No. _____

In the Supreme Court of the United States

TERRY FROMAN,
Petitioner,

v.

STATE OF OHIO
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

OFFICE OF THE OHIO PUBLIC DEFENDER

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The Supreme Court of Ohio

State of Ohio

v.

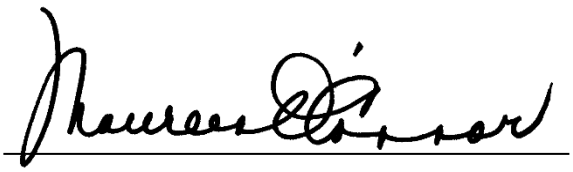
Terry Lee Froman

Case No. 2022-1188

E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Warren County Court of Appeals; No. CA 2020-12-080)



Maureen O'Connor
Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/

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IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Appellee,	:	CASE NO. CA2020-12-080
	:	JUDGMENT ENTRY
- vs -	:	
TERRY LEE FROMAN,	:	
Appellant.	:	

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

Robin N. Piper, Presiding Judge

Stephen W. Powell, Judge

Matthew R. Byrne, Judge

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Appellee,	:	CASE NO. CA2020-12-080
	:	OPINION
- vs -	:	8/8/2022
TERRY LEE FROMAN,	:	
Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 14CR30398

David P. Fornshell, Warren County Prosecuting Attorney, and Kirsten A. Brandt, Assistant Prosecuting Attorney, for appellee.

Jessica Houston, Kimberlyn Seccuro, and Adam Vincent, Office of the Ohio Public Defender, for appellant.

BYRNE, J.

{¶1} The Warren County Court of Common Pleas convicted and sentenced Terry Froman to death for murdering his estranged former girlfriend, Kimberly Thomas. Froman appealed to the Ohio Supreme Court, which affirmed Froman's conviction and sentence. Froman separately petitioned for postconviction relief in the Warren County Court of Common Pleas. That court dismissed the postconviction relief petition ("PCR petition")

without a hearing and granted the state's motion to dismiss and/or for summary judgment. Froman now appeals from that decision. We affirm the trial court's decision for the reasons below.

I. Procedural and Factual Background

{¶2} In 2014, a Warren County grand jury indicted Froman on two counts of aggravated murder, both with death penalty specifications, and two counts of kidnapping. The indictment stemmed from allegations that Froman kidnapped Kimberly Thomas ("Thomas") from her home in western Kentucky. He then transported Thomas by vehicle to Ohio and shot and killed her after troopers pulled him over in Warren County on I-75.

{¶3} The matter proceeded to a trial. The facts underlying the offenses are not at issue regarding most grounds for relief raised in Froman's PCR petition, and so we will only summarize them here. The Ohio Supreme Court's opinion resulting from Froman's direct appeal contains a more extensive review of the trial evidence. *State v. Froman*, 162 Ohio St.3d 435, 2020-Ohio-4523, ¶ 3-26.

{¶4} Froman and Thomas were in a romantic relationship, and Froman lived with Thomas at her home in Mayfield, Kentucky during the relationship. Thomas ended the relationship in August 2014 and asked Froman to move out. Froman eventually moved out but persisted in involving himself in Thomas' life. For example, Froman one day showed up at Thomas' workplace and entered her office. A supervisor, knowing about their troubled relationship, told Froman that Thomas had to go to a meeting. Before leaving, Froman told the supervisor, "Kim has made me lose everything, now I will make her lose everything no matter the cost." Also, after moving out, Froman twice texted a neighbor to ask if any men had been at Thomas' house.

{¶5} On the morning of September 12, 2014, the evidence showed that Froman entered Thomas' home with a gun and forced her out of bed. Thomas' son Eli was in the

home and came to his mother's aid. Froman shot and killed Eli. Investigators later found gunshot wounds on Eli's abdomen, right forearm, and the back of his head. Froman forced Thomas outside and into his vehicle and drove away.

{¶6} Froman stopped at a gas station in the nearby town of Paducah, Kentucky. While he went inside to pay, video surveillance shows that Thomas, naked, escaped from Froman's vehicle and began running away. Froman rushed out of the store, grabbed Thomas by the hair, and forced her into the backseat of his vehicle.

{¶7} Froman then fled, with Thomas still in the vehicle, to Ohio. During the long drive, he spoke on the phone with his friend, David Clark, multiple times. Clark cooperated with police in real time, and police recorded some of the phone calls. During these conversations Froman confessed that he had killed Eli and kidnapped Thomas. Clark later tried to persuade Froman to let Thomas go, but Froman refused:

> [Clark]: Have you thought about letting her go?
>
> [Froman]: Have I thought about it? No, not at all. * * * It's too late. I mean it ain't too late, but, I just can't, I can't, I can't. I just got to. No ifs, ands, or buts about it.
>
> * * *
>
> I mean, I know you're trying to talk me down, baby I appreciate it and all. But like I said, I mean it's just not going to happen. It's just not going to happen.
>
> [Clark]: There's still good stuff to live for, Fam.[1]
>
> [Froman]: Man, I already took one life, and I'm about to go ahead and take two [more].

{¶8} During a later phone call, Froman informed Clark that the police were following him and that he intended to kill Thomas. He refused Clark's request that he stop:

1. Clark referred to Froman as "Fam" several times during their recorded telephone conversations.

[Froman]: I'm gonna kill her dude.

[Clark]: Don't do it Fam. Don't do it. * * * [J]ust pull over.

* * *

[Clark]: Well just, man, just pull over. Don't do nothing.

[Froman]: I can't do it man.

{¶9} The call disconnected. When Clark called Froman again, Froman stated, "She dead. I shot myself." He added, "I shot myself, and I shot her three times."

{¶10} Police had been tracking Froman by working with his cell phone provider, which provided police with updates on his location by periodically sending a "ping" to his cell phone. Around six hours had passed since the abduction began when two Ohio State Highway Patrol troopers pulled Froman over on I-75 in Warren County, Ohio. The officers heard gunshots upon exiting their cruisers.

{¶11} A brief time later, two tactical teams approached Froman's vehicle and apprehended Froman, who was sitting in the driver's seat with a gun in his hand. Froman had a bullet wound in his left upper chest near his shoulder. First responders transported Froman to a hospital for treatment.

{¶12} The troopers found Thomas in the back seat of Froman's vehicle, deceased. She had bullet wounds in the back of her head, her right upper chest, her right breast, and her right upper abdomen. She had also suffered blunt force trauma to her torso, inner thighs, and extremities, a laceration on her upper lip, three lacerations on the top of her head, and abrasions on her forehead and right cheek. She also had a broken jaw and one of her lower teeth had been knocked out.

{¶13} Authorities tried Froman in Kentucky for killing Eli and in Ohio for killing Thomas. Ohio bifurcates capital trials into guilt and penalty/mitigation phases. *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, ¶ 147, citing R.C. 2929.03(D); R.C.

2929.04(B) and (C). The jury initially determines a defendant's guilt. If the jury convicts the defendant of aggravated murder and at least one death specification, then the trial proceeds to the second phase. Otherwise, the second phase never occurs. *Id.* At the end of the guilt phase of Froman's trial, the jury found Froman guilty of all the counts and specifications in the indictment. The state elected to proceed to the penalty phase on the first count of aggravated murder and its accompanying death-penalty specifications.

{¶14} At the penalty phase trial, the jury heard testimony from Alexis Froman (Froman's younger daughter) and Dr. Nancy Schmidtgoessling, a clinical psychologist who interviewed Froman while he was awaiting trial. The jury also heard Froman read an unsworn statement, in which he apologized and asked the jurors to spare his life for the sake of Alexis and his mother.

{¶15} Following the penalty phase, the jury recommended a sentence of death and the trial court subsequently sentenced Froman to death.

{¶16} As mentioned, Froman directly appealed to the Ohio Supreme Court. *Froman*, 2020-Ohio-4523. Among other arguments, Froman—who is black, and who the state accused of murdering Thomas, a white woman—argued that the state denied him a fair trial due to the seating of racially biased jurors, and that his trial counsel provided ineffective assistance in failing to question or remove one of those jurors. *Id.* at ¶ 48. He also argued that his counsel provided ineffective assistance by failing to call certain mitigation witnesses. *Id.* at ¶ 146.

{¶17} As for the allegation of racially biased jurors, the Ohio Supreme Court agreed with Froman that Juror 49's answers on a jury questionnaire indicated that she held racially biased views. *Id.* at ¶ 55. Even so, the Ohio Supreme Court found that the state had not deprived Froman of a fair trial because the court and counsel questioned Juror 49 on her views and successfully rehabilitated her. *Id.* at ¶ 57. Nor had Froman's trial counsel

provided ineffective assistance in his questioning or failure to question Juror 49 during voir dire. *Id.* The supreme court also analyzed allegedly racially biased juror questionnaire answers given by Jurors 5, 13, and 46. *Id.* at ¶ 58-61. The supreme court found that those jurors' questionnaire answers did not indicate racially biased views, and that the record did not show that they could not be impartial. *Id.* at ¶ 61.

{¶18} As for Froman's ineffective assistance claim related to mitigation evidence, the supreme court found that Froman's trial counsel's decision not to call certain mitigation witnesses was a "tactical choice," and that Froman had not established prejudice because he did not identify what specific evidence those witnesses would have offered had counsel called them to testify. *Id.* at ¶ 151-153.

{¶19} Having found no merit to Froman's arguments and having conducted its own independent evaluation of Froman's death sentence and the mitigating evidence offered during the trial's penalty phase, the Ohio Supreme Court affirmed Froman's conviction and sentence. *Id.* at ¶ 161-187.

{¶20} In October 2018, Froman petitioned for postconviction relief under R.C. 2953.21. In September 2019, Froman filed an amended petition for postconviction relief (referred to as the "PCR petition"). In his PCR petition, Froman asserted 47 grounds for relief ("Grounds"), presenting various arguments alleging that the state denied him his rights or violated those rights in ways that rendered his conviction void or voidable. Some of those arguments related to issues that he presented in his direct appeal to the Ohio Supreme Court. Froman included voluminous new documents with his PCR petition, including, but not limited to, affidavits and reports of various putative experts opining on juror bias and other issues, and affidavits of fourteen lay witnesses providing information in support of mitigation regarding his death penalty sentence.

{¶21} The state filed a motion to dismiss and/or for summary judgment ("state's

motion to dismiss") in March 2020. In November 2020, the trial court granted the state's motion. The trial court found that res judicata barred nearly all Froman's grounds for relief. But the court also substantively addressed all grounds for relief and found none had any merit. Froman appeals, raising nine assignments of error.[2]

II. Legal Analysis

A. Standards of Review

{¶22} R.C. 2953.21 authorizes the filing of petitions for postconviction relief. A postconviction proceeding is a collateral civil attack on a criminal judgment, not an appeal of a criminal conviction. *State v. Dillingham*, 12th Dist. Butler Nos. CA2012-02-037 and CA2012-02-042, 2012-Ohio-5841, ¶ 8. To prevail on a postconviction relief petition, the petitioner must establish a violation of his constitutional rights that renders the judgment of conviction void or voidable. R.C. 2953.21. A petition does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing. *State v. Rose*, 12th Dist. Butler No. CA2012-03-050, 2012-Ohio-5957, ¶ 16. A trial court properly denies a postconviction relief petition without an evidentiary hearing if the supporting affidavits, the documentary evidence, the files, and the records of the case do not demonstrate that the petitioner set forth sufficient operative facts to establish substantive grounds for relief. *State v. Blankenburg*, 12th Dist. Butler No. CA2012-04-088, 2012-Ohio-6175, ¶ 9; R.C. 2953.21.

{¶23} "It is well-established that a trial court may dismiss a postconviction relief petition on the basis of the doctrine of res judicata." *State v. Davis*, 12th Dist. Butler No. CA2012-12-258, 2013-Ohio-3878, ¶ 30. Under res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in

2. Froman has appealed the dismissal of each ground for relief except for Ground 15, in which he alleged that his trial counsel were ineffective for failing to adequately prepare Dr. Schmidtgoessling.

any proceeding except an appeal from judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment or conviction, or on an appeal from that judgment. *State v. Wagers*, 12th Dist. Preble No. CA2011-08-007, 2012-Ohio-2258, ¶ 10, citing *State v. Szefcyk*, 77 Ohio St.3d 93 (1996), syllabus.

{¶24} The presentation of competent, relevant, and material evidence outside the trial record may defeat the application of res judicata. *State v. Lawson*, 103 Ohio App.3d 307, 315 (12th Dist.1995). The petitioner can avoid the bar of res judicata by submitting evidence outside the record on appeal that demonstrates that the petitioner could not have raised the claim based on information in the original record. *Id.*

{¶25} However, the evidence submitted with the petition cannot be merely cumulative of or alternative to evidence presented at trial. *State v. Myers*, 12th Dist. Warren No. CA2019-07-074, 2021-Ohio-631, ¶ 17. That is to say, "[r]es judicata bars a petitioner from 're-packaging' evidence or issues that either were or could have been raised in trial or on direct appeal." *State v. Casey*, 12th Dist. Clinton No. CA2017-08-013, 2018-Ohio-2084, ¶ 15.

{¶26} Instead, "'[e]vidence presented outside the record must meet some threshold standard of cogency * * *.'" *State v. Statzer*, 12th Dist. Butler No. CA2017-02-022, 2018-Ohio-363, ¶ 16, quoting *Lawson* at 315. Otherwise, a petitioner could overcome res judicata "'by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery.'" *Lawson* at 315, quoting *State v. Coleman*, 1st Dist. Hamilton No. C-900811, 1993 WL 74756, *7 (Mar. 17, 1993). If the evidence outside the record is only "marginally significant," res judicata still applies to the claim. *State v. Lindsey*, 12th Dist. Brown No. CA2002-02-002, 2003-Ohio-811, ¶ 22, citing *Lawson* at 315.

{¶27} "In reviewing an appeal of postconviction relief proceedings, this court applies an abuse of discretion standard." *State v. Snead*, 12th Dist. Clermont No. CA2014-01-014, 2014-Ohio-2895, ¶ 16. The term "abuse of discretion" implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Thornton*, 12th Dist. Clermont No. CA2012-09-063, 2013-Ohio-2394, ¶ 34; *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 130. "The trial court does not abuse its discretion in dismissing a PCR petition without an evidentiary hearing if (1) the petitioner fails to set forth sufficient operative facts to establish substantive grounds for relief, or (2) the operation of res judicata prohibits the claims made in the petition." *Myers* at ¶ 18.

{¶28} With these principles in mind, we now address Froman's assignments of error. We address certain assignments of error out of the order presented.

B. Use of the State's Briefing in the Trial Court's Written Decision

{¶29} Assignment of Error No. 2:

{¶30} FROMAN'S RIGHTS AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE TRIAL COURT FAILING TO PROVIDE HIM THE INDEPENDENT, DELIBERATIVE PROCESS TO WHICH HE IS DUE.

{¶31} In a 2018 email correspondence between the trial court judge and the parties' counsel, the judge requested that the parties submit their PCR petition briefings to the court in a Microsoft Word document. The judge explained that, sometimes "I want to restate what has been included in one of the briefs * * * [and] it is easier if I cut and paste those portions."

{¶32} Froman points to various sections of the trial court's 31-page decision denying his PCR petition that were apparently copied and pasted from the state's motion to dismiss. Froman argues that the trial court's use of these excerpts shows that the trial court failed to issue its own decision and instead used a "large portion of the State's analysis" in denying

various grounds for relief. Froman even claims that the trial court's decision was "almost completely derived" from the state's motion to dismiss. He also argues that by copying portions of the state's brief the trial court showed unfairness and presented the image that it was an "advocate" for the state and biased against Froman. Froman suggests that the trial court's decision demonstrates bias. On these bases, Froman argues in Assignment of Error No. 2 that the trial court abused its discretion by denying his "right" under the Eighth and Fourteenth Amendments to the United States Constitution to "an independent, deliberative review."

{¶33} The state, on the other hand, argues that the trial court's decision shows that the court did, in fact, conduct an independent analysis. The state argues that even if the court relied on or "cut and pasted" into its decision certain portions of the state's motion to dismiss, this alone does not prove that the trial court did not engage in an independent analysis or that the court was biased. The state argues that Froman's argument, though not explicitly stated in terms of judicial bias, amounts to an argument that the trial court was biased and that Froman has not overcome the presumption that the trial court acted impartially.

{¶34} It is true that there is a general presumption that a judge is fair and impartial. *State v. Dennison*, 10th Dist. Franklin No. 12AP-718, 2013-Ohio-5535, ¶ 49, citing *In re Disqualification of Kilpatrick*, 47 Ohio St.3d 605, 606 (1989). Froman, as the party alleging a lack of fairness and impartiality, has the burden of bringing forth evidence to overcome that presumption. *Id.*

{¶35} However, "R.C. 2701.03 provides the exclusive means by which a litigant may claim that a common pleas judge is biased and prejudiced." *Vogel v. Felts*, 12th Dist. Clermont No. CA2008-05-051, 2008-Ohio-6569, ¶ 14, *citing Vera v. Yellowrobe*, 10th Dist. Franklin No. 05AP-1081, 2006-Ohio-3911, ¶ 54. "To that end, it is the Ohio Supreme Court,

not this Court, that has the authority to determine whether a [common pleas] judge is biased or prejudiced." *Blair v. Adkins*, 12th Dist. Fayette No. CA2020-10-018, 2021-Ohio-2292, ¶ 9, *citing In re Guardianship of Constable*, 12th Dist. Clermont No. CA97-11-101, 1998 WL 142381, *4 (Mar. 30, 1998) ("'[a] court of appeals is without authority to pass upon the disqualification of a judge"'), quoting *State v. Blankenship*, 115 Ohio App.3d 512, 516 (12th Dist.1996). That said, we may review arguments that a judge's actions violated a defendant's procedural due process rights, and we review Froman's Assignment of Error No. 2 in that way. *See Blair* at ¶ 10.

{¶36} We have reviewed the state's motion to dismiss, the trial court's decision granting the state's motion, and Froman's exhibits identifying the portions of each that Froman claims the trial court copied. We find that Froman has not established that the trial court failed to provide him with an independent, deliberative process. Froman grossly overstates how much the trial court used the state's motion to dismiss in the trial court's decision when he states that the decision was "almost completely derived" from the motion. In fact, while Froman is correct that some passages were copied verbatim, most of the trial court's decision was *not* copied from the state's motion.

{¶37} But we need not describe the exact percentage of the trial court's decision attributable to the state's motion to dismiss. That the court incorporated the state's language in its own decision does not establish that the trial court did not independently deliberate.[3] The court could have simply decided, after a review of arguments by both the state and Froman, that it agreed with the state's position. Froman points to no legal

3. Froman argues that "An 'unbiased' opinion should not resemble so closely the arguments drafted by one of the adversaries." Froman cites no authority for this proposition. That is unsurprising, because it is a common, accepted, and ethical practice in the law for judges to refer to and rely on text from other judicial decisions and from documents submitted by the parties. It is only natural that when a party is correct about a point of law or fact, the judge's decision will closely resemble, and perhaps even mimic, the arguments made by that party.

authority that would prevent a court from using one side's legal arguments in drafting a written decision. The court stated in its decision granting the state's motion to dismiss that it conducted the necessary review of all materials submitted with the petition, under R.C. 2953.21(D) and (F). Based on our review of the trial court's decision, we conclude that the trial court engaged in an independent, deliberative process. Froman merely speculates that the trial court did not independently deliberate. We overrule Assignment of Error No. 2.

C. Claims of Ineffective Assistance During the Guilt Stage of the Trial (Grounds 1-2, 4-13, 22-28, and 44)

{¶38} Assignment of Error No. 3:

{¶39} THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED FROMAN'S CLAIMS THAT HIS TRIAL COUNSEL RENDERED CONSTITUTIONALLY DEFICIENT PERFORMANCE IN THE TRIAL PHASE OF HIS CAPITAL TRIAL, WITHOUT ALLOWING FOR AN EVIDENTIARY HEARING, AND IN FAILING TO GRANT RELIEF ON THESE MERITORIOUS IAC CLAIMS.

{¶40} Froman's PCR petition contained 20 grounds for relief (Grounds 1-2, 4-13, 22-28, and 44) related to ineffective assistance of counsel during the guilt stage of his trial. In those grounds for relief, Froman claimed his trial counsel[4] were ineffective by failing to (1) adequately question and challenge allegedly racially biased jurors during voir dire, (2) adequately address issues of negative pretrial publicity, (3) investigate and present expert testimony on the effects of his testosterone use, and (4) effectively cross-examine a state's witness. The trial court denied all these grounds for relief, and Froman argues that such denial was an abuse of the trial court's discretion. We address each argument in turn.

4. The word "counsel" can refer to attorneys in the singular or plural. In this opinion, our references to Froman's trial "counsel" are in the plural, as Froman was represented by two attorneys during his trial.

1. Standard of Review

{¶41} To establish a claim of ineffective assistance of counsel, a petitioner must show that an attorney's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). In postconviction proceedings, a petitioner bears the initial burden of submitting evidentiary materials containing sufficient operative facts to demonstrate the lack of competent counsel and prejudice resulting from counsel's ineffectiveness. *State v. Jackson*, 64 Ohio St.2d 107, 111 (1980).

{¶42} Under the res judicata doctrine, a trial court may dismiss a postconviction relief petition where a petitioner, represented by new counsel on direct appeal, could have raised the ineffective assistance of trial counsel claim on direct appeal without evidence outside the record. *State v. Lentz*, 70 Ohio St.3d 527 (1994), syllabus; *State v. Loza*, 12th Dist. Butler No. CA96-10-214, 1997 WL 634348, *3 (Oct. 13, 1997). Additionally, mere presentation of evidence outside the record does not transform a claim into one addressable in postconviction. *Myers*, 2021-Ohio-631 at ¶ 95, citing *State v. Drummond*, 7th Dist. Mahoning No. 05 MA 197, 2006-Ohio-7078, ¶ 17. The evidence must show that the petitioner could not have appealed his claim based on the information in the original record. *Id.*

2. Failure to Challenge Allegedly Racially Biased Jurors (Grounds 7-13, 44)

{¶43} In Ground 7 of his PCR petition, Froman argued that his trial counsel were ineffective "for failing to voir dire individual jurors on racist attitudes." In Grounds 8 through 13, Froman argued that his trial counsel were ineffective for failing to voir dire six specific jurors—that is, Jurors 5, 13, 19, 23, 46, and 49—on "racial bias" or "racial and/or ethnic bias." In Ground 44, Froman argued that his trial counsel were ineffective for failure to challenge jurors for implicit racial bias.

{¶44} In support of these arguments, Froman pointed to certain answers that Jurors 5, 13, 19, 23, 46, and 49 gave to various questions on the long form jury questionnaire. For example, Froman argued that his trial counsel should have explored alleged racial bias held by Juror 49 because she stated in her juror questionnaire responses that she "strong[ly] agree[d]" that "some races and/or ethnic groups tend to be more violent than others," and elaborated, "statistics show that there are more black people commit [sic] crimes. And certain religions have violent beliefs." Froman also pointed out that Juror 49 stated that racial discrimination against black people was "not a problem" and, when asked if she had ever had a "negative or frightening" experience with a person of another race, she described an experience she had with an African-American male who "approach[ed] our training center at night and call[ed] us names and made derogatory remarks."

{¶45} Froman also argues that his trial counsel showed a lack of understanding of implicit bias when, during voir dire, his counsel failed to question jurors about their implicit biases and stated, "I assume none of you people are racist. There is no reason for me to believe that. That would be a totally false impression because there's nothing to indicate that."

{¶46} The trial court dismissed Grounds 7 through 13 and 44. The trial court held that res judicata barred Froman's arguments about the six jurors at issue in Grounds 7 through 13 and about implicit bias in Ground 44 because Froman could have raised those arguments in his direct appeal. Froman appeals, arguing that the trial court abused its discretion.

a. Res Judicata

{¶47} We agree with the trial court that res judicata barred Grounds 7 through 13 and 44. Froman's claims of ineffective assistance related to alleged racial bias are primarily based on (1) jurors' answers to questions in the long form juror questionnaire and (2)

questions asked (or not asked) by counsel and answers given by jurors during voir dire. The juror questionnaires and the voir dire transcript were within the trial record. Froman therefore could have raised during his direct appeal the very same ineffective assistance arguments he raised in Grounds 7 through 13 and 44 of his PCR petition. *Wagers*, 2012-Ohio-2258 at ¶ 10; *Szefcyk*, 77 Ohio St.3d 93 at syllabus.

{¶48} In fact, Froman *did*, on direct appeal, argue that his trial counsel provided ineffective assistance by failing to question or remove Juror 49 based on the very same juror questionnaire answers that Froman pointed to in his PCR petition. The Ohio Supreme Court rejected Froman's argument and held that because Juror 49 promised that she could set her opinions aside and decide the case based on the evidence, Froman's counsel did not provide ineffective assistance and that "the record does not support Froman's argument that [Juror 49] was actually biased against him." *Froman*, 2020-Ohio-4523 at ¶ 57. Because the supreme court has already rejected Froman's ineffective assistance arguments related to Juror 49, we may not reach a different result now, when Froman is attempting to take a second bite at the apple. *See State v. Bethel*, 10th Dist. Franklin No. 07AP-810, 2008-Ohio-2697, ¶ 2 ("We are not at liberty to re-decide any issues that were already decided by the Ohio Supreme Court unless the appellant presents some new evidence or factual information that was unavailable on direct appeal").

{¶49} Froman did not argue in his direct appeal that his trial counsel provided ineffective assistance related to Jurors 5, 13, 19, 23, and 46.[5] However, Froman could have

5. While Froman did not argue *ineffective assistance* related to Jurors 5, 13, 19, 23, and 46 in his direct appeal, he did argue in his direct appeal that the seating of three of those five jurors—that is, Jurors 5, 13, and 46—violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution. The supreme court analyzed Froman's arguments related to those jurors and concluded, "We do not agree that, as Froman argues, the questionnaire responses of juror Nos. 5, 13, and 46 demonstrate 'blatantly expressed racial views.' The record does not demonstrate that the jurors were unable to be impartial, and Froman has not established that they were actually biased against him." *Froman* at ¶ 61. In reaching this conclusion, the supreme court noted that Froman had omitted from his description of the questionnaire answers given by

brought such arguments in his direct appeal as such arguments rely on information in the trial record. Therefore, res judicata barred Froman's ineffective assistance arguments related to Jurors 5, 13, 19, 23, and 46, just as res judicata barred Froman's ineffective assistance argument as to Juror 49. *Wagers*, 2012-Ohio-2258 at ¶ 10; *Szefcyk*, 77 Ohio St.3d 93 at syllabus. We affirm the trial court as to its denial of Grounds 7 through 13 and 44, and we need not review those grounds further.

b. Analysis of Evidence Outside the Record

{¶50} Froman tries to circumvent the res judicata bar of his claims of ineffective assistance relating to alleged racial bias by pointing to new documents that he filed with his PCR petition and that were not in the trial record on direct appeal. Those documents were (1) a 2003 article by the American Bar Association ("ABA Guidelines"), titled "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases," stating that defense counsel in capital cases should be aware of racial issues with juries and should question jurors about racial bias, (2) the affidavit of Dr. Jack Glaser, and (3) the expert report of Donald Malarcik. We must determine whether Froman has submitted competent, relevant, and material evidence outside the record to overcome the res judicata bar. *Lawson*, 103 Ohio App.3d at 315.

