

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

:

Case No.

**07 - 0216**

Appellee,

:

On Appeal from the Belmont County  
Court of Appeals, Seventh Appellate

District

v.

:

Court of Appeals Case No. 05-BE-15

NAWAZ AHMED,

:

Appellant.

:

**THIS IS A CAPITAL CASE**

MEMORANDUM IN SUPPORT OF JURISDICTION AND  
NOTICE OF APPEAL OF APPELLANT NAWAZ AHMED

Michael J. Benza - 0061454  
4403 St. Clair Avenue  
Cleveland, Ohio 44103  
(216) 361-1026  
(216) 881-3928 (fax)  
**Counsel of Record**

COUNSEL FOR APPELLANT NAWAZ AHMED

Christopher M. Berhalter  
Belmont County Prosecutor  
Court House Annex I  
147-A West Main Street  
St. Clairesville, Ohio 43950

Michael Collyer  
Assistant Attorney General  
Capital Crimes Section  
615 West Superior Avenue, 12th Floor  
Cleveland, Ohio 44113

COUNSEL FOR APPELLEE, STATE OF OHIO

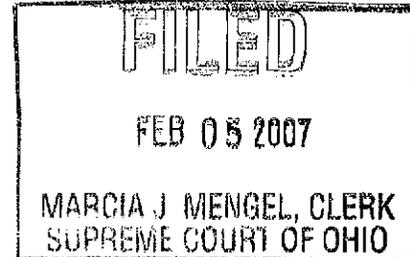


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**I. THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS, IS OF PUBLIC OR GREAT GENERAL INTEREST, AND INVOLVES A FELONY AND LEAVE TO APPEAL SHOULD BE GRANTED.**

This case involves the imposition of the sentence of death. Whenever society seeks to extinguish human life through its criminal laws the case always involves substantial constitutional questions and is of public or great general interest. Further, under Ohio law, the death sentence must involve a felony conviction. As outlined below, this case involves questions implicating the rights to the effective assistance of counsel, a fair trial, to be competent in state post-conviction proceedings, to fundamental due process and fairness in state post-conviction proceedings, and direct challenges to the validity of the conviction and death sentence imposed on Mr. Ahmed. This case presents significant questions as to the ability of Ohio's post-conviction scheme to provide an adequate avenue for capital defendants to pursue vindication of constitutional and statutory rights, *Case v. Nebraska*, 381 U.S. 336 (1965), the standards for determining to provide discovery and hold evidentiary hearings in capital post-conviction proceedings, the systemic flaws of Ohio's post-conviction scheme, and the right to be competent in post-conviction proceedings.

Mr. Ahmed's post-conviction petitions presented sufficient facts, materials, and arguments that could not be determined by the record and the lower courts erred in dismissing the petition without discovery and a hearing.

This Court must grant jurisdiction to review the process of post-conviction as well as the merits of Mr. Ahmed's case. This matter must be reversed and remanded for a new trial and sentencing proceeding. In the alternative, this matter should be remanded to the trial court for discovery, hearing, and full review on the merits of Mr. Ahmed's claims.

**II. STATEMENT OF THE CASE AND FACTS**

**A. Procedural History**

Appellant Nawaz Ahmed was indicted for aggravated murder, among other counts. The jury returned guilty verdicts on all counts and specifications. After the mitigation hearing, the jury returned a recommendation that the death penalty be imposed. On February 2, 2001, the court sentenced Nawaz Ahmed to death.

On October 3, 2002, Mr. Ahmed filed his Ohio Revised Code § 2953.21 petition for post-conviction relief. Through counsel, two amendments to the post-conviction petition were filed. Through counsel, he also filed motions for discovery and for voluntary recusal of the trial judge as well as a specific request for a competency evaluation, funds for an independent psychiatric evaluation of Mr. Ahmed, and that the matter be stayed pending the competency determination.

On October 3, 2002, Mr. Ahmed, proceeding *pro se* filed supplemental claims to the post-conviction petition filed by counsel. Mr. Ahmed also filed an amendment to his *pro se* claims.

The state submitted to the court, but did not file, proposed findings of fact and conclusions of law. Mr. Ahmed objected to the untimely and improper submission.

The trial court did not rule on any of Mr. Ahmed's motions. Instead, on March 8, 2005, the trial court granted the state's motion to dismiss without a hearing by simply signing the state's findings of fact and conclusions of law. No competency determination was made, no hearing was held, no evaluation was conducted, no experts were appointed, no funds were allocated, and the issue was simply ignored by the trial court.

Mr. Ahmed timely appealed to the Seventh District Court of Appeals. New counsel was appointed to represent Mr. Ahmed on appeal. Counsel requested the matter be stayed pending a competency evaluation and the authorization of funds to retain an expert competency evaluation before the appeal could proceed. The Court of Appeals denied that request and the matter proceeded

for full briefing and argument without a determination of Mr. Ahmed's competency to proceed with his appeal.

On December 28, 2006, the Seventh District affirmed the dismissal of the post-conviction petitions and this timely appeal follows.

**B. Statement of Facts**

Mr. Ahmed is a Pakistani national and he was arrested shortly before he was to return to Pakistan to bring his ailing father to the United State for medical care. Upon his arrest he was not advised of his rights under the Vienna Convention on Consular Relations.

Mr. Ahmed was convicted and sentenced to death for the murder of his wife, her father, his sister-in-law, and her daughter. At the time the Ahmeds were in the process of divorce proceedings.

Because of the lack of direct evidence of Mr. Ahmed's guilt the prosecutor relied on improper arguments about this being an "honor killing." There was no evidence presented to explain what an "honor killing" is or how this crime satisfied this definition but the prosecutor appealed to the jurors' biases and prejudices to obtain a conviction.

In the mitigation phase of the case counsel for Mr. Ahmed failed to properly investigate, prepare, and present a mitigation case. The language, cultural, religious, mental health and other barriers pervading this case prevented counsel from effectively advocating for Mr. Ahmed leaving the jury with no option but to impose death.

Throughout the proceedings at trial, on appeal, and in post-conviction Mr. Ahmed tried to actively participate in his defense. It is very clear that everyone involved, the trial court, the prosecutors, and the various defense counsel, grew weary of Mr. Ahmed's attempts to participate and proceeded to review this case as if Mr. Ahmed did not exist. It is clear from all of the records of this case that questions of Mr. Ahmed's competency have not been addressed.

## **II. ARGUMENT**

### **PROPOSITION OF LAW NO. I**

In an action for post-conviction relief, a petition that presents sufficient operative facts supported by evidence *de hors* the record meets the required pleading standard and must not be summarily dismissed without an evidentiary hearing.

The trial court erred by dismissing Mr. Ahmed's post-conviction petition because (1) he raised constitutional issues for relief; (2) the petition contained sufficient operative facts that supported the grounds for relief and merited an evidentiary hearing; and (3) the grounds for relief were supported by evidence *de hors* the record and raised genuine issues of material fact sufficient to avoid summary dismissal.

#### **A. Requirements for an Evidentiary Hearing**

Ohio Revised Code § 2953.21 provides defendants who have been convicted of criminal offenses the right to seek post-conviction relief for violations of their constitutional rights. To receive an evidentiary hearing on post-conviction claims, a petitioner must meet certain pleading standards. Before a hearing may be granted, the petitioner bears the initial burden of submitting evidentiary documents containing sufficient operative facts that support alleged violations of constitutional rights—such as the lack of competent counsel—and that the petitioner was thereby prejudiced. *State v. Jackson*, 64 Ohio St.2d 107, 111 (1980); *State v. Kapper*, 5 Ohio St.3d 36 (1983).

Moreover, Mr. Ahmed's supporting affidavits were neither contradicted by evidence in the record nor internally inconsistent. *State v. Calhoun*, 86 Ohio St.3d 279, 285 (1999). The evidence *de hors* the record offered in support of Mr. Ahmed's claims presented sufficient operative facts to support his grounds for relief, *State v. Cole*, 2 Ohio St.3d 112 (1982), and warrant a hearing. *Cole*,

at 114. Mr. Ahmed specifically pled the deprivation of his constitutional rights and submitted exhibits demonstrating the error and harm through evidence *de hors* the record.

**B. Ohio's Post-conviction Process Fails to Protect Capital Defendants' Rights.**

Ohio's application of O.R.C. § 2953.21 renders the post-conviction process a meaningless ritual. *See Michel v. Louisiana*, 350 U.S. 91, 93 (1955); *Parker v. Illinois*, 333 U.S. 571, 574 (1948). The need for valid post-conviction proceedings was outlined by Justice Brennan in his concurring opinion in *Case v. Nebraska*, 381 U.S. 336 (1965). The process must provide a real avenue for review of federal constitutional claims, provide full hearings on disputed factual issues, discovery, and be a simplistic and open process rather than a procedural morass. *Id.*, 381 U.S. at 346-347. Ohio's scheme fails in all respects. The policies adopted and procedures employed by the Ohio courts deprived Mr. Ahmed of his rights to due process, equal protection, adequate trial and appellate review, and to be free from cruel and unusual punishment in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Almost since the enactment of Ohio's post-conviction law, the Sixth Circuit criticized the law as inadequate. *Keener v. Ridenour*, 594 F.2d 581, 587 (6th Cir. 1979) ("greatly restricts the scope of post-conviction relief under Ohio law"); *Coley v. Alvis*, 381 F.2d 870, 872 (6th Cir. 1967) ("The *Perry* decision has rendered such process [the Ohio post-conviction statute] ineffective to protect the rights of Appellant"); and *Allen v. Perini*, 424 F.2d 134, 140-141 (6th Cir. 1970). These cases all recognize the futility of presenting claims to the Ohio post-conviction courts. Nothing has changed to bring the process up to constitutional code. *See Hill v. Mitchell*, 400 F.3d 308, 313-315 (6th Cir. 2004); *Greer v. Mitchell*, 264 F.3d 663, 675 (6th Cir. 2001).

The death penalty is like no other penalty both in terms of its finality and scope. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). Because of the nature of the penalty at stake, capital cases require

additional procedural and substantive protections. *Herrera v. Collins*, 506 U.S. 390, 399 (1993); *Gardner v. Florida*, 430 U.S. 349 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Our law struggles to ensure that a defendant receives every required safeguard before and after a sentence of death. *Lockett*, 438 U.S. at 604; *Gardner*, 430 U.S. at 358; *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson*, 428 U.S. at 305; *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring in result); *Powell v. Alabama*, 287 U.S. 45, 71 (1932). This due process protection extends beyond the initial trial to the direct appeal of right, *Evitts v. Lucey*, 469 U.S. 387 (1985). It also protects a capital defendant in the pursuit of clemency. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998). Surely, if Mr. Ahmed is entitled to some, as yet unknown, level of due process at the very end of capital litigation, clemency, then he is entitled to significantly more due process at his first opportunity to litigate claims of constitutional violation *de hors* the record. In fact, the Sixth Circuit recognizes that due process protections extend to post-conviction proceedings. *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178, 1186 (6th Cir. 1997), rev'd on other grounds *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).

### **C. Improper Application of *Res Judicata* Doctrine**

The lower courts held that Mr. Ahmed's First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Twelfth, Thirteenth, and Seventeenth Grounds for Relief were barred by *res judicata*. A review of each of these claims demonstrates that each was supported by evidence *de hors* the record. The evidence *de hors* the record demonstrates that the claim was not capable of being raised on direct appeal or could not have been fully litigated on direct appeal. Therefore, the trial court improperly applied *res judicata* to these claims. Ohio courts improperly use the doctrine of *res judicata* to dismiss claims in post-conviction. *Hill*, 400 F.3d at 313-315; *Greer*, 264 F.3d at 675. The failure to give proper review deprived Mr. Ahmed of his right to self-representation, due process and

equal protection of law, and impeded his right of access to the courts as guaranteed by the First, Fifth, Sixth, Eighth, Fourteenth Amendments to the Constitution. For this reason, review should be granted and the matter must be reversed and remanded for proper consideration of Mr. Ahmed's claims.

## **PROPOSITION OF LAW NO. II**

A capital petitioner in post-conviction must be competent at all stages of the post-conviction process and an indigent petitioner must be afforded the resources to properly litigate questions of competency.

Counsel advised the courts of their concerns about Mr. Ahmed's competency to proceed in post-conviction. Counsel requested funds to retain an independent competency evaluation and to stay and abey the post-conviction proceedings pending a competency determination. The trial court made no ruling on this motion. The concerns for competency were presented to the court of appeals along with request for funds, an evaluation and a competency determination. The court of appeals denied these requests without determining Mr. Ahmed's competency holding that there is no right to be competent if a petitioner wishes to pursue post-conviction remedies.

Encompassed in the right to pursue post-conviction relief are the rights to due process, effective counsel, equal protection, freedom from cruel and unusual punishment and other constitutional rights as guaranteed by the Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments. The Supreme Court clearly mandates that petitioners in *habeas* actions be competent. *Rees v. Payton*, 384 U.S. 312 (1966). See *Rohan ex rel Gates v. Woodford*, 334 F.3d 803, 814 (9th Cir. 2003).

