

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Respondent-Appellee

-vs.-

NAWAZ AHMED,

Petitioner-Appellant.

07-0216  
Case No. 02-0870

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ON APPEAL FROM THE SEVENTH DISTRICT COURT OF APPEALS  
BELMONT COUNTY, OHIO  
CASE NO 05-BE-15

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APPELLEE'S MEMORANDUM OPPOSING JURISDICTION

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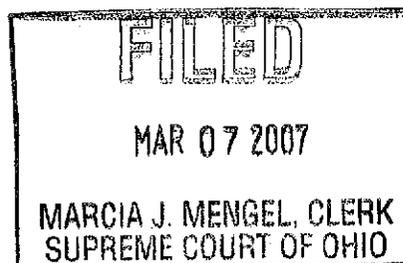
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*State v. Ahmed* (December 28, 2006), 2006 Ohio 7069

**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

To accept jurisdiction over this case would only give this Court the opportunity to cover well-settled ground, especially in the area of *res judicata*. Ahmed, like most Ohio post-conviction petitioners, believes that the mere attachment of paper to his petition should enable him to avoid the application of *res judicata*. And he also believes that he is entitled to relitigate the exact same issues raised and resolved against him in his direct appeal merely because he has gathered exhibits to go along with the same claims. There is no sound reason to accept jurisdiction to reaffirm that post-conviction petitioners have no such right.

Ahmed also claims that the appeal is of great interest or involves a substantial constitutional question because he was denied discovery and an evidentiary hearing. But Ohio post-conviction petitioners have no absolute right to either, particularly when they raise the same claims they raised on direct appeal or when they attach meaningless paper to their petitions.

This Court should decline to exercise jurisdiction over this case.

## STATEMENT OF THE CASE

The Belmont County grand jury returned indictment 99-CR-192, charging Ahmed with three counts of Aggravated Murder under R.C. §2903.01(A), each containing specifications for mass murder (R.C. §2929.04(A)(5)). The grand jury also charged one count of Aggravated Murder under R.C. §2903.01(C), which contained a specification for mass murder and an underage victim (R.C. §2929.04(A)(9)). The jury found Ahmed guilty of all counts and specifications, and after a penalty phase hearing, the jury recommended a death sentence for each count. The trial court sentenced Ahmed to death for each of the four counts on February 2, 2001.

### **Direct Appeal**

Ahmed pursued a direct appeal to this Court, which unanimously affirmed Ahmed's conviction and sentence on August 25, 2004. *State v. Ahmed* (2004), 103 Ohio St.3d 27, 2004 Ohio 4190.

### **Post-Conviction Proceedings**

On October 3, 2002, Ahmed filed a petition to vacate or set aside sentence with attached exhibits. The petition was prepared and filed by William J. Mooney and Ruth L. Tkacz of the Ohio Public Defender's Office. On October 22, 2002, Ahmed's counsel filed their first amendment to the post-conviction petition, which added a sixteenth ground for relief and an Exhibit (T). On December 2, 2002, Ahmed's counsel filed their second amendment to the post-conviction petition, which added a seventeenth ground for relief.

Along with the post-conviction petition filed on October 3, 2002, Ahmed's counsel submitted an additional document entitled, "Petitioner Nawaz Ahmed's Additional Postconviction Petition Grounds for Relief, Filed Pro Se." Ahmed also attempted to file numerous other pro se documents, including an amendment to his pro se grounds for relief as

well as several motions.

In addition to the post-conviction petition and amendments, counsel for Ahmed filed four motions: Motion for Discovery; Motion for Voluntary Recusal of Trial Judge; Motion for Competency Evaluation of Nawaz Ahmed; and Conditional Motion to Withdraw as postconviction counsel.

After securing an extension of time in which to answer, the State filed an Answer and Motion to Dismiss on February 12, 2003. The State filed responses to all of post-conviction counsel's motions on February 14, 2003.

The State submitted proposed findings of fact and conclusions of law, which Ahmed's counsel opposed on November 1, 2004. The trial court adopted and entered the Findings of Fact and Conclusions of Law on March 8, 2005. Ahmed appealed, and on December 28, 2006, the Seventh District Court of Appeals unanimously upheld the trial court's dismissal of the post-conviction petition. Ahmed appeals now from that judgment.

#### **Ahmed's Pro Se Ohio Supreme Court Litigation Regarding Post-Conviction Litigation**

In a separate but related action, Ahmed filed in this Court a Complaint for Mandamus, Prohibition & Procedendo on April 4, 2003. Ahmed alleged that the State Public Defender should cease their representation in the post-conviction proceedings; the Belmont County Clerk of Courts, and all of the Clerk's employees, should accept and file all pro se pleadings; the Belmont County Prosecutor should address the pro se pleadings and ignore the State Public Defender's pleadings; and the trial court should strike the State Public Defender's pleadings and consider and rule upon any and all of Ahmed's pro se pleadings.

On April 25, 2003, the Ohio Public Defender filed a motion to dismiss and motion for summary judgment. On April 30, 2003, Respondents Sargus, Clerk of Courts (Marple,

Kightliner, and Muir), Pierce, and Collyer filed motions to dismiss.

On June 11, 2003, this Court sustained the motions to dismiss submitted by Respondents Sargus, the Clerk of Courts (which covers Marple, Kightlinger and Muir), Pierce and Collyer. *State ex rel. Ahmed v. Sargus, et al.* (2003), 99 Ohio St.3d 1431, 2003 Ohio 2902.

Ahmed filed for reconsideration of that dismissal on June 18, 2003, which the Court denied on June 30, 2003. Ahmed then filed a petition for a writ of certiorari in the United States Supreme Court, which denied certiorari on January 20, 2004. *Ahmed v. Sargus, et al.* (2004), 124 S.Ct. 1126.

#### **Ineffective Assistance of Appellate Counsel & Competency Litigation**

On September 21, 2004, this Court appointed Michael Benza and Alan Rossman to represent Ahmed in the filing of an application for reopening pursuant to Supreme Court Practice Rule XI. Ahmed's attorneys filed their application on December 21, 2004, some twenty-eight days after the deadline. Ahmed's counsel also filed a motion for funds to hire a psychologist as well as a motion to hold the case in abeyance pending the outcome of the motion for funds and eventual evaluation. On March 2, 2005, this Court denied all of Ahmed's requests.