{¶51} Upon review and for the reasons described below, we find that the extra-record materials that Froman submitted with his PCR petition fail to transform his claims about alleged racial bias of jurors barred by res judicata into those addressable in a

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those three jurors certain answers that undermined his claim that they were racially biased. For example, the supreme court noted that Juror 13 admitted to being exposed to a person exhibiting "racial, sexual, religious, and/or ethnic prejudice" by explaining he/she had heard "Friends using words that shouldn't be used." *Id.* at ¶ 59. And the supreme court noted that Juror 46 had checked a box indicating that "the issue of racial discrimination against African-Americans in our society" was a "very serious problem." *Id.* Because the supreme court has already rejected Froman's racial bias arguments related to Jurors 5, 13, and 46, we could not re-decide this issue and find that Froman's trial counsel were ineffective in failing to question those jurors further without some new evidence unavailable on direct appeal. *See Bethel* at ¶ 2.

postconviction relief petition.

i. ABA Guidelines

{¶52} Froman argues that his trial counsel failed to address potential racial bias issues in a manner consistent with the ABA Guidelines' recommendations. For example, he points to the ABA Guidelines' statement that the "defense in a capital case is entitled to voir dire to discover those potential jurors poisoned by racial bias, and should do so when appropriate," and argues that his trial counsel did not ask sufficient questions about race during voir dire. The ABA Guidelines were not part of the trial record and Froman submitted the ABA Guidelines for the first time with his PCR petition.

{¶53} Froman correctly cites the United States Supreme Court as having stated that when courts analyze claims of ineffective assistance of counsel, they may look to American Bar Association standards "and the like" as demonstrating "prevailing professional norms." *Strickland* 466 U.S. at 688. But Froman's citation undermines his argument. The ABA Guidelines are legal guidance that—just like other materials arguably demonstrating "prevailing professional norms"— any court may consider when reviewing an ineffective assistance of counsel claim. *Id.* As legal guidance, Froman or the state could have cited the ABA Guidelines (which were issued in 2003, long before his direct appeal in 2017) at any time in Froman's direct appeal. Therefore, res judicata barred Froman's arguments concerning the ABA Guidelines. *Wagers*, 2012-Ohio-2258 at ¶ 10; *Szefcyk*, 77 Ohio St.3d 93 at syllabus.

{¶54} Froman cannot rely on the ABA Guidelines for another reason. After explaining that ABA guidance materials might establish "prevailing professional norms," the United States Supreme Court cautioned that such published materials "are only guides." *Strickland* at 688. These materials are "only guides" because

> No particular set of detailed rules for counsel's conduct can

> satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.

(Citations omitted.) *Id.* at 688-689. Stated otherwise, the ABA Guidelines are not "inexorable commands" with which all capital defense counsel must comply. *Bobby v. Van Hook*, 558 U.S. 4, 8, 130 S.Ct. 13 (2009). Instead, the ABA Guidelines are just that – guidelines purporting to establish a national standard of practice for defense counsel in capital cases. The ABA Guidelines are generic; that is, they are not specific to Froman's case. The ABA Guidelines do not show that any jurors in Froman's case harbored a racial bias against Froman or that Froman's counsel were ineffective in their voir dire of the jury.

{¶55} We therefore conclude that the ABA Guidelines are not competent, relevant, and material evidence outside the record that would allow Froman to overcome the res judicata bar as to his arguments about ineffective assistance with respect to potential racial bias. *Lawson*, 103 Ohio App.3d at 315. And we find that the ABA Guidelines are not significant and do not advance Froman's claim beyond a mere hypothesis and a desire for further discovery. *Lindsey*, 2003-Ohio-811 at ¶ 22.

ii. Dr. Glaser's Affidavit

{¶56} Froman submitted an affidavit signed by Dr. Jack Glaser with his PCR petition. Dr. Glaser's affidavit was not part of the trial record on Froman's direct appeal. Froman argues that Dr. Glaser's affidavit establishes that his trial counsel were ineffective in identifying racial bias during voir dire, and that Dr. Glaser could have assisted trial counsel in that task if Froman's counsel had retained him.

{¶57} Dr. Glaser stated in his affidavit that he is a social psychologist who

specializes in issues involving stereotyping and prejudice. Dr. Glaser stated that there was a "considerable likelihood" that racial stereotypes influenced the jurors in Froman's case. Dr. Glaser arrived at this conclusion based on his review of the jury questionnaires, and specifically the jurors' responses. Ultimately, Dr. Glaser opined that Froman was not afforded a fair and impartial trial by jury.

{¶58} As for Froman's argument that Dr. Glaser's affidavit establishes that his trial counsel were ineffective in identifying racial bias during voir dire, we conclude that Dr. Glaser's affidavit is deficient in several ways. First, Dr. Glaser did not address the fact that all the seated jurors acknowledged during voir dire that race should not play a role in the decision-making process. Dr. Glaser simply speculates that the allegedly racially biased jurors disregarded their promise to remain fair and impartial and instead decided the case based on racial bias. *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, ¶ 162 (holding that an expert's opinion is admissible so long as it provides evidence of more than mere possibility or speculation). Second, Dr. Glaser's affidavit fails to acknowledge that the court instructed the jurors that they must decide the case only on the evidence presented at trial and simply speculates that the jurors ignored their instructions. This contradicts our duty under Ohio law to presume that jurors followed a court's instructions. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, ¶ 208. Third, Dr. Glaser's affidavit is simply a repackaging of information in the record concerning alleged racial bias among jurors to promote an argument that we have already determined res judicata bars. Froman may not avoid res judicata by simply submitting an affidavit that repackages information and issues in the record. *See Lawson*, 103 Ohio App.3d at 315; *Casey*, 2018-Ohio-2084 at ¶ 15.

{¶59} We also note the law does not support Froman's reliance on Dr. Glaser's discussion of "implicit bias," or "implicit stereotyping"—that is, the idea that all individuals harbor biases that they do not recognize or acknowledge consciously. Effectively, Froman

cites Dr. Glaser's opinion to suggest that counsel were per se ineffective for not presuming that all jurors are biased and then exposing these biases through interrogation. But there is no basis for such a presumption in the law, and Froman cites none. We reject the notion that defense counsel must conduct voir dire with the presumption that all jurors are biased. Trial counsel is in the best position to determine whether to question any potential juror and to what extent. *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, ¶ 225. "'Few decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on the basis of intangible factors.'" *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶ 64, quoting *Miller v. Francis*, 269 F.3d 609, 620 (6th Cir.2001). "'[T]he selection process is more an art than a science, and more about people than about rules.'" *Id.* quoting *Romero v. Lynaugh*, 884 F.2d 871, 878 (5th Cir.1989). In some cases, asking few or no questions of a prospective juror may be the best tactic for any number of reasons. *Id.* at ¶ 65.

{¶60} Dr. Glaser's opinion is substantively premised upon evidence within the trial record and does not advance Froman's arguments that the jurors in question were racially biased against him. In sum, Dr. Glaser's affidavit is not competent, relevant, and material evidence outside the record that would allow Froman to overcome the res judicata bar as to his arguments about ineffective assistance in discovering potential racial bias in jury selection. *Lawson*, 103 Ohio App.3d at 315. In addition, we find that Dr. Glaser's affidavit is not significant and does not advance Froman's claim beyond a mere hypothesis and a desire for further discovery. *Lindsey*, 2003-Ohio-811 at ¶ 22.

{¶61} To the extent that Froman argues that his trial counsel were ineffective because they failed to consult Dr. Glaser, who could have assisted them as to racial issues during voir dire, the record shows that trial counsel were effective in asking questions intended to identify potential racial bias among jurors.

iii. Attorney Donald J. Malarcik's Affidavit

{¶62} Froman attached the report of a potential expert witness, attorney Donald J. Malarcik, to his PCR petition. Froman makes no argument related to Malarcik's report in his appellate brief. Even so, we have reviewed the report and will analyze whether it advances Froman's ineffective assistance of counsel arguments beyond the res judicata bar.

{¶63} In his putative expert report, Malarcik explains that the Ohio Supreme Court certified him to accept capital cases in 1997 and that he has since represented many capital defendants in death penalty cases. Malarcik also states that he has significant experience teaching about the representation of defendants in death penalty cases at legal conferences or seminars. Malarcik opines that Froman's trial counsel were ineffective for failing to question Jurors 5, 13, 46, and 49 concerning racial bias.

{¶64} Like Dr. Glaser's affidavit, Malarcik's report simply repackages Froman's arguments related to his trial counsel providing ineffective assistance as to racial bias. *See Lawson*, 103 Ohio App.3d at 315; *Casey*, 2018-Ohio-2084 at ¶ 15. Malarcik's putative expert report is substantively based on matters within the trial record. Malarcik was not present during voir dire and would not be privy to those nuances of juror behavior that might inform counsel. Ultimately, Mr. Malarcik's report is speculative and does not materially advance Froman's ineffective assistance claims.

{¶65} We therefore conclude that Malarcik's report is not competent, relevant, and material evidence outside the record that would allow Froman to overcome the res judicata bar related to his arguments about ineffective assistance in pursuing potential racial bias issues during jury selection. *Lawson* at 315. In addition, we find that Malarcik's report is not significant and does not advance Froman's claim beyond a mere hypothesis and a desire for further discovery. *Lindsey*, 2003-Ohio-811 at ¶ 22.

c. Conclusion Regarding Ineffective Assistance Regarding Alleged Racial Bias

{¶66} For these reasons, the trial court did not abuse its discretion in finding that res judicata barred Froman's arguments in Grounds 7 through 13 and 44. Froman could have raised, and in some cases did raise, those arguments in his direct appeal. And the new documents submitted by Froman with his PCR petition are not significant and do not set forth sufficient operative facts establishing substantive grounds for relief. *Id.*; *Blankenburg*, 2012-Ohio-6175 at ¶ 9.

3. Ineffective Assistance Regarding Pretrial Publicity (Grounds 4-6)

{¶67} In Ground 4, Froman argues that his "trial counsel were ineffective for failing to adequately support and request their change of venue request for Froman's trial." (Sic.) In Ground 5, Froman argues that "Defense counsel were ineffective for failing to voir dire the jury on the extensive, prejudicial, and racist pretrial publicity that occurred in this case." In Ground 6, Froman argues that "[p]rejudicial pretrial publicity deprived Froman of his fundamental rights to due process and a fair trial." In support of these grounds, Froman argues that media articles described gruesome details of the case and that prosecutors' statements portrayed him through "various racist stereotypes," which statements dehumanized him as "innately savage, animalistic, destructive, and criminal-deserving punishment, maybe death," and played into the stereotypes of "black dishonesty" and the "black brute caricature."

{¶68} Froman concedes that his trial counsel moved for a change of venue because of pretrial publicity and submitted to the trial court several news articles showing the type of coverage the case received in the media. But Froman argues that (1) his trial counsel did not effectively voir dire the jurors concerning their awareness of negative pretrial publicity, and (2) his trial counsel were deficient in investigating the media coverage of his case and the impact it had on the jury pool.

{¶69} The trial court dismissed Grounds 4 through 6. The trial court held that res judicata barred Froman's arguments related to pretrial publicity in Grounds 4 through 6 because Froman could have raised those arguments on direct appeal. On appeal, Froman argues that the trial court abused its discretion.

a. Res Judicata

{¶70} We agree with the trial court that res judicata barred Froman's arguments in Grounds 4 through 6. Froman's claims of ineffective assistance related to pretrial publicity are primarily based on (1) his motion for change of venue and (2) questions asked (or not asked) by counsel and answers given by jurors during voir dire. Froman filed and the court decided the motion for change of venue before trial, and of course the parties and court completed voir dire at the beginning of the trial. Thus, both sources of evidence were in the trial record on direct appeal. Froman therefore could have raised on direct appeal his arguments related to the alleged deficiencies in his counsel's investigation of pretrial publicity and in his motion for change of venue. *Wagers*, 2012-Ohio-2258 at ¶ 10, citing *Szefcyk*, 77 Ohio St.3d 93 at syllabus.

{¶71} Likewise, Froman could have argued on direct appeal that his trial counsel's questioning of potential jurors about pretrial publicity during voir dire was deficient. In fact, as discussed above, Froman did argue in his direct appeal that his counsel's conduct of voir dire was deficient as to issues of racial bias, and he could have made similar arguments about pretrial publicity. Froman simply failed to raise his arguments related to pretrial publicity in his direct appeal. The trial court therefore correctly held that res judicata barred Froman's arguments related to pretrial publicity. *Wagers* at ¶ 10; *Szefcyk* at syllabus.

b. Analysis of Evidence Outside the Record

{¶72} Froman submitted with his PCR petition many documents related to pretrial publicity that were not part of the trial record. We must examine whether these new

documents presented competent, relevant, and material evidence outside the record that may defeat the application of res judicata. *Lawson*, 103 Ohio App.3d at 315.

{¶73} After a review of the pretrial documents in the trial record and those attached to Froman's PCR petition, we find that the pretrial publicity materials attached to Froman's PCR petition were largely cumulative of the articles that Froman's counsel submitted to the court before trial.

{¶74} Froman submitted three articles with his motion for change of venue. The title of the first article is "Accused I-75 shooter files 93 Warren County Jail complaints." That article described 93 medical complaints and 59 inmate requests made by Froman. The point of the article was that Froman had initiated many more complaints than the average inmate. The second article is titled, "Trial Delayed for I-75 murder suspect Terry Froman." The article described a delay in Froman's trial based on Froman's request for a new lawyer. The article then described allegations concerning Froman's criminal acts, including that he killed Eli, kidnapped Thomas, and shot and killed Thomas after a police chase. A third article, titled "Trial again delayed for man accused in Warren County highway slaying" described a trial delay after the judge granted Froman's request for a new lawyer. The article also discussed Froman's statement that he could not get a fair trial in Warren County because the county was allegedly "racially imbalanced."

{¶75} The new articles submitted along with Froman's PCR petition include articles containing similar reporting on pretrial matters. Several articles describe Froman's trial counsel's demands to have the death-specifications dismissed from his case. An article titled "Accused I-75 shooter gets new attorneys" describes how the trial court continued Froman's trial for a third time after the court granted Froman's request for new lawyers. In fact, Froman included one of the articles submitted with the PCR petition, "Trial Delayed for I-75 murder suspect Terry Froman," with the original motion for change of venue. Another

article titled, "Suspect in Ohio shooting to get new attorney; trial delayed" recounted a trial delay based on Froman's request for a new lawyer. The same article described Froman's claim that he would be denied a fair trial in Warren County due to racial imbalances in the population. Froman included with his PCR petition multiple articles from different news sources that all variously report on his trial delays and continuances and his claim that he could not receive a fair trial.

{¶76} Thus, much of the pretrial publicity documentation presented with Froman's PCR petition was cumulative to what Froman previously submitted with his motion for change of venue. Cumulative evidence of pretrial publicity fails to establish that the outcome at trial would have been different had Froman's counsel submitted the new materials. *See State v. Hicks*, 12th Dist. Butler No. CA2004-07-170, 2005-Ohio-1237, ¶ 12 (affidavits containing evidence cumulative to evidence in the record failed to establish a changed outcome).

{¶77} The record shows that the trial court was aware of the pretrial publicity about Froman's case, and the mere fact that trial counsel failed to submit some published articles about the case in support of Froman's motion for a change of venue does not, by itself, amount to ineffective assistance. *State v. McKnight*, 4th Dist. Vinton No. 07CA665, 2008-Ohio-2435, ¶ 31 ("[C]ounsel's failure to include every piece of publicity surrounding a case does not amount to ineffective assistance of counsel when the trial court is well aware of the level of publicity").

{¶78} Crim.R. 18(B) allows a court to transfer a case to another jurisdiction when it appears that a fair and impartial trial cannot be held in the court in which the action is pending. That said, pretrial publicity, even where that publicity is "pervasive" and "adverse," does not inevitably lead to an unfair trial. *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, ¶ 54.

{¶79} The Ohio Supreme Court has said that the best test of whether prejudicial pretrial publicity has prevented a fair and impartial trial is a "'careful and searching voir dire.'" *Id.* at ¶ 55, quoting *State v. Bayless*, 48 Ohio St.2d 73, 98 (1976). Therefore, the supreme court advised that a trial court should make a good-faith effort to seat a jury before granting a motion for a change of venue. *Id.*

{¶80} At the same time, in "rare" cases, pretrial publicity is "so damaging" that a court must presume prejudice even without a showing of actual bias. *Id.* at ¶ 56, citing *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507 (1966). To prevail on a claim of presumed prejudice, a defendant must make a "clear" and "manifest" showing that pretrial publicity was so pervasive and prejudicial that an attempt to seat a jury would be a vain act. *Id.*

{¶81} Upon a full consideration of the "new" pretrial publicity materials that Froman submitted with his PCR petition, we do not find that Froman has made a clear or manifest showing that pretrial publicity was so pervasive or prejudicial that the trial court had to presume prejudice. Nor do we find that the trial court would have granted a change of venue had trial counsel submitted those additional pretrial publicity materials that Froman submitted with his PCR petition.

{¶82} As described above, much of the "new" pretrial publicity material submitted with Froman's PCR petition was merely cumulative of the articles already submitted with the motion for change of venue. Those publicity materials in the record covered largely benign topics such as Froman's medical issues, complaints in jail, and continuances of the trial. Much of the actual added content was duplicative, that is, multiple news articles repeating the same factual reporting on pretrial events. None of the reporting we reviewed, either if considered specifically or holistically, would cause us to question whether pretrial media coverage of the case was so pervasive and prejudicial that a court must presume

prejudice. As discussed below, the court and parties did in fact engage the venire in a careful and searching voir dire as to pretrial publicity concerns and managed to impanel a jury.

{¶83} Froman also argues that certain media coverage, including comments by prosecutors, indicated that Froman had a history of domestic violence, kidnapping, and stalking. Froman claims these comments "dehumanized" him and played into stereotypes of "black dishonesty" and "black brute caricature." However, in support of this argument, Froman merely cites to a law review article generally discussing what it describes as implicit racial bias in "prosecutorial summations."[6] Froman points to no evidence supporting the contention that any statements by prosecutors in his case depicted him in a racist manner, that any jurors were aware or affected by any allegedly racist comments, or that such alleged comments prevented a fair and impartial jury. The articles cited by Froman consist of statements by prosecutors and news reporting that is factual. Froman does not dispute the accuracy of any of the statements made by prosecutors.

{¶84} We therefore conclude that the new pretrial publicity materials Froman submitted with his petition are not competent, relevant, and material evidence outside the record that would allow him to overcome the res judicata bar related to his arguments about ineffective assistance in pursuing a change of venue. *Lawson*, 103 Ohio App.3d at 315. And we find that the new materials are not significant and do not advance Froman's claim beyond a mere hypothesis and a desire for further discovery. *Lindsey*, 2003-Ohio-811 at ¶ 22.

c. Merits of Froman's Arguments Related to Pretrial Publicity

{¶85} Even if res judicata did not bar Froman's pretrial publicity arguments, the

6. Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 Fordham L. Rev. 3091, 3103-04 (2018).

record does not support Froman's argument that counsel and the court failed to effectively question jurors about pretrial publicity. Counsel and the court extensively questioned jurors about pretrial publicity during voir dire and the record shows that jurors who acknowledged having been exposed to pretrial publicity about Froman's case were questioned concerning whether they could decide the case impartially. The trial court excused jurors who indicated partiality based on pretrial publicity.

{¶86} For example, the record reflects that Juror No. 35 was observed with a newspaper that contained an article about Froman. The parties extensively questioned the juror about that issue. The court excused Juror 35.

{¶87} Juror 85 stated during voir dire that he had heard about Froman on the radio while he was sitting in traffic. The parties questioned Juror 85 about what he had heard and asked whether he thought he could be impartial given his awareness of the case. He repeatedly assured the parties and court that he could be impartial.

{¶88} The court questioned the prospective jurors as a group and asked whether there was anyone who could not put aside any information that they may have heard about the case and start with a clean state related to the facts and evidence. All jurors agreed that they could put aside what they may have heard and decide the case from a clean slate. Juror 13 stated that he had read an article and had formed an opinion about the case but stated that he could set that opinion aside.

{¶89} In multiple instances in group discussions, unidentified jurors responded affirmatively when asked if they had read something about the case. The court then questioned them as a group and asked whether they could set that information aside, and all agreed that they could.

{¶90} Juror 56 stated that he had heard something about the case before the trial and when asked if he could set that aside and start with a clean slate, the juror responded,

"I don't think I really can." The court excused Juror 56.

{¶91} Juror 108 stated that she had seen something about Froman on television but could put it aside for trial purposes.

{¶92} Juror 98 stated that she had heard something about the case and could not put it aside and had formed an opinion about Froman's guilt or innocence. The court excused Juror 98.

{¶93} Juror 107 stated he recalled seeing mention of Froman's case on Twitter but would try his best not to let those things influence him. The court excused Juror 107.

{¶94} Juror 113 stated that she had heard or read something about the case and did not think she could set it aside. The court excused Juror 113.

{¶95} In other words, the record shows that the court and counsel discussed pretrial publicity throughout the voir dire, and the court either excused or did not seat any jurors who indicated an inability to act impartially based on materials they had seen before trial. The trial court judge "who sees and hears the juror," has discretion to accept a juror's assurances that he or she would be fair and impartial and would decide the case based on the evidence. *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, ¶ 98, quoting *Wainwright v. Witt*, 469 U.S. 412, 426, 105 S.Ct. 844 (1985), citing *State v. Jones*, 91 Ohio St.3d 335, 338 (2001). Based on the voir dire, the trial court reasonably credited the jurors' assurances and there was no evidence presented of actual bias. Froman's arguments to the contrary in Grounds 4 through 6 of his PCR petition are simply without merit.

d. Conclusion on Ineffective Assistance Related to Pretrial Publicity

{¶96} For all these reasons, the trial court did not abuse its discretion in finding that res judicata barred Froman's arguments in Grounds 4 through 6. Froman could have raised these arguments on direct appeal. Additionally, the new evidence about pretrial publicity presented by Froman is not significant and does not set forth sufficient operative facts

establishing substantive grounds for relief. *Lindsey*, 2003-Ohio-811 at ¶ 22; *Blankenburg*, 2012-Ohio-6175 at ¶ 9. Finally, the record does not support Froman's claim that counsel failed to voir dire prospective jurors on pretrial publicity.

4. Ineffective Assistance Regarding Expert Testimony on Testosterone Use (Grounds 1-2)

{¶97} Before addressing the trial court's handling of Froman's next set of grounds for relief concerning ineffective assistance, we must provide some background information about the offenses of "aggravated murder" and "murder." The statute defining aggravated murder states, "No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy." R.C. 2903.01(A). The statute defining murder, on the other hand, states, "No person shall purposely cause the death of another or the unlawful termination of another's pregnancy." R.C. 2903.02(A). The two offenses are almost the same, except aggravated murder requires evidence of another element: "prior calculation and design." R.C. 2903.01(A). Murder is a lesser included offense of aggravated murder. *State v. Haynie*, 12th Dist. Clinton No. CA93-12-039, 1995 WL 55289, *4 (Feb. 13, 1995).

{¶98} In this case, the state charged Froman with aggravated murder, so it had to prove that Froman adopted a plan to kill Thomas. *State v. Coley*, 93 Ohio St.3d 253, 263 (2001).

{¶99} In Ground 1 of his PCR petition, Froman argued that his trial counsel provided ineffective assistance by "fail[ing] to request a lesser included murder instruction and for failure to present supporting expert testimony of lack of prior calculation and design." In Ground 2, Froman argued that his trial counsel provided ineffective assistance by "fail[ing] to request an involuntary intoxication instruction supported by readily available expert testimony."

{¶100} In support of these grounds for relief, Froman argued that his trial counsel "failed to retain and/or utilize an expert in pharmacology, such as Dr. Craig Stevens, Ph.D. * * *." Froman submitted Dr. Sevens' putative expert report with his PCR petition. In the report, Dr. Stevens explains how testosterone supplements impact aggression and violence among men. Dr. Stevens also reviews the dates on which pharmacy records show Froman retrieved a prescription for testosterone supplements. Those dates included the day before Froman killed Thomas and her son. Dr. Stevens opines that Froman's "aggression and violence" was due, "at least in part," to increased levels of testosterone in his body.[7]

{¶101} The trial court dismissed Grounds 1 and 2. The trial court determined that Dr. Stevens' testimony would not have merited an instruction on the lesser included offense of murder because Ohio does not recognize the defenses of involuntary intoxication or diminished capacity. The trial court also found that res judicata barred Grounds 1 and 2 and that the materials submitted by Froman did not constitute substantive grounds for relief.

{¶102} Froman argues in his appellate brief that the trial court abused its discretion because Dr. Stevens would have been able to:

> (1) present affirmative evidence Froman failed to act with prior calculation and design; (2) present affirmative evidence of Froman's involuntary intoxication at the time of the incident; (3) assist with the cross-examination of the State's witnesses and confront the State's case at trial; (4) provide defense counsel the basis to ask for a lesser included murder instruction; and/or (5) provide defense counsel the basis to ask for an involuntary intoxication instruction.

Boiled down, Froman argues that Dr. Stevens would have testified that Froman's murder of Thomas was "a reflection" of the testosterone in his system and not the product of

7. In his report, Dr. Stevens did not state that he communicated with Froman and learned that Froman consumed or used the testosterone supplements after filling the prescription and before killing Thomas and Eli. Dr. Stevens simply assumes that Froman used the testosterone supplements in that period. But there is no support for this assumption in the record. Nor did Froman submit an affidavit with his PCR petition stating that he used testosterone supplements during the relevant time.

reasonable thought.

{¶103} Froman's argument is essentially that his trial counsel were ineffective for failing to pursue a defense of involuntary intoxication — that he acted under an alleged "roid rage" and that he was incapable of forming the necessary mens rea to support an aggravated murder conviction. The First District faced a similar argument in *State v. Clemons*, 1st Dist. Hamilton No. C-980456, 1999 WL 252655 (April 30, 1999). In that case, the court convicted the defendant of aggravated murder and sentenced him to death, and the Ohio Supreme Court affirmed on direct appeal. *Id.* at *1. The defendant filed a PCR petition and argued that his "trial counsel were ineffective for failing to reasonably investigate a 'Prozac defense' or obtain an expert to present testimony on Prozac in each phase of the trial." *Id.* at *3. The defendant specifically argued that his ingestion of Prozac rendered him involuntarily intoxicated, leaving him incapable of forming the required mens rea. *Id.* at *4. The First District rejected this argument, noting that "Ohio does not recognize a defense of diminished capacity." *Id.* In support, the court cited the Ohio Supreme Court's opinion in *State v. Wilcox*, 70 Ohio St.2d 182 (1982). In *Wilcox*, the supreme court held that a "defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that the defendant lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime." *Id.* at paragraph two of the syllabus. On this basis, and because there was "overwhelming evidence" of the defendant's "murderous intent with prior calculation and design," the First District held that the trial court properly rejected the defendant's argument that trial counsel provided ineffective assistance by not reasonably investigating a "Prozac defense" and by not obtaining an expert to testify about that defense. *Clemons* at *4.

{¶104} The Ohio Supreme Court applied the same principle when it stated, in *State v. Taylor*, 98 Ohio St.3d 72, 2002-Ohio-7017, that,

> Except in the mitigation phase, "a defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that, due to mental illness, *intoxication*, or any other reason, he lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime."

(Emphasis added.) *Id.* at ¶ 69, quoting *State v. Cooey*, 46 Ohio St.3d 20, 26 (1989).

{¶105} The Ninth District applied the same principle in a recent case. *State v. Cowell*, 9th Dist. Summit No. 30052, 2022-Ohio-1742. There, the defendant moved to withdraw his guilty plea to aggravated burglary, felonious assault, rape, and kidnapping. *Id.* at ¶ 2-3. The defendant argued that he should be permitted to withdraw his plea because when he made the plea he was unaware of the side effects of Abilify, a drug he was apparently taking at the time of his offenses. *Id.* at ¶ 4, 7. The trial court denied the defendant's motion and the Ninth District affirmed, citing the language from *Taylor* that we cited in the previous paragraph. *Id.* at ¶ 12. The court concluded that,

> Because [the defendant] was previously determined to be sane at the time of the offense, [the defendant] cannot now offer expert psychiatric testimony to prove he lacked the requisite mens rea to commit these crimes or that Abilify caused him to involuntarily kidnap, assault, and rape the victims.

