Capital Case

Case No. _____

October Term, 2017

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT GROUP, PETITIONER,

VS.

NORM ROBINSON, WARDEN, RESPONDENT.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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158 F.Supp.3d 632
United States District Court,
N.D. Ohio, Western Division.

Scott A. Group, Petitioner,
v.
Norm Robinson, Warden, Respondent.

Case No. 4:13 CV 1636
|
Signed January 20, 2016

Synopsis

Background: Following affirmance of his conviction in state court for aggravated murder, attempted aggravated murder, aggravated robbery, and intimidation of a witness, and his death sentence, 98 Ohio St.3d 248, petitioner filed federal petition for writ of habeas corpus.

Holdings: The District Court, Jack Zouhary, J., held that:

[1] petitioner was not entitled to habeas relief on claim that trial counsel were ineffective in failing to secure expert to testify about DNA blood evidence found on shoes petitioner wore when he voluntarily surrendered to police;

[2] petitioner was not entitled to habeas relief on claim that trial counsel were ineffective in cross-examining state's DNA expert;

[3] petitioner was not entitled to habeas relief on claim that trial counsel were ineffective in failing to properly investigate defense DNA expert;

[4] petitioner was not entitled to habeas relief on claim that trial court improperly excused for cause prospective juror who stated that she was opposed to death penalty but would follow law;

[5] petitioner was not entitled to habeas relief on claim that trial court erred in removing alternate juror who expressed reservations about jury's verdict; and

[6] convictions for attempted aggravated murder and intimidated were supported by sufficient evidence.

Petition denied.

Attorneys and Law Firms

Joseph E. Wilhelm, Alan C. Rossman, Vicki R.A. Werneke, Office of the Federal *640 Public Defender, Cleveland, OH, for Petitioner.

David M. Henry, Columbus, OH, for Respondent.

Opinion

MEMORANDUM OPINION AND ORDER

JACK ZOUHARY, UNITED STATES DISTRICT JUDGE

INTRODUCTION

A jury convicted Petitioner Scott Group of the 1997 murder of Robert Lozier. On the jury's recommendation, the court sentenced Group to death. Group now petitions for a writ of habeas corpus under 28 U.S.C. § 2254 (Doc. 16). Respondent Warden Norm Robinson filed a Return of Writ (Doc. 24), and Group filed a Traverse (Doc. 34). For the following reasons, this Court denies the Petition.

FACTUAL BACKGROUND

On direct appeal from Group's conviction and sentence in *State v. Group*, 98 Ohio St.3d 248, 249–53, 781 N.E.2d 980 (2002), the Ohio Supreme Court set out the following account of Group's crimes:

> Robert Lozier's wife, Sandra Lozier, owned the Downtown Bar in Youngstown, Ohio. In late September 1996, the Loziers began buying wine and other merchandise from Ohio Wine Imports Company. Group, who was then employed as a deliveryman for Ohio Wine, made weekly deliveries to the Downtown Bar. Group never asked the Loziers to sign or initial a copy of the invoice when they took delivery, a practice Mrs. Lozier characterized as unusual.
>
> On December 12, 1996, Group brought his cash receipts to the Ohio Wine warehouse manager's office to be counted and compared against his invoices. Group's cash receipts were approximately $1,300 short.

Although the police were notified, Group was never charged with stealing the missing money.

About a week before Robert Lozier's murder, Group went to the Downtown Bar and asked Mrs. Lozier to show him the bar's copies of invoices from Ohio Wine.

Less than a week before Robert Lozier's murder, two Ohio Wine employees saw Group with a revolver at work. They told him to take the gun out of the building, since possessing a firearm in the warehouse was illegal.

The day before the murder, Group quit his job at Ohio Wine. That night, two witnesses saw Group at the Downtown Bar. One of them, Robert Genuske, who worked at the bar, recalled that a few weeks earlier, Group had come to the bar looking for Mr. or Mrs. Lozier because he wanted to talk to them about an invoice.

The next day, January 18, the Loziers arrived at the Downtown Bar around 10:00 a.m. It was a cold day and Robert Lozier went upstairs to see whether the pipes had frozen. Sandra Lozier went to an office, opened a safe, removed five bags containing approximately $1,200 to $1,300 in cash, and set them on her desk.

As she counted the cash, Mrs. Lozier heard a knock at the bar's front door. She went to the door, looked through the peephole, and saw Group. Mrs. Lozier recognized Group and let him in. She noted that he was wearing tennis shoes, jeans, a dark blue sweatshirt, and an undershirt. She particularly noticed that he wore both a sweatshirt and an undershirt because Group "never dressed that warmly."

Group told Mrs. Lozier that he wanted to check the invoices again. Mrs. Lozier led him to the office. As Mrs. Lozier and Group searched through the invoices, ***641** Robert Lozier came into the office, sat at the desk, and took over counting the money. As Mrs. Lozier later testified, "[Group] just kept going through [the invoices], and it was like he just kept staring at them."

Asking to use the restroom, Group left the office briefly. When he returned, he had a gun. Group ordered the Loziers to put their hands up and get into the restroom. Mrs. Lozier told Group to take the money, but Group replied, "This isn't about money." He forced the Loziers into the restroom at gunpoint and made them put their hands against the wall.

Group stated that "he was the brother of the girl that was missing." Mrs. Lozier interpreted this as a reference to Charity Agee, a murder victim who had last been seen at the Downtown Bar on New Year's Eve. The Loziers turned around, but Group ordered them to face the wall. Then he shot them both. He shot Robert Lozier once in the head. He shot Sandra Lozier twice: once in the back of the neck and once near her temple.

Mrs. Lozier lost consciousness. She woke to find her husband dead on the floor. Mrs. Lozier thought she was dying, so she tried to write "Ohio Wine" on the floor in her own blood as a clue for the police. At the time, she did not know Group's name. She then crawled to the office, where she managed to dial 911. She told the operator that "the delivery man from Ohio Wine" had shot and robbed her and her husband. The 911 call was recorded; a voice timestamp on the tape established that the call was received at 11:05 a.m.

The first Youngstown police officer to arrive at the crime scene was Detective Sergeant Joseph Datko. Mrs. Lozier told Datko: "The Ohio Wine man shot me. The Ohio Wine man. Our delivery man shot us." The money the Loziers had been counting before the shootings was gone and so was the box of invoices that Group had been looking through.

At trial, Group, his family, and a family friend gave a different account of Group's whereabouts. Group testified that, after driving his foster son to work around 7:30 a.m., he went back to his apartment, gathered some dirty laundry, and went to his mother's house to wash it, arriving around 9:00 or 9:30 a.m. He testified that he did not know what time he had left his mother's house. Group's mother, grandmother, and sister were at Group's mother's house that morning, along with Francisco Morales, a friend of the Group family. The accounts given by these witnesses generally indicated that Group had arrived at his mother's house by 9:00 a.m. and had left between 11:30 and 11:40 a.m.

According to Group, after leaving his mother's house, he drove to the Diamond Tavern in Campbell, Ohio. Group testified that he did not know how long he was at the tavern but that he had left at noon.

There were about eight customers at the Diamond Tavern. Group bought at least two rounds of drinks for all of the customers. A fellow patron thanked Group and said, "I'll see you," but Group replied, "You aren't going to see me anymore." He had a similar exchange with the bartender, Bonnie Donatelli.

Group then drove to the VFW post, which took about five minutes. The manager, Maria Dutton, was a friend of Group's. According to Dutton, Group arrived slightly after noon and left at 12:55 p.m. While there, Group bought a round of drinks for everyone.

Group then drove to a grocery store and telephoned his mother. According to his mother, she received the call between *642 1:00 and 1:30 p.m. Mrs. Group told her son that Youngstown police were looking for him in connection with a shooting downtown.

According to Group, he knew that he had not been downtown, so he surmised that his mother misunderstood the situation and that the police were actually looking for him because of some unpaid parking tickets. Group told his mother that he would go to the police station. Group's mother and sister intercepted him en route and went to the station with him.

When Group arrived at the police station, he spoke with Captain Robert Kane, chief of detectives, and Detective Sergeant Daryl Martin. Kane and Martin noticed what looked like blood on one of Group's tennis shoes. When questioned about it, Group told Kane that he had cut his finger. He showed Kane the finger, and there was a cut on it, but it "looked like a superficial old cut" to Kane.

After brief questioning, Sergeant Martin arrested Group. Group said, "You better check out Sam Vona," a former driver for Ohio Wine. But Mrs. Lozier did not recognize Vona's picture when Martin later showed it to her.

Group's shoe was sent to Cellmark Diagnostics for DNA testing. An expert from Cellmark testified that the DNA pattern of the blood on the shoe matched the DNA pattern of a known sample of Robert Lozier's blood. She further testified that the same DNA pattern occurs in approximately 1 in 220,000 Caucasians, 1 in 81 million African–Americans, and 1 in 1.8 million Hispanics. The testing also revealed that Group was excluded as the source of the blood.

Lisa Modarelli, an Ohio Wine sales representative, was a friend of Group's. According to Modarelli, Group confided to her that police had swabbed his hands to test for gunshot residue and that he was concerned that the test might be positive because he had been shooting a gun the day before the murder with "a friend." Later, Group told Modarelli that he had been shooting with his foster son, but Group's foster son denied that he had gone shooting with Group.

Group contacted Bonnie Donatelli from jail and asked her to contact Darryl Olenick for him. Olenick was a regular at the Diamond Tavern; his hobbies were gun collecting and target shooting. Group told Donatelli that the police had found gunshot residue on his hands and asked Donatelli to get Olenick to tell police that he and Group had been target shooting together the day before the murder. In fact, Olenick and Group did not associate outside the tavern and had never gone shooting together. Donatelli promised to "see what [she] could do," but instead, she told Sergeant Martin about Group's request.

Robert Clark was an inmate at the Mahoning County Jail with Group. Clark mentioned to Group that he "was familiar with the people in the [Downtown] [B]ar." Group asked Clark whether he would "be willing to help [Group] out." Group then made up a story for Clark to tell police. Clark was to say that he had been near the Downtown Bar on the morning of the murder and had seen a man leave the bar carrying a large beer bottle box. In return, Group promised to help Clark "any way he could." Clark later received an anonymous $50 contribution to his commissary account.

Adam Perry was another Mahoning County Jail inmate at the time of Group's pretrial incarceration. Awaiting trial on pending charges, Perry was incarcerated with Group from December *643 1997 to May 1998. Perry was released on bond in May 1998.

In a letter postmarked March 20, 1998, before Perry's release, Group begged for Perry's help with his case:

> "If you do bond out, let me know. There's something you may be able to do to help me with concerning my case. And I'm telling you, I need

> all the help I can get. * * * But seriously man, and this is no joke, I need your help with something if you get out. Please don't leave me hanging? We've known each other a long time and if anyone in your family needs help, you know I'll be there."

Before Perry was released, Group asked him to firebomb Mrs. Lozier's house. Group assured Perry that Mrs. Lozier no longer lived there. However, he told Perry that "[h]e didn't want Sandy Lozier to testify against him," and he wanted Perry to "firebomb the lady's house to either scare her from testifying or to lead the police into investigating others."

Group told Perry that he had $300,000 hidden away. He offered Perry half of it in exchange for his help. Group also offered to dissuade a witness from testifying in Perry's trial.

Group explained to Perry how to make a firebomb by mixing gasoline with dish soap in a bottle, with a rag in the neck for a fuse. He instructed Perry to light the rag and throw it through the front window and then to drop a key chain with the name "Charity" on it on the front lawn. "[W]hat he wanted to do," Perry explained, "was to mislead the police into thinking that the firebomb and the murder [sic] was all involved as far as Charity's abduction and murder."

In a letter postmarked May 6, 1998, Group wrote to Perry: "So I need to know on everything if that party is still on where your sister lived. The party has to happen and happen the way we last talked. I've got to know bro, so I can figure some other things out in the next few weeks." Perry understood "the party" to refer to the planned firebombing of Mrs. Lozier's house.

Group also corresponded with Perry after Perry's release. State's Exhibit 37, a letter from Group to Perry, contains the following passage: "[Y]ou said you would take care of that flat tire for me and now that your [sic] out, I hope you do because it's a matter of life or death (mine)[.]" In the next sentence, Mrs. Lozier's address appears next to the name "Agee."

Group then wrote: "If you take care of the flat, please take care of it with that two step plan we talked about. * * * Theres [sic] $300,000.00 in a wall of a certain house * * *. Half goes to you to do what you like."

The second page of State's Exhibit 37 contains Mrs. Lozier's address and describes the house as ranch–style. It also lists the following items: "Cheap key chain or ID bracelet — name (Charity)" and "3 liter wine jug — mix gas & dish soap."

In June 1998, Perry knocked on Mrs. Lozier's door. When she answered, he asked her whether a "Maria something lived there." Mrs. Lozier said no, and Perry left. Perry testified that he did not want to hurt Mrs. Lozier and so, after finding her at home, he took no further action. Perry later told the prosecutor about Group's plan.

PROCEDURAL HISTORY

State–Court Proceedings

In January 1997, a Mahoning County grand jury indicted Group on three counts. The first, for the aggravated murder of Robert Lozier, carried with it two death– ***644** penalty specifications: murder during an aggravated robbery and purposeful attempt to kill two persons. The remaining counts charged Group with aggravated robbery and the attempted aggravated murder of Sandra Lozier on January 18. Each count included a firearm specification (Doc. 21–1 at 54–56).

The grand jury returned a superceding indictment in June 1998 after Perry told the prosecutor about Group's plan to firebomb Sandra's house. It added two new counts: the attempted aggravated murder of Sandra "on or about or between April 1, 1998 and June 5, 1998"; and intimidating a witness (Sandra) "on or about or between December 1, 1997 and June 5, 1998" (*id.* at 333–36).

Group went to trial in March 1999. The jury convicted him on all counts and specifications (Doc. 21–2 at 295). Following the mitigation phase, the jury recommended Group be sentenced to death for murdering Robert (*id.* at 324). The trial court accepted the jury's recommendation and imposed the following additional sentences, to run consecutively: a ten–year prison term on the attempted aggravated murder charge; a ten–year prison term on the aggravated robbery charge; a ten–year prison term on the attempted aggravated robbery charge; a five–year prison

term on the intimidation charge; and a three–year prison term for the merged firearm specifications (*id.* at 324–26).

In June, with new counsel, Group timely appealed his convictions and sentence to the Ohio Supreme Court (Doc. 21–3 at 5). He raised sixteen propositions of law, stated as follows:

1. Appellant's due process rights protected by Amendment [XIV], United States Constitution[,] are violated when the trial court dismisses for cause jurors who express views against capital punishment.

2. It is error for the trial court to overrule [Group's] motion to prohibit the use of peremptory challenges to exclude jurors who express concerns about capital punishment, in violation of [Group's rights under the] Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

3. A trial court's refusal to excuse a juror who expressed a preference for the death penalty, and the inability to consider mitigation evidence and the corresponding requirements placed upon a capital defendant to excuse such a juror through the use of peremptory challenges, amounts to a denial of a fair and impartial jury and results in a denial of due process and equal protection of the laws under U.S. Const. amend. XIV and Ohio Const. art. I, [§§] 2 [,] 16.

4. The trial court's granting of the State's motion to excuse prospective Juror Number 389 for cause where the juror appears to be impartial and agrees to follow the judge's instructions, constituted a denial of a fair and impartial jury[,] which resulted in the denial of due process and the equal protection of the laws of the U.S. Const.[ ] amend. IV [and] the Ohio Const [.] art. I, [§§] 2[,] 16.

5. The conviction of the Appellant for the charge of aggravated murder in this case is against the manifest weight of the evidence. The evidence was insufficient as a matter of law to support Appellant's conviction for aggravated murder and should be reversed.

6. The Appellant's right to effective assistance of counsel [was] prejudiced by counsel's deficient performance.

***645** 7. It is an abuse of discretion for the trial court to deny Appellant's Rule 29 motion for acquittal regarding the attempted aggravated murder charge.

8. It is error for the trial court to fail to instruct the jury pursuant to the request of Appellant on law pertinent to the case[,] all in violation of Appellant's rights as guaranteed in the Fifth, Sixth, Eighth[,] and Fourteenth Amendments to the United States Constitution.

9. It is prejudicial error for the trial court to remove [a] juror for expressing reservations [about] the verdict.

10. The trial court commits prejudicial error in failing to instruct the jury as requested by the Appellant in the second phase of th[e] trial in violation of the Appellant's Fifth, Sixth, Eighth[,] and Fourteenth Amendment rights to the United States Constitution.

11. [Ohio Rev. Code §] 2929.04(B)(7) is unconstitutionally vague and may be understood by jurors as [a] reason[ ] for imposing the death sentence.

12. The Due Process Clause is violated by a jury charge which permits a criminal conviction on proof less than beyond a reasonable doubt.

13. It is prejudicial error to sentence Defendant to the death penalty, when, based upon the law and the record of this case, the sentence of death herein is inappropriate and is disproportionate to the penalty imposed in similar cases, in violation of Defendant's rights as guaranteed to him by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U. S. Constitution and Sections 5, 9, 10, and 16 of Article One of the Ohio Constitution.

14. [Ohio Rev. Code §§] 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 and 2929.05[,] as read together and as applied in this case[,] violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10, and 16 of Article I of the Ohio Constitution.

15. The proportionality review that this Court must conduct in the present capital case pursuant to Ohio Revised Code Section 2929.05 is fatally flawed and therefore the present death sentence must be vacated pursuant to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, Sections 5 and 10, Article I of the Ohio Constitution and Ohio Revised Code Section 2929.05, in violation

of [Group's] rights as guaranteed to him by the Fifth, Eighth, and Fourteenth Amendments to the U. S. Constitution and Sections 5, 9, 10[,] and 16 of Article One of the Ohio Constitution.

16. It is error for a trial court to impose a death sentence when the death penalty law as currently applied in Ohio violates [Ohio Rev. Code §] 2929.05(A) by requiring appellate courts and the [Ohio] Supreme Court, in conducting their [OHIO REV. CODE §] 2929.04(A) review of "similar cases" for proportionality, to examine only those cases in which a death sentence was imposed and ignore those in which a sentence of life with a parole eligibility after twenty full years or life with a parole eligibility after thirty full years was imposed. The current method also violates the rights to a fair trial and due process, results in cruel and unusual ***646** punishment, and implicates others of Appellant's protected rights as well, all as set forth in the Fifth, Sixth, Eighth, Ninth[,] and Fourteenth Amendments to the United States Constitution and in Sections 1, 2, 5, 9, 10, 16[,] and 20, Article I of the Ohio Constitution.

(Doc. 21–3 at 45–48). The Ohio Supreme Court affirmed Group's convictions and sentence in December 2002. *Group*, 98 Ohio St.3d at 275, 781 N.E.2d 980.

Group petitioned for post–conviction review while his direct appeals were pending. In June 2003, Group amended his post–conviction petition to assert the following claims:

1. [Group] did not receive effective assistance of counsel during the trial phase of his capital trial. ... [Counsel was] unprepared for a hearing on counsel's own motion [to disqualify the Prosecutor's Office.] ... [O]ne of his lawyers, Jerry McHenry, repeatedly dosed off. ... [T]he defense lawyers failed to prepare Petitioner to testify .... [D]efense lawyers failed to call a witness from Ohio BCI, who [could] have testified about negative test results, including a negative gunshot residue test. ... [D]efense lawyers told him that they did not want to litigate vigorously pretrial motions for fear of angering the judge and the prosecutors. ... [O]ne of Petitioner's lawyers, Andrew Love, kept calling Petitioner Fred, and he called other people by the wrong name as well.

...

2. [Defense counsel was] totally unprepared for a motion hearing [on a motion for a gag order]. ... [C]ounsel were ineffective for failing to prepare adequately for hearings.

...

3. Defense counsel was ineffective under the Sixth Amendment of the United States Constitution for misleading the jury on the material issue of the DNA identity of the blood found on Scott Group's shoe. ... The failure of Petitioner's trial counsel to obtain a defense DNA expert, to have promised that one would testify and then not produce one, and to fail to cross–examine the State's expert effectively, fell below objective standards of performance for counsel in capital cases.

...

4. Defense [counsel] prejudicially failed to obtain an expert on the issue of the physical impairment of Scott Group's right hand.

...

5. Petitioner's convictions, death sentence, and other sentences are void or voidable because the trial court used an anonymous juror system.

...

6. [T]rial counsel failed to prepare their client to testify and thereby opened the door to devastating impeachment of Petitioner when he testified, "I never robbed anybody in my life."

...

7. [D]efense counsel created a situation permitting further devastating impeachment of Petitioner. ... Defense counsel opened the door to the use of [ ] letters [Group had written and sent from jail] with Petitioner's testimony.

...

8. Petitioner did not receive effective assistance of counsel during the trial phase of his

capital trial [because] [m]itigation was incongruent, inconsistent[,] and incomplete.

...

*647 9. Counsel's failure to voir dire the jury effectively regarding mitigating factors and counsel's failure to rehabilitate jurors violated Petitioner's rights under the United States Constitution's Fifth, Sixth, Eighth, and Fourteenth Amendments and Petitioner was prejudiced.

...

10. Counsel's failure to file a motion for a change of venue and to voir dire the jury effectively regarding pretrial publicity violated Petitioner's rights under U.S. Const.[ ] amend[s]. VI and XIV and Ohio Const. [ ] art. I, §§ 1, 2, 5, 10, and 16.

...

11. Petitioner's trial counsel ... failed to cross–examine Mrs. Lozier effectively, denying Petitioner the twin liberties protected by the Sixth and Fourteenth Amendments of confrontation and the effective assistance of counsel.

...

12. Petitioner was denied compulsory process, due process of law, and the effective assistance of counsel ... [w]hen his trial counsel failed to subpoena and call to the stand scientific witnesses from the Ohio Bureau of Criminal Identification & Investigation.

...

13. [P]etitioner's trial counsel did nothing to investigate the possibility of Ferguson as a suspect or present him to the jury as a source of reasonable doubt. ... Further, Petitioner's trial counsel did not prepare Petitioner's witnesses to testify according to the norms employed by trial lawyers.

(Doc. 21–6 at 59, 74, 76–77, 80–84, 88, 90, 93, 95, 98, 100, 105–06, 111 (citations omitted)).

The State moved for summary judgment (Doc. 21–7 at 1–44). Group opposed the motion and alternatively moved for the appointment of an expert (*id.* at 116–48). The court granted the summary–judgment motion and denied appointment of an expert (Doc. 21–8 at 20–55). Group timely appealed to the Mahoning County Court of Appeals (Doc. 21–9 at 10). He raised two assignments of error:

1. The trial court erred and abused its discretion by granting summary judgment to the State, and dismissing Appellant's petition for post–conviction relief.

2. The trial court erred and abused its discretion in denying the petition without conducting an evidentiary hearing or permitting discovery, thus depriving Appellant of liberties secured by U.S. Const. amend. XIV and Ohio Const. art. I, §§ 1, 2, 10, and 16, including meaningful access to the courts of this State.

(*id.* at 110). The appellate court affirmed (*id.* at 259). Group then appealed to the Ohio Supreme Court, raising one proposition of law:

> To deny a post–conviction capital defendant who makes a colorable showing that discovery will aid in presenting constitutional errors is a denial of due process and meaningful access to the courts of this State.

(Doc. 21–10 at 4, 8). The court declined to accept jurisdiction (*id.* at 222).

Federal Habeas Proceedings

In July 2013, Group filed a notice of intent to initiate this habeas action and moved for appointment of counsel and leave to proceed in forma pauperis (Docs. 1–3). This Court granted both Motions and *648 appointed the Capital Habeas Unit of the Federal Public Defender's Office to represent him (Docs. 4–5).

Group moved for discovery in January 2015. The State opposed, and Group replied (Docs. 40, 41 & 44). This Court denied the Motion with prejudice as to certain discovery requests and without prejudice as to others (Doc. 49).

Group also moved for leave to amend his Petition and add another claim for relief, which the State also opposed, and to which Group replied (Docs. 45–47). This Court granted

the Motion (Doc. 50). Some three months later, the State moved for leave to respond to the additional claim (Doc. 51), but this Court denied the Motion as untimely (Doc. 53).

PETITIONER'S GROUNDS FOR RELIEF

Group asserts eight grounds for relief. They are:

1. Trial counsel rendered ineffective assistance in the culpability phase because counsel's cross–examination of the State's key witness, Sandra Lozier, was inadequate.

2. Trial counsel rendered ineffective assistance in the culpability phase as trial counsel failed to present a cogent defense to create reasonable doubt that Petitioner was the offender because trial counsel failed to prepare Petitioner's alibi witnesses or present evidence of another suspect.

3. Trial counsel rendered ineffective assistance in the culpability phase because counsel failed to utilize an expert to rebut the State's DNA evidence and trial counsel's cross–examination of the State's DNA expert was ineffectual.

4. Trial counsel rendered ineffective assistance in the culpability phase because counsel failed to present objective evidence demonstrating a serious physical impairment to Petitioner's hands making it improbable that Petitioner could fire a gun, and trial counsel failed to present evidence to show that microscopic tests for gunshot residue on Petitioner's hands were negative.

5. The trial court's dismissal for cause of a properly qualified non–biased juror from the panel deprived Petitioner Scott Group of his Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution.

6. The trial court's dismissal for cause of a properly qualified non–biased alternate juror who expressed reservations about the verdict deprived Petitioner Scott Group of his Fifth, Sixth, Eighth[,] and Fourteenth Amendment rights under the United States Constitution.

7. Petitioner Scott Group was convicted on evidence insufficient to sustain essential elements of attempted aggravated murder, and intimidation in violation of Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth [,] and Fourteenth Amendments.

8. Trial counsel rendered ineffective assistance in the culpability phase because trial counsel failed to conduct a proper investigation to determine the content of the defense DNA expert's testimony and, consequently, trial counsel falsely promised the jury it would hear important testimony from a defense DNA expert.

(Doc. 16 at 34, 40, 50, 63, 75, 80, 83; Doc. 45–1 at 1 (citations omitted)).

STANDARD OF REVIEW

[1] The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs Group's Petition. ***649** *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). AEDPA, which amended 28 U.S.C. § 2254, was enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 'to further the principles of comity, finality, and federalism.'" *Woodford v. Garceau*, 538 U.S. 202, 206, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003) (quoting *(Michael) Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000)) (citations omitted).

AEDPA Deference

Section 2254(d) forbids a federal court from granting habeas relief with respect to a "claim that was adjudicated on the merits in State court proceedings" unless the state–court decision either:

1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[2] **[3]** Habeas courts review the "last explained state–court judgment" on the federal claim at issue. *Ylst v.*

Nunnemaker, 501 U.S. 797, 805, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) (emphasis omitted). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state–law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

[4] [5] [6] [7] [8] A state–court decision is contrary to "clearly established Federal law" under Section 2254(d)(1) only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *(Terry) Williams v. Taylor*, 529 U.S. 362, 412–13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). "[R]eview under [Section] 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). "Clearly established Federal law" for purposes of the provision "is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71–72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003); *see also White v. Woodall*, —— U.S. ——, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014) (explaining that "only the holdings, as opposed to the dicta, of [Supreme] Court[ ] decisions" qualify as "clearly established Federal law" for purposes of Section 2254(d) (citations and internal quotation marks omitted)). "And an 'unreasonable application of' those holdings must be 'objectively unreasonable', not merely wrong; even 'clear error' will not suffice." *Woodall*, 134 S.Ct. at 1702 (quoting *Lockyer*, 538 U.S. at 75–76, 123 S.Ct. 1166). "The critical point is that relief is available under [Section] 2254(d)(1)'s unreasonable–application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Id.* at 1706–07 (quoting *Harrington*, 562 U.S. at 102, 131 S.Ct. 770).

[9] [10] [11] [12] A state–court decision is an "unreasonable determination of the facts" under Section 2254(d)(2) only if the court made a "clear factual error." *Wiggins v. Smith*, 539 U.S. 510, 528–29, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). This Court's ***650** review of state–court factual findings is limited to "the evidence presented in the State court proceeding," and Petitioner bears the burden of rebutting the state court's factual findings "by clear and convincing evidence." *Burt v. Titlow*, ——U.S. ——, 134 S.Ct. 10, 15, 187 L.Ed.2d 348 (2013); *see also* 28 U.S.C. § 2254(e)(1). "[I]t is not enough for the petitioner to show some unreasonable determination of fact; rather, the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice v. White*, 660 F.3d 242, 250 (6th Cir.2011). "[A] state–court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010).

[13] Section 2254(d) "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems" and does not function as a "substitute for ordinary error correction through appeal." *Harrington*, 562 U.S. at 102–03, 131 S.Ct. 770 (internal quotation marks omitted). Thus, Petitioner "must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103, 131 S.Ct. 770.

[14] [15] [16] [17] But AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Id.* at 102, 131 S.Ct. 770. "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller–El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Moreover, the deference AEDPA demands is not required if Section 2254(d) does not apply to a claim. Federal habeas courts may review de novo an exhausted federal claim that was not adjudicated on the merits in state court. *See Hill v. Mitchell*, 400 F.3d 308, 313 (6th Cir.2005).

Procedural Default

[18] [19] [20] [21] A federal court may not consider "contentions of general law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). If a "state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate

cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A procedural bar is "independent" when a state court applies the rule without relying on federal law, *id.* at 732–33, 111 S.Ct. 2546, and "adequate" when the procedural rule is "firmly established and regularly followed" by state courts, *Beard v. Kindler*, 558 U.S. 53, 60–61, 130 S.Ct. 612, 175 L.Ed.2d 417 (2009) (internal quotation marks omitted). If a petitioner fails to fairly present a federal constitutional claim to the state courts and no longer can present that claim to a state court, the claim is procedurally defaulted. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999).

[22] This Court employs a four–step analysis to assess procedural default:

> First, the federal court must determine whether there is a state procedural rule ***651** that is applicable to the petitioner's claim and whether the petitioner failed to comply with that rule. Second, the federal court must determine whether the state courts actually enforced the state procedural sanction — that is, whether the state courts actually based their decisions on the procedural rule. Third, the federal court must decide whether the state procedural rule is an adequate and independent state ground on which the state can rely to foreclose federal review of a federal constitutional claim. ... Fourth, if the federal court answers the first three questions in the affirmative, it would not review the petitioner's procedurally defaulted claim unless the petitioner can show cause for not following the procedural rule and that failure to review the claim would result in prejudice or a miscarriage of justice.

Williams v. Coyle, 260 F.3d 684, 693 (6th Cir.2001). If a claim is procedurally defaulted, a federal court may excuse the default and consider the claim on the merits if the petitioner demonstrates either (1) cause for the petitioner not to follow the procedural rule and prejudice from the alleged constitutional error, or (2) that a fundamental miscarriage of justice would result from denying federal habeas review. *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546.

[23] **[24]** **[25]** A petitioner can establish cause by "show[ing] that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Objective impediments include an unavailable claim or interference by state officials that made compliance with state procedural rules impracticable. *Id.* If the procedural default can be attributed to counsel's constitutionally inadequate representation, that failing can serve as cause so long as the ineffective–assistance–of–counsel claim was presented to the state courts. *Id.* at 488–89. If the ineffective–assistance claim was not presented to the state courts in the manner that state law requires, that claim is itself procedurally defaulted and can only be used as cause for the underlying defaulted claim if the petitioner demonstrates cause and prejudice with respect to the ineffective–assistance claim. *Edwards v. Carpenter*, 529 U.S. 446, 452–53, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000).

[26] **[27]** To establish prejudice, a petitioner must demonstrate that the constitutional error "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). "When a petitioner fails to establish cause to excuse a procedural default, a court does not need to address the issue of prejudice." *Simpson v. Jones*, 238 F.3d 399, 409 (6th Cir.2000).

[28] **[29]** A narrow exception to the cause–and–prejudice requirement exists where a constitutional violation "probably resulted" in the conviction of a person who is "actually innocent" of the crime for which he was convicted in state court. *Dretke v. Haley*, 541 U.S. 386, 392, 124 S.Ct. 1847, 158 L.Ed.2d 659 (2004) (citing *Murray*, 477 U.S. at 496). The petitioner must show "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

DISCUSSION

First, Second, Third, Fourth, and Eighth Grounds for Relief

Ineffective Assistance of Trial Counsel

Group claims trial counsel's performance denied him his Sixth Amendment right to ***652** effective assistance of counsel. Specifically, he complains counsel failed to adequately: (1) cross–examine Sandra; (2) prepare Group's alibi witnesses and develop his defense concerning an alternate suspect; (3) investigate and present DNA evidence and related expert testimony; and (4) present evidence of Group's impaired hand and inform the jury that tests performed to detect gunshot residue on Group's hands were negative (Doc. 16 at 34, 40, 48, 50, 63–64; Doc. 45–1 at 1).

Ineffective Assistance of Counsel: Standard

[30] The Sixth Amendment right to the effective assistance of counsel at trial "is a bedrock principle in our justice system." *Martinez v. Ryan*, ——U.S. ——, 132 S.Ct. 1309, 1317, 182 L.Ed.2d 272 (2012). The Court announced a two–part test for claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[31] First, a petitioner must show counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. 2052. Counsel's performance must fall "below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. A reviewing court must "reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052.

[32] Second, a petitioner must show he was prejudiced by counsel's errors with "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. "It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. 2052. Because ineffective–assistance–of–counsel claims are mixed questions of law and fact, *id.* at 698, 104 S.Ct. 2052, a habeas court reviews such claims under AEDPA's "unreasonable application" prong, *see, e.g.*, *Mitchell v. Mason*, 325 F.3d 732, 737–38 (6th Cir.2003).

[33] **[34]** **[35]** Prevailing on an ineffective–assistance–of–counsel claim through habeas review is no easy task. "Judicial scrutiny of counsel's performance must be highly deferential" and "every effort [must] be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. "*Strickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment'," recognizing "the constitutionally protected independence of counsel and ... the wide latitude counsel must have in making tactical decisions." *Cullen*, 563 U.S. at 195, 131 S.Ct. 1388 (quoting *Strickland*, 466 U.S. at 689–90, 104 S.Ct. 2052). And because the standards imposed by *Strickland* and Section 2254(d) are both "highly deferential," applying both standards together results in "doubly" deferential review. *Harrington*, 562 U.S. at 105, 131 S.Ct. 770. The question for a habeas court "is simply whether there is 'any reasonable argument' " that counsel's performance was professionally reasonable. *Davis v. Carpenter*, 798 F.3d 468, 474 (6th Cir.2015) (quoting *Harrington*, 562 U.S. at 105, 131 S.Ct. 770).

Procedurally Defaulted Claims (First and Second Grounds for Relief)

Group claims in his First Ground for Relief that trial counsel provided ineffective ***653** assistance by not adequately cross–examining Sandra. Specifically, he complains trial counsel failed to: (1) drive home inconsistencies between Sandra's description of her shooter and Group's physical appearance; (2) use medical records to impeach Sandra's statement that she lost consciousness after the shooting; and (3) emphasize that she could not recall Group's name, even though Group's name was visible on the Ohio Wine uniform he wore during deliveries to the bar (*see* Doc. 16 at 34–39). Group claims in his Second Ground for Relief that trial counsel were ineffective for failing to present a "cogent" alibi

defense or offer evidence pointing to a different suspect, Brian Ferguson (*see* Doc. 34 at 33).

The state appellate court, the last state court to provide a reasoned judgment on these claims, found them barred by res judicata. *See State v. Group*, 2011-Ohio-6422, at ¶¶ 126, 134–35 (Ct.App.). This Court analyzed the effect of those rulings at length in the context of Group's motion for discovery, and concluded that these claims are procedurally defaulted (*see* Doc. 49 at 8–16). This Court also found Group has not shown good cause to excuse the default because the claims lack merit. This Court adopts and incorporates that analysis here.

DNA Evidence and Expert Testimony (Third and Eighth Grounds for Relief)

Group asserts in his Third and Eighth Grounds for Relief that trial counsel were constitutionally deficient in their handling of DNA evidence and related expert testimony. He specifically complains they failed to: (1) present an expert to testify regarding DNA blood evidence found on the shoes Group wore when he voluntarily surrendered to police; (2) adequately cross–examine the State's DNA expert; and (3) sufficiently investigate their chosen DNA expert's availability and willingness to testify, while promising the jury it would hear testimony from a DNA expert (Doc. 34 at 51; Doc. 45–1 at 1). The Ohio Supreme Court adjudicated the first two claims on the merits, preserving them for habeas review. The Ohio court of appeals found the third barred by res judicata, but alternatively ruled on the merits.

Defense DNA Expert. Group faults trial counsel for failing to secure an expert to testify about DNA blood evidence found on his shoes (Doc. 34 at 60–64).

In rejecting this claim, the Ohio Supreme Court reasoned:

> Group contends that defense counsel never had independent tests performed on the DNA evidence.
>
> The record indicates that Cellmark Diagnostics performed DNA testing for the prosecution in this case. The defense was allotted funds for its own DNA testing and submitted DNA samples to Lifecodes Corporation. Before trial, one of the prosecutors advised the trial court that, due to an acquisition, Cellmark and Lifecodes were now part of the same corporation. However, the defense counsel representing Group at that time had no objection to using Lifecodes; they were satisfied that the two testing facilities were independent of each other.
>
> At trial, Group had counsel different from those representing him on appeal. Trial counsel represented to the court that Dr. Baird, the Lifecodes expert, had read the Cellmark report and that his "cursory * * * evaluation" was that contamination may have taken place so as to render DNA testing "useless." (Baird did not test the blood sample because Cellmark's testing had used it up.) According to defense counsel, Baird subsequently refused to testify, because "they are both in the same company, and * * * he did not want to challenge a coworker." Counsel tried to enlist Roche ***654** Laboratories, but Roche refused to get involved in the case at such a late date.
>
> The record does not show either deficient performance or prejudice. Group's original counsel apparently satisfied themselves that Cellmark and Lifecodes were independent. That situation did not change until later, when the DNA expert from Lifecodes backed out. When that happened, defense counsel tried to line up a replacement. Nothing in the record indicates that Group's counsel were at fault.
>
> As to prejudice, no one can say how a DNA expert from a different laboratory would have testified. Moreover, defense counsel cross–examined the Cellmark expert on the subject of contamination.

Group, 98 Ohio St.3d at 269–70, 781 N.E.2d 980.

Group claims the court incorrectly excused counsel for failing to obtain a DNA expert because Dr. Baird refused to testify at the last minute and a replacement could not be found. He maintains that counsel's deficient performance lies not in the last–minute predicament, but in how they got into that situation in the first place: by not recognizing the conflict of interest between the State and defense experts' laboratories and consulting with Dr. Baird in time to either confirm his participation or retain a new expert (Doc. 34 at 52, 60–63). Group stresses that counsel knew of the conflict and Group himself had "warned" them Dr. Baird could not testify (*id.* at 62).

The State responds that the Ohio Supreme Court's findings were fully supported by the record (Doc. 24 at 43).

This Court agrees. At a hearing held nine months before the trial began, the prosecutor explained to the trial court:

> [T]he company that is performing the defense analysis [Lifecodes] has been acquired by the company that is to perform the State's analysis [Cellmark]. They're two independent companies but it is my understanding that they would have the same shareholders. It is two operations. One doesn't have anything to do with the other except for our company ... acquired the defense's company ....

(Doc. 22–1 at 48–49). Group's counsel added that the companies were located in different states (*id.* at 49). The parties then both represented to the court that despite the two companies' new relationship, there was no conflict of interest. Group's counsel stated:

> It was disclosed to me immediately on the telephone. ... [I]t is our belief that they are separate. It is also our belief that a scientific test is a scientific test and the only thing we're going to check on is the protocols they use, each lab, to do the test. We don't feel that there is a problem.

(*Id.* at 49–50). The prosecutor agreed:

> I don't feel there is a problem either. I wanted it to be a matter of record that we all agree on that, that there is no potential conflict of interest that I see from my standpoint and likewise from the defense's standpoint.
>
> ...
>
> [W]e all acknowledged the situation as it exists and we understand it is two separate facilities, nonetheless, two separate testing procedures and there is no conflict with regard to the tests that are being performed by their company.

(*Id.* at 50–51). The trial court was satisfied the issue had been resolved (*id.* at 51).

[36] Group misstates the record in claiming trial counsel did not adequately "engage" with Dr. Baird before trial (Doc. 34 at 61–63). At a hearing held prior to the scheduled testimony of the State's DNA expert, Group's counsel explained to the court that they had "done everything ***655** [they] could possibly do to get a DNA expert in here," but "were essentially hung out to dry" (Doc. 22–5 at 652). When trial counsel first began to work on Group's case, Group's former counsel gave them the Cellmark and Lifecodes reports and explained the connection between the two companies. Trial counsel then contacted Dr. Baird, who offered his initial impression of the Cellmark report and agreed to testify on Group's behalf about possible contamination of the blood evidence. Counsel sent Dr. Baird a contract guaranteeing his fee and agreed to pay for his travel expenses. After that, counsel claimed Dr. Baird "became almost impossible to reach." Trial had already begun by the time Dr. Baird informed counsel he was no longer willing to testify for Group because "he did not want to challenge a coworker, co–DNA expert." Counsel then tried to find another expert, but could not (*id.* at 549–53).

On these facts, this Court cannot conclude the Ohio Supreme Court's decision was unreasonable. Dr. Baird's personal refusal to testify for Group because he did not want to challenge a coworker does not prove a conflict of interest between Cellmark and Lifecodes. And, since counsel had no reason to believe Dr. Baird would back out at the last minute when the parties had previously agreed there was no conflict and Dr. Baird had agreed to testify, there was nothing more counsel should have done. "The Supreme Court has never reached the specific question[ ]" of "how hard" an attorney must try to secure an expert. *Davis*, 798 F.3d at 473. Perhaps Group wishes counsel had done more to ensure that Baird or another expert was available and willing to testify at trial. "In the absence of any guidance from the Supreme Court as to how hard an attorney must work to find an expert, however, a fairminded jurist could conclude that [counsel]'s efforts fell in the permissible zone between 'best practices' and outright incompetence." *Id.* at 474 (citing *Harrington*, 562 U.S. at 102, 131 S.Ct. 770).

The Ohio Supreme Court also reasonably determined that Group was not prejudiced by his trial counsel's failure to secure a DNA expert. Group argues the state court did not adjudicate this issue on the merits because Ohio law dictates that "the Ohio Supreme Court does not

adjudicate claims if the defendant must resort to evidence outside the appellate record to show prejudice," and extra–record evidence would have refuted the state court's observation that "no one can say how a DNA expert from a different laboratory would have testified" (Doc. 34 at 63–64). He thus urges this Court to review the decision de novo. Regardless of whether Group accurately states Ohio law on this point, as discussed below, this Court agrees with the Ohio court's second basis for finding no prejudice: Group's counsel adequately cross–examined the State's expert on the contamination issue. The state court's application of *Strickland* to this ineffective–assistance claim, therefore, was not an unreasonable application of clearly established federal law.

[37] ***Cross–examination of State DNA Expert.*** Group also claims in his third ground for relief that his counsel was ineffective in cross–examining the State's DNA expert, Dr. Reynolds. He contends counsel was not adequately prepared (Doc. 34 at 69–70), and provides numerous examples where counsel's questions were confusing, convoluted, or inexact, leaving Dr. Reynolds "lost" and "befuddled" (*see id.* at 65–71). The court rejected this claim, reasoning:

> Group also suggests that his counsel did not prepare adequately before cross–examining the state's DNA expert witness. However, the record indicates that defense ***656** counsel researched the subject of DNA thoroughly before cross–examining the Cellmark expert. Group does not identify any mistakes made by defense counsel as a result of allegedly inadequate preparation.

Group, 98 Ohio St.3d at 270, 781 N.E.2d 980.

[38] **[39]** "'[D]ecisions about 'whether to engage in cross–examination, and if so to what extent and in what manner, are ... strategic in nature' and generally will not support an ineffective assistance claim.'" *Davie v. Mitchell*, 291 F.Supp.2d 573, 604 (N.D.Ohio 2003) (quoting *Dunham v. Travis*, 313 F.3d 724, 732 (2d Cir.2002)); *see also United States v. Steele*, 727 F.2d 580, 591 (6th Cir.1984) (concluding cross–examination fell "within the area of trial tactics and strategy that should not be subjected to second guessing and hindsight by this Court" and noting "an attorney must be free to determine questions of trial strategy"). "[T]he Confrontation Clause guarantees an *opportunity* for effective cross–examination, not cross–examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (internal quotation marks omitted).

The Ohio Supreme Court reasonably concluded counsel's cross–examination of Dr. Reynolds was thorough and effective. Counsel told the court that Dr. Baird had recommended preparation material and counsel worked "feverishly" to prepare, reading several books and consulting with people familiar with DNA testing (Doc. 22–5 at 652). The court also assured Group that because he had lost his expert, defense counsel had "wide latitude" in cross–examining Dr. Reynolds (*id.* at 654). Finally, although counsel's questioning at times was not as artful or exact as it could have been, in nearly every instance Group cites, Dr. Reynolds was able to provide a comprehensive and meaningful answer after brief clarification (*see, e.g.*, *id.* at 701 ("I think what you're asking me is sometimes, with PCR, there are some substrates that don't amplify well.")). And in many other instances, Dr. Reynolds agreed with counsel's characterization of the technology or evidence (*see, e.g.*, *id.* at 684–85 (repeatedly answering "[t]hat's right" and "that is correct")).

The state court correctly concluded that Group has not identified any specific mistakes counsel made during cross–examination that prejudiced his case, or any additional information that counsel should have uncovered that would have benefitted his case. On the particular issue of whether the blood evidence was contaminated, Dr. Reynolds was adamant in her position that the State's DNA test results were "extraordinarily clean" (*id.* at 695). "Again," she testified, "there's no indication of any kind of mixture that would cause me to feel that these samples were contaminated in any way" (*id.* at 695–96). Group may be dissatisfied with counsel's inability to impeach Dr. Reynolds and cast doubt on the DNA test results, especially on the contamination issue, but that does not mean counsel's performance was deficient under *Strickland's* exacting standard. *See Van Arsdall*, 475 U.S. at 679, 106 S.Ct. 1431. The Ohio Supreme Court did not contravene or misapply Supreme Court precedent in rejecting this claim.