## STATEMENT OF THE FACTS

This Court set forth the applicable facts during the direct appeal:

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

### I. Facts and Case History

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.

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.

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.

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

In March 1999, Lubaina complained to police that 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.

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.

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

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

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

Later that day, Belmont County Sheriff's Department Detective Steve Forro was assigned to investigate the missing persons. He recognized Lubaina's name because he was the officer who had talked to her regarding 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.

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

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

Detective Bart Giesey found 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.

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.

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 attache case containing 15 traveler's checks totaling \$7,500, his will, and \$6,954.34 in cash.

On October 7, 1999, a grand jury indicted 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).

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

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

Diane Larson, a forensic scientist at the DNA-serology section of the Bureau of Criminal Identification and Investigation ("BCI"), concluded that the DNA of blood found in the kitchen of Lubaina's home matched 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.

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.

*State v. Ahmed* (2004), 103 Ohio St. 3d 27, 27-30, 2004 Ohio 4190, P1-P21.

## FIRST PROPOSITION OF LAW

### THE APPLICATION OF RES JUDICATA TO POST-CONVICTION CLAIMS DOES NOT DENY THE PETITIONER DUE PROCESS.

Ahmed makes a blanket claim that the trial court erred in denying relief without discovery or an evidentiary hearing. He makes no attempt to demonstrate that individual claims deserved discovery and/or an evidentiary hearing. This Court has held that there is no automatic right to a hearing:

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).

*State v. Calhoun (1999)*, 86 Ohio St.3d 279, 282-83, 1999 Ohio 102, 714 N.E.2d 905.

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.

Post-conviction petitioners are also not entitled to discovery. *State v. Twyford* (7th Dist. 2001), 7th Dist. No. 98-JE-56, 2001-Ohio-3241, 2001 Ohio App. LEXIS 1443, \*16 unreported ("That is, pursuant to *Love* and *Spirko*, there are no circumstances under which a defendant in postconviction proceedings can be entitled to discovery").

The Court should reject the first proposition of law as incorrect as a matter of law, and meritless for lack of any particularized argument as to how the circumstances of a claim in this case merited discovery and/or an evidentiary hearing.

## SECOND PROPOSITION OF LAW

### THERE IS NO RIGHT TO POST-CONVICTION COMPETENCE.

Ahmed claims that he was entitled to an expert and a competency determination below. But Ahmed neglects to mention that he requested the same relief from this Court in connection with his Application for Reopening, and this Court denied his request. There is no right to post-conviction competence: “We specifically hold a capital defendant is neither statutorily nor constitutionally entitled to a competency hearing as part of his or her postconviction proceedings.” *State v. Eley* (Nov. 6, 2001), Mahoning App. No. 99 CA 109, 2001 Ohio App. LEXIS 5225, \*46, unreported. Indeed, Eley appealed to this Court and moved separately for a competency determination, and this Court denied the appeal and the motion. *State v. Eley* (2002), 94 Ohio St.3d 1506 (appeal and motion for competency determination denied).

Ahmed claims that *State v. Berry* (1997), 80 Ohio St.3d 371, compelled a competency determination, but the lower court properly distinguished *Berry* on the ground that it establishes a right “to a competency hearing when [the capital defendant] is seeking to *terminate* all further challenges to his death sentence.” *Eley*, 2001 Ohio App. LEXIS at \*45 (emphasis in original); *State v. Ahmed* (December 28, 2006), 2006 Ohio 7069, P55-62.

Even if Ahmed’s request were otherwise appropriate, counsel below provided no reason to believe that Ahmed was incompetent to assist them. Moreover, the trial record shows that Ahmed assisted post-conviction counsel – Ahmed signed affidavits and provided information on other witnesses.

### THIRD PROPOSITION OF LAW

#### TRIAL COURTS MAY ADOPT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY A PARTY.

Trial courts may adopt proposed findings of fact and conclusions of law submitted by a party:

In *State v. Sowell* (1991), 73 Ohio App. 3d 672, 598 N.E.2d 136, 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, 629 N.E.2d 13, *State v. Murphy* (May 12, 1995), 1995 Ohio App. LEXIS 1963, Marion App. No. 9-94-52, unreported. We agree.

*State v. Lorraine* (11th Dist. 1996), 1996 Ohio App. LEXIS 642, \*11-12; *State v. Lorraine* (11th Dist. 2000), 2000 Ohio App. LEXIS 3982, \*13-14 (readopting this holding); see also *State v. Leonard* (1st Dist. 2004), 157 Ohio App.3d 653, 658-59, 2004 Ohio 3323.

This is particularly acceptable where the opposing party has an opportunity to contest the proposed findings and submit their own, if they choose, as Ahmed's counsel below did when they opposed the proposed findings.

*State v. Roberts* (2006), 110 Ohio St.3d 71, 92-95, does not compel a different result. It is distinguishable from this case on two grounds. First, this Court emphasized the unique nature of the trial judge's decision to impose the death penalty. Second, this Court was particularly concerned by the ex parte nature of the prosecutor's involvement. Neither factor is in play in this appeal.

This Court noted the "crucial role" that a trial judge's sentencing opinion plays in the capital punishment scheme. *Id.* at 93. The Court has a "firm belief that the consideration and imposition of death are the most solemn of all the duties that are imposed on a judge." *Id.* at 94. The Court also noted that it had reversed capital sentences for other errors relating to the written

sentencing opinion. *Id.* (discussing *State v. Green* (2000), 90 Ohio St.3d 352, 360, and *State v. Davis* (1988), 38 Ohio St.3d 361).

As it relates to post-conviction “findings of fact and conclusions of law [the purposes] is to apprise the petitioner of the basis for the common pleas court’s disposition and to facilitate appropriate and meaningful appellate review. *State ex rel. Carrion v. Harris* (1988), 40 Ohio St.3d 19, 530 N.E.2d 1330.” *State v. Sowell* (1991), 73 Ohio App. 3d 672, 676. There is no question that a judge’s decision on the weighing of aggravating circumstances and mitigating factors and her reason for calculating an outcome based on that weighing is more important than post-conviction findings that mostly deal with whether a petitioner’s claim could have been made on direct appeal.

Even if the post-conviction findings are just as important as the trial weighing decision, this Court specifically relied upon the *ex parte* communication between the judge and the prosecutor as a basis for reversal in *Roberts*: “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.” *Roberts*, 110 Ohio St.3d. at 93. Indeed, the *ex parte* participation prevented this Court from curing the error: “The 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 94. The decision to reverse was “compelled particularly in light of the trial court’s *ex parte* communications about sentencing with the prosecutor in preparing the sentencing opinion.” *Id.* at 94.

There is no evidence of *ex parte* communication between the trial court and the prosecutor in this case. The record confirms and Ahmed’s counsel at oral argument conceded

that the State served its proposed findings and conclusions on Ahmed's counsel, who did in fact comment on them to the trial judge.

*Roberts* does not disturb the settled line of authority holding that there is no reversible error simply by a trial court's adoption of proposed findings of fact and conclusions of law from a prosecutor after notice to the defense and an opportunity to respond.

Ahmed also claims in this proposition of law that the trial court did not have the record to review before making her findings of fact and conclusions of law, but the court of appeals properly found that a copy of the record was maintained and there was a specific finding that it was reviewed. *State v. Ahmed* (December 28, 2006), 2006 Ohio 7069, P77.

#### **FOURTH PROPOSITION OF LAW**

**A TRIAL JUDGE HAS NO DUTY TO RECUSE HERSELF IN RESPONSE TO A GENERAL ALLEGATION OF BIAS AND AN INTENT TO CALL HER AS WITNESS.**

In his request below, Ahmed asked the trial judge to recuse herself because Ahmed planned to call her as a witness in the post-conviction proceedings. Since there was no discovery or hearing, there was no potential for the Court being placed in the position of having to testify as a witness. Ahmed's vague protestations of bias and the appearance of partiality simply do not merit relief on appeal, particularly where Ahmed failed to avail himself of the proper remedy for the denial of a motion for voluntary recusal by filing an Affidavit of Disqualification in this Court.

## FIFTH PROPOSITION OF LAW

### THERE IS NO CONSTITUTIONAL OR STATUTORY RIGHT TO HYBRID REPRESENTATION IN A POST-CONVICTION PROCEEDING.

The lower court properly found no right to hybrid representation in a post-conviction proceeding. *State v. Ahmed* (December 28, 2006), 2006 Ohio 7069, P87-90 (citing *State v. Beaver* (1997), 119 Ohio App.3d 385, 401-02, 695 N.E.2d 385, *jurisdiction denied*, 79 Ohio St.3d 1504; *State v. Bryant* (Dec. 4, 2001), Mahoning App. No. 99CA135, 2001 Ohio App. LEXIS 5465, \*23-24, *jurisdiction denied* (2002), 94 Ohio St.3d 1508); see also *State v. Thompson* (1987), 33 Ohio St.3d 1, 6-7, 514 N.E.2d 407; *McKaskle v. Wiggins* (1984), 465 U.S. 168, 183. This Court also refused to grant Ahmed his requested relief of hybrid representation in this action. *State ex rel. Ahmed v. Sargus, et al.* (2003), 99 Ohio St.3d 1431, 2003 Ohio 2902. Ahmed fails to cite a single case supporting his claimed entitlement to hybrid representation.

## SIXTH PROPOSITION OF LAW

A TRIAL COURT DOES NOT ERR IN REJECTING CLAIMS UNSUPPORTED BY COGENT EVIDENCE, PARTICULARLY WHEN THE RECORD REBUTS THE CLAIMS.

### A. First Claim for Relief – Prosecutorial Misconduct re Honor Killing

Ahmed claims that the Prosecutor committed misconduct by arguing that Ahmed's murders could be classified as honor killings. To support this argument, Ahmed used the affidavit of Anita Weiss, an expert on Pakistani culture, who averred that Ahmed's crime and methodology do not fit the classic type of honor killing that would occur in the Faisalabad district of Punjab, Pakistan, where Ahmed grew up. The lower courts properly rejected this argument as both factually and legally deficient as *State v. Calhoun* allows trial judges to do when evaluating post-conviction affidavits.

#### (1) Ms. Weiss does not adequately distinguish Ahmed's murders from traditional honor killings.

Anita Weiss' argument was internally inconsistent and it conflicted with Amnesty International's findings. Ms. Weiss distinguished Ahmed's killing from traditional honor killings on two grounds: (1) the husband is not normally the actual killer; and (2) the motive (Dr. Bhatti's suit for divorce) is an acceptable ground only in "certain communities in Pakistan – Pakhtuns, in particular, and other tribal groups."

On the first ground, even Ms. Weiss conceded that husbands sometimes are the actual killer: "An honor killing is usually committed by a woman's *wali* (male guardian) or his designate who is still from within her immediate family (usually her father, brother or son, and less so her husband)." Moreover, the Amnesty International report on honor killings notes that husbands, particularly from the Punjab province that Ahmed is from, are involved in honor

killings: "In Punjab, the killings, usually by shooting, are more often based on individual decisions and carried out in private. In most cases, husbands, fathers or brothers of the woman concerned commit the killings." Thus, the fact that Ahmed murdered his wife is not inconsistent with traditional honor killings. Indeed, Ms. Weiss failed to account for the apparent lack of an alternative killer given the support that Dr. Bhatti received from her family – if her father was supporting her efforts to divorce Ahmed, who else was left to vindicate Ahmed's honor?

As for the second distinguishing characteristic of the offense, Ms. Weiss ruled out Ahmed's allegation that Dr. Bhatti was having an affair as a motive because Ahmed later said that he withdrew this allegation.<sup>1</sup> "By September 1999, Nawaz Ahmed had withdrawn his contention that his wife had been having an affair with someone else." At the outset, Ms. Weiss necessarily conceded that this otherwise would be a classic motive for an honor killing. See, e.g., "Honour Killings in Pakistan," Amnesty International, September 1999, pp. 2, 3, 5 (Petitioner's Exhibit A) (noting that illicit sexual relationships constitute *kari*, which is the most common justification for honor killings). But the State maintained, and the trial evidence proved, that Ahmed did not cease his belief that Dr. Bhatti was having an improper relationship with Dr. Hernandez. See Trial Transcript (Vol. I, Tr. 72-78) (Grace Hoffman reading Ahmed's deposition wherein he testified about his suspicions that Dr. Bhatti was having an illicit relationship with Dr. Hernandez), Tr. 132 (Dr. Hernandez testifying that Ahmed called his house and accused him of having an affair with Dr. Bhatti), Tr. 158 (testimony of Saed Khan, the victim's brother-in-law, who testified that Ahmed told him that Dr. Bhatti's affair with Dr. Hernandez was the cause of the breakdown of the marriage). Thus, Ms. Weiss proceeded from

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<sup>1</sup> Ms. Weiss is probably confusing two different allegations. While Ahmed may have technically withdrawn his allegation that one of his sons was illegitimate, this allegation was not coextensive with the allegation that Dr. Bhatti was having an affair with Dr. Hernandez.

an assumption that the trial record contradicts.

Even if it were true that Ahmed had renounced this allegation, Dr. Bhatti's pursuit of a divorce still remained as a viable justification for an honor killing. While Ms. Weiss contended that divorce may provide a justification in certain Pakistani communities, she asserted that it would not be a valid ground in Punjab. But Amnesty International did not make this distinction. "Honour Killings in Pakistan," Amnesty International, September 1999, pp. 2, 7-8 (noting that women seeking divorce are at risk of an honor killing, and devoting an entire section to this as a ground for honor killings in Pakistan). And whether Ahmed's family or neighbors in Punjab viewed the divorce as sufficiently dishonorable to justify an honor killing, it is clear that Ahmed perceived it to be this way as Saed Khan testified to a conversation he had with Ahmed: "he said that if we have a divorce then his life will be ruined and he will never be able to get married again." Trial Transcript (Vol. I, Tr. 159).<sup>2</sup>

Ahmed failed to prove that the circumstances of the murders he committed could not be considered honor killings. Moreover, Ahmed failed to prove that, even if what he alleges is true, the prosecutor *knowingly* presented false evidence. *State v. Iacona* (2001), 93 Ohio St.3d 83, 97, 2001 Ohio 1292 (citations omitted).

- (2) Whether or not Ahmed's murders were "traditional" honor killings is legally irrelevant.

Even if Ahmed could show that the murders he committed absolutely could not be considered to be honor killings, he still failed to state a claim upon which relief can be granted. The State had no burden to prove that the killings were honor killings – that simply was not an element of the offense, and it did not somehow elevate the offense. Ahmed's theory could affect

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<sup>2</sup> Whether or not this is a correct statement of Pakistani cultural norms is irrelevant. The State presented un rebutted evidence that this was what Ahmed believed.

the State's proof of motive, but even under Ahmed's own argument a legitimate motive remains. See, e.g., *Affidavit of Anita Weiss* (Exhibit B), p. 4 (contending that the State's proof of motive was more in line with anger, not honor killings); *Post-Conviction Petition*, p. 7, ¶3 (noting that the State produced evidence that Ahmed killed his wife out of anger over the impending divorce).

Ahmed attempted below to transform the "confusion" between anger and honor killings into prejudice by claiming that juror Cilli told assistant state public defender Kathryn Sandford that "honor killings happen in that country" and that the State's evidence on this point helped to convince him that Ahmed was guilty. But the Amnesty International article and Ms. Weiss buttress the underlying (alleged) statement by the juror that honor killings do indeed occur in Pakistan.

Moreover, at bottom Ahmed claims that the prosecutor referred to honor killings without any evidentiary support to back up his allegation. Ahmed should have objected at trial and raised a claim based thereon during the direct appeal. The court of appeals properly found the claim barred by *res judicata*. *State v. Ahmed* (December 28, 2006), 2006 Ohio 7069, P101.

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

**Second Claim for Relief:** Ineffective assistance of trial counsel by failing to object to the State's "honor killings" argument.

Ahmed essentially reiterates his first ground for relief and argues that trial counsel should have objected to the prosecutor's reference to "honor killings." This argument fails essentially for the same reasons we identify above. The prosecutor's characterization in fact was not false; Ahmed's murders do fit within the concept of honor killings practiced in Pakistan. And even if

Ahmed's murders do not exactly fit within that paradigm, there was no prejudice in the prosecutor's characterization as the exact motive (anger vs. honor killing) was irrelevant.

**Third Claim for Relief:** Ineffective assistance of trial counsel by failing to provide testimony on Ahmed's cultural background at the penalty phase.

Ahmed argues that trial counsel should have retained an investigator and cultural expert to provide records for Dr. Smalldon to consider and to present mitigation concerning Ahmed's cultural background. Ahmed fails to identify anything in particular about his background that was either not covered in some way through other witnesses or that was not presented at all. This argument is particularly interesting because Ms. Weiss' affidavit in this respect would have *undercut* the mitigation that Ahmed's counsel produced at the penalty phase.

Part of trial counsel's strategy was to show that Ahmed suffered from a mental disease or defect that caused him to be delusional. Dr. Smalldon testified at length about this (Mit. Tr. 121, 123), and two lay witnesses testified about Ahmed's belief that the CIA was bugging his apartment. (Mit Tr. 64, 69). The prosecutor attempted to rebut this testimony by asking whether it was possible that Ahmed's fears and suspicions could be considered normal for someone from Pakistan, particularly someone who suffered the type of religious persecution that Ahmed and his fellow Ahmadis endured. (Mit. Tr. 143). Ms. Weiss' affidavit supports the State's theory as she explains that Ahmed's "paranoia," his mistrust, and his apparent arrogance would be considered normal in the Pakistani culture for people of Ahmed's religious sect:

This fear of persecution is, indeed, well-founded.

\* \* \* \*

One can conclude that an Ahmadi from Pakistan would likely be highly mistrustful of the actions of a state, and fearful of persecution.

\* \* \* \*

A great deal of mistrust generally exists between Pakistanis and the state's system of law enforcement and policing.

\* \* \* \*

There have been press reports that the authorities are conducting surveillance on the Ahmadis and their institutions. [Citations omitted]

\* \* \* \*

There were a number of observations made of Nawaz being self-absorbed, with a sense of entitlement that he be treated differently from the norm. This, actually, is a common cultural trait in Pakistan.

The State fails to see how this evidence would have been helpful to Ahmed in the penalty phase of his trial; indeed, its impact could only be described as detrimental as counsel attempted to present a psychological disorder defense. Ms. Weiss's testimony would have left defense counsel in the unenviable position of presenting a client with no psychological factors to argue as somehow at play in the murders.

Ahmed also refers to Dr. Smalldon, who averred that Ms. Weiss' testimony would have been helpful in presenting Ahmed's cultural influences. Dr. Smalldon failed to account for the plain fact that Ms. Weiss' testimony would have undercut Smalldon's psychological opinion, that Ahmed had an unreasonably acute fear and mistrust of the authorities. Moreover, aside from Smalldon's general characterization of Ms. Weiss's value as someone to provide a cultural background, Dr. Smalldon, and Ahmed as well, fail to identify anything particularly compelling about Ms. Weiss' information. And while Ms. Weiss certainly provides more cultural detail, Dr. Smalldon did cover this topic during his testimony. (Mit. Tr. 113-14, 117-19).

Dr. Smalldon also concluded that a cultural expert could have helped Ahmed's relationship with his counsel, though Smalldon neglected to explain how this would have helped.

The trial court observed that Ahmed's difficulties with counsel arose out of Ahmed's desire to control everything that counsel did – it is highly unlikely that a cultural expert could have overcome this fundamental defect unless the expert could have persuaded counsel to follow all of Ahmed's instructions.

**Fourth Claim for Relief:** Ineffective assistance of trial counsel by failing to retain a better translator.

Ahmed claims that trial counsel procured a translator who did not accurately translate witness Shehida Khan's testimony. Ahmed uses Ms. Weiss as support for this argument, as she claims that based on her review of the transcript she believes that the translator did not speak the witness' dialect and this resulted in inaccurate translation. The trial court properly accorded her statements no weight because Ms. Weiss did not hear the actual testimony, and thus her pronouncement of what the witness actually said was speculation. What's more, just from reading the English transcript Ms. Weiss claimed to know what the witness meant to communicate,<sup>3</sup> but she then claimed that Americans would not interpret the answers the same way. For example, Ms. Weiss quotes the following exchange as representative of the misinterpretation that the jurors would have made:

- Q. Does she have any knowledge of any kind of antisocial behavior at all?
- A. No. She says that he, Mr. Ahmed and wife both went to their place in Canada, they stayed there for a few hours and went, came back. She says that I did not notice anything between them. They have been talking. They have been loving with each other. That's all.

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<sup>3</sup> In this respect, Ahmed's Exhibit F, a handwritten note that Ahmed claimed to have given counsel Hershey, is at odds with what Ms. Weiss speculated. Ms. Weiss contended that the translator was not correctly translating Ms. Khan's testimony, while Exhibit F is a complaint that the translator was not correctly translating defense counsel's questions to the witness. Why would Ahmed only complain about the questions and not the answers? And this assumes, of course, that the note is authentic and Ahmed actually gave it to defense counsel.

Why would an American not understand Ms. Khan's answer? She was asked whether she noticed Ahmed acted antisocially. She said no. She then elaborated that she "did not notice anything between" Ahmed and his wife, and she observed them talking and loving each other. The trial court correctly found that there is no reasonable probability that the jury misunderstood this and considered it to be the opposite, that Ahmed was antisocial.

Ahmed also produced an affidavit from Ms. Khan. And this could have been a source for direct information on the topic, but even here Ahmed (or more accurately Ms. Khan) failed to provide any relevant evidence. Ms. Khan could have given specific examples of inaccurate translations; instead she claimed generally that the translator did not properly translate, and she concluded that American jurors would not have understood the translated answers. Ms. Khan failed to provide specific examples, and the trial court properly found her affidavit lacking in relevance.

Ahmed failed to show either deficient performance or prejudice.

**Ninth Claim for Relief:** Trial defense counsel were ineffective in failing to object to prosecutorial misconduct in arguing nonstatutory aggravating circumstances.

Ahmed raised this very argument as part of his sixth proposition of law in his direct appeal to this Court; the court of appeals properly found it barred by *res judicata*. *State v. Ahmed* (December 28, 2006), 2006 Ohio 7069, P119.

**Tenth Claim for Relief:** Trial counsel were ineffective by referring to the nature and circumstances of the offense.

This claim is clearly *res judicata*. Ahmed could have raised this argument in his direct appeal to this Court; and his failure to do so still does not defeat a *res judicata* bar.

Moreover, Ahmed tortures defense counsel's statements to make them arguments concerning the nature and circumstances of the offense as aggravating circumstances. After all, when counsel spoke about the killings as something that the defense had to offset, this was literally true as the one specification that attended each aggravated murder count was mass murder! Counsel did not act deficiently in recognizing this fact. Counsel did not try to pretend to the jury that the crime wasn't horrific. And Ahmed certainly cannot show prejudice, that in the absence of defense counsel's argument the jury would have voted for a life sentence.

**Eleventh Claim for Relief:** Trial counsel were ineffective by failing to produce alibi evidence, a benign explanation for Ahmed's flight, and more evidence that Ahmed withdrew his allegation that his eldest son had a different father.

There are three parts to this claim, all of which center around the notion that trial counsel could have produced more evidence on Ahmed's behalf in the guilt phase. Ahmed does not provide a specific argument on what counsel failed to investigate and what such an investigation would have uncovered. Even if the Court parses the trial court record in search of Ahmed's argument, the trial court's judgment should still be affirmed.

- (1) **Ahmed's additional evidence to show why he was leaving the country would not have made a difference (*Post-Conviction Petition*, p. 33, ¶¶95-96).**

Ahmed attempted below to use photocopies of his father's travel visa to show that his father was eligible to travel to the U.S. during the timeframe covering Ahmed's attempted escape from this country. Even if this exhibit is authentic, and even if Ahmed could have somehow convinced the Court to admit it, the visa does not provide a benign explanation for Ahmed's flight from this country. For example, how does his father's visa explain away Ahmed's haste to leave the country and his bizarre act of signing over his car and his children to a travel agent he

never met before? And if Ahmed was traveling to Pakistan merely to accompany his father back to the U.S., why was Ahmed traveling with so much cash and his living will?

Ahmed's trial counsel tried to admit Ahmed's self-serving e-mails to his boss to show that he had been planning the trip to retrieve his father, but trial counsel simply could not overcome Evidence Rule 801. Counsel succeeded in demonstrating that Ahmed had tried to book other trips and that the September 11, 1999, trip was booked as a round-trip ticket and that Ahmed was flying to Pakistan because his father was ill. See (Vol. I, Tr. 438, 464-65). Thus, trial counsel did not perform deficiently. Moreover, the failure to somehow present the travel visa was not prejudicial because it did nothing to account for the inexplicable anomalies in Ahmed's flight.

- (2) **A September 11, 1999, credit card transaction in Columbus was not exculpatory (*Post-Conviction Petition*, pp. 33-34, ¶97).**

Ahmed claimed below that a credit card transaction, shown to have occurred on September 11, 1999, in Columbus, Ohio, casts doubt on whether he could have traveled to St. Clairsville in time to kill his wife and her family. But the credit card receipt does not show the time of the transaction. And since the State's evidence showed that Dr. Bhatti and her family were likely murdered at some point before 3:45 AM (the time of the first welfare check by Deputy Michelle Markus), that leaves plenty of time for Ahmed to travel to St. Clairsville from Columbus. (Vol. I, Tr. 202).

Since the credit card printout does not provide Ahmed an alibi, trial counsel were not ineffective in failing to attempt admission of this evidence.

- (3) **A letter concerning Ahmed's alleged effort to reconcile his marriage problems does not negate the State's proof of motive (*Post-Conviction Petition*, p. 34, ¶98).**

In his petition below, Ahmed used his attached Exhibit O in an attempt to show that he did not contest the paternity of his eldest son and he was attempting to resolve the marriage difficulties peacefully. Exhibit O consists of two items: (1) a letter from Munawar A. Saeed; and (2) a letter from Nawaz Ahmed to Ameer Sahib. Both items are hearsay. Ahmed did not explain how either letter would have been admissible. He also does not explain how Munawar Saeed would have been permitted to testify about what Ahmed told him about the paternity tests. Since the "evidence" contained in Exhibit O would not have been admissible, trial counsel could not have been ineffective.

Even if trial counsel could have called Munawar Saeed to testify about his communication with Ahmed, it would not have made a difference. First of all, the State produced Ahmed's sworn testimony on the subject from Ahmed's deposition. Ahmed gave his deposition on August 18, 1999, after the correspondence contained in Post-Conviction Exhibit O. (Vol. I, Tr. 64) (testimony of Grace Hoffman about the date of the deposition). Ahmed's sworn explanation for the circumstances surrounding the paternity tests was already in the record, so additional testimony would have been cumulative. (Vol. I, Tr. 72-73).

Additional testimony also would not have made a difference. Indeed, Exhibit O only corroborates that Ahmed did not want the divorce and was trying everything he could to prevent it from happening. The letters certainly do not help to explain why Ahmed would attempt to flee the country two days before finalization of the divorce, nor do they justify Ahmed's abandonment of his children to a stranger.

Trial counsel neither performed deficiently nor did the failure to produce the statements contained in Exhibit O prejudice Ahmed.

**Sixteenth Claim for Relief:** Ineffective assistance of trial counsel for failing to call Abdus Malik at the penalty phase.<sup>4</sup>

According to Ahmed, trial counsel should have called Abdus Malik during the penalty phase to make three points: (1) Ahmed contributed to the community and regularly attended prayer services; (2) religion was important to Ahmed; and (3) Ahmed would not have been stigmatized in his community by the divorce. Ahmed fails to show either deficient performance or prejudice.

How do we know that Ahmed told his trial counsel about Abdus Malik? Without a showing that Ahmed told trial counsel about Malik, where to find him, and what value his testimony would have had, counsel could not have performed deficiently. *Findings of Fact and Conclusions of Law*, p. 21 (finding as a fact that Ahmed submitted no evidence on the subject of what he told his trial counsel about Malik, if anything)

Even if Ahmed told trial counsel all about Malik, there is no evidence of prejudice. That Ahmed contributed to his religious community and regularly prayed surely would not have changed the result of the penalty phase proceedings. And there was already evidence in the record to substantiate that Ahmed was a religious person (Mit. Tr. 79-80) (testimony of Shehida Ahmed that Nawaz was devout and regularly helpful to his community), so additional evidence would have been cumulative. *State v. Combs*, 100 Ohio App.3d at 98. As for the last item of proposed testimony, there was already evidence in the record that divorce would not have stigmatized Ahmed in his Islamic community. Saed Khan testified that Ahmed believed that divorce would ruin his life, but Khan told him that this was wrong:

And I just kind of laugh.

---

<sup>4</sup>

Ahmed added this claim in his first amendment to the petition.

I says, "This is completely wrong. Usually this is happen in our society with woman; she can't be entitled as a bad woman, once being divorced. Nobody want to marry her. And in your case, you can go and find as many women you want."

Trial Transcript (Vol. I, Tr. 159).

This perfectly mirrors what Abdus Malik would have offered on the subject. *First Amendment to Post-Conviction Petition* (Attached Affidavit of Abdus Malik), ¶¶9-11.

**C. Fifth Claim for Relief:** Eighth Amendment claim regarding inaccurate translation by trial defense counsel's translator.

This is a restatement of the fourth claim for relief cast in terms of the Eighth Amendment instead of the Fourteenth Amendment. It fails essentially for the same reasons outlined above, principally that Ahmed fails to show what was inaccurately translated and that such mistranslations affected the outcome of the proceeding. Moreover, since this claim is not based upon ineffective assistance of trial counsel (which could not have been raised at trial), the claim is also barred by res judicata as Ahmed had a duty to raise this claim at trial.

**D. Sixth Claim for Relief:** Jurors did not follow the trial court's instructions.

Ahmed claims that some of the jurors did not follow the trial court's instructions during the penalty phase. Ahmed knows that he has a burden to provide evidence dehors the record in order for this claim to be considered in a post-conviction proceeding, so he attached the affidavit of an assistant state public defender who claimed to have spoken to jurors whose statements about the death-penalty-recommendation evince a misunderstanding of the Court's instructions. This affidavit is legally deficient on two levels. First and foremost, juror statements on their deliberative process are inadmissible. In *State v. Hessler* (2000), 90 Ohio St.3d 108, 123, 2000 Ohio 30, this Court reaffirmed the long-standing rule that juror testimony offered to impeach a verdict is inadmissible. Hessler had produced an affidavit from a juror who stated that, among

other things, the jury ignored mitigating evidence and did not properly weigh the aggravating circumstances against the mitigating factors when they deliberated and voted for the death penalty. *Id.* This Court held that the trial court properly disregarded the affidavit. *Id.* (citing and discussing Ohio Evid. R. 606(B)); *see also State v. Hughbanks* (1st Dist. 2003), 2003 Ohio 187, P19-21.

Ahmed claims this Court has vitiated this doctrine by allowing cameras to record jury deliberations in *State v. Ducic*. Since there is no opinion associated with this case, and Ahmed never submitted any documents to corroborate his claim, the argument fails for lack of factual support. Finally, the argument is unpersuasive on the merits as it appears that the jurors and the parties consented ahead of time to allow the recording in that case, a fact noticeably absent from this record. Moreover, the *Ducic* case does not involve the admission of juror testimony to impeach a verdict, which is the issue involved in this case that Evidence Rule 606(b) directly addresses.

Even if juror testimony on the deliberative process were otherwise admissible, Ms. Sandford's affidavit is not. Ms. Sandford has no personal knowledge of the issue. She is merely offering what she allegedly heard jurors tell her about the process. The trial court properly rejected the affidavit on the ground that it is based solely on hearsay. *State v. Calhoun*, 86 Ohio St.3d at 285, 714 N.E.2d at 910 (noting that post-conviction courts may consider whether the affidavit contains or relies upon hearsay in determining the credibility of the affiant).

**E. Seventh Claim for Relief:** The Court's instructions were either too unclear or the jurors disregarded them.

Ahmed simply refers to, but does not discuss, the affidavit of a linguistics professor to support an argument that jury instructions in Ohio are incomprehensible. Even if the Court

looked to the record below to identify more specifically what Ahmed's argument is, the Court would find that Dr. Geis discusses Ohio's OJI instructions and not the trial court's actual instructions in Ahmed's case. Ohio courts have repeatedly found Dr. Geis' affidavit (and those of linguistics professors in general) to be inadmissible on the subject for lack of personal knowledge. *See generally State v. Hughbanks* (1st Dist. 2003), 2003 Ohio 187, P19-21; *State v. Phillips* (9th Dist. 2002), 2002 Ohio 823, 2002 Ohio App. LEXIS 788, \*29-30 (collecting cases).

Since the affidavits do not constitute evidence dehors the record, the claim is deficient on its face. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 714 N.E.2d 905, 910; *State v. Jackson* (1983), 64 Ohio St.2d 107, 413 N.E.2d 819, 823. Without evidence dehors the record, the claim becomes an attack on the penalty phase instructions. Such an attack must be made at trial and on direct appeal, which means that this claim fails due to *res judicata* as well. *State v. Herring* (7th Dist. 2004), 2004 Ohio 5357, P135-37 (rejecting post-conviction claim based on Dr. Geis' affidavit because the jury instruction argument should have been raised on direct appeal).

**F. Eighth Claim for Relief:** The prosecutor committed misconduct in arguing nonstatutory aggravating circumstances.

This claim is clearly *res judicata*. Ahmed should have objected at trial to the prosecutor's argument and then argued it on direct appeal. Indeed, Ahmed raised this very argument as part of his fifth proposition of law in his direct appeal to this Court. *State v. Ahmed* (2004), 103 Ohio St.3d at 49, 2004 Ohio 4190, P134. The affidavits from two jurors (exhibits J and K) do not resuscitate this claim as the jurors' affidavits are inadmissible, Evid. R. 606(B), and irrelevant since they did not indicate that they relied on the prosecutor's argument.

Even if this Court could address the claim on the merits, it would continue to fail for the reasons identified by this Court. *State v. Ahmed* (2004), 103 Ohio St.3d at 49, 2004 Ohio 4190,

P134. The parties have latitude in arguing the weight to be given to the aggravating circumstances and mitigating factors. *State v. Loza* (1994), 71 Ohio St.3d 61, 82, 1994 Ohio 409, 641 N.E.2d 1082, 1104. In referring to the weight to be given the four victims and the value of the death of a baby, the prosecutor was explicitly referring to the two types of aggravating circumstances, the mass murder specification and the child murder (under thirteen) specification. See (Mit. Tr. 174) (prosecutor explained that the aggravating circumstance for the first three counts was mass murder and the last count was mass murder plus killing a child under thirteen); (Mit. Tr. 175) (prosecutor urging jury to rely on the court's instructions on what is aggravating and mitigating and how to weigh them). Since the jury received correct instructions on the weighing process, any error was harmless. Penalty Phase Jury Instructions, pp. 6-7, 9-10 (describing what the aggravating circumstances are and how the weighing process is to be undertaken); *Boyde v. California* (1990), 494 U.S. 370, 384-85 (instructions carry substantially more weight than counsel's arguments).

**G. Twelfth Claim for Relief:** The State failed to advise Ahmed of his rights under the Vienna Convention on Consular Rights.

This claim is clearly *res judicata*. Ahmed raised this argument as his seventeenth proposition of law in his direct appeal to this Court, and the Court rejected it. *State v. Ahmed* (2004), 103 Ohio St.3d at 36, 2004 Ohio 4190, P51-55. The Court found the claim waived due to Ahmed's failure to raise it at trial and meritless on the ground that Ahmed's dual citizenship rendered the provisions of the Vienna Convention inapplicable. *Id.*

**H. Thirteenth Claim for Relief:** Ahmed was incompetent to stand trial.

This claim is clearly *res judicata*. This Court rejected it on direct appeal. *State v. Ahmed* (2004), 103 Ohio St.3d at 36-37, 2004 Ohio 4190, P56-58.

Ahmed attempted to circumvent the *res judicata* hurdle by adding some of his pro se pleadings as additional evidence of incompetence. Some of this material (like the civil rights complaint he filed against trial counsel on the eve of trial) were clearly available and could have been used at trial. The additional material after trial does not shed any light on Ahmed's competence at trial and is therefore not cogent evidence dehors the record. *State v. Combs* (1994), 100 Ohio App.3d 90, 97, 652 N.E.2d 205; *State v. Lawson* (1995), 103 Ohio App.3d 307, 316, 659 N.E.2d 362. Indeed, the pleadings are cumulative of the information available at trial, and thus the attachment of additional pleadings does not constitute evidence dehors the record. *State v. Combs*, 100 Ohio App.3d at 98.

**I. Fourteenth Claim for Relief:** Ahmed will be insane at the time of his execution.

This claim is not cognizable in a post-conviction proceeding – Ahmed's remedy is through Ohio Revised Code §2949.28, which explicitly covers this claim and the procedures to follow for litigating it. Ahmed fails to explain why this procedure is inapplicable or inadequate.

The claim is also obviously not ripe as Ahmed is not close to execution, and as these claims necessarily depend on the mental state at the time of execution, it would do no good to probe that issue at this time. Lastly, Ahmed produces no evidence to support the notion that he lacks the capacity to understand the nature of the penalty and why it was imposed, so the claim facially lacks merit as well.

**J. Fifteenth Claim for Relief:** Cumulative error.

There is no error to cumulate as each of the above claims lacks merit. Even if Ahmed has shown more than one meritorious claim, the State respectfully suggests that any such accumulation would not result in reversible error.

**K. Seventeenth Claim for Relief:** Denial of Sixth Amendment right to a fair cross-section of the community.

This claim is barred by *res judicata*. Ahmed raised this claim at trial (Voir Dire, Tr. 482), and he should have presented any statistical analysis in support of it then. He should have then raised it on direct appeal, which he did not. It is now barred in this forum. *State v. Ahmed* (December 28, 2006), 2006 Ohio 7069, P158. It also lacks merit.

Claimants must satisfy three requirements when alleging the infringement of the Sixth Amendment right to a fair cross-section of the community:

the group alleged to be excluded is a "distinctive" group in the community;

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

this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

*Duren v. Missouri* (1979), 439 U.S. 357, 364; *State v. Jackson* (2005), 107 Ohio St. 3d 53, 66, 2005 Ohio 5981, P65.

(1) Ahmed has failed to demonstrate that Non-Whites are a cognizable group under *Duren*.

Ahmed fails to demonstrate that Non-Whites are a distinctive group. *United States v. Suttiswad* (C.A. 9, 1982), 696 F.2d 645, 649 (Non-Whites are not a distinctive group under *Duren*).

(2) Ahmed has failed to prove that the representation of Non-Whites in his jury pool was unfair and unreasonable in relation to the number of Non-Whites in his community.

Ahmed supported his claim below with a printout from the U.S. Census Bureau's web site for Belmont County for 2000 and 2001. Ahmed extrapolated from the data that approximately five percent of the county is nonwhite.

Even assuming the statistics are valid, Ahmed still fails to even make a statistically significant prima facie showing of underrepresentation. See *State v. Phillips* (9th Dist. 2002), 2002 Ohio 823, \*21-23 (rejecting post-conviction underrepresentation claim because petitioner only attached census data and referred to trial transcript for the number of minorities on venire).

Most courts require the petitioner to demonstrate an absolute disparity of at least 10% between the underrepresented group's proportion of the general or age-eligible population and its representation on the jury venire. *United States v. Tuttle* (C.A. 11, 1984), 729 F.2d 1325, 1327, cert. denied sub. nom. (1985), *Vereen v. United States*, 469 U.S. 1192; *Ramseur v. Beyer* (C.A. 3, 1992), 983 F.2d 1215, 1232 (14.1% "borderline"); *United States v. McAnderson* (C.A. 7, 1990), 914 F.2d 934, 941 (8% is de minimus); *United States v. Butler* (C.A. 5, 1980), 611 F.2d 1066, 1069-70 (under 10% permissible; rejected 9.14% as insufficient).

In this case, according to Ahmed, Non-Whites constituted 5% of his community and about 1% of the jury venire, thus yielding an absolute disparity of about 4% (5% minus 1%). These figures do not even come close to the 10% threshold considered by most courts to be a prima facie demonstration of underrepresentation.

Ahmed failed to produce an expert opinion from a statistician that rules out the possibility that the underrepresentation was due to chance.

- (3) Even if Ahmed could have shown the above factors, he fails to even allege the existence of the third factor, much less provide any evidence in support of it.

Moreover, Ahmed cannot rely on an isolated instance of statistically significant underrepresentation (which Ahmed has not even shown here) – there must be continued underrepresentation. *State v. McNeill* (1998), 83 Ohio St.3d 438, 444, 700 N.E.2d 596 ("underrepresentation on a single venire is not a *systematic* exclusion") (emphasis in original);

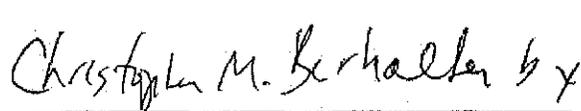
*Ford v. Seabold* (C.A. 6), 841 F.2d 677, 685, cert. denied (1988), 488 U.S. 928. Ahmed's showing in one case is insufficient. *State v. Jackson* (2005), 107 Ohio St. 3d 53, 66, 2005 Ohio 5981, P67.

Ahmed fails to point to any aspect of the jury selection process that makes it obvious that the "underrepresentation" was due to the system itself. *Ford v. Seabold*, 841 F.2d at 685 (rejecting *Duren* claim on the ground that the petitioner pointed to nothing in the process itself as the cause for underrepresentation).

**CONCLUSION**

This Court should decline to accept jurisdiction over the case.

Respectfully submitted,

 by 

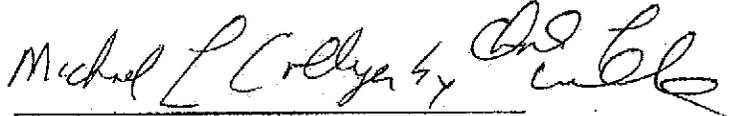
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**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the foregoing *Memorandum Opposing Jurisdiction* was served upon Michael J. Benza, 4403 St. Clair Ave., Cleveland, Ohio 44114, by ordinary U.S. mail this 6th day of March 2007.

  
MICHAEL L. COLLYER