

No. _____

IN THE
Supreme Court of the United States

MICHAEL AMES LILLEY,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether the Sixth Amendment permits empaneling a juror who expressed bias against the sexual-orientation of the defendant when the trial court refuses to hear a challenge for cause or to allow further questioning of the juror even though the jury has yet to be empaneled and sworn.
- II. Whether depriving the jury of an instruction and thus a legal framework to evaluate the defense theory of diminished capacity after finding the theory admissible at trial and allowing the defendant to present it deprives him of the right to present his defense.

LIST OF PARTIES

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Ames Lilley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion below is unpublished, but is available at 2017 WL 7048806 and herein at Appendix A. The denial of rehearing *en banc* does not currently have a Westlaw citation but should have one in the near future; it is available below at Appendix B.

JURISDICTION

The Sixth Circuit issued its opinion on July 26, 2017, and denied rehearing *en banc* October 30, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the U.S. Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Mr. Lilley was convicted by a jury of federal sex trafficking offenses involving girls in their mid to late teens. He appealed to the Sixth Circuit Court of Appeals, where two members of a three-judge panel affirmed the conviction (hereinafter referred to as *Majority*) and one member dissented (hereinafter referred to as *Dissent*).

1. Before Mr. Lilley's arrest, his home had become a gathering place—or “party house”—and in some instances a home for misfits of various stripes including troubled teens and young adults. As a gay man, Mr. Lilley had no sexual interest in the young women in the case. His romantic life consisted of brief relationships, usually initiated via the internet. As a result, the computers and phones seized at Mr. Lilley's house contained explicit evidence of his same-sex encounters, desires, and fantasies. They also contained items relevant to the charges, however, so the defense requested that evidence of Mr. Lilley's sex life be excluded from trial as irrelevant and potentially prejudicial. (R. 50, Def's Mtn in Limine; R. 216, Def's Reply to Gvt Resp). The trial court denied the request, but said the issue could be revisited depending on the proof at trial. (R. 291, Tr. Of Pretrial Mtn Hrg, Pg ID 2053-54]. Mr. Lilley therefore expected details of his private life to come out at trial and conducted his voir dire accordingly.

During jury selection, five prospective jurors openly acknowledged that Mr. Lilley's sexual orientation may affect their ability to be impartial. One of those five was empaneled on Mr. Lilley's jury. The defense asked jurors whether they would find that a gay couple being intimate is “gross” and to ask themselves if seeing a heterosexual couple might trigger a different reaction. Of the jurors who expressed bias, one stated at sidebar that while she had listened to what was said “about the law and all that[,]” but she “follows the Lord's bible[,]” and believes homosexuality is “biblically” wrong. (R. 293, Trial, Pg ID 2213). Another juror expressed her views in open court, saying she was “a strong Christian, conservative,” that she “would try to put that aside” but would be “very uncomfortable in that situation.” (*Id.* at pg ID 2272-73). Acknowledging the

juror's candor, the defense asked whether "anyone else here share[s] those feelings[.]" which prompted two jurors to raise their hand. One was seated in the front row (Lufcy, hereinafter "Juror L") and the other (Kinsey, hereinafter "Juror K") had already been moved to what the court called "the box," starting at the second row. (R. 292, Trial, Pg ID 2222-2223 (Juror K is moved to the "back row" and Juror L is called to sit in front row)). Mr. Lilley followed up with questions to Juror K first. (R. 293, Trial, Pg ID 2284). A round of strikes followed in which the defense struck Juror K from the box. (R. 293, Trial, Pg ID 2288). Juror L was then moved to up (to "the box"), and Mr. Lilley attempted to question her. (R. 293, Trial, Pg. ID 2288-2289). The trial court prohibited the questioning, saying it could only take place *before* a juror was moved to "the box."¹ Based on the court's decision to disallow further questioning, the defense tried to use the only other option available to remove a biased juror, a challenge for cause. (*Id.* at Pg ID 2289-90). The trial court refused to hear the challenge, however, saying this was the peremptory strike stage of the process and the time to raise challenges for cause had passed. (R. 293, Trial, Pg ID 2291 ("I like to deal with the cause and get those out of the way before we proceed to peremptory challenges, we're in the peremptory challenge area of our jury selection now."))

On appeal, the *Majority* reasoned that even assuming the Juror L harbored actual bias, the record was silent due to defense counsel's failure to follow the court's preferred method. The *Dissent* disagreed, emphasizing that neither defense counsel or the court may waive the Sixth Amendment right to an impartial jury and that it "cannot be forfeited on the basis of a technicality." *Dissent*, at 19.

¹ Both parties experienced varying degrees of confusion about the trial court's preferred process. (R. 292, Trial Pg ID 2221 (court tells defense their strike includes a name on the first row, which is not subject to strikes)); (R. 293, Trial, Pg ID 2285-86 (government asks "[c]an we strike anyone from the full 18" and seeks clarification on the process)); (R. 293, Trial, Pg ID 2286; 2288 (court addresses the government in reference to Juror K, saying "you passed on her, too[.]" but moments later, Juror K is dismissed with a defense peremptory)).

2. At trial, several young women who testified for the government confirmed they had sometimes recruited each other and that others were recruited by a teenager (J.O.) who had initiated romantic relationships with them. Most of the young women said Mr. Lilley sent pictures of them to potential “johns[,]” and that the men would then come to the house or at times meet them elsewhere to have sex.

Mr. Lilley relied exclusively on a claim of diminished capacity to defend the charges. He provided notice of three experts and submitted a legal memorandum detailing the claim and the legal analysis. (R.164, 165, 166, Notice of Experts as to Dr. McChesney-Atkins, Dr. Laster, and Dr. Stone, respectively; R. 214, Def’s Memo in Support of DCJ). The trial court found that the testimony of one of the experts was admissible and allowed Mr. Lilley to present his diminished capacity defense to the jury. [R. 291, Pretrial Mtn. Hrg, Pg ID 2085-2090).

The defense expert was a neuropsychologist who testified that Mr. Lilley suffered from serious memory deficits, among other cognitive impairments, which manifested with a difficulty keeping track of faces, names, and other information. Based on extensive testing and interviews, the expert concluded that Mr. Lilley simply “does not remember how to remember.” (R. 299, Trial, Pg ID 3127-3134). The neuropsychologist also diagnosed Mr. Lilley with dependent personality disorder, which manifested with a compulsive need to please the people around him. The expert further found that Mr. Lilley has no “framework to fall back on” when it comes to decision making, dealing with adversity, and that in difficult situations the process is “automatic” and “[h]e is not conscious of it.” (R. 299, Trial, Pg ID 3143-3144).

Despite ruling that the diminished capacity claim was admissible at trial, the court refused to provide a diminished capacity instruction to the jury. On appeal, the *Majority* concluded that the trial court erred in finding that all the offenses charged were general intent crimes, but nonetheless upheld the verdict, reasoning that the record did not support a diminished-capacity defense. The

Dissent, on the other hand, insisted there was “ample evidence” to support the claim and that under controlling precedent, Mr. Lilley was entitled to an instruction outlining his defense.

REASONS FOR GRANTING THE PETITION

This case presents an important question about juror bias against the sexual orientation of the accused in criminal trials. The risk of prejudice is compounded where, as here, the defendant also faces sex-related charges.