This Court recognizes the right to be competent in post-conviction proceedings. *State v. Berry*, 80 Ohio St.3d 371 (1997). The issue in *Berry* was Berry's competency to proceed in post-conviction. The question was framed as competency to waive review but this question necessarily

required the Court to address the substantive issue of the right to be competent. If a defendant has the right to be competent to waive post-conviction by necessity he must be competent to decide to pursue post-conviction. The right to competency does not change based on the answer to a question but on the fact that a question exists.

Several courts of appeals in Ohio have determined that defendants do not have a right to be competent in post-conviction. *See State v. Ely*, unreported, 2001 Ohio App. Lexis 5225 (7th Dist. November 6, 2001); *State v. Moreland*, unreported, 2004 Ohio App. Lexis 5242 (2nd Dist. October 8, 2004). The Ohio courts have created an irrational and inconsistent legal landscape: per *Berry* a capital defendant must be competent to waive his appeals but per this case a capital defendant does not have to be competent to go forward with litigation. As outlined above, the Constitution, as well as Ohio law as set forth in *Berry*, provide a clear mandate that capital defendants be competent in post-conviction proceedings. *See Drope v. Missouri*, 420 U.S. 162, 181 (1975); *Pate v. Robinson*, 383 U.S. 375, 385-386 (1966). Forcing Mr. Ahmed to proceed in post-conviction while incompetent deprives him of his First, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendment rights of access to courts, assistance of counsel, freedom from cruel and unusual punishment, and due process and equal protection of law. Review must be granted and this matter must be remanded for a competency determination.

### **PROPOSITION OF LAW NO. III**

It is error for a trial court to summarily adopt the findings of fact and conclusions of law of the state.

The Supreme Court has long been critical of a court's verbatim adoption of findings of fact prepared by the prevailing party. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964); *United States v. Marine Bancorporation*, 418 U.S. 602, 615 (1974). While adopted findings will stand on appeal if supported

by the evidence, *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), “[t]hose drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.” *El Paso*, 376 U.S. at 656.

Appellate courts almost universally condemned the practice of the prevailing party “ghost writing” for the trial courts its findings of facts and conclusions of law. Lawyers are adversarial and cannot be trusted to fairly draft an accurate version of the facts. *See Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 459 (4th Cir. 1983). The trial court, as fact finder, “is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts.” *United States v. Forness*, 125 F.2d 928, 942-43 (2nd Cir. 1942). When a trial court delegates its duty to the prevailing party to make findings of fact and conclusions of law, it abandons its institutional role. *El Paso Natural Gas*, 376 U.S. at 657 n. 4. “[T]he practice tends to deflect the court's attention from, or actually to obscure, the more difficult factual issues and credibility problems presented by the evidence. The natural tendency of counsel, given an opportunity free of adversary constraints to shore up weak points, to gloss over evidence or credibility problems at odds with necessary findings, and to argue inferences in the guise of 'findings' is obvious.” *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 369 (1983). *See also Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960, 962 (5th Cir. 1975); *Wylar Summit Partnership v. Turner Broadcasting System, Inc.*, 235 F.3d 1184 (9th Cir. 2000). It is because of this risk that the Fifth Circuit demands that “rubber-stamped” findings receive increased scrutiny. *McClennan v. American Eurocopter Corp., Inc.*, 245 F.3d 403, 409 (5th Cir. 2001).

Ohio law mandates that the post-conviction court *shall* make findings of fact and conclusions of law. O.R.C. § 2953.21(G). The capital scheme is not designed for the judge to merely rubber-stamp the state’s findings of fact and conclusions of law without seriously considering the record

of the trial, the petition and evidence submitted by the petitioner, and any other evidence that may be presented. Simply signing the document created by the prosecutor invalidates the entire process and cannot be condoned. This is the same mandate as O.R.C. § 2929.03(F). *See State v. Roberts*, 110 Ohio St.3d 71, 93-95 (2006).

This error is especially glaring in this case as it is clear that the trial court did not independently review the record of proceedings before signing the state's findings of fact and conclusions of law. The record of Mr. Ahmed's case was transferred to the Ohio Supreme Court for direct appeal of the conviction and sentence. A duplicate copy was not maintained by the trial court. A review of the docket of the Ohio Supreme Court demonstrates that the record was not returned to the trial court until March 10, 2005, two days after the trial court signed the state's findings of fact and conclusions of law. Clearly the trial court could not conduct the mandated review of the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. O.R.C. §2953.21(C). The failure of the trial court to follow Ohio's procedures and law violated Mr. Ahmed's substantive rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as his due process and equal protection rights.

The state submitted its proposed findings of fact and conclusions of law without any adversarial proceedings, hearings, or factual development. In spite of this, the state was able to discern how the trial court would address Mr. Ahmed's *pro se* pleadings, recall the presentation of evidence and the conduct of Mr. Ahmed from the trial, and make other conclusions or opinions. It of course begs the question of how the state knew that the trial court would address issues especially since there were no court proceedings, hearings, status conferences or any other interaction between the court and counsel. The most logical way for this to occur would be through *ex parte* communications. If in fact there were *ex parte* communications this would further taint the entire

proceedings. Therefore, this matter should be reversed, remanded for further factual development before a new judge in which Mr. Ahmed would have the opportunity to explore the scope of the contact. *State v. Roberts*, 110 Ohio St.3d 71, 93 (2006); *Bracey v. Gramley*, 519 U.S. 1074 (1997). *See also In re Murchison*, 349 U.S. 133 (1955).

Mr. Ahmed filed a motion to compel the trial court to issue independent findings of facts and conclusions of law as well as to correct the record. The trial court set a date for a hearing on Mr. Ahmed's motions but postponed that hearing. To date that hearing has not been held nor has the trial court ruled on Mr. Ahmed's motions.

Even if the signing of the state's findings of fact and conclusions of law is not reversible error in general it is reversible error in this case. The dismissal entry must be "sufficiently comprehensive and pertinent to the issue to form a basis upon which the evidence supports the conclusion." *State v. Calhoun*, 86 Ohio St.3d 279, 291-92 (1999). This requires that "findings are comprehensive and pertinent to the issues presented, . . . [that] findings demonstrate the basis for the decision by the trial court." *Id.* It is clear that the state's findings of fact and conclusions of law fall woefully short of this mandate. The "findings of fact" are not factual determinations but simple restatements of the claim asserted in the petition and, in some cases, a statement of the factual assertions made by Mr. Ahmed. At no point do the findings of fact make factual determinations or conclusions and are therefore inadequate as a matter of law.

The conclusions of law are equally inadequate. The court engaged in no legal analysis or discussion of the relevant law and made no attempt to apply the facts to the law. For example, six claims were based on the ineffective assistance of counsel the court never once cited the binding Supreme Court authority of *Strickland v. Washington*, 466 U.S. 668 (1984). It is impossible to conduct a proper legal analysis without identifying and applying the proper law.

As the trial court's, or rather, the state's, findings of fact and conclusions of law are inadequate as a matter of law. Review must be granted and the matter reversed for proper review and consideration. *Calhoun*. The failure of the trial court to properly and independently review Mr. Ahmed's case deprived him of his Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendment rights and this matter must be reversed.

#### **PROPOSITION OF LAW NO. IV**

When a petitioner files a motion for voluntary recusal of the trial judge that motion must be addressed before further proceedings can occur.

The trial judge's presumptive denial of Mr. Ahmed's motion for recusal was error and her subsequent dismissal of his petition without a hearing, in the wake of claims implicating her bias and knowledge of circumstances surrounding the trial, gives the appearance of impropriety in this case. The trial judge should have recused herself to preserve the appearance of impartiality in the post-conviction proceedings. *See In re Disqualification of Sheward*, 77 Ohio St. 3d 1258 (1996). The appearance of bias violates the due process rights of litigants, even if the judge is not actually biased. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). The parties' confidence in the fairness of the proceedings must be preserved. The facts surrounding the dismissal Mr. Ahmed's petition are tainted with the appearance of impropriety and judicial bias.

Furthermore, the judge simply signed the state's proposed findings of fact and conclusions of law. The Entry shows that the judge did not exercise impartial, independent judicial review of the case. The judge cannot make findings in a fair and impartial manner when she merely signs fact-finders and legal arguments from one party. A court's delegation of its judicial function to an adversarial party conflicts with the need for both the reality and appearance of a fair, objective, and reliable process for imposing or affirming death. *Johnson v. Mississippi*, 486 U.S. 578, 584-85 (1988); *Gardner v. Florida*, 430 U.S. 349, 358 (1977). *See also Roberts*. The findings should reflect

“an effort of composition by the trial judge.” *Garcia v. Rush-Presbyterian-St. Luke’s Medical Ctr.*, 660 F.2d 1217, 1220 (7th Cir. 1981). There was no such effort by the trial judge in Mr. Ahmed’s case. The judge’s findings of facts and conclusions of law are insufficient under the statute, create an appearance of bias and violate Mr. Ahmed’s Fifth and Sixth Amendment rights to fair review and Fourteenth Amendment right to due process.

To preserve the integrity of Mr. Ahmed’s post-conviction proceedings, and to protect his rights under the United States Constitution’s Fifth, Sixth, Eighth, and Fourteenth Amendments, this Court should remand this case to the common pleas court for full review of the petition and the post-conviction motions for discovery, an evidentiary hearing, and review by an independent judge. Judge Sargus should have removed herself from this case and a visiting judge assigned to hear the case. This did not happen and therefore this matter must be reversed and remanded for proper review by an different judge.

#### **PROPOSITION OF LAW NO. V**

Because Ohio does not recognize a constitutional right to counsel in post-conviction, a court must review a petitioner’s *pro se* claims even if the petitioner is also represented by counsel.

Mr. Ahmed filed a *pro se* post-conviction petition raising numerous claims to be considered by the trial court. The trial court improperly refused to consider these claims or to conduct any inquiry into the relationship between Mr. Ahmed and former counsel. Despite this total lack of factual development the trial court determined that “Ahmed has not made a valid decision to waive his statutory right to counsel and proceed in this action *pro se*.”<sup>1</sup> Entry at 5, para. 6. The court did not engage in any inquiry into why the claims in Mr. Ahmed’s *pro se* petition were not submitted

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<sup>1</sup>See PROPOSITION OF LAW No. II. The trial court did not engage in a competency determination of whether Mr. Ahmed was competent to waive counsel and proceed *pro se*. See *Berry*.

by counsel. This determination in and of itself could only be properly reached after an evidentiary hearing. Since a hearing was not held, especially in light of counsel's assertions that Mr. Ahmed was not competent, the trial court had no foundation for its conclusion.

The trial court gave no reason for refusing to consider Mr. Ahmed's petition. Further, the trial court engaged in no evaluation of why not to consider Mr. Ahmed's claims. It appears that the trial court simply determined that the most expeditious course of action was to ignore Mr. Ahmed, much as the court did during Mr. Ahmed's trial. Refusing to consider these claims without any justification or explanation is arbitrary, an abuse of discretion, and demonstrates the need for an independent judicial review of Mr. Ahmed's petition.

It is true that Mr. Ahmed does not have a right to hybrid representation on direct appeal, *see State v. Beaver*, 119 Ohio App.3d 385 (1997); *McKaskle v. Wiggins*, 465 U.S. 168 (1984). However, these cases all address the issue of *pro se* representation when the Sixth Amendment right to counsel is at issue. As the state repeatedly argues in *habeas* cases, there is no Sixth Amendment right to counsel in state post-conviction proceedings. Similarly, the state cannot force Mr. Ahmed to be represented by counsel. Therefore, Mr. Ahmed must be permitted the right to self-representation and hybrid representation is neither prohibited nor relevant to the issue in this case.

Finally, the state will argue that any claim that should have been but was not raised in post-conviction that Mr. Ahmed seeks to raise in *habeas* is barred from review. *Habeas* petitioners are routinely penalized for the failures of post-conviction counsel. *See Coleman v. Thompson*, 501 U.S. 722 (1991). Mr. Ahmed's *pro se* petition simply sought to prevent this prejudice. Given the impact of failure to raise issues in state court it was error on the part of the trial court to fail to consider Mr. Ahmed's *pro se* petition. The failure to review Mr. Ahmed's *pro se* claims deprived Mr. Ahmed of his right to self-representation, due process and equal protection of law, and impeded his right of

access to the courts as guaranteed by the First, Sixth, Eighth, Fourteenth Amendments to the Constitution. This matter must be reversed and remanded for proper review of all of Mr. Ahmed's claims.

### **PROPOSITION OF LAW NO. VI**

The issues presented in Mr. Ahmed's petition were sufficient to warrant relief or at least discovery and an evidentiary hearing.

