense apparently had no more questions and alleged no deprivation of voir dire.

[5] JURY $\S$ 131(4)

230k131(4)

Trial court did not improperly restrict capital murder defendant's questioning of venireperson who was stricken from venire after stating that he had could not impose death penalty; while trial court did sustain objections to three defense questions, all three repeated questions judge had already asked.

[6] CRIMINAL LAW $\S$ 796

110k796

Although instruction that only judge can ultimately decide sentence does not constitute prejudicial error in capital prosecution, there is preference that such instruction be avoided.

[7] JURY $\S$ 33(5.15)

230k33(5.15)

Prosecution may peremptorily challenge juror on ground that she opposes death penalty.

[8] CRIMINAL LAW $\S$ 636(7)

110k636(7)

Trial court did not deny capital murder defendant fair trial where, in defendant's absence and in response to jury's note asking for copy of

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psychiatric manual and dictionary, court wrote back that jurors could receive no more exhibits and could not engage in extraneous research; there was no possibility that court's refusal to supply those materials could have influenced jury's conclusion. U.S.C.A. Const.Amend. 6.

[8] CRIMINAL LAW ⚡858(3)

110k858(3)

Trial court did not deny capital murder defendant fair trial where, in defendant's absence and in response to jury's note asking for copy of psychiatric manual and dictionary, court wrote back that jurors could receive no more exhibits and could not engage in extraneous research; there was no possibility that court's refusal to supply those materials could have influenced jury's conclusion. U.S.C.A. Const.Amend. 6.

[8] CRIMINAL LAW ⚡864

110k864

Trial court did not deny capital murder defendant fair trial where, in defendant's absence and in response to jury's note asking for copy of psychiatric manual and dictionary, court wrote back that jurors could receive no more exhibits and could not engage in extraneous research; there was no possibility that court's refusal to supply those materials could have influenced jury's conclusion. U.S.C.A. Const.Amend. 6.

[9] CRIMINAL LAW ⚡636(7)

110k636(7)

Trial judge may not communicate with jury in defendant's absence; however, if communication is not "substantive," error is harmless.

[9] CRIMINAL LAW ⚡1166.14

110k1166.14

Trial judge may not communicate with jury in defendant's absence; however, if communication is not "substantive," error is harmless.

[10] CRIMINAL LAW ⚡1144.13(3)

110k1144.13(3)

Test for sufficiency of evidence is whether any rational trier of fact, viewing evidence in light most favorable to prosecution, could have found elements of crime beyond reasonable doubt.

[10] CRIMINAL LAW ⚡1159.2(7)

110k1159.2(7)

Test for sufficiency of evidence is whether any rational trier of fact, viewing evidence in light most favorable to prosecution, could have found elements of crime beyond reasonable doubt.

[11] HOMICIDE ⚡234(8)

203k234(8)

Evidence supported aggravated murder conviction; defendant's partial thumbprint was found on lens of victim's glasses, and there was evidence that defendant was hostile to victim despite their earlier friendship, that victim was killed by someone she knew, that several butts of brand of cigarettes that defendant smoked were found in victim's house, that defendant was same type of secretor as person who smoked those cigarettes, and that defendant boarded bus at bus stop just 1.3 miles from victim's home shortly after victim's murder. R.C. § 2903.01(A, B).

[12] ROBBERY ⚡24.15(1)

342k24.15(1)

Evidence supported aggravated robbery conviction; evidence showed that defendant was present in victim's home, that victim kept five credit cards, checkbook, and wallet containing cash in her purse, that none of those items was found in her house after her murder, and that burned remains of her purse and wallet were found in fireplace. R.C. § 2911.01.

[13] CRIMINAL LAW ⚡369.2(4)

110k369.2(4)

Evidence that murder defendant was previously incarcerated, which came in through testimony that victim met defendant through victim's church's prison ministry program, was properly admitted; since victim was apparently killed by someone she knew, prior-imprisonment evidence was relevant to explain that victim knew defendant through visiting him in prison, and probative value of that evidence outweighed danger of unfair prejudice, as trial judge forbade state to mention why defendant had been in prison and instructed jury that it could not infer defendant was guilty of murder merely because he may have been convicted and incarcerated in past. Rules of Evid., Rules 403(A), 404(B).

[13] CRIMINAL LAW ⚡673(5)

110k673(5)

Evidence that murder defendant was previously incarcerated, which came in through testimony that victim met defendant through victim's church's

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prison ministry program, was properly admitted; since victim was apparently killed by someone she knew, prior-imprisonment evidence was relevant to explain that victim knew defendant through visiting him in prison, and probative value of that evidence outweighed danger of unfair prejudice, as trial judge forbade state to mention why defendant had been in prison and instructed jury that it could not infer defendant was guilty of murder merely because he may have been convicted and incarcerated in past. Rules of Evid., Rules 403(A), 404(B).

[14] CRIMINAL LAW ⚡338(7)

110k338(7)

When considering whether probative value of evidence outweighs danger of unfair prejudice, trial court is vested with broad discretion, and appellate court should not interfere absent clear abuse of that discretion. Rules of Evid., Rule 403(A).

[14] CRIMINAL LAW ⚡1153(1)

110k1153(1)

When considering whether probative value of evidence outweighs danger of unfair prejudice, trial court is vested with broad discretion, and appellate court should not interfere absent clear abuse of that discretion. Rules of Evid., Rule 403(A).

[15] CRIMINAL LAW ⚡338(7)

110k338(7)

Evidence about a victim is admissible when it relates directly to circumstances of crime and is not offered to elicit sympathy from jury. Rules of Evid., Rule 406.

[16] HOMICIDE ⚡163(2)

203k163(2)

State admitted proper "habit evidence," rather than improper "character evidence," in capital murder prosecution by virtue of testimony that victim did not drink or smoke and that she was immaculate housekeeper; that testimony was relevant, because wine bottle and cigarette butts were found in her house, and because she likely would have wiped defendant's fingerprint off her glasses had he placed it there before murder. Rules of Evid., Rule 406. See publication Words and Phrases for other judicial constructions and definitions.

[17] HOMICIDE ⚡163(2)

203k163(2)

Evidence showing aggravated murder/aggravated

robbery victim's religious devotion was relevant for noncharacter purposes; "praying hands" design on wallet identified it as hers, her dedication to helping sinners "straighten out" explained her relationship with defendant, her attendance at monthly prayer meeting explained what person who found her body was doing at victim's house (i.e., to take victim to that meeting), and testimony that victim was early for morning devotions was relevant because victim had not put out her garbage on morning of her murder. Rules of Evid., Rule 406.

[18] CRIMINAL LAW ⚡339.7(4)

110k339.7(4)

Bus driver's identification of photo of defendant as person whom driver picked up near victim's home shortly after murder was reliable, even if it were "suggestive" due to use of single photo instead of array; defendant boarded bus near street light, was only passenger for seven minutes, and conversed with driver, and driver's identification of defendant was verified by defendant's possession of transfer slip.

[19] CRIMINAL LAW ⚡339.10(1)

110k339.10(1)

Reliable identification testimony may be admitted regardless of flaws in identification procedure.

[20] CRIMINAL LAW ⚡339.7(3)

110k339.7(3)

Test for determining admissibility of photographic identification is whether under totality of circumstances evidence was reliable even though confrontation procedure was suggestive; factors to be considered include opportunity of witness to view criminal at time of crime and witness' degree of attention.

[21] CRIMINAL LAW ⚡1030(1)

110k1030(1)

Plain error occurs when, but for error, outcome of trial clearly would have been otherwise.

[22] CRIMINAL LAW ⚡1036.4

110k1036.4

Unobjected-to introduction of evidence that allegedly was not properly authenticated was not plain error; although probative, that evidence was not determinative of case.

[23] CRIMINAL LAW ⚡1035(10)

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110k1035(10)

Trial court did not commit plain error by allowing prosecution exhibits to be displayed in open court before their formal admission into evidence, which did not occur until after state had rested its case; none of state's exhibits was ruled inadmissible, so there could be no prejudice since all exhibits that were displayed eventually went to jury.

