No. 21-___

In the Supreme Court of the United States

TIM SHOOP, WARDEN,

Petitioner,

v.

RAYMOND TWYFORD,

Respondent.

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

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 20-3346

RAYMOND A. TWYFORD, III,

Petitioner-Appellee,

v.

TIM SHOOP, Warden,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Ohio at Columbus.

No. 2:03-cv-00906—Algenon L. Marbley, Chief District Judge.

Argued: April 8, 2021

Decided and Filed: August 26, 2021

Before: BATCHELDER, MOORE, and COLE, Circuit Judges.

COUNSEL

ARGUED: Zachery P. Keller, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellant. Michael J. Benza, LAW OFFICE OF MICHAEL J. BENZA, INC., Chagrin Falls, Ohio, for Appellee. **ON BRIEF:** Zachery P. Keller, Benjamin M. Flowers, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellant. Michael J. Benza, LAW OFFICE OF MICHAEL J. BENZA, INC.,

Chagrin Falls, Ohio, Alan C. Rossman, Sharon A. Hicks, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cleveland, Ohio, for Appellee.

MOORE, J., delivered the opinion of the court in which COLE, J., joined. BATCHELDER, J. (pp. 14–16), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. Tim Shoop, the warden of the Chillicothe Correctional Institution, appeals from the district court's order ("transport order") requiring the warden to transport Raymond Twyford, an Ohio death-row inmate, to The Ohio State University Wexner Medical Center, affiliated with the Ohio Department of Rehabilitation and Correction, for neurological imaging (a CT/FDG-PET scan) in support of his petition for a writ of habeas corpus. The district court issued the transport order under the All Writs Act, 28 U.S.C. § 1651, in aid of its jurisdiction over Twyford's habeas petition. For the following reasons, we hold that we have jurisdiction under the collateral-order doctrine to review the warden's appeal, and we **AFFIRM** the district court's transport order.

I. BACKGROUND

An Ohio jury convicted Twyford of aggravated murder and sentenced him to death in 1993.[1] In

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[1] The facts and legal proceedings surrounding Twyford's conviction and death sentence are detailed in *State v. Twyford*, 763 N.E.2d 122, 128–31 (Ohio 2002).

January 2003, Twyford filed a federal habeas petition raising twenty-two claims for relief. R. 13 (Pet. for Writ of Habeas Corpus) (Page ID #2–205). The district court stayed Twyford's case pending completion of litigation regarding his state application to reopen his direct appeal. R. 38 (12/30/04 Order) (Page ID #379–85). After the Ohio Supreme Court affirmed the denial of Twyford's application to reopen his direct appeal, *State v. Twyford*, 833 N.E.2d 289, 290 (Ohio 2005), the district court returned Twyford's case to the active docket, *see* R. 49 (Oct. 2005 Status Rep.) (Page ID #408–09). In 2008, the Warden moved to dismiss some of Twyford's claims as procedurally defaulted. R. 78 (Warden's Mot. to Dismiss Procedurally Defaulted Claims) (Page ID #510–39). The district court granted the warden's motion in part. R. 93 (09/27/17 Order at 74) (Page ID #765).

This brings us to the subject of this appeal. In November 2018, Twyford requested leave to file *ex parte* and under seal a motion to transport for medical testing, R. 101 (Mot. for Leave to File Mot. to Transport *Ex Parte*) (Page ID #6998–7003), which the district court denied in light of the need for transparency, R. 105 (03/15/19 Order at 3–4) (Page ID #7017–18). Twyford then filed a motion to transport for neurological imaging. Twyford noted that he may have neurological problems due to childhood physical abuse, alcohol and drug use, and a self-inflicted gunshot wound to his head from a suicide attempt at age thirteen, which cost him his right eye and left shrapnel remaining in his head. R. 106 (Mot. to Transport for Medical Testing at 3) (Page ID #7021). In support of the motion, Twyford submitted a letter from Dr. Douglas Scharre, a neurologist and the

director of the Cognitive Neurology Division at The Ohio State University Wexner Medical Center ("OSU"), which stated that Dr. Scharre had evaluated Twyford, reviewed his medical records, and concluded that a CT scan and an FDG-PET scan were necessary for him to evaluate Twyford fully. R. 106-2 (Letter from Dr. Scharre) (Page ID #7088). Twyford requested that the warden transport him to OSU for this imaging because the Chillicothe Correctional Institution, where Twyford is incarcerated, does not have the equipment to perform this imaging.[2] R. 106 (Mot. to Transport for Medical Testing at 4) (Page ID #7022). He submits that the neurological imaging is necessary for his case because:

> [g]iven the issues in Mr. Twyford's petition relating to his family history, mental health issues, and the impact of his suicide attempt (see Claims for Relief Nos. 1 (Ineffective Assistance of Counsel), 4 (Involuntary and Coerced Statement), 6 (Competency to Stand Trial), 16 (Ineffective Assistance of Counsel at Mitigation), 17 (Ineffective Assistance of Expert), 18 (Denial of Right to Present Mitigation Evidence)), it is plausible that the testing to be administered is likely to reveal evidence in support of Mr. Twyford's claims. Additionally, this investigation could plausibly lead to the development of evidence

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[2] OSU has experience securely treating prisoners as OSU provides any needed emergency or inpatient care and performs surgeries and advanced imaging for Ohio inmates. *See* Bureau of Medical Services (BOMS), Ohio Dep't of Rehab. & Corr., https://drc.ohio.gov/correctional-healthcare (last visited on Apr. 26, 2021).

> and materials in support for any challenges to the Warden's claims of procedural default or exhaustion.

Id. at 8 (Page ID #7026).

The warden opposed this motion on two grounds. R. 107 (03/28/19 Warden's Opp. to Mot.) (Page ID #7089–94). First, the warden contended that the district court has jurisdiction under 28 U.S.C. § 2241 "to bring a prisoner to the place where the Court is convened in order to facilitate its adjudication of a 2254 action," but not to require that the state transport a prisoner to an outside medical facility. *Id.* at 1–3 (Page ID #7089–91). Second, the warden argued that Twyford was seeking new information that he did not present to the state courts and therefore *Cullen v. Pinholster*, 563 U.S. 170 (2011), precluded the district court from considering the results of any resultant neurological imaging. *Id.* at 3–5 (Page ID #7091–93).

The district court granted Twyford's motion. R. 109 (03/19/20 Op. & Order) (Page ID #7102–09). The district court found that it had jurisdiction under the All Writs Act to order the warden to transport Twyford for neurological imaging because the results "may aide this Court in the exercise of its congressionally mandated habeas review." *Id.* at 6 (Page ID #7107). It concluded that it was not "in a position at this stage of the proceedings to make a determination as to whether or to what extent it would be precluded by *Cullen v. Pinholster* from considering any evidence in connection with Dr. Scharre's evaluation." *Id.* at 7–8 (Page ID #7108–09).

The warden timely appealed. R. 110 (Not. of Appeal) (Page ID #7110–11). The district court granted the warden's request for a stay pending our resolution of the warden's appeal. R. 114 (05/04/2020 Order) (Page ID #7123–24).

II. JURISDICTION

Before reaching the merits of the warden's appeal, we must first determine whether we have jurisdiction over the appeal. The warden argues that we should exercise jurisdiction over his interlocutory appeal either through the collateral-order doctrine or as a petition for a writ of mandamus. We conclude that the warden's appeal satisfies the collateral-order doctrine, so we need not address the warden's mandamus argument.

We have jurisdiction to review final decisions of the district courts, 28 U.S.C. § 1291, and a narrow class of interlocutory and collateral orders, 28 U.S.C. § 1292; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). To fall within the collateral-order doctrine, the decision (1) must be "conclusive"; (2) must "resolve important questions separate from the merits"; and (3) must be "effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995). The Supreme Court has recognized that in cases where it has permitted an interlocutory appeal, "some particular value of a high order was marshaled in support of the interest in avoiding trial." *Will v. Hallock*, 546 U.S. 345, 352 (2006).

The transport order satisfies all three conditions. First, the transport order conclusively determined that the State must transport Twyford to OSU for

neurological imaging. Second, whether the district court has the authority to order the transport of Twyford to OSU is unrelated to the merits of Twyford's habeas petition but implicates important issues of state sovereignty and federalism. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714 (1996) (holding that an order remanding on grounds of *Burford* abstention is an appealable collateral order because it "conclusively determines an issue that is separate from the merits, namely, the question whether the federal court should decline to exercise its jurisdiction in the interest of comity and federalism"). Third, the transport order would be effectively unreviewable if we were to wait until after the district court resolved Twyford's habeas petition. At that stage, the State will have already undertaken the burden, risk, and expense of transporting Twyford to OSU for neurological imaging. Our conclusion that we have appellate jurisdiction over the warden's appeal is consistent with other circuits that have considered transport orders. *Jones v. Lilly*, 37 F.3d 964, 965–66 (3d Cir. 1994); *Jackson v. Vasquez*, 1 F.3d 885, 887–88 (9th Cir. 1993); *Ballard v. Spradley*, 557 F.2d 476, 479 (5th Cir. 1977).

Twyford argues that the district court's transport order does not involve a disputed question. Rather, Twyford characterizes the transport order as "simply authoriz[ing] habeas counsel to conduct their own independent investigation of Mr. Twyford's case," which is "no more 'disputed' than an order appointing counsel under 18 U.S.C. § 3599(a)(2) or appointing an investigator under § 3599(f)." Twyford's Br. at 11. Twyford's portrayal of the district court's transport order, however, glosses over the federalism concerns

implicated by the transport order. Twyford also contends that, if we were to take seriously the warden's argument that this is a discovery order in disguise, discovery orders generally are not appealable under the collateral-order doctrine despite their irreversible burden, citing *U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 472 (6th Cir. 2006) (collecting cases). Twyford's Br. at 12–14. Twyford is correct that mere expense and burden to a party do not necessitate immediate review. In *Will v. Hallock*, the Supreme Court concluded that a district court ruling that would prevent a party from avoiding the expense and burden of trial was not reviewable under the collateral-order doctrine because the burden and expense of trial, absent "some particular value of a high order," did not require immediate appeal. 546 U.S. at 350–53. Here, however, the district court's transport order implicates a "particular value of a high order," namely a federal court's authority to compel state action.

We therefore have appellate jurisdiction to review the district court's transport order under the collateral-order doctrine. The district court had jurisdiction over Twyford's habeas petition under 28 U.S.C. §§ 2241 and 2254.

III. ANALYSIS

The warden argues that the district court did not have authority under the All Writs Act to issue the transport order because the order is inconsistent with statutes and the common-law understanding of habeas corpus. The warden also claims that the transport order is not "necessary or appropriate" in Twyford's case because Twyford has not shown that

results of the neurological imaging would be relevant to or admissible in his habeas proceeding. We conclude that the district court properly exercised its authority under the All Writs Act to issue the transport order in aid of its jurisdiction over Twyford's habeas petition. [3]

The All Writs Act states that courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The Act is not an independent source of jurisdiction. *See United States v. Denedo*, 556 U.S. 904, 911 (2009). Rather, the Act serves to "fill[] the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." *Penn. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985). As the text of § 1651 states, the district court's order must be "agreeable to the usages and principles of law." "In determining

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[3] In his brief, Twyford appears to argue that the district court had authority to issue the order under 18 U.S.C. § 3599(f), which provides for appointed counsel and investigative services in capital habeas proceedings. Twyford's Br. at 22–27. The district court, however, based the transport order on its jurisdiction over Twyford's habeas petition. Further, § 3599(f) is not an independent source of jurisdiction. The warden argues in his reply brief and at oral argument that Twyford has abandoned the district court's reasoning. Warden's Reply Br. at 14–15. At oral argument, Twyford's counsel clarified that he is arguing that the district court's order is based on § 3599(f) and the district court's habeas jurisdiction. We have rejected the argument that appellees who fail to raise an argument on appeal waive that argument, for we "can affirm the district court on any basis supported by the record." *Leary v. Daeschner*, 228 F.3d 729, 741 n.7 (6th Cir. 2000). We consider the arguments included in the appellate briefs as well as the basis of the district court's order.

what auxiliary writs are 'agreeable to the usages and principles of law,' we look first to the common law." *United States v. Hayman,* 342 U.S. 205, 221 n.35 (1952). The Supreme Court has cautioned that "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Penn. Bureau of Corr.*, 474 U.S. at 43. The Act "does not authorize [federal courts] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Id.* Even when no statute seemingly precludes the district court's action, we consider whether the action is "consistent with the intent of Congress." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977). We review de novo a district court's exercise of authority under the All Writs Act. *See United States v. Perry*, 360 F.3d 519, 533 (6th Cir. 2004).

The warden argues that *Baze v. Parker*, 632 F.3d 338 (6th Cir. 2011), controls our decision in this case. We disagree. *Baze* involved a death-row inmate who sought to compel the state to make state prison officials and other inmates available for interviews so that he could submit their interview statements in support of his state clemency application. *Id.* at 340. We concluded that the All Writs Act and 18 U.S.C. § 3599(f) did not give the district court authority to grant Baze's motion. Section 3599(f) "simply empowers a court to authorize, for purposes of compensation, an attorney to acquire an investigator's efforts"; it does not "enable a court to order any party that stands in the investigator's way to stand down." *Id.* at 343.

Baze is distinguishable from Twyford's case. Here, the district court grounds its order in its jurisdiction over Twyford's habeas petition, not in the All Writs Act alone or in § 3599. Moreover, the district court's transport order is also of a different character from the order sought in *Baze*. The defendant in *Baze* sought to compel state prison officials to provide him with information that could be helpful to his state clemency petition, whereas Twyford seeks an order that the State transport him to obtain medical imaging of his own body for use in his federal habeas proceeding.

To the extent that *Baze* applies to this case, it supports the district court's authority to issue the transport order. In a footnote, *Baze* recognized that "federal courts in [federal capital trials and federal habeas proceedings] may have oversight powers similar to those Baze seeks here," but "those powers are exercised pursuant to other sources of authority, not section 3599." *Id.* at 342 n.3. Twyford's request for an order to compel transport in aid of the district court's pre-existing jurisdiction over his federal habeas petition is precisely the type of order contemplated by the *Baze* footnote.

Although we have not squarely addressed whether a district court may order the transport of a habeas petitioner under the All Writs Act, a few district courts in this circuit have addressed the question and reach differing conclusions. In *Elmore v. Warden, Chillicothe Correctional Institution*, No. 1:07-CV-776, 2019 WL 5704042 (S.D. Ohio Nov. 5, 2019), the district court concluded that it had jurisdiction under the All Writs Act to order a habeas petitioner's transportation for neurological imaging. *Baze* did not preclude the

district court from issuing the order to transport because the defendant in *Baze* requested an order to obtain information in support of his state clemency petition, whereas Elmore sought to obtain neurological imaging in support of his habeas petition before the district court. *Id.* at *3. By contrast, in *Trimble v. Bobby*, No. 5:10-CV-00149, 2011 WL 1527323 (N.D. Ohio Apr. 19, 2011), the district court denied the petitioner's request for an order directing the state to transport him for neurological imaging. The district court concluded that *Baze* precludes a district court from ordering the transport of a habeas petitioner for neurological imaging. *Id.* at *1. Even if *Baze* were distinguishable, the district court in *Trimble* found that the petitioner did not establish that the district court would be able to consider the results of the neurological imaging under *Cullen v. Pinholster* because he had requested neurological imaging in his state-court proceeding and the state courts denied this request. *Id.* at *2.

We agree with the district courts' decisions in this case and in *Elmore* that a district court has the authority under the All Writs Act to order the state to transport a habeas petitioner for medical imaging in aid of its habeas jurisdiction. Such transport orders do not conflict with habeas statutes or the common law and are consistent with congressional intent to provide for counsel for capital defendants. In this case, Twyford has shown that such an order is "necessary or appropriate" to aid the district court in its adjudication of his habeas petition.

The warden contends that the district court's order is contrary to the role of the writ of habeas corpus at

common law in securing the petitioner's release from unlawful restraint. In support, the warden cites the Supreme Court's decision in *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), which held that the Suspension Clause did not entitle an asylum applicant to additional administrative review of his asylum application. The Supreme Court in *Thuraissigiam* reasoned that the writ of habeas corpus "has traditionally been a means to secure *release* from unlawful detention, but respondent invokes the writ to achieve an entirely different end, namely, to obtain additional administrative review of his asylum claim and ultimately to obtain authorization to stay in this country." *Id.* at 1963. Here, in contrast, the district court's transport order is in connection with a petition for a writ of habeas corpus challenging Twyford's detention, and is therefore, not contrary to the common-law understanding of habeas.

The district court's transport order also does not contravene other statutes. The warden contends that 28 U.S.C. § 2241(c) limits the district court's authority to order the transport of prisoners to bringing prisoners only to court to testify or for trial. The relevant portion of § 2441(c) states that "[t]he writ of habeas corpus shall not extend to a prisoner unless— . . . (5) *[i]t is necessary to bring him into court to testify or for trial*." (emphasis added). Specifically, the warden argues that "[t]he allowance of transport orders in these narrow circumstances is best read to *prohibit* orders mandating the transportation of prisoners in other circumstances." Warden's Br. at 32. The Seventh Circuit, in a § 1983 suit, concluded that § 2241 precluded the district court from ordering the

transport of the petitioner for a medical examination for his lawsuit. *Ivey v. Harney*, 47 F.3d 181 (7th Cir. 1995). The Seventh Circuit reads § 2241(c)(5) as a "closed-ended statutory list" that permitted the district court to issue orders to transport an inmate only to court or to testify, not to an outside medical facility for a medical exam. *Id.* at 185.

We disagree with the Seventh Circuit's interpretation of § 2241(c)(5) in *Ivey*, which involved a civil suit under § 1983 rather than a federal habeas action, and instead view § 2241(c)(5) as limiting when the district court may issue the writ of habeas corpus *itself*, not forbidding ancillary orders needed to aid in adjudicating a petitioner's habeas petition. Transport orders, such as the one issued in Twyford's case, instead fill the gaps left by federal habeas statutes by ensuring that states cannot prevent federal habeas petitioners from presenting their cases to the district court.

Habeas discovery rules do not preclude the district court from issuing the transport order in Twyford's case. The warden contends that the district court's order is inconsistent with the rules for habeas discovery.[4] Warden's Br. at 13–15, 40–42. The warden notes that rules governing discovery in habeas proceedings require petitioners to show "good cause" to obtain the evidence, which is a higher bar than the requirement under the All Writs Act that the district

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[4] The warden argues, in the alternative, that Twyford's request does not satisfy the requirements for habeas discovery. Warden's Br. at 35–40. We need not address this argument because Twyford has repeatedly disclaimed that he is seeking discovery.

court find the order is "necessary or appropriate." *Id.* at 35. Rules limiting habeas discovery have no bearing on the transport order because Twyford's request for transportation to OSU for neurological imaging is not a request for discovery. Rule 6 of the Rules Governing Section 2254 Cases, which governs discovery in federal habeas proceedings, does not define "discovery," though Black's Law Dictionary defines it as the "[c]ompulsory disclosure, at a party's request, of information that relates to the litigation," *Discovery*, Black's Law Dictionary (11th ed. 2019). The transport order does not fall within Black's definition of discovery, because Twyford is seeking neurological imaging of his own brain, not information from the other party. But for his incarceration, Twyford and his attorneys would not need any state involvement in obtaining his own neurological imaging.

The district court's transport order is also consistent with congressional intent. Section 3599, although not an independent source of jurisdiction, indicates that Congress considered it important that persons sentenced to death have counsel and investigative services in post-conviction proceedings. The district court's transport order ensures that Twyford's statutory right to counsel and investigative services in post-conviction proceedings is meaningful.

Finally, we agree with the district court that Twyford has shown that requiring transport to OSU is "necessary or appropriate" to aid the district court in its adjudication of Twyford's habeas petition. The All Writs Act requires that the writ be "necessary or appropriate in aid of [the courts'] respective jurisdictions." 28 U.S.C. § 1651. Although Twyford

argues that the transport order is "reasonably necessary," under the standard for requests for investigative services under § 3599(f), Twyford's Br. at 18–19, we affirm the district court's transport order under the All Writs Act in aid of its habeas jurisdiction, and thus we review Twyford's request for whether it is "necessary or appropriate," as required by the All Writs Act.

As Twyford notes, neurological imaging establishing the extent of Twyford's neurological deficits plausibly relates to his claims of ineffective assistance of counsel regarding the failure of trial counsel to present evidence of his neurological deficits, ineffective assistance of the expert witness for failing to conduct testing to show neurological deficits, ineffective assistance of his post-conviction counsel to conduct testing to show his neurological deficits, lack of his competency to stand trial, and the involuntariness of his statement. Twyford's Br. at 23.

The warden contends that district court's transport order is not appropriate because Twyford has not shown that the district court may consider the results of the neurological testing under *Cullen v. Pinholster*, 563 U.S. 170 (2011), which limits when a district court in habeas proceedings may consider evidence not presented before the state courts, Warden's Reply Br. at 22. The dissent similarly accuses us of "circumvent[ing] the Supreme Court's admonition against the admission of new evidence at the federal habeas review stage." Dissenting Op. at 14. In issuing the transport order, the district court emphasized that "at this stage of the proceedings," it was not in a position "to make a determination as to

whether or to what extent it would be precluded by *Cullen v. Pinholster* from considering any evidence in connection with Dr. Scharre's evaluation, including whether that information could be considered for any other purpose such as revisiting procedural default." R. 109 (03/19/20 Op. & Order at 7–8) (Page ID #7108–09). At this stage, on review of Twyford's interlocutory appeal seeking a transport order, we need not consider the admissibility of any resulting evidence. The district court is best situated in the first instance to untangle the knotty *Pinholster* evidentiary issues in Twyford's case.

The dissent also contends that the Supreme Court's decision in *Harris v. Nelson*, 394 U.S. 286 (1969), supplies a test for reviewing Twyford's request for a transport order, and that, applying the *Harris* test, the transport order is not "necessary or appropriate" to aid the district court's jurisdiction over Twyford's case. Dissenting Op. at 15. *Harris*, a decision predating the Antiterrorism and Effective Death Penalty Act of 1996, held that Federal Rule of Civil Procedure 81(a)(2), which governed the application of the rules to habeas corpus, articulated a general presumption against applying the Federal Rules of Civil Procedure to habeas corpus proceedings. The defendant in *Harris* sought to compel the warden to respond to interrogatories pursuant to Federal Rule of Civil Procedure 33. *Id.* at 289. The Court reasoned that Congress did not "intend[] to extend to habeas corpus, as a matter of right, the broad discovery provisions which, even in ordinary civil litigation, were 'one of the most significant innovations' of the new rules." *Id.* at 295 (quoting *Hickman v. Taylor*, 329 U.S. 495, 500 (1947)). At the same time, the Court

recognized that "a district court may, in an appropriate case, arrange for procedures which will allow development, for purposes of the hearing, of the facts relevant to disposition of a habeas corpus petition." *Id.* at 298. "[W]here specific allegations before the court show reason to believe that the petitioner, may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Id.* at 300. In that circumstance, the Court reasoned that courts may exercise their authority under the All Writs Act to "fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage." *Id.* at 299.

Harris does not govern the district court's exercise of its authority under the All Writs Act to order the transport of Twyford. *Harris* concerns a habeas petitioner's request for discovery. *See Thomas v. United States*, 849 F.3d 669, 680 (6th Cir. 2017) ("Rule 6(a) of the Rules Governing § 2255 Proceedings allows the district court to enable further discovery in a habeas proceeding where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief." (citing *Harris*, 394 U.S. at 300)); *Hodges v. Bell*, 170 F. App'x 389, 393–94 (6th Cir. 2006) (citing *Harris* in a decision reversing the district court's order requiring that the prison videotape the movements of the petitioner and staff members interacting with the petitioner); *Lynott v. Story*, 929 F.2d 228, 232 (6th Cir. 1991) (citing *Harris*

in a decision affirming the district court's denial of the petitioner's request for production of documents from the Parole Commission). Twyford, by contrast, has repeatedly disclaimed that he is seeking discovery. It is understandable that the warden would cite *Harris* only for the principle that "habeas proceedings do not normally allow for liberal discovery or federal factfinding." Warden's Br. at 41.

Therefore, we affirm the district court's determination that the transport order is "necessary or appropriate" in aid of its jurisdiction to adjudicate Twyford's habeas petition.

IV. CONCLUSION

For the foregoing reasons, we hold that we have appellate jurisdiction under the collateral-order doctrine to review the warden's interlocutory appeal, and we **AFFIRM** the district court's transport order issued pursuant to its exercise of its habeas jurisdiction and the All Writs Act.

DISSENT

ALICE M. BATCHELDER, Circuit Judge, dissenting. In my view, *Harris v. Nelson*, 394 U.S. 286, 299-300 (1969), governs the exercise of the All Writs Act here. Because the majority holds otherwise, I must respectfully dissent. And because Twyford has not met the *Harris* standard—and no one contends that he has—I would reverse the judgment of the district court. Finally, and perhaps most importantly, the further ramifications of this decision are worth careful note because its effect, if not its purpose, is to

circumvent the Supreme Court's admonition against the admission of new evidence at the federal habeas review stage. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Under the All Writs Act, Article III courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Despite this broad language, the Act's authority is not unlimited. As is relevant here, a habeas court may use the Act to aid the petitioner's efforts to develop facts and evidence "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief." *Harris*, 394 U.S. at 300; *see also Hodges v. Bell*, 170 F. App'x 389, 394 (6th Cir. 2006) (citing *Harris* for this proposition). In *Pinholster*, 563 U.S. at 181, the Court emphasized AEDPA's strict limitations on the admission of new evidence—i.e., evidence that was not before the state courts—at the federal habeas stage. Neither the Supreme Court nor this court has reconciled *Harris*'s right to factual development (which pre-dates AEDPA) with *Pinholster*'s prohibition.

Because of the apparent *Harris-Pinholster* friction, the district court was, at a minimum, obliged to comply with *Harris* before invoking its authority under All Writs Act to resolve Twyford's claim. That is, the court should have first determined whether the evidence Twyford was seeking (i.e., brain-scan results) would—supposing the results were as Twyford hoped or predicted—support his specific claims, so as to show

that he was entitled to habeas relief. The district court did not make—indeed, expressly avoided making—this determination, claiming that it could not make the determination until it had the actual test results for consideration.

For his part, Twyford neither argued nor proved that the brain-scan results would meet the *Harris* standard. Instead, Twyford cloaked his case in a broad argument that counsel, appointed under 18 U.S.C. § 3599, has a right to investigate his client's habeas claims. We have rejected such a broad reading of § 3599. *Baze v. Parker*, 632 F.3d 338, 345 (6th Cir. 2011) ("Accordingly, we hold that . . . 3599(f) provides a federal court with no jurisdiction to issue any order beyond the authorization of funds."). As the majority explains in more detail, Twyford's claim sounds in the All Writs Act, not § 3599. But the majority does not apply *Harris*'s limitation.

Pursuant to *Harris*, the All Writs Act empowers the district court to issue orders that enable a habeas petitioner's collection of evidence when: (1) the petitioner has identified specific claims for relief that the evidence being sought would support or further; and (2) the district court has determined that if that evidence is as the petitioner proposed or anticipated, then it could entitle the petitioner to habeas relief. To be sure, this might be easy to the point of formulaic. On the other hand, it might not survive its first confrontation with *Pinholster*'s inadmissibility standard.

In the present case, if the court properly applied *Harris*, then Twyford would first have to point to which of his habeas claims the brain scan would

support and explain how the anticipated results of that scan would further those claims. Then, the court would have to determine whether that evidence would entitle Twyford to habeas relief, and whether that evidence could overcome *Pinholster*. If the district court considered Twyford's specific claims and explanations, found that *Pinholster* would not bar admission, and determined that the requested evidence (if as anticipated) could reasonably entitle Twyford to habeas relief, then it could invoke the All Writs Act to order the federal government to transport Twyford to OSU for testing.

But instead, the district court has enabled Twyford to proceed in reverse order by collecting evidence before justifying it. Because that contradicts *Harris* and, as was mentioned at the outset, appears by either design or effect to circumvent *Pinhoslter*, I must respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:03cv906

Chief Judge Algenon L. Marbley

Chief Magistrate Judge Deavers

RAYMOND A. TWYFORD, III,

Petitioner,

v.

WARDEN, CHILLICOTHE
CORRECTIONAL INSTITUTION,

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 18 U.S.C. § 2254. This matter is before the Court upon Petitioner's Motion to Transport for Medical Testing, (ECF No. 106), Respondent's opposition, (ECF No. 107), and Petitioner's Reply, (ECF No. 108.)

Petitioner seeks an Order from this Court directing his custodian, the Warden-Respondent, to transport Petitioner to The Ohio State University Medical Center for neurological imaging, to include a PET-CT scan. Petitioner states he has been evaluated by neurologist Dr. Douglas Scharre, director of the Cognitive Neurology Division at The Ohio State University Medical Center, and following that

evaluation, Dr. Scharre recommended Petitioner undergo further testing. (ECF No. 106, at PageID 7021.) According to Petitioner, "Dr. Scharre suspects that Mr. Twyford may suffer from neurological defects due to childhood physical abuse, alcohol and drug use, and a self-inflicted gunshot wound to the head during an adolescent suicide attempt. Numerous lead metal fragments from the gunshot wound remain lodged in Mr. Twyford's head." (*Id*. at PageID 7021.) Petitioner surmises the additional medical testing is not only necessary for Dr. Scharre to assist in his defense, but is also crucial to Counsel's ability to investigate, present and develop Petitioner's claims in his petition for habeas corpus relief. (*Id*. at PageID 7021-22.) Additionally, Petitioner explains he is not seeking formal discovery or funding by the Court, as he is represented by the Capital Habeas Unit of the Federal Public Defender's Office for the Northern District of Ohio, who will cover the cost of the scans. (*Id*. at PageID 7022.) According to Petitioner, although the Federal Public Defender has the financial resources available to obtain the necessary scans, "in order to make proper use of those services," he needs a court order compelling his conveyance to a proper medical facility where the testing can be conducted. (*Id*.) Finally, Petitioner notes "[a]s the official prison hospital, The Ohio State University Medical Center has the security and other infrastructure to accommodate any concerns of Respondent." (*Id*.)

Respondent opposes Petitioner's motion for an order to transport, arguing this Court lacks jurisdiction to order Respondent to transfer Petitioner for medical testing. (ECF No. 107, at PageID 7089.) Additionally, Respondent asserts Petitioner's request

for transport amounts to a motion for discovery that should be precluded at this stage of the proceedings by *Cullen v. Pinholster*, 563 U.S. 70 (2011), which held a federal court's review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. (*Id.* at PageID 7091.) The Court will address these arguments in turn.

With respect to the threshold matter of jurisdiction, Respondent argues "the federal district court lacks jurisdiction in a 2254 proceeding to issue a writ *ad testificandum* to compel Twyford's custodian to take Twyford to the place where Twyford would seek to have physical evidence in the form of scans of his brain produced and then have the results utilized by him in a collateral attack on his state court conviction and death sentence." (*Id.* at PageID 7089.) Respondent posits that while this Court has the power "to compel persons or things to appear before the Court, in the place where the Court is convened, for the purpose of facilitating the adjudication of a 2254 action by the Court," the Court does not have jurisdiction "to facilitate his effort to create new evidence to be utilized in a collateral attack of his state court conviction and sentence." (*Id.* at PageID 7091.) According to Respondent, "[t]his sort of foray into the world at large on a quest to obtain new evidence in hopes to enhance his success in a 2254 action is outside the jurisdiction of the Court." (*Id.*)

"In determining the scope of a district court's jurisdiction," the Court of Appeals for the Sixth Circuit has explained, "our starting point is that the lower federal courts are courts of limited jurisdiction

and possess only those powers granted to them by Congress." *Baze v. Parker*, 632 F.3d 338, 341 (6th Cir. 2011) (citing *Finley v. United States*, 490 U.S. 545, 550 (1989) (quoting *Aldinger v. Howard*, 427 U.S. 1, 15 (1976)). Federal courts are to infer jurisdiction narrowly, especially "where an expansion of jurisdiction would implicate federalism concerns." *Baze*, 632 F.3d at 341 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). The Sixth Circuit went on to explain that "[f]ederalism concerns are particularly strong in criminal matters, and, absent a clear directive from Congress or the Constitution, a federal court should be loath to assume jurisdiction to interfere with state criminal proceedings, including postconviction proceedings." *Baze*, 632 F.3d at 341 (citations omitted).

Here, Petitioner seeks an Order from this Court to compel the Warden of the Chillicothe Correctional Institution where Petitioner is currently held, to arrange the transportation of Petitioner and convey him to The Ohio State University Medical Center for neurological imaging. Petitioner argues this Court has jurisdiction to enter an order for transport pursuant to the All Writs Act, which provides, in relevant part, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

Petitioner's request for an order to transport is not the first instance in this district wherein a death-sentenced habeas petitioner has sought a federal court order to be transferred for neurological imaging and

testing. In *Elmore v. Warden,* Case No. 1:07-cv-776, 2019 WL 5704042 (S.D. Ohio Nov. 5, 2019), United States District Judge Edmund A. Sargus, Jr., recently found that a federal district court possesses jurisdiction in a habeas proceeding to order the warden to transport a petitioner for testing. In finding jurisdiction, Judge Sargus determined the All Writs Act empowers a federal district court to issue an order for transport when "the evidence-collection that that order will facilitate would aid this Court in its existing habeas corpus jurisdiction to assess the constitutionality of Petitioner's incarceration." *Elmore*, Case No. 1:07-cv-776, 2019 WL 5704042, at *5. In reaching this determination, Judge Sargus drew a distinction between requests for transport in connection with a habeas corpus proceeding wherein the testing may "be necessary in aid of the Court's congressionally granted habeas corpus jurisdiction to determine the legality of Petitioner's incarceration by assessing the merits of his constitutional claims," and similar requests to order state action made in connection with a district court's much more limited role in a state clemency proceeding. *Id.* at *5. In drawing this distinction, Judge Sargus analyzed the Sixth Circuit's decision in *Baze v. Parker*, 632 F.3d 338, 341 (6th Cir. 2011), wherein the Sixth Circuit held that neither the federal funding statute set forth in 18 U.S.C. § 3599, nor the All Writs Act, gave a district court jurisdiction to grant Baze's request for an order requiring a state correctional facility to allow Baze to interview correctional personnel and inmates, in connection with his pursuit of state clemency. In that case, the Sixth Circuit noted that the All Writs Act provides federal courts only with the authority to

issue writs in aid of their respective jurisdictions, and does not serve as an independent source of jurisdiction. The Sixth Circuit concluded that "jurisdiction to appoint and fund counsel for a state clemency proceeding is not, as Baze would have it, bundled with jurisdiction to oversee the state clemency proceeding itself." *Baze*, 632 F.3d at 346. In distinguishing *Baze*, Judge Sargus found persuasive the fact that Elmore's case did not involve the federal court's much more limited role in connection with a state clemency proceeding, but instead was before the court in habeas corpus, as "[t]hat distinction is pivotal to the determination of whether the All Writs Act empowers this Court to order the relief Petitioner seeks." *Elmore*, Case No. 1:07-cv-776, 2019 WL 5704042, at *4.

Finally, Judge Sargus addressed – and distinguished – a pair of unreported decisions out of the Northern District of Ohio reaching a different result on this issue, in the context of a habeas corpus proceeding:

> In *Trimble v. Bobby*, Case No. 5:10-cv-149, 2011 WL 900997 (N.D. Ohio Mar. 14, 2011), the district court held, in the context of an ongoing habeas corpus proceeding, that *Baze v. Parker* compelled a finding that neither §3599 nor the All Writs Act empowered the district court to order Trimble's transport for neurological testing in support of his claim of mitigation-phase ineffective assistance of counsel. On a motion for reconsideration, the district court expressly rejected Trimble's argument that *Baze* was distinguishable because it was decided in the context of a state clemency

proceeding as opposed to an ongoing habeas corpus proceeding. *Trimble v. Bobby*, Case No. 5:10-cv-149, 2011 WL 1527323, at *1-2 (N.D. Ohio April 19, 2011). Specifically, the district court noted that because consideration of the new evidence (results of neurological testing) would be precluded by *Cullen v. Pinholster*, 563 U.S. 170 (2011), ordering Trimble's transport for the purpose of gathering evidence that could not be considered would not be in aid of the Court's § 2254 jurisdiction. *Id.* at *2-3. This Court disagrees for two reasons.

First, this Court is of the view that the district court's reasoning above conflates two distinct issues: one, whether ordering transport to collect new evidence would on its face be in aid of the federal court's duty to determine the constitutionality of the movant's incarceration; and two, whether the federal court ultimately can consider that new evidence. Magistrate Judge Merz recognized that distinction as well, holding that the reason for which Petitioner sought transport—to obtain neurological test results—would be in aid of the Court's jurisdiction to adjudicate Petitioner's ineffective assistance claim but then ultimately holding that transport was nonetheless not warranted because it appeared that procedural default would preclude the Court from considering the merits of the claim and thus any new evidence supporting it. That is, in Magistrate Judge Merz's analysis, the secondary issue of whether the Court could ultimately consider results of the neurological testing did not inform the threshold issue of whether ordering

> transport to obtain those results would on its face be in aid of the Court's habeas jurisdiction.

Elmore, Case No. 1:07-cv-776, 2019 WL 5704042, at *4-5.

For the reasons set forth above and more fully outlined in the *Elmore* decision, this Court agrees that it possesses jurisdiction via the All Writs Act to order the transport of Petitioner for neurological testing and imaging, as such imaging may aide this Court in the exercise of its congressionally mandated habeas review. Having determined this Court has jurisdiction to order Petitioner's transport, the Court must now determine whether Petitioner has sufficiently demonstrated a need for obtaining the testing he seeks, and whether the Court should issue an order to transport in this case.

Petitioner seeks an order to transport, because his defense expert, Dr. Scharre, has requested a CT/FDG-PET scan in order to complete his evaluation of Petitioner. Dr. Scharre suspects Petitioner may suffer neurological defects resulting from childhood abuse, alcohol and drug use, and a self-inflicted gunshot wound to the head during an adolescent suicide attempt. (ECF No. 106, at PageID 7021.) After reviewing Petitioner's past medical records, Dr. Scharre notes that a "CT sinus series in 1996 by my review revealed 20-30 multiple metal fragments scattered in his nasion, right orbital and ethmoid sinus regions. There is not a clear view of his frontal lobes or the rest of his brain." (ECF No. 106-2, at PageID 7088.) Dr. Scharre continues, noting that "[t]he CT portion is required for the PET scan and will show the full extent of metal fragments and exactly

where in relation to the brain they extend. The PET portion of the scan will reveal how the brain is functioning and if there is evidence particularly of frontal lobe damage from either physical trauma or drug use." (*Id*.)

Additionally, counsel for Petitioner argue the testing is crucial to their investigation of this case, as well as their ability to assist Petitioner with the development and presentation of his claims in his petition for habeas corpus relief. (ECF No. 106, at PageID 7021-22.). Specifically,counsel argue:

> Given the issues in Mr. Twyford's petition relating to his family history, mental health issues, and the impact of his suicide attempt (see Claims for Relief Nos. 1 (Ineffective Assistance of Counsel), 4 (Involuntary and Coerced Statement), 6 (Competency to Stand Trial), 16 (Ineffective Assistance of Counsel at Mitigation), 17 (Ineffective Assistance of Expert), 18 (Denial of Right to Present Mitigation Evidence)), it is plausible that the testing to be administered is likely to reveal evidence in support of Mr. Twyford's claims. Additionally, this investigation could plausibly lead to the development of evidence and materials in support for any challenges to the Warden's claims of procedural default or exhaustion."

(*Id.* at PageID 7026.)

With respect to Respondent's argument that Petitioner's request for transport amounts to a request for discovery that should be precluded by *Cullen v. Pinholster*, 563 U.S. 70 (2011), Petitioner states as follows:

> Twyford is not seeking discovery from the State or any entity. Rather, he is seeking material encased within his own body. Twyford's motion in no way compels the State to disclose evidence or in the language of *Baze v. Parker*, 'to stand down.' This Court clearly has jurisdiction to ensure that Twyford and his appointed counsel, are able to properly and fully investigate and litigate his habeas petition.

(ECF No. 108, at PageID 7095.)

The Court finds an Order to Transport for medical testing to facilitate the completion of Dr. Scharre's evaluation of Petitioner is warranted and necessary, and the evidence-collection that this Order will facilitate could aid the Court in its existing habeas corpus jurisdiction to assess the constitutionality of Petitioner's incarceration. The fact that Petitioner has multiple bullet fragments that remain lodged in his brain weighs in favor of this Court issuing an Order to Transport. The Court cautions counsel, however, that the Court does not find itself in a position at this stage of the proceedings to make a determination as to whether or to what extent it would be precluded by *Cullen v. Pinholster* from considering any evidence in connection with Dr. Scharre's evaluation, including whether that information could be considered for any other purpose such as revisiting procedural default.

For the foregoing reasons, the Court **GRANTS** Petitioner's Motion for an Order to Transport. (ECF No. 106.) However, in light of the exigent circumstances brought about by the COVID-19 pandemic, the Court **HEREBY STAYS** this Order for thirty (30) days.

IT IS SO ORDERED.

s/ ALGENON L. MARBLEY
ALGENON L. MARBLEY
Chief United States District Judge

DATED: March 19, 2020

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 20-3346

ORDER

RAYMOND A. TWYFORD, III,

Petitioner – Appellee

v.

TIM SHOOP, Warden,

Respondent – Appellant

Before: COLE, BATCHELDER, and, MOORE
Circuit Judges.