1. Mr. Lilley's case was tried in the aftermath of this Court's decision *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which had been making headlines for months. Like Mr. Lilley, *Obergefell*'s petitioners were gay; they challenged the laws of three states, including Tennessee, and sued the states' elected officials. In this context, there can be little doubt that many in the jury pool had at least heard of the controversy and the issues at stake. Given the comments made in voir dire, some jurors were likely exposed to the issue in church. One such comment during a sidebar suggests some members of the jury pool felt so strongly about the matter that they discussed it during the selection process. (R. 293, Trial, Pg ID 2314 ("I've done heard it over and over and over again, don't know if I can do a good job knowing he's a homosexual").

No less than *five* prospective jurors expressed bias against homosexuality during voir dire and one of those five was ultimately seated on Mr. Lilley's jury. Had the "sensitive" issue been something else, like inter-racial marriage for instance, the bias expressed here—even assuming it was tentatively expressed—would be shocking, thanks in large part to decades of legal precedent. But with respect to bias and potential prejudice, interracial marriage and sexual orientation are no different, the latter just happens to have been litigated more recently. Regardless of context, however, this Court has held that "the presence of even a single biased juror deprives the defendant of his right to an impartial jury[.]" *Williams v. Bagley*, 380 F.3d 932, 944 (2004). The *Majority*'s reliance on a technicality to create an exception to that rule is unprecedented and dismissive of the fundamental nature of constitutional trial protections.

2. In *Elonis v. United States*, 135 S. Ct. 2001 (2015), this Court addressed the absence of a *mens rea* element in some federal criminal statutes and reiterated the

presumption in favor of scienter. This Court has yet to address the increasingly common use of a “knowing” *mens rea* element which—although ostensibly generic—has proven challenging to interpret, especially where courts must distinguish between general and specific intent crimes. Compare e.g., *United States v. Odeh*, 815 F.3d 968 (6th Cir. 2016) (analyzing a statute with a *mens rea* of “knowing” in the context of diminished capacity and finding that it effectively combines general and specific intent) and *United States v. Ettinger*, 344 F.3d 1149, 1158 (11th Cir. 2003) (stating that the term “knowingly” means no specific intent element is apparent on the face of the statute and the crime is therefore one of general intent).

As evidenced by the trial court’s confusion in the present case, as well as by the Sixth Circuit’s reversal in *Odeh*, these interpretive difficulties are exacerbated in the context of a diminished capacity claim, which is traditionally admissible only for the purpose of negating the *mens rea* of a specific intent crime. Although the *Majority* held that the trial court erred in finding that all of the offenses charged were general intent crimes, the trial court’s pretrial ruling on the admissibility of the diminished capacity claim suggests otherwise. The only possible conclusion is that the trial court was confused about both the general-specific intent distinction and its purpose in the diminished capacity context.

As a result, although Mr. Lilley was permitted to build his defense around this theory and thus to challenge the narrow but all-important issue of *mens rea*, the denial of a concomitant instruction deprived the jury of any legal framework to consider the defense. Throughout trial and in closing argument, Mr. Lilley relied on the legal framework applicable to diminished capacity claims, expecting the court to provide the jury with the necessary tools, *i.e.*, the appropriate analytical standard. Without the instruction, Mr. Lilley’s right to present a defense—and the defense he did in fact try to present—were compromised. *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (reiterating that the right to present a defense should only be subject to “reasonable restrictions that are not arbitrary or disproportionate to the purposes they are designed to serve.”) (internal quotations omitted). Even assuming,

arguendo, that the *Majority* correctly concluded the record does not support a diminished capacity claim, Mr. Lilley prepared his defense as if it did, in reliance on the trial court's pretrial rulings. Had the trial court excluded the defense, Mr. Lilley would have prepared his defense differently or may even have decided that a guilty plea was his best option.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Court will grant certiorari to review the judgment of the Sixth Circuit in his case.

DATED: 26th-day of January 2018

Respectfully submitted,



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IN THE
Supreme Court of the United States

MICHAEL AMES LILLEY, *Petitioner*,

v.

UNITED STATES, *Respondent*.

CERTIFICATE OF SERVICE

I, Valentine C. Darker, hereby affirm that on January 26th, 2018, as required by Supreme Court Rule 29, I have served this MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding by depositing an envelope containing the above documents at Federal Express, properly addressed with costs prepaid for Standard Overnight. Names and addresses of those served are:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., NW
Washington, D. C. 20530-0001

With a courtesy copy also e-mailed this to:
SUPREMECTBRIEFS@USDOJ.GOV.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of January 2018.



Valentine C. Darker

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 15-6415

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jul 26, 2017

DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL A. LILLEY,

Defendant-Appellant.

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ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF
TENNESSEE

ORDER

Before: SUHRHEINRICH, MOORE, and COOK, Circuit Judges.

Michael A. Lilley, a federal prisoner proceeding through counsel, appeals his judgment of conviction and sentence. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

A jury found Lilley guilty of four counts of aiding and abetting sex trafficking of children in violation of 18 U.S.C. §§ 2 and 1591(a)(1), one count of conspiracy to commit sex trafficking of children in violation of 18 U.S.C. §§ 1591(a)(1) and 1594(c), three counts of sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a), one count of attempted sexual exploitation of a minor in violation of § 2251(a), three counts of distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2), and two counts of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). He was sentenced to serve a total of 300 months of imprisonment followed by a total of 20 years of supervised release.

Lilley filed a timely appeal. He argues that: (1) he “was deprived of the fundamental right to an impartial jury”; (2) he was denied a fair trial when the district court denied his request for a jury instruction on diminished capacity and limited the testimony of his defense expert, and the government discredited his diminished capacity defense theory during cross-examination of his expert and closing argument; (3) the government failed to disclose “in discovery the contents of the telephones seized at [his] residence”; and (4) his sentences are “procedurally and substantively unreasonable.”

I. VOIR DIRE

Lilley argues that he was denied an impartial jury. Lilley claims that one juror—Ms. Lufcy—and one alternate juror—Ms. Reaves—potentially expressed “that their religious beliefs may cause them to be biased in that they disapproved of [his] homosexuality.” Lilley admits that he did not question Lufcy despite having the opportunity to do so, that he did not “immediately attempt to exclude the two jurors, believing their location outside the jury box precluded the challenge,” and that he “had misunderstood the process and believed there would be an opportunity for further questioning.”

Before jury selection began, the district court explained the jury selection process to counsel. The district court informed counsel that eighteen potential jurors would initially be called and that they could inquire of all prospective jurors in a question and answer format—first the government, then the defense, then “redirect and recross”—with both sides having “two hits at the witness”; challenges for cause were required in the question and answer phase rather than the peremptory phase; peremptory challenges could only be exercised on the jurors seated “in the box”; and “[n]o back strikes” were permitted once jurors had gone through a round of peremptory strikes—without being stricken—once counsel passed on a juror, they “got them.”

During questioning, the potential jurors were asked whether they would be uncomfortable, or find it “gross” to walk in on two members of the same sex being intimate with one another, and if so, whether they could put that aside in judging the case. R. 293, PID 2271-72. Ms. Reaves indicated that that situation would make her uncomfortable because she is “a strong Christian, conservative, and [she] would try to put that aside.” *Id.* at PID 2272. A few

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minutes later, defense counsel, Ms. Darker, revisited this line of questioning, which we reproduce in full:

BY MS. DARKER:

Q. Ms. Reaves was very candid in telling us about her religious views and how they would make certain things difficult for her.