#### **A. First Ground for Relief - Prosecutorial Misconduct**

In his First Ground for Relief Mr. Ahmed alleged prosecutorial misconduct in repeatedly arguing that the homicide was an "honor killing." By so doing the prosecutors injected the improper and unconstitutional issues of race and culture and appealed to the jury's passions and prejudices to obtain the conviction and death sentence. *Berger v. United States*, 295 U.S. 78 (1935). *Cunningham v. Zant*, 928 F.3d 1006, 1020 (11th Cir. 1991).

Not only were the prosecutors' arguments improper, they were wrong as a matter of fact. As the affidavit of Dr. Weiss demonstrates, the facts surrounding this case do not demonstrate that the crime was an "honor killing." The state, and the trial court, simply dismissed this affidavit based on its understanding of Pakistani culture. It is the misunderstanding of honor killings, and the state's steadfast adherence to this claim, that demonstrates the misconduct. Calling something an "honor killing" connotes certain cultural, historical, religious, social, and factual determinations, all of which are missing from this case. The state's argument called on the jury to label this crime an "honor killing" because that is what the state said it was. This is the definition of prosecutorial misconduct. "Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88. The prosecutors antics deprived Mr. Ahmed of his right to a

fair and impartial trial, sentencing determination, and due process and equal protection of the law under the Sixth, Eighth and Fourteenth Amendments to the Constitution.

Furthermore, whether the state intentionally misstated the facts is irrelevant. The fact of the matter is that the prosecutors simply made up the argument that this was an “honor killing.” There is absolutely not testimony about honor killings in the trial. Creating of whole cloth personal beliefs about the crime are clearly improper. *Berger*. At a minimum, the state’s argument that Dr. Weiss’s affidavit is incorrect demonstrates why this claim could not be heard on the pleadings and why further discovery and an evidentiary hearing is warranted. The state proffered no evidence in support of its argument that Dr. Weiss was incorrect other than its own bare assertions. The trial court should have ordered further discovery and an evidentiary hearing to determine exactly what the facts of this matter were before denying Mr. Ahmed’s petition. The court of appeals compounded the error by dismissing the claim on a theory that, because the prosecutor’s argument was irrelevant to the elements of the charges, the misconduct could not have impacted the outcome. This has the effect of authorizing prosecutors to engage in any sort of misconduct so long as it is irrelevant to an ultimate issue. For too long, this Court has found prosecutorial misconduct but refused to take corrective measures and it is now time to change this course. Review should be granted and the prosecution’s misconduct subjected to full and proper review.

#### **B. Ineffective Assistance of Counsel Claims**

The Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). This right is violated when counsel’s performance falls below an objective standard of reasonableness and the client is prejudiced by counsel’s breach of duty. *Id.*, at 690, 696. Only after a *full* investigation can counsel make an

informed, tactical decision about which information would be helpful in the client's case. *Strickland*; *State v. Johnson*, 24 Ohio St. 3d 87, 90 (1986).

In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, and (2) counsel's performance prejudiced the defense so as to deprive the defendant of a fair trial. *Id.*, at 687. Counsel's performance is reviewed under the prevailing professional norms. *Id.* The professional norms are the standards set out in the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, February 2003, hereinafter "ABA Guidelines." *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 125 S.Ct. 2456 (2005); *Cone v. Bell*, 359 F.3d 785, 804 (6th Cir. 2004) (Merritt, J. concurring); *Hamblin v. Mitchell*, 354 F.3d 482, 287 (6th Cir. 2003).

The prejudice prong of *Strickland* requires Mr. Ahmed to show there is a reasonable probability that, but for counsels deficient performance, the outcome of his trial would have been different. *Id.*, 466 U.S. at 694. But, Mr. Ahmed does not have to show that counsels' deficient conduct "more likely than not altered the outcome in the case." *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), citing *Strickland*, 466 U.S. at 693. *Williams v. Taylor*, 529 U.S. 362 (2000) (expressly affirming that *Lockhart v. Fretwell*, 506 U.S. 364 (1993), did not change the *Strickland* test).

When a capital defendant is deprived of an individualized sentencing assessment because of his attorneys' failure to investigate, the integrity of the proceedings are suspect and prejudice is established. *Williams v. Taylor*, 529 U.S. 362, 393 fn.17 (2000). Counsel did not meet their obligations under the Sixth Amendment and *Strickland*. Moreover, counsel's penalty-phase performance failed to meet the standards articulated in *Wiggins*, *Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003), and *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995).

It is clear that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Strickland*, 466 U.S. at 694. Therefore, the trial court erred in summarily dismissing this claim. In order to protect Mr. Ahmed’s constitutional rights to the effective assistance of counsel, freedom from cruel and unusual punishments, a fair and impartial trial, and due process of law, Fifth, Sixth, Eighth and Fourteenth Amendments, review should be granted.

**1. Second Ground for Relief - Failure to Object to Prosecutorial Misconduct**

In the Second Ground for Relief Mr. Ahmed alleged that he was denied the effective assistance of counsel due to trial counsels’ failed to object to the prosecutorial misconduct outlined in the First Ground for Relief and to present evidence rebutting the false arguments. The failure to object to improper arguments is the definition of ineffective assistance of counsel. *Hodge v. Hurley*, 426 F.3d 368, 385-387 (6th Cir. 2005); *Gravelly v. Mills*, 87 F.3d 779, 785-86 (6th Cir. 1996); *Rachel v. Bordenkircher*, 590 F.2d 200, 204 (6th Cir. 1978).

There is simply no strategic reason for counsel not to object to the improper arguments of the prosecutors.<sup>2</sup> The failure to object allowed the prosecutors to inject improper considerations of race, culture, and religion into the jury’s determinations. There is simply no rational reason to allow the jury to decide a client’s fate based on racism or cultural or religious bias. Counsels’ failure to object was clearly deficient performance.

Mr. Ahmed was prejudiced by counsels’ errors in that the jury was exposed to unsubstantiated arguments about race, culture and religion that had no bearing on the guilt or innocence of Mr. Ahmed and have no place in sentencing determinations. The prosecutors

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<sup>2</sup>The denial of discovery and evidentiary hearing renders any determination that the failure to object was strategic rank speculation.

improperly argued that the jury should find Mr. Ahmed guilty and sentence him to death because of his racial, cultural, and religious beliefs. Had counsel objected these improper considerations would not have been before the jury. Review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

## **2. Third Ground for Relief - Ineffective Assistance of Counsel - Mitigation Phase**

Counsel relied on the theory that the jury had to understand the context of Mr. Ahmed's emotional, cultural, insane, and religious reaction to his life situation. It was during the preparation, presentation, and proof of this defense that counsel's performance fell terribly short. There was available direct and uncontradicted evidence that directly proved the mitigation theory of the case. It is inexcusable for counsel to ignore or at least investigate this evidence.

Rather than leaving the prosecutor free to argue that Mr. Ahmed was motivated by a misdirected sense of social "honor", counsel would have had direct testimony from people directly involved in the situation that supported their mitigation strategy. Rebutting the prosecutors' clear misrepresentation of this crime as an "honor crime" was critical to give the jury a reason not to execute Mr. Ahmed. The failure to call these witnesses stems from counsels' unreasonable decision not to independently investigate this case. *Strickland* has always stood for the proposition that there can be no "strategic decision" predicated on a lack of investigation. *Wiggins; Strickland*. Since trial counsel did an inadequate investigation, they had no facts on which to base their "strategy" or to support a decision not to investigate further. *Harries v. Bell*, 417 F.3d 631, 637-642 (6th Cir. 2005). This renders counsels' performances constitutionally deficient and deprived Mr. Ahmed of his constitutional right to the effective assistance of counsel.

Counsel also failed to seek the resources necessary to conduct a proper investigation. As in *Wiggins*, the failure of counsel to conduct a reasonable investigation constitutes deficient

performance, and Mr. Ahmed was prejudiced by this performance. Counsel never requested funds to hire a mitigation investigator and cultural expert. This was despite the fact that Ohio's statute specifically provides funding for this type of assistance. O.R.C. § 2929.024. These professionals are a regular members of the death penalty defense team. *Wiggins*. The mitigation investigator ensures that counsel and the other experts, especially psychological experts, have the necessary records, documents, and access to witnesses essential to the effective defense of capital cases.

The failure to collect these records also deprived Dr. Smalldon, the psychologist who evaluated Mr. Ahmed, and testified at the mitigation phase of the case, of extensive medical and psychological information that would have led to other areas of investigation including evidence to rebut the prosecutors' arguments that Mr. Ahmed's severe paranoia was culturally justified and not a mental health issue.

The cultural expert provides the jury with insight, information, and facts of the defendant, his life history, culture, religion, and other experiences that are beyond the experiences of the individual jurors. The denial of this expert is clear reversible error, *State v. Dixon*, unreported, Case No. 68338, 1997 Ohio App. Lexis 915 (8th Dist. 1997), and counsels' failure to request this expert was deficient and prejudiced Mr. Ahmed. The failure to properly explain Mr. Ahmed's social, cultural, religious and life history deprived the jury of relevant, critical, and important mitigation evidence.

Counsels' failure to tap into available resources to properly investigate, prepare, and present a mitigation defense is unreasonable performance. Counsel must conduct an adequate investigation in order to make reasonable strategic decisions. *Rompilla; Wiggins; Strickland*. Mr. Ahmed was prejudiced by counsels' deficient performance in that the jurors were deprived of this relevant, important, critical information as to the underlying aspects of this matter, insight into Mr. Ahmed

as a person, and reasons not to kill Mr. Ahmed. There is a reasonable likelihood that, had counsel properly prepared, investigated, and presented this testimony, one juror would have voted for a life sentence. Review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

**3. Fourth Ground for Relief - Failure to Employ an Appropriate Translator**

One of the critical mitigation witnesses was Mr. Ahmed's sister, Shehida Ahmed. Ms. Ahmed is not fluent in English and speaks Urdu. The translator used by counsel did not speak Urdu. This resulted in an improper, inaccurate, and ineffective presentation of this mitigation evidence. Counsel literally presented evidence in a language that the jury was incapable of understanding. The failure to make sure that the jury could actually understand what a witness was saying is clearly deficient performance resulting in prejudice. The only way a capital jury can return a life sentence is if some mitigation evidence is presented. *See Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir. 1999); *Wickline v. Mitchell*, 319 F.3d 813, 819 (6th Cir. 2003). While Ms. Ahmed's testimony was presented it cannot be called evidence as the translator failed to properly translate her testimony so that the jury could understand the evidence and its value.

Review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

**4. Ninth Ground for Relief - Failure to Object to Prosecutorial Misconduct**

Mr. Ahmed directs the Court to Section 1, *supra*, for the argument and law that counsels' failure to object constituted deficient performance.

Mr. Ahmed was prejudiced by counsels' errors in that the jury was told by the prosecutor to use the nature and circumstances of the crime as a reason to impose death. It is clear misconduct for the prosecutor to make the argument made in this case. *State v. Wogenstahl*, 75 Ohio St.3d 344,

345 (1996); *Clemons*. Had counsel objected these improper considerations would not have been before the jury.

It is clear that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Strickland*, 466 U.S. at 694. Review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed’s claims.

#### **5. Tenth Ground for Relief - Improper Mitigation Argument**

In the Tenth Ground for Relief Mr. Ahmed alleged that he was denied the effective assistance of counsel because trial counsel improperly told the jury that the nature and circumstances of the murder were aggravating circumstances that had to be overcome by the mitigating evidence. Counsel compounded this error by telling the jury that no amount of mitigation evidence could overcome the nature and circumstances of the crime.

There is simply no strategic reason for counsel to make clearly improper arguments of this magnitude.<sup>3</sup> Counsel’s improper argument injected improper, non-statutory aggravating circumstances to the death side of the jury’s calculation, *see Clemons v. Mississippi*, 494 U.S. 738 (1990), and then destroyed any possibility that the jury would return a life sentence by stating that no mitigation could overcome the invalid, non-statutory aggravating circumstance.

Counsel’s conduct was clearly deficient performance. *Rickman v. Bell*, 131 F.3d 1150, 1156 (6th Cir. 1997); *Spisak v. Mitchell*, 465 F.3d 684, 706 (6th Cir. 2006). The Court determined that counsel’s introduction of unrelated crimes, coupled with clear animosity towards the client, constituted a constructive denial of counsel under *United States v. Cronin*, 466 U.S. 648 (1984). The

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<sup>3</sup>The denial of discovery and evidentiary hearing renders any determination that the failure to object was strategic rank speculation.

severity of counsel's error mandated relief without a specific demonstration of prejudice. *Rickman*; *Spisak*.

Mr. Ahmed was prejudiced by counsels' errors in that the jury was told by the defense attorneys, the only ones constitutionally mandated to be on Mr. Ahmed's side, to use the nature and circumstances of the crime as a reason to impose death. It is clear misconduct for the prosecutor to make this argument, *State v. Wogenstahl*, 75 Ohio St.3d at 345; *Clemons*, and yet counsel abandoned Mr. Ahmed, switched to the prosecution side of the courtroom, and told the jury to sentence Mr. Ahmed to death on the basis of an invalid, non-statutory aggravating circumstance. *Spisak*.