Id. at ¶ 12.

{¶106} Froman's ineffective assistance arguments in Grounds 1 and 2 are all based on the argument that his use of testosterone supplements rendered him "involuntarily intoxicated." This is a diminished capacity defense that is not permitted under Ohio law and we find that the trial court properly granted the state's motion to dismiss related to Grounds 1 and 2. *Taylor* at ¶ 69.

{¶107} Even if Grounds 1 and 2 did not fail as a matter of law for the reasons just described, the trial court would still have properly dismissed those grounds because the evidence presented at trial would not support Froman's claim that Thomas' murder was an impulsive act lacking any prior calculation and design. *See Clemons* at *4. Before the

murder, Froman discussed his plans to kill Thomas with his friend, David Clark. In a recorded conversation, Clark tried to persuade Froman to let Thomas go. Froman responded,

> [Froman]: I mean, I know you're trying to talk me down, baby I appreciate it and all. But like I said, I mean it's just not going to happen. It's just not going to happen.
>
> [Clark]: There's still good stuff to live for, Fam.
>
> [Froman]: Man, I already took one life, and I'm about to go ahead and take two [more].

{¶108} In a subsequent phone conversation, Froman informed Clark that police were following him, then he stated, "I'm gonna kill her dude." The facts at trial therefore did not support an instruction on the lesser included offense of murder and the trial court properly dismissed Grounds 1 and 2. *See State v. Hines*, 12th Dist. Clermont No. CA2017-06-025, 2018-Ohio-1780, ¶ 25 (In considering whether an instruction upon a lesser offense should be given, a trial court must first determine whether an offense is a lesser included offense of the crime charged. If the court answers that inquiry affirmatively, then the court must proceed to determine whether the evidence in the case supports an instruction on the lesser included offense).

{¶109} Froman has not shown that his trial counsel provided ineffective assistance by failing to investigate and present evidence about involuntary intoxication by testosterone supplements. We conclude that Dr. Stevens' report is not competent, relevant, and material evidence outside the record that would allow Froman to overcome the res judicata bar related to his arguments about pursuing a testosterone defense or seeking an instruction on a lesser included offense. *Lawson*, 103 Ohio App.3d at 315. And we find that Stevens' report is not significant and does not advance Froman's claim beyond a mere hypothesis and a desire for further discovery. *Lindsey*, 2003-Ohio-811 at ¶ 22. The trial court properly

dismissed Grounds 1 and 2.

5. Failure to Effectively Cross-Examine State's Witness (Grounds 22-28)

{¶110} Matthew White, a firearms examiner with the Ohio Bureau of Criminal Investigation, testified at trial as the state's expert witness. White testified about his examination of the gun recovered from Froman's vehicle, a .40-caliber Hi-Point semiautomatic pistol. White determined the gun was operable. White also examined six spent shell casings recovered from the vehicle. White matched the shell casings found in the vehicle to the gun found in the vehicle. Froman's counsel did not object to White's testimony as an expert witness.

{¶111} In Grounds 22-28 of his PCR petition, Froman argued that forensic firearms evidence used to support Froman's conviction was unreliable and that his trial counsel were ineffective for failing to impeach White. The trial court dismissed Grounds 22-28, finding that res judicata barred Froman's arguments. But the trial court also examined the merits of Froman's arguments and found them without merit. Froman now argues that the trial court abused its discretion.

{¶112} On appeal, Froman argues that his trial counsel failed to ask "meaningful" questions on cross-examination that would have "given the jury reason to question the validity of White's testimony." Froman argues that the reliability of expert testimony on ballistics is "questionable" and in support of this argument points to a 2006 report from the National Academy of Sciences' Committee on Identifying the Needs of the Forensic Science Community. Froman submitted this report for the first time with his PCR petition. In the report, the committee made various recommendations for improving the practice of forensic science. The report argued that trial courts should consider two questions in deciding whether to admit forensic evidence: (1) the question of the reliability of the relevant scientific methodology, and (2) the question of the potential for human interpretation tainted by error,

bias, or "the absence of sound operational procedures and robust performance standards."

{¶113} We begin our analysis with the understanding that "[t]he scope of cross-examination falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *State v. Conway*, 109 Ohio St. 3d 412, 2006-Ohio-2815, ¶ 101. To fairly judge counsel's performance, we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

{¶114} Likewise, "the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, ¶ 66. "[I]t is generally a legitimate trial strategy for defense counsel not to present expert testimony and instead rely upon cross-examination of a state's expert to rebut evidence of a crime." *State v. Green*, 12th Dist. Warren No. CA2017-11-161, 2018-Ohio-3991, ¶ 43. This is because, in many criminal cases, such a decision by trial counsel might uncover evidence that further inculpates the defendant. *See id.*

{¶115} We find that Froman's argument that his trial counsel were ineffective in their cross-examination of White at trial is primarily based on evidence in the trial record. Froman could have argued this issue in his direct appeal. The trial court therefore properly held that res judicata barred Froman's Grounds 22-28. *Wagers*, 2012-Ohio-2258 at ¶ 10; *Szefcyk*, 77 Ohio St.3d 93 at syllabus.

{¶116} We do not find that Froman's submission with his PCR petition of the 2006 National Academy of Sciences committee report transforms Froman's argument from one barred by res judicata into one properly presented in postconviction relief. The report is generic and non-specific to Froman's case. The report does not directly or indirectly undermine the reliability of White's testimony. We therefore conclude that the report is not competent, relevant, and material evidence outside the record that would allow Froman to

overcome the res judicata bar related to his arguments about forensic science. *Lawson*, 103 Ohio App.3d at 315. And we find that report is not significant and does not advance Froman's claim beyond a mere hypothesis and a desire for further discovery. *Lindsey*, 2003-Ohio-811 at ¶ 22.

{¶117} Furthermore, we previously held (in a case in which White testified) that forensic ballistics is an accepted science in Ohio. *State v. Fuell*, 12th Dist. Clermont No. CA2020-02-008, 2021-Ohio-1627, ¶ 50-54. The committee's report merely offers recommendations for improving the field of forensic science, and nothing in the report undermines our previous holding in *Fuell*. Froman does not specify what questions an effective trial counsel would have asked White to give "the jury reason to question the validity" of White's testimony. *See State v. Green*, 12th Dist. Warren No. CA2017-11-161, 2018-Ohio-3991, ¶ 44-45 (rejecting appellant's ineffective assistance argument related to expert testimony, finding that appellant failed to disclose what an expert would have stated at trial or how it would have helped the defense).

{¶118} Even if there was merit to Froman's argument about forensic science, Froman was not prejudiced by White's testimony. White established, as a forensic matter, that Froman shot Thomas, and yet at trial there was no real dispute that Froman shot Thomas. Froman told Clark on the phone that he planned to kill Thomas, and later he told Clark that he had shot Thomas. The responding law enforcement officers personally overheard Thomas' shooting. White's testimony matching shell casings to Froman's gun was thus duplicative of other evidence establishing that Froman shot and killed Thomas. Froman therefore cannot show any reasonable probability of a changed result from a theoretically more effective cross-examination of White. *See Strickland*, 466 U.S. at 694.

{¶119} We find no abuse of discretion in the trial court's decision to apply res judicata to the argument that trial counsel were ineffective as to the cross-examination of Matthew

White. Froman could have raised this argument in a direct appeal. The new evidence presented by Froman is not significant and does not set forth sufficient operative facts establishing substantive grounds for relief. *Lindsey*, 2003-Ohio-811 at ¶ 22; *Blankenburg*, 2012-Ohio-6175 at ¶ 9.

{¶120} Having now completed our analysis of all Froman's arguments related to ineffective assistance of counsel during the guilt phase of his trial, for all these reasons we find that the trial court did not abuse its discretion in denying Grounds 1-2, 4-13, 22-28, and 44. We overrule Froman's third assignment of error.

D. Claims of an Allegedly Racially Biased Jury (Grounds 14 and 45)

{¶121} Assignment of Error No. 4:

{¶122} THE IMPANELING [sic] OF A RACIALLY BIASED JURY IS STRUCTURAL ERROR. FROMAN ESTABLISHED THAT HIS JURY WAS COMPRISED OF RACIALLY BIASED JURORS AND THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT FROMAN RELIEF ON THESE GROUNDS.

{¶123} Referring to his third assignment of error, Froman argues that the court denied him a fair trial because racially biased individuals were empaneled on his jury, that this was structural error, and prejudice must be presumed. For the reasons set forth in our response to the third assignment of error, res judicata bars Froman's claim that racially biased jurors convicted him. Froman could and did raise claims related to racially biased jurors in his direct appeal to the Ohio Supreme Court. *Froman*, 2020-Ohio-4523, ¶ 53, 58. The supreme court rejected these claims. For the same reasons discussed in response to the third assignment of error, the extra-record materials about alleged racial bias that Froman submitted with his PCR petition are not significant and do not advance Froman's claim beyond the bar of res judicata. *Lindsey*, 2003-Ohio-811 at ¶ 22; *Myers*, 2021-Ohio-631 at ¶ 17. We therefore overrule Froman's fourth assignment of error.

E. Claims of Ineffective Assistance During the Penalty Phase (Grounds 3, 16-21, 36-43, 46, and 47)

{¶124} Assignment of Error No. 5:

{¶125} THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED FROMAN DUE PROCESS, WHEN IT SUMMARILY DISMISSED HIS CLAIMS THAT HIS TRIAL COUNSEL RENDERED CONSTITUTIONALLY DEFICIENT PERFORMANCE DURING THE MITIGATION PHASE OF HIS CAPITAL TRIAL, AND IN FAILING TO GRANT RELIEF ON THE MERITORIOUS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

{¶126} Assignment of Error No. 5 concerns the penalty phase of the trial and Froman's claim that his counsel provided ineffective assistance in presenting a mitigation case. In support of his PCR petition, Froman identified two groups of putative mitigation witnesses: (1) fourteen lay witnesses, and (2) three putative expert witnesses. We will address these groups separately.

1. Grounds for Relief Concerning Lay Witnesses (Grounds 16-21, 36-43, and 47)

{¶127} In his PCR petition, Froman argued in Grounds 16-21, 36-43, and 47 that his trial counsel provided ineffective assistance in the penalty phase of his trial by failing to investigate and present certain lay witnesses, including various relatives, friends, co-workers, and past acquaintances.

{¶128} More specifically, in Grounds 16-21, Froman argued that his trial counsel provided ineffective assistance for failing to "investigate" and present the following mitigation witnesses: Harry Lynn, Jr.; Delores Nance; Dawn Attebury; Andrea Jerome; Doug Van Fleet; Steven Dreher. In Grounds 36-43, Froman argued that his trial counsel provided ineffective assistance by failing to "fully investigate"[8] and present the following

8. Froman never explained why Grounds 16-21 concerned the alleged failure to "investigate" some lay witnesses, while Grounds 36-43 concerned the failure to "fully investigate" other lay witnesses.

mitigation witnesses: Alexis Froman; Alissa Jones; Anna Wilson Merriweather; Glenda Dunbar Dinkins; Dr. Jermaine Ali, M.D.; Kim Froman; Margaret Smith; and Rev. Charles Dunbar. Froman submitted affidavits signed by all fourteen of these individuals with his PCR petition. In Ground 47, Froman argued that his trial counsel provided ineffective assistance by "failure to present compelling mitigation information about Froman's unique background, health, and the racial dynamics he faced."

{¶129} The trial court granted the state's motion to dismiss these grounds for relief, finding them barred by res judicata. The trial court also found that the exhibits Froman submitted in support of his penalty phase arguments did not meet the threshold level of cogency to avoid the res judicata bar and that there was no substantive merit to Froman's arguments. Froman argues that the trial court abused its discretion.

{¶130} We agree with Froman that because he relied on affidavits outside the record in support of Grounds 16-21, 36-43, and 47 in his PCR petition, and because Froman could not have raised his arguments with respect to those affidavits in his direct appeal, res judicata did not bar those arguments. *See State v. Fry*, 9th Dist. Summit No. 26121, 2012-Ohio-2602, ¶ 38-39 (holding that denial of PCR argument was error because PCR petitioner relied on affidavit presenting "evidence outside of the record," the petitioner's claim "could not have been fairly determined on direct appeal"); *Lawson* at 315. Thus, we agree the trial court erred to the extent it found that res judicata barred Grounds 16-21, 36-43, and 47. That said, we need not remand for the trial court to consider the evidence presented as it relates to this claim because the trial court already determined that the affidavits relied on by Froman in his PCR petition were not significant, or were only marginally significant, to his claims. *See State v. Ruggles*, 12th Dist. No. CA2021-03-023, 2022-Ohio-1804, ¶ 64.

{¶131} We will therefore analyze the merits of Froman's arguments related to Grounds 16-21, 36-43, and 47. But we will first describe trial counsel's obligations with

respect to mitigation in a capital case, the information the record reveals about the scope of trial counsel's investigation into potential mitigation evidence and witnesses, and the mitigating evidence that counsel offered at trial.

a. Applicable Law: Investigation and Presentation of Mitigation Evidence

{¶132} "In a capital case, '[d]efense counsel has a duty to investigate the circumstances of his client's case and explore all matters relevant to the merits of the case and the penalty, including the defendant's background, education, employment record, mental and emotional stability, and family relationships.'" *Myers*, 2021-Ohio-631 at ¶ 134, quoting, *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, ¶ 219. "Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, citing *State v. Johnson*, 24 Ohio St. 3d 87, 89 (1986). Counsel's mitigation investigation should include efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence. *Id.*, citing *Wiggins* at 524.

{¶133} "Given the severity of the potential sentence and the reality that the life of a capital defendant is at stake, it is only after a full investigation of all the mitigating circumstances that counsel can make an informed, tactical decision about which information would be most helpful to the client's case." *Id.* citing *State v. Johnson*, 24 Ohio St.3d 87, 90 (1986). "'Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]'" *Id.* quoting *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir.1994). "'However, a failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that investigation was not warranted.'" *Id.* "An attorney's failure to reasonably investigate the defendant's background and present mitigating evidence to the jury at sentencing can constitute ineffective assistance of counsel." *Pickens* at ¶ 219.

{¶134} That said, the law is well settled that counsel's strategic decisions related to mitigation do not constitute ineffective assistance of counsel. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, ¶ 288. "The decision to forgo the presentation of additional mitigating evidence does not itself constitute proof of ineffective assistance of counsel." *State v. Keith*, 79 Ohio St.3d 514, 536 (1997). Moreover, "'[a]ttorneys need not pursue every conceivable avenue; they are entitled to be selective.'" *State v. Murphy*, 91 Ohio St.3d 516, 542 (2001), quoting *United States v. Davenport*, 986 F.2d 1047, 1049 (7th Cir.1993). "[A] petition for postconviction relief does not provide the defendant with a second opportunity to litigate his conviction, nor does the submission of a new expert opinion containing a theory of mitigation different from the one presented at trial show ineffective assistance of counsel." *State v. Murphy*, 10th Dist. Franklin No. 00AP-233, 2000 WL 1877526, *5 (Dec. 26, 2000).

b. Froman's Trial Counsel's Investigation and Presentation of Mitigation Evidence

{¶135} Froman did not submit with his PCR petition any affidavits signed by his trial counsel explaining the steps they took or did not take to investigate potential mitigating evidence. *See generally Myers*, 2021-Ohio-631 at ¶ 137 (explaining that PCR petitioner submitted affidavit of trial counsel admitting steps counsel did not take in mitigation investigation). This is not to say that we know nothing about the scope of Froman's trial counsel's investigation. On the contrary, the trial record reveals much about the steps that Froman's trial counsel took to investigate potential mitigating evidence. For example, the record shows that Froman's trial counsel retained a mitigation specialist to assist them at trial, that Froman had three experts appointed to him at various stages of the case, and that trial counsel had access to Froman's medical, school, and jail records. Furthermore, Froman's counsel engaged in at least some investigation of witnesses who could provide information about Froman's history, character, and background; we know this because trial counsel identified several such witnesses. The trial court also found in its decision that

Froman's counsel were in contact with the mitigation specialist in Froman's separate capital prosecution case in Kentucky for Eli's murder. And as we will discuss below, the trial record and affidavits submitted with the PCR petition reflect that trial counsel interviewed Froman's two daughters and his mother as to potential mitigating evidence.

{¶136} During the penalty phase of the trial, Froman's trial counsel called and elicited testimony from Froman's daughter and a clinical psychologist. Trial counsel also permitted Froman to read an unsworn statement to the jury. We will summarize what each had to say.

{¶137} First, Alexis Froman, who is Froman's younger daughter, testified about the positive experiences she had with her father while growing up. She testified that she loves him and that he was a "big part" of her life. She also testified that Froman was a good worker. She said that before September 12, 2014, her father had become more distant and sometimes he would lose his "train of thought." Alexis directly addressed her Father's murders of Thomas and Eli, stating that what her father did that day was not the father she knew. Alexis asked the jury to spare her father from death because he was a positive person in her life, and she needed him around for "motivation" and "encouragement."

{¶138} Second, expert witness Dr. Nancy Schmidtgoessling, a clinical psychologist, testified that she had interviewed Froman for around seven hours over two days. She questioned Froman to learn more about his background, including where he grew up, what he did in his life, his family, his schooling, his work experiences, and his psychological functioning. She recounted Froman's answers for the jury.

{¶139} Dr. Schmidtgoessling reported that Froman told her that his mother raised him and that he had five siblings. As a child, he was not close to anyone. He felt his mother was too strict; she hit him and called him names. His father "really wasn't that available."

{¶140} Early in his life, Froman learned to stay to himself emotionally. His IQ, 86,

was below average, but he completed high school, and his IQ was sufficient to allow him to manage his life. Froman had multiple jobs and loved to work. He mainly worked jobs in the restaurant industry.

{¶141} Dr. Schmidtgoessling explained that along with asking Froman questions about his life, she conducted two tests. The first, a "personality assessment inventory" (PAI), surveyed a wide variety of disorders. The PAI test showed that Froman had symptoms of depression. The second test, the "OMNI" test, measures personality. The OMNI test revealed that Froman was a person who tends to be unhappy and pessimistic.

{¶142} Dr. Schmidtgoessling testified that Froman's depression did not rise to the level of impairing his ability to function. However, she concluded that when an episode of major depression superimposed itself upon his underlying depression, such an event would impact his ability to function.

{¶143} Froman reported to Dr. Schmidtgoessling that he and Thomas had been together around four years at the time of her murder. He told Dr. Schmidtgoessling that his relationship with Thomas was "very special" to him and that Thomas was "perfect." They had talked about marriage and having a child. Froman told Dr. Schmidtgoessling that he believed that Thomas was seeing other men. He claimed to have found evidence on Thomas' phone that she was communicating with other men about sexual matters. Froman also told Dr. Schmidtgoessling that Thomas' failure to account for money he gave to her angered him.

{¶144} Dr. Schmidtgoessling opined that Froman was suffering from a moderate underlying depression in 2014 but that a major depressive disorder occurred from two stressors in his life before the murders: the loss of his relationship with Thomas, and the loss of his employment. Dr. Schmidtgoessling further opined that due to Froman's emotional detachment, such stressors affected him more than they would have a different

person.

{¶145} Third, while he did not testify, Froman read an unsworn statement during the penalty hearing. In it, he repeatedly apologized and took the blame for what he did, stating, "I totally accept responsibility for what happened on September 12, 2014." He also stated that "everything that happened was my fault." But he also blamed Thomas for taking his money and not being "nice" to him and said that he found out that she was sending "naked pictures" of herself to other men, which made him sick and unhappy.

{¶146} Having reviewed the mitigation evidence submitted or elicited by Froman's trial counsel, we conclude that the state accurately summarized Froman's trial counsel's mitigation strategy as follows:

> * * * [Froman's trial counsel's] strategy in the sentencing phase was to emphasize Froman's good qualities. Through the testimony they elicited, they tried to portray Froman as:
>
> - A good father and son, whom his daughter and his mother needed in their life, both mentally and financially;
>
> - A hard worker, who had tried to rise above his low IQ and mental shortcomings;
>
> - A person who accepted responsibility and had great remorse for what he had done; and
>
> - A person who was typically strong but who, at the time of the murders, was struggling mentally and emotionally because of the loss of employment and the loss of his relationship with Ms. Thomas.

c. Analysis of Alleged Failure to Investigate Lay Witnesses

{¶147} As described above, Froman's trial counsel *did* undertake an investigation of potential mitigation evidence. Froman's argument related to Grounds 16-21, 36-43, and 47 is not that his trial counsel completely failed to investigate mitigation evidence, but that he failed to investigate as to the fourteen lay witnesses identified by Froman in his PCR

petition. Froman refers to his trial counsel's investigation of potential lay witnesses as "unreasonably truncated."

{¶148} But the affidavits that Froman submitted with his PCR petition do not show that trial counsel's investigation was "unreasonably truncated." In her affidavit, Alexis states that "I testified at trial but the attorneys never asked me about most of the information here [in her affidavit]. They only asked me very basic questions, which I answered. I would have told them all of this had they shown any real interest in what I had to say." It is unclear from this statement whether Alexis contends that Froman's trial counsel failed to ask her about the topics covered in her affidavit at trial or failed to ask her about those topics when they spoke to her before trial. But even if we assume that she meant that trial counsel "only asked me very basic questions" before trial and failed to "show any real interest in what I had to say" before trial, Alexis leaves the question of what trial counsel did and did not ask her to the imagination.

{¶149} Next, Alissa Jones, who is Froman's older daughter, states in her affidavit that "I spoke to one of my dad's lawyers, a woman, years ago, about testifying at my dad's trial." She states that she told the lawyer that she was "worried about testifying in a way that would hurt my dad because I love him," and that the attorney never followed up with her about testifying. Alissa, like Alexis, does not describe the scope or content of Froman's trial counsel's questioning about the topics raised in her affidavit.

{¶150} The same is true with Kim Froman. Kim states in her affidavit that "I talked to [Froman's] lawyers at a deposition before his sentencing hearing in Ohio." She complains that they did not ask "a lot of specific questions about my life or [Froman]," but she admits that she "remember[s] that they said they would try to help me get up to Ohio for [Froman's] case because I didn't have a lot of money or a good car." Either trial counsel helped Kim travel to Ohio or Kim found her own way to travel to Ohio, because Kim also states that she

came to Ohio for "one night of the trial." Kim complains that Froman's counsel "never asked me to testify" after she arrived in Ohio. While Kim states her opinion that trial counsel did not ask "a lot of specific questions about my life or [Froman]," she does not provide any details about the scope or content of trial counsel's questioning.[9]

{¶151} The remaining eleven lay witnesses proposed by Froman—that is, Harry Lynn, Jr.; Delores Nance; Dawn Attebury; Andrea Jerome; Doug Van Fleet; Steven Dreher; Anna Wilson Merriweather; Glenda Dunbar Dinkins; Dr. Jermaine Ali, M.D.; Margaret Smith; and Rev. Charles Dunbar—all state in their affidavits that Froman's trial counsel did not contact them before trial or state nothing about contact with trial counsel. But Froman has provided no affidavits explaining whether Froman's counsel may have learned of those witnesses and the knowledge they may have possessed by other means. The mere fact that trial counsel did not question a potential lay witness is insufficient to prove that trial counsel did not satisfy trial counsel's obligation to investigate.

{¶152} We explained above that "[i]n a capital case, '[d]efense counsel has a duty to investigate the circumstances of his client's case and explore all matters relevant to the merits of the case and the penalty, including the defendant's background, education, employment record, mental and emotional stability, and family relationships.'" *Myers*, 2021-Ohio-631 at ¶ 134, quoting *Pickens*, 2014-Ohio-5445 at ¶ 219. This duty does not require that trial counsel interview *every* individual who may have knowledge of the "defendant's background, education, employment record, mental and emotional stability, and family relationships." A requirement that trial counsel interview every such individual could never be satisfied. As an example, if the law required trial counsel to interview every individual

9. While we recognize that Froman's argument is that trial counsel's mitigation investigation is "truncated," we still emphasize that each of Alexis, Alissa, and Kim's affidavits show that trial counsel *did* investigate all three women as potential mitigation witnesses. The affidavits simply do not describe the extent of this investigation.

with knowledge of a capital defendant's "employment record," counsel would be required to interview every manager, every coworker, and potentially every client and customer who ever worked with the defendant at any of the defendant's previous places of employment. The unreasonableness of such a requirement is apparent. Therefore, the law requires, instead, that trial counsel meet the less specific, more general obligation of "investigat[ing] the circumstances of his client's case and explor[ing] all matters relevant to the merits of the case and the penalty* * *." *Id.* "In a petition for post-conviction relief, which asserts the ineffective assistance of counsel, the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness." *Jackson*, 64 Ohio St. 2d 107, at syllabus. Froman did not meet his burden as to the remaining eleven lay witnesses.

{¶153} Because the record, as supplemented by the affidavits attached to Froman's PCR petition, is unclear on the scope of questioning and preparation that trial counsel engaged in with the fourteen lay witnesses at issue, we cannot find a failure to investigate as to those lay witnesses. *See Thompson*, 2014-Ohio-4751 at ¶ 247 ("[w]here the record on appeal does not indicate the extent of counsel's pretrial investigation, an appellate court will not infer a defense failure to investigate from a silent record").[10]

d. Analysis of Alleged Failure to Present Mitigation Evidence

{¶154} Froman also argues that his trial counsel were ineffective during the penalty phase in failing to present the testimony of the fourteen lay witnesses identified above. Froman points to the content of the fourteen witnesses' affidavits in support of his argument.

10. Though unnecessary to our analysis, we note that the testimony offered by Alexis and Dr. Schmidtgoessling addressed aspects of Froman's background, education, employment record, mental and emotional stability, and family relationships—all topics that trial counsel had an obligation to investigate.

{¶155} For purposes of demonstrating ineffective assistance, the Ohio Supreme Court has advised that a petitioner must establish operative facts of deficient performance and prejudice. *State v. Kapper*, 5 Ohio St.3d 36, 38 (1983). To establish deficient performance, Froman's petition must include evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel. *Jackson*, 64 Ohio St.2d 107 at syllabus. To establish prejudice, Froman must support his petition with sufficient operative facts to demonstrate a reasonable probability that the new mitigation evidence would have swayed the jury to impose a life sentence. *Keith*, 79 Ohio St.3d at 536.

i. Analysis of Deficient Performance

{¶156} During her penalty phase testimony, trial counsel elicited testimony from Alexis Froman that supported trial counsel's strategy of depicting Froman as a good father and son, whom his daughter needed in her life. Her testimony also supported trial counsel's strategy of depicting Froman as a hard worker who had been acting differently in the time leading up to the murders. Alexis emphasized that Froman's behavior deviated from his past behavior, further supporting trial counsel's strategy. In Alexis' affidavit submitted with Froman's PCR petition, Alexis fleshes out and expands on her trial testimony by saying more about mental health and substance abuse issues in her family, mentally and physically abusive behavior by Froman's mother and other family members, as well as her own mental health issues. She discusses positive aspects of her father and states that Froman liked to work, and always had a job. She explains that Froman struggled to find work after he won a lawsuit against his former employer. She also states that her father loved Thomas very much and that she felt like Froman, Thomas, Alexis, Eli, and Thomas' other son formed a family. In other words, Alexis' affidavit both deepens her previous trial testimony and adds testimony that supports Froman's new mitigation theories asserted in his PCR petition.