[24] CRIMINAL LAW ⚖️ 475.2(1)

110k475.2(1)

Trace-evidence-examiner was properly permitted to testify in murder prosecution that items burned in victim's fireplace could not be tested for blood, and thus "could have" had blood on them, and that it was "possible" that black substance found on bottom of shoes that allegedly belonged to defendant was ash; despite defendant's claim that such testimony was not based on reasonable degree of medical certainty, examiner did not provide improper opinion that blood had been on those items, but merely explained that she could not rule out such possibility, and that she could not rule out possibility that substance on shoes was ash.

[25] CRIMINAL LAW ⚖️ 438(6)

110k438(6)

Trial court did not abuse its discretion in aggravated murder prosecution by permitting state to introduce photographs of victim's body; photos were not particularly gruesome or shocking, and they clarified testimony regarding number, type and placement of wounds, and cause of death.

[26] CRIMINAL LAW ⚖️ 438(2)

110k438(2)

Photographs of physical exhibits introduced into evidence were admissible, as they showed exhibits in location where they were found, and served to show condition of exhibits when they were discovered and to authenticate them.

[27] HOMICIDE ⚖️ 341

203k341

Even if trial court erred by failing to instruct jury on murder as lesser included offense of felony murder, error was harmless; because jury found defendant guilty of aggravated robbery, jury would have convicted defendant of aggravated murder on felony-murder count even if given a lesser included offense option. R.C. §§ 2903.01(A, B), 2929.04(A)(7).

[28] CRIMINAL LAW ⚖️ 798(.5)

110k798(.5)

Jury instruction that if jury found defendant not guilty of aggravated murder, it would "then proceed with [its] deliberations and determine whether * * * the defendant is guilty or not guilty of murder," did not improperly bar jury from considering murder without first acquitting defendant of aggravated murder; although not ideal, instruction did not require unanimous acquittal on crime charged before jury could move on to consider lesser included offense.

[29] HOMICIDE ⚖️ 311

203k311

Capital murder defendant was not entitled to instruction that jury could consider sympathy arising from mitigating evidence and that they could consider mercy; sympathy and mercy were not mitigating factors and were thus irrelevant to sentencing, and permitting jury to consider sympathy and mercy would violate well-established principal that death penalty must not be administered in arbitrary, capricious or unpredictable manner.

[30] CRIMINAL LAW ⚖️ 796

110k796

Instruction that jury must recommend death penalty if aggravating circumstance outweighed mitigating factors was consistent with statute that sets forth guidelines for imposing sentence in capital case. R.C. § 2929.03(D)(2).

[31] HOMICIDE ⚖️ 325

203k325

Trial court did not commit plain error when, during instruction on felony- murder specification, it failed to state that jury must find that defendant was principal offender or that he killed with prior calculation and design; jury convicted defendant of aggravated murder on another count, and judge expressly told jury that it had to find prior calculation and design if it found him guilty of that count. R.C. § 2929.04(A)(7).

[32] CRIMINAL LAW ⚖️ 720(1)

110k720(1)

Prosecutor's comment on capital murder defendant's unsworn statement was proper, as prosecutor merely commented that defendant's statement was not made under oath, in contrast to testimony of all other witnesses.

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[33] CRIMINAL LAW ⇨ 641.13(1)

110k641.13(1)

To prevail on claim of ineffective assistance of counsel, defendant must show that counsel's representation was deficient and that he was prejudiced by that deficiency. U.S.C.A. Const.Amend. 6.

[34] CRIMINAL LAW ⇨ 641.13(1)

110k641.13(1)

To show prejudice, defendant claiming ineffectiveness of counsel must show reasonable probability that, but for counsel's unprofessional errors, result would have been different; reasonable probability is probability sufficient to undermine confidence in outcome of case. U.S.C.A. Const.Amend. 6.

[35] CRIMINAL LAW ⇨ 641.13(2.1)

110k641.13(2.1)

Counsel's uncertainty as to whether search warrant existed did not constitute ineffective assistance, despite defendant's claim that such ignorance evidenced inadequate investigation; warrant did exist, and thus, counsel's knowledge of it was inconsequential. U.S.C.A. Const.Amend. 6.

[36] CRIMINAL LAW ⇨ 641.13(7)

110k641.13(7)

Counsel was not ineffective during penalty phase of capital murder prosecution by asking psychologist whether defendant's illness would be "treatable" over 30-year imprisonment, to which psychologist replied it was "possible" but uncertain, leading prosecutor to ask if defendant could kill again, to which psychologist replied "it's certainly a possibility"; defense counsel's question was of some benefit to defendant because psychologist answered that it was possible that defendant's condition was treatable. U.S.C.A. Const.Amend. 6.

[37] COSTS ⇨ 302.4

102k302.4

Trial court properly denied capital murder defendant's motion to appoint neurologist at sentencing phase to investigate possible organic brain damage; request was filed after court's deadline for such motions, and, although defendant's ink blot test indicated simplistic view of life consistent with, but not necessarily caused by, brain damage, Bender test (which is specifically designed

to test for organic brain damage) indicated "little likelihood" of brain damage. R.C. § 2929.024.

[38] COSTS ⇨ 302.2(2)

102k302.2(2)

Indigent aggravated murder defendant who seeks appointment of expert must show, not just mere possibility, but reasonable probability that expert would aid in defense, and that denial of expert assistance would result in unfair trial. R.C. § 2929.024.

[39] CRIMINAL LAW ⇨ 1134(1)

110k1134(1)

Supreme Court's independent review in capital case can correct flaws in trial court's opinion.

[40] CRIMINAL LAW ⇨ 1179

110k1179

Court of Appeals' one-page "supplemental journal entry on appeal of death sentence," summarily stating that aggravating circumstance outweighed mitigating factors and that death sentence was not disproportionate, was sufficient; statute that requires Court of Appeals to independently review death sentences does not expressly require detailed explanation. R.C. § 2929.05(A).

[41] HOMICIDE ⇨ 357(4)

203k357(4)

Death sentence was appropriate in aggravated robbery/murder prosecution; aggravating circumstance that defendant committed murder while committing or attempting to commit aggravated robbery outweighed purported mitigating factors of diminished capacity and residual doubt of guilt, as defense psychologist's finding of substantial impaired capacity to obey law was undermined by his testimony that he doubted defendant would have murdered victim had policeman been sitting in victim's house, and defendant's explanations of evidence were unpersuasive. R.C. § 2929.05(A).

[41] HOMICIDE ⇨ 357(7)

203k357(7)

Death sentence was appropriate in aggravated robbery/murder prosecution; aggravating circumstance that defendant committed murder while committing or attempting to commit aggravated robbery outweighed purported mitigating factors of diminished capacity and residual doubt of guilt, as defense psychologist's finding of substantial

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impaired capacity to obey law was undermined by his testimony that he doubted defendant would have murdered victim had policeman been sitting in victim's house, and defendant's explanations of evidence were unpersuasive. R.C. § 2929.05(A).

****679** In June 1991, a Cuyahoga County jury returned guilty verdicts in the trial of appellant, David W. Allen ("Allen"), for the aggravated robbery and aggravated murder of eighty-four-year-old Chloe English ("English") of Bedford, Ohio. English knew Allen through her participation in a prison ministry program. English ministered to five convicted felons, including Allen. She visited and corresponded with Allen while he was in prison and they stayed in touch after his release in 1989. On January 9, 1991, English received a phone call from someone named "David." According to English's daughter, the conversation left English shaking.

***627** English was last seen alive at 5:45 p.m. on January 24, 1991, by her friend Judy Sperry ("Sperry") who had visited English in her home. At 6:45 p.m. the next day, English's friend Cathy Curry found English lying dead in her living room. The doors to English's house were unlocked, which was unusual because English always locked her doors and never opened them to strangers.

After English's body was found, Bedford police officers secured, photographed, and searched the house. Detective Gerry Artl found English's eyeglasses on the floor and noted a large thumbprint on the inside of the left lens. That thumbprint turned out to belong to David Allen. Police recovered ten cigarette butts from English's kitchen garbage. ****680** Saliva tests showed that five of the butts had been smoked by a Type O secretor. [FN1] (The rest lacked sufficient saliva for testing.) Two of the butts still had the "Doral" brand name on them. Allen is a Type O secretor, and there was evidence that he smoked Dorals. English disapproved of smoking and was a Type O non-secretor.

FN1. Trace-evidence expert Kay May testified that certain individuals secrete their blood type in bodily fluids, such as saliva.

Although English's last known visitor was a woman, someone had left the toilet seat up in English's bathroom. Moreover, the coffee pot in the kitchen, empty when Sperry left, was half full

when English's body was discovered. Police found several items burnt in the fireplace, including the remains of English's purse and wallet, a broken ashtray, a broken coffee cup, a broken drinking glass, a wine bottle, and a knife with its handle burnt off.

Police found no money in the house, even though English always kept about \$50 in her wallet for emergencies. English's credit cards and checkbook were also missing.

Detective Timothy Oleksiak ("Oleksiak") obtained the names of prisoners with whom English had corresponded. All but Allen were still in prison. Oleksiak and Artl had the print on the eyeglasses compared with Allen's; when the print was identified as Allen's, Oleksiak got an arrest warrant.

On January 29, Allen was arrested. He was wearing a denim jacket with a stain on one of the sleeves. That stain turned out to be Type O blood, the same type Allen and English shared. Allen was carrying a bus transfer issued between 6:04 and 7:00 a.m., January 25, on the No. 41 Warrensville bus route. The driver identified Allen as a passenger he had picked up on January 25 at 6:04 a.m., at a stop 1.3 miles from English's house.

Allen also had a refund receipt for a Greyhound bus ticket. There was no record of when the ticket was sold, but Allen got the refund on January 25, at 11:28 p.m. Moreover, when Detective Artl searched Allen's bedroom, he found two packed suitcases under Allen's bed.

***628** The jury returned guilty verdicts on two counts of aggravated murder, R.C. 2903.01(A) and (B), each count having a death specification under R.C. 2929.04(A)(7) (felony-murder). The jury also found Allen guilty of aggravated robbery, R.C. 2911.01. After a penalty hearing, the jury recommended the death penalty. The court accepted the recommendation and imposed the death sentence. As to the aggravated robbery count, the court imposed a sentence of fifteen to twenty-five years. The court of appeals affirmed the convictions and sentences.

This cause is now before the court upon an appeal as of right.

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Stephanie Tubbs Jones, Cuyahoga County Pros. Atty., Thomas Sammon, Timothy Dobeck and Elaine Welsh, Asst. Pros. Attys., for appellee.

David H. Bodiker, Ohio Public Defender, Gloria Eyerly, Kathleen A. McGarry and Jane P. Perry, Asst. Public Defenders, for appellant.

COOK, Justice.

We have reviewed Allen's twenty-three propositions of law, independently weighed the aggravating circumstance against the mitigating factors and evaluated the proportionality and appropriateness of the death penalty. For the following reasons, we affirm the judgment of the court of appeals and uphold the convictions and death sentence.

[1] Pursuant to R.C. 2929.05, this court is required to review capital cases in a specific way; however, that section does not require us to discuss each and every proposition of law raised by the parties. *State v. Scudder* (1994), 71 Ohio St.3d 263, 267, 643 N.E.2d 524, 528; *State v. Poindexter* (1988), 36 Ohio St.3d 1, 3, 520 N.E.2d 568, 570. Accordingly, in this opinion we address only those issues that warrant discussion.

I The Guilt Phase A. Jury Issues

1. Alleged Bias

[2] In his first proposition of law, Allen contends that juror Worthington should have **681 been excused for cause because she could not be fair and impartial and was biased against him. Juror Worthington's brother had been murdered, and the alleged killer was acquitted. On voir dire, Worthington admitted to some bitterness, but said she could set her feelings aside and vote solely on the evidence. Although Worthington was unsure if she could hold back her emotions *629 on hearing testimony similar to that at her brother's trial, she answered "no" when asked if her feelings would "impact" on the case. Additionally, Allen points out that Worthington had two friends who were police officers, and the prosecutor and detective who investigated her brother's murder sometimes "checked-up" on her mother.

When the defense challenged Worthington, the court noted that she "unequivocally stated that she could be fair and impartial." The court found Worthington was "very straightforward" and "under[stood] the responsibility here * * *."

[3] The trial court's ruling on a challenge for cause will be affirmed if supported by substantial testimony. *State v. Tyler* (1990), 50 Ohio St.3d 24, 31, 553 N.E.2d 576, 587. Here, the trial court found Worthington unbiased, a finding supported by Worthington's testimony. Allen argues that the juror's belief in her own impartiality is insufficient support, but the trial judge saw and heard Worthington and could legitimately validate her statements. See *Tyler* at 30, 553 N.E.2d at 586; *State v. Henderson* (1988), 39 Ohio St.3d 24, 26-27, 528 N.E.2d 1237, 1241. Allen's first proposition of law lacks merit.

2. Voir Dire Issues

[4][5][6] In his second proposition of law, Allen contends that veniremen Skufca and Washington, who stated that they could not impose the death penalty, were improperly stricken from the venire. See, generally, *Witherspoon v. Illinois* (1968), 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776. Allen claims the trial court improperly restricted his questioning of them. However, defense counsel questioned Skufca after she said she didn't believe she could impose the death penalty. Although the court did excuse her after only two questions by the defense, the defense apparently had no more questions and alleged no deprivation of voir dire. During Washington's voir dire, the trial court sustained objections to three defense questions; however, all three repeated questions the judge had already asked. Allen also argues that the trial court should have allowed the defense to ask Washington whether he understood "that only the Judge can decide ultimately what the sentence is," because it "downplayed to the jurors, the significance of their verdict * * *." This court has previously found that such an instruction does not constitute prejudicial error, *State v. Landrum* (1990), 53 Ohio St.3d 107, 122, 559 N.E.2d 710, 727, although we have expressed a preference that this instruction be avoided. *Id.*, citing *State v. Williams* (1986), 23 Ohio St.3d 16, 22, 23 OBR 13, 19, 490 N.E.2d 906, 912.

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[7] In part B of Allen's second proposition of law, he complains that the state peremptorily challenged a juror because she opposed the death penalty. Allen waived this issue by not raising it at trial. See *State v. Campbell* (1994), 69 Ohio St.3d 38, 40-41, 630 N.E.2d 339, 344. Furthermore, " 'prosecutors can exercise a *630 peremptory challenge for any reason, without inquiry, and without a court's control,' apart from excluding jurors based on race * * * or sex." (Citations omitted.) *State v. Lundgren* (1995), 73 Ohio St.3d 474, 484, 653 N.E.2d 304, 317. The second proposition of law is overruled in its entirety.

3. Judge's Note to Jury

[8] In his eighteenth proposition of law, Allen claims that he was denied a fair trial because the trial court communicated with the jury outside his presence. During penalty phase deliberations, the jury sent the judge a note asking for "a copy of DSM III-R [FN2] and [d]ictionary[.]" The judge wrote **682 back: "You have received all of the exhibits that have been received into evidence and you may not receive any others. No extraneous research may be done (i.e., looking up words in a dictionary etc.)"

FN2. "DSM III-R" refers to the Third Edition of the Diagnostic and Statistical Manual of the American Psychiatric Association. Dr. Kaplan, a clinical psychologist who testified in this case, explained that it is a publication used by mental health professionals for classifying psychiatric and emotional problems and diseases and defects and determining their existence.

[9] A trial judge may not communicate with the jury in the defendant's absence. *State v. Abrams* (1974), 39 Ohio St.2d 53, 56, 68 O.O.2d 30, 32, 313 N.E.2d 823, 825; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 149, 524 N.E.2d 881, 886. However, if the communication is not "substantive," the error is harmless. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 236-237, 15 OBR 311, 373-374, 473 N.E.2d 264, 324; accord *Abrams*, supra, and *Bostic*, supra. In *Bostic*, we held that the court's ex parte communication with the jury was harmless error because there was "no possibility that the jury's conclusion was influenced by the court's reply." *Id.*, at 150, 524 N.E.2d at 887. Likewise, in this case there is no possibility that the court's refusal to supply a dictionary and DSM III-R could

have influenced the jury's conclusion. The eighteenth proposition of law lacks merit.

B. Evidentiary Issues

1. Sufficiency

[10] In his fourth proposition of law, Allen contends that the evidence of each count and specification was legally insufficient to convict him. The test for the sufficiency of evidence is whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2788-2789, 61 L.Ed.2d 560, 573; *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492, 503.