It is clear that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. Therefore, the trial court erred in summarily dismissing this claim. In order to protect Mr. Ahmed's constitutional rights to the effective assistance of counsel, freedom from cruel and unusual punishments, a fair and impartial trial, and due process of law, Fifth, Sixth, Eighth and Fourteenth Amendments, review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

**6. Eleventh Ground for Relief - Failure to Investigate and Present Evidence in Rebuttal of the State's Evidence and Theory**

In the Eleventh Ground for Relief Mr. Ahmed alleged that he was denied the effective assistance of counsel because trial counsel failed to investigate the facts of his case, the prosecutors' theory of the case, or to present the available evidence to rebut the prosecutors' evidence and arguments. Counsel took no steps to investigate these theories or to present any evidence to support this defense. The failure to present an available defense, especially an affirmative defense, is deficient performance. *Wiggins*; *Rickman*; *Wong v. Money*, 142 F.3d 313 (6th Cir. 1998); *Genius*; *Tooley v. Rose*, 507 F.2d 413 (6th Cir. 1974); *Miller v. Francis*, 269 F.3d 609 (6th Cir. 2001).

Counsel's abandonment of any defense without any rationale is ineffective assistance of counsel. *Wiggins*; *Wong*, 1142 F.3d at 321. *Strickland*, 466 U.S. at 690. It is clear that any defense attorney who abdicates the preparation of the case to the prosecutor is constitutionally deficient. *See Wiggins* (counsel has an independent duty to investigate); *Banks v. Dretke*, 124 S.Ct. 1256 (2004); ABA Guidelines 10.7, 10.10.1, 10.11, *see also* ABA Guidelines 4.1, 10.3, 10.4, 10.5, 10.8.

The state presented this case as an "honor killing" that was preplanned because of the pending divorce action. Had counsel performed even a most basic independent investigation they would have discovered a vast wealth of evidence rebutting the state's entire theory and case. Available evidence to rebut the prosecutors' arguments that Mr. Ahmed challenged the paternity of his son, that his trip to Pakistan was unplanned and motivated by an attempt to flee after the crime, and demonstrate that Mr. Ahmed was in Columbus at the time the murders were committed was available but not sought.

There can be no "strategic decision" predicated on a total lack of investigation. *Wiggins*; *Strickland*. It is clear that counsel did not investigate the only available defense. A decision not to investigate is reasonable only so far as it is predicated on sufficient investigation to warrant a decision not to continue the investigation. *Strickland*; *Wiggins*. There could be no reasonable decision not to investigate this case because counsel never investigated to see if there was anything to find. As in *Wiggins*, the failure of counsel to conduct a reasonable investigation constitutes deficient performance, and Mr. Ahmed was prejudiced by this performance. Review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

**7. Sixteenth Ground for Relief - Failure to Investigate and Present Mitigation Evidence**

In his Sixteenth Ground for Relief Mr. Ahmed argued that he was deprived of the effective assistance of counsel due to counsel's failure to investigate and present mitigation evidence. It was

during the preparation, presentation, and proof of this defense that counsel's performance fell terribly short. There was available direct and uncontradicted evidence that directly proved the mitigation theory of the case. It is inexcusable for counsel to ignore or at least investigate this evidence. Counsel knew that it was essential that the jury know and understand the specifics of Mr. Ahmed's life history, cultural, psychological, religious, and emotional background and yet they failed to investigate an available witness who could explain to the jury the importance of religion to Mr. Ahmed, how his faith impacted his thoughts and actions, and dispute the prosecutors' improper arguments about "honor killings". See *Wiggins*, 539 U.S. at 522-23, 526-28, 533; *Strickland*, 466 U.S. at 690-691; *Rompilla*, 125 S.Ct. at 2465. Since trial counsel did no investigation, they had no facts on which to base their "strategy" or to support a decision not to investigate further. *Harries v. Bell*, 417 F.3d 631, 637-642 (6th Cir. 2005). This renders counsels' performances constitutionally deficient and deprived Mr. Ahmed of his constitutional right to the effective assistance of counsel.

Counsels' failure to talk to Dr. Malik and to properly investigate, prepare, and present a mitigation defense, was unreasonable performance. Counsel must conduct an adequate investigation in order to make reasonable strategic decisions. *Wiggins*, 539 U.S. at 522-23, 526-28, 533; *Strickland*, 466 U.S. at 690-691. Mr. Ahmed was prejudiced by counsels' deficient performance in that the jurors were deprived of this relevant, important, critical information as to the underlying aspects of this matter, insight into Mr. Ahmed as a person, and reasons not to kill Mr. Ahmed. As in *Wiggins*, there is a reasonable likelihood that, had counsel properly prepared, investigated, and presented this testimony, one juror would have voted for a life sentence. Review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

**C. Fifth Ground for Relief - Denial of a Fair Sentencing Proceeding**

One of the critical mitigation witnesses was Mr. Ahmed's sister, Shehida Ahmed. Ms. Ahmed is not fluent in English and speaks Urdu. The translator used by counsel did not speak Urdu. This resulted in an improper, inaccurate, and ineffective presentation of this mitigation evidence. The jury was literally presented evidence in a language that it was incapable of understanding. The improper translation failed to ensure that the jury could understand, consider, and weigh the mitigation evidence. This deprived Mr. Ahmed of his right to a fair and impartial sentencing proceeding and renders the death sentence arbitrary and capricious. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

The only way a capital jury in Ohio can return a life sentence is if some mitigation evidence is presented. *See Mapes; Wickline*. While Ms. Ahmed's testimony was presented it cannot be called evidence as the translator failed to properly translate her testimony so that the jury could understand the evidence and its value. Review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

#### **D. Sixth Ground for Relief - Improper Jury Conduct**

The post-conviction evidence shows that jurors did not weigh proper statutory aggravating circumstances against mitigating factors. Juror Holcomb stated that the most significant aggravating circumstances for her were the autopsy and crime scene photographs. She stated that she decided on the death penalty during the trial phase without hearing any mitigation evidence or even deciding Mr. Ahmed's guilt. Juror Holcomb also stated that she considered the non-statutory aggravator of one of the victim's advanced age. Other jurors reported considering the non-statutory aggravator of "viciousness". The viciousness of the crime, the autopsy and crime scene photographs, or the age of a victim over the age of 13 are not valid aggravating circumstances. When deciding whether Mr.

Ahmed should live or die, the jury put on the scale circumstances that cannot be weighed against mitigating factors. *See State v. Gumm*, 73 Ohio St.3d 413, 422 (1995).

Statements from jurors have been routinely opposed on the basis of Evid. R. 606(B), the *aliunde* rule. The trial court invoked this rule in dismissing Mr. Ahmed's claims. However, the Ohio Supreme Court permitted the media to invade the jury's deliberations in the Cuyahoga County Common Pleas Court case, *State v. Ducic*, Case No. CR-03-440378-A (2004), by allowing ABC-News to record and televise the jury's trial- and mitigation-phase deliberations. The nationally televised broadcast undermined the stated purpose of Evid. R. 606(B). "The purpose of the *aliunde* rule is to maintain the sanctity of the jury room and the deliberations therein." *State v. Hessler*, 90 Ohio St.3d 108, 123 (2000) (citing *State v. Rudge*, 89 Ohio App.3d 429, 438-39 (1993)). With the Ohio Supreme Court's willingness to make public jury deliberations the application of the *aliunde* rule in Mr. Ahmed's case is arbitrary. Just as the state evidentiary rules cannot prevent presentation of relevant mitigation evidence, *see Green v. Georgia*, 442 U.S. 95 (1979), nor can the state rules prevent consideration of material evidence of juror misconduct, arbitrary infliction of the death penalty, and juror confusion.

The jurors violated their oath to follow the law as given through instructions by the court. The Supreme Court mandates individualized capital sentencing. *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976), and *Lockett v. Ohio*, 438 U.S. 538 (1978). The Sixth, Eighth, and Fourteenth Amendments require that a sentencing authority actually consider and give effect to all relevant mitigation evidence before imposing a death sentence. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982). Mr. Ahmed did not receive his constitutionally guaranteed right to individualized sentencing. The juror misconduct deprived him of due process and a fair mitigation hearing. Review

must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

**E. Seventh Ground for Relief - Incomprehensible Jury Instructions**

Mr. Ahmed alleged that the jury instructions deprived him of due process and a fair sentencing hearing. Members of the jury failed to understand and follow the trial court's instructions of law, resulting in a sentencing verdict that is arbitrary and unreliable. Ohio's death penalty scheme does not work. Jurors neither understand the law nor apply it when deciding capital cases. As the affidavit of Dr. Geis demonstrates, the jury instructions were incomprehensible, fail to properly guide the jury's discretion, and lead to arbitrary and capricious death sentences. *Mills v. Maryland*, 486 U.S. 367 (1988). *Furman v. Georgia*, 408 U.S. 238, 309-310, 313 (1976); *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003). Review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

**F. Eighth Ground for Relief - Prosecutorial Misconduct**

In the Eighth Ground for Relief Mr. Ahmed alleged that he was denied a fair and impartial sentencing proceeding due to the misconduct of the prosecutors in arguing non-statutory aggravating circumstances and urging the jury to speculate about the existence of facts and evidence. The prosecutors injected improper, non-statutory aggravating circumstances to the death side of the jury's calculation, *see Clemons v. Mississippi*, in urging the jury to use the nature and circumstances of the crime as a reason to impose death. It is clear misconduct for the prosecutor to make this argument. *State v. Wogenstahl*, 75 Ohio St.3d 344, 345 (1996); *Clemons*.

In order to protect Mr. Ahmed's constitutional rights to the effective assistance of counsel, freedom from cruel and unusual punishments, a fair and impartial trial, and due process of law,

Fifth, Sixth, Eighth and Fourteenth Amendments, review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

**G. Twelfth Ground for Relief - Denial of Rights Under the Vienna Convention on Consular Relations**

Mr. Ahmed is a Pakistani citizen. As such he is entitled to the protections of the Vienna Convention on Consular Relations ("VCCR").<sup>4</sup> A critical component of the VCCR is duty of the arresting nation to inform the foreign national of the right to contact his consulate. At no point was Mr. Ahmed ever advised of this right, nor was the Pakistani Consulate ever contacted. As the affidavits of Drs. Weiss and Smalldon demonstrate, the assistance of the Consulate was critical to conducting a proper mitigation investigation and defense.

The trial court dismissed this Ground in part because Mr. Ahmed was unable to prove what the Government of Pakistan could have done to assist in his defense. This of course begs the question of whether Mr. Ahmed was entitled to discovery and an evidentiary hearing to prove his claim. On this flawed rationale alone the matter should be reversed and remanded for proper review.

The trial court's logic is flawed as a matter of fact. Contact with the Consulate would have provided Mr. Ahmed with the necessary resources to avoid the ineffective assistance of counsel claims outlined above as well as the tools necessary to ensure that a qualified, Urdu speaking translator was available, that an expert on Pakistani culture, Islam, and other issues unique to Mr. Ahmed's family, social, religious, and cultural history were available to counsel. Review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

**H. Thirteenth Ground for Relief - Mr. Ahmed was Incompetent to Stand Trial and Proceed in Mitigation**

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<sup>4</sup>It is irrelevant to the Treaty and international law whether Mr. Ahmed is a dual national of Pakistan and the United States. All that matters is that he is a Pakistani national.

In his Thirteenth Ground for Relief Mr. Ahmed challenged his competency to stand trial. The record of the trial, the filings and attempted filings of Mr. Ahmed, and the post-conviction materials demonstrate a clear need to determine whether Mr. Ahmed was competent at trial.

It is clear that a defendant has an absolute right to be competent at trial. *Drope v. Missouri*, 420 U.S. 162 (1975). Given the clear evidence of incompetency at trial, the materials submitted in post-conviction, the experiences of every judge, attorney, and other person in dealing with Mr. Ahmed during the course of this litigation, the question of his competency is a threshold issue. Review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

**I. Fourteenth Ground for Relief - Mr. Ahmed is Incompetent to be Executed**

As outlined above, questions of Mr. Ahmed's competency. It is axiomatic that Mr. Ahmed must be competent to be executed. *Ford v. Wainwright*, 477 U.S. 399 (1986). As the date of Mr. Ahmed's execution can be set at any time or he may choose to waive his appeals, this issue is ripe for review. The trial court dismissed this claim as not ripe without any consideration to these facts. Furthermore, the execution of an incompetent person violates the Eighth Amendment and therefore is clearly a claim that can be raised in post-conviction. Furthermore, the trial court denied further discovery and factual development and then denied the claim as without factual support. This is clearly improper and denies Mr. Ahmed of his rights to due process. Review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

**J. Fifteenth Ground for Relief - Cumulative Error**

The trial court denied this Ground stating there is "nor error". This is simply impossible as a matter of fact and law. No trial is perfect and without error. In fact, the courts assume that certain amount of error will occur in a trial. This is why the doctrine of harmless error exists. The trial court

clearly failed to engage in any analysis of the claim and simply adopted in toto the state's findings of fact and conclusions of law. This improper conduct demonstrates the absolute failure of Ohio's post-conviction scheme and mandates reversal. Review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

**K. Seventeenth Ground for Relief - Racial Discrimination in the Jury Venire**

In his Seventeenth Ground for Relief Mr. Ahmed alleged that the jury venire in his case failed to represent a fair cross-section of the community in that non-whites were underrepresented. The post-conviction materials demonstrate that the population of Belmont County is 5% non-white. As such, the final jury pool should have consisted of 10 non-whites but Mr. Ahmed's venire consisted of only 1 non-white.