{¶157} We have also closely reviewed the remaining thirteen lay witness affidavits

submitted with Froman's petition. The subjects covered include Froman's childhood and adolescence, Froman's family, Froman's mother's alleged abuse of him, Froman's mental health, substance abuse in Froman's family, and instances of racism experienced by Froman or generally experienced by Black people in the area where Froman grew up.

{¶158} In other words, the fourteen witnesses' affidavits all contain content intended to either expand on trial counsel's mitigation strategy or to support new mitigation strategies asserted by Froman in his PCR petition, such as emphasizing the effects of a bad childhood and racism on Froman's life. But "[i]t is well established that a 'defense decision to call or not call a mitigation witness is a matter of trial strategy * * * Debatable trial tactics generally do not constitute ineffective assistance of counsel.'" *Myers*, 2021-Ohio-631 at ¶ 125, quoting *State v. Graham*, 164 Ohio St.3d 187, 2020-Ohio-6700, ¶ 19.

{¶159} While the lay witness affidavits may paint a more complete picture of Froman as a person, the content of those affidavits is not significant in terms of mitigating Froman's conduct. That Froman faced racism at times during his life is of course condemnable. It is also unfortunate that Froman came from a dysfunctional family. But there is no evidence that these issues in Froman's past had anything to do with or mitigated Thomas' aggravated murder.

{¶160} Additionally, if defense counsel chose not to present the jurors with evidence about racism or Froman's dysfunctional family, then such a decision would be within the ambit of reasonable trial strategy. *Keith*, 79 Ohio St.3d at 530, quoting *State v. Johnson*, 24 Ohio St.3d 87, 91 (1986) ("It is conceivable that the omission of such evidence in an appropriate case could be in response to the demands of the accused or the result of a tactical, informed decision by counsel, completely consonant with his duties to represent the accused effectively"). Counsel could have determined that a strategy that emphasized these issues might appear to jurors like trying to shift blame away from Froman for Thomas'

brutal slaying. In sum, the affidavits submitted by Froman do not provide sufficient operative facts to demonstrate the lack of competent counsel. *Jackson*, 64 Ohio St.2d 107 at syllabus.

ii. Analysis of Prejudice

{¶161} In addition, even if Froman had demonstrated deficient performance by his trial counsel during the penalty phase of his trial, we do not find that Froman has demonstrated prejudice.

{¶162} The jury found Froman guilty of two aggravating factors that permitted imposing the death penalty. The first aggravating factor was that Thomas' murder was part of a course of conduct that involved the purposeful killing of two or more people. R.C. 2929.04(A)(5). The second aggravating factor was that Froman murdered Thomas while he was committing a kidnapping offense. R.C. 2929.04(A)(7).

{¶163} Evidence at trial support these factors. Froman, armed with a gun, entered Thomas' home at around 5:00 a.m. He went into Thomas' bedroom and forced her out of bed. Thomas started screaming for her son. Eli, dressed only in boxer shorts, woke, and came to help his mother. Froman shot Eli in the abdomen, the arm, and the back of the head. After killing her son in front of her, Froman forced Thomas out of the home and into his vehicle.

{¶164} Froman then drove away with Thomas as his hostage. The evidence showed that at some time during the kidnapping, Froman severely beat Thomas. She suffered blunt force trauma to her torso, inner thighs, and extremities, a laceration on her upper lip, three lacerations on the top of her head, and abrasions on her forehead and right cheek. She had a broken jaw and one of her lower teeth had been knocked out. She had defensive wounds, including chipped nails and a nail ripped off.

{¶165} The evidence showed that Froman stopped at a gas station sometime during

the kidnapping. On video security footage, Froman gets out of his vehicle and walks into the gas station. It was daytime and the gas station was full of people. Thomas, completely nude, exited the vehicle and began to run away. However, Froman saw her, rushed outside, grabbed her by her hair, and then dragged her back to the vehicle. He threw her into the backseat and drove away.

{¶166} While Froman was driving on the highway, he discussed what he had done with his friend, David Clark. Clark tried to convince him to give up and allow Thomas to live. But Froman was resolute that he planned to kill Thomas. Eventually, he did so by shooting her four times, once in the stomach, once in the breast, once in her upper chest, and then once, like her son, in the back of her head.

{¶167} Froman did not kill Thomas because he was suffering from mental illness. Froman did not kill Thomas because of his dysfunctional family or an abusive mother. Froman did not kill Thomas because of incidents of racism he endured. Froman killed Thomas because he was angry that she broke up with him and he killed Eli because Eli got in his way.

{¶168} In fact, there was evidence at trial that Froman began engaging in stalking-type behavior the day after Thomas ended their relationship. He appeared at Thomas' workplace and told Thomas' boss that "Kim has made me lose everything, now I will make her lose everything no matter the cost." He kept that promise. The aggravating evidence here far outweighs any evidence Froman submitted with his PCR petition.

{¶169} For the foregoing reasons, we do not find that there exists a reasonable probability that a juror would have recommended a life sentence had Froman's counsel presented the testimony of the lay witnesses newly identified in Froman's PCR petition. *Keith*, 79 Ohio St.3d at 536. The trial court did not abuse its discretion in granting the state's motion to dismiss as to Grounds 16-21, 36-43, and 47. *Blankenburg* at ¶ 9 ("The decision

to grant or deny an evidentiary hearing [for a PCR petition] is left to the sound discretion of the trial court").

2. Grounds for Relief Concerning Putative Expert Witnesses (Grounds 3 and 46)

{¶170} In Ground 3, Froman argued that his trial counsel provided ineffective assistance "for failing to investigate and present expert pharmacological testimony" in the penalty phase. In Ground 46, Froman argued that his trial counsel provided ineffective assistance by "failure to present compelling psychological testimony." In support of his arguments in these grounds for relief Froman submitted the putative expert reports of Celeste Henery, Ph.D. and Daniel Grant, Ed.D, as well as the previously discussed report of Dr. Stevens. Because we have already summarized Dr. Stevens' report, we will only summarize Dr. Henery's report and Dr. Grant's report here.

{¶171} Dr. Henery's putative expert report says that she is a cultural anthropologist. She met with and interviewed Froman for five and one-half hours. She also reviewed the lay person affidavits described above. In Dr. Henery's opinion, Froman spent his life minimizing the ramifications of a volatile childhood. Dr. Henery believes that Froman, because of an inability to communicate, relied on self-sufficiency and a job to overcome stereotypes and maintain a stable economic life. She believes that Froman sought out interracial romantic relationships and that his struggles in those relationships were his greatest challenge. His emotional decline, most pronounced in the summer of 2014, suggests to Dr. Henery that Froman was under tremendous pressure due to unemployment, homelessness, failing health, and emotional alienation. Dr. Henery believes that Froman's issues at that time were "cross-cut" by racial dynamics. Dr. Henery further reports that Froman did not have the understanding to seek professional help.

{¶172} Dr. Grant's putative expert report says that he is a neuropsychologist and that he met with Froman in prison. Froman told Dr. Grant that his mother hit him and would call

him names like "dumb" and make other negative comments about him. Dr. Grant opines that Froman has difficulty using language to solve problems. Dr. Grant also opines that abuse by Froman's mother during Froman's childhood was a factor in shaping his relationships and that the same abuse contributed to episodic outbursts and difficulty controlling his temper. Dr. Grant states that Froman maintained a low level of depression throughout his life and that when Froman experienced distress, self-doubts, and rejection, his depression would likely spike to the level of a major depressive disorder. Dr. Grant suggests that Froman's depression may have "spiked" to a "major depressive disorder" that contributed to his killing Thomas. Referring to Dr. Stevens' report on Froman's use of testosterone, Dr. Grant also opines that it was "possible" that testosterone injections contributed to Froman's loss of control "in the rapidly evolving, emotionally charged situation with the victim [that is, Thomas]."

{¶173} In *Myers*, 2021-Ohio-631, we reversed a trial court's denial of a PCR petition and ordered the trial court to conduct an evidentiary hearing on claims of ineffective assistance of counsel concerning the failure to present expert testimony during the mitigation stage of a capital case. *Id.* at ¶ 148. There, Myers, who was nineteen years old when he committed a murder, claimed his counsel were ineffective for failing to present any expert testimony, and specifically for failing to present expert testimony relating to (1) adolescent brain development, (2) that he suffered from bipolar disorder causing increased impulsivity, and (3) that he was not fully neurologically developed at the time of the offense. *Id.* at ¶ 132, 135, 136. Myers included the affidavit of his lead counsel, who stated, "I did not consider requesting funding for, or hiring, a youth/adolescent expert to help explain issues, including youth/adolescent brain development, to the jury." *Id.* at ¶ 137. Furthermore, the lead counsel claimed that he had retained a psychologist for mitigation, but that she had informed him that her testimony would not be helpful and would be

cumulative to other testimony. *Id.*

{¶174} But the psychologist contradicted lead counsel's assertion. In an affidavit, she asserted that she provided Myers' lead counsel with a report that included her opinion about the effects of Myer's age as a strong mitigating factor and that she was prepared to testify to this at trial. *Id.* at ¶ 138. This court found that the lead counsel's assertion that he did not consider hiring a youth/adolescent expert indicated that his decision was not an informed tactical decision. *Id.* at ¶ 142. We thus held that Myers had set forth sufficient operative facts to warrant an evidentiary hearing on his PCR petition. *Id.* at ¶ 140.

{¶175} Froman's case is distinguishable from *Myers*. First, there was no expert mitigation testimony presented in *Myers*, while here, Dr. Schmidtgoessling presented her opinion about the mitigating effects of a major depressive disorder that Froman underwent at the time of the offense. Second, the mitigating factor of youth and the neurological effects of not having a fully developed brain appear to be stronger factors in mitigation than the proposed expert testimonies of Dr. Henery, Dr. Grant, and Dr. Stevens. As compared to adults, juveniles lack maturity, have a less developed sense of responsibility, are more vulnerable to negative influences, and their characters are not well formed. *See Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011 (2010). Juveniles are also more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Graham* at 68, quoting *Roper* at 570.

{¶176} The report of Dr. Henery sets forth sociological or cultural mitigation information, but courts have rejected claims that failure to use this type of evidence constitutes ineffective assistance. *State v. Murphy*, 10th Dist. Franklin No. 00AP-233, 2000 WL 1877526, *6 (Dec. 26, 2000) ("[e]ncouraging jurors to decide a defendant's sentence based on conclusions about groups of people, delineated by race or ethnicity, is [an] anathema to individualized sentencing. Sentencing in capital cases should be about the

crime and the individual characteristics of the defendant"). Accord *State v. McKnight*, 4th Dist. Vinton No. 07CA665, 2008-Ohio-2435, at ¶ 101-103; *State v. Issa*, 1st Dist. Hamilton No. C-000793, 2001 WL 1635592, at *4. In addition, Dr. Henery's report simply does not meaningfully mitigate Froman's actions on September 12, 2014. Dr. Henery suggests that it is important to understand Froman's dysfunctional life to put into "context" what he did on September 12, 2014. However, Froman's background is ultimately irrelevant here because, as stated above, the evidence was clear that Froman killed Thomas due to anger – not because of a poor upbringing or because he was a Black man who suffered racism. Dr. Henery's report does not set forth sufficient operative facts to establish substantive grounds for relief. *Blankenburg*, 2012-Ohio-6175 at ¶ 9.

{¶177} Dr. Grant's report goes into detail about Froman's background and opines that depression could have contributed to Froman's actions when he killed Thomas. But there is nothing in Dr. Grant's reports that suggests that immaturity or a less-than-developed brain mitigated Froman's actions. Rather, as is clear from the evidence, Froman's actions appeared well-planned and fueled by anger and rage. Dr. Grant's report is speculative as to the causes that contributed to Froman's actions on September 12, 2014. Dr. Grant's report does not set forth sufficient operative facts in support of Froman's petition. *Id.*

{¶178} Regarding testosterone, Dr. Grant's report references Dr. Stevens' report and suggests that testosterone "could" have contributed to Froman's actions that day. In this regard, Froman contends that his trial counsel was ineffective for failing to retain Dr. Stevens to consult with Dr. Schmidtgoessling and provide her with information to "better assist the jury in understanding her findings." Froman refers to Dr. Schmidtgoessling's testimony that Froman was suffering from depression and stressors. Froman contends that Dr. Steven's opinion concerning testosterone would have strengthened the mitigating value of Dr. Schmidtgoessling's testimony concerning Froman's depression because she based

it on only "very generic background information" that she "gathered from Froman himself."

{¶179} Froman contends that Dr. Schmidtgoessling "would have been able to use Dr. Stevens' expert knowledge concerning testosterone to better assist her in explaining to the jury that testosterone injections alter brain function" and cause "severe psychological manifestations," including depression. Quoting Dr. Stevens' report, Froman further contends that Dr. Schmidtgoessling "could have explained how testosterone can cause 'serious psychiatric manifestations, including major depression, mania, paranoia, psychosis, delusions, hallucinations, hostility, and aggression.'"

{¶180} Froman's argument here concerning what would have happened in mitigation had Dr. Stevens consulted with Dr. Schmidtgoessling is wholly speculative. Froman submits no "cogent" evidence suggesting that Dr. Schmidtgoessling would have testified in a different manner had she consulted with Dr. Stevens. *See Statzer*, 2018-Ohio-363 at ¶ 16. Instead, his argument simply presumes that Dr. Schmidtgoessling would have repeated all the information contained in Dr. Stevens' report. Froman further assumes that if his counsel provided the jury with information about the effects of testosterone, it would have accepted that testosterone contributed to what occurred or that it in some way mitigated Froman's conduct. But Froman's argument here is just that, argument. The hypothesis that Dr. Schmidtgoessling may have testified about the effects of testosterone had she consulted with Dr. Stevens, and that the jury may have found Dr. Schmidtgoessling's testimony more impactful, does not constitute an "operative fact" demonstrating Froman's entitlement to relief in PCR proceedings. *See Blankenburg* at ¶ 9.

{¶181} Additionally, we note that Froman has never submitted any evidence in support of his PCR petition that indicates that he in fact acted under the influence of testosterone. As discussed in greater detail in response to Froman's third assignment of error, Froman presented no evidence that his actions that day were the result of a "roid

rage." Instead, the evidence indicates that Froman's actions were the result of planning and consideration. Moreover, the PCR petition record reflects that defense counsel were aware of the testosterone issue, having been advised of such by Froman's prior capital counsel. Given the nature of this case and the lack of evidence that Froman acted under the influence of testosterone (or any other substance), that counsel chose not to present a mitigation defense based on expert pharmacological testimony is well within the ambit of trial strategy. *Keith*, 79 Ohio St.3d at 530.

{¶182} For all these reasons, we find that Froman has not set forth sufficient operative facts showing his entitlement to substantive relief with respect to attorney performance during the penalty stage of trial. *Blankenburg* at ¶ 9. Therefore, we find that the trial court did not abuse its discretion in dismissing Grounds 3 and 46. *Id.* We overrule Froman's fifth assignment of error.

F. Claims Challenging the Constitutionality of Lethal Injection (Ground 32)

{¶183} Assignment of Error No. 6

{¶184} THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING FROMAN RELIEF ON THE GROUNDS THAT LETHAL INJECTION AS ADMINISTERED IN THE STATE OF OHIO VIOLATES THE UNITED STATES AND OHIO CONSTITUTIONS. U.S. CONST. AMENDS. I, VII, IX, XIV, § § 1, 5, 10, and 16, ARTICLE I OF THE OHIO COSNTITUTION.

{¶185} Froman argues that the death penalty, administered through lethal injection, violates the federal and state constitutional prohibitions against cruel and unusual punishment. Citing a doctor's affidavit written in 2008, Froman argues that the lethal injection protocol adopted by the state in 2016 could cause pain or an inability to monitor whether he is conscious during the lethal injection procedure.

{¶186} We agree with the trial court that res judicata bars Froman's claim because

he could have raised it in his direct appeal. *Myers*, 2021-Ohio-631 at ¶ 63 (holding that res judicata barred constitutional challenges to the death penalty in a postconviction relief case because the petitioner could have raised such challenges on direct appeal). In fact, the record reflects that Froman did argue the unconstitutionality of lethal injection in the fourteenth proposition of law of his brief on direct appeal to the Ohio Supreme Court. The Ohio Supreme Court overruled that proposition of law summarily. *Froman*, 2020-Ohio-4523 at ¶ 159.[11] We may not reconsider Froman's already-rejected argument.

{¶187} The materials submitted in conjunction with Froman's argument about lethal injection are not significant and do not advance Froman's claims beyond the bar of res judicata. *Lindsey*, 2003-Ohio-811 at ¶ 22. The trial court did not abuse its discretion when it dismissed Ground 32 because Froman has failed to demonstrate substantive grounds for relief with respect to lethal injection. *Blankenburg*, 2012-Ohio-6175 at ¶ 9. We overrule Froman's sixth assignment of error.

G. Claims Challenging the Constitutionality of the Death Penalty (Grounds 29-31)

{¶188} Assignment of Error No. 7:

{¶189} THE TRIAL COURT ERRED, AND DENIED FROMAN DUE PROCESS AND AN ADEQUATE CORRECTION PROCESS WHEN IT FOUND PROCEDURALLY BARRED FROMAN'S CLAIMS CHALLENGING IN MULTIPLE RESPECTS THE CONSTITUTIONALITY OF OHIO'S DEATH PENALTY STATUTE AND SYSTEMS (GROUNDS 29-31), AND IN SUMMARILY DISMISSING SUCH CLAIMS UNDER R.C. 2953.21 WITHOUT ALLOWING DISCOVERY OR AN EVIDENTIARY HEARING AND IN FAILING TO GRANT RELIEF.

11. We note that the Ohio Supreme Court has repeatedly affirmed the constitutionality of lethal injection as a method of administering the death penalty. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, ¶ 118; *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶ 131; *State v. Carter*, 89 Ohio St.3d 593, 608 (2000).

{¶190} Froman argues that the death penalty is unconstitutional because it is (1) incompatible with modern standards of decency, (2) per se unconstitutional due to unreliability, arbitrariness, and long delays, and (3) per se unconstitutional because it allows for "invidious racial disparities in capital indictment practices." Froman acknowledges that the Ohio Supreme Court has previously rejected these arguments but asserts them here to preserve his ability to present them in federal proceedings.

{¶191} Res judicata again bars Froman's claims here because he could has raised such claims in his direct appeal. *Myers*, 2021-Ohio-631 at ¶ 63. Furthermore, the Ohio Supreme Court has previously rejected these arguments. *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, ¶ 184 (noting that the court has held that Ohio does not impose its death-penalty scheme in an arbitrary and racially discriminatory manner and the scheme is neither unconstitutionally vague nor arbitrary and capricious).

{¶192} The petition materials submitted in conjunction with this argument are not significant and do not advance Froman's claims beyond the bar of res judicata. *Lindsey*, 2003-Ohio-811 at ¶ 22. The trial court did not abuse its discretion when it dismissed Grounds 29, 30, and 31 because Froman has failed to show substantive grounds for relief with respect to his arguments about the death penalty. *Blankenburg*, 2012-Ohio-6175 at ¶ 9. We overrule Froman's seventh assignment of error.

H. Claims Challenging the Postconviction Relief System (Ground 33)

{¶193} Assignment of Error No. 8:

{¶194} THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED FROMAN RELIEF WITHOUT AFFORDING HIM THE NECESSARY DUE PROCESS TO MEET HIS BURDEN.

{¶195} Froman argues that Ohio's postconviction relief system denies him his due process rights because it is not "simple" or "easily invoked," and because it does not permit

meaningful review due to a court's ability to dismiss arguments through doctrines such as res judicata, waiver, and forfeiture. Froman also argues that Crim.R. 35(A), which sets forth a three-page limitation on each ground for relief in a postconviction relief petition, deprived him of the ability to present a complete argument.

{¶196} Froman's complaints about the postconviction relief system and Crim.R. 35 lack merit. Regarding Crim.R. 35, R.C. 2953.21(A)(6) specifies that there is no page limit on a postconviction relief petition in a death penalty case, "notwithstanding any law or court rule to the contrary." This provision stemmed from an amendment to the statute effective April 2017. Froman filed his original petition in October 2018. Thus, if Froman limited his petition to three pages per ground for relief, he simply did not avail himself of R.C. 2953.21(A)(6).

{¶197} As for Froman's challenges to the postconviction relief system, we have repeatedly held that the system provides an adequate corrective process. *State v. Lawson*, 12th Dist. Clermont No. CA2013-12-093, 2014-Ohio-3554, ¶ 43; *State v. Davis*, 12th Dist. Butler No. CA2012-12-258, 2013-Ohio-3878, ¶ 34; *Lindsey*, 2003-Ohio-811 at ¶ 13. Other districts have held the same. *See State v. Trimble*, 11th Dist. Portage No. 2007-P-0098, 2008-Ohio-6409, ¶ 108; *State v. Frazier*, 6th Dist. Lucas No. L-07-1388, 2008-Ohio-5027, ¶ 70; *State v. Elmore*, 5th Dist. Licking No. 2005-CA-32, 2005-Ohio-5940, ¶ 143-149; *State v. Hessler*, 10th Dist. Franklin No. 01AP-1011, 2002-Ohio-3321, ¶ 85. We find no reason to reconsider our precedent on this issue. Froman has failed to demonstrate substantive grounds for relief with respect to his arguments about the postconviction relief system and the trial court did not abuse its discretion in dismissing Ground 33. *Blankenburg*, 2012-Ohio-6175 at ¶ 9. We overrule Froman's eighth assignment of error.

I. Cumulative Error Doctrine (Grounds 34 and 35)

{¶198} Assignment of Error No. 9:

{¶199} THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED FROMAN FACTUAL DEVELOPMENT AND RELIEF ON THE THIRTY-FOURTH AND THIRTY-FIFTH GROUNDS FOR RELIEF.

{¶200} Froman argues that even if a single error was insufficient to demonstrate grounds for relief, the cumulative effect of all errors that occurred in his trial entitled him to an evidentiary hearing. But for the reasons described above, Froman has demonstrated no errors that occurred at his trial, including no violations of his constitutional rights that render his judgment of conviction void or voidable. The cumulative error doctrine is inapplicable when there are not multiple instances presented of harmless error. *State v. Garner*, 74 Ohio St.3d 49, 64 (1995). Froman has failed to demonstrate substantive grounds for relief with respect to cumulative error and the trial court did not abuse its discretion by dismissing Grounds 34 and 35. *Blankenburg*, 2012-Ohio-6175 at ¶ 9. We overrule Froman's ninth assignment of error.

J. Claims Challenging the Trial Court's Use of the Doctrine of Res Judicata

{¶201} Assignment of Error No. 1:

{¶202} THE TRIAL COURT ERRED BY APPLYING THE DOCTRINE OF RES JUDICATA TO BAR FROMAN'S GROUNDS FOR RELIEF.

{¶203} Froman argues that the court erred by dismissing 45 of 47 of his Grounds based on res judicata. He contends that he supported many of the Grounds with evidence outside the record and therefore res judicata did not apply. In particular, Froman points to his claims of ineffective assistance of counsel and the various materials he submitted in support of those claims. Froman also contends that the trial court dismissed Grounds 4 through 6 (relating to pretrial publicity and voir dire) based only on res judicata.[12]

12. We observe that this argument about Grounds 4 through 6 is an implicit acknowledgment that the trial court provided other, substantive reasons for denying Froman's remaining Grounds.

{¶204} The state defends the trial court's use of the doctrine of res judicata but also contends that the court provided other, substantive reasons for denying each Ground, including Grounds 4 through 6. The state also argues that the vast majority of Froman's grounds for relief are based on matters that Froman did or could have raised on direct appeal and that he is attempting to bypass res judicata by submitting insignificant affidavits and other materials not in the record.

{¶205} Whether the court erred in applying a legal doctrine is a matter of law that we review de novo. *Myers*, 2021-Ohio-631 at ¶ 36. Upon review, we find that we have already addressed the arguments in Assignment of Error No. 1 in the course of analyzing Froman's other assignments of error above. We have either affirmed the trial court's decision on substantive grounds, or affirmed the trial court's use of res judicata, or both. Accordingly, we find this assignment of error is moot and need not be considered. App.R. 12(A)(1)(c).

III. Conclusion

{¶206} For the reasons described above, we find that the trial court did not abuse its discretion and properly dismissed Froman's PCR petition without an evidentiary hearing. Res judicata bars most of Froman's grounds for relief. In all other instances, the petition, the supporting affidavits, the documentary evidence, the files, and the records of the case failed to demonstrate sufficient operative facts to establish substantive grounds for relief.

{¶207} Judgment affirmed.

PIPER, P.J., and S. POWELL, J., concur.

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STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
Criminal Division

STATE OF OHIO,	:	**CASE NO. 14CR30398**
	:	
Plaintiff/Respondent,	:	(Judge Joseph Kirby)
	:	
vs.	:	**DECISION/ENTRY DENYING DEFENDANT'S POST-CONVICTION PETITION AND GRANTING STATE'S MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT**
	:	
TERRY LEE FROMAN,	:	
	:	
Defendant/Petitioner.	:	

David Fornshell, Warren County Prosecutor & Kirsten A. Brandt, Assistant Prosecuting Attorney, Warren County Prosecutor's Office, 520 Justice Drive, Lebanon, Ohio 45036

Jessica L. Houston & Kimberlyn Seccuro, Assistant State Public Defenders, Office of the Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215-2998

I. INTRODUCTION

This matter comes before the Court for decision upon *Petitioner Terry Froman's Amended Post-conviction Petition to Vacate or Set Aside Judgment and/or Sentence Pursuant to Ohio Rev. Code § 2953.21*, its evidentiary and other attachments including supplemental items. The Court fully reviewed Froman's amended petition, the *State's Motion to Dismiss and/or for Summary Judgment*; *Defendant-Petitioner Terry Froman's Reply to the State's Motion to Dismiss and/or for Summary Judgment*; and the supporting affidavits, the documentary evidence, the entirety of the filings from the trial court proceedings, including the indictment, the Court's journal entries, orders and

pretrial decision, the journalized records of the clerk of the court, and the court reporter's transcript of the trial and pretrial recordings, and all other matters in the record.

Contemporaneously with this decision, the Court filed "Court's Post-conviction Petition Exhibit 1". These are emails exchanged between the Court and counsel throughout the pendency of the post-conviction amended petition.

A post-conviction proceeding is not an appeal of a criminal conviction, but rather a collateral civil attack on a criminal judgment. *State v. McKelton*, 12th Dist. Butler No. CA2015-02-028, 2015-Ohio-4228, ¶ 9. R.C. 2953.21 allows "[a]ny person who has been convicted of a criminal offense * * * who claims that there was such a denial or infringement of the person's rights as to render the conviction void or voidable under the Ohio Constitution or the Constitution of the United States" to petition the trial court to vacate or set aside his sentence. "[I]n order to succeed on such a petition, the petitioner must show that a constitutional violation occurred at the time of his trial and conviction." *State v. Hill*, 2d Dist. Greene No. 2004 CA 79, 2005-Ohio-3176, ¶ 7. It is the petitioner's burden to submit "evidentiary documents with sufficient facts to demonstrate a constitutional deprivation, such as ineffective assistance of counsel." *Id.* (Internal citations omitted.) "Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." *Id* at ¶13. "When the evidence a defendant relies upon [is] dehors the record that evidence must meet a threshold of cogency." *Id* at ¶8. "Cogent evidence is that which is more than 'marginally significant' and advances a claim 'beyond mere hypothesis and desire for further discovery.' " *Id.*

As noted by the Ohio Supreme Court, pursuant to R.C. § 2953.21(C), "a trial court properly denies a defendant's petition for post-conviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." (See *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, at ¶ 2 of the syllabus. Substantive grounds for relief exist where there was a denial or infringement of the petitioner's constitutional rights so as to render the judgment void or voidable." *McKelton* at ¶ 10. "Rather than

automatically being granted a hearing on the petition, the trial court must determine from an analysis of the petition and its supporting affidavits whether substantive grounds for the relief are present, meriting a hearing." *Hill* at ¶8. "Broad conclusory allegations are insufficient, as a matter of law, to require a hearing." *State v. Coleman*, 2d Dist. Clark Nos. 04CA43, 04CA44, 2005-Ohio-3874, ¶ 17. "A petitioner is not entitled to a hearing if his claim for relief is belied by the record and is unsupported by any operative facts other than Defendant's own self-serving affidavit or statements in his petition, which alone are legally insufficient to rebut the record on review." *Id.* "In reviewing petitions for post-conviction relief, a trial court may, in the exercise of its sound discretion, weigh the credibility of affidavits submitted in support of the petition in determining whether to accept the affidavit as true statements of fact." *Id at* ¶ 25.

