CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2024 TERM

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**NAWAZ AHMED,**

*Petitioner,*

vs.

**TIM SHOOP, Warden,**

*Respondent.*

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*On Petition for a Writ of Certiorari*
To the United States Court of Appeals for the Sixth Circuit

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# PETITION FOR A WRIT OF CERTIORARI

**CAPITAL CASE - NO EXECUTION DATE SET**

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CAPITAL CASE

## QUESTIONS PRESENTED

I

Has the Sixth Amendment right to the assistance of counsel been met when a trial court freezes and takes control of the Defendant's assets, appoints counsel over the Defendant's objection, prohibits the jailed Defendant from attempting to hire his own counsel unless the prospective lawyer first comes before the court to be interviewed by the judge without the Defendant's presence or participation, and then tells the lawyers who come that she intends to use part of the Defendant's funds to pay for appointed counsel and costs and is vague about how much of Ahmed's money will be left for counsel's fees, the Defendant never gains access to his funds and is forced to trial with appointed counsel he does not want and is convicted and sentenced to death? Specifically, did the United States Court of Appeals for the Sixth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent when it denied Mr. Ahmed a COA?

II

Has the Defendant' right to Due Process and Equal Protection of the Law been observed when his *pro se* presentation of his claim that his Sixth Amendment right to hire counsel was denied is deemed not to have been presented to the state courts by his pros se efforts even though his appointed lawyers failed repeatedly to raise the issue in the state courts and the federal courts misapplied a state prohibition against hybrid representation? Specifically, did the United States Court of Appeals for the Sixth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent when it denied Mr. Ahmed a COA by recognizing this as a default without analysis.

## LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases

Statutes



Other Authorities



Constitutional Provisions

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Nawaz Ahmed respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in *Ahmed v. Shoop*, Case No. 21-3542/22-3039 (November 5, 2024).

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit for which Mr. Ahmed seeks issuance of the writ is published at *Ahmed v. Shoop*, 2024 U.S. App. LEXIS 28143, 2024 WL 5125984 (6th Cir. 2024). The decision of the Federal District Court for the Southern District of Ohio, Eastern Division, denying Ahmed's Federal Civil Procedure Rule 59(e) motion appears at 2021 U.S. Dist. LEXIS 87986. The District Court's opinion denying habeas relief appears at *Ahmed v. Houk*, 2020 U.S. Dist. LEXIS 172728. The decision of the Ohio Supreme Court denying relief on direct appeal appears at *State v. Ahmed*, 103 Ohio St. 3d 27 (2004).

## JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 5, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves a state criminal defendant's constitutional right under the Sixth, Eighth, and Fourteenth Amendments.

U.S. Const. amend. VI which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

U.S. Const. amend. VIII, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1, which provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

> (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.

## STATEMENT OF THE CASE

### INTRODUCTION

Judge Jennifer Sargus who presided over Ahmed's capital trial was also the judge in Ahmed's divorce proceedings. The divorce proceedings should have been terminated upon the wife's death, but Judge Sargus kept the case open and froze all of Ahmed's assets. In the criminal case, Ahmed objected to the appointment of counsel saying he was going to hire his own lawyer. Ahmed asked the court repeatedly for access to his funds so he could hire his own lawyer and was repeatedly refused. He raised the issue in court hearings, by motion, and in letters to the court. At various times Judge Sargus said Ahmed would be granted access to

his money in order to hire counsel but with conditions including a requirement that before Ahmed could hire counsel, the lawyer had to appear before Judge Sargus. Ahmed tried to gain control of his money by voluntarily establishing a conservatorship over his funds. When that did not work, he tried to close the conservatorship, but Judge Sargus ordered that the conservatorship judge could not close it. When the conservatorship was finally closed, Judge Sargus ordered that Ahmed's money be deposited with the clerk of courts for her oversight. Ahmed never had free access to his funds, and he raised the issue *pro se* many times.

None of Ahmed's state court counsel (trial, appeal) raised the issue in a straightforward way though the issue is apparent on the face of the record. Only Ahmed's *pro se* objections and filings directly preserved the issue at trial and in subsequent state court proceedings.

Ahmed through counsel raised the denial of his right to hire his own lawyer in his federal habeas corpus petition arguing that the issue had been presented to the state courts through his *pro se* efforts and thus that there was no default. The federal district court found the issue procedurally defaulted due to the lawyers' failure to raise it in state court. The district court found that Ohio law forbids "hybrid representation" and thus that Ahmed's *pro se* filings and objections failed to preserve his claim that he was denied the right to hire counsel of his choice.

Ohio did not prohibit "hybrid representation" until the Ohio Supreme Court's decision in *State v. Martin*, 103 Ohio St. 3d 385 (2004). Prior to *Martin*, the Ohio Supreme Court held that there was not a right to hybrid representation but had not

prohibited it and left the decision of whether to allow it to the discretion of each court. *State v. Thompson*, 33 Ohio St.3d, 1, 6-7 (1987), *State v. Landrum*, 53 Ohio St. 3d 107, 119 (1990). The trial court gave Ahmed permission to file motions and be heard regarding counsel issues and on *pro se* motions if his appointed trial lawyers filed them. ECF No. 92-1, PageID # 7579.

The District Court denied relief and denied a COA. ECF No. 156, Op. & Order, PageID#10574.

The Sixth Circuit panel did not address the impact of Ahmed's *pro se* presentation of his claim to the state courts but said, "even assuming that Ahmed did not procedurally default his counsel-of-choice claim, he still is not entitled to a COA because the district court correctly determined that the merit of the claim is not debatable." The panel decided that "[t]he trial court did not prohibit Ahmed from retaining counsel of his own choosing." Ahmed's efforts to hire his own lawyer were extensive and fairly presented the issue in the state courts as is set out below.

## THE STATE CAPITAL TRIAL PROCEEDINGS

Nawaz Ahmed, a naturalized U.S. citizen of Pakistani origin, was arrested in New York on September 11, 1999, for the aggravated murders of his wife, her sister and the sister's child, and his wife's father. Ahmed and his wife were divorcing, and the final hearing was schedule for September 13, 1999. Under Ohio law, the death of a spouse deprives the divorce court of jurisdiction. *State ex rel. Litty v. Leskovyansky*, 77 Ohio St.3d 97, 99 (1996). Even so, on September 13, 1999, Belmont County, Ohio Common Pleas Judge Jennifer Sargus, in the Ahmed divorce case, placed a restraining order on Ahmed's assets. ECF No. 90-8, Entry, PageID#5257.

Ahmed was returned to Ohio and was indicted on October 7, 1999. ECF No. 90-1, Indictment, PageID#2411. At his arraignment on October 13, 1999, Ahmed informed the court that he would hire private counsel. ECF No. 92-1, Arraign. Tr., PageID #7345. Two public defenders were appointed on a "provisional basis." *Id.*

On November 15, 1999, Judge Sargus, now presiding over both the divorce proceedings and the capital trial, said in the criminal proceeding that she had received correspondence from Ahmed saying that he would hire private counsel. ECF No. 92-1, Hrg. Tr., PageID#7353: ECF No.90-1, Letter to Honorable Judge Jennifer L. Sargus, PageID#2423. Ahmed requested that Judge Sargus, due to her involvement in his divorce proceedings, "recuse" herself from his criminal case. *Id.* at #2423, #2427. Ahmed feared that the judge's knowledge of his finances from the divorce case could cause her to "exhaust my fund [sic] and force me to go without counsil [sic] or depend on court appointed counsil [sic]." *Id.* at #2423.

On November 24, 1999, even though Ahmed had not claimed indigency status or sought appointed counsel, Judge Sargus ordered, in the criminal case, that "no assets are to be expended or committed by defendant or his attorneys or his representatives prior to this court's . . . having made a determination upon his indigency status." ECF No. 90-1, Entry, PageID#2462.

On November 29, 1999, in a pre-trial hearing, the prosecuting attorney informed Judge Sargus that Ahmed was not indigent. ECF No. 92-1, Hrg. Tr., PageID#7377.

On November 30, 1999, Ahmed filed a motion for the "Removal of

Restrictions/Liens, *etc.* on Financial Assets." ECF No. 90-1, Mot., Page ID#2464.

On December 6, 1999, Ahmed objected when Judge Sargus said he either had to waive speedy trial or go to trial with the counsel she had appointed. *Id.* at 92-1, Hrg. Tr., #7385. Ahmed explained that the appointed lawyers told him "their workload is excessive, they cannot devote much time to this case" and said:

> I'm under eviction notice because the same judge [re: Sargus] in the divorce court put my hands tied behind me for not allowing me to use my financial resources to have any counsel, which I don't even have. Now I cannot do anything myself because I don't have the access to the financial resources, which I had, and then court appointed people are not doing their job. . .

*Id.* at #7386. Judge Sargus set the capital trial for January 3, 2000. *Id.* at # 7387.

On December 8, 1999, Judge Sargus removed herself from Ahmed's still open divorce case saying, "Because financial issues in this case have a direct impact upon rulings made in tangential litigation, this matter is transferred to Judge John M. Solovan II." ECF No. 45-4, Dkt. Entry, PageID#839, 90-8, Entry p.2, PageID#5267.

On December 13, 1999, Judge Solovan terminated the divorce proceedings and the domestic relations restraining order on Ahmed's funds. ECF No. 45-4, Entry, PageID#845. For Ahmed's money to become available, however, the order required Ahmed's counsel to notify all the financial institutions that had previously been ordered to freeze Ahmed's accounts. *Id.*

On January 26, 2000, Ahmed entered into a voluntary conservatorship of his assets under R.C. 2111.021. ECF No. 45-3, PageID#821; ECF No. 45-4, PageID#844.

On February 7, 2000, Judge Sargus required that Ahmed file a financial affidavit and said, "upon receipt of a financial affidavit, we can review where and

how the defendant's assets can be spent to compensate the public defender's office." ECF No. 92-1, Hrg. Tr., PageID#7405 -7407. Ahmed said he should be permitted to hire his own lawyer before the court considered using his monies to pay the public defenders. *Id.* The court told Ahmed to "be quiet," said he hadn't hired anyone to date and "I don't want to hear about how you have a right to hire someone, because I have waited for four months for someone to appear in this case." *Id.* at #7408.

Ahmed explained that "It is my choice which kind of attorney I want." *Id.* at #7407. He said he was unable to hire counsel of his choice because Judge Sargus was preventing it with her orders. *Id.* at #7408-7409.

On February 14, 2000, Ahmed provided the affidavit ordered by Judge Sargus. *Id.* at #7425.

On March 9, 2000, Judge Sargus ordered that Ahmed deposit $10,000.00 with the clerk's office to pay the public defender or that he hire his own counsel within 20 days and ordered that a copy of the entry be sent to Ahmed's conservator. ECF No. 90-1, Entry, PageID#2543.

An attorney contacted Judge Sargus and tried to determine the amount of Ahmed's funds that were available to pay for Ahmed's representation. Judge Sargus, explained that

> THE COURT: Yes. I'm pretty sure the 30 is -- at least it's a sum total of 30. I don't know that it was-- the conservator definitely believed that he had as much as 40, maybe 50, that he could put toward his own representation, if I'm recalling correctly. So there are assets there. And I have not-- you know, my—I froze 10,000 for appointed counsel. If you get in the case, I will take that order off.

ECF No. 92-1, Trans., PageID#7392-7393.

On March 14, 2000, Ahmed sent a "Notice of Termination of Conservatorship by Ward Under RC 2111.021." ECF No. 45-4, Notice of Termination, PageID#849. By the terms of the statute the conservatorship is to be terminated upon the direction of the party whose assets are being conserved. R.C. 2111.021.

On March 28, 2000, Judge Sargus issued an order saying that Ahmed "is hereby barred from dissolving the conservatorship . . . in Case No. 00 GD 49." ECF No. 90-1, Entry, PageID#2575.

On April 3, 2000, Ahmed filed a motion for a hearing to terminate the conservatorship. ECF No. 45-3, Motion, PageID#850. Termination was denied:

> Now the last issue is the request to terminate the conservatorship or does want [sic] to make the parties aware that on March 28th of this year that there was a determination and an order by **Judge Sargus** that the conservatorship not be terminated until the happening of certain events.
> . . .
> Okay, on this matter the Court is going to rule Mr. Sustersic, first of all, that the conservatorship not be terminated, reason being that this Court is going to honor **Judge Sargus's** order regarding that same termination and will only terminate the conservatorship on the stipulation set forth by Judge Sargus in her entry of March 28. Those stipulations being that Mr. Ahmed deposit $10,000.00 with the Clerk of Courts, permitted to use his funds for the retention of counsel and upon happening of that event or those events then the conservatorship may be terminated.

ECF No. 92-1, Trans., Page ID#7276-7277 (emphasis added).

On April 7, 2000, Judge Solovan ordered in Case No. 99 cv 403 that Ahmed could use his money to hire counsel under the following conditions:

> Therefore, the court <u>orders defendant to provide the following</u>: Name of his proposed attorney in criminal proceedings; amount of proposed retainer; amount of funds in possession of defendant

> and/or his conservatorship; and revelation to the court of any other assets, if any.
> Upon the court having been assured of such facts, it will **consider** an order the release of necessary funds presently held under the restraining order, to be paid directly to defendant's criminal attorney **with restrictions as to appropriate accounting for expenditures to the court**.
> And a proposed stipulation embodying the order of this court may be submitted by counsel when defendant has provided the necessary information.

ECF No. 92-1, Trans., PageID#7450 (emphasis added).

On April 27, 2000, defense attorney Harry Rinehart met with Judge Sargus and informed the court that he was willing to represent Ahmed for a flat fee once it was clear that Ahmed's money could be accessed. Judge Sargus explained:

> there is a conservatorship downstairs **where I have advised them to hold on to $10,000.00 to pay the Belmont County Public Defender**. The Belmont County Public Defender can submit a bill for their services rendered if they stay in this case.

ECF No. 92-1, Trans., Page ID #7436 (emphasis added). She also told Mr. Rinehart, "If I see the check going to you, the money that we have set aside for attorney fees should go to you." *Id.* at 7436-7437; 7438.

On April 19, 2000, Judge Mark Costine, presiding in Case No. 00 GD-49, held a hearing on Ahmed's motion to terminate the conservatorship, in which Ahmed's need for money to hire counsel was addressed. ECF No. 92-1, Trans., PageID#7279-7280. Judge Costine ordered: "That the Conservatorship shall not be terminated until such time as $10,000.00 is deposited with the Belmont County Clerk of Courts and other orders consistent with the General Division of the Common Pleas Court are complied with; specifically, the order of Judge Sargus of March 8, 2000 in Case

No. 99 CR 192." ECF No. 45-2, Entry, PageID#745; 45-3, Entry, PageID#817.

On May 24, 2000, Judge Sargus and Judge Solovan held a telephonic conference with defense attorneys Don Schumacher and Brian Riggs who were considering representing Ahmed. PageID#7441-7442. Judge Sargus explained:

> Okay. I have appointed Pete Olivito to represent Mr. Ahmed. I have frozen $10,000 for payment of fees associated with that representation. I have a pretrial conference tomorrow scheduled for 3:00, at which time we'll be setting a trial date. If you enter a Notice of Appearance, I will release the $10,000 to you with an understanding that if you do not stay in this case because of Mr. Ahmed's inability to pay you the full $35,000, that money that I free up for you should be returned to the court so that it can be placed in that conservatorship. It should not be returned directly to Mr. Ahmed. As I said, I am willing to release it when you enter your Notice of Appearance.

ECF No. 92-1, Trans., PageID#7443. Judge Solovan then explained that $20,000 was being held by the court, in two suits filed by the estate of Ahmed's deceased wife, that would be used for legal fees only as a last resort. Judge Solovan also explained that additional money was being held in the conservatorship, "but I am not going to invade on the $20,000, if these accounts have otherwise been addressed by Ahmed and the money is gone to another source." *Id.* at 7446.

On June 2, 2000, Judge Sargus informed Ahmed that attorneys Olivito and Nichelson had been appointed to represent him. ECF No. 92-1, Page ID#7464. Olivito told the court that Attorneys Schumacher and Rigg had agreed to represent Ahmed for a retainer of $35,000.00 and he had a letter from the attorneys confirming this. *Id.* at #7466. Judge Sargus told Ahmed that attorneys Schumacher and Rigg had declined representation. *Id.* at #7467. The same day, Judge Sargus

ordered the Clerk of Court to pay Cellmark Diagnostics the sum of $17,425.00. The entry also ordered Ahmed to pay that same amount to the Belmont Clerk of Court. ECF No. 90-1, Entry, Page ID#2611.

On August 22, 2000, Judge Sargus modified her order of March 28, 2000, and said the conservatorship could be terminated with the probate court's approval but required that upon termination Ahmed's funds be deposited with the Clerk of Courts and held in escrow to pay appointed counsel and any counsel of choice that Ahmed hired. ECF No. 90-1, Entry, PageID#2645-2647. Counsel would have to verify counsel's engagement before any funds would be released. *Id.*

In September 2000, Ahmed's income tax return check was sent to him at the Belmont County Jail. The jail administrator asked the prosecuting attorney what to do with Ahmed's money. ECF No. 45-2, Pros. Letter to J. Sargus, PageID#857. On September 20, 2000, Judge Costine sent a letter to Judge Sargus saying the tax refund should go to conservator. ECF No. 90-2, Letter, Page ID#2970.

On September 28, 2000, the court docketed an entry saying, in part, that it had been apprised that "the inventory filed by the conservator in this matter on 4-3-2000 shows funds in the sum of $57,234.25." ECF No. 90-1, Entry, Page ID#2687. Even though Ahmed had no access to these monies, the docket entry also said, "However, the most recent accounting of these funds shows a balance of $18,491.50. *Id.* Immediately thereafter, in another entry the court said it had appointed counsel to represent Ahmed, and that Ahmed had again notified the court "of an intention to retain counsel if funds are released." ECF No. 90-1, Page ID#2689.

On October 6, 2000, Ahmed filed a motion in the trial court to release funds to pay Attorney Rigg. ECF No. 90-1, Mot., Page ID#2691. A similar motion was filed in the conservatorship. ECF No. 45-4, PageID#864.

On October 23, 2000, Ahmed filed a motion in his criminal case asking to have his money released so he could hire counsel of his choice. ECF No. 92-1, PageID#7494. Ahmed's appointed counsel requested that Judge Sargus lift her restraining order against Ahmed's funds because attorney Brian Rigg was going to undertake Ahmed's representation. *Id.* It was also noted that $7,500.00 in cash, which had been taken from Mr. Ahmed at the time of his arrest, was available for release. *Id.*, Page ID#7495-7496. Judge Sargus said, "I will, upon Mr. Rigg's entering -- coming into this court to tell me he's entering an appearance, I will release funds. I'd also like to have the bill for the services that have been rendered by you and Mr. Olivito." PageID#7496.

Ahmed filed a motion to terminate the conservatorship on October 25, 2000. ECF No. 90-8, Conservatorship Dkt., PageID#5060.

On November 9, 2000, Ahmed asked for a copy of an entry showing that Judge Sargus had taken control of his money from Judge Solovan. Judge Sargus responded, "It's not an entry. There was a record made of everything that was said. I believe it was typed up and made part of a transcript. I was under the impression you probably had it. It's not a big deal, you can have it, it will come to you with the file." ECF No. 92-1, Hrg. Tr., PageID#7504. Mr. Ahmed explained that when attorneys Schumacher and Rigg met with him, they said they had already talked

with the judge and she had required a waiver of Ahmed's speedy trial rights if they were to takeover representation. PageID#7532. Ahmed, who had already been incarcerated for more than a year, was not prepared to waive his speedy trial rights. *Id.* Judge Sargus issued a new order restraining Ahmed's assets. ECF No. 90-1, Entry, PageID#2708-2709.

On November 13, 2000, Ahmed's request to end the conservatorship was denied based on "the order of Judge Jennifer L. Sargus, dated November 9, 2000." ECF No. 90-8, Conservatorship Dkt., PageID#5060.

On November 27, 2000, attorney Bob Suhr met with Judge Sargus to verify that, if he represented Ahmed, the court would recognize Ahmed's partial indigency for purposes of expert funding. ECF No. 92-1, Trans., PageID #7557. Judge Sargus said that others would be paid out of the money that Suhr understood was available for his representation. In the following exchange she explained that, out of the fifty to sixty thousand dollars Ahmed had, the cost of six months of legal work by two appointed counsel plus five thousand dollars ($5,000.00) for an expert witness would be deducted and what was left would be available to pay Suhr:

> THE COURT: He would have to pay the two attorneys who had been working on the case since last summer who are appointed to even know what's left in his asset fund.
>
> MR. SUHR: He has to do what now?
>
> THE COURT: There have been court appointed attorneys who have been working on the case since, I think, June or July, June maybe, and they, first, before we get to the issue of what is left in his fund, he's going to have to make payment to the people that have already dedicated six months of service to him.
>
> MR. SUHR: I see.

> THE COURT: So the funds, it's what's in there. Also, I'm going to attach part of it for payment for services rendered.
>
> MR. SUHR: Well, then, there's no point in me sticking around here.
>
> THE COURT: The other thing, if the issue comes up, I was willing to put money into a psychiatrist, you know, if somebody wanted for mitigation, the county would have sponsored, I'm going to put $5,000.00 into that. He's refused to let anybody do anything with that. My suggestion to you is to talk to Mr. Ahmed and see if an attorney/client relationship can be hammered out before you even address any of this.
>
> MR. SUHR: If there's no funding, you know --
>
> THE COURT: I don't know how much would come out of it, but some of it has to for the people – **he's not indigent, he's not indigent**. He's got close to 50, 60 thousand, so something would have to go to the public defender attorneys, two of whom have worked on the case for the past six months.
>
> MR. SUHR: Okay. Well, I guess they're still on the case then.

PageID#7557-7558 (emphasis added).

On December 8, 2000, attorney Joseph Carpino appeared before Judge Sargus and said he was awaiting Ahmed's signature on a fee agreement and that he understood that Ahmed's funds would be released to pay for his representation. ECF No. 92-1, Trans., PageID#7563. Judge Sargus said that Ahmed had approximately fifty thousand dollars, but it would not all be available to pay Carpino because Ahmed had been represented by appointed counsel and "I will require him to make a partial payment for their services." *Id.* at #7564.

On December 21, 2000, Ahmed filed a motion asking the court to address "counsil [sic] of choice forthwith." ECF No. 90-1, Mot., PageID#2768.

On January 2, 2001, Ahmed asked for Judge Sargus' removal from his case because "Your Honor, you have been preventing me from - -." *Id.* at #7573. The judge did not allow Ahmed to speak to the issue underlying his motion to disqualify

her. ECF No. 90-2, Affidavit: ORC 2901.03 Court Disqualification, PageID#2945-2952. Ahmed's affidavit cited his belief that Judge Sargus had denied him the right to counsel of choice by discouraging private counsel who sought to represent him, withholding his funds so he could not hire counsel on his own, and imposing an unconstitutional condition on his exercise of the right to counsel of choice by requiring him to waive speedy trial rights if his own counsel came into the case. *Id.* at #2948-#2950. He also alleged that Judge Sargus, by issuing an order in the divorce case freezing his assets after his wife was deceased, violated his rights to due process, equal justice, the right to counsel, and a fair trial. *Id.* at #2950.

On January 3, 2001, Ahmed's Motion to Lift All Restrictions of Finances /Funds was filed. ECF No. 90-2, Mot. PageID#2832.

On January 8, 2001, Ahmed informed Judge Sargus that he had hired counsel saying, "At the same time, I've exercised my Constitutional right to select an attorney of my choice and have contracted him and he is present in case [sic] in the court, Attorney Joseph Carpino." PageID#7647. Asserting that, due to court expenditures, Ahmed no longer had sufficient funds to hire counsel, Judge Sargus denied representation by Carpino. ECF No. 92-1, PageID#7701-7702.

On January 8, 2001, Ahmed filed an affidavit of disqualification in the Ohio Supreme Court, seeking to remove Judge Sargus from his case. ECF 90-2, OSC Letter, PageID#2944; Aff. Of Disqualification, PageID#2945. He cited Judge Sargus's denial of his right to hire his own lawyer of choice as one basis. *Id.* at PageID#2948, Paragraph 8.

On January 11, 2001, Ahmed presented motions, in court, in an effort to hire his own counsel. ECF No. 92-2, PageID#7840-7841. Judge Sargus told Ahmed to file them, and she would "take a look at them." *Id.* They were filed that day. ECF No. 90-1, Dkt. Entry, PageID#2359, Dkt. #447, 448; 90-2, Motions, PageID#2998, 3000. In the hearing Ahmed told the judge again that he had the right to hire his own counsel because "I am not indigent." ECF No.92-2, Trans., PageID#7841.

On January 12, 2001, the Ohio Supreme Court found Ahmed's affidavit of disqualification "not well taken" and allowed the capital murder trial to proceed. ECF No. 90-2, OSC Entry, PageID#3017. The Entry was docketed in Belmont County on January 16, 2001. ECF No. 90-1, Dkt. Entry, PageID#2358.

On January 16, 2001, Ahmed presented a written motion objecting to his court appointed representation. ECF No. 92-2, Trans., #7868-7869. The motion had not yet been filed with the clerk. Defense counsel were ordered to file it. The motion was overruled. *Id.* It was filed on January 17, 2001, as Ahmed's "Motion to Have Rights (If They Exist) By Court Appointed Counsels As Per Crim. R. 44(C) And Request A Hearing as per Crim R. 44(I) and Crim. R. 11." ECF No. 90-2, Motion, PageID#3020. The capital trial proceeded with Ahmed's appointed counsel.

On January 31, 2001, Judge Sargus ordered that all financial institutions holding Ahmed's funds were prohibited from allowing any withdrawals "of any kind, in any amount, unless directed by this court." ECF No. 90-2, Entry, PageID#3109.

On February 2, 2001, Judge Sargus accepted the jury's recommendation of death. ECF No. 92-5, Trans., PageID#9550. The court appointed the Ohio Public

Defender to represent Ahmed in his direct appeal to the Ohio Supreme Court. *Id.* at #9551. Ahmed informed the court that he already had selected attorney Joseph Carpino as his appellate counsel. See ECF No. 92-5, Page ID#9551-9552.

That same day, Attorney Carpino filed a motion in arrest of judgment and a motion for new trial on behalf of Ahmed. 90-2, Mots., PageID#3110, #3111. On February 5, 2001 Carpino amended the motion for new trial. ECF No. 90-2, Page ID#3137.

On February 8, 2001, Judge Sargus entered an order saying that the scope of Carpino's representation was uncertain and continued the appointment of the Ohio Public Defender. ECF No. 90-2, Entry, #3149. Carpino's last filing for Ahmed was on April 11, 2001. 90-3, Mot., PageID#3249.

On February 14, 2001, Judge Sargus ordered the prosecutor to "file judgment liens against assets of Awaz [sic] Ahmed for attorney fees and other associated costs now ordered by the court." ECF No. 90-3, Dkt. Entry, PageID#3355.

On March 12, 2001, a judgment lien was entered against Mr. Ahmed's funds in the amount of sixty-eight thousand, four hundred and sixty dollars and thirty-six cents ($68,460.36). ECF No. 90-2, Entry, PageID#3181-3182.

## STATE APPELLATE PROCEEDINGS

Ahmed engaged attorneys Paul Mancino and Brett Mancino for the appeal of his convictions and death sentence. On May 7, 2001, the Mancinos filed Ahmed's notice of appeal in the Ohio Supreme Court. ECF No. 90-3, NOA, PageID#3288.

On June 15, 2001, Judge Solovan, in Ahmed's wife's estate proceedings, sent an entry to Paul Mancino saying that some funds "may" be available for Ahmed's

legal fees and requiring Ahmed to submit information about his lawyer and representation. The order said that, once that information was received, it would consider releasing funds "with restrictions as to appropriate accounting." The order concluded saying that it was subject to the order in Ahmed's criminal case that placed a lien on his funds. ECF No. 90-3, Entry, PageID#3346-3348.

On October 4, 2001, the Mancinos moved to withdraw. ECF No. 90-03, Mot., PageID#3313.

On December 5, 2001, the Mancinos' motion to withdraw was granted. ECF No. 90-03, Mot., PageID#3319.

On January 31, 2002, the Ohio Public Defender was appointed to represent Ahmed on appeal. ECF No. 90-3, Entry, PageID#3438.

Ahmed filed a motion to disqualify the Ohio Public Defender on April 24, 2002, ECF No. 90-3, Mot., PageID#3503, and May 21, 2002. ECF No. 90-5, Mot., PageID#3885; ECF No. 90-5, Aff., PageID#3915; ECF No. 90-5, Aff. In Support, PageID#3933-3939. The Ohio Supreme Court denied Ahmed's motion. ECF No. 90-3, OSC Dkt., PageID#3281-3287; ECF No. 90-3, Entry, PageID #3524. On May 21, 2002, he moved to strike the brief filed by the Ohio Public Defender lawyers in part because they had failed to recognize that he was denied the right to counsel of choice. ECF No. 90-5, Mot. To Strike OPD Brief, PageID#3885, 3890-3891; ECF No. 90-5, Aff. In Support, PageID#3915. Both motions were denied. ECF No. 90-3, Entry, PageID#3524.

On July 15, 2002, Ahmed filed a *pro se* motion asking the Ohio Supreme Court to order the release of his funds so he could hire counsel of his choice for his appeal. ECF No. 90-5, Mot., PageID#3974.

On August 16, 2002, the Ohio Supreme Court denied Ahmed's motion. ECF No. 90-5, Entry, PageID#4006.

Ahmed again presented his denial of the right to hire his own counsel claim in a *pro se* motion for reconsideration. ECF No. 90-5, Mot., PageID#4182; Page ID #4190-4191. Ahmed further pursued the claim in his "Continued in Third Part Motion to Reconsider." ECF No. 90-5, Page ID #4227-4232. The Ohio Supreme Court denied Ahmed's motion on October 27, 2004. ECF No. 90-5, Reconsideration Entry, PageID#4234.

## THE DISTRICT COURT RULING

In Ahmed's Habeas Petition (ECF No. 35) and subsequent filings, Ahmed argued that he was denied his "fundamental right to his own funds to employ counsel of choice, plan his defense and employ experts of his choosing." Petition, ECF No. 35, PageID#173. He claimed that Judge Sargus, through her own court orders and working in concert with other county judges, prevented Ahmed from accessing his personal funds to hire counsel of his choice and that other state actors aided, assisted, and supported the trial court in doing so.

The district court found that Ahmed's denial of counsel of choice claim was "both procedurally defaulted and without merit" and said it could not 'conclude that reasonable jurists would find [its] resolution of this claim on either basis debatable

or wrong." The court then denied Ahmed a certificate of appealability. ECF No. 156, Op. & Order, PageID#10574.

Ahmed filed a Rule 59(e) motion to alter or amend the judgment. ECF No. 160. The Magistrate Judge recommended that Ahmed's Rule 59(e) Motion be denied. R&R, ECF No. 174, PageID#10980-10987, and the District Court adopted the Magistrate's recommendation. ECF No. 194, Decision and Order Denying Petitioner's Rule 59(e) Motion to Alter or Amend Judgment.

The District Court determined, in its initial denial of habeas relief, that Ahmed's *pro se* efforts to vindicate his right to hire counsel of choice did not preserve the issue because Ohio prohibits hybrid representation (counsel and client) and Ahmed was represented by appointed counsel, who did not raise the issue, throughout his trial and state appellate proceedings. ECF No. 156, Op. & Order, PageID#10561-10564. The District Court affirmed this decision when ruling on the Rule 59 motion without addressing the facts that hybrid representation was not prohibited until October 27, 2004 when *State v. Martin,* 103 Ohio St.3d 385 (2004) was decided and Judge Sargus had allowed Ahmed's *pro se* motions to be filed and considered.Judge Sargus held hearings and issued orders regarding Ahmed's motions for removal of appointed counsel, the release of his funds so he could hire his own lawyer, and his desire to represent himself. See ECF No. 92-1, Trans., PageID#7591, 7648-7704; ECF No. 90-1, Entry, Page ID #2382-83; ECF No. 90-2, Dkt. Entry, Page ID#3056 and facts set out in Ahmed's Objections at ECF No. 150, PageID#10406-10424.

The District Court found Ahmed's efforts in the Ohio Supreme Court to hire his own counsel and raise the trial court's denial of his Sixth Amendment right to hire his counsel defaulted by appellate counsel's failure to present it and decided that Ahmed's *pro se* motions filed in the Ohio Supreme Court did not preserve the issue due to the prohibition against hybrid representation. The district court also said that the Ohio Supreme Court's denials were not rulings on the merits of Ahmed's *pro se* filings and declined to apply the *Harrington v. Richter*, 562 U.S. 86, 97 (2001) "presumption that state court summary dispositions are merits decisions." ECF No. 156, Op. & Order, PageID#10561.

The Ohio Supreme Court did not decide until October 27, 2004, that hybrid representation is prohibited. *State v. Martin*, 103 Ohio St.3d 385 (2004). In *Martin*, the court held for the first time that the right to the assistance of counsel and the right to *pro se* representation could not be exercised simultaneously. *Id.* at syl. 1. Prior to *Martin*, the Ohio Supreme Court had ruled that there was not a right to hybrid representation but had not prohibited it and left the decision of whether to allow it to the discretion of each court. *State v. Thompson*, 33 Ohio St.3d, 1, 6-7 (1987), *State v. Landrum*, 53 Ohio St. 3d 107, 119 (1990).

The district court mistakenly relied on cases that arose after the Ohio Supreme Court's decision in *Martin*, to find that the Magistrate Judge's R&R recommending against Mr. Ahmed on this issue "is consistent with the decisions of other federal habeas courts that have addressed this issue." ECF No. 156, Op., PageID#10562 citing *Whatley v. Warden*, No: 2:16-cv-676, 2017 WL 1196168 (S.D.

Ohio Mar. 31, 2017); *Rojas v. Warden*, 2015 WL 631183, *6 (N.D. Ohio Feb. 12, 2015); *Ysreal v. Warden*, 2014 WL 7185264, *9 (S.D. Ohio Dec. 16, 2014); *Storks [sic] v. Sheldon,* No. 3:12–cv–191, 2013 WL 3992592, at *35 (N.D. Ohio Aug.5, 2013); *Wallace v. Sexton,* No. 13–5331, 2014 WL 2782009, at *8 (6th Cir. 2014); *Hill v. Carlton*, 399 F. App'x 38, 42-45 (6th Cir. 2010). All the cited decisions post-date *Martin* and thus have no bearing on Ahmed's case.

Exhaustion does not require a state court adjudication on the merits of the claim at issue. *Smith v. Digmon*, 434 U.S. 332, 333 (1978). All that was required of Ahmed was that he present his claim so the state courts had the opportunity to rule on it. Even though the district court did not recognize the state court decisions on Ahmed's motions as rulings on the merits of his denial of counsel of choice claim, the Ohio courts had the discretion and thus the opportunity to rule on Ahmed's claim when he filed it.

The district court failed to consider the unique circumstances Ahmed faced that made preservation of this issue through the actions of his appointed counsel untenable. See ECF No. 150, Corrected Objections, PageID#10449-10450. Even though appointed counsel are normally the ones to raise issues with the court, where the issue is the client's desire to remove the appointed lawyers and hire counsel of his choice, counsel are compromised in their ability to recognize and pursue the client's interest in obtaining other lawyers.

If a default were found, Ahmed can show cause and prejudice as a result of his appellate counsel's ineffective assistance when they failed to raise the issue of

the denial of his right to hire his own lawyer. Moreover, Ahmed's appellate counsel advised him that he could file *pro se* claims on appeal in the Ohio Supreme Court. On March 28, 2002. Doc. 66-1, Traverse Ex. A, PageID#1332.

On April 12, 2002, Ahmed wrote to one of his State Public Defender lawyers requesting that she present a claim that the trial court placed restraints on his funds and denied him his right to counsel of choice. Doc. 66-3, Traverse Ex. C, PageID#1340. On July 7, 2002, Ahmed wrote another letter complaining that his Public Defender lawyers had failed to present a claim that Belmont County courts placed restraints on his funds thereby denying him his right to counsel of choice. Doc. 66-4, Traverse Exhibit D, PageID#1351.

On November 19, 2002, Ahmed was advised by an Asst. Public Defender to seek permission to file any issues not raised by his Ohio Public Defender in a *pro se* brief and said the issues could be raised in a motion to reopen his appeal claiming ineffective assistance. Doc. 66-5, Traverse Exhibit E, PageID#1359.

Appellate counsel were to act as Ahmed's agents. See *Coleman v. Thompson*, 501 U.S. 722, 753-754 (1991). If hybrid representation was prohibited at the time, Appellate counsels' advice, to Ahmed that he could raise his claims *pro se,* is cause for any default in Ahmed's *pro se* presentation of the denial of his right to hire counsel of choice and appellate counsel was ineffective for failing to raise the claim themselves. Counsel's ineffectiveness also establishes cause.

The unique character of this issue and the unusual stresses it places on the normal court processes of an adversarial system allowed it to be ignored by Ahmed's

advocates. Ahmed had no way to raise the denial of his right to hire his own lawyer except through his *pro se* efforts when his appointed lawyers would not do it. If being saddled with unwanted appointed counsel precludes being able to raise such a claim, this is a wrong without a remedy and is constitutionally intolerable where the fundamental Sixth Amendment right to hire one's own counsel is at stake. See *Marbury v. Madison*, 5 U.S. 137 (1803). Due Process requires that there be a path to review of this claim. Fourteenth Amendment, U.S. Constitution.

Prejudice has not been definitively defined. *Amadeo v. Zant*, 486 U.S. 214, 221 (1988). However, it can be said with certainty that had Ahmed not been prevented by Judge Sargus's orders from obtaining counsel of his choice as soon as he was arrested, hired counsel would have pursued Ahmed's interest in a speedy trial from the start. Ahmed was persistent in his demands for a speedy trial. On at least nine (9) separate occasions Ahmed complained to Judge Sargus that he was being denied his right to a speedy trial: ECF No. 92-1, Trans., PageID#7835-7837; ECF No. 92-1, Letter, PageID#2514-2515; ECF No. 90-1, "Various Motions," PageID#2545-2546, 2549, 2550; ECF No. 90-1, Letter, PageID#2582, 2583-2585; ECF No. 90-1, Letter: "Financial Matters", PageID#2596, 2599; ECF No. 90-1, Mot., PageID#2674; ECF No. 92-1, Hrg. Tr., PageID#7532; ECF No. 90-2, Motions, PageID#2828; ECF No. 90-2, Mot., PageID#2883.

Prejudice is also apparent in the length of Ahmed's pre-trial incarceration, and the indignities and harms he suffered while awaiting trial. Ahmed suffered oppressive pre-trial incarceration. He was assaulted while in the jail awaiting trial.

ECF No. 90-1, Letter, PageID#2532-2535, 2600 (news coverage of assault); ECF No. 92-1, Trans., PageID#7650-7651. He is Muslim and during a religious fast, his food was taken away before the sun set which was when he could break his fast and eat. ECF No. 92-1, Trans., PageID#7523-7524, ECF No. 90-1, Letter, PageID#2548 (food). He was in jail awaiting trial for 16 months. And he lost his apartment. ECF No. 90-1, Letter, PageID#2455 (eviction).

Other critical aspects of Ahmed's defense were lost as well. By forcing Ahmed to proceed with appointed counsel when he had the funds to hire his own lawyer and wanted to do that, time was lost to the defense and gifted to the State. All the while that Ahmed was trying to gain access to his funds to hire counsel, the State was preparing a case against him. Had Ahmed been permitted to exercise his constitutional right to hire counsel, he would have had lawyers pursuing his interests from the start, the precious preparation time lost would have been used to Ahmed's benefit including mitigation preparation, and the possibility of a plea or negotiation for life would have been explored protecting his Eighth Amendment rights. There is more than a reasonable probability that the outcome of Ahmed's trial would have been different if he had been allowed to hire his own lawyer.

## THE SIXTH CIRCUIT DENIAL OF A COA

Although the Sixth Circuit panel cited the correct standard for issuing a COA, it failed to apply that standard. The panel relied heavily on quotes that allow limited review of COA requests. Order, Page 3. The Sixth Circuit panel did not address the impact of Ahmed's *pro se* presentation of his claim to the state courts but said, "even assuming that Ahmed did not procedurally default his counsel-of-

choice claim, he still is not entitled to a COA because the district court correctly determined that the merit of the claim is not debatable." *Id.* at 4. The panel decided that "[t]he trial court did not prohibit Ahmed from retaining counsel of his own choosing." *Id.*

## REASONS FOR GRANTING THE WRIT

### I. Certiorari Should Be Granted Because Reasonable Jurists Could Debate Whether Ahmed's Pro Se Objections and Filings Preserved his Claim that he Was Denied His Sixth Amendment Right to Hire His Own Counsel in His Capital Case and Thus a COA Should Have Been Granted.

This Court has made it clear that, "The COA inquiry . . . is not coextensive with a merits analysis." *Buck v. Davis*, 580 U.S. 100, 115 (2017). "[A] prisoner seeking a COA need only demonstrate 'a substantial showing'" that the district court erred in denying relief. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) and 28 U.S.C. § 2253(c)(2)). This "threshold inquiry" is met so long as reasonable jurists could either disagree with the district court's decision or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327, 336. A COA is not contingent upon proof "that some jurists would grant the petition for habeas corpus. A claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. In short, the grant or denial of a COA is to be based on "the debatability of the underlying constitutional claim [or procedural issue], not the resolution of that debate." *Id.* at 342; see also *id.* at 348 (Scalia, J., concurring) (noting that a COA is required when the district court's denial of relief is not

"undebatable").

Like the court in *Buck v. Davis*, "The court below phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief—but it reached that conclusion only after essentially deciding the case on the merits." 580 U.S. at 116 (citation omitted).

Although the Sixth Circuit cited the debatability requirement, it merely said that all claims must be presented to the state courts and never addressed whether Ahmed's *pro se* objections and filings did just that.

The Sixth Circuit panel then moved directly to the constitutional question and held that "The trial court did not prohibit Ahmed from retaining counsel of his own choosing." The panel cited the fact that some lawyers met the trial court's requirement that they come before the court before Ahmed could hire them. It observed that "The trial court met with prospective counsels, telling each of them that they would have access to all but twenty-thousand dollars of Ahmed's assets when they filed an appearance" but failed even to consider how many were deterred by the requirement of an unpaid appearance. Moreover, the panel did not consider the other court-imposed restrictions on Ahmed's access to his funds including the requirement that invoices would be reviewed by the court before or if they were paid. Ahmed was absolutely barred from accessing his money during the time his assets were frozen. After that, if he and his prospective counsel could met the court's unusual requirements including requiring counsel to come before the court

before being hired, it was theoretically possible for him to hire someone. However, that did not happen.

When Ahmed finally found private counsel who would try to represent him under the circumstances imposed by the court, Ahmed informed the trial court that he had hired counsel saying, "I've exercised my Constitutional right to select an attorney of my choice and have contracted him and he is present in case [sic] in the court, Attorney Joseph Carpino." PageID #7647. Asserting that, due to court expenditures, Ahmed no longer had sufficient funds to hire counsel, Judge Sargus denied representation by Carpino, saying:

> Your request will be treated as a motion that you be substituted as counsel, and that you be substituted and that the other attorneys be discharged. Now, in so much as that retainer that you've requested cannot be paid from funds that this court has, and that certainly in combination with a $15,000 Selmark [sic] bill, a $1,900 psychological bill, and any other expenses the court records don't disclose that type of asset, you must be treated as a court-appointed attorney. Under the rule of *McKee vs. Harris* and *State vs. Glasgow*, an appointed attorney for an indigent defendant is not to be selected by that indigent defendant but by the court. However, even if I were willing to disobey that ruling because I know you want this case, I couldn't. You aren't certified, and so you cannot participate. And the motion of January 5th to become trial counsel is overruled.

Doc. 92-1, PageID#7701-7702. Here the court makes clear that Ahmed's purported indigency was created by the court's expenditures of his money. Moreover, indigent clients are not required to accept appointed counsel. Among their options are pro bono representation, contracts for future payment with willing lawyers, funding from family and friends, or self-representation. Indigency status is only relevant when the defendant requests appointed counsel. In Ohio, only appointed counsel are

subject to death penalty representation certification requirements. Ohio Supreme Court Rules for the Appointment of Counsel in Capital Cases, Section 5. In that same hearing the court found Ahmed's chosen counsel in contempt because:

> You have stated that the court's rulings shepparding the defendant's funds for his defense are earmarked for wrongful payment. And you have repeated that the proceeding is a travesty of justice. You have accused the judge of prejudice. All of this is done as an officer of the court.

ECF No. 92-1, PageID 7702.

Reasonable jurists could debate whether Ahmed's appellate counsel were ineffective for failing to raise the right to counsel of choice issue in his appeal to the Ohio Supreme Court. The issue was so obvious on the face of the record that the Ohio Supreme Court mentioned it twice in its opinion. It is also impossible to review the record and not be aware that Ahmed sought continuously to assert his right to hire counsel of choice and wrote to his appellate lawyers asking that they do so. There was no reason not to directly assert the claim. It is intertwined with claims that were raised on appeal including the denial of Ahmed's right to self-representation and his desire to be rid of his unwanted appointed counsel. "[I]t is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of the defendant's conviction or punishment." American Bar Association, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Revised Edition (February 2003), 31 Hofstra Law Review 913, 968 (2003). Instead of raising this claim even when asked by Ahmed to do so, his appellate lawyers told him he should file it himself. He did and

the district court found his claim defaulted.

Reasonable jurists could also debate whether the Ohio Supreme Court's recognition of the fact that there is no right to hybrid representation (counsel and the accused acting together) but permitting courts the discretion to allow it, is the same as the rule adopted in *State v. Martin*, 103 Ohio St.3d 385 (2004) that prohibited hybrid representation. The difference between the absence of a right and a court-imposed prohibition is a distinction many jurists would recognize. The question of whether the two have the same meaning (not having a right vs. being prohibited) is debatable based on definitions alone.

The concept of "availability" adopted by the district court in deciding that Ahmed's "funds were always available for Petitioner to use to hire his own counsel," ECF No. 156, Op. & Order, PageID#10567, is debatable. This is evidenced by other circumstances in which limitations and restrictions on access to fundamental rights resulted in making those rights unavailable. Just as the ballot box is unavailable when taxes or literacy tests restrict access to voting, reasonable jurists could debate whether Ahmed's right to hire counsel of choice was available to him when the trial court took control of his money, withheld it entirely for six months, and then placed restrictions on Ahmed's access to it for the remainder of the time his trial case pended and the initiation of his appeal was required. Reasonable jurists could debate whether the special burdens Judge Sargus placed on Ahmed's ability to hire his own lawyer, assuming *arguendo* that Ahmed could ever have jumped through enough hoops fast enough to hire his own lawyer, actually allowed him to exercise

his constitutional right to hire counsel of choice.

Reasonable jurists could debate whether the District Court's determination that Ahmed was "at all times represented by appointed counsel," ECF No. 156, Op. & Order, PageID#10570, when he vociferously wanted to hire his own lawyer, complied with the right set out in *Wheat v. United States*, 486 U.S. 153 (1988) and the Sixth Amendment.

The right to hire counsel of choice is well established and was well established at the time of Ahmed's appeal. *Wheat* v. *United States,* 486 U.S. 153 (1988). Certainly, the recognition that "To force a lawyer on a defendant can only lead him to believe that the law contrives against him," *Faretta v. California*, 422 U.S. 806, 834 (1975), calls into question the assumption that an unwanted, appointed lawyer is the Sixth Amendment equivalent of a lawyer chosen and hired by the defendant. citing *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) and *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."

The impediments placed on Ahmed's ability to hire his own lawyer were great. His funds were frozen. Any lawyer he wanted to hire had to make a trip to the courthouse to meet with Judge Sargus. From discussion to discussion the other restrictions on his funds varied but the amount available was always unclear and the reasons ranged from requiring that Ahmed pay for the appointed counsel he did not want to DNA testing, to expert witnesses. This was a death penalty trial. Even

a pole tax of $1.50 was too great an impediment to the exercise of the constitutional right to vote. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1965)

The District Court cited trial counsel's remark at sentencing that "no other counsel from any other part of the State of Ohio wished to become involved in this case after they found out exactly what they had to deal with" (at ECF No. 92-5, at PAGEID 9548) as evidence that the trial court's taking and controlling Ahmed's funds was not the reason he had been unable to hire counsel. ECF No. 156, Op. & Order, PageID#10573-74. In fact, what the record shows is that every lawyer who made an effort to represent Ahmed learned that the money to pay them was in the court's hands, the amount of money available was uncertain each time the court was asked and varied from attorney discussion to attorney discussion, that any lawyer hired would have to submit explanations and invoices to the court rather than the client, and that approval of funding was dependent on the court paying others first.

## II. Certiorari Should Be Granted Because Reasonable Jurists Could Debate Whether The Freezing Ahmed's Assets and the Restrictions Imposed on His Ability to Freely Hire His Own Lawyer Violated his Sixth Amendment and Fourteenth Rights and Thus a COA Should Have Issued.

Judge Sargus placed unwarranted restrictions on Ahmed's access to his funds to hire counsel and on his ability to hire counsel as guaranteed by the Sixth Amendment. The trial court took control of Ahmed's money, withheld it entirely for six months, and then placed restrictions on Ahmed's access to it for the remainder of the time his trial case pended and when the initiation of his appeal was required. Reasonable jurists could debate whether the special burdens Judge Sargus placed

on Ahmed's ability to hire his own lawyer actually allowed him any opportunity to exercise his constitutional right to hire counsel of his choice. And he was not allowed to hire his own lawyer but was forced to trial with appointed counsel he did not want and required to pay for them.

The right to hire counsel is well established and was well established at the time of Ahmed's trial and appeal. *Wheat* v. *United States,* 486 U.S. 153 (1988). "It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932). Ahmed did not get that fair opportunity.

The trial court required proof of indigency and with held access to Ahmed's funds when nothing in the law allowed either. Indigency is only relevant if the client seeks funding from the court. Defendants' financial status and assets are not subject to court control when the defendant has not brought his financial condition before the court.

The impediments placed on Ahmed's ability to hire his own lawyer were great. His funds were frozen. Any lawyer he wanted to hire had to make a trip to the courthouse to meet with Judge Sargus. From discussion to discussion the other restrictions on his funds varied but the amount available was always unclear and the reasons ranged from requiring that Ahmed pay for the appointed counsel he did not want to DNA testing, to expert witnesses. This was a death penalty trial. Even a pole tax of $1.50 was too great an impediment to the exercise of the constitutional right to vote. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1965). How

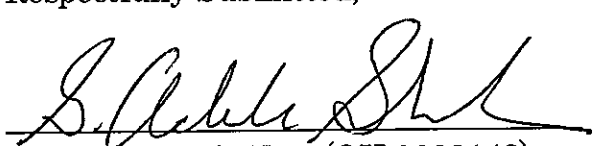
much greater then is the impediment to the right to hire counsel when the court takes control of the defendant's money, requires counsel to travel, unpaid, to a courthouse, and then fails to inform the lawyers trying to represent Ahmed how much money might be available for their representation in a capital case. "The degree of infringement . . . is irrelevant." *Id.* And the prejudice to Ahmed is immeasurable. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006).

This Court has recognized that "To force a lawyer on a defendant can only lead him to believe that the law contrives against him," *Faretta v. California*, 422 U.S. 806, 834 (1975), calls into question the assumption that an unwanted, appointed lawyer is the Sixth Amendment equivalent of a lawyer chosen and hired by the defendant." *Id.* citing *Wheat v. United States*, 486 U.S. 153, 159, (1988) and *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Ahmed bore unconstitutional burdens imposed by the trial court judge, that denied him his right to hire counsel, to be treated equally under the law in his ability to hire counsel, and to due process. The Sixth Circuit failed to apply the correct standard for assessing a COA request.

**Conclusion**

For all of the reasons set out herein, and in the interest of justice, Nawaz Ahmed respectfully requests that the writ be granted.

Respectfully Submitted,



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Nos. 21-3542/22-3039

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



NAWAZ AHMED,

Petitioner-Appellant,

v.

TIM SHOOP, Warden,

Respondent-Appellee.

ORDER

Before: SILER, WHITE, and LARSEN, Circuit Judges.

Nawaz Ahmed, a death-row inmate, appeals from a district-court judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The district court denied Ahmed a certificate of appealability (COA). Ahmed now applies for a COA for two claims. Ahmed also moves to exceed the page limit for the COA application. Ahmed has filed a pro se motion to stay post-conviction proceedings in the Belmont County Court of Common Pleas. And the Warden moves to extend the time for responding to the COA application.

In October 1998, Lubaina Ahmed, Ahmed's wife, started divorce proceedings. Ahmed did not want to end the marriage. The final hearing for the divorce proceedings was scheduled for Monday, September 13, 1999. Lubaina's sister was scheduled to testify and arrived in Columbus, Ohio on September 10. When Lubaina's sister did not call her husband, he called the Sheriff's Department. On September 11, the Sheriff's Department found a dead body in Lubaina's garage and three dead bodies in her basement, along with Ahmed's employee badge. The bodies were identified as Lubaina, her father, her sister, and her niece. Each died from skull fractures and a large cut on the neck. New York police arrested Ahmed at JFK International Airport, where he had checked in for a flight to Lahore, Pakistan. When police arrested Ahmed, he was carrying his will and thousands of dollars in cash and travelers' checks and had a large laceration on his right

Appendix A

thumb. An Ohio jury convicted Ahmed of four counts of aggravated murder, for which he was sentenced to death. The Ohio Supreme Court affirmed Ahmed's convictions and sentence. *State v. Ahmed*, 813 N.E.2d 637, 669 (Ohio 2004).

The state courts denied post-conviction relief. *State v. Ahmed*, No. 05-BE-15, 2006 WL 3849862, at *21 (Ohio Ct. App. Dec. 28, 2006). The Ohio Supreme Court denied further review. *State v. Ahmed*, 866 N.E.2d 512 (Ohio 2007) (table). And the state courts denied Ahmed's application to reopen his direct appeal. *See State v. Ahmed*, 886 N.E.2d 870 (Ohio 2008) (table).

In May 2008, Ahmed filed his § 2254 petition. Over Ahmed's objections, the district court adopted the magistrate judge's report and recommendation and denied habeas relief. The district court also denied a COA. Ahmed filed a pro se notice of appeal. (Case No. 20-4153). He then moved to alter or amend the judgment and the district court denied relief. He appealed again, this time through counsel. (Case No. 21-3542). The district court then denied Ahmed's pro se motion to extend the time to appeal the denial of a separate post-judgment motion. In response, Ahmed filed another pro se notice of appeal. (Case No. 22-3039). On March 4, 2024, this court consolidated all three cases, dismissed the first appeal (Case No. 20-4153) as duplicative, and denied Ahmed's motion to proceed in forma pauperis (IFP) in the third appeal (Case No. 22-3039). (Case No. 22-3039, Doc. 19). The court also warned Ahmed that, unless he paid the $505 appellate filing fee within 30 days of that order's entry, it would dismiss Case No. 22-3039 for want of prosecution. (*Id.*).

In the COA application now before the court, Ahmed alleges that the trial court denied him his right to hire counsel of his choice (ground 1) and erroneously admitted gruesome and inflammatory photographs during the guilt and penalty phases of trial (ground 13).

A state prisoner must obtain a COA to appeal from the denial of § 2254 relief. To do so, the prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(1)–(2). A prisoner makes a substantial showing by demonstrating 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.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). If a district court has rejected constitutional claims on the merits, a prisoner "must demonstrate that reasonable jurists would find the district court's assessment of the . . . claims debatable or wrong." *Id.* And when evaluating whether constitutional claims are debatable, we do not engage in a "full consideration of the factual or legal bases adduced in support of the claims." *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). Rather, we engage in a "limited" review. *Id.* at 117. We may therefore find a claim "debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338. If a district court has rejected a claim solely on a procedural basis, a COA should issue if the petitioner shows that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Ground 1: Ahmed was denied the right to hire counsel of his choice.

Ahmed argues that the trial court denied him his right to hire counsel of his choice even though he was not indigent. The Warden responds that the district court properly determined that this claim was both procedurally defaulted and without merit.

Ahmed did not raise this claim on direct appeal. He did, however, raise it in a pro se motion for reconsideration, which the state court denied. Ahmed then applied to reopen his direct appeal, asserting that appellate counsel was ineffective for omitting this claim. The state court denied that application as untimely.

Ahmed raised the claim on § 2254 habeas review. The district court denied relief, determining that the claim was procedurally defaulted because Ahmed did not raise it on direct appeal and state law did not permit hybrid representation. The district court also determined that the claim lacked merit because Ahmed presented no evidence that he was prevented from using his funds to retain private counsel.

A petitioner must exhaust state-court remedies to obtain habeas relief. 28 U.S.C. § 2254(b)(1)(A). To satisfy the exhaustion requirement, a petitioner "must have argued the claim's factual and legal basis at each level of the state court system." *Whitman v. Gray*, 103 F.4th 1235, 1238 (6th Cir. 2024). Ahmed argues that he exhausted this claim.

However, even assuming that Ahmed did not procedurally default his counsel-of-choice claim, he still is not entitled to a COA because the district court correctly determined that the merit of the claim is not debatable. The Sixth Amendment guarantees a criminal defendant the right to counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). "[A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." *Id.* (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988)). However, "[t]he central teaching of *Wheat* is that a criminal defendant's right to counsel of his choosing is not unlimited." *Jones v. Bradshaw*, 46 F.4th 459, 475 (6th Cir. 2022). This court has recognized that the right to counsel of one's choosing can be balanced against public interest, fairness, and the trial court's schedule. *See id.* at 475–76 (citing *Gonzalez-Lopez*, 548 U.S. at 152).

The trial court did not prohibit Ahmed from retaining counsel of his own choosing. From the outset, Ahmed availed himself of appointed counsel and resisted the trial court's efforts to determine his financial assets to determine indigency. Then, Ahmed simply did not retain counsel as he said he would. The trial court met with prospective counsels, telling each of them that they would have access to all but twenty-thousand dollars of Ahmed's assets when they filed an appearance. None did, with at least one declining representation because Ahmed would not waive his right to a speedy trial. The trial court engaged in this process to ensure that Ahmed's assets would be spent on his criminal defense. Reasonable jurists would not find the district court's decision debatable or wrong.

Ground 13: The trial court erroneously admitted gruesome and inflammatory photographs.

Ahmed argues that the trial court's admission of the prosecution's photographs and videotape from the crime scene and certain autopsy slides during the guilt and penalty phases denied him a fair trial. The Warden responds that the district court properly denied habeas relief.

On direct appeal, the Ohio Supreme Court determined that the photographs and videotape from the crime scene were "gruesome" but the "probative value of each one outweighed any prejudicial effect" because they "helped to prove the killer's intent and illustrated the testimony of detectives who described the crime scene" and "gave the jury an 'appreciation of the nature and circumstances of the crimes.'" *Ahmed*, 813 N.E.2d at 656, 657 (quoting *State v. Evans*, 586 N.E.2d 1042 (Ohio 1992)). The Ohio Supreme Court first determined that any repetition in the admission of both the photographs and videotape from the crime scene and the autopsy photographs was harmless error. *Id.* at 656-57. It then found the autopsy photographs "gruesome" but properly admitted because they "illustrated the coroner's testimony in describing the multiple injuries sustained by all four victims" and "helped prove the killer's intent." *Id.* at 657. And it held that the admission of some photographs at the penalty phase was appropriate because they "helped demonstrate the aggravating circumstances in this case." *Id.*

The district court denied relief on this claim, determining that the state court's decision was neither egregious nor incorrect.

"[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions," such as the admission of evidence. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). However, "[i]f a ruling is especially egregious and 'results in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief.'" *Wilson v. Sheldon*, 874 F.3d 470, 475 (6th Cir. 2017) (quoting *Bugh v. Mitchell*, 328 F.3d 496, 512 (6th Cir. 2003)).

Ahmed relies on *Payne v. Tennessee*, 501 U.S. 808 (1991), to support this claim. But *Payne* did not address a due process violation. *See Stewart v. Winn*, 967 F.3d 534, 539 (6th Cir. 2020). We rejected a similar claim in *Frazier v. Huffman*. 343 F.3d 780, 789–90 (6th Cir. 2003) (holding that the Ohio Supreme Court's ruling upholding the admission of "multiple photographs of [the victim's] corpse was not an unreasonable application of federal law as articulated by the Supreme Court"). Reasonable jurists therefore would not find the district court's decision to deny Ahmed relief on this claim debatable or wrong.

For the foregoing reasons, we **DENY** Ahmed's COA application and pro se motion to stay the state court post-conviction proceedings. We **DENY** Ahmed's motion to proceed IFP as moot. We also **GRANT** Ahmed's motion to exceed the page limit. And we **GRANT** the Warden's motion for an extension of time. Finally, because Ahmed has not paid the appellate filing fee in No. 22-3039, we **DISMISS** that case for want of prosecution.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**NAWAZ AHMED,**

**Petitioner,**

**v.**

**Case No. 2:07-cv-658**
**JUDGE WATSON**
**Magistrate Judge Merz**

**MARK C. HOUK,**

**Respondent.**

## OPINION AND ORDER

This capital habeas corpus case is before the Court on Petitioner's Objections, ECF No. 190, to the Magistrate Judge's Report and Recommendations, ECF No. 174, recommending denial of Petitioner's Rule 59(e) Motion to Alter or Amend the Judgment, ECF No. 160. Respondent has replied to the Objections. Resp., ECF No. 192.

When a party objects to a Magistrate Judge's Report on a dispositive motion, the District Judge is required by Rule 72(b) of the Federal Rules of Civil Procedure to review *de novo* any portion of the Report to which specific objection has been made. Having reviewed the Report employing that standard, the Court hereby **ADOPTS** the Report and Recommendations of the Magistrate Judge, **OVERRULES** Petitioner's objections, and **DENIES** Petitioner's Motion to Alter or Amend the Judgment. While reaching the same conclusions as the Magistrate Judge, the Court adds the following analysis.

Appendix B

## I. STANDARD OF REVIEW

Rule 59(e) of the Federal Rules of Civil Procedure "enables a district court to 'rectify its own mistakes in the period immediately following' its decision." *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020) (quoting *White v. New Hampshire Dep't of Emp't Sec.*, 455 U.S. 445, 450 (1982)). The motion is a "one-time effort to bring alleged errors in a just-issued decision to a habeas court's attention, before taking a single appeal." *Id.* at 1710. To grant a motion filed under Rule 59(e), there must be "'(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.'" *Clark v. United States*, 764 F.3d 653, 661 (6th Cir. 2014) (quoting *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010)). "[A] prisoner may invoke . . . [R]ule [59(e)] only to request 'reconsideration of matters properly encompassed in the challenged judgment.'" *Banister*, 140 S. Ct. at 1708 (quoting *White v. New Hampshire Dep't of Emp. Sec.*, 455 U.S. 445, 451 (1982)).

## II. ANALYSIS

**First Objection: Denial of Counsel of Choice Claim**

The Motion to Amend and corresponding Objections criticize the Court's decision finding Petitioner's First Ground for Relief to be both procedurally defaulted and without merit. Petitioner continues to argue that the trial judge and other state actors, without authority to do so, froze his personal funds and placed

unreasonable restrictions on his use of that money, in order to prevent him from being able to hire counsel of his choosing. The Magistrate Judge determined Petitioner fell short of establishing any manifest error of law in the Court's resolution of this claim.

Petitioner has dedicated another twenty-four pages of his Rule 59(e) objections to the rehashing of this claim, repeating nearly every argument he set forth in the prior Corrected Objections. With respect to procedural default, Petitioner again argues that he fairly presented this claim to the Ohio Supreme Court, directing this Court's attention to case law he cited in his appellate brief. Additionally, Petitioner argues he preserved the issue in *pro se* filings and contends the Ohio Supreme Court's ruling on his *pro se* motion for reconsideration constituted a ruling on the merits. Alternatively, Petitioner argues to the extent the claim was not fairly presented on direct appeal, the ineffective assistance of appellate counsel serves as cause and prejudice to excuse that default, and the fundamental miscarriage of justice exception also applies. With respect to the merits of his claim, Petitioner continues to argue "the trial judge was the one withholding his money." ECF No. 190, at PAGEID # 11101. Petitioner posits "[t]he facts are what they are. They do not change. It is the interpretation of the facts as showing that Ahmed had access to his funds that is in error." *Id.* at PAGEID # 11105.

In this Court's September 21, 2020, Opinion and Order adopting the

Report and Recommendations of the Magistrate Judge, this Court carefully considered the issues of procedural default in connection with this ground for relief. Nevertheless, after concluding this claim was defaulted, the Court proceeded to conduct a thorough evaluation of the facts underlying the merits of this claim, as did the Magistrate Judge. The record belies Petitioner's claims of unconstitutionally obstructive behavior by the trial court, and shows, to the contrary, that the trial court attempted to facilitate Petitioner's hiring of counsel. As set forth in more detail in this Court's prior Opinion and Order, the trial court offered, on at least one occasion, that "the County will pick up necessary defense services of a reasonable amount," in the event Petitioner "exhausted his assets." ECF No. 92-1, at PAGEID ## 7434–38. It is evident, however, that Petitioner was not able to come to a mutual agreement for representation with the many attorneys he attempted to hire.

Although a Rule 59(e) motion is not an opportunity to effectively reargue a case, *Howard v. U.S.*, 533 F.3d 472, 475 (6th Cir. 2008), this is precisely what Petitioner has attempted to do. Absent some showing that the Court has committed a manifest error of law in denying relief, this Court will not reengage in further discussion of this claim. Petitioner has generally restated the arguments set forth in his prior Corrected Objections and fails to identify a proper basis for Rule 59(e) relief. Petitioner's first objection is **OVERRULED.**

**Second Objection: Conflict/Breakdown in the Attorney-Client Relationship**

In his second objection, Petitioner criticizes this Court's determination that the decision of the Ohio Supreme Court rejecting his claim based on the breakdown in the attorney-client relationship was entitled to AEDPA deference. According to Petitioner, "[t]he Ohio Supreme Court did not review all the circumstances surrounding Ahmed's conflict claim and its failure to do so was an unreasonable application of federal law." ECF No. 190, at PAGEID # 11111. Additionally, Petitioner restates prior arguments, including his contention that relief should be granted on the sole basis that he sued his trial counsel. *Id.*

Petitioner has failed to raise any compelling arguments suggesting that this Court's resolution of his Second Ground for Relief was a manifest error. Petitioner rehashes the issues already considered by this Court, and his objections merely disagree with the Magistrate Judge's recommendations and this Court's ultimate resolution of the claim. Petitioner's second objection is **OVERRULED.**

**Third Objection: Denial of Right to Self-Representation**

In his Third Ground for Relief, Petitioner argues he was denied his right to represent himself at trial, as recognized by *Faretta v. California*, 422 U.S. 806, 835 (1975). Petitioner objects to the Magistrate Judge's recommendation that his Rule 59(e) motion be denied as to this claim. Specifically, Petitioner argues this Court erred when it determined that the Ohio Supreme Court's resolution of

this claim was entitled to AEDPA deference. As evidence of this Court's error, Petitioner references a document titled "Pro Se Motion: Removal of Court Appointed Attorneys," filed December 21, 2000. The Magistrate Judge considered the document, finding it was "not a 'smoking gun' that disproves the conclusions of the Supreme Court of Ohio, the Magistrate Judge, and this Court." ECF No. 174, at PAGEID # 10989. This Court agrees. Furthermore, the Court agrees with the Magistrate Judge that "[t]here is no Supreme Court precedent known to the Magistrate Judge [or this Court] which holds that a trial court cannot nail down a *Faretta* claim by insisting on an unequivocal written waiver" and that "[d]oing so seems particularly prudent in this case, given Ahmed's constant and repeated equivocation." *Id.* at PAGEID # 10990. Petitioner has shown no error of law in this Court's resolution of his Third Ground for Relief, and his objection is **OVERRULED**.

**Remaining Objections**

The Motion to Amend criticizes the Court's decisions with respect to Petitioner's Fifth Ground for Relief (appellate counsel ineffectiveness), Eighth Ground for Relief (biased trial judge), Thirteenth Ground for Relief (gruesome photos), Nineteenth Ground for Relief (speedy trial), and Twenty-Seventh Ground for Relief (cumulative error). With respect to each of these grounds for relief, Petitioner merely relies on prior arguments, which this Court has considered and rejected. The Motion to Amend and corresponding Objections

add nothing to the argument and authority already presented in the Corrected Objections and rejected by this Court. Petitioner has failed to identify a proper basis for Rule 59(e) relief. The objections are hereby **OVERRULED**.

**Certificate of Appealability**

Finally, Petitioner argues this Court should reverse course and grant a certificate of appealability as to each of his claims. However, this Court must be mindful that "the standards for a certificate are no mere technicality." *Moody v. United States*, 958 F.3d 485, 493 (6th Cir. 2020). As recently restated by the Sixth Circuit, this Court shall not grant a certificate of appealability "without some substantial reason to think that the denial of relief might be incorrect" and "unless every independent reason to deny the claim is reasonably debatable." *Id.* at 488. Applying this standard, the Court again concludes that none of Petitioner's grounds for relief addressed in the Corrected Objections meets the standard set forth in *Moody*.

**III. CONCLUSION**

Petitioner's Objections, ECF No. 190, are **OVERRULED** and the Motion to Alter or Amend the Judgment, ECF No. 160, is **DENIED**.

**IT IS SO ORDERED.**

**MICHAEL H. WATSON, JUDGE**
**UNITED STATES DISTRICT COURT**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION AT COLUMBUS**

NAWAZ AHMED,

Petitioner, : Case No. 2:07-cv-658

-vs.- : District Judge Michael H. Watson
Magistrate Judge Michael R. Merz

MARC C. HOUK, Warden,

Respondent :

## REPORT AND RECOMMENDATIONS

This capital habeas corpus case is before the Court on Petitioner's Motion to Alter or Amend the Judgment pursuant to Fed.R.Civ.P. 59(e)(ECF No. 160)[1] which Respondent opposes (ECF No. 167).

On September 21, 2020, the Court entered its Opinion and Order dismissing all claims and denying a certificate of appealability ("Opinion," ECF No. 156; Judgment, ECF No. 157). As the Opinion notes, the Petition in this case pleads twenty-seven grounds for relief from Petitioner's conviction and sentence of death for the killing of his estranged wife, and his sister-in-law, father-

[1] The Motion to Amend is thirty-eight pages long. At that length, it is subject to S. D. Ohio Civ. R. 7.2(a)(3) which provides in part "In all cases in which memoranda exceed twenty pages, counsel shall include a combined table of contents and a succinct, clear, and accurate summary, not to exceed five pages, indicating the main sections of the memorandum and the principal arguments and citations to primary authority made in each section, as well as the pages on which each section and any sub-sections may be found." Counsel essentially mock that Rule by writing as to each Ground for Relief "The Claim has merit. The Court should issue a certificate of appealability." Those statements are not arguments, but conclusions. No authority is cited. Counsel's disdain for the Rule is obvious. Instead of mock compliance, why not ask to be excused?



