

No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2024

VON CLARK DAVIS,
Petitioner,

v.

WARDEN BILL COOL,
Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Sixth Circuit

PETITIONER'S APPENDIX

Joseph Medici,
Federal Public Defender

Erin G. Barnhart (OH 0079681)

**Counsel of Record*

Jordan S. Berman (OH 0093075)

(Supreme Court Bar No. 285543)

Assistant Federal Public Defenders
Office of the Federal Public Defender
for the Southern District of Ohio
Capital Habeas Unit

10 W. Broad Street, Suite 1020

Columbus, Ohio 43215

(614) 469-4141

(614) 469-2999 (Fax)

Erin_Barnhart@fd.org

Jordan_Berman@fd.org

Counsel for Petitioner Von Clark Davis

Davis v. Jenkins

United States Court of Appeals for the Sixth Circuit

March 20, 2024, Argued En Banc; August 20, 2024, Decided; August 20, 2024, Filed

File Name: 24a0188p.06

No. 21-3404

Reporter

115 F.4th 545 *; 2024 U.S. App. LEXIS 20985 **; 2024 FED App. 0188P (6th Cir.) ***; 2024 WL 3873457

VON CLARK DAVIS, Petitioner-Appellant, v. CHARLOTTE JENKINS, Warden, Respondent-Appellee.

Subsequent History: Reconsideration denied by, En banc Davis v. Jenkins, 2024 U.S. App. LEXIS 25932 (6th Cir., Oct. 15, 2024)

Prior History: [**1] On Petition for Rehearing En Banc. United States District Court for the Southern District of Ohio at Columbus. No. 2:16-cv-00495—Susan J. Dlott, District Judge.

Davis v. Shoop, 2016 U.S. Dist. LEXIS 206230, 2018 WL 11561997 (S.D. Ohio, Jan. 4, 2018)

Davis v. Shoop, 2021 U.S. Dist. LEXIS 59175, 2021 WL 1172048 (S.D. Ohio, Mar. 29, 2021)

Counsel: ARGUED EN BANC: Erin G. Barnhart, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE SOUTHERN DISTRICT OF OHIO, Columbus, Ohio, for Appellant.

T. Elliot Gaiser, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

ON SUPPLEMENTAL BRIEF: Erin G. Barnhart, Jordan S. Berman, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE SOUTHERN DISTRICT OF OHIO, Columbus, Ohio, for Appellant.

T. Elliot Gaiser, Michael J. Hendershot, Jana M. Bosch, Stephen E. Maher, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

Judges: Before: SUTTON, Chief Judge; MOORE, COLE, CLAY, GIBBONS, GRIFFIN, KETHLEDGE, STRANCH, THAPAR, BUSH, LARSEN, NALBANDIAN, READLER, DAVIS and MATHIS, Circuit Judges.* GIBBONS, J., delivered the opinion of the court in which SUTTON, C.J., and GRIFFIN, KETHLEDGE, THAPAR, BUSH, LARSEN, NALBANDIAN, and READLER, JJ., joined. MOORE, J., delivered a separate dissenting opinion in which COLE, CLAY, STRANCH, and DAVIS, JJ., joined in full and MATHIS, J., joined in Part I.A.

Opinion by: JULIA SMITH GIBBONS

Opinion

[*550] [***2] JULIA SMITH GIBBONS, Circuit [**2] Judge. In 1984, a Butler County, Ohio court tried and convicted Von Clark Davis of aggravated murder with a capital specification for a prior conviction of purposeful killing of another. Forty years later, Davis is before us on habeas review of the third death sentence for this conviction. Today, we accord the Ohio courts the deference owed their adjudication of Davis's various claims and deny his petition for habeas relief.

I.

* Pursuant to 6 Cir. I.O.P. 35(c), Composition of the En Banc Court, Judge Cole, a senior judge of the court who sat on the original panel in this case, participated in this decision. Judge Murphy and Judge Bloomekatz recused themselves from participation in this decision.

The facts relevant to each of Davis's habeas claims span nearly 40 years of proceedings. In 1971, Davis pled guilty to second-degree murder for the purposeful killing of his wife, Ernestine Davis. *State v. Davis*, No. CA95-07-124, 1996 Ohio App. LEXIS 4263, 1996 WL 551432, at *1 (Ohio Ct. App. Sept. 30, 1996). While on parole for that conviction in 1983, Davis [*551] shot and killed his ex-girlfriend, Suzette Butler. *State v. Davis*, 139 Ohio St. 3d 122, 2014- Ohio 1615, 9 N.E.3d 1031, 1036 (Ohio 2014). In January 1984, a Butler County, Ohio grand jury indicted Davis for aggravated murder (with a capital specification based on his 1971 conviction for purposeful killing of another) and possessing a firearm while under a disability.

Prior to trial, Davis's counsel submitted an election pursuant to Ohio Rev. Code § 2929.022, by which Davis elected to waive his right to a jury trial and instead be tried and sentenced by a panel of three judges. Davis's counsel also submitted a "Motion for Notice [*3] of Prospective Three-Judge Panel," the stated purpose of which was to obtain "some information as to . . . what the panel would consist of, what judges, so we can inform Mr. Davis of that fact." DE 5-1, Tr. of Motions, Page ID 7209. Judge Henry Bruewer, conducting the proceedings, responded: "For the record, you know the three judges would be the ones that are here in the General Division, it would be Judge Stitsinger, Judge Moser and myself." *Id.*

***3 A few days later, the court conducted a colloquy with Davis to confirm his jury waiver. During this colloquy, the court did not mention the names of the three judges; it stated only that Davis was waiving his right to trial by jury for submission of his case "to a panel of three judges." *Id.* at 7222-24. After Judge Bruewer completed the colloquy, he forecasted to trial the next day, saying "we'll have three judges [who] will be here tomorrow, you know who they are, and they're in this form here. It'll be myself and Judge Moser and Judge Stitsinger." *Id.* at 7225.

The waiver form, signed by Davis and his counsel, stated that Davis "voluntarily waive[d] [his] right to trial by jury and elect[ed] to be tried by a court to be composed of three [*4] judges, consisting of Judges Henry J. Bruewer, William R. Stitsinger, and John R. Moser, all the same being the elected judges of the General Division of the Court of Common Pleas of Butler County who are engaged in the trial of criminal cases." DE 4-3, Jury Waiver and Election of Three-Judge Panel, Page ID 433. The court signed a supplemental sentence below Davis's election, which stated: "This jury waiver and election to be tried by a three-judge panel is hereby accepted and entered upon the journal of this Court." *Id.*

The three-judge panel convicted Davis on both counts and applied the death penalty. The basis for the death penalty was the panel's finding that Davis was guilty of the capital specification, a prior conviction for the purposeful killing of another. On direct appeal, the Ohio Supreme Court affirmed Davis's convictions but vacated his death sentence. *State v. Davis*, 38 Ohio St. 3d 361, 528 N.E.2d 925, 936 (Ohio 1988). On remand, the same three-judge panel held a second sentencing hearing and again sentenced Davis to death. That sentence was affirmed on appeal. *State v. Davis*, CA89-09-123, 1990 Ohio App. LEXIS 4717, 1990 WL 165137, at *1, *5 (Ohio Ct. App. Oct. 29, 1990), *aff'd*, 63 Ohio St. 3d 44, 584 N.E.2d 1192, 1198 (Ohio 1992).

Davis subsequently filed his first habeas petition, and a panel of this court vacated Davis's second death sentence. *Davis v. Coyle*, 475 F.3d 761, 781 (6th Cir. 2007). By the time of Davis's third sentencing hearing [*5] in 2009 (his second *resentencing*), one of the judges from the original panel had died, and the other two had retired. *State v. Davis*, No. CA2009-10-263, 2011 Ohio 787, 2011 WL 646404, at *2 (Ohio Ct. App. Feb. 22, 2011). A new three-judge panel was constituted, and that panel refused Davis's motion to withdraw his 1984 jury waiver and proceeded with the sentencing hearing. *Id.*

***4 One of the judges on this panel, Judge Andrew Nastoff, had previously worked as [*552] a prosecutor. During that time, Judge Nastoff had been on the prosecution team that had sought a death sentence against Lahray Thompson, Davis's nephew, for an unrelated murder. Carol Smith, Davis's sister and Thompson's mother, testified at Davis's sentencing hearing. She spoke about Davis's parents and siblings, childhood memories with Davis, their home life while growing up together, and her preference for Davis to receive a life sentence. Carol had not testified at Thompson's mitigation trial.

After Carol had finished her testimony, Judge Nastoff announced on the record that "[d]uring the testimony of the last witness, Carol Smith, she indicated that she was the mother of [Lahray] Thompson and I just felt that it is necessary to disclose on the record that I was a member of the prosecution team against [Lahray] Thompson" and that [*6] he had "argued to the jury that [Thompson] should receive the death sentence." DE 5-7, Mitigation Hr'g Tr., Page ID 8321. Davis's counsel responded, "we were aware that . . . you were involved in the prosecution, and we made a decision long ago not to challenge you on that." *Id.* at 8322.

Next, defense counsel called Ohio Parole Board Chair Cynthia Mausser as a witness, having forecasted that she would testify that Davis would never be paroled if given a life sentence. The prosecution objected to Mausser being called, explaining that Mausser

had told them she could not testify whether or not she would vote for parole, as the case had not yet been presented to the parole board and such testimony would be speculation. Additionally, the prosecution reported, Mausser was just one member of the parole board, composed of seven to twelve people, and so Mausser could not speak on behalf of the board. Defense counsel pushed forward, maintaining that they would "be in a position of surprise" if Mausser "testifies as the prosecution is suggesting," as defense counsel had "interviewed her four months ago" and "that that is not what we were told." *Id.* at 8327. The three-judge panel allowed her to [**7] testify.

Mausser testified on direct examination that the average amount of time served for an aggravated murder conviction before parole was about 27 years, past Davis's life expectancy. Mausser added that those with aggravated murder convictions who are eligible for parole "generally do not get released at" their first parole hearing. *Id.* at 8361. After being given a hypothetical case mirroring Davis's situation, Mausser concluded that such a person "would [***5] likely spend a large portion of the remainder of their life in prison" and that it would be "unlikely" that such an individual would be granted parole in his first hearing. *Id.* at 8364-65. On cross-examination, Mausser admitted that, at this point, she did not have all of the information needed to make a parole determination, and she also acknowledged that the parole determination was a collective decision, so she could not say how any other member on the parole board would vote. In its written sentencing opinion, the panel acknowledged her testimony but ultimately concluded it was highly speculative and "entitled to no weight."

The day after Mausser testified, defense counsel called Dr. Robert Smith, an expert witness in clinical [**8] psychology and addiction. Smith testified that, at the time of the offense, Davis suffered from two psychological disorders—alcohol dependence and borderline personality disorder. Smith testified that one of the characteristics of borderline personality disorder was "unwarranted aggressive behavior that comes about with minor provocation." DE 5-8, Mitigation Hr'g Tr., Page ID 8451. He explained that those with borderline personality disorder thrive in "structured environment[s], [**53] with clear-cut rules and people who enforce those rules every day." *Id.* at 8448. Smith opined that Davis had limited incidents in prison because he thrived in the structured environment. In its sentencing opinion, the panel acknowledged Smith's testimony but noted his failure to forecast Davis's behavior outside of prison or recommend a treatment plan should he be released, ultimately entitling Smith's diagnosis to "little weight in mitigation."

After the close of the mitigation hearing, the three-judge panel issued a written opinion sentencing Davis to death for a third time. Most persuasive for the panel was the sole aggravating circumstance, Davis's prior conviction for second-degree murder. The panel held [**9] that the sole aggravating circumstance outweighed, beyond a reasonable doubt, the mitigating factors presented.

Davis's sentence was affirmed on direct appeal. *Davis*, 2011 Ohio 787, 2011 WL 646404, at *23, *aff'd*, 9 N.E.3d at 1057. Davis also sought post-conviction relief in state court, which was denied. *State v. Davis*, No. CA2012-12-258, 2013 Ohio 3878, 2013 WL 4806935, at *1 (Ohio Ct. App. Sept. 9, 2013), *appeal not accepted for review*, 143 Ohio St. 3d 1441, 2015- Ohio 3427, 36 N.E.3d 188 (Ohio 2015) (unpublished table decision). In 2016, Davis filed a habeas petition raising 26 grounds for relief. The district court denied the petition. [***6] After a panel of this court granted habeas relief on three claims, a majority of the court voted to rehear this case en banc.

II.

We review de novo a district court's decision to deny a writ of habeas corpus. *Foust v. Houk*, 655 F.3d 524, 533 (6th Cir. 2011). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court may grant a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings" only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or if it "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

A state court decision is contrary to [**10] clearly established federal law if "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at" a different result. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state court decision unreasonably applies clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08. "Clearly established federal law" refers to the holdings, not dicta, of Supreme Court decisions at the time of the relevant state court decision. *Id.* at 412; *Stojetich v. Ishee*, 892 F.3d 175, 192 (6th Cir. 2018).

115 F.4th 545, *553; 2024 U.S. App. LEXIS 20985, **10; 2024 FED App. 0188P (6th Cir.), ***6

This standard in § 2254(d) is difficult to meet, as intended. *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Section 2254(d) "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings" and allows issuance of the writ only in cases "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" Supreme Court precedent. *Id.* Section 2254(d) is "not a substitute for ordinary error correction through appeal." *Id.* at 102-03 (citation omitted). "[A] state prisoner must [*554] show that the state court's ruling on the claim [*11] being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law [***7] beyond any possibility for fairminded disagreement." *Id.* at 103. "Clear error does not suffice." *Stojetzy*, 892 F.3d at 192 (citation omitted).

III.

Davis presents six claims for this court's en banc review:

1. Whether the enforcement of Davis's 1984 jury waiver at his 2009 resentencing hearing denied him due process under the Fourteenth Amendment and/or violated the Sixth and Eighth Amendments.
2. Whether Davis's 1984 jury waiver was knowing or intelligent because he did not know that, when he waived his right to a jury trial in 1984 to be tried by three specifically identified judges, he could later be sentenced by three different judges.
3. Whether the 2009 resentencing counsel were ineffective for failing to seek recusal of one of the judges for bias.
4. Whether the 2009 resentencing counsel were ineffective for failing to reasonably prepare for and present mitigation evidence as to parole eligibility and reintegration.
5. Whether the 2009 resentencing counsel were ineffective for failing to investigate and present mitigating evidence about the circumstances of Davis's 1971 conviction.
6. Whether the 1984 trial counsel were ineffective [*12] for failing to advise Davis properly about waiving his right to a jury trial.

For the following reasons, we deny each of Davis's six claims and affirm the district court's denial of habeas relief.

A.

Davis first argues that the State violated his rights under the Sixth Amendment, the Eighth Amendment, and the Due Process Clause of the Fourteenth Amendment by breaching the "explicit terms" of his 1984 jury waiver. By refusing Davis's withdrawal of his waiver and forcing him to be sentenced by three judges not named in the waiver, Davis contends, the State denied him the benefit of his bargain to be sentenced by three specific judges and thus violated his constitutional rights to "fundamental fairness."

***8 To begin, we consider exhaustion and procedural default. Before filing a habeas petition, "a state prisoner must exhaust available state remedies." *Davila v. Davis*, 582 U.S. 521, 527, 137 S. Ct. 2058, 198 L. Ed. 2d 603 (2017); *see* 28 U.S.C. § 2254(b)(1)(A). "Ordinarily, a state prisoner satisfies this exhaustion requirement by raising his federal claim before the state courts in accordance with state procedures." *Shinn v. Ramirez*, 596 U.S. 366, 378, 142 S. Ct. 1718, 212 L. Ed. 2d 713 (2022). This requires a prisoner to "fairly present" his claim "in the appropriate state court." *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004) (quoting *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (per curiam)). The prisoner must present to the state courts "the same claim under the same theory." *Wagner v. Smith*, 581 F.3d 410, 417 (6th Cir. 2009). He must also make the state courts aware of the "federal [*13] nature of the claim." *Baldwin*, 541 U.S. at 29. The Sixth Circuit considers four factors to determine whether a state prisoner has "fairly presented" [*555] his federal claim in state court. We evaluate whether the petitioner:

- (1) relied upon federal cases employing constitutional analysis; (2) relied upon state cases employing federal constitutional analysis; (3) phrased the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleged facts well within the mainstream of constitutional law.

Hand v. Houk, 871 F.3d 390, 418 (6th Cir. 2017). The key thrust of these factors is to determine whether the petitioner "gave the state courts the opportunity to apply the legal principles governing" his present claim. *Jalowiec v. Bradshaw*, 657 F.3d 293, 304 (6th Cir. 2011). "It is not enough" that his prior claims "implicated some of the same facts that are integral" to his current claim. *Id.* "The bottom line is" whether "the state courts were . . . called upon to apply the legal principles governing the constitutional claim now presented to the federal courts." *Id.* "Simply presenting the claim clothed in an analogous theory of relief will not do." *Kelly v. Lazaro*, 846 F.3d 819, 828 (6th Cir. 2017). Where a state prisoner fails to raise his federal claim in state court, and the state remedy

is no **[**14]** longer available to him, the claim is procedurally defaulted. *Atkins v. Holloway*, 792 F.3d 654, 657 (6th Cir. 2015); *Jones v. Bagley*, 696 F.3d 475, 483 (6th Cir. 2012); *see also Ramirez*, 596 U.S. at 378.

The Warden argues that Davis's "bargained-for" theory is procedurally defaulted, as Davis argued a wholly distinct theory—that he had a right to withdraw his waiver because continuing to apply it violated a "constitutional mandate for jury sentencing" per the Eighth **[***9]** Amendment, due process, and *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)—during his direct appeal. CA6 R. 54, Suppl. Appellee Br., at 6 (quoting DE 4-43, Ohio Sup. Ct. Merit Br., Page ID 5868-72). To an extent, the Warden is correct: At least until the point of oral argument before the Ohio Supreme Court, Davis had not raised the bargain theory in state court. Davis's briefing did not give the Ohio state courts the opportunity to apply the legal principles governing a bargain with the state. *See Jalowiec*, 657 F.3d at 304. Davis did not cite in his briefs before the Ohio state courts any of the bargain theory precedent he now raises. *See Hand*, 871 F.3d at 418. Instead, Davis argued a wholly distinct theory—that Ohio violated his due process, Sixth Amendment, and Eighth Amendment rights by subjecting him to a "stale" waiver "when the law has changed and the facts have changed." DE 4-42, Ohio Ct. App. Merit Br., Page ID 5496. This theory did not rely on a bargain with the state, but **[**15]** rather claimed that the changed circumstances in their entirety altered the landscape so drastically that it was unfair for Davis to be held to the same waiver. When Davis did mention the new judges on the panel, he was listing them as one of the many changed circumstances, in addition to new mitigation evidence and new attorneys, that entitled him to reevaluate his waiver. It is not enough that Davis's claims "implicated some of the same facts." *Jalowiec*, 657 F.3d at 304. These "analogous theor[ies] of relief will not do." *Kelly*, 846 F.3d at 828. Until oral argument before the Ohio Supreme Court, Davis did not call on the Ohio state courts "to apply the legal principles" governing his claim that he bargained for the three specific judges named in his waiver and that the State violated this bargain. *Jalowiec*, 657 F.3d at 304.

Davis's strongest case for fair presentation arises from his oral argument before the Ohio Supreme Court. There, Davis's counsel asserted: "The state can no longer **[*556]** live up to their end of the bargain. . . . We haven't got, and they cannot deliver, what our client waived his jury for." Oral Argument at 7:26, *State v. Davis*, No. 2011-0538 (Oct. 22, 2013), <https://ohiochannel.org/video/case-no-2011-0538-von-clark-davis-v-state-of-ohio>; *see also id.* at 7:17, 8:12, 10:45, 22:10. In **[**16]** response, several justices engaged with this argument, asking questions about its implications. *Id.* at 7:41, 8:30, 9:11, 10:00, 11:27, 21:32. The Warden argues that, by the time Davis raised the theory at oral argument, it was forfeited. But the Ohio Supreme Court never expressly made that determination. We therefore will assume, without deciding, that Davis fairly presented his bargain theory.

[*10]** Turning to the merits, Davis cannot show that the Ohio Supreme Court's decision was contrary to or an unreasonable application of clearly established Supreme Court precedent. As an initial matter, we must determine whether the Ohio Supreme Court, providing the last reasoned state court decision on Davis's claim, adjudicated it on the merits. *See* 28 U.S.C. § 2254(d). A claim is adjudicated on the merits when a judgment has been rendered "after the court . . . heard and *evaluated* the evidence and the parties' substantive arguments." *Johnson v. Williams*, 568 U.S. 289, 302, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013) (quoting BLACK'S LAW DICTIONARY 1199 (9th ed. 2009)). Following *Harrington v. Richter*, federal habeas courts must apply a "strong but rebuttable" presumption that a federal claim was adjudicated on the merits by the state court. *English v. Berghuis*, 900 F.3d 804, 811 (6th Cir. 2018) (quotation omitted). For example, a state court's unexplained **[**17]** denial of a federal claim is presumed to constitute an adjudication on the merits. *Richter*, 562 U.S. at 98, 102 (explaining that § 2254(d) deference still applies even "[w]here a state court's decision is unaccompanied by an explanation" and that in such a case § 2254(d) applies to the "arguments or theories" that "could have supported[] the state court's decision"); *Ballinger v. Prelesnik*, 709 F.3d 558, 562 (6th Cir. 2013). The *Richter* presumption also applies to state court decisions that address some, but not all, of the defendant's claims, as "it is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference." *Williams*, 568 U.S. at 298, 299-300 (explaining, for example, that "there are instances in which a state court may simply regard a claim as too insubstantial to merit discussion"). This strong-but-rebuttable presumption also applies to each part of a multipart claim, "whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." *Richter*, 562 U.S. at 98.

The Ohio Supreme Court adjudicated Davis's jury waiver claim on the merits. In his brief before the Ohio Supreme Court, Davis raised his claim that application of the 1984 waiver violated **[**18]** the Sixth Amendment, Eighth Amendment, and the Due Process Clause. And at oral argument, Davis pressed the bargain theory angle. The Ohio Supreme Court understood the factual basis for Davis's claim. *Davis*, 9 N.E.3d at 1040 ("Davis's claims center on the fact that the three-judge panel that sentenced him in 2009 was not the same three-judge panel before which he had expected to be tried and sentenced when he waived a jury trial in 1984."). Even so, **[***11]** the court determined that Ohio Rev. Code § 2929.06(B) governed Davis's jury waiver and that the state statute explicitly provided for "a new panel of three **[*557]** judges" to conduct a resentencing "if necessary." *Id.* at 1041 (quoting

Ohio Rev. Code § 2929.06(B)). "Given the clear command" of the statute, the Ohio Supreme Court explained that Davis could not obtain relief unless the application of the statute violated his federal constitutional rights. *Id.* at 1041-42. The Ohio Supreme Court then held that "neither the Sixth nor the Eighth Amendment creates a constitutional right [*558] to be *sentenced* by a jury, even in a capital case," and so there was "no constitutional bar to conducting [the 2009 resentencing] without a jury pursuant to" § 2929.06(B). *Id.* at 1042. There was thus no federal constitutional prohibition to conducting Davis's 2009 resentencing with a new three-judge panel via § 2929.06(B). *Id.* at 1042, 1043.

Given Davis's briefing and assertions at oral argument, [**19] as well as the court's subsequent analysis, it is clear the Ohio Supreme Court "heard and *evaluated*" Davis's substantive arguments. *Williams*, 568 U.S. at 302. As the Ohio Supreme Court found no constitutional bar to conducting Davis's resentencing with a new three-judge panel pursuant to § 2929.06(B), it may have regarded Davis's due process bargain theory claim "as too insubstantial to merit discussion." *Id.* at 299. Finally, Davis did not move for reconsideration or argue in state court that the Ohio Supreme Court inadvertently overlooked his bargain theory claim, which supports the presumption of adjudication on the merits. *See Rogers v. Mays*, 69 F.4th 381, 389 (6th Cir. 2023) (en banc).

AEDPA deference applies to "decision[s]," not opinions or reasoning. *See* 28 U.S.C. § 2254(d)(1)-(2); *Holland v. Rivard*, 800 F.3d 224, 235 (6th Cir. 2015). Davis argues that the state court did not discuss the merits of his bargain theory claim, so AEDPA deference does not apply. This assertion is incorrect. As *Richter* and *Williams* demonstrate, a state court's silence, without more, is insufficient to rebut the presumption of adjudication on the merits. *Richter*, 562 U.S. at 98; *Williams*, 568 U.S. at 298, 299-300; *see Davis v. Johnson*, 661 F. App'x 869, 877-78 (6th Cir. 2016) (holding a state prisoner must "do more than point to the state court's silence to defeat *Richter*'s strong presumption that the state court adjudicated his claim" on the merits). To overcome AEDPA deference, the [**20] state court's *decision* must be contrary to clearly established Supreme Court precedent such that "there is no possibility fairminded jurists could disagree that [***12] the state court's decision conflicts with" the Supreme Court's precedents. *Richter*, 562 U.S. at 102. Here, there was no error so egregious that all fairminded jurists would have seen it. *Mack v. Bradshaw*, 88 F.4th 1147, 1154 (6th Cir. 2023). The Ohio Supreme Court's decision comports—not conflicts—with Supreme Court precedent.

Davis acknowledged at oral argument before this court that there is no constitutional right to jury sentencing and that his only claimed constitutional right to being sentenced by the three named judges stems from his bargain theory. Oral Argument at 2:35-3:11, *Davis v. Jenkins*, No. 21-3404 (Mar. 20, 2024), https://www.opn.ca6.uscourts.gov/internet/court_audio/audio/03-20-2024%20-%20Wednesday/21-3404%20Von%20Davis%20v%20Charlotte%20Jenkins.mp3.

Davis also acknowledged that the three named judges made all of the factual findings necessary to sentence him to death during his trial in 1984. *Id.* at 4:35-45. Davis thus no longer disputes that the Ohio Supreme Court correctly applied clearly established federal law when it held that "neither the Sixth nor the Eighth Amendment creates a constitutional right to be *sentenced* by a jury, even in a capital [**21] case." *Davis*, 9 N.E.3d at 1042; *see also id.* (explaining that the "Sixth Amendment never has been thought to guarantee a right to a jury determination of" the appropriate punishment to be imposed on an individual) (quoting *Spaziano v. Florida*, 468 U.S. 447, 459, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984)).

This new tack makes sense, as the Ohio Supreme Court's holding offends neither *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), nor *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). True, *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), overruled *Spaziano*, but first, *Hurst* was issued on January 12, 2016, twenty months after the Ohio Supreme Court's decision on April 22, 2014, and second, *Hurst* held only that a jury must find the facts necessary to make the defendant death eligible. *Hurst*, 577 U.S. at 97-99. *McKinney v. Arizona*, 589 U.S. 139, 140 S. Ct. 702, 206 L. Ed. 2d 69 (2020), emphasizes that the decisions in *Ring* and *Hurst* "ha[ve] nothing to do with jury sentencing." *Id.* at 145 (quoting *Ring*, 536 U.S. at 612 (Scalia, J., concurring)). A jury must find the facts necessary to subject a defendant to the death penalty, but the judge may still conduct the weighing of aggravating and mitigating factors to determine whether the defendant should receive the death penalty or some lesser punishment. "[T]he 'States that leave the ultimate life-or-death decision to the judge may continue to do so.'" *Id.* (quoting *Ring*, 536 U.S. at 612 (Scalia, J., concurring)); *see also id.* at [***13] 144 ("[I]n a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required [**22] to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range."). So, Ohio, which occasionally leaves the ultimate life-or-death decision to the judge pursuant to Ohio Rev. Code § 2945.06, may continue to do so. And Davis's 2009 resentencing hearing focused on mitigating factors, not any of the facts that made him death eligible. This court's reversal of Davis's sentencing on habeas review did not demand reconsideration of the "fact[s] necessary to impose a sentence of death." *Hurst*, 577 U.S. at 94; *see Davis*, 475 F.3d at 780. At the 2009 resentencing, the only aggravating circumstance was Davis's prior conviction for second-degree murder, which had already been found by the initial three-judge panel on May 9, 1984. *Davis*,

2011 Ohio 787, 2011 WL 646404, at *14-15; *STATE v. DAVIS*, No. CA84-06-071, 1986 Ohio App. LEXIS 6919, 1986 WL 5989, at *2 (Ohio Ct. App. May 27, 1986). The 2009 resentencing panel did not find any new facts with respect to this aggravating circumstance but merely weighed it with the mitigating evidence. *See Davis*, 2011 Ohio 787, 2011 WL 646404, at *15; *see also McKinney*, 589 U.S. at 144. There was no Sixth or Eighth Amendment bar to conducting Davis's 2009 resentencing without a jury pursuant to Ohio Rev. Code § 2929.06(B).

Davis asserts that the Ohio Supreme Court's decision was contrary to clearly established federal law because clearly established federal law requires fundamental fairness in both limiting the waiver of a **[**23]** constitutional right and enforcing the promises made in inducing the waiver agreement. But Davis has not identified a Supreme Court case holding that enforcement of a jury waiver in a similar circumstance violates fundamental fairness or the Due Process Clause of the Fourteenth Amendment. Davis relies on *Puckett v. United States*, 556 U.S. 129, 129 S. Ct. 1423, **[*559]** 173 L. Ed. 2d 266 (2009), *Mabry v. Johnson*, 467 U.S. 504, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984), and *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). But such reliance places the level of abstraction of the clearly established Supreme Court precedent too high. *See Fields v. Jordan*, 86 F.4th 218, 232 (6th Cir. 2023) (en banc) ("[P]risoners may not sidestep the lack of Supreme Court precedent on a legal issue by raising the 'level of generality' at which they describe the Court's holdings on other issues."). All three cases dealt with the government's purported violation of a plea agreement, not a jury waiver. *See Puckett*, 556 U.S. at 136; *Mabry*, 467 U.S. at 510; *Santobello*, 404 U.S. at 258. Davis has not cited a Supreme Court case explaining, much less holding, that the contract principles applicable to plea bargain **[***14]** agreements are also applicable to jury waivers. *See Woods v. Donald*, 575 U.S. 312, 317, 135 S. Ct. 1372, 191 L. Ed. 2d 464 (2015) (per curiam) (holding that a state court decision cannot be contrary to clearly established federal law where no Supreme Court decision has "confront[ed] the specific question presented" (internal quotation marks and citation omitted)).

This lack of precedent is unsurprising, as plea bargains and waivers of constitutional **[**24]** rights are distinct legal concepts. Waiver is "[t]he voluntary relinquishment or abandonment . . . of a legal right or advantage." *Waiver*, BLACK'S LAW DICTIONARY (12th ed. 2024). A plea bargain, on the other hand, is a "negotiated agreement between a prosecutor and a criminal defendant" where the defendant pleads guilty "in exchange for some concession by the prosecutor." *Plea Bargain*, BLACK'S LAW DICTIONARY (12th ed. 2024). Defendants routinely waive constitutional rights without inducements, such as waiving the right to remain silent when being questioned by a police officer, *see Berghuis v. Thompson*, 560 U.S. 370, 385, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010), waiving the right to representation by counsel, *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), or pleading guilty without a plea deal, thereby waiving the right to trial, *see United States v. Ruiz*, 536 U.S. 622, 628-29, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002). These waivers are not bargained-for exchanges.

Reasonable jurists could reject Davis's attempt to paint his waiver as a bargain with the prosecution or the court. The text of Ohio Rev. Code § 2945.05 emphasizes the unilateral nature of the jury waiver. Under that provision, Davis had the statutory right to elect trial by the bench rather than a jury, and the court had no discretion to refuse this choice. *See Ohio Rev. Code § 2945.05; State v. Banks*, 2019- Ohio 5440, 151 N.E.3d 198, 201 (Ohio Ct. App. 2019); *State v. Van Sickle*, 90 Ohio App. 3d 301, 629 N.E.2d 39, 43 (Ohio Ct. App. 1993); *see also State v. Ruppert*, 54 Ohio St. 2d 263, 375 N.E.2d 1250, 1254 (Ohio 1978) (explaining that a jury waiver is a "jurisdictional" prerequisite to the appointment **[**25]** of the three-judge panel). And, unlike a bargain, the statute allows a defendant to withdraw his bench-trial election at any time before trial for any reason. *See Ohio Rev. Code § 2945.05*. Once defendants, like Davis, make this election, there is a statutory procedure for designating which judges sit on that panel—defendants do not request the specific judges. *See Ohio Rev. Code § 2945.06* (mandating the panel consist of "the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court"); *State v. Wesson*, 137 Ohio St. 3d 309, 2013- Ohio 4575, 999 N.E.2d 557, 571 (Ohio 2013).

[*15]** A reasonable jurist could conclude that that statutory procedure was the operating force in Davis's case, regardless of the **[*560]** three judges being listed in his waiver. From the beginning, the presiding judge, Judge Henry Bruewer, established that Davis already knew the identities of the judges.¹ DE 5-1, Tr. of Motions, Page ID 7209 ("For the record, you know the three judges would be the ones that are here in the General Division, it would be Judge Stitsinger, Judge Moser and myself."). And the colloquy with Davis did not mention the names of the three judges, only that Davis was waiving his right to trial by jury for submission of his case "to a panel of three **[**26]** judges." *Id.* at 7222-24. It was only outside the colloquy, when the court was forecasting to trial the

¹ Nor were there other options of judges for Davis to "request." The three judges designated to the panel were the only three judges in the general division of the Butler County Court of Common Pleas at the time. Sherrod Brown, Sec'y of State, The State of Ohio Official Roster Federal, State, County Officers, and Departmental Information 319 (1983-1984).

115 F.4th 545, *560; 2024 U.S. App. LEXIS 20985, **26; 2024 FED App. 0188P (6th Cir.), ***15

next day, when it said "we'll have three judges [who] will be here tomorrow, you know who they are, and they're in this form here. It'll be myself and Judge Moser and Judge Stitsinger." *Id.* at 7225. Because, as a matter of statutory procedure, the defendant does not have a say in the judges that make up the panel, a reasonable jurist could conclude that Davis did not "bargain" with the state for the three specific judges.

We are aware of no precedent, federal or otherwise, establishing a due process constitutional right to have a particular judge, and only that judge, make decisions in a criminal defendant's case. Davis likewise has been unable to identify a case in which a plea deal or waiver contains such a commitment. This is to be expected. The law considers judges fungible, based on the underlying presumption that judges conduct themselves with honesty and integrity. *See Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*, 806 F.3d 162, 194 (3d Cir. 2015) (Ambro, J., dissenting in part and concurring in part); *In re Lowe*, 102 F.3d 731, 733 n.1 (4th Cir. 1996); *see also United States v. Keane*, 375 F. Supp. 1201, 1204 (N.D. Ill. 1974) ("[A] defendant has no vested right to have his case tried before any particular judge."). It is extraordinary, if not unheard of, to obtain [**27] this kind of commitment from a trial court. And the terms of the waiver here are insufficient to create such an unusual bargain. The express terms of the 1984 waiver mention only trial, not [***16] sentencing. While the waiver colloquy does mention sentencing, that colloquy is outside of the four corners of the document of which Davis demands strict enforcement.

Finally, a reasonable jurist could disregard, based on the facts in the record, Davis's claim that he only waived his right to a jury in return for being tried and sentenced, in perpetuity, by three specific judges. A reasonable jurist could credit Davis's 1993 affidavit, closer in time to the 1984 waiver, explaining his election. Davis, under oath, stated he made the three-judge panel election "because I did not want the jury to hear about my prior murder during the guilt phase of my capital trial." DE 4-19, Aff., Page ID 1964. Davis had filed a motion to sever his charge for having a weapon under a disability from the aggravated murder charge, but the court denied it, meaning the jury would "hear about [his] prior murder." *Id.* at 1965. Davis reported that he "felt the jury would not be able to separate [his] prior murder from the [**28] current capital charge," and that as a result he "had no choice but to waive [his] right to trial by jury." *Id.* Davis ended the affidavit by asserting, "[h]ad the trial court severed [**561] the charges, I would not have waived my trial by jury." *Id.* A reasonable jurist could credit these earlier and more consistent statements.

In sum, we accord the Ohio Supreme Court's decision to reject Davis's jury waiver claim the deference owed under AEDPA, as its decision did not conflict with or unreasonably apply clearly established Supreme Court precedent. Davis has neither rebutted the strong presumption of adjudication on the merits, nor has he met his steep burden to show an error so egregious that all fairminded jurists would see it.

B.

Alternatively, Davis argues that his 1984 waiver was not knowing, intelligent, and voluntary because he did not know that, when he waived his rights in exchange for trial and sentencing before a panel of three specifically identified judges, he could later be tried or sentenced by three entirely different judges.

Although Davis's unknowing-waiver claim has evolved somewhat throughout his post-sentencing litigation, Davis "fairly present[ed]" his claim in the Ohio [**29] state courts. *See Baldwin*, 541 U.S. at 29 (quoting *Duncan*, 513 U.S. at 365-66). Davis argued in the Ohio courts that he did not knowingly, intelligently, and validly waive his jury trial and sentencing rights in [***17] 1984 for a new sentencing hearing in 2009 with new facts in mitigation, new attorneys, the operation of new statutory provisions, and new judges. While the thrust of his argument relied on the change in circumstances in 2009 more generally, the Ohio Supreme Court recognized that the basis of his claim was the fact that "the 2009 resentencing was conducted before a three-judge panel composed of different judges than the panel that had tried the case in 1984." *Davis*, 9 N.E.3d at 1042. Moreover, Davis's argument put the Ohio courts on notice that he was invoking the federal constitutional principles of knowing, voluntary, and intelligent waiver. *Hand*, 871 F.3d at 418; *Jalowiec*, 657 F.3d at 304.

The Ohio Supreme Court, providing the last reasoned state court decision on this claim, rejected Davis's argument that his 1984 waiver was not knowing, voluntary, or intelligent. *See Davis*, 9 N.E.3d at 1042-43. Davis's argument failed because it required that "a defendant waiving a jury trial possess more information than courts have usually held sufficient for a knowing and intelligent jury waiver." *Id.* at 1042. The court then cited the [**30] well-established standard that a defendant is sufficiently informed if he understands "that a jury is composed of 12 members of the community, he may participate in the selection of the jurors, [and] the verdict of the jury must be unanimous," whereas if he were to waive the right, "a judge alone will decide guilt or innocence." *Id.*

(quoting *United States v. Martin*, 704 F.2d 267, 273 (6th Cir. 1983)). Knowing the exact identity of the three judges on the panel was not one of the circumstances that made Davis's 1984 waiver knowing, voluntary, or intelligent.

Because Davis presents an exhausted claim that was adjudicated on the merits in state court, AEDPA deference applies. *See* 28 U.S.C. § 2254(d). Davis argues that the Ohio Supreme Court unreasonably applied clearly established federal law, specifically the command in *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 63 S. Ct. 236, 87 L. Ed. 268 (1942), that the "unique circumstances of each case" dictate whether the waiver is knowing, voluntary, or intelligent. CA6 R. 53, Suppl. Appellant Br., at 13 (quoting *Adams*, 317 U.S. at 278). Davis asserts that the Ohio Supreme Court's decision unreasonably [*562] applied *Adams*, *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

We disagree. First, as explained above, the Ohio Supreme Court found there was no constitutional problem with enforcing the waiver at Davis's 2009 resentencing. *Davis*, 9 N.E.3d [***18] at 1042. Per the analysis in Section III.A., *supra* [***31], this was not an unreasonable application of Supreme Court precedent. And since there is no constitutional right to a jury weighing the aggravating and mitigating circumstances of a defendant's case, there is no need to determine whether his 1984 waiver was knowing, voluntary, and intelligent for the purposes of his 2009 resentencing.

Even so, the Ohio Supreme Court reasonably applied clearly established federal law. The four Supreme Court cases that Davis cites reflect the general proposition that waivers of constitutional rights must be knowing, voluntary, and intelligent acts "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748; *see also id.* at 748 n.6 (citing cases); *Adams*, 317 U.S. at 278; *Johnson*, 304 U.S. at 464; *Boykin*, 395 U.S. at 244. But, again, Davis raises the level of abstraction too high. *See Fields*, 86 F.4th at 232; *see also id.* at 236 (emphasizing that "a 'general proposition' that originates with a few quotations from far-afield decisions" is not clearly established law). The clearly established precedent upon which Davis relies does not require that a defendant be informed of all remotely possible consequences of a waiver, only the "likely consequences." *Brady*, 397 U.S. at 748; *see also Ruiz*, 536 U.S. at 629 ("[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently [***32] aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it."). The identity of a sentencing judge has never been one of those "likely consequences." *See Ruiz*, 536 U.S. at 629-30 (explaining that, for example, a defendant "may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide."). Davis asserts that whether a waiver was knowing, voluntary, and intelligent depends, per *Adams*, on "the unique circumstances of each case," and here those unique circumstances included the waiver's naming of three particular judges to the panel. 317 U.S. at 278. But this is not a unique circumstance that has been clearly established.

Instead, the Court's inquiry of whether "the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances" focuses on the choice [***19] between the two different types of proceedings—jury trial versus [***33] bench trial. *See Ruiz*, 536 U.S. at 629-30; *Adams*, 317 U.S. at 278. *United States v. Martin* emphasizes this point.² 704 F.2d at 273. For a jury waiver to be knowing, voluntary, and intelligent, a defendant should have "some knowledge of the jury trial [***563] right before he is allowed to waive it." *Id.* But the level of knowledge required is not a "technical knowledge of the jury trial right." *Id.* A defendant need only understand that "a jury is composed of 12 members of the community, [that] he may participate in the selection of the jurors, [that] the verdict of the jury must be unanimous, and that a judge alone will decide guilt or innocence should he waive his jury trial right." *Id.*; *Spytma v. Howes*, 313 F.3d 363, 370 (6th Cir. 2002). Davis's insistence that he know the identity of the three judges is a far cry from these basic points.

Moreover, as recognized later in *Sowell v. Bradshaw*, 372 F.3d 821, 833, 836 (6th Cir. 2004), *Martin's* list is not a statement of constitutional law, but it instead gives a flavor of the type of information that makes a jury waiver knowing, voluntary, and intelligent. Again, the key is whether the defendant understood the type of proceeding he was choosing—jury or judge—not the procedural specifics of either. *See id.* at 836. "[T]he dispositive inquiry is whether the defendant understood that the choice confronting him was, on the one hand, [***34] to be judged by a group of people from the community, and on the other hand, to have his guilt or innocence determined by a judge." *Otte v. Houk*, 654 F.3d 594, 601 (6th Cir. 2011) (quoting *Jells v. Mitchell*, 538 F.3d

² Although courts of appeals decisions do not create clearly established law for AEDPA purposes, we may look to such decisions to evaluate whether the Supreme Court has clearly established a principle. *Avery v. Prelesnik*, 548 F.3d 434, 436-37 (6th Cir. 2008).

478, 510 (6th Cir. 2008)); *see also Haliym v. Mitchell*, 492 F.3d 680, 698 (6th Cir. 2007). These Sixth Circuit cases demonstrate that the Supreme Court did not clearly establish that a defendant's knowing, voluntary, and intelligent jury waiver must be predicated on the identity of the sentencing judge.

Fairminded jurists could reject Davis's contention that his waiver is invalid because he harbored a private belief that the three named judges would sentence him in perpetuity. *Brady* and *Boykin* do not clearly establish a rule that courts must "probe the minds of defendants in search of myths to bust" before accepting a waiver. *Currica v. Miller*, 70 F.4th 718, 726 (4th Cir. 2023). That principle especially holds true in this case. Judges retire, lose elections, and [***20] die. It was not the 1984 trial court's responsibility to dispel Davis's unreasonable expectations about the remotely possible consequences of his waiver. The Ohio Supreme Court's rejection of this claim is entitled to AEDPA deference, and Davis has failed to overcome such deference.

C.

Next, Davis raises the first of four ineffective assistance of counsel claims. Davis argues that his 2009 resentencing counsel were ineffective [***35] for failing to move for the recusal of Judge Andrew Nastoff, even though counsel knew that Judge Nastoff had previously prosecuted and sought the death penalty for Davis's nephew, Lahray Thompson, for an unrelated murder thirteen years earlier. The Ohio Court of Appeals provides the last reasoned state court decision on this issue. The Ohio Court of Appeals concluded that Davis failed to show that his counsel's representation fell below an objective standard of reasonableness and denied the claim. *Davis*, 2013 Ohio 3878, 2013 WL 4806935, at *6 ("[T]he decision not to seek recusal of the judge can only be viewed as strategic and will not form the basis of an ineffective counsel claim." This is particularly true in this case considering counsel's direct knowledge of Judge Nastoff's prior participation in Thompson's prosecution." (quoting *State v. Nuhfer*, No. L-07-1125, 2009 Ohio 1474, 2009 WL 806905, at *3 (Ohio Ct. App. Mar. 20, 2009))).

We note at the outset that, contrary to the dissent's assertion, a *Strickland* deficient performance claim based on judicial bias is not a two-pronged analysis. A two-pronged analysis is unsupported by our [***564] case law and enables the dissent to avoid applying AEDPA deference where it is merited. *See Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (identifying deficient performance and prejudice as two prongs, as opposed to divvying up deficient [***36] performance itself); *Rayner v. Mills*, 685 F.3d 631, 636 (6th Cir. 2012) (same). Instead, the proper analysis takes both elements, judicial bias and deficient performance, together in one prong.

Davis argues that the Ohio Court of Appeals unreasonably applied *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), by applying an irrebuttable presumption of reasonableness to counsel's decision. We disagree that the Ohio Court of Appeals applied an irrebuttable presumption. *Strickland* cautions that "[j]udicial scrutiny of counsel's performance must be highly deferential," and, accordingly, "a court must indulge a strong presumption that counsel's [***21] conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. It is the defendant's burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). Davis was not able to overcome that presumption before the Ohio Court of Appeals. Davis's briefing did not give any reason to doubt that counsel's decision was sound trial strategy, especially considering that counsel knew about Judge Nastoff's prior prosecution beforehand. While *Strickland* does emphasize a counsel's duty to investigate, "strategic choices made after thorough investigation . . . are [***37] virtually unchallengeable," and "strategic choices made after less than complete investigation are reasonable" to the extent that limiting the investigation was reasonably supported. *Id.* at 690-91. Given that counsel knew ahead of time of Judge Nastoff's previous prosecution, as counsel acknowledged at the hearing, the Ohio Court of Appeals could assume that counsel made at least some investigation and could thus apply a "strong presumption"—which Davis failed to rebut—that counsel's choice was "sound trial strategy." *Id.* at 689 (citation omitted).

Investigation of the origin of the quoted language with which Davis takes issue also shows that the Ohio Court of Appeals was not applying an irrebuttable presumption. In the quoted case, *State v. Nuhfer*, the court considered an ineffective assistance of counsel claim through the lens of *Strickland*. *Nuhfer* noted that "[s]crutiny of counsel's performance must be deferential" per *Strickland*, and so "[c]ounsel's actions which 'might be considered sound trial strategy' are presumed effective." 2009 Ohio 1474, 2009 WL 806905, at *3 (quoting *Strickland*, 466 U.S. at 689). *Nuhfer* found that nothing in the case's record indicated that the judge there was biased or had a risk of bias and found that counsel may have had strategic reasons [***38] to keep the judge, as in Davis's case. *Id.* *Nuhfer* itself followed *Strickland* and did not apply an irrebuttable presumption, so the Ohio Court of Appeals' reliance on, and quotation of, *Nuhfer* cannot show application of an irrebuttable presumption.

Davis's claim fails on AEDPA review because it is not clearly established that a judge's prior involvement in the prosecution of a defendant's family member creates "an impermissible risk of actual bias" in the defendant's case. *See Williams v. Pennsylvania*, 579 U.S. 1, 8, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016). Davis asserts that, even if there is no evidence in the record of actual bias, "the [*565] probability of [***22] actual bias on the part of [Judge Nastoff] [was] too high to be constitutionally tolerable." CA6 R. 53, Suppl. Appellee Br., at 19 (quoting *Withrow*, 421 U.S. at 47). Davis relies on *Williams v. Pennsylvania* for the proposition that Judge Nastoff had an improper motive to sentence Davis to death. But his reliance on *Williams v. Pennsylvania* is misplaced. The Supreme Court has never "required recusal as a matter of course when a judge has had prior involvement with a defendant in his role as a prosecutor"—let alone a defendant's nephew. *Isom v. Arkansas*, 140 S. Ct. 342, 343, 205 L. Ed. 2d 373 (2019) (mem.) (statement of Sotomayor, J.). The Court in *Williams* held there was an "unacceptable risk of [**39] actual bias" in the Pennsylvania Supreme Court's denial of a postconviction motion where the chief justice had "significant, personal involvement in a critical decision in" the defendant's case. 579 U.S. at 14. But participation in a defendant's own case differs from participation in a family member's case. Judge Nastoff did not have "significant, personal involvement in a critical decision" in Davis's case; he had previously prosecuted Davis's nephew for a separate criminal offense that bore no connection to the instant murder. *Id.* Davis nevertheless claims that then-prosecutor Nastoff "heard and cross examined some of the very same mitigation evidence that Davis presented in his case." CA6 R. 20, Appellant Br., at 54 (quoting DE 4-46, Expert Aff., Page ID 6279). But Davis has never identified the alleged overlapping evidence between Davis's and Thompson's trials. True, Carol Smith, who is Davis's sister and Thompson's mother, testified at Davis's sentencing hearing, but first, she testified about matters unrelated to Thompson and his upbringing, and second, she did not testify at Thompson's mitigation trial. Davis cannot rely on this tenuous connection to show bias. We therefore accord the Ohio [**40] Court of Appeals' decision AEDPA deference and deny Davis's claim for relief.

D.

Davis also argues that his 2009 resentencing counsel were ineffective by failing to reasonably prepare and present mitigation evidence, specifically (1) by promising the panel that Ohio Parole Board Chair Cynthia Mausser would testify that Davis would never receive parole if given a life sentence, (2) by presenting Mausser's testimony, and (3) by failing to revise testimony by Robert Smith, Ph.D., a clinical psychologist, in view of Mausser's testimony.

[***23] The Ohio Court of Appeals, providing the last reasoned state court decision on this issue, found that counsel made reasonable strategic decisions to call and question Mausser and Smith and thus denied Davis's ineffective assistance of counsel claim. *Davis*, 2013 Ohio 3878, 2013 WL 4806935, at *5. Davis again argues that the Ohio Court of Appeals' decision involved an unreasonable application of *Strickland* by applying an irrebuttable presumption of sound trial strategy. We disagree.

The Ohio Court of Appeals first stated that the "decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *Id.* (quoting *State v. Johnson*, No. CA2011-09-169, 2013-Ohio-856, 2013 WL 938598, at *10 (Ohio Ct. App. Mar. 11, 2013)). *State v. Johnson*, the case [**41] from which the Ohio Court of Appeals quoted, itself did not apply an irrebuttable presumption but rather concluded that trial counsel's decision not to call a witness was sound trial strategy where the defendant had failed to carry his burden to overcome that presumption. *See* 2013 Ohio 856, 2013 WL 938598, at *10 (noting that the defendant had failed to specify what the witness would have said [*566] or how the witness's testimony would have aided his defense). Where Davis had not overcome the presumption of sound trial strategy, the Ohio Court of Appeals in hindsight could not second guess the decision to call Mausser. This conclusion tracks *Strickland*. *See* 466 U.S. at 689.

The Ohio Court of Appeals next concluded that "counsel's strategic decision to engage, or not engage, in a particular line of questioning" was "presumed to be the product of sound trial strategy." *Davis*, 2013 Ohio 3878, 2013 WL 4806935, at *5. Again, this is a rough paraphrase of *Strickland*, not an unreasonable application of it. *See Strickland*, 466 U.S. at 689-90. The Ohio Court of Appeals stated that it was applying a "presum[ption]," not an irrebuttable one. *Davis*, 2013 Ohio 3878, 2013 WL 4806935, at *5. And it is clear from the court's decision that it did not find Davis had rebutted the presumption of sound trial strategy. The Ohio Court of Appeals concluded that "[t]he fact that the [**42] trial strategy was ultimately unsuccessful or that there was another possible and better strategy available does not amount to ineffective assistance of counsel." *Id.* (quoting *State v. Murphy*, No. CA2009-05-128, 2009 Ohio 6745, 2009 WL 4896231, at *5 (Ohio Ct. App. Dec. 21, 2009)). This proposition is consistent with *Strickland's* pronouncement that deficient performance requires "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by [***24] the Sixth Amendment." *Strickland*, 466 U.S. at 687. The Ohio Court of Appeals was well within *Strickland's* scope when it found that counsel's strategy of calling Mausser and questioning Smith, while perhaps not the best strategy, was not deficient performance.

When AEDPA deference applies to an ineffective assistance of counsel claim, "[t]he question is whether there is *any reasonable argument* that counsel satisfied *Strickland's* deferential standard." *Richter*, 562 U.S. at 105 (emphasis added); *see id.* (explaining that when *Strickland* and AEDPA apply in tandem, reviewing courts must accord double deference). Davis asserts counsel were ineffective in calling Mausser as a witness, despite being on notice that her testimony may not be as promised. But there is a reasonable argument that counsel satisfied *Strickland's* deferential standard. At the sentencing hearing, counsel explained **[**43]** that they had interviewed Mausser four months before the hearing and based their strategy on how they thought she would testify. This shows at least some prior investigation. *See Strickland*, 466 U.S. at 690-91. When the prosecution asserted that Mausser would not testify as the defense believed, defense counsel were so confident that the prosecution was incorrect that they were ready to testify under oath "that that is not what we were told." DE 5-7, Mitigation Hr'g Tr., Page ID 8327. Given the defense's prior interview with Mausser, as well as their apparent confidence in her testimony based on that interview, there is a reasonable argument that counsel's conduct fell "within the wide range of reasonable professional assistance" and that they were functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 689. Because there is room for fairminded disagreement about the application of *Strickland* to this case, Davis's claim fails. *See Richter*, 562 U.S. at 103.

There is also a reasonable argument supporting defense counsel's decision to call and question Dr. Smith, even in light of Mausser's testimony. *See id.* at 105. True, Smith's testimony that Davis thrived in a structured environment like prison due to his borderline personality **[*567]** disorder rested on the key **[**44]** assumption that Davis would remain in prison for the rest of his life. But Mausser's testimony did not conclusively establish that Davis would be released on a life sentence. Although speculative, Mausser's testimony was that Davis would likely not be paroled before the end of his natural life. There is thus a reasonable argument that counsel's **[***25]** decision to call Dr. Smith folded into a sound trial strategy and was within the wide range of reasonable professional assistance. *See id.*; *Strickland*, 466 U.S. at 689.

Even if Davis could overcome the double deference accorded to the state court's decision, Davis's claim would fail on the prejudice prong. *See Rayner*, 685 F.3d at 638 (prescribing de novo review for unadjudicated *Strickland* prongs). In the context of a death sentence, a defendant proves prejudice if "there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Davis cannot show prejudice because the Ohio Supreme Court's independent review, which gave weight to the "likelihood that Davis will never be released from prison" given **[**45]** his age, cured any error. *See Davis*, 9 N.E.3d at 1056; *see also Lundgren v. Mitchell*, 440 F.3d 754, 783 (6th Cir. 2006) (acknowledging that independent reweighing by the Ohio Supreme Court under Ohio Rev. Code § 2929.05(A) can cure error in weighing factors). The Ohio Supreme Court thus came to the conclusion that Davis sought—that his parole was unlikely—even if Mausser's testimony did not accomplish that objective. This conclusion defeats any reasonable probability that, absent the purported error, a sentencer would have weighed the aggravating and mitigating circumstances to a different result. *Strickland*, 466 U.S. at 694.

Nor was Davis prejudiced by Smith's testimony. The Ohio Supreme Court, in conducting its independent reweighing, found Smith's testimony about Davis's borderline personality disorder unpersuasive because the murder at issue "was not an impulsive act or the product of an angry outburst," but rather a killing "with prior calculation and design," where Davis had organized a straw purchaser to acquire a gun and ammunition earlier that day. *Davis*, 9 N.E.3d at 1055. In other words, even if Davis were to be later released on parole, the problem was not impulsive behavior. This independent reweighing cured any purported error in failing to elicit Smith's testimony about Davis's behavior if eventually paroled. *See Lundgren*, 440 F.3d at 783. We thus **[**46]** accord the Ohio Court of Appeals the deference owed under AEDPA and reject the claim.

[*26]** E.

Davis next argues that his 2009 resentencing counsel were constitutionally ineffective for failing to investigate and present mitigating evidence—specifically, a letter from Robert J. Beard—concerning the circumstances of Davis's 1971 conviction of second-degree murder. Several years after that conviction, a man named Robert J. Beard wrote a letter to H.J. Bressler, Davis's trial counsel in the 1971 murder case, stating that Beard had been in the house when Ernestine was killed and that Ernestine's death was the result of a heated dispute in which she was the aggressor. *Davis*, 1996 Ohio App. LEXIS 4263, 1996 WL 551432, at *4. Beard's "letter was time-stamped for the record by the clerk's office in 1981," thus preceding the 1983 murder. *Id.*

[*568] While Davis used the letter to move for a new trial challenging his 1971 conviction, Davis did not raise an ineffective assistance of counsel claim for failure to investigate and present the letter on direct appeal of his 1984 conviction. *Id.* Instead, Davis raised this claim for the first time in his post-conviction petition following his second sentencing. At that time, the Ohio Court of Appeals barred Davis's claim [**47] under res judicata because Davis had not raised it on direct appeal, even though he could have. *Id.*

Davis did not raise this claim in his state post-conviction proceedings following his third sentencing in 2009. The Warden argues that Davis thus did not satisfy the exhaustion requirement. Davis argues that, because the Sixth Circuit's decision in *Davis v. Coyle* granted relief only as to his sentence, his conviction was left in place, and thus he properly exhausted this claim by presenting it to the state courts in his postconviction petition following his second sentencing. But the problem with this position is that Davis was represented by different counsel at his second sentencing versus his third. Davis's briefing before this court focuses exclusively on the new counsel's alleged deficiencies at his third sentencing hearing by not investigating or presenting the letter as mitigating evidence. Davis thus never "fairly presented" his claim, as he never presented the factual basis for the deficiency of his new attorney at his third sentencing to the Ohio state courts. *See Wagner*, 581 F.3d at 414-15. Davis's claim of error is procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161-62, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996).

[***27] F.

Finally, Davis argues that his original trial counsel [**48] in 1984 were ineffective by failing to advise him of the collateral consequences of waiving his constitutional right to a jury trial.³ The Warden contends that this claim is procedurally defaulted because the Ohio Court of Appeals invoked a procedural bar instead of considering this claim on the merits. *See Davis*, 2013 Ohio 3878, 2013 WL 4806935, at *7 (explaining that "as this court has previously determined, Davis'[s] habitual challenges regarding his jury waiver are barred by the doctrine of res judicata"). Thus, review by this court would be barred because "the state judgment rests on independent and adequate state procedural grounds." *Coleman v. Thompson*, 501 U.S. 722, 730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

The parties dispute whether Ohio correctly applied its res judicata rule. In all events, even on de novo review, Davis's ineffective assistance of counsel claim fails. Davis relies on *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), for the contention that his 1984 trial counsel were ineffective. Davis's reliance on *Padilla* is misplaced because the Supreme Court has held that *Padilla* does not have retroactive effect. *Chaidez v. United States*, 568 U.S. 342, 344, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013). Moreover, the timing here is critical. The Supreme Court has held that deficient performance is judged based on the prevailing professional norms at the time of trial. *Bobby v. Van Hook*, 558 U.S. 4, 8, [*569] 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009) (per curiam) ("Judging counsel's conduct in the 1980's on the basis [**49] of these 2003 Guidelines—without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial—was error."). In 1984, the prevailing professional norms did not require attorneys to inform clients of the collateral consequences of waiving a constitutional right. *See Chaidez*, 568 U.S. at 350. Davis has thus not shown deficient performance.

[***28] IV.

For the reasons discussed above, we deny Davis's claims for habeas relief. In the habeas context, federal courts may not displace with their own judgment the valid adjudications of state courts.

Dissent by: KAREN NELSON MOORE

Dissent

³Specifically, Davis argues that counsel did not inform him of the negative impact that a jury waiver would have on appellate review, did not explain that the jury waiver could not be retracted at a later guilt or penalty phase regardless of the three-judge panel, did not reserve the right to withdraw the waiver, and advised Davis to waive his right to a jury trial knowing that he would likely be sentenced to death because his innocence defense prevented him from accepting responsibility.

[***29] KAREN NELSON MOORE, Circuit Judge, dissenting. In 1984, Von Clark Davis was sentenced to death by a three-judge panel. Since that time, Davis's death sentence has been vacated twice—once by the state courts and once by a panel of this court. Before his third resentencing, Davis unsuccessfully attempted to withdraw his 1984 jury waiver because the three-judge panel explicitly named in the waiver was no longer available. The new state resentencing panel denied this request, Davis presented his mitigation case, and the new panel again sentenced Davis to death.

Today, the Majority finds both that Davis must be held to [**50] his 1984 jury waiver and that the waiver was knowing and voluntary, despite the fact that the promise that induced Davis's waiver is not being enforced. Excising the promise of the named three-judge panel from the jury waiver, the Majority enforces the waiver against Davis while simultaneously holding that the aspect of the waiver that benefits Davis is not enforceable. At bottom, the Majority creates a rule that allows death-eligible defendants to be induced to waive their constitutional right to a jury trial by unenforceable promises, leaving these individuals with no recourse to vindicate their constitutional rights. This plainly contradicts binding Supreme Court precedent. Likewise, the Majority finds that the state court properly applied *Strickland's* presumption to counsel's failure to move for recusal and decision to present incomplete mitigating evidence, even though the state court *never assessed* the adequacy of counsel's investigation and preparation. This, too, conflicts with longstanding Supreme Court precedent. I therefore respectfully dissent.

I. DISCUSSION

Davis raises six bases for relief. In my view, Davis is entitled to relief on four bases: (1) his claim that his jury [**51] waiver was breached when he was forced to be resentenced before a different three-judge panel (the "Breach Claim"); (2) his claim that his jury waiver was not [***30] knowing, intelligent, and voluntary (the "Unknowing-Waiver Claim");¹ (3) his claim that his counsel were ineffective for failing to move for Judge Nastoff's recusal (the "Recusal Claim"); and (4) his claim that his counsel were ineffective for failing adequately to [**570] investigate, prepare for, and present mitigating evidence (the "Failure-to-Investigate Claim"). I will address each claim in turn.

A. The Breach Claim

Davis argues that his jury waiver was breached because he did not receive the benefit of the bargain when he was resentenced before a different three-judge panel than the one specified in his jury waiver. D. 53 (Appellant Suppl. Br. at 3-9). In response, the Warden contends that Davis procedurally defaulted this claim, and, in the alternative, the state court's denial of this claim was reasonable. D. 54 (Appellee Suppl. Br. at 5-11). Although the Majority claims not to resolve the procedural-default question, Maj. Op. at 8-9, its acknowledgment that the Supreme Court of Ohio did not dismiss this claim on procedural grounds [**52] coupled with its subsequent reliance on Davis's briefing, Davis's oral argument, and the Supreme Court of Ohio's opinion leads to one conclusion: the Breach Claim was properly exhausted. *See Jones v. Bradshaw*, 46 F.4th 459, 484 (6th Cir. 2022) (explaining that procedural default applies only when "the state courts actually enforced the state procedural sanction" (citation omitted)). Accordingly, I proceed to assess whether AEDPA deference applies and whether Davis is entitled to relief on his Breach Claim.

1. AEDPA Deference

Because the Supreme Court of Ohio did not cite the relevant U.S. Supreme Court standard, rely on an analogous state-law standard, or analyze Davis's Breach Claim, I would find that AEDPA deference does not apply. *Lafler v. Cooper*, 566 U.S. 156, 173, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) (holding that AEDPA deference did not apply because the state court determined that the defendant's plea was knowing and voluntary without considering whether counsel was ineffective under *Strickland*). [***31] Specifically, under the sub-heading "Constitutionality," the Supreme Court of Ohio considered Davis's Unknowing-Waiver Claim only. *See State v. Davis*, 139 Ohio St. 3d 122, 2014- Ohio 1615, 9 N.E.3d 1031, 1042-43 (Ohio 2014) (*Davis XIV*).² The court

¹ Davis cannot be granted relief simultaneously on both the Breach Claim and the Unknowing-Waiver Claim. At a high level the argument is: either the jury waiver included an enforceable contractual term—the specific three judges—that was breached, or that term was an unenforceable promise that induced Davis's waiver, thereby making the waiver unknowing. Rather than take a position on which claim should succeed, I assess each claim independently and find that they each warrant relief.

concluded that Davis did not have a constitutional right to jury sentencing under *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), and that it therefore did not need to determine whether the waiver **[**53]** was knowing and voluntary. *Davis XIV*, 9 N.E.3d at 1042. In the alternative, the court found that Davis's argument failed because it "appear[ed] to require that a defendant . . . possess more information than courts have usually held sufficient" for a knowing and voluntary waiver. *Id.* Finally, the court determined that *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), did not alter its analysis. *Id.* at 1043. At bottom, the state court never considered the constitutional implications of holding Davis to the waiver of his constitutional right to a jury during the *guilt phase* that was induced by an explicit promise—that he would be tried *and sentenced* before a specific panel³—that could not be fulfilled. *See id.* at 1042-43. **[*571]** By concluding that that AEDPA deference applies to Davis's Breach Claim because the state court presumptively adjudicated this claim on its merits, *see* Maj. Op. at 10-11, the **[***32]** Majority flouts the reasoning of *Johnson v. Williams*, 568 U.S. 289, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013). In *Williams*, the petitioner brought claims under the Sixth Amendment and the California Penal Code based on the trial court's decision to excuse a juror. 568 U.S. at 295. The California Court of Appeals denied the petitioner's claims and, although the state court "did not expressly acknowledge" the Sixth Amendment claim, it relied on Supreme Court precedent concerning the Sixth Amendment. *Id.* at 296. On federal habeas review, **[**54]** the Supreme Court held that AEDPA deference applied, and federal courts should presume that, in situations such as *Williams*'s, the Sixth Amendment claim had been adjudicated on the merits. *Id.* at 298.

The Court cautioned that, although there is "a strong . . . presumption" that the state court adjudicated issues on the merits, the presumption is rebuttable. *Id.* at 301. The Court stated that it would "go[] too far," if the presumption applied when "a defendant claimed in state court that something that occurred at trial violated both a provision of the Federal Constitution and a related provision of state law, and . . . in denying relief, [the state court] made no reference to federal law." *Id.* Likewise, the Court explained that the presumption would be rebutted in several circumstances, including if the petitioner invokes both the state and federal constitutions but "the state standard is quite different from the federal standard" and the state court does not explicitly resolve the federal claim. *Id.*

That is precisely the case here. Davis invoked two interrelated claims—the same that we address here—arising under the Federal Constitution: that his jury waiver was breached and that his jury waiver was not **[**55]** knowing and voluntary. The federal standard for determining whether a waiver **[*572]** is knowing, intelligent, and voluntary is "quite different" from the federal standard for determining whether there was a breach of the jury waiver. *Id.* This is plain from the Majority's separate analysis of each claim. Notably, the Supreme Court of Ohio did not cite any federal precedent or analogous state precedent relevant to adjudicating Davis's Breach Claim on its merits. *Davis*, 9 N.E.3d at 1042-43. Thus, this case falls squarely within the circumstances in which the

²In the preceding section of the opinion, the Ohio Supreme Court assessed the applicability of the Ohio death-penalty statute. *Davis XIV*, 9 N.E.3d at 1041-42. This cannot be considered an assessment of the merits of Davis's Breach Claim because it is explicitly not a constitutional analysis and it does not invoke the relevant federal standard or an analogous state standard.

³The Majority contends that Davis's jury waiver—within its "four corners"—does not mention sentencing and therefore the waiver did not include a promise that the three-judge panel would preside over sentencing. Maj. Op. at 15-16; however, this argument ignores generally applicable Ohio jury-waiver law. Specifically, "[a]s [the Ohio courts] h[ave] previously recognized, [Ohio Revised Code §] 2929.03(C)(2)(b) states that once a defendant waives his right to a jury trial, that waiver applies to the penalty proceeding as well." *State v. Davis*, No. CA2009-10-263, 2011 Ohio 787, 2011 Ohio 787, 2011 WL 646404, at *7 (Ohio Ct. App. Feb. 22, 2011) (*Davis XI*). The three-judge panel thus presides over both trial and sentencing. *See* Ohio Rev. Code § 2929.03(C)(2)(b)(i)-(ii) (stating that a penalty imposed under § 2929.03(D)—including the death penalty—"shall be determined by . . . the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury"). Accordingly, without any jury-waiver language to the contrary, there is no basis to conclude that the waiver's use of the word "trial" was intended to alter generally applicable Ohio jury-waiver law.

Indeed, this straightforward interpretation of the jury waiver in light of the generally applicable law was reinforced during Davis's colloquy and was even the basis of the state courts' later determinations that Davis's waiver was knowing and voluntary. *See* R. 5-1 (Tr. of 1984 Mot. Hr'g at 60-61) (Page ID #7224-25) (explaining during the waiver colloquy that the jury waiver would shift decision making from a jury to a three-judge panel and clarifying that "it goes to all phases" of the trial); R. 4-37 (Dec. 29, 2008 Order at 15) (Page ID #4648) ("As the record shows, all were aware, including Defendant, that a jury waiver applied to both phases of trial, and that a three judge panel would determine Defendant's sentence should the need arise."); *Davis XI*, 2011 Ohio 787, 2011 WL 646404, at *7 (concluding that "Davis was aware that by waiving his right to a jury, he was giving up that right for both the guilt phase of the trial, as well as the sentencing proceeding"). It is only now, because the plain language and most obvious interpretation of the jury waiver does not support the Majority's argument, that the waiver no longer applies to the sentencing phase.

presumption is rebutted, as contemplated by *Williams* because the standards applied by the Supreme Court of Ohio do not encapsulate—or even relate to—the standards relevant to Davis's Breach Claim. *See* 568 U.S. at 301-02.

[***33] The Majority contends that "a state court's unexplained denial of a federal claim is presumed to constitute an adjudication on the merits." Maj. Op. at 10 (citing *Harrington v. Richter*, 562 U.S. 86, 98, 102, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2016)). But the cited portion of *Richter* establishes that the state court need not *explain* a decision, not that the state court can simply *ignore* a non-frivolous claim. 562 U.S. at 98, 102 (considering "whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining its reasons" and then holding that § 2254(d) does [**56] not "require that there be an opinion from the state court explaining the state court's reasoning" but that the statute does require a "decision"). As the Court explained in *Williams*, if there is a written statement of reasons, the presumption of adjudication on the merits is rebutted when, as here, "a defendant claimed in state court that something that occurred at trial violated both a provision of the Federal Constitution and a related provision of state law, and . . . in denying relief, [the state court] made no reference to federal law." 568 U.S. at 301.

The Majority also suggests that the Supreme Court of Ohio "may have regarded" the Breach Claim "as too insubstantial to merit discussion." Maj. Op. at 11 (quotations omitted). Yet, the Majority's subsequent five-page analysis of the Breach Claim contradicts its contention that this claim is also somehow "insubstantial." *Id.* at 11-16. And the Majority relies on a mischaracterization of *Williams* and *Rogers v. Mays*, 69 F.4th 381 (6th Cir. 2023) (en banc), for the proposition that Davis was required to move for reconsideration. Unlike *Williams*'s failure to "argue[] in the subsequent state and federal proceedings that the state court had failed to adjudicate her . . . claim on the merits," 568 U.S. at 306, Davis has repeatedly [**57] argued in subsequent proceedings that his Breach Claim was not adjudicated on its merits. *See* D. 53 (Appellant Suppl. Br. at 6-7); D. 59 (Appellant Suppl. Reply Br. at 1-2); D. 20 (Appellant Br. at 40) (arguing that "the court did not address whether it was a violation of fundamental fairness to hold Davis to a jury waiver in violation of its explicit terms").⁴ Because both *Rogers* and *Williams* relied on the petitioner's failure to raise the argument altogether, today the Majority suggests that petitioners must also move for reconsideration—a clearly improper expansion of this procedural hurdle. With no state-court analysis resolving the Breach Claim or even a [***34] passing citation to the relevant legal standard in the state-court opinion, the Majority "goes too far" in applying AEDPA deference to a non-frivolous claim. [*573] *Williams*, 568 U.S. at 301. Thus, I would find that the Breach Claim is subject to de novo analysis.

2. Merits

Even if AEDPA deference applies, Davis is entitled to relief on his Breach Claim because the Supreme Court of Ohio's decision is an unreasonable application of Supreme Court precedent. Davis claims that his rights under the Due Process Clause and the Sixth and Eighth Amendments were violated when his 1984 jury waiver was enforced [**58] against him at his third sentencing hearing in 2009 because the state did not comply with the plain terms of the waiver agreement, which included a promise that the three named judges would try and sentence him.⁵

To determine whether the enforcement of Davis's waiver was valid, I am guided by the Supreme Court's instruction that, because "the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393, 57 S. Ct. 809, 81 L. Ed. 1177 (1937). The Supreme Court has held that written waivers of constitutional trial rights "are essentially contracts," "[a]lthough the analogy may not hold in all respects." *Puckett v. United States*, 556 U.S. 129, 137, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009). "When the consideration for a contract fails—that is, when one of the exchanged promises is not kept—. . . the contract was broken" and "[t]he party injured by the breach will generally be entitled to some remedy, which might include the right to rescind the contract entirely." *Id.* Because the waiver of a constitutional right is involved, a breach of a jury waiver has constitutional dimensions. *See United States v. Barnes*, 278 F.3d 644, 648 (6th Cir. 2002).⁶ Specifically, "a

⁴This same distinction is also apparent in *Rogers* because, unlike Davis, Rogers "concede[d] that the state court adjudicated his claim" and "in both his original and supplemental briefs before [the en banc] court, he admitted that the state court addressed this claim on the merits." 69 F.4th at 388 (quotations omitted).

⁵Confusingly, the Majority dedicates two pages to responding to an argument that no one advocates before the en banc court and, indeed, that Davis expressly *disclaimed*. Maj. Op. at 12-13 (noting that Davis agrees "that there is no constitutional right to jury sentencing and that his only claimed constitutional right to being sentenced by the three named judges stems from his bargain theory" and then proceeding to analyze whether there is a constitutional right to jury sentencing). Because this argument is irrelevant and not properly before this court, I decline to address it.

defendant has a due process right to hold the government to the promises it made that induced him to" waive the right. *United States [***35] v. Warren*, 8 F.4th 444, 448 (6th Cir. 2021) (citing *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)). It therefore follows that Davis **[**59]** has the right to receive the benefit of the jury waiver or, in the alternative, to withdraw his waiver. *Cf. Sinistaj v. Burt*, 66 F.3d 804, 809 (6th Cir. 1995) (denying analogous habeas claim because petitioner's jury waiver did not specify that only a particular named judge could preside).

The Majority comes to the opposite conclusion by claiming that Davis relies on Supreme Court cases that are not specific enough to the facts of this case because, in the Majority's view, Davis's analogy to plea agreements is inapt. *See* Maj. Op. at 13-14 ("Davis has not cited a Supreme Court case explaining, much less holding, that the contract principles applicable to plea bargain agreements are also applicable to **[**574]** jury waivers.").⁷ In an effort to distinguish Davis's written jury waiver from written plea agreements, the Majority begins by suggesting that "Defendants routinely waive constitutional rights *without inducements*, such as waiving the right to remain silent when being questioned by a police officer, waiving the right to representation by counsel, or pleading guilty without a plea deal." Maj. Op. at 14 (emphasis added) (citations omitted).⁸ But Davis *was induced* to waive his jury right based on the availability of a specific three-judge panel. **[**60]** Davis filed a pre-trial motion for notice of the three judges that would preside over his trial if he decided to waive his jury right. R. 4-1 (Mot. for Notice of Panel at 1-2) (Page ID #212-13). In the motion, Davis stated that he wanted this information before he could "make a valid, fully informed decision as to whether or not he should waive his right to trial by jury." *Id.* at 2 (Page ID #213). The court was not required to provide Davis with the requested information; however, the court was required to provide accurate information. At a pre-trial motion hearing, Judge Bruewer addressed the motion, stating "[f]or the record" and "so [the court] can inform Mr. Davis of [this] fact," "you know the three judges would be the ones that **[***36]** are here in the General Division, it would be Judge Stitsinger, Judge Moser and myself." R. 5-1 (Tr. of 1984 Mot. Hr'g at 34, 42) (Page ID #7201, 7209). It was only after receiving this information that Davis signed the jury-waiver form that included the specific names of the three judges who would preside. R. 4-3 (Jury Waiver at 1) (Page ID #433). Thus, the Majority's suggestion that Davis's jury waiver came without inducement is plainly contradicted **[**61]** by the record.

Davis's jury waiver is also distinct from the Majority's proffered examples because his jury waiver was more formal.⁹ As explained, **[**575]** here there was a written jury waiver with an explicit promise that Davis informed the court was relevant to his willingness to waive his jury right. The waiver was prepared by the prosecutor, signed by the court, the defendant, and defense counsel, and, after an on-the-record colloquy, accepted by the court. *See* R. 5-1 (Tr. of 1984 Mot. Hr'g at 34, 42) (Page ID #7201, 7209); R. 4-3 (Jury Waiver at 1) (Page ID #433); R. 5-1 (Tr. of 1984 Waiver Colloquy at 58-62) (Page ID #7222-26). The jury waiver in this case is therefore much more analogous to a written plea agreement that is signed by the defendant, defense counsel, and the government,

⁶ "Although courts of appeals decisions do not create clearly established law for AEDPA purposes, we may look to such decisions to evaluate whether the Supreme Court has clearly established a principle." Maj. Op. at 23 n.2 (citing *Avery v. Prelesnik*, 548 F.3d 434, 436-37 (6th Cir. 2008)).

⁷ Despite taking great pains to distance Davis's written jury waiver from a contract—specifically a plea agreement—the Majority nonetheless applies contract principles when those principles support its argument. Maj. Op. at 15-16 (applying the "four corners" doctrine in an effort to ignore the plea colloquy that indicates the jury waiver applies to guilt and sentencing).

⁸ Waiving the right to remain silent when being questioned by a police officer is legally distinct from a court accepting an individual's decision to waive a constitutional right in court. *See Berghuis v. Thompkins*, 560 U.S. 370, 385, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010) ("*Miranda* rights can . . . be waived through means less formal than a typical waiver on the record in a courtroom, given the practical constraints and necessities of interrogation and the fact that *Miranda*'s main protection lies in advising defendants of their rights." (citations omitted)). This comparison is therefore fundamentally inapt.

⁹ Even if Davis's written jury waiver could be considered properly analogous to an unwritten plea agreement, waiving the right to counsel, or waiving *Miranda* rights, promises that induce these categories of waivers—like Davis's jury waiver—must be enforceable. For example, if a defendant was induced to plead guilty by an explicit promise but without a written contract, this would be discussed during the on-the-record colloquy required when the court accepted the plea agreement. *See Santobello*, 404 U.S. at 261-62. Likewise, defendants who waive the right to counsel do so after an on-the-record colloquy that is "more" formal than a plea colloquy to ensure that the waiver was not induced by unenforceable promises. *See Iowa v. Tovar*, 541 U.S. 77, 87-88, 90-91, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004) ("While the Constitution does not force a lawyer upon a defendant, it does require that any waiver of the right to counsel be knowing, voluntary, and intelligent." (internal quotation marks omitted)). Finally, in the context of choosing to speak with officers, when the validity of a *Miranda* waiver is at issue, courts consider whether there was an illusory promise that induced the individual to waive their rights. *See United States v. Johnson*, 351 F.3d 254, 257, 260-63 (6th Cir. 2003) (considering whether Johnson's waiver of *Miranda* rights was unknowing or involuntary because the waiver was induced by the verbal promise of leniency). This is the very basis of knowing and voluntary waivers.

subject to an on-the-record colloquy, and accepted by a court before it becomes valid. *See generally* Ohio Rev. Code Ann. § 2945.05 (requiring that a jury waiver must be "in writing, signed by the defendant, and filed in" the record and "must be made in open court"); *see also* *Fitzgerald v. Withrow*, 292 F.3d 500, 503 (6th Cir. 2002) (explaining that courts "have required elaborate conditions for [a jury] waiver to be valid"). Courts treat plea agreements with such formality *****62** because defendants are waiving their constitutional right to a jury trial. *See Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

*****37** Thus, just as with plea agreements, before a court can accept a defendant's jury waiver, it is required to ensure that the waiver is "voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." *Santobello*, 404 U.S. at 261-62; *cf.* Fed. R. Crim. P. 11(b)(2) ("[T]he court must address the defendant personally in open court and determine that the plea is voluntary and did not result from . . . promises (other than promises in the plea agreement)."). If there are any promises "that . . . can be said to be part of the inducement or consideration, such promise[s] *must be fulfilled*." *Santobello*, 404 U.S. at 262 (emphasis added).

In this case, the promise of a specific three-judge panel was put on the record by Davis's motion requesting the judges' names, the court identifying the judges' names in response to that motion, the written plea agreement (drafted on state letterhead and signed by the defendant, defense counsel, and the court), and the court's waiver colloquy that acknowledged and reaffirmed the specific three judges. When the state court accepted the waiver on this record, it accepted that *****63** Davis had been induced to waive his jury right based on the promise that he would be tried and sentenced by three specific judges. Once the waiver was accepted based on the explicit promise of the named three judges, the promise "must be fulfilled" or, if that is not possible, Davis is entitled to relief for the breach. *See Santobello*, 404 U.S. at 262; *Puckett*, 556 U.S. at 137.

To further distance Davis's written jury waiver from written plea agreements, the Majority asserts that the jury waiver was not bargained-for for three interrelated reasons: (1) Davis was able unilaterally to withdraw his waiver, (2) there is a statutory procedure for designating the judges for the panel, and (3) "the court had no discretion to refuse [Davis's] choice" to waive his jury right. Maj. Op. at 14. But this reasoning is either inapt, incorrect, or irrelevant. First, although Ohio law does allow a defendant to withdraw a jury waiver up until the point of trial, once the guilt *****576** phase began Davis was bound by his waiver. *See* Ohio Rev. Code Ann. § 2945.05. Indeed, this was the basis of the state's opposition to—and the state court's rejections of—Davis's repeated requests to withdraw his jury waiver for resentencing. *See, e.g.*, R. 5-6 (Tr. of 2008 Mot. Hr'g at 53-58) (Page ID #8068-73) *****64** (arguing that Davis's jury waiver remains valid at resentencing and opposing Davis's attempts to invalidate or withdraw it). *****38** Accordingly, it is not clear how it is relevant that, for a brief period, Davis could have withdrawn his waiver. Once that period expired, Davis was bound by the waiver as if it were a contract so long as his conviction remained intact. *See* Ohio Rev. Code Ann. § 2945.05; R. 4-37 (Dec. 29, 2008 Order at 20-21) (Page ID #4653-54). This aspect of Ohio procedural law does not make the waiver any less bargained-for. It is similarly irrelevant that there is a statutory procedure for designating the judges and that these were the only three judges in the relevant division because certain issues, such as illness, scheduling conflicts, or a conflict of interest, could lead to the appointment of a judge outside of the typical procedure. Although there may have been a "typical" procedure, Davis nonetheless received a promise that three specific judges would preside over his case and sentencing.

Finally, the Majority's contention that the trial court "had no discretion to refuse" Davis's waiver has no support in the relevant law. Maj. Op. at 14. It is correct that defendants have a *statutory* right to *****65** waive their jury right. *See* Ohio Rev. Code § 2945.05; *State v. Banks*, 2019- Ohio 5440, 151 N.E.3d 198, 201 (Ohio Ct. App. 2019) (explaining that a defendant's jury waiver must be accepted if the court "strictly compl[ies] with the five requirements of . . . § 2945.05" (quotations omitted)). It is not the case, however, that the trial court could simply ignore any potential federal constitutional implications of the jury waiver. *See, e.g.*, *State v. Van Sickle*, 90 Ohio App. 3d 301, 629 N.E.2d 39, 43-44 (Ohio Ct. App. 1993) (explaining that the trial court has no discretion to reject a defendant's jury waiver "unless suggestion of his present insanity is made" (quotations omitted)). The court must be certain that the jury waiver was made knowingly, intelligently, and voluntarily. *Santobello*, 404 U.S. at 261-62; *Brady*, 397 U.S. at 748. If there is reason to doubt that the waiver is knowing, intelligent, or voluntary, the trial court was *obligated* to reject it. *See Brady*, 397 U.S. at 748 (explaining that "a guilty plea is a grave and solemn act to be accepted only with care and discernment"). Stated differently, if, as the Majority contends, "the defendant does not have a say in the judges that make up the panel" and thus "Davis did not 'bargain' with the state for the three specific judges," Maj. Op. at 15, then the court was *obligated* to reject his jury waiver because it was improperly induced. *See infra* Part II.C. Instead, the court accepted *****66** the jury waiver, and Davis was therefore owed the promise of the specific three-judge panel or, given the judges' unavailability at resentencing, the ability to withdraw his waiver. *Santobello*, 404 U.S. at 262.

[***39] Perhaps sensing the inadequacy of its argument that the express terms of the jury waiver did not bind the trial court at resentencing, the Majority suggests that because the provision providing for a specific three-judge panel is unusual, that it could not have created any obligations. Maj. Op. at 15 (noting that Davis did not "identify a case in which a plea deal or waiver contains [a similar] commitment" and concluding that, therefore, "the terms of the waiver here are insufficient to create such an unusual bargain"). But the unusual nature of the express terms of the jury waiver *reinforces* the conclusion that [*577] the specific judges were bargained-for. If all the usual rules of Ohio statutory procedure applied, there would be *no reason* to include any reference to the three-judge panel in the jury waiver. Instead, the only reason Davis—and defense counsel, the state, and the trial court—included such a provision was to create a situation in which the general rules did not apply. In concluding otherwise, [**67] the Majority improperly excises the three-judge-panel term from the jury waiver. *Cf. Warren*, 8 F.4th at 448 ("[W]e enforce [plea agreements] *according to their literal terms*" because "defendants waive[] certain fundamental rights when they enter plea agreements" (quotations omitted) (emphasis added)).

In a last-ditch effort to shore up its conclusion, the Majority claims that Davis's "closer in time" 1993 affidavit provides a basis to "disregard" his "claim that he only waived his right to a jury in return for being tried and sentenced" by the named three-judge panel. Maj. Op. at 16. But this affidavit is not closer in time than Davis's pre-trial motion, pre-trial motion hearing, and jury-waiver colloquy, all of which occurred in the lead up to trial. It is not clear why the 1993 affidavit could be considered "earlier" or "more consistent" than Davis's conduct during the trial proceedings. Moreover, "credit[ing] Davis's 1993 affidavit," the Majority provides no reason why Davis can have only one reason for electing to proceed before a three-judge panel. Davis likely took many factors into consideration when deciding whether to proceed before a jury. Thus, this is not a basis to "disregard" entirely Davis's [**68] other reasons for waiving his jury rights. Finally, the "other" reason for Davis's waiver—that Davis wanted a three-judge panel because he did not want the prior aggravating circumstance decided by a jury—was resolved before he elected to waive his right to a jury trial. Four days before Davis decided to sign the jury waiver, he elected to have the court decide the aggravating circumstance in this case. *See* R. 5-1 (Tr. of 1984 Waiver Colloquy at 56-58) (Page ID #7220-22). Thus, by the time that Davis decided to [***40] waive his jury right, he had already received the benefit of keeping the aggravating circumstance from the jury.

At bottom, by finding that Davis's jury waiver was not breached and denying Davis his requested relief—resentencing at which he is allowed to withdraw the waiver—the Majority concludes that the jury waiver is not a contract *and* that Davis is legally bound by it. Put differently, under the Majority's view, the jury waiver is not a contract from which Davis can benefit, but it is a contract that *can be enforced upon Davis* as to the terms that do not benefit him. This simply cannot be the case. Either the waiver is a "contract"—as the term is used in *Puckett*—and it was [**69] breached when Davis did not get the benefit of the specific three-judge panel, or the waiver is not a binding contract and Davis can withdraw it. For the reasons explained, I would find that Davis is entitled to relief on his Breach Claim.

B. The Unknowing-Waiver Claim

As an alternative to his Breach Claim, Davis argues that his jury waiver was unknowing because it was premised on an unfulfillable promise or misinformation. D. 53 (Appellant Suppl. Br. at 9-16). For the reasons explained below, I would find that the last-reasoned state-court decision unreasonably applied Supreme Court precedent and Davis's claim succeeds on the merits.

1. AEDPA Deference

The Ohio Supreme Court identified two primary bases for denying Davis relief, which are based on either an unreasonable [*578] application of Supreme Court precedent or an unreasonable determination of fact. First, the Ohio Supreme Court held that Davis did not have the right to a jury trial at sentencing; therefore, it reasoned that it was irrelevant whether Davis's waiver was voluntary, knowing, and intelligent. *Davis XIV*, 9 N.E.3d at 1042 ("[T]he requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to [**70] a criminal defendant in order to preserve a fair trial." (quoting *Schneekloth v. Bustamonte*, 412 U.S. 218, 237, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973))). This reasoning fails to address that Davis waived his right to a jury during *the guilt phase of his trial* because he was promised that the specific three-judge [***41] panel would

adjudicate *both phases of the trial*.¹⁰ R. 4-37 (Dec. 29, 2008 Order at 15) (Page ID #4648) ("As the record shows, all were aware, including Defendant, that a jury waiver applied to both phases of trial, and that a three judge panel would determine Defendant's sentence should the need arise."); R. 4-3 (Jury Waiver at 1) (Page ID #433); R. 5-1 (Tr. of 1984 Mot. Hr'g at 60-61) (Page ID #7224-25) (explaining that the jury waiver would shift decision making from a jury to a three-judge panel and clarifying that "it goes to all phases" of the trial). The Ohio Supreme Court's reasoning on this point, therefore, is an unreasonable determination of fact because it relied on an incorrect determination that Davis's jury waiver was irrelevant to the resentencing proceeding.

Alternatively, the Ohio Supreme Court reasoned that Davis's Unknowing-Waiver Claim failed because defendants are typically "sufficiently informed to make an intelligent waiver" so long **[**71]** as they are aware of the general parameters of a jury trial. *Davis XIV*, 9 N.E.3d at 1042. The Ohio Supreme Court, however, failed to consider the "relevant circumstances and likely consequences" specific to Davis's jury waiver, despite *Brady* and *McCann* requiring that it do so. *Brady*, 397 U.S. at 748; *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 278, 63 S. Ct. 236, 87 L. Ed. 268 (1942). Most relevant here, the Ohio Supreme Court did not consider whether Davis's jury waiver was "induced by . . . misrepresentation (including unfulfilled or unfulfillable promises)." *Brady*, 397 U.S. at 755 (citation omitted). Accordingly, this aspect of the decision constitutes an unreasonable application of Supreme Court precedent. For these reasons, I would find that the Unknowing- Waiver Claim is subject to de novo review that includes consideration of all the relevant circumstances, as required by Supreme Court precedent.

2. Merits

"Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748. The "relevant circumstances and likely consequences" include whether the defendant "was subjected to . . . threats or promises" and "had competent counsel and full opportunity to assess the advantages and disadvantages of trial." *Id.* at 748, 754; **[***42]** see also **[**72]** *McCann*, 317 U.S. at 278 (explaining that determining whether a defendant's jury waiver was "intelligent, competent, [and] self-protecting . . . depend[s] upon the unique circumstances of each case"). Likewise, the waiver must be "entered by one fully aware of the direct **[*579]** consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel." *Brady*, 397 U.S. at 755 (quoting and adopting the standard as stated in *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26, 78 S. Ct. 563, 2 L. Ed. 2d 579 (1958)). A waiver is invalid if it was "induced by threats . . . , misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper . . . (e.g. bribes)." *Brady*, 397 U.S. at 755 (quotations omitted). Thus, the record must reflect that the defendant possessed a full understanding of the direct consequences such that the waiver represents a voluntary and intelligent choice among alternatives. See *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Here, the record reflects that Davis decided to waive his jury right based on the promise of a specific three-judge panel presiding over the guilt and penalty phases of trial. Davis filed a pre-trial motion for notice of the three judges that would preside over his trial if he decided to waive his jury right. R. 4-1 **[**73]** (Mot. for Notice of Panel at 1-2) (Page ID #212-13). In the motion, Davis stated that he needed this information to "make a valid, fully informed decision as to whether or not he should waive his right to trial by jury." *Id.* at 2 (Page ID #213). At a pre-trial motion hearing on May 2, 1984, Judge Bruewer addressed this motion and stated "[f]or the record" "you know the three judges would be the ones that are here in the General Division, it would be Judge Stitsinger, Judge Moser and myself." R. 5-1 (Tr. of 1984 Mot. Hr'g at 34, 42) (Page ID #7201, 7209). Davis and his attorney then signed a waiver form¹¹ that stated, in relevant part, that Davis "voluntarily waive[d] [his] right to trial by jury and elect[ed] to be tried by a court to be composed of three judges, consisting of Judges Henry J. Bruewer, William R. Stitsinger, and John R. Moser" R. 4-3 (Jury Waiver at 1) (Page ID #433). On May 8, 1984, the parties reconvened so that the court could conduct a colloquy about Davis's intent to waive his jury rights. R. 5-1 (Tr. of 1984 Waiver Colloquy at 58-62) (Page ID #7222-26). During the colloquy, Judge Bruewer reaffirmed the identities of the three judges previously discussed **[**74]** and **[***43]** included on the jury waiver form. *Id.* at 61 (Page ID #7225) ("[W]e'll have three judges will [sic] be here tomorrow, you know who they are, and they're in this form

¹⁰The Majority adopts this inadequate reasoning as well. See Maj. Op. at 17-18. Perhaps recognizing its deficiency, the Majority does not rest the opinion on this basis. *Id.* at 18-20.

¹¹The waiver form is printed on the letterhead of the "Office of Prosecuting Attorney Butler County, Ohio," and was presumably typed by an employee of that office. R. 4-3 (Jury Waiver at 1) (Page ID #433).

here[, the jury waiver]. It'll be myself and Judge Moser and Judge Stitsinger."'). Judge Bruewer then accepted the jury waiver form and signed it, along with his statement that "[t]his jury waiver and election to be tried by a three-judge panel is hereby accepted and entered upon the journal of this Court." *Id.*; R. 4-3 (Jury Waiver at 1) (Page ID #433).

Unlike other cases that have addressed similar claims under *Brady*, here the record leading up to the waiver, the waiver colloquy, and the language included in the waiver all lead to the same conclusion: Davis agreed to waive his jury right based on his understanding—informed by the court, his counsel, and the written jury waiver—that he would be tried and sentenced by a specific three-judge panel. *Cf. Ray v. Curtis*, 21 F. App'x 333, 334-35 (6th Cir. 2001) (finding the defendant's jury waiver was knowing and voluntary because "[n]othing in either the written waiver or [*580] the transcript of the waiver hearing conditioned Ray's waiver on having the case heard by" a specific judge); *Fitzgerald*, 292 F.3d at 503-06 (finding the defendant's jury waiver was knowing [*75] and voluntary, despite a colloquy on the record that suggested the defendant may have understood that he would be tried before a specific judge, because the plain language of the waiver was "a judge of the" court and the colloquy was not sufficiently clear to override the waiver); *Sinistaj*, 66 F.3d at 809 (denying analogous due-process claim because petitioner's jury waiver stated that he agreed to be tried by "a judge of the . . . Court" and, therefore, did not specify that it applied only to a trial before a particular named judge). Although "a trial court need not grant a defendant's request for a bench trial at all," *Fitzgerald*, 292 F.3d at 503, where, as here, the trial court granted the defendant's request for this information and then accepted the defendant's waiver that was premised on this information, the defendant must understand the value of such a commitment, *see Brady*, 397 U.S. at 755 (explaining that the waiver must be "entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel").

[***44] The Majority attempts to sidestep the clear applicability of *Brady*. Maj. Op. at 18-20.¹² Although the Majority purports to apply *Brady* in support of its contention that [*76] "Davis raises the level of abstraction too high" because *Brady* and its progeny "do[] not require that a defendant be informed of all remotely possible consequences of a waiver," Maj. Op. at 18, it ignores the aspect of *Brady* that controls this case. Even if "[t]he identity of a sentencing judge has never been one of th[e] likely consequences" contemplated by *Brady*, Maj. Op. at 18 (quotations omitted), the Court explicitly contemplated that the relevant circumstances and likely consequences include "unfulfillable promises," "misrepresentation," and "the actual value of any commitments made to [the defendant] by the court, prosecutor, or his own counsel." *Brady*, 397 U.S. at 748, 754-55 (quotations omitted). With a full understanding of Supreme Court precedent, the Majority's suggestion that Davis needed only to "understand[] the nature of the [jury] right and how it would likely apply *in general*" falls flat. Maj. Op. at 18 (alterations added) (emphasis in original) (quotation omitted).

Finally, the Majority blithely states that "[f]airminded jurists could reject Davis's contention that his waiver is invalid because he harbored a private belief that the three named judges would sentence him in perpetuity." Maj. [*77] Op. at 19. Davis's "belief" was far from private and was reinforced multiple times on the record by his counsel, the presiding judge, and the prosecutor. Davis stated explicitly in his motion for notice that he wanted to know the identities of the judges before he decided to waive his jury right. This motion was then discussed on the record, and the presiding [*581] judge provided Davis with the names of the specific judges. Thereafter, Davis, his counsel, and the presiding judge signed a waiver form that included these three judges' names. At the waiver colloquy, the presiding judge reaffirmed the members of the three-judge panel, acknowledged their inclusion in the waiver form, and accepted the waiver as knowing, voluntary, and intelligent. Moreover, it was established under Ohio law that Davis's [***45] jury waiver would bind him upon resentencing. *See State v. Foust*, 105 Ohio St. 3d 137, 2004- Ohio 7006, 823 N.E.2d 836, 852 (Ohio 2004) ("The waiver of the right to trial by jury in a capital case applies to both the guilt phase and the penalty phase of the trial."); *Davis XI*, 2011 Ohio 787, 2011 WL 646404, at *7 ("[T]he Ohio legislature has statutorily foreclosed the possibility of withdrawing a jury waiver after a panel of three judges determines guilt."). Therefore, to the extent the Majority suggests Davis's understanding [*78] that his jury waiver would bind him at resentencing was "private," this contention is contradicted by the record and Ohio law. Rather than requiring that the court search for "myths to bust," the record and law make clear that Davis's

¹²To do so, the Majority frames Davis's argument as granular: "here those unique circumstances included the waiver's naming of three particular judges to the panel. But this is not a unique circumstance that has been clearly established." Maj. Op. at 18 (stating that "[t]he identity of a sentencing judge has never been one of those likely consequences" (quotations omitted)). But Davis argues that he was "assured"—or promised—the specific three-judge panel without knowing that that assurance would not apply under certain circumstances—"if those judges were not available." D. 53 (Appellant Suppl. Br. at 15) (quoting *Brady*, 397 U.S. at 755 for the proposition that "a waiver is invalid if induced through 'unfulfilled or unfulfillable promises'"). Stated differently, Davis argued that he was induced by an unfulfillable promise in direct violation of *Brady*.

explicit concern with the specific three-judge panel could in no way be considered a "private belief." *Cf.* Maj. Op. at 19 (quotations omitted).

For the reasons explained above, Davis was induced to waive his jury right based on the unfulfillable promise of a specific three-judge panel. Accordingly, I would find that Davis's waiver was not knowing and voluntary and that he is therefore entitled to relief on this claim.

C. Ineffective Assistance of Counsel

Davis brought two ineffective-assistance-of-counsel claims that, in my view, warrant relief. The first is based on counsel's failure to move for Judge Nastoff's recusal, and the second is based on counsel's failure to investigate and prepare two witnesses. I will address each in turn.

1. The Recusal Claim

Davis claims that trial counsel at his third sentencing hearing were constitutionally ineffective for failing to move to recuse Judge Nastoff for bias or the appearance thereof, given his death-penalty prosecution [**79] of Davis's nephew. The Ohio Court of Appeals concluded that trial counsel's decision not to seek Judge Nastoff's recusal was strategic and therefore it did not constitute ineffective assistance of counsel. *State v. Davis*, No. CA2012-12-258, 2013 Ohio 3878, 2013 WL 4806935, at *6 (Ohio Ct. App. Sept. 9, 2013) (*Davis XIII*). Because the Ohio Court of Appeals adjudicated this claim on the merits—at least as to *Strickland*'s performance prong—the deference requirements of ¶ 2254(d) apply to that prong.

To demonstrate ineffective assistance of counsel, a petitioner typically must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the [***46] defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In the context of judicial-bias ineffective-assistance-of-counsel claims, however, a defendant need not prove prejudice under *Strickland* because, if proven, "judicial bias is a structural defect." *Coley v. Bagley*, 706 F.3d 741, 750 (6th Cir. 2013) (citing *Arizona. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). In other words, a *Strickland* claim based on judicial bias has two prongs: (1) judicial bias and (2) deficient performance.¹³ Accordingly, [**582] the operative questions are whether Judge Nastoff's potential for bias violated due process, and, if so, whether the Ohio Court of Appeals unreasonably applied Supreme Court precedent in determining that trial counsel's decision not to seek recusal was reasonable. *See Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (holding that, if trial [**80] counsel's failure to litigate a constitutional claim competently "is the principal allegation of ineffectiveness," petitioner must also prove that the underlying constitutional claim is "meritorious").

a. Judicial Bias

The Ohio Court of Appeals did not address the issue of whether Judge Nastoff's potential bias rose to the level of constitutional error and instead simply concluded that the decision of Davis's trial counsel not to seek Judge Nastoff's recusal was strategic. *See Davis XIII*, 2013 Ohio 3878, 2013 WL 4806935, at *6. The judicial-bias portion of Davis's claim is therefore subject to de novo review. *See Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (explaining that when no "state courts below [have] reached" a prong of a petitioner's claim, "our review is not circumscribed by" AEDPA's requirements); *Rayner v. Mills*, 685 F.3d 631, 638-39 (6th Cir. 2012) (holding that when a state court reviews only one portion of a claim in disposing of the claim, we review de novo any portions of the claim that the state court did not review). The Majority offers no reason that the Supreme Court's guidance in *Wiggins* and our prior precedent in *Rayner* ought not to apply here. Instead, the Majority simply assumes that AEDPA deference applies to the judicial-bias prong of Davis's claim even though no [**81] state court reviewed it. *See* Maj. Op. at

¹³The Majority contends that it is incorrect to frame this claim as having two *Strickland* prongs. But even if, as the Majority suggests, counsel's performance and the merits of the underlying judicial-bias claim should be considered together under the performance prong of *Strickland*, de novo review would still apply because, as explained below, the state court unreasonably applied *Strickland* to the performance prong. *See infra* Part I.C.1.b.

20-21 (finding that "Davis's claim fails on AEDPA review because it is not clearly established that a [***47] judge's prior involvement in the prosecution of a defendant's family member creates 'an impermissible risk of actual bias' in the defendant's case." (quoting *Williams v. Pennsylvania*, 579 U.S. 1, 8, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016))). Seeing no reason not to apply the binding rule of *Wiggins* and *Rayner*, I review de novo this prong of Davis's claim.

The Supreme Court has held that judicial bias violates due process when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). The standard is objective, and thus courts ask "not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009). This is because "both the appearance and reality of fairness" must be preserved so that litigants are assured "that the arbiter is not predisposed to find against [them]." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980).

This case is analogous to *Williams v. Pennsylvania*, which concluded that "there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement [**82] as a prosecutor in a critical decision regarding the defendant's case." 579 U.S. at 8. In coming to its decision in *Williams*, the Court reasoned that there is "a risk that the judge 'would be so psychologically [**583] wedded' to his or her previous position as a prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'" *Id.* at 9 (quoting *Withrow*, 421 U.S. at 57). Likewise, the Court concluded that "the judge's 'own personal knowledge and impression' of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties' arguments to the court." *Id.* at 9-10 (quoting *In re Murchison*, 349 U.S. 133, 138, 75 S. Ct. 623, 99 L. Ed. 942 (1955)).

This logic applies with equal force to Judge Nastoff's role as a prosecutor in cross-examining Thompson's family and friends. As part of his strategy during the Thompson trial, then-prosecutor Nastoff, argued that Thompson had his friends and family members come into court to lie on his behalf. R. 4-46 (Postconviction Pet. Ex. N at 1207) (Page ID #6458) (Nastoff arguing that Thompson "buil[t] [his] alibi by lying, by getting [his] friends and family to come in, that's important when you lie. You know, it's a mockery, it's an absolute mockery. A lie is [***48] nothing but a [**83] tool."); *see also id.* at 1205 (Page ID #6456) (Nastoff describing Lawrence Jones as a liar who told Thompson that he (Jones) would "clear [Thompson's] name right off the map. Blood [is] thicker than water. You my family," and arguing that Thompson's family and friends "aren't set to snitch").

Although it is true that Judge Nastoff served as a prosecutor in Thompson's case and not in Davis's prior case, he did have significant personal involvement as a prosecutor in the cross-examination, and therefore the undermining and discrediting of critical mitigation evidence such that he formed an opinion that was pertinent to Davis's mitigation case. *See* R. 4-46 (2011 Postconviction Pet. Ex. D, Menashe Aff. ¶ 23) (Page ID #6279) (noting that "[i]t would be difficult, if not impossible, to put aside Judge Nastoff's prior opinions about *the veracity and strength* of the mitigation" (emphasis added)). Specifically, as discussed above, Judge Nastoff formed negative opinions about the mitigation evidence presented by Thompson and Davis's relatives during Thompson's trial. *See* R. 4-46 (2011 Postconviction Pet. Ex. D, Menashe Aff. ¶ 23) (Page ID #6279). Judge Nastoff was necessarily a biased actor because [**84] it was his job as a prosecutor to represent the interests of the state. *Cf. Coley*, 706 F.3d at 749-51. Thus, there is an impermissible risk that Judge Nastoff's critical view of the mitigation evidence from his time as a prosecutor would carry more weight than the arguments that Davis actually presented to the court. Similarly, given his view of Thompson's family and friends, there is a danger that Judge Nastoff remained "psychologically wedded" to his position as a prosecutor and thus would not want to give the appearance of reversing his position on their credibility.

The Majority's analysis of the judicial-bias prong sidesteps the facts of this case by claiming that "Davis has never identified the alleged overlapping evidence between" the trials. Maj. Op. at 22. Specifically, the Majority contends that Carol Smith—Davis's sister and Thompson's mother who testified at Davis's sentencing hearing—is too "tenuous" an overlap because her testimony at Davis's sentencing was "unrelated to Thompson" and she did not testify at Thompson's mitigation trial. *Id.* The Majority's suggestion that Smith's testimony at Davis's sentencing needed to be related to Thompson ignores the source of Judge Nastoff's bias (and notably [**85] absent from the Majority is any discussion of Judge Nastoff's actual biased statements). Instead, the relevant overlap is in Davis's and Thompson's shared friends and family [**584] members [***49] more broadly. At the third sentencing, Davis's mitigation strategy was almost entirely reliant on his family members' and close friends' testimony. The mitigation witness list included the following family members and close family friends: Victor Davis, Sherry Davis, Charles Tipton, Alluster Tipton, Carol Smith, and Rick Rotundo. R. 5-7 (2009 Mitigation Hr'g Tr. Vol. I at 78) (Page ID #8268) (V. Davis, brother); *id.* at 98 (Page ID #8288) (S. Davis, daughter); *id.* at 104-05 (Page ID #8294-95) (C. Tipton, stepfather); *id.* at 113-14 (Page ID #8303-04) (A. Tipton,

mother); R. 5-8 (2009 Mitigation Hr'g Tr. Vol. III at 207-08) (Page ID #8397-98) (Rotundo, neighbor and family friend). It was therefore vital that his family members were credible to the panel.

Davis's and Thompson's family were close knit and spent a significant amount of time together. Davis had the closest relationships with his siblings Smith and Elliot Davis. R. 5-7 (2009 Mitigation Hr'g Tr. Vol. I at 85) (V. Davis) (Page ID #8275). Multiple **[**86]** generations, at times, lived under the same roof. *Id.* at 82 (V. Davis) (Page ID #8272) (explaining that he lived with his mother and siblings, as well as his "grandmother, her sister, [Victor's] great aunt, her eldest sister, [Victor's] grandmother's eldest brother, and his wife"). Smith, at the time that she testified in Davis's trial, lived with Davis's mother and stepfather. *Id.* at 104 (Page ID #8294) (C. Tipton). Smith also testified about gatherings that involved the extended family. *Id.* at 128-29 (Smith) (Page ID #8318-19) (explaining that Davis's extended family, including his living, non-incarcerated siblings and his daughter, have had family gatherings since Davis's incarceration). This overlap is significant. That Davis does not identify a specific piece of evidence is not the point. Davis's mitigation defense relied on the credibility of his family members, and Judge Nastoff had a particularly negative view of this family's credibility based on his experience prosecuting Thompson.

The three-judge panel, including Judge Nastoff, "considered the testimony of [Davis's] friends and family concerning his dysfunctional family and childhood experiences" and found "the testimony **[**87]** to be unconvincing and entitled to little or no weight." R. 4-39 (2009 Sent'g Op. at 9) (Page ID #4932). "The panel . . . also considered the testimony of Sherry Davis and the fact that she has forgiven [Davis] for purposefully killing her mother" and "afford[ed] this factor very **[***50]** little weight." *Id.* In other words, Judge Nastoff and the panel concluded that all six of Davis's friends and family members were unconvincing.

Because Davis relied principally on his family members during his sentencing hearing, "the probability of actual bias on the part of" Judge Nastoff as it relates to the veracity and strength of Davis's mitigation evidence "[wa]s too high to be constitutionally tolerable," *Withrow*, 421 U.S. at 47, especially in a death-penalty case.

b. Performance

The remaining question is therefore whether the Ohio Court of Appeals unreasonably applied clearly established federal law in determining that trial counsel's recusal decision was not deficient performance. The Ohio Court of Appeals provided little reasoning for its holding, other than the fact that trial counsel were aware that Judge Nastoff had prosecuted Thompson and still chose not to challenge him. *Davis XIII*, 2013 Ohio 3878, 2013 WL 4806935, at *6.

When addressing the performance prong, the **[**88]** state court explained that Davis's counsel stated on the record that "they were aware of Judge Nastoff's prior **[*585]** participation in Thompson's prosecution [Davis's nephew's prosecution], but chose not to seek recusal." *Davis XIII*, 2013 Ohio 3878, 2013 WL 4806935, at *6. The court then stated that "[t]he decision not to seek recusal of the judge can *only* be viewed as strategic and *will not form the basis* of an ineffective counsel claim." *Id.* (emphasis added) (quoting *State v. Nuhfer*, No. L-07-1125, 2009 Ohio 1474, 2009 WL 806905, at *3 (Ohio Ct. App. Mar. 20, 2009)).¹⁴ The court concluded that Davis's ineffective-assistance claim therefore failed. *Id.* This analysis was an unreasonable application of *Strickland* because the court "simply assumed that counsel's [decision] w[as] motivated by strategy" without determining whether that decision was reasonable under the circumstances. *Dickerson v. Bagley*, 453 F.3d 690, 697 (6th Cir. 2006). Most notably missing from its analysis was any consideration of whether there was an unconstitutionally high risk of bias, and the reasonableness of counsel's investigation into the potential for bias. Although trial counsel's strategic choices are protected, **[***51]** they must be "reasonable" based on the "totality of the circumstances." *Strickland*, 466 U.S. at 681 (quotations omitted). By deferring to counsel's determination with no consideration of "the totality of the circumstances," *Strickland*, 466 U.S. at 681 (quotations **[**89]** omitted), the Ohio Court of Appeals unreasonably applied *Strickland*. *Cf. Dickerson*, 453 F.3d at 697 ("[T]he state court unreasonably applied clearly established Supreme Court precedent when it simply assumed that counsel's oversights were motivated by strategy.").

¹⁴The Majority appears to conclude that the Supreme Court of Ohio's reliance on *Nuhfer* means that it applied the correct standard. Maj. Op. at 21. But the Majority identifies aspects of *Nuhfer* that the state supreme court did not cite. Instead, the Supreme Court of Ohio identified a *quote* that it used as an irrebuttable presumption. There is no reason to believe that the Supreme Court of Ohio chose a specific quote but, in reality, intended to use a broader portion of *Nuhfer*. Rather than rewrite the state supreme court opinion, I take it as it is.

Here, Davis's trial counsel performed deficiently, because no competent attorney would reasonably choose to proceed with a capital-sentencing hearing before a court that was constitutionally deficient. Davis is therefore entitled to relief on this claim. *See McKernan v. Superintendent Smithfield SCI*, 849 F.3d 557, 566-67 (3d Cir. 2017) (finding that trial counsel performed deficiently in "advis[ing] his client to proceed before a court that was structurally deficient" as a result of the judge's potential for bias, which the Third Circuit concluded was "something no competent attorney would ever do").

Rather than engage with the record, the Majority flatly repeats and reaffirms the state supreme court opinion's flaws, enshrining them into Sixth Circuit law. The Supreme Court has instructed that "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision. . . . Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." **[**90]** *Wiggins*, 539 U.S. at 527. In other words, the fact of an investigation says nothing about its reasonableness. Nonetheless, the Majority—in conflict with Supreme Court precedent—concludes that the state court properly applied "a strong presumption" that Davis's counsel performed a reasonable expectation based on the court's "assum[ption] that counsel made at least some investigation," Maj. Op. at 21, without any consideration of "the reasonableness of the investigation," *Wiggins*, 539 U.S. at 527. For the reasons explained above, the state supreme **[*586]** court unreasonably applied *Strickland* and, had counsel moved for Judge Nastoff's recusal, such a motion would have been successful. I would therefore find that Davis is entitled to relief on his Judicial-Bias Claim.

[*52] 2. The Failure-to-Investigate Claim**

a. AEDPA Deference

Davis next argues that trial counsel at his third sentencing hearing were constitutionally ineffective for failing reasonably to investigate, prepare for, and present mitigation testimony from Cynthia Mausser and Dr. Robert Smith. The Ohio Court of Appeals concluded that the decision to call Mausser as well as the "decision to engage, or not engage, in a particular line of questioning" with Mausser and Smith were "presumed **[**91]** to be the product of sound trial strategy" and therefore did not constitute ineffective assistance of counsel. *Davis XIII*, 2013 Ohio 3878, 2013 WL 4806935, at *5.¹⁵

Although *Strickland* established that it is "strongly presumed" that counsel performed adequately and reasonably exercised their professional judgment in making decisions, it did not create an irrebuttable presumption that any act with strategic implications is reasonable and cannot constitute deficient performance. 466 U.S. at 690. The Supreme Court has confirmed that taking the approach that the Ohio Court of Appeals took constitutes an incorrect reading of *Strickland*. *See Wiggins*, 539 U.S. at 527 ("*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy."). Moreover, by concluding that it would "not question counsel's strategic decision" regarding questioning witnesses, the Ohio Court of Appeals unreasonably applied *Strickland* by imposing a far higher presumption of reasonableness than *Strickland* requires, and by altogether failing to consider the reasonableness of the investigation and preparation that supported **[**92]** trial counsel's choices, as required by *Wiggins*. *Davis XIII*, 2013 Ohio 3878, 2013 WL 4806935, at *5. The Ohio Court of Appeals' decision on the merits rests entirely on this unreasonable application of *Strickland* and *Wiggins*.

[*53]** The Supreme Court's precedents also clearly establish that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Here, trial counsel promised in their opening statement that Mausser would provide specific testimony, despite failing adequately to investigate what her testimony would be. Counsel then compounded this failure to investigate by calling Mausser to testify even after being warned by the prosecution that Mausser would not provide the promised testimony. This court has previously held that it is an unreasonable application of clearly established law to conclude that trial counsel did not perform deficiently in such a scenario. *English v. Romanowski*, 602 F.3d 714, 728-29 (6th Cir. 2010); *see also Avery*, 548 F.3d at 436-37 (holding that a court of appeals may look to its own decisions to determine whether a legal principle has been clearly established by the Supreme Court). This logic

¹⁵ In an effort to revise the Ohio Court of Appeals' opinion to fit its argument, the Majority again, *see supra* n.14, contends that the state court's invocation of a specific quote from prior case should be read as a citation to a broader portion of that underlying opinion. Maj. Op. at 23-24. Rather than rewrite the state court opinion, I take it as it is.

applies with equal force to Davis's [*587] counsel in their failure to adequately investigate what testimony Mausser would provide [**93] before promising the specifics of her testimony in an opening argument.

As noted above, the Ohio Court of Appeals failed to address the fact that Davis raised his claim under the rubric of trial counsel's failure to *investigate* and *prepare for* Mausser and Dr. Smith's testimony, R. 4-46 (2011 Postconviction Pet. ¶¶ 64-65, 76-77) (Page ID #6248, 6251), instead characterizing the claim as grounded only in trial counsel's strategic decision to call Mausser and engage in particular lines of questioning with Mausser and Dr. Smith, *see Davis XIII*, 2013 Ohio 3878, 2013 WL 4806935, at *5. The Ohio Court of Appeals thus did not adhere to the Supreme Court's instruction that, in such cases, the "principal concern" is "not whether counsel should have presented" certain mitigation evidence, but instead "whether the investigation supporting counsel's decision . . . was itself reasonable." *Wiggins*, 539 U.S. at 522-23 (emphasis in original). For these reasons, I review de novo Davis's claim that trial counsel failed to adequately investigate and prepare for Mausser and Dr. Smith's testimony.

b. Performance

Davis's Failure-to-Investigate Claim rests on three interrelated deficiencies: (1) counsel "promised the panel it would hear certain testimony [from Cynthia Mausser] even [**94] though counsel was "on notice that [Mausser] could not deliver that testimony," (2) counsel "failed to properly investigate and prepare" Mausser and Dr. Robert Smith, and (3) because of the failure [***54] to investigate and prepare, counsel "elicited harmful testimony . . . from Dr. Smith." D. 53 (Appellant Suppl. Br. at 20-21). I will address the testimony of Mausser and Smith in turn and evaluate counsel's investigation and preparation as it relates to each witness.

i. Cynthia Mausser

Rather than consider the facts of this case, the Majority instead insists that defense counsel's investigation related to Mausser was presumptively reasonable because there was "at least some prior investigation" and "defense counsel were so confident that the prosecution was incorrect that they were ready to testify under oath that that is not what [they] were told." Maj. Op. at 24 (quotations omitted). But, for the reasons discussed below, defense counsel's confidence only serves to underscore the lack of reasonable investigation.

During Davis's counsel's opening statement, counsel told the three-judge panel to expect Mausser, the Chair of the Ohio Parole Board, to explain that because of Davis's "prior record[] [**95] [and] the fact that he committed the second murder[] while he was still on parole from the first murder, . . . he will not be paroled." R. 5-7 (2009 Mitigation Hr'g Tr. Vol. I at 36-37) (Page ID #8225-26). Counsel intended to use this testimony to argue that, although a life without the possibility of parole was not available as a sentencing option, it was "a very de facto possibility in this case." *Id.* at 37 (Page ID #8226). Counsel were aware that, because the case had been pending for approximately 25 years and Davis was requesting a sentence of life with parole eligibility after serving 30 years, the panel was concerned that Davis would be parole eligible soon. *Id.* at 38 (Page ID #8227).

In her postconviction affidavit, Mausser explained that she "never told defense counsel that Mr. Davis would never be paroled." R. 4-46 (Postconviction Ex. F ¶ 4) (Page ID #6365). She explained that she "cannot predict" the outcome of [*588] Davis's parole case, in part, because she cannot "predict what other Parole Board members would do." *Id.* ¶ 6 (Page ID #6365). Likewise, Mausser could not even testify as expected regarding her own opinion because "[d]efense counsel did not provide [her with] Mr. Davis's [**96] entire file which would [have been] necessary . . . to give any opinion on whether [she] would likely vote to parole Mr. Davis." *Id.* ¶ 7 (Page ID #6366); *see also* R. 5-7 (2009 Mitigation Hr'g Tr. Vol. I at 181-82) (Mausser) [***55] (Page ID #8371-72) (testifying before the panel that she had only "a very small amount of the information" that she would need to give an accurate opinion).

Before counsel presented Mausser's testimony during the 2009 mitigation hearing, the state objected, arguing that the prosecutor had "spoken to Ms. Mausser" and that, because the parole board included "seven to twelve people," Mausser told the state "that she would not be in a position to be able to testify whether or not she would vote for parole" and that "she could not say what a majority of the board would do." *Id.* at 133 (Page ID #8323). Defense counsel then conceded that they would "be *in a position of surprise and affirmative damage* if she testifie[d] as the prosecution . . . suggest[ed] because [defense counsel], in fact, interviewed her four months ago and . . . that [wa]s not what [they] were told." *Id.* at 137 (Page ID #8327) (emphasis added).

Mausser then testified "as the prosecution . . . suggest[ed]." **[**97]** *Id.* She initially stated that certain aspects of Davis's case—such as his prior murder conviction and the fact that his later crime occurred while he was on probation—would negatively impact his parole request. *Id.* at 154-55, 159-61 (Mausser) (Page ID #8344-45, 8349-51). She also explained that Davis would score negatively in terms of his criminal history and that he would likely not be granted parole at his first parole hearing. *Id.* at 154-55, 175 (Mausser) (Page ID #8344-45, 8365). Mausser hypothesized that someone like Davis "would likely spend a large portion of the remainder of [his] life in prison." *Id.* at 175 (Mausser) (Page ID #8365).

On cross examination, however, she revealed that, although she had access to some of Davis's file, she did not have most of the materials that would be relevant for her to make a parole determination. *Id.* at 181-82 (Mausser) (Page ID #8371-72). If not granted parole at the initial hearing, Mausser explained, Davis would be eligible for a second hearing within ten years. *Id.* at 179-80 (Mausser) (Page ID #8369-70). Mausser also stated that she could be terminated at any point and that she could not predict how any of the other members of the parole board would vote. *Id.* at 177, 183-84 **[**98]** (Mausser) (Page ID #8367, 8373-74). Finally, and most notably, Mausser explained that she could not state with "any level of certainty" how the board would vote on Davis's parole eligibility or even how she would vote when Davis became eligible for parole. *Id.* at 188-89 (Mausser) (Page ID #8378-79).

[*56]** In the sentencing opinion, the court emphasized that "Mausser could not . . . state with any certainty if or when [Davis] might be paroled if th[e] Court imposed a sentence less than death." R. 4-39 (2009 Sent'g Op. at 6-7) (Page ID #4929-30). When weighing the mitigating and aggravating circumstances, the panel reasoned that Mausser's testimony was "highly speculative and unconvincing and entitled to no weight." *Id.* at 10 (Page ID #4933).

This court has previously explained that counsel's performance can be considered constitutionally deficient due to failure to conduct a reasonable investigation if counsel promises the factfinder evidence that they cannot deliver. In *English*, 602 F.3d **[*589]** at 728-29, we held that counsel was ineffective because "it was objectively unreasonable for English's trial attorney to decide before trial to call [English's then-girlfriend] as a witness, make that promise to the jury, and then later abandon **[**99]** that strategy, all without having fully investigated [his then-girlfriend] and her story prior to opening statements." Likewise, in *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000), we explained that "defense counsel's failure to have questioned [the witness] in this regard prior to trial is inexcusable" because "[d]efense counsel should have known [the witness's] opinion on this ultimate issue and should have prepared accordingly." These cases are not only analogous to the facts at issue here, but they also align with Supreme Court's instruction that the "principal concern" is "not whether counsel should have presented" certain mitigation evidence, but instead "whether the investigation supporting counsel's decision . . . was itself reasonable" such that counsel's strategic decision was an informed one. *Wiggins*, 539 U.S. at 522-23; see also *Williams v. Taylor*, 529 U.S. 362, 395-96, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Today, the Majority makes the first inquiry its principal concern while wholly ignoring the latter.

Although counsel spoke with Mausser before trial, it is apparent that counsel did not know that she would testify that she could not determine whether Davis would ever be paroled. R. 5-7 (2009 Mitigation Hr'g Tr. Vol. I at 137) (Page ID #8327). Thus, counsel either did not ask Mausser this key question that framed their **[**100]** entire mitigation case and nonetheless called this witness without knowing her "opinion on this ultimate issue," *Combs*, 205 F.3d at 288, or counsel asked Mausser this question and knew the answer was not what counsel promised during opening, *English*, 602 F.3d at 728-29. This is reinforced by Mausser's affidavit, in which she states that counsel either never asked her this question or, if they did, she did not give the answer **[***57]** that they promised during their opening argument. See R. 4-46 (Postconviction Ex. F ¶¶ 4, 6) (Page ID #6365). Either way, counsel failed to conduct a reasonable investigation and counsel's "confidence" in their belief that Mausser would testify differently does not make their investigation sufficient. *Cf.* Maj. Op. at 24. Accordingly, I would find that counsel performed deficiently because counsel failed adequately to investigate and prepare for Mausser's testimony.

ii. Robert Smith

After presenting Mausser's testimony, counsel compounded the above-described error with the testimony they elicited from Smith. Despite the concern that Davis could be paroled, Smith did not testify about whether Davis would succeed outside of prison. Instead, Smith diagnosed Davis with borderline personality disorder and alcohol dependence **[**101]** at the time of the offense. R. 5-8 (2009 Mitigation Hr'g Tr. Vol. III at 248) (Page ID #8438). Smith described many of the characteristic behaviors of individuals with borderline personality disorder, including "very dramatic mood swings" and "unwarranted aggressive behavior that comes about with minor provocation." *Id.* at 257, 261 (Page ID #8447, 8451). And Smith noted that, in people with these disorders, there is often "[i]mpulsivity that is severe, they act and then think about it afterwards. They are not really considering their actions and

what the consequences will be." *Id.* at 263 (Page ID #8453); *see also id.* ("It is a chronic disorder."). Finally, Smith explained that Davis had adjusted and would continue positively to adjust in a structured prison environment but that Davis would have struggled to adjust in the community [*590] if there was no clear structure. *Id.* at 258 (Page ID #8448). Along those same lines, Smith testified that "Borderlines and people with alcohol dependence do very well in a structured environment," explaining:

"[I]n a prison setting [they] don't have a lot of decisions to make, [they] don't have lots of opportunities to act out and [they] also don't form lots of relationships. [They] are pretty much restricted in what [they] get to do, when [they] get to do it, and [they] have supervision at all times regarding what [they] [are] doing."

Id. at 283-84 (Page ID #8473-74).

When considering Smith's testimony, the resentencing court identified a glaring deficiency: "Smith failed to forecast [Davis's] behavior or recommend a treatment plan, should [***58] he eventually be released from prison." R. 4-39 (2009 Sent'g Op. at 8) (Page ID #4931). In his postconviction affidavit, Smith explained that he was not aware that his opinion about whether Davis would succeed on parole was relevant. R. 4-46 (Postconviction Ex. I ¶ 11) (Page ID #6382). Smith stated that, had he been asked, he would have testified that Davis's experience living in a structured setting for approximately 25 years at the time of resentencing had taught Davis "to accept external rules and expectations" and had allowed Davis to "develop[] coping strategies to deal effectively with frustration, annoyance, disappointment, etc." *Id.* ¶ 12 (Page ID #6382).

The Majority claims that counsel's failure to elicit this testimony was reasonable because "Mausser's testimony was that Davis would likely not be paroled [**103] before the end of his natural life." Maj. Op. at 24. But, as already explained, Mausser's testimony was wholly inconclusive on whether Davis would be paroled before the end of his natural life. Thus, Smith's testimony about Davis's potential for success if he were to remain incarcerated does not impact the negative effects of the lack of testimony about whether Davis would succeed if released on parole. Indeed, without the latter testimony from Smith, Smith and Mausser's combined testimony could support only a sentence of life without the possibility of parole, and that sentence was not an available option. Instead, the closer option to life without the possibility of parole—indeed the sentence that was ultimately imposed—was a death sentence. For the reasons explained above, I would find that counsel's investigation and preparation of Smith's testimony was also constitutionally deficient.

c. Prejudice

Because the Ohio Court of Appeals held that trial counsel's performance was not deficient, it did not address the prejudice prong of Davis's claim, and thus I review *de novo* whether Davis was prejudiced by trial counsel's performance. *See Wiggins*, 539 U.S. at 534; *Williams v. Anderson*, 460 F.3d 789, 804 (6th Cir. 2006). To show prejudice, Davis must show "a reasonable [**104] probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This probability must be "sufficient to undermine confidence in the outcome." *Id.*

[***59] Here, Davis was prejudiced by trial counsel's deficient performance. The sentencing panel described Mausser's testimony as "highly speculative and unconvincing" and determined it was "entitled no weight" as a mitigating factor. R. 4-39 (2009 Sent'g Op. at 10) (Page ID #4933). Following Davis's second sentencing hearing, however, without Mausser's testimony, the Ohio Supreme Court found that the probability that Davis would never be paroled [*591] if he were not sentenced to death was entitled to "some weight in mitigation." *State v. Davis*, 63 Ohio St. 3d 44, 584 N.E.2d 1192, 1198 (Ohio 1992) (*Davis IV*). Including Mausser's testimony as they did, therefore, demonstrably detracted from Davis's case in mitigation. The 2009 panel's sentencing opinion also highlighted the fact that "Dr. Smith failed to forecast Defendant's behavior or recommend a treatment plan, should he eventually be released from prison," which demonstrates that such evidence would have been beneficial to the panel in weighing mitigation evidence. R. 4-39 (2009 Sent'g Op. at 8) (Page ID #4931). Thus, Dr. [**105] Smith's testimony did in fact prejudice Davis.

The Majority fails to discuss the testimony that Dr. Smith would have provided, had trial counsel effectively prepared him for the parole issue. Specifically, Dr. Smith would have testified that "with time, maturity, and freedom from drugs and alcohol, someone with Borderline Personality Disorder will gain insight and develop coping skills that would enable him to adjust to living in the outside world." R. 4-46 (2011 Postconviction Pet. Ex. I, Smith Aff. ¶ 12) (Page ID #6382). He also would have testified that Davis "at the present time is a different person than he was when he was admitted to [the Ohio Department of Rehabilitation and Correction] in 1984." *Id.* Furthermore, Dr. Smith would have testified that:

Having been in a structured setting for the past 27 years, [Davis] has learned to accept external rules and expectations regarding his behavior. He has developed coping strategies to deal effectively with frustration, annoyance, disappointment, etc. He has learned to weigh the potential consequences of his decisions and actions.

Id. Finally, he would have "explained that the parole process itself would provide [Davis] with significant **[**106]** structure and guidelines that would assist him in successfully re-entering society." *Id.* ¶ 13) (Page ID #6382).

[*60]** This testimony would have left the state-court panel with a substantially different picture of Davis than Smith's actual testimony provided, because his actual testimony focused on Davis's state of mind in 1984 such that Smith did not explain how Davis had changed in the intervening years and why Davis could now be paroled without necessarily presenting a danger to the community. Smith's proffered testimony would have strengthened the evidence of Davis's good behavior while in prison, because it would have established how his behavior was demonstrative of broader changes that Davis had made that would also allow him to live successfully outside of a carceral environment. Instead, the state-court panel was left with the impression that Davis would be dangerous were he to be paroled, and that, as a result of Mausser's testimony, imposing a death sentence was the only way to prevent his release.

The issue of whether Davis would be paroled, and if so, whether he would present a danger to society was plainly a major factor in the panel's decision regarding whether to impose a death **[**107]** sentence. The errors that trial counsel made in investigating and preparing Mausser's and Smith's testimony are substantial enough to undermine any confidence in the outcome of the sentencing hearing. Trial counsel's deficient performance likely negatively impacted the weight the panel assigned to several of Davis's mitigating factors, and thus there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

[*592] Perhaps recognizing that counsel's errors prejudiced Davis, the Majority contends that "Davis cannot show prejudice because the [Supreme Court of Ohio's] independent review . . . cured any error" by "g[iving] weight to the 'likelihood that Davis will never be released from prison.'" Maj. Op. at 25 (quoting *Davis XIV*, 9 N.E.3d at 1056). Even if the Warden did not forfeit this argument by failing to raise it at any point before this case reached en banc review, and even assuming that it is proper to consider the Ohio Supreme Court opinion as opposed to the Ohio Court of Appeals opinion that assessed Davis's Failure-to-Investigate Claim, *see* D. 59 (Appellant Suppl. Reply Br. at 13), this argument lacks merit. The Ohio Supreme Court first **[**108]** determined that it "afford[ed] *no weight* to the testimony of the chair of the parole board regarding the likelihood of parole for a person in Davis's situation" because the "testimony was speculative." *Davis XIV*, 9 N.E.3d at 1056 (emphasis added). In other words, it came to the **[***61]** same conclusion as the sentencing court on this issue. *See* R. 4-39 (2009 Sent'g Op. at 10 (Page ID #4933)). The court then determined that it was likely that, based on Davis's age, he would not be released from prison and that "deserve[d] some weight." *Davis XIV*, 9 N.E.3d at 1056. The court determined only that it was *possible* that Davis would not be released on parole. Thus, this "weighing" does not actually address the prejudice created by Mausser's testimony because the possibility of parole remained.

Moreover, the Ohio Supreme Court necessarily could not consider the evidence that Smith and Mausser *did not present*. Had Mausser been provided the relevant materials and been properly prepared, she would have been able to testify credibly to whether she would be likely to vote to grant Davis parole, such that her opinion could have been given at least some—as opposed to no—weight. *See Davis XIV*, 9 N.E.3d at 1056; R. 4-46 (Postconviction Ex. F ¶ 7) (Page ID #6366). Smith's additional testimony **[**109]** would have explained how Davis would have adjusted if released, which remained a concern to the Ohio Supreme Court. The reweighing of evidence, under these circumstances, therefore, cannot cure the prejudice because the court did not address the issues created by Mausser's testimony and could not assess testimony from both Mausser and Smith that was not in the record. *Cf. Lundgren v. Mitchell*, 440 F.3d 754, 782-83 (6th Cir. 2006) (finding that the state court cured any potential prejudice because it reweighed the evidence and omitted the alleged prosecutorial misconduct from the otherwise complete record); *Post v. Bradshaw*, 621 F.3d 406, 419-20 (6th Cir. 2010) (finding that "[a]ny error was cured when the Ohio Supreme Court . . . independently reweighed the aggravating and mitigating factors and affirmed the sentence of death" because the state court omitted the improper evidence from the otherwise complete record). Accordingly, for the reasons explained above, Davis was prejudiced by counsel's failure to investigate and prepare Mausser's and Smith's testimony. I would therefore hold that Davis is entitled to relief on this claim.

II. CONCLUSION

115 F.4th 545, *592; 2024 U.S. App. LEXIS 20985, **109; 2024 FED App. 0188P (6th Cir.), ***61

Today's Majority finds both that Davis must be held to his 1984 jury waiver and that the waiver was knowing and voluntary, despite the fact that the promise [**110] that induced Davis's waiver is not being enforced. Excising the promise of the three-judge panel from the jury waiver, the Majority enforces the waiver against Davis while simultaneously holding that the aspect of the [***62] waiver that benefits Davis is not enforceable. At bottom, the Majority creates a rule that allows death-eligible [*593] defendants to be induced by unenforceable promises to waive their constitutional right to a jury trial, leaving these individuals with no recourse to vindicate their constitutional rights. This plainly contradicts binding Supreme Court precedent. Likewise, the Majority finds that the state court properly applied *Strickland's* presumption to counsel's failure to move for recusal and decision to present incomplete mitigating evidence, even though the state court *never assessed* the adequacy of counsel's investigation and preparation. This, too, conflicts with longstanding Supreme Court precedent. I therefore respectfully dissent.

End of Document

Davis v. Jenkins

United States Court of Appeals for the Sixth Circuit

December 13, 2022, Argued; August 16, 2023, Decided; August 16, 2023, Filed

File Name: 23a0179p.06

No. 21-3404

Reporter

79 F.4th 623 *; 2023 U.S. App. LEXIS 21413 **; 2023 FED App. 0179P (6th Cir.) ***

VON CLARK DAVIS, Petitioner-Appellant, v. CHARLOTTE JENKINS, Warden, Respondent-Appellee.

Subsequent History: Vacated by, Stay granted by Davis v. Jenkins, 2023 U.S. App. LEXIS 30820, 2023 WL 8015701 (6th Cir. Ohio, Nov. 20, 2023)

Prior History: **[**1]** Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 2:16-cv-00495—Susan J. Dlott, District Judge.

Davis v. Shoop, 2021 U.S. Dist. LEXIS 59175, 2021 WL 1172048 (S.D. Ohio, Mar. 29, 2021)

Counsel: ARGUED: Jordan S. Berman, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE SOUTHERN DISTRICT OF OHIO, Columbus, Ohio, for Appellant.

Jana M. Bosch, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

ON BRIEF: Jordan S. Berman, Erin G. Barnhart, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE SOUTHERN DISTRICT OF OHIO, Columbus, Ohio, for Appellant.

Stephen E. Maher, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

Judges: Before: MOORE, COLE, and GIBBONS, Circuit Judges. MOORE, J., delivered the opinion of the court in which COLE, J., joined. GIBBONS, J., delivered a separate dissenting opinion.

Opinion by: KAREN NELSON MOORE

Opinion

[*630] [*2]** KAREN NELSON MOORE, Circuit Judge. A three-judge panel convicted Von Clark Davis of aggravated murder and sentenced him to death. On direct appeal, Davis's sentence was vacated, but on remand, the same three-judge panel again sentenced him to death. We subsequently vacated Davis's death sentence on appeal of his first federal habeas petition. A different three-judge panel again sentenced Davis to death. Davis **[**2]** again petitioned for a writ of habeas corpus, and the district court denied the petition. Now on appeal, Davis raises five claims: (1) that the state violated Davis's constitutional rights by enforcing his 1984 jury waiver against him at his third sentencing hearing in 2009; (2) that Davis's trial counsel were constitutionally ineffective in failing to investigate and present mitigating evidence about the circumstances of Davis's prior conviction, which provided the aggravating circumstance that made him eligible for the death penalty; (3) that Davis's trial counsel provided ineffective assistance by failing to move to recuse one of the judges on Davis's 2009 sentencing panel for bias; (4) that Davis's trial counsel were constitutionally ineffective in failing to reasonably prepare and present mitigation evidence at Davis's third sentencing hearing; and (5) that Davis's trial counsel provided ineffective assistance by failing adequately to advise him of the collateral consequences of a jury waiver. For the reasons that follow, we conclude that Davis's constitutional rights were violated when his 1984 jury waiver was enforced against him at his 2009 sentencing hearing and that his trial **[**3]** counsel also rendered ineffective assistance at that sentencing hearing, such that we doubt that the hearing produced a fair result. Accordingly, we **AFFIRM** in part;

REVERSE in part; and **REMAND** to the district court with instructions to **CONDITIONALLY GRANT** Davis's petition for writ of habeas corpus as to his first, third, and fourth claims.

[***3] I. BACKGROUND

A. Procedural History

In January 1984, a grand jury indicted Davis for aggravated murder (accompanied [*631] by capital and firearm specifications) and possessing a firearm while under a disability. After Davis waived his right to a trial by jury, a three-judge panel convicted him on all counts and sentenced him to death. On direct appeal, Davis's convictions were affirmed, but his death sentence was vacated. *STATE v. DAVIS*, No. CA84-06-071, 1986 WL 5989 (Ohio Ct. App. May 27, 1986) (*Davis I*) (Ohio Ct. App. May 27, 1986) (Davis I), *rev'd in part*, 38 Ohio St. 3d 361, 528 N.E.2d 925 (Ohio 1988) (*Davis II*). On remand, the same three-judge panel held a second sentencing hearing and again sentenced Davis to death, which was affirmed on appeal. *State v. Davis*, No. CA89-09-123, 1990 WL 165137 (Ohio Ct. App. Oct. 29, 1990) (*Davis III*) (Ohio Ct. App. Oct. 29, 1990) (Davis III), *aff'd*, 63 Ohio St. 3d 44, 584 N.E.2d 1192 (Ohio 1992) (*Davis IV*).

The state trial court dismissed Davis's postconviction petition after conducting a limited evidentiary hearing. R. 4-20 (Entry of Dismissal at 1-9) (Page ID #2158-66) (*Davis V*). The Ohio Court of Appeals affirmed. *State v. Davis*, No. CA95-07-124, 1996 WL 551432 (Ohio Ct. App. Sept. 30, 1996) (*Davis V*) (Ohio Ct. App. Sept. 30, 1996) (Davis VI). The Ohio Supreme Court declined further review. [**4] *State v. Davis*, 77 Ohio St. 3d 1520, 674 N.E.2d 372 (Ohio 1997) (table) (*Davis VII*). Davis's two motions to reopen his direct appeal were dismissed as untimely. *State v. Davis*, 86 Ohio St. 3d 212, 1999-Ohio-160, 714 N.E.2d 384 (Ohio 1999) (*Davis VIII*).

In April 1997, Davis filed his first federal habeas petition, and the district court denied relief. R. 16-2 (2001 D. Ct. Op. & Order at 1-87) (Page ID #8947-9032) (*Davis IX*). On appeal, this court vacated Davis's death sentence. *Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007) (*Davis X*). Then in the state court, a different three-judge panel conducted a third sentencing hearing and sentenced Davis to death, which was affirmed on appeal. *State v. Davis*, No. CA2009-10-263, 2011 WL 646404 (Ohio Ct. App. Feb. 22, 2011) (*Davis XI*). Feb. 22, 2011) (Davis XI), *aff'd*, 139 Ohio St. 3d 122, 2014-Ohio-1615, 9 N.E.3d 1031 (Ohio 2014) (*Davis XIV*). Davis unsuccessfully sought postconviction relief in state court. R. 4-47 (Entry & Order Dismissing Pet. Postconviction Relief at 1-18) (Page ID #6633-50) (*Davis XII*); *State v. Davis*, No. CA2012-12-258, 2013 WL 4806935 (Ohio Ct. App. Sept. 9, 2013) (*Davis XIII*). Sept. 9, 2013) (Davis XIII). The Ohio Supreme Court declined further review. *State v. Davis*, 143 Ohio St. 3d 1441, 2015-Ohio-3427, 36 N.E.3d 188 (Ohio 2015) (table) (*Davis XV*).

[***4] In August 2016, Davis filed a second-in-time habeas petition raising twenty-six claims of constitutional error. R-6 (Pet. for Writ of Habeas Corpus) (Page ID #8563-838). The district court dismissed the petition and certified several claims for appeal. R. 64 (Order Adopting R. & R. in Part & Den. Pet.) (Page ID #10022-74). This court subsequently expanded the COA to certify a total of seven claims for appeal. Davis now timely appeals.

B. Relevant [**5] Facts

1. The Offense

The Ohio Supreme Court summarized the facts as follows:

{¶2} On December 12, 1983, Davis offered Mark "Poppa" Lovette \$60 in exchange for a favor. He then drove Lovette to a pawn shop, where Lovette bought a Raven P.25 semi-automatic handgun using Davis's money. Lovette gave the gun to Davis. Davis then gave Lovette more money and took him to a different store to buy ammunition.

{¶3} When Davis discovered that the ammunition did not fit the Raven, he took Lovette to a local gun store. There, Lovette bought a box of PMC .25-caliber automatic rounds, which he gave to Davis. Davis loaded the Raven and placed it under the driver's seat. After dropping Lovette off, Davis and Wade Coleman rode around drinking beer for 30 minutes to an hour.

79 F.4th 623, *631; 2023 U.S. App. LEXIS 21413, **5; 2023 FED App. 0179P (6th Cir.), ***4

{¶ 4} Later that day, Suzette Butler met her friend, Mona Aldridge, at the American [*632] Legion post in Hamilton. Shortly thereafter, Davis arrived. Davis and Butler had lived together for a time but had recently separated. Davis spoke with Butler at the bar, and eventually they sat together at a table and Aldridge joined them. Aldridge testified at trial that she did not observe any argument or harsh words between them.

{¶ 5} After a short [**6] time, Butler told Aldridge that she would be "right back" and asked Aldridge to watch her jacket, cigarettes, and drink. Davis and Butler then walked out the front door. Several minutes later, Aldridge checked on Butler, saw Davis pointing a gun at Butler's head, and panicked and retreated into the bar. Within moments, several people entered the bar saying that someone had been shot.

{¶ 6} Reginald Denmark and Cozette Massey witnessed the shooting. As they walked in front of the American Legion post, they saw a man and a woman talking. Two shots rang out, and they saw the woman—later identified as Butler—fall. As she fell, another shot was fired. Finally, once Butler was down, the man bent down and shot her in the head. Both Massey and Denmark identified Davis as the shooter.

[**5] {¶ 7} An autopsy performed the next day revealed that Butler had died of multiple gunshot wounds to the left side of her head. Stippling around one of the entrance wounds indicated that the muzzle of the murder weapon had been less than 20 inches from Butler's head when the shot causing that wound had been fired.

{¶ 8} Four spent PMC shell casings were collected at the murder scene. Ronald Dye, a criminalist with [**7] the Ohio Bureau of Criminal Identification and Investigation, examined the shells and concluded that all four had been chambered in the same gun. Dye examined the four bullets removed from Butler's head and determined that they had been fired from a handgun manufactured by either Raven or Astra.

Davis XIV, 9 N.E.3d at 1036-37.

2. Aggravating Circumstance

The aggravating circumstance that made Davis eligible for the death penalty was the fact that he had previously "been convicted of an offense an essential element of which was the purposeful killing of, or attempt to kill, another." *Davis II*, 528 N.E.2d at 927 (citing OHIO REV. CODE ANN. § 2929.04(A)(5)). Namely, he had pleaded guilty in 1971 "to second degree murder in connection with the stabbing death of his estranged wife, Ernestine Davis." *Davis VI*, 1996 Ohio App. LEXIS 4263, 1996 WL 551432, at *1. Several years later, a man named Robert J. Beard wrote a letter to H.J. Bressler, Davis's trial counsel in the second-degree murder case, stating that Beard had been in a house with Ernestine on the day of her death, and was there when Davis arrived. 1996 Ohio App. LEXIS 4263, [WL] at *4; R. 4-19 (1993 Postconviction Pet. Ex. CC) (Page ID #2028-29). The letter suggested that Ernestine initiated the confrontation with Davis:

[Ernestine] cursed to me about being tired of that bastard and would stick him. She withdrew a large [**8] knife from under the mattress and swore she would use it. . . . They were arguing in the kitchen, and when it became very loud I decided to leave coming down the stairs I remember him asking her why did she have a knife? Moving toward the door I saw Ernestine strike at Von with the knife, and then heard wrestling. To be honest with you, Ernestine was the aggressor and not Von, he was trying to talk to her. I couldn't see much more, only heard Ernestine yelling that she would kill him. . . . I know it wasn't premeditation because he did not have a knife with him, the knife that killed Ernestine was the knife she withdrew from the mattress, because I saw it.

[*633] [**6] R. 4-19 (1993 Postconviction Pet. Ex. CC) (Page ID #2028-29). Davis's postconviction counsel following his second sentencing argued that this letter demonstrated mitigating circumstances regarding the statutory aggravator and that trial counsel were therefore ineffective for failing to investigate and present mitigating evidence about the prior conviction that made Davis eligible for the death penalty. R. 4-18 (1993 Postconviction Pet.) (Page ID #1925-27).

3. Jury Waiver and Composition of the Three-Judge Panel

In advance of his initial **[**9]** trial in 1984, Davis waived his right to a jury trial and instead elected to be tried by a three-judge panel. R. 4-3 (Jury Waiver & Election of Three-Judge Panel) (Page ID #433). The waiver form, signed by Davis, his counsel, and the initial trial judge, stated that Davis "voluntarily waive[d] [his] right to trial by jury and elect[ed] to be tried by a court to be composed of three judges, consisting of Judges Henry H. Bruewer, William R. Stitsinger, and John R. Moser." *Id.* Although the prosecutor did not sign the waiver agreement, it was typed on his letterhead, *id.*, and the prosecutor had previously agreed in a pretrial motions hearing to prepare the written waiver. R. 5-1 (Mot. Hr'g Tr. at 37-38) (Page ID #7204-05). At the waiver colloquy, the presiding judge again reiterated the names of the three judges that would form the panel. *Id.* at 61 (Page ID #7225).

By the time of Davis's third sentencing hearing in 2009, however, one of the judges from the original panel had died, and the other two had retired. *Davis XI*, 2011-Ohio-787, 2011 WL 646404, at *2. The sentencing court did not allow Davis to withdraw his original jury waiver from 1984, and instead enforced it against him. *Id.* He was thereafter sentenced to death by a new **[**10]** three-judge panel. *Id.*

One of the judges on the new three-judge panel, Judge Nastoff, had previously worked as a prosecutor. R. 5-7 (3d Sent'g Hr'g Tr. at 131) (Page ID #8321). During his time as a prosecutor, Judge Nastoff had been on the prosecution team that sought a death sentence against Lahr Thompson, Davis's nephew. *Id.* Judge Nastoff himself "argued to the jury that [Thompson] should receive the death sentence." *Id.* In doing so, Judge Nastoff repeatedly told jurors that Thompson lied. R. 4-46 (2011 Postconviction Pet. Ex. N at 1207) (Page ID #6458). Davis alleges that during his prosecution of Thompson, Judge Nastoff "heard and cross **[**7]** examined some of the very same mitigation evidence that Davis presented in his case." R. 4-46 (2011 Postconviction Pet. Ex. D, Menashe Aff. ¶ 23) (Page ID #6279). At Davis's third sentencing hearing, over which Judge Nastoff presided, Davis presented mitigation testimony from his sister, Carol Smith, who is Thompson's mother. R. 5-7 (3d Sent'g Hr'g Tr. at 131) (Page ID #8321). Judge Nastoff made the parties aware of his involvement in Thompson's case after the panel heard Smith's testimony. *Id.* Davis's counsel responded that, "[i]n the interest **[**11]** of full candor, we were aware that Your Honor, that you were involved in the prosecution, and we made a decision long ago not to challenge you on that." *Id.* at 132 (Page ID #8322). In a postconviction affidavit, Davis averred that his trial counsel "did not discuss at all with" him the decision not to seek the recusal of Judge Nastoff and that, had he been asked, he would have wanted them to seek Judge Nastoff's recusal. R. 4-46 (2011 Postconviction Pet. Ex. B, Davis Aff. ¶ 8) (Page ID #6271).

4. Mitigation Evidence at Davis's Third Sentencing Hearing

During opening argument at Davis's third sentencing hearing, his trial counsel **[*634]** promised that Cynthia Mausser, Chair of the Ohio Parole Board, would "testify based upon [Davis's] prior record, the fact that he committed the second murder, while he was still on parole from the first murder is that he will not be paroled." R. 5-7 (3d Sent'g Hr'g Tr. at 36-37) (Page ID #8225-26). Later in opening argument, his trial counsel again reiterated that, "we will note from Ms. Mausser's testimony that he will never be paroled." *Id.* at 38 (Page ID #8227). The issue of parole was critical because, under Ohio law in effect at the time of the offense, **[**12]** if the panel declined to impose a death sentence, the maximum available sentence would be thirty years to life, which would make Davis eligible for parole six years after the 2009 sentencing hearing. *Id.* at 36 (Page ID #8225).

The prosecution objected to Davis calling Mausser, stating that:

Ms. Mausser herself could not testify and has told me that she would not be in a position to be able to testify whether or not she would vote for parole or not vote for parole, it would be improper for her to say that she could not say what a majority of the board would do as they are not here. None of the board members, even if all seven or twelve were present would be able to say how they would vote **[**8]** because this case is not in front of them. . . . The entire thing would be speculation.

Id. at 133-34 (Page ID #8323-24). Davis's counsel responded that "we will be in a position of surprise and affirmative damage if she testifies as the prosecution is suggesting because we, in fact, interviewed her four months ago and Ms. Cook will testify, if necessary, that that is not what we were told." *Id.* at 137 (Page ID #8327). The panel allowed Mausser to testify. *Id.* at 144-45 (Page ID #8334-35). When Davis's **[**13]** trial counsel posed a hypothetical with circumstances similar to Davis's case, Mausser responded that the individual "would likely spend a large portion of the remainder of their life in prison." *Id.* at 175 (Page ID #8365). On cross-examination, Mausser agreed that she did not have all the information necessary to know how she would vote on Davis's case, were it to be presented to the parole board, nor could she say how other board members would vote. *Id.* at 181-82, 184-85, 188-89 (Page

ID #8371-72, 8374-75, 8378-79). In an affidavit obtained by postconviction counsel, Mausser averred that she "never told defense counsel that Mr. Davis would never be paroled." R. 4-46 (2011 Postconviction Pet. Ex. F, Mausser Aff. ¶ 4) (Page ID #6365).

Trial counsel later called Dr. Robert Smith, a clinical psychologist. R. 5-8 (3d Sent'g Hr'g Tr. at 230) (Page ID #8420). Dr. Smith opined that, at the time of the offense, Davis was suffering from alcohol dependence and borderline personality disorder. *Id.* at 248 (Page ID #8438). Regarding borderline personality disorder, Dr. Smith testified that:

And within the institution he does well, which we would expect with someone with a personality disorder. Think **[**14]** about it. I am saying that you have got this dysfunctional style. If you put me in a very structured environment, with clear-cut rules and people who enforce those rules every day, the same way, I will adapt and I will adjust. My problem with borderline personality disorder is if I am in the community where I have no clear structure and I am reacting to whatever is happening to me throughout the day.

Id. at 258 (Page ID #8448). He further testified that a characteristic of borderline personality disorder is "unwarranted aggressive behavior that comes about with minor provocation" that is "out of proportion." *Id.* at 261 (Page ID #8451). Dr. Smith opined that impulsivity and reactivity **[*635]** characterized borderline personality disorder and that individuals diagnosed with it "act and then think about it afterwards" and do not consider "what the consequences will be" but **[***9]** just "act out again based on what they are feeling." *Id.* at 263 (Page ID #8453). In an affidavit obtained by postconviction counsel, Dr. Smith stated that trial counsel did not tell him that parole was an issue in the case and that, had he known, he could have testified about how Davis "has learned to accept external rules **[**15]** and expectations regarding his behavior" and that he has developed coping strategies and can "weigh the potential consequences of his decisions and actions." R. 4-46 (2011 Postconviction Pet. Ex. I, Smith Aff. ¶¶ 11-12) (Page ID #6382).

II. ANALYSIS

A. Standard of Review

We review de novo a district court's decision to grant or deny a writ of habeas corpus. *Foust v. Houk*, 655 F.3d 524, 533 (6th Cir. 2011). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings" only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "Where the state court fails to adjudicate a claim on the merits, however, AEDPA's deferential standard of review does not apply." *Williams v. Anderson*, 460 F.3d 789, 796 (6th Cir. 2006).

A state-court decision is contrary to clearly established federal law if "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" **[**16]** or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state-court decision unreasonably applies clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08.

Clearly established federal law "refers to the holdings, as opposed to the dicta, of [Supreme Court] decisions as of the time of the relevant state-court decision." *Id.* at 412. "Although courts of appeals' decisions do not establish new rules, the court may look to such **[***10]** decisions to inform its analysis of whether a legal principle had been clearly established by the Supreme Court." *Avery v. Preslesnik*, 548 F.3d 434, 436-37 (6th Cir. 2008).

B. Jury Waiver

1. Exhaustion

"Exhaustion requires 'fair presentation' of the federal claim 'to the state courts.'" *Williams v. Mitchell*, 792 F.3d 606, 613 (6th Cir. 2015) (quoting *Bray v. Andrews*, 640 F.3d 731, 734-35 (6th Cir. 2011)). "To fairly present a federal claim, a state prisoner is required to present the state courts with 'both the *legal* and factual basis' for the claim." *Id.* (quoting *Anderson*, 460 F.3d at 806) (emphasis in original). Put differently, the petitioner must have presented the state courts with "a claim substantially [**17] equivalent to the [federal] claim." *Jalowiec v. Bradshaw*, 657 F.3d 293, 304 (6th Cir. 2011) (internal citations and quotation marks omitted).

[*636] Davis presented both the legal and factual basis for this claim in state court. On direct appeal of his third sentencing in the Ohio Court of Appeals, Davis's brief argued that the state "violate[d] Due Process and the Eighth and Sixth Amendment" by enforcing the jury waiver from 1984 "when the law has changed and the facts have changed." R. 4-42 (Direct Appeal Merit Br. at 4) (Page ID #5496). The brief also presented the factual basis for the claim, noting that Davis was sentenced by a panel consisting of different judges than he had agreed to in his original jury waiver. *Id.* at 6 (Page ID #5498). Davis's brief in the Ohio Supreme Court also extensively covered both the legal and factual bases of this claim. R. 4-43 (Ohio Sup. Ct. Merit Br. at 4-20) (Page ID #5859-75). Davis therefore properly exhausted this claim in the state courts.

2. AEDPA Deference

Davis claims that the Ohio Supreme Court unreasonably applied clearly established federal law in determining that the sentencing court's enforcement of his 1984 jury waiver against him at his third sentencing hearing did not violate the federal constitution. In its decision, [**18] the Ohio Supreme Court concluded that "although the Sixth Amendment guarantees the right to trial by jury, neither the Sixth nor the Eighth Amendment creates a constitutional right to [***11] be *sentenced* by a jury, even in a capital case." *Davis XIV*, 9 N.E.3d at 1042. The Ohio Supreme Court relied on the Supreme Court's decision in *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), in reaching this conclusion. Thus, the Ohio Supreme Court determined that a capital defendant could be sentenced to death without a jury, even absent any waiver. *Id.* The court further held that the changed circumstances (i.e., the new three-judge panel) did not have any constitutional implications for Davis's waiver, because that would require that a defendant "possess more information than courts have usually held sufficient for a knowing and intelligent jury waiver." *Id.*

The Ohio Supreme Court unreasonably applied clearly established federal law to Davis's jury claim. First, the Supreme Court's decisions in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), established the constitutional right to have a jury decide the factual findings necessary to impose a death sentence. As the Supreme Court has held:

Spaziano and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death [**19] be made by the jury." Their conclusion was wrong, and irreconcilable with *Apprendi*. Indeed, today is not the first time we have recognized as much.

Hurst v. Florida, 577 U.S. 92, 101, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) (quoting *Hildwin v. Florida*, 490 U.S. 638, 640-41, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989)). Although *Hurst* was decided after Davis's third sentencing in 2009, both *Ring* and *Apprendi* preceded the 2009 sentencing hearing. And the Supreme Court made explicit in *Hurst* that *Ring*, decided in 2002, had already clearly established this constitutional right: "In *Ring*, we held that another pre-*Apprendi* decision—*Walton*—could not 'survive the reasoning of *Apprendi*.'" *Id.* (quoting *Ring*, 536 U.S. at 603) (internal citation omitted). Thus, the Ohio Supreme Court's decision that a capital defendant can be sentenced to death without a jury, even absent any waiver, because there is no constitutional right to jury factfinding in capital sentencing, was [*637] an unreasonable application of then clearly established federal law. Once a petitioner's claim overcomes the relitigation bar imposed by 28 U.S.C. § 2254(d), we apply de novo review, because no deference is owed to a state-court decision premised upon an [***12] unreasonable application of clearly established federal law. *See Rice v. White*, 660 F.3d 242, 252 (6th Cir. 2011).

Second, although the Ohio Supreme Court briefly discussed whether changed circumstances between 1984 and 2009 impacted the knowing and intelligent nature of his [**20] waiver, it failed to discuss the constitutional implications of enforcing a waiver against Davis even though the state did not comply with the express language of the waiver, instead relying solely on *Spaziano* to dispose of Davis's claim. *See Davis XIV*, 9 N.E.3d at 1042. We have previously held that when a state court relies on one component of a claim to adjudicate the claim on the merits, we review de novo the component of the claim that state court did not address. *Rayner v. Mills*, 685 F.3d 631, 639 (6th Cir. 2012). We explained that this comported with the rule of *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770,

178 L. Ed. 2d 624 (2011), because "the Supreme Court expressly limited application of its holding [in *Richter*] to cases in which the state court's decision 'is unaccompanied by an explanation.'" *Rayner*, 685 F.3d at 638 (quoting *Sussman v. Jenkins*, 642 F.3d 532, 534 (6th Cir. 2011)). We also noted that this approach ensured harmony with the Supreme Court's prior decisions in *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), and *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), both of which "recognized that the AEDPA standard applies to the 'claim' of ineffective assistance of counsel before evaluating an unreviewed prong de novo." *Rayner*, 685 F.3d at 639. Because the state court did not adjudicate the merits of Davis's claim as to the due-process implications of the violation of the terms of his written waiver agreement, we apply de novo review to that portion of his claim. We therefore review de novo Davis's entire jury waiver **[**21]** claim, given that part of his claim was not adjudicated on the merits in state court, and the other part of his claim was adjudicated based on an unreasonable application of clearly established federal law.

3. Enforcement of Jury Waiver

Davis claims that his rights under the Due Process Clause and the Sixth and Eighth Amendments were violated when his 1984 jury waiver was enforced against him at his third sentencing hearing in 2009, because the state did not comply with the plain terms of the waiver agreement, which named the three judges who would try and sentence him.

[*13]** In determining whether the enforcement of Davis's waiver against him in 2009 was valid, we are guided by the Supreme Court's instruction that, because "the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393, 57 S. Ct. 809, 81 L. Ed. 1177 (1937). The Court has held that waivers of constitutional rights "are essentially contracts," although "the analogy may not hold in all respects." *Puckett v. United States*, 556 U.S. 129, 137, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009). If the government "takes on certain obligations" in a waiver agreement, and "those obligations are not met, the defendant is entitled to seek a remedy." *Id.* Because the waiver of a constitutional right is involved, a breach of a waiver agreement has constitutional dimensions. **[**22]** See *United States v. Barnes*, 278 F.3d 644, 648 (6th Cir. 2002). We have previously held that "a defendant has a due process right to hold the government to the promises **[*638]** it made that induced him to" waive the right. *United States v. Warren*, 8 F.4th 444, 448 (6th Cir. 2021). It therefore follows that Davis has the right to require the state to comply with the terms of the jury-waiver agreement or, in the alternative, to withdraw his waiver. *Cf. Sinistaj v. Burt*, 66 F.3d 804, 809 (6th Cir. 1995) (denying analogous habeas claim because petitioner's jury waiver did not specify that it applied only to a trial before a particular named judge).

The warden raises the fact that the prosecutor did not sign the jury waiver form, although it was prepared by the prosecutor and written on the prosecutor's letterhead. It was, however, signed by one of the trial judges. R. 4-3 (Jury Waiver & Election of Three-Judge Panel) (Page ID #433). Although a prosecutor's signature may be significant for the enforcement of a plea agreement, we note that, despite some similarities between a jury waiver and a plea agreement, the analogy does not hold in all respects. See *Puckett*, 556 U.S. at 137. In the typical case involving a plea-agreement violation, it is the prosecution's refusal to honor a condition to which it explicitly agreed that forms the basis for the defendant's constitutional claim. **[**23]** See, e.g., *Barnes*, 278 F.3d at 646-48 (finding violation where prosecution agreed to recommend defendant be sentenced at the low end of the guidelines but subsequently failed to state the recommendation on the record at defendant's sentencing hearing); *Warren*, 8 F.4th at 448 (finding violation where prosecution agreed not to "suggest in any way" that a variance from the sentencing guidelines range was appropriate but then suggested to the sentencing court that it would have made different guidelines recommendations had it known about other facts regarding **[***14]** defendant's criminal history). Here, however, the violation did not occur because of the prosecutor's conduct, but instead because the trial court enforced the waiver against Davis without holding up its end of the bargain regarding the composition of the three-judge panel.¹ Because a judge of that same trial court agreed to the terms of Davis's jury waiver, including the composition of the panel, and signed the waiver agreement, the prosecution's lack of signature has no effect on Davis's claim. Davis's due-process rights were therefore violated by the enforcement of the waiver against him at his 2009 resentencing, in breach of the explicit terms of his waiver.

¹ Although it is not dispositive of the issue, we note that the jury-waiver agreement at issue in *Sinistaj* was signed by the defendant and his trial counsel only. 66 F.3d at 806. In analyzing the issue, this court did not discuss the fact that the agreement was not signed by the prosecution or by the trial court.

The dissent criticizes [**24] our conclusion, incorrectly claiming that we "transform[] a waiver of jury trial into a waiver of jury trial only if three particular judicial officers make the sentencing decision." Dissent at 29. This misrepresents our decision. As a practical matter, almost all jury waiver agreements do not specify the judge or judges that will hear a case, and thus our conclusion here will have no bearing on cases involving such agreements. If the state does not wish to be bound by the requirement that certain judges will hear a case, it can simply choose not to include such language in any agreements involving the waiver of a defendant's constitutional rights. Thus, we do not conclude that there is a "constitutional right to have a particular judge make any decision." Dissent at 29. We simply hold, as has always been the case, that if a defendant waives a constitutional right in exchange for certain obligations, those obligations must be met if the waiver is to be enforced.

[*639] 4. Prejudice

It is an open question in our circuit whether Davis must satisfy the prejudice requirements of *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), in order to obtain relief on this claim. When such a claim is raised on direct appeal, automatic reversal is required [**25] so long as the defendant preserved their objection to the waiver-agreement violation. *Puckett*, 556 U.S. at 141; *Warren*, 8 F.4th at 450-51. This suggests that the violation of a jury-waiver agreement is per se reversible error and thus a habeas petitioner need not meet the requirements of *Brecht* to obtain [***15] relief. See *Spytma v. Howes*, 313 F.3d 363, 372 (6th Cir. 2002) (concluding that, on habeas review, while a claim of ineffective assistance of counsel regarding jury-waiver issues is subject to a prejudice analysis, "the actual jury waiver issue is arguably not subject to harmless error analysis"). And not requiring a showing of prejudice under *Brecht* makes sense given that the violation involved a denial of the jury-trial right, the deprivation of which the Supreme Court has held "unquestionably qualifies as 'structural error.'" *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

We need not decide this issue, however, because Davis has demonstrated prejudice under the *Brecht* standard. *Brecht* requires a showing that the error had a "substantial and injurious effect or influence" on the outcome of the proceedings. 507 U.S. at 637; see also *Fry v. Pliler*, 551 U.S. 112, 121-22, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007). As a result of the enforcement of Davis's jury waiver against him at his third sentencing hearing, Davis was sentenced to death by a panel that included a judge with a risk of actual bias that is too high to be constitutionally tolerable. [**26] See *infra* section II.D.1. This alone was enough to have a substantial and injurious effect on the outcome of the proceedings, because it ensured that Davis was sentenced by a court that was structurally deficient. We conclude that Davis is entitled to relief on this claim.

C. Ineffective Assistance of Counsel for Failing to Investigate the Circumstances of Davis's Prior Conviction

Next, Davis contends that his trial counsel were constitutionally ineffective for failing to investigate and present mitigating evidence about the circumstances of his prior conviction, which formed the death specification for his capital conviction. The warden argues that Davis failed to exhaust this claim in state court and that, as a result, it is procedurally defaulted. See 28 U.S.C. § 2254(b)(1)(A). Davis first raised this claim in his state postconviction proceedings following his second sentencing. R. 4-18 (1993 Postconviction Pet.) (Page ID #1925-27). The Ohio Court of Appeals held that the claim was barred by res judicata because Davis did not raise it on direct appeal even though Beard's "letter was time-stamped for the record by the clerk's office in 1981," and had precipitated the filing of a new-trial motion for his prior [**27] conviction for second-degree murder. *Davis VI*, 1996 Ohio App. LEXIS 4263, 1996 WL 551432, at *4. Davis did not raise this claim in his state postconviction proceedings following his third sentencing in 2009. R. 4-46 (2011 [***16] Postconviction Pet.) (Page ID #6236-64). Davis argues that, because our decision in *Davis X* granted relief as to only his sentence, his conviction was left in place and thus he properly exhausted this claim by presenting it to the state courts in his postconviction petition following his second sentencing. Appellant Reply Br. at 11-12.

The warden cites *King v. Morgan*, 807 F.3d 154, 160 (6th Cir. 2015), for the proposition that Davis's claim is unexhausted. [*640] *King*, however, dealt with the question of whether a second-in-time federal habeas petition following a new judgment constituted a "second or successive" petition such that the limitations of 28 U.S.C. § 2244 apply. *Id.* at 156-57. In answering that question in the negative, we simply reminded petitioners that "[a]ll habeas petitioners, including King on remand, must show that they did not procedurally default each claim and that they exhausted each claim." *Id.* at 160. That statement does not answer the question of what is necessary to meet the exhaustion requirement when a second judgment has been entered relating to a petitioner's already-existing conviction. [**28]

But we need not answer the question of whether a habeas petitioner must raise claims relating to their conviction anew in state-postconviction proceedings following a new sentencing judgment in order to meet the exhaustion requirement, because Davis's claim relates to his sentence and thus is plainly unexhausted following his third sentencing. Although Davis's federal habeas petition raised this claim as relating to his conviction, R. 6 (Pet. for Habeas Corpus at 152-55) (Page ID #3725-28), and the district court understood it as such, R. 64 (Order Adopting R. & R. in Part & Den. Pet. at 45-47) (Page ID #10066-68), Davis's brief in this court focuses exclusively on the impact of his trial counsel's alleged deficiencies at his sentencing hearing. *See* Appellant Br. at 46-48. Because Davis's opening brief did not raise the argument that this claim related to his conviction, he has waived that argument. *See Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010). And the argument is unexhausted as to Davis's sentence, because he did not raise it again in his state-postconviction proceedings following his third sentencing, despite being represented by different counsel at his third sentencing hearing than at his second sentencing hearing. R. [**29] 4-46 (2011 Postconviction Pet. ¶¶ 9, 25) (Page ID #6237, 6239). The factual basis for the claim was thus not presented to the state courts, as required by [***17] the exhaustion doctrine. *See Williams*, 792 F.3d at 613. We therefore hold that this claim is procedurally defaulted.

D. Ineffective Assistance of Counsel for Failing to Move to Recuse a Judge for Bias

Davis claims that trial counsel at his third sentencing hearing were constitutionally ineffective for failing to move to recuse Judge Nastoff for bias or the appearance thereof, given his prosecution of Davis's nephew. The Ohio Court of Appeals concluded that trial counsel's decision not to seek Judge Nastoff's recusal was strategic and therefore it did not constitute ineffective assistance of counsel. *Davis XIII*, 2013-Ohio-3878, 2013 WL 4806935, at *6. Because the Ohio Court of Appeals adjudicated this claim on the merits, the deference requirements of § 2254(d) apply.

To demonstrate ineffective assistance of counsel, a petitioner typically must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We, however, have held that because "judicial bias is a structural defect both when actual and when merely unconstitutionally probable, if either type of judicial bias [**30] is proven, *Strickland* prejudice need not be proven." *Coley v. Bagley*, 706 F.3d 741, 750 (6th Cir. 2013) (internal citation omitted). The operative questions, therefore, are whether Judge Nastoff's potential for bias violated due process, and, if so, whether the Ohio Court of Appeals unreasonably applied federal law in determining that trial counsel's decision not to seek recusal was strategic. *See Kimmelman v. Morrison*, 477 U.S. 365, 375, [*641] 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (holding that, if trial counsel's failure to litigate a constitutional claim competently "is the principal allegation of ineffectiveness," petitioner must also prove that the underlying constitutional claim is meritorious).

1. Judicial Bias

The Ohio Court of Appeals did not address the issue of whether Judge Nastoff's potential bias rose to the level of constitutional error and instead simply decided that the decision of Davis's trial counsel not to seek Judge Nastoff's recusal was strategic. We therefore review de novo the judicial-bias portion of Davis's claim. *See Rayner*, 685 F.3d at 638-39 (holding that when a state court reviews only one portion of a claim in disposing of the claim, we review de novo any portions of the claim that the state court did not review). The dissent confusingly [***18] argues that "Davis's claim fails on AEDPA review. . . because it is not [**31] clearly established federal law that a judge's prior involvement in the prosecution of a defendant's family member creates 'an impermissible risk of actual bias' in the defendant's case." Dissent at 30-31 (quoting *Williams v. Pennsylvania*, 579 U.S. 1, 8, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016)). But such a showing is not required, because the Supreme Court has confirmed that when no "state courts below [have] reached" a prong of a petitioner's claim, "our review is not circumscribed by" AEDPA's requirements. *Wiggins*, 539 U.S. at 534. The dissent offers no reason that the Supreme Court's guidance in *Wiggins* and our prior precedent in *Rayner* ought not to apply here. Instead, the dissent simply assumes that AEDPA deference applies despite the fact that no state court reviewed the judicial bias portion of Davis's claim. Seeing no reason not to apply the rule of *Wiggins* and *Rayner*, we review de novo this prong of Davis's claim.

The Supreme Court has held that judicial bias violates due process when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). The standard is objective, and thus courts ask "not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an [**32] unconstitutional 'potential for bias.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009). This is because "both the appearance and reality of

fairness" must be preserved so that litigants are assured that "the arbiter is not predisposed to find against [them]." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980).

We have previously held that a petitioner claiming judicial bias must overcome the presumptions of judicial impartiality and regularity, as well as the presumption of "honesty and integrity in those serving as adjudicators" and that "judges know the law and apply it in making their decisions." *Coley*, 706 F.3d at 751 (quoting *Withrow*, 421 U.S. at 47). Although *Coley* recognized that "exposure to bad facts and formation of an opinion based on them are not enough to establish bias," this case is easily distinguishable from *Coley*. *Id.* at 750. In *Coley*, the judge had previously been exposed to bad facts about the defendant outside of the record, but it was in her official capacity as a judge, and she did not investigate the facts further, nor did she even read the source of the bad facts. *Id.* at 749-51. Instead, the judge had heard about the facts [***19] second-hand from the defense attorney, at which point she contacted the police so that they [*642] could properly handle any investigation into the issue. *Id.* Thus, we concluded that it left "the trial judge [***33] as neither investigator nor prosecutor, but simply a judge to whom the presumption of impartiality applies." *Id.* at 751.

Here, Judge Nastoff was, in fact, acting as a prosecutor when he learned of some of the mitigation evidence that Davis later presented at his third sentencing hearing. *See* R. 4-46 (2011 Postconviction Pet. Ex. D, Menashe Aff. ¶ 23) (Page ID #6279). Unlike the judge in *Coley*, who was acting as a neutral arbiter, Judge Nastoff was necessarily a biased actor, because it was his job as a prosecutor to represent the interests of the state. And Judge Nastoff did not simply receive the information and pass it on to the relevant authorities; he actively cross-examined witnesses on the same mitigation evidence that Davis would later present at his sentencing hearing, where Judge Nastoff was required to weigh that same evidence as a neutral arbiter. *Id.* The presumptions that we applied in *Coley* are therefore inapplicable to the facts in Davis's case.

For the above-stated reasons, this case is much closer to *Williams v. Pennsylvania*,² which concluded that "there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical [***34] decision regarding the defendant's case." 579 U.S. at 8. Although it is true that Judge Nastoff served as a prosecutor in Thompson's case and not in Davis's case, he did have "significant, personal involvement as a prosecutor" in the cross-examination, and therefore the undermining and discrediting of, critical mitigation evidence that was equally applicable to Davis's case. *See* R. 4-46 (2011 Postconviction Pet. Ex. D, Menashe Aff. ¶ 23) (Page ID #6279).

In coming to its decision in *Williams*, the Court reasoned that there is "a risk that the judge 'would be so psychologically wedded' to his or her previous position as a prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed [***20] position.'" 579 U.S. at 9 (quoting *Withrow*, 421 U.S. at 57). Likewise, the Court concluded that "the judge's 'own personal knowledge and impression' of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties' arguments to the court." *Id.* at 9-10 (quoting *In re Murchison*, 349 U.S. 133, 138, 75 S. Ct. 623, 99 L. Ed. 942 (1955)). This logic applies with equal force to Judge Nastoff's role as a prosecutor in cross-examining the same mitigation evidence that Davis would later present at [***35] his sentencing hearing. There is an impermissible risk that Judge Nastoff's critical view of the mitigation evidence from his time as a prosecutor would carry more weight than the arguments that Davis actually presented to the court. Similarly, given his role in arguing that Thompson ought to receive a death sentence, there is a danger that Judge Nastoff remained "psychologically wedded" to his position as a [*643] prosecutor and thus would not want to give the appearance of reversing his position on the merits of the mitigation evidence.

For these reasons, "the probability of actual bias on the part of" Judge Nastoff "is too high to be constitutionally tolerable," *Withrow*, 421 U.S. at 47, especially in a death-penalty case. The potential for bias on behalf of Judge Nastoff at Davis's third sentencing hearing was intolerably high and thus violated due process.

2. Deficient Performance

² Although we review de novo this portion of Davis's claim and so we are not required to confine our discussion to clearly established federal law, we note that we do not rely on the holding of *Williams* to decide Davis's claim. The legal reasoning anchoring *Williams* was established by both *Withrow*, decided in 1975, and *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955). We therefore decide Davis's claim on the holdings of *Withrow* and *Murchison* alone. We nevertheless include a discussion of *Williams* here for the sake of completeness and as an example of how the Supreme Court applied the legal reasoning of *Withrow* and *Murchison* to a set of facts similar to those in Davis's case.

The remaining question is therefore whether the Ohio Court of Appeals unreasonably applied clearly established federal law in determining that trial counsel's decision not to seek recusal was strategic and therefore did not constitute deficient performance. The Ohio Court of Appeals provided little reasoning for its holding, other than [**36] the fact that trial counsel were aware that Judge Nastoff had prosecuted Thompson and still chose not to challenge him. *Davis XIII*, 2013-Ohio-3878, 2013 WL 4806935, at *6.

We conclude that the Ohio Court of Appeals unreasonably applied *Strickland* and its progeny in holding that trial counsel's decision not to move for recusal was strategic. Although trial counsel's strategic choices are protected, they must be "reasonable" based on the "totality of the circumstances." *Strickland*, 466 U.S. at 681 (internal citations and quotation marks omitted). In its decision, the Ohio Court of Appeals did not even identify the appropriate federal [***21] constitutional standard for determining judicial bias, let alone apply it to the facts of Davis's case. Without determining whether Judge Nastoff's risk of bias was too high to be constitutionally tolerable, the Ohio Court of Appeals could not properly determine whether trial counsel's decision was reasonably strategic or not, because the potential for bias necessarily informs the reasonableness of trial counsel's decision under the circumstances. *Cf. Dickerson v. Bagley*, 453 F.3d 690, 697 (6th Cir. 2006) ("[T]he state court unreasonably applied clearly established Supreme Court precedent when it simply assumed that counsel's oversights were motivated by strategy."). The Supreme Court, [**37] moreover, has held that trial counsel must consult with their clients regarding important decisions and overarching strategy. *Strickland*, 466 U.S. at 688; *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004). Davis's trial counsel did not do so. R. 4-46 (2011 Postconviction Pet. Ex. B, Davis Aff. ¶ 8) (Page ID #6271).

One of our sibling circuits has likewise held that a state court unreasonably applied *Strickland* in finding that trial counsel did not perform deficiently in "advis[ing] his client to proceed before a court that was structurally deficient" as a result of the judge's potential for bias, which the Third Circuit concluded was "something no competent attorney would ever do." *McKernan v. Superintendent Smithfield SCI*, 849 F.3d 557, 566-67 (3d Cir. 2017). For the same reasons, Davis's trial counsel performed deficiently, because no competent attorney would reasonably choose to proceed with a capital-sentencing hearing before a court that was constitutionally deficient. Davis is therefore entitled to relief on this claim.

E. Ineffective Assistance of Counsel for Failing Adequately to Investigate, Prepare for, and Present Mitigating Evidence

1. AEDPA Deference

Davis argues that trial counsel at his third sentencing hearing were constitutionally ineffective for failing to reasonably [**644] investigate, prepare for, and present mitigation testimony [**38] from Cynthia Mausser and Dr. Robert Smith. The Ohio Court of Appeals concluded that the decision to call Mausser as well as the "decision to engage, or not engage, in a particular line of questioning" were "presumed to be the product of sound trial strategy" and therefore did not constitute ineffective assistance of counsel. *Davis XIII*, 2013-Ohio-3878, 2013 WL 4806935, at *5.

[***22] Although *Strickland* established that it is "strongly presumed" that counsel performed adequately and reasonably exercised their professional judgment in making decisions, it did not create an irrebuttable presumption that any act with strategic implications is reasonable and cannot constitute deficient performance. 466 U.S. at 690. The Supreme Court has confirmed that taking the approach that the Ohio Court of Appeals took constitutes an incorrect reading of *Strickland*. *See Wiggins*, 539 U.S. at 527 ("*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy."). This court has also reached the same conclusion. *Dickerson*, 453 F.3d at 697 ("[T]he state court unreasonably applied clearly established Supreme Court precedent when it simply [**39] assumed that counsel's oversights were motivated by strategy, instead of requiring a complete and thorough mitigation investigation as mandated by *Strickland* and its progeny."). In concluding that it would "not question counsel's strategic decision" regarding questioning witnesses, the Ohio Court of Appeals unreasonably applied *Strickland* by imposing a far higher presumption of reasonableness than *Strickland* requires, and by failing to consider the reasonableness of the investigation and preparation that supported trial counsel's choices, as required by *Wiggins*. *Davis XIII*, 2013-Ohio-3878, 2013 WL 4806935, at *5. Because the entirety of the Ohio Court of Appeals' decision on the merits turns on this unreasonable application of *Strickland* and *Wiggins*, we review de novo this claim, because no deference is owed to a state-court decision premised upon an unreasonable application of clearly established federal law. *See Rice*, 660 F.3d at 252.

The Supreme Court's precedents, moreover, clearly establish that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Trial counsel promised in opening argument that Mausser would provide specific testimony, despite failing adequately to investigate [**40] what her testimony would be, and called her to testify even after being warned by the prosecution that Mausser would not provide the promised testimony. This court has already concluded that it is an unreasonable application of clearly established federal law to conclude that trial counsel did not perform deficiently in such a scenario. *English v. Romanowski*, 602 F.3d 714, 728-29 (6th Cir. 2010); *see also Avery*, 548 F.3d at 436-37 (holding that a court of [***23] appeals may look to its own decisions to determine whether a legal principle has been clearly established by the Supreme Court). In *English*, this court held that "it was objectively unreasonable for English's trial attorney to decide before trial to call [English's then-girlfriend] as a witness, make that promise to the jury, and then later abandon that strategy, all without having fully investigated [his then-girlfriend] and her story prior to opening statements." 602 F.3d at 728. This logic applies with equal force to Davis's counsel in their failure adequately to investigate what testimony Mausser would actually give before promising [*645] the specifics of her testimony in opening argument.

As noted above, the Ohio Court of Appeals failed to address the fact that Davis raised his claim under the rubric of trial counsel's failure to *investigate* [**41] and *prepare for* Mausser and Dr. Smith's testimony, R. 4-46 (2011 Postconviction Pet. ¶¶ 64-65, 76-77) (Page ID #6248, 6251), instead characterizing it as grounded in trial counsel's decision to call Mausser and engage in particular lines of questioning with Mausser and Dr. Smith, *Davis XIII*, 2013-Ohio-3878, 2013 WL 4806935, at *5. The Ohio Court of Appeals thus ignored the Supreme Court's warning that, in such cases, the "principal concern" is "not whether counsel should have presented" certain mitigation evidence, but instead "whether the investigation supporting counsel's decision . . . was itself reasonable." *Wiggins*, 539 U.S. at 522-23 (emphasis in original). For this reason, to the extent that Davis's claim is rooted in trial counsel's failure adequately to investigate and prepare for Mausser and Dr. Smith's testimony, there was no state court adjudication on the merits, and we review de novo the claim, because the deference requirements of 28 U.S.C. § 2254(d) do not apply.

2. Deficient Performance

We have repeatedly held that trial counsel perform deficiently when they either present or choose not to present witness testimony based on inadequate investigation and preparation. *See English*, 602 F.3d at 728-29; *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000) ("[D]efense counsel's failure to have questioned [the witness] in this regard prior to trial [**42] is inexcusable. Defense counsel should have known [the witness's] opinion on this ultimate issue and should have prepared accordingly."). The Supreme Court has likewise frequently faulted trial counsel for failing adequately to investigate mitigation evidence in preparation for their client's sentencing. *See Wiggins*, 539 U.S. at 534; *Williams*, 529 U.S. at 395-96.

[***24] For the reasons stated in the foregoing section, trial counsel performed deficiently in failing adequately to investigate and prepare for Mausser's testimony in advance of promising her testimony at opening argument. Our decision in *English* controls. 602 F.3d at 728-29.

After Mausser's testimony failed to establish that Davis would never be paroled, trial counsel then failed to prepare Dr. Smith for the fact that Davis potentially being paroled would be an issue. R. 4-46 (2011 Postconviction Pet. Ex. I, Smith Aff. ¶ 11) (Page ID #6382). Because of this failure, Dr. Smith's testimony focused on Davis's state of mind in 1984 and how individuals with borderline personality disorder can adapt to a carceral environment, R. 5-8 (3d Sent'g Hr'g Tr. at 248-63) (Page ID #8438-53), instead of addressing how Davis has changed and might be able to adapt well, were he to be paroled, R. 4-46 (2011 Postconviction [**43] Pet. Ex. I, Smith Aff. ¶ 12) (Page ID #6382). This was not a reasonable exercise of professional judgment, and it compounded trial counsel's failure adequately to prepare for and investigate Mausser's testimony. It is especially unreasonable given that two prior panels had heard and rejected similar psychological testimony and that, at Davis's second sentencing hearing, the panel had in fact used such testimony in determining that a death sentence was appropriate. R. 4-46 (2011 Postconviction Pet. Ex. D, Menashe Aff. ¶ 17) (Page ID #6278). "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. [*646] The combination of Mausser's testimony and the fact that a prior sentencing panel had found that such psychological testimony was aggravating for Davis would lead a reasonable attorney to investigate further and prepare Dr. Smith differently for his testimony to address both the parole issue and any issues that prior panels had found with the psychological testimony. Davis's counsel did not do so, and [**44] thus performed deficiently.

3. Prejudice

Because the Ohio Court of Appeals held that trial counsel's performance was not deficient, it did not address the prejudice prong of Davis's claim, and thus we review de novo whether Davis was prejudiced by trial counsel's performance. *See Wiggins*, 539 U.S. at 534; *Williams*, 460 F.3d at 804. To show prejudice, Davis must show "a reasonable probability that, [***25] but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This probability must be "sufficient to undermine confidence in the outcome." *Id.*

Davis was prejudiced by trial counsel's deficient performance. The sentencing panel described Mausser's testimony as "highly speculative and unconvincing" and determined it was "entitled no weight" as a mitigating factor. R. 4-39 (3d Sent'g Op. at 10) (Page ID #4933). Following Davis's second sentencing hearing, however, without Mausser's testimony, the Ohio Supreme Court found that the probability that Davis would never be paroled if he were not be sentenced to death was entitled to "some weight in mitigation." *Davis IV*, 584 N.E.2d at 1198. Mausser's testimony therefore actively detracted from Davis's case in mitigation. The 2009 panel's sentencing opinion also highlighted the fact that [**45] "Dr. Smith failed to forecast Defendant's behavior or recommend a treatment plan, should he eventually be released from prison," which demonstrates that such evidence would have been beneficial to the panel in weighing mitigation evidence. R. 4-39 (3d Sent'g Op. at 8) (Page ID #4931). The dissent argues that because the panel gave weight to Davis's good behavior while previously incarcerated, Dr. Smith's testimony did not prejudice Davis. Dissent at 33. But the panel actually decided to attribute "little weight" to Davis's good behavior while in prison as a mitigating factor, *id.* at 10 (Page ID #4933), which was likely related to the parole issue and the fact that Dr. Smith did not testify about Davis's ability to rejoin society were he to be paroled. Thus, Dr. Smith's testimony did in fact prejudice Davis.

The dissent also fails to discuss the testimony that Dr. Smith would have provided, had trial counsel effectively prepared him for the parole issue. Dr. Smith could have testified that "with time, maturity, and freedom from drugs and alcohol, someone with Borderline Personality Disorder will gain insight and develop coping skills that would enable him to adjust to living in the outside [**46] world." R. 4-46 (2011 Postconviction Pet. Ex. I, Smith Aff. ¶ 12) (Page ID #6382). He also would have testified that Davis "at the present time is a different person than he was when he was admitted to [the Ohio Department of Rehabilitation and Correction] in 1984." *Id.* Furthermore, Dr. Smith would have testified that:

[***26] Having been in a structured setting for the past 27 years, Von has learned to accept external rules and expectations regarding his behavior. He has developed coping strategies to deal effectively with frustration, annoyance, disappointment, etc. He has learned to weigh the potential consequences of his decisions and actions.

[*647] *Id.* Finally, he would have "explained that the parole process itself would provide Von with significant structure and guidelines that would assist him in successfully re-entering society." *Id.* ¶ 13) (Page ID #6382). This testimony would have left the panel with a substantially different picture of Davis than Dr. Smith's actual testimony provided, because his testimony focused Davis's state of mind in 1984, and did not explain how Davis had changed in the intervening years and why he could now be paroled without necessarily presenting a danger to the [**47] community. It also would have strengthened the evidence of Davis's good behavior while in prison, because it would have established how his behavior was demonstrative of broader changes that Davis had made that would also allow him to live successfully outside of a carceral environment. Instead, the panel was left with the opinion that Davis would be dangerous were he to be paroled, and that imposing a death sentence was the only way to prevent that, as a result of Mausser's testimony.

The issue of whether Davis would be paroled, and if so, whether he would present a danger to society was plainly a major factor in the panel's decision regarding whether to impose a death sentence. The errors that trial counsel made in investigating and preparing Mausser and Dr Smith's testimony are substantial enough to undermine our confidence in the outcome of the sentencing hearing. Trial counsel's deficient performance likely negatively impacted the weight the panel assigned to several of Davis's mitigating factors, and thus there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. We therefore hold that Davis is entitled [**48] to relief on this claim.

[***27] **F. Ineffective Assistance of Counsel for Failing to Properly Advise Davis about Waiving his Right to a Jury Trial**

1. Procedural Bar

Davis contends that his conviction cannot stand because his original trial counsel in 1984 failed to advise him of the collateral consequences of waiving his constitutional right to a jury trial. The warden contends that this claim is procedurally defaulted because the Ohio Court of Appeals invoked a procedural bar instead of considering the claim on the merits, and thus review by this court is barred because "the state judgment rests on independent and adequate state procedural grounds." *Coleman v. Thompson*, 501 U.S. 722, 730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). The Ohio Court of Appeals concluded that, "as this court has previously determined, Davis' habitual challenges regarding his jury waiver are barred by the doctrine of res judicata." *Davis XIII*, 2013-Ohio-3878, 2013 WL 4806935, at *7. The Ohio Court of Appeals incorrectly applied the doctrine of res judicata to this claim, however, because Davis's claim relies on evidence outside the record. Because the Ohio Court of Appeals erred in applying the res judicata rule to Davis's claim, it is not procedurally defaulted, and AEDPA deference also does not apply given that his claim was not adjudicated [**49] on the merits in state court. 28 U.S.C. § 2254(d); see also *Jones v. Bradshaw*, 46 F.4th 459, 486 (6th Cir. 2022). We review de novo the merits of Davis's claim. *Jones*, 46 F.4th at 486.

2. Ineffective Assistance of Counsel

To the extent that Davis's claim relies on *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), we conclude that it must fail, because the Supreme Court has held that *Padilla* does not apply retroactively to petitioners [*648] whose convictions became final before *Padilla* was decided. *Chaidez v. United States*, 568 U.S. 342, 344, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013). Because Davis challenges the performance of his original trial counsel in 1984, and *Padilla* was not decided until 2010, Davis cannot benefit from the rule of *Padilla*. Although we vacated Davis's sentence in 2007, his conviction was left undisturbed, and thus *Padilla* cannot apply to claims relating to his conviction alone. And even if we determined that Davis's 2009 resentencing—which did not become final until after *Padilla*—worked to defeat the non-retroactivity of *Padilla* as to Davis's conviction, the rule of *Padilla* still could not help in determining whether Davis's trial counsel performed deficiently in [***28] 1984, because the Supreme Court has held that deficient performance is judged based on the prevailing professional norms at the time of trial. *Bobby v. Van Hook*, 558 U.S. 4, 8, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009) (per curiam) ("Judging counsel's conduct in the 1980's on the basis of these 2003 Guidelines—without even pausing to consider whether they reflected [**50] the prevailing professional practice at the time of the trial—was error."). And the Supreme Court's decision making *Padilla* non-retroactive explains why, in 1984, prevailing professional norms did not require attorneys to inform clients of the collateral consequences of waiving a constitutional right. *Chaidez*, 568 U.S. at 350. Because Davis has not identified any other legal authority to demonstrate that trial counsel performed deficiently, this claim must fail. Finding no deficient performance, we need not address the prejudice prong of Davis's *Strickland* claim.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's denial of relief as to Davis's claims that his trial counsel were constitutionally ineffective for failing to investigate and present mitigating evidence about the circumstances of Davis's prior conviction (claim two) and that his trial counsel provided ineffective assistance by failing adequately to advise him of the collateral consequences of a jury waiver (claim five). We **REVERSE** the district court's denial of relief on Davis's claims that the state violated his constitutional rights by enforcing his 1984 jury waiver against him at his 2009 sentencing hearing (claim one), that his [**51] trial counsel provided ineffective assistance by failing to move to recuse Judge Nastoff for bias (claim three), and that his trial counsel were constitutionally ineffective in failing to reasonably prepare and present mitigation evidence at his 2009 sentencing hearing (claim four). We **REMAND** to the district court with instructions to **GRANT** a writ of habeas corpus vacating Davis's death sentence unless the State of Ohio conducts a new sentencing proceeding within 180 days of remand.

Dissent by: JULIA SMITH GIBBONS

Dissent

[**29] JULIA SMITH GIBBONS, Circuit Judge, dissenting. I join the majority opinion in its affirmance of the district court's denial of relief as to Davis's claims that his trial counsel were constitutionally ineffective for failing to investigate and present mitigating evidence and for failing to adequately advise him of collateral consequences of a jury waiver. As to the majority's holdings on Davis's other claims, I respectfully dissent and would affirm the district court's denial of Von Clark Davis's petition for writ of habeas corpus.

I.

In his second habeas petition, Von Clark Davis claims that Ohio breached the terms of his jury waiver, trial counsel failed to [*649] investigate the circumstances [**52] of his prior conviction, trial counsel failed to move to recuse a judge who either was biased or presented the impermissible appearance of bias, trial counsel failed to reasonably prepare for and present mitigation evidence, and trial counsel failed to properly advise him about the effects of waiving his right to a jury. The majority concludes that Davis is entitled to relief on three of his claimed grounds for relief—the enforcement of his 1984 jury waiver, the ineffective assistance of counsel for failing to move to recuse a judge at his 2009 resentencing, and the ineffective assistance of counsel for failing to prepare and present mitigation evidence at his 2009 sentencing. Maj. Op. at 28. I disagree.

II.

The majority initially concludes that Davis's right to a jury trial was violated in 2009 when Davis's 1984 jury trial waiver was enforced against him, despite the death of one member of the original three-judge panel and the retirement of the other two. In so ruling, the majority transforms a waiver of jury trial into a waiver of jury trial only if three particular judicial officers make the sentencing decision. While it is true that Davis's waiver does mention the names of three [**53] particular judges, there is no constitutional right to have a particular judge make any decision in any legal context of which I am aware. The law considers judges fungible. Interpreting the waiver as the majority does would turn waivers, guilty pleas, and various [***30] proceedings upside down. Judges die, become ill, and leave the bench all the time, without any effect on any waivers or other decisions a defendant may have made about his or her case.

The majority accomplishes this analytical feat by converting the judicial officer who signed the waiver into a party to a contractual agreement with Davis. That is never the judicial role. Judges do not strike bargains with criminal defendants. I would deny relief on this claim.

III.

I would similarly reject Davis's argument that his counsel was ineffective for failing to move for the recusal of a judge, Judge Nastoff, at his resentencing. The Ohio Court of Appeals held that Davis's counsel was not ineffective because the decision not to seek recusal was a reasonable trial strategy. *State v. Davis*, No. CA2012-12-258, 2013 Ohio 3878, 2013 WL 4806935, at *6 (Ohio Ct. App. Sept. 9, 2013).

For an ineffective assistance claim, a petitioner typically must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the [**54] defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). But *Strickland* prejudice not need be proven if a petitioner establishes judicial bias because "judicial bias is a structural defect." *Coley v. Bagley*, 706 F.3d 741, 750 (6th Cir. 2013) (citation omitted). Thus, we consider whether the potential for bias violated Davis's due process rights, and, if so, whether the Ohio Court of Appeals unreasonably applied federal law in determining that trial counsel's decision not to seek recusal was strategic. See *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

The majority concludes that "the probability of actual bias on the part of Judge Nastoff 'is too high to be constitutionally tolerable.'" Maj. Op. at 20 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)). It reasons that because Judge Nastoff served as a prosecutor in a case against Davis's nephew and "actively cross-examined witnesses on the same mitigation evidence that Davis would later present at his sentencing hearing," counsel's failure to move for his recusal [*650] entitled Davis to habeas relief. *Id.* at 22-23.

Davis's claim fails on AEDPA review, however, because it is not clearly established federal law that a judge's prior involvement in the prosecution of a defendant's family member [***31] creates "an impermissible risk of actual bias" in the defendant's case. *Williams v. Pennsylvania*, 579 U.S. 1, 8, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016). *Williams*, the primary case that Davis cites, involved [**55] a judge's prior participation as a prosecutor in the same defendant's case. *Id.* at 1. But participation in a family

member's case is different than involvement in a defendant's own case. Thus, *Williams* did not clearly establish Judge Nastoff's involvement in Davis's case as a constitutional violation.

The majority opinion grounds its analysis in *Larkin* and *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955). *See* Maj. Op. at 19 n.2. But *In re Murchison* involved a state law that empowered a judge to sit as a "one man grand jury" and charge crimes, which violated due process because the judge had in effect become part of the prosecution in that same case. 349 U.S. at 138. And while the majority cites *Withrow* for its general statements about judicial bias, the facts of *Withrow* contradict its position. Indeed, *Withrow* rejected a judicial prejudice argument where the adjudicator had previously conducted investigative functions, finding that adjudicators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." 421 U.S. at 46-55 (quoting *United States v. Morgan*, 313 U.S. 409, 421, 61 S. Ct. 999, 85 L. Ed. 1429 (1941)).

In an attempt to connect Davis's case to those in which a judge previously acted as a prosecutor against the same defendant, the majority asserts **[**56]** that Judge Nastoff was exposed to some of the same mitigation evidence in Davis's trial and the trial of Davis's nephew, Lahray Thompson. Maj. Op. at 23-24. This argument is unpersuasive. First, Davis never clarifies what mitigation evidence appeared at both his and Thompson's trials, leaving us to guess the content and extent of such evidence. Davis does point to the testimony of his sister, Carol Smith, Thompson's mother, and argues that "[g]iven Judge Nastoff's prior attempt to seek the execution of Smith's son, he was predisposed to reject her testimony for Davis." CA6 R. 20, Appellant Br., at 55. But Smith never testified at Thompson's trial, and it is not clear why Judge Nastoff would disregard Smith's testimony simply because he previously prosecuted her son.

Accordingly, I would hold that Davis is not entitled to relief on this claim.

[*32]** IV.

Finally, in my view, Davis's claim that his trial counsel was ineffective for failing to prepare and present mitigation evidence also fails. Davis contends that trial counsel was ineffective for presenting testimony by Cynthia Mausser, a member of the Ohio Parole Board, and for failing to prepare or revise testimony by Robert Smith, Ph.D., a **[**57]** clinical psychologist, in view of Mausser's testimony.

First, Davis argues that trial counsel—attempting to avoid a death sentence—incorrectly told the three-judge panel that Mausser would testify that Davis would never be paroled. During direct testimony, Mausser hypothesized that an individual with a criminal history comparable to Davis's "would likely spend a large portion of the remainder of their life in prison" and was "unlikely" to be granted parole at a first hearing. DE 5-7, Mitigation Hr'g Tr., Page ID 8365. On cross-examination, **[*651]** Mausser admitted that she could not say with certainty how she or other parole board members would vote should Davis gain parole eligibility.

In light of Mausser's testimony, Davis argues that trial counsel was further ineffective for failing to prepare Smith "for the fact that the possibility of parole was going to be a critical issue" or to testify about "how Davis had changed over time and how, even with borderline personality disorder, he could adapt in society if paroled," and "failed to consider that this psychological evidence was rejected in two previous sentencing hearings involving Davis." CA6 R. 20, Appellant Br., at 71-72. Smith testified **[**58]** that Davis, who was diagnosed with borderline personality disorder, responds well to a structured setting like prison and had shown progress within that setting. Davis's position is that, in the context of Mausser's testimony regarding the possibility of parole, Smith's testimony implied that Davis would pose a danger to society once outside prison's structured environment.

Davis's claim fails on the prejudice prong. The trial court "found that Mausser's testimony was 'entitled to no weight' because it was 'highly speculative and unconvincing.'" *State v. Davis*, 139 Ohio St. 3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, 1056 (Ohio 2014). Similarly, the Ohio Supreme Court "afford[ed] no weight" to Mausser's "speculative" testimony. *Id.* Despite this, the Ohio Supreme Court concluded that Davis was unlikely ever to be released from prison given his age. **[***33]** Thus, the court came to the conclusion that Davis sought—that his parole was unlikely—even if Mausser's testimony did not accomplish that objective.

Smith's testimony also did not prejudice Davis. Despite Mausser's ineffective testimony, the court believed that Davis would likely spend the rest of his life in prison. Smith testified that Davis suffered from alcohol dependence and borderline personality disorder and that Davis **[**59]** benefitted from the prison environment due to its structure and lack of access to alcohol. Thus, Smith's

79 F.4th 623, *651; 2023 U.S. App. LEXIS 21413, **59; 2023 FED App. 0179P (6th Cir.), ***33

testimony supported Davis's argument that he would continue the good behavior that he had exhibited while imprisoned, and the court gave weight to Davis's "record of good behavior in prison, both during his earlier incarceration and on death row." *Davis*, 9 N.E.3d at 1056. Smith's testimony therefore did not undermine counsel's strategy of showing that Davis would likely remain in prison and exhibit good behavior during that incarceration.

Because Davis cannot show prejudice, I would deny relief on this claim.

V.

For these reasons, I would not grant Davis habeas relief. I respectfully dissent.

End of Document

Davis v. Shoop

United States District Court for the Southern District of Ohio, Western Division

March 29, 2021, Decided; March 29, 2021, Filed

Case No. 2:16-cv-495

Reporter

2021 U.S. Dist. LEXIS 59175 *; 2021 WL 1172048

VON CLARK DAVIS, Petitioner, - vs - TIMOTHY SHOOP, Warden, Chillicothe Correctional Institution, Respondent.

Subsequent History: Reversed by, in part, Affirmed by, in part, Remanded by Davis v. Jenkins, 79 F.4th 623, 2023 U.S. App. LEXIS 21413 (6th Cir. Ohio, Aug. 16, 2023)

Writ of habeas corpus denied Davis v. Jenkins, 2024 U.S. App. LEXIS 20985, 2024 FED App. 188P (6th Cir.) (6th Cir. Ohio, Aug. 20, 2024)

Motion granted by, Stay granted by, Motion denied by, As moot Davis v. Jenkins, 2024 U.S. App. LEXIS 23357 (6th Cir., Sept. 13, 2024)

Prior History: Davis v. Shoop, 2020 U.S. Dist. LEXIS 106444, 2020 WL 3255145 (S.D. Ohio, June 16, 2020)

Counsel: [*1] For Von Clark Davis, Petitioner: Erin Gallagher Barnhart, Federal Public Defender for the Southern District of Ohio, Capital Habeas Unit, Columbus, OH; Jordan S. Berman, Federal Public Defender, Capital Habeas Unit, Columbus, OH.

For Warden Chillicothe Correctional Institution, Respondent: Stephen E. Maher, LEAD ATTORNEY, Office of the Ohio Attorney General, Criminal Justice Section, Capital Crimes Unit, Columbus, OH.

Judges: Susan J. Dlott, United States District Judge.

Opinion by: Susan J. Dlott

Opinion

ORDER ADOPTING REPORT AND RECOMMENDATIONS IN PART AND DENYING PETITION FOR HABEAS CORPUS

This capital habeas corpus case is before the Court for decision on the merits on the Petitioner Von Clark Davis's Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 (ECF No. 6). The case was referred to the Magistrate Judge for a Report and Recommendations, 28 U.S.C. § 636(b)(1)(B), which he filed on June 16, 2020 (Report, ECF No. 51). Davis subsequently filed Objections (ECF No. 57), to which the Warden has responded (Response, ECF No. 60), and Davis has filed a Reply (ECF No. 63).¹ For the reasons set forth below, the Report is ADOPTED, with the following exceptions: Davis is allowed to proceed *in forma pauperis* on appeal and is granted a certificate of appealability [*2] as to Claims Four and Eleven, and Claims Twenty-Two through Twenty-Five only as to their cognizability.² The Petition is DENIED.

¹ Davis raised no new arguments and incorporated by reference his objections to the following: Claims Six, Eleven, Thirteen, Nineteen, and Twenty-One through Twenty-Six; and Sub-claims 1(A-B, D-E), 2(A), and 8(B) (Reply, ECF No. 63, PageID 10002, 10004, 10008, 10013-14, 10015, 10019).

² The Magistrate Judge extensively and accurately set forth the factual background and procedural history of the case (Report, ECF No. 51, PageID 9586-9644), which the Court adopts in full. Given the case's history and complexity, the Court finds it useful to restate the ordinal fashion in which the parties and the Court have long referred to the various proceedings:

I. LEGAL STANDARDS

A. 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b)

A District Judge may, as the undersigned has here, refer a dispositive matter to a Magistrate Judge "to submit to a judge of the court proposed findings of fact and recommendations for the disposition[.]" 28 U.S.C. § 636(b)(1)(B).

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a *de novo* determination of those portions

1. *Davis I: State v. Davis*, 12th Dist. Butler No. CA84-06-071, 1986 Ohio App. LEXIS 6919, 1986 WL 5989 (May 27, 1986); (**Appeal from conviction and first sentencing to death**)
2. *Davis II: State v. Davis*, 38 Ohio St. 3d 361, 528 N.E.2d 925 (1988) (**Appeal from conviction and first sentencing to death**);
3. *Davis III: State v. Davis*, 12th Dist. Butler No. CA89-09-123, 1990 Ohio App. LEXIS 4717, 1990 WL 165137 (Oct. 29, 1990) (**Appeal from second sentencing to death**);
4. *Davis IV: State v. Davis*, 63 Ohio St. 3d 44, 584 N.E.2d 1192 (1992) (**Appeal from second sentencing to death**);
5. *Davis V: State v. Davis*, No. CR83-12-0614 (Butler Cnty. C.P. Jun. 30, 1995) (State Court Record, ECF No. 4-20, PageID 2158-66) (**First postconviction petition**)
6. *Davis VI: State v. Davis*, 12th Dist. Butler No. CA95-07-124, 1996 Ohio App. LEXIS 4263, 1996 WL 551432 (Sept. 30, 1996) (**Appeal from first postconviction petition**)
7. *Davis VII: State v. Davis*, No. 96-2547, 77 Ohio St. 3d 1520, 674 N.E.2d 372 (TABLE) (Jan. 15, 1997) (**Appeal from first postconviction petition**)
8. *Davis VIII: State v. Davis*, 86 Ohio St. 3d 212, 1999- Ohio 160, 714 N.E.2d 384 (1999) (*per curiam*) (**Appeal from application to reopen direct appeal**)
9. *Davis IX: Davis v. Bagley*, No. C-1-97-402, ECF No. 16-2, PageID 8947-9032 (S.D. Ohio Jan. Sept. 4, 2001) (Graham, J.) (**Habeas petition**)
10. *Davis X: Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007) (**Appeal from habeas petition**)
11. *Davis XI: State v. Davis*, 12th Dist. Butler No. CA2009-10-263, 2011-Ohio-787 (Feb. 22, 2011) (**Direct appeal from second resentencing**);
12. *Davis XII: State v. Davis*, No. CR83-12-0614 (Butler Cnty. C.P. [*3] Nov. 26, 2012), unreported, included at State Court Record, ECF No. 4-47, PageID 6633-50 (**Second postconviction petition**);
13. *Davis XIII: State v. Davis*, 12th Dist. Butler, No. CA2012-12-258, 2013-Ohio-3878 (Sept. 9, 2013) (**Appeal from second postconviction petition**);
14. *Davis XIV: State v. Davis*, 139 Ohio St. 3d 122, 2014-Ohio-1615, 9 N.E.3d 1031 (**Direct appeal from second resentencing**);
15. *Davis XV: State v. Davis*, 144 Ohio St. 3d 1441, 2015-Ohio-3427 (**Appeal from second postconviction petition**);
16. *Davis XVI: Davis v. Ohio*, 574 U.S. 1202, 135 S. Ct. 1494, 191 L. Ed. 2d 452 (2015) (**Denial of certiorari from direct appeal from second resentencing**); and
17. *Davis XVII: Davis v. Ohio*, 136 S.Ct. 88 (Mem.) (2016) (**Denial of certiorari from appeal from second postconviction petition**).

Accordingly, future references to this order shall be to "*Davis XVIII*."

of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [*4] judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1)(C).

B. 28 U.S.C. § 2254

As Davis is imprisoned based on a state court judgment, he may petition for a writ of habeas corpus "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A petition:

[S]hall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented[.]

28 U.S.C. § 2254(d). A habeas corpus petitioner must also satisfy additional procedural requirements, including but not limited to exhaustion of State court judicial remedies. 28 U.S.C. § 2254(b). Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, this Court's review of a claim adjudicated on its merits in a State court proceeding is sharply circumscribed: the federal court must defer to the state [*5] court decision unless that decision is contrary to or an objectively unreasonable application of clearly established precedent of the United States Supreme Court. 28 U.S.C. § 2254(d)(1); *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 785, 178 L. Ed. 2d 624 (2011); *Brown v. Payton*, 544 U.S. 133, 140, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005); *Bell v. Cone*, 535 U.S. 685, 693-94, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Williams (Terry) v. Taylor*, 529 U.S. 362, 379, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Deference is also due under 28 U.S.C. § 2254(d)(2) unless the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. A determination of a factual issue made by a State court is presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court may be found to have acted "contrary to" federal law in two ways: (1) if the state court's decision is "substantially different from the relevant precedent" of the United States Supreme Court; or (2) if "the state court confronts a set of facts that are materially indistinguishable from a decision of [the United States Supreme] Court and nevertheless arrives at a result different from [United States Supreme Court] precedent[.]" *Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2006). A state court does not act contrary to federal law simply because its application of federal law was incorrect. Rather, the decision must have been "mutually opposed[.]" *id.*, to "clearly established [*6] Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), which encompasses only the holdings of Supreme Court decisions, and not their dicta. *Williams*, 529 U.S. at 412.

The "unreasonable application" standard is distinct from and more deferential than that of "clear error." "It is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court decision was erroneous. . . . Rather, that application must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75, 76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (internal quotation marks omitted). "[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) (internal citation omitted). However, this deferential standard applies only when the state court has addressed the merits of a claim raised on appeal; "[w]here a state court has not adjudicated a claim on the merits, the issue is reviewed *de novo* by a federal court on collateral review." *Trimble v. Bobby*, 804 F.3d 767, 777 (6th Cir. 2015).

C. Exhaustion, Procedural Default, and *Res Judicata*

A federal habeas corpus petitioner must exhaust his claims in the state court before he may bring those claims before this Court. [*7] 28 U.S.C. § 2254(b)(2). This can be shown by demonstrating that: (1) the highest court of a state has adjudicated the merits of the claim; or (2) under state law, the claims are procedurally barred. *Gray v. Netherland*, 518 U.S. 152, 161-62, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996). "[T]he doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court." *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998). However, if a claim is

procedurally barred under state law because "a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, [then] federal habeas review of the claims is barred." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). Under Ohio law, failure to make timely objections at trial or to raise the issue on direct appeal from the trial court, if possible, bars a petitioner from raising that claim in a federal habeas corpus petition. *Seymour v. Walker*, 224 F.3d 542, 555 (6th Cir. 2000), citing *State v. Perry*, 10 Ohio St. 2d 175, 176, 226 N.E.2d 104 (1967), paragraphs eight and nine of the syllabus; see also, e.g., *Coleman v. Mitchell*, 244 F.3d 533, 538-39 (6th Cir. 2001) ("*Coleman I*"), superseded by statute on other grounds as stated in *Stewart v. Winn*, 967 F.3d 534, 540 (6th Cir. 2020) (holding that the "*Perry* rule" regarding *res judicata* was an adequate and independent state law ground upon which to find a claim procedurally defaulted, and thus, bar its consideration of claims by district courts); *Wong*, 142 F.3d at 322 (emphasis added) ("Under Ohio law, the failure [*8] to raise on appeal a claim that appears on the face of the record constitutes a procedural default under the State's doctrine of *res judicata*"). A claim of ineffective assistance of counsel—e.g. for failure to make timely objections at trial—normally must "be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 489, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

Further, in raising the claims in the state court, a petitioner must set out why he believes his federal constitutional rights have been violated to avoid procedural default. 28 U.S.C. § 2254; *Gray*, 518 U.S. at 162-63. The procedural default analysis focuses on the "last explained state court judgment." *Ylst v. Nunnemaker*, 501 U.S. 797, 805, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). Therefore, a decision by a state supreme court in which the court declines to exercise jurisdiction over an appeal from an intermediate appellate court, but that does not provide reasons for that decision, does not constitute the "state judgment" upon which this Court resolves the procedural default question. *Munson v. Kapture*, 384 F.3d 310, 314 (6th Cir. 2004), citing *Ylst*, *supra*. However, the threshold for what constitutes an "explained state court judgment" is modest—an order from a state supreme court stating nothing more than "that the petitioner had failed to meet the burden of establishing entitlement [*9] to relief under [Michigan Rule of Criminal Procedure] 6.508(D) - though brief - constituted the last explained state court decision in the case." *Id.* (internal quotation marks omitted), quoting *Simpson v. Jones*, 238 F.3d 399, 407-08 (6th Cir. 2000). A decision by a state court to review the merits of an otherwise-defaulted claim, as an act of grace to an appellant, does not save that claim from being procedurally defaulted in the federal District Court. *Coleman v. Mitchell*, 268 F.3d 417, 429 (6th Cir. 2001) ("*Coleman II*"), quoting *Amos v. Scott*, 61 F.3d 333, 342 (5th Cir. 1995). Finally, a District Court's review "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011).

A State's procedural default defense must clear four hurdles. *First*, a petitioner must have actually violated the state procedural rule; a state court's mistaken interpretation of a rule in finding that the petitioner violated that rule will not suffice. *Lee v. Kemna*, 534 U.S. 362, 376-77, 387, 122 S. Ct. 877, 151 L. Ed. 2d 820 (2002); *Trevino v. Texas*, 503 U.S. 562, 567, 112 S. Ct. 1547, 118 L. Ed. 2d 193 (1992) (*per curiam*). *Second*, the case must not fall within an exception to the state procedural rule which the petitioner is alleged to have violated; e.g., if the gravamen of a petitioner's ineffective assistance of counsel claim is based on evidence outside the trial court record, then failure to raise that claim on direct appeal does not constitute a procedural default. *Morales v. Mitchell*, 507 F.3d 916, 937 (6th Cir. 2007). *Third* [*10], the state court, in its last explained decision, must expressly state that a claim has been procedurally defaulted by failing to comply with a procedural rule; otherwise, "[w]hen a federal claim has been presented to a state court[,] and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication [of such a holding] or state-law procedural principles to the contrary." *Harrington*, 562 U.S. at 99. *Finally*, the state procedural rule must be "adequate"—that is, it must have been clearly announced, "firmly established[,] and regularly followed" by the state. *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991).

The Sixth Circuit adopted a four-part test in *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), in which the District Court must examine whether: (1) a petitioner failed to comply with a procedural rule; (2) the state court enforced the procedural sanction; (3) the state procedural bar is "an adequate and independent ground" upon which the state can foreclose federal review; and (4) a petitioner can demonstrate good cause for not complying with the procedural rule, and actual prejudice from enforcement of the default. *Id.* at 138. A petitioner may circumvent the procedural default bar by showing cause for the default and actual prejudice [*11] as a result of the alleged violation of federal law, "or demonstrate that failure to consider the claims will result in fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. at 749-50; *McCleskey v. Zant*, 499 U.S. 467, 494-95, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). A petitioner must show that an objective factor, external to petitioner, prevented him from complying with the procedural rule, *Murray*, 477 U.S. at 488, and that his trial was "infected with error so 'plain' that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *U.S. v. Frady*, 456 U.S. 152, 163 (1982), 102 S. Ct. 1584, 71 L. Ed. 2d 816, citing FED.R.CRIM.P. 52(b). Similarly, ineffective assistance of counsel in failing to raise a claim in

postconviction can be considered good cause to set aside the procedural default and examine the claim on its merits. *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013); *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) ("*Martinez-Trevino* doctrine.").

Procedural default may also be excused if a Petitioner can show, by a preponderance of the evidence, that he is "actually innocent," such that "a court cannot have confidence in the outcome of the trial[.]" *Lott v. Coyle*, 261 F.3d 594, 602 (6th Cir. 2001), quoting *Schlup v. Delo*, 513 U.S. 298, 316, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), and thus, his conviction constituted a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. at 750.

II. ANALYSIS

A. Fair Presentation and Exhaustion

The Warden devotes much of his Response to arguing that many of Davis's claims should be considered defaulted for failure to raise them anew [*12] in the state courts after the second resentencing (ECF No. 60, PageID 9957 n.1, 9956-74). In his Reply, Davis notes that the Magistrate Judge did not accept this argument, even though it was raised in the Return of Writ (ECF No. 63, PageID 9996, citing *King v. Morgan*, 807 F.3d 154 (6th Cir. 2015); Report, ECF No. 51, PageID 9652-53). Davis argues that he fairly presented the claims to the state courts, which considered those claims. *Id.* at PageID 9997, citing *Traverse*, ECF No. 29, PageID 9156-58. "Hence, there is no concern about fair presentment or exhaustion under AEPDA because Mr. Davis's claims were in fact adjudicated in state court, and the resentencing judgment now at issue relied on that earlier, undisturbed conviction." *Id.* Further, Davis claims that the Warden's argument that there was nothing stopping Davis from re-raising claims in state court has no support in Ohio law, *id.* at PageID 9999, citing Response, ECF No. 60, PageID 9968, and that Davis did not re-raise the claims in state court because he was procedurally barred, not because it was futile; "section 2254(b)(1)(B)(i) does not require exhaustion where 'there is an absence of available State corrective process.'" *Id.* at PageID 10000, quoting *Traverse*, ECF No. 29, PageID 9159.

The [*13] Court agrees with Davis that he fairly presented and exhausted his claims in state court when appropriate, and that the procedural bar that kept him from raising the claims anew after the second resentencing did not, as the Warden argues, constitute a "purposeful bypass of the state courts[.]" (Response, ECF No. 60, PageID 9971). Thus, Davis has fairly presented and exhausted his claims, *King*, 807 F.3d at 160, and the Court will not procedurally default any claims for failure to attempt to raise them after the second resentencing. However, if a claim was previously procedurally defaulted by a state court, then the Court will examine whether that previous default bars Davis from obtaining relief on that claim.

B. Jury Waiver Grounds for Relief

1. Claim One: Jury Waiver not Knowing, Intelligent, and Voluntary

Davis sets forth five reasons as to why his conviction and death sentence are void due to the impermissible waiver of his fundamental right to a jury trial:

- a. Mr. Davis's jury waiver was not voluntary because the trial court's denial of his motion to sever forced him to waive jury.
- b. Mr. Davis's jury waiver was not knowing and intelligent because he did not know at the time of the waiver that Ohio Supreme [*14] Court would refuse to apply the rule of *Penix* to his case and hold him eligible to be resentenced to death.
- c. Mr. Davis's jury waiver was not knowing and intelligent because he did not know when he waived his right to a jury trial in favor of being tried before three specifically identified judges that he was also waiving his jury-trial rights twenty-five years in the future to instead be tried before an entirely different panel of three unknown judges.
- d. Mr. Davis's jury waiver was not knowing and intelligent because he did not know that two of the three judges on his panel represented a party adverse to him in a prior case.

e. Mr. Davis's jury waiver was not knowing and intelligent because he did not know that a different standard of proof would be applied to him on appeal from a decision by three-judge panel than would have been applied to an appeal from a jury verdict.

(Petition, ECF No. 6, PageID 8565, 8626-27 (citations omitted)). The Magistrate Judge concluded that Sub-Claim 1(C) is not cognizable because *Hurst v. Florida* may not be applied retroactively on collateral review (Report, ECF No. 51, PageID 9650-51, citing *McKinley v. Arizona*, 140 S.Ct. 702, 709-10 (2020) (Ginsburg, J., dissenting); *Hurst*, 577 U.S. 92, 94, 102, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016); *Schiro v. Summerlin*, 542 U.S. 348, 358 (2004); *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (plurality opinion)). The [*15] Magistrate Judge concluded that Sub-Claims 1(A, B, and D) failed on their merits for the same reasons that they did in *Davis IX*, and that Sub-Claim 1(E) was procedurally defaulted. *Id.* at PageID 9654-59.

As to Sub-Claim 1(A), Davis objects that "[t]he recommendation failed to note that the Sixth Circuit also expressed strong reservations in ruling against relief on this point" in *Davis X*. "Accordingly, Mr. Davis preserves his argument that he was forced to waive his right to trial by jury because the trial court refused to sever the weapon-under-disability charge, rendering his jury waiver involuntary and in violation of his constitutional rights." (Objections, ECF No. 57, PageID 9850, quoting *Davis X*, 475 F.3d at 778). The *Davis X* panel explains why relief is not appropriate: "Nevertheless, a habeas corpus proceeding is not an appropriate vehicle for this court to substitute its own judgment for that of the State of Ohio." 475 F.3d at 778. This statement is just as true now as it was in 2007, and the objection as to Sub-Claim 1(A) is overruled.

In Sub-Claim 1(B), Davis claims that the "arguably rational" basis for holding him to his jury waiver during the first penalty phase retrial—that the original three-judge panel could [*16] be reassembled—did not exist for the second such retrial, and thus, the state court's decision not to apply *State v. Penix* to him and require a trial by jury violated his Sixth and Fourteenth Amendment rights (Objections, ECF No. 57, PageID 9851-52, citing *Davis X*, 475 F.3d at 780; Ohio Rev. Code § 2929.03(C)(2)(a), (C)(2)(b)(i); *State v. Penix*, 32 Ohio St. 3d 369, 372, 513 N.E.2d 744 (1987)). The *Davis X* panel stated that "the practice of finding a jury waiver inherently revoked 'should certainly inform the sentencing court's determination of the viability of Davis's jury waiver on remand' where 'additional evidence would be introduced from both the prosecution and the defense, as is likely to occur on remand of [Mr. Davis's] case.'" *Id.* at PageID 9854 (emphasis and brackets in original), quoting *Davis X*, 475 F.3d at 781. Yet, "should clearly inform" falls well short of a violation of clearly established federal law by the trial court ignoring the Sixth Circuit's advice. Absent such a violation, relief may not be granted under 28 U.S.C. § 2254(d), and the Court overrules the objections as to Sub-Claim 1(B).

Sub-Claim 1(C) is discussed *infra* in conjunction with Sub-Claim 2(B).

As to Sub-Claim 1(D), Davis objects that the Magistrate Judge improperly relied on Judge James L. Graham's decision "that 'Davis's inability to show evidence of bias on the part of the judges or prejudice resulting [*17] therefrom meant that their involvement did not render his waiver constitutionally invalid.'" (Objections, ECF No. 57, PageID 9856, quoting Report, ECF No. 51, PageID 9658; citing *Davis IX*, ECF No. 16-2, PageID 8981, 8984). Davis notes that in none of the cases relied upon by the Magistrate Judge was the judge in question adverse to a defendant in a previous action, whereas two of the three judges on his initial panel "were 'instrumental' in taking away his home." *Id.* at PageID 9856-57, citing *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997); *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927); *Sinistaj v. Burt*, 66 F.3d 804, 808 (6th Cir. 1995)).

Davis has still not met burden of showing that the waiver was *prima facie* invalid simply because Judges John R. Moser and William R. Stitsinger of the first panel worked on a foreclosure action against Davis and his then-wife, Ernestine, fourteen years prior to the first trial. A foreclosure action is different in nature from a criminal prosecution, or even a complex civil case, and the Court has no reason to disbelieve the statements of the judges that they (and Davis) had no recollection of having been involved in that action at the time of the trial. *See, e.g., Davis VI*, 1996 Ohio App. LEXIS 4263, 1996 WL 551432, at *8. Given that the judges did not remember the action, it is unreasonable to presume that their prior involvement could have caused [*18] them to be biased against Davis, and Davis's objections allude to no facts that would make the presumption reasonable. Absent any circumstance that would lead to actual bias, Davis cannot show that the judges' mere involvement rendered his jury waiver unknowing or involuntary, such that it would implicate his constitutional rights. Accordingly, the objections to Sub-Claim 1(D) are overruled.

As to Sub-Claim 1(E), that Davis was purportedly misled into thinking there were differing standards of proof for a bench or jury trial, the Magistrate Judge noted that the state court had dismissed the claim as barred by *res judicata* (Report, ECF No. 51, PageID 9658-59). Davis concedes that is normally an adequate and independent ground upon which to preclude habeas review (Objections,

ECF No. 57, PageID 9858, quoting *Hartman v. Bagley*, 492 F.3d 347, 357-58 (6th Cir. 2007); citing Report, ECF No. 51, PageID 9659; *Maupin*, 785 F.3d 135). However, Davis objects that the *Davis VI* court erred, as the sub-claim could only have been brought in postconviction, because he relied on his affidavit—evidence *debors* the record—that he was misinformed as to the standard of proof. Consequently, the state court misapplied *res judicata*, and there is no procedural bar to this Court reviewing [*19] the claim. *Id.* at PageID 9859, citing *Filiaggi v. Bagley*, 445 F.3d 851, 855 (6th Cir. 2006); State Court Record, ECF No. 4-18, PageID 1909; State Court Record, ECF No. 4-19, PageID 1961-62).

The Court disagrees with Davis's characterization of *Davis VI*. Therein, the Twelfth District Court of Appeals held that because "the sufficiency of the trial court's colloquy . . . concerning the jury waiver could have been determined from the trial record itself, [the appellant's] claim is barred by the principles of *res judicata*." 1996 Ohio App. LEXIS 4263, 1996 WL 551432, at *7-8 (brackets in original), quoting *State v. Brewer*, 2nd Dist. Greene No. 93CA62, 1994 Ohio App. LEXIS 4363, 1994 WL 527740, *8 (Ohio App. Sept. 27, 1994). Davis does not argue that the purportedly misstated burden of proof was not contained in the original trial record. Thus, Sub-Claim 1(E) could have been raised on direct appeal, and the holding in *Davis VI* that the claim was barred by *res judicata* was correct under Ohio law. Consequently, the sub-claim is foreclosed from review here, and Davis's objection is overruled.

2. Claim Two: Court Violated Davis's Sixth, Eighth, and Fourteenth Amendment Rights by Enforcing Jury Waiver in Resentencings

Davis set forth two reasons why continued enforcement of his jury waiver in resentencing was unconstitutional:

- a. The trial court violated Mr. Davis's rights under the Eighth and Sixth Amendments and the Due Process Clause by enforcing his prior jury waiver at his first [*20] resentencing when he had no knowledge at the time of the waiver that Ohio Supreme Court would refuse to apply the rule of *Penix* to his case and hold him eligible to be resentenced to death; and
- b. The trial court violated Mr. Davis's rights under the Eighth and Sixth Amendments and the Due Process Clause by enforcing a stale jury waiver at a new penalty hearing twenty-five years later before an entirely different panel of judges.

(Petition, ECF No. 6, PageID 8565).

a. Sub-claim 2(B) is not Cognizable

The Magistrate Judge concluded that, as with sub-claim 1(C), sub-claim 2(B) was not cognizable on collateral review; "at the very least, the continued enforcement of the waiver by the trial court is not a violation of clearly established federal law required for habeas relief." (Report, ECF No. 51, PageID 9660, quoting *Williams (Terry) v. Taylor*, 529 U.S. 362, 379-80, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). Accordingly, he recommended that Sub-Claim 2(B) be dismissed. *Id.* Davis objects that *Hurst* was nothing more than an extension of *Apprendi v. New Jersey* and *Ring v. Arizona*, and thus, the right to be sentenced by a jury was clearly established at the time of his second resentencing (Objections, ECF No. 57, PageID 9860-61, citing *Ring*, 536 U.S. 584, 603, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *Apprendi*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Yet, the *Davis X* panel "recogniz[ed] 'a legitimate question as to whether a criminal [*21] defendant should be held to a jury waiver entered almost 25 years before his newly-mandated sentencing hearing.'" *Id.* at PageID 9861, quoting *Davis X*, 475 F.3d at 780. A "legitimate question" falls well short of clearly established federal law required for habeas relief. Finally, Davis states that he is not arguing that *Hurst* forbids a capital defendant from waiving a jury, but that his waiver was not valid because he waived the jury initially only on the ground that the original particular three judges would be the ones trying and sentencing him (Reply, ECF No. 63, PageID 10001-02, citing Objections, ECF No. 57, PageID 9847-49). This statement does nothing to overcome the non-cognizability of these claims in habeas, and the Court overrules Davis's objection.³

b. Petitioner has not met his burden under as to Sub-Claim 2(A)

³ Davis states that this Reply pertained to Sub-Claims 1(C) and 2(A) (Reply, ECF No. 63, PageID 10001), but the gravamen of Sub-Claims 1(C) and 2(B) are virtually identical; both are distinct from Sub-Claim 2(A).

Davis objects to the recommendation for Sub-Claim 2(A) for the same reasons he objects as to Sub-Claim 1(B), validating the Magistrate Judge's conclusion that the claims are "virtually identical." (Report, ECF No. 51, PageID 9660; Objections, ECF No. 57, PageID 9862). Accordingly, for the same reasons that Sub-Claim 1(B) is dismissed, Sub-Claim 2(A) is as well, and Davis's objection is overruled. [*22]

C. Mitigation Evidence Claims for Relief

1. Claim Five: Court failed to Consider all Mitigating Evidence

"Davis argue[d] that the second resentencing panel failed to give the particularized, individualized consideration of mitigating evidence has been 'repeatedly stressed' since capital punishment was reinstated, by ignoring or inappropriately discounting mitigation evidence presented." (Report, ECF No. 51, PageID 9661, citing Petition, ECF No. 6, PageID 8669-71). The Report concluded that "Davis's case is not one in which his due process rights were violated because he was prevented from introducing certain evidence. Rather, he disagrees with the weight afforded to that evidence by the trial court, which is not a constitutional violation." *Id.* at PageID 9663.

Davis devotes an entire page in his Objections to mitigation evidence that he believes was given too little weight (Objections, ECF No. 57, PageID 9874 (citations omitted)). Yet, contrary to Davis's argument *id.* at PageID 9873, *Porter v. McCollum*, 558 U.S. 30, 43, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009), does not transform a disagreement over the weight of the evidence into a constitutional claim. In *Porter*, trial counsel was deficient in "fail[ing] to conduct a thorough—or even cursory—investigation" into [*23] mitigating evidence. 558 U.S. at 42. Here, counsel investigated and presented extensive mitigation evidence. Moreover, the *Porter* Court held that the trial court erred when it "unreasonably discounted" to zero the petitioner's past military experience. *Id.* at 43. In this case, the only factors assigned no weight were: Cynthia Mausser's statement that it was unlikely Davis would ever be paroled; and Davis's argument that a life sentence would be economical and provide closure to the victim's family (State Court Record, ECF No. 4-39, PageID 4933-34). The panel's reason for doing so—that Mausser's statement was "highly speculative" and that "the panel [was] uncertain whether these factors are relevant mitigating factors under Ohio law"—are not baseless, and the Court will not disturb that reasoning. The Supreme Court of Ohio affirmed that both factors were entitled to "no weight," *Davis XIV*, 2014-Ohio-1615 at ¶¶ 111, 114, 139 Ohio St. 3d 122, 9 N.E.3d 1031, and certainly did not suggest that the panel was predisposed to sentencing Davis to death. Davis's objection is overruled.⁴

2. Claim Six: Capital Specification was too Remote in Time

Davis argued that his 1971 murder conviction being used as the capital specification was unconstitutional [*24] because it was too remote in time, had no relation to the present offense, and constituted "an *ex post facto* application of a sentencing enhancement provision that did not exist in 1971." (Petition, ECF No. 6, PageID 8676-77). The Magistrate Judge remarked that the:

Supreme Court of Ohio held that the prior conviction was not too remote in time to serve as the capital specification, noting that "[t]he General Assembly has placed no time limits on the use of the prior conviction and it is not required to do so[]" and that it had previously upheld a death sentence "which involved the aggravating circumstance of an eleven-year-old prior conviction."

(Report, ECF No. 51, PageID 9664-65, quoting *Davis II*, 38 Ohio St. 3d at 369 n.9; citing *State v. Mapes*, 19 Ohio St. 3d 108, 19 Ohio B. 318, 484 N.E.2d 140 (1985), *conditional writ of habeas corpus on other grounds aff'd in Mapes v. Tate*, 388 F.3d 187 (6th Cir. 2004)). The Magistrate Judge noted that, while the death sentence in *Mapes* was vacated, it was not vacated "because of the year in which the defendant was sentenced for the prior [crime] Accordingly, the *Davis II* decision did not run afoul of clearly established

⁴ Davis additionally argued that the Warden's assertion that Davis relied upon *Porter v. McCollum* overruling *Harris v. Alabama* was erroneous (Reply, ECF No. 63, PageID 10003-04, citing *Porter*, 558 U.S. 30, 43, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (*per curiam*); *Harris*, 513 U.S. 504, 512, 115 S. Ct. 1031, 130 L. Ed. 2d 1004 (1995)), an issue not relevant to the Court's decision, and reiterated his argument that the panel ignored and impermissibly discounted mitigating evidence in violation of his rights. *Id.* at PageID 10004, citing *Traverse*, ECF No. 29, PageID 9217-23. He incorporated the remainder of his objections by reference. *Id.*

precedent with respect to Davis's *ex post facto* argument." *Id.* at PageID 9665. Finally, the Magistrate Judge, in recommending that Claim Six be dismissed, concluded [*25] that:

Davis's focus on the time in between his sentence for killing Ernestine⁵ and his death sentence ignores the similarities between the two crimes: murder of a significant other during an argument, and the remoteness in time can be explained almost completely by the time Davis spent incarcerated for killing Ernestine.

Id.

Davis argues that the Magistrate Judge improperly relied on *Mapes*, where the death sentence was vacated due to the jury's not being allowed to consider mitigating evidence regarding the prior homicide being used as an aggravating factor (Objections, ECF No. 57, PageID 9877, citing *Mapes v. Tate*, 388 F.3d 187 (6th Cir. 2004); *State v. Mapes*, 8th Dist. Cuyahoga No. 86225, 2006-Ohio-294, ¶¶ 12-18 (Ohio App. Jan. 26, 2006)). Yet, neither Sixth Circuit nor the Eighth District found that it was improper, much less constitutionally infirm, for the prior homicide to be used as an aggravating circumstance. Indeed, the Eighth District stated that "[t]he trial court also found *Mapes* guilty on the third specification, which involved a prior murder conviction. Therefore, pursuant to R.C. 2929.04(A), *Mapes* was eligible for the death penalty." *Mapes*, 2006-Ohio-294 at ¶ 43. Davis's argument is thus unavailing.

Davis also claims that while the Magistrate Judge relied on the similarities between the two crimes to minimize the amount of time that had lapsed between [*26] the crimes and the fact that he was incarcerated, the Supreme Court of Ohio relied on no such reasoning. "To the contrary, the court decided that the General Assembly had removed any authority for the judiciary to decide whether a prior conviction was too remote in time to support a capital specification." (Objections, ECF No. 57, PageID 9878, citing *Davis II*, 38 Ohio St. 3d at 369 n.9). Davis argues that this assertion by the Supreme Court of Ohio is contrary to United States Supreme Court precedent, which forbids legislatures from removing certain aggravating circumstances from judicial review. *Id.*, quoting *Lewis v. Jeffers*, 497 U.S. 764, 776, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990); citing *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). Yet, Davis mischaracterizes the above-quoted language in *Davis II*, in which the Supreme Court of Ohio stated that the General Assembly had declined to *exclude categorically* crimes that happened a certain number of years before the crime for which the defendant is currently charged. *Davis II*'s reliance on the original *Mapes* decision therefore was not contrary to clearly established federal law. 28 U.S.C. § 2254(d)(1).

Davis argues that, because there is no common course of conduct or other similarities between his killings of Ernestine and Suzette Butler⁶, the Court should review Claim Six *de novo*. He also claims that the prior [*27] homicide's use as an aggravating circumstance violates his constitutional right against double jeopardy, "since the first conviction did not 'require[] proof of a fact' beyond what was required for the second conviction." (Objections, ECF No. 57, PageID 9878-79, quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Both arguments are facially unreasonable, and Davis cites no statute or caselaw making them any less so. Davis's objection is overruled.

D. Ineffective Assistance of Counsel Claims for Relief

Davis raised several claims of ineffective assistance of trial and appellate counsel. The Court examines them in turn, noting that when the issue is ineffective assistance of counsel, the federal court is required to be doubly deferential as to any claim adjudicated by the state courts. *Harrington*, 562 U.S. at 105.

1. Claim Three: Failure to Effectively Investigate and Present Character Evidence

Davis argued that "[d]efense counsel failed to reasonably investigate and present mitigating evidence of Mr. Davis's good prison behavior even though this information was known, available and relevant" and "despite the Sixth Circuit remanding the case for a new penalty phase in order to consider this very evidence." (Petition, ECF No. 6, PageID 8652, citing *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); *Davis X*, 475 F.3d at 774-75). The [*28] Magistrate Judge found that this argument was belied by the record, and certainly was not enough to overcome the double deference that must be accorded state court

⁵ Davis's estranged wife, Ernestine Davis, for whose killing Davis pled guilty to second-degree murder in 1971.

⁶ Davis's estranged girlfriend, whose murder by Davis is the subject of the instant conviction and death sentence.

decisions on ineffective assistance of counsel (Report, ECF No. 51, PageID 9666, 9668-70, quoting *Strickland v. Washington*, 466 U.S. 668, 699, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Davis XIII*, 2013-Ohio-3878 at ¶¶ 16-18).

Davis objects that the Magistrate Judge's conclusion is belied by the record, which showed extensive additional mitigation evidence that the Sixth Circuit found was "highly relevant" in light of the single aggravating circumstance—the previous killing of Ernestine (Objections, ECF No. 57, PageID 9865-67, quoting *Davis X*, 475 F.3d at 773). Even if true, "highly relevant" is not the standard under either prong of *Strickland*. Moreover, *Davis XIII* restated the significant mitigation evidence researched and presented by counsel. 2013-Ohio-3878 at ¶¶ 16-18. It is axiomatic that research and presentation of every piece of mitigation evidence is not necessary for competent representation under *Strickland*. Moreover, Davis's Objections do not lead the undersigned to conclude that, had the additional evidence been presented, there was a reasonable probability that the three-judge panel would hand down a different result. "As fair-minded jurists could agree that the *Davis XIII* decision [*29] was a reasonable application of *Strickland* and its progeny, AEDPA deference must be accorded[.]" (Report, ECF No. 51, PageID 9669).

In his Reply, Davis argues that the Warden mischaracterized his claim as mere anecdotes of good behavior; the point was that there was myriad evidence that counsel didn't investigate (Reply, ECF No. 63, PageID 10004-05, quoting Response, ECF No. 60, PageID 9979; citing *Rompilla v. Beard*, 545 U.S. 374, 381-90, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534-35, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). Further, he claims that, contrary to the Warden's argument, *Davis IX* should not have precedential value, since it was vacated on this ground in *Davis X*. *Id.* at PageID 10005-06, citing *Davis X*, 475 F.3d at 774-75; Response, ECF No. 60, PageID 9980. "Mr. Davis discussed the decades of powerful *Skipper* evidence that his counsel unreasonably failed to include in his case. As he explained, there is no reasonable strategy that would including leaving out evidence that the Sixth Circuit held was compelling enough to support a grant of habeas relief." *Id.* at PageID 10006, citing Objections, ECF No. 57, PageID 9864-69.

Again, Davis's argument is rebutted by the last reasoned state court decision, which discussed the breadth of evidence introduced and considered by the panel. *Davis XIII*, 2013-Ohio-3878 at ¶¶ 16-18. While Davis claims that the evidence of his [*30] good behavior—the subject of the remand in *Davis X*—was not sufficiently introduced:

[A]s the state aptly recognizes, the Sixth Circuit's decision in *Coyle* did not hold the testimony from . . . specific individuals must be introduced. Rather, the Sixth Circuit merely found the three judge panel erred by improperly precluding Davis from introducing *any evidence* of his good behavior while on death row contrary to the United States Supreme Court's decision in *Skipper v. South Carolina*[.]

Id. at ¶ 20, citing 476 U.S.1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986). The interpretation of *Davis X* by the *Davis XIII* panel is accurate, and the denial of the claim was neither factually nor legally unreasonable. Thus, the Court may not substitute its judgment for that of *Davis XIII*, and Davis's objection is overruled.

2. Claim Four: Failure to Advise of More Deferential Appellate Review of Verdicts of Three-Judge Panels vis-à-vis Jury Verdicts

Davis allege[d] that Ohio has an effectively non-rebuttable presumption that a three-judge panel 'considered only relevant, material, and competent evidence in reaching its decision unless the record affirmatively demonstrates otherwise[.]' and that his trial counsel was ineffective in failing to advise him on the [*31] different standards of review prior to Davis making his jury waiver[.]

(Report, ECF No. 51, PageID 9670, quoting *Traverse*, ECF No. 29, PageID 9204). The Magistrate Judge concluded that "Ohio courts have consistently held that the standard of review on appeals from jury verdicts versus verdicts from three-judge panels is identical; as such an interpretation is not clearly erroneous, this Court is bound by the Ohio courts' decisions on matters of state law" *Id.*, citing *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005).

Davis raises two main objections. *First*, Davis argues that the Magistrate Judge appears to conflate the burden of proof at trial with the standard of review on appeal (Objections, ECF No. 57, PageID 9870-71 (citations omitted)).

To the contrary, the Ohio Supreme Court has adopted a rule in capital cases that in a trial before a three-judge panel, the appellate court will, in reviewing the case, presume that the panel considered only relevant, material, and competent evidence in reaching its decision unless the record affirmatively demonstrates otherwise.

Id. at PageID 9871, citing *State v. Post*, 32 Ohio St. 3d 380, 384, 513 N.E.2d 754 (1987), *overruled on other grounds by State v. McDermott*, 72 Ohio St.3d 570, 574, 1995- Ohio 80, 651 N.E.2d 985 (1995); *State v. White*, 15 Ohio St. 2d 146, 151, 239 N.E.2d 65 (1968); State Court Record, ECF No. 4-19, PageID 1987-91. No such affirmative showing is required with respect to [*32] a jury verdict, thus creating a *de facto* higher standard of review. *Post*, 32 Ohio St. 3d at 384. *Second*, Davis claims that there is no state court decision for this Court to defer to, as the last reasoned state court decision improperly applied *res judicata* to foreclose review (Objections, ECF No. 51, PageID 9872, citing *Davis VI*, 1996 Ohio App. LEXIS 4263, 1996 WL 554132, at *3).

Even assuming that the substance of Davis's objections is true, and that this Court must review the claim *de novo*, the objection is still unavailing. As the Warden correctly notes, any higher standard of review that may exist is not the same as saying that there is no meaningful appellate review of decisions from three-judge panels (Response, ECF No. 60, PageID 9981). Indeed, Davis obtained such meaningful review on direct appeal from the one instance in which he actually waived a jury trial—the Supreme Court of Ohio vacated his death sentence and remanded the matter for a new penalty phase trial. *Davis II*, 38 Ohio St. 3d at 373. Davis does not argue that, had the case been before a jury, he would have been acquitted. In other words, even if counsel was deficient in failing to advise Davis of a different standard of review, he suffered no prejudice from that deficient performance. Consequently, there was no *Strickland* violation [*33] and no violation of Davis's constitutional rights.

Davis claims that "while the Magistrate Judge and the Warden mentioned only the standard-of-review issue, Mr. Davis has asserted that his counsel was ineffective for failing to inform him of several additional collateral consequences of his decision to waive his right to a jury trial." (Reply, ECF No. 63, PageID 10006, citing Petition, ECF No. 6, PageID 8659-68; Response, ECF No. 60, PageID 9981). Moreover, he claims that he "never asserted that appellate review was 'meaningless'—only that a capital defendant should always be advised prior to waiving a jury if, as here, his case will be subject to a less favorable standard of review on appeal if tried before a three-judge panel." *Id.* at PageID 10007, citing Petition, ECF No. 6, PageID 8660-62. As with his objections, these arguments fail to show how Davis was prejudiced by any failure to advise.

Thus, Davis's objection is overruled. However, because reasonable jurists could disagree with this conclusion, Davis is granted a certificate of appealability on this issue.

3. Claim Seven: Failure to Represent Davis Adequately at Second Resentencing Hearing

Davis argues that counsel at the second [*34] resentencing was deficient in four areas: (1) calling Mausser as a witness; (2) failing to call John Lee; (3) failing to revise Dr. Robert Smith's testimony in light of Mausser's testimony; and (4) failing to prepare adequately the mitigation witnesses (Objections, ECF No. 57, PageID 9879-80, citing *Strickland*, 466 U.S. at 687-88). The Magistrate Judge concluded Davis had not met the standard for showing deficient, prejudicial representation in the penalty phase and recommended that the claim be dismissed (Report, ECF No. 51, PageID 9672-74, citing *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)). Much of Davis's objection rehashes the arguments made in his Petition and Traverse; such practice is not the point of objections and does not compel this Court to review those arguments. *Ahmed v. Houk*, No. 2:07-cv-658, 2020 U.S. Dist. LEXIS 172728, 2020 WL 5629622, *5 (S.D. Ohio Sept. 21, 2020) (Watson, J.). The Court will examine only those portions of the objection "offering targeted discussion of why the Magistrate Judge's determinations are wrong." *Id.*⁷

a. Mausser

Davis objects that the Magistrate Judge addressed only his attorneys' decision to call her as a witness, not their deficiencies in the following areas: (1) pursuing a line of testimony that they knew or should have reasonably known was impossible (that Davis would [*35] never be released) and that Davis asked them not to present; (2) failing to redirect Mausser even after she began to

⁷Beyond incorporating his objections in the Reply, Davis also restates his argument that counsel's performance was so deficient that it meets the *Wiggins* standard (ECF No. 63, PageID 10007-08). For the reasons discussed below, Davis has fallen well short of meeting *Wiggins*.

clarify a statement before being cut off by the panel; and (3) failing to call a witness who would have testified that Mausser had made a prior inconsistent statement (Objections, ECF No. 57, PageID 9881-83). In sum, "[a] substantial amount of counsel's strategy hinged on testimony that counsel should have known Ms. Mausser would be unable to give. Ms. Mausser's testimony served only to contradict counsel's opening statements and to provide the flawed basis to counsel's subsequent deficient mitigation strategy." *Id.* at PageID 9883.

As the Magistrate Judge noted, the State's strategy at resentencing was to rely Davis's eligibility for parole, and "[e]ven though Mausser could not testify that Davis would never be paroled, she did testify that it was unlikely." (Report, ECF No. 51, PageID 9673). Davis does not articulate how else counsel could have countered the State's strategy than with Mausser's testimony. In light of that, pursuing the above line of testimony and not impeaching her were within the broad ambit of reasonable trial strategy. Further, the issue of whether [*36] to redirect a witness is exactly the type of judgment call that cannot be second guessed by appellate or habeas courts. *Davis XIII*, 2013-Ohio-3839 at ¶ 24. Davis's objection as to Mausser is overruled.

b. Lee

The Magistrate Judge concluded that Lee, despite being retained as a mitigation expert, would not have provided expert testimony as contemplated by Ohio R.Evid. 702. Rather, he would have testified as to "Davis's family background and history and his personal character," which necessarily would have involved repeating out-of-court statements of others, *i.e.* hearsay testimony for which no exception applied (Report, ECF No. 51, PageID 9674). "Moreover, even if Lee were allowed to testify . . . , such testimony would have been cumulative of the testimony offered by other fact witnesses. Decisions not to present cumulative testimony—or even attempt to do so—are generally considered [within the ambit of] sound trial strategy." *Id.*; see also *Davis XIII*, 2014-Ohio-3839 at ¶ 24 (internal quotation marks and citations omitted) ("the decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.").

Davis argues that Lee would have been an expert witness (Objections, ECF No. 57, PageID 9887, citing *Doe v. Ayers*, 782 F.3d 425, 450 (9th Cir. 2015)), and even [*37] if he were a fact witness, his testimony would have come within a hearsay exception, especially given the wide latitude in presenting mitigation evidence. *Id.* at PageID 9887-88, citing Ohio Rev. Code § 2929.04(C); Ohio R.Evid. 803(19), 804(B)(4). Further, his testimony would not have been cumulative, as he would have summarized the planned testimony of four mitigation witnesses unable to testify, all of whom would have provided evidence that Davis had suffered a dysfunctional upbringing. *Id.* at PageID 9888-89. Thus, the failure to call Lee and offer his exhibits into evidence fell below the standards of professional representation and prejudiced Davis. *Id.* at PageID 9889, citing State Court Record, ECF No. 4-39, PageID 4933; ECF No. 4-46, PageID 6278).

Even assuming that Lee could have testified in the manner Davis wanted, Davis does not identify in the Objections the unavailable mitigation witnesses or why they would have been prepared to testify as projected. The Court is left with, at best, a claim that Lee would have testified as to unknown statements, and that those statements would have caused the panel to conclude that Davis had a dysfunctional upbringing and give significant weight to that mitigating factor. Such speculation falls [*38] well short of what is required under *Strickland*, and Davis's objection as to Lee is overruled.

c. Smith

The Magistrate Judge concluded that Smith's testimony that Davis could become violent in an uncontrolled environment was immaterial, as the defense strategy at resentencing was premised in part on Davis's never being released, and there was no indication that the potential of release factored into the panel's decision to resentence him to death (Report, ECF No. 51, PageID 9674). He also found that "Dr. Smith adequately discussed Davis's history of alcohol dependence and borderline personality disorder, and Davis's argument that Smith would have provided more persuasive testimony had he been fully informed of Davis's family history is purely speculative." *Id.* at PageID 9673-74. Davis argues that, once Mausser could not testify that he would never be released, allowing Smith to testify about the danger Davis posed to society was no longer a reasonable strategy. Further, he claims that the Magistrate Judge conflated sub-claim 7(B) (failure to investigate and make reasonable decision to call Smith) with sub-claim 7(D) (failure to obtain adequate family history to inform the panel) (Objections, [*39] ECF No. 57, PageID 9884-85). Finally, the Magistrate Judge's finding of no prejudice was erroneous, as the panel concluded that "Dr. Smith failed to forecast Defendant's

behavior or recommend a treatment plan, should he eventually be released from prison" and gave his opinion "little weight." *Id.* at PageID 9886-87, quoting State Court Record, ECF No. 4-39, PageID 4931, 4933.

None of these points is persuasive. As Davis notes, Smith testified that Davis still struggled with borderline personality disorder (Objections, ECF No. 57, PageID 9885, citing Trial Tr., ECF No. 5-8, PageID 8453, 8468). While the panel judges could have interpreted this struggle as a continuing danger should he be released (as Davis argues), they also could have interpreted it as underscoring the severity of Davis's mental illness, a key factor in mitigation. Simply because the strategy was unsuccessful does not render the representation constitutionally deficient. *Davis XIII*, 2013-Ohio-3878 at ¶¶ 24-25. Further, because the panel gave Smith's opinion "little weight," it is still unclear how his testimony prejudiced Davis. Finally, any conflation of sub-claims does not change the fact that Davis has failed to satisfy either prong of *Strickland* [*40] with respect to Smith, and his objection as to Smith is overruled.

d. Inadequate Development of Mitigation Evidence

Davis argued that counsel's investigation and development of mitigation evidence of his dysfunctional upbringing, alcohol dependence, or lifelong behavioral issues, would have led to a much more persuasive mitigation case being presented. Thus, Davis claimed, their failure to do so prejudiced him. The Magistrate Judge concluded that any inadequacies in investigation did not rise to the level of a constitutional violation: "*Wiggins[v. Smith]* is a much higher bar to relief than Davis wishes it to be." (Report, ECF No. 51, PageID 9673, citing 539 U.S. 510, 523-24, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)). The Magistrate Judge contrasted *Wiggins*, in which: no mitigation was presented at all; counsel did not retain an forensic social worker despite being afforded funds to do so; and counsel performed only a rudimentary investigation into mitigation evidence, and the instant case, in which "his attorneys retained a mitigation expert and called witnesses to testify as to the full range of mitigation factors, including but not limited to his childhood, substance abuse, and borderline personality disorder." *Id.* at PageID 9671-73, citing *Wiggins*, 539 U.S. at 524.

[*41] Davis claims that this case is legally similar to *Wiggins*, in that "counsel chose to abandon their investigation at an unreasonable juncture[.]" and that had counsel investigated and prepared witnesses better, the panel would have found that Davis had suffered from a dysfunctional upbringing and granted greater weight to the mitigation factors (Objections, ECF No. 57, PageID 9891-92, quoting *Wiggins*, 539 U.S. at 527). The Court disagrees. The transcript shows mitigation witnesses testifying to a wide variety of evidence regarding his good character in prison, mental health diagnoses, alcoholism, and dysfunctional upbringing, including but not limited to having an alcoholic, absentee father (Report, ECF No. 51, PageID 9623-30 (citations omitted)). Simply because the evidence was not persuasive or because there was other evidence that could have been presented is insufficient to rebut the heavy presumption of competent representation under *Strickland*. Davis's objection is overruled.

4. Claim Eight: Failure to Seek Recusal of Biased Judges

Davis argued that his attorneys were ineffective in declining to *voir dire* or seek recusal of Judge Charles Pater, a friend of Davis's brother Victor, and Presiding Judge Andrew Nastoff, who prosecuted Davis's nephew for capital murder, although the death penalty was not imposed (Petition, ECF No. 6, PageID 8693-98).

The Magistrate Judge concluded that the claim as to Judge Pater was procedurally defaulted, and found that there was no good cause to set aside that default (Report, ECF No. 51, PageID 9675-76). He also concluded that, in the absence of any actual bias by Judge Nastoff, there was no prejudice in failing to *voir dire* him or seek his recusal, *id.* at PageID 9676-77, citing *In re Disqualification of Nastoff*, 134 Ohio St. 3d 1232, 2012-Ohio-6339, PP 9-10, and that any claim "that counsel deprived him of his right to participate in decisions affecting his possible sentence" was procedurally defaulted. *Id.* at PageID 9678, citing *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007).

Regarding procedural default as to the claim regarding Judge Pater, the Magistrate Judge wrote:

Davis does not dispute that the ineffective assistance of trial counsel [*42] claim was available to him on direct appeal. Consequently, Davis's ineffective assistance claim should be dismissed as procedurally defaulted unless Davis could show good cause to excuse appellate counsel's failure to raise the issue, or good cause to excuse postconviction counsel's failure to seek to reopen Davis's direct appeal or raise it in Davis's state court postconviction petition. *Edwards v. Carpenter*, 529 U.S. 446, 449-50,

452-53, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). Davis does not allege facts that would constitute such good cause. Accordingly, Claim Eight is procedurally defaulted as it pertains to any failure to voir dire or seek recusal of Judge Pater.

(Report, ECF No. 51, PageID 9676).

Davis objects:

The Magistrate Judge based that conclusion on the assertion that "Davis does not dispute that the ineffective assistance of trial counsel claim was available to him on direct appeal." (*Id.*) But that is incorrect. Mr. Davis specifically alleged ineffective assistance of his post-conviction counsel in his Traverse as "cause" to excuse the failure to raise the issue⁸. To the extent this claim was based on evidence outside of the record and was not raised in Mr. Davis's initial state post-conviction petition, the performance of state post-conviction counsel was deficient, [*43] to Mr. Davis's prejudice, depriving him of the effective assistance of initial review state-post-conviction counsel. See *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674; *White v. Warden*, 940 F.3d 270 (6th Cir. 2019) (citing *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013) & *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)).

(Objections, ECF No. 57, PageID 9894). Davis's allegation of ineffective assistance in the Traverse as excusing cause is completely conclusory: "Mr. Davis specifically asserts ineffectiveness of trial counsel, his direct appeal counsel, and his post-conviction counsel for failing to properly present this claim to the state courts as cause for any default. See *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)." (Traverse, ECF No. 29, PageID In other words, the Traverse does not spell out, but merely asserts, that direct appeal counsel and/or post-conviction counsel performed ineffectively as to this claim. It is, of course, axiomatic that if the claim necessarily depended on evidence outside the appellate record, failure to present the claim on direct appeal would not preclude its assertion in a post-conviction petition under Ohio Revised Code § 2953.21. It is also true in light of *Martinez* and *Trevino* that a failure to present the claim in post-conviction could be excused by showing ineffective assistance of counsel in post-conviction that met the *Strickland* standard. But merely reciting axioms of law does not prove their applicability [*44] to a given case.

Davis argues that the Magistrate Judge's "potential bias" analysis as to Judge Nastoff was irrelevant and misguided, as Davis claimed in his Petition that Judge Nastoff's prior capital prosecution of Davis's nephew, whom he referred to as "a liar" during that trial, was actual bias that should have prompted counsel to *voir dire* Judge Nastoff and request his recusal or move to disqualify him (Objections, ECF No. 57, PageID 9897-99, citing Petition, ECF No. 6, PageID 8695; Report, ECF No. 51, PageID 9677-78). He further claims that the Magistrate Judge's "no prejudice" conclusion was erroneous because, as a biased factfinder, Judge Nastoff's presence on the panel irreversibly tainted the sentencing, and because the evidence before the Supreme Court of Ohio in *In re Nastoff* was not the same as the evidence in the second resentencing. *Id.* at PageID 9898-99, quoting Report, ECF No. 51, PageID 9678; *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986); *Tumey v. Ohio*, 273 U.S. 510, 533-34, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927); *In re Nastoff*, 2012-Ohio-6339 at ¶ 11, 134 Ohio St. 3d 1232, 983 N.E.2d 354.

Davis argues that because Judge Nastoff used some of the same mitigation evidence presented by Davis in prosecuting and cross-examining Davis's nephew, it would be virtually impossible for him to set aside his bias (Reply, ECF No. 63, PageID 10009, citing State Court [*45] Record, ECF No. 4-46, PageID 6278-79). Further, and contrary to the Warden's argument, presumptive actual bias goes beyond simply cases in which the judge has a pecuniary interest. *Id.* at PageID 10009-10, quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980); *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); Response, ECF No. 60, PageID 9982; citing *Taylor v. Hayes*, 418 U.S. 488, 503, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974). "In *In re Murchison*, for example, the Court found a due process violation where the judge was 'part of the accusatory process' as a 'judge-grand jury,' such that it would be 'difficult if not impossible for a judge to free himself from the influence' of the earlier proceedings." *Id.* at PageID 10010, quoting 349 U.S. at 137-38. "So too here; it would be difficult if not impossible for Judge Nastoff to free himself from his prior opinions about the mitigation evidence that appeared in his previous case involving Mr. Davis's family." *Id.*

⁸The Traverse is 259 pages long, but Petitioner's counsel fail to include a citation to the place in the Traverse where this allegation is purportedly made. This failure violates S.D. Ohio Civ.R. 7.2(b)(5) which provides "all filings in this Court that reference a prior filing must provide pinpoint citations to the PageID number in the prior filing being referenced, along with a brief title and the docket number (ECF No. __ or Doc. No. __) of the document referenced."

While Davis argues that the evidence for *In re Nastoff* and the second resentencing were different, he does not actually state what the different evidence was. Moreover, even though the former pertained to adjudicating his postconviction petition and the latter to being on a panel, the gravamen was the same—that Judge Nastoff was supposedly biased due to his prosecution of Davis's nephew. Thus, the Magistrate Judge [*46] was correct that *In re Nastoff's* denial of Davis's motion to disqualify because there was no evidence of bias, "while not binding . . . , is instructive" (Report, ECF No. 51, PageID 9678, citing *In re Nastoff*, 2012-Ohio-6339 at ¶¶ 9-11, 134 Ohio St. 3d 1232, 983 N.E.2d 354). Further, the cases cited by Davis in the Objections and Reply, in addition to being repetitive of what he cited in his Traverse, only stand for the well-established proposition that participation by an actually biased judge is structural error. *Tumey*, in which the trial judge had a pecuniary interest in conviction, 273 U.S. at 522, is so far removed from the factual circumstances here as to be inapposite. The *In re Murchison* judge was both a "one-man grand jury" and the trial judge for the same defendant arising out of the same course of conduct, 349 U.S. at 135-36; similarly, the judge in *Taylor* convicted the defendant attorney of criminal contempt from conduct arising out at a criminal trial at which that judge also presided. 418 U.S. at 489-90. *Marshall* addressed a governmental agency's reimbursement from successful enforcement of child labor laws. 446 U.S. at 239.

None of these cases suggests that prosecution of a family member, even for the same-level crime for which the defendant is charged, creates in the judge a presumptive actual bias, such that [*47] counsel's failure to *voir dire* or challenge his inclusion on the panel would violate *Strickland*, and it was not ineffective assistance by counsel to decline to *voir dire* Judge Nastoff or seek his recusal. Davis's objections as to Ground Eight are overruled.

E. Execution Claims

1. Claim Nine: Execution after Thirty-Six Years on Death Row is Cruel and Unusual Punishment

Davis argued that carrying out a death sentence after more than thirty years on death row would constitute cruel and unusual punishment (Traverse, ECF No. 29, PageID 9252, 9255, 9259 (citations omitted)). The Magistrate Judge recommended denying the claim on the grounds that "there is not a clearly established federal legal principle that delay in carrying out death sentence is cruel and unusual under the Eighth Amendment. Dissents, no matter how eloquent and continuous, do not create constitutional law." (Report, ECF No. 51, PageID 9679-80). Davis cites numerous Supreme Court opinions in his Objections (ECF No. 57, PageID 9900-02, quoting *Baze v. Rees*, 553 U.S. 35, 81, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008) (Stevens, J., concurring); *Elledge v. Florida*, 525 U.S. 944, 119 S. Ct. 366, 142 L. Ed. 2d 303 (1998) (Breyer, J., dissenting from denial of certiorari); *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *Furman v. Georgia*, 408 U.S. 238, 288, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (*per curiam*) (Brennan, J., concurring); *id.* at 312 (White, J., concurring); [*48] citing *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion); *In re Medley*, 134 U.S. 160, 172, 10 S. Ct. 384, 33 L. Ed. 835 (1890)). In his Reply, Davis reiterates his argument that he "noted a long line of United States Supreme Court opinions that support his request for relief." (ECF No. 63, PageID 10011). However, none of the actual holdings of those cases establishes that a long wait between sentence and execution constitutes an Eighth Amendment violation. Only holdings of the Supreme Court, not dicta in its opinions, much less concurring or dissenting opinions, can warrant habeas corpus relief. *Bryan v. Bobby*, 843 F.3d 1099 (6th Cir. 2016), citing *White v. Woodall*, 572 U.S. 415, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014). As there is no clearly established law for this proposition, Davis's objection is overruled.

2. Claim Twenty-One: Ohio's Postconviction Scheme Inadequate to Address Constitutional Claims in State Courts

Davis argued that Ohio's postconviction scheme is unconstitutional because of its discretionary nature, the high threshold it imposes on petitioners without the chance to engage in discovery prior to filing the petition (Petition, ECF No. 6, PageID 8749-50), and that restrictions on filing means that "in practice the granting of postconviction relief by Ohio courts is so rare that it fails to provide the meaningful opportunity for relief required by the Fifth and Fourteenth Amendments." (Report, ECF No. 51, PageID 9684, [*49] citing *Keener v. Ridenour*, 594 F.2d 581, 590 (6th Cir. 1979); *Allen v. Perini*, 424 F.3d 134, 139-40 (6th Cir. 1970); *Coley v. Ahvis*, 381 F.2d 870, 872 (6th Cir. 1967); Petition, ECF No. 6, PageID 8750). The Magistrate Judge recommended dismissing the claim as non-cognizable, "because 'the [. . .] Sixth Circuit has held that alleged errors in state collateral proceedings cannot form the

basis for habeas corpus relief." *Id.*, quoting *Davis IX*, ECF No. 16-2, PageID 9030; citing *Kirby v. Dutton*, 794 F.2d 245, 247 (6th Cir. 1986).

Davis objects that *Kirby* applies only when a postconviction regime comports with due process, which Ohio's does not because it fails the requirement that the "corrective process should be 'swift and simple and easily invoked,' should 'eschew rigid and technical doctrines of forfeiture, waiver or default,' and should 'provide for full fact hearings to resolve disputed factual issues.'" (Objections, ECF No. 57, PageID 9941, quoting *Case v. Nebraska*, 381 U.S. 336, 346-47, 85 S. Ct. 1486, 14 L. Ed. 2d 422(1965) (Brennan, J., concurring); *Evitts v. Lucey*, 469 U.S. 387, 401, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Carter v. People of State of Illinois*, 329 U.S. 173, 175, 67 S. Ct. 216, 91 L. Ed. 172 (1946)). "The clearest evidence of this failure[.]" Davis argues, "is the sheer volume of cases in which the Sixth Circuit has found it necessary to grant federal habeas corpus relief to Ohio prisoners under a death sentence, notwithstanding the fact that they had already sought post-conviction review in Ohio state court." *Id.*, citations to twelve cases at n.4. Yet, despite numerous chances to overrule *Kirby*'s non-cognizability [*50] holding, none of those cases called *Kirby* into question. If *Kirby* is no longer good law, the Sixth Circuit will so inform us; for now, the Magistrate Judge's non-cognizability analysis is correct, and the Court adopts it.

Davis states that "[t]o the extent this Court views *Kirby* as controlling, Mr. Davis preserves the argument that *Kirby* was wrongly decided under the caselaw of the United States Supreme Court." (Objections, ECF No. 57, PageID 9942-43, citing *Rodriguez v. United States*, 395 U.S. 327, 330, 89 S. Ct. 1715, 23 L. Ed. 2d 340 (1969); *Lane v. Brown*, 372 U.S. 477, 83 S. Ct. 768, 9 L. Ed. 2d 892 (1963); *Dond v. Cook*, 340 U.S. 206 (1951)). Yet, in none of the cases cited by Davis was the petitioner attacking the constitutionality of a state's postconviction regime, as Davis is here. Davis is free to raise that argument with the Sixth Circuit, but it is not persuasive here, and his objection is overruled.

3. Claims Twenty-Two through Twenty-Six: Method of Execution and Legal Injection is Unconstitutional

For Claims Twenty-Two through Twenty-Five, Davis concedes that the panel in *In re Smith* held that *Bucklew v. Precythe* did not abrogate the rule in *In re Campbell* that method of execution challenges must be brought under 42 U.S.C. § 1983, rather than habeas (Objections, ECF No. 57, PageID 9944; quoting *Bucklew*, 139 S.Ct. 1112, 1128, 203 L. Ed. 2d 521 (2019); citing *In re Smith*, 806 F. App'x 862, 863-64 (6th Cir. 2020) (*per curiam*); *In re Campbell*, 874 F.3d 454, 464 (6th Cir. 2017)). "Davis acknowledges the state of the law in the Sixth [*51] Circuit at this time and objects to preserve his argument to the contrary that the cognizability of constitutional lethal-injection claims is supported by *Bucklew*." *Id.*, citing *Bucklew*, 139 S.Ct. at 1128. As Davis cites no caselaw that would cause the Court to depart from the logic in *Smith*, the objection is overruled. However, the Court does adopt the Magistrate Judge's recommendation to grant a certificate of appealability as to the cognizability of these claims.

Twenty-Six: The State of Ohio cannot constitutionally execute Mr. Davis because the only means available for execution depend on state execution laws that are preempted by federal law. (Petition, ECF No. 6, PageID 8571, 8814). Davis argued that:

Ohio's use of drugs, including controlled substances and/or compounded drugs, to execute Mr. Davis will result in violations of various provisions of the Controlled Substances Act (CSA), 21 U.S.C. §§ 801, *et seq.*, the Federal Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. §§ 301 *et seq.*, and federal regulations issued by the Drug Enforcement Agency (DEA) and Food and Drug Administration (FDA).

...

The Ohio lethal-injection statute, Ohio Revised Code § 2949.22(A), along with DRC's practices, policies and protocols used to carry out that statute, are preempted by the Controlled Substances [*52] Act (CSA), 21 U.S.C. §§ 801, *et seq.*, the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §§ 301, *et seq.*, and federal regulations issued by the Drug Enforcement Agency (DEA) and Food and Drug Administration (FDA). (Petition, ECF No. 6, PageID 8815-16).

The Magistrate Judge, noting that the claim had not been raised in Davis's state court petitions, concluded that the claim was procedurally defaulted (Report, ECF No. 51, PageID 9685). He also found the claim meritless, noting: the heavy burden a petitioner must meet to obtain habeas relief based on a federal statutory violation; the absence of a preemption clause in the FDCA; the

inapplicability of the CSA's preemption clause; and that lethal injection protocols have never been held to be in conflict with federal drug laws and regulations. *Id.* at PageID 9691-93.

Davis objects that the claim could not have been raised in state court, as Ohio's postconviction regime does not allow for adjudicating statutory claims (Objections, ECF No. 57 PageID 9943). He also claims that the Magistrate Judge's analysis vindicates his argument, *id.* at PageID 9944-45, and reiterates his argument that

There is no question that Ohio is obtaining and using controlled substances, and that persons obtaining, [*53] possessing, and administering such drugs are doing so in violation of the express provisions of the CSA and/or FDCA, and are administering such drugs without a valid prescription and using such drugs to cause death, all of which makes their use illegal under federal law.

Id. at PageID 9945, quoting *Gonzales v. Oregon*, 546 U.S. 243, 299, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006) (Scalia, J., dissenting); citing 21 U.S.C. § 829; 21 C.F.R. § 1306.04. "The Magistrate Judge has asserted that there is no pre-emption under federal law, but in reaching that conclusion, the Magistrate Judge properly acknowledges that 'state law is naturally preempted to the extent of any conflict with a federal statute.'" *Id.*, quoting *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 630, 132 S. Ct. 1261, 182 L. Ed. 2d 116 (2012); Report, ECF No. 51, PageID 9691. As the Supremacy Clause of the United States Constitution requires the invalidation of any state law that conflicts with federal law, Ohio's lethal injection protocol must be invalidated. *Id.* at PageID 9945-46, citing U.S. Const. art. VI, § 2; *Roane v. Barr*, No. 19-mc-145, 485 F. Supp. 3d 233, 2020 U.S. Dist. LEXIS 155191 (D.D.C. Aug. 27, 2020), *vacated on other grounds at Roane v. Barr*, No. 20-5260, 2020 U.S. App. LEXIS 27495 (D.C. Cir. Aug. 27, 2020) (*per curiam*).

There are numerous issues with Davis's claim and objections, including the threshold issue of standing. In *Durr v. Strickland*, a plaintiff facing execution by lethal injection sought a declaratory judgment that Ohio's lethal injection protocol violated the CSA and FDCA. This Court dismissed the civil complaint on the [*54] ground that neither statute afforded a private right of action, No. 2:10-cv-288, 2010 U.S. Dist. LEXIS 37641, 2010 WL 1610592 at *2-3 (Apr. 15, 2010) (Frost, J.), *aff'd* 602 F.3d 788, 789 (6th Cir. 2010). The latter decision has not been overruled, and nowhere in his Petition, Traverse, or Objections does he explain why he has standing when Durr did not. As Judge Gregory L. Frost explained in *Durr*, the plaintiff did not seek to protect his own rights, *e.g.*, against an inhumane execution, but to prevent the State from violating federal law through an unauthorized use of execution drugs.

Thus, the only injury that the declaratory relief sought here actually informs is whether Defendants would be acting in technical violation of federal law. Implicit in any declaration that such a violation would exist would be a possible suggestion (according to Plaintiff) that Defendants might be subjecting themselves to potential prosecution for violating federal law. This is an injury to Defendants, not to Plaintiff.

2010 U.S. Dist. LEXIS 37641, [WL] at *4; *accord: In re Ohio Execution Protocol Litig.*⁹, No. 2:11-cv-1016, 2017 U.S. Dist. LEXIS 107468, 2017 WL 2964901, *24 (S.D. Ohio Jul. 12, 2017) (Merz, Mag. J.) ("[T]here is no constitutional right to the statutory protections provided by the FDCA or CSA."). Moreover, to the extent that Davis is alleging that the protocol, rather than the death sentence itself, violates [*55] his constitutional rights, his claim properly arises under 42 U.S.C. § 1983, not in habeas. *See id.* ("An allegation that a violation of the federal law involved here would lead to an inhumane execution . . . would constitute a § 1983 civil rights violation, regardless of whether such a claim is then asserted.").

Also, *Roane* addressed "a pure legal question: is pentobarbital subject to the FDCA when used for lethal injection? Under D.C. Circuit precedent, the answer appears to be yes." 485 F. Supp. 3d 233, 2020 U.S. Dist. LEXIS 155191 at *12-13, citing *Cook v. FDA*, 733 F.3d 1, 10-11, 407 U.S. App. D.C. 1 (D.C. Cir. 2013). The District Court did not opine on the state of the law elsewhere, and indeed noted that "the Supreme Court has expressly declined to consider the 'thorny' jurisdictional issue of whether of the FDCA applies to drugs used for executions." *Id.* at *16, citing *Heckler v. Chaney*, 470 U.S. 821, 828, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). Davis cites no Sixth Circuit caselaw as to whether the FDCA applies to execution drugs; given the unsettled nature of the law's applicability, Davis has fallen well short of showing "a fundamental defect which inherently results in a complete miscarriage of justice [o]r an omission inconsistent with the rudimentary demands of fair procedure[.]" *Hill v. United States*, 368 U.S. 424, 428, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962), as is necessary for a federal statutory violation to be cognizable in habeas. Finally, the Magistrate Judge's analysis as [*56] to why there has been no preemption and that there is no indication of conflict between Ohio execution

⁹ Davis is an active Plaintiff in that consolidated 42 U.S.C. § 1983 litigation.

and federal drug law (Report, ECF No. 51, PageID 9692-93) is well-founded and adopted. For these reasons, Claim Twenty-Six is without merit, and Davis's objection is overruled.

F. Pretrial, Trial, and Sentencing Claims for Relief

1. Claim Ten: Conviction product of Unnecessarily Suggestive Police Procedures and Unreliable Eyewitness Testimony

Davis set forth numerous purported problems with the procedures used by police with eyewitnesses to identify Davis as Butler's killer, and why the eyewitness testimony used almost exclusively to convict Davis was unreliable. Thus, Davis claimed, the conviction should be vacated and reversed as unreliable (Petition, ECF No. 6, PageID 8706-09 (citations omitted)). The Magistrate Judge noted that the claim had been barred by *res judicata* in the last reasoned state court decision (Report, ECF No. 51, PageID 9681, citing *Davis VI*, 1996 Ohio App. LEXIS 4263, 1996 WL 551432 at *9) and that "*res judicata* is an adequate and independent state ground upon which to find a claim procedurally defaulted and precluded from federal habeas review." *Id.*, citing *Durr v. Mitchell*, 487 F.3d at 431-32.

Davis argues that ineffective assistance of appellate counsel [*57] is cause to excuse the procedural default, and that he had properly presented the ineffective assistance claim to the Supreme Court of Ohio in an Application to Reopen Direct Appeal (Objections, ECF No. 57, PageID 9904, citing *Murray*, 477 U.S. at 488; State Court Record, ECF No. 4-27, PageID 2942 *et seq.*). The Supreme Court of Ohio did not address the merits, holding instead that the Application to Reopen was untimely and that no good cause existed to excuse the untimely filing. *Davis VIII*, 86 Ohio St. 3d at 213-14, citing Ohio App.R. 26(B). Davis argues that the Sixth Circuit had held that the ninety-day limit was not consistently enforced, and thus, fails the *Maupin* test for enforcing procedural default (Objections, ECF No. 57, PageID 9904-05, citing *Franklin v. Anderson*, 434 F.3d 412, 420-21 (6th Cir. 2006)). Yet, in caselaw predating, postdating, and contemporaneous with *Franklin*, the Sixth Circuit found the ninety-day limit consistently enforced for *Maupin* purposes. *See, e.g., Van Hook v. Bobby*, 661 F.3d 264, 270 (6th Cir. 2011); *Poindexter v. Mitchell*, 454 F.3d 564, 583-84 (6th Cir. 2006); *Coleman I*, 244 F.3d at 540). Moreover, at the time the Supreme Court of Ohio applied the Rule 26(B) deadline in *Davis VIII*, the sanction was regularly enforced. *Franklin*, 434 F.3d at 420-21 (citations omitted). Davis fails to address the *res judicata* issue in his reply, focusing solely on the merits (ECF No. 63, PageID 10012-13). As the Magistrate Judge's recommendation on procedural default was [*58] proper, Davis's objection is overruled.

2. Claim Eleven: Resentencing Procedures Violated Federal and State Constitutions

Davis claimed that the first resentencing violated his Equal Protection rights because he was subject to a death sentence upon remand, whereas defendants sentenced to death originally by juries could not be. He claimed that the second resentencing violated his due process rights because, in contravention of Ohio law, he was tried before a different three-judge panel than the one from his initial trial and first resentencing. Finally, he argued that both the first and second resentencings violated his rights under the *Ex Post Facto* clause (Petition, ECF No. 6, PageID 8710-14 (citations omitted)). The Magistrate Judge noted that the gravamen of his equal protection and due process claims were identical; this Court had already rejected both his equal protection and *ex post facto* claims; and that the Sixth Circuit did not disturb those rulings when it remanded for the second resentencing in *Davis X* (Report, ECF No. 51, PageID 9694-96). The Magistrate Judge concluded the Sixth Circuit's differentiation of the case of *State v. McGee*—in which the defendant had to be retried by a jury because [*59] he would be under a new indictment—and the instant case—in which only the penalty phase was being retried—was a rational basis for differentiation, and thus the equal protection claim failed. *Id.* at PageID 9695-96. Further, the Supreme Court of Ohio rejected Davis's *ex post facto* claim, "finding that it did not fit into any of the categories of *ex post facto* laws set forth in *Calder[v. Bull]* and its progeny." *Id.* at PageID 9697, citing *Calder*, 3 U.S. 386, 390, 1 L. Ed. 648, 3 Dall. 386 (1798); *Davis XIV*, 2014-Ohio-1615 at ¶ 54, 139 Ohio St. 3d 122, 9 N.E.3d 1031; *State v. White*, 132 Ohio St. 3d 344, 2012-Ohio-2583, ¶ 64, 972 N.E.2d 534; Ohio Rev. Code § 2929.06(B). The Magistrate Judge concluded that *Davis XIV* was not contrary to clearly established federal law, and recommended that Claim Eleven be denied (Report, ECF No. 51, PageID 9697).

Davis argues that the Magistrate Judge misread *Davis X*, in which the Sixth Circuit stated that "[w]hile not directly on point, because Davis is not facing a new indictment, the reasoning of the Ohio court in *McGee* should certainly inform the sentencing court's determination of the viability of Davis's jury waiver on remand." (Objections, ECF No. 57, PageID 9909, quoting *Davis X*, 475 F.3d at 781). Moreover, the arguably rational basis for differentiating this case from others in which a jury was mandated on retrial—that

the original panel could be reassembled—was no longer rational in the second [*60] resentencing, which was before an entirely different panel, and in which new evidence was introduced. *Id.*, citing *Davis*, 475 F.3d at 780. Finally, they claim that Judge Graham erred in *Davis IX* by finding that the change of the law in Ohio Revised Code § 2929.06(B) was procedural, rather than substantive; *Davis XIV* violated *Calder*; there has been a violation of clearly established federal law; and habeas relief is proper. *Id.* at PageID 9910-12 (citations omitted).

While *Davis* claims that the Magistrate Judge ignored clearly established federal law, as the Warden points out, he never actually states what that law is (Response, ECF No. 60, PageID 9986). *Davis* claims that the retroactive application of the modified Ohio Revised Code § 2929.06(B) to allow for a new panel of three judges to resentence him to death on retrial constituted a sentencing enhancement that violated the *Ex Post Facto* clause (Objections, ECF No 57, PageID 9910, citing *Pugh v. United States*, 569 U.S. 530, 550, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013); *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 505, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995); *Calder*, 3 U.S. at 390; *Davis XIV*, 2014-Ohio-1615 at ¶¶ 54-55, 139 Ohio St. 3d 122, 9 N.E.3d 1031). In addition to this being a recitation of the arguments raised in his Traverse (ECF No. 29, PageID 9272-73), *Davis* does not set forth the holdings in these cases beyond the well-established principle that "the *Ex Post Facto* Clause forbids the States to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing [*61] range." *Morales*, 514 U.S. at 505. The amendment to Ohio Rev. Code § 2929.06(B), meanwhile, merely changed the procedure by which a three-judge panel could be constituted. It did not empower a three-judge panel to impose a death sentence on remand when that was not possible before. Thus, Judge Graham's decision that the modification was procedural, rather than substantive, was correct, and the Supreme Court of Ohio's rejection of *Davis*'s *Ex Post Facto* claim, *Davis XIV*, 2014-Ohio-1615 at ¶¶ 54-55, 139 Ohio St. 3d 122, 9 N.E.3d 1031, was not contrary to clearly established federal law.

The statement in *Davis X* that *McGee*, "[w]hile not directly on point, . . . should certainly inform the sentencing court's determination of the viability of *Davis*'s jury waiver on remand[.]" 475 F.3d at 781, means that there is not clearly established federal law on whether continued enforcement of the jury waiver violated his due process and equal protection rights. Thus, *Davis*'s objection is overruled. However, because a reasonable jurist could disagree with these conclusions, *Davis* is granted a certificate of appealability as to Claim Eleven.

3. Claim Twelve: Inability to Inspect Grand Jury Transcripts

"*Davis* argue[d] that he had a particularized need to see the grand jury transcripts, specifically, the need to prepare and present a complete [*62] defense, and that his need . . . outweighed the State's presumptive need to keep the testimony secret." (Report, ECF No. 51, PageID 9697-98, citing Petition, ECF No. 6, PageID 8715). The Magistrate Judge concluded that the claim was speculative, as:

Nowhere in the Petition or Traverse does *Davis* identify what evidence he thinks is contained in the transcripts, much less how the outcome of his trial and sentencings would have been different if he had had access to the transcripts. Rather, *Davis* is asking, more than thirty years after the grand jury issued the indictment against him, for a grant of discovery to see the transcripts so that he might formulate a theory based on what might be contained in there

Id. at PageID 9698.

Davis argues that *de novo* review of the claim by this Court is necessary, as the last reasoned state court decision, *Davis II*, was based entirely on state law (Objections, ECF No. 57, PageID 9912-13, citing *Davis II*, 38 Ohio St. 3d at 364-65). Under that standard, *Davis* claims, relief is proper, as he has demonstrated a particularized need to inspect the transcripts that outweighs the general presumption of secrecy: the inconsistent statements of eyewitness and trial witness Cozette Massey. *Id.* at [*63] PageID 9913. The inability to examine the transcript meant that he was deprived of "a meaningful opportunity to present a complete defense." *Id.*, quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). *Davis* further argues that, contrary to the Warden's assertion, the main issue is not the secrecy of the grand jury, but the need to present a complete defense (Reply, ECF No. 63, PageID 10014). "*Davis* has also cited cases such as *Dennis v. United States*, which reversed and remanded for a new trial where 'petitioners were entitled to examine the grand jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross-examination.'" *Id.* citing *Dennis*, 384 U.S. 855, 875, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966); Traverse, ECF 29, PageID 9280.

The Supreme Court cases relied upon by Davis in his Objections are inapposite; none of them deals with matters, such as grand jury testimony, in which a presumption in favor of access does not apply. In *Dennis*, "the Government concede[d] the that the importance of preserving the secrecy of the grand jury minutes is minimal and also admit[ted] the persuasiveness of the arguments advanced in favor of disclosure[.]" 384 U.S. at 871-72. Thus, it could not "fairly be said that the defense has failed to make [*64] out a 'particularized need.'" *Id.* at 872. No such concession or admission has been made by the Warden in this case. Further, the defendant in *Dennis* had identified four key trial witnesses about whom grand jury minutes existed, and sought those minutes for the purpose of cross-examination. *Id.* at 875. No such analogue exists for Davis. As to the example Davis cites for needing to inspect the transcript—Cozette Massey's inconsistent identification of Davis as the shooter (among other, unspecified eyewitness statements) (Objections, ECF No. 57, PageID 9913)—Davis provides no reason as to why he thinks that evidence is only obtainable through the grand jury transcripts. After all, Massey testified at trial (Trial Tr., ECF No. 5-2, PageID 7227), and counsel had the opportunity to impeach her on cross-examination. Contrary to his argument (Reply, ECF No. 63, PageID 10014-15), Davis cites to no caselaw suggesting that mere inconsistent statements constitute the "particularized need" to inspect the transcripts. In sum, even under a *de novo* standard, his objection must be overruled.

4. Claim Thirteen: Discriminatory Selection of Grand Jury Foreperson in Violation of Fifth, Sixth, Eighth, and Fourteenth Amendments

"Davis claim[ed] that the Presiding [*65] Judge of the Court of Common Pleas selecting the grand jury foreperson, who need not be part of the venire, is arbitrary and the resulting selection process is racially discriminatory, and thus, unconstitutional." (Report, ECF No. 51, PageID 9699, citing Petition, ECF No. 6, PageID 8717). The Magistrate Judge recommended that the claim be dismissed as speculative, as the only argument Davis offered in support of the discrimination argument was that in Hamilton County, adjacent to Butler County, the presiding judge of the Court of Common Pleas selects the grand jury foreman, and that African-Americans and women were underrepresented there by a statistically significant amount from 1982 through 1998. *Id.*

Davis argues that the Magistrate Judge, by using the "clearly erroneous or contrary to law" standard, improperly applied AEDPA deference when there was no state court adjudication on the merits of that fairly presented claim (Objections, ECF No. 57, PageID 9915, citing *Davis VIII*, 86 Ohio St. 3d 212, 1999- Ohio 160, 714 N.E.2d 384; State Court Record, ECF No. 4-27, PageID 2965). Yet, this argument was raised for the first time in Davis's untimely Rule 26(B) motion (State Court Record, ECF No. 4-25, PageID 2809-10). As discussed above, default for failure [*66] to file a Rule 26(B) Motion in a timely manner is a consistently enforced sanction for procedural default purposes. Thus, regardless of the standard applied by the Magistrate Judge, the claim is procedurally defaulted, and Davis's objection is overruled.

5. Claim Fourteen: Trial Court Prohibiting Elbert Avery from Testifying During Guilt Phase

Davis argued that the trial court's unwillingness to allow Elbert Avery to testify for the purpose of impeaching fellow defense witness Anthony Ferguson "deprived him of his fundamental right to present a complete defense." (Report, ECF No. 51, PageID 9700, citing Petition, ECF No. 6, PageID 8720-21; *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The Magistrate Judge concluded that the state court was correct in finding the claim barred by *res judicata* for failure to raise it on direct appeal, and that "[t]his adequate and independent state ground forecloses habeas relief." *Id.*, citing *Davis VI*, 1996 Ohio App. LEXIS 4263, 1996 WL 551432, *9. He concluded that Davis's argument that ineffective assistance of appellate counsel was cause to excuse the default was itself defaulted by counsel's failure to properly raise the issue in his untimely filed application to reopen direct appeal. *Id.* at PageID 9700-01.

For the reasons stated above, *res judicata* for [*67] failure to raise on direct appeal and failure to file a timely Rule 26(B) application are adequate and independent state grounds for procedural default and, thus, foreclose this Court's review of the claim. This is especially true when, as here, there are two levels of procedural default. While Davis argues that capital and non-capital appellants are treated differently in their applications to reopen (Objections, ECF No. 57, PageID 9918-19), he cites no data or caselaw in support. Davis's Reply deals only with the merits and does not address procedural default (ECF No. 63, PageID 10015). Davis's objection is overruled.

6. Claims Fifteen and Sixteen: Capital Specification was Invalid, and Counsel Failed to Investigate the Underlying Crime

As to Claim Fifteen, Davis argued that he killed his estranged wife Ernestine "in a heat of passion and without any premeditation or purpose, and thus, lacked the requisite *mens rea* for the specified prior offense" of second-degree murder, which was defined at the time as purposeful killing. (Objections, ECF No. 57, PageID 9720-21, citing Ohio Rev. Code § 2929.04(A)(5); State Court Record, ECF No. 4-19, PageID 2028-29; Petition, ECF No. 6, PageID 8722-23). Absent a proper death specification [*68] or other aggravating circumstance, Davis argued, his "conviction on this aggravated specification and his death sentence are unconstitutional and must be vacated." (Petition, ECF No. 6, PageID 8723). The Magistrate Judge, declining to rule whether the claim was procedurally defaulted, found the claim meritless. He noted the letter from Robert Jones Beard, Davis's neighbor who witnessed the killing and, years later, wrote that Davis did so in the midst of a heated argument. However, the Magistrate Judge concluded that letter was not enough to overcome his guilty plea for second-degree murder, which at the time required a finding of purposeful killing, such that "the prior conviction was infected with constitutional error." (Report, ECF No. 51, PageID 9702, quoting *Davis IX*, ECF No. 16-2, PageID 8969).

Davis restates his argument that Beard's letter demonstrates that Davis could not have had the *mens rea* to commit second degree murder, and that this Court has jurisdiction to review the earlier conviction's validity when, as here, Davis is attacking that conviction and, consequently, the sole capital specification (Objections, ECF No. 57, PageID 9922). Davis notes that the Warden does [*69] not respond to the objection that Judge Graham did not find it procedurally defaulted, (Reply, ECF No. 63, PageID 10016, citing *Davis IX*, ECF No. 16-1, PageID 8924-25, ECF No. 16-2, PageID 8967-74; Report, ECF No. 51, PageID 9702; Objections, ECF No. 57, PageID 9921), and argues that, contrary to the Warden's assertion, Davis is not trying to vacate his prior conviction, but to examine the prior conviction as a sentencing enhancement. *Id.* at PageID 10016-17. Davis does not meaningfully address the Magistrate Judge's well-reasoned conclusion that a single letter written years after his conviction does not outweigh his tacit admission, via his guilty plea for second-degree murder, that he purposefully killed Ernestine. The Court finds there was no constitutional error in the underlying conviction, and Davis's objection is overruled as to Claim Fifteen. Because the underlying claim was not meritorious, even if "counsel did not even make an informed decision to abandon an investigation or argument based on this evidence[.]" *id.* at PageID 10011, that failure could not have been prejudicial under *Strickland*. Davis's objection as to Claim Sixteen is overruled as well.

7. Claim Seventeen: Denial [*70] of Motion to Sever

"Davis claim[ed] that the trial court's denial of his motion to sever Counts One (aggravated murder) and Two (possessing a weapon under a disability) caused him to waive his right to a jury trial and proceed before a three-judge panel." As his waiver was not knowing, intelligent, and voluntary, "the unconstitutional waiver of his jury right was a structural error, for which no showing of prejudice is required." (Report, ECF No. 51, PageID 9703). He also argues that he was prejudiced because the denial of his motion meant that the prior conviction was admitted, whereas it would have otherwise "been excluded from trial of the aggravated murder count under Ohio R.Evid. 403." *Id.* Had the prior killing been excluded, Davis argued, there is a reasonable probability that a jury would not have voted to convict him and sentence him to death. *Id.*, citing *Fry v. Pliler*, 551 U.S. 112, 121-22, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007); *Sullivan v. Louisiana*, 508 U.S. 275, 280-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); *Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 63 S. Ct. 236, 87 L. Ed. 268 (1942); *Traverse*, ECF No. 29, PageID 9304-06. The Magistrate Judge rejected Davis's argument that the Supreme Court of Ohio only evaluated his state law claims and recommended dismissal even if a *de novo* review were proper, as the claim was "speculative at best." *Id.* at PageID 9703-04, citing *Spencer v. Texas*, 385 U.S. 555, 562 (1962); *Davis II*, 38 Ohio St. 3d at 364.

Davis raises two main objections. First, he [*71] claims that the Magistrate Judge's focus on prejudice was misguided, as violation of a right to a jury trial—which is what the denial of the motion to sever was—is structural error (Objections, ECF No. 57, PageID 9929, citing *Sullivan*, 508 U.S. at 281-82). Second, the prejudice was more than speculative, as evidence of the prior conviction would have made a jury much more likely to convict him because they thought he was a bad guy, not because he killed Suzette Butler. *Id.* at PageID 9930, quoting *United States v. Bell*, 516 F.3d 432, 446, 448 (6th Cir. 2000). Moreover, the jury almost certainly would not have heard testimony about his killing of Ernestine, as Davis's attorneys stipulated to the prior conviction. Taken together, the "trial court's refusal to sever the charges represented 'an arbitrary disregard of [Mr. Davis's] right to liberty' and accordingly violated his due process rights." *Id.* (brackets in original), quoting *Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980); citing *Old Chief v. United States*, 519 U.S. 172, 174, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

As a petitioner claiming a federal constitutional violation based on a state court application of state law, Davis faces the heavy burden of showing "that misjoinder of the counts 'result[ed] in prejudice so great as to deny a defendant his ... right to a fair trial.'"

Davis X, 475 F.3d at 777 (brackets in original), quoting *United States v. Lane*, 474 U.S. 438, 446 n.8, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986). Neither Davis in his Objections [*72] or Reply nor the Warden in his Response acknowledged that the Sixth Circuit already extensively discussed and rejected this claim in *Davis X*. *Id.* at 776-79. Davis does not explain what new caselaw or argument has been presented that either: (a) is more persuasive than what was before the Sixth Circuit in *Davis X*; or (b) would lead this Court to conclude that the holding or reasoning in *Davis X* should not apply as to the instant Petition. In *Davis X*, the Sixth Circuit concluded that "[b]ecause the denial of Davis's motion for severance did not constitute a denial of the petitioner's due process right to a fair trial, that ruling cannot be said to have rendered his waiver of a jury trial involuntary." *Id.* at 778-79. There being no compelling reason presented to depart from the appellate court's well-reasoned discussion and conclusion, the Court overrules Davis's objection.

8. Claims Eighteen and Twenty: Death Sentence is Disproportionate, and the Product of a constitutionally Inadequate Proportionality Review

"In Claim Eighteen, Davis argue[d] that the trial court panel's conclusion that the sole aggravating factor, his 1971 homicide conviction, outweighed the extensive mitigation evidence presented resulted in a death [*73] sentence that was disproportionate, in violation of the Fifth and Fourteenth Amendments[.]" (Report, ECF No. 51, PageID 9705, citing *Evitts v. Lucey*, 469 U.S. 387, 401, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *United States v. Hopper*, 941 F.2d 419, 422 (6th Cir. 1991); Petition, ECF No. 6, PageID 8732; Traverse, ECF No. 29, PageID 9313, Ohio Rev. Code § 2929.05). "In Claim Twenty, which is closely related, Davis argue[d] that the Supreme Court of Ohio's proportionality review, by comparing Davis only with cases in which a death sentence was imposed, did not comport with due process." *Id.* at PageID 9705-06, citing *State v. Taylor*, 78 Ohio St. 3d 15, 1997- Ohio 243, 676 N.E.2d 82 (1997), *writ of habeas corpus granted at Taylor v. Mitchell*, 296 F. Supp. 2d 784 (N.D. Ohio 2003); *State v. Mapes*, 19 Ohio St. 3d 108, 19 Ohio B. 318, 484 N.E.2d 140 (1985), *conditional writ of habeas corpus aff'd at Mapes*, 388 F.3d 187; Petition, ECF No. 6, PageID 8739). The Magistrate Judge rejected both claims, noting that no case had found a death sentence disproportionate when the single aggravating circumstance was a prior homicide, and that no case had held that a sentencing scheme such as Ohio's—in which the case is only weighed against cases in which a death sentence has been imposed—"shocked the conscience" for Fourteenth Amendment purposes. *Id.* at PageID 9706-07.

Davis concedes that the Supreme Court of Ohio adjudicated and rejected the merits of Claims Eighteen and Twenty (Objections, ECF No. 57, PageID 9933-34; *see also Davis XIV*, 2014-Ohio-1615 at ¶ 117, 139 Ohio St. 3d 122, 9 N.E.3d 1031). Davis objects that the adjudication was contrary to law because the state court only compared [*74] Davis to cases in which death sentences were upheld but subsequently vacated. "In other words, the court cited two cases factually similar to Mr. Davis's where the death penalty was *not* appropriate, and did not cite any case similar to Mr. Davis's where a death sentence passed scrutiny under federal review." *Id.* at PageID 9934. Yet, as the Magistrate Judge pointed out, the death sentences in *Taylor* and *Mapes* were vacated for reasons other than lack of proportionality (Report, ECF No. 51, PageID 9707). Davis points to no case in which a prior homicide serving as the sole aggravating factor was insufficient to outweigh the mitigating evidence. In other words, Davis has offered no reason why the *Davis XIV* decision was even wrong, much less contrary to clearly established federal law, as is required for habeas relief. Moreover, Davis cites Supreme Court precedent for the general proposition that disproportionate death sentences, or sentences imposed arbitrarily or irrationally, violate the Eighth and Fourteenth Amendments (Objections, ECF No. 57, PageID 9933, 9934, quoting *Parker v. Dugger*, 498 U.S. 308, 321, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991); citing *Callins v. Collins*, 510 U.S. 1141, 1145, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (Blackmun, J., dissenting from denial of certiorari); *Coker v. Georgia*, 433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977); *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)). Yet, none of those cases suggests that a death sentence imposed with the [*75] single aggravating factor of a prior homicide—even against substantial mitigation evidence—is so disproportionate or unfair as to be cruel and unusual punishment under the Eighth Amendment or "shock the conscience" for Fourteenth Amendment purposes. Nor do they suggest that the comparative analysis undertaken by *Davis XIV* rendered the death sentence arbitrary or irrational.

Davis incorporates his main arguments on proportionality (Claim Eighteen) and shocking the conscience (Claim Twenty) (Reply, ECF No. 63, PageID 10019). He also takes issue with the Warden's reliance on *Getsy v. Mitchell*, "for the proposition that there is no proportionality review requirement that a death sentence be compared with the sentences imposed in other cases." *Id.* at PageID 10018-19, citing 495 F.3d 295, 309 (6th Cir. 2007) (*en banc*); Response, ECF No. 60, PageID 9989. "As Mr. Davis explained in his Traverse, the Sixth Circuit based its conclusion on a misreading of *Pulley v. Harris* that is contrary to the clearly established federal law contemplating fundamental statutory protections[.]" *Id.* at PageID 10019, citing *Pulley*, 465 U.S. 37, 44-51, 104 S. Ct. 871, 79 L.

Ed. 2d 29 (1984). The Court need not reach this issue because, as discussed above, the Supreme Court of Ohio *did* conduct a proportionality review, and that review was not constitutionally [*76] infirm. Davis's objections as to Claims Eighteen and Twenty are overruled.

9. Claim Nineteen: Insufficient Evidence to Support a Conviction for Aggravated Murder

Davis argued that there was insufficient evidence to prove the prior calculation and design element beyond a reasonable doubt, and "thus, his conviction and death sentence were unconstitutional." (Report, ECF No. 51, PageID 9708, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Robbins*, 58 Ohio St. 2d 74, 388 N.E.2d 755 (1979); *State v. Cotton*, 56 Ohio St. 2d 8, 381 N.E.2d 190 (1978); Petition, ECF No. 6, PageID 8737-38). The Magistrate Judge, reviewing the three factors that Ohio courts consider with respect to prior calculation and design, concluded that the finding by the trial court of prior calculation and design was not unreasonable *Id.* at PageID 9709-10, citing *Taylor*, 78 Ohio St. 3d at 19.

Davis notes that the Magistrate Judge was equivocal as to the second (thought and preparation as to murder weapon or location) and third (drawn out or instantaneous killing) factors (Objections, ECF No. 57, PageID 9938, citing Report, ECF No. 51, PageID 9709), and claims that the Magistrate Judge erred in his analysis of the first factor (whether the parties knew each other and if their relationship was strained). *Id.* at PageID 9937-38. Davis argues that the State presented no evidence of a strained relationship [*77] between Butler and him, whereas Davis "said that they separated by 'mutual agreement,' that there were no hard feelings, that he had still kept some of his possessions at her home, and that he had even gone out for breakfast with Ms. Butler after the separation." *Id.*, citing Trial Tr., ECF No. 5-3, PageID 7542-45. Yet, there was also some evidence that Butler had called the police on Davis shortly after the breakup (Trial Tr., ECF No. 5-3, PageID 7545). Further, as the Magistrate Judge pointed out, there was evidence, albeit conflicting, that Davis had given prior thought to the murder weapon (bringing a loaded gun into the American Legion) and that the confrontation was drawn out (more than thirty minutes elapsing from entering the American Legion until Davis killed Butler) (Report, ECF No. 51, PageID 9709). Thus, even if the undersigned were to agree with Davis that "if anything, Mr. Davis shooting Ms. Butler in the heat of the moment during an argument, and *not* that he had a scheme in place designed to implement the calculated decision to kill her[.]" (Objections, ECF No. 57, PageID 9939 (emphasis in original)), such agreement would be immaterial. The role of this habeas Court is [*78] not to stand in the shoes of the factfinder, but to determine whether the trial court's conclusion "was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2). As a finding beyond a reasonable doubt that Davis exhibited prior calculation and design is not unreasonable, Davis's objection is overruled.

III. CONCLUSION

For the foregoing reasons, the Magistrate Judge's Report (ECF No. 51) is ADOPTED in full except as where expressly set forth below. Davis's Petition (ECF No. 6) is DENIED and DISMISSED WITH PREJUDICE. Judgment shall enter in favor of the Warden and against Davis. No reasonable jurist would find that Davis "has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), or would disagree with this conclusion with respect to Claims One through Three, Five through Ten, Twelve through Twenty-One, and Twenty-Six, and Petitioner is denied a certificate of appealability on those claims. However, reasonable jurists could disagree with the undersigned with respect to the cognizability of Claims Twenty-Two through Twenty-Five, and if Davis's argument is correct, he may be able to make the showing required under 28 U.S.C. § 2253(c)(2). Reasonable jurists could [*79] also disagree with the undersigned's conclusions as to Claims Four and Eleven. Davis is granted a certificate of appealability only as to those claims. Because Davis's appeal on these issues do not lack a basis in law or fact, *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Coppedge v. United States*, 369 U.S. 438, 445, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962), Davis is permitted to proceed *in forma pauperis*.

The above-captioned cause is hereby ordered terminated upon the docket of the United States District Court for the Southern District of Ohio.

IT IS SO ORDERED.

March 29, 2021.

2021 U.S. Dist. LEXIS 59175, *79

/s/ Susan J. Dlott

Susan J. Dlott

United States District Judge

End of Document

Davis v. Shoop

United States District Court for the Southern District of Ohio, Western Division

June 16, 2020, Decided; June 16, 2020, Filed

Case No. 2:16-cv-495

Reporter

2020 U.S. Dist. LEXIS 106444 *; 2020 WL 3255145

VON CLARK DAVIS, Petitioner, - vs - TIMOTHY SHOOP, Warden, Chillicothe Correctional Institution, Respondent.

Subsequent History: Adopted by, in part Davis v. Shoop, 2021 U.S. Dist. LEXIS 59175, 2021 WL 1172048 (S.D. Ohio, Mar. 29, 2021)

Prior History: Davis v. Shoop, 2018 U.S. Dist. LEXIS 109758 (S.D. Ohio, July 2, 2018)

Counsel: **[*1]** For Von Clark Davis, Petitioner: Erin Gallagher Barnhart, Federal Public Defender for the Southern District of Ohio, Capital Habeas Unit, Columbus, OH; Jordan S. Berman, Federal Public Defender, Capital Habeas Unit, Columbus, OH.

For Warden Chillicothe Correctional Institution, Respondent: Stephen E. Maher, LEAD ATTORNEY, Office of the Ohio Attorney General, Criminal Justice Section, Capital Crimes Unit, Columbus, OH.

Judges: Michael R. Merz, United States Magistrate Judge. District Judge Susan J. Dlott.

Opinion by: Michael R. Merz

Opinion

REPORT AND RECOMMENDATIONS

This capital habeas corpus case is before the Court for decision on the merits on the Petitioner Von Clark Davis's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (ECF No. 6). The case has been referred to the undersigned for a Report and Recommendations. 28 U.S.C. § 636(b).

On May 16, 1984, Davis was convicted by a three-judge panel¹ of the Butler County, Ohio, Court of Common Pleas of one count of aggravated murder of his girlfriend, Suzette Butler, with a firearm specification, and one count of knowing use of a firearm while under a disability—having previously pled guilty to and been convicted of both shooting with the intent to wound his estranged wife, Ernestine, and later, **[*2]** second degree murder of Ernestine (Petition, ECF No. 6, PageID 8581-82, 8589, citing Trial Tr., ECF No. 5-3, PageID 7641-42, 7645-47, 2nd Resent'g Tr., ECF No. 5-8, PageID 8441-42, 8466). After a penalty phase, which began on May 24, 1984, the panel sentenced Davis to death. *Id.* at PageID 8589, citing State Court Record, ECF No. 4-3, PageID 487-89. In 1988 and 2007, the Supreme Court of Ohio and the United States Court for the Sixth Circuit, respectively, affirmed Davis's convictions, but vacated his death sentence and remanded the matter to the trial court for a new penalty phase. *Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007); *State v. Davis*, 38 Ohio St. 3d 361, 528 N.E.2d 925 (1988).² Twice, three-judge panels resentenced

¹ Judges Henry J. Bruewer, John R. Moser, and William R. Sitsinger

² Given the case's history and complexity, the parties and the Court have long taken to referring to cases in the following ordinal fashion:

1. *Davis I: State v. Davis*, 12th Dist. Butler No. CA84-06-071, 1986 Ohio App. LEXIS 6919, 1986 WL 5989 (May 27, 1986); (**Appeal from conviction and first sentencing to death**)

2. *Davis II: State v. Davis*, 38 Ohio St. 3d 361, 528 N.E.2d 925 (1988) (**Appeal from conviction and first sentencing to death**);

Davis to death (Petition, ECF No. 6, PageID 8595, 8618, citing State Court Record, ECF No. 4-39, PageID 4924-34; 1st Resent'g Tr., ECF No. 5-4, PageID 7728). The judgment from the Second Resentencing became final upon the United States Supreme Court's denying Davis's petition for writ of *certiorari* on March 2, 2015. *Davis XVI*, 135 S.Ct. 1494, 574 U.S. 1202, 191 L. Ed. 2d 452.³ Davis first filed a petition for writ of *habeas corpus* in this Court on April 28, 1997, which was denied by Judge James L. Graham in Orders dated December 23, 1997, and September 4, 2001. *Davis IX*, ECF Nos. 16-1, 16-2. Those orders were overturned **[*3]** by the Sixth Circuit's decision to vacate Davis's death sentence and remand for resentencing. *Davis X*, 475 F.3d 761. Davis filed the instant Petition on August 25, 2016 (ECF No. 6). For the reasons set forth below, it is recommended that the Petition be DENIED.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The factual background has been extensively set forth in previous opinions listed *supra*. The discussion below is limited to those facts germane to the Grounds for Relief in the instant Petition.

Davis, after dropping out of school in the ninth grade, enlisted in the Navy in 1964 when he was seventeen years old, but was discharged seven months later after he went Absent Without Leave and the Navy "determined his emotional instability was 'so severe that he [was] not suitable to be in the US Armed Forces.'" (Petition, ECF No. 6, PageID 8581 (brackets in original, quoting

3. *Davis III: State v. Davis*, 12th Dist. Butler No. CA89-09-123, 1990 Ohio App. LEXIS 4717, 1990 WL 165137 (Oct. 29, 1990) (**Appeal from second sentencing to death**);

4. *Davis IV: State v. Davis*, 63 Ohio St. 3d 44, 584 N.E.2d 1192 (1992) (**Appeal from second sentencing to death**);

5. *Davis V: State v. Davis*, No. CR83-12-0614, 1995 Ohio Misc. LEXIS 117 (Butler Cnty. C.P. Jun. 30, 1995) (State Court Record, ECF No. 4-20, PageID 2158) (**Postconviction petition**)

6. *Davis VI: State v. Davis*, 12th Dist. Butler No. CA95-07-124, 1996 Ohio App. LEXIS 4263, 1996 WL 551432 (Sept. 30, 1996) (**Appeal from postconviction petition**)

7. *Davis VII: State v. Davis*, No. 96-2547, 77 Ohio St. 3d 1520, 674 N.E.2d 372 (TABLE) (Jan. 15, 1997) (**Appeal from postconviction petition**)

8. *Davis VIII: State v. Davis*, 86 Ohio St. 3d 212, 1999- Ohio 160, 714 N.E.2d 384 (1999) (per curiam) (**Appeal from application to reopen direct appeal**)

9. *Davis IX: Davis v. Bagley*, No. C-1-97-402, 2002 U.S. Dist. LEXIS 28977, unreported, included at ECF Nos. 16-1 and 16-2 (S.D. Ohio Jan. 17, 2002) (Graham, J.) (**Habeas petition**)

10. *Davis X: Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007) (**Appeal from habeas petition**)

11. *Davis XI: State v. Davis*, 12th Dist. Butler No. CA2009-10-263, 2011-Ohio-787 (Feb. 22, 2011) (**[*4] Direct appeal from second resentencing**);

12. *Davis XII: State v. Davis*, No. CR83-12-0614, 2012 Ohio Misc. LEXIS 18217 (Butler Cnty. C.P. Nov. 26, 2012), unreported, included at State Court Record, ECF No. 4-47, PageID 6633 *et seq.* (**Second postconviction petition**);

13. *Davis XIII: State v. Davis*, 12th Dist. Butler, No. CA2012-12-258, 2013-Ohio-3878 (Sept. 9, 2013) (**Appeal from second postconviction petition**);

14. *Davis XIV: State v. Davis*, 139 Ohio St. 3d 122, 2014-Ohio-1615, 9 N.E.3d 1031 (**Direct appeal from second resentencing**);

15. *Davis XV: State v. Davis*, 143 Ohio St. 3d 1441, 2015-Ohio-3427, 36 N.E.3d 188 (**Appeal from second postconviction petition**); and

16. *Davis XVI: Davis v. Ohio*, 574 U.S. 1202, 135 S.Ct. 1494, 191 L. Ed. 2d 452 (Mem) (2015) (**Petition for certiorari from direct appeal from second resentencing**).

³Justice Breyer dissented from the denial of certiorari without opinion. 135 S.Ct. at 1494.

2nd Resent'g Tr., ECF No. 5-8, PageID 8442; citing [*5] 2nd Resent'g Tr., ECF No. 5-8, PageID 8441-42, 8466)). He married Ernestine in 1967, but the couple separated in 1969. *Id.* On September 16, 1969, while they were separated, Davis fired four shots at Ernestine, causing her to "suffer[] a bullet wounds (sic) in the right upper arm and in the left hand." (Trial Tr., ECF No. 5-3, PageID 7642). Davis was subsequently charged with and pled guilty to one count of discharging a firearm with the intent to wound Ernestine. *Id.* On December 30, 1970, during an altercation, Davis, by his own admission to law enforcement officers, stabbed and killed Ernestine. *Id.* at PageID 7645-47. In 1971, a mental evaluation was conducted on Davis, in which the psychologist concluded that Davis's "desperate need for relationships triggers paranoia at the prospect of losing them, causing a sudden and dramatic vacillation from love and idealization to anger and hate. This disposition made Mr. Davis prone to 'angry outbursts with very little provocation.'" (Petition, ECF No. 6, PageID 8582, quoting 2nd Resent'g Tr., ECF No. 5-7, PageID 8445). "This evaluation additionally described Mr. Davis as 'unstable and hostile' and 'afraid of his impulses.'" *Id.*, quoting 2nd [*6] Resent'g Tr., ECF No. 5-7, PageID 8445. Davis pled guilty to one count of second-degree murder of Ernestine and served ten years in prison from 1971 until 1981. While incarcerated, Davis exhibited exemplary behavior and obtained numerous educational degrees and certifications. *Id.*, citing Trial Tr., ECF No. 5-3, PageID 7613-15.

Upon his release, Davis began a tumultuous live-in relationship with Suzette Butler. On December 12, 1983, while separated from Butler, Davis asked Wade Coleman and Mark Lovette, his cousin and acquaintance, respectively, to buy a gun and bullets for him. Coleman testified that Davis wanted the gun for protection, but gave no specifics and never mentioned Butler with respect to acquiring the weapon (Trial Tr., ECF No. 5-2, PageID 7313-15). Armed and heavily intoxicated, he entered an American Legion bar in Hamilton, Ohio, where Butler was eating dinner with a friend, Mona Aldridge (Petition, ECF No. 6, PageID 8583, citing Trial Tr., ECF No. 5-2, PageID 7289-92, 7309-13, 7317, 7335-37). Butler and Davis talked privately (and, by outward appearances, calmly) before Aldridge joined them (Trial Tr., ECF No. 5-2, PageID 7348-49). Aldridge testified that at some point, [*7] Butler asked her to watch her personal belongings while she went outside with Davis. Several minutes after Butler and Davis stepped outside, Aldridge reportedly opened the door to the bar, "peeked out[,] and saw "Davis with a gun pointed towards [Butler's] head." (Trial Tr., ECF No. 5-2, PageID 7338, 7353-54). While the police record of Aldridge's statement immediately after the shooting included a statement that she heard Butler and Davis arguing when she peeked outside, she testified at trial that they were not arguing and that she never told the police that. *Id.* at PageID 7358-60. Aldridge further testified that, even though she did not hear gunshots, she ran back inside the American Legion because she was scared, and approximately 90 seconds later, people entered the bar and reported that someone had been shot. *Id.* at PageID 7338-39, 7355.

Sometime between 7:00 and 7:30 that evening, an Anthony Ferguson observed Butler and Davis outside the bar as Ferguson was standing on the corner diagonally across from the American Legion. Ferguson testified that "as soon as [Butler and Davis] walked out the door he turned around and he shot her. And as she fell on the ground he shot her some [*8] more . . . about three or four times." (Grand Jury Tr., ECF No. 5-1, PageID 7128). Ferguson did not call the police but spoke with law enforcement after the crime scene was roped off. *Id.* at PageID 7147-48. However, Ferguson did not testify at trial, and two of the State's trial witnesses, Reginald Denmark and Cozette Massey, who testified that they were near the scene of the crime, testified that they had not seen Ferguson. (Petition, ECF No. 6, PageID 8735, citing Trial Tr., ECF No. 5-2, PageID 7373-74, 7382-83, 7424). Denmark and Massey, who were in a romantic relationship at the time of the murder, indicated that they had left Massey's apartment between 7:15 and 7:30 p.m. and observed Butler and Davis outside the American Legion from across the street; Massey testified that she heard gunfire and saw Davis shoot Butler in the head three times after the initial two gunshots (which she did not witness) sent Butler to the ground (Trial Tr., ECF No. 5-2, PageID 7366-68). Massey further testified that she spoke to the police anonymously immediately after the shooting occurred, and also spoke to the police approximately four days later. During the latter interview, police showed Massey [*9] a photograph of Butler (in isolation, rather than an array of photographs including others), and a photograph of Davis with Butler (again, in isolation). From those photos, Massey identified Butler as the victim and Davis as the man who shot her. *Id.* at PageID 7385-89. When Massey identified Davis in court as the perpetrator, trial counsel moved to strike the identification, arguing that it was the fruit of the photograph shown Massey by the police, which was itself an impermissibly suggestive process. However, the three-judge panel collectively overruled the motion. *Id.* at PageID 7393-94.

Denmark testified that, from across the street next to Massey, he saw Davis quickly take out a gun and fire two shots; at that point, Denmark testified, Butler attempted to say something but fell to the ground, at which point Davis quickly shot her again (Trial Tr., ECF No. 5-2, PageID 7397-98, 7417). Denmark identified Davis while under oath, saying that he had known of Davis at the time of the shooting, having seen him around town, and that there was "never any doubt" that Davis was the man he had seen shooting Butler. *Id.* at PageID 7399-400. At the end of the State's case-in-chief, Davis's counsel [*10] moved for acquittal on the charge of aggravated murder, citing the inconsistent testimony of the above eyewitnesses and arguing that, even if true, there was no "prior

calculation or design" by Davis to kill Butler, which was required under the statute to sustain a conviction for aggravated murder (Trial Tr., ECF No. 5-3, PageID 7445-53, citing Ohio R.Crim.P. 29). The three-judge panel overruled the motion, finding "that there is sufficient evidence here on each element in the crimes charged in the indictment[.]" *Id.* at PageID 7461.

After the Rule 29 Motion was denied, Davis's counsel, John Garretson, set forth Davis' defense with his opening statement. Counsel argued that the evidence would show that Davis had procured the gun and ammunition not for a purpose of violence, but to trade those items to a man named Silky Carr in exchange for dental equipment, as "his trade so to speak that he learned in prison was to be a dental technician." (Trial Tr., ECF No. 5-3, PageID 7463). He also claimed that Carr showed up at the American Legion looking for Butler, who allegedly owed Carr money from drug transactions, and that Davis had left the American Legion while Carr and Butler were talking. *Id.* at 7464. Davis, [*11] testifying on his own behalf, stated that after hearing that Butler had been shot, he went to Lexington, Kentucky, where Carr was living, in an unsuccessful attempt to track the latter down. He testified that, after three days, he turned himself into Lexington police and arranged to have the Hamilton, Ohio, Police Department pick him up and return him to Hamilton. *Id.* at PageID 7539-41. Davis adamantly denied shooting Butler. *Id.* at PageID 7541.

On cross-examination, Davis conceded that he and Butler had separated only five days before the murder (Trial Tr., ECF No. 5-3, PageID 7542-43). He further conceded that he did not have the bullets to make the firearm functional, such that he could give the gun to Carr, until approximately three hours prior to Butler's being killed, and that nobody else besides Davis was responsible for the gun and bullets prior to that time. Further, he stated that despite giving the gun to Carr in the late afternoon in Hamilton, he and Carr had agreed that Carr would not give him the dental equipment until between 8:30 and 9:30 that evening in Middletown, Ohio. *Id.* at PageID 7556-58.

Davis was indicted by a Butler County, Ohio, grand jury, with a Caucasian [*12] foreperson, on January 6, 1984, the aforementioned charges of aggravated murder with a capital specification and use of a firearm after having been convicted of a violent felony (State Court Record, ECF No. 4-1, PageID 72). On January 17, 1984, Davis, via his attorney Michael Shanks, filed a Motion to Sever the charged counts and a Motion to Dismiss and to Inspect the Grand Jury Transcript. *Id.* at PageID 75-76, 82-102. On February 1, 1984, Davis filed a Motion to Bifurcate the Trial/Motion *in Limine* to separate the trials for Count One (aggravated murder) and Count Two (unlawful use of firearm) or, in the alternative, to prevent the introduction of evidence as to the reason he was under a firearm restriction (*i.e.*, the murder of Ernestine) "only after a finding of guilty is returned on the charge of aggravated murder[.]" *Id.* at PageID 127. On May 4, 1984, Judge Bruewer overruled all the above motions (State Court Record, ECF No. 4-3, PageID 428-31). Subsequently, on advice of counsel, Davis waived his right to a jury trial in favor of being tried before the three-judge panel of Judges Bruewer (acting as Presiding Judge), Moser, and Stitsinger. *Id.* at 432-33, citing Ohio Rev. Code § 2945.06. On May 16, 1984, having heard [*13] the testimony detailed above, the panel, after approximately ninety minutes of deliberations, found Davis guilty on both counts. *Id.* at PageID 473; Trial Tr., ECF No. 5-3, PageID 7607.

On May 29, 1984, the panel convened a sentencing hearing, at which John Bohlen, Chief of the Adult Probation Department, testified as a defense witness (Trial Tr., ECF No. 5-3, PageID 7610). Bohlen, in preparing the presentence report, also reviewed records from Davis's previous incarceration and the pre-parole psychological evaluation conducted in December 1980. In that evaluation, Davis was classified as having "Compulsive Personality Disorder," but that classification was qualified by the evaluator's conclusion that "the results of personality testing are not indicative of serious personality disorientation." *Id.* at PageID 7610-12. He testified that Davis, despite having only an eighth grade education upon incarceration at London Correctional Institution ("LCI"), went through dental technician training and obtained a General Equivalency Diploma ("GED") by March 1973, Associate's Degree in Business Administration, and vocational training in masonry and as an automobile mechanic. *Id.* at PageID 7612-14. [*14] Bohlen concluded by stating that Davis had no instances of discipline or misconduct while incarcerated. *Id.* at PageID 7614-15. Charles and Allister Tipton, Davis's stepfather and mother respectively, testified to Davis's good character both while incarcerated and when he lived with them upon release. *Id.* at PageID 7615-25.

Roger Fisher, Ph.D., director of the Butler County Center for Forensic Psychiatry, testified as to his May 21, 1984, evaluation of Davis and his review of previous psychological and psychiatric records (Trial Tr., ECF No. 5-3, PageID 7625, 7627-28). Among those records was an April 27, 1978, evaluation done by LCI Psychological Services, in which the psychologist stated that his "basic impression of Davis is largely that of active-detached individual with schizoid trends[.]" *Id.* at PageID 7630. Dr. Fisher also reviewed a 1980 evaluation conducted by LCI Psychological Services, which "indicated that the over all (sic) impression is that of an individual who is best classified under the heading of Compulsive Personality Disorder[.]" *Id.* Dr. Fisher indicated that he agreed with both assessments, "even as we see Mr. Davis today." *Id.* at PageID 7631. However, on cross-examination, [*15] Dr. Fisher admitted that both reports termed Davis a "minimal risk" to persons and property[.] *Id.* at PageID 7632. Importantly, Dr. Fisher

opined that, at the time when Davis allegedly murdered "Butler, he was free of . . . mental disease or defect which would have impaired his capacity to appreciate the criminality of any conduct in which he engaged or to have conformed his conduct to the requirement of the law[.]" and that Davis "was then and is now, free of any emotional disease or defect, of the mind[.]" *Id.* at PageID 7633-34, 7635. The State used this conclusion to support its argument that the "mental disease or defect" mitigation factor was not applicable; nor, for that matter, were any other mitigation factors. *Id.* at PageID 7650.

Shanks, in his closing argument on behalf of Davis, noted the contradictory eyewitness testimony and argued that, even if Davis had killed Butler, the evidence suggested that it was a crime of passion, lacking the prior calculation or design of an intentional killing (Trial Tr., ECF No. 5-3, PageID 7653-55). He also argued that Davis's past and present mental illness were significant mitigating factors, and that if the panel chose "not to impose the [*16] ultimate punishment, . . . then Mr. Davis, in all honesty, as this panel well knows[,] is going to die in prison in any event." *Id.* at PageID 7655-57. The panel imposed a death sentence on May 19, 1984. *Id.* at PageID 7672.

II. POST-SENTENCING PROCEDURAL HISTORY

A. Initial Direct Appeal

1. Twelfth District Court of Appeals

As Butler's murder occurred before January 1, 1995, Petitioner first appealed to the Twelfth District Court of Appeals, rather than directly to the Supreme Court of Ohio. *Davis I*, 1986 Ohio App. LEXIS 6919, 1986 WL 5989. On November 13, Attorney Timothy Evans filed Petitioner's initial brief, (State Court Record, ECF No. 4-4, PageID 546), raising seven assignments of error, with numerous sub-assignments:

FIRST ASSIGNMENT OF ERROR: The trial court erred in failing to dismiss the death penalty specifications against the Defendant because the death penalty is unconstitutional.

1. The death penalty as authorized by the Ohio Revised Code, deprives the Defendant of his life for that [sic] due process of law guaranteed in Article One, Section 16 of the Ohio Constitution (sic) and the Fourteenth Amendment to the United States Constitution.;
2. Ohio's death penalty violates the Eighth Amendment of the United States Constitution and Ohio Constitution, Article One Section 9 prohibiting the infliction of cruel and unusual punishment.;
3. The death penalty is arbitrarily and capriciously [*17] inflicted, constituting a denial of equal protection of the laws under the Eighth and Fourteenth Amendments of the U.S. Constitution and Article One, Section 9 and 16 of the Ohio Constitution.;
4. The death penalty sections of the Ohio Revised Code deprive the Defendant of due process of law under the Fourteenth Amendment and Article One, Section 16 of the Ohio Constitution and constitute cruel and unusual punishment under the Eighth Amendment and Article One, Section 9 of the Ohio Constitution as it permits imposition of the death penalty on a less than adequate showing of guilt. It is also unconstitutional because it requires proof of aggravating circumstances during the guilt determination state of death penalty deliberations.;
5. The death penalty is unconstitutional because it denies the Defendant the right to a trial before an impartial jury as guaranteed by the Sixth and Fourteenth Amendment to the U.S. Constitution and Article 1, Section 10 of Ohio Constitution.;
6. The death penalty is unconstitutional because it has a chilling effect on the Defendant's right to a jury trial guaranteed by the Sixth and Fourteenth Amendment to the U.S. Constitution and Article 1, Section 10 of the Ohio Constitution.;
7. Section 2945.25(C) of the Ohio Revised Code violates the Defendant's right to an impartial jury on the determination of guilt.;
8. The Ohio death penalty fails to provide a sentencing authority with an option to choose a life sentence when there are aggravating circumstances and no mitigating circumstances and is, therefore, unconstitutional under the Eighth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 9 and 16 of the Ohio Constitution.;
9. The death penalty authorized by the Ohio Revised [Code] violates the Eighth Amendment and the Fourteenth Amendment clauses of the U.S. Constitution and the cruel and unusual punishment provisions and due process clauses of the State

2020 U.S. Dist. LEXIS 106444, *18

Constitution in that several of the aggravating circumstances set forth in Ohio Revised Code 2929.04(A) are overbroad and vague and fail to reasonably justify the imposition of the ultimate sentence.

SECOND ASSIGNMENT OF ERROR: The court erred in failing to allow the Defendant to inspect the grand jury transcript.

1. Where the Defendant moves to dismiss and to inspect the grand jury transcript for purposes of showing that the indictment against him was not based upon probable cause and that the indictment was founded on illegal and incompetent evidence, the Defendant has a right to inspect the Grand Jury Testimony.

THIRD ASSIGNMENT OF ERROR: The court erred in denying Defendant's motion to bifurcate the trial and sever the charges.

1. Where a defendant is charged with aggravated murder with a specification that he had previously been convicted of murder and further in the second count of the indictment charged with having firearms while under disability, is it improper for the Court to try all charges together and to [*19] refuse to bifurcate the trial and to have the proof of specification at the sentencing hearing if the defendant is found guilty and further to refuse to sever the charge of having weapons while under disability so that no evidence would be introduced as to defendant's prior crimes.

2. Where the Defendant is charged with aggravated murder with a specification that he has previously committed a homicide and also while having weapons while under a disability, Defendant's right to a trial by an impartial jury is violated by requiring all charges to be tried at once, in violation of the Ohio Revised Code, so as to allow the prosecution to introduce by way of evidence on having weapons while under disability, evidence which could not otherwise be introduced at the trial in chief.

FOURTH ASSIGNMENT OF ERROR: The judgment was against the manifest weight of evidence and contrary to law.

1. Where the Defendant, in an aggravated murder case is bound over to the grand jury and indicted on the testimony of one witness and the State then fails to present that witness at Trial, but instead presents other witnesses who contradict the fact that that witness was even at the scene, the judgment is against [*20] the manifest weight of the evidence and the credibility of the State's case fails entirely; and

2. Where the State presents no evidence that the Defendant in any way plotted, schemed or planned to kill the deceased, and there is no evidence of prior calculation and design the Defendant may only be convicted of murder and not aggravated murder.

FIFTH ASSIGNMENT OF ERROR: The court erred in not dismissing the specification of the indictment that the Appellant had committed a prior homicide, on the basis that such specification was too remote in time to be used against Appellant.

1. Where the prior murder conviction of the Defendant occurred thirteen (13) years prior to the homicide in question, to allow such homicide to be used as a basis of an aggravating circumstance is improper and should have been stricken from the indictment.

SIXTH ASSIGNMENT OF ERROR: The court erred in imposing the death penalty as the court found as aggravating factors not listed in the Ohio Revised Code and factors which were improper for consideration under the Ohio Revised Code.

1. Where the court finds as aggravating circumstances four factors which are not listed in the Ohio Revised Code as aggravating circumstances, [*21] and not charged in the indictment as specifications, and considers these circumstances in imposing death, the Court errs in imposing the death penalty and the death penalty must be reversed.

SEVENTH ASSIGNMENT OF ERROR: Under the proportionality review required by this court, the penalty imposed upon Von Clark Davis is out of proportion to the other sentences given for similar crimes in this court.

1. Under ORC 2929.05, where this Court is required to consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, the penalty imposed upon Von Clark Davis is excessive.

(State Court Record, ECF No. 4-4, PageID 546-53).

The Twelfth District rejected all seven Assignments of Error and affirmed the trial court's death sentence. *Davis I*, 1986 Ohio App. LEXIS 6919, 1986 WL 5989. The panel noted that Ohio's death penalty scheme had been generally upheld as constitutional, and thus the First Assignment and each of its sub-assignments were without merit. 1986 Ohio App. LEXIS 6919, [WL] at *2-5 (citations omitted). As to the Second Assignment, the panel concluded that Davis had not demonstrated a particularized need that outweighed the general need for grand jury secrecy. 1986 Ohio App. LEXIS 6919, [WL] at *5-6, citing Ohio R.Crim.P. 6(E); *United States v. Calandra*, 414 U.S. 338, 344-45, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974); *State v. Greer*, 66 Ohio St. 2d 139, 420 N.E.2d 982

(1981). The Appellate court found that the Third Assignment [*22] (failure to sever) was without merit; as the charges arose out of the same transaction, joinder was proper, and joinder raised only a risk of prejudice, one which never materialized: "The evidence of the prior convictions was simple and distinct; there was no elaboration as to the details of appellant's prior second degree murder conviction." 1986 Ohio App. LEXIS 6919, [WL] at *7-8, citing Ohio Rev. Code § 2941.04; Ohio R.Crim.P. 8(A), 14. Similarly, the panel concluded that, because "evidence of appellant's 1971 second degree murder conviction was here offered, in connection with R.C. 2929.04(A)(5), simply to demonstrate that appellant had, in fact, previously been convicted of an offense an essential element of which was the purposeful killing of another[.]" Davis's Fifth Assignment (not dismissing the specification in the indictment that he had committed a prior homicide) was unavailing 1986 Ohio App. LEXIS 6919, [WL] at *10. The Twelfth District found, contrary to Davis's Fourth Assignment, that there was sufficient evidence that his murder of Butler was the product of prior calculation and design, despite Davis's state of mind at the time not being established. 1986 Ohio App. LEXIS 6919, [WL] at *9, quoting *State v. Davis*, 8 Ohio App. 3d 205, 206-07, 8 Ohio B. 276, 456 N.E.2d 1256 (8th Dist. 1982); citing *State v. Robbins*, 58 Ohio St. 2d 74, 388 N.E.2d 755 (1979).

On Davis's Sixth Assignment, the appellate panel concluded that the three-judge panel's findings of five aggravated [*23] circumstances was improper because they were not strictly confined to the eight statutorily permitted aggravating factors. *Davis I*, 1986 Ohio App. LEXIS 6919, 1986 WL 5989 at *5, 10-11, citing *Godfrey v. Georgia*, 446 U.S. 420, 428-29, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980); Ohio Rev. Code §§ 2929.03(F), 2929.04(A). Nonetheless, the Twelfth District concluded that "although the trial court improperly considered non-statutory aggravating circumstances, this does not require that appellant's sentence be set aside[.]" as there was sufficient evidence that the validly considered aggravating circumstances outweighed the mitigating factors. 1986 Ohio App. LEXIS 6919, [WL] at *12, quoting *State v. Jenkins*, 15 Ohio St. 3d 164, 199-200, 15 Ohio B. 311, 473 N.E.2d 264 (1984); citing *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). The panel also overruled his Seventh Assignment, conducting its statutorily mandated proportionality analysis under Ohio Rev. Code § 2929.05(A) and opining "that the death penalty is appropriate in this case *sub judice* and is not excessive or disproportionate to the penalty imposed in similar cases." *Id.* (citations omitted).

2. Supreme Court of Ohio

Davis then appealed to the Supreme Court of Ohio, raising as propositions of law the same seven assignments of error raised with the Twelfth District, and added Proposition of Law VIII: "Where the testimony of the State's Witness is contradictory to the point that credibility is questionable and the state presents no evidence of prior calculation and design, the conviction of aggravated murder [*24] was against the manifest weight of the evidence." (State Court Record, ECF No. 4-6, PageID 740). The Supreme Court of Ohio sustained Davis's Seventh Proposition of Law, noting that "[t]he trial essentially made 'prior calculation and design' an aggravating circumstance. It is an element of aggravated murder, but it is not an aggravating circumstance listed in R.C. 2929.04(A)." *Davis II*, 38 Ohio St. 3d at 372. The panel also rejected the State's contention "that consideration of nonstatutory aggravating circumstances does not constitute reversible error." *Id.* at 369, citing *Barclay v. Florida*, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983); *Zant*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235. In both *Barclay* and *Zant*, the United States Supreme Court "held that review of such a defect required an inquiry into 'the function of the finding of aggravating circumstances under [state] law and the reason why this aggravating circumstance is invalid.'" *Id.* at 370, quoting *Barclay*, 463 U.S. at 951; citing *Zant*, 462 U.S. at 884. The Supreme Court of Ohio noted that "Florida's statutory framework for implementation of capital punishment is similar to Ohio's[.]" *id.*, citing *Jenkins*, 15 Ohio St. 3d at 207, and that, in *Barclay*, the death sentence was upheld despite the consideration of improper aggravating circumstances, as "the [United States] Supreme Court was persuaded by the fact that the evidence of the defendant's record was otherwise admissible, [*25] and that in reviewing similar errors, the Florida Supreme Court did not mechanically apply a harmless error analysis." *Id.*, citing *Barclay*, 463 U.S. at 956-58.

"However," the court continued, "it is significant to note that in *Barclay*, unlike the case at bar, the trial court did *not* find any mitigating factors to be present[.]" *Davis II*, 38 Ohio St. 3d at 370 (emphasis in original), and that when there are mitigating factors found, "the case will generally be remanded for resentencing." *Id.*, citing *Elledge v. State*, 346 So.2d 998, 1002-03 (Fla. 1977). Remand was necessary, the court concluded, because the aggravating circumstances in Ohio Rev. Code §2929.04(A) were meant to guide the *sentencing* court; accordingly, the statutorily-mandated independent review conducted by the *appellate* court, even if accurate, cannot function as a "cure-all" for an improper trial court analysis. *Id.* at 372. However, the court affirmed Davis's conviction, and stated that "[w]e have *not* found the evidence in the instant action to be legally insufficient to justify imposition of the death penalty." *Id.* at 373 (emphasis in original). Accordingly, the court remanded the case for a "resentencing hearing at which the state may seek

whatever punishment is lawful, *including, but not limited to, the death sentence.*" *Id.* (emphasis added). Finally, the court found that, [*26] because Davis was sentenced initially by a three-judge panel, and would be resentenced by a three-judge panel, the court's holding in *State v. Penix*, 32 Ohio St. 3d 369, 371, 513 N.E.2d 744 (1987), which barred reimposition of the death penalty when the initial sentencing and resentencing both proceeded before a jury, did not apply to Davis. *Id.*; *see also id.* at 374 (Holmes, J., concurring in part and dissenting in part):

The sole concern of the majority in *Penix* was that Ohio's death penalty statute did not expressly provide for either re-panels the original sentencing jury or impaneling a new jury upon remand from an appellate court, coupled with the realization of the practical difficulties inherent in such an undertaking. Such practical concerns are obviously not present in trials held before a three-judge panel.

B. First Resentencing

On remand, Davis was represented by Timothy Evans, Garretson, and Michael Shanks, and promptly moved to withdraw his jury waiver and to be resentenced to life imprisonment (State Court Record, ECF No. 4-11, PageID 1119-22). Davis moved to disqualify the three-judge panel and, in the alternative, prohibit any such panel from imposing a death sentence in light of *Penix*. *Id.* at PageID 1125-26, citing 32 Ohio St. 3d 369, 513 N.E.2d 744. Davis argued that, [*27] were he to be resentenced by a three-judge panel, he would be disadvantaged vis-à-vis an inmate for whom a jury would consider the imposition of the death penalty upon resentencing, as the panel would "not come to this resentencing with the same state of mind, knowledge of this case, nor disposition to hear this matter as when the case was originally heard." *Id.* at PageID 1126. However, in a July 25, 1989, affidavit, Daniel G. Eichel, the First Assistant Prosecuting Attorney for Butler County, averred that during the March 2, 1988, oral argument for *Davis II*, Evans, representing Davis, "was asked by one of the Justices whether the death penalty could again be sought on remand; Mr. Evans replied in the affirmative, and agreed with the Justice's comment that *Penix* would not apply because this was a three-judge panel rather than a jury trial." *Id.* at PageID 1149.

Judges Bruewer, Moser, and Stitsinger were again empaneled to conduct the resentencing, and on July 31, 1989, the panel overruled all of Davis's motions (State Court Record, ECF No. 4-11, PageID 1168-69). The first resentencing of Davis began with the resumption of deliberations on August 4, 1989, and on August 7, the panel resentenced [*28] Davis to death, finding the following mitigating factors to be "of slight weight":

- 1) The Defendant adjusted well to prison routine and during his stay in prison, obtained a high school GED and an associate degree in Business Administration, and studied for and worked as a dental technician.
- 2) There has always been a good family relationship between the Defendant and all members of his family, including his stepfather.
- 3) Since his release on parole, he has maintained at least partial employment.
- 4) As testified by the psychologist, Defendant has a compulsory (sic) personality disorder or explosive disorder which may have contributed to the violence in this case.

Id. at PageID 1176-77. The panel found that those mitigating factors "were overwhelmingly counterbalanced and outweighed by the aggravating circumstance of his prior conviction for purposeful killing, demonstrating rather convincingly that a prior life sentence was no deterrent at all for this Defendant." *Id.* at PageID 1177.

1. Twelfth District Court of Appeals

On appeal from the sentence on remand, Davis was represented by Randall M. Dana of the Ohio Public Defender (State Court Record, ECF No. 4-12, PageID 1227), and raised [*29] the following Assignments of Error:

FIRST ASSIGNMENT OF ERROR: The trial court erred to the prejudice of Appellant Davis by failing to allow him to present all available, relevant mitigating evidence at his resentencing hearing.

1. A capital defendant, facing the possibility of a death sentence, must be entitled to introduce all available relevant mitigating evidence at a resentencing hearing.

SECOND ASSIGNMENT OF ERROR: The trial court erred to the prejudice of Appellant Davis by separating during its sentencing deliberations.

1. A sentence which is determined by a three-judge panel, where the panel conducted part of their deliberations individually and separate from one another, is a violation of due process of law as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

THIRD ASSIGNMENT OF ERROR: The trial court erred to the prejudice of Appellant Davis in overruling his motion to prohibit three-judge panel from resentencing to death and his motion to withdraw jury waiver.

1. The fact that a capital defendant tried before a three judge panel is eligible for the death penalty at a resentencing hearing, while a capital defendant tried before a jury is not, violates the principles of the due process [*30] and equal protection clauses; and
2. The jury waiver executed by Appellant Davis was not knowing, intelligent, and voluntary...

FOURTH ASSIGNMENT OF ERROR: The death sentence imposed in Defendant-Appellant (sic) case was inappropriate and disproportionate and violated the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

1. The imposition of a death sentence is inappropriate and a violation of Appellant's rights as guaranteed by the Eighth and Fourteenth Amendments and Sections 9 and 16, Article I of the Ohio Constitution where the sentencer does not consider all of the relevant mitigating evidence and accord each mitigating factor its proper weight; and
2. A sentence of death is disproportionate and a violation of Appellant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution where it is shown to be excessive when compared to cases already decided by the court in which the death penalty has been imposed.

FIFTH ASSIGNMENT OF ERROR: The trial court erred in imposing the death sentence on Appellant Davis because the death penalty scheme in Ohio is unconstitutional.

1. The death penalty constitutes cruel and unusual punishment;
2. Ohio's capital punishment scheme allows for imposition of the death penalty in an arbitrary and discriminatory manner;
3. The death penalty violates due process;
4. Ohio's capital punishment scheme is unconstitutional [*31] because it requires proof of mitigating factors by a preponderance of evidence;
5. Ohio's death penalty does not ensure a sufficiently individualized determination in sentencing;
6. Ohio's capital felony murder scheme fails to narrow those offenders eligible for the death penalty;
7. The death penalty scheme imposes an impermissible risk of death on capital defendant's (sic) who choose to exercise their right to a jury trial;
8. Adequate appellate review of death sentences is precluded because trial courts do not file life [sentence] opinions;
9. Ohio courts' proportionality review fails to meaningfully distinguish between those capital defendants for whom death is appropriate, and those who are not; and
10. Ohio's capital statutes are mandatory in nature.

(State Court Record, ECF No. 4-12, PageID 1283-93).

The Twelfth District overruled all five Assignments on October 29, 1990. *Davis III*, 1990 Ohio App. LEXIS 4717, 1990 WL 165137. As to the First Assignment, the panel held that "upon remand the lower court is required to proceed from the point at which the error occurred." 1990 Ohio App. LEXIS 4717, [WL] at *2, citing *State ex rel. Stevenson v. Murray*, 69 Ohio St. 2d 112, 113, 431 N.E.2d 324 (1982). As the reversible error (improper weighing of evidence) occurred *after* the submission of evidence, the procedural posture on remand was for the trial court to [*32] weigh properly the evidence *already submitted in the first sentencing phase*. "As the supreme court expressly held, a mere reweighing was all that was required." *Id.*, citing *Davis II*, 38 Ohio St. 3d at 373. Moreover, and contrary to the Second Assignment, as the "three-judge panel . . . is presumed to consider only the relevant material and competent evidence in arriving at a judgment, unless the contrary appears from the record[.]" it was not error for the panel not to remain sequestered during the deliberative period between August 4 and August 7, 1989. 1990 Ohio App. LEXIS 4717, [WL] at *3, citing *State v. White*, 15 Ohio St. 2d 146, 151, 239 N.E.2d 65 (1968); Ohio Rev. Code § 2945.33.

The panel also overruled both sub-assignments in Davis's Third Assignment, holding that his initial jury waiver was knowing, intelligent, voluntary, and not the result of misinformation, and "[t]he fact that subsequent decisional law may or may not have affected the tactical decision to waive the right to trial by jury provides no avenue of relief for appellant at this stage of the proceedings." *Davis III*, 1990 Ohio App. LEXIS 4717, 1990 WL 165137, at *3. "With respect to the ability of the three-judge panel to reimpose the death penalty, . . . the supreme court ruled that on remand 'the state may seek whatever punishment is lawful, including, but not limited to, the death sentence.' We have no discretion to [*33] disregard this mandate." *Id.*, quoting *Davis II*, 38 Ohio St. 3d at 373; citing *Nickell v. Gonzalez*, 34 Ohio App. 3d 364, 519 N.E.2d 414, *Nolan v. Nolan*, 11 Ohio St. 3d 1, 11 Ohio B. 1, 462 N.E.2d 410, syllabus (1984). In rejecting Davis's Fourth Assignment that the sentence imposed was disproportionate, the panel evaluated three other, purportedly similar, cases in which death sentences were imposed, and "[i]n comparing the facts and circumstances . . . with the instant case, we cannot say that the sentence of death is excessive." 1990 Ohio App. LEXIS 4717, [WL] at *4, citing *State v. Lawson*, No. CA8-05-044, 1990 Ohio App. LEXIS 2195, unreported (Ohio App. 12th Dist. Jun. 4, 1990); *State v. Watson*, No. CA88-02-014, 1989 Ohio App. LEXIS 1165, 1989 WL 30739 (Ohio App. 12th Dist. Mar. 31, 1989), *aff'd in part and rev'd in part*, *State v. Watson*, 61 Ohio St. 3d 1, 572 N.E.2d 97 (1991); *State v. DePew*, No. CA85-07-075, 1987 Ohio App. LEXIS 7724, unreported (Ohio App. 12th Dist. Jun. 29, 1987), *aff'd*, *State v. DePew*, 38 Ohio St. 3d 275, 528 N.E.2d 542 (1988). In so holding, the panel also purported to discharge its statutorily-mandated independent review obligation. *Id.*, citing Ohio Rev. Code § 2929.05(A); *State v. Steffen*, 31 Ohio St. 3d 111, 31 Ohio B. 273, 509 N.E.2d 383 (1987). The panel summarily dismissed Davis's Fifth Assignment and arguments that Ohio's death penalty scheme is unconstitutional, noting that "[e]ach of the . . . arguments was considered and rejected" by the Supreme Court of Ohio. 1990 Ohio App. LEXIS 4717, [WL] at *5 (citations omitted).

2. Supreme Court of Ohio

In his appeal to the Supreme Court, Davis was represented by Dana, Joann Bour-Stokes, and Linda Prucha (State Court Record, ECF No. 4-14, PageID 1489), and raised [*34] as Propositions of Law the Assignments of Error he had raised to the Twelfth District. *Id.* at PageID 1490-97. The Supreme Court of Ohio rejected all of Davis's Propositions and, in its own independent review, found the death sentence to be proportionate and appropriate. *Davis IV*, 63 Ohio St. 3d at 50-51, citing Ohio Rev. Code § 2929.04(A)(5); *State v. Mapes*, 19 Ohio St. 3d 108, 19 Ohio B. 318, 484 N.E.2d 140 (1985), *overruled on other grounds in State v. DePew*, 38 Ohio St. 3d 275, 285, 528 N.E.2d 542 (1988), *and vacated in part on other grounds by Mapes v. Coyle*, 171 F.3d 408 (6th Cir. 1999), and *Mapes v. Tate*, 388 F.3d 187 (6th Cir. 2004).

C. First Post-Conviction Petition

1. Application and Denial at Trial Court

On October 8, 1993, Davis, represented by Bour-Stokes, James Kura, and Prucha, filed a Petition to Vacate or Set Aside Sentence pursuant to Ohio Revised Code § 2953.21 ("Initial Petition"), raising twenty-eight causes of action (State Court Record, ECF No. 4-17, Page ID 1824-64, ECF No. 4-18, PageID 1865-1934.). On October 18, 1993, the State filed an Answer and Motion to Dismiss, arguing that twenty-seven of the causes were barred by *res judicata*, as they were raised on direct appeal and adjudicated on the merits against Davis, or they were issues that could and should have been raised on direct appeal but were not (State Court Record, ECF No. 4-20, PageID 2037-39, citing Ohio Rev. Code § 2953.21; *Greer*, 39 Ohio St. 3d at 244; *State v. Perry*, 10 Ohio St. 2d 175, 179-80, 226 N.E.2d 104 and syllabus (1967). The State claimed that the following causes of action were barred by *res judicata* and [*35] otherwise were foreclosed as a matter of law by *Davis IV*:

1. First: Trial court overruling request for inspection of grand jury transcript;
2. Second: Insufficiency of evidence to support conviction;
3. Third: Refusal to sever charges in the indictment;
4. Fourth: Capital specification was too remote in time;
5. Sixth: Refusal to allow introduction of additional mitigation evidence in first resentencing;
6. Seventh: Improper review as to the propriety of the death sentence by the Twelfth District;
7. Eighth: Impropriety of death sentence;
8. Ninth: Failure by three-judge panel to sequester during deliberations in first resentencing;
9. Tenth: Failure to allow Davis to withdraw his jury waiver prior to first resentencing;

10. Eleventh: The statutorily-mandated appellate review for proportionality is "fatally flawed," as the comparators are only those cases in which a death sentence was also imposed⁴;
11. Twelfth: Ohio's death penalty legislation is unconstitutional;
12. Fourteenth: No meaningful independent appellate review;
13. Twenty-Second: Conviction "was obtained through the use of an unnecessarily suggestive identification procedure";
14. Twenty-Third: Death sentence is defective due to introduction [*36] of improper rebuttal testimony at sentencing phase in first sentencing;
15. Twenty-Sixth: Davis's prior conviction in 1971 for purposeful killing, was an improper death specification;
16. Twenty-Seventh: IATC for failure to investigate the validity of the death specification; and
17. Twenty-Eighth: Failure to allow Davis to introduce additional mitigation evidence at first resentencing.

Id. at PageID 2039-54.

Additionally, the State argued that the following claims were waived for failure to raise on direct appeal:

1. Fifth: Ineffective assistance of trial counsel ("IATC") in advising Davis to waive his right to a jury trial;
2. Ninth: *See infra*;
3. Thirteenth: Improper weighing of mitigation evidence in first resentencing⁵;
4. Fifteenth: Appellate presumption that a three-judge panel considers "only relevant, material and admissible evidence," and that they need not worry about joinder of offenses or sequestration during deliberations as would a jury, constituted unconstitutional deference;
5. Sixteenth: Ohio Revised Code § "2929.03(D)(3) is unconstitutional in failing to prescribe a standard of proof for three-judge panels"⁶;
6. Seventeenth: Original jury waiver was ineffective [*37] because "he was not informed that by waiving a jury he subjected himself to a greater risk of being sentenced to death";
7. Eighteenth: Original jury waiver was ineffective because he was misinformed of the respective burdens of proof by which the State would have to prove Davis's guilt to a jury versus a three-judge panel;
8. Twentieth: Original jury waiver was ineffective because Davis only made waiver after the improper denial of his motion to sever; and
9. Twenty-First: IATC in connection by failing to preserve an option for Davis to withdraw his jury waiver.

(State Court Record, ECF No. 4-20 PageID 2040-54).

The State did not argue waiver or *res judicata* as to Davis's Nineteenth Cause of Action—that his jury waiver was ineffective because "he was not informed that Judges Stitsinger and Moser, as attorneys[,] prior to their election to office as judges of the Butler County Common Pleas Court, had represented the Federal National Mortgage Company in a 1970 foreclosure action against defendant and his then-wife, Ernestine Davis[.]" (State Court Record, ECF No. 4-20, PageID 2049). Nonetheless, the State claimed that the claim failed as a matter of law because: (i) the Judges' past [*38] work was not material to their adjudication of Davis's criminal charges; (ii) Davis had not alleged prejudice; (iii) there is no evidence in the record that his waiver was not informed, knowing, and voluntary; and (iv) his "self-serving affidavit, that he would not have waived a jury had he been informed of such facts, is insufficient to warrant an evidentiary hearing." *Id.* The State did not expressly address Davis's Twenty-Fourth and Twenty-Fifth Causes of Action

⁴The State also argued that the Eleventh, Fourteenth, and Fifteenth Causes were "claim[s] relating to the validity of a judgment rendered in the Court of Appeals and is [sic] not cognizable by this court upon postconviction proceedings pursuant to R.C. 2953.21" (State Court Record, ECF No. 4-20, PageID 2043-45, citing *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992), *superseded by* Ohio R.App.P. 26(B)).

⁵The State also argued that Davis had failed to state a claim upon which relief could be granted, because "the trial court is not required to accept as mitigating everything offered by the defendant and accepted into evidence," and "such error, if any, by the trial court in its sentencing decision may be cured by the independent sentence assessments in the Court of Appeals and Ohio Supreme Court." (State Court Record, ECF No. 4-20, PageID 2044).

⁶The State also noted that the statute at issue *does* set forth a burden of proof (State Court Record, ECF No. 4-20, PageID 2046, citing Ohio Rev. Code §2929.03(D)(2-3)).

which were, respectively, his inability to introduce the testimony of lay witness Elbert Avery, and the panel's denial of his request for expert assistance at the first resentencing (State Court Record, ECF No. 4-18, PageID 1919-22).

On June 28, 1994, Judge Matthew J. Crehan of the Butler County, Ohio, Court of Common Pleas conducted a hearing on the State's Motion to Dismiss and, on November 1, 1994, issued an order dismissing all claims except for the Nineteenth Cause of Action (State Court Record, ECF No. 4-20, PageID 2093, 2099-2100). Judge Crehan rejected Davis's argument that "the defense of *res judicata* is invalid in a post-conviction action due to the classification of the action as a civil proceeding governed [*39] by Civ. R. 12(B),]" noting that "[t]he law in Ohio as to the defense of *res judicata* in a post-conviction action has a long history." *Id.* at PageID 2095-96, citing *State v. Lentz*, 70 Ohio St. 3d 527, 529, 1994-Ohio-532, 639 N.E.2d 784 (1994); *Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104. He then concluded "that each of the petitioner's enumerated Causes of Action, except the Nineteenth Cause of Action, were raised or could have been raised at trial or on direct appeal, and were adjudicated against the defendant, hence *res judicata* bars Von Clark Davis's petition for postconviction relief" on all causes of action except the Nineteenth, which required evidence *dehors* the record to adjudicate. *Id.* at PageID 2096, 2098.

Judge Crehan conducted an evidentiary hearing on the Nineteenth Cause of Action on January 11, 1995 (State Court Record, ECF No. 4-20, PageID 2121). During the hearing, Judges Moser and Stitsinger testified that they were involved more than 250 foreclosure actions in the years 1969 and 1970 and did not recall the proceedings against Davis and Ernestine, even after the action was brought to their attention in 1984. *Id.* at PageID 2159-60. Judge Crehan concluded that, because there was no indication that Judges Moser and Stitsinger's involvement affected the proceedings or the judgment in the [*40] 1984 trial and sentencing and 1989 first resentencing, they did not exhibit the "bias, prejudice, or other disqualifying factors" that would have made their presence on the panel improper. *Id.* at PageID 2161. Further, as Judges Moser and Stitsinger were unaware of their past litigation against Davis at the time of Davis's jury waiver, their failure to inform Davis did not negate the validity of his jury waiver. *Id.* at PageID 2161-62, citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 281, 63 S. Ct. 236, 87 L. Ed. 268 (1942); *State v. Jells*, 53 Ohio St. 3d 22, 26, 559 N.E.2d 464 (1990). Concluding "that there was no infringement of Petitioner's Constitutional rights so as to render the judgements in this case to be void or voidable[.]" Judge Crehan dismissed the Nineteenth Cause of Action and, consequently, his Petition as a whole. *Id.* at PageID 2162.

2. Twelfth District Court of Appeals

Davis appealed the trial court's denial of his Petition to the Twelfth District and raised twenty-one Assignments of Error. *First*, he claimed that "the trial court erred when it denied Appellant Davis an evidentiary hearing based on the doctrine of *res judicata*." (State Court Record, ECF No. 4-21, PageID 2232). The Second through Twentieth Assignments of Error concerned the trial court's dismissal of the various causes of action in his Petition. [*41] *Id.* at PageID 2234-49. Finally, he claimed that the fifty-page briefing limit in a complex capital case meant that his postconviction remedy was so inadequate as to constitute a denial of due process. *Id.* at PageID 2249.

On September 30, 1996, the Twelfth District rejected all three Assignments of Error, and affirmed the trial court's denial of the petition. As to the issue of *res judicata*, the Twelfth District noted that "[t]he [trial] court may refuse to grant a hearing . . . if a constitutional claim is advanced but the issue was or could have been raised at trial or on direct appeal." *Davis VI*, 1996 Ohio App. LEXIS 4263, 1996 WL 551432, at *2, citing Ohio Rev. Code § 2953.21(E); *Perry*, 10 Ohio St. 2d at 175, paragraph nine of the syllabus; *State v. Combs*, 100 Ohio App. 3d 90, 97, 652 N.E.2d 205 (Ohio App. 1st Dist. 1994). The court rejected Davis's arguments that *res judicata* is not a defense that may be raised in a motion to dismiss, and "that *res judicata* cannot bar a post-conviction relief claim supported by evidence outside the record." *Id.*, citing Ohio Civ.R. 12(B)(6). The court noted that a postconviction petition, although civil in nature, is a creature of statute, meaning that Ohio Revised Code §2953.21 *et seq.* governed, not the Ohio Rules of Civil Procedure, and the statutory provisions had been consistently interpreted to allow for summary dismissal of a petition if it "does not allege facts which, if proved, would [*42] entitle the prisoner to relief." *Id.*, citing *Perry*, 10 Ohio St. 2d at 175, paragraph two of the syllabus. The court also noted that the Supreme Court of Ohio had upheld the use of *res judicata* to summarily dismiss those claims brought in postconviction that were or could have been raised at trial or on direct appeal. *Id.*, citing *State v. Lester*, 41 Ohio St. 2d 51, 54-55, 322 N.E.2d 656 (1975). Adhering to that precedent, the Twelfth District summarily concluded that the trial court did not err in dismissing without a hearing those claims that were barred by *res judicata*, and overruled Davis's First Assignment of Error, and also analyzed and overruled Assignments of Error Nos. 2-6, 8-14, and 16-20 (the dismissals of Davis's specific causes of action as barred by *res judicata*) on that basis. 1996 Ohio App. LEXIS 4263, [WL] at*3-9.

The appellate panel considered and overruled the Seventh Assignment—the presumption that a three-judge panel only considers "proper and competent evidence"—as procedurally defaulted and improperly raised in a postconviction petition, as that presumption is applied at the appellate, rather than trial, level. *Davis VI*, 1996 Ohio App. LEXIS 4263, 1996 WL 551432, at *5, citing *State v. Murnahan*, 63 Ohio St. 3d 60, 63, 584 N.E.2d 1204 (1992); *Combs*, 100 Ohio App. 3d at 97. The court held that Davis's Fifteenth Assignment—that improper evidence regarding his prior homicide conviction was introduced in rebuttal in the penalty phase—was a constitutional [*43] issue available to him on direct appeal, and thus, could not be raised in postconviction. *Id.*, citing *Perry*, 10 Ohio St. 2d at 175, paragraph seven of the syllabus. Finally, the panel concluded that Davis's Twenty-First Assignment failed on its merits, as the trial court did not abuse its discretion in denying Davis's motion to file an oversized brief. *Id.*, citing *State v. Bonnell*, 61 Ohio St. 3d 179, 185-86, 573 N.E.2d 1082 (1991); *State v. Powell*, 90 Ohio App. 3d 260, 271-72, 629 N.E.2d 13 (Ohio App. 1st Dist. 1993). Overruling all Twenty-One Assignments of Error, the Twelfth District affirmed the denial of Davis's post-conviction petition. 1996 Ohio App. LEXIS 4263, [WL] at *10.⁷ The Supreme Court of Ohio declined jurisdiction over Petitioner's appeal. *Davis VII*, 77 Ohio St. 3d 1520.

D. Application to Reopen Direct Appeal

On August 21, 1998, Davis, represented by Lori Leon and John Marshall, filed Applications to Reopen his Direct Appeals from both his original trial and sentencing and first resentencing under Ohio R.App.P. 26(B) and *Murnahan*, claiming ineffective assistance of appellate counsel ("IAAC"). *Davis VIII*, 86 Ohio St. 3d at 213. Therein, Davis argued that "[a] reasonable probability exists that, but for such ineffective assistance, Mr. Davis' aggravated murder conviction would have been reversed and his death sentence would have been vacated." (State Court Record, ECF No.4-25, PageID 2802). Davis claimed that he should be excused from the time limitations [*44] in Rule 26(B) and *Murnahan*, as the alleged ineffective assistance pertained to a judgment filed by the Twelfth District in 1986, long before the *Murnahan* decision or Rule 26(B) was issued. *Id.* at PageID 2804. He argued that the inexperience of his appellate counsel, who had never represented a capital defendant on appeal before, resulted in his failing to raise the following Assignments of Error:

1. His conviction resulted from supposed eyewitnesses being subjected to unnecessarily and unconstitutionally suggestive identification procedures by police;
2. IATC due to the decision to call a prejudicial witness, who identified Davis as the killer, as an adverse witness for the purposes of impeaching him;
3. The trial court erred in denying his motion to sever the charges, which led to his jury waiver, and IATC in failing to ensure waiver was voluntary;
4. IATC in failing to inform him of the consequences of his waiver, which gave rise to a greater possibility of a death sentence;
5. The jury waiver was invalid;
6. IATC in failing to inform Davis that decision of three judge panel would be subject to more deferential review on appeal than jury verdict;
7. Rebuttal evidence introduced by the state in the sentencing [*45] phase was improper, and IATC in failing to object to the introduction of said evidence;
8. Ohio's death penalty scheme regarding proof of mitigating factors is unconstitutional, and IATC was ineffective in failing to object to same;
9. Racial discrimination exists in the selection of the grand jury foreperson, grand jury members, and petit jury members, and IATC in failing to file motions to quash or dismiss the indictment on that ground; and
10. Presiding judge erred in considering Davis's failure to take responsibility for the crimes, and trial counsel was ineffective in failing to object to same.

Id. at PageID 2804-10.

⁷ Davis, in the appendix to his appellant brief, raised nine additional assignments of error, none of which differed substantively from the twenty-one raised in his appellant brief (State Court Record, ECF No. 4-21, PageID 2321-53). The panel "reviewed the nine assignments of error raised in the appendix to appellant's brief and conclude[d] that each was properly dismissed by the trial court on *res judicata* grounds." *Davis VI*, 1996 Ohio App. LEXIS 4263, 1996 WL 551432, at *9 n.3.

On January 13, 1999, the Twelfth District denied reopening (Entry, unreported, copy at State Court Record, ECF No. 4-25, PageID 2855 *et seq.*). The panel noted the Supreme Court of Ohio's holding that:

[A]n applicant who seeks to reopen an appellate judgment journalized before July 1, 1993 may not simply rely on the fact that App.R. 26(B) did not exist within the ninety days following journalization of the appellate judgment, but must show good cause why he or she did not attempt to invoke the procedures available under former App.R. 26 and 14(B).

Id. at PageID 2858, quoting [*46] *State v. Reddick*, 72 Ohio St. 3d 88, 90, 1995-Ohio-249, 647 N.E.2d 784 (1995). The Twelfth District also noted that, when Rule 26(B) was amended in light of *Murnahan*, the amended rule provided for newly viable applications to reopen to be filed no later than September 30, 1993; yet, Davis's "applications were filed . . . nearly five years after the effective date of App.R. 26(B)." *Id.* at PageID 2858-59. As Davis had not even attempted to demonstrate good cause as to why he did not file a timely application with respect to his original trial and sentencing, the application was now improper. The Twelfth District also held that the recent withdrawal of his appellate attorney from his first resentencing (who could not, of course, raise an IAAC claim against himself) was not, without more, good cause to excuse his late filing as to the direct appeal from that latter resentencing. *Id.* at PageID 2859-60. Absent any good cause, the panel denied the applications as untimely. *Id.* at PageID 2860.

The Supreme Court of Ohio affirmed the Twelfth District's ruling that the applications were untimely, noting that:

Admittedly, counsel cannot be expected to argue their own ineffectiveness. However, Davis has gone through several different sets of appellate lawyers since his initial appeal [*47] in 1986. Moreover, Lori Leon has represented him since at least March 1997, and Davis has not explained his failure to file between March 1997 and August 1998. Even if we were to find good cause for earlier failures to file, any such good cause "has long since evaporated. Good cause can excuse the lack of a filing only while it exists, not for an indefinite period."

Davis VIII, 86 Ohio St. 3d at 214, quoting *State v. Fox*, 83 Ohio St. 3d 514, 516, 1998- Ohio 517, 700 N.E.2d 1253 (1998) (*per curiam*); citing *State v. Lentz*, 70 Ohio St. 3d 527, 529-30, 1994- Ohio 532, 639 N.E.2d 784 (1994).

E. First Federal Court Petition

1. Initial Proceedings

On April 28, 1997, Davis filed his Petition for Writ of Habeas Corpus ("First Petition") in this Court, raising twenty-eight claims for relief (*Davis IX*, No. C-1-97-402, ECF No. 1). On December 23, 1997, Judge James L. Graham concluded that ten of the claims in the First Petition were procedurally barred and allowed the remaining eighteen to proceed (Opinion and Order, ECF No. 29, docketed in the instant case at ECF No. 16-1). On March 31, 2000, Judge Graham denied Davis's motion for an evidentiary hearing (Order, ECF No. 130). While on October 5, 2000, Davis filed an Amended Petition for Writ of Habeas Corpus (ECF No. 132), the Court "later concluded that the additional [fourteen] issues" raised therein "were also procedurally barred." [*48] *Davis X*, 475 F.3d at 766. On September 4, 2001, Judge Graham entered an Order dismissing the First Petition, without an evidentiary hearing, and directing final judgment to be entered (*Davis IX*, ECF No. 139, docketed in the instant case at ECF No. 16-2), but also issuing a certificate of appealability as to the eighteen non-defaulted issues. *Davis X*, 475 F.3d at 766. Judgment was entered the same day (*Davis v. Coyle*, ECF No. 140).

On September 18, 2001, Davis filed a timely Motion to Alter or Amend the Judgment ("Motion to Amend," ECF No. 141). On January 17, 2002, Judge Graham issued an Opinion and Order denying the Motion to Amend. *Davis v. Bagley*, No. C-1-97-402, 2002 U.S. Dist. LEXIS 28977, 2002 WL 193579. Judge Graham noted that Davis had relied upon *Greer v. Mitchell*, 264 F.3d 663 (6th Cir. 2001), and *Mapes v. Coyle*, 171 F.3d at 429, "for the proposition that an evaluation of all of the circumstances, especially on issues of attorney ineffectiveness, can only be accomplished with full and fair discovery and a full and fair evidentiary hearing." *Id.* at *1. Judge Graham noted that, unlike in *Greer* and *Mapes*, Davis's IAAC claims were procedurally defaulted, and concluded that Davis had not established the cause and prejudice necessary to excuse the procedural default. 2002 U.S. Dist. LEXIS 28977, [WL] at *2. Moreover, an evidentiary hearing was not necessary, because the Court's enforcement of [*49] procedural default and denials on the merits of Davis's claims for relief were based on "undisputed principles of constitutional law and essentially assumed as true the facts alleged by petitioner." *Id.* Accordingly, the Court held, Davis had not demonstrated "a clear error of law or manifest

injustice[.]" such that would justify granting his Motion to Amend and convening an evidentiary hearing. 2002 U.S. Dist. LEXIS 28977, [WL] at *3.

The Court also rejected Davis's argument that statements from then-Supreme Court of Ohio Associate Justice Paul Pfeifer that "the Ohio Supreme Court's statutorily-mandated proportionality review under O.R.C. 2929.05 is little more than lip service[.]" *Davis IX*, 2002 U.S. Dist. LEXIS 28977, 2002 WL 193579, at *3 (internal quotation marks and citation omitted), constituted newly discovered evidence "that the Ohio Supreme Court does not conduct appellate review in good faith, thereby violating petitioner's due process rights." *Id.* The Court found that, because the statements were made prior to the Entry of Judgment, they could have been discovered with reasonable diligence by Petitioner prior to the Initial Petition's dismissal, and thus were not "newly discovered," such that relief under Rule 59(e) was warranted. 2002 U.S. Dist. LEXIS 28977, [WL] at *4. Also, the lack of any constitutional guarantee of proportionality [*50] review, along with Sixth Circuit precedent rejecting a challenge to Ohio's proportionality analysis, meant that Justice Pfeifer's statements were not a viable basis upon which to alter judgment. *Id.*, citing *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984); *Greer*, 264 F.3d at 691. Finally, Judge Graham rejected Davis's argument that Dr. Fisher's appointment not as a defense expert, but as a neutral presentence investigation "expert pursuant to O.R.C. § 2929.03(D)(1), who was obligated to report his findings to the prosecution and the trial court[.]" was a viable basis upon which to alter or amend the judgment. 2002 U.S. Dist. LEXIS 28977, [WL] at *5. The Court noted that Davis was raising this argument for the first time, despite the argument's not being based on newly-discovered evidence; consequently, Davis was "not entitled to Rule 59 relief based on [that] argument[.]" *Id.*, citing *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998).

2. Sixth Circuit

Davis timely appealed the denial of his *habeas corpus* petition to the Sixth Circuit, raising the eighteen issues certified by Judge Graham, and a nineteenth issue certified by the Sixth Circuit panel. *Davis X*, 475 F.3d at 766. However, Davis subsequently "abandoned several of those certified questions." *Id.*

Most of the remaining issues present challenges to the process of the petitioner's resentencing, including his contentions that he should have [*51] been allowed to withdraw his jury waiver prior to resentencing because it had been involuntarily entered at the time of his original trial, that it was error to deny his requests both for the appointment of additional experts and to introduce new mitigation evidence, that the three-judge panel should not have separated during deliberations, and that the Ohio Court of Appeals did not review adequately on direct appeal either his original sentence or the reimposed sentence. Davis also challenges the district court's determination that several of the issues in his habeas petition were procedurally defaulted either because they were not raised on direct appeal in the state courts or because they were raised in an untimely motion to reopen his appeal in state court.

Id. The appellate panel noted that, despite the Supreme Court of Ohio's order remanding the case "'for a new sentencing trial at which the [improper factors] shall not be considered as aggravating circumstances in the weighing process[.]' . . . the reconstituted three-judge panel declined to interpret the ruling to require a full sentencing trial, or even an evidentiary hearing." *Id.* at PageID 769 (emphasis and brackets in original), [*52] quoting *Davis II*, 38 Ohio St. 3d at 372. The trial court panel heard argument from Davis and the State and allowed Davis to make a proffer as to certain additional mitigating evidence he would have presented. However, the panel also set forth its belief that its job, on remand, was to weigh the sole aggravating factor—the killing of Ernestine Davis—against the mitigation factors as they existed at the time of Butler's killing, and its opinion consisted of little more than a recitation of the statutory mitigation factors and a conclusion the aggravating circumstance outweighed those mitigating factors. *Id.* at 769-70.

The Sixth Circuit held that the failure by the trial court to allow Davis to present evidence of "his exemplary behavior on death row in the time between the two sentencing hearings violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments[.]" as "the right of a defendant to present evidence of good behavior in prison is particularly relevant when a prediction of future dangerousness figures centrally in a prosecutor's plea for imposition of the death penalty." *Davis X*, 475 F.3d at 770-71, citing *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 597, 604 n.12, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). This was of concern in Davis's case, as the State argued during resentencing "that Davis's status as a repeat offender rendered him too dangerous for anything [*53] other than a death sentence[.]" *Id.* at 772. In light of the above consideration, the Ohio appellate courts' conclusions that *Lockett* and its progeny are satisfied if a defendant can introduce evidence of good behavior between arrest and trial "w[ere] 'contrary to' United States Supreme Court decisions[.]" *id.*, citing *Williams (Terry) v. Taylor*, 529 U.S. 362, 413, 120 S. Ct. 1495, 146 L.

Ed. 2d 389 (2000), and thus, not subject to deference under the AEDPA. 28 U.S.C. § 2254(d)(1). "[B]ecause the improperly-excluded mitigation evidence was never put into the record[,] . . . the case must be remanded for a new sentencing hearing." *Id.* at 774-75, citing *Skipper*, 476 U.S. at 8.

The Sixth Circuit rejected Davis's argument that the denial of his motion to sever, and his consequent decision to waive his right to a jury trial, were grounds for federal habeas relief; *i.e.*, "that misjoinder of the counts 'resulted in prejudice so great as to deny [a defendant] . . . his right to a fair trial.'" *Davis X*, 475 F.3d at 777 (alteration in original), quoting *United States v. Lane*, 474 U.S. 438, 446 n.8, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986). The court noted that the Ohio appellate courts' upholding of the trial court's decision, as state court interpretations of state law, "and, as a result, we must accept as binding the state supreme court's interpretation of the interaction between the capital specification-election provision, and the rules for joinder and [*54] severance of criminal charges." *Id.*, citing Ohio Rev. Code § 2929.022(A); *Davis II*, 38 Ohio St. 3d at 364; *Davis I*, 1986 Ohio App. LEXIS 6919, 1986 WL 5989 at *8. The panel concluded that that, while "[w]ithout question, a risk of undue prejudice exists whenever joinder of counts permits introduction of evidence of other crimes that would otherwise be inadmissible[.]" the Supreme Court had previously held in a similar case "that the prejudice suffered by a defendant in such a case does not rise to the level of a violation of due process." *Id.* at 777-78, citing *Spencer v. Texas*, 385 U.S. 554, 560-62, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967).

The Sixth Circuit also rejected Davis's argument that the trial court violated his equal protection rights in denying his motion to withdraw his jury waiver before resentencing in light of the Supreme Court of Ohio's intervening holding "that a capital defendant who is sentenced by a jury in the first instance becomes ineligible for the death penalty following reversal of that sentence." *Davis X*, 475 F.3d at 779, citing *Penix*, 32 Ohio St. 3d at 373, *abrogated by* Ohio Rev. Code § 2929.06(B). The court noted that, while in *Ring v. Arizona*, the Supreme Court

[D]id recognize that Sixth Amendment jurisprudence now requires that a jury find, beyond a reasonable doubt, any fact necessary to increase a defendant's authorized punishment. *Ring*, however, postdates not only the petitioner's sentencing and resentencing, but also the denial of habeas relief [*55] by the district court. Consequently, the state courts cannot be faulted for failing to analyze Davis's motion to withdraw his jury waiver under a fundamental-rights-analysis when the right in question had yet to be recognized by the Supreme Court in the context raised by the petitioner.

Id. at 780, citing *Ring*, 536 U.S. 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). The panel also found that the statute did not lack any conceivable reasonable basis, such that it would violate the "rational basis prong of an equal protection analysis." *Id.* Thus, the panel concluded, Davis's resentencing by a three-judge panel did not entitle him to federal habeas relief. *Id.*

Nonetheless, the Sixth Circuit expressed, in *dicta*, concerns about the continued validity of the jury trial waiver on remand for resentencing:

We note that under Ohio Revised Code § 2945.05, a waiver of jury trial "may be withdrawn by the defendant at any time before the commencement of trial." Granted, the resentencing hearing that we order today will not constitute a "trial" in the sense that the petitioner's guilt or innocence is again at issue. However, in this case, the proceeding can indeed be considered the functional equivalent of "trial" because, unlike sentencing in a non-capital case, it will take the form of an evidentiary [*56] proceeding on the question of whether Davis should receive the death penalty or some form of a life sentence.

Moreover, we think there is a legitimate question as to whether a criminal defendant should be held to a jury waiver entered almost 25 years before his newly-mandated sentencing hearing. In the Sixth Circuit, at least, we have recognized that a defendant's jury waiver entered prior to the first trial of his case does not bar his right to a jury trial on the same case after remand from a reviewing court.

Id. at 780, quoting Ohio Rev. Code § 2945.05, citing *United States v. Groth*, 682 F.2d 578, 580 (6th Cir. 1982).

F. Second Resentencing

On remand, Davis was represented by Randall Porter and Melynda Cook-Reich (State Court Record, ECF No. 4-29, PageID 3231). On May 26, 2008, they filed a Motion to Preclude Imposition of the Death Penalty on the basis that Ohio's lethal injection protocol constituted cruel and unusual punishment. *Id.* at PageID 3329-52. They also moved to dismiss the capital specification in the indictment (State Court Record, ECF No. 4-34, PageID 4053-97), to suppress pretrial and trial eyewitness identifications, *id.* at

PageID 4102-07, and for limited discovery. *Id.* at PageID 4108-12. Davis filed a memorandum setting forth his argument that he was "entitled [*57] to have a jury for purposes of his re-sentencing hearing[.]" *id.* at PageID 4155, and filed a Motion to Preclude the State from Seeking the Death Penalty (State Court Record, ECF No. 4-35, PageID 4218-36). On May 11, 2009, a three-judge panel of Judges Andrew Nastoff (Presiding), Charles L. Pater, and Keith M. Spaeth was appointed to hear testimony in the second resentencing (State Court Record, ECF No. 4-38, PageID 4837).

The resentencing hearing took place from September 8-10, 2009, "to determine whether the single aggravating circumstance in this case outweighed the mitigating factors beyond a reasonable doubt." (State Court Record, ECF No. 4-39, PageID 4926; *see also* 2nd Resent'g Tr., ECF No. 5-7, PageID 8199 (statement of Judge Pater that "we are not going to take into consideration any other aggravating circumstance other than" the 1971 conviction.)). During oral argument, Judge Pater termed "ludicrous" Davis's argument that the panel, in its consideration of the aggravating circumstance, could "only take cognizance of the fact that there was a previous conviction . . . when the person committed the murder at question in the current case[.]" rather than the fact that Davis's previous [*58] conviction was for the purposeful killing of his significant other (2nd Resent'g Tr., ECF No. 5-7, PageID 8201). The State argued that testimony regarding the prior killing—not merely the fact of conviction—was allowed at the original trial, and that the law of the case dictated that such evidence could be considered in the panel's weighing of the aggravating circumstance. *Id.* at PageID 8203-04. The court ruled that:

[W]hile the law requires us to consider evidence and testimony about the nature and circumstances of the aggravating circumstance that is relevant to the aggravating circumstance, what the state is going to be expected to present is evidence that is relevant to the conviction, the nature and circumstances relevant to the fact of the conviction so that is what the State is going to be limited to as we go forward.

Id. at PageID 8211. Counsel for the State, in opening statements, stated that Davis would be sentenced under the statute as it was written at the time of the murder, which meant that he was ineligible for life without parole. Rather, if the panel decided not to sentence Davis to death, the maximum sentence that could be imposed was thirty years to life for murder, [*59] with eighteen months of his sentence for having a weapon to be served consecutively. As Davis had already been incarcerated for twenty-five years, Randall Porter, counsel for Davis, conceded that Davis would be eligible for parole within six years. *Id.* at PageID 8227. However, Porter argued that, while life without parole was not a possible *de jure* sentence, it was almost certain to be the *de facto* sentence, as "Cynthia Mausser, who is the head of the Ohio Parole Board, who will testify [that] based upon his prior record, [and] the fact that he committed the second murder, while he was still on parole from the first murder . . . he will not be paroled." *Id.* at PageID 8225-26. Prior to the beginning of live testimony, Davis gave an unsworn statement, in which he apologized for "the pain and grief I have caused the Butler family with the horrendous loss of their loved one . . . I will repeat: T]his was nothing but any evil act by me." *Id.* at PageID 8235. Upon questioning by Cook-Reich, Davis expressly affirmed that his statement constituted him taking responsibility for Butler's murder. *Id.* at PageID 8235-36.

The three-judge panel then heard testimony from Frances⁸ Welland, Davis's prison [*60] pen pal, who described Davis's good character in their correspondence and face-to-face meetings, and Davis's true remorse over what he had done (2nd Resent'g Tr., ECF No. 5-7, PageID 8236-52). Victor Davis, Davis's younger brother, testified regarding their father's abandoning the family when he and Davis were young, *id.* at PageID 8270-71, and that Davis expressed true remorse while incarcerated. *Id.* at PageID 8278. After his testimony, Judge Pater stated that he "didn't know who the witnesses were going to be at the trial today[.]" but that he had known Victor "since high school days and we are good friends, but I do think I can fairly and impartially decide this matter, so I just wanted to put that on record." *Id.* at PageID 8285-86. Subsequently, counsel for the State informed the Court that he had gone to high school with Judge Pater's wife, and Judge Nastoff stated that, while he did not know Victor personally, he knew of Victor's (seemingly positive) reputation in the community. *Id.* at PageID 8286-87.

Sherry Davis, daughter of Davis and Ernestine, testified that she and Davis "have a strong bond[.]" despite Davis having been incarcerated for almost her entire life (2nd Resent'g [*61] Tr., ECF No. 5-7, PageID 8289). She stated she had forgiven Davis for killing Ernestine, continuing that "I have had my mother taken away from me. I would not like to see my father taken away from me as well." *Id.* at PageID 8290-91. Charles Tipton, Davis's stepfather, testified that he and Davis had been "very, very close" when Davis was a child, never missing a weekly fishing trip. *Id.* at PageID 8297. Allister Tipton, Davis's mother, testified that Nicholas Davis, her ex-husband and Davis's father, was in and out of their lives before he left for good, and had a drinking problem that affected their household. She also stated that Davis would still be a part of her life, even if he were incarcerated for the rest of his

⁸ Erroneously transcribed as "Francis." (2nd Resent'g Tr., ECF No. 5-7, PageID 8237).

life. *Id.* at PageID 8307-08, 8310-11. Carol Smith, Davis's sister, testified that Davis was still "a good person deep inside[.]" and that even though "he has taken [lives], but the part that he does is good right now, and I would like to see it continued." *Id.* at PageID 8319, 8320. After her testimony, Judge Mastoff stated on the record that, prior to becoming a judge, he had prosecuted Smith's son, *i.e.*, Davis's nephew, in a capital murder case, although the death penalty [*62] was not imposed. *Id.* at PageID 8321. Porter responded that, "we were aware that your Honor, that you were involved in the prosecution, and we made a decision long ago not to challenge you on that." *Id.* at PageID 8322.

Cynthia Mausser testified as the chair of the Adult Parole Board of the Ohio Department of Rehabilitation and Corrections ("ODRC"), having previously worked at the office of the Ohio Public Defender (2nd Resent'g Tr., ECF No. 5-7, PageID 8335-38). She explained that, if a board member is "leaning towards" releasing an offender, a psychological assessment will be conducted on the inmate, and the examining psychologist will submit a report evaluating the inmate, which will be part of the board's evaluation of specified risk factors and its general assessment of risk. *Id.* at PageID 8340-42. Mausser testified that as to one of the seventeen statutorily mandated factors, the seriousness of the previous offense on a scale from one to thirteen, aggravated murder would be rated a thirteen. *Id.* at PageID 8344. She also stated that factors present with Davis—seriousness of the offense, that he committed the offense while on parole—would increase his "criminal history risk" score. [*63] *Id.* at PageID 8344-46. More importantly, Davis would require a full board hearing and a majority of board members voting for release before parole could be granted. *Id.* at PageID 8346-47.

Mausser testified that repeat criminal behavior and a recommendation by the court against release would be considered "negative factors" by the board (2nd Resent'g Tr., ECF No. 5-7, PageID 8348-49). She concluded her direct testimony by stating that it was highly unlikely that an inmate with Davis's circumstances would be granted parole at his first hearing, and that "that person would have to -- would likely spend a large portion of the remainder of their life in prison." *Id.* at PageID 8365. However, she conceded on cross-examination that her testimony was based on her years of service on the board, and that she could not reasonably predict how a particular board member might vote—indeed, she testified, it would be inappropriate for her even to guess as to how she or other board members might vote if Davis's case were to come before the board. *Id.* at PageID 8378-79.

Jerome Steinman, an attorney who volunteered at an Alcoholics Anonymous ("AA") group where Davis was incarcerated, testified that he and [*64] Davis participated in approximately 48 AA meetings per year between 1990 and 1993 (2nd Resent'g Tr., ECF No. 5-7, PageID 8382-83). Steinman stated that in those meetings, Davis disclosed that he was "in blackout" when he killed Butler. *Id.* at PageID 8383. On cross-examination, Steinman testified that Davis's statements that he drank only a little was not inconsistent with him being an alcoholic, as many alcoholics understate the amount of their drinking. *Id.* at PageID 8385. Steinman also said that only drinking one beer, eating food, and driving a car the night of the murder (as Davis had indicated in previous statements to law enforcement) were not necessarily inconsistent with Davis's statement to Steinman that Davis was in a blackout state when he killed Butler. *Id.* at PageID 8386.

Prior to Patrick Michael ("Rick") Rotundo testifying, Judge Pater indicated that, while he did not "know Rick Rotundo very well[.]" I know his brother, Jerry and his little sister Debbie. I know the two of them quite well and I know the Rotundo family[.]" (2nd Resent'g Tr., ECF No. 5-8, PageID 8396-97). Counsel for Davis declined to *voir dire* Judge Pater on the issue. *Id.* at PageID 8397. Rotundo testified [*65] that he lived next door to Davis for approximately six years, and that Charles and Allister Tipton and their children were "like my second family[.]" *id.* at PageID 8398, and that he and Davis "were like brothers." *Id.* at PageID 8403. He testified that they drank together sporadically, but that the environment was "not similar to the Animal House." *Id.* at PageID 8400. Scott Nowak, the Program Specialist Director for the Ohio State Penitentiary at Youngstown, *id.* at PageID 8406-07, testified that Davis had been housed in the "extended privilege unit" of death row since May 2006, meaning he had had no behavior violations since at least May 2003. *Id.* at PageID 8417-19.

Robert Smith, Ph.D., testified as an expert psychologist and certified addiction specialist, (2nd Resent'g Tr., ECF No. 5-8, PageID 8420-22). He conducted two interviews with Davis in 2009, doing a "comprehensive psychosocial history . . . , a diagnostic workup and a mental status examination." *Id.* at PageID 8432. Dr. Smith also interviewed Charles and Allister Tipton, Elliot Davis (Davis's brother), Victor Davis, Carol Smith, and Rick Rotundo, in an attempt "to get corroborating data[.]" *id.* at PageID 8433, for the statements [*66] made to him by Davis, voluminous documents relating to Davis and the case, and psychological evaluations from 1971 through 2002. *Id.* at PageID 8434-37. From the review and evaluation, he opined:

[T]hat at the time of the offense[.] Von was suffering from two psychological disorders. One would be alcohol dependence and the other would be borderline personality disorder. And that both of these disorders were present and that they interfered with his cognitive functioning, that they impaired or diminished his ability at the time of the offense.

Id. at PageID 8438.

Dr. Smith described how borderline personality disorder is characterized by poor impulse control, and that lack of control manifested itself early in Davis's life, when he went absent without leave ("AWOL") from the Navy in an attempt to reconnect with his biological father, with whom he had not been in contact for several years (2nd Resent'g Tr., ECF No. 5-8, PageID 8440-41). As borderline personality disorder was not an accepted diagnosis until 1987, it could not have been evaluated by the trial court as a mitigating factor during his initial sentencing. *Id.* at PageID 8450. Dr. Smith testified that the borderline personality **[*67]** disorder and alcohol dependence did not render Davis "totally unable to appreciate that his behavior was wrong[.]" *id.* at PageID 8442, and that the original examining psychologist was correct to conclude that Davis's capacity was not so severely diminished that he would have a colorable defense of not guilty by reason of insanity. *Id.* at PageID 8450-51. "But [the original examining psychologist] did indicate during his testimony that there was evidence of an explosive psychiatric disorder." *Id.* at PageID 8451. Dr. Smith also testified that the 1994 psychological evaluation of Davis, in which he was diagnosed with "mood disorder and mixed personality disorder with anti-social traits . . . is not inconsistent with borderline." *Id.* at PageID 8451-52. Dr. Smith stated that Davis's home life, in which his mother and birth father, Nicholas Davis, were "dysfunctional" and "had significant problems that prevented them from being able to be there for him." *Id.* at PageID 8458-59. While Charles Tipton tried to be a more stabilizing influence on Davis, he and Allister did not get married until "Von is 14[.]" and by that point Von's use of alcohol, his investment in school, his other problems" had **[*68]** taken over. "He is running the streets, he is with his peers, . . . [s]o although I think Charles would have been well intentioned, he couldn't have that impact." *Id.* at PageID 8465. Davis increasingly used alcohol to deal with his emotional discomfort and jealousy over Ernestine and Butler becoming involved with other men. *Id.* at PageID 8467. His borderline personality disorder caused him to overreact to stress, in a manner that is "very aggressive and very angry." *Id.* at PageID 8469. While Davis had had treatment for his alcohol abuse, a condition he had had since the age of seventeen, *id.* at PageID 8477, he had not been treated simultaneously for BPD. Dr. Davis stated that: "If you treat just one disorder and not the other, the individual will not be successful in their recovery. . . . [S]o as a result, he continued to abuse alcohol[.]" in addition to continuing to suffer from BPD. *Id.* at PageID 8473.

Nonetheless, Dr. Smith testified, people with borderline personality disorder and "with alcohol dependence do very well in a structured environment . . . like prison," because "first of all, what you've done is you've greatly reduced the likelihood that they can access alcohol and drugs." **[*69]** (2nd Resent'g Tr., ECF No. 5-8, PageID 8473). "The second thing is, if I have . . . poor decision making and difficulty with relationships, in a prison setting, I don't have a lot of decisions to make, I don't have lots of opportunities to act out and I also don't form lots of relationships." *Id.*

On cross-examination, Dr. Smith conceded that he did not prepare a written report on Davis, as he had not been asked to by counsel; rather, the PowerPoint slides he created were "a summary of my findings and of my opinion . . . contain[ing] everything that would be in a report[.]" (2nd Resent'g Tr., ECF No. 5-8, PageID 8485-86). Dr. Smith also stated that, in their meetings Davis was not "all that motivated to helping himself[.]" *id.* at PageID 8488; rather, he minimized the extent of his substance abuse issues and denied that he had any personality disorder. *Id.* Dr. Smith acknowledged that Davis's statements to him, in which he accepted responsibility as the sole person responsible for Butler's murder, were inconsistent with his testimony during the guilt phase of the initial trial, in which he averred that it was Silkey Carr who killed Butler. *Id.* at PageID 8489-90. He also opined that Davis's **[*70]** borderline personality disorder and alcohol dependence, while serious, did not rise to the level of psychosis, legal insanity, or other inability to discern right from wrong. *Id.* at PageID 8492-93.

In closing arguments, Cook-Reich reiterated that Davis was asking the panel to reject the sentences of death or twenty years to life imprisonment, and impose a sentence of thirty years to life, because based on "the evidence presented[.]" 30 to life is in essence . . . life without the possible (sic) of parole. And it is LWOP, because of his history, no parole board I submit to you is going to by majority vote release Von Clark Davis[.]" (2nd Resent'g Tr., ECF No. 5-8, PageID 8533). Cook-Reich referenced Mausser's testimony that "she has never seen an aggravated murder defendant come up for parole, let alone an aggravated murder with death specifications . . . What are the chances that the first one that comes before them, Von Clark Davis, that they are going to let that person out?" *Id.* at PageID 8537. She also pointed to Davis's troubled family history as a significant one of the mitigating factors, which "are explanations, not excuses or justifications." *Id.* at PageID 8538. She emphasized **[*71]** Davis's flawless behavioral record while incarcerated and his reestablishment of a relationship with his daughter. *Id.* at PageID 8542-43.

Upon the completion of closing arguments, the panel queried whether the eighteen month sentence for having a weapon under disability would necessarily be served consecutively to any sentence less than death (2nd Resent'g Tr., ECF No. 5-8, PageID 8554-56). The parties agreed that it was within the trial court's discretion to impose the sentences consecutively, although if the panel did

not specify that the sentences were to run consecutively, then they would run concurrently. *Id.* at PageID 8556-58. After deliberating for approximately one hour, *id.* at PageID 8558, 8560, the panel found that "the aggravating circumstance that the defendant was found guilty of committing outweighs the mitigating factors presented in this case by proof beyond a reasonable doubt and hereby imposes on the defendant, Von Clark Davis, the sentence of death." *Id.* at PageID 8558-59. Davis's counsel asked "that new counsel be appointed so the ineffectiveness challenge can be made on direct appeal as appropriate[.]" *id.* at PageID 8560; the panel indicated they would grant that [*72] request upon the filing of notice of appeal. *Id.*

In its written opinion filed September 21, 2009, the panel summarized and evaluated the aggravating circumstance, the statutory mitigation factors, and the mitigation evidence presented by Davis (State Court Record, ECF No. 4-39, PageID 4926-31, citing Ohio Rev. Code § 2929.04(B)). The panel found that, in accordance with their statutory duty under section 2929.04(B), the aggravating circumstance—Davis's conviction for purposefully killing Ernestine—"deserves great weight." *Id.* at PageID 4932. The judges concluded that there was "nothing mitigating about the nature and circumstances of the [capital] offense itself[.]" and that the love of his family and the forgiveness by his daughter were entitled to very little weight. *Id.* The panel also concluded that Davis's dysfunctional upbringing was entitled to little weight, and that "the separate testimony of Defendant's family and friends does not support Dr. Smith's conclusion that Defendant suffered an extreme and dysfunctional upbringing. . . . Dr. Smith's diagnos[is] of borderline personality disorder and alcohol dependence "even if valid, [are] entitled to little weight in mitigation." *Id.* at PageID 4932, 4933. The judges gave no [*73] weight to Mausser's testimony as to "the probability that Defendant would never be released from prison if given a sentence less than death[.]" finding it "highly speculative." *Id.* at PageID 4933. "The panel considered the Defendant's good behavior while in prison, the Defendant's advanced age, and the Defendant's remorse and apology during his unsworn statement. The panel attributes little weight to each factor." *Id.* The court gave no weight to Davis's arguments that a life sentence would be cheaper than execution and would bring closure to the victim's family. *Id.* at PageID 4933-34.

1. Twelfth District Court of Appeals

Davis was represented on appeal by Alan Freedman, Laurence Komp, and John Parker (State Court Record, ECF No. 4-42, PageID 5485), and raised the following assignments of error:

FIRST ASSIGNMENT OF ERROR: The trial court erred in violation of the Eighth Amendment and Due Process to allow a 25-year old, stale jury waiver to stand when there was a new penalty hearing.

1. The trial court erred in violation of the Eighth Amendment and Due Process to allow a 25-year old, stale jury waiver to stand when there was a new penalty hearing; and
2. Appellant did not knowingly, intelligently and validly waive his jury [*74] in 1984 for a sentencing hearing in 2009.

SECOND ASSIGNMENT OF ERROR: The three-judge panel erred in not considering and giving effect to mitigating evidence.

1. Whether the trial court in giving no weight to mitigation; and
2. Whether the trial court listened to mitigation.

THIRD ASSIGNMENT OF ERROR: The trial court erred in not precluding the death penalty and enforcing the then-existing provisions of Ohio Revised Code § 2929.03(C)(2)(a).

1. Whether the trial court violated the constitution in applying a revised and amended O.R.C. 2929.03 in order to make death an available option.

FOURTH ASSIGNMENT OF ERROR: Appellant's death sentence is disproportionate and inappropriate, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Sections 9 and 16 of the Ohio Constitution.

FIFTH ASSIGNMENT OF ERROR: Twenty-six years on Ohio's death row constitutes cruel and unusual punishment under the state and federal constitution, and international law.

1. Executing Appellant after such a lengthy stay on death row constitutes cruel and unusual punishment. *Lackey v. Texas*, 514 U.S. 1045, 115 S.Ct. 1421, 131 L. Ed. 2d 304 (1995) (Stevens, J., dissenting from denial of certiorari); and
 2. Executing Appellant after such a lengthy stay on death row violates international law.
- (State Court Record, ECF No. 4-42, PageID 5486-90).

On February 11, 2011, the Twelfth District [*75] rejected each of his five assignments. The appellate court found that challenges to the validity of his jury waiver were barred by *res judicata* and law of the case, as it had been repeatedly challenged in prior litigation, and upheld as knowing, intelligent, and voluntary each time. *Davis XI*, 2011-Ohio-787, ¶ 16. The court "reiterate[d] that the trial court, before accepting Davis' waiver, performed a colloquy advising Davis of his rights and what he was giving up by executing his waiver." *Id.* at ¶ 29. The panel also rejected Davis's argument that "should this court apply the current version of R.C. 2929.06(B), such application would violate the Ohio Constitution's prohibition against retroactive laws, as well as the ex post facto clause of the federal constitution." *Id.* at ¶ 44. The appellate court concluded that the amended statute, which dropped the requirement that a defendant waiving his right to a jury must have his guilt and sentence determined by the original three-judge panel, is remedial, rather than substantive, in nature, and thus, its application was not impermissibly retroactive or otherwise an *ex post facto* law. *Id.* at ¶¶ 45, 47, citing OHIO CONST., art. II, § 28; *State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059, ¶¶ 9-10, 775 N.E.2d 829. The panel so concluded because the amended law "affects only the methods or procedures by which the Butler County Court [*76] of Common Pleas implemented Davis' jury waiver. . . . The amendment did not, however, change the fact that Davis had the right to avoid a jury and have his guilt and penalty determined by a panel of judges." *Id.* at ¶ 49. Finally, the appellate court "also f[ou]nd that the amendment is not violation of the ex post facto clause of the federal constitution." *Id.* at ¶ 57, citing *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). The panel noted "there is no language in the previous version [of the statute] that directed a court to enter a life sentence if the panel could not perform its duties[.]" *id.* at ¶ 59, that the Supreme Court of Ohio opted not to extend the holding of *Penix* (which forbade the imposition of a death sentence on remand when the original sentence was imposed by a jury that could not be reassembled) to Davis's situation, leaving it open to the trial court panel's discretion as to the appropriate sentence on remand. *Id.* at ¶ 60, citing *Penix*, 32 Ohio St. 3d at 369. As "Davis was subject to either life imprisonment or death" under the former and amended versions of the statute, *id.* at ¶ 62, "Davis' jury waiver is still valid, and . . . R.C. 2929.06(B) is not unlawfully retroactive or does not otherwise violate the ex post facto clause of the United States Constitution[.]" *Id.* at ¶ 63.

The Twelfth District also found meritless Davis's Second and Fourth Assignments [*77] of Error, "that the New Panel erred by not considering or giving the proper effect to his mitigation evidence, and that the panel's sentence was improper[.]" respectively. *Davis XI*, 2011-Ohio-787, ¶ 68. The appellate court contrasted the original and first resentencing panel's refusal to consider all relevant mitigating evidence, in violation of *Skipper*, *id.* at ¶73, citing 476 U.S. at 4, with the second panel hearing evidence and considering:

Davis' borderline personality disorder, alcohol abuse, love and support of family members and friends, the testimony of Davis' daughter that she has forgiven her father for killing her mother, Davis' good behavior in prison, childhood and family experience, and the impact of each upon Davis' personality development and mental health, remorse and apology, age (62), probability of no release from prison, whether a sentence of life in prison would bring closure to the victim's family, and the savings to taxpayers should a life sentence be imposed.

Id. at ¶ 75. "While Davis disagrees with the amount of weight . . . the panel assigned to each factor, the fact that the panel assigned less weight to the factors than he believes they deserve is not the same as the panel failing to consider the [*78] evidence." *Id.* at ¶ 84, citing *State v. Newton*, 108 Ohio St. 3d 13, 2006-Ohio-81, ¶ 60, 840 N.E.2d 593. The appellate court found that the trial court had not abused its discretion in its evaluation of the mitigation factors, and in its statutorily-mandated independent review of Davis's death sentence, found "that the penalty imposed in the case at bar is not excessive or disproportionate." *Id.* at ¶ 105.

Finally, the Twelfth District overruled Davis's Fifth Assignment—that the imposition of the death penalty after twenty-six years on death row was unconstitutional—noting that Justice Stevens's dissent from denial of certiorari in *Lackey* "is not binding on this, or any, court. It merely expressed Justice Steven's [*sic*] desire to have the court address at what point the state's desire for retribution is satisfied by imprisonment as opposed to execution." *Davis XI*, 2011-Ohio-787, ¶ 119, citing 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304. The panel also noted that other states had upheld as constitutional execution after similarly lengthy stays on death row, *id.* at ¶ 122 (citations omitted), and that "recently, the Supreme Court was again offered the opportunity to address whether a lengthy stay of 32 years on death row constitutes cruel and unusual punishment, and declined to do so." *Id.* at ¶ 123, citing *Thompson v. McNeil*, 556 U.S. 1114, 129 S. Ct. 1299, 173 L. Ed. 2d 693 (2009). Finally, the court rejected [*79] Davis's argument "that his time on death row, as well as the death penalty in general, violates international law specific to Article VII of the International Covenant on Civil and Political Rights[.]" holding that, because the United States specifically reserved certain rights when it ratified the Covenant, "United States courts are not bound by international law on the issue of capital punishment where the death penalty is upheld as constitutional." *Id.* at ¶ 124, citing *Buell v. Mitchell*, 274 F.3d 337, 371 (6th Cir. 2001).

2. Supreme Court of Ohio

On June 22, 2011, Davis filed his merit brief with the Supreme Court of Ohio, raising as his five Propositions of Law the same Assignments of Error he had raised in the Twelfth District (State Court Record, ECF No. 4-43, PageID 5849-52). On April 22, 2014, the Supreme Court of Ohio overruled the propositions and affirmed the death sentence. *Davis XIV*, 2014-Ohio-1615, 139 Ohio St. 3d 122, 9 N.E.3d 1031. The court held that Davis's request for reconsideration of *Davis II*, in light of *Padilla v. Kentucky*, was barred by *res judicata*. *Id.* at ¶ 31, citing 559 U.S. 356, 374, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). The court concluded that *res judicata* and the law of the case doctrine did not foreclose adjudication on the merits as to his first proposition—that the trial court erred in not allowing him to withdraw [*80] his jury waiver. *Id.* at ¶ 32. However, the court again distinguished cases in which "a conviction was either reversed on appeal or was set aside, necessitating a retrial on the issue of guilt or innocence[.]" *id.* at ¶¶ 33-34 (citations omitted), in which the original jury waiver is voided, and that of Davis, whose case was remanded solely for purpose of sentencing, in which the waiver is not voided. *Id.* at ¶ 34. The court further noted that because Davis had had his original guilt and sentencing phases tried before a three-judge panel, under Ohio law, a jury *could not be* impaneled for the purpose of resentencing. *Id.*, citing Ohio Rev. Code § 2929.06(B). As the Sixth and Eighth Amendments do not guarantee a jury determination of a death sentence, *id.* at ¶ 39, citing *Harris v. Alabama*, 513 U.S. 504, 515, 115 S. Ct. 1031, 130 L. Ed. 2d 1004 (1995), *overruled on other grounds by Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); *Spaziano v. Florida*, 468 U.S. 447, 459, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), *overruled by Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616, 193 L. Ed. 2d 504 (2016), "even were we to hold the 1984 jury waiver insufficient or inapplicable as to the 2009 resentencing hearing, we would find no constitutional bar to conducting that hearing without a jury pursuant to R.C. 2929.06(B)." *Id.* at ¶ 40. "Therefore, we overrule Davis's first proposition of law." *Id.* at ¶ 43.

The court, in rejecting Davis's Third Proposition, concluded that Ohio Rev. Code § 2929.06(B) was remedial, not substantive, in nature, and thus, did not violate the [*81] Ohio Constitution's retroactivity clause. *Davis XIV*, 2014-Ohio-1615, ¶ 47, 139 Ohio St. 3d 122, 9 N.E.3d 1031, citing OHIO CONST., art. II, § 28; *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 107, 522 N.E.2d 489, paragraph one of the syllabus (1988), *superseded on other grounds by* Ohio Rev. Code § 2745.01. The court noted that it had recently held that the statute did not violate the retroactivity clause with respect to a capital defendant who was "sentenced to death after a jury trial . . . , [but] he obtained habeas corpus relief from his death sentence, obliging the trial court to resentence him[.]" *id.* at ¶ 49, citing *State v. White*, 132 Ohio St. 3d 344, 2012-Ohio-2583, ¶¶ 1-2, 48, 972 N.E.2d 534, and while "Davis was sentenced by a three-judge panel, . . . in all relevant respects his situation is indistinguishable from White's for the purposes of the inquiry here." *Id.* at ¶ 50. The court similarly concluded that the statute did not violate the Ex Post Facto Clause of the United States Constitution, as it "does not fall within any of the four categories of *ex post facto* laws identified in *Calder [v. Bull]*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648, 3 Dall. 386 (1798)." *Id.* at ¶ 55, quoting *White*, 2012-Ohio-2583, ¶ 64, 132 Ohio St. 3d 344, 972 N.E.2d 534.

The court similarly found unavailing Davis's Second Proposition, "that [the] three-judge panel violated the Eighth Amendment . . . by giving either insufficient weight or no weight at all to his mitigating evidence." *Davis XIV*, 2014-Ohio-1615, ¶ 56, 139 Ohio St. 3d 122, 9 N.E.3d 1031, citing *Eddings*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1. The court noted that the second resentencing panel heard extensive mitigation testimony and assigned weight to that testimony. *Id.* at ¶¶ 57-58. That is [*82] all the panel was required to do under *Eddings*; consequently, any failure to assign particular weight or reach any particular conclusion was an insufficient basis for an Eighth Amendment claim. *Id.* at ¶¶ 59-68 (citations omitted). Moreover, in its statutorily-mandated independent review of the death sentence, the court affirmed the lower courts' conclusions that the aggravating circumstance outweighed the several mitigating factors. *Id.* at ¶¶ 80-116. The court concluded that "[t]he mitigating factors are not strong[.]" and noted that "[t]he aggravating circumstance here, the prior conviction of murder, is one that this court has described as 'very strong,' and 'significant[.]'" *id.* at ¶ 116, and that the court "ha[d] approved death sentences in which the prior-murder-conviction specification . . . was the sole aggravating circumstance presented." In so doing, the court rejected Davis's Fourth Proposition. *Id.* at ¶¶ 116-17, quoting *State v. Taylor*, 78 Ohio St. 3d 15, 34, 1997- Ohio 243, 676 N.E.2d 82 (1997); *State v. Carter*, 64 Ohio St. 3d 218, 228, 1992- Ohio 127, 594 N.E.2d 595 (1992); citing Ohio Rev. Code §§ 2929.04(A)(4-5); *Mapez*, 19 Ohio St. 3d 108, 19 Ohio B. 318, 484 N.E.2d 140 (1985).

The court also rejected Davis's Fifth Proposition, that to execute Davis almost thirty years after initially being sentenced to death would violate the Eighth Amendment, noting that "[n]umerous courts have rejected claims that delays between the imposition and the execution [*83] of a death sentence constitute cruel and unusual punishment." *Davis XIV*, 2014-Ohio-1615, ¶ 71, 139 Ohio St. 3d 122, 9 N.E.3d 1031 (citations omitted). The court rejected Davis's argument that the three-judge panel's improper sentencing

procedures being the cause of the delay, rather than frivolous appeals by Davis, constituted an Eighth Amendment violation, noting that "[d]elay, in large part, is a function of the desire of our courts to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone's life[.]" and that "even if it were held that delay . . . constitutes cruel and unusual punishment," it is by no means clear that "commutation of the death penalty will turn out to be the appropriate remedy." *Id.* at ¶ 72, quoting *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998); *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995); citing *Elledge v. Florida*, 525 U.S. 944, 945, 119 S. Ct. 366, 142 L. Ed. 2d 303 (1998) (Breyer, J., dissenting from the denial of certiorari). Further, while the court acknowledged the decisions cited by Davis from foreign courts "that, in his view, establish an international norm recognizing that long postsentencing delays of execution are cruel[.]" *id.* at ¶ 74 (citations omitted), the court rejected his argument that "lengthy waits between sentencing and execution contravene 'our society's evolving standards of decency.'" Absent some such showing, the foreign cases Davis cites [*84] cannot advance his Eighth Amendment claim." *Id.* at ¶ 77, quoting *Roper v. Simmons*, 543 U.S. 551, 563, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Having rejected all five Propositions of Law, the court "affirm[ed] the judgment of the court of appeals, affirming Davis's sentence of death." *Id.* at ¶ 118.

G. Second Post-Conviction Petition

On October 21, 2011, Davis, represented by Kort Gatterdam and Erik P. Henry, filed a Second Post-Conviction Petition with the trial court (State Court Record, ECF No. 4-46, PageID 6236 *et seq.*), claiming that his counsel was ineffective at his 2009 resentencing (First through Seventh Grounds for Relief) and in his initial 1984 trial (Eighth Ground) by the following acts or omissions:

1. Failure to investigate fully mitigation evidence;
2. Failure to present adequately mitigation evidence;
3. Decision to call Cynthia Mausser in mitigation;
4. Decision to call Dr. Smith in mitigation;
5. Decision not to call John Lee in mitigation;
6. Decision not to seek recusal of Judge Mastoff from resentencing panel;
7. Informing Davis, contrary to the controlling statutory language, that a sentence of life without parole was an option; and
8. Advising Davis to waive his right to a jury trial.

Id. at PageID 6242-59. In his Ninth Ground, Davis argued that "Ohio's post-conviction [*85] procedures do not provide an adequate corrective process," and are thus violative of the United States and Ohio Constitutions. *Id.* at PageID 6260-62.

The State moved to dismiss the "petition for failure to state a claim upon which relief can be granted. In the alternative, the State request[ed] that summary judgment be granted in favor of the State." (State Court Record, ECF No. 4-47, PageID 6461). The State claimed that most of the alleged instances of deficient performance in Grounds One through Seven were nothing more than judgment calls "not outside the norms of professional practice" that did not produce the results desired by Davis. As a matter of law, the State argued, such judgment calls cannot form the basis of a viable claim under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Moreover, the State claimed that, even if the judgment calls had fallen outside the norms of professional practice, the purported errors were not so egregious as to change the outcome of the initial trial or second resentencing, as is required under *Strickland*. *Id.* at PageID 6471-84. As to Davis's Eighth Ground, the State noted that the amendments to Ohio Rev. Code §§ 2953.21 that took effect on September 21, 1995, imposed a time restriction on postconviction petitions [*86] for claims that were already ripe—no later than one year after the enactment of the amendments. *Id.* at PageID 6484, citing Ohio Rev. Code § 2953.21(A)(2); 1995 S.B. 4; *State v. Freeman*, Nos. 73784-87, 1998 Ohio App. LEXIS 5927, 1998 WL 855613, at * 1 (Ohio App. 8th Dist. Dec. 10, 1998). As the claim regarding advice to Davis as to his initial jury waiver was ripe at the time of the amendments, the State argued, his failure to bring the claim by September 21, 1996 rendered the Eighth Ground time-barred. *Id.* at PageID 6484-85. Finally, the State argued that Davis's Ninth Ground was barred by *res judicata* for failure to raise the claim on direct appeal, and was also meritless. *Id.* at PageID 6485-86, citing *State v. Ketterer*, 126 Ohio St. 3d 448, 2010-Ohio-3831, ¶ 59, 935 N.E.2d 9.

On November 26, 2012, the trial court issued an Entry and Order dismissing the petition and denying Davis's motion to conduct discovery (State Court Record, ECF No. 4-47, PageID 6633). The trial court noted that the *Strickland* test had been adopted by the Supreme Court of Ohio to evaluate ineffective assistance of counsel claims, and that trial courts are permitted to evaluate the "deficient performance" and "prejudice" prongs in either order. *Id.* at PageID 6636, quoting *State v. Bradley*, 42 Ohio St. 3d 136, 143, 538 N.E.2d 373 (1989); *Strickland*, 466 U.S. at 697. As to the First Ground, the court concluded that the evidence that Davis claimed

had not been presented had actually been presented by counsel in a different [*87] form; thus, "[t]rial counsel's performance was not deficient for failing to [investigate and] call these additional witnesses. For the same reasons, Davis has failed to establish that he was prejudiced[.]" *Id.* at PageID 6638. The court concluded that the gravamen of Davis's Second Ground—counsel's "presenting a summary of his prison unit file to the three-judge panel instead of the entire unit file"—was a "strategic decision" that was comfortably within the realm of trial strategy. *Id.* at PageID 6638-39. The court found his Third Ground—decision to call Cynthia Mausser—could have been raised on direct appeal and thus was barred by *res judicata*. Also, because her testimony could have just as easily been helpful as harmful, the Third Ground also failed on its merits. *Id.* at PageID 6640-41. The court found that Dr. Smith's focus during his testimony on Davis's borderline personality disorder and substance abuse problems was proper, as the evidence underlying his opinions was relevant and well-supported, and "[h]indsight cannot affect the evaluation of trial counsels' performance." *Id.* at PageID 6644. "Furthermore, had trial counsel asked Dr. Smith to provide an opinion as to Davis's ability [*88] to adapt to society, his testimony would have been largely cumulative. The panel heard testimony from Scott Nowak, Jerome Stineman, and pen pal Franc[e]s Welland and admitted the aforementioned institutional summary as an exhibit." *Id.* Thus, Davis's Fourth Ground was not viable. Similarly, the trial court rejected Davis's Fifth Ground, failure to call investigator John Lee as a mitigation witness to present interview summaries, because the panel heard direct testimony from many of Lee's interview subjects (e.g., members of Davis's extended family), such that his testimony would have been cumulative. *Id.* at PageID 6646.

The court concluded that Davis's Sixth and Eighth Grounds—failing to seek recusal of Judge Nastoff and original counsel's failure to advise Davis of all consequences of a jury waiver—were barred by *res judicata* (State Court Record, ECF No. 4-47, PageID 6647, 6648). Finally, the court found that Davis's Seventh Ground, that trial counsel erroneously advised Davis that the panel could impose a sentence of life without parole, was factually baseless (supported by nothing more than Davis's self-serving affidavit) and, even if true, did not prejudice Davis. *Id.* at PageID 6647-48. [*89] In rejecting Davis's Ninth Ground—that Ohio's postconviction relief procedure is a constitutionally inadequate corrective process—the court noted that the Third District Court of Appeals had rejected an argument that courts are constitutionally required to allow postconviction petitioners to take discovery, and concluded that "[b]ecause Davis' argument attacking the constitutionality of R.C. 2953.21 is in no way related to the events of his re-sentencing hearing, it is not appropriate for the Court to consider" in his postconviction petition, as any constitutional deprivation did not occur "during the proceedings resulting in the petitioner's conviction." *Id.* at PageID 6649-50, citing *State v. Fitzpatrick*, No. C-030804, 2004-Ohio-5615 (Ohio App. 1st Dist. Oct. 22, 2004); *State v. Yarbrough*, No. 17-2000-10, 2001-Ohio-2351, 2001 WL 454683, *11 (Ohio App. 3rd Dist. Apr. 30, 2001). Having rejected all of Davis's Grounds for Relief, the trial court dismissed his Second Post-Conviction Petition and deemed the dismissal a final appealable order. *Id.* at PageID 6650, citing Ohio Civ.R. 54(B).

On appeal to the Twelfth District, Davis raised three Assignments of Error. For the First Assignment, ineffective assistance of trial counsel, he raised as issues for review the First through Eighth Grounds for Relief in his Second Post-Conviction Petition. For the Second Assignment, Davis raised his Ninth Ground for Relief [*90] below—that "Ohio's post-conviction procedures do not provide an adequate corrective process, in violation of the" United States and Ohio constitutions. In his Third Assignment, Davis claimed that "the trial court erred when it refused to allow appellant to conduct discovery or grant an evidentiary hearing, in violation of appellant's rights under R.C. 2953.21 and the Sixth, Eight, and Fourteenth Amendments to the United States Constitution." (State Court Record, ECF No. 4-48, PageID 6779-80).

On September 9, 2013, the Twelfth District overruled all three assignments, concluding that the trial court did not abuse its discretion in finding that the alleged instances of ineffective assistance did not form the basis of a viable *Strickland* claim. *Davis XIII*, 2013-Ohio-3878, ¶¶ 9-31. The panel summarily dispensed with Davis's Second Assignment, noting that the Twelfth District and its sister districts "already determined that 'the statutory procedure for postconviction relief constitutes an adequate corrective process[.]'" and that the panel saw "no reason to deviate from this prior precedent." *Id.* at ¶ 34, quoting *State v. Lindsey*, No. CA2002-02-002, 2003-Ohio-811, ¶ 13 (Ohio App. 12th Dist. Feb. 24, 2003). The appellate court overruled Davis's Third Assignment on similar grounds, reiterating the well-established precedent that a postconviction [*91] petitioner has no right to discovery or an evidentiary hearing absent a showing of good cause, *id.* at ¶¶ 38-39 (citations omitted), and that:

[T]he trial court properly determined that Davis' claims alleging ineffective assistance of counsel lacked merit and were otherwise barred by *res judicata*. Therefore, we likewise find no abuse of discretion in the trial court's decision not to hold an evidentiary hearing and to deny Davis' request to conduct discovery in this matter.

Id. at ¶ 40. The Supreme Court of Ohio declined to consider Davis's appeal, *Davis XV*, 143 Ohio St. 3d 1441, 2015-Ohio-3427, 36 N.E.3d 188, and the United States Supreme Court denied Davis's petition for certiorari on January 25, 2016. *Davis v. Ohio*, 136 S.Ct. 988, 989, 194 L. Ed. 2d 11 (Mem.) (2016).

III. LEGAL STANDARDS

A. 28 U.S.C. § 2254

As Davis is imprisoned based on a state court judgment, he may petition for a writ of habeas corpus "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A petition "shall not be granted with respect to any claim" that:

[W]as adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined [*92] by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented[.]

28 U.S.C. § 2254(d). A habeas corpus petitioner must also satisfy additional procedural requirements, including but not limited to exhaustion of State court judicial remedies. 28 U.S.C. § 2254(b). Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, this Court's review of any claim adjudicated on its merits in a State court proceeding is sharply circumscribed; "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

A state court may be found to have acted "contrary to" federal law in two ways: (1) if the state court's decision is "substantially different from the relevant precedent" of the U.S. Supreme Court; or (2) if "the state court confronts a set of facts that are materially indistinguishable from a decision of [the U.S. Supreme] Court and nevertheless arrives at a result different from [U.S. Supreme Court] precedent." *Williams (Terry)*, 529 U.S. 362 at 405, 406, 120 S. Ct. 1495, 146 L. Ed. 2d 389. A state court does not act contrary to federal law [*93] simply because its application of federal law was incorrect. Rather, the decision must have been "mutually opposed[.]" *id.* at 406, to "clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), which encompasses only the holdings of Supreme Court decisions, and not their dicta. *Williams (Terry)*, 529 U.S. at 412.

The "unreasonable application" standard is distinct from and more deferential than that of "clear error." "It is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court decision was erroneous. . . . Rather, that application must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75, 76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (internal quotation marks omitted). "[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004). However, this deferential standard applies only when the state court has addressed the merits of a claim raised on appeal; "[w]here a state court has not adjudicated a claim on the merits, the issue is reviewed *de novo* by a federal court on collateral review." *Trimble v. Bobby*, 804 F.3d 767, 777 (6th Cir. 2015).

B. Exhaustion, Procedural Default, and *Res Judicata*

A federal [*94] habeas corpus petitioner must exhaust his claims in the state court before he may bring those claims before this Court. 28 U.S.C. § 2254(b)(2). This can be shown by demonstrating that: (1) the highest court of a state has adjudicated the merits of the claim; or (2) under state law, the claims are procedurally barred. *Gray v. Netherland*, 518 U.S. 152, 161-62, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996). "[T]he doctrine of exhaustion requires that a claim be presented to the state courts under the same theory on which it is later presented in federal court." *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998). However, if a claim is procedurally barred under state law because "a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, [then] federal habeas review of the claims is barred." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

Under Ohio law, failure to make timely objections at trial or to raise the issue on direct appeal from the trial court, if possible, bars a petitioner from raising that claim in a federal habeas corpus petition. *Seymour v. Walker*, 224 F.3d 542, 555 (6th Cir. 2000), citing *Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104, paragraphs eight and nine of the syllabus; *Leroy v. Marshall*, 757 F.2d 94, 97-99 (6th Cir.

1985); *see also, e.g., Coleman v. Mitchell*, 244 F.3d 533, 538-39 (6th Cir. 2001) (holding that the "Perry rule" regarding *res judicata* was an adequate and independent state law ground upon which to find a claim procedurally defaulted, and thus, bar its consideration of claims in district [*95] courts); *Wong*, 142 F.3d at 322 ("Under Ohio law, the failure to raise on appeal a claim that appears on the face of the record constitutes a procedural default under the State's doctrine of *res judicata*."). A claim of ineffective assistance of counsel—*i.e.*, an argument that failure to make timely objections at trial should be excused—normally must "be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 489, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

Further, in raising the claims in the state court, a petitioner must set out why he believes his federal constitutional rights have been violated to avoid procedural default. 28 U.S.C. § 2254; *Gray*, 518 U.S. at 162-63. The procedural default analysis focuses on the "last explained state court judgment." A decision by a state supreme court in which the court declines to exercise jurisdiction over an appeal from an intermediate appellate court, but that does not provide reasons for its declination, does not constitute the "state judgment" upon which this Court resolves the procedural default question. *Munson v. Kapture*, 384 F.3d 310, 314 (6th Cir. 2004), citing *Ylst v. Nunnemaker*, 501 U.S. 797, 805, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). However, the threshold for what constitutes an "explained state court judgment" is modest—the Sixth Circuit has held that an order from a state supreme court stating nothing [*96] more than "that the petitioner had failed to meet the burden of establishing entitlement to relief under [Michigan Rule of Criminal Procedure] 6.508(D) — though brief — constituted the last explained state court decision in the case." *Id.* (internal quotation marks omitted), quoting *Simpson v. Jones*, 238 F.3d 399, 407-08 (6th Cir. 2000). A decision by a state court to review the merits of an otherwise-defaulted claim, as an act of grace to an appellant, does not save that claim from being procedurally defaulted in the federal district court. *Coleman v. Mitchell*, 268 F.3d 417, 429 (6th Cir. 2001); *Amos v. Scott*, 61 F.3d 333, 342 (5th Cir. 1995). Finally, a District Court may not consider claims raised collaterally in a habeas corpus petition that are not supported by substantial evidence from outside the trial or appellate record. *Mapes v. Coyle*, 171 F.3d at 421-22.

Nonetheless, there are certain requirements that the State must prove by a preponderance of the evidence before the procedural default rule bars claims in this Court. *First*, a petitioner must have actually violated the state procedural rule; a state court's mistaken interpretation of a rule, or mistaken finding that the petitioner violated that rule, will not suffice. *Lee v. Kemna*, 534 U.S. 362, 376-77, 387, 122 S. Ct. 877, 151 L. Ed. 2d 820 (2002); *Trevino v. Texas*, 503 U.S. 562, 567, 112 S. Ct. 1547, 118 L. Ed. 2d 193 (1992). *Second*, the case must not fall within an exception to the state procedural rule which the petitioner is alleged to have violated; *e.g.*, if [*97] the gravamen of a petitioner's ineffective assistance of counsel claim is based on evidence outside the trial court record, then failure to raise that claim on direct appeal does not constitute a procedural default. *Morales v. Mitchell*, 507 F.3d 916, 937 (6th Cir. 2007). *Third*, the state court, in its last explained decision, must expressly state that a claim has been procedurally defaulted by failing to comply with a procedural rule; otherwise, "[w]hen a federal claim has been presented to a state court[,] and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication [of such a holding] or statelaw procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Finally, the state procedural rule must be "adequate"—that is, it must have been "clearly announced, firmly established[,] and regularly and consistently applied by the state[]." (Traverse, ECF No. 234, Page ID 16253, citing *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991); *James v. Kentucky*, 466 U.S. 341, 348-49, 104 S. Ct. 1830, 80 L. Ed. 2d 346 (1984); *Hathorn v. Lovorn*, 457 U.S. 255, 262-63, 102 S. Ct. 2421, 72 L. Ed. 2d 824 (1983); *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S. Ct. 13, 68 L. Ed. 143, 21 Ohio L. Rep. 322 (1923)).

A petitioner may circumvent the procedural default bar by "demonstrat[ing] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750; *McCleskey v. Zant*, 499 U.S. 467, 494-95, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). The Sixth [*98] Circuit has adopted a four-part test in *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), under which this Court must examine whether: (1) a petitioner failed to comply with a procedural rule; (2) the state court enforced the procedural rule; (3) the state procedural bar is "an adequate and independent ground" upon which the state can foreclose federal review; and (4) a petitioner can demonstrate good cause for not complying with the procedural rule, and actual prejudice from enforcement of the default. *Id.* at 138. A petitioner must show that an objective factor, external to petitioner, prevented him from complying with the procedural rule, *Murray*, 477 U.S. at 488; and that his trial was "infected with error so 'plain' that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady*, 456 U.S. 152, 163, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982), citing FED.R.CRIM.P. 52(b).

Procedural default may also be excused if a petitioner can show, by a preponderance of the evidence, that he is "actually innocent," such that "a court cannot have confidence in the outcome of the trial[.]" *Lott v. Coyle*, 261 F.3d 594, 602 (6th Cir. 2001), quoting

Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), and thus, his conviction constitutes a "fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750; *Murray*, 477 U.S. at 515. Finally, as a procedural default is not an adjudication on the merits, if a petitioner can successfully set [*99] aside such a default, then this Court must review the claim *de novo*. *Harrington*, 562 U.S. at 99.

IV. ANALYSIS

A. Jury Waiver Grounds for Relief

1. Claim One: Jury Waiver not Knowing, Intelligent, and Voluntary

Davis sets forth five reasons as to why his conviction and death sentence are void due to the impermissible waiver of his fundamental right to a jury trial:

- a. Mr. Davis's jury waiver was not voluntary because the trial court's denial of his motion to sever forced him to waive jury.
- b. Mr. Davis's jury waiver was not knowing and intelligent because he did not know at the time of the waiver that Ohio Supreme Court would refuse to apply the rule of *Penix* to his case and hold him eligible to be resentenced to death.
- c. Mr. Davis's jury waiver was not knowing and intelligent because he did not know when he waived his right to a jury trial in favor of being tried before three specifically identified judges that he was also waiving his jury-trial rights twenty-five years in the future to instead be tried before an entirely different panel of three unknown judges.
- d. Mr. Davis's jury waiver was not knowing and intelligent because he did not know that two of the three judges on his panel represented a party adverse to [*100] him in a prior case.
- e. Mr. Davis's jury waiver was not knowing and intelligent because he did not know that a different standard of proof would be applied to him on appeal from a decision by three-judge panel than would have been applied to an appeal from a jury verdict.

(Petition, ECF No. 6, PageID 8565, 8626, citing U.S. CONST. ART. III § 2, 5th Am., 6th Am., 8th Am., 14th Am.; *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 63 S. Ct. 236, 87 L. Ed. 268 (1942); *Patton v. United States*, 281 U.S. 276, 312, 50 S. Ct. 253, 74 L. Ed. 854 (1930), *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970)).

a. Sub-Claim 1(C) is not Cognizable

In the Return of Writ, the Warden argues that sub-claim 1(C)—the continuing validity of a jury waiver—is non-cognizable, on the basis that "although the Sixth Amendment guarantees the right to trial by jury, neither the Sixth nor the Eighth Amendment creates a constitutional right to be sentenced by a jury, even in a capital case." (Return of Writ, ECF 17, PageID 9043-44 (emphasis removed), quoting *Davis XIV*, 2014-Ohio-1615 at ¶ 39, 139 Ohio St. 3d 122, 9 N.E.3d 1031). In his Traverse, Davis notes that the quoted portion of *Davis XIV* relies on the Supreme Court's holdings in *Spaziano v. Florida*, which, along with *Hildwin v. Florida*, was expressly overruled by *Hurst v. Florida* in 2016 (ECF No. 29, PageID 9173-74, citing *Hurst*, 577 U.S. 92, 136 S.Ct. 616, 619, 623-24, 193 L. Ed. 2d 504 (2016); *Spaziano*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984); *Davis XIV*, 2014-Ohio-1615 at ¶ 39, 139 Ohio St. 3d 122, 9 N.E.3d 1031; see also *Hildwin*, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989)). Davis is correct that *Hurst* overruled *Spaziano* and *Hildwin*'s upholding of the constitutionality of Florida's capital sentencing [*101] scheme, in which a judge made the critical findings, as "wrong, and irreconcilable with *Apprendi*." 136 S.Ct. at 624, citing *Apprendi*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). "In *Ring v. Arizona*, we held that another pre-*Apprendi* decision—*Walton v. Arizona*—could not 'survive the reasoning of *Apprendi*.' *Walton*, for its part, was a mere application of *Hildwin*'s holding to Arizona's capital sentencing scheme." *Id.*, quoting *Ring*, 536 U.S. 584, 603, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); citing *Walton*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990); *Hildwin*, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728. Yet, the Supreme Court recently reaffirmed that *Ring* is retroactive only on direct appeal, not on collateral review. *McKinney v. Arizona*, 140 S.Ct. 702, 709, 206 L. Ed. 2d 69 (2020) (Ginsburg, J., dissenting), citing *Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004); *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (plurality opinion). Given the Supreme Court's identical treatment of Florida and Arizona's capital sentencing regimes and refusal to apply *Ring* retroactively on collateral review, the undersigned cannot

reasonably conclude that *Hurst* would apply retroactively, either. Accordingly, sub-claim 1(C), failure to be sentenced by a jury on remand, is not cognizable and should be dismissed.

b. Remainder of Claim Reviewed *De Novo*

The Warden argues that the other four sub-claims are barred "for failure to present the claims for state court adjudication in respect to the state court judgment currently under attack that was final on March 2, 2015." (Return of Writ, ECF No. [*102] No. 17, PageID 9039, citing *Davis v. Ohio*, 574 U.S. 1202, 135 S.Ct. 1494, 191 L. Ed. 2d 452 (2015)). "Under these circumstances, it is of no legal import that the trial phase jury waiver claims in habeas claims 1, 2 and 4, except 1(C) and 2(B), were earlier presented to the state courts in respect to a state court judgment that no longer exists[.]" *Id.* at PageID 9039-40, citing *Davis X*, 475 F.3d 761. Alternatively, he claims that, because the claims were previously raised and rejected by this Court in *Davis IX* and the Sixth Circuit did not disturb those rulings in *Davis X*, the Court should summarily adjudicate those claims based on the same reasoning as in *Davis IX*. To do otherwise the Warden argues, would give Davis an improper "do over" on those claims. *Id.* at PageID 9040-43, citing *King v. Morgan*, 807 F.3d 154, 159 (6th Cir. 2015); *Davis X*, 475 F.3d at 779-80 (Claims 1(A-B)); *Davis IX*, ECF No. 16-2, PageID 8980-93 (Claim 1(D)), and ECF No. 16-1, PageID 8927-28, 8937, ECF No. 16-2, Page 8950 n.1 (Claim 1(E)).

Yet, Davis argues correctly that, contrary to the Warden's argument as to Ground One—and fifteen of his grounds for relief—*King* does not create a procedural bar for "identical claims [which] have already been denied in prior federal habeas proceedings." (Traverse, ECF No. 29, PageID 9152 (internal quotation marks omitted), citing *King*, 807 F.3d at 159; Return of [*103] Writ, ECF No. 17, PageID 9039-43, 9065, 9067-71, 9073). Davis claims that a petitioner obtains habeas relief and is resentenced via a new judgment, a subsequent habeas petition is not "second or successive" one "even if the claimant previously filed petitions that challenged the original sentence and *even if he raised or could have raised the same claims in those earlier petitions.*" *Id.* (emphasis in original), quoting *King*, 807 F.3d at 159; citing *Magwood v. Patterson*, 561 U.S. 320, 130 S. Ct. 2788, 177 L. Ed. 2d 592 (2010). Davis claims that, pursuant to *King*, his claims are not second or successive even though the "new judgment" is only a new sentence, rather than the underlying conviction. *Id.* at PageID 9152-53, citing *Magwood*, 561 U.S. at 328-29, 331, 349-50 (Kennedy, J., dissenting at 349-50); *In re Stansell*, 828 F.3d 412, 416 (6th Cir. 2016); *King*, 807 F.3d at 157.

Davis's interpretation of *King* is correct. That Davis raised and was unsuccessful with these claims previously is irrelevant; he is challenging the most recent death sentence. "Accordingly, while this Court is free to review its prior rulings on the same claims, there is no procedural bar to this Court's ability to again address those claims on the merits." (Traverse, ECF No. 29, PageID 9155). Moreover, upon resentencing, the statute of limitations clock reset, and the law-of-the-case doctrine does not apply. Thus, the [*104] sub-claims are properly before this Court. *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983); *King*, 807 F.3d at 159-60; *Scott v. Churchill*, 377 F.3d 565, 569 (6th Cir. 2004).

c. Procedural Default

d.

As discussed above, the Warden argues that the sub-claims are procedurally defaulted because Davis failed to raise them in the state courts after his second resentencing. There is no dispute that: Davis did not raise these sub-claims in state court after his 2009 resentencing; they relate to his original conviction, rather than the resentencing; and that they are substantively identical to the claims that were presented to and rejected by this Court in *Davis IX*. Davis presents two arguments as to why the sub-claims are not procedurally defaulted. *First*, Davis argues that the claims have already been fairly presented in the state courts, and that because the factual bases and legal claims contained in the sub-claims are identical to those previously presented, including to this Court in *Davis IX*, they are not "new claims" and, thus, are not procedurally defaulted (Traverse, ECF No. 29, PageID 9156-57, citing *Gray v. Netherland*, 518 U.S. 152, 162-63, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996); *Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986); *Anderson v. Harless*, 459 U.S. 4, 6, 103 S. Ct. 276, 74 L. Ed. 2d 3 (1982); *Picard v. Connor*, 404 U.S. 270, 275-76, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971); *Richey v. Bradshaw*, 498 F.3d 344, 352 (6th Cir. 2007); *Pillette v. Foltz*, 824 F.2d 494, 496 (6th Cir. 1987)).

Second, Davis argues that, because the sub-claims were adjudicated on their merits previously, and pertain to his original trial and conviction, rather than his second resentencing, it would have been [*105] futile for him to raise them again. Thus, he claims, this Court should find that "there is an absence of available State corrective process" for those sub-claims, and, consequently, there was no procedural default (Traverse, ECF No. 29, PageID 9159, quoting 28 U.S.C. § 2254(b)(1)(B)(i); *Turner v. Bagley*, 401 F.3d 718, 724

(6th Cir. 2005); *Sherley v. Parker*, No. 99-5535, 2000 U.S. App. LEXIS 19805, 2000 WL 1141425, *5, 229 F.3d 1153 (TABLE) (6th Cir. 2000)).⁹

Davis's first argument—that the Court should treat the sub-claims as identical to those in *Davis IX*—is inconsistent with his argument elsewhere—that the Court should review these subclaims *de novo*, as if they had *not* been raised in this Court before. Nonetheless, the Court need not address whether the sub-claims are procedurally defaulted, because they are without merit.

e. Davis has not met his Burden Under 28 U.S.C. § 2254(d)

The Sixth Circuit, in *Davis X*, considered and addressed sub-claim 1(A): that the trial court's denial of his motion to sever the charges of aggravated murder and possessing a firearm under a disability (his prior murder conviction) rendered his jury waiver involuntary. 475 F.3d at 775-79. The panel noted that "[i]n denying Davis's motion for severance, the Ohio courts applied state law and, as a result, we must accept as binding the state [*106] supreme court's interpretation of the interaction between the capital specification-election provision, and the rules for joinder and severance of criminal charges." *Id.* at 777, citing Ohio Rev. Code § 2929.022(A). Moreover, the *Davis X* court noted, the Supreme Court has repeatedly held that when prior felony convictions are introduced to the jury for sentencing purposes, "the conceded possibility of prejudice is believed to be outweighed by the validity of the State's purpose in permitting introduction of the evidence." *Id.* at 777-78 (internal quotation marks omitted), quoting *Spencer*, 385 U.S. at 561; citing *Marshall v. Lonberger*, 459 U.S. 422, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983). Consequently, "the prejudice suffered by a defendant in such a case does not rise to the level of a violation of due process[.]" *id.*, quoting *Spencer*, 385 U.S. at 562, and "[b]ecause the denial of Davis's motion for severance did not constitute a denial of the petitioner's due process right to a fair trial, that ruling cannot be said to have rendered his waiver of a jury trial involuntary." *Id.* at 778-79. Davis does not argue that the legal holdings of the published decision in *Davis X* are not binding upon this Court, just as they would be in a factually unrelated case. Further, Davis concedes that there are no facts regarding the trial court's decision to sever that were not before [*107] the Sixth Circuit in *Davis X*. Hence, the Court concludes that sub-claim 1(A) is no more meritorious now than it was in 2007.

Sub-claim 1(B)—that the waiver was not knowing and intelligent because Davis could not have known that the Supreme Court of Ohio would refuse to extend *Penix* as to him, and thus leave him eligible for a death sentence upon resentencing—was considered *de novo* by the Sixth Circuit. *Davis X*, 475 F.3d at 779. The panel held that, even in light of *Ring*, "the state courts cannot be faulted for failing to analyze Davis's motion to withdraw his jury waiver under a fundamental-rights-analysis when the right in question had yet to be recognized by the Supreme Court in the context raised by the petitioner." *Id.* at 780. The appellate court reiterated the well-settled precedent that prisoners and capital defendants are not "suspect classes" that would subject the waiver statute to strict scrutiny. *Id.* at 779, citing *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976); *Tigner v. Cockrell*, 264 F.3d 521, 526 (5th Cir. 2001); *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000). Finally, the panel affirmed this Court's ruling:

[T]hat a sound, rational basis did indeed exist in this case for the different treatment of defendants resentenced after jury trials and those resentenced after trials before three-judge panels. According to the district court, there are obvious difficulties [*108] presented in trying to reassemble the original trial jury to participate in a resentencing hearing. By contrast, the three judges who comprised the original panel in the petitioner's case were still available to resentence the petitioner. Because such a distinction is arguably rational, we must conclude that Davis's equal protection challenge to the original denial of his motion to withdraw his jury waiver is without merit.

Id. at 780 (internal quotation marks and citation omitted).

Davis, in arguing that sub-claim 1(B) is viable (Traverse, ECF No. 29, PageID 9166), emphasizes language in *Davis X*, in which the panel stated that the second resentencing:

[C]an indeed be considered the functional equivalent of 'trial' because, unlike sentencing in a non-capital case, it will take the form of an evidentiary proceeding on the question of whether Davis should receive the death penalty or some form of a life sentence.

⁹ Davis's citation of *Sherley* was merely "229 F.3d 1153," leading the Court to believe that it was a published, precedential opinion, when in fact it is not. Unpublished opinions must be cited properly. COLUMBIA LAW REVIEW ASS'N ET AL. EDS., THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, Rule 10.8.1 (20th ed. 2015).

Moreover, we think there is a legitimate question as to whether a criminal defendant should be held to a jury waiver entered almost 25 years before his newly-mandated sentencing hearing. In the Sixth Circuit, at least, we have recognized that a defendant's jury waiver entered prior to the [*109] first trial of his case does not bar his right to a jury trial on the same case after remand from a reviewing court. . . . Likewise, the Ohio courts have held, in reversing a conviction "on the basis that [the defendant] was neither charged [with] nor found guilty of an essential element of the offense," that the defendant's "previous waiver of a jury trial is also inherently revoked by the reversal of the conviction and the [amended] indictment."

Davis X, 475 F.3d at 780-81, quoting *State v. McGee*, 128 Ohio App. 3d 541, 545, 715 N.E.2d 1175 (Ohio App. 3rd Dist. 1998); citing *Sinistaj v. Burt*, 66 F.3d 804, 808 (6th Cir.1995); *United States v. Groth*, 682 F.2d 578, 580 (6th Cir.1982); *United States v. Lee*, 539 F.2d 606, 608 (6th Cir. 1976). Yet, the panel concedes that *McGee* is "not directly on point, because Davis is not facing a new indictment," *id.* at 781, and while the panel stated that "the reasoning of the Ohio court in *McGee* should certainly inform the sentencing court's determination of the viability of Davis's jury waiver on remand[.]" *id.*, any failure to do so by the trial court cannot constitute a violation of "clearly established federal law," and thus cannot form the basis of a viable habeas claim. 28 U.S.C. § 2254(d)(1). Sub-claim 1(B) should accordingly be denied.

Davis argues that the last reasoned state court decision as to sub-claim 1(D)—that Davis could not have made a knowing, intelligent, and voluntary jury waiver because he did not know that two of the judges on [*110] the panel had prosecuted a foreclosure case against him more than a decade prior to his trial—was *Davis VI* (Traverse, ECF No. 29, PageID 9171, citing 1996 Ohio App. LEXIS 4263, 1996 WL 551432). In that case, the Twelfth District relied on *State v. D'Ambrosio*, in which the Supreme Court of Ohio "held that D'Ambrosio's waiver was not retroactively rendered invalid by the judge's involvement in the other defendant's case. The court found no evidence that because of the prior proceeding, the judge had 'formed an opinion as to the facts at issue in [the] subsequent proceeding.'" *Davis VI*, 1996 Ohio App. LEXIS 4263, 1996 WL 551432, at * 8 (alterations added), quoting 67 Ohio St. 3d 185, 188-89, 1993- Ohio 170, 616 N.E.2d 909 (1993). The panel concluded that because, "at the time of the appellant's trial, neither the two judges in question nor appellant had any recollection of the judges' involvement in the 1970 foreclosure action[.]" *id.*, there could not have been any bias (and hence, actual prejudice) to Davis as a result of them adjudicating his case. Further, the court that "the trial court[s] conclu[sion] that as a factual matter it did not believe appellant's claim that had he been aware of the foreclosure information, he would not have waived a jury trial" was not clearly erroneous. *Id.* Consequently, the court was "not persuaded that appellant's [*111] postwaiver awareness of the judges' foreclosure involvement rendered appellant's jury waiver unknowing or unintelligent so as to implicate appellant's constitutional rights." *Id.*, citing *D'Ambrosio*, 67 Ohio St. 3d at 189; *State v. Dickerson* 45 Ohio St. 3d 206, 209-10, 543 N.E.2d 1250 (1989).

In *Davis IX*, this Court considered and rejected this sub-claim because "[a] valid jury waiver does not require that the defendant be fully aware at the time of the waiver of all the circumstances which may arise during his trial. . . . The burden rests upon the petitioner to demonstrate that the waiver was *prima facie* invalid." (ECF No. 16-2, PageID 8981, citing *Sinistaj*, 66 F.3d at 808; *Milone v. Camp*, 22 F.3d 693, 704 (7th Cir. 1994)). The Court noted that "[m]ost questions concerning a judge's qualifications to hear a case are not of a constitutional nature," *id.* at PageID 8982, citing *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997); *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927), and concluded that the trial judges' mere involvement in a civil action against Davis fourteen years prior to the trial—a point not remembered by anyone prior to or during the trial—did not constitutionally preclude them from adjudicating Davis's guilt and sentence. Accordingly, Davis's inability to show evidence of bias on the part of the judges or prejudice resulting therefrom meant that their involvement did not render his waiver constitutionally invalid. *Id.* at PageID 8984.

[*112] *Bracy*, *Tumey*, and *Sinistaj* are still binding precedent upon this Court, and Davis does not present any new evidence of bias on the part of the judges that could reasonably be said to have resulted from their prosecuting a foreclosure action against Davis and Ernestine in 1970. Accordingly, this Court's analysis in *Davis IX* remains sound, and sub-claim 1(D) should be dismissed.

Davis claims that *Davis VI* was the last reasoned state court decision on sub-claim 1(E)—that his waiver was not knowing and voluntary because of the greater standard of proof imposed upon him in the penalty phase proceedings before a three-judge panel rather than a jury (Traverse, ECF No. 29, PageID 9172-73, citing 1996 Ohio App. LEXIS 4263, 1996 WL 551432, at *7-8). Davis argues that there was no adjudication on the merits in that decision because he "fairly presented to the state courts his claim that he was misinformed by the trial court as to the proper standard of proof[.]" *id.* at PageID 9173, yet, the Twelfth District held that "[t]his is an issue that could have been raised on direct appeal, however, and is barred from post-conviction consideration on *res judicata* grounds." *Davis VI*, 1996 Ohio App. LEXIS 4263, 1996 WL 551432 at * 7, citing *Combs*, 100 Ohio App. 3d at 97. This argument ignores the immediately preceding sentence in the opinion: [*113] "The Ohio Supreme Court held in *Dickerson* that the

standard of proof is the same before a three-judge panel and a jury." *Id.*, citing 45 Ohio St.3d at 208-209. Thus, *Davis VI* could reasonably be read as an adjudication on the merits (albeit brief), an adjudication entitled to deference under 28 U.S.C. § 2254(d). *Harrington*, 562 U.S. at 100-01. Yet, even if the above decision was based solely on Ohio's *res judicata* rule, that rule has been upheld repeatedly as an adequate and independent state ground of decision under *Maupin*. See, e.g., *Williams v. Bagley*, 380 F.3d 932, 967 (6th Cir. 2000); *Coleman v. Mitchell*, 268 F.3d 417, 428-29 (6th Cir. 2001); *Bonnell v. Mitchell*, 212 F. App'x 517, 529 (6th Cir. 2007). Finally, Davis does not attempt to explain why he did not raise this sub-claim until postconviction, even though all the relevant facts underpinning the sub-claim were available to Davis on direct appeal. Accordingly, sub-claim 1(E) should be denied as procedurally defaulted.

2. Claim Two: Court Violated Davis's Sixth, Eighth, and Fourteenth Amendment Rights by Enforcing Jury Waiver in Resentencings

Davis sets forth two reasons why the continued enforcement of his jury waiver upon resentencing was unconstitutional

- a. The trial court violated Mr. Davis's rights under the Eighth and Sixth Amendments and the Due Process Clause by enforcing his prior jury waiver at his first resentencing when he had no knowledge at the time of the waiver that Ohio Supreme Court would refuse to apply the rule [*114] of *Penix* to his case and hold him eligible to be resentenced to death; and
- b. The trial court violated Mr. Davis's rights under the Eighth and Sixth Amendments and the Due Process Clause by enforcing a stale jury waiver at a new penalty hearing twenty-five years later before an entirely different panel of judges.

(Petition, ECF No. 6, PageID 8565).

a. Sub-claim 2(B) is not Cognizable

The Warden argues that sub-claim 2(B) must be dismissed because, as with sub-claim 1(C), the right to be sentenced by a jury in a capital case, established by *Ring* and *Hurst*, is not retroactive on collateral review, only on direct appeal (Return of Writ, ECF No. 17, PageID 9043-44, citing *Hurst*, 136 S.Ct. at 624 (Breyer, J., concurring in the judgment)). The undersigned agrees. Justice Ginsburg's dissent in *McKinney* reaffirmed the well-settled precedent that any claim of violation of right to a jury trial under *Hurst* is not cognizable in habeas; at the very least, the continued enforcement of the waiver by the trial court is not a violation of clearly established federal law required for habeas relief. See *Williams (Terry)*, 529 U.S. at 379-80, citing *Teague*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 ("It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of [*115] law not clearly established at the time the state conviction became final.") Accordingly, sub-claim 2(B) should be dismissed.

b. Petitioner has not met his burden under 28 U.S.C. § 2254(d) as to Sub-Claim 2(A)

The gravamen of sub-claim 2(A)—that the state courts violated Davis's constitutional rights by not applying *Penix* to him on remand—is virtually identical to sub-claim 1(B)—that his waiver was not knowing, voluntary, and intelligent because he could not have foreseen the refusal to apply *Penix*. For the same reasons that sub-claim 1(B) was unavailing, sub-claim 2(A) is as well. When a state court decides on the merits a federal constitutional claim later presented to a federal habeas court, the federal court must defer to the state court decision unless that decision is contrary to or an objectively unreasonable application of clearly established precedent of the United States Supreme Court. 28 U.S.C. § 2254(d)(1); *Harrington*, 562 U.S. at 100; *Brown v. Payton*, 544 U.S. 133, 140, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005); *Bell v. Cone*, 535 U.S. 685, 693-94, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Williams (Terry)*, 529 U.S. at 379. Deference is also due under 28 U.S.C. § 2254(d)(2) unless the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. The state courts' interpretations of state law are entitled to deference under the AEDPA, and because a fair-minded jurist [*116] could differentiate the factual and procedural circumstances in *Penix* and those in *Davis*, and do so in a manner not inconsistent with Supreme Court precedent. *Harrington*, 562 U.S. at 102. For those reasons, that sub-claim 2(A) should be dismissed.

B. Mitigation Evidence Claims for Relief

1. Claim Five: Court failed to Consider all Mitigating Evidence

Davis argues that the second resentencing panel failed to give the particularized, individualized consideration of mitigating evidence has been "repeatedly stressed" since capital punishment was reinstated, by ignoring or inappropriately discounting mitigation evidence presented (Petition, ECF No. 6, PageID 8669-70, citing *Porter v. McCollum*, 558 U.S. 30, 42-43, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (*per curiam*); *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002); *Eddings*, 455 U.S. at 113-14, 117; *Lockett*, 438 U.S. at 605; *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); *Gregg v. Georgia*, 428 U.S. 153, 206, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)). He claims that the second resentencing panel violated his constitutional rights in the following ways:

- Failing to assign any specific weight to certain mitigation evidence, which is a due process violation;
- Assigning "little weight" to Davis's good behavior in prison; even though Supreme Court of Ohio had previously assigned it "some weight";
- Giving little weight to his personality disorder and alcohol dependence, despite being required to consider existence of mental illness or defect by [*117] statute;
- Giving little or no weight to Davis's family background and childhood experiences, and discounting it without explanation;
- Giving insufficient weight to the remorse shown by Davis and the love he received from family and friends, despite the Supreme Court of Ohio stating that that was a mitigating factor;
- Giving no weight "to evidence that Mr. Davis would never be released from prison if given a life sentence, evidence of the economic benefit to tax payers (sic) if given a life sentence, and the closure a life sentence would bring to the victim's family"; and
- Starting with a desire to put Davis to death, and worked backwards from there. Impermissibly discounting this evidence is further proof thereof.

Id. at PageID 8671-74, citing *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Eddings*, 455 U.S. at 115; *State v. Smith*, 87 Ohio St. 3d 424, 447, 2000- Ohio 450, 721 N.E.2d 93 (2000); *Davis IV*, 63 Ohio St. 3d at 52 (Wright, J., dissenting); State Court Record, ECF No. 4-39 PageID 4931-34, 4947, ECF No. 4-46, PageID 6375-77.

Davis's argument finds little, if any, support in the actual opinion from the resentencing panel. The opinion stated that the panel considered each of the factors listed by Davis (State Court Record, ECF No. 4-39, PageID 4927-28) and summarized the testimony of Davis's family and friends, prison personnel, Mausser, and Dr. Smith. [*118] *Id.* at PageID 4928-31. That the trial court appeared to give less weight to his good behavior than did the Supreme Court of Ohio is immaterial.

Similarly, the panel summarized and considered the testimony regarding Davis's borderline personality disorder and alcohol dependence, along with the testimony of the love that his family and friends have for him—specifically, that Davis's daughter had forgiven him for murdering her mother—prior to giving little weight to those mitigating factors (2nd Resent'g Op., ECF No. 4-39, PageID 4932-33). Contrary to Davis's argument, the trial court stated that it considered "[c]hildhood and family experience, and the impact of each upon Defendant's personality development and mental health;" *id.* at PageID 4928, and the opinion summarized the relevant testimony. Importantly, the panel "noted that Defendant did not request a pre-sentence investigation or mental examination pursuant to R.C. 2929.03(D)(1)[.]" *Id.* Thus, Davis's case is not one in which his due process rights were violated because he was prevented from introducing certain evidence. Rather, he disagrees with the weight afforded to that evidence by the trial court, which is not a constitutional violation.

Contrary [*119] to Davis's argument, there was no evidence presented that he would never be released from prison if he was not sentenced to death. Indeed, Mausser testified that she could *not* promise that Davis would never be paroled, and that it would be inappropriate for her to guess how a parole board member might vote (2nd Resent'g Tr., ECF No. 5-7, PageID 8378-79). Finally, Davis's argument that the resentencing panel had decided before the hearing to sentence Davis to death, and thus did not give a fair and meaningful review to his mitigation evidence (Petition, ECF No. 6, PageID 8674), quotes *Davis IV*, which was the Supreme Court of Ohio's review of Davis's *first* resentencing. In that proceeding, the three-judge panel was identical to the one that conducted the original trial, and did not entertain any new evidence. The panel for the *second* resentencing was completely different from the one for the original and first resentencing, and did hear additional evidence. Thus, Justice Wright's statement in dissent is immaterial and does not form the basis for habeas corpus relief. Claim Five is unavailing and should be dismissed.

2. Claim Six: Capital Specification Was Too Remote in Time

Davis argues [*120] that the use of his 1971 murder conviction as the capital specification in Count One of the Indictment, which ultimately resulted in his 1984 death sentence, was unconstitutional for two reasons (Petition, ECF No. 6, PageID 8676, citing Ohio Rev. Code § 2929.04(A)(5)). *First*, he notes that during the thirteen-year gap between the homicides, the Supreme Court invalidated the death penalty and allowed it anew, and Ohio enacted a new statutory scheme for capital punishment. *Id.*, citing *Lockett*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973; *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Davis claims that "[t]his offense was too remote in time to be used as a specification for the death penalty" and "has no relationship to the present offense. Rather, § 2929.04(A)(5) 'acts as an *ex post facto* application of a sentencing enhancement provision that did not exist in 1971[.]'" in violation of Article 1, Section 10 of the United States Constitution. *Id.* at PageID 8676-77, citing *Stogner v. California*, 539 U.S. 607, 611-13, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003); *Carmell v. Texas*, 529 U.S. 513, 521-25, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648, 3 Dall. 386 (1798). *Second*, Davis claims that using his "prior conviction in charging him regarding a subsequent crime subjects him to jeopardy twice for a single offense by the same jurisdiction." *Id.* at PageID 8677, citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

The last reasoned state court opinion on the issue is *Davis II*, in which the Supreme Court of Ohio held that the prior conviction was not too remote in time to serve as the capital specification, noting [*121] that "[t]he General Assembly has placed no time limits on the use of the prior conviction and it is not required to do so[.]" and that it had previously upheld a death sentence "which involved the aggravating circumstance of an eleven-year-old prior conviction." 38 Ohio St. 3d at 369 n.9, citing *State v. Mapes*, 19 Ohio St. 3d 108, 19 Ohio B. 318, 484 N.E.2d 140 (1985), *conditional writ of habeas corpus on other grounds aff'd in Mapes v. Tate*, 388 F.3d 187. Davis argues that *Davis II* was "contrary to the clear holdings of the [United States] Supreme Court[.]" which requires a trial court to use aggravating and mitigating factors to distinguish who is truly deserving of the death penalty (Traverse, ECF No. 29, PageID 9226-27, citing *Lewis v. Jeffers*, 497 U.S. 764, 776, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990); *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)). He also claims that "use of this offense as an aggravating circumstance was unconstitutionally retroactive because it attached new legal consequences to events completed before enactment of Ohio's current death penalty scheme . . . in 1981." *Id.* at PageID 9227, citing *Landgraf v. U.S.I. Film Prods.*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); Ohio Rev. Code § 2929.04(A)(5).

Neither argument is persuasive. In *Mapes*, the homicide conviction that served as the capital specification also predated the reenactment of Ohio's capital punishment regime in 1981. 19 Ohio St. 3d at 119. Yet, the death sentence in *Mapes* was not vacated because of the year in which the defendant was sentenced for the prior homicide [*122] or the length of time between the first conviction and the second homicide. Accordingly, the *Davis II* decision did not run afoul of clearly established precedent with respect to Davis's *ex post facto* argument.

Davis's focus on the time in between his sentence for killing Ernestine and his death sentence ignores the similarities between the two crimes: murder of a significant other during an argument, and the remoteness in time can be explained almost completely by the time Davis spent incarcerated for killing Ernestine. Moreover, Davis does not cite any caselaw—and the undersigned is unaware of any—in which a court held that use of a prior conviction as an aggravating circumstance violated *Blockburger* and thus constituted a Double Jeopardy violation. The specification does not attach a new consequence to the prior conviction. Rather, it serve the same purpose as recidivism statutes generally: it attaches a potentially more severe consequence to the later conviction in the hopes of dissuading persons from committing the second offense. Accordingly, Claim Six should be dismissed.

C. Ineffective Assistance of Counsel Claims for Relief

Davis raises several claims of ineffective assistance [*123] of trial and appellate counsel. The Court examines them in turn, noting that when the issue is ineffective assistance of counsel, the federal court is required to be doubly deferential. *Harrington*, 562 U.S. at 100.

1. Claim Three: Failure to Effectively Investigate and Present Character Evidence

Davis argues that he was denied effective assistance of trial counsel in violation of *Strickland* at his first and second resentencing hearings. "Defense counsel failed to reasonably investigate and present mitigating evidence of Mr. Davis's good prison behavior even though this information was known, available and relevant" and "despite the Sixth Circuit remanding the case for a new penalty phase in order to consider this very evidence." (Petition, ECF No. 6, PageID 8652, citing *Skipper*, 476 U.S. at 5; *Davis X*, 475

F.3d at 774-75). Noting that the Eighth Amendment requires a sentencing court to consider a defendant's character, background, and history, Davis claims that counsel, in failing to investigate and present evidence that he would not be a harm to the community if he were released, fell below the standard of competent representation. *Id.* at 8652-53, citing *Boyde v. California*, 494 U.S. 370, 377-78, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). Davis argues that counsel's inadequate representation prejudiced him, as the first resentencing court found that his continued danger [*124] to the community was an aggravating circumstance in reimposing a death sentence. *Id.* at PageID 8654, citing *Davis X*, 475 F.3d at 770, 773. The trial court in the first resentencing did not consider any new evidence, and there is no indication in the record that the panel was willing to entertain new evidence. Thus, any failure to adequately investigate mitigation evidence was necessarily irrelevant; even if an exhaustive investigation unearthed myriad mitigation evidence, said evidence would not have been considered by the first resentencing panel. Moreover, the panel's failure to consider new evidence was one of the reasons the Sixth Circuit vacated the death sentence and remanded for a second resentencing. Davis has not explained how deficient performance by counsel with respect to the first resentencing could have prejudiced him. Therefore, he does not have a viable *Strickland* claim with respect to the first resentencing.

Davis claims that this incompetent representation continued in the second resentencing, when counsel called only one witness, Nowak, to discuss Davis's exemplary prison record, and Nowak "testified for a meager thirteen pages without offering any substantive or anecdotal evidence regarding [*125] his interactions with Mr. Davis. In addition, defense counsel introduced only a single exhibit, a two-page institutional summary prepared by Mr. Nowak." (Petition, ECF No. 6, PageID 8654-55, citing State Court Record, ECF No. 4-50, PageID 7112-13; 2nd Resent'g Tr., ECF No. 5-8, PageID 8406-19). Davis claims that he was not even "asked by his attorneys for names of other guards, caseworkers or other prison personnel." *Id.* at PageID 8655, citing State Court Record, ECF 4-46, PageID 6270. "Neglecting to investigate and talk to favorable witnesses cannot be a reasonable trial strategy. The Sixth Circuit reversed the case because this very evidence existed but had not been presented." *Id.* at PageID 8656. Further, despite Davis having a prison record replete with evidence of ambition (e.g., completion of his General Equivalency Diploma) and good behavior, Nowak's testimony failed to cover and highlight the "highly relevant" mitigating evidence contained in the institutional summary. *Id.* at PageID 8655-57, citing State Court Record, ECF No. 4-46, PageID 6281-6364. Consequently, Davis argues, "[c]ounsel's performance" at the second resentencing "fell well below an objective standard of reasonableness [*126] and the prevailing professional norms as articulated in the ABA Guidelines[.]" and counsel's failure to present all the mitigating evidence prejudiced Davis by ensuring that the single aggravating circumstance—his prior homicide conviction—outweighed the mitigating factors. *Id.* at PageID 8658, citing *Wiggins v. Smith*, 539 U.S. at 525; *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

The parties agree that the last reasoned state court opinion is *Davis XIII* (Return of Writ, ECF No. 17, PageID 9045-46; Traverse, ECF No. 29, PageID 9200-01). Therein, the Twelfth District panel noted that "contrary to his claims otherwise, Davis explicitly states as part of his submitted affidavit that he 'discussed with my attorneys all my certificates, job evaluations, good conduct as well as guards and case managers that have seen me in prison since 1984.'" 2013-Ohio-3878 at ¶ 16 (citation omitted). Davis also conceded that, in addition to Nowak, counsel also called Stineman, "who testified that Davis regularly attended Alcoholics Anonymous meetings where he was an active participant. Nowak also specifically testified as to Davis' good behavior and noted Davis' position in the 'extended privilege unit' or 'honor block.'" *Id.* After noting Davis's comprehensive work history summary, *id.* at ¶ 17, the panel [*127] concluded that "the evidence presented at Davis' third sentencing hearing demonstrates his strong work ethic, good behavior, and trustworthiness while in prison. In turn, we agree with the trial court's decision finding any additional testimony regarding his 'exemplary prison record' would have been cumulative." *Id.* at ¶ 18. Consequently, the panel held, Davis's claim that providing additional evidence "would have saved his life . . . is purely speculative and is otherwise not supported by the record." *Id.* (internal quotations marks and citation omitted).

Davis claims that "[t]here is no reasonable strategy that would including [sic] leaving out evidence that the federal court held was compelling enough to support a grant of habeas relief. Therefore, counsel's failure cannot be viewed as a reasonable strategic decision, but rather viewed as a dereliction of duty that prejudiced Mr. Davis." (Traverse, ECF No. 29, PageID 9202, citing *Wiggins*, 539 U.S. at 525, *Davis X*, 475 F.3d at 773). Thus, he argues that *Davis XIII* is not entitled to AEDPA deference, as its holding contradicts clearly established Supreme Court precedent. *Id.* at PageID 9201-02, citing *Rompilla*, 545 U.S. at 381-90; *Wiggins*, 539 U.S. at 521-29; *Williams*, 529 U.S. at 395-97; *Boyde*, 494 U.S. at 377-78; *Lockett*, 438 U.S. at 604.

This argument is not persuasive. An attorney need not present every piece [*128] of evidence to satisfy the constitutional requirement of constitutional, meaningful representation. Indeed, in *Strickland*, the Supreme Court held that, in the face of overwhelming aggravating circumstances, "[t]rial counsel could reasonably surmise . . . that character and psychological evidence

would be of little help. . . . On these facts, there can be little question, . . . that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment." 466 U.S. at 699.

Davis's barebones allegation that trial counsel failed to investigate and present certain mitigation evidence is not supported by the record, including the affidavits of Davis and his post-conviction counsel. As the *Davis XIII* court correctly explained, the evidence that Davis claims should reasonably have been discovered and presented covered the same topics and mitigation factors on which counsel had already put forth evidence. Such cumulative evidence is unlikely to have changed Davis's sentence when the aggravating circumstance could be reasonably interpreted as "overwhelming." As fair-minded jurists could agree that the *Davis XIII* decision was a reasonable application of *Strickland* and its progeny, AEDPA [*129] deference must be accorded, and Claim Three should be dismissed.

2. Claim Four: Failure to Advise of More Deferential Appellate Review of Verdicts of Three-Judge Panels vis-à-vis Jury Verdicts

Davis alleges that Ohio has an effectively non-rebuttable presumption that a three-judge panel "considered only relevant, material, and competent evidence in reaching its decision unless the record affirmatively demonstrates otherwise[.]" and that his trial counsel was ineffective in failing to advise him on the different standards of review prior to Davis making his jury waiver (Traverse, ECF No. 29, PageID 9204, citing *State v. Post*, 32 Ohio St. 3d 380, 384, 513 N.E.2d 754 (1987); *White*, 15 Ohio St. 2d at 151). As discussed above, Ohio courts have consistently held that the standard of review on appeals from jury verdicts versus verdicts from three-judge panels is identical; as such an interpretation is not clearly erroneous, this Court is bound by the Ohio courts' decisions on matters of state law. *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005). As there is no legally-recognized difference between the standards of review, it could not have been error for trial counsel to have failed to advise him of such, and Claim Four should be dismissed.

3. Claim Seven: Failure to Represent Davis Adequately at Second Resentencing Hearing

[*130] Davis claims that counsel was deficient in arguing during opening statements at the second resentencing that Davis, if sentenced to life in prison, would never be paroled. He claims that counsel was further deficient in calling Mausser to testify in support of that statement, even though she did not testify that he would never be paroled, and Mausser, in a subsequent affidavit, averred "that she did not tell defense counsel that Mr. Davis would never be paroled." (Petition, ECF No. 6, PageID 8678-79, citing State Court Record, ECF No. 4-46, PageID 6365; 2nd Resent'g Tr., ECF No. 5-7, PageID 8225-27 8323-25, 8327, 8330, 8333-35). Davis alleges that after discussing Mausser's proposed testimony with the mitigation expert, he indicated to his counsel that he did not wish for Mausser to testify, but that his counsel nonetheless called her. *Id.* at PageID 8680-81, citing State Court Record, ECF No. 4-46, PageID 6271, 6275-77). Counsel compounded his mistake by not asking Mausser on redirect examination to clarify her view that "it might be unusual" for someone in Davis's situation to be paroled, or to ask her how she voted, as a member of the Parole Board, when a convict with death specifications came up for parole. *Id.* at PageID 8681, citing State Court Record, ECF No. 4-46, PageID 6366; 2nd Resent'g Tr., ECF No. 5-7, PageID 8379. In sum, Davis argues:

If counsel would have conducted a reasonable investigation and effectively prepared for mitigation, the harmful testimony of Ms. Mausser would not have been presented in the first place. Absent counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different and the three-judge [*131] panel would not have convicted Mr. Davis.

Id. at PageID 8681-82.

Davis argues further that counsel did not adequately prepare Dr. Smith to testify, and as a result, "Dr. Smith left the panel with the impression that due to Mr. Davis's borderline personality disorder, if Mr. Davis were ever released from prison, and no longer in a structured environment, he could kill again." (Petition, ECF No. 6, PageID 8682). Dr. Smith averred that he was not informed by Davis's counsel that parole might be an issue, and Davis argues that counsel's decision to present Dr. Smith's testimony that Davis was unlikely to do well in an environment without strict limitations, "after Cynthia Mausser, the chair of the Ohio Parole Authority, could not guarantee that Mr. Davis would not be paroled if he received a non-death sentence[.]" constituted deficient performance under *Strickland*. *Id.* at PageID 8684, citing State Court Record, ECF No. 4-46, PageID 6382. Further, the testimony that Dr. Smith

and others gave in mitigation failed "to present a full and accurate picture of Mr. Davis's character and background," because counsel failed to adequately investigate and prepare witnesses to discuss issues such as [*132] Davis's family history, mental health, or alcohol dependence. *Id.* at PageID 8690-91. Finally, Davis argues that counsel was ineffective in failing to call mitigation investigator John Lee, who Davis claims would have presented "relevant and compelling evidence of Mr. Davis's character, history and background." *Id.* at PageID 8685. Davis claims that, had the evidence been presented properly and completely, there is a reasonable probability that he would not have been sentenced to death. *Id.* at PageID 8688, citing *Strickland*, 466 U.S. at 687-88.

The last reasoned state court decision on the issue was *Davis XIII*, in which the appellate panel held that the decisions to call Lee, Mausser, and Dr. Smith were "within the rubric of trial strategy and will not be second-guessed by a reviewing court." 2013-Ohio-3878 at ¶¶ 24-25, quoting *State v. Hanna*, 95 Ohio St. 3d 285, 304, 2002-Ohio-2221, 767 N.E.2d 678. The court did not engage in any analysis of the factual substance of Davis's claims, and Davis argues that the dearth of analysis means that *Davis XIII* is not entitled to deference. Further, Davis claims, relief is warranted because the decisions as to calling witnesses and the testimony they elicited from them were not within the ambit of "sound trial strategy." (Traverse, ECF No. 29, PageID 9238-40, quoting *Davis XIII*, 2013-Ohio-3878 at ¶ 25; citing [*133] *Wiggins*, 539 U.S. at 523-24; *Strickland*, 466 U.S. at 688-91).

In *Wiggins*, no mitigation evidence was presented at all, and "[c]ounsel's decision not to expand their investigation beyond the PSI and [Department of Social Services] records" prior to deciding not to present mitigation evidence "fell short of the professional standards that prevailed in Maryland in 1989." 539 U.S. at 524. Indeed, *Wiggins*'s attorney conceded that, despite it being standard practice for counsel representing capital defendants to prepare "a social history report[.]" and "[d]espite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report." *Id.* Counsel for *Wiggins* also violated the American Bar Association Guidelines by not discovering "all reasonably available mitigating evidence[.]" and not conducting any more than a rudimentary investigation into potential mitigating evidence. *Id.* (emphasis removed). In sum, Davis argues, counsel's performance was so patently deficient that the presumption of competent representation and heavy deference to trial strategy set forth in *Strickland* and its progeny do not apply.

Wiggins is a much higher bar to relief than Davis wishes it to be. Even [*134] though Davis did not request a presentence investigation, his attorneys retained a mitigation expert and called witnesses to testify as to the full range of mitigation factors, including but not limited to his childhood, substance abuse, and borderline personality disorder. Moreover, counsel faced a more daunting challenge in crafting trial strategy than most attorneys representing capital defendants—the fact that, despite the hearing occurring in 2009, Davis could not be sentenced to life without possibility of parole, because such a sentence did not exist under the law at the time Davis murdered Butler. As discussed above, it was apparent from the State's opening statement that they intended to rely heavily upon the fact that Davis would be eligible for parole six-and-a-half years after resentencing if he were not sentenced to death. Even though Mausser could not testify that Davis would never be paroled, she did testify that it was unlikely. Importantly, Davis does not argue that he could have gotten evidence as to the unlikelihood of parole from another source. Counsel's decision to call Mausser and elicit certain testimony fell within the broad ambit of sound trial strategy and [*135] did not prejudice Davis.

Moreover, the testimony by Dr. Smith adequately discussed Davis's history of alcohol dependence and borderline personality disorder, and Davis's argument that Dr. Smith would have provided more persuasive testimony had he been fully informed of Davis's family history is purely speculative. While Dr. Smith avers that he was unaware of parole's being a possibility for Davis, his testimony regarding the possibility of Davis's becoming violent upon release was immaterial to Davis's defense, which was premised in part on his never being released. Moreover, there was no indication in the trial court opinion that the possibility of Davis's becoming violent upon release influenced the panel's decision to sentence him to death. Accordingly, any deficient performance in calling Dr. Smith did not prejudice Davis, and thus cannot be the basis of a viable *Strickland* claim. Finally, as Defendants point out, Lee "would be purely a fact witness. As a fact witness, elementary rules of hearsay would preclude Lee from parroting out-of-court statements from others to prove that Davis supposedly is a great guy who deserves a lenient sentence." (Return, ECF No. 17, PageID 9054). [*136] Moreover, even if Lee were allowed to testify as to Davis's family background and history and his personal character, such testimony would have been cumulative of the testimony offered by other fact witnesses. Decisions not to present cumulative testimony—or even attempt to do so—are generally considered sound trial strategy. As counsel's decision not to call Lee was not a *Strickland* violation, the Court should dismiss the Seventh Claim.

4. Claim Eight: Failure to Seek Recusal of Biased Judges

Davis claims that his attorneys were ineffective in failing to *voir dire* Judge Pater after the Judge revealed that was a longtime friend of Victor Davis. Davis claims his attorneys were further ineffective in failing to discover that Judge Nastoff, prior to going on the bench, had prosecuted Lahray Thompson, Davis's nephew, for capital murder and that Judge Nastoff had referred to Thompson as "a liar" during the proceedings. Finally, Davis argues that counsel were ineffective in failing to seek recusal of Judges Nastoff and Pater after becoming aware of their alleged bias. Their failures to conduct *voir dire* and seek recusal deprived Davis of his Sixth Amendment right to "an opportunity to comment on facts which [*137] may influence the sentencing decision in capital cases." Had counsel done so, Davis argues, he would not have received a death sentence because the panel would have concluded that Davis had an extremely dysfunctional upbringing (a factor in mitigation) (Petition, ECF No. 6, PageID 8693-98, quoting *Gardner v. Florida*, 430 U.S. 349, 360, 362, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); citing *Simmons v. South Carolina*, 512 U.S. 154, 161, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994); *Strickland*, 466 U.S. at 668; *Gardner*, 430 U.S. at 353, 360-62; State Court Record, ECF No. 4-39, PageID 4933; State Court Record, ECF No. 4-46, PageID 6278-79, 6451-55, 6457; 2nd Resnt'g Tr., ECF No. 5-7, PageID 8268, 8285-87).

As the Warden notes, Davis never presented his claim regarding Judge Pater to the state courts (Return of Writ, ECF No.17, PageID 9059, citing 28 U.S.C. § 2254(b)(1)(A); State Court Record, ECF No. 4-46, PageID 6255-56; ECF No. 4-48, PageID 6809-11), and in the last reasoned state court decision, his claim as it pertains to Judge Pater was not discussed. *See Davis XIII*, 2013-Ohio-3878, at ¶ 26 (discussing only counsel's failure to seek recusal as to Judge Nastoff). Thus, the claim is procedurally defaulted. *Wong*, 142 F.3d at 322. Davis does not contest that the claim is defaulted, but "specifically asserts ineffectiveness of trial counsel, his direct appeal counsel, and his post-conviction counsel for failing to properly present this claim to the state courts as cause for any default." (Traverse, [*138] ECF No. 29, PageID 9251, citing *Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397). Yet, in *Carrier*, the Supreme Court held that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." 477 U.S. at 488. Moreover, principles of comity dictate that a federal court is normally not the proper venue to vacate a state court conviction or sentence without first giving the state the chance to cure any constitutional violation. "That holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief." *Id.*, citing *Darr v. Burford*, 339 U.S. 200, 204, 70 S. Ct. 587, 94 L. Ed. 761 (1950), *overruled in part on other grounds by Fay v. Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963). Davis does not dispute that the ineffective assistance of trial counsel claim was available to him on direct appeal. Consequently, Davis's ineffective assistance claim should be dismissed as procedurally defaulted unless Davis could show good cause to excuse appellate counsel's failure to raise the issue, or good cause to excuse postconviction counsel's failure to seek to reopen Davis's direct appeal or raise it in Davis's state court postconviction petition. [*139] *Edwards v. Carpenter*, 529 U.S. 446, 449-50, 452-53, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). Davis does not allege facts that would constitute such good cause. Accordingly, Claim Eight is procedurally defaulted as it pertains to any failure to *voir dire* or seek recusal of Judge Pater.

In *Davis XIII*, the Twelfth District noted that "counsel explicitly stated that they were aware of Judge Nastoff's prior participation in Thompson's prosecution, but chose not to seek recusal." 2013-Ohio-3878, ¶ 26. The panel concluded that Davis's claim failed as a matter of law, as "the decision not to seek recusal of the judge can only be viewed as strategic and will not form the basis of an ineffective counsel claim." *Id.*, quoting *State v. Nuhfer*, No. L-07-1125, 2009-Ohio-1474, ¶ 22 (Ohio App. 6th Dist. Mar. 20, 2009). The appellate court noted that the Tenth District had not found ineffective assistance in failing to seek recusal of a judge who was involved in a previous prosecution of the defendant himself. *Id.*, citing *State v. Morgan*, No. 12AP-241, 2012-Ohio-5773, ¶ 24 (Ohio App. 10th Dist. Dec. 6, 2012), *appeal not allowed at* 134 Ohio St. 3d 1488, 2013-Ohio-902, 984 N.E.2d 31. But see *Williams v. Pennsylvania*, 579 U.S. ___, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016).

The Warden argues that the decision, as a state court decision on a question of constitutional law, is entitled to double deference under AEDPA, and that the claim fails even under a *de novo* standard (Return of Writ, ECF No. 17, PageID 9058). In support, he notes that when postconviction counsel moved to disqualify [*140] Judge Nastoff from adjudicating Davis's petition, based on the judge's prior work as a prosecutor, the Supreme Court of Ohio denied the motion because "[n]o factual basis for disqualification has been presented in the instant affidavit" of his postconviction attorney. *Id.* at PageID 9058-59, quoting *In re Disqualification of Nastoff*, 134 Ohio St. 3d 1232, 2012-Ohio-6339, ¶ 10, 983 N.E.2d 354. In other words, Judge Nastoff's prosecution of Davis's nephew was not *per se* grounds for disqualification; rather, there had to be some showing that that prior involvement engendered "bias, prejudice, or a disqualifying interest" on the part of the judge. *In re Nastoff*, 2012-Ohio-6339, ¶ 9, 134 Ohio St. 3d 1232, 983 N.E.2d 354.

Davis argues that: *In re Nastoff* is immaterial because it pertained to a motion to disqualify due to bias, rather than a claim of ineffective assistance of counsel; *Davis XIII* was contrary to clearly established Supreme Court precedent, such that it should not be accorded deference; and the presence of Judge Nastoff tainted the death sentence "with constitutional infirmity." (Traverse, ECF

No. 29, PageID 9247-48, quoting *Strickland*, 466 U.S. at 688; citing *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *Edwards v. Balisok*, 520 U.S. 641, 647, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997); *Johnson v. United States*, 520 U.S. 461, 469, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997); *Rose*, 478 U.S. at 577-78; State Court Record, ECF No. 4-46, PageID 6271).

Contrary to Davis's argument, trial before a judge with *potential* bias has not been held by the Supreme Court to be structural error. See *Johnson*, 520 U.S. at 469 (citations omitted) [*141] ("We have found structural errors in only a limited class of cases[.] . . . It is by no means clear that the error here [trial judge determining a question properly reserved to the jury] fits within this limited class of cases."); *Rose*, 478 U.S. at 577-78, citing *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927) (*actual* bias on the part of the judge is structural error); *Smith v. Warden*, 780 F. App'x 208, 230 (6th Cir. 2019), citing *Rose*, 478 U.S. at 577, *Tumey*, 273 U.S. at 514-15 (distinguishing from the trial judge's actual bias via pecuniary interest in the outcome in *Tumey*, which was structural error, and the trial judge's alleged *potential* bias from an alleged "fixed anticipatory judgment" against the defendant, which was not). *In re Nastoff*, while not binding on this court, is instructive—the court found no allegations of actual bias or prejudice on the part of Judge Nastoff. Thus, even if counsel was deficient in not failing to seek Judge Nastoff's recusal, there is no evidence that the deficient performance prejudiced Davis, and it cannot serve as the basis of a *Strickland* claim.

As to Davis's argument that counsel deprived him of his right to participate in decisions affecting his possible sentence (Traverse, ECF No. 29, PageID 9249, citing *Gardner*, 430 U.S. at 353, 360-62), Judge Nastoff held that the claim was available to him on direct appeal but was not presented, and thus, [*142] was barred by *res judicata* (State Court Record, ECF No. 4-47, citing *State v. Lawson*, 103 Ohio App. 3d 307, 315, 659 N.E.2d 362 (Ohio App. 12th Dist. 1995). As Ohio's *res judicata* law is an adequate and independent state ground to find this portion of the claim procedurally defaulted, *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007), Claim Eight should be dismissed in its entirety.

5. Claim Sixteen: Failure to Investigate Circumstances Surrounding Prior Killing

Davis argues that his trial counsel failed to thoroughly investigate the circumstances of the prior homicide conviction[;] consequently, Davis claims, "they failed to discover evidence demonstrating that that killing was not purposeful, as required by the statute." (Petition, ECF No. 6, PageID 8725, citing State Court Record, ECF No. 4-19, PageID 2032). He argues that Robert Jones Beard's letter was evidence that Davis did not act purposefully in killing Ernestine, and that, had counsel discovered that letter or other evidence, Davis's prior murder conviction could not have been used as a capital specification and he could not have been sentenced to death. *Id.* at PageID 8725-26. As with Claim Fifteen (the capital specification's supposedly being improper), the Twelfth District held that the claim was barred by *res judicata*, *Davis VI*, 1996 Ohio App. LEXIS 4263, 1996 WL 551432 at * 4, and as with Claim Fifteen, the claim [*143] also fails on its merits. The letter from Beard could not, by itself, have overcome the uncontested finding that Davis had purposely killed Ernestine. Davis cites no other evidence that, had it been discovered and presented by counsel, would have rendered his prior conviction unconstitutional. Any failure to investigate the circumstances surrounding Davis's killing of Ernestine did not prejudice Davis, and cannot be the basis of a viable *Strickland* claim. Thus, Claim Sixteen should be dismissed.

D. Execution Claims

1. Claim Nine: Execution after Thirty-Six Years on Death Row is Cruel and Unusual Punishment

Davis argues that, because the punitive justification for a death sentence weakens with time, carrying out a death sentence after he has been on death row for more than thirty years is gratuitous, thus constituting cruel and unusual punishment that has no place within "the evolving standards of decency that mark the progress of a maturing society." (Traverse, ECF No. 29, PageID 9252, 9255, 9259, quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958); citing *Roper*, 543 U.S. at 578; *Lackey*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (Stevens, J., respecting the denial of certiorari); *Gregg v. Georgia*, 428 U.S. 153, 177, 182-

83, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)).¹⁰ However, as the Warden correctly points out, there is not a clearly established federal legal principle that delay in [*144] carrying out death sentence is cruel and unusual under the Eighth Amendment. Dissents, no matter how eloquent and continuous, do not create constitutional law. Accordingly, habeas relief not available for this claim (Return of Writ, ECF No. 17, PageID 9060, citing 28 U.S.C. § 2254(d)(1); *Wright v. Van Patten*, 552 U.S. 120, 126, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008); *Carey v. Musladin*, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006)). Davis's arguments that that he should not be penalized for the State's faulty sentencing procedures, which caused the delay between 1984 (initial sentence) and 2007 (*Davis X*), are ultimately irrelevant. Even if the wait is "horrible," as the Supreme Court remarked more than 100 years ago, *In re Medley*, 134 U.S. 160, 172, 10 S. Ct. 384, 33 L. Ed. 835 (1890), that horribleness does not by itself violate the Eighth Amendment. Nor does Davis cite any caselaw for the proposition that the admirable work by his attorneys to twice vacate his death sentence renders the carrying out of a new death sentence a violation of clearly established federal law. Accordingly, Claim Nine should be dismissed.

2. Claim Ten: Conviction Product of Unnecessarily Suggestive Police Procedures and Unreliable Eyewitness Testimony

The evidence upon which the State relied to convict Davis was almost exclusively the eyewitness testimony of Anthony Ferguson (before the grand jury), Reginald Denmark, Cozette Massey, and Shelba Robertson, recapitulated [*145] in detail above. Davis notes that Ferguson and Massey did not know Davis, and they had not seen him prior to the night of the murder. Moreover, Ferguson and Massey did not recall seeing each other, Denmark (Massey's girlfriend) did not see Ferguson, and Robertson (Butler's friend) did not see Denmark or Massey. Finally, Massey did not go to the police until four days after the murder, and her description of Davis to investigators was incomplete and inaccurate. Despite this, Ferguson and Massey's identifications of Davis did not come from a photo array or live lineup. Rather, investigators showed them a single photo of Davis with Butler, a process Davis argues is unconstitutionally suggestive (Petition, ECF No. 6, PageID 8706-08, citing *Manson v. Brathwaite*, 432 U.S. 98, 109, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); State Court Record, ECF No. 4-28, PageID 3188-89, Trial Tr., ECF No. 5-2, PageID 7351, 7367, 7369, 7373-75, 7382-85, 7389, 7391, 7393, 7399, 7423-24; ECF No. 5-3, PageID 7495, 7498-99, 7507, 7566, 7568-70). Consequently, Davis argues, his conviction was the product of unreliable and inadmissible evidence, and his conviction must be vacated and reversed. *Id.* at PageID 8708-09.

Davis's conviction has been upheld repeatedly by state and federal courts, [*146] even when his death sentence was vacated. *Davis X*, 475 F.3d 761; *Davis II*, 38 Ohio St. 3d at 366. Yet, Davis argues that the last reasoned state court decision was *Davis VI*, in which the Twelfth District held that, because the claim did not require evidence *dehors* the record, Davis's failure to raise it on initial direct appeal meant that it was barred by *res judicata* on postconviction. 1996 Ohio App. LEXIS 4263, 1996 WL 551432 at * 9, citing *Combs*, 100 Ohio App. 3d at 97. Davis argues: the lack of adjudication on the merits means that AEDPA deference does not apply; Ohio courts have not consistently applied *res judicata* as a procedural bar; and ineffective assistance of appellate counsel excuses any procedural default (Traverse, ECF No. 29, PageID 9264-65, citing *Johnson v. Williams*, 568 U.S. 289, 302, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013); *James v. Kentucky*, 466 U.S. 341, 348, 104 S. Ct. 1830, 80 L. Ed. 2d 346 (1984); *Post v. Bradshaw*, 621 F.3d 406, 424 (6th Cir. 2010); *Franklin v. Anderson*, 434 F.3d 412, 420-21 (6th Cir. 2006)).

Davis's argument is unavailing for at least three reasons. *First*, as discussed above, *res judicata* is an adequate and independent state ground upon which to find a claim procedurally defaulted and precluded from federal habeas review. *Durr*, 487 F.3d 423 at 431-32. *Second*, even if *Davis VI* did not address the merits of this particular claim, the Supreme Court of Ohio, in *Davis II*, in discussing Massey's identification of Davis to police and Denmark and Massey's testimony regarding the night of the killing, "conclude[d] that there is sufficient evidence in the record to [*147] support the conviction." 38 Ohio St. 3d at 366.

Third, as the Warden notes, an identical claim was presented and rejected in his first habeas corpus petition before this Court (Return of Writ, ECF No. 17, PageID 9061, citing *Davis IX*, ECF No. 16-1, PageID 8914-22). Therein, Judge Graham followed

¹⁰ In his Petition, Davis also notes that Justice Breyer has consistently, in his dissents from denials of certiorari, inveighed against the lengthy delays between sentences and executions (Petition, ECF No. 6, PageID 8701-02, citing *Conner v. Sellers*, 136 S.Ct. 2440, 2441, 195 L. Ed. 2d 881 (Mem) (2016) (Breyer, J., dissenting from denial of certiorari and stay); *Boyer v. Davis*, 136 S. Ct. 1446, 1446-47, 194 L. Ed. 2d 840 (Mem) (2016) (Breyer, J., dissenting from denial of certiorari); *Valle v. Florida*, 564 U.S. 1067, 132 S. Ct. 1, 180 L. Ed. 2d 940 (2011) (Breyer, J. dissenting from denial of stay and certiorari); *Smith v. Arizona*, 552 U.S. 985, 128 S. Ct. 466, 169 L. Ed. 2d 326 (2007) (Breyer, J. dissenting); *Foster v. Florida*, 537 U.S. 990, 123 S. Ct. 470, 154 L. Ed. 2d 359 (2002) (Breyer, J. dissenting from denial of certiorari); *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 145 L. Ed. 2d 370 (1999) (same); and *Elledge v. Florida*, 525 U.S. 944, 119 S. Ct. 366, 142 L. Ed. 2d 303 (1998) (same).

Sixth Circuit precedent that, when a state appellate court summarily dismisses a claim that a lower court has ruled to be procedurally defaulted, the federal habeas court must presume that the appellate court relied upon and affirmed the procedural default decision. *Davis IX*, ECF No. 16-1, PageID 8915-16, citing *Rust v. Zent*, 17 F.3d 155, 161 (6th Cir. 1994). Moreover, Judge Graham found there was not the requisite cause to excuse the default, both because Davis failed to present an ineffective assistance of appellate counsel claim on direct appeal, and because Davis failed to articulate what objective external factor impeded appellate counsel from raising it on direct appeal (as is required to excuse the procedural default of the underlying claim). *Id.* at PageID 8917-20. Further, Davis was unable to demonstrate prejudice, as the allegedly inaccurate or inconsistent testimony by Ferguson and Massey "does not at all undermine the credibility of the other two [*148] eyewitnesses who identified the petitioner as the person who shot Suzette Butler." *Id.* at PageID 8920. Finally, the substantial evidence of Davis's guilt meant that a reasonable factfinder could have imposed the death penalty, even absent the testimony of Ferguson and Massey. Thus, it was not a miscarriage of justice for Judge Graham to refuse to set aside the procedural default—indeed, based on the evidence before him, the refusal was proper. *Id.* at PageID 8921-22, quoting *Schlup v. Delo*, 513 U.S. 298, 315, 329, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); *McCleskey*, 499 U.S. at 494; citing *Sanyer v. Whitley*, 505 U.S. 333, 350, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992). Davis has not argued that there is new evidence that constitutes cause and prejudice to set aside the default. For all these reasons, Claim Ten is not viable and should be dismissed.

3. Claim Twenty-One: Ohio's Postconviction Scheme Inadequate to Address Constitutional Claims in State Courts

Davis argues that he fairly presented his federal constitutional claims to the Ohio courts under the state's postconviction relief proceedings, and supported those claims with "affidavits and other evidence *debors* the record." (Petition, ECF No. 6, PageID 8747, citing Ohio Rev. Code §§ 2953.21 *et seq.*; *State v. Cole*, 2 Ohio St. 3d 112, 2 Ohio B. 661, 443 N.E.2d 169 (1982)). Nonetheless, Davis claims, the Ohio courts "effectively foreclosed Mr. Davis from having his legitimate claims reviewed[,] denying him discovery [*149] or an evidentiary hearing during either postconviction proceeding. *Id.* This is because Ohio law requires a postconviction court to examine the petition "and make a facial determination if a hearing is required. All this must be done without the benefit of the discovery processes available to every other civil litigant." Essentially, Davis argues, Ohio's postconviction regime is a circular logic that "imposes an impossible pleading standard on petitioners." *Id.* at PageID 8748.

[A]n individual seeking post-conviction relief is not entitled to an evidentiary hearing until he produces sufficient documentation in the form of evidence outside the record to demonstrate that he is entitled to relief. However, a post-conviction petitioner is not entitled to conduct discovery to obtain the necessary documentation to warrant a hearing until such time as he demonstrates that a hearing is necessary.

Id., citing Ohio Rev. Code § 2953.21(A)(1)(a); *Cole*, 2 Ohio St. 3d at 114. Making matters worse, Davis claims, is that "each cause of action in a postconviction petition [may] not exceed three pages[.]" meaning that death row petitioners with complex claims are not able to fact plead extensively in an attempt to meet their initial burden to obtain a hearing. [*150] *Id.* at PageID 8749, citing Ohio Crim.R. 35. In sum, "[a]lthough, the State must provide Mr. Davis 'with a constitutionally adequate opportunity to be heard,' Mr. Davis has been denied 'even this rudimentary process.'" *Id.* at PageID 8751, quoting *Panetti v. Quarterman*, 551 U.S. 930, 952, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007). Davis argues that "[d]eath is different. For that reason more process is due, not less." *Id.*, citing *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998); *Lockett*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973; *Woodson*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944. However, there is no provision in the statute, Criminal Rule 35, or anywhere else allowing more flexibility for death row petitioners to present their constitutional claims.

Finally, Davis argues, even if the process is adequate in theory, in practice the granting of postconviction relief by Ohio courts is so rare that it fails to provide the meaningful opportunity for relief required by the Fifth and Fourteenth Amendments (Petition, ECF No. 6, PageID 8750, citing *Keener v. Ridenour*, 594 F.2d 581, 590 (6th Cir. 1979); *Allen v. Perini*, 424 F.2d 134, 139-40 (6th Cir. 1970); *Coley v. Alvis*, 381 F.2d 870, 872 (6th Cir. 1967)).

Davis raised a nearly identical claim in his first habeas petition, which was rejected because "the Sixth Circuit has held that alleged errors in state collateral proceedings cannot form the basis for habeas corpus relief." (*Davis IX*, ECF No. 16-2, PageID 9030, citing *Kirby v. Dutton*, 794 F.2d 245, 247 (6th Cir. 1986)). *Kirby* has never been called into question, much less overruled, as to alleged errors arising solely out of postconviction. Thus, Claim Twenty-One should [*151] be dismissed as not cognizable.

4. Claims Twenty-Two through Twenty-Six: Method of Execution and Legal Injection is Unconstitutional

Davis raises the following claims with respect to the constitutionality of Ohio's execution statute and protocol:

Twenty-Two: Ohio's statutory provisions governing the imposition of the death penalty do not meet the prescribed constitutional requirements and are unconstitutional, both on their face and as applied to Mr. Davis, in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution;

Twenty-Three: The State of Ohio cannot constitutionally execute Mr. Davis because the only means available under the law to execute him violate his Eighth Amendment rights;

Twenty-Four: The State of Ohio cannot constitutionally execute Mr. Davis because the only means available for execution violate the Fourteenth Amendment's Due Process and Privileges or Immunities Clauses;

Twenty-Five: The State of Ohio cannot constitutionally execute Mr. Davis because the only means available for execution violate the Equal Protection Clause of the Fourteenth Amendment; and

Twenty-Six: The State of Ohio cannot constitutionally execute Mr. Davis because the only means available for execution depend on state execution laws that are preempted by federal law.

(Petition, ECF No. 6, PageID 8753-8835). **[*152]**

At the outset, the Court notes the Warden's uncontradicted assertion that Davis failed to present these claims in either of his state court postconviction petitions (Return of Writ, ECF No. 17, PageID 9073, 9076-77). Davis's failure to present the claims renders them procedurally defaulted.

Moreover, they are barred as a matter of law. When Davis filed his Petition and the Warden filed the Return of Writ, the authoritative case on the cognizability of method of execution claims in habeas corpus was *Adams v. Bradshaw* ("*Adams III*"), in which the Sixth Circuit held that "to the extent that Adams challenges the constitutionality of lethal injection in general and not a particular lethal-injection protocol, his claim is cognizable in habeas." 826 F.3d 306, 318-21 (6th Cir. 2016). However, shortly after *Adams III* was handed down, the Sixth Circuit began to alter its jurisprudence. In *In re Tibbetts*, the appellate panel, while acknowledging that it could not overturn *Adams III*, emphasized that any challenge to a particular method of lethal injection was properly brought under 42 U.S.C. § 1983, rather than in habeas. 869 F.3d 403, 406 (6th Cir. 2017). In *(Roland) Davis v. Jenkins*, a capital habeas case, the Warden asked this Court to dismiss the petitioner's method of execution **[*153]** claim in light of *In re Tibbetts*. Chief Judge Sargus refused, noting that "[t]he Sixth Circuit has consistently held that 'the prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.'" *(Roland) Davis v. Jenkins*, No. 2:10-cv-107, 2017 U.S. Dist. LEXIS 161152, *4 (S.D. Ohio Sept. 29, 2017) (Sargus, C.J.), quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). Nonetheless, the Court acknowledged that *Adams III* and *Tibbetts* could be read as contradictory, and expressed its hope "that further authority from the Sixth Circuit or Supreme Court will answer the question of whether *Tibbetts* and *Adams III* are inconsistent and, if so, resolve that conflict." 2017 U.S. Dist. LEXIS 161152 at *5.

On October 25, 2017, the Sixth Circuit provided precisely such guidance:

A prisoner who challenges a method of execution as unconstitutionally painful *must* identify an alternative means by which he may be executed. *Glossip*¹¹ makes clear that a prisoner cannot invalidate his death sentence simply by asserting that *every* method offered by state statute will be unconstitutionally painful. And as we explained above, the Court's decision to preclude this argument effectively divests us of **[*154]** habeas jurisdiction over such a claim. . . . The proper method for Campbell to bring these claims is in a § 1983 action[.]

In re Campbell, 874 F.3d 454, 465-66 (6th Cir. 2017) (emphasis in original), citing *Glossip*, 576 U.S. 863, 135 S.Ct. 2726, 2739, 192 L. Ed. 2d 761 (2015). Crucially, the *Campbell* panel also stated that the language in *Adams III* suggesting that a claim challenging the general constitutionality of lethal injection was cognizable in habeas was "dictum [that] mischaracterizes both *Adams II*¹¹ and *Glossip*."

¹¹ *Adams v. Bradshaw*, 644 F.3d 481 (6th Cir. 2011).

And, of course, dictum in a prior decision—as opposed to a *holding*—does not bind future panels, including this one." *Id.* at 464 (emphasis in original), citing 6 Cir.R. 32.1(b).

Davis argues that, because *In re Campbell* was neither a Supreme Court nor an *en banc* decision, it could not overrule *Adams III*, and thus, may not alter, much less overrule, the holding set forth in *Adams III* (Traverse, ECF No. 29, PageID 9380). He claims that "[t]he *Campbell* panel asserted that the language in *Adams III* supporting Mr. Davis's claims is dicta, but *Campbell* relied on language in *Glossip* . . . that was itself dicta." *Id.*, citing *Glossip*, 135 S.Ct. at 2738-39; *In re Campbell*, 874 F.3d at 463-64. Further, Davis claims that the *In re Campbell* panel's reading of *Glossip* was "also highly questionable[.]" as "[c]ognizability of lethal injection claims in habeas corpus proceedings was [*155] not an issue before the Court in *Glossip*." *Id.*

This Court is bound by *In re Campbell*'s characterization of the relevant language in *Adams III* as dicta and its holding that *Glossip* forecloses any challenge to method of execution in habeas. More importantly, the Sixth Circuit, in *In re Smith*, addressed the issue of whether *In re Campbell* was still good law or if it had been abrogated by the Supreme Court's decision in *Bucklew v. Pritchett*. The panel acknowledged the parenthetical in *Bucklew* that "(if the relief sought in a 42 U.S.C. § 1983 action would foreclose the State from implementing the [inmate's] sentence under present law, then recharacterizing a complaint as an action for habeas corpus might be proper)." *In re Smith*, No. 17-4090, __ F. App'x __, 2020 U.S. App. LEXIS 16768, 2020 WL 2732228, *2 (6th Cir. May 26, 2020) (*per curiam*) (alterations in original), quoting *Bucklew*, __ U.S. __, 139 S.Ct. 1112, 1128, 203 L. Ed. 2d 521 (2019) (internal quotation marks and citation omitted). However, the panel held that:

Smith stretches *Bucklew* too far. Whether an as-applied method-of-execution claim may be brought in habeas is not implicated by the question presented in *Bucklew*, its holding, or its primary legal reasoning. The Court in *Bucklew* held that prisoners bringing as-applied method-of-execution challenges under § 1983 must satisfy the *Baze-Glossip* test, and the Court's analysis of [*156] the Eighth Amendment, *Baze*, and *Glossip* reflects this focus. Furthermore, *Hill v. McDonough* was decided before and extensively discussed in *Campbell*, 874 F.3d at 460-63, meaning that the new law to implicitly overrule *Campbell* would have to come from *Bucklew* itself. And we cannot say that the parenthetical, combined with the Court's statement that the question of state law "might be relevant to determining the proper procedural vehicle for the inmate's claim," meaningfully alters the analysis in *Campbell*.

Id., quoting *Bucklew*, 139 S.Ct. at 1128 (emphasis added) citing *In re Campbell*, 874 F.3d at 460-63 "For this reason, we must once again conclude that Smith's proposed amendment presents claims that are not cognizable in habeas in light of *Campbell*." 2020 U.S. App. LEXIS 16768, [WL] at *3.

In re Smith put to rest any ambiguity regarding the non-cognizability of method of execution claims in *habeas corpus*. Consequently, Claims Twenty-Two through Twenty-Five should be dismissed without prejudice. The Magistrate Judge notes that Davis is a plaintiff in the consolidated § 1983 method of execution case pending in this Court, *In re Ohio Lethal Injection Protocol*, Case No 2:11-cv-1016.

As to Claim Twenty-Six, Davis argues that:

In relying on *Glossip*, the court in *Campbell* appears to have overlooked any statutory claims in conducting its [*157] analysis. Thus, even if this Court finds that *Campbell* forecloses certain constitutional claims, Mr. Davis should be permitted to proceed on the statutory "fundamental defect" claim set out in his Twenty-Sixth Ground for Relief.

(Traverse, ECF No. 29, PageID 8931, citing Petition, ECF No. 6, PageID 8814). Even if Davis's "statutory defect" Claim Twenty-Six were not foreclosed by *Glossip* and *In re Campbell*, which it is, it would fail on its merits. Davis argues that

Ohio's use of drugs, including controlled substances and/or compounded drugs, to execute Mr. Davis will result in violations of various provisions of the Controlled Substances Act (CSA), 21 U.S.C. §§ 801, *et seq.*, the Federal Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. §§ 301 *et seq.*, and federal regulations issued by the Drug Enforcement Agency (DEA) and Food and Drug Administration (FDA).

...

The Ohio lethal-injection statute, Ohio Revised Code § 2949.22(A), along with DRC's practices, policies and protocols used to carry out that statute, are preempted by the Controlled Substances Act (CSA), 21 U.S.C. §§ 801, *et seq.*, the Federal Food, Drug,

and Cosmetic Act (FDCA), 21 U.S.C. §§ 301, *et seq.*, and federal regulations issued by the Drug Enforcement Agency (DEA) and Food and Drug Administration (FDA). (Petition, ECF No. 6, PageID 8815-16).

Davis makes [*158] conclusory statements that "carrying out Ohio's lethal-injection laws as to Mr. Davis stands as an obstacle to Congress's full purposes and objectives behind the CSA and/or the FDCA, and compliance with both Ohio law and federal law in this situation is impossible because compliance with Ohio law would breach federal law" and that "Ohio's execution laws that contemplate inclusion of controlled substances in the course of carrying out a death sentence are expressly and impliedly preempted by the CSA and its implementing regulations." (Petition, ECF No. 6, PageID 8816; *see also Mut. Pharm. Co., Inc., v. Bartlett*, 570 U.S. 472-73, 480, 133 S. Ct. 2466, 186 L. Ed. 2d 607 (2013), quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990) ("a state law may be impliedly preempted where it is 'impossible for a private party to comply with both state and federal requirements'"). Yet, formalistic recitations of the elements of a claim are insufficient to survive a motion to dismiss under Fed.R.Civ.P. 12(b)(6), much less state a plausible claim in habeas.

Davis claims that the Ohio Department of Rehabilitation and Correction ("ODRC") cannot procure any drugs permitted in its execution protocol without violating the CSA and its regulations (Petition, ECF No. 6, PageID 8818-19, citing 21 U.S.C. § 844; 21 C.F.R. §§ 1306.03-05, 1306.11). Specifically, he claims that ODRC's standard practice is:

[N]ot to provide [*159] in the course of that transaction a valid patient-specific prescription issued for a legitimate medical purpose by a licensed health professional authorized to prescribe drugs in the State of Ohio. Instead, DRC provides only a certified copy of a Death Warrant issued by the Supreme Court of Ohio for an inmate, not necessarily the same inmate who will be executed with the particular drugs obtained and/or ordered.

Id. at PageID 8819 (emphasis in original). "Further, it is impossible for DRC to obtain a valid patient-specific prescription for any drug to be used to carry out a human execution, since there is no drug that has been approved by FDA for the purpose of carrying out a human execution." *Id.* at PageID 8820. Moreover, Davis argues, the DRC employees cannot lawfully procure, possess, and dispense the execution drugs, because they are not being procured, possessed, and dispensed in compliance with FDA and Drug Enforcement Agency ("DEA") regulations when used for executions. *Id.* at PageID 8821-23, citing 21 U.S.C. §§ 331(a), 355(a), 393(b)(2), 841(a); 21 C.F.R. §§ 1301.22, 1307.11; Ohio Rev. Code §§ 4729.01(I), 4765.39(C)(1). Davis claims that human execution is not, and can never be, a valid "off-label" use of the execution drugs, because they are dangerous when used as directed in executions. [*160] For those reasons, Davis argues, the State's use of the protocol drugs in executions violates the FDCA. *Id.* at PageID 8823, citing 21 U.S.C. § 352. Moreover, he argues that, because thiopental sodium has never been approved by the FDA, and none of the drugs in the protocol has been the subject of an investigative new drug application, much less approved for use in execution, the State's use of the drugs violates the FDCA and FDA regulations for those reasons, too. *Id.* at PageID 8823-26, citing 21 U.S.C. §§ 321(p), 355, 812; 21 C.F.R. § 312.20(a-b); *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695, 697-98, 378 U.S. App. D.C. 33 (D.C. Cir. 1997).

Finally, Davis claims that the lethal injection statute and protocol that purport to enable ODRC "to procure, obtain, import, purchase, dispense, distribute, possess and/or administer (and any other terms of art under the CSA or FDCA) compounded drugs, including controlled substances, as lethal-injection drugs, are in contravention of federal drug laws." (Petition, ECF No. 6, PageID 8828). Davis asserts that any compounding of drugs for purposes of executions violates the CSA, because there is no legitimate medical purpose for an execution. *Id.* at PageID 8829-33, citing 21 U.S.C. §§ 353a, 353b, 21 C.F.R. § 1307.11. As adherence to state law and federal law is impossible, Davis [*161] argues, Ohio's lethal injection statute, regulations, and protocol are preempted. *Id.* at PageID 8820, 8834, quoting 21 U.S.C. § 903; citing *Bartlett*, 570 U.S. at 479-80.

For two reasons, any habeas claim based on statutory preemption faces a heavy burden. *First*, it is well-established that a "claim of a federal statutory violation will not be reviewed [in habeas corpus] unless it alleges 'a fundamental defect which inherently results in a complete miscarriage of justice [o]r an omission inconsistent with the rudimentary demands of fair procedure.'" *Reed v. Farley*, 512 U.S. 339, 356, 114 S. Ct. 2291, 129 L. Ed. 2d 277 (1994) (Scalia, J., concurring in part), quoting *Hill v. United States*, 368 U.S. 424, 428, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962). *Second*, except as to the Medical Device Amendments (inapposite here), "[t]he FDCA contains no preemption clause," *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 339, 128 S. Ct. 999, 169 L. Ed. 2d 892 (2008) (Ginsburg, J., dissenting), and the express preemption provision in the CSA is narrow:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be

within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. Moreover, [*162] implied preemption exists only under two circumstances:

"Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances." First, "state law is naturally preempted to the extent of any conflict with a federal statute." Second, we have deemed state law pre-empted "when the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively."

Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625, 630, 132 S. Ct. 1261, 182 L. Ed. 2d 116 (2012), quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995).

In support of his implied preemption argument, Davis cites *Gonzales v. Oregon*, wherein the Supreme Court reiterated that "the CSA creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of substances." (Petition, ECF No. 6, PageID 8818, quoting 546 U.S. 243, 250, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006)). Davis's reliance on *Gonzales* is curious, since in that case, the Supreme Court held that CSA's preemption did *not* extend to empowering the Attorney General to promulgating rules and regulations prohibiting doctors from prescribing controlled substances under Oregon's Death With Dignity Act (known as "Medical Aid in Dying," or "MAID"). 546 U.S. at 248-49, 274-75. In that case, the Attorney General was acting under his uncontroverted [*163] rulemaking authority with respect to the relatively novel practice of legal MAiD. Davis, on the other hand, does not identify any instance in which the Attorney General or Secretary of Health and Human Services attempted to regulate the use of controlled substances in lethal injection. Moreover, the constitutionality of lethal injection in general has been upheld repeatedly. *See, e.g., Glossip*, 135 S.Ct. at 2732-33; *Baze v. Rees*, 553 U.S. 35, 63, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008) (Alito, J., concurring), citing *Gregg v. Georgia*, 428 U.S. 153, 175, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Hill v. McDonough*, 547 U.S. 573, 580-81, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006). In sum, preemption was not a persuasive argument in *Gonzales v. Oregon*, and it is even less persuasive here.

Moreover, Ohio's lethal injection statute, regulations, and protocol cannot be said to conflict with federal law. The undersigned agrees with Davis that, if his preemption argument were accepted, it would be impossible to implement the lethal injection protocol of Ohio and every other state that uses the method. Yet, not only has States' use of lethal injection been upheld repeatedly, the federal government has evinced its intent to resume executions via lethal injection. *In re: Federal Bureau of Prisons' Execution Protocol Litig.*, 955 F.3d 106 (D.C. Cir. 2020). Thus, Davis's argument, if accepted, compels the conclusion that the federal government is implicitly preempting state lethal injection laws [*164] to make lethal injection—the federal government's intended method of execution—impossible. Such an outcome is dubious, if not absurd, and Davis offers no caselaw in support. In light of the above, and the strong interests in comity and federalism that compel this Court to be cautious when determining preemption, Claim Twenty-Six is without merit, and should be dismissed.

E. Pretrial, Trial, and Sentencing Claims for Relief

1. Claim Eleven: Resentencing Procedures Violated Federal and State Constitutions

Davis argues that the first resentencing violated his Fourteenth Amendment right to equal protection because, in light of *Penix*, defendants sentenced to death by a three-judge panel were treated unfairly vis-à-vis those sentenced to death by a jury, because only defendants in the former group could be sentenced to death upon resentencing (Petition, ECF No. 6, PageID 8710-11, citing *McCoy v. Court of Appeals of Wisc., Dist. 1*, 486 U.S. 429, 435, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988); *Griffin v. Illinois*, 351 U.S. 12, 17, 76 S. Ct. 585, 100 L. Ed. 891 (1956); Ohio Rev. Code § 2929.06; *Penix*, 32 Ohio St. 3d at 372)). Davis claims that the second resentencing violated his Due Process rights, because under the law in effect, he could only be resentenced to death by the original three-judge panel; yet, even though the original panel could not be re-assembled, the new panel rejected Davis's motion to withdraw his jury waiver, and resentenced [*165] him to death. *Id.* at PageID 8712-13, citing *Landgraf*, 511 U.S. at 266; Ohio Rev. Code §§ 2929.03, 2929.06, 2945.05, 2945.06. He concludes by arguing that both the first and second resentencings violated the *Ex Post Facto* clause of the federal constitution; "the state court was required to apply the statute as written at the time of Mr. Davis's crime. To do otherwise violates the Fifth, Eighth and Fourteenth Amendments. Retroactive legislation is prohibited under these Constitutional

provisions." *Id.* at PageID 8714, citing U.S. CONST. ART. I, § 10, amend. V, VIII, XIV; *Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000); *Landgraf*, 511 U.S. at 266; *Lindsey v. Washington*, 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937); *In re Medley*, 134 U.S. 160, 10 S. Ct. 384, 33 L. Ed. 835 (1890), *abrogated on other grounds as discussed in* *Hilton v. Braunskill*, 481 U.S. 770, 775, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987); *Calder*, 3 U.S. 386, 1 L. Ed. 648, 3 Dall. 386.

As the Warden notes, this Court previously rejected Davis's arguments that the different panel for resentencing constituted an *ex post facto* violation, and held that the differentiation of Davis from Penix did not constitute an equal protection violation (Return of Writ, ECF No. 17, PageID 9062, citing *Davis IX*, ECF No. 16-2, PageID 8992). Judge Graham noted that the difficulty in reassembling the jury for resentencing was not an issue with a three-judge panel, which was a rational basis upon which the State could differentiate Davis from Penix. Thus, any equal protection claim was not viable. Judge Graham continued by explaining that the change in the statute to allow for a different three-judge panel was procedural, rather than substantive, in nature, [*166] and a procedural change, no matter how significant, cannot form the basis of an *ex post facto* claim. *Davis IX*, ECF No. 16-2, PageID 8991-93, quoting *Corbitt v. New Jersey*, 439 U.S. 212, 226, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978); *Dobbert v. Florida*, 432 U.S. 282, 292-97, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977). Moreover, since the statute allowed for a death sentence upon resentencing, just as in the original trial, there was no greater punishment possible, and thus was procedural in nature. Accordingly, the Twelfth District found that there was no *ex post facto* violation and that applying the amended Ohio Revised Code § 2929.06(B) retroactively did not violate the Ohio or federal constitution. *Davis XI*, 2011-Ohio-787, at ¶ 62, *aff'd Davis XIV*, 2014-Ohio-1615, ¶¶ 44-55, 139 Ohio St. 3d 122, 9 N.E.3d 1031.

In his Traverse, Davis concedes that the gravamen of his Due Process and Equal Protection claims are identical (ECF No. 29, PageID 9270). He also argues that *Davis XIV* did not reach the merits on his claim, despite his fairly presenting it. *Id.* at PageID 9271, citing *Davis XIV*, 2014-Ohio-1615, 139 Ohio St. 3d 122, 9 N.E.3d 1031; State Court Record, ECF No. 4-43, PageID 5884). He claims that the Supreme Court's discussion in *Davis XIV* of its holding in *Davis II* that *Penix* did not apply to Davis was not an adjudication on the merits by the *Davis XIV* court, because it was contained in the background, rather than analysis, section of the opinion. *Id.*, citing 2014-Ohio-1615 at ¶¶ 22-26. Davis notes that, in his appeal from the first resentencing, the Supreme [*167] Court of Ohio in *Davis IV* refused to revisit its holding in *Davis II*, and the Sixth Circuit held that *Davis IX*'s implicit affirmation of *Davis II* was not an adjudication on the merits. Therefore, Davis claims, AEDPA deference did not apply (Traverse, ECF No. 29, PageID 9272, citing *Davis X*, 475 F.3d at 779).

Further, while the *Davis X* court held that the denial of his waiver withdrawal at the first resentencing did not constitute an equal protection violation, 475 F.3d at 779-80, Davis argues that the rational basis identified by the Sixth Circuit—the possibility that the original three-judge panel could be reassembled, whereas the original jury could not—did not apply to his second resentencing (Traverse, ECF No. 29, PageID 9274, citing Ohio Rev. Code § 2929.06(B); *Davis X*, 475 F.3d at 779-80). Given that *Davis X*, in dicta, cast doubt on the continued validity of a jury waiver twenty-five years after the initial trial, Davis argues that the enforcement of his jury waiver in the second resentencing violated his right to equal protection. *Id.* at PageID 9274-75, citing 475 F.3d at 780-81.

However, portion of *Davis X* not discussed by Davis is fatal to his equal protection claim. The opinion noted the longstanding Sixth Circuit and Ohio precedent that a jury waiver in the initial trial will not be valid [*168] in the event of a retrial or if the conviction is reversed. *Davis X*, 475 F.3d at 780-81, citing *Sinistaj v. Burt*, 66 F.3d 804, 808 (6th Cir.1995); *United States v. Groth*, 682 F.2d 578, 580 (6th Cir. 1982); *United States v. Lee*, 539 F.2d 606, 606 (6th Cir. 1976); *State v. McGee*, 128 Ohio App. 3d 541, 545, 715 N.E.2d 1175 (Ohio App. 3rd Dist. 1998). However, the opinion continued that *McGee* was "not directly on point, because *Davis is not facing a new indictment*["] *Id.* at 781 (emphasis added). That Davis was being resentenced with his underlying conviction intact, as opposed to a completely new determination of guilt, is a rational basis for treating Davis differently than McGee. It is reasonable to infer from *Davis X* that the Sixth Circuit was dubious of the State's argument that a jury waiver made in 1984 would be valid almost twenty-five years hence. However, mere uncertainty is not itself grounds for an equal protection claim, and because there is no independent basis upon which this court could find a due process violation, both the Equal Protection and Due Process claims fail, even assuming *de novo* review is proper.

It is undisputed that the Supreme Court of Ohio examined and rejected Davis's claim that the second resentencing violated the federal constitution's *Ex Post Facto* Clause and the Ohio constitution's Retroactivity Clause. *Davis XIV*, 2014-Ohio-1615 at ¶¶ 44-55, 139 Ohio St. 3d 122, 9 N.E.3d 1031. The court reiterated: "The General Assembly has clearly expressed its intent that R.C. 2929.06(B) apply retroactively." *Id.* at ¶ 48 (internal quotation marks omitted), quoting *State v. White*, 2012-Ohio-2583 at ¶ 30, 132 Ohio St. 3d 344, 972 N.E.2d 534. The [*169] court further explained that:

(1) a defendant does not face greater potential sentence on resentencing than in the original sentencing;

- (2) the defendant does not have a vested or accrued right to be sentenced by a jury;
- (3) the defendant does not face any greater burden on resentencing;
- (4) the defendant is not being deprived of a reliance or vested interest in finality, and
- (5) the State does not obtain a new right at the expense of the defendant, the statute is remedial, rather than substantive in nature, and its application did not violate the Retroactivity Clause.

Id. at ¶¶ 48-53, citing *White*, 2012-Ohio-2583 at ¶¶ 1-2, 12-14, 34-37, 41, 43-44, 132 Ohio St. 3d 344, 972 N.E.2d 534. Similarly, the court applied its holding in *White* to Davis as to the *Ex Post Facto* Clause, finding that it did not fit into any of the categories of *ex post facto* laws set forth in *Calder* and its progeny. Specifically, the revision to Ohio Rev. Code § 2929.06(B) did not: (1) transform his murder and firearms specification from innocent to criminally culpable conduct; (2) make the crimes greater in degree than when they were committed; (3) inflict a greater punishment upon resentencing; or (4) lessen the evidentiary burden required to convict a defendant of the crimes. *Id.* at ¶ 54, quoting *Calder*, 3 U.S. at 390; *White*, 2012-Ohio-2583, at ¶ 64, 132 Ohio St. 3d 344, 972 N.E.2d 534.

Davis argues that *Davis XIV* was contrary to clearly [*170] established federal law, and thus, AEDPA deference should not be accorded the decision. Specifically, he argues that his potential sentence was enhanced upon resentencing; in support, he argues that, because the original threejudge panel could not be reconstituted, a death sentence would not have been possible under the old version of the statute, but would be possible under the revised statute (Traverse, ECF No. 29, PageID 9273, citing *Dobbert v. Florida*, 432 U.S. 282, 300, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); Ohio Rev. Code § 2929.06(B)). Yet, Davis ignores the conclusion in *White* that "[a]pplying R.C. 2929.06(B) to a defendant whose case was remanded for resentencing after that provision became law is analogous to extending an unexpired statute of limitations." 2012-Ohio-2583, at ¶ 62, 132 Ohio St. 3d 344, 972 N.E.2d 534, citing *Stogner*, 539 U.S. at 618. As *White* was not reversed or modified by the United States Supreme Court in any case, the decision in *Davis XIV* could not have been "clearly established federal law." Also, because the retroactivity of Ohio Rev. Code § 2929.06(B) is a question of law, the decision could not have been "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1-2). Thus, Claim Eleven should be denied.

2. Claim Twelve: Inability to Inspect Grand Jury Transcripts

Davis argues that he had a particularized need to see [*171] the grand jury transcripts, specifically, the need to prepare and present a complete defense, and that his need outweighed the State's presumptive need to keep the testimony secret (Petition, ECF No. 6, PageID 8715, citing *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); *State v. Sellards*, 17 Ohio St. 3d 169, 172-73, 17 Ohio B. 410, 478 N.E.2d 781 (1985); *State v. Greer*, 66 Ohio St. 2d 139, 420 N.E.2d 982 (1981)). He claims that there was no need for secrecy at the time he was preparing for trial, since "[t]he witnesses had already testified before the grand jury . . . If the prosecution had any concerns about shielding the identity of grand jury witnesses, due to safety concerns or any other reason, they could have sought a protective order prohibiting particular evidence from being disclosed." *Id.*

Davis argues that, despite fairly presenting the claim on direct appeal, the Supreme Court of Ohio violated clearly established federal law in its conclusory holding that "nothing in the record indicates that appellant failed to receive a fair trial because he was not provided with the grand jury testimony[.]" and thus, AEDPA deference is not appropriate (Traverse, ECF No. 29, PageID 9280, quoting *Davis II*, 38 Ohio St. 3d at 365). The Court need not address this argument, however, because Davis's overarching claim—that his inability to access the grand jury transcripts denied him full knowledge of the [*172] evidence that might be used against him, and thus, deprived him of his constitutional right to present a complete defense—is speculative. Nowhere in the Petition or Traverse does Davis identify what evidence he thinks is contained in the transcripts, much less how the outcome of his trial and sentencings would have been different if he had had access to the transcripts. Rather, Davis is asking, more than thirty years after the grand jury issued the indictment against him, for a grant of discovery to see the transcripts so that he might formulate a theory based on what might be contained in there (Traverse, ECF No. 29, PageID 9279, citing *Bracy v. Gramley*, 520 U.S. 899, 908-09, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997)). Such speculation is not even sufficient under Fed.R.Civ.P. 8, see *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"), much less the Rules Governing § 2254 Cases; consequently, Claim Twelve should be dismissed.

3. Claim Thirteen: Discriminatory Selection of Grand Jury Foreperson in Violation of Fifth, Sixth, Eighth, and Fourteenth Amendments

Davis claims that the Presiding Judge of the Court of Common Pleas selecting the grand jury foreperson, who need not be part of the venire, is arbitrary and the resulting selection process is racially discriminatory, [*173] and thus, unconstitutional (Petition, ECF No. 6, PageID 8717, citing Ohio Rev. Code § 2939.02). "Further, according to Hamilton County[Ohio] Common Pleas Judge [Melba] Marsh, the common pleas judges in Hamilton County, which adjoins Butler County, regularly exercised their statutory prerogative to select grand jury forepersons." *Id.* "Based upon the evidence regarding Hamilton County, counsel have reason to believe that the same improper procedures were used at the time of Mr. Davis's indictment in Butler County, an adjoining county." *Id.* at PageID 8718.

In *Hughbanks v. Hudson*, Petitioner Gary L. Hughbanks, Jr. was indicted by a Hamilton County grand jury with a Caucasian forewoman chosen by Judge Marsh, who also presided over Hughbanks's trial. The undersigned examined and rejected a claim based on racially discriminatory grand jury foreperson selection, finding that the "Supreme Court of Ohio's adjudication [against Hughbanks] was not 'decision that was contrary to, or involved an unreasonable application of, clearly established federal law.'" No. 1:07-cv-111, 2018 U.S. Dist. LEXIS 228976, 2018 WL 9597457, *35-36, quoting 28 U.S.C. § 2254(d)(1) (S.D. Ohio Sept. 7, 2018) (Merz, Mag. J.). In other words, Hughbanks actually had a basis for his claim, and it was still unavailing. Davis, [*174] on the other hand, seems to allege that Butler County's geographic proximity to Hamilton County caused it to adopt the latter's supposedly discriminatory grand jury foreperson selection policy. Yet, he offers no facts in support thereof. As speculation, without more, cannot serve as the basis for a viable habeas claim, Claim Thirteen should be dismissed.

4. Claim Fourteen: Trial Court Prohibiting Elbert Avery from Testifying During Guilt Phase

In Davis's case-in-chief, his counsel attempted to call Elbert Avery as a live witness to rebut Anthony Ferguson's testimony that Ferguson had seen Davis shoot Butler. Specifically, Avery was prepared to testify that Ferguson had told him that Ferguson had not seen Davis shoot Butler (Petition, ECF No. 6, PageID 8720). The panel refused to allow Avery to testify, and instead allowed counsel to introduce a proffer of Avery's anticipated testimony. *Id.*, quoting Trial Tr., ECF No. 5-3, PageID 7515-16; citing Trial Tr., ECF No. 5-3, PageID 7495. Davis argues that the proffer carried less weight than if Avery had testified, and that the lack of live testimony deprived him of his fundamental right to present a complete defense. *Id.* at PageID 8720-21, [*175] quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Despite the claim being available to Davis on direct appeal, he did not raise the issue until his first postconviction petition in state court. Consequently, the Twelfth District found that the claim was barred by *res judicata* and did not address its merits (Traverse, ECF No. 29, PageID 9287, citing *Davis VI*, 1996 Ohio App. LEXIS 4263, 1996 WL 551432, *9). This adequate and independent state ground forecloses habeas relief. As to Davis's alternative argument that appellate counsel provided ineffective assistance for failing to raise the issue on direct appeal, Davis notes the Sixth Circuit opinion in *Hoffner v. Bradshaw*. *Id.* at Page ID 9288, citing 622 F.3d 487 (6th Cir. 2010). The *Hoffner* court held that "since at least 1996, Ohio law has provided sufficient guidance on what constitutes a 'good cause' for a late filing under Rule 26(B). Furthermore, as of January 1996, 'the time constraints of Rule 26(B) were firmly established and regularly followed.'" 622 F.3d at 504-05, quoting *Parker v. Bagley*, 543 F.3d 859, 861 (6th Cir.2008); *Monzo v. Edwards*, 281 F.3d 568, 578 (6th Cir. 2002). Moreover, the court held that while it had, "in prior cases, found Rule 26(B) not to be an adequate and independent ground on which to find procedural default, those precedents are not applicable here because Rule 26(B) was firmly established and regularly followed by June 2006." *Id.* at 505, citing *Parker*, 543 F.3d at 862.

Davis's direct appeals from his conviction [*176] and first resentencing occurred before Rule 26(B) was enacted, but his direct appeal from his second resentencing happened well after its enactment. Also, Davis moved under Rule 26(B) to reopen his direct appeal in 1998, but did not raise this claim in the application. Thus, procedural default is an adequate and independent ground upon which to find the ineffective assistance of appellate counsel claim procedurally defaulted.

Moreover, the claim fails on its merits. As discussed above, there was more than sufficient evidence to convict Davis for the murder of Butler, even if Ferguson's testimony were to be discounted. Further, while the reduction of Avery's testimony to a proffer may have prevented Davis from defending himself in his preferred manner, that reduction was not completely prejudicial. Davis was

able to introduce Avery's statement impeaching Ferguson without Avery being subject to cross-examination that could have damaged *Avery's* credibility. This falls well short of the prejudice required for a *Strickland* claim, and Claim Fourteen should be dismissed.

5. Claim Fifteen: Capital Specification was Invalid

Davis argues that the sole specification allowing prosecutors to seek the death penalty was [*177] Davis's 1971 conviction for second-degree murder, arising from killing his estranged wife, Ernestine (Petition, ECF No. 6, PageID 8722). The death penalty specification was under Ohio Rev. Code §2929.04(A)(5), which is a prior purposeful killing. *Id.* Davis argues that he killed Ernestine in a heat of passion and without any premeditation or purpose, and thus, lacked the requisite *mens rea* for the specified prior offense. *Id.* at PageID 8722-23, citing State Court Record, ECF No. 4-19, PageID 2028-29. Absent a proper death specification or other aggravating circumstance, Davis argues, his "conviction on this aggravated specification and his death sentence are unconstitutional and must be vacated." *Id.* at PageID 8723. The parties agree that the last reasoned court decision was *Davis VI*, in which the Twelfth District found the claim procedurally barred by failing to raise it on direct appeal. 1996 Ohio App. LEXIS 4263, 1996 WL 551432 at *4, citing *State v. Lentz*, 70 Ohio St. 3d 527, 527-28, 1994- Ohio 532, 639 N.E.2d 784, paragraph one of the syllabus (1994). Judge Graham relied in part on the Twelfth District's *res judicata* ruling to deny the claim in Davis's first habeas petition. *Davis IX*, ECF No. 16-2, PageID 8967-74.

Davis argues that *Davis VI* was not an adjudication on the merits of his claim. Yet, even if *res judicata* were not [*178] an adequate and independent state ground, Davis's claim is meritless. As Judge Graham noted, "Where a defendant seeks to attack a prior conviction used to enhance the penalty for a later conviction, the defendant must show that . . . the prior conviction was infected with constitutional error." *Davis IX*, ECF No. 16-2, PageID 8969, citing *Parke v. Raley*, 506 U.S. 20, 29, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992); *Johnson v. Zerbst*, 304 U.S. 458, 468, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *Cuppert v. Duckworth*, 8 F.3d 1132, 1136 (7th Cir. 1993). At the time Davis was convicted of second-degree murder, the statute pertaining to that offense required a finding of purposeful killing. Davis's guilty plea was, at the very least, a decision not to contest the finding that he purposefully killed Ernestine. Against that uncontested finding, the letter from Davis's neighbor cannot, by itself, render the conviction for second degree murder unconstitutional. Thus, using Davis's 1971 conviction as the capital specification was not constitutionally improper, and Claim Fifteen should be dismissed.

6. Claim Seventeen: Denial of Motion to Sever

Davis claims that the trial court's denial of his motion to sever Counts One (aggravated murder) and Two (possessing a weapon under a disability) caused him to waive his right to a jury trial and proceed before a three-judge panel. Davis, on advice of trial counsel, [*179] believed that the introduction of his prior murder conviction, the reason for the "disability," would have so prejudiced the jury that he could have never gotten a fair hearing on the aggravated murder count (Petition, ECF No. 6, PageID 8729, citing State Court Record, ECF No. 4-19, PageID 1963-69; ECF No. 4-46, PageID 6459; Trial Tr., ECF No. 5-1, PageID 7211-15, 7221). Consequently, Davis argues, his waiver was not knowing, intelligent, and voluntary. *Id.* at PageID 8730. Davis claims that the unconstitutional waiver of his jury right was a structural error, for which no showing of prejudice is required. Nonetheless, he argues, he was prejudiced because, had the motion to sever been granted, his prior conviction would have been excluded from trial of the aggravated murder count under Ohio R.Evid. 403. Thus, there is a reasonable probability that the jury would not have voted in favor of conviction and death sentence, and the lack of a jury verdict undermined confidence in the outcome, as evidenced by remand for resentencing twice (Traverse, ECF No. 29, PageID 9304-06, citing *Fry v. Pliler*, 551 U.S. 112, 121-22, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007); *Sullivan v. Louisiana*, 508 U.S. 275, 280-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); *Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980); *Adams v. United States*, 317 U.S. 269, 275, 63 S. Ct. 236, 87 L. Ed. 268 (1942)).

Davis argues that he fairly presented his federal constitutional claim to the Supreme Court of Ohio on direct appeal, [*180] but that court only evaluated his Ohio statutory claim; thus, no AEDPA deference applies (Traverse, ECF No. 29, PageID 9306-07, citing *Davis II*, 38 Ohio St. 3d at 364; Ohio Rev. Code § 2929.022(A)). Yet, as Judge Graham noted, *Davis IX*, ECF No. 16-2, PageID 8975, the Supreme Court of Ohio went into much greater detail than suggested by Davis. The court held that Davis's:

[F]urther contention that he was "forced" into waiving his right to a jury trial because of the *possibility* that the jury would not follow a curative instruction raises a mere risk of prejudice that can be best described as speculative. . . . A jury is believed capable of segregating the proof on multiple charges when the evidence as to each of the charges is uncomplicated.

38 Ohio St. 3d at 364 (emphasis in original), citing *Spencer*, 385 U.S. at 562; *State v. Torres*, 66 Ohio St. 2d 340, 343-44, 421 N.E.2d 1288 (1981). As the Supreme Court discussed in *Spencer*, there is no constitutional bar against prior crimes being mentioned. 385 U.S. at 562. Moreover, Davis's argument that, but for the joinder of the counts, the prior murder conviction would have been excluded, is speculative at best. The prior murder conviction was the basis upon which he was charged with *aggravated* murder and a capital specification; it is reasonable to conclude that the conviction would have been introduced to prove the capital [*181] specification, and it is well-established that a prior conviction may be introduced to prove, among other things, a necessary element of a crime. *See, e.g., id.* at 560; Fed.R.Evid. 404(b)(2); Ohio R.Evid. 404(B); *see also State v. Allen*, 29 Ohio St. 3d 53, 54, 29 Ohio B. 436, 506 N.E.2d 199 (1987) (when a prior conviction "transform[s] the crime itself by increasing its degree[,] it becomes "an essential element . . . and must be demonstrated beyond a reasonable doubt.")). The Supreme Court of Ohio's rejection of Davis's argument that a jury would not adhere to a limiting instruction as speculative was well-reasoned and should not be disturbed by this Court.

As the trial court's denial of Davis's motion to sever was not unconstitutional, that denial cannot serve to render his waiver less than knowing, voluntary, intelligent. Claim Seventeen should be dismissed.

7. Claims Eighteen and Twenty: Death Sentence is Disproportionate, and the Product of a Constitutionally Inadequate Proportionality Review

In Claim Eighteen, Davis argues that the trial court panel's conclusion that the sole aggravating factor, his 1971 homicide conviction, outweighed the extensive mitigation evidence presented resulted in a death sentence that was disproportionate, in violation of the Fifth and Fourteenth Amendments (Petition, ECF No. 6, PageID 8732; Traverse, [*182] ECF No. 29, PageID 9313, citing Ohio Rev. Code § 2929.05; *Evitts v. Lucey*, 469 U.S. 387, 401, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *United States v. Hopper*, 941 F.2d 419, 422 (6th Cir. 1991). Davis cites several Sixth Circuit decisions in which death sentences were upheld only after much greater aggravating circumstances and/or much less mitigation evidence. *Id.* at PageID 8733, citing *Reynolds v. Bagley*, 498 F.3d 549, 560 (6th Cir. 2007); *Baston v. Bagley*, 420 F.3d 632, 634-35 (6th Cir. 2005); *DePew v. Anderson*, 311 F.3d 742, 746-47 (6th Cir. 2002). Davis claims that there was no adjudication on the merits of his constitutional claim, as the Supreme Court of Ohio only analyzed the appropriateness of the sentence under the state statute as follows: "We have approved death sentences in cases in which the prior-murder-conviction specification under R.C. 2929.04(A)(5) was the sole aggravating circumstance presented." (Traverse, ECF No. 29, PageID 9315-16, quoting *Davis XIV*, 2014-Ohio-1615, at ¶ 117, 139 Ohio St. 3d 122, 9 N.E.3d 1031). Davis claims that even if this analysis were to have reached the constitutional issue, it would have been an unreasonable determination, as the death sentences in both cases cited by the *Davis XIV* court were later vacated in federal habeas proceedings. *Id.* at ¶ 116-17, citing *Taylor*, 78 Ohio St. 3d 15, 1997- Ohio 243, 676 N.E.2d 82 *writ of habeas corpus granted at Taylor v. Mitchell*, 296 F. Supp. 2d 784 (N.D. Ohio 2003); *State v. Mapes*, 19 Ohio St. 3d 108, 19 Ohio B. 318, 484 N.E.2d 140 (1985), *conditional writ of habeas corpus aff'd at Mapes v. Tate*, 388 F.3d 187).

In Claim Twenty, which is closely related, Davis argues that the Supreme Court of Ohio's proportionality review, by comparing Davis only with cases in which a death sentence was imposed, did not comport with due process [*183] (Petition, ECF No. 6, PageID 8739, citing *Taylor*, 78 Ohio St. 3d 15, 1997- Ohio 243, 676 N.E.2d 82; *Mapes*, 19 Ohio St. 3d 108, 19 Ohio B. 318, 484 N.E.2d 140). Davis claims that the proportionality review scheme is "ethically indefensible," because it does not consider similarities between the capital defendant and defendants in cases where the death penalty was *not* imposed. *Id.* at PageID 8740, quoting *State v. Murphy*, 91 Ohio St. 3d 516, 562, 2001- Ohio 112, 747 N.E.2d 765 (2001) (Pfeifer, J., dissenting).

This review process presents three constitutional problems, Davis argues. *First*, by only evaluating against cases in which the death penalty is imposed, the death penalty is no longer "limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Id.* at PageID 8741, quoting *Kennedy v. Louisiana*, 554 U.S. 407, 420, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008); *Roper*, 543 U.S. at 568; *Atkins v. Virginia*, 536 U.S. 304, 319, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). *Second*, each time the death penalty is imposed in a less serious case, the bar for what crimes are sufficiently heinous to impose the death penalty diminishes, leading to an ever-greater number of circumstances in which the death penalty could be applied. *Id.* at PageID 8743. *Third*, Davis claims, the analysis contravenes *Gregg*, which, according to

Davis, held that, if a state conducts a proportionality review, then that review is constitutional only if cases in which the death penalty was not imposed [*184] are also considered. *Id.* at PageID 8742, citing *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *Gregg*, 428 U.S. at 205. Specifically, the proportionality review scheme's "fail[ure] to properly narrow the reach of its death penalty fails to pass constitutional muster because it will result in arbitrary, capricious, or discriminatory death sentences." (Traverse, ECF No. 29, PageID 9328, citing *Walker v. Georgia*, 555 U.S. 979, 129 S. Ct. 453, 129 S. Ct. 481, 172 L. Ed. 2d 344 (2008) (statement of Stevens, J., respecting the denial of writ of certiorari); *Furman v. Georgia*, 408 U.S. 238, 309-10, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)).

As to Claim Eighteen, Davis cites no caselaw, and the Court is not aware of any, in which the Supreme Court has held that a death sentence was unconstitutional despite there being substantial mitigating evidence and a prior murder being the sole aggravating circumstance. Moreover, while the sentences in *Taylor* and *Mapes* were vacated in habeas, neither sentence was voided for lack of proportionality. Indeed, in *Taylor*, Judge James Carr noted that:

[W]hen the state courts have engaged in a proportionality review, the district court's review is limited. The district court is to examine the state's proportionality review only to determine whether the imposition of death on the petitioner is patently unjust or "shocks the conscience; the court is not to second-guess the state court's comparison [*185] of other cases in which the death penalty was imposed." Moreover, the Sixth Circuit in a recent opinion stated that because "proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison."

296 F. Supp. 2d at 839-40, quoting *Buell v. Mitchell*, 274 F.3d 337, 369 (6th Cir. 2001); *Kordenbrock v. Scroggy*, 680 F. Supp. 867, 899 (E.D. Ky. 1988). Accordingly, the trial court's proportionality review was not a violation of clearly established federal law. 28 U.S.C. § 2254(d)(1). Even considering all the mitigating evidence, the trial court finding that the single aggravating circumstance—previously killing an estranged significant other, the exact crime for which the original three-judge panel convicted him and sentenced him to death in 1984—outweighed those mitigating factors does not "shock the conscience." Thus, the undersigned cannot find that the state courts' proportionality review violated due process or constituted cruel and unusual punishment, and Claims Eighteen and Twenty should be dismissed.

8. Claim Nineteen: Insufficient Evidence to Support a Conviction for Aggravated Murder

Davis argues that the testimony and evidence introduced against him at trial were insufficient to support a conviction for aggravated murder. In support, Davis emphasizes that:

The testimonies [*186] of Denmark, Massey, and Robertson at trial were inconsistent and often contradictory both with each other and with the testimony of Ferguson before the grand jury;

Massey's identification of Davis did not occur until four days after the killing, and was the product of unconstitutionally suggestive police procedures;

Coleman's testimony that Davis had acquired the gun for the purpose of protection, rather than to kill Butler; and

Aldridge's testimony that Davis appeared irate at the time of the killing (which Davis argues shows he lacked the requisite *mens rea* for aggravated murder).

(Petition, ECF No. 6, PageID 8735-37, citing State Court Record, ECF No. 4-28, PageID 3188-89; Grand Jury Tr., ECF No. 5-1, PageID 7127-52; Trial Tr., ECF No. 5-2, PageID 7240, 7351, 7360-61, 7373-75, 7382-85, 7417, 7424-26; Trial Tr., ECF No. 5-3, PageID 7450, 7499, 7503, 7569). Given this inadequate evidence, and the lack of deoxyribonucleic acid or other circumstantial evidence tying Davis to the murder, he argues that the State could not prove the "prior calculation and design" element of aggravated murder beyond a reasonable doubt, and thus, his conviction and death sentence were unconstitutional. *Id.* [*187] at PageID 8737-38, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Robbins*, 58 Ohio St. 2d 74, 388 N.E.2d 755 (1979); *State v. Cotton*, 56 Ohio St. 2d 8, 381 N.E.2d 190 (1978).

Davis claims that the last reasoned state court opinion was *Davis II*, in which the Supreme Court of Ohio did not address whether Davis acted with prior calculation and design; Davis argues that the state court's failure to do so means that "the state court's adjudication in this case was based on an unreasonable determination of the facts in light of the evidence presented in state court."

2020 U.S. Dist. LEXIS 106444, *187

(Traverse, ECF No. 29, PageID 9322-23, citing *State v. Walker*, 150 Ohio St. 3d 409, 2016-Ohio-8295, ¶¶ 17-19, 82 N.E.3d 1124; *State v. Braden*, 98 Ohio St. 3d 354, 2003-Ohio-1325, ¶¶ 62-65, 785 N.E.2d 439; *State v. Keenan*, 81 Ohio St. 3d 133, 156-58, 1998-Ohio 459, 689 N.E.2d 929 (1998) (Moyer, C.J., dissenting in part), *writ of habeas corpus granted in part by Keenan v. Bagley*, No. 1:01-cv-2139, 2012 U.S. Dist. LEXIS 57044, 2012 WL 1424751 (N.D. Ohio Apr. 24, 2012); *Davis II*, 38 Ohio St. 3d at 366).

"The General Assembly has determined that it is a greater offense to premeditate or to plan ahead to purposely kill someone. All prior-calculation-and-design offenses will necessarily include purposeful homicides; not all purposeful homicides have an element of prior calculation and design." *Walker*, 2016-Ohio-8295, at ¶ 18, 150 Ohio St. 3d 409, 82 N.E.3d 1124. Nonetheless, the Supreme Court of Ohio has repeatedly rejected any "bright-line test that emphatically distinguishes between presence and absence of prior calculation and design. Instead, each case turns on the particular facts and evidence presented at trial." *Id.* at ¶ 19 (internal quotation marks and citations [*188] omitted). Ohio courts have traditionally considered three factors: "(1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or 'an almost instantaneous eruption of events?'" *Id.*, quoting *Taylor*, 78 Ohio St. 3d at 19. Factor one weighs heavily in favor of finding prior calculation and design; Butler had been Davis's live-in girlfriend prior to separating less than a week before the murder. Factor two has evidence in support of and against a finding of prior calculation. As discussed above, Coleman testified that Davis asked him to buy the firearm and ammunition for self-defense; yet, Davis had the loaded firearm on his person when he approached Butler at the American Legion, and continued to have it as he and Butler went outside to talk, despite there being no evidence that Butler posed any type of threat to Davis. As to factor three, the circumstances surrounding Davis's killing of Butler do not neatly fall into either category. While there was no evidence that Davis went to the American Legion intending to kill Butler, Davis and Butler were together [*189] for more than half an hour prior to the killing. In light of the evidence presented, a finding of prior calculation and design is not unreasonable, and Claim Nineteen should be dismissed.

V. CONCLUSION

For the foregoing reasons, the Magistrate Judge recommends that Davis's Petition (ECF No. 6) be DISMISSED, and that judgment should be entered in favor of the Warden and against Davis. The undersigned concludes that no reasonable jurist would find that Davis "has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), or would disagree with this conclusion with respect to any of the claims, and recommends that Petitioner be denied a certificate of appealability and that this Court certify to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

June 16, 2020.

/s/ Michael R. Merz

United States Magistrate Judge

No. 21-3404

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Dec 14, 2023
KELLY L. STEPHENS, Clerk

VON CLARK DAVIS,

Petitioner-Appellant,

V.

CHARLOTTE JENKINS, WARDEN,

Respondent-Appellee.

)
)
)
)
)
)
)
)
)
)
)

ORDER

Upon consideration of the appellant's motion to expand the certificate of appealability to include Claim 1(C) from the habeas petition,

it is ORDERED that the motion is GRANTED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens
Kelly L. Stephens, Clerk

Kelly L. Stephens, Clerk

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0253p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

VON CLARK DAVIS,

Petitioner-Appellant,

v.

CHARLOTTE JENKINS, Warden,

Respondent-Appellee.

No. 21-3404

On Petition for Rehearing En Banc.

United States District Court for the Southern District of Ohio at Columbus.

No. 2:16-cv-00495—Susan J. Dlott, District Judge.

Decided and Filed: November 20, 2023

Before: SUTTON, Chief Judge; MOORE, CLAY, GIBBONS, GRIFFIN,
KETHLEDGE, STRANCH, THAPAR, BUSH, LARSEN, NALBANDIAN,
READLER, DAVIS and MATHIS, Circuit Judges.*

COUNSEL

ON PETITION FOR REHEARING EN BANC: Michael J. Hendershot, Jana M. Bosch, Stephen E. Maher, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON RESPONSE:** Erin G. Barnhart, Jordan S. Berman, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE SOUTHERN DISTRICT OF OHIO, Columbus, Ohio, for Appellant.

*Judge Murphy and Judge Bloomekatz recused themselves from participation in this case.

No. 21-3404

Davis v. Jenkins

Page 2

ORDER

A majority of the Judges of this Court in regular active service has voted for rehearing en banc of this case. Sixth Circuit Rule 35(b) provides as follows:

The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal.

Accordingly, it is ORDERED that the previous decision and judgment of this court are vacated, the mandate is stayed, and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as possible.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

No. 21-3404

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED

Sep 13, 2024

KELLY L. STEPHENS, Clerk

VON CLARK DAVIS,

Petitioner - Appellant,

v.

CHARLOTTE JENKINS, Warden,

Respondent - Appellee.

ORDER

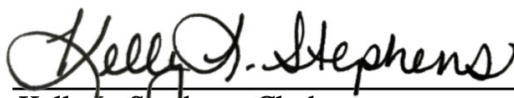
Before: SUTTON, Chief Judge; MOORE, COLE, CLAY, GIBBONS, GRIFFIN,
KETHLEDGE, STRANCH, THAPAR, BUSH, LARSEN, NALBANDIAN,
READLER, DAVIS and MATHIS, Circuit Judges.*

UPON CONSIDERATION of motions filed by Petitioner,

IT IS ORDERED that Petitioner's motion for leave to file a motion for en banc reconsideration is GRANTED. Respondent shall file a response to the motion for en banc reconsideration no later than 5 p.m. on September 20, 2024. Petitioner's motion to stay the mandate is GRANTED pending disposition of the motion for en banc reconsideration before this court and/or a petition for a writ of certiorari, if any, before the Supreme Court of the United States.

IT IS FURTHER ORDERED that Petitioner's motion to file a supplemental brief is DENIED AS MOOT.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

*Pursuant to 6 Cir. I.O.P. 35(c), Composition of the En Banc Court, Judge Cole, a senior judge of the court who sat on the original panel in this case, participated in this decision. Judge Murphy and Judge Bloomekatz recused themselves from participation in this decision.

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Kelly L. Stephens
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: September 13, 2024

Ms. Erin Gallagher Barnhart
Mr. Jordan S. Berman
Ms. Jana Minich Bosch
Mr. Thomas Elliot Gaiser
Mr. Michael Jason Hendershot
Mr. Stephen E. Maher

Re: Case No. 21-3404, *Von Davis v. Charlotte Jenkins*
Originating Case No. : 2:16-cv-00495

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

Enclosure

No. 21-3404

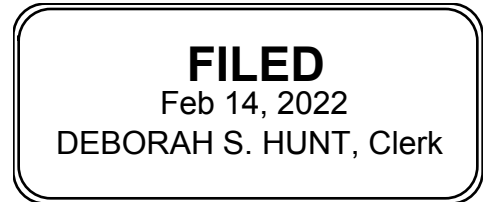
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VON CLARK DAVIS,
Petitioner-Appellant,

v.

CHARLOTTE JENKINS,
Respondent-Appellee.

)
)
)
)
)
)
)
)
)
)
)



O R D E R

Before: MOORE, COLE, and GIBBONS, Circuit Judges.

Von Clark Davis, an Ohio death-row inmate represented by counsel, appeals from a district court judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The district court granted a certificate of appealability (“COA”) for several claims. Davis has filed a motion to expand the COA. Charlotte Jenkins, a warden for the State of Ohio proceeding through counsel, has filed a response in opposition, and Davis has filed a reply.

In January 1984, a grand jury indicted Davis for aggravated murder (accompanied by capital and firearm specifications) and possessing a firearm while under a disability. After Davis waived his right to a trial by jury, a three-judge panel convicted him of all counts and sentenced him to death. On direct appeal, Davis’s convictions were affirmed, but his death sentence was vacated. *State v. Davis*, No. CA84-06-071, 1986 WL 5989 (Ohio Ct. App. May 27, 1986), *rev’d in part*, 528 N.E.2d 925 (Ohio 1988).

On remand, the same three-judge panel held a second sentencing hearing and again sentenced Davis to death, which was affirmed on appeal. *State v. Davis*, No. CA89-09-123, 1990 WL 165137 (Ohio Ct. App. Oct. 29, 1990), *aff’d*, 584 N.E.2d 1192 (Ohio 1992).

No. 21-3404

- 2 -

The trial court dismissed Davis's post-conviction petition after conducting a limited evidentiary hearing. The Ohio Court of Appeals affirmed. *State v. Davis*, No. CA95-07-124, 1996 WL 551432 (Ohio Ct. App. Sept. 30, 1996). The Ohio Supreme Court declined further review. *State v. Davis*, 674 N.E.2d 372 (Ohio 1997) (table). Davis's two motions to reopen his direct appeal were dismissed as untimely. *State v. Davis*, 714 N.E.2d 384 (Ohio 1999).

In April 1997, Davis filed his first habeas petition, and the district court denied relief. On appeal, we vacated the death sentence. *Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007).

On remand to state court, a different three-judge panel conducted a third sentencing hearing and sentenced Davis to death, which was affirmed on appeal. *State v. Davis*, No. CA2009-10-263, 2011 WL 646404 (Ohio Ct. App. Feb. 22, 2011), *aff'd*, 9 N.E.3d 1031 (Ohio 2014).

Davis unsuccessfully sought post-conviction relief. *State v. Davis*, No. CA2012-12-258, 2013 WL 4806935 (Ohio Ct. App. Sept. 9, 2013). The Ohio Supreme Court declined further review. *State v. Davis*, 36 N.E.3d 188 (Ohio 2015) (table).

In August 2016, Davis filed a second-in-time habeas petition raising twenty-six claims of constitutional error. The warden filed a return of writ. Davis filed a traverse. The magistrate judge issued a report recommending that the petition be dismissed. Davis filed objections to the report and recommendation. The warden filed a response in opposition, and Davis filed a reply. The district court dismissed the petition and certified several claims for appeal.

Davis now seeks to expand the COA to include six more claims. The warden has filed a response in opposition, and Davis has filed a reply.

"[A] COA may not issue unless 'the applicant has made a substantial showing of the denial of a constitutional right.'" *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (quoting 28 U.S.C. § 2253(c)(2)). A substantial showing is made where the applicant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support

No. 21-3404

- 3 -

of the claims. In fact, the statute forbids it.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the district court has denied a claim on a procedural basis only, a COA should issue “when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

In his first claim, Davis contends that he did not knowingly, intelligently, and voluntarily waive his right to a jury trial because: (a) the trial court denied his motion to sever the two charges; (b) two members of the three-judge panel previously represented an adverse party in foreclosure proceedings against him, (c) he did not anticipate at the time of the waiver that the Ohio Supreme Court’s decision in *State v. Penix*, 513 N.E.2d 744 (Ohio 1987), would not apply to his case; and (d) he did not know that his jury waiver would apply twenty-five years later.

“[T]he Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.” *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The Court acknowledged that this right can be waived: “[W]e hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial.” *Id.* at 158 (footnote omitted). “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970). A valid waiver satisfies the following requirements: “(1) the waiver must be in writing; (2) the government must consent to the waiver; (3) the trial court must consent to the waiver; and (4) the defendant’s waiver must be voluntary, knowing, and intelligent.” *Haliym v. Mitchell*, 492 F.3d 680, 698 (6th Cir. 2007) (citing *United States v. Martin*, 704 F.2d 267, 271 (6th Cir. 1983)). Davis challenges the fourth requirement and bears the burden of demonstrating that it was not satisfied. *Id.* (citing *Sowell v. Bradshaw*, 372 F.3d 821, 832 (6th Cir. 2004)). “[A] waiver satisfies the fourth element of the test if the defendant understood that the choice confronting him was, on the one hand, to be judged by a group of people from the community, and on the other hand, to have his

No. 21-3404

- 4 -

guilt or innocence determined by a judge.” *Id.* (quoting *Sowell*, 372 F.3d at 836) (internal quotation marks omitted). To effect a waiver of the right to a trial by jury, a colloquy is recommended but not constitutionally required. *Otte v. Houk*, 654 F.3d 594, 601 (6th Cir. 2011) (citing *Haliym*, 492 F.3d at 698).

No COA should issue for the first claim. Davis previously raised the argument presented in part (a) before this court and a panel rejected it. *Davis*, 475 F.3d at 778-79 (“Because the denial of Davis’s motion for severance did not constitute a denial of the petitioner’s due process right to a fair trial, that ruling cannot be said to have rendered his waiver of a jury trial involuntary.”). The panel also rejected the argument presented in part (b). *Id.* at 781 (“The claim of bias raised against two of the three judges on the trial court panel is without merit . . .”). In part (c), Davis argues that “*Penix* was the law at the time of his waiver, and he had no reason to suspect that the state supreme court would distinguish it from his case based on his decision to be tried by a three-judge panel instead of a jury.” App. R. 7 (Mot. to Expand COA at 15-16). But this assertion is incorrect: Davis signed his waiver in 1984 and the Ohio Supreme Court decided *Penix* three years later in 1987. Davis thus could not have relied on *Penix* in waiving his right to a jury trial. Finally, Davis has waived part (d) by providing no discussion in support. *Spirko v. Mitchell*, 368 F.3d 603, 612 (6th Cir. 2004).

For his second claim, Davis contends that the trial court erred by enforcing his jury trial waiver at: (a) the second sentencing hearing because he did not know at the time of waiver that the *Penix* decision would not apply in his case; and (b) the third sentencing hearing because twenty-five years had passed since the waiver was entered. Because a panel of this court previously rejected the argument raised in part (a), Davis has not shown that reasonable jurists could debate that it should have been resolved in a different manner now. *See Davis*, 475 F.3d at 775 (holding “the sentencing process in this case did not violate due process under *Hicks* [*v. Oklahoma*, 447 U.S. 343 (1980)]”).

In part (b), on the other hand, Davis complains that his waiver form designated by name the judges who would comprise the three-judge panel. Although that panel presided over the first

No. 21-3404

- 5 -

and second sentencing hearings, a different three-judge panel heard evidence at the third sentencing hearing. We have been mindful of how the appointment of a specific judge may affect a decision to waive the right to a jury trial. *See, e.g., Fitzgerald v. Withrow*, 292 F.3d 500, 504-05 (6th Cir. 2002); *Sinistaj v. Burt*, 66 F.3d 804, 809 (6th Cir. 1995). Reasonable jurists could debate whether part (b) should have been resolved in a different manner.

Davis contends for his third claim that trial counsel did not properly investigate and present evidence of his good behavior in prison at his third sentencing hearing. A successful claim asserting the ineffective assistance of trial counsel requires a demonstration that trial counsel performed deficiently and that the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The record shows that trial counsel investigated evidence of Davis's good behavior and presented it to the three-judge panel. The information that Davis now argues should have been discovered and presented does not differ in a "substantial way" from that introduced at trial. *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005). Reasonable jurists would not debate whether claim three should have been resolved in a different manner.

For his fourth claim, Davis provides three reasons that trial counsel were ineffective in preparing for the penalty phase. First, despite pursuing a mitigating theory that centered on Davis not posing a danger to society if sentenced to life in prison, trial counsel introduced testimony that Davis could be paroled. Second, along with the evidence about the availability of parole, trial counsel introduced testimony that Davis sometimes exhibited unwarranted aggressive behavior. Third, trial counsel omitted testimony about Davis's family history and traumatic childhood.

Although a COA should issue for the first two reasons, a COA should not issue for the third. First, Davis has demonstrated that reasonable jurists could debate whether trial counsel were ineffective for presenting testimony about the availability of parole and for failing to conduct a thorough investigation before presenting potentially damaging testimony during the sentencing hearing. *Wiggins v. Smith*, 539 U.S. 510, 524-26 (2003). Next, given counsel's possible ineffectiveness in presenting testimony about the availability of parole, reasonable jurists could debate whether counsel were also ineffective in introducing testimony concerning Davis's

No. 21-3404

- 6 -

aggression. Trial counsel, however, did present evidence of Davis's family history and traumatic childhood through expert testimony, rendering further testimony by family and friends on this point cumulative. See *Tibbetts v. Bradshaw*, 633 F.3d 436, 443-44 (6th Cir. 2011).

Davis alleges that trial counsel were ineffective for failing to seek the recusal of a judge as his fifth claim. A member of the three-judge panel at the third sentencing hearing served as part of the prosecution team that some years prior had sought a capital conviction against Davis's nephew. "Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (per curiam) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Although the judge acknowledged his prior role following the testimony of the mother of Davis's nephew and stated that he could maintain his impartiality, the inquiry is not "whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Id.* (quoting *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016)). Reasonable jurists could debate whether the average judge would be neutral in this position, and thus whether Davis could show deficient performance and prejudice.

For his sixth claim, Davis contends that trial counsel were ineffective because they did not investigate the capital specification, i.e., Davis's 1971 conviction for second-degree murder, a purposeful killing. In support, Davis relies upon a letter from an individual who purported to be on the scene when the earlier murder occurred. This prior conviction alone underpinned the capital specification, and trial counsel had an obligation to investigate the circumstances. *Rompilla v. Beard*, 545 U.S. 374, 385-86 (2005). Reasonable jurists could debate whether this claim should have been resolved in a different manner.

We **GRANT** Davis's motion to expand the COA in part. The Clerk's Office shall issue a briefing schedule for the following claims certified either by the district court or by this court: (1) whether trial counsel were ineffective for failing to advise Davis properly about waiving his right to a jury trial; (2) whether being resentenced twice violated Davis's rights under the Fifth,

No. 21-3404

- 7 -

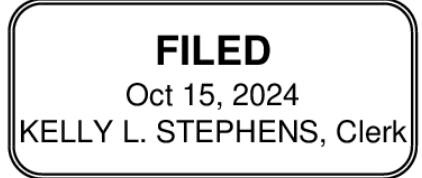
Eighth, and Fourteenth Amendments; (3) whether the enforcement of Davis's jury waiver at the third sentencing hearing denied him due process; (4) whether trial counsel were ineffective for presenting evidence of Davis's parole eligibility and aggression; (5) whether trial counsel were ineffective for not seeking the recusal of one of the judges during Davis's third resentencing; (6) whether trial counsel were ineffective for failing to investigate the circumstances of his prior felony conviction; and (7) whether the following claims are cognizable on habeas review: Ohio's statutory scheme for imposing the death penalty is unconstitutional; Ohio's lethal injection protocol is unconstitutional; Ohio's lethal injection protocol violates the Due Process and Privileges and Immunities Clauses; and Ohio's lethal injection protocol violates the Equal Protection Clause.

ENTERED BY ORDER OF THE COURT

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

Deborah S. Hunt, Clerk

No. 21-3404

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VON CLARK DAVIS,

Petitioner-Appellant,

v.

CHARLOTTE JENKINS, Warden,

Respondent-Appellee.

)
)
)
)
)
)
)
)
)
)

ORDER

BEFORE: SUTTON, Chief Judge; MOORE, CLAY, GIBBONS, GRIFFIN,
KETHLEDGE, STRANCH, THAPAR, BUSH, LARSEN, NALBANDIAN,
READLER, DAVIS, and MATHIS, Circuit Judges.

The court received a motion for en banc reconsideration of the en banc opinion filed on August 20, 2024. The en banc court has reviewed the motion and concludes that the issues raised in the motion were fully considered upon the original submission and decision. No judge* has requested a vote in favor of reconsideration en banc.

Therefore, the motion is denied.

ENTERED BY ORDER OF THE COURT

 A handwritten signature in cursive script, reading "Kelly L. Stephens", written over a horizontal line.

Kelly L. Stephens, Clerk

*Judge Murphy and Bloomekatz are recused from participation in this ruling.



FEDERAL PUBLIC DEFENDER SOUTHERN DISTRICT OF OHIO

Natalie Olmstead
CHU Chief

Joseph Medici
Federal Public Defender

Richard Monahan
First Assistant

OFFICES

COLUMBUS | 10 West Broad Street, Suite 1020 • Columbus, Ohio 43215 • 614-469-2999
CINCINNATI | 250 East 5th Street, Suite 350 • Cincinnati, Ohio 45202 • 513-929-4834
DAYTON | 1 South Main Street, Suite 490 • Dayton, Ohio 45402 • 937-225-7687

August 14, 2024

Kelly L. Stevens
Clerk of the Court
United States Court of Appeals
for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202-3988

Re: *Davis v. Jenkins*, 6th Cir. No. 21-3404
Fed. R. App. P. 28(j) Notice of Supplemental Authority

Dear Clerk Stevens:

We respectfully provide notice of *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, 144 S.Ct. 2244 (2024).

Loper overruled the “*Chevron* Doctrine,” holding, under the Administrative Procedure Act (APA), federal courts must not defer to agency interpretations of statutes. *See* 144 S. Ct. at 2263-70. *Loper* explained that under Article III, the federal judiciary must independently declare the law, *id.* at 2257-58, and the APA incorporates this understanding of the judicial function, *id.* at 2261-62.

Justice Thomas emphasized *Chevron* unconstitutionally “compels judges to abdicate their Article III ‘judicial Power.’” *Id.* at 2274 (Thomas, J., concurring) (quoting § 1). Justice Gorsuch also noted federal courts did not traditionally “defer” to “reasonable” interpretations of law propounded by non-Article III agencies. *Id.* at 2283 (Gorsuch, J., concurring). Critically, such “deference” fails to insulate Article III adjudications “from power and politics . . . as the federal judicial oath demands,” unfairly tilting the scales of justice in favor of “the most powerful.” *Id.* at 2285-86.

Davis has argued that he is entitled to *de novo* review. *See* Supp. Br. at 12-13, 20-25, 27-28; Supp. Reply Br. at 6, 11-12, 14-17. *Loper* provides an alternative basis for granting *Davis* *de novo* review and relief.

FEDERAL PUBLIC DEFENDER
SOUTHERN DISTRICT OF OHIO

Section 2254(d) violates Article III in the same way as *Chevron* when it requires federal courts to defer to interpretations or applications of federal law by non-Article III actors (state courts) which are not “unreasonable.” *See Loper*, 144 S. Ct. at 2283 (Gorsuch, J., concurring). Just as this Article III Court is not bound by “reasonable” legal interpretations of federal bureaucrats, it cannot be bound by reasonable-but-incorrect legal decisions of *state* entities. This is especially true where §2254(d) deference compromises the Constitution’s “practical and real protections for individual liberty,” which depend on fidelity to the separation of powers the Framers enshrined in the Constitution. *See id.* at 2274 (Thomas, J., concurring) (internal quotation marks omitted). Article III courts are “not at liberty to surrender, or to waive” their duty to independently interpret laws. *Id.* at 2283 (Gorsuch, J., concurring) (internal quotation marks omitted); *see also id.* at 2258 (majority op.) (same).¹

Respectfully submitted,

Joseph Medici

Federal Public Defender

by

/s/ Erin G. Barnhart

Erin G. Barnhart (0079681)

Trial attorney

Jordan S. Berman (0093075)

Co-counsel

Assistant Federal Public Defenders

Federal Public Defender’s Office

for the Southern District of Ohio

Capital Habeas Unit

10 W. Broad Street, Suite 1020

Columbus, Ohio 43215

Phone: (614) 469-4141

erin_barnhart@fd.org

jordan_berman@fd.org

Counsel for Petitioner-Appellant

¹ Davis is unable to fully set forth the argument that *Loper* demonstrates the unconstitutionality of AEDPA deference within the limits of this Rule 28(j) letter. Accordingly, he will also submit a motion for supplemental briefing requesting adequate space in which to do so.

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2024, I electronically filed the foregoing **Federal Rule of Appellate Procedure 28(j) letter** with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send notification of such filing to the email address of opposing counsel on file with the Court.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)
Assistant Federal Public Defender
Co-counsel for Petitioner-Appellant

No. 21-3404

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

VON CLARK DAVIS, *Petitioner-Appellant*,
v.
WARDEN, *Chillicothe Correctional Institution, Respondent.*

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CASE NO. 2:16-cv-00495**

**PETITIONER-APPELLANT VON CLARK DAVIS'S
MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING**

THIS IS A DEATH PENALTY CASE

Joseph Medici

Federal Public Defender

Erin G. Barnhart (0079681)

Lead/Trial Counsel

Jordan S. Berman (0093075)

Co-Counsel

Assistant Federal Public Defenders

Office of the Federal Public Defender for the Southern District of Ohio

Capital Habeas Unit

10 West Broad Street, Suite 1020

Columbus, OH 43215-3469

Telephone: (614) 469-2999

Facsimile: (614) 469-5999

Erin_Barnhart@fd.org

Jordan_Berman@fd.org

Counsel for Petitioner-Appellant Von Clark Davis

Now that “*Chevron* is overruled,” *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, ___, 144 S. Ct. 2244, 2273 (2024), *Loper* and its concurring opinions raise a fundamental question of exceptional importance: whether AEDPA deference, like *Chevron* deference, unconstitutionally “compels judges to abdicate their Article III ‘judicial Power.’” *Id.* at 2274 (Thomas, J., concurring) (quoting § 1). (*See Davis’s* 28(j) letter, R. 61.) This consequential issue warrants this Court’s attention and briefing now, especially where it is likely to recur in the numerous habeas cases which are or will be pending before this Court in the near future.

The majority and concurring opinions in *Loper* emphasize that the judicial function requires federal courts to exercise “independent judgment,” free from constraints imposed by non-Article III decisionmakers. *See Loper*, 144 S. Ct. at 2257; *id.* at 2274 (Thomas, J., concurring) (same); *id.* at 2283 (Gorsuch, J., concurring) (the Framers “made a considered judgment to build judicial independence into the Constitution’s design.”). As Justices Thomas and Gorsuch have explained, *Chevron’s* requirement that Article III courts “defer” to Article II agencies’ interpretations of law thus violates the Constitution. *Id.* at 2274 (Thomas, J., concurring) (“Because the judicial power requires judges to exercise their independent judgment, the deference that *Chevron* requires contravenes Article III’s mandate.”); *id.* at 2285 (Gorsuch, J., concurring) (“*Chevron* deference . . . precludes

courts from exercising the judicial power vested in them by Article III to say what the law is.”).

Loper’s elimination of *Chevron* deference shows that AEDPA deference is also impermissible. Consider Judge Easterbrook’s opinion about the constitutionality of AEDPA in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev’d on other grounds*, 521 U.S. 320 (1997). Judge Easterbrook reasoned that AEDPA deference could not violate Article III since if the court were to reach that conclusion, it would mean, among other things, “that deference in administrative law under *Chevron* is unconstitutional.” *Id.* at 871. He was correct: *Chevron* deference and AEDPA deference rise and fall together. Now that there is “a tombstone on *Chevron* no one can miss,” *Loper*, 144 S. Ct. at 2275 (Gorsuch, J., concurring), AEDPA deference must face the identical fate.

If an Article II bureaucrat’s “reasonable” interpretation of federal law cannot constrain an Article III court’s independent judgment, *id.* at 2285 (Gorsuch, J., concurring), neither can a “reasonable” decision made by a non-Article III state court. Just as “deference” to non-Article III civil servants is prohibited by the Constitution, so too is “deference” to non-Article III state court judges under 28 U.S.C. §2254(d). *See also Lindh*, 96 F.3d at 890 (Ripple, J., dissenting) (AEDPA deference violates Article III because, under § 2254(d), “the lower federal court must accept as the federal rule of decision the state court’s view as preferable to its own.”).

As Justice Gorsuch pointed out, the Framers set apart Article III judges from state court judges to ensure absolute judicial independence. *Id.* at 2284. That is the genius of Article III. The Framers knew that anything less than independent adjudications posed a threat to individual liberty and enforcement of the Constitution and federal law. That is especially true where non-Article III actors are not insulated from political pressures. *See* The Federalist Papers, No. 81 (“State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.”).

This Court’s adjudication of Davis’s case by applying § 2254(d) deference would not provide the *independent adjudication* that Article III requires. Rather, § 2254(d) would demand that this Court’s Article III decision-making process and the outcome of this case be subjected to—and fully *dependent upon*—what non-Article III actors said or did and how *they* viewed or interpreted the Constitution, the same way *Chevron* made Article III adjudications dependent upon administrators’ interpretations of federal law. Because it makes the Article III judges of this Court beholden to state court judges’ interpretation and application of the Constitution, § 2254(d) violates Article III. Article III’s *independence* requirement does not permit an adjudication of Davis’s rights that *depends upon* (and incorporates) the views of state court judges who, like Article II bureaucrats, lack the independence of Article III judges.

Accordingly, and to quote Justice Thomas, “the type of deference required by [AEDPA] violates the Constitution,” *Loper*, 144 S. Ct. at 2275 (Thomas, J., concurring), because it disrupts the structural safeguards the Framers designed to provide Americans with “practical and real protections for individual liberty,” *id.* at 2274. With Davis’s life and liberty at stake, this Court must provide Davis *de novo* “plenary Article III adjudication” of the question whether he is in custody in violation of the Constitution, 28 U.S.C. § 2241(c)(3), rather than providing the less-than-robust, non-independent adjudication superimposed on this inquiry by § 2254(d). *See Axon Enter. v. FTC*, 598 U.S. 175, 203 (2023) (Thomas, J., concurring) (“If private rights are at stake, the Constitution likely requires plenary Article III adjudication.”).

This motion’s limited discussion of *Loper* and Article III, and Davis’s even more abbreviated discussion of such issues in his Rule 28(j) letter, (R. 61), confirm that *Loper*, the concurring opinions of Justices Thomas and Gorsuch, and the *Lindh* opinions of Judges Easterbrook and Ripple warrant further exploration by the parties and this Court. Davis’s truncated discussion of these profound issues in his Rule 28(j) letter is not adequate under the circumstances. *See Covenant Medical Ctr. v. Burwell*, 603 F. App’x 360, 363 (6th Cir. 2015) (noting limited nature of a Rule 28(j) letter as insufficient for a full and fair adjudication of an issue).

Davis has explained why he should prevail even under the deference demanded by § 2254(d). (*See* Davis’s Supp. Br. at 12-13, 20-25, 27-28; Supp. Reply Br. at 6, 11-12, 14-17.) In light of the Supreme Court’s intervening decision in *Loper*, this Court should order Davis and the Warden to file supplemental briefs addressing whether Davis is entitled to *de novo* review and to relief for the additional or alternative reason that AEDPA deference under 28 U.S.C. § 2254(d) violates Article III of the Constitution. *See e.g., In re MCP*, No. 24-7000, 2024 U.S. App. Lexis 15890 *6 (6th Cir. June 28, 2024) (ordering supplemental briefing in light of *Loper*); *United States v. Cogdill*, No. 22-5603, 2024 U.S. App. Lexis 18756 (6th Cir. July 29, 2024) (ordering supplemental briefing to address impact of *Erlinger v. United States*, 602 U.S. ___, 144 S. Ct 1840 (2024)); *United States v. Williams*, No. 23-6115, R. 14 (6th Cir. June 26, 2024) (ordering supplemental briefing on impact of *United States v. Rahimi*, 602 U.S. ___, 144 S. Ct. 1889 (2024), limited to 20 pages).

Respectfully submitted,

Joseph Medici
Federal Public Defender

By

/s/ Erin G. Barnhart
Erin G. Barnhart (0079681)
Trial attorney
Jordan S. Berman (0093075)
Co-counsel
Assistant Federal Public Defenders

Federal Public Defender's Office
for the Southern District of Ohio
Capital Habeas Unit
10 W. Broad Street, Suite 1020
Columbus, Ohio 43215
Phone: (614) 469-4141
erin_barnhart@fd.org
jordan_berman@fd.org

Counsel for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2024, I electronically filed the foregoing **PETITIONER-APPELLANT VON CLARK DAVIS'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING** with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send notification of such filing to the email address of opposing counsel on file with the Court.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)
Assistant Federal Public Defender
Co-counsel for Petitioner-Appellant

No. 21-3404

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

VON CLARK DAVIS, *Petitioner-Appellant*,

v.

WARDEN, Chillicothe Correctional Institution, *Respondent*.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO**

CASE NO. 2:16-cv-00495

MOTION FOR EN BANC RECONSIDERATION

THIS IS A DEATH PENALTY CASE

Joseph Medici

Federal Public Defender

Erin G. Barnhart (0079681)

Lead/Trial Counsel

Jordan S. Berman (0093075)

Co-Counsel

Assistant Federal Public Defenders

Office of the Federal Public Defender for the Southern District of Ohio

Capital Habeas Unit

10 West Broad Street, Suite 1020

Columbus, OH 43215-3469

Telephone: (614) 469-2999

Facsimile: (614) 469-5999

Erin_Barnhart@fd.org

Jordan_Berman@fd.org

Counsel for Petitioner-Appellant Von Clark Davis

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. A Motion for En Banc Reconsideration is appropriate for seeking reconsideration, vacation, or modification of an en banc Court’s Opinion and Judgment.	1
II. On reconsideration, this Court should vacate its Opinion, grant Davis’s Motion for Supplemental Briefing, and ultimately grant Davis habeas corpus relief.....	2
A. Reconsideration is warranted here.	2
B. On reconsideration, the en banc Court should vacate its Opinion and grant Davis’s Motion for Supplemental Briefing.	3
C. On reconsideration, the en banc Court should undertake de novo review and grant Davis habeas corpus relief.	7
CONCLUSION.....	13
CERTIFICATE OF COMPLIANCE.....	15
CERTIFICATE OF SERVICE	
Opinion (en banc), Doc. 63	Exhibit 1
Motion for Leave to File Supplemental Briefing, Doc. 62.....	Exhibit 2
Rule 28(j) Notice of Supplemental Authority, Doc. 61	Exhibit 3

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Beck v. Alabama</i> , 447 U.S. 625 (1980).....	8
<i>Comer v. Murphy Oil USA</i> , 718 F.3d 460 (5th Cir. 2013)	3
<i>Grzegorzcyk v. United States</i> , 597 U.S. ___, 142 S. Ct. 2580 (2022) (Sotomayor, J., dissenting)	8
<i>Lawrence v. Chater</i> , 516 U.S. 163 (1996) (per curiam).....	8
<i>Lindh v. Murphy</i> , 96 F.3d 856 (7th Cir. 1996) (en banc), <i>overruled on other grounds</i> , 521 U.S. 320 (1997).....	10
<i>Loper Bright Enterprises v. Raimondo</i> , 603 U.S. ___, 144 S. Ct. 2244 (2024).....	<i>passim</i>
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950).....	9
<i>Shrader v. CSX Transp., Inc.</i> , 70 F.3d 255 (2d Cir. 1995)	4
<i>Tennessee v. Becerra</i> , No. 24-5220, 2024 U.S. App. Lexis 21521 (6th Cir. Aug. 26, 2024)	9
<i>United States v. Boler</i> , No. 23-4352, 2024 U.S. App. Lexis 21379 (4th Cir. Aug. 23, 2024)	10
<i>United States v. Brooks</i> , 245 F.3d 291 (3d Cir. 2001)	7
<i>United States v. Chandler</i> , No. 22-1786, 2024 U.S. App. Lexis 21204 (3d Cir. Aug. 22, 2024) (Bibas, J., dissenting from denial of rehearing en banc)	10

United States v. Havis,
927 F.3d 382 (6th Cir. 2019) (en banc) 3

United States v. Havis,
929 F.3d 317 (6th Cir. 2019) (en banc) 2, 3, 4

United States v. Klein,
80 U.S. 128 (1871)..... 8-13

United States v. Rogers,
925 F.2d 1285 (10th Cir. 1991) 7

United States v. Trumbull,
No. 23-912, 2024 U.S. App. Lexis 21289 (9th Cir. Aug. 22, 2024)
(Bea, J., concurring).....10

Webster v. Cooper,
558 U.S. 1039 (2009).....8

Statutes

28 U.S.C. § 2241(c)(3).....13

28 U.S.C. § 2253 7

28 U.S.C. § 2254(d)*passim*

Other Authorities

Fed. R. App. P. 27(a)(3)(A) 5

Fed. R. App. P. 27(d)(2)(A) 17

Fed. R. App. P. 28(j) 4, 5, 6, 7

Fed. R. App. P. 35(a) 3

Fed. R. App. P. 35(b)(1)(B) 4

Fed. R. App. P. 35(b)(2)(A) 17

Fed. R. App. P. 40(a)(2) 4

INTRODUCTION

Under the authority of this Court’s order in *United States v. Havis*, 929 F.3d 317, 318 (6th Cir. 2019) (en banc), Von Clark Davis respectfully moves “for reconsideration of the en banc court’s opinion” of August 20, 2024. On reconsideration, the en banc Court should enter an order that (1) vacates and withdraws its August 20, 2024 Opinion, (Doc. 63); (2) grants Davis’s overlooked and still-pending Motion to File Supplemental Brief, (Doc. 62); and (3) orders briefing on the constitutionality of 28 U.S.C. § 2254(d).

I. A Motion for En Banc Reconsideration is appropriate for seeking reconsideration, vacation, or modification of an en banc Court’s Opinion and Judgment.

This en banc Court may reconsider its decision and modify its judgment until a mandate is issued. *See, e.g., Comer v. Murphy Oil USA*, 718 F.3d 460, 467 (5th Cir. 2013). This Court’s August 20, 2024 Opinion, (Doc. 63-2) (attached as Exhibit 1), is subject to revision by the en banc Court because it is not yet a final judgment.

The litigation in *Havis* demonstrates that this motion is the proper way for Davis to request reconsideration. There, the Government filed a “Motion for *En Banc* Reconsideration,” 929 F.3d at 318, challenging this Court’s en banc decision in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc). The Government based its request on the Court’s inherent discretion to vacate or modify an opinion

before issuance of the mandate and Federal Rule of Appellate Procedure 35(a)’s provision that that matters may be “heard *or reheard* by the court of appeals en banc” (emphasis added). *See* Mot. for *En Banc* Reconsideration, *Havis*, 6th Cir. No. 17-5772, Doc. 62-1 (filed June 20, 2019). This Court ordered a response, granted the Government’s request for a reply, and considered the motion before ultimately denying it on the merits. *See Havis*, 929 F.3d at 318. As in *Havis*, this Court is authorized to consider and decide this motion before issuing a mandate.

II. On reconsideration, this Court should vacate its Opinion, grant Davis’s Motion for Supplemental Briefing, and ultimately grant Davis habeas corpus relief.

A. Reconsideration is warranted here.

Reconsideration by the en banc Court is warranted if it has overlooked significant matters, including arguments “that might reasonably be expected to alter the conclusion reached by the court.” *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). *Cf.* Fed. R. App. P. 40(a)(2) (rehearing warranted where court has “overlooked or misapprehended” a “point of law or fact”). Reconsideration is especially warranted if an overlooked issue is one of exceptional importance. *Cf.* Fed. R. App. P. 35(b)(1)(B). That is precisely the case here.

On August 14, 2024, Davis filed a Notice of Supplemental Authority under Federal Rule of Appellate Procedure 28(j), (Doc. 61) (attached as Exhibit 3). He noted that *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, 144 S. Ct. 2244

(2024) “provides an alternative basis for granting Davis *de novo* review and relief.” (Davis’s Rule 28(j) Letter, Doc. 61, at 1.) The Warden did not submit a response to this filing. Nevertheless, the Court did not address *Loper* in its en banc Opinion.

Davis explained that because the limits of the 28(j) letter prevented him from fully setting forth his *Loper*-based arguments that AEDPA deference violates the Constitution, he would also be filing a motion for supplemental briefing requesting adequate space in which to do so. (Doc. 61 at 2 n.1.) Davis filed that motion on August 19, 2024. (Davis’s Motion for Supplemental Briefing, Doc. 62) (attached as Exhibit 2). The deadline for the Warden to respond to that motion expired on August 29, 2024. *See* Fed. R. App. P. 27(a)(3)(A) (10-day deadline). The Court issued its Opinion the day after Davis filed his motion, on August 20, 2024. (Doc. 63.) It did so without ruling on that pending motion.

B. On reconsideration, the en banc Court should vacate its Opinion and grant Davis’s Motion for Supplemental Briefing.

Because the Court overlooked both the arguments Davis raised in his Rule 28(j) letter and his pending, unopposed motion to supplement the briefing, this Court should grant this motion for reconsideration.

Davis has asserted that he is entitled to *de novo* review and habeas corpus relief because 28 U.S.C. § 2254(d) violates Article III of the Constitution, notably in light of *Loper*. In their concurring opinions in that case, Justices Thomas and Gorsuch explain the unconstitutionality of Article III judges giving “deference” to

legal conclusions reached by non-Article III actors. (*See* Davis’s Notice of Supplemental Authority, Doc. 61.) As Davis has argued:

Section 2254(d) violates Article III in the same way as *Chevron* when it requires federal courts to defer to interpretations or applications of federal law by non-Article III actors (state courts) which are not ‘unreasonable.’ *See Loper*, 144 S. Ct. at 2283 (Gorsuch, J., concurring). Just as this Article III Court is not bound by ‘reasonable’ legal interpretations of federal bureaucrats, it cannot be bound by reasonable-but-incorrect legal decisions of *state* entities.

(*Id.* at 2.) In its en banc Opinion, however, this Court failed to mention or engage with Davis’s argument at all.

Instead, the en banc Opinion concluded with the statement that, “[i]n the habeas context, federal courts *may not displace with their own judgment* the valid adjudications of state courts.” (Doc. 63-2 at 28 (emphasis added).) But *Loper* explains that Article III demands that this Court declare the law and exercise its own “independent judgment” on the question of whether Davis is in custody in violation of the Constitution, regardless of what the state courts may have concluded. (Davis’s Rule 28(j) Letter, Doc. 61, at 1); (Davis’s Motion for Supplemental Briefing, Doc. 62, at 2).

That is, contrary to the en banc Opinion denying relief, *post-Loper*, the judgment of a non-Article III state court *cannot displace* the independent judgment of an Article III court exercising the Judicial Power of the United States over

Davis’s claims for habeas corpus relief. This is faithful to the Framers’ understanding and crafting of Article III. (See Davis’s Motion for Supplemental Briefing, Doc. 62, at 2-4 (citing, *e.g.*, The Federalist Papers, No. 81).) Davis made this point before this Court issued its en banc Opinion:

The majority and concurring opinions in *Loper* emphasize that the judicial function requires the federal courts to exercise “independent judgment,” free from constraints imposed by non-Article III decisionmakers. See *Loper*, 144 S. Ct. at 2257; *id.* at 2274 (Thomas, J., concurring); *id.* at 2284 (Gorsuch, J., concurring) (the Framers “made a considered judgment to build judicial independence into the Constitution’s design.”). As Justices Thomas and Gorsuch have explained, *Chevron*’s requirement that Article III courts “defer” to Article II agencies’ interpretations of law thus violates the Constitution. *Id.* at 2274 (Thomas, J., concurring) (“Because the judicial power requires judges to exercise their independent judgment, the deference that *Chevron* requires contravenes Article III’s mandate.”); *id.* at 2285 (Gorsuch, J., concurring) (“*Chevron* deference . . . precludes courts from exercising the judicial power vested in them by Article III to say what the law is.”).

(*Id.* at 1-2). The en banc Court, however, overlooked Davis’s Article III argument, as raised in his Rule 28(j) Letter, (Doc. 61), and it overlooked his Motion for Supplemental Briefing, (Doc. 62), which remains pending and undecided.

Davis thus presents clear grounds for en banc reconsideration. In *United States v. Brooks*, 245 F.3d 291, 292 (3d Cir. 2001), a panel including then-Judge Alito granted rehearing to address a constitutional challenge to 28 U.S.C. § 2253 because the “issue was inadvertently not addressed in [our] decision.” That is the

appropriate course here as well. *See also United States v. Rogers*, 925 F.2d 1285, 1286 (10th Cir. 1991) (granting rehearing “to consider the severance issue which we inadvertently did not address in our previous opinion.”). Likewise, after reconsideration, the en banc Court should grant Davis’s motion for supplemental briefing, (Doc. 62), to which the Warden has not filed any timely response in opposition.

Reconsideration, rather than a request for certiorari, promotes judicial efficiency because the Article III issue was raised in this Court but not decided. In the past, the Supreme Court has remanded cases, “flagging a particular issue that [the court of appeals] does not appear to have fully considered.” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *see also Webster v. Cooper*, 558 U.S. 1039 (2009) (granting, vacating, and remanding for court of appeals to consider applicability of a January 2009 Supreme Court decision that was not mentioned by court of appeals in March 2009 denial of relief). Since Davis has now flagged this undecided issue, reconsideration would eliminate the need for this extra step and save judicial resources.

Further, this Court should also grant reconsideration because failure to consider Davis’s constitutional challenge to § 2254(d) would violate due process. This is a capital habeas corpus proceeding, and given the nature of the penalty he faces, Davis is entitled to the most expansive due process protections available. *Cf.*

Beck v. Alabama, 447 U.S. 625 (1980); *Grzegorzcyk v. United States*, 597 U.S. ___, 142 S. Ct. 2580, 2585 (2022) (Sotomayor, J., dissenting) (“[D]eprivations of process, particularly where the stakes for individual litigants are high, are unjust in and of themselves.”). Davis has a fundamental due process “right to be heard.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Davis has been denied his fundamental right: He has not been heard at all on his arguments challenging the standard of review that the en banc court has now used to deny him relief. Under the circumstances, absent reconsideration and a full and proper airing of Davis’s Article III challenges, Davis will be denied his right to due process of law.

C. On reconsideration, the en banc Court should undertake de novo review and grant Davis habeas corpus relief.

On reconsideration, this Court should ultimately conclude that 28 U.S.C. § 2254(d) violates Article III; that Davis is entitled to de novo review of his claims; and that he is entitled to habeas corpus relief.

As Davis will explain in more detail if granted supplemental briefing, *Loper* and the concurring opinions of Justices Thomas and Gorsuch lead to the conclusion that Article III courts cannot, without violating Article III, defer to the decisions or adjudications of non-Article III decisionmakers. *See, e.g., Loper*, 144 S. Ct. at 2284-85 (Gorsuch, J., concurring).

Now that “*Chevron* deference has fallen,” *Loper* and its concurring opinions have “open[ed] the door to new challenges” to deference. *Cf. Tennessee v. Becerra*, No. 24-5220, 2024 U.S. App. Lexis 21521 at *21 (6th Cir. Aug. 26, 2024). These challenges should include Davis’s Article III challenge to AEDPA deference. Davis’s Article III challenge is “profoundly important,” and “though *Loper Bright*’s holding does not reach this case, its reasoning” and the reasoning of Justices Thomas and Gorsuch “cast[] doubt” on the continuing vitality of AEDPA deference. *Cf. United States v. Chandler*, No. 22-1786, 2024 U.S. App. Lexis 21204 at *4 (3d Cir. Aug. 22, 2024) (Bibas, J., dissenting from denial of rehearing en banc); *see also id.* at * 3-4 (Justice Gorsuch’s *Loper* concurrence indicates that “lenity trumps deference” now that *Chevron* has been overruled); *United States v. Boler*, No. 23-4352, 2024 U.S. App. Lexis 21379 at *8 n.4 (4th Cir. Aug. 23, 2024) (recognizing that *Loper* “calls into question *Auer* [*v. Robbins*, 519 U.S. 452 (1997)] deference”); *United States v. Trumbull*, No. 23-912, 2024 U.S. App. Lexis 21289 at *27 (9th Cir. Aug. 22, 2024) (Bea, J., concurring) (even where *Loper* did not “expressly overrule” a type of deference, courts “should hesitate to expand” that deference following *Loper*’s “landmark” ruling).

As Davis pointed out in his Motion for Supplemental Briefing, (Doc. 62), the Seventh Circuit previously linked the constitutionality of AEDPA deference to the constitutionality of *Chevron* deference. *See Lindh v. Murphy*, 96 F.3d 856, 871

(7th Cir. 1996) (en banc), *overruled on other grounds*, 521 U.S. 320 (1997). And the Supreme Court’s foundational ruling in *United States v. Klein*, 80 U.S. 128 (1871), also supports the conclusion that if *Chevron* deference is unconstitutional, AEDPA deference must be unconstitutional as well. Proper resolution of Davis’s “profoundly important” Article III challenge requires briefing and careful consideration of *Klein*, which also involved Congress’ attempt to impose a rule of deference upon the federal judiciary.

Klein concerned individuals whose property had been confiscated during the Civil War. In early 1863, Congress passed a law allowing those individuals to receive compensation if they could prove that they had never given “any aid or comfort to the present rebellion.” *Klein*, 80 U.S. at 131 (emphasis removed). Later that year, President Lincoln granted full pardons to anyone who “desired to resume their allegiance” to the United States and took “a prescribed oath of allegiance.” *Id.* at 131-32. V.F. Wilson (whose property was at issue, and whose estate administrator was Klein) took the prescribed oath in 1864. *Id.* at 132.

In 1870, however, Congress attempted to vitiate the effect of these pardons. It mandated that no pardon was admissible or could be used as evidence for a claim of compensation; it required that federal courts at all levels had to immediately dismiss many cases involving pardons, *id.* at 134, 143-44; and it declared that a Presidential pardon was to be considered “conclusive evidence” that the individual

“*did* give aid to the rebellion” under certain circumstances, *id.* at 134, 144 (emphasis added).

The Supreme Court concluded that the 1870 Act violated constitutional separation-of-powers principles. *Id.* at 147. As relevant here, it held unconstitutional the Congressional provisions purporting to deprive the Supreme Court of jurisdiction over cases proving loyalty through a pardon, making a pardon “conclusive evidence” of disloyalty, and requiring the lower court to dismiss a claim “forthwith” upon receipt of such evidence. *Id.* at 145-45. These provisions, the Court explained, were “founded solely on the application of a rule of decision.” *Id.* at 146. By requiring a federal court to declare its jurisdiction had ceased, these provisions unconstitutionally “prescribe[d]” for the judiciary “a rule for the decision of a cause in a particular way[.]” *Id.* And in doing so, Congress effectually required the federal courts to render their decisions in cases or controversies *not* by using their independent judgment about what justice requires, but by acting in ways that facilitated the outcomes that Congress wanted:

In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed [by the 1870 Act] to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to decide it in its own favor? *Can we do so without allowing that the legislature may prescribe rules of*

decision to the Judicial Department of the government in cases pending before it? We think not

Id. (emphasis added).

The crux of the Article III problem in *Klein* was the same as that identified by Justices Thomas and Gorsuch in *Loper*: under Congress’s 1870 Act, “the court [was] forbidden to give the effect to evidence which, *in its own judgment* . . . *should have* . . . give[n] it an effect precisely contrary.” *Id.* at 147 (emphasis added). That is, Congress purported to tell the Article III courts *to not exercise their independent judgment* about the effect of a presidential pardon, but instead to *defer* to what Congress said the “legal effect” of a presidential pardon should be. *Id.* at 148.

The separation-of-powers violation identified in *Klein* establishes that 28 U.S.C. § 2254(d) is also unconstitutional. Like the 1870 Act, § 2254(d) “prescribe[s] a rule for the decision of a cause in a particular way,” *Klein*, 80 U.S. at 146, namely, for how this Court is to adjudicate whether Davis is “in custody in violation of the Constitution or laws or treaties of the United States,” 28 U.S.C. § 2241(c)(3). Section 2254(d) does so by demanding *how* this Article III court must adjudicate Davis’s claims: 1) examine the case for the existence of a state-court adjudication (like the 1870 Act instructed federal courts to do regarding the existence of a presidential pardon), and 2) determine the “legal effect” of any such adjudication by applying the rule of decision established by Congress in § 2254(d)

(like the 1870 Act required federal courts to do regarding the rule of decision it prescribed for cases involving a pardon). This rule of decision requires this Court to deny relief upon finding an erroneous-but-not-unreasonable state court decision. This is so even if this Article III court concludes, in its independent judgment, that Davis is actually in custody in violation of the Constitution. In this way, the effect of AEDPA deference parallels the 1870 Act's mandate that the federal courts deny relief based on the existence of a presidential pardon even when, in the federal court's independent judgment, relief would be appropriate under the substantive governing law.

The Framers deliberately crafted judicial independence into Article III to guard against action from the political branches like the 1870 Act, *Chevron* deference, and AEDPA. See *Loper*, 144 S. Ct. at 2284 (Gorsuch, J., concurring). In 1870, Congress skewed the federal courts' adjudication of cases or controversies in favor of the government and against a class of claimants who, as former confederates, were politically disfavored. In 1996, Congress did the same thing, favoring States at the expense of the politically disfavored class of convicted persons seeking habeas relief.

As was the case in *Klein*, Congress "passed the limit which separates the legislative from the judicial power" in enacting 28 U.S.C. § 2254(d). *Klein*, 80

U.S. at 147. Section 2254(d) is unconstitutional, and Davis is entitled to de novo review of the constitutional claims for which he seeks habeas relief.

CONCLUSION

This Court should grant en banc reconsideration. Because this Court has overlooked Davis's challenge to the constitutionality of 28 U.S.C. § 2254(d), it should vacate its en banc opinion. This Court should address Davis's challenge fully, including by granting his Motion for Supplemental Briefing, which is still pending and undecided and is therefore subject to this Court's en banc consideration. Afterwards, following additional proceedings, this Court should then issue an en banc decision concluding that Davis is entitled to habeas corpus relief.

Respectfully submitted,

Joseph Medici
Federal Public Defender

by

/s/ Erin G. Barnhart
Erin G. Barnhart (0079681)
Trial attorney

Jordan S. Berman (0093075)
Co-counsel

Assistant Federal Public Defenders
Federal Public Defender's Office
for the Southern District of Ohio
Capital Habeas Unit
10 W. Broad Street, Suite 1020
Columbus, Ohio 43215

Phone: (614) 469-4141
erin_barnhart@fd.org
jordan_berman@fd.org
Counsel for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE

Counsel for Petitioner-Appellant Von Clark Davis hereby certifies that the foregoing motion complies with the type-volume limitations provide in Federal Rules of Appellate Procedure 27(d)(2)(A) and 35(b)(2)(A). The relevant portions of the foregoing brief contain 3055 words in Times New Roman (14-point) proportional type. The word processing software used to prepare this motion was Microsoft Word 2016.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)

Assistant Federal Public Defender

Co-counsel for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, I electronically filed the foregoing **PETITIONER-APPELLANT VON CLARK DAVIS'S MOTION FOR EN BANC RECONSIDERATION** with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send notification of such filing to the email address of opposing counsel on file with the Court.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)

Assistant Federal Public Defender

Co-counsel for Petitioner-Appellant

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Kelly L. Stephens
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: August 30, 2024

Ms. Erin Gallagher Barnhart
Federal Public Defender's Office
Capital Habeas Unit
1660 W. Second Street
Suite 750
Columbus, OH 43215

Re: Case No. 21-3404, *Von Davis v. Charlotte Jenkins*
Originating Case No.: 2:16-cv-00495

Dear Ms. Barnhart,

The enclosed motion for en banc reconsideration is being returned to you unfiled.

Neither the Federal Rules of Appellate Procedure nor the Rules of the Sixth Circuit make any provision for rehearing/reconsideration of an opinion of the en banc court. Therefore, the motion is not accepted for filing.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Jordan S. Berman
Ms. Jana Minich Bosch
Mr. Thomas Elliot Gaiser
Mr. Michael Jason Hendershot
Mr. Stephen E. Maher

No. 21-3404

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

VON CLARK DAVIS, *Petitioner-Appellant*,
v.
WARDEN, *Chillicothe Correctional Institution*, *Respondent*.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CASE NO. 2:16-cv-00495**

**PETITIONER-APPELLANT VON CLARK DAVIS'S
MOTION TO THE EN BANC COURT FOR LEAVE TO FILE
"MOTION FOR EN BANC RECONSIDERATION" (DOC. 64)**

THIS IS A DEATH PENALTY CASE

Joseph Medici
Federal Public Defender
Erin G. Barnhart (0079681)
Lead/Trial Counsel
Jordan S. Berman (0093075)
Co-Counsel
Assistant Federal Public Defenders
Office of the Federal Public Defender for the Southern District of Ohio
Capital Habeas Unit
10 West Broad Street, Suite 1020
Columbus, OH 43215-3469
Telephone: (614) 469-2999
Facsimile: (614) 469-5999
Erin_Barnhart@fd.org
Jordan_Berman@fd.org
Counsel for Petitioner-Appellant Von Clark Davis

On August 30, 2024, Von Clark Davis electronically filed with this Court a “Motion for En Banc Reconsideration,” (Docs. 64-1 through 64-4 (attached as Ex. A).) In his motion, Davis invoked the same procedure the Government used in *United States v. Havis*, 929 F.3d 317, 318 (6th Cir. 2019) (en banc), when it filed a “Motion for *En Banc* Reconsideration” to seek reconsideration of an en banc opinion of this Court. *See* Motion for *En Banc* Reconsideration, *United States v. Havis*, 6th Cir. No. 17-5772, Doc. 62-1 (filed June 20, 2019) (attached as Ex. B).

In *Havis*, after ordering a response to the motion for en banc reconsideration, *see id.*, Doc 63 (filed June 27, 2019), this Court unanimously decided the movant’s motion on its merits, issuing a published order signed by all the judges of the en banc Court. *See Havis*, 929 F.3d at 318 (denying “the government’s motion for reconsideration of the *en banc* court’s opinion of June 6, 2019”); *see also id.* at 318-19 (Sutton, J., concurring in the denial of en banc reconsideration). Davis’s procedurally identical motion, however, has received starkly different treatment.

On August 30, 2024, En Banc Coordinator Beverly Harris sent undersigned counsel a letter stating that Davis’s Motion for En Banc Reconsideration was “not accepted for filing,” because neither the Federal Rules of Appellate Procedure nor the Rules of this Court “make any provision for rehearing/reconsideration of an opinion of the en banc court.” (Aug. 30, 2024 Letter of Beverly Harris to Erin Gallagher Barnhart, Esq., Doc. 65-2 (attached as Ex. C).) Ms. Harris’s letter to

Davis's counsel cannot be reconciled with the en banc Court's treatment and disposition of the Government's "Motion For *En Banc* Reconsideration" filed and decided in *Havis*.

Davis thus respectfully moves the en banc Court for leave to file his "Motion For En Banc Reconsideration," originally filed as Docket Entry 64. Alternatively, the en banc Court should simply order the docketing of Davis's "Motion For En Banc Reconsideration" (after which the Court should grant Davis's motion to reconsider and revise its August 20, 2024 en banc opinion, (Doc. 63), for the reasons stated in the motion for reconsideration).¹

This Court should grant Davis leave to file his "Motion For En Banc Reconsideration" (or docket his motion directly) for numerous reasons.

First, Davis's motion is controlled by this Court's published en banc decision in *Havis*, 929 F.3d at 317. Davis is entitled to the same process the United States received in *Havis* when it filed a motion for en banc reconsideration, which was docketed and decided on its merits.

¹ In a telephone discussion on September 4, 2024, Clerk of the Court Kelly Stephens instructed undersigned counsel that a motion for leave was the appropriate vehicle to litigate why Davis believes it was error to reject his August 30, 2024 filing. For the reasons set forth in this motion, Davis does not believe he should be required to seek leave to file his motion for en banc reconsideration. Recognizing, however, that he is unlikely to receive a different result by simply filing the same motion he already attempted to file, he submits this motion for leave while noting his disagreement with the need to seek leave.

Second and third, Davis's disparate treatment raises two constitutional concerns. Because Davis is similarly situated to the United States in *Havis*, failing to allow Davis to file his motion or to have it considered on its merits would deny Davis equal protection of the laws under the Fifth Amendment. Davis's motion is indistinguishable in all relevant respects from the Government's motion in *Havis*, meaning no rational basis exists for treating them differently from each other. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam).

Likewise, Davis also has a due-process right to be heard (like the United States was heard in *Havis*) and cannot be denied that right arbitrarily. It would thus deny him due process for this Court to fail to docket and consider his motion. There is no rational basis for this Court to refuse to hear and decide Davis's motion after it considered and decided the very same motion in *Havis*. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government.").

Fourth, this Court has inherent authority to consider and decide Davis's motion and to revise its en banc opinion and judgment because no mandate has yet issued. This Court's opinion and judgment accordingly remain subject to revision. The United States made that point in *Havis*, *see* Motion for *En Banc* Reconsideration, *Havis*, 6th Cir. No. 17-5772, Doc. 62-1, at 7, and Davis

emphasized it as well in his Motion For En Banc Reconsideration, (*see* Doc. 64-1 at 5-6).

Fifth, 28 U.S.C. § 452 requires that Davis’s motion for en banc reconsideration be filed and decided by the en banc Court. Under § 452, “[a]ll courts of the United States shall be deemed *always open for the purpose of filing proper papers*, issuing and returning process, and *making motions* and orders.” (emphasis added). Section 452’s open-courts provision requires that Davis be allowed to “make[his] motion[.]” for en banc reconsideration to this Court, and the Court must likewise be open “for the purpose of filing” his motion, which *Havis* demonstrates is a “proper paper[.]” filed in this Court.

Sixth and finally, the Federal Rules of Appellate Procedure *do* allow Davis to file his motion and to have it decided by the judges of this Court. Rule 27, entitled “Motions,” allows him to file a motion like the one he has filed. *See id.* (“An application for an order or other relief is made by motion unless these rules prescribe another form.”) Rule 45(a)(2), “Clerk’s Duties,” requires that this Court, through the Clerk of the Court, be “always open for filing any paper . . . making a motion, and entering an order.” Davis is properly “making a motion,” and his motion is “any paper” for which this Court must be “always open.” *Id.* In *Havis*, the United States also relied on Rule 35(a)’s provision that matters may be “heard *or reheard* by the court of appeals en banc” (emphasis added). *See* Motion for *En*

Banc Reconsideration, *Havis*, 6th Cir. No. 17-5772, Doc. 62-1, at 7. Finally, Rule 2(a) allows this Court to “suspend any provision of the Rules in a particular case and order proceedings as it directs,” regardless of the specific rules of appellate procedure. Thus, no matter how one views the rules of appellate procedure, this Court must, or at the very least can, allow Davis’s motion for en banc reconsideration to be filed and considered by this Court, as occurred in *Havis*.

CONCLUSION

Under the direct authority of *Havis*, 929 F.3d at 317; given the constitutional problems that would arise if Davis were treated differently from the movant in *Havis*; and via this Court’s inherent powers under 28 U.S.C. § 452, and Federal Rules of Appellate Procedure 2, 27, 35(a), and 45(a)(2), this Court should grant Davis leave to file his Motion For En Banc Reconsideration, (Doc. 64), or otherwise docket his motion. Afterwards, this Court should grant reconsideration of its en banc opinion, including providing the additional process Davis has requested in his motion.

Respectfully submitted,

Joseph Medici
Federal Public Defender

by

/s/ Erin G. Barnhart

Erin G. Barnhart (0079681)

Trial attorney

Jordan S. Berman (0093075)

Co-counsel

Assistant Federal Public Defenders
Federal Public Defender's Office
for the Southern District of Ohio
Capital Habeas Unit

10 W. Broad Street, Suite 1020

Columbus, Ohio 43215

Phone: (614) 469-4141

erin_barnhart@fd.org

jordan_berman@fd.org

Counsel for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE

Counsel for Petitioner-Appellant Von Clark Davis hereby certifies that the foregoing motion complies with the type-volume limitations provide in Federal Rule of Appellate Procedure Rules 27(d)(2)(A). The relevant portions of the foregoing motion contain 1214 words in Times New Roman (14-point) proportional type. The word processing software used to prepare this motion was Microsoft Word 2016.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)

Assistant Federal Public Defender

Co-counsel for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2024, I electronically filed the foregoing **PETITIONER-APPELLANT VON CLARK DAVIS’ MOTION TO THE EN BANC COURT FOR LEAVE TO FILE “MOTION FOR EN BANC RECONSIDERATION”** with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send notification of such filing to the email address of opposing counsel on file with the Court.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)

Assistant Federal Public Defender

Co-counsel for Petitioner-Appellant

No. 21-3404

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

VON CLARK DAVIS, *Petitioner-Appellant*,
v.
WARDEN, Chillicothe Correctional Institution, *Respondent*.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CASE NO. 2:16-cv-00495**

MOTION FOR EN BANC RECONSIDERATION

THIS IS A DEATH PENALTY CASE

Joseph Medici

Federal Public Defender

Erin G. Barnhart (0079681)

Lead/Trial Counsel

Jordan S. Berman (0093075)

Co-Counsel

Assistant Federal Public Defenders

Office of the Federal Public Defender for the Southern District of Ohio

Capital Habeas Unit

10 West Broad Street, Suite 1020

Columbus, OH 43215-3469

Telephone: (614) 469-2999

Facsimile: (614) 469-5999

Erin_Barnhart@fd.org

Jordan_Berman@fd.org

Counsel for Petitioner-Appellant Von Clark Davis

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. A Motion for En Banc Reconsideration is appropriate for seeking reconsideration, vacation, or modification of an en banc Court’s Opinion and Judgment.	1
II. On reconsideration, this Court should vacate its Opinion, grant Davis’s Motion for Supplemental Briefing, and ultimately grant Davis habeas corpus relief.....	2
A. Reconsideration is warranted here.	2
B. On reconsideration, the en banc Court should vacate its Opinion and grant Davis’s Motion for Supplemental Briefing.	3
C. On reconsideration, the en banc Court should undertake de novo review and grant Davis habeas corpus relief.	7
CONCLUSION.....	13
CERTIFICATE OF COMPLIANCE.....	15
CERTIFICATE OF SERVICE	
Opinion (en banc), Doc. 63	Exhibit 1
Motion for Leave to File Supplemental Briefing, Doc. 62.....	Exhibit 2
Rule 28(j) Notice of Supplemental Authority, Doc. 61	Exhibit 3

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Beck v. Alabama</i> , 447 U.S. 625 (1980).....	8
<i>Comer v. Murphy Oil USA</i> , 718 F.3d 460 (5th Cir. 2013)	3
<i>Grzegorzcyk v. United States</i> , 597 U.S. ___, 142 S. Ct. 2580 (2022) (Sotomayor, J., dissenting)	8
<i>Lawrence v. Chater</i> , 516 U.S. 163 (1996) (per curiam).....	8
<i>Lindh v. Murphy</i> , 96 F.3d 856 (7th Cir. 1996) (en banc), <i>overruled on other grounds</i> , 521 U.S. 320 (1997).....	10
<i>Loper Bright Enterprises v. Raimondo</i> , 603 U.S. ___, 144 S. Ct. 2244 (2024).....	<i>passim</i>
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950).....	9
<i>Shrader v. CSX Transp., Inc.</i> , 70 F.3d 255 (2d Cir. 1995)	4
<i>Tennessee v. Becerra</i> , No. 24-5220, 2024 U.S. App. Lexis 21521 (6th Cir. Aug. 26, 2024)	9
<i>United States v. Boler</i> , No. 23-4352, 2024 U.S. App. Lexis 21379 (4th Cir. Aug. 23, 2024)	10
<i>United States v. Brooks</i> , 245 F.3d 291 (3d Cir. 2001)	7
<i>United States v. Chandler</i> , No. 22-1786, 2024 U.S. App. Lexis 21204 (3d Cir. Aug. 22, 2024) (Bibas, J., dissenting from denial of rehearing en banc)	10

<i>United States v. Havis</i> , 927 F.3d 382 (6th Cir. 2019) (en banc)	3
<i>United States v. Havis</i> , 929 F.3d 317 (6th Cir. 2019) (en banc)	2, 3, 4
<i>United States v. Klein</i> , 80 U.S. 128 (1871).....	8-13
<i>United States v. Rogers</i> , 925 F.2d 1285 (10th Cir. 1991)	7
<i>United States v. Trumbull</i> , No. 23-912, 2024 U.S. App. Lexis 21289 (9th Cir. Aug. 22, 2024) (Bea, J., concurring).....	10
<i>Webster v. Cooper</i> , 558 U.S. 1039 (2009).....	8

Statutes

28 U.S.C. § 2241(c)(3).....	13
28 U.S.C. § 2253	7
28 U.S.C. § 2254(d)	<i>passim</i>

Other Authorities

Fed. R. App. P. 27(a)(3)(A)	5
Fed. R. App. P. 27(d)(2)(A).....	17
Fed. R. App. P. 28(j)	4, 5, 6, 7
Fed. R. App. P. 35(a)	3
Fed. R. App. P. 35(b)(1)(B)	4
Fed. R. App. P. 35(b)(2)(A)	17
Fed. R. App. P. 40(a)(2).....	4

INTRODUCTION

Under the authority of this Court’s order in *United States v. Havis*, 929 F.3d 317, 318 (6th Cir. 2019) (en banc), Von Clark Davis respectfully moves “for reconsideration of the en banc court’s opinion” of August 20, 2024. On reconsideration, the en banc Court should enter an order that (1) vacates and withdraws its August 20, 2024 Opinion, (Doc. 63); (2) grants Davis’s overlooked and still-pending Motion to File Supplemental Brief, (Doc. 62); and (3) orders briefing on the constitutionality of 28 U.S.C. § 2254(d).

I. A Motion for En Banc Reconsideration is appropriate for seeking reconsideration, vacation, or modification of an en banc Court’s Opinion and Judgment.

This en banc Court may reconsider its decision and modify its judgment until a mandate is issued. *See, e.g., Comer v. Murphy Oil USA*, 718 F.3d 460, 467 (5th Cir. 2013). This Court’s August 20, 2024 Opinion, (Doc. 63-2) (attached as Exhibit 1), is subject to revision by the en banc Court because it is not yet a final judgment.

The litigation in *Havis* demonstrates that this motion is the proper way for Davis to request reconsideration. There, the Government filed a “Motion for *En Banc* Reconsideration,” 929 F.3d at 318, challenging this Court’s en banc decision in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc). The Government based its request on the Court’s inherent discretion to vacate or modify an opinion

before issuance of the mandate and Federal Rule of Appellate Procedure 35(a)'s provision that that matters may be “heard *or reheard* by the court of appeals en banc” (emphasis added). *See* Mot. for *En Banc* Reconsideration, *Havis*, 6th Cir. No. 17-5772, Doc. 62-1 (filed June 20, 2019). This Court ordered a response, granted the Government’s request for a reply, and considered the motion before ultimately denying it on the merits. *See Havis*, 929 F.3d at 318. As in *Havis*, this Court is authorized to consider and decide this motion before issuing a mandate.

II. On reconsideration, this Court should vacate its Opinion, grant Davis’s Motion for Supplemental Briefing, and ultimately grant Davis habeas corpus relief.

A. Reconsideration is warranted here.

Reconsideration by the en banc Court is warranted if it has overlooked significant matters, including arguments “that might reasonably be expected to alter the conclusion reached by the court.” *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). *Cf.* Fed. R. App. P. 40(a)(2) (rehearing warranted where court has “overlooked or misapprehended” a “point of law or fact”). Reconsideration is especially warranted if an overlooked issue is one of exceptional importance. *Cf.* Fed. R. App. P. 35(b)(1)(B). That is precisely the case here.

On August 14, 2024, Davis filed a Notice of Supplemental Authority under Federal Rule of Appellate Procedure 28(j), (Doc. 61) (attached as Exhibit 3). He noted that *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, 144 S. Ct. 2244

(2024) “provides an alternative basis for granting Davis *de novo* review and relief.” (Davis’s Rule 28(j) Letter, Doc. 61, at 1.) The Warden did not submit a response to this filing. Nevertheless, the Court did not address *Loper* in its en banc Opinion.

Davis explained that because the limits of the 28(j) letter prevented him from fully setting forth his *Loper*-based arguments that AEDPA deference violates the Constitution, he would also be filing a motion for supplemental briefing requesting adequate space in which to do so. (Doc. 61 at 2 n.1.) Davis filed that motion on August 19, 2024. (Davis’s Motion for Supplemental Briefing, Doc. 62) (attached as Exhibit 2). The deadline for the Warden to respond to that motion expired on August 29, 2024. *See* Fed. R. App. P. 27(a)(3)(A) (10-day deadline). The Court issued its Opinion the day after Davis filed his motion, on August 20, 2024. (Doc. 63.) It did so without ruling on that pending motion.

B. On reconsideration, the en banc Court should vacate its Opinion and grant Davis’s Motion for Supplemental Briefing.

Because the Court overlooked both the arguments Davis raised in his Rule 28(j) letter and his pending, unopposed motion to supplement the briefing, this Court should grant this motion for reconsideration.

Davis has asserted that he is entitled to *de novo* review and habeas corpus relief because 28 U.S.C. § 2254(d) violates Article III of the Constitution, notably in light of *Loper*. In their concurring opinions in that case, Justices Thomas and Gorsuch explain the unconstitutionality of Article III judges giving “deference” to

legal conclusions reached by non-Article III actors. (*See* Davis’s Notice of Supplemental Authority, Doc. 61.) As Davis has argued:

Section 2254(d) violates Article III in the same way as *Chevron* when it requires federal courts to defer to interpretations or applications of federal law by non-Article III actors (state courts) which are not ‘unreasonable.’ *See Loper*, 144 S. Ct. at 2283 (Gorsuch, J., concurring). Just as this Article III Court is not bound by ‘reasonable’ legal interpretations of federal bureaucrats, it cannot be bound by reasonable-but-incorrect legal decisions of *state* entities.

(*Id.* at 2.) In its en banc Opinion, however, this Court failed to mention or engage with Davis’s argument at all.

Instead, the en banc Opinion concluded with the statement that, “[i]n the habeas context, federal courts *may not displace with their own judgment* the valid adjudications of state courts.” (Doc. 63-2 at 28 (emphasis added).) But *Loper* explains that Article III demands that this Court declare the law and exercise its own “independent judgment” on the question of whether Davis is in custody in violation of the Constitution, regardless of what the state courts may have concluded. (Davis’s Rule 28(j) Letter, Doc. 61, at 1); (Davis’s Motion for Supplemental Briefing, Doc. 62, at 2).

That is, contrary to the en banc Opinion denying relief, *post-Loper*, the judgment of a non-Article III state court *cannot displace* the independent judgment of an Article III court exercising the Judicial Power of the United States over

Davis’s claims for habeas corpus relief. This is faithful to the Framers’ understanding and crafting of Article III. (*See* Davis’s Motion for Supplemental Briefing, Doc. 62, at 2-4 (citing, *e.g.*, The Federalist Papers, No. 81).) Davis made this point before this Court issued its en banc Opinion:

The majority and concurring opinions in *Loper* emphasize that the judicial function requires the federal courts to exercise “independent judgment,” free from constraints imposed by non-Article III decisionmakers. *See Loper*, 144 S. Ct. at 2257; *id.* at 2274 (Thomas, J., concurring); *id.* at 2284 (Gorsuch, J., concurring) (the Framers “made a considered judgment to build judicial independence into the Constitution’s design.”). As Justices Thomas and Gorsuch have explained, *Chevron*’s requirement that Article III courts “defer” to Article II agencies’ interpretations of law thus violates the Constitution. *Id.* at 2274 (Thomas, J., concurring) (“Because the judicial power requires judges to exercise their independent judgment, the deference that *Chevron* requires contravenes Article III’s mandate.”); *id.* at 2285 (Gorsuch, J., concurring) (“*Chevron* deference . . . precludes courts from exercising the judicial power vested in them by Article III to say what the law is.”).

(*Id.* at 1-2). The en banc Court, however, overlooked Davis’s Article III argument, as raised in his Rule 28(j) Letter, (Doc. 61), and it overlooked his Motion for Supplemental Briefing, (Doc. 62), which remains pending and undecided.

Davis thus presents clear grounds for en banc reconsideration. In *United States v. Brooks*, 245 F.3d 291, 292 (3d Cir. 2001), a panel including then-Judge Alito granted rehearing to address a constitutional challenge to 28 U.S.C. § 2253 because the “issue was inadvertently not addressed in [our] decision.” That is the

appropriate course here as well. *See also United States v. Rogers*, 925 F.2d 1285, 1286 (10th Cir. 1991) (granting rehearing “to consider the severance issue which we inadvertently did not address in our previous opinion.”). Likewise, after reconsideration, the en banc Court should grant Davis’s motion for supplemental briefing, (Doc. 62), to which the Warden has not filed any timely response in opposition.

Reconsideration, rather than a request for certiorari, promotes judicial efficiency because the Article III issue was raised in this Court but not decided. In the past, the Supreme Court has remanded cases, “flagging a particular issue that [the court of appeals] does not appear to have fully considered.” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *see also Webster v. Cooper*, 558 U.S. 1039 (2009) (granting, vacating, and remanding for court of appeals to consider applicability of a January 2009 Supreme Court decision that was not mentioned by court of appeals in March 2009 denial of relief). Since Davis has now flagged this undecided issue, reconsideration would eliminate the need for this extra step and save judicial resources.

Further, this Court should also grant reconsideration because failure to consider Davis’s constitutional challenge to § 2254(d) would violate due process. This is a capital habeas corpus proceeding, and given the nature of the penalty he faces, Davis is entitled to the most expansive due process protections available. *Cf.*

Beck v. Alabama, 447 U.S. 625 (1980); *Grzegorzcyk v. United States*, 597 U.S. ___, 142 S. Ct. 2580, 2585 (2022) (Sotomayor, J., dissenting) (“[D]eprivations of process, particularly where the stakes for individual litigants are high, are unjust in and of themselves.”). Davis has a fundamental due process “right to be heard.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Davis has been denied his fundamental right: He has not been heard at all on his arguments challenging the standard of review that the en banc court has now used to deny him relief. Under the circumstances, absent reconsideration and a full and proper airing of Davis’s Article III challenges, Davis will be denied his right to due process of law.

C. On reconsideration, the en banc Court should undertake de novo review and grant Davis habeas corpus relief.

On reconsideration, this Court should ultimately conclude that 28 U.S.C. § 2254(d) violates Article III; that Davis is entitled to de novo review of his claims; and that he is entitled to habeas corpus relief.

As Davis will explain in more detail if granted supplemental briefing, *Loper* and the concurring opinions of Justices Thomas and Gorsuch lead to the conclusion that Article III courts cannot, without violating Article III, defer to the decisions or adjudications of non-Article III decisionmakers. *See, e.g., Loper*, 144 S. Ct. at 2284-85 (Gorsuch, J., concurring).

Now that “*Chevron* deference has fallen,” *Loper* and its concurring opinions have “open[ed] the door to new challenges” to deference. *Cf. Tennessee v. Becerra*, No. 24-5220, 2024 U.S. App. Lexis 21521 at *21 (6th Cir. Aug. 26, 2024). These challenges should include Davis’s Article III challenge to AEDPA deference. Davis’s Article III challenge is “profoundly important,” and “though *Loper Bright*’s holding does not reach this case, its reasoning” and the reasoning of Justices Thomas and Gorsuch “cast[] doubt” on the continuing vitality of AEDPA deference. *Cf. United States v. Chandler*, No. 22-1786, 2024 U.S. App. Lexis 21204 at *4 (3d Cir. Aug. 22, 2024) (Bibas, J., dissenting from denial of rehearing en banc); *see also id.* at * 3-4 (Justice Gorsuch’s *Loper* concurrence indicates that “lenity trumps deference” now that *Chevron* has been overruled); *United States v. Boler*, No. 23-4352, 2024 U.S. App. Lexis 21379 at *8 n.4 (4th Cir. Aug. 23, 2024) (recognizing that *Loper* “calls into question *Auer* [*v. Robbins*, 519 U.S. 452 (1997)] deference”); *United States v. Trumbull*, No. 23-912, 2024 U.S. App. Lexis 21289 at *27 (9th Cir. Aug. 22, 2024) (Bea, J., concurring) (even where *Loper* did not “expressly overrule” a type of deference, courts “should hesitate to expand” that deference following *Loper*’s “landmark” ruling).

As Davis pointed out in his Motion for Supplemental Briefing, (Doc. 62), the Seventh Circuit previously linked the constitutionality of AEDPA deference to the constitutionality of *Chevron* deference. *See Lindh v. Murphy*, 96 F.3d 856, 871

(7th Cir. 1996) (en banc), *overruled on other grounds*, 521 U.S. 320 (1997). And the Supreme Court’s foundational ruling in *United States v. Klein*, 80 U.S. 128 (1871), also supports the conclusion that if *Chevron* deference is unconstitutional, AEDPA deference must be unconstitutional as well. Proper resolution of Davis’s “profoundly important” Article III challenge requires briefing and careful consideration of *Klein*, which also involved Congress’ attempt to impose a rule of deference upon the federal judiciary.

Klein concerned individuals whose property had been confiscated during the Civil War. In early 1863, Congress passed a law allowing those individuals to receive compensation if they could prove that they had never given “any aid or comfort to the present rebellion.” *Klein*, 80 U.S. at 131 (emphasis removed). Later that year, President Lincoln granted full pardons to anyone who “desired to resume their allegiance” to the United States and took “a prescribed oath of allegiance.” *Id.* at 131-32. V.F. Wilson (whose property was at issue, and whose estate administrator was Klein) took the prescribed oath in 1864. *Id.* at 132.

In 1870, however, Congress attempted to vitiate the effect of these pardons. It mandated that no pardon was admissible or could be used as evidence for a claim of compensation; it required that federal courts at all levels had to immediately dismiss many cases involving pardons, *id.* at 134, 143-44; and it declared that a Presidential pardon was to be considered “conclusive evidence” that the individual

“*did* give aid to the rebellion” under certain circumstances, *id.* at 134, 144 (emphasis added).

The Supreme Court concluded that the 1870 Act violated constitutional separation-of-powers principles. *Id.* at 147. As relevant here, it held unconstitutional the Congressional provisions purporting to deprive the Supreme Court of jurisdiction over cases proving loyalty through a pardon, making a pardon “conclusive evidence” of disloyalty, and requiring the lower court to dismiss a claim “forthwith” upon receipt of such evidence. *Id.* at 145-45. These provisions, the Court explained, were “founded solely on the application of a rule of decision.” *Id.* at 146. By requiring a federal court to declare its jurisdiction had ceased, these provisions unconstitutionally “prescribe[d]” for the judiciary “a rule for the decision of a cause in a particular way[.]” *Id.* And in doing so, Congress effectually required the federal courts to render their decisions in cases or controversies *not* by using their independent judgment about what justice requires, but by acting in ways that facilitated the outcomes that Congress wanted:

In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed [by the 1870 Act] to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to decide it in its own favor? *Can we do so without allowing that the legislature may prescribe rules of*

decision to the Judicial Department of the government in cases pending before it? We think not

Id. (emphasis added).

The crux of the Article III problem in *Klein* was the same as that identified by Justices Thomas and Gorsuch in *Loper*: under Congress’s 1870 Act, “the court [was] forbidden to give the effect to evidence which, *in its own judgment* . . . *should have* . . . give[n] it an effect precisely contrary.” *Id.* at 147 (emphasis added). That is, Congress purported to tell the Article III courts *to not exercise their independent judgment* about the effect of a presidential pardon, but instead to *defer* to what Congress said the “legal effect” of a presidential pardon should be. *Id.* at 148.

The separation-of-powers violation identified in *Klein* establishes that 28 U.S.C. § 2254(d) is also unconstitutional. Like the 1870 Act, § 2254(d) “prescribe[s] a rule for the decision of a cause in a particular way,” *Klein*, 80 U.S. at 146, namely, for how this Court is to adjudicate whether Davis is “in custody in violation of the Constitution or laws or treaties of the United States,” 28 U.S.C. § 2241(c)(3). Section 2254(d) does so by demanding *how* this Article III court must adjudicate Davis’s claims: 1) examine the case for the existence of a state-court adjudication (like the 1870 Act instructed federal courts to do regarding the existence of a presidential pardon), and 2) determine the “legal effect” of any such adjudication by applying the rule of decision established by Congress in § 2254(d)

(like the 1870 Act required federal courts to do regarding the rule of decision it prescribed for cases involving a pardon). This rule of decision requires this Court to deny relief upon finding an erroneous-but-not-unreasonable state court decision. This is so even if this Article III court concludes, in its independent judgment, that Davis is actually in custody in violation of the Constitution. In this way, the effect of AEDPA deference parallels the 1870 Act’s mandate that the federal courts deny relief based on the existence of a presidential pardon even when, in the federal court’s independent judgment, relief would be appropriate under the substantive governing law.

The Framers deliberately crafted judicial independence into Article III to guard against action from the political branches like the 1870 Act, *Chevron* deference, and AEDPA. *See Loper*, 144 S. Ct. at 2284 (Gorsuch, J., concurring). In 1870, Congress skewed the federal courts’ adjudication of cases or controversies in favor of the government and against a class of claimants who, as former confederates, were politically disfavored. In 1996, Congress did the same thing, favoring States at the expense of the politically disfavored class of convicted persons seeking habeas relief.

As was the case in *Klein*, Congress “passed the limit which separates the legislative from the judicial power” in enacting 28 U.S.C. § 2254(d). *Klein*, 80

U.S. at 147. Section 2254(d) is unconstitutional, and Davis is entitled to de novo review of the constitutional claims for which he seeks habeas relief.

CONCLUSION

This Court should grant en banc reconsideration. Because this Court has overlooked Davis's challenge to the constitutionality of 28 U.S.C. § 2254(d), it should vacate its en banc opinion. This Court should address Davis's challenge fully, including by granting his Motion for Supplemental Briefing, which is still pending and undecided and is therefore subject to this Court's en banc consideration. Afterwards, following additional proceedings, this Court should then issue an en banc decision concluding that Davis is entitled to habeas corpus relief.

Respectfully submitted,

Joseph Medici
Federal Public Defender

by

/s/ Erin G. Barnhart
Erin G. Barnhart (0079681)
Trial attorney
Jordan S. Berman (0093075)
Co-counsel

Assistant Federal Public Defenders
Federal Public Defender's Office
for the Southern District of Ohio
Capital Habeas Unit
10 W. Broad Street, Suite 1020
Columbus, Ohio 43215

Phone: (614) 469-4141
erin_barnhart@fd.org
jordan_berman@fd.org
Counsel for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE

Counsel for Petitioner-Appellant Von Clark Davis hereby certifies that the foregoing motion complies with the type-volume limitations provide in Federal Rules of Appellate Procedure 27(d)(2)(A) and 35(b)(2)(A). The relevant portions of the foregoing brief contain 3055 words in Times New Roman (14-point) proportional type. The word processing software used to prepare this motion was Microsoft Word 2016.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)
Assistant Federal Public Defender
Co-counsel for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, I electronically filed the foregoing **PETITIONER-APPELLANT VON CLARK DAVIS'S MOTION FOR EN BANC RECONSIDERATION** with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send notification of such filing to the email address of opposing counsel on file with the Court.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)
Assistant Federal Public Defender
Co-counsel for Petitioner-Appellant

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0188p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VON CLARK DAVIS,

Petitioner-Appellant,

v.

CHARLOTTE JENKINS, Warden,

Respondent-Appellee.

No. 21-3404

On Petition for Rehearing En Banc

United States District Court for the Southern District of Ohio at Columbus.

No. 2:16-cv-00495—Susan J. Dlott, District Judge.

Argued En Banc: March 20, 2024

Decided and Filed: August 20, 2024

Before: SUTTON, Chief Judge; MOORE, COLE, CLAY, GIBBONS, GRIFFIN,
KETHLEDGE, STRANCH, THAPAR, BUSH, LARSEN, NALBANDIAN,
READLER, DAVIS and MATHIS, Circuit Judges.*

COUNSEL

ARGUED EN BANC: Erin G. Barnhart, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE SOUTHERN DISTRICT OF OHIO, Columbus, Ohio, for Appellant. T. Elliot Gaiser, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON SUPPLEMENTAL BRIEF:** Erin G. Barnhart, Jordan S. Berman, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE SOUTHERN DISTRICT OF OHIO, Columbus, Ohio, for Appellant. T. Elliot Gaiser, Michael J. Hendershot, Jana M. Bosch, Stephen E. Maher, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

GIBBONS, J., delivered the opinion of the court in which SUTTON, C.J., and GRIFFIN, KETHLEDGE, THAPAR, BUSH, LARSEN, NALBANDIAN, and READLER, JJ., joined.

*Pursuant to 6 Cir. I.O.P. 35(c), Composition of the En Banc Court, Judge Cole, a senior judge of the court who sat on the original panel in this case, participated in this decision. Judge Murphy and Judge Bloomekatz recused themselves from participation in this decision.

MOORE, J. (pp. 29–62), delivered a separate dissenting opinion in which COLE, CLAY, STRANCH, and DAVIS, JJ., joined in full and MATHIS, J., joined in Part I.A.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. In 1984, a Butler County, Ohio court tried and convicted Von Clark Davis of aggravated murder with a capital specification for a prior conviction of purposeful killing of another. Forty years later, Davis is before us on habeas review of the third death sentence for this conviction. Today, we accord the Ohio courts the deference owed their adjudication of Davis’s various claims and deny his petition for habeas relief.

I.

The facts relevant to each of Davis’s habeas claims span nearly 40 years of proceedings. In 1971, Davis pled guilty to second-degree murder for the purposeful killing of his wife, Ernestine Davis. *State v. Davis*, No. CA95-07-124, 1996 WL 551432, at *1 (Ohio Ct. App. Sept. 30, 1996). While on parole for that conviction in 1983, Davis shot and killed his ex-girlfriend, Suzette Butler. *State v. Davis*, 9 N.E.3d 1031, 1036 (Ohio 2014). In January 1984, a Butler County, Ohio grand jury indicted Davis for aggravated murder (with a capital specification based on his 1971 conviction for purposeful killing of another) and possessing a firearm while under a disability.

Prior to trial, Davis’s counsel submitted an election pursuant to Ohio Rev. Code § 2929.022, by which Davis elected to waive his right to a jury trial and instead be tried and sentenced by a panel of three judges. Davis’s counsel also submitted a “Motion for Notice of Prospective Three-Judge Panel,” the stated purpose of which was to obtain “some information as to . . . what the panel would consist of, what judges, so we can inform Mr. Davis of that fact.” DE 5-1, Tr. of Motions, Page ID 7209. Judge Henry Bruewer, conducting the proceedings, responded: “For the record, you know the three judges would be the ones that are here in the General Division, it would be Judge Stitsinger, Judge Moser and myself.” *Id.*

No. 21-3404

Davis v. Jenkins

Page 3

A few days later, the court conducted a colloquy with Davis to confirm his jury waiver. During this colloquy, the court did not mention the names of the three judges; it stated only that Davis was waiving his right to trial by jury for submission of his case “to a panel of three judges.” *Id.* at 7222–24. After Judge Bruewer completed the colloquy, he forecasted to trial the next day, saying “we’ll have three judges [who] will be here tomorrow, you know who they are, and they’re in this form here. It’ll be myself and Judge Moser and Judge Stitsinger.” *Id.* at 7225.

The waiver form, signed by Davis and his counsel, stated that Davis “voluntarily waive[d] [his] right to trial by jury and elect[ed] to be tried by a court to be composed of three judges, consisting of Judges Henry J. Bruewer, William R. Stitsinger, and John R. Moser, all the same being the elected judges of the General Division of the Court of Common Pleas of Butler County who are engaged in the trial of criminal cases.” DE 4-3, Jury Waiver and Election of Three-Judge Panel, Page ID 433. The court signed a supplemental sentence below Davis’s election, which stated: “This jury waiver and election to be tried by a three-judge panel is hereby accepted and entered upon the journal of this Court.” *Id.*

The three-judge panel convicted Davis on both counts and applied the death penalty. The basis for the death penalty was the panel’s finding that Davis was guilty of the capital specification, a prior conviction for the purposeful killing of another. On direct appeal, the Ohio Supreme Court affirmed Davis’s convictions but vacated his death sentence. *State v. Davis*, 528 N.E.2d 925, 936 (Ohio 1988). On remand, the same three-judge panel held a second sentencing hearing and again sentenced Davis to death. That sentence was affirmed on appeal. *State v. Davis*, CA89-09-123, 1990 WL 165137, at *1, *5 (Ohio Ct. App. Oct. 29, 1990), *aff’d*, 584 N.E.2d 1192, 1198 (Ohio 1992).

Davis subsequently filed his first habeas petition, and a panel of this court vacated Davis’s second death sentence. *Davis v. Coyle*, 475 F.3d 761, 781 (6th Cir. 2007). By the time of Davis’s third sentencing hearing in 2009 (his second *resentencing*), one of the judges from the original panel had died, and the other two had retired. *State v. Davis*, No. CA2009-10-263, 2011 WL 646404, at *2 (Ohio Ct. App. Feb. 22, 2011). A new three-judge panel was constituted, and that panel refused Davis’s motion to withdraw his 1984 jury waiver and proceeded with the sentencing hearing. *Id.*

One of the judges on this panel, Judge Andrew Nastoff, had previously worked as a prosecutor. During that time, Judge Nastoff had been on the prosecution team that had sought a death sentence against Lahray Thompson, Davis's nephew, for an unrelated murder. Carol Smith, Davis's sister and Thompson's mother, testified at Davis's sentencing hearing. She spoke about Davis's parents and siblings, childhood memories with Davis, their home life while growing up together, and her preference for Davis to receive a life sentence. Carol had not testified at Thompson's mitigation trial.

After Carol had finished her testimony, Judge Nastoff announced on the record that "[d]uring the testimony of the last witness, Carol Smith, she indicated that she was the mother of [Lahray] Thompson and I just felt that it is necessary to disclose on the record that I was a member of the prosecution team against [Lahray] Thompson" and that he had "argued to the jury that [Thompson] should receive the death sentence." DE 5-7, Mitigation Hr'g Tr., Page ID 8321. Davis's counsel responded, "we were aware that . . . you were involved in the prosecution, and we made a decision long ago not to challenge you on that." *Id.* at 8322.

Next, defense counsel called Ohio Parole Board Chair Cynthia Mausser as a witness, having forecasted that she would testify that Davis would never be paroled if given a life sentence. The prosecution objected to Mausser being called, explaining that Mausser had told them she could not testify whether or not she would vote for parole, as the case had not yet been presented to the parole board and such testimony would be speculation. Additionally, the prosecution reported, Mausser was just one member of the parole board, composed of seven to twelve people, and so Mausser could not speak on behalf of the board. Defense counsel pushed forward, maintaining that they would "be in a position of surprise" if Mausser "testifies as the prosecution is suggesting," as defense counsel had "interviewed her four months ago" and "that that is not what we were told." *Id.* at 8327. The three-judge panel allowed her to testify.

Mausser testified on direct examination that the average amount of time served for an aggravated murder conviction before parole was about 27 years, past Davis's life expectancy. Mausser added that those with aggravated murder convictions who are eligible for parole "generally do not get released at" their first parole hearing. *Id.* at 8361. After being given a hypothetical case mirroring Davis's situation, Mausser concluded that such a person "would

No. 21-3404

Davis v. Jenkins

Page 5

likely spend a large portion of the remainder of their life in prison” and that it would be “unlikely” that such an individual would be granted parole in his first hearing. *Id.* at 8364–65. On cross-examination, Mausser admitted that, at this point, she did not have all of the information needed to make a parole determination, and she also acknowledged that the parole determination was a collective decision, so she could not say how any other member on the parole board would vote. In its written sentencing opinion, the panel acknowledged her testimony but ultimately concluded it was highly speculative and “entitled to no weight.”

The day after Mausser testified, defense counsel called Dr. Robert Smith, an expert witness in clinical psychology and addiction. Smith testified that, at the time of the offense, Davis suffered from two psychological disorders—alcohol dependence and borderline personality disorder. Smith testified that one of the characteristics of borderline personality disorder was “unwarranted aggressive behavior that comes about with minor provocation.” DE 5-8, Mitigation Hr’g Tr., Page ID 8451. He explained that those with borderline personality disorder thrive in “structured environment[s], with clear-cut rules and people who enforce those rules every day.” *Id.* at 8448. Smith opined that Davis had limited incidents in prison because he thrived in the structured environment. In its sentencing opinion, the panel acknowledged Smith’s testimony but noted his failure to forecast Davis’s behavior outside of prison or recommend a treatment plan should he be released, ultimately entitling Smith’s diagnosis to “little weight in mitigation.”

After the close of the mitigation hearing, the three-judge panel issued a written opinion sentencing Davis to death for a third time. Most persuasive for the panel was the sole aggravating circumstance, Davis’s prior conviction for second-degree murder. The panel held that the sole aggravating circumstance outweighed, beyond a reasonable doubt, the mitigating factors presented.

Davis’s sentence was affirmed on direct appeal. *Davis*, 2011 WL 646404, at *23, *aff’d*, 9 N.E.3d at 1057. Davis also sought post-conviction relief in state court, which was denied. *State v. Davis*, No. CA2012-12-258, 2013 WL 4806935, at *1 (Ohio Ct. App. Sept. 9, 2013), *appeal not accepted for review*, 36 N.E.3d 188 (Ohio 2015) (unpublished table decision). In 2016, Davis filed a habeas petition raising 26 grounds for relief. The district court denied the petition.

After a panel of this court granted habeas relief on three claims, a majority of the court voted to rehear this case en banc.

II.

We review de novo a district court’s decision to deny a writ of habeas corpus. *Foust v. Houk*, 655 F.3d 524, 533 (6th Cir. 2011). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court may grant a writ of habeas corpus “with respect to any claim that was adjudicated on the merits in State court proceedings” only if the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or if it “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

A state court decision is contrary to clearly established federal law if “the state court applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at” a different result. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). A state court decision unreasonably applies clearly established federal law if it “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.” *Id.* at 407–08. “Clearly established federal law” refers to the holdings, not dicta, of Supreme Court decisions at the time of the relevant state court decision. *Id.* at 412; *Stojetz v. Ishee*, 892 F.3d 175, 192 (6th Cir. 2018).

This standard in § 2254(d) is difficult to meet, as intended. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Section 2254(d) “stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings” and allows issuance of the writ only in cases “where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with” Supreme Court precedent. *Id.* Section 2254(d) is “not a substitute for ordinary error correction through appeal.” *Id.* at 102–03 (citation omitted). “[A] state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law

No. 21-3404

Davis v. Jenkins

Page 7

beyond any possibility for fairminded disagreement.” *Id.* at 103. “Clear error does not suffice.” *Stojetz*, 892 F.3d at 192 (citation omitted).

III.

Davis presents six claims for this court’s en banc review:

1. Whether the enforcement of Davis’s 1984 jury waiver at his 2009 resentencing hearing denied him due process under the Fourteenth Amendment and/or violated the Sixth and Eighth Amendments.
2. Whether Davis’s 1984 jury waiver was knowing or intelligent because he did not know that, when he waived his right to a jury trial in 1984 to be tried by three specifically identified judges, he could later be sentenced by three different judges.
3. Whether the 2009 resentencing counsel were ineffective for failing to seek recusal of one of the judges for bias.
4. Whether the 2009 resentencing counsel were ineffective for failing to reasonably prepare for and present mitigation evidence as to parole eligibility and reintegration.
5. Whether the 2009 resentencing counsel were ineffective for failing to investigate and present mitigating evidence about the circumstances of Davis’s 1971 conviction.
6. Whether the 1984 trial counsel were ineffective for failing to advise Davis properly about waiving his right to a jury trial.

For the following reasons, we deny each of Davis’s six claims and affirm the district court’s denial of habeas relief.

A.

Davis first argues that the State violated his rights under the Sixth Amendment, the Eighth Amendment, and the Due Process Clause of the Fourteenth Amendment by breaching the “explicit terms” of his 1984 jury waiver. By refusing Davis’s withdrawal of his waiver and forcing him to be sentenced by three judges not named in the waiver, Davis contends, the State denied him the benefit of his bargain to be sentenced by three specific judges and thus violated his constitutional rights to “fundamental fairness.”

No. 21-3404

Davis v. Jenkins

Page 8

To begin, we consider exhaustion and procedural default. Before filing a habeas petition, “a state prisoner must exhaust available state remedies.” *Davila v. Davis*, 582 U.S. 521, 527 (2017); *see* 28 U.S.C. § 2254(b)(1)(A). “Ordinarily, a state prisoner satisfies this exhaustion requirement by raising his federal claim before the state courts in accordance with state procedures.” *Shinn v. Ramirez*, 596 U.S. 366, 378 (2022). This requires a prisoner to “‘fairly present’ his claim” in the appropriate state court. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (quoting *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995) (per curiam)). The prisoner must present to the state courts “the same claim under the same theory.” *Wagner v. Smith*, 581 F.3d 410, 417 (6th Cir. 2009). He must also make the state courts aware of the “federal nature of the claim.” *Baldwin*, 541 U.S. at 29. The Sixth Circuit considers four factors to determine whether a state prisoner has “fairly presented” his federal claim in state court. We evaluate whether the petitioner:

(1) relied upon federal cases employing constitutional analysis; (2) relied upon state cases employing federal constitutional analysis; (3) phrased the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleged facts well within the mainstream of constitutional law.

Hand v. Houk, 871 F.3d 390, 418 (6th Cir. 2017). The key thrust of these factors is to determine whether the petitioner “gave the state courts the opportunity to apply the legal principles governing” his present claim. *Jalowiec v. Bradshaw*, 657 F.3d 293, 304 (6th Cir. 2011). “It is not enough” that his prior claims “implicated some of the same facts that are integral” to his current claim. *Id.* “The bottom line is” whether “the state courts were . . . called upon to apply the legal principles governing the constitutional claim now presented to the federal courts.” *Id.* “Simply presenting the claim clothed in an analogous theory of relief will not do.” *Kelly v. Lazaroff*, 846 F.3d 819, 828 (6th Cir. 2017). Where a state prisoner fails to raise his federal claim in state court, and the state remedy is no longer available to him, the claim is procedurally defaulted. *Atkins v. Holloway*, 792 F.3d 654, 657 (6th Cir. 2015); *Jones v. Bagley*, 696 F.3d 475, 483 (6th Cir. 2012); *see also Ramirez*, 596 U.S. at 378.

The Warden argues that Davis’s “bargained-for” theory is procedurally defaulted, as Davis argued a wholly distinct theory—that he had a right to withdraw his waiver because continuing to apply it violated a “constitutional mandate for jury sentencing” per the Eighth

No. 21-3404

Davis v. Jenkins

Page 9

Amendment, due process, and *Duncan v. Louisiana*, 391 U.S. 145 (1968)—during his direct appeal. CA6 R. 54, Suppl. Appellee Br., at 6 (quoting DE 4-43, Ohio Sup. Ct. Merit Br., Page ID 5868–72). To an extent, the Warden is correct: At least until the point of oral argument before the Ohio Supreme Court, Davis had not raised the bargain theory in state court. Davis’s briefing did not give the Ohio state courts the opportunity to apply the legal principles governing a bargain with the state. *See Jalowiec*, 657 F.3d at 304. Davis did not cite in his briefs before the Ohio state courts any of the bargain theory precedent he now raises. *See Hand*, 871 F.3d at 418. Instead, Davis argued a wholly distinct theory—that Ohio violated his due process, Sixth Amendment, and Eighth Amendment rights by subjecting him to a “stale” waiver “when the law has changed and the facts have changed.” DE 4-42, Ohio Ct. App. Merit Br., Page ID 5496. This theory did not rely on a bargain with the state, but rather claimed that the changed circumstances in their entirety altered the landscape so drastically that it was unfair for Davis to be held to the same waiver. When Davis did mention the new judges on the panel, he was listing them as one of the many changed circumstances, in addition to new mitigation evidence and new attorneys, that entitled him to reevaluate his waiver. It is not enough that Davis’s claims “implicated some of the same facts.” *Jalowiec*, 657 F.3d at 304. These “analogous theor[ies] of relief will not do.” *Kelly*, 846 F.3d at 828. Until oral argument before the Ohio Supreme Court, Davis did not call on the Ohio state courts “to apply the legal principles” governing his claim that he bargained for the three specific judges named in his waiver and that the State violated this bargain. *Jalowiec*, 657 F.3d at 304.

Davis’s strongest case for fair presentation arises from his oral argument before the Ohio Supreme Court. There, Davis’s counsel asserted: “The state can no longer live up to their end of the bargain. . . . We haven’t got, and they cannot deliver, what our client waived his jury for.” Oral Argument at 7:26, *State v. Davis*, No. 2011-0538 (Oct. 22, 2013), <https://ohiochannel.org/video/case-no-2011-0538-von-clark-davis-v-state-of-ohio>; *see also id.* at 7:17, 8:12, 10:45, 22:10. In response, several justices engaged with this argument, asking questions about its implications. *Id.* at 7:41, 8:30, 9:11, 10:00, 11:27, 21:32. The Warden argues that, by the time Davis raised the theory at oral argument, it was forfeited. But the Ohio Supreme Court never expressly made that determination. We therefore will assume, without deciding, that Davis fairly presented his bargain theory.

No. 21-3404

Davis v. Jenkins

Page 10

Turning to the merits, Davis cannot show that the Ohio Supreme Court’s decision was contrary to or an unreasonable application of clearly established Supreme Court precedent. As an initial matter, we must determine whether the Ohio Supreme Court, providing the last reasoned state court decision on Davis’s claim, adjudicated it on the merits. *See* 28 U.S.C. § 2254(d). A claim is adjudicated on the merits when a judgment has been rendered “after the court . . . heard and *evaluated* the evidence and the parties’ substantive arguments.” *Johnson v. Williams*, 568 U.S. 289, 302 (2013) (quoting BLACK’S LAW DICTIONARY 1199 (9th ed. 2009)). Following *Harrington v. Richter*, federal habeas courts must apply a “strong but rebuttable” presumption that a federal claim was adjudicated on the merits by the state court. *English v. Berghuis*, 900 F.3d 804, 811 (6th Cir. 2018) (quotation omitted). For example, a state court’s unexplained denial of a federal claim is presumed to constitute an adjudication on the merits. *Richter*, 562 U.S. at 98, 102 (explaining that § 2254(d) deference still applies even “[w]here a state court’s decision is unaccompanied by an explanation” and that in such a case § 2254(d) applies to the “arguments or theories” that “could have supported[] the state court’s decision”); *Ballinger v. Prelesnik*, 709 F.3d 558, 562 (6th Cir. 2013). The *Richter* presumption also applies to state court decisions that address some, but not all, of the defendant’s claims, as “it is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference.” *Williams*, 568 U.S. at 298, 299–300 (explaining, for example, that “there are instances in which a state court may simply regard a claim as too insubstantial to merit discussion”). This strong-but-rebuttable presumption also applies to each part of a multipart claim, “whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a ‘claim,’ not a component of one, has been adjudicated.” *Richter*, 562 U.S. at 98.

The Ohio Supreme Court adjudicated Davis’s jury waiver claim on the merits. In his brief before the Ohio Supreme Court, Davis raised his claim that application of the 1984 waiver violated the Sixth Amendment, Eighth Amendment, and the Due Process Clause. And at oral argument, Davis pressed the bargain theory angle. The Ohio Supreme Court understood the factual basis for Davis’s claim. *Davis*, 9 N.E.3d at 1040 (“Davis’s claims center on the fact that the three-judge panel that sentenced him in 2009 was not the same three-judge panel before which he had expected to be tried and sentenced when he waived a jury trial in 1984.”). Even so,

No. 21-3404

Davis v. Jenkins

Page 11

the court determined that Ohio Rev. Code § 2929.06(B) governed Davis’s jury waiver and that the state statute explicitly provided for “a new panel of three judges” to conduct a resentencing “if necessary.” *Id.* at 1041 (quoting Ohio Rev. Code § 2929.06(B)). “Given the clear command” of the statute, the Ohio Supreme Court explained that Davis could not obtain relief unless the application of the statute violated his federal constitutional rights. *Id.* at 1041–42. The Ohio Supreme Court then held that “neither the Sixth nor the Eighth Amendment creates a constitutional right to be *sentenced* by a jury, even in a capital case,” and so there was “no constitutional bar to conducting [the 2009 resentencing] without a jury pursuant to” § 2929.06(B). *Id.* at 1042. There was thus no federal constitutional prohibition to conducting Davis’s 2009 resentencing with a new three-judge panel via § 2929.06(B). *Id.* at 1042, 1043.

Given Davis’s briefing and assertions at oral argument, as well as the court’s subsequent analysis, it is clear the Ohio Supreme Court “heard and *evaluated*” Davis’s substantive arguments. *Williams*, 568 U.S. at 302. As the Ohio Supreme Court found no constitutional bar to conducting Davis’s resentencing with a new three-judge panel pursuant to § 2929.06(B), it may have regarded Davis’s due process bargain theory claim “as too insubstantial to merit discussion.” *Id.* at 299. Finally, Davis did not move for reconsideration or argue in state court that the Ohio Supreme Court inadvertently overlooked his bargain theory claim, which supports the presumption of adjudication on the merits. *See Rogers v. Mays*, 69 F.4th 381, 389 (6th Cir. 2023) (en banc).

AEDPA deference applies to “decision[s],” not opinions or reasoning. *See* 28 U.S.C. § 2254(d)(1)–(2); *Holland v. Rivard*, 800 F.3d 224, 235 (6th Cir. 2015). Davis argues that the state court did not discuss the merits of his bargain theory claim, so AEDPA deference does not apply. This assertion is incorrect. As *Richter* and *Williams* demonstrate, a state court’s silence, without more, is insufficient to rebut the presumption of adjudication on the merits. *Richter*, 562 U.S. at 98; *Williams*, 568 U.S. at 298, 299–300; *see Davis v. Johnson*, 661 F. App’x 869, 877–78 (6th Cir. 2016) (holding a state prisoner must “do more than point to the state court’s silence to defeat *Richter*’s strong presumption that the state court adjudicated his claim” on the merits). To overcome AEDPA deference, the state court’s *decision* must be contrary to clearly established Supreme Court precedent such that “there is no possibility fairminded jurists could disagree that

No. 21-3404

Davis v. Jenkins

Page 12

the state court’s decision conflicts with” the Supreme Court’s precedents. *Richter*, 562 U.S. at 102. Here, there was no error so egregious that all fairminded jurists would have seen it. *Mack v. Bradshaw*, 88 F.4th 1147, 1154 (6th Cir. 2023). The Ohio Supreme Court’s decision comports—not conflicts—with Supreme Court precedent.

Davis acknowledged at oral argument before this court that there is no constitutional right to jury sentencing and that his only claimed constitutional right to being sentenced by the three named judges stems from his bargain theory. Oral Argument at 2:35–3:11, *Davis v. Jenkins*, No. 21-3404 (Mar. 20, 2024), https://www.opn.ca6.uscourts.gov/internet/court_audio/audio/03-20-2024%20-%20Wednesday/21-3404%20Von%20Davis%20v%20Charlotte%20Jenkins.mp3.

Davis also acknowledged that the three named judges made all of the factual findings necessary to sentence him to death during his trial in 1984. *Id.* at 4:35–45. Davis thus no longer disputes that the Ohio Supreme Court correctly applied clearly established federal law when it held that “neither the Sixth nor the Eighth Amendment creates a constitutional right to be *sentenced* by a jury, even in a capital case.” *Davis*, 9 N.E.3d at 1042; *see also id.* (explaining that the “Sixth Amendment never has been thought to guarantee a right to a jury determination of” the appropriate punishment to be imposed on an individual) (quoting *Spaziano v. Florida*, 468 U.S. 447, 459 (1984)).

This new tack makes sense, as the Ohio Supreme Court’s holding offends neither *Ring v. Arizona*, 536 U.S. 584 (2002), nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000). True, *Hurst v. Florida*, 577 U.S. 92 (2016), overruled *Spaziano*, but first, *Hurst* was issued on January 12, 2016, twenty months after the Ohio Supreme Court’s decision on April 22, 2014, and second, *Hurst* held only that a jury must find the facts necessary to make the defendant death eligible. *Hurst*, 577 U.S. at 97–99. *McKinney v. Arizona*, 589 U.S. 139 (2020), emphasizes that the decisions in *Ring* and *Hurst* “ha[ve] nothing to do with jury sentencing.” *Id.* at 145 (quoting *Ring*, 536 U.S. at 612 (Scalia, J., concurring)). A jury must find the facts necessary to subject a defendant to the death penalty, but the judge may still conduct the weighing of aggravating and mitigating factors to determine whether the defendant should receive the death penalty or some lesser punishment. “[T]he ‘States that leave the ultimate life-or-death decision to the judge may continue to do so.’” *Id.* (quoting *Ring*, 536 U.S. at 612 (Scalia, J., concurring)); *see also id.* at

144 (“[I]n a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.”). So, Ohio, which occasionally leaves the ultimate life-or-death decision to the judge pursuant to Ohio Rev. Code § 2945.06, may continue to do so. And Davis’s 2009 resentencing hearing focused on mitigating factors, not any of the facts that made him death eligible. This court’s reversal of Davis’s sentencing on habeas review did not demand reconsideration of the “fact[s] necessary to impose a sentence of death.” *Hurst*, 577 U.S. at 94; *see Davis*, 475 F.3d at 780. At the 2009 resentencing, the only aggravating circumstance was Davis’s prior conviction for second-degree murder, which had already been found by the initial three-judge panel on May 9, 1984. *Davis*, 2011 WL 646404, at *14–15; *State v. Davis*, No. CA84-06-071, 1986 WL 5989, at *2 (Ohio Ct. App. May 27, 1986). The 2009 resentencing panel did not find any new facts with respect to this aggravating circumstance but merely weighed it with the mitigating evidence. *See Davis*, 2011 WL 646404, at *15; *see also McKinney*, 589 U.S. at 144. There was no Sixth or Eighth Amendment bar to conducting Davis’s 2009 resentencing without a jury pursuant to Ohio Rev. Code § 2929.06(B).

Davis asserts that the Ohio Supreme Court’s decision was contrary to clearly established federal law because clearly established federal law requires fundamental fairness in both limiting the waiver of a constitutional right and enforcing the promises made in inducing the waiver agreement. But Davis has not identified a Supreme Court case holding that enforcement of a jury waiver in a similar circumstance violates fundamental fairness or the Due Process Clause of the Fourteenth Amendment. Davis relies on *Puckett v. United States*, 556 U.S. 129 (2009), *Mabry v. Johnson*, 467 U.S. 504 (1984), and *Santobello v. New York*, 404 U.S. 257 (1971). But such reliance places the level of abstraction of the clearly established Supreme Court precedent too high. *See Fields v. Jordan*, 86 F.4th 218, 232 (6th Cir. 2023) (en banc) (“[P]risoners may not sidestep the lack of Supreme Court precedent on a legal issue by raising the ‘level of generality’ at which they describe the Court’s holdings on other issues.”). All three cases dealt with the government’s purported violation of a plea agreement, not a jury waiver. *See Puckett*, 556 U.S. at 136; *Mabry*, 467 U.S. at 510; *Santobello*, 404 U.S. at 258. Davis has not cited a Supreme Court case explaining, much less holding, that the contract principles applicable to plea bargain

agreements are also applicable to jury waivers. *See Woods v. Donald*, 575 U.S. 312, 317 (2015) (per curiam) (holding that a state court decision cannot be contrary to clearly established federal law where no Supreme Court decision has “confront[ed] the specific question presented” (internal quotation marks and citation omitted)).

This lack of precedent is unsurprising, as plea bargains and waivers of constitutional rights are distinct legal concepts. Waiver is “[t]he voluntary relinquishment or abandonment . . . of a legal right or advantage.” *Waiver*, BLACK’S LAW DICTIONARY (12th ed. 2024). A plea bargain, on the other hand, is a “negotiated agreement between a prosecutor and a criminal defendant” where the defendant pleads guilty “in exchange for some concession by the prosecutor.” *Plea Bargain*, BLACK’S LAW DICTIONARY (12th ed. 2024). Defendants routinely waive constitutional rights without inducements, such as waiving the right to remain silent when being questioned by a police officer, *see Berghuis v. Thompson*, 560 U.S. 370, 385 (2010), waiving the right to representation by counsel, *Faretta v. California*, 422 U.S. 806, 835 (1975), or pleading guilty without a plea deal, thereby waiving the right to trial, *see United States v. Ruiz*, 536 U.S. 622, 628–29 (2002). These waivers are not bargained-for exchanges.

Reasonable jurists could reject Davis’s attempt to paint his waiver as a bargain with the prosecution or the court. The text of Ohio Rev. Code § 2945.05 emphasizes the unilateral nature of the jury waiver. Under that provision, Davis had the statutory right to elect trial by the bench rather than a jury, and the court had no discretion to refuse this choice. *See* Ohio Rev. Code § 2945.05; *State v. Banks*, 151 N.E.3d 198, 201 (Ohio Ct. App. 2019); *State v. Van Sickle*, 629 N.E.2d 39, 43 (Ohio Ct. App. 1993); *see also State v. Ruppert*, 375 N.E.2d 1250, 1254 (Ohio 1978) (explaining that a jury waiver is a “jurisdictional” prerequisite to the appointment of the three-judge panel). And, unlike a bargain, the statute allows a defendant to withdraw his bench-trial election at any time before trial for any reason. *See* Ohio Rev. Code § 2945.05. Once defendants, like Davis, make this election, there is a statutory procedure for designating which judges sit on that panel—defendants do not request the specific judges. *See* Ohio Rev. Code § 2945.06 (mandating the panel consist of “the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court”); *State v. Wesson*, 999 N.E.2d 557, 571 (Ohio 2013).

A reasonable jurist could conclude that that statutory procedure was the operating force in Davis’s case, regardless of the three judges being listed in his waiver. From the beginning, the presiding judge, Judge Henry Bruewer, established that Davis already knew the identities of the judges.¹ DE 5-1, Tr. of Motions, Page ID 7209 (“For the record, you know the three judges would be the ones that are here in the General Division, it would be Judge Stitsinger, Judge Moser and myself.”). And the colloquy with Davis did not mention the names of the three judges, only that Davis was waiving his right to trial by jury for submission of his case “to a panel of three judges.” *Id.* at 7222–24. It was only outside the colloquy, when the court was forecasting to trial the next day, when it said “we’ll have three judges [who] will be here tomorrow, you know who they are, and they’re in this form here. It’ll be myself and Judge Moser and Judge Stitsinger.” *Id.* at 7225. Because, as a matter of statutory procedure, the defendant does not have a say in the judges that make up the panel, a reasonable jurist could conclude that Davis did not “bargain” with the state for the three specific judges.

We are aware of no precedent, federal or otherwise, establishing a due process constitutional right to have a particular judge, and only that judge, make decisions in a criminal defendant’s case. Davis likewise has been unable to identify a case in which a plea deal or waiver contains such a commitment. This is to be expected. The law considers judges fungible, based on the underlying presumption that judges conduct themselves with honesty and integrity. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*, 806 F.3d 162, 194 (3d Cir. 2015) (Ambro, J., dissenting in part and concurring in part); *In re Lowe*, 102 F.3d 731, 733 n.1 (4th Cir. 1996); *see also United States v. Keane*, 375 F. Supp. 1201, 1204 (N.D. Ill. 1974) (“[A] defendant has no vested right to have his case tried before any particular judge.”). It is extraordinary, if not unheard of, to obtain this kind of commitment from a trial court. And the terms of the waiver here are insufficient to create such an unusual bargain. The express terms of the 1984 waiver mention only trial, not

¹Nor were there other options of judges for Davis to “request.” The three judges designated to the panel were the only three judges in the general division of the Butler County Court of Common Pleas at the time. Sherrod Brown, Sec’y of State, The State of Ohio Official Roster Federal, State, County Officers, and Departmental Information 319 (1983–1984).

No. 21-3404

Davis v. Jenkins

Page 16

sentencing. While the waiver colloquy does mention sentencing, that colloquy is outside of the four corners of the document of which Davis demands strict enforcement.

Finally, a reasonable jurist could disregard, based on the facts in the record, Davis’s claim that he only waived his right to a jury in return for being tried and sentenced, in perpetuity, by three specific judges. A reasonable jurist could credit Davis’s 1993 affidavit, closer in time to the 1984 waiver, explaining his election. Davis, under oath, stated he made the three-judge panel election “because I did not want the jury to hear about my prior murder during the guilt phase of my capital trial.” DE 4-19, Aff., Page ID 1964. Davis had filed a motion to sever his charge for having a weapon under a disability from the aggravated murder charge, but the court denied it, meaning the jury would “hear about [his] prior murder.” *Id.* at 1965. Davis reported that he “felt the jury would not be able to separate [his] prior murder from the current capital charge,” and that as a result he “had no choice but to waive [his] right to trial by jury.” *Id.* Davis ended the affidavit by asserting, “[h]ad the trial court severed the charges, I would not have waived my trial by jury.” *Id.* A reasonable jurist could credit these earlier and more consistent statements.

In sum, we accord the Ohio Supreme Court’s decision to reject Davis’s jury waiver claim the deference owed under AEDPA, as its decision did not conflict with or unreasonably apply clearly established Supreme Court precedent. Davis has neither rebutted the strong presumption of adjudication on the merits, nor has he met his steep burden to show an error so egregious that all fairminded jurists would see it.

B.

Alternatively, Davis argues that his 1984 waiver was not knowing, intelligent, and voluntary because he did not know that, when he waived his rights in exchange for trial and sentencing before a panel of three specifically identified judges, he could later be tried or sentenced by three entirely different judges.

Although Davis’s unknowing-waiver claim has evolved somewhat throughout his post-sentencing litigation, Davis “‘fairly present[ed]’ his claim” in the Ohio state courts. *See Baldwin*, 541 U.S. at 29 (quoting *Duncan*, 513 U.S. at 365–66). Davis argued in the Ohio courts that he did not knowingly, intelligently, and validly waive his jury trial and sentencing rights in

No. 21-3404

Davis v. Jenkins

Page 17

1984 for a new sentencing hearing in 2009 with new facts in mitigation, new attorneys, the operation of new statutory provisions, and new judges. While the thrust of his argument relied on the change in circumstances in 2009 more generally, the Ohio Supreme Court recognized that the basis of his claim was the fact that “the 2009 resentencing was conducted before a three-judge panel composed of different judges than the panel that had tried the case in 1984.” *Davis*, 9 N.E.3d at 1042. Moreover, Davis’s argument put the Ohio courts on notice that he was invoking the federal constitutional principles of knowing, voluntary, and intelligent waiver. *Hand*, 871 F.3d at 418; *Jalowiec*, 657 F.3d at 304.

The Ohio Supreme Court, providing the last reasoned state court decision on this claim, rejected Davis’s argument that his 1984 waiver was not knowing, voluntary, or intelligent. *See Davis*, 9 N.E.3d at 1042–43. Davis’s argument failed because it required that “a defendant waiving a jury trial possess more information than courts have usually held sufficient for a knowing and intelligent jury waiver.” *Id.* at 1042. The court then cited the well-established standard that a defendant is sufficiently informed if he understands “that a jury is composed of 12 members of the community, he may participate in the selection of the jurors, [and] the verdict of the jury must be unanimous,” whereas if he were to waive the right, “a judge alone will decide guilt or innocence.” *Id.* (quoting *United States v. Martin*, 704 F.2d 267, 273 (6th Cir. 1983)). Knowing the exact identity of the three judges on the panel was not one of the circumstances that made Davis’s 1984 waiver knowing, voluntary, or intelligent.

Because Davis presents an exhausted claim that was adjudicated on the merits in state court, AEDPA deference applies. *See* 28 U.S.C. § 2254(d). Davis argues that the Ohio Supreme Court unreasonably applied clearly established federal law, specifically the command in *Adams v. U.S. ex rel. McCann*, 317 U.S. 269 (1942), that the “unique circumstances of each case” dictate whether the waiver is knowing, voluntary, or intelligent. CA6 R. 53, Suppl. Appellant Br., at 13 (quoting *Adams*, 317 U.S. at 278). Davis asserts that the Ohio Supreme Court’s decision unreasonably applied *Adams*, *Johnson v. Zerbst*, 304 U.S. 458 (1938), *Boykin v. Alabama*, 395 U.S. 238 (1969), and *Brady v. United States*, 397 U.S. 742 (1970).

We disagree. First, as explained above, the Ohio Supreme Court found there was no constitutional problem with enforcing the waiver at Davis’s 2009 resentencing. *Davis*, 9 N.E.3d

No. 21-3404

Davis v. Jenkins

Page 18

at 1042. Per the analysis in Section III.A., *supra*, this was not an unreasonable application of Supreme Court precedent. And since there is no constitutional right to a jury weighing the aggravating and mitigating circumstances of a defendant’s case, there is no need to determine whether his 1984 waiver was knowing, voluntary, and intelligent for the purposes of his 2009 resentencing.

Even so, the Ohio Supreme Court reasonably applied clearly established federal law. The four Supreme Court cases that Davis cites reflect the general proposition that waivers of constitutional rights must be knowing, voluntary, and intelligent acts “done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady*, 397 U.S. at 748; *see also id.* at 748 n.6 (citing cases); *Adams*, 317 U.S. at 278; *Johnson*, 304 U.S. at 464; *Boykin*, 395 U.S. at 244. But, again, Davis raises the level of abstraction too high. *See Fields*, 86 F.4th at 232; *see also id.* at 236 (emphasizing that “a ‘general proposition’ that originates with a few quotations from far-afield decisions” is not clearly established law). The clearly established precedent upon which Davis relies does not require that a defendant be informed of all remotely possible consequences of a waiver, only the “likely consequences.” *Brady*, 397 U.S. at 748; *see also Ruiz*, 536 U.S. at 629 (“[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.”). The identity of a sentencing judge has never been one of those “likely consequences.” *See Ruiz*, 536 U.S. at 629–30 (explaining that, for example, a defendant “may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide.”). Davis asserts that whether a waiver was knowing, voluntary, and intelligent depends, per *Adams*, on “the unique circumstances of each case,” and here those unique circumstances included the waiver’s naming of three particular judges to the panel. 317 U.S. at 278. But this is not a unique circumstance that has been clearly established.

Instead, the Court’s inquiry of whether “the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances” focuses on the choice

between the two different types of proceedings—jury trial versus bench trial. *See Ruiz*, 536 U.S. at 629–30; *Adams*, 317 U.S. at 278. *United States v. Martin* emphasizes this point.² 704 F.2d at 273. For a jury waiver to be knowing, voluntary, and intelligent, a defendant should have “some knowledge of the jury trial right before he is allowed to waive it.” *Id.* But the level of knowledge required is not a “technical knowledge of the jury trial right.” *Id.* A defendant need only understand that “a jury is composed of 12 members of the community, [that] he may participate in the selection of the jurors, [that] the verdict of the jury must be unanimous, and that a judge alone will decide guilt or innocence should he waive his jury trial right.” *Id.*; *Spytma v. Howes*, 313 F.3d 363, 370 (6th Cir. 2002). Davis’s insistence that he know the identity of the three judges is a far cry from these basic points.

Moreover, as recognized later in *Sowell v. Bradshaw*, 372 F.3d 821, 833, 836 (6th Cir. 2004), *Martin*’s list is not a statement of constitutional law, but it instead gives a flavor of the type of information that makes a jury waiver knowing, voluntary, and intelligent. Again, the key is whether the defendant understood the type of proceeding he was choosing—jury or judge—not the procedural specifics of either. *See id.* at 836. “[T]he dispositive inquiry is whether the defendant understood that the choice confronting him was, on the one hand, to be judged by a group of people from the community, and on the other hand, to have his guilt or innocence determined by a judge.” *Otte v. Houk*, 654 F.3d 594, 601 (6th Cir. 2011) (quoting *Jells v. Mitchell*, 538 F.3d 478, 510 (6th Cir. 2008)); *see also Haliym v. Mitchell*, 492 F.3d 680, 698 (6th Cir. 2007). These Sixth Circuit cases demonstrate that the Supreme Court did not clearly establish that a defendant’s knowing, voluntary, and intelligent jury waiver must be predicated on the identity of the sentencing judge.

Fairminded jurists could reject Davis’s contention that his waiver is invalid because he harbored a private belief that the three named judges would sentence him in perpetuity. *Brady* and *Boykin* do not clearly establish a rule that courts must “probe the minds of defendants in search of myths to bust” before accepting a waiver. *Currica v. Miller*, 70 F.4th 718, 726 (4th Cir. 2023). That principle especially holds true in this case. Judges retire, lose elections, and

²Although courts of appeals decisions do not create clearly established law for AEDPA purposes, we may look to such decisions to evaluate whether the Supreme Court has clearly established a principle. *Avery v. Prelesnik*, 548 F.3d 434, 436–37 (6th Cir. 2008).

No. 21-3404

Davis v. Jenkins

Page 20

die. It was not the 1984 trial court's responsibility to dispel Davis's unreasonable expectations about the remotely possible consequences of his waiver. The Ohio Supreme Court's rejection of this claim is entitled to AEDPA deference, and Davis has failed to overcome such deference.

C.

Next, Davis raises the first of four ineffective assistance of counsel claims. Davis argues that his 2009 resentencing counsel were ineffective for failing to move for the recusal of Judge Andrew Nastoff, even though counsel knew that Judge Nastoff had previously prosecuted and sought the death penalty for Davis's nephew, Lahray Thompson, for an unrelated murder thirteen years earlier. The Ohio Court of Appeals provides the last reasoned state court decision on this issue. The Ohio Court of Appeals concluded that Davis failed to show that his counsel's representation fell below an objective standard of reasonableness and denied the claim. *Davis*, 2013 WL 4806935, at *6 (“[T]he decision not to seek recusal of the judge can only be viewed as strategic and will not form the basis of an ineffective counsel claim.” This is particularly true in this case considering counsel's direct knowledge of Judge Nastoff's prior participation in Thompson's prosecution.” (quoting *State v. Nuhfer*, No. L-07-1125, 2009 WL 806905, at *3 (Ohio Ct. App. Mar. 20, 2009))).

We note at the outset that, contrary to the dissent's assertion, a *Strickland* deficient performance claim based on judicial bias is not a two-pronged analysis. A two-pronged analysis is unsupported by our case law and enables the dissent to avoid applying AEDPA deference where it is merited. See *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (identifying deficient performance and prejudice as two prongs, as opposed to divvying up deficient performance itself); *Rayner v. Mills*, 685 F.3d 631, 636 (6th Cir. 2012) (same). Instead, the proper analysis takes both elements, judicial bias and deficient performance, together in one prong.

Davis argues that the Ohio Court of Appeals unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), by applying an irrebuttable presumption of reasonableness to counsel's decision. We disagree that the Ohio Court of Appeals applied an irrebuttable presumption. *Strickland* cautions that “[j]udicial scrutiny of counsel's performance must be highly deferential,” and, accordingly, “a court must indulge a strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance.” 466 U.S. at 689. It is the defendant’s burden to “overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Davis was not able to overcome that presumption before the Ohio Court of Appeals. Davis’s briefing did not give any reason to doubt that counsel’s decision was sound trial strategy, especially considering that counsel knew about Judge Nastoff’s prior prosecution beforehand. While *Strickland* does emphasize a counsel’s duty to investigate, “strategic choices made after thorough investigation . . . are virtually unchallengeable,” and “strategic choices made after less than complete investigation are reasonable” to the extent that limiting the investigation was reasonably supported. *Id.* at 690–91. Given that counsel knew ahead of time of Judge Nastoff’s previous prosecution, as counsel acknowledged at the hearing, the Ohio Court of Appeals could assume that counsel made at least some investigation and could thus apply a “strong presumption”—which Davis failed to rebut—that counsel’s choice was “sound trial strategy.” *Id.* at 689 (citation omitted).

Investigation of the origin of the quoted language with which Davis takes issue also shows that the Ohio Court of Appeals was not applying an irrebuttable presumption. In the quoted case, *State v. Nuhfer*, the court considered an ineffective assistance of counsel claim through the lens of *Strickland*. *Nuhfer* noted that “[s]crutiny of counsel’s performance must be deferential” per *Strickland*, and so “[c]ounsel’s actions which ‘might be considered sound trial strategy’ are presumed effective.” 2009 WL 806905, at *3 (quoting *Strickland*, 466 U.S. at 689). *Nuhfer* found that nothing in the case’s record indicated that the judge there was biased or had a risk of bias and found that counsel may have had strategic reasons to keep the judge, as in Davis’s case. *Id.* *Nuhfer* itself followed *Strickland* and did not apply an irrebuttable presumption, so the Ohio Court of Appeals’ reliance on, and quotation of, *Nuhfer* cannot show application of an irrebuttable presumption.

Davis’s claim fails on AEDPA review because it is not clearly established that a judge’s prior involvement in the prosecution of a defendant’s family member creates “an impermissible risk of actual bias” in the defendant’s case. See *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). Davis asserts that, even if there is no evidence in the record of actual bias, “the probability of

actual bias on the part of [Judge Nastoff] [was] too high to be constitutionally tolerable.” CA6 R. 53, Suppl. Appellee Br., at 19 (quoting *Withrow*, 421 U.S. at 47). Davis relies on *Williams v. Pennsylvania* for the proposition that Judge Nastoff had an improper motive to sentence Davis to death. But his reliance on *Williams v. Pennsylvania* is misplaced. The Supreme Court has never “required recusal as a matter of course when a judge has had prior involvement with a defendant in his role as a prosecutor”—let alone a defendant’s nephew. *Isom v. Arkansas*, 140 S. Ct. 342, 343 (2019) (mem.) (statement of Sotomayor, J.). The Court in *Williams* held there was an “unacceptable risk of actual bias” in the Pennsylvania Supreme Court’s denial of a postconviction motion where the chief justice had “significant, personal involvement in a critical decision in” the defendant’s case. 579 U.S. at 14. But participation in a defendant’s own case differs from participation in a family member’s case. Judge Nastoff did not have “significant, personal involvement in a critical decision” in Davis’s case; he had previously prosecuted Davis’s nephew for a separate criminal offense that bore no connection to the instant murder. *Id.* Davis nevertheless claims that then-prosecutor Nastoff “heard and cross examined some of the very same mitigation evidence that Davis presented in his case.” CA6 R. 20, Appellant Br., at 54 (quoting DE 4-46, Expert Aff., Page ID 6279). But Davis has never identified the alleged overlapping evidence between Davis’s and Thompson’s trials. True, Carol Smith, who is Davis’s sister and Thompson’s mother, testified at Davis’s sentencing hearing, but first, she testified about matters unrelated to Thompson and his upbringing, and second, she did not testify at Thompson’s mitigation trial. Davis cannot rely on this tenuous connection to show bias. We therefore accord the Ohio Court of Appeals’ decision AEDPA deference and deny Davis’s claim for relief.

D.

Davis also argues that his 2009 resentencing counsel were ineffective by failing to reasonably prepare and present mitigation evidence, specifically (1) by promising the panel that Ohio Parole Board Chair Cynthia Mausser would testify that Davis would never receive parole if given a life sentence, (2) by presenting Mausser’s testimony, and (3) by failing to revise testimony by Robert Smith, Ph.D., a clinical psychologist, in view of Mausser’s testimony.

The Ohio Court of Appeals, providing the last reasoned state court decision on this issue, found that counsel made reasonable strategic decisions to call and question Mausser and Smith and thus denied Davis’s ineffective assistance of counsel claim. *Davis*, 2013 WL 4806935, at *5. Davis again argues that the Ohio Court of Appeals’ decision involved an unreasonable application of *Strickland* by applying an irrebuttable presumption of sound trial strategy. We disagree.

The Ohio Court of Appeals first stated that the “decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.” *Id.* (quoting *State v. Johnson*, No. CA2011-09-169, 2013 WL 938598, at *10 (Ohio Ct. App. Mar. 11, 2013)). *State v. Johnson*, the case from which the Ohio Court of Appeals quoted, itself did not apply an irrebuttable presumption but rather concluded that trial counsel’s decision not to call a witness was sound trial strategy where the defendant had failed to carry his burden to overcome that presumption. *See* 2013 WL 938598, at *10 (noting that the defendant had failed to specify what the witness would have said or how the witness’s testimony would have aided his defense). Where Davis had not overcome the presumption of sound trial strategy, the Ohio Court of Appeals in hindsight could not second guess the decision to call Mausser. This conclusion tracks *Strickland*. *See* 466 U.S. at 689.

The Ohio Court of Appeals next concluded that “counsel’s strategic decision to engage, or not engage, in a particular line of questioning” was “presumed to be the product of sound trial strategy.” *Davis*, 2013 WL 4806935, at *5. Again, this is a rough paraphrase of *Strickland*, not an unreasonable application of it. *See Strickland*, 466 U.S. at 689–90. The Ohio Court of Appeals stated that it was applying a “presum[ption],” not an irrebuttable one. *Davis*, 2013 WL 4806935, at *5. And it is clear from the court’s decision that it did not find Davis had rebutted the presumption of sound trial strategy. The Ohio Court of Appeals concluded that “[t]he fact that the trial strategy was ultimately unsuccessful or that there was another possible and better strategy available does not amount to ineffective assistance of counsel.” *Id.* (quoting *State v. Murphy*, No. CA2009-05-128, 2009 WL 4896231, at *5 (Ohio Ct. App. Dec. 21, 2009)). This proposition is consistent with *Strickland*’s pronouncement that deficient performance requires “errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by

No. 21-3404

Davis v. Jenkins

Page 24

the Sixth Amendment.” *Strickland*, 466 U.S. at 687. The Ohio Court of Appeals was well within *Strickland*’s scope when it found that counsel’s strategy of calling Mausser and questioning Smith, while perhaps not the best strategy, was not deficient performance.

When AEDPA deference applies to an ineffective assistance of counsel claim, “[t]he question is whether there is *any reasonable argument* that counsel satisfied *Strickland*’s deferential standard.” *Richter*, 562 U.S. at 105 (emphasis added); *see id.* (explaining that when *Strickland* and AEDPA apply in tandem, reviewing courts must accord double deference). Davis asserts counsel were ineffective in calling Mausser as a witness, despite being on notice that her testimony may not be as promised. But there is a reasonable argument that counsel satisfied *Strickland*’s deferential standard. At the sentencing hearing, counsel explained that they had interviewed Mausser four months before the hearing and based their strategy on how they thought she would testify. This shows at least some prior investigation. *See Strickland*, 466 U.S. at 690–91. When the prosecution asserted that Mausser would not testify as the defense believed, defense counsel were so confident that the prosecution was incorrect that they were ready to testify under oath “that that is not what we were told.” DE 5-7, Mitigation Hr’g Tr., Page ID 8327. Given the defense’s prior interview with Mausser, as well as their apparent confidence in her testimony based on that interview, there is a reasonable argument that counsel’s conduct fell “within the wide range of reasonable professional assistance” and that they were functioning as the “counsel” guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 689. Because there is room for fairminded disagreement about the application of *Strickland* to this case, Davis’s claim fails. *See Richter*, 562 U.S. at 103.

There is also a reasonable argument supporting defense counsel’s decision to call and question Dr. Smith, even in light of Mausser’s testimony. *See id.* at 105. True, Smith’s testimony that Davis thrived in a structured environment like prison due to his borderline personality disorder rested on the key assumption that Davis would remain in prison for the rest of his life. But Mausser’s testimony did not conclusively establish that Davis would be released on a life sentence. Although speculative, Mausser’s testimony was that Davis would likely not be paroled before the end of his natural life. There is thus a reasonable argument that counsel’s

decision to call Dr. Smith folded into a sound trial strategy and was within the wide range of reasonable professional assistance. *See id.*; *Strickland*, 466 U.S. at 689.

Even if Davis could overcome the double deference accorded to the state court’s decision, Davis’s claim would fail on the prejudice prong. *See Rayner*, 685 F.3d at 638 (prescribing de novo review for unadjudicated *Strickland* prongs). In the context of a death sentence, a defendant proves prejudice if “there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695. Davis cannot show prejudice because the Ohio Supreme Court’s independent review, which gave weight to the “likelihood that Davis will never be released from prison” given his age, cured any error. *See Davis*, 9 N.E.3d at 1056; *see also Lundgren v. Mitchell*, 440 F.3d 754, 783 (6th Cir. 2006) (acknowledging that independent reweighing by the Ohio Supreme Court under Ohio Rev. Code § 2929.05(A) can cure error in weighing factors). The Ohio Supreme Court thus came to the conclusion that Davis sought—that his parole was unlikely—even if Mausser’s testimony did not accomplish that objective. This conclusion defeats any reasonable probability that, absent the purported error, a sentencer would have weighed the aggravating and mitigating circumstances to a different result. *Strickland*, 466 U.S. at 694.

Nor was Davis prejudiced by Smith’s testimony. The Ohio Supreme Court, in conducting its independent reweighing, found Smith’s testimony about Davis’s borderline personality disorder unpersuasive because the murder at issue “was not an impulsive act or the product of an angry outburst,” but rather a killing “with prior calculation and design,” where Davis had organized a straw purchaser to acquire a gun and ammunition earlier that day. *Davis*, 9 N.E.3d at 1055. In other words, even if Davis were to be later released on parole, the problem was not impulsive behavior. This independent reweighing cured any purported error in failing to elicit Smith’s testimony about Davis’s behavior if eventually paroled. *See Lundgren*, 440 F.3d at 783. We thus accord the Ohio Court of Appeals the deference owed under AEDPA and reject the claim.

E.

Davis next argues that his 2009 resentencing counsel were constitutionally ineffective for failing to investigate and present mitigating evidence—specifically, a letter from Robert J. Beard—concerning the circumstances of Davis’s 1971 conviction of second-degree murder. Several years after that conviction, a man named Robert J. Beard wrote a letter to H.J. Bressler, Davis’s trial counsel in the 1971 murder case, stating that Beard had been in the house when Ernestine was killed and that Ernestine’s death was the result of a heated dispute in which she was the aggressor. *Davis*, 1996 WL 551432, at *4. Beard’s “letter was time-stamped for the record by the clerk’s office in 1981,” thus preceding the 1983 murder. *Id.*

While Davis used the letter to move for a new trial challenging his 1971 conviction, Davis did not raise an ineffective assistance of counsel claim for failure to investigate and present the letter on direct appeal of his 1984 conviction. *Id.* Instead, Davis raised this claim for the first time in his post-conviction petition following his second sentencing. At that time, the Ohio Court of Appeals barred Davis’s claim under res judicata because Davis had not raised it on direct appeal, even though he could have. *Id.*

Davis did not raise this claim in his state post-conviction proceedings following his third sentencing in 2009. The Warden argues that Davis thus did not satisfy the exhaustion requirement. Davis argues that, because the Sixth Circuit’s decision in *Davis v. Coyle* granted relief only as to his sentence, his conviction was left in place, and thus he properly exhausted this claim by presenting it to the state courts in his postconviction petition following his second sentencing. But the problem with this position is that Davis was represented by different counsel at his second sentencing versus his third. Davis’s briefing before this court focuses exclusively on the new counsel’s alleged deficiencies at his third sentencing hearing by not investigating or presenting the letter as mitigating evidence. Davis thus never “fairly presented” his claim, as he never presented the factual basis for the deficiency of his new attorney at his third sentencing to the Ohio state courts. *See Wagner*, 581 F.3d at 414–15. Davis’s claim of error is procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161–62 (1996).

F.

Finally, Davis argues that his original trial counsel in 1984 were ineffective by failing to advise him of the collateral consequences of waiving his constitutional right to a jury trial.³ The Warden contends that this claim is procedurally defaulted because the Ohio Court of Appeals invoked a procedural bar instead of considering this claim on the merits. *See Davis*, 2013 WL 4806935, at *7 (explaining that “as this court has previously determined, Davis’[s] habitual challenges regarding his jury waiver are barred by the doctrine of res judicata”). Thus, review by this court would be barred because “the state judgment rests on independent and adequate state procedural grounds.” *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).

The parties dispute whether Ohio correctly applied its res judicata rule. In all events, even on de novo review, Davis’s ineffective assistance of counsel claim fails. Davis relies on *Padilla v. Kentucky*, 559 U.S. 356 (2010), for the contention that his 1984 trial counsel were ineffective. Davis’s reliance on *Padilla* is misplaced because the Supreme Court has held that *Padilla* does not have retroactive effect. *Chaidez v. United States*, 568 U.S. 342, 344 (2013). Moreover, the timing here is critical. The Supreme Court has held that deficient performance is judged based on the prevailing professional norms at the time of trial. *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (per curiam) (“Judging counsel’s conduct in the 1980’s on the basis of these 2003 Guidelines—without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial—was error.”). In 1984, the prevailing professional norms did not require attorneys to inform clients of the collateral consequences of waiving a constitutional right. *See Chaidez*, 568 U.S. at 350. Davis has thus not shown deficient performance.

³Specifically, Davis argues that counsel did not inform him of the negative impact that a jury waiver would have on appellate review, did not explain that the jury waiver could not be retracted at a later guilt or penalty phase regardless of the three-judge panel, did not reserve the right to withdraw the waiver, and advised Davis to waive his right to a jury trial knowing that he would likely be sentenced to death because his innocence defense prevented him from accepting responsibility.

Case: 21-3404 Document: 66-2 Filed: 09/05/2024 Page: 48 (57 of 122)
Case: 21-3404 Document: 64-2 Filed: 08/30/2024 Page: 28 (48 of 93)

Case: 21-3404 Document: 63-2 Filed: 08/20/2024 Page: 28 (30 of 65)

No. 21-3404

Davis v. Jenkins

Page 28

IV.

For the reasons discussed above, we deny Davis’s claims for habeas relief. In the habeas context, federal courts may not displace with their own judgment the valid adjudications of state courts.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. In 1984, Von Clark Davis was sentenced to death by a three-judge panel. Since that time, Davis’s death sentence has been vacated twice—once by the state courts and once by a panel of this court. Before his third resentencing, Davis unsuccessfully attempted to withdraw his 1984 jury waiver because the three-judge panel explicitly named in the waiver was no longer available. The new state resentencing panel denied this request, Davis presented his mitigation case, and the new panel again sentenced Davis to death.

Today, the Majority finds both that Davis must be held to his 1984 jury waiver and that the waiver was knowing and voluntary, despite the fact that the promise that induced Davis’s waiver is not being enforced. Excising the promise of the named three-judge panel from the jury waiver, the Majority enforces the waiver against Davis while simultaneously holding that the aspect of the waiver that benefits Davis is not enforceable. At bottom, the Majority creates a rule that allows death-eligible defendants to be induced to waive their constitutional right to a jury trial by unenforceable promises, leaving these individuals with no recourse to vindicate their constitutional rights. This plainly contradicts binding Supreme Court precedent. Likewise, the Majority finds that the state court properly applied *Strickland*’s presumption to counsel’s failure to move for recusal and decision to present incomplete mitigating evidence, even though the state court *never assessed* the adequacy of counsel’s investigation and preparation. This, too, conflicts with longstanding Supreme Court precedent. I therefore respectfully dissent.

I. DISCUSSION

Davis raises six bases for relief. In my view, Davis is entitled to relief on four bases: (1) his claim that his jury waiver was breached when he was forced to be resentenced before a different three-judge panel (the “Breach Claim”); (2) his claim that his jury waiver was not

knowing, intelligent, and voluntary (the “Unknowing-Waiver Claim”);¹ (3) his claim that his counsel were ineffective for failing to move for Judge Nastoff’s recusal (the “Recusal Claim”); and (4) his claim that his counsel were ineffective for failing adequately to investigate, prepare for, and present mitigating evidence (the “Failure-to-Investigate Claim”). I will address each claim in turn.

A. The Breach Claim

Davis argues that his jury waiver was breached because he did not receive the benefit of the bargain when he was resentenced before a different three-judge panel than the one specified in his jury waiver. D. 53 (Appellant Suppl. Br. at 3–9). In response, the Warden contends that Davis procedurally defaulted this claim, and, in the alternative, the state court’s denial of this claim was reasonable. D. 54 (Appellee Suppl. Br. at 5–11). Although the Majority claims not to resolve the procedural-default question, Maj. Op. at 8–9, its acknowledgment that the Supreme Court of Ohio did not dismiss this claim on procedural grounds coupled with its subsequent reliance on Davis’s briefing, Davis’s oral argument, and the Supreme Court of Ohio’s opinion leads to one conclusion: the Breach Claim was properly exhausted. *See Jones v. Bradshaw*, 46 F.4th 459, 484 (6th Cir. 2022) (explaining that procedural default applies only when “the state courts actually enforced the state procedural sanction” (citation omitted)). Accordingly, I proceed to assess whether AEDPA deference applies and whether Davis is entitled to relief on his Breach Claim.

1. AEDPA Deference

Because the Supreme Court of Ohio did not cite the relevant U.S. Supreme Court standard, rely on an analogous state-law standard, or analyze Davis’s Breach Claim, I would find that AEDPA deference does not apply. *Lafler v. Cooper*, 566 U.S. 156, 173 (2012) (holding that AEDPA deference did not apply because the state court determined that the defendant’s plea was knowing and voluntary without considering whether counsel was ineffective under *Strickland*).

¹Davis cannot be granted relief simultaneously on both the Breach Claim and the Unknowing-Waiver Claim. At a high level the argument is: either the jury waiver included an enforceable contractual term—the specific three judges—that was breached, or that term was an unenforceable promise that induced Davis’s waiver, thereby making the waiver unknowing. Rather than take a position on which claim should succeed, I assess each claim independently and find that they each warrant relief.

No. 21-3404

Davis v. Jenkins

Page 31

Specifically, under the sub-heading “Constitutionality,” the Supreme Court of Ohio considered Davis’s Unknowing-Waiver Claim only. *See State v. Davis*, 9 N.E.3d 1031, 1042–43 (Ohio 2014) (*Davis XIV*).² The court concluded that Davis did not have a constitutional right to jury sentencing under *Spaziano v. Florida*, 468 U.S. 447 (1984), and that it therefore did not need to determine whether the waiver was knowing and voluntary. *Davis XIV*, 9 N.E.3d at 1042. In the alternative, the court found that Davis’s argument failed because it “appear[ed] to require that a defendant . . . possess more information than courts have usually held sufficient” for a knowing and voluntary waiver. *Id.* Finally, the court determined that *Duncan v. Louisiana*, 391 U.S. 145 (1968), did not alter its analysis. *Id.* at 1043. At bottom, the state court never considered the constitutional implications of holding Davis to the waiver of his constitutional right to a jury during the *guilt phase* that was induced by an explicit promise—that he would be tried *and sentenced* before a specific panel³—that could not be fulfilled. *See id.* at 1042–43.

By concluding that that AEDPA deference applies to Davis’s Breach Claim because the state court presumptively adjudicated this claim on its merits, *see* Maj. Op. at 10–11, the

² In the preceding section of the opinion, the Ohio Supreme Court assessed the applicability of the Ohio death-penalty statute. *Davis XIV*, 9 N.E.3d at 1041–42. This cannot be considered an assessment of the merits of Davis’s Breach Claim because it is explicitly not a constitutional analysis and it does not invoke the relevant federal standard or an analogous state standard.

³ The Majority contends that Davis’s jury waiver—within its “four corners”—does not mention sentencing and therefore the waiver did not include a promise that the three-judge panel would preside over sentencing, Maj. Op. at 15–16; however, this argument ignores generally applicable Ohio jury-waiver law. Specifically, “[a]s [the Ohio courts] h[ave] previously recognized, [Ohio Revised Code §] 2929.03(C)(2)(b) states that once a defendant waives his right to a jury trial, that waiver applies to the penalty proceeding as well.” *State v. Davis*, No. CA2009-10-263, 2011 WL 646404, at *7 (Ohio Ct. App. Feb. 22, 2011) (*Davis XI*). The three-judge panel thus presides over both trial and sentencing. *See* Ohio Rev. Code § 2929.03(C)(2)(b)(i)–(ii) (stating that a penalty imposed under § 2929.03(D)—including the death penalty—“shall be determined by . . . the panel of three judges that tried the offender upon the offender’s waiver of the right to trial by jury”). Accordingly, without any jury-waiver language to the contrary, there is no basis to conclude that the waiver’s use of the word “trial” was intended to alter generally applicable Ohio jury-waiver law.

Indeed, this straightforward interpretation of the jury waiver in light of the generally applicable law was reinforced during Davis’s colloquy and was even the basis of the state courts’ later determinations that Davis’s waiver was knowing and voluntary. *See* R. 5-1 (Tr. of 1984 Mot. Hr’g at 60–61) (Page ID #7224–25) (explaining during the waiver colloquy that the jury waiver would shift decision making from a jury to a three-judge panel and clarifying that “it goes to all phases” of the trial); R. 4-37 (Dec. 29, 2008 Order at 15) (Page ID #4648) (“As the record shows, all were aware, including Defendant, that a jury waiver applied to both phases of trial, and that a three judge panel would determine Defendant’s sentence should the need arise.”); *Davis XI*, 2011 WL 646404, at *7 (concluding that “Davis was aware that by waiving his right to a jury, he was giving up that right for both the guilt phase of the trial, as well as the sentencing proceeding”). It is only now, because the plain language and most obvious interpretation of the jury waiver does not support the Majority’s argument, that the waiver no longer applies to the sentencing phase.

No. 21-3404

Davis v. Jenkins

Page 32

Majority flouts the reasoning of *Johnson v. Williams*, 568 U.S. 289 (2013). In *Williams*, the petitioner brought claims under the Sixth Amendment and the California Penal Code based on the trial court’s decision to excuse a juror. 568 U.S. at 295. The California Court of Appeals denied the petitioner’s claims and, although the state court “did not expressly acknowledge” the Sixth Amendment claim, it relied on Supreme Court precedent concerning the Sixth Amendment. *Id.* at 296. On federal habeas review, the Supreme Court held that AEDPA deference applied, and federal courts should presume that, in situations such as *Williams*’s, the Sixth Amendment claim had been adjudicated on the merits. *Id.* at 298.

The Court cautioned that, although there is “a strong . . . presumption” that the state court adjudicated issues on the merits, the presumption is rebuttable. *Id.* at 301. The Court stated that it would “go[] too far,” if the presumption applied when “a defendant claimed in state court that something that occurred at trial violated both a provision of the Federal Constitution and a related provision of state law, and . . . in denying relief, [the state court] made no reference to federal law.” *Id.* Likewise, the Court explained that the presumption would be rebutted in several circumstances, including if the petitioner invokes both the state and federal constitutions but “the state standard is quite different from the federal standard” and the state court does not explicitly resolve the federal claim. *Id.*

That is precisely the case here. Davis invoked two interrelated claims—the same that we address here—arising under the Federal Constitution: that his jury waiver was breached and that his jury waiver was not knowing and voluntary. The federal standard for determining whether a waiver is knowing, intelligent, and voluntary is “quite different” from the federal standard for determining whether there was a breach of the jury waiver. *Id.* This is plain from the Majority’s separate analysis of each claim. Notably, the Supreme Court of Ohio did not cite any federal precedent or analogous state precedent relevant to adjudicating Davis’s Breach Claim on its merits. *Davis*, 9 N.E.3d at 1042–43. Thus, this case falls squarely within the circumstances in which the presumption is rebutted, as contemplated by *Williams* because the standards applied by the Supreme Court of Ohio do not encapsulate—or even relate to—the standards relevant to Davis’s Breach Claim. *See* 568 U.S. at 301–02.

The Majority contends that “a state court’s unexplained denial of a federal claim is presumed to constitute an adjudication on the merits.” Maj. Op. at 10 (citing *Harrington v. Richter*, 562 U.S. 86, 98, 102 (2016)). But the cited portion of *Richter* establishes that the state court need not *explain* a decision, not that the state court can simply *ignore* a non-frivolous claim. 562 U.S. at 98, 102 (considering “whether § 2254(d) applies when a state court’s order is unaccompanied by an opinion explaining its reasons” and then holding that § 2254(d) does not “require that there be an opinion from the state court explaining the state court’s reasoning” but that the statute does require a “decision”). As the Court explained in *Williams*, if there is a written statement of reasons, the presumption of adjudication on the merits is rebutted when, as here, “a defendant claimed in state court that something that occurred at trial violated both a provision of the Federal Constitution and a related provision of state law, and . . . in denying relief, [the state court] made no reference to federal law.” 568 U.S. at 301.

The Majority also suggests that the Supreme Court of Ohio “may have regarded” the Breach Claim “as too insubstantial to merit discussion.” Maj. Op. at 11 (quotations omitted). Yet, the Majority’s subsequent five-page analysis of the Breach Claim contradicts its contention that this claim is also somehow “insubstantial.” *Id.* at 11–16. And the Majority relies on a mischaracterization of *Williams* and *Rogers v. Mays*, 69 F.4th 381 (6th Cir. 2023) (en banc), for the proposition that Davis was required to move for reconsideration. Unlike *Williams*’s failure to “argue[] in the subsequent state and federal proceedings that the state court had failed to adjudicate her . . . claim on the merits,” 568 U.S. at 306, Davis has repeatedly argued in subsequent proceedings that his Breach Claim was not adjudicated on its merits. *See* D. 53 (Appellant Suppl. Br. at 6–7); D. 59 (Appellant Suppl. Reply Br. at 1–2); D. 20 (Appellant Br. at 40) (arguing that “the court did not address whether it was a violation of fundamental fairness to hold Davis to a jury waiver in violation of its explicit terms”).⁴ Because both *Rogers* and *Williams* relied on the petitioner’s failure to raise the argument altogether, today the Majority suggests that petitioners must also move for reconsideration—a clearly improper expansion of this procedural hurdle. With no state-court analysis resolving the Breach Claim or even a

⁴This same distinction is also apparent in *Rogers* because, unlike Davis, Rogers “concede[d] that the state court adjudicated his claim” and “in both his original and supplemental briefs before [the en banc] court, he admitted that the state court addressed this claim on the merits.” 69 F.4th at 388 (quotations omitted).

passing citation to the relevant legal standard in the state-court opinion, the Majority “goes too far” in applying AEDPA deference to a non-frivolous claim. *Williams*, 568 U.S. at 301. Thus, I would find that the Breach Claim is subject to de novo analysis.

2. Merits

Even if AEDPA deference applies, Davis is entitled to relief on his Breach Claim because the Supreme Court of Ohio’s decision is an unreasonable application of Supreme Court precedent. Davis claims that his rights under the Due Process Clause and the Sixth and Eighth Amendments were violated when his 1984 jury waiver was enforced against him at his third sentencing hearing in 2009 because the state did not comply with the plain terms of the waiver agreement, which included a promise that the three named judges would try and sentence him.⁵

To determine whether the enforcement of Davis’s waiver was valid, I am guided by the Supreme Court’s instruction that, because “the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.” *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937). The Supreme Court has held that written waivers of constitutional trial rights “are essentially contracts,” “[a]lthough the analogy may not hold in all respects.” *Puckett v. United States*, 556 U.S. 129, 137 (2009). “When the consideration for a contract fails—that is, when one of the exchanged promises is not kept—. . . the contract was broken” and “[t]he party injured by the breach will generally be entitled to some remedy, which might include the right to rescind the contract entirely.” *Id.* Because the waiver of a constitutional right is involved, a breach of a jury waiver has constitutional dimensions. *See United States v. Barnes*, 278 F.3d 644, 648 (6th Cir. 2002).⁶ Specifically, “a defendant has a due process right to hold the government to the promises it made that induced him to” waive the right. *United States*

⁵Confusingly, the Majority dedicates two pages to responding to an argument that no one advocates before the en banc court and, indeed, that Davis expressly *disclaimed*. Maj. Op. at 12–13 (noting that Davis agrees “that there is no constitutional right to jury sentencing and that his only claimed constitutional right to being sentenced by the three named judges stems from his bargain theory” and then proceeding to analyze whether there is a constitutional right to jury sentencing). Because this argument is irrelevant and not properly before this court, I decline to address it.

⁶“Although courts of appeals decisions do not create clearly established law for AEDPA purposes, we may look to such decisions to evaluate whether the Supreme Court has clearly established a principle.” Maj. Op. at 23 n.2 (citing *Avery v. Prelesnik*, 548 F.3d 434, 436–37 (6th Cir. 2008)).

No. 21-3404

Davis v. Jenkins

Page 35

v. Warren, 8 F.4th 444, 448 (6th Cir. 2021) (citing *Santobello v. New York*, 404 U.S. 257, 262 (1971)). It therefore follows that Davis has the right to receive the benefit of the jury waiver or, in the alternative, to withdraw his waiver. *Cf. Sinistaj v. Burt*, 66 F.3d 804, 809 (6th Cir. 1995) (denying analogous habeas claim because petitioner’s jury waiver did not specify that only a particular named judge could preside).

The Majority comes to the opposite conclusion by claiming that Davis relies on Supreme Court cases that are not specific enough to the facts of this case because, in the Majority’s view, Davis’s analogy to plea agreements is inapt. *See* Maj. Op. at 13–14 (“Davis has not cited a Supreme Court case explaining, much less holding, that the contract principles applicable to plea bargain agreements are also applicable to jury waivers.”).⁷ In an effort to distinguish Davis’s written jury waiver from written plea agreements, the Majority begins by suggesting that “Defendants routinely waive constitutional rights *without inducements*, such as waiving the right to remain silent when being questioned by a police officer, waiving the right to representation by counsel, or pleading guilty without a plea deal.” Maj. Op. at 14 (emphasis added) (citations omitted).⁸ But Davis *was induced* to waive his jury right based on the availability of a specific three-judge panel. Davis filed a pre-trial motion for notice of the three judges that would preside over his trial if he decided to waive his jury right. R. 4-1 (Mot. for Notice of Panel at 1–2) (Page ID #212–13). In the motion, Davis stated that he wanted this information before he could “make a valid, fully informed decision as to whether or not he should waive his right to trial by jury.” *Id.* at 2 (Page ID #213). The court was not required to provide Davis with the requested information; however, the court was required to provide accurate information. At a pre-trial motion hearing, Judge Bruewer addressed the motion, stating “[f]or the record” and “so [the court] can inform Mr. Davis of [this] fact,” “you know the three judges would be the ones that

⁷Despite taking great pains to distance Davis’s written jury waiver from a contract—specifically a plea agreement—the Majority nonetheless applies contract principles when those principles support its argument. Maj. Op. at 15–16 (applying the “four corners” doctrine in an effort to ignore the plea colloquy that indicates the jury waiver applies to guilt and sentencing).

⁸Waiving the right to remain silent when being questioned by a police officer is legally distinct from a court accepting an individual’s decision to waive a constitutional right in court. *See Berghuis v. Thompson*, 560 U.S. 370, 385 (2010) (“*Miranda* rights can . . . be waived through means less formal than a typical waiver on the record in a courtroom, given the practical constraints and necessities of interrogation and the fact that *Miranda*’s main protection lies in advising defendants of their rights.” (citations omitted)). This comparison is therefore fundamentally inapt.

No. 21-3404

Davis v. Jenkins

Page 36

are here in the General Division, it would be Judge Stitsinger, Judge Moser and myself.” R. 5-1 (Tr. of 1984 Mot. Hr’g at 34, 42) (Page ID #7201, 7209). It was only after receiving this information that Davis signed the jury-waiver form that included the specific names of the three judges who would preside. R. 4-3 (Jury Waiver at 1) (Page ID #433). Thus, the Majority’s suggestion that Davis’s jury waiver came without inducement is plainly contradicted by the record.

Davis’s jury waiver is also distinct from the Majority’s proffered examples because his jury waiver was more formal.⁹ As explained, here there was a written jury waiver with an explicit promise that Davis informed the court was relevant to his willingness to waive his jury right. The waiver was prepared by the prosecutor, signed by the court, the defendant, and defense counsel, and, after an on-the-record colloquy, accepted by the court. *See* R. 5-1 (Tr. of 1984 Mot. Hr’g at 34, 42) (Page ID #7201, 7209); R. 4-3 (Jury Waiver at 1) (Page ID #433); R. 5-1 (Tr. of 1984 Waiver Colloquy at 58–62) (Page ID #7222–26). The jury waiver in this case is therefore much more analogous to a written plea agreement that is signed by the defendant, defense counsel, and the government, subject to an on-the-record colloquy, and accepted by a court before it becomes valid. *See generally* Ohio Rev. Code Ann. § 2945.05 (requiring that a jury waiver must be “in writing, signed by the defendant, and filed in” the record and “must be made in open court”); *see also* *Fitzgerald v. Withrow*, 292 F.3d 500, 503 (6th Cir. 2002) (explaining that courts “have required elaborate conditions for [a jury] waiver to be valid”). Courts treat plea agreements with such formality because defendants are waiving their constitutional right to a jury trial. *See Brady v. United States*, 397 U.S. 742, 748 (1970).

⁹Even if Davis’s written jury waiver could be considered properly analogous to an unwritten plea agreement, waiving the right to counsel, or waiving *Miranda* rights, promises that induce these categories of waivers—like Davis’s jury waiver—must be enforceable. For example, if a defendant was induced to plead guilty by an explicit promise but without a written contract, this would be discussed during the on-the-record colloquy required when the court accepted the plea agreement. *See Santobello*, 404 U.S. at 261–62. Likewise, defendants who waive the right to counsel do so after an on-the-record colloquy that is “more” formal than a plea colloquy to ensure that the waiver was not induced by unenforceable promises. *See Iowa v. Tovar*, 541 U.S. 77, 87–88, 90–91 (2004) (“While the Constitution does not force a lawyer upon a defendant, it does require that any waiver of the right to counsel be knowing, voluntary, and intelligent.” (internal quotation marks omitted)). Finally, in the context of choosing to speak with officers, when the validity of a *Miranda* waiver is at issue, courts consider whether there was an illusory promise that induced the individual to waive their rights. *See United States v. Johnson*, 351 F.3d 254, 257, 260–63 (6th Cir. 2003) (considering whether Johnson’s waiver of *Miranda* rights was unknowing or involuntary because the waiver was induced by the verbal promise of leniency). This is the very basis of knowing and voluntary waivers.

Thus, just as with plea agreements, before a court can accept a defendant’s jury waiver, it is required to ensure that the waiver is “voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known.” *Santobello*, 404 U.S. at 261–62; *cf.* Fed. R. Crim. P. 11(b)(2) (“[T]he court must address the defendant personally in open court and determine that the plea is voluntary and did not result from . . . promises (other than promises in the plea agreement).”). If there are any promises “that . . . can be said to be part of the inducement or consideration, such promise[s] *must be fulfilled*.” *Santobello*, 404 U.S. at 262 (emphasis added).

In this case, the promise of a specific three-judge panel was put on the record by Davis’s motion requesting the judges’ names, the court identifying the judges’ names in response to that motion, the written plea agreement (drafted on state letterhead and signed by the defendant, defense counsel, and the court), and the court’s waiver colloquy that acknowledged and reaffirmed the specific three judges. When the state court accepted the waiver on this record, it accepted that Davis had been induced to waive his jury right based on the promise that he would be tried and sentenced by three specific judges. Once the waiver was accepted based on the explicit promise of the named three judges, the promise “must be fulfilled” or, if that is not possible, Davis is entitled to relief for the breach. *See Santobello*, 404 U.S. at 262; *Puckett*, 556 U.S. at 137.

To further distance Davis’s written jury waiver from written plea agreements, the Majority asserts that the jury waiver was not bargained-for for three interrelated reasons: (1) Davis was able unilaterally to withdraw his waiver, (2) there is a statutory procedure for designating the judges for the panel, and (3) “the court had no discretion to refuse [Davis’s] choice” to waive his jury right. *Maj. Op.* at 14. But this reasoning is either inapt, incorrect, or irrelevant. First, although Ohio law does allow a defendant to withdraw a jury waiver up until the point of trial, once the guilt phase began Davis was bound by his waiver. *See Ohio Rev. Code Ann. § 2945.05*. Indeed, this was the basis of the state’s opposition to—and the state court’s rejections of—Davis’s repeated requests to withdraw his jury waiver for resentencing. *See, e.g., R. 5-6 (Tr. of 2008 Mot. Hr’g at 53–58) (Page ID #8068–73) (arguing that Davis’s jury waiver remains valid at resentencing and opposing Davis’s attempts to invalidate or withdraw it).*

Accordingly, it is not clear how it is relevant that, for a brief period, Davis could have withdrawn his waiver. Once that period expired, Davis was bound by the waiver as if it were a contract so long as his conviction remained intact. *See* Ohio Rev. Code Ann. § 2945.05; R. 4-37 (Dec. 29, 2008 Order at 20–21) (Page ID #4653–54). This aspect of Ohio procedural law does not make the waiver any less bargained-for. It is similarly irrelevant that there is a statutory procedure for designating the judges and that these were the only three judges in the relevant division because certain issues, such as illness, scheduling conflicts, or a conflict of interest, could lead to the appointment of a judge outside of the typical procedure. Although there may have been a “typical” procedure, Davis nonetheless received a promise that three specific judges would preside over his case and sentencing.

Finally, the Majority’s contention that the trial court “had no discretion to refuse” Davis’s waiver has no support in the relevant law. Maj. Op. at 14. It is correct that defendants have a *statutory* right to waive their jury right. *See* Ohio Rev. Code § 2945.05; *State v. Banks*, 151 N.E.3d 198, 201 (Ohio Ct. App. 2019) (explaining that a defendant’s jury waiver must be accepted if the court “strictly compl[ies] with the five requirements of . . . § 2945.05” (quotations omitted)). It is not the case, however, that the trial court could simply ignore any potential federal constitutional implications of the jury waiver. *See, e.g., State v. Van Sickle*, 629 N.E.2d 39, 43–44 (Ohio Ct. App. 1993) (explaining that the trial court has no discretion to reject a defendant’s jury waiver “unless suggestion of his present insanity is made” (quotations omitted)). The court must be certain that the jury waiver was made knowingly, intelligently, and voluntarily. *Santobello*, 404 U.S. at 261–62; *Brady*, 397 U.S. at 748. If there is reason to doubt that the waiver is knowing, intelligent, or voluntary, the trial court was *obligated* to reject it. *See Brady*, 397 U.S. at 748 (explaining that “a guilty plea is a grave and solemn act to be accepted only with care and discernment”). Stated differently, if, as the Majority contends, “the defendant does not have a say in the judges that make up the panel” and thus “Davis did not ‘bargain’ with the state for the three specific judges,” Maj. Op. at 15, then the court was *obligated* to reject his jury waiver because it was improperly induced. *See infra* Part II.C. Instead, the court accepted the jury waiver, and Davis was therefore owed the promise of the specific three-judge panel or, given the judges’ unavailability at resentencing, the ability to withdraw his waiver. *Santobello*, 404 U.S. at 262.

No. 21-3404

Davis v. Jenkins

Page 39

Perhaps sensing the inadequacy of its argument that the express terms of the jury waiver did not bind the trial court at resentencing, the Majority suggests that because the provision providing for a specific three-judge panel is unusual, that it could not have created any obligations. Maj. Op. at 15 (noting that Davis did not “identify a case in which a plea deal or waiver contains [a similar] commitment” and concluding that, therefore, “the terms of the waiver here are insufficient to create such an unusual bargain”). But the unusual nature of the express terms of the jury waiver *reinforces* the conclusion that the specific judges were bargained-for. If all the usual rules of Ohio statutory procedure applied, there would be *no reason* to include any reference to the three-judge panel in the jury waiver. Instead, the only reason Davis—and defense counsel, the state, and the trial court—included such a provision was to create a situation in which the general rules did not apply. In concluding otherwise, the Majority improperly excises the three-judge-panel term from the jury waiver. *Cf. Warren*, 8 F.4th at 448 (“[W]e enforce [plea agreements] *according to their literal terms*” because “defendants waive[] certain fundamental rights when they enter plea agreements” (quotations omitted) (emphasis added)).

In a last-ditch effort to shore up its conclusion, the Majority claims that Davis’s “closer in time” 1993 affidavit provides a basis to “disregard” his “claim that he only waived his right to a jury in return for being tried and sentenced” by the named three-judge panel. Maj. Op. at 16. But this affidavit is not closer in time than Davis’s pre-trial motion, pre-trial motion hearing, and jury-waiver colloquy, all of which occurred in the lead up to trial. It is not clear why the 1993 affidavit could be considered “earlier” or “more consistent” than Davis’s conduct during the trial proceedings. Moreover, “credit[ing] Davis’s 1993 affidavit,” the Majority provides no reason why Davis can have only one reason for electing to proceed before a three-judge panel. Davis likely took many factors into consideration when deciding whether to proceed before a jury. Thus, this is not a basis to “disregard” entirely Davis’s other reasons for waiving his jury rights. Finally, the “other” reason for Davis’s waiver—that Davis wanted a three-judge panel because he did not want the prior aggravating circumstance decided by a jury—was resolved before he elected to waive his right to a jury trial. Four days before Davis decided to sign the jury waiver, he elected to have the court decide the aggravating circumstance in this case. *See* R. 5-1 (Tr. of 1984 Waiver Colloquy at 56–58) (Page ID #7220–22). Thus, by the time that Davis decided to

waive his jury right, he had already received the benefit of keeping the aggravating circumstance from the jury.

At bottom, by finding that Davis’s jury waiver was not breached and denying Davis his requested relief—resentencing at which he is allowed to withdraw the waiver—the Majority concludes that the jury waiver is not a contract *and* that Davis is legally bound by it. Put differently, under the Majority’s view, the jury waiver is not a contract from which Davis can benefit, but it is a contract that *can be enforced upon Davis* as to the terms that do not benefit him. This simply cannot be the case. Either the waiver is a “contract”—as the term is used in *Puckett*—and it was breached when Davis did not get the benefit of the specific three-judge panel, or the waiver is not a binding contract and Davis can withdraw it. For the reasons explained, I would find that Davis is entitled to relief on his Breach Claim.

B. The Unknowing-Waiver Claim

As an alternative to his Breach Claim, Davis argues that his jury waiver was unknowing because it was premised on an unfulfillable promise or misinformation. D. 53 (Appellant Suppl. Br. at 9–16). For the reasons explained below, I would find that the last-reasoned state-court decision unreasonably applied Supreme Court precedent and Davis’s claim succeeds on the merits.

1. AEDPA Deference

The Ohio Supreme Court identified two primary bases for denying Davis relief, which are based on either an unreasonable application of Supreme Court precedent or an unreasonable determination of fact. First, the Ohio Supreme Court held that Davis did not have the right to a jury trial at sentencing; therefore, it reasoned that it was irrelevant whether Davis’s waiver was voluntary, knowing, and intelligent. *Davis XIV*, 9 N.E.3d at 1042 (“[T]he requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.” (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 237 (1973))). This reasoning fails to address that Davis waived his right to a jury during *the guilt phase of his trial* because he was promised that the specific three-

judge panel would adjudicate *both phases of the trial*.¹⁰ R. 4-37 (Dec. 29, 2008 Order at 15) (Page ID #4648) (“As the record shows, all were aware, including Defendant, that a jury waiver applied to both phases of trial, and that a three judge panel would determine Defendant’s sentence should the need arise.”); R. 4-3 (Jury Waiver at 1) (Page ID #433); R. 5-1 (Tr. of 1984 Mot. Hr’g at 60–61) (Page ID #7224–25) (explaining that the jury waiver would shift decision making from a jury to a three-judge panel and clarifying that “it goes to all phases” of the trial). The Ohio Supreme Court’s reasoning on this point, therefore, is an unreasonable determination of fact because it relied on an incorrect determination that Davis’s jury waiver was irrelevant to the resentencing proceeding.

Alternatively, the Ohio Supreme Court reasoned that Davis’s Unknowing-Waiver Claim failed because defendants are typically “sufficiently informed to make an intelligent waiver” so long as they are aware of the general parameters of a jury trial. *Davis XIV*, 9 N.E.3d at 1042. The Ohio Supreme Court, however, failed to consider the “relevant circumstances and likely consequences” specific to Davis’s jury waiver, despite *Brady* and *McCann* requiring that it do so. *Brady*, 397 U.S. at 748; *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 278 (1942). Most relevant here, the Ohio Supreme Court did not consider whether Davis’s jury waiver was “induced by . . . misrepresentation (including unfulfilled or unfulfillable promises).” *Brady*, 397 U.S. at 755 (citation omitted). Accordingly, this aspect of the decision constitutes an unreasonable application of Supreme Court precedent. For these reasons, I would find that the Unknowing-Waiver Claim is subject to de novo review that includes consideration of all the relevant circumstances, as required by Supreme Court precedent.

2. Merits

“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady*, 397 U.S. at 748. The “relevant circumstances and likely consequences” include whether the defendant “was subjected to . . . threats or promises” and “had competent counsel and full opportunity to assess the advantages and disadvantages of trial.” *Id.* at 748, 754;

¹⁰The Majority adopts this inadequate reasoning as well. See Maj. Op. at 17–18. Perhaps recognizing its deficiency, the Majority does not rest the opinion on this basis. *Id.* at 18–20.

see also *McCann*, 317 U.S. at 278 (explaining that determining whether a defendant’s jury waiver was “intelligent, competent, [and] self-protecting . . . depend[s] upon the unique circumstances of each case”). Likewise, the waiver must be “entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel.” *Brady*, 397 U.S. at 755 (quoting and adopting the standard as stated in *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev’d on other grounds*, 356 U.S. 26, 78 (1958)). A waiver is invalid if it was “induced by threats . . . , misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper . . . (e.g. bribes).” *Brady*, 397 U.S. at 755 (quotations omitted). Thus, the record must reflect that the defendant possessed a full understanding of the direct consequences such that the waiver represents a voluntary and intelligent choice among alternatives. See *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

Here, the record reflects that Davis decided to waive his jury right based on the promise of a specific three-judge panel presiding over the guilt and penalty phases of trial. Davis filed a pre-trial motion for notice of the three judges that would preside over his trial if he decided to waive his jury right. R. 4-1 (Mot. for Notice of Panel at 1–2) (Page ID #212–13). In the motion, Davis stated that he needed this information to “make a valid, fully informed decision as to whether or not he should waive his right to trial by jury.” *Id.* at 2 (Page ID #213). At a pre-trial motion hearing on May 2, 1984, Judge Bruewer addressed this motion and stated “[f]or the record” “you know the three judges would be the ones that are here in the General Division, it would be Judge Stitsinger, Judge Moser and myself.” R. 5-1 (Tr. of 1984 Mot. Hr’g at 34, 42) (Page ID #7201, 7209). Davis and his attorney then signed a waiver form¹¹ that stated, in relevant part, that Davis “voluntarily waive[d] [his] right to trial by jury and elect[ed] to be tried by a court to be composed of three judges, consisting of Judges Henry J. Bruewer, William R. Stitsinger, and John R. Moser” R. 4-3 (Jury Waiver at 1) (Page ID #433). On May 8, 1984, the parties reconvened so that the court could conduct a colloquy about Davis’s intent to waive his jury rights. R. 5-1 (Tr. of 1984 Waiver Colloquy at 58–62) (Page ID #7222–26). During the colloquy, Judge Bruewer reaffirmed the identities of the three judges previously discussed and

¹¹The waiver form is printed on the letterhead of the “Office of Prosecuting Attorney Butler County, Ohio,” and was presumably typed by an employee of that office. R. 4-3 (Jury Waiver at 1) (Page ID #433).

included on the jury waiver form. *Id.* at 61 (Page ID #7225) (“[W]e’ll have three judges will [sic] be here tomorrow, you know who they are, and they’re in this form here[, the jury waiver]. It’ll be myself and Judge Moser and Judge Stitsinger.”). Judge Bruewer then accepted the jury waiver form and signed it, along with his statement that “[t]his jury waiver and election to be tried by a three-judge panel is hereby accepted and entered upon the journal of this Court.” *Id.*; R. 4-3 (Jury Waiver at 1) (Page ID #433).

Unlike other cases that have addressed similar claims under *Brady*, here the record leading up to the waiver, the waiver colloquy, and the language included in the waiver all lead to the same conclusion: Davis agreed to waive his jury right based on his understanding—informed by the court, his counsel, and the written jury waiver—that he would be tried and sentenced by a specific three-judge panel. *Cf. Ray v. Curtis*, 21 F. App’x 333, 334–35 (6th Cir. 2001) (finding the defendant’s jury waiver was knowing and voluntary because “[n]othing in either the written waiver or the transcript of the waiver hearing conditioned Ray’s waiver on having the case heard by” a specific judge); *Fitzgerald*, 292 F.3d at 503–06 (finding the defendant’s jury waiver was knowing and voluntary, despite a colloquy on the record that suggested the defendant may have understood that he would be tried before a specific judge, because the plain language of the waiver was “a judge of the” court and the colloquy was not sufficiently clear to override the waiver); *Sinistaj*, 66 F.3d at 809 (denying analogous due-process claim because petitioner’s jury waiver stated that he agreed to be tried by “a judge of the . . . Court” and, therefore, did not specify that it applied only to a trial before a particular named judge). Although “a trial court need not grant a defendant’s request for a bench trial at all,” *Fitzgerald*, 292 F.3d at 503, where, as here, the trial court granted the defendant’s request for this information and then accepted the defendant’s waiver that was premised on this information, the defendant must understand the value of such a commitment, *see Brady*, 397 U.S. at 755 (explaining that the waiver must be “entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel”).

The Majority attempts to sidestep the clear applicability of *Brady*. Maj. Op. at 18–20.¹² Although the Majority purports to apply *Brady* in support of its contention that “Davis raises the level of abstraction too high” because *Brady* and its progeny “do[] not require that a defendant be informed of all remotely possible consequences of a waiver,” Maj. Op. at 18, it ignores the aspect of *Brady* that controls this case. Even if “[t]he identity of a sentencing judge has never been one of th[e] likely consequences” contemplated by *Brady*, Maj. Op. at 18 (quotations omitted), the Court explicitly contemplated that the relevant circumstances and likely consequences include “unfulfillable promises,” “misrepresentation,” and “the actual value of any commitments made to [the defendant] by the court, prosecutor, or his own counsel.” *Brady*, 397 U.S. at 748, 754–55 (quotations omitted). With a full understanding of Supreme Court precedent, the Majority’s suggestion that Davis needed only to “understand[] the nature of the [jury] right and how it would likely apply *in general*” falls flat. Maj. Op. at 18 (alterations added) (emphasis in original) (quotation omitted).

Finally, the Majority blithely states that “[f]airminded jurists could reject Davis’s contention that his waiver is invalid because he harbored a private belief that the three named judges would sentence him in perpetuity.” Maj. Op. at 19. Davis’s “belief” was far from private and was reinforced multiple times on the record by his counsel, the presiding judge, and the prosecutor. Davis stated explicitly in his motion for notice that he wanted to know the identities of the judges before he decided to waive his jury right. This motion was then discussed on the record, and the presiding judge provided Davis with the names of the specific judges. Thereafter, Davis, his counsel, and the presiding judge signed a waiver form that included these three judges’ names. At the waiver colloquy, the presiding judