No. 21-___

In the Supreme Court of the United States

TIM SHOOP, Warden,

Petitioner,

v.

JERONIQUE D. CUNNINGHAM,

Respondent.

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

APPENDIX

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TABLE OF CONTENTS

Page

Appendix A: Opinion, United States Court of Appeals for the Sixth Circuit, January 10, 2022 ..... 1a

Appendix B: Opinion and Order, United States District Court for the Southern District of Ohio, December 18, 2019 ..... 96a

Appendix C: Opinion, Ohio Court of Appeals for the Third District, November 8, 2004 ..... 147a

Appendix D: Order, United States Court of Appeals for the Sixth Circuit, March 31, 2022 .... 181a

Appendix E: Order, On Petition for Rehearing *En Banc*, United States Court of Appeals for the Sixth Circuit, March 28, 2022 ..... 182a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 11-3005/20-3429

JERONIQUE D. CUNNINGHAM,

Petitioner-Appellant,

v.

TIM SHOOP, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Ohio at Toledo.

No. 3:06-cv-00167—Patricia A. Gaughan, District Judge.

Argued: May 12, 2021

Decided and Filed: January 10, 2022

Before: MOORE, KETHLEDGE, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Michael J. Benza, LAW OFFICE OF MICHAEL J. BENZA, Chagrin Falls, Ohio, for Appellant. Margaret Moore, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF**: Michael J. Benza, LAW OFFICE OF MICHAEL J. BENZA, Chagrin Falls, Ohio, Karl Schwartz, WISEMAN & SCHWARTZ,

LLP, Philadelphia, Pennsylvania, for Appellant. Margaret Moore, Stephen E. Maher, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

MOORE, J., delivered the opinion of the court in which WHITE, J., joined. KETHLEDGE, J. (pp. 51–62), delivered a separate opinion concurring in the judgment in part and dissenting in part.

OPINION

KAREN NELSON MOORE, Circuit Judge. Jeronique Cunningham and his half-brother Cleveland Jackson robbed and shot several friends and their family members. A three-year-old girl, Jala Grant, and a seventeen-year-old woman, Leneshia Williams, were killed; six others were injured. Cunningham was indicted and tried on two aggravated-murder counts, an aggravated-robbery count, and six attempted-aggravated-murder counts. The aggravated-murder charges carried death-penalty and firearms specifications. Cunningham and Jackson were tried separately. The jury found Cunningham guilty on all counts and specifications and sentenced him to death. *See State v. Cunningham* (*Cunningham II*), 824 N.E.2d 504, 510–13 (Ohio 2004).

We consider eight issues in this habeas case. The first and second issues are juror-bias claims involving Cunningham's jury foreperson Nichole Mikesell. Cunningham argues that Mikesell's colleagues at the county's children-services agency improperly relayed external information about Cunningham to her. He

also argues that Mikesell's relationship with the victims' families affected the jury's impartiality. He seeks a hearing to investigate jury bias on both fronts. Third, we consider whether Cunningham's counsel ineffectively failed to investigate and present mitigating evidence. Fourth, we review whether Cunningham's trial counsel ineffectively failed to investigate, obtain, and present expert testimony about ballistics. Fifth, we evaluate whether the trial court improperly restricted Cunningham's ability to question prospective jurors during voir dire. Sixth, we decide whether the trial court failed to instruct the jury that it must determine Cunningham's personal culpability before imposing a death sentence. Seventh, we determine whether the prosecution improperly failed to turn over witness statements to the defense. Finally, we consider whether the prosecution made improper closing arguments during the guilt and sentencing phases. CA6 No. 11-3005 R. 50 (7/27/11 Order at 2); R. 71 (10/13/11 Order at 1); R. 187 (7/28/20 Order at 3).

We cannot grant Cunningham relief for issues three through eight. But we conclude that Cunningham is entitled to proceed on his juror-bias claims. We therefore **REVERSE** and **REMAND** so that the district court can conduct an evidentiary hearing to investigate juror bias.

I. ISSUES #1 & #2: JUROR BIAS

A. Background

1. Trial

Nichole Mikesell served as the jury foreperson for Cunningham's trial. R. 194-2 (Trial Tr. at 1498) (Page

ID #10708). On her jury questionnaire, Mikesell indicated that she worked as a child-abuse investigator at Allen County Children Services and as a crisis counselor at Crime Victims Services. R. 192-4 (Mikesell Questionnaire) (Page ID #5301, 5306). She wrote that she worked closely with the Allen County sheriff's office, the Lima police department, and the juvenile court. *Id.* (Page ID #5302–04). To the prompt "[d]o you know of any reason you could not sit as a juror and be absolutely fair to the Defendant and the State of Ohio and render a verdict based solely upon the evidence presented you[,]" Mikesell checked "no." *Id.* (Page ID #5308). At voir dire, the judge asked the prospective jurors "do any of you have any personal knowledge of the facts of this case?" R. 194-1 (Voir Dire at 13) (Page ID #9181). Mikesell said nothing. *Id.* at 14 (Page ID #9182). The court, the prosecution, and defense counsel confirmed that Mikesell knew several of the prosecutors and a defense lawyer from work, that she worked at children services, and that she had friends "on the police department," but Mikesell assured the court that she would be impartial. *Id.* at 24–25, 37, 72, 207–09 (Page ID #9192–93, 9205, 9240, 9375–77).

The jury found Cunningham guilty on all counts and specifications and sentenced him to death. *See Cunningham II*, 824 N.E.2d at 512–13. Cunningham appealed his conviction and sentence to the Ohio Supreme Court. *See id.* at 513.

2. State Postconviction Proceedings

During the pendency of Cunningham's direct appeal, Jackson's investigator endeavored to interview Cunningham's jurors. The investigator

secured interviews with six members of Cunningham's jury, including foreperson Mikesell and jurors Staci Freeman and Roberta Wobler, and an alternate. R. 192-4 (Investigator Rep.) (Page ID #5122). The investigator prepared a report of these seven interviews, and he swore to their veracity in an affidavit dated July 16, 2003. R. 192-4 (Ericson Aff.) (Page ID #5121). The investigator wrote—

> [Mikesell] said that there was nothing in Jeronique's life that could have possibly explained his participation in the instant offense. She said that Jeronique is an evil person. *She said that some social workers worked with Jeronique in the past and were afraid of him.* She also said that if you observe one of the veins starting to bulge in his head, watch out and stay away because he might try to kill you. She also said that Jeronique had no redeeming qualities. . . . She said that the defense knew what she did at children's services but did not ask her if she had any direct information regarding the instant offense. As it turned out, she did not have any pertinent information regarding the instant offense but said that the defense would not be aware of this.

R. 192-4 (Investigator Rep.) (Page ID #5132) (emphasis added). Freeman relayed that she voted last for finding Cunningham guilty of aggravated murder. *Id.* (Page ID #5125). "After a while," the report provides, "[Freeman] was convinced by the other jurors that Jeronique had in fact been guilty of aggravated murder as opposed to murder." *Id.*

Cunningham timely petitioned for state postconviction relief on August 1, 2003, raising a jury-

bias claim based on the investigator's affidavit and report. R. 192-4 (2003 Postconviction Pet.) (Page ID #5047, 5085–91). Pointing to Mikesell's interview, Cunningham asserted that Mikesell's colleagues told her "extraneous" and "highly prejudicial information" that Mikesell had failed to divulge during voir dire or in her jury questionnaire. *Id.* (Page ID #5087). Asserting that his Sixth Amendment right to a trial by an impartial jury and his Fifth and Fourteenth Amendment due-process rights were violated, Cunningham requested a new trial or, at a minimum, discovery and an evidentiary hearing. *Id.* (Page ID #5088, 5090–91).

The state trial court denied Cunningham's postconviction petition without permitting discovery or an evidentiary hearing, and the Ohio Court of Appeals affirmed, reasoning that

> Cunningham asserted that the presence of Juror Number 21, Nichole Mikesell, on the jury was prejudicial to him and violated his rights to a fair and impartial jury. . . .
>
> The only comment made by Mikesell that would have any bearing on Cunningham's assertion is that she was provided information by some social workers regarding Cunningham. However, the investigator's interview summary of Mikesell does not indicate whether Mikesell obtained this information from the social workers prior to, during, or subsequent to Cunningham's trial. The record also does not provide when the investigator conducted these interviews with the jurors. However, the record does provide that Mikesell was thoroughly examined during the voir dire

> process and that she informed the court regarding the information she had about the case. Mikesell never indicated that she could not be a fair and impartial juror.

State v. Cunningham (*Cunningham I*), 2004 WL 2496525, at *15 (Ohio Ct. App. 2004).

The Ohio Supreme Court denied Cunningham's claims on direct appeal, *Cunningham II*, 824 N.E.2d at 532, and later declined to review Cunningham's postconviction petition, *State v. Cunningham*, 824 N.E.2d 92 (Ohio 2005).

3. Federal Habeas Proceedings

In 2006, Cunningham petitioned for habeas relief. He reasserted that his constitutional rights were violated by Mikesell's knowledge of extrajudicial information about Cunningham. R. 19-2 (Habeas Pet. at 7) (Page ID #243). The district court allowed Cunningham to depose the jurors, Mikesell's colleagues at Allen County Children Services, and Jackson's investigator. R. 79 (4/18/08 Mot. at 2–3) (Page ID #1501–02); R. 86 (6/9/08 Order at 10–12) (Page ID #1861– 63).

Cunningham acquired affidavits from Freeman and Wobler. R. 104-1 (Freeman Aff. at 1) (Page ID #1955); R. 103-1 (Wobler Aff. at 1) (Page ID #1952). Freeman averred that during guilt-phase deliberations, Mikesell told the other jurors that she worked at the county's children-services agency. R. 104-1 (Freeman Aff. at 1) (Page ID #1955). When Freeman expressed that the ballistic evidence pointed to Jackson's—not Cunningham's—gun, Mikesell apparently responded: "[y]ou don't understand. I

know the families of the people that were shot in the kitchen. The families know me and I am going to have to go back and see them. These families are my clients." *Id.* at 1–2 (Page ID #1955–56). Freeman "interpreted Mikesell's comments as pressure to vote guilty." *Id.* at 2 (Page ID #1956). Wobler attested that "[o]ne young woman on the jury was adamant that Jeronique was not guilty. Mikesell told the young woman and the jury that the young woman did not have to work in the local community." R. 103-1 (Wobler Aff. at 1) (Page ID #1952).

Cunningham also deposed Mikesell. When pressed about her comments to Jackson's investigator, Mikesell avouched that none of her social-worker colleagues had spoken to her about Cunningham but conceded that she had read Cunningham's files posttrial. R. 188-1 (Mikesell Dep. at 13–14) (Page ID #2915–16). Mikesell claimed that she had not relayed to the other jurors any information from these records. *Id.* at 14 (Page ID #2916). The presiding magistrate judge barred Cunningham's attorney from asking Mikesell if she worked with or had communicated with the victims' families. *Id.* at 16–20 (Page ID #2916–17).

The district court permitted Cunningham to amend his habeas petition to include a second juror-bias claim based on Mikesell's knowledge and relationship with the victims' families. R. 111 (3/27/09 Mot. at 4–5) (Page ID #2036–37); R. 120 (7/21/09 Order at 5) (Page ID #2321). Denying Cunningham's request for an evidentiary hearing, the district court permitted depositions of Freeman and Wobler instead. R. 120 (7/21/09 Order at 5) (Page ID #2321). The

district court explained that the necessity of an evidentiary hearing depended on the jurors' testimony. *Id.* at 6 (Page ID #2322).

Cunningham deposed Freeman and Wobler. Freeman reiterated that at guilt-phase deliberations, Mikesell told the jurors that she "dealt with the victims and their families, they knew who she was, and that if she would find him not guilty that she would have to deal with them and that's just something she didn't want to have to deal with because they knew who she was." R. 137-1 (Freeman Dep. at 6) (Page ID #2455). Mikesell's comments affected Freeman—

> I felt, I felt pressured that . . . How do I put this? I think that [Mikesell] . . . I think that other people in the room felt pressured. I was honestly the last one holding out, and I felt that I was up against a wall, and she was very domineering and so I just . . . You know I regret, I shouldn't have, but I voted guilty. I mean I felt the sense in the room, I felt the pressure. She tried to steer everyone towards that.

Id. at 11 (Page ID #2460). Freeman did not remember whether she had told Jackson's investigator that she was "[c]onvinced by the other jurors that Jeronique had in fact been guilty of aggravated murder as opposed to murder." *Id.* at 28–29 (Page ID #2477–78). But, Freeman insisted, she had mentioned to the investigator that Mikesell spoke during deliberations about the victims' families. *Id.* at 15, 18, 19, 20 (Page ID #2464, 2467, 2468, 2469). After reading the investigator's report, however, Freeman confirmed that her remarks to Jackson's investigator were not in the report. *Id.* at 17–18 (Page ID #2466–67). Wobler

likewise averred that Mikesell stated in guilt-phase deliberations that she "may in the future be working with the [victims'] families." R. 136-1 (Wobler Dep. at 5) (Page ID #2435). Wobler swore, however, that her decision was unaffected by Mikesell's comments. *Id.* at 6 (Page ID #2436).[1]

The case was subsequently assigned to a different district court, which denied Cunningham's federal habeas petition. *See Cunningham v. Hudson*, No. 3:06 CV 0167, 2010 WL 5092705, at *1 (N.D. Ohio Dec. 7, 2010). Applying 28 U.S.C. § 2254(d)(1) deference, the district court found that the *Cunningham I* court's treatment of Cunningham's initial juror-bias claim (involving Mikesell's exposure to external information about Cunningham) neither contradicted nor unreasonably applied Supreme Court precedent. *Id.* at *20. The district court further found that Cunningham's second juror-bias claim (involving Mikesell's relationship to the victims' families) was unexhausted, procedurally defaulted, and meritless. *Id.* at *21.

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[1] Wobler could not recall having spoken to Jackson's investigator but confirmed that it was possible. R. 136-1 (Wobler Dep. at 12) (Page ID #2442).
Ohio moved to strike Freeman's and Wobler's depositions. R. 142 (3/15/10 Mot.) (Page ID #2504). The district court denied Ohio's motion. R. 155 (5/26/10 Order at 3) (Page ID #2590). To the district court, Cunningham's seeking discovery for his initial juror-bias claim in his state postconviction petition showed that Cunningham had diligently attempted to develop the facts underlying his second juror-bias claim in state court. *Id.* Accordingly, the district court reasoned, 28 U.S.C. § 2254(e)(2) permitted the court to add the depositions to the record. *Id.*

We vacated and remanded. *Cunningham v. Hudson*, 756 F.3d 477, 479 (6th Cir. 2014) (per curiam). Pointing to the Ohio courts' obscure interpretations of Ohio Rule of Criminal Procedure 33 and Ohio Revised Code § 2953.23(A)(1), we concluded that it was "at least debatable" whether Cunningham could raise his second juror-bias claim in a second state postconviction petition or a motion for a new trial. *Id.* at 485 (citation omitted). So Cunningham's failure to exhaust his second juror-bias claim did not constitute procedural default. *See id.* at 487. The district court held Cunningham's habeas petition in abeyance to allow Cunningham to exhaust his second juror-bias claim in state court. *Cunningham v. Hudson*, No. 3:06 CV 0167, 2014 WL 5341703, at *1 (N.D. Ohio Oct. 20, 2014).

4. There and Back Again

Back in state court, Cunningham filed a second state postconviction petition and a motion for a new trial. He raised his second juror-bias claim in both documents and requested discovery, an investigator, an evidentiary hearing, and permission to file the delayed motion. R. 188-1 (2018 Postconviction Pet. at 1) (Page ID #2828); R. 209-1 (Mot. New Trial at 1) (Page ID #11342). The Allen County Court of Common Pleas denied relief, and the Ohio Court of Appeals affirmed. The state appellate court ruled that Cunningham was not "unavoidably prevented" from discovering the facts underlying his second juror-bias claim. *State v. Cunningham* (*Cunningham III*), 65 N.E.3d 307, 312–15, 317–18 (Ohio Ct. App. May 23, 2016). The appellate court thus concluded that Ohio Revised Code Annotated § 2953.23(A) and Ohio

Criminal Rule 33 barred Cunningham's new filings. *See id.* at 314–15, 317–18. The Ohio Supreme Court declined review. *State v. Cunningham*, 77 N.E.3d 987 (Ohio 2017) (Table).

Deferring to the state court's "unavoidably prevented" analysis, the district court found that Cunningham procedurally defaulted his second juror-bias claim. *See Cunningham v. Shoop*, No. 3:06 CV 167, 2019 WL 6897003, at *11–12 (N.D. Ohio Dec. 18, 2019). Cunningham appealed the district court's decision, and we granted his motion to reinstate his initial appeal. CA6 No. 11-3005 R. 187 (7/28/20 Order at 2).

B. Analysis

1. Precedent

To resolve Cunningham's juror-bias claims, we consider three canonical cases: *Remmer v. United States*, 347 U.S. 227 (1954); *Michael Williams v. Taylor*, 529 U.S. 420 (2000); and *Cullen v. Pinholster*, 563 U.S. 170 (2011).

a. Juror Bias: *Remmer*

In *Remmer*, the Supreme Court held that a prima facie showing of juror bias—such as an allegation of "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury" in a criminal case—entitles a defendant to a hearing, awards to the defendant a presumption of prejudice, and places on the Government the burden of showing that the contact was harmless. *Remmer*, 347 U.S. at 229. The Court followed up in *Smith v. Phillips*: "This Court has long held that the remedy for allegations of juror

partiality is a hearing in which the *defendant* has the opportunity to prove actual bias." 455 U.S. 209, 215 (1982) (emphasis added). Put another way, the *Phillips* Court reaffirmed *Remmer*'s core holding that a showing of juror bias demands a hearing. *See United States v. Zelinka*, 862 F.2d 92, 94–95 (6th Cir. 1988); *United States v. Herndon*, 156 F.3d 629, 635 (6th Cir. 1998). Subsequent Supreme Court decisions that address *Remmer* hearings confirm as much. *See, e.g.*, *United States v. Olano*, 507 U.S. 725, 738–39 (1993); *Rushen v. Spain*, 464 U.S. 114, 119–20 (1983).

The courts of appeals were forced to grapple with whether *Phillips* shifted the burden of proof at a *Remmer* hearing from the Government to the defendant and whether the presumption of prejudice survived *Phillips*. Every other circuit maintains that the Government shoulders the burden at a *Remmer* hearing of showing that the alleged juror bias was harmless and has reaffirmed that defendants are awarded a presumption of prejudice at that hearing. *See* B. Samantha Helgason, *Opening Pandora's Jury Box*, 89 FORDHAM L. REV. 231, 242–43, 249–50 (2020); *Sheppard v. Bagley*, 657 F.3d 338, 350 n.1 (6th Cir. 2011) (Merritt, J., dissenting) (collecting cases). We charted our own course. In *Zelinka*, we reiterated that *Remmer* "outlined the procedure that district courts should follow when advised of unauthorized contacts with a juror"—

> The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror,

> and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.

Zelinka, 862 F.2d at 94–95 (quoting *Remmer*, 347 U.S. at 229–30). We nonetheless concluded that *Phillips* shifted the burden of showing bias at *Remmer* hearings to defendants and stripped defendants of the presumption of prejudice. *See id.* at 95–96. Notwithstanding, we still guarantee defendants a "meaningful opportunity" to demonstrate juror bias, *United States v. Lanier*, 988 F.3d 284, 295 (6th Cir. 2021) (quoting *Herndon*, 156 F.3d at 637), and maintain that bias may be actual ("bias in fact") or implied ("employ[ing] a conclusive presumption that a juror is biased" in "certain 'extreme' or 'exceptional' cases"), *Treesh v. Bagley*, 612 F.3d 424, 437 (6th Cir. 2010) (citations omitted).

b. AEDPA: Michael Williams and Pinholster

In *Michael Williams*, the Court held that when the state courts have not adjudicated a habeas petitioner's claims on the merits and the petitioner diligently attempted to develop the facts of that claim in state courts, 28 U.S.C. § 2254(e)(2) permits federal courts to hold an evidentiary hearing for that claim. *See Michael Williams*, 529 U.S. at 437.

Michael Wayne Williams was convicted of a capital crime. *See id.* at 426. He petitioned for postconviction relief in the Virginia courts, alleging that the Commonwealth had failed to disclose its unofficial deal with one of the witnesses. *See id.* at 427. The Virginia Supreme Court dismissed the petition. *See id.* Williams sought federal habeas relief. *See id.* He reraised his undisclosed-agreement claim and set

forth three new claims. Williams now alleged that Virginia violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose a pretrial psychiatric examination of the same witness. *Michael Williams*, 529 U.S. at 427. He also raised a juror-bias claim and a prosecutorial-misconduct claim. *See id.* One of Williams's jurors was formerly married to a witness for Virginia, and one of the prosecutors had represented the juror in the divorce proceedings. *See id.* at 440–41. At voir dire, when the judge asked if any of the prospective jurors were related to the witnesses, the juror said nothing. *See id*. And when the judge asked if any of the prospective jurors had been represented by the attorneys involved in the case, both the juror and the prosecutor remained silent. *See id.* at 441.

The *Michael Williams* Court addressed whether 28 U.S.C. § 2254(e)(2) barred a federal habeas court from holding an evidentiary hearing for these four claims. *See id.* at 432. Per that provision, "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the [federal habeas] court shall not hold an evidentiary hearing on the claim unless the applicant shows that" they meet both exceptions listed in § 2254(e)(2)(A) and (B). 28 U.S.C. § 2254(e)(2). The Court underscored that "failed to develop" turned on "diligence." *Michael Williams*, 529 U.S. at 432.

Because Williams diligently explored the facts underlying his juror-bias and prosecutorial-bias claims, the Court concluded that the federal courts could hold a § 2254(e)(2) evidentiary hearing for those two claims. *See id.* at 440–44. But the Court

determined that Williams had not diligently developed his *Brady* claim. *See id.* at 437–38. The Court also punted Williams's failure-to-disclose claim. *See id.* at 444. Unlike the three new federal habeas claims, the Virginia Court of Appeals had rejected the failure-to-disclose claim on the merits, implicating 28 U.S.C. § 2254(d)(1)'s deferential standards of review of state courts' merits decisions. The *Michael Williams* Court therefore found it "unnecessary to reach the question whether § 2254(e)(2) would permit a hearing on th[at] claim." *Id.*

The Court addressed the relationship between § 2254(d)(1) and (e)(2) more than a decade later in *Pinholster*. There, the Court concluded that federal courts must limit their review of a state court's merits adjudication to the record before that state court. *Pinholster*, 563 U.S. at 181. Thus, federal courts cannot consider evidence yielded at federal habeas evidentiary hearings when reviewing state courts' merits decisions. *See id.* at 185–86.[2]

Faithfully applying *Remmer*, *Michael Williams*, and *Pinholster*, we conclude that Cunningham is entitled to an evidentiary hearing for both his juror-bias claims.

2. Juror-Bias Claim #1

The *Cunningham I* court adjudicated Cunningham's first juror-bias claim—that Mikesell's

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[2] The *Pinholster* Court reiterated *Michael Williams*'s analysis of § 2254(e)(2)'s application to claims that had not been adjudicated by state courts on the merits and reasoned further that *Michael Williams*'s leaving open the § 2254(d)(1) question "supported" the outcome in *Pinholster*. *See Pinholster*, 563 U.S. at 183–86.

social-worker colleagues fed her information about Cunningham—on the merits. Per 28 U.S.C. § 2254(d)(1) and *Pinholster*, the appropriate inquiry is whether *Cunningham I* was contrary to or unreasonably applied Supreme Court precedent based on the record before it. *See Terry Williams v. Taylor*, 529 U.S. 362, 405–11 (2000) (O'Connor, delivering majority opinion for standards governing § 2254(d)(1)'s contrary-to and unreasonable-application clauses); *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (promulgating fairminded-jurists-could-disagree standard for § 2254(d)(1) unreasonable-application inquiry); *Renico v. Lett*, 559 U.S. 766, 779 (2010) (explaining that decisions issued by courts of appeals do not constitute clearly established Supreme Court precedent for § 2254(d) purposes). So—as Ohio points out, Appellee's Br. #2 at 55—we may consider the investigator's affidavit and interview report that were presented to the state court, but we cannot include the affidavits and depositions generated during the federal habeas proceedings.

We hold that *Cunningham I* unreasonably applied *Remmer*. *Phillips* retained *Remmer*'s core holding that a prima facie showing of juror bias entitles a defendant to an evidentiary hearing. *See Phillips*, 455 U.S. at 215 ("[T]he remedy for allegations of juror partiality is a *hearing*. . . ." (emphasis added)). By attaching evidence to his state postconviction petition that raised the question whether Mikesell had spoken to her colleagues about him, Cunningham credibly alleged that a "private communication [occurred] with a juror during a trial about the matter pending before the jury . . . ." *Remmer*, 347 U.S. at 229. This colorable claim of extraneous influence entitled Cunningham to

a *Remmer* hearing. *See id.*; *see also Herndon*, 156 F.3d at 635 ("Where a colorable claim of extraneous influence has been raised . . . a '*Remmer* hearing' is necessary to provide the defendant with 'the opportunity to prove actual bias.'" (quoting *Phillips*, 455 U.S. at 217)); *Garcia v. Andrews*, 488 F.3d 370, 376 (6th Cir. 2007)) ("This court has defined 'an extraneous influence on a juror [as] one derived from specific knowledge about or a relationship with either the parties or their witnesses.'" (alteration in original) (quoting *Herndon*, 156 F.3d at 635)); *Ewing v. Horton*, 914 F.3d 1027, 1030 (6th Cir. 2019) ("When a trial court is presented with evidence that an extrinsic influence has reached the jury which has a reasonable potential for tainting that jury, due process requires that the trial court take steps to determine what the effect of such extraneous information actually was on that jury. In other words, where a colorable claim of extraneous influence has been raised, an evidentiary hearing must be held to afford the defendant an opportunity to establish actual bias." (cleaned up)).

The dissent notes that only our circuit precedent addressing juror bias on direct appeal uses the term "colorable claim," and as such, per § 2254(d)(1), we may not rely on it in analyzing the state court's interpretation of *Remmer*. Dissent Op. at 54. Requiring only a prima facie (i.e., colorable) claim of prejudice, however, is the only sensical interpretation of *Remmer*, which is Supreme Court precedent. *Remmer* instructed the trial court to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing" based on "information such as was received in this case," but the point of that rule was to direct the district court to

inquire *further* into the defendant's credible allegations. 347 U.S. at 229–30. That language cannot be reduced to a mere "data point," and cannot be reasonably interpreted, as the dissent suggests, to limit the future application of *Remmer* to its precise facts. Dissent Op. at 55.

Nor does our requisite level of deference to Ohio courts require us to accept an unreasonable application of *Remmer*'s rule solely because *Remmer* involved different allegations of outside influence. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006))). Whether the defendant alleges that a third party offered a juror a bribe, as in *Remmer*, or that a third party provided a juror with outside information she otherwise would not have known, the principle is the same: a defendant must be afforded a chance to prove the juror's bias in a *Remmer* hearing. *See Phillips*, 455 U.S. at 216 ("Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." (quoting *Dennis v. United States*, 339 U.S. 162, 167 (1950))).

Ohio insists, and the dissent agrees, that Cunningham has not provided any evidence that Mikesell used extrajudicial information while a member of the jury. *See* Appellee's Br. #2 at 21; Dissent Op. at 55–56. But Ohio has skipped a constitutional step. In *Remmer*, the Court did not require the defendant to prove "what actually transpired, or whether the incidents that may have

occurred were harmful or harmless" before receiving an evidentiary hearing. 347 U.S. at 229. Again, *Phillips* reiterated *Remmer*'s guarantee that a prima facie showing of juror bias entitles a defendant to an evidentiary hearing—"*allegations* of juror partiality" suffice. 455 U.S. at 215 (emphasis added). Per *Remmer*,—which, contrary to the dissent's interpretation, also involved a "degree of speculation"—a hearing was the appropriate forum for a trial court to decide the nature, timing, and content of any communications about Cunningham between Mikesell and her colleagues. To receive a *Remmer* hearing, Cunningham had to colorably allege that the jury encountered extraneous influence—which he did in his state postconviction petition. The state appellate court thus unreasonably dismissed Cunningham's first juror-bias claim based on the interview report.

The *Cunningham I* court erroneously homed in on Mikesell's statements during voir dire. *Cf. Cunningham I*, 2004 WL 2496525, at *15.[3] Yes, Mikesell proclaimed that she could be fair and impartial notwithstanding that she had worked with members of the police department, the prosecution, and the defense. But Mikesell's relationship with the Ohio justice system's repeat players is immaterial to whether her colleagues may have provided her with external information during trial. Nothing otherwise stated in Mikesell's jury questionnaire or during voir dire would have flagged to Cunningham's trial counsel

[3] The district court similarly erred. *See Cunningham*, 2019 WL 6897003, at *20.

that Mikesell might have been discussing this case with her colleagues. Indeed, Mikesell confirmed that her employment at Allen County Children Services would not affect her partiality without saying more. Her statement weighs in favor— not against—finding that Cunningham's lawyers had no notice that Mikesell or her colleagues possessed extrajudicial information about him.

The *Cunningham I* court's unsound reasoning that "the record [] does not provide when the investigator conducted these interviews with the jurors" puts us at sea. *Cunningham I*, 2004 WL 2496525, at *15. Neither *Remmer* nor *Phillips* states that the timing of a defendant's allegation of an external contact erases their right to an evidentiary hearing. Indeed, the defendant in *Remmer* learned about an impermissible external contact between his jury foreperson and the FBI after his verdict came in—just like this case. *See Remmer*, 347 U.S. at 228. Citing the timing of the juror interviews to deny Cunningham any investigation into juror bias involves an unreasonable application of *Remmer*. The interviewer's affidavit, moreover, is dated July 16, 2003. R. 192-4 (Ericson Aff.) (Page ID #5121). Clearly, the investigator interviewed the jurors between Cunningham's sentencing on June 23, 2002 and the affidavit's signing on July 16, 2003. *See* R. 192-2 (Sentencing Order at 8) (Page ID #4326); R. 192-4 (2003 Postconviction Pet.) (Page ID #5047). Because the record indicates the period during which these interviews occurred, the *Cunningham I* court "unreasonabl[y] determine[ed] the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). "This partial reliance on an

erroneous factual finding further highlights the unreasonableness of the state court's decision." *Wiggins v. Smith*, 539 U.S. 510, 528 (2003).

That Mikesell told Jackson's investigator that she did not have "pertinent" or "direct" information about Cunningham's "instant offense" is inapposite. R. 192-4 (Investigator Rep.) (Page ID #5132). Consider our recent decision in *Ewing*. In that habeas case, Ewing was convicted of a gang-related murder. One of Ewing's jurors filed an affidavit postverdict. She swore that two other jurors mentioned during deliberations that they had looked up a picture of Ewing on Facebook; had read a eulogy online about the victim; and Googled information about gang codes, history, and hierarchy. Based on that affidavit alone, the State of Michigan conceded, and this court agreed, that Ewing deserved a *Remmer* hearing. *Ewing*, 914 F.3d at 1029–30. We emphasized that the external information "had a clear potential for tainting the jury." *Id.* at 1030. We were unswayed by the Michigan Court of Appeals's determination "that the extraneous information was duplicative of evidence produced at trial and thus harmless"; that the Facebook picture was "innocuous and similar to many photos that were shown at trial"; that "Watson's eulogy contained no new, relevant information and presumably was discussed only in passing"; and that "the information about gang activity and hierarchy was either patently obvious or easily inferred from witness testimony." *Id.* at 1029–30.

Likewise, any information that Mikesell's social-worker colleagues may have told her about Cunningham or that she learned from reading his file

poses a glaring risk of taint.[4] Consider what Mikesell told Jackson's investigator. Mikesell stated that "there was nothing in Jeronique's life that could have possibly explained his participation in the instant offense" and that "Jeronique is an evil person." R. 192-4 (Investigator Rep.) (Page ID #5132). She mentioned that "some social workers worked with Jeronique in the past and were afraid of him" before explaining "if you observe one of the veins starting to bulge in his head, watch out and stay away because he might try to kill you." *Id.* She closed with: "Jeronique had no redeeming qualities." *Id.* Of course, we cannot tell from the investigator's report whether Mikesell developed these strong opinions because of information learned at trial or from her colleagues; a *Remmer* hearing is the appropriate forum to discern the answer. Just like the photo, eulogy, and gang information in *Ewing*, the information that might

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[4] The dissent portrays Cunningham's claim of juror bias as "an allegation that, a year after trial Mikesell knew that some of her colleagues were afraid of Cunningham" and concludes that this "allegation, taken as true, is not nearly as prejudicial on its face as the bribery allegation in *Remmer* was." Dissent Op. at 55. The dissent both mischaracterizes Cunningham's allegations and conflates his allegations with one sentence in the investigative report read in isolation. Cunningham alleges that the information in the investigator's report, read in context with Mikesell's other statements and the timing of the investigation, plausibly give rise to an inference that Mikesell received during the trial information about Cunningham from social workers or Cunningham's case file. That allegation—that Mikesell received during the trial outside information that social workers were afraid of Cunningham—taken as true, is even more prejudicial than an FBI agent's inquiring about the juror's own conduct in *Remmer*. 347 U.S. at 229.

have been relayed to Mikesell is just as irrelevant to the crime but equally as charged with bias. Clearly, the prejudicial nature of the external information does not rise and fall on whether the information is "pertinent" or "direct[ly]" connected to a habeas petitioner's "instant offense." R. 192-4 (Investigator Rep.) (Page ID #5132).

We are aware that the district court allowed Cunningham to conduct limited depositions of three of the jurors—Freeman, Wobler, and Mikesell. And during her deposition, Mikesell denied that she spoke to her colleagues about Cunningham or read from his file during the trial. Even if we could consider the affidavits and depositions—which, again, we cannot under *Pinholster*—we would still grant Cunningham a *Remmer* hearing. *Remmer* was unambiguous: an allegation of extraneous influence entitles a defendant to a constitutionally meaningful investigation into juror bias at a hearing. Of course, we accord deference to state courts' management of *Remmer* hearings in habeas cases per § 2254(d)(1). *See Carroll v. Renico*, 475 F.3d 708, 712 n.3 (6th Cir. 2007). But no *Remmer* hearing occurred on this juror-bias claim in the Ohio courts. And the depositions taken in the federal habeas proceeding did not comport with the constitutional contours of a *Remmer* hearing. *See Lanier*, 988 F.3d at 295. Because the jurors were deposed outside the presence of the district judge, no factfinder had the opportunity to assess Mikesell's credibility as she testified that she did not talk to her coworkers about Cunningham and did not review his file until after the trial was over. The greater the probability of juror bias, moreover, the more searching the court's investigation must be. *See id.* Mikesell's

statement to Jackson's investigator indicated bias against Cunningham. Freeman and Wobler also supplied evidence that Mikesell knew the victims' families (we explore this issue below). The discovery permitted in the habeas proceeding is not the constitutional equivalent of a *Remmer* hearing. The district court's permitting defense counsel to question just three jurors and the magistrate judge's limiting the scope of Mikesell's deposition placed unconstitutional constraints on defense counsel. To that end, Mikesell's denying during her deposition that she spoke to her colleagues does not eliminate Cunningham's entitlement to a proper *Remmer* hearing, and we must remand because we cannot say on this record that the failure to provide a *Remmer* hearing was harmless. *See Nian v. Warden, N. Cent. Corr. Inst.*, 994 F.3d 746, 756 (6th Cir. 2021).[5]

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[5] We have treated a trial court's failure to hold a *Remmer* hearing as a "trial error" subject to harmless-error review. *See Nevers v. Killinger*, 169 F.3d 352, 370–73 (6th Cir. 1999), *abrogated on other grounds by Harris v. Stovall*, 212 F.3d 940 (6th Cir. 2000) (trial court's failure to investigate extraneous influence on jury was trial error subject to harmless-error review); *Nian*, 994 F.3d at 756 (ordering *Remmer* hearing because state court's failure to hold *Remmer* hearing for allegation of extraneous influence was not harmless).

Here, Cunningham's first juror-bias claim, which involves allegations of extraneous information learned from Mikesell's coworkers and a casefile, fits into the framework we applied in other cases where there were allegations of extraneous influence during the trial. *See, e.g.*, *Nevers*, 169 F.3d at 354; *Nian*, 994 F.3d at 753; *Ewing*, 914 F.3d at 1030. After a hearing, the trial court will be well equipped to make a finding whether the state court's *Remmer* error in this case was harmless. *See, e.g.*, *Barnes v. Joyner*, 751 F.3d 229, 253 (4th Cir. 2014) (remanding habeas

To sum up, Cunningham's first state postconviction petition set forth a prima facie case of extraneous influence, i.e., that Mikesell's colleagues at Allen County Children Services or Mikesell's review of Cunningham's file relayed to her external information about Cunningham. The *Cunningham I* court unreasonably applied *Remmer* by refusing to grant Cunningham an evidentiary hearing. Cunningham is thus entitled to an evidentiary hearing for his first juror-bias claim involving Mikesell's obtaining prejudicial information about Cunningham from her colleagues or his file.

3. Juror-Bias Claim #2

To refresh, the *Cunningham III* court decided that it could not entertain Cunningham's second postconviction petition or motion for a new trial under Ohio law and refused to consider on the merits Cunningham's second juror-bias claim involving Mikesell's relationship with the victims' family. *Cunningham III*, 65 N.E.3d at 315, 317.[6] "It is

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petition to district court to hold *Remmer* hearing on claim of extraneous influence and to make harmless error determination).

[6] During oral argument, Ohio contradicted its brief's position that Cunningham procedurally defaulted his second juror-bias claim by arguing for the first time that the Ohio Court of Appeals adjudicated this claim on the merits. *Compare* Appellee's Br. #2 at 17–18, *with* Oral Arg. at 33:00–35:24. Ohio pointed to this sentence in *Cunningham III*: "Even were we to consider Cunningham's arguments that he satisfied R.C. 2953.23(A)(1)(b), we would conclude that he has not shown that, but for any purported constitutional error at trial, no reasonable fact-finder would have found him guilty of the offenses or found him eligible

for a death sentence." *Cunningham III*, 65 N.E.3d at 315; Oral Arg. at 34:41–35:17.

After focusing on this sentence, we remain unswayed by Ohio's belated argument. In the paragraph preceding this single sentence, the Ohio Court of Appeals determined that Cunningham's failure to satisfy Ohio Rev. Code § 2953.23(A)(1)(a) "alone" deprived the state courts of "jurisdiction" to review Cunningham's second postconviction petition. *Id.* No doubt, the Ohio Court of Appeals clearly, expressly, and actually rested its judgment on a state procedural bar. *See Harris v. Reed*, 489 U.S. 255, 263 (1989); *Williams v. Coyle*, 260 F.3d 684, 693 (6th Cir. 2001). The in-the-alternative analysis following the words "even were we" is detached from the state appellate court's conclusive procedural determination. No one, for that matter, can read Ohio's selective slice of *Cunningham III* as a merits adjudication of *anything*. The Ohio Court of Appeals merely reasoned that Cunningham's allegation of a structural error such as juror bias is insufficient to satisfy Ohio Rev. Code § 2953.23(A)(1)(b). *See Cunningham III*, 65 N.E.3d at 315–16. So the Ohio Court of Appeals issued yet another procedural determination—not a merits decision. To the extent that one could read Ohio's chosen sentence as a merits adjudication of Cunningham's innocence of the alleged crime or innocence of the death penalty (which would demand a dubious and implausible linguistic stretch), deciding Cunningham's innocence is not pertinent to whether Mikesell was biased. Put simply: no merits determination of any juror-bias issue can be found anywhere in *Cunningham III*. Finally, if we did read this sentence, somehow, as a merits determination of the second juror-bias claim, Cunningham still prevails for the same reason that he succeeds for his first juror-bias claim. Per *Remmer*, there has been a credible allegation of juror bias via Mikesell's relationship with the victims' families. So if the *Cunningham III* court had denied Cunningham an evidentiary hearing on the merits, it unreasonably applied *Remmer*. But because no merits adjudication occurred in *Cunningham III*—which Ohio maintained all the way until our oral argument—we invoke § 2254(e)(2) instead of § 2254(d)(1).

axiomatic that state courts are the final authority on state law." *Hutchison v. Marshall*, 744 F.2d 44, 46 (6th Cir. 1984). And we must presume that the *Cunningham III* court's factual findings are correct absent clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1). But a faithful application of *Michael Williams* reveals that we may order an evidentiary hearing for this juror-bias claim under § 2254(e)(2).

First, Cunningham was at least as diligent as Williams had been about pursuing a remedy in state court. In *Michael Williams*, state postconviction counsel "did attempt to investigate [Williams's] jury" by petitioning for funding for an investigator "to examine all circumstances relating to the empanelment of the jury and the jury's consideration of the case." *Michael Williams*, 529 U.S. at 442 (citations omitted). By denying this request, Virginia "depriv[ed] [Williams] of a further opportunity to investigate." *Id.* The Court did not care that Williams's state postconviction petition was "prompted by concerns about a different juror" from the juror underlying his federal habeas juror-bias claim. *Id.* Nor did the Court alter its conclusion because the state postconviction petition contained mere "vague allegations" that "irregularities, improprieties and omissions exist[ed] with respect to the empaneling *[sic]* of the jury." *Id.* (alterations and emphasis in original, citation omitted).

Here, Cunningham sought an evidentiary hearing and discovery from the Ohio courts for his initial juror-bias claim; his claim was more concrete and substantiated than Williams's obscure juror-bias

allegation had been. *Compare* R. 192-4 (2003 Postconviction Pet.) (Page ID #5085–91), *with Michael Williams*, 529 U.S. at 442. Because "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law," Cunningham crossed the Court's diligence threshold. *See Michael Williams*, 529 U.S. at 437; *see also Bowling v. Parker*, 344 F.3d 487, 511–12 (6th Cir. 2003); *Robinson v. Howes*, 663 F.3d 819, 824 (6th Cir. 2011); *cf. Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 465 (6th Cir. 2012).

Second, Cunningham had as little notice as Williams had about the facts underlying their respective juror-bias claims. In *Michael Williams*, the Court explained that nothing in the record would have notified a reasonable attorney that the juror deliberately omitted material information by remaining silent in voir dire. *See Michael Williams*, 529 U.S. at 442. So too here. The jury questionnaire and the voir dire transcript do not indicate that Mikesell was connected to the victims' families. As in *Michael Williams*, Mikesell said nothing when the trial court asked if any prospective jurors had personal knowledge of the case. The investigator's comprehensive interview report also never mentions Mikesell's relationship with the victims' families. Put simply, nothing Mikesell wrote in her questionnaire, nothing Mikesell said at voir dire, and nothing in the interview report would have alerted a reasonable attorney about Mikesell's connection to the victims. *Cf. Hutchison v. Bell*, 303 F.3d 720, 747–48 (6th Cir. 2002) (concluding that petitioner failed diligently to develop facts underlying *Brady* claim when

prosecution referred to undisclosed report at closing arguments, petitioner personally spoke to report's author, and subject of report came up in cross-examination).

We accept that Freeman may have told Jackson's investigator that Mikesell had brought up the victims' families at deliberations, but we deem this fact inapposite. In *Michael Williams*, the Court rejected the argument that Williams was not diligent because his state postconviction investigator would have discovered the juror's earlier marriage in the county's public records—

> We should be surprised, to say the least, if a district court familiar with the standards of trial practice were to hold that in all cases diligent counsel must check public records containing personal information pertaining to each and every juror. Because of [the juror's] and [the prosecutor's] silence, there was no basis for an investigation into [the juror's] marriage history.

Michael Williams, 529 U.S. at 443. That "[t]he investigator later confirmed [the juror's] prior marriage to [the witness] by checking Cumberland County's public records" did not sway the Court. *Id.* In short, the Court refused to draw the diligence bright line at what Williams could have discovered and underscored that diligence turned on notice. Turning back to the present case, we note that Freeman insisted that she had told the investigator about Mikesell's remarks about the victims' families during deliberations. R. 137-1 (Freeman Dep. at 15, 18, 19, 20) (Page ID #2464, 2467, 2468, 2469). But Freeman herself read the interview report, and she confirmed

that the report contained no mention of her comments to the investigator about Mikesell. *Id.* at 18 (Page ID #2467). Ohio conceded at oral argument that Freeman's comments are not in the report. *See* Oral Arg. at 45:58–47:57. We cannot expect Cunningham's state postconviction counsel to read tea leaves in an empty cup. Because the report could not have notified Cunningham's state postconviction counsel about Mikesell's relationship with the victims' families, what Freeman may have said to the investigator does not alter our outcome.

Third, *Cunningham III* sealed the diligence deal. In *Michael Williams*, the Court noted that state postconviction relief was unavailable to Williams when he had discovered the factual bases of his juror-bias and prosecutorial-misconduct claims. *See Michael Williams*, 529 U.S. at 443. At the time, Virginia law required indigent petitioners to file a state postconviction petition within 120 days of appointment of state postconviction counsel. *See id.* at 443–44 (citing VA. CODE ANN. § 8.01–654.1 (1999)). But Williams's federal habeas investigator discovered the juror's connections to the witness and the prosecutor long after that deadline. *See id.* at 444. So it was futile for Williams to return to the Virginia courts. *See id.*

Here, Cunningham discovered the facts underlying his second juror-bias claim after the *Cunningham I* court rejected his first postconviction petition. When this case initially arrived at our doorstep, Cunningham urged us that "[u]nder Ohio law, . . . there is simply no avenue for postconviction petitioners to obtain discovery." Appellant's Br. #1 at

23. Ohio countered that Cunningham "could and should have" presented this claim in the state courts because AEDPA guarantees habeas petitioners a "fair opportunity" in state courts to raise a constitutional claim. *See* Appellee's Br. #1 at 46. Because murky Ohio precedent did not clearly explain whether the state courts could hear this claim, we ordered Cunningham to attempt to seek relief in the Ohio courts. *See Cunningham*, 756 F.3d at 485.

By refusing to consider the merits of the claim, the *Cunningham III* court vindicated Cunningham's interpretation of Ohio law. Clearly, it was always "futile" for Cunningham to return to the Ohio courts. Like Williams, Cunningham "cannot be said to have failed to develop [his claims] in state court by reason of having neglected to pursue remedies available under [Ohio] law." *Michael Williams*, 529 U.S. at 444. Indeed, futility is clearer here than it was in *Michael Williams*. Conceivably, the Virginia courts could have interpreted state postconviction or equitable law to allow the commonwealth's courts to hear Williams's claim notwithstanding the state's filing deadline. Yet Williams never tried to file his three new habeas claims with the Virginia courts. *See Michael Williams*, 529 U.S. at 444. Compare Williams to Cunningham, who sought and failed to obtain relief from the state courts. In this way, Cunningham acted more diligently than Williams had.

We address one crinkle in this case. As we mentioned, Virginia's postconviction-petition procedures had a hard filing deadline for indigent petitioners when *Michael Williams* was decided. *See* VA. CODE ANN. § 8.01–654.1 (1999)). Ohio's rules

governing second or successive habeas petitions and motions for a new trial also have filing deadlines. *See* OHIO REV. CODE ANN. 2953.21(A)(2) (2014); OHIO R. CRIM. P. 33(B) (2014). But Ohio excepts from the filing deadlines incarcerated persons who were "unavoidably prevented" from developing the facts underlying their claim. *See* OHIO REV. CODE ANN. 2953.23(A)(1)(a) (2014); OHIO R. CRIM. P. 33(B) (2014). Virginia's statute contained no such exception; so the face of Virginia's statute made it "futile" for Williams to return to state court. Cunningham, by contrast, is not barred from pursuing state remedies by the black letter of Ohio's statutes and rules. Rather, the Ohio Court of Appeals's conclusion that Cunningham was not "unavoidably prevented" from developing the facts has rendered futile his return to state court.

This interstice between Ohio law in 2014 and Virginia law in 1999 does not rupture Cunningham's case. For one, *Michael Williams*'s futility analysis did not rise and fall on the reason why Williams could not return to the state courts. The Court merely determined that because "state postconviction relief was no longer available at the time the facts came to light, it would have been futile for petitioner to return to the Virginia courts." *Michael Williams*, 529 U.S. at 444. So too for Cunningham. After all, *Cunningham III* erased any doubt— Cunningham was never able to seek relief for his second juror-bias claim in the state courts.

Nor is the Ohio Court of Appeals's "unavoidably prevented" determination relevant to our § 2254(e)(2) diligence analysis. For one, diligence "is a question of

federal law decided by federal habeas courts." *Boyle v. McKune*, 544 F.3d 1132, 1136 (10th Cir. 2008); *see also Michael Williams*, 529 U.S. at 429–38 (referring to no state-court findings and zero state law in promulgating and applying its diligence standards). "Unavoidably prevented," on the other hand, is a question of Ohio law. *See Cunningham III*, 65 N.E.3d at 314–15 (citing *State v. Creech*, 2013 WL 4735469, at *4 (Ohio Ct. App. Aug. 27, 2013)). Therefore, even after taking the *Cunningham III* court's findings of fact as true, *see* 28 U.S.C. § 2254(e)(1), and deferring wholly to *Cunningham III*'s interpretation of state law that controlled when Cunningham sought an evidentiary hearing, *Boyle*, 544 F.3d at 1136, nothing in *Cunningham III* alters our diligence analysis.

To illustrate how the "unavoidably prevented" and diligence analyses are distinct, contrast *Cunningham III* with *Michael Williams*. The state appellate court, for example, cited state common law in reasoning that Cunningham's claim of ineffective assistance of state postconviction counsel suggests that his juror-bias claim could have been uncovered if he had been reasonably diligent. *Cunningham III*, 65 N.E.3d at 314. But the Supreme Court reasoned to the contrary—Williams's state postconviction counsel's half-baked attempt to investigate the whole jury based on a different juror's apparently biased conduct favored determining that Williams had been diligent. *See Michael Williams*, 529 U.S. at 442.

The *Cunningham III* court also reasoned that Cunningham's raising his first juror-bias claim shows that he was not unavoidably prevented from discovering the facts of his second juror-bias claim.

Cunningham III, 65 N.E.3d at 314. On the contrary, the *Michael Williams* Court concluded that "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." 529 U.S. at 437.

The *Cunningham III* court, moreover, reasoned that Cunningham should have discovered the connection between Mikesell and the victims' families because the investigator could have and did interview Mikesell, Freeman, and Wobler. *Cunningham III*, 65 N.E.3d at 314. For a § 2254(e)(2) analysis, however, "[t]he question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts." *Michael Williams*, 529 U.S. at 435. Here, the investigator tried to interview every juror and thoroughly grilled seven of them, including Mikesell, Freeman, and Wobler. Clearly, the state-law "unavoidably prevented" inquiry is wholly distinct from the federal-law diligence assessment.

Finally, Cunningham's diligence excuses any procedural default. The *Michael Williams* Court explained that its analysis of Williams's diligence "should suffice to establish cause for any procedural default petitioner may have committed in not presenting these claims to the Virginia courts in the first instance." *Id.* at 444. Because, as we have explained, the facts of this case are on all fours with *Michael Williams*, Cunningham's diligence likewise demonstrated cause. And Cunningham has made a colorable claim that Mikesell was biased by a pre-existing relationship with the victims' families, and that her bias prejudiced him, requiring a § 2254(e)(2)

hearing. Because cause and prejudice excuses any default, and we again cannot say at this point whether Mikesell was actually biased and Cunningham's Sixth Amendment rights were violated, the federal courts may hold an evidentiary hearing under § 2254(e)(2).[7]

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[7] The district court's error arose from a misunderstanding of the relationship between diligence and procedural default. The district court reasoned that a diligence analysis under § 2254(e)(2) is "not relevant" to a procedural-default analysis and that the state courts are the final arbiters of when an imprisoned person can obtain an evidentiary hearing in the state courts. *Cunningham*, 2019 WL 6897003, at *11. Because Cunningham had procedurally defaulted his second juror-bias claim, the district court deemed Cunningham's diligence to be irrelevant. *See id.* The district court further found that any diligence on Cunningham's part could not constitute cause to excuse his procedural default, reasoning that the *Michael Williams* Court's "discussion of the procedural default of the petitioner's juror-bias claims is dicta, and the circumstances under which the court found cause for the default are easily distinguished." *Id.* at *13. "Here, unlike in *Williams*, Cunningham was able to return to state court with his newly developed claim, and the state courts found that under Ohio law and court rules, he was not unavoidably prevented from discovering, or reasonably diligent in attempting to discover, the factual basis of his claim sooner." *Id.*

We conclude that the district court was wrong. True, we usually cannot upset Ohio courts' procedural determinations, nor can we dictate Ohio's rules for conducting evidentiary hearings. *See Hutchison*, 744 F.2d at 46. But § 2254(e)(2) governs the ability of the federal courts—not the state courts—to hold an evidentiary hearing. *See Michael Williams*, 529 U.S. at 437. As *Michael Williams* makes clear, diligence can excuse a procedural default. The district court's interpretation of the interplay between procedural default and diligence erases the plain text of § 2254(e)(2) and ignores *Michael Williams* and *Pinholster*. And *Michael Williams*'s discussion of procedural default was not dicta

The dissent argues that Cunningham relies improperly on evidence—Freeman's and Wobler's testimony about Mikesell's statements during deliberations—that would be inadmissible under Federal Rule of Evidence 606(b) as "an inquiry into the validity of a verdict or indictment."[8] Dissent Op.

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by any measure of what dicta means. If Williams's diligence failed to excuse his procedural default, Williams could not have received an evidentiary hearing in any court. Put another way, whether diligence can excuse a procedural default was necessary to the outcome of Williams's case. *See Dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019). Even if this were dicta, Supreme Court dicta is persuasive and cannot be ignored by lower courts for no good reason. *See ACLU of Kentucky v. McCreary County*, 607 F.3d 439, 447–48 (6th Cir. 2010). Finally, the district court erroneously found that no cause exists in Cunningham's case. The issue is not whether Cunningham *could* have returned to the state courts but whether it was *futile* for Cunningham to have returned. Again, *Cunningham III* eradicated any ambiguity: Ohio law does not allow Cunningham to litigate his unadjudicated juror-bias claim in the state courts. And, as we have already explained, the Ohio court's state-law "unavoidably prevented" analysis is distinct from our federal-law diligence determination.

[8] Federal Rule of Evidence 606(b) provides:

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) *Exceptions.* A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

at 57–62. It is unclear whether the dissent faults Cunningham for relying on juror testimony to establish prejudice sufficient to excuse his procedural default or to meet the requisite showing to obtain a § 2254(e)(2) hearing. In either case, Cunningham does not, and need not, rely on juror testimony.

First, Cunningham does not need to rely on juror testimony at this stage because a § 2254(e)(2) hearing will afford him an opportunity to show prejudice. In *Michael Williams*, the Supreme Court decided that lower courts on remand would be best positioned to decide the prejudice issue even though Williams offered only "suspicions" and "vague allegations" of juror bias. 529 U.S. at 442, 444. The Court's reasoning for deferring to lower courts follows logically from the inextricable nature of the actual bias and prejudice inquiries. Whether a juror was actually biased sufficient to "taint the jury to [the defendant's] detriment," *see Ewing*, 914 F.3d at 1031, and whether that bias would have so prejudiced the defendant to change the outcome of the trial, *see Jones v. Bell*, 801 F.3d 556, 564 (6th Cir. 2015), are closely related.[9] Thus, even if a defendant's allegations are "vague" or not supported by any testimony, a defendant's "reasonable efforts" in uncovering evidence of actual

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(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

[9] Also closely related is the doctrine of harmless error. We have long established that the presence of a biased juror is a structural error not subject to harmless-error analysis. *See Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001).

bias give him an opportunity to explore both actual bias and prejudice at an evidentiary hearing. *Michael Williams*, 529 U.S. at 442, 444. A § 2254(e)(2) hearing will resolve whether Mikesell was actually biased (and for the reasons described below, Cunningham need not rely on juror testimony about trial deliberations to do so). If Mikesell was actually biased, then Cunningham will likewise establish prejudice to excuse his default.

As for the threshold evidentiary showing needed to obtain a hearing under § 2254(e)(2), the dissent misunderstands the nature of Cunningham's second juror-bias claim. Although we have held that a habeas petitioner must conform to Federal Rule of Evidence 606(b) when seeking a *Remmer* hearing based on extraneous influence, *see Smith v. Nagy*, 962 F.3d 192, 200 (6th Cir. 2020), Cunningham's second juror-bias claim, which involves an alleged undisclosed pre-existing relationship with the victims' families, does not involve allegations of extraneous influences.[10] We have treated a trial court's failure to hold a *Remmer* hearing as a due process violation closely related to, but distinct from the underlying question of juror bias

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[10] Evidence supporting Cunningham's first juror-bias claim—that Mikesell received information about Cunningham from her coworkers and from reading his casefile—would clearly constitute "extraneous prejudicial information" as defined by Federal Rule of Evidence 606(b)(2)(A) even if it did come in the form of juror testimony and would thus be admissible under that rule. *See United States v. Davis*, 177 F.3d 552, 556 (6th Cir. 1999) (finding extraneous influence where juror's employee provided juror with information that members of the community were discussing juror's role in the proceedings).

in violation of the Sixth Amendment right to an impartial jury. *See Ewing*, 914 F.3d at 1030.

Cunningham's second juror-bias claim is thus more akin to *Michael Williams* and the line of cases addressing juror omissions during voir dire. *See, e.g.*, *English v. Berghuis*, 900 F.3d 804, 813 (6th Cir. 2018) (applying framework under *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984), to determine whether juror bias warrants new trial). But even if Cunningham is not able to show that Mikesell was untruthful during voir dire, he is still entitled to relief if he is able to show at the § 2254(e)(2) hearing that Mikesell was actually or impliedly biased. *See McDonough*, 464 U.S. at 556–57 (Blackmun, J., concurring) (explaining that advent of *McDonough* test did not foreclose defendant from proving juror bias via a showing of actual or implied bias, regardless of truthfulness of juror's voir dire answers); *Zerka v. Green*, 49 F.3d 1181, 1186 n. 7 (6th Cir. 1995); *Gonzales v. Thomas*, 99 F.3d 978, 985–86 (10th Cir. 1996).

It would therefore be possible for Cunningham to prove that Mikesell was actually biased without relying on juror testimony in violation of Federal Rule of Evidence 606(b). For example, Cunningham could rely on Mikesell's testimony or the testimony of a victim's family member to show that Mikesell answered untruthfully "a material question on *voir dire*" that "would have provided a valid basis for a challenge for cause." *English*, 900 F.3d at 813 (quoting *McDonough*, 464 U.S. at 556). Cunningham could offer evidence to prove, for example, that Mikesell's relationship with the victims' families caused her to

answer dishonestly that she did not have any personal knowledge of the facts of the case, R. 194-1 (Trial Tr. at 13–14) (Page ID #9181–82), or that working for family services would prevent her from being fair and impartial towards Cunningham, R. 194-1 (Trial Tr. at 208–09) (Page ID #9376–77). Or Cunningham could elicit testimony to show that the nature of Mikesell's relationship with the victim constituted an "extreme situation[] that would justify a finding of implied bias," sufficient to overturn a verdict. *English*, 900 F.3d at 816 (quoting *Phillips*, 455 U.S. at 222 (O' Connor, J., concurring)). Allowing such an evidentiary proceeding would therefore not be fruitless even if Rule 606(b) were faithfully applied during the hearing.

Whether or not Rule 606(b) bars the testimony of jurors Freeman and Wobler, Cunningham does not need to rely on that testimony to be granted an evidentiary hearing under § 2254(e)(2). Again, in *Michael Williams*, the court allowed Williams an evidentiary hearing to prove actual bias even though his allegations were "vague," reasoning that "the vagueness was not [Williams's] fault." 529 U.S. at 442–43. Cunningham alleged in his 2018 post-conviction petition that Mikesell "did not reveal her connection to Cunningham or the victims" and that "Mikesell was biased against Cunningham because of a current or future relationship with the victims' families." R. 188-1 (2018 Postconviction Pet. at 8–9) (Page ID #2835–36). Such allegations were even more specific than the "vague allegations" of "irregularities, improprieties and omissions . . . with respect to the empaneling *[sic]* of the jury" Williams alleged. *Michael Williams*, 529 U.S. at 442. Just like Williams,

Cunningham attempted to offer more evidence in support of his allegations, but his failure to do so was not his fault. As Cunningham noted in his 2018 post-conviction petition, Cunningham asked Mikesell about her relationship with the victims during her deposition, but the district court did not allow Mikesell to answer. R. 188-1 (2018 Postconviction Pet. at 9) (Page ID #2836); R. 188-1 (Mikesell Dep. at 19–20) (Page ID #2917). Cunningham may not be able to rely on juror testimony at the evidentiary hearing, but he does not need to do so to be offered an *opportunity* to prove actual bias. The dissent makes some valid points, which will no doubt constrain the parameters of the evidentiary hearing, but they have no bearing on Cunnningham's right to such a hearing.

* * *

This case is *Michael Williams*, blow-for-blow. The Ohio courts never adjudicated the merits of Cunningham's claim that the victims' families were Mikesell's clients. And Cunningham diligently sought to develop the factual basis of his second juror-bias claim in the Ohio courts. The federal courts may accordingly hold an evidentiary hearing for his second juror-bias claim concerning Mikesell's relationship with the victims' families under § 2254(e)(2).

4. Remedy

To recap, Cunningham is entitled to habeas relief for both of his juror-bias claims. When we determine in a habeas case that a *Remmer* hearing is in order, we often grant habeas relief unless the State takes steps to conduct a proper evidentiary hearing on juror misconduct within a reasonable time. *See Ewing*, 914 F.3d at 1034; *see also Nian*, 994 F.3d at 759 (citing

Ewing and issuing the same remedy). Our customary remedy makes sense for Cunningham's first juror-bias claim. But Cunningham receives relief for his second juror-bias claim under § 2254(e)(2), which governs the federal courts—not the state courts. And conducting parallel hearings about the same juror in the state and federal courts with the same witnesses makes no sense, depletes judicial resources, and wastes everyone's time.

We therefore order the federal district court to conduct a *Remmer* hearing to investigate both juror-bias claims. Cunningham is entitled to a "'meaningful opportunity' to demonstrate jury bias at the *Remmer* hearings." *Lanier*, 988 F.3d at 295 (quoting *Herndon*, 156 F.3d at 637). Under Sixth Circuit precedent, Cunningham bears the burden of proving actual or implied bias at that hearing. *See Zelinka*, 862 F.2d at 95; *Treesh*, 612 F.3d at 437. Because this evidentiary hearing will transpire nearly two decades after Cunningham's trial, we acknowledge that it may be complicated to locate jurors and to navigate the jury's waning memories. *See Lanier*, 988 F.3d at 298. "[T]he district court should [be] extra attentive [and] ensur[e] that this belated, post-verdict hearing would serve as an adequate forum for investigating juror bias, especially because the accuracy of the information yielded at *Remmer* hearings declines over time." *Id.* If the hearing turns out to be "both constitutionally deficient and practically pointless," *id.*, Cunningham is free to seek habeas relief again, *see Ewing*, 914 F.3d at 1033.

II. ISSUE #3: INEFFECTIVE COUNSEL AT PENALTY PHASE

Whether Cunningham's trial counsel ineffectively presented mitigation evidence presents a close question. Cunningham is correct: his lawyer's subpar performance at the penalty phase flouted the Constitution. The Ohio Court of Appeals's decision on this issue did not, however, unreasonably apply Supreme Court precedent. We therefore cannot grant Cunningham habeas relief for this claim.

A. Background

Cunningham's lawyer presented meager mitigating evidence at the penalty phase. Just three witnesses testified on Cunningham's behalf: his sister Tarra, his mother Betty, and forensic psychologist Dr. Daniel Davis. Relevant here, Tarra and Betty confirmed that Betty beat Cunningham; Betty's partners beat Betty, Cunningham, and his siblings; and Cunningham witnessed Betty's stabbing his stepfather to death. R. 194-2 (Trial Tr. at 29–33, 40–44, 47–48) (Page ID #10762–66, 10773–77, 10780–81). The two women, however, offered scant details about the abuse. Defense counsel, for example, asked Tarra if Betty physically abused Cunningham, to which Tarra replied "Yes." *Id.* at 33 (Page ID #10766). The lawyer posed to Tarra no further questions about Betty's abuse of Cunningham; Tarra said no more. When Cunningham's attorney asked Betty if she had disciplined Cunningham, Betty stated that she had only "whip[ped] his butt." *Id.* at 47 (Page ID #10780). She denied having used a stick or her hand to hit Cunningham before confirming that she had disciplined Cunningham with a belt. *Id.* at 47–48

(Page ID #10780–81). She hedged and denied that Cunningham's stepfather abused her children. *Id.* at 42 (Page ID #10775). According to Betty, he only whipped her children with a belt—"like any normal parent would." *Id.* When defense counsel asked if Betty had ever attempted suicide, she responded that she had tried to kill herself before she had children. *Id.* at 48 (Page ID #10781). Cunningham's attorney said nothing further. The lawyer did not press Betty or Tarra about specific incidents, the nature, or the consistency of Betty's abuse of Cunningham. When asked why Cunningham's life should be spared, Betty mentioned that Cunningham visited her at her nursing home. *Id.* 49–50 (Page ID #1078–83).

Davis was more specific than Tarra and Betty were. Davis attested that he reviewed records from Allen County Children Services. *Id.* at 58 (Page ID #10791). Citing these records, Davis explained that Betty once abandoned her children and moved to Indiana. *Id.* at 69 (Page ID #10802). Cunningham and his siblings were shuttled between Betty, their grandmother, children services, and foster homes. *Id.* at 69–70 (Page ID #10802–03). After the children missed school for twelve days, Davis testified, the children's elementary-school principal visited Betty's house and found the kids by themselves. *Id.* at 70 (Page ID #10803). Once, Betty told a visiting caseworker that she would "blow the caseworker away" should the caseworker return for another home visit. *Id.* Davis affirmed that Cunningham had been physically abused. *Id.* Davis pointed to three incidents of physical abuse described in the children-services agency's records. *Id.* at 70–71 (Page ID #10803–04). Betty, for example, once beat Cunningham with a

switch because he stole twenty dollars from her; she bruised his arm and cut his forehead. *Id.* at 70 (Page ID #1083). A year later, Betty beat and bruised Cunningham for supposedly taking Betty's money. *Id.* at 71 (Page ID #10804). Betty later beat and bruised Cunningham with an extension cord. *Id.* Davis mentioned in passing that Betty overdosed on pills once. *Id.*

Davis dedicated most of his testimony, however, to classifying Cunningham as "antisocial" and "psychopathic." *Id.* at 80–81 (Page ID #10813–14). Davis affirmed that antisocial persons are at risk of "criminality" and "violence," "typically lack empathy," and "tend to be highly manipulative"; he averred that Cunningham exhibited an antisocial "personality." *Id.* at 81–82 (Page ID #10814–15). Davis also diagnosed Cunningham with malingering, explaining that Cunningham had feigned illness to avoid responsibility or work. *Id.* at 82–83 (Page ID #10815–16).

Cunningham's state postconviction petition asserted that his trial counsel "failed to reasonably and competently investigate, prepare and present mitigating evidence" at his sentencing phase. R. 192-4 (2003 Postconviction Pet.) (Page ID #5091). Raising four subclaims, Cunningham asserted that his lawyer should have introduced (1) testimony from employees of or records supplied by Allen County Children Services; (2) testimony from a caretaker at Betty's nursing home that Cunningham cared for Betty; (3) the details and results of a "voice stress analyzer" lie-detector test that indicate that Cunningham told the police that he did not fire his weapon at the crime

scene; and (4) testimony from a cultural expert. *Id.* (Page ID #5092, 5095, 5098, 5101). Cunningham attached to his postconviction petition sixty-three pages of Allen County Children Services records. R. 192-4 (Children-Servs. Rep. at 1) (Page ID #5155). He also affixed Jackson's investigator's report, which, as explained in the previous section, summarized the investigator's posttrial interviews of six of Cunningham's jurors and one alternate. R. 192-4 (Investigator Rep.) (Page ID #5122).

The children-services report does include Tarra's, Betty's, and Davis's anecdotes but also contains substantial mitigating information that never surfaced at sentencing. *See generally* R. 192-4 (Children-Servs. Rep.) (Page ID #5155–5217). Betty, for example, attested that she had tried to kill herself before she had children. The children-services records unveil a bleaker picture. When Cunningham was just ten years old, one of Betty's boyfriends beat Betty, broke into the family home, and tried to rape her in front of the children on multiple occasions. *Id.* at 7, 48 (Page ID #5161, 5200). Ostensibly to prevent herself from killing her boyfriend, Betty sliced her wrists open when her children were at home. *Id.* at 6–7 (Page ID #5160–61).[11] The police discovered Betty, wrists slashed, drinking a beer with blood trickling from her arms. *Id.* at 6 (Page ID #5160). The children's bedroom brimmed with mounds of garbage, bottles, cans,

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[11] Cunningham may have been staying with his aunt during the suicide incident. R. 192-4 (Children-Servs. Rep. at 42) (Page ID #5194). This traumatic attempted suicide, the state of the family home, and the starvation, however, were still pertinent to Cunningham's case at the penalty phase.

paper, dirt, dried food, dirty clothes, broken glass, and junk. *Id.* at 6, 43 (Page ID #5160, 5195). The kids had no beds or bedding; cockroaches bit them as they slept on the floor. *Id.* at 43 (Page ID #5195). The children, covered in bug bites, told children services that they competed to smash the most cockroaches at night. *Id.* at 44 (Page ID #5196). The bathroom was smeared with filth and blood. *Id.* at 43 (Page ID #5195). A large, fresh pool of blood dripped from the dining-room table onto the floor and chairs. *Id.* at 43 (Page ID #5195). Broken glass piled in one corner of the dining room; garbage concentrated in another. *Id.* Sitting on the floor, Jackson—a baby at the time—ate from an open box of garbage and glass. *Id.* The "very dirty" children were caked in dried blood. *Id.* at 44 (Page ID #5196).

The kids told the police that they "didn't eat every day" because Betty spent the little money that she had on beer. *Id.* at 6, 36, 41 (Page ID #5160, 5188, 5193).[12] They relayed that "they had not eaten since yesterday and that since mommy wanted to kill herself today they weren't going to eat today." *Id.* at 43 (Page ID #5195). The children were put in a foster home. *Id.* On the way, a caseworker took the children to a McDonalds, but the children hid their food under the caseworker's car seat. *Id.* at 44 (Page ID #5196). The children explained that they thought the foster family would withhold food when they saw the children eating. *Id.* The timing and violent nature of Betty's suicide attempt, the children's witnessing multiple attempted rapes, the horrendous state of the family

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[12] Betty used the children's social security money to pay for her alcohol. R. 192-4 (Children-Servs. Rep. at 57) (Page ID #5209).

home, and the children's starvation were never brought up during Cunningham's sentencing.

At least three specific incidents involving Betty's beating Cunningham and the extent of her physical abuse were never mentioned at sentencing. Once, Cunningham's school nurse discovered that Cunningham smelled "foul," his hands and clothes were dirty, his hair was uncombed, there were "moderate bruises" on his left upper arm, there were "mild bruises" on his right upper arm, and "old bruises" on his legs and buttock. *Id.* at 28 (Page ID #5180). Cunningham told children services that his mother hit him with a broom. *Id.* On another occasion, Cunningham lost twenty-one dollars of "Boy Scout tickets" at school. *Id.* at 59 (Page ID #5211). Betty beat him with an extension cord. *Id.* at 58 (Page ID #5210). It is unclear whether the extension-cord episode was separate from the Boy Scout tickets incident. On another occasion, a bruise-covered Cunningham approached his grandmother and told her that the children were left alone. *Id.* at 58 (Page ID #5210). The grandmother refused to take them in; she told Cunningham, "that's your problem." *Id.* Cunningham told children services that he was frequently beaten because he was expected to watch his siblings, clean, and cook. *Id.* Cunningham relayed that his mother had recently beaten him and his siblings when she found the home in slight disarray. *Id.* Betty, Cunningham told children services, "is either going to 'beat me to death or kill me.'" *Id.* Yet children services refused to place the children in another home, instead sending Cunningham back to Betty. *Id.* at 58–59 (Page ID #5210–11). No one spoke about these three beating incidents at sentencing, and no one mentioned

that Cunningham's grandmother and children services refused to assist Cunningham and his siblings even though Cunningham told them that his mother would beat him to death.

Although Davis mentioned that Betty threatened to "blow" a caseworker "away," he missed other incidents involving Betty's threatening caseworkers with violence. Betty once told Cunningham's stepfather to hit a caseworker. *Id.* at 39 (Page ID #5191). Betty told another caseworker that she had a dream about beating that caseworker to death, mimicked said beating, and stated that she would kill the caseworker and that she was "going to [the caseworker's] home to get you." *Id.* at 55–57 (Page ID #5207–08).

The report also includes details about Cunningham's relationship with his siblings that were cursorily mentioned but inadequately presented at sentencing. For example, trial counsel asked Tarra, "Jeronique do a good job taking care of his sisters and half-brothers?" R. 194-2 (Trial Tr. at 32) (Page ID #10765). To which Tarra answered, "yes." *Id.* Trial counsel did not introduce evidence from the report that ten-year-old Cunningham had to "watch the children, clean and keep the home clean, and cook on several occasions when Betty is drinking"; that Cunningham had to "watch the baby"; and when Cunningham was put in a foster home away from his siblings, he was "concerned about his brothers and sisters [] [,] wants to return home to take care of them[,] [and] goes over to the home daily to [e]nsure that they have food and are OK." R. 192-4 (Children-Servs. Rep. at 9, 26, 40) (Page ID #5163, 5178, 5192).

Penalty-phase evidence of Betty's neglect of the children was similarly limited to Tarra's confirmation that Betty "left the children home" for "a couple of days" and Davis's affirmation that Cunningham "would go from his grandmother to children's services to maybe home for a short period of time[.]" R. 194-2 (Trial Tr. at 32, 69–70) (Page ID #10765, 10802–03). No one mentioned the extraordinary frequency with which Cunningham was placed with his grandmother, his aunt, and foster families or how traumatizing that was for Cunningham. *See generally* R. 192-4 (Children-Servs. Rep.) (Page ID #5155–5217). No one mentioned at sentencing, moreover, that Betty refused to take Cunningham to counseling after he witnessed her killing his stepfather, even though Cunningham repeatedly told children services that the stabbing made him scared of Betty. *Id.* at 26–28 (Page ID #5178–80). Also, Betty repeatedly expressed to children services that she did not consider using a belt or a switch to beat children to be child abuse. *Id.* at 29–30 (Page ID #5181–82). This too never came up at sentencing. Cunningham's foster parents noticed that Cunningham "sometimes forgets that he is a younger boy," and the records show that Cunningham had bed-wetting problems. *Id.* at 31, 41 (Page ID #5183, 5193). This, likewise, was never brought up at sentencing. Davis testified that Betty once overdosed on pills. But Davis did not mention that it was nine-year-old Cunningham who discovered Betty overdosed and unconscious. *Id.* at 36 (Page ID #5188). Nor did Davis explain that after the extension-cord-beating incident, Cunningham appeared "very frightened" of Betty and told Betty that "she drank too much and left

them alone, and he had to watch all the kids." *Id.* at 38, 55 (Page ID #5190, 5207).

In postconviction proceedings, the Ohio Court of Appeals dismissed on the merits Cunningham's claim of ineffective assistance of counsel. *See Cunningham I*, 2004 WL 2496525, at *9–11.[13] Cunningham preserved all four subclaims in his federal habeas petition. R. 19-8 (Habeas Pet. at 78) (Page ID #157).

B. Analysis

To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687, 691 (1984). We begin by rejecting Cunningham's second, third, and fourth subclaims, i.e., that defense counsel should have introduced testimony from one of Betty's caretakers (subclaim two); the details and results of a lie-detector test (subclaim three); and testimony from a cultural expert (subclaim four). First, testimony from a caretaker and evidence about the lie-detector test would have been cumulative. Betty testified about how Cunningham cared for her and visited her at the nursing home. And, as explained in the following section, the jury had already heard significant testimony from eyewitnesses and experts at the guilt phase about whether Cunningham fired a weapon

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[13] The Ohio Supreme Court rejected a related argument that Cunningham raised on direct appeal—that "[defense] counsel should have made a more 'powerful plea' to spare Cunningham's life" at sentencing. *Cunningham II*, 824 N.E.2d at 526. Cunningham did not raise his powerful-plea argument in this appeal. *See* Appellant's Br. #1 at 88–89.

that night. Second, Cunningham's habeas petition and appellate brief do not articulate how the absence of cultural testimony prejudiced the defense. *See* Appellant's Br. #1 at 99–105. Thus, the Ohio Court of Appeals did not unreasonably apply Supreme Court caselaw in dismissing these three subclaims on the merits.

Cunningham's first subargument—that defense counsel should have investigated, prepared, and presented the children-services records—is his only meritorious ground for relief. We focus on that subclaim here. We apply § 2254(d)(1) deference to *Cunningham I*, and we may look only at the record before the Ohio Court of Appeals—the sentencing-hearing transcript, the children-services records, and Jackson's investigator's report. *See Pinholster*, 563 U.S. at 181.

Cunningham argues that his trial counsel ineffectively failed to introduce the children-services records. Appellant's Br. #1 at 92. The State responds that (1) "trial counsel made a strategic decision to have Cunningham's family members give a real life account of Cunningham's childhood, instead of putting the jury to sleep with a bureaucratic case worker going over hundreds of records reading to the jury the minute details of Cunningham's childhood"; and (2) "[t]he Allen County Children Services records are not substantially different, neither in strength nor subject matter, than what was testified to at the penalty phase." Appellee's Br. #1 at 138.

Ohio's first argument holds no water. For one, the State describes a false dichotomy. A happy medium lies between data dumping and an evidence vacuum:

a social worker with the Allen County Children Services could have read out or described relevant portions of the agency's records. Our precedent, moreover, counsels against anointing the let's-not-bore-the-jury-with-records approach as a viable penalty-phase strategy. In *Johnson v. Bagley*, Johnson's defense attorney "obtained a large number of files from the Ohio Department of Human Services but apparently never read them." 544 F.3d 592, 600 (6th Cir. 2008). Counsel "simply submitted them to the jury—unorganized and without knowing whether they hurt Johnson's strategy or helped it." *Id.* Of course, the opposite occurred here: the jury never saw a single page of the children-services records. A closer look at *Johnson* reveals that Ohio's health-services records showed that Johnson's grandmother had a lengthy history of abuse and that the State was worried about placing the young Johnson in her custody. *See id.* Yet defense counsel's penalty-phase strategy revolved around that grandmother's testimony. *See id.* at 599–600. Therefore, the *Johnson* court chided that the records should have "tipped [defense counsel] off to a different mitigation strategy" and "would have avoided the pitfall of submitting records to the jury that directly contradicted their theory that [the grandmother] was a positive force for change in [Johnson's] life." *Id.* at 600–01.

So too in Cunningham's case. Here, Cunningham's counsel called Betty to the stand and elicited from her half-hearted and perfunctory confirmations that she whipped Cunningham with a belt and that her partner whipped her children like "normal" parents do. The lawyer did not solicit more details about the abuse; he also failed to correct Betty when she lied

about the timing of her suicide attempt and about how she never hit Cunningham with a stick or her hand. Instead, the lawyer prodded Betty to speak about how Cunningham cared for her at her nursing home. Like in *Johnson*, the children-services records here demonstrated Betty's malevolent effect on Cunningham's childhood. Her weak testimony lacerated the far-more-compelling, unintroduced evidence about the monstrous childhood abuse that Cunningham suffered at his mother's hands. And introducing lengthy excerpts from the records—no matter how "bureaucratic"—made far more sense than calling an expert to testify that Cunningham was a lying, manipulative, malingering antisocial psychopath. Asking Betty and Davis to recount unconvincingly a handful of contextless anecdotes instead of calling a social worker from Allen County Children Services to lay out substantial portions of the agency's records simply cannot be written off as strategy.

Ohio's second argument—that the children-services records overlapped with the testimony that was introduced at the penalty phase—presents a close call. The Court's ineffective-assistance-of-counsel precedent extends across a spectrum. Habeas petitioners are entitled to relief when their trial counsel fails "their obligation to conduct a thorough investigation of the defendant's background[,]" *Terry Williams*, 529 U.S. at 396, as dictated by "reasonable professional judgment," *Wiggins*, 539 U.S. at 527. So, at one pole, the Court has granted relief in egregious scenarios involving penalty-phase lawyers failing to investigate *any* pertinent records or to interview *any* relevant witnesses. *See, e.g.*, *Porter v. McCollum*, 558

U.S. 30, 39 (2009) (granting relief when defense counsel failed to obtain defendant's school, medical, or military service records and to interview any of defendant's family); *Terry Williams*, 529 U.S. at 395 ("[Defense counsel] failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood[.]"). At the other pole, the Court has denied relief when trial counsel conducts a substantial investigation and presents significant mitigating evidence. *See, e.g.*, *Bobby v. Van Hook*, 558 U.S. 4, 10–13 (2009). In between the poles are cases in which counsel has conducted *some* investigation into the defendant's personal background. The Court has issued inconsistent conclusions in those cases. *Compare Wiggins*, 539 U.S. at 526, *with Pinholster*, 563 U.S. at 190–94.

Obviously, this case does not belong at the no-investigation-at-all pole. Cunningham's lawyer, at minimum, interviewed Tarra and Betty. And Davis referred to the children-services records in his testimony. But Cunningham's case does not fit at the substantial-investigation-and-significant-presentation pole either. Cunningham's lawyer introduced mere bare-bones facts of Cunningham's personal background and omitted significant detail and specific episodes of abuse. Cunningham's case is distinguishable from every single case in the Court's ineffective-assistance-of-counsel canon. So, thanks to murky precedent, whether Cunningham should receive habeas relief for this claim is a close question.

Consider, for example, *Van Hook*. There, defense counsel spoke nine times with Van Hook's mother,

once with both parents together, twice with an aunt, and thrice with a family friend; contacted two expert witnesses; reviewed military records; attempted to obtain medical records; and considered enlisting a mitigation specialist. *See Van Hook*, 558 U.S. at 9. The lawyer called eight mitigation witnesses who outlined Van Hook's traumatic childhood. *See id.* at 5. Van Hook argued that his lawyer should have contacted his stepsister, two uncles, two aunts, and a psychiatrist who once treated his mother. *See id.* at 11. The Court concluded that defense counsel's investigation was reasonable in scope, reasoning that "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Id.* Specifically, only one of Van Hook's uncles and the stepsister arguably would have added "new, relevant information" at the penalty phase; the uncle would have testified that Van Hook's mother was temporarily committed to a psychiatric ward, and the stepsister would have attested that Van Hook's father frequently hit him and tried to kill his mother. *Id.* at 12. But other witnesses had already repeatedly and thoroughly testified to both facts at sentencing. *See id.* Because Van Hook had not shown how the uncle's and stepsister's "minor additional details" about already introduced and thoroughly discussed mitigating evidence "would have made any difference," the Court concluded that Van Hook had failed to demonstrate prejudice. *Id.*

Cunningham's case is not *Van Hook*. Like Van Hook's witnesses, Cunningham's witnesses acknowledged that Cunningham suffered physical abuse, neglect, and exposure to violence. But the

perfunctory evidence presented at Cunningham's sentencing was far less substantial than the thorough, highly detailed evidence in *Van Hook*. In Van Hook—

> The trial court learned, for instance, that Van Hook (whose parents were both "heavy drinkers") started drinking as a toddler, began "barhopping" with his father at age 9, drank and used drugs regularly with his father from age 11 forward, and continued abusing drugs and alcohol into adulthood. The court also heard that Van Hook grew up in a "'combat zone'": He watched his father beat his mother weekly, saw him hold her at gun and knifepoint, "observed" episodes of "sexual violence" while sleeping in his parents' bedroom, and was beaten himself at least once. It learned that Van Hook, who had "fantasies about killing and war" from an early age, was deeply upset when his drug and alcohol abuse forced him out of the military, and attempted suicide five times (including a month before the murder). And although the experts agreed that Van Hook did not suffer from a "mental disease or defect," the trial court learned that Van Hook's borderline personality disorder and his consumption of drugs and alcohol the day of the crime impaired "his ability to refrain from the [crime]," and that his "explo[sion]" of "senseless and bizarre brutality" may have resulted from what one expert termed a "homosexual panic."

Id. at 10–11 (citations omitted, alterations in original).

Tarra and Betty, by contrast, merely said "yes" when asked if Cunningham was beaten by Betty and

her boyfriends and if Cunningham had to care for his siblings. That's it. No other details from the children-services report were provided. Yes, Davis recounted three episodes involving Betty's beating Cunningham and one in which Betty threatened to blow a caseworker away. Per *Van Hook*, evidence in the children-services records about these four incidents might be cumulative. But no witness mentioned Betty's boyfriend attempting to rape her in front of the children; the timing of Betty's traumatic attempted suicide; the disgusting state of the family house; that Betty and the foster families starved the children; that Betty's grandmother and children services refused Cunningham's pleas for help; that Cunningham found Betty when she overdosed; that Betty refused to take Cunningham to counseling after she killed his stepfather in front of him; or that the traumatized nine-year-old Cunningham wet his bed and forgot his age. Such evidence cannot be described as "minor additional details" about information that had already been discussed at great length at the penalty phase. *Cf. Van Hook*, 558 U.S. at 4, 12.

And, unlike in *Van Hook*, the failure to introduce the mitigating information in the children-services report here was highly prejudicial. All six jurors who were interviewed posttrial conveyed that Cunningham's attorney was abysmal during the penalty phase. R. 192-4 (Investigator Rep.) (Page ID #5122–32).[14] Six out of six expressed that the defense's

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[14] According to Juror Cheryl Osting—

> [S]he was distressed because the attorneys could not come up with anything at the sentencing/mitigation hearing. She also said that the psychologist said that the defendant did

> not suffer from a mental illness but did suffer from a mental disorder at times and was very manipulative. All 12 jurors wanted the defense to give them anything which they could use in mitigation but the defense did not deliver anything. She remembered that the jurors deliberated for 3 hours trying to find a mitigating factor but could not find anything and that the attorneys did not give a good defense at the mitigation hearing [T]he jurors prayed for one factor they could have used in mitigation but there was no mitigating factors to be found.

R. 192-4 (Investigator Rep.) (Page ID #5122–23). Juror Staci Freeman "believe[d] that the defense performed poorly at the sentencing hearing[,]" that Tarra was "high on drugs" during her testimony, and that Cunningham's foster families or social workers who knew Cunningham should have testified. *Id.* (Page ID #5125). She "might have been swayed if other professionals who knew [Cunningham] when he was a younger man [testified] and said something positive about him, might have swayed her vote for the death penalty to life in prison." *Id.* She was "upset because the defense did not offer any mitigating factors during the sentencing phase which would indicate to her and the rest of the jurors that Jeronique Cunningham had a soul." *Id.* (Page ID #5126). Juror Roberta Wobler complained that "no one" was "present to testify and corroborate testimony from [Betty] about anything of a positive nature in [Cunningham's] life" and that the jurors were "searching for anything of a mitigating factor[.]" *Id.* (Page ID #5127). To Wobler, "the defense could have significantly improved on their presentation if only they would have included corroborating witnesses." *Id.* (Page ID #5128). She was "really not in favor of the death penalty but because she could find absolutely no mitigating factors regarding Jeronique, she voted for the death penalty." *Id.* Juror Douglas Upshaw "concluded that the defense did not present any mitigating factors which would prevent the defendant from being sentenced to death." *Id.* (Page ID #5129). Juror Jeanne Adams "said that at the sentencing hearing absolutely nothing was added in mitigation by the defense which would have argued for anything less than the death penalty. . . . [T]he defense did not present any defense at the sentencing hearing . . . . [T]here really was not any

poor performance was tantamount to supplying no mitigating evidence whatsoever. *Id.* The posttrial interviews make plain that Cunningham's penalty-phase case was eviscerated by defense counsel's failure to furnish much-needed detail and corroboration about the extent to which Cunningham was abused and about how Cunningham had to look after his siblings. *Id.*

In *Wiggins*, defense counsel had "*some* information" about Wiggins's background from the presentence investigation report and Baltimore's social-services department's records. *Wiggins*, 539 U.S. at 527, 524. The Court concluded that the scope of investigation was unreasonable partially because of the contents of the social-services records. *Id.* at 525. In *Wiggins*, the social-services records revealed that—

> [Wiggins's] mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there; he had frequent, lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone for days without food.

Id. Yet at sentencing, Wiggins's counsel merely "told the jury it would 'hear that Kevin Wiggins has had a

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mitigation to work with." *Id.* (Page ID #5130). Jury Foreperson Nichole Mikesell stated that the "[j]urors made a concerted effort to find at least one mitigating factor but there wasn't any." *Id.* (Page ID #5131). "She, and the other jurors, wanted corroboration from other witnesses at the sentencing hearing regarding something of a positive aspect regarding Jeronique." *Id.*

difficult life[.]'" *Id.* at 526 (citation omitted). "At no point did [defense counsel] proffer *any* evidence of [Wiggins's] life history or family background. *Id.* at 516 (emphasis added); *see also Rompilla v. Beard*, 545 U.S. 374, 381–82, 387 (2005) (concluding that defense counsel must obtain records containing information that the State has and will use against defendant even when defendant was "actively obstructive" and "sen[t] counsel off on false leads" and defense counsel spoke with five members of defendant's family and three mental-health witnesses).

Cunningham's case is akin to but not quite *Wiggins*. The contents of the social-services records in *Wiggins* parallel the revelations in the children-services records in the present case. Here, children services thoroughly documented how Betty abused substances; how she starved, abandoned, beat, and neglected her children; and the many times Cunningham was placed with his grandmother, aunt, and foster homes. Unlike Wiggins's lawyer, however, Cunningham's counsel introduced *some* personal history through Tarra's, Betty's, and Davis's testimony, most of which overlapped with or, in Davis's case, was drawn from the children-services records. That fact distinguishes Cunningham's lawyer from Wiggins's lawyer, who presented *no* mitigating evidence about Wiggins's background to back up her penalty-phase statement that Wiggins had a difficult life.

What does this mean for Cunningham? To us, Cunningham's trial counsel's performance during the penalty phase was clearly constitutionally deficient and prejudicial. The Ohio Court of Appeals

nonetheless held that defense counsel did not perform ineffectively. Applying the harsh standards of AEDPA as elaborated by the Court, *Richter*, 562 U.S. at 102, we cannot say that the Ohio Court of Appeals unreasonably applied the Court's ineffective-assistance-of-counsel precedent. We cannot grant Cunningham habeas relief for this claim.

III. ISSUE #4: INEFFECTIVE COUNSEL AT GUILT PHASE

Cunningham argues that his trial counsel provided ineffective assistance in failing to obtain and present testimony from a ballistics expert. We disagree.

Because no weapons were recovered from the scene of the crime, *see Cunningham I*, 2004 WL 2496525, at *6, eyewitnesses and experts supplied the sole evidence about who shot whom with what. The trial court granted defense counsel funds to hire a ballistics expert. R. 194-1 (Trial Tr. at 4–8) (Page ID #8847–51).

Five survivors of the shooting—Dwight Goodloe, Coron Liles, Loyshane Liles, Tomeaka Grant, and James Grant—testified that Cunningham was armed with a revolver, that Jackson wielded a semiautomatic, and that both Cunningham and Jackson shot persons. R. 194-2 (Trial Tr. at 1027–28, 1052–59, 1121–22, 1129–33, 1143, 1153–54, 1175–76, 1195, 1222–27, 1278–88) (Page ID #10216–17, 10241–48, 10317–18, 10325–29, 10339, 10349–50, 10371–72, 10391, 10418–23, 10482–92). Coron Liles attested that he spat out a bullet a few blocks from the crime scene; the bullet was never recovered by law enforcement. Tomeaka Grant swore that a bullet remained lodged in her arm; the caliber of that bullet

is unknown. *Id.* at 1133, 1226 (Page ID #10329, 10422); *Cunningham I*, 2004 WL 2496525, at *8.

At trial, Ohio called two experts: John Heile, a forensic scientist with Ohio's Bureau of Criminal Investigation and Identification, and Cynthia Beisser, a coroner. Heile testified that all the recovered cartridges and most of the recovered bullets were .380 caliber and fired from the same pistol. Point 380 caliber casings are typically fired by a semiautomatic—not a revolver. R. 194-2 (Trial Tr. at 1066–67, 1071–74) (Page ID #10262–63, 10267–70). A damaged bullet and a damaged lead core shared the characteristics of .380 caliber bullets, Heile attested. *Id.* at 1075–76 (Page ID #10271–72). But Heile could not conclusively state that these two nonintact bullets were fired from the same weapon as the other recovered bullets. *See id.* Because no weapons were located, Heile penned a report that listed the guns that could have fired the recovered bullets. Only semiautomatics made the list—no revolvers. *Id.* at 1076–77 (Page ID #10272–73). On cross-examination, Heile testified that .380 cartridges could fit into a .38 caliber revolver but that the revolver would probably not fire. Heile also attested that .380 cartridges would not fire in a .44 caliber revolver without alterations to the gun. *Id.* at 1082–84 (Page ID #10278–80).

Beisser autopsied the two murder victims, Leneshia Williams and Jala Grant, who had died of gunshot wounds to the head. *Id.* at 1252–54 (Page ID #10456–58). Based on her examination, Beisser could not determine the caliber of the bullets that entered Williams and Grant. *Id.* at 1257 (Page ID #10461). Skin, Beisser explained, is elastic; a hole in skin is not

the same size as the projectile that penetrates the skin. *Id.* On cross-examination, Beisser testified that a .380 caliber pistol could leave entrance wounds of the size found on the victims but that the wounds were also consistent with other different-caliber weapons. *Id.* at 1265–70 (Page ID #10469–74). On redirect and re-cross-examination, Beisser repeatedly testified that .380 and .38 caliber bullets are the same size. *Id.* at 1271–72 (Page ID #10475–76).

Instead of summoning a ballistics expert, defense counsel called gun-shop owner William Danny Reiff. Reiff testified that .44 caliber revolvers and bullets are much larger than .380 caliber pistols and bullets. R. 194-2 (Trial Tr. at 1363–64) (Page ID #10567–68). On cross-examination, Reiff testified that .38, .357, .380, and .9 caliber cartridges are the same diameter and are indistinguishable to lay persons. *Id.* at 1366–69 (Page ID #10570–73).

In his state postconviction petition, Cunningham asserted that his trial counsel ineffectively failed to obtain and present testimony from a ballistics expert. Cunningham lambasted Reiff's rebuttal. To clarify that Cunningham could not have fired a .380 caliber cartridge in any of the weapons suggested by Heile, Cunningham asserted, defense counsel should have shown the jury a video of .380 caliber cartridges being placed into different caliber revolvers and fired. R. 192-4 (2003 Postconviction Pet.) (Page ID #5069–72, 5077–80). The Ohio Court of Appeals rejected Cunningham's assertions on the merits. *See Cunningham I*, 2004 WL 2496525, at *6–8. Cunningham restated his claim in his federal habeas

petition. R. 19-6 (Habeas Pet. at 61–67) (Page ID #129–35); Appellant's Br. #1 at 128–29.

According § 2254(d)(1) deference to the Ohio Court of Appeals, we assess whether defense counsel performed deficiently and prejudicially. *See Strickland*, 466 U.S. at 687, 691. Perhaps a ballistics expert would have been more convincing than Reiff had been. But trial counsel pushed the theory that Cunningham did not fire any weapon on the night of the murder while questioning all three experts. Indeed, Heile's and Beisser's testimony favored Cunningham's theory. Heile conveyed that no evidence indicated that a revolver fired the bullets and casings recovered; and Beisser insisted that she could not determine the caliber of the gun that caused the victims' entrance wounds. Multiple eyewitnesses, on the other hand, testified that they saw Cunningham shoot persons. Cunningham does not explain in either his postconviction petition or his brief how a ballistics expert's testimony would have affected the evidence elicited at trial or altered the outcome of the case. Without evidence of prejudice, we deny relief on Cunningham's fourth claim.

IV. ISSUE #5: VOIR DIRE

We also reject Cunningham's argument that the trial court improperly constrained defense counsel's latitude to question prospective jurors about their willingness to consider specific mitigating factors.

At trial, the court allowed Cunningham's lawyer to question members of the venire about whether they would automatically vote for the death penalty and whether they were willing to consider fairly all mitigating factors, sentencing options, and available

evidence. R. 194-1 (Trial Tr. at 327–31) (Page ID #9502–06). The trial court, however, barred defense counsel from asking the prospective jurors about the type of mitigating factors that they would consider in voting against the death penalty. *Id.* at 422–25 (Page ID #9597–600).

On direct appeal, Cunningham argued that the trial court's restrictions on questioning likely resulted in the seating of a juror who would automatically impose the death penalty. *See Cunningham II*, 824 N.E.2d at 513. The Ohio Supreme Court concluded that defense counsel waived this argument "by failing to challenge any seated juror's views on capital punishment." *Id.* The state high court also rejected Cunningham's claim as meritless. *See id.* at 513–14. Cunningham reraised this claim in his federal habeas petition. R. 19-3 (Habeas Pet. at 23) (Page ID #85).

Because the Ohio Supreme Court failed to clearly and expressly rely on a procedural bar, any procedural default is excused. *See Harris v. Reed*, 489 U.S. 255, 263 (1989). Extending § 2254(d)(1) deference to the state high court's merits decision, we reject Cunningham's argument. Trial courts must ensure that jurors will not automatically vote for the death penalty. *See Morgan v. Illinois*, 504 U.S. 719, 729, 734–36 (1992). Others have argued to this court that a trial judge violates this constitutional precept when they prohibit questions about specific mitigating factors during voir dire. *See Hodges v. Colson*, 727 F.3d 517, 528–29 (6th Cir. 2013); *Bedford v. Collins*, 567 F.3d 225, 232–33 (6th Cir. 2009); *Dennis v. Mitchell*, 354 F.3d 511, 523–25 (6th Cir. 2003). Just as

we rejected that argument in those habeas cases, we do not grant relief to Cunningham here.

V. ISSUE #6: JURY INSTRUCTIONS

Cunningham has procedurally defaulted his argument that the trial court neglected to instruct the jury that it must determine Cunningham's personal culpability before imposing a death sentence. We cannot review this claim.

Under Ohio Supreme Court Rule of Practice 11.06(A), capital defendants may apply to reopen their case within ninety days of the Ohio Supreme Court's issuance of a mandate. Those who show good cause are exempted from the ninety-day deadline. *See* OHIO S. CT. PRAC. R. 11.06(A).

In his 2006 federal habeas petition, Cunningham asserted for the first time that the trial court violated the *Apprendi v. New Jersey*, 530 U.S. 466 (2000), line of cases by failing to instruct the jury that Cunningham must possess the requisite personal responsibility to be eligible for the death penalty. R. 19-10 (Habeas Pet. at 123, 144–45) (Page ID #190, 211–12). On April 23, 2007—as federal habeas proceedings unfolded—the Ohio Supreme Court appointed counsel to apply to reopen Cunningham's case under Rule 11.06(A). *See* R. 51 (1/11/07 Mot.) (Page ID #644); R. 55 (2/8/07 Order at 1–2) (Page ID #738–39); R. 59-1 (Reopen App.) (Page ID #749). Cunningham reasserted that the jury instructions violated *Apprendi* and its progeny. R. 59-1 (Reopen App.) (Page ID #866–69). Cunningham conceded that he had surpassed the ninety-day deadline, but he argued that his applying to reopen his case within ninety days of appointment of counsel satisfied good

cause. *Id.* at 2 (Page ID #750); Appellant's Br. #1 at 44. In a single-sentence order, the Ohio Supreme Court rejected Cunningham's application, reasoning that Cunningham failed to comply with the rule's ninety-day filing deadline. The state high court said nothing about good cause. *State v. Cunningham*, 872 N.E.2d 946 (Ohio 2007) (Table).

Cunningham has procedurally defaulted this claim. The Ohio courts have firmly established the meaning of "good cause" and regularly follow the ninety-day deadline. *Wogenstahl v. Mitchell*, 668 F.3d 307, 322 (6th Cir. 2012).[15] Thus, Rule 11.06(A) constitutes an independent and adequate state ground for procedural default, which the Ohio Supreme Court enforced in this case. *See Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). Cunningham correctly points out that postconviction counsel's ineffective performance can establish cause to excuse a procedural default in certain circumstances. *See* Appellant's Br. #1 at 48; *Martinez v. Ryan*, 566 U.S. 1, 13–14 (2012); *Trevino v. Thaler*, 569 U.S. 413, 417 (2013). But Cunningham has not explained *why* his postconviction counsel was deficient or prejudicial. *See* Appellant's Br. #1 at 49. We have nothing to base an ineffective-counsel decision on. To that end, we

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[15] *Wogenstahl* addresses Ohio Rule of Appellate Procedure 26(B), not Rule 11.06(A). *See Wogenstahl*, 668 F.3d at 322. Rule 26(B) governs applications to reopen filed by defendants in all criminal cases, not just defendants in death-penalty cases. *See* OHIO APP. R. 26(B). The provisions are otherwise identical; they include the same ninety-day limit. *Compare id.*, *with* OHIO S. CT. PRAC. R. 11.06(A). We therefore apply *Wogenstahl*'s analysis to this case.

cannot excuse Cunningham's procedural default, and we cannot review this claim.

VI. ISSUE #7: BRADY

Cunningham argues that Ohio violated *Brady* by failing timely to turn over police interviews of two testifying witnesses. We conclude that this claim is partially procedurally defaulted and partially meritless.

At trial, eyewitnesses Dwight Goodloe and James Grant testified. Defense counsel moved the trial court to review in camera a police report summarizing an interview with Goodloe, R. 192-4 (Goodloe Rep.) (Page ID #5295–97), and two police reports memorializing interviews with Grant, *id.* (Grant Reps.) (Page ID #5140–50). Finding that Goodloe had testified consistently with his interview, the trial court did not supply the Goodloe report to defense counsel. R. 194-2 (Trial Tr. at 1037) (Page ID #10226). The trial court, however, found sufficient differences between Grant's testimony and his interviews and allowed the defense to use the reports during cross-examination. *Id.* at 1296 (Page ID #10500). Defense counsel, however, never mentioned the Grant reports during cross. *Id.* at 1298–305 (Page ID #10502– 09).

In his state postconviction petition, Cunningham cited *Brady* in two claims for relief; he assailed Ohio for failing to turn over the Goodloe and Grant reports ahead of trial. Cunningham explained that defense counsel could have used the interviews to impeach or undermine Goodloe and Grant. R. 192-4 (2003 Postconviction Pet.) (Page ID #5072–74, 5083–85). The Ohio Court of Appeals concluded that res judicata prevented it from reviewing Cunningham's *Brady*

arguments. *See Cunningham*, 2004 WL 2496525, at *12. The state appellate court reasoned that these *Brady* subclaims could have been fairly determined within the confines of the trial record and thus should have been raised on direct appeal. *See id.* Alternatively, the Ohio Court of Appeals concluded, the *Brady* claims were meritless. *See id.* at *11–12. Cunningham preserved his two *Brady* subclaims in his federal habeas petition. R. 19-5 (Habeas Pet. at 53) (Page ID #100).

In his postconviction petition, Cunningham supplied two attachments for his argument that the State improperly withheld the Goodloe report—the report itself and Goodloe's testimony at trial. R. 192-4 (2003 Postconviction Pet.) (Page ID #5074, 5109, 5135–36, 5295–97). Because this subclaim was based solely on the trial record, the Ohio Court of Appeals correctly invoked res judicata in refusing to hear this subclaim. *See Hill v. Mitchell*, 400 F.3d 308, 314 (6th Cir. 2005).

We reach a different conclusion for the Grant subclaim. To support this claim, Cunningham attached to his postconviction petition the two Grant reports and Grant's testimony at trial. These, of course, were part of the trial record. R. 192-4 (2003 Postconviction Pet.) (Page ID #5085, 5109, 5140–50). But Cunningham also attached Jackson's investigator's report, which, again, was generated posttrial. That report laid out postverdict interviews with six jurors and an alternate, several of whom stated that Grant's testimony swayed them to convict. *Id.* (Page ID #5085, 5109, 5121–32; 5140–50). Because Cunningham relied on evidence outside the trial

record for this subclaim, the Ohio Court of Appeals incorrectly invoked res judicata in refusing to consider Cunningham's assertion about the Grant reports. We may therefore review the merits of this subclaim. *See Hill*, 400 F.3d at 314. We apply § 2254(d)(1) deference to the Ohio Court of Appeals's merits decision.

The State violates the Constitution when it withholds evidence favorable to a defendant that is material to his guilt or punishment. *See Brady*, 373 U.S. at 87; *see also United States v. Bencs*, 28 F.3d 555, 561 (6th Cir. 1994). A delay in turning over evidence contravenes *Brady* only if the delay itself is prejudicial. *See Bencs*, 28 F.3d at 561. Here, the prosecution *did* produce the Grant reports; any prejudice arose from the timing of the handover. Even though defense counsel may have been better prepared to cross-examine Grant had the reports been turned over before (rather than during) trial, Cunningham's lawyer failed to request a continuance to review the reports. *Cf. Joseph v. Coyle*, 469 F.3d 441, 472 (6th Cir. 2006). Indeed, when the trial court asked defense counsel if he was ready to cross-examine Grant, the lawyer answered in the affirmative. R. 194-2 (Trial Tr. at 1296) (Page ID #10500). Given these circumstances, we cannot conclude that the delay prejudiced Cunningham.

VII. ISSUE #8: PROSECUTOR'S STATEMENTS

Cunningham argues that the prosecutor made five improper statements. Cunningham defaulted his claims about three of the statements, so we cannot consider them. The Ohio Supreme Court's decision about the remaining two statements, moreover, involved no unreasonable application of Supreme

Court precedent. We thus reject Cunningham's final argument.

Cunningham takes issue with five of the prosecutor's statements—three from the prosecutor's closing argument at the guilt phase and two from his closing argument at the sentencing phase. The first statement arose from a back-and-forth about bullets at the closing of the guilt phase. Defense counsel conveyed that the physical evidence showed that just one gun was used and that Jackson—not Cunningham—fired that weapon. R. 194-2 (Trial Tr. at 1440) (Page ID #10650). The prosecutor responded by speculating that Cunningham could have fired bullets that were lost in the blood at the crime scene or disintegrated when they hit a wall. *Id.* at 1441–43 (Page ID #10651–53). Second, the prosecutor stated during the guilt phase that Grant, the three-year-old murder victim, never received a chance for justice. *Id.* at 1448 (Page ID #10658). Third, the prosecutor commented at the guilt phase that the killings were "absolutely the most cold-blooded calculated inhumane murder that anyone could ever imagine." *Id.* at 1449 (Page ID #10658). Fourth, the prosecutor mentioned that Cunningham made an unsworn statement during the penalty phase that was not subject to cross-examination, which did not "lessen his moral culpability" or "diminish the appropriateness of the death sentence." *Id.* at 116 (Page ID #10849). Fifth, the prosecutor conveyed during the penalty phase that Cunningham's unsworn statement; malingering, antisocial-personality, and psychopathic-personality diagnoses; comprehension of right and wrong; and lack of progress in treatment should not mitigate Cunningham's sentence. *Id.* at

116–17 (Page ID #10849–50). Cunningham frames these statements as the prosecutor's impermissibly listing out nonstatutory aggravating factors. *See* Appellant's Br. #1 at 85.

Cunningham argued on direct appeal that these five statements were improper. Highlighting that Cunningham's trial counsel had objected at trial to the third and fourth statements but not to the first, second, and fifth statements, the Ohio Supreme Court reviewed for plain error the latter trio of comments. The state high court rejected Cunningham's argument on the merits, concluding that none of the five statements were improper. *Cunningham II*, 824 N.E.2d at 523–24. Cunningham preserved all five subarguments in his federal habeas petition. R. 19-7 (Habeas Pet. at 68) (Page ID #111).

We cannot review the first, second, and fifth statements because they have been procedurally defaulted. The Ohio courts' enforcement of the contemporaneous-objection rule is an independent and adequate ground that bars habeas relief. *See Hand v. Houk*, 871 F.3d 390, 417 (6th Cir. 2017). That the Ohio Supreme Court reviewed the merits of three of Cunningham's allegations for plain error does not waive Ohio's procedural-default rules. *See id.* So we cannot review these three statements unless the default is excused. *See id.*

Cunningham argues that his trial counsel's ineffective performance served as cause and prejudice to excuse his defaulting this trifecta of statements. Appellant's Br. #1 at 85–86. But Cunningham has not established prejudice. The first statement—the speculation about the unfound bullets—was not

prejudicial. The jury heard that one bullet was dug out of a wall and a bullet fragment was discovered in a pool of blood. R. 194-2 (Trial Tr. at 966–71) (Page ID #10155–60). A police officer also testified that law enforcement recovered a tooth and jewelry while fishing through pools of blood with a pen. *Id.* at 957–58 (Page ID #10146–47). Again, Coron Liles spat out an unrecovered bullet in the streets; another bullet remains lodged in Tomeaka Grant's arm. *Id.* at 1133, 1226 (Page ID #10329, 10422); *Cunningham I*, 2004 WL 2496525, at *8. Put another way, other evidence indicated that bullets fired from Cunningham's weapon may have fragmented, been overlooked in blood pools, or otherwise been lost. So the prosecutor's speculations were not prejudicial. No doubt, the prosecutor's second statement—that Grant never received a chance at justice—wrongfully inflamed the passions and prejudices of the jury. *See Wogenstahl*, 668 F.3d at 333. But this comment was isolated and therefore harmless. *See id.* at 333–34. As for Cunningham's fifth allegation, we are not convinced that the prosecutor's description of the mitigating evidence constituted a list of nonstatutory aggravating factors. Either way, the Constitution allows juries to consider nonstatutory aggravating factors. *See LaMar v. Houk*, 798 F.3d 405, 431 (6th Cir. 2015). Because this troika of statements did not prejudice Cunningham, his procedural default is unexcused. We cannot address the merits of these claims.

We can, however, review the merits of the two nondefaulted subclaims; we apply § 2254(d)(1) deference to the Ohio Supreme Court's consideration of the prosecutor's third and fourth statements. The

prosecutor's third statement—that this was "absolutely the most cold-blooded calculated inhumane murder that anyone could ever imagine," R. 194-2 (Trial Tr. at 1449) (Page ID #10658)—was improperly designed to inflame the jury's passion, *see Gumm v. Mitchell*, 775 F.3d 345, 377 (6th Cir. 2014). If we were directly reviewing Cunningham's case, he may be entitled to relief. *See id.* But this is a habeas case. To attain habeas relief, Cunningham must show that the prosecutor's statements were "so pronounced and persistent that it permeates the entire atmosphere of the trial or so gross as probably to prejudice the defendant"—a high standard to surpass. *Hartman v. Bagley*, 492 F.3d 347, 367 (6th Cir. 2007) (quoting *Simpson v. Jones*, 238 F.3d 399, 409 (6th Cir. 2000)). In deciding that the third statement was harmless, the Ohio Supreme Court did not unreasonably apply Supreme Court precedent.

The prosecutor's fourth statement—that Cunningham testified sans oath—violated Ohio law. *See Bedford v. Collins*, 567 F.3d 225, 236 (6th Cir. 2009) (explaining that Ohio law provides that the prosecution may not disparage a defendant's decision not to testify under oath). But the Supreme Court has never addressed whether the Constitution is implicated when a state-law right to supply unsworn testimony is violated. Absent such precedent, the Ohio Supreme Court's single-sentence postcard denial—"[w]e reject this argument," *Cunningham II*, 824 N.E.2d at 524—involved no unreasonable application of Supreme Court caselaw. *See Richter*, 562 U.S. at 98 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there

was no reasonable basis for the state court to deny relief.").

In short, Cunningham's argument that the prosecutor made improper statements is partially defaulted and partially meritless. We thus reject this argument.

VIII. CONCLUSION

We **REVERSE** and **REMAND** so that the district court can conduct an evidentiary hearing to investigate Cunningham's two juror-bias claims consistent with this opinion.

CONCURRING IN THE JUDGMENT IN PART AND DISSENTING IN PART

KETHLEDGE, Circuit Judge, concurring in the judgment in part and dissenting in part. What the majority calls "the harsh standards of AEDPA as elaborated by the [Supreme] Court," Op. at 41, are standards that bind us nonetheless. Here, the majority orders habeas relief based on our own precedents, rather than those of the Supreme Court—an error for which the Court has already reversed us more than once. The majority also orders the district court to conduct an evidentiary hearing on the basis of post-trial testimony about jury deliberations—which Federal Rule of Evidence 606(b) presumptively bars a federal court from even "receiv[ing.]" As to those holdings, I respectfully dissent.

I.

The background facts deserve mention here. During the afternoon of January 3, 2002, Cunningham bought crack cocaine from Shane Liles at Liles's apartment in Lima, Ohio. That evening, Cunningham and Cleveland Jackson—armed with a revolver and pistol, respectively— returned to Liles's apartment to rob him. When they arrived, Liles was not home; instead, they found several of his friends and family members. Liles's girlfriend, Tomeaka Grant, called Liles to tell him he had visitors. Cunningham and Jackson waited for Liles in the living room, where teenagers Leneshia Williams, Coron Liles, and Dwight Goodloe Jr. were talking and watching "The Fast and the Furious." Tomeaka Grant

returned to the kitchen, where she had been playing cards with her brother, James Grant, and a family friend, Armetta Robinson. Grant had stopped by with his three-year-old daughter Jala to pick up a vacuum cleaner.

Shane Liles soon arrived home, and Cunningham told him that Jackson wanted to purchase drugs. Liles and Jackson discussed the sale on the staircase near the living room, while Cunningham remained on the couch with the teens. Then Cunningham stood up and ordered the teens into the kitchen. When Coron hesitated, Cunningham struck him in the face with the barrel of his gun, breaking Coron's jaw. Coron ran into the kitchen crying; Cunningham followed, rounding up the other two teens and forcing them at gunpoint into the kitchen, where they joined Tomeaka, James, and Jala Grant, along with Armetta Robinson. The group tried to shield themselves with a table, but Cunningham pushed it away and locked the back door.

Meanwhile, Jackson pulled a gun on Shane Liles and walked him upstairs, demanding drugs and money. Jackson then tied Liles's hands behind his back and forced him into the kitchen, where the rest of the group was huddled, crying and pleading. James Grant held his daughter, three-year-old Jala, in his lap. Jackson and Cunningham demanded that everyone place any valuables on the table; when Shane Liles said he had none left, Jackson shot him in the back. Almost immediately, Cunningham and Jackson started firing into the rest of the group—"aiming towards like the middle, at the ends and coming in . . . one from one side, one from the other."

The victims saw smoke and sparks from Cunningham's gun and heard the "click, click, click" of empty weapons as Jackson and Cunningham continued to pull the triggers, even after they were out of bullets.

Every member of the group was shot. Seventeen-year-old Leneshia Williams was shot in the back of her head, killing her almost instantly. Goodloe saw Coron's head "snap back" when Cunningham shot him in the mouth. Armetta Robinson was shot in the back of her head and comatose for 47 days. Tomeaka Grant was shot in the head and arm and lost her left eye. James Grant was shot five times, including in his face, as he tried to shield Jala. His efforts were unsuccessful: Jala was shot twice in the head and died on the kitchen floor. Cunningham and Jackson fled and discarded the murder weapons, which were never recovered.

* * *

As a juror in Cunningham's trial, Nichole Mikesell heard detailed testimony regarding the facts described above—including testimony by James Grant about how he begged for his daughter's life before she was shot. The jury convicted Cunningham and recommended a sentence of death, which the trial judge imposed.

II.

A.

One weekend afternoon about a year after the trial, investigator Gary Ericson showed up uninvited at Mikesell's home while she was playing outside with her kids. Ericson's summary of that interview is the

basis of Cunningham's first claim of juror bias, on which the majority now grants relief.

That claim, as the majority describes it, is that "Mikesell's social-worker colleagues fed her information about Cunningham." Op. at 12. That description substantially embellishes what the summary itself says. As an initial matter, the majority asserts that Mikesell's "statement" to Ericson "indicated bias against Cunningham." Op. at 17. But of course it did: the interview came a year after Mikesell had heard chapter and verse about how Cunningham rounded up and then helped to shoot eight people in Shane Liles's kitchen. By then—after Mikesell and every other juror had voted to convict Cunningham and recommended a sentence of death—it was Mikesell's prerogative to think that Cunningham was "an evil person" with "no redeeming qualities." Jurors must be impartial before they render a verdict, not after.

The only assertion in Ericson's summary that matters—as the state court of appeals correctly observed—was his assertion that Mikesell had said that "some social workers worked with Jeronique in the past and were afraid of him." That assertion was not enough, the state court held, to require the trial court to hold an evidentiary hearing as to whether Mikesell had been an impartial juror the year before. The question now is whether that decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

The answer to that question depends on the showing necessary to mandate—as a matter of constitutional due process—an evidentiary hearing regarding a juror's partiality. On habeas review, we determine that answer only by reference to "clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d). Here, the relevant Supreme Court case is *Remmer v. United States*, 347 U.S. 227 (1954), in which a juror alleged mid-trial that he had been offered a bribe to acquit the defendant. That allegation, coupled with an FBI agent's follow-up visit to the juror while the trial was still underway, mandated an evidentiary "hearing with all interested parties permitted to participate." *Id.* at 230. The majority thinks this case is so obviously similar to *Remmer* that the state court's decision not to hold an evidentiary hearing was "an unreasonable application of *Remmer*." Op. at 15.

But the only obvious error here is the majority's own. The majority says that, "[t]o receive a *Remmer* hearing, Cunningham had to *colorably allege* that the jury encountered extraneous influence—which he did in his state postconviction petition." Op. at 14 (emphasis added). But the rule that the majority applies to this claim—that upon a "colorable" allegation of juror bias, the trial court must hold an evidentiary hearing to investigate the matter further—appears in no holding "by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d). Instead that rule comes from our own direct-review cases, notably *United States v. Davis*, 177 F.3d 552, 557 (6th Cir. 1999). And we cannot grant habeas relief based upon our own constitutional precedents, which is what

the majority does today. For this particular trespass the Supreme Court has already reversed us at least twice: "As we explained in correcting an identical error by the Sixth Circuit two Terms ago, circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court,' 28 U.S.C. § 2254(d)(1). It therefore cannot form the basis for habeas relief under AEDPA." *Parker v. Matthews*, 567 U.S. 37, 48-49 (2012) (cleaned up). Thus, the Court held, "it was plain and repetitive error for the Sixth Circuit to rely on its own precedents in granting [] habeas relief." *Id.* at 49. Yet here the majority repeats the same error again.

A lawful resolution of Cunningham's claim would begin with the Supreme Court's recognition that, "[w]hen assessing whether a state court's application of federal law is unreasonable, the range of reasonable judgment can depend in part on the nature of the relevant rule that the state court must apply." *Renico v. Lett*, 559 U.S. 766, 776 (2010) (internal quotation marks omitted). Specifically, "the more general the rule at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—the more leeway state courts have in reaching outcomes in case-by-case determinations." *Id.*

Under that framework, the Ohio Court of Appeals had maximum leeway when adjudicating the claim at issue here. For as to the showing necessary to mandate an evidentiary hearing regarding potential juror bias, the Supreme Court's holdings provided the Ohio court with scarcely any guidance at all. In *Remmer* itself, the Court made no attempt to describe, qualitatively or quantitatively, the showing necessary

to mandate the evidentiary hearing that the majority says was so plainly mandated here. Instead the Court said this: "The trial court should not decide and take final action ex parte *on information such as was received in this case*, but should determine the circumstances, the impact thereof on the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." 347 U.S. at 229-30 (emphasis added).

That holding provided not a rule but a data point: the Court said that a hearing was necessary on the facts of that case, but did not state a principle of general application as to why. The Ohio courts were thus left to compare the facts of this case to the facts of *Remmer* when deciding whether to order a hearing. And a fairminded jurist could easily conclude that the facts here were materially different than the facts there. In *Remmer*, two facts were critical. The first, as noted above, was that, during trial, a juror reported to the judge that a third party had offered the juror what appeared to have been a bribe to vote in favor of acquittal. That amounted to an allegation of "tampering directly or indirectly with a juror during a trial about the matter pending before the jury[,]" which, if true, the Court deemed "presumptively prejudicial." *Id*. at 229. The second critical fact was that, after the juror reported the apparent bribe to the judge, an FBI agent visited the juror to inquire about it, again while the trial was still pending. *Id*. at 228. As to the latter fact, the Court said: "The sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly." *Id*. at 229. These two facts combined were the "information such as was

received in this case" that mandated a hearing in *Remmer*. *Id.* at 229-230.

We have nothing of the sort for the claim here. What we have, rather, is an allegation that, a year after trial, Mikesell knew that some of her colleagues were afraid of Cunningham. That allegation, taken as true, is not nearly as prejudicial on its face as the bribery allegation in *Remmer* was. Instead, as the Ohio Court of Appeals recognized, the allegation requires a degree of speculation—about whether Mikesell obtained that putative knowledge in the twelve months after trial rather than before, and about the extent to which that knowledge was actually prejudicial—that the allegation in *Remmer*, taken as true, did not. A fairminded jurist could therefore conclude that *Remmer*'s presumption of prejudice did not apply here. Nor does the record for this claim include anything like an FBI agent's mid-trial visit to a juror recently offered a bribe to acquit. Thus, a fairminded jurist could conclude—I think likely would conclude—that the information received here was less suggestive of prejudice than the "information such as was received" in *Remmer*. *Id.* at 229-30.

Meanwhile, in the 60-odd years since *Remmer*, the Supreme Court has not ordered a *Remmer* hearing even once. (The majority's reliance on *Smith v. Phillips*, 455 U.S. 209 (1982), is misplaced: that case did not even present the question whether to order a *Remmer* hearing. *See id.* at 217.) Thus, as to the Supreme Court's own precedents, the facts of *Remmer* itself remain the only source of guidance as to the showing necessary to mandate a *Remmer* hearing. And those facts are quite different from those here. No

precedent of the Supreme Court, therefore, would compel every fairminded jurist to hold that a *Remmer* hearing was mandatory as to Cunningham's first claim of juror bias. The majority misapplies § 2254(d) when it grants the writ as to that claim.

B.

The majority likewise orders a hearing as to Cunningham's second claim of juror bias, which the Ohio Court of Appeals held was procedurally barred. We therefore review that claim de novo. *Coley v. Bagley*, 706 F.3d 741, 749 (6th Cir. 2013).

As an initial matter, I think that Cunningham has established diligence for purposes of seeking an evidentiary hearing (as opposed to substantive relief) on this claim. The claim itself centers on allegations that, during deliberations, Mikesell told other jurors that she knew the victims' families. Cunningham first became aware of the grounds for this claim, such as they are, when his own investigator interviewed jurors Staci Freeman and Roberta Wobler in late 2008. Cunningham then sought written discovery and an evidentiary hearing in federal and then state court. Under Supreme Court precedent, those efforts are enough to establish Cunningham's diligence for purposes of the habeas statute. *See* 28 U.S.C. § 2254(e)(2); *Williams v. Taylor*, 529 U.S. 420, 437 (2000). Those same efforts support a determination of cause (though not prejudice) for purposes of his procedural default of this claim. *Id.* at 444.

That leaves the question whether Cunningham has made the substantive showing necessary to obtain a hearing as to this claim. But a threshold question is evidentiary: whether, as the district court held, the

evidence on which Cunningham based this claim was itself barred by the longstanding "rule against admission of jury testimony to impeach a verdict[.]" *Tanner v. United States*, 483 U.S. 107, 121 (1987). I think the district court was right on this point.

"[L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Id.* at 127. As this case itself illustrates, if jury deliberations were open to examination upon every *post hoc* claim of misconduct or bias, "[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *Id.* at 120. Thus, by the early 20th century, "the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a verdict." *Id.* at 117. That rule is codified today in Federal Rule of Evidence 606(b), which provides in full:

> (1) *Prohibited Testimony or Other Evidence*. During an inquiry into the validity of a verdict or indictment, *a juror may not testify about* any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. *The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.*
>
> (2) *Exceptions*. A juror may testify about whether:
>
> (A) extraneous prejudicial information was improperly brought to the jury's attention;

> (B) an outside influence was improperly brought to bear on any juror; or
>
> (C) a mistake was made in entering the verdict on the verdict form.

(Emphasis added.)

The testimony on which Cunningham based his second claim of juror bias ran directly into the headwinds of this rule. That testimony took the form of affidavits and deposition testimony by Roberta Wobler and Staci Freeman, both of whom were jurors at his trial. And virtually all that testimony concerned matters within the jury's deliberations, which means that—subject to the exceptions in Rule 606(b)(2)—the district court presumptively could not even "*receive*" these jurors' "affidavits and evidence[.]" Fed. R. Evid. 606(b)(1) (emphasis added). Yet the majority proceeds not only to receive all that evidence but to order a hearing based upon it.

Most of the testimony that the majority cites from these witnesses—*e.g.*, Freeman's testimony that she and "other people in the [jury] room felt pressured[,]" that Mikesell "was very domineering[,]" that Freeman "was the last one holding out," that "I felt the sense in the room, I felt the pressure," Mikesell "tried to steer everyone," and so on—was patently barred under the plain terms of Rule 606(b)(1). That testimony was the archetype of evidence that the Rule precludes jurors from offering and courts from receiving. That testimony was pedestrian as well: jurors commonly "assert after the fact that other jurors pressured them into their verdict." *United States v. Brooks*, 987 F.3d 593, 604 (6th Cir. 2021); *see also, e.g., United States v. Lloyd*, 462 F.3d 510, 519 (6th Cir. 2006) (district court

properly declined to receive post-trial testimony that a juror "could no longer stand the pressure from other jurors"); *United States v. Tallman*, 952 F.2d 164, 167 (8th Cir. 1991) ("To admit proof of contentiousness and conflict to impeach a verdict under Rule 606(b) would be to eviscerate the rule").

The only testimony that was even arguably proper under Rule 606(b) concerned Mikesell's putative relationships with the victims' families—an issue that easily could have been covered in voir dire. Wobler testified in her deposition that during "deliberations [Mikesell] stated she may in the future be working with the families under the Welfare Job and Family Services where she worked." Freeman testified in her deposition that, during deliberations, Mikesell said "she dealt with the victims and their families, they knew who she was, and that if she would find him not guilty that she would have to deal with them and that's just something she didn't want to have to deal with because of who she was."

The question, then, is whether this subset of testimony fell within an exception to Rule 606(b)'s bar on juror testimony concerning statements made during deliberations. The relevant exceptions are those in Rule 606(b)(2)(A) and (B)—whose differences the caselaw sometimes blurs by conflating them into one.

Rule 606(b)(2)(A) concerns certain "information"; Rule 606(b)(2)(B), certain "influences." "[E]xtraneous prejudicial information[,]" within the meaning of Rule 606(b)(2)(A), includes "publicity and information *related specifically to the case* the jurors are meant to decide[.]" *Warger v. Shauers*, 574 U.S. 40, 51 (2014)

(emphasis added). That kind of information bears directly on the facts the jury must find (which one might call "substantive extraneous information") or on the jury's assessment of a witness's credibility (which one might call "impeachment extraneous information"). That a juror's daughter was involved in an accident similar to the accident at issue at trial, for example, did not provide that juror with "extraneous prejudicial information" within the meaning of the rule—because the prior accident "did not provide either her or the rest of the jury with any specific knowledge regarding [the defendant's] collision with [the plaintiff]." *Id*. at 52. By contrast, "news reports *of the case being decided by the jurors*" would be extraneous prejudicial information under Rule 606(b)(2)(A). *Thompson v. Parker*, 867 F.3d 641, 648 (6th Cir. 2017). So too would a juror's past dealings with a party or witness, which "taints the deliberations with information not subject to a trial's procedural safeguards." *United States v. Herndon*, 156 F.3d 629, 636 (6th Cir. 1998). Here, Mikesell's alleged reference to her past or future relationship with the victim's families conveyed to the jurors no information about the facts of the case or the credibility of the witnesses who testified. That reference therefore did not convey "extraneous prejudicial information" to the jury.

A closer question is whether Mikesell's alleged past (Freeman's version) or future (Wobler's version) relationship with the victims' families was "an outside influence [that] was improperly brought to bear on any juror[.]" Fed. R. Evid. 606(b)(2)(B). An outside influence is an "external influence" upon the jury, rather than an "internal" one. *Tanner*, 483 U.S. at 117.

This distinction too is more illustrated than defined in the caselaw. Examples of external influence include the bribe offer in *Remmer*; a bailiff's statement to jurors that the defendant was "wicked" and "guilty[,]" *see Parker v. Gladden*, 385 U.S. 363, 365 (1966); the mid-trial pendency of a juror's employment application with the district attorney's office that was trying the case, *see Smith v. Phillips*, 455 U.S. 209, 212 (1982); and "'a threat to the safety of a member of [a juror's] family,'" *see Tanner*, 483 U.S. at 123 (quoting H.R.Rep. No. 93-650, pp. 9-10 (1973)). Examples of influences deemed internal include a juror's intoxication during trial, *Tanner*, 483 U.S. at 125; and a juror's "own subjective fear" that he might encounter the defendant's family after trial. *Garcia v. Andrews*, 488 F.3d 370, 376 (6th Cir. 2007).

The distinction between external and internal influences is elusive because even internal influences ultimately arise from some external cause. (No influence upon a juror is *a priori*.) In *Garcia*, for example, the juror's fear was "based on the fact that he worked in the area where the Garcia family owned property and that he was 'in the same business'" that they were in. *Id*. That professional and geographic immediacy was external to the juror's own mental processes, but the "subjective fear" that resulted—and thus the "influence" arising from that fear—was internal. Yet in *Phillips* the pending job application—which the juror himself submitted, and whose effect on the juror might have been no different than the "subjective fear" in *Garcia*—was apparently an external influence.

All these cases involve a chain of causation between external events and an influence that is ultimately felt as internal. Perhaps the best way to understand these distinctions, then, is by reference to whether the influence's *proximate cause* is internal or external to the juror's mental processes. Suppose a juror's spouse threatens to divorce him if he does not vote to convict in the case in which he sits. Any resultant influence on that juror would flow from the threat itself, "in a natural and continuous sequence, unbroken by any efficient intervening cause[.]" *Black's Law Dictionary* 1125 (6th ed. 1990) (defining "proximate cause"). Hence the threat would be an external influence. But suppose the juror instead merely believes that his spouse very much wants him to vote to convict. A prejudicial influence resulting from that belief would flow more from the intervening cause of juror's own subjective fears than from his spouse's body language. Hence that influence, like the one in *Garcia*, would be internal. *Phillips* might be a closer case; but there the Court apparently thought that the influence upon the applicant juror flowed more naturally and continuously from the pending application than from his antecedent decision to submit it. (No application, no influence.) By contrast, in *Garcia*, the juror's fear did not flow naturally and continuously from the what the juror called the "propensity for contact" with the defendant's family; instead that fear was "subjective," which is to say its primary cause was internal.

In any event, I think that any influence from Mikesell's alleged relationship with the victim's families was likewise internal. In our last decision in Cunningham's case, more than seven years ago, our

court defined "the real question raised by this claim" as follows: "did Mikesell have a relationship with the families of the victims, and if so, was she improperly biased or influenced by that relationship and her knowledge that she would have to face them and work in the community after the trial was over?" *Cunningham v. Hudson*, 756 F.3d 477, 486 (6th Cir. 2014). Any "fear" that Mikesell had of facing the victim's families after an acquittal was just as "subjective" as the *Garcia* juror's fear of facing the defendant's family after a conviction. For in neither case did the families take any discrete action to cause the alleged fear. In both cases, rather, the fear was subjective, arising primarily from the juror's own mental processes—in Mikesell's case (assuming the fear existed at all) from her own self-imposed moral pressure.

The "influence" of which Cunningham complains now was therefore internal. Thus, the jurors' testimony about that alleged influence did not fall within any exception in Rule 606(b)(2), which means that Rule 606(b)(1) barred the district court from receiving that testimony. The district court therefore was not required to hold a hearing on the basis of that testimony. *See Tanner*, 483 U.S. at 126-27. (On this point the majority's reliance on *Williams* is likewise misplaced: the evidence that supported a hearing in that case had nothing to do with jury deliberations. *See* 529 U.S. at 441-43.)

It bears mention that the omission of any open-ended exception in Rule 606(b)(2) for testimony about "potential juror bias" was deliberate. The rule's exceptions, as shown above, are more narrow and

discrete. And Rule 606(b)(1)'s limitations, the Supreme Court has repeatedly emphasized, operate alongside "existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial juror testimony[.]" *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 866 (2017). Specifically, "*voir dire* provides an opportunity for the court and counsel to examine members of the venire for impartiality. As a trial proceeds, the court, counsel, and court personnel have some opportunity to learn of any juror misconduct. And, before the verdict, jurors themselves can report misconduct to the court." *Id.* But testimony about jury deliberations cannot serve as a back-end substitute for voir dire. "It is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Phillips*, 455 U.S. at 217. And it is far from clear "that the jury system could survive such efforts to perfect it." *Tanner*, 483 U.S. at 120. For all these reasons, the majority errs in ordering a hearing on this claim.

C.

Finally, I concur in the judgment as to the majority's denial of relief on Cunningham's remaining claims. I disagree, however, with the majority's dictum that counsel's "subpar performance at the penalty phase flouted the Constitution." Op. at 29. The majority does not dispute the adequacy of counsel's investigation, asserting instead that counsel should have presented more details from the records of Allen Children's Services. As the Ohio courts determined, however, the evidence that Cunningham (and now the majority) cites "largely duplicated the mitigation evidence at trial." *Cullen v. Pinholster*, 563

U.S. 170, 200 (2011). And those records "would barely have altered the sentencing profile presented[.]" *Strickland v. Washington*, 466 U.S. 668, 700 (1984).

I concur in the judgment in part and respectfully dissent in part.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 3:06 CV 167

JUDGE PATRICIA A. GAUGHAN

Jeronique D. Cunningham,

Petitioner,

v.

Tim Shoop, Warden,

Respondent.

MEMORANDUM OF OPINION AND ORDER

INTRODUCTION

This Court denied Petitioner Jeronique Cunningham's petition for writ of habeas corpus on December 7, 2010. (Doc. 157.) On appeal of that judgment, the Sixth Circuit Court of Appeals concluded that one of Cunningham's claims, juror bias, was unexhausted and it remanded the case to this Court "to determine whether it is appropriate to stay-and-abey the petition while Cunningham returns to state court to exhaust this claim." *Cunningham v. Hudson*, 756 F.3d 477, 479 (6th Cir. 2014) (per curiam). This Court then stayed this case and held it in abeyance while Cunningham exhausted the juror-bias claim in state courts. (Doc. 173.) Cunningham has now exhausted the claim and filed an amended habeas petition. (Doc. 200.) Respondent Warden Tim Shoop has filed a supplemental return of writ (Doc. 201), and

Cunningham has filed a traverse. (Doc. 205.) For the following reasons, the Court **DENIES** Cunningham's amended petition.

FACTUAL BACKGROUND

Cunningham was convicted and sentenced to death in an Ohio court (Allen County Court of Common Pleas) for the aggravated murder of three-year-old Jala Grant and seventeen-year-old Leneshia Williams. *See State v. Cunningham*, 105 Ohio St. 3d 197, 197-200 (Ohio 2004).[1]

In the early afternoon of January 3, 2002, Cunningham and his half-brother, Cleveland Jackson, bought crack cocaine from Lashane Liles at Liles' apartment in Lima, Ohio. *Id.* at 197. Cunningham and Jackson returned to Liles' apartment that evening, intending to rob him. *Id.* When the brothers arrived, Liles was not home, but several family members and friends were there. *Id.*

Liles showed up soon after, and Jackson spoke to him about purchasing drugs while Cunningham watched a movie with two teenagers in the living room. *Id.* Cunningham then ordered the two teenagers into the kitchen, where three adults and two children – three-year-old Jala and seventeen-year-old Leneshia – were already gathered. *Id.* The teenagers did not immediately comply, so Cunningham pulled out a gun and struck one in the face with the gun

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[1] The facts and procedural history of this case are more fully set forth in *State v. Cunningham*, 105 Ohio St. 3d 197 (Ohio 2004), and this Court's Memorandum of Opinion and Order, dated December 7, 2010 (Doc. 157).

barrel, breaking his jaw. *Id*. At that point, Jackson brandished his gun and aimed it at Liles. *Id*.

The two teenagers ran into the kitchen, followed by Cunningham, who then held the group at gunpoint. *Id*. at 197-98. Jackson forced Liles upstairs, where he robbed him of drugs and money. *Id*. at 198. Jackson then led Liles downstairs to the kitchen. *Id*. The group was ordered to place their money, jewelry, and watches on the table. *Id*. Jackson demanded more money from Liles, and when Liles told him he had none, Jackson shot him in the back. *Id*. Cunningham and Jackson then turned their weapons on the others, shooting each of them. *Id*. Jala and Leneshia both died from gunshot wounds to the head. *Id*. The rest survived, though all but one were seriously injured. *Id*.

The police recovered only five bullets and eight spent shell casings at the scene and one bullet from a victim's arm. *Id*. at 199. The guns were never found. *Id*. There was no physical evidence that any of the bullets came from Cunningham's gun. *Id*. at 199-200.

RELEVANT PROCEDURAL HISTORY

A. State-Court Proceedings

Cunningham was indicted on two counts of aggravated murder for purposely causing the death of Jayla Grant and Lenishia Williams during an aggravated robbery; one count of aggravated robbery; and six counts of attempted murder. (Doc. 192-1 at 34-44.)[2] Each of the aggravated murder counts contained

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[2] All references to page numbers of documents in the Court's electronic court filing system ("ECF") are to the page numbers of

two death-penalty specifications: one that the murder was part of a course of conduct to kill or attempt to kill two or more persons, and another that the murder occurred during an aggravated robbery and was committed with prior calculation and design. (*Id*. at 34-35.) Firearm and repeat-violent-offender specifications were attached to all counts except the weapon-under-disability charge. (*Id*. at 34-44.)[3] Cunningham entered pleas of not guilty to all charges. (*See* Doc. 192-2 at 204.)

On June 18, 2002, after a seven-day trial, a jury found Cunningham guilty of all charges, the two death-penalty specifications, and the firearm specifications. (*See id*. at 204-10.) After a penalty hearing, the trial court sentenced Cunningham to death on the aggravated murder charges consistent with the jury's recommendation. (*Id*. at 211-25.)[4] Cunningham's convictions and sentences were affirmed on direct appeal. *See Cunningham*, 105 Ohio St. 3d at 224.

Cunningham filed a timely petition for post-conviction relief in the trial court in August 2003. (Doc. 192-4 at 45-453 (Post-Conviction Petition).) Among other claims, he asserted that one of the jurors

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the individual ECF documents, not to the original documents' page numbers or ECF "PageID" numbers.

[3] Cunningham also was charged with having a weapon under disability, but that charge was severed from the case and then dismissed after his convictions on the other counts. (*See* Doc. 192-2 at 154, 232.)

[4] Jackson, who was tried after Cunningham, also was convicted and sentenced to death. *See State v. Jackson*, 107 Ohio St. 3d 53 (Ohio 2005).

was biased, violating his constitutional right to a fair and impartial jury. (*Id.* at 83-86.) He argued that Nichole Mikesell, the foreperson of the jury, had obtained negative information about him from colleagues at the social-services agency where she worked at the time of the trial. (*Id.* at 85.) To support this claim, he attached a summary of an interview with Mikesell that an investigator for Cleveland Jackson had conducted after the trial. (*Id.* at 310-11 (Ex. R to Post-Conviction Petition).) The investigator reported that Mikesell called Cunningham "an evil person" with "no redeeming qualities." (*Id.* at 311.) He also wrote that she told him that "some social workers worked with Jeronique in the past and were afraid of him," and that "if you observe one of the veins starting to bulge in his head, watch out and stay away because he might try to kill you." (*Id.*)

The trial court denied Cunningham's post-conviction petition without allowing discovery or an evidentiary hearing. (Doc. 192-5 at 8-30.) The state appellate court affirmed. *State v. Cunningham*, No. 1–04–19, 2004 WL 2496525 (Ohio Ct. App. Nov. 8, 2004). The Ohio Supreme Court denied discretionary review. *State v. Cunningham*, 105 Ohio St. 3d 1464 (2005).

B. Initial Federal Habeas Proceedings

In October 2006, Cunningham filed a petition for a writ of habeas corpus in this Court, asserting fourteen claims for relief. (Doc. 19.) The case originally was assigned to Judge Peter Economus who referred the matter to Magistrate Judge McHargh for "limited delegation." His first claim included his allegations of juror bias based on Mikesell's knowledge of extra-

judicial information about Cunningham. (Doc. 19-2 at 1-6.)

In April 2008, Cunningham requested discovery, including documents and depositions related to his juror-bias claim. (Doc. 79 at 2-3.) In June 2008, Judge Economus granted Cunningham leave to depose Mikesell, the other seated and alternate jurors, Mikesell's co-workers at the Allen County Children's Services, and Jackson's investigator. (Doc. 86 at 12.) In August 2008, Cunningham requested, and was granted, funds to employ an investigator. (Docs. 91, 92.)

In the fall of 2008, Cunningham acquired affidavits from two jurors, Staci Freeman and Roberta Wobler. (Doc. 104-1 (Freeman Aff.); Doc. 103-1 (Wobler Aff.).) Neither Freeman nor Wobler recalled hearing Mikesell discuss the negative information about Cunningham at issue in Cunningham's petition. (*See* Doc. 104-1 at 2.) But, both women averred that Mikesell mentioned knowing the families of the victims of the crime. (*Id.*; Doc. 103-1 at 1.) Freeman stated:

> At one point during the jury deliberations, I had problems with the apparent fact that all the ballistic evidence pointed to a 9mm automatic pistol and not the revolver [allegedly belonging to Cunningham]. I expressed my opinion and Nichole Mikesell responded that, You don't understand. I know the families of the people that were shot in the kitchen. The families know me and I am going to have to go back and see them. These families are my clients. I interpreted Mikesell's comments as pressure to vote guilty.

(Doc. 104–1 at 1-2.) Wobler averred that Mikesell

> stated that she knew of the families of the victims from Family Services[.] One young woman on the jury was adamant that Jeronique was not guilty. Mikesell told the young woman and the jury that the young woman did not have to work in the local community.

(Doc. 103–1 at 1–2.)

Cunningham's counsel deposed Mikesell in January 2009. (Doc. 188-1 (Mikesell Dep.).) She testified that she did not speak to social workers about Cunningham at the time of the trial, but that she did look at his file after the trial concluded. (*Id*. at 118.) During the deposition, counsel asked Mikesell if she knew any of the victims. (*Id*. at 119.) Respondent's counsel objected on the ground that the question was beyond the scope of the claim, and the federal magistrate judge presiding over the deposition sustained the objection. (*Id*. at 120.)

In March 2009, Cunningham moved for, and Judge Economus granted, leave to amend his juror-bias claim to add the allegations that Mikesell was biased because she knew the victims' families, considered them her clients, and would ultimately have to face them in the community. (Docs. 111, 120.) Cunningham also requested an evidentiary hearing, which Judge Economus denied, although he permitted Cunningham to depose jurors Freeman and Wobler on this issue. (Doc. 120 at 5–6.)

Freeman and Wobler were deposed in October 2009. Freeman testified that during guilt-phase deliberations, Mikesell "stat[ed] that she dealt with

the victims and their families, they knew who she was, and that if she would find him not guilty that she would have to deal with them and that's just something she didn't want to have to deal with because they knew who she was." (Doc. 137-1 (Freeman Dep.) at 60.) When asked how this remark impacted her deliberations, Freeman testified that she "felt pressured," and "as the last one holding out, [she] felt that [she] was up against a wall, and [Mikesell] was very domineering and so I just . . . You know I regret, I shouldn't have, but I voted guilty." (*Id.* at 11.) Mikesell's comment, she said, "should never have been made . . . ." (*Id.*) Wobler testified at her deposition that, "at the very end of the deliberations [Mikesell] stated she may in the future be working with the families under the Welfare Job and Family Services where she worked," but "not that she had been." (Doc. 136–1 (Wobler Dep.) at 5–6.) She denied, however, that the comment had any impact on her deliberations (*Id.* at 6) or that anyone forced her to recommend the death penalty (*Id.* at 13).

Cunningham requested and was granted leave to amend his petition in November 2009 and again in March 2010 to include the allegations about Mikesell that he uncovered in the depositions. (Docs. 129, 141.) In March 2010, Respondent moved to strike the Freeman and Wobler depositions on the ground that Cunningham did not diligently seek information about the victims' families in state court. (Doc. 142.) Judge Economus denied the motion (Doc. 155), finding that Cunningham had exercised due diligence in state courts in attempting to develop the claim's factual basis through requests for discovery and an

evidentiary hearing, though the state trial court denied those requests. (*Id.* at 3.)

The case was then assigned to this Court which, in December 2010, denied Cunningham's petition. (Doc. 157.) Regarding the juror-bias claim based on Mikesell's relationship with the victims' families, the Court concluded that the claim was unexhausted and procedurally defaulted because Cunningham had not presented it to the state courts, but that even "[i]f the Court were to consider the testimony, it would find this claim to be without merit." (*Id.* at 31-32.) It found that the deposition testimony of jurors Wobler and Freeman demonstrated that "they were not forced to convict Cunningham. Even though Freeman stated that she felt pressured, it was because she was the only one holding out, and she was not happy that Mikesell, as jury foreperson, was controlling the situation. Usually, a foreperson controls the jury." (*Id.* at 32.)

Cunningham appealed that judgment, and the Sixth Circuit granted a certificate of appealability on seven claims, including whether the presence of the jury foreperson deprived Cunningham of a fair trial. *See Cunningham v. Hudson*, 756 F.3d 477, 481 (6th Cir. 2014). In June 2014, the circuit court issued a per curiam opinion addressing Cunningham's claim of juror bias based on Mikesell's relationship with the families of the murder victims. The court concluded that this claim was unexhausted but not procedurally defaulted, because Cunningham still could raise it in a motion for a new trial or a second petition for post-conviction relief in the Ohio state courts. *Id.* at 485. The court further found that Cunningham had good

cause for his failure to exhaust the claim because he did not become aware of the factual basis for this claim until he conducted discovery in this Court, and Respondent had not demonstrated that this Court's finding that Cunningham exercised due diligence in attempting to develop the factual basis of this claim was clearly erroneous. *Id.* at 486. Finally, it determined that the juror-bias claim was "not plainly meritless," as "evidence of [Mikesell's] alleged relationship with the families of the victims raises grave concerns about her impartiality . . . ." *Id.* at 486-87. The court framed the issue raised by this claim as: "did Mikesell have a relationship with the families of the victims, and if so, was she improperly biased or influenced by that relationship and her knowledge that she would have to face them and work in the community after the trial was over?" *Id.* at 486. The court, therefore, vacated this Court's judgment denying Cunningham's petition and remanded the petition to this Court "to determine whether it is appropriate to stay-and-abey the petition while Cunningham returns to state court to exhaust this claim." *Id.* at 479.

The parties then briefed the matter (Docs. 169, 171, 172), and this Court granted Cunningham's request to stay this matter and hold it in abeyance until he exhausted his claim in state courts (Doc. 173). In evaluating Cunningham's request to stay these proceedings under federal law and procedural rules, the Court observed that "Cunningham [had] not engaged in abusive litigation tactics or intentional delay[,]" but had "diligently sought to develop the factual basis of this claim in both state and federal court." (Doc. 173 at 6.)

C. State-Court Proceedings Following Remand

In December 2014, Cunningham filed in the state trial court a second-in-time petition for post-conviction relief, a motion for leave to file a delayed motion for a new trial, and a motion for funds to employ an investigator. (Doc. 188-1 at 31-138 (Post-Conviction Petition); Doc. 209-1 at 4-10 (Motion for Funds), 11-115 (New-Trial Motion).) In both the post-conviction petition and delayed motion for new trial, he asserted a single claim of juror bias based on both Mikesell's alleged extra-judicial information about him and her alleged relationship with the victims' families. (Doc. 188-1 at 38-40; Doc. 209-1 at 14-17.) He also requested discovery. (Doc. 188-1 at 31; Doc. 209-1 at 17.) As support, he submitted the 2003 affidavit of Jackson's investigator, who interviewed the jurors after the trial, with the attached report; the 2008 Freeman and Wobler affidavits; the 2009 depositions of Freeman and Wobler; and the 2009 deposition of Mikesell. (*See* Doc. 188-1 at 42; Doc. 209-1 at 19 (lists of exhibits).) The State responded to Cunningham's post-conviction petition and motions, and moved to dismiss the petition and new-trial motion. (Doc. 188-1 at 150-82.)

In September 2015, the trial court denied the post-conviction petition and motion for leave to file a delayed motion for a new trial without permitting discovery or an evidentiary hearing; denied the motion for funds to employ an investigator; and granted the State's motion to dismiss. (*Id*. at 223-38.) Cunningham appealed the trial court's judgment to the state appellate court. (Doc. 188-2 at 7.) The court of appeals affirmed the ruling in May 2016. (*Id*. at 159-

83.) Cunningham appealed that judgment to the Ohio Supreme Court (*Id*. at 187-88), which declined jurisdiction in July 2017 (Doc. 188-3 at 96).

D. Reinstated Federal Habeas Proceedings

Cunningham returned to this Court in November 2017. (*See* Doc. 187.) He filed an "Amended Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus" in July 2018. (Doc. 200.) Therein, he reasserts the first claim for relief in his original habeas petition, captioned: "The state court determinations that errors in jury selection did not deprive Mr. Cunningham of a fair trial and sentencing proceeding rest on unreasonable determination of facts, are contrary to, or an unreasonable application of law." (Doc. 200-1 at 6 (capitalization altered).) He expands upon his analysis of his allegations related to juror Mikesell's relationship with the victims' families. (*Id*. at 12-22.) Claims for relief 2 through 14 of Cunningham's amended petition are nearly identical to his original petition.[5]

Respondent filed a "Supplemental Return of Writ to Amended Petition" in October 2018 (Doc. 201), and Cunningham filed a "Traverse" in June 2019. (Doc. 205.) Cunningham also filed a motion for discovery (Doc. 206), which Respondent opposed (Doc. 207).

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[5] Cunningham added a brief argument to support his second claim for relief, for example. (*See* Doc. 200-1 at 37-41.)

ANALYSIS

A. Scope of Remand

As a preliminary matter, the parties dispute the scope of the Sixth Circuit's remand. Cunningham argues that the circuit court made its mandate "clear" when it stated at the beginning of its opinion: "[W]e vacate the district court's judgment and remand the petition to the district court to determine whether it is appropriate to stay-and-abey the petition while Cunningham returns to state court to exhaust this claim." (Doc. 205 at 3 (quoting *Cunningham*, 756 F.3d at 479).) He asserts that through this language, the court vacated this Court's entire judgment denying his petition, and the Court must now reconsider all of his claims, taking into account the "significant legal developments" in habeas law since the allegedly vacated judgment was issued nearly nine years ago. (*Id*. at 3-4.)

Respondent, for his part, notes the circuit court explained that it was "address[ing] only" Cunningham's claim of juror bias based on Mikesell's alleged relationship with the murder victims' families and her resulting impartiality. The Sixth Circuit specifically determined that the juror-bias claim was not plainly meritless because of evidence of "Mikesell's alleged relationship with the families of the victims..." *Cunningham*, 756 F.3d at 486. In finding the claim was unexhausted but neither procedurally defaulted nor plainly meritless, it remanded the petition to this Court for a stay-and-abeyance determination. (Doc. 201 at 25-30.) He maintains that the "law of the case" doctrine dictates that this Court should review only the juror-bias claim at issue in the Sixth Circuit's

opinion and decline to reconsider its prior ruling on Cunningham's other claims. (*Id.*)

The doctrine of law of the case provides that findings made at one point in litigation become the binding law of the case for subsequent stages of that same litigation. *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) (citing *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993)). A related theory is the mandate rule, which "requires lower courts to adhere to the commands of a superior court." *Id.* (citing *Bell*, 988 F.2d at 251). Therefore,

> "[u]pon remand of a case for further proceedings after a decision by the appellate court, the trial court must 'proceed in accordance with the mandate and the law of the case as established on appeal.' The trial court must 'implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.'"

Id. (quoting *United States v. Kikumura*, 947 F.2d 72, 76 (3d Cir. 1991) (citations omitted)). Appellate courts have broad discretion to issue either a general or limited remand. *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999) (citing 28 U.S.C. § 2106). General remands "give district courts authority to address all matters as long as remaining consistent with the remand." *Id.* Limited remands, on the other hand, "explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate." *Id.* "Traditionally, the mandate rule instructs that the district court is without authority to expand its

inquiry beyond the matters forming the basis of the appellate court's remand." *Id.*

The scope of a remand is ascertained by "examining the entire order or opinion, to determine whether and how the court of appeals intended to limit a remand." *Scott v. Churchill*, 377 F.3d 565, 570 (6th Cir. 2004). When confronted with a remanded case, a district court must "determin[e] what part of this court's mandate is intended to define the scope of any subsequent proceedings. The relevant language could appear anywhere in an opinion or order, including a designated paragraph or section, or certain key identifiable language." *Campbell*, 168 F.3d at 266-67 (footnote omitted). Individual paragraphs and sentences, however, must not be read out of context. *Id.* at 267.

Here, the Sixth Circuit's opinion indicates that its remand was limited in scope. The court explicitly stated the limited purpose of the opinion: to order consideration of a stay and abeyance so that Cunningham could exhaust in state court a claim that the circuit court found was neither procedurally defaulted nor plainly meritless. And it clearly identified the action this Court was to take: "[W]e remand Cunningham's mixed habeas petition to the district court to determine whether state-and-abeyance is appropriate." *Cunningham,* 756 F.3d at 487. Consistent with that limited objective, the circuit court vacated this Court's judgment to allow for further consideration of the juror-bias claim.

Pursuant to that limited remand, this Court determined that stay-and-abeyance was appropriate while Cunningham exhausted the juror-bias claim.

(Doc. 173.) As those state-court proceedings are complete, this Court will review the now-exhausted claim of juror bias based on Mikesell's alleged relationship with the families of the murder victims. The Court will not revisit Cunningham's other claims, as it "is without authority to expand its inquiry beyond the matters forming the basis of the appellate court's remand." *Campbell*, 168 F.3d at 265. The Court, therefore, repeats and incorporates herein its judgment of December 7, 2010 (Doc. 157), as to Cunningham's remaining claims in his claim for relief 1 and his claims for relief 2 through 14.[6]

B. Cunningham's Claim of Juror Bias

In his amended petition, Cunningham asserts that during the jury's deliberations, the jury foreperson,

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[6] The Court denies Cunningham's motion for discovery (Doc. 206) because, to the extent he seeks information relating to claims other than his juror-bias claim based on Mikesell's alleged relationship with the victims' families, it too exceeds the scope of the Sixth Circuit's limited remand. And, to the extent he requests information related to the juror-bias claim at issue here, Cunningham cannot satisfy his burden of showing good cause for the discovery. *See* Rule 6(a) of the Rules Governing § 2254 Cases (permitting discovery under the federal civil rules "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise"); *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (noting that a federal habeas petitioner, "unlike the usual civil litigant, is not entitled to discovery as a matter of ordinary course"). This Court already has granted leave for similar discovery concerning this claim – including depositions of Mikesell, all seated and alternate jurors in Cunningham's trial, Allen County Children's Services employees, and Jackson's investigator (*see* Doc. 86 at 12) – and funds for an investigator (*see* Doc. 92). Additional discovery is unwarranted.

Nichole Mikesell, told her fellow jurors that she knew the families of the victims, they were her clients at the Allen County Children's Services, and she pressured the jurors to convict Cunningham and sentence him to death "to spare her the negative reactions from the victims' family members." (Doc. 200-1 at 12-14.) Cunningham notes that Mikesell did not divulge this alleged relationship during *voir dire*. (*Id*. at 8.) He bases his claim on information gleaned from the affidavits and depositions of two jurors, Staci Freeman and Roberta Wobler, taken in 2008 and 2009. (*See* Doc. 103-1 (Wobler Aff.); Doc. 104-1 (Freeman Aff.); Doc. 136-1 (Wobler Dep.); Doc. 137-1 (Freeman Dep.).)

1. Procedural Posture

Respondent argues that this claim is procedurally defaulted and barred from federal habeas review. The default occurred, he asserts, when Cunningham returned to state court to raise it for the first time and the state courts rejected his second-in-time petition for post-conviction relief as untimely and successive under Ohio's statutory post-conviction relief scheme, and his motion for leave to file a delayed motion for a new trial as failing to meet the requirements of Ohio's procedural rules. (Doc. 201 at 10-17.)

Procedural default occurs when a habeas petitioner fails to obtain consideration of a federal constitutional claim by state courts because he or she failed to comply with a state procedural rule that prevented the state courts from reaching the merits of the petitioner's claim. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 80, 84-87 (1977); *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). In determining

whether a claim is procedurally defaulted and barred from consideration on federal habeas review, the federal court looks to the last state court rendering a reasoned opinion on that claim. *Ylst v. Nunnemaker,* 501 U.S. 797, 805 (1991).[7]

Where a state court declines to address a prisoner's federal claim because the prisoner has failed to meet a state procedural requirement, federal habeas review is barred as long as the state judgment rested on "independent and adequate" state procedural grounds. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). To be independent, a state procedural rule and the state courts' application of it must not rely in any part on federal law. *Id.* at 732-33. To be adequate, a state procedural rule must be "'firmly established' and 'regularly followed'" by the state courts at the time it was applied. *Beard v. Kindler*, 558 U.S. 53, 60-61 (2009).

In *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), the Sixth Circuit established this now familiar test to be followed when the state argues that a habeas claim is defaulted because of a prisoner's failure to observe a state procedural rule:

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[7] Where a later state-court decision rests upon a prohibition against *further* state review, the decision "neither rests upon procedural default nor lifts a pre-existing procedural default, [and] its effect upon the availability of federal habeas is nil . . . ." *Ylst*, 501 U.S. at 804 n.3. In that case, habeas courts "look through" that later decision to the prior reasoned state-court judgment. *Id.* at 805 ("state rules against [a] superfluous recourse [of state habeas proceedings] have no bearing upon [a petitioner's] ability to raise the [federal] claim in federal court").

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

Williams v. Coyle, 260 F.3d 684, 693 (6th Cir. 2001) (citing *Maupin*, 785 F.2d at 138) (further citations omitted).

State-court decision. Here, the state appellate court which was the last state court to consider Cunningham's juror-bias claim based on Mikesell's alleged relationship with the victims' families, upheld the trial court's dismissal of Cunningham's post-conviction petition. (Doc. 188-2 at 165-75.) It explained that when Cunningham filed his second-in-time petition in December 2014, Ohio's statutory post-conviction relief scheme required that petitions in capital cases be filed within 180 days after the trial transcript is filed in the Ohio Supreme Court. (*Id*. at

165-66 (citing Ohio Rev. Code § 2953.21(A)(2)).)[8] Otherwise, trial courts "lack[ed] jurisdiction to entertain" untimely or successive petitions, unless the petitioner established that one of two exceptions applied: either (1) he was "unavoidably prevented from discovering the facts necessary for the claim for relief"; or (2) the claim was based on a new and retroactive federal or state right recognized by the United States Supreme Court. (*Id.* at 166-67 (citing Ohio Rev. Code § 2953.23(A)(1)(a)).) A defendant "is 'unavoidably prevented' from the discovery of facts if he had no knowledge of the existence of those facts and could not have, in the exercise of reasonably diligence, learned of their existence" before the filing deadline for post-conviction petitions. (*Id.* at 170) (citations omitted). If the petitioner was able to satisfy one of these threshold conditions, then he was required to demonstrate by clear and convincing evidence that, but for the constitutional error at trial or the sentencing hearing, no reasonable fact-finder would have found him guilty of the offenses or found him eligible for a death sentence. (*Id.* at 167) (citing Ohio Rev. Code § 2953.23(A)(1)(b)).

The court first rejected Cunningham's argument that his petition was not successive, and, therefore, subject to § 2953.23(A), because Ohio's post-conviction process had failed to "provide an adequate corrective process" for review of his constitutional claims. (*Id.* at 167.) It noted that his petition was subject to §

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[8] The court noted that on March 23, 2015, this time period for defendants to file post-conviction petitions was extended from 180 to 365 days. (*Id.* at 166 n.2.)

2953.23(A) because it was untimely by more than a decade, and that a court cannot "bypass the requirements of R.C. 2953.23 and consider his petition because Ohio's postconviction process somehow failed him." (*Id*. at 168.)

The state court then determined that Cunningham did not satisfy either exception for untimely and successive petitions under § 2953.23(A)(1)(a). He did not assert that his juror-bias claim was based on a new federal or state right. (*Id*. at 170.) And, contrary to Cunningham's assertion, he was not "unavoidably prevented" from discovering the facts supporting his claim by the ineffectiveness of post-conviction counsel or the inability to conduct discovery; Mikesell, Freeman, and Wobler were "available and interviewed by a privately hired investigator" some time before the date of the investigator's affidavit – July 16, 2003 – and within the specified time for filing his first post-conviction petition. (*Id*. at 169-72.) The court stressed that, in its view, the juror-bias claim Cunningham asserted in his first petition raised the "same arguments" that Cunningham presented in his second petition – namely, "that Mikesell committed 'juror misconduct,' that she was prejudiced against Cunningham, and that her presence on the jury 'may have contaminated the remainder of the jury[.]'" (*Id*. at 172 (citing Doc. 192-4 at 83-86).) The court concluded that, "[o]n that basis alone," the trial court was "without jurisdiction" to entertain Cunningham's petition. (*Id*. at 173.)

Finally, the court explained that even if it were to find that Cunningham had satisfied § 2953.23(A)(1)(a), he had not shown that, but for the

alleged constitutional error, no reasonable fact-finder would have found him guilty of the offenses or found him eligible for a death sentence under § 2953.23(A)(1)(b). (*Id.* at 173-75.) It rejected, as unsupported by any authority and contradicted by the plain language of the statute, Cunningham's argument that he had satisfied § 2953.23(A) because "a biased juror is a structural defect that does not require a showing of harm." (*Id.*)

The state court then turned to Cunningham's motion for leave to file a delayed motion for a new trial. Ohio Criminal Procedure Rule 33 provides that "[a] new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights: . . . (2) Misconduct of the jury . . . ." Ohio R. Crim. P. 33(A). Rule 33(B) sets a 120-day time limit from the date of the verdict or judgment for new-trial motions based on newly discovered evidence, unless the defendant can demonstrate that he was "unavoidably prevented from discovering the evidence" within that time period. Ohio R. Crim. P. 33(B). The state court observed that "'[a] party is 'unavoidably prevented' from filing a motion for a new trial if the party had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence.'" (Doc. 188-2 at 177 (quoting *State v. Lee*, No. 05AP-229, 2005 WL 3220245, *1 (Ohio Ct. App. Dec. 1, 2005)).) Cunningham asserted that he was unavoidably prevented from discovering the information relating to Mikesell's relationship with the victims' families within the rule's 120-day time limit until he was

granted permission to conduct discovery in federal court. The court rejected this argument. (*Id*. at 179.) It again pointed to the investigator's interviews of Mikesell, Freeman, and Wobler sometime prior to the date of his July 16, 2003 affidavit as evidence that Cunningham had notice of Mikesell's misconduct and had the ability to obtain information about her alleged relationship with the victims' families within the rule's prescribed time period. (*Id*. at 179-80.) "The purported new evidence of juror misconduct was not undiscoverable simply because, as Cunningham argues, he did not discover it sooner," the court observed. (*Id*. at 180.)

Procedural default. Respondent argues that in this decision, the state appellate court clearly asserted an independent and adequate state procedural bar to Cunningham's juror-bias claim based on Mikesell's relationship with the victims' families, and the claim is procedurally defaulted. (Doc. 201 at 5.)[9] Cunningham strongly contests the state court's ruling. He does not challenge the default under the second and third prongs of the *Maupin* test for procedural default of federal habeas claims, i.e., requiring that the rules state courts applied to preclude review of the claim were actually applied and were adequate and independent state grounds upon which state courts can rely to refuse to consider the merits of a federal constitutional claim. (*See* Doc. 200-

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[9] The parties limit their arguments to the state appellate court's review of Cunningham's post-conviction petition and are silent about his new-trial motion. As the state court's analyses regarding both pleadings were virtually identical, the Court will limit its discussion to the post-conviction petition as well.

1 at 16.) Rather, he contends the ruling does not satisfy *Maupin*'s first prong, that he failed to comply with a state procedural rule. (*Id.*)

Cunningham asserts that his "diligence overcomes any default based on [§ 2953.23(A)(1)(a)]." (Doc. 205 at 10 (capitalization altered).) He first challenges the state court's finding that he had notice of the underlying factual basis of the claim during post-conviction proceedings and, therefore, could have discovered the evidence at that time, long before he conducted discovery in his federal habeas proceedings. (Doc. 200-1 at 16.) He claims that the only evidence he obtained while in state court after conviction was of Mikesell's knowledge of information about him from the social services agency at which she worked and "there was no notice or even hint of the evidence found anew in federal court" relating to her relationship with the victims' families. (*Id.*) Mikesell was never questioned about the family members during state-court proceedings, and the state trial court on post-conviction did not permit discovery or conduct an evidentiary hearing. (*Id.*) Cunningham emphasizes that, contrary to the state court's analysis, the claims based on Mikesell's negative information about him and her relationship with the victims' families "are two distinct factual claims." (*Id.*) The Sixth Circuit made this point clear, he argues, when it observed that "'the factual basis [of the exhausted state-court juror-bias claim] was Mikesell's knowledge of Cunningham from her colleagues, not her alleged relationship with the families of the victims.'" (*Id.* (quoting *Cunningham*, 756 F.3d at 482).)

Cunningham cites as support the Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 420 (2000). (Doc. 200-1 at 18-19.) In that case, the court held that a habeas petitioner was entitled to an evidentiary hearing on a juror-bias claim under 28 U.S.C. § 2254(e)(2) because he made a reasonable effort to develop the claim in state-court proceedings. *Id.* at 443. The petitioner had discovered evidence during federal habeas proceedings that, during *voir dire*, the jury foreperson failed to disclose that a state witness was her former husband and the prosecutor had represented her when he was in private practice. *Id.* at 440-43. The court noted that the petitioner had some concerns about a different juror, which the petitioner's state habeas counsel had unsuccessfully requested funding for an investigator to examine, but that the trial record "contain[ed] no evidence which would have put a reasonable attorney on notice" of the jury foreperson's misconduct at issue at that time. *Id.* at 442.

In *Williams*, however, the court was evaluating the petitioner's efforts in state court in the context of a *federal* habeas statute, 28 U.S.C. § 2254(e)(2), which prohibits an evidentiary hearing on a claim "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings" unless the applicant satisfies certain conditions.[10] 28 U.S.C. § 2254(e)(2).

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[10] Those conditions are:

> (A) the claim relies on –
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> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

The court explained that under § 2254(e)(2), "a failure to develop the factual basis of a claim is not established unless there is lack of diligence or some greater fault attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 432. A federal court's finding of diligence in the context of a federal habeas proceeding is not equivalent to a state court's finding of diligence in the context of the state's post-conviction statutes and procedural rules.

Moreover, in this case, unlike *Williams*, Cunningham had notice of Mikesell's potential bias and misconduct during deliberations as early as July 2003, the date of the investigator's report, which Cunningham submitted with his first post-conviction petition, timely filed in August 2003. (Doc. 192-4 at 310-11 (Ex. R to Post-Conviction Petition).) As the state appellate court reasonably opined, once on notice, Cunningham was free to further investigate Mikesell and any bias or misconduct on her part, even if outside the formal discovery process. Information relating to Mikesell's relationship with the victims'

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Section 2254(e)(2) also applies to the introduction of new evidence without an evidentiary hearing, such as when the petitioner seeks to introduce new evidence based on a motion to expand the record. *Holland v. Jackson*, 542 U.S. 649, 653 (2004).

families was not undiscoverable until he conducted discovery in these habeas proceedings several years later, in 2008 and 2009, simply because Cunningham did not discover it sooner.

Cunningham argues that the issue of "diligence" is a question of federal law to be determined by federal habeas courts, and this Court has found that he was diligent in attempting to develop his juror-bias claims in state court. (Doc. 205 at 11.) He cites the Tenth Circuit's decision in *Boyle v. McKune*, 544 F.3d 1132 (10th Cir. 2008), to support this proposition. But, again, the court in *Boyle* was evaluating a petitioner's diligence under AEDPA's § 2254(e)(2). *See id*. at 1136. This Court, too, considered Cunningham's diligence during the course of this action only for purposes of § 2254(e)(2) or other federal procedural issues. (*See* Doc. 155 (Op. on Resp. Motion to Strike Deps.) at 3); Doc. 173 (Op. on Pet. Motion to Stay) at 6.) Those determinations are not relevant to this procedural-default analysis.

In fact, the circuit court noted in *Boyle* that "[t]he state courts are, of course, the final arbiters of when and how a state prisoner can obtain an evidentiary hearing in their courts." *Boyle,* 544 F.3d at 1135-36. This is the controlling principal here. It is well-established, as Respondent argues and the Sixth Circuit made clear in its remand decision, that "the determination of whether a habeas petitioner satisfies a state procedural requirement 'is for the state court to make.'" *Cunningham*, 756 F.3d at 483 (quoting *Wagner v. Smith*, 581 F.3d 410, 419 (6th Cir. 2009)); *see also id.* at 484 ("[W]e conclude that it is for the Ohio courts, not this court, to determine whether

Cunningham may bring this petition") (citing *Godbolt v. Russell*, 82 Fed. Appx. 447, 450 (6th Cir. 2003) (holding that even though it was unlikely that petitioner met the requirements for a second post-conviction petition in Ohio, "it is for the state courts to interpret and enforce their laws on such issues")); *Vance v. Scutt*, 573 Fed. Appx. 415, 418-19 (6th Cir. 2014) ("Timeliness is not a simple question of fact that requires nothing more than counting days on a calendar; rather, it is a matter of state procedural law . . . We do not meddle with state court decisions on state procedural issues in habeas. We are bound by the state court's determination of its own law.") (internal quotation marks and citations omitted). Habeas courts "are bound by state court interpretations of state criminal law except in extreme circumstances where it appears that the interpretation is an obvious subterfuge to evade consideration of a federal issue." *Warner v. Zent*, 997 F.2d 116, 133 (6th Cir. 1993) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 690–91, n.11 (1975)). There is nothing in the state appellate court's application of Ohio's post-conviction relief statutes or procedural rules that is beyond the norm or contrary to the holdings of the Ohio Supreme Court. This Court is, therefore, bound by, and must defer to, the state court's determination that Cunningham did not meet the diligence requirement of Ohio's post-conviction provision § 2953.23(A)(1)(a).

Furthermore, Respondent correctly points out that regardless of the state court's finding on Cunningham's diligence under § 2953.23(A)(1)(a), the state court also found that Cunningham failed to satisfy § 2953.23(A)(1)(b), which requires that a

defendant demonstrate that but for the alleged constitutional error, no reasonable fact-finder would have found him guilty of the offenses or found him eligible for a death sentence. As explained above, the state appellate court rejected Cunningham's argument that he is not obligated to demonstrate prejudice because "a biased juror is a structural defect" as unsupported by any authority and contradicted by the plain language of the statute. (Doc. 188-2 at 173-75.) Cunningham contends this finding under § 2953.23(A)(1)(b) is irrelevant here because the state court remarked that his failure to satisfy § 2953.23(A)(1)(a) stripped the court of its jurisdiction "[o]n that basis alone . . . [and it] need not address the applicability of R.C. 2953.23(A)(1)(b)." (Doc. 205 at 12 (quoting Doc. 188-2 at 173).) But the state court did in fact proceed to consider whether Cunningham met that provision, and found he had not. Again, this Court is bound by the state court's interpretation of Ohio law.

Cunningham, therefore, has not demonstrated that the state appellate court misapplied state law and procedural rules in finding his post-conviction petition and new-trial motion procedurally barred from review. And, his claim of juror bias based on juror Mikesell's relationship with the families of the victims is procedurally defaulted.

Cause and prejudice. Cunningham argues, however, that even if the claim is procedurally defaulted, the default should be excused for cause. (Doc. 200-1 at 17-22.) A petitioner may overcome procedural default by demonstrating cause for the default and actual prejudice that resulted from the

alleged violation of federal law, or that there will be a "fundamental miscarriage of justice" if the claim is not considered. *Coleman*, 501 U.S. at 750. "'[C]ause' under the cause and prejudice test must be something external to the petitioner, something that cannot be fairly attributed to him." *Id*. To establish prejudice, a petitioner must demonstrate that the constitutional error "worked to his actual and substantial disadvantage." *Perkins v. LeCureux*, 58 F.3d 214, 219 (6th Cir. 1995) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)).

Cunningham first contends that the default should be excused because Ohio's post-conviction process never afforded him a "full and fair opportunity to litigate his claim," particularly in denying him discovery that would have led to his uncovering the underlying facts of his juror-bias claim. (Doc. 200-1 at 17.) The Sixth Circuit, however, has explicitly rejected this argument. In response to a petitioner's claim that the "Tennessee post-conviction statute did not provide him a minimally adequate forum in which to discover and air [his defaulted] claims," the court declared that "criticisms of Tennessee's Post Conviction Procedures Act do not address the question of cause and prejudice." *O'Guinn v. Dutton*, 88 F.3d 1409, 1455 (6th Cir. 1996) (en banc); *see also Haight v. White*, No. 3:02 CV 206, 2017 WL 3584218, at *38 (W.D. Ky. Aug. 18, 2017) (rejecting petitioner's argument that "the denial of a full and fair state post-conviction process . . . [should] establish cause for the procedural default of specified claims").

Indeed, the Sixth Circuit repeatedly has held that complaints about deficiencies and errors in state post-

conviction proceedings are outside the scope of federal habeas corpus review. *See Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007); *Roe v. Baker*, 316 F.3d 557, 571 (6th Cir. 2002); *Kirby v. Dutton*, 794 F.2d 245, 246 (6th Cir. 1986). It has explained that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody." *Kirby*, 794 F.2d at 246 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)). Challenges to post-conviction proceedings "address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration." *Id.* at 247. A due process claim related to collateral post-conviction proceedings, therefore, even if resolved in a petitioner's favor, would not "result [in] . . . release or a reduction in . . . time to be served or in any other way affect his detention because we would not be reviewing any matter directly pertaining to his detention." *Id*. Accordingly, this Court will not review Cunningham's allegations regarding deficiencies in Ohio's post-conviction procedures.

Cunningham next relies again on *Williams v. Taylor, supra,* to support his assertion of cause. (Doc. 200-1 at 18-19.) After concluding that the petitioner had diligently sought to discover the facts supporting his juror-bias claims in state habeas proceedings and, therefore, was entitled to an evidentiary hearing in federal court under § 2254(e)(2), the *Williams* court remarked on the procedural posture of the new claims. *Williams*, 529 U.S. at 443-44. It noted that the petitioner could not have returned to state court to exhaust the juror-bias claims with his newly discovered evidence under Virginia law governing

post-conviction relief. *Id.* Under those circumstances, it remarked, "[o]ur analysis should suffice to establish cause for any procedural default petitioner may have committed in not presenting these claims to the Virginia courts in the first instance." *Id.* Cunningham contends this comment suggests that

> the finding of diligence presumed something other than neglect (i.e., something external) as the cause for [the] state petitioner's inability to discover the claim. For this reason, the finding of diligence in state court invariably redounds to a finding of cause when the newly developed evidence results in a new claim in federal court.

(Doc. 200-1 at 19.)

Again, *Williams* does not help Cunningham. The court's discussion of the procedural default of the petitioner's juror-bias claims is dicta, and the circumstances under which the court found cause for the default are easily distinguished. The court's finding of diligence, as explained above, arose in the context of AEDPA's § 2254(e)(2), not a state court's ruling on diligence under a state law or procedural rule. Here, unlike in *Williams*, Cunningham was able to return to state court with his newly developed claim, and the state courts found that under Ohio law and court rules, he was not unavoidably prevented from discovering, or reasonably diligent in attempting to discover, the factual basis of his claim sooner. Accordingly, this argument also fails.

Finally, Cunningham asserts that the ineffectiveness of his post-conviction counsel provides cause for the default under the Supreme Court decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and

Trevino v. Thaler, 569 U.S. 413 (2013). (Doc. 200-1 at 19-22.) In *Martinez*, the court held that the "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez,* 566 U.S. at 9. In *Trevino*, the court elaborated on and expanded *Martinez*, by holding that *Martinez* would apply in Texas, even though Texas criminal procedure "on its face appears to permit (but does not require) the defendant to raise the claim [of ineffective assistance of trial counsel] on *direct appeal*." *Trevino*, 569 U.S. at 423 (emphasis original).

Martinez and *Trevino*, however, do not apply to Cunningham's juror-bias claim. Although the Sixth Circuit recently held that *Martinez* and *Trevino* apply in Ohio in certain circumstances, *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270, 275-78 (6th Cir. 2019), those cases apply only to excuse the default of claims of ineffective assistance of trial counsel. *See Hodges v. Colson*, 711 F.3d 589, 602-03 (6th Cir. 2013) (refusing to extend *Martinez* to allow the ineffectiveness of post-conviction counsel to provide cause for the procedural default of an ineffective assistance of *appellate* counsel claim). Thus, this argument, too, lacks merit.

Accordingly, Cunningham has not demonstrated cause to excuse the procedural default of his juror-bias claim. And, because he has not established cause, the Court need not consider the "prejudice" prong of the procedural-default analysis. *See, e.g., Simpson v. Jones*, 238 F.3d 399, 409 (6th Cir. 2000). This claim is procedurally defaulted.

2. Merits Analysis

Even if the Court were to review Cunningham's claim of juror bias, it would fail. Because this claim was not adjudicated on the merits in state court, this Court will review it *de novo*. 28 U.S.C. § 2254(d); *see also Rice v. White*, 660 F.3d 242, 252 (6th Cir. 2011).

The Sixth Amendment protects a defendant's right, "[i]n all criminal prosecutions," to a "trial, by an impartial jury." U.S. CONST. amend. VI. "The constitutional standard of fairness" guarantees the criminally accused "'a fair trial by a panel of impartial, 'indifferent' jurors.'" *Murphy v. Florida,* 421 U.S. 794, 799 (1975) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). An impartial jury is one in which every juror is "capable and willing to decide the case solely on the evidence before [him or her]." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Even one biased juror violates a defendant's right to a impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

The Constitution, however, "does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith,* 455 U.S. at 217. "Qualified jurors need not . . . be totally ignorant of the facts and issues involved." *Murphy,* 421 U.S. at 799-800. The Supreme Court has long recognized that "[a litigant] is entitled to a fair trial but not a perfect one, for there are no perfect trials." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (internal quotation marks and citations omitted). It has explained:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of the 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, 366 U.S. at 723. However, "the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'" *Murphy*, 421 U.S. at 800 (quoting *Irvin*, 366 U.S. at 723).

When a juror's impartiality is at issue, the "ultimate question" is "whether the 'juror swore that he could set aside any opinion he might hold and decide the case on the evidence, and [whether] the juror's protestation of impartiality [should be] believed.'" *White v. Mitchell*, 431 F.3d 517, 538 (6th Cir. 2005) (quoting *Patton v. Yount*, 467 U.S. 1025, 1036 (1984)). Habeas courts must accord "special deference" to trial courts in determining a juror's credibility, as trial judges are in the best position to assess the demeanor and credibility of the jurors. *Patton*, 467 U.S. at 1038. *Voir dire* examination serves to protect the defendant's right to an impartial jury

> by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges.

McDonough Power Equip., Inc., 464 U.S. at 554.

In cases where a juror is alleged to have intentionally concealed information during *voir dire*, a defendant may obtain a new trial if he or she can show that a juror failed to answer honestly a material question on *voir dire*, and a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equip., Inc.,* 464 U.S. at 556. Challenges for cause are subject to approval by the court and must be based on a finding of actual or implied bias. *Hughes,* 258 F.3d at 457-58 (quotation marks and citation omitted). *McDonough* applies only in cases where the juror's failure to disclose information was deliberate, not merely a mistake. *See Zerka v. Green*, 49 F.3d 1181, 1185 (6th Cir. 1995); *Dennis v. Mitchell*, 354 F.3d 511, 520 (6th Cir. 2003). In cases where a juror's failure to respond to *voir dire* questioning is the result of an honest mistake, the pre-existing rule applies, requiring proof of actual juror bias or, in exceptional circumstances, implied bias. *Zerka*, 49 F.3d at 1186 n.7.

In its remand order, the Sixth Circuit posed "the real question raised by this claim: did Mikesell have a relationship with the families of the victims, and if so, was she improperly biased or influenced by that relationship and her knowledge that she would have to face them and work in the community after the trial was over?" *Cunningham*, 756 F.3d at 486. The circuit court found that "the evidence of Mikesell's alleged relationship with the families of the victims raises grave concerns about her impartiality . . . ." *Id.* at 486-87. Yet, Cunningham presents no additional evidence now from which to answer this question than he did in his final statement of the claim in 2010, despite being granted leave to conduct discovery in these

federal habeas proceedings – including depositions and the use of an investigator – and a return to state court to further develop and exhaust the claim. (*See* Doc. 141 ("Second Amended Claim 1, A").) Again, the Court finds that Cunningham has failed to demonstrate that juror Mikesell was biased because of a relationship with the victims' families and, therefore, could not "lay aside [her] impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723.

Admissibility of evidence. Initially, the evidence Cunningham presents to support this claim is likely inadmissible under the no-impeachment rule, which generally forbids jurors from impeaching their verdict, either by affidavit or live testimony. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 863 (2017). Cunningham's evidence of Mikesell's alleged bias due to her relationship with the victims' families is derived from four sources: the 2008 affidavits and the 2009 deposition testimony of jurors Staci Freeman and Roberta Wobler.

In juror Freeman's affidavit, she stated:

> At one point during the jury deliberations, I had problems with the apparent fact that all the ballistic evidence pointed to a 9mm automatic pistol and not the revolver [allegedly belonging to Cunningham]. I expressed my opinion and Nichole Mikesell responded that, You don't understand. I know the families of the people that were shot in the kitchen. The families know me and I am going to have to go back and see them. These families are my clients. I interpreted Mikesell's comments as pressure to vote guilty.

(Doc. 104–1 (Freeman Aff.) at 1-2.) Freeman testified at her deposition that, during the jury's guilt-phase deliberations, Mikesell

> stat[ed] that she dealt with the victims and their families, they knew who she was, and that if she would find him not guilty that she would have to deal with them and that's just something she didn't want to have to deal with because they knew who she was.

(Doc. 137-1 (Freeman Dep.) at 60.) When asked how this remark impacted her deliberations, Freeman testified that she "felt pressured," and "as the last one holding out, [she] felt that [she] was up against a wall, and [Mikesell] was very domineering and so I just . . . You know I regret, I shouldn't have, but I voted guilty." (*Id*. at 11.) Mikesell's comment, she said, "should never have been made . . . ." (*Id*.) Freeman also acknowledged that she was merely "paraphrasing" what Mikesell had said because it had been eight years since the trial and she "didn't have a very good memory." (*Id*. at 21-23.) And, she testified that "[n]o one forced her" to convict Cunningham. (*Id*. at 23-24.)

Juror Wobler averred in her affidavit that Mikesell said she "knew of the families of the victims from Family Services." (Doc. 103-1 (Wobler Aff.) at 1.) Wobler added in her handwriting the words "of" and "from Family Services" to her typewritten affidavit and initialed the alterations. (*Id*.) She continued, "One young woman on the jury was adamant that Jeronique was not guilty. Mikesell told the young woman and the jury that the young woman did not have to work in the local community." (*Id*.) Wobler testified at her deposition that, "at the very end of the deliberations

[Mikesell] stated she may in the future be working with the families under the Welfare Job and Family Services where she worked," but "not that she had been." (Doc. 136–1 (Wobler Dep.) at 5–6.) She denied, however, that the jurors discussed the comment or the comment had any impact on her deliberations (*Id*. at 6), or that anyone forced her to recommend the death penalty. (*Id*. at 13).

The state trial court[11] reasonably concluded that this evidence is inadmissible under Ohio's version of the no-impeachment rule, Rule 606(B).[12] (*See* Doc. 188-2 at 17-18.) The rule provides:

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[11] The state appellate court did not address this evidentiary issue.

[12] In *Doan v. Brigano*, 237 F.3d 722 (6th Cir. 2001), *abrogation on other grounds recognized by Thompson v. Parker*, 867 F.3d 641, 648 (6th Cir. 2017), the Sixth Circuit noted that the federal no-impeachment rule, Federal Evidence Rule 606(b), is similar to Ohio's Rule 606(B), but differs in that the federal rule does not require that the evidence of misconduct come from some outside source independent of the jury, and that some circuits have stated that in federal habeas proceedings, Federal Evidence Rule 1101(e) provides that the federal evidentiary rules should be applied in deciding whether juror testimony is admissible to impeach a jury verdict. *Id*. at 734 n.8 (listing cases). Nevertheless, the Sixth Circuit concluded:

> In light of the deference to state proceedings called for by AEDPA, it seems strange indeed that a federal habeas court would apply its own rules of evidence despite a conflicting state rule when it is simply reviewing the state court record in making its determination, rather than holding an evidentiary hearing in federal court. *See Shillcutt v. Gagnon*, 827 F.2d 1155, 1161 (7th Cir. 1987) (Ripple, J., concurring). We decline to apply Fed.R.Evid. 606(b) in this case since the district court did not hold an evidentiary hearing.

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

Ohio R. Evid. 606(B). It permits a juror's testimony regarding "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror," but "only after some outside evidence of that act or event has been presented." *Id*. The Supreme Court has rejected constitutional challenges to the similar federal no-impeachment rule, found in Federal Evidence Rule 606(b), as applied to evidence of juror misconduct or bias. *See Tanner v. United States*, 483 U.S. 107 (1987); *Warger v. Shauers*, 574 U.S. 40 (2014). The rule, it has explained,

> promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to

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Id. *Accord Salazar v. Dretke*, 419 F.3d 384, 399 n. 28 (5th Cir. 2005). As this Court did not hold an evidentiary hearing on this claim and is now reviewing supporting evidence from the state-court record, the Court follows *Doan* and applies Ohio Evidence Rule 606(B) here.

> challenge the verdict. The rule gives stability and finality to verdicts.

Pena-Rodriguez, 137 S. Ct. at 865.

The state trial court found that Cunningham's evidence of juror bias based on Mikesell's alleged relationship with the victims' families "speak[s] directly to the jury's deliberation process" at his trial, which is "the exact type of evidence which Rule 606(B) was designed to prohibit." (Doc. 188-2 at 18.) This Court agrees. The evidence at issue does not include extraneous information or involve outside influences, and it imparts no information specifically related to the facts of the case. *See Warger*, 574 U.S. at 51 (defining "extraneous" information under Federal Evidence Rule 606(b) as "'[e]xternal' matters [that] include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room"); *Pena-Rodriguez*, 137 S. Ct. at 863 (defining "events extraneous to the deliberative process" as reliance on outside evidence, such as newspapers, dictionaries, or a personal investigation of the facts). Cunningham does not allege, for example, that the family members attempted to contact or influence Mikesell, or that they told her information about the case. In fact, he concedes that the "contact" he alleges – Mikesell's fear of facing the families after the verdict – is just "prospective." (Doc. 205 at 18.) Ultimately, Mikesell's alleged relationship with the families "may well have informed [her] general views [about the tragedy or difficulty of their situation], but it did not provide either [her] or the rest

of the jury with any specific knowledge regarding" the allegations against Cunningham, and it, therefore, does not fall under Rule 606(B)'s exception for extraneous information. *Warger*, 574 U.S. at 51-52. And, even if some or all of the information could be considered "extraneous," Cunningham offers no outside evidence to corroborate it.[13] Accordingly, Cunningham's evidence is most likely inadmissible under Ohio's no-impeachment rule.

Actual bias. Regardless, even if this evidence of Mikesell's alleged bias is admissible, it does not establish the central premise of Cunningham's claim: that Mikesell had a relationship with the families of the victims and was improperly influenced by it. The evidence does not clearly show that there was even a real relationship between Mikesell and the victims' families. Freeman recounted that Mikesell told her that "[t]hese families are my clients"; she "knew" them and had "dealt" with them, they knew who she was, and she would see them again. But, she acknowledged that she was merely "paraphrasing" what Mikesell had said because it had been eight years since the trial

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[13] There is some question as to whether Ohio Evidence Rule 606(B)'s requirement that outside evidence corroborate evidence of juror misconduct to render it admissible, or the *aliunde* rule, is constitutional. In *Hoffner v. Bradshaw*, 622 F.3d 487, 501 (6th Cir. 2010), the Sixth Circuit observed, "This court has previously held that there is 'no constitutional impediment to enforcing' Ohio's *aliunde* rule . . . ." *Id*. at 501(quoting *Brown v. Bradshaw*, 531 F.3d 433, 438 (6th Cir. 2008)). But, in *Doan*, *supra*, the circuit court found that the state court's application of the rule, *in that case*, violated the petitioner's constitutional right to confront evidence and witnesses and to an impartial jury. *Doan,* 237 F.3d at 731-32.

and her memory was not "very good." Wobler, on the other hand, stated only that Mikesell said she "knew *of*" the victims' families and "*may*" work with them in the future.

Moreover, even assuming the victims' families were among Mikesell's clients, as Freeman recalled her saying, there is no evidence that that relationship was a sufficient basis upon which to presume bias. The Sixth Circuit has observed that "[t]here is no constitutional prohibition against jurors simply knowing the parties involved or having knowledge of the case." *McQueen v. Scroggy*, 99 F.3d 1302, 1320 (6th Cir. 1996), *overruled on other grounds*, *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004). In *Wolfe v. Brigano,* 232 F.3d 499 (6th Cir. 2000), however, it held that two jurors were biased because their relationships with the victims' parents were "close and ongoing." *Wolfe,* 232 F.3d at 502. One of the jurors had an "ongoing business relationship" with the victim's parents; the other was "close friends" with them and visited them "quite a bit." *Id*. One juror had "spoken to" the parents, and the other's husband "had spoken with the victim's parents about what they thought had happened when their son was killed, information that he related to her at some length." *Id.* The jurors could not state unequivocally that they could set aside their relationships with the victim's parents and decide the case fairly. *Id.*

The following year, the circuit court distinguished *Wolfe* and found no bias where a juror "had an ongoing professional relationship with the victim's mother as her welfare caseworker." *Miller v. Francis*, 269 F.3d 609, 618 (6th Cir. 2001). The court found "no evidence

that the relationship was so 'close' that bias must be presumed." *Id.* It rejected the dissent's position that all relationships between welfare caseworkers and their clients are "close." *Id.* The court noted that welfare caseworkers have dozens, if not hundreds of clients, and the juror's responses during *voir dire* about her relationship with the victim's mother were not "indicative of a friendship or strong personal bond" or "an inability to put their professional relationship aside during the trial." *Id.* The juror also responded without equivocation during *voir dire* that she could face the woman after rendering a not guilty verdict. *Id. See also Porter v. Gramley*, 112 F.3d 1308, 1318 (7th Cir. 1998) (finding the "attenuated connections" between a juror and the victim's mother, who attended the same large church, did "not suffice to prove actual bias").

This case is far closer to *Miller* than to *Wolfe*: Cunningham has presented no evidence of a "close and ongoing" relationship between Mikesell and the victims' families such that bias can be presumed. Merely knowing someone does not establish "a friendship or strong personal bond"; nor does a caseworker-client relationship. And, Cunningham has failed to demonstrate anything more.

Furthermore, Mikesell was very forthcoming during *voir dire* about her employment at Allen County Children Services and her familiarity with prosecutors and attorneys because of it. As Cunningham concedes, Mikesell was never questioned directly about her relationship with the victims' families during *voir dire*. (Doc. 200-1 at 16.) But, she was questioned by the trial court,

prosecution, and defense counsel about her work and repeatedly "swore that [she] could set aside any opinion [she] might hold and decide the case on the evidence," with no indication that "her protestation of impartiality [should not be] believed." *Patton*, 467 U.S. at 1036.

Early in *voir dire*, Mikesell, who was Juror No. 21 (*see* Doc. 192-4 at 296 (Mikesell Juror Questionnaire)), volunteered that she knew the prosecutors. The trial court closely examined her about the connection in the following colloquy:

> The Court: 21. Who do you know?
>
> Prospective Juror: I've worked with several of the prosecutors with regards to my job.
>
> The Court: And what is your job?
>
> Prospective Juror: I work at Allen County Children's Services. I'm an investigator there.
>
> The Court: Okay. And would that have any bearing on your ability to be fair and impartial?
>
> Prospective Juror: No.
>
> The Court: **Could you decide the case – this case from the facts that are presented from this witness stand and could you look everybody in the eye after the case is over and say, hey, I decided the case from what was presented at court. It had nothing to do with whether I knew you, personalities or anything?**
>
> **Okay.**

(Doc. 194-1 at 488-89 (emphasis added).)

A prosecutor, David Bowers, interrogated Mikesell when she volunteered that she knew defense attorney Robert Grzybowski in this exchange:

> Mr. Bowers: . . . Mr. Grzybowski, do any of you know him?
>
> Prospective Juror: Absolutely.
>
> Mr. Bowers: You ever been a witness on the witness stand?
>
> Prospective Juror: I've been a witness on the witness stand.
>
> Mr. Bowers: Has he ever cross-examined you?
> Prospective Juror: Absolutely.
>
> Mr. Bowers: Okay. You – you're Juror No.
>
> Prospective Juror: 21.
>
> Mr. Bowers: 21.
>
> And you know everyone I guess working – Do you work at Juvenile Court or Ch–
>
> Prospective Juror: Children's Services.
>
> Mr. Bowers: Children's Services.
>
> **The fact that you work there, you know a lot of the officers, you know a lot of the prosecutors, you know a lot of defense counsel, you know everyone so to speak. Any bearing whatsoever?**
>
> Prospective Juror: **No.**
>
> Mr. Bowers: Okay.

(*Id.* at 517-18 (emphasis added).)

And defense counsel engaged in this dialogue with her:

Mr. Grzybowski: Good afternoon, Juror 21, how are you? Prospective Juror: Fine.

Mr. Grzybowski: We've met previously? Prospective Juror: Yes.

Mr. Grzybowski: **The fact that you and I have seen each other in a professional basis for five (5) or so years does that, in any way, taint you from being a fair and impartial juror?**

Prospective Juror: **No.**

Mr. Grzybowski: Okay, why won't that taint you in any way?

Prospective Juror: **Because I'm here to look at the facts of the case**.

Mr. Grzybowski: Okay.

Prospective Juror: **Regardless if I know you or anyone else doesn't mean anything.**

Mr. Grzybowski: Because we have had the opportunity to interact as well as I know members of the prosecutor's office you've worked with them also, correct?

Prospective Juror: Correct.

Mr. Grzybowski: Do you believe that you'll be able to look at the facts of this case and decide this case based on those facts?

Prospective Juror: Absolutely.

Mr. Grzybowski: Okay. Now, I do know that you work for Children's Services?

Prospective Juror: Yes.

Mr. Grzybowski: And that working for Children's Services you work around children?

Prospective Juror: Yes.

Mr. Grzybowski: There was a three year old [*sic*] child involved in this particular case.

Prospective Juror: Yes.

Mr. Grzybowski: She died.

Prospective Juror: Uh-huh (yes).

Mr. Grzybowski: Is that, in any way, going to go ahead and cause you to not be fair and impartial to Mr. Cunningham?

Prospective Juror: No.

Mr. Grzybowski: Any questions?

Prospective Juror: No.

(*Id.* at 671-73 (emphasis added).)

It is evident from these exchanges that the trial court conducted a full and fair *voir dire*. Mikesell was cooperative during the process, eagerly volunteering information about herself, and she was carefully examined by the judge, prosecutor, and defense counsel about the people she had met through her social services work. She steadfastly maintained throughout *voir dire* that she could decide the case based on the evidence and not be influenced by anyone she knew as a result of her work. There was no hint of

any bias on her part.[14] Neither Cunningham's evidence nor the trial record, therefore, demonstrates that Mikesell was actually biased due to a relationship with the families of the murder victims.

Intentional concealment. Furthermore, even assuming that Cunningham has established that Mikesell had a close and ongoing relationship with the victims' families, he has offered no evidence to suggest that Mikesell deliberately concealed that relationship in response to a material question on *voir dire*, and that a correct response would have provided a valid basis for a challenge for cause, entitling him to relief under *McDonough*. *McDonough Power Equip., Inc.*, 464 U.S. at 556. Cunningham claims Mikesell withheld "extrajudical information" by responding "No" to a question the prosecutor asked toward the end of *voir dire*: "Anything that you feel you need to bring to our attention that you haven't already?" (Doc. 200-1 at 9 (quoting Doc. 194-1 at 567).) But, it is

---

[14] Cunningham asserts in a conclusory fashion that the trial court did not conduct a "full, fair, and proper *voir dire*," and had he been "permitted the *voir dire* required . . ., it is possible that Mikesell's lack of impartiality, exposure to extra-judicial information, and inability to be fair would have been discovered and she could have been removed." (Doc. 200-1 at 9.) However, "[t]he adequacy of *voir dire* is not easily the subject of appellate review." *Morgan*, 504 U.S. at 730. The trial court has "great latitude" in conducting *voir dire*, and questions are "constitutionally compelled" only "if the trial court's failure to ask these questions [renders] the defendant's trial fundamentally unfair." *Williams v. Bagley*, 380 F.3d 932, 944 (6th Cir. 2004) (internal quotation marks and citations omitted). Cunningham has provided no legal or factual analysis demonstrating how the trial court conducted a fundamentally unfair *voir dire*, and this assertion is meritless.

unclear that the prosecutor asked Mikesell this question and not another juror, and even if he did, such a general, catchall question would not provide the basis for deliberate concealment. Cunningham, therefore, also has not established intentional concealment under *McDonough*.

Harmless error. Finally, habeas courts review constitutional errors at trial such as Sixth Amendment violations under the harmless error standard established in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *See Smith,* 455 U.S. at 215, 220; *Mason v. Mitchell*, 320 F.3d 604, 638 (6th Cir. 2003); *Doan*, 237 F.3d at 736. Here, Cunningham would have to show that Mikesell's presence on the jury "'had substantial and injurious effect or influence in determining the jury's verdict[.]'" *Doan*, 237 F.3d at 736 (quoting *Brecht*, 507 U.S. at 637). Even assuming Cunningham could establish that Mikesell's presence on the jury amounted to constitutional error due to her relationship with the victims' families and resulting bias, Cunningham has not shown beyond conclusory assertions that she substantially affected or influenced the jury's verdict or sentence. In fact, Freeman testified that "[n]o one forced her" to convict Cunningham. (Doc. 137-1 at 23-24.) And, Wobler denied that Mikesell's comment about knowing the victims' families had any impact on her deliberations (Doc. 136-1 at 6), or that anyone forced her to recommend the death penalty (*id*. at 13).

Accordingly, Cunningham's claim of juror bias based on juror Mikesell's alleged relationship with the families of the victims of Cunningham's crimes is meritless.

CONCLUSION

For the foregoing reasons, this Court denies Cunningham's Amended Petition for Writ of Habeas Corpus (Doc. 200) and Second Motion to Compel Discovery (Doc. 206). The Court further certifies that, pursuant to 28 U.S.C. § 1915(a)(3), an appeal from this decision could be taken in good faith as to Cunningham's juror-bias claim based on juror Mikesell's relationship with the families of the murder victims, as a reasonable jurist could debate the Court's conclusions regarding that claim, and the Court issues a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b) as to that claim.

IT IS SO ORDERED.

s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
Chief Judge
United States District Court

DATED: 12/18/19

APPENDIX C

IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY

CASE NO. 1-04-19

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

JERONIQUE D. CUNNINGHAM,

DEFENDANT-APPELLANT

OPINION

CHARACTER OF PROCEEDINGS: Criminal: Appeal from Common Pleas Court

JUDGMENT: Judgment Affirmed

DATE OF JUDGEMENT ENTRY: November 8, 2004

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BRYANT, J.

{¶1} Appellant, Jeronique D. Cunningham ("Cunningham"), appeals the February 11, 2004 judgment entry of the Common Pleas Court of Allen County denying postconviction relief to Cunningham and the February 12, 2004 judgment entry of the Common Pleas Court of Allen County denying Cunningham leave of court to conduct discovery and denying Cunningham's motion for funds to retain a firearms and ballistics expert.

{¶2} The pertinent facts and procedural history of the case are as follows. On January 3, 2002, Cunningham and his brother, Cleveland Jackson ("Jackson"), went to the residence of Loyshane Liles ("Shane") at 503 East Eureka Street in Lima, Ohio, to buy some drugs and presumably to rob Shane. Shane was not at the residence when they arrived, but several friends and family members were present. Shane's girlfriend, Tomeaka Grant, called Shane to tell him Cunningham was at the residence and reported that Shane would be home shortly. Cunningham and Jackson waited in the living room, where three teenagers, Dwight Goodloe, Coron Liles, and Leneshia Williams, were watching a movie and talking. Tomeaka Grant went into the kitchen where

she visited with her brother, James Grant, and his three-year-old daughter, Jala Grant, and a family friend, Armetta Robinson.

{¶3} Shane arrived at the residence shortly after Cunningham and Jackson arrived. Shane and Jackson then spoke quietly on the stairway in the living room about Shane selling drugs to Jackson. Cunningham remained in the living room seated on the couch with the three teenagers. As Shane and Jackson continued to talk, Cunningham pulled out a gun and ordered the three teenagers into the kitchen. When the teenagers hesitated, Cunningham struck Coron Liles hard in the jaw with the gun. The teenagers then ran into the kitchen, followed by Cunningham. Cunningham then held the seven people in the kitchen at gunpoint

Meanwhile, Jackson also pulled a gun on Shane on the living room stairway, almost simultaneously with Cunningham pulling his gun. Jackson walked Shane upstairs at gunpoint and demanded drugs and money from Shane. Jackson walked Shane back downstairs and then tied Shane's hands together behind his back and guided Shane to the kitchen. As Shane walked into the kitchen, Jackson shot him in the back and Shane fell to the floor. Cunningham and Jackson then began firing their guns at the group of people in the kitchen. When the shooting stopped, the victims heard the guns clicking. Cunningham and Jackson then left the residence through the front door.

{¶4} Shane, assisted by Tomeaka Grant, called 9-1-1. Coron Liles and Dwight Goodloe ran out the backdoor and flagged down a woman who drove them to the hospital. The remaining victims were found at

the scene by the police and emergency medical personnel. Three-year-old Jala Grant and seventeen-year-old Leneshia Williams were both killed as a result of gunshot wounds to their heads. The remaining victims all suffered gunshot injuries as well.

{¶5} On January 10, 2002, Cunningham was indicted on the following ten counts: count one charged Cunningham with the aggravated murder of Jala Grant, in violation of R.C. 2903.01(B); count two charged Cunningham with the aggravated murder of Leneshia Williams, in violation of R.C. 2903.01(B); count three charged Cunningham with aggravated robbery, in violation of R.C. 2911.01(A)(1); counts four through nine charged Cunningham with the attempted aggravated murders of Armetta Robinson, Loyshane Liles, Tomeaka Grant, Coron Liles, Dwight Goodloe, Jr., and James Grant, respectively, in violation of R.C. 2923.02 and R.C. 2903.01(B); and count ten charged Cunningham with having weapons under disability, in violation of R.C. 2923.13(A)(2). Counts one and two also included two death penalty specifications pursuant to R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7), as well as gun and repeat violent offender specifications. Each non-capital count also included gun and repeat violent offender specifications. The trial court severed count ten prior to trial and the count was later dropped by the prosecution.

{¶6} A jury trial began in this case on June 10, 2002. The jury returned verdicts of guilty on counts one through nine, as well as the accompanying death penalty and firearm specifications on June 18, 2002.

The penalty phase of the trial began on June 20, 2002. The trial court merged the aggravating circumstances, so that only the R.C. 2929.04(A)(5) specification that each aggravated murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons was before the jury.

{¶7} The jury subsequently recommended that Cunningham be sentenced to death. The trial court held a separate hearing on June 25, 2002, wherein the court adopted the jury's recommendation and ordered that Cunningham be sentenced to death on the two counts of aggravated murder. The trial court also sentenced Cunningham to terms of imprisonment on the non-capital convictions. On August 12, 2002, Cunningham filed a direct appeal in the Ohio Supreme Court, where the case is currently pending.

{¶8} Cunningham filed his petition for postconviction relief on August 1, 2003 in the Common Pleas Court of Allen County. The State filed an answer and motion to dismiss on October 24, 2003. Cunningham also filed a motion for leave to pursue discovery and a motion for funds to retain a ballistics and firearms expert. On February 11, 2004, the trial court dismissed Cunningham's petition for postconviction relief. On February 12, 2004, the trial court denied Cunningham's motions for discovery and funds for expert assistance. It is from these judgments that Cunningham now appeals, asserting the following three assignments of error.

The trial court erred in dismissing appellant's post-conviction petition where he presented sufficient operative facts to merit

relief or, at bare minimum, an evidentiary hearing.

The trial court erred when it denied petitioner's post-conviction petition without first affording him the opportunity to conduct discovery.

The trial court erred when it overruled appellant's motion for funds to employ an expert.

{¶9} In his first assignment of error, Cunningham argues that the trial court erred in dismissing his postconviction petition for the following reasons: (1) Cunningham raised violations of his constitutional rights that warranted relief; (2) the petition contained sufficient operative facts, meriting an evidentiary hearing; and (3) Cunningham's grounds were supported by evidence dehors the record and could not have been fully litigated on direct appeal. In its judgment entry denying postconviction relief, the trial court concluded that Cunningham had failed to meet his burden of asserting facts which would entitle him to relief and that most of the claims could have been raised at trial or on direct appeal and were therefore barred by the doctrine of res judicata.

{¶10} This court clearly set forth the standards applicable to the review of petitions for postconviction relief in *State v. Yarbrough,* 3d Dist. No. 17-2000-10, 2001-Ohio-2351, 2001 WL 454683. R.C. 2953.21 governs postconviction relief and provides "a remedy for a collateral attack upon judgments of conviction claimed to be void or voidable under the United States or the Ohio Constitution." Id. at *8. Therefore, in order to prevail on a petition for postconviction relief, a

petitioner must establish that there was a denial or infringement of his constitutional rights. See R.C. 2953.21(A)(1).

{¶11} This court has noted though that "the postconviction statute is not intended * * * to permit 'a full blown retrial of the [petitioner's] case.'" *Yarbrough,* 2001 WL 454683 at *3, citing *State v. Robison* (June 19, 1989), 4th Dist. No. 88 CA 15, 1989 WL 72802. Since postconviction petitions are limited to claimed constitutional violations, "procedural or other errors at trial not involving constitutional rights are not relevant or subject to review." *Yarbrough,* 2001 WL 454683 at *3, citing *Robison,* 1989 WL 72802.

{¶12} A petitioner is not necessarily entitled to an evidentiary hearing when a petition for postconviction relief is filed. R.C. 2953.21(C); see also *State v. Calhoun,* 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905. Rather, the trial court shall determine whether there are substantive grounds for relief before granting a hearing on the petition. R.C. 2953.21(C). In order to show that substantive grounds for relief exist, a petitioner must produce sufficient credible evidence to demonstrate that he suffered a violation of his constitutional rights. R.C. 2953.21(A)(1); *Calhoun,* 86 Ohio St.3d at 283. Ohio courts have held that it is not unreasonable to require a petitioner to show in his postconviction petition that the alleged errors resulted in prejudice before a hearing on the petition is scheduled. See *Calhoun,* 86 Ohio St.3d at 283; *State v. Jackson* (1980), 64 Ohio St.2d 107, 112, 413 N.E.2d 819. Therefore, before a hearing is granted, the petitioner bears the initial

burden to submit evidentiary documents containing sufficient operative facts to demonstrate the errors alleged in the petition for postconviction relief. *Calhoun,* 86 Ohio St.3d at 283, citing *Jackson,* 64 Ohio St.2d at syllabus. The trial court has the sound discretion to decide whether to grant the petitioner an evidentiary hearing. *Calhoun,* 86 Ohio St.3d at 284.

{¶13} The trial court must examine the petition, any supporting affidavits, any documentary evidence and all the files and records in the case when determining whether the petition contains substantive grounds for relief. R.C. 2953.21(C). While a trial court should give deference to sworn affidavits filed in support of the petition, the trial court may also exercise discretion in judging the credibility of the affidavits to determine whether to accept the affidavits as true statements of fact. *Calhoun,* 86 Ohio St.3d at 284.

{¶14} The Ohio Supreme Court has applied the doctrine of res judicata to postconviction proceedings. *State v. Reynolds,* 79 Ohio St.3d 158, 1997-Ohio-304, 679 N.E.2d l 131. The Court in *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus, 226 N.E.2d 104 held that:

> **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.**

A claim for relief presented in a postconviction petition is, under the doctrine of res judicata, subject to dismissal without an evidentiary hearing when it presents a matter that could fairly have been determined on direct appeal and without resort to evidence dehors the record. Id.

{¶15} In addition, the doctrine of res judicata has been specifically applied to postconviction proceedings alleging ineffective assistance of counsel. *State v. Cole* (1982), 2 Ohio St.3d 112, syllabus, 443 N.E.2d 169.

> **Where defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, *res judicata* is a proper basis for dismissing defendant's petition for postconviction relief. (citations omitted.)**

In the case sub judice, Cunningham was represented by different attorneys on appeal than at the trial level. Therefore, any claim of ineffective assistance of counsel which could fairly have been determined without resort to evidence dehors the record had to be brought on direct appeal or it is waived, and now barred by res judicata.

{¶16} To overcome the barrier of res judicata, a petitioner must attach evidence dehors the record that is "competent, relevant and material" and that was not in existence or available for use at the time of the trial. *State v. Jackson,* 10th Dist. No. 0JAP-808, 2002-

Ohio-3330, ¶45, citing *State v. Gipson* (Sept. 26, 1997), 1st Dist. Nos. C-960867, C-960881, 1997 WL 598397, *6. Such evidence "must meet some threshold standard of cogency; otherwise it would be too easy to defeat [the doctrine of 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." *State v. Lawson* (1995), 103 Ohio App.3d 307, 315, 659 N.E.2d 362.

{¶17} Appellate review of a trial court's disposition of a petition for postconviction relief presents mixed questions of law and fact. *State v. Smith* (Sept. 24, 1999), 11th Dist. No. 98-T-0097, 1999 WL 778376, *3,; *State v. Akers* (Sept. 9, 1999), 4th Dist. No. 98 CA 33, 1999 WL 731066, *7. The trial court's factual findings will not be reversed unless they are against the manifest weight of the evidence. *State v. Cornwell,* 7th Dist. No. 00-CA-217, 2002-Ohio-5177, ¶28. Judgments will not be reversed, as being against the manifest weight of the evidence, if they are supported by some competent, credible evidence. Id., citing *Gerijo, Inc. v. Fairfield,* 70 Ohio St.3d 223, 226, 1994-Ohio-432, 638 N.E.2d 533; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus, 376 N.E.2d 578. Upon accepting such findings of fact, an appellate court then independently determines whether the trial court's conclusions of law are proper. *Cornwell,* 2002-Ohio-5177, at ¶28.

{¶18} For purposes of clarity and logic, we have chosen to address the grounds for relief in a different order than that in which Cunningham discusses them.

We begin by addressing the grounds which raise ineffective assistance of counsel.

{¶19} In *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674, the United States Supreme Court established the process for evaluating a claim of ineffective assistance of counsel. The court held that an appellant must first show that his counsel's performance was deficient. Id. at 687. An appellant demonstrates this by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. Second, the appellant must show that his counsel's deficient performance prejudiced him. Id. This is proven by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

{¶20} The Ohio Supreme Court set forth the test as to whether an individual has been denied effective counsel in *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304. In *Hester,* the court held that the test was "whether the accused, under all the circumstances, * * * had a fair trial and substantial justice was done." Id. at 79. The Ohio Supreme Court later revised this test in *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 358 N.E.2d 623, vacated on other grounds in (1978), 438 U.S. 910, 98 S.Ct.3135, 57 L.Ed.2d 1154, stating:

> **When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense**

counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.

The court also placed the burden of proof upon the appellant, "since in Ohio a properly licensed attorney is presumably competent." Id., citing *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164; *State v. Williams* (1969), 19 Ohio App.2d 234, 250 N.E.2d 907.

{¶21} Therefore, in order for an appellant to overcome the presumption of effectiveness, he "must submit sufficient operative facts or evidentiary documents which, if proven, would show that appellant was prejudiced by said ineffective counsel." *State v. Smith* (1987), 36 Ohio App.3d 162, 163, 521 N.E.2d 1112. Until appellant has proven prejudice as a result of ineffective counsel, an evidentiary hearing is not required. See *State v. Pankey* (1981), 68 Ohio St.2d 58, 428 N.E.2d 413.

{¶22} We now review the claims presented by Cunningham alleging ineffective assistance of counsel at the guilt phase of the trial using the standard set forth above. We begin with the first and fourth claims for relief, in which Cunningham alleged that his defense counsel was ineffective for failing to obtain the appointment of a qualified ballistics expert and inadequately preparing the defense case at trial. Cunningham argues that counsel could have and should have shown to the jury a videotape of a procedure in which .380 caliber cartridges were placed

into different caliber revolvers and fired. Cunningham argues that this procedure would have clarified for the jury that he could not have fired a .380 caliber cartridge in any of the weapons (.38, .357, or .44 revolver) which the state suggested he possessed on January 3, 2002. Cunningham also argues that defense counsel was ineffective for failing to adequately rebut the testimony of state's witnesses Cynthia Beisser and John Heile with regard to this point.

{¶23} It is not disputed in the record or by the state that on January 3, 2002 Cunningham was not armed with a semi-automatic weapon or a weapon with a clip, but rather was armed with a revolver. Since the weapons Cunningham and Jackson purportedly used on that day were not recovered, witness testimony was the only evidence to indicate which weapon Cunningham possessed. In addition, there is no dispute in the record or by the state that the casings and bullets recovered at the scene by law enforcement officers were of a .380 caliber, which are typically fired by a semi-automatic weapon and not a revolver.

{¶24} John Heile, a forensic scientist with the Bureau of Criminal Investigation and Identification, was a witness for the state. Heile testified that the cartridges recovered at the scene were all fired from the same weapon, a .380 caliber pistol. Heile also testified that most of the bullets recovered at the scene were .380 automatic caliber bullets. Heile could not conclusively state that one of the bullets was fired from the same weapon as the others due to its condition. Also, a lead core from a full metal jacket bullet was recovered which Heile could not

conclusively state was fired from the same weapon as the other bullets. However, Heile did testify that the damaged bullet and fragmented lead core had the characteristics of .380 caliber bullets. Since Heile did not have the actual weapons to analyze, he constructed a list of possible guns which could have fired the bullets he analyzed from the scene. All of the weapons on the list were semi-automatic handguns as opposed to revolvers. While Heile testified that .380 caliber cartridges would fit in the chamber of a .38 caliber revolver, he stated that it was unlikely that the revolver would fire. Heile also testified that the .380 caliber cartridges would not fire in a .44 caliber revolver without some type of manipulation to the weapon.

{¶25} Defense counsel thoroughly questioned Heile on cross-examination regarding the differences between weapons of different calibers and the casings and bullets that were recovered from the scene. Heile was consistent in his testimony that the .380 caliber cartridges would fit in a .38 caliber revolver, but that the revolver likely would not fire.

{¶26} Cynthia Beisser, Lucas County coroner, was also a witness for the state. Dr. Beisser performed the autopsies of Leneshia Williams and Jala Grant and testified as to her findings. Dr. Beisser found that both victims died of gunshot wounds to the head. Dr. Beisser testified that she could not determine the caliber of the projectile that was fired based solely on her examination of the wounds. Dr. Beisser testified that the entrance wounds on Leneshia Williams and Jala Grant were consistent with the size of a .380 caliber pistol. Dr. Beisser also testified that the

entrance wounds on both victims were consistent with a range of different size caliber weapons. Further, Dr. Beisser testified that .380 and .38 caliber bullets are essentially the same size.

{¶27} Defense counsel also thoroughly examined Dr. Beisser regarding the wounds she examined on the two victims. While Dr. Beisser maintained that the size of the wounds were consistent with the size of .380 caliber bullets, she also stated that the size of .380 and .38 caliber bullets are in essence equal. Although Dr. Beisser was unable to conclusively state the caliber of the bullets that caused the wounds on the victims, she testified that the size of the wounds were not consistent with a large caliber weapon. Further, due to the elasticity of the skin, a bullet may stretch the skin when it passes through it but the skin will snap back in place. Therefore, Dr. Beisser testified that the size of the hole in the skin is not exactly the same size as the projectile that goes through the skin.

{¶28} In the defense's presentation of evidence, Daniel Reiff, a gun shop owner, testified regarding the differences between a .380 caliber pistol and a .44 caliber revolver. Defense counsel apparently wanted to give the impression that Cunningham possessed a .44 caliber revolver on January 3, 2002. Reiff testified that a .44 caliber revolver is much bigger than a .380 caliber pistol. Similarly, Reiff testified that .44 caliber bullets are much bigger than .380 caliber bullets. On cross-examination, Reiff testified that .38, .357, .380 and .9 caliber cartridges are all approximately the same diameter and that they would be indistinguishable to the eye of an average person.

{¶29} Cunningham argues that defense counsel's decision to rebut the prosecution's case with the testimony of Daniel Reiff "did not work." Appellant's Merit Brief, p. 7. However, as noted above, this is not the standard by which a reviewing court determines ineffective assistance of counsel. A reviewing court may not second-guess decisions of counsel which could be considered matters of trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128. While the testimony of Daniel Reiff may not have convinced the jury that Cunningham did not fire his gun, defense counsel's cross-examination of the state's witnesses and presentation of the case-in-chief for the defense did not fall below the level of reasonable representation.

{¶30} While the evidence presented at trial showed that a .380 semi-automatic weapon was fired during the shootings on January 3, 2002, the evidence also supported the finding by the jury that Cunningham fired his weapon as well. The testimony of the five witnesses who could recall the events of January 3, 2002 supported the finding that Cunningham fired his weapon at the victims. Since the testimony showed that Cunningham's weapon was a revolver, the casings of the bullets would not have been expelled at the scene, as is the case with a semi-automatic weapon. Therefore, while .380 caliber casings were collected by law enforcement officers at the scene, casings from the weapon fired by Cunningham were not recovered, which would be consistent with him firing a revolver.

{¶31} Further, the evidence shows that only five spent .380 caliber bullets and one .380 caliber bullet

fragment were recovered by the police although there were a total of thirteen gunshot wounds among the victims. The difference in the number of bullets recovered and gunshot wounds shows that the physical evidence of the bullets and casings is not conclusive regarding which weapon caused the victims' injuries. Moreover, other pieces of evidence were either not located or were not maintained by the time of trial. Coron Liles, who was shot in the mouth, testified that as he was running to get help after the shooting he spit out a bullet a few blocks from the residence on Eureka Street. This bullet was never recovered by law enforcement officers. A bullet was also discovered on the front steps of the residence on Eureka Street, which was photographed and recovered by law enforcement officers, but was inadvertently misplaced prior to trial. Finally, a bullet still remained in the arm of Tomeaka Grant, a victim of the shootings on January 3, 2002, at the time of trial. The caliber of the bullet in Tomeaka Grant's arm is unkown.

{¶32} Thus, as the trial court held, "while the physical evidence did not directly establish that a revolver was fired during the shootings, the physical evidence and surrounding facts did not in the least rule that out." February 11, 2004 Judgment Entry Denying Post-Conviction Relief, p. 11. The trial court's finding is supported by the record.

{¶33} Cunningham argues that defense counsel could have convinced the jury that a revolver could not have fired .380 caliber cartridges by obtaining a qualified ballistics expert. Cunningham relies on the post-trial interview statements of jurors that it was

their understanding that a revolver could fire a .380 caliber cartridge to support his argument. However, based on the evidence outlined above, the jury's finding of Cunningham's guilt was clearly supported. Sufficient evidence existed aside from the analysis of the physical evidence to support Cunningham's involvement in the shootings. Therefore, we cannot say that had defense counsel obtained a ballistics expert it would have established that Cunningham did not fire a weapon at the residence on Eureka Street on January 3, 2002. Even if Cunningham had not fired a weapon in this incident, the jury would still have been able to find him guilty of complicity in all of the crimes and specifications charged.

{¶34} The evidence submitted by Cunningham lacks the threshold standard of cogency. The evidence is only marginally significant and does not advance Cunningham's claim beyond mere hypothesis. Cunningham's counsel was not ineffective so as to have precluded a fair trial or to have created an unreliable result. Since Cunningham has failed to support these grounds with evidence that contains sufficient operative facts to demonstrate he was prejudiced as a result of ineffective counsel, we hold that the trial court did not error in dismissing the first and fourth grounds for relief without an evidentiary hearing.

{¶35} In the ninth, tenth, eleventh and twelfth grounds for relief, Cunningham alleged that defense counsel was ineffective for failing to investigate, prepare and present available mitigating evidence to the jury pertaining to his character, history and background. In the ninth ground, Cunningham

alleged counsel did not present records or testimony from employees of the Allen County Children's Services pertaining to Cunningham's involvement with the agency. In the tenth ground, Cunningham alleged counsel failed to present testimony from Sharon Cage, a nurse's aide at Lima Manor Nursing Home, who provided long term care to Bettye Cunningham, Cunningham's mother. In the eleventh ground, Cunningham alleged counsel failed to present evidence of Cunningham's limited involvement in the shootings, consisting of statements Cunningham and Jackson had made to police and the results of the Voice Stress Analyzer tests (VSA) administered to Cunningham and Jackson. Finally, in the twelfth ground, Cunningham alleged counsel failed to seek the assistance of a cultural expert and present such evidence at the mitigation phase. Cunningham argues that these failures by defense counsel prejudiced him.

{¶36} Ohio courts have held that the claim of failure to present mitigating evidence is properly considered in a postconviction proceeding because evidence in support of the claim could not be presented on direct appeal. See *State v. Keith,* 79 Ohio St.3d 514,536, 1997-Ohio-367, 684 N.E.2d 47: *State v. Scott* (1989), 63 Ohio App.3d 304, 308, 578 N.E.2d 841. In *Wiggins v. Smith* (2003), 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471, the United States Supreme Court held that the failure to conduct a reasonable investigation into a defendant's history and background and present mitigating evidence constituted ineffective assistance of counsel. In his ninth, tenth and twelfth grounds for relief, Cunningham argued that counsel's failure to present additional evidence of his positive qualities fell below

the standard of reasonable and effective counsel and prejudiced him. However, Cunningham has not shown what these witnesses or records would have provided to the jury that was not provided by the witnesses who testified at the penalty phase. It is uncertain that such testimony or records would have made a difference in the determination of the jury.

{¶37} Our review of the record reveals that Cunningham's counsel adequately investigated his background and character and presented such evidence through the testimony of Cunningham's mother and sister and a forensic psychologist. The forensic psychologist, Dr. Davis, evaluated Cunningham several times, interviewed Cunningham's mother, and reviewed records and other information regarding Cunningham's history and background. Cunningham's mother and sister both testified as to the involvement of Children's Services during Cunningham's childhood, as well as the abuse that both Bettye and the children endured. Dr. Davis also testified regarding Children's Services involvement with the family, specifically relaying the circumstances surrounding the multiple referrals and home visits. Further, Dr. Davis explained his assessments of Cunningham and gave a lengthy description of the factors that likely contributed to Cunningham's problems with depression and substance abuse.

{¶38} The documents presented by Cunningham in support of his ninth, tenth and twelfth grounds do not set out any information that would not have been repetitive and cumulative of that presented at trial. It is within the purview of counsel to determine whether

additional expert testimony or other information regarding a defendant's background is cumulative in nature. *Yarbrough,* 2001 WL 454683, at *7.

{¶39} In the eleventh ground, Cunningham argues that counsel should have presented to the jury Cunningham's and Jackson's statements to law enforcement officers, as well as the results of the VSA tests administered to them. The Ohio Supreme Court has ruled that, while defendants must be given wide latitude in the presentation of mitigating evidence, the Rules of Evidence nevertheless apply at the sentencing phase of a capital trial. *State v. Esparza* (1988), 39 Ohio St.3d 8, 11-12, 529 N.E.2d 192; see also *State v. Jenkins* (1984), 15 Ohio St.3d 164, 171, 473 N.E.2d 264. While the evidence that Cunningham argues should have been admitted was not ruled upon by the trial court at the penalty phase, it is possible that defense counsel did not seek to admit such evidence due to its presumed inadmissibility. The trial court had already ruled on the admissibility of Cunningham's statement at the guilt phase of the trial. In addition, results of lie detector tests are generally inadmissible under Ohio law. Further, defense counsel could have decided not to attempt to admit such evidence due to the incriminating nature of the evidence.

{¶40} Moreover, this court has repeatedly held that debatable trial tactics and strategies do not constitute a denial of effective assistance of counsel. *Yarbrough*, 2001 WL 454683*,* *7, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189. We will not second-guess every aspect of defense counsel's presentation of mitigation evidence at the

penalty phase. *Yarbrough,* 2001 WL 454683, at *7. It is well-settled that the existence of alternative or additional mitigation theories not pursued by defense counsel does not establish ineffective assistance of counsel. Id., citing *State v. Combs* (1994), 100 Ohio App.3d 90, 105, 652 N.E.2d 205.

{¶41} Nothing in the record before us or in the evidentiary material offered in support of these claims presents a reasonable probability that, but for the alleged omissions of counsel, the result of the penalty phase of Cunningham's trial would have been different. Thus, Cunningham failed to sustain his burden of demonstrating substantive grounds for relief. We, therefore, hold that the trial court did not err in dismissing Cunningham's ninth, tenth, eleventh and twelfth grounds for relief without an evidentiary hearing.

{¶42} In the second and sixth grounds for relief, Cunningham alleged that the prosecution violated the *Brady* rule by failing to provide defense counsel with the police summaries of interviews with witnesses Dwight Goodloe and James Grant that were conducted shortly after the shootings. Cunningham argues that these statements contained information of the events that transpired on January 3, 2002 that would have allowed defense counsel to attack or impeach the testimony presented by the witnesses at trial.

{¶43} There is an obligation imposed upon the prosecution to disclose to an accused evidence that is material to the accused's guilt or innocence. *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. Evidence is "material" only if there is a

"reasonable probability" that the result of the proceeding would have been different had the evidence been disclosed to the defense. *U. S. v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id., quoting *Strickland,* 466 U.S. at 694.

{¶44} The court in *Kyles v. Whitney* (1995), 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L.Ed.2d 490, outlined four aspects of materiality under the standard set forth in *Bagley*. Regarding the first aspect, the *Kyles* court stated that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Id. The *Kyles* court further stated:

> **The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'**

Id., quoting *Bagley,* 473 U.S. at 678.

{¶45} The second aspect of materiality is that it is not a test of sufficiency of evidence. *Kyles,* 514 U.S. at 434. In other words, "[o]ne does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but

by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435. Regarding the third aspect, the court noted that "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review." Id. The fourth and final aspect of materiality is that its definition in terms of the suppressed evidence is considered collectively, not item by item. Id. at 436.

{¶46} In the *Kyles* case, the United States Supreme Court found that disclosure of the witnesses' statements "would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." Id. at 441. In its assessment, the court in *Kyles* considered whether the value of the witnesses would have been substantially reduced or destroyed by disclosure of the statements. Id.

{¶47} In the case sub judice, we cannot say that disclosure of the statements of Dwight Goodloe or James Grant to defense counsel prior to trial would have made a different result reasonably probable. The prosecution did not willfully withhold evidence that they knew would be favorable to the defense. Rather, the prosecution made all prior statements of the witnesses available to the court for in camera inspection pursuant to Crim.R. 16(B)(1)(g). Both Goodloe and Grant were key witnesses for the prosecution and their prior statements were made available by the prosecution for review by the trial court subsequent to their direct examination testimony. The court reviewed these statements,

along with statements of four other witnesses, during the trial and determined that there were inconsistencies in the testimony of some of the witnesses and not with others. The court determined that there were no inconsistencies in the testimony of Goodloe and defense counsel was not permitted to review the prior statements of Goodloe. The court did find inconsistencies with the testimony of Grant and defense counsel was permitted to review his prior statements. All statements were made part of the trial record.

{¶48} We agree with the trial court that Cunningham's second and sixth grounds are barred from consideration at this time based on the doctrine of res judicata. Our review of Cunningham's petition for postconviction relief occurs while his direct appeal is currently pending before the Ohio Supreme Court and it is quite possible that these grounds were raised on direct appeal. These issues could have fairly been determined without resort to evidence outside of the trial record. As the claims were evident and part of the record at the time of direct appeal, they are now barred. We therefore find no error in the trial court's decision dismissing these claims without an evidentiary hearing.

{¶49} Cunningham's third and fifth grounds for relief are related to the second and sixth grounds discussed above. In his fifth ground, Cunningham asserted that the trial court erred by not allowing defense counsel to review the statements made by Goodloe to investigating officers. Cunningham asserts that Crim.R. 16(B)(1)(g) required that defense counsel

be permitted to review the statements for inconsistencies.

{¶50} Crim.R. 16(B)(1)(g) provides:

> **Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.**
>
> **If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.**
>
> **If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.**
>
> **Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.**

{¶51} Ohio courts have held that only the written statements of the witnesses, rather than police notes or reports, are discoverable under Crim.R. 16. *State v. Washington* (1978), 56 Ohio App.2d 129, 132-133, 381

N.E.2d 1142; *State v. Johnson* (1978), 62 Ohio App.2d 31, paragraph one of the syllabus, 403 N.E.2d 1003. The *Washington* court stated that it was clear that notes made by a detective when talking to a witness as part of an investigation were not included within the purview of Crim.R. 16(B)(1)(g) "because it would be incorrect to permit a perusal of notes made by a detective which do not have the imprimatur of the witness." *Washington,* 56 Ohio App.2d at 133. The court further stated that "the notes may or may not be accurate and a witness should not be bound by or cross-examined concerning them unless they have received his approval." Id.

{¶52} The statements Goodloe made to the investigating officer prior to trial were incorporated into a summary of the officer's notes. This summary that Cunningham argues should have been given to him prior to trial, or at least reviewed by defense counsel subsequent to Goodloe's direct examination testimony, does not constitute a statement by a witness as contemplated by Crim.R. 16(B)(1)(g). There is nothing to indicate that Goodloe reviewed the notes and the officer's summary was not signed by Goodloe. Therefore, Cunningham was not entitled to the officer's summary as part of discovery.

{¶53} In *State v. Daniels* (1982), 1 Ohio St.3d 69, 70-71, 437 N.E.2d 1186, the Ohio Supreme Court held:

> **We construe Crim.R. 16(B)(1)(g) to mean that, once the trial court independently determines that a producible out-of-court witness statement exists, attorneys for all parties must be given the opportunity to inspect the statement personally. The trial**

court's simply permitting the attorneys to be passively present and available for consultation during the *in camera* inspection constitutes reversible error.

Therefore, defense counsel is entitled to participate in the in camera inspection of a statement only after the trial court independently determines that a producible out-of-court statement of the witness exists. Id. In the case sub judice, defense counsel was properly denied inspection of the police summary because it did not contain a "statement" of the witness within the meaning of Crim.R. 16(B)(1)(g).

{¶54} Defense counsel thoroughly cross-examined Goodloe and brought out any conceivable discrepancies. A review of the statements made by Goodloe incorporated into the officer's summary and Goodloe's trial testimony did not reveal any inconsistencies on which defense counsel would have been able to further cross-examine Goodloe. We are unable to find any prejudice resulting from the trial court refusing to allow defense counsel to review the statement at trial.

{¶55} Furthermore, it appears that this claim could have been raised on direct appeal, as it could have fairly been determined without resorting to evidence outside of the trial record. As this claim was evident and part of the record at the time of the direct appeal it is barred from consideration at this time based on the doctrine of res judicata. Therefore, we find no error in the trial court's decision dismissing the fifth ground for relief without an evidentiary hearing.

{¶56} In his third ground, Cunningham alleged that his counsel was rendered ineffective due to the state's failure to provide exculpatory evidence to defense counsel regarding the statements of James Grant. Cunningham basically reiterates the same argument that was presented in the sixth ground for relief.

{¶57} As we discussed above, notes made by a detective when talking to a witness as part of an investigation are not included within the purview of Crim.R. 16(B)(1)(g). *Washington,* 56 Ohio App.2d at 133. The statements Grant made to investigating officers were not written by him, reviewed by him, or signed by him. Rather, the officers' notes of the interviews with Grant were incorporated into reports. Even if the statements were within the purview of Crim.R. 16(B)(1)(g), the prosecution did not have a duty to disclose the statements until after the direct examination of the witness and an in camera review of the statements by the trial court.

{¶58} In this case, the trial court reviewed the statements of James Grant and permitted defense counsel to review the statements. Defense counsel then thoroughly cross-examined Grant with regard to his recollection of the events. Thus, defense counsel was fully apprised of Grant's prior statements and any possible inconsistencies between those statements and his testimony on direct examination. Therefore, defense counsel was not prejudiced by the prosecution's failure to disclose the statements of James Grant prior to his trial testimony. Defense counsel also was not ineffective in their thorough cross-examination of Grant.

{¶59} Furthermore, it appears that this claim could have been raised on direct appeal, as it could have fairly been determined without resorting to evidence outside of the trial record. As this claim was evident and part of the record at the time of the direct appeal it is barred from consideration at this time based on the doctrine of res judicata. Therefore, we find no error in the trial court's decision dismissing the third ground for relief without an evidentiary hearing.

{¶60} In the seventh ground for relief, Cunningham asserted that the presence of Juror Number 21, Nichole Mikesell, on the jury was prejudicial to him and violated his rights to a fair and impartial jury. Cunningham provided a summary of an interview with Mikesell conducted by a privately hired investigator after Cunningham's trial had ended. Cunningham points to several statements made by Mikesell to the investigator in support of his assertion of prejudice. Specifically, the investigator provided that Mikesell said Cunningham "is an evil person." Further, Mikesell stated "some social workers worked with Jeronique in the past and were afraid of him." Cunningham also points to Mikesell's comments that "if you observe one of the veins starting to bulge in his head, watch out and stay away because he might try to kill you" and that Cunningham "had no redeeming qualities" to show Mikesell was not an impartial juror.

{¶61} The only comment made by Mikesell that would have any bearing on Cunningham's assertion is that she was provided information by some social workers regarding Cunningham. However, the

investigator's interview summary of Mikesell does not indicate whether Mikesell obtained this information from the social workers prior to, during, or subsequent to Cunningham's trial. The record also does not provide when the investigator conducted these interviews with the jurors. However, the record does provide that Mikesell was thoroughly examined during the voir dire process and that she informed the court regarding the information she had about the case. Mikesell never indicated that she could not be a fair and impartial juror.

{¶62} The other comments Mikesell made to the investigator that Cunningham relies upon to show Mikesell's prejudice are statements regarding Mikesell's impression of Cunningham's character, which was likely shaped during the trial. Further, the other information provided in the investigator's interview summary of Mikesell shows that Mikesell followed the law and carefully considered the evidence in the case and the mitigating factors that were presented by defense counsel. Therefore, the trial court did not err in dismissing, without an evidentiary hearing, Cunningham's claim that juror Mikesell had prejudicial information regarding Cunningham and that she had already formed an opinion about the outcome of the case from the beginning.

{¶63} Cunningham's eighth ground for relief is related to the seventh ground. In the eighth ground, Cunningham asserted that defense counsel was ineffective during voir dire. Cunningham argues that defense counsel failed to conduct a reasonable inquiry during voir dire to elicit prejudicial information from juror Nichole Mikesell.

{¶64} It is a well established principle of law that "the conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked." *State v. Cornwell,* 86 Ohio St.3d 560, 568, 1999-Ohio-125, 715 N.E.2d 1144, citing *State v. Evans* (1992), 63 Ohio St.3d 231, 247, 586 N.E.2d 1042. A review of defense counsel's examination of juror Mikesell and her testimony in response to defense counsel's questions indicates no deficient performance or errors on the part of counsel. While Cunningham can now point to post-trial statements of Mikesell that show she has formed a negative impression of Cunningham, there was no indication given by Nichole at the time of the jury voir dire to indicate she had such an impression. Cunningham may now contend that defense counsel should have asked more probing questions of juror Mikesell, but Ohio courts "have recognized that counsel is in the best position to determine whether any potential juror should be questioned and to what extent." *State v. Murphy,* 91 Ohio St.3d 516, 539, 2001-Ohio-112, 747 N.E.2d 765, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 143-144, 538 N.E.2d 373.

{¶65} Cunningham has not supported this ground with evidence dehors the record that contains sufficient operative facts to demonstrate he was prejudiced as a result of ineffective assistance of counsel. We, therefore, hold that the trial court did not err in dismissing Cunningham's eighth ground for relief without an evidentiary hearing.

{¶66} In the fourteenth ground for relief, Cunningham asserted that the cumulative errors demonstrated in his petition for postconviction relief

deprived him of fundamental fairness and resulted in his conviction and sentences being void. The Ohio Supreme Court recognized the doctrine of cumulative error in *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus, 509 N.E.2d 1256. In *State v. Garner,* 74 Ohio St.3d 49, 64, 1995-Ohio-168, 656 N.E.2d 623, the Court stated that "pursuant to this doctrine, a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal."

{¶67} In the case sub judice, the doctrine of cumulative error is not applicable as we have found no merit to Cunningham's other twelve grounds for relief. We, therefore, hold that the trial court did not err in dismissing Cunningham's fourteenth ground for relief without an evidentiary hearing.

{¶68} Accordingly, since Cunningham has failed to produce sufficient, credible evidence demonstrating that he has suffered an infringement or deprivation of his constitutional rights, we hold that the trial court properly found that Cunningham did not set forth sufficient operative facts to warrant an evidentiary hearing and properly dismissed the petition for postconviction relief. Therefore, we overrule Cunningham's first assignment of error.

{¶69} In his second assignment of error, Cunningham argues that the trial court erred in not granting his request to conduct discovery to support his grounds for relief. Ohio law is clear that discovery is not available in the initial stages of a postconviction

proceeding. *State v. Byrd* (2001), 145 Ohio App.3d 318, 332, 762 N.E.2d 1043. While a petition for postconviction relief is a civil proceeding, the procedure is governed by R.C. 2953.21. The statute does not confer upon the trial court the power to conduct and compel discovery under the Civil Rules. *State v. Dean,* 149 Ohio App.3d 93, 2002-Ohio-4203, 776 N.E.2d 116, ¶ 10. Since discovery is not available in the initial stages of a postconviction proceeding, the trial court did not err in refusing to allow Cunningham to engage in discovery. Accordingly, the second assignment of error is overruled.

{¶70} In his third assignment of error, Cunningham argues that the trial court erred in denying his request for funds to retain a firearms and ballistics expert. Cunningham sought the funds to retain the expert to support his first and fourth grounds for relief. Since we have already determined that Cunningham's first and fourth grounds for relief are without merit and that R.C. 2953.21 does not confer power upon the trial court to conduct or compel discovery, we hold that the trial court did not err in denying Cunningham's request for funds to retain a firearms and ballistics expert. Accordingly, the third assignment of error is overruled.

{¶71} Finding no merit with Cunningham's assignments of error, the judgment of the Common Pleas Court of Allen County is affirmed.

Judgment Affirmed.

CUPP and ROGERS, J.J., concur.

/jlr

APPENDIX D

Case No. 11-3005/20-3429

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

JERONIQUE D. CUNNINGHAM,

Petitioner – Appellant

v.

TIM SHOOP, Warden,

Respondent – Appellee

Before: MOORE, KETHLEDGE, and, WHITE
Circuit Judges.

Upon consideration of motion to stay mandate,

It is ORDERED that the mandate be stayed to allow appellee time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk
s/ DEBORAH S. HUNT

Issued: March 31, 2022

APPENDIX E

Case No. 11-3005/20-3429

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JERONIQUE D. CUNNINGHAM,

Petitioner – Appellant

v.

TIM SHOOP, WARDEN,

Respondent – Appellee

FILED
Mar 28, 2022
DEBORAH S. HUNT, Clerk

ORDER

BEFORE: MOORE, KETHLEDGE, and, WHITE
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 cases. 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.

ENTERED BY ORDER OF THE COURT

s/ DEBORAH S. HUNT
Deborah S. Hunt, Clerk