The trial court erred in applying *res judicata* to this claim as it could not have been raised on direct appeal. While the number of non-whites in the venire was known the statistical information was not part of the record and therefore the claim was not capable of review.

The trial court committed a factual error in determining that Mr. Ahmed showed a disparity of 4%. The court did this by simply subtracting the total population from the venire population. The use of this analysis renders any claim impossible to prove in a racially homogenous county such as Belmont. Even if there was intentional discrimination occurring it would never be proved because the total minority population (5% of the population) will never satisfy the 10% threshold set by the trial court. *See United States v. Jackman*, 46 F.3d 1240, 1247 (2nd Cir. 1995). The disparity should be determined by comparing the amount of expected non-whites (10) to the actual amount (1) which demonstrates that a full 90% of the expected non-white venire persons were excluded from the jury pool. This disparity is significant. *United States v. Tuttle*, 729 F.2d 1325 (9th Cir. 1984).

It is beyond dispute that Mr. Ahmed had a Sixth and Fourteenth Amendment right to a jury composed of a fair cross-section of the community. *Duren v. Missouri*, 439 U.S. 357 (1979). The evidence submitted demonstrates a actual and statistical disparity in non-white representation in the jury pool. Review must be granted and the matter reversed and remanded for proper review of all of Mr. Ahmed's claims.

### III. Conclusion

For the above stated reasons, the Court should grant leave to appeal, order a full round of briefing and argument on the issues contained in this memorandum and ultimately order relief to Mr. Ahmed or remand to the trial court for full and proper review on the merits of Mr. Ahmed's claims.

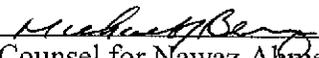
Respectfully submitted,

  
Michael J. Benza - 0061454  
4403 St. Clair Avenue  
Cleveland, Ohio 44103  
(216) 361-1026  
(216) 881-3928 (fax)  
**Counsel of Record**

COUNSEL FOR APPELLANT NAWAZ AHMED

### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Support of Jurisdiction was forwarded by regular U.S. Mail to Christopher M. Berhalter, Belmont County Prosecutor, Court House Annex I, 147-A West Main Street, St. Clairesville, Ohio 43950, and Michael Collyer, Assistant Attorney General, Capital Crimes Section, 615 West Superior Avenue, 12th Floor, Cleveland, Ohio 44113 on this 2<sup>nd</sup> day of February, 2007.

  
Counsel for Nawaz Ahmed





APPEARANCES:

For Plaintiff-Appellee

Chris Berhalter  
Prosecutor  
Courthouse Annex  
147 West Main Street  
St. Clairsville, Ohio 43950

Michael Collyer  
Ass't. Atty. General  
Capital Crimes Section  
615 W. Superior Ave., 12<sup>th</sup> Floor  
Cleveland, Ohio 44113

For Defendant-Appellant

Attorney Michael Benza  
4403 St. Clair Avenue  
Cleveland, Ohio 44103

Nawaz Ahmed, pro se  
A 404-511  
MANCI  
P.O. Box 788  
Mansfield, Ohio 44901

DONOFRIO, J.

{¶1} Defendant-appellant, Nawaz Ahmed, appeals from a Belmont County Common Pleas Court judgment denying his motion for postconviction relief.

{¶2} The facts of this case are taken from appellant's direct appeal to the Ohio Supreme Court. *State v. Ahmed*, 103 Ohio St.3d 27, 813 N.E.2d 637, 2004-Ohio-4190, at ¶1-21.

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

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

{¶5} "Appellant had accused Lubaina, a physician, of having an affair with another physician, and claimed that their oldest son, Tariq, was not his. A subsequent paternity test showed that claim to be false. According to Lubaina's divorce attorney, Grace Hoffman, Lubaina had been afraid of appellant, and she had called Hoffman three or four times a week, 'scared [and] frustrated \* \* \*. It just kept escalating.' Lubaina had also confided to Hoffman that appellant had forced her to have sex with him during the marriage.

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

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

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

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

{1110} "Rafi Ahmed, husband of Ruhie and father of two-year-old Nasira, testified that Ruhie and Nasira had been scheduled to arrive in Columbus from California at 10:34 p.m. on Friday, September 10. Ruhie had planned to call Rafi that night when she arrived at Lubaina's home near St. Clairsville. However, since he had not heard from Ruhie, Rafi began calling Lubaina's home at 1:21 a.m., Saturday, September 11. Rafi called 20 to 25 times, but he got only Lubaina's answering machine. At approximately 3:00 a.m., he called the Belmont County Sheriff's Office.

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

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

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

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

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

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

{¶17} "Through several inquiries, police learned that appellant was scheduled to depart from JFK for Lahore, Pakistan, that evening. Earlier that day, appellant, through a travel agent, had booked a flight leaving for Pakistan that same evening. Appellant had made arrangements to pick up the airline ticket at the travel agent's home near JFK. Appellant arrived at the agent's home with both of his sons and

asked if he could leave them with the agent, saying that his wife would pick them up soon. Appellant wrote on the back of his and Lubaina's marriage certificate, which he gave to the agent, that he was leaving his sons to be handed over to his wife. Appellant also signed his car over to the agent. The agent then drove appellant to JFK to catch his flight to Pakistan.

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

{¶19} "On October 7, 1999, a grand jury indicted appellant on three counts of aggravated murder for purposely and with prior calculation and design killing Lubaina, Ruhie, and Abdul, pursuant to R.C. 2903.01(A), and one count for the aggravated murder of Nasira, pursuant to R.C. 2903.01(C) (victim younger than 13). All four aggravated murder counts carried a death-penalty specification alleging a course of conduct involving the killing of two or more persons. R.C. 2929.04(A)(5). The aggravated murder count for Nasira carried an additional death-penalty specification alleging that the victim was younger than 13 years at the time of the murder. R.C. 2929.04(A)(9).

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

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

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

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

{¶24} Appellant subsequently filed a direct appeal with the Ohio Supreme Court, which affirmed his convictions and death sentence. See *Ahmed*, 103 Ohio St.3d 27.

{¶25} In the meantime, appellant filed a petition for postconviction relief in the trial court raising 17 causes of action. Additionally, he filed motions for discovery, voluntary recusal of the trial court judge, a competency evaluation, and funds for an independent psychiatric evaluation. Appellant also requested that the ruling on his petition be stayed pending his requested competency determination.

{¶26} The trial court denied the petition without holding a hearing and entered its judgment on March 8, 2005. Appellant filed a timely notice of appeal on March 28, 2005.

{¶27} Appellant raises six assignments of error, the first of which states:

{¶28} "THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S POST-CONVICTION PETITION, WHERE HE PRESENTED SUFFICIENT OPERATIVE FACTS AND SUPPORTING EXHIBITS TO MERIT AN EVIDENTIARY HEARING AND DISCOVERY."

{¶29} Appellant argues that the trial court erred in failing to hold an evidentiary hearing on his petition before dismissing it. He first contends that his petition raised constitutional issues, contained operative facts to support his grounds for relief supported by evidence, and raised genuine issues of material fact.

{¶30} R.C. 2953.21 governs postconviction proceedings. R.C. 2953.21(C) provides in part:

{¶31} "Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript."

{¶32} In *State v. Calhoun* (1999), 86 Ohio St.3d 279, 282-83, 714 N.E.2d 905, the Ohio Supreme Court held:

{¶33} "According to the postconviction relief statute, a criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing. *State v. Cole* (1982), 2 Ohio St.3d 112, 2 OBR 661, 443 N.E.2d 169. Before granting an evidentiary hearing on the petition, the trial court shall determine *whether there are substantive grounds for relief* (R.C. 2953.21[C]), i.e., whether there are grounds to believe that 'there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States.' (Emphasis added.) R.C. 2953.21(A)(1)."

{¶34} The Court also went on to hold that it is not unreasonable to require the defendant to show in his petition for postconviction relief that the alleged errors resulted in prejudice before a hearing is scheduled. *Id.* at 283. Therefore, before a hearing is granted, the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the merit of his claims.

{¶35} Thus, the trial court must determine if a hearing is warranted based upon the petition, supporting affidavits, and all of the files and records pertaining to the proceedings. *State v. Pierce* (1998), 127 Ohio App.3d 578, 586, 713 N.E.2d

498; *State v. Smith* (Dec. 11, 1997), 7th Dist. No. 96-JE-44. A trial court's decision regarding whether or not to conduct an evidentiary hearing in postconviction matters is governed by the "abuse of discretion" standard. *Smith*, 7th Dist. No. 96-JE-44. An abuse of discretion connotes conduct which is unreasonable, arbitrary, or unconscionable. *State ex rel. Richard v. Seidner* (1996), 76 Ohio St.3d 149, 151, 666 N.E.2d 1134.

{¶36} In this case, the trial court did not abuse its discretion in deciding not to hold a hearing on appellant's petition. Appellant does not make any arguments here specific to any of his grounds for relief or the evidence he submitted in support. But later in this opinion, each of appellant's 17 grounds for relief will be discussed in detail. As will be seen, none of appellant's grounds for relief have merit, nor did he show that the alleged errors resulted in prejudice to him. On this basis, the trial court did not abuse its discretion in denying appellant a hearing.

{¶37} Appellant next contends that Ohio's postconviction process fails to protect capital defendants' rights. He asserts that he is entitled to due process, but that R.C. 2953.21 et seq. does not provide him with such. Appellant contends that the statute requires him to prove his claims based solely on his petition, thus mooted the provision in the statute for an evidentiary hearing. He asserts that requiring a petitioner to demonstrate substantive grounds for relief that warrant a hearing, while simultaneously denying access to discovery to clarify those grounds, violates the rights to due process, equal protection, adequate trial and appellate review, and to be free from cruel and unusual punishment.

{¶38} While appellant argues that he was entitled to discovery to protect his constitutional rights, the Ohio Supreme Court and this court have held, "there is no requirement of civil discovery in postconviction proceedings." *State v. Twyford* (March 19, 2001), 7th Dist. No. 98-JE-56, quoting *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office* (1999), 87 Ohio St.3d 158, 159, 718 N.E.2d 426. Furthermore, in *Twyford*, the defendant argued that R.C. 2953.21 et seq. does not give a criminal defendant a proper procedural mechanism for contesting alleged

violations of constitutional rights because the Ohio Supreme Court has placed too many restrictions on the use of the remedy, urging this court to overrule an Ohio Supreme Court decision to the contrary.

{¶39} This court relied on *State v. Wiles* (1998), 126 Ohio App.3d 71, 709 N.E.2d 898, where the defendant argued that the procedure set forth in the postconviction statutes did not provide an adequate remedy because the statutes had been interpreted to have too many technical requirements. In making that argument, the defendant asked the appellate court to ignore an Ohio Supreme Court holding. We noted that the *Wiles* court stated that appellate courts are not free to refuse to follow a Supreme Court decision. *Twynford*, supra. Likewise, this court concluded we were bound to adhere to the Ohio Supreme Court's holding on the issue raised by the defendant.

{¶40} Similarly, in the case at bar, we must adhere to the Court's holding that postconviction petitioners are not entitled to discovery.

{¶41} Appellant finally contends that the trial court improperly applied the doctrine of res judicata. The trial court held that appellant's first, fifth, seventh, eighth, ninth, tenth, twelfth, thirteenth, and seventeenth grounds for relief were barred by res judicata. He claims that each of these grounds for relief was supported by evidence de hors the record that demonstrated the ground for relief was not capable of being raised on direct appeal or could not have been fully litigated on direct appeal.

{¶42} Once again, later in this opinion, we discuss each of appellant's grounds for relief in detail, including those that the trial court held were barred by res judicata. As will be seen, the court properly dismissed numerous grounds for relief on this basis.

{¶43} Accordingly, appellant's first assignment of error is without merit.

{¶44} Appellant's second assignment of error states:

{¶45} "THE TRIAL COURT ERRED IN NOT PROVIDING RESOURCES TO MR. AHMED TO DETERMINING [sic.] MR. AHMED'S COMPETENCY, FAILING TO

EVALUATION [sic.] MR. AHMED'S COMPETENCY, AND TO RENDER AN OPINION AS TO MR. AHMED'S COMPETENCY TO PROCEED IN POST-CONVICTION."

