IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ANTONIO FRANKLIN,

Petitioner, : Case No. 3:04-cv-187

-vs- : Magistrate Judge Michael R. Merz

MARGARET BRADSHAW, Warden,

Respondent. :

DECISION AND ORDER

In the summer of 1998, Petitioner Antonio Sanchez Franklin was convicted in Ohio of the aggravated murders of Ivory Franklin, Sr., Ophelia Franklin, and Anthony Franklin, and the jury recommended he be sentenced to death. (Appendix, Vol. 5 at 50-139.) The state trial court performed its statutorily required independent weighing of the aggravating circumstances against the mitigating factors in Franklin's case, and adopted the jury's recommendation of the death sentence. (Appendix, Vol. 6 at 7-11.)

Franklin has filed his petition for a writ of habeas corpus and traverse (Doc. Nos. 21, 49), and Respondent has filed a return of writ, and a response to the traverse (Doc. Nos. 39, 55). The case was referred to this Magistrate Judge under 28 U.S.C. § 636(c) upon consent of the parties (Doc. No. 26). On Petitioner's motion, the Court conducted an evidentiary hearing and both parties have filed post-evidentiary hearing briefs (Doc Nos. 93, 95, 98, 100). The case is now ripe for decision on the merits.

In his petition, Franklin advances fifty-one concisely worded grounds for relief as follows:

First Ground for Relief

Petitioner was tried while incompetent

Second Ground for Relief

The trial court failed to conduct a competency hearing when Petitioner's behavior required it

Third Ground for Relief

Petitioner was incompetent during post conviction proceedings.

Fourth Ground for Relief

Petitioner was shackled during the sentencing phase of trial.

Fifth Ground For Relief

The trial court failed to hold a hearing to determine whether the use of shackles was necessary.

Sixth Ground for Relief

Petitioner was under unreasonably heavy guard during the sentencing phase of trial.

Seventh Ground for Relief

Prosecutor misconduct denied Petitioner a fair trial through the use of improper argument, unfair comment, and inflammatory rhetoric.

Eighth Ground for Relief

Failure to provide *Brady* material

Ninth Ground for Relief

Destruction of evidence

Tenth Ground for Relief

Trial counsel provided ineffective assistance at the guilt/innocence phase of trial

(First[1]) Eleventh Ground for Relief

Failure to investigate

(Second) Eleventh Ground for Relief

Failure to conduct adequate voir dire

Twelfth Ground for Relief

Failure to prepare expert witnesses for cross-examination.

Thirteenth Ground for Relief

Failure to object

Fourteenth Ground for Relief

Failure to seek additional competency hearing

Fifteenth Ground for Relief

Trial counsel provided ineffective assistance of counsel at the sentencing phase of trial when they failed to investigate Petitioner's history, character, and background.

Sixteenth Ground for Relief

Failure to obtain competent experts

Seventeenth Ground for Relief

Failure to adequately cross-examine state experts

Eighteenth Ground for Relief

Failure to object to shackling or demand a hearing on its necessity.

Nineteenth Ground for Relief

Failed to object to the re-admission of all guilt-phase evidence.

Twentieth Ground for Relief

[1]The grounds for relief in Franklin's petition include two that are numbered as the eleventh ground for relief. (Doc. No. 21 at 23.)

Failed to object to failure to merge charges and death specifications.

Twenty-first Ground for Relief

Failed to require the defendant's presence at all proceedings.

Twenty-second Ground for Relief

Unreasonable denial of a continuance when defense fire expert witness died.

Twenty-third Ground for Relief

Instructed jurors and conducted critical proceedings outside the presence of Defendant.

Twenty-fourth Ground for Relief

Determination of relevance left to jurors – abdication of judicial responsibility

Twenty-fifth Ground for Relief

Failure to follow Ohio law in sentencing – no merger

Twenty-sixth Ground for Relief

Trial court sentencing opinion

Twenty-seventh Ground for Relief

Death penalty cruel and unusual in violation of the Eighth Amendment

Twenty-eighth Ground for Relief

Ohio post conviction remedies are inadequate and wrongly denied Petitioner a hearing on his post[-]conviction claims.

Twenty-ninth Ground for Relief

Ohio's death penalty sentencing scheme is unconstitutional

Thirtieth Ground for Relief

The Eighth Amendment prohibits the execution of the seriously mentally ill

Thirty-first Ground for Relief

The Equal Protection Clause prohibits the execution of the seriously mentally ill

Thirty-second Ground for Relief

Due process prohibits the execution of the seriously mentally ill

Thirty-third Ground for Relief

State failed to establish guilt by proof beyond a reasonable doubt

Thirty-fourth Ground for Relief

The jury received a constitutionally inadequate instruction on reasonable doubt.

Thirty-fifth Ground for Relief

The jury received a constitutionally inadequate instruction on the culpable mental state required for conviction.

Thirty-sixth Ground for Relief

The jury received an unconstitutional instruction requiring acquittal of greater charges before lesser charges could be considered.

Thirty-seventh Ground for Relief

The jury received an inadequate instruction on causation that allowed application of an unconstitutional presumption.

Thirty-eighth Ground for Relief

The jury received an instruction that constitutionally prevented them from giving consideration to Petitioner's mitigating evidence.

Thirty-ninth Ground for Relief

The jury was not instructed that the duplicative charges and death specifications had to be merged for sentencing purposes and the specifications could only be weighed in assessing the penalty for the crime to which they were attached.

Fortieth Ground for Relief

The jurors considered evidence/information not admitted at trial

Forty-first Ground for Relief

Introduction of victim impact evidence

Forty-second Ground for Relief

Evidence obtained through illegal search and seizure was used against Petitioner

Forty-third Ground for Relief

Evidence obtained through illegal interrogation

Forty-fourth Ground for Relief

Use of irrelevant, prejudicial, and misleading evidence

Forty-fifth Ground for Relief

Gruesome photographs

Forty-sixth Ground for Relief

Other acts evidence

Forty-seventh Ground for Relief

Denied effective assistance of appellate counsel

Forty-eighth Ground for Relief

The cumulative effect of the many errors at Petitioner's trial denied Petitioner due process of law

Forty-ninth Ground for Relief

The many errors at trial and sentencing rendered Petitioner's death sentence unreliable and inappropriate

Fiftieth Ground for Relief

Petitioner was denied the assistance of effective experts.

(Doc. No. 21 at 16-46.)

FACTS

The facts of Franklin's case, as found by the Ohio Supreme Court on direct appeal, are as follows:

A. Causes of Deaths

> At 1:53 a.m. on April 18, 1997, the Dayton Fire Department was dispatched to a fire at 39 Riegel Street, where [A]ppellant lived with his grandmother, Ophelia Franklin, his grandfather, Ivory Franklin, Sr., and his uncle, Anthony Franklin. Upon entering the house, firefighters found three bodies. Ophelia Franklin was found lying on the floor with blood on her head. A bloody baseball bat lay next to her. The body of Ivory Franklin was found upstairs. When firefighters carried his body outside, their gear was covered with blood. Once the fire was under control, firefighters then observed the charred body of Anthony Franklin in the center room of the first floor.
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> An autopsy revealed that Ophelia Franklin had sustained a gunshot wound to her forehead and a bullet track through her brain. Forensic pathologist Dr. David Smith observed at least eight blunt force injuries to her head, consistent with the use of a baseball bat. He concluded that either the gunshot wound or the blunt force injuries would have killed her.
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> Dr. Smith further found that Ivory Franklin had been subjected to at least five hard blows to the back of the head, which fractured his skull. However, the examination suggested that the weapon used to cause these injuries was something other than a baseball bat. Anthony Franklin also sustained multiple fractures to his skull, which were consistent with the use of a baseball bat. Dr. Smith concluded that both Ivory Franklin and Anthony Franklin died of "blunt impact injuries of the head and inhalation of products of combustion."

B. Arrest

> Later in the morning, [A]ppellant was involved in an automobile accident while driving Ivory Franklin's car in Tennessee. Appellant abandoned the vehicle. Then, around 6:00 p.m., after receiving reports of a suspicious person in a Nashville, Tennessee neighborhood, two police officers found and questioned [A]ppellant. Appellant gave officers a false name and claimed to be a juvenile. He carried no identification, and his answers to questions were suspicious. An officer then asked [A]ppellant about the bulge in his jacket pouch. When [A]ppellant began to reach into that pouch, the officer told him to stop and tried to frisk him. However, [A]ppellant ran from the officers. Upon catching up to him, the officers searched [A]ppellant, found a loaded gun and jewelry, and arrested [A]ppellant

> for carrying a weapon and resisting a stop. The gun later was determined to be Ivory's, and a firearms examiner concluded that it had fired the bullet recovered from Ophelia Franklin's skull. Blood was found on the shoes, pants, and jacket that [A]ppellant was wearing when he was arrested.
>
> Two days later, when [A]ppellant was in police custody in a Tennessee jail, a Dayton police detective spoke with him. After receiving Miranda warnings, [A]ppellant signed a waiver and said to the detective, "You figured out I did it." When asked why he committed the crimes, [A]ppellant replied, "They weren't treating me right." He said that he and his family "were always bumpin' heads" and that they had threatened to kick him out of the house. He also said that he had killed his relatives because Anthony Franklin had raped him when [A]ppellant was fourteen years old.
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> *C. Trial Court Proceedings*
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> Appellant was charged in a seventeen-count indictment with four death specifications, *inter alia*, for the aggravated murders of Ophelia Franklin, Ivory Franklin, Sr., and Anthony Franklin. Appellant entered a plea of not guilty by reason of insanity and claimed to be incompetent to stand trial. The trial court rejected this claim, and the case proceeded to trial.
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> At trial, the judge granted defense motions to dismiss two of the [aggravated arson] counts against [A]ppellant. The jury found [A]ppellant guilty of all remaining counts and specifications. After the penalty phase, the jury recommended death sentences on each aggravated murder count. The trial court sentenced [A]ppellant to death on each aggravated murder count and to a total of [ninety-one] years in prison on the noncapital counts in the indictment.

State v. Franklin, 97 Ohio St. 3d 1, 1-3, 776 N.E.2d 26 (2002).

PROCEDURAL HISTORY

Direct Appeal

Franklin appealed his convictions and death sentences in the Ohio Supreme Court, raising the following seventeen propositions of law:

> 1. The capital defendant's right against cruel and unusual punishment and his right to due process are violated when the legal issue of relevance is left to the jury regarding sentencing

considerations and the sentencing proceeding creates an unacceptable risk of arbitrary, nonstatutory aggravators in the weighing process.

2. The defendant's right to reliable capital sentencing, to due process, to a fair trial, and to a fair and impartial jury is violated when, [sic] the defendant is shackled at the penalty phase and additional security guards are used, and the trial court does not hold a hearing to determine the need for such excessive security measures in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

3. When a trial court is presented with information suggesting that a capital defendant may be unable to assist in his defense or understand the proceedings against him, a trial court must *sua sponte* order a competency evaluation and conduct a hearing on the matter.

4. The introduction of gruesome, highly prejudicial, photographs with little or no probative value violates a capital defendant's right to a fair trial, due process, and a reliable determination of guilt as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

5. A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution . . . when a prosecutor commits acts of misconduct during the trial phase and the sentencing phase of his capital trial.

6. The failure of a trial court to merge duplicative aggravating murder counts, aggravated arson counts and capital specifications as well as the grouping of aggravating circumstances by the jury improperly inflates the aggravating circumstances to be considered by the jury, skews the weighing process and thus renders a death sentence invalid in violation of the Eighth and Fourteenth Amendments tot he United States Constitution.

7. When trial counsel commits serious errors in [a] capital trial that prejudice the defense[,] the capital defendant is deprived of the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

8. The failure of the trial court to secure the presence of the accused or to obtain a waiver of such right violates the accused's right under the Sixth and Fourteenth Amendment[s] to the United State[s] Constitution.

9. The accused's right against an unreasonable search and seizure is violated when law enforcement lacks either a probable cause or a reasonable suspicion to seize the accused in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

10. The accused's right to a fair trial and to due process is violated when the trial court denies the accused a continuance of the trial and the continuance was justified by the unexpected death of defense expert witness in violation of the Fourteenth Amendment to the United States Constitution. The trial court's failure to grant a continuance under such circumstances also renders defense counsel ineffective in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

11. When a sentence of death is unreliable and inappropriate, the sentence violates the Eighth and Fourteenth Amendments to the United States Constitution . . . and must be vacated.

12. When a trial court fails to define what if any weight was given to mitigation evidence, fails to give weight to evidence of mental disease or defect because it does not rise to the level of insanity, gives deference to the jury's verdict instead of rendering an independent decision, fails to merge aggravating circumstances, fails to explain why it imposed the death penalty and rebuts defendant's mitigation evidence with evidence other than what can be permissibly considered, the capital defendant is deprived of the right to individualized sentencing and of his liberty interest in the statutory sentencing scheme in violation of rights as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

13. A conviction on an aggravated murder charge cannot stand when the evidence is insufficient to demonstrate that the defendant committed the murder with prior calculation and design.

14. 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.

15. The introduction of victim impact testimony during the trial and penalty phase of a capital trial violates the capital defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution.

16. The accused's right to due process under the Fourteenth Amendment to the United States Constitution is violated when the state is permitted to convict upon a standard of proof below proof beyond a reasonable doubt.

17. Ohio's death penalty law is unconstitutional.

(Appendix, Vol. 6 at 55-263.) On October 16, 2002, the Ohio Supreme Court affirmed Franklin's convictions and sentences. *State v. Franklin*, 97 Ohio St. 3d 1, 776 N.E.2d 26 (2002). A subsequent motion for reconsideration was summarily denied. (Appendix, Vol. 8 at 67-85.) Although the Court does not find Franklin's petition for a writ of certiorari in the record, there is evidence it was filed in the United States Supreme Court and denied. (Appendix, Vol. 8 at 109-10.)

Applications to Reopen Direct Appeal

A January 14, 2003, *pro se* application to reopen Franklin's direct appeal (Appendix, Vol. 8 at 99-108), was denied without discussion (Appendix, Vol. 8 at 98). Undeterred, Franklin filed two more *pro se* applications to reopen on March 19, 2004. (Appendix, Vol. 8 at 111-149.) Those applications, too, were denied. (Appendix, Vol. 18 at 44.)

In his first application to reopen his direct appeal, Franklin identified ten propositions of law alleging that appellate counsels' failure to raise them amounted to ineffective assistance of counsel:

1. Defendant was denied Due Process and Equal Protection, prejudiced, and denied the right to a fair and impartial trial, as defendant's trial counsel failed to present all of defendant's possesions [sic] to the jury in an attempt to question his sanity . . . [t]hus, violating defendant's [F]ifth, [S]ixth, [E]ighth, [N]inth, and [F]ourteenth Amendments to the United States Constitution.

2. Defendant was denied Due Process and Equal Protection, prejudiced, and denied the right to a fair and impartial trial,

as defendant's trial counsel failed to question prospective jurors about their views on diffrent [sic] aspects of insanity . . . [t]hus, violating defendant[']s [F]ifth, [S]ixth, [E]ighth, [N]inth, and [F]ourteenth Amendments to the United States Constitution . . ., as defendant was suffering from delusions and auditory hallucinations . . . as a direct result of being schizophrenic.

3. Defendant was denied Due Process and Equal Protection, prejudiced, and denied the right to a fair and impartial trial, as defendant's trial counsel failed to impeach Dr. Martin's . . . inadmissible opinion/testimony as it relates to this capital offense . . . .

4. Defendant was denied Due Process and Equal Protection, prejudiced, and denied the right to a fair and impartial trial, as defendant's trial counsel failed to object to deragatory [sic] statements made by the prosecution during opening and closing arguements [sic] . . . as it relates to defendant[']s tattoos, to which they (the prosecution) furnished to the Court and jury no proof or evidence.

5. Defendant was denied Due Process and Equal Protection, prejudiced, and denied a fair and impartial trial before a fair and impartial judge, as trial court abused it's [sic] discretion by preventing defendant's trial attorneys from questioning prospective jurors about their views on the diffrent [sic] aspects of insanity.

6. Defendant was denied Due Process and Equal Protection, prejudiced, and denied the right to a fair and impartial trial before a fair and impartial judge, as [the] trial court abused it's [sic] discretion by allowing experts to testify and give inadmissible opinion(s) . . . that were based on other experts' reports.

7. Defendant was denied Due Process and the right to Equal Protection, prejudiced, and denied the right to a fair and impartial trial before a fair and impartial judge, as [the] trial court abused it's [sic] discretion by allowing the flagrant misconduct of the prosecution to go unrebuked during opening and closing arguements [sic].

8. Defendant was denied Due Process and the right to Equal Protection, prejudiced, and denied the right to a fair and impartial trial when the prosecution suppressed evidence from the defense.

9. Defendant was denied Due Process and the right to Equal Protection, prejudiced, and denied the right to a fair and impartial trial when prosecutors knowingly and purposefully mislead the jurors with flagrant comments during opening and closing arguements [sic].

10. Defendant was denied Due Process and the right to Equal Protection, prejudiced, and denied the right to a fair and impartial trial, as competent by law, but incompetent by skill experts were permitted to render prejudicial testimony and opinions.

(Appendix, Vol. 8 at 102-7.) Franklin's second and third applications to reopen his direct appeal contained only one proposition of law each, and they were identical:

> Appellant was denied his Constitutional rights to the Due Process and Equal Protection Clauses, prejudiced, and denied his right to a fair and impartial trial when the prosecution acted in "bad faith", [sic] thereby violating Appellant's Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.

(Appendix, Vol. 8 at 113, 122-23.) As noted above, none of Franklin's three applications to reopen his direct appeal succeeded.

Petition for Post-conviction Relief

On August 9, 1999, Franklin filed a petition for post-conviction relief in the Montgomery County Court of Common Pleas, advancing twenty-two claims for relief as follows:

1. Petitioner Franklin's convictions and sentences are void and/or voidable due to the ineffective assistance of counsel during the voir dire stage of his capital trial, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

2. Petitioner Franklin's convictions and sentences are void and/or voidable due to restrictions placed on the voir dire process by the trial court, which restrictions in turn forced trial counsel to render ineffective assistance of counsel, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

3. Petitioner Franklin's convictions and/or sentences are void or voidable due to his inability to make rational decisions, to assist his attorneys, and aid in his defense at the time of his

trial and sentencing.

4. Petitioner Franklin's conviction and/or sentence are void or voidable because he was prejudiced by prosecutorial misconduct with regard to the destruction of evidence related to his capital proceedings.

5. Petitioner Franklin's conviction and/or sentence are void or voidable because he was denied the effective assistance of counsel in the trial phase of his capital trial.

6. Petitioner Franklin's conviction and/or sentence are void or voidable because the State withheld exculpatory, impeaching, and mitigation evidence by failing to obtain the Nashville 911 tape and turn it over to the defense attorneys.

7. Petitioner Franklin's conviction and/or sentence are void or voidable because the was denied the effective assistance of counsel in the trial phase of his capital trial, as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution.

8. Petitioner Franklin's conviction and/or sentence are void or voidable because the trial court abused its discretion when it overruled defense counsel's pre-trial motion to prohibit the admission into evidence of inflammatory and prejudicial photographs of a tattoo on Petitioner's arm.

9. Petitioner Franklin's convictions and/or sentences are void and/or voidable because . . . the trial court's use of excessive security during the trial denied Petitioner a fair and impartial trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Furthermore, counsels' failure to request a hearing to determine the need for such precautions, and their failure to object to the use of these precautions, resulted in the denial of effective assistance of counsel.

10. Petitioner Franklin's convictions and sentences are void and/or voidable because he was denied the effective assistance of counsel at the penalty phase of his capital trial in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

11. Petitioner Jackson's [sic] convictions and/or sentences are void or voidable because he was denied the effective assistance of counsel in the mitigation phase of his capital

trial as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution.

12. Petitioner Franklin's convictions and/or sentences are void or voidable because he was denied the effective assistance of experts as a result of trial counsel's deficient performance in the mitigation phase of his capital trial as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution.

13. Petitioner Franklin's convictions and/or sentences are void or voidable because he was denied the effective assistance of counsel as a result of their failure to adequately investigate, prepare and present psychological evidence during his mitigation hearing as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution.

14. Petitioner Franklin's convictions and/or sentences are void or voidable because juror misconduct occurred during his capital sentencing deliberations, thus denying him a fair and impartial determination of his sentence in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

15. Petitioner Franklin is currently incompetent to appreciate the nature and objective of these post-conviction proceedings and to provide assistance to his counsel, and failure to stay these proceedings until his competency is restored will constitute a violation of the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.

16. Petitioner Franklin's convictions and/or sentences are void or voidable because he was denied the effective assistance of counsel during his mitigation hearing as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution.

17. Petitioner Franklin's conviction and sentence are void or voidable because the post-conviction process provides an inadequate corrective process.

18. Petitioner Franklin's convictions and/or sentences are void or voidable because the death penalty is disproportionately meted out to those defendants who are racial minorities.

19. The judgment and sentence against Petitioner are void or voidable because the death penalty as administered by

> electrocution in the state of Ohio violates his constitutional rights to protection from cruel and unusual punishment and to due process of law.
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> 20. The judgment and sentence against Petitioner are void or voidable because the death penalty as administered by lethal injection in the state of Ohio violates his constitutional rights to protection from cruel and unusual punishment and to due process of law.
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> 21. Petitioner Franklin's judgment and sentence are void or voidable because assuming *arguendo* that none of the Grounds for Relief in his Post-Conviction Petition individually warrant the relief sought from this court, the cumulative effects of the errors and omissions as presented in the Petition's foregoing paragraphs have been prejudicial and have denied Petitioner his rights as secured by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
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> 22. Petitioner Franklin's convictions and/or sentences are void or voidable because he was denied a fair and impartial jury trial when the trial judge held discussions with the jury outside the presence of his counsel.

(Appendix, Vol. 9 at 102-63; Vol. 11 at 8-9.) The State moved for summary judgment (Appendix, Vol. 12 at 1-33), which the trial court granted, finding Franklin had not shown any ground upon which the relief requested could be granted (Appendix, Vol. 13 at 8-40). The court of appeals affirmed the trial court, *State v. Franklin*, No. 19041, 2002 WL 1000415 (Ohio App. 2d Dist. May 17, 2002) (unreported), an appeal to the Ohio Supreme Court was not allowed, *State v. Franklin*, 98 Ohio St. 3d 1422, 782 N.E.2d 77 (2003)(table), and a request for reconsideration to that court was denied, *State v. Franklin*, 101 Ohio St. 3d 1462, 804 N.E.2d 37 (2004)(table).

On September 16, 2003, while his original petition for post-conviction relief was proceeding through the appeals process, Franklin filed a *pro se* successor petition in the state trial court. (Appendix, Vol. 13 at 95-144.) He alleged seventeen claims for relief, as follows:

> 1. Petitioner[']s conviction and/or sentence are void or voidable due to his trial counsel's failure to disclose to the jurors the reasons why Petitioner took what he took from the scene of

the crime.

2. Petitioner's conviction and/or sentence are void or voidable due to his trial counsel's failure to disclose to the jurors the reason why Petitioner had on a heavy, winter coat in warm weather.

3. Petitioner's conviction and/or sentence are void or voidable due to Petitioner's trial attorney's [sic] failure to interview Brian Dallas, the person who did Petitioner's tattoos.

4. Petitioner's conviction and/or sentence are void or voidable due to his trial counsel's failure to obtain the two photo albums that Petitioner took from the scene of the crime.

5. Petitioner's conviction and/or sentence are void or voidable due to trial counsel's failure to disclose to the triers of fact the reason "why" [sic] Petitioner went down south.

6. Petitioner's conviction and/or sentence are void or voidable due to his trial counsel's ineffectiveness at interviewing Brian Dallas and then disclosing to the jurors the event of Petitioner getting into a fight in Nashville's county jail over [a] tattoo, which was a music, delusional based incident.

7. Petitioner[']s conviction and/or sentence are void or voidable due to his trial counsel's ineffectiveness at obtaining and utilizing Petitioner[']s notes that he wrote while he was incarcerated in Nashville's county jail, as those notes are and were very much crucial to this case.

8. Petitioner[']s conviction and/or sentence are void or voidable due to his trial attorney's [sic] failure to impeach and/or try to impeach Dr. Stukey's [sic] and Dr. Martin's prejudicial testimony.

9. Petitioner's conviction and/or sentence are void or voidable due to his trial counsel's failure to question prospective jurors about their views on insanity issues, as it relates to this case.

10. Petitioner's conviction and/or sentence are void or voidable due to trial judge abusing his discretion during voir dire by preventing Petitioner's trial counsel from questioning prospective jurors about their views on insanity, which in return rendered Petitioner's trial counsel ineffective and the judge unfair and partial.

11. Petitioner[']s conviction and/or sentence are void or voidable

because trial court abused it's [sic] discretion by allowing competent by law, but incompetent by skill psychiatrist to render inaccurate, prejudicial testimony.

12. Petitioner's conviction and/or sentence are void or voidable because Petitioner's imprisonment resulted from prejudicial comments/arguements [sic] knowingly used by the prosecution to obtain Petitioner[']s conviction, and from the deliberate suppression by the same prosecution of evidence favorable to Petitioner.

13. Petitioner's conviction and/or sentence are void or voidable due to the prosecution suppression of evidence that was requested.

14. Petitioner's conviction and/or sentence are void or voidable because Petitioner was prejudiced by Dr. Stukey's [sic] and Dr. Martin's testimony, as both doctor's [sic] testimony was both inaccurate and prejudicial.

15. Petitioner's conviction and/or sentence is void or voidable due to his incompetency to stand trial during his trial.

16. Petitioner's judgement and sentence are void or voidable because assuming arguendo that none of the grounds for relief sought from this court, the cumulative effects of the errors and omissions as presented in the Petitioner's foregoing paragraphs have bene prejudicial and have denied Petitioner his rights as secured by the Fourth, [F]ifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

17. Petitioner's conviction is void and/or voidable due to the ineffective assistance that was rendered to him by trial counsel during voir dire of this capital trial.

(Appendix, Vol. 13 at 95-144; Vol. 19 at 200-6.) The trial court determined that Franklin's successive petition was untimely and that the claims therein were barred by the doctrine of *res judicata*, and dismissed the petition. (Appendix, Vol. 19 at 210-16.) The court of appeals affirmed the trial court's decision in all respects. (Appendix, Vol. 20 at 149-57.) The Ohio Supreme Court later declined jurisdiction over Franklin's appeal. (Appendix, Vol. 20 at 192.)

On July 28, 2005, Franklin filed what purports to be an application to reopen his post-conviction proceedings, urging the court to create a procedure akin to that set forth in Ohio R. App.

Proc. 26(B) which would provide him with a vehicle with which to pursue his ineffective assistance of post-conviction counsel claims. (Appendix, Vol. 21 at 5-14.) The court of appeals denied Franklin's request, stating that (1) Ohio law limits the applicability of Ohio R. App. Proc. 26(B) to instances where the effectiveness of appellate counsel on direct appeal is challenged, (2) there is no right to effective counsel in post-conviction proceedings, and (3) Franklin failed to show good cause for not having filed his request in a timely manner. (Appendix, Vol. 21 at 56-58.) On February 22, 2006, the Ohio Supreme Court declined jurisdiction over Franklin's subsequent appeal. (Entry of the Ohio Supreme Court, Case No. 05-2249 (Feb. 22, 2006), *available at* http://www.clerk.co.montgomery.oh.us/pro/image_onbase.cfm?docket=8684149.)

ANALYSIS

Since Franklin filed his petition for a writ of habeas corpus well after the effective date of the Anti-terrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the amendments to 28 U.S.C. § 2254 embodied in that Act are applicable to his petition. (*See* Petition, Doc. No. 21.) The Sixth Circuit has summarized the standard of review under the AEDPA as follows:

> Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) . . . , a federal court
>
> > may not grant a writ of habeas to a petitioner in state custody with respect to any claim adjudicated on the merits in state court unless (1) the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" . . . or (2) the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings."
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> *Taylor v. Withrow*, 288 F.3d 846, 850 (6th Cir.2002) (quoting 28 U.S.C. § 2254(d)).
>
> This standard requires the federal courts to give considerable deference to state-court decisions. *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir.1998) ("[the AEDPA] tells federal courts: Hands off,

> unless the judgment in place is based on an error grave enough to be called unreasonable.") (citation and quotation marks omitted).
>
> The first line of analysis under [the] AEDPA involves the consistency of the state-court decision with existing federal law. A state-court decision is considered "contrary to . . . clearly established Federal law" if it is "diametrically different, opposite in character or nature, or mutually opposed." *Williams v. Taylor*, 529 U.S. 362, 405 [sic] (2000) (emphasis and quotation marks omitted). Alternatively, to be found an "unreasonable application of . . . clearly established Federal law," the state-court decision must be "objectively unreasonable" and not simply erroneous or incorrect. *Id*. at 409-11.
>
> The second line of analysis under [the] AEDPA concerns findings of fact made by the state courts. [The] AEDPA requires federal courts to accord a high degree of deference to such factual determinations. "A federal court is to apply a presumption of correctness to state court findings of fact for habeas corpus purposes unless clear and convincing evidence is offered to rebut this presumption. The [federal] court gives complete deference to the . . . state court's findings of fact supported by the evidence." *McAdoo v. Elo*, 365 F.3d 487, 493-94 (6th Cir.2004) (citations omitted).

Nields v. Bradshaw, 482 F.3d 442, 449 (6th Cir. 2007)(parallel citations omitted). It is with these principles in mind that this Court considers the merits of Franklin's grounds for relief.

First and Second Grounds for Relief

In his first ground for relief, Franklin contends constitutional error occurred at his trial because he was incompetent to stand trial at the time. (Petition, Doc. No. 21 at 16-17.) His second claim alleges the trial court should have conducted a second competency hearing based upon his peculiar behavior during trial. *Id*. at 17-18. Respondent does not contend the claims are procedurally defaulted[2] and argues instead that they are meritless. (Return of Writ, Doc. No. 39 at

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[2] Respondent erroneously states that Franklin challenged the trial court's pretrial determination that Franklin was competent to stand trial as his third proposition of law on direct appeal to the Ohio Supreme Court. (Return of Writ, Doc. No. 39 at 60.) The claim asserted in the state court, however, duplicates his second ground for relief here in which Franklin contends the trial court should have *sua sponte* held a second competency hearing after observing Franklin's behavior during his trial. (Appendix, Vol. 6 at 103-8.) The two are separate and distinct claims, and the raising of one does

60-68.)

In *Filiaggi v. Bagley*, 445 F.3d 851, 858 (6th Cir. 2006), the Sixth Circuit Court of Appeals concisely summarized the applicable test for determining whether a defendant is competent to stand trial:

> The due-process right to a fair trial is violated by a court's failure to hold a proper competency hearing where there is substantial evidence that a defendant is incompetent. *Pate v. Robinson*, 383 U.S. 375, 385-86 (1966). To be adjudged competent, a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Dusky v. U*[*nited*] S[*tates*], 362 U.S. 402 (1960)(per curium).

See also Drope v. Missouri, 420 U.S. 162, 170 n.7 (1975). Even when a defendant has been held competent prior to his trial, a trial court must always be alert to circumstances arising during the proceedings that might render the accused unable to meet the standards of competence to stand trial. *Drope*, 420 U.S. at 181. The Supreme Court has also stated that

> [E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient [to establish the defendant's incompetence]. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists [or psychologists] can entertain on the same facts.

Drope, 420 U.S. at 180, discussing the import of *Pate v. Robinson*, 383 U.S. 375 (1966).

A defendant's competence to stand trial is a question of fact. *Thompson v. Keohane*, 516

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not necessarily raise the other. Respondent has not asserted a procedural default defense as to Franklin's first ground for relief, which in fact waives it, so this Court will address the issue *de novo*. "If deference to the state court is inapplicable . . ., we 'exercise our independent judgment' and review the claim *de novo*.**"** *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003), *quoting Hain v. Gibson*, 287 F.3d 1224, 1229 (10th Cir. 2002).

U.S. 99, 110-11 (1995); *Harries v. Bell*, 417 F.3d 631, 635 (6th Cir. 2005). To succeed on his habeas claim, therefore, Franklin must demonstrate that the state courts' denial of the claim was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding[s]." 28 U.S.C. § 2254(d)(2). "[R]egardless of whether [a federal court] would reach a different conclusion were [it] reviewing the case *de novo*, the findings of the state court must be upheld unless there is clear and convincing evidence to the contrary." *Clark v. O'Dea*, 257 F.3d 498, 506 (6th Cir. 2001).

On October 7, 1997, the trial judge in Franklin's case ordered a competency evaluation. (Trial Tr., Vol. 1, Docket Call of October 7, 1997 at 1-2.) Dr. Eugene Cherry testified as a defense expert witness and Dr. Thomas Martin was presented as the prosecution's expert witness at the competency hearing held on May 21, 1998. (Trial Tr., Vol. 2 at 2-94.)

Dr. Cherry interviewed Franklin seven times at the Montgomery County Jail, spending a total of approximately eleven hours with him. *Id*. at 12. He also interviewed Franklin's mother, girlfriend, and cousin to corroborate Franklin's statements and confirm his own understanding of Franklin. *Id*. at 13, 33. Dr. Cherry testified that Franklin's childhood was permeated with his mother's alcoholism, mental illness, rage, and physical and emotional abuse. *Id*. at 13-14. Franklin told Dr. Cherry that he had no memory of the night of the murders beyond his picking up of a baseball bat after having been threatened by his uncle Anthony. *Id*. at 14. Franklin admitted to continued suicidal ideation since his arrest in Nashville. *Id*. at 16. He also reported repeated auditory hallucinatory experiences in which voices instructed him to defend himself from the other inmates at the jail, including an instruction to attack another inmate with a ballpoint pen, something Franklin did on October 19, 1997. *Id*. at 18.

In the course of his evaluation, Dr. Cherry administered five psychological tests: (1) the Wechsler Adult Intelligence Scale Revised, or WAIS-R; (2) the Wechsler Memory Test; (3) the

Wide Range Achievement Test Revised, or WRAT-R; (4) the Minnesota Multiphasic Personality Inventory II Test, or MMPI-II; and (5) the Rorschach Inkblot Test. (Trial Tr., Vol. 2 at 23-25, 31.) Dr. Cherry interpreted the results of those tests as indicating that Franklin is of average intelligence, and that he suffers from a schizophrenic disorder, paranoid type. *Id*. at 23-28. Although Franklin scored high on the F scale, one of the three validity scales contained within the MMPI-II, Dr. Cherry explained that the other two validity scores were within the normal range, and that an elevated F scale score was consistent with his diagnosis of paranoid schizophrenia. *Id*. at 26, 28. It was Dr. Cherry's opinion that Franklin had been paranoid and delusional since at least approximately eight months prior to the murders. *Id*. at 50.

Dr. Cherry's interviews with Franklin, his relatives, and his former girlfriend, his testing of Franklin, and his diagnosis of paranoid schizophrenia all informed his expert opinion that Franklin was incompetent to stand trial. He testified that Franklin understood he was facing a possible death sentence and that he was experiencing anxiety from that knowledge, but that he did not understand the nature of the charges against him, the pleas available to him, the nature of bail and house arrest, the trial judge's role in his case, the function of the jury, the significance of waiving various rights available to criminal defendants, or the legal proceedings against him. (Trial Tr., Vol. 2 at 43-48, 51.)

Dr. Martin's conclusions differed greatly from those of Dr. Cherry, and he testified that he was met with initial resistance from Franklin until after Franklin had discussed with his counsel whether or not to cooperate with the evaluation. *Id*. at 110, 116. Dr. Martin spent significantly less time with Franklin, two hours as opposed to Dr. Martin's eleven, and indicated that he did not have much time in which to complete his evaluation. *Id*. at 132, 136. To complete his evaluation in time, Dr. Martin stated that he relied on the information and results from tests administered by other psychologists, including Dr. Cherry. *Id*. at 128, 132. He disagreed with Dr. Cherry's interpretation

of Franklin's elevated score on the F scale of the MMPI-II and concluded that it invalidated the test results. *Id*. at 143. Dr. Martin testified that Franklin understood the seriousness of the charges against him (although Franklin seemed surprised to learn that there were seventeen counts in the indictment against him), the essential nature of a plea agreement, the roles of the various participants in the courtroom, and that he could be sentenced to death. *Id*. at 123-28, 140-141. He described Franklin as coherent, logical, not disorganized in his thinking, oriented, aware of his surroundings and situation, and not afflicted with mental illness or mental retardation. *Id*. at 129-30. Dr. Martin concluded that Franklin was capable of understanding the nature of the legal proceedings and was able to assist his attorneys in his defense. *Id*. at 134.

Not long after the competency hearing, the trial court decided that Franklin had not met his burden of overcoming the presumption of his competence to stand trial. (Appendix, Vol. 3 at 124-5.) In so concluding, the trial court implicitly determined that Dr. Martin's testimony was more credible and entitled to more weight than Dr. Cherry's in spite of Dr. Cherry's more extensive interviewing and testing of Franklin.

Generally, reviewing courts defer to credibility determinations made by trial court fact finders since the witness' gestures, body language, facial expression, eye contact, inflection, and general demeanor are not communicated to a reviewing court by a transcript of the proceedings. *See Peveler v. United States*, 269 F.3d 693, 702 (6th Cir. 2001) (recognizing a general reluctance "to set aside credibility determinations made by the trier of fact, who has had the opportunity to view the witness on the stand and assess his demeanor). Apart from the general practice of deference, the AEDPA would require deference to a credibility finding as a finding of fact unless it were overcome by clear and convincing evidence.

In this case, the entire trial court proceedings, from pretrial hearings to sentencing, were recorded on videotape and those videotapes, seventeen in all, were transmitted with the record as

part of the Appendix[3]. This Court has viewed the entire tape of the competency hearing, and while the sound is serviceable, the visual quality of the tape is so poor that it is impossible to ascertain the facial expressions or body language of any of the hearing participants.[4] Consequently, and even assuming it would be proper to do so, the videotape provides this Court no means by which to critique the trial judge's determination of the witnesses' credibility at the competency hearing, nor does it allow this Court to assess Franklin's behavior during the hearing, which Franklin argues is further evidence of his incompetence to stand trial. (*See* Traverse, Doc. No. 49 at 12-13.)

But, one may protest, the Court is addressing Franklin's claim *de novo*, in which case it owes no deference to the state trial court's credibility determination. Not so. The claim in habeas corpus this Court is addressing *de novo* is not that Franklin was incompetent to stand trial, but rather that the trial court erred in finding Franklin competent to stand trial. This is not a distinction without a difference, for in the first case, this Court would look to the evidence presented by both parties at the competency hearing and make a fresh determination of Franklin's competence without regard to the trial court's decision. In the second and pertinent case, however, this Court evaluates only whether the state trial court's determination was erroneous in light of the deference due the trial court's decision. As just noted, however, this Court is without the benefit of the full panoply of factors that contribute to a credibility calculation, all of which the trial court observed. That being the case, this Court is reluctant to second guess the state trial court's finding, based on the evidence presented at the competency hearing, that Franklin was competent to stand trial.

Franklin argues that Dr. Cherry's evaluation is more reliable than Dr. Martin's assessment

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[3]The Court understands that it has for some time been common practice in the Montgomery County Common Pleas Court to create the official record by videotaping proceedings. This practice is authorized by the Ohio Supreme Court's Superintendence Rules.

[4]It should be noted that the videotape was played on six different VCR players, and that none provided images clear enough to tell one person from another. Some of the other videotapes from the trial had much clearer images, and some had even worse.

because it is more comprehensive and because, in Franklin's opinion, Dr. Cherry is more experienced and possesses better credentials than Dr. Martin. (Traverse, Doc. No. 49 at 8-16.) Even if this were true, credibility on the witness stand may still reasonably trump such advantages. What this Court knows is that both doctors were accepted as experts qualified to offer their opinions at Franklin's competency hearing. No challenge was made to Dr. Cherry's qualifications and the court implicitly accepted him as a psychological expert, and Dr. Martin was expressly recognized as such. (Trial Tr., Vol. 2 at 98-99; *see also* Appendix, Vol. 3 at 124-25.) Both have had long careers as forensic psychologists in the Dayton, Ohio, area and have been accepted as expert psychological experts in this Court.

Franklin also suggests that Dr. Kim Stookey's October 2, 1997, report[5] corroborates Dr. Cherry's opinion, and that after reviewing Dr. Stookey's report, the trial court was so concerned about Franklin's competence that it ordered a hearing on the matter. (Traverse, Doc. No. 49 at 10-12.) By that time, however, Dr. Cherry's competency evaluation of Franklin was well under way. What is clear from the record is that the following events took place on the following dates:

May 12, 1997	Dr. Cherry submitted his proposal for evaluating Franklin's competence (Trial Tr., Vol. 1, Sept. 22, 1997, at 17);
June 19, 1997	The trial court authorized Dr. Cherry's compensation as a defense expert (Appendix, Vol. 1 at 125);
July 6, 1997	Dr. Cherry began interviewing Franklin on July 6, 1997 (Trial Tr., Vol. 2, May 21, 1998, at 12);
October 2, 1997	Dr. Stookey submitted her report on Franklin's insanity defense to the trial court (Appendix, Vol. 12 at 186-99);
October 7, 1997	Trial court orders second competency evaluation which is ultimately performed by Dr. Martin (Trial Tr., Vol. 1, October 7, 1997, at 1; Vol. 2 at 99);

[5]Dr.Stookey's pretrial evaluation of Franklin was solely in relation to Franklin's plea of not guilty by reason of insanity. She neither evaluated him in terms of his competence to stand trial, nor did she offer an opinion on that issue.

January 20, 1998 Dr. Cherry submitted his report on Franklin's competency to stand trial to the trial court (Appendix, Vol. 22 at 2-24).

In fact, when the trial court stated it was going to order a competency hearing, it acknowledged that Dr. Cherry was the defense psychologist, which reflects the court's awareness that the defense was in the process of having Franklin's competence evaluated. (Trial Tr., Vol. 1, October 7, 1997, at 1.) Knowing that, and since there is little evidence of Franklin's incompetence in Dr. Stookey's NGRI evaluation report, the trial court likely preferred to err on the side of caution and have a second, court-appointed psychologist evaluate Franklin's competence. Enter Dr. Martin. On February 18, 1998, he was appointed by the trial court to evaluate both Franklin's competence and his sanity at the time of the offense. (Trial Tr., Vol. 2 at 99.) Thus, on October 7, 1997, when the trial court said it was going to order a competency evaluation, it was Dr. Martin's evaluation the court was referring to, not Dr. Cherry's, which was already under way. Furthermore, the trial court's order explicitly states that the competency hearing was ordered because Franklin's attorney raised the issue of his competence to stand trial, not, as Franklin would have this Court believe, because the court was alarmed by the contents of Dr. Stookey's report. (Appendix, Vol. 2 at 289.) Finally, in the trial court's decision on the competency issue, the court identified only Dr. Cherry's and Dr. Martin's reports and testimony as the bases for its decision. (Appendix, Vol. 3 at 124-5.)

Franklin states that "[u]pon reviewing [Dr. Stookey's] report, the trial judge entertained doubts about Mr. Franklin's competence to stand trial and ordered a competency hearing. . . . As the trial judge discerned at that time, although Dr. Stookey did not assess Mr. Franklin's competency, the social history she compiled and observations she made provided a basis to suspect incompetence." (Traverse, Doc. No. 49 at 11-12.) The facts contradict rather than support Franklin's interpretation of events surrounding his competency evaluations and hearing. The trial court granted a defense request for expert assistance in assessing Franklin's competence. After reading Dr. Stookey's NGRI report and finding little indication that Franklin was incompetent, the

court recognized the likelihood of disagreement between the parties on the issue and appointed Dr. Martin as the court's expert. This Court, too, has found little in Dr. Stookey's report to support Franklin's argument that he was incompetent to stand trial.

Although Franklin presented evidence at his evidentiary hearing in these proceedings to support his first ground for relief, it is unpersuasive. Any information Dr. Cherry provided at the evidentiary hearing relevant to the first ground for relief was also presented at the competency hearing. Dr. Sharon Pearson was also called to testify at the evidentiary hearing, but she did not evaluate Franklin until after his trial, during Franklin's post-conviction proceedings in the state court. (Appendix, Vol. 9 at 189-212.) Furthermore, although she reviewed portions of the videotapes of Franklin's trial, she did not comment on his demeanor during the pretrial competency hearing. (Evid. Hrg. Tr., Doc. No. 86 at 72, 76-82.) Her testimony relates to Franklin's second ground for relief, which follows, rather than his first.

Franklin has not demonstrated that the trial court's decision finding him competent to stand trial was erroneous based on the evidence presented to the trial court before and during the competency hearing. Relief is therefore denied on the first ground.

In his second ground for relief, Franklin contends that his conduct during his trial was so bizarre that the trial court had a duty to hold a second competency hearing. (Petition, Doc. No. 21 at 17-18.) Respondent correctly observes that the claim was presented to the Ohio Supreme Court on direct appeal, and that the claim was overruled as meritless. (Return of Writ, Doc. No. 39 at 60-61.)

The Ohio Supreme Court decided Franklin's claim as follows:

> The question of whether to hold a competency hearing after the commencement of trial is left to the court's discretion. A defendant has a constitutional right to such a hearing only when there is sufficient "indicia of incompetence" to alert the court that an inquiry is needed to ensure a fair trial. Considerations in this regard might include supplemental medical reports, specific references by defense

> counsel to irrational behavior, and the defendant's demeanor during trial.
>
> Appellant points to psychologist Dr. Eugene Cherry's finding that [A]ppellant was a paranoid schizophrenic as an indication of his incompetency. However, this evidence did not need to be reconsidered because similar testimony had been presented at [A]ppellant's pretrial competency hearing. Furthermore, [A]ppellant argues that his erratic behavior at trial, which included belching loudly and interrupting the judge, further demonstrated his incompetency. Although these actions did indeed constitute strange behavior, they illustrated a pattern of rudeness rather than incompetency to stand trial. Therefore, the evidence upon which [A]ppellant relies does not shed any new light on [A]ppellant's ability to understand the proceedings, to interact with his counsel, or to assist in his defense. Consequently, we do not believe that the trial court abused its discretion by declining to revisit the competency issue. [A]ppellant's third proposition of law is without merit.

State v. Franklin, 97 Ohio St. 3d 1, 5, 776 N.E.2d 26 (2002).

One may suffer from mental illness yet still be competent to stand trial. *See Indiana v. Edwards*, ___ U.S. ___, 128 S.Ct. 2379, 2388 (2008). That Franklin was diagnosed as a paranoid schizophrenic with a borderline personality disorder by Dr. Cherry (*see* Appendix, Vol. 22 at 16) is therefore something to be considered, but not determinative of the question of Franklin's competence during his trial. Dr. Sharon Pearson's evaluation of Franklin and her conclusions are somewhat diminished as evidence of Franklin's incompetence at trial by the post-trial nature of her evaluation and by her acknowledgment that she watched only part, and an unspecified part at that, of the trial videotapes. (Evid. Hrg.Tr., Doc. No. 86 at 65-66, 72.)

Franklin argues that his conduct at trial establishes that he lacked sufficient ability to consult with his lawyers and have a reasonable degree of rational and factual understanding of the proceedings against him. (Traverse, Doc. No. 49 at 20.) He contends that his socially inappropriate conduct (interrupting the proceedings to ask for a restroom break, playing with his tie, making shadow puppets with his hands, etc.) and a deputy's opinion that Franklin was undergoing a personality change are evidence of his incompetence and should have triggered a second

competency hearing. *Id*.

Franklin provides several record references, comprising approximately thirty-three minutes in total, to support the allegation of inappropriate behavior during his trial. (Petitioner's Post-Evidentiary Hearing Brief, Doc. No. 95 at 25-26.) He states that his affect was flat at trial and is observable throughout the videotaped recording of the proceedings. (Traverse, Doc. No. 49 at 18.) There is no doubt that Franklin engaged in some behavior that is presumably uncommon in trials.

During the evidentiary hearing in these proceedings, a short portion of one of the trial videotapes was played as Franklin's psychological expert, Dr. Sharon Pearson, explained how Franklin's behavior exemplified incompetence. (Evid. Hrg. Tr., Doc. No. 86 at 76-82.) The state supreme court found that Franklin toyed with his tie, made shadow puppets with his hands, belched loudly during the proceedings, and interrupted examination of a witness to request a restroom break. *See State v. Franklin*, 97 Ohio St. 3d 1, 5, 776 N.E.2d 26 (2002). Dr. Pearson attributed Franklin's flat affect during his trial to her post-trial diagnosis of dissociative identity disorder. (Evid. Hrg. Tr., Doc. No. 86 at 82-87.) She also diagnosed Franklin with cannabis dependence, post-traumatic stress disorder, and borderline personality disorder. *Id*. at 82. Dr. Pearson opined that these mental illnesses rendered Franklin incompetent at the time of his trial. *Id*. at 107. On cross-examination, however, she stated that Franklin did at times make an effort to see the photographs of the crime scene as they were projected to the jury during his trial, which indicated he was paying attention to what was going on around him. *Id*. at 99. Franklin also addressed the court during a break in the proceedings, although he was advised not to do so by counsel. *Id*. at 143. Further, she acknowledged that reasonable experts could agree with her diagnoses and nevertheless conclude that Franklin was competent to stand trial. *Id*. at 135. Finally, the state supreme court found that a deputy requested that Franklin be handcuffed when the verdict was returned because of a perceived personality change. *Id*. at 19.

Dr. Cherry offered his opinion at the evidentiary hearing that in addition to the diagnoses he made before Franklin's trial, he further diagnosed Franklin with a dissociative disorder. (Evid. Hrg. Tr., Doc. No. 86 at 32.) Dr. Cherry testified that his new diagnosis was based upon pleadings Franklin filed in his post-conviction proceedings following his trial, in which Franklin claims to have been taking orders from a rap song, and his observation of Franklin during the time he (Dr. Cherry) was testifying at Franklin's trial. *Id*. at 32-35. Dr. Cherry implicitly acknowledged, however, that he had not fully evaluated all the things he was talking about at the evidentiary hearing. *Id*. at 35. Franklin's burden here is to demonstrate that the state supreme court's determination that it was rudeness rather than incompetence that explained his strange behavior during his trial was an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). He has not done so. The brief portions of the videotape of Franklin's trial that were viewed during his evidentiary hearing here are insufficient to render the state court's determination unreasonable. In the other sixteen videotapes of the trial, the video camera's lens is generally trained on the attorneys, witnesses, or the trial judge, rather than Franklin. Moreover, many of the videos are so scrambled that it is impossible to tell who, if anyone, appears in the frame, much less to evaluate the individual's behavior. Thus, this Court is unable to view Franklin's behavior during the extended period of time over which his trial took place. Dr. Pearson's testimony about Franklin's conduct at his trial related to a few instances of peculiar behavior and Dr. Cherry's observation of Franklin at trial was also limited to the time during which Dr. Cherry was testifying. This is not the type of "clear and convincing" evidence sufficient to justify a finding that the state supreme court's factual determination that Franklin was rude rather than incompetent was unreasonable. *Nields v. Bradshaw*, 482 F.3d 442, 449 (6th Cir. 2007).

For the foregoing reasons, Franklin's first and second grounds for relief are denied.

Third Ground for Relief

In his third ground for relief, Franklin contends he was incompetent during his state post-conviction proceedings which he claims violates the Due Process Clause of the United States Constitution. (Petition, Doc. No. 21 at 18.) Respondent argues the claim is meritless, and that the state court's resolution of the claim was neither contrary to nor an unreasonable application of federal law. (Return of Writ, Doc. No. 29 at 69-71.)

On appeal from denial of his request for post-conviction relief, the state court of appeals rejected Franklin's claim for the following reason:

> In his fifteenth claim for relief, Franklin argued that he is incompetent to understand and assist with his postconviction proceedings and that these proceedings should have been stayed until his competency is restored. This is not a proper matter for postconviction proceedings. These proceedings are designed to investigate the validity of Franklin's conviction. Franklin is represented by experienced, qualified counsel in these proceedings. His current competency has no bearing on whether his conviction was validly obtained. Nor has Franklin demonstrated how, if competent, he could be of any significant assistance to his counsel in these proceedings. Therefore, the trial court did not err in dismissing this claim for relief.

State v. Franklin, No. 19041, 2002 WL 1000415 at *12 (Ohio App. 2d Dist. May 17, 2002)(unreported). Thus, the state court concluded Franklin's claim " was not cognizable in post-conviction," which is a matter of state law, not federal constitutional law. It is not the province of a federal habeas corpus court to correct errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

In addition, during his post-conviction proceedings, Franklin submitted Dr. Pearson's report to the state trial court in support of his claim of incompetence. (Appendix, Vol. 9 at 189-212.) Therein, Dr. Pearson opined that Franklin was "unable to assist counsel in the preparation of his post-conviction case." *Id*. at 211. Franklin called Dr. Pearson to testify at the evidentiary hearing in these proceedings (Evid. Hrg. Tr., Doc. No. 86 at 61-163), but no evidence of Franklin's

incompetence at the time of his post-conviction proceedings was presented beyond what was available to the state courts through Dr. Pearson's affidavit. Indeed, Dr. Pearson's evidentiary hearing testimony focused primarily on Franklin's competence at trial, and only slight mention was made of the state of his competence during the state post-conviction proceedings. *Id*.

Franklin never addresses the state court's reason for denying his claim, and his argument in support here is convoluted. He states, for instance, that "[a]lthough there has been no specific holding that a defendant must be competent during post conviction proceedings, it is the logical extension of existing United States Supreme Court precedent holding that there is no right to counsel after the first appeal of right." (Traverse, Doc. No. 49 at 24.) He contends that if a defendant must be competent when he has a right to counsel, then surely he must be competent when he does *not* have a right to counsel. *Id*. The fact of the matter is, however, that Franklin *did* have counsel representing him during his state post-conviction proceedings, even though his right to representation was conferred on him by state statute rather than the federal constitution. *See* Ohio Rev. Code § 2953.21(I)(1). Piggybacking his right to be competent at state post-conviction proceedings on his right to counsel on a first appeal of right in this manner is a *non sequitur*, does not satisfy Franklin's burden under the AEDPA, and is unavailing as well.

Moreover, even if this Court determined that Franklin had a federal constitutional right to competence during his state post-conviction proceedings, and that he had demonstrated he was not competent, he has failed to allege, much less show, any prejudice from the claimed error. Finally, even if this Court decided there was a right to a stay of post-conviction proceedings until one was restored to competence, it would not apply in this case because the United States Supreme Court has not yet recognized such a right. For all of the foregoing reasons, Franklin's third ground for relief is denied.

Fourth, Fifth, and Sixth Grounds for Relief

In his fourth, fifth, and sixth grounds for relief, Franklin contends the security measures taken during the mitigation phase of his trial were unreasonable and inherently prejudicial. (Petition, Doc. No. 21 at 18-20.) Specifically, he claims the trial court should have ordered a hearing prior to deciding to shackle Franklin, and that the shackles and additional law enforcement officers positioned near him were inherently prejudicial. *Id*. Respondent argues all three claims are procedurally defaulted as well as lacking in merit. (Return of Writ, Doc. No. 39 at 72-77.) Franklin claims his trial counsel's ineffectiveness excuses the default. (Traverse, Doc. No. 49 at 25-30.)

The standard for evaluating a procedural default defense is as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause of the default and actual prejudice as a result of the alleged violation of federal law; or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 749 (1991); *see also Simpson v. Jones*, 238 F. 3rd 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional right he could not raise in state court because of procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982). Absent cause and prejudice, a federal habeas petitioner who fails to comply with a State's rules of procedure waives his right to federal habeas corpus review. *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000); *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). *Wainwright* replaced the "deliberate bypass" standard of *Fay v. Noia*, 372 U.S. 391 (1963).

The Sixth Circuit Court of Appeals requires a four-part analysis when the State alleges a habeas claim is precluded by procedural default. *Reynolds v. Berry*, 146 F.3d 345, 347-48 (6th Cir.

1998), citing *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986); *accord Lott v. Coyle*, 261 F.3d 594 (6th Cir. 2001).

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
>
> . . . .
>
> Second, the court must decide whether the state courts actually enforced the state procedural sanction, citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 149, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).
>
> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.
>
> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

*Maupin,*785 F.2d, at 138.

Franklin raised the instant claims in one proposition of law on direct appeal in the Ohio Supreme Court. (Appendix, Vol. 6 at 97-102.) The state supreme court decided the claim as follows:

> In his second proposition of law, [A]ppellant alleges that the trial court violated his due process rights and his right to a fair trial and fair sentencing when it allowed him to be handcuffed with two deputies positioned beside him during the penalty phase of his trial. He asserts that these actions forced the jury to view him as dangerous, thus prejudicing its decision on whether to impose a death sentence.
>
> While the state concedes in its brief that these procedures were in fact utilized, there is no written transcript of any debate as to whether the actions were improper. Appellant never objected to the handcuffs or the presence of the two deputies. Therefore, the issue is waived

> unless we determine that the trial court's actions were plain error. We find no such error.

State v. Franklin, 97 Ohio St. 3d 1, 18-19, 776 N.E.2d 26 (2002).

Ohio's contemporaneous objection rule — that parties must preserve errors for appeal by calling them to the attention of the trial court at a time when the error could have been avoided or corrected, set forth in *State v. Williams*, 51 Ohio St. 2d 112, 364 N.E.2d 1364 (1977) *vacated in part on other grounds, Williams v. Ohio*, 438 U.S. 911 (1978) — is an adequate and independent state ground for decision. *Scott v. Mitchell*, 209 F.3d 854, 865-68 (6th Cir. 2000), *citing Engle v. Isaac*, 456 U.S. 107, 124-29 (1982). In addition, the Ohio Supreme Court enforced the rule against Franklin in its appellate review of his case as the quoted portion of that court's decision, *supra*, shows. Consequently, unless Franklin can demonstrate cause for the default and prejudice therefrom, his fourth, fifth, and sixth grounds for relief are procedurally defaulted.

For trial counsel's ineffectiveness to serve as cause for the procedural default of a habeas claim, the claim of ineffectiveness itself must also be preserved for habeas review. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). Franklin raised his counsel's ineffectiveness on direct appeal, and that claim included an argument that counsel provided ineffective assistance by failing to object to Franklin's shackling and by not requesting a hearing on the matter. (Appendix, Vol. 6 at 151-152.) The additional complaint Franklin makes here, that his counsel neglected to raise as error the presence of two extra deputies during the mitigation phase of his trial, was not a part of that or any other claim on direct appeal in the state court. Franklin's preservation of some of his ineffective assistance of trial counsel claims does not operate to preserve all of them, however. Consequently, Franklin's procedural default of his sixth ground for relief, where he contends he was prejudiced by the deputies' presence, is not excused by any ineffectiveness on the part of his attorneys.

In his habeas corpus petition, Franklin raises his counsel's ineffectiveness in relation to his shackling as his eighteenth ground for relief. (Petition, Doc. No. 21 at 26.) Because this Court

recommends that ground for relief be denied as meritless, *infra*, counsel's alleged ineffectiveness cannot save Franklin's instant claims from procedural default. Franklin's fourth, fifth, and sixth grounds for relief are procedurally defaulted, and Franklin has failed to demonstrate cause and prejudice for the default. Accordingly, all three grounds for relief are denied.

Even if the claims were preserved, however, they would fail. The Ohio Supreme Court evaluated Franklin's claim for plain error. In doing so, it stated the following:

> The usual practice, of course, is for a defendant to appear in court while free of shackles. This is the accepted procedure because the presence of restraints tends to erode the presumption of innocence that our system attaches to every defendant. But it is widely accepted that a prisoner may be shackled where there is danger of violence or escape. The decision to impose such a restraint is left to the sound discretion of the trial court, which is in a position to consider the prisoner's actions both inside and outside the courtroom, as well as his demeanor while court is in session. We also note that a court need not sit by helplessly waiting for a defendant to commit a violent or disruptive act in the courtroom before being cloaked with the power to invoke extra security measures.
>
> While the use of restraints is a fairly unusual measure, it has been upheld in some cases. Here, [A]ppellant demonstrated a propensity for violence. Not only had he just been convicted of three brutal murders, but he also had stabbed a fellow inmate with a pen six times in a dispute over turning out a light. It is certainly proper to seek to prevent similar violent incidents in the courtroom.
>
> Furthermore, the testimony of Dr. Cherry, the defense's own witness, revealed that [A]ppellant "is a time bomb waiting to happen. * * * [O]ne can never tell when he will become violent." The videotape even reveals the trial judge stating that the deputy "wants permission to cuff him * * * when the verdict comes in , because he says his personality is beginning to change a little the last couple of days." These statements shed light on [A]ppellant's tendency for violence at the time.
>
> Although we stress that the preferred and encouraged practice prior to handcuffing a defendant during any phase of trial is to hold a hearing on the matter, we do not find this to be an absolute rule. Where the facts and circumstances surrounding a defendant illustrate a compelling need to impose exceptional security procedures, the trial court's exercise of discretion in this regard should not be disturbed unless its actions are not supported by the evidence before it. Had the

> lower court in the case sub judice held a hearing on the matter, it would be much easier to review its decision to handcuff [A]ppellant and to place the deputies with him. Even though such a hearing did not take place, we find that the trial judge's actions did not amount to plain error.

State v. Franklin, 97 Ohio St. 3d 1, 19-20, 776 N.E.2d 26 (2002).

It is true that "[t]he Constitution forbids the use of visible shackles during the penalty phase [of a capital trial], as it forbids their use during the guilt phase," *Deck v. Missouri*, 544 U.S. 622, 624 (2005),[6] but that prohibition is not unqualified. If the use of such security measures is "justified by an essential state interest – such as the interest in courtroom security – specific to the defendant on trial," there is no constitutional prohibition against using such measures. *Id*. In other words, the Constitution does not prohibit shackling, it prohibits routine shackling. *Id*. at 626. The state court's reliance on Franklin's history of violence and his own defense expert's testimony that Franklin was violent and unpredictable satisfies the requirement that the decision to shackle be one based on the individual defendant, although it would have been a better practice for the trial court to hold a hearing on the matter. Since Dr. Cherry, Franklin's psychological expert, provided the firmest reason for shackling him and placing extra deputies nearby, however, it is difficult to imagine what evidence Franklin might have presented at a hearing that could counter Dr. Cherry's assessment of his violent tendencies, and he presented no such evidence at the evidentiary hearing in these proceedings. Although both of Franklin's trial counsel testified at the evidentiary hearing that Franklin's behavior was consistent throughout the trial (Evid. Hrg. Tr., Doc. No. 86-2 at 58, 129), one also recognized that Franklin's attempted stabbing of another inmate was at least a partial explanation for the increased security measures, *id*. at 153. Their testimonies do little to counteract Dr. Cherry's assessment that Franklin was unpredictable and violent.

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[6]In a recent case, the Sixth Circuit Court of Appeals observed that it has twice held that "the principles underlying *Deck* were, in fact, clearly established by the Supreme Court before its decision in *Deck*." *Mendoza v. Berghuis*, 544 F.3d 650, 653 (6th Cir. 2008), *citing Lakin v. Stine*, 431 F.3d 959, 963 (6th Cir. 2005); *Robinson v. Gundy*, 174 Fed. Appx. 886, 893 (6th Cir. 2006) (unpublished).

Finally, Franklin has failed to demonstrate prejudice from the security measures employed during the mitigation phase of his trial. Instead, he contends shackling is inherently prejudicial and that it is structural error. (Traverse, Doc. No. 49 at 27, 29; Petitioner's Amended Post-Evidentiary Hearing Brief, Doc. No. 95 at 31.) Franklin provides no authority for the second of those propositions, and this Court finds no case in which the United States Supreme Court has held shackling to be structural error. Arguing that shackling is inherently prejudicial might succeed where a trial court ordered it without adequate justification. In such a case, the defendant would not be required to demonstrate actual prejudice to make out a due process violation, and the burden would be on the State to prove "'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" *Deck*, 544 U.S. at 635, *quoting Chapman v. California*, 386 U.S. 18, 24 (1967). The trial court in Franklin's case, however, had adequate justification for ordering him shackled during the mitigation phase, as the Ohio Supreme Court indicated in its plain error review of Franklin's claim. The state court's reasoning is consistent with United States Supreme Court law. In addition, Franklin has made no attempt whatsoever to distinguish his situation from that of the petitioner in *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986), where the Supreme Court held that the conspicuous, or at least noticeable, presence of guards in the courtroom during trial was not an inherently prejudicial practice permissible only where justified by an essential state interest specific to each defendant.

Franklin's fourth, fifth, and sixth grounds for relief are procedurally defaulted and he has failed to demonstrate cause and prejudice to excuse the default. Accordingly, all three grounds for relief are denied.

Seventh Ground for Relief

In his seventh ground for relief, Franklin contends his right to a fair trial was violated by the

prosecutor's disparaging remarks about the defense, the defense witnesses, and Franklin himself, and by the prosecutor's elicitation of inadmissible victim impact testimony. (Petition, Doc. No. 21 at 21.) In addition, Franklin claims the prosecutor presented irrelevant, misleading, and prejudicial evidence, specifically about the tattoos Franklin acquired in jail after the murders. *Id*. Respondent argues that the claim is both procedurally defaulted and meritless. (Return of Writ, Doc. No. 39 at 80-83.) Franklin counters that Respondent misconstrues the trial court's ruling respecting his objections to the alleged prosecutorial misconduct, and that two of his sub-claims here have properly been preserved for habeas corpus review. (Traverse, Doc. No. 49 at 31-33.) He also argues that his procedural default of the remaining three sub-claims can be excused by the ineffective assistance of his trial counsel. *Id*. at 33-34.

First Sub-claim

Franklin's first sub-claim concerns the prosecutor's suggestion to the jury that the defense planted evidence at the scene of the murders and fire. (Petition, Doc. No. 21 at 21; Traverse, Doc. No. 49 at 31-32.) He sets forth a time line relevant to his sub-claim as follows: The jury began deliberating at 2:00 pm on the first day of their deliberations. (Traverse, Doc. No. 49 at 31.) At 10:35am on the morning of the second day of deliberations, the defense objected to the prosecutor's closing argument comment suggesting the defense had planted evidence, and asked for a curative instruction, which was denied. *Id*. Roughly three hours later, the jury returned its verdicts. *Id*. Franklin argues that although the rule requiring contemporaneous objections might have come into play in these circumstances, that is not the ground upon which the trial court declined to give corrective instructions to the jury. *Id*. at 31-32. Instead, the trial court determined that any curative instruction would be futile since the jury had been deliberating since the prior afternoon. (Trial Tr., Vol. 14 at 1704.)

Franklin acknowledges that the Ohio Supreme Court did enforce the contemporaneous

objection rule when he presented his prosecutorial misconduct claim as error on direct appeal. (Traverse, Doc. No. 49 at 32.) *See State v. Franklin*, 97 Ohio St. 3d 1, 7-9, 776 N.E.2d 26 (2002). He argues, however, that the state supreme court's "failure to note the objection and it's [sic] choice to ignore the motions for mistrial and a new trial does [sic] not turn defense counsel's conduct into procedural default." (Traverse, Doc. No.49 at 32.) These alleged oversights should negate the state supreme court's decision, leaving the trial court's ruling on Franklin's objections as the one to which the AEDPA should be applied here, according to Franklin. *Id*.

Franklin's argument contradicts federal law. Under *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), federal courts considering habeas petitions are instructed to look to "the last *explained* state-court judgment" in determining whether a petitioner's claim is procedurally defaulted. *Couch v. Jabe*, 951 F.2d 94, 96 (6th Cir. 1991). The Ohio Supreme Court's judgment constitutes an "explained judgment" as the court noted the rule requiring a contemporaneous objection and applied it in Franklin's case. *Franklin*, 97 Ohio St. 3d at 7-9. Where the highest state court rejects a petitioner's claims on procedural grounds, the possibility of a subsequent state court reaching the merits of the federal claim is for all intents and purposes foreclosed and in Franklin's case, the Ohio Supreme Court's decision remains undisturbed.

Franklin urges this Court to assume that the Ohio Supreme Court "failed" to note his objection and "ignored" subsequent attempts to obtain a new trial based on nothing more than his word. (Traverse, Doc. No. 49 at 32.) He points to nothing in the record that would cause this Court to believe that the state court ignored any of the evidence before it, including the objections Franklin raised the day after the offending remarks were made by the prosecutor. Moreover, in its opinion, the state court acknowledged that the trial judge had found the prosecutor's statements "improper" and "illegitimate," comments that the trial judge made after and in response to Franklin's late objections. *State v. Franklin*, 97 Ohio St. 3d 1, 8, 776 N.E.2d 26 (2002). The state supreme court

also conducted plain error review of that part of Franklin's prosecutorial misconduct claim, which indicates that the court concluded Franklin's objection was untimely, and applied the contemporaneous objection rule to the claim. A state appellate court's review for plain error is enforcement, not waiver, of a procedural default. *White v. Mitchell*, 431 F.3d 517, 525 (6th Cir. 2005); *Hinkle v. Randle*, 271 F. 3rd 239 (6th Cir. 2001), citing *Seymour v. Walker*, 224 F. 3rd 542, 557 (6th Cir. 2000)(plain error review does not constitute a waiver of procedural default); *accord, Mason v. Mitchell*, 320 F.3d 604 (6th Cir. 2003).

The Ohio Supreme Court determined that Franklin had not lodged an objection to the prosecutor's comment suggesting the defense had planted evidence at the scene of the crimes. For the reasons stated above, the state court's determination that Franklin had made no objection can reasonably be read as meaning Franklin had made no contemporaneous objection. The state court considered Franklin's claim of error waived and conducted plain error review. It found none, which results in a procedural default of Franklin's claim unless he can demonstrate cause and prejudice to excuse the default. Franklin does not contend his counsel's ineffectiveness or any other circumstance provides cause for his default, however (Traverse, Doc. No. 49 at 31-32), so his first prosecutorial misconduct sub-claim is procedurally defaulted and denied.

Second Sub-claim

In his second sub-claim, Franklin contends the prosecutor engaged in misconduct when he characterized Franklin's arson expert witness as a liar. (Petition, Doc. No. 21 at 20-21; Traverse, Doc. No. 49 at 32-33.) In his argument, Franklin relies entirely on the trial court's response to a defense objection to the prosecutor's characterization of arson expert Yeazell as a liar, and completely ignores the Ohio Supreme Court's discussion of the claim. (Traverse, Doc. No. 49 at 32-33.) As before, however, it is the Ohio Supreme Court's decision to which this Court must apply the AEDPA in considering Franklin's claim in habeas corpus.

Respondent contends Franklin's sub-claim is procedurally defaulted. (Return of Writ, Doc. No. 39 at 80.) Franklin presented his claim to the Ohio Supreme Court on direct appeal, and as with the previous sub-claim, that court found that no contemporaneous objection had been raised and that the claim was consequently waived. *State v. Franklin*, 97 Ohio St. 3d 1, 8, 776 N.E.2d 26 (2002). Franklin has not contended that his attorneys' ineffectiveness provides cause for the default. The Court notes, however, that the state supreme court found the assistance rendered by Franklin's counsel was not ineffective with respect to the matter at hand, *Franklin*, 97 Ohio St. 3d at 11, and Franklin does not challenge that finding in any of his other claims here. Consequently, the instant sub-claim is procedurally defaulted, and is denied on that basis.

Even if he had preserved the claim for habeas review, however, it would fail. Franklin has not claimed, demonstrated, argued, or otherwise explained how the Ohio Supreme Court's decision was contrary to or an unreasonable application of Supreme Court law, nor has he contended it was based upon an unreasonable determination of the facts based on the evidence presented in the state courts. (Traverse, Doc. No. 49 at 32-33.) Under the AEDPA, therefore, Franklin has not carried his burden. 28 U.S.C. § 2254(d). Accordingly, even if preserved, Franklin's second sub-claim would be denied.

Franklin's claim is otherwise meritless as well. The Sixth Circuit has articulated the relevant standard for habeas claims of prosecutorial misconduct as follows:

> On habeas review, claims of prosecutorial misconduct are reviewed deferentially. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). To be cognizable, the misconduct must have "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id*. (citation omitted). Even if the prosecutor's conduct was improper or even "universally condemned," *id*., we can provide relief only if the statements were so flagrant as to render the entire trial fundamentally unfair. Once we find that a statement is improper, four factors are considered in determining whether the impropriety is flagrant: (1) the likelihood that the remarks would mislead the jury or prejudice the accused, (2) whether the remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally

> presented to the jury, and (4) whether other evidence against the defendant was substantial. *See Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000). Under [the] AEDPA, this bar is heightened by the deference we give to the . . . [Ohio] Supreme Court's determination of . . . [Petitioner's] prosecutorial-misconduct claims. *See Macias v. Makowski*, 291 F.3d 447, 453-54 (6th Cir. 2002)("If this court were hearing the case on direct appeal, we might have concluded that the prosecutor's comments violated Macias's due process rights. But this case is before us on a petition for a writ of habeas corpus. So the relevant question is not whether the state court's decision was wrong, but whether it was an unreasonable application of clearly established federal law.").

Bowling v. Parker, 344 F.3d 487, 512-13 (6th Cir. 2003). In addition, an examination of alleged prosecutorial misconduct is performed in the context of the trial as a whole. *United States v. Beverly*, 369 F.3d 516, 543 (6th Cir. 2004), *citing United States v. Young*, 470 U.S. 1, 12 (1985) and *United States v. Francis*, 170 F.3d 546, 552 (6th Cir. 1999).

The Sixth Circuit has drawn a line between a prosecutor's calling a defense witness a liar where "significant evidence offered at trial supported the prosecutor's statements," and where "statements by the prosecutor were not coupled with a more detailed analysis of the evidence actually adduced at trial." *Cristini v. McKee*, 526 F.3d 888, 902 (6th Cir. 2008), *quoting Hodge v. Hurley*, 426 F.3d 368, 378 (6th Cir. 2005). In the first situation, the Court explained that the prosecutor was arguing from the evidence to contend that certain testimony should not be believed. *Cristini*, 526 F.3d at 902. In the second, however, the prosecutor's comments "convey[ed] an impression to the jury that they should simply trust the State's judgment that . . . the defendant's witnesses were non-credible, if not perjurious." *Id.*, *quoting Hodge*, 426 F.3d at 378-79.

In its plain error review of Franklin's claim, the Ohio Supreme Court stated that Franklin's prosecutor's characterization of Yeazell as a liar were supported by the evidence presented at trial. *State v. Franklin*, 97 Ohio St. 3d 1, 8, 776 N.E.2d 26 (2002). This Court further notes that the prosecutor referenced the same evidence discussed by the state supreme court during his closing argument when he made the "liar" comments. (Trial Tr., Vol. 7 at 1625-26.) Thus, the prosecutor's

remarks fall into the category of remarks that *Cristini* identifies as acceptable, not improper.

Even if Franklin could demonstrate the remarks were improper, however, they were not likely to mislead the jury, since the jury was aware that Yeazell had testified he would never offer an opinion as to whether a fire was accidental or arson prior to receipt of the laboratory results, but that two reports on other fires were admitted into evidence in which Yeazell did just that. (Trial Tr., Vol. 11 at 885; Vol. 13 at 1397.) The jury was also cognizant of the discrepancies between Yeazell's testimony about the Riegel Street fire and that of three fire investigators who investigated the fire. (Trial Tr., Vol. 1390-1440.) In addition, the comments were isolated, not extensive, and comprise only two pages of a transcript more than 1,700 pages in length. The comments were undoubtedly made intentionally, but the other evidence against Franklin was substantial. Consequently, even if Franklin had demonstrated that the prosecutor's remarks were improper, his claim would still fail as they were not "so flagrant as to render . . . [his] entire trial fundamentally unfair." *Bowling v. Parker*, 344 F.3d 487, 512-13 (6th Cir. 2003).

Franklin's second prosecutorial misconduct sub-claim is denied because it is procedurally defaulted. In addition, the prosecutor's comments were neither improper nor flagrant, so Franklin's claim, if properly preserved, would fail regardless.

Third Sub-claim

In his third sub-claim, Franklin contends the prosecutor's comments about Franklin's tattoos were improper. (Petition, Doc. No. 21 at 21; Traverse, Doc. No. 49 at 33.) He fails to point to anywhere in the record where the comments are made, and does not claim that the state court's decision on the matter was contrary to or an objectively unreasonable application of federal law. Franklin purportedly sought permission to present evidence on his seventh ground for relief in his request for an evidentiary hearing (Doc. No. 71 at 8-12), but as was noted by the Court in its order granting Franklin's motion in part, the substance of Franklin's request on that ground relates to his

fortieth ground for relief rather than the prosecutorial misconduct claim set forth in the instant ground (Doc. No. 73 at 6). Thus, Franklin neither sought nor was granted permission to present evidence to support his third prosecutorial misconduct sub-claim. Consequently, Franklin has offered only unsupported conclusions that the introduction of and argument about his tattoos violated the federal constitution in some way. He has demonstrated no basis upon which this Court might grant the writ of habeas corpus on this basis, and it is accordingly denied.

The sub-claim is also procedurally defaulted. On direct appeal, the Ohio Supreme Court concluded that Franklin's claim was waived since he failed to raise a contemporaneous objection to the introduction of the tattoo evidence and the prosecutor's comments on the tattoos in closing argument. *State v. Franklin*, 97 Ohio St. 3d 1, 7, 776 N.E.2d 26 (2002). Franklin does not dispute that finding, but states that his trial attorneys' ineffectiveness should excuse the default. (Traverse, Doc. No. 49 at 33.) As in the second prosecutorial misconduct sub-claim, however, the state court found no ineffectiveness on Franklin's attorneys' part, *Franklin*, 97 Ohio St. 3d at 11. Franklin's claim that his counsel were ineffective for failing to contemporaneously object to unspecified "irrelevant, infammatory [sic], and prejudicial evidence," asserted as his thirteenth ground for relief fails. (*See* Petition, Doc. No. 21 at 24.) Even if read to encompass the instant sub-claim as an example of counsel's ineffectiveness, therefore, the failure of Franklin's counsel to raise a contemporaneous objection to the tattoo evidence and argument cannot serve as cause for his default. Nor has Franklin demonstrated prejudice from his attorneys' failure to object to the admission of the tattoo evidence or the prosecutor's comments about the tattoos. Thus, the third sub-claim is procedurally defaulted without excuse, and would be denied even if Franklin had properly supported his allegations.

Franklin's has failed to support and properly preserve his third prosecutorial misconduct sub-claim, and for those reasons, the sub-claim is denied.

Fourth Sub-claim

Franklin's fourth sub-claim is in the same posture as his third. He claims improper victim impact testimony was elicited by the prosecutor, but fails to identify any specific testimony that this Court might consider, does not refer to the state court record, and has not satisfied his burden under the AEDPA standard applicable in these proceedings. (Petition, Doc. No. 21 at 21; Traverse, Doc. No. 49 at 33.) Franklin never sought or received permission to present evidence at his evidentiary hearing that might have supported this claim. (Petitioner's Renewed Motion for Evidentiary Hearing, Doc. No. 71; Decision and Order Granting in Part and Denying in Part Petitioner's Renewed Motion for Evidentiary Hearing, Doc. No. 73.) Consequently, he has failed to demonstrate entitlement to habeas corpus relief under the AEDPA, and the sub-claim is denied on that ground.

Even if that were not so, the sub-claim is procedurally defaulted. Franklin again makes the conclusory assertion that his trial counsel's ineffectiveness should excuse his default. (Traverse, Doc. No. 49 at 33.) Even if the Court were to generously read Franklin's thirteenth ground for relief as encompassing a claim that his trial counsel were ineffective for not objecting to the unspecified victim impact evidence (*see* Petition, Doc. No. 21 at 24), that claim fails, *infra*, so Franklin's statement that counsel's errors provide cause for his procedural default fails as well. Franklin has also failed to demonstrate prejudice from his counsel's alleged ineffectiveness.

Franklin's fourth prosecutorial misconduct sub-claim is both unsupported and procedurally defaulted without excuse. For those reasons, the sub-claim is denied.

Fifth, Sixth, and Seventh Sub-claims

Each of the final three sub-claims are, although substantively distinct, procedurally similar and can be addressed together. In his fifth-sub-claim, Franklin contends the prosecutor made remarks improperly characterizing him; as what, he does not reveal. (Petition, Doc. No. 21 at 21; Traverse, Doc. No. 49 at 33-34.) His sixth and seventh sub-claims respectively concern the

prosecutor's characterization of the defense tactics as a "smoke screen," and the prosecutor's improper argument respecting non-statutory aggravating circumstances. (Petition, Doc. No. 21 at 21.) As with the preceding prosecutorial misconduct sub-claims, Franklin neither requested nor received permission to present evidence to support his allegations at the evidentiary hearing in these proceedings. (Petitioner's Renewed Motion for Evidentiary Hearing, Doc. No. 71; Decision and Order Granting in Part and Denying in Part Petitioner's Renewed Motion for Evidentiary Hearing, Doc. No. 73.) He provides no specificity in his pleading, no citations to the state court record, and no claim that a state court's decision on the issues presented was contrary to or an objectively unreasonable application of federal law, or that it was based upon an unreasonable determination of the facts as presented at trial. *See* 28 U.S.C. § 2254(d). As such, Franklin has failed to substantiate his allegations and consequently to satisfy his burden under the AEDPA. Accordingly, his fifth, sixth, and seventh sub-claims are denied.

In addition, the fifth sub-claim is procedurally defaulted. As with prior prosecutorial misconduct sub-claims, Franklin raised the fifth sub-claim on direct appeal. (Appendix, Vol. 6 at 114-124.) The Ohio Supreme Court found it was waived because defense counsel made no contemporaneous objection. *State v. Franklin*, 97 Ohio St. 3d 1, 7-8, 776 N.E.2d 26 (2002). Franklin again offers his trial counsel's ineffectiveness as cause for his default, but as his claim to that effect is denied below, it also fails as cause for the procedural default. Further, Franklin has made no attempt to demonstrate prejudice from the prosecutor's statements or from the alleged attorney error. Accordingly, his fifth prosecutorial misconduct sub-claim is procedurally defaulted without excuse and denied.

Franklin does not argue the sixth or seventh sub-claims in his Traverse, and he does not identify with specificity what the prosecutor's comments were, or where the offending comments might be found in the record. (Petition, Doc. No. 21 at 21.) This Court is not required to search the

record in order to find support for a habeas petitioner's claims. Nevertheless, the Court will assume that the issues Franklin attempts to raise here are similar to the ones he raised with more precision in his direct appeal to the Ohio Supreme Court. (Appendix, Vol. 6 at 117-18, 121-24.) Doing so, however, causes this Court to conclude that the sub-claims are procedurally defaulted along with his other prosecutorial misconduct sub-claims, because the Ohio Supreme Court determined the claims were waived for lack of a contemporaneous objection at trial. *State v. Franklin*, 97 Ohio St. 3d 1, 7, 776 N.E.2d 26 (2002). Franklin has not suggested any cause for his default, nor has he demonstrated prejudice therefrom. Consequently, his sixth and seventh prosecutorial misconduct sub-claims are procedurally defaulted without excuse, and would be denied even if they had been fully presented and properly supported.

Having considered, both individually and cumulatively, each of Franklin's seven prosecutorial misconduct sub-claims, the Court concludes they are procedurally defaulted, insufficiently supported, and meritless, and his seventh ground for relief is denied.

Eighth Ground for Relief

In his eighth ground for relief, Franklin contends the prosecutors withheld exculpatory evidence from the defense contrary to *Brady v. Maryland*, 373 U.S. 83 (1963). (Petition, Doc. No. 21 at 21-22.) Specifically, he claims prosecutors should have divulged to the defense (1) the recording of the 911 call that precipitated his arrest, (2) Franklin's own notes that he made while he was incarcerated, (3) an out-of-court statement made by "witness" Brian Dallas,[7] and (4) information about Franklin's family history. *Id.* at 22. Respondent argues Franklin's claim is partially procedurally defaulted and wholly meritless as well. (Return of Writ, Doc. No. 39 at 83-84.) Franklin contends each part of his *Brady* claim is preserved for habeas corpus review. (Traverse,

[7]In his petition, Franklin refers to Brian Dallas as a "witness" (Doc. No. 21 at 22), but the record shows that no one by that name testified at Franklin's trial.

Doc. No. 49 at 34-35.) He did not seek to present evidence relating to this ground for relief in his request for an evidentiary hearing in this Court. (*See* Petitioner's Renewed Motion for Evidentiary Hearing, Doc. No. 71.)

Franklin raised the first of his sub-claims as his sixth claim for relief in his state petition for post-conviction relief. (Appendix, Vol. 9 at 123-25.) The state trial court denied Franklin's claim, reasoning that there existed at that time no evidence to show that the prosecution had the 911 tape in its possession or that the prosecution had withheld the tape from the defense. (Appendix, Vol. 13 at 33-34.) The court of appeals subsequently rejected Franklin's arguments that the tape contained useful evidence with which he might have impeached the testimony of the officer who arrested him, and that the evidence contained in the audio recording was relevant to Franklin's state of mind at the time of the murders. *State v. Franklin*, No. 19041, 2002 WL 1000415 at *5 (Ohio App. 2d Dist. May 17, 2002)(unreported). A later appeal to the Ohio Supreme Court was not allowed, *State v. Franklin*, 98 Ohio St. 3d 1422, 782 N.E.2d 77 (2003)(table), and Franklin's motion for reconsideration of that decision was also denied, *State v. Franklin*, 101 Ohio St. 3d 1462, 804 N.E.2d 37 (2004)(table). Since the state courts adjudicated the merits of Franklin's claim, it is preserved for habeas corpus review.

The Sixth Circuit has explained habeas corpus review of a state court decision on a *Brady* claim as follows:

> Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution must disclose all material, exculpatory evidence to a defendant, irrespective of whether the failure to disclose was done in good or bad faith. To assert a successful Brady claim, a habeas petitioner must show that (1) the withheld evidence was favorable to the petitioner, (2) the evidence was suppressed by the government, and (3) the petitioner suffered prejudice. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The *Brady* rule encompasses both exculpatory and impeachment evidence when such evidence is material. *United States v. Bagley*, 473 U.S. 667, 676 (1985). This Court explained in *United States v. Bencs* that "[m]ateriality pertains to the issue of guilt or innocence, and not to the defendant's ability to prepare for trial."

> 28 F.3d 555, 560 (6th Cir. 1994) (citing *United States v. Agurs*, 427 U.S. 97, 112 n.20 (1976)). Evidence is material under *Brady* if a reasonable probability exists that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Bagley*, 473 U.S. at 682. A reasonable probability is one that sufficiently undermines confidence in the outcome of the trial. *Id*. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). When determining whether the withheld information was material and therefore prejudicial, we consider it in light of the evidence available for trial that supports the petitioner's conviction. *See Towns v. Smith*, 395 F.3d 251, 260 (6th Cir. 2005); *Clinkscale v. Carter*, 375 F.3d 430, 445 (6th Cir. 2004).

Jells v. Mitchell, 538 F.3d 478, 501-02 (6th Cir. 2008).

In addition, the United States Supreme Court has observed that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting in the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995.) Although the trial court's resolution of Franklin's claim was undoubtedly contrary to *Kyles*, it is the court of appeals' decision to which this Court must apply the AEDPA. That court dismissed Franklin's argument that the 911 caller's description of Franklin as "depressed or disoriented" would have been useful as impeachment evidence against the officer who arrested Franklin in Tennessee. *State v. Franklin*, No. 19041, 2002 WL 1000415 at *5 (Ohio App. 2d Dist. May 17, 2002) (unreported). Instead, the court stated that "[h]ow Franklin was described by the caller on the 911 tape has little relevance to how he behaved with the arresting officer, and his state of mind hours after the murders has little relevance to his state of mind at the time of the murders." *Id*. The court concluded Franklin had not demonstrated that his counsel were deficient or that he was prejudiced by his counsel's failure to obtain the tape. *Id*. While the state appellate court evaluated Franklin's claim as an ineffective

assistance of counsel claim,[8] it is clear from its discussion that no *Brady* violation occurred. If the withheld information could not meet the minimum standard of relevance, it surely cannot meet the more demanding standard of materiality required by *Brady*.

More importantly, however, Franklin's only argument respecting the prosecutor's failure to turn over the 911 tape is that he was "denied the opportunity to fairly challenge the *Terry* [*v. Ohio,* 392 U.S. 1 (1968)] stop that led to his search and arrest in Tennessee." (Traverse, Doc. No. 49 at 34.) He does not claim that had he been given the 911 tape and been able to "fairly challenge" the stop, the outcome of his suppression hearing would have been different, or that if evidence were suppressed, there existed a reasonable probability that the outcome of his trial would have been different. Even if Franklin had made the same arguments here as he made in the state court, his claim would fail. It is immaterial whether the jacket Franklin was wearing when he was arrested was described as "a heavy winter football type jacket" (Transcript of 911 Tape, Appendix, Vol. 10 at 207), or "a starter jacket" (Suppression Hearing Testimony of James Sullivan, Trial Tr., Vol. 3 at 51), as the terms are practically synonymous. It is worthwhile to note that the jacket was only part of the description provided by the caller. The "suspicious" individual was also described as a black male, approximately sixteen years old, short hair, wearing dark pants, and clean. (Appendix, Vol. 10 at 207.) The arresting officer testified that Franklin was the only person in the area who matched the description of the 911 caller when he and his partner responded to the call. (Suppression Hearing Testimony of James Sullivan, Trial Tr., Vol. 3 at 51.) Even if the jacket was mischaracterized, then, the officer had sufficient other descriptive criteria to question Franklin.

The officer testified he found Franklin at an intersection that Franklin alleged in his state court proceedings was two blocks from the intersection reported in the 911 call. (Appendix, Vol.

[8]It appears that Franklin actually presented two claims in his sixth ground for relief in his state post-conviction petition; one claiming a *Brady* violation which challenged the prosecutor's conduct, and one alleging the ineffectiveness of his trial counsel on somewhat nebulous, but related grounds. (Appendix, Vol. 9 at 123.)

9 at 124.) Assuming that is true, it is also immaterial. As noted above, the arresting officer testified at the suppression hearing that Franklin was the only person in the vicinity matching the description of the 911 caller at the time. That Franklin was allegedly two blocks from where he was reported to be in the 911 call might be explained by any number of things: the caller mistook the name of one of the streets when he called 911, the officer mistook or did not accurately recall the name of one of the streets when he testified, or Franklin simply walked the two blocks between the time the 911 call was made and the officers arrived in the area. There is hardly a reasonable probability that the outcome of Franklin's suppression hearing and thereby his trial would have been different had the defense known of the two-block inconsistency between the 911 caller's report and the arresting officer's testimony.

Franklin also contended in the state court that the officer could have been impeached with the information contained in the 911 tape on his testimony that he was dispatched to investigate a report of a young black male selling drugs. (Appendix, Vol. 9 at 124.) The 911 caller did not report that he suspected the young man of selling drugs, merely that the individual had been on the corner for about an hour and a half and was "sleepy, or down, or out of it, or something." (Appendix, Vol. 10 at 207-8.) The arresting officer testified that when he approached the area, he did not see anyone, including Franklin, selling drugs, and that Franklin was not breaking the law nor did Franklin appear suspicious to him at that time. (Trial Tr. Vol. 3 at 45-47.) Nevertheless, since Franklin matched the physical description given by the 911 caller, he approached Franklin and requested to see his identification. *Id*. at 12. The officer was on firm constitutional ground in doing so. The United States Supreme Court has held that "[i]n the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment." *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 185 (2004). The officer testified that it was not until he received unsatisfactory, or in his words "fuzzy," answers to his questions, and saw that Franklin's

jacket pouch appeared weighted down with something heavy that he became suspicious of Franklin. *Id*. at 13-17. After the officer asked Franklin what he had in his jacket, Franklin retrieved a piece of paper from one of his pockets, then reached toward his back pocket. (Trial Tr., Vol. 3 at 17, 48-49.) It was at that point that the officer decided to pat Franklin down for weapons. *Id*. It is true that the officer also indicated that he believed the 911 caller had reported drug dealing and that he justified his decision to pat Franklin down in part on that erroneous fact. *Id*. But even without that factor, the officer's concern for his safety was warranted. Franklin said he had no identification, and told the officers he was a minor from Dayton, Ohio, visiting his sister. *Id*. at 13-14. He said he had walked the several miles from his sister's home, but was unfamiliar with the area in which she lived. *Id*. at 15, 48. Franklin told the officers he had come to where they found him to play basketball, but it was getting dark, the basketball court was unlit, and there was no one else there to play the game. *Id*. at 48. In addition, the officer testified that his experience included arresting individuals in the same area for drug offenses, and having recovered weapons from some of those individuals. (Trial Tr., Vol. 3 at 9, 62.) The United States Supreme Court has observed that

> [T]he policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect. "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others" he may conduct a limited protective search for concealed weapons. . . . The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law.

Adams v. Williams, 407 U.S. 143, 146 (1972), *quoting Terry v. Ohio*, 392 U.S. 1, 24 (1968). In Franklin's case, the officer's decision to perform a protective search was justified by the circumstances identified by the officer even without his mistaken belief that the 911 caller had reported drug activity. Thus, even if the defense had possessed the 911 tape and cross-examined the

officer on that issue, it is unlikely that the outcome of Franklin's suppression hearing and trial would have been different. Accordingly, Franklin's claim that prosecutors violated *Brady* by withholding the contents of the 911 tape is denied.

Respondent contends Franklin's remaining three *Brady* sub-claims are procedurally defaulted. (Return of Writ, Doc. No. 39 at 83.) This Court agrees. Franklin states that the sub-claims are preserved for habeas corpus review because he raised them as claims underlying his application to reopen his direct appeal in the state courts. (Traverse, Doc. No. 49 at 34-35.) A defaulted claim, however, cannot be resurrected by raising it as a claim underlying an application to reopen a direct appeal unless the state appellate court grants the application and reopens the judgment. *Abshear v. Moore*, 546 F. Supp.2d 530, 541 (S.D. Ohio 2008). "Because claims of ineffective assistance of appellate counsel are based on a different legal theory from the underlying claims, . . . [an] application [to reopen a direct appeal] does not preserve the underlying claims from default." *Id*., *citing White v. Mitchell*, 431 F.3d 517, 526 (6th Cir. 2005). Consequently, Franklin's has not demonstrated cause for the default of his remaining three *Brady* sub-claims or resulting prejudice, and they are denied.

Even if they were preserved, however, they would fail. Franklin does not identify the contents of the notes he made while he was incarcerated and which he now claims have been improperly withheld from him. He makes no reference to any place in the record at which such notes or a description of the notes might be found. The same is true of the statement by Brian Dallas and the information about his own family history. As noted above, he did not seek to present evidence relating to his eighth ground for relief at his evidentiary hearing. Moreover, the government's *Brady* disclosure obligation does not apply when the "defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information' at issue." *United States v. Mullins*, 22 F.3d 1365, 1371 (6th Cir. 1994), *quoting United States v. Clark*, 928

F.2d 733, 738 (6th Cir. 1991). Obviously, the contents of notes produced by Franklin himself, and his own family history is information Franklin knew or should have known at the time of his trial. Of the Brian Dallas statement, whatever transpired between Dallas and Franklin, too, was within Franklin's own knowledge and cannot be the foundation of a *Brady* claim.

For the reasons stated above, Franklin's first *Brady* sub-claim is denied. Because the remaining three sub-claims are procedurally defaulted, they, too are denied.

Ninth Ground for Relief

In his ninth ground for relief, Franklin claims that the prosecutors violated *Brady v. Maryland*, 373 U.S. 83 (1963), by collapsing the standing walls of the Riegel Street house before he had access to the burned-out remains of the structure. (Petition, Doc. No. 21 at 22; Traverse, Doc. No. 49 at 36-37.) Franklin contends that as a result, he was deprived of an opportunity to have a "new expert" evaluate the evidence and discredit the prosecution's version of events. (Petition, Doc. No. 21 at 22.) Respondent relies on the state post-conviction trial court's rejection of the claim in arguing it is meritless, but acknowledges it is properly preserved for habeas corpus review. (Return of Writ, Doc. No. 39 at 84.)

Franklin raised a claim in his state court petition for post-conviction relief which frames the issue as one involving the prosecutor's destruction of evidence in bad faith. (Appendix, Vol. 9 at 118-19.) Franklin did not suggest there that *Brady* is the governing law applicable to his claim, as he does in these proceedings. *Id*. The state trial court denied Franklin's claim, reasoning that he had not shown bad faith on the part of police, and that the evidence Franklin relied on instead demonstrated that the structure was demolished as a nuisance. (Appendix, Vol. 13 at 32-33.) In addition, Franklin failed to provide any evidence that the prosecutors were even aware of the demolition. (Appendix, Vol. 13 at 32-33.) When Franklin appealed the trial court's decision to the

state court of appeals, that court overruled his claim of error as follows:

> Following their investigation on April 24, 1997, police and arson investigators pulled down the remaining walls of the Franklins' house, and it collapsed into a pile of rubble. Although one arson investigator claimed in his affidavit that the house was destroyed by order of the Housing Department, the records of the Department do not support this contention as the house was not brought to its attention until July of 1997. The complaints at the time regarded the large pile of debris. Franklin reasons that the destruction of the house hampered his defense. The defense theory at Franklin's trial was that he had been insane at the time of the murders but that he had not started the fire. The defense argued that the fire had been started by a space heater. The destruction of the house rendered Franklin's investigators unable to determine the location of space heaters in the house and unable to fully support this theory. Whether Franklin had started the fire was especially important at trial because it was the arson and the robberies that elevated Franklin's crimes to aggravated murder and warranted a death penalty specification. To further complicate matters, Franklin notes that the prosecutor, David Franceschelli, made repeated reference to the defense's lack of evidence regarding the origin of the fire and made accusations that defense counsel had placed the space heater at the scene.
>
> The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a criminal defendant from being convicted where the state fails to preserve materially exculpatory evidence or destroys in bad faith potentially useful evidence. See *Arizona v. Youngblood* (1988), 488 U.S. 51, 57-58; *State v. Benton* (2000), 136 Ohio App.3d 801, 805, 737 N.E.2d 1046; *State v. Lewis* (1990), 70 Ohio App.3d 624, 633-34, 591 N.E.2d 854. To be materially exculpatory, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta* (1984), 467 U.S. 479, 489.
>
> Franklin does not appear to argue that the house contained materially exculpatory evidence. Doing so would be difficult as the crux of Franklin's argument is that the destruction of the house rendered him unable to determine whether it contained exculpatory evidence. Because there is nothing to suggest that the house contained evidence with exculpatory value that was apparent before its destruction, any evidence contained in the house must be considered merely potentially useful.
>
> No due process violation arises from the destruction of potentially useful evidence unless such evidence is destroyed in bad faith. See

> *Youngblood*, *supra*, at 57-58; *Benton*, *supra*, at 805, 737 N.E.2d 1046; *Lewis*, *supra*, at 633-34, 591 N.E.2d 854.
>
> > The term "bad faith" generally implies something more than bad judgment or negligence. "It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another."
> >
> > *State v. Buhrman* (Sept. 12, 1997), Greene App. No. 96 CA 145, [1997 WL 566154 at *12] unreported (citations omitted). Franklin attempts to establish bad faith on the part of the state by noting the lack of a credible explanation for why the house was destroyed and by noting Franceschelli's comments at trial. Apparently, we are to infer bad faith from these facts. While it is unfortunate that the house was destroyed before Franklin's investigators had had an opportunity to examine it, Franklin has not presented sufficient evidence of bad faith as it is defined above. What we have is, at worst, bad judgment or negligence. Bad judgment and negligence are not enough to violate a defendant's due process rights. Moreover, Fransceschelli's comments long after the house was destroyed are irrelevant to the required showing of bad faith. Therefore, the trial court did not err in dismissing this claim.

State v. Franklin, No. 19041, 2002 WL 1000415 at *9-10 (Ohio App. 2d Dist. May 17, 2002) (unreported)(some parallel citations omitted). Further appeal and reconsideration were declined by the Ohio Supreme Court. *State v. Franklin*, 98 Ohio St. 3d 1422, 782 N.E.2d 77 (2003)(table); *State v. Franklin*, 101 Ohio St. 3d 1462, 804 N.E.2d 37 (2004)(table).

Neither state court to consider Franklin's claim evaluated it under the rubric of *Brady* because it was not presented to those courts as a *Brady* claim. An at least colorable argument could be made that Franklin has consequently procedurally defaulted the issue here, but Respondent does not do so, so the Court will delve no further into that quagmire.

Franklin did not request permission to present evidence relating to his ninth ground for relief in his motion for an evidentiary hearing in these proceedings. (Petitioner's Renewed Motion for Evidentiary Hearing, Doc. No. 71.) Consequently, this Court has no evidence outside the state court record upon which to base a finding of misconduct on the prosecutor's part in not preventing

destruction of whatever material exculpatory evidence might have been found at the Riegel Street house had the structure not been knocked down.

As noted, Franklin contends that *Brady*, not *Youngblood*, is the federal law applicable to his claim in habeas corpus. (Traverse, Doc. No. 49 at 36-37.) The advantage to Franklin of relying on *Brady* now is that where a prosecutor withholds evidence, his good or bad faith is irrelevant. *Brady*, 373 U.S. at 87. The weakness of Franklin's claim, however, is not simply that he has failed to show prosecutorial bad faith. As was observed by the state court of appeals, Franklin did not there, and does not here argue that any specific material exculpatory evidence was destroyed when the walls of the Riegel Street house were knocked down. *See State v. Franklin*, No. 19041, 2002 WL 1000415 at *9 (Ohio App. 2d Dist. May 17, 2002)(unreported). Here, for instance, Franklin argues instead that the state courts' reliance on *Youngblood* was unreasonable because in that case the defense had access to the evidence for a short time but failed to avail itself of that opportunity before the evidence was destroyed. (Traverse, Doc. No. 49 at 37.) He contends that since the prosecutors recognized their own need to examine the crime scene, they should have recognized Franklin's identical need as well. *Id*. None of this gets to the heart of Franklin's burden, however. Here, he must demonstrate that material exculpatory evidence was destroyed under *Brady*. That he has not done. Furthermore, he has not even alleged that there is a reasonable probability that the outcome of his trial would have been different had the charred remains of the Franklins' home been preserved. Franklin's claim, put forth here as a *Brady* claim, fails and is accordingly denied.

He fares no better under *Youngblood*, for there, to avoid having to demonstrate bad faith on the prosecutor's part, which Franklin failed to do here and in the state courts, he must show that the evidence allegedly destroyed by the demolition of the Riegel Street house was, once again, material and exculpatory. 488 U.S. at 57-58. Thus, under either *Brady* or *Youngblood*, Franklin's claim fails.

The state courts correctly identified *Youngblood* as the federal law governing his claim that

the prosecutors improperly destroyed material exculpatory evidence. The court of appeals' decision rejecting Franklin's claim is in concert with federal law as determined by the United States Supreme Court in *Youngblood*, rather than contrary to or an unreasonable application of the law. Franklin has not demonstrated entitlement to habeas corpus relief under either *Brady* or *Youngblood*, and his ninth ground for relief is denied.

Tenth Ground for Relief

Franklin next contends that his trial counsel provided ineffective assistance in the guilt phase of his trial as evidenced by their "overall performance and the cumulative effect of their many errors and omissions." (Petition, Doc. No. 21 at 23.) Respondent argues the claim is procedurally defaulted (Return of Writ, Doc. No. 39 at 87), which Franklin asserts is incorrect (Traverse, Doc. No. 49 at 38).

Before addressing the procedural status of Franklin's claim, the Court is compelled to note that Franklin's pleading of his tenth ground for relief does not conform to Rule 2(c)(2) of the Rules Governing Section 2254 Cases in the United States District Courts. That rule requires that the petition must "state the facts supporting each ground [for relief]." The necessity for the rule is explained in the notes of the Advisory Committee relating to the 1976 adoption of the Habeas Rules. "In the past, petitions have frequently contained mere conclusions of law, unsupported by any facts. Since it is the relationship of the facts to the claim asserted that is important, these petitions were obviously deficient." A more precise description of Franklin's tenth ground for relief cannot be found. In his Traverse, Franklin appears to attempt to incorporate the substance of both his eleventh ground for relief, and his twelfth, thirteenth, and fourteenth grounds for relief into his tenth ground. (Traverse, Doc. No. 49 at 38.) In addition, he asserts that his tenth ground for relief is not procedurally defaulted since he raised it on direct appeal in the state courts as his seventh

proposition of law, which contained nine sub-claims. *Id*.

Franklin's method of incorporating by reference his other habeas claims, and even more so his claims raised in the state courts, is ill advised and the validity of this maneuver is doubtful. With respect to the claims raised in the state court, the issue on direct appeal there was whether the trial court erred, counsel performed effectively, the prosecutor conducted himself within ethical and legal bounds, etc. In habeas corpus, however, although the issue raised is related, the federal court must determine whether the highest state court to address the matter rendered a decision that was contrary to or an unreasonable application of federal law, or was based on an unreasonable determination of the facts presented at trial. 28 U.S.C. § 2254(d). The focus of a federal habeas corpus court, then, is primarily on the reasonableness of the highest state court's decision. The arguments a petitioner may have made in the state court, therefore, do not adequately address the question this Court must answer in a habeas petition, and merely parroting, or even worse, attempting to incorporate the state arguments by reference comes nowhere near meeting the burden imposed on a petitioner by the federal habeas statutes and rules.

As for Franklin's reference to succeeding habeas grounds for relief, those claims will be addressed under the grounds for relief in which they are raised. There is no need for this Court to address each here as well.

On direct appeal to the Ohio Supreme Court, Franklin set forth nine sub-claims in which he argued his trial counsel were ineffective:

1. Defense counsel failed to ensure that the proper standard was used to determine who sat on the jury;

2. Defense counsel failed to conduct a searching inquiry of the pretrial publicity in the case;

3. Defense counsel failed to make appropriate objections during voir dire;

4. Defense counsel failed to attempt to suppress evidence;

5. Defense counsel failed to request another competency hearing;

6. Defense counsel failed to adequately prepare expert witnesses;

7. Defense counsel failed to object to highly inflammatory and prejudicial misconduct committed presented [sic] by the State and during the State's closing argument;

8. Defense counsel failed to object to hearsay evidence and leading questions, and stipulated to chain of evidence testimony; in addition, defense counsel failed to request curative instruction when prejudicial evidence was introduced, objected to and sustained by the trial court; and

9. [Defense counsel f]ailed to object to improper trial phase instructions.

(Appendix, Vol. 6 at 138-50.) Franklin also contends the substance of the instant ground for relief was presented to the state courts in his twenty-first claim in his state post-conviction petition. (Traverse, Doc. No. 49 at 38.) In that claim, however, Franklin merely argued that the cumulative effect of his combined post-conviction claims warranted relief. (Appendix, Vol. 9 at 162.) Franklin does not provide an explanation as to how that claim is related to his ineffective assistance of counsel claim here and the Court is not inclined to supply one of its own making.

The state supreme court addressed the merits of each of Franklin's nine sub-claims, so they are properly preserved for habeas corpus review. It is noted that Franklin requested and was granted permission to present evidence pertaining to his tenth ground for relief at his evidentiary hearing, and that he did so, although the evidence presented related only to a couple of his sub-claims. The evidence presented at the hearing will be discussed as it relates to each sub-claim, which this Court takes in turn.

The law governing Franklin's ineffective assistance of counsel claims is embodied in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which holds that

A convicted defendant's claim that counsel's assistance was so

> defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

The Court is mindful of these precepts in considering all of Franklin's ineffective assistance of counsel grounds for relief.

First Sub-claim

In his first sub-claim, Franklin argued to the Ohio Supreme Court that his counsel were ineffective when they failed to assure the proper standard was used in questioning prospective jurors about their views on the death penalty. (Appendix, Vol. 6 at 140-42.) This sub-claim duplicates the substance of his (second) eleventh ground for relief in his petition for habeas corpus relief, and is fully addressed below.

Second Sub-claim

The Ohio Supreme Court also rejected Franklin's claim that his trial counsel provided ineffective assistance when they failed to adequately enquire of the prospective jurors about their exposure to pre-trial publicity. (Appendix, Vol. 6 at 142); *State v. Franklin*, 97 Ohio St. 3d 1, 9, 776 N.E.2d 26 (2002). The substance of this sub-claim is included in Franklin's (second) eleventh ground for relief in his petition for habeas corpus relief and is fully discussed below.

Third Sub-claim

Franklin also raised on direct appeal in the state court his trial counsel's failure to object to the trial court's characterization of the jury's sentencing verdict as a recommendation as an example of his counsel's constitutionally deficient performance. (Appendix, Vol. 6 at 143-44.) That issue

is included in Franklin's (second) eleventh ground for relief in his habeas corpus petition and is fully addressed below.

Fourth Sub-claim

In his fourth sub-claim to the state appellate court, Franklin argued his counsel should have moved for suppression of statements he made to law enforcement officers while he was being transported from Nashville to Dayton. (Appendix, Vol. 6 at 145.) He contended the *Miranda v. Arizona*, 384 U.S. 436 (1966), warnings provided to him on April 20, 1997, had gone stale during the time he was held in Nashville, a period of approximately sixteen days. *Id*. Franklin did not claim in the state court that the officers escorting him initiated conversation with him or interrogated him in any fashion during the trip, however. The Ohio Supreme Court concluded that "[s]ince the record does not yield evidence of an interrogation, any statements made by appellant were admissible without regard to *Miranda* warnings, and the filing of any motion on this premise would have been futile."[9] The state court was correct: *Miranda* requires the use of procedural safeguards to protect the privilege against self-incrimination only when there is a custodial interrogation. 384 U.S. at 467-68. Any claim Franklin might have made that he was interrogated during the Nashville-to-Dayton trip would have been disproved by the record. Consequently, Franklin's trial counsel were not ineffective for failing to pursue a hopeless motion to suppress the statements Franklin made during the trip back to Dayton, and his fourth sub-claim is denied.

Fifth Sub-claim

Franklin also argued to the Ohio Supreme Court that his counsel were ineffective when they failed to request a second competency hearing in response to his peculiar behavior during his trial. (Appendix, Vol. 6 at 146.) That sub-claim duplicates Franklin's fourteenth ground for relief in his

[9]In fact, the record shows that it was Franklin who initiated the conversation with the officers during the trip. (Trial Tr., Vol. 3 at 92-95, 105-7, 112.)

petition for habeas corpus relief, and is discussed below.

Sixth Sub-claim

Franklin next contended that defense counsel failed to properly prepare his arson and psychological experts for cross-examination on subjects upon which the prosecutor was able to impeach their testimonies. (Appendix, Vol. 6 at 147.) In the alternative, he argues the defense experts failed to disclose to counsel information used by the prosecutor to impeach them. (Appendix, Vol. 6 at 147.) Either way, Franklin argues, counsel were ineffective or rendered so by the defense experts' quiescence prior to testifying. *Id*. The substance of this sub-claim is presented in Franklin's twelfth ground for relief in his petition for habeas corpus relief, and is fully discussed below.

Seventh, Eighth, and Ninth Sub-claims

In his seventh, eighth, and ninth sub-claims to the Ohio Supreme Court, Franklin contended his trial counsel provided ineffective assistance when they failed to object to the introduction of improper evidence and comment by the prosecutor. (Appendix, Vol. 6 at 147-51.) In addition, Franklin claimed that on the occasions when his counsel did object, they failed to request curative instructions, rendering their representation deficient. *Id*. He also contends his counsel were ineffective for failing to object to improper jury instructions during the guilt phase of his trial. *Id*. As best this Court can tell, Franklin has raised these issues as his thirteenth ground for relief in his petition for habeas corpus relief (Doc. No. 21 at 24), and they are discussed below.

In sum, most of Franklin's ineffective assistance of trial counsel sub-claims asserted here are duplicated elsewhere in his habeas corpus petition; only one is not, and it is without merit. Accordingly, Franklin's tenth ground for relief is denied.

(First) Eleventh Ground for Relief

In his (first) eleventh ground for relief, Franklin contends his trial counsel's representation was constitutionally deficient because they failed to adequately investigate his mental health issues; the backgrounds of the defense and prosecution experts; the history, character, and background of the victims; and the arson evidence. (Petition, Doc. No. 21 at 23.) Respondent argues the claim is only partially preserved for habeas corpus review, and that it is meritless in any case. (Return of Writ, Doc. No. 39 at 88.) Franklin counters that he preserved the issues by presenting them to the state courts in his petitions for post-conviction relief. (Traverse, Doc. No. 49 at 39.)

In this ground for relief, Franklin provides so little substantive specificity and argument that it is extremely difficult to determine whether the claim is preserved for habeas review. He sets forth his claim, such as it is, in one sentence in his habeas petition containing no citation to the record or federal law (Doc. No. 21 at 23), and merely defends against Respondent's assertion of procedural default in three sentences in his Traverse (Doc. No. 49 at 39). Apparently, Franklin intends to incorporate by reference the substance of his state claims, a technique questioned by this Court above.

Franklin contends he raised the substance of this ground for relief in his state court petition for post-conviction relief as his seventh and tenth through thirteenth claims. (Traverse, Doc. No. 49 at 39.) There, he argued that his counsel were ineffective because they (1) failed to properly investigate his mental health history; (2) failed to adequately investigate, prepare, and present the defense's psychological expert; (3) failed to obtain a copy or transcript of the 911 tape; (4) failed to request that Franklin's statements during the trip from Nashville to Dayton be suppressed as contrary to *Miranda v. Arizona*, 384 U.S. 436 (1966); (5) failed to request a second competency hearing; (6) failed to adequately prepare defense experts; (7) failed to object to the prosecutor's misconduct; and (8) failed to effectively use a mitigation specialist. (Appendix, Vol. 9 at 126-28, 134-45.)

Many of those claims are repeated elsewhere in Franklin's petition for habeas corpus relief. The claim that Franklin's counsel failed to properly investigate, prepare, and present his psychological expert duplicates his twelfth ground for relief. Counsel's failure to request suppression of Franklin's statements made during the Nashville to Dayton trip is the subject of Franklin's fourth sub-claim of his tenth ground for relief. Similarly, his claim that his counsel should have requested a second competency hearing was presented as his fourteenth ground for relief. Franklin's claim that his counsel should have objected to prosecutorial misconduct was also presented as his thirteenth ground for relief. As these claims are considered elsewhere, there is no reason to address them here.

Left to discuss, therefore, are Franklin's claims that his counsel failed to properly investigate his mental health history; failed to obtain a copy of the 911 tape, and failed to effectively use the services of a mitigation expert. In Franklin's eighth ground for relief, this Court denied his claim that prosecutors engaged in misconduct by failing to disclose the contents of the 911 call, concluding that it contained no exculpatory or impeaching evidence material to his case. That being so, Franklin cannot demonstrate prejudice from his counsel's failure to acquire the tape even if it were error not to do so. Consequently, that part of Franklin's (first) eleventh ground for relief is denied.

What remains are the two arguments that Franklin's attorneys should have investigated his mental health history more fully, and that they should have made better use of their mitigation expert. In the state court, Franklin supported the first of those arguments with an affidavit from Dr. Sharon Pearson, who also testified in the evidentiary hearing in these proceedings. (Appendix, Vol. 9 at 189-212; Evid. Hrg. Tr., Doc. No. 86 at 61-163.) Dr. Pearson disagreed with Dr. Cherry's diagnosis of Franklin as being a paranoid schizophrenic, but candidly acknowledged that her disagreement did not mean that Dr. Cherry's diagnosis was wrong. (Evid. Hrg. Tr, Doc. No. 86 at 127.) Her testimony related almost exclusively to Franklin's competence at trial, and has been

previously discussed in the Court's consideration of Franklin's first and second grounds for relief.

When the matter was presented to the state trial court in Franklin's post-conviction proceedings, that court concluded that Dr. Pearson's affidavit merely presented "an alternative theory to the one presented at trial" and was therefore insufficient to warrant a hearing on the claim, let alone reversal of Franklin's death sentence. (Appendix, Vol. 13 at 29.) The court of appeals agreed stating that "the trial court did not err in refusing to find that Franklin was denied the effective assistance of counsel simply because the theory pursued by Franklin's attorneys at trial, that he was a paranoid schizophrenic, was unsuccessful where a different theory may have been successful." *State v. Franklin*, No. 19041, 2002 WL 1000415 at *8 (Ohio App. 2d Dist. May 17, 2002) (unreported). Franklin does not explain how that decision is contrary to or an unreasonable application of federal law, and this Court does not find it to be so.

Finally, Franklin claimed in the state court that his trial counsel should have made better use of the mitigation expert they employed to assist them in Franklin's case. (Appendix, Vol. 9 at 134-36.) He supported his claim with an affidavit from Dr. Susan Shorr, who was the mitigation specialist contacted by defense counsel prior to the beginning of Franklin's trial. (Appendix, Vol. 9 at 217-23.)

The post-conviction trial court rejected Franklin's claim. It found the failure to use a mitigation specialist "neither violates an essential duty nor prejudices the defense" (Appendix, Vol. 13 at 26), and concluded that Dr. Shorr's affidavit showed that she supported the defense's mitigation strategy and offered only evidence that was cumulative to that presented at trial. *Id*. The court of appeals agreed, stating

> In his tenth claim for relief, Franklin argued that his counsel were ineffective in failing to adequately use the services of Dr. Susan Shorr, the mitigation specialist for whom the [trial] court had granted funding. In support of this argument, Franklin submitted Dr. Shorr's affidavit, in which she stated that she had not been given adequate time or materials to prepare for Franklin's trial and stated what

> assistance she could have provided had Franklin's trial counsel fully utilized her. The trial court concluded that the evidence presented with the postconviction petition was merely cumulative to what was actually presented at trial and therefore not sufficient to create a genuine issue of material fact regarding the quality of the representation.
>
> We agree. Although Dr. Shorr did not testify, trial counsel implemented many of Dr. Shorr's suggestions in the mitigation hearing. For example, counsel followed Dr. Shorr's advice in calling Franklin's mother, who is a recovering alcoholic, to testify about his childhood, during which she beat him, threatened to kill him, and attempted suicide in his presence. Counsel also followed Dr. Shorr's advice in calling Franklin's girlfriend and her mother to testify regarding Franklin's personality change in the months before the murders. Those areas in which counsel did not follow Dr. Shorr's advice, such as placing a picture of Franklin's grandmother in front of him during trial in the hopes that he would become emotional, could be considered reasonable tactical choices. Therefore, the trial court did not err in concluding that Franklin's counsel were not ineffective in their utilization of Dr. Shorr.

State v. Franklin, No. 19041, 2002 WL 1000415 at *7 (Ohio App. 2d Dist. May 17, 2002) (unreported).

Franklin requested and was granted permission to present evidence relating to the instant claim at his evidentiary hearing in these proceedings. (Petitioner's Renewed Motion for Evidentiary Hearing, Doc. No. 71 at 12-13; Decision and Order Granting in Part and Denying in Part Petitioner's Renewed Motion for Evidentiary Hearing, Doc. No. 73 at 8.) At the hearing, both of Franklin's defense counsel testified that the mitigation specialist met with them prior to the trial and told them they had done her work for her. (Evid. Hrg. Tr., Doc. No. 86-2 at 63-65, 117-18.) They testified that Dr. Shorr had made a few suggestions about presenting the mitigation case, but that she discouraged them from calling her as a witness because she would have nothing to add to their case. *Id*. at 65, 118. In addition, each attorney expressed a belief that they had been able to present a complete picture of Franklin in the mitigation case. *Id*. at 94, 151. One of Franklin's attorneys expressed some regret over the decision not to call Dr. Shorr to testify, but added that the defense

had access to certain records and had interviewed family members which allowed them to "paint a pretty good picture" of Franklin for the jury. *Id*. at 118-19. Franklin has presented neither any argument nor any evidence to show the state court's resolution of his claim was unreasonable. Accordingly, since he has failed to meet his burden under the AEDPA, his (first) eleventh ground for relief is denied.

(Second) Eleventh Ground for Relief

In his (second) eleventh ground for relief, Franklin contends his counsel were ineffective when they failed to assure the proper standard was used in questioning prospective jurors about their views on the death penalty, failed to adequately inquire of prospective jurors' exposure to pretrial publicity, failed to object to the trial court's characterization of the jury's sentencing verdict as a recommendation, and failed to question prospective jurors about specific mitigating factors. (Petition, Doc. No. 21 at 23-24.) Respondent correctly states that the claim is preserved for habeas corpus review, but argues it is meritless. (Return of Writ, Doc. No. 39 at 88-90.)

The Ohio Supreme Court rejected Franklin's claim that his counsel were ineffective for failing to ensure the proper standard was used to qualify the jury as follows:

> "To win a reversal on the basis of ineffective assistance of counsel, the defendant must 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." *State v. Jones* (2001), 91 Ohio St.3d 335, 354, 744 N.E.2d 1163, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687 (1984). To show such prejudice, "the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus.
>
> . . .
>
> The relevant inquiry during voir dire is whether the juror's beliefs would prevent or substantially impair his or her performance of the duty in accordance with the instructions and oath. *Wainwright v. Witt*

> (1985), 469 U.S. 412, 424. In the present case, the trial judge asked jurors whether they were capable of signing a death verdict. Clearly, a juror who is incapable of signing a death verdict demonstrates substantial impairment in his ability to fulfill his duties. Although the judge's inquiry differed in form from that endorsed by the *Witt* court, the substance of his interrogation was the same. Thus, the failure to object to the judge's line of questioning in voir dire did not constitute deficient performance by appellant's counsel.

State v. Franklin, 97 Ohio St. 3d 1, 9, 776 N.E.2d 26 (2002)(some parallel citations omitted). Franklin makes no argument as to why or how the state court's application of the law was unreasonable or erroneous and he presented no evidence relating to this sub-claim at his evidentiary hearing.

This Court does not find the state court's analysis of Franklin's claim incorrect or unreasonable. Franklin argued in the state courts that the standard set forth in *Witt* and *Witherspoon v. Illinois*, 391 U.S. 510 (1968), for excusing prospective jurors based on whether they were able to recommend a death sentence required the juror to "unequivocally state that under no circumstances will he follow instructions of a trial judge and consider fairly the imposition of a sentence of death." (Appendix, Vol. 6 at 141.) But in *Witherspoon*, the United States Supreme Court refined the standard of *Witt* as it has since explained:

> In *Witherspoon*, this Court held that a capital defendant's right, under the Sixth and Fourteenth Amendments, to an impartial jury prohibited the exclusion of venire members "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S., at 522 . . . . It reasoned that the exclusion of venire members must be limited to those who were "irrevocably committed . . . to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," and to those whose views would prevent them from making an impartial decision on the question of guilt. *Id.*, at 522, n. 21 . . . . We have reexamined the *Witherspoon* rule on several occasions, one of them being *Wainwright v. Witt*, 469 U.S. 412 (1985), where we clarified the standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment. We there held that the relevant inquiry 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.'" *Id*. at 424, . . . quoting *Adams v. Texas,* 448 U.S. 38, 45 (1980).

Gray v. Mississippi, 481 U.S. 648, 657-58 (1987). Thus, the more stringent standard of *Witherspoon* has been superceded by *Witt*. It is true, however, that Ohio has adopted the *Witherspoon* standard by statute:

> A person called as a juror in a criminal case may be challenged for the following causes:
> . . .
> (C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case.

Ohio Rev. Code § 2945.25. Whether the Ohio Supreme Court's decision relating to Franklin's sub-claim was consistent with Ohio statutory law, however, is not a matter with which this Court can concern itself. *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991) (stating that a violation of state law does not entitle a federal habeas corpus petitioner to relief).

On direct appeal in the state supreme court, Franklin equated the *Witt* and *Witherspoon* standards and the standard imposed by Ohio statutory law. (Appendix, Vol. 6 at 141.) They are not synonymous, as noted above, however, and the Ohio Supreme Court correctly identified *Witt* as the federal law governing Franklin's claim. *Franklin*, 97 Ohio St. 3d at 9.

There is no requirement that any "magic words" from the *Witt* standard be used in assessing a prospective juror's ability to fairly consider a death sentence. In Franklin's case, the Ohio Supreme Court recognized that, and determined that the prospective jurors had been asked questions which communicated the substance of the *Witt* standard satisfactorily. *Franklin*, 97 Ohio St. 3d at 9. In many instances, prospective jurors were asked whether their views on the death penalty would prevent or impair their ability to perform his or her duties in language that was nearly a verbatim repetition of the *Witt* standard. (*See, e.g.*, Trial Tr., Vol. 4 at 64, 70, 105-6, 228, 231, 254-55, 275;

Vol. 5 at 356, 363, 366, 404; Vol. 7 at 899, 948, 953, 964.) In addition, several prospective jurors made it clear to the court that they could not or would not recommend a death sentence under any circumstances, making the "prevent or substantially impair" question redundant and unnecessary. (*See, e.g.*, Trial Tr., Vol. 4 at 65-66, 83, 92 (prospective juror Brenner); 110, 128, 136 (prospective juror Zubrick); 144, 148, 173, 201 (prospective juror Fletcher); 146, 152, 155, 201 (prospective juror Wade); 158-59, 196, 201 (prospective juror Amburgey); Vol. 5 at 454, 471-72, 483 (prospective juror Hussong); Vol. 6 at 593-5, 627-8, 634 (prospective juror Young); 644, 646-7, 681 (prospective juror Kuns); 691, 693-4 (prospective juror Martinez); 594-6 (prospective juror Norman); 859 (prospective juror Jordan); Vol. 7 at 953, 965 (prospective juror Starnes)). Most of the prospective jurors were also asked, after a necessarily superficial explanation of the death penalty scheme in Ohio, whether they could sign their names on a verdict recommending death. Of course, if they answered in the affirmative, there was no reason to ask the "prevent or substantially impair" question. There is no basis upon which this Court can find fault with the Ohio Supreme Court's resolution of Franklin's claim that his trial counsel were ineffective for failing to ensure that the proper standard was used when the prospective jurors were questioned on their feelings toward the death penalty.

Franklin also contends his counsel were ineffective for failing to adequately question prospective jurors about their exposure to pretrial publicity, and renewing a previously withdrawn motion for a change of venue. (Petition, Doc. No. 21 at 23.) In *Irvin v. Dowd*, 366 U.S. 717 (1961), the United States Supreme Court expounded on the right to a jury untainted by pretrial publicity as follows:

> [T]he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257 [(1948)]. . . .
>
> It is not required, however, that the jurors be totally ignorant of the

> facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.
>
> This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his [or her] impression or opinion and render a verdict based on the evidence presented in court. *Spies v. People of State of Illinois*, 123 U.S. 131 (1887); *Holt v. United States*, 218 U.S. 245 (1910); *Reynolds v. United States*, [98 U.S. 145 (1878)].

Irvin, 366 U.S. at 722-23. In *Patton v. Yount*, 467 U.S. 1025, 1031 (1984), the Court observed that "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." Where that is the case, a more extensive examination of prospective jurors might be appropriate, *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991), but Franklin does not suggest that the pretrial publicity in his case had such an effect on the community in and around Dayton, Ohio, where the murders occurred.

On direct appeal, the state court found the trial record "replete with instances where the trial judge asked questions regarding pretrial publicity" and concluded that Franklin's trial counsel's decision not to ask more questions on that topic was acceptable. *Franklin*, 97 Ohio St. 3d at 9. The state supreme court's decision is both factually and legally correct. The procedure employed by the trial court during the voir dire of the prospective jurors was to question small groups of prospective jurors together. The court specifically asked each individual if they had been exposed to any pretrial publicity, then asked whether they had formed any opinions about Franklin's culpability, and if so, if they could put those thoughts aside and provide him a fair and impartial hearing at trial. (*See*, *e.g.*, Trial Tr., Vol. 4 at 53-58, 95-103, 139-43, 203-13, 220-24, 233-38, 270-73; Vol. 5 at 352-55, 390-93, 440-43, 481-82, 493-94, 585-86; Vol. 6 at 638-40, 687-89, 742-55, 778-79, 820-28; Vol. 7 at

932-37.) There is no duty imposed upon counsel to cover in voir dire ground already thoroughly examined by the trial judge. Thus, Franklin's trial counsel were not ineffective in failing to do so with respect to questioning prospective jurors about their exposure to pretrial publicity.

Next, Franklin contends his trial counsel were ineffective when they failed to object to the trial court's characterization of the jury's sentencing verdict as a "recommendation" and of news reports about the murders as "facts." (Appendix, Vol. 6 at 143-44.) The Ohio Supreme Court rejected that sub-claim. *State v. Franklin*, 97 Ohio St. 3d 1, 9-10, 776 N.E.2d 26 (2002). Franklin also unsuccessfully claimed that his trial counsel were forced to provide ineffective assistance by the trial court's refusal to allow counsel to ask prospective jurors about potentially mitigating evidence. *Id*. The state court found that the trial judge "went out of his way to stress that media statements might not be true and that the jurors must make their decisions without regard to extraneous influences." *Franklin*, 97 Ohio St. 3d at 9-10. The state supreme court also noted that the characterization of the jury's sentencing verdict as a "recommendation" was an accurate statement of Ohio law, and that since jurors cannot be asked to weigh specific mitigating factors before they have heard all the evidence and been instructed on the law, the trial court was not required to permit defense counsel to inquire about particular factors. *Id*. at 10.

Ohio law requires the jury to determine whether the aggravating circumstances outweigh the mitigating factors after the sentencing phase of trial, then to make a sentencing recommendation to the trial court. Ohio Rev. Code § 2929.03 (C)(2)(b)(ii) and (D)(2). If the jury recommends a sentence other than death, the trial court is bound by the jury's recommendation; if the jury recommends death, however, the trial court must undertake an independent weighing of the aggravating circumstances and mitigating factors and come to its own conclusion as to whether death is the appropriate sentence. Ohio Rev. Code § 2929.03(D)(2)(b) and (D)(3). In other words, the trial court is not bound by the jury's recommendation that the death sentence be imposed, and

there is no guarantee under the law that the jury's recommendation of death will be the sentence imposed. The Sixth Circuit Court of Appeals has distinguished cases in which "the jury was given the uncorrected impression that the appellate courts would make the final decision on the imposition of a death sentence" from situations in which the jury's sentencing verdict is accurately referred to as a recommendation subject to the trial court's adoption. *Buell v. Mitchell*, 274 F.3d 337, 353 (6th Cir. 2001). The former would violate the United States Supreme Court's holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), whereas the latter does not. *Buell*, 274 F.3d at 353. In Franklin's case, the trial judge repeatedly and consistently emphasized the enormous responsibility each juror shoulders in making a sentencing recommendation. (Trial Tr., Vol. 4 at 62, 104, 214; Vol. 5 at 345, 356, 394, 444, 495, 568, 588; Vol. 6 at 641, 690, 756; Vol. 7 at 888, 898, 947-48.) As such, the trial judge's comments are covered by *Buell*, so his trial counsel's failure to object to the trial court's accurate statement of state law provides no basis upon which to conclude counsel were ineffective.

In his argument to the state supreme court pertaining to the trial court's alleged description of media reports about the murders as "facts," Franklin referenced a single example. (Appendix, Vol. 6 at 143.) Even if this Court were to find the Ohio Supreme Court's resolution of Franklin's claim constitutionally infirm, which it pointedly does not, it would be nearly impossible for Franklin to show prejudice from the trial judge's single remark. Franklin failed to demonstrate that his counsel provided substandard representation by not objecting to the trial court's comment, and he did not explain how he was prejudiced by his counsel's failure.

Furthermore, the trial court said nothing improper, contrary to Franklin's claim. Franklin directs this Court to a discussion between the trial judge and a prospective juror in voir dire. The exchange, in context, is as follows:

> Judge Gilvary: Tell me what – you know, let's back up. If, in fact, you saw [the incident] on T.V., and they

had some pictures, say, of a burning house, and maybe some police standing around, and if, in fact, you read in the paper that three people died, and if you found out later that the Defendant was arrested out of state, those are all facts.

Mr. Zubrick: Mmm hmm.

Judge Gilvary: But that doesn't tell you what happened, does it? You don't know how they died?

Mr. Zubrick: Died in the fire.

Judge Gilvary: Well, see, you don't know that. That – if that's what the newspapers said, you really don't know if that's how it happened. What if they died before the fire? You don't know that, do you? And that's why I'm asking you. And I don't know either, I haven't heard the case yet. I'm going to get it just like you get it.

And my question to you is: Will you wait and let people come in, raise their right hand, and swear to tell the truth, and tell you what they know about it, and then make a decision as to how it happened or what it was that happened?

(Trial Tr., Vol. 4 at 101-2.) Regardless of the prospective juror's answer to Judge Gilvary's question, the judge made a point exactly opposite from what Franklin claims: he emphasized that news reports are not to be relied upon as fact by any juror in determining the outcome of Franklin's trial. The Ohio Supreme Court correctly denied Franklin's claim.

The state supreme court also rejected Franklin's claim that his counsel were rendered ineffective by the trial court's refusal to allow counsel to question prospective jurors on particular mitigating factors, specifically mental health issues. (Appendix, Vol. 6 at 144.) That court has repeatedly rejected the underlying claim, so there was little likelihood of counsel's objection being sustained and the questioning permitted. *See State v. Skatzes*, 104 Ohio St. 3d 195, 202, 819 N.E.2d

215 (2004); *State v. Dennis*, 79 Ohio St. 3d 421, 430, 683 N.E.2d 1096 (1997); *State v. Wilson*, 74 Ohio St. 3d 381, 385-87, 659 N.E.2d 292 (1996); *State v. Lundgren*, 73 Ohio St. 3d 474, 481, 653 N.E.2d 304, 315 (1995); *State v. Bedford*, 39 Ohio St. 3d 122, 129, 529 N.E.2d 913, 920 (1988). Contrary to Franklin's argument to the appellate court that the trial court's decision violated *Morgan v. Illinois*, 504 U.S. 719 (1992), *Morgan* does not require judges to allow individual voir dire on specific mitigating factors. *Moore v. Mitchell*, 531 F. Supp.2d 845, 879 (S.D. Ohio 2008); *Skatzes*, 104 Ohio St. 3d 202; *Wilson*, 74 Ohio St. 3d at 386. With so little chance of success, Franklin's trial counsel's failure to object to the trial court's prohibition against questioning prospective jurors on particular mitigating factors was neither error nor prejudicial to Franklin, and the state court correctly rejected Franklin's contrary contention.

This Court finds no error implicating the federal constitution in the Ohio Supreme Court's decision denying Franklin's claim that his trial counsel provided ineffective assistance during the voir dire phase of his trial in the state court. Accordingly, Franklin's (second) eleventh ground for relief is denied.

Twelfth Ground for Relief

Franklin next contends that defense counsel's performance was constitutionally deficient because they either failed to properly prepare their expert witnesses for cross-examination, or the defense experts failed to disclose to counsel information used by the prosecutor to impeach them. (Petition, Doc. No. 21 at 24.) Respondent acknowledges the claim is preserved for habeas corpus review, but argues the Ohio Supreme Court's resolution of the claim was neither contrary to nor an unreasonable application of federal law, and was not based on an unreasonable determination of the facts. (Return of Writ, Doc. No. 39 at 90.)

On direct appeal to the Ohio Supreme Court, Franklin claimed his trial counsel's error was

evident in the defense experts' appearance of unpreparedness during cross-examination. (Appendix, Vol. 6 at 146.) He also argued that his arson expert's impeachment and the prosecutor's attack on the validity of the psychological tests administered by Dr. Cherry were additional proof of defense counsel's ineffectiveness. *Id*. at 146-47.

In its decision on direct appeal, the Ohio Supreme Court merely stated that Franklin's allegations were not supported by the record. *State v. Franklin*, 97 Ohio St. 3d 1, 11, 776 N.E.2d 26 (2002). It is true that the record does not support Franklin's claim that his arson expert, William Yeazell, appeared unprepared during his cross-examination. It does show that Yeazell was subjected to a vigorous cross-examination by the prosecutor, with both witness and prosecutor interrupting each other with some regularity, but he ably answered the prosecutor's questions, and explained his answers when given the chance to do so.

Furthermore, a prosecutor's impeachment of a defense witness does not necessarily render defense counsel's performance constitutionally defective. *See Jones v. Bradshaw*, 489 F.Supp.2d 786, 840 (N.D. Ohio 2007)(observing that a prosecutor's elicitation of damaging testimony from a defense witness on cross-examination in the mitigation phase does not render defense counsel's performance ineffective).

In the defense's case in chief and on cross-examination, Yeazell testified that in cases where the laboratory results show no accelerants were present in samples taken from a fire scene, he will not declare the fire an aggravated arson. (Trial Tr., Vol. 11 at 947.) Two reports authored by Yeazell when he was an investigator in the State Fire Marshall's Office were produced by the prosecutor. *Id*. at 950. Yeazell testified that although the cover sheet indicated arson, he did not write it, and he denied that his reports included a determination of arson. *Id*. at 950-56. In the prosecution's rebuttal case, however, Michael Simmons, custodian of records for the State Fire Marshall's Office, testified that though it was true that Yeazell did not write the cover page of the

reports in question, Yeazell's handwritten report did include a suggestion of arson, and was written prior to receipt of the lab reports. (Trial Tr., Vol. 13 at 1391, 1397.) Michael McCarroll, arson investigator for the State Fire Marshall's Office, testified that in order to receive a case number when investigating a fire, an investigator must call headquarters and suggest a cause for the fire, be it arson, attempted arson, accident, or undetermined. *Id* at 1445. He explained that the suggested cause is only preliminary and is based on the investigator's initial observations at the scene. *Id*. at 1460. Michael Simmons also testified that Yeazell had submitted two preliminary investigation reports in which he suggested the cause of the fires was arson, and that the results of the laboratory tests were not available prior to Yeazell's reports. (Trial Tr., Vol. 13 at 1392-1400.)

Because Yeazell did not author the cover page of the reports the prosecutor intended to be impeaching, his credibility was not damaged by that evidence or was adequately restored later. In addition, McCarroll's and Simmons' testimonies established that as a routine matter, arson investigators must make some preliminary suggestion of the cause of a fire at the beginning of an investigation to have a case number assigned by the State Fire Marshall's Office. Since the preliminary report is the device through which a case number is assigned, it is created very early in the investigatory period, and by their very name, they are preliminary. Yeazell did not testify that he would not suggest a cause of any fire prior to obtaining the results of the laboratory tests. He testified that he would not conclude a fire was arson after receipt of lab reports showing no accelerants were present in the samples. Yeazell was not referring to preliminary reports, therefore, but to final reports which are presumably rendered after all the evidence pertaining to the cause of the fire is received and analyzed. Consequently, Yeazell's testimony was not impeached by the testimonies of McCarroll and Simmons.

The claimed "attack" on the validity of the psychological tests administered by Dr. Cherry presents an easier question. Franklin is apparently referring to his elevated T score on the F scale

of the MMPI-II test which was discussed in this Court's consideration of Franklin's first and second grounds for relief, *supra*. Dr. Cherry testified at trial that the elevated score was consistent with his diagnosis of paranoid schizophrenia and did not compromise the validity of the test. (Trial Tr., Vol. 12 at 1164-66.) In fact, Franklin's MMPI-II profile was "perfectly symmetrical" with a sample of 863 persons diagnosed with paranoid schizophrenia, including the T score. *Id*. at 1165. Dr. Cherry also testified that the general rule in interpreting MMPI-II tests is that a T score of over 100 indicates malingering, but that that rule applies only in cases of blind testing, or when a doctor does not have any other information about the individual being tested. *Id*. at 1237. His testing was not blind since he conducted several interviews with Franklin and had observed him for many hours. *Id*. Franklin's claim that Dr. Cherry was unprepared for the vigorous cross-examination by the prosecutor is unfounded. Dr. Cherry ably defended his opinion of the validity of Franklin's MMPI-II test, while admitting the nearly inescapable possibility of malingering. (Trial Tr., Vol. 12 at 1198-1205.) He stated the reason he did not believe Franklin to be malingering was because of what he learned through his interviews with Franklin, his family members and friends, and his reading on the subject of interpreting MMPI-II test results. *Id*. at 1202-05. Accordingly, the Court finds the Ohio Supreme Court correctly determined that Franklin's claim of ineffective assistance of trial counsel due to counsel's failure to adequately prepare the defense experts for cross-examination was not supported by the record. Franklin's twelfth ground for relief is consequently denied.

Thirteenth Ground for Relief

In his thirteenth ground for relief, Franklin contends his trial counsel provided ineffective assistance by failing to object to the introduction of inadmissible evidence "including but not limited to victim impact evidence, hearsay, improper jury instructions, other acts evidence, and prosecutorial comment through leading questions." (Petition, Doc. No. 21 at 24.) Further, defense counsel failed

to function as counsel by not requesting a curative instruction for those of their objections that were sustained by the court. *Id*. Respondent does not argue the claim is procedurally defaulted, claiming instead that the Ohio Supreme Court's decision on the issue was neither contrary to nor an unreasonable application of federal law. (Return of Writ, Doc. No. 39 at 90-91.) Franklin does not address Respondent's argument in his Traverse, but only acknowledges that Respondent did not advance a procedural default defense. (Traverse, Doc. No. 49 at 40.)

The Ohio Supreme Court resolved Franklin's claim as follows:

> Nor do we find merit in [A]ppellant's argument that his counsel were guilty of ineffective assistance by failing to object to prosecutorial misconduct in closing argument, and by failing to object to hearsay, leading questions, and improper jury instructions. A reasonable attorney may decide not to interrupt this adversary's argument as a matter of strategy. Furthermore, [A]ppellant cites no specific instances of hearsay or leading questions. Appellant's argument that counsel should have objected to incorrect jury instructions given with respect to voluntary-manslaughter [sic] is without merit, because we find below that the instruction was not prejudicial.

State v. Franklin, 97 Ohio St. 3d 1, 11, 776 N.E.2d 26 (2002)(citation omitted).

Franklin has provided this Court no citation to any example of any of the failures of his counsel he alleges in his claim. As has been noted above, Habeas Rule 2(c) requires a petitioner to state the facts supporting each ground for relief. Instead, Franklin has merely made bare conclusory accusations without citing any support in law or fact. Neither has Franklin explained how the Ohio Supreme Court's decision was contrary to or an unreasonable application of Supreme Court law. In such a vacuum, this Court is unable to grant habeas corpus relief. Even if the claim were properly presented, Franklin has not shown how he was prejudiced by the errors he attributes to his trial counsel. Consequently, he has failed to demonstrate entitlement to a writ of habeas corpus, and his thirteenth ground for relief is denied.

Fourteenth Ground for Relief

In his fourteenth ground for relief, Franklin argues that his counsel were ineffective when they failed to request a second competency hearing in response to his peculiar behavior during his trial. (Petition, Doc. No. 21 at 25.) This Court addressed and denied the underlying claim which Franklin raised in his second ground for relief, *supra*. There being no merit to the underlying claim, there can be none to the claim of ineffective assistance of trial counsel, either. Accordingly, Franklin's fourteenth ground for relief is denied.

Fifteenth Ground for Relief

In his fifteenth ground for relief, Franklin contends his trial counsel failed to investigate his history, character, and background in preparation for the mitigation phase of his trial, thereby providing ineffective assistance. (Petition, Doc. No. 21 at 25.) Respondent acknowledges the claim is preserved for habeas corpus review, but argues the Ohio courts' resolution of the claim was neither contrary to nor an unreasonable application of federal law. (Return of Writ, Doc. No. 39 at 92.) Franklin cites *Wiggins v. Smith*, 539 U.S. 510 (2003), as the law governing his case, and claims the state court's decision is unreasonable under that case. (Traverse, Doc. No. 49 at 41.)

Franklin presented the instant issue to the state court as his eleventh claim for relief in his petition for post-conviction relief. (Appendix, Vol. 9 at 137-39.) The trial court found the material Franklin contended should have been presented was merely cumulative to the evidence produced in the mitigation phase of his trial. (Appendix, Vol. 13 at 27-28.) When Franklin appealed that decision to the state court of appeals, that court stated the following:

> In his eleventh claim for relief, Franklin argued that trial counsel were ineffective in failing to adequately investigate all of Franklin's friends and family in order to obtain mitigating information. . . . In support of this argument, Franklin submitted numerous affidavits, most of which contained information that was presented at the mitigation hearing – that Franklin's behavior had changed in the months preceding the trial, that he had abused drugs, that he had behaved strangely. However, the affidavits of Franklin's mother,

> brother, and former girlfriend also stated that Franklin's uncle, Anthony, had sexually abused him and had sexually abused his mother when she was a child. Furthermore, the affidavit of Franklin's mother stated that her parents had known of her sexual abuse by Anthony and had seemed unconcerned. The affidavits also stated that the defense team had not contacted either of Franklin's siblings and had not discussed his mother's testimony with her prior to the mitigation hearing.
>
> The trial court concluded that Franklin's trial counsel had presented adequate evidence in mitigation and that the additional information in Franklin's affidavits would have been merely cumulative. We agree. The evidence to which Franklin points came in at trial. Dr. Cherry testified that there were indications that Franklin had been abused by his uncle. Therefore, the jury had that information. More importantly, the defense attorneys had the information and can therefore not [sic] be deemed incompetent for failing to conduct [a] sufficient investigation to determine its existence. Rather, Franklin's attorneys may well have made a tactical decision not to attack the victims of the crime during the mitigation hearing. Therefore, we conclude that the trial court did not err in dismissing Franklin's eleventh . . . claim[] for relief.

State v. Franklin, No. 19041, 2002 WL 1000415 at *8 (Ohio App. 2d Dist. May 17, 2002) (unreported). Subsequent appeal to the Ohio Supreme Court was not allowed. *State v. Franklin*, 98 Ohio St. 3d 1422, 782 N.E.2d 77 (2003)(table).

The record before this Court supports the state court's decision. Much of the material Franklin submitted to the state court in post-conviction was presented at his trial. For example, in her post-conviction affidavit, Jacqueline Franklin averred that she was an alcoholic and drank during her pregnancy with Franklin. (Appendix, Vol. 9 at 225-26.) She further stated that she had attempted to induce an abortion by taking drugs and inserting a pencil into her vagina when she was pregnant with Franklin. *Id*. at 225. That same evidence was presented through Ms. Franklin in the mitigation phase of her son's trial, however. (Trial Tr., Vol. 15 at 34-36.) Similarly, both Juanita Fitts, Franklin's sister, and John Carlos Franklin, his brother, averred that Jacqueline Franklin was a physically and verbally abusive parent. (Appendix, Vol. 9 at 230-31; 234-35.) Jacqueline Franklin admitted to her abusive parenting when she testified at the mitigation phase. (Trial Tr.,

Vol. 15 at 39-40.) Thus, Franklin's trial counsel cannot be faulted for failing to present evidence of his mother's alcoholism, her drinking during her pregnancy, her attempt to abort Franklin, and her verbal and physical abuse of her children including Franklin.

In addition, much of the information contained in the affidavits submitted to the state court to support his claim is hearsay lacking in credibility and entitled to little weight in this Court's analysis. Jacqueline Franklin stated in her affidavit that a relative told her that when Franklin was about five years old, he asked a younger child if the two of them could perform a sexual act together. *Id*. That statement is hearsay, the trustworthiness of which is questionable. Ms. Franklin also stated that her older son Carlos told her he saw her daughter Juanita having sex with Franklin when he was four or five years old. (Appendix, Vol. 9 at 226.) That, too, is hearsay. Furthermore, Carlos Franklin's affidavit contradicts Jacqueline's affidavit. He stated it was his mother, not himself, who discovered Juanita having sex with Franklin. *Id*. at 235. Juanita admitted to the sexual act in her affidavit, *id*. at 231, however Franklin did not seek to present her at his evidentiary hearing in these proceedings and the information contained in her affidavit is consequently uncross-examined and entitled to less weight than her live testimony would have been.

It is not difficult to understand why Franklin's trial counsel might decide not to present Franklin's brother Carlos' testimony in the mitigation phase. Some of the information in Carlos' affidavit would have been damaging to Franklin's mitigation case. He stated that Franklin was not only a drug abuser, but a drug dealer (Appendix, Vol. 9 at 236), a fact not likely to endear him to the jurors. In addition, many of Carlos' statements in his affidavit consist of inadmissible hearsay. He stated that he learned through his mother that Franklin was abusing crack cocaine, *id*. at 236, that Franklin had told him his uncle Anthony was "touchy" with him, *id*., and that he learned from his mother's family that a neighbor had molested Franklin's mother and aunt when they were younger, *id*. at 237, none of which would have been admissible evidence if attempted to be offered through

Carlos Franklin. In addition, if Carlos had testified to Franklin's crack cocaine dealing, it would have had a damaging rather than mitigating effect. *Id*. at 236.

The examples here are not the only circumstances of his history Franklin claimed in the state court his counsel should have presented to the jury. (Appendix, Vol. 9 at 138-39.) This Court, however, is not inclined to identify where each was testified to by mitigation witnesses or which consist of hearsay or which lacked any mitigatory value, especially since the Court is unaware of precisely which of the allegations made in the state court Franklin intends this Court to address, given his failure to set forth specifics in his Petition or Traverse. The Court has performed a full review of Franklin's claim, and uses the examples above to illustrate its reasoning.

Nothing in the record persuades the Court that the Ohio court's denial of Franklin's ineffective assistance of trial counsel claim was contrary to or an unreasonable application of federal law as determined by the United States Supreme Court, or based upon an unreasonable determination of the facts. *See* U.S.C. § 2254(d). Accordingly, Franklin's fifteenth ground for relief is denied.

Sixteenth Ground for Relief

In his sixteenth ground for relief, Franklin contends his trial counsel's failure to obtain and effectively use a qualified arson expert, psychological expert, and a mitigation specialist constituted ineffective assistance of counsel. (Petition, Doc. No. 21 at 25.) Respondent states that Franklin's claim respecting the arson and psychological experts was presented elsewhere in his Petition, and that it need not be addressed again. (Return of Writ, Doc. No. 39 at 92-93.) Respondent is correct. Franklin's contention was presented as his twelfth ground for relief (Petition, Doc. No. 21 at 24), and was fully discussed therein. The Court observes that the remainder of Franklin's sixteenth ground for relief was also presented in his petition as part of his (first) eleventh ground, *supra*.

Because the Court has already addressed the totality of the instant ground in Franklin's other claims, there is no reason to do so again here. Franklin's sixteenth ground for relief is denied.

Seventeenth Ground for Relief

In his seventeenth ground for relief, Franklin states his "[d]efense counsel failed to prepare and understand the issues involved in competency evaluations and mitigation and thus failed to effectively cross-examine state experts." (Petition, Doc. No. 21 at 26.) Respondent argues the claim is procedurally defaulted (Return of Writ, Doc. No. 39 at 94), but Franklin contends, without citation to the record, that the claim was preserved for habeas review via a *pro se* application to reopen his direct appeal filed in the state court (Traverse, Doc. No. 39 at 42).

Franklin's claim is procedurally defaulted. Ohio law provides that claims of ineffective assistance of appellate counsel may be raised, indeed may *only* be raised, in an application to reopen an appellant's direct appeal. *See* Ohio Sup. Ct. Prac. Rule XI, Sec. 5. Franklin contends his ineffective assistance of *trial* counsel claim was preserved because he identified it as an assignment of error his appellate counsel should have raised on direct appeal, the failure of which constituted ineffective assistance of *appellate* counsel. Because claims of ineffective assistance of appellate counsel are based on a different legal theory from the underlying claims, the Sixth Circuit has expressly held that an application to reopen a direct appeal does not preserve the underlying claims from default. *White v. Mitchell*, 431 F.3d 517, 526 (6th Cir. 2005). Franklin's contention that he presented the underlying ineffective assistance of trial counsel claim in the state courts is therefore unavailing. As Franklin has offered no other basis upon which the Court might excuse his default, his seventeenth ground for relief is procedurally defaulted and accordingly denied.

Eighteenth Ground for Relief

In his eighteenth ground for relief, Franklin states that his trial counsel's failure to object to his shackling and his being flanked by additional guards during the mitigation phase of his trial constituted ineffective assistance. (Petition, Doc. No. 21 at 26.) Respondent notes that Franklin presented his claim as part of his seventh proposition of law on direct appeal in the state court, but that the Ohio Supreme Court rejected the claim after concluding Franklin suffered no prejudice from his counsel's alleged error. (Return of Writ, Doc. No. 39 at 94.) *See also State v. Franklin*, 97 Ohio St. 3d 1, 11, 776 N.E.2d 26 (2002). Franklin argues that the state court's determination is based upon an unreasonable determination of the facts and an unreasonable application of federal law. (Traverse, Doc. No. 49 at 42-43.)

Franklin's argument repeats his suggestion, which failed to persuade the Court in its discussion of Franklin's fourth, fifth, and sixth grounds for relief, above, that shackling is inherently prejudicial. (Traverse, Doc. No. 49 at 42.) It is no more persuasive here than it was there, for the same reason. Since the Ohio Supreme Court indicated there was ample support for the trial judge's decision to take such measures, even if Franklin's counsel had objected to the shackling and additional security personnel, the objection would almost certainly have been overruled. This Court reiterates that it is a better practice to hold a hearing before implementing increased security measures such as those used at Franklin's trial, but in this case, the failure to do so was harmless even if it was error. Accordingly, Franklin's eighteenth ground for relief is denied.

Nineteenth Ground for Relief

In his nineteenth ground for relief, Franklin contends the admission of all of the guilt phase testimony and exhibits into evidence in the mitigation phase should have been objected to by his trial counsel, and their failure to do so constitutes ineffective assistance. (Petition, Doc. No. 21 at 27.) Respondent has not advanced a procedural default defense, and argues instead that the claim is

meritless. (Return of Writ, Doc. No. 39 at 95.) Franklin states, without supporting argument or citation to law, that the Ohio Supreme Court's decision is unreasonable. (Traverse, Doc. No. 49 at 43.)

Franklin appears to have presented his claim to the state court as part of his seventh proposition of law on direct appeal.[10] (Appendix, Vol. 6 at 152-53.) The Ohio Supreme Court held that Franklin suffered no prejudice from the blanket admission of the guilt phase evidence in the mitigation phase of his trial. *State v. Franklin*, 97 Ohio St. 3d 1, 11, 776 N.E.2d 26 (2002). Franklin states the Ohio Supreme Court's decision is unreasonable, but does not explain why or what federal law it contradicts, other than to cite unspecified "existing precedent." (Petition, Doc. No. 21 at 27; Traverse, Doc. No. 49 at 43-44.)

Ohio law directs factfinders in capital cases to consider "the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, [and] arguments of counsel" when determining an appropriate sentence. Ohio Rev. Code § 2929.03(D)(2) and (3). Relevance, then, appears to be the sole criterion for the admissibility of guilt-phase evidence in the mitigation phase of a capital trial. Thus, if the guilt-phase evidence admitted in the mitigation phase was relevant, counsel could not have been ineffective in failing to object to its admittance.

This Court is not in possession of the slides of the victims' wounds, and consequently has no ability to determine whether the state court's determination that they were relevant to the multiple-murder aggravating circumstance, *see Franklin*, 97 Ohio St. 3d at 20, was in accordance with federal law. The evidence relating to the hit-and-run accident was the only evidence directly linking Franklin to Ivory Franklin, Sr.'s, automobile and was, as the state court found, relevant to another of the aggravating circumstances. *See id.* Finally, the evidence relating to the fire and its

[10]Lacking any indication from Franklin of what specific guilt-phase evidence was but should not have been admitted in the mitigation phase, the Court assumes it is the same evidence he identified in the state court on direct appeal. *But see* Habeas Rule 2(c)(2)(requiring a habeas petition to "state the facts supporting each ground" for relief).

origins was also found by the state court to be relevant to the aggravated arson circumstance. *Id*. Franklin alleges the Ohio court's findings are unreasonable, but provides no citation to any authority that might provide this Court with a basis upon which to make that determination. Even if Franklin had shown the guilt-phase evidence should not have been admitted in the mitigation phase, however, he has not demonstrated prejudice from admission of the evidence or his attorney's failure to object to the same. Under *Strickland*, Franklin is required to demonstrate error on his attorneys' part and prejudice caused by the error. As he has done neither, he is not entitled to habeas corpus relief, and his nineteenth ground for relief is denied.[11]

Twentieth Ground for Relief

In his twentieth ground for relief, Franklin contends his counsel provided ineffective assistance when they failed to request that the aggravated murder counts for each victim be merged into one for sentencing purposes, that the aggravated arson counts be merged, and that the duplicative aggravating circumstances be merged prior to the jury's sentencing phase deliberations. (Petition, Doc. No. 21 at 27.) He also challenges his attorney's decision not to object to the trial court's failure to include an instruction explaining how the aggravating circumstances are to be weighed against the mitigating factors in determining Franklin's sentence. *Id*. Respondent does not argue the claim is procedurally defaulted, and instead simply states that the Ohio Supreme Court's decision on the matter is neither contrary to nor an unreasonable application of United States Supreme Court precedent, without identifying the governing law with any more specificity than that. (Return of Writ, Doc. No. 94-95.) Franklin provides no more insight into his claim in his Traverse,

[11]The Court is aware that the following issue has recently been certified for appeal in *Jackson v. Bradshaw*, No. 2:03-cv-983, 2008 WL 926572 at *13 (S.D.Ohio April 3. 2008): "Did defense counsel perform unreasonably and to Petitioner's prejudice during the mitigation phase when they failed to oppose the [mitigation-phase] readmission of prosecution [guilt-phase] evidence that did not relate to the proven aggravating circumstances?" As discussed above, however, the evidence admitted in Franklin's mitigation phase did "relate to the proven aggravating circumstances."

stating only that the state court's decision is unreasonable and not entitled to a presumption of correctness without citation to the record or law. (Traverse, Doc. No. 49 at 44.)

In deciding Franklin's claim on direct appeal, the Ohio Supreme Court stated merely that it found Franklin had suffered no prejudice from his attorneys' alleged errors. *Franklin*, 97 Ohio St. 3d at 11. In those proceedings, however, Franklin also raised the underlying claims as a separate proposition of law. (Appendix, Vol. 6 at 153-55.) The state court discussed the merits of the underlying claims at length, concluding that Franklin's claim did not require reversal of his death sentence, and that in any case, the court's independent review cured any error.[12] *Franklin*, 97 Ohio St. 3d at 12-13. *See also, Wickline v. Mitchell*, 319 F.3d 813, 824 (6th Cir. 2003) (finding state supreme court's independent weighing of aggravating circumstances and mitigating factors cured any error resulting from sentencer's improper consideration of duplicative aggravating circumstances, and finding no constitutional violation therefrom). That Franklin's counsel did not make the objections Franklin now claims they should have, was therefore error without consequence, if error at all, as he cannot demonstrate prejudice therefrom. Since counsel's objections had little chance of being sustained, Franklin's attorneys cannot be faulted for failing to lodge them.

Having presented no argument or support in law for his claim, and having failed to demonstrate prejudice from his attorneys' claimed error, Franklin's twentieth ground for relief is without merit and is denied.

Twenty-first Ground for Relief

In his twenty-first ground for relief, Franklin contends his counsel were ineffective when

[12]In its independent sentencing evaluation, the Ohio Supreme Court observed that "[a]s the state concedes, the specification under R.C. 2929.04(A)(3) [stating the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense] merges into the felony-murder specifications, so we undertake a weighing of the remaining three aggravating circumstances only." *Franklin*, 97 Ohio St. 3d at 22 n.5.

they allowed his trial to continue in his absence on several occasions. (Petition, Doc. No. 21 at 27-28.) Respondent acknowledges the claim was properly presented to the state courts and is therefore preserved for habeas corpus review, but recites the Ohio Supreme Court's determination that Franklin suffered no prejudice from his counsel's alleged error, and states that decision is in conformity with federal law. (Return of Writ, Doc. No. 39 at 95.) Franklin merely repeats again that the state court's decision is contrary to unspecified federal law without citation. (Traverse, Doc. No. 44.)

Franklin contends his counsel should have assured his presence during three telephone conferences at which defense counsel, the prosecutor, and the trial judge formulated answers to three questions from the jury. (*See* Trial Tr., Vol. 14 at 1683-84, 1690-91, 1696-97.) During the court's discussion of the jury questions, however, there is no sure indication whether Franklin was or was not participating in the telephone conferences. *Id*. For the sake of argument, the Court assumes, but does not find, that Franklin was not a participant in those conferences. Franklin also argues he should have been present when the trial court reviewed proposed jury instructions and during his counsel's objections to the prosecutor's closing argument in the mitigation phase of the trial. (See Trial Tr., Vol. 13 at 1468; Vol. 14 at 1516, 1699.) In each of these instances, Franklin's presence was waived by counsel on the record. *Id*. When the issue was brought to the Ohio Supreme Court on direct appeal, that court found that Franklin had not shown there was a reasonable probability that but for counsel's waivers of his presence, the outcome of the trial would have been different. *Franklin*, 97 Ohio St. 3d at 11. Having demonstrated no prejudice from the alleged errors, Franklin's claim was overruled. *Id*.

Here, Franklin has added nothing to the record to suggest that his presence during the discussions of the jury questions, the jury charge, and his counsel's objections to the prosecutor's closing argument would have affected the jury's recommendation to any detectable degree. To do

so, of course, Franklin would had to have submitted evidence of precisely how those discussions would have been so different in his presence that they would have had a reasonable probability of changing the outcome of his sentencing hearing.[13] He did not do so in the state court, and he has not done so here. Consequently, the result is the same: Franklin has demonstrated no prejudice from his attorney's alleged errors in not assuring his presence at the discussions. Thus, this Court does not find the Ohio Supreme Court's decision in the least bit unreasonable or contrary to federal law. Franklin's twenty-first ground for relief is accordingly denied.

Twenty-second Ground for Relief

In his twenty-second ground for relief, Franklin contends he was deprived of due process when the trial court refused repeated requests by defense counsel for a continuance following the unexpected death of one of the defense's arson experts just days before he was scheduled to testify in the defense's case in chief. (Petition, Doc. No. 21 at 28.) Respondent argues the claim is preserved for habeas review but meritless nonetheless. (Return of Writ, Doc. No. 39 at 100-2.) Franklin acknowledges that the decision whether to grant a continuance is generally within the discretion of the trial judge, but that where there is "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay," the federal constitution is violated. (Traverse, Doc. No. 49 at 45, *citing United States v. King*, 127 F.3d 483, 486-87 (6th Cir. 1997).)

Franklin presented his claim to the state supreme court on direct appeal as his tenth proposition of law. (Appendix, Vol. 6 at 172-75.) The court overruled Franklin's claimed error, reasoning as follows:

> Appellant also contends, in proposition of law number ten, that the trial court deprived him of due process in denying his motion for a

[13]Since the claim necessarily relies for its success on evidence that is not apparent on the trial record, it is one that should have been brought in Franklin's post-conviction proceedings, with appropriate support from outside the record, rather than on direct appeal, where it was necessarily doomed to fail.

> continuance. We disagree. In [A]ppellant's case, arson investigators William Fricker and William Yeazell inspected the victims' home after the fire. The defense had planned to call Fricker as an expert witness on arson, but he died unexpectedly two days before the defense began its case. Appellant moved for a continuance, seeking one to two additional weeks to find a new expert. The trial court denied the motion, pointing out that [A]ppellant had another expert witness, Yeazell, available to testify. Before resting his case, [A]ppellant renewed the motion and briefly proffered Fricker's expected testimony. The motion was once again denied.
>
> The decision of whether to grant a continuance rests in the broad discretion of the trial court. See, e.g., *Morris v. Slappy* (1983), 461 U.S. 1, 11, 103 S.Ct. 1610; *State v. Lorraine* (1993), 66 Ohio St.3d 414, 423, 613 N.E.2d 212. While there is no bright-line test for determining whether a continuance should be allowed, a court should be guided by consideration of several factors, including the length of the requested delay, whether other continuances have been requested and received, the inconveniences likely to result, the reasons for the delay, and whether the defendant contributed to the circumstances giving rise to the need for delay. *State v. Unger* (1981), 67 Ohio St.2d 65, 67-68, 423 N.E.2d 1078.
>
> Applying these factors, we find that the trial court did not abuse its discretion in denying the request for a continuance. Appellant requested the delay in the middle of the trial, which would have inconvenienced everyone involved and would have placed the jurors out of the court's control for a great deal of time. Additionally, this continuance would have been the second granted to the defense; the court had previously postponed the beginning of the trial for seven months due to an auto accident involving one of [A]ppellant's attorneys. Moreover, the defense called Yeazell, another arson expert, who had inspected the home with Fricker. These factors weighed heavily against granting the continuance.
>
> It is true that the timing of the death was no fault of the defense, but this factor does not override the numerous reasons for denying [A]ppellant's motion. Upon our review of the trial court's decision to deny a continuance, we find that the surrounding facts and circumstances support that decision. Proposition of law number ten is without merit.

State v. Franklin, 97 Ohio St. 3d 1, 5-6, 776 N.E.2d 26 (2002)(some parallel citations omitted). The state court accurately identified and summarized the federal law governing Franklin's claim.

The state court's decision does not evidence the unjustified reliance upon expeditiousness

Franklin claims it does. Furthermore, even if it did, Franklin has not demonstrated prejudice from any error. In their request for a continuance, Franklin's attorneys stated that "the presentation of the two, uh . . . experts was going to complement each other," and that the prosecution had two fire experts so they should as well. (Trial Tr., Vol. 11 at 846.) Any suspicion that the two defense arson experts' testimonies might be anything but repetitive was dispelled by the defense's proffer of Fricker's testimony. There, defense counsel stated that Fricker "would've testified to the same conclusions as has Mr. Yeazell regarding the cause and origin of the fire being the space heater in the center room." (Trial Tr., Vol. 12 at 1242.)

At the evidentiary hearing in these proceedings, Franklin's trial counsel, John Cumming, testified that the defense intended to use Yeazell at trial, that Fricker was an "additional" expert, and that the two experts' opinions were the same. (Evid. Hrg. Tr., Doc. No. 86-2 at 113.) Cumming's testimony contradicts that of his co-counsel in Franklin's trial. Larry Henke testified that he did not intend to call both experts to testify, and that Yeazell's weakness was not his qualifications, but his susceptibility to impeachment. (Evid. Hrg. Tr., Doc. No. 86-2 at 50-53.) Yeazell's alleged susceptibility to impeachment, however, was not known prior to his taking the stand,[14] and Henke's testimony that Fricker was not impeachable is mere speculation. *Id*. In any case, trial counsel's testimonies respecting the two experts is only tangentially related to the issue at hand. The record is devoid of any evidence that Fricker would have testified to, or opinion that he might have held, that was not presented through Yeazell in Fricker's absence. There exists no constitutional right to present through two expert witnesses what can be presented through one, and if the two experts' testimonies were expected to be the same, as is the case here, a defendant suffers no detriment when

[14]Elsewhere in his petition, in fact, Franklin claims his trial counsel were ineffective for the very reason that they did not know of Yeazell's alleged impeachability prior to calling him to the witness stand. Trial counsel John Cumming testified, somewhat contradictorily, that although Yeazell was the defense's expert and Fricker was "an additional expert," defense counsel knew Yeazell "was weaker" and "more tentative as a witness than Fricker." (Evid. Hrg. Tr., Doc. No. 86-2 at 113, 114, 116.) Still, that testimony does not establish that defense counsel were aware of Yeazell's alleged susceptibility to impeachment.

one is unable to testify at trial for whatever reason. Based on the information available to the trial judge at the time the motion for a continuance was made, the court's denial did not deprive Franklin of due process of law. The Ohio Supreme Court's conclusion to that effect was neither contrary to nor an unreasonable application of federal law. Accordingly, Franklin's twenty-second ground for relief is denied.

Twenty-third Ground for Relief

In his twenty-third ground for relief, Franklin contends the trial court erred when it answered the jurors' questions, reviewed the proposed jury instructions, and considered the defense's objections to the prosecution's closing argument when Franklin was not present. (Petition, Doc. No. 21 at 29.) Respondent argues the state court's reliance on an independent and adequate state procedural rule in disposing of Franklin's claim renders it procedurally defaulted for habeas corpus purposes, and that the claim is meritless in any case. (Return of Writ, Doc. No. 39 at 103-5.) Franklin urges the Court to reach the merits of his claim, offering his trial counsel's ineffectiveness as cause for his procedural default. (Traverse, Doc. No. 49 at 46.)

As Respondent states, Franklin raised this claim as his eighth proposition of law on direct appeal to the Ohio Supreme Court. (Appendix, Vol. 6 at 160-66.) The state court held that since Franklin's counsel did not object, and in fact assented to his absence, all but plain error was waived. *Franklin*, 97 Ohio St. 3d at 18. Respondent argues, correctly, that plain error analysis does not open the door to habeas corpus review. (Return of Writ, Doc. No. 39 at 103.) A state appellate court's review for plain error is enforcement, not waiver, of a procedural default. *White v. Mitchell,* 431 F.3d 517, 525 (6th Cir. 2005); *Hinkle v. Randle*, 271 F. 3d 239, 244 (6th Cir. 2001), *citing Seymour v. Walker*, 224 F. 3d 542, 557 (6th Cir. 2000). Thus, unless Franklin can show cause and prejudice for his default, his claim is not amenable to habeas corpus review.

Franklin's suggestion that his trial counsel's ineffectiveness should excuse his default is unavailing. In his twenty-first ground for relief, *supra*, the Court rejected Franklin's claim that his counsel provided ineffective assistance when they failed to assure his presence at the same discussions involved here. Thus, his counsel's performance does not provide cause for his default, and his claim is accordingly denied.

Even if the claim were preserved, however, it would fail. Although Franklin claimed in the state court that his counsel did not obtain his consent before waiving his presence at the times at issue, there is nothing in the record to support that claim. It may be just as Franklin states, but this Court is duty bound to rely on evidence, not unsupported claims in pleadings, when evaluating the constitutional integrity of a capital trial. Franklin did not seek to present evidence germane to the matter at hand at his evidentiary hearing in these proceedings, although he did call both of his trial counsel to testify about other matters. (Petitioner's Renewed Motion for Evidentiary Hearing, Doc. No. 71; Evid. Hrg. Tr., Doc. No. 86-2) Nevertheless, one of his counsel testified that it would not have mattered if Franklin were present during the review of the proposed jury instructions because he "did not, could not, would not, whatever," assist his counsel in any manner during the proceedings. (Testimony of Larry Henke, Evid. Hrg. Tr., Doc. No. 86-2 at 57.) Henke testified that determining the instructions given to the jury is a critical part of a trial, and clients have a unique knowledge of the facts in their case. *Id*. at 57-57. That may well be true, but it does not provide this Court with the substance of any contribution Franklin would have made to the discussion of the jury charge, or the jury questions and the defense's objection to the prosecution's closing argument for that matter, if he had been present for those conversations. Both counsel testified that they had no success in motivating Franklin to become a more active participant in his trial. (Evid. Hrg. Tr., Doc. No. 86-2 at 14-16, 20-22, 26-27, 31, 39, 47, 73, 75, 87, 92-93, 102-4, 107, 113, 123, 141, 151-52.) There is no reason to believe that Franklin would have been any more helpful in the discussions

about the jury instructions, jury questions, or the defense objections to the prosecutor's closing argument. Since Franklin has not demonstrated prejudice from his claimed error, even if it were properly preserved for habeas corpus review, it would fail.

Franklin has procedurally defaulted his twenty-third ground for relief and it is denied.

Twenty-fourth Ground for Relief

In his twenty-fourth ground for relief, Franklin contends the trial court erred when it permitted the blanket admission of all guilt-phase evidence in the mitigation phase of his trial. (Petition, Doc. No. 21 at 29-30.) Respondent argues the claim is preserved for habeas review but that it does not provide a basis upon which habeas corpus review should be granted. (Return of Writ, Doc. No. 39 at 105-7.) In his Traverse, Franklin merely notes that Respondent has acknowledged that the claim has been properly preserved. (Traverse, Doc. No. 49 at 46.)

Franklin presented his claim to the state supreme court as his first proposition of law on direct appeal.[15] (Appendix, Vol. 6 at 97-97.) The court overruled Franklin's claim, reasoning as follows:

> In his first proposition of law, [A]ppellant contends that the jury was permitted to consider guilt-phase evidence that was irrelevant to the sentencing phase. In particular, he asserts that the slides showing the victims' injuries, evidence of [A]ppellant's hit-and-run accident in Tennessee, and evidence relating to the endangerment of firefighters should not have been considered by the jury. We disagree. The slides were relevant to the nature and circumstances of the multiple-murder aggravating circumstance. The car accident, which involved a vehicle stolen from Ivory Franklin, was relevant to the aggravated robbery circumstance, and the information about the fire was relevant to the aggravated arson circumstance.

State v. Franklin, 97 Ohio St. 3d 1, 20, 776 N.E.2d 26 (2002). Franklin's task, under the AEDPA,

[15]Although Franklin does not identify any particular guilt-phase evidence that was allegedly irrelevant to the sentencing determination in his claim here, the Court assumes it is the same evidence discussed in his first proposition of law on direct appeal to the Ohio Supreme Court. The magnanimity of the Court knows no bounds.

is to demonstrate how that decision is contrary to or an unreasonable application of federal law.

There are several barriers to the relief Franklin has requested in the instant ground for relief. First, Franklin cites no federal law or constitutional provision violated by the trial court's admission of all of the guilt-phase evidence in the mitigation phase of his trial. There is a good reason for that. The Court's research finds no case in which the United States Supreme Court has held that indiscriminate admission of guilt-phase evidence in the mitigation phase of a trial violates any provision of the federal constitution. *See Zant v. Stephens*, 462 U.S. 862, 878 (1983) (observing that "[o]ur cases indicate . . . that statutory aggravating circumstances play a constitutionally necessary function . . . [b]ut the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting . . . those defendants who will actually be sentenced to death."). *See also Morales v. Coyle*, 98 F. Supp.2d 849, 885 (N.D. Ohio 2000) (concluding that the wholesale admission of guilt-phase evidence in the mitigation phase, if a violation of law at all, is not one of a constitutional dimension and is not cognizable in federal habeas corpus proceedings).

Franklin's claim is primarily one challenging Ohio's procedure and evidentiary rules for admitting evidence in the mitigation phase of a capital trial, presumably because some of that evidence could be considered aggravating rather than mitigating. These are matters of state law. As such, he is not entitled to habeas corpus relief unless he has demonstrated that the claimed error compromised the fundamental fairness of his trial, depriving him of due process. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Wainwright v. Goode*, 464 U.S. 78, 83 (1983). Franklin has not done so. Instead, he makes a generalized claim that much of the guilt-phase evidence was irrelevant to his moral culpability for aggravated murder. (Petition, Doc. No. 21 at 30.) Claims that are at least similar to Franklin's have been rejected by the Ohio Supreme Court, which is the final interpreter of the state's law. In *State v. Stumpf*, 32 Ohio St. 3d 95, 99, 512 N.E.2d 598 (1987), for instance, the supreme court observed that "[i]n a particular case, the nature and circumstances of the

offense may have a mitigating impact, or they may not. . . .Either way, they must be considered." In addition, the state court has also observed that "[m]ost guilt-phase evidence is relevant to the penalty phase." *State v. Bethel*, 110 Ohio St. 3d 416, 440, 854 N.E.2d 150 (2006). Thus, the state supreme court has interpreted its statute and evidentiary rules to permit the admission of all or nearly all guilt-phase evidence in the mitigation phase of a capital trial.

The state court determined that the evidence Franklin claimed was improperly admitted in the mitigation phase of his trial was relevant to the aggravating circumstances in his case. *Franklin*, 97 Ohio St. 3d at 20. Franklin has provided no authority suggesting the state court's finding was contrary to *any* law, state *or* federal. Thus, he has failed to make out his claim of a denial of due process of law, and he has failed to carry his burden under the AEDPA. Even if he had done so, however, his claim would fail because he has made no showing of prejudice from the alleged error.

Franklin has not demonstrated entitlement to habeas corpus relief, and his twenty-fourth ground for relief is accordingly denied.

Twenty-fifth Ground for Relief

In his twenty-fifth ground for relief, Franklin contends that the trial court erred in allowing the jurors to consider in the mitigation phase all of the charges and specifications of which Franklin had been found guilty rather than merging those that arose out of the same course of conduct. (Petition, Doc. No. 21 at 30-31.) Respondent does not challenge the procedural status of the claim, but argues the matter is one of state law and that the Ohio Supreme Court's rejection of the claim is neither contrary to nor an unreasonable application of federal law. (Return of Writ, Doc. No. 39 at 107-9.) Franklin appears to concede that the federal constitution does not require merger of the charges arising out of the same course of conduct, but argues that it is required under state law. (Traverse, Doc. No. 49 at 47-48.) In addition, he expands his argument to include a claim that the

aggravating circumstances attached to each murder count should have been merged as well. (Traverse, Doc. No. 49 at 46-47.) He contends that the trial court's failure to follow state law amounted to a deprivation of his federal right to due process of law, and that the Ohio Supreme Court's decision on appeal was contrary to federal law and based upon an unreasonable determination of the facts. *Id*.

Franklin presented the instant claim to the state court as his sixth proposition of law on direct appeal. (Appendix, Vol. 6 at 125-125-37.) The state court concluded that some of the counts and specifications Franklin claimed should have been merged were not amenable to merger, and that the error of failing to merge certain other counts and specifications was cured by the appellate court's independent weighing of the aggravating circumstances and mitigating factors. *Franklin*, 97 Ohio St. 3d at 12-13.

First, the Court considers Franklin's claim that the six counts of aggravated murder, two for each victim, should have been merged so that the jury would only consider one count of aggravated murder per victim for sentencing purposes. Franklin contends the trial court erred by failing to instruct the jury that the two murder counts for each victim were merged into one apiece. (Traverse, Doc. No. 49 at 47.) It is true that the jury was not instructed on merging the aggravated murder counts for each victim, but what is also true is that the jury was provided with only one verdict form per murder, and that the jurors recommended only one death sentence per victim. (Appendix, Vol. 5 at 134-39.) In addition, the trial court sentenced Franklin to one death sentence for each of his three victims. (Appendix, Vol. 5 at 269.)[16] Functionally, then, merger did occur even if the jury was

[16]The Court further observes that in the course of reviewing the videotapes of Franklin's trial, it was revealed that the trial judge merged the sixth and seventh counts in the indictment which pertain to Anthony's murder; the eighth and ninth counts which relate to Ivory, Sr.'s, murder, and the tenth and eleventh counts which relate to Ophelia's murder. Individuals are not discernable on the videotape, and the time and date stamp visible on some other videotapes is not on the tape that recorded Judge Gilvary's sentencing of Franklin. The sound quality on the tape, however, is serviceable, and Judge Gilvary's merger of the counts as noted is clear. (See Videotape 17 of 17.)

not so instructed. The merger was effected by limiting the jury's ability to recommend death twice for the same murder, or six times for three murders as the case may be. That the trial court did not instruct the jurors on merging the six counts of aggravated murder into three is, therefore, error without consequence. The jury was never given the opportunity to recommend more than one death sentence per victim. To the extent that Franklin argues otherwise, therefore, his claim is without factual support, and thus, merit.

Next, Franklin has argued that the trial court erred in failing to merge the aggravating circumstances attached to each count of aggravated murder for sentencing purposes. (Traverse, Doc. No. 49 at 47.) Recall that each aggravated murder count included four aggravating circumstances which were as follows:

> 1. The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense, R.C. 2929.04(A)(3);
>
> 2. Felony-murder predicated on aggravated robbery, R.C. 2929.04(A)(7);
>
> 3. Felony-murder predicated on aggravated arson, R.C. 2929.04(a)(7), and;
>
> 4. Course of conduct involving two or more purposeful killings, R.C. 2929.04(A)(5).

Franklin, 97 Ohio St. 3d at 22.

On direct appeal, the Ohio Supreme Court agreed in part with Franklin's arguments presented there and merged the first aggravating circumstance into the two felony-murder aggravating circumstances. *Franklin*, 97 Ohio St. 3d at 22 n.5. Although here Franklin does not identify which aggravating circumstances he believes should have been merged with which other aggravating circumstances, in the state court he argued that the "course-of-conduct" specification should have been merged with the "escape detection" aggravating circumstance. (Appendix, Vol. 6 at 131-32.) Franklin cited *State v. Spisak*, 36 Ohio St. 3d 80, 83 [sic], 521 N.E.2d 800 (1988), for

the proposition that those two aggravating circumstances have been found to arise from the same act or indivisible course of conduct and are consequently duplicative and subject to merger. (Appendix, Vol. 6 at 132.)

The Ohio Supreme Court did not address this specific portion of Franklin's claim in its discussion of his sixth proposition of law on direct appeal. *Franklin*, 97 Ohio St. 3d at 12-13. Assuming, without finding, that Franklin is correct in asserting that the "escape detection" and "course of conduct" aggravating circumstances should have been merged, however, the error was harmless and does not warrant granting habeas corpus relief.

The Sixth Circuit Court of Appeals has recently surveyed the state of Supreme Court law on the propriety of a federal district court's conducting harmless-error review following a state-court sentencer's consideration of an invalid aggravating circumstance. In *Wilson v. Mitchell*, 498 F.3d 491, 508 (6th Cir. 2007), after an extensive examination of recent Supreme Court caselaw, the court concluded that "federal courts may conduct harmless-error review of invalid aggravating factors even where the state court has not done so." While it is true that in *Brown v. Sanders*, 546 U.S. 212 (2006), the appellate court found some indication that only a state court may conduct harmless-error review in such situations, it came from *dicta* rather than a holding of the United States Supreme Court. *Wilson*, 498 F.3d at 508. Consequently, this Court may conduct harmless-error review of Franklin's claim respecting the merger of the relevant aggravating circumstances.

In *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), the Supreme Court explained a federal court's duty with regard to such review as follows:

> Consistent with the jury-trial guarantee, the question . . . the reviewing court [is] to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict

> actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee.

Id., *quoting Yates v. Evatt*, 500 U.S. 391, 404 (1991)(citations omitted). Likewise in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), the Court observed that "[t]he standard for determining whether habeas relief must be granted is whether . . . the . . . error 'had substantial and injurious effect or influence in determining the jury's verdict,'" *quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Finally, the Supreme Court has held that the *Brecht* standard governs a federal court's harmless-error review in habeas corpus cases. *Fry v. Pliler*, 551 U.S. 112, ___, 127 S.Ct. 2321, 2327 (2007). Thus, in evaluating Franklin's claim to determine whether the asserted error was harmless, this Court simply answers whether Franklin has shown that the alleged error had a substantial and injurious effect in determining the jury's verdict. *See Wilson v. Mitchell*, 498 F.3d 491, 503 (2007).

Franklin has failed to demonstrate that the trial court's failure to merge the two relevant aggravating circumstances had any effect, let alone a substantial and injurious one, on the jury's verdict in his case. Showing that the aggravating circumstances could have been, and perhaps should have been merged goes to identifying the error that may have occurred in his trial, but it does not demonstrate any prejudicial effect the error might have had on the jury's sentencing recommendation. As noted above, Franklin has not identified in these proceedings which aggravating circumstances should have been merged for sentencing purposes, and only states that some of them should have been. (Petition, Doc. No. 21 at 30-31; Traverse, Doc. No. 49 at 46-49.) In his state court appellate brief, moreover, Franklin merely states that the "escape detection" and "course of conduct" aggravating circumstances should have been merged, and leaves it at that. (Appendix, Vol. 6 at 131.) Thus, there is no basis upon which this Court can conclude that the trial court's failure to merge the aggravating circumstances, if error, had a substantial and injurious effect

on the jury's sentencing verdicts. *See Wickline v. Mitchell*, 319 F.3d 813, 824 (6th Cir. 2003)(finding state supreme court's independent weighing of aggravating circumstances and mitigating factors cured any error resulting from sentencer's improper consideration of duplicative aggravating circumstances, and finding no constitutional violation therefrom). To the extent Franklin has claimed error respecting those two relevant aggravating circumstances, then, he has not demonstrated entitlement to habeas corpus relief.

Franklin's argument that the multiple aggravated murder counts should have been merged prior to sentencing is lacking in factual and legal support. He has also failed to demonstrate prejudice from the trial court's alleged error in not merging certain aggravating circumstances with others for sentencing purposes. His twenty-fifth ground for relief is accordingly denied.

Twenty-sixth Ground for Relief

In his twenty-sixth ground for relief, Franklin contends that the Ohio death penalty scheme, which provides that a jury may "recommend" a sentence of death in a particular case, but the trial judge actually imposes the sentence, violates the holding of *Ring v. Arizona*, 536 U.S. 504 (2002). (Petition, Doc. No. 21 at 31-32.) He further contends that the trial court's sentencing opinion failed to give effect to legitimate mitigating evidence and that the trial court's independent weighing of the aggravating circumstances and mitigating factors was flawed. *Id*. at 32. Respondent argues that when the claim was presented to the state supreme court on direct appeal, the court rejected it on its merits. (Return of Writ, Doc. No. 39 at 110-12.) Franklin disputes that the state court addressed his claim in its entirety and argues that to the extent the state court did address his claim, its decision was contrary to or an unreasonable application of federal law. (Traverse, Doc. No. 49 at 49-52.)

Franklin's first argument states that the determination of the existence of aggravating circumstances and mitigating factors was left to the trial court, contrary to *Ring*. (Petition, Doc. No.

21 at 32.) His reasoning is that because the jury's death verdicts were only "recommendations," the ultimate findings requisite to imposition of a death sentence were made by the trial court. *Id*. That simply is not so. The aggravating circumstances making a death sentence possible are determined exclusively by the jury in a jury trial, or the three-judge panel in a bench trial, during the guilt phase of the trial under Ohio law. Ohio Rev. Code § 2929.03(B). That provision of the Ohio death penalty scheme is consistent with United States Supreme Court law that requires a "narrowing of the class of death-eligible persons and thereby channeling the jury's discretion." *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988); *Coleman v. Mitchell*, 268 F.3d 417, 443 (6th Cir. 2001).

In Franklin's case, the jury found him guilty of all of the aggravating circumstances attached to each count of aggravated murder. (Appendix, Vol. 5 at 62-125.) Those verdicts were not recommendations, but findings beyond a reasonable doubt. Thus, Franklin's claim that the trial judge determined the existence of the aggravating circumstances in his case in violation of *Ring* is wholly without merit.

As for his argument that the trial court also determined the existence of any mitigating factors, it, too, is unavailing. (See Petition, Doc. No. 21 at 32.) Franklin's claim is essentially that characterizing the jury's sentencing verdicts as "recommendations" transferred responsibility for the death sentences to the trial judge, who adopted the jury's recommendations of death. *Id*. The claim is unfounded. During voir dire, the trial court consistently informed prospective jurors that the use of the term "recommendation" concerning a capital jury's sentencing decision was a very serious matter, and not one to be taken lightly. (Trial Tr. Vol. 4 at 62, 104, 214, 273-74; Vol. 5 at 345, 356, 394, 444, 495, 568, 588; Vol. 6 at 641, 690, 756; Vol. 7 at 888-98, 948.) In the trial court's preliminary instructions to the jury at the start of the mitigation phase, the judge described the sentencing process, but never used the word "recommendation." (Trial Tr., Vol. 15 at 1-7.) In the court's final instructions to the jurors, just prior to their deliberations, the trial judge told them "you

will decide which sentence will be imposed upon this Defendant. You will decide whether the Defendant should be sentenced to death, or to life in prison without the possibility of parole, or to life in prison with parole eligibility." *Id*. at 147. The trial court also instructed the jurors that after weighing the aggravating circumstances against the mitigating factors, they would have the duty of determining which of the sentencing options would be imposed. *Id*. at 157-58. The court did instruct the jury that it "shall recommend the sentence of death if you unanimously find by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors," or that they "shall unanimously recommend" a life sentence if they find the aggravating circumstances did not outweigh the mitigating factors. (Trial Tr., Vol. 15 at 148.) The verdict forms themselves, however, did not include the "recommendation" language, and stated instead that "the sentence of death is imposed herein." (Appendix, Vol. 5 at 134-39.) In its instructions and through the verdict forms, then, the trial court emphasized rather than diminished the jury's role in determining Franklin's sentence. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (holding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere"). It is highly doubtful that the jurors interpreted the trial judge's limited use of the word "recommendation" as an invitation to "lay the decision[-]making responsibility on the judge's shoulders" as Franklin contends. In addition, the same "recommendation" instruction has been found by the Sixth Circuit Court of Appeals not to have run afoul of the federal constitution. *Buell v. Mitchell*, 274 F.3d 337, 352-53 (6th Cir. 2001).

Franklin also argues that the trial court failed to give effect to mitigating evidence and failed to properly weigh the aggravating circumstances and mitigating factors in its sentencing opinion. (Petition, Doc. No. 21 at 32.) The mitigating evidence Franklin claims was not given effect consists of the evidence he produced respecting the mental disease or defect mitigating factor. His argument

contends that the trial court erred in equating that mitigating factor with the insanity defense advanced during the guilt phase of the trial, and in improperly deferring to the jury's rejection of the insanity defense rather than independently evaluating the "mental disease or defect" evidence produced during the mitigation phase. (Traverse, Doc. No. 49 at 50.) As is explained below, Franklin misconstrues the trial court's reasoning.

When Franklin raised the alleged error on direct appeal, the Ohio Supreme Court rejected it, stating that "[o]ur review of the sentencing opinion convinces us that the lower court's discussion of the mitigating factors is sufficient to explain its weighing process." *Franklin,* 97 Ohio St. 3d at 20. In addition, the court found "nothing to indicate that the judge did anything but undertake a separate consideration of the relevant issues and reach his own conclusion, which happens to mirror the view of the jury." *Id.*

The trial court identified each mitigating factor upon which evidence was produced in the sentencing phase of Franklin's trial, and gave a brief explanation of the weight he accorded each. (Appendix, Vol. 5 at 267-68.) None was given more than minimal weight. *Id.* The trial court then concluded that the aggravating circumstances outweighed the mitigating factors, and expressed agreement with the jury's death verdicts. *Id.*

Franklin specifically challenges the trial court's reasoning respecting the "mental disease or defect" mitigating factor. In its discussion of the mitigating factors upon which some evidence was produced in the mitigation phase, the trial court observed in part as follows:

> Whether the offender, because of a mental disease or defect lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Dr. Cherry's opinion was the sole evidence on this circumstance. The jury observed Dr. Cherry, they listened to his opinion, they listened to his answers on cross-examination, and as was their prerogative, they chose to reject his conclusions. They had done so earlier in this case on the issue of Defendant's sanity at the time of the crime. The Court agrees with their position.

(Appendix, Vol. 5 at 268.) The state court correctly identified the mitigating factor, and the standard included in the statute. *See* Ohio Rev. Code § 2929.04(B)(3).

Franklin claims the Ohio Supreme Court did not address the trial court's alleged failure to give weight to the "mental disease or defect" evidence, and the trial court's deference to the jury's rejection of Franklin's guilt-phase evidence on insanity. (Traverse, Doc. No. 49 at 50.) He argues that as a result, the Ohio Supreme Court did not adjudicate Franklin's claim on the merits, and that he is consequently entitled to *de novo* review here. *Id*. at 51. This Court disagrees.

The trial court identified the mitigating factors and aggravating circumstances and independently concluded that the aggravating circumstances outweighed the mitigating factors. That the court did not expound upon every nuance of the weighing process or assign a numerical weight to each factor and circumstances is neither here nor there: the law does not require it to do so. The Ohio Supreme Court found the lower court's discussion adequate to explain its weighing process, and Franklin has not demonstrated that that decision was contrary to or an unreasonable application of federal law. In addition, the Ohio Supreme Court also engaged in an independent weighing of the mitigating factors and aggravating circumstances, and came to the same conclusion as did the trial court and jury. *Franklin*, 97 Ohio St. 3d at 22-24. Thus, the Ohio Supreme Court employed the practice of "appellate reweighing" specifically authorized under *Clemons v. Mississippi*, 494 U.S. 738, 748 (1990). Any error in the trial court's weighing, therefore, was corrected by the Ohio Supreme Court's independent weighing of the aggravating circumstances and mitigating factors. *Id*.

In sum, this Court finds that the trial court properly conducted an independent weighing of the mitigating factors and aggravating circumstances as required by Ohio law. In addition, the Ohio Supreme Court's decision finding the same was neither contrary to nor an unreasonable application of federal law. The Court declines Franklin's invitation to review his claim *de novo*, as it finds the

state supreme court did address the merits of the claim consistent with federal law. Finally, the Court concludes that even if the alleged flaws in the trial court's opinion were found to exist, the Ohio Supreme Court's independent weighing of the mitigating factors and aggravating circumstances would have corrected any error. Franklin's twenty-sixth ground for relief is accordingly denied.

Twenty-seventh Ground for Relief

In his twenty-seventh ground for relief, Franklin contends capital punishment, regardless of the method by which it is inflicted, is cruel and unusual punishment, and that lethal injection is inhumane. (Petition, Doc. No. 21 at 32.) Both of those contentions are rejected on the authority of *Baze v. Rees*, ___ U.S. ___, 128 S.Ct. 1520 (2008), and Franklin's twenty-seventh ground for relief is denied.

Twenty-eighth Ground for Relief

In his twenty-eighth ground for relief, Franklin contends that Ohio's post-conviction procedures are inadequate and that he was improperly denied a hearing on his post-conviction claims in the state court. (Petition, Doc. No. 21 at 33.) Franklin acknowledges that there is no constitutional requirement that a state provide defendants with any post-conviction remedies at all, but contends that once created, they must administer such remedies in a way that comports with due process. (Traverse, Doc. No. 49 at 55.) He states without citation, however, that "the Sixth Circuit has recognized the inherent inadequacy of Ohio post-conviction remedies." (Traverse, Doc. No. 49 at 55.) Respondent notes that the issue was presented as Franklin's seventeenth claim for relief in his state post-conviction proceedings, and that the trial court and court of appeals both rejected the claim on its merits. (Return of Writ, Doc. No. 39 at 117-120, *citing* Appendix, Vol. 13 at 37-38, and

State v. Franklin, No. 19041, 2002 WL 1000415 at *12 (Ohio App. 2d Dist. May 17, 2002) (unreported).)

The most thorough discussion of the issue by the Sixth Circuit that this Court's research has revealed is contrary to Franklin's position.

> [T]he Sixth Circuit has consistently held that errors in post-conviction proceedings are outside the scope of federal habeas corpus review. *See Kirby v. Dutton*, 794 F.2d 245, 246-47 (6th Cir. 1986); *Roe v. Baker*, 316 F.3d 557, 571 (6th Cir. 2002). We have clearly held that claims challenging state collateral post-conviction proceedings "cannot be brought under the federal habeas corpus provision, 28 U.S.C. § 2254," because "'the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody.'" *Kirby*, 794 F.2d at 246 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)); *see also Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987)("States have no obligation to provide this avenue of relief, and when they do the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well." (citation omitted)). A due process claim related to collateral post-conviction proceedings, even if resolved in a petitioner's favor, would not "result [in] . . . release or a reduction in . . . time to be served or in any other way affect his detention because we would not be reviewing any matter directly pertaining to his detention. *Kirby*, 794 F.2d at 247. Though the *ultimate* goal in " a case alleging post-conviction error "is release from confinement, the result of habeas review of the specific issue [] . . . is not in any way related to the confinement." *Id*. at 248. Accordingly, we have held repeatedly that "the scope of the writ [does not] reach this second tier of complaints about deficiencies in state post-conviction proceedings," noting that "the writ is not the proper means" to challenge "collateral matters" as opposed to "the underlying state conviction giving rise to the prisoner's incarceration." *Id*. at 248, 247; *see also Alley v. Bell*, 307 F.3d 380, 387 (6th Cir. 2002)("error committed during state post-conviction proceedings can not [*sic*] provide a basis for federal habeas relief" (citing *Kirby*, 794 F.2d at 247)); *Greer v. Mitchell*, 264 F.3d 663, 681 (6th Cir. 2001)("habeas corpus cannot be used to mount challenges to a state's scheme of post-conviction relief").

Cress v. Palmer, 484 F.3d 844, 853 (6th Cir. 2007).

Under the federal constitution, Franklin was not entitled to any post-conviction remedy, nor was he entitled to a hearing in his post-conviction proceedings. The claim advanced is one that is

not cognizable in habeas corpus, and it is accordingly denied.

Twenty-ninth Ground for Relief

In his next ground for relief, Franklin argues that Ohio's procedure for indicting, trying, and sentencing capital defendants is unconstitutional because it is applied in a racially disparate and otherwise arbitrary manner. (Petition, Doc. No. 21 at 33.) In his Traverse, Franklin elaborates upon the "otherwise arbitrary manner" portion of his claim to include several very familiar challenges to the constitutionality of Ohio's statutory scheme. (Traverse, Doc. No. 49 at 56-64.) Respondent acknowledges the claim is preserved for habeas corpus review, but argues that Ohio's statutes have repeatedly withstood the same attacks on their constitutionality. (Return of Writ, Doc. No. 39 at 120-22.)

Franklin's first sub-claim alleges that the Ohio death penalty scheme allows prosecutors unfettered discretion in determining whether to indict a capital offense. (Traverse, Doc. No. 49 at 57-58.) The Sixth Circuit rejected that claim in *Cooey v. Coyle*, 289 F.3d 882, 922 (6th Cir. 2002).

Next, Franklin contends the death penalty in Ohio is applied in a racially discriminatory manner. (Traverse, Doc. No. 49 at 57-59.) The United States Supreme Court has held that in order for a defendant to prove an equal protection violation, he must demonstrate "purposeful discrimination" in his own case, *McCleskey v. Kemp*, 481 U.S. 279, 293-94 (1987), which Franklin has failed to acknowledge, let alone show.

Franklin then contends that the Ohio scheme does not provide adequate guidance to sentencers respecting the weighing of aggravating circumstances and mitigating factors. (Traverse, Doc. No. 49 at 57, 59-60.) The Sixth Circuit rejected the same claim in *Cooey*, stating, "the Supreme Court has said: '[W]e have never . . . held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence. And indeed, our decisions

suggest that complete jury discretion is constitutionally permissible.'" *Cooey*, 289 F.3d at 924, *quoting Buchanan v. Angelone*, 522 U.S. 269, 276-77 (1998).

In his fourth sub-claim, Franklin contends that the Ohio death penalty scheme creates an impermissible risk of death to those who exercise the right to a jury trial. (Traverse, Doc. No. 49 at 57, 60-61.) He cites *United States v. Jackson*, 390 U.S. 570 (1968), in support, but the statute in that case is distinguishable from Ohio's death penalty scheme. In *Jackson*, a defendant who gave up his right to a jury trial could not be executed. *Id*. at 581. In Ohio, when a defendant pleads guilty or no contest to a capital offense, the trial judge *may* dismiss the death specifications. Ohio R. Crim. Proc. 11(C)(3). There is no requirement in Ohio law that the possibility of a death sentence be removed once the defendant has pleaded guilty or no contest. In addition, the same claim has been rejected by the Sixth Circuit in *Cooey*, 289 F.3d at 924-25.

Next, Franklin argues that Ohio's requirement that the aggravating circumstances be proved in the guilt phase of a capital trial precludes individualized sentencing. (Traverse, Doc. No. 49 at 57, 61-62.) His sub-claim fails on the authority of *Lowenfield v. Phelps*, 484 U.S. 231, 244-46 (1988), where the United States Supreme Court stated:

> The use of "aggravating circumstances" is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase.
>
> . . .
>
> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

While capital punishment schemes that allow aggravating circumstances to be established in the

penalty phase of a bifurcated trial has certainly been approved by the Supreme Court, a system permitting them to be determined in the guilt phase has not been found unconstitutional. Consequently, Franklin's sub-claim is meritless.

Franklin also contends that Ohio's requirement that any report resulting from a presentence investigation or mental examination be provided to the court, the jury if applicable, and the prosecutor, *see* Ohio Rev. Code § 2929.03(D)(1), unconstitutionally interferes with defense counsel's ability to represent his or her client. (Traverse, Doc. No. 49 at 57, 62.) In *Cooey*, the Sixth Circuit found the portion of the claim respecting a presentence investigation report unavailing, stating that "we could find no case where the Constitution has been construed as forbidding such a rule." 289 F.3d at 925. As for the "mental examination" portion of Franklin's claim, it fails as well. The Ohio statute requires any report generated as a result of a mental examination conducted for mitigation purposes to be provided to the trial court, jury, and prosecutor. It does not require a report to be created, however. Thus, as happened in Franklin's case, a psychologist may conduct a mental examination for mitigation purposes and testify to his or her findings without preparing a written report. (See Trial Tr., Vol. 15 at 66-90 (mitigation-phase testimony of Dr. Eugene Cherry).) In addition, the Supreme Court has never expressed any constitutional discomfort with the Ohio statutory provision Franklin challenges. Accordingly, Franklin's sixth sub-claim is denied.

In his seventh sub-claim, Franklin contends that Ohio's definition of "mitigating factor" violates the reliability component of the Eighth Amendment. (Traverse, Doc. No. 49 at 57, 62-63.) More precisely, he argues that Ohio's "catch-all" mitigating factor, which allows a capital jury to consider "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death," Ohio Rev. Code § 2929.04(B)(7), when determining the appropriate sentence, converts what should be evidence of mitigation into aggravation. (Traverse, Doc. No. 49 at 62-63.) The Sixth Circuit rejected the same claim in *Cooey*, reasoning that (1) there was no evidence of any

Ohio court ever having used evidence presented under the relevant provision as aggravating instead of mitigating, (2) Cooey did not and could not show that such a thing occurred in his trial, and (3) even if the statutory provision had the potential for unreliability Cooey claimed, there was no reason to think that alone would be constitutional error. *Cooey*, 289 F.3d at 926. Franklin's claim is indistinguishable from Cooey's, and it meets the same fate.

Finally, Franklin contends that Ohio's death penalty scheme is unreliable because it fails to provide adequate appellate review of death sentences. (Traverse, Doc. No. 49 at 57, 63-64.) What Franklin actually contests, however, is the adequacy of the Ohio Supreme Court's statutory duty to conduct a proportionality review of a particular death sentence by comparing it to other similar cases. *See* Ohio Rev. Code § 2929.05(A). Franklin cites, among other cases, *Pulley v. Harris*, 465 U.S. 37 (1984), as the law governing his claim, but ignores the Court's holding in that case, which it set forth as follows:

> The proportionality review sought by Harris, required by the Court of Appeals, and provided for in numerous state statutes is of a different sort. This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because it is disproportionate to the punishment imposed on others convicted of the same crime. The issue in this case, therefore, is whether the Eighth Amendment, applicable to the States through the Fourteenth Amendment, requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases . . . . Harris insists that it does and that this is the invariable rule in every case. . . . We do not agree.

Id. at 43-44; *see also Cooey*, 289 F.3d at 928. Thus, the constitution does not guarantee Franklin the exhaustive proportionality review to which he contends he is entitled. Accordingly, his final sub-claim of his twenty-ninth ground for relief is denied.

Each of Franklin's attacks on the constitutionality of the Ohio death penalty scheme has failed. Consequently, his twenty-ninth ground for relief is denied.

Thirtieth, Thirty-first, and Thirty-second Grounds for Relief

In this trio of claims, Franklin alleges his mental illness precludes his execution under various constitutional theories. (Petition, Doc. No. 21 at 34-35.) He argues that the Supreme Court's ruling prohibiting the execution of the mentally retarded, *see Atkins v. Virginia*, 536 U.S. 304 (2002), should be extended to include the seriously mentally ill as well. *Id*. The very nature of the argument admits its inadequacy. The AEDPA provides that this Court may only grant habeas corpus relief if the Supreme Court has already interpreted the federal constitution in a way that favors the petitioner. 28 U.S.C. § 2254(d)(1).

The Supreme Court has long held that the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane. *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986), *see also Panetti v. Quarterman*, ___ U.S. ___, ___, 127 S.Ct. 2842, 2855 (2007). Franklin does not contend he is insane, however. (Traverse, Doc. No. 49 at 64-67.) Even if he had done so, and had been able to so demonstrate, his claims would not be ripe, because his execution is not imminent. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998); *see also Panetti*, 127 S.Ct. at 2855. In addition, although the Supreme Court has recognized that the AEDPA does not prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced," *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003), extending the holding of *Atkins* to exempt the mentally ill, or even just the seriously mentally ill, from execution exceeds the limited elasticity of the AEDPA and the Court's relevant holdings. For all of these reasons, Franklin thirtieth, thirty-first, and thirty-second grounds for relief fail, and they are denied.

Thirty-third Ground for Relief

In his thirty-third ground for relief, Franklin alleges that the "prior calculation and design"

element of the aggravated murder charges, and thus his guilt, was not established beyond a reasonable doubt, and that his convictions therefore violate the holding of *In re Winship*, 397 U.S. 358 (1970). (Petition, Doc. No. 21 at 36-37; Traverse, Doc. No. 49 at 75-76.) Respondent acknowledges the claim is preserved for habeas corpus review, but that the Ohio Supreme Court's decision on the matter is neither contrary to nor an unreasonable application of federal law. (Return of Writ, Doc. No. 39 at 126-27.) Franklin counters that the Ohio Supreme Court failed to comment on whether Franklin had developed a plan to commit the murders, or whether they were committed while Franklin was in a rage. (Traverse, Doc. No. 49 at 75-76.)

The problem with Franklin's argument is that he relies upon federal law (*In re Winship*) for the proposition that guilt must be proven beyond a reasonable doubt for any conviction, yet he relies on four factors that "Ohio courts have generally looked to" in evaluating on appeal whether guilt was so proven. (Traverse, Doc. No. 49 at 75, *citing State v. Jenkins*, 48 Ohio App.2d 99, 102, 355 N.E.2d 825, 828 (1976).) He then concludes that the Ohio Supreme Court, which is a court superior to the *Jenkins* court, rendered a decision that was contrary to or an unreasonable application of *federal law* because the supreme court's opinion did not address every factor "generally looked to" in Ohio's courts. There is no federal constitutional requirement that a state high court consider and discuss each of a lower state court's "generally looked to" factors in its appellate review of a conviction. Certainly a state supreme court's failure to do so does not run afoul of *Winship* or any other federal law.

In fact, when Franklin raised the instant claim on direct appeal, the Ohio Supreme Court observed that it had "never set forth a bright-line test for determining the existence of prior calculation and design," but articulated three factors pertinent to such an inquiry. *Franklin*, 97 Ohio St. 3d at 14. Those factors are as follows:

> 1. Did the accused and victim know each other, and if so, was that relationship strained?

2. Did the accused give thought or preparation to choosing the murder weapon or murder site?, and

3. Was the act drawn out or "an almost instantaneous eruption of events"?

Id., *citing State v. Taylor*, 78 Ohio St. 3d 15, 19, 676 N.E.2d 82 (1997).[17] The court proceeded to address each of the three factors, concluding that the evidence presented at trial, when viewed in a light most favorable to the prosecution, was sufficient to convince a rational trier of fact beyond a reasonable doubt that the murders were committed with prior calculation and design. *Franklin*, 97 Ohio St. 3d at 15. Franklin's citation to a lower court's slightly different formulation of the factors to be considered in such an inquiry falls far short of demonstrating error at all, let alone error of a federal constitutional dimension.

Franklin's specific complaints are that the state court did not make any finding as to whether the evidence showed Franklin had made any plan to kill his three relatives, and that the court did not address the evidence of an argument between Franklin and his uncle just prior to the murders. (Traverse, Doc. No. 49 at 75-76.) But the state court did find that

> There is . . . evidence to support the view that the accused gave thought and preparation to choosing the murder weapon and the murder site. He used various weapons on the three victims . . . [and] proceeded to intentionally set a fire.
>
> . . .
>
> [I]t does not appear that the murders were instantaneous events, but instead were carried out over a period of time. "[T]he jury could find prior calculation and design, * * * based on the protracted nature of the murder." *State v. Allen* (1995), 73 Ohio St.3d 626, 632, 653 N.E.2d 675.

Franklin, 97 Ohio St. 3d at 14-15. In addition, the court found that Franklin's relationships with the

[17]The Court notes that on March 3, 2003, a writ of habeas corpus was granted in *Taylor v. Mitchell*, 296 F.Supp.2d 784 (N.D. Ohio 2003), on Taylor's claim that there was insufficient evidence to prove beyond a reasonable doubt prior calculation and design. Nevertheless, the factors used in Ohio for assessing an insufficient evidence claim relating to prior calculation and design remain valid. On January 27, 2004, Taylor died of natural causes in prison.

all three murder victims were strained, and that when Franklin was being interrogated by police, he had blurted out that he killed his relatives because Anthony had raped him years before and had accused him of being gay the night of the murders. *Id.* As for Franklin's contention that the state court did not factor in that Franklin went into a rage after being so provoked by Anthony's accusation, failing to do so is not inconsistent with the court's duty to view the evidence in a light most favorable to the prosecution. Moreover, it is unlikely that Franklin's statements to Dr. Cherry about having gone into a rage, to which Dr. Cherry testified at trial (Trial Tr., Vol. 12 at 1142), were imbued with the weight and credibility sufficient to call into question the reasonableness of the Ohio Supreme Court's finding that prior calculation and design had been proven beyond a reasonable doubt at trial.

Franklin has not demonstrated that the Ohio Supreme Court's decision rejecting his claim that the evidence was insufficient to show that he committed the murders with prior calculation and design was contrary to or an unreasonable application of federal law as determined by the United States Supreme Court. His thirty-third ground for relief is consequently denied.

Thirty-fourth Ground for Relief

In his thirty-fourth ground for relief, Franklin claims the trial court failed to properly instruct the jury on the burden of proof and the definition of reasonable doubt. (Petition, Doc. No. 21 at 37.) Respondent contends the claim is procedurally defaulted because Franklin never raised it in any state court, and also that the trial court's instructions were not in conflict with federal law. (Return of Writ, Doc. No. 39 at 129-30.) Franklin is silent as to Respondent's procedural default defense, and does not elaborate on his claim respecting the instruction on the burden of proof, but states that Ohio's definition of "reasonable doubt" sets an unreasonably low bar in capital cases. (Traverse, Doc. No. 49 at 77-79.)

Franklin never raised his claim on direct appeal or in any state petition for post-conviction relief. Franklin has made no effort to demonstrate cause or prejudice to excuse the default. His thirty-fourth claim is accordingly denied as procedurally defaulted.

Even if he had preserved the claim, however, it would fail. The Sixth Circuit Court of Appeals has consistently rejected challenges to Ohio's articulation of the reasonable doubt standard. *White v. Mitchell*, 431 F.3d 517, 533-34 (6th Cir. 2005); *Buell v. Mitchell*, 274 F.3d 337, 366 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417, 437 (6th Cir. 2001); *Scott v. Mitchell*, 209 F.3d 854, 884 (6th Cir. 2000); *Byrd v. Collins*, 209 F.3d 486, 527 (6th Cir. 2000). Franklin provides no convincing reason why this line of cases does not doom his claim as well.

Franklin's claim of erroneous jury instructions respecting the burden of proof and the definition of reasonable doubt is procedurally defaulted, and unexcused by cause and prejudice. His thirty-fourth ground for relief is accordingly denied.

Thirty-fifth Ground for Relief

In his thirty-fifth ground for relief, Franklin contends the instruction to the jury on the culpable mental state required for conviction was constitutionally inadequate. (Petition, Doc. No. 21 at 37.) Respondent argues the claim is both procedurally defaulted and meritless. (Return of Writ, Doc. No. 39 at 132-34.) Ignoring Respondent's procedural default defense, Franklin counters that the instruction as given was an irrebuttable direction to the jury to find intent based upon his voluntary actions, contrary to *Sandstrom v. Montana*, 442 U.S. 510 (1979).

When Franklin raised the instant claim on direct appeal, the Ohio Supreme Court observed that Franklin had not objected to the instruction at trial, and that he consequently waived all but plain error. *Franklin*, 97 Ohio St. 3d at 15. As has already been noted above, Ohio's contemporaneous objection rule — that parties must preserve errors for appeal by calling them to the attention of the

trial court at a time when the error could have been avoided or corrected, set forth in *State v. Williams*, 51 Ohio St. 2d 112, 364 N.E. 2d 1364 (1977) *vacated in part on other grounds, Williams v. Ohio*, 438 U.S. 911 (1978) — is an adequate and independent state ground. *Scott v. Mitchell*, 209 F.3d 854, 865-68 (6th Cir. 2000), *citing Engle v. Isaac*, 456 U.S. 107, 124-29 (1982). The Ohio Supreme Court applied the contemporaneous objection rule in Franklin's case, and Franklin has offered no excusing cause or prejudice for the default. Accordingly, Franklin's thirty-fifth ground for relief is denied because it is procedurally defaulted.

Even if that were not so, however, Franklin's claim would fail, as it has when pursued by other habeas corpus petitioners. *Buell v. Mitchell*, 274 F.3d 337, 366 (6th Cir. 2001); *Roberts v. Marshall*, 736 F.2d 1126, 1127-28 (6th Cir. 1984). Franklin provides no basis upon which his claim should be decided differently from the line of cases rejecting the same claim.

Franklin failed to object to the challenged jury instruction at his trial, and the Ohio Supreme Court relied on an independent and adequate state procedural rule in denying his claim of constitutional error. Franklin offers neither cause for nor prejudice from the alleged error to excuse his procedural default, and his thirty-fifth ground for relief is denied for that reason. Even if he had preserved the alleged error for habeas corpus review, however, it would be unavailing.

Thirty-sixth Ground for Relief

In his thirty-sixth ground for relief, Franklin challenges another part of the guilt-phase jury instruction, claiming the trial court directed the jury that they must first unanimously find Franklin not guilty of the most severe offenses before considering the lesser included offenses. (Petition, Doc. No. 21 at 38.) Respondent states that the Ohio Supreme Court relied on an independent and adequate state procedural rule in rejecting Franklin's claim on direct appeal, and that in any case, the claim is meritless. (Return of Writ, Doc. No. 39 at 134-37.) Once again, Franklin ignores

Respondent's procedural defense, arguing only the merits of his claim in his traverse. (Traverse, Doc. No. 49 at 82-84.)

When presented with the claim on direct appeal, the Ohio Supreme Court found that Franklin did not object to the relevant instruction at trial. *Franklin*, 97 Ohio St. 3d at 15. Consequently, all but plain error was waived, and, finding none, the state court overruled Franklin's claimed error. *Id*. at 15, 17. As noted above, Ohio's contemporaneous objection rule has been recognized as an independent and adequate state procedural ground for federal habeas corpus review purposes. *Scott v. Mitchell*, 209 F.3d 854, 865-68 (6th Cir. 2000). As Franklin has not demonstrated cause for his default or prejudice therefrom, his claim is not preserved for habeas corpus review. Accordingly, being in the same procedural posture as his previous claim, Franklin's thirty-sixth ground for relief is denied as procedurally defaulted.

Franklin's claim would fail regardless. Although he never quotes or identifies where in the record this Court might find the instruction he complains of, the Court assumes Franklin refers to the following instruction:

> If you find the State proved beyond a reasonable doubt all of the essential elements of the offense of Aggravated Murder as charged in any one or more of the Counts of the Indictment, then your Verdict must be Guilty of that offense, and in that event, you will not consider any lesser charge.
>
> If you find that the State failed to prove beyond a reasonable doubt Aggravated Murder, or if you are unable to agree that the State proved Aggravated Murder, you will proceed with your deliberations and decide whether the State has proved beyond a reasonable doubt the elements of the lesser included offense of murder.

(Trial Tr., Vol. 14 at 1663.)

The Sixth Circuit has commented as follows respecting federal review of jury instructions in a state proceeding:

> In a federal habeas action, errors in jury instructions are generally not cognizable unless they deprive [a] petitioner of a fundamentally fair

> trial. *See Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Wood v. Marshall*, 790 F.2d 548, 551-52 (6th Cir. 1986). To warrant federal habeas corpus relief based on instructions that were allegedly erroneous under state law, [a] petitioner must demonstrate that the error violated a federal constitutional right. *See Cupp v. Naughten*, 414 U.S. [141], 146 [(1973)]. The issue . . . is thus not whether the . . . instruction was undesirable or erroneous under Ohio law, but rather whether the instruction, by itself, so infected the entire trial that the resulting conviction violated due process.

Weese v. Turner, 187 F.3d 639, 1999 WL 427151 at *3 (6th Cir. 1999)(table). In *Bonnell v. Mitchel*, 301 F. Supp.2d 698, 738 (N.D. Ohio 2004), the jury was instructed that "if you find that the State failed to prove prior calculation and design, you must find the Defendant non [sic] guilty of aggravated murder . . . . [Y]ou will proceed with your deliberations and decide whether or not the state has proved beyond a reasonable doubt the elements of the lesser offense of murder." The court denied Bonnell's "acquittal first" claim citing *Weese*, and noting that nothing in the instructions suggested that Bonnell had to have been unanimously acquitted of aggravated murder before the jury could consider the lesser-included offense of murder. *Id*. at 740.

The instruction Franklin challenges is indistinguishable from that in *Bonnell*, except that in Franklin's trial, the court explicitly communicated to the jurors that if they could not agree that the state had carried its burden as to the aggravated murder charge, they should consider the lesser included offense of murder. In other words, if even one juror was unconvinced that Franklin was guilty of aggravated murder, the instruction made it clear that the jury should proceed to determine whether he was guilty of the lesser included offense of murder. This is not the "acquittal first" instruction Franklin makes it out to be. He contends the instruction required the jurors to unanimously agree that Franklin *was not* guilty of aggravated murder before considering any lesser included offenses. (Traverse, Doc. No. 49 at 82.) Instead, it required the jurors to either unanimously agree that he *was* guilty of aggravated murder, or if they were unable to do that, move on to consider the lesser included offense.

Franklin also argues that his jury was precluded from fairly considering the evidence of provocation he presented as an affirmative defense to the aggravated murder charges because they were instructed that if they unanimously agreed that every element of aggravated murder was proven beyond a reasonable doubt, they must find him guilty of aggravated murder. (Traverse, Doc. No. 49 at 82-84.) Franklin argues that procedure prevented the jury from considering a verdict of voluntary manslaughter. *Id*. In the Ohio Supreme Court's plain error review of Franklin's claim, the court agreed that the instruction on the offense of voluntary manslaughter was erroneous, although not in a way that benefitted Franklin. Instead, the court stated as follows:

> "An offense is an 'inferior degree' of the indicted offense where its elements are identical to or contained within the indicted offense, except for one or more additional mitigating elements." *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph two of the syllabus. Voluntary manslaughter is an inferior degree of aggravated murder. *State v. Tyler* (1990), 50 Ohio St.3d 24, 36, 553 N.E.2d 576. It is not, however, a lesser included offense of aggravated murder. *State v. Shane* (1992), 63 Ohio St.3d 630, [632,] 590 N.E.2d 272. It consists of knowingly causing a death "while under the influence of sudden passion or in a sudden fit of rage. * * * brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the [offender] into using deadly force * * *." R.C. 2903.03(A).
>
> The instruction was erroneous, since there was no evidence adduced to entitle appellant to a jury instruction on voluntary manslaughter. However, the erroneous instruction does not require reversal.
>
> In order to have a jury instruction on voluntary manslaughter included in the court's charge, a jury must be able to reasonably find that Anthony had seriously provoked appellant and that the serious provocation was reasonably sufficient to have incited him to use deadly force. State v. Lawrence (1989), 44 Ohio St.3d 24, 26, 541 N.E.2d 451. The only provocation alleged was Anthony's calling appellant "gay." However, this evidence was inadmissible hearsay, since it involved out-of-court statements made to Dr. Cherry and to a detective. Evid. R. 801(C) and 802. Even if the jury had been allowed to consider the statements, it could not reasonably have found that the statement was a serious provocation. The provocation must be such that a reasonable person would be provoked to use deadly force, but "[w]ords alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most

> situations." *Shane*, 63 Ohio St.3d 630, 590 N.E.2d 272, paragraph two of the syllabus. Anthony's use of words toward appellant did not rise to the level of sufficient provocation in this case. Therefore, the instruction, while erroneously labeling voluntary manslaughter as a lesser included offense of murder, did not amount to plain error. Regardless of the label, appellant could not be found to have committed voluntary manslaughter.

Franklin, 97 Ohio St. 3d at 17-18. Franklin ignores the state court's discussion of the matter, and even if Franklin's claim were preserved, this Court would find no fault with the state court's reasoning.

To summarize, Franklin's claim was denied in the state court because he failed to follow an independent and adequate state procedural rule, resulting in procedural default of the claim for habeas corpus purposes. Franklin offered no excuse for the default, and his claim is accordingly denied as procedurally defaulted. Even if he had preserved the claim for habeas review, however, he has not demonstrated entitlement to the relief requested.

Thirty-seventh Ground for Relief

Franklin's thirty-seventh ground for relief concerns an allegedly unconstitutional instruction on causation in the guilt phase of his trial.[18] (Petition, Doc. No. 21 at 38.) Respondent advances a procedural default defense, and argues in the alternative that the claim is meritless. (Return of Writ, Doc. No. 39 at 137-39.) Franklin ignores Respondent's procedural defense, and argues that the trial court's instruction on causation "abrogated the statutory requirement that Franklin be proven beyond a reasonable doubt to have specific intent to cause a particular result, that being the death of another human being." (Traverse, Doc. No. 49 at 85.)

Respondent correctly identifies Franklin's claim as procedurally defaulted. The Ohio

[18]Franklin's claim, in its entirety, is as follows: "The trial court gave an erroneous instruction on causation." (Petition, Doc. No. 21 at 38.) This is a textbook example of improperly conclusory pleading under the Habeas Rules.

Supreme Court observed that Franklin failed to object to the challenged instruction at trial and that all but plain error was therefore waived. *Franklin*, 97 Ohio St. 3d at 15. As noted above, Ohio's contemporaneous objection rule has been recognized as an independent and adequate state procedural ground for federal habeas corpus review purposes. *Scott v. Mitchell*, 209 F.3d 854, 865-68 (6th Cir. 2000). The state court's review for plain error found none, and the proposition of law was overruled. *Franklin*, 97 Ohio St. 3d at 15-16. Franklin has provided no excusing cause for or prejudice from his procedural default, leaving this Court no option but to deny his claim as procedurally defaulted.

In any event, that the instruction may have been contrary to an Ohio statutory requirement is of no concern to this Court. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Furthermore, the Sixth Circuit Court of Appeals rejected an identical claim in another capital case, *Byrd v. Collins*, 209 F.3d 486, 527 (6th Cir. 2000). Accordingly, Franklin's thirty-seventh ground for relief is denied.

Thirty-eighth Ground for Relief

Franklin next claims that the trial court's instruction to the jury prevented jurors from considering Dr. Cherry's testimony as mitigation in violation of *Lockett v. Ohio*, 438 U.S. 668 (1984).[19] (Petition, Doc. No. 21 at 38.) Respondent argues the claim is both procedurally defaulted and meritless. (Return of Writ, Doc. No. 39 at 139-41.) Franklin again ignores Respondent's procedural defense, and argues that the trial court's *guilt* phase instruction on the proper use of the psychological evidence failed to inform the jurors that they could consider Dr. Cherry's statements in the *mitigation* phase. (Traverse, Doc. No. 49 at 85-86.)

The Ohio Supreme Court found that Franklin had failed to lodge a contemporaneous objection to the challenged instruction at trial. *Franklin*, 97 Ohio St. 3d at 15. That being the case,

[19]The Court understands Franklin to mean *Lockett v. Ohio*, 438 U.S. 586 (1978).

all but plain error was waived, and the state court found none sufficient to warrant a full consideration of the claim. *Id*. at 15-16. As noted above, Ohio's contemporaneous objection rule has been recognized as an independent and adequate state procedural ground for federal habeas corpus review purposes. *Scott v. Mitchell*, 209 F.3d 854, 865-68 (6th Cir. 2000). As Franklin has made no effort to demonstrate cause and prejudice for the default, his thirty-eighth ground for relief is denied on procedural default grounds.

Furthermore, the claim is completely meritless. Franklin argues that the jury should have been pre-instructed on mitigation issues before his guilt had even been determined. This Court has found no basis in law to support such a suggestion, and the case cited by Franklin is off the mark. *See Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (stating that a sentencer must not be precluded from considering a as mitigating factor any relevant mitigating evidence, any aspect of a defendant's character or record, or any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death). The Supreme Court's use of the word "sentencer" leaves no doubt that the mitigating evidence is properly considered in the sentencing phase, not the guilt phase of a capital trial, as Franklin contends. Franklin fails to acknowledge that the jury was instructed in the mitigation phase to consider any evidence from the guilt phase that was relevant to any mitigating factor, and that Dr. Cherry testified in *both* phases of the trial, which allowed the defense to bring out the most salient and persuasive psychological evidence in closer temporal proximity to the jury's sentencing deliberations for maximum benefit to Franklin. (Trial Tr., Vol. 15 at 66-90, 149.) Furthermore, the jury was instructed in the mitigation phase to consider the testimony received from the mitigation phase witnesses, and the relevant mitigating factors were explained to the jurors. *Id*. at 149-50, 154-55. The trial court also linked the psychological evidence offered to both the "mental disease or defect" and "catch-all" mitigating factors, in its instruction to the jurors. *Id*. at 155. The guilt-phase instruction on the proper use of Dr. Cherry's guilt-phase testimony is irrelevant to the

use of his mitigation-phase testimony in the mitigation phase of the trial. The jury was adequately instructed on the use of Dr. Cherry's guilt- and mitigation-phase testimony in the mitigation phase of the trial. Therefore, even if Franklin had preserved his claim for habeas corpus review, it would be denied as lacking merit.

Franklin's thirty-eighth ground for relief is procedurally defaulted and it is accordingly denied.

Thirty-ninth Ground for Relief

In his thirty-ninth ground for relief, Franklin contends that constitutional error resulted from the trial court's failure to properly instruct the jury on weighing the aggravating circumstances and mitigating factors. (Petition, Doc. No. 21 at 38-39.) Respondent acknowledges that Franklin raised the claim in the state court and that it is consequently preserved for habeas corpus review, but that it is meritless. (Return of Writ, Doc. No. 39 at 112-15.) Franklin counters that the instructions as given required the jury to give undue weight to the aggravating circumstances when weighing them against the mitigating factors, rendering their sentencing recommendations unfair and arbitrary. (Traverse, Doc. No. 49 at 87-88.)

Franklin raised the instant claim as part of his sixth proposition of law on direct appeal to the Ohio Supreme Court. (Appendix, Vol. 6 at 133-36.) In overruling Franklin's claim, the court stated as follows:

> On the subject of the death penalty specifications, [A]ppellant lastly asserts that the instructions given by the trial court allowed the jury to group together all of the aggravating circumstances for all of the counts against [A]ppellant. It is true that "[o]nly the aggravating circumstances related to a given count may be considered in assessing the penalty for that count." *State v. Cooey* (1989), 46 Ohio St.3d 20, 544 N.E.2d 895, paragraph three of the syllabus. No lengthy analysis is required here, since we find no evidence that the lower court violated this maxim. Its instructions concisely guided the jury in its consideration of the aggravating circumstances.

Franklin, 97 Ohio St. 3d at 13. Franklin has not explained how the Ohio Supreme Court's decision is contrary to or an unreasonable application of clearly established federal law, nor does he identify, either by quotation or by reference to the record, precisely which instructions he is challenging.

In his twenty-fifth ground for relief, above, Franklin argued unsuccessfully that the jury's consideration of duplicative aggravating circumstances deprived him of a fair sentencing hearing. Practically speaking, the failure of the trial court to merge the allegedly duplicative aggravating circumstances and the court's failure to instruct the jury that the allegedly duplicative aggravating circumstances had been merged are the same claim. Aggravating circumstances have no physical existence so they cannot be physically merged. The only way to merge two or more aggravating circumstances is through instruction to the body performing the sentencing function, the jury in Franklin's case. Thus, the judge's merging of the duplicative aggravating circumstances would have been accomplished through jury instructions, making Franklin's twenty-fifth ground for relief substantively the same as the instant claim. In *Wickline v. Mitchell*, 319 F.3d 813, 824 (6th Cir. 2003), the Sixth Circuit Court of Appeals found that the state supreme court's independent weighing of the merged aggravating circumstances against the mitigating factors cured any error resulting from the trial court's failure to merge the aggravating circumstances prior to the jury's sentencing determination. Franklin has not persuaded this Court that the outcome of his claim should be different than Wickline's.

Franklin has failed to show that he is entitled to habeas corpus relief because of the trial court's failure to instruct the jury that certain unspecified aggravating circumstances should be merged prior to their being weighed against the mitigating factors. As such, he has not demonstrated that the Ohio Supreme Court's resolution of his claim was contrary to or an unreasonable application of clearly established federal law. Accordingly, his thirty-ninth ground for relief is denied.

Fortieth Ground for Relief

In his fortieth ground for relief, Franklin contends the jurors improperly considered extrinsic evidence, to wit, a Bible, just prior to the jury's sentencing deliberations. (Petition, Doc. No. 21 at 38.) Respondent does not challenge the procedural vitality of the claim, but relies on the state court's determination that the juror's affidavit submitted in support of the claim in state post-conviction proceedings was inadmissible under Ohio R. Evid. 606, otherwise known as the "aliunde rule." (Return of Writ, Doc. No. 39 at 142-44.) Franklin maintains that the affidavit was evidence of "extraneous prejudicial information," and argues it is admissible to support his claim. (Traverse, Doc. No. 49 at 88-90.)

Franklin presented the issue as his fourteenth claim for relief in his state post-conviction proceedings. (Appendix, Vol. 9 at 146-48.) In support, he attached a juror's affidavit, in which the juror averred, in relevant part, as follows:

> During our sentencing deliberations, several jurors had difficulties, in light of their moral and religious views, to consider the imposition of the death penalty. One evening prior to this process, I went home and reviewed my Bible scriptures to deal with my own feelings on this issue. After we began our deliberations, I shared the information I obtained from the Bible with the other jury members.

(Affidavit of Kathryn Levens, Appendix, Vol. 9 at 213.) The trial court rejected Franklin's claim, explaining that Levens' affidavit was excluded under Ohio R. Evid. 606, and that the affidavit did not establish any "extraneous influence such as a bribe, threat, or improprieties by a court officer." (Appendix, Vol. 13 at 36-37.)

When Franklin appealed the trial court's decision to the state court of appeals, the court stated that it could not use the evidentiary rule to avoid considering a possible constitutional violation. *State v. Franklin*, No. 19041, 2002 WL 1000415 at *11-12 (Ohio App. 2d Dist. May 17, 2002)(unreported). The court proceeded to squarely confront the constitutional issue, concluding that "[w]hile it is questionable whether the juror's actions in sharing her readings constitutes an

improper communication at all . . . Franklin has presented no evidence that the juror's actions had any effect on the jury." *Id*. at *12. The court noted the absence of an affidavit from any of the other jurors stating Levens' conduct had any impact on the jury's deliberations or verdict, and observed that Levens' affidavit contained no such information either. *Id*. A subsequent appeal to the Ohio Supreme Court was not allowed. *State v. Franklin*, 98 Ohio St. 3d 1422, 782 N.E.2d 77 (2003)(table).

The federal law governing Franklin's claim has been cogently set forth by the Fifth Circuit Court of Appeals as follows:

> [T]he Sixth Amendment [] forbids a jury from being exposed to external influences during its deliberations. *See Parker v. Gladden*, 385 U.S. 363, 364-65 (1966) (stating that 'the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel' (internal quotation marks omitted)); *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) ('The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.'); *Remmer v. United States*, 347 U.S. 227, 229 (1954) (stating that 'private communication, contact, or tampering' with the jury is presumptively prejudicial); *Mattox v. United States*, 146 U.S. 140, 149 (1892) (stating that 'in capital cases [] the jury should pass upon the case free from external causes tending to disturb the exercise of deliberated and unbiased judgment.').

Oliver v. Quarterman, 541 F.3d 329, 334 (5th Cir. 2008). Thus, the Supreme Court has clearly established a constitutional rule forbidding a jury from being exposed to an external influence. *Id*. The question remains, however, as to whether the Bible, or more precisely in this case, ideas contained in the Bible, constitute an external influence.

The Fourth Circuit Court of Appeals has held that the Bible was not an external influence where a juror read aloud from a Bible in the jury room to convince other jurors to return a death verdict. *Robinson v. Polk*, 438 F.3d 350 (4th Cir. 2006). The court reasoned that "reading the Bible is analogous to the situation where a juror quotes the Bible from memory, which assuredly would

not be considered an improper influence." *Id*. at 364. In contrast, the Sixth Circuit Court of Appeals has not addressed that question directly, but it has implied in *dicta* that the actual presence of a Bible in the jury room is an external influence that might prejudice the jury's deliberations. *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998). Recently, the First Circuit Court of Appeals has also suggested as much. *United States v. Lara-Ramirez,* 519 F.3d 76, 88 (1st Cir. 2008). The Eleventh Circuit Court of Appeals has held that a jury's use of a Bible during their deliberations was presumptively prejudicial, but found the state had rebutted the presumption. *McNair v. Campbell*, 416 F.3d 1291, 1307-08 (11th Cir. 2005). The Fifth Circuit has also held that jurors' reading of a Bible in the jury room was an extraneous influence. *Oliver v. Quarterman*, 541 D.3d 329, 339-40 (5th Cir. 2008). That court distinguished the Fourth Circuit's contrary holding in *Robinson, supra*, by explaining that the Bible verses at issue in *Robinson* expressed general concepts such as "an eye for an eye," whereas the passages read and discussed by the jurors in *Oliver* provided specific guidance on the appropriate punishment for the defendant's particular method of murder. *Oliver,* 541 F.3d at 339-40.

Those cases all commented on whether a Bible *in the jury room* constituted an external influence. In Franklin's case, however, it is agreed that there was no Bible in the jury room, and the dispute is whether a juror's consultation of the Bible outside the jury room, and her subsequent discussion of her findings in the jury room, was an external influence, or whether it was instead a subjective opinion of the juror, her attitudinal exposition, or her philosophy. *See United States v. McKinney*, 429 F.2d 1019, 1022-23 (5th Cir. 1970) (stating that a juror's subjective opinions, attitudinal expositions, and philosophies "involve the very human elements that constitute one of the strengths of our jury system, and we cannot and should not excommunicate them from jury deliberations").

Most similar to the factual scenario in Franklin's case is that in *Fields v. Brown,* 503 F.3d 755 (9th Cir. 2007)(*en banc*). There, during an overnight break from deliberations in the sentencing

phase of a capital trial, a juror consulted his Bible and other reference texts, making notes of the passages he found that militated "for" and "against" imposition of the death penalty. *Id*. at 777. The next day, when deliberations resumed, the juror shared the information he had collected with at least some of the other jurors. *Id*. at 777-78. The court found that the juror's notes contained a "mix of ideas 'for' and 'against' capital punishment" and that "[b]oth the Biblical verses and the other concepts contained in the notes are notions of general currency that inform the moral judgment that capital-case jurors are called upon to make." *Id*. at 780. The court also quoted Justice Stevens in his *Sawyer v. Whitley*, 505 U.S. 333, 370 (1992) concurrence in which he observed that, "[w]hile the question of innocence or guilt of the offense is essentially a question of fact, the choice between life imprisonment and capital punishment is both a question of underlying fact and a matter of reasoned moral judgment." *Fields*, 503 F.3d at 780. One might predict that the Ninth Circuit would have concluded that the Bible, used as it was in Fields' case, was not an external influence, but the court did not do so. Instead, it sidestepped that question, and found that whether or not there was juror misconduct, the notes had no substantial and injurious effect or influence on the jury's sentencing verdict. *Id*. at 781. Thus, the court did not feel compelled to decide whether the Bible's use constituted an internal or external influence.

However "there is no Supreme Court authority on Biblical references in the jury room," *Fields*, 503 F.3d at 778, and there exists no consensus among the circuits as to whether the Bible or its teachings are an internal or external influence when read or discussed by jurors in their deliberations, *see* 3 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 6:18 (3d ed. 2008). Thus, this Court has no basis upon which to conclude that allowing the verdict to stand despite Juror Levens' Bible reading, or her sharing her findings with the other jurors, was an objectively unreasonable application of clearly established law as decided by the Supreme Court.

Even if this Court could agree with Franklin's argument that the Bible was an external influence, however, his claim would fail for two reasons. First, there is no evidence demonstrating which Bible passages Juror Levens consulted. Consequently, there is no way to discern whether the verses were of a general or more specific nature, as distinguished by *Fields, supra*. Second, nothing in Levens' affidavit, the record before the state courts, or the record before this Court demonstrates any influence the Bible passages might have had on the jury's sentencing verdict. Therefore, even if Franklin had cleared the hurdle of demonstrating an extraneous influence, he could not, and has not, demonstrated any prejudice from the jurors' consideration of whatever Bible verses Juror Levens brought to them. Accordingly, Franklin has not shown that the Ohio appellate court's decision rejecting his claim was in any way contrary to or an unreasonable application of federal law as determined by the Supreme Court. As such, he is not entitled to habeas corpus relief, and his fortieth ground for relief is denied.

Forty-first Ground for Relief

In his forty-first ground for relief, Franklin contends the admission of improper victim impact evidence denied him a fair trial. (Petition, Doc. No. 21 at 40.) Respondent argues the claim is procedurally defaulted, and also meritless. (Return of Writ, Doc. No. 39 at 145-51.) Franklin counters that his claim is properly preserved, and that even if this Court finds otherwise, he has demonstrated cause for the default and prejudice from the constitutional violation. (Traverse, Doc. No. 49 at 90-97.)

Franklin's claim refers to Stephanie Franklin's testimony that Ophelia Franklin's medical condition required her to wear a diaper, Ivory Franklin, Jr.'s, testimony that his parents would have celebrated fifty years of marriage the year they were murdered, and Ivory Franklin, Jr.'s, identification of photographs of the victims in life. (Petition, Doc. No. 21 at 40.) Franklin raised

the issue as part of his fifth proposition of law on direct appeal to the Ohio Supreme Court. (Appendix, Vol. 6 at 114-15.) The state court observed that Franklin failed to object to admission of the alleged victim impact evidence at trial and that all but plain error was consequently waived. *Franklin*, 97 Ohio St. 3d at 7. The court concluded there was no plain error and therefore no prosecutorial misconduct. *Id*.

Notwithstanding Franklin's argument to the contrary, Ohio's contemporaneous objection rule has been found by the Sixth Circuit Court of Appeals to be an independent and adequate state procedural rule in the habeas corpus context. *Scott v. Mitchell*, 209 F.3d 854, 865-68 (6th Cir. 2000), *citing Engle v. Isaac*, 456 U.S. 107, 124-29 (1982). In addition, the Ohio Supreme Court enforced the rule against Franklin in its appellate review of his case. Consequently, unless Franklin can demonstrate cause for the default and prejudice therefrom, his forty-first ground for relief is procedurally defaulted.

Franklin contends his trial counsel's ineffectiveness provides cause for his procedural default. (Traverse, Doc. No. 49 at 94.) "The procedural default doctrine and its attendant 'cause and prejudice' standard are 'grounded in concerns of comity and federalism.'" *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000), *quoting Coleman v. Thompson*, 501 U.S. 722, 730 (1991). In certain circumstances, the ineffectiveness of a habeas petitioner's attorney may operate as cause for the petitioner's failure to meet the state's procedural requirements for presenting his federal claims to the state courts. *Edwards*, 529 U.S. at 451. "[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 486 (1986). Rather, "the assistance must have been so ineffective as to violate the Federal Constitution." *Edwards*, 529 U.S. at 451, *citing Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). Franklin acknowledges that in order for counsel's ineffectiveness to serve as cause for a procedural default,

the ineffective assistance of counsel claim itself must be preserved. (Traverse, Doc. No. 49 at 94-95.)

Franklin states that he preserved his ineffective assistance of trial counsel claim by raising it on direct appeal in the state court. *Id*. The Court finds that Franklin did indeed raise his counsel's ineffectiveness on account of their failure to object to the victim impact evidence as part of his seventh proposition of law on direct appeal to the Ohio Supreme Court. (Appendix, Vol. 6 at 147-48.) Although the Ohio Supreme Court addressed Franklin's other ineffective assistance of trial counsel sub-claims, it did not mention the one Franklin identifies as cause for the default of his the instant claim. *See Franklin*, 97 Ohio St. 3d at 10-11. The state court's failure to address that portion of Franklin's claim does not negate that he actually presented the claim, and that the state court had an opportunity to correct any error prior to federal habeas corpus review. In such circumstances, a federal court is entitled to address a habeas petitioner's claim *de novo*. *Howard v. Bouchard*, 405 F.3d 459, 467 (6th Cir. 2005) (observing that "where a state court has not addressed or resolved claims based on federal law, most courts, including this one, have held that the decision is not an 'adjudication on the merits' and that in such cases *de novo* review is appropriate); *Burton v. Renico*, 391 F.3d 764, 770 (6th Cir. 2004) (stating that "[w]hen a state court has not adjudicated a claim on the merits, we review the issue *de novo*"); *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003)(stating when "there are no results, let alone reasoning, to which this court can defer . . ., any attempt to determine whether the state court decision was contrary to, or involved an unreasonable application of clearly established federal law would be futile"). Thus, this Court will consider *de novo* whether Franklin's trial counsel's failure to object to the admission of the victim impact evidence can excuse the procedural default of his claim.

Franklin's burden here is heavy. He must demonstrate both that admission of the victim impact testimony violated his federal constitutional guarantees, and that the claim was such a sure-

fire winner that his appellate counsel's failure to raise it on direct appeal in the state court constituted ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). Failing on either front will result in denial of his forty-first ground for relief.