[40] ***Promise to Jury Regarding Defense DNA Expert.*** Group asserts in his Eighth Ground for Relief that trial counsel failed to properly investigate Dr. Baird and falsely promised the jury that the defense would present a DNA expert to prove the blood evidence was contaminated (Doc. 45–1 at 1). He contends that counsel's "empty promise eviscerated the defense team's credibility with the jury and ***657** created an adverse inference against the defense presented, thereby prejudicing" Group (*id.* at 2).

Group raised this claim on post–conviction review. The trial court dismissed it as barred by res judicata, and the Ohio court of appeals affirmed. *Group*, 2011-Ohio-6422, at ¶ 92. The appellate court ruled:

> In his third ground for relief, Group argues that trial counsel was ineffective for "misleading" the jury, during opening statements, into believing that defense would present a DNA expert at trial. Group specifically asserts: "The failure to provide the promised DNA expert caused the defense to lose all credibility because the DNA results were material and outcome determinative. The State's DNA results, if scientifically valid, place Petitioner at the scene of Mr. Lozier's murder." Again, Group cites directly to the record in support of this claim. He also cites to Powers' affidavit. For all of the aforementioned reasons, the trial court correctly concluded this claim is barred by res judicata.

Id. The appellate court alternatively ruled that even if the claim were not procedurally barred, it lacked merit, because Group could not prove prejudice given the weight of the evidence of Group's guilt. *Id.* The court explained:

> [T]he evidence of the guilt of Scott Group is overwhelmingly persuasive — a constellation of both direct and circumstantial evidence pointing convincingly and powerfully to Scott Group as the perpetrator, one who shot his victims in cold blood, and then later — from his jail cell — attempted to hire a hit man in order to eliminate and thereby silence the sole survivor. This evidence includes: Mrs. Lozier's eyewitness identification of Group, which was reliable considering that Group, as her wine deliveryman, was no stranger to her; blood on Group's shoe that matched the DNA of Mr. Lozier, the murder victim; the fact that, while in prison, Group tried to enlist several others to falsify evidence and to eliminate or intimidate Mrs. Lozier; and the fact that the box of Ohio Wine invoices was missing from the Downtown Bar after the shootings.

Id. at ¶ 88 (internal quotation marks omitted).

Group acknowledges his claim may be procedurally defaulted, barred by res judicata, but he argues he should be excused by the ineffective assistance of post–conviction counsel (Doc. 45–1 at 10–18). The State, however, has not raised the procedural default defense, and it is waived. *See, e.g.*, *Trest v. Cain*, 522 U.S. 87, 89, 118 S.Ct. 478, 139 L.Ed.2d 444 (1997) ("Procedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'" (quoting *Gray v. Netherland*, 518 U.S. 152, 166, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996))).

[41] Where federal habeas courts disregard a procedural–bar ruling, the state court's alternative merits ruling receives AEDPA deference under Section 2254(d)(1). *See, e.g.*, *Brooks v. Bagley*, 513 F.3d 618, 624–25 (6th Cir.2008) ("[A]n alternative procedural–bar ruling does not alter the applicability of AEDPA."). Given the overwhelming evidence of Group's guilt, including the victim's consistent identification of Group as the shooter, it was not unreasonable for the state appellate court to discount the effect counsel's unfulfilled promise had on the jury's verdict. Further, while Group describes counsel as promising the jury would hear "game–changing DNA evidence" (Doc. 45–1 at 18), counsel in fact peppered his statement with suppositions (*see* Doc. 22–4 at 450 ("In all likelihood we anticipate that ***658** this expert ... will determine, we anticipate, that these artifacts are contaminates and ... render any DNA testing moot.")). Group's speculation that the jury must have "expect[ed] a major evidentiary development" based on these comments does not show the state court's prejudice determination was objectively unreasonable (Doc. 45–1 at 19). And, in any event, counsel thoroughly cross–examined the State DNA expert regarding contamination, even if counsel did not impeach the expert to the extent Group may have wished. This sub–claim is meritless. *See Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir.2006) ("If

Petitioner fails to prove either deficiency or prejudice, then Petitioner's ineffective assistance of counsel claims must fail.").

Firearm–Related Evidence (Fourth Ground for Relief)

Group claims in his Fourth Ground for Relief that trial counsel failed to develop evidence showing: (1) Group's physical impairments made it "improbable" that he could have fired a gun; and (2) his hands lacked gunshot residue at the time of the arrest (Doc. 34 at 73). Only the latter sub–claim, however, is preserved for habeas review.

Physical Impairment Evidence. At trial, Group testified about physical impairments that he claims affected his ability to hold and fire a gun, including a gunshot wound affecting his right hand and arm, a broken right thumb that was later re–broken, and lacerations to his left arm from putting his left hand through a glass window (Doc. 16 at 66–67). Group faults trial counsel for failing to develop additional evidence at trial suggesting he was physically incapable of holding and firing a gun. The post–conviction court found this claim barred by res judicata, and the court of appeals affirmed. *Group*, 2011-Ohio-6422, at ¶¶ 93–95. As with Group's First and Second Grounds for Relief, this Court incorporates its previous analysis finding this sub–claim procedurally defaulted without good cause to excuse the default (*see* Doc. 49 at 17–18).

[42] ***Gunshot Residue Evidence.*** Group faults trial counsel for failing to present a witness who could have explained the "exculpatory" test results showing no gunshot residue was present on Group's hands when he was arrested (Doc. 34 at 86–87, 90–91).

Group raised this claim on direct appeal to the Ohio Supreme Court, which rejected it on the merits. The court opined:

> Group further contends that counsel did not employ "a scientific investigation unit" to show that Group did not fire a gun on January 18, 1997. But Group fails to show either prejudice or deficient performance. As to prejudice, there is no way for us to tell whether the results of such testing would have helped Group's case. As to performance, counsel's performance cannot be characterized as deficient, because the record indicates that no valid test was possible.
>
> Officer Lou Ciavarella testified that he performed a gunshot residue test on Group's hands on the afternoon of January 18, 1997. However, Ciavarella's test took place at 3:25 p.m., more than four hours after the shooting. According to Ciavarella's unchallenged testimony, the Bureau of Criminal Identification and Investigation ["BCI"] recommends that any gunshot residue test be done within two hours after a gun is fired because the residue tends to rub off a person's hands over time. Thus, a negative test would have been devoid of probative value.

Group, 98 Ohio St.3d at 269, 781 N.E.2d 980. Group claims the state court's determination that "no valid test was possible" ***659** because more than two hours had passed is an unreasonable determination of the facts under Section 2254(d)(2) (Doc. 34 at 86). The testimony to which Group refers is this:

> Q. Do you know why BCI recommended a two–hour limit?
>
> A. For the most part they recommended a two–hour limit because as time goes on, there is an ever more probable — it's ever more probable that the individual will have wiped some or the majority of the debris off his hands. Any time you are rubbing your hands together, putting your hands in your pockets, washing your hands, driving a car, rubbing your hands on the steering wheel, winding a window, all of these things make that debris disappear.
>
> Q. How about if you go into a restroom and wash your hands?
>
> A. Exactly.

(Doc. 22–5 at 28). He contends that Ciavarella's testimony implied it is in fact possible to detect gunshot residue when a hand is swabbed after the BCI's recommended two–hour time period, and therefore his negative test result was "exculpatory" evidence (Doc. 34 at 86 (citing Doc. 22–5 at 28)). He criticizes the court for "misconstru[ing] BCI's two hour recommendation as the equivalent of a scientific impossibility" and posits that the police must have considered the gunshot residue test worthwhile or they would not have conducted the test (*id.*).

Group has not met his burden of rebutting the Ohio court's factual findings "by clear and convincing

evidence." 28 U.S.C. § 2254(e)(1); *see also Burt*, 134 S.Ct. at 15. Ciavarella may have implicitly acknowledged it is *possible* some gunshot residue *may* remain on hands longer than two hours after firing a gun, but he also explained BCI recommends a two–hour limit because the likelihood of a false negative increases thereafter. Group fails to show it was objectively unreasonable for the Ohio Supreme Court to conclude the negative test result carried minimal probative value.

Group further argues the Ohio court did not adjudicate the merits of *Strickland*'s prejudice prong for this claim because, under Ohio law, "the Ohio Supreme Court does not adjudicate a claim if the defendant must resort to evidence outside the appellate record to show prejudice" (Doc. 34 at 87 (citing *State v. Kirkland*, 140 Ohio St.3d 73, 83, 15 N.E.3d 818 (2014); *State v. Mammone*, 139 Ohio St.3d 467, 501, 13 N.E.3d 1051 (2014); *State v. Keith*, 79 Ohio St.3d 514, 535–36, 684 N.E.2d 47 (1997))). He maintains this Court should therefore review his claim de novo. Group misstates the law. In the cases he cites, the court simply recognized that defendants sometimes need extra–record evidence to prove their claims, and because the court is precluded from considering such evidence, the claims are more appropriately presented post–conviction. The court went on, however, to rule on the claims. *See, e.g.*, *Keith*, 79 Ohio St.3d at 536, 684 N.E.2d 47 ("Regardless, we find that appellant has failed to prove prejudice."). The Ohio Supreme Court reasonably concluded that Group could not show that he was prejudiced by counsel's failure to present additional evidence concerning the negative gunshot residue test.

Fifth and Sixth Grounds for Relief

Jury Challenges

[43] Group argues in his Fifth and Sixth Grounds for Relief that the trial court denied him a fair and impartial jury by excusing two properly qualified jurors (Doc. 16 at 75, 80). Group raised these claims on direct appeal to the Ohio Supreme Court, which adjudicated them on ***660** the merits. The claims are therefore preserved for federal habeas review.

[44] **[45]** The Sixth Amendment commands that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" U.S. CONST. amend. VI. The Sixth Amendment "reflect[s] a profound judgment about the way in which law should be enforced and justice administered. ... Providing an accused with the right to be tried by a jury of his peers g[ives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 155–56, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Due process requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

Juror Disqualification (Fifth Ground for Relief)

[46] Group claims the trial court improperly excused for cause a prospective juror, Juror No. 389, who stated that she was opposed to the death penalty but would follow the law (Doc. 16 at 75–80). In adjudicating this claim, the Ohio Supreme Court reasoned:

> Group contends that it was improper to dismiss jurors for cause because they expressed reservations about capital punishment. ... He contends that prospective juror No. 389 was improperly excused for cause because of her opposition to the death penalty. Prospective juror No. 389 stated that although she did not believe in capital punishment, she could vote for it "[w]hen the state proves it to me." She also stated that in order for the state to prove it to her, it would have to present more than one eyewitness to the crime:
>
> "Q. What kind of proof do you think you would want?
>
> A. Hard evidence that he really did this.
>
> Q. Like what?
>
> A. Like what?
>
> Q. Yeah.
>
> A. I don't know.
>
> * * *
>
> Q. How about an eyewitness?
>
> A. A couple. Not one. I will need more than one.

* * *

Q. If I only had one eyewitness, that would not be enough?

A. That's his word against my word. Like, I'd have to weigh it. I really need more than one."

The prosecutor also asked the prospective juror, "What if I told you that we don't have the gun that was used to kill Mr. Lozier." The prospective juror's response was "How can you prove that he — that he did something if you don't have the gun?"

The state challenged prospective juror No. 389 for cause. In ruling on the challenge, the trial judge expressed her concern that, although the prospective juror had indicated that she would follow the law in the penalty phase, she would not follow the law in the guilt phase but would hold the state to a higher burden of proof than the law prescribed. The judge concluded: "I don't think that she understands the law, and I don't think she'll follow the law in that regard."

The defense then requested a further opportunity to question the prospective juror. The judge granted the request. During this additional voir dire, defense ***661** counsel tried to explain the difference between proof beyond a reasonable doubt and proof beyond all doubt. Counsel then asked the prospective juror whether she would use the reasonable–doubt standard if so instructed, and the prospective juror answered, "Yes."

But when the prosecutor asked the prospective juror what "beyond a reasonable doubt" meant to her, she gave confused responses: "They have to prove to me all the evidence, everything that comes in, prove to me beyond a reasonable doubt." She went on to explain, "They have to prove to me. Make my mind up * * * with all of the evidence they have." The prosecutor asked, "With two eyewitnesses and a gun?" "Yes," said the prospective juror.

> "The proper standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath."
>
> The trial judge here determined that the prospective juror did not understand the concept of "proof beyond a reasonable doubt" and would not follow the law in that regard. We must defer to that finding if the record supports it, and, in this case, the record does. Prospective juror No. 389 said that she would hold the state to an extraordinarily high burden of proof in the guilt phase of a capital case, requiring the state to produce two eyewitnesses and the murder weapon before she would vote to convict. Her opinion persisted despite the best efforts of defense counsel to explain what the state's burden actually was. Because the record supports the trial judge's decision to grant the challenge for cause, we overrule Group's first and fourth propositions of law.

Group, 98 Ohio St.3d at 254–55, 781 N.E.2d 980 (citations omitted).

[47] [48] [49] [50] In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Supreme Court recognized the Sixth Amendment's guarantee of an impartial jury provides capital defendants the right to a jury not "uncommonly willing to condemn a man to die." *Id.* at 521, 88 S.Ct. 1770. At the same time, the State has a "legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme." *Wainwright v. Witt*, 469 U.S. 412, 416, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). During voir dire, therefore, a prosecutor may probe into prospective jurors' views of the death penalty, and may challenge for cause a potential juror who appears unwilling to return a capital sentence. *Id.* at 423–24, 105 S.Ct. 844. Only "a juror who is substantially impaired in his or her ability to impose the death penalty under the state–law framework can be excused for cause." *Uttecht v. Brown*, 551 U.S. 1, 9, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). A juror is properly excused "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Witt*, 469 U.S. at 425–26, 105 S.Ct. 844.

[51] [52] [53] [54] Federal habeas courts accord "special deference" to state trial courts in applying these standards, because trial judges are in the best position to

assess the demeanor and credibility of the jurors. *See, e.g.*, *Darden v. Wainwright*, 477 U.S. 168, 175–78, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). "The question is not whether the trial judge was wrong or right in his determination of impartiality, but merely whether his decision was 'fairly supported by the ***662** record.'" *Bowling v. Parker*, 344 F.3d 487, 519 (6th Cir.2003) (quoting *Witt*, 469 U.S. at 433, 105 S.Ct. 844). A trial court's finding "may be upheld even in the absence of clear statements from the juror that he or she is impaired." *Uttecht*, 551 U.S. at 7, 127 S.Ct. 2218. And "when there is ambiguity in the prospective juror's statements, 'the trial court ... [is] entitled to resolve it in favor of the State.'" *Id.* (quoting *Witt*, 469 U.S. at 434, 105 S.Ct. 844). Thus, federal habeas courts, in reviewing *Witherspoon–Witt* claims, like ineffective–assistance claims, must be "doubly deferential." *White v. Wheeler*, —— U.S. ——, 136 S.Ct. 456, 460, 193 L.Ed.2d 384 (2015) (internal quotation marks omitted).

Group emphasizes that Juror No. 389 should not have been excused for cause because she stated fourteen times that she would follow the court's instructions on the law (Doc. 16 at 76 (citing Doc. 22–3 at 733, 737, 742–43, 745, 748, 751, 760–61, 766–69)). But the record shows the juror's assurances that she could follow the law were belied by her consistent position that she would impose a higher standard of proof than the law requires. As the Ohio Supreme Court noted, Juror No. 389 repeatedly affirmed the State would need to present at least two eyewitnesses and the murder weapon to convince her of Group's guilt (*see* Doc. 22–3 at 748–50, 770). She also agreed the proof should show Group's guilt "beyond all doubt" because it was a capital crime (*id.* at 752). It is her views on the standard of proof for capital defendants, rather than the death penalty itself, that "substantially impaired" her ability to follow the law. *Witt*, 469 U.S. at 434, 105 S.Ct. 844. The trial judge conducted a "'diligent and thoughtful *voir dire*'"; "considered with care the juror's testimony; and ... was fair in the exercise of her 'broad discretion' in determining whether the juror was qualified to serve in this capital case." *Wheeler*, 136 S.Ct. at 461 (quoting *Uttecht*, 551 U.S. at 20, 127 S.Ct. 2218).

Group contrasts the trial court's treatment of Juror No. 389 with that of another juror, Juror No. 318, whom the court refused to remove for cause after the defense challenged her on the ground that she was biased in favor of the death penalty (Doc. 16 at 76–78). Group points out that Juror No. 318 stated under oath that she thought the death penalty should be imposed for every murder; could not presume Group innocent until proven guilty; thought Group should testify if he had nothing to hide; and believed mitigation evidence to be nothing more than excuses (*id.* (citing Doc. 22–1 at 660, 669–70; Doc. 22–2 at 22, 26–30)). Group argues that "[n]either side, nor the court, were able to move her off of those positions[,] [but] because she said she could follow the law, the court refused to excuse her for cause" (*id.* at 78).

First, the trial court's treatment of Juror No. 318 has no bearing on the constitutionality of Juror No. 389's dismissal. Second, Juror No. 318 qualified her positions on most of the issues Group cites. For example, after stating her belief that "if [defendants] go out and murder someone, they deserve to die," she continued, "I think that there might be reasons — there might not be reasons, but certain circumstances where I wouldn't feel that way" (Doc. 22–1 at 660). She also confirmed, "I believe in the death penalty, but, again, I think I'm fair enough that I could make a different opinion if [the State] did not prove [its] case to me" (*id.* at 669).

Group finally argues the trial court's removal of Juror No. 389 violated state law (Doc. 16 at 80). However, the Supreme Court has "repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the ***663** challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005) (citing *Estelle v. McGuire*, 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)).

In short, the Ohio Supreme Court reasonably determined that the trial court's decision to excuse Juror No. 389 for cause was fairly supported by the record and not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103, 131 S.Ct. 770.

Juror Removal (Sixth Ground for Relief)

[55] Group argues the trial court erred when it removed an alternate juror who expressed reservations about the jury's verdict (Doc. 16 at 80–82). In rejecting this claim, the court stated:

> Group contends that the trial judge abused her discretion by removing an alternate juror who did not

agree with the jury's verdict of guilt on the aggravated murder charge.

After the jury returned its verdicts, the trial court asked each of the four alternate jurors whether they could "accept" the verdicts rendered by the jury on the aggravated murder charge and its specifications. Each one said that he or she could.

Before the penalty phase, a juror was dismissed and replaced with the first alternate juror. However, as soon as the alternate learned that she was to sit on the jury in the penalty phase, she advised the trial judge that she was "emotional and a little shook up" and that she wanted to address the court.

In chambers, the former alternate — now designated juror No. 10 — said that, while she felt that the evidence tended to show guilt, she was "bothered by a lot of things that the police didn't do." She stated, "[F]or a sentence as serious as this, it's kind of bothersome to me, because I think he should have had the advantage of whatever investigating the — the police did and there just were too many things that weren't done." She further said, "I accept [the verdict], but with reservations." She admitted that she had a reasonable doubt of Group's guilt and would "[p]robably not" have voted to convict. Although she had previously told the court that she could accept the verdict, she later explained that she thought she "had no choice." The trial judge excused juror No. 10 and replaced her with the second alternate.

Group contends that excusing this juror was "manifestly arbitrary," and therefore an abuse of discretion, because the juror's "reservations" as to the verdict did not indicate an inability to be impartial.

We disagree. The trial court's decision was supported by the juror's persistent reservations as to the verdict. The jury's right to recommend a sentence is predicated on the jury's finding of the defendant's guilt beyond a reasonable doubt. It would be difficult for a juror who could not accept the jury's finding of guilt to consider the penalty with impartiality.

We further note that the juror raised the issue with the court. The trial judge could reasonably interpret that fact as an indication that the juror doubted her own ability to serve in the penalty phase. Moreover, the juror appears to have felt strongly about the issue. Finally, her statement suggests that her reservations would in fact have affected her judgment as to the sentence: "[F]or a sentence as serious as this, * * * it's kind of bothersome to me * * *."

***664** *Group*, 98 Ohio St.3d at 257–58, 781 N.E.2d 980 (citations omitted).

Group argues the trial court erred in removing Juror No. 10 from the jury because, although the juror expressed reservations about Group's guilt, she never said that she could not accept the jury's verdict (Doc. 16 at 82). The trial judge's determination, however, was fully supported by the record. When the court asked Juror No. 10 whether she would have entered a guilty verdict during the culpability phase, she answered "[p]robably not" (Doc. 22–7 at 294). She also expressly confirmed she had "a reasonable doubt that the State did not prove their case" (*id.* at 303). On these facts, the Ohio Supreme Court's decision neither contravened nor misapplied federal law.

Seventh Ground for Relief

Sufficiency of the Evidence

Group argues in his Seventh Ground for Relief that the State failed to produce sufficient evidence supporting his convictions for attempted aggravated murder under OHIO REV. CODE § 2903.01(B) and intimidation under OHIO REV. CODE § 2921.03(A) (Doc. 16 at 83). Group raised this claim on direct appeal to the Ohio Supreme Court, which addressed it on the merits.

[56] [57] [58] [59] [60] [61] The Due Process Clause of the Fourteenth Amendment requires a state to prove every element of a crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 315–16, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A habeas court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential ***665** elements of the crime beyond a reasonable doubt." *Id.* at 319, 99 S.Ct. 2781. "[T]he *Jackson* inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a *rational* decision to convict or acquit." *Herrera v. Collins*, 506 U.S. 390, 402, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). This Court must limit its review to evidence adduced during trial. *Herrera*, 506 U.S.

at 402, 113 S.Ct. 853. Sufficiency–of–the–evidence claims are assessed "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n. 16, 99 S.Ct. 2781. Because both *Jackson* and AEDPA apply to Group's sufficiency claim, this Court's review requires deference at two levels. "First, deference should be given to the trier–of–fact's verdict, as contemplated by *Jackson*; second, deference should be given to the [state court's] consideration of the trier–of–fact's verdict, as dictated by AEDPA." *Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir.2011) (internal quotation marks omitted).

Attempted Aggravated Murder

Group claims the evidence adduced at trial was insufficient to satisfy the elements of attempted aggravated murder (Doc. 16 at 83–84). He argues that his only intent was to solicit Perry to firebomb Sandra's house, not to murder her, and "[m]ere solicitation does not rise to the level of attempt" under Ohio law (*id.* at 84 (citing *State v. Dapice*, 57 Ohio App.3d 99, 566 N.E.2d 1261 (1989))).

The Ohio Supreme Court, in rejecting this claim, reasoned:

> Group contends that the state introduced insufficient evidence to prove him guilty of attempted aggravated murder. When a defendant challenges the legal sufficiency of the state's evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."
>
> The state's evidence showed that Group had asked Adam Perry to firebomb Mrs. Lozier's house. In exchange, Group said he would give Perry $150,000 and would dissuade a witness from testifying in Perry's trial. Group gave Perry Mrs. Lozier's address, gave him instructions for making a firebomb, and instructed him to drop a key chain with the name "Charity" on it.
>
> However, Perry took no further action in furtherance of the plan against Mrs. Lozier after knocking on her door and finding that she was still living in her house. Perry testified that he had no intention of killing Mrs. Lozier and that Group had assured him that the house was vacant.

Group argues that "based upon [Perry's] testimony there is absolutely no evidence of an attempted aggravated murder of Sandra Lozier at the time of this incident." The state contends that Group's actions in this case — repeatedly asking Perry to firebomb the house, giving him the address and the firebomb recipe, offering to reward him, instructing him to leave a false trail — were enough to permit the jury to find him guilty of attempted aggravated murder.

The crime of attempt is defined by [OHIO REV. CODE §] 2923.02(A), which provides: "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

We have elaborated on the statutory definition as follows: "A 'criminal attempt' is when one purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." A "substantial step" requires conduct that is "strongly corroborative of the actor's criminal purpose." "[T]his standard does properly direct attention to overt acts of the defendant which convincingly demonstrate a firm purpose to commit a crime, while allowing police intervention * * * in order to prevent the crime when the criminal intent becomes apparent."

...

Two Ohio courts have concluded that merely soliciting another person to commit a crime does not constitute an attempt. That also appears to be the majority view nationally.

However, Group did more than merely solicit the firebombing of Mrs. Lozier's house. He took all action within his power, considering his incarceration, to ensure that the crime would be committed. He offered Perry a large monetary reward and a reciprocal favor. He gave Perry Mrs. Lozier's address and told him how to make the bomb. He repeatedly wrote to Perry urging him to complete the act.

...

"The federal courts have generally rejected a rigid or formalistic approach to the attempt offense. Instead

they commonly recognize that '[t]he determination whether particular conduct constitutes * * * [an attempt] is so dependent on the particular facts of each case that, of necessity, there can be no litmus test to guide the reviewing courts.' * * * Following this analysis, which we consider the better reasoned approach, several federal courts have concluded that a solicitation accompanied by the requisite intent may constitute an attempt."

We agree with the federal courts that "a rigid or formalistic approach to the attempt offense" should be avoided. Nothing in the language of [***666** OHIO REV. CODE §] 2923.02(A), or in our own precedents, compels such an approach. [OHIO REV. CODE §] 2923.02(A) defines attempt broadly as "conduct that, if successful, would constitute or result in the offense." *In State v. Woods*, *supra*, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976), paragraph one of the syllabus, we defined a "criminal attempt" as "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor's] commission of the crime." A "substantial step" requires conduct that is "strongly corroborative of the actor's criminal purpose."

With reference to "overt acts," we said in *Woods* that the "substantial step" standard "properly direct[s] attention to overt acts of the defendant which convincingly demonstrate a firm purpose to commit a crime, while allowing police intervention * * * in order to prevent the crime when the criminal intent becomes apparent." Thus, we conclude that an "overt act" is simply an act that meets the "substantial step" criterion enunciated in *Woods*.

Group's acts — offering Perry $150,000 to throw a firebomb through the window of Mrs. Lozier's house, providing him with her address, repeatedly importuning him to commit the crime, and instructing him how to make the bomb and how to misdirect any subsequent police investigation — strongly corroborate Group's criminal purpose, and therefore constitute a substantial step in a course of conduct planned to culminate in the aggravated murder of Mrs. Lozier. We therefore find that the evidence presented was sufficient to prove the essential elements of attempted aggravated murder.

Group, 98 Ohio St.3d at 261–63, 781 N.E.2d 980 (citations and footnote omitted).

[62] **[63]** As he did before the Ohio Supreme Court, Group argues that solicitation does not rise to the level of attempt under Ohio law. But "it is not the province of a federal habeas court to reexamine state–court determinations on state–law questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). This Court thus limits its review to "determining whether the evidence was so overwhelmingly in favor of the petitioner that it compelled a verdict in his or her favor." *Thompson v. Bock*, 215 Fed.Appx. 431, 436 (6th Cir.2007); *see also Moore v. Duckworth*, 443 U.S. 713, 714–15, 99 S.Ct. 3088, 61 L.Ed.2d 865 (1979) ("The Court of Appeals properly deferred to the Indiana law governing proof of sanity" in determining a sufficiency–of–the–evidence claim.).

[64] Here, the Ohio Supreme Court expressly rejected a "rigid or more formalistic approach" to attempt offenses, in which "merely soliciting another person to commit a crime does not constitute an attempt," distinguishing the very case Group cites to support his petition. *See Group*, 98 Ohio St.3d at 262, 781 N.E.2d 980 (citing *Dapice*, 57 Ohio App.3d at 104, 566 N.E.2d 1261). Instead, the court endorsed a "substantial step" standard, in which solicitation is sufficient to establish attempt if "strongly corroborative of the actor's criminal purpose." Applying that standard, the court concluded that Group's actions, which were "more than merely solicit[ing] the firebombing of Mrs. Lozier's house," strongly corroborated his criminal intent to murder Sandra. *Group*, 98 Ohio St.3d at 263, 781 N.E.2d 980. This Court defers to the Ohio Supreme Court's analysis of state law, and agrees with the court that, based on the record evidence, a "rational trier of fact could have found the essential elements of [attempted aggravated murder] beyond a reasonable doubt." *Jackson*, 443 at 319, 99 S.Ct. 2781.

***667 Intimidation**

Group also claims the evidence adduced at trial was insufficient to satisfy the elements of intimidation (Doc. 16 at 83–84). He argues there was no evidence that he or Perry "threatened, or took any action to put Mrs. Lozier in fear to prevent her from testifying" (*id.* at 84.)

The Ohio Supreme Court rejected this claim as well, stating:

> Group ... also contends that the state failed to prove him guilty of intimidation, which is defined in [OHIO REV. CODE §] 2921.03(A). We disagree.
>
> The state presented the following evidence to support this charge: Group hired Perry to firebomb Mrs. Lozier's house so that she would not testify against him. In June 1998, Perry knocked on Mrs. Lozier's door and asked her whether a "Maria something lived there." When Mrs. Lozier said no, Perry thanked her and left. Mrs. Lozier saw Perry looking around at the neighboring houses, which gave her a "little bit of a scare." She watched Perry drive away and noted that he did not stop at any nearby houses. When she looked up the name Perry had given her, she found that no such person lived on her street. She described Perry's car to a neighbor and asked her to watch for it. Two days later, Sergeant Martin told Mrs. Lozier that someone had been hired to kill her. She told Martin about the incident with Perry, whereupon he advised her to move out of her house right away. She followed this advice.
>
> On these facts, the state presented sufficient evidence to permit the jury to find Group guilty of intimidation. [OHIO REV. CODE §] 2921.03(A) provides: "No person, knowingly and by force [or] by unlawful threat of harm to any person or property, * * * shall attempt to influence, intimidate, or hinder a * * * witness in the discharge of the [witness's] duty."
>
> There is no question that Group intended to influence, intimidate, or hinder Mrs. Lozier in discharging her duties as a witness. Moreover, given Mrs. Lozier's reaction to Perry's visit, the jury could reasonably find that Perry's words and actions constituted a threat within the meaning of the statute.

Group, 98 Ohio St.3d at 263–64, 781 N.E.2d 980.

Again, the Ohio court's decision is supported by the record and is neither contrary to, nor an unreasonable application of *Jackson*.

CERTIFICATE OF APPEALABILITY ANALYSIS

[65] **[66]** This Court must determine whether to grant a Certificate of Appealability ("COA") for any of Group's grounds for relief. Group may not appeal this Court's denial of any portion of his Petition "[u]nless a circuit justice or judge issues a certificate of appealability," which "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). Group must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (internal quotation marks omitted). With respect to Group's procedurally defaulted claims, Group must show "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

[67] ***668** This Court concludes reasonable jurists could not debate (1) the finding that Group procedurally defaulted certain claims without good cause to excuse the default or (2) the disposition of those claims Group preserved for habeas review. The Ohio courts thoroughly considered Group's arguments and rejected them with considerable record support. This Court thus denies Group a COA as to all claims.

CONCLUSION

For the foregoing reasons, this Court denies Group's Petition for Writ of Habeas Corpus (Doc. 16). This Court further certifies that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c).

IT IS SO ORDERED.

All Citations

158 F.Supp.3d 632

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Scott A. Group,

Petitioner,

-vs-

Norm Robinson, *Warden*,

Defendant.

Case No. 4:13 CV 1636

JUDGMENT ENTRY

JUDGE JACK ZOUHARY

This Court denies Group's Petition for Writ of Habeas Corpus (Doc. 16). This Court further certifies that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. §2253(c).

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

January 20, 2016

No. 16-3726

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCOTT A. GROUP,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
NORM ROBINSON, Warden,	)	
	)	
Respondent-Appellee.	)	
	)	

Before: COLE, Chief Judge; BOGGS and SILER, Circuit Judges.

Scott A. Group, an Ohio death-row prisoner, appeals a district-court judgment denying his petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254. The district court denied a certificate of appealability ("COA"). Group seeks it here. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1)-(2). He also moves this court to authorize his federal habeas counsel to pursue certain state-court litigation. *See* 18 U.S.C. § 3599 (a)(2) and (e).

The jury convicted Group of aggravated murder, two counts of attempted aggravated murder, aggravated robbery, and intimidating a witness. The trial court sentenced him to death and 38 years in prison. He unsuccessfully sought relief on direct appeal and in state postconviction proceedings, then filed a federal habeas corpus petition in 2014. As amended, it raised eight claims: 1) counsel rendered ineffective assistance in the guilt phase by inadequately cross-examining the State's key witness, Sandra Lozier; 2) counsel were ineffective in the guilt phase because they failed to prepare the alibi witnesses or present evidence of another suspect; 3) counsel were ineffective in the guilt phase because they failed to use an expert to rebut the State's DNA expert and ineffectually cross-examined that expert; 4) counsel were ineffective in the guilt phase because they failed to present evidence that Group's hands were seriously impaired and tested negative for gunshot residue; 5) the trial court improperly dismissed for

cause a properly qualified, unbiased juror; 6) the trial court improperly dismissed for cause a properly qualified, unbiased alternate juror who expressed reservations about the guilty verdict; 7) the evidence of intimidation and of the second attempted aggravated murder was constitutionally insufficient; and 8) counsel were ineffective in the guilt phase because they failed to interview their own DNA expert properly, yet promised the jurors—falsely, as it turned out—that they would hear important testimony from him. The district court denied discovery, the petition, and a COA. Group moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) and, under Federal Rule of Civil Procedure 15, moved to amend the federal petition by adding a ninth claim. The district court denied both motions. Group timely appealed. He seeks a COA on Claims 1-3 and 8 and on the denials of his motions to alter or amend the judgment, to amend the federal petition, and for discovery.

A COA shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied the habeas petition on the merits, the applicant must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). If the district court denied the petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the applicant shows that jurists of reason would find debatable (a) whether the petition states a valid claim of the denial of a constitutional right and (b) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Upon consideration, we **DENY** the COA application because Group has failed to make the required showing. We also **DENY** Group's request that we authorize federal habeas counsel's pursuit of the suggested state-court litigation.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 16-3726

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCOTT A. GROUP,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
NORM ROBINSON, WARDEN,	)	
	)	
Respondent-Appellee.	)	
	)	
	)	

Before: COLE, Chief Judge; BOGGS and SILER, Circuit Judges.

Scott A. Group petitions for rehearing en banc of this court's order, entered on May 25, 2017, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

In The United States Court Of Appeals
For The Sixth Circuit

Scott A. Group,	)	
	)	**Case No. 16-3726**
Petitioner-Appellant,	)	
	)	
-v-	)	**Death Penalty Case**
	)	
Norm Robinson, Warden	)	
	)	
Respondent-Appellee.	)	

Petitioner-Appellant's Motion for a Certificate of Appealability

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Petitioner-Appellant Scott A. Group now moves this Court for a Certificate of Appealability [COA] to appeal the district court's order denying habeas relief. Habeas Judgment Entry, Doc. #: 55. No COA was issued by the district court. Habeas Memorandum Opinion and Order, Doc. #: 54, PageID#: 8818-19. Group must obtain a COA in order to appeal to this Court. 28 U.S.C. § 2253 (c). For the reasons stated in the attached Memorandum in Support, Group is entitled to a COA on his habeas claims and procedural issues because the district court's resolution of the case is debatable among reasonable jurists.

Respectfully submitted,

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TABLE OF CONTENTS

Memorandum in Support 3

I. Background information. 4

A. Trial. 5

B. Review in state courts. 8

C. Habeas petition. 9

D. Civil 59 motion. 10

E. Second motion to amend habeas petition. 10

F. District court's final order. 11

II. Standard of review for issuance of COA 11

III. A COA should issue on procedural grounds. 13

A. Group's First Ground is not procedurally defaulted. 13

i. Ineffective post-conviction counsel. 14

ii. Application of *Slack* standard to *Trevino* argument. 19

iii. Group's underlying claim is substantial. 21

B. It's debatable if Group's Second Ground is procedurally defaulted. 26

i. Group's post-conviction evidence and state court review. 27

ii. Procedural bar inadequate to preclude habeas review. 29

iii. Ineffective alibi defense....31

iv. Deficient performance....35

v. Prejudice....37

C. A COA should issue for Group's two post-judgment motions....39

i. Proceedings in district court....39

ii. Considerations for appealing post-judgment motions....40

iii. COA should issue for Group's motion to amend....42

iv. COA should issue for Rule 59 motion....44

a. Funk report differs in kind from Powers' affidavit....45

b. Funk's report is valid evidence for Rule 59 motion....47

c. Group was not dilatory....48

d. State's proof not overwhelming....50

D. COA should issue on denial of discovery under *Trevino*....51

IV. Merit denials: A COA should issue on Grounds Three and Eight....52

A. Trial proceedings relevant to DNA-based, *Strickland* claims....54

i. Lifecodes appointed as defense expert....56

ii. Trial counsel promised a defense expert to the jury....56

iii. Cross-examination of Dr. Reynolds. 58

B. New evidence changes the picture and law. 59

C. Group's new evidence 61

i. Documentary evidence and Dr. Baird's affidavit 61

ii. Attorney expert Christine Funk's report. 64

D. Group's DNA-based, *Strickland* claims warrant COA. 68

i. Reasonable jurists could debate deficient performance. 68

ii. Reasonable jurists could debate prejudice 71

V. Conclusion. 77

TABLE OF AUTHORITIES

Anderson v. Butler,
858 F.2d 16 (1st Cir. 1988).....72

Barefoot v. Estelle,
463 U.S. 880 (1983).....12

Bedford v. Collins,
567 F.3d 225 (6th Cir. 2009) 21

Bonin v. Calderon,
59 F.3d 815 (9th Cir. 1995). 47, 48

Bracy v. Gramley,
520 U.S. 899 (1997).....51, 52

CMF Communications, LLC v. Mitts Telecasting Co.,
424 F. Supp. 2d 1229, (E.D. Cal. 2005) 47

C.P. Interests, Inc. v. California Pools, Inc.,
238 F.3d 690 (5th Cir. 2001) 47

Clark v. United States,
764 F.3d 653 (6th Cir. 2014)..... 40-42, 44

Crawford v. Washington,
541 U.S. 36 (2004).....54

Cullen v. Pinholster,
563 U.S. 170 (2011).....51, 61

Dennis v. Sec'y. Penn. Dept. Corrections,
__F.3d. __, 2016 WL 4440925 *39-54 (3rd Cir. 8/23/16, *en banc*).....22

District Attorney's Office for the Third Judicial District, et al. v.Osborne,
557 U.S. 52 (2009).....72

Douglas v. Alabama,
380 U.S. 415 (1965).....29

English v. Romanowski,
602 F.3d 714 (6th Cir. 2010) 72

Ferensic v. Birkett,
501 F.3d 469 (6th Cir. 2007) 22

Glenn v. Tate,
71 F.3d 1204 (6th Cir. 1995) 68

Goff v. Bagley,
601 F.3d 445 (6th Cir. 2010) 21

Greer v. Mitchell,
264 F.3d 663 (6th Cir. 2001). 18, 30, 68

Haliym v. Mitchell,
492 F.3d 680 (6th Cir. 2007) 15

Hamblin v. Mitchell,
354 F.3d 482 (6th Cir. 2003) 68

Harris v. Nelson,
394 U.S. 286 (1969).....51

Hill v. Mitchell,
400 F.3d 308 (6th Cir. 2005).....18, 30

Huddleston v. MacLean,
640 F.2d 534 (5th Cir. 1981) 47

Karis v. Calderon,
283 F.3d 1117 (9th Cir. 2002) 47, 49

Lee v. Kenma,
534 U.S. 3625 (2002).....29

Leisure Caviar, LLC v. U.S. Fish and Wildlife Service,
616 F.3d 612 (6th Cir. 2010).....41

Loza v. Mitchell,
766 F.3d 466 (6th Cir. 2014) 15

Martin v. Ind. Mich. Power Co.,
292 F. Supp. 2d 947 (W.D. Mich. 2002) 47

Martinez v. Ryan,
566 U.S. 1, 132 S. Ct. 1309 (2012) 14, 18-21

Maupin v. Smith,
785 F.2d 135, 138 (6th Cir. 1986) 29

Mayle v. Felix,
545 U.S. 644 (2005) 9, 43, 44

McGuire v. Warden, Chillicothe Correctional Institution,
738 F.3d 741 (6th Cir. 2013) 18

Moore v. Mitchell,
708 F.3d 760 (6th Cir. 2013) 19

Moreland v. Robinson,
813 F.3d 315 (2016) 19, 41, 42

Morris v. Carpenter,
802 F.3d 825 (6th Cir. 2015) 19, 59

Murphy v. Ohio,
263 F.3d 466 (6th Cir. 2001) 11

Ouber v. Guarino,
293 F.3d 19 (7th Cir. 2002) 73

Plummer v. Jackson,
491 Fed. Appx. 671 (6th Cir. 2012) 73, 74

Porter v. McCollum,
558 U.S. 30 (2009) 51

Ramseyer v. Wood,
64 F.3d 1432 (9th Cir. 1995). 71

See Hovey v. Ayers,
458 F.3d 892 (9th Cir. 2006). 47

Slack v. McDaniel,
529 U.S. 473 (2000) ..... passum

State v. Calhoun,
714 N.E.2d 905 (Ohio 1999) 16, 30

State v. Cole,
443 N.E.2d 169, syl. (Ohio 1982) 16

State v. Group,
781 N.E.2d 980 (Ohio 2002) 6

State v. Ishmail,
423 N.E.2d 1068 (Ohio 1981) 16, 59

State v. Jackson,
413 N.E.2d 819 (Ohio 1980) 16

State v. Keith,
684 N.E.2d 47 (Ohio 1997) 17, 19

State v. Kirkland,
15 N.E.3d 818 (Ohio 2014) 17

State v. Lentz,
639 N.E.2d 784 (Ohio 1994) 16

State v. Madrigal,
721 N.E.2d 52 (Ohio 2000) 17

State v. Mammone,
13 N.E.3d 1051 (Ohio 2014) 17

State v. Perry,
226 N.E.2d 104 (Ohio 1967).....16

Strickland v. Washington,
466 U.S. 668 (1984).....passum

Toliver v. Pollard,
688 F.3d 853 (7th Cir. 2012) 51

Trevino v. Thaler, __ U.S. __,
133 S. Ct. 1911 (2013).....14, 18-21, 26

United States, ex. rel. Hampton v. Leibach,
347 F.3d 219 (7th Cir. 2003) 72

United States v. Wade,
388 U.S. 218 (1967).....22

Watkins v. Sowders,
449 U.S. 341 (1981).....22

White v. Mitchell,
431 F.3d 517 (6th Cir. 2005) 18

Whorton v. Bockting,
549 U.S. 406 (2007).....54

Ylst v. Nunnemaker,
501 U.S. 797, 803 (1991).....15, 29

Federal Statutes

28 U.S.C. § 2253(c). 12

28 U.S.C. § 2255.....40

Memorandum in Support[1]

At first blush, this may appear to be an open-and-shut case. Scott Group was convicted of robbing a bar owned by a married couple, Sandra and Robert Lozier. He supposedly shot them both killing Robert and leaving Sandra alive. She identified Group and DNA evidence supposedly sealed Group's fate as the culprit. A small drop of Robert's blood was allegedly found on Group's gym shoe.

The state courts and the district readily accepted the notion that the evidence against Group was overwhelming because of Sandra's identification and the DNA evidence. But the notion that this is an open-and-shut case with overwhelming proof of guilt is sophistry. Group's new evidence significantly undercuts Lozier's identification testimony and the force of the DNA evidence.

For the first time on habeas review, Group supplied information that seriously calls into question the Lozier's purported identification of him. Serious doubts arise over her identification of him based on documents showing discrepancies between the shooter and Group. Lozier also gave inconsistent accounts as to whether she lost consciousness after she was shot. This calls into question her capacity to recall information accurately after she was traumatized by gunshot wounds to the head, and her exposure to her husband's murder.

[1] Group's motion is lengthy, but necessarily so. Without a COA from the district court, Group must discuss the detailed facts and complicated procedural issues at more length than would be necessary if the district court had granted a COA for some of the issues.

Additionally, the trial testimony reveals inconsistencies in her testimony as to whether money bags in the Lozier's bar were in fact taken.

Nor does the DNA conclusively put Robert's blood on one of Group's shoes. Group's new evidence demonstrates that the tested genetic material was derived from a "mixed sample" meaning that another person's DNA was present. The frequency with which Robert's DNA profile would be found was also misrepresented at trial by the state. Contrary to what the jury was told, it cannot be scientifically proven that Robert's DNA was in fact found on Group's gym shoe. Robert's genetic profile is hardly unusual within the population.

Group's trial counsel failed miserably in their attempts to impeach either the identification testimony or the DNA evidence. The representation provided by his post-conviction counsel's was also abysmal. At the heart of this appeal lies Group's attempt to use new evidence to bring important new facts into view. In order for Group to do that, he must meet the "cause and prejudice" exception to procedural default based on the ineffective assistance of post-conviction counsel. In this appeal, this Court must finally decide whether that exception for finding "cause and prejudice" is applicable to Ohio's system of review.

I. Background information.

This case involves a robbery with two associated shootings at the Downtown Bar in Youngstown, Ohio in 1997. The proprietors of the Downtown Bar were

also the victims, a married couple named Sandra and Robert Lozier. Sandra survived after being shot in the head. She purportedly identified Scott Group as the assailant. The state offered DNA evidence to bolster Sandra Lozier's identification of Group. As demonstrated below, both Lozier's identification and the state's DNA evidence could have been successfully challenged to create reasonable doubt over the identity of the shooter. But that opportunity was missed due to the ineffective assistance rendered by Scott Group's trial counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984).

A. Trial.

On January 18, 1997 the Lozier's were counting the previous night's receipts when there was a knock at the door. Sandra Lozier testified that the man at the door that morning was the delivery person for the Ohio Wine company.

The man asked to look through the Lozier's invoices for Ohio Wine. After parsing the invoices for a while, the man asked to use the restroom. When the man returned, he brandished a pistol and ordered the Loziers to go into the men's restroom. The man said that he was the brother of a young woman who was last seen in the Downtown Bar. That young woman was later found to have been murdered. The Loziers tried to assure the man that they were cooperating with the police to help find the missing woman. Despite the Loziers' assurances, the man shot Robert in the head, killing him. He also shot Sandra in the head twice.

Sandra Lozier survived. She managed to call 911 at 11:05 am. She said the bar's Ohio Wine delivery person had shot her. Scott Group became the focal point of the investigation because, at that time, he was the Ohio Wine company's delivery person for the Downtown Bar. At trial, Lozier identified Group as the perpetrator of the Downtown Bar crimes. *See State v. Group*, 781 N.E.2d 980, 985-87 (Ohio 2002).

Her testimony was vulnerable to impeachment, however, due to inconsistencies in her identification of Group and as the result of the serious head trauma she sustained. Group stridently denied any involvement, he presented several alibi witnesses, and it was undisputed that he did not know the young woman who disappeared from the Downtown Bar. There was evidence that a week prior to these crimes, Group went to the Downtown Bar for a delivery and to look at some invoices. (*See* Doc. #: 22-4, PageID#: 6024-28). That is, Sandra Lozier may have conflated the prior date that Group came to the bar with the day of the crimes due to her serious head trauma.

Discrepancies are apparent on the record regarding Lozier's testimony about money bags that were purportedly stolen from the Downtown Bar. Lozier was asked about the money that she claimed was taken during the shooting incident. Lozier said she took the money out of the safe. Doc. #: 22-4, PageID #: 6030. There were two safes but she opened just one of them. *Id.* at PageID #: 6031. That

safe required a key and a combination. *Id.* Only one safe had money in it, and the second was empty. *Id.* at PageID #: 6073-74.

Lozier said there were four bags of register money in the safe. She took out all four bags from the safe—one bag for each register—and she put them on the office desk. *Id.* at PageID#: 6031. One of those bags was "start-up" money. *Id.* Lozier said she took all the money out of all the bags, totaling in her estimation, about $1,200-1,300 dollars and some rolls of coins. *Id.* at PageID #: 6031-32. Lozier reiterated that all the money was laying out on her desk when the assailant was allowed into the bar. *Id.* at PageID #: 6033. After the shooting, there were still some rolls of coins on the desk, but all the other money and the bags were gone. *Id.* at PageID #: 6047.

On cross-examination, Lozier testified that there were actually five bags of money that she removed from the safe. *Id.* at PageID #: 6072, 6073. She claimed that each bag was opened on her desk. *Id.* at PageID #: 6073. After the shooting, Lozier did not return to the bar for ten days. *Id.* at PageID #: 6074. During that time only her son, Robert Lozier, Jr. and the manager, Mark Chapman, had access to the bar. *Id.* When asked if Lozier's son had removed the money and bags from the bar and given them to the police, she answered, "I don't know." *Id.* at PageID #: 6080.

Officer Datko was in the first police car to arrive on the scene. *Id.* at PageID #: 5998. Althought he spoke to Lozier twice, Datko was not able to ascertain if any money was taken. *Id.* at PageID #: 5993-94. He observed the safe and it was open. *Id.* at PageID #: 6006-6007. Significantly, Datko saw money bags inside the open safe while he was with Officer Ciavarella. *Id.* at PageID #: 6007 He confirmed that there was indeed money inside those bags, which he and Ciavarella removed from the safe and examined. *Id.* at PageID 6007. He found a bag of small bills and some rolls of coins. *Id.* at PageID 6007-08.

Despite issues with Lozier's identification of Group, the jury returned guilty verdicts for the following charges:

> [T]he aggravated murder of Robert Lozier under R.C. 2903.01(B). The aggravated-murder count had two death specifications: R.C. 2929.04(A)(5) (purposeful attempt to kill two persons) and R.C. 2929.04(A)(7) (murder during aggravated robbery). The indictment also contained a count charging Group with the attempted aggravated murder of Mrs. Lozier on January 18, 1997, and a count charging aggravated robbery, R.C. 2911.0l(A)(1). Each count had a firearm specification, R.C. 2941.145(A). ...

Group, 781 N.E.2d at 989. "After a penalty hearing, [Group] was sentenced to, death." *Id.*

B. Review in state courts.

The Ohio Supreme Court affirmed Group's convictions and death sentence on direct review. *Id.* at 1006. Group did not petition for a writ of certiorari in the Supreme Court on direct review.

Group also sought relief on state post-conviction review. O.R.C. §2953.21. The trial court denied his post-conviction petition, the Ohio Court of Appeals affirmed, and the Ohio Supreme Court declined to exercise jurisdiction over Group's post-conviction appeal. *See* Trial Court, Doc. #: 21-8, PageID #: 2457; Ohio Court of Appeals, Doc. #: 21-9, PageID#: 2809; Ohio Supreme Court, Doc.#: 21-10, PageID #: 3090.

C. Habeas petition.

Group timely petitioned the district court for habeas relief raising seven grounds for relief. Habeas Petition, Doc. #: 16, PageID #: 76. The district court denied Group's request for discovery. Doc. 49, PageID #: 8729. Group moved to amend his petition with an Eighth Ground, alleging ineffective trial counsel based on counsel's false promise to the jury that it would hear testimony from a defense DNA expert. Doc. #: 45, PageID #: 8617. The district court permitted that amendment because Group's new claim related back to a core set of facts pleaded in the "original, timely filed petition." Doc. #: 50, PageID #: 8749 (citing *Mayle v. Felix*, 545 U.S. 644, 659 (2005)). The district court denied Group's petition on January 21, 2016. Doc #: 54, PageID #: 8777; Doc. #: 55.

D. Civil 59 motion.

Group then timely moved to alter or amend the judgment under Rule 59, by offering the opinion of Christine Funk an attorney expert on forensic, DNA issues.

Doc. #: 56, PageID #: 8821. Funk's report explained how Group's trial counsel performed in a professionally unreasonable manner in confronting the state's DNA evidence. Doc. #: 56-1, PageID #: 8864-65.

Group then moved to stay the case to allow him the opportunity to "offer the expert opinions of Dr. Dan E. Krane, Ph. D., of the Department of Biological Sciences at Wright State University in Dayton, Ohio." Doc. #: 62, PageID #: 8928. Group explained that he had entered into a contract for Dr. Krane's services on March 5, 2016, and habeas counsel asked the district court to stay the case until April 15, 2016, the date when habeas counsel could offer Dr. Krane's opinions to the court. *Id.* at PageID #: 8929, 8931.

E. Second motion to amend habeas petition.

On April 15, Group filed Dr. Krane's sworn declaration in support of his Eighth Ground, his Ninth Ground, proffered with his second motion to amend the petition, and also his Motion to Alter or Amend the Judgment. Doc. #: 66, PageID #: 8957. Group asserted that Dr. Krane's declaration supported his ineffective trial counsel claim in two important respects. First, the prosecution misrepresented the statistical significance of the population frequency statistic provided by the state's DNA expert. Second, the evidence showed "[t]he presence of an additional allele … consistent with the proposition that the results obtained from A8-1 [a blood spot

on Group's shoe] are from a mixture of two or more individuals." *Id.* at PageID #: 8957-58.

F. District court's final order.

The district court denied Group's two post-judgment motions on May 27. Doc. #: 67, PageID #: 8965; Doc. #: 68, PageID #: 8973. Group timely appealed that judgment. Doc. #: 69, PageID #: 8974. He moved this Court for an order to stay his appeal for exhaustion of his ninth ground in the state courts, but this Court denied that motion. This Court set a briefing schedule for Group to request a COA by August 29. Document: 8-1, Page: 1. Group now moves for a COA from this Court.

II. Standard of review for issuance of COA.

A district court must supply its reasoning when determining which claims merit a COA, "which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability." *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001); *see also Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001) (remanding motion for certificate of appealability for district court's analysis of claims). The district court did not supply that analysis in its final order, Doc. #: 54, PageID #: 8818-19. This Court now must consider whether to grant a COA for Group's habeas claims under the standard set forth in 28 U.S.C. § 2253(c).

In *Slack v. McDaniel*, 529 U.S. 473 (2000), the Supreme Court held that § 2253 codified the standard it set forth in *Barefoot v. Estelle*, 463 U.S. 880 (1983), but for the substitution of the word "constitutional" for "federal" in the statute. *Id.* at 483. The Supreme Court reasoned that for claims denied on the merits the habeas petitioner "must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'" *Id.* at 483–84 (quoting *Barefoot*, 463 U.S. at 893, n.4).

The *Slack* standard applies to the denial of a habeas claim on either the merits or on a procedural ground. *See id.* at 478. If the district court denied the petitioner's claim on procedural grounds, a habeas appeal should be taken "if the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In the following section, Group argues that the district court's procedural rulings are debatable among reasonable jurists such that a COA should issue.

After discussing why a COA should issue on procedural grounds, Group then argues why he is entitled to a COA on the merits of other constitutional claims.

III. A COA should issue on procedural grounds.

It is debatable among reasonable jurists whether the district court correctly determined that Scott Group's First and Second habeas grounds were procedurally defaulted. *See id.* The district court also issued procedural rulings denying Group's Motion to Alter/Amend the Judgment, his Motion to Amend the Petition, and his Motion for Discovery. Those procedural rulings are also debatable among reasonable jurists. *See id.*

A. Group's First Ground is not procedurally defaulted.

In Group's First Ground, he asserted that trial counsel rendered prejudicially deficient performance because counsel failed to competently cross-examine Sandra Lozier, the state's key witness. Doc. #: 16, PageID #: 109. The district court denied this claim as procedurally defaulted on the basis of Ohio's *res judicata* rule. Doc. #:54, PageID #: 8796 (Citing Doc. #:49, PageID #: 8734-40).

A COA should issue as to whether Group's first habeas ground is defaulted. Reasonable jurists would debate the adequacy of Ohio's *res judicata* rule to Group's first ground. Reasonable jurists would debate whether Group can demonstrate cause to excuse the state's procedural bar due to the ineffective assistance rendered by his post-conviction counsel when Group was before the

Ohio Court of Common Pleas during state post-conviction review. *See Trevino v. Thaler*, __ U.S. __, 133 S. Ct. 1911 (2013); *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012). After finding the district court's procedural rulings debatable, reasonable jurists would also find it debatable whether Group pleaded a valid, underlying *Strickland* claim. *See Slack*, 529 U.S. at 484.

i. Ineffective post-conviction counsel.

Group's post-conviction counsel failed to append any cogent evidence *de hors* the record to support this *Strickland* claim. Post-conviction counsel alleged that trial counsel ineffectively cross-examined Sandra Lozier. Counsel noted that Lozier's descriptions of her assailant were inconsistent and they did not fit with Group's physical characteristics. Counsel also asserted that Lozier's medical records showed she did not lose consciousness after she was shot, which contradicted her testimony. Doc. #: 21-6, PageID #: 2175.

Post-conviction counsel explained that Lozier's medical records were being filed under seal to the amended petition as Exhibit H. *Id.* at PageID #: 2177. But counsel did not file those medical records with the amended petition. The Ohio Court of Appeals *sua sponte* considered a police report with a specific description of the assailant from Lozier and photographs of Group. *Id.* at 2834.

That police report is hand-written. It notes this description taken by the police from Sandra: "Shakes, 5'9" thin Blond short, clean shaven." Doc. #: 21-6,

PageID #: 2254. The photographs were attached to Ruth Group's affidavit and were marked separately as Exhibits 1, 2, and 3. The photograph marked as Exhibit 1 depicts Scott wearing his Ohio Wine work shirt with the name "Scott" visible on the right breast of his shirt. Doc. #: 21-6, PageID #: 2263.

This Court looks to the opinion issued by the Ohio Court of Appeals to determine whether Group's post-conviction claim is procedurally defaulted. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Loza v. Mitchell*, 766 F.3d 466, 473 (6th Cir. 2014); *Haliym v. Mitchell*, 492 F.3d 680, 691 (6th Cir. 2007). The Ohio Court of Appeals found that the claim was barred by *res judicata.* Doc. #: 21-9, PageID #: 2834. That finding is the result of post-conviction counsel's ineffective representation of Group. Professionally reasonable post-conviction counsel would have supported this claim with evidence *de hors* the trial record. The way post-Group's counsel raised this claim doomed it to certain failure in light of established Ohio procedural law.

Ohio law was clear when post-conviction counsel filed Group's amended petition. A claim that can be fully litigated on the trial record must be raised on direct appeal. *See State v. Ishmail*, 423 N.E.2d 1068, 1070 (Ohio 1981); *State v. Perry*, 226 N.E.2d 104, 105-06, syl. ¶ 7 (Ohio 1967). To surmount the application of *res judicata* to this claim, it was necessary for post-conviction counsel to attach supporting evidence beyond the trial record when the petition was filed. *See State*

v. Calhoun, 714 N.E.2d 905, 910 (Ohio 1999) (quoting *State v. Jackson*, 413 N.E.2d 819, 823 (Ohio 1980); *State v. Lentz*, 639 N.E.2d 784, 786 (Ohio 1994) (Quoting *State v. Cole*, 443 N.E.2d 169, syl. (Ohio 1982).

The failure of post-conviction counsel to plead this claim—without appending the necessary evidentiary support—was professionally unreasonable given the well-established state rules mandating such evidentiary support. *See Calhoun,* 714 N.E.2d at 910. Indeed, the relevant Ohio statute provides: "the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider [*inter alia]* … the supporting affidavits, and the documentary evidence …." O.R.C. § 2953.21(C). Ohio law makes it clear that a defendant has not even pleaded a "substantive ground[] for relief" unless his claim is supported by evidence beyond the trial record such as "affidavits" and "documentary evidence." *See id.*

Further, the defendant may not meet his initial pleading burden by simply attaching any affidavits or documentary evidence. For example, even with supporting affidavits, the trial court may dismiss the defendant's petition, without a hearing, if it finds that the defendant's supporting affidavits were not credible. *Calhoun,* 714 N.E.2d at 911-12. In other words, without cogent evidence beyond the trial record, the defendant has not even pleaded a "substantive ground[] for relief" under state law. *See*, O.R.C. § 2953.21(C).

Importantly, the Ohio Supreme Court has recognized in several cases that some *Strickland* claims cannot be litigated on direct appeal if the claim depends on evidence beyond the trial record to demonstrate prejudice for an ineffective counsel claim. *State v. Kirkland*, 15 N.E.3d 818, 830 (Ohio 2014); *State v. Mammone*, 13 N.E.3d 1051, 1087 (Ohio 2014); *State v. Madrigal*, 721 N.E.2d 52, 65 (Ohio 2000); *State v. Keith*, 684 N.E.2d 47, 67 (Ohio 1997) (Citation omitted).

For two reasons, those Ohio Supreme Court decisions are significant to this procedural default discussion. First, those decisions make clear that some *Strickland* claims cannot be litigated on direct appeal in the Ohio courts. Some ineffective counsel claims can only be fully litigated in the Ohio courts on post-conviction review by resort to evidence beyond the trial record. *Id.* As such, Group had to raise this particular claim on post-conviction review—with cogent evidence *de hors* the appellate record—and not on direct appeal.

Second, this Court has found, in several cases, that the Ohio courts misapplied their own *res judicata* rule to cases where the habeas petitioner could not fully litigate his *Strickland* claim on the trial record, and the habeas petitioner had to resort to evidence beyond the trial record to prove his claim. *Richey v. Bradshaw*, 489 F.3d 344, 360 (6th Cir. 2007); *White v. Mitchell*, 431 F.3d 517, 527 (6th Cir. 2005); *Hill v. Mitchell*, 400 F.3d 308, 314 (6th 2005); *Greer v. Mitchell*, 264 F.3d 663, 675 (6th Cir. 2001). In those cases, this Court found the state's

application of Ohio's *res judicata* rule to the respective claims was inappropriate and it reviewed them *de novo*. Those cases provide strong support for the proposition that the rule in *Martinez* and *Trevino* applies here.

In *McGuire v. Warden, Chillicothe Correctional Institution*, 738 F.3d 741, 743-44 (6th Cir. 2013), this Court examined the principles of *Martinez* and *Trevino* in the context of deciding whether those cases provided a ground to support the habeas petitioner's motion for relief under Rule 60(b)(6). The issue presented in *McGuire* was whether *Martinez* and *Trevino*, as intervening law, created an "extraordinary" circumstance to warrant relief under Rule 60(b)(6). *McGuire*, 738 F.3d. at 749-50. This court acknowledged that it had previously found the *Martinez* exception inapplicable to Ohio cases "because Ohio permits ineffective assistance of counsel claims to be made on direct appeal, [*Moore v. Mitchell*], 708 F.3d 760, 785 (6th Cir. 2013), but that decision was issued before *Trevino*." *McGuire*, 738 F.3d at 749. Following *McGuire*, it is an open question in this Court whether the *Trevino* exception to default applies to an Ohio habeas petitioner's case. *See id.* at 751 ("Third, while we need not determine whether *Trevino* applies to Ohio cases, it is not obvious that *Trevino* applies here."); *Moreland v. Robinson*, 813 F.3d 315, 327 (2016) (Citing *Morris v. Carpenter*, 802 F.3d 825, 844 (6th Cir. 2015)). That open question is now ripe for review in Group's appeal.

ii. Application of *Slack* standard to *Trevino* argument.

The state court's application of the *res judicata* rule in this case is debatable among reasonable jurists in view of all the above-cited Ohio Supreme Court cases declining to review underdeveloped *Strickland* claims on direct appeal. *See Madrigal*, 721 N.E.2d at 65; *Keith*, 684 N.E.2d at 67 (citing *Scott*, 578 N.E.2d at 844). Further, it is debatable among reasonable jurists whether the district court's procedural ruling is correct in light of this Court's cases declining to honor the state's court's application of *res judicata* to cases in which the habeas petitioner had to depend on evidence outside the record to fully develop his claim. *See Richey*, 489 F.3d at 360; *Hill,* 400 F.3d at 314; *Morris*, 802 F.3d at 844 (*Martinez* inapplicable to claims "fully adjudicated on the merits" in the state courts). Put another way, it is debatable whether Group's *Strickland* claim is defaulted in light of Ohio's system of review and the rules established under *Martinez* and *Trevino*.

By the "operation and design" of Ohio's system, collateral review was Group's only "meaningful opportunity to raise [this] ineffective assistance of trial counsel" claim. *See Trevino*, __ U.S. at __, 133 S. Ct. at 1921. Post-conviction counsel failed to follow the relevant state law, and thus deprived Group of any meaningful opportunity to litigate this Sixth Amendment claim.

A policy concern underlying the *Martinez* decision is germane to this appeal. In *Martinez*, Supreme Court recognized the "cause and prejudice" default

exception to ameliorate the harsh outcome of having a habeas petitioner forfeit any merit review of his constitutional claim. *See Martinez*, 566 U.S. at __, 132 S. Ct. at 1316. Due to post-conviction counsel's ineffectiveness, the trial court found that Group's Sixth Amendment claim was procedurally barred. Doc. #: 21-8, PageID #: 2475. The Ohio Court of Appeals followed suit, depriving Group of any merit review of his *Strickland* claim in the Ohio courts. Doc. #: 21-9, PageID #: 2828. In this circumstance, Group may avail himself of the "cause and prejudice" default exception to avoid losing any merit review of his Sixth Amendment claim. *See Martinez*, 566 U.S. at __, 132 S. Ct. at 1316.

Reasonable jurists could debate whether Group demonstrates "cause and prejudice" to excuse the default of this claim based on post-conviction counsel's professionally unreasonable failure to present his *Strickland* claim to the trial court as a valid post-conviction claim. *See*, *Martinez*, 566 U.S. at __, 132 S. Ct. at 1320; *Trevino*, __ U.S. at __, 133 S. Ct. at 1921. Once post-conviction counsel accepted the appointment to represent Group, counsel had a duty to know the relevant procedural law regarding the pleading requirements that would distinguish a "substantive ground for relief" from a legally feckless allegation based solely on the record. *See* O.R.C. § 2953.21(C); *Strickland*, 466 U.S. at 688 (counsel has duty "to bring to bear such skill and knowledge" to make the proceeding "a reliable adversarial testing process").

Post-conviction counsel ineffectively pleaded this claim because counsel was ignorant of Ohio procedural law or counsel unreasonably failed to comply with that law despite having some awareness of it. *See Goff v. Bagley*, 601 F.3d 445, 464 (6th Cir. 2010); *Bedford v. Collins*, 567 F.3d 225, 237 (6th Cir. 2009). Counsel's performance in litigating this claim was deficient because counsel was ignorant of or disregarded the relevant Ohio law.

Group was prejudiced because he had a substantial Sixth Amendment claim that was deemed procedurally barred as the result of post-conviction counsel's failure to plead a legally valid post-conviction claim. When properly supported with evidence beyond the trial record, Group's underlying ineffective trial counsel claim is "substantial". *See Trevino*, __ U.S. at __, 133 S. Ct. at 1918.

iii. Group's underlying claim is substantial.

As the surviving witness, Sandra Lozier's testimony was the lynchpin to the state's case against Group. Effective cross-examination of her was necessary to effective representation by trial counsel. But trial counsel failed to use professional skill and judgment in cross-examining Lozier. *See Strickland*, 466 U.S. at 688. Counsel should have impeached her testimony by exploiting important inconsistencies between her descriptions of the assailant and Group.

For starters, the Supreme Court has made clear that eyewitness identifications are "peculiarly riddled with innumerable dangers and variable

factors which might seriously, even crucially, derogate from a fair trial." *United States v. Wade*, 388 U.S. 218, 228 (1967); *see id* at 235 (noting "dangers inherent with eyewitness identifications[]"); *Dennis v. Sec'y. Penn. Dept. Corrections*, __F.3d. __, 2016 WL 4440925 *39-54 (3rd Cir. 8/23/16, *en banc*) (McKee, C.J., concurring). Following the Supreme Court's guidance, *see id.*, this Court has also explained "eyewitness misidentification accounts for more false convictions in the United States than any other factor." *Ferensic v. Birkett*, 501 F.3d 469, 478 (6th Cir. 2007); *see id.* at 482 (quoting *Watkins v. Sowders*, 449 U.S. 341, 352 (1981). Although Lozier's identification of Group was compelling, it could have been impeached by professionally competent counsel.

Lozier testified the assailant was about the same height as her husband, Robert, but thinner. The coroner's examination done on January 19, 1997, put Robert at 72" tall with an estimated weight of 175 pounds. Doc. #: 16-1. The hand-written police report and typed police report note that Sandra Lozier described her assailant as thin with blond wavy hair. Doc. #: 21-6, PageID #: 2254; Doc. #: 16-2. A police report from January 31, 1997, put Group's height as 6'1" and his weight at 190 pounds. Doc. #: 16-3. An earlier police report from when Group was age 18 states he was 6' tall, 185 pounds, had a "stocky" build, and had red hair. Doc. #:16-4.

Some reports are consistent with Lozier's testimony that Robert and the assailant were about the same height. Yet Lozier's testimony was materially different from reports in other respects. At 190 pounds, Group was not thinner than Robert who was estimated to weigh 175 pounds. At 190 pounds, Group was not even "thin." In fact, Group had a stocky build according to a 1983 police record, and in 1997, he was heavier than he was in 1983. Unlike the assailant, Group did not have blond wavy hair because his hair was red. Doc. #: 16-4.

Trial counsel failed to point out several other inconsistencies. Lozier testified her assailant's height was similar to Robert's (taller than average at 6'). Trial counsel asked Lozier if she recalled telling the detective that her assailant was 5'9" (average height). Lozier said she did not recall saying that, and trial counsel just let that answer stand without any challenge. Trial counsel thus failed to impeach Sandra Lozier with an available police report in which Lozier said her assailant was 5'9" to 5'10". Doc #: 21-6, PageID #: 2254.

Trial counsel could have informed the jury that Lozier's description had evolved. The January 31, 1997, police report puts Robert's weight at 200 pounds, and that report was prepared twelve days after the coroner's examination on January 19, 1997, the day after Robert died. *Compare* Doc. #: 16-1 *with* Doc. #: 16-3.

Trial counsel further failed to impeach Lozier's testimony as to whether she lost consciousness at the Downtown Bar. The medical records state Lozier did not lose consciousness. Doc. #: 16-5. Nor did trial counsel impeach Lozier's claim she did not know Group's name before the crimes. Trial counsel should have impeached Lozier's testimony with a photograph depicting Group in his company shirt because his name was visible on the front of that shirt. Doc. #: 21-6, PageID #: 2263. Group was the regular Ohio Wine delivery person for the Downtown Bar and Sandra Lozier saw him on several occasions. Even a negative answer from Lozier could have left the jury with questions about her attentiveness and ability to recall information after sustaining head trauma.

A competent defense required trial counsel to confront Lozier and poke holes in her story where counsel was able to do so. Lozier suffered a gunshot wound to her head. Her memory certainly could have been affected by the trauma she suffered. She testified Group had been to the Downtown Bar on the Saturday preceding the crimes. Doc. #: 22-4, PageID #: 6026. Trial counsel needed to challenge Lozier's recall of events in order to create reasonable doubt that she may have confused the days when Group was at the Downtown Bar.

Trial counsel was deficient. Rather than effectively cross-examining Lozier with readily available documents, counsel instead called her motive into question by delving into her post-crime, civil suit against Group. Doc. 22-4, PageID #:

6079-80. The apparent suggestion was that Lozier might identify Group for pecuniary gain. This was folly.

Sandra Lozier was a sympathetic witness who had suffered a tragic loss and much hardship. Trial counsel's questions about her lawsuit probably alienated the jurors. And the prosecutor saw no need to redirect Lozier's testimony because trial counsel's cross-examination was so ineffectual; and likely counter-productive because of the inquiry into the civil lawsuit.

Group was prejudiced because an effective challenge to Lozier's identification was there to be made. Trial counsel missed the opportunity to confront Lozier about: (1) the differences between her description of the shooter's thin build versus Group's stocky build, (2) the differences between her testimony that Group was thinner than Robert Lozier, (3) the differences between her description of the assailant's blond, wavy hair versus Group's red hair, (4) the differences between her description of a tall man versus her description of a man of average height, (5) the differences between her losing consciousness versus her staying awake, and (6) Lozier did not recall Group's name even though it was on his shirt when he made deliveries to her bar. And, as discussed above, trial counsel could have further undermined her credibility by highlighting discrepancies between her testimony and Datko's about the money bags. (See section I.A, above.) The cumulative weight of trial counsel's error and omissions calls into question Lozier's ability to recall facts

after sustaining a serious head trauma. Trial counsel squandered the opportunity to effectively confront Sandra Lozier, the state's key witness.

It is certainly debatable among reasonable jurists whether Group can demonstrate "cause and prejudice" resulting from the ineffective assistance of post-conviction counsel to excuse the Ohio Court of Appeals' application of *res judicata*. If the procedural bar imposed by the Ohio Court of Appeals is inadequate, moreover, this Court would be free to reach the merits of this *Strickland* claim with *de novo* review. *See Trevino*, __U.S. at__, 133 S. Ct. at 1921. And because Group's *Strickland* claim is "substantial" under *Trevino*, it is necessarily "valid" under the less-exacting standard in *Slack*. *See Slack*, 529 U.S. at 484. After considering the many errors and omissions in trial counsel's confrontation of Lozier, reasonable jurists would find it debatable as to whether Group's *Strickland* claim was "valid". *See id.*

B. It's debatable if Group's Second Ground is procedurally defaulted.

In Group's Second Ground, he asserted an ineffective counsel claim based on trial counsel's professionally unreasonable presentation of Group's alibi defense. Doc. #: 16, PageID #: 115. The district court denied this claim as procedurally defaulted on the basis of Ohio's *res judicata* rule. Doc. #: 54, PageID #: 8796 (Citing Doc. #: 49, PageID #: 8742-44). Reasonable jurists could debate,

however, whether that procedural bar was inadequate, thereby permitting *de novo* review of Group's *Strickland* claim on the merits. *See Slack*, 529 U.S. at 484.

i. Group's post-conviction evidence and state court review.

On post-conviction review, Group alleged that trial counsel failed to competently prepare for and present the testimony offered in support of his defense. *See* Doc. #: 21-9, PageID #: 2836. In support of this claim, Group relied on an affidavit from his mother, Ruth Group. Doc. #: 21-6, PageID #: 2259-62.

Ruth averred, "the lawyers did not pinpoint the time that my son was home [on the morning the crime was committed], despite my having informed [trial counsel's] investigators of those facts." *Id.* at PageID #: 2259. Ruth continued, "[o]n two occasions during the preparation of the case, witness preparation sessions were scheduled. The first was held in the basement of a McDonald's restaurant in Canfield, and the second was held at the hotel in which the lawyers, who are from out of town, were staying." *Id.* at PageID #: 2260.

"The 'witness preparation' sessions were more like social gatherings than trial preparation sessions. Neither I nor any of the witnesses whom I was able to observe were prepared by sitting us down and asking questions that we might expect from my son's lawyers and also from the prosecutors. Instead, there was a general group discussion with refreshments being served." *Id.*

Group's claim was also supported by his own affidavit in support of this claim. Doc. #: 21-6, PageID #: 2239-45. He averred: "During the pretrial portions of my case, the defense lawyers failed to prepare me to testify on the witness stand." *Id.* at PageID #: 2243. He further averred: "During the preparation and trial of my case, one of my lawyers, Andrew Love, kept calling me Fred, and he called other people by the wrong name as well. The trial record reflects his lack of preparedness to vigorously defend my case." *Id.* at PageID #: 2244.

The Ohio Court of Appeals denied this claim on the procedural ground of *res judicata*, adopting the trial court's finding that this claim was not supported by "cogent evidence de hors the record." Doc. #: 21-9, PageID #: 2836. The court found Group's "alibi defense was addressed by the [Ohio] Supreme Court on direct appeal, and that Court concluded that such defense did not present an exceptional case to outweigh the evidence of guilt. … Thus, even assuming that trial counsel's preparation of the alibi witnesses for trial was somehow lacking, Group cannot demonstrate prejudice." *Id.* The Ohio Supreme Court declined to accept jurisdiction over Scott's post-conviction appeal. Doc #: 21-10, PageID #: 3090.

An Ohio post-conviction court may assess an affidavit at face value to determine if it supplies a sufficient level of cogency or credibility to support the petitioner's claim. *Calhoun,* 714 N.E.2d at 911-12. But deference to that specific assessment is not warranted here, because the issue of procedural default is a

federal question that is reviewed *de novo*. "'[T]he adequacy of state procedural bars to the assertion of federal questions,' [the Supreme Court has recognized] is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.'" *Lee v. Kenma*, 534 U.S. 362, 375 (2002) (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)). Despite the state appellate court's "assessment" of cogency as to Ruth Group's affidavit, this Court should find that a reasonable jurist—applying *de novo* review to the issue of procedural default—could debate the adequacy of this procedural bar. *See Slack*, 529 U.S. at 484.

ii. Procedural bar inadequate to preclude habeas review.

This Court reviews the procedural ruling of the Ohio Court of Appeals, the last state court to review Group's claim. *See Ylst*, 501 U.S. at 803-05. The state's procedural bar, *res judicata*, is inadequate to preclude habeas review. *See Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986) (Court's four part test to analyze default includes review of whether purportedly defaulted claim was "adequate and independent"); *see Post*, 621 F.3d at 423 (Ohio court's application of *res judicata* to habeas claim inadequate to bar merit review); *White*, 431 F.3d at 527 (same); *Hill*, 400 F.3d at 314 (same); *Greer*, 264 F.3d at 675 (same).

The Ohio Court of Appeals reasoned that the trial court had discounted Group's supporting evidence based on a lack of cogency, which is permitted under *Calhoun*. But that conclusion is clearly rebutted by the record. When the trial

court addressed Group's claim, it did not find that his supporting evidence suffered from a lack of cogency. Rather, the trial court found that Group presented no evidence beyond the direct appeal record. The trial court found "these issues are not supported by evidence de hors the record." Doc. #:21-8, PageID #: 2479.

Contrary to the state appellate court's finding, the trial court's opinion is bereft of any discussion as to the cogency of Group's proffered affidavits. *See id.* at PageID #: 2457-92. The only affidavit even mentioned in the trial court's entry is the one executed by attorney Annette Powers, who had no personal information about trial counsel's witness preparations. *See id.* at PageID #: 2475. The Ohio Court of Appeals' *res judicata* finding deserves no deference because it erroneously found the trial court made a credibility or cogency assessment under *Calhoun* when none was made.

Group's affidavits were also credible. He testified in his own defense. But trial counsel failed to address Group's guilty plea to a prior conviction for conspiracy to commit robbery during his testimony. Consequently, the prosecutor exploited trial counsel's baffling omission when he cross-examined Group. *See* Doc. #: 22-6, PageID # : 6931, 6949-51. No professionally reasonable attorney would hang his or her client out to dry like that as a matter of strategy or trial tactics. Given the importance of Group's credibility relative to his own alibi defense, it is clear that trial counsel did not adequately prepare Group to testify. The trial record thus

corroborated Group's supporting affidavits. Reasonable jurists could debate the district court's procedural ruling on this claim was correct. *See Slack*, 529 U.S. at 484.

iii. Ineffective alibi defense.

Group is also entitled to a COA because this claim is "valid". *See id.* In pursuing an alibi defense based on a quantity of witnesses, trial counsel overlooked the need to present a quality alibi defense. Trial counsel's shotgun approach to the alibi witnesses resulted in an inconsistent alibi defense that was exploited by the prosecutor in closing argument to Group's prejudice.

Group presents a valid claim as to trial counsel's deficient performance. *See Slack*, 529 U.S. at 484; *Strickland*, 466 U.S. at 688. In view of the importance of Lozier's identification testimony, the inconsistencies in her identification of the assailant, and the head trauma that she sustained, evidence that Group was elsewhere on the morning of the Downtown Bar crimes was crucial to create reasonable doubt of guilt. Group filed a pretrial notice of alibi under Ohio Criminal Rule 12.1 asserting that he was at his mother's house that morning.

Group testified that on the Saturday morning of the shooting, he took his adopted son, William Enyeart, to work at about 7:00 a.m. Doc. #: 22-6, PageID #: 6898. He wore the same clothes from the night before: jeans, white tennis shoes, and a black corduroy shirt. *Id.* at PageID #: 6901. After taking William to work,

Group returned home for a while before going to his mother's house, as he did each Saturday, to get his clothes washed. *Id.* at PageID #: 6899-900.

He went to his mother's house between 9:00 and 9:30. *Id.* at PageID #: 6903. He said that Ruth was there along with his grandmother, Naomi Socie, his sister, Danielle Group, a family friend, Poncho Morales, and his young nephew Nicky. *Id.* at PageID #: 6903. He did not know when he left Ruth's house. *Id.* at PageID #: 6909. After leaving Ruth's house, he went to an Amoco gas station, the Diamond Tavern, and the VFW club in Struthers, Ohio. *Id.* at PageID #: 6909-15. He denied going to the Downtown Bar that morning. *Id.* at PageID #: 6931.

Naomi Socie, Group's maternal grandmother, testified. She lived with Ruth. Naomi said she went downstairs to take her medication about 9:40 that Saturday morning. *Id.* at PageID #: 7088. At that time, Group was drinking coffee in the kitchen. *Id.* In addition to Scott, Naomi said Ruth, Danielle, and Morales were present. *Id.* at PageID #: 7089. Naomi said Group left the house at 11:35 or 11:40. *Id.* at PageID #: 7091.

William Enyeart lived with Group. He testified that Group took him to work that morning and they left at about 6:00. *Id.* at PageID #: 7139. He also said Group wore the same clothes from the preceding evening, except that Group's shirt was red rather than black. *Id.* at PageID #: 7138-39. Enyeart did not see Group again that day after Group drove him to work. *Id.* at Page ID #: 7143.

Brenda Enyeart, Group's adopted daughter, also lived with Group and her brother, William. Brenda said that Scott does not wear coats and he wears shirts with the buttons undone. *Id.* at PageID #: 7184. On that Saturday morning, Group woke up Brenda and asked her if she wanted to go with him to Ruth's to wash clothes but Brenda declined the offer. *Id.* at PageID #: 7186-87.

Danielle Group lived with Ruth. Group's sister, Denise Molina, gave birth to Danielle. Ruth adopted Danielle, and while she was actually Group's niece, Danielle referred to him as her brother. *See* Doc. #: 22-7, PageID #: 8048. Danielle said Group was in Ruth's kitchen between 8:30 and 9:00. Doc. #: 22-6, PageID #: 7193. Danielle said she and Morales left to go to the store at 11:30. *Id.* at PageID #: 7204-05. Group was still at Ruth's when Danielle left at 11:30. *Id.* at PageID #: 7194.

Poncho Morales testified that he went to Ruth's house to cook spaghetti sauce that morning. *Id.* at PageID #: 7254. He arrived around 9:00, and Group was there drinking coffee. *Id.* at PageID #: 7255. Morales said he and Danielle left to go shopping at about 9:45. When he returned from shopping, Scott and Naomi were sitting together in the kitchen. *Id.* at PageID #: 7266-67. Morales testified he left Ruth's after 11:00 and Scott was still there. *Id.* at PageID #: 7258. Morales said that Group, Danielle, Ruth, and Naomi, were present in the house that morning

along with Terri, Scott's sister, Billy, Brenda, Nickie Melena [Molina], and Devon Group. *Id.* at PageID #: 7265.

Terri Banyots, Group's sister, testified that she called Ruth's house at 11:10 and spoke to Danielle and then Ruth. *Id.* at PageID #: 7278. She called back at 11:30 and spoke to Ruth. *Id.* at PageID #: 7279. During that call, Terri overheard Group's voice because he spoke while standing next to Ruth. *Id.* at PageID #: 7279. Group was leaving Ruth's house at that time. *Id.*

Ruth Group testified that Scott, Naomi, Danielle, Morales, Nicholas [Nickie], and Devon were in her house that Saturday morning. *Id.* at PageID #: 7411-12. She also said Terri called her at 11:55, and Terri arrived around noon. *Id.* at PageID #: 7412. Group arrived between 9:00 and 9:30, and Naomi came downstairs at 9:40. *Id.* at PageID #: 7413. Morales arrived between 9:00 and 9:40, although Ruth said that Morales was there before Naomi came downstairs. *Id.* at PageID #: 7414, 7419-20.

Ruth further testified that Group left her house between 11:30 and 11:40. *Id.* at PageID #: 7419-20. Five minutes later, Ruth got a call from Joe Blumetti, Group's employer at Ohio Wine, who relayed information about a shooting involving an Ohio Wine driver. *Id.* at PageID #: 7424, 7486. After getting Blumetti's call, Ruth said she called Terri Banyots. *Id.* at PageID #: 7425. Unlike Terri's testimony, Ruth did not recall getting a call from Terri around 11:10.

iv. Deficient performance.

Trial counsel performed deficiently in handling Group's alibi defense. Trial counsel was obligated to use their professional skills and judgment in presenting his alibi defense. *See Strickland*, 46 U.S. at 688. Given Lozier's identification of Group, it was essential to make his alibi defense credible. Thus, trial counsel needed to be aware of these types of glaring inconsistencies among the witness's statements, and then make reasoned, professional decisions as to which witnesses to put on the stand and which ones to omit. Trial counsel was over-enamored with presenting a quantity of witnesses without regard for the quality of their testimonies.

Trial counsel had no reason to offer the testimonies of William and Brenda Enyeart. They added nothing to Group's alibi. William did not know where Group was during the relevant time frame because he was at work. Likewise, Brenda could not vouch for Group's whereabouts because she stayed home when Group left to go to Ruth's house.

Trial counsel should have foreseen the detrimental effect of focusing on a quantity of alibi witnesses without regard for the quality of the alibi defense. The jury was instructed to assess witness credibility based on the quality of the witness's testimony: "It is the quality of the evidence that must be weighed. Quality and quantity may or may not be identical with quantity or the greater

number of the witnesses." *Id.* at PageID #: 7719-20. And, as argued by the prosecutor, the difference between quality and quantity was painfully obvious here. *Id.* at PageID #: 7614-16.

Trial counsel could only make the necessary professional judgments about which witnesses to present or omit through adequate pre-trial interviews of the witnesses. Group's post-conviction affidavit demonstrates trial counsel failure to prepare for an adequate defense: "During the pretrial portions of my case, the defense lawyers failed to prepare me to testify on the witness stand." Doc. #: 21-6, PageID #: 2243.

He further averred: "During the preparation and trial of my case, one of my lawyers, Andrew Love, kept calling me Fred, and he called other people by the wrong name as well. The trial record reflects his lack of preparedness to vigorously defend my case." *Id.* at PageID #: 2244. Group also averred that one of his lawyers, Jerry McHenry, "repeated[ly] dosed off. Cynthia Yost, another one of [Group's] lawyers, joked that we [they] had to keep prodding McHenry to wake him up." *Id.* at PageID #: 2243.

Trial counsel had a professionally reasonable alternative to presenting Group's alibi defense with multiple, inconsistent witnesses. In addition to Group's testimony, counsel could have presented materially consistent alibi testimony from

just Ruth and Terri. They both put Group in Ruth's house at 11:30, about a half hour after Sandra Lozier's 911-call was made at 11:05.

v. Prejudice.

Reasonable jurists would debate whether Groups prejudiced by William's culpability phase testimony. Lisa Modarelli testified that she spoke to Group after his hands were swabbed by the police for gunshot residue. Modarelli said Group had told her that he had been target shooting with William before the police swabbed his hands for gunshot residue. Doc. #: 22-5, PageID #: 6319-21. No residue was found. Nevertheless, when cross-examined, William said he did not target shoot with Group shortly before January 18, 1997. Doc. #: 22-6, PageID #: 7136. Additionally, William said that Group wore a red shirt on the morning the Downtown Bar was robbed when other witnesses testified that Group's shirt was black. *Id.* at PageID #: 7138-39.

Reasonable jurists would further debate if Group was prejudiced because his inconsistent alibi witnesses provided substantial fodder for the prosecutor's closing argument. That argument eviscerated the credibility of Group's alibi witnesses:

> What is the truth and what is the lie among a whole bunch of people? It gets real hard to remember. What happens is you can't remember all the details, truth versus the lie. That's exactly what happened here. You hear all these people testify and they swear they were all at the house that same morning with him, but you wouldn't know it by what they said because they couldn't get all the details right. Mr. Morales ... says everybody was there that morning including his [Scott's] stepchildren, Billy and Brenda. Billy told you he was at work. Brenda said she was home sleeping. The defendant said, "Billy woke me up at 7:30 to take him to

work." ... Brenda said he asked her to go to his mother's at 7:00. The defendant said he only took white clothes to his mother's. His mother said he took three loads, white clothes, towels and dark clothes. Danielle said ... "My brother washed his own clothes." The defendant and his mother both said that his mother washed his clothes. The defendant said he left his mother's house after all of his clothes were washed. His mother said he left after the first load. Danielle said she and Mr. Morales went to the store together at 11:30. ... Mr. Morales says, "We went to the store at quarter until ten." Naomi Socie, the defendant's grandmother, said she saw the defendant outside fixing the van from the kitchen window .... Both the defendant's mother and Mr. Morales said "You can't see the van from that window." The defendant's mother mentioned the muscle contest between the defendant and Mr. Morales. Nobody, not even the defendant, mentioned that one. So what is the truth and what is [sic] the lies?

Doc. #: 22-7, PageID #: 7614-16.

Group was prejudiced because trial counsel's deficient witness preparation undermined his chance to convince the jury that Sandra Lozier misidentified him because Group was elsewhere when the Downtown Bar was robbed. That opportunity to present an alibi defense was squandered by counsel's errors and omissions. Trial counsel violated their "overarching duty to advocate [Group's] cause...." *See Strickland*, 466 U.S. at 688. Reasonable jurists would debate whether Group's underlying *Strickland* claim is valid under the standard in *Slack*.

C. A COA should issue for Group's two post-judgment motions.

This request for a COA involves Scott Group's post-judgment motions in support of his DNA-based, ineffective trial counsel claims. A COA should issue here because reasonable jurists could debate the correctness of the district court's

procedural ruling denying Group's Rule 59 motion and his motion to amend the petition. *See Slack*, 529 U.S. at 484.

i. Proceedings in district court.

After the district court denied habeas relief, but before the window for filing the notice of appeal had expired, Group moved to alter or amend the judgment. Doc. #: 56. In support of Group's motion, he offered a report from Christine Funk, who is an expert on attorney performance in criminal cases involving the prosecution's use of forensic DNA evidence. Doc. #: 57-2. While his Rule 59 motion was pending, Group also moved to amend his habeas petition with a Ninth Ground for Relief. In his motion to amend and the proffered Ninth Ground, Group relied on a declaration from a DNA scientist, Dr. Dan Krane, Ph. D., of Wright State University in Fairborn, Ohio. Doc. #: 66-1; Doc. #: 57-1. Group also supplemented his Civil Rule 59 motion with Dr. Krane's declaration. Doc. #: 66-1. He asserted that Funk's report and Krane's declaration constituted important new evidence supporting his DNA-based *Strickland* claims.

The district court denied both motions. Doc. #: 67. In analyzing Group's Rule 59 motion, the district court found that Funk's report amounted to nothing more than "notarized legal argument." *Id.*, at PageID #: 8968. It therefore found that Funk's report was not even evidence, much less newly found evidence. *Id.* It further found that Group was dilatory in offering Dr. Krane's declaration to the

court. *Id.* at PageID #: 8969. The district also reasoned that Group could not establish prejudice from this new evidence "in light of the 'overwhelmingly persuasive' evidence of Group's guilt …." *Id.* (Citation omitted).

As to Group's motion to amend the petition, the district court reasoned that Group's proffered, unexhausted, claim "is too little too late." *Id.* at PageID #: 8970. The district court found that this claim was untimely filed, procedurally defaulted, and meritless. *Id.* at PageID #: 8970-72. The district explained that Group's evidence failed to create a reasonable probability of a different outcome at the trial because Sandra Lozier identified Group. *Id.* at PageID #: 8972.

ii. Considerations for appealing post-judgment motions.

In a federal post-conviction case under 28 U.S.C. §2255, this Court issued a COA to the prisoner for review of whether the district court properly denied her post-judgment motion to amend. *Clark v. United States*, 764 F.3d 653, 655 (6th Cir. 2014). In light of *Clark*, Group seeks a COA to appeal the denial of his motion to amend and his Civil Rule 59 motions. *See id.*; *Slack*, 529 U.S. at 484 (discussing standard for obtaining COA on district court's decision "on procedural grounds").

In AEDPA cases, an attempt to amend the petition after an adverse decision is not deemed a successive habeas action if the petitioner's post-judgment motion is filed while the district court still retains jurisdiction; that is, before the petitioner's time to file his notice of appeal has expired. *Moreland*, 813 F.3d at

763-64 (Citing *Clark*, 764 F.3d 658-60). Accordingly, the district court had jurisdiction to hear Group's post-judgment motions, because he filed his Rule 59 motion before his thirty day window to appeal had expired, following the district court's adverse decision on his petition. Doc. #: 55; Doc. #: 56. While the district court retained jurisdiction, moreover, Group moved to amend his petition with his proffered Ninth Ground. Doc. #: 57; Doc. #: 57-1. He also filed Dr. Krane's declaration in the district court while it retained jurisdiction over the case. Doc. #: 66. Group's motion practice was procedurally sound under *Moreland* and *Clark.*

"The basics for obtaining relief under either theory are straight forward. Under Rule 59, a court may alter the judgment based on [newly discovered evidence or a need to prevent a manifest injustice]." *Leisure Caviar, LLC v. U.S. Fish and Wildlife Service*, 616 F.3d 612, 615 (6th Cir. 2010) (Citation omitted). "Under Rule 15, a court may grant permission to amend a complaint when justice so requires and in the normal course will freely do so." *Id.* (Citations and internal quotation marks omitted).

"But when a Rule 15 motion comes *after* a judgment against the plaintiff, that is a different story." *Id.* (Emphasis in original). After the judgment, the district court must account for the "competing interest of protecting the finality of judgments and the expeditious termination of litigation." *Id.* at 615-16 (Citation omitted). A party seeking to amend after an adverse judgment "must shoulder a

heavier burden. Instead of meeting the modest requirements of Rule 15, the claimant must meet the requirements for opening a case established by [Rule 59]." *Id.* at 616 (Citations omitted); *see Moreland*, 813 F.3d at 327 (Citations omitted); *Clark*, 764 F.3d at 661(Citations omitted).

On appeal, this Court reviews a district court's decision to deny a post-judgment motion for an abuse of discretion. *Id.* Group is not yet appealing the district court's denial of his post-judgment motions because he requests a COA in order to appeal their denial. Under the *Slack* standard, this Court must decide if reasonable jurists could have debated the district court's procedural ruling denying Group's two motions. *See* 529 U.S. at 484.

iii. COA should issue for Group's motion to amend.

This Court reasoned that a civil plaintiff seeking to amend his complaint after an adverse judgment must meet the tougher test under Rule 59, rather than the permissive standard for Rule 15, where leave to amend is "freely" given. *See id.*; *Leisure Caviar*, 616 F.3d at 615-16. Leave to amend is not freely given in an AEDPA case. Due to AEDPA's one-year statute of limitations, the habeas petitioner may not amend, at any time in the case, unless his new and existing claims share the same legal theory and a common core set of operative facts. *Mayle v. Felix*, 545 U.S. 644, 650, 656-7, 659 (2005).

As the habeas petitioner already "shoulder[s] a heavier burden" under AEDPA than does an ordinary civil plaintiff, *see Leisure Caviar*, 616 F.3d at 616, this Court should analyze the district court's denial of Group's motion to amend under the test set out in *Mayle*. In other words, this Court should review the district court's denial of Group's motion to amend to see if reasonable minds could debate whether Group's motion to amend met the test in *Mayle*. *See Slack*, 529 U.S. at 484. Applying the *Mayle* test, a COA should issue on the district court's procedural ruling denying Group's motion to amend his petition.

Group's new habeas claim (Ninth Ground) and his existing claims (Third and Eighth Grounds) all share the same legal theory; a DNA-based, *Strickland* claim. This is evident from the pleadings and evidence. Doc. #: 16, PageID #: 125; Doc. #: 45-1, PageID #: 8624; Doc. #: 56-1, PageID #: 8864-65; Doc. #: 66; Doc. #: 66-1.

All three claims share a common core set of facts. Doc. #: 16, PageID #: 135, 136, 137-38, 138 (habeas petition); Doc. #: 45-1, PageID #: 8641-42, 8644-49, 8651-52 92015 (amendment to petition); Doc. #: 56-1, PageID#: 8853-55, 8860-64, 8856-59, 8859-60, 8855-56 (Ninth Ground); Doc. #: 66-1, PageID #: 8962-64 (Dr. Krane's declaration). On this record, it is evident that Scott Group's new claims share the same legal theory and "a common core of operative facts" to

unite them with his Third and Eighth Grounds for Relief. *See Mayle*, 545 U.S. at 659.

As Group satisfies the criteria set out in *Mayle* for leave to amend his habeas petition, reasonable jurists could debate whether the district court's procedural ruling was correct. *Slack*, 529 U.S. at 484. If this Court declines to review the motion to amend under the *Mayle* test, however, then Group can still meet the criteria to amend with his Ninth Ground under the Rule 59 analysis provided below. *See Clark*, 764 F.3d at 661(Citations omitted).

iv. COA should issue for Rule 59 motion.

The district court denied the Rule 59 motion after finding that Funk's report did not constitute new evidence, and it was not even evidence to support a Rule 59 motion. It further found that Group was dilatory in presenting this evidence. And the district court reasoned that the evidence did not matter due to compelling evidence of Group's culpability. Reasonable jurists could debate the correctness of those findings. *See Slack*, 529 U.S. at 484.

a. Funk report differs in kind from Powers' affidavit.

The district found that "Group presented a similar affidavit to the state courts during post-conviction review." Doc. #: 67, PageID #: 8968. That finding is not just debatable, it is wrong.

Post-conviction counsel submitted an attorney affidavit from Annette Powers. Doc. #: 21-4, PageID #: 1724. She averred, "Mr. Group's counsel provided ineffective assistance of counsel during voir dire and at the trial and penalty phases of Group's capital trial. As a result of counsel's ineffectiveness, Mr. Group was prejudiced." *Id.* at PageID #:1730. But Funk's report and Powers' affidavit are not remotely comparable for the purpose of supporting Group's DNA-based *Strickland* claim.

Powers' affidavit is generic. It had to be because Powers was not qualified to deliver the analysis provided in Funk's report. Powers' affidavit is silent as to whether Group's trial counsel performed within a professionally reasonable standard of care in preparing their "defense" against the state's forensic DNA evidence. Her affidavit does not explain why trial counsel needed to engage with the appointed defense DNA expert, Michael Baird from Lifecodes, before trial, or why trial counsel's failure to do so undercut Group's defense. Her affidavit says nothing about trial counsel's failure to challenge the state's exaggerated assertion about the statistical evidence, or the state's false assertion that the genetic material collected from Group's shoe definitively identified to Robert Lozier as the source.

Nor does Powers' affidavit discuss the errors committed by Group's counsel during the cross-examination of the State's DNA expert, Jennifer Reynolds from Cellmark. The district found that Group had failed to identify specific errors

committed by Group's trial counsel when she confronted Reynolds. Doc. #: 54, PageID #: 8802. Funk's report fills in that gap. Doc. #: 56-1, Page ID#: 8850-65. Funk's report addresses all of the important points that are sorely lacking in Powers' generic affidavit. *See id.* at PageID#: 8864-65. Importantly, Powers' affidavit is bereft of any fact-specific analysis. *See generally*, Doc. #: 21-4, PageID#: 1724-48. She wrote at length about legal standards and the process of capital representation without ever saying anything specific or important to the allegations of ineffective counsel in Group's case. *See id.*

Unlike Funk, who is a "world-renowned" expert on forensic DNA evidence, *see* Doc. 59, PageID#: 8912, Powers claimed no such specialized education, knowledge, or training relevant to defending against forensic DNA evidence. Doc. #: 21-4, PageID#: 1724-26. Powers noted that she had attended one professional seminar on "Forensic Science for Lawyers" hosted by the Ohio Bureau of Criminal Identification and Investigation [BCI]. *Id.* at PageID #: 1726.

b. Funk's report is valid evidence for Rule 59 motion.

Next, the district court found that Funk's report was not evidence because it was a "notarized legal argument." Doc. #: 67, PageID #:8968. It is certainly debatable among reasonable jurists whether Funk's report constituted real evidence to support Group's *Strickland* claim. Federal courts have the discretion to consider the opinions of attorney experts. *See Hovey v. Ayers*, 458 F.3d 892, 911 (9th Cir.

2006). In the habeas context, such evidence has been found admissible where it enlightens the district court as to the standard of practice for trial counsel in a capital case. *Karis v. Calderon*, 283 F.3d 1117, 1133 (9th Cir. 2002). Conversely, such evidence has been deemed unhelpful where it merely addresses "the legal analysis required by *Strickland*." *Bonin v. Calderon*, 59 F.3d 815, 838 (9th Cir. 1995). More generally, such evidence has been deemed admissible in litigation involving specialized or technical issues. *See C.P. Interests, Inc. v. California Pools, Inc.*, 238 F.3d 690 (5th Cir. 2001); *Huddleston v. MacLean*, 640 F.2d 534 (5th Cir. 1981), *modified on other grounds,* 459 U.S. 375 (1983); *CMF Communications, LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229, (E.D. Cal. 2005). In cases where the judge sits as the trier of fact, as for this issue, there is more room to admit such evidence. *See id.* at 1233-34; *Martin v. Ind. Mich. Power Co.*, 292 F. Supp. 2d 947, 959 (W.D. Mich. 2002).

Funk's report addresses a very specialized and technical area—attorney performance for defense counsel in the area of forensic DNA evidence. Her report helps a habeas court resolve the issue because it identifies specific errors beyond the record that render trial counsel's performance ineffective in view of the prevailing professional norms. *See Wiggins*, 539 U.S. at 523. Unlike in *Bonin*, Funk's report does not present a mere legal analysis of record facts applied to the *Strickland* test. Her report was helpful to the district court's resolution of Group's

DNA-based *Strickland* claims, to the court's understanding of the applicable professional prevailing norms in place at the time of Group's trial, and there is no risk of confusing a jury in this case because the matter was before the district court.

c. Group was not dilatory.

The district court also found that Group failed to demonstrate that either Funk's report or Dr. Krane's declaration were unavailable before the adverse adjudication of the petition. Doc. #: 67, PageID #: 8969.

Group's Eight Ground was added to his petition in September 2015. It was that claim which prompted habeas counsel to reach out to Funk. Group's counsel secured Funk's expert services while Group's first motion to amend the petition with the Eighth Ground for Relief was pending before the district court. His Eight Ground for Relief alleged that trial counsel was ineffective by: (1) failing to engage with their DNA expert, Dr. Baird in a professionally reasonable manner; (2) falsely promising the jury a defense expert in the opening statement counsels' due to trail counsel's lack of preparation in dealing with Dr. Baird, and: (3) trial counsel' failure to investigate what value Michael Baird could add to the defense against the State's DNA evidence.

This is the type of claim where the opinion of an attorney expert is important. An expert such as Funk is in the best position to discuss trial counsels' failings in light of the prevailing professional norms for defending against DNA

evidence. *See Wiggins*, 539 U.S. at 523; *Karis*, 283 F.3d at 1133. Notably, Group's state post-conviction counsel failed to raise this claim and failed to secure the services of an expert such as Funk, relying instead on the generic affidavit from Powers. *See Trevino*, __ U.S. at __, 133 S. Ct. at 1918. Group's habeas counsel were put in the position of litigating the case that was presented to the state courts while simultaneously trying to salvage important but unexhausted Sixth Amendment claims.

Funk's report also shows that she conducted an extensive, and thus time-consuming, review of the DNA materials from trial, off-record correspondence related to Dr. Baird's potential assistance, Dr. Reynolds's testimony, the arguments of counsel, and even the *voir dire* transcript. Doc. #: 56-1, PageID #: 8850-65. Funk's thorough review of those materials accounts for Group's inability to file her report before the district court denied habeas relief on January 20, 2016. Group's counsel obtained Funk's report on January 30, 2016.

As for Dr. Krane's declaration, Group contracted with his lab early in the proceedings. Group moved *ex parte* to issue a subpoena to the state's DNA lab, Cellmark to obtain materials for Dr. Krane's review. *See* Doc. #: 33. Although disagreeing with the need to move for the subpoena *ex parte*, the district authorized Group "to issue the subpoena on Cellmark Forensics ...." *Id.* Notwithstanding that subpoena, there was not enough genetic material from Cellmark to permit Dr.

Krane's lab to retest the state's DNA evidence. After receiving Funk's report, however, it became clear that Dr. Krane's opinion was needed to scientifically validate her points. And Group's Civil Rule 59 motion was also timely filed within twenty-eight days of this Court's judgment. Fed. R. Civ. P. 59(b). Group was not dilatory under these circumstances.

d. State's proof not overwhelming.

The district court found that Group's new evidence would not matter due to "overwhelmingly persuasive evidence of Group's guilt." Doc. #: 67, PageID #: 8969 (Citation and internal quotation marks omitted). As discussed in section III.A.iii, above, there was room for a juror to find reasonable doubt of Group's guilt because Lozier's identification of him was contestable. Reasonable jurors could at least debate this basis for the district court's procedural ruling. *See Slack*, 529 U.S. at 484.

D. COA should issue on denial of discovery under *Trevino*.

Group moved for discovery to develop his procedural default arguments based on ineffective post-conviction counsel under *Martinez* and *Trevino*. Doc. #: 40, PageID #: 8557. Although the district court's ability to take new evidence is restricted by *Cullen v. Pinholster*, 563 U.S. 170, 182-84 (2011), Group's request for discovery was not controlled by *Pinholster*. The restriction in *Pinholster* applies only to claims receiving merits adjudications in the state courts. *See id.* at

188. Review on habeas is *de novo* if the state court did not adjudicate the petitioner's claim. *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (citing *Rompilla*, 545 U.S. at 390); *Toliver v. Pollard*, 688 F.3d 853, 859 (7th Cir. 2012) (same).

The rule in *Pinholster* was inapposite to Group's request to take discovery for this procedural issue. The district was thus bound to apply a straight application of the "good cause" discovery standard in *Bracy v. Gramley*, 520 U.S. 899 (1997), to Group's federal, procedural discovery requests. Good cause exists "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate [that he is entitled] that he is …entitled to relief …." *Id.* at 909-10 (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). Good cause to take discovery may exist even where the petitioner's claim is "only a theory" when discovery is requested. *Id.* at 908.

In light of *Bracy*, reasonable jurists would debate the correctness of the district court's procedural ruling denying Group's discovery motion. Group sought to depose post-conviction counsel. Doc. #: 40, PageID #: 8566, 8569, 8572, 8573. Post-conviction counsel failed to develop Group's ineffective trial counsel claim with cogent evidence beyond the cold record as required by Ohio law. (See discussion of defaulted First Ground, above). An example is post-conviction counsel's use of Power's generic affidavit to support specific claims. As discussed above, it was bereft of any case-specific analysis and thus wholly insufficient to

support a petition for post-conviction relief. And recall that post-conviction counsel cited to Sandra Lozier's medical records but did not offer them in support of Group's ineffective counsel claim based on trial counsel's inadequate confrontation of Lozier. (See discussion of defaulted First Ground, above). Accordingly, a reasonable jurist could debate the district court's denial of discovery as to Group's *Trevino* argument to lift state procedural bars.

IV. Merit denials: A COA should issue on Grounds Three and Eight.

Grounds Three and Eight allege DNA-based *Strickland* claims. In Ground Three, Group asserted trial counsel's confrontation of the state's DNA expert, Dr. Jennifer Reynolds, was professionally unreasonable. Doc. #: 16, PageID #: 125. He also asserted that trial counsel were ineffective for not employing a DNA expert of their own. *Id.* A key issue for the Third Ground was whether the defense DNA expert, Dr. Michael Baird, had left trial counsel high and dry on the eve of the trial, or whether trial counsel's lack of professionally reasonable preparation caused Dr. Baird's unavailability. *See id.* at PageID #: 129-30. The district court denied relief on the merits after finding that Group's claims in the Third Ground were presented, and rejected, on direct review in the Ohio Supreme Court. Doc. #: 54, PageID #: 8794, 8799, 8801.

Before the district court's adverse judgment, it permitted Group to amend his petition with the Eighth Ground. That ground alleged trial counsel performed

deficiently to Group's prejudice by promising the jury it would hear game-changing testimony from a defense expert, and then reneging on the promise without no explanation to the jury. Doc. #: 45-1, PageID #: 8624.

The district court further found that the state had "waived" the procedural default argument as to Group's Eighth Ground. *Id.* at PageID #: 8803. However, the district court applied AEDPA deference to the alternative merits review provided by the Ohio Court of Appeals on post-conviction review, and the district court denied Group's claim under AEDPA's deferential limitation on granting habeas relief. *Id.* at PageID #: 8803-04. In light of new evidence, reasonable jurists would debate the district court's decision.

A. Trial proceedings relevant to DNA-based, *Strickland* claims.

On the afternoon of the Downtown Bar crimes, Group went, voluntarily, to the police station after he was told by his mother the police were looking for him. Doc. #: 22-6, PageID #: 6922-26. While there, Detective Daryl Martin saw what appeared to him to be a small blood spot on Group's gym shoe. Officer Ciavarella then took Group's gym shoes. Doc. #: 22-5, PageID #: 6641. The police submitted the shoes to the Ohio Bureau of Criminal Investigation and Identification [BCI] for forensic testing. *Id.* at PageID #: 6159. BCI analyst, Dale Laux, tested three spots on top of the left shoe and determined that two of them were human blood. *Id.* at PageID #: 6554-55. The test of the third spot was inconclusive. *Id.* at PageID 6557.

Laux packaged the relevant items—including blood samples drawn from Group and the Loziers—and sent them to Cellmark Forensics for DNA analysis. *Id.* at PageID #: 6559-60.

At trial, the State presented testimony from a Cellmark scientist, Jennifer Reynolds. Dr. Reynolds did not do the lab work or co-sign the report.[2] *Id.* at PageID #: 6787-88. Rather, she did a "full technical review" of the work done by other analysts. *Id.* at PageID #: 6788. RFLP and PCR DNA analysis was done by the lab. *Id.* at PageID #: 6790. She noted that the PCR "technique is a very sensitive technique and extra precautions are necessary ...." *Id.* at PageID #: 6791. She explained the DNA database that was used "to help us establish how common or how rare it is to see certain genetic types in a person." *Id.* at PageID #: 6792-93.

When explaining the tests done and the genetic profiles obtained for Group and the Loziers, Dr. Reynolds noted an asterisk correlating to "very faint results, and sometimes these faint results are so faint we don't know where they're from. We don't know whether it's DNA from another person contributing and just there ever so slightly or whether it's a technical reason, and sometimes these tests, there are technical reasons why you might get very, very faint results." *Id.* at PageID #: 6802-03. She explained: "They're not interpretable. ... So we put them there to be

[2] Group's direct review became final after the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). *See Whorton v. Bockting*, 549 U.S. 406 (2007).

complete, and in our report it will say there were faint results present that might be due to DNA from another person or to technical artifacts. We can't determine which. It's too faint. But the important point is that it has no impact on the conclusions that we're drawing." *Id.* at PageID #: 6803.

Dr. Reynolds's lab did "additional testing with the two swabs [from Group's gym shoe] and the sample from Robert Lozier." *Id.* at PageID #: 6803. She said Group and Sandra Lozier were excluded as the source of DNA on those swabs. *Id.* at PageID #: 6804. Robert Lozier's DNA profile was not excluded from those two swabs. *Id.* at PageID #: 6804-05. As Robert Lozier was Caucasian, his genetic profile would appear in the population at a frequency of one time per 220,000 Caucasians. *Id.* at PageID #: 6805.

i. Lifecodes appointed as defense expert.

Group's first set of counsel, Gary Van Brocklin and John Schlutz, moved for a DNA expert, and the trial court appointed Lifecodes. Doc. 21-1, PageID #: 217. The state moved for a hearing on that appointment "to inquire of defense counsel, on the record, whether or not they are aware that the corporation selected by them [for DNA analysis] is the owner or parent corporation of Cellmark [the state's lab] …." *Id.* at PageID #: 220; Doc. 21-1, PageID #: 541. At the hearing, Van Brocklin explained that it was his belief the companies were "separate", the work to be done by Lifecodes would not be problematic, and Lifecodes was one of only a few

viable, and affordable, options for forensic DNA work. Doc. 22-1, PageID# 3368-70. Subsequently, the trial court authorized funds to pay Lifecodes as the defense expert. Doc. #:21-1, PageID #: 222.

ii. Trial counsel promised a defense expert to the jury.

The relationship between Group and his first set of counsel soured, and the trial court appointed the Ohio Public Defender to represent Group. Doc. #: 21-1, PageID #: 223. Assistant State Public Defenders Andrew Love, Jerry McHenry, and Cynthia Yost appeared on Group's behalf. At *voir dire*, Love admitted: "DNA is going to play a role in this case as well. And I would be—I wouldn't be truthful if I told you that I knew all about DNA. I could spell it. I could say it. But I'll be darned if I know how to pull it all together." Doc. #: 22-3, PageID #: 4955.

In his opening statement on March 29, 1999, Love promised the jury it would hear game-changing testimony from a defense expert. Love said "the defense, Scott Group, has a DNA expert as well." Doc. #: 22-4, PageID #: 5973. He also said the defense expert had identified "artifacts … [which are] in all likelihood contaminates …." *Id.* Love claimed "these artifacts are contaminates …that render any DNA testing moot." *Id.* at PageID #: 5974. "It's what the evidence will show." *Id.*

Before Reynolds testified, however, Love told the court that their expert, Dr. Baird, would not testify.[3] Love said that Dr. Baird initially had identified the artifacts caused by contamination, but Dr. Baird had subsequently become "almost impossible to reach ...." Doc. #: 22-5, PageID #: 6779. Love complained that Dr. Baird still had not reviewed Cellmark's "protocol", which Love implied was Dr. Baird's fault. *Id.* Love said that Dr. Baird "was not going to challenge the DNA expert from Cellmark[,]" because "they are both in the same company ... [and] he did not want to challenge a coworker .... Well, that left us in the lurch." *Id.* at PageID #: 6779-80. Love said, "it's not our fault. We had a promise, we had a contract, we had a plane ticket. The guy's not coming." *Id.* at PageID #: 6781. To fill this gap in Group's defense, trial counsel relied on Yost to cross-examine Dr. Reynolds. *See id.*

iii. Cross-examination of Dr. Reynolds.

Rather than hearing from a defense expert—with testimony about artifacts rendering the State's DNA evidence moot—the jury instead considered Yost's cross-examination of Dr. Reynolds. Yost made an attempt to explore with Reynolds the issue of contamination and artifacts but that attempt proved fruitless. Yost asked Reynolds how contamination affected the collection of DNA. But Reynolds said: "Um, I'm actually not familiar with collection techniques. I've

[3] Group complained to the trial court about the lack of a DNA expert, which prompted Love's statements to the court. Doc. #: 22-5, PageID #: 6774-77.

never done it myself, so I—I wouldn't—hesitate to say whether it's prone to it or not prone to it." *Id.* at PageID #: 6814-15. Reynolds simply said "[s]ure" to the question whether "contamination of evidence occurs?" *Id.* at PageID #: 6815.

Yost then asked about contamination versus degradation of DNA, and asked "would it be fairly easy for that to be contaminated either from the crime scene or from the investigator just from looking and handling something?" But Reynolds could not follow the question: "And for this are you talking about—what kind of contamination are you asking me about?" *Id.* at PageID #: 6816. Yost's follow up question about contamination was no clearer to Reynolds: "And again, is it contamination from another human is what you're asking me?" *Id.* at PageID #: 6817.

An additional attempt by Yost to explore the "artifact" issue raised in Love's opening statement went nowhere. Yost asked if Cellmark's report revealed "an artifact or something else that there that should not have been there?" Dr. Reynolds answered: "No, no, it does not. Our conclusions will say the DNA from sample X contains DNA from more than one person. That is a statement of our conclusions. That is certainly not said in this report." *Id.* at PageID #: 6824-26.

B. New evidence changes the picture and law.

The district court denied the Third and Eighth Grounds after applying AEDPA's deferential limitation on granting relief. Reasonable jurist could

disagree, however, whether AEDPA applies to these claims. *See Slack*, 529 U.S. at 484. Group's DNA-based, *Strickland* claims could not be fully adjudicated on the appellate record. *See Morris*, 802 F.2d at 844; *Ishmail*, 423 N.E.2d at 1070; *Perry*, 226 N.E.2d at 105-06, syl. ¶ 7. Group is entitled to a COA on the issue of whether these claims should be afforded *de novo* review because they depended on evidence beyond the appellate record by the "operation and design" of Ohio law. *See Trevino*, __ U.S. at__, 133 S. Ct. at 1921. Reasonable jurists would also debate whether Group's claims are valid. *See Slack*, 529 U.S. at 484.

Group raised these claims on post-conviction review. Doc. #: 21-6, PageID #: 2142-45 (failure to use expert); *id.* at PageID #: 2150-53 (ineffective cross-examination); *id.* at PageID #: 2150-54 (false promise to present defense expert). But his counsel failed to support them with any cogent evidence beyond the record, and so the Ohio Court of Appeals found that they were barred by *res judicata*. Doc. #: 21-9, PageID #: 2828 (failure to use expert); *id.* at PageID #: 2835 (ineffective cross-examination); *id.* at PageID #: 2828 (false promise to present defense expert). Post-conviction counsel therefore performed unreasonably in light of the "operation and design" of Ohio law. *See Trevino*, __ U.S. at__, 133 S. Ct. at 1921.

It is debatable among reasonable jurists whether the district court correctly reviewed these claims through AEDPA's deferential lens and then denied them by

applying such deference. A reasonable jurist could determine that, in light of Ohio law and *Trevino*, Group's DNA-based, *Strickland* claims were defaulted and the ineffective assistance rendered by post-conviction counsel served as cause to excuse the default. A reasonable jurist could decide that Group's claims should be afforded *de novo* review. (See section III.A.i, above, for a fuller discussion of the relevant Ohio law and its relationship to *Trevino*). Group's argument is founded on new evidence developed on habeas review.

C. Group's new evidence.

Group's new evidence changes the picture for these DNA-based, *Strickland* claims to such an extent that they cannot be fully adjudicated on the cold record. *Pinholster*, 563 U.S. at 205 (Breyer, J., concurring). Love told the jury in his opening statement a defense expert would testify about contamination in the DNA evidence. Love put the blame squarely on Dr. Baird for the lack of a defense expert. Contrary to Love's assertions, trial counsel was not blindsided by Dr. Baird's unwillingness to testify.

i. Documentary evidence and Dr. Baird's affidavit.

Love's opening statement was made on March 29, 1999. Two days later, Dr. Baird sent a letter by facsimile to Yost in which he recognized that "Cellmark Diagnostics is a subsidiary of Lifecodes Corporation." Doc. #: 45-1, PageID #:8658. Nevertheless, Dr. Baird assured Yost that he could testify for Group: "I

am available to testify the week of April 12th." *Id.* In that letter, Dr. Baird also wrote that he had "not reviewed the data utilized by Cellmark. ..." *Id.* Dr. Baird also wrote that he had not "reviewed the protocol utilized by Cellmark ...." *Id.* Importantly, Dr. Baird prefaced this letter by stating: "I am providing this correspondence at the request of Kelvin Ford [investigator] to clarify what my testimony might entail if called for the above captioned trial." *Id.* Dr. Baird's availability to testify was made clear to trial counsel in his March 31, 1999 letter. *Id.* at PageID #: 8659. His letter was faxed to trial counsel two days after Love's opening statement and five days before Love offered his "it's not our fault" excuse to the trial court.

Habeas counsel presented the March 31 letter to Dr. Baird in an email and asked him whether he had been willing to testify at the trial. *Id.* at PageID #: 8661. Dr. Baird replied: "In regards to the above captioned case, if requested, someone from Lifecodes would have testified at trial regarding the testing performed and conclusions. The testing performed by Cellmark was prior to Lifecodes acquiring Cellmark." *Id.* Dr. Baird then averred in an affidavit, "I affirm that my response to [habeas counsel] in the February 24, 2015 email is accurate." *Id.*

Additionally, the trial court appointed Lifecodes as the defense expert when Group was represented by his first set of trial counsel, Van Brocklin and Schultz. The order appointing Lifecodes continued after the public defenders were

appointed. Group's public defenders started from square one with Lifecodes as their court-appointed expert. But according to the billing records filed by Love and McHenry—and Yost's activities log—the first contact with Lifecodes was not made until February 8, 1999. Doc. #: 21-7, PageID #: 2428, ("call Lifecode for DNA information").

No other contact with Lifecodes or Dr. Baird was noted in counsel's time records until March 9, 1999; twenty days before Love's opening statement. On that date, counsel's time records reflect that Love, McHenry, and Yost all participated in a conference call with Dr. Baird. Doc. #: 16-6, PageID #: 177(Love); Doc. #: 16-7, PageID #: 186 (McHenry); Doc. #: 21-7, PageID #: 2429 (Yost). An email from Yost to Assistant State Public Defender Kort Gatterdam was sent on that date, discussing trial counsel's call with Dr. Baird. Doc. #: 45-1, PageID #: 8663. Yost discussed some points made by Dr. Baird regarding Cellmark's analysis: "Dr. Baird has a lot of good points to make that will negate the State's DNA experts…[because] CellMark's examination shows signs of contamination -that there is other evidence mixed in with that sample." *Id.*

The day after trial counsel's conference call with Dr. Baird, Love wrote to the prosecutor to request "a copy of the protocol used by CellMark's testing methods …." *Id.* at PageID #: 8664. That letter appears on Love's billing record. Doc. #: 16-6, PageID #: 177. There are no entries in any of trial counsel's time

records, however, to note either the receipt of the Cellmark protocol from the prosecutor or to show that the Cellmark protocol was forwarded by trial counsel to Dr. Baird. *See id.*

ii. Attorney expert Christine Funk's report.

Christine Funk identified red flags that point to trial counsel's deficient performance in dealing with Dr. Baird. Funk reviewed the above documentary evidence in light of the state record and she concluded trial counsel had no DNA expert as a result of their own ineffectiveness. Doc. #: 56-1, PageID #: 8860-63. Love's "it's not our fault" excuse did not recount "a fair or accurate assessment of Dr. Baird's representations." *Id.* at PageID #: 8862. During the March 9, 1999 phone call, Dr. Baird asked counsel to obtain additional information from Cellmark. Love wrote to the prosecutor with a "gibberish" request that reflected a lack of any understanding beyond some basic DNA words. *Id.* at PageID #: 8858. There is no evidence indicating that trial counsel ever followed up on this matter, rendering trial counsel's preparation of Dr. Baird deficient. *Id.*; *id.* at PageID #: 8858, 8860-64.

Funk's report also supports Group's claim Love prejudiced his right to a fair trial by falsely promising a defense expert to the jury in his opening statement. "Decisions about whether to call an expert witness, either to observe testimony of others, or to provide testimony, should be made well in advance of trial.

Particularly when working with DNA evidence, a clear, understood and understandable theory of defense should be established and presented as a recurring theme in trial." *Id.* at PageID #: 8855.

"By representing a defense expert would testify, and that the defense expert would establish the DNA evidence would be discredited, defense counsel created in the jurors an expectation that such testimony would actually be presented." *Id.* "The failure to then provide such testimony, as well as the failure of the attorneys to provide the expert with the documents he said he would need in order to render an opinion, fall short of reasonable expected practices in 1999." *Id.*

Trial counsel's first contact with Dr. Baird was March 9, 1999. *Id.* at PageID #: 8854. At that time, Dr. Baird relayed to counsel that he needed additional information about Cellmark's protocols. *Id.* After Love's opening statement on March 29, 1999, Dr. Baird wrote to trial counsel and said "he had not yet seen the protocols, and adding, '[p]lease contact me if you wish to have me testify at trial.'" *Id.*

No decision was made whether to call Dr. Baird as an expert well in advance of the trial. "There does not have appeared to be any contact between defense counsel and the expert between March 9 and March 31. Nor does it appear there was any follow up with the state regarding the requested documents [from Cellmark]." *Id.* "However, it does appear that defense counsel decided not to call a

defense expert long before the April 6 exchange [when Love offered his 'it's not our fault' excuse]." *Id.* at PageID #: 8854-55.

As Funk explained, trial counsel was obviously inexperienced with DNA evidence and they clearly needed a defense expert's help to understand the scientific issues or to contest Dr. Reynolds's prosecution-friendly testimony. *Id.* at PageID #: 8863. "Perhaps the most critical error in failing to call a defense expert is related to the issue of whether there is the presence of more than one individual in the DNA sample." *Id.* at PageID #: 8864. Dr. Reynolds said the apparent faint blue dots in the DNA test result had no impact on the conclusions drawn by Cellmark, but those "conclusions include the statistical significance of the profile observed." *Id.* However, "[o]ne of the most important potential problems with the statistic used by the prosecution is that they may not adequately account for all of the factors that have gone into the declaration of a match." *Id.* (Citation omitted).

Funk's report also addressed Yost's professionally inadequate confrontation of Dr. Reynolds, as well as the need to have an expert help Yost prepare for that cross-examination. Trial counsel missed a valuable opportunity to challenge the population frequency statistic of 1 in 220,000, as testified to by Dr. Reynolds, because counsel did not use an expert to help them prepare for and confront the State's evidence. Had trial counsel done so, testimony could have been developed to establish that the 1 in 220,000 figure is actually an "estimate [and] is considered

to be within a range, plus or minus a factor of ten. ..." *Id.* at PageID #:8857 (Citation omitted).

Yost also missed an important opportunity to question Dr. Reynolds about the potential of a mixed DNA sample; that is, a sample with more than one contributor. Dr. Reynolds testified on direct that faint results in the test can appear, and those faint results can be DNA "from another person" or due to a "technical reason." *Id.* at PageID #: 8859. She said that because these results, noted in the Cellmark report by an asterisk, were not interpreted by the Cellmark analysts because they were "that faint." *Id.* Dr. Reynolds told the jury: "But the important point is that it has no impact on the conclusions that we are drawing." *Id.*

With that testimony, Reynolds was "ignoring data, declaring it not relevant." *Id.* "The test does not account for how many potential contributors are present at a given tested locus. If three people contribute in small amounts, or one person presents in a larger amount, the results could be the same." *Id.* "If the analyst didn't ignore the faint dots, and asked a different question, "[w]hat are the odds of seeing one of the potential profiles this mixed sample could contain?" the statistic would be very different. A defense expert could have explained that to the jury...." *Id.*

Indeed, "[c]ase notes identify a 1.1 at DQA1, a C at GC, a faint 9, 11 at CSF *in both samples* and a faint 7 *in both samples.* These may be artifacts." *Id.*

(Emphasis in original). "[F]or the same artifacts to appear in both samples leads one to question whether they are more likely an indication of DNA from another individual. An expert for the defense could have assisted in this portion of the cross examination." *Id.* at PageID # 8859-60. Such an expert also could have "testified to the potential significance of the presence of these alleles."[4] *Id.* at PageID #: 8860.

D. Group's DNA-based, *Strickland* claims warrant COA.

Although Group presents three bases for trial counsel's ineffectiveness, this Court should assess them for their synergistic effect on his Sixth Amendment right to a fair trial. Trial counsel promised significant evidence before they had fully investigated their own expert's opinions. This resulted in no DNA expert for Group. When no expert was offered, the prejudice from trial counsel's empty promise to the jury ripened. Trial counsel was left with only Yost's feckless attempt to confront Dr. Reynolds.

i. Reasonable jurists could debate deficient performance.

Trial counsel was not blindsided by Dr. Baird's refusal to testify because Dr. Baird was willing to testify. Rather, trial counsel failed to engage with Dr. Baird in a timely, professional reasonable manner. *See Greer*, 264 F.3d at 676-77; *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995); *Hamblin v. Mitchell*, 354 F.3d 482,

[4] Group submitted Dr. Krane's declaration in support of his Rule 59 motion, his motion to amend the petition, and his proffered Ninth Ground.

487 (6th Cir. 2003). Reasonable jurists could debate whether trial counsel's performance was thus deficient. *See Slack*, 529 U.S. at 484; *Strickland*, 466 U.S. at 687.

After the initial phone consultation with Dr. Baird on March 9, 1999, Yost said in an email: "Dr. Baird suggested that we obtain from the State, a copy of the procedures and protocol used by CellMark. Once we have that he said he will review same for us to give a better opinion." Doc. #: 45-1, PageID #: 8663. Trial counsel's billing records show that they failed to follow up on Dr. Baird's request to see the additional information from Cellmark. *See* Doc. #: 16-6, PageID #: 166-67; Doc. #:16-7, PageID #: 168-79.

Counsel also failed to alert the trial court about Dr. Baird's late availability date for testifying. Dr. Baird said in his March 31, 1999 letter that he was available to testify on the week of April 12, 1999. Doc. #: 45-1, PageID #: 8659. That date fell on the week when the trial court planned to give the jury instructions. *See* Doc. #: 22-6, PageID #: 7530. By March 31, however, trial counsel should already have known Dr. Baird's availability. But setting that aside, trial counsel failed to alert the trial court of that date and they failed to request a continuance to facilitate Dr. Baird's available date. Consequently, trial counsel was left without a DNA expert due to their own professionally unreasonable inaction. Doc. #: 56-1, PageID #: 8860-64.

Reasonable jurists could also debate whether Love's promise in the opening statement was deficient. Love told the jury "Scott Group[] has a DNA expert as well." Doc. #: 22-4, PageID #: 5973. He told the jury that expert would discuss "artifacts" that contaminated the state's evidence "render[ing the state's] DNA testing moot. ... It's what the evidence will show." *Id.* at PageID #: 5974.

Love's promise preceded an adequate investigation by trial counsel. Love's opening statement was made on March 29, 1999, but it is apparent from Dr. Baird's March 31 letter that he still needed to "clarify" the substance of his testimony as a defense witness. Doc. #: 45-1, PageID #: 8658. Before Love's delusive promise to the jury was made, moreover, Yost said in the email that Dr. Baird still needed additional information on Cellmark's protocol to form a "better opinion." *Id.* at PageID #: 9663. A reasonable jurist could find that Love's promise was rashly made before trial counsel had completed an adequate investigation as to what Dr. Baird could offer to the defense. *See Strickland*, 466 U.S. at 691.

Reasonable jurists could also find that Yost's confrontation of Dr. Reynolds fell below professional norms. Funk identified a salient fact that "Yost was not an experienced DNA attorney." Doc. #: 56-1, PageID #: 8857. Funk noted the minimal preparation done by Yost before she cross-examined Reynolds, and Funk concluded: "[T]his level of preparation is unacceptable by one who has experience

with forensic DNA evidence and falls well short of the bar for an attorney who has not previously handled a DNA case." *Id.* Without expert assistance, trial counsel clearly lacked the ability to mount a professionally competent challenge to the State's DNA evidence.

Funk's report demonstrates that the harm of trial counsel's unfulfilled promise to the jury could have been eliminated if trial counsel had handled their defense against the State's DNA evidence in a professional reasonable manner. Her report shows that Cynthia Yost was inexperienced and not capable of developing available favorable testimony from Jennifer Reynolds on the subject of contamination and artifacts in DNA test results. *See id.* Here, the assistance of a qualified DNA expert was essential to trial counsel's ability to adequately confront the state's expert. *See id.* at PageID #: 8859.

ii. Reasonable jurists could debate prejudice.

This Court should assess these claims cumulatively under *Strickland's* prejudice prong in determining if a reasonable jurist could debate whether a COA should issue on Group's three claims. *See Harris by and through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995). With no expert, Love's promise to the jury became delusive, and it undercut the credibility of Group's whole defense. And without an expert's help, Yost could not enlighten the jury about important matters that could have made a difference to the jury.

"Modern DNA testing can provide powerful new evidence unlike anything known before .... While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue .... DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others." *District Attorney's Office for the Third Judicial District, et al. v. Osborne*, 557 U.S. 52, 62 (2009). Because DNA evidence can be so "powerful," jurors are likely to be impressed by it. *See id.*

Where trial counsel makes a substantial claim in his opening statement about DNA evidence—and then fails to follow through on the promise—jurors are likely to be impressed by that as well. "Little is more damaging than to fail to produce important evidence that had been promised in an opening." *English v. Romanowski*, 602 F.3d 714, 729 (6th Cir. 2010) (quoting *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988)). The failure to fulfill such a promise creates a "negative inference" against, the defendant and against his testimony that may "damage[] the credibility of [the defendant's] version of events ...." *Id.* By "creat[ing] an expectation that the jury [will] hear evidence tending to [exculpate the defendant,] ..." trial counsel "undercuts the credibility of the defense with the jury." *United States, ex. rel. Hampton v. Leibach*, 347 F.3d 219, 259 (7th Cir.

2003). *See also Plummer v. Jackson*, 491 Fed. Appx. 671, 680 (6th Cir. 2012) (remanding for hearing in AEDPA case).

Such unfulfilled promises may also cause the jury to "question the attorney's credibility." *Id.* "When a jury is promised that it will hear [important evidence] from [a key witnesses'] own lips, and [trial counsel] then reneges, common sense suggests that the course of trial may be profoundly altered. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made." *Id.* at 257 (quoting *Ouber v. Guarino*, 293 F.3d 19, 28 (7th Cir. 2002)). Trial counsel performs deficiently when he or she fails to make good on a promise to deliver important evidence to the jury. *See Ouber*, 293 F.3d at 28.

Love promised DNA evidence which can be "powerful." *See Osborne*, 557 U.S. at 62. That promise doubtlessly "create[d] expectations" with the jury as it waited to hear how the State's DNA evidence would be rendered "moot." *See Plummer*, 491 Fed. Appx. at 679 (citation omitted). This point cannot be gainsaid because Love promised game-changing DNA evidence in his opening statement. Love made a promise to the jury of substantial "magnitude." *Hampton*, 347 F.3d at 257 (quoting *Ouber*, 293 F.3d at 28). The bigger the promise, the bigger the harm when the promise goes unfulfilled.

Love's unfulfilled promise was harmful under *Strickland's* prejudice prong. It undercut trial counsel's essential duty to advocate Scott's cause. *See Strickland*,

466 U.S. at 687, 688-89. The empty promise undercut trial counsel's credibility with the jury and it created an adverse inference against Group and his alibi defense. *See English*, 602 F.3d at 729; *Hampton*, 347 F.3d at 259; *id.* And, as in *Hampton* and *Plummer*, the prejudice to Group was compounded because trial counsel never explained to the jury why Love's promise went unfulfilled. *See Hampton*, 347 F.3d at 259; *Plummer*, 491 Fed. Appx. at 677.

Group was further prejudiced by the lack of a DNA expert to aid in his defense. That was an omission that Yost could not compensate for in her useless confrontation of Dr. Reynolds. Reasonable jurists could debate the issue. *See Slack*, 529 U.S. at 484.

Trial counsel missed a valuable opportunity to challenge the population frequency statistic of 1 in 220,000, as testified to by Reynolds, because counsel did not use an expert to help them prepare for and confront the State's evidence. Had trial counsel done so, testimony could have been developed to establish that the 1 in 220,000 figure is actually an "estimate [and] is considered to be within a range, plus or minus a factor of ten. … In other words, the profile could be as rare as 1 in 2,000,000 or as common as 1 in 20,000." Doc. #: 56-1, PageID #: 8857.

"[T]his number represents the number of profiles one *would expect* to take to find the particular profile once amongst unrelated people. However, it is also possible that one could find that same profile in *less* than 200,000 people—or

20,000 people." *Id.* (Emphasis in original). Indeed, one of the jurors in this case could have had that same genetic profile. *Id.* "An expert present to listen to the statements made by the state's expert would have also been able to recognize and address this issue, both by assisting in formulating cross examination questions and in testifying himself." *Id.*

The prejudice from this omission was compounded when the prosecutor misleadingly told the jury that Robert Lozier's blood was definitely found on Group's shoe. Doc #: 22-4, PageID #: 5961. The jury was also told by the prosecutor, misleadingly, that Robert's genetic profile would only appear once or less within the entire population of Mahoning County, Ohio. Doc #: 22-7, PageID #: 7603.

And, it was clearly trial counsels' strategy to contest the State's DNA evidence, given Love's opening statement about "contaminates" or "artifacts" present in the State's DNA test results which might undercut the cogency of that evidence. Love's promise to the jury went unfulfilled, and compensate for the lack of expert assistance, the defense relied solely on Yost's useless cross-examination of Dr. Reynolds.

When Yost questioned Dr. Reynolds about the possibility of contamination she answered: "There was no indication that those two swabs had additional types of – that there was a mixed sample." Doc #: 22-5, PageID #: 6817. After a second

attempt to develop something helpful Dr. Reynolds answered: "Again, there's no indication of any kind of mixture that would cause me to feel that these samples were contaminated in any way." *Id.* at PageID #: 6823-24.

Funk explained, "[t]his is inconsistent with [Dr. Reynolds'] report, as well as the case notes. Case notes identify a 1.1 at DQA1, a C at GC, a faint 9, 11 at CSF *in both samples* and a faint 7 *in both samples.* These may be artifacts." Doc. #: 56-1, PageID# 8859 (Emphasis in original). "[F]or the same artifacts to appear in both samples leads one to question whether they are more likely an indication of DNA from another individual. An expert for the defense could have assisted in this portion of the cross examination, as well as testified to the potential significance of the presence of these alleles." *Id.*at PageID #: 8859-60. Reasonable jurists could debate whether Group was prejudiced given that Yost, without an expert's help, could not see that Reynolds was "ignoring data, declaring it not relevant." *Id.* at PageID# 8859.

V. Conclusion.

Scott Group is entitled to a COA on these ineffective counsel claims. The state's case depended on a credible identification made by Sandra Lozier. Eyewitness identifications can be powerful and it is essential to impeach such testimony when it is assailable. Trial counsel missed a golden opportunity to impeach Lozier's testimony with the evidence discussed above.

Lozier's identification was bolstered by the State's DNA evidence. The state's DNA evidence most likely impressed the jury, especially after the jury realized that Group had no expert testimony to render it moot. Due to trial counsel's ineffectiveness, another golden opportunity was missed to impeach Dr. Reynolds' testimony, as discussed above.

Group acknowledges that there was some other evidence offered against him at trial in addition to Lozier's testimony and the DNA evidence. Notwithstanding any other evidence, there was ample room for an acquittal if trial counsel had competently impeached Lozier's identification, competently impeached the state's DNA evidence, and presented a competent alibi defense for Scott Group. At the least, reasonable jurists could debate all of the above issues under *Slack* standard for granting a COA. *See* 529 U.S. at 478, 484.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016 a copy of the foregoing Appellant-Petitioner Scott A. Group's 's Motion for a Certificate of Appealability, was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Joseph E. Wilhelm
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