{¶46} Appellant filed motions for a competency evaluation, a request for funds for an independent psychiatric evaluation, and requested that the court delay ruling on his petition pending a competency determination. It appears that the trial court never entered a judgment on these motions.

{¶47} Appellant argues that he has a statutory right to counsel in postconviction proceedings. This right, he argues, would be rendered meaningless if he is unable to assist his counsel. Appellant cites to several federal cases where courts have held that competency is required in habeas corpus proceedings. He analogizes those cases to his, arguing that he has a right to be competent during all collateral proceedings. He also acknowledges that this court has determined that defendants do not have a statutory right to be competent in postconviction. *State v. Eley* (Nov. 6, 2001), 7th Dist. No. 99-CA-109. However, he argues that *Eley* only addressed a statutory issue, not a constitutional issue as he raises here. Appellant argues that because there is a serious question as to his competency, the court should have permitted a psychiatric evaluation.

{¶48} Appellant also argues that the Ohio Supreme Court has recognized the right to be competent in postconviction proceedings and cites to *State v. Berry* (1997), 80 Ohio St.3d 371, 686 N.E.2d 1097, for support.

{¶49} First, it should be noted that the trial court never explicitly ruled on appellant's competency-related motions. However, when a trial court fails to rule on a motion, the motion is considered denied. *State v. Collins*, 5th Dist. No. 03-CA-103, 2004-Ohio-3645, at ¶28. Thus, the trial court implicitly denied appellant's competency-related motions by failing to issue a judgment on them.

{¶50} Second, appellant's statement of our holding in *Eley* is incorrect. We stated: "We specifically hold a capital defendant is neither statutorily *nor* constitutionally entitled to a competency hearing as a part of his or her postconviction

proceedings.” (Emphasis added). *Id.* We reasoned, in part:

{¶151} “A post-conviction proceeding is not an appeal of a criminal conviction, rather, it is a collateral civil attack on a criminal judgment. Significantly, state post-conviction review is not a constitutional right. Accordingly, in a post-conviction proceeding, a convicted defendant has only the rights granted to him by the legislature.

{¶152} “An example of statutorily granted rights is the right to counsel during post-conviction proceedings. Although an indigent petitioner does not have a state or federal constitutional right to representation by an attorney in a post-conviction proceeding, pursuant to R.C. 120.16(A)(1) and (D), the petitioner is entitled to representation if the public defender concludes the issues raised by the petitioner have arguable merit.

{¶153} “Applying this analysis, we conclude the right to a determination of competency to assist with post-conviction proceedings must be provided for by statute. However, the only time competency is deemed relevant by statute are at the time of the offense and at the time of trial. R.C. 2945.37 and R.C. 2945.371.” (Internal citations omitted.) *Id.*

{¶154} Thus, this court has made clear that a postconviction petitioner is not constitutionally entitled to a competency determination.

{¶155} Third, appellant’s reliance on *Berry*, 80 Ohio St.3d 371, is misplaced. In *Berry*, the defendant sought to terminate all further challenges to his conviction and sentence after the Ohio Supreme Court upheld it on direct appeal. His lawyer challenged his competency to make such a decision. The Court ordered a competency hearing and appointed a doctor to evaluate the defendant’s condition.

{¶156} This court also addressed the issue in *Eley* where the defendant made a similar argument to appellant’s argument in this case. In analyzing whether *Berry* applied to a postconviction petitioner sentenced to death, we reasoned:

{¶157} “*Berry* differs significantly from the present case in that the defendant was forgoing rights that were guaranteed by law. Here, *Eley* wishes to continue to

pursue all avenues available to him to challenge his death sentence. This distinguishable factor is also highlighted in *State v. Ashworth* (1998), 85 Ohio St.3d 56. In *Ashworth*, a defendant's competency was called into question when he decided to abandon his right to present mitigating evidence.

{¶158} \*\* \* \*

{¶159} "We also note that *Berry* and *Ashworth* deal with foregoing rights that are afforded to those defendants who have been criminally accused. Although Eley has been accused and convicted of a capital crime, he was not before the court in a criminal proceeding, rather, a collateral attack of a criminal proceeding. It is well settled that postconviction proceedings are civil proceedings.

{¶160} \*\* \* \*

{¶161} "The issue in *Berry* is slightly different than the issue before us. However, this subtle nuance is significant. Eley is arguing here that the trial court erred by concluding he did not have the right to a competency hearing to determine his ability to assist counsel during postconviction collateral review. Conversely, the issue resolved by the Ohio Supreme Court in the *Berry* line of cases is that a capital defendant is entitled to a competency hearing when he is seeking to terminate all further challenges to his death sentence." *Eley*, 7th Dist. No. 99-CA-109.

{¶162} In *Eley*, we clearly explained why *Berry* does not apply to a case such as the one at bar. Thus, appellant's reliance on *Berry* is misplaced.

{¶163} Accordingly, appellant's second assignment of error is without merit.

{¶164} Appellant's third assignment of error states:

{¶165} "THE TRIAL COURT ERRED IN ADOPTING VERBATIM THE FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY THE STATE."

{¶166} Appellant argues that the trial court should not have adopted the findings of fact and conclusions of law that the state submitted word-for-word. He points out that R.C. 2953.21(G) requires the court to make findings of fact and conclusions of law when it denies a postconviction petition. Appellant argues that in capital cases, the court should not merely "rubber stamp" findings of fact and

conclusions of law submitted by the state.

{¶67} At oral argument, appellant asserted that this case must be reversed based on the Ohio Supreme Court's recent decision in *State v. Roberts*, 110 Ohio St.3d 71, 850 N.E.2d 1168, 2006-Ohio-3665. In *Roberts*, the defendant, like appellant here, argued that the trial court erred in allowing the prosecutor to assist in drafting the court's sentencing opinion. However, the similarity in the facts ends there.

{¶68} In *Roberts*, the prosecutor aided the trial court in drafting the findings of fact for a death sentence without defense counsel's knowledge. The trial judge had given his notes to the prosecutor and told the prosecutor what he wanted the findings to be. The judge acknowledged that his opinion had to be corrected six or seven times, thus indicating that he had been in ex parte communication with the prosecutor on an ongoing basis.

{¶69} The Ohio Supreme Court held that R.C. 2929.03(F) clearly contemplated that the trial court itself was to draft a death-sentence opinion. *Id.* at ¶156. The Court further opined, "our confidence in the trial court's sentencing opinion is undermined by the fact that the trial judge directly involved the prosecutor in preparing the sentencing opinion and did so on an ex parte basis." *Id.* at ¶159. It further found: "[t]he trial court's consultation with the prosecutor, particularly when undertaken without the knowledge or participation of defense counsel, can neither be ignored nor found to be harmless error." *Id.* at ¶162. Thus, the Court vacated the defendant's death sentence and remanded the matter for resentencing.

{¶70} In this case, however, while the prosecution did draft the findings of fact, it did not do so in an ex parte manner. During oral argument, appellant's counsel admitted that the prosecutor submitted proposed findings of fact to the court and served a copy to appellant's counsel. Appellant's counsel then had the opportunity to, and in fact did, file objections to the prosecutor's findings of fact. Additionally, appellant had the opportunity to submit his own findings of fact for the court to consider. Therefore, in this case, appellant had just as much of a role in the

findings of fact as the prosecutor did. This distinguishes the case at bar from *Roberts*.

{¶71} Furthermore, *Roberts* dealt with a direct appeal. Instead, we are faced with an appeal on a postconviction petition. The Eleventh District addressed this issue as pertaining to postconviction proceedings in *State v. Lorraine* (Feb. 23, 1996), 11th Dist. No. 95-T-5196. It rejected the appellant's argument and cited to several other courts that had reached the same conclusion:

{¶72} "In *State v. Sowell* (1991), 73 Ohio App.3d 672, however, the First District Court of Appeals determined that the trial court's adoption of the state's findings of fact and conclusions of law does not, by itself, deprive the petitioner of a meaningful review of his petition for post-conviction relief. *Id.* at 676. See, also, *State v. Powell* (1993), 90 Ohio App.3d 260, 263, *State v. Murphy* (May 12, 1995), Marion App. No. 9-94-52, unreported. We agree. Without showing that the trial court failed to comply with its statutory duty pursuant to R.C. 2953.21(C), appellant has failed to show that the trial court acted inappropriately by merely agreeing with the state." *Id.*

{¶73} Likewise, we conclude that the trial court did not err in adopting the state's proposed findings of fact and conclusions of law.

{¶74} Appellant further claims that the trial court could not have conducted an independent review of the record and transcript as required by R.C. 2953.21(C) because the Ohio Supreme Court did not return the record to the trial court until March 10, 2005, two days after the trial court dismissed appellant's petition. He also asserts that the trial court did not maintain a duplicate copy of the file. However, he offers no proof of this assertion.

{¶75} R.C. 2953.21(C) provides in relevant part:

{¶76} "Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records

pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript."

{¶77} A review of the Supreme Court's docket reveals that appellant is correct; the Court did not return the case file to the clerk's office until March 10, 2005. However, our clerk's office maintains a duplicate copy of files that it sends to the Supreme Court so that the files are readily available to the trial court when needed. Thus, the trial court had a duplicate copy of the file to review. Additionally, the trial court's judgment entry specifically states that "the Court considered the record available to the Court in case no. 99-CR-192 [appellant's criminal case]," which indicated that it did have a copy of the file to consider. Furthermore, the judge who ruled on appellant's postconviction petition was the same judge who presided over his trial. Thus, the judge also had firsthand knowledge of the trial and surrounding proceedings in addition to the file.

{¶78} Finally, appellant argues that even if the court could simply adopt the state's findings of fact and conclusions of law, in this case they are inadequate. He asserts that they fail to make factual determinations or to cite the appropriate law.

{¶79} Appellant is simply wrong in this argument. A review of the trial court's findings of fact and conclusions of law reveals that the court separately addressed each of appellant's proposed grounds for relief. For each one, it first set out findings of fact and then conclusions of law. The court spent 28 pages addressing appellant's arguments and thoroughly spoke to each one.

{¶80} For these reasons, appellant's third assignment of error is without merit.

{¶81} Appellant's fourth assignment of error states:

{¶82} "THE TRIAL COURT ERRED BY FAILING TO RULE ON APPELLANT'S MOTION FOR VOLUNTARY RECUSAL OF THE TRIAL JUDGE AND THEN DISMISSING THE POST-CONVICTION PETITION WITHOUT A HEARING, THUS TAINTING THE POST-CONVICTION PROCESS."

{¶83} Appellant argues here that the trial judge should have recused herself because she was biased against him. He then argues that because the judge simply adopted the state's findings of fact and conclusions of law, as he argued above, she demonstrated that she did not conduct an impartial and independent review of the case.

{¶84} While appellant asserts that the judge was biased against him, he makes no allegations to support this claim other than to argue that the judge should not have adopted the state's findings of fact and conclusions of law. Since, as discussed above, the court did not err in adopting those findings of fact and conclusions of law, appellant is left with no argument to support this assignment of error. Accordingly, appellant's fourth assignment of error is without merit.

{¶85} Appellant's fifth assignment of error states:

{¶86} "THE TRIAL COURT ERRED IN REFUSING TO ADDRESS MR. AHMED'S PRO SE CLAIMS FOR RELIEF."

{¶87} In its judgment entry, the trial court refused to consider appellant's pro se filings. Appellant filed a pro se postconviction petition and amendment where he raised 19 grounds for relief, several of which raised similar arguments as those raised by counsel. The court reasoned that appellant was not entitled to "hybrid" representation. It stated that appellant had not given a sufficient basis for substitution of counsel and that appellant had not made a valid decision to waive his statutory right to counsel and proceed pro se. It also noted that appellant's counsel had more than discharged their duties and acted professionally in representing appellant.

{¶88} Appellant now argues that the court erred in failing to review his pro se postconviction petition. He states that the court never inquired into why the claims he raised pro se were not raised by his counsel. He argues that the trial court could have only reached such a determination by conducting an evidentiary hearing. Appellant also acknowledges that he does not have a right to hybrid representation on direct appeal. However, he argues that because he has no right to counsel in

postconviction proceedings, as in a direct appeal, he may proceed both pro se and with counsel. Finally, appellant argues that he was simply using his pro se petition to preserve issues for review that may be raised in a federal habeas corpus proceeding.

{¶189} In determining that it would not consider appellant's pro se filings, the trial court cited several cases. See *State v. Bryant* (Dec. 4, 2001), 7th Dist. No. 99-CA-135 ("This appellate court has the discretion whether to address arguments raised in a pro se brief when that appellant is represented by counsel who has already filed a brief"); *State v. Beaver* (1997), 119 Ohio App.3d 385, 695 N.E.2d 332, (appellate court refused to consider assignments of error raised by appellant pro se and without leave of court stating that no accused has the constitutional right to act as his own co-counsel where the state has appointed an attorney to represent him); *State v. Thompson* (1987), 33 Ohio St.3d 1, 6-7, 514 N.E.2d 407 (the defendant had no right, under either State or Federal Constitution, to act as co-counsel on his own behalf during trial).

{¶190} These cases support the trial court's decision not to consider appellant's pro se postconviction petition. Appellant had state-appointed counsel who filed a postconviction petition, and amendments, which raised 17 grounds for relief along with numerous exhibits. The fact that appellant may not have a right to counsel in postconviction, does not give him more rights than on a direct appeal where he does have a right to counsel. Here, he was appointed counsel to handle his postconviction proceedings. Appellant can point to no case-law that holds that he is entitled to hybrid representation on postconviction when he is not entitled to such representation during other phases, such as at trial and on direct appeal. Thus, appellant's fifth assignment of error is without merit.

{¶191} Appellant's sixth assignment of error states:

{¶192} "THE TRIAL COURT ERRED IN DENYING RELIEF ON EACH GROUND FOR RELIEF RAISED IN THE PETITION."

{¶193} Appellate review of a trial court's disposition of a petition for

postconviction relief is a hybrid presenting mixed questions of law and fact. *State v. Smith* (Sept. 24, 1999), 11th Dist. No. 98-T-0097; *State v. Akers* (Sept. 9, 1999), 4th Dist. No. 98-CA-33. The trial court's factual findings will not be reversed unless they are against the manifest weight of the evidence. Judgments will not be reversed, as being against the manifest weight of the evidence if they are supported by some competent, credible evidence. *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 226, 638 N.E.2d 533; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. Upon accepting such findings of fact, an appellate court then independently determines the propriety of the trial court's conclusions of law.

{¶94} In postconviction, the petitioner bears the initial burden of presenting evidentiary documents containing sufficient operative facts to demonstrate a denial of a constitutional right and resulting prejudice. *State v. Rector*, 7th Dist. No. 04-CA-810, 2005-Ohio-6944, at ¶16. Matters which were or could have been raised on direct appeal may not be considered in postconviction proceedings, as such matters are barred by the doctrine of res judicata. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, at paragraphs eight and nine of the syllabus.

{¶95} Appellant argues that the trial court erred in denying each of his 17 grounds for relief. For ease of discussion, this assignment of error is broken down into subsections.

#### Prosecutorial Misconduct

{¶96} In his first ground for relief appellant raised the issue of prosecutorial misconduct. Appellant is from Pakistan. He alleged that the prosecutor prejudicially and repeatedly argued that the murders were honor killings. By doing so, appellant argues that the prosecutor appealed to the jury's passions and prejudices to obtain a conviction. Appellant relied on the affidavit of Dr. Anita Weiss, who provided information about honor killings and the Pakistani culture, to argue that the murders he was convicted of did not meet the definition of honor killings. (Ex. B).

{¶97} Appellant argues that the prosecutor simply made up the argument at

trial that these were honor killing despite no such evidence.

{¶98} Since appellant could have raised this issue in his direct appeal, it is barred by *res judicata*. But even if this claim was not barred, appellant has not demonstrated any prejudice. The state was required to prove that appellant "purposely, and with prior calculation and design, cause[d] the death of another" and that he "purposely cause[d] the death of another who is under thirteen years of age." R.C. 2903.01(A)(C). The state was not required to prove that appellant committed these murders as honor killings. Thus, whether or not the state introduced evidence that the murders in this case were honor killings, it would not have affected the trial's outcome.

{¶99} In his eighth ground for relief, appellant argued that the prosecutor committed misconduct during the mitigation phase by arguing non-statutory factors, specifically the manner in which the victims were killed and the brutality of the murders, and inviting the jury to speculate about facts not in evidence. He relied on affidavits of two jurors who stated that they considered the severity of the victims' injuries. (Ex. J, K).

{¶100} Appellant argues that the prosecutor's interjection of non-statutory aggravating factors deprived him of a fair sentencing hearing.

{¶101} Appellant raised this issue in his direct appeal. The Supreme Court concluded that the prosecutor's comments did not affect appellant's substantial rights and that the comments did not, as appellant argued, invite the jury to weigh the nature and circumstances of the offenses as aggravating circumstances. *Ahmed*, 103 Ohio St.3d at ¶133-134. Thus, this issue is barred by *res judicata*.

{¶102} Furthermore, the jurors' affidavits upon which appellant relied are not admissible. Evid.R. 606(B) states in pertinent part:

{¶103} "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to \* \* \* the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or

indictment or concerning his mental processes in connection therewith. \* \* \*. His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes." (Emphasis added.)

{¶104} Courts have held that such affidavits are inadmissible in postconviction. See *State v. Jackson*, 10th Dist. No. 01AP-808, 2002-Ohio-3330, at ¶59; *State v. Hoffner*, 6th Dist. No. L-01-1281, 2002-Ohio-5201, at ¶30. Thus, even if appellant's argument was not barred by res judicata, he would not be entitled to relief on this ground because the evidence on which he relies is inadmissible.

{¶105} Accordingly, the trial court did not err in dismissing appellant's grounds for relief based on prosecutorial misconduct.

Ineffective Assistance of Counsel

{¶106} "Where ineffective assistance of counsel is alleged in a petition for postconviction relief, the defendant, in order to secure a hearing on his petition, must proffer evidence which, if believed, would establish not only that his trial counsel had substantially violated at least one of a defense attorney's essential duties to his client but also that said violation was prejudicial to the defendant." *State v. Cole* (1982), 2 Ohio St.3d 112, 114, 443 N.E.2d 169.

{¶107} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. Second, appellant must demonstrate that he was prejudiced by counsel's performance. *Id.* To show that he has been prejudiced by counsel's deficient performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus.

{¶108} In his second ground for relief, appellant alleged that his trial

counsel was ineffective because counsel failed to object to the prosecutorial misconduct discussed above. He argued that there was no strategic reason for counsel not to object to the prosecutor's improper arguments. The failure to object, appellant contended, allowed the jury to consider issues of race, culture, and religion, which had no bearing on his guilt or innocence.

{¶109} In his direct appeal, appellant also argued that his counsel was ineffective for failing to object to prosecutorial misconduct. The Court found this alleged failure did not affect the outcome of appellant's trial. *Ahmed*, 103 Ohio St.3d at ¶164. Thus, this argument is barred by res judicata.

{¶110} In his third ground for relief, appellant claimed that his counsel was ineffective because counsel failed, during the mitigation phase of the trial, to present evidence of his background and cultural and religious beliefs. He argued that counsel should have investigated his background and called a cultural expert to testify as to these matters.

{¶111} Appellant alleges that had counsel presented evidence as to whom he was as a person, at least one juror would have voted for a life sentence instead of death.

{¶112} But appellant cites to nothing about his cultural or religious background that was not covered by other witnesses. Additionally, part of defense counsel's mitigation strategy was to show that appellant suffered from a mental disease or defect that caused him to be delusional. Counsel called a psychologist who testified at length regarding appellant's mental condition and called two lay witnesses who testified that appellant believed the CIA was bugging his apartment. The prosecutor attempted to rebut this testimony by asking whether it was possible that appellant's fears and suspicions could be considered normal for someone from Pakistan who suffered religious persecution. It is possible that testimony from a cultural expert, such as Dr. Weiss, would have supported the prosecutor's position because her testimony would have shown that appellant's paranoia and delusions were normal for someone from his background. Therefore, defense counsel's

mitigation defense of a psychological disorder would be seriously undermined.

{¶113} In his fourth ground for relief, appellant claimed that counsel was ineffective because he failed to arrange for a proper translator during mitigation. Appellant's sister-in-law testified for appellant during mitigation. She is from Pakistan and is not fluent in English. Thus, she needed a translator for her testimony. Appellant argued that the translator his counsel used was not fluent in the Urdu dialect, which the witness spoke. Therefore, appellant argued that the jury did not hear a proper translation of the witness's testimony. Appellant again relied on Dr. Weiss's affidavit in which she stated that there was some miscommunication between the translator and witness resulting in a flawed translation. Additionally, appellant attached a copy of a note that he passed to his counsel during his sister-in-law's testimony in which he told his counsel that the translator was mistranslating.

{¶114} Appellant argues that his counsel's failure to correct this miscommunication was error.

{¶115} These issues too were addressed in appellant's direct appeal. The Court found that appellant's assertions that a cultural expert and a foreign-language interpreter would have helped his defense were speculative at best. *Ahmed*, 103 Ohio St.3d at ¶157.

{¶116} Additionally, appellant relied on two affidavits to support his contention that the interpreter misinterpreted his sister-in-law's mitigation testimony. First, he relied on Dr. Weiss. However, Dr. Weiss did not hear the testimony. She only reviewed the English version of the testimony that was included in the transcript. Thus, she could only speculate as to what was said. Appellant also relied on the affidavit of his sister-in-law, Shehida Ahmed. She stated that during her testimony, the translator did not properly translate the questions. However, she failed to give any specific examples of this alleged mistranslation or to demonstrate how, if properly translated, her testimony would have affected the outcome of appellant's sentence.

{¶117} In his ninth ground for relief, appellant alleged that his counsel

was ineffective for failing to object to statements made by the prosecutor. Specifically, appellant took issue with the statements that "you are not going into somebody's basement to slash somebody's throat" and "I wonder if those four innocent victims were given a chance to pray before their throats were slashed?" and to the prosecutor's question as to what weight the jury would assign to "four innocent lives taken the way they were taken." (Mitigation Tr. 176, 180, 182).

{¶118} Appellant argues that he was prejudiced because the prosecutor told the jury to use the nature and circumstances of the crime as a reason to impose a death sentence.

{¶119} Appellant also raised this argument in his direct appeal and the Court found it to be without merit. *Ahmed*, 103 Ohio St.3d at ¶133, 164. Thus, it is barred by res judicata.

{¶120} In his tenth ground for relief, appellant claimed he was denied effective assistance of counsel because his counsel repeatedly made references to the nature and circumstances of the offense as an aggravating factor that had to be overcome by mitigating factors. Appellant relied on the affidavits of two jurors in an attempt to show that they relied on these non-statutory aggravating factors in reaching their decision to recommend a death sentence. (Ex. J, K).

{¶121} Appellant argues that counsel's argument made the jurors consider non-statutory aggravating factors.

{¶122} This argument should have been raised on direct appeal. Thus, it is barred by res judicata. Furthermore, as explained above, the jurors' affidavits, upon which appellant relies, are inadmissible in postconviction to show the effect of anything on their minds that influenced them to assent to the verdict. Evid.R. 606(B).

{¶123} In his eleventh ground for relief, appellant made three separate arguments. At trial, the state presented evidence that appellant booked a flight to Pakistan after the murders and was arrested at JFK Airport in New York. Appellant first argued that his counsel failed to present evidence that his father, who lived in Pakistan, was ill and that appellant planned to travel to Pakistan to pick up his father

and bring him back to the United States before his father's visa expired. Appellant submitted his own affidavit in support of these facts along with a photocopy of his father's visa. (Ex. L, M).

{¶124} A copy of his father's visa does not explain why appellant signed over his car and, more importantly, *the care of his children* to a travel agent he had never met before. Furthermore, appellant's counsel attempted to prove that appellant was merely traveling to Pakistan to pick up his ill father by introducing evidence that appellant purchased a round-trip ticket and that his father was ill. (Trial Tr. 438, 464-65). Thus, counsel was not ineffective for failing to introduce the above mentioned evidence.

{¶125} Second, appellant argued that his counsel should have introduced a credit card statement that showed that his card was used in Columbus on September 11, 1999. At trial, the state argued that on September 11, appellant drove from his apartment in Columbus to his marital residence in St. Clairsville, committed the murders, and then drove to New York. Appellant argues that his counsel should have introduced his credit card statement to rebut this theory. He submitted the statement for support. (Ex. N).

{¶126} The credit card statement does not include a time which the card was used, only the date September 11, 1999. Appellant could have used the card in Columbus around midnight and made it to St. Clairsville to commit the murders well before 3:45 a.m. Another possibility is that someone other than appellant used his credit card in Columbus that day. Thus, the credit card statement would not have exonerated appellant. Furthermore, appellant did not submit any evidence that he informed his counsel about this credit card statement and that counsel refused to use it. Hence, he cannot show that his counsel erred in this regard.

{¶127} Finally, appellant argued that counsel should have introduced two letters – one that he wrote to a religious leader in which he expressed remorse for asking for a paternity test for his oldest son and stated that he had not wanted to do so but that his attorney decided a paternity test should be conducted and another

from the religious leader to Lubania's father repeating the same. He submitted copies of the letters. (Ex. O). Appellant argued that these letters, along with testimony from his religious leader, would have contradicted the state's portrayal of him as an obsessive, controlling person.