Franklin cites *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), in support of his argument that admission of victim impact evidence in a capital trial violates the Eighth Amendment to the United States Constitution. (Traverse, Doc. No. 49 at 96-97.) He coyly suggests that *Payne v. Tennessee*, 501 U.S. 808 (1991), "modified" the holdings of *Booth* and *Gathers*, finding that the Eighth Amendment does not erect a *per se* bar to victim impact evidence in capital proceedings, but leaving intact the prohibition against expressions of opinion by a victim's family as to the appropriate sentence. (Traverse, Doc. No. 49 at 97.) Putting aside the fact that Franklin has not claimed in this ground for relief error from the admission of any of his relatives' opinions about his sentence, the *Payne* Court expressly overruled *Booth* and *Gathers*. *Payne*, 501 U.S. 808, 830 ("Reconsidering [*Booth* and *Gathers*] now, we conclude . . . that they were wrongly decided and should be, and now are, overruled"[20]). Although each instance of victim impact evidence alleged by Franklin to have been prejudicial was presented in the guilt phase of his trial, the Sixth Circuit Court of Appeals has approved such evidence during both phases of a capital trial. *Hicks v. Collins*, 384 F.3d 204, 222 (2004), *citing Cooey v. Coyle*, 289 F.3d 882, 921 (6th Cir. 2002); *see also Byrd v. Collins*, 209 F.3d 486, 532 (6th Cir. 2000); *Bennett v. Angelone*, 92 F.3d 1336, 1348 (4th Cir. 1996).

Moreover, likening evidence of the victim's personal characteristics to other relevant evidence, the *Payne* Court stated there was no reason to treat it differently unless it is so "unduly prejudicial that it renders the trial fundamentally unfair." 501 U.S. at 825, 827, 829 n.2. In determining whether victim impact evidence crosses that line, courts must consider it in relation to

[20]Needless to say, "modify" and "overrule" are not synonyms.

the proceeding as a whole, the extent of the improper conduct, whether the court issued curative instructions, whether the defense invited introduction of the victim impact evidence, and the weight of the evidence. *Humphries v. Ozmint*, 397 F.3d 206, 218 (4th Cir. 2005), *citing Darden v. Wainwright*, 477 U.S. 168 (1986) and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

The Court finds that the isolated comments about Ophelia's medical condition, Ophelia and Ivory, Sr.'s, unrealized 50th wedding anniversary, and the introduction of a photo of the victims in life were not so prejudicial that they deprived Franklin of a fundamentally fair trial. In *Payne* itself, the challenged evidence was the testimony of the mother of a deceased victim explaining the effect of the crime on her minor grandson, who witnessed the murders of his mother and sister and who had nearly been killed as well. *Payne*, 501 U.S. 814-15. That testimony was far more emotional and had a greater potential for unfairly prejudicing Payne than the victim impact evidence in Franklin's case had in prejudicing him. Likewise, a challenge to the admission of victim impact testimony consisting of the victim's family members describing the horror they imagined their loved one experienced in the course of her death, the loss they suffered, and the coping mechanisms on which they relied was found no more inflammatory than the evidence approved in *Payne*. *Simmons v. Bowersox*, 235 F.3d 1124, 1134-35 (8th Cir. 2001). Franklin has presented only bald statements that, because of the challenged testimony, the jury decided the case based on emotion rather than the overwhelming weight of the other evidence presented in his case. (Traverse, Doc. No. 49 at 96.) The Court is unconvinced.

In addition, Franklin has not shown that his trial counsel's failure to object to the victim impact evidence was anything other than a strategic decision intended to avoid emphasizing whatever prejudicial effect the evidence had on the jury, if any, by drawing attention to it via an objection. Given *Payne* and its progeny, the Court does not agree with Franklin that the few isolated statements relating to Ophelia and Ivory, Sr., were "patently objectionable." (Traverse, Doc. No.

49 at 96.) Consequently, Franklin has not demonstrated that his trial counsel were ineffective for failing to object to the evidence, nor has he shown prejudice from the alleged error. Therefore, Franklin's argument that his trial counsel's ineffectiveness provides cause for the default of his victim impact evidence claim fails.

Having failed to demonstrate cause and prejudice for his procedural default, Franklin's claim is not preserved for habeas corpus review, and it is denied. As a corollary, Franklin could not demonstrate prejudice from the admission of the victim impact testimony even if it were error, and even if his claim had been properly preserved, and it would be denied on its merits were this Court to address it in that manner.

Forty-second Ground for Relief

Next, Franklin contends that the evidence seized during and after his arrest, and his post-arrest statements were the products of an unconstitutional search and seizure and were improperly used against him at his trial. (Petition, Doc. No. 21 at 40-41.) Respondent acknowledges the Ohio Supreme Court rejected the claim on direct appeal, and argues the state court did so correctly because the claim is meritless. (Return of Writ, Doc. No. 39 at 151-52.) Franklin argues the contrary in his Traverse. (Doc. No. 49 at 97-99.)

Neither party mentions *Stone v. Powell*, 428 U.S. 465 (1976), wherein the United States Supreme Court held as follows:

> Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease. Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement

> them, to incorporate Fourth Amendment ideals into their value system.
>
> We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions. But the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs. To be sure, each case in which such claim is considered may add marginally to an awareness of the values protected by the Fourth Amendment. There is no reason to believe, however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions. Nor is there reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant. The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal. Even if one rationally could assume that some additional incremental deterrent effect would be presented in isolated cases, the resulting advance of the legitimate goal of furthering Fourth Amendment rights would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.
>
> In sum, we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduce at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of the application of the rule persist with special force.

Stone, 428 U.S. at 492-95 (footnotes omitted). *Stone* requires the district court to determine whether state procedure in the abstract provides full and fair opportunity to litigate, and Ohio procedure does. The district court must also decide if a Petitioner's presentation of claim was frustrated because of a failure of the state mechanism. Habeas relief is allowed if an unanticipated and unforeseeable application of procedural rule prevents state court consideration of merits. *Riley v. Gray*, 674 F.2d

522 (6th Cir. 1982). The *Riley* court, in discussing the concept of a "full and fair opportunity," held:

> The mechanism provided by the State of Ohio for resolution of Fourth Amendment claims is, in the abstract, clearly adequate. Ohio R. Crim. P. 12 provides an adequate opportunity to raise Fourth Amendment claims in the context of a pretrial motion to suppress, as is evident in the petitioner's use of that procedure. Further, a criminal defendant, who has unsuccessfully sought to suppress evidence, may take a direct appeal of that order, as of right, by filing a notice of appeal. See Ohio R. App. P. 3(A) and Ohio R. App. P. 5(A). These rules provide an adequate procedural mechanism for the litigation of Fourth Amendment claims because the state affords a litigant an opportunity to raise his claims in a fact-finding hearing and on direct appeal of an unfavorable decision.

Id. at 526. Franklin has presented to evidence or argument to suggest that the Ohio process for litigating Fourth Amendment claims was somehow frustrated in his case. Thus, Franklin's claim that evidence used at his trial was obtained in violation of the Fourth Amendment is not cognizable in habeas corpus.[21] His forty-second ground for relief is accordingly denied.

Forty-third Ground for Relief

In his forty-third ground for relief, Franklin contends the statements he made to officers during the automobile trip from Tennessee to Ohio were elicited in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and that their use against him at trial was unconstitutional. (Petition, Doc. No. 21 at 42.) Respondent alleges the claim is procedurally defaulted since Franklin never raised it on direct appeal in the state court. (Return of Writ, Doc. No. 39 at 153.) In addition, Respondent argues that even if preserved, the claim would fail. *Id*. at 153-54.

Franklin disputes that his claim is defaulted, contending he raised it as part of his seventh

[21]The Court notes that "*Stone*'s restriction on the exercise of federal habeas jurisdiction does not extend to a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by *Miranda v. Arizona*, 384 U.S. 436 (1966)." *Withrow v. Williams*, 507 U.S. 680, 683 (1993)(parallel citations omitted). Franklin does not in this ground for relief contend the evidence obtained was in violation of his *Miranda* rights, however. That claim is advanced in his forty-third ground for relief, and is addressed therein.

ground for relief on direct appeal to the Ohio Supreme Court. (Traverse, Doc. No. 49 at 100.) That state court claim, however, alleged his trial counsel were ineffective for failing to move for suppression of his statements. (Appendix, Vol. 6 at 145.) That claim is distinct from the one alleged here, where Franklin claims trial court error in not suppressing his statements, and an ineffective assistance of trial counsel claim in the state court does not preserve the underlying claim for habeas corpus review in the federal court. An ineffective assistance of counsel claim relies upon a different legal theory than a claim of trial court error, even when the ineffectiveness alleged is counsel's failure to protect a defendant from the trial court's error. *White v. Mitchell*, 431 F.3d 517, 526 (6th Cir. 2005). Consequently, Franklin's assertion that he presented the instant claim to the state court is incorrect. The claim was not raised in the state court proceedings, and Franklin has offered no cause and prejudice that might excuse his default. Accordingly, the Court finds that Franklin's forty-third ground for relief is procedurally defaulted, and it is denied.

Franklin's claim would fail even if it had been properly preserved. He has not indicated what statements made during the trip from Nashville to Dayton were prejudicial. (Petition, Doc. No. 21 at 42; Traverse, Doc. No. 49 at 99-100.) Instead, he alleges he was only eighteen years old at the time, that he had previously requested counsel, that he was not re-Mirandized prior to the trip, and that the police officers "elicited" statements from him during the trip. (Traverse, Doc. No. 49 at 100.) He states he was prejudiced because the statements, whatever they were, were admitted during his trial. *Id*. Even if all of those allegations are true, Franklin has still failed to demonstrate a constitutional violation that prejudiced him at trial. Although Franklin has not cited any of the evidence that came out in his pre-trial suppression hearing in the state court, this Court has read the testimony of an officer who accompanied Franklin from Nashville to Dayton. Detective Doyle Burke testified at the suppression hearing that Franklin was advised of the transportation procedures to be used in taking him back to Dayton, and that conversation transpired during the trip, always

initiated by Franklin. (Trial Tr., Vol. 3 at 92, 94.) The statements Franklin made that Burke related to the trial court, however, can only be characterized as innocuous. He stated that Franklin commented on not having had time to see much of Nashville because of his arrest, and that when the officers and Franklin arrived in Dayton, Franklin indicated a desire to drive by the Riegel Street house. *Id*. at 93-94. Even if the statements had been obtained in violation of *Miranda*, and even if Franklin's youth rendered him particularly susceptible to police coercion, the Court simply cannot fathom how any of the statements recounted by Detective Burke could have prejudiced Franklin's defense. Were this Court to address the merits of Franklin's claim, therefore, it would be unavailing.

Franklin has procedurally defaulted his claim and offers no cause or prejudice to excuse the default. Accordingly, his forty-third ground for relief is denied.

Forty-fourth Ground for Relief

In his forty-fourth ground for relief, Franklin contends the evidence presented respecting the tattoos he acquired during his incarceration compromised the fairness of his trial. (Petition, Doc. No. 21 at 42.) Respondent counters that the claim is procedurally defaulted since the Ohio Supreme Court relied upon an independent and adequate state procedural rule in rejecting it when it was presented on direct appeal. (Return of Writ, Doc. No. 39 at 155-56.) Franklin disputes that the claim is procedurally defaulted, contending it was preserved by his having requested the tattoo evidence be excluded in a pretrial motion. (Traverse, Doc. No. 49 at 101.) He also argues that aside from the pretrial motion, he presented the claim to the state court in his post-conviction proceedings, and that it was preserved in that manner as well. *Id*. at 101-102.

First, it is established law in Ohio that "a ruling on a motion *in limine* may not be appealed and that objections to the introduction of testimony . . . must be made during the trial to preserve evidentiary rulings for appellate review." *Gable v. Gates Mills*, 103 Ohio St. 3d 449, 456, 816

N.E.2d 1049 (2004). Therefore, a trial court's ruling on a motion *in limine* is not a final ruling on evidence, but is rather a "tentative, interlocutory, precautionary ruling." *State v. Grubb*, 28 Ohio St. 3d 199, 201-2, 503 N.E.2d 142, 145 (1986); *State v. Maurer*, 15 Ohio St. 3d 239, 259, 473 N.E.2d 768, 787 (1984). As such, a ruling on a motion *in limine* does not preserve the record on appeal. *Grubb*, 28 Ohio St. 3d at 203. Thus, Franklin's argument that the Ohio Supreme Court erred in finding that he had not preserved his claim by objecting at trial is without legal support. Consequently, the state court's conclusion that Franklin had waived all but plain error was correct under state law. *Franklin*, 97 Ohio St. 3d at 7. As has been noted in the Court's discussions of Franklin's previous claims, Ohio's contemporaneous objection rule is an adequate and independent state ground. Franklin's claim that he has avoided procedural default of his claim by filing a pretrial motion to exclude the challenged evidence is therefore unavailing.

Next, Franklin contends the state supreme court actually addressed the merits of his claim on direct appeal. (Traverse, Doc. No. 49 at 101.) Franklin, however, misconstrues the state court's plain error review for a merits review. A state appellate court's review for plain error is enforcement, not waiver, of a procedural default. *White v. Mitchell*, 431 F.3d 517, 525 (6th Cir. 2005); *Hinkle v. Randle*, 271 F. 3d 239, 244 (6th Cir. 2001), *citing Seymour v. Walker*, 224 F. 3d 542, 557 (6th Cir. 2000)(plain error review does not constitute a waiver of procedural default). Thus, the Ohio Supreme Court's plain error review does not save Franklin's claim from procedural default.

Franklin also argues his claim has been preserved for habeas corpus review by virtue of his having raised it in his state post-conviction proceedings, and the court's consideration of the claim on its merits. (Traverse, Doc. No. 49 at 102.) The claim there was actually two claims in one: first, Franklin alleged trial court error in the admission of the tattoo evidence, then he claimed his trial counsel's failure to object to it during trial constituted ineffective assistance. (Appendix, Vol. 9 at 129-31.) The post-conviction trial court concluded the claim was barred by the doctrine of *res*

judicata (Appendix, Vol. 13 at 34-35), and the state court of appeals agreed, *State v. Franklin*, No. 19041, 2002 WL 1000415 at *5 (Ohio App. 2d Dist. May 17, 2002)(unreported). Ohio's doctrine of *res judicata* is also an independent and adequate state procedural rule which, when relied upon by a state court, results in procedural default for federal habeas corpus purposes, unless excused. *Fautenberry v. Mitchell*, 515 F.3d 614, 633 (6th Cir. 2008); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6th Cir. 2000); *Mapes v. Coyle*, 171 F.3d 408, 421 (6th Cir. 1999).

Franklin denies his claim is procedurally defaulted, but none of his explanations as to why overcome the clear law stating it is. Perhaps because he is so confident in his assertions, he has offered no cause for the procedural default of his forty-fourth claim or prejudice therefrom. Accordingly, his claim is denied as procedurally defaulted.

The Ohio Supreme Court's plain error analysis provides a window into which this Court may peer in an effort to surmise how the claim would have been received had it been preserved for review on direct appeal. The supreme court stated that "[a]ny references to these tattoos were relevant to counter the defense theory that [A]ppellant was delusional," by presenting the tattoos as evidence of Franklin's bravado regarding the murders *Franklin*, 97 Ohio St. 3d at 7. The tattoo identifying Franklin as a member of a particular gang was relevant to counter evidence presented by Franklin that indicated his fear of being attacked by a rival gang was irrational or the product of mental illness. *Id*. Even if Franklin had preserved his claim for both state appellate and federal habeas corpus review, therefore, it would fail.

Franklin's claim was denied in the state courts on independent and adequate state procedural grounds, and he has offered no cause or prejudice to excuse the default. His forty-fourth ground for relief is accordingly denied as procedurally defaulted.

Forty-fifth Ground for Relief

Franklin's next claim is that his trial was rendered unfair by the introduction of numerous gruesome photographs. (Petition, Doc. No. 21 at 42-43.) Respondent acknowledges the claim is preserved for habeas corpus review, but contends it is without merit. (Return of Writ, Doc. No. 39 at 159-61.) Franklin counters that the photographs served only to inflame the passions of the jury, and that their admission in the mitigation phase in particular was unduly prejudicial. (Traverse, Doc. No. 49 at 103-4.)

Franklin did indeed raise the instant claim as his fourth proposition of law on direct appeal to the Ohio Supreme Court. (Appendix, Vol. 6 at 109-13.) The state court held as follows:

> In his fourth proposition of law [A]ppellant argues that certain post-mortem photographs of the victims should have been excluded from evidence because they are gruesome. Gruesome photographs are inadmissible in capital cases if their probative value is outweighed by the danger of unfair prejudice to the defendant, or if they are repetitive or cumulative. Exhibits 56 and 61, two photos that feature the covered bodies of Ophelia Franklin and Ivory Franklin lying in the back of an ambulance and a close-up of Ivory's bloody stocking feet, are not gruesome, and their admission was proper.
>
> Although separate autopsy slides presented by the prosecution were gruesome, their probative value was high, since they corroborated the medical examiner's testimony as to the nature and extent of the victims' injuries. They were also pertinent to prove prior calculation and design.
>
> We also note that the record contains a lengthy discussion of whether individual photographs should be admitted. In fact, the judge excluded three slides and five photos when applying the above test. This action convinces us that the trial judge subjected each photo to the proper scrutiny before admitting them. Proposition of law number four is overruled.

Franklin, 97 Ohio St. 3d at 6.

Since the photographs at issue have not been made a part of the record in these habeas proceedings, it is impossible for this Court to determine whether the state court's decision is contrary to or an unreasonable application of federal law. That being the case, Franklin's forty-fifth ground for relief is denied.

Forty-sixth Ground for Relief

In his forty-sixth ground for relief, Franklin contends the fairness of his trial was unconstitutionally compromised by the admission of improper other acts evidence. (Petition, Doc. No. 21 at 43.) Respondent seems to acknowledge that Franklin raised the claim in his state post-conviction proceedings, but argues it could have been and should have been raised on direct appeal instead, and the failure to do so renders it procedurally barred for habeas corpus purposes. (Return of Writ, Doc. No. 39 at 161.) In any case, Respondent contends, the claim is meritless. *Id*. at 161-62. Franklin does not address his alleged failure to raise the claim on direct appeal, and instead counters that his raising the claim in post-conviction adequately preserved it for habeas corpus review. (Traverse, Doc. No. 49 at 105.)

Although the parties appear to be in agreement that Franklin presented the instant claim to the state court in his post-conviction petition, neither directs this Court to where it might read the claim as presented there. Franklin, for his part, includes a citation to the Ohio Supreme Court's opinion on direct appeal wherein the court found evidence relating to Franklin's antagonistic conduct toward Ophelia relevant to show his "penchant for causing harm" to her. (Petition, Doc. No. 21 at 43, *citing Franklin*, 97 Ohio St. 3d at 7.) That comment was made by the state court in relation to Franklin's fifth proposition of law in his appellate brief. There, however, Franklin makes no mention of improperly admitted "other acts" evidence, instead focusing on victim impact evidence, the subject of his forty-first ground for relief, *supra*.

Had Franklin raised the issue as he claims he did, this Court would find no constitutional error in the state court's resolution of his claim. The evidence was relevant to show that Franklin regularly exhibited animus toward Ophelia, and that Ophelia's murder was a result of that animus, rather than the product of a psychologically disturbed individual, as Franklin has contended he was at the time of the murders. Moreover, this Court has searched Franklin's state post-conviction

petition in vain for the claim presented here.[22] Since Franklin raised his claim neither on direct appeal nor in his post-conviction proceedings, it is procedurally defaulted. Franklin states in his Traverse that he "can establish cause through his counsel's ineffectiveness for failing to object" to the challenged evidence, but he does not actually do so. (Traverse, Doc. No. 49 at 105.) Furthermore, he makes no attempt to demonstrate prejudice from any trial court or defense attorney error resulting from the admittance of the evidence or the failure to object to its admittance.

Franklin has not demonstrated that he would be entitled to habeas corpus relief on his claim even if it were properly preserved, nor has he shown cause for his default of the claim. Accordingly, his forty-sixth ground for relief is denied as procedurally defaulted.

Forty-seventh Ground for Relief

In his forty-seventh ground for relief, Franklin contends that his counsel on direct appeal provided ineffective assistance, referencing the claims he raised in his three *pro se* applications to reopen his direct appeal. (Petition, Doc. No. 21 at 43-44.) Respondent does not advance a procedural default defense, arguing instead that Franklin's appellate counsel's failure to raise the proposed propositions of law identified in Franklin's applications to reopen was the result of counsel's decision winnow out weaker claims to emphasize the stronger ones. (Return of Writ, Doc. No. 39 at 96-98.) Franklin counters that the arguments winnowed out by his counsel were stronger than those presented. (Traverse, Doc. No. 49 at 105-8.)

Franklin's three applications to reopen his direct appeal were denied by the Ohio Supreme Court without elaboration. (Appendix, Vol. 8 at 98; Vol. 18 at 44.) As the state court never

[22]The Court notes that since Franklin's claim is one that is apparent on the record, raising it on direct appeal would have been the proper remedy for any error. *See State v. Carter*, 89 Ohio St. 3d 593, 606, 734 N.E.2d 345 (2000); *State v. Keith*, 79 Ohio St. 3d 514, 536-37, 684 N.E.2d 47 (1997). Even if he had raised it in his post-conviction proceedings, therefore, the state court likely would have dismissed his claim as barred by the doctrine of *res judicata*, thwarting habeas corpus review in the process.

mentioned or discussed any state procedural rule, there has been no procedural default of Franklin's ineffective assistance of appellate counsel claim, and Respondent was wise to forego that defense. *See Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986).

In Ohio, an application for reopening is the only vehicle available to raise claims of ineffective assistance of appellate counsel. *See State v. Murnahan*, 63 Ohio St.3d 60, 65-66, 584 N.E. 2d 1204 (1992); Ohio Sup. Ct. Prac. Rule XI, Sec. 5. In filing the application, the appellant states that his appellate counsel failed to raise arguably meritorious claims on direct appeal, and that their failure constituted ineffective assistance. Essential to the success of an application for reopening in Ohio, however, is that the proposed propositions of law must be of the sort that are cognizable on direct appeal. If a proposed proposition of law relies upon evidence outside the trial court record, the proper vehicle for presenting it would be a petition for post-conviction relief, which process allows, and in fact, requires presentation of such evidence. *See* Ohio Rev. Code § 2953.21

In his first proposed proposition of law, Franklin claimed his appellate counsel were ineffective in failing to raise as error on direct appeal trial counsel's ineffectiveness for their having failed to present to the jury the coat found on Franklin's person when he was arrested.[23] (Appendix, Vol. 8 at 102.) In his affidavit, Franklin contends that "[t]rial counsel's refusal to submit this evidence to the jurors in an attempt to question defendant's sanity was **NOT** a strategic tactic, as it (the evidence) was already presented to the Court and jury by the prosecution as evidence of defendant's guilt." *Id*. at 132. At best, Franklin's statement is incomprehensible; at worst, it defeats his claim by acknowledging that the evidence was before the jury, though perhaps not presented through his own attorneys. In any case, there was a suggestion at trial that the jacket the Court

[23]In his application to reopen his direct appeal, Franklin does not mention what possessions he is referring to. (Appendix, Vol. 8 at 102.) That volume of the Appendix also contains a January 8, 2003, affidavit sworn by Franklin, which bears no indication of having been filed in the state court. *Id*. at 131-49. There, Franklin references a coat Franklin was apparently wearing when he was arrested. *Id*. at 132. In the absence of any indication to the contrary, the Court assumes that is the possession Franklin mentions in his proposed proposition of law.

assumes Franklin is referring to was discarded because it was left in a holding cell, and no one knew whose jacket it was by the time it was found. (Trial Tr., Vol. 10 at 541.) Thus, it appears the physical jacket was unavailable to trial counsel at the time of trial. No ineffectiveness can result from trial counsel's failure to present evidence that is not available. Likewise, no ineffectiveness may result from appellate counsel's having failed to raise trial counsel's ineffectiveness as error under such circumstances. Finally, Franklin has never demonstrated how the jacket would have helped his defense or damaged the prosecution's case.

In Franklin's second proposed proposition of law, he suggested his appellate counsel were ineffective for not having raised as error on direct appeal trial counsel's failure to voir dire prospective jurors on their attitudes toward the insanity defense. (Appendix, Vol. 8 at 102-3.) That claim was presented on direct appeal, however, as part of Franklin's seventh proposition of law. (Appendix, Vol. 6 at 144.)

Next, Franklin claimed his appellate counsel were ineffective because they failed to impeach Dr. Martin's opinion testimony based upon Dr. Martin's reliance on the tests administered by other doctors. (Appendix, Vol. 8 at 103.) Dr. Martin's reliance upon the other doctors' test results, however, was well established during the trial, and trial counsel subjected Dr. Martin to vigorous cross-examination. (Trial Tr., Vol. 2 at 100-5, 135-44.)

Franklin also claimed his appellate counsel were ineffective for failing to raise as error on direct appeal his trial counsel's failure to object to prosecutorial misconduct during the opening statements and closing argument. (Appendix, Vol. 8 at 104.) That claim was presented on direct appeal as part of Franklin's fifth proposition of law, however.

In his fifth proposed proposition of law, Franklin stated his appellate counsel were ineffective for not raising on direct appeal the trial court's failure to allow defense counsel to question prospective jurors on their views on insanity, which duplicates his second proposed

proposition of law and requires no further discussion here. (Appendix, Vol. 8 at 104-5.)

Next, Franklin claimed his appellate counsel were ineffective for failing to raise as error on direct appeal the trial court's admittance of expert opinion evidence based upon other expert's reports. (Appendix, Vol. 8 at 105.) This proposition of law presents the same error as was claimed in Franklin's third proposed proposition of law, and warrants no further consideration.

In his seventh proposed proposition of law, Franklin made the same claim as he did in his fourth, which sets forth a claim that was presented by his appellate counsel on direct appeal as part of his fifth proposition of law. (Appendix, Vol. 8 at 105-6; Vol. 6 at 115-24.)

In his eighth proposed proposition of law, Franklin argued his appellate counsel were ineffective for failing to raise as error on direct appeal the prosecutor's failure to provide certain evidence to the defense. (Appendix, Vol. 8 at 106.) To succeed on that argument, Franklin would have to show what the withheld evidence was, and how he was prejudiced by its withholding, something that could not have been done without resort to evidence outside the trial record. As no evidence may be added to the record on direct appeal in Ohio, the claim was one that should be presented in post-conviction proceedings, not on direct appeal. As such, Franklin's appellate attorney's performance was astute rather than ineffective.

Next, Franklin claimed his appellate counsel provided ineffective assistance by not raising as error on direct appeal the prosecutor's misconduct during opening statements and closing arguments. (Appendix, Vol. 8 at 106-7.) This claim duplicated his fourth and seventh proposed propositions of law and requires no further discussion.

In his tenth proposed proposition of law, Franklin contended his appellate counsel rendered ineffective assistance when they failed to raise as error on direct appeal the trial court's erroneous admittance of Dr. Martin's and Dr. Stookey's expert opinions. (Appendix, Vol. 8 at 107.) Franklin argued that the doctors' opinions should not have been admitted because "they failed to recognize

defendant[']s schizophrenia symptoms . . . that defendant and/or loved ones of the defendant relayed to the doctors, or that they (the doctors) read in reports." *Id.* Anecdotal lay witness testimony, however, does not preclude expert testimony on a psychological condition. Moreover, the jury had the benefit of both types of testimony and accorded credibility and appropriate weight where it determined it was proper. No ineffectiveness results from Franklin's appellate counsel's decision not to raise a losing issue on direct appeal.

Finally, Franklin's eleventh proposed proposition of law claimed his appellate counsel were ineffective when they failed to raise as error on appeal the prosecution's "bad faith." (Appendix, Vol. 8 at 113, 122-23.) Although he does not state so in his application to reopen his direct appeal, Franklin's affidavit attached to the application suggests the prosecution was acting in "bad faith" by objecting to defense counsel's questioning of Dr. Martin, and Dr. Stookey's direct testimony based upon her review of another doctor's report. (Appendix, Vol. 8 at 116-17.)

Franklin's claim now that those propositions of law were stronger than the ones presented by his appellate counsel is unconvincing. Some of the propositions are duplicates of others, some rely upon evidence outside the record, and others were actually presented by appellate counsel to the state court on direct appeal. None were such "dead-bang winners" that their omission from the direct appeal constitutes ineffective assistance. *See Mapes v. Coyle*, 171 F.3d 408, 431 (6th Cir. 1999) *quoting Banks v. Reynolds*, 54 F.3d 1508, 1515 n.13 (10th Cir. 1995).

Franklin has not demonstrated that the Ohio Supreme Court's summary rejection on the merits of his application to reopen his direct appeal was contrary to or an unreasonable application of federal law. Accordingly, his forty-seventh ground for relief is denied.

Forty-eighth and Forty-ninth Grounds for Relief

In next two grounds for relief, Franklin contends that even if any one of his previous grounds

is not a sufficient basis upon which to grant habeas corpus relief, the cumulation of those errors is. (Petition, Doc. No. 21 at 44-45.) Respondent argues that since neither Franklin's forty-eighth nor his forty-ninth ground was presented on direct appeal, they are both procedurally defaulted, and meritless as well. (Return of Writ, Doc. No. 39 at 163-64.) Franklin disagrees, stating that he raised his claims in his state post-conviction proceedings, thereby preserving them for habeas corpus review, and he lists numerous alleged errors that generally sum up his previous grounds for relief. (Traverse, Doc. No. 49 at 109-12.)

> The Supreme Court has repeatedly stated that fundamentally unfair trials violate due process, *see, e.g.*, *Riggins v. Nevada*, 504 U.S. 127, 149 (1992) (quoting *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967)), and common sense dictates that cumulative errors can render trials fundamentally unfair. Additionally, the Supreme Court has expressly cumulated prejudice from distinct errors under the Due Process Clause. *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973). ("We need not decide, however, whether this error alone would occasion reversal since Chambers' claimed denial of due process rests on the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit him to call other witnesses."). Nonetheless, the law of this Circuit is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue. *See Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005) (discussing cumulated evidentiary errors). No matter how misguided this case law may be, it binds us.

Williams v. Anderson, 460 F.3d 789, 816 (6th Cir. 2006.) As the Sixth Circuit Court of Appeals is bound, so it is with this Court. Franklin's forty-eighth and forty-ninth grounds for relief are not cognizable in habeas corpus, and are accordingly denied.

Fiftieth Ground for Relief

In his fiftieth and final ground for relief, Franklin contends that he was denied the services of an additional psychological expert and a fire scene expert. (Petition, Doc. No. 21 at 46.) Respondent argues the claim is both procedurally defaulted and without merit. (Return of Writ, Doc. No. 39 at 165-66.) Franklin alleges he raised the instant issue as his twelfth claim for relief

in his state post-conviction petition, thereby preserving it for habeas corpus review. (Traverse, Doc. No. 49 at 113.) In addition, he argues that his trial counsel failed to adequately investigate, prepare, and present his psychological expert's testimony in the mitigation phase of the trial, and that his counsel failed to effectively use the services of the appointed mitigation specialist, but does not advance counsel's deficiencies as cause for defaulting his claim. *Id*.

In his twelfth ground for relief in his post-conviction proceedings, Franklin raised the ineffectiveness of his trial counsel, using language essentially identical to the argument he sets forth in his traverse as summarized in the previous paragraph. (Appendix, Vol. 9 at 140-42.) An ineffective assistance of trial counsel claim rests upon a different legal theory than the underlying claims, and the raising the former in the state courts does not preserve the latter for habeas corpus review. *See White v. Mitchell*, 431 F.3d 517, 526 (6th Cir. 2005) (recognizing that an ineffective assistance of appellate counsel claim is analytically distinct from the underlying claim). Thus, his argument as to his trial counsel's performance respecting the use of experts is off the mark. Raising his counsel's ineffectiveness in post-conviction does not preserve the underlying claims for habeas review. Franklin's attempt to avoid default of his fiftieth ground thus fails and he has offered no cause or prejudice for the default. Accordingly, his fiftieth ground for relief is denied as procedurally defaulted.

His claim would fail regardless. Franklin cites *Ake v. Oklahoma*, 470 U.S. 68 (1985), as the law governing his claim. The Sixth Circuit Court of Appeals has summarized the holding of *Ake* as follows:

> In *Ake*, the Supreme Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." *Ake*, 470 U.S. at 74. . . . The *Ake* Court also stated that a similar conclusion was required "in the context of a capital sentencing proceeding, when the state presents psychiatric evidence of the defendant's future

> dangerousness." *Id*. at 83. At the same time, the *Ake* majority emphasized that its ruling was limited to cases in which the defendant's mental condition was "seriously in question" upon the defendant's "threshold showing." *Id*. at 82. Furthermore, the Court held that the state was obliged merely to provide one competent psychiatrist, and that it could choose that psychiatrist. In other words, the defendant's right does not include the right to a psychiatrist of his choice. *Id*. at 83.
>
> This Court has interpreted *Ake* as allowing psychiatric assistance during the sentencing phase if 1) the defendant's sanity was a significant factor at trial, or 2) the state presents at sentencing psychiatric evidence of future dangerousness.

Smith v. Mitchell, 348 F.3d 177, 207 (6th Cir. 2003)(parallel citations omitted); *see also Durr v. Mitchell*, 487 F.3d 423, 433 (6th Cir. 2007)(refusing to extend *Ake* and rejecting claim where the petitioner fell into neither *Ake* scenario).

Franklin falls into the first *Ake* circumstance; his sanity was a factor at his trial. In his Traverse, however, his argument relates to the mitigation phase of his trial, not the guilt phase where insanity was an issue. (Traverse, Doc. No. 49 at 113.) Furthermore, Franklin does not claim he was deprived of psychiatric and fire scene experts, he only argues the ones he was provided were "deficient." (Petition, Doc. No. 21 at 46.) The fact is that Franklin had both a psychiatric expert, Dr. Cherry, and a fire scene expert, Mr. Yeazell, appointed to assist him in his defense, and both testified at his trial. This Court has rejected Franklin's grounds for relief in which he claimed his counsel were ineffective for failing to adequately prepare those experts for trial, that they failed to adequately investigate his case, and that he was improperly denied a continuance to replace Mr. Fricker, *supra*. Finally, Franklin does not contend or demonstrate how the outcome of his trial would have been different had he been granted access to non-deficient experts to testify on his behalf. He never attempted to present at the evidentiary hearing in this Court what "non-deficient" experts would have testified to. Thus, even if Franklin had preserved his claim for habeas review, it would fail.

Franklin never raised the substance of his fiftieth ground for relief in the state court, and it is consequently procedurally defaulted. He has not posited a cause for his default, nor has he explained how he was prejudiced by it. Accordingly, his claim is procedurally defaulted without excuse, and it is denied.

CONCLUSION

The Court has considered each of Franklin's fifty-one grounds for relief, both individually and cumulatively, and found no basis upon which to grant the writ of habeas corpus. Accordingly, Franklin's petition for the writ is denied. The Clerk will enter judgment dismissing the Petition with prejudice.

March 9, 2009.

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

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