Upon consideration of motion to stay mandate,

It is **ORDERED** that the mandate be stayed to allow Appellant time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk
s/ DEBORAH S. HUNT

Issued: August 31, 2021

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:03cv906

Chief Judge Algenon L. Marbley

Chief Magistrate Judge Deavers

RAYMOND A. TWYFORD, III,

Petitioner,

v.

WARDEN, CHILLICOTHE
CORRECTIONAL INSTITUTION,

Respondent.

ORDER

Petitioner, a prisoner sentenced to death by the State of Ohio, has pending before this Court a habeas corpus action pursuant to 18 U.S.C. § 2254. This matter is before the Court upon Respondent-Warden's Corrected Motion to Stay the Court's March 19, 2020 Order. (ECF No. 112.)

On March 19, 2020, this Court granted Petitioner's motion for an Order directing his custodian, the Warden-Respondent, to transport Petitioner to The Ohio State University Medical Center for neurological imaging, to include a PET-CT scan. (Opinion and Order, ECF No. 109.) On March 25, 2020, Respondent filed a Notice of Appeal of the Court's Order, to the United States Court of Appeals for the Sixth Circuit.

(ECF No. 110.) Respondent now seeks a stay of the Court's Order to Transport pending resolution of that appeal. Petitioner has not filed a response.

In requesting a stay of the Court's Order, Respondent argues that in the absence of a stay, "the Warden will be deprived of a remedy, as transporting Petitioner Twyford will render moot the Warden's appeal." (ECF No. 112, at PageID 7118). Additionally, Respondent argues a stay will not harm others, Petitioner will not suffer prejudice, and "the public interest is served generally by clarifying the authority of the district court to order the transportation of condemned prisoners beyond the secure confines of the institution." (*Id*.)

"The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co*., 459 U.S. 56, 58 (1982). Thus, while this Court retains jurisdiction over matters not implicated by the appeal, the Order to Transport has effectively been stayed by the filing of Respondent's timely notice of appeal. Accordingly, the Court **GRANTS** Respondent's motion to stay the Court's March 19, 2020 Order, (ECF No. 112), pending resolution of Respondent's appeal.

IT IS SO ORDERED.

s/ ALGENON L. MARBLEY
ALGENON L. MARBLEY
Chief United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:03cv906

Chief Judge Algenon L. Marbley

Chief Magistrate Judge Deavers

RAYMOND A. TWYFORD, III,

Petitioner,

v.

WARDEN, CHILLICOTHE
CORRECTIONAL INSTITUTION,

Respondent.

ORDER

Petitioner, a prisoner sentenced to death by the State of Ohio, has pending before this Court a habeas corpus action pursuant to 18 U.S.C. § 2254. This matter is before the Court upon Petitioner's Motion for Leave to File Motion to Transport for Medical Testing, and Accompanying Exhibits, *Ex Parte* and Under Seal. (ECF No. 101.) Respondent opposes the Motion, (ECF No. 103), and Petitioner has filed a Reply (ECF No. 104.)

Petitioner seeks an Order authorizing him to file under seal a motion to transport Petitioner to The Ohio State University Medical Center to undergo further neurological evaluation and testing to include a CT and/or PET scan. Petitioner seeks to file his motion *ex parte* and under seal "in order that work

product strategies, mental impressions, legal theories and case analyses not be divulged to opposing counsel." (ECF No. 101, at PAGEID # 6998.) Petitioner further states that he has been evaluated by neurologist Dr. Douglas Scharre, director of the Cognitive Neurology Division at The Ohio Sate University Medical Center, and following the evaluation, Dr. Scharre recommended Petitioner undergo further testing. Petitioner contends that in light of his mental health issues and prior suicide attempt, "it is plausible that the testing to be administered is likely to reveal evidence in support of Mr. Twyford's claims." (*Id*. at PAGEID # 7000.) According to Petitioner, the Capital Habeas Unit of the Federal Public Defender's Office for the Northern District of Ohio will pay all costs associated with obtaining the scans, and Petitioner "requests no discovery or funding from the Court." (*Id*. at PAGEID # 7001.)

Respondent filed a Response in Opposition, arguing that Petitioner's motion should be denied on jurisdictional grounds, and also because his request for transport amounts to a motion for discovery that should be precluded at this stage of the proceedings by *Cullen v. Pinholster*, 563 U.S. 70 (2011). (ECF No. 103, at PAGEID # 7008.) Respondent did not address Petitioner's request to file the motion to transport under seal.

As was recently noted by United States Magistrate Judge Michael Merz, "a party seeking to seal court records bears a heavy burden of justification." *Elmore v. Houk*, No. 1:07cv776 (S.D. Ohio Feb. 28, 2019) (Order, ECF No. 168, PAGEID # 13002) (denying

request by capital habeas petitioner to file motion to transport for medical testing under seal on basis of unspecified security concerns). The United States Court of Appeals for the Sixth Circuit has held:

> The courts have long recognized, therefore, a "strong presumption in favor of openness" as to court records. *Brown & Williamson*, 710 F.2d at 1179. The burden of overcoming that presumption is borne by the party that seeks to seal them. *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001). The burden is a heavy one: "Only the most compelling reasons can justify non-disclosure of judicial records." *In re Knoxville News–Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983). Moreover, the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access. *See Brown & Williamson*, 710 F.2d at 1179. For example, in class actions—where by definition "some members of the public are also parties to the [case]"—the standards for denying public access to the record "should be applied ... with particular strictness." *Cendant*, 260 F.3d at 194. And even where a party can show a compelling reason why certain documents or portions thereof should be sealed, the seal itself must be narrowly tailored to serve that reason. *See, e.g.*, *Press–Enter. Co. v. Superior Court of California, Riverside Cnty.*, 464 U.S. 501, 509-11, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). The proponent of sealing therefore must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." *Baxter*, 297 F.3d at 548.

> In like fashion, a district court that chooses to seal court records must set forth specific findings and conclusions "which justify nondisclosure to the public." *Brown & Williamson*, 710 F.2d at 1176. That is true even if neither party objects to the motion to seal, as apparently neither did in *Brown & Williamson*. (There, our court "reach[ed] the question" of the district court's seal "on our own motion." *Id.*) As our decision there illustrates, a court's obligation to explain the basis for sealing court records is independent of whether anyone objects to it. And a court's failure to set forth those reasons—as to why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary—is itself grounds to vacate an order to seal. *Id.*; *see also United States v. Kravetz*, 706 F.3d 47, 60 (1st Cir. 2013) ("Appellate courts have on several occasions emphasized that upon entering orders which inhibit the flow of information between courts and the public, district courts should articulate on the record their reasons for doing so"); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993) (reversing because "[w]e find no evidence in the record that the district court balanced the competing interests prior to sealing the final order").

Shane Group, Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 305-06 (6th Cir. 2016).

In light of the "strong presumption in favor of openness" articulated by the Court of Appeals for the Sixth Circuit, *Shane*, 825 F.3d at 305, this Court

cannot conclude that Petitioner has met the heavy burden necessary to authorize the sealing of his motion to transport. In denying a similar request to seal a motion to transport, the court in *Elmore* noted that in a capital case, "the public is at least potentially more interested in the outcome and process used to reach that outcome than in other civil cases." *Elmore*, No. 1:07cv776, ECF No. 168, PAGEID # 13004. Although Petitioner cites the need to protect "work product strategies, mental impressions, legal theories and case analyses" as the reason for the request to seal, the Court finds that the public's interest in this death penalty case, the potential for temporary interference in state custody caused by the transporting of a death-sentenced inmate from state prison to a hospital for testing, and the expenditure of public funds in connection with the transport, are compelling reasons to require transparency in this matter. This Court is mindful of the need to protect work product strategies and legal theories. At this stage of the proceedings, however, counsel's concerns and theories regarding the lasting effects of Petitioner's prior suicide attempt have been documented in both the state and federal courts, including in the Petition pending before this Court. (ECF No. 13-2, PAGEID # 104, ¶ 548; ECF No. 13-3, PAGEID # 107, ¶ 564); *State v. Twyford*, No. 98-JE-56, 2002 WL 301411, *12 (Ohio App. 7th Dist. Mar. 19, 2001). Accordingly, the Court **DENIES** Petitioner's request to file a motion to transport under seal. (ECF No. 101.)

IT IS SO ORDERED.

s/ ELIZABETH A. PRESTON DEAVERS
ELIZABETH A. PRESTON DEAVERS
Chief United States Magistrate Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:03cv906

Judge Marbley

Magistrate Judge Deavers

RAYMOND A. TWYFORD, III,

Petitioner,

v.

MARGARET BRADSHAW,

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 for consideration of Respondent's motion to dismiss procedurally defaulted claims, ECF No. 78, Petitioner's response in opposition, ECF No. 79, Respondent's Reply, ECF No. 80, and Petitioner's notice of supplemental authority, ECF No. 85. Also before the Court are the habeas corpus petition, ECF No. 13, the state court record, and the joint appendix. This Opinion and Order will address whether any of Petitioner's claims for relief must be dismissed because they were procedurally defaulted during the course of the state court proceedings, and whether Petitioner has successfully

demonstrated the existence of cause and prejudice sufficient to excuse any such default.

I. Factual History

The relevant underlying facts are taken from the Supreme Court of Ohio's Opinion, *State v. Twyford*, 94 Ohio St. 3d 340 (2002):

> In the early evening hours of September 23, 1992, Athena Cash was walking in a rural area in Jefferson County, Ohio. After traversing the crest of a hill, Cash noticed an object floating in an old strip-mining pond. Although it appeared to be in the shape of a human body, Cash was uncertain whether the object was, in fact, human. Cash subsequently summoned her boyfriend to view the object, and he concluded that the object was a human body. As a result, the couple contacted local law enforcement authorities.
>
> Law enforcement personnel, including Jefferson County Sheriff Fred Abdalla, responded to the scene and found parts of a skull and flesh on the ground. Some seventy-four feet away, the sheriff saw a body lying on its back in the body of water. On the shore, the sheriff also found blood, a pair of glasses, a baseball cap, and six shell casings fired from a .30–06–caliber rifle.
>
> While the body was floating in the pond, Sheriff Abdalla observed that it appeared "as if the head was cut off" and also noticed that "the hands were severed from the body." Once the body was removed from the water, it was determined that part of the face was still attached but that the skull was missing. Abdalla also discovered that the

victim had been shot in the back. At the scene, Dr. John Metcalf, the Jefferson County Coroner, observed the same injuries. In addition, Dr. Metcalf found a pocket calendar diary inside the victim's shirt pocket. The victim's name, Richard Franks, as well as a Windham, Ohio address, was written in the diary.

On September 24, 1992, after contacting the Windham Police Department and receiving information that Franks had been missing for two days, Sheriff Abdalla traveled to the village of Windham in Portage County, Ohio. Prior to Sheriff Abdalla's arrival, Windham Chief of Police Thomas Denvir decided to place Franks's apartment under surveillance. Chief Denvir had discovered that Daniel Eikelberry lived with Franks, and while surveilling the apartment, Chief Denvir observed Eikelberry and Raymond A. Twyford III, appellant, in an automobile belonging to Joyce Sonny, appellant's girlfriend.

Sheriff Abdalla arrived in Windham and at approximately 4:50 p.m. met local police officials, including Chief Denvir. Around 5:30 p.m. that same afternoon, while Sheriff Abdalla and Chief Denvir waited outside Franks's apartment for a warrant to enter the premises, appellant, accompanied by Eikelberry and Terri Sonny, Joyce's daughter, again drove by in Joyce Sonny's car. Appellant lived with Joyce Sonny and her daughters, Christina, age eighteen, and Terri, age thirteen, in Windham.

At that time, and at Sheriff Abdalla's request, Chief Denvir stopped the car to talk with

Eikelberry about his missing roommate, Franks. As appellant got out of Joyce's 1975 Chrysler sedan, Abdalla noticed "two survival knives, a hatchet and a small * * * hand saw" in the car. Appellant, who was not detained, waited outside Franks's house while Abdalla questioned Eikelberry at the police station.

After interviewing Eikelberry, Sheriff Abdalla arrested appellant at around 6:25 p.m. for the murder of Richard Franks and advised appellant of his Miranda rights.

After declining to be interviewed, appellant was taken to the Windham Police Department and held while police continued to question Eikelberry. At around 7:15 p.m., appellant on his own initiative indicated that he would like to speak to Sheriff Abdalla and told him, "[S]heriff, I want to talk to you now, I'll tell you anything you want to know." Sheriff Abdalla, however, did not talk to appellant right away. Around 8:30 p.m., Abdalla again advised appellant of his Miranda rights, and appellant acknowledged and waived those rights, both orally and in writing.

Appellant told Sheriff Abdalla and Chief Denvir that he lived with Joyce Sonny and her two daughters, Christina and Terri. On Saturday, September 19, two days prior to the murder, Eikelberry told appellant that Franks had raped Christina. After learning this, appellant said that he was very angry and that every time he thought of Franks or saw him he "saw red and started to shake."

Appellant told Sheriff Abdalla that after learning of the rape, he and Eikelberry decided to kill Franks. The two of them drove around with Franks on Sunday evening, September 20. Appellant said, however, that he and Eikelberry could not find a suitable place to kill Franks. On Monday evening, September 21, on the pretext that they were going deer hunting, appellant, Eikelberry, and Franks drove to Jefferson County, arriving at around 1:00 or 2:00 a.m., September 22. Appellant was familiar with the area and had suggested this as the locale for the killing.

According to appellant, he and Eikelberry told Franks to hold a flashlight, look for deer, and "hold the light in the eye of the deer," and appellant and Eikelberry would shoot the deer. Instead, as Franks walked off and was ten to twelve feet away, appellant shot him in the back with a .30–06–caliber rifle. After he fell down, Franks was still "gurgling," and Eikelberry shot Franks in the head with a .22 caliber pistol.

Appellant and Eikelberry then repeatedly shot Franks in the head with the rifle and also shot his hands. Appellant also "took the wallet from Mr. Franks" and handed it to Eikelberry, and Eikelberry removed the hunting license from Franks's jacket. "[A]fter they [Eikelberry and appellant] had cut [Franks's] hands off, they took the hands and put them in a * * * cowboy boot and * * * put some rocks in the boot to weigh it down and * * * [ran] the extension cord * * * around the boot." They shot Franks several times "to disfigure him so he couldn't be recognizable." Then "they

both [dragged] the body * * * to the embankment * * * [and] shoved the body over the bank."

Appellant further said that after leaving the scene of the murder, Eikelberry threw the boot containing Franks's hands into Yellow Creek (some eighteen miles away). On September 25, divers recovered the boot (which contained the hands) from Yellow Creek where appellant reported that it had been thrown.

After he orally confessed to the murder, appellant wrote out details in a three-page handwritten statement that he signed. Chief Denvir and Sheriff Abdalla witnessed appellant's statement.

Based upon other information from appellant's confession, police recovered from behind a vent off Joyce Sonny's living room a loaded "high-powered" .30–06– caliber rifle and a .22 caliber handgun loaded with "hollow point" ammunition. Two knives were also found. Both guns were operable. A parole officer verified that appellant had previously been convicted of burglary and hence was "restricted from owning, possessing or using any type of firearm."

The grand jury indicted appellant on five counts. Count One alleged aggravated murder with prior calculation and design in violation of R.C. 2903.01(A) and aggravated murder in the course of a kidnapping in violation of R.C. 2903.01(B). Count One of the indictment also charged appellant with an R.C. 2929.04(A)(7) death penalty specification for committing aggravated murder during the course of a kidnapping. Count Two alleged an aggravated murder with prior calculation and

design in violation of R.C. 2903.01 and aggravated murder in the course of aggravated robbery in violation of R.C. 2903.01(B). Count Two also charged appellant with an R.C. 2929.04(A)(7) death penalty specification of committing aggravated murder during the course of committing an aggravated robbery. Count Three alleged kidnapping, Count Four alleged aggravated robbery, and Count Five alleged that appellant had a weapon while under disability. Counts One through Four contained gun specifications. Counts Three and Four also contained specifications enhancing the penalty, and these alleged that appellant had previously been convicted of burglary.

Prior to trial, appellant moved to suppress his confession. A hearing was held on the motion to suppress wherein appellant testified that his confession was an involuntarily coerced statement made under duress and threat by law enforcement officers. Appellant further alleged that his confession was made while he was under the influence of narcotics and alcohol. The trial court denied the motion to suppress.

During his 1993 trial, appellant pled not guilty but otherwise did not seriously contest the charges and presented no evidence at the guilt phase. In addition to the foregoing evidence obtained from appellant's confession, the state presented the following evidence as part of its case in chief.

A forensics expert concluded that cartridge casings found at the murder scene could have been fired from the rifle seized from Joyce's living room

"based upon the breech and firing pin impressions." Police also dug two bullets from the ground at the crime scene. According to the same expert, those bullets could have been fired from the rifle, but no conclusive match was shown.

Dr. Patrick Fardal, the pathologist who performed the autopsy, indicated that the victim had suffered "approximately six to eight gunshot wounds of his body including his head and hands." Dr. Fardal found a gunshot wound, "obviously a fatal injury," where the bullet had entered Franks's back, had gone through his spinal cord, and had caused paralysis below the waistline and "injuries to multiple abdominal organs" before it then exited his abdomen. Franks also had bullet wounds in his severed hands, and his head sustained "massive destruction of his skull, the skin of his face and the intracranial contents." According to Dr. Fardal, Richard Franks "died solely and exclusively of gunshot wounds * * * and probably the most significant one was the one to the trunk first and then the ones to the head."

The jury found appellant guilty of all counts as charged. However, the findings on specifications enhancing the penalty were reserved for the court. After a penalty hearing, the jury recommended death on each aggravated murder charge. The trial court sentenced appellant to death on each murder count and to prison for kidnapping, aggravated robbery, having a weapon while under disability, and the firearms specifications.

Twyford, 94 Ohio St. 3d at 340-43.

Further into its opinion, the Ohio Supreme Court set forth the facts underlying Petitioner'smitigation case as follows:

> Having considered appellant's propositions of law, we must now independently review the death sentence for appropriateness and proportionality (also raised in appellant's Proposition of Law No. IV). For purposes of our independent review, we will consider only the single (merged) aggravating circumstance that was considered by the court of appeals in its own independent review of appellant's death sentence. Thus, we consider the R.C. 2929.04(A)(7) specification of the aggravating circumstance premised on kidnapping—i.e., that appellant shot and killed Richard Franks during the course of a kidnapping—which appellant does not seriously dispute.
>
> In mitigation, testimony was received from three people: appellant, Dr. Donald Gordon, a psychology professor, and Charles Twyford, appellant's younger brother. Each testified concerning appellant's history, character, and background.
>
> Appellant testified that he was born on October 15, 1962, in Youngstown, Ohio. When he was an infant, his parents divorced. During this time, his father took appellant and his younger brother to live in Nevada. At around age six, appellant's grandparents returned him to Ohio, where he lived with his mother and stepfather. Appellant's stepfather frequently got drunk and beat appellant, his younger brother, and his mother. Appellant's biological father died when he was seven years old.

When appellant was eight, his mother had a nervous breakdown, which the stepfather blamed on appellant. Appellant was subsequently sent to live with an aunt and uncle in Youngstown. While otherwise kind to appellant, the uncle also introduced appellant to alcohol and marijuana. Between the ages of nine and thirteen, appellant drank alcohol and used drugs. When he was thirteen, he intentionally shot himself in the head and lost his right eye as a result. During the rest of his teen years, he spent time in juvenile detention facilities.

After he turned eighteen, appellant lived and worked in Ohio, Texas, Florida, and California, spending time in prison but also working in a variety of jobs. While in juvenile detention facilities and in prison, he tried to kill himself several times and was hospitalized as a result. After his last release from prison in 1992, his wife and stepdaughter refused to live with him. At that time, he was drinking heavily and using drugs.

Appellant also testified that he did not like rapists or child molesters, having been raped in prison. Appellant noted that even before he met Joyce Sonny, Christina had already had a baby as a result of being raped, but Christina and Joyce had given the baby up for adoption. Appellant also indicated that he learned in prison that it did not help to complain to authorities.

Appellant additionally acknowledged that Christina was "mentally disabled" but denied knowing that Richard Franks was similarly challenged. Appellant claimed that he got into

fights or used violence only for self-defense or to defend women or children. Appellant denied that he was sexually active with either Terri or Christina but admitted that he once gave Terri a sucker bite on her neck to punish her.

Dr. Donald Gordon, a psychology professor, testified that he interviewed appellant, gave him several tests, interviewed appellant's relatives, and looked at various documents. Dr. Gordon reiterated appellant's family history and upbringing, noting the severe mistreatment he suffered at the hands of his stepfather. According to Dr. Gordon, the abuse was so severe that finally, when appellant was fifteen, he told his stepfather that he would kill him if he ever beat up appellant's mother again. Dr. Gordon also testified that, as a youth, appellant frequently ran away and was suspended from school. From age seventeen to twenty-eight, appellant spent time in prison but also was able to gain employment when he was not incarcerated.

Dr. Gordon indicated that appellant hated child molesters and rapists based on his experiences while incarcerated. In Dr. Gordon's opinion, appellant did not trust people and believed that they overlooked the welfare of children. Appellant felt that he had to be the protector of children, especially Christina and Terri Sonny. According to Dr. Gordon, appellant was not a violent person, and his prior offenses were property crimes, not crimes of violence. Moreover, Dr. Gordon testified that appellant believed that Franks would not be punished for raping Christina, just as the men who

had raped him in prison had not been punished. Also, if appellant was caught for killing Franks, then no one would take care of Joyce's children, since she was not able to do so. Dr. Gordon believed that law enforcement officers may have unduly influenced or coerced the Sonny children's statements about appellant's reported sexual misconduct of them. In Dr. Gordon's view, appellant was compassionate and felt empathy for others. Finally, in Dr. Gordon's opinion, appellant was not a sociopath, nor did he have an antisocial personality disorder.

Charles Twyford, appellant's younger brother, described life with their stepfather as frightening because their stepfather got drunk and beat up their mother and the children every week. According to Charles, as a youth, appellant ran away frequently because he did not want to be beaten. Charles did not believe that his brother was violent and indicated that his brother was arrested mostly for property crimes. Charles stated that appellant was good with children, including Terri and Christina, and children liked him.

Appellant also gave his version of the events leading up to and including the murder of Richard Franks. In the summer of 1992, appellant met Joyce Sonny and her two daughters and moved in with them. According to appellant, he felt "very protective" of Joyce's daughters and helped care for them, especially after Joyce was hospitalized in August 1992 following a motorcycle accident.

Richard Franks was a friend of Joyce's, but appellant never trusted him. When he was told

> that Franks had raped Christina, appellant was "shocked" and "couldn't see, * * * started shaking" and was very angry. According to appellant, Christina told appellant directly that Franks had raped her, and she was "very subdued, very quiet, [and] she didn't want to talk."
>
> Appellant further testified that he had told Eikelberry that he was "going to kill Richard Franks for raping [his] stepdaughter" because appellant "didn't think it would do any good to go to the police." He had to kill Franks to protect the family. Appellant reiterated the details of his confession but stressed that when he killed Franks, he was "still angry, * * * in a rage," drinking heavily, and taking pain medication. Appellant acknowledged that he never confronted Franks about his alleged rape of Christina, but he believed that Franks had raped Christina and had to be killed to protect the family.

Twyford, 94 Ohio St. 3d at 364–67.

II. State Court History

A. Trial

On October 8, 1992, the Jefferson County Grand Jury indicted Petitioner for the aggravated murder, kidnapping, and aggravated robbery of Richard Franks. Specifically, Count One charged Petitioner with aggravated murder during the course of a kidnapping in violation of O.R.C. § 2903.01 and included a corresponding death penalty specification. Count Two charged Petitioner with aggravated murder during the course of an aggravated robbery with a corresponding death penalty specification.

Count Three charged Petitioner with kidnapping, Count Four charged him with aggravated robbery, and Count Five charged him with possessing a weapon while under disability due to his prior felony conviction for burglary. Counts Three and Four contained a sentencing enhancement specification based on the prior burglary conviction. (J.A. Vol. I, at 12-16.)

On March 23, 1993, and represented by Attorneys Adrian Hershey and David Vukelic, the jury trial began. On March 26, 1993, and after approximately two hours of deliberation, the jury returned a verdict of guilty on all counts and death penalty specifications. The penalty phase of Petitioner's trial began on March 31, 1993, and concluded on April 1, 1993. After approximately two hours of deliberation, the jury returned a unanimous recommendation of death. On April 7, 1993, the trial court accepted the jury's recommendation and sentenced petitioner to death. Petitioner was also sentenced to 15-25 years for aggravated robbery, 15-25 years for kidnapping, three years for the gun specification, and three years for possessing a firearm while under disability, all to be served consecutively.

B. Direct Appeal – Seventh District Court of Appeals

Represented by Attorneys Milton Hayman and James McKenna, Petitioner appealed his conviction and sentence of death to the Seventh District Court of Appeals. On April 19, 1994, Petitioner filed an appellate brief setting forth only three assignments of error:

Assignment of Error No. 1:

> The Court erred when it permitted testimony about the Defendant's prior criminal record allowing the record to be introduced and admitted into evidence.
>
> Assignment of Error No. 2:
>
> The Court erred in allowing the State to display highly inflammatory evidence on its counsel table in view of the Jury, when said objects were never intended to be introduced as evidence.
>
> Assignment of Error No. 3:
>
> Ineffective assistance of counsel.

(J.A. Vol. II, at 44.)

On October 6, 1995, the Seventh District Court of Appeals rejected Petitioner's assignments of error and affirmed his conviction and sentence of death. (J.A. Vol. II, at 115-138.)

C. Direct Appeal to Ohio Supreme Court and Rule 26(B) Application for Reopening

On November 20, 1995, Attorneys Hayman and McKenna filed a notice of appeal to the Ohio Supreme Court, (J.A. Vol. III, at 3), and on December 18, 1995, they filed a motion to withdraw as counsel for Petitioner. (J.A. Vol. III, at 16.) On December 22, 1995, the Ohio Supreme Court granted the motion to withdraw and appointed the Ohio Public Defender's Office to serve as appellate counsel. (J.A. Vol. III, at 21.)

Now represented by Attorneys Joseph Bodine and Tracey Leonard of the Ohio Public Defender's Office, and while his direct appeal before the Ohio Supreme Court was pending, Petitioner filed an application to

reopen his direct appeal before the Seventh District Court of Appeals, pursuant to Ohio Appellate Rule 26(B), also known as a *Murnahan* petition, which is the procedure in Ohio for raising claims of ineffective assistance of appellate counsel. (J.A. Vol. IX, at 27.) The *Murnahan* petition identified multiple potentially meritorious claims that were apparent from the face of the record but were not raised by prior appellate counsel. (*Id.*) On January 2, 1997, the court of appeals granted the application for reopening, (J.A. Vol. IX, at 225), and on January 10, 1997, Petitioner filed a motion to stay his direct appeal before the Ohio Supreme Court pending the resolution of the reopened appeal in the court below. (J.A. Vol. IV, at 420.) On January 13, 1997, the Ohio Supreme Court stayed the direct appeal and transferred the record back to the Seventh District Court of Appeals for further proceedings in connection with the granting of Petitioner's application to reopen his appeal before that court. (J.A. Vol. IV, at 436.)

On the reopening of his direct appeal before the Seventh District Court of Appeals, and in a merit brief filed on March 3, 1997, Petitioner argued that his initial appellate attorneys, Milton McKenna and James Hayman, performed deficiently and to his prejudice in failing to raise the following twenty-five assignments of error:

> ASSIGNMENT OF ERROR NO. I
>
> Appellate counsel's direct appeal representation before this court deprived Mr. Twyford of the effective assistance of appellate counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution

and Article I §§ 9, 10, AND 16 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. II

Morgan v. Illinois, 504 U.S. 719 (1992), mandates that a capital defendant be permitted to "life-qualify" potential jurors by inquiring into their view about capital punishment, the facts and circumstances the crime and the evidence to be presented in mitigating. Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 10 AND 16 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. III

The trial court erroneously instructed the jury at the penalty phase regarding the factors to consider in recommending punishment, and it independently considered more than one valid aggravating circumstance. Consequently, Appellant Twyford was denied the right to a fair trial, the right to a reliable sentencing determination, and the right to due process of law. Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. IV

When a juror is replaced with an alternate juror between the guilt and penalty phases of a trial, a capital defendant may not be sentenced to death. Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 2, 3, 5, 10 and 16 of the Ohio Constitution. Ohio Rev. Code Ann. § 2929.03(d)(2) (Anderson 1993).

ASSIGNMENT OF ERROR NO. V

The trial court erred, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution, by sentencing a capital defendant to death when the death sentence is excessive and disproportionate to the sentences imposed in similar cases.

ASSIGNMENT OF ERROR NO. VI

Mr. Twyford's statement to police officials was involuntarily and unknowingly obtained. The trial court's failure to suppress the statement denied Mr. Twyford his rights to a fair trial, due process and a reliable determination of his guilt and sentence as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 2, 9, 16 and 20 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. VII

The trial court erred by failing to inquire *sua sponte* into the issue of appellant's competency pursuant to Ohio Rev. Code Ann. § 2945.37 prior to the commencement of trial in deprivation of the appellant's right to due process of law as guaranteed by the fifth and fourteenth amendments of the United States Constitution, and Article I, §§ 9, 10 and 16 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. VIII

Raymond Twyford's convictions must be reversed and his death sentence vacated because

prosecutorial misconduct throughout all phases of the capital trial violated his right to due process under the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution, and it deprived the sentencing determination of the reliability required by the Eighth Amendment to the United States Constitution and Article I, § 9 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. IX

The state failed to introduce sufficient evidence to prove all the elements of aggravated robbery beyond a reasonable doubt, and therefore, appellant was deprived of his right to due process of law under the Fourteenth Amendment to the United States Constitution as well as Article I, § 16 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. X

It was error under the rule of corpus delicti to allow introduction of appellant's confession absent independent evidence to corroborate the crimes charged. This violated the appellant's rights under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution as well as Article I, §§ 9 and 16 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. XI

A capital defendant is denied a fair trial and a reliable sentencing determination when gruesome and cumulative photographs are admitted into evidence. Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 16 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. XII

When the state fails to show with reasonable certainty that real evidence offered at trial is in substantially the same condition as it was at the time of the crime and when it was analyzed by the state's forensic laboratory, the admission of such evidence violated the capital defendant's rights to due process, a fair trial, a reliable guilt verdict, and effective assistance of counsel under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 5, 9, 10 and 16 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. XIII

The trial court erred to the prejudice of Appellant Twyford by allowing the prosecutor to preempt jurors with reservations about the death penalty. Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 5, 10, and 16 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. XIV

The trial court abused its discretion by permitting a witness to testify after violating the court's order to separate witnesses pursuant to Ohio R. Evid. 615. As a result, the appellant was denied his right to due process under the Fourteenth Amendment to the United States Constitution and Article I, §§ 9 and 16 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. XV

The trial court erred by overruling the appellant's motion for a mistrial based on inadmissible evidence having not been presented to the jury in

violation of the appellant's rights as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution Article I, §§ 9 and 16 of the Ohio Constitution, and Ohio R. Evid. 401, 402 and 403.

ASSIGNMENT OF ERROR NO. XVI

A trial court denies a capital defendant the right to a fair trial and to due process of law when it erroneously instructs the jury during the trial and penalty phases of a capital case.

ASSIGNMENT OF ERROR NO. XVII

When pre-trial publicity pervades the community in which a capital trial is to be held, it is an abuse of discretion for the trial court to deny the defendant's motion for a change of venue.

ASSIGNMENT OF ERROR NO. XVIII

When the trial court does not permit a witness to testify about capital defendant's ability to peacefully live in prison, the trial court diminishes the liability of the jury's determination that death was the appropriate punishment in violation of the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. XIX

Defense counsel's actions and omissions at Mr. Twyford's capital trial deprived him of the effective assistance of trial counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the

United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. XX

When the record before the court of appeals is incomplete, a sufficient review of the record pursuant to Ohio Rev. Code Ann. § 2929.05 cannot be conducted. U.S. Const. Amend. XIV; Ohio Const. Art. I, §§ 1, 2, 3, 5, 10 and 16.

ASSIGNMENT OF ERROR NO. XXI

When a capital defendant is sentenced to die twice for one killing, and receives additional sentences for two allied offences, his sentences violate the prohibition against double jeopardy of the United States and Ohio Constitutions as well as Ohio Revised Code § 2941.25.

ASSIGNMENT OF ERROR NO. XXII

The court of appeals erred in violation of the Fourteenth Amendment of the United States Constitution when, in the case of a capital appellant, it limited the pool of cases for sentencing comparison to only those cases in which the death penalty was imposed.

ASSIGNMENT OF ERROR NO. XXIII

The trial court erred by denying the right to a fair trial, an impartial jury and to reliable sentencing determination when it permitted the state to introduce evidence of appellant's prior criminal acts during the culpability phase of the proceedings.

ASSIGNMENT OF ERROR NO. XXIV

> The trial court erred by sentencing Mr. Twyford to death in violation of treaties to which the United States of America is a signatory in violation of the supremacy clause of the United States Constitution.
>
> ASSIGNMENT OF ERROR NO. XXV
>
> Ohio's statutory scheme for the imposition of the death penalty is unconstitutional as drafted and as applied.

(J.A. Vol. X, at 8-303). The State filed a response on April 21, 1997, (J.A. Vol. XI, at 273). On September 25, 1998, the Seventh District Court of Appeals rejected the additional assignments of error presented in the reopened direct appeal, and affirmed Petitioner's convictions and sentence. *See State v. Twyford*, No. 93-J-13, 1998 WL 671382 (Ohio App. 7th Dist. Sept. 25, 1998) (J.A. Vol. XII, at 38-159.)

On November 6, 1998, and still represented by the Ohio Public Defender's Office, Petitioner filed a notice of appeal in the Ohio Supreme Court. The Ohio Supreme Court consolidated the appeals of both Seventh District Court of Appeals' decisions, and the case was re-briefed. (J.A. Vol. XIII, at 3.) On March 1, 1999, Petitioner filed a merit brief raising the following thirteen propositions of law:

> PROPOSITION OF LAW NO. I
>
> Morgan v. Illinois, 504 U.S. 719 (1992), mandates that a capital defendant be permitted to voir dire potential jurors on their views of capital punishment, fact and circumstances of conviction and evidence of mitigating circumstances. Sixth, Eighth and Fourteenth Amendments to the United

States Constitution and Article I, §§ 2, 9, 10 and 16 of the Ohio Constitution.

PROPOSITION OF LAW NO. II

When a trial court erroneously instructs a jury at the penalty phase regarding the factors to consider in recommending punishment and when it independently considers more than one valid aggravating circumstance, a capital defendant is denied the right to a fair trial, the right to a reliable sentencing determination, and the right to due process of law. Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution.

PROPOSITION OF LAW NO. III

Where the trial court does not permit a witness to testify about capital defendant's ability to peacefully live in prison, the trial court diminishes the reliability of the jury's determination that death was the appropriate punishment, in violation of the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

PROPOSITION OF LAW NO. IV

When the death sentence is excessive and disproportionate to the sentences in similar cases and when it is inappropriate, the death sentence must be vacated and a life sentence imposed. Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution.

PROPOSITION OF LAW NO. V

The state failed to introduce sufficient evidence to prove all elements of aggravated robbery beyond a reasonable doubt, and therefore, appellant was deprived of his right to due process of law under the fourteenth amendment of the United States Constitution as well as Article I, Section 16 of the Ohio Constitution.

PROPOSITION OF LAW NO. VI

Raymond Twyford's convictions must be reversed and his death sentence vacated because prosecutorial misconduct throughout all phases of the capital trial violated appellant's rights to due process under the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution, and it deprived the sentencing determination of the reliability required by the Eighth Amendment to the United States Constitution and Article I, § 9 of the Ohio Constitution.

PROPOSITION OF LAW NO. VII

A capital defendant is denied a fair trial and a reliable sentencing determination when gruesome and cumulative photographs are admitted into evidence. Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 10 and 16 of the Ohio Constitution.

PROPOSITION OF LAW NO. VIII

When the trial court permits evidence of prior criminal acts, it denies a capital defendant the

right to a fair trial, an impartial jury, and to a reliable sentencing determination in violation of the sixth and fourteenth amendments to the United States Constitution and Article I, §§ 2, 5 and 10 of the Ohio Constitution.

PROPOSITION OF LAW NO. IX

The trial court erred when it failed to suppress Twyford's statement because the Miranda waiver was obtained unknowingly, and the confession was the product of coercion. The trial court's action denied Twyford his rights to a fair trial, due process and a reliable determination of his guilt and sentence as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 2, 9, 16 and 20 of the Ohio Constitution.

PROPOSITION OF LAW NO. X

When a juror is replaced with an alternate juror between the guilt and penalty phases of a trial, a capital defendant may not be sentenced to death. Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 2, 3, 5, 10 and 16 of the Ohio Constitution. Ohio Rev. Code Ann. § 2929.03(d)(2) (Anderson 1993).

PROPOSITION OF LAW NO. XI

Defense counsel's actions and omissions at Twyford's capital trial deprived him of the effective assistance of trial counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution.

PROPOSITION OF LAW NO. XII

A trial court denies a capital defendant the right to a fair trial and to due process of law when it erroneously instructs the jury during the trial and penalty phases of a capital case.

PROPOSITION OF LAW NO. XIII

Ohio's death penalty law is unconstitutional. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and §§ 2, 9, 10 and 16, Article I of the Ohio Constitution establish the requirements for a valid death penalty scheme. Ohio Rev. Code Ann. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 AND 2929.05, (Anderson 1996) do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Raymond Twyford.

(J.A. Vol. XIII, p. 27-179). The State of Ohio filed a merit brief on April 19, 1999, (J.A. Vol. XIII, at 385), and on May 10, 1999, Petitioner filed a reply. (J.A. Vol. XIII, at 461.) On March 6, 2002, the Ohio Supreme Court rejected Petitioner's propositions of law and affirmed his convictions and sentence. *See State v. Twyford*, 94 Ohio St. 3d 340 (2002); (J.A. Vol. XIII, at 479.) The United States Supreme Court denied Petitioner's Petition for a Writ of Certiorari.

D. State Postconviction Proceedings Pursuant to Ohio Rev. Code § 2953.21

On September 20, 1996, Petitioner filed a petition for postconviction relief pursuant to Ohio Revised Code § 2953.21, and set forth twelve claims for relief:

FIRST CLAIM FOR RELIEF

Petitioner Twyford's convictions and sentences are void and/or voidable because he was denied the effective assistance of counsel. Petitioner Twyford's trial counsel failed to subpoena the co-defendant, Daniel Eikelberry, to testify on behalf of Twyford, although he was willing and able to do so.

SECOND CLAIM FOR RELIEF

Petitioner Twyford's convictions and sentences are void and/or voidable because he was deprived of his right to effective representation. Daniel Eikelberry was not subpoenaed by Petitioner's trial counsel to testify on behalf of Petitioner Twyford.

THIRD CLAIM FOR RELIEF

Petitioner Twyford's convictions and sentences are void and/or voidable because his trial attorneys did not effectively represent him. Petitioner Twyford's trial attorneys failed to contest Daniel Eikelberry through arrangement with Eikelberry's attorneys, nor did they subpoena him to testify.

FOURTH CLAIM FOR RELIEF

Petitioner Twyford's convictions and sentences are void and/or voidable because his trial attorneys were ineffective. Petitioner's trial attorneys failed to question or subpoena Daniel Eikelberry to introduce testimony in regards to issues affecting Petitioner's physical and mental health at the time of capital crime charged against him.

FIFTH CLAIM FOR RELIEF

Petitioner Twyford's convictions and sentences are void and/or voidable because relevant and probative evidence was not admitted into evidence on his behalf. Petitioner should have been evaluated by a pharmacologist and that evidence should have been admitted on his behalf.

SIXTH CLAIM FOR RELIEF

Petitioner Twyford's convictions and sentences are void and/or voidable because his trial attorneys did not employ a neuropharmacologist to evaluate Petitioner prior to trial, thus depriving him of effective assistance of counsel.

SEVENTH CLAIM FOR RELIEF

Petitioner's convictions and sentences are void and/or voidable because Dr. Donald A. Gordon (Petitioner's mental health expert for the sentencing phase) provided an inadequate evaluation of [sic] Petitioner.

EIGHTH CLAIM FOR RELIEF

Petitioner Twyford's convictions and/or sentences are void or voidable because death by electrocution constitutes a blatant disregard for the value of human life, entails unnecessary and wanton infliction of pain and diminishes the dignity of man.

NINTH CLAIM FOR RELIEF

The Ohio courts have not performed any meaningful proportionality review, but instead simply have failed to follow the spirit and intent of the statutory requirement.

TENTH CLAIM FOR RELIEF

> Petitioner's convictions and sentences are void and/or voidable because he was denied the effective assistance of counsel in the jury selection phase of his trial. This was caused both by counsel's failure to be effective advocates and by the State's rendering Petitioner's counsel ineffective.
>
> ELEVENTH CLAIM FOR RELIEF
>
> Petitioner Twyford's convictions and sentences are void and/or voidable because he was denied the effective assistance of counsel in the Mitigation phase of his trial. Petitioner Twyford was denied his right to the assistance of a Mitigation Specialist in preparing and presenting evidence and testimony at the Mitigation Phase of the proceedings.
>
> TWELFTH CLAIM FOR RELIEF
>
> Petitioner Twyford's convictions and sentences are void and/or voidable because the cumulative effects of the errors and omissions as presented in this petition in paragraphs one (1) through one hundred thirty (130), have been prejudicial to Petitioner and have denied Petitioner his rights as secured by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10, 16, and Article I of the Ohio Constitution.

(Petition for Post-Conviction Relief, J.A. Vol. V, at 23-73). Subsequently, on October 7, 1996, Petitioner filed an amended postconviction petition in which he added a new claim for relief as his twelfth claim, and renumbered claim twelve as claim thirteen:

> TWELFTH CLAIM FOR RELIEF

> Petitioner Twyford's convictions and sentences are void and/or voidable because a conflict in his representation existed that precluded him from having the effective assistance of counsel.
>
> THIRTEENTH CLAIM FOR RELIEF
>
> Petitioner Twyford's convictions and sentences are void and/or voidable because the cumulative effects of the errors and omissions as presented in this petition in paragraphs one (1) through one hundred thirty-nine (139), have been prejudicial to Petitioner and have denied Petitioner his rights as secured by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10, 16, and Article I of the Ohio Constitution.

(J.A. Vol. VI, at 123-28.) On December 13, 1996, the State of Ohio filed a memorandum in opposition to the petition. (J.A. Vol. VI, at 130-135.) On November 16, 1998, the trial court issued findings of fact and conclusions of law denying Petitioner's claims and dismissing his postconviction action. (J.A. Vol. VI, at 276-281.)

On December 15, 1998, Petitioner filed a Notice of Appeal to the intermediate court of appeals as to the trial court's order denying his postconviction petition. (J.A. Vol. VII, at 12.) Petitioner filed a merit brief on July 26, 1999, setting forth three assignments of error:

> ASSIGNMENT OF ERROR NO. I: Ohio's postconviction system does not comply with the requirements of due process as guaranteed by the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

> ASSIGNMENT OF ERROR NO. II: The trial court erred when it denied appellant's requests for discovery in violation of Appellant's rights under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, Sections 1, 2, 9, 10, 16 and 20 of the Ohio Constitution.
>
> ASSIGNMENT OF ERROR NO. III: The trial court erred in granting summary judgment against Appellant Twyford and dismissing his postconviction action in violation of Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

(J.A. Vol. VII, at 100.) The State filed its merit brief on February 4, 2000, (J.A. Vol. VII, at 238), and on March 19, 2001, the court of appeals issued a decision affirming the trial court's judgment denying Petitioner postconviction relief. (J.A. Vol. VII, at 301-33).

On April 24, 2001, Petitioner filed a notice of appeal to the Ohio Supreme Court and a memorandum in support of jurisdiction raising the following propositions of law:

> PROPOSITION OF LAW NO. I: Ohio's postconviction system does not comply with the requirements of due process as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.
>
> PROPOSITION OF LAW NO. II: The trial court erred when it denied Appellant's requests for discovery in violation of Appellant's rights under

> the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 1, 2, 9, 10, 16 and 20 of the Ohio Constitution.
>
> PROPOSITION OF LAW III: The trial court erred in granting summary judgment against Appellant Twyford and dismissing his postconviction action in violation of Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

(J.A. Vol. VIII, at 2-49.) The State filed a memorandum in opposition to jurisdiction on May 23, 2001, (J.A. Vol. VIII, at 90-117), and on May 1, 2002, the Ohio Supreme Court issued an Entry summarily declining jurisdiction. (J.A. Vol. VIII, at 144.)

III. Federal Habeas Proceedings

Petitioner initiated the instant proceedings on January 13, 2003, by filing a notice of intent to file a federal habeas corpus petition, Doc. # 1, an application to proceed *in forma pauperis*, Doc. # 3, and a motion for the appointment of counsel, Doc. # 6. On October 2, 2003, the Court appointed Attorneys Michael Benza and Paul Mancino to serve as Petitioner's Counsel. (ECF No. 12.) Attorney Benza has since been replaced by Attorney Alan Rossman of the Federal Public Defender, Northern District of Ohio, Capital Habeas Unit. (ECF No. 70.)

On October 6, 2003, Petitioner filed a petition for writ of habeas corpus, raising the following twenty-two grounds for relief:

> **Claim for Relief No. 1**: Ineffective Assistance of Counsel

A. Eliciting testimony alleging sexual abuse of Christina and Terri Sonny.

B. Failed to effectively present a defense or defend Mr. Twyford.

C. Failed to challenge Mr. Twyford's competency to stand trial.

D. Improper opening statements.

E. Ineffective voir dire.

1. Pretrial Publicity

2. Death penalty qualification

F. Failed to challenge the initial seizure and continued detention of Mr. Twyford.

G. Failed to challenge improper jury instructions.

H. Failed to challenge presence of alternate jurors in jury room during deliberations.

I. Failed to challenge substitution of alternate juror onto the jury between trial and mitigation phases.

J. Failure to challenge constitutional validity of seizure of Mr. Twyford.

K. Failed to object to prosecutorial misconduct.

L. Failed to investigate exculpatory test results.

M. Failed to prevent or object to errors by the trial court.

N. Cumulative impact.

Claim for Relief No. 2: Ineffective assistance of counsel on his direct appeals. Counsels' performance was unreasonable, deficient, and failed to meet reasonable standard of care in capital cases. Appellate counsels' performance prejudiced Mr. Twyford.

Claim for Relief No. 3: Prosecutorial misconduct deprived Mr. Twyford of his rights to a fair trial before a fair and impartial tribunal, and to a fair and impartial sentencing determination.

Claim for Relief No. 4: The trial court erred in failing to suppress Mr. Twyford's involuntary and coerced statement.

Claim for Relief No. 5: The initial seizure and detention of Mr. Twyford was unconstitutional and the fruits of that search, including the statements and physical evidence, must be suppressed.

Claim for Relief No. 6: Mr. Twyford was Incompetent to be tried. Counsel failed to re-refer the defendant and/or request a second competency hearing based upon the defendant's inability to assist with his own defense.

Claim for Relief No. 7: Denial of Proper Voir Dire

Claim for Relief No. 8: The failure to provide a change of venue due to pretrial publicity deprived Mr. Twyford his right to a fair trial and sentencing proceeding.

Claim for Relief No. 9: The trial court denied Mr. Twyford a fair and impartial trial and sentencing proceeding.

Claim for Relief No. 10: Discriminatory use of peremptory challenges.

Claim for Relief No. 11: Erroneous Jury Instructions.

Claim for Relief No. 12: The use of a prior conviction deprived Mr. Twyford of his rights to a fair trial before a fair and impartial tribunal, and a fair and impartial sentencing determination.

Claim for Relief No. 13: The evidence of robbery was constitutionally insufficient to warrant a conviction.

Claim for Relief No. 14: Erroneous introduction into evidence of gruesome and cumulative photographs and physical evidence.

Claim for Relief No. 15: The jury that sentenced Mr. Twyford was not the same jury that convicted him and this deprived Mr. Twyford of his rights to a fair and impartial and competent jury.

Claim for Relief No. 16: Ineffective Assistance of Counsel at Mitigation Phase.

A. Failed to properly prepare, investigate, and present a mitigation defense.

1. Failure to call Daniel Eikelberry.
2. Failure to correct their error from trial phase in eliciting testimony of uncharged, unproven, and unsupported allegations of misconduct.
3. Failed to hire experts for mitigation.

B. Cumulative Impact.

Claim for Relief No. 17: Ineffective Assistance of Expert.

Claim for Relief No. 18: The trial court improperly denied Mr. Twyford an opportunity to present relevant mitigation evidence as to his ability to adjust to life in prison.

Claim for Relief No. 19: Ohio's post-conviction process is an inadequate corrective remedy rendering the entire death penalty scheme arbitrary and capricious.

Claim for Relief No. 20: Denial of a fair proportionality review as mandated by statute.

Claim for Relief No. 21: Unconstitutionality of the death penalty statute.

Claim for Relief No. 22: The cumulative impact of the errors addressed in this Petition render Mr. Twyford's conviction and sentence unreliable and unconstitutional.

(Petition, ECF No. 13.) Subsequently, Petitioner filed several motions for funds to employ experts and/or

investigators, as well as an estimated proposed budget, all of which were filed *ex parte* and under seal and approved by the Court. (ECF Nos. 30, 57.)

On August 2, 2004, Petitioner filed a motion to stay the proceedings and hold the case in abeyance in order to exhaust state court remedies, *i.e.*, a second Rule 26(B) application to reopen his direct appeal to assert additional claims of ineffective assistance of appellate counsel. (ECF No. 33.) This Court granted Petitioner's motion to stay and directed Petitioner to file monthly status reports regarding the state court proceedings. (ECF No. 38.) In December 2004, the Seventh District Court of Appeals denied Petitioner's second application to reopen his appeal, explaining that Petitioner was not entitled to file a second application for reopening. (J.A. Vol. XV, at 329.) On September 7, 2005, the Ohio Supreme Court affirmed the decision of the court of appeals, finding "there is no right to file successive applications for reopening under App.R. 26(B)," and holding that "[o]nce ineffective assistance of counsel has been raised and adjudicated, *res judicata* bars its relitigation." *State v. Twyford*, 106 Ohio St. 3d 176, 176-77 (2005). Additionally, the Court determined that Petitioner's application was untimely, as Rule 26(B)(1) directs that an application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment, and Petitioner failed to show good cause why he "waited more than five years before filing his application." *Id.* at 177.

IV. Procedural Default

This matter is before the Court upon Respondent's motion to dismiss certain claims on the basis of procedural default. (ECF No. 78.) Respondent asserts that not every claim Petitioner has raised in his habeas corpus petition was presented to the Ohio courts either during the direct appeals or on collateral review. As a general matter, a defendant who is convicted in Ohio of a criminal offense has available to him more than one method of challenging that conviction. Claims appearing on the face of the trial record must be raised on direct appeal, or they will be waived under Ohio's doctrine of *res judicata*. *State v. Perry*, 10 Ohio St. 2d 175 (1967). Issues that must be raised in a postconviction action pursuant to R.C. § 2953.21 include claims that do not appear on the face of the record; issues that can be raised in postconviction include claims of ineffective assistance of trial counsel where the defendant was represented on direct appeal by the same attorney who represented him at trial. *State v. Cole*, 2 Ohio St. 3d 112 (1982). In 1992, a third procedure of review emerged. Claims of ineffective assistance of appellate counsel must be presented to the appellate court in a motion for delayed reconsideration or application for reopening pursuant to *State v. Murnahan*, 63 Ohio St. 3d 60 (1992) and Ohio R. App. P. 26(B). In addition to raising each claim in the appropriate forum, a habeas litigant, in order to preserve his constitutional claims for habeas review, must present those claims to the state's highest court. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between the state and federal courts, a state criminal defendant with federal constitutional claims is required to present those claims to the state courts for consideration. 28 U.S.C. § 2254(b), (c). If he fails to do so, but still has an avenue open to him by which he may present his claims, then his petition is subject to dismissal, or stay and abeyance, for failure to exhaust state remedies. *Id.*; *Rhines v. Weber*, 544 U.S. 269 (2005); *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). But if, because of a procedural default, the petitioner can no longer present his claims to the state courts, then he has also waived those claims for purposes of federal habeas corpus review unless he can demonstrate both cause for the procedural default, as well as actual prejudice from the alleged constitutional error. *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

In the Sixth Circuit, a district court must undertake a four-part analysis when the state argues that a federal habeas claim is waived by the petitioner's failure to observe a state procedural rule. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). "First, the court must decide that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Id.* Second, the Court must determine whether the state courts actually enforced the state procedural sanction. *Id.* Third, it must be decided whether the state procedural forfeiture is an adequate and

independent state ground upon which the state can rely to foreclose review of a federal constitutional claim. *Id*. Finally, if the Court has determined that a petitioner did not comply with a state procedural rule, and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for him not to follow the procedural rule, and that he was actually prejudiced by the alleged constitutional error. Id. This "cause and prejudice" analysis applies to failures to raise or preserve issues for review at the appellate level. *Leroy v. Marshall*, 757 F.2d 94 (6th Cir. 1985).

Respondent alleges that many of Petitioner's grounds for relief, in their entirety or in part, are subject to dismissal as procedurally defaulted. (ECF No. 78.) The Court will address each of Respondent's allegations, in the order raised by Respondent, as well as Petitioner's response (ECF No. 79), Respondent's reply (ECF No. 80), and Petitioner's notice of supplemental authority (ECF No. 85).

A. Failure to object at trial

Respondent argues that Petitioner's entire twelfth ground for relief and portions of his third, eleventh and fourteenth grounds for relief are procedurally defaulted because Petitioner failed to object at trial and therefore waived the issues. Respondent argues that Ohio's contemporaneous objection rule "long has been recognized as a basis for a procedural bar in federal habeas," and "[t]he essence of the rule is that errors should be noted at a time when the error could have been avoided or corrected by the trial court." (ECF No. 78, at PAGEID # 530.)

1. Twelfth ground for relief: The use of a prior conviction deprived Mr. Twyford of his rights to a fair trial before a fair and impartial tribunal, and to a fair and impartial sentencing determination.

In his twelfth ground for relief, Petitioner argues that he was denied a fair trial because the trial judge read the full Indictment to the jury during jury selection, and the Indictment contained a reference to Petitioner's prior conviction for burglary. That prior burglary conviction served as the basis for a sentencing enhancement specification to the kidnapping and aggravated robbery charges contained in Counts Three and Four, and also served as the crux of the weapon under disability charge contained in Count Five of the Indictment. Specifically, in his twelfth ground for relief, Petitioner alleges:

> The court in the jury selection in this case proceeded to read the indictment to the jury. The court read the third count of the indictment which charged petitioner with the offense of kidnapping. The jury was informed concerning a specification that petitioner had been previously convicted of an aggravated felony, to wit: burglary in Lake County. The court then read the fourth count which was aggravated robbery which also alleged the prior conviction of an aggravated felony of burglary in Lake County. The Ohio Supreme Court, in considering this issue, did not reference the fact that the jury was informed concerning defendant's convictions which were only sentencing enhancements to applicable Ohio law. The statute

> in effect as the time, Ohio Revised Code §2941.142, specifically stated that evidence of prior convictions which was used as a sentencing enhancement shall, at the request of a defendant be submitted to the court. However, the Ohio Supreme Court made no reference of the court announcing to the jury panel that petitioner had these prior convictions.

(Petition, ECF No. 13-2, at PAGEID # 89.)

In the motion to dismiss, Respondent states that Petitioner raised this claim for relief as his eighth proposition of law on direct appeal to the Ohio Supreme Court. (ECF No. 78, at PAGEID # 531.) According to Respondent, the Ohio Supreme rejected the claim on the basis that Petitioner failed to object at trial, and only reviewed the claim for plain error, finding that no plain error occurred where Petitioner's prior conviction was an element of Count Five of the Indictment, which alleged that Petitioner possessed a firearm while under disability due to his prior conviction for a felony offense of violence. (*Id.*) Respondent argues that Ohio's contemporaneous objection rule has long been recognized as a basis for a procedural bar to a claim in federal court, and the Ohio Supreme Court's "alternate plain error analysis 'does not save a petitioner from procedural default. . . . Plain error analysis is more properly viewed as a court's right to overlook procedural defects to prevent manifest injustice, but is not equivalent to a review on the merits.'" (Reply, ECF No. 80, at PAGEID # 597-98) (citing *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006)).

In response, Petitioner argues that the Ohio Supreme Court did not specifically address the claim or issue alleged in his twelfth ground for relief. According to Petitioner, in detailing his twelfth ground for relief in his habeas petition, he asserts that it was during jury selection that the trial court erred by reading the entire Indictment, including the reference to the prior conviction for burglary that served as a sentencing enhancement for the kidnapping and aggravated robbery charges. Petitioner argues that in considering his eighth proposition of law on direct appeal, the Ohio Supreme Court "did not reference the fact that the jury was informed concerning defendant's convictions which were only sentencing enhancements to applicable Ohio law." (ECF No. 79, at PAGEID # 542.) Instead, Petitioner argues, the court's focus in denying the claim was anchored in trial counsel's failure to object to the use of the prior conviction in connection with Count Five, the weapon under disability charge. (*Id*., at PAGEID # 543.)

Petitioner contends that because the Ohio Supreme Court did not specifically address the claim at issue in his twelfth ground for relief, the AEDPA does not apply. Petitioner argues:

> While the Ohio Supreme Court's arguably erroneous interpretation may have allowed for the disposal of the issue by reference to counsel's failure to object to the prior conviction being presented relative to the 'weapon while under a disability' count in the indictment, (to which Section 2941.142 admittedly does not apply), it does not render the analysis a decision that

> addresses the claim presented in Twyford's Habeas Petition.
>
> Because the Ohio Supreme Court did not adjudicate the claim in the broader context in which it was litigated and alleged in the Petition, the State Court has not addressed the claim presented on the merits. The AEDPA does not apply given that the AEDPA's standard of review applies only to habeas claims that were adjudicated on the merits in State court proceedings.

(ECF No. 79, at PAGEID # 544) (internal quotation omitted).

At the outset, the Court notes that there was no "arguably erroneous interpretation" of Petitioner's eighth proposition of law by the Ohio Supreme Court. Unmistakably, the Ohio Supreme Court dealt with the claim that was presented to it. In his eighth proposition of law, Petitioner argued that the trial court erred by not granting a defense request to rule from the bench with respect to the existence of the prior felony conviction as it related to the weapon under disability charge set forth in Count Five of the Indictment. The first two paragraphs of Petitioner's eighth proposition of law read as follows:

> Count five of the indictment charged Raymond Twyford with carrying a weapon while under disability in violation of Ohio Rev. Code Ann. Sec. 2923.14 (Baldwin 1995). On March 19, 1993, defense counsel filed a Request that the Trial Judge Determine the Existence of Prior Felony Convictions at a Sentencing Hearing, instead of the jury as part of the guilt phase of the trial. The

> motion had two purposes. First, defense counsel asked the trial court to determine the prior felony specifications at a sentencing hearing pursuant to Ohio Rev. Code Ann. Sec. 2941.142 (Baldwin 1995). Second, that the jury should not consider evidence of defendant's prior convictions as this would improperly influence the jury.
>
> After voir dire, defense counsel brought to the court's attention that this request had not been ruled upon; but Judge Olivito still refused to issue a ruling. Judge Olivito proceeded to instruct the jurors that they had to find that Twyford had previously been convicted of a felony crime of violence in order to find him guilty of Court five of the indictment. Judge Olivito did not instruct the jury to limit Twyford's prior burglary conviction to Count five only; and, thus to prohibit the jury from using the burglary conviction as evidence of Twyford's propensity to commit crimes. Furthermore, the jury was instructed to evaluate Count five (which included the burglary conviction) before any of the two aggravated murder counts. As to Count five of the Indictment, the jury found Twyford guilty.

(J.A. Vol. XIII, 127-28.) Although the remainder of the proposition of law goes on to argue the concerns associated with character evidence generally, that argument merely expanded upon the allegation that it was error for the trial court to permit the jury to determine the existence of the prior conviction as an element of the offense of weapon under disability. At no point in his eighth proposition of law, (J.A. Vol. XII, at 128-131), did Petitioner allege the trial court erred

during voir dire by reading the Indictment, which included the sentencing enhancement specifications to the kidnapping and aggravated robbery counts. Accordingly, this Court concludes that Petitioner's twelfth ground for relief is procedurally defaulted because it was never presented to the State courts.

However, to the extent the parties both appear to agree that Petitioner's twelfth ground for relief was contained within his eighth proposition of law (a contention this Court does not share based on its own review of the state court record), the Court agrees that the Ohio Supreme Court expressly rejected any claim concerning the use of the prior conviction on the basis of the contemporaneous objection rule. With respect to the prior burglary conviction, the court noted "contrary to appellant's assertions, defense counsel never objected to this evidence, requested a limiting instruction, or objected to the lack of a limiting instruction," and "[h]aving failed to object to the evidence or instructions, appellant waived all but plain error." *State v. Twyford*, 94 Ohio St. 3d 340, 360 (2002). The Court determined that no plain error occurred where the prior conviction was an essential element of the crime charged. *Id*. Specifically, the Ohio Supreme Court held:

> Before trial, counsel did request that the court, pursuant to Ohio Revised Code Section 2941.142 to determine the existence of prior felony convictions at the sentencing hearing and that the jury not be permitted to consider the evidence of prior convictions.
>
> But R.C. 2941.142, since repealed, applied only to situations where a penalty for a felony offense

> under R.C. 2929.11 was enhanced because of the existence of a prior felony conviction. The court in fact followed R.C. 2941.142 in this case. At appellant's request, the trial court did not submit those penalty enhancement specifications to the jury, and the jury made no findings regarding them. Instead, the trial court, as requested, referred to those penalty enhancement specifications only at sentencing.
>
> Former R.C. 2941.142 does not apply to Count Five because the prior conviction was a direct element of the principal offense charged. The state was entitled to prove that element of Count Five as it did.

State v. Twyford, 94 Ohio St. 3d 340, 359-60 (2002).

The Court finds a clear and express intent on behalf of the Ohio Supreme Court to treat Petitioner's claim regarding the prior conviction as waived based on trial counsel's failure to object at trial. Ohio's contemporaneous objection rule, set forth in *State v. Glaros*, 170 Ohio St. 471 (1960), requires the parties to preserve errors for appeal by calling them to the attention of the trial court at a time when the error could be avoided or corrected. It has been held time and again that the rule is an adequate and independent state ground of decision sufficient to justify the procedural default of a federal constitutional claim. *See*, *e.g.*, *Hand v. Houk*, No. 14-3148, 2017 WL 3947732, at *18 (6th Cir. Sept. 8, 2017) ("We have previously held that an Ohio court's enforcement of the contemporaneous-objection rule is an independent and adequate state ground of decision sufficient to bar habeas relief.") (internal citation

omitted); *Wogenstahl v. Mitchell*, 668 F.3d 307, 335 (6th Cir. 2012) ("Failure to adhere to the firmly-established Ohio contemporaneous objection rule is an independent and adequate state ground of decision."), *citing Keith v. Mitchell*, 455 F.3d 662, 673 (6th Cir. 2006); *Goodwin v. Johnson*, 632 F.3d 301, 315 (6th Cir. 2011) ("Ohio's contemporaneous objection rule is a firmly established procedural rule that is an adequate and independent state ground to foreclose federal relief."); *Smith v. Bradshaw*, 591 F.3d 517, 522 (6th Cir. 2010) (same). Moreover, under Ohio law, the mere filing of a motion requesting that the trial court and not the jury determine the existence of the prior conviction did not relieve Petitioner of the duty to actually object to any reference or evidence of the prior conviction. *See State v. Grubb*, 503 N.E.2d 142, 146 (Ohio 1986) ("An order granting or denying a motion *in limine* is a tentative, preliminary or presumptive ruling about an evidentiary issue that is anticipated. An appellate court need not review the propriety of such an order unless the claimed error is preserved by a timely objection when the issue is actually reached during the trial."). *See also Jones v. Warden, Lebanon Corr. Inst.*, No. 2:14cv01218, 2015 WL 7829145, at *3 (S.D. Ohio Dec. 4, 2015) ("Under Ohio's contemporaneous objection rule, a criminal defendant must object at trial in order to preserve for appeal a trial court's ruling on a motion *in limine*.").

Here, the Ohio Supreme Court specifically invoked the contemporaneous objection rule, noting both counsel's failure to object at trial as well as counsel's failure to even request a limiting instruction. *Twyford*, 94 Ohio St. 3d at 360. The fact that the Court proceeded to conduct a plain error analysis regarding

the introduction of evidence of the prior conviction does not revive the claim but instead constituted actual enforcement of the contemporaneous objection rule. *See, e.g.*, *Everett v. Turner*, No. 1:16-cv-654, 2017 WL 2861181, at *3 (S.D. Ohio July 5, 2017) ("An Ohio state appellate court's review for plain error is enforcement, not waiver, of a procedural default."), *citing Wogenstahl*, 668 F.3d at 337 ("Although the court did evaluate the claim under plain error, the Ohio Supreme Court's plain error review does not constitute a waiver of the state's procedural default rules and resurrect the issue.") (internal citation omitted); *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006) ("Plain error analysis . . . is not equivalent to a review of the merits."). Accordingly, absent a showing of cause and prejudice or manifest injustice, this Court finds the Ohio Supreme Court's enforcement of the contemporaneous objection rule is a valid reason to preclude habeas review of Petitioner's twelfth ground for relief.

Petitioner argues that cause exists to excuse the default of his twelfth ground for relief based on the ineffective assistance of trial counsel for failing to properly preserve the claim for review in state court. (ECF No. 79, at PAFEID # 547.) But before a claim of ineffective assistance of trial counsel can be considered as cause to excuse a procedural default, that ineffective assistance claim must itself have been fairly presented to the state courts. *See Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000) (holding that an ineffective assistance of counsel claim offered as cause for the default of a substantive federal claim must first be properly presented to the state courts). Petitioner argues that a review of "the broader record"

on appeal indicates that he properly raised a corresponding claim of ineffective assistance of trial counsel for failing to object at trial. Specifically, Petitioner notes that in his merit brief to the Ohio Supreme Court, he argued as part of his eleventh proposition of law, that "trial counsel failed to object and thus preserve numerous errors at trial, which have been red-flagged through individual propositions of law contained in this brief." (ECF No. 79, at PAGEID # 547.)

In his eleventh proposition of law on direct appeal, Petitioner set forth two specific allegations of ineffective assistance of trial counsel. First, Petitioner argued that his trial counsel were ineffective during the cross-examination of the Sheriff, because counsel elicited testimony regarding Petitioner's alleged sexual misconduct with his girlfriend's minor children. (J.A. Vol. XIII, at 145.) Secondly, Petitioner argued that his counsel were ineffective during voir dire in connection with the death qualification of the jury. (*Id.* at 151.) The fact that Petitioner tossed in a generic, all-encompassing one-liner that trial counsel failed *generally* to object to numerous errors at trial is not sufficient to state a claim of ineffective assistance for not specifically objecting to references and evidence concerning his prior felony conviction for burglary. That is because a petitioner does not fairly present the substance of a claim unless the state courts are afforded sufficient notice and a fair opportunity "to apply controlling legal principles to the facts underlying the constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982). A petitioner must present to the state courts both the legal theory and the factual basis of any federal claim that he seeks

to present. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971); *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); *Pillette v. Foltz*, 824 F.2d 494, 496 (6th Cir. 1987). Accordingly, the Court finds that Petitioner never presented this specific ineffective assistance of trial counsel claim to the state courts, and *Edwards v. Carpenter* thus precludes this Court from considering it as cause-and-prejudice to excuse any waiver of Petitioner's twelfth ground for relief. The Court **GRANTS** Respondent's motion to dismiss Petitioner's twelfth ground for relief as procedurally defaulted and waived.

2. Third ground for relief: Prosecutorial misconduct deprived Mr. Twyford of his rights to a fair trial before a fair and impartial tribunal, and to a fair and impartial sentencing determination.

Respondent argues that Petitioner procedurally defaulted six sub-claims of his third ground for relief, which set forth several instances of alleged prosecutorial misconduct, based on his failure to object to the alleged misconduct at trial. Specifically, Respondent argues that Petitioner defaulted his allegations that (1) the prosecutor stated Petitioner was not a credible witness because he did not testify (¶ 277), (2) the prosecutor introduced inadmissible evidence against Petitioner and commented on this inadmissible evidence (¶ 278), (3) the prosecutor argued a non-statutory aggravating factor (¶ 280), (4) the prosecutor demeaned mitigating evidence which outweighed any aggravating factors (¶ 281), (5) the prosecutor attempted to cumulate the aggravating circumstances when there were none and implied

there were more aggravating circumstances than there were (¶ 282), and (6) the prosecutor argued that any mitigation was not an excuse for murder (¶ 283). (ECF No. 78, at PAGEID # 531.) According to Respondent, the Ohio Supreme Court denied the claims as waived because there was no contemporaneous objection at trial, and only reviewed the claims to determine whether plain error occurred. (*Id*. at PAGEID # 532.)

In response, Petitioner does not squarely address Respondent's argument that the sub-claims are defaulted because of his failure to comply with the contemporaneous objection rule, and instead argues that he fairly presented the sub-claims at issue because he raised them in his direct appeal to the Ohio Supreme Court. (ECF No. 79, at PAGEID # 549.) Additionally, Petitioner asserts that he "also made repeated efforts to raise his counsel's failure to object to the misconduct before the state courts" and "[t]he courts failed to address his claim." (*Id*.) Specifically, Petitioner contends that in his merit brief addressing his prosecutorial misconduct claims, he argued that "[w]here trial counsel failed to object to these errors, their action fell below the reasonable professional standards in a capital case, resulting in prejudice to the defendant." (*Id*.) (citing J.A. Vol. XIII, at 105.) Petitioner appears to conclude that because he offered the Ohio Supreme Court an excuse for his failure to object at trial to the alleged misconduct of the prosecutor, the Ohio Supreme Court had an obligation to consider the merits of his "cause" argument before enforcing the contemporaneous objection rule. Applying this perspective, Petitioner maintains that the AEDPA does not apply because the claims were

not adjudicated on the merits. (ECF No. 79, at PAGEID # 550.) This Court does not agree.

At issue in this Opinion and Order are paragraphs 277, 278 and 280 through 283 of Petitioner's third ground for relief, all of which set forth allegations of prosecutorial misconduct during Petitioner's trial. A review of the Ohio Supreme Court's decision reveals that the Court chose to address the allegations set forth in paragraphs 277-78, and 280-83, but only as an alternative, plain error review, after finding that Petitioner defaulted the claims by failing to lodge objections at trial.

In paragraph 277, Petitioner argues the prosecutor impermissibly commented that Petitioner "was not a credible witness because he did not testify." (Petition, ECF No. 13-1, at PAGEID # 54.) This commentary appears to have occurred during the prosecution's closing argument during the guilt phase and was not objected to by trial counsel. Petitioner challenged the prosecutor's commentary on direct appeal to the Ohio Supreme Court as part of his sixth proposition of law. The Ohio Supreme Court began its discussion of this sub-claim by finding it was waived due to trial counsel's failure to object. Specifically, the Court held "[w]e note, initially, that appellant failed to object at trial regarding this particular conduct of the prosecutor. Thus, appellant has waived all but plain error." *State v. Twyford*, 94 Ohio St. 3d 340, 355 (2002). The Court then proceeded to acknowledge that "[a]rguably, the comments by the prosecutor in this instance can be read as an impermissible inference of guilt regarding the defendant's decision not to testify, and we in no way condone such tactics," but reiterated

that "isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning." *Id.* at 356. The Court concluded that the comments neither materially prejudiced Petitioner nor denied him a fair trial.

In paragraph 278, Petitioner argues "[t]he prosecutor introduced inadmissible evidence against petitioner and commented on this inadmissible evidence." (Petition, ECF No. 13-1, at PAGEID # 54.) It appears this sub-claim references the prosecutor's mentioning of certain objects that were not introduced into evidence or definitively linked to the crime, such as knives, a saw and a hatchet. (Petition, ECF No. 13, at PAGEID # 14.) In sub-claims 280-283, Petitioner argues the prosecutor committed misconduct by arguing non-statutory aggravating circumstances, demeaning the mitigating evidence, implying that there were more aggravating circumstances than there were, and arguing that the mitigating evidence was not an excuse for murder. (ECF No. 13-1, at PAGEID # 54-55.) After listing these various allegations of misconduct, the Ohio Supreme Court held as follows:

> We have reviewed these arguments in their entirety, and none is supported by a fair and impartial review of the record. Trial counsel failed to object to each and every one of these purported acts of prosecutorial misconduct and thus have waived all but plain error. We find that neither alone nor in the aggregate did these asserted errors have an arguable effect on the outcome of the trial.

State v. Twyford, 94 Ohio St. 3d 340, 357 (2002) (internal quotation omitted).

As stated in the previous section of this Opinion and Order, Ohio's contemporaneous objection rule requires the parties to preserve errors for appeal by calling them to the attention of the trial court at a time when the error could be avoided or corrected, and the Sixth Circuit has unequivocally held the rule is an adequate and independent state ground of decision sufficient to justify the procedural default of a federal constitutional claim. *See*, *e.g.*, *Wogenstahl v. Mitchell*, 668 F.3d 307, 334 (6th Cir. 2012), *citing Keith v. Mitchell*, 455 F.3d 662, 673 (6th Cir. 2006); *Goodwin v. Johnson*, 632 F.3d 301, 315 (6th Cir. 2011); *Smith v. Bradshaw*, 591 F.3d 517, 522 (6th Cir. 2010). Here, the Ohio Supreme Court clearly and expressly invoked the rule, noting Petitioner's failure to object and preserve the alleged misconduct for review. The fact that the court proceeded to conduct a plain error analysis of Petitioner's claims of prosecutorial misconduct did not negate the invocation of the procedural bar and instead constituted actual enforcement of Ohio's contemporaneous objection rule. *See, e.g.*, *Everett v. Turner*, No. 1:16-cv-654, 2017 WL 2861181, at *3 (S.D. Ohio July 5, 2017) ("An Ohio state appellate court's review for plain error is enforcement, not waiver, of a procedural default."), *citing Wogenstahl*, 668 F.3d at 337 ("Although the court did evaluate the claim under plain error, the Ohio Supreme Court's plain error review does not constitute a waiver of the state's procedural default rules and resurrect the issue.") (internal citation omitted); *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006) ("Plain error analysis . . . is not equivalent

to a review of the merits."). Absent a showing of cause and prejudice or manifest injustice, this Court finds the Ohio Supreme Court's enforcement of the contemporaneous objection rule is a valid reason to preclude habeas review of sub-claims 277-78 and 280-83 of Petitioner's third ground for relief.

Although Petitioner argues that he offered the Ohio Supreme Court an explanation for his failure to object at trial, and faults the Ohio Supreme Court for not addressing whether his trial counsel were ineffective for failing to object, Petitioner does not actually offer this Court any cause and prejudice arguments with respect to the sub-claims at issue in his third ground for relief. Nevertheless, the Court has considered whether Petitioner has established cause to excuse his failure to comply with the contemporaneous objection rule, and finds that he has not. Petitioner references the section of his direct appeal merit brief addressing his claims of prosecutorial misconduct, wherein he stated "[w]here trial counsel failed to object to these errors, their action fell below the reasonable professional standards in a capital case, resulting in prejudice to the defendant." (J.A. Vol. XIII, at 105.) This blanket, conclusory statement contained within a separate claim of prosecutorial misconduct is insufficient to present a freestanding claim of trial counsel ineffectiveness to the state courts, and therefore cannot serve as cause and prejudice to excuse a procedural default. *See Wogenstahl*, 668 F.3d at 335 (finding petitioner's ineffective assistance of counsel allegation insufficient to excuse the default of a prosecutorial misconduct claim because "merely conclusory allegations of ineffective assistance like

those Wogenstahl makes here, are insufficient to state a constitutional claim."), citing *Workman v. Bell*, 178 F.3d 759, 771 (6th Cir. 1998); *Meridy v. Ludwick*, No. 2:08cv15249, 2017 WL 3263451, at *8 (E.D. Mich. July 31, 2017) ("Petitioner, however, fails to provide any specific information as to what counsel could have or should have done, but failed to do. This conclusory allegation is insufficient to sustain an ineffective assistance of counsel claim.") (citing *Wogenstahl*, 668 F.3d at 335-36).

Absent a properly presented free-standing claim of attorney ineffectiveness, the ineffective assistance of trial counsel cannot serve as cause and prejudice to excuse the default of the sub-claims at issue in his third ground for relief. *Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000). Accordingly, the Court **GRANTS** Respondent's motion to dismiss the sub-claims contained within paragraphs 277, 278, 280, 281, 282, and 283 of Petitioner's third ground for relief.

3. Eleventh ground for relief: Erroneous jury instructions

Respondent argues that Petitioner procedurally defaulted two sub-claims of his eleventh ground for relief by failing to object at trial. First, Respondent alleges that Petitioner defaulted the portion of his claim alleging there was an improper instruction on the principal offender or prior calculation and design element, set forth in paragraphs 446-451 of the petition. Secondly, Respondent argues that Petitioner failed to object to the mitigation phase instructions and the alleged failure of those instructions to merge the aggravating circumstances (¶¶ 452-458). (ECF No. 78, at PAGEID # 532.) Respondent contends that

Petitioner presented the allegations at issue to the Ohio Supreme Court as part of his Second Proposition of Law and the Ohio Supreme Court rejected the claims on the basis of the contemporaneous objection rule, and only alternatively held that no plain error occurred. (*Id.*)

In response, Petitioner concedes that the Ohio Supreme Court only reviewed this portion of his jury instruction claim under the plain error doctrine. (ECF No. 79, at PAGEID # 550.) However, Petitioner argues "the reason this procedural defense fails is that Twyford did assert on direct review to the Ohio Supreme Court that his trial counsel failed to object to the jury instructions. The Court failed to address the merits of his claim." (*Id.*) Again, Petitioner appears to argue that the Ohio Supreme Court's enforcement of the procedural bar is not binding on this Court, because he attempted to excuse his failure to object by arguing that his trial counsel were ineffective, yet the Ohio Supreme Court did not address his ineffective assistance argument before deeming the claim waived. Regarding cause and prejudice, Petitioner concedes that he never presented to the Ohio courts a freestanding claim of ineffective assistance of trial counsel for failure to object to these instructions, and that pursuant to *Edwards v. Carpenter*, a defaulted claim of ineffective assistance of trial counsel cannot serve as cause and prejudice to excuse the default of an underlying claim. Offering cause for the default of cause, Petitioner argues the ineffective assistance of appellate counsel acts as cause to excuse the default of his ineffective assistance of trial counsel claim, so that it may excuse the default of the specific jury instruction sub-claims at issue. According to

Petitioner, appellate counsel failed to "specifically (as opposed to generally) rais[e] trial counsel's failure to object to specific jury instructions." (*Id.* at PAGEID # 551.)

On direct appeal to the Ohio Supreme Court, as his second proposition of law, Petitioner set forth several claims of error regarding the instructions during the mitigation phase of his trial. In the first paragraph of the Ohio Supreme Court's discussion of the matter, the Court noted:

> In his second proposition of law, appellant contends that the trial court erroneously instructed the jury regarding the factors to consider in recommending punishment. Initially, we note that appellant did not request different penalty instructions or object to those given at trial. Appellant's failure to object to a jury instruction constitutes a waiver of any claim of error relative thereto, unless, but for the error, the outcome of the trial clearly would have been otherwise. The trial court's penalty instructions did not rise to the level of plain error.

State v. Twyford, 94 Ohio St. 3d 340, 349-50 (2002). The Ohio Supreme Court then proceeded to address the two specific instructions at issue in this default decision and held that no plain error occurred.

Here, the Court finds that the Ohio Supreme Court clearly and expressly invoked the contemporaneous objection rule and determined that Petitioner waived all but plain error review with respect to the mitigation phase instructional error sub-claims set forth in paragraphs 446-451 and 452-458 of the petition. Thus, the only question before this Court is

whether Petitioner can establish cause and prejudice for his failure to preserve the sub-claims. Petitioner is asking this Court to go down a path of triple default analysis in order to determine that a defaulted claim of ineffective assistance of appellate counsel can excuse the default of an ineffective assistance of trial counsel claim that Petitioner wishes to use to excuse the default of a freestanding claim of instructional error. This the Court will not do.

On his first direct appeal to the Seventh District Court of Appeals, Petitioner did not set forth a claim of ineffective assistance of trial counsel for failing to object to the trial court's sentencing phase jury instructions. (J.A. Vol. II, at 44.) Subsequently, the court of appeals granted Petitioner's application to reopen his direct appeal, and represented by new appellate counsel, Petitioner raised an additional twenty-five assignments of error that he argued should have been raised on direct appeal. Still, Petitioner did not assert a claim of ineffective assistance of trial counsel for failing to object to the erroneous jury instructions at issue in this default decision. Petitioner has defaulted his ineffective assistance of trial counsel as cause argument, and it cannot be used to excuse the default of his eleventh ground for relief.

In an attempt to excuse the many defaults regarding these claims of instructional error, Petitioner argues that the ineffective assistance of his attorneys from the Ohio Public Defender's Office who represented him in his reopened appeal, as well as his consolidated direct appeal to the Ohio Supreme Court, serves as cause and prejudice. In his Notice of

Supplemental Authority in opposition to Respondent's motion to dismiss, Petitioner argues the United States Supreme Court decisions of *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), "provide authority to rescue trial counsel IAC claims defaulted while litigating a reopened direct appeal in Ohio." (ECF No. 85, at PAGEID # 632.) Specifically, Petitioner argues that because a reopened appeal pursuant to Rule 26(B) is considered a post-conviction remedy, "*Martinez* and *Trevino* provide authority for the proposition that, in instances where an appellant's direct appeal is reopened pursuant to Rule 26(B), trial counsel IAC claims defaulted by ineffective Rule 26(B) post-conviction counsel's failure to present them may be rescued by the *Martinez/Trevino* cause and prejudice analysis." (*Id.*, at PAGEID # 635.)

As an initial matter, the Sixth Circuit has treated reopened appeals under Ohio Appellate Rule 26(B) as post-conviction proceedings, for which no right to counsel is constitutionally required. *See Lopez v. Wilson,* 426 F.3d 339, 352 (6th Cir. 2005) (holding that "a Rule 26(B) application to reopen is a collateral matter rather than part of direct appeal," and "[a]s such, there is no federal constitutional right to assistance of counsel at that stage"); *Issa v. Bagley*, 1:03-CV-280, 2015 WL 5542524, at *28 (S.D. Ohio Sept. 21, 2015) ("In *Lopez v. Wilson*, 426 F.3d 339 (6th Cir. 2005) (en banc), the Sixth Circuit overruled *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000), and held that an Ohio Rule 26(B) application to reopen a direct appeal to raise an ineffective assistance of appellate counsel claim, is a post-conviction proceeding and not an extension of a defendant's direct appeal."). The

Ohio Supreme Court has also determined that the Rule 26(B) procedure is part of a collateral post-conviction review. *Morgan v. Eads,* 104 Ohio St.3d 142, 818 N.E.2d 1157 (2004).

In *Coleman v. Thompson*, 501 U.S. 722, 757 (1991), the Supreme Court established that because there was no constitutional right to counsel in state post-conviction proceedings, attorney error in those proceedings could not constitute cause to excuse procedural default in habeas corpus. In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court carved the following narrow exception to *Coleman*: "[w]here, under state law, claims of ineffective assistance of *trial* counsel *must* be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17 (emphasis added). In *Trevino v. Thaler*, 133 S.Ct. 1911, 1918 (2013), the Supreme Court expanded *Martinez*'s narrow exception beyond states where claims of ineffective assistance of trial counsel *must* be raised in an initial-review collateral proceeding to states that *permit* but do not *require* claims of ineffective assistance of trial counsel to be raised on direct appeal.

In *McGuire v. Warden*, 738 F.3d 741 (6th Cir. 2013), the Sixth Circuit declined to find that *Trevino* expanded *Martinez* to apply to Ohio cases, explaining that "Ohio law appears to contemplate two kinds of ineffective assistance of counsel claims, those based only on evidence in the trial record and those based in

part on evidence outside the record." *McGuire*, 738 F.3d at 751. Moreover, in *Hill v. Mitchell*, 842 F.3d 910, 937 (6th Cir. 2016), the Sixth Circuit remarked, "[w]e have yet to decide whether *Trevino* applies in Ohio, *but we have suggested it may not on multiple occasions*." (emphasis added) (citing *Landrum v. Anderson*, 813 F.3d 330, 336 (6th Cir. 2016)).

Regardless of whether *Martinez/Trevino* applies to Ohio, two things are clear. First, the exception only applies during *initial-review* collateral proceedings. *See Young v. Westbrooks*, 16-5075, 2017 WL 2992222, at *10 (6th Cir. July 14, 2017) (noting that "the *Martinez-Trevino* exception does not extend to attorney error at post-conviction *appellate* proceedings because those proceedings are not the 'first occasion' at which an inmate could meaningfully raise an ineffective-assistance-of-trial-counsel claim"). Secondly, the exception only applies to excuse the default of claims of ineffective assistance of counsel at *trial*. Recently, in *Davila v. Davis*, 137 S.Ct. 2058 (2017), the United States Supreme Court reiterated that *Martinez* will allow the ineffectiveness of post-conviction counsel to excuse only "a single claim—ineffective assistance of *trial* counsel – in a single context" and the Court declined to "extend that exception to allow federal courts to consider a different kind of defaulted claim—ineffective assistance of *appellate* counsel." *Davilla*, 137 S.Ct. at 2062-63.

Accordingly, because the *Martinez/Trevino* exception is inapplicable to the claims and procedural posture to which Petitioner seeks to apply it, this Court must find, pursuant to the general rule announced in *Coleman v. Thompson*, 501 U.S. 722,

757 (1991), that Petitioner had no constitutional right to counsel in his state proceedings to reopen his direct appeal, as those proceedings constituted post-conviction proceedings by nature to which no right to counsel attaches. *McClain v. Kelly*, 631 F. App'x 422, 437 (6th Cir. Dec. 14, 2015) (noting "counsel's failures in connection with a Rule 26(B) application cannot serve as cause to excuse a procedural default because there is no right to counsel at that stage"); *Tolliver v. Sheets*, 594 F.3d 900, 929 (6th Cir. 2010) (noting that "[u]nder Ohio law, however, a Rule 26(B) proceeding is a 'separate collateral' proceeding rather than part of the original appeal," and "Tolliver therefore has no constitutional right to counsel for the proceeding—and thus certainly had no constitutional right to *effective* counsel"). With respect to Petitioner's argument that the same counsel from the Ohio Public Defender's Office represented him during his reopened direct appeal proceedings as well as his second appeal as of right to the Ohio Supreme Court, this Court notes that "the right to appointed counsel extends to the first appeal of right, and no further." *Pennsylvania v. Finley,* 481 U.S. 551, 555 (1987); *State v. Buell*, 70 Ohio St. 3d 1211, 1212 (1994) (death penalty case finding no right to appointed counsel exists on second appeal as of right to Ohio Supreme Court after initial appeal as of right to intermediate court of appeals).

For the reason set forth above, the Court **GRANTS** Respondent's motion to dismiss paragraphs 446-451 and 452-458 of Petitioner's eleventh ground for relief as procedurally defaulted.

4. Fourteenth ground for relief: Erroneous introduction into evidence of gruesome and cumulative photographs and physical evidence

Respondent argues that Petitioner waived portions of his fourteenth ground for relief due to his failure to object at trial. Specifically, Respondent argues that Petitioner failed to object to the State's introduction into evidence of Exhibits 9 and 24. (ECF No. 78, at PAGEID # 532.) According to Respondent, Petitioner first challenged the introduction of Exhibits 9 and 24 on direct appeal as his seventh proposition of law, and the Ohio Supreme Court found the claim waived on the basis of the contemporaneous objection rule.

In his seventh proposition of law before the Ohio Supreme Court, Petitioner argued that he was denied a fair trial and a fair sentencing determination because the trial court erroneously admitted gruesome and cumulative photos which were designed to invoke the sympathy of the jurors and inflame the jury's emotions. In rejecting this claim, the Ohio Supreme Court specifically identified the photographs at issue here, exhibits 9 and 24, and found that Petitioner violated the contemporaneous objection rule. The Court noted:

> Appellant refers specifically to state's exhibits 8, 9, 14, 15, 16, 24, 27, and 28. However, appellant made no objection at trial to exhibits 9 and 24 and hence can complain only of plain error as to those exhibits. Exhibit 9, a photo of Frank's baseball cap, purportedly shows brain tissue, but, if so, it is not noticeable. Exhibit 24, a nongruesome side view of the cowboy boot, does not display the hands inside.

> This, no plain error resulted from admitting exhibits 9 and 24.

State v. Twyford, 94 Ohio St. 3d 340, 358 (2002).

Petitioner concedes that his trial counsel did not object at trial during the admission of Exhibits 9 and 24 into evidence, and also agrees that the Ohio Supreme Court conducted only plain error review with respect to these exhibits. Petitioner argues, however, that he can establish cause and prejudice to excuse the default of these sub-claims, because his trial counsel were ineffective for failing to object at trial. Petitioner argues that he presented a general claim of ineffective assistance based on his trial counsel's failure to object, but the Ohio Supreme Court refused to consider the merits of that argument. For the reasons set forth in the Court's discussion of Petitioner's twelfth ground for relief, in Part IV(A)(1) of this Opinion and Order, this Court does not agree.

Petitioner references his eleventh proposition of law on direct appeal wherein he set forth two specific allegations of trial counsel ineffectiveness. Specifically, Petitioner argued trial counsel were ineffective during the cross-examination of Sheriff Abdalla because counsel elicited testimony regarding Petitioner's alleged sexual misconduct with a minor, (J.A. Vol. XIII, at 145), and secondly, that counsel were ineffective during voir dire because they did not properly explore juror biases. (J.A. Vol. XIII, at 151.) Petitioner concluded this proposition of law with the statement that "[a]lso, trial counsel failed to object and thus preserve numerous errors at trial, which have been red-flagged through individual propositions of law contained in this brief." (J.A. Vol. XIII, at 153.)

The fact that Petitioner tossed in a generic, conclusory allegation of trial counsel error for failing to object, without any specific factual basis underlying the claim, is insufficient to state a claim of ineffective assistance of counsel for not specifically objecting to the introduction of two particular evidentiary exhibits. That is because a petitioner does not fairly present the substance of a claim unless the state courts are afforded sufficient notice and a fair opportunity "to apply controlling legal principles to the facts underlying the constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982). A habeas petitioner must present to the state courts both the legal theory and the factual basis of any claim he seeks to present. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971); *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); *Pillette v. Foltz*, 824 F.2d 494, 496 (6th Cir. 1987). Accordingly, the Court finds that Petitioner never presented this specific ineffective assistance claim to the state courts, and *Edwards v. Carpenter* thus precludes this Court from considering it as cause-and-prejudice to excuse the default of the two-subclaims at issue in Petitioner's fourteenth ground for relief. The Court hereby **GRANTS** Respondent's motion to dismiss the sub-claims challenging the introduction of Exhibits 9 and 24 as procedurally defaulted.

B. Failure to raise record-based claims on direct appeal

Respondent argues that Petitioner procedurally defaulted sub-claim E(2) of his first ground for relief, because it was apparent from the face of the record, yet Petitioner presented it to the state courts for the

first time during his postconviction proceedings as part of his tenth claim for relief. (ECF No. 78, at PAGEID # 533.) Respondent contends that the state courts denied the claim on the basis of *res judicata*. (*Id*. at PAGEID # 534.) In response, Petitioner offers somewhat conflicting arguments. First, Petitioner argues that this sub-claim is not defaulted because he presented it to the state courts during his direct appeal. (ECF No. 79, at PAGEID # 556-557.) Petitioner goes on to argue, however, that he properly presented this claim in postconviction and supported it with evidence *dehors* the record. (Id. at PAGEID 558-59.) The Court will address his arguments in turn.

In sub-claim E(2) of his first ground for relief, titled Death Penalty Qualification, Petitioner argues that his trial counsel provided ineffective assistance of counsel during voir dire, because they failed to adequately question the prospective jurors regarding their ability to consider and "give effect" to his mitigating evidence. (Petition, ECF No. 13, at ¶¶ 167-87.) Specifically, Petitioner asserts:

> *Voir dire* is a critical part of a[] capital trial. In order to protect a defendant's right to a fair and impartial jury it is essential that counsel conduct an adequate examination of every venire member on the issues of death qualification, both as to exclusion and inclusion on the final jury under *Witherspoon*, the ability of potential jurors to properly consider the specific mitigation evidence to be presented in the case, the understanding of each individual jurors power to prevent a death

> sentence solely on his or her individual review of the case.

(ECF No. 13, at ¶172.) Petitioner argues "[c]ounsel's performance was too short, too oblique, and too perfunctory to serve the critical constitutional purpose of ensuring a fair and unbiased jury capable of performing the important job of deciding whether Mr. Twyford should live or die." (*Id*. at ¶ 185.)

Petitioner first argues that he presented the basis for this claim on direct appeal to the Ohio Supreme Court as part of his first proposition of law. Petitioner acknowledges that this proposition of law "was admittedly primarily focused upon the limitations placed upon trial counsel by the trial court," but argues that within the proposition of law he referenced "the shortcomings of trial counsel during the restricted voir dire." (ECF No. 79, at PAGEID # 557.)

A review of the state court record reveals that Petitioner's first proposition of law on direct appeal to the Ohio Supreme Court set forth allegations of trial court error. Specifically, Petitioner asserted that the trial court erred because the court incorrectly conducted the death qualifying portion of the voir dire. Petitioner argued:

> 1) The trial court asked a 'death qualifying' question which inadequately assessed the jurors' views on the death penalty; and 2) The trial court refused to allow defense counsel to ask any follow-up questions to the trial court's erroneous death-qualifying inquiry. The result was that Twyford had absolutely no means of determining whether jurors were predisposed to issuing a death

> sentence; therefore, he was unable to determine if jurors were subject to a challenge for cause, and he could not effectively exercise his peremptory challenges.

(J.A. Vol. XIII, at 52-68.) Within that proposition of law, and with respect to trial counsel's performance, Petitioner argued that counsel "sought to reasonably voir dire prospective jurors on their views relating to capital punishment, the facts and circumstances of conviction and mitigating factors. Judge Olivito, however, abused his discretion by not permitting the questioning to take place." (J.A. Vol. XIII, at 55.)

Here, it is quite a stretch for Petitioner to contend that the claim of trial court error alleged in his first proposition of law on direct appeal also set forth a colorable claim of trial counsel ineffectiveness, when Petitioner made a point of arguing that his trial counsel attempted to question the prospective jurors but was thwarted by the conduct of the trial court. Moreover, Petitioner's argument fails because claims of trial court error and claims of ineffective assistance of counsel are based on different legal theories. It is well settled that a petitioner must present the same claim to the federal courts in habeas corpus that he presented to the state courts, *Picard v. Connor*, 404 U.S. 270, 275 (1971), and a claim of trial court error is factually and legally distinct from a claim of ineffective assistance of trial counsel. *See Carter v. Mitchell*, 693 F.3d 555, 568– 69 (6th Cir. 2012) (holding that "in order to avoid a procedural default, the petitioner's federal habeas petition must be based on the same theory presented in state court and cannot be based on a wholly separate or distinct

theory"); *White v. Mitchell*, 431 F.3d 517, 526 (6th Cir. 2005) (finding that although a freestanding *Batson* claim is related to an ineffective assistance of appellate counsel claim for failing to raise the *Batson* issue, "the two claims are analytically distinct"). Accordingly, this Court finds that Petitioner did not adequately present the legal basis of the ineffective assistance of counsel claim set forth in sub-part (E)(2) to the state courts as part of his first proposition of law on direct appeal, as that proposition of law set forth a freestanding claim of trial court error.

Petitioner also references his eleventh proposition of law on direct appeal to the Ohio Supreme Court, wherein he set forth two specific claims of ineffective assistance of trial counsel. (J.A. Vol. XIII, at 145-53.) At issue is the second claim, wherein Petitioner argued that counsel were ineffective during voir dire because they did not properly explore juror bias regarding the presumption of innocence, exposure to pre-trial publicity, and the possibility that some jurors were relatives of victims of violent crime. (J.A. Vol. XIII, at 151-53.) Petitioner attempts to persuade the Court that this claim also included the claim of voir dire ineffectiveness set forth in sub-claim (E)(2) of his first ground for relief, wherein Petitioner argues that counsel failed to adequately death qualify the jury. The Court, however, is not so persuaded.

Petitioner's eleventh proposition of law on direct appeal was primarily dedicated to the argument that counsel failed to adequately voir dire regarding the somewhat extensive pretrial publicity and "shocking" details of the case. (J.A. Vol. XIII, at 151.) Petitioner admits as much, noting that "the IAC voir dire claim

was predominately focused upon pre-trial publicity." (ECF No. 79, at PAGEID # 557.) Moreover, when the Ohio Supreme Court concisely resolved the claim against Petitioner, it characterized the claim as one involving the argument that "his counsel should have further questioned prospective jurors in voir dire by asking more questions on pretrial publicity, the presumption of innocence, and their status as relatives of crime victims." *State v. Twyford*, 94 Ohio St. 3d 340, 364-65 (2002).

The Court finds that Petitioner's eleventh proposition of law on direct appeal simply did not include any allegations concerning counsel's failure to adequately death qualify the jury, and as such, this Court finds that Petitioner did not present the factual basis underlying sub-claim (E)(2) to the state courts on direct appeal. The Court recognizes that a habeas petitioner is not required to raise his habeas corpus claims using precisely the same language as was used in state court, but a petitioner is required to sufficiently identify the factual basis comprising the claim. Here, the Court simply cannot conclude that the allegations contained in sub-claim (E)(2) are the substantial equivalent of what Petitioner raised on direct appeal.

The Court now turns to Petitioner's second argument, wherein he contends that he properly presented the allegations contained in sub-claim E(2) to the state courts during his postconviction proceedings and supported the claim with evidence *dehors* the record. According to Petitioner, he raised the claim at issue as part of his tenth claim for postconviction relief, (J.A. Vol. V, at 66-68), and in

support of the claim, he submitted the affidavit of an attorney expert in the area of voir dire, as well as the affidavit of one of his two trial counsel. (ECF No. 79, at PAGEID # 558; J.A. Vol. V, at 232; J.A. Vol. VI, at 99.) Petitioner argues that because he properly supported his claim with evidence outside the trial record, the court of appeals erred in applying *res judicata* and concluding the claim should have been raised on direct appeal. (ECF No. 79, at PAGEID # 559.)

In his petition for postconviction relief, Petitioner argued, in his tenth claim for relief, that his trial counsel inadequately questioned potential jurors and was unable "to expose those whose strong opinions in favor of the death penalty would render them excludable under *Morgan v. Illinois*, 504 U.S. 719 (1992)," that counsel failed to "learn their attitudes toward the type of mitigating evidence present in this case," and failed to "educate[] the jurors to understand that each juror could consider mitigating evidence he or she found to exist, even if no other juror agreed that the mitigating factor has been established." (J.A. Vol. V, at 66-67.) In support of his arguments, Petitioner referenced two affidavits he submitted in support of his petition for post-conviction relief. The first was the Affidavit of Clive A. Stafford, an attorney expert, attached as Exhibit V. (J.A. Vol. V, at 232.) Attorney Stafford opined that based upon his knowledge of the standard of practice for lawyers in capital cases, Petitioner's trial counsel fell below that standard and failed to engage in a meaningful voir dire which would have enabled them to detect death-prone jurors. Secondly, Petitioner attached the Affidavit of Adrian

Hershey, who was one of Petitioner's two attorneys at trial.

The trial court granted the state's motion for summary judgment and rejected all of petitioner's claims for postconviction relief. With respect to Petitioner's tenth claim for relief, the trial court simply opined that "[t]he Court has reviewed the record and finds that Defendant's counsel was not ineffective." (J.A. Vol. VI, at 280-81.) On appeal, the Seventh District Court of Appeals rejected the claim on the basis of *res judicata*, holding:

> Under his seventh claim, appellant asserted that he was denied his constitutional right to effective assistance because his trial counsel failed to conduct the proper voir dire examination. In support of this particular claim, appellant attached to his petition the affidavit of Clive Stafford, an attorney from the state of Louisiana who has tried a significant number of death penalty cases. In this affidavit, Stafford averred that, after reviewing the transcript of appellant's trial, it was his belief that trial counsel had failed to question the potential jurors properly on a number of critical issues. Stafford further averred that, in his opinion, the failure to conduct an adequate voir dire denied appellant his right to a fair trial. As to this claim, this court would merely note that, although Stafford's statements were set forth in the form of an affidavit, those statements essentially asserted a legal argument which could have been raised as an assignment of error in his appellate brief on direct appeal from his conviction. Therefore,

> appellant's seventh claim was barred under the doctrine of *res judicata*.

State v. Twyford, No. 98-JE-56, 2001 WL 301411, at *15 (Ohio App. 7th Dist. Mar. 19, 2001). The Ohio Supreme Court declined to exercise jurisdiction.

The first part of the *Maupin* test requires the Court to determine whether a state procedural rule applies to Petitioner's claim and, if so, whether Petitioner violated that rule. As noted *supra,* claims appearing on the face of the record must be raised on direct appeal or they will be waived under Ohio's doctrine of *res judicata. State v. Perry,* 10 Ohio St.2d. Claims that involve matters outside the trial record must be raised and supported by evidence *dehors* the record in state postconviction proceedings. In order to properly raise a claim in postconviction, the evidence *dehors* the record "must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of *Perry* by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim[.]" *Stallings v. Bagley,* 561 F. Supp. 2d 821, 863 (N.D. Ohio 2008) (citing *State v. Lawson,* 103 Ohio App.3d 307 (Ohio App. 12 Dist. 1995)). The evidence at issue must materially support the claim in a manner no record evidence could, such that the claim could not be meaningfully litigated without evidence.

The voir dire conducted in Petitioner's case is part of the trial record. *See Hand v. Houk*, No. 14-3148, 2017 WL 3947732, at *13 (6th Cir. Sept. 8, 2017) ("Hand's claim, based on his trial counsel's performance during voir dire, could have been raised on direct appeal with the evidence contained within

the trial record, just as he could have raised his analogous voir dire claim regarding the trial court."). In his state court postconviction proceedings, the only evidence that Petitioner offered in support of this claim that trial counsel were ineffective for failing to properly death qualify the jury was the affidavit of an attorney expert and the affidavit of one of his trial counsel summarizing what happened on the record during voir dire. The Court finds that, at best, the Stafford Affidavit amounts to a notarized argument whereby Stafford applied the facts as they appeared on the record to the applicable body of case law pertaining to claims of ineffective assistance of counsel during voir dire. Such an undertaking, however, does not constitute new evidence or evidence *dehors* the record. *See e.g., Group v. Robinson*, 4:13 CV 1636, 2016 WL 3033408, at *2 (N.D. Ohio May 27, 2016) (finding "the reasonableness of a strategic choice is a question of law to be decided by the court, not a matter subject to factual inquiry and evidentiary proof" and "it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable") (citing *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998)); *see also Lynch v. Hudson*, 2009 WL 483325, at *18 (S.D. Ohio 2009) (rejecting attorney affidavit as "notarized argument" and collecting Ohio cases holding the same); *State v. Scudder,* 131 Ohio App. 3d 470, 477 (Ohio App. 10th Dist. 1998) (affidavit does not constitute evidence *dehors* the record when affiant "bases his opinion on evidence that is in fact contained within the transcript of defendant's trial"); *State v. Bies,* No. C– 980688, 1999 WL 445692, at *3 (Ohio App. 1st Dist. June 30, 1999) ("[T]he affidavit of

the criminal defense attorney reviewing the case does not constitute legitimate new evidence because, as we have previously held, such an affidavit is essentially a notarized argument that could and should have [been] raised on direct appeal."). Accordingly, the Court finds the Stafford Affidavit simply does not provide cogent evidence *dehors* the record sufficient to withstand the application of *res judicata.* Moreover, the affidavit of trial counsel merely summarized the voir dire, did not point to any new evidence that was not already part of the record, and did not amount to an admission of ineffective assistance. (J.A. Vol. VI, at 99.)

The Court finds that the allegations comprising sub-claim (E)(2) of Petitioner's first ground for relief appear on the face of the record, and Petitioner should have raised this claim on direct appeal, as the Ohio Supreme Court could have fairly resolved the claim without resorting to evidence outside the trial record. Thus, Petitioner violated Ohio's doctrine of *res judicata* when he raised this claim in postconviction, and the Court finds the first part of the *Maupin* test has been satisfied. Under the second part of the *Maupin* test, the Court must determine whether the state courts clearly and expressly enforced the procedural default against Petitioner's claim. In this instance, the intermediate appellate court clearly and expressly dismissed Petitioner's claim on the basis of *res judicata*, *State v. Twyford*, No. 980JE-56, 2001 WL 301411, at *15 (Ohio App. 7th Dist. Mar. 19, 2001), and the Ohio Supreme Court declined to accept jurisdiction over Petitioner's appeal, thereby letting stand the lower court's ruling. (J.A. Vol. VIII, at 144.) Therefore, the Court finds that the second part of the *Maupin* test is satisfied and Petitioner does not

appear to argue otherwise. With respect to the third part of the *Maupin* rule, it is well settled that Ohio's doctrine of *res judicata* is an independent and adequate state procedural rule. *Hand v. Houk*, No. 14-3148, 2017 WL 3947732, at *13 (6th Cir. Sept. 8, 2017) ("[I]t is established law in this circuit that an Ohio court's application of the doctrine *of res judicata* is an independent and adequate state ground sufficient to bar habeas relief.") Because Petitioner does not argue cause and prejudice to excuse the default of this sub-claim, the Court **GRANTS** Respondent's motion to dismiss sub-claim (E)(2) of Petitioner's first ground for relief.

As a final matter, Petitioner notes that the procedural history of his direct appeals and postconviction process was somewhat unusual:

> As an introductory note, it should be noted that because Twyford's initial direct appeal was vacated and re-opened upon the grant of a *Murnahan* application on January 2, 1997, his Merit Brief to the Ohio 7th District Court of Appeals was not filed until March, 1997. His direct appeal to the Ohio Supreme Court was not filed until March, 1999. This resulted in a situation in which his state post-conviction was being litigated [i]n September, 1996, well in advance of his direct appeal. Without any knowledge whether his *Murnahan* application would be granted, (and it is indeed a rarity in Ohio law that it was), it is not surprising that Twyford made efforts to raise his claims in the sole forum available to him at the time, that of state post-conviction. Thus, rulings by the state court indicating that some post-

> conviction claims should have been presented on direct appeal need to be considered in the context that Twyford was actively litigating the right to re-open his direct appeal simultaneously.

(ECF No. 79, at PAGEID # 555-56.) While the Court acknowledges the complexity of death penalty litigation, the procedural history of this case does not diminish Petitioner's obligation under state law to raise his claims in the proper forum.

C. Abandoned Claims

Respondent argues that Petitioner abandoned several claims that he first presented to the Seventh District Court of Appeals on direct appeal by not appealing the denial of the claims to the Ohio Supreme Court. Specifically, Respondent argues that Petitioner abandoned the claims contained in his sixth, eighth, and tenth grounds for relief, and portions of his first and ninth grounds for relief. With respect to his sixth ground for relief, wherein he argues he was incompetent to be tried, and his eighth ground for relief, wherein he challenges the failure to change venue due to pretrial publicity, Petitioner "acknowledges that these claims were not litigated through the Ohio Supreme Court on direct appeal." (ECF No. 79, at PAGEID # 560.)

It is well settled that in order to exhaust his claims, a petitioner must fairly present each claim to the highest court of the state where he was convicted. *Baldwin v. Reese,* 541 U.S. 27, 29 (2004). If a claim is not fairly presented, and the time to present the claim to the state court has run, then the claim is deemed procedurally defaulted. *Lovins v. Parker*, 712 F.3d 283, 295 (6th Cir. 2013); *Hicks v. Straub,* 377 F.3d 538,

551 (6th Cir. 2004). This Court may not review a procedurally defaulted claim unless the petitioner can show cause and actual prejudice, or that federal court review is necessary "to correct 'a fundamental miscarriage of justice.'" *Coleman v. Thompson,* 501 U.S. 722, 748, 111 (1991) (quoting *Engle v. Isaac,* 456 U.S. 107, 135 (1982)). Here, Petitioner, by his own admission, did not present the claims set forth in his sixth and eighth grounds for relief to the Ohio Supreme Court, and he has not attempted to establish cause and prejudice or fundamental miscarriage of justice. Accordingly, the Court hereby **GRANTS** Respondent's motion to dismiss Petitioner's sixth and eighth grounds for relief.

1. Tenth ground for Relief: Discriminatory use of peremptory challenges

In his tenth ground for relief, Petitioner argues that the state improperly used peremptory challenges. Respondent argues that Petitioner has procedurally defaulted this claim, because he first raised the claim on the reopening of his direct appeal as his thirteenth assignment of error, (J.A. Vol. X, at 168-72), but failed to appeal the court of appeals' denial of the claim to the Ohio Supreme Court. (ECF No. 78, at PAGEID # 535.)

In response, Petitioner argues that "Respondent has misrepresented the nature of this claim," because his thirteenth assignment of error during his reopened appeal involved a claim challenging the improper exclusion of jurors who had reservations about the death penalty, whereas his tenth ground for relief in habeas argues that the state improperly excluded women. Petitioner goes on to concede that he

has never presented his claim regarding the improper exclusion of female jurors to the state courts, but argues that the claim is not defaulted because the ineffective assistance of appellate counsel serves as cause and prejudice to excuse the default. (ECF No. 79, at PAGEID # 561.)

As an initial matter, the Court finds it is Petitioner who is mischaracterizing the nature of his tenth ground for relief. His tenth ground for relief comprises paragraphs 409 through 426 of the habeas petition. (ECF Nos. 13-1, at PAGEID # 74-76; 13-2, at PAGEID # 77.) Petitioner spends the majority of this claim asserting that the state improperly excluded potential jurors who "expressed any hesitation about the death penalty," and that "[t]hese tactics created a hanging jury which was extraordinarily predisposed to impose the death penalty." (ECF No. 13-1, at PAGEID # 76, ¶¶409-419.) It is not until paragraphs 420-426 of the Petition that Petitioner argues the state systematically excluded women from his trial and asserts that "[t]he prosecutor used 6 of his 8 peremptories against women." (ECF No. 13-2, at PAGEID # 77, ¶423.)

To the extent Petitioner argues in his tenth ground for relief that the state improperly excluded from the jury those who expressed hesitation regarding the death penalty, specifically paragraphs 409-419 of the petition, the Court hereby **GRANTS** Respondent's motion to dismiss on the basis that Petitioner has abandoned that argument, and in fact denies making it, and also because it does not appear that he appealed the court of appeals' decision denying that claim for relief to the Ohio Supreme Court.

With respect to the part of Petitioner's tenth ground for relief challenging the prosecution's alleged discriminatory use of peremptory challenges against women, Petitioner admits he has never presented this claim to the Ohio Courts. As this Court has discussed, if a federal habeas claim is not fairly presented to the state courts, and the time to present the claim to the state court has run, then that claim is deemed procedurally defaulted. *Lovins v. Parker*, 712 F.3d 283, 295 (6th Cir. 2013).

As cause for the default of this claim, Petitioner asserts the "ineffective assistance of appellate counsel, the State Public Defender, who failed to raise the claim in their appellate briefing to the 7th Circuit Court of Appeal[s] and their subsequent appeal to the Ohio Supreme Court on direct review." (ECF No. 79, at PAGEID # 561.) This Court has already concluded, for the reasons set forth in Part IV(A) (3) of this Opinion and Order, that the ineffective assistance of appellate counsel from the Ohio Public Defender's Office – who represented Petitioner during the reopening of his direct appeal and his second appeal as of right to the Ohio Supreme Court – cannot serve as cause to excuse the default of his claims. Accordingly, the Court **GRANTS** Respondent's motion to dismiss Petitioner's tenth ground for relief.

2. First ground for relief: Ineffective assistance of trial counsel sub-claims C, G, I,M, N

In his first ground for relief, Petitioner sets forth several claims of ineffective assistance of trial counsel. Respondent argues that sub-claims C (failure to challenge Twyford's competency to stand trial), sub-

claim G (failure to challenge jury instructions), subclaim I (failure to challenge substitution of alternate juror), subclaim M (failure to object to trial court error), and subclaim N (cumulative error), are procedurally defaulted. According to Respondent, although Petitioner raised these claims as part of his reopened appeal before the Seventh District Court of Appeals, he did not appeal the denial of those claims to the Ohio Supreme Court when his reopened appeal was consolidated with his direct appeal. (ECF No. 78, at PAGEID # 535.)

In response, Petitioner argues that he did not default the allegations of ineffective assistance of trial counsel at issue because he presented the underlying errors to the state courts as independent and substantive claims. According to Petitioner, "[b]ecause there could be no demonstration of *Strickland*'s prejudice prong in Twyford's ineffective assistance claim without demonstrating the merits of the underlying claims," it is sufficient for habeas review that he presented the underlying claims to the state courts. (ECF No. 79, at PAGEID # 564.) The Court rejects Petitioner's argument.

As noted earlier, a state criminal defendant who seeks to present federal constitutional claims in habeas is required to first fairly present those claims to the state courts for consideration. 28 U.S.C. § 2254(b)(1). A petitioner "fairly presents" the substance of his federal habeas corpus claim when the state courts are afforded sufficient notice and a fair opportunity to "apply controlling legal principles to the facts underlying the constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Thus, a

petitioner must present to the state courts both the legal theory and factual basis of any claim that he seeks to present in habeas corpus. *Picard v. Connor*, 404 U.S. 270, 275-76 91971); *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); *Pillette v. Foltz*, 824 F.2d 494, 496 (6th Cir. 1987). In other words, a petitioner must present "the same claim under the same theory" to the state court, *Hicks v. Straub,* 377 F.3d 538, 552 (6th Cir. 2004), and "[i]t is not sufficient that all the facts necessary to support the federal claim were before the court or that the petitioner made a 'somewhat similar' state-law claim." *Gross v. Warden, Lebanon Corr. Inst.*, 426 F. App'x 349, 355 (6th Cir. 2011) (citing *Anderson v. Harless,* 459 U.S. 4, 6 (1982)). Here, the underlying claims of error are legally distinct from the claims of ineffective assistance of trial counsel that Petitioner seeks to raise. Accordingly, the court finds that because Petitioner did not fairly present his claims to the state court under the same legal theory, and the time for doing that has passed, his claims are procedurally defaulted. Petitioner does not attempt to establish cause and prejudice to excuse the default of the sub-claims of ineffective assistance of trial counsel that are at issue, with the exception of sub-claim (C).

With respect to sub-claim (C) specifically, wherein Petitioner argues that trial counsel were ineffective for failing to challenge Twyford's competency to stand trial, Petitioner attempts to assert as cause the *Martinez/Trevino* cause and prejudice argument this Court rejected in Part IV(A)(3) of this Opinion and Order. According to Petitioner, his "Rule 26(B) post-conviction counsel was ineffective during the Rule 26(B) collateral proceeding insofar as counsel failed to raise this substantial trial counsel IAC claim

notwithstanding that it was apparent on the face of the record and is stronger than other claims counsel did raise." (ECF No. 85, at PAGEID # 638.) This Court has rejected Petitioner's argument that the ineffective assistance of counsel during the reopening of his direct appeal can serve as cause for the default of his claims, because Petitioner had no right to the effective assistance of counsel in a Rule 26(B) reopening of his direct appeal. Because Petitioner has not established cause and prejudice to excuse the defaults of sub-claims C, G, I, M and N of his first ground for relief, the Court **GRANTS** Respondent's motion to dismiss.

3. Ninth Ground for Relief: Denial of a fair trial, ¶390 and ¶395

Respondent argues that paragraph 390 of Petitioner's ninth ground for relief, wherein Petitioner argues that the trial court erred by failing to ensure a full record was preserved for appeal, as well as paragraph 395, wherein he argues the trial court failed to prevent improper use of prior bad acts, are procedurally defaulted. Respondent asserts that although Petitioner first raised these claims in his reopened appeal as part of his twentieth and twenty-third assignments of error, he did not appeal the court of appeals' denial of those claims to the Ohio Supreme Court when his reopened appeal was consolidated with his second direct appeal as of right. (ECF No. 78, at PAGEID # 536.)

In his response, Petitioner acknowledges that upon review of the record, he failed to litigate the claim contained within paragraph 390 to the Ohio Supreme Court. He does not argue cause and prejudice to excuse his failure to fairly present this claim and

accordingly, the Court **GRANTS** Respondent's motion to dismiss paragraph 390 of Petitioner's ninth ground for relief.

With respect to paragraph 395, Petitioner does not refute Respondent's assertion that he failed to appeal the court of appeals' denial of this claim to the Ohio Supreme Court. Instead, he appears to argue that this claim of trial court error is properly before the Court because it is interrelated with a corresponding claim of prosecutorial misconduct that he did appeal to the Ohio Supreme Court. Petitioner asserts that "[t]rial court errors and errors of prosecutorial misconduct are analyzed as Due Process claims asserting a denial of Twyford a fundamentally fair trial." (ECF No. 79, at PAGEID # 565.) This Court does not agree for the reasons discussed in the preceding section of this Opinion and Order. Claims of trial court error and claims of prosecutorial misconduct are distinct legal claims and the fair presentation of one does not serve to automatically save the other. Absent a showing of cause and prejudice, which Petitioner has not attempted to do, the Court **GRANTS** Respondent's motion to dismiss paragraph 395 of Petitioner's ninth ground for relief.

D. Claims First Raised in Habeas

Finally, Respondent argues that several of Petitioner's claims are defaulted because he failed to fairly present them to the state courts and raised them for the first time in these federal habeas proceedings. Specifically, Respondent argues that Petitioner failed to fairly present his fifth ground for relief and portions

of his first, second, third, ninth, eleventh and sixteenth grounds for relief.[1]

1. Fifth ground for relief: Illegal seizure and detention of Twyford and subsequent 'fruits' of an illegal search

In his fifth ground for relief, Petitioner argues that his initial stop, seizure and detention by law enforcement was unconstitutional, and the fruits of that search, including statements and physical evidence, must be suppressed. (Petition, ECF No. 13-1, at PAGEID # 57-58.) Respondent argues that Petitioner has never presented this ground for relief to the state courts and has attempted to assert it for the first time in these habeas proceedings. (ECF No. 78, at PAGEID # 536.) Petitioner acknowledges that he has not presented this claim to the state courts, but asserts as "cause" for the default of this claim that "his appellate counsel, State Public Defender Bodine, failed to present this claim in either Bodine's brief to the 7th District Court of Appeals, or his brief to the Ohio Supreme Court." (ECF No. 79, at PAGEID # 567.) For the reasons discussed in Part IV(A)(3) of this Opinion and Order, the ineffective assistance of appellate counsel on the reopening of Petitioner's direct appeal and on Petitioner's second appeal as of right cannot serve as cause to excuse the default of this ground for ground for relief. Therefore, the Court

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[1] As a housekeeping issue, the Court notes that Respondent initially argued that Petitioner's eighteenth ground for relief was also defaulted, but acknowledged in the Reply that Petitioner had properly preserved this claim for review. (ECF No. 80, at PAGEID # 608.)

GRANTS Respondent's motion to dismiss Petitioner's fifth ground for relief.

2. First ground for relief: Ineffective assistance of trial counsel

Respondent argues that Petitioner procedurally defaulted certain sub-claims of his first ground for relief because he failed to present the factual bases for the claims to the state courts for consideration and review. Specifically, Respondent argues that Petitioner failed to present the allegations outlined in sub-claim B (IAC for failing to effectively present a voluntary manslaughter defense or defend Petitioner), sub-claim D (improper opening statement), sub-claim F (IAC for failing to challenge the initial seizure and continued detention of Petitioner), sub-claim H (IAC for failing to challenge the presence of alternate jurors in the jury room during deliberations), sub-claim J (IAC for failing to challenge the constitutional validity of the seizure of Petitioner); sub-claim L (IAC for failing to investigate exculpatory test results), and sub-claim M (IAC for failing to object to trial court errors). (ECF No. 78, at PAGEID # 536.)

In his response, Petitioner argues that the "sum and substance" of his first ground for relief was presented to the state courts. (ECF No. 79, at PAGEID # 569.) With respect to sub-claim B, Petitioner argues that trial counsel were ineffective because they did not "mount a defense to the aggravated murder charge based on Mr. Twyford's mental state and motivation for the killing." (ECF No. 13, at PAGEID # 25, ¶105.) Petitioner asserts that "[c]ounsel expressed the intention to defend Mr. Twyford on the theory that his

involvement in the murder of Mr. Franks was the direct result of Mr. Twyford's belief that Franks raped Christina Sonny," yet "[d]espite the clear intent to defend on the fit of passion theory, counsel took no steps to present any evidence to support this defense." (*Id*. at PAGEID # 25, ¶¶106, 110.) Petitioner contends he presented these allegations to the state courts during post-conviction, wherein he argued that counsel were ineffective for failing to present evidence about Petitioner's motive for the homicide, as well as his mental state. This Court agrees. During his postconviction proceedings, Petitioner argued that his counsel were ineffective for failing to call Daniel Eikelberry, his co-defendant, as a witness to testify regarding what he perceived to be the rape of Christina Sonny by the victim of this offense. In its decision rejecting Petitioner's grounds for relief in post-conviction, the court of appeals spent considerable time discussing the Eikelberry affidavits and how his testimony may have "supported appellant's contention that the rape had actually occurred and that he had been attempting to avenge or protect the daughter in murdering Franks." (J.A. Vol. VII, at PAGEID # 318; *State v. Twyford*, No. 98-JE-56, 2001 WL 301411, at *8-9 (Ohio App. 7th Dist. Mar. 19, 2001.) Accordingly, the Court finds that Petitioner did present the "sum and substance" of this claim of ineffective assistance of trial counsel to the state courts during post-conviction and the Court **DENIES** Respondent's motion to dismiss sub-claim B of Petitioner's first ground for relief.

With respect to sub-claim D of his first ground for relief, Petitioner argues his counsel were ineffective during opening statement because they promised to

provide an explanation for the murder but then failed to do so. (ECF No. 13, at PAGEID # 29.) In response to the motion to dismiss, Petitioner argues that this allegation is inseparably tied to his claim that counsel were ineffective for failing to effectively present a defense, and is the substantial equivalent to his other claims of ineffective assistance of counsel to which Respondent has not asserted default. This Court agrees, and finds the allegations set forth in sub-claim D are linked to Petitioner's other allegations of ineffective assistance of trial counsel in regard to their handling of the defense theory of the case. The Court finds that Petitioner presented the substance of this claim as part of his allegations concerning the failure to produce evidence that Petitioner acted in a fit of rage, and the Court **DENIES** Respondent's motion to dismiss sub-claim D of Petitioner's first ground for relief.

In sub-claims F and J, Petitioner argues that his trial counsel were ineffective based on their failure to challenge the initial seizure and continued detention of Petitioner. In his response to the motion to dismiss, Petitioner acknowledges that he did not present this claim of ineffective assistance of counsel to the state courts, just as he did not present the underlying claim regarding his initial stop and seizure. Petitioner argues that the ineffective assistance of appellate counsel during his reopened appeal before the court of appeals serves as cause to excuse this default. For the reasons discussed in Part IV(A)(3) of this Opinion and Order, Petitioner cannot rely on the ineffective assistance of appellate counsel during his reopened appeal as cause to excuse the default of his claims. Accordingly, the Court **GRANTS** Respondent's

motion to dismiss sub-claims F and J of Petitioner's first ground for relief.

In sub-claim H, Petitioner argues his counsel were ineffective for failing to challenge the presence of alternate jurors in the jury room during deliberations, and in sub-claim L, Petitioner contends his counsel were ineffective for failing to investigate exculpatory test results. Petitioner acknowledges that he did not present these claims to the Ohio courts and he does not offer cause and prejudice or any argument to excuse the default. As such, the Court **GRANTS** Respondent's motion to dismiss sub-claims H and L from Petitioner's first ground for relief.

Finally, in sub-claim M, Petitioner argues his counsel were ineffective for failing to object to "multiple" trial court errors, and specifically references those allegations set forth in his ninth ground for relief. (ECF No. 13-1, at PAGEID # 44.) Petitioner argues that this ground for relief was properly preserved at the state court level because he argued, as part of his eleventh proposition of law on direct appeal to the Ohio Supreme Court, that his counsel were ineffective, generally, for failing to object at trial. This Court has already determined, in Part IV(C)(2) of this Opinion and Order, that sub-claim M is procedurally defaulted. Moreover, in Part IV(A)(2) of this Opinion and Order, the Court determined that Petitioner's general statements regarding counsel's overall failure to object were insufficient to properly present a constitutional claim. Accordingly, the Court finds Petitioner has defaulted sub-claim M of his first ground for relief and hereby **GRANTS** Respondent's motion to dismiss it from the petition.

3. Second ground for relief: Ineffective assistance of appellate counsel

In his second ground for relief, Petitioner sets forth several claims of ineffective assistance of appellate counsel on direct appeal. Respondent argues that sub-claims B, C, D, and F are defaulted because Petitioner failed to present those claims to the state courts.

In sub-claim B, Petitioner argues that appellate counsel failed to challenge the initial seizure and continued detention of Petitioner, and also failed to raise a claim of ineffective assistance of trial counsel for failing to challenge that seizure and detention. (ECF No. 13-1, at PAGEID # 46.) In sub-claim C, Petitioner argues appellate counsel failed to raise a claim of ineffective assistance of counsel at trial for failing to object to the trial court's improper unanimity instruction. (*Id.*) In sub-claim D, Petitioner asserts that appellate counsel were ineffective because they failed to raise a claim of ineffective assistance of counsel for failing to object to victim impact information, and in sub-claim F, for failing to ensure that Petitioner's *pro se* claims were properly preserved for appellate review. (*Id.*)

In response, Petitioner argues that his claims of appellate counsel ineffectiveness during his reopened appeal and second direct appeal are not defaulted, because he had no available remedy to present and exhaust those claims. (ECF No. 79, at PAGEID # 575.) Petitioner asserts that because he was represented in his second appeal as of right to the Ohio Supreme Court by the same attorneys who represented him in his reopened direct appeal, and because the two appeals were consolidated, he could not have

challenged appellate counsels' performance during the reopening without asking counsel to raise their own ineffectiveness. Given the unique circumstances of this case, Petitioner argues, the Ohio courts should have permitted him to reopen his direct appeal a second time, at the conclusion of his direct appeal to the Ohio Supreme Court. Petitioner contends that his "IAAC claim is entitled to a merits review because, in his unique situation, there was no viable remedy to present and exhaust the claim and the imposition of a procedural bar was not adequate to sustain the default." (ECF No. 79, at PAGEID # 575.)

The Court notes that the Ohio Supreme Court issued its decision denying Petitioner's consolidated appeal on March 6, 2002. *State v. Twyford*, 94 Ohio St. 3d 340 (2002). Petitioner did not seek to reopen his appeal a second time, via a second application pursuant to Rule 26(B), until after he filed the instant habeas action. Petitioner sought and obtained a stay by this Court in order to pursue a second reopening of his direct appeal, which was denied by the state courts on the basis that Petitioner "was not entitled to file a second application for reopening under App. R. 26(B)." *State v. Twyford*, 106 Ohio St. 3d 176, 177 (2005). The Ohio Supreme Court held that "[o]nce ineffective assistance of counsel has been raised and adjudicated, *res judicata* bars its relitigation." *Id.* The Ohio Supreme Court also concluded that even if Petitioner had a right to file a second application for reopening, his application was untimely and Petitioner failed to show good cause for waiting "more than five years before filing his application." *Id.*

Petitioner argues that this Court should not enforce the default of his claims of ineffective assistance of appellate counsel. Petitioner appears to assert as "cause" that the Ohio courts left him with no viable remedy due to the unique procedural nature of his case. It bears mentioning that the "uniqueness" of his situation is that he is one of a very few death-sentenced defendants who have been given a true second bite at the appellate apple. Petitioner's attorneys from the Ohio Public Defender's Office, the same attorneys Petitioner asserts were ineffective, successfully convinced the intermediate appellate court that Petitioner was entitled to a do-over, and ultimately those attorneys litigated another twenty-five constitutional issues on Petitioner's behalf. The fact that the state courts invoked the procedural bar of *res judicata* to prevent Petitioner from having a third bite at that apple is not something this Court can simply overlook. Moreover, even if the Court permitted Petitioner's "no viable option" argument to serve as cause to excuse the default, something this Court will not do, Petitioner would not be able to establish actual prejudice to excuse the default of this claim. The Court has determined, in Part IV(A)(3) of this Opinion and Order, that Petitioner had no right to the effective assistance of counsel in his reopened direct appeal, which constitutes a postconviction proceeding. With respect to Petitioner's argument that the same counsel from the Ohio Public Defender's Office represented him during his reopened direct appeal proceedings as well as his second appeal as of right to the Ohio Supreme Court, this Court notes that Petitioner's federal right to counsel "extends to the first appeal of right, and no further." *Pennsylvania v.*

Finley, 481 U.S. 551, 555 (1987); *see also State v. Buell*, 70 Ohio St. 3d 1211, 1212 (1994) (no right to appointed counsel exists on second appeal as of right to Ohio Supreme Court after initial appeal as of right to intermediate court of appeals). Because Petitioner did not have the right to appointed counsel in these proceedings, he did not have the right to the effective assistance of counsel. *See, e.g.*, *Tolliver v. Sheets*, 594 F.3d 900, 929 (2010) (noting that under Ohio law, a Rule 26(B) proceeding is a collateral proceeding and "Tolliver therefore has no constitutional right to counsel for the proceeding—and thus certainly had no constitutional right to *effective* counsel"). As such, the Court rejects Petitioner's offer to determine that the state courts acted unjustly by rejecting his successive application for reopening on the basis on *res judicata*.

Accordingly, the Court **GRANTS** Respondent's motion to dismiss sub-claims B, C, D and F of Petitioner's second ground for relief as procedurally defaulted.

4. Third ground for relief: Prosecutorial misconduct

Respondent argues that paragraph 277 (suggesting Petitioner was not credible because he did not testify), and paragraph 279 (presenting character evidence of the victim) of Petitioner's third ground for relief are procedurally defaulted because the allegations were not presented to the state courts. The Court has already granted Respondent's motion to dismiss paragraph 277 in Part IV(A)(2) of this Opinion and Order based on Petitioner's failure to preserve the error at trial.

With respect to paragraph 279, Petitioner argues "the prosecutor presented character evidence of the victim, which was irrelevant in the guilt phase. This aroused the sympathy of the jury and prejudiced petitioner." (Petition, ECF 13-1, at PAGEID # 54.) Petitioner argues that this allegation is part of the general claim of prosecutorial misconduct that he raised on direct appeal, wherein he asserted that during the penalty phase, the state made repeated references to improper non-aggravating circumstances such as how the victim was "brutalized" and "dehumanized" in order to induce sympathy for the victim of this offense. Petitioner argues that his claim is fairly presented as long as it is the substantial equivalent of what he presented to the state courts, and faults Respondent for parsing his prosecutorial misconduct claim into technical and independent sub-parts. (ECF No. 79, at 584-85.)

The Court acknowledges that a habeas petitioner does not have to present exactly the same claim in habeas as he presented to the state courts so long as the claim he presents is the substantial equivalent of what he presented to the state courts. The Court finds, however, that a claim of guilt phase prosecutorial misconduct for introducing character evidence of the victim is arguably not quite the same as a claim of penalty phase misconduct for arguing impermissible aggravating circumstances in order to inflame the jury. Nevertheless, the Court will **DENY** Respondent's motion to dismiss as it relates to paragraph 279 of Petitioner's third ground for relief. The Court finds that on the whole, Petitioner has fairly presented his claim that the prosecutor engaged

in misconduct by attempting to invoke sympathy for the victim.

5. Ninth ground for relief: Denial of a fair and impartial sentencing hearing

Respondent argues that ten paragraphs of Petitioner's ninth ground for relief are procedurally defaulted because they are "new" claims that Petitioner has first raised in habeas and that he did not fairly present to the state courts. (ECF No. 78, at PAGEID # 537.) Specifically, Respondent argues:

> Many of the sub-claims in Twyford's Ninth Habeas Claim are new claims first raised in federal habeas: trial court had at least one meeting with an individual juror (¶ 391); trial court offered to talk with each juror about the case after a verdict was returned in the mitigation phase (¶ 392); trial court did not allow Twyford to attend sidebars (¶ 393); trial court failed to prevent prosecutorial misconduct (¶ 394); trial court failed to prevent improper argument by the prosecutor (¶ 395); trial court permitted alternate jurors to sit in the jury room during guilt phase deliberations (¶ 397); judge had a preconceived belief in Twyford's guilt (¶ 398); trial court denied Twyford an expert to investigate the validity of a not guilty by reason of insanity plea (¶ 404); trial court accepted the withdrawal of the not guilty by reason of insanity plea without proper examination of the validity of the plea (¶ 405); and trial court considered non-statutory aggravating circumstances and refused to consider appropriate mitigation evidence (¶406).

(ECF No. 78, at PAGEID # 537-38.)

In his response, Petitioner concedes that he never presented the sub-claims set forth in paragraphs 391, 392, 393, 398, 404 and 405 of his ninth ground for relief to the state courts. Because Petitioner admits that he failed to properly present those claims, and he does not argue that he has a remaining avenue to present those claims or that cause and prejudice excuses his failure to have presented those claims, the Court hereby **GRANTS** Respondent's motion to dismiss those paragraphs from the habeas petition. Furthermore, this Court has already granted, in Section IV(C)(3) of this Opinion and Order, Respondent's motion to dismiss paragraph 395.

In paragraph 394, Petitioner argues that the trial court failed to prevent prosecutorial misconduct at his trial. Petitioner contends that this claim was fairly presented to the state courts because he properly presented the underlying prosecutorial misconduct claim, and as part of that claim, he "made references, (however passing), to the role of the trial court in preventing misconduct to protect due process." (ECF No. 79, at PAGEID # 586.) This Court does not agree. In order to fairly present a federal constitutional claim to the state courts, a petitioner must present the state courts with both the same factual basis and legal theory. A claim of trial court error is legally distinct from a claim of prosecutorial misconduct, and the presentation of one does not serve to preserve the other. Accordingly, the Court **GRANTS** Respondent's motion to dismiss paragraph 394 of Petitioner's ninth ground for relief.

In paragraph 397, Petitioner argues that the trial court erred by permitting the alternate jurors to sit in

the jury room during the trial phase deliberations. Petitioner argues this claim was presented to the Ohio Supreme Court on direct appeal as part of his tenth proposition of law, wherein he argued that his due process rights were violated when the trial court replaced a juror who had deliberated during the guilt phase of his trial with an alternate juror during the mitigation phase of the trial. (ECF No. 79, at PAGEID # 587.) This Court agrees. In his tenth proposition of law on direct appeal before the Ohio Supreme Court, Petitioner challenged the trial court's decision to dismiss Juror Kerr after the guilty verdicts were returned and the Court's decision to replace her with an alternate for purposes of the mitigation hearing. (J.A. Vol. XIII, at 138.) Part of this argument included Petitioner's assertion that "[o]nce Twyford's jury began its deliberations, the trial court should have dismissed the alternate jurors." (*Id.* at 140.) Because Petitioner presented the record-based allegation comprising paragraph 397 on direct appeal to the Ohio Supreme Court, it is properly before this Court for review. The Court **DENIES** Respondent's motion to dismiss paragraph 397.

Finally, in paragraph 406, Petitioner argues the trial court considered non-statutory aggravating factors and refused to consider mitigating evidence in sentencing Petitioner. (ECF No. 13-1, at PAGEID # 73.) Petitioner argues that this claim was properly presented to the Ohio Supreme Court on direct review as part of his second proposition of law, in which he challenged the trial court's various sentencing phase jury instructions that allowed the jury to consider non-statutory aggravating factors. This Court agrees.

Within his second proposition of law on direct appeal, Petitioner challenged the trial court's independent weighing of the aggravating circumstance and the mitigating evidence. (J.A. Vol. XIII, at 71, 73, 74, 81, 85, 89.) Specifically, Petitioner argued "[t]he jury, trial judge, and appellate court in Twyford's case improperly grouped the aggravating circumstances from both counts of aggravated murder and weighed them against Twyford's single set of mitigating factors." (J.A. Vol. XIII, at 89.) The Court finds, after its own review of the state court record, that the claim set forth in paragraph 406 is encompassed within the claim Petitioner raised on direct appeal, and accordingly, the Court **DENIES** Respondent's motion to dismiss paragraph 406 of Petitioner's ninth ground for relief.

6. Eleventh ground for relief: Jury Instructions

Finally, Respondent argues the sub-claim of Petitioner's eleventh ground for relief wherein he argues that the trial court failed to properly instruct on unanimity, as alleged in paragraphs 464-74 of the petition, is procedurally defaulted because Petitioner failed to present the sub-claim to the state courts.

In Response, Petitioner concedes that he never presented the sub-claim challenging the unanimity instruction to the state courts, but argues the ineffective assistance of appellate counsel constitutes cause to excuse the failure to present the claim. Specifically, petitioner again argues that the attorneys who represented him in his reopened appeal and during his second direct appeal as of right before the Ohio Supreme Court were ineffective for failing to

raise the claim challenging the unanimity instruction. Because this Court has rejected that argument as cause for the default of Petitioner's other claims, specifically as discussed in Part IV(A)(3) of this Opinion and Order, the Court finds Petitioner cannot establish cause for his failure to present this claim of instructional error to the state courts. If a claim is not fairly presented, and the time to present the claim to the state courts has run, then the claim is deemed procedurally defaulted. *Lovins v. Parker*, 712 F.3d 283, 295 (6th Cir. 2013); *Hicks v. Straub,* 377 F.3d 538, 551 (6th Cir.2004). Here, Petitioner cannot establish cause to excuse the default and accordingly, the Court **GRANTS** Respondent's motion to dismiss paragraphs 464-74 of Petitioner's eleventh ground for relief.

7. Sixteenth ground for relief: Ineffective assistance of counsel at mitigation

In his sixteenth ground for relief, Petitioner sets forth several claims of ineffective assistance of trial counsel at mitigation. Respondent argues that sub-claims (A)(2) and (B) are procedurally defaulted because Petitioner failed to present the allegations to the state courts.

In subclaim (A)(2), Petitioner argues that trial counsel were ineffective during mitigation because they failed "to correct their error from the trial phase" concerning the testimony of Sheriff Abdalla that Petitioner had engaged in sexual misconduct with Christina and Terri Sonny. (Petition, ECF No. 13-2, at PAGEID # 102, ¶¶ 535-543.) Specifically, Petitioner argues "[i]t was accepted and understood by everyone in this case that Christina suffered from mental retardation. What was never explored by defense

counsel was whether Christina was competent to relate any allegations against Mr. Twyford." (*Id*. at PAGEID # 102.)

In response, Petitioner argues he properly presented this claim to the state courts and asserts the allegations in sub-claim (A)(2) are intertwined with his other claims of ineffective assistance of trial counsel. Specifically, Petitioner argues this sub-claim is related to his argument that counsel were ineffective during cross-examination of the Sheriff, and also in failing to present evidence regarding Christina Sonny's mental state. The Court agrees, and finds that on the whole, Petitioner's allegations concerning counsel's failures with respect to the testimony by the Sheriff are intertwined with other claims of attorney error that are properly before the Court. Accordingly, the Court **DENIES** Respondent's motion to dismiss sub-claim (A)(2) of Petitioner's sixteenth ground for relief.

In sub-claim (B), Petitioner sets forth a claim of "cumulative impact" based on his trial "counsels' deficiencies." (Petition, ECF No. 13-2, at PAGEID # 105.) Petitioner argues that this claim is properly before the Court, because "[a]s a practical matter, in analyzing an IAC claim, counsels' error are considered cumulatively." (ECF No. 79, at PAGEID # 592.) Additionally, Petitioner argues he presented his cumulative trial counsel error claim on direct appeal to the Ohio Supreme Court when he argued that "trial counsel's errors, individually and cumulatively, deprived Twyford of a trial the result of which was reliable." (ECF No. 79, at PAGEID # 593; J.A. Vol. XIII, at 153.)

Respondent argues this claim is defaulted because Petitioner failed to present an independent and freestanding claim of cumulative trial counsel error to the state courts. The Court determines that to the extent Petitioner's "cumulative" deficiency claim pertains to non-defaulted allegations of trial counsel ineffectiveness that are properly before the Court for review, the claim itself is properly before the Court. The Court **DENIES** Respondent's motion to dismiss sub-claim (B) of Petitioner's sixteenth ground for relief.

V. Conclusion

For the foregoing reasons, the Court **GRANTS** Respondent's motion to dismiss with respect to Petitioner's fifth, sixth, eighth, tenth, and twelfth grounds for relief in their entirety. Furthermore, the Court **GRANTS** Respondent's motion to dismiss as it relates to the following sub-claims or paragraphs: Sub-claims C, E(2), F, G, H, I, J, L, M and N of Petitioner's first ground for relief, sub-claims B, C, D, and F of Petitioner's second ground for relief, paragraphs 277-278 and 280-283 of Petitioner's third ground for relief, paragraphs 390-395, 398, 404 and 405 of Petitioner's ninth ground for relief, paragraphs 446-458 and 464-74 of his eleventh ground for relief, and the sub-claims challenging the introduction of Exhibits 9 and 24 in Petitioner's fourteenth ground for relief.

The Court **DENIES** Respondent's motion to dismiss sub-claims (B) and (D) of Petitioner's first ground for relief, paragraph 279 of Petitioner's third ground for relief, paragraphs 397 and 406 of Petitioner's ninth ground for relief and sub-claims

(A)(2) and (B) of Petitioner's sixteenth ground for relief.

IT IS SO ORDERED.

s/ ALGENON L. MARBLEY
ALGENON L. MARBLEY
United States District Judge

DATED: September 27, 2017

APPENDIX G

THE SUPREME COURT OF OHIO

Case No. 2001-0788

State of Ohio

v.

Raymond A. Twyford, III

FILED
May 1, 2002
CLERK OF COURT
SUPREME COURT OF OHIO

Jefferson App. No. 98JE56, 2001-Ohio-3241

APPEAL NOT ACCEPTED FOR REVIEW

Lundberg Stratton, J., dissents and would allow on Proposition of Law No. III.

APPENDIX H

THE STATE OF OHIO, APPELLEE, v.
TWYFORD, APPELLANT.

[Cite as *State v. Twyford* (2002), 94 Ohio St.3d 340.]

Criminal Law—Aggravated murder—Death penalty upheld, when.

(No. 98-2360 and 95-2379—Submitted October 21, 2001—Decided March 6, 2002.)

APPEAL from the Court of Appeals for Jefferson County, No. 93-J-13.

DOUGLAS, J. In the early evening hours of September 23, 1992, Athena Cash was walking in a rural area in Jefferson County, Ohio. After traversing the crest of a hill, Cash noticed an object floating in an old strip-mining pond. Although it appeared to be in the shape of a human body, Cash was uncertain whether the object was, in fact, human. Cash subsequently summoned her boyfriend to view the object, and he concluded that the object was a human body. As a result, the couple contacted local law enforcement authorities.

Law enforcement personnel, including Jefferson County Sheriff Fred Abdalla, responded to the scene and found parts of a skull and flesh on the ground. Some seventy-four feet away, the sheriff saw a body lying on its back in the body of water. On the shore, the sheriff also found blood, a pair of glasses, a baseball cap, and six shell casings fired from a .30-06-caliber rifle.

While the body was floating in the pond, Sheriff Abdalla observed that it appeared "as if the head was cut off" and also noticed that "the hands were severed from the body." Once the body was removed from the water, it was determined that part of the face was still attached but that the skull was missing. Abdalla also discovered that the victim had been shot in the back. At the scene, Dr. John Metcalf, the Jefferson County Coroner, observed the same injuries. In addition, Dr. Metcalf found a pocket calendar diary inside the victim's shirt pocket. The victim's name, Richard Franks, as well as a Windham, Ohio address, was written in the diary.

On September 24, 1992, after contacting the Windham Police Department and receiving information that Franks had been missing for two days, Sheriff Abdalla traveled to the village of Windham in Portage County, Ohio. Prior to Sheriff Abdalla's arrival, Windham Chief of Police Thomas Denvir decided to place Franks's apartment under surveillance. Chief Denvir had discovered that Daniel Eikelberry lived with Franks, and while surveilling the apartment, Chief Denvir observed Eikelberry and Raymond A. Twyford III, appellant, in an automobile belonging to Joyce Sonny, appellant's girlfriend.

Sheriff Abdalla arrived in Windham and at approximately 4:50 p.m. met local police officials, including Chief Denvir. Around 5:30 p.m. that same afternoon, while Sheriff Abdalla and Chief Denvir waited outside Franks's apartment for a warrant to enter the premises, appellant, accompanied by Eikelberry and Terri Sonny, Joyce's daughter, again drove by in Joyce Sonny's car. Appellant lived with

Joyce Sonny and her daughters, Christina, age eighteen, and Terri, age thirteen, in Windham.

At that time, and at Sheriff Abdalla's request, Chief Denvir stopped the car to talk with Eikelberry about his missing roommate, Franks. As appellant got out of Joyce's 1975 Chrysler sedan, Abdalla noticed "two survival knives, a hatchet and a small * * * hand saw" in the car. Appellant, who was not detained, waited outside Franks's house while Abdalla questioned Eikelberry at the police station.

After interviewing Eikelberry, Sheriff Abdalla arrested appellant at around 6:25 p.m. for the murder of Richard Franks and advised appellant of his *Miranda* rights. After declining to be interviewed, appellant was taken to the Windham Police Department and held while police continued to question Eikelberry. At around 7:15 p.m., appellant on his own initiative indicated that he would like to speak to Sheriff Abdalla and told him, "[S]heriff, I want to talk to you now, I'll tell you anything you want to know." Sheriff Abdalla, however, did not talk to appellant right away. Around 8:30 p.m., Abdalla again advised appellant of his *Miranda* rights, and appellant acknowledged and waived those rights, both orally and in writing.

Appellant told Sheriff Abdalla and Chief Denvir that he lived with Joyce Sonny and her two daughters, Christina and Terri. On Saturday, September 19, two days prior to the murder, Eikelberry told appellant that Franks had raped Christina. After learning this, appellant said that he was very angry and that every time he thought of Franks or saw him he "saw red and started to shake."

Appellant told Sheriff Abdalla that after learning of the rape, he and Eikelberry decided to kill Franks. The two of them drove around with Franks on Sunday evening, September 20. Appellant said, however, that he and Eikelberry could not find a suitable place to kill Franks. On Monday evening, September 21, on the pretext that they were going deer hunting, appellant, Eikelberry, and Franks drove to Jefferson County, arriving at around 1:00 or 2:00 a.m., September 22. Appellant was familiar with the area and had suggested this as the locale for the killing.

According to appellant, he and Eikelberry told Franks to hold a flashlight, look for deer, and "hold the light in the eye of the deer," and appellant and Eikelberry would shoot the deer. Instead, as Franks walked off and was ten to twelve feet away, appellant shot him in the back with a .30-06-caliber rifle. After he fell down, Franks was still "gurgling," and Eikelberry shot Franks in the head with a .22 caliber pistol.

Appellant and Eikelberry then repeatedly shot Franks in the head with the rifle and also shot his hands. Appellant also "took the wallet from Mr. Franks" and handed it to Eikelberry, and Eikelberry removed the hunting license from Franks's jacket. "[A]fter they [Eikelberry and appellant] had cut [Franks's] hands off, they took the hands and put them in a * * * cowboy boot and * * * put some rocks in the boot to weigh it down and * * * [ran] the extension cord * * * around the boot." They shot Franks several times "to disfigure him so he couldn't be recognizable." Then "they both [dragged] the body

* * * to the embankment * * * [and] shoved the body over the bank."

Appellant further said that after leaving the scene of the murder, Eikelberry threw the boot containing Franks's hands into Yellow Creek (some eighteen miles away). On September 25, divers recovered the boot (which contained the hands) from Yellow Creek where appellant reported that it had been thrown.

After he orally confessed to the murder, appellant wrote out details in a three-page handwritten statement that he signed. Chief Denvir and Sheriff Abdalla witnessed appellant's statement.

Based upon other information from appellant's confession, police recovered from behind a vent off Joyce Sonny's living room a loaded "high-powered" .30-06-caliber rifle and a .22 caliber handgun loaded with "hollow point" ammunition. Two knives were also found. Both guns were operable. A parole officer verified that appellant had previously been convicted of burglary and hence was "restricted from owning, possessing or using any type of firearm."

The grand jury indicted appellant on five counts. Count One alleged aggravated murder with prior calculation and design in violation of R.C. 2903.01(A) and aggravated murder in the course of a kidnapping in violation of R.C. 2903.01(B). Count One of the indictment also charged appellant with an R.C. 2929.04(A)(7) death penalty specification for committing aggravated murder during the course of a kidnapping. Count Two alleged an aggravated murder with prior calculation and design in violation of R.C. 2903.01 and aggravated murder in the course of aggravated robbery in violation of R.C. 2903.01(B).

Count Two also charged appellant with an R.C. 2929.04(A)(7) death penalty specification of committing aggravated murder during the course of committing an aggravated robbery. Count Three alleged kidnapping, Count Four alleged aggravated robbery, and Count Five alleged that appellant had a weapon while under disability. Counts One through Four contained gun specifications. Counts Three and Four also contained specifications enhancing the penalty, and these alleged that appellant had previously been convicted of burglary.

Prior to trial, appellant moved to suppress his confession. A hearing was held on the motion to suppress wherein appellant testified that his confession was an involuntarily coerced statement made under duress and threat by law enforcement officers. Appellant further alleged that his confession was made while he was under the influence of narcotics and alcohol. The trial court denied the motion to suppress.

During his 1993 trial, appellant pled not guilty but otherwise did not seriously contest the charges and presented no evidence at the guilt phase. In addition to the foregoing evidence obtained from appellant's confession, the state presented the following evidence as part of its case in chief.

A forensics expert concluded that cartridge casings found at the murder scene could have been fired from the rifle seized from Joyce's living room "based upon the breech and firing pin impressions." Police also dug two bullets from the ground at the crime scene. According to the same expert, those bullets could have

been fired from the rifle, but no conclusive match was shown.

Dr. Patrick Fardal, the pathologist who performed the autopsy, indicated that the victim had suffered "approximately six to eight gunshot wounds of his body including his head and hands." Dr. Fardal found a gunshot wound, "obviously a fatal injury," where the bullet had entered Franks's back, had gone through his spinal cord, and had caused paralysis below the waistline and "injuries to multiple abdominal organs" before it then exited his abdomen. Franks also had bullet wounds in his severed hands, and his head sustained "massive destruction of his skull, the skin of his face and the intracranial contents." According to Dr. Fardal, Richard Franks "died solely and exclusively of gunshot wounds * * * and probably the most significant one was the one to the trunk first and then the ones to the head."

The jury found appellant guilty of all counts as charged. However, the findings on specifications enhancing the penalty were reserved for the court. After a penalty hearing, the jury recommended death on each aggravated murder charge. The trial court sentenced appellant to death on each murder count and to prison for kidnapping, aggravated robbery, having a weapon while under disability, and the firearms specifications.

In 1995, on the initial appeal, the court of appeals rejected appellant's three assignments of error and affirmed the trial court's judgment. *State v. Twyford* (Oct. 6, 1995), Jefferson App. No. 93-J-13, unreported, 1995 WL 591905. Appellant appealed to this court, and the case was fully briefed. Then in 1997, the court

of appeals reopened the appeal on a *Murnahan* application alleging ineffective assistance of appellant's appellate counsel before that court. We stayed the matter before us and transferred the record to the court of appeals for consideration of appellant's claims.

Following rebriefing, the court of appeals noted the peculiar manner in which Counts One and Two were charged. *State v. Twyford* (Sept. 25, 1998), Jefferson App. No. 93-J-13, unreported. Namely, Count One charged felony murder with kidnapping as the underlying felony, and the R.C. 2929.04(A)(7) specification listed only kidnapping. In the Count Two felony murder charge, aggravated robbery was identified as the underlying felony, and the R.C. 2929.04(A)(7) death specification listed only aggravated robbery. The court also indicated that it had to merge the two murder counts, since a single death occurred. See, *e.g.*, *State v. Huertas* (1990), 51 Ohio St.3d 22, 28, 553 N.E.2d 1058, 1066.

Accordingly, the court of appeals held that it could "consider only one of the two R.C. 2929.04(A)(7) specifications of which appellant was found guilty. Specifically, * * * [it] consider[ed only] the R.C. 2929.04(A)(7) specification which was contained in the first felony-murder count."[1] Thus, the court of appeals sustained the death penalty only on the basis of Count One and the R.C. 2929.04(A)(7) specification related to the kidnapping. In all other respects, the court of

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[1] Appellant's counsel incorrectly asserts that the court of appeals affirmed the death sentence only for the aggravated robbery death penalty specification.

appeals affirmed the trial court's judgment and the death penalty. Appellant now appeals to this court as a matter of right, and the entire case has been rebriefed.

Appellant presents thirteen propositions of law for our consideration. (See Appendix, below.) We have considered each of appellant's propositions of law and have reviewed the penalty of death for appropriateness and proportionality. Upon review, and for the reasons that follow, we uphold appellant's convictions and sentences, including the sentence of death.

I

We have held that this court is not required to address and discuss, in opinion form, each and every proposition of law raised by the parties in a death penalty appeal. We continue to adhere to that position today. We have carefully considered all of the propositions of law and allegations of error and have thoroughly reviewed the record in its entirety. Many of the issues raised by appellant have been addressed and rejected by this court under analogous circumstances in a number of our prior cases. Therefore, these issues require little, if any, discussion. Additionally, many of appellant's arguments have been waived. Upon careful review of the record and the governing law, we fail to detect any errors requiring reversal of appellant's convictions and death sentence. We have found nothing in the record or in the arguments advanced by appellant that would in any way undermine our confidence in the outcome of appellant's trial. Accordingly, we address

and discuss in detail only those issues that merit detailed analysis.

II

Proposition of Law No. I

In his first proposition of law, appellant alleges that he was denied his right to a fair and impartial jury and a reliable sentencing determination because the trial court denied him an opportunity to adequately voir dire prospective jurors on their death penalty views. In addressing questions concerning the proper scope and application of the voir dire process, we are guided by the following principles.

The standard for determining whether a prospective juror may be excluded for cause due to his or her views on capital punishment is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. (*Wainwright v. Witt* [1985], 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841, followed.)" *State v. Rogers* (1985), 17 Ohio St.3d 174, 17 OBR 414, 478 N.E.2d 984, paragraph three of the syllabus, vacated and remanded on other grounds (1985), 474 U.S. 1002, 106 S.Ct. 518, 88 L.Ed.2d 452. See, also, *State v. Williams* (1997), 79 Ohio St.3d 1, 5, 679 N.E.2d 646, 653.

Additionally, "*voir dire* may constitute reversible error only upon a showing of abuse of discretion by the trial court." *Rogers,* 17 Ohio St.3d at 179, 17 OBR at 418, 478 N.E.2d at 990. Moreover, a trial court has " 'great latitude in deciding what questions should be asked on voir dire.' " *State v. Wilson* (1996), 74 Ohio St.3d 381, 386, 659 N.E.2d 292, 300, quoting *Mu'Min*

v. Virginia (1991), 500 U.S. 415, 424, 111 S.Ct. 1899, 1904, 114 L.Ed.2d 493, 505. See, also, *State v. Beuke* (1988), 38 Ohio St.3d 29, 39, 526 N.E.2d 274, 285 (issues raised in voir dire in criminal cases have long been held to be within the discretion of the trial judge).

Appellant initially contends that the trial court permitted a "death qualifying" question that inadequately assessed potential jurors' views on capital punishment. We disagree.

The death qualifying question generally posed by the prosecutor to a prospective juror in this matter was whether, "[i]n a proper case where the facts warrant it and the law permits it, could you join in signing a verdict form calling for the imposition of the death penalty?" According to appellant, this and similar questions served to identify only those individuals who were opposed to capital punishment in all cases and not those who would impose death in all instances.

Appellant identifies the questioning of prospective jurors Carpenter and Buckmelter as evidence of error. However, both Carpenter and Buckmelter were excused for cause by the trial judge. The purpose of the voir dire is to empanel a fair and impartial jury. In this instance, the voir dire worked as designed. That is, through questioning from the prosecutor, defense counsel, and the trial judge, unqualified jurors are identified and excused. In essence, appellant's contention centers on the expediency with which the trial judge excused prospective jurors Carpenter and Buckmelter and not in the adequacy of the voir dire. In any event, Carpenter and Buckmelter clearly indicated a partiality towards imposing death in all

cases of murder, and both were excused for cause. Therefore, we find no error.

Appellant additionally argues that the trial court refused to allow defense counsel to ask any followup questions to the death-qualifying inquiry. In this instance, appellant relies heavily on *Morgan v. Illinois* (1992), 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492. In *Morgan,* the United States Supreme Court considered whether a state trial court may refuse a defendant's request to question potential jurors during the *voir dire* of a capital case on whether they would automatically impose the death penalty upon conviction of the defendant. As this court has recognized, "[i]n *Morgan*, the United States Supreme Court held that the trial court, at an accused's request, must ask prospective jurors about their views on capital punishment in an attempt to ascertain whether any of them would automatically vote for the death penalty regardless of the circumstances." *State v. Wilson,* 74 Ohio St.3d at 386, 659 N.E.2d at 300. Thus, "a capital defendant must be allowed to identify prospective jurors who have 'predetermined the terminating issue of [the] trial, that being whether to impose the death penalty.' " *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 623, 637, quoting *Morgan v. Illinois*, 504 U.S. at 736, 112 S.Ct. at 2233, 119 L.Ed.2d at 507. Finally, the court in "*Morgan* held that answers to 'general questions of fairness or impartiality' cannot negate a statement by the prospective juror that he or she would automatically vote for death." *State v. Williams* (1997), 79 Ohio St.3d at 7, 679 N.E.2d at 654, quoting *Morgan*, 504 U.S. at 735, 112 S.Ct. at 2233, 119 L.Ed.2d at 506.

Still, as already indicated, "a trial court has 'great latitude in deciding what questions should be asked on voir dire.' " *State v. Wilson*, 74 Ohio St.3d at 386, 659 N.E.2d at 300, quoting *Mu'Min v. Virginia,* 500 U.S. at 424, 111 S.Ct. at 1904, 114 L.Ed.2d at 505. Thus, for example, "*Morgan* does not require judges to allow individual voir dire on separate mitigating factors." *Wilson*, 74 Ohio St.3d at 386, 659 N.E.2d at 301. In *State v. Jones* (2001), 91 Ohio St.3d 335, 338, 744 N.E.2d 1163, 1171, we reaffirmed that "jurors cannot be asked to weigh specific factors until they have heard all the evidence and been fully instructed on the applicable law." See, also, *State v. Dennis* (1997), 79 Ohio St.3d 421, 430, 683 N.E.2d 1096, 1105; *State v. Lundgren* (1995), 73 Ohio St.3d 474, 481, 653 N.E.2d 304, 315; *State v. Bedford* (1988), 39 Ohio St.3d 122, 129, 529 N.E.2d 913, 920.

In this case, the prosecutor and trial court appeared to be unaware of the underlying principle of *Morgan v. Illinois*, decided in June 1992, some nine months before this case was tried in March and April 1993. Thus, the trial court at times expressed the incorrect view that death qualification in voir dire concerned only whether a prospective juror could vote for the death penalty, not whether he or she would automatically impose it. For example, when defense counsel argued that jurors had to "show a willingness to consider mitigating factors and to follow the law," the court responded, "This phase of * * * voir dire [concerns] whether or not they would be able to impose a death penalty." The court believed that death qualification "had nothing to do with mitigation."

We disagree, however, with appellant's assessment that the trial court prevented appellant from engaging in any meaningful inquiry of the jurors' impartiality and thus their ability to act as triers of fact. Defense counsel objected for the record in regard to the trial court's apparent confusion regarding the teachings of *Morgan*. Arguing his objection, defense counsel asked that the record reflect that "we wish to question each one of these jurors individually about whether they will follow the law and consider other penalties as well as the death penalty." Further, defense counsel requested that they "be able to ask these [prospective jurors] will you follow the law, will you consider mitigating factors as well." After reviewing the transcript of proceedings of the voir dire, we find that defense counsel was, in fact, permitted to ask these and similar questions. Thus, in spite of the mistaken views of the prosecutor and trial court, the voir dire of prospective jurors indicates that appellant had an opportunity to discover those jurors who would automatically vote for the death penalty regardless of mitigation. The following is typical of the defense voir dire of sitting jurors.

"Mr. Hershey: Mrs. Harries, if the Court also instructed you that you are to consider three possible penalties, * * * a sentence of a minimum of twenty years to life, * * * a minimum of thirty years to life, * * * or the death penalty, do you feel you could follow that instruction?

"Mrs. Harries: Yes, I could.

"Mr. Hershey: And if the Judge instructs you that you are to consider the aggravating factors in this case as well as the mitigating factors * * * and that you can

only find the death penalty appropriate if the aggravating factors exceed the mitigating factors, do you also feel you can follow that instruction?

"Mrs. Harries: Yes.

"Mr. Hershey: Do you also feel that you can remain open minded about the penalties in this case?

"Mrs. Harries: Yes, yes.

"Mr. Hershey: We'll pass for cause."

The key issue here concerns the opportunity of defense counsel to determine the competence of jurors who actually sat, and appellant fails to show any restrictions that prejudiced him as to those jurors. For example, appellant cites the voir dire of sitting juror Griffo. But the trial court did not improperly limit the voir dire of Griffo. In response to brief questions by the state, Griffo agreed that she would follow instructions to consider three possible penalties. Defense counsel was then permitted to question Griffo further without objection or interruption.

The voir dire of still other sitting jurors demonstrated a fair opportunity to identify any juror who would automatically vote for the death penalty. Other than Griffo, appellant does not complain about the voir dire of any sitting juror. Nor did he challenge for cause those who sat as jurors.

In fact, at the start of the penalty phase, the trial court again voir dired the jury to ensure that jurors had no fixed view on the penalty:

"Court: Ladies and Gentlemen, * * * I would like to know at this time if any of you have now formed such

a fixed opinion on what the sentence should be in this case or have so closed your mind that you could not hear and fairly consider evidence favorable to the defendant which might cause you to conclude that the death penalty is not appropriate in this case. First I'll ask if you understand my question. If any of you don't, raise your hand. (No response.)

"Court: Not hearing any response I take it that you have not formed such a fixed opinion on what the sentence should be in this case or have so closed your mind that you could not hear and fairly consider evidence favorable to the defendant which might cause you to conclude that the death penalty is not appropriate in this case. So I take it that's your state of mind at this time.

"Now, * * * [could you] fairly consider the evidence which the State might present in an effort to convince you that the death penalty is appropriate in this case? If you have any questions as to that * * * let us know now.

"I take it then that you are in a frame of mind that you could fairly consider the evidence which the State might present in an effort to convince you that the death penalty is appropriate in this case."

Appellant complains about the voir dire of prospective juror DeLaurentis. However, DeLaurentis never sat as a juror because defense counsel peremptorily excused him. Moreover, the trial court did not restrict the defense voir dire of DeLaurentis. DeLaurentis agreed to follow the trial court's instructions and consider the three options as to available penalties. When asked if he could consider "mitigating factors," DeLaurentis stated that he did

not understand those. The court explained that "[m]itigating in that sense would mean to lessen the impact of the penalty." DeLaurentis agreed with defense counsel that he could "keep an open mind and follow the Court's instructions as to all the elements of this case." Defense counsel did not challenge DeLaurentis for cause or ask to question him further.

Still, the trial court came dangerously close, at the prosecutor's urging, to improperly restricting the voir dire. The trial court could have readily explained the concept of mitigation. Jurors can be told, for example, that mitigating factors can relate to the nature and circumstances of the offense or the history, character, and background of the accused, his age, or other factors known to be relevant. See, *e.g., State v. Getsy* (1998), 84 Ohio St.3d 180, 200, 702 N.E.2d 866, 886. The trial court can easily do this while avoiding inquiry about specific mitigating factors as proscribed in *State v. Jones*, 91 Ohio St.3d at 338, 744 N.E.2d at 1171.

Moreover, contrary to his argument, appellant is required to show that his jury was tainted in order for his sentence to be vacated. In its discussion of *Ross v. Oklahoma* (1988), 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80, the *Morgan* court makes clear that constitutional error will arise in this instance only when the trial court permits an obviously unqualified juror to sit on the jury that invokes the death penalty and defense counsel objected to the trial court's failure to remove that juror for cause. *Morgan,* 504 U.S. at 728-729, 112 S.Ct. at 2229, 119 L.Ed.2d at 502. Appellant has not demonstrated any restrictions on the voir dire of sitting jurors in this case that

precluded counsel from exposing "faults that would render a juror ineligible. * * * *Morgan* imposes no further requirements on voir dire." *State v. Wilson*, 74 Ohio St.3d at 386, 659 N.E.2d at 301.

Based on the foregoing, we find that the jury herein consisted of a panel of fair and impartial jurors. Accordingly, Proposition of Law No. I is rejected.

III

Proposition of Law No. II

In his second proposition of law, appellant contends that the trial court erroneously instructed the jury regarding the factors to consider in recommending punishment. Initially, we note that appellant did not request different penalty instructions or object to those given at trial. Appellant's "failure to object to a jury instruction constitutes a waiver of any claim of error relative thereto, unless, but for the error, the outcome of the trial clearly would have been otherwise." (Citation omitted.) *State v. Underwood* (1983), 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332, syllabus. The trial court's penalty instructions did not rise to the level of plain error.

Appellant first contends that the trial court erred by failing to instruct the jury that only one aggravating circumstance could be weighed against the evidence of mitigation on each individual count of aggravated murder. According to appellant, the result was that the jury grouped the aggravating circumstances from both counts and weighed them against appellant's single set of mitigation evidence.

The court in *State v. Cooey* (1989), 46 Ohio St.3d 20, 544 N.E.2d 895, paragraph three of the syllabus, specified, "When a capital defendant is convicted of more than one count of aggravated murder, the penalty for each individual count must be assessed separately. Only the aggravating circumstances related to a given count may be considered in assessing the penalty for that count."

Despite appellant's contention, we find that the trial court's instructions satisfied the dictates of *Cooey*. The trial court correctly instructed the jury on the single aggravating circumstance in each separate count. The court instructed the jury that "[t]he verdicts in each count and their respective specifications to each count constitute separate and distinct matters." Further, the court instructed the jury that it "must consider each verdict on each count and the specifications to each count and the evidence applicable to each count separately and you must state your decision and finding to each count uninfluenced by your verdict on the other count. You shall consider the evidence in each charge fairly and carefully."

The trial court did make references, at various times, to "aggravating circumstances" in its instructions. For instance, the trial court indicated that the state "has the burden of proving beyond a reasonable doubt that the aggravating circumstances of which the Defendant * * * was found guilty outweigh the mitigating factors before you may return a sentence of death" and also that "the aggravating circumstance or circumstances is precisely set out in specification number one to Count One, to-wit: that

[defendant] was the principal offender in the commission of the aggravated murder * * * while * * * committing kidnapping." However, we find that these and such similar references by the trial court were not equivalent to an instruction to weigh the separate aggravating circumstances together. The court did not mislead the jury into multiplying or grouping the aggravating circumstances. See, *e.g.*, *State v. Palmer* (1997), 80 Ohio St.3d 543, 573-574, 687 N.E.2d 685, 710-711. Here, the jury returned separate verdicts for each aggravated murder count, and each verdict form referred precisely to the single specification in each count. Thus, the instructions complied with paragraph three of the syllabus in *Cooey*, 46 Ohio St.3d 20, 544 N.E.2d 895.

Second, appellant argues that the court "told the jury that the quantity of aggravating circumstances was relevant in its deliberations," and, as a result, the jury understood that the number of aggravating circumstances was an important consideration in its determination of the appropriate penalty. However, our review of the record reveals that the trial court emphasized just the opposite to the jury. The court instructed the jurors that "[i]t is the quality of the evidence that must be given primary consideration" and further noted that "[i]t *is not* the quantity of the aggravating circumstances versus the quantity of the mitigating factors which is to be the basis of your decision. The quality or importance of the mitigating factors and the aggravating circumstances must also be considered." (Emphasis added.) Such an instruction involves no prejudicial error. See *State v. Goodwin* (1999), 84 Ohio St.3d 331, 348, 703 N.E.2d 1251, 1266.

Third, appellant argues that when a defendant is convicted of two counts of aggravated murder for the killing of a single victim, the trial court should require the state to elect to proceed on a single murder count before beginning the penalty phase. However, the court's failure to merge the two counts at sentencing "represents a 'procedural' error that is 'harmless beyond a reasonable doubt.' " *State v. O'Neal* (2000), 87 Ohio St.3d 402, 415, 721 N.E.2d 73, 87, quoting *State v. Moore* (1998), 81 Ohio St.3d 22, 39, 689 N.E.2d 1, 17. Thus, we find no error here in the jury's consideration of two aggravated murder counts for a single victim. *State v. Woodard* (1993), 68 Ohio St.3d 70, 78-79, 623 N.E.2d 75, 81; *State v. Waddy* (1992), 63 Ohio St.3d 424, 447, 588 N.E.2d 819, 836. Moreover, and in any event, the court of appeals mooted this issue when it upheld the death penalty, after independently reassessing the sentence, solely on the basis of Count One of the indictment and the R.C. 2929.04(A)(7) specification relating to kidnapping.

Fourth, appellant avers that the instructions and verdict forms allowed the jury to improperly weigh both prior calculation and design and his principal offender status to determine the penalty. See *State v. Penix* (1987), 32 Ohio St.3d 369, 371, 513 N.E.2d 744, 746. Appellant is incorrect. In fact, the indictment, the trial and penalty instructions, and the jury's findings as to the death specifications all followed the statutory language set forth in R.C. 2929.04(A)(7) and specified alternatives, *i.e.*, that appellant "was the principal offender" in the murder, "*or, if not*," committed the murder with prior calculation and design. (Emphasis added.) This court has repeatedly declined to find

prejudicial error from similar instructional language. See, *e.g.*, *State v. O'Neal*, 87 Ohio St.3d at 415-416, 721 N.E.2d at 87-88; *State v. Goodwin*, 84 Ohio St.3d at 349, 703 N.E.2d at 1266-1267; *State v. Burke* (1995), 73 Ohio St.3d 399, 405, 653 N.E.2d 242, 248.

Fifth, appellant argues that this court's independent sentence reassessment cannot cure penalty instructional errors. However, our independent reassessment of the sentence can, in fact, cure penalty-phase instructional errors. See, *e.g.*, *State v. Goodwin*, 84 Ohio St.3d at 348-349, 703 N.E.2d at 1266; *State v. Cook* (1992), 65 Ohio St.3d 516, 527, 605 N.E.2d 70, 83. Moreover, appellant's failure to object to the trial court's instructions waived all but plain error, and no plain error occurred.

Finally, appellant complains that the trial court's sentencing opinion improperly multiplied the single R.C. 2929.04(A)(7) death specification into multiple aggravating circumstances. The language of the trial court's opinion does not support that claim. Further, as already indicated, the court of appeals independently reassessed the death penalty based on a single aggravated murder count and death penalty specification, which moots that issue. Furthermore, our review can also cure such an error. *State v. Fox* (1994), 69 Ohio St.3d 183, 191, 631 N.E.2d 124, 131.

Accordingly, Proposition of Law No. II is not well taken.[2]

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[2] Appellant's complaint in this proposition of law regarding the prosecutor's arguing "non- statutory aggravating circumstances to the jury and repeatedly referr[ing] to the aggravating

IV

Proposition of Law No. III

In Proposition of Law No. III, appellant argues that the trial court wrongfully excluded mitigating evidence related to his ability to peacefully coexist with other inmates. Appellant notes that during the penalty phase, the trial court did not allow a defense psychologist, Dr. Donald Gordon, to answer the question: "If [Twyford] would be returned to prison do you feel he poses a threat to another inmate?"

Despite the state's arguments, the question was relevant. R.C. 2929.04(C) grants "great latitude" to an accused in the presentation of mitigating evidence during death penalty hearings. A " 'sentencer, in all but the rarest kind of capital case, [must] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record * * * that the defendant proffers as a basis for a sentence less than death.' " (Emphasis *sic.*) *State v. Jenkins* (1984), 15 Ohio St.3d 164, 189, 15 OBR 311, 332, 473 N.E.2d 264, 288, quoting *Lockett v. Ohio* (1978), 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973, 990. See, also, *Parker v. Dugger* (1991), 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (court erred in not considering nonstatutory mitigating evidence); *Skipper v. South Carolina* (1986), 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (error to exclude evidence of defendant's adjustment to incarceration); see, *e.g., State v. Smith* (1997), 80 Ohio St.3d 89, 121-122, 684

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circumstances in the plural" is also raised in Proposition of Law Number VI. It will be discussed and addressed within the context of appellant's prosecutorial misconduct claims raised therein.

N.E.2d 668, 696. Thus, the trial court erred when it sustained the state's objection. Dr. Gordon was qualified by education and familiarity with the case to express an opinion on appellant's likely adjustment to prison, and the answer to such a question was relevant.

Nonetheless, no prejudicial error exists. First, for error to occur because evidence is excluded "(1) the exclusion of such evidence must affect a substantial right of the party, *and* (2) the substance of the excluded evidence was made known * * * by proffer *or* was apparent from the context within which questions were asked." (Emphasis *sic.*) Evid.R. 103(A)(2); *State v. Gilmore* (1986), 28 Ohio St.3d 190, 28 OBR 278, 503 N.E.2d 147, syllabus. Accord *State v. Mitts* (1998), 81 Ohio St.3d 223, 227, 690 N.E.2d 522, 527; *State v. Davie* (1997), 80 Ohio St.3d 311, 327, 686 N.E.2d 245, 261.

The court can ordinarily eliminate the effect of any exclusion of evidence by independently reassessing the penalty in light of the excluded evidence. See *State v. Landrum* (1990), 53 Ohio St.3d 107, 115, 559 N.E.2d 710, 721. At trial, appellant never made a proffer of exactly what Dr. Gordon would say. In most instances, the lack of a proffer would preclude the court from determining the significance of the excluded testimony.

However, here appellant presented other evidence fully reflecting Dr. Gordon's views without interference. For instance, Dr. Gordon testified that appellant did not have violent tendencies except to protect children who were threatened. If an adult "was trying to intimidate him, * * * he would be aggressive

back but not violent. * * * [H]e would do what he had to do to get them to back off. But he wouldn't be cruel or violent." Dr. Gordon discussed at length the nature of appellant's past crimes, his past incarcerations, the lack of violence in his background, and his sense of compassion for children and his need to protect them. In view of Dr. Gordon's testimony, sustaining the state's objection was harmless error. Hence, Proposition of Law No. III lacks merit.

V

Proposition of Law No. IV

Appellant's arguments concerning the proportionality and appropriateness of his death sentence are addressed in our discussion in Part XIV.

VI

Proposition of Law No. V

In Proposition of Law No. V, appellant challenges the sufficiency of the evidence necessary to support a conviction for aggravated robbery (Count Four), which served as the underlying felony for aggravated murder in Count Two of the indictment. Based upon his claim of insufficient evidence, appellant contends that his convictions for aggravated murder and attached capital specifications must be set aside.

In reviewing a record for sufficiency, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus,

following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

Appellant argues that the evidence does not establish that he stole anything. However, the jury could reasonably find that he and Eikelberry stole Franks's wallet and hunting license. In his confession statement, appellant admits, "I whent (*sic*) through his [Franks's] pockets and took his walet (*sic*) out and gave it to Danny [Eikelberry.] [H]e stuck it in his pocket! Danny [then] * * * ripped [Franks's hunting tag] off[.]" Crime scene witnesses verified that they discovered Franks's identity through a pocket diary, and none mentioned seeing a wallet or hunting license.

Appellant also argues that no robbery occurred because Franks was already dead when the items were stolen. This court has consistently rejected arguments that no robbery occurred because the murder victim was already dead at the time of the theft. See, *e.g.*, *State v. Biros* (1997), 78 Ohio St.3d 426, 450, 678 N.E.2d 891, 911; *State v. Rojas* (1992), 64 Ohio St.3d 131, 139, 592 N.E.2d 1376, 1384; *State v. Smith* (1991), 61 Ohio St.3d 284, 290, 574 N.E.2d 510, 516.

Moreover, in this case, the death penalty does not hinge upon finding appellant guilty of the offense of aggravated robbery. The court of appeals affirmed the death penalty only on the basis of Count One, the felony-murder involving kidnapping and the R.C. 2929.04(A)(7) specification charging murder during a kidnapping. Thus, the sufficiency of evidence as to Count Two, felony murder, is a moot issue. Any sufficiency of evidence claim as to aggravated robbery

would affect only Count Four, the aggravated robbery count.

Therefore, Proposition of Law No. V is not well taken.

VII

Proposition of Law No. VI

In Proposition of Law No. VI, appellant raises several instances of alleged prosecutorial misconduct. The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether the remarks prejudicially affected the accused's substantial rights. *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293, 300, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14-15, 14 OBR 317, 318-319, 470 N.E.2d 883, 885-886. The touchstone of this analysis "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, 947, 71 L.Ed.2d 78, 87.

Appellant first contends that the prosecutor remarked on appellant's decision not to testify. In the guilt phase of appellant's trial, the prosecutor's closing argument consisted, in part, of the following:

"As you know, opening statements, arguments of Counsel are not evidence. Mr. Vukelic [defense counsel] repeated [in his closing statement] what he told you in opening statement. What he [defense counsel] told you and what I told you is [*sic*] not evidence.

"Athena Cash was a witness, Florence Logan, Gerry Mroczkowski, Mr. Roberts from BCI, Greg Helmick, Lieutenant Noble, Chief Denvir, Doctor

Metcalf, Doctor Fardal, Mr. Haggarty, Sheriff. Those are witnesses.

"Now he [defense counsel] went through again repeating his opening statement. He [defense counsel] reminded you how he told you how Raymond— how Raymond Twyford was about the summer of 1992. He told you that. Did you hear anything from the witness stand?

"And he explained to you in his opening statement how Raymond cared for these children. Nice statement. He [defense counsel] didn't take the stand. Did you hear anything from the witness stand?

"He [defense counsel] told you how there was cooking and cleaning and cared for and home life and father image. And did you hear any of that from the witness stand?

"You hold us [defense counsel and prosecutor] to whether we've proven what * * * we were required to prove. That's why statements of Counsel are not evidence, only the ones that come from the witness stand."

We note, initially, that appellant failed to object at trial regarding this particular conduct of the prosecutor. Thus, appellant has waived all but plain error. *State v. Wade* (1978), 53 Ohio St.2d 182, 7 O.O.3d 362, 373 N.E.2d 1244, paragraph one of the syllabus. See, also, Crim.R. 52(B).

Clearly, it is improper for a prosecutor to comment on the defendant's failure to testify. *Griffin v. California* (1965), 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106; *State v. Cooper* (1977), 52 Ohio St.2d 163, 173, 6 O.O.3d 377, 382-383, 370 N.E.2d 725, 732-733.

In order to determine whether there was a violation of defendant's Fifth Amendment rights, we must consider " 'whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' " (Emphasis deleted.) *State v. Webb* (1994), 70 Ohio St.3d 325, 328, 638 N.E.2d 1023, 1028, quoting *Knowles v. United States* (C.A.10, 1955), 224 F.2d 168, 170.

Arguably, the comments by the prosecutor in this instance can be read as an impermissible inference of guilt regarding the defendant's decision not to testify, and we in no way condone such tactics. However, isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning. *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431, 439; *State v. Hill* (1996), 75 Ohio St.3d 195, 204, 661 N.E.2d 1068, 1078. In this light, we do not find that the prosecutor acted improperly. Counsel is entitled to latitude in closing arguments as to what the evidence has shown. *State v. Smith,* 80 Ohio St.3d at 111, 684 N.E.2d at 689; *State v. Loza* (1994), 71 Ohio St.3d 61, 78, 641 N.E.2d 1082, 1102. The prosecutor merely pointed out differences between what defense counsel said in their opening statement versus what the evidence proved. The prosecutor did not refer to appellant's choice not to testify or even to matters solely within appellant's knowledge. For instance, Sonny or her daughters could have testified about appellant's household assistance. Cf. *State v. Fears* (1999), 86 Ohio St.3d 329, 336, 715 N.E.2d 136, 145-146; *State v. Webb*, 70 Ohio St.3d at 328-329, 638 N.E.2d at 1028-1029.

Even assuming *arguendo* that the prosecutor's comments were improper, such comments neither materially prejudiced appellant nor denied him a fair trial. Appellant presented no evidence at the trial phase, and evidence of his guilt was compelling. In addition, the court instructed the jury not to consider appellant's decision not to testify "for any purpose," and "[a] jury is presumed to follow the instructions given to it by the trial judge." *Loza,* 71 Ohio St.3d at 75, 641 N.E.2d at 1100.

Appellant raises several additional contentions regarding prosecutorial misconduct. First, appellant contends that the prosecution erred by mentioning certain objects (*i.e.,* two knives, a saw, and a hatchet) in its opening statement and by presenting evidence about these objects. Second, appellant complains about certain comments by the prosecutor during the guilt phase, specifically the prosecutor's commenting that evidence would show that appellant "terrorized this victim," that he "restrained" him, "mutilated the body," or that appellant "confessed to the murder and mutilation" of Franks, and that Franks, who lay on the ground after being shot, "was brutalized and * * * dehumanized." Third, appellant complains that the prosecutor argued facts as nonstatutory aggravating circumstances and "argued for the death penalty based on the 'heinous, atrocious, or cruel' nature of the crime." Fourth, appellant argues that the prosecutor shifted the burden of proof to an incorrect standard by referring to whether mitigating factors outweighed aggravating circumstances. Fifth, appellant argues that the prosecutor's argument improperly suggested that the jury should individually weigh each mitigating factor against the aggravating

circumstances. Finally, appellant asserts that the prosecutor discounted the role of mitigating evidence when he indicated that such evidence did not excuse or justify the crime.

We have reviewed these arguments in their entirety, and none is supported by a fair and impartial review of the record. Trial counsel failed to object to each and every one of these purported acts of prosecutorial misconduct and thus have waived all but plain error.[3] We find that "[n]either alone nor in the aggregate did these [asserted] errors have an arguable effect on the outcome of the trial." *State v. Slagle* (1992), 65 Ohio St.3d 597, 605, 605 N.E.2d 916, 925. In sum, appellant received a fair trial, and misconduct by the prosecutor did not permeate the trial.

Accordingly, we reject appellant's Proposition of Law No. VI. *State v. Landrum*, 53 Ohio St.3d at 111, 559 N.E.2d at 717; *State v. Johnson* (1989), 46 Ohio St.3d 96, 102, 545 N.E.2d 636, 642.

VIII

Proposition of Law No. VII

In his seventh proposition of law, appellant argues that he was denied a fair trial and a fair sentencing

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[3] In regard to the physical evidence, *e.g.,* two knives, a saw, and a hatchet, found in Joyce Sonny's car when appellant was first stopped, we note that, although appellant's trial counsel failed to raise an objection to references or testimony about these objects or to their being marked as state's exhibits, counsel did object to their being admitted as evidence at the close of the state's case and the exhibits were not admitted. We further note that appellant's trial counsel was able to cross-examine Sheriff Abdalla regarding these items.

determination because the trial court erroneously admitted gruesome and cumulative photographs. According to appellant, these photographs served no purpose other than to invoke the sympathy of the jurors toward the victim and inflame the jury's emotions against appellant. We disagree.

Pursuant to Evid.R. 403 and 611(A), the admission of photographs is left to the sound discretion of the trial court. *State v. Landrum,* 53 Ohio St.3d at 121, 559 N.E.2d at 726. "Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number." *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768, paragraph seven of the syllabus. See, also, *State v. Morales* (1987), 32 Ohio St.3d 252, 257-258, 513 N.E.2d 267, 273-274. For the following reasons, we find that the trial court did not abuse its discretion.

Appellant refers specifically to state's exhibits 8, 9, 14, 15, 16, 24, 26, 27, and 28. However, appellant made no objection at trial to exhibits 9 and 24 and hence can complain only of plain error as to those exhibits. *State v. Taylor* (1997), 78 Ohio St.3d 15, 26, 676 N.E.2d 82, 93. Exhibit 9, a photo of Franks's baseball cap, purportedly shows brain tissue, but, if so, it is not noticeable. Exhibit 24, a nongruesome side view of the cowboy boot, does not display the hands inside. Thus, no plain error resulted from admitting exhibits 9 and 24.

At trial, appellant objected to the remaining exhibits that he now challenges. However, no error occurred. These photos portrayed Franks's body in relation to his surroundings and illustrated the testimony of Sheriff Abdalla, the coroner, and others who saw the crime scene. Exhibits 8, 14, 15, 27, and 28, for example, depicted the wounds inflicted upon Franks and helped to prove the killer's intent and the lack of accident or mistake. See *State v. Goodwin,* 84 Ohio St.3d at 342, 703 N.E.2d at 1262; *State v. Mason* (1998), 82 Ohio St.3d 144, 158- 159, 694 N.E.2d 932, 949. These photos 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, 1058.

The photos were limited in number, noncumulative, and each photograph had substantial probative value and relevance. After the defense objected, the trial court excluded from evidence the most gruesome photograph, exhibit 16. After a defense objection, the state did not offer into evidence twenty-seven autopsy photographs. In other cases involving arguably more gruesome photographs, the court has found no abuse of discretion. See, *e.g.*, *State v. Smith,* 80 Ohio St.3d at 108-109, 684 N.E.2d at 687-688; *State v. Biros*, 78 Ohio St.3d at 443-444, 678 N.E.2d at 907-908.

Even if the trial court did err in admitting these photographs, any prejudice was harmless in view of the compelling evidence of appellant's guilt. As to the penalty phase of appellant's trial, the trial court did not err in allowing these photographs into evidence. *State v. DePew* (1988), 38 Ohio St.3d 275, 282-283, 528

N.E.2d 542, 551-552. Moreover, this court, by its independent reassessment of the sentence, can minimize any improper impact on the sentence arising from the admittance of these photographs. *State v. Davie,* 80 Ohio St.3d at 318, 686 N.E.2d at 255; *State v. Lundgren*, 73 Ohio St.3d at 486, 653 N.E.2d at 318.

Thus, Proposition of Law No. VII is denied.

IX

Proposition of Law No. VIII

Appellant argues in his eighth proposition of law that the trial court erred by permitting evidence of a prior criminal act committed by appellant, thereby depriving him of a fair trial and sentencing determination. We find no merit to appellant's contentions.

In Count Five of the indictment, appellant was charged with knowingly possessing a weapon while under disability in violation of R.C. 2923.14 because he had previously been convicted of a felony of violence: burglary. To prove an essential element of that offense, to which appellant had pled not guilty, the state was required to prove this felony conviction. The state did so with an appropriate record of the conviction and testimony from a parole officer. See, *e.g.*, *State v. Smith* (1990), 68 Ohio App.3d 692, 695-96, 589 N.E.2d 454, 457.

Appellant contends that his counsel preserved this issue by asking the trial judge to determine the existence of this conviction at sentencing. Appellant, however, is mistaken. The pretrial motion to which counsel refers concerned an entirely different issue, one relating to penalty enhancement specifications.

The kidnapping (Count Three) and aggravated robbery (Count Four) charges against appellant included penalty enhancement specifications. Before trial, counsel did request that the court, "pursuant to Ohio Revised Code Section 2941.142 to determine the existence of prior felony convictions at the sentencing hearing and that the jury not be permitted to consider the evidence of prior convictions."

But R.C. 2941.142, since repealed, applied only to situations where a penalty for a felony offense under R.C. 2929.11 was enhanced because of the existence of a prior felony conviction.[4] The court in fact followed

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[4] Former R.C. 2941.142 provided:
"Imposition of a term of actual incarceration upon an offender pursuant to division (B)(1)(b), (2)(b), or (3)(b) of section 2929.11 of the Revised Code because the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender has previously been convicted of or pleaded guilty to such an offense. Such a specification shall be stated at the end of the body of the indictment, count, or information * * *.
"* * *
"A certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar is sufficient to prove the prior conviction. If an indictment, count in an indictment, or information that charges a defendant with an aggravated felony contains such a specification, the defendant may request that the trial judge, in a case tried by a jury, determine the existence of the specification at the sentencing hearing." Am.Sub.S.B. No.

R.C. 2941.142 in this case. At appellant's request, the trial court did not submit those penalty enhancement specifications to the jury, and the jury made no findings regarding them. Instead, the trial court, as requested, referred to those penalty enhancement specifications only at sentencing.

Former R.C. 2941.142 does not apply to Count Five because the prior conviction was a direct element of the principal offense charged. The state was entitled to prove that element of Count Five as it did. Moreover, contrary to appellant's assertions, defense counsel never objected to this evidence, requested a limiting instruction, or objected to the lack of a limiting instruction. Having failed to object to the evidence or instructions, appellant waived all but plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332, syllabus. See, also, Crim.R. 30(A). No error occurred.

Accordingly, appellant's Proposition of Law No. VIII lacks merit.

X

Proposition of Law No. IX

In Proposition of Law No. IX, appellant argues that the trial court erred when it failed to suppress his confession. Appellant contends that his *Miranda* waiver was invalid because it was obtained

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210, 140 Ohio Laws, Part I, 583, 602- 603, repealed by Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7136, 7138, effective July 1, 1996.

unknowingly and also because his confession was the product of coercion.

"In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards* (1976), 49 Ohio St.2d 31, 3 O.O.3d 18, 358 N.E.2d 1051, paragraph two of the syllabus, vacated in part on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155. The same considerations apply to whether appellant understood and voluntarily waived his *Miranda* rights. *State v. Green* (2000), 90 Ohio St.3d 352, 366, 738 N.E.2d 1208, 1226.

First, appellant claims that his confession was not made knowingly and intelligently because he was intoxicated by alcohol and under the influence of drugs at the time that he was arrested and agreed to waive his rights. Second, appellant claims that his confession was coerced because police officers threatened to arrest Joyce Sonny and her children unless he cooperated.

Appellant's claim that he was intoxicated with alcohol and under the influence of drugs is contradicted by the fact that appellant wrote out a legible and coherent three-page confession in which he recalled days-old events and articulated, in detail, the motivation, planning, and execution of Franks's murder. No evidence was submitted to suggest that police officers physically abused appellant, threatened

him, or made any promises during questioning. Furthermore, appellant was twenty-nine years old when questioned and was experienced with the criminal justice system.

Moreover, the evidence indicates that appellant was verbally advised of his *Miranda* rights on two separate occasions. Appellant signed a waiver of rights form, acknowledging that he understood his rights and that he knowingly and voluntarily waived those rights. In addition, we note that there was little incentive to coerce appellant, since at the time of the alleged coercion, Sheriff Abdalla had already obtained a statement from Eikelberry implicating appellant in Franks's murder. In short, there is no credible evidence that appellant's confession was coerced.

In *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972, 982, the court noted that "[a]t a suppression hearing, the evaluation of evidence and the credibility of witnesses are issues for the trier of fact." In *State v. Keene* (1998), 81 Ohio St.3d 646, 656, 693 N.E.2d 246, 257, the court recognized the need to defer to a trial court's factual findings that are supported by the record. The record of appellant's suppression hearing contains ample evidence that appellant's confession was given knowingly, intelligently, and voluntarily. Therefore, we find that the trial court did not err in failing to suppress the confession.

Accordingly, appellant's Proposition of Law No. IX lacks merit and is denied.

XI

Proposition of Law No. X

Appellant contends that when a juror is excused after the rendering of the guilt phase verdict and replaced by an alternate juror prior to the start of the penalty phase, a capital defendant may not be sentenced to death. Appellant's tenth proposition of law is rejected on the authority of *State v. Hutton* (1990), 53 Ohio St.3d 36, 559 N.E.2d 432, paragraphs two and three of the syllabus.

XII

Proposition of Law No. XI

In his eleventh proposition, appellant argues that trial counsel were ineffective because they elicited evidence about appellant's sexual misconduct with Joyce Sonny's daughters, Christina and Terri. In cross-examining Sheriff Abdalla, appellant's trial counsel attempted to develop the basic defense theme that appellant killed Franks because appellant believed that Franks had raped Christina Sonny. However, Sheriff Abdalla had interviewed Joyce and her daughters, who reportedly had told Abdalla about appellant's alleged sexual activities with both Sonny daughters.

Appellant complains that counsel should never have elicited such reported evidence of misconduct. We agree that trial counsel used poor judgment in using open-ended questions while cross-examining Abdalla. Counsel's cross-examination elicited serious uncharged misconduct regarding appellant's sexual activity with Joyce's children. In response to the defense claim, the state contended that appellant

acted more from jealousy than revenge because he had been sexually active with both daughters. Such evidence undermined the defense theory that appellant killed Franks simply to punish Franks for raping Christina and to protect Joyce's children.

The court of appeals indicated that given the defense strategy, testimony that appellant was involved in sexual activity with Joyce's children was inevitable. That rationale assumes that, first, the state intended to introduce such evidence, and, second, such evidence was admissible. The court of appeals described it as counsel's "difficult dilemma."

Yet, the prosecution did not seek to introduce evidence at the guilt phase that appellant had sex with Joyce's children. Nor did the prosecution call either of Joyce's children to attempt to prove this point, although the state had asked Sheriff Abdalla questions on redirect after appellant's counsel had introduced the subject. The evidence on this point at trial consisted only of otherwise inadmissible hearsay statements to Abdalla. Moreover, the defense introduced no evidence during the guilt phase, and thus the state was unable to introduce such misconduct through cross-examination or rebuttal evidence. Thus, it was totally unnecessary for the defense to introduce such harmful testimony of appellant's reported misconduct at the guilt phase.

Reversal of convictions for ineffective assistance of counsel 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, 104 S.Ct. 2052, 80

L.Ed.2d 674. Accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

Eliciting testimony regarding appellant's reported misconduct with Joyce's children through open-ended questioning of one of the state's most important witnesses was inexplicable. Moreover, counsel could have waited until the penalty phase before assessing whether such testimony was absolutely necessary. In this regard, the record does not show that either child was available and willing to testify or what their testimony would have been.

Admittedly, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, *supra,* at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. However, we find that counsel's open-ended cross-examination of Sheriff Abdalla represented deficient performance. No reasonable defense trial tactics or strategy would support eliciting hearsay evidence that appellant had sex with these children. This evidence lacked both relevance and any benefit for appellant at the guilt phase. Under the circumstances, counsel's performance fell "below an objective standard of reasonable representation." *Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus.

However, even if the cross-examination reflected deficient performance, appellant fails to establish prejudice under the *Strickland* test. The jury would inevitably have found appellant guilty as charged. First, forensic evidence linked the shell casings at the murder scene to the rifle found in Joyce Sonny's living room. Second, appellant wrote out a confession

admitting to robbing, kidnapping, and killing Franks, and he also displayed detailed knowledge of how the crime was planned and carried out. Third, counsel at trial conceded that appellant did not contest many of the facts and that appellant and Eikelberry had "killed Richard Franks."

Moreover, any deficient performance at the guilt phase did not reasonably affect the penalty phase. As part of the defense penalty-phase strategy, appellant testified about his life and the events leading to the killing, including his motive. Appellant denied sexual activity with the daughters, explained away his prior admissions, and admitted that he had, indeed, put a "hickey" or "sucker bite" on Terri Sonny's neck. As a result, the state cross- examined appellant about his reason for killing Franks and delved into assertions about appellant's own sexual activity with the children.

Finally, prejudice is not established, since disclosure of this evidence was probably inevitable at the penalty phase, given appellant's strong reliance on the claim that he killed Franks because Franks had raped Christina. Appellant has thus failed to show by "a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. Even if we found that evidence of appellant's sexual activity with the children should never have been presented to the jury, the effect of this error can be corrected by our independent reassessment of the sentence. See, *e.g.*, *State v. Davie*, 80 Ohio St.3d at 322, 686 N.E.2d at

258; *State v. Landrum*, 53 Ohio St.3d at 115, 559 N.E.2d at 721.

Appellant also argues in this proposition of law that his counsel should have further questioned prospective jurors in voir dire by asking more questions on pretrial publicity, the presumption of innocence, and their status as relatives of crime victims. We have considered these instances of alleged ineffectiveness of trial counsel and find that appellant has failed to satisfy his burden of establishing ineffective assistance under the standards set forth in *Strickland,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

XIII

Propositions of Law Nos. XII and XIII

Appellant's challenge in Proposition of Law No. XII to the court's "reasonable doubt" instruction is summarily rejected. See *State v. Jones* (2000), 90 Ohio St.3d 403, 417, 739 N.E.2d 300, 316; *State v. Van Gundy* (1992), 64 Ohio St.3d 230, 594 N.E.2d 604; *State v. Nabozny* (1978), 54 Ohio St.2d 195, 8 O.O.3d 181, 375 N.E.2d 784, paragraph two of the syllabus. We also summarily reject appellant's contention, also raised in Proposition of Law No. XII, that the trial court erred in its instruction to the jury regarding appellant's purpose to commit the crime. See, *e.g.*, *State v. Stallings* (2000), 89 Ohio St.3d 280, 291, 731 N.E.2d 159, 172; *State v. Getsy*, 84 Ohio St.3d at 196, 702 N.E.2d at 883; *State v. Loza*, 71 Ohio St.3d at 81, 641 N.E.2d at 1104.

We further summarily reject appellant's Proposition of Law No. XIII challenging the

constitutionality of Ohio's death penalty statute. *State v. Carter* (2000), 89 Ohio St.3d 593, 607, 734 N.E.2d 345, 357-358; *State v. Clemons* (1998), 82 Ohio St.3d 438, 454, 696 N.E.2d 1009, 1023; *State v. Poindexter* (1988), 36 Ohio St.3d 1, 520 N.E.2d 568, syllabus. In addition, appellant has waived his international law challenge by not raising this claim before the trial court. *State v. Awan* (1986), 22 Ohio St.3d 120, 22 OBR 199, 489 N.E.2d 277, syllabus. In any event, we also summarily reject appellant's challenge based on international law. *State v. Bey* (1999), 85 Ohio St.3d 487, 502, 709 N.E.2d 484, 499; *State v. Phillips* (1995), 74 Ohio St.3d 72, 103-104, 656 N.E.2d 643, 671.

XIV

Having considered appellant's propositions of law, we must now independently review the death sentence for appropriateness and proportionality (also raised in appellant's Proposition of Law No. IV). For purposes of our independent review, we will consider only the single (merged) aggravating circumstance that was considered by the court of appeals in its own independent review of appellant's death sentence. Thus, we consider the R.C. 2929.04(A)(7) specification of the aggravating circumstance premised on kidnapping—*i.e.,* that appellant shot and killed Richard Franks during the course of a kidnapping—which appellant does not seriously dispute.

In mitigation, testimony was received from three people: appellant, Dr. Donald Gordon, a psychology professor, and Charles Twyford, appellant's younger brother. Each testified concerning appellant's history, character, and background.

Appellant testified that he was born on October 15, 1962, in Youngstown, Ohio. When he was an infant, his parents divorced. During this time, his father took appellant and his younger brother to live in Nevada. At around age six, appellant's grandparents returned him to Ohio, where he lived with his mother and stepfather. Appellant's stepfather frequently got drunk and beat appellant, his younger brother, and his mother. Appellant's biological father died when he was seven years old.

When appellant was eight, his mother had a nervous breakdown, which the stepfather blamed on appellant. Appellant was subsequently sent to live with an aunt and uncle in Youngstown. While otherwise kind to appellant, the uncle also introduced appellant to alcohol and marijuana. Between the ages of nine and thirteen, appellant drank alcohol and used drugs. When he was thirteen, he intentionally shot himself in the head and lost his right eye as a result. During the rest of his teen years, he spent time in juvenile detention facilities.

After he turned eighteen, appellant lived and worked in Ohio, Texas, Florida, and California, spending time in prison but also working in a variety of jobs. While in juvenile detention facilities and in prison, he tried to kill himself several times and was hospitalized as a result. After his last release from prison in 1992, his wife and stepdaughter refused to live with him. At that time, he was drinking heavily and using drugs.

Appellant also testified that he did not like rapists or child molesters, having been raped in prison. Appellant noted that even before he met Joyce Sonny,

Christina had already had a baby as a result of being raped, but Christina and Joyce had given the baby up for adoption. Appellant also indicated that he learned in prison that it did not help to complain to authorities.

Appellant additionally acknowledged that Christina was "mentally disabled" but denied knowing that Richard Franks was similarly challenged. Appellant claimed that he got into fights or used violence only for self-defense or to defend women or children. Appellant denied that he was sexually active with either Terri or Christina but admitted that he once gave Terri a sucker bite on her neck to punish her.

Dr. Donald Gordon, a psychology professor, testified that he interviewed appellant, gave him several tests, interviewed appellant's relatives, and looked at various documents. Dr. Gordon reiterated appellant's family history and upbringing, noting the severe mistreatment he suffered at the hands of his stepfather. According to Dr. Gordon, the abuse was so severe that finally, when appellant was fifteen, he told his stepfather that he would kill him if he ever beat up appellant's mother again. Dr. Gordon also testified that, as a youth, appellant frequently ran away and was suspended from school. From age seventeen to twenty-eight, appellant spent time in prison but also was able to gain employment when he was not incarcerated.

Dr. Gordon indicated that appellant hated child molesters and rapists based on his experiences while incarcerated. In Dr. Gordon's opinion, appellant did not trust people and believed that they overlooked the

welfare of children. Appellant felt that he had to be the protector of children, especially Christina and Terri Sonny. According to Dr. Gordon, appellant was not a violent person, and his prior offenses were property crimes, not crimes of violence. Moreover, Dr. Gordon testified that appellant believed that Franks would not be punished for raping Christina, just as the men who had raped him in prison had not been punished. Also, if appellant was caught for killing Franks, then no one would take care of Joyce's children, since she was not able to do so. Dr. Gordon believed that law enforcement officers may have unduly influenced or coerced the Sonny children's statements about appellant's reported sexual misconduct of them. In Dr. Gordon's view, appellant was compassionate and felt empathy for others. Finally, in Dr. Gordon's opinion, appellant was not a sociopath, nor did he have an antisocial personality disorder.

Charles Twyford, appellant's younger brother, described life with their stepfather as frightening because their stepfather got drunk and beat up their mother and the children every week. According to Charles, as a youth, appellant ran away frequently because he did not want to be beaten. Charles did not believe that his brother was violent and indicated that his brother was arrested mostly for property crimes. Charles stated that appellant was good with children, including Terri and Christina, and children liked him.

Appellant also gave his version of the events leading up to and including the murder of Richard Franks. In the summer of 1992, appellant met Joyce Sonny and her two daughters and moved in with

them. According to appellant, he felt "very protective" of Joyce's daughters and helped care for them, especially after Joyce was hospitalized in August 1992 following a motorcycle accident.

Richard Franks was a friend of Joyce's, but appellant never trusted him. When he was told that Franks had raped Christina, appellant was "shocked" and "couldn't see, * * * started shaking" and was very angry. According to appellant, Christina told appellant directly that Franks had raped her, and she was "very subdued, very quiet, [and] she didn't want to talk."

Appellant further testified that he had told Eikelberry that he was "going to kill Richard Franks for raping [his] stepdaughter" because appellant "didn't think it would do any good to go to the police." He had to kill Franks to protect the family. Appellant reiterated the details of his confession but stressed that when he killed Franks, he was "still angry, * * * in a rage," drinking heavily, and taking pain medication. Appellant acknowledged that he never confronted Franks about his alleged rape of Christina, but he believed that Franks had raped Christina and had to be killed to protect the family.

After independent assessment, we find that the evidence is sufficient to prove beyond a reasonable doubt the aggravating circumstance that appellant committed aggravated murder as the principal offender in the course of kidnapping Richard Franks. R.C. 2929.04(A)(7).

As to mitigating factors, the nature and circumstances of the offense do not appear to be mitigating. Although appellant may have acted out of

rage at the asserted rape of Christina, several factors tend to negate giving weight to his motive. First, appellant did not act quickly on some sudden impulse. By his own admission, nearly two days had elapsed between the time that appellant learned of the reported rape and when Franks was killed. Second, appellant never confronted Franks and, instead, just accepted as true the allegation that Christina was raped by Franks. Third, the viciousness of appellant's murder of Franks also tends to negate giving mitigating weight to the nature and circumstances of the offense.

Upon review of the evidence, we find that appellant's history and background present some, but only modest, weight in mitigation. Admittedly, appellant suffered from a difficult upbringing with a stepfather who drank heavily and abused appellant, appellant's mother, and younger brother. However, appellant made clear choices in his early life to rebel against authority and to spend his time and effort on self-gratification through drugs, alcohol, and property crimes. Moreover, we find that appellant's character offers no weight in mitigation.

Furthermore, the evidence does not support finding other statutory mitigating factors. Appellant's actions are removed in time from the alleged rape of Christina. This, of course, tends to negate the claim that Franks "induced" or "facilitated" the offense. See R.C. 2929.04(B)(1). This time delay also undercuts appellant's claim that he acted under "strong provocation." R.C. 2929.04(B)(2). Appellant did not suffer from any "mental disease or defect" as defined in R.C. 2929.04(B)(3). In addition, appellant's age of

twenty-nine and his prior criminal history negate the application of R.C. 2929.04(B)(4) and (B)(5). His actions as a principal offender preclude applying the mitigating factor, guilt as an accessory, in R.C. 2929.04(B)(6). Finally, the record does not support finding other mitigating factors. R.C. 2929.04(B)(7).

After weighing the aggravating circumstance against the mitigating evidence, we find that the aggravating circumstance of murder during a kidnapping outweighs the evidence presented in mitigation. Appellant admits to having planned a deliberate murder for revenge, acting as the judge, jury, and executioner of Richard Franks. According to his own testimony, appellant never confronted Franks and, instead, exacted the revenge that he wanted by shooting Franks in the back without any warning and then deliberately mutilating Franks's body.

As a final matter, we have undertaken a comparison of the sentence imposed in this case to those in which we have previously imposed the death sentence. We find that the death penalty imposed against appellant is neither excessive nor disproportionate when compared with other aggravated murders involving kidnapping. *State v. Ballew* (1996), 76 Ohio St.3d 244, 667 N.E.2d 369; *State v. Joseph* (1995), 73 Ohio St.3d 450, 653 N.E.2d 285; *State v. Simko* (1994), 71 Ohio St.3d 483, 644 N.E.2d 345; *State v. Fox* (1994), 69 Ohio St.3d 183, 631 N.E.2d 124; *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464; *State v. Brewer* (1990), 48 Ohio St.3d 50, 549 N.E.2d 491; and *State v. Morales* (1987), 32 Ohio St.3d 252, 513 N.E.2d 267.

Accordingly, for all of the foregoing reasons, we affirm the judgment of the court of appeals and uphold the sentence of death.

Judgment affirmed.

RESNICK and F.E. SWEENEY, JJ., concur.

COOK, J., concurs in judgment.

MOYER, C.J., and LUNDBERG STRATTON, J., concur in part and dissent in part.

PFEIFER, J., dissents.

LUNDBERG STRATTON, J., concurring in part and dissenting in part. I concur in the portion of the majority opinion affirming Twyford's convictions, but for the reasons that follow, I respectfully dissent from the analysis of Part XII of the opinion regarding ineffective assistance of counsel, and I would remand the cause to the trial court for a new sentencing hearing.

I concur with the majority in its conclusion that there was overwhelming evidence of Twyford's guilt. Twyford made a voluntary, knowing, and detailed confession of his crimes, both orally and in writing. There was a myriad of forensic evidence supporting Twyford's convictions, including information that he gave police that led to the discovery of the victim's hands and the retrieval of two guns and two knives from the home in which Twyford resided. Moreover, at trial, Twyford did not dispute that he had committed the murders. In fact, at trial, defense counsel conceded that Twyford did not contest many of the facts and

that Twyford and an accomplice had "killed Richard Franks."

However, rather than having killed Franks in cold blood, Twyford claimed that he killed Franks because he believed that Franks had raped Twyford's girlfriend's daughter, Christina. Yet, in cross-examining Sheriff Abdalla, defense counsel elicited evidence about Twyford's alleged sexual misconduct with his girlfriend's two daughters, Christina, age eighteen, and Terri, age thirteen. In cross-examining Sheriff Abdalla, defense counsel apparently had sought to advance the theory that Twyford killed Franks because Franks had raped Christina. But as the majority points out, counsel used poor judgment in using open-ended questions while cross-examining Sheriff Abdalla, and, in doing so, elicited evidence about Twyford's alleged sexual misconduct involving the two girls.

Below is a portion of the transcript reflecting the cross-examination of Sheriff Abdalla. Counsel was inquiring as to why the children's mother, Twyford's girlfriend Joyce, did not look for the younger child, Terri, when she was absent from school:

"Q. Why didn't Joyce go look for her? Do you have any idea? "A: To be honest with you?

"Q: Uh-huh.

"A: I don't think she could care less about her children. "Q: Why would you say that?

"A: Why?

"Q: Yes.

"A: Because she was aware that Mr. Twyford was having sex with her eighteen year old and her thirteen year old and did nothing.

"Q: Now just a minute. Let's explore that a minute. How did you know she was aware of that?

"A: Cause she advised me of that."

Even after eliciting this damning information about his own client, counsel persisted in cross-examining with more open-ended questions.

"Q: Okay. Anything else about Joyce that indicated to you she was less than a good mother?

"A: Sure. Number one, as I stated, that I don't think that she provided the—the medical treatment or mental treatment for her daughter that she should. I'm standing in a house and her thirteen year old daughter's got a large sucker bite over here that Mr. Twyford put on the child.

"Q: Now, how do you know that? "A: Cause she told me.

"Q: Who did? "A: The child.

"Q: Now did the child indicate anything else to you?

"A: Sure.

"Q: And what did she tell you?

"A: That Raymond Twyford took her to bed.

"Q: Now wait. Which child is this now?

"A: I'm talking about the thirteen year old. When I started to talk to the thirteen year old about Raymond's sexual advances on that child, the child

started to open up. Okay. She started telling me what he was doing with her.

"* * *

"Q: Did you ask Christina if she had been raped?

"A: Yes.

"Q: Do you think she understands what the word raped means?

"A: I think if you sit down and try to explain it to her, she might understand it. She had sex with the victim. She had sex with this suspect.

"Q: Now, wait a minute. How do you know that?

"A: She told me."

In response to this testimony from the guilt phase, as the majority notes, the state claimed that Twyford had acted more from jealousy than revenge because he had been sexually active with both daughters. The majority notes that counsel's continued cross-examination elicited serious uncharged misconduct about Twyford's sexual activity with his girlfriend's children, all in the form of hearsay that is inadmissible under the Rules of Evidence. The majority finds that this testimony undermined the defense theory that Twyford had killed Franks in order to punish Franks for raping Christina and to protect Joyce's children.

In order for a conviction to be reversed on appeal for ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and, (2) that the deficient performance prejudiced the defense so as to deprive the defendant

of a fair trial. See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

The majority concludes that counsel's open-ended cross-examination of Sheriff Abdalla represented deficient performance, thus satisfying the first prong of the *Strickland* test. However, the majority holds that Twyford failed to establish prejudice because the jury would inevitably have found Twyford guilty as charged. While I agree that there was overwhelming evidence of Twyford's guilt, I cannot agree with the majority's conclusion that any deficient performance at the guilt phase did not reasonably affect the *penalty phase*.

At the penalty hearing, Twyford presented compelling evidence in mitigation. Twyford testified that his biological father was lost at sea when Twyford was seven years old and he had lived with his mother and stepfather, who frequently drank and beat him. After his mother had a nervous breakdown, he went to live with an aunt and uncle for three or four months. The uncle introduced him to alcohol and marijuana, which he began using at the age of nine. Twyford ran away whenever he was sent back to his mother and stepfather. At the age of thirteen, Twyford intentionally shot himself in the head and lost his right eye. After his attempted suicide, the beatings by his stepfather resumed.

Twyford was sent to a detention center for six months when he was fourteen but again was returned to the home of his mother and stepfather, where he was beaten; he ran away again. When he was arrested once more, he was sent to a more secure detention center for eighteen months. He has spent considerable

time in both juvenile and adult detention facilities and has had a lifelong substance abuse problem. While in juvenile detention and prison, Twyford attempted suicide several times.

Most compelling and most relevant to the case, Twyford testified that he was raped in prison and that prison authorities did nothing to stop it or punish those involved. In the opinion of expert psychologist Dr. Gordon, based on Twyford's past experiences, Twyford did not trust people and did not have faith in law enforcement authorities. Dr. Gordon testified that Twyford's early childhood set him up to believe that people do not protect children and that because of his bad experiences with his own mother, his ex-wife, and Joyce, Twyford developed the attitude that he had to protect Joyce's children. Dr. Gordon testified that Twyford believed that just as the men who had raped him in prison had not been punished, Franks would not be punished for raping Christina.

Twyford testified that he knew that Christina had some mental handicaps and knew that she had been raped in the past and had had a child. Twyford testified that he believed that he had to be the protector of his girlfriend's two children. Twyford also testified that he believed that when a woman is raped, it is the woman who goes on trial and not the man. Twyford believed that there was a good chance that Franks would not be punished.

Twyford denied that he was sexually active with the two girls but admitted that he had once playfully given the younger one a sucker bite on her neck in order to teach her a lesson after she had done the same to him. Moreover, Dr. Gordon testified that he

believed that law enforcement officers might have unduly influenced or coerced the girls' statements about Twyford's reported sexual activity with them.

The majority holds that disclosure of the evidence regarding Twyford's alleged sexual misconduct was *probably inevitable* at the penalty phase, given Twyford's strong reliance on the claim that he had killed Franks because Franks had raped Christina. I disagree. In my view, there is no evidence to support this conclusion. The testimony of the witnesses was blatant hearsay and clearly inadmissible. The prosecution never put the mother, Joyce, or either child on the witness stand. Therefore, there is no way that this evidence could have been properly presented to a jury. In its hearsay form, there was no opportunity to cross-examine the alleged sources of the statements—the mother and the children—and no opportunity to test the credibility of the claims. These allegations dramatically altered the picture presented by the defense and, I believe, seriously impacted how the jury viewed mitigation.

In my view, it is very probable that the evidence confused the jurors and led them to conclude that Twyford was worthy of the worst form of punishment that our system permits: death. It was almost inevitable that this piece of damning evidence would transform the defendant in the jury's eyes from a frustrated man seeking justice outside a system that had previously failed him to a pedophile who wanted to eliminate his competition.

With all of the evidence of mitigation and without hearing this damning evidence that was permitted due to the deficiencies of Twyford's counsel, I believe

that this jury would have chosen life imprisonment. Accordingly, I would find that Twyford's counsel's incompetence prejudiced his defense so as to deprive him of a fair trial. *Strickland,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

For these reasons, therefore, I concur as to the majority's affirmance of Twyford's convictions but respectfully dissent from the majority's decision to uphold the sentence of death. I would instead vacate the sentence of death and remand the cause for rehearing pursuant to R.C. 2929.06(B), which provides for the trial court to impanel a new jury for a new mitigation and sentencing hearing in which this evidence would be excluded.

Moyer, C.J., concurs in the foregoing opinion.

PFEIFER, J., dissenting. This case is another example of why the felony- murder rule is often inappropriate for determining which murderers are death- worthy. See *State v. Murphy* (2001), 91 Ohio St.3d 516, 561, 747 N.E.2d 765, 812 (Pfeifer, J., dissenting); *State v. Carter* (2000), 89 Ohio St.3d 593, 611, 734 N.E.2d 345, 360 (Pfeifer, J., concurring).

Death penalty cases require courts to perform two general tasks. We must determine whether the defendant is the murderer. In this case, Twyford's culpability is manifest. Next, we must determine whether the defendant should be sentenced to death. In this case, the determination of death-worthiness turns on whether there was a kidnapping. See Crocker, Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and

Punishment in Death Penalty Cases (1997), 66 Fordham L.Rev. 21.

When kidnapping is the felony undergirding a felony-murder death sentence, distinguishing guilt and punishment is especially difficult because the line between murder and kidnapping is blurry. In *State v. Logan* (1979), 60 Ohio St.2d 126, 14 O.O.3d 373, 397 N.E.2d 1345, syllabus, we stated:

"In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:

"(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions."

As in *State v. Hartman* (2001), 93 Ohio St.3d 274, 754 N.E.2d 1150, the kidnapping here was incidental to the murder. Twyford used deception to kidnap the victim for the express purpose of killing him. Accordingly, there was no separate animus, and there was no significance independent of the other offense. Without a kidnapping, there is no felony murder; without felony murder, there is no death sentence. The majority deals with this important issue by stating that the appellant did not "seriously dispute" the kidnapping.

An appellant's action or inaction does not obviate our duty to conduct an independent review into the appropriateness of the sentence of death. When the felony in a felony-murder death sentence is incidental to the murder, we as a court should find the death sentence inappropriate and reverse it. I dissent.

APPENDIX

"Proposition of Law No. I: Morgan v. Illinois, 504 U.S. 719, [112 S.Ct. 2222] 119 L.Ed.2d 492 (1992), mandates that a capital defendant be permitted to voir dire potential jurors on their views of capital punishment, facts and circumstances of conviction and evidence of mitigating circumstances. Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 10, and 16 of the Ohio Constitution.

"Proposition of Law No. II: When a trial court erroneously instructs a jury at the penalty phase regarding the factors to consider in recommending punishment and when it independently considers more than one valid aggravating circumstance, a capital defendant is denied the right to a fair trial, the right to a reliable sentencing determination, and the right to due process of law. Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 10 and 16 of the Ohio Constitution.

"Proposition of Law No. III: Where the trial court does not permit a witness to testify about capital defendant's ability to peacefully live in prison, the trial court diminishes the reliability of the jury's determination that death was the appropriate punishment, in violation of the Fifth, Sixth, Eighth,

Ninth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

"Proposition of Law No. IV: When the death sentence is excessive and disproportionate to the sentences in similar cases and when it is inappropriate, the death sentence must be vacated and a life sentence imposed. Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 10 and 16 of the Ohio Constitution.

"Proposition of Law No. V: The state failed to introduce sufficient evidence to prove all the elements of aggravated robbery beyond a reasonable doubt, and therefore, appellant was deprived of his right to due process of law under the Fourteenth Amendment of the United States Constitution as well as Article I, Section 16 of the Ohio Constitution.

"Proposition of Law No. VI: Raymond Twyford's convictions must be reversed and his death sentence vacated because prosecutorial misconduct throughout all phases of the capital trial violated appellant's right to due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution, and it deprived the sentencing determination of the reliability required by the Eighth Amendment to the United States Constitution and Article I, Section 9 of the Ohio Constitution.

"Proposition of Law No. VII: A capital defendant is denied a fair trial and a reliable sentencing determination when gruesome and cumulative photographs are admitted into evidence. Fifth, Sixth,

Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 10 and 16 of the Ohio Constitution.

"Proposition of Law No. VIII: When the trial court permits evidence of prior criminal acts, it denies a capital defendant the right to a fair trial, an impartial jury, and to a reliable sentencing determination in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 5 and 10 of the Ohio Constitution.

"Proposition of Law No. IX: The trial court erred when it failed to suppress Twyford's statement because the *Miranda* waiver was obtained unknowingly, and the confession was the product of coercion. The trial court's action denied Twyford his rights to a fair trial, due process and a reliable determination of his guilt and sentence as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 2, 9, 16, and 20 of the Ohio Constitution.

"Proposition of Law No. X: When a juror is replaced with an alternate juror between the guilt and penalty phases of a trial, a capital defendant may not be sentenced to death. Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 2, 3, 5, 10, and 16 of the Ohio Constitution. Ohio Rev.Code Ann. Section 2929.03(d)(2) (Anderson 1993).

"Proposition of Law No. XI: Defense counsel's actions and omissions at Twyford's capital trial deprived him of the effective assistance of trial counsel as guaranteed by the Sixth, Eighth and Fourteenth

Amendments to the United States Constitution and Article I, Sections 9, 10 and 16 of the Ohio Constitution.

"Proposition of Law No. XII: A trial court denies a capital defendant the right to a fair trial and to due process of law when it erroneously instructs the jury during the trial and penalty phases of a capital case.

"Proposition of Law No. XIII: Ohio's death penalty law is unconstitutional. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution establish the requirements for a valid death penalty scheme. Ohio Rev.Code Ann. Sections 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 and 2929.05, (Anderson 1996), do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Raymond Twyford."

Bryan H. Felmet, Jefferson County Prosecuting Attorney, and *Richard H. Ferro,* Assistant Prosecuting Attorney, for appellee.

David H. Bodiker, Ohio Public Defender, *J. Joseph Bodine, Jr.,* and *Angela Greene,* Assistant Public Defenders, for appellant.

APPENDIX I

COURT OF APPEALS
SEVENTH DISTRICT
JEFFERSON COUNTY, OHIO

FILED
COURT OF APPEALS
JEFFERSON COUNTY, OHIO
MAR 19, 2001
JOHN A. CORRIGAN
CLERK

STATE OF OHIO,

Appellee,

-vs-

RAYMOND A. TWYFORD, III,

Appellant.

JUDGES

HON. DONALD R. FORD, P.J,
Eleventh Appellate District,
sitting by assignment
HON. JUDITH A CHRISTLEY, J.,
Eleventh Appellate District,
sitting by assignment
HON. ROBERT A. NADER, J.,
Eleventh Appellate District,
sitting by assignment

CASE NO. 98-JE-56

OPINION

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas Case No. 92-CR-116.

JUDGMENT: Affirmed

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Dated: March 19, 2001

FORD, P.J.

The instant appeal stems from a final judgment of the Jefferson County Court of Common Pleas. Appellant, Raymond A. Twyford, III, seeks reversal of the trial court's decision granting summary judgment in favor of the state regarding all the claims asserted in appellant's petition for postconviction relief. For the reasons which follow, we affirm the trial court's decision in all respects.

In March 1993, appellant was tried and convicted of aggravated murder, aggravated robbery, kidnapping, and having a firearm while under a disability. Appellant was then sentenced to death for the aggravated murder. This conviction was predicated upon an incident in which appellant and a second offender lured the victim to an obscure field in Jefferson County and shot him multiple times with a rifle and pistol.

The state's case against appellant was primarily based upon a confession appellant gave to the police shortly after the discovery of the victim's body. In the confession, appellant indicated that, as of September 1992, he was living with his girlfriend and her two minor daughters at the girlfriend's residence in Portage County, Ohio. During this time, appellant had befriended Daniel Eikelberry, who lived in an apartment a short distance from the girlfriend's home. Eikelberry resided with Richard Franks, a mildly retarded individual who was an acquaintance of appellant's girlfriend and her two daughters.

According to appellant, on the evening of September 19, 1992, Eikelberry told him that Franks had allegedly raped the youngest daughter of

appellant's girlfriend. After discussing the situation fully, they formulated a plan to kill Franks and dispose of his body. Two days later, appellant and Eikelberry invited Franks to go deer hunting that night. When Franks agreed, the three men drove over one hundred miles to a secluded field by State Route 646 in Jefferson County. Upon arriving at that location, appellant and Eikelberry convinced Franks to walk into the woods and attempt to "spot light" a deer through the use of a flashlight. As Franks was walking into the woods a second time, appellant shot him in the back with a 30.06 caliber rifle. He and Eikelberry then each shot Franks one time in the head.

As part of his confession, appellant further admitted that, after Franks had died, he and Eikelberry agreed to mutilate the body so that it could not be recognized. Besides cutting the hands off the body, they fired a number of additional shots into the victim's head. They then rolled the corpse into a nearby pond and disposed of the hands in a separate location.

Two days following the murder, Franks' body was discovered by a couple walking through the secluded field near the pond. Although appellant and Eikelberry had tried to remove all forms of identification from the body, they overlooked a small calendar book which Franks had kept in the pocket of his inner shirt. In searching the corpse following its discovery, the Jefferson County Sheriff found the book and, accordingly, was able to identify the body. In turn, the sheriff also discovered that Franks had lived in Portage County.

As Eikelberry had been Franks' roommate, he was the first individual interviewed during the subsequent investigation. As part of his statement to the police, Eikelberry implicated appellant in the murder. As a result, appellant was placed under arrest and taken to a local police department in Portage County for questioning. After being held for approximately one hour, appellant gave an oral and written confession concerning the murder to the Jefferson County Sheriff.

Upon being transported back to Jefferson County, appellant was indicted on, *inter alia,* two counts of aggravated murder under R.C. 2903.0l(B). Each of these counts contained a death penalty specification alleging that appellant had committed the murder in conjunction with the commission of a separate underlying felony, and that he either had been the principal offender in the commission of the murder or had committed the murder with prior design and calculation.

As was noted previously, the state's evidence during the guilt phase of the ensuing trial essentially consisted of appellant's confession. In responding to the state's case, appellant did not present any witnesses or evidence in his own behalf. Despite this, appellant's counsel did try to establish a possible motive for the murder. Specifically, during the cross-examination of the Jefferson County Sheriff, counsel elicited testimony that appellant had told the sheriff that he had committed the murder because Franks had raped his girlfriend's youngest daughter. To rebut this, the state presented testimony designed to demonstrate that appellant himself had been

engaging in sexual activity with both of his girlfriend's daughters.

After deliberating for less than one day, the jury found appellant guilty of all of the charged counts, including the death-penalty specifications. During the ensuing penalty phase, appellant presented evidence designed to bolster his justification for the murder. In testifying in his own behalf, appellant stated that, in addition to being physically abused by his stepfather as a child, he had been sexually assaulted while he had been incarcerated on minor theft offenses. Appellant further testified that, in light of his own experiences, it was his belief that rapists were never properly punished. Based on this, appellant stated that he felt that Franks would never be punished for raping the child unless he killed Franks.

Appellant also presented the testimony of a psychologist, Dr. Donald Gordon. This expert stated that, as a result of appellant's own difficult childhood, he had a tendency to become attached emotionally to children quickly and to act as their protector against abusive individuals.

Although the state did not present any new evidence during the penalty phase, the jury still returned a recommendation that the death penalty be imposed. In its ensuing sentencing judgment, the trial court independently concluded that the death penalty was warranted because the aggravating circumstances outweighed the mitigating factors in the case.

In his direct appeal from the foregoing conviction, appellant initially asserted only three assignments of error for this court's consideration. In October 1995,

we issued an opinion overruling the three assignments and affirming the imposition of the death penalty. However, approximately fifteen months later, we granted appellant's motion to reopen the appeal on the basis that he may have been denied effective assistance of appellate counsel. As a result, appellant was permitted to file a new appellate brief in which he raised twenty-five assignments of error. Nevertheless, after considering the merits of these new assignments, this court concluded that appellant had not been denied effective appellate assistance and again affirmed the imposition of the death penalty. See *State v. Twyford* (Sept. 25, 1998), Jefferson App. No. 93-J-13, unreported.

Prior to the issuance of our opinion upon reopening, appellant filed with the trial court a petition for postconviction relief under R.C. 2953.21. In this petition, appellant essentially asserted eight claims for relief, the majority of which stated that appellant's conviction should be vacated because he had been denied effective assistance of counsel during his trial. Specifically, under the majority of his claims, appellant argued that his trial -counsel had failed to present certain evidence which would have proven additional mitigating factors against the imposition of the death penalty.

In support of his eight claims, appellant attached to his petition multiple affidavits of certain individuals who stated what the substance of their testimony would have been if they had been called to testify. The affiants included Daniel Eikelberry, a different psychologist who had examined appellant, a medical doctor who was an expert on the effect of

alcohol intoxication on the human brain, a mitigation specialist, and various members of appellant's family:

In conjunction with the postconviction petition, appellant submitted a motion for discovery for both the Jefferson County Prosecutor's Office and the Jefferson County Sheriff's Department. In additional to a general request for exculpatory items, appellant stated in his motion that he was especially seeking any information regarding an alleged prior rape which had involved the same daughter who had supposedly been raped by Richard Franks. Upon considering the discovery motion, the trial court denied it on the basis that appellant had not established good cause.

After appellant's petition had been pending for approximately four months, the state moved for summary judgment as to each of the eight claims. In support of its motion, the state did not present any evidential materials which were designed to contradict the materials submitted by appellant; instead, the state essentially maintained that appellant's materials were insufficient, as a matter of law, to show that his constitutional rights had been violated.

Once appellant had submitted a response to the summary judgment motion, the trial court rendered its decision in favor of the state as to each of appellant's eight claims for relief. In its judgment entry. the trial court primarily held that appellant had not been denied his right to effective assistance of trial counsel because the introduction of the "new" evidence cited by appellant in his postconviction petition would not have altered the outcome of the trial.

In now appealing the foregoing decision, appellant has assigned the following as error:

> "[I.] Ohio's postconviction system does not comply with the requirements of due process as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.
>
> "[II.] The trial court erred when it denied appellant's requests for discovery in violation of appellant's rights under the Fifth. Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, Sections 1, 2, 9, 10, 16 and 20 of the Ohio Constitution.
>
> "[III.] The trial court erred in granting summary judgment against appellant Twyford and dismissing his postconviction action in violation of appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution."

Under his first assignment, appellant contends that the Ohio statutory scheme for postconviction relief. R.C. 2953.21 *et seq.,* does not give a criminal defendant a proper procedural mechanism for contesting alleged violations of constitutional rights because the Supreme Court of Ohio has placed too many restrictions on the use of the remedy. Citing to *State v. Perry* (1967), 10 Ohio St.2d 175, appellant argues that the application of the doctrine of *res judicata* to postconviction petitions improperly limits the types of claims which can be asserted in such a proceeding. In support of this point, appellant emphasizes that the inadequacy of the remedy can be

inferred from the fact that petitions for postconviction relief are actually granted on only rare occasions.

Although not expressly stated in appellant's brief, he has essentially requested this court to overrule the *Perry* holding. In considering arguments similar to this, appellate courts of this state have simply concluded that such an argument can be properly raised only before the Supreme Court itself. In *State v. Wiles* (1998), 126 Ohio App.3d 71, the defendant maintained that the procedure set forth in the postconviction statutes did not provide an adequate remedy because the statutes had been interpreted to have too many technical requirements. In making this argument, the defendant was asking the appellate court to ignore the holding of *Freeman v. Maxwell* (1965), 4 Ohio St.2d 4, in which the Supreme Court had held that the postconviction procedure constituted an adequate legal remedy which precluded the use of a habeas corpus action as a means of raising constitutional issues. Without addressing the actual merits of the defendant's argument, the *Wiles* court stated that an appellate court did not have the power to refuse to follow a Supreme Court decision.

The *Wiles* holding is clearly applicable to appellant's instant argument. As to this point, we would emphasize that the Supreme Court recently reaffirmed *Perry* in *State v. Szefcyk* (1996), 77 Ohio St.3d 93. Thus, we are bound to follow the *Perry* holding concerning the application of the *res judicata* doctrine to postconviction proceedings.

As an aside, we would further note that the *Wiles* defendant also asserted that the fact that it was

extremely difficult to obtain postconviction relief demonstrated that the remedy was inadequate. Although it was not necessary to address this point, the *Wiles* court indicated that its review of the relevant case law did not support the conclusion that postconviction statutes failed to provide a true remedy: "These cases demonstrate that a petitioner's chance of success depends more on the merits of his claim than on the procedural obstacles he faces." *Wiles* at 84. Again, the foregoing analysis applies to appellant's argument as to the effect of the. application of the *res judicata* doctrine on postconviction proceedings.

As a court of error, we cannot simply ignore the *stare decisis* character of an Ohio Supreme Court holding. Appellant's legal contentions under this assignment are more properly directed to that forum. Appellant does not raise an argument which this court can sustain, although it may be sympathetic with respect to some aspects of appellant's submissions. Thus, appellant's first assignment is without merit.

Under his second assignment, appellant challenges the trial court's decision to deny his motion for discovery. Appellant asserts that he was entitled to conduct discovery because a postconviction proceeding under R.C. 2953.21 is considered civil in nature. He further asserts that, since a party in a civil action is entitled to complete discovery before summary judgment can be granted, he was not given a legitimate opportunity to develop his claims before judgment was entered against him.

Like appellant's first assignment, the resolution of his second assignment is also dictated by express

precedent of the Supreme Court of Ohio. In *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office* (1999), 87 Ohio St.3d 158, 159, the court stated that "there is no requirement of civil discovery in postconviction proceedings."

In support of the foregoing statement, the *Love* court cited with favor the decision of the Third Appellate District in *State v. Spirko* (1998), 127 Ohio App.3d 421. In the latter case, the *Spirko* court began its analysis by noting that postconviction proceedings in Ohio are governed solely by statutory law. The court then noted that R.C. 2953.21 *et seq.,* did not contain any provision allowing for discovery. Based on this, the *Spirko* court concluded that the trial court had not erred in refusing the defendant's request for discovery.

Although not cited in either *Love* or *Spirko,* this court would note that the holding in both cases is consistent with the Supreme Court's interpretation of Crim.R. 16(B) and R.C. 149.43, the public records statute. In *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, the court indicated that, prior to his trial in a criminal proceeding, a defendant cannot employ R.C. 149.43 to obtain documents from the prosecutor which would not be subject to discovery under Crim.R. 16(B). The *Steckman* court also stated that once a defendant has exhausted his direct appeal from his conviction, he cannot use R.C. 149.43 to obtain documents from the prosecutor to support a postconviction relief petition. *Id.* at paragraph six of the syllabus. Furthermore, as to post-trial requests for documents from the prosecutor, the Supreme Court has held that such a request cannot be made under

Crim.R. 16 because the duty to disclose exculpatory evidence under that rule only applies before or during trial. *State ex rel. Flagner v. Arko* (1998), 83 Ohio St.3d 176, 177.

In light of the foregoing precedent, it is evident that the Ohio Supreme Court has determined that discovery between the state and a defendant can take place only when a criminal case is pending for trial. This basic holding is based on the proposition that a defendant's post-judgment motion cannot be predicated upon additional information from the prosecutor which had not been disclosed prior to the end of the trial. *Steckman* at 432. Thus, by concluding that discovery cannot be had as part of a postconviction proceeding, the *Love* court was acting consistent with its general precedent on the issue of criminal discovery.[1]

Prior to the issuance of the *Love* decision, there existed some authority for the basic proposition that the allowance of discovery in a postconviction proceeding was a matter within the sound discretion of the trial court. See *Wiles, supra,* at 77, citing *State* v. *Smith* (1986), 30 Ohio App.3d 138, 140. However, that authority has no further value as precedent. That is, pursuant to *Love* and *Spirko,* there are no circumstances under which a defendant in

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[1] Of course, this does not mean that a defendant is foreclosed from obtaining documents to support a postconviction petition from other public officials. However, the proper procedure for obtaining documents from officials other than the prosecutor would not be through discovery. Instead, the defendant would be required to bring a mandamus action under R.C. 149.43.

postconviction proceedings can be entitled to discovery.

Although the trial court in the instant case improperly based its decision to deny the discovery motion on a finding of no good cause, the foregoing analysis supports the trial court's disposition of the matter. Accordingly, as the trial court did not err in denying appellant's motion, his second assignment in this appeal lacks merit.

Appellant's third assignment of error constitutes the crux of this appeal, since he specifically attacks the trial court's analysis in granting summary judgment in favor of the state. Appellant contends that summary judgment should have been denied because he submitted sufficient evidential materials to create a factual dispute regarding whether certain violations of his constitutional rights had occurred during his trial. In turn, he further maintains that his evidential materials were sufficient to require the trial court to hold an oral hearing on his postconviction petition.

R.C. 2953.2l(D) states that either party in a postconviction proceeding can move for summary judgment on the petition. This statute further provides that a trial court should grant such a motion only when the right to such a determination is apparent on the face of the record. In applying the foregoing basic provisions, the Supreme Court of Ohio has indicated that a trial court's consideration of a summary judgment motion in a postconviction proceeding is generally governed by Civ.R. 56. *State v. Milanovich* (1975), 42 Ohio St.2d 46, 51.

In interpreting Civ.R. 56, the courts of this state have consistently held that, before summary judgment can be granted, the moving party must establish that: (1) there is no genuine dispute as to any material fact; (2) the state of the evidential materials is such that, even if the materials are construed in a manner most favorable to the nonmoving party, reasonable minds could only reach a decision favorable to the moving party; and (3) the moving party is entitled to judgment as a matter of law. See, *e.g., Heitanen v. Rentschler* (Dec. 17, 1999), Geauga App. No. 98-G-2187, unreported, at 13, 1999 Ohio App. LEXIS 6112. To satisfy the foregoing standard, the moving parry has the initial burden of stating to the trial court the legal basis for the motion and identifying the portions of the record which show that there are no genuine factual disputes. *Westfield Ins. Co.* v. *Paglio* (Aug. 4, 2000), Lake App. No. 99-L-022, unreported, at 10, 2000 Ohio App. LEXIS 3529, quoting *Dresher v. Bun* (1996), 75 Ohio St.3d 280, 296. If the moving party does not fulfill this initial burden, his motion cannot be granted regardless of the content of nonmoving party's response to the motion; however, if the initial burden is carried, the nonmoving party must-submit evidential materials indicating that a factual conflict does exist. *State v. Pierce* (1998), 127 Ohio App.3d 578, 587.

In regard to the factual portion of the moving party's initial burden, it has also been held that the moving party cannot merely state in the motion that the nonmoving party has no evidence to support his claim. Instead, the moving party must specifically refer to evidential materials which, in addition to complying with the forms listed in Civ.R. 56(C),

affirmatively show that there is no evidence under which the opposing party can prevail. *Heitanen, supra,* unreported. Under Civ.R. 56(C), the acceptable forms of evidential materials include the pleadings, depositions, written admissions, transcripts of evidence, affidavits, answers to interrogatories, and written stipulations of fact.

In the instant appeal, our review of the state's motion for summary judgment shows that it satisfied its initial burden under the foregoing precedent. That is, not only did the state inform the trial court of the legal basis for its motion, but it also referred the trial court to specific evidential materials to support its legal argument. In relation to the latter prong of the initial burden, the state did not present any materials of its own, but merely referred to the materials appellant had attached to his petition. In essence, the state argued that appellant's own materials, in and of themselves, were not legally sufficient to raise a factual dispute regarding whether his constitutional rights had been violated at trial.

In responding to the state's summary judgment motion, appellant also referred only to the evidential materials he had attached to his petition. Thus, unlike the "normal" summary judgment exercise, this case did not involve a situation in which the trial court had to decide whether competing evidential materials created a factual dispute. Rather, the trial court had to decide whether, in light of the trial record, appellant's materials were sufficient to raise the possibility that a constitutional violation had occurred.

The materials accompanying appellant's petition primarily consisted of affidavits in which certain individuals gave statements concerning possible additional testimony they could have given at appellant's trial. Regarding this form of evidential materials. the Supreme Court of Ohio has recently stated:

> "*** [I]n reviewing a petition for postconviction relief filed pursuant to R.C. 2953.21, a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge their credibility in determining whether to accept the affidavits as true statements of fact. To hold otherwise would require a hearing for every postconviction relief petition. ***
>
> "Unlike the summary judgment procedure in civil cases, in postconviction relief proceedings, the trial court has presumably been presented with evidence sufficient to support the original entry of conviction, or with recitation of facts attendant to an entry of a guilty or no-contest plea. The trial court may, under appropriate circumstances in postconviction relief proceedings, deem affidavit testimony to lack credibility without first observing or examining the affiant. That conclusion is supported by common sense, the interests of eliminating delay and unnecessary expense, and furthering the expeditious administration of justice. ***
>
> "An affidavit, being by definition a statement that the affiant has sworn to be truthful, and made under penalty of perjury. should not lightly be

> deemed false. However, not all affidavits accompanying a postconviction relief petition demonstrate entitlement to an evidentiary hearing, even assuming the truthfulness of their contents. Thus, where a petitioner relies upon affidavit testimony as the basis of entitlement to postconviction relief, and the information in the affidavit, even if true, does not rise to the level of demonstrating a constitutional violation, then the actual truth or falsity of the affidavit is inconsequential." (Citations omitted.) *State v. Calhoun* (1999), 86 Ohio St.3d 279, 284.

Upon reviewing the various affidavits submitted by appellant in this case, this court concludes that the trial court did not err in granting summary judgment in favor of the state because, in light of the *Calhoun* standard, the averments in those affidavits did not rise to the level of demonstrating a constitutional violation. Specifically, we hold that, as a matter of law, those affidavits were insufficient to show that appellant was denied his right to effective assistance of trial counsel because, even if the proposed testimony set forth in the affidavits had been presented at trial, it would not have altered the trial's outcome.

As was noted above, appellant asserted eight separate claims in his petition. Under his first claim, appellant argued that his trial counsel had rendered ineffective assistance by failing to call Daniel Eikelberry, the co-offender in the commission of the murder, to testify at trial. In four affidavits attached to the postconviction petition, Eikelberry averred that, if he had been called, he could have testified as

to the following: (1) his belief concerning the facts underlying Franks' alleged rape of the youngest daughter of appellant's girlfriend; (2) his belief concerning whether appellant had been engaging in sexual activity with both daughters of appellant's girlfriend; (3) his belief concerning the facts of an incident in which Franks had allegedly slapped the oldest daughter and (4) his belief as to whether appellant had suffered from painful headaches immediately prior to the murder.

In regard to the first aspect of Eikelberry's proposed testimony, this court would note that his statements concerning the nature of alleged rape would have corroborated the justification appellant gave for the murder. During both phases of appellant's trial, his trial counsel elicited testimony which was designed to establish that appellant had murdered Franks because Eikelberry had told appellant that he had seen Franks with the youngest daughter. Eikelberry's proposed testimony on this particular point would have supported appellant's contention that the rape had actually occurred and that he had been attempting to avenge or protect the daughter in murdering Franks.

Specifically, Eikelberry stated in his first affidavit that he could have testified as to the following regarding the point: (1) on September 20, 1992, both of the daughters of appellant's girlfriend were allowed to sleep at the residence of Eikelberry and Franks; (2) Eikelberry was away from the residence the majority of the evening; (3) when he returned to the residence at approximately 2:30 p.m., Eikelberry was walking toward his bedroom when he saw Franks lying on the

floor inside the bedroom; (4) when he saw Eikelberry, Franks immediately stood up, readjusted his pants, and walked quickly from the bedroom; (5) as they passed each other near the doorway to the room, Franks asked Eikelberry not to tell anyone what he had just seen; and (6) when Eikelberry went into his bedroom, he saw the youngest daughter lying naked on the floor.

Clearly, the foregoing statements would have supported appellant's assertion that the rape had actually occurred. Nevertheless, this court holds that his testimony would not have been admissible in evidence during the guilt phase of the trial. Although the trial transcript shows that the trial court allowed appellant to elicit testimony about the alleged justification for the murder during the guilt phase, that evidence was not relevant to any material fact in dispute at that juncture of the trial. Not only was the testimony irrelevant to any element of the charged offenses, but it also lacked any relevance to any possible defense to the charges. For example, the justification testimony was not relevant to the factual issue of whether appellant had acted purposefully in causing the death of Franks.

The trial transcript further indicates that, despite its irrelevancy, the testimony as to the reason for the murder was admitted during the guilt phase because the state never objected to the testimony in question. However, although the state allowed this issue to be raised during the guilt phase, we cannot assume that the state would not have made an objection to Eikelberry's proposed testimony on this point. Like the testimony which was actually elicited on this

issue, any testimony from Eikelberry concerning the reason for the murder was inadmissible because it was not relevant to any element or possible defense. Thus, the failure of trial counsel to call Eikelberry as a witness during the guilt phase cannot form the basis of a violation of the right to effective assistance.

As this court stated in our opinion upon reopening, appellant's contention that he had committed the murder to revenge the alleged rape was, at best, a moral justification for the crime. Accordingly, Eikelberry's proposed testimony concerning the fact that he had told appellant about the alleged rape would have been admissible in the penalty phase of the trial. Eikelberry's testimony would have helped to rebut the state's position that the murder had taken place because appellant did not want Franks interfering with his own sexual relationship with the child.

However, upon reviewing the transcript of the penalty phase, this court concludes that the introduction of Eikelberry's proposed testimony on this point would not have altered the outcome of the trial. In conducting our independent review of the imposition of the death penalty, we stated in our opinion upon reopening that the alleged rape of the child did not constitute sufficient provocation to justify the premeditated murder of Franks. In reaching this conclusion, we clearly assumed, for the sake of the analysis, that appellant had proven that the rape had occurred. Furthermore, our conclusion was supported by the fact that Franks' alleged commission of the rape did not necessarily mean that appellant had committed the murder to protect the

child; instead, it was still feasible that the murder had occurred because appellant viewed Franks as a rival.

As a result, Eikelberry's proposed testimony would have been merely cumulative in nature. Therefore, it is pure speculation that the proposed testimony on this issue would have resulted in a jury verdict which would have recommended a life sentence.

The foregoing analysis also applies to the second and third aspects of Eikelberry's proposed testimony. Although testimony as to whether appellant was engaging in sexual relations with his girlfriend's daughters may have been admissible in the penalty phase, its introduction clearly would not have had any effect upon the jury's death penalty recommendation. Again, our analysis in the opinion upon reopening was predicated upon the assumption that, even if appellant's version of the various events were true, that factual scenario did not constitute a legal or moral justification for the murder. Accordingly, Eikelberry's proposed testimony would have merely reinforced a factual point which this court had already deemed proven for the sake of our analysis.

Similarly, testimony as to whether Franks had slapped the oldest daughter would not have altered the decision to impose the death penalty. Even if it were assumed that both the rape and the slapping did occur, no reasonable jury would have found that sufficient provocation had existed to justify the premeditated murder of the victim.

As to the fourth aspect of Eikelberry's proposed testimony, this court would note that, as part of a separate claim in his postconviction petition, appellant asserted that his trial counsel should have

called a different psychologist to testify in his behalf during the penalty phase of the trial. Appellant also asserted that this new psychologist would have stated that appellant suffered from neuropsychological deficits which caused him to be unable to make rational and voluntary choices. According to appellant, the new psychologist would have further stated that the deficits were due to a head injury which appellant had suffered as a teenager.

In one of the affidavits attached to the postconviction petition, Eikelberry averred that, if he had been called as a witness, he would have stated that appellant had suffered from serious headaches during the time period prior to the murder. To the extent that this testimony would have bolstered the new psychologist's contention that appellant was still suffering from the effects of the head injury, Eikelberry's proposed testimony might have been relevant if the new psychologist had testified.

However, our review of the testimony of the psychologist who *did* testify during the penalty phase indicates that this expert witness did not rely upon the head injury as an explanation for appellant's behavior; instead, the expert attributed appellant's actions to the difficulties appellant had experienced as a child. As will be discussed below, we conclude that appellant's trial counsel did not render ineffective assistance by relying solely upon the theory of this psychologist. Thus, because Eikelberry's testimony as to the headaches would not have been relevant to the "theory of the case" which trial counsel actually submitted to the jury, the failure to present that

testimony would not have affected the outcome of the case.

To establish a claim of ineffective assistance, a criminal defendant must show that the performance of his trial counsel did not satisfy an objective standard of reasonable representation and that the inadequate performance was prejudicial to him. See *State* v. *Williams* (Oct. 16, 1998), Trumbull App. No. 97-T-0153, unreported, 1998 Ohio App. LEXIS 4884. In light of the foregoing discussion, this court concludes that, at the very least, appellant's evidential materials were insufficient to show that he was prejudiced by the failure of his trial counsel to call Daniel Eikelberry as a witness. Hence, the first claim in his postconviction petition did not establish that he had been denied effective trial assistance.

Under the second claim in his petition, appellant maintained that he was denied his right to effective assistance because his trial counsel failed to call a neuropharmacologist to testify in his behalf at trial. Appellant contended that such a witness would have been beneficial to his case because a neuropharmacologist could have explained the effect of alcohol on his thought processes at the time of the murder.

In support of this claim, appellant attached to his petition the report of Charles T. Kandiko, who had a doctorate in pharmacology and physiology. In this report, Kandiko averred that: (1) it was his opinion that, at the time of the murder, appellant had been under the influence of alcohol; (2) the alcohol in appellant's body had adversely affected his basic ability to consider the ramifications of his actions and,

therefore, alleviated the fears he normally would have felt in that situation; (3) the alcohol also contributed to the feelings of rage appellant had against Franks; and (4) if appellant had not consumed the alcohol, he would not have committed the murder.

As a general proposition, alcohol intoxication can be invoked as a defense to a charge of aggravated murder when the level of intoxication is sufficient to negate the element of purpose. However, the defense will not apply when the evidence indicates that the intake of alcohol only resulted in reduced inhibitions or impaired judgment on the part of the defendant. That is, the defense can be invoked only when the level of intoxication is so severe that the defendant no longer had the mental ability to form the requisite *mens rea:* See *State v. Combs* (1994), 100 Ohio App.3d.90, 101.

In his report concerning appellant, Dr. Kandiko never stated that appellant's level of intoxication was so high at the time of the murder that it deprived him of the ability to form the intent to kill. Moreover, our review of the trial transcript shows that there was no factual predicate from which such a finding could have been made. As to this point, we would emphasize that appellant's own confession indicated that his actions in committing the murder were done pursuant to a premeditated plan and that he was able to remember the events of that night quite vividly.

In fact, Kandiko only stated in his report that appellant's alcohol consumption had alleviated his fear of the various consequences of the murder. Pursuant to *Combs,* this fact would not have been sufficient to establish the defense of intoxication.

Therefore, Kandiko's proposed testimony would not have been admissible during the guilt phase of appellant's trial.

In regard to the penalty phase, the Supreme Court of Ohio has held that voluntary intoxication can be a mitigating factor which can be considered in determining whether the death penalty should be imposed. Nevertheless, in *State v. D'Ambrosio* (1995), 73 Ohio St.3d 141, the Supreme Court emphasized that this factor should not be given much weight when the defendant has not been diagnosed as suffering from alcoholism.

In his report, Dr. Kandiko never gave any indication that appellant had become an alcoholic as a result of his use of alcohol. Furthermore, the report did not indicate that appellant's use of alcohol had caused any other type of mental disease or defect. Thus, pursuant to *D'Amrosio,* we conclude that, even though Kandiko's proposed testimony would have been admissible during the penalty phase of appellant's trial, the failure of his trial counsel to introduce similar testimony did not affect the outcome of the action because any testimony concerning appellant's level of intoxication would not have been entitled to any significant weight in the weighing exercise.

Because the Kandiko report was legally insufficient to raise a factual dispute as to whether appellant was prejudiced as a result of the failure of his trial counsel to call a neuropharmacologist as a witness. the second claim of his postconviction petition did not demonstrate that his constitutional rights had been violated.

Under his next claim, appellant contended that his conviction should be declared void because the psychologist who testified in his behalf at trial did not conduct a proper evaluation of him. Based upon this, appellant further contended that he was denied his constitutional right to effective assistance because his trial counsel predicated his defense during the guilt phase upon the opinion of that psychologist.

In support of his claim, appellant submitted the affidavit of a different psychologist, Dr. Newton Jackson, who had examined appellant immediately prior to the filing of the postconviction petition. In his affidavit, Jackson stated that the psychologist who had testified at trial, Dr. Donald Gordon, had relied too much upon the interviews he had conducted with appellant and members of his family. Jackson also opined that Gordon should have instead relied upon: (1) certain medical reports which had been produced when appellant was a teenager; and (2) the results of psychological tests. According to Jackson, these reports would have established that appellant had shot himself in the head during a suicide attempt and that a fragment of the bullet was still lodged in his head. In addition, the test results would have led Gordon to the conclusion that appellant did not have the ability to make voluntary and rational choices.

In relation to the adequacy of Dr. Gordon's evaluation of appellant, our review of the trial transcript demonstrates that Gordon's failure to consider the medical reports and tests results, as suggested by Dr. Jackson, was not malpractice. Rather, this omission was simply due to the specific nature of his training as a psychologist. At the outset

of his testimony, Gordon stated that he was a behavioral psychologist who predicated his professional opinions upon his observance of a patient's actual behavior. Gordon further testified that, by the nature of his psychological philosophy, he tends to place less weight upon the results of psychological tests.

The trial transcript further indicates that Dr. Gordon gave a coherent and logical explanation for appellant's behavior in committing the murder. Moreover, this court would note that Gordon's explanation was consistent with appellant's own justification for his actions. That is, Gordon stated that, in his opinion, appellant's commission of the murder was his way of protecting the alleged rape victim from the same type of abusive behavior appellant had experienced when he was young. Thus, the record before us simply does not support the conclusion that Dr. Gordon failed to provide adequate expert testimony in support of appellant's trial strategy.

At best, Dr. Jackson's explanation of appellant's actions in committing the murder merely constituted an alternative psychological theory. Although Dr. Jackson's theory arguably constitutes a viable explanation for appellant's actions, the same can also be said for Dr. Gordon's theory.

In considering circumstances similar to this, the courts of this state have held that a finding of ineffective assistance cannot be based upon the trial counsel's choice of one competing psychological explanation over another. See, *e.g., Combs,* at 98. To hold otherwise would potentially place a burden on

trial counsel to have his client tested and examined by a proponent of every available psychological and psychiatric school of thought. That is not a realistic proposition. Thus, appellant's third claim in his postconviction petition did not state a viable argument that the employment of Dr. Gordon as his expert witness at trial violated his constitutional rights.

Under the fourth claim for relief, appellant asserted that his trial counsel rendered ineffective assistance by failing *to* obtain the help of a mitigation specialist in preparing his defense. Appellant maintained that the use of such a specialist would have aided his counsel in obtaining additional information concerning his background which could have been presented to the jury during the penalty phase.

In attempting to demonstrate how a mitigation specialist could have helped in his defense, appellant attached to his petition certain documents which were designed to set forth what additional evidence could have presented at trial. These documents consisted of the affidavits of certain members of appellant's family who stated what the substance of their testimony could have been had they been called. The family members included appellant's mother, his brother, his grandmother, and two aunts.

A perusal of these affidavits readily indicates that the family members would have given testimony which primarily concerned the nature of appellant's childhood and his relationship with his stepfather. A comparison of this proposed testimony to the actual testimony presented during the penalty phase shows that the substance of the majority of the proposed

testimony was submitted to the jury for their consideration. Both Dr. Gordon and appellant himself gave extensive testimony concerning the same topics that the family members addressed. In addition, Gordon testified that he had interviewed three of the family members in question.

Thus, the proposed testimony of the family members would have been cumulative in nature. Given these circumstances, this court concludes that the introduction of the proposed testimony would not have altered the outcome of the penalty phase in this case because the jury still would have found that the aggravating circumstance outweighed the mitigating factors. In turn, it follows that the failure of trial counsel to employ a mitigation specialist did not result in a violation of appellant's constitutional rights.

Under his fifth claim in his petition, appellant argued that his death sentence should be declared void because electrocution violates his constitutional right against cruel and unusual punishment. Appellant asserted that electrocution constitutes an unnecessary and wanton infliction of pain.

As to this claim, this court holds that this argument was not properly before the trial court in the context of a postconviction proceeding. As was noted previously, a criminal defendant is barred under the doctrine of *res judicata* from raising a defense or constitutional claim in a postconviction petition which could have been asserted at trial or on direct appeal. *Williams, supra,* unreported. The foregoing basic rule has been expressly applied to challenges to the constitutionality of the death penalty. See *State v. Powell* (1993), 90 Ohio App.3d 260, 267.

In support of his constitutional challenge to electrocution, appellant attached to his petition considerable evidential materials which had not been a part of the trial record in this case. However, these materials, along with appellant's legal argument on this issue, could have been readily raised before the trial court during his trial. As a result, appellant was barred from asserting this argument in his postconviction petition.

A similar analysis is applicable to the sixth claim in the instant appeal. Under that claim, appellant maintained that Ohio's procedure for reviewing the imposition of the death penalty is constitutionally flawed because the appellate courts and the Supreme Court of this state have failed to engage in an adequate proportionality review. In ruling upon arguments similar to the foregoing, the courts of this state have held that this type of argument cannot be asserted in a postconviction petition because a trial court does not have the authority to review the actions of superior courts. See, *e.g., Powell,* at 267. Hence, since appellant's sixth claim was not based upon a viable argument for postconviction relief, it was not properly before the trial court in the context of this case.

Under his seventh claim, appellant asserted that he was denied his constitutional right to effective assistance because his trial counsel failed to conduct the proper *voir dire* examination. In support of this particular claim, appellant attached to his petition the affidavit of Clive Stafford, an attorney from the state of Louisiana who has tried a significant number of death penalty cases. In this affidavit, Stafford averred

that, after reviewing the transcript of appellant's trial, it was his belief that trial counsel had failed to question the potential jurors properly on a number of critical issues. Stafford further averred that, in his opinion, the failure to conduct an adequate *voir dire* denied appellant his right to a fair trial.

As to this claim, this court would merely note that, although Stafford's statements were set forth in the form of an affidavit, those statements essentially asserted a legal argument which could have been raised as an assignment of error in his appellate brief on direct appeal from his conviction. Therefore, appellant's seventh claim was barred under the doctrine of res judicata.

Under his final claim, appellant argued that he was entitled to have his conviction vacated as a result of the cumulative effect of the errors cited in his other seven claims. In light of our disposition of those other claims, this court concludes that relief was also not warranted under this particular claim. Although appellant's trial counsel could have introduced additional testimony during the penalty phase of the trial, the failure to do so even when considered as a whole, did not have an adverse affect upon the outcome of the trial.

Pursuant to the foregoing discussion, this court ultimately concludes that, as to each of the eight claims in appellant's postconviction petition, there were no factual disputes as to any material fact. Furthermore, we hold that appellant's evidential materials were legally insufficient to establish that a violation of appellant's basic constitutional rights occurred during his trial. Therefore, as the trial court

did not err in granting summary judgment in favor of the state in relation to appellant's entire postconviction petition, his third assignment of error lacks merit.

The judgment of the trial court is affirmed.

s/ DONALD R. FORD
PRESIDING JUDGE DONALD R. FORD
Eleventh District Court of Appeals,
Sitting by assignment.

CHRISTLEY, J,
Eleventh District Court of Appeals,
Sitting by assignment.

Nader, J.,
Eleventh District Court of Appeals,
Sitting by assignment.

concur.

FILED
COURT OF APPEALS
JEFFERSON COUNTY, OHIO
MAR 19, 2001
JOHN A. CORRIGAN
CLERK

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:03-cv-00906

JUDGE ALGENON L. MARBLEY

Magistrate Judge Preston Deavers

Death Penalty Case

RAYMOND A. TWYFORD, III,

Petitioner,

vs.

TIM SHOOP, WARDEN,

Respondent.

PETITIONER RAYMOND A. TWYFORD, III'S REPLY TO OPPOSITION TO MOTION FOR TRANSPORT FOR NEUROLOGICAL TESTING

Petitioner Raymond Twyford is before the Court seeking an order of transport to the Ohio State Medical Center for neurological scan testing. [Doc. 106]

In opposing the motion, Respondent asserts that the Court is without jurisdiction to authorize the transport. [Doc. 107] The assertion of lack of jurisdiction is built on the misrepresentation of the state of law, conflation of legal issues, and a failure to disclose binding Supreme Court authority.

First, Respondent attempts to cast Twyford's motion for transport as a motion for discovery.

[Opposition, Doc 107, PAGEID# 2.] In the motion, Twyford is not seeking discovery from the State or any entity. Rather, he is seeking material encased within his own body. Twyford's motion in no way compels the State to disclose evidence or to, in the language of *Baze v. Parker*, "to stand down." *Baze v. Parker*, 632 F.3d 338, 343 (6th Cir. 2011). This Court clearly has jurisdiction to ensure that Twyford, and his appointed counsel, are able to properly and fully investigate and litigate his habeas petition. *See Bergman v. United States*, 565 F.Supp. 1353 (WD MI 1983). "Our constitutional system of government works because we want it to -- we pay more than lip service to the rule of law." *Id.*, at 1367. *See also United States v. Hutchins*, 2018 CCA Lexis 31, 160 (Navy-Marine Corps Court of Criminal Appeals, January 29, 2018) ("There is usually no obligation to arrange interviews between trial defense counsel and witnesses, but the government may not hinder them") If Respondent interfered with Twyford's right to appointed counsel by denying counsels' access to Twyford there is no doubt that this Court would have jurisdiction to ensure that its appointment order was given effect. *Geders v. United States*, 425 U.S. 80 (1976) (court order denying defendant the right to consult with counsel during a seventeen hour recess impaired defendant's right to effective assistance of counsel); *Herring v. New York*, 422 U.S. 853 (1975) (statute allowing judge in non-jury criminal trial to deny counsel the opportunity to give closing statements unconstitutionally denies defendant the right to effective assistance of counsel); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (court procedures that require defendant, if testifying, to testify before any other

defense witnesses, unconstitutionally impairs counsel's ability to effectively assist defendant); *Ferguson v. State of Georgia*, 365 U.S. 570 (1961)(court rules denying defendant the right to take the stand and be questioned by his attorney unconstitutionally impairs the right to effective assistance of counsel); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Nicholson v. Williams*, 203 F.Supp.2d 153, 239 (ED NY, 2002) ("where the government is under a due process obligation to appoint counsel, it cannot do so in a way that structurally impedes the ability of counsel to effectively represent clients.") Twyford is seeking nothing more than this access.

Second, the ability of counsel to conduct their investigation into this matter is not dependent on any restrictions that may be imposed on the ability of this Court to order additional discovery, conduct an evidentiary hearing, or event to grant relief under the AEDPA amendments to 28 U.S.C. § 2254. That is because any issue of application of 2254(b)(1) presents questions of fact and law of a pure federal question-2254(d)(1) is limited to issues that were "adjudicated on the merits" requiring investigation and litigation before the Court, and 2254(e) specifically envisions a process by which additional evidence may be considered by the Court.

Respondent improperly limits the law to *Harrington v. Richter*, 562 US. 86 (2011), and *Cullen v. Pinholster*, 563 U.S 170 (2011), asserting that these cases absolutely prohibit any factual development by this Court. *Cullen* itself directly disavows Respondent's position.

Pinholster's contention that our holding renders § 2254(e)(2) superfluous is incorrect. Section 2254(e)(2) imposes a limitation on the discretion of federal habeas courts to take new evidence in an evidentiary hearing. See *Landrigan*, *supra,* at 473, 127 S.Ct. 1933, 167 L. Ed. 2d 836 (noting that district courts, under AEDPA, generally retain the discretion to grant an evidentiary hearing). Like § 2254(d)(1), it carries out "AEDPA's goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance." *Jimenez* v. *Quarterman*, 555 U.S. 113, 121, 129 S.Ct. 681, 172 L. Ed. 2d 475, 483 (2009) (internal quotation marks omitted).

Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief. For example, not all federal habeas claims by state prisoners fall within the scope of § 2254(d), which applies only to claims "adjudicated on the merits in State court proceedings." At a minimum, therefore, § 2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court. See, *e.g.*, *Michael Williams*, 529 U.S., at 427-429, 120 S.Ct. 1479, 146 L. Ed. 2d 435.

Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so. Provisions like §§ 2254(d)(1) and (e)(2) ensure that "[f]ederal courts sitting in habeas

> are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Id.,* at 437, 120 S.Ct. 1479, 146 L. Ed. 2d 435; see also *Richter*, 562 U.S., at 103, 131 S.Ct. 770, 178 L. Ed. 2d 624, 642 ("Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions"); *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 53 L. Ed. 2d 594 (1977) ("[T]he state trial on the merits [should be] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing").

It is clear from this passage that factual development is still possible in habeas proceedings and Respondent's overstatement and material omissions of law should be rejected.

Third, Respondent failed to address the impact of *Ayestas v. Davis*, 138 S.Ct. 1080 (2018). In *Ayestas* the Court determined that "Proper application of the 'reasonably necessary' standard thus requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Id*., at 1094. Because Twyford is fortunate to have the Federal Public Defender as appointed counsel he does not need to seek funding for his investigation into this matter. However, the fact that Twyford is held by Respondent prevents the expert from conducting his

investigation, fulfilling the terms of his contract, and interferes with counsels' abilities to do their job. It is the ability to perform that testing necessary that is "reasonably necessary."

The testing by Dr. Scharre is reasonably necessary to the proper investigation, litigation, and resolution of Mr. Twyford's habeas petition. "Reasonably necessary" is a term of art that carries a permissive tone. "In those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding." *Ayestas*, 138 S.Ct. at 1094. This standard does not require Twyford to prove that he is entitled to relief if the service is provided. *Id.* Rather, it is sufficient to show that the service supports a plausible claim. *Id.*

As outlined in Twyford's Motion to Transport there are specific and clear issues that are before this Court that are directly implicated by the testing Twyford is seeking. Given the issues in Twyford's petition relating to his family history, mental health issues, and the impact of his suicide attempt (see Claims for Relief Nos. 1 (Ineffective Assistance of Counsel), 4 (Involuntary and Coerced Statement), 6 (Competency to Stand Trial), 16 (Ineffective Assistance of Counsel at Mitigation), 17 (Ineffective Assistance of Expert), 18 (Denial of Right to Present Mitigation Evidence)), it is plausible that the testing to be administered is likely to reveal evidence in support of Twyford's claims. Additionally, this investigation could plausibly lead to the development of evidence and materials in support for any challenges to the Warden's claims of procedural default or exhaustion.

Ayestas, 138 S.Ct. at 1093-1094 (recognizing that *Trevino v. Thaler*, 569 U.S. 413 (2013), permitted investigation into evidence for cause and prejudice review).

In seeking expert testing, counsel neither requests discovery nor funding from the Court. Pursuant to obligations consistent with being appointed habeas counsel under 18 U.S.C. § 3599 and *McFarland v. Scott*, 512 U.S. 849 (1994), Twyford's counsel are seeking to investigate the factual bases for his exhausted habeas claims so that he may properly and thoroughly litigate them. The Supreme Court recognized that "the right to counsel [in federal habeas corpus proceedings] necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." Counsel can only fulfill the duty imposed by *McFarland* and 18 U.S.C. § 3599 if provided the tools to research and investigate the case and access to Twyford is an integral and critical tool. *See Banks v. Dretke*, 540 U.S. 668, 675 (2004) ("Ultimately, through discovery and an evidentiary hearing authorized in a federal habeas corpus proceeding, the long-suppressed evidence came to light.").

Additionally, the investigation may reasonably lead to material that addresses issues to forgive any procedural defaults or otherwise impact the ability of this Court to address the merits of Twyford's claims. The Capital Habeas Unit for the Northern District of Ohio Federal Public Defender's Office will pay all costs associated with obtaining the CT and FDG-PET scans.

For these reasons, and the reasons set forth in Twyford's Motion to Transport [Doc. 106], this Court

should order Respondent to transport Twyford to Ohio State Medical Center for neurological testing.

Respectfully submitted,

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Federal Public Defender
Ohio Bar: 0051928

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ALAN C. ROSSMAN (#0019893)
Assistant Federal Public Defender

/s/ Sharon A. Hicks
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APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:03-cv-00906

Judge Algenon L. Marbley

Magistrate Judge Preston Deavers

DEATH PENALTY CASE

RAYMOND A. TWYFORD, III,

Petitioner,

vs.

TIM SHOOP, WARDEN,

Respondent.

MOTION TO TRANSPORT FOR MEICAL TESTING

In ECF No. 92, Opinion and Order, 09/26/2017, this Court denied without prejudice, subject to re-filing at a later date, Petitioner's request to be transported to The Ohio State University Medical Center for purposes of neurological scan testing. Petitioner hereby again moves this Honorable Court to issue an Order to Tim Shoop, Warden of Chillicothe Correctional Institution, to transport Mr. Raymond Twyford to The Ohio State University Medical Center for medical testing necessary for the investigation, presentation, and development of claims in his pending petition for writ of habeas corpus. The need for this testing is detailed within the attached Memorandum in Support, and, as indicated, is

relevant and specific to Petitioner's claims for relief. This motion is made pursuant to 18 U.S.C. § 3599, 28 U.S.C. § 1651, *McFarland v. Scott*, 512 U.S. 849 (1994), *Ake v. Oklahoma*, 470 U.S. 68, 79-80 (1985), and *Ayestas v. Davis*, 138 S.Ct. 1080 (2018).

Upon issuance of the Order by this Court, counsel for Mr. Twyford will work with counsel for Respondent to arrange transport accommodating Respondent's reasonable concerns regarding security and other issues.

Respectfully submitted,

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Federal Public Defender
Ohio Bar: 0051928

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Counsel for Petitioner Raymond A. Twyford, III

MEMORANDUM IN SUPPORT OF APPLICATION

1. **This Testing Is Medically Reasonable and Necessary:**

Petitioner Raymond Twyford was recently evaluated by neurologist, Dr. Douglas Scharre, with regard to potential neurological deficits. Dr. Scharre is the director of the Cognitive Neurology Division at The Ohio State University Medical Center. (Exhibit 1). Following the evaluation, Dr. Scharre recommended Mr. Twyford undergo further testing in the form of a CT scan and FDG-PET scan. (Exhibit 2). Dr. Scharre suspects that Mr. Twyford may suffer from neurological defects due to childhood physical abuse, alcohol and drug use, and a self-inflicted gunshot wound to the head during an adolescent suicide attempt. (*Id*.) Numerous lead metal fragments from the gunshot wound remain lodged in Mr. Twyford's head.

In seeking expert testing, counsel requests neither discovery nor funding from the Court. Pursuant to obligations consistent with being appointed habeas counsel under 18 U.S.C. § 3599 and *McFarland v. Scott*, 512 U.S. 849 (1994), Mr. Twyford's counsel are seeking to investigate the factual bases for his

exhausted habeas claims so that he may properly and thoroughly litigate them. The Capital Habeas Unit for the Northern District of Ohio Federal Public Defender's Office will pay all costs associated with obtaining the CT and FDG-PET scans.

2. <u>Petitioner Cannot Obtain the Necessary Testing Without this Court's Order:</u>

Petitioner seeks an Order from this Court to compel Tim Shoop, Warden of the Chillicothe Correctional Institution where Mr. Twyford is currently held, to arrange transportation of Mr. Twyford and convey him to The Ohio State University Medical Center for medical testing. Mr. Twyford is not seeking funding for this substantive testing because he is represented by the Office of the Federal Public Defender that currently has financial resources to obtain the necessary services. However, in order to make proper use of those services, Mr. Twyford needs the order of this Court to compel his conveyance to a proper medical facility where appropriate testing can be conducted.

As stated above, counsel obtained the services of Dr. Douglas Scharre, a Professor of Clinical Neurology and Psychiatry at The Ohio State University Medical Center. He performed a neuropsychological evaluation of Mr. Twyford. It is Dr. Scharre's opinion that additional neuropsychological and neurological scan testing is required to complete an evaluation of Mr. Twyford, that the testing is medically appropriate, and the testing is likely to reveal material and evidence relevant to this case. The testing required can only be conducted at a full-service medical facility and Dr. Scharre can perform and / or

supervise this testing at The Ohio State University Medical Center.

This testing cannot be conducted in the prison. In fact, any Ohio inmate needing such testing is routinely transported from the prison to The Ohio State University Medical Center because The Ohio State University Medical Center is the official prison hospital. https://drc.ohio.gov/correctional-healthcare (last visited November 19, 2018). This is the very facility where Dr. Scharre will facilitate and/or perform the necessary testing. As the official prison hospital, The Ohio State University Medical Center has the security and other infrastructure to accommodate any concerns of Respondent.

Petitioner is imprisoned on Ohio's death row. He is currently without assets or resources, he proceeded *in forma pauperis*, and this Honorable Court appointed him *habeas* counsel. 18 U.S.C. § 3599, authorizes federal habeas corpus courts to provide funds for all "reasonably necessary" investigative and expert services requested by indigent habeas corpus petitioners challenging the constitutionality of their convictions and death sentences.[1] *See also Ake v.*

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[1] 18 U.S.C. § 3599(f) ("Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request

Oklahoma, 470 U.S. 68, 79-80 (1985). Inherent in the authorization for services is the power of the Court to issue orders in support of the services.

This Court has jurisdiction under 28 U.S.C. § 1651 to enter an order for transport of Mr. Twyford in order to give full effect to its jurisdiction. Section 1651, the All Writs Act, provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law." If Mr. Twyford required this Court's authorization for services under § 3599, logic dictates that the All Writs Act authorized the Court to order transport of Mr. Twyford to a facility capable of providing the testing the appointed expert needed to conduct his review. Just because Mr. Twyford's appointed counsel can fund the necessary expert services does not diminish this Court's authority to support the expert services.

In *McFarland v. Scott*, 512 U.S. 849, 855 (1994), the Supreme Court acknowledged that Congress's adoption of the Anti-Drug Abuse Act creating a right to counsel and support services in capital cases "reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of the 'seriousness of the possible penalty and... the unique and complex nature of the litigation.'" This concern reflects a long time acknowledgment of the unique concerns with capital litigation. As such, policies favoring the provision of financial services are even stronger in capital cases

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shall be transcribed and made a part of the record available for appellate review.")

than in non-capital cases because of the "finality" of death and its "qualitative difference from a sentence of imprisonment, however long." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

The *McFarland* Court confirmed the right to financial assistance for necessary support services, investigative and otherwise, *even before the filing of a Petition*:

> 21 U.S.C. section 848(q)(9)[2] ... entitles capital [postconviction petitioners] to a variety of expert and investigative services upon a showing of necessity... The services of investigators and other experts may be critical in the *preapplication* phase of habeas corpus proceeding, when possible claims and their factual bases are researched and identified. Section 848(a)(9) clearly anticipates that capital defense counsel will have been appointed under section 848(q)(4)(B) before the need for such technical assistance arises, since the statute requires "the defendant's attorneys to obtain such services." (emphasis added).

McFarland, 512 U.S. at 855.

This concern for providing funds for capital counsel is not surprising given that the Supreme Court has long acknowledged that habeas corpus claims frequently turn upon factual questions, and because the "'procedures by which the facts of a case are determined assume an importance fully as great as the validity of the substantive rule of law to be

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[2] 21 U.S.C. § 848(q) was subsequently reenacted without meaningful revision in 18 U.S.C. § 3599.

applied.'" *Wingo v. Wedding*, 418 U.S. 461, 474 (1974) (*quoting Speiser v. Randall*, 357 U.S. 513, 520 (1958)); *McFarland v. Scott*, 512 U.S. at 855 (purpose of habeas corpus procedures is development of "possible claims and their factual bases); *Townsend v. Sain*, 372 U.S. 293, 312 (1963) ("it is the typical, not the rare, [habeas corpus] case in which constitutional claims turn upon the resolution of contested factual issues.").

Thus, it is well established that petitioners have the means to fully develop determinative factual questions prior to any adjudication of habeas corpus claims. *Blackledge v. Allison*, 431 U.S. 633, 82-83 (1977) (habeas corpus petitioner is "entitled to careful consideration and plenary processing of [his claim], including full opportunity for presentation of the relevant facts." (*quoting Harris v. Nelson*, 394 U.S. 286, 298 (1969)). Because of his incarceration, Mr. Twyford can only develop the determinative facts if this Court orders Respondent to transport him to The Ohio State University Medical Center

As then-Chief Judge Merritt of the Sixth Circuit stated in a letter drawing the attention of district judges in the circuit to the support services of the Anti-Drug Abuse Act:

> The Act... provides that "investigative, expert or other services [which] are reasonably necessary for the representation of a defendant, whether in connection with issues relating to guilt or sentencing," 21 U.S.C. section 848(q)(9), shall be authorized by the court...
>
> These requirements for... support services have been promulgated in federal legislation due to the peculiar, diverse and demanding characteristics of

> capital defense. Generally, see, "*ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*," adopted February 1989. The defense is confronted with a substantively and procedurally complex body of law in all capital litigation; the defense is also confronted... with a different sentencing procedure, in which the client's life is at stake. Psychiatric and other mental health experts for evaluation, consultation and testimony, may be necessary for the defense in order to competently... make an evaluation on collateral review. (Letter from Hon. Gilbert S. Merritt to Hon. Thomas A. Wiseman, dated 10-11-90, as cited in Liebman, James S., and Hertz, Randy, *Federal Habeas corpus Practice and Procedure*, § 19.3, at 775 (4th edition, LexisNexis, 2001)).

The testing by Dr. Scharre is reasonably necessary to the proper investigation, litigation, and resolution of Mr. Twyford's Habeas Petition. *See Ayesta v. Davis*, 138 S.Ct. 1080 (2018). "Reasonably necessary" is a term of art that carries a permissive tone. "In those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding." *Id.*, at 1094. This standard does not require Mr. Twyford to prove that he is entitled to relief if the service is provided. *Id.* Rather, it is sufficient to show that the service supports a plausible claim. *Id.*

Mr. Twyford is not seeking funding for this investigation but the logic of *Ayesta* applies. The transport of Mr. Twyford to The Ohio State University

Medical Center can only be accomplished by this Court's order. Given the issues in Mr. Twyford's petition relating to his family history, mental health issues, and the impact of his suicide attempt (see Claims for Relief Nos. 1 (Ineffective Assistance of Counsel), 4 (Involuntary and Coerced Statement), 6 (Competency to Stand Trial), 16 (Ineffective Assistance of Counsel at Mitigation), 17 (Ineffective Assistance of Expert), 18 (Denial of Right to Present Mitigation Evidence)), it is plausible that the testing to be administered is likely to reveal evidence in support of Mr. Twyford's claims. Additionally, this investigation could plausibly lead to the development of evidence and materials in support for any challenges to the Warden's claims of procedural default or exhaustion. *Ayesta*, 138 S.Ct. at 1093- 1094 (recognizing that *Trevino v. Thaler*, 569 U.S. 413 (2013), permitted investigation into evidence for cause and prejudice review). As such, this Court should order the transport of Mr. Twyford to The Ohio State University Medical Center.

3. <u>The Testing to be Performed is Necessary in this Case:</u>

Neuropsychological testing of Petitioner is necessary in order to determine the existence, severity, and effect of brain damage and cognitive impairment on Mr. Twyford's behavior and mental functioning. Neurological disease can cause impaired judgment and reasoning, distorted perceptions of reality, loss of contact with reality, memory loss, social ostracism, disrupted academic performance, learning disabilities, and aggressive behavior. Acquired brain damage can also have psychiatric consequences such

a confusion, lability, depression, irritability, and paranoia. Neuropsychological testing is essential when certain hallmark signs and symptoms are present. Several factors indicate that neuropsychological testing will offer explanations for Mr. Twyford's development and functioning and will shed light on otherwise inexplicable behavior.

One of the most salient of these is the fact that Mr. Twyford sustained a head injury when he attempted suicide by shooting himself in the head. Mr. Twyford remains blind in one eye as a result. Numerous fragments of the lead bullet remain lodged in Mr. Twyford's brain. The impact of this longstanding injury was not investigated nor evaluated by trial counsel. *See Wiggins v. Smith*, 123 S.Ct. 2527, 2537 (2003). This issue must be explored both as to any ineffective assistance of counsel claim as well as any substantive claim pertaining to the head trauma and its impact on Mr. Twyford.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based upon his mental condition," when the defendant's mental health is at issue. *Id.*, 470 U.S. at 70. The Court recognized that indigent defendants are entitled to independent mental health experts when their assistance "may well be crucial to the defendant's ability to marshal a defense." *Ake*, 470 U.S. at 80. The Court conducted a Fourteenth Amendment due process analysis, *id.*, 470 U.S. at 87, and held that, without independent experts, defendants could be denied "meaningful

access to justice." *Id.*, 470 U.S. at 76-77. This was because, while jurors may disregard a defendant's testimony or a lawyer's argument, experts "assist lay jurors, who generally have no training in" scientific or medical matters "to make a sensible and educated determination about" the contested issues. *Id.*, 470 U.S. at 81. "By organizing ...[data], interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the [expert] for each party enable[s] the jury to make its most accurate determination of the issue before them." *Id. See also Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir.) (en banc), *cert. denied*, 499 U.S. 970 (1991); *Blake v. Kemp*, 758 F.2d 523 (11th Cir.), *cert. denied*, 474 U.S. 998 (1985); *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990).

The *Ake* Court, after discussing the potential help that might be provided by a psychiatrist, stated:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, *assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense*. That is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a *competent psychiatrist* for the purpose we have discussed, and as in the case of the provision of counsel we leave

> to the states the decision on how to implement this right.

Id. 470 U.S. at 83 (emphasis added).

In other words, *Ake*'s holding recognized the entitlement of an indigent accused, not only to a "competent" psychiatrist (*i.e.*, one who is duly qualified to practice psychiatry), but also to a psychiatrist who performs competently- who conducts a professionally competent examination of the defendant and who on this basis provides professionally competent assistance. *See also Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995); *Buttrum v. Black*, 721 F.Supp. 1268, 1312 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990) (expert "failed to provide the scope of psychiatric assistance contemplated by *Ake"*). *See, Tuggle v. Netherland*, 516 U.S. 10 (1995)(*per curiam*)(capital case)("The *Ake* error prevented petitioner from developing his own psychiatric evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation"; on remand, 79 F.3d 1396 (1996), *cert. denied*, 117 S.Ct. 207 (1996), the court of appeals, using the *Brecht* standard, found the *Ake* error harmless); *Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 499 (1994)(capital case)(only viable defense was defendant's mental condition; defendant was entitled to expert assistance and trial court's denial of request for a mental health professional at the sentencing phase violated *Ake*; the right to subpoena state professionals who conducted a competency evaluation was not an adequate substitute for the assistance of a defense mental health professional in evaluating, preparing, and presenting defense; competency

evaluation would not satisfy *Ake* because it was not "appropriate" for developing mitigation based on defendant's functional deficits).

The rationale underlying the holding of *Ake* compels such a conclusion, for it is based upon the due process requirement that fact-finding must be reliable in criminal proceedings. *Id.*, 470 U.S. at 77-83. Due process requires the state to make available mental health experts for indigent defendants, because "the potential accuracy of the jury's determination is . . . dramatically enhanced" by providing indigent defendants with competent psychiatric assistance. *Id.*, 470 U.S. at 81-83. In this context, the Court clearly contemplated that the right of access to a competent psychiatrist who will conduct appropriate testing and professional examinations based upon such testing. To conclude otherwise would make the right of "access to a competent psychiatrist" an empty exercise in formalism. *See, Youngberg v. Romeo*, 457 U.S. 307 (1982) (recognizing that psychiatrist's performance must be measured against a standard of care when due process demands adequate performance.)

4. <u>The Implications of *Cullen v. Pinholster*, _ U.S. _, 131 S.Ct. 1388 (2011)</u>:

In ECF No. 92, <u>Opinion and Order</u>, 09/26/2017, this Court asked that if Petitioner again sought to request transport to The Ohio State University Medical Center for purposes of scan testing, "petitioner should address the implications of *Pinholster* in his request." *Id.* at PageID #691. For the reasons expressed below, this request to transport should not be denied pursuant to *Pinholster*.

In *Cullen v. Pinholster,* _ U.S. _, 131 S.Ct. 1388 (2011), the Supreme Court held that 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), limits § 2254 habeas review to the "record that was before the state court that adjudicated the claim on the merits." *Id. at* 1398. In so holding, the Supreme Court stated that "[s]ection 2254(e) continues to have force" and that "state prisoners may sometimes submit new evidence in federal court." *Id*. at 1401.

Mr. Twyford's request for transport in order to secure new scientific evidence to support extant constitutional claims renders this request akin to seeking new evidence through discovery. Significantly, *Pinholster* did not address a federal court's ability to authorize discovery. *See Conway v. Houk,* No. 07-cv-947, 2011 WL 2119373 at *3 (S.D. Ohio May 26, 2011) (granting Petitioner's Motion for Discovery) ("*Pinholster* did not, strictly speaking, alter or even speak to the standards governing discovery set forth in Rule 6 of the Rules Governing Section 2254 Cases and *Bracy v. Gramley*, [520 U.S. 899 (1997)]") (internal citations omitted). The omission alone is "reason enough to refrain from invoking *Pinholster's* restrictions" when a party requests discovery. *Id.* at *3. Applying *Pinholster* so broadly as to disallow discovery would work a revolution on prior precedent and the habeas rules, effectively render completely meaningless Rule 6, and require the court to determine that *Bracy v. Gramley* is no longer applicable to discovery determinations.

Beyond the discovery context, the Supreme Court rejected the notion that its holding would bar habeas

petitioners from ever presenting new evidence in federal habeas proceedings. *See Pinholster, Id.* at 1401 (acknowledging that "state prisoners may sometimes submit new evidence in federal court" although "AEDPA's statutory scheme is designed to strongly discourage them from doing so."). The Supreme Court expressly withheld review of a situation in which additional facts afforded through new investigations or discovery may present a new claim for federal habeas review. *Id.* In her dissent, Justice Sotomayor described a hypothetical situation in which new evidence supporting a claim adjudicated on the merits in state court "gives rise to an altogether different claim," like the discovery of potential *Brady* claim. *Id.* at 1417 fn. 5. The Supreme Court declined to decide whether the AEDPA would preclude consideration of new evidence in that situation. *Id.* at 1401 fn. 10. But even if the Court were to hold that *Pinholster* did categorically bar new fact development, that bar would only apply to the merits of claims decided by state courts.

Thus, at very least, this Court will have to determine questions surrounding the asserted procedural defenses that might come to bear depending upon the evidence secured from these tests. *See Johnson v. Mississippi,* 486 U.S. 578, 587 (1988) (holding that "when and how defaults" "can preclude our consideration of a federal question is itself a federal question.") (quoting *Henry v. Mississippi,* 379 U.S. 443, 447 (1965). Accordingly, *Pinholster* does not categorically bar all presentation of new evidence or discovery in federal habeas proceedings.

Further, it is important to not read *Pinholster* myopically, as there may be situations in which additional facts gathered in federal habeas proceedings may find their way back into the state record and eventually wind up before a federal habeas court. Depending upon the nature of this scientific evidence, Mr. Twyford will prove that good cause exists to go back to state court to present unexhausted claims. This evidence would, in that case, support his motion to hold these proceedings in abeyance pursuant to *Rhines v. Weber,* 544 U.S. 269, 277 (2005). If the Court were to grant Mr. Twyford's *Rhines* motion hold the federal case in abeyance to allow for exhaustion of a new claim in state court, certainly that new evidence will eventually comprise the state court record for any subsequent review by this Court. *See Conway,* 2011 WL 2119373 at *3 (recognizing that if petitioner were to return to state court to exhaust additional claims based on new facts, *Pinholster* would not preclude a federal court's consideration of those facts).

Moreover, courts have found persuasive the need for further factual development of claims in light of the imposition of an impending death sentence. The district court in *Conway*, for example, granted the petitioner's second motion for discovery over the respondent's *Pinholster* argument primarily because "in a death penalty habeas corpus case, the Court prefers to err on the side of gathering too much information rather than too little." *See Conway,* 2011 WL 2119373 at *4. Similarly, in *Ervin v. Cullen,* the court found that "*Pinholster* does not bar discovery in this instance" as the petitioner "faces the ultimate punishment" and the underlying discovery requests

relate to discovering potentially exculpatory evidence. *See Ervin v. Cullen,* No. 00-01228, 2011 WL 4006389 at *4 (N.D. Cal. Sept. 8,2011) (granting in part Petitioner's Motion for Supplemental Discovery) (granting discovery because the Eighth Amendment entails a "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'"). Here, as noted previously, Mr. Twyford seeks discovery to support many of his constitutional claims. The gravity and importance of his situation warrant the opportunity to have Mr. Twyford conveyed to the medical facilities to secure this doctor-recommended testing.

5. Conclusion:

Neuropsychological assessments have evolved into a rather standard set of procedures with acceptable levels of reliability and validity and that enables linking patterns of behavioral deficits to regional brain function. Such methods are becoming increasingly integrated into psychiatric research and practice. In this capacity, they are being used to detect the presence of organic brain damage in patients who present with psychopathology. The need for this testing is specifically pertinent in order to determine a psychiatric workup for organically based psychiatric disorders. For these reasons, counsel request authorization to transport Mr. Twyford to the appropriate medical facilities to secure the necessary testing to properly evaluate Mr. Twyford.

Respectfully submitted,

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APPENDIX L

THE OHIO STATE UNIVERSITY
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October 14, 2018

Alan Rossman

Re: Raymond A. Twyford, III

Dear Mr. Rossman

I have reviewed the medical records you provided and interviewed and examined Mr. Raymond Twyford on 27 September 2018. Based on these records and my interview and examination, I would suggest that a CT/FDG-PET scan would be a useful next step to further evaluate for brain injury in this individual.

Mr. Twyford, was the recipient of physical abuse as a child and had a self-inflicted gunshot wound to his head in 1977. He had a history of alcohol and drug use growing up that also could contribute to brain injury. His CT sinus series in 1996 by my review revealed 20-30 multiple metal fragments scattered in his nasion, right orbital and ethmoid sinus regions. There is not a clear view of his frontal lobes or the rest of his brain.

Given the risk of performing an MRI brain scan with so many metal fragments close to his face and brain, I suggest obtaining a CT/ FDG PET scan of his brain. The CT portion is required for the PET scan and will show the full extent of metal fragments and exactly where in relation to the brain they extend. The PET portion of the scan will reveal how the brain is functioning and if there is evidence particularly of frontal lobe damage from either physical trauma or drug use. I believe there is enough evidence in this case to justify this CT/FDG PET scan.

Please call me with any questions.

Sincerely,

s/ DOUG SCHARRE

Doug Scharre