**{¶128}** The letters appellant wished counsel to introduce would have been inadmissible hearsay. Additionally, Grace Hoffman, Lubaina's divorce attorney, read excerpts of appellant's deposition for the jury. In his deposition, appellant stated that he never doubted his son's paternity and that he only asked for a paternity test at the urging of his attorney. (Trial Tr. 72-73). Furthermore, appellant did not present any evidence that he informed his counsel about these letters prior to trial. Thus, it is hard to see how counsel could have been ineffective for failing to introduce them.

**{¶129}** For all of the above reasons, the trial court did not err in denying appellant's eleventh ground for relief.

**{¶130}** In his sixteenth ground for relief, appellant argued that counsel was ineffective for failing to call additional mitigation witnesses to testify as to his character, history, and background. For support he submitted the affidavit of Dr. Abdus Malik in which Dr. Malik stated that appellant was a timid man not prone to outbursts, that he never observed any marital problems between appellant and his wife, that appellant would not have been shamed for a divorce, that appellant was religious, and that he would have testified to these matters if appellant's attorneys had contacted him to do so. (Ex. T).

**{¶131}** Appellant argues that his counsel failed to conduct a proper investigation to find witnesses who would testify as to his background, religion, and character.

**{¶132}** Appellant submitted no evidence that he informed his counsel about Dr. Malik or that Dr. Malik was willing to testify on his behalf regarding the subjects set out above. Thus, it is difficult to understand how counsel could have erred in not contacting him.

{¶133} Furthermore, other witnesses testified as to appellant's character and that he would not have been shamed by his community for getting a divorce. Shehida Ahmed testified during mitigation that appellant treated family members well and was helpful towards children. (Mit. Tr. 78-79). She further stated that appellant helped others in his community. (Mit. Tr. 79). Additionally, she stated that appellant was a religious man. (Mit. Tr. 79-80). And she testified that appellant was devoted to his family. (Mit. Tr. 80). Furthermore, at trial, Saeed Khan, testified that appellant would not be shamed by a divorce the way a woman would, but instead appellant could "find as many women" as he wanted to. (Trial Tr. 159). Thus, there was evidence on the record similar to that which Dr. Malik would have testified to.

{¶134} As to all of these grounds, appellant has not presented any evidence that he was prejudiced by his counsel's alleged ineffectiveness. He has not pointed to any evidence that indicates that the outcome of the trial or the penalty phase would have been different had his counsel performed in the way he saw fit. For this reason, as well as the other reasons stated above, the trial court did not err in denying appellant relief based on his ineffective assistance of counsel claims.

#### Eighth Amendment Claim Regarding Inaccurate Translation

{¶135} In his fifth ground for relief, appellant argued that because the translator misinterpreted his sister-in-law's testimony, the jury was unable to consider the mitigation evidence she presented. He again relied on Dr. Weiss's affidavit for support.

{¶136} Appellant argues that because the jury could not fully understand his sister-in-law's testimony, he was deprived of his rights to present mitigation evidence and to a fair and impartial sentencing hearing.

{¶137} This ground for relief is basically a restatement of appellant's fourth ground for relief. As stated above, the affidavits appellant relied on in support of this alleged error do not demonstrate how he was prejudiced. Dr. Weiss never heard Shehida Ahmed's testimony. Therefore, she could only hypothesize as to what Shehida testified to. And Shehida, in her affidavit, gave no examples of what

part of her testimony was misinterpreted and what that testimony should have been interpreted to mean. Furthermore, appellant should have raised this issue in his direct appeal. Therefore, it is barred by *res judicata*. Accordingly, the trial court properly denied appellant's fifth ground for relief.

#### Jury Conduct

{¶138} In his sixth ground for relief, appellant alleged that the jurors failed to follow the court's instruction that they only consider the statutory aggravating factors. For support, appellant referred to the affidavit of assistant state public defender, Kathryn Sandford, who was present at interviews with three of the jurors. (Ex. C). She stated that those three jurors stated that they based their decision to vote for the death penalty on such things as the gruesome crime scene photographs, the viciousness of the crime, and the age and frailty of appellant's father-in-law.

{¶139} Appellant argues that he was denied a fair sentencing hearing because the jury failed to weigh the statutory aggravating factors against the mitigating factors.

{¶140} In *State v. Hessler* (2000), 90 Ohio St.3d 108, 734 N.E.2d 1237, the Court held that a juror's and an alternate juror's affidavits could not be considered when ruling on a motion for a new trial or evidentiary hearing. The affidavits stated that the juror signed the verdict voting for death only to avoid continued harassment by other jurors. The Court applied the firmly established rule that flatly prohibits the admission of juror testimony to impeach a jury verdict, known as the *aliunde* rule, which is embodied in Evid.R. 606(B). *Id.* at 123. It went on to state: "The purpose of the *aliunde* rule is to maintain the sanctity of the jury room and the deliberations therein. The rule is designed to ensure the finality of jury verdicts and to protect jurors from being harassed by defeated parties." (Internal citation omitted.) *Id.* Because the affidavits offered internal evidence of the jury's deliberations in order to impeach the sentencing recommendations, the Court held that the trial court correctly overruled the motion for a new trial or evidentiary hearing.

{¶141} Likewise, appellant offered an affidavit containing what alleged to be internal evidence of the jury's deliberations. In this case, however, the affidavit was not from a juror but from a third party who re-stated what the jurors had told her about their deliberations. The reasoning of *Hessler* and the aliunde rule still apply. In both cases, the defendant offered affidavits based on jurors' statements as to why they concluded that the death sentence was warranted. Whether the information came from the jurors themselves or from another person in whom the jurors confided, either way the finality of the verdict and the sanctity of the jury deliberations are affected. Furthermore, in this case, Sandford stated in her affidavit that the jurors she referred to refused to sign affidavits, which shows that they did not wish to be harassed by appellant. And Sandford's affidavit was based completely on hearsay. Thus, it was likely inadmissible. Based on the foregoing, the court did not err in rejecting appellant's sixth ground for relief.

{¶142} In his seventh ground for relief, appellant argued that the jury did not understand the court's instructions regarding aggravating and mitigating circumstances. He again relied on Sandford's affidavit. He also relied on an affidavit from Michael Geis, a linguistics professor, who stated that the Ohio Jury Instructions on aggravating and mitigating circumstances are overly broad and allow jurors to consider non-statutory aggravating factors. (Ex. H).

{¶143} Appellant argues that the jury instructions deprived him of a fair sentencing hearing because the jurors did not understand the law.

{¶144} Other courts have rejected the same argument appellant advances here based on res judicata. See *State v. Highbanks*, 1st Dist. No. C-010372, 2003-Ohio-187, at ¶18 ("The affidavits of the linguistics professor and the defense attorney presented 'essentially \* \* \* notarized argument[s]' that could have been advanced at trial or on appeal. Therefore, neither affidavit constituted outside evidence that precluded dismissal of the tenth claim under the doctrine of res judicata"); *State v. Phillips*, 9th Dist. No. 20692, 2002-Ohio-823 ("the inclusion of Dr. Geis' affidavit does not immunize Mr. Phillips from the operation of res judicata,

because the linguistic arguments made by Mr. Geis in his affidavit could have been argued on direct appeal; therefore, the affidavit is only of marginal significance in determining whether the jury instructions were erroneous, misleading, or confusing").

These courts are correct. Appellant could have raised this argument in his direct appeal and he failed to do so. Therefore, appellant's seventh ground for relief is barred by res judicata.

#### Vienna Convention

{¶145} In his twelfth ground for relief, appellant argued that his death sentence is void since he was not advised of his rights under the Vienna Convention on Consular Rights. He asserted that because he is a citizen of both the United States and of Pakistan, he should have been advised of his right of access to his Pakistani consul. He argued that had he been informed of this right, he could have contacted his consul who would have been of assistance during the mitigation phase of trial regarding appellant's culture.

{¶146} Appellant argues that contact with his consul would have provided him with the resources to avoid his ineffective assistance of counsel claims and provided him with the tools necessary to ensure that a qualified Urdu-speaking translator was available.

{¶147} This claim is barred by res judicata because appellant already raised it in his direct appeal. There, the Ohio Supreme Court found it to be without merit based on appellant's dual citizenship and the fact that he failed to raise the argument before the trial court. *Ahmed*, 103 Ohio St.3d at ¶51-55.

#### Competency/Sanity

{¶148} In his thirteenth ground for relief, appellant argued that he was incompetent during his trial and sentencing and was unable to assist in his defense. For support, appellant attached copies of various documents and motions that he filed pro se, which he argues evidence his lack of competency. (Ex. Q).

{¶149} Appellant contends that the trial court erred in dismissing this matter without granting discovery and holding a hearing because "the experiences of

every judge, attorney, and other person in dealing with Mr. Ahmed during the course of this litigation" beg the question of his competency.

{¶150} This claim is barred by *res judicata*. Appellant raised the identical claim in his direct appeal. The Ohio Supreme Court found it to be without merit. *Ahmed*, 103 Ohio St.3d at ¶56-69.

{¶151} In his fourteenth ground for relief, appellant argued that he will be incompetent and insane at the time of his execution. Therefore, he argued that his execution will violate his Eighth Amendment rights since he will be unable to understand the connection between his crimes and his punishment.

{¶152} Appellant asserts that because his execution date may be set at any time or he may choose to terminate his appeals, this issue is ripe for review.

{¶153} R.C. 2949.28 sets out the procedure to follow when there is an inquiry into the sanity of a convict. "Insane" as used in that section specifically refers to when "the convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict." R.C. 2949.28(A). "If a convict sentenced to death appears to be insane, the warden or the sheriff having custody of the convict, the convict's counsel, or a psychiatrist or psychologist who has examined the convict shall give notice of the apparent insanity to \* \* \* the judge who imposed the sentence upon the convict or, if that judge is unavailable, to another judge of the same court of common pleas." R.C. 2949.28(B)(1)(a). The remainder of R.C. 2949.28 sets out the procedure for the court to follow. If appellant's sanity is in question, he must avail himself of the procedure set out in R.C. 2949.28.

{¶154} Furthermore, this issue is not ripe for review. There is no indication in the record that appellant's execution date is set and approaching. Thus, whether appellant is insane or incompetent now could very well change by the time his actual execution date arrives.

{¶155} Therefore, the trial court properly dismissed appellant's fourteenth ground for relief.

Jury Selection

{¶156} In his seventeenth ground for relief, appellant argued that the jury venire was not representative of the community. He asserted that because approximately five percent of Belmont County is non-Caucasian, five percent of the venire should have been non-Caucasian. He attached a Belmont County census report. (Ex. D). Appellant stated that in a jury venire of 200 people, at least ten people should have been non-Caucasian. He asserted that his jury venire included only one non-Caucasian.

{¶157} Appellant contends that the trial court erred in dismissing this claim based on res judicata because while the venire makeup was known on direct appeal, the statistical information was not part of the record and therefore the claim was not capable of review.

{¶158} Firstly, this claim is barred by res judicata. Appellant should have, but failed to raise it in his direct appeal.

{¶159} Secondly, even if not barred, appellant's claim lacks merit. In order to establish a claim for a violation of the Sixth Amendment's fair-cross-section requirement, the defendant must demonstrate "(1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *State v. Jackson*, 107 Ohio St.3d 53, 836 N.E.2d 1173, 2005-Ohio-5981, at ¶65, quoting *Duren v. Missouri* (1979), 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579.

{¶160} Appellant made no attempt whatsoever to present any evidence as to the third element – underrepresentation due to systematic exclusion. Underrepresentation on a single venire is not *systematic* exclusion. *State v. McNeill* (1998), 83 Ohio St.3d 438, 444, 700 N.E.2d 596. Appellant did not provide any evidence that jury venires systematically excluded non-Caucasians. Furthermore,

appellant only alleged that "non-Caucasians" were not represented in the venire. It does not seem that "non-Caucasians" is a distinctive group such as African Americans or Hispanic Americans. Thus, even if appellant's claim was not barred by res judicata, it fails because he cannot make the necessary showing pursuant to *Jackson and Duren*.

{¶161} Accordingly, the trial court did not err in dismissing appellant's seventeenth ground for relief.

Cumulative Error

{¶162} In his fifteenth ground for relief, appellant argued that the cumulative effects of the errors he presented warranted a new trial or, at the least, discovery and an evidentiary hearing.

{¶163} Appellant asserts that the trial court failed to analyze this claim and simply adopted the state's findings of fact and conclusions of law.

{¶164} Since none of appellant's alleged errors have merit, there is no cumulative error to examine. Thus, the trial court properly found appellant's fifteenth ground for relief to be meritless.

{¶165} Based on the foregoing analysis of each of appellant's grounds for relief, appellant's sixth assignment of error is without merit.

{¶166} For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, J., concurs.  
DeGenaro, J., concurs.

APPROVED:

  
Gene Donofrio  
Presiding Judge