In reviewing a petition for post-conviction relief filed pursuant to R.C. § 2953.21, a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact. *Id.* If the court summarily dismisses the petition without holding an evidentiary hearing, it must make and file findings of fact and conclusions of law with respect to such dismissal. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the dismissal of the petition and of each claim it contains. R.C. § 2953.21(D); *State v. Francis*, 2014-Ohio-443, ¶ 10 (12th Dist.)

Therefore, since the Court has already ruled upon the issue of discovery -- which is now complete -- the Court's sole function is to decide whether to allow Froman to have an evidentiary hearing to support his claims for relief, or, if it is determined that the petition and its supporting evidentiary documents do not contain operative facts that would, if proven, establish a substantive ground for relief, then to dispose of the case by way of summary judgment without a hearing.

II. STATEMENT OF THE CASE AND FACTS

In the early morning hours of September 12, 2014, in Mayfield, Kentucky, Terry Lee Froman (hereinafter referred to interchangeably as "the Petitioner" or "Froman")

went to the home of his ex-girlfriend, Kimberly Thomas, with his .40 caliber handgun and proceeded to kidnap Ms. Thomas. During the kidnapping, and prior to her being forcibly removed from her home, Ms. Thomas yelled for her 17-year old son, Michael "Eli" Mohney, to help her. Eli approached Froman, and Froman fired a single gunshot into the abdomen of Eli, dropping him to the ground. Eli lay bleeding from his gunshot wound, face down, with his head resting on his right forearm. Froman then shot Eli a second time in the back of his head, killing him instantly. Froman then forced Ms. Thomas, who was in a state of undress, into his sport utility vehicle (hereinafter referred to as an "SUV") and drove away.

Froman stopped at a gas station/food mart in Paducah, Kentucky to refuel his vehicle. While he was inside, Ms. Thomas exited the SUV and ran to a nearby vehicle for help. Surveillance footage taken from the store showed Froman come out of the store, pursue Ms. Thomas, and force her back into the SUV by dragging her by the hair on her head. Froman then drove off.

Over the next several hours, Froman made contact with a friend who caused the conversations to be recorded at a local police station. During these calls Froman admitted to killing Eli, acknowledged that Ms. Thomas had a concussion, and told his friend that he planned on killing Ms. Thomas. Despite this friend's repeated pleas to let Ms. Thomas go, Froman maintained his resolve and commitment in taking the life of Ms. Thomas.

As Froman made his way northbound on I-75, entering Warren County, Ohio, troopers with the Ohio State Highway Patrol spotted Froman's vehicle, closed in on it, and initiated their pursuit lights in order to effectuate a stop of Froman's vehicle.

As the troopers were exiting their cruisers, two gunshots were heard. The troopers retreated to their cruisers to formulate a tactical plan to remove Froman from his vehicle.

At this same time, Froman was again on his cell phone with his friend telling him that Ms. Thomas was dead and that he was dying. It was later revealed that Froman shot himself in the upper left shoulder as a failed attempt to kill himself. The troopers performed a maneuver utilizing two three-man teams to approach Froman's vehicle. The teams were used to break out the rear glass of the SUV (first team) and the driver's side window of the SUV (second team). The troopers were then able to forcibly knock

the .40 caliber handgun from Froman's hand and remove him from his vehicle. It was then that they discovered that Ms. Thomas was dead in the backseat of Froman's vehicle due to multiple gunshot wounds.

On October 20, 2014, Froman was indicted on two counts of aggravated murder of Kimberly Thomas and Michael "Eli" Mohney (Counts 1 and 2), two counts of kidnapping (Counts 3 and 4), and one count of discharging of a firearm on or near prohibited premises (Count 5). In June 2017, Froman was found guilty after a 10-day jury trial and was sentenced to death.

Froman appealed his convictions and death sentence to the Supreme Court of Ohio. His merit brief was filed on April 13, 2018; an *amicus* brief was filed on April 30, 2018 by the Ohio Association of Criminal Defense Lawyers in support of [Froman]; the State's merit brief was filed on August 31, 2018; and Froman's reply brief was filed on September 14, 2018. Oral argument was held on June 12, 2019. The Supreme Court of Ohio affirmed this Court's judgment of conviction and death sentence on September 24, 2020.

III. GROUNDS FOR RELIEF

Froman filed the herein amended post-conviction petition, with attachments, on September 6, 2019. R.C. 2953.21 provides for the filing of a post-conviction petition for relief from conviction by any person convicted of a criminal offense who claims there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States. "A person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death." R.C. 2953.21(A)(3).

Froman has raised 47 grounds for relief to support his amended petition:

- First Ground for Relief: Ineffective assistance of counsel for failure to request a lesser included murder instruction and for failure to present supporting expert testimony of lack of prior calculation and design.

- Second Ground for Relief: Ineffective assistance of counsel for failure to request an involuntary intoxication instruction supported by readily available expert testimony.
- Third Ground for Relief: Ineffective assistance of counsel for failing to investigate and present expert pharmacological testimony during the penalty phase of Froman's capital trial.
- Fourth Ground for Relief: Trial counsel were ineffective for failing to adequately support and request their change of venue request for Froman's trial.
- Fifth Ground for Relief: Defense counsel were ineffective for failing to voir dire the jury on the extensive, prejudicial, and racist pretrial publicity that occurred in this case.
- Sixth Ground for Relief: Prejudicial pretrial publicity deprived Froman of his fundamental rights to due process and a fair trial.
- Seventh Ground for Relief: Defense counsel were ineffective for failing to voir dire individual jurors on racist attitudes.
- Eighth Ground for Relief: Defense counsel were ineffective for failing to voir dire Juror #23 on her expressed racial and/or ethnic bias.
- Ninth Ground for Relief: Defense counsel were ineffective for failing to voir dire Juror #46 on her expressed racial bias.
- Tenth Ground for Relief: Defense counsel were ineffective for failing to voir dire Juror #49 on her expressed racial bias.
- Eleventh Ground for Relief: Defense counsel were ineffective for failing to voir dire Juror #5 on his expressed racial bias.
- Twelfth Ground for Relief: Defense counsel were ineffective for failing to voir dire Juror #13 on his expressed racial bias.
- Thirteenth Ground for Relief: Defense counsel were ineffective for failing to voir dire Juror #19 on his expressed racial bias.
- Fourteenth Ground for Relief: The impaneling of a biased juror is a structural defect, not subject to a harmless error analysis, and the trial court erred in failing to voir dire the venire and dismiss those who harbored racial bias.

- Fifteenth Ground for Relief: Trial counsel were ineffective for failing to adequately prepare Froman's mental health expert witness.
- Sixteenth Ground for Relief: Ineffective assistance of counsel for failing to investigate and present additional mitigation witnesses: Harry Lynn, Jr.
- Seventeenth Ground for Relief: Ineffective assistance of counsel for failing to investigate and present additional mitigation witnesses: Delores Nance.
- Eighteenth Ground for Relief: Ineffective assistance of counsel for failing to investigate and present additional mitigation witnesses: Dawn Atterbury.
- Nineteenth Ground for Relief: Ineffective assistance of counsel for failing to investigate and present additional mitigation witnesses: Andrea Jerome.
- Twentieth Ground for Relief: Ineffective assistance of counsel for failing to investigate and present additional mitigation witnesses: Doug Van Fleet.
- Twenty-First Ground for Relief: Ineffective assistance of counsel for failing to investigate and present additional mitigation witnesses: Steven Dreher.
- Twenty-Second Ground for Relief: Forensic firearms evidence used as evidence to support Froman's conviction was unreliable and defense counsel were ineffective for failing to impeach the State's expert witness, Matthew White.
- Twenty-Third Ground for Relief: Forensic firearms evidence used as evidence to support Froman's conviction was unreliable and defense counsel were ineffective for failing to impeach the State's expert witness, Matthew White.
- Twenty-Fourth Ground for Relief: Forensic firearms evidence used as evidence to support Froman's conviction was unreliable and defense counsel were ineffective for failing to impeach the State's expert witness, Matthew White.
- Twenty-Fifth Ground for Relief: Forensic firearms evidence used as evidence to support Froman's conviction was unreliable and defense counsel were ineffective for failing to impeach the State's expert witness, Matthew White.
- Twenty-Sixth Ground for Relief: Forensic firearms evidence used as evidence to support Froman's conviction was unreliable and defense counsel were ineffective for failing to impeach the State's expert witness, Matthew White.

- Twenty-Seventh Ground for Relief: Forensic firearms evidence used as evidence to support Froman's conviction was unreliable and defense counsel were ineffective for failing to impeach the State's expert witness, Matthew White.
- Twenty-Eighth Ground for Relief: Forensic firearms evidence used as evidence to support Froman's conviction was unreliable and defense counsel were ineffective for failing to impeach the State's expert witness, Matthew White.
- Twenty-Ninth Ground of Relief: Ohio's death penalty is incompatible with modern standards of decency.
- Thirtieth Ground for Relief: The death penalty is per se unconstitutional.
- Thirty-First Ground of Relief: Ohio's death penalty is unconstitutional because of the racial and geographical disparities in which it is applied.
- Thirty-Second Ground for Relief: Lethal injection as administered in the state of Ohio violates the United States and Ohio Constitutions.
- Thirty-Third Ground for Relief: Ohio's post-conviction procedures are constitutionally inadequate.
- Thirty-Fourth Ground for Relief: Cumulative effect of the denial of effective assistance of counsel.
- Thirty-Fifth Ground for Relief: Cumulative errors at Froman's trial and sentencing deprived him of his constitutional rights.
- Thirty-Sixth Ground for Relief: Ineffective assistance of counsel for failing to fully investigate and present additional mitigation witness: Alexis Froman.
- Thirty-Seventh Ground for Relief: Ineffective assistance of counsel for failing to investigate and present additional mitigation witness: Alissa Jones.
- Thirty-Eighth Ground for Relief: Ineffective assistance of counsel for failing to investigate and present additional mitigation witness: Anna Wilson Merriweather.
- Thirty-Ninth Ground for Relief: Ineffective assistance of counsel for failing to investigate and present additional mitigation witness: Glenda Dunbar Dinkins.
- Fortieth Ground for Relief: Ineffective assistance of counsel for failing to investigate and present additional mitigation witness: Dr. Jermaine Ali, M.D.

- Forty-First Ground for Relief: Ineffective assistance of counsel for failing to investigate and present additional mitigation witness: Kim Froman.
- Forty-Second Ground for Relief: Ineffective assistance of counsel for failing to investigate and present additional mitigation witness: Margaret Smith.
- Forty-Third Ground for Relief: Ineffective assistance of counsel for failing to investigate and present additional mitigation witness: RuCharles Dunbar.
- Forty-Fourth Ground for Relief: Ineffective assistance of counsel for failure to challenge jurors for implicit racial bias.
- Forty-Fifth Ground for Relief: The impaneling of biased jurors is structural defect, not subject to a harmless error analysis, and the trial court erred in failing to voir dire the venire and dismiss those who harbored implicit racial bias.
- Forty-Sixth Ground for Relief: Ineffective assistance of counsel for failure to present compelling psychological testimony.
- Forty-Seventh Ground for Relief: Ineffective assistance of counsel for failure to present compelling mitigation information about Froman's unique background, health, and the racial dynamics he faced.

It is out of these 47 grounds for relief that Froman asks this Court to:

> (*i.*) Declare his convictions to be void and/or voidable and grant him a new trial;
>
> (*ii.*) [In the alternative], Declare his death sentence to be void and/or voidable and grant him a new sentencing hearing pursuant to *State v. Jackson*, 64 Ohio St.2d 107, 111 (1980);
>
> (*iii.*) [If neither one nor two above is granted], Permit him to pursue discovery and have the Court conduct an evidentiary hearing pursuant to R.C. 2953.21; and
>
> (*iv.*) Grant any further relief to which he may be entitled.

The Court is familiar with the facts of the case – having served as the trial judge for the entirety of the trial proceedings. As noted above, the Court has reviewed the entire record in this case, and all exhibits and authority filed and cited in the amended post-conviction petition. Because the Court is able to resolve the claims based on the

evidence presented at trial and included with the petition, no evidentiary hearing is required.

IV. ISSUES PRESENTED

While Petitioner's appeal was pending before the Supreme Court of Ohio, he filed the instant collateral attack on his conviction and death sentence. Upon review of same, the Court finds that Froman's amended petition for post-conviction relief presents several issues for review. These issues have been broken down into three groups (1) constitutional arguments, (2) ineffective assistance of counsel, and (3) cumulative effect and errors, which have been rearranged, in numerical order by topic, for purposes of the Court's discussion and analysis.

V. CONSTITUTIONAL ARGUMENTS

(Grounds for Relief: 29-33)

The Petitioner has set forth a number of grounds for relief alleging the statutory scheme of the death penalty and other certain procedures are unconstitutional, including the post-conviction petition process.

Petitioner's Grounds for Relief Twenty-Nine through Thirty-Two claim that Ohio's death penalty is incompatible with modern standards of decency; is per se unconstitutional due to racial and geographical disparities in which it is applied; and Ohio's use of lethal injection is in violation of his constitutional rights to protection from cruel and unusual punishment and due process of law.

The Court finds these arguments unpersuasive and barred by the doctrine of res judicata. These issues have either been fully litigated in Petitioner's direct appeal to the Supreme Court of Ohio, or they should have been raised in his direct appeal but were omitted.

The Court notes the Supreme Court of Ohio has held that the doctrine of res judicata bars a convicted defendant who was represented by counsel from litigating in a post-conviction petition proceeding, any defense or any claimed lack of due process that could have been raised at trial or on appeal of that judgment. *State v. Lawson*, 103 Ohio

App.3d 307, 313, (12th Dist.1995) citing *State v. Perry* , 10 Ohio St.2d 175 (1967).

However, "there is an exception to the res judicata bar when the Petitioner presents competent, relevant, and material evidence outside the record that was not in existence and available to the Petitioner in time to support the direct appeal. Evidence outside the record, or evidence dehors the record, must demonstrate that appellant could not have appealed the constitutional claim based upon information in the original record and such evidence must not have been in existence and available to the Petitioner at the time of trial." *State v. Boles*, 12th Dist. Brown No. CA2016-07-014, 2017-Ohio-786, ¶ 20, appeal not allowed, 151 Ohio St.3d 1453, 2017-Ohio-8842, (internal citations omitted.)

Most of the claims submitted by Petitioner are primarily supported by the trial record and not by new evidence which was unavailable to the Petitioner at the time of trial. To the extent these grounds for relief make reference to new evidence introduced with the petition, the Court finds the new evidence only marginally significant to, and not supportive of, the claims made.

Froman challenged the constitutionality of the death penalty in his trial and in his appeal to the Supreme Court of Ohio making many of these same arguments. He could have raised all of them. Failure to do so results in these claims being denied based on the doctrine of res judicata.

Even if these claims were not denied on the basis of res judicata, they would still fail as the Supreme Court of Ohio has upheld the constitutionality of the Ohio death penalty scheme for each of the grounds that Froman has presented here. See *State v. Jenkins,* 15 Ohio St.3d 164, 169 (1984), citing *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, (1976) (rejecting the claim that Ohio's death-penalty scheme is unconstitutional because it gives prosecutors unfettered discretion to indict); *State v. Steffen*, 31 Ohio St.3d 111, 125 (1987)(rejects statistics on racial disparity to find the death penalty unconstitutional, individuals must show that racial consideration in his sentencing violated equal protection) , *State v. Short,* 129 Ohio St.3d 360, 2011-Ohio-3641, ¶ 137, and *State v. Mink,* 101 Ohio St.3d 350, 2004-Ohio-1580, ¶ 103 (both rejecting the claim that Ohio's death penalty is applied in a racially discriminatory manner); *State v. Buell,* 22 Ohio St.3d 124, 136, (1986) (rejecting an equal-protection challenge based on the geographic disparity of death sentences); and *Mink, supra* at ¶ 103; *Jenkins,* 15 Ohio

St.3d at 168, (rejecting the claim that the death penalty is unconstitutional because it is neither the least restrictive punishment nor an effective deterrent). *State v. Glenn,* 28 Ohio St.3d 451, 453, (1986), (rejected the argument that allowing juries to weigh aggravating and mitigating factors leads to arbitrary and capricious imposition of the death penalty); *State v. Mapes,* 19 Ohio St.3d 108, 116–117, (1985), (Use of the same jury at trial and sentencing burdens a defendant's rights to counsel and an impartial jury); *State v. Kirkland, 140 Ohio St.3d 73, 2014-Ohio-1966, ¶ 111 (2014). State v. Tompkins*, 12th Dist. Butler No. CA2014-07-159, 2015-Ohio-2316, ¶ 19 (felony-murder statute is constitutional).

Next the Petitioner argues in his Thirty-Third ground for relief that Ohio's post-conviction procedures are constitutionally inadequate in that they do not provide an adequate corrective process that is swift, simple and easily invoked, eschew rigid and technical doctrines of res judicata, forfeiture, waiver or default, and allows full fact hearings to resolve disputed factual issues.

Citing the Supreme Court of Ohio decision in *Freeman v. Maxwell,* 4 Ohio St.2d 4, 6, 210 (1965), the Twelfth District Court of Appeals has consistently held that statutory procedure for post-conviction relief does contain an adequate corrective process. *State v. Lindsey*, 12th Dist. Brown No. CA2002-02-002, 2003-Ohio-811, ¶ 13. See also, *State v. Davis*, 12th Dist. Butler No. CA2012-12-258, 2013-Ohio-3878, ¶ 34, *State v. Ketterer*, 2017-Ohio-4117, 92 N.E.3d 21, ¶ 27 (12th Dist.).

For these reasons, the Court finds the Petitioner has failed to set forth such facts to demonstrate a cognizable claim of a constitutional error in grounds Twenty-Nine, Thirty, Thirty-One, Thirty-Two, and Thirty-Three. The Court hereby finds that Froman is not entitled to an evidentiary hearing on these issues and they are therefore, ***OVERRULED.***

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction petition asserting ineffective assistance of counsel, such as the case here, the Petitioner must first show that his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial. *State v. Widmer,* 12th Dist. Warren No.

CA2012–02–008, 2013–Ohio–62, ¶ 132. A trial counsel's performance will not be deemed ineffective unless the Petitioner demonstrates that counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, were it not for counsel's errors, the result of the proceeding would have been different. *State v. Ullman,* 12th Dist. Warren No. CA2002–10–110, 2003–Ohio–4003, ¶ 43; *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). A Petitioner's failure to satisfy either prong is fatal to an ineffective assistance of counsel claim. *State v. Ayers,* 12th Dist. Warren Nos. CA2010–12–119 and CA2010–12–120, 2011–Ohio–4719, ¶ 49; *State v. Madrigal,* 87 Ohio St.3d 378, 389 (2000). *State v. Davis,* supra *at* ¶¶ 12-14 (Butler County).

The Twelfth District has held that a post-conviction petition that alleges a flawed trial strategy is not the basis of a finding of ineffective assistance of counsel. *State v. Kinsworthy,* 12th Dist. Warren No. CA2013–06–053, 2014-Ohio-1584, ¶ 43. See also *State v. Casey,* 2018-Ohio-2084, ¶¶ 33-34 (12th. Dist.). Even establishing another attorney would have employed a different strategy does not mean the strategy used by defense counsel fell below the objective standard of reasonableness. There is a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of professional judgment. *Id. See* also *State v. Murphy,* 12th Dist. Butler No. CA2009–05–128, 2009-Ohio-6745, ¶ 43 ("the fact that the trial strategy was ultimately unsuccessful or that there was another possible and better strategy available does not amount to ineffective assistance of counsel").

a. Ineffective Assistance of Counsel – Expert Testimony (Grounds for Relief 1-3, 46-47)

In his First and Second Ground for Relief, Froman claims his trial counsel did not do a thorough investigation or present adequate evidence during the trial phase. He claims that they should have pursued an expert in pharmacology to counter "prior calculation and design" and failed to request an involuntary intoxication instruction which could have been supported by readily available expert testimony. More specifically, counsel should have consulted with Dr. Craig Stevens, Ph.D., a Professor of Pharmacology at Oklahoma State University's College of Osteopathic Medicine. Froman claims testimony provided

by Dr. Stevens would have been compelling evidence at trial which would have demonstrated he did not act with prior calculation and design. Additionally, it would have helped with cross examination of the State's witnesses and been the basis for a lesser included murder instruction. Alternatively, it would have allowed Froman to present an affirmative defense of involuntary intoxication at the time of the incident which would have permitted trial counsel to ask for an involuntary intoxication instruction. This testimony could have shown that Froman's violence was a result of the actual pharmacological effects of the testosterone derivates on his brain and behavior. Froman argues this would have allowed him to attribute his violent acts to the testosterone shots he was receiving. Froman further argues that his trial counsel's failure to conduct any meaningful investigation in this case limited his ability to obtain an expert in pharmacology who could have assisted the defense throughout the case. This expert assistance may have resulted in a request for a lesser included murder offense instruction, eliminating his eligibility for the death penalty, or an instruction for involuntary intoxication.

Similarly, regarding mitigation, in Froman's Third Ground for Relief he argues that Dr. Stevens' testimony would have helped contextualize the findings by Dr. Schmidtgoessling, who testified that Froman suffered from major depressive disorder. Dr. Schmidtgoessling testified that Froman suffered two major psychological stressors – a break up and lack of employment. Dr. Stevens would have testified that testosterone shots alter brain function and cause severe psychological manifestations, including depression. This testimony would have strengthened the mitigating value of Froman's mental state at the time of the offenses.

For his Forty-Sixth Ground for Relief, Froman claims his trial counsel was ineffective for failing to present compelling psychological testimony in mitigation. Specifically, they failed to present evidence regarding his family and personal background, and mental and physical health. As a result, Froman's rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were violated. While Froman acknowledged that psychological testimony was presented on his behalf, he claims it was utterly lacking in substance and support. Ultimately, it prevented the jury from considering additional information about his chaotic and abusive childhood, his

tendency toward emotional suppression and isolation, his physical and mental health issues, and the persistent and debilitating racism he faced as a black man in Kentucky. Froman now claims that his trial counsel should have presented this evidence through readily available expert testimony. Testimony from Dr. Daniel Grant, Ed.D. could have illustrated the significant struggles Froman had in his life and methodically explained how Froman has maintained at least a low level of depression throughout most of his life.

Finally, in his Forty-Seventh Ground for Relief, Froman claims his trial counsel was ineffective for failure to present compelling mitigation information about Froman's unique background, health, and the racial dynamics he faced. Using an anthropologist, like Dr. Celeste Henery, Ph.D., would have provided the jury with information about Froman's background including, but not limited to, Froman's birthplace; an area replete with a history of slavery, his exposure to racism, his mother's untreated mental illness, and his emotional struggles exacerbated by his loss of employment. All of these issues leading to Froman's mental deterioration and destabilization.

Froman's argument regarding involuntary intoxication lacks merit. "[B]ecause Ohio does not recognize a defense of diminished capacity, a defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that he lacked the mental capacity to form the specific mental state required for the crime. *State v. Wilcox*, 70 Ohio St.2d 182, (1982).

The same is true for Froman's attempt to offer this testimony to demonstrate he failed to act with prior calculation and design. The partial defense of diminished capacity is not recognized either. "A defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that the defendant lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime." *Id.*

The mere fact that an offense is a lesser included offense of another does not mean the court must instruct the jury on both offenses. *State v. Wilkins*, 64 Ohio St.2d 382, 387 (1980). A charge on the lesser included offense is not required unless the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Thomas*, 40 Ohio St.3d 213, 216 (1988). Likewise, the proper standard for determining whether a defendant has successfully raised an affirmative defense asks whether the defendant has introduced

"evidence of a nature and quality sufficient to raise the issue." *State v. Melchior*, 56 Ohio St.2d 15, 20 (1978), citing *State v. Robinson*, 47 Ohio St. 2d 103, 111-112.

Notwithstanding the documentary materials presented by Froman in support of his Amended Petition, the evidence simply does not establish that Froman was under the influence of testosterone, nor was he suffering from the effects of testosterone, at the time of the murders of Kimberly Thomas and Eli Mohney. Thus, allowing expert testimony to help further this speculation, or to allow a lesser-included offense instruction and a jury instruction on involuntary intoxication, was not warranted.

Froman's conduct on September 12, 2014 was the result of a plan he developed after Ms. Thomas ended their romantic relationship on August 20, 2014. Froman fatally shot Eli for no other reason than he came to the aid of his mother when she called his name as she was being forced from her home. It was Froman's intent to make Ms. Thomas "lose everything." And, as this Court said in its judgment entry of June 22, 2017, what better way to make her lose everything than to kill her son, execution-style, in front of her.

The issue of Froman taking testosterone injections is not a new one. His trial counsel was aware of his injections and was in possession of Froman's medical and prescription records. There simply isn't any proof that Froman had taken testosterone on September 11 or 12, 2014 and was under the effects of testosterone at the time of the murders. What the trial counsel had available to them was overwhelming evidence showing Froman was not acting impulsively, was not agitated, and his rage was reserved for Ms. Thomas and Eli who, unfortunately, just so happened to get in his way. The Court can easily conclude that trial counsel did not give the testosterone shot theory serious consideration as a possible defense during the trial phase, and, if they did, their rejection of it was reasonable.

Similarly, trial counsel did not substantially violate any of their duties as defense counsel in their decision to not use the information identified in Froman's Forty-Sixth and Forty-Seventh Grounds for Relief during mitigation. The presentation of witnesses and evidence during mitigation is a matter of strategy. Counsel's strategic decisions in the presentation of mitigation evidence do not constitute ineffective assistance of counsel. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, at ¶288. "There is no per se rule that every capital defense team must present the testimony of a psychologist in mitigation." *State v. Adams*, 7th Dist. Mahoning No. 08 MA 246, 2012-Ohio-2719, at ¶65. Courts will

not second-guess the strategic decisions of counsel even though different counsel now argues that they would have defended differently. *State v. Mason*, 82 Ohio St.3d 144, 169, 1998-Ohio-370.

Froman's trial counsel had a mitigation specialist and a total of three experts assisting them at different times leading up to trial. Counsel had Froman's medical, school, and jail records, and had identified individuals to provide information about Froman's history, character, and background. Additionally, Froman was facing a second capital murder case in Graves County, Kentucky for his murder of Eli. Froman's defense counsel in Kentucky also had a mitigation specialist and an investigator, with whom his Ohio counsel were in contact.

There is no evidence that trial counsel did not thoroughly investigate his history, character, and background. A reviewing court will not "infer a defense failure to investigate from a silent record." *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, at ¶247; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, at ¶65; citing *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, at ¶244.

The additional information presented by Froman in his amended post-conviction materials in the form of reports from Craig W. Stevens, Ph.D., Donald Malarcik, Daniel Grant, Ed.D, and Celeste Henery, Ph.D. do not establish that trial counsel's chosen strategy was unreasonable or that there is a reasonable probability of a different outcome had they been called to testify. To the extent these grounds for relief make reference to new evidence introduced with the Amended Petition, the Court finds the new evidence only marginally significant to, and not supportive of, the claims made.

Lastly, Froman's arguments are barred by res judicata. Under the doctrine of res judicata, "a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Perry, supra*, at paragraph nine of the syllabus.

Froman's Grounds for Relief One, Two, Three, Forty-Six and Forty-Seven do not demonstrate substantive grounds for relief or show that there is a genuine issue as to any material fact.

For these reasons, the Court finds the Petitioner has failed to set forth such facts to demonstrate a cognizable claim of a constitutional error in grounds One, Two, Three, Forty-Six and Forty-Seven. The Court hereby finds that Froman is not entitled to an evidentiary hearing on these issues and they are therefore, ***OVERRULED***.

b. Ineffective Assistance of Counsel - Pretrial Publicity
(Grounds for Relief 4-6)

In his Fourth Ground for Relief, the Petitioner alleges trial counsel was ineffective for failing to adequately support and request a change of venue. As a result, Froman claims his rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Ohio Const., Art. I, §§ 1, 2, 5, 9, 10 and 16 were violated.

Froman identifies media sources in Warren and surrounding counties who ran numerous articles and news segments regarding his case. He claims numerous articles surfaced describing the gruesome details of the case. Prior to trial, there was also coverage of alleged acts by Froman that were presented as "admissions" made by Froman or at least as evidence of his consciousness of guilt. Froman argues that trial counsel failed to ask any questions on the issue of pre-trial publicity.

In his Fifth Ground for Relief, Froman argues his trial counsel was ineffective for failing to voir dire the jury on the pretrial publicity that occurred in this case. In his Sixth Ground for Relief Froman claims he was deprived of his fundamental rights to due process and a fair trial because of the prejudicial pretrial publicity.

The Court finds the jurors were satisfactorily questioned about pre-trial publicity and the amount of pre-trial publicity in this case was not so extraordinary to deprive the Petitioner of due process. This argument is without merit and must fail.

Additionally, the argument fails because these grounds are barred by res judicata. *See State v. Perry, supra,* at paragraph nine of the syllabus. The Petitioner claimed ineffective assistance of counsel in his direct appeal. Part of his ineffective assistance argument alleged that his counsel was deficient in their questioning of and failure to remove certain jurors during voir dire. Froman also claimed on appeal that he was not tried by a fair and impartial jury. Froman's motion for a change of venue, the discussions

about the change of venue between this Court and counsel, this Court's and counsels' questioning of the veniremen during voir dire, and the jurors' responses during voir dire are all matters appearing on the face of the existing record.

Consequently, Froman could have argued on appeal that the jury was not fair and impartial on the basis of pretrial publicity, and his counsel were ineffective during voir dire. Because he could have made those arguments on appeal, his current claims of ineffective assistance of counsel and prejudice from pretrial publicity in his Fourth through Sixth Grounds for Relief are barred by res judicata. *See State v. Cole*, 2 Ohio St.3d 112, at syllabus (1982); *Perry, supra*, at paragraph nine of the syllabus. The Court further finds that the exhibits submitted in support of his arguments are only marginally significant to, and not supportive of, the claims made.

For these reasons, the Court finds the Petitioner has failed to set forth such facts to demonstrate a cognizable claim of a constitutional error in grounds Four, Five and Six. The Court hereby finds that Froman is not entitled to an evidentiary hearing on these issues and they are therefore, ***OVERRULED***.

c. Ineffective Assistance of Counsel – Racism

(Grounds for Relief 7-14, 44-45)

Froman argues his trial counsel was ineffective in his Seventh Ground for failing to voir dire individual jurors on racist attitudes. He claims counsel failed to inquire of jurors who expressed racial bias and ultimately failed to strike those jurors. In his Eighth Ground for Relief, Froman argues his trial counsel was ineffective for failing to voir dire Juror 23 about her expressed racial and/or ethnic bias. In his Ninth Ground for Relief, he faults his trial counsel for failing to voir dire Juror 46 on her expressed racial bias. In his Tenth Ground for Relief, he argues his trial counsel was ineffective for failing to voir dire Juror 49 on her expressed bias. On his Eleventh Ground for Relief, Froman has the same argument about Juror 5 and his expressed racial bias. Froman's Twelfth Ground for Relief was the same complaint for Juror 13. Froman's Thirteenth Ground for Relief involved Juror 19 and his expressed racial bias.

Froman argues in his Fourteenth Ground for Relief that the trial court failed to voir dire the veniremen and dismiss those who harbored racial bias, creating a structural defect thereby impaneling a biased juror. Froman claims his trial counsel was

ineffective for failing to challenge jurors for implicit racial bias in his Forty-Fourth Ground for Relief. Finally, in his Forty-Fifth Ground for Relief, Froman argues the trial court's failure to voir dire the venire and dismiss those who harbored implicit racial biases created a structural defect by impaneling biased jurors.

Froman's arguments are barred by res judicata because the same arguments either were or could have been raised in his direct appeal. *See State v. Perry, Id.* On appeal to the Supreme Court of Ohio, Froman specifically argued error and ineffective assistance of counsel on the exact same grounds as he asserts in his Seventh through Fourteenth and Forty-Fourth and Forty-Fifth Grounds for Relief. None of his arguments were found to have merit by the Supreme Court of Ohio.

Although he did not specifically challenge counsels' voir dire of Jurors 19, 23, and 41 on appeal and did not argue that counsel should have retained an expert to assist them on issues of race in making challenges to the jurors, he certainly could have made those arguments. The exhibits Froman includes in support of his Amended Petition's Seventh through Fourteenth and Forty-Fourth and Forty-Fifth Grounds for Relief are only marginally relevant to his claims. There is no proof that that any of the jurors seated on the jury were racist or that counsel was ineffective in their questioning, or in their decision not to hire an expert to assist them in voir dire.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right of an accused in all criminal prosecutions to a trial by an impartial jury. *Turner v. Murray*, 476 U.S. 28, 36, fn. 9, 106 S.Ct. 1683 (1986); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, (1961). To that end, a capital defendant who is tried for an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. *Turner*, at 36-37.

Jurors are objectionable if they have formed "such strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them." *Irvin*, at 722, fn. 3. But "to hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, at 723.

In the context of ineffective assistance of counsel, a defendant must meet the

Strickland test, as set forth above in response to the First through Third and Forty-Sixth and Forty-Seventh Grounds for Relief. *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, at ¶62. "When a capital defendant is accused of interracial murder, defense counsel are 'entitled to engage in racial-bias inquiry,' but they are not required to do so." *State v. Thompson, supra.* "[T]he actual decision to question on racial prejudice is a choice best left to a capital defendant's counsel," which reviewing courts have consistently declined to second-guess. *Id.* at ¶225, 233, quoting *Mundt, supra,* at ¶63 and *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, at ¶33. To satisfy the prejudice prong of *Strickland,* a defendant "*must* show that [a] juror was *actually biased* against him." (Emphasis *sic.*) *Mundt, supra,* at ¶67.

Initially, it should be noted that Froman did not challenge for cause or use a peremptory challenge on any of the jurors he now challenges on appeal. Moreover, he accepted the jury and the alternates without exhausting all of his peremptory challenges. Consequently, he has waived this issue for all but plain error.

This case was not about race. It was about retaliation and retribution for what Froman perceived as a wrong committed against him. Froman killed Kimberly Thomas because she broke off their relationship. And while he went to kidnap Ms. Thomas, her son, Eli, came to her aid. That's when Froman killed him, and then kidnapped Ms. Thomas at gunpoint driving her all the way from Kentucky to Ohio before he finally killed her. Making good on a promise to "make her lose everything no matter the cost."

The parties were given several opportunities to question the jurors about any racial or other biases they harbored. The first opportunity came in the form of (two) written questionnaires. One was a case-specific questionnaire about the prospective jurors' familiarity or knowledge about the case and their views on the death penalty. The other contained 141 questions about the prospective jurors' backgrounds, experiences, and attitudes, including their attitudes about and experiences with members of other races or ethnic groups. Counsel further questioned the prospective jurors about racial biases and biases for or against the death penalty in small panel voir dire. Finally, Counsel questioned the potential jurors in large group voir dire. During voir dire, Juror 49 agreed that race should not play any role in the decision-making process whatsoever.

Froman has not demonstrated ineffective assistance of counsel in defense

counsels' failure to employ an expert in voir dire. He asserts that "counsel failed to obtain readily available expert testimony to assist them in ensuring that the jury they selected would be free from racial bias." The Court is unpersuaded by the two opinions from Donald Malarcik and Jack Glaser, Ph.D. asserting their expertise might have assisted trial counsel. The Court finds that trial counsel's failure to employ one was not ineffective.

The Court finds that the exhibits submitted in support of his arguments are only marginally significant to, and not supportive of, the claims made. The Court further finds that the Petitioner has not established that the trial court's seating of the jury was any kind of error, much less the existence of error that is structural.

For these reasons, the Court finds the Petitioner has failed to set forth such facts to demonstrate a cognizable claim of a constitutional error in grounds Seven through Fourteen and Forty-Four through Forty-Five. The Court hereby finds that Froman is not entitled to an evidentiary hearing on these issues and they are therefore, ***OVERRULED***.

d. Ineffective Assistance of Counsel – Sentencing Phase
(Grounds for Relief 15-21, 36-43)

The Petitioner claims in his Fifteenth Ground for Relief that trial counsel was ineffective for failing to adequately prepare his mental health witness. More specifically, Froman claims trial counsel failed to make a meaningful mitigation presentation, effectively denying him counsel at a critical stage of the trial – the mitigation phase – where his life was at stake. Froman claims the psychologist that was hired by his trial counsel to assist in the development of his mitigation case, Dr. Nancy Schmidtgoessling, was unprepared because trial counsel did not provide her with adequate records for her review.

Froman also argues that his trial counsel was ineffective in their failure to investigate and present the following additional mitigation witnesses: Sixteenth Ground for Relief - Harry Lynn, Jr.; Seventeenth Ground for Relief – Delores Nance; Eighteenth Ground for Relief – Dawn Atterbury; Nineteenth Ground for Relief – Andrea Jerome; Twentieth Ground for Relief – Doug Van Fleet; Twenty-First Ground for Relief – Steven

Dreher; Thirty-Sixth Ground for Relief – Alexis Froman; Thirty-Seventh Ground for Relief – Alissa Jones; Thirty-Eighth Ground for Relief – Anna Wilson Merriweather; Thirty-Ninth Ground for Relief – Glenda Dunbar Dinkins; Fortieth Ground for Relief – Dr. Jermaine Ali, M.D.; Forty-First Ground for Relief – Kim Froman; Forty-Second Ground for Relief – Margaret Smith; and Forty-Third Ground for Relief – RuCharles Dunbar. The new witnesses' affidavits were provided by Froman as part of his post-conviction petition.

To begin with, each ground for relief stated above is barred by res judicata because Froman could have asserted them in his direct appeal and did not. *State v. Cole*, 2 Ohio St.3d 112 (1982); *State v. Perry, supra*, at paragraph nine of the syllabus. The testimony and evidence presented during the sentencing phase of Froman's trial are matters appearing on the face of the existing record. Thus, the issue of whether other witnesses and/or other information would have assisted Froman in the mitigation phase could have been raised on appeal. In fact, he did raise them. The Supreme Court of Ohio gave no credence to his argument when they affirmed his judgment of conviction and death sentence in their written decision of September 24, 2020. None of his arguments taken up during his direct appeal to the Supreme Court of Ohio were found to have merit.

While Froman submits exhibits in support of his arguments, a defendant does not overcome the res judicata bar merely by providing evidence outside the record. *State v. Fears*, 1st Dist. Hamilton No. C-990050, 1999 WL 1032592 (Nov. 12, 1999), at *3. Rather, the evidence presented dehors the record must satisfy a threshold level of "cogency." "Otherwise it would be too easy to defeat the holding of *Perry* by simply attaching evidence which is not "more than marginally significant", and which does not "advance the [defendant's] claim beyond mere hypothesis and a desire for further discovery." *Id.*; *State v. Coleman*, 1st Dist. Hamilton No. C-900811, 1993 WL 74756, at *7. *See also State v. Blankenburg*, 12th Dist. Butler No. CA2012-04-088, 2012-Ohio-6175, at ¶11. The evidence must be "'competent, relevant, and material' to the claim, must not be cumulative of or alternative to evidence presented at trial, and it "must be more than evidence which was in existence and available to the defendant at the time of the trial and which could and should have been submitted at trial if the defendant wished to make use of it." *Fears, supra* at *3; *Coleman, supra*, at *7.

The exhibits Froman includes in support of his Fifteenth through Twenty-First

and Thirty-Sixth through Forty-Third Grounds for Relief do not meet that threshold requirement. The exhibits are not relevant, or are only marginally relevant, to his claims. *See State v. Jones*, 1st Dist. Hamilton No. C-990813, 2000 WL 1886307 (Dec. 29, 2000), at *2. The exhibits do not demonstrate that Froman's counsel was ineffective for failing to call additional witnesses in the sentencing phase or in fully preparing the witnesses who testified in the sentencing phase. They contain cumulative and/or alternative information that was in existence at the time of trial.

Furthermore, there is no substantive merit to Froman's claims. Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, at ¶286; *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4. "The defense decision to call or not call a mitigation witness is a matter of trial strategy." *Dean, supra*, at ¶288; *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, at ¶116. Likewise, the scope of questioning of a witness is generally a matter left to the discretion of defense counsel. *Id.* Even debatable trial tactics do not constitute ineffective assistance of counsel. *Dean, supra*, at ¶288; *Elmore, supra*, at ¶116.

Likewise, "[t]he decision to forego the presentation of additional mitigating evidence does not itself constitute proof of ineffective assistance of counsel." *Id.*, at ¶119; *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, at ¶240. "[A]ttorneys need not pursue every conceivable avenue; they are entitled to be selective." *Elmore, supra*, at ¶119; *Hand, supra*, at ¶240.

Froman's exhibits in support of his Amended Petition do not show that counsel failed to adequately prepare Dr. Schmidtgoessling to testify during the mitigation phase. They do not in any way demonstrate that counsel "never provided [her] with the records that were necessary to assist her in developing her assessment of [Defendant's] mental health" or failed "to facilitate interviews with family members and friends," as Froman contends at ¶121 of his Amended Petition. Nor do the exhibits show that talking to particular family members and friends would have changed Dr. Schmidtgoessling's findings, her testimony, or the outcome of trial.

Further, Froman's exhibits do not establish that counsels' representation was unreasonable in their presentation of evidence in the mitigation phase or that he was prejudiced by counsels' decisions. Froman provides affidavits containing information that

he claims should have been presented. However, information about Froman's family background, familial mental illness, issues with poverty, his mother's verbal, physical, and emotional abuse of him as a child, his history of head injury, his below-average IQ, issues with focus and memory, his low level mental functioning, his medical conditions, major depression, and suicide attempt, his history of dysfunctional romantic relationships, and feelings of isolation and distrust were all presented in the sentencing phase through Froman, his daughter Alexis Froman, and Dr. Schmidtgoessling. (6/15/17 Tr. 50-54, 62, 70-73, 75-89) Therefore, much of the information that Froman claims should have been presented was actually presented.

The Court finds that the failure to present testimony from each of the witnesses suggested by Froman in his Amended Petition was a matter of strategy and not such a failure of the duties of counsel to represent a constitutional violation. A defendant in a capital case cannot get the benefit of using one trial strategy, and then, in a post-conviction petition, claim that the strategy failed, seeking to use a different, more successful, strategy.

The Court further finds that the exhibits submitted in support of his arguments are only marginally significant to, and not supportive of, the claims made.

For these reasons, the Court finds the Petitioner has failed to set forth such facts to demonstrate a cognizable claim of a constitutional error in grounds Fifteen through Twenty-One and Thirty-Six through Forty-Three. The Court hereby finds that Froman is not entitled to an evidentiary hearing on these issues and they are therefore, ***OVERRULED.***

e. Ineffective Assistance of Counsel – Challenging Experts (Grounds for Relief 22-28)

For this group of challenges, Froman argues his trial counsel was ineffective for failing to impeach the State's expert witness, Matthew White, who testified about the firearms used during the murder of Kimberly Thomas. Froman asserts he was "prejudiced by the use of questionable 'scientific' evidence which resulted from unreliable scientific practice."

Like other arguments presented by the Petitioner, these grounds are also barred by the doctrine of res judicata as they could have been raised on appeal. *See State v. Perry, supra,* at paragraph nine of the syllabus.

The exhibit Froman includes in support of his petition's Twenty-Second through

Twenty-Eighth Grounds for Relief, Exhibit 53, is not relevant, or is only marginally relevant, to his claims. *See State v. Jones, supra.* Exhibit 53 does not demonstrate that his counsel was ineffective in his cross-examination of Mr. White. Froman's argument does not have substantive merit.

To prevail on his claim of ineffective assistance of counsel, Froman must show both deficient performance and resulting prejudice. *See Strickland, supra.* Generally, the extent and scope of cross-examination falls within the ambit of trial strategy. *State v. Conway, supra,* at ¶101; *State v. Hoffner,* 102 Ohio St.3d 358, 2004-Ohio-3430, at ¶45; *State v. Dixon,* 101 Ohio St.3d 328, 2004-Ohio-1585, at ¶54. Trial tactics, even debatable ones, do not establish ineffective assistance of counsel. *Id.*

Matthew White's testimony established that he was more than qualified to testify as an expert in firearms examination and identification, and this Court properly admitted his testimony in Froman's trial. Mr. White testified that he had been a firearms examiner with the Ohio Attorney General's Bureau of Criminal Investigation ("BCI") for over nine years. Prior to his employment with BCI, he worked as a firearms examiner at the West Virginia State Police Forensic Laboratory for seven years and at the Hamilton County Coroner's Office Forensic Lab for approximately six months. He had received specialized training in the area of firearms identification, was a member of the international organization of the Association of Firearm and Tool Mark Examiners and had conducted lectures and research in the field of firearm and tool mark identification. In his career as a firearms examiner, he had handled thousands of firearm identification cases. He had testified in court as a firearms expert approximately 85 times in Ohio and West Virginia. His testimony demonstrated his extensive knowledge in the field of firearms. During his testimony, he described, in detail, the process by which he collected, fired, and unfired cartridge cases and bullets from the Hi-Point semi-automatic pistol found in Froman's hand when he was apprehended. White also described the process by which he microscopically compared those known fired and unfired cartridge cases and bullets to fired and unfired cartridge cases and bullets recovered from Froman's vehicle, Kimberly Thomas' residence in Kentucky, and Eli's deceased body.

Similar testimony was found to be admissible in *State v. Mack,* 73 Ohio St.3d 502, 510-11, 1995-Ohio-273. The Supreme Court of Ohio found that the firearms examiner was qualified to testify as an expert, and his testimony "assisted the jury in its understanding of

the technical ballistics report submitted into evidence and 'aid[ed] [the jury] in the search for the truth.'" *Id.* at 511. Significantly, Mr. White had more experience than the firearms examiner in *Mack*.

Mr. White's examination and identification of the firearms evidence was reliable, and his testimony about his comparison assisted the jury in determining the source of the fired cartridges and live round found at the scenes. Consequently, Mr. White's testimony was admissible evidence, and this Court properly admitted that evidence.

Exhibit 53 was authored by committees who were tasked with examining current practices in the field of forensic science and making *recommendations*. The committees' report did not impose evidence-testing, analyst-certification, or lab-accreditation requirements. It did not create a threshold level or standard with which all testing, certification, and accreditation must comply. Significantly, the report noted that "it matters a great deal whether an expert is qualified to testify about forensic evidence and whether the evidence is sufficiently reliable to merit a fact finder's reliance on the truth that it purports to support." (Exhibit 53, at p. 9) This inquiry is the very inquiry that is encompassed within Evid.R. 702, which Mr. White's testimony more than amply satisfied, as set forth above.

Because the report provided only *recommendations*, which the federal government may or may not actually implement, it is hard to imagine what arguments Froman believes his trial counsel could have made with the use of the report. This is especially true when many of the recommendations were not applicable to Froman's case.

It is Froman's burden to demonstrate his claims of ineffective assistance of counsel. His petition, and the materials attached to his petition, fail to allege sufficient operative facts to establish ineffective assistance of counsel under *Strickland v. Washington*. His claims are also procedurally barred by res judicata. His petition and supporting documentation do not set forth substantive grounds for relief. Further, the files and records of the case contradict the existence of facts sufficient to establish relief or show that there is no genuine issue as to any material fact. Dismissal and/or summary judgment is appropriate.

The Court further finds that the exhibits submitted in support of his arguments are only marginally significant to, and not supportive of, the claims made. The Petitioner has shown neither error nor resultant prejudice as a result of the trial strategy used by trial

counsel.

For these reasons, the Court finds the Petitioner has failed to set forth such facts to demonstrate a cognizable claim of a constitutional error in grounds Twenty-Two through Twenty-Eight. The Court hereby finds that Froman is not entitled to an evidentiary hearing on these issues and they are therefore, ***OVERRULED***.

As previously stated, the Court is familiar with the facts of the case – having served as the trial judge for the entirety of the trial proceedings. During trial, it became obvious to the Court that the strategy of the defense was to essentially confess judgment. They didn't want to appear as though Froman was making excuses for the murders. The Court witnessed Froman attempt to "take responsibility for his actions", to the extent he could during the trial phase, hoping to gain favor with the jury. Froman's attorneys avoided feigned trial techniques and instead employed basic cross examination. This strategy was obviously designed to prevent unnecessary drama and exhibition; an effort the jurors might appreciate as it came time for mitigation. Perhaps Froman thought he could extend courtesy to the State, the Court, and the victim's family by yielding in this way. Perhaps, he also thought, the jury would return the courtesy and render one of the life verdicts instead of the death penalty. However, it didn't turn out that way. Hindsight is always perfect to near perfect. If this strategy was successful, his trial counsels' performance would have been heralded as great lawyering. But, because Froman was not given the life sentence he was hoping for, his counsels' "light touch" approach during the trial phase has now been characterized as ineffective assistance of counsel. In this case, trial counsel made a strategic decision regarding the manner in which they handled the trial proceedings. This was truly a strategic decision, and, therefore, cannot be the basis of a finding of ineffective assistance of counsel.

VII. Cumulative Effect and Cumulative Errors

(Grounds for Relief 34-35)

In Petitioner's Thirty-Fourth and Thirty-Fifth ground for relief, Froman asserts that, even if the individual grounds set forth in his petition were not sufficient to warrant post-conviction relief, the cumulative effect of such errors have deprived him the right to effective assistance of counsel counsel, freedom from cruel and unusual punishment, a fair

trial, and due process; and that the cumulative errors have deprived him of his constitutional rights. As such, according to Froman, he is entitled to a new trial, and/or a new penalty phase hearing or, at the least, an evidentiary hearing as to the cumulative effect of such errors.

Given that this Court has found that Froman has failed to establish substantive grounds for any of his claims for relief, this Court finds that there were no errors committed during the trial that resulted in a denial of Froman's constitutional rights. Having so found, there is, *a fortiori*, no "cumulative error."

Moreover, to find validity in Froman's "cumulative effect" argument, this Court would have to find that trial counsel's strategy during the trial and mitigation phase fell below an objective standard of reasonable representation. The Court, in assessing trial counsel's decisions at the time they were made, finds trial counsel's strategy reasonable and have given appropriate deference thereto. Froman has failed to present evidence to overcome the presumption that the challenged grounds for relief were part of trial counsel's trial strategy.

The Court further finds that the exhibits submitted in support of the arguments presented in Froman's Amended Post-conviction petition are only marginally significant to, and not supportive of, the claims made.

For these reasons, the Court finds the Petitioner has failed to set forth such facts to demonstrate a cognizable claim of a constitutional error in grounds Thirty-Four and Thirty-Five. The Court hereby finds that Froman is not entitled to an evidentiary hearing on these issues and they are therefore, ***OVERRULED***.

VIII. CONCLUSION

(i.) Grant Him a New Trial

Motions for new trial are governed by Crim. R. 33, which sets forth the available grounds, time limits, and some procedures. The Court finds that Froman has neither timely asserted his motion for a new trial, nor has he moved for leave to file an untimely one. However, even if the motion was later found to be timely filed, the Court finds, after careful review of the foregoing and consideration of each of Froman's 47 asserted grounds for relief, that Froman has failed to provide the Court with sufficient facts and evidence to meet his burden of establishing an entitlement to a new trial pursuant to

Crim. R. 33(A). As such, the Court hereby finds Froman's request for a new trial to be ***NOT WELL TAKEN*** and ought to be and is hereby ***DENIED***.

(ii.) Grant Him a New Sentencing Hearing

After careful review of the foregoing and consideration of each of Froman's 47 asserted grounds for relief, the Court hereby finds that Froman has failed to provide the Court with sufficient facts and evidence to support his claim that he is entitled to a new sentencing hearing pursuant to *State v. Jackson*, 64 Ohio St.2d 107,111 (1980). As such, the Court hereby finds Froman's request for a new sentencing hearing to be ***NOT WELL TAKEN*** and ought to be and is hereby ***DENIED***.

(iii.) Request to Pursue Discovery and Have an Evidentiary Hearing

Froman was able to show good cause to grant his request to pursue discovery, and the Court granted same. That discovery is now complete.

Although the Court is familiar with the facts of the case as it was the jurist who presided over the entire trial, the Court has re-reviewed the old evidence and new evidence presented, making up the entire record in this case, as well as all exhibits and authority filed and cited by the parties in the post-conviction petition. The Petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that Froman has set forth sufficient operative facts to establish substantive grounds for relief. The exhibits submitted in support of his arguments are only marginally significant to, and not supportive of, the claims made.

As such, the Court finds his request to have an evidentiary hearing to be ***NOT WELL TAKEN*** and ought to be and his hereby ***DENIED.***

(iv.) Any Other Relief to Which He May Be Entitled

After careful review of the foregoing and consideration of each of Froman's 47 asserted grounds for relief, the Court hereby finds that there is no other relief to which he may be entitled and, therefore, dismisses *Petitioner Terry Froman's Amended Post-conviction Petition to Vacate or Set Aside Judgment and/or Sentence Pursuant to Ohio Rev. Code § 2953.21* without hearing. No hearing is granted because the Petition and its accompanying materials and the entire record of the proceedings show that Froman is

not entitled to relief under any of the grounds for relief. Froman has failed to sustain his burden to provide the Court with evidentiary documents containing sufficient operative facts to demonstrate his entitlement to relief under the Petition. Specifically, the Court finds there was no denial or infringement of Petitioner's constitutional rights so as to render the judgment void or voidable, and the Petitioner failed to produce sufficient operative facts to demonstrate the performance of his trial counsel was deficient or that he was prejudiced by ineffectiveness of counsel. As such, the Court finds Froman's request for any other relief to which he may be entitled to be ***NOT WELL TAKEN*** and ought to be and is hereby ***DENIED.***

Accordingly, the *State's Motion to Dismiss and/or for Motion for Summary Judgment* are herein found to be ***WELL TAKEN***, and herein ***SUSTAINED***.

IT IS SO ORDERED.

Joseph Kirby, Judge
Warren County Common Pleas Court

CERTIFICATE OF SERVICE:
Final Appealable Order
Case No. 14CR30398

I hereby certify that a copy of this *Decision/Entry Denying Defendant's Post-Conviction Petition and Granting State's Motion to Dismiss and Motion for Summary Judgment* has been mailed via regular U.S. mail on the 4th day of November 2020 to:

David Fornshell
Warren County Prosecutor
Warren County Prosecutor's Office
520 Justice Drive, Lebanon, Ohio 45036

Kirsten A. Brandt
Assistant Prosecuting Attorney
Warren County Prosecutor's Office
520 Justice Drive, Lebanon, Ohio 45036

Jessica L. Houston
Assistant State Public Defender
Office of the Public Defender, Death Penalty Department
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215-2998

Kimberly Seccuro
Assistant State Public Defender
Office of the Public Defender, Death Penalty Department
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215-2998

and was further emailed on this same date to:

David.Fornshell@warrencountyprosecutor.com
Kirsten.Brandt@warrencountyprosecutor.com
Jessica.Houston@opd.ohio.gov and
Kimberlyn.Seccuro@opd.ohio.gov

TO THE CLERK:

Note that service has been perfected on the docket.

Joseph Kirby, Judge

Brandt, Kirsten A.

From: Brandt, Kirsten A.
Sent: Wednesday, November 28, 2018 4:33 PM
To: 'Jessica.Houston@opd.ohio.gov'
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Jessica,
I will take a look at the proposed scheduling order tomorrow afternoon. I am in the midst of filing something in the Supreme Court and would like to get that off my desk before I start on anything new. I will get back to you as soon as I do. Thanks!

Kirsten

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Tuesday, November 27, 2018 12:28 PM
To: Brandt, Kirsten A.
Cc: Kathryn.Polonsky@opd.ohio.gov
Subject: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Kirsten,

I have attached a proposed scheduling order for your review for Mr. Froman's post-conviction proceedings. I understand that you have asked the Court for additional time in which to respond to our initial PC petition and that the Court granted your motion. However, given the recent amendment to the statute, Mr. Froman has 180 days to amend his petition and we intend on filing an amendment on or before 04/09/2019. Given the voluminous nature of our initial filing and given that we will be amending, I thought it might be in everyone's best interest to agree to additional time for you to file your response and for Mr. Froman to file his reply. Please review the attached proposed scheduling order, and if you have no objections, I will file this with the Court this week. Please let me know the State's position.

Regards,

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

Court's Post-Conviction Petition
Exhibit: 1
Date: Nov. 4, 2020
1:47

Brandt, Kirsten A.

From: Jessica.Houston@opd.ohio.gov
Sent: Friday, November 30, 2018 9:27 PM
To: Brandt, Kirsten A.; Kathryn.Polonsky@opd.ohio.gov
Subject: Re: State v. Terry Lee Froman, Case No.: 14-CR-30398

Great. I will get it sent out first thing next week. Thank you, Kirsten.

Get Outlook for iOS

From: Brandt, Kirsten A. <kirsten.brandt@warrencountyprosecutor.com>

Sent: Friday, November 30, 2018 4:27 PM

To: Houston, Jessica

Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Jessica,

I have reviewed the statute and your proposed scheduling order, and I am fine with it. Feel free to file it at your convenience.

Kirsten

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]

Sent: Tuesday, November 27, 2018 12:28 PM

To: Brandt, Kirsten A.

Cc: Kathryn.Polonsky@opd.ohio.gov

Subject: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Kirsten,

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your response and for Mr. Froman to file his reply. Please review the attached proposed scheduling order, and if you have no objections, I will file this with the Court this week. Please let me know the State's position.

Regards,

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

3:47

Kirby, Jdg Joseph W.

From: Kirby, Jdg Joseph W.
Sent: Thursday, December 6, 2018 4:22 PM
To: 'Jessica.Houston@opd.ohio.gov'; Brandt, Kirsten A.; Kathryn.Polonsky@opd.ohio.gov
Cc: Crossley, Paige Magistrate
Subject: RE: State v Froman

Ms. Houston:

Yes, this has answered all of my questions.

I have already filed the Scheduling Order and time-stamped copies are being distributed to everyone in this email chain.

Unless Ms. Brandt corrects anything you have said, then I know not to expect anything from the State and I won't really need to do anything until the amended complaint is filed, the State has responded, and you have filed a reply to the State's response.

Happy holidays to all.

J. Kirby

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Thursday, December 6, 2018 3:27 PM
To: Kirby, Jdg Joseph W.; Brandt, Kirsten A.; Kathryn.Polonsky@opd.ohio.gov
Cc: Crossley, Paige Magistrate
Subject: RE: State v Froman

Good afternoon Judge Kirby,

Mr. Froman's investigation of his postconviction appeal is currently on-going and he will be filing an amended petition on or before April 09, 2019. Given the lengthy nature of our initial filing and given that we will be filing an amendment pursuant to the recently amended postconviction statute, I reached out to Ms. Brandt with the thought that it might be in everyone's best interest to agree to additional time for the State to file its response to Mr. Froman's petition. That way, she can respond to the petition as a whole as opposed to in a piecemeal fashion. This is often the procedure that OPD has followed in our postconviction cases since the legislature amended the statute to allow for the 180 day amendment period, and it seems to make things cleaner.

Thus, our understanding is that the State would no longer need to file a response by the December 21 deadline. Instead, the State would wait to respond until after Mr. Froman files his amendment on or before April 09, 2019. Ms. Brandt, please correct me if I'm misunderstanding the State's position on this issue.

Given this, we envision that a hearing regarding discovery and any other matter that may arise would be requested and held after Mr. Froman files his reply to the State's response. Should your Honor sign and file the proposed order, that hearing would take place in late 2019/early 2020.

4:47

Brandt, Kirsten A.

From:	Kirby, Jdg Joseph W.
Sent:	Thursday, December 6, 2018 4:23 PM
To:	Brandt, Kirsten A.; 'Jessica.Houston@opd.ohio.gov'; Kathryn.Polonsky@opd.ohio.gov
Cc:	Crossley, Paige Magistrate
Subject:	RE: State v Froman

We are all on the same page it seems.

From: Brandt, Kirsten A.
Sent: Thursday, December 6, 2018 4:23 PM
To: 'Jessica.Houston@opd.ohio.gov'; Kirby, Jdg Joseph W.; Kathryn.Polonsky@opd.ohio.gov
Cc: Crossley, Paige Magistrate
Subject: RE: State v Froman

Judge Kirby,
Ms. Houston is correct that, given the defense's intention to file an amended petition, it would be the State's preference to respond to the petition after all of the arguments have been raised instead of in piecemeal fashion. It is my understanding therefore that, if the Court were to adopt the proposed scheduling order, the deadline for the State's response would be October 7, 2019, and the December 21, 2018 deadline would no longer apply.

Kirsten Brandt

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Thursday, December 06, 2018 3:27 PM
To: Kirby, Jdg Joseph W.; Brandt, Kirsten A.; Kathryn.Polonsky@opd.ohio.gov
Cc: Crossley, Paige Magistrate
Subject: RE: State v Froman

Good afternoon Judge Kirby,

Mr. Froman's investigation of his postconviction appeal is currently on-going and he will be filing an amended petition on or before April 09, 2019. Given the lengthy nature of our initial filing and given that we will be filing an amendment pursuant to the recently amended postconviction statute, I reached out to Ms. Brandt with the thought that it might be in everyone's best interest to agree to additional time for the State to file its response to Mr. Froman's petition. That way, she can respond to the petition as a whole as opposed to in a piecemeal fashion. This is often the procedure that OPD has followed in our postconviction cases since the legislature amended the statute to allow for the 180 day amendment period, and it seems to make things cleaner.

Thus, our understanding is that the State would no longer need to file a response by the December 21 deadline. Instead, the State would wait to respond until after Mr. Froman files his amendment on or before April 09, 2019. Ms. Brandt, please correct me if I'm misunderstanding the State's position on this issue.

Given this, we envision that a hearing regarding discovery and any other matter that may arise would be requested and held after Mr. Froman files his reply to the State's response. Should your Honor sign and file the proposed order, that hearing would take place in late 2019/early 2020.

Finally, I have attached Word copies of Mr. Froman's initial petition and the unopposed motion for a scheduling order. I believe that I have responded to all of your concerns from the below email, but please let me know if you need anything further from me.

Regards,

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Thursday, December 6, 2018 1:47 PM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Houston, Jessica <Jessica.Houston@opd.ohio.gov>; Polonsky, Kathryn <Kathryn.Polonsky@opd.ohio.gov>
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: State v Froman

Good afternoon counsel:

I wanted to take this opportunity to reach out to all of you about the work that lies ahead for Mr. Froman's postconviction petition. As you can probably tell by my position, I do not handle adult cases (save and except child support cases or misdemeanor child endangering cases) that often, so I am looking to you for guidance on how this case should proceed procedurally.

So far, I have received (1) the OPD's postconviction petition that was filed on October 11, 2018, (2) the State's motion to extend time in which to file an answer which was filed on October 22, 2018 (which the Court granted on October 26, 2018 and gave the State until the close of business on December 21, 2018 in which to file its answer), and most recently (3) Defendant's Unopposed Motion for Scheduling Order (which was sent to me and I will ensure that it is filed timely and time stamped copies will be sent to each of you).

First and foremost, it is my request that anything that you file by way of briefs or memorandums be sent to me (and cc'd to everyone) via a Word version of the document. I do all of my own typing and sometimes when I want to restate what has been included in one of the briefs and memorandums it is easier if I cut and paste those portions. This is not a substitute for the actual filing of the document – it's just a courtesy copy for me to draw text from in the event I wish to do so. If anyone needs any clarification of what I mean, please advise. But the gist of it is I'm just trying to save myself some time by having to re-type what has already been typed by one of you.

Second, with the most recent mailing I received from the OPD – Defendant's Unopposed Motion for Scheduling Order – I want to make sure I am clear. You already have a petition filed and the State has asked for, and has received permission by me, to file their answer by December 21, 2018. Does this scheduling order (once I sign it and cause it to be filed) change the State's obligation to file their answer by December 21, 2018? It seems to me that that still holds true, and that this scheduling order merely refers to any amendment the OPD makes to their original petition. In other words, if the OPD files an amended petition, they must do so by April 9, 2018. Then the State has until October 7, 2018 in which to respond. Then the OPD has 60 days after that to file its response.

If we could clear that up, I would appreciate it very much.

Finally, it was always my intention of waiting until the State files its answer on December 21, 2018 and the OPD files its response after that before I brought you all together to have a conference. This conference would deal exclusively with Mr. Froman's request to conduct discovery. How much discovery is he looking for? What does he want and why does he want it? Those sort of questions. Then let the State weigh in on the specific requests and the Court would decide from there if discovery is going to be permitted and, if so, to what extent.

6:47

But, before I have that conference I need to know what the timeline is going to look like – for the postconviction petition that is currently pending and the amended petition that might be filed on or before April 9, 2019.

All emails need to be responded to "reply all" and I will ensure that these emails are made part of the Court record.

Thank you all and I look forward to working with you in this matter.

Joseph W. Kirby, Judge

Warren County Probate-Juvenile Court

900 Memorial Drive | Lebanon, OH 45036
513.695.2686 | Fax: 513.695.2345
JdgJoseph.Kirby@co.warren.oh.us | www.co.warren.oh.us/probate_juvenile

"Be the change you wish to see in the world."
- Mahatma Gandhi

7:47

Brandt, Kirsten A.

From: Jessica.Houston@opd.ohio.gov
Sent: Tuesday, February 12, 2019 1:57 PM
To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Thank you so much. Apologies for not being more clear in our prior communications that we had already sent out the Rule 42 request. Thank you for clarifying things for me.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Tuesday, February 12, 2019 1:39 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Cc: Fornshell, David P. <David.Fornshell@warrencountyprosecutor.com>; Knippen, Steven T. <steven.knippen@warrencountyprosecutor.com>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Jessica,
We apologize for the delay in responding to your request under Crim.R. 42(C). We understood from your email of 12/6/18 to Judge Kirby that any discovery would take place after your reply to the State's response to the petition in late 2019/early 2020. We will begin gathering the information you requested and will let you know when it is ready for you to pick up.

Kirsten

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Monday, February 04, 2019 2:40 PM
To: Brandt, Kirsten A.
Subject: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Kirsten,

On November 27, 2018, we sent a certified letter to Mr. Fornshell seeking a copy, pursuant to Crim. R. 42(c), of all files that relate to Mr. Froman's trial. I have attached a scanned copy of that letter and as you can see, it was received by your office on November 29. Mr. Fornshell, or someone on his behalf, has not yet responded to my request. I understand that he is busy so I thought it might be better if I reached out to you to follow up on our letter. Any assistance that you may provide in this matter is greatly appreciated.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

8:47

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

9:47

Brandt, Kirsten A.

To: Jessica.Houston@opd.ohio.gov
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

I'm not sure I understand or agree with what you are saying. Froman has until 4/9/19 to amend his petition without leave of court. Beyond that, he has to seek permission from the court. The State does not oppose the request for an extension of 60 days, but the court still has to adopt the scheduling order.

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Friday, March 08, 2019 12:13 PM
To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Here is the draft updated with your modifications with one exception. I retained the original language of from the first scheduling order of:

- Defendant Terry Lee Froman has until *** to file amendments to his post-conviction petition, without prejudice or leave of court

because "without prejudice or leave of court" is the language used in the statute regarding the 180 day amendment period. Froman's PC petition was filed on 10/11/18, so pursuant to the statute we have 180 days in which to amend the PC without prejudice or leave of court which would be 4/9/19. I want to be clear that we are extending that filing deadline by 60 days without a need for permission from the court. Otherwise, I adopted all of your modifications. I will file it once you've had another opportunity to review it. Thank you, Kirsten.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Wednesday, March 6, 2019 11:36 AM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Jessica,
Thanks for drafting that. I do have some modifications.
1. modify the first sentence to read "an amended scheduling order." OR "an amended scheduling order for his post-conviction proceedings" - without referring to "initial" post-conviction proceedings;
2. spell out in more detail that the 60 days applies to the amended postconviction petition and all other deadlines - i.e., at bottom of page 1/top of page 2, when you say "seeking a 60-day extension in which to file his amended postconviction petition," modify that to state that you are seeking a 60-day extension in which to file his amended postconviction petition and all other previously agreed upon deadlines.
3. In the amended scheduling order, I would prefer the language to read consistently with the original scheduling order and to note that the deadline for the amended petition is with leave of Court, as follows:

Defendant Terry Lee Froman has until June 10, 2019 to file amendments to his post-conviction petition, with leave of Court
The State of Ohio will have until December 09, 2019 to file its response to the post-conviction petition

10:47

Froman will have 60 days from the date the State files its response in which to file his reply to the State's response The State of Ohio will have 60 days from the date Froman files his reply in which to file a reply.

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Tuesday, March 05, 2019 3:59 PM
To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Here is the draft. I will get it out in the mail for filing once you've had a chance to review it. Thanks.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Tuesday, March 5, 2019 2:02 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Yes, if you could draft a motion that would be great. 60 days for the reply would be fine.

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Tuesday, March 05, 2019 11:14 AM
To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

I have no objection to the state replying to our response. Would you like me to draft a motion to amend the scheduling order asking for the 2 mos as well as giving the state 60?? days to reply to our response? I will send it to you for your review later today if you'd like me to go ahead and draft the motion asking for both of the amendments. Thanks, Kirsten.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Tuesday, March 5, 2019 11:09 AM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Jessica,
I have no objection to pushing out the deadlines by 60 days under the circumstances, as long as I still get 180 days to file a response.
One other thing, in other post-conviction cases I've handled, the State has the option to reply to the defendant's response to the State's motion. I don't believe we discussed that in our emails and it does not appear in the scheduling order. I'm going to be asking the judge to add that to the order. Do you have any objections to that?

Kirsten

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Tuesday, February 26, 2019 1:21 PM

1147

To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Kirsten,

Mr. Froman's amended petition is due to be filed on or before 4/9, and pursuant to our agreed upon scheduling order, your response would be due 180 days after the filing of our amendment with our reply due 60 days thereafter. I am wondering your position on pushing our deadlines out by a 60-day extension?

Mr. Froman was transported to Kentucky to await trial early 2018 and he has only recently returned to Ohio (I believe he returned mid/late December, although I am uncertain of an exact date). During his time in Kentucky, we were attempting to obtain a temporary license for one of our experts so that he could interview Mr. Froman and during that process, Mr. Froman was subsequently returned to Ohio where he was hospitalized outside of CCI for some time and unavailable to communicate with. Because of this, we had to re-arrange our expert's visit and he was only able last week to complete his interview with Mr. Froman at CCI. Also, I have just been made aware that my co-counsel is due to go on maternity leave mid/late-March, which is earlier that I was expecting. Given that his direct appeal is on-going and no oral argument has yet been scheduled, and Governor DeWine's recent announcement regarding the lethal injection protocol, I was hopeful you would agree to the 60-day extension as this request is being made due to circumstances beyond my control and not being made for the purposes of delay. Please let me know the state's position on this request.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Tuesday, February 12, 2019 1:39 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Cc: Fornshell, David P. <David.Fornshell@warrencountyprosecutor.com>; Knippen, Steven T. <steven.knippen@warrencountyprosecutor.com>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Jessica,
We apologize for the delay in responding to your request under Crim.R. 42(C). We understood from your email of 12/6/18 to Judge Kirby that any discovery would take place after your reply to the State's response to the petition in late 2019/early 2020. We will begin gathering the information you requested and will let you know when it is ready for you to pick up.

Kirsten

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Monday, February 04, 2019 2:40 PM
To: Brandt, Kirsten A.
Subject: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Kirsten,

12:47

On November 27, 2018, we sent a certified letter to Mr. Fornshell seeking a copy, pursuant to Crim. R. 42(c), of all files that relate to Mr. Froman's trial. I have attached a scanned copy of that letter and as you can see, it was received by your office on November 29. Mr. Fornshell, or someone on his behalf, has not yet responded to my request. I understand that he is busy so I thought it might be better if I reached out to you to follow up on our letter. Any assistance that you may provide in this matter is greatly appreciated.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

13-47

Brandt, Kirsten A.

From: Brandt, Kirsten A.
Sent: Monday, March 11, 2019 9:14 AM
To: 'Jessica.Houston@opd.ohio.gov'
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

That looks fine. Thank you, Jessica.

Kirsten

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Friday, March 08, 2019 5:06 PM
To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Yes, you are correct about the language. I have made the correction and attached a Word and pdf copy. I will file it Monday after you've had a chance to sign off on it. Thank you, Kirsten.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Friday, March 8, 2019 3:05 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Pursuant to the statute, Froman has a flat 180 days to amend his petition "with or without leave or prejudice to the proceedings." Any additional time above and beyond what is set forth in the statute necessarily has to be by leave of court. We do not oppose an additional 60 days under the circumstances but, to be accurate, the entry has to state that the extension is by leave of court because that's what it is. I cannot sign off on the amended scheduling order without that language.
Let me know how you want to proceed with this given the above.

Kirsten

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Friday, March 08, 2019 12:13 PM
To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Here is the draft updated with your modifications with one exception. I retained the original language of from the first scheduling order of:

- Defendant Terry Lee Froman has until *** to file amendments to his post-conviction petition, without prejudice or leave of court

because "without prejudice or leave of court" is the language used in the statute regarding the 180 day amendment period. Froman's PC petition was filed on 10/11/18, so pursuant to the statute we have

14:47

180 days in which to amend the PC without prejudice or leave of court which would be 4/9/19. I want to be clear that we are extending that filing deadline by 60 days without a need for permission from the court. Otherwise, I adopted all of your modifications. I will file it once you've had another opportunity to review it. Thank you, Kirsten.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Wednesday, March 6, 2019 11:36 AM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Jessica,
Thanks for drafting that. I do have some modifications.
1. modify the first sentence to read "an amended scheduling order." OR "an amended scheduling order for his post-conviction proceedings" - without referring to "initial" post-conviction proceedings;
2. spell out in more detail that the 60 days applies to the amended postconviction petition and all other deadlines - i.e., at bottom of page 1/top of page 2, when you say "seeking a 60-day extension in which to file his amended postconviction petition," modify that to state that you are seeking a 60-day extension in which to file his amended postconviction petition and all other previously agreed upon deadlines.
3. In the amended scheduling order, I would prefer the language to read consistently with the original scheduling order and to note that the deadline for the amended petition is with leave of Court, as follows:

Defendant Terry Lee Froman has until June 10, 2019 to file amendments to his post-conviction petition, with leave of Court
The State of Ohio will have until December 09, 2019 to file its response to the post-conviction petition
Froman will have 60 days from the date the State files its response in which to file his reply to the State's response
The State of Ohio will have 60 days from the date Froman files his reply in which to file a reply.

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Tuesday, March 05, 2019 3:59 PM
To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Here is the draft. I will get it out in the mail for filing once you've had a chance to review it. Thanks.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Tuesday, March 5, 2019 2:02 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Yes, if you could draft a motion that would be great. 60 days for the reply would be fine.

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Tuesday, March 05, 2019 11:14 AM

15:47

To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

I have no objection to the state replying to our response. Would you like me to draft a motion to amend the scheduling order asking for the 2 mos as well as giving the state 60?? days to reply to our response? I will send it to you for your review later today if you'd like me to go ahead and draft the motion asking for both of the amendments. Thanks, Kirsten.

Jessica Houston
Assistant Public Defender
Death Penalty Department

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Sent: Tuesday, March 5, 2019 11:09 AM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Jessica,
I have no objection to pushing out the deadlines by 60 days under the circumstances, as long as I still get 180 days to file a response.
One other thing, in other post-conviction cases I've handled, the State has the option to reply to the defendant's response to the State's motion. I don't believe we discussed that in our emails and it does not appear in the scheduling order. I'm going to be asking the judge to add that to the order. Do you have any objections to that?

Kirsten

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Tuesday, February 26, 2019 1:21 PM
To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Kirsten,

Mr. Froman's amended petition is due to be filed on or before 4/9, and pursuant to our agreed upon scheduling order, your response would be due 180 days after the filing of our amendment with our reply due 60 days thereafter. I am wondering your position on pushing our deadlines out by a 60-day extension?

Mr. Froman was transported to Kentucky to await trial early 2018 and he has only recently returned to Ohio (I believe he returned mid/late December, although I am uncertain of an exact date). During his time in Kentucky, we were attempting to obtain a temporary license for one of our experts so that he could interview Mr. Froman and during that process, Mr. Froman was subsequently returned to Ohio where he was hospitalized outside of CCI for some time and unavailable to communicate with. Because of this, we had to re-arrange our expert's visit and he was only able last week to complete his interview with Mr. Froman at CCI. Also, I have just been made aware that my co-counsel is due to go on maternity leave mid/late-March, which is earlier that I was expecting. Given that his direct appeal is on-going and no oral argument has yet been scheduled, and Governor DeWine's recent announcement regarding the lethal injection protocol, I was hopeful you would agree to the 60-day extension as this request is being made due to circumstances beyond my control and not being made for the purposes of delay. Please let me know the state's position on this request.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Tuesday, February 12, 2019 1:39 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Cc: Fornshell, David P. <David.Fornshell@warrencountyprosecutor.com>; Knippen, Steven T. <steven.knippen@warrencountyprosecutor.com>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Jessica,
We apologize for the delay in responding to your request under Crim.R. 42(C). We understood from your email of 12/6/18 to Judge Kirby that any discovery would take place after your reply to the State's response to the petition in late 2019/early 2020. We will begin gathering the information you requested and will let you know when it is ready for you to pick up.

Kirsten

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Monday, February 04, 2019 2:40 PM
To: Brandt, Kirsten A.
Subject: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Kirsten,

On November 27, 2018, we sent a certified letter to Mr. Fornshell seeking a copy, pursuant to Crim. R. 42(c), of all files that relate to Mr. Froman's trial. I have attached a scanned copy of that letter and as you can see, it was received by your office on November 29. Mr. Fornshell, or someone on his behalf, has not yet responded to my request. I understand that he is busy so I thought it might be better if I reached out to you to follow up on our letter. Any assistance that you may provide in this matter is greatly appreciated.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

17:47

Brandt, Kirsten A.

From:	Jessica.Houston@opd.ohio.gov
Sent:	Tuesday, March 12, 2019 11:18 AM
To:	Kirby, Jdg Joseph W.
Cc:	Brandt, Kirsten A.; Crossley, Paige Magistrate
Subject:	State v. Froman
Attachments:	2019.03.11-Unopposed motion for an amended scheduling order.docx; 2019.03.11-Unopposed motion for an amended scheduling order.pdf

Good morning Judge Kirby,

Per this Court's request, attached please find a courtesy copy of Mr. Froman's unopposed motion for an amended scheduling order which was filed today with the Clerk. If you have any further questions or concerns, please feel free to contact me.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

(8:47

Brandt, Kirsten A.

From: Brandt, Kirsten A.
Sent: Wednesday, May 8, 2019 4:26 PM
To: 'Jessica.Houston@opd.ohio.gov'
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

I've reviewed and have no changes. Thanks!

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Wednesday, May 08, 2019 1:02 PM
To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Thanks, Kirsten. I will file the attached once you've had a chance to review it.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Tuesday, May 7, 2019 3:47 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

I am fine with that.

Kirsten

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Monday, May 06, 2019 11:59 AM
To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Kirsten. I intend to file a motion with the court this week seeking a 90 day extension for filing my amended petition, but wanted to reach out to get the State's position on that request? I received an email from one of my experts this past Friday indicating that he needs an extension in order to complete his work due to a conflict in schedule and he has asked for the additional 90 days. Thank you.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Thursday, May 2, 2019 2:00 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Thank you!

(9:47

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Thursday, May 02, 2019 2:00 PM
To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Thanks, Kirsten. The thumb drive and a pre-paid return envelope will go out in today's mail addressed to your attention.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Wednesday, May 1, 2019 10:48 AM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Jessica,
I wanted to touch base with you about your request under Crim.R. 42(C). We are providing the information you requested in electronic format and request that you mail us a thumb drive that can accommodate the voluminous file, which is 128 GB of materials. You can mail the thumb drive to my attention at 520 Justice Drive, Lebanon, Ohio 45036. Once that is done, we anticipate that it will be ready for you to pick up at our office at the end of next week. Or if you prefer it to be mailed to you, we can do it that way. Please let me know if you have any questions.

Kirsten

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Tuesday, February 12, 2019 1:57 PM
To: Brandt, Kirsten A.
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Thank you so much. Apologies for not being more clear in our prior communications that we had already sent out the Rule 42 request. Thank you for clarifying things for me.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Tuesday, February 12, 2019 1:39 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Cc: Fornshell, David P. <David.Fornshell@warrencountyprosecutor.com>; Knippen, Steven T. <steven.knippen@warrencountyprosecutor.com>
Subject: RE: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Jessica,
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Kirsten

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Sent: Monday, February 04, 2019 2:40 PM
To: Brandt, Kirsten A.
Subject: State v. Terry Lee Froman, Case No.: 14-CR-30398

Hi Kirsten,

On November 27, 2018, we sent a certified letter to Mr. Fornshell seeking a copy, pursuant to Crim. R. 42(c), of all files that relate to Mr. Froman's trial. I have attached a scanned copy of that letter and as you can see, it was received by your office on November 29. Mr. Fornshell, or someone on his behalf, has not yet responded to my request. I understand that he is busy so I thought it might be better if I reached out to you to follow up on our letter. Any assistance that you may provide in this matter is greatly appreciated.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

21:47

Brandt, Kirsten A.

From:	Kirby, Jdg Joseph W.
Sent:	Thursday, May 9, 2019 11:54 AM
To:	'Jessica.Houston@opd.ohio.gov'
Cc:	Crossley, Paige Magistrate; Brandt, Kirsten A.
Subject:	RE: State v. Froman, Case No. 14-CR-30398

I will wait for the original to be filed and then sign and cause to be filed the *Amended Scheduling Order.*

Thank you all.

JWK

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Thursday, May 9, 2019 11:38 AM
To: Kirby, Jdg Joseph W.
Cc: Crossley, Paige Magistrate; Brandt, Kirsten A.
Subject: State v. Froman, Case No. 14-CR-30398

Good morning Judge Kirby,

Per this Court's request, attached please find a courtesy copy of Mr. Froman's unopposed motion for an amended scheduling order. The original will be mailed out today via UPS overnight for filing with the Clerk. If you have any further questions or concerns, please feel free to contact me.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

22:47

Brandt, Kirsten A.

From: Brandt, Kirsten A.
Sent: Monday, May 20, 2019 3:50 PM
To: 'Jessica.Houston@opd.ohio.gov'
Subject: RE: Froman

Thanks for letting me know!

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Monday, May 20, 2019 3:49 PM
To: Brandt, Kirsten A.
Subject: Froman

Hi Kirsten. I got the flash drive in the mail today and can confirm that I have access to the files. Thank you!

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

23:47

Brandt, Kirsten A.

From: Jessica.Houston@opd.ohio.gov
Sent: Friday, October 4, 2019 9:20 AM
To: Kirby, Jdg Joseph W.
Cc: Crossley, Paige Magistrate; Brandt, Kirsten A.
Subject: RE: State v. Froman, Case No.: 14-CR-30398
Attachments: 2019.09.06-Amended PC-FINAL.docx

Good morning Judge Kirby,

I have attached the 150 page Word version of the Amended petition that was filed last month. I did go back and look at the document that was attached to my 9/6/19 email sent to the Court and the State, and from my end, that document is also 150 pages. I spoke briefly to someone in our IT department about what could potentially be causing the 17 extra pages on the document that you received and were able to open and it was suggested that it could possibly be that whatever particular software that the Court uses has somehow changed the formatting font and/or font size, but this doesn't make sense to me because we've not experienced this issue with any of the prior emailed documents. Please let me know if the attached document appears to be longer than 150 pages and I will have someone from my IT department take a closer look to see what could potentially be the cause. But, the attached document is the same document that was filed with the Clerk. Thank you and sorry to all for any inconvenience.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Thursday, October 3, 2019 3:41 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>; Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Ms. Houston :

You attached what you refer to as the amended post conviction petition; however, I will note that the final version that was actually filed was only 150 pages and not 167 as it was presented in this email.

Please email the Word version which corresponds with the one that was actually filed.

Thank you.

JWK

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Friday, September 6, 2019 5:14 PM
To: Kirby, Jdg Joseph W.
Cc: Crossley, Paige Magistrate; Brandt, Kirsten A.
Subject: State v. Froman, Case No.: 14-CR-30398

24:47

Good afternoon Judge Kirby,

Attached please find a courtesy copy of Mr. Froman's amended post-conviction petition which was filed with the Clerk earlier today. Also, please find a motion to redact exhibits 1 and 49 (which were filed attached to Mr. Froman's post-conviction petition filed on October 11, 2018) which was also filed earlier today. The redactions relate to personal contact information such as cell phone numbers, personal email addresses, and home addresses, as well as social security numbers. If you have any questions or concerns, please let me know.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

25:47

Houston, Jessica

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Friday, October 4, 2019 10:04 AM
To: Houston, Jessica
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Actually this one comes to 167 pages also.

We went through your time stamped copy and the email copy after I emailed you and I concluded it was word for word. It did do some weird spacing issues which added the 17 pages.

I just wanted to make sure what you file stamped was the same one that I had an electronic version of.

Which I now conclude they are one and the same.

So we are good.

Thank you Jessica.

JWK

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Friday, October 4, 2019 9:20 AM
To: Kirby, Jdg Joseph W.
Cc: Crossley, Paige Magistrate; Brandt, Kirsten A.
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Good morning Judge Kirby,

I have attached the 150 page Word version of the Amended petition that was filed last month. I did go back and look at the document that was attached to my 9/6/19 email sent to the Court and the State, and from my end, that document is also 150 pages. I spoke briefly to someone in our IT department about what could potentially be causing the 17 extra pages on the document that you received and were able to open and it was suggested that it could possibly be that whatever particular software that the Court uses has somehow changed the formatting font and/or font size, but this doesn't make sense to me because we've not experienced this issue with any of the prior emailed documents. Please let me know if the attached document appears to be longer than 150 pages and I will have someone from my IT department take a closer look to see what could potentially be the cause. But, the attached document is the same document that was filed with the Clerk. Thank you and sorry to all for any inconvenience.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Thursday, October 3, 2019 3:41 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>; Brandt, Kirsten A.

26:47

Brandt, Kirsten A.

From: Jessica.Houston@opd.ohio.gov
Sent: Monday, March 9, 2020 5:10 PM
To: Brandt, Kirsten A.
Subject: RE: Terry Froman - State's Response to PCR

Thanks, Kirsten!

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Monday, March 9, 2020 5:03 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: Terry Froman - State's Response to PCR

Hi Jessica,
I filed the State's response to Terry Froman's petition for post-conviction relief today. It is attached to this email. A hard copy is being sent by mail. Let me know if you have any questions. Thanks!

Kirsten Brandt

Brandt, Kirsten A.

From: Kirby, Jdg Joseph W.
Sent: Monday, March 23, 2020 9:59 AM
To: Brandt, Kirsten A.; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Thank you.

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Monday, March 23, 2020 9:58 AM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Yes, I did see that, and I will be compiling those emails and contacting Jessica for agreement in the next couple days. The only motions that I believe are outstanding at this point are (1) Defendant's reply to the State's motion to dismiss and/or for summary judgment, and (2) the State's reply to Defendant's response. The deadlines for those pleadings are set forth in the May 13, 2019 amended scheduling order.

Kirsten

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Monday, March 23, 2020 9:51 AM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Thank you Kirsten.

And, as for anything else, please refer back to my original email. There was a request I had of you and Jessica.

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Monday, March 23, 2020 9:48 AM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Judge Kirby,
I have attached a copy of the filed response and also a copy in word format to this email. Please let me know if you need anything else from me.

Kirsten Brandt

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Monday, March 23, 2020 7:39 AM
To: Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>; Brandt, Kirsten A.

28:47

<Kirsten.Brandt@warrencountyprosecutor.com>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Kirsten:

For whatever reason I was on the clerk's website yesterday just looking around and I noticed that a response brief was filed by you on the 9th of March (which was the due date). I did not receive any copies of this.

Similar to what I had Jessica do (see below), I would like this document sent to me in a word format.

Also to Jessica and Kirsten:

After I get my two courts here under our new public health crisis restrictions, I plan on picking up the Froman file and begin my decision making.

1. Please let me know (from each of you) what motions you believe are currently pending besides the Amended Post Conviction Petition.
2. I need to make sure I get all the emails that have been exchanged on this case since this post conviction motion was filed. Therefore, I will need for you to communicate with one another and come up with a "master", all encompassing email chain that I will be able to submit as a court exhibit. Once you have that, please scan it and send it to me.
3. Once you provide me with one that gets me current on documenting all the emails, I will try and maintain it. I want to make sure the record is complete and would appreciate your help in this regard.

Hope you are all staying safe.

JWK

From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Friday, October 4, 2019 9:20 AM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>; Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Good morning Judge Kirby,

I have attached the 150 page Word version of the Amended petition that was filed last month. I did go back and look at the document that was attached to my 9/6/19 email sent to the Court and the State, and from my end, that document is also 150 pages. I spoke briefly to someone in our IT department about what could potentially be causing the 17 extra pages on the document that you received and were able to open and it was suggested that it could possibly be that whatever particular software that the Court uses has somehow changed the formatting font and/or font size, but this doesn't make sense to me because we've not experienced this issue with any of the prior emailed documents. Please let me know if the attached document appears to be longer than 150 pages and I will have someone from my IT department take a closer look to see what could potentially be the cause. But, the attached document is the same document that was filed with the Clerk. Thank you and sorry to all for any inconvenience.

Jessica Houston
Assistant Public Defender
Death Penalty Department

29:47

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Thursday, October 3, 2019 3:41 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>; Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Ms. Houston :

You attached what you refer to as the amended post conviction petition; however, I will note that the final version that was actually filed was only 150 pages and not 167 as it was presented in this email.

Please email the Word version which corresponds with the one that was actually filed.

Thank you.

JWK

From: Jessica.Houston@opd.ohio.gov [mailto:Jessica.Houston@opd.ohio.gov]
Sent: Friday, September 6, 2019 5:14 PM
To: Kirby, Jdg Joseph W.
Cc: Crossley, Paige Magistrate; Brandt, Kirsten A.
Subject: State v. Froman, Case No.: 14-CR-30398

Good afternoon Judge Kirby,

Attached please find a courtesy copy of Mr. Froman's amended post-conviction petition which was filed with the Clerk earlier today. Also, please find a motion to redact exhibits 1 and 49 (which were filed attached to Mr. Froman's post-conviction petition filed on October 11, 2018) which was also filed earlier today. The redactions relate to personal contact information such as cell phone numbers, personal email addresses, and home addresses, as well as social security numbers. If you have any questions or concerns, please let me know.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

30:47

Brandt, Kirsten A.

From: Jessica.Houston@opd.ohio.gov
Sent: Wednesday, March 25, 2020 10:23 AM
To: Brandt, Kirsten A.
Subject: RE: Froman

I'm ok with that change. Thank you!

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Wednesday, March 25, 2020 10:14 AM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: Froman

I have inserted the email, but re-ordered the emails to go from oldest to newest. If you are ok with that change, I will send it on to Judge Kirby.

Kirsten

From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Tuesday, March 24, 2020 12:23 PM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Subject: RE: Froman

Thanks, Kirsten. No need for me to review it before it's sent to Judge Kirby.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Tuesday, March 24, 2020 12:19 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: Froman

Thank you Jessica! I will print this out, insert it into the packet, and scan. I'll also include this email thread at the end of the packet. Would you like to see the updated packet with the inclusion of the email you located, or is it ok to send on to Judge Kirby?

From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Tuesday, March 24, 2020 11:44 AM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Subject: RE: Froman

I have come across one email response from Judge Kirby that was not included in the pdf that you sent to me. Specifically the portion that is missing is what you see in the screen shot below. I believe that the best place to insert the attached pdf into the pdf that you sent to me is b/w pdf pages 4 and 5. Other than this one response, I believe that you have compiled everything. Thank you for putting this together.

Houston, Jessica

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Friday, October 4, 2019 10:04 AM
To: Houston, Jessica
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Actually this one comes to 167 pages also.

We went through your time stamped copy and the email copy after I emailed you word. It did do some weird spacing issues which added the 17 pages.

I just wanted to make sure what you file stamped was the same one that I had an

Which I now conclude they are one and the same.

So we are good.

Thank you Jessica.

JWK

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Tuesday, March 24, 2020 9:31 AM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: Froman

Hi Jessica,

32:47

I had a chance to compile the emails between us and have attached what I have. This should be all of them. Let me know if you agree and we can send them on to Judge Kirby.

Kirsten

From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Monday, March 23, 2020 2:26 PM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Subject: RE: Froman

Yes, I was referring to staying the pc proceedings. In other cases we have stayed the pc proceedings until the OSC issues an opinion in the direct appeal and, if applicable, continued the stay until the Murnahan was ruled upon by the OSC.

I will also look through my emails and will compile a pdf so we can coordinate on that issue. Thanks, Kirsten!

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Monday, March 23, 2020 2:07 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Subject: RE: Froman

Yes, those are the only motions I anticipate as well. As for a stay, are you referring to a stay of the post-conviction proceedings until a decision from the Ohio Supreme Court comes out in the direct appeal?
I will be compiling emails tomorrow and we can coordinate before sending them on to the judge.
Thanks!

Kirsten

From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Monday, March 23, 2020 12:36 PM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Subject: Froman

Hi Kirsten. I will touch base with you regarding the emails that I compile before I send them to Judge Kirby. At this time, other than Froman's reply and the State's reply, I don't anticipate any additional motions/pleadings being filed. I wanted to get the State's position on seeking a stay pending resolution of the direct appeal after the State files its reply? Thanks, Kirsten.

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

33:47

Kirby, Jdg Joseph W.

From: Kirby, Jdg Joseph W.
Sent: Wednesday, March 25, 2020 11:28 AM
To: Brandt, Kirsten A.; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Thank you.

I will cause them to be filed as a Court Exhibit.

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Wednesday, March 25, 2020 10:49 AM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Judge Kirby,
Per your request, I am attaching a master copy of all of the emails exchanged in this case since the post-conviction petition was filed.

Kirsten Brandt

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Monday, March 23, 2020 9:59 AM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Thank you.

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Monday, March 23, 2020 9:58 AM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Yes, I did see that, and I will be compiling those emails and contacting Jessica for agreement in the next couple days. The only motions that I believe are outstanding at this point are (1) Defendant's reply to the State's motion to dismiss and/or for summary judgment, and (2) the State's reply to Defendant's response. The deadlines for those pleadings are set forth in the May 13, 2019 amended scheduling order.

Kirsten

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Monday, March 23, 2020 9:51 AM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Jessica.Houston@opd.ohio.gov

35:47

Kirby, Jdg Joseph W.

From:	Jessica.Houston@opd.ohio.gov
Sent:	Wednesday, March 25, 2020 11:36 AM
To:	Kirby, Jdg Joseph W.; Brandt, Kirsten A.
Cc:	Crossley, Paige Magistrate
Subject:	RE: State v. Froman, Case No.: 14-CR-30398

Good morning Judge Kirby,

I agree with Ms. Brandt that, at this point in time, the only outstanding motions are Mr. Froman's reply which is due 5/8/20 and the State's reply. Thank you.

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Wednesday, March 25, 2020 11:28 AM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Thank you.

I will cause them to be filed as a Court Exhibit.

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Wednesday, March 25, 2020 10:49 AM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Judge Kirby,
Per your request, I am attaching a master copy of all of the emails exchanged in this case since the post-conviction petition was filed.

Kirsten Brandt

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Monday, March 23, 2020 9:59 AM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Thank you.

Kirby, Jdg Joseph W.

From: Kirby, Jdg Joseph W.
Sent: Wednesday, March 25, 2020 6:39 PM
To: Brandt, Kirsten A.; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Hey Kirsten and Jessica:

I don't think I worded my initial email very well.

What I meant was this:

I know there is the Defense's Amended Post Conviction petition filed on September 6, 2019 (which replaced the October 11, 2018 version).

I also know that the State filed their Motion to Dismiss and/or for Summary Judgment.

While I appreciate you both telling me that I can expect these future filings (the defendant has 60 days to file a reply to the state's motion to dismiss and/or summary judgement), then the State having 60 days in which to file a reply to Defendant's reply) . . .

My initial question is this: AS OF RIGHT NOW, is anything else pending before me other than the Defense's Amended Post Conviction petition and the State's Motion to Dismiss and/or for Summary Judgment?

JWK

From: Brandt, Kirsten A.
Sent: Monday, March 23, 2020 9:57 AM
To: Kirby, Jdg Joseph W.; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Yes, I did see that, and I will be compiling those emails and contacting Jessica for agreement in the next couple days. The only motions that I believe are outstanding at this point are (1) Defendant's reply to the State's motion to dismiss and/or for summary judgment, and (2) the State's reply to Defendant's response. The deadlines for those pleadings are set forth in the May 13, 2019 amended scheduling order.

Kirsten

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Monday, March 23, 2020 9:51 AM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Thank you Kirsten.

37:47

Kirby, Jdg Joseph W.

From: Kirby, Jdg Joseph W.
Sent: Thursday, March 26, 2020 10:28 AM
To: Jessica.Houston@opd.ohio.gov; Brandt, Kirsten A.
Cc: Crossley, Paige Magistrate
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Thank you both.

-----Original Message-----
From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Thursday, March 26, 2020 9:29 AM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Good morning. Ms. Brandt is correct and there is nothing currently pending other than the amended petition and the motion to dismiss and/or for summary judgment. Thank you.

Jessica Houston
Assistant Public Defender
Death Penalty Department

-----Original Message-----
From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Thursday, March 26, 2020 9:23 AM
To: Kirby, Joseph <JDGJOSEPH.KIRBY@CO.WARREN.OH.US>; Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Good morning,

There is nothing pending other than the amended post-conviction petition and the State's motion to dismiss and/or for summary judgment.

Kirsten

-----Original Message-----
From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Wednesday, March 25, 2020 6:39 PM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Jessica.Houston@opd.ohio.gov
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Hey Kirsten and Jessica:

I don't think I worded my initial email very well.

39:47

Kirby, Jdg Joseph W.

From: Jessica.Houston@opd.ohio.gov
Sent: Thursday, May 7, 2020 2:31 PM
To: Kirby, Jdg Joseph W.; Brandt, Kirsten A.
Cc: Crossley, Paige Magistrate; Kimberlyn.Seccuro@opd.ohio.gov
Subject: RE: State v. Froman, Case No.: 14-CR-30398
Attachments: 2020.05.07-Defendant-Petitioner Terry Froman's Reply.pdf; 2020.05.07-Notice of Appearance as Co-counsel and Notice of Withdrawal as Co-counsel.pdf; 2020.05.07-Defendant-Petitioner Terry Froman's Reply.docx; 2020.05.07-Notice of Appearance as Co-counsel and Notice of Withdrawal as Co-counsel.docx

Good afternoon Judge Kirby and Ms. Brandt,

Attached please find a copy of Mr. Froman's reply to the State's motion to dismiss and notice of appearance as co-counsel of Kimberlyn Seccuro. Pursuant to local rule 2.10 for the Warren County Common Pleas Court, both documents were submitted today via email to the Clerk's Office for filing. Please let me know if either of you need anything further from me.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

-----Original Message-----
From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Thursday, March 26, 2020 10:28 AM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>; Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Thank you both.

-----Original Message-----
From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Thursday, March 26, 2020 9:29 AM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Good morning. Ms. Brandt is correct and there is nothing currently pending other than the amended petition and the motion to dismiss and/or for summary judgment. Thank you.

Jessica Houston
Assistant Public Defender
Death Penalty Department

39:47

Kirby, Jdg Joseph W.

From: Kirby, Jdg Joseph W.
Sent: Friday, May 8, 2020 9:27 AM
To: 'Jessica.Houston@opd.ohio.gov'; Brandt, Kirsten A.
Cc: Crossley, Paige Magistrate; Kimberlyn.Seccuro@opd.ohio.gov
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Thank you Jessica and Kimberlyn.

-----Original Message-----
From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Thursday, May 7, 2020 2:31 PM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>; Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>; Kimberlyn.Seccuro@opd.ohio.gov
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Good afternoon Judge Kirby and Ms. Brandt,

Attached please find a copy of Mr. Froman's reply to the State's motion to dismiss and notice of appearance as co-counsel of Kimberlyn Seccuro. Pursuant to local rule 2.10 for the Warren County Common Pleas Court, both documents were submitted today via email to the Clerk's Office for filing. Please let me know if either of you need anything further from me.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

-----Original Message-----
From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Thursday, March 26, 2020 10:28 AM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>; Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

Thank you both.

-----Original Message-----
From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Thursday, March 26, 2020 9:29 AM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Cc: Crossley, Paige Magistrate <Paige.Crossley@co.warren.oh.us>
Subject: RE: State v. Froman, Case No.: 14-CR-30398

40:47

Kirby, Jdg Joseph W.

From:	Jessica.Houston@opd.ohio.gov
Sent:	Thursday, May 9, 2019 11:38 AM
To:	Kirby, Jdg Joseph W.
Cc:	Crossley, Paige Magistrate; Brandt, Kirsten A.
Subject:	State v. Froman, Case No. 14-CR-30398
Attachments:	2019.05.09-Unopposed motion for an amended scheduling order.pdf; 2019.05.09-Unopposed motion for an amended scheduling order.docx

Good morning Judge Kirby,

Per this Court's request, attached please find a courtesy copy of Mr. Froman's unopposed motion for an amended scheduling order. The original will be mailed out today via UPS overnight for filing with the Clerk. If you have any further questions or concerns, please feel free to contact me.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

41:47

Kirby, Jdg Joseph W.

From: Kirby, Jdg Joseph W.
Sent: Monday, July 6, 2020 3:17 PM
To: Brandt, Kirsten A.; 'Jessica.Houston@opd.ohio.gov'; 'Kimberlyn.Seccuro@opd.ohio.gov'
Subject: RE: State v. Froman

Kirsten:

I don't think that's necessary, as it is not material to what was filed.

I am keeping these emails as a paper trail which will reflect the error, so that should suffice.

JWK

-----Original Message-----
From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Monday, July 6, 2020 1:59 PM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>; 'Jessica.Houston@opd.ohio.gov' <Jessica.Houston@opd.ohio.gov>; 'Kimberlyn.Seccuro@opd.ohio.gov' <Kimberlyn.Seccuro@opd.ohio.gov>
Subject: RE: State v. Froman

Good afternoon Judge Kirby and Counsel:

I have attached a PDF and Word copy of the State's Reply to Defendant-Petitioner's Response to the Motion to Dismiss and/or for Summary Judgment, which was filed today.
I wanted to point out a clerical error that I just noticed in the reply. At a couple points in the reply, I refer to the Motion to Dismiss and/or for Summary Judgment as being filed on March 10, 2020. I took that date from the clerk of court's website, but on closer examination I realized that the motion was time-stamped as being filed on March 9, 2020. It's not material to the arguments made in the reply, but I wanted to bring it to everyone's attention in case there was a question. If the Court prefers that I file an amended reply correcting that error, I can certainly do so later today or tomorrow.

Kirsten Brandt

-----Original Message-----
From: Brandt, Kirsten A.
Sent: Tuesday, June 2, 2020 3:58 PM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>; Jessica.Houston@opd.ohio.gov; 'Kimberlyn.Seccuro@opd.ohio.gov' <Kimberlyn.Seccuro@opd.ohio.gov>
Subject: RE: State v. Froman

Judge Kirby,
The appeal is still pending. I'm not exactly sure when the decision will come out, but it was orally argued last June.

Kirsten

-----Original Message-----
From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Tuesday, June 2, 2020 12:57 PM

42:41

To: Jessica.Houston@opd.ohio.gov; Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Cc: Kimberlyn.Seccuro@opd.ohio.gov
Subject: RE: State v. Froman

Good afternoon everyone:

Off topic to the post-conviction petition that I am dealing with, does anyone know the status of the appeal pending in the Ohio Supreme Court, or when a decision is likely to be rendered?

Hope everyone is staying safe.

JWK

43:47

Kirby, Jdg Joseph W.

From: Kirby, Jdg Joseph W.
Sent: Tuesday, August 4, 2020 3:00 PM
To: Jessica.Houston@opd.ohio.gov
Subject: RE: State of Ohio v. Terry Froman, Case No.: 14-CR-30398
Attachments: FROMAN.pdf

Jessica:

Thank you for the emails. Please find a copy of the time stamped entry approving your motion.

Thank you.

JWK

From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Tuesday, August 4, 2020 12:43 PM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Cc: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Kimberlyn.Seccuro@opd.ohio.gov
Subject: State of Ohio v. Terry Froman, Case No.: 14-CR-30398

Good afternoon Judge Kirby,

Please find attached a copy of the **Unopposed Motion to Stay Petitioner Terry Froman's Postconviction Proceedings Pending Resolution of His Direct Appeal, *State v. Froman*, Case No.: 2017-0938** that was sent to the Clerk today for filing in the above-captioned case.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

44:47

Kirby, Jdg Joseph W.

From: Brandt, Kirsten A.
Sent: Thursday, September 24, 2020 9:55 AM
To: 'Jessica.Houston@opd.ohio.gov'; Kirby, Jdg Joseph W.
Cc: Kimberlyn.Seccuro@opd.ohio.gov
Subject: RE: State of Ohio v. Terry Froman, Case No.: 14-CR-30398

Good morning Judge Kirby and Counsel,

Today, the Supreme Court of Ohio issued its decision in the direct appeal. The conviction and sentence were affirmed. The citation is 2020-Ohio-4523.

Kirsten Brandt

From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Tuesday, August 4, 2020 12:43 PM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Cc: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Kimberlyn.Seccuro@opd.ohio.gov
Subject: State of Ohio v. Terry Froman, Case No.: 14-CR-30398

Good afternoon Judge Kirby,

Please find attached a copy of the **Unopposed Motion to Stay Petitioner Terry Froman's Postconviction Proceedings Pending Resolution of His Direct Appeal, *State v. Froman*, Case No.: 2017-0938** that was sent to the Clerk today for filing in the above-captioned case.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
614.466.5394

45:47

Kirby, Jdg Joseph W.

From: Kirby, Jdg Joseph W.
Sent: Wednesday, September 30, 2020 7:57 AM
To: Jessica.Houston@opd.ohio.gov
Cc: Kimberlyn.Seccuro@opd.ohio.gov; Brandt, Kirsten A.
Subject: RE: State of Ohio v. Terry Froman, Case No.: 14-CR-30398

Thank you.

From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Tuesday, September 29, 2020 4:26 PM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Cc: Kimberlyn.Seccuro@opd.ohio.gov; Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Subject: RE: State of Ohio v. Terry Froman, Case No.: 14-CR-30398

Good afternoon Judge Kirby,

Attached please find the notice regarding the Ohio Supreme Court's decision in Mr. Froman's direct appeal which was filed today.

Thank you,

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Friday, September 25, 2020 12:32 PM
To: Houston, Jessica <Jessica.Houston@opd.ohio.gov>; Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Cc: Seccuro, Kimberlyn <Kimberlyn.Seccuro@opd.ohio.gov>
Subject: RE: State of Ohio v. Terry Froman, Case No.: 14-CR-30398

Thank you Jessica.

The Court intends to proceed with a decision on the postconviction proceeding in the next few weeks.

If anyone has any questions, please advise.

JWK

From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Friday, September 25, 2020 12:30 PM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>; Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Cc: Kimberlyn.Seccuro@opd.ohio.gov
Subject: RE: State of Ohio v. Terry Froman, Case No.: 14-CR-30398

46:47

Good afternoon Judge Kirby and Ms. Brandt,

I'd like to inform the Court and the State regarding the remaining proceedings relating to Mr. Froman's direct appeal. A motion for reconsideration will be filed in the Ohio Supreme Court, and, if needed, a petition for certiorari will be filed in the U.S. Supreme Court. Also, in order to comply with this Court's August 4, 2020 order to stay the postconviction proceedings, I intend on filing a formal notice of the release of the Ohio Supreme Court's decision with this Court next week.

Thank you and enjoy your weekend,

Jessica Houston
Assistant Public Defender
Death Penalty Department

From: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Sent: Thursday, September 24, 2020 11:27 AM
To: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Houston, Jessica <Jessica.Houston@opd.ohio.gov>
Cc: Seccuro, Kimberlyn <Kimberlyn.Seccuro@opd.ohio.gov>
Subject: RE: State of Ohio v. Terry Froman, Case No.: 14-CR-30398

Thank you.

From: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>
Sent: Thursday, September 24, 2020 9:55 AM
To: 'Jessica.Houston@opd.ohio.gov' <Jessica.Houston@opd.ohio.gov>; Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Cc: Kimberlyn.Seccuro@opd.ohio.gov
Subject: RE: State of Ohio v. Terry Froman, Case No.: 14-CR-30398

Good morning Judge Kirby and Counsel,

Today, the Supreme Court of Ohio issued its decision in the direct appeal. The conviction and sentence were affirmed. The citation is 2020-Ohio-4523.

Kirsten Brandt

From: Jessica.Houston@opd.ohio.gov <Jessica.Houston@opd.ohio.gov>
Sent: Tuesday, August 4, 2020 12:43 PM
To: Kirby, Jdg Joseph W. <JdgJoseph.Kirby@co.warren.oh.us>
Cc: Brandt, Kirsten A. <Kirsten.Brandt@warrencountyprosecutor.com>; Kimberlyn.Seccuro@opd.ohio.gov
Subject: State of Ohio v. Terry Froman, Case No.: 14-CR-30398

Good afternoon Judge Kirby,

Please find attached a copy of the **Unopposed Motion to Stay Petitioner Terry Froman's Postconviction Proceedings Pending Resolution of His Direct Appeal, *State v. Froman*, Case No.: 2017-0938** that was sent to the Clerk today for filing in the above-captioned case.

Thank you,

47:47