[11] As to the aggravated murder count, Allen claims the state did not prove he was the killer. The strongest evidence of Allen's guilt is the presence of his partial *631 thumbprint on English's glasses. That print could not have been left days before the murder as Allen argues. It was on the inside of the lens, and English wore her glasses "constantly." Moreover, the print covers nearly half the lens. There was testimony that English was a tidy person, from which the jury could infer that she would not have allowed a large thumbprint to remain on her glasses for days. Allen's mistaken claim that the print wasn't that large is based on a misreading of the fingerprint expert's comment, "It's a very little area"; this comment refers to the area of the thumb represented by the print, not the area of the lens covered. Allen also suggests that the expert might have misidentified the print, since he found "only" in excess of twelve to fourteen matching ridge characteristics out of a possible seventy-five to one hundred twenty-five. However, the fingerprint expert testified that twelve matches are enough for an identification.

There was also evidence presented that about two weeks before her murder, English got a phone call from someone named "David" that left her "shaking." That suggests that Allen was hostile to English, despite their earlier friendship. Furthermore, there was evidence that English was killed by someone she knew. English never unlocked her doors to strangers, yet on the evening that her body was discovered her doors were found unlocked, with no signs of forced entry. English

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made coffee after Sperry left, and a coffee cup was found burned in the fireplace in an apparent attempt to destroy fingerprints. From that evidence the jury may have concluded that the killer shared a cup of coffee with English, another indication that English knew her killer.

Inside English's home, police found several Doral brand cigarette butts, which had been smoked by a Type O secretor; Allen is a Type O secretor [FN3] and there was testimony that he smoked Dorals. Someone burned an ashtray in English's fireplace, apparently to destroy fingerprints. Moreover, English disapproved of smoking, and even her daughter did not feel free to smoke in her home. Based on this evidence the jury could conclude that the killer smoked the cigarettes found in English's home.

FN3. Trace expert Kay May testified that 32.4 percent of the white population are Type O secretors.

****683** There was evidence that Allen boarded a bus at a bus stop just 1.3 miles from English's home at 6:04 a.m., January 25, 1991, yet he was not going to or from work. The coroner estimated that English died between midnight and 6:00 a.m. on January 25. Allen points out that some of the coroner's testimony indicates that English died between 12:38 p.m. and 10:38 p.m., on January 24; however, the jury was entitled to accept the coroner's estimated time of death. Even if English did die in the afternoon or evening of January 24, Allen's presence at the ***632** bus stop near English's home in the early morning of January 25 could still be viewed by the jury as incriminating.

There was also some evidence that Allen had prepared to flee. He had evidently purchased a Greyhound bus ticket (although he did turn it in for a refund), and packed his bags. He did not go to work on January 25.

Finally, the jury could find prior calculation and design, necessary for an aggravated murder conviction, based on the protracted nature of the murder. English was beaten and strangled; her wrists were slashed; and she was stabbed sixteen times, with three of the wounds being in her back.

[12] Allen next contends that there was insufficient

evidence that he committed aggravated robbery; specifically, he claims there was no evidence that he committed a theft. We find that there was sufficient evidence that Allen committed a theft. English kept five credit cards, a checkbook, and a wallet containing cash in her purse, yet none of these items was found in her house. The burned remains of her purse and wallet were found in the fireplace. English received a \$104 monthly pension and a monthly gift of \$100 from her daughter Sharon. Her daughter Janet gave her \$100 for her birthday on January 9. Allen argues that English could have spent or given away all of her money, but Janet testified that her mother always kept about \$50 on hand for emergencies. From this evidence, the jury could reasonably find that money, checks, and credit cards should have been present. The absence of these items along with the burned purse and wallet and the evidence of Allen's presence in English's home was sufficient for a reasonable jury to conclude that Allen committed aggravated robbery.

Based on the foregoing we find that there was sufficient evidence for the jury to find Allen guilty of aggravated murder and aggravated robbery. Allen's fourth proposition of law is overruled.

2. Character Evidence

[13] In his third proposition of law Allen claims he was denied a fair trial because of the introduction of evidence that he was previously incarcerated. This evidence came in through testimony that English met Allen through her church's prison ministry program.

Allen challenges the prior-imprisonment evidence as inadmissible "other acts" evidence. However, Evid.R. 404(B) allows "other acts" evidence as proof of identity. Since English was apparently killed by someone she knew, the prior-imprisonment evidence was relevant to explain that English knew Allen through visiting him in prison.

[14] Allen's argument under Evid.R. 403(A) also fails. Pursuant to Evid.R. 403(A), the court is required to weigh the probative value of the evidence against the ***633** danger of unfair prejudice, confusion of the issue, or misleading the jury. When considering evidence under Evid.R. 403, the trial court is vested with broad discretion and an appellate court should not interfere absent a clear abuse of that discretion. *State v. Morales*

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(1987), 32 Ohio St.3d 252, 257-258, 513 N.E.2d 267, 273-274. Allen never denied English knew him, and the state had other evidence of the fact. However, the judge took steps to minimize unfair prejudice, forbidding the state to mention why Allen had been in prison and instructing the jury: "[Y]ou may not infer that the defendant is guilty of these offenses because he may have been convicted and incarcerated in the past." Thus, the trial court did not abuse its discretion by finding that potential unfair prejudice did not substantially outweigh the relevance of the testimony. Allen's third proposition of law is overruled.

In his sixth proposition of law, Allen contends that the state introduced irrelevant, **684 prejudicial evidence of the victim's good character during trial. Allen failed to object to the alleged character evidence and therefore waived this argument. See *State v. Williams* (1977), 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3137, 57 L.Ed.2d 1156.

[15][16] Furthermore, Allen's claims regarding evidence of English's character have no merit. Evidence about a victim is admissible when it relates directly to the circumstances of the crime and is not offered to elicit sympathy from the jury. *State v. Williams* (1988), 38 Ohio St.3d 346, 354, 528 N.E.2d 910, 919-920. The evidence that Allen complains about was not offered to elicit sympathy from the jury; rather, the testimony related directly to the circumstances of the murder and the robbery. Testimony that English did not drink or smoke was relevant, because a wine bottle and cigarette butts were found in her house. Testimony that she was an immaculate housekeeper was relevant to show that she likely would have wiped Allen's fingerprint off her glasses had he placed it there before the murder. This was "habit" evidence, admissible under Evid.R. 406, not character evidence.

[17] Evidence showing English's religious devotion was also relevant for non-character purposes. The "praying hands" design on the wallet identified it as hers. Her dedication to helping sinners "straighten * * * out" explained her friendship with Allen. Her habit of baking things for people was relevant to her spending habits.

Cathy Curry, who found the body, testified that

English taught Sunday school, knew the Bible, taught Curry how to make pecan tarts, and attended a monthly prayer meeting. The prayer meeting explained what Curry was doing at English's house: Curry had come to take English to that meeting. The other *634 facts explained Curry's relationship with English and knowledge of her habits. See *State v. Waddy* (1992), 63 Ohio St.3d 424, 444, 588 N.E.2d 819, 834.

English's friend Constance Dickson testified that English rose early for morning devotions. This evidence of English's habit was relevant because English had not put out her garbage on the morning of January 25. English's habitual early rising explained why this non-occurrence was unusual, narrowing the time of death.

Allen's sixth proposition of law lacks merit because the evidence about English related directly to the circumstances of the crimes.

3. Photographic "Show-up" Identification

[18] Police showed bus driver Gilbert Pittman a photo of Allen, whom he identified as the person he picked up at 6:04 a.m. on January 25. In Allen's ninth proposition of law, he claims the identification was tainted by the "unnecessarily suggestive" use of a single photo instead of an array. See *Stovall v. Denno* (1967), 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199, 1206. However, Allen stipulated to the identification at trial and never moved to suppress it. As a result, Allen's claims of error are deemed to be waived. *State v. Cook* (1992), 65 Ohio St.3d 516, 523, 605 N.E.2d 70, 79.

[19][20] Even if Allen had raised this objection at trial, Pittman's identification testimony was properly admitted. Use of a single photo may have been "suggestive"; however, reliable identification testimony may be admitted regardless of the flaws in the identification procedure. *State v. Jells* (1990), 53 Ohio St.3d 22, 26-27, 559 N.E.2d 464, 469-470. The test for determining the admissibility of a photographic identification is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Id.* at 27, 559 N.E.2d at 469. The factors to be considered include the opportunity of the witness to view the criminal at the time of the crime and the witness's degree of attention. *Id.*

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Allen boarded the bus near a streetlight, was the only passenger for seven minutes, and conversed with Pittman. Moreover, Pittman's identification of Allen is verified by Allen's possession of the transfer slip. Accordingly, we find that under the totality of the circumstances the identification was reliable, and we reject the ninth proposition of law.

**685 4. Authentication

[21][22] In his seventh proposition of law, Allen claims the blood samples, shoes, jeans jacket and bus transfer were not properly authenticated. See Evid.R. 901. However, Allen never made this objection at trial, and thus waived this issue absent plain error. See *State v. Wiles* (1991), 59 Ohio St.3d 71, 86, 571 N.E.2d 97, 116. Plain error occurs when, but for the error, the outcome of the trial clearly *635 would have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91, 96-97, 7 O.O.3d 178, 181, 372 N.E.2d 804, 807-808. We find no plain error in this instance. Although probative, the admission of these items into evidence did not alter the outcome of this case. The blood sample was used to link Allen's blood type to that found on the cigarette butts in English's wastebasket. This evidence was not determinative of the case because the trace evidence examiner testified that forty-five percent of whites have Type O blood and, of that forty-five percent, seventy-two percent are secretors. The jeans jacket, shoes and bus transfer are also not determinative of the case. These items were introduced as the items worn by Allen when he was arrested. The jeans jacket had Type O blood on it; however, both Allen and English had Type O blood. The shoes had an unidentified black substance on them, possibly ash from English's fireplace, and the bus transfer placed Allen at a bus stop 1.3 miles from English's home. Given the ample evidence of Allen's guilt in addition to these items, we do not find plain error in the admission of these items. The seventh proposition of law lacks merit and is overruled.

5. Other Evidentiary Issues

In his fifth, eighth, tenth and eleventh propositions of law Allen claims various errors involving evidentiary issues. Each of these propositions of law is discussed below.

[23] In his fifth proposition of law, Allen contends

that it was error for the trial court to allow prosecution exhibits to be displayed in open court before their formal admission into evidence, which did not occur until after the state had rested its case. Allen failed to object to the display of the exhibits at trial and consequently waived any claim, absent plain error. See *State v. Esparza* (1988), 39 Ohio St.3d 8, 529 N.E.2d 192. There is no plain error because none of the state's exhibits was ruled inadmissible, so there can be no prejudice since all the exhibits which were displayed eventually went to the jury. Furthermore, Evid.R. 611 grants the trial court discretion over the mode of the presentation of evidence. Evid.R. 611(A). The fifth proposition of law lacks merit.

[24] In his eighth proposition of law, Allen complains that the state's expert witnesses gave impermissible testimony. First, Allen claims that trace-evidence examiner Kay May's ("May") answers to several questions on redirect should have been stricken because they were not based on a reasonable degree of medical certainty. See Evid.R. 403. Specifically he complains about May's responses that (1) items burned in English's fireplace, including a knife and scissors, could not be tested for blood, and thus "could have" had blood on them, and (2) it was "possible" that the black substance found on the bottom of shoes which allegedly belonged to Allen was ash.

*636 May did not provide an improper opinion that blood had been on the knife and scissors; she merely explained that she did not find blood on the objects but could not rule out the possibility that blood could have been on the objects at some time. She did not testify that the substance on the shoes was in fact ash; she said she could not rule that possibility out. We do not find any error in the admission of this testimony. See *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 191, 616 N.E.2d 909, 915; *State v. Bayless* (1976), 48 Ohio St.2d 73, 111-112, 2 O.O.3d 249, 270, 357 N.E.2d 1035, 1058-1059, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1155.

Allen also complains about the following question asked of Detective Edward Walsh, the fingerprint expert: "[Y]ou don't go walking around with a fingerprint on your eyeglasses normally, do you?" He answered, "No. I do not." Allen contends Walsh was not an expert "on whether people

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immediately clean their glasses when a fingerprint gets **686 on them. * * * But Walsh did not purport to give an expert opinion on that subject; his response was specifically limited to his personal experience. The jurors were free to rely on their common sense and experience in determining the length of time the victim would have allowed Allen's fingerprint to remain on her glasses.

Lastly, Allen argues that these responses from the experts were "given an air of credibility" by the jury because they were offered by expert witnesses. This argument lacks merit because the trial court cautioned the jurors that expert testimony was entitled to no more weight than the testimony of any other witness. Allen's eighth proposition of law is overruled.

[25] In his tenth proposition of law, Allen asserts that the state introduced repetitive, gruesome photos of English's body, as well as a crime-scene videotape. Specifically, Allen argues that exhibits 1 through 16, photos of the victim's body, are gruesome and repetitive. "Under Evid.R. 403 and 611(A), the admission of photographs is left to the sound discretion of the trial court." *State v. Maurer* (1984), 15 Ohio St.3d 239, 264, 15 OBR 379, 401, 473 N.E.2d 768, 791. Allen has failed to show how the trial court abused its discretion by admitting the photographs. The test Allen cites from *Maurer*, which prohibits repetitive photos, is the standard for admitting gruesome photographs. "Absent gruesomeness or shock value, it is difficult to imagine how the sheer number of photographs admitted can result in prejudice requiring reversal." *State v. DePew* (1988), 38 Ohio St.3d 275, 281, 528 N.E.2d 542, 550; see, also, *State v. Davis* (1991), 62 Ohio St.3d 326, 348, 581 N.E.2d 1362, 1380. The photographs admitted in this case were not particularly gruesome or shocking. The photographs clarified the testimony regarding the number, type and placement of the wounds, and the cause of death. We find that the probative value of the photographs outweighed any prejudice to Allen. *State v. Maurer*, supra.

*637 As to the videotape of the crime scene, Allen failed to object to its introduction and therefore waived that claim. See *State v. Wiles* (1991), 59 Ohio St.3d 71, 86, 571 N.E.2d 97, 116. Allen's tenth proposition of law is not well taken.

[26] In his eleventh proposition of law, Allen contends that the trial court erroneously admitted both physical exhibits and photographs of those exhibits. He claims the photos were cumulative. Allen failed to object to the admission of these exhibits and therefore waived this issue absent plain error. *State v. Watson* (1991), 61 Ohio St.3d 1, 7-8, 572 N.E.2d 97, 104. Furthermore, we find that the photographs were admissible because they show the items that were admitted into evidence in the location where they were found. The photographs serve to show the condition of the items when they were discovered and to authenticate the items. See *State v. Murphy* (1992), 65 Ohio St.3d 554, 581, 605 N.E.2d 884, 906. The eleventh proposition of law is overruled.

C. Instructional Issues

In his thirteenth proposition of law, Allen claims the jury instructions were deficient in several ways.

1. Lesser Included Offense

[27] Allen requested that the trial court instruct the jury on murder as a lesser included offense of aggravated murder. The trial court did so, but only as to Count One (aggravated murder with prior calculation and design), and refused to give any lesser-included-offense instruction on Count Two (felony-murder). Allen claims that the trial court's refusal to give this lesser-included-offense charge was erroneous.

An instruction on a lesser included offense is required where the evidence presented at trial would reasonably support an acquittal on the crime charged and a conviction on the lesser included offense. *State v. Tyler*, 50 Ohio St.3d at 36, 553 N.E.2d at 591. The lesser-included-offense instruction for Count Two in this case was required if the jury could reasonably have found that Allen killed English, but not while trying to rob her. See id.

Assuming arguendo that the trial court did err in failing to give the lesser-included-offense **687 instruction on Count Two, that error was harmless, because the jury actually did find that a robbery took place when it convicted Allen on Count Three--aggravated robbery. Given that the jury did find Allen guilty of aggravated robbery, it follows that the jury would have convicted Allen of aggravated

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murder on Count Two even if given the lesser-included- offense option. Any error in not giving the lesser-included-offense instruction did not enhance "the risk of an unwarranted conviction" on Count Two. See *Beck v. Alabama* (1980), 447 U.S. 625, 638, 100 S.Ct. 2382, 2390, 65 L.Ed.2d 392, 402-403, limited on other *638 grounds, *Harmelin v. Michigan* (1991), 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836.