Appendix C

in-law, and niece. The Magistrate Judge recommended that relief be denied on all grounds for relief and that Ahmed be denied a certificate of appealability (Report and Recommendations, ECF No. 88, the "Report"). Petitioner objected only as to Grounds for Relief One, Two, Three, Five, Eight, Thirteen, Nineteen and Twenty-Seven (Corrected Objections, ECF No. 150) and thus has forfeited any objections as to the other nineteen grounds for relief. *Thomas v. Arn*, 474 U.S. 140 (1985); *Alspugh v. Mcconnell,* 643 F.3d 162, 166 (6th Cir. 2011). District Judge Watson overruled all of Petitioner's Corrected Objections and denied a certificate of appealability, adopting the result recommended by the Magistrate Judge. The instant Motion followed, challenging the result as to all eight grounds for relief on which objection had been made to the Report.

**Standard for Review of a Motion to Amend the Judgment**

For a district court to grant relief under Rule 59(e), "there must be '(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.'" *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 474 (6th Cir. 2009) (quoting *Henderson v. Walled Lake Consol. Sch.,* 469 F.3d 479, 496 (6th Cir. 2006)).

> Motions to alter or amend judgment may be granted if there is a clear error of law, *see Sault Ste. Marie Tribe*, 146 F.3d at 374, newly discovered evidence, *see id.*, an intervening change in controlling constitutional law, *Collison v. International Chem. Workers Union, Local 217*, 34 F.3d 233, 236 (4th Cir. 1994); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 90-91 n.3 (1st Cir. 1993); *School District No. 1J v. ACANDS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), or to prevent manifest injustice. *Davis*, 912 F.2d at 133; *Collison*, 34 F.3d at 236; *Hayes*, 8 F.3d at 90-91 n.3. *See also North River Ins. Co. v. Cigna Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995).
>
> To constitute "newly discovered evidence," the evidence must have been previously unavailable. *See ACandS*, 5 F.3d at 1263; *Javetz v.*

> *Board of Control, Grand Valley State Univ.* 903 F. Supp. 1181, 1191 (W.D. Mich. 1995)(and cases cited therein); Charles A. Wright, 11 *Federal Practice and Procedure* § 2810.1 at 127-28 (1995).

*Gencorp, Inc. v. American Int'l Underwriters,* 178 F.3d 804, 834 (6th Cir. 1999), *accord, Nolfi v. Ohio Ky. Oil Corp.,* 675 F.3d 538, 551-52 (6th Cir. 2011), quoting *Leisure Caviar, LLC v. United States Fish & Wildlife Serv.,* 616 F.3d 612, 615 (6th Cir. 2010).

A motion under Fed. R. Civ. P. 59(e) is not an opportunity to reargue a case. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)(citation omitted). Thus, parties should not use them to raise arguments which could and should have been made before judgment issued. *Id.* Motions under Rule 59(e) must establish either a manifest error of law or must present newly discovered evidence. *Id.* In ruling on an Fed.R.Civ.P. 59(e) motion, "courts will not address new arguments or evidence that the moving party could have raised before the decision issued. See 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2810.1, pp. 163-164 (3d ed. 2012) (Wright & Miller); accord, *Exxon Shipping Co. v. Baker,* 554 U. S. 471, 485-486, n. 5 (2008) (quoting prior edition)." *Bannister v. Davis*, 140 S. Ct. 1698, 1703, 207 L.Ed. 2d 58 (2020).

Petitioner's Motion to Amend is measured against this standard.

**Ground One: Denial of Counsel of Choice**

In his First Ground for Relief, Petitioner claimed he was denied the right to retain counsel of his choice by the way the involved divisions of the Belmont County Court of Common Pleas restricted his ability to spend marital and probate assets. The Report concluded this ground for relief was both procedurally defaulted and without merit. As to procedural default, the Opinion

agreed that Ahmed failed to fairly present this claim to the state courts because the Sixth Amendment claims he did present were legally and factually distinct from this claim (ECF No. 156, PageID 10556-64). Even if the claim were not procedurally defaulted, the Opinion found it was without merit because there was no evidence of record from which it could be found the trial court prevented Ahmed from hiring counsel of his choice. *Id.* at PageID 10564-74. Ahmed objects to both conclusions.

**Procedural Default of the First Ground for Relief**

Ahmed asserts four errors of law in the Opinion as to the finding of procedural default on Ground One:

**The denial of counsel of choice is intertwined with the issues raised by Ahmed in the Ohio Supreme Court and thus was raised in that court.**

Ahmed claims his counsel of choice claim is "inextricably intertwined" with his claim that appointed counsel should have been removed and was therefore fairly presented to the Supreme Court of Ohio (Motion, ECF No. 160, PageID 10632, relying on *Dando v. Yukins*, 461 F.3d 791 (6th Cir. 2006)). In *Dando* the Sixth Circuit granted a certificate of appealability on two questions: "(1) whether the sentencing court abused its discretion in denying Dando's motion for an expert witness, and (2) whether trial counsel was ineffective for failing to pursue a duress defense" and found these two questions "inherently intertwined." 461 F.23d at 797. On that basis, the court overruled a fair presentation procedural default defense:

> Given our determination that the two issues from the certificate of appealability are in fact one in the same and that Dando adequately referenced the ineffective assistance of counsel claim in her state

> court filings, we conclude that Dando did indeed present this claim to the state courts. She has thus "exhausted the remedies available in the courts of the State" as required under section 2254.

*Id.*

The *Dando* majority did not engage in a general analysis of "fair presentation" as a habeas prerequisite or attempt to formulate any general rule on the subject. Instead it found, on the particular facts of that case, that the ineffective assistance of trial counsel claim had been fairly presented. Ahmed cites no case in which presenting a claim of ineffective assistance of trial counsel because of conflict of interest or denying a request for self-representation, the two Sixth Amendment claims he expressly made, was held to fairly present a claim of denial of the right to retain counsel of one's choice.

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

If a petitioner's claims in federal habeas rest on different theories than those presented to the state courts, they are procedurally defaulted. *Williams v. Anderson,* 460 F.3d 789, 806 (6th Cir. 2006); *Lorraine v. Coyle*, 291 F.3d 416, 425 (6th Cir. 2002), *citing Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998); *Lott v. Coyle*, 261 F.3d 594, 607, 619 (6th Cir. 2001)("relatedness" of a claim will not save it). The Sixth Circuit recently reiterated this "same claim" requirement. *Allen v. Mitchell*, 953 F.3d 858 (6th Cir. 2020). This Court made no error of law in relying, as it did, on *McMeans* (Opinion, ECF No. 156, PageID 10561).

**The issue of the denial of counsel of choice was before the Ohio Supreme Court because it is legally required to review the entire record in capital cases.**

Ahmed next argues the Supreme Court of Ohio was required to consider his counsel of choice claim because that court is required to review the "entire record" in capital cases (Motion, ECF No. 157, PageID 10632, citing Ohio Revised Code § 2929.05(A)).

Ahmed cites no decision of the Ohio Supreme Court or the Sixth Circuit which interprets this statute to require the Ohio Supreme Court to raise *sua sponte* claims that the parties have not presented. Indeed, the statute says the supreme court "shall review the judgment in the case and the sentence of death . . .**in the same manner** that they review other criminal cases," except that it is to independently consider the evidence for aggravating circumstances and whether the death sentence is proportionate.[2] The phrase "entire record" does not appear in Ohio Revised Code § 2929.05(A). The fact (on which Ahmed relies) that the Supreme Court of Ohio recognized that the counsel of choice claim had been an issue in the trial court does not logically imply it was still an issue on appeal.

This Court did not commit legal error in failing to find Ahmed's counsel of choice claim

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[2] The full text of the statute reads: "(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case."

was before the Supreme Court of Ohio because it was required to review the "entire record."

**Ahmed's Claim That He Was Denied Counsel of Choice Was Fairly Presented in his pro se Motion for Reconsideration as well as in Other Motions Ahmed filed in the Ohio Supreme Court.**

Ahmed claims he fairly presented his counsel of choice claim in *pro se* filings that he made in the Supreme Court of Ohio. He claims error in this Court's finding that denial of those filings was procedural rather than on the merits (Motion, ECF No. 160, PageID 10633-34). However, the Opinion addressed the Report's reasons for concluding that those decisions were procedural rather than on the merits, thus rebutting the merits decision presumption of *Harrington v. Richter*, 562 U.S. 86, 103 (2011)(ECF No. 156, PageID 10561-62).

The Motion asserts that the language of the Ohio Supreme Court in denying these filings makes it clear the rulings were on the merits. Ahmed makes no new argument, but incorporates his Corrected Objections (ECF No. 150, PageID 10439). The Magistrate Judge has reviewed the cited language and finds it just as opaque and summary at he did in the original Report. Certainly the language contains less of a purported discussion of the merits than the standard form entry, signed by the Chief Justice of Ohio, declining appellate jurisdiction in felony appeals. In any event, this argument is merely a reargument of the point made in the Corrected Objections and adds no new law to show, e.g., that any court has found language like that used in denying the Motion for Reconsideration to be a ruling on the merits. The Court committed no manifest error of law in finding to the contrary.

**There was no rule prohibiting hybrid representation at the time of Ahmed's trial, appeal, and post conviction filings.**

One of the requirements for the procedural default defense in habeas is that the rule relied on by the state court must have been firmly established and regularly followed. *Maupin v. Smith*,

785 F.2d 135, 138 (6th Cir. 1986); accord, *Hartman v. Bagley,* 492 F.3d 347, 357 (6th Cir. 2007). The Report found that Ohio's rule against hybrid representation in criminal cases was firmly established and regularly followed as of the time of Ahmed's appeal to the Supreme Court of Ohio (ECF No. 88, PageID 2134). The Opinion accepted this position (ECF No. 156, PageID 10562).

The Report relied on *State v. Martin*, 103 Ohio St.3d 385 (2004). The Motion to Amend argues that "[i]n *Martin*, the court held for the first time that the right to the assistance of counsel and the right to *pro se* representation could not be exercised simultaneously. *Id.* at syl. 1[3]" (ECF No. 160, PageID 10634). The Motion continues:

> Prior to *Martin*, the Ohio Supreme Court had ruled that there was no right to hybrid representation but had not prohibited it and left the decision of whether to allow it to the discretion of each court. *State v. Thompson*, 33 Ohio St.3d 1, 6-7 (1987)[;] *State v. Landrum,* 53 Ohio St. 3d 107, 119 (1990).

*Id.* at PageID 10634-35. The Motion argues it was legal error to rely on cases decided after *Martin* to show the rule against hybrid representation was regularly followed because Ahmed's *pro se* filings were made before *Martin*. *Id.* at PageID 10635-36.

The Magistrate Judge disagrees. The Ohio Supreme Court's decision in *Thompson* from 1987 says nothing about discretion to allow hybrid representation but instead holds:

> Appellant, in his seventh proposition of law, argues that he should have been permitted to act as co-counsel in his own behalf during the trial. Appellant argues that a hybrid representation of criminal defendant and defense counsel both preserves the reliability of the judicial process and protects his dignity. We do not agree. Neither the United States Constitution, the Ohio Constitution nor case law mandates such a hybrid representation. See *McKaskle* v. *Wiggins* (1984), 465 U.S. 168. Although appellant has the right either to appear *pro se* or to have counsel, he has no corresponding right to

[3] The opinion in *Martin* does have a syllabus, but the syllabus rule under which the syllabus stated the controlling law of the case was was abolished in 2002 when the Supreme Court of Ohio completely revised the Ohio Rules for the Reporting of Opinions. As of July 1, 2012, the relevant rule reads "All majority opinions of the Supreme Court shall have the same authority, whether issued *per curiam* or as an opinion authored by a justice and whether or not they have a syllabus."

> act as co-counsel on his own behalf. Accordingly, appellant's seventh proposition of law is not well-taken.

33 Ohio St. 3d at 6-7. In *Landrum* the Supreme Court of Ohio relied on *Thompson* to hold Landrum had no right to act as co-counsel at trial. In *Martin* the Supreme Court squarely held that the rights to self-representation and to counsel could not be exercised simultaneously, saying it was **reaffirming** Ohio law in holding that the right to proceed *pro se* and to have counsel could not be exercised simultaneously. *Id.* ¶ 32.

Post-*Martin* cases cited in the Opinion recognize that it has long been the rule in Ohio that a defendant is not entitled to hybrid representation. For example, in *State v. Ferguson*, 108 Ohio St. 3d 451 (2006), the court held:

> [**P97] Ferguson has no constitutional right to self-representation in the appellate process on direct appeal. *Martinez v. California* Court of Appeal, Fourth Appellate Dist. (2000), 528 U.S. 152, 163, 120 S.Ct. 684, 145 L.Ed.2d 597. Furthermore, "[a] defendant has no right to a 'hybrid' form of representation wherein he is represented by counsel, but also acts simultaneously as his own counsel." *State v. Keenan* (1998), 81 Ohio St.3d 133, 138, 1998 Ohio 459, 689 N.E.2d 929, citing *McKaskle v. Wiggins* (1984), 465 U.S. 168, 183, 104 S.Ct. 944, 79 L.Ed.2d 122.

In sum, *Martin* did not adopt a new rule forbidding hybrid representation. Instead, it and the later cases cited in the Opinion documented the long-standing practice of Ohio courts in disallowing hybrid representation in criminal cases. Even if Ohio courts had discretion prior to *State v. Martin* to allow hybrid representation, the Supreme Court has held a rule can be firmly established and regularly followed even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not in others. *Walker v. Martin*, 562 U.S. 307, 316 (2011), citing *Beard v. Kindler*, 558 U.S. 53, 60-61 (2009).

> *Beard* and *Walker*, when read together, permit a state procedural rule to serve as an adequate state ground for preventing review of a habeas petition even if the state rule accords courts broad discretion.

*Stone v. Moore*, 644 F.3d 342, 348 (6th Cir. 2011).

The Motion to Amend does not show a manifest error of law in relying on this consistent line of Ohio authority.

**Merits of the First Ground for Relief**

Alternatively, the Report concluded Ahmed's First Ground was without merit (ECF No. 88, PageID 2147-61, discussing at length the evidence on this claim). The District Judge's Opinion adopted this conclusion (ECF No. 156, PageID 10564-74). The Motion to Amend, however, argues this claim is meritorious (ECF No. 160, PageID 10637-45).

Ahmed's Motion argues that this Court put an inappropriate construction on the facts underlying this claim; it does not present any new evidence. Without rehearsing the evidence, the Magistrate Judge is not persuaded that the Court committed any manifest error of law in deciding relief was not warranted on the merits of the First Ground for Relief.

**Ground Two: Ineffective Assistance of Trial Counsel: Conflict of Interest**

In his Second Ground for Relief, Ahmed contends suffered ineffective assistance of trial counsel because he was forced to go to trial with counsel who labored under a conflict of interest. (Petition, Doc. No. 35 at PageID 199). The Report concluded that the state court decision on this claim was entitled to deference under Antiterrorism and Effective Death Penalty Act of 1996 (Pub.

L. No 104-132, 110 Stat. 1214)(the "AEDPA")(Report, ECF No. 88, PageID 2171). The District Court adopted the Report on this point and rejected Ahmed's attempt to inject a new factual basis (Opinion, ECF No. 156, PageID 10575-83).

The Motion to Amend essentially reargues the merits of this Ground for Relief and raises no argument that was not sufficiently considered by the Court in entering judgment.

**Ground Three: Denial of Right of Self-Representation**

In his third ground for relief, Ahmed contends that he was denied his right to represent himself at trial as recognized in *Faretta v. California,* 422 U.S. 806, 835 (1975)(Petition, ECF No. 35 at PageID 214-220).

As to any asserted right to represent himself during the guilt phase of the trial, the Report concluded Ahmed had never made such a request, rebutting his twisted interpretations of the record (ECF No. 88, PageID 2171-75). As to the mitigation phase, although Ahmed did state he wanted to proceed *pro se* at that point, he refused to acknowledge the trial judge's explanation of consequences. *Id.* at PageID 2175-77. The Supreme Court of Ohio affirmed denial of Ahmed's request to proceed *pro se. Id.* at PageID 2177-78, citing *State v. Ahmed*, 103 Ohio St. 3d 27, 44-45, 2004-Ohio-4190 ¶¶ 102-108 (2004). The Report concluded this was not an unreasonable application of relevant Supreme Court precedent and was therefore entitled to deference under 28 U.S.C. § 2254(d)(1)(ECF No. 88, PageID 2178-82). The Opinion adopted the Report's position on Ground Three (ECF No. 156, PageID 10583-95).

In claiming there is an error of law in the Opinion regarding Ahmed's request to represent himself, the Motion to Amend cites a document labeled "Pro Se Motion: Removal of Court-

Appointed Attorneys," filed December 21, 2000 (Appendix, ECF No. 90-1, PageID 2764, et seq.). This document is not a "smoking gun" that disproves the conclusions of the Supreme Court of Ohio, the Magistrate Judge, and this Court. Petitioner has filed many documents *pro se*, including many in this Court, essentially claiming the right to hybrid representation, to force his appointed attorneys to do what he wanted and wants done in the litigation. Ultimately Ahmed failed to meet the reasonable requirements of the Common Pleas Judge to discharge his appointed counsel. The Motion ultimately concluded on this portion of Ground Three "The record shows that Ahmed's goal was to represent himself so he could then hire his own lawyer." (ECF No. 160, PageID 10653). That does not amount to an unequivocal documented request to represent himself at the guilt phase of the trial.

Regarding Ahmed's request to represent himself during the mitigation phase, the Motion to Amend asserts:

> The Ohio Supreme Court's decision that Ahmed's comments made his assertion of the right to self-representation equivocal was an unreasonable application of United States Supreme Court precedent and an unreasonable determination of fact in light of the evidence. There is no requirement in *Faretta* that the accused must acknowledge in writing that he was advised of his rights – Ahmed made the acknowledgment that on the record. Doc. 92-5, Trans., PageID# 9327 ("Advice has been given.") In addition, he signed the entry saying the same thing. Doc. 90-5, OSC Opinion, PageID# 4160; Doc. 92-5, Trans., PageID#9326. Ahmed's written remarks and insistence that he had been advised of his rights but that his rights had not been observed in no way changed his acknowledgement that he had been advised of his rights. This court was mistaken when it deferred to the Ohio Supreme Court on this issue. Doc. 156, Opinion & Order, PageID# 10594.

(Motion to Amend, ECF No. 160, PageID 10654-55.) This argument turns the required analysis under 28 U.S.C. § 2254(d) completely on its head. There is no Supreme Court precedent known to the Magistrate Judge which holds that a trial court cannot nail down a *Faretta* claim by insisting on an unequivocal written waiver. Doing so seems particularly prudent in this case, given

Ahmed's constant and repeated equivocation.

Ahmed has shown no error of law in the Court's disposition of the Third Ground for Relief.

**Ground Five: Ineffective Assistance of Appellate Counsel**

In his Fifth Ground for Relief, Ahmed claimed he received ineffective assistance of appellate counsel on his direct appeal to the Supreme Court of Ohio (Petition, ECF No. 35 at PageID 246-55). The Report rejected Respondent's procedural default defense to this claim except as to omitted propositions of law ten, eleven, twelve, and thirteen (Report, ECF No. 88, PageID 2186-91). It then analyzed at length the merits of this claim and found it was without merits. *Id.* at PageID 2191-2218. The Opinion adopted the Report's conclusions on this Ground for Relief (ECF No. 156, PageID 10595-97). The Motion to Amend relies on prior presentations of this claim which the Court has already considered and which the Motion to Amend gives no reasons for reconsideration.

**Ground Eight: Trial By A Biased Judge**

In his Eighth Ground for Relief, Ahmed contends he was denied due process because the trial judge was biased against him throughout his trial. (Petition, ECF No. 35 at PageID 273-77). Respondent defended on the grounds this claim was both procedurally defaulted and meritless. (Return of Writ, ECF No. 61 at PageID 1004-6). The Report found that Ahmed had not properly preserved the claim and it was therefore procedurally defaulted (ECF No. 88, PageID 2228-30). The Opinion adopted this conclusion and also found the claim was without merit (ECF No. 156,

PageID 10597-99).

The Motion to Amend argues Ahmed showed in his Corrected Objections that this claim had been adjudicated by the Supreme Court of Ohio (ECF No. 160, PageID 10657 citing ECF No. 150, PageID 10483-86). When one examines those pages of the Corrected Objections, however, one finds no citation to any place where the Supreme Court of Ohio dealt with this claim on the merits, although it is correct that the Chief Justice rejected Ahmed's Affidavit of Disqualification of Judge Sargus. The Report questioned whether presenting the claim in an Affidavit of Disqualification was an appropriate way of preserving this claim. Ahmed also presented the claim a part of his Motion to Reopen the Appeal as an omitted proposition of law. The Report found in its analysis of Ground Five for Relief that the time limit for filing a motion to reopen was not firmly established and regularly followed at the time of Ahmed's motion.

Aside from the possible time-limit default, presenting a claim as an omitted proposition of law in an ineffective assistance of appellate counsel claim does not preserve that claim for merits review by a habeas court. An Ohio App. Rule 26(B) application, which is the prescribed method for raising an ineffective assistance of appellate counsel claim in the Ohio appellate courts, preserves for habeas review only the ineffective assistance of appellate counsel arguments, not the underlying substantive arguments. *Wogenstahl v. Mitchell*, 668 F.3d 307, 338 (6th Cir. 2012), *citing Lott v. Coyle*, 261 F.3d 594, 612 (6th Cir. 2001). "The *Lott* court explained that permitting an Ohio prisoner to raise a substantive claim in a Rule 26(B) motion "would eviscerate the continued vitality of the procedural default rule; every procedural default could be avoided, and federal court merits review guaranteed, by claims that every act giving rise to every procedural default was the result of constitutionally ineffective counsel." *Id.* Logically, the same is true of an application to reopen a direct appeal to the Supreme Court of Ohio in a capital direct appeal. The

Motion to Amend does not show the Court's conclusion on procedural default is an error of law.

The Opinion also rejected this Eighth Ground for Relief on the merits (ECF No. 156, PageID 10598-99). In the Motion to Amend, Ahmed cites three bases for finding Merit in this Eighth Ground. First he argues Judge Sargus's orders dealing with his funds were *ultra vires* (ECF No. 160, PageID 10657-58). Whether or not that is so is a question of Ohio law. Ahmed's cited authority, *State, ex rel Litty, v. Leskovyansky*, 77 Ohio St. 3d 97 (1996), establishes that a writ of prohibition is available to prevent an Ohio Common Pleas judge from entering orders beyond his or her jurisdiction. Ahmed cites no attempt on his part to invoke that authority and no Supreme Court authority for the proposition that a trial judge's assertion of jurisdiction in such circumstances renders the judgment in a related criminal case unconstitutional.

Ahmed next argues Judge Sargus "had a financial interest in how Ahmed's case was adjudicated which violates *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)" (ECF No. 160, PageID 10658). Ahmed's quotation from the record which is supposed to show the judge's financial interest, instead shows a financial interest of the Belmont County Public Defender. In *Tumey* the Supreme Court found that a conviction in an Ohio mayor's court where the mayor was paid as a judge only for convictions and where he had fiscal responsibility for the village o which he was mayor violated the Due Process Clause. Ohio Common Pleas judges are paid a salary by the State and have no fiscal responsibility for county public defender commissions.

*Tumey* continues to be good law and the Supreme Court has recognized that decision by a biased judge is unconstitutional. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); *Williams v. Pennsylvania*, 579 U.S. ___, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016). But nothing in those cases approaches a holding that Judge Sargus's actions here were unconstitutional as evincing a personal financial interest.

Ahmed lastly argues "[t]he trial judge displayed "marked personal feelings" against" him

(ECF No. 160, PageID 10658). Among the many behaviors in the record which reflects obstructive behavior by Ahmed are attempting to cross-examine the judge, rustling papers when the judge was speaking, and constant demands to change counsel. The Motion to Amend references one of their exchanges. But that exchange would not be enough to warrant disqualification, much less a finding that the conviction was unconstitutional.

A disqualifying prejudice or bias must ordinarily be personal or extrajudicial. *United States v. Sammons,* 918 F.2d 592, 598 (6th Cir. 1990); *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1250 (6th Cir. 1989). That is, it "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *see also Youn v. Track, Inc.*, 324 F.3d 409, 423 (6th Cir. 2003), *citing Grinnell, supra; Bradley v. Milliken,* 620 F.2d 1143, 1157 (6th Cir. 1980), *citing Grinnell, supra*; *Woodruff v. Tomlin*, 593 F.2d 33, 44 (6th Cir. 1979) (citation omitted). The Supreme Court has held:

> *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration — even a stern and short-tempered judge's ordinary efforts at courtroom administration — remain immune.

*Liteky v. United States,* 510 U.S. 540, 554-55 (1994).

The Court's rejection of the Eighth Ground for Relief on the merits is not a manifest error of law.

**Ground Thirteen: Gruesome Photographs**

In his thirteenth ground for relief, Ahmed contends that a videotape and numerous crime scene and autopsy photographs admitted at trial created an unacceptable risk of prejudice to him and violated his right to a fair trial, citing the Fourteenth Amendment. (Petition, ECF No. 35 at PageID 323-24).

Although, as the Report found, Ahmed presented this claim to the Supreme Court of Ohio, that court relied exclusively on state evidence law in rejecting the claim (ECF No. 88, PageID 2263-64). That court found "most of the photographs and slides and the crime-scene videotape admitted were relevant to prove the killer's intent, illustrate witnesses' testimonies, or give the jury an 'appreciation of the nature and circumstances of the crimes.'" (ECF No. 88 at PageID 2264, quoting *Ahmed*, 103 Ohio St. 3d at 42-43, 2004-Ohio-4190 at ¶¶ 94-100). The Report noted that *Harrington v. Richter*, 562 U.S. 86, 103 (2011), did not preclude de novo review of this claim. *Id.*

The Report concluded that the admitted photographs, although gruesome, were no more so than photographs introduced by the defense. *Id.* at PageID 2267-68. On the ultimate merits of the claim, the Report opines:

> In Ahmed's case, the prosecution showed admirable restraint in presenting only eight crime scene photographs that show the victims' bodies, especially since there were four victims. The videotape, a little more than five minutes in length altogether, did not dwell on the gruesome features of the crime scene, and included substantial footage of other, less gruesome evidence, as well. The outcome of Ahmed's trial and mitigation hearing were not likely to have been different had the photographs and videotape been excluded.

*Id.* at PageID 2269. The Court adopted this conclusion, finding it was not changed as a result of adding the autopsy slides to the record which had not been available to the Magistrate Judge

(Opinion, ECF No. 156, PageID 10603-05).

The Motion to Amend adds nothing to the argument and authority already presented in the Corrected Objections and rejected by the Court. It does not show any error in the Court's Opinion.

**Ground Nineteen: Denial of a Speedy Trial**

In his nineteenth ground for relief, Ahmed contends that the prosecutor, his trial counsel, and the trial court all violated his right to a speedy trial. (Petition, ECF No. 35 at PageID 371-78). The Report rejected this claim when it was presented as an underlying claim to the Fifth Ground for Relief, asserting omission of this speedy trial claim was one of the ways in which Ahmed received ineffective assistance of appellate counsel (ECF No. 88, PageID 2294-95).

The Opinion likewise concluded this claim was without merit, applying the test adopted by the Supreme Court in *Barker v. Wingo,* 407 U.S. 514 (1972)(ECF No. 156, PageID 10609-11). The Motion to Amend merely quarrels with this Court's balancing of the Barker factors and does not show an error of law in denying this claim.

**Ground Twenty-Seven: Cumulative Error**

In Ground Twenty-Seven Ahmed argues that even if none of the preceding grounds justifies habeas corpus relief individually, they cumulate to warrant such relief. (Petition, ECF No. 35 at 422-23). The Report rejected this argument, concluding that post-EADPA a petitioner cannot accumulate errors to obtain relief (Report, ECF No. 88, PageID 2318, citing *Moreland v. Bradshaw*, 699 F.3d 908, 931 (6th Cir. 2012), *quoting Hoffner v. Bradshaw*, 622 F.3d 487, 513 (6th Cir. 2010), and *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005). The Opinion concluded this

was a correct statement of the law and adopted it (ECF No. 156, PageID 10611-12).

The Motion to Amend asserts there is a circuit split on this question, but admits that the Sixth Circuit has not recognized cumulative error as a ground post-AEDPA (ECF No. 160, PageID 10662-63). It claims a split even within the Sixth Circuit, citing the unpublished opinion in *Mackey v. Russell*, 148 Fed. App'x 355, 367 (6th Cir. 2005). *Mackey*, however, is not about cumulating trial court error, but cumulating deficiencies in counsel's performance when deciding an ineffective assistance of trial counsel claim under *Strickland v. Washington,* 466 U.S. 668 (1984).

The Court's decision on the Twenty-seventh Ground for Relief follows binding Sixth Circuit precedent and is not in error.

**Certificate of Appealability**

The Report recommended that Ahmed be denied a certificate of appealability (ECF No. 88, PageID 2318) and the Court adopted that recommendation (ECF No. 156, PageID 10612).

The Motion to Amend, of course, seeks a certificate of appealability on each Ground for Relief addressed in the Corrected Objections. The arguments, however, are largely conclusory. For example, as to Ground Two, the Motion to Amend argues:

> A certificate of appealability should be granted because reasonable jurists could debate whether the Ohio Supreme Court decision was a reasonable determination of fact in light of the evidence and a reasonable application of United States Supreme Court precedent because the court failed to consider all the circumstances surrounding appointed counsels' conflict and the broken attorney-client relationship they had with Ahmed.

(ECF No. 160, PageID 10651). As to Ground Five, the Motion claims:

> A certificate of appealability should be granted because reasonable jurists could debate whether the Ohio Supreme Court decision was a reasonable determination of fact in light of the evidence and a reasonable application of United States Supreme Court precedent because the court failed to consider all the circumstances surrounding appointed counsels' conflict and the broken attorney-client relationship they had with Ahmed.

(ECF No. 160, PageID 10657). The argument is somewhat more extended on other Grounds for Relief, but fails to come to grips with the appropriate standard for granting a certificate of appealability, recently re-stated by the Sixth Circuit:

> In short, a court should not grant a certificate without some substantial reason to think that the denial of relief might be incorrect. Crucially, in applying this standard, a court must consider not only the merits of the underlying constitutional claim but also any procedural barriers to relief. *Buck v. Davis,* 137 S. Ct. 759, 777, 197 L. Ed. 2d 1 (2017); *Slack [v. McDaniel]*, 529 U.S. at 484-85; see also *Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017). To put it simply, a claim does not merit a certificate unless every independent reason to deny the claim is reasonably debatable.

*Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020).

> [T]he standards for a certificate are no mere technicality. Quite the contrary. By authorizing extra appeals, improper certificates add to the "profound societal costs" of habeas litigation while sapping limited public resources. *Calderon v. Thompson,* 523 U.S. 538, 554, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) (quoting *Smith v. Murray*, 477 U.S. 527, 539, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986)). For one, they divert our time and attention from the cases Congress actually meant us to hear, often leading us to appoint counsel and schedule argument in cases that we later find to be insubstantial. For another, they require state and federal government attorneys to devote their time and attention to defending appeals that should never have existed. Plus, they may even harm those habeas petitioners whose claims really do merit an appeal because it could "prejudice the occasional meritorious [claim] to be buried in a flood of worthless ones." *Brown v. Allen*, 344 U.S. 443, 537, 73 S. Ct. 397, 97 L. Ed. 469 (1953) (Jackson, J., concurring). In short, it's critical that courts follow the rules Congress set.

*Moody,* 958 F.3d at 493.

Because this Court's decision on none of the Grounds for Relief addressed in the Corrected Objections has been shown to meet the standard in *Moody*, Ahmed should be denied a certificate of appealability. In particular with respect to the cumulative error claim, while Ahmed has posited that some other circuits have accepted such claims, he has not shown that any reasonable jurist has interpreted Sixth Circuit precedent to allow such a claim. Any reasonable jurist deciding Ahmed's case in the Sixth Circuit would be bound by the published Sixth Circuit precedent cited in the Opinion on this point. And, of course, this Court is not the last word on this question; the Sixth Circuit will consider it *de novo*[4] if Ahmed raises it.

**Conclusion**

The Magistrate Judge respectfully recommends that the Motion to Amend be denied.

December 14, 2020.

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

**NOTICE REGARDING OBJECTIONS**

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure

[4] Although Congress initially assigned the certificate of appealability question to the circuit courts, those courts quickly delegated the initial task to the District Courts and that delegation is now codified in Rule 11 of the Rules Governing § 2254 Cases. Nonetheless, circuit courts consider the question de novo, rather than reviewing district court denials.

to make objections in accordance with this procedure may forfeit rights on appeal.

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**NAWAZ AHMED,**

**Petitioner,**

**v.**

**Case No. 2:07-cv-658**
**JUDGE WATSON**
**Magistrate Judge Merz**

**MARK C. HOUK,**

**Respondent.**

## OPINION AND ORDER

Petitioner, a prisoner sentenced to death by the State of Ohio, has pending before this Court a habeas corpus action pursuant to 28 U.S.C. § 2254. This matter is before the Court upon the Magistrate Judge's Report and Recommendations ("R&R"), ECF No. 88, in which the Magistrate Judge recommended denying relief on all of Petitioner's habeas claims. This matter is also before the Court on Petitioner's Corrected Objections to the R&R, ECF No. 150, the Warden's response, ECF No. 151, and Petitioner's Reply, ECF No. 155.

As required by 28 U.S.C. § 636(b) and Federal Rules of Civil Procedure Rule 72(b), the Undersigned has made a *de novo* review of the record in this case. Upon said review, the Court finds all of Petitioner's objections to the R&R to be without merit. The Court **OVERRULES** Petitioner's objections and **ADOPTS** the R&R. While reaching the same conclusions as the Magistrate Judge, the Court adds the following analysis.

Appendix D

## I. Factual and Procedural History

In 2001, a jury convicted Petitioner of four counts of Aggravated Murder and sentenced him to death in Belmont County, Ohio, for the murders of his wife Lubaina Bhatti Ahmed, Lubaina's father Abdul Bhatti, Lubaina's sister Ruhie Ahmed, and Ruhie Ahmed's two-year old daughter, Nasira Ahmed. The Ohio Supreme Court set forth the facts of this case as follows:

> In October 1998, Lubaina hired an attorney to end her marriage with [Ahmed] and to secure custody of their two children, Tariq and Ahsan. According to Lubaina's divorce attorney, [Ahmed] did not want a divorce, and consequently, it was a hostile divorce proceeding. In early February 1999, shortly after the complaint for divorce had been filed, Lubaina was awarded temporary custody of the children and exclusive use of the marital residence. Later that month, the divorce court issued a restraining order to prevent [Ahmed] from coming near Lubaina or making harassing phone calls to her.
>
> [Ahmed] had accused Lubaina, a physician, of having an affair with another physician, and claimed that their oldest son, Tariq, was not his. A subsequent paternity test showed that claim to be false. According to Lubaina's divorce attorney, Grace Hoffman, Lubaina had been afraid of [Ahmed] and she had called Hoffman three or four times a week, "scared [and] frustrated * * *. It just kept escalating." Lubaina had also confided to Hoffman that [Ahmed] had forced her to have sex with him during the marriage.
>
> Tahira Kahn, one of Lubaina's sisters, corroborated that Lubaina had feared [Ahmed]. She also testified that Lubaina had told her that [Ahmed] had raped her repeatedly.
>
> The owner of the rental home where Lubaina resided testified that Lubaina had called him in February 1999 and asked him to change the locks on the house. He stated that Lubaina had been very upset and had asked that he change them within the hour.
>
> In March 1999, Lubaina complained to police that [Ahmed] was

harassing her by telephone, but after the officer explained that the matter could be handled through criminal or civil proceedings, she decided to handle it through the ongoing divorce proceedings. The final divorce hearing was scheduled for Monday, September 13, 1999, and Lubaina had arranged for her sister Ruhie to fly in from California the Friday before to testify at the hearing.

On Friday, September 10, 1999, [Ahmed] called Lubaina's office several times. But Lubaina had instructed the medical assistants at her office to reject any phone calls from him. Then, at approximately 4:00 p.m. that day, Lubaina took [Ahmed's] call. [Ahmed] who worked and lived in Columbus, wanted Lubaina to bring the children to him for the weekend two hours earlier than planned. [Ahmed] claimed that he was planning a surprise birthday party for their youngest son. Lubaina, however, refused to change her plans and told [Ahmed] that he was using the birthday party as an excuse to inconvenience her.

Rafi Ahmed, husband of Ruhie and father of two-year-old Nasira, testified that Ruhie and Nasira had been scheduled to arrive in Columbus from California at 10:34 p.m. on Friday, September 10. Ruhie had planned to call Rafi that night when she arrived at Lubaina's home near St. Clairsville. However, since he had not heard from Ruhie, Rafi began calling Lubaina's home at 1:21 a.m., Saturday, September 11. Rafi called 20 to 25 times, but he got only Lubaina's answering machine. At approximately 3:00 a.m., he called the Belmont County Sheriff's Office.

A parking receipt found in Lubaina's van indicated that the van had entered a Columbus airport parking lot at 9:30 p.m. and exited at 11:14 p.m. on September 10, 1999.

Around 3:45 a.m. on September 11, in response to Rafi Ahmed's call, a sheriff's detective went to Lubaina's home and knocked on the doors and rang the doorbell. She got no answer. The detective also looked in the windows, but nothing at the home appeared to be disturbed.

Later that day, Belmont County Sheriff's Department Detective Steve Forro was assigned to investigate the missing persons. He recognized Lubaina's name because he was the officer who had talked to her regarding [Ahmed's] harassing phone calls. Forro called [Ahmed's] home to see if he had any information. [Ahmed] did not answer, so

Forro called Columbus police to have them check [Ahmed's] apartment. They did and found that he was not home.

Forro went to Lubaina's home at 2:18 p.m. As he walked around the outside of the house, he noticed a flicker of a car taillight through a garage window. Using a flashlight, he looked through the window and saw a van with its hatch open and luggage inside. He then saw the body of a man on the floor covered with blood.

Forro called for backup. Deputy Dan Showalter responded and entered through a side door, which he had found unlocked. He searched the house and found three more bodies on the basement floor.

Detective Bart Giesey found [Ahmed's] MCI WorldCom employee badge on the basement floor near the bodies. Records from [Ahmed's] employer, MCI WorldCom in Hilliard, Ohio, revealed that [Ahmed's] badge was last used at 7:19 p.m. on September 10, 1999.

Through several inquiries, police learned that [Ahmed] was scheduled to depart from JFK [International Airport in New York] for Lahore, Pakistan, that evening. Earlier that day, [Ahmed], through a travel agent, had booked a flight leaving for Pakistan that same evening. [Ahmed] arrived at the agent's home with both of his sons and asked if he could leave them with the agent, saying that his wife would pick them up soon. [Ahmed] wrote on the back of his and Lubaina's marriage certificate, which he gave to the agent, that he was leaving his sons to be handed over to his wife. [Ahmed] also signed his car over to the agent. The agent then drove [Ahmed] to JFK to catch his flight to Pakistan.

At 8:10 p.m., Robert Nanni, a police officer stationed at JFK, learned that [Ahmed] was a murder suspect and that he had checked in for a flight scheduled to leave for Pakistan at 8:55 p.m. [Ahmed] was located and arrested. Nanni noticed a large laceration on [Ahmed's] right thumb. Nanni read [Ahmed] his rights and called airport paramedics to attend to [Ahmed's] thumb. Among the items confiscated from [Ahmed] was an attaché case containing 15 traveler's checks totaling $7,500, his will, and $6,954.34 in cash.

On October 7, 1999, a grand jury indicted [Ahmed] on three counts of

> aggravated murder for purposely and with prior calculation and design killing Lubaina, Ruhie, and Abdul, pursuant to R.C. 2903.01(A), and one count for the aggravated murder of Nasira, pursuant to R.C. 2903.01(C) (victim younger than 13). All four aggravated murder counts carried a death-penalty specification alleging a course of conduct involving the killing of two or more persons. R.C. 2929.04(A)(5). The aggravated murder count for Nasira carried an additional death-penalty specification alleging that the victim was younger than 13 years at the time of the murder. R.C. 2929.04(A)(9).
>
> At trial, Dr. Manuel Villaverde, the Belmont County Coroner, testified that he had been called to the crime scene on September 11, 1999. All four victims appeared to have died from blood loss from slashes on their necks. Based on the condition of the bodies, he determined that the victims had been killed at approximately 3:00 a.m. that day, with two to four hours variation either way.
>
> A deputy coroner for Franklin County performed autopsies on all four victims and concluded that each victim had died from skull fractures and a large cut on the neck.
>
> Diane Larson, a forensic scientist at the DNA-serology section of the Bureau of Criminal Identification and Investigation ("BCI"), concluded that the DNA of blood found in the kitchen of Lubaina's home matched [Ahmed's] DNA profile. The probability of someone else in the Caucasian population having that same DNA profile is 1 in 7.6 quadrillion, and in the African-American population, the probability is 1 in 65 quadrillion.

*State v. Ahmed*, 103 Ohio St. 3d 27, 27-30 (2004).

On January 25, 2001, Petitioner was found guilty of the aggravated murders of Lubaina Bhatti Ahmed, Abdul Bhatti, Ruhie Ahmed, and Nasira Ahmed, as well as the death penalty specifications. ECF No. 92-4, at PAGEID # 9185-9190. Following a mitigation hearing, the jury recommended a sentence of death on each of the four aggravated murder counts. ECF No. 92-5, at

PAGEID # 9477-78. After independently weighing the aggravating circumstances and mitigating factors, the trial court imposed a sentence of death. *Id.* at PAGEID # 9550-51.

On direct appeal, the Ohio Supreme Court affirmed Petitioner's convictions and sentence and overruled each of Petitioner's nineteen propositions of law. *State v. Ahmed*, 103 Ohio St. 3d 27 (2004). Subsequently, the Ohio Supreme Court denied Petitioner's application to reopen his direct appeal, along with a motion to amend the application, because Petitioner failed to comply with the 90-day filing deadline. The trial court denied Petitioner's petition for post-conviction relief, ECF 90-10, at PAGEID # 5648-5675, and the court of appeals affirmed the trial court's denial of the post-conviction petition. *State v. Ahmed*, No. 05-BE-15, 2006 WL 3849862 (Ohio App. 7th Dist. Dec. 28, 2006).

## II. Standards of Review

This Court reviews *de novo* those portions of the R&R to which the parties objected. *See, e.g., Chinn v. Warden*, 3:02-cv-512, 2020 WL 2781522, *5 (S.D. Ohio May 29, 2020); *Lardie v. Birkett*, 221 F. Supp. 2d 806, 807 (E.D. Mich. 2002). In that regard, Fed. R. Civ. P. 72(b)(3) provides:

> The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b)(3).

Because this is a habeas corpus case, provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") that became effective prior to the filing of the instant Petition, apply to this case. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA limits the circumstances under which a federal court may grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in a state court proceeding. Specifically, the AEDPA directs us not to grant a writ unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). Section 2254(d)(1) circumscribes a federal court's review of claimed legal errors, while § 2254(d)(2) places restrictions on a federal court's review of claimed factual errors.

Under § 2254(d)(1), "[a] state court's adjudication of a claim is 'contrary to' clearly established federal law 'if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts.'" *Stojetz v. Ishee*, 892 F.3d 175, 192 (6th Cir. 2018) (quoting *Van Tran v. Colson*, 764 F.3d 594, 604 (6th Cir. 2014)). A state court decision involves an "unreasonable application" of Supreme Court precedent if

the state court identifies the correct legal principle from the decisions of the Supreme Court but unreasonably applies that principle to the facts of the petitioner's case. *Id.* (citing *Henley v. Bell*, 487 F.3d 379, 384 (6th Cir. 2007)). A federal habeas court may not find a state adjudication to be "unreasonable" simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams v. Coyle*, 260 F.3d 684, 699 (6th Cir. 2001). Rather, for purposes of 2254(d)(1), "clearly established federal law includes only the holdings of the Supreme Court, excluding any dicta; and, an application of these holdings is 'unreasonable' only if the petitioner shows that the state court's ruling 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.'" *Stojetz*, 892 F.3d at 192-193 (quoting *White v. Woodall*, 572 U.S. 415 (2014)).

Further, § 2254(d)(2) prohibits a federal court from granting an application for habeas relief on a claim that the state courts adjudicated on the merits unless the state court adjudication of the claim "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)(2). In this regard, § 2254(e)(1) provides that the findings of fact of a state court are presumed to be correct and that a petitioner bears the burden of rebutting the presumption of correctness by

clear and convincing evidence. Last, our review is limited to the record that was before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 563 U.S. 170 (2011).

A state prisoner who seeks a writ of habeas corpus in federal court does not have an automatic right to appeal a district court's adverse decision unless the court issues a certificate of appealability ("COA"). 28 U.S.C. § 2253(c). When a claim has been denied on the merits, a COA may be issued only if the petitioner "has made a substantial showing of the denial of a constitutional right." *Id.* To make such a showing, a petitioner must demonstrate "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.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Recently, the Sixth Circuit vacated a COA and dismissed an appeal, on the basis that a district court did not appropriately apply the correct standard for granting a COA. *Moody v. United States*, 958 F.3d 485 (6th Cir. 2020). In *Moody*, the Sixth Circuit cautioned that "a court should not grant a certificate without some substantial reason to think that the denial of relief might be incorrect," and, "[t]o put it simply, a claim does not merit a certificate unless *every independent reason to deny the claim is reasonably debatable*." *Id.* at 488 (emphasis in original).

## III. Petitioner's Claims

On July 11, 2007, after exhausting his state court remedies, Petitioner filed motions to proceed in forma pauperis and for the appointment of counsel. ECF No. 1. On May 14, 2008, Petitioner filed the instant Petition for a Writ of Habeas Corpus, raising twenty-seven claims for relief. Petition, ECF No. 35. In the R&R, the Magistrate Judge considered each of Petitioner's claims for relief and found none of them—nor any combination of them—to be meritorious. The Magistrate Judge recommended the Petition be denied and that Ahmed be denied a COA.

On September 4, 2019, Petitioner filed Corrected Objections to the R&R, ECF No. 150, wherein he challenges the Magistrate Judge's R&R as to eight claims only. Specifically, Petitioner objects to the Magistrate Judge's resolution of his first, second, third, fifth, eighth, thirteenth, nineteenth, and twenty-seventh claims for relief. For the reasons that follow, the Court **OVERRULES** each of Petitioner's objections. The Court finds the Magistrate Judge's R&R to be thorough, well-supported, and correct. The Court further finds that Petitioner's objections fail to raise factual or legal arguments that have not been fully addressed by the R&R.

### First Claim for Relief: Denial of Counsel of Choice

In his first claim for relief, Petitioner argues he was denied his "fundamental right to his own funds to employ counsel of choice, plan his defense and employ experts of his choosing." Petition, ECF No. 35 at PAGEID

# 173. Specifically, Petitioner contends he was denied his right to counsel of choice when the trial judge restrained his assets without the legal authority to do so and required him to proceed to trial with appointed counsel. Corrected Obj., ECF No. 150 at PAGEID # 10402. According to Petitioner, "[n]ot being indigent, petitioner's equal protection and due process rights were violated when the criminal trial judge, domestic relations court judge and probate judge of Belmont County, Ohio coordinated their actions with the prosecutor's office, sheriff's office, the Belmont County public defender and the appointed conservator Edward Susteric by intentionally engaging in conduct designed to frustrate petitioner's efforts to obtain counsel of choice." Petition, ECF No. 35, at PAGEID # 173.

Petitioner and his wife, Lubaina Bhatti Ahmed, were involved in divorce proceedings at the time of her death, and Petitioner's first claim for relief arises from a series of orders issued in domestic relations and probate court, as well as his criminal case, regarding the expenditure and conservation of his funds. The Magistrate Judge recommended that Petitioner's first claim for relief be dismissed as both procedurally defaulted and without merit, R&R, ECF No. 88, at PAGEID # 2131-6, and Petitioner objects to both determinations.

The Magistrate Judge engaged in a thorough and well-reasoned analysis of Petitioner's first claim for relief that spans thirty-two pages of the R&R. In large part, Petitioner's Corrected Objections merely rehash the same issues

addressed by the R&R, without offering targeted discussion of why the Magistrate Judge's determinations are wrong. For the following reasons, this Court **OVERRULES** Petitioner's Corrected Objections and **ADOPTS** the R&R. Although the Court has adopted the R&R, the Court will address, generally, Petitioner's main objections.

**A. Procedural Default**

The Magistrate Judge concluded that Petitioner failed to raise his denial of counsel of choice claim during his direct appeal as of right to the Ohio Supreme Court and failed to offer cause and prejudice to excuse that default. The Magistrate Judge rejected Petitioner's argument that he presented this claim to the Ohio Supreme Court by way of his *pro se* motion to reconsider, or by way of a *pro se* motion to disqualify the Ohio Public Defender and to strike the brief filed by the Ohio Public Defender. The Magistrate Judge determined those *pro se* filings did not preserve the issue, because Ohio law did not permit hybrid representation. Finally, the Magistrate Judge found that Petitioner's attempt to raise a claim of ineffective assistance of appellate counsel for failing to raise the denial of counsel of choice claim did not preserve for habeas review the underlying claim of denial of counsel of choice.

In his Corrected Objections, Petitioner argues this Court should reject the Magistrate Judge's determination that he procedurally defaulted his counsel of choice claim. First, Petitioner argues he presented the substance of this claim as

part of his second and thirteenth propositions of law on direct appeal. Corrected Obj., ECF No. 150 at PAGEID # 10432-34. Next, Petitioner asserts that Ohio's rule against hybrid representation had not been firmly and routinely established at the time he filed his *pro se* motions for reconsideration and to strike, and, therefore, those *pro se* filings presented the issue to the Ohio Supreme Court. Finally, Petitioner argues that even if the Magistrate Judge correctly determined he failed to present this claim to the Ohio Supreme Court, the ineffective assistance of appellate counsel excuses the default. The Court will address Petitioner's arguments in turn.

First, Petitioner argues the "content" of his counsel of choice claim was presented to the Ohio Supreme Court on direct appeal as part of Propositions of Law Nos. 2 and 13. According to Petitioner:

> In his brief to the Ohio Supreme Court, filed by his appointed counsel, Ahmed argued in Proposition of Law No. 2 that the trial court refused to remove appointed counsel and that Ahmed had been forced to proceed to trial with appointed counsel he did not want. The brief urged among many factors that those appointed lawyers had a conflict of interest because, "As they were selected by the court, they served the court's and prosecution's interests rather than his." Doc. 90-3, OSC brief, PageID # 3569. During its resolution of the merits of this claim, the Ohio Supreme Court recognized that "Although appellant sought to hire attorneys of his own choosing, he was never able to do so." Doc. 90-5. OSC Opinion, PageID # 4152. The court also noted that Ahmed told the trial court he had hired Attorney Carpino to represent him but that the trial court found that Carpino "could not serve as Ahmed's counsel because he was not certified to act as counsel in capital cases." *Id.* Privately retained counsel do not have to be death penalty certified to represent defendants charged with capital offenses. Rules for Appointment of Counsel in Capital Cases,

> R. 2.01 (formerly R. 20).
>
> In Proposition of Law No. 13, Ahmed argued that he had been denied the right to represent himself. Doc. 90-4, OSC brief, PageID # 3706. He also reported that he had been denied his right to counsel of choice. *Id.* During its resolution of the merits of Proposition of Law No. 13, the Ohio Supreme Court cited in its decision that Ahmed had signed an entry in the trial court and wrote on the entry: "I have not been allowed the rights under the Constitution and as given in Constitution and Crim. R. 10 and 44 to continuance and representation by selection counsel. . . . ." Doc. 90-5, OSC opinion, PageID # 4160.
>
> Neither of these propositions of law is captioned as a claim of denial of counsel of choice but each references that denial and relies on the Sixth and Fourteenth Amendments. In *Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000), the court said, "We do not require word-for-word replication of the state claim in the habeas petition . . . only that the petitioner 'fairly present' . . . his federal constitutional claims." *Id.* at 606-607.

Corrected Obj., ECF No. 150, at PAGEID # 10432-33.

The Court has carefully reviewed Propositions of Law 2 and 13, as set forth in Ahmed's state appellate brief, and concludes Petitioner did not present his denial of counsel of choice claim within those propositions of law. Petitioner admits that "neither of these propositions of law is captioned as a claim of denial of counsel of choice." Corrected Obj., ECF No. 150 at PAGEID # 10433. This Court agrees but also finds that no reasonable read of those claims can support Petitioner's argument that his counsel of choice claim was raised within the body of those propositions of law. Petitioner's second proposition of law on direct appeal was titled:

> A DEFENDANT IS DENIED HIS RIGHTS TO COUNSEL, A FAIR TRIAL, AND DUE PROCESS WHEN HE IS FORCED TO

> PROCEED TO TRIAL WITH COUNSEL THAT HAS A CONFLICT OF INTEREST. SIMILARLY, FORCING A DEFENDANT TO TRIAL WHERE THERE HAS BEEN A BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP DEPRIVES THE DEFENDANT OF THOSE SAME RIGHTS. U.S. CONST. AMENDS. VI AND XIV, OHIO CONST. ART. I, §§ 2, 9, 20.

ECF No. 90-3 at PAGEID # 3567-77. In that proposition, Petitioner argued his court-appointed counsel "were burdened with a conflict of interest" and there was "a complete breakdown of the attorney-client relationship." *Id.* Petitioner cited several instances during the pendency of his case in the trial court wherein Ahmed claimed trial counsel were not working on his case, failed to meet with him, failed to review evidence, withheld discovery, and did not consult him about continuances, and Petitioner "did not trust them." *Id.* at PAGEID # 3568. Specifically, Petitioner accused Attorney Hershey of "directing racial and religious remarks at him," as well as being in collusion with the prosecution and the police. *Id.* Petitioner "believed counsel were involved in a conspiracy to suppress evidence favorable to him." *Id.* at PAGEID # 3569. Attorney Hershey refused to see Ahmed alone and contended that "Ahmed distorted and twisted what counsel said and that an atmosphere of distrust had been created." *Id.* Ultimately, Petitioner filed a civil rights lawsuit against his counsel while they were representing him.

In the "law" section of this proposition of law, Petitioner argued that a conflict of interest occurred because Ahmed had filed the civil lawsuit against

counsel, and "[a] defendant's federal lawsuit against counsel suggests divided loyalties and gives the attorney a personal interest in the way he conducts the defense." *Id.* at PAGEID # 3570. The appellate brief alleged "[o]nce Ahmed sued counsel, counsel's and Ahmed's interests diverged." *Id.* at PAGEID # 3571. There is only one reference to "new counsel" in this section of Petitioner's merit brief, and that reference acknowledges the fact that the trial court would have permitted new counsel. Specifically, Petitioner argued, "[w]hile the trial court told Ahmed it would permit substitution of counsel, the court made clear that it would not provide any extensions or continuances to new counsel." *Id.* at PAGEID # 3576. At the end of that sentence is a footnote acknowledging "[t]he trial court subsequently withdrew its comments regarding a potential continuance. (See entry at docket no. 210)." ECF No. 90-3 at PAGEID # 3576. Petitioner does not allege anywhere in the more than ten pages of briefing dedicated to his second proposition of law that he was denied counsel of his choosing or that the trial court—or anyone for that matter—withheld his funds in a manner that prevented him from hiring new counsel. There is no reasonable argument to be made that Petitioner fairly presented the factual premise of his denial of counsel of choice claim as part of his second proposition of law on direct appeal.

Petitioner's thirteenth proposition of law on direct appeal was titled as follows:

> WHERE A DEFENDANT MAKES A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO COUNSEL AND ELECTS TO PROCEED PRO SE, THE TRIAL COURT'S FAILURE TO HONOR THAT ELECTION DEPRIVES THE DEFENDANT OF HIS RIGHTS TO CONDUCT HIS OWN DEFENSE AND TO DUE PROCESS. U.S. CONST. AMEND. VI AND XIV; OHIO CONST. ART. I §§ 10, AND 16.

ECF No. 90-4 at PAGEID # 3706-08. This proposition of law, in both its heading and argument, sets forth a claim alleging the denial of Petitioner's right to self representation, which is the subject of Petitioner's third ground for relief in these habeas proceedings. Although a claim challenging the denial of counsel of choice and a claim asserting the denial of the right to self represent both invoke the Sixth Amendment, the claims are nonetheless factually and legally distinct. A criminal defendant's decision to represent himself, once knowingly and intelligently made, is a relinquishment of the right to counsel. *See Hill v. Curtin*, 792 F.3d 670, 678 (6th Cir. 2015) (noting that "a self-representation request" is "in effect, a waiver of the right to counsel"). As such, Petitioner's thirteenth proposition of law, asserting the denial of his right to represent himself, did not fairly present the factual or legal basis of his claim challenging the denial of his right to counsel of choice.

The concept of procedural default requires a person convicted of a crime in a state court to present a particular claim to the highest court of the state so the state has a fair chance to correct any errors made in the course of the trial or the appeal, before a federal court intervenes in the state criminal process. Fair

presentment requires the petitioner to present the same claim under the same legal theory to the state courts before raising it on federal habeas review. *See McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000) (finding federal courts do not have jurisdiction to entertain a claim in a federal habeas petition that was not fairly presented to the state court, and "[a] claim may only be considered fairly presented if the petitioner asserted both the factual and legal basis for his claim to the state courts"). This Court agrees with and adopts the Magistrate Judge's conclusion that Petitioner failed to present his counsel of choice claim to the state courts.

Next, Petitioner takes issue with the Magistrate Judge's determination that Ohio's rule against hybrid representation was firmly and routinely established at the time he filed his *pro se* motions for reconsideration and to strike, and, therefore, those *pro se* filings did not sufficiently present the issue to the Ohio Supreme Court. Petitioner takes further issue with the Magistrate Judge's finding that the state courts presumably denied those *pro se* pleadings on procedural grounds. The Magistrate Judge determined:

> Ahmed argues that the state supreme court's summary denial of his *pro se* motion for reconsideration constituted a decision on the merits in this post-*Harrington v. Richter* world. 131 S.Ct. 770 (2011). But while *Harrington* does not require written opinions from the state courts, it does hold that the presumption that state court summary dispositions are merits decisions may be overcome "when there is reason to think some other explanation for the state court's decision is more likely." *Id.* at 785, *citing Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). As has been discussed above, there are at least two

> procedurally based explanations for the Ohio court's denial of Ahmed's motion for reconsideration that are more likely than a merits decision: (1) it is unlikely the state court would have addressed the merits of Ahmed's *pro se* motion since he was at all times represented by counsel and therefore not entitled to hybrid representation, and (2) the state procedural rule allowing motions for reconsideration does not contemplate new claims being presented to the state court in such filings. Therefore, this Court does not presume that the Ohio Supreme Court denied Ahmed's *pro se* motion for reconsideration on its merits, and instead concludes it was denied on both of the procedural grounds discussed. It also appears that the rule against hybrid representation is firmly established and regularly followed in the Ohio courts. *See State v. Martin*, 103 Ohio St. 3d 385, 2004-Ohio5471 (2004) (paragraph one of the syllabus); *State v. Ferguson*, 108 Ohio St. 3d 451, 466, 2006-Ohio-1502 at ¶ 97 (2006); *State v. Tenace*, 109 Ohio St. 3d 451, 452-53, 2006-Ohio-2987 at ¶ 10 (2006); *State v. Martin*, 103 Ohio St. 3d 385, 391, 2004-Ohio-5471 at ¶ 32 (2004); *State v. Taylor*, 98 Ohio St. 3d 27, 34, 2002-Ohio-7017 at ¶ 43 (2002); *State v. Cassano*, 96 Ohio St. 3d 94, 100, 2002-Ohio-3751 at ¶ 37 (2002); *State v. Keenan*, 81 Ohio St. 3d 133, 138 (1998); *State v. Landrum*, 53 Ohio St. 3d 107, 119 (1990); *State v. Thompson*, 33 Ohio St. 3d 1, 6-7 (1987); *State v. Packer*, 188 Ohio App. 3d 162, 168-69, 2010-Ohio-2627 at ¶ 20 (Ohio App. 6th Dist. 2010); *State v. Pilgrim*, 184 Ohio App. 3d 675, 2009-Ohio-5357 (Ohio App. 10th Dist. 2009) (paragraph five of the syllabus); *State v. Litten*, 174 Ohio App. 3d 743, 747, 2008- Ohio-313 at & 19 (Ohio App. 8th Dist. 2008); *State v. Beaver*, 119 Ohio App. 3d 385, 401-2 (Ohio App. 11th Dist. 1997); *State v. Day*, 72 Ohio App. 3d 82, 86 (Ohio App. 4th Dist. 1991); *State v. Carter*, 53 Ohio App. 2d 125, 129 (Ohio App. 4th Dist. 1977).

R&R, ECF No. 88, at PAGEID # 12-13. The Magistrate Judge's determination is consistent with the decisions of other federal habeas courts that have addressed this issue. *See, e.g.*, *Whatley v. Warden*, No: 2:16-cv-676, 2017 WL 1196168 (S.D. Ohio Mar. 31, 2017) ("Other courts which have considered this question have concluded that Ohio's judicially-created rule against hybrid representation is an adequate and independent state ground which supports the state courts'

refusal to consider, on their merits, claims raised by a criminal defendant which have not been advanced by that defendant's counsel."); *Rojas v. Warden*, 2015 WL 631183, *6 (N.D. Ohio Feb. 12, 2015) (finding the petitioner defaulted claims he sought to raise *pro se* on direct appeal while represented by counsel because "[t]he Ohio Supreme Court has held that '[a] defendant has no right to a 'hybrid' form of representation'" and "the State of Ohio regularly enforces its prohibition against Petitioners raising claims on appeal while being represented by counsel."); *Ysreal v. Warden*, 2014 WL 7185264, *9 (S.D. Ohio Dec. 16, 2014) ("Ohio's rule against hybrid representation is an adequate and independent state ground sufficient to foreclose habeas review"); *Storks v. Sheldon,* No. 3:12–cv–191, 2013 WL 3992592, at *35 (N.D. Ohio Aug.5, 2013) (same). *See also Wallace v. Sexton,* No. 13–5331, 2014 WL 2782009, at *8 (6th Cir. 2014) (finding procedural default of a claim based on the petitioner's presentation of the claim in a supplemental *pro se* brief prohibited under Tennessee procedural rule barring defendants from filing *pro se* briefs while simultaneously represented by counsel); *Hill v. Carlton*, 399 F. App'x 38, 42-45 (6th Cir. 2010) (finding a failure to fairly present federal habeas corpus claim when Tennessee petitioner violated similar state procedural rule against hybrid representation). Moreover, the Magistrate Judge correctly determined that a rule can be firmly established and regularly followed despite the fact that "a particular trial court and court of appeals might have disregarded or, in their discretion decided not to enforce the

rule in a few cases[.]" R&R, ECF No. 88, at PAGEID # 2145. *See Ysreal v. Warden*, 2014 WL 7185264, *9 (S.D. Ohio Dec. 16, 2014) ("To be considered regularly followed, a procedural rule need not be applied in every relevant case, but rather "[i]n the vast majority of cases.") (*quoting Dugger v. Adams,* 489 U.S. 401, 410 n. 6 (1989)).

In an effort to save his first claim for relief from procedural default, Petitioner argues the ineffective assistance of appellate counsel for failing to raise this claim on direct appeal establishes cause and prejudice to excuse the default. Alternatively, Petitioner claims the fundamental miscarriage of justice exception should apply. Petitioner is wrong on both accounts. Petitioner cannot establish a claim of appellate counsel ineffectiveness for failing to raise the denial of counsel of choice claim on direct appeal, because ultimately the denial of counsel of choice claim lacks merit, and appellate counsel were therefore not ineffective for failing to raise it. Furthermore, "[t]he narrow exception for fundamental miscarriage of justice is reserved for the extraordinary case in which the alleged constitutional error probably resulted in the conviction of one who is actually innocent of the underlying offense." *Rogers v. Skipper*, No. 19-1426, 2020 WL 4219683, *3 (6th Cir. July 23, 2020) (*citing Schlup v. Delo*, 513 U.S. 298 (1995)). Petitioner has not presented any evidence of actual innocence.

**B. Merits Discussion**

The Magistrate Judge determined that even if Petitioner had preserved his

denial of counsel of choice claim for habeas review, the claim lacks merit. The Magistrate Judge found no evidence of any conspiracy to deny Petitioner use of his funds to hire counsel. According to the Magistrate Judge, "Ahmed provides a lengthy chronology of his attempts to hire counsel, but fails to expose any collaboration, nefarious or otherwise, between the various courts he names, the prosecutor's office, the public defender, or conservator intended to deny him his right to counsel of his choice." R&R, ECF No. 88, at PAGEID # 2150. The Magistrate Judge noted that "[w]hat Ahmed thinks, or suspects, or claims is not evidence upon which this Court may rely in evaluating his counsel-of-choice ground for relief." R&R, ECF No. 88, at PAGEID # 2162.

The Magistrate Judge concluded, and Petitioner appears to agree, that the appropriate standard for reviewing Petitioner's counsel of choice claim was set forth in *Wheat v. United States*, 486 U.S. 153 (1988), which requires Petitioner to demonstrate both that he was denied the right to hire counsel of choice and that the fairness of his trial was compromised as a result. In *Wheat*, the Supreme Court determined that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Id.* at 158-59. The Court noted the right to counsel of choice is not absolute:

> The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government.

*Id.* at 158-59. Subsequently, in 2006, the Supreme Court decided *United States v. Gonzalez-Lopez*, 545 U.S. 140, 148 (2006), finding "[w]here the right to be assisted by counsel of one's choice is wrongly denied, . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation." *Id.* at 148. *Gonzalez-Lopez* was decided a year after Petitioner's convictions became final, *see Ahmed v. Ohio*, 544 U.S. 952 (2005) (denying certiorari) and *Ahmed v. Ohio*, 545 U.S. 1124 (2005), and is not retroactively applicable to Petitioner's case. *Rodriguez v. Montgomery*, 594 F.3d 548, 549 (7th Cir. 2010); *Rodriguez v. Chandler*, 492 F.3d 863, 866 (7th Cir. 2007); *Peters v. Bell*, No. 1:06-cv-880, 2007 WL 3348011, at *1 (W.D. Mich. Nov. 8, 2007).

Because Petitioner's claim is procedurally defaulted, the state courts were not given an opportunity to consider the circumstances leading to Petitioner's funds being subject to oversight. Petitioner contends the domestic relations court improperly restrained his funds, and the probate court permitted funds to be attached to protect a future judgment in the wrongful death action pursued by Lubaina Bhatti's estate and also established a conservatorship over his funds.

Corrected Obj., ECF No. 150, at PAGEID # 10408. Regardless of the various orders pertaining to Petitioner's finances, one thing is clear: Petitioner's funds were always available for Petitioner to use to hire his own counsel.

Petitioner himself acknowledges "[a]n agreement was reached, whereby twenty thousand dollars would be attached *subject to Ahmed's need to use the money to pay for representation in his criminal trial at which time there would be a hearing on the matter.*" ECF No. 150, at PAGEID # 10408 (emphasis added). Petitioner further acknowledges that the orders to which he complains were lifted nearly a year before his trial, alleging in his Corrected Objections that his funds were unavailable "from September 13, 1999 to March 9, 2000," well ahead of his January, 2001 trial. *Id.* at 10427. During a February 7, 2000, status conference, the trial court made clear to Petitioner "if you are laboring under an illusion that I am somehow strapping you from hiring someone, you're mistaken," and the court noted it had "waited for four months for someone to appear in this case." ECF No. 92-1, at PAGEID # 7408-09. In a March 29, 2000, docket entry, the trial court stated "defendant is permitted and encouraged to utilize funds for retention of counsel." ECF No, 90-1, at PAGEID # 2575.

The trial court's willingness to accommodate rather than hinder Petitioner's quest for private counsel was apparent during an April 27, 2000, on-the-record discussion between the trial court and Attorney Harry Reinhart. ECF No. 92-1, at PAGEID # 7432-39. During that hearing, Attorney Reinhart expressed concerns

that Ahmed did not have enough money to hire private counsel and also fund other aspects of his defense. The trial court was willing to permit Petitioner to use his owns funds to hand select counsel, while still availing himself of court resources:

> MR. REINHART: Judge, I've been contacted by Mr. Ahmed who has indicated to me he's interested in retaining me in this matter and I told him that I would explore this both with him and with the other interested parties in this, but I told him that I had to get a few questions answered before I could even consider agreeing to represent him.
>
> He does not have, based on his representations to me, he does not have nearly sufficient funds to properly fund the defense of a capital case. He has – he has enough money that I would consider accepting that on a flat rate basis for legal services for attorneys fees, but that's not the end of the story in this case. I mean, there are costs and expenses in these cases that can be substantial, and I would not be doing him a favor, and I would be doing a disservice to the court and everybody else in this if I agree to enter into the case under circumstances where essentially my professional services are almost guaranteed to be constituted [sic] ineffective assistance of counsel.
>
> So I told him the first question I need to get answered, at least preliminary, would be whether or not the court would entertain an arrangement whereby he is declared marginally indigent, as that phrase is used by the State Public Defender's Office, which means he's got some money, but not enough money, and essentially the State is going to pick up the tab for necessary defense services such mitigation and investigation and, potentially, expert witness fees.
>
> THE COURT: If he has exhausted his asserts and I have his statement to that effect and the conservator's statement to that effect, I will – the County will pick up necessary defense services of a reasonable amount. By that I mean, if this – should he select an investigator that charges $150.00 an hour, that's not reasonable and the County will not pick up the tab for that. But if the fees are consistent with fees charged by other persons performing those services, the County will be reasonable about it.
>
> MR. REINHART: Assuming we got to that point, what I would do is submit a proposed litigation budget to you so you could look at it in advance, and I do that to [sic] both good business practice as a

courtesy to the court and as protection of myself.

THE COURT: So we know what's going on down the road, I think that's a good idea.

. . .

MR. REINHART: So he's a little bit weak even on the flat rate, but I told him I would consider taking it on a flat rate, but if there's not going to be a problem with actually getting the funds from wherever they are right now, you know, to me, and since the court has, as I understand it, some of the accounts are tied up by order of this court, some of the accounts are tied up by order of the other Common Pleas Court judge, and maybe even the Probate Court, can you tell me – can you tell me how difficult it's going to be to actually get access to the funds?