Does anybody else here share those feelings?

Yes. Yes.

Anyone else, you share those feelings as well and so does Ms. Kinsey.

Anyone else?

Would those feelings make it difficult for you, Ms. Kinsey, to sit in judgment of someone because you see some evidence of, I guess, their sexual, their minority sexual orientation in progress or in action?

A. No.

Q. No?

A. No, I don't agree, I would --

THE COURT: Would you say that again.

A. I said I may not agree with the activity, but it would not play, I guess -- be a deciding factor within the law of reasonable doubt.

Q. Okay. So you would be able to separate your -- your personal opinions from that?

A. I feel I could, yes.

Q. Anyone else?

MS. DARKER: All right, thank you.

THE COURT: All right.

Id. at PID 2284-85

After Lufcy had been seated in the jury box, defense counsel asked the district court if Lufcy could be asked additional questions. Defense counsel explained: When Ms. Kinsey revealed that she had some issues because of her religious beliefs, I later asked whether anyone else felt the same way. And Ms. Lufcy raised her hand at that time.” *Id.* at PID 2290. The district court denied counsel’s request, noting that counsel had an opportunity to question Lufcy at that time but did not do so. The district court also denied counsel’s challenge of Lufcy for cause because the time to raise challenges for cause had passed. Defense counsel acknowledges that “a peremptory challenge was technically possible” but claims that it would not have been beneficial.

“[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). “The label ‘biased’ is applied to two sorts of jurors.” *Franklin v. Anderson*, 434 F.3d 412, 422 (6th Cir. 2006). “In the usual sense, a biased juror is one who has a predisposition against or in favor of the defendant. In a more limited sense, a biased juror is one who cannot ‘conscientiously apply the law and find the facts.’” *Id.* (quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1985)). When considering a juror bias claim, “the question is ‘did a juror swear that [s]he could set aside any opinion [s]he might hold and decide the case on the evidence, and should the juror’s protestation of impartiality have been believed.’” *Montgomery v. Bobby*, 654 F.3d 668, 684 (6th Cir. 2011) (en banc) (quoting *Williams v. Bagley*, 380 F.3d 932, 944 (6th Cir. 2004)).

Here, there was no “open declaration of [Lufcy’s] inability to be fair.” *Hughes v. United States*, 258 F.3d 453, 459 (6th Cir. 2001). Instead, Lilley argues that Lufcy expressed potential bias by raising her hand during general questioning whether anyone’s religious beliefs may make them uncomfortable given Lilley’s homosexuality. But there is no factual finding, nor evidence in the record save defense counsel’s untimely assertion, to support this.

The only indication in the record that a hand was raised was in response to Ms. Darker’s question: “Does anybody else here share [Ms. Reaves’] feelings?” when Ms. Darker says immediately thereafter, “Yes. Yes. Anyone else, you share those feelings as well and so does Ms. Kinsey.” R. 293, PID 2284. Contrary to the dissent’s assertion, all this reveals is that an unidentified juror would have been made uncomfortable walking in on two same sex individuals being intimate, because he or she is “a strong Christian, conservative, and [that he or she] would try to put that aside [in judging this case].” *Id.* at PID 2272. This is not the same as indicating that one’s “religious beliefs would make it difficult to judge a gay man.” *See* Dissent at 20 n.5.

More importantly, the record unambiguously shows that Ms. Darker was given the opportunity to follow up and ask Ms. Kinsey and the other potential jurors whether their religious beliefs would not permit them to judge unbiasedly in this case. After Ms. Kinsey clarified that she could be unbiased, the court asked whether anyone else had a problem. R. 293, PID 2284. No jurors raised their hand. *See id.* at PID 2284-85. Furthermore, at this point, the

record reflects that both defense counsel and the court were satisfied, and asked no further questions. *Id.* at PID 2285.

However, even assuming Lufcy did raise her hand as Lilley argues, counsel admittedly did not follow-up with Lufcy and inquire further in order to obtain any information regarding her religious beliefs and opinions on homosexuality, if any, when counsel had the opportunity to do so. The district court did not permit counsel to question Lufcy on the issue at a later time because counsel, for whatever reason, admittedly did not follow the district court's procedures regarding challenges for cause and peremptory strikes.

Because counsel failed to question Lufcy at the appropriate time, the record is silent as to any potential bias harbored by Lufcy and thus any presumptions of bias on counsel's part are speculative. As a result, the record does not support a determination that Lufcy either would be predisposed to find Lilley guilty based on his homosexuality, or that Lufcy otherwise could not be fair and impartial.¹ *See Montgomery*, 654 F.3d at 684.

Even if Lilley could show that Reaves was biased, he is not entitled to a new trial because, as an alternate juror, Reaves did not participate in the deliberations and verdict. On this record, Lilley has failed to show that he was denied an impartial jury.

II. DIMINISHED CAPACITY

Lilley presented a diminished capacity theory throughout the case and was allowed to present expert testimony regarding that theory at trial. Yet, Lilley argues that the district court erroneously refused to instruct the jury on diminished capacity even though the expert's testimony supported the instruction. He argues that a proper instruction would have permitted the jury to "determine whether Mr. Lilley's mental illnesses impaired his ability to form the *mens rea* required for a finding of guilt." He also argues that the district court improperly limited the testimony of his expert witness. Lilley further argues that the government discredited his diminished capacity defense theory during cross-examination of his expert and closing argument.

¹ The dissent claims that we base our holding on defense counsel having forfeited Lilley's right to challenge Lufcy's bias by failing to challenge Lufcy for cause. *See Dissent* at 19, n.4. However, as demonstrated above, we highlight defense counsel's failure to ask follow up questions to Lufcy, only because, as a result, defense counsel has left us with a record devoid of evidence showing any bias by Lufcy.

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Lilley requested a diminished capacity jury instruction and presented a proposed instruction to the district court. He argued that the crimes with which he was charged were specific intent crimes and that he lacked the mental capacity to form the specific intent to commit them. The district court denied Lilley's request. The district court concluded that a diminished capacity instruction was not appropriate because Lilley was charged with general intent crimes, setting out "the standard as knowing," but permitted him to argue diminished capacity during closing arguments.

We review for an abuse of discretion a district court's denial of a proposed jury instruction. *United States v. Adams*, 583 F.3d 457, 468-69 (6th Cir. 2009). Jury instructions are viewed "as a whole to determine 'whether they fairly and accurately inform the jury of relevant considerations and explain the applicable law.'" *United States v. McGee*, 529 F.3d 691, 695 (6th Cir. 2008) (quoting *United States v. Prince*, 214 F.3d 740, 760-61 (6th Cir. 2000)). "A trial court's refusal to give a requested jury instruction is reversible error only if the instruction is (1) correct, (2) not substantially covered by the actual jury charge, and (3) so important that failure to give it substantially impairs [the] defendant's defense." *United States v. Hart*, 635 F.3d 850, 854 (6th Cir. 2011) (alteration in original) (quoting *United States v. Heath*, 525 F.3d 451, 456 (6th Cir. 2008)).