2. "Acquittal First" Instruction

[28] Although the trial court did instruct the jury on murder as a lesser included offense to aggravated murder on Count One, Allen contends that instruction barred the jury from considering murder without first acquitting him of aggravated murder. Absent a showing of plain error, Allen waived this claim because he failed to object to the instruction. Allen has failed to make a showing of plain error. This court has previously held that an acquittal- first instruction is erroneous. *State v. Thomas* (1988), 40 Ohio St.3d 213, 219-220, 533 N.E.2d 286, 292-293. In this case, however, the trial court did not give an acquittal-first instruction; rather, the court instructed the jury as follows: "If you find the defendant not guilty of aggravated murder, you will then proceed with your deliberations and determine whether * * * the defendant is guilty or not guilty of murder." Although not ideal, [FN4] this instruction does not require unanimous acquittal on the crime charged before the jury can move on to consider the lesser included offense. See *id.* The *Thomas* court found an instruction substantially similar to the one given in this case acceptable.

FN4. A better instruction would incorporate the "inability to agree" language adopted in *Thomas*, *supra.*, at 220-221, 533 N.E.2d at 293.

3. Denial of "Mercy" Instruction

Next, Allen complains of the trial court's denial of his request to instruct the jury that they could consider sympathy arising from the mitigating evidence and that they could consider mercy. Allen also complains of the court's instruction that the jury "must recommend" death if aggravation outweighed mitigation.

[29][30] The jury's decision should not be based on sympathy or mercy, which are not mitigating factors

and are thus irrelevant to sentencing. *State v. Landrum*, 53 Ohio St.3d at 123, 559 N.E.2d at 728; *State v. Lorraine* (1993), 66 Ohio St.3d 414, 417-418, 613 N.E.2d 212, 216-217. Permitting the jury to consider sympathy and mercy would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner. *California v. Brown* (1987), 479 U.S. 538, 541, 107 S.Ct. 837, 839, 93 L.Ed.2d 934, 939; *Lorraine*, 66 Ohio St.3d at 417, 613 N.E.2d at 216. Accordingly, there was no error in the trial court's denial of the requested sympathy and mercy instructions. Furthermore, the court's instruction that the jury must recommend the death penalty if the aggravating circumstance outweighed the mitigating factors is *639 consistent with R.C. 2929.03(D)(2), which sets forth the guidelines for imposing sentence in a capital case.

4. Felony-Murder Instruction

[31] Allen next claims the trial judge erred when, during her instruction on the felony-murder specification (R.C. 2929.04[A][7]), she failed to state that, to find Allen guilty, the jury must find that he was the principal offender or that he killed with prior calculation and design. Allen claims this omission is reversible error.

Again, Allen did not object at trial and therefore waived this issue, absent plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332.

The failure to give a jury instruction is not plain error, unless, but for the error, the outcome of the trial would have been different. *State v. Long*, 53 Ohio St.2d at 97, 7 **688 O.O.3d at 181, 372 N.E.2d at 808. The trial court's omission does not constitute plain error, because the jury actually did find prior calculation and design in this case. The jury convicted Allen of aggravated murder, R.C. 2903.01(A), on Count One, and the judge expressly told the jury that it had to find prior calculation and design if it found him guilty of that count.

Allen's thirteenth proposition of law is overruled in its entirety.

D. Prosecutorial Misconduct

In his twelfth proposition of law Allen alleges

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several instances of prosecutorial misconduct. Allen raised no objection to many of the comments he challenges and therefore these alleged improprieties are waived, absent plain error. *State v. Williams*, supra.; *State v. Greer* (1988), 39 Ohio St.3d 236, 530 N.E.2d 382. We have reviewed these prosecutorial comments and find no plain error.

Allen also complains of the prosecutor's comment regarding his lack of organic brain damage and the prosecutor's question concerning Allen's prior not guilty by reason of insanity pleas. Allen objected in both instances and both of these objections were sustained. Furthermore, Allen failed to request the curative instruction he claims should have been given.

[32] Lastly, the prosecutor's comment on Allen's unsworn statement was within the guidelines of *State v. DePew*, supra, at paragraph two of the syllabus, because the prosecutor merely commented that Allen's statement was not made under oath, in contrast to testimony of all the other witnesses.

Allen's twelfth proposition of law is overruled.

*640 E. Ineffective Assistance of Counsel

[33][34] In his nineteenth proposition of law, Allen claims ineffective assistance of counsel. In order to prevail on this claim Allen must show that counsel's representation was deficient and that he was prejudiced by that deficiency. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693. The *Strickland* court defined deficient representation as representation which is unreasonable under prevailing professional norms. In order to show prejudice, Allen must show a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case. *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. Allen's claims of ineffective representation are discussed below.

1. Motions to Suppress

[35] Allen claims his counsel inadequately investigated the facts behind a motion to suppress. Police seized several cigarette butts (some smoked

by a Type O secretor) from Allen's bedroom. Allen's counsel moved to suppress that evidence, alleging a warrantless search. However, at the hearing, counsel stated: "I'm unclear as to whether there was a warrant * * *." The prosecutor later produced the warrant. Defense counsel examined it, then withdrew the motion.

Allen claims his counsel was ineffective because he was ignorant of the warrant's existence due to inadequate investigation. The record does not show what investigations counsel made so we are unable to evaluate the sufficiency of those investigations. Nor has Allen shown how he was prejudiced. Since a warrant existed, defense counsel's knowledge of it is inconsequential.

Next, Allen claims his counsel should have moved to suppress the bus driver's identification of him based on the use of a single photograph. Since we have previously found that this identification procedure was reliable under the totality of the circumstances, defense counsel's failure to move to suppress did not "render the [trial's] result unreliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

2. Ineffective Assistance in Penalty Phase

[36] Allen next argues that it was ineffective for his counsel to ask psychologist Dr. Robert Kaplan ("Kaplan") whether Allen's illness would be "treatable" over a thirty-year imprisonment. Kaplan said it was "possible" **689 but uncertain, leading the prosecutor to ask if Allen could kill again. Kaplan replied: "It's certainly a possibility." The asking of this question constituted neither deficient performance nor was it prejudicial. This question was of some benefit to Allen because Kaplan answered that it was possible that Allen's condition was treatable.

*641 Allen has identified no act or omission that was both deficient and prejudicial and his nineteenth proposition of law is overruled.

II

Penalty Phase

A. Refusal to Appoint Neurologist

[37] In his fifteenth proposition of law, Allen argues that the trial court erred by refusing to

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appoint a neurologist to investigate possible organic brain damage as a mitigating factor. R.C. 2929.04(B)(3).

Just seven days before the date set for the penalty phase hearing, Allen moved for appointment of a neurologist to determine, by means of a CAT scan or MRI scan, whether he had brain damage. The motion was filed beyond the deadline previously set for motions related to the penalty phase.

The court set the motion for a hearing. At that hearing, Allen introduced reports and an affidavit of psychologist Dr. Robert G. Kaplan. Kaplan was first employed by Allen's parents and then appointed by the court at Allen's request. Kaplan did two examinations and some testing of Allen. In his report relating to the first examination of Allen, Kaplan stated that, at age sixteen, Allen was knocked unconscious by a head injury. That report did not address possible brain damage. Kaplan's second report gave the results of two tests. The first was the Rorschach Ink Blot Test. Kaplan reported that Allen's responses indicated a simplistic, "black or white" view of life. Kaplan stated that such a view is "characteristic of persons with limited intelligence or organic brain impairment," but there could also be un-organic causes as well. Kaplan then reported on the results of the Bender Visual-Motor Gestalt Test ("Bender test") which is a screening measure for organic brain impairment. In this report, Kaplan stated that the test results "would indicate little likelihood of any organic brain impairment." In the conclusions and recommendations section of this report, Kaplan attributed Allen's simplistic world view to a "motivation to avoid problems." Kaplan did not mention brain damage, nor did he suggest that a neurologist be obtained or that further testing be conducted. However, in an affidavit, dated just three days after his second report, Kaplan stated the following:

" * * * That I have examined David Allen and administered psychological tests which suggest the presence of organic brain damage, which if present could cause him to lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law.

*642 " * * * That the absence or presence of organic brain impairment can be determined by a

qualified neurologist in conjunction with the administration of a CAT or MRI scan."

[38] In considering Allen's assertion that a neurologist should have been appointed, we look to R.C. 2929.024, which entitles an indigent defendant charged with aggravated murder to such "investigation services, experts, or other services" as the trial court finds "reasonably necessary for [his] proper representation * * * at trial or at the sentencing hearing. * * * " A defendant must show, not just a mere possibility, but a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial. *State v. Broom* (1988), 40 Ohio St.3d 277, 283, 533 N.E.2d 682, 691. Moreover, the determination of necessity lies in the trial court's discretion. R.C. 2929.024; see *State v. Jenkins*, 15 Ohio St.3d at 193, 15 OBR at 336, 473 N.E.2d at 291.

The trial court did not abuse its discretion by denying Allen's motion to appoint a neurologist. First, the request was filed after the court's deadline for such motions. Second, Allen failed to specifically demonstrate the reasonableness of the request. *State v. Broom*, 40 Ohio St.3d at 283-284, 533 N.E.2d at 691. Allen did not show a reasonable probability that an expert would aid in his defense. *Id.* Although Allen's ink blot test **690 indicated a "simplistic * * * view of life" consistent with, but not necessarily caused by, brain damage, the Bender test indicated "little likelihood" of brain damage, and Kaplan's second report seems to rule out brain damage. Given that the Bender test is specifically designed to test for organic brain damage and that the results of the ink blot test were not conclusive as to brain damage, we find no abuse of discretion by the trial court in denying the motion to appoint a neurologist to further investigate Allen's claim of brain damage.

Although Kaplan's affidavit states that test results suggest the presence of organic brain damage and that testing by a neurologist could determine the absence or presence of brain damage, the trial court could properly disregard the affidavit. It adds nothing substantive to the reports, fails to mention the Bender test, and ventures no opinion as to whether neurological testing is necessary.

Accordingly, Allen's fifteenth proposition of law

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lacks merit.

B. Factual Errors in Sentencing Opinion

In his twenty-first proposition of law, Allen claims that the trial court's sentencing opinion contains factual mistakes, improperly treats the facts of the case as aggravating circumstances, and improperly weighs the mitigating factors.

[39] The trial court's opinion does contain two minor factual errors. The cigarette butts from Allen's bedroom were not identified as Dorals. And, there was no testimony that Allen boarded the bus "less than one mile from Mrs. English's *643 home," as the court stated. We find these minor flaws inconsequential. Furthermore, this court's independent review can correct flaws in the trial court's opinion. See *State v. Lewis* (1993), 67 Ohio St.3d 200, 204, 616 N.E.2d 921, 925.

C. Court of Appeals' Independent Review

[40] In his twenty-second proposition of law, Allen charges that the court of appeals improperly performed its independent review under R.C. 2929.05(A). With its opinion, the appellate court filed a one-page "supplemental journal entry," summarily stating that the aggravating circumstance outweighed the mitigating factors and that the sentence was not disproportionate. Allen asks this court to remand to the court of appeals with instructions to explain why it so found.

R.C. 2929.05(A) requires courts of appeals to independently review death sentences; it does not expressly require a detailed explanation. By contrast, R.C. 2929.03(F) requires that the trial court opinion explain why aggravation does or does not outweigh mitigation. If the legislature had intended that the court of appeals provide an explanation, it would have stated that requirement, as it did for trial courts in R.C. 2929.03(F).

Allen incorrectly relies upon *State v. Gillard* (1988), 40 Ohio St.3d 226, 533 N.E.2d 272, and *State v. D'Ambrosio*, supra, to support his argument. In *Gillard*, this court remanded because the court of appeals had not reviewed the sentence at all. Here the supplemental entry says the court did perform an independent review. In *D'Ambrosio*, it appeared that the court of appeals reviewed the

sentence without a full record. Allen makes no such claim here.

We find no deficiencies in the court of appeals' independent review and, accordingly, we overrule Allen's twenty-second proposition of law.

III Independent Review

[41] Having found that the evidence shows beyond a reasonable doubt that Allen committed the murder while committing or attempting to commit aggravated robbery, R.C. 2929.04(A)(7), we now turn to our independent assessment of whether that aggravating circumstance outweighs the mitigating factors raised by Allen. Against the single specification Allen asks us to weigh two mitigating factors: diminished capacity, R.C. 2929.04(B)(3), and residual doubt of guilt.

A. Diminished Capacity

Dr. Kaplan testified regarding Allen's claim of diminished capacity. Kaplan testified that multiple mental diseases substantially impaired his capacity to appreciate the **691 criminality of his actions and conform to the law. Dr. Kaplan *644 diagnosed Allen as having post-traumatic stress disorder ("PTSD"). Allen told Kaplan he was raped in prison in 1981; Kaplan did not know if this was true, but noted that being raped can cause PTSD. Allen's symptoms included "intrusive recollections" of the trauma, excessive suspiciousness, and feelings of inadequacy, shame, and rage.

Kaplan further testified that Allen's "sense of limited ability to handle" complex situations motivates him to oversimplify situations without regard for reality, due to "personality disorganization" and possibly also to low intelligence or brain damage. However, Kaplan said "intellectual laziness" may also play a part.

On cross-examination, Kaplan testified that he "doubt[ed]" Allen would have murdered English had a policeman been sitting in her house. This testimony undermines Kaplan's finding of substantially impaired capacity to obey the law.

We assign only modest weight to Dr. Kaplan's mitigation testimony.

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B. Residual Doubt

Allen also raises "residual doubt" of his guilt as a mitigating factor. In an unsworn statement Allen insisted he was innocent and tried to explain the evidence. Based on the evidence as set forth in the body of this opinion, we find Allen's explanations unpersuasive and we have no doubt of his guilt.

Accordingly, weighing the aggravating circumstance against the claimed mitigating factors, we conclude that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.

IV

Proportionality Review

We conclude that the death penalty is appropriate and proportionate in this case. R.C. 2929.05(A). This court has consistently upheld the death penalty in cases involving aggravated robbery-murder. See, e.g., *State v. Scott* (1986), 26 Ohio St.3d 92, 26 OBR 79, 497 N.E.2d 55; *State v. Holloway* (1988), 38 Ohio St.3d 239, 527 N.E.2d 831; *State v. Van Hook* (1988), 39 Ohio St.3d 256, 530 N.E.2d 883.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

DOUGLAS, RESNICK and FRANCIS E. SWEENEY, Sr., JJ., concur.

MOYER, C.J., WRIGHT and PFEIFER, JJ., dissent.

WRIGHT, Justice, dissenting.

The bedrock of our criminal justice system is the constitutional right to a trial by jury. At the heart of this basic grant and due *645 process of law is the constitutional guaranty that the jurors who decide a defendant's fate will be fair, impartial and free from bias or prejudice. *Morgan v. Illinois* (1992), 504 U.S. 719, 727, 112 S.Ct. 2222, 2228, 119 L.Ed.2d 492, 501; *Ross v. Oklahoma* (1988), 487 U.S. 81, 85, 108 S.Ct. 2273, 2277, 101 L.Ed.2d 80, 88; *Wainwright v. Witt* (1985), 469 U.S. 412, 418, 105 S.Ct. 844, 849, 83 L.Ed.2d 841, 845; *Turner v. Louisiana* (1965), 379 U.S. 466, 471-472, 85 S.Ct.

546, 549, 13 L.Ed.2d 424, 431; and *Irvin v. Dowd* (1961), 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751, 755.

A prospective juror should be removed for cause when he "discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court." R.C. 2313.42(J). Additionally, a prospective juror should be excused "if the court has any doubt as to the juror's being entirely unbiased." (Emphasis added.) R.C. 2313.43. In the present case, the trial court deprived the defendant of important constitutional and statutory rights when it failed to remove for cause a juror who clearly demonstrated that she could not be impartial.

Before this trial began, the trial judge asked all of the prospective jurors en masse to advise the bailiff if they had any personal problems with serving as a juror. Ms. Worthington, one of the prospective jurors, approached the bailiff, indicating that she had some problems with serving as a juror. She was then brought before the judge. She **692 advised the court that she was previously unaware that she had been called to serve in a criminal case and that she did not feel that she could serve as a juror in such a case because only a few years earlier her brother had been shot and killed. The trial court did not take any action, stating that her ability to serve as a juror, in light of her experiences, would be addressed during the general voir dire. [FN5]

FN5. The action of the trial judge in this instance appears to be inapposite to the judge's treatment of prospective juror Townes. Mr. Townes indicated he had been convicted of manslaughter, and the trial judge immediately excused him.

When Ms. Worthington was finally called as a juror, she was the twelfth juror to be seated on the panel. At that point, the defendant had exhausted all six of his peremptory challenges. Ms. Worthington was questioned in open court in the presence of the balance of the seated jurors. During questioning, she again related the facts surrounding her brother's murder and the fact that she had sat through every day of that trial. She indicated without equivocation that she did not feel that justice was done in that case because the accused had been found not guilty. She stated without equivocation that she harbored feelings of bitterness and resentment as a result of

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the outcome of that trial. She further indicated that she was friendly with a number of police officers and the detectives and the prosecutor who were involved with her brother's case. The detective in her *646 brother's case apparently was still in contact with her mother. Ms. Worthington also stated that she did not know if she could hold back her emotions when the coroner testified as she believed, apparently as a result of listening to earlier questioning, that the facts in this case were very similar to those in her brother's case. She then stated that the recent trial involving her brother's murder could be a problem if she served as a juror in the present case.

Counsel for appellant asked that this juror be excused for cause, citing, among other reasons, her familiarity with potential state witnesses, her bitterness arising from the not guilty finding in her brother's murder case, and her emotional involvement as a result of her brother's case. As a result, counsel argued that she did not have the "detachment from these proceedings that ought to be required, particularly in a capital case." Defense counsel, of course, also pointed out there were many other jurors available for seating in the event that the trial court sustained their challenge for cause. The trial court overruled the challenge, stating that "[t]he juror, when questioned, unequivocally stated that she could be fair and impartial. * * * I don't see a problem with her serving."

I do not see how any fair-minded individual can suggest that Ms. Worthington did not indicate a state of mind and view that cast the most serious sort of question on her ability to render an impartial verdict. In *Palmer v. State* (1885), 42 Ohio St. 596, paragraph three of the syllabus, this court stated: "A person called as a juror in a criminal case, who clearly shows himself, on his voir dire, not to be impartial between the parties, is not rendered competent by saying that he believes himself able to render an impartial verdict, notwithstanding his opinions, although the court may be satisfied that he would render an impartial verdict on the evidence." While it is true that the state made every effort to extract a statement to the effect that this juror believed herself capable of rendering an impartial verdict, I cannot think of a situation similar to this where this court or any other court has indicated that a juror with experience and perspective similar to Ms. Worthington should not have been excused for

cause.

It is interesting to note that when questioned about this matter during oral argument to this court, the assistant prosecutor arguing this case indicated that Ms. Worthington was the type of juror he "wanted" on the jury. I must respectfully disagree. The state has an obligation to vigorously prosecute crime. However, the state also has a duty to uphold the law and protect the constitutional rights of those who are tried for crimes.

The state argues that our decision in *State v. Broom* (1988), 40 Ohio St.3d 277, 533 N.E.2d 682, upholds the posture taken by the **693 trial judge. In *Broom*, we held that the relevant inquiry with respect to the impartiality of the jury is focused on the jurors who eventually sat and decided the case, not those jurors who were excused pursuant to peremptory challenges. *Id.* at 287-288, 533 N.E.2d at 695. *647 Consequently, we stated: "[I]n order to state a constitutional violation in this situation, the defendant must use all his peremptory challenges and demonstrate that one of the jurors seated was not impartial." *Id.* at 288, 533 N.E.2d at 695. In *Broom*, the defendant's impartiality challenge was unsuccessful because he had exercised a peremptory challenge to remove the juror who he alleged was biased.

Consistent with our holding in *Broom*, if a biased juror has sat on a jury that ultimately sentenced a defendant who had preserved his right to challenge the trial court's failure to remove the juror for cause, the defendant's sentence must be overturned. Accord *Ross v. Oklahoma*, supra, 487 U.S. at 85, 108 S.Ct. at 2277, 101 L.Ed.2d at 88. That is exactly what occurred in this case. The appellant had exhausted all of his peremptory challenges by the time Ms. Worthington was seated on the panel. He challenged her for cause, but because the trial court failed to remove her, she was a member of the panel that found defendant guilty and sentenced him to death.

I do not relish taking a position that would require a retrial of this particular matter. However, better to retry this matter now than two or three years hence as a result of a successful action in habeas corpus. Furthermore, this is a purely circumstantial case. There are serious questions concerning the admissibility of certain evidence with respect to the

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defendant's background and character and whether or not the defendant, if he did commit this crime, did so in the course of an armed robbery.

Accordingly, for the foregoing reasons, I would reverse the decision of the court of appeals and remand this matter for a new trial.

MOYER, C.J., and PFEIFER, J., concur in the foregoing dissenting opinion.

APPENDIX

"Proposition of Law No. I

"A prospective juror should be removed for cause when she discloses by her answer that she cannot be a fair and impartial juror or if the court has any doubt as to the juror's being entirely unbiased.

"Proposition Law No. II

"Defense counsel should be permitted to question prospective jurors concerning their views on capital punishment and the trial court should not excuse a juror for cause based on views concerning capital punishment until such questioning is allowed and unless those views would prevent or substantially impair the performance of their duties.

*648 "Proposition of Law No. III

"The existence of a prior offense is such an inflammatory fact that it should not be revealed to the jury unless specifically permitted under statute or rule.

"Proposition of Law No. IV

"A conviction cannot stand when the state failed to present sufficient evidence to meet the legal requirements to sustain a conviction.

"Proposition of Law No. V

"Evidentiary exhibits, sought to be introduced into evidence, should not be displayed to the jury prior to their admission.

"Proposition of Law No. VI

"Victim character evidence is inadmissible in the guilt-innocence phase of a capital trial.

"Proposition of Law No. VII

"A trial court should not admit evidentiary exhibits absent proper authentication.

"Proposition of Law No. VIII

"Expert testimony should be excluded from evidence when no basis or foundation for such testimony is established and its admission is irrelevant.

"Proposition of Law No. IX

"The use of a single photograph for identification purposes is impermissibly suggestive and destroys any reliability of the identification.

**694 "Proposition of Law No. X

"Duplicative and repetitive gruesome photographs are inadmissible in a capital prosecution.

"Proposition of Law No. XI

"When the state admits actual physical exhibits into evidence, the introduction of photographs of those items, having no independent evidentiary value, is error since it only serves to cumulate the quantity of evidence and overstate the state's case.

"Proposition of Law No. XII

"Misconduct by the prosecuting attorney in either the guilt-innocence or penalty phase of a capital case will serve as the basis of a reversal if it denies the *649 capital defendant a fair determination of either his guilt or innocence or the appropriate sentence in the case.

"Proposition of Law No. XIII

"A jury in a criminal case must be instructed to find every element of the offense beyond a reasonable doubt.

"Proposition of Law No. XIV

"Erroneous jury instructions in either the guilt-innocence or penalty phase of a capital case mandate reversal of the conviction and/or death sentence.

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"Proposition of Law No. XV

"An indigent defendant is entitled to the appointment of a defense expert, at state's expense, to assure he has a fair opportunity to present his defense.

"Proposition of Law No. XVI

"The state may re-admit evidence from the guilt-innocence phase of a capital case into the penalty phase only if they are relevant to the death penalty specifications of which appellant was found guilty.

"Proposition of Law No. XVII

"A trial court's use of the word 'recommendation' (when describing the jury verdict) in voir dire and penalty phase jury instructions denies a capital defendant a fair determination of his sentence by the jury.

"Proposition of Law No. XVIII

"A trial court should not engage in communications with a deliberating jury without notice to and consultation with the parties involved.

"Proposition XIX

"A capital defendant is entitled to the effective assistance of counsel throughout all stages of the capital prosecution.

"Proposition of Law No. XX

"When a capital defendant is indicted and later convicted under both Sections of R.C. 2903.01 when there is but one victim, the trial court should sentence the defendant under only one of the counts and vacate the other.

"Proposition of Law No. XXI

"When a trial court opinion in a capital case is replete with errors and fails to correctly weigh the aggravating circumstances and mitigating factors the appropriate remedy is vacation of the death penalty.

*650 "Proposition of Law No. XXII

"A capital appellant is constitutionally entitled to an independent review of his conviction and death sentence by both the court of appeals and the Ohio Supreme Court.

"Proposition of Law No. XXIII

"The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution establish the requirements for a valid death penalty scheme. Ohio Revised Code, Section[s] 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 and 2929.05, Ohio's statutory provisions governing the imposition of the death penalty, do not meet the prescribed requirements and thus are unconstitutional, both on their face and as applied."

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