THE COURT: I don't have anything tied up in – I get letters from – he believes I have money tied up. I'm not a judge in any case but this case, and there is a conservatorship downstairs where I have advised them to hold on to $10,000 to pay the Belmont County Public Defender. The Belmont County Public Defender can submit a bill for their services rendered if they stay in this case.

If you told me today that you were taking this case, and you needed that money for your retainer, I would vacate my order. Now, that's the extent of the funds to which I have access. Now, he has, you know, it's a mystery to me, he's told me he only has $15,000 and he's sworn to that, so it's obvious that everybody's records are different.

...

MR. REINHART: I have no problems at all, Judge, with making an in camera disclosure to you about what resources this individual has and he proposes to use to retain me because there is no reason why the court should be asked to authorize a kind of hybrid representation if you know counsel is getting on the sly $500.00, if he had that much money he could pay for his entire defense himself. . . . I don't think I – in fact, I think I have a responsibility to be forthcoming to the court in that regard. But as I understand what you're telling me, if I show you a signed fee contract where I have agreed contractually to represent him –

THE COURT: If I see the check going to you, the money that we have set aside for attorney fees should go to you. I don't have a

> problem with that. I would love to see the case move and I have put off appointing another public defender because I've been told for a month that the hiring of an attorney is about to happen and if – should it happen, no one would be more pleased than me.

ECF No. 92-1, at PAGEID # 7434-38. Additionally, during a January 2, 2001, hearing, Judge Sargus noted that she was "mindful of the great role played by one in his selection of counsel" and reiterated that she had agreed to "not only turn over all funds which were retained by the court, but we would supplement those funds for you so that you could have a defense." ECF No. 92-1, at PAGEID # 7574. During a January 8, 2001, hearing, the trial court remarked "we have all advised every attorney who expressed an interest in the case that any funds that we had would be released." ECF No. 92-1, at PAGEID # 7627. Those on-the-record discussions completely negate the allegations contained in Petitioner's First Claim for Relief.

The state-court record reflects that Ahmed was at all times represented by appointed counsel, beginning at his arraignment, and for nearly sixteen months, Ahmed unsuccessfully attempted to hire private counsel. The Magistrate Judge found no evidence that any of the attorneys Petitioner sought to hire declined representation because the trial court refused to release funds. In so finding, the Magistrate Judge engaged in a detailed thirteen-page recitation of Petitioner's attempts to obtain private counsel, as well as the trial court's willingness to release funds to counsel if counsel entered an appearance in the case. That

discussion, ECF No. 88, at PAGEID # 2150-63, is adopted by the Court. As revealed by that discussion, there is little evidence to suggest Petitioner's inability to hire private counsel had anything to do with the trial court's orders. To the contrary, much evidence suggests Petitioner was unable to hire counsel because of his own terms and conditions regarding new counsel's representation. The record establishes that Petitioner sought to hire an impressive list of criminal defense attorneys. That list includes Dennis McNamara, Sam Shamansky and William Meeks, Harry Reinhart, Brian Rigg and Donald Schumacher, Terry Sherman and Debra Gorrell, Robert Suhr, and Richard Cline and David Young. No agreements were reached with any of these attorneys in large part because Petitioner refused to waive his speedy trial rights to allow new counsel a reasonable time to prepare to defend this quadruple homicide death penalty case. The record reflects the trial judge attempted to facilitate Petitioner's hiring of counsel by agreeing to permit reasonable continuances to accommodate defense preparation, by agreeing to release the funds that had been earmarked for reimbursement of appointed counsel, and by agreeing to authorize additional county funds to pay for reasonably necessary defense services if Petitioner depleted his own funds. *See, e.g.*, ECF No. 92-1, at PAGEID # 7434-38. The Magistrate Judge concluded:

> Although attorney McNamara mentioned that it would take time for Ahmed's funds to be released, he also stated that he could not take Ahmed's case because he did not have time to prepare for

Ahmed's trial, and Ahmed refused to waive his speedy trial right. Attorneys Shamansky, Meeks, and Thomas were apparently willing to take Ahmed's case and sent him forms to complete that would give them access to Ahmed's account with T. Rowe Price, apparently one of the accounts not in the control of the conservator. The record does not indicate what became of those forms, whether Ahmed executed them or not, but because Ahmed had not provided the court with a financial statement from which the court could determine his indigency status, Ahmed was prohibited by a court order from using any of his money for any purpose. Thus, it was Ahmed's failure to cooperate with the court's assessment of his ability to pay for his own counsel that prevented Shamansky, *et. al.* from receiving payment from Ahmed's funds. When attorney Reinhart discussed taking Ahmed's case with Judge Sargus, she assured him there was no barrier to his receiving payment from Ahmed's funds, and this Court has not found within the record any explanation as to why Reinhart ultimately decided not to take Ahmed's case. Although attorneys Rigg and Schumacher initially declined to represent Ahmed in part because of the financial restrictions, they later expressed an interest in taking his case. When they informed Ahmed that he would need to waive his right to a speedy trial if they decided to represent him, he refused to sign either a waiver or the retainer agreement they had presented to him. Ahmed, then, was the one to reject representation by Rigg and Schumacher.

The only evidence that attorneys Sherman and Gorrell were interested in representing Ahmed is their retainer agreement, signed by both of them, but not by Ahmed. The Court cannot presume anything from that document other than that an agreement was not reached. The reasons for that outcome are unknown. Attorney Suhr was apparently under the impression that Ahmed did not have counsel at the time he expressed an interest in representing him, and when he found out otherwise, he determined that having a conversation with Ahmed, who was represented by appointed counsel, would be "premature." That does not establish that Suhr was worried about the availability of Ahmed's funds to pay him should he become Ahmed's lawyer. If this Court were to assume anything about the failure of attorneys Cline and Young to represent Ahmed, it would be that Ahmed altered the "Scope of Work" portion of the retainer agreement to terms that would be unacceptable to most, if not all, attorneys. There is nothing in the record suggesting that they were afraid they would not be paid if they took Ahmed's case. And as for Carpino, it is evident that Ahmed himself had doubts about Carpino's

> ability to competently represent him, and those doubts were warranted, as evidenced by Carpino's filings and conduct in Ahmed's case, by Carpino's conduct in other cases around that same time, and by his mental illness suspension from the practice of law a couple of years later. None of these attorneys ever filed a notice of appearance in Ahmed's case, which the trial court had repeatedly stated was necessary before Ahmed's funds would be released. Under the circumstances present in Ahmed's case, it was not unreasonable for Judge Sargus to require such a filing before disbursing Ahmed's funds to any attorney.

R&R, ECF No. 88, at PAGEID 2159-61. It is relevant to note that although Petitioner claimed he had hired Attorney Carpino as his private counsel, it is clear Carpino wanted to be paid by the court and was hesitant to take on the full role as Petitioner's only trial counsel. This is evidenced by Carpino's requests to be permitted to assist Attorneys Olivito and Hershey, or to appear as "a friend of the court." ECF No. 92-1, at PAGEID # 7575. Carpino inquired as to whether "Belmont County would pay the difference" if Petitioner ran out of funds to pay him. The trial court denied this request, because Attorney Carpino was not certified to serve as appointed counsel in death penalty cases. *Id.* at 7697-7702.

This Court agrees with the recommendation of the Magistrate Judge. Petitioner has presented no evidence of a conspiracy to deny him counsel of choice or any attempt to impede the expenditure of his funds to hire counsel. A much more likely explanation for Petitioner's failure to obtain his own counsel was offered during Petitioner's sentencing hearing, wherein appointed counsel Olivito remarked "no other counsel from any other part of the State of Ohio

wished to become involved in this case after they found out exactly what they had to deal with." ECF No. 92-5, at PAGEID 9548. Petitioner's First Claim for Relief lacks merit.

Having determined Petitioner's First Claim for Relief should be denied as both procedurally defaulted and without merit, the Court must determine whether a COA should issue as to this claim. To warrant a COA, a petitioner must make a substantial showing that he was denied a constitutional right. 28 U.S.C. § 2253(c)(2); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1073 (6th Cir. 1997). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy 28 U.S.C. § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Recently, in *Moody v. United States*, 958 F.3d 485 (6th Cir. 2020), the Sixth Circuit dismissed an appeal and expressly cautioned against issuing a COA in cases where alternate grounds for denying relief exist, finding "a claim does not merit a certificate unless *every independent reason to deny the claim is reasonably debatable*." *Id.* at 488 (emphasis in original). Here, two independent grounds exist to dismiss Petitioner's first ground for relief, and this Court cannot conclude that reasonable jurists would find the Court's resolution of this claim on either basis to be debatable or wrong. The Court denies Petitioner a COA as to

his first claim for relief.

**Second Claim for Relief: Conflict/Breakdown in Attorney-Client Relationship**

In his second claim for relief, Petitioner argues he was denied his rights to counsel, a fair trial, and due process when he was forced to proceed to trial with appointed counsel who had a conflict of interest and when there was a complete breakdown in the attorney-client relationship. Petition, ECF No. 35 at PAGEID # 198. The record reflects that in the time leading up to and during his trial, Petitioner aired a near constant stream of perceived grievances regarding his court-appointed counsel. Petitioner's complaints were the subject of several hearings before the trial court, as well as a civil rights lawsuit filed by Petitioner. The Magistrate Judge recommended denying relief on this claim, and Petitioner objects to that recommendation.

The Magistrate Judge determined that Petitioner's second claim for relief was properly before the court, having been raised on direct appeal before the Ohio Supreme Court as Petitioner's second proposition of law. In rejecting the merits of this claim on direct appeal, the Ohio Supreme Court held:

> In his second proposition of law, appellant asserts that the trial court erred in failing to remove defense counsel, since a conflict of interest occurred when he filed a lawsuit against counsel in federal court. Alternatively, appellant contends that there was a total breakdown of the attorney-client relationship that required counsel's removal. Appellant submits that the trial court's inquiry into the difficulties between him and counsel was insufficient.

Appellant complained about his counsel on numerous occasions. Appellant was first represented by appointed public defenders at his arraignment. Appellant claimed that counsel had not met with him or answered his questions, but counsel disputed appellant's allegations. Due to conflicts with appellant, both attorneys later withdrew, and by June 2000, the trial court had appointed attorneys Peter Olivito and Adrian Hershey to represent appellant. Although appellant sought to hire attorneys of his own choosing, he was never able to do so.

Soon after Olivito and Hershey were appointed, appellant began complaining that their representation was ineffective. At a September 6, 2000 hearing, appellant claimed that counsel had neither met nor consulted with him prior to seeking a continuance. At a November 9, 2000 hearing, appellant complained that Hershey had laughed at and humiliated him in front of a detective, had made racial slurs, and had been hostile toward him. Hershey disputed appellant's complaints, and the court advised appellant to let his counsel help him.

At a January 2, 2001 hearing, appellant told the court that he had hired attorney Joseph Carpino to represent him and that he had filed a civil rights lawsuit against Olivito and Hershey in federal court and wanted to discharge them.

On January 8, 2001, the trial court held a hearing on appellant's motion to discharge counsel. Appellant indicated again that he was suing counsel in federal court. He also claimed that he had given his attorneys a list of witnesses, but that in 16 months, neither his first attorneys nor his new attorneys had contacted them and that his new attorneys had "refused to contact them." Olivito explained that many of the witnesses that appellant had named were in Pakistan and that appellant had not provided phone numbers to contact them. Both attorneys told the trial court of their efforts to obtain witnesses and comply with requests by appellant. The trial court concluded that counsel was representing appellant diligently and therefore overruled appellant's motion to discharge them.

Also at the January 8, 2001 hearing, the court found that Carpino could not serve as appellant's counsel because he was not certified to act as counsel in capital cases. The court overruled Carpino's motion to become appellant's trial counsel.

Appellant reiterated his dissatisfaction with counsel at a January 11, 2001 suppression hearing. He also complained about counsel at the outset of voir dire, as well as at the mitigation and sentencing hearings.

Appellant relies on *Smith v. Lockhart* (C.A.8, 1991), 923 F.2d 1314, 1321, citing *Douglas v. United States* (D.C.App.1985), 488 A.2d 121, 136, in claiming that his federal lawsuit against appointed counsel reflected a conflict between his interests and counsel's. Appellant contends that once he raised the issue of a conflict of interest, the trial court was required to allow him to demonstrate that the conflict "impermissibly imperil[ed] his right to a fair trial." *See Cuyler v. Sullivan* (1980), 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333.

There are strong indications that appellant filed his federal lawsuit simply to get his court-appointed attorneys discharged. Prior to trial, the trial court held hearings regarding appellant's complaints about counsel on November 9, 2000, and January 8, 2001. Upon considering the statements of appellant and counsel, the trial court found no reason to replace counsel. At the conclusion of the November 9 hearing, the trial court urged appellant to let his counsel help him. At the conclusion of the January 8 hearing, the court stated: "The court is comfortable that counsel has represented Mr. Ahmed * * * diligently; that the difficulties which have arisen in this case stem from what Mr. Ahmed himself pinpointed when he said that he does not understand. And the allegations do not have firm footing in law or in fact. The motion to discharge is overruled." Nor did the trial court find any conflict of interest that adversely affected counsel's performance. *See Mickens v. Taylor* (2002), 535 U.S. 162, 171–172, 122 S.Ct. 1237, 152 L.Ed.2d 291. Under these circumstances, we will defer to the trial judge, "who see[s] and hear[s] what goes on in the courtroom." *State v. Cowans* (1999), 87 Ohio St.3d 68, 84, 717 N.E.2d 298.

We further note that courts "must be wary of defendants who employ complaints about counsel as dilatory tactics or for another invidious motive." *Smith v. Lockhart,* 923 F.2d at 1321, fn. 11, citing *United States v. Welty* (C.A.3, 1982), 674 F.2d 185, 193–194.

Appellant continually complained about counsel. The trial court took appellant's complaints seriously and listened to all sides before it

> determined that his complaints were not valid and that counsel should remain as appellant's attorneys. The federal lawsuit appears to have been filed in an attempt to create a conflict so that his counsel would be removed from the case, not a genuine grievance causing a true conflict of interest. Moreover, after the trial court conducted thorough inquiries into the difficulties between appellant and counsel, it found that appellant's complaints against counsel were not substantiated. Nothing offered by appellant compels us to disturb that ruling. *See State v. Deal* (1969), 17 Ohio St.2d 17.
>
> Appellant argues alternatively that even if there was no conflict of interest, there was at least a total breakdown in the attorney-client relationship that necessitated counsel's removal. The trial court, however, addressed appellant's complaints concerning counsel's representation of him at two hearings as stated above. Upon considering appellant's motion for a new trial and his complaints about counsel and claims of counsel's ineffectiveness throughout trial, the trial court held that "[h]ours of testimony [concerning appellant's disagreements with counsel] established that the grounds alleged were not cogent or reliable." In addition, the record reflects many instances where appellant continued to confer with counsel throughout the proceedings, thus belying his claim that there was a total breakdown in the attorney-client relationship.
>
> Since appellant did not substantiate his claims of a conflict of interest and of a total breakdown of the attorney-client relationship, we overrule his second proposition.

*State v. Ahmed*, 103 Ohio St. 3d 27 (2004). Because the Ohio Supreme Court considered and rejected this claim on the merits, this Court's review is limited by the AEDPA.

The Magistrate Judge criticized Petitioner for "repeating verbatim the arguments he presented in the state court" and not attempting "in any serious manner" to satisfy the requirements of the AEDPA. R&R, ECF No, 88, at PAGEID # 2167. The Magistrate Judge observed:

> The issue before the habeas court is not the same as the issue presented to the state court. The question before the state court was whether there was a conflict of interest or a total breakdown of communication between Ahmed and his trial counsel requiring reversal of his convictions. Here, the question is whether the state court's decision that there was not a conflict is either contrary to or an unreasonable application of federal law as determined by the United States Supreme Court, or whether the state court's decision was based upon an unreasonable determination of the facts, given the evidence before that court at the time of Ahmed's trial, starkly different inquiries than the one before the state court in the first instance. Basically cutting and pasting the claim as it was presented to the state court into a habeas petition is consequently ill advised as it does not address the question this Court must consider in habeas review.

R&R, ECF No. 88, at PAGEID # 2166-67.

As noted by the Magistrate Judge, "a claim that counsel labored under a conflict of interest is at base a claim of ineffective assistance of counsel governed by *Strickland v. Washington*, 466 U.S. 668 (1984)." R&R, ECF No. 88, at PAGEID # 2168. Under *Strickland*, the Court must ask whether counsel's performance "fell below an objective standard of reasonableness" and whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The standard for reviewing claims of ineffective assistance of counsel on habeas review is highly deferential:

> The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court.

> Under [the] AEDPA, though, it is a necessary premise that the two questions are different. . . . A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

*Harrington v. Richter*, 562 U.S. 86, 101 (2011).

Applying that deferential standard, the Magistrate Judge concluded that Petitioner fell short of demonstrating that the state court's decision was contrary to federal law or was based on an unreasonable determination of the facts. In reaching that conclusion, the Magistrate Judge opined:

> Ahmed's claim as it was presented in the state court and in this Court is filled with statements that begin with "Ahmed accused . . .," "Ahmed claimed . . .," "Ahmed asserted . . .," "Ahmed believed . . .," and the like (Appendix, Vol. 3 at 287-97; Petition, Doc. No. 35 at PageID 199-207), but the Court notes that Ahmed's belief or claim or assertion of something does not establish it as fact upon which the state court may act, or this Court rely.
>
> That Ahmed lodged numerous and far-fetched accusations against his trial counsel reflects more on his own inability to cooperate with counsel than on counsel's ability to represent him adequately. Ahmed's filing of the lawsuit against his trial counsel in federal court was determined by the state court to likely have been for the very purpose of creating a conflict of interest in hopes of having them removed from his case, and Ahmed does not explain how that determination was unreasonable under federal law or based upon an unreasonable determination of the facts as they existed at the time of the state court's decision.

R&R, ECF No. 88, at PAGEID # 2169.

In his Corrected Objections, Petitioner seeks to introduce a new factual basis for his second ground for relief. Petitioner argues "[e]very lawyer appointed to represent Ahmed had at least a financial conflict that weighed against pursuing

Ahmed's right to hire counsel of his own choosing." ECF No. 150, at PAGEID # 10455. According to Petitioner:

> Ahmed's appointed counsel were conflicted due to the financial detriment they faced if they pursued their own replacement with counsel of Ahmed's choice. In addition, they were conflicted because they believed that their replacement was likely, and thus were not [ ] actively pursuing Ahmed's other trial interests. Moreover, by accepting appointment in the face of Ahmed's clear and repeated statements that he did not want appointed counsel, they entered the case, not as his agents, but as state actors working in opposition to his desire to hire his own counsel and to insist[] on his speedy trial rights. The fact that Ahmed filed a lawsuit alleging that the appointed lawyers were violating his civil rights was to be expected under the circumstances. Ahmed had nowhere to turn except to another court. Judge Sargus, although she was fully aware that Ahmed was not indigent, withheld and controlled his funds despite his multiple attempts to access and use them to hire counsel. His lawyers were not representing his interest in hiring other counsel.

Corrected Obj., ECF No. 150, at PAGEID 10456. The Court notes that this new argument was not set forth in the Petition as part of the second claim for relief, was not included on direct appeal as part of Petitioner's second proposition of law, and was not addressed by the Magistrate Judge in connection with this claim for relief in the R&R. On direct appeal, the factual basis underlying his conflict of interest claim was that Petitioner did not trust his appointed counsel and felt they were not working on his case. Petitioner alleged that counsel failed to meet with him, withheld discovery, failed to review evidence, and did not consult him about continuances.

Respondent characterizes Petitioner's new argument regarding a financial

conflict of interest as an attempt "to transform his conflict of interest claim into the choice of counsel claim that he did not fairly present to the Ohio Supreme Court." Response, ECF No. 151, at PAGEID # 10516. This Court is inclined to agree. To the extent Petitioner argues his appointed counsel operated under a financial conflict of interest with an agenda to maintain their appointment, this factual basis is procedurally defaulted because it was not presented to the state courts. Furthermore, Petitioner's argument is conclusory, speculative and not supported by facts of record. Petitioner points to nothing in the record to support his broad assertion that his counsel labored under a constitutionally infirm conflict of interest simply because they did not want their "employment as court appointed counsel" to be terminated by the trial court. Corrected Obj, ECF No. 150 at PAGEID # 10402. In fact, the state-court record contradicts Petitioner's claim. During a January 8, 2001 hearing, Attorney Hershey stated:

> MR. HERSHEY: Early in this case, it occurred to Mr. Olivito and I that Mr. Ahmed did have a right to hire his own attorney. I redrafted his pro se motions, obtained his signature which he at first refused to sign, filed them in Judge Solovan's court, filed them in this court, filed them in the juvenile court and obtained clear court orders his money was to be released. He immediately appealed Judge Solovan for doing that, became extremely angry at me and informed Mr. Olivito and I that we had absolutely no business interfering in his affairs in these other matters. And from that point on, it's been up to Mr. Ahmed. We have had nothing more to do with the issue.

ECF No. 92-1, at PAGEID # 7628.

With respect to the conflict of interest allegations Petitioner actually

presented to the state court, the Ohio Supreme Court found Petitioner's arguments unpersuasive. The Ohio Supreme Court determined that the trial court carefully considered Petitioner's complaints regarding counsel and found them to be unfounded. Petitioner has not established that this determination was unreasonable under federal law or based on an unreasonable determination of the facts. As such, the Court **OVERRULES** Petitioner's Corrected Objections, ECF No. 150, **ADOPTS** the R&R of the Magistrate Judge, ECF No. 88, and hereby **DENIES** Petitioner's second claim for relief. The Court also declines to issue a COA, because reasonable jurists would not find the Court's resolution of this claim debatable or wrong. Petitioner's Second Claim for Relief is not deserving of further review on appeal.

**Third Claim for Relief: Denial of the Right to Self-Representation**

In his Third Claim for Relief, Petitioner argues he was denied his Sixth and Fourteenth Amendment rights to represent himself at trial. Petition, ECF No. 35-1, at PAGEID # 214. As an initial matter, the Court notes that in this claim, Petitioner asserts the trial court violated his right to self-representation not only during the penalty phase of his trial but during the pre-trial proceedings and guilt phase as well. Petition, ECF No. 35-1, at PAGEID # 214. In the R&R, the Magistrate Judge observed that on direct appeal to the Ohio Supreme Court, Petitioner's allegations regarding the denial of his right to self-representation concerned only the penalty phase. Petitioner never presented the state courts

with any arguments or claims asserting the denial of his right to self-representation in connection with the pre-trial proceedings or the guilt phase of his trial. The Magistrate Judge opined:

> Respondent acknowledges the claim has been properly preserved for habeas corpus review, but argues it is nevertheless meritless. (ROW, Doc. No. 61 at PageID 977-980.) . . . .
>
> Respondent is only partially correct in stating that Ahmed raised the instant claim on direct appeal in the state court. There, Ahmed's claim that he was denied his right to proceed *pro se* was explicitly limited to the mitigation phase of his trial (Appendix, Vol. 3 at 426-28), whereas here, the claim has expanded to include both phases of the trial (Petition, Doc. No. 35 at PageID 214-17). Although a colorable argument could be made that Ahmed procedurally defaulted the part of the instant claim relating to the guilt phase of his trial, Respondent has not suggested that any part of Ahmed's claim has been defaulted.
>
> Generally, procedural default is an affirmative defense that must be asserted by a respondent at the earliest opportunity or it will be waived. *Trest v. Cain*, 522 U.S. 87, 89 (1997). While a federal court is not required to *sua sponte* invoke procedural default when a respondent has failed to do so, there is no prohibition against doing so, either. *Id.* at 89-90; *Sowell v. Bradshaw*, 372 F.3d 821, 830 (6th Cir. 2004); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000). This Court has been reluctant to raise the defense *sua sponte* except in cases where an expressly defederalized claim was presented to the state courts. *See Sheppard v. Bagley*, 604 F.Supp.2d 1003, 1008-1013 (S.D. Ohio 2009). That is not the situation here, and because of the seriousness of the penalty Ahmed faces, the Court will exercise its discretion not to raise the procedural defense *sua sponte*.
>
> Where a respondent does not advance a procedural default defense respecting a habeas claim never presented to the state court, a federal court has an opportunity to address the claim *de novo*. "If deference to the state court is inapplicable . . ., we 'exercise our independent judgment' and review the claim *de novo*." *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003), *quoting Hain v. Gibson*, 287 F.3d 1224, 1229 (10th Cir. 2002). Accordingly, to the extent Ahmed

> argues that he was denied his right to represent himself in the guilt phase of his capital trial, this Court will address his claim *de novo*. That part of his claim relating to the mitigation phase of his trial, of course, will be considered under the familiar standard set forth in the AEDPA.

R&R, ECF No. 88, at PAGEID # 2171-72. Accordingly, the Magistrate Judge reviewed the portion of Petitioner's third ground for relief asserting the denial of his right to self representation during the pre-trial proceedings and guilt phase *de novo* and the allegations concerning the mitigation phase through the deferential lens required by the AEDPA.

The right to self-representation is firmly rooted in the Sixth and Fourteenth Amendments to the United States Constitution:

> It is undeniable that, in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

*Faretta v. California*, 422 U.S. 806, 834 (1975) (citing *Illinois v. Allen*, 397 U.S. 337, 250-51 (1970)). Although the right to self representation exists where a

defendant has voluntarily and intelligently elected to do so, the right is not absolute. As the Magistrate Judge noted:

> Criminal defendants may not use the courtroom to engage in "deliberate disruption . . . [or] serious and obstructionist misconduct," *id.* at 834 n.46, and must be "able and willing abide [sic] by the rules of procedure and courtroom protocol," *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984). "[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000), *see also Sell v. United States*, 539 U.S. 166, 180 (2003) (observing that "the Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one"). Furthermore, any waiver of the right to counsel, for that is what the decision to represent one's self is, must be knowing, intelligent, and unequivocal. *Faretta*, 422 U.S. at 835. When the right to proceed *pro se* is properly invoked and a trial court denies the request, the denial is *per se* reversible error. *McKaskle*, 465 U.S. at 177 n.6.

R&R, ECF No. 88, at PAGEID # 2178-79.

In rejecting the pre-trial and guilt phase portion of Petitioner's third ground for relief, the Magistrate Judge concluded that Petitioner had not attempted to represent himself but had instead vacillated between wanting appointed counsel discharged and replaced and seeking hybrid representation. With respect to the pre-trial proceedings, Petitioner asserts that his intent to waive his right to counsel was evident during a January 2, 2001, hearing. In the R&R, the Magistrate Judge determined that no such request was made:

> [Petitioner] cites to pages eight through eighteen of the transcript of a January 2, 2001, hearing as supporting his claim, but those pages reveal that what Ahmed was actually seeking is discharge of his appointed counsel, Hershey and Olivito, because he had retained

> private counsel, Carpino. (Trial Tr., Vol. 3 at 8-18.) Carpino incongruously stated that he wanted to be appointed as a third counsel in addition to Hershey and Olivito and that he wanted to be appointed as a friend of the court. *Id.* at 8. Ahmed suggested that he could represent himself *pro se* as well as having Carpino retained as his counsel, in other words, he requested hybrid representation, which the court denied. *Id.* at 11-12. Requesting hybrid representation is not the same as requesting to represent one's self, and Ahmed's argument that he requested *pro se* status within the pages of the transcripts he cited is disingenuous.

R&R, ECF No. 88, at PAGEID # 2173. Regarding a September 6, 2000, hearing, the Magistrate Judge concluded that although Petitioner sought to submit his own motion addressing a litany of issues including, but not limited to, voir dire, the exclusion of photographs, and his request to view the crime scene before it was cleaned, Petitioner made no request to proceed *pro se*. *Id.* at PAGEID # 2174. As to the January 8, 2001, hearing, the Magistrate Judge opined that Petitioner had sought to discharge his court-appointed attorneys but did not request to proceed *pro se*.

In his Corrected Objections, Petitioner does not attempt to refute the Magistrate Judge's *de novo* findings regarding whether he sought to definitively assert his right to self representation at the pre-trial and guilt phases. Instead, Petitioner reiterates previous arguments and asserts that he attempted to proceed *pro se* by filing several *pro se* motions, wherein he "sought to represent himself in these motions for limited purposes in order to be able to hire his counsel of choice and to preserve objections his trial lawyers were not making."

Corrected Obj., ECF No. 150, at PAGEID # 10458-59. Petitioner contends that "[a]lthough he asked to be able to self-represent for these specific purposes, he still wanted to hire counsel of choice once he vindicated his right to counsel of choice and to a speedy trial by representing himself in the specified matters." *Id.* The Court finds that each of the additional instances highlighted by Petitioner in the Corrected Objections evidence an intention by Petitioner to engage in hybrid representation, not to knowingly, intelligently and unequivocally waive his right to counsel. *See, e.g.*, Hearing of January 2, 2001, ECF No. 92-1, at PAGEID # 7577-78. Because there is no constitutional right to hybrid representation, Petitioner cannot establish that he is entitled to relief on this part of his third ground for relief. *See McKaskle v. Wiggins*, 465 U.S. 168 (1984) ("*Faretta* does not require a trial judge to permit 'hybrid' representation" and "[a] defendant does not have a constitutional right to choreograph special appearances by counsel"); *United States v. Cromer*, 389 F.3d 662, 682-83 (6th Cir. 2004) ("Because the assertion of the right to self-representation necessarily involves a waiver of the constitutional right to counsel, and given the importance of the right to counsel, we think the wisest course is to require a clear and unequivocal assertion of a defendant's right to self-representation before his right to counsel may be deemed waived."); *Cassano v. Bradshaw*, 1:03 CV 1206, 2018 WL 3455531, at *25 (N.D. Ohio July 18, 2018) ("The Ohio Supreme Court, therefore, reasonably found that Cassano's initial demands regarding representation 'focused

on hybrid representation,' to which he had no constitutional right"); *Rojas v. Warden*, No. 3:13cv2521, 2015 WL 631183, *7 (N.D. Ohio Feb. 12, 2015) ("A defendant has a constitutional right to be represented by counsel or to represent himself during his criminal proceedings, but not both." (citing *United States v. Mosley*, 810 F.2d 93, 98 (6th Cir. 1987))); *Randolph v. Cain*, 412 F. App'x 654 (5th Cir. 2010) ("Requests that vacillate between self-representation and representation by counsel are equivocal.").

With respect to the mitigation phase of trial, the Magistrate Judge summarized Petitioner's attempt to represent himself as follows:

> At the outset of the mitigation phase of Ahmed's trial, he repeatedly requested to waive his right to appointed counsel and to represent himself for the remainder of his trial. (Trial Tr., Vol. 9 at 10, 33, 34, 35.) The trial judge advised him that he would be required to follow the same procedural rules as attorneys, that she would not grant a continuance, and that he would not have a lot of time to talk with the mitigation witnesses. *Id.* at 11. She also warned Ahmed that he does not possess the same knowledge as do his attorneys respecting the available penalties, the mitigating factors, the aggravating circumstances, or the weighing process. *Id.* at 12. She reminded Ahmed that he had already been found in contempt of court several times during his trial, and she cautioned that if he engaged in disorderly or contemptuous conduct, she would remove him from his own case. *Id.* at 11. As the judge reviewed the proposed jury instructions with Ahmed, he rustled papers, and interrupted the judge to question whether the court composed the proposed instructions or if the prosecutor had done so. *Id.* at 23-25. The trial court advised him that he cannot question the court and that if it was his intent to represent himself and thwart the rules of procedure, she would not permit him to proceed *pro se*. *Id.* at 25. Ahmed then asked about the author of the jury instructions again, to which the court responded that if Ahmed were to ask another question contrary to the rules, she would hold him in contempt of court. *Id.* Ahmed continued to interrupt the

> judge and objected to Hershey and Olivito's continued presence in the courtroom since he had decided to represent himself. *Id.* at 29, 33. The judge asked Ahmed again if he wanted his appointed counsel discharged and to represent himself, to which Ahmed responded by repeating his persistent complaint of having been denied his right to hire counsel of his choice. *Id.* at 34. The court then overruled Ahmed's motion, stating it was false and that the issue of Ahmed's dissatisfaction with his appointed counsel had been dealt with previously. *Id.* at 35. The court continued to explain self-representation to Ahmed, however, and responded to his complaint about Hershey and Olivito remaining in the courtroom by saying that they would be there for Ahmed to consult should he wish to do so. *Id.* at 33, 36-37. Finally, the trial court indicated to Ahmed that if he wanted to proceed *pro se*, he had to sign a form acknowledging his rights by a time certain that day. *Id.* at 37. That time came and went without Ahmed's signing the form acknowledging his rights. *Id.* at 38. Instead, Ahmed composed a written addendum to the form contending he was denied his constitutional rights to a continuance and to self-representation without the presence of his previously appointed counsel. *Id.* at 38, 41. When the trial court questioned Ahmed as to whether he agreed that he was advised of his rights to self-representation, Ahmed argued that advisement means nothing when the rights are not given. *Id.* The court found that Ahmed had not effectively signed the acknowledgement of rights form and overruled his motion to proceed *pro se*. *Id.* at 43

R&R, ECF No. 88, at PAGEID # 2176-77. *See also* Trans., ECF No. 92-5, at PAGEID # 9298-9331.

The Magistrate Judge concluded that this claim was raised on direct appeal to the Ohio Supreme Court as Petitioner's thirteenth proposition of law, and the Ohio Supreme Court rejected the claim on the merits. Specifically, the Ohio Supreme Court determined:

> In his 13th proposition of law, appellant submits that the trial court deprived him of due process and the right to conduct his own defense when the court declined to accept his waiver of counsel at the

beginning of the penalty phase. Appellant contends that *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562, guarantees him the right to waive assistance of counsel and proceed *pro se*.

If a trial court denies the right of self-representation, when properly invoked, the denial is per se reversible error. State v. Reed (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, citing McKaskle v. Wiggins (1984), 465 U.S. 168, 177, 104 S.Ct. 944, 79 L.Ed.2d 122. However, in this case, the right of self-representation was not properly invoked. See State v. Vrabel, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 49–53.

At the beginning of the penalty phase, appellant gave the trial court a *pro se* motion "to exercise his right to self representation under the circumstances and thus hereby discharge the appointed counsels." The court explained to appellant the right that he was waiving and what representing himself would entail. The court then gave appellant a docket entry to sign that stated: "Being fully advised of my rights, I hereby elect to represent myself." Appellant signed the form but also wrote on the docket entry: "I have not been allowed the rights under Constitution and as given in Constitution and Crim.R. 10 and 44 to continuance and representation by selection counsel and even to represent myself alone without the presence of court appointed counsels to whom I have sued in the civil case C2–001–0013 in Federal Court. There has been no defense, no defense witnesses and almost no investigation to justify 16 months of delay or period before trial and—."

The trial court then addressed appellant and repeatedly asked him whether he understood his rights and wanted to waive them. Appellant did not give a clear answer. The court then held: "When I read the comments that you have written on the docket entry, I find that you have failed to effectively sign the entry that was prepared by the court; that the soliloquy [sic] has failed and that you have not, in fact, elected to undertake self representation. We will proceed. Counsel will represent you."

The trial court correctly found that appellant did not unequivocally and explicitly invoke his right to self-representation. See State v. Cassano, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 37–38. "The constitutional right of self-representation is waived if it is not timely and unequivocally asserted." Jackson v. Ylst (C.A.9, 1990),

> 921 F.2d 882, 888; see, also, United States v. Frazier–El (C.A.4, 2000), 204 F.3d 553, 558 (assertion of the right of self-representation "must be * * * clear and unequivocal").
>
> Given these circumstances, appellant's 13th proposition is not well taken.

*State v. Ahmed*, 103 Ohio St. 3d 27, 44-45 (2004).

The Magistrate Judge concluded that the decision of the Ohio Supreme Court that Petitioner did not unequivocally invoke his right to self-representation during the penalty phase was entitled to deference under the AEDPA. Additionally, the Magistrate Judge determined that Petitioner's unwillingness to adhere to the rules of court and to conduct himself within the parameters of courtroom protocols constituted an additional reason to deny his request to self represent. The Magistrate Judge opined:

> Ahmed also argues that the trial court improperly required his waiver to be in writing. (Traverse, Doc. No. 71 at PageID 1701.) But what the trial court did is not the primary focus of this Court. Instead, it is how the Ohio Supreme Court decided the constitutional propriety of the trial court's handling of the matter that is at issue. *Harrington v. Richter*, 131 S.Ct. 770, 785 (2011). That court merely concluded that the trial court correctly found Ahmed had not equivocally and explicitly invoked his right to represent himself in the mitigation phase of his trial. *Ahmed*, 103 Ohio St. 3d at 45, 2004-Ohio-4190 at ¶ 107. Significantly, the state supreme court acknowledged that Ahmed actually signed the written request to proceed *pro se*, *Ahmed*, 103 Ohio St. 3d at 44, 2004-Ohio-4190 at ¶ 105, contrary to the trial court's statement on the record that he had not (Trial Tr., Vol. 9 at 38).
>
> In habeas corpus, the petitioner's burden "must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 131 S.Ct. 770, 784 (2011). Both the trial court and the Ohio Supreme Court concluded that Ahmed had not

effectively invoked his right to self representation, presumably because of his handwritten addendum to the form provided to Ahmed by the trial court. This Court need not agree with the state court on that question to deny Ahmed's claim for habeas corpus relief, however. "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams v. Taylor*, 529 U.S. 362, 410 (2000). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington*, 131 S.Ct. at 786, *quoting Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). This Court does not disagree with the state court's decision, but even if it were to do so, Ahmed has not demonstrated that only an unreasonable jurist would agree with the decision. In addition, another basis for denying Ahmed's request to proceed *pro se*, perhaps even stronger than the first, is apparent in the record.

As noted above, a defendant wishing to represent himself may not use the right for the purpose of disrupting the proceedings, and must be willing to follow courtroom procedure and protocol. *Faretta*, 422 U.S. at 834 n.46; *United States v. Lopez-Osuna*, 232 F.3d 657, 665 (9th Cir. 2000) (holding defendant's request to represent himself may be denied when he is unable or unwilling to adhere to rules of procedure and courtroom protocol); *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000) (stating that "the *Faretta* right to self-representation is not absolute, and the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer"); *United States v. Brock*, 159 F.3d 1077, 1079 (7th Cir. 1998) (finding that "when a defendant's obstreperous behavior is so disruptive that the trial cannot move forward, it is within the trial judge's discretion to require the defendant to be represented by counsel"). Ahmed had already been cited for contempt of court before he requested to proceed *pro se* in the mitigation phase of his trial. In numerous hearings, Ahmed repeatedly interrupted the trial judge, answered questions directed to others, refused to move on in his argument when instructed to do so by the court, and used contemptuous language directed at his attorneys and the court (Hearing of January 2, 2001, Trial Tr., Vol. 3 at 18, 19; Hearing of January 8, 2001, Trial Tr., Vol. 4 at 11, 20, 27, 30-31, 33, 37, 42, 43, 45, 46, 48, 49, 52, 54, 57, 59, 73-74; Hearing of January 11, 2001, id. at 86, 87; Hearing of February 1, 2001, Trial

> Tr., Vol. 9 at 11), demonstrating a persistent inability or unwillingness to adhere to the rules of procedure and courtroom protocol. As the trial judge observed, she had been "heroically patient" with Ahmed and his numerous and repeated complaints about them, providing him with multiple opportunities at hearings to air his grievances about his appointed attorneys, his treatment at the jail, and the trial judge herself. (Hearing of January 11, 2001, Trial Tr., Vol. 4 at 85.) Still, she found it necessary to hold Ahmed in contempt of court. (Hearing of February 1, 2001, Trial Tr., Vol. 9 at 11.) In addition, in presenting his request to proceed *pro se*, Ahmed again breached protocol by arguing about the judge's decision that appointed counsel would become stand-by counsel should Ahmed represent himself, challenging the judge on the origin of the proposed jury instructions to the point of being threatened with being held in contempt of court again, interrupting the judge, and arguing with the judge about the difference between being advised of his rights and being given his rights. (Hearing of February 1, 2001, Trial Tr., Vol. 9 at 12, 25, 33, 36, 38-39.) Thus, even if the state court's finding that Ahmed had not effectively invoked his right to self representation were objectively unreasonable, Ahmed's demonstrated unwillingness to adhere to the rules of court and to conduct himself within the parameters of courtroom protocol would provide a solid ground upon which to deny his right to represent himself in the mitigation phase of his trial.

R&R, ECF No. 88, at PAGEID # 2179-80.

This Court agrees with the findings of the Magistrate Judge. The decision of the state courts on this issue is entitled to deference. Furthermore, Ahmed's disruptive behavior was an additional reason to deny his request to represent himself. A review of the hearing discussing his request demonstrates his inability to accept the rules of court. It is also apparent from that hearing that Petitioner sought to represent himself in part just so he could call his appointed counsel as witnesses and subject them to cross-examination. Petitioner's third claim for relief lacks merit, and this Court hereby **ADOPTS** the R&R, **OVERRULES**

Petitioner's Corrected Objections, and declines to issue a COA. Reasonable jurists would not find the Court's resolution of Petitioner's third claim for relief to be debatable or wrong.

**Fifth Claim for Relief: Ineffective Assistance of Appellate Counsel**

In his fifth claim for relief, Petitioner argues he was "denied the effective assistance of appellate counsel when his lawyers failed to raise in his first appeal of right preserved, constitutional issues, apparent on the face of the record including the denial of the right to speedy trial, the right to self-representation, the right to counsel of choice, and trial before a biased or apparently biased judge." Corrected Obj., ECF No. 150 at PAGEID # 10403. These claims were raised before the Ohio Supreme Court in Petitioner's application to reopen his direct appeal, however his application for reopening was dismissed as untimely because Petitioner's appointed counsel failed to comply with the 90-day filing deadline. ECF No. 90-6, PAGEID # 4323. The Magistrate Judge concluded that this procedural rule was not firmly established and regularly followed at the time it was enforced against Petitioner. R&R, ECF No. 88, at PAGEID # 2189-2191. As such, the Magistrate Judge reviewed Petitioner's claims of ineffective assistance of appellate counsel *de novo* and determined that sub-claims one through nine lacked merit and sub-claims ten through thirteen were procedurally defaulted because they were not raised in the application to reopen. *Id.* at PAGEID # 2191-2218.

In his Corrected Objections, Petitioner contends the Magistrate Judge was correct in the assessment of the procedural issues but incorrect in the *de novo* review of certain sub-parts of his fifth claim for relief. Specifically, Petitioner objects to the Magistrate Judge's resolution of the sub-parts challenging appellate counsel's failure to raise the denial of counsel of choice (Corrected Obj., ECF No. 150, at PAGEID # 10470-76), the speedy trial violation (*Id.* at PAGEID # 10476-79), the denial of his right to self-representation (*Id.* at PAGEID # 10479-80), and his claim that the trial judge was biased (*Id.* at PAGEID # 10481-82).

It is well settled that appellate counsel's failure to raise an issue on direct appeal amounts to the ineffective assistance of counsel "only if a reasonable probability exists that the inclusion of the issue would have changed the result of the appeal." *Henness v. Bagley*, 644 F.3d 308, 317 (6th Cir. 2011) (citing *Wilson v. Parker*, 515 F.3d 682, 707 (6th Cir. 2008)). "If a reasonable probability exists that the defendant would have prevailed had the claim been raised on appeal, the court still must consider whether the claim's merit was so compelling that the failure to raise it amounted to ineffective assistance of appellate counsel." *Id.* In other sections of this Opinion and Order, the Court has considered and rejected each of the underlying claims that Petitioner argues appellate counsel should have raised. Because none of the underlying claims have merit, Petitioner cannot prevail on his claim of ineffective assistance of appellate counsel for

failing to raise those issues on appeal. The Court **ADOPTS** the Magistrate Judge's R&R as it relates to Petitioner's fifth claim for relief, R&R ECF No. 88, at PAGEID # 2186-2218, and hereby **DISMISSES** this claim in its entirety. Furthermore, the Court finds that reasonable jurists would not disagree with the Court's resolution of the claim and concludes that no COA should issue.

**Eighth Claim for Relief: Biased Judge**

In his Eighth Claim for Relief, Petitioner argues the trial judge was biased against him throughout his trial. Petition, ECF No. 35, at PAGEID # 273-77. Specifically, Petitioner contends he was "tried before a judge who took control of his funds through defunct divorce proceedings and continued to control his funds making him unable to hire his own counsel. The judge was intolerant of Petitioner's speaking style and accent and created the appearance (and belief in him) that she was biased against him by cutting him off, telling him to be quiet and to 'shut up.'" Corrected Obj., ECF No. 150 at PAGEID # 10403.

The Magistrate Judge concluded that Petitioner's Eighth Claim for Relief is procedurally defaulted and that the ineffective assistance of appellate counsel for failing to raise the claim on direct appeal could not serve as cause and prejudice to excuse that default. The Magistrate Judge concluded that because the underlying claim of judicial bias lacks merit, appellate counsel were not ineffective for failing to raise and preserve the claim on direct appeal. The Court **ADOPTS** the Magistrate Judge's discussion of both the procedural default of this

claim, R&R, ECF No. 88, at PAGEID # 2228-30, and what amounts to a merits discussion of the claim in connection with Petitioner's allegations of ineffective assistance of appellate counsel, *id.* at PAGEID # 2201-03. In sum, although Petitioner alleged bias and sought to disqualify the trial judge through various *pro se* documents and complaints, he failed to fairly present this claim to the state courts on appellate review.

The Court also finds that even if Petitioner had properly raised the claim on direct appeal, the claim is without merit. In connection with Ahmed's First Claim for Relief, this Court adopted the Magistrate Judge's determination that the trial judge did not deny Petitioner access to his funds or impede his ability to hire counsel of choice. Moreover, although Ahmed complains that the trial judge continuously attempted to silence him, the record reflects that Judge Sargus exuded patience in her handling of this case and liberally permitted Petitioner to be heard throughout the proceedings. Hundreds of pages of the transcript reveal the wide latitude Petitioner had to air his grievances regarding appointed counsel, his treatment at the jail, and his belief that jail officials were surveilling his meetings with counsel through ceiling tiles, baseboards, and air vents. *See, e.g.*, Hearing of Nov. 9, 2000, ECF No. 92-1, at PAGEID # 7498-7554; Hearing of Jan. 2, 2001, ECF No. 92-1, at PAGEID # 7568-87; Hearing of Jan. 8, 2001, ECF No. 92-1, at PAGEID # 7588-7705. With respect to the reasonable limits imposed by the trial court, the Magistrate Judge correctly concluded:

> Judge Sargus' refusal to permit Ahmed limitless opportunities to complain about his attorneys, his treatment at the jail, and the bias he perceived on the judge's part toward him was understandable and completely appropriate to maintain some semblance of order in the court in the face of Ahmed's obstreperous behavior. That being the case, Ahmed's appellate counsel were not derelict in failing to raise a losing judicial bias claim as error on direct appeal.

R&R, ECF No. 88, at PAGEID # 2203. The Magistrate Judge's recommendation is a fair and correct assessment of Petitioner's claim, and Petitioner has failed to raise any convincing arguments to the contrary in his objections. The Court hereby **OVERRULES** Petitioner's objections and **DISMISSES** Petitioner's Eighth Claim for Relief as both procedurally defaulted and without merit.

The Magistrate Judge recommended against granting a COA on this issue. A district court "should not grant a certificate without some substantial reason to think that the denial of relief might be incorrect." *Moody v. United States*, 958 F.3d 485 (6th Cir. 2020). Here, two equally strong reasons exist to deny relief on this claim, as it is both defaulted and utterly lacking in merit. A COA is not warranted.

**Thirteenth Claim for Relief: Gruesome Photographs**

In his Thirteenth Claim for Relief, Petitioner argues that the State "introduced particularly gory and gruesome photographs that were, at best, of cumulative probative value and were so likely to induce prejudice against the accused that he was denied Due Process of Law." Corrected Obj., ECF No. 150 at PAGEID # 10403. Specifically, Petitioner challenges the admission of a

videotape and numerous crime scene and autopsy photographs. Petition, ECF No. 35 at PAGEID # 323-24.

In the R&R, the Magistrate Judge determined that Petitioner properly presented his gruesome photographs claim to the Ohio Supreme Court, but that court "did not acknowledge that Ahmed had included his federal claim in his proposition of law before that court, nor did it rely on any federal law or use any language in its opinion that might suggest it had considered Ahmed's due process arguments." R&R, ECF No. 88 at PAGEID # 2264. The Magistrate Judge concluded that the Ohio Supreme Court relied exclusively on state law, and specifically Ohio R. Evid. 403, in finding that "most of the photographs and slides and the crime-scene videotape admitted were relevant to prove the killer's intent, illustrate witnesses' testimonies, or give the jury an appreciation of the nature and circumstances of the crimes." *Id.* Because the Ohio Supreme Court did not address the federal claim Petitioner presented in his direct appeal, the Magistrate Judge reviewed Petitioner's Thirteenth Claim for Relief *de novo*, rather than deferentially. *Id.*

The Magistrate Judge cited the Ohio Supreme Court's description of the materials at issue, a description Petitioner does not challenge:

> Eight crime scene photos were admitted over appellant's objections, and they are gruesome. State's Exhibit 6 depicts the body of Abdul Bhatti on the garage floor. State's Exhibit 15 shows the doorway area between the basement and garage where the bodies of Ruhie and Abdul can partially be seen. State's Exhibit 16 depicts the bodies of

> Lubaina, Ruhie, and Nasira on the basement floor. . . . State's Exhibits 17, 18, 19, and 20 are individual close-up photos of the heads of the four murder victims. State's Exhibit 21 is a crime-scene videotape, and portions of it are repetitive of the crime-scene photos.
> . . .
> Appellant also claims that he was prejudiced by the admission of the autopsy slides of the four victims. . . .
>
> Many of the autopsy slides are gruesome.

*State v. Ahmed*, 103 Ohio St. 3d at 42-43.

In rejecting Petitioner's claim, the Magistrate Judge compiled and cited a laundry list of federal cases rejecting due process claims involving the admission of gruesome evidence:

> The Sixth Circuit Court of Appeals has rejected claims that the admission of gruesome or repetitive evidence is a violation of a defendant's right to due process on numerous occasions. *Franklin v. Bradshaw,* 695 F.3d 439, 456–57 (6th Cir. 2012) (rejecting claim that autopsy photographs of charred, disfigured, and gory remains of victims denied petitioner the fundamental right to a fair trial); *Biros v. Bagley,* 422 F.3d 379, 391 (6th Cir. 2005) (holding admittedly gruesome photographs of victim's severed head, severed breast, and torso depicting pre-and post-mortem injuries demonstrated defendant's intent to kill and mutilate, and that court's limiting instruction was sufficient to guarantee fundamentally fair trial); *Cooey v. Coyle,* 289 F.3d 882, 893–94 (6th Cir. 2002) (finding gruesome and duplicative photographs were highly probative and did not "raise the spectre of fundamental fairness such as to violate federal due process of law"). Many other circuit courts of appeals have done so as well. *Lyons v. Brady,* 666 F.3d 51, 54–56 (1st Cir. 2012); *Wilson v. Sirmons,* 536 F.3d 1064, 1114–16 (10th Cir. 2008); *Rousan v. Roper,* 436 F.3d 951, 958–59 (8th Cir. 2006); *Woods v. Johnson,* 75 F.3d 1017, 1038–39 (5th Cir. 1996); *Gomez v. Ahitow,* 29 F.3d 1128, 1139–40 (7th Cir. 1994); Bat*chelor v. Cupp,* 693 F.2d 859, 865 (9th Cir. 982).

R&R, ECF No. 88 at PAGEID # 2267. In the time since the Magistrate Judge

issued the R&R, the law has not become more favorable to Petitioner.

The Magistrate Judge determined that although the crime scene photographs and videotape were gruesome, many of the photographs were no more gruesome than photographs introduced by the defense, which also portrayed all three bodies, and "in fact appear to be if not identical, then nearly so to some of the challenged photographs (Defense Exhibits 10, 18, Appendix, Vol. 13 at 11, 19)." R&R, ECF No. 88, at PAGEID # 2267. The Magistrate Judge noted that while the close-up photographs of the heads of the four victims are quite gruesome, State's Exhibits 17–20; Appendix, Vol. 12 at 139–42, the photos "were used at trial to identify the victims and to establish the state of the crime scene at the time it was discovered. (Trial Tr., Vol. 7 at 218–20, 239–47.)." R&R, ECF No. 88, at PAGEID 2268. Additionally, the Magistrate Judge determined the photos "show the positions of the victims' bodies relative to each other, and establish the nature and extent of the injuries to them." *Id.* The Magistrate Judge concluded:

> As for the crime scene videotape, it too is gruesome in parts. (State's Exhibit 21, Appendix, Vol. 12, following index, immediately before page 1.) It was offered by the State for the purpose of more fully illustrating the bodies' spatial relationship to each other and various other objects of evidentiary value, such as Ahmed Bhatti's eyeglasses on the garage floor, blood droplets throughout the scene and in the kitchen of the house, and bloody footprints found at the scene and their location relative to the bodies and other evidence. *Id.* The videotape does not linger unnecessarily over the bodies, the copious quantities of the victims' blood, or the slashed throats of the four victims. *Id.* The videotape, too, was used in

> conjunction with testimony from the detective who was one of the first to enter the crime scene. (Trial Tr., Vol. 7 at 247–52.)

*Id.* at PAGEID # 2268.

In the Corrected Objections, Petitioner rehashes previous arguments concerning the gruesome nature of the photographs and argues it was error for the trial court to re-admit certain photos during the sentencing phase. None of his arguments merit further discussion by this Court, with the exception of the autopsy photos. The Magistrate Judge noted in the R&R that the autopsy slides were unavailable for review, and no photographic reproductions of those images had been provided. Those images have since been provided to the Court. On August 19, 2019, the Warden-Respondent manually filed one compact disc containing the autopsy photos that were admitted at trial as State's Exhibits 163 through 166. ECF No. 143. State's Exhibit 163 is a slide containing thirteen photographs taken as part of the autopsy of Abdul Bhatti. Exhibit 164 is a slide containing seventeen photographs from the autopsy of Ruhie Ahmed. Exhibit 165 is a slide containing ten photographs from the autopsy of Nasira Ahmed. Finally, Exhibit 166 is a slide containing fourteen photographs from the autopsy of Lubaina Bhatti Ahmed.

The Court has reviewed each set of photographs and finds Petitioner's objections lack merit. Dr. Keith Norton, the forensic pathologist who conducted the four autopsies, testified regarding the extensive and numerous injuries

inflicted upon each of the four decedents. Tr. Trans., ECF No. 92-4, at PAGEID # 8957-9009. Dr. Norton testified the photographs were helpful to illustrate his findings. *Id.* at PAGEID # 8966. During his testimony, Dr. Norton utilized the photographs when describing the vast number of injuries as well as the nature and extent of the wounds. The photographs illustrated the fatal wounds, the manner of death, and the presence of defensive wounds on all but Nasira. Furthermore, the photographs were probative of Petitioner's intent. For example, the photographs illustrated Dr. Norton's testimony that Lubaina Ahmed received what could be characterized as a disproportionate number of injuries in relation to the other deceased victims. Additionally, the photographs illustrated the severity of her neck injury, which was described by Dr. Norton as a ten and one-half inch long, two and one-half inch deep incised wound or sharp-instrument wound, "which cut across the voice box, both jugular veins, both carotid arteries, and then there was a – actually a mark into the spinal column, the back bone from the front." ECF No. 92-4 at PAGEID # 8986. The photographs illustrated additional injuries to Lubaina Ahmed, including eleven defensive wounds and thirty-three scalp lacerations associated with blunt force trauma. ECF No. 92-4, at PAGEID # 8990-97. Likewise, the photographs illustrated Petitioner's intent and the nature of the injuries to Ruhie Ahmed, which included twenty-six scalp lacerations, at least seven of which were lethal, as well as a significant incised wound to the neck measuring seven and one-half inches long and one and one-

half inches deep, that injured the voice box, carotid artery and jugular vein. ECF No. 92-4, at PAGEID # 8977-85.

In sum, the Court **ADOPTS** the R&R of the Magistrate Judge with respect to Petitioner's gruesome photographs claim. Habeas relief is not available for a state court's evidentiary ruling unless the ruling was "so egregious that it resulted in a denial of fundamental fairness." *Giles v. Schotten*, 449 F.3d 698, 704 (6th Cir. 2006); *see also Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Here, Petitioner has not established that the trial court's evidentiary rulings with respect to the photographs or videotape were egregious, or even incorrect. The photographs were probative of Petitioner's intent to kill and mutilate the four victims, and they illustrated the testimony of the pathologist regarding the nature and number of injuries. Likewise, the crime scene photographs and videotape discussed in detail by the Magistrate Judge were indicative of the spacial relationship of the bodies at the crime scene, both in relation to each other and to other objects of evidentiary value, such as bloody footprints and blood droplets. That evidence also helped to illustrate the testimony of the first officers on the scene.

The Court hereby **DENIES** Petitioner's Thirteenth Claim for Relief as without merit and further finds that this issue is not deserving of further attention on appeal. The Court declines to issue a COA.

**Nineteenth Claim for Relief: Speedy Trial**

In his Nineteenth Claim for Relief, Petitioner argues the trial court,

prosecutor, and his trial counsel violated his right to a speedy trial. Petition, ECF No. 35 at PAGEID # 371-78. According to Petitioner, he was "denied his right to a speedy trial because the trial judge took control of his funds and made it impossible for him to hire his counsel of choice and appointed counsel against Petitioner's wishes who failed to investigate and conduct his defense as he wished, who failed to safeguard his right to a speedy trial, and who failed to pursue his right to counsel of choice." Corrected Obj., ECF No. 150 at PAGEID # 10404.

The Magistrate Judge determined Petitioner procedurally defaulted his Nineteenth Claim for Relief by failing to raise it on direct appeal and that the ineffective assistance of appellate counsel could not serve as cause and prejudice sufficient to excuse that default. R&R, ECF No. 88, at PAGEID # 2295. In so finding, the Magistrate Judge considered the merits of Petitioner's underlying speedy trial claim to the extent necessary to determine whether appellate counsel were ineffective for failing to raise the matter as error on direct appeal. The Magistrate Judge concluded the claim, had it been raised, was meritless, which in turn means that appellate counsel were not ineffective for omitting the claim on direct appeal. R&R, ECF No. 88, at PAGEID # 2295.

In considering the underlying merits of Petitioner's speedy trial claim as it related to whether appellate counsel were ineffective for failing to raise the issue, the Magistrate Judge applied the Supreme Court's flexible four-part balancing

test for examining whether a defendant's federal constitutional right to a speedy trial has been violated: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether prejudice occurred. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). "No one factor is dispositive. Rather, they are related factors that must be considered together with any other relevant circumstances." *Brown v. Romanowski*, 845 F.3d 703, 712 (6th Cir. 2017) (citing *Barker*, 407 U.S. at 533). Furthermore, "[e]ven if all four *Barker* factors are satisfied, a court is not required to conclude that a defendant's speedy trial right has been violated." *Rice v. Warden*, 786 F. App'x 32, 35 (6th Cir. 2019).

Here, the Magistrate Judge noted that the length of delay in this case was approximately sixteen months, calculated from the date of Petitioner's September 11, 1999, arrest until voir dire began on January 16, 2001. A delay that approaches one year triggers a court's consideration of the rest of the *Barker* factors. With respect to the second factor, the Magistrate Judge determined that none of the continuances were requested by the prosecution. Instead, each continuance was requested by defense counsel, and "because 'the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation,' delay caused by the defendant's counsel is also charged against the defendant, whether counsel is retained or appointed." R&R, ECF No. 88, at PAGEID # 2197 (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)).

Specifically, the Magistrate Judge concluded:

> None of defense counsel's requests for continuances was unreasonable. Approximately one month of delay was requested and granted because defense counsel stated it was impracticable to defend a defendant charged with four aggravated murders and facing the death penalty three months after the crimes. That is indubitably an accurate assessment and implies conscientiousness rather than needless delay. One year of the delays can be attributed to the time necessary for the defense to complete DNA testing. On day of the delay was attributable to the federal holiday marking the birth of Dr. Martin Luther King, Jr. Although Ahmed at times expressed opposition to the continuances, none of counsel's requests were unreasonable and nothing in the record suggests that counsel had any nefarious or ulterior motive in requesting them. Even if the reasons given by counsel had not fully explained why any particular continuance was required, Ahmed himself caused his attorneys to expend significant pre-trial time on collateral matters, such as Ahmed's repeated attempts to substitute counsel, which were sometimes effective; his lawsuits naming everyone involved in his legal matters (including those whose connection was solely tangential) as either defendants or witnesses; his seeking to have the trial judge removed from his case; his constant complaining about having been deprived of access to his own money; and his insistence that extraordinary measures be taken to assure the confidentiality of his conversations with counsel at the jail. "Just as a State's 'deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the [State],' so too should a defendant's deliberate attempt to disrupt proceedings be weighed heavily against the defendant." *Vermont*, 556 U.S. at 93, *quoting Barker*, 407 U.S. at 531. Thus, any delay unaccounted for by counsel's need to adequately prepare for trial would be taxed to Ahmed's contumacy and his attempts to derail his trial. The second *Barker* factor weighs heavily against Ahmed.

R&R, ECF No. 88, at PAGEID # 2197-98. With respect to the remaining factors, the Magistrate Judge concluded the third factor weighed in favor of Petitioner, because he objected to continuance requests. As to the last factor—prejudice—

the Magistrate Judge noted "Ahmed failed to demonstrate, as opposed to alleging, prejudice from the delays." *Id.* at PAGEID # 2200.

In his Corrected Objections, Petitioner argues that in the context of a speedy trial violation, the prejudice is "personal" and "not always readily identifiable." Corrected Obj., ECF No. 150, at PAGEID # 10505. Specifically, Petitioner asserts he suffered oppressive pre-trial incarceration, was assaulted while in jail awaiting trial, was denied food at the conclusion of a religious fast, and lost his apartment while waiting in jail for sixteen months before trial. *Id.* at PAGEID # 10507. The Court does not find Petitioner's arguments persuasive.

The Supreme Court has identified three relevant forms of prejudice in speedy trial cases: (1) "oppressive pretrial incarceration"; (2) "anxiety and concern of the accused"; and (3) "'the possibility that [the accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." *Doggett v. United States,* 505 U.S. 647, 654 (1992) (quoting *Barker,* 407 U.S. at 532). "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker*, 407 U.S. at 532. *See also United States v. Howard,* 218 F.3d 556, 564 (6th Cir. 2000) ("a defendant who cannot demonstrate how his defense was prejudiced with specificity will not make out a speedy trial claim no matter how great the ensuing delay."). In the instant case, Petitioner does not allege the third form of prejudice and fails to assert how the pretrial delay impaired his defense or

resulted in the loss of exculpatory evidence. Petitioner's claimed prejudice, particularly the loss of his apartment, is less than substantial.

Here, the reasons for the delay in trial were largely due to the conduct of Petitioner himself or Petitioner's counsel—not dilatory conduct by the state. Counsel sought reasonable continuance requests to prepare to defend a case of mass murder involving the death penalty. While attempting to remain focused on the defense of Petitioner, counsel were continually forced to address peripheral matters including Petitioner's unfounded and hostile allegations towards them, Petitioner's attempts to sue them, Petitioner's constant complaints of conspiracies, and his overall disruption of the proceedings. The Court finds Petitioner's pre-trial delay was not unreasonable, Petitioner did not suffer prejudice as a result, and the Court rejects any claim that Petitioner was denied his constitutional right to a speedy trial.

In sum, Petitioner procedurally defaulted his speedy trial claim by failing to raise it on direct appeal. Petitioner cannot establish the ineffective assistance of appellate counsel as cause and prejudice to excuse that default because the claim would not have been successful on the merits had appellate counsel raised it. The Court hereby **ADOPTS** the R&R of the Magistrate Judge, set forth at ECF No. 88 at PAGEID # 2194-2200, 2294-95, and **OVERRULES** Petitioner's objections. The Court finds that reasonable jurists would not find the Court's resolution of Petitioner's Nineteenth Claim for relief to be debatable or wrong,

and Petitioner is not entitled to a COA.

**Twenty-Seventh Claim for Relief: Cumulative Error**

In his Twenty-Seventh Claim for Relief, Petitioner argues "[t]he cumulative prejudice from the errors at his trial denied Petitioner a fair trial and Due Process of law." Corrected Obj., ECF No. 150 at PAGEID # 10404. The Magistrate Judge summarily denied this claim, finding cumulative error is not a basis for habeas corpus relief, even in a capital case. R&R, ECF No. 88, at PAGEID # 2317. The Magistrate Judge's decision is supported by binding Sixth Circuit precedent. *See Webster v. Horton*, 795 F. App'x 322, 327-28 (6th Cir. 2019) ("Webster argued that the trial court's cumulative errors entitled him to habeas relief. As stated by the district court, such claims of cumulated trial errors are not cognizable under § 2254."). *See also Moreland v. Bradshaw*, 699 F.3d 908, 931 (6th Cir. 2012) ("'[P]ost-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief.'") (quoting *Hoffner v. Bradshaw*, 622 F.3d 487, 513 (6th Cir. 2010)); *Sheppard v. Bagley*, 657 F.3d 338, 348 (6th Cir. 2011) ("Finally, Sheppard argues that the cumulative effect of these errors rendered his trial fundamentally unfair. Post-AEDPA, that claim is not cognizable."); *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005) ("Because Moore can cite no Supreme Court precedent obligating the state court to consider the alleged trial errors cumulatively, we cannot grant relief on this ground."); *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002) (death

penalty case noting "[t]he Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief."). Furthermore, there is no error to cumulate as each of Petitioner's claims for relief lack merit. Petitioner's objection to the decision of the Magistrate Judge is **OVERRULED**, and because reasonable jurists would not find this decision debatable or wrong, the Court will not issue a COA as to Petitioner's Twenty-Seventh Claim for Relief.

## IV. CONCLUSION

For the foregoing reasons, the Court **ADOPTS** and **AFFIRMS** the Magistrate Judge's R&R, ECF No. 88, and **OVERRULES** Petitioner's Corrected Objections, ECF No. 150. The Court **DENIES** the petition for a writ of habeas corpus and **DISMISSES** this action **WITH PREJUDICE**.

Furthermore, the Court **DENIES** Petitioner a certificate of appealability and hereby **CERTIFIES** that any appeal in this matter would be objectively frivolous.

**IT IS SO ORDERED.**

s/Michael H. Watson

**MICHAEL H. WATSON, JUDGE**
**UNITED STATES DISTRICT COURT**

[Cite as *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190.]

**THE STATE OF OHIO, APPELLEE, *v.* AHMED, APPELLANT.**

**[Cite as *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190.]**

*Criminal law — Aggravated murders — Death penalty upheld, when.*

(No. 2001-0871—Submitted April 27, 2004—Decided August 25, 2004.)

APPEAL from the Court of Common Pleas for Belmont County, No. 99-CR-192.

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**ALICE ROBIE RESNICK, J.**

**{¶1}** On the afternoon of September 11, 1999, Belmont County Sheriff deputies discovered the bodies of Dr. Lubaina Ahmed, Ruhie Ahmed, Nasira Ahmed, and Abdul Bhatti in Lubaina's rental home. Later that night, defendant-appellant, Nawaz Ahmed, was detained before he could depart for Pakistan on a flight from John F. Kennedy International Airport ("JFK") in New York. Appellant was indicted for the aggravated murders of his estranged wife, Lubaina, her father, Abdul, and her sister and niece, Ruhie and Nasira. Appellant was found guilty and sentenced to death.

I. Facts and Case History

**{¶2}** In October 1998, Lubaina hired an attorney to end her marriage with appellant and to secure custody of their two children, Tariq and Ahsan. According to Lubaina's divorce attorney, appellant did not want a divorce, and consequently, it was a hostile divorce proceeding. In early February 1999, shortly after the complaint for divorce had been filed, Lubaina was awarded temporary custody of the children and exclusive use of the marital residence. Later that month, the divorce court issued a restraining order to prevent appellant from coming near Lubaina or making harassing phone calls to her.

**{¶3}** Appellant had accused Lubaina, a physician, of having an affair with another physician, and claimed that their oldest son, Tariq, was not his. A

Appendix E

subsequent paternity test showed that claim to be false. According to Lubaina's divorce attorney, Grace Hoffman, Lubaina had been afraid of appellant, and she had called Hoffman three or four times a week, "scared [and] frustrated * * *. It just kept escalating." Lubaina had also confided to Hoffman that appellant had forced her to have sex with him during the marriage.

{¶4} Tahira Khan, one of Lubaina's sisters, corroborated that Lubaina had feared appellant. She also testified that Lubaina had told her that appellant had raped her repeatedly.

{¶5} The owner of the rental home where Lubaina resided testified that Lubaina had called him in February 1999 and asked him to change the locks on the house. He stated that Lubaina had been very upset and had asked that he change them within the hour.

{¶6} In March 1999, Lubaina complained to police that appellant was harassing her by telephone, but after the officer explained that the matter could be handled through criminal or civil proceedings, she decided to handle it through the ongoing divorce proceedings. The final divorce hearing was scheduled for Monday, September 13, 1999, and Lubaina had arranged for her sister Ruhie to fly in from California the Friday before to testify at the hearing.

{¶7} On Friday, September 10, 1999, appellant called Lubaina's office several times. But Lubaina had instructed the medical assistants at her office to reject any phone calls from him. Then, at approximately 4:00 p.m. that day, Lubaina took appellant's call. Appellant, who worked and lived in Columbus, wanted Lubaina to bring the children to him for the weekend two hours earlier than planned. Appellant claimed that he was planning a surprise birthday party for their youngest son. Lubaina, however, refused to change her plans and told appellant that he was using the birthday party as an excuse to inconvenience her.

{¶8} Rafi Ahmed, husband of Ruhie and father of two-year-old Nasira, testified that Ruhie and Nasira had been scheduled to arrive in Columbus from

California at 10:34 p.m. on Friday, September 10. Ruhie had planned to call Rafi that night when she arrived at Lubaina's home near St. Clairsville. However, since he had not heard from Ruhie, Rafi began calling Lubaina's home at 1:21 a.m., Saturday, September 11. Rafi called 20 to 25 times, but he got only Lubaina's answering machine. At approximately 3:00 a.m., he called the Belmont County Sheriff's Office.

**{¶9}** A parking receipt found in Lubaina's van indicated that the van had entered a Columbus airport parking lot at 9:30 p.m. and exited at 11:14 p.m. on September 10, 1999.

**{¶10}** Around 3:45 a.m. on September 11, in response to Rafi Ahmed's call, a sheriff's detective went to Lubaina's home and knocked on the doors and rang the doorbell. She got no answer. The detective also looked in the windows, but nothing at the home appeared to be disturbed.

**{¶11}** Later that day, Belmont County Sheriff's Department Detective Steve Forro was assigned to investigate the missing persons. He recognized Lubaina's name because he was the officer who had talked to her regarding appellant's harassing phone calls. Forro called appellant's home to see if he had any information. Appellant did not answer, so Forro called Columbus police to have them check appellant's apartment. They did and found that he was not home.

**{¶12}** Forro went to Lubaina's home at 2:18 p.m. As he walked around the outside of the house, he noticed a flicker of a car taillight through a garage window. Using a flashlight, he looked through the window and saw a van with its hatch open and luggage inside. He then saw the body of a man on the floor covered with blood.

**{¶13}** Forro called for backup. Deputy Dan Showalter responded and entered through a side door, which he had found unlocked. He searched the house and found three more bodies on the basement floor.

**{¶14}** Detective Bart Giesey found appellant's MCI WorldCom employee badge on the basement floor near the bodies. Records from appellant's employer, MCI WorldCom in Hilliard, Ohio, revealed that appellant's badge was last used at 7:19 p.m. on September 10, 1999.

**{¶15}** Through several inquiries, police learned that appellant was scheduled to depart from JFK for Lahore, Pakistan, that evening. Earlier that day, appellant, through a travel agent, had booked a flight leaving for Pakistan that same evening. Appellant had made arrangements to pick up the airline ticket at the travel agent's home near JFK. Appellant arrived at the agent's home with both of his sons and asked if he could leave them with the agent, saying that his wife would pick them up soon. Appellant wrote on the back of his and Lubaina's marriage certificate, which he gave to the agent, that he was leaving his sons to be handed over to his wife. Appellant also signed his car over to the agent. The agent then drove appellant to JFK to catch his flight to Pakistan.

**{¶16}** At 8:10 p.m., Robert Nanni, a police officer stationed at JFK, learned that appellant was a murder suspect and that he had checked in for a flight scheduled to leave for Pakistan at 8:55 p.m. Appellant was located and arrested. Nanni noticed a large laceration on appellant's right thumb. Nanni read appellant his rights and called airport paramedics to attend to appellant's thumb. Among the items confiscated from appellant was an attaché case containing 15 traveler's checks totaling $7,500, his will, and $6,954.34 in cash.

**{¶17}** On October 7, 1999, a grand jury indicted appellant on three counts of aggravated murder for purposely and with prior calculation and design killing Lubaina, Ruhie, and Abdul, pursuant to R.C. 2903.01(A), and one count for the aggravated murder of Nasira, pursuant to R.C. 2903.01(C) (victim younger than 13). All four aggravated murder counts carried a death-penalty specification alleging a course of conduct involving the killing of two or more persons. R.C. 2929.04(A)(5). The aggravated murder count for Nasira carried an additional

death-penalty specification alleging that the victim was younger than 13 years at the time of the murder. R.C. 2929.04(A)(9).

**{¶18}** At trial, Dr. Manuel Villaverde, the Belmont County Coroner, testified that he had been called to the crime scene on September 11, 1999. All four victims appeared to have died from blood loss from slashes on their necks. Based on the condition of the bodies, he determined that the victims had been killed at approximately 3:00 a.m. that day, with two to four hours' variation either way.

**{¶19}** A deputy coroner for Franklin County performed autopsies on all four victims and concluded that each victim had died from skull fractures and a large cut on the neck.

**{¶20}** Diane Larson, a forensic scientist at the DNA-serology section of the Bureau of Criminal Identification and Investigation ("BCI"), concluded that the DNA of blood found in the kitchen of Lubaina's home matched appellant's DNA profile. The probability of someone else in the Caucasian population having that same DNA profile is 1 in 7.6 quadrillion, and in the African-American population, the probability is 1 in 65 quadrillion.

**{¶21}** After deliberating, the jury found appellant guilty as charged. After the mitigation hearing, the jury recommended death, and the court imposed a death sentence on appellant.

**{¶22}** The cause is now before this court upon an appeal as of right.

**{¶23}** Appellant has raised 19 propositions of law. We have reviewed each and have determined that none justifies reversal of appellant's convictions for aggravated murder. Pursuant to R.C. 2929.05(A), we have also independently weighed the aggravating circumstances against the mitigating evidence. We find that the aggravating circumstance (circumstances, in the case of Nasira) in each murder count outweighs the mitigating factors beyond a reasonable doubt. Therefore, we affirm appellant's sentence of death.

## II. Pretrial/Voir Dire Issues

### A. Failure to Remove Counsel

**{¶24}** In his second proposition of law, appellant asserts that the trial court erred in failing to remove defense counsel, since a conflict of interest occurred when he filed a lawsuit against counsel in federal court. Alternatively, appellant contends that there was a total breakdown of the attorney-client relationship that required counsel's removal. Appellant submits that the trial court's inquiry into the difficulties between him and counsel was insufficient.

**{¶25}** Appellant complained about his counsel on numerous occasions. Appellant was first represented by appointed public defenders at his arraignment. Appellant claimed that counsel had not met with him or answered his questions, but counsel disputed appellant's allegations. Due to conflicts with appellant, both attorneys later withdrew, and by June 2000, the trial court had appointed attorneys Peter Olivito and Adrian Hershey to represent appellant. Although appellant sought to hire attorneys of his own choosing, he was never able to do so.

**{¶26}** Soon after Olivito and Hershey were appointed, appellant began complaining that their representation was ineffective. At a September 6, 2000 hearing, appellant claimed that counsel had neither met nor consulted with him prior to seeking a continuance. At a November 9, 2000 hearing, appellant complained that Hershey had laughed at and humiliated him in front of a detective, had made racial slurs, and had been hostile toward him. Hershey disputed appellant's complaints, and the court advised appellant to let his counsel help him.

**{¶27}** At a January 2, 2001 hearing, appellant told the court that he had hired attorney Joseph Carpino to represent him and that he had filed a civil rights lawsuit against Olivito and Hershey in federal court and wanted to discharge them.

**{¶28}** On January 8, 2001, the trial court held a hearing on appellant's motion to discharge counsel. Appellant indicated again that he was suing counsel in federal court. He also claimed that he had given his attorneys a list of witnesses, but that in 16 months, neither his first attorneys nor his new attorneys had contacted them and that his new attorneys had "refused to contact them." Olivito explained that many of the witnesses that appellant had named were in Pakistan and that appellant had not provided phone numbers to contact them. Both attorneys told the trial court of their efforts to obtain witnesses and comply with requests by appellant. The trial court concluded that counsel was representing appellant diligently and therefore overruled appellant's motion to discharge them.

**{¶29}** Also at the January 8, 2001 hearing, the court found that Carpino could not serve as appellant's counsel because he was not certified to act as counsel in capital cases. The court overruled Carpino's motion to become appellant's trial counsel.

**{¶30}** Appellant reiterated his dissatisfaction with counsel at a January 11, 2001 suppression hearing. He also complained about counsel at the outset of voir dire, as well as at the mitigation and sentencing hearings.

**{¶31}** Appellant relies on *Smith v. Lockhart* (C.A.8, 1991), 923 F.2d 1314, 1321, citing *Douglas v. United States* (D.C.App.1985), 488 A.2d 121, 136, in claiming that his federal lawsuit against appointed counsel reflected a conflict between his interests and counsel's. Appellant contends that once he raised the issue of a conflict of interest, the trial court was required to allow him to demonstrate that the conflict "impermissibly imperil[ed] his right to a fair trial." See *Cuyler v. Sullivan* (1980), 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333.

**{¶32}** There are strong indications that appellant filed his federal lawsuit simply to get his court-appointed attorneys discharged. Prior to trial, the trial

court held hearings regarding appellant's complaints about counsel on November 9, 2000, and January 8, 2001. Upon considering the statements of appellant and counsel, the trial court found no reason to replace counsel. At the conclusion of the November 9 hearing, the trial court urged appellant to let his counsel help him. At the conclusion of the January 8 hearing, the court stated: "The court is comfortable that counsel has represented Mr. Ahmed * * * diligently; that the difficulties which have arisen in this case stem from what Mr. Ahmed himself pinpointed when he said that he does not understand. And the allegations do not have firm footing in law or in fact. The motion to discharge is overruled." Nor did the trial court find any conflict of interest that adversely affected counsel's performance. See *Mickens v. Taylor* (2002), 535 U.S. 162, 171-172, 122 S.Ct. 1237, 152 L.Ed.2d 291. Under these circumstances, we will defer to the trial judge, "who see[s] and hear[s] what goes on in the courtroom." *State v. Cowans* (1999), 87 Ohio St.3d 68, 84, 717 N.E.2d 298.

**{¶33}** We further note that courts "must be wary of defendants who employ complaints about counsel as dilatory tactics or for another invidious motive." *Smith v. Lockhart*, 923 F.2d at 1321, fn. 11, citing *United States v. Welty* (C.A.3, 1982), 674 F.2d 185, 193-194.

**{¶34}** Appellant continually complained about counsel. The trial court took appellant's complaints seriously and listened to all sides before it determined that his complaints were not valid and that counsel should remain as appellant's attorneys. The federal lawsuit appears to have been filed in an attempt to create a conflict so that his counsel would be removed from the case, not a genuine grievance causing a true conflict of interest. Moreover, after the trial court conducted thorough inquiries into the difficulties between appellant and counsel, it found that appellant's complaints against counsel were not substantiated. Nothing offered by appellant compels us to disturb that ruling. See *State v. Deal* (1969), 17 Ohio St.2d 17, 46 O.O.2d 154, 244 N.E.2d 742, syllabus.

**{¶35}** Appellant argues alternatively that even if there was no conflict of interest, there was at least a total breakdown in the attorney-client relationship that necessitated counsel's removal. The trial court, however, addressed appellant's complaints concerning counsel's representation of him at two hearings as stated above. Upon considering appellant's motion for a new trial and his complaints about counsel and claims of counsel's ineffectiveness throughout trial, the trial court held that "[h]ours of testimony [concerning appellant's disagreements with counsel] established that the grounds alleged were not cogent or reliable." In addition, the record reflects many instances where appellant continued to confer with counsel throughout the proceedings, thus belying his claim that there was a total breakdown in the attorney-client relationship.

**{¶36}** Since appellant did not substantiate his claims of a conflict of interest and of a total breakdown of the attorney-client relationship, we overrule his second proposition.

B. Change of Venue

**{¶37}** In his ninth proposition of law, appellant claims that pervasive, prejudicial pretrial publicity about this case saturated Belmont County and thus required a change of venue. Appellant moved for a change of venue and, in a hearing on that motion, offered 14 articles about the crimes from local newspapers. The trial court, however, overruled the motion after the jury had been impaneled.

**{¶38}** The trial court has discretion to grant or deny a motion for a change of venue; its ruling will not be disturbed on appeal unless the court abused its discretion. See, e.g., *State v. Lundgren* (1995), 73 Ohio St.3d 474, 479, 653 N.E.2d 304. We have long held that voir dire examination provides the best test as to whether prejudice exists in the community against the defendant precluding a fair trial in the jurisdiction. *State v. Swiger* (1966), 5 Ohio St.2d 151, 34 O.O.2d 270, 214 N.E.2d 417, paragraph one of the syllabus; *State v. Landrum* (1990), 53

Ohio St.3d 107, 117, 559 N.E.2d 710. "A defendant claiming that pretrial publicity has denied him a fair trial must show that one or more jurors were actually biased." *State v. Treesh* (2001), 90 Ohio St.3d 460, 464, 739 N.E.2d 749; accord *Mayola v. Alabama* (C.A.5, 1980), 623 F.2d 992, 996. Even pervasive adverse pretrial publicity does not inevitably lead to an unfair trial. *Nebraska Press Assn. v. Stuart* (1976), 427 U.S. 539, 554, 96 S.Ct. 2791, 49 L.Ed.2d 683.

**{¶39}** Undoubtedly, there was extensive pretrial publicity about the murders in the local media. However, the trial court conducted an extensive, individual, sequestered voir dire of prospective jurors, which helped insulate against any negative effect of the pretrial publicity. *Lundgren*, 73 Ohio St.3d at 479-480, 653 N.E.2d 304.

**{¶40}** The trial court did not abuse its discretion in denying appellant's request for a change in venue. Similar to the situations in *Treesh*, 90 Ohio St.3d at 464, 739 N.E.2d 749, and *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 28-30, appellant failed to demonstrate that "the publicity in this case was so pervasive that it impaired the ability of the empaneled jurors to deliberate fairly and impartially."

**{¶41}** Moreover, as in *Treesh*, each empaneled juror confirmed during voir dire that he or she had not formed an opinion about the guilt or innocence of the accused, could put aside any information previously heard about the case, and could render a fair and impartial verdict based on the law and evidence. Thus, appellant has not shown that any biased juror sat on the jury or that the trial court abused its discretion. Accordingly, we reject appellant's ninth proposition.

C. Failure to Grant a Continuance

**{¶42}** In his tenth proposition of law appellant asserts that the trial court abused its discretion in failing to grant him a continuance at the outset of trial.

**{¶43}** On the day before voir dire began, appellant provided defense counsel a list of approximately 60 potential witnesses that he wanted contacted

and interviewed to aid in his defense. The list of names provided no addresses or phone numbers, but only a general description of the area where the potential witnesses might be located, i.e., Pakistan, Washington D.C., Pittsburgh, New York. Defense counsel requested a continuance in order to find and interview these potential witnesses. The state objected, and the trial court denied the continuance, stating: "I believe that if we were to work with this list, we might never have a trial. And so balancing the need to have an efficient administration of justice and the tardy presentation of the list, the court overrules the motion for a continuance."

**{¶44}** We have recognized that " '[t]he grant or denial of a continuance is a matter [that] is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.' " *State v. Jones* (2001), 91 Ohio St.3d 335, 342, 744 N.E.2d 1163, quoting *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 21 O.O.3d 41, 423 N.E.2d 1078. In evaluating a motion for a continuance, "[s]everal factors can be considered: the length of delay requested, prior continuances, inconvenience, the reasons for the delay, whether the defendant contributed to the delay, and other relevant factors." *State v. Landrum*, 53 Ohio St.3d at 115, 559 N.E.2d 710.

**{¶45}** Appellant asserts that the denial of the continuance resulted in ineffective assistance of counsel. However, the trial court's denial of a continuance did not result in ineffective assistance or reflect an abuse of discretion. The motion was made at the beginning of voir dire, and the list of names of potential witnesses was just that, a list of names. No phone numbers or addresses were provided, only general locations. Moreover, defense counsel Olivito noted when requesting the continuance that when he and Hershey were appointed, more than six months earlier, "we began making inquiry of the defendant as to witnesses that could assist us in either phase of this case."

**{¶46}** At a January 8, 2001 hearing, approximately one week before voir dire began, appellant claimed that he had given names of potential witnesses to counsel but that counsel had never contacted them. Olivito responded that the list that appellant had given him did not include telephone numbers and was largely made up of people in Pakistan who did not speak English. Appellant then asserted that no one had contacted other potential witnesses who live in the United States and Canada and that "most of that information is available with the sheriff's office, because they confiscated all my phone books * * *." But nothing in the record, beyond appellant's assertions, indicates that appellant had previously relayed that information to counsel. Furthermore, defense counsel noted that none of the witnesses that appellant had named lived in Belmont County.

**{¶47}** Hershey stated that he had contacted appellant's brother in Toronto, Canada, but he had been uncooperative and had hung up on him. Moreover, appellant's own failure to communicate specific information about potential witnesses to his attorneys contributed to the last-minute request for a continuance at the outset of voir dire. Appellant could have easily told counsel earlier that contact information for potential witnesses was in his address books that were in the custody of the sheriff's office.

**{¶48}** Also militating against the requested continuance was the fact that no time period was specified as to the proposed length of the continuance. In addition, the list of potential witnesses contained people who lived in Pakistan, whose testimony could be secured only with difficulty, which suggests that the delay would be significant. Nor did appellant proffer any summary of what the testimony of these witnesses would have been, and thus there is no basis for us to judge the importance of obtaining the continuance. By failing to proffer a description of the testimony, appellant has not preserved the issue. See, e.g., *State*

*v. Davie* (1997), 80 Ohio St.3d 311, 327, 686 N.E.2d 245; *State v. Twyford* (2002), 94 Ohio St.3d 340, 353, 763 N.E.2d 122.

**{¶49}** The inconvenience that would have resulted if a continuance had been granted also supports the trial court's denial of appellant's requested continuance. The venire had been summoned, and an open-ended continuance could have delayed the beginning of trial in the hope that some witnesses could be located, to the inconvenience of all involved with the trial.

**{¶50}** Since the trial court's denial of the requested continuance did not amount to an abuse of discretion, we reject appellant's tenth proposition.

D. Right to Contact Foreign Consulate

**{¶51}** In his 17th proposition of law, appellant argues that law enforcement officers' failure to advise him, a foreign citizen, of his right to contact his country's consulate pursuant to the Vienna Convention on Consular Relations ("VCCR") deprived him of due process.

**{¶52}** Appellant asserts that both New York and Belmont County law enforcement personnel were aware that he was a Pakistani citizen, since they had seized his Pakistani passport. Appellant contends that even though police officers knew that he was a Pakistani citizen, they failed to inform him of his absolute right to consular access under the VCCR.

**{¶53}** Appellant contends that he is a citizen of both Pakistan and the United States. Under Section 1448, Title 8, U.S.Code, however, the United States does not recognize the "other citizenship" of a person claiming dual citizenship once the person takes the oath to become a United States citizen. See *United States v. Shahani-Jahromi* (E.D.Va.2003), 286 F.Supp.2d 723, 726, fn. 1.

**{¶54}** Moreover, as the court noted in *United States v. Matheson* (D.C.N.Y.1975), 400 F.Supp. 1241, 1245: "[I]t is a recognized fact of international law that a dual national is never entitled to invoke the protection or assistance of one of the two countries while within the other country. See

*Nishikawa v. [Dulles]*, 356 U.S. 129, 132, 78 S.Ct. 612, 2 L.Ed.2d 659 (1958); *Kawakita v. United States*, 343 U.S. 717, 733, 72 S.Ct. 950, 96 L.Ed. 1249 (1952)."

**{¶55}** Additionally, we have decided that whatever individual rights the treaty may confer are waivable. *State v. Issa* (2001), 93 Ohio St.3d 49, 54-56, 752 N.E.2d 904. As in *Issa*, appellant failed to raise this issue before the trial court and has therefore waived all but plain error. Plain error is absent, since it cannot be said that but for the error, the outcome of the trial clearly would have been otherwise. *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894. Appellant's 17th proposition is not well taken.

III. Trial Issues

A. Competency Issues

**{¶56}** In his first proposition of law, appellant contends that the trial court erred in failing to order a competency evaluation. Appellant submits that there were sufficient indicia of incompetency before and during trial to compel the trial court to order a competency evaluation.

**{¶57}** Near the end of the guilt phase, appellant filed a handwritten motion to have his competency evaluated. He asserted that he was having "extreme pain in the brain and head and * * * frequent blackouts and vertigo attacks." The court asked the jail's physician to examine appellant, but appellant refused to be examined by anyone other than his own doctor from Columbus.

**{¶58}** The court then held a hearing, without the jury present, in which appellant and several employees of the Belmont County Jail testified. Appellant claimed that he had vertigo and that his head was hurting, and that he had been suffering from these problems during the 16 months that he had been in jail. But employees at the jail who saw him on a daily basis rebutted his testimony. They testified that appellant had never complained of any medical, mental, or psychological conditions until the day he filed the motion for the competency

evaluation. The trial court then held that appellant had not established good cause for the court to order a competency evaluation.

**{¶59}** Appellant argues that the trial court erred and cites a number of instances in which his behavior should have prompted the court to order a competency evaluation. First, appellant notes that the court was aware that no attorney could please him. At five different hearings, appellant complained about counsel and lodged numerous allegations that counsel were not listening to his requests or working on his case.

**{¶60}** Second, appellant points to his suspicions that jail personnel were spying on him. During the mitigation hearing, Dr. Smalldon stated that appellant believed that jail personnel were monitoring everything he said and wrote.

**{¶61}** Third, appellant claims that the court knew that appellant was seeing conspiracies everywhere. Before the court, he accused his counsel of colluding with the prosecutor. He made accusations, in numerous pro se pleadings, that the trial judge was conspiring to deprive him of his rights. Appellant felt that the jail staff were part of the prosecution and that the jail physician was biased against him.

**{¶62}** Fourth, appellant cites his failure to understand the proceedings and his inability to respond on point to questions asked him.

**{¶63}** Last, appellant points to Dr. Smalldon's penalty-phase testimony that appellant has a delusional disorder of the persecutory type.

**{¶64}** R.C. 2945.37 requires a competency hearing if a request is made before trial. But "[i]f the issue is raised after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court's own motion." R.C. 2945.37(B). Thus, "the decision as to whether to hold a competency hearing once trial has commenced is in the court's discretion." *State v. Rahman* (1986), 23 Ohio St.3d 146, 156, 23 OBR 315, 492 N.E.2d 401. The right to a hearing "rises to the level of a constitutional guarantee where the record

contains 'sufficient indicia of incompetence,' such that an inquiry into the defendant's competency is necessary to ensure the defendant's right to a fair trial." *State v. Berry* (1995), 72 Ohio St.3d 354, 359, 650 N.E.2d 433, citing *Drope v. Missouri* (1975), 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103, and *Pate v. Robinson* (1966), 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815.

**{¶65}** There was no request before trial to evaluate appellant's competency. When appellant requested a competency evaluation during trial, the trial court received testimony from him and jail personnel and concluded that he had not established good cause for the court to hold a hearing on the issue. This case is similar to *State v. Smith* (2000), 89 Ohio St.3d 323, 329, 731 N.E.2d 645, wherein the record did not reflect "sufficient indicia of incompetence" to have required the trial court to conduct a competency hearing.

**{¶66}** Although Dr. Smalldon testified that appellant suffers from a severe mental illness, "[t]he term 'mental illness' does not necessarily equate with the definition of legal incompetency." *State v. Berry*, 72 Ohio St.3d 354, 650 N.E.2d 433, at the syllabus. "A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel." *State v. Bock* (1986), 28 Ohio St.3d 108, 110, 28 OBR 207, 502 N.E.2d 1016. In fact, as the trial court noted when it denied appellant's motion, appellant was able to prepare the motion for a competency evaluation himself using correct legal terms. We also note that the record shows that appellant assisted counsel subsequent to the motion.

**{¶67}** Nor did defense counsel enter an insanity plea or suggest that appellant lacked competency, unlike counsel in *State v. Were* (2002), 94 Ohio St.3d 173, 176, 761 N.E.2d 591, who continually raised the issue of defendant's competency. Counsel had ample time to become familiar with appellant, since they represented him from June 2000 through the February 2001 sentencing. Although appellant repeatedly complained about his counsel—making allegations

that counsel disputed—counsel never questioned his competency. If counsel had some reason to question appellant's competency before the filing of appellant's handwritten motion, counsel surely would have done so. See *State v. Spivey* (1998), 81 Ohio St.3d 405, 411, 692 N.E.2d 151.

**{¶68}** Neither appellant's behavior at trial nor any testimony presented on his behalf provided "good cause" to hold a hearing on his competency or "sufficient indicia of incompetence." Moreover, deference on such issues should be granted to those "who see and hear what goes on in the courtroom." *State v. Cowans*, 87 Ohio St.3d at 84, 717 N.E.2d 298; *State v. Smith,* 89 Ohio St.3d at 330, 731 N.E.2d 645. Accordingly, we overrule appellant's first proposition.

**{¶69}** In his 11th proposition of law, appellant contends that the trial court abused its discretion in precluding him from offering rebuttal evidence on the issue of whether he had established good cause to hold a competency hearing. However, this argument is also not well taken. Nothing in R.C. 2945.37 required the court to hold a hearing to determine good cause or allow rebuttal testimony. Nor was there any proffer of evidence to demonstrate that appellant had credible rebuttal evidence. In sum, appellant was not prejudiced by the trial court's refusal to allow him to rebut the jail staff's testimony.

B. Hearsay

**{¶70}** In his third proposition of law, appellant argues that the admission of hearsay evidence regarding Lubaina's fear of appellant and the reasons for her fear deprived him of a fair trial.

**{¶71}** Grace Hoffman, Lubaina's divorce attorney, testified that Lubaina had been afraid of appellant. On cross-examination, defense counsel elicited from Hoffman that Lubaina had described appellant as controlling and manipulative and that Lubaina had told her that appellant had been violent during the marriage, including "forced sex" and "some striking." On redirect, Hoffman again stated that Lubaina had been afraid of appellant during the divorce proceedings.

**{¶72}** Tahira Khan, Lubaina's sister, also testified that Lubaina had been afraid of appellant. The second time this was elicited from Khan, the defense objected and the court essentially advised the prosecutor to limit his questions to adducing testimony that Lubaina had feared appellant and not the reasons behind the fear.

**{¶73}** Khan also testified that when she had asked Lubaina why, with all the problems in the marriage, she and appellant had had a second child, Lubaina had told her, "He raped me." The defense did not object to this testimony.

**{¶74}** In *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 21-22, 514 N.E.2d 394, this court held that evidence that a victim had a fearful state of mind was admissible as a hearsay exception under Evid.R. 803(3), as a statement of "then existing state of mind, emotion, sensation, or physical condition." However, the reasons or basis behind the victim's fearful state of mind would not be admissible under this exception. This court has followed the reasoning in *Apanovitch* in subsequent cases. See *State v. Simko* (1994), 71 Ohio St.3d 483, 491, 644 N.E.2d 345; *State v. Frazier* (1995), 73 Ohio St.3d 323, 338, 652 N.E.2d 1000; *State v. Awkal* (1996), 76 Ohio St.3d 324, 331, 667 N.E.2d 960; *State v. Reynolds* (1998), 80 Ohio St.3d 670, 677-678, 687 N.E.2d 1358. With regard to testimony of fear elicited in this case, the trial court properly allowed the testimony. No testimony was admitted over objection as to the basis of the victim's fear.

**{¶75}** With regard to the testimony that appellant had "forced sex" on Lubaina, defense counsel elicited this statement on cross-examination. Any error in admitting this testimony and Khan's subsequent testimony that appellant had raped Lubaina was invited error, since the defense first elicited the testimony. See *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 102. The defense opened the door to Khan's remark about rape based on its cross-examination of Hoffman. See *State v. Davie*, 80 Ohio St.3d at 322, 686 N.E.2d 245.

**{¶76}** Moreover, since no objection was raised, appellant has waived all but plain error. *State v. Slagle* (1992), 65 Ohio St.3d 597, 604, 605 N.E.2d 916. In view of the strong and compelling evidence of appellant's guilt, any error was not plain error affecting the outcome of his trial. *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus. Accordingly, we overrule appellant's third proposition.

C. Other-Acts Evidence

**{¶77}** In his fourth proposition of law, appellant contends that the trial court admitted improper character and other-acts evidence throughout the trial.

**{¶78}** Under Evid.R. 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove" a defendant's character as to criminal propensity. "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The exceptions allowing the evidence "must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." *State v. Broom* (1988), 40 Ohio St.3d 277, 533 N.E.2d 682, paragraph one of the syllabus.

**{¶79}** However, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus. Thus, we review the trial court's decision with an abuse-of-discretion standard. See *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233; *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 38 O.O.2d 298, 224 N.E.2d 126.

**{¶80}** By failing to object at trial to any of the instances he refers to in arguing this proposition, appellant waived all but plain error. *State v. Slagle*, 65 Ohio St.3d at 604, 605 N.E.2d 916. Appellant fails to demonstrate plain error.

**{¶81}** Appellant asserts that the court allowed impermissible character evidence when Lubaina's attorney, Grace Hoffman, was permitted to read

portions of appellant's August 18, 1999 divorce-proceeding deposition during her testimony. Appellant contends that the deposition was irrelevant and that it was introduced to demonstrate that he was long-winded and evasive. But such characteristics do not imply that he had a propensity to commit crime. Moreover, the passages read by Hoffman tended to show that appellant had been suspicious that Lubaina was having an affair and thus related to appellant's motive:

**{¶82}** "That was surprising to know that my wife didn't want any present from me but she brought home flowers on Valentine's Day given by somebody else, which definitely was something strange to me that somebody was giving [a] Valentine gift to my wife at the hospital * * *."

**{¶83}** Another deposition passage read by Hoffman concerned appellant's explanation of why he had secretly applied for passports for his two sons. This testimony helped show that appellant had planned in advance to leave the country. Appellant had initially planned to take his sons with him on the flight to Pakistan. Thus, the testimony was admissible because it tended to show prior calculation and design.

**{¶84}** Appellant next complains that Deputy Forro's testimony regarding Lubaina's complaint that he was harassing her by phone tended to show his bad character. However, this testimony tended to show the escalating acrimony between appellant and Lubaina.

**{¶85}** Testimony from Lubaina's sister Tahira Khan that appellant had repeatedly raped Lubaina should not have been allowed. However, appellant did not object, and defense counsel had elicited the rape allegations earlier in the trial through Lubaina's divorce attorney. Given the substantial evidence of appellant's guilt, this evidence was not outcome-determinative. *State v. Getsy* (1998), 84 Ohio St.3d 180, 193, 702 N.E.2d 866.

**{¶86}** In addition, testimony by Khan that appellant had refused to help Lubaina comfort one of their sons, who was upset that his mother was leaving

him with his father for a visit, was harmless. Testimony that appellant came to Lubaina's house in February 1999 and "started flinging things all over the floor" was also harmless and did not affect the outcome of appellant's trial.

**{¶87}** Appellant also asserts that the trial court should have provided a limiting instruction as to testimony about his behavior during the divorce proceedings. Yet appellant failed to request a limiting instruction, and the lack of such an instruction did not amount to plain error. See *State v. Frazier*, 73 Ohio St.3d at 339, 652 N.E.2d 1000.

**{¶88}** Given the admissibility of some of the alleged other-acts evidence and the lack of plain error with regard to the inadmissible evidence, we overrule appellant's fourth proposition.

D. Failure to Declare a Mistrial

**{¶89}** In his eighth proposition of law, appellant contends that the trial court erred in failing to declare a mistrial after Officer Nanni testified that when appellant was arrested at JFK and Nanni asked him what happened to his thumb, appellant had replied: "I want to speak to my lawyer."

**{¶90}** Defense counsel did not object to Nanni's comment, but shortly after the comment was made, the prosecutor informed the court, away from the jury, that he had inadvertently elicited the response from Nanni that appellant had asked to speak with his attorney. The prosecutor suggested, and defense counsel requested, that a curative instruction be given. The court then instructed the jury: "A few moments ago, the witness stated that during police interrogation, the defendant requested the right to counsel. You are instructed to disregard the defendant's request to speak to counsel. Each of us has an absolute right to have counsel present during any police interrogation. You are to infer nothing from his having requested the right to speak to counsel."

**{¶91}** The testimony elicited from Nanni was improper, since the assertion of the right to counsel must not be used against the accused. *State v.*

*Combs* (1991), 62 Ohio St.3d 278, 280-281, 581 N.E.2d 1071. See, also, *Doyle v. Ohio* (1976), 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91; *Wainwright v. Greenfield* (1986), 474 U.S. 284, 295, 106 S.Ct. 634, 88 L.Ed.2d 623, fn. 13; *State v. Treesh*, 90 Ohio St.3d at 479, 739 N.E.2d 749. However, the trial court's curative instruction prevented any prejudice.

**{¶92}** The trial court did not err in not sua sponte declaring a mistrial at that point. The determination of whether to grant a mistrial is in the discretion of the trial court. *State v. Glover* (1988), 35 Ohio St.3d 18, 19, 517 N.E.2d 900; *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, ¶ 42. "[T]he trial judge is in the best position to determine whether the situation in [the] courtroom warrants the declaration of a mistrial." *Glover*, 35 Ohio St.3d. at 19, 517 N.E.2d 900; see, also, *State v. Williams* (1995), 73 Ohio St.3d 153, 167, 652 N.E.2d 721. This court will not second-guess such a determination absent an abuse of discretion.

**{¶93}** No abuse of discretion occurred. The trial court issued a curative instruction shortly after the jury heard Nanni's improper statement. The jury can be presumed to have followed the court's instructions, including instructions to disregard testimony. *State v. Loza* (1994), 71 Ohio St.3d 61, 75, 641 N.E.2d 1082; *State v. Zuern* (1987), 32 Ohio St.3d 56, 62, 512 N.E.2d 585. The curative instruction by the court was similar to that upheld in *State v. Treesh*, 90 Ohio St.3d at 480, 739 N.E.2d 749, in a similar factual context. Accordingly, appellant's eighth proposition is overruled.

E. Gruesome Photos

**{¶94}** In his 12th proposition of law, appellant asserts that gruesome crime-scene photos, autopsy slides, and videotape that were admitted were irrelevant, unnecessary, cumulative, and repetitive and prejudiced him.

**{¶95}** Under Evid.R. 403, the admission of photographs is left to a trial court's sound discretion. *State v. Landrum*, 53 Ohio St.3d at 121, 559 N.E.2d

710; *State v. Maurer* (1984), 15 Ohio St.3d 239, 264, 15 OBR 379, 473 N.E.2d 768. Nonrepetitive photographs in a capital case, even if gruesome, are admissible if the probative value of each photograph outweighs the danger of material prejudice to the accused. Id. at paragraph seven of the syllabus; *State v. Morales* (1987), 32 Ohio St.3d 252, 257-258, 513 N.E.2d 267.

**{¶96}** Eight crime scene photos were admitted over appellant's objections, and they are gruesome. State's Exhibit 6 depicts the body of Abdul Bhatti on the garage floor. State's Exhibit 15 shows the doorway area between the basement and garage where the bodies of Ruhie and Abdul can partially be seen. State's Exhibit 16 depicts the bodies of Lubaina, Ruhie, and Nasira on the basement floor, and although it is repetitive of State's Exhibit 25, any error in admitting it was harmless. State's Exhibits 17, 18, 19, and 20 are individual close-up photos of the heads of the four murder victims. State's Exhibit 21 is a crime-scene videotape, and portions of it are repetitive of the crime-scene photos.

**{¶97}** However, all of the photos and the videotape helped to prove the killer's intent and illustrated the testimony of detectives who described the crime scene. These photos and video also gave the jury an "appreciation of the nature and circumstances of the crimes." *State v. Evans* (1992), 63 Ohio St.3d 231, 251, 586 N.E.2d 1042. The trial court did not abuse its discretion in deciding that the probative value of each one outweighed any prejudicial effect. Some of the photos and videotape were repetitive, but their admission did not materially prejudice appellant.

**{¶98}** Appellant also claims that he was prejudiced by the admission of the autopsy slides of the four victims. Appellant raised no specific objection.

**{¶99}** Many of the autopsy slides are gruesome. However, the slides illustrated the coroner's testimony in describing the multiple injuries sustained by all four victims. The slides also helped to prove the killer's intent. The trial court did not abuse its discretion in deciding that the probative value of each one

outweighed any prejudicial effect. Any repetition did not materially prejudice appellant.

**{¶100}** In addition, the trial court did not err in readmitting seven crime-scene photos during the penalty phase. A trial court may properly allow repetition of much or all that occurred in the guilt phase pursuant to R.C. 2929.03(D)(1). See, e.g., *State v. DePew* (1988), 38 Ohio St.3d 275, 282-283, 528 N.E.2d 542; *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 73. The photos in question helped demonstrate the aggravating circumstances in this case. Appellant's claims of prejudice are not persuasive. Therefore, we overrule appellant's 12th proposition.

F. Jury Instructions

**{¶101}** In his 18th proposition of law, appellant contends that the trial court erred in instructing the jury on reasonable doubt based on the statutory definition in R.C. 2901.05. We have repeatedly rejected the same argument, and do so again for the same reasons. See *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, paragraph eight of the syllabus; *State v. Jones* (2000), 90 Ohio St.3d 403, 417, 739 N.E.2d 300.

IV. Penalty-Phase Issues

A. Sentence Appropriateness

**{¶102}** In his seventh proposition of law, appellant argues that his death sentence is inappropriate because his background and mental disease militate against such a sentence. We will consider appellant's arguments later in this opinion as part of our independent review of sentence.

B. Failure to Allow Pro Se Representation

**{¶103}** In his 13th proposition of law, appellant submits that the trial court deprived him of due process and the right to conduct his own defense when the court declined to accept his waiver of counsel at the beginning of the penalty phase. Appellant contends that *Faretta v. California* (1975), 422 U.S. 806, 95

S.Ct. 2525, 45 L.Ed.2d 562, guarantees him the right to waive assistance of counsel and proceed pro se.

**{¶104}** If a trial court denies the right of self-representation, when properly invoked, the denial is per se reversible error. *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, citing *McKaskle v. Wiggins* (1984), 465 U.S. 168, 177, 104 S.Ct. 944, 79 L.Ed.2d 122. However, in this case, the right of self-representation was not properly invoked. See *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 49-53.

**{¶105}** At the beginning of the penalty phase, appellant gave the trial court a pro se motion "to exercise his right to self representation under the circumstances and thus hereby discharge the appointed counsels." The court explained to appellant the right that he was waiving and what representing himself would entail. The court then gave appellant a docket entry to sign that stated: "Being fully advised of my rights, I hereby elect to represent myself." Appellant signed the form but also wrote on the docket entry: "I have not been allowed the rights under Constitution and as given in Constitution and Crim.R. 10 and 44 to continuance and representation by selection counsel and even to represent myself alone without the presence of court appointed counsels to whom I have sued in the civil case C2-001-0013 in Federal Court. There has been no defense, no defense witnesses and almost no investigation to justify 16 months of delay or period before trial and — "

**{¶106}** The trial court then addressed appellant and repeatedly asked him whether he understood his rights and wanted to waive them. Appellant did not give a clear answer. The court then held: "When I read the comments that you have written on the docket entry, I find that you have failed to effectively sign the entry that was prepared by the court; that the soliloquy [sic] has failed and that you have not, in fact, elected to undertake self representation. We will proceed. Counsel will represent you."

**{¶107}** The trial court correctly found that appellant did not unequivocally and explicitly invoke his right to self-representation. See *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 37-38. "The constitutional right of self-representation is waived if it is not timely and unequivocally asserted." *Jackson v. Ylst* (C.A.9, 1990), 921 F.2d 882, 888; see, also, *United States v. Frazier-El* (C.A.4, 2000), 204 F.3d 553, 558 (assertion of the right of self-representation "must be * * * clear and unequivocal").

**{¶108}** Given these circumstances, appellant's 13th proposition is not well taken.

C. Jury Instructions

**{¶109}** In his 14th proposition of law, appellant complains about the following penalty-phase instruction: "For purposes of this proceeding, only that testimony and evidence which was presented in the first phase that is relevant to the aggravating circumstance or circumstances Defendant was found guilty of committing and to any of the mitigating factors that will be described below, is to be considered by you." Appellant asserts that this instruction improperly left it up to the jury to determine what guilt-phase evidence was relevant in its sentencing deliberations.

**{¶110}** As in *State v. Jones*, 91 Ohio St.3d at 349-350, 744 N.E.2d 1163, appellant failed to raise this issue before the trial court and has therefore waived all but plain error. See, e.g., *State v. Slagle*, 65 Ohio St.3d at 604, 605 N.E.2d 916. The instruction might have been interpreted to mean that jurors had to determine which evidence that had been presented during the guilt phase was relevant to the penalty phase. As we noted in *State v. Getsy*, 84 Ohio St.3d at 201, 702 N.E.2d 866, it is "the trial court's responsibility, not the jury's, to determine what evidence [is] relevant."

**{¶111}** However, no outcome-determinative plain error occurred. As in *Jones*, the ambiguous instruction did not determine the outcome of the case

because "[m]uch of the trial phase evidence was relevant at the sentencing phase because it was related to the aggravating circumstances, the nature and circumstances of the offense, and the asserted mitigating factors. See *State v. Gumm* (1995), 73 Ohio St.3d 413, 653 N.E.2d 253, syllabus." *Jones*, 91 Ohio St.3d at 350, 744 N.E.2d 1163. As noted in *Jones*, evidence of the nature and circumstances of the aggravating circumstances is also relevant at the penalty phase. Most of the evidence admitted in the guilt phase was also admissible during the penalty phase. See *State v. LaMar,* 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, at ¶ 90. Therefore, we overrule appellant's 14th proposition.

D. Sentencing Opinion

**{¶112}** In his 15th proposition of law, appellant argues that the trial court's sentencing opinion was inadequate and did not comply with the requirements of R.C. 2929.03(F). Appellant's arguments are not well taken.

**{¶113}** First, appellant points to an error in the court's sentencing opinion, which states that the jury heard the "testimony of the defendant" in mitigation, when in fact, appellant never testified. This misstatement was harmless. Moreover, we have independently evaluated the sentence and thereby rectified any error in the sentencing opinion. *State v. Fox* (1994), 69 Ohio St.3d 183, 191, 631 N.E.2d 124.

**{¶114}** Appellant also claims that the sentencing opinion fails to define how much weight the court gave to the mitigating evidence. But when a defendant introduces evidence in mitigation, a trial court is not required to accept it as mitigating or assign it any weight. See *State v. Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph two of the syllabus. And although the trial court did fail to explain its weighing process, inadequate explanations do not create reversible error. *State v. Fox*, 69 Ohio St.3d at 190, 631 N.E.2d 124. Any error in the trial court's sentencing opinion can be cured by our independent

review. See, e.g., *State v. Lott* (1990), 51 Ohio St.3d 160, 170-173, 555 N.E.2d 293; *State v. Raglin* (1998), 83 Ohio St.3d 253, 257, 699 N.E.2d 482; *State v. Cooey* (1989), 46 Ohio St.3d 20, 38, 544 N.E.2d 895 (failure to separately weigh the aggravating circumstances of each murder count against the mitigating factors can be cured by independent review). Accordingly, we overrule appellant's 15th proposition.

E. Alternate Jurors in Deliberation Room

**{¶115}** In his 16th proposition of law, appellant argues that the trial court erred by permitting the alternate jurors to sit in on deliberations during both phases of the trial in violation of Crim.R. 24(F).

**{¶116}** The trial court clearly erred in allowing the alternate jurors to sit in on deliberations during both phases of trial, even though the defense agreed to it and the trial court admonished the alternates not to participate in the deliberations. As we held in *State v. Murphy* (2001), 91 Ohio St.3d 516, 531-534, 747 N.E.2d 765, and *State v. Jackson* (2001), 92 Ohio St.3d 436, 438-440, 751 N.E.2d 946, Crim.R. 24(F) prohibits the presence of alternate jurors in the jury deliberation room.

**{¶117}** Because appellant failed to object, all error is waived save plain error. *Murphy*, 91 Ohio St.3d at 532, 747 N.E.2d 765. Plain error is absent in this case. Appellant does not allege, nor does the record reveal, that the alternate jurors participated in the deliberations either " 'verbally or through "body language" [or that] alternates' presence exerted a "chilling" effect on the regular jurors.' " *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, at ¶ 135, quoting *United States v. Olano* (1993), 507 U.S. 725, 739, 113 S.Ct. 1770, 123 L.Ed.2d 508.

**{¶118}** Thus, appellant fails to demonstrate that he was in fact prejudiced by the presence of the alternate jurors. See *State v. Murphy*, 91 Ohio St.3d at 531-534, 747 N.E.2d 765; *State v. Jackson*, 92 Ohio St.3d at 439-440, 751 N.E.2d 946.

This court will not ordinarily presume prejudice. Id. at 439, 751 N.E.2d 946. Accordingly, we reject appellant's 16th proposition.

V. Prosecutorial Misconduct

**{¶119}** In his fifth proposition of law, appellant alleges that he was denied a fair trial because of prosecutorial misconduct throughout the trial. "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78.

A. Guilt phase

**{¶120}** Appellant first complains that the prosecutor referred to the death sentence during both opening and closing statements. References to the death penalty during the guilt phase were condemned by the United States Supreme Court in *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144. In *Darden* the prosecutor implied that imposing the death penalty would be the only guarantee against a future similar act. Id. at 180, 106 S.Ct. 2464, 91 L.Ed. 2d 144. Nevertheless, the court held that the comments did not deprive Darden of a fair trial. See, also, *State v. Brown* (1988), 38 Ohio St.3d 305, 316, 528 N.E.2d 523 ("counsel should not comment on matters not at issue in the trial"). Appellant failed to object and thus waived all but plain error. The remarks made did not amount to plain error. In addition, the trial court instructed the jury that opening and closing statements were not evidence.

**{¶121}** Appellant next complains that the prosecutor referred to evidence not presented at trial. Before trial, the prosecutor informed the court that it would not call a police officer who had taken a domestic-violence report from Lubaina in 1994. But then in his opening statement, the prosecutor stated: "Like many women in her situation, she filed reports with the authorities, but never followed through." Appellant claims that the prosecutor promised one thing to the parties

and the court but then submitted evidence through the "back door" by vouching to the jury that it existed.

**{¶122}** Appellant is incorrect. The prosecution never stated that it would not present any evidence of domestic-violence reports, only that it would not present the 1994 report. The prosecution did present evidence that Lubaina had complained of telephone harassment when Deputy Steve Forro testified that he had responded to a March 1999 complaint by Lubaina. He also testified that Lubaina had decided to handle the problem through her divorce proceedings.

**{¶123}** Appellant also contends that the state failed to disclose before trial, as required by Crim.R. 16, that appellant had told Officer Nanni at the time of his arrest that he had come from St. Clairsville. Appellant argues that this prejudiced his defense, since it placed him in the vicinity of the murders, instead of Columbus, where he resided.

**{¶124}** Yet the defense failed to object and thus did not give the trial court an opportunity to fashion a remedy, assuming that there was a violation of Crim.R. 16. See Crim.R. 16(E)(3). Moreover, evidence not disclosed is deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different. See *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898, paragraph five of the syllabus. Even if this information had been disclosed by the prosecution, the outcome of the trial would not have been different.

**{¶125}** Appellant also claims that the prosecutor improperly elicited testimony that Lubaina had feared appellant and that appellant had raped her. However, as discussed earlier regarding appellant's third and fourth propositions of law, that testimony was either proper or did not affect the outcome of appellant's trial.

**{¶126}** Appellant next claims that misconduct occurred during the state's guilt-phase closing argument when the prosecutor (1) vouched for state's

witnesses, (2) made derogatory comments about defense counsel's trial tactics, and (3) speculated about evidence that was not presented at trial. Appellant did not object to any of the claimed misconduct at trial. His claims are therefore waived. *State v. Slagle*, 65 Ohio St.3d at 604, 605 N.E.2d 916. Even assuming that these comments were improper, we find that they did not determine the outcome of appellant's trial. *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 14 OBR 317, 470 N.E.2d 883 (whether improper remarks constitute prosecutorial misconduct requires analysis as to [1] whether the remarks were improper and, [2] if so, whether the remarks prejudicially affected the accused's substantial rights).

B. Penalty phase

**{¶127}** Appellant next claims misconduct in the prosecutor's cross-examination of the defense's mitigation expert, Dr. Jeffrey Smalldon. Appellant claims that the prosecutor was abusive and tried to discredit Smalldon's testimony based on Smalldon's general opposition to the death penalty. However, the prosecutor's questioning was not improper, but was designed to detect bias in Smalldon and thereby discredit his findings of mitigating evidence in favor of appellant.

**{¶128}** Appellant did not object to any other claimed misconduct during Smalldon's cross-examination. His claims are therefore waived. *State v. Slagle*, 65 Ohio St.3d at 604, 605 N.E.2d 916.

**{¶129}** Appellant further contends that the following comments made during penalty-phase closing argument denigrated defense counsel:

**{¶130}** "The defense has a little more leeway. * * * They essentially can say anything they want. Had I dared quote anything from the Bible, there would have been an objection and the judge would have silenced me at once."

**{¶131}** "So that's the procedure to keep us away from these emotional appeals, where he quotes from the Bible; I quote from the Bible. He quotes again; I quote again, and instead of a court of law, we're here at a prayer meeting."

**{¶132}** "Ladies and gentlemen, your common sense has brought you this far. Don't abandon it now just because somebody quotes from the Bible. I wonder if those four innocent victims were given a chance to pray before their throats were slashed."

**{¶133}** These comments were made in reply to the defense's closing argument employing biblical references such as God did not sentence Cain to death for killing Abel, Christ pronounced that "we should turn the other cheek," and Christ sought mercy for his killers. While the prosecutor's remarks were theatrical, they were provoked by defense counsel's argument. In any event, none of these comments affected appellant's substantial rights.

**{¶134}** Appellant next complains about the prosecutor's speculating how many "pounds" of weight should be accorded to the aggravating circumstances and the mitigating factors. Appellant's objection on this point was correctly overruled by the trial court, as we have noted that "[a] prosecutor can freely argue the weight to be given to potentially mitigating factors." *State v. Loza* (1994), 71 Ohio St.3d 61, 82, 641 N.E.2d 1082. In addition, the question "What's the weight you give to four innocent lives taken the way they were taken?" does not necessarily suggest, as appellant submits, that the prosecutor was inviting the jury to weigh the nature and circumstances of the offenses as aggravating circumstances, which would violate our holding in *State v. Wogenstahl* (1996), 75 Ohio St.3d 344, 662 N.E.2d 311, paragraph two of the syllabus. "Isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning." *State v. Hill* (1996), 75 Ohio St.3d 195, 204, 661 N.E.2d 1068, citing *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431.

**{¶135}** Appellant also contends that the prosecutor attempted to lessen the jurors' responsibility for imposing a death sentence by saying, "[M]aybe some day, when I'm retired and gone from here, they might actually consider executing

somebody." But the defense objected, and the trial court sustained the objection and instructed the jury to disregard the comment.

**{¶136}** As appellant claims, the prosecutor did attack his character when he commented: "[H]e's just a bad person who does bad, evil things." But this characterization was part of the prosecutor's argument that the psychological evidence was not mitigating and that appellant was not delusional or "sick" when he killed the victims. The jury must consider the defendant's character under R.C. 2929.04(B), and the prosecutor can argue the merits of his cause.

**{¶137}** Appellant also complains that prosecutorial comments on Dr. Smalldon's testimony were an attack on the value of psychiatric evidence. Yet the prosecutor opened these comments by stating: "I believe that psychology can be a good thing, if it's used for good purposes. * * * But you know, psychology can be misused." The prosecutor continued by questioning Smalldon's expert opinion that appellant was delusional during the murders.

**{¶138}** However, appellant's failure to object waived all but plain error, and there is no plain error. Appellant relies upon *Gall v. Parker* (C.A.6, 2000), 231 F.3d 265, 313-314, but *Gall* is readily distinguishable. In *Gall*, the court found the comments by the prosecutor to be an attack on the legitimacy of the defense of insanity, a defense that had been enacted by the legislature. In this case, the prosecutor merely questioned Smalldon's expert opinion and did not attack the legitimacy of a mental disease or defect as a mitigating factor.

**{¶139}** Last, appellant contends that even though defense counsel failed to object to some of the prosecutorial comments that he now claims were improper, this court can examine them, individually and collectively, for prejudicial effect. See *State v. Fears* (1999), 86 Ohio St.3d 329, 354-355, 715 N.E.2d 136 (Moyer, C.J., concurring in part and dissenting in part). We have examined them, and none of the comments by the prosecutor compel a reversal, either individually or collectively.

**{¶140}** Based on the foregoing, we overrule appellant's fifth proposition.

VI. Effective Assistance

**{¶141}** In his sixth proposition of law, appellant argues that trial counsel rendered ineffective assistance. Reversal of a conviction for ineffective assistance requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373. However, in no instance does appellant demonstrate, "a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." Id. at paragraph three of the syllabus.

A. Voir dire

**{¶142}** Appellant asserts that counsel failed to adequately question prospective jurors on their racial and religious biases, particularly because of issues that were raised during the trial. For example, the prosecutor argued that the murders were honor killings, born of religious extremism. In addition, the state introduced evidence about appellant's religion and his religious views on divorce. Moreover, Dr. Smalldon observed that appellant had fled Pakistan because of religious persecution.

**{¶143}** However, "[t]he conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked." *State v. Evans*, 63 Ohio St.3d at 247, 586 N.E.2d 1042. As we noted in *State v. Watson* (1991), 61 Ohio St.3d 1, 13, 572 N.E.2d 97, under *Turner v. Murray* (1986), 476 U.S. 28, 37, 106 S.Ct. 1683, 90 L.Ed.2d 27, fn.10, "the actual decision to voir dire on racial prejudice is a choice best left to a capital defendant's counsel." The same applies to a decision to voir dire on religious prejudice.

**{¶144}** Defense counsel did voir dire on racial and religious prejudice with regard to some, but not all, prospective jurors. We will normally defer to defense counsel's judgment in voir dire and not find ineffective assistance. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 16 O.O.3d 35, 402 N.E.2d 1189.

**{¶145}** Appellant also contends that counsel failed to adequately probe prospective jurors about their experience with or views on domestic violence and incorrectly recited the burden that the defense would have if a penalty phase were required, by stating that, to avoid a death sentence, the mitigating factors had to outweigh the aggravating circumstances.

**{¶146}** With regard to domestic violence, counsel questioned some prospective jurors on the topic and may have decided that the examination of other jurors' views would be unwise. Again, we ordinarily refrain from second-guessing counsel's trial strategy. Id.

**{¶147}** While counsel's comments during voir dire did incorrectly describe the defendant's burden in the penalty phase, the errors were harmless. The trial court's correct instruction of the law with regard to the weighing process cured counsel's much earlier misstatements. *State v. Loza*, 71 Ohio St.3d at 79, 641 N.E.2d 1082; *State v. Jackson* (1991), 57 Ohio St.3d 29, 40, 565 N.E.2d 549. The jury is presumed to follow the instructions given to it by the trial judge. *State v. Henderson* (1988), 39 Ohio St.3d 24, 33, 528 N.E.2d 1237.

**{¶148}** Appellant also claims that counsel failed to adequately challenge the venire or present evidence of the percentage of minorities in Belmont County to show that the venire was composed unconstitutionally. Appellant did object to the venire as not representing a true cross section of the community, but the trial court overruled the objection and noted that the issue could be raised again if specifics were asserted. At the close of voir dire, counsel moved to dismiss the jury panel as not representing a proper cross section of the community, since there was only one non-Caucasian person on the venire.

**{¶149}** A defendant is entitled to a jury "drawn from a source fairly representative of the community." *Taylor v. Louisiana* (1975), 419 U.S. 522, 538, 95 S.Ct. 692, 42 L.Ed.2d 690. Counsel did object to the composition of the venire but did not present evidence on minorities in Belmont County. In any event, appellant fails to show prejudice or a reasonable probability that were it not for this error, the result of the trial could have been different. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus.

B. Guilt Phase

**{¶150}** Appellant next argues that defense counsel robbed him of the presumption of innocence during opening statement when counsel mentioned that the prosecutor would seek a death sentence if appellant were found guilty. The jurors knew, however, that they were seated in a capital trial, and counsel simply reminded the jurors that appellant's life was at stake.

**{¶151}** Appellant complains that counsel failed to authenticate e-mails that he had exchanged with his employer that would have shown a benign explanation for appellant's attempted trip to Pakistan after the murders. The e-mails were rejected for lack of authentication. However, even if these e-mails had been admitted, they would not have changed the result of appellant's trial.

**{¶152}** Appellant asserts that counsel were ineffective for failing to request a competency evaluation and for failing to object to the trial court's denial of appellant's midtrial request for a competency evaluation. But as discussed regarding appellant's first proposition of law, the trial court acted properly in rejecting appellant's request and there was insufficient indicia of incompetency to justify an evaluation.

**{¶153}** Appellant contends that counsel failed to adequately prepare and investigate his case due to other trial obligations. Defense counsel Olivito informed the trial court in June of 2000 that he would be defending another capital case in September of that year, as well as a federal case in November.

Olivito told the court that his earliest trial availability would be January 2001, when trial, in fact, took place. Despite Olivito's busy schedule, however, he and defense co-counsel Hershey met and discussed appellant's case "at least twice a week" beginning in July 2000. Appellant fails to demonstrate that Olivito's performance was deficient. This court will not infer failure to investigate from a silent record. *State v. Murphy*, 91 Ohio St.3d at 542, 747 N.E.2d 765.

**{¶154}** Appellant next complains that he was prejudiced when defense counsel elicited testimony from state's witness Grace Hoffman that appellant had been violent toward Lubaina and had forced sex on her. As we determined in the discussions regarding appellant's third and fourth propositions of law, this testimony did not affect the outcome of his trial nor deprive appellant of a fair trial.

C. Penalty Phase

**{¶155}** Appellant asserts that counsel was deficient during opening statement of the penalty phase by reciting all of the statutory mitigating factors and commenting that most were not applicable in this case. While this was not helpful to appellant's case, it was not prejudicial.

**{¶156}** Appellant further claims that defense counsel failed to adequately investigate and prepare for the penalty phase. Again, appellant raises generalities but no specifics as to what other mitigating evidence was available. Appellant did not provide counsel with his list of approximately 60 potential witnesses until the onset of trial. And the list did not include contact information. Appellant fails to overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland v. Washington,* 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674.

**{¶157}** Appellant argues next that counsel failed to request the assistance of a "cultural expert" and a foreign-language interpreter. However, appellant's assertions that these experts would have helped his defense are speculative at best.

In *State v. Mason* (1998), 82 Ohio St.3d 144, 694 N.E.2d 932, syllabus, we recognized that a trial court must provide funds for an indigent criminal defendant when the defendant has made a particularized showing of a reasonable probability that experts would aid the defense.

**{¶158}** The record, however, does not support appellant's assertions that these experts would have helped his defense. In fact, appellant employed a psychiatrist, Dr. Jeffrey Smalldon, who testified in mitigation, describing appellant's mental and emotional problems and his background in Pakistan. Moreover, the record does not show that defense counsel failed to investigate whether these experts would help appellant's case. This court will not infer failure to investigate from a silent record. *State v. Murphy*, 91 Ohio St.3d at 542, 747 N.E.2d 765.

**{¶159}** Appellant also argues that during penalty-phase closing argument, defense counsel encouraged the jury to impose death. Appellant cites several statements that he claims were attacks against him: (1) "I've spoken about the brutality of these crimes. * * * But ladies and gentlemen of the jury, shouldn't we be considered here to be better than Nawaz? In your own thinking, shouldn't we all be better than Nawaz?" (2) "Because I, quite frankly, think – and I can stand here and look you in the eye and tell you – I think you are better than Nawaz, and I think I am better than Nawaz, and I think everybody in this courtroom is." (3) "Ladies and gentleman, Nawaz dealt the cards that he was given. I don't think he did it wisely. I don't think he did it justly and I don't think you do, either." (4) "And I know – I know the other side of that coin, those victims weren't big; those victim weren't strong. One of them was a very, very young child. One of them was a very, very old and fragile father."

**{¶160}** Defense counsel made these comments after the jury had already found appellant guilty of all four murders. In context of the entire closing argument, counsel was trying to persuade the jurors to think beyond "an eye for

an eye," to persuade them that although appellant thought that killing would solve his problems, they could think "better than Nawaz" and opt not to give him a death sentence. In any event, the complained-of statements by counsel were part of a trial strategy meant to convince the jury to not impose a death sentence. Even if some statements were questionable, they do not compel us to find ineffective assistance. *State v. Clayton,* 62 Ohio St.2d at 49, 16 O.O.3d 35, 402 N.E.2d 1189.

**{¶161}** Appellant next contends that counsel failed to tell him about his right of allocution so that he was not prepared for the sentencing hearing. He also claims that his counsel encouraged the judge to impose a death sentence by stating that if appellant were "put to death, that would probably be merciful." Neither of these things prejudiced appellant.

**{¶162}** With regard to counsel's failure to prepare appellant for the sentencing hearing, it is noteworthy that during allocution, the trial judge explained the purpose of allocution to appellant several times and advised him to focus on his life and why his life should be spared. Appellant ignored the court's advice, however, and spent most of his time arguing that counsel had been ineffective. The trial court succinctly responded to appellant's complaints that counsel had not prepared him for the hearing: "What I want to know about doesn't require preparation or briefing."

**{¶163}** Counsel's comment that death for appellant might be merciful was part of a defense strategy to point out that a life sentence would be a worse punishment than a death sentence for this particular defendant. Moreover, counsel concluded by asking the court to impose a life sentence on appellant rather than a death sentence.

**{¶164}** Next, appellant cites instances in which counsel failed to object to statements or matters that we have discussed under other propositions of law: allowing alternates in the deliberation room (proposition No. 16), eliciting hearsay

testimony regarding Lubaina's fear of appellant (No. 3), prosecutorial misconduct (No. 5), improper definition of reasonable doubt (No. 18), other-acts evidence (No. 4), violations of the VCCR (No. 17), leaving it to the jury to determine which guilt-phase evidence was relevant to the penalty phase (No. 14), and testimony that should have prompted a mistrial (No. 8). However, in none of these instances was appellant prejudiced by trial counsel's failure to object. None of the alleged failures to object amounted to deficient performance, either individually or collectively, nor did they affect the outcome of appellant's trial.

**{¶165}** Last, appellant asserts that the cumulative effect of errors and omissions by trial counsel infringed his Sixth Amendment right to effective assistance of counsel. However, appellant received a fair trial, and any error was nonprejudicial. "Such errors cannot become prejudicial by sheer weight of numbers." *State v. Hill*, 75 Ohio St.3d at 212, 661 N.E.2d 1068; *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 123. For all the foregoing reasons, we reject appellant's sixth proposition.

VII. Constitutionality

**{¶166}** In his 19th proposition of law, appellant challenges the constitutionality of Ohio's death-penalty statutes. These claims are summarily rejected. See, e.g., *State v. Jenkins*, 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, syllabus; *State v. Zuern* (1987), 32 Ohio St.3d 56, 63, 512 N.E.2d 585; *State v. Carter* (1992), 64 Ohio St.3d 218, 227, 594 N.E.2d 595; *State v. Buell* (1986), 22 Ohio St.3d 124, 139, 22 OBR 203, 489 N.E.2d 795; *State v. Phillips* (1995), 74 Ohio St.3d 72, 103-104, 656 N.E.2d 643.

VIII. Independent Review and Proportionality

**{¶167}** After independent assessment, we find that the evidence proves beyond a reasonable doubt the aggravating circumstances in this case: that appellant murdered Lubaina, her father Abdul, her sister Ruhie and Ruhie's

daughter, Nasira, as a course of conduct (R.C. 2929.04[A][5]); and that Nasira was under the age of 13 at the time of her death (R.C. 2929.04[A][9]).

**{¶168}** At the mitigation hearing, appellant presented four witnesses. The first two were called to show that prior to the murders, appellant was showing signs of paranoia. John Mentzer, the maintenance supervisor of the apartments where appellant lived, testified that appellant "was one of the more difficult residents that I've got on the property." Appellant had complained to Mentzer that maintenance personnel had entered his apartment without his permission. He insisted on seeing Mentzer's records of when apartment personnel had entered his apartment as well as the apartments above and below his. Appellant told Mentzer that "he knew that the CIA had gotten into his apartment and bugged it."

**{¶169}** Lisa Redmond, the apartment manager, also testified for the defense. Redmond testified that appellant had told her that the apartment maintenance personnel had let the CIA into his apartment to bug it. When she denied this, she felt that appellant did not believe her.

**{¶170}** Shehida Ahmed, appellant's sister-in-law, testified on appellant's behalf. Shehida moved to Canada from Pakistan five years earlier and had known appellant for 20 years. According to Shehida, appellant treated all family members well and was very helpful. Appellant had also helped family members financially. Shehida described appellant as having always been religious, practicing Islam, and "devoted towards family." When Lubaina filed for divorce, appellant was very upset, and he tried to convince his relatives to keep their families together and "make their relations better with each other." Shehida always knew appellant as "a loving person."

**{¶171}** Dr. Jeffrey Smalldon, a forensic psychologist, was the principal mitigation witness. Dr. Smalldon observed that "of all of the capital death penalty defendants who I've ever worked with, I believe Mr. Ahmed may have been the most difficult to work with." Smalldon met with appellant three times, spending

between 12 and 15 hours with him. Appellant refused to participate in formal testing, and Smalldon found it "all but impossible to engage in a dialog" with him. But Smalldon felt that he had been "able to collect a great deal of relevant information" from appellant without the tests.

**{¶172}** Smalldon found appellant to be "very intelligent" but also paranoid and extremely guarded. Nevertheless, Smalldon was able to obtain useful information on appellant's history and background from appellant and his acquaintances. Appellant grew up in a rural area in Pakistan and attended school, even though education was not compulsory there. His father was a farmer, and his mother was an uneducated housewife. Appellant was one of six children and was the oldest son.

**{¶173}** Appellant served in the Pakistani Air Force, where, in the early 1970s, he became friends with Major Naeem Khan. Appellant maintained contact with Khan until Khan moved to America in the early 1980s. Appellant reestablished contact with Khan when appellant came to the United States in 1987.

**{¶174}** Appellant practices Islam and, according to Smalldon, belongs to the "73rd denomination of Islam," which was in radical disfavor with the mainstream Islamic population in Pakistan in the 1980s. The sect was persecuted, and discriminatory laws were enacted against its members. When appellant emigrated from Pakistan to the United States, he felt he had no other choice. Both appellant and Khan decided to flee Pakistan because of the persecution.

**{¶175}** Upon emigrating from Pakistan, appellant lived in Chicago, where he earned a degree in computer science from Northeastern University. During that time, he worked for Khan at a refrigeration company. Khan described appellant to Smalldon as quiet, introverted, and very devout but very rigid in his religious beliefs. Khan told Smalldon that appellant was a nonviolent person. In

fact, Khan described an incident to Smalldon in which appellant had been beaten up for his religious convictions and had walked away instead of fighting back.

**{¶176}** According to Smalldon's testimony, Khan has remained in contact by telephone with appellant since he has been in jail. Khan told Smalldon, "This is not the Nawaz that I've known. He's living in an illusion." Kahn told Smalldon that he believes that appellant had lost touch with reality and had lost his rationality. Appellant asked Khan in one phone conversation: "Are you on my side or are you on their side?"

**{¶177}** Smalldon noted that appellant had no history of being treated for mental or emotional problems until 1999. Lubaina had prescribed for him the antidepressant Prozac at the beginning of 1999. Appellant's physician in Columbus, Dr. Mohammed Ahmed, met with him briefly in 1999 and prescribed Zoloft for his depression.

**{¶178}** Smalldon concluded that appellant is not insane, but suffers from a delusional disorder, persecutory type; a depressive disorder; and a paranoid personality disorder. In addition, appellant has several prominent personality traits: narcissistic trait — a pattern of grandiosity, presumptuousness, and a sense of entitlement; passive-aggressive trait — a pervasive negativistic attitude, seeing the glass half-empty, and feeling that he is getting "a raw deal"; and obsessive-compulsive trait — a preoccupation with control, order, typically at the expense of flexibility and spontaneity. According to Smalldon, appellant's paranoid-personality disorder is characterized by a pervasive suspicion of other people, a too quick tendency to believe that people are out to humiliate or demean him.

**{¶179}** Smalldon testified that appellant was experiencing delusional disorder of the persecutory type while committing the murders. Smalldon asserted that appellant has a severe mental illness that impaired his capacity to accurately perceive reality and think logically. However, Smalldon declined to state that because of appellant's mental illness, he lacked the capacity to

understand the wrongfulness of his conduct. Rather, Smalldon stated that appellant's mental illness was of such severity that it *could* have substantially impaired his ability to conform his conduct to the requirements of law.

**{¶180}** Appellant declined to make an unsworn statement at the mitigation hearing.

**{¶181}** The nature and circumstances of the offense offer nothing in mitigation. Appellant traveled from Columbus to St. Clairsville and murdered his estranged wife, father-in-law, sister-in-law, and niece by fracturing their skulls and slitting their throats. Appellant then tried to escape to Pakistan before he was apprehended.

**{¶182}** Appellant's history, character, and background provide some mitigating features. He served in the Pakistani Air Force. He earned a degree in computer science when he came to the United States and was gainfully employed during his time here. Appellant is very religious and, in fact, fled Pakistan because of religious persecution.

**{¶183}** With regard to the statutory mitigating factors of R.C. 2929.04(B), the trial court considered appellant's mental illness to be a mental disease or defect under R.C. 2929.04(B)(3). Dr. Smalldon testified that appellant's mental illness could have substantially impaired his ability to conform his conduct to the requirements of law. Although we do not view appellant's mental illness as a (B)(3) factor, it is nevertheless entitled to weight in mitigation as a (B)(7) factor. See *State v. Raglin*, 83 Ohio St.3d at 273, 699 N.E.2d 482.

**{¶184}** The R.C. 2929.04(B)(5) factor also deserves weight in mitigation, since appellant lacked a significant history of prior criminal convictions and juvenile adjudications. None of the other factors of R.C. 2929.04(B) are implicated.

**{¶185}** Upon independent weighing, we find that the aggravating circumstance in each murder count (circumstances, in the case of Nasira)

outweighs the mitigating factors beyond a reasonable doubt. While appellant was suffering mental and emotional problems in the midst of a contentious divorce, these factors and other mitigating factors are far outweighed in each instance by the aggravating course-of-conduct circumstance. In the murder of Nasira, the two aggravating circumstances heavily outweigh the mitigation. Appellant's actions merit the capital penalty to which he was sentenced.

**{¶186}** As to each victim, the death penalty is both appropriate and proportionate when compared with capital cases involving the purposeful killing or attempt to kill two or more persons. See *State v. Davie*, 80 Ohio St.3d 311, 686 N.E.2d 245; *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72; *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506; and *State v. Jordan*, 101 Ohio St.3d 216, 2004-Ohio-783, 804 N.E.2d 1. The death penalty is also appropriate and proportionate when compared to cases involving the murder of a child under the age of 13. See *State v. Smith*, 97 Ohio St.3d 367, 2002-Ohio-6659, 780 N.E.2d 221 (six-month-old victim); *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185 (six-year-old victim).

**{¶187}** Based on the foregoing, the judgment of the court of common pleas, including the penalty of death, is hereby affirmed.

Judgment affirmed.

MOYER, C.J., F.E. SWEENEY, PFEIFER, LUNDBERG STRATTON, O'CONNOR and O'DONNELL, JJ., concur.

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Frank Pierce, Belmont County Prosecuting Attorney, and Michael L. Collyer, Special Assistant Prosecuting Attorney, for appellee.

David H. Bodiker, State Public Defender, Kelly L. Culshaw and Pamela Prude-Smithers, Assistant Public Defenders, for appellant.

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