"[A] specific intent crime is one that requires a defendant to do more than knowingly act in violation of the law. The defendant must also act with the purpose of violating the law." *United States v. Kimes*, 246 F.3d 800, 806 (6th Cir. 2001) (quoting *United States v. Gonyea*, 140 F.3d 649, 653 (6th Cir. 1998)). A general intent crime requires a defendant to "intend to do the act that the law proscribes." *Id.* (quoting *Gonyea*, 140 F.3d at 653). Generally, "evidence of diminished capacity may be used to negate the *mens rea* of specific intent crimes only." *Id.* However, as this court recently clarified, evidence of diminished capacity is admissible in general intent prosecutions, but only where the diminished capacity relates to what would be a general intent element, i.e., knowledge. *United States v. Odeh*, 815 F.3d 968, 978-79 (6th Cir. 2016).

With the exception of distribution of child pornography, the crimes charged against Lilley are specific intent crimes: aiding and abetting sex trafficking of children, *see Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014) (describing an aiding and abetting offense as a specific intent crime); conspiracy to commit sex trafficking of children and attempted sexual exploitation of a minor, *see United States v. Bailey*, 444 U.S. 394, 405 (1980) (noting that “inchoate offenses such as attempt and conspiracy” require “a heightened mental state [that] separates criminality itself from otherwise innocuous behavior”); sexual exploitation of a minor, *see* 18 U.S.C. § 2251(a) (containing specific language requiring that a defendant act with purpose to produce or transmit visual depictions of minors); and possession of child pornography, *see* 18 U.S.C. § 2252(a)(4)(B) (containing specific language requiring intent). The district court thus erred in suggesting otherwise. Nevertheless, Lilley was not entitled to a diminished capacity jury instruction because the record does not support that defense. *See Odeh*, 815 F.3d at 978-79.

Neuropsychologist Susan McChesney Atkins (McChesney) opined that Lilley’s reading and writing skills were equivalent to a first-grade level due to his severe dyslexia and dysgraphia. McChesney diagnosed Lilley with major depressive disorder, anxiety involving panic attacks, dependent personality disorder, and symptoms of posttraumatic stress disorder (PTSD). McChesney assumed that Lilley could text basic messages on a cell phone, but did not offer an opinion as to his ability to text. McChesney testified that Lilley could perform simple daily activities such as collecting money, driving a vehicle, and inviting people to his home.

McChesney also stated that Lilley’s test scores from past evaluations showed that intellectually he operated “in the average to high average range” in some areas, but that there has been “a gradual decline in his IQ scores.” She testified that, although Lilley’s memory function was on the low end, it still was above the “impaired range.” In fact, at a pre-trial hearing, McChesney testified that Lilley passed all of his memory tests “without difficulty.” The only specific memory issue that McChesney identified was Lilley’s ability to properly single out the source of his knowledge or information.

Before charging the jury, Lilley requested an instruction that would have required the jury to render a not guilty verdict if, based on McChesney's testimony regarding Lilley's mental condition, they could not find that he was able to form the requisite *mens rea*. However, the cognitive impairments identified by McChesney—struggling to read or write properly, depression, anxiety, tending to be a pleaser in relationships, and getting confused as to where one learned a particular fact—do not potentially negate the *mens rea* for any of the crimes charged, regardless of whether they require knowledge or intent. Therefore, the district court did not err in denying Lilley's requested instruction. *See Odeh*, 815 F.3d at 979 (requiring the record evidence to potentially negate the *mens rea* element of a crime for a defendant to be entitled to a diminished mental capacity instruction).

Lilley's case is distinguishable from *Odeh*. There, the defendant was charged with "knowingly procuring naturalization contrary to law." *Id.* at 973. The record evidence actually showed that defendant's post traumatic stress disorder caused memory loss such that when the defendant told immigration officers untruthful answers, she could not have known she was not telling the truth. *Id.* at 976-77. Thus, because the evidence "potentially negate[d] the general intent element" of knowledge, the defendant was entitled to a diminished capacity instruction on that point. *See id.* at 979. Here, if anything, the record evidence of cognitive impairments goes towards negating Lilley's ability to complete the relevant *actus reus*, not the *mens rea* of any of the charged crimes.

Because the impairments identified by McChesney are not relevant to, and therefore cannot potentially negate, the *mens rea*, Lilley failed to provide a factual basis for the desired jury instruction, and therefore was not entitled to a diminished capacity instruction for that reason.² Although the district court denied Lilley's desired instruction based on a mistaken belief that all of the charged offenses were general intent crimes, we "may affirm on alternative

² The dissent charges us with articulating as general rule that "evidence of psychological compulsion or of an inability to control one's behavior cannot be used to negate the *mens rea* for specific-intent crimes." Dissent at 22. That is not correct. Rather, as stated above, we find that the record evidence failed to provide a basis for a diminished capacity instruction. The same was true in *Odeh*. *See* 815 F.3d at 979 (requiring the record evidence to potentially negate the *mens rea* element of a crime for a defendant to be entitled to a diminished mental capacity instruction).

grounds supported by the record.” *Murphy v. Nat’l City Bank*, 560 F.3d 530, 535 (6th Cir. 2009).

Lilley argues that his diminished capacity defense was improperly limited by restrictions placed on McChesney’s testimony. He claims that the district court unfairly limited McChesney’s testimony regarding an MRI of his brain. The MRI was performed by Robert Laster, a neuroradiologist. The district court excluded Laster’s testimony before trial and Lilley does not challenge the district court’s ruling in that regard.³

This court reviews for an abuse of discretion a district court’s limitation of expert testimony. *Rheinfrank v. Abbott Labs., Inc.*, __ F. App’x __, 2017 WL 680349, at *9 (6th Cir. Feb. 21, 2017). No abuse of discretion occurred here.

McChesney testified that she requested the MRI, but did not perform it, interpret it, or rely on its results when diagnosing Lilley. McChesney testified at a pretrial motion hearing that the MRI did not influence her diagnosis because she “formed [her] opinion prior to the MRI being done.” She testified that she relied on Laster to explain the MRI and that Laster “pointed some things out to [her]” on the images. At trial, McChesney testified that if, while preparing a neuropsychological assessment of a patient, she reviews an MRI, she does not “do any interpretation, but we have a neuroradiologist at the clinic and right down the hall, he - - he often will explain things to me and show me images.” Moreover, McChesney is neither a medical doctor nor a neuroradiologist. Under these circumstances, the district court did not abuse its discretion in limiting McChesney’s testimony regarding Lilley’s MRI to her own work and area of expertise. *See Rheinfrank*, 2017 WL 680349, at *9 (finding no error in limiting “the testimony of medical experts to questions within their specialized medical ken”).

Lilley further argues that his diminished capacity defense theory was discredited through the government’s cross-examination of McChesney and its closing argument. Lilley argues that the government improperly cross-examined McChesney regarding his ability to communicate via

³ The dissent believes we err in holding that “no abuse of discretion occurred when the district court limited the testimony of Dr. Robert Laster.” Dissent at 23. This is also not correct. We do not discuss the district court’s limitation of Dr. Laster’s testimony because Defendant does not claim that it was erroneously excluded.

text messaging. McChesney testified regarding Lilley's limited reading and writing skills, and the government's cross-examination followed up on that testimony by inquiring as to McChesney's opinion regarding Lilley's ability to text message from a cell phone. The government pointed out that Lilley's cell phone contained thousands of text messages and inquired of McChesney whether Lilley was capable of communicating in that manner. McChesney stated that she assumed Lilley could text but had no opinion on his ability to do so. Given the nature of the case, the evidence of record, and McChesney's testimony on direct examination, the government's cross-examination was proper. The district court did not abuse its discretion by allowing the government's cross-examination of McChesney regarding Lilley's ability to communicate via text message.

Lilley also argues that the government discredited McChesney during rebuttal closing argument and disparaged his diminished capacity defense, "sometimes with inaccurate statements of law."

"Whether the government's closing argument amounted to prosecutorial misconduct and whether the argument rendered the trial 'fundamentally unfair' are mixed questions of law and fact that are reviewed de novo." *United States v. Sherrill*, 388 F.3d 535, 538 (6th Cir. 2004) (citation omitted). We first determine "whether the prosecutor's statement was improper." *Id.* If so, we determine whether the statement was "flagrant and warrant[s] reversal." *United States v. Tocco*, 200 F.3d 401, 420 (6th Cir. 2000) (quoting *United States v. Francis*, 170 F.3d 546, 549 (6th Cir. 1999)).

The government's rebuttal closing argument was not improper. Lilley argued lack of intent in his closing argument, and the prosecutor's reference to intent in rebuttal responded to that argument. Moreover, the government's closing argument was supported by evidence of record—the charged crimes contain a knowledge element; McChesney testified that Lilley had several personality disorders; and the witnesses' testimony supported the inference that Lilley could perform the acts required to commit the charged crimes, including text messaging, driving a vehicle, collecting money, communicating with other people, arranging appointments, and taking photographs. On this record, the government's rebuttal closing argument was not

improper, and any improper remarks did not rise to the level of flagrancy so as to require reversal. *See Tocco*, 200 F.3d at 420. Additionally, the district court instructed the jury that Lilley was presumed innocent, that the government had the burden of proof, and that counsel's arguments were not evidence. Lilley was not denied a fair trial for any of the reasons raised in his second argument.

III. DISCOVERY

Lilley argues that the government withheld exculpatory evidence during discovery. He argues that numerous cell phones were seized during a search of his residence and that the government refused to disclose information related to those phones, including their contents, to the defense prior to trial. The district court denied Lilley's motion to compel discovery related to the cell phones.

During trial, the government disclosed several text messages from one of the seized phones. Lilley then requested the district court to review in camera all the material from that particular phone under a provision of the Jencks Act, 18 U.S.C. § 3500(c). The district court "reviewed the material" and ruled that "[t]here is nothing else that should have been turned over to the defense in any way . . . there's just nothing there." Despite the district court's ruling, Lilley finds it "simply unfathomable" that the material reviewed by the district court did not implicate him.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To establish a *Brady* violation, a defendant must demonstrate that: (1) the non-disclosed evidence is favorable, "either because it is exculpatory, or because it is impeaching"; (2) the state suppressed the evidence, "either willfully or inadvertently"; and (3) prejudice resulted. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). A *Brady* violation occurs "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith v. Cain*, 565 U.S. 73, 75 (2012) (quoting *Cone v. Bell*, 556 U.S. 449, 469-70 (2009)). "A reasonable probability does not mean that the defendant 'would more likely than not

have received a different verdict with the evidence,’ only that the likelihood of a different result is great enough to ‘undermine[] confidence in the outcome of the trial.’” *Id.* at 75-76 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

Lilley failed to establish a *Brady* violation. He did not show that the evidence at issue was favorable or that the outcome of his trial would have been different had he obtained the information sought. The government asserted that the evidence sought did not contain any relevant information concerning Lilley, and both the magistrate judge and the district court reviewed the evidence and agreed. At a hearing, the magistrate judge “painstakingly went through information concerning each separate phone” seized at Lilley’s residence. Specifically, “[t]he government provided the name of the individuals to whom each phone was attributed, the locations of the seizures of each phone, whether the contents of the phone had been examined, and whether information had been extracted.” Regarding the information obtained from the seized phones, “the government indicated whether the information was material evidence, whether there were any calls to [Lilley] or [the] victims, whether any pictures were seized, whether the material had already been provided to Lilley, and whether the information constituted impeachment evidence.” The district court also spent “many hours” reviewing the text message material that the defense requested the court to review and concluded that “the government has complied with - - with their [discovery] obligation.”

The district court rejected Lilley’s “negative *Brady*” argument, which asserted that evidence that does not implicate him is also exculpatory and subject to disclosure. The district court concluded that the negative *Brady* argument lacked merit because the government had determined that the phones did not contain any material benefitting Lilley and the case law cited by Lilley in support of that argument was inapposite. Furthermore, the magistrate judge and the district court reviewed the material and concluded that it contained nothing of value to the defense. Lilley’s discovery argument lacks merit.

IV. SENTENCE

Lilley argues that his sentence is procedurally and substantively unreasonable. He argues that the district court denied his request for a downward departure under USSG § 5K2.13 based

on diminished capacity without providing reasons for the denial; denied his objection to “the grouping of the offenses” because it “resulted in double counting” without addressing “the substance of the argument”; and denied his request to dismiss Count 13 of the indictment because the images involved in that count incorporated “images that were distributed or produced,” which were accounted for in other counts. Lilley also challenges several special conditions of his supervised release as too restrictive.

We review a sentence imposed by a district court to determine whether it is reasonable. *United States v. Walters*, 775 F.3d 778, 781 (6th Cir. 2015). Reasonableness review has both a procedural and a substantive component. *See Gall v. United States*, 552 U.S. 38, 51 (2007); *Walters*, 775 F.3d at 781. When reviewing a district court’s sentencing determination, this court “must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence.” *Gall*, 552 U.S. at 51.

“Assuming that the district court’s sentencing decision is procedurally sound, [we] [] then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *Id.* “Sentences are substantively unreasonable where ‘the district court chooses the sentence arbitrarily, grounds the sentence on impermissible factors, or unreasonably weighs a pertinent factor.’” *United States v. Lumbard*, 706 F.3d 716, 727 (6th Cir. 2013) (quoting *United States v. Brooks*, 628 F.3d 791, 796 (6th Cir. 2011)). “A sentence that falls within a properly calculated guideline range is afforded a rebuttable presumption of reasonableness, and it is incumbent upon the defendant to demonstrate that his sentence is unreasonable.” *United States v. Evers*, 669 F.3d 645, 661 (6th Cir. 2012) (quoting *United States v. Brogdon*, 503 F.3d 555, 559 (6th Cir. 2007)); *see also United States v. Curry*, 536 F.3d 571, 573 (6th Cir. 2008).

When preparing Lilley’s presentence report, a United States Probation Officer grouped his counts of conviction under USSG § 3D1.2(b). The convictions were grouped into five separate Count Groups. After application of a multiple-count adjustment, the combined adjusted

offense level for Lilley's convictions was 46, which the probation officer treated as 43, the highest offense level on the sentencing guidelines table. Lilley was placed in criminal history category I because he had no criminal history points. With a total offense level of 43 and a criminal history category of I, the sentencing guidelines recommended life imprisonment. *See* USSG Ch.5, Pt.A.

At sentencing, the district court considered Lilley's "double counting" objection based on Count Group 5. Lilley explained his position that Count Group 5 was not necessary because Count Groups "one through four [were] sufficient." The district court clarified the probation officer's calculations regarding Count Group 5, observing that the adjusted offense level for Count Group 5 was 33 and that no units were added for that group in the multiple count adjustment, unlike the other Count Groups, which received one unit each. The probation officer explained that Count Group 5 received no units in the multiple count adjustment because it was "so many levels less serious than the other ones." The district court overruled Lilley's objection, finding no "issue with regard to double counting" because Count Group 5 did not "factor into the final calculations." Contrary to Lilley's argument, the district court addressed and rejected the substance of his double counting argument.

When imposing sentence, the district court addressed the relevant § 3553(a) factors, including the nature and circumstances of Lilley's offenses; his background and personal characteristics; the seriousness of his offenses; the need to promote respect for the law; the need for the sentence imposed to provide just punishment; the need to deter criminal conduct; the need to protect the public from further crimes by Lilley; and the recommended sentencing range under the advisory guidelines as well as the statutory mandatory minimum and maximum sentences he faced. The district court denied Lilley's motion for a downward departure, finding that a departure was not warranted in light of the record and "the testimony from family and the professionals." However, the district court granted Lilley's request for a downward variance in light of his "mental and physical condition." The district court found that a mandatory minimum fifteen-year sentence and a maximum life sentence were both inappropriate, and varied downward from the advisory life sentence under the guidelines to a 300-month sentence in an

effort to balance a sentence for very serious crimes against Lilley's individual mental and physical conditions.

The district court explained its rationale for imposing the sentence that it did, did not rely on any impermissible factors, and did not accord disproportionate weight to any one of the § 3553(a) factors. The district court considered the relevant § 3553(a) factors along with Lilley's individual circumstances. Lilley's 300-month sentence fell below the properly-calculated sentencing guidelines range of life imprisonment and is entitled to a presumption of substantive reasonableness. *See Curry*, 536 F.3d at 573. There is nothing in the record that rebuts this presumption. Lilley's sentence is procedurally and substantively reasonable.

The district court's denial of Lilley's motion for a downward departure under § 5K2.13 is unreviewable in the absence of "clear evidence that 'the lower court incorrectly believed that it lacked authority to grant such a departure.'" *United States v. Church*, 731 F.3d 530, 533-34 (6th Cir. 2013) (quoting *United States v. Madden*, 515 F.3d 601, 610 (6th Cir. 2008)). Because the district court denied Lilley's motion on the merits, not because of an erroneous belief that it lacked the authority to grant a downward departure, Lilley may not challenge the district court's denial of his motion for a downward departure.

Following sentencing, Lilley requested the district court to vacate Count 13—possession of child pornography—because it "is a lesser included of both production and distribution" that "did not survive sentencing." The district court denied Lilley's request, concluding that there was a sufficient distinction between the possession and distribution offenses based on "the proof that was introduced at trial" to allow Count 13 to remain.

According to Lilley's sentencing memorandum, he sought to vacate Count 13 on grounds of multiplicity. But he waived that claim by failing to raise it in a pretrial motion challenging the indictment. *See Fed. R. Crim. P. 12(b)(3)(B)(ii); United States v. Hart*, 70 F.3d 854, 859-60 (6th Cir. 1995). In any event, Lilley's multiplicitous-indictment claim lacks merit. A multiplicitous indictment charges "a single offense in more than one count." *United States v. Swafford*, 512 F.3d 833, 844 (6th Cir. 2008) (quoting *United States v. Lemons*, 941 F.2d 309, 317 (5th Cir. 1991)). Lilley argued that Count 13 was multiplicitous because it charged possession of sexually

explicit images and other counts of the indictment charged distribution, which necessarily includes possession. However, as the district court instructed the jury, the distribution counts have different elements from Count 13, the possession count. *See id.* Lilley has not demonstrated that the district court's ruling was erroneous.

Finally, Lilley challenges several special conditions of his supervised release as too restrictive. Specifically, he challenges the special conditions prohibiting his use of electronic devices, access to legal sexual material and services, and contact with minors, and the special conditions requiring his attendance at "specialized sex offender treatment" and submission to polygraph examinations.

When reviewing the imposition of special conditions of supervised release, this court must first "determine whether the district court adequately stated in open court at the time of sentencing 'its rationale for mandating special conditions of supervised release.'" *Brogdon*, 503 F.3d at 563 (quoting *United States v. Carter*, 463 F.3d 526, 528-29 (6th Cir. 2006)). Then, this court "must determine whether the 'condition of supervised release is reasonably related to the dual goals of probation, the rehabilitation of the defendant and the protection of the public.'" *Id.* (quoting *United States v. Ritter*, 118 F.3d 502, 504 (6th Cir. 1997)). The conditions must be reasonably related to the nature of the offenses and the history and characteristics of the defendant and "involve[] no greater deprivation of liberty than is reasonably necessary" to serve the goals of deterrence, protection of the public, and rehabilitation of the defendant. 18 U.S.C. § 3583(d)(1)-(2); *see United States v. Dotson*, 715 F.3d 576, 584 (6th Cir. 2013). Finally, the supervised release conditions must be "consistent with any applicable policy statements issued by the United States Sentencing Commission." *Dotson*, 715 F.3d at 584 (citing 18 U.S.C. § 3583(d)(3)).

The district court stated that the special conditions of supervised release were all "appropriate given what [the court] heard as far as the facts of this case are concerned." Even if the district court did not adequately explain its rationale for the special conditions imposed, any procedural error on the court's part is harmless because "the reasons for imposing [the] condition[s] are clear from the record." *Dotson*, 715 F.3d at 584 n.4. Lilley's offenses involved

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the use of electronic devices to possess and distribute child pornography, to sexually exploit minors and to engage in sex trafficking of children. Lilley used his cell phone to take sexually explicit pictures of minors and set up sexual encounters for them with adult men. Given these risk factors, it was not unreasonable for the court to order Lilley to refrain from using electronic devices, accessing sexually explicit material and services, and contacting minors and to attend “specialized sex offender treatment” and submit to polygraph examinations. “Special conditions of supervised release that ‘implicate fundamental rights such as . . . freedom of association are subject to careful review, but if primarily designed to meet the ends of rehabilitation and protection of the public, they are generally upheld.’” *United States v. Widmer*, 785 F.3d 200, 204 (6th Cir.) (quoting *Ritter*, 118 F.3d at 504), *cert. denied*, 136 S. Ct. 701 (2015).

Because the special conditions imposed on Lilley’s supervision are reasonably related to the goals of deterrence, protection of the public, and rehabilitation, they are entirely appropriate and not too restrictive. The district court did not abuse its discretion when imposing the challenged special conditions of supervised release. *See Brogdon*, 503 F.3d at 563.

Accordingly, we **AFFIRM** the district court’s judgment.

KAREN NELSON MOORE, Circuit Judge, dissenting. Several serious errors were committed in this case. The first, which warrants reversal, was the impaneling of a biased juror. The second, which also warrants reversal, deprived Lilley of the ability to present his defense fully. Finally, the district court failed to develop an adequate record to support its decision to exclude certain expert testimony. I would grant Lilley a new trial and instruct the district court to conduct a *Daubert* hearing for Lilley's expert, Dr. Robert Laster.

I. VOIR DIRE

Lilley was denied an impartial jury. "When presented with an allegation of [juror] bias, the question is 'did a juror swear that [s]he could set aside any opinion [s]he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed.'" *Montgomery v. Bobby*, 654 F.3d 668, 684 (6th Cir. 2011) (citation omitted). The answer here, simply, is no. Moreover, when a concern about juror bias is raised, it is the district court's *duty* to "take steps to determine what the effect of such [bias] actually was on that jur[or]." *Williams v. Bagley*, 380 F.3d 932, 945 (6th Cir. 2004). "The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction." *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001).

During voir dire, counsel asked the potential jurors whether anyone would find it difficult to judge a gay man because of their personal views about his sexual orientation. Specifically, counsel asked whether anyone would find it "gross" if they observed a gay couple being intimate with one another. R. 293 (Sept. 15, 2015 Trial Tr. at 171) (Page ID #2272). One juror, Ms. Reaves, raised her hand and stated, "I'm a strong Christian, conservative, and I would try to put that aside. I teach children [that] all children are the same . . . But I would be very uncomfortable in that situation." *Id.* at 171–72 (Page ID #2272–73). Later, counsel said to the jury pool, "Ms. Reaves was very candid in telling us about her religious views and how they would make certain things difficult for her. Does anyone else here share those feelings?" *Id.* at 183 (Page ID #2284). Counsel then noted affirmative answers from other jurors. *Id.* Counsel addressed one juror, Ms. Kinsey, and asked, "Would those feelings make it difficult for you, Ms. Kinsey, to sit in judgment of someone because you see some evidence of . . . their minority

sexual orientation in progress or in action?” *Id.* Ms. Kinsey responded, “I said I may not agree with the activity, but it would not . . . be a deciding factor within the law of reasonable doubt.” *Id.* Although Ms. Reaves and Ms. Kinsey stated that they could set aside their personal opinions and apply the law, Ms. Lufcy, who raised her hand with Ms. Kinsey, was not asked those same questions. *See id.* at 183–84 (Page ID #2284–85). Moments later, counsel attempted to ask further questions of Ms. Lufcy, but was denied. *Id.* at 188 (Page ID #2289). Counsel responded:

When Ms. Kinsey revealed that she had some issues because of her religious beliefs, I later asked whether anyone else felt the same way. And Ms. Lufcy raised her hand at that time. And I believe it shows that she can’t—I would like to probe her further on it, but since it’s not an option, I—I believe that shows that she can’t be unbiased in this case.

Id. at 189 (Page ID #2290). Counsel was not permitted to ask further questions, and Ms. Lufcy never swore “that [s]he could set aside any opinion [s]he might hold and decide the case on the evidence.”

Although the majority does not contest the proper standard to be applied in this case, its analysis all but ignores the obvious answer before it. In the face of an expression of actual bias, the district court did not inquire into Ms. Lufcy’s ability to remain impartial. *Montgomery*, 654 F.3d at 684. On those facts, it is clear that Lilley’s right to an impartial jury was denied. The majority’s conclusion to the contrary has no basis in precedent.

The majority argues that even if Lufcy expressed actual bias, Lilley nonetheless loses because his counsel failed to follow the district court’s particular procedures for making a challenge for cause.¹ This is a remarkable assertion. The Sixth Amendment’s guarantee of a defendant’s right to an impartial jury cannot be forfeited on the basis of a technicality. *Williams*, 380 F.3d at 944. Although we grant district courts broad discretion in the conduct of voir dire,

¹ The assertion that Lilley’s counsel negligently caused the forfeiture of his bias claim is belied by our own precedent. We have previously held that that “when a defendant objects to a trial court’s denial of his for-cause challenge, the defendant may choose to either remove the challenged juror peremptorily and forgo a later Sixth Amendment challenge, or allow the juror to sit, preserving the Sixth Amendment claim for appeal.” *Wolfe v. Brigano*, 232 F.3d 499, 502 (6th Cir. 2000) (citing *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000)). After Lilley’s for-cause claim was rejected by the district court, Lilley’s counsel opted for the latter approach, clearly preserving the claim for appeal.

“[t]he question of whether to seat a biased juror is not a discretionary or strategic decision.” *Hughes*, 258 F.3d at 463. We have held numerous times that it is the *duty* of the district court to protect this right through appropriate procedure. *See id.* at 464; *Williams*, 380 F.3d at 944. Therefore, “[b]ecause the ‘[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant’s right to an impartial jury,’ questions directed at potential bias may be constitutionally compelled.” *Williams*, 380 F.3d at 944 (quoting *Dennis v. United States*, 339 U.S. 162, 171–72 (1950)). And where counsel negligently fails to follow up on an expression of bias, “the presiding trial judge has the authority and *responsibility*, either *sua sponte* or upon counsel’s motion, to dismiss prospective jurors for cause.” *Hughes*, 258 F.3d at 464 (emphasis added).

The defendant’s right to an impartial jury cannot be waived by counsel or by the district court. *Id.* at 463. “[T]he presence of a biased juror . . . is a structural defect in the constitution of the trial mechanism that defies harmless error analysis.” *Id.* at 463 (internal quotation marks omitted). The standard requiring a protestation of impartiality therefore must be strictly applied. *Id.* In *Hughes*, a juror expressed that she did not think she could be fair given her personal relationship with a police officer involved in the case. The district court and counsel did not inquire further, and the juror never made any subsequent assurances as to her impartiality. Recognizing the district court’s failure “to rehabilitate [the] juror . . . to establish record support for the claim that [the juror] was able to cast aside her opinion and render a verdict based on the evidence presented in court,” we held that the defendant’s right to an impartial jury had been violated. *Id.* at 459, 464. Notably, we also made clear that “silence in the face of generalized questioning . . . [does] not constitute an assurance of impartiality.” *Id.* at 461. The only inquiry is whether an assurance of impartiality was made. Here, as in *Hughes*, the district court failed either to rehabilitate or to dismiss a juror who had unambiguously² expressed concerns about her

² Lufcy’s assertion was unambiguous—she raised her hand when asked if anyone felt that their religious beliefs would make it difficult to judge a gay man. That assertion should have been enough to trigger an inquiry. *See Hughes v. United States*, 258 F.3d 453, 460 (6th Cir. 2001) (“juror bias can always be presumed from such unequivocal statements” as a declaration that a juror did not “think [she] could be fair”).

personal biases. Ignoring the magnitude of Lufcy's claim, the majority would have this case rise or fall on where the juror was seated at the moment a challenge was raised. But the proper outcome here is clear—the impaneling of a biased juror prejudiced Lilley. Therefore, he is entitled to a new trial.

The majority also asserts that Lilley cannot prove bias because the district court made no factual finding to that effect and the record does not support his claim. First, the failure to make a finding with regard to juror bias *describes* the district court's mistake, it does not justify it. Moreover, the majority cites no case that requires a defendant to prove bias in order to trigger the court's duty of inquiry. On the contrary, our cases make clear that the inquiry is triggered “[w]hen presented with an allegation of [juror] bias.” *Montgomery*, 654 F.3d at 684. The district court here ignored Lilley's challenge for cause, which constitutes an abuse of discretion.

II. DIMINISHED CAPACITY INSTRUCTION

At trial, Lilley sought a jury instruction laying out his diminished-capacity defense. The district court denied this request on the ground that the crimes with which Lilley had been charged were general-intent crimes to which a diminished-capacity defense could not apply. The majority holds, and I agree, that the district court erred in holding that all of Lilley's crimes were general-intent crimes. The majority nonetheless finds that we need not disturb the district court's judgment because the record evidence does not support Lilley's diminished-capacity defense. It is with this latter conclusion that I take issue.

There is ample evidence in this record to support a diminished-capacity defense. Although a defendant's theory of the case must be supported by more than “mere suspicion or speculation,” the standard for admitting an instruction outlining his defense is not high. *United States v. Newcomb*, 6 F.3d 1129, 1132 (6th Cir. 1993). “[S]o long as there is even weak supporting evidence, ‘[a] trial court commits reversible error in a criminal case when it fails to give an adequate presentation of a theory of defense.’” *Id.* (quoting *United States v. Plummer*, 789 F.2d 435, 438 (6th Cir. 1986)) (second alteration in original). Lilley argues that an expert testified that Lilley's “memory was impaired, which manifested with a difficulty ‘keeping track of information,’” that “he has trouble remembering faces and names,” and that he “does not

‘remember how to remember.’” Appellant’s Br. at 24–25. Lilley therefore asserts that “the jury could have found that he was unable to recall the age of teenagers from one meeting to the next, or even notice it at all, that he lacked the ability to remember much of anything, or truly know what he was doing.” *Id.* at 26. Cognitive impairments that affect memory clearly are relevant to a person’s “knowledge,” and may potentially negate the *mens rea* for the crimes charged. *See United States v. Odeh*, 815 F.3d 968, 979 (6th Cir. 2016). Indeed, our cases have held that such evidence can support a diminished-capacity defense not only in specific-intent prosecutions, but also in general-intent prosecutions, insofar as that evidence is used to negate the general-intent element of that crime, i.e., knowledge. *Id.* Given the evidence in this case, Lilley was entitled to a diminished-capacity instruction for all his specific-intent crimes, and a limited instruction for his general-intent crime.

Moreover, the cognitive impairments that relate to psychological compulsions, including, as the majority notes, “tending to be a pleaser in relationships,” can negate the *mens rea* for specific-intent crimes. Majority Op. at 8. Lilley argues that the evidence shows that he “lacks a ‘framework to fall back on when it comes to making decisions and dealing with adversity,’ and tends to go into a default mode when faced with difficult situations.” Appellant’s Br. at 25. He contends that “[i]f [his] sole purpose in life was to do what he believed would please or help others, any actions he took in furtherance of that purpose could be bereft of the requisite intent.” *Id.* at 26. These conditions are akin to psychological compulsions, which can negate a defendant’s purpose. *See Odeh*, 815 F.3d at 979 (noting that evidence of a condition that “rob[s] a defendant] of the ability to control his actions,” or of a condition that convinces him that he has “no choice but to carry [a] gun” can negate a defendant’s purpose) (quoting *United States v. Kimes*, 246 F.3d 800, 803 (6th Cir. 2001), and *United States v. Willis*, 187 F.3d 639, at *7 (6th Cir. 1999) (unpublished table opinion)). This type of defense goes to his purpose, which is permissible to negate the *mens rea* of specific intent crimes.

III. DIMINISHED-CAPACITY EXCLUDED TESTIMONY

I also believe that the district court abused its discretion by limiting the testimony of Dr. Robert Laster.³ In deciding upon the admissibility of expert testimony, district courts are required to perform a gatekeeping function by assessing the reliability and relevance of potential expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). This obligation may be performed through a *Daubert* hearing, where a court considers several factors identified by the Supreme Court as ones that may have a bearing on the reliability and relevance of expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589–95 (1993); *Kumho*, 526 U.S. at 149–50. Although district courts enjoy considerable latitude in determining how to test reliability and relevancy, “there is no discretion regarding the actual performance of the gatekeeper function.” *Busch v. Dyno Nobel, Inc.*, 40 F. App’x 947, 960–61 (6th Cir. 2002) (citation omitted). Therefore, while a full *Daubert* hearing is not required, the district court is nonetheless “charged with the responsibility of ensuring that the record before the court is adequate” by “allow[ing] both parties the opportunity to argue the admissibility of the disputed testimony.” *Id.* at 961. Where a district court has failed to make “any specific factual determinations explaining its conclusion that the testimony was unsound,” it has failed in its gatekeeping obligation, and thereby abused its discretion. *See id.*

The district court excluded Dr. Laster’s testimony because it did not “think he really adds anything to [Dr. Susan McChesney’s] testimony.” R. 291 (Sept. 14, 2015 Motion Hr’g Tr. at 115) (Page ID #2031). This conclusion appears to have been based on the testimony of Dr. McChesney and the prosecution’s motion in limine. *Id.* However, Lilley did not file a response to the motion in limine, and Dr. Laster never testified about his findings or background. *Id.* at 11–13 (Page ID #1927–29). Given that the district court did not know what Dr. Laster would

³ The majority argues that Lilley did not challenge the district court’s ruling as to Dr. Laster. Majority Op. at 9. I disagree. Lilley argues on appeal that he was prejudiced by the exclusion of expert testimony relating to his diminished-capacity defense. Appellant’s Br. at 31. In addition to Dr. McChesney’s testimony, Lilley also notes the court’s exclusion of testimony from Dr. Laster. *Id.* at 32. He does not assert that his challenge is only to the limitations placed on Dr. McChesney’s testimony.

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testify to, it is difficult to understand how that court determined which parts of Dr. Laster's testimony were likely to be duplicative. Moreover, the district court failed to explain why it would not be relevant to have Dr. Laster, a neuroradiologist, testify to the abnormality of Lilley's brain atrophy observed in the MRI. As Lilley's counsel explained at the motion hearing, while Dr. McChesney, a neuropsychologist, would testify to Lilley's psychological disorder, Dr. Laster's testimony regarding the MRI and Lilley's physiological condition could indicate the presence of more than just a "purely psychological disorder." *Id.* at 11 (Page ID #1927). The fact that Dr. McChesney "rendered her opinion prior to receiving the MRI," therefore, may have been irrelevant to Dr. Laster's findings. But again, with an incomplete record, we are left to guess what aspects of Dr. Laster's imagined testimony were unlikely to "add anything to the decisions that the jury [would] ultimately . . . make." *Id.* at 115 (Page ID #2031). The district court failed to meet its gatekeeping obligation required under *Daubert* and failed to make specific factual findings explaining its decision to exclude Dr. Laster's testimony. I would direct the district court to conduct a *Daubert* hearing before retrial in order to remedy this error.

Because I believe that Lilley is entitled to a new trial and to specific factual findings regarding the reliability of his expert, I respectfully dissent.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

APPENDIX B

No. 15-6415

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 30, 2017
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL A. LILLEY,

Defendant-Appellant.

ORDER

BEFORE: SUHRHEINRICH, MOORE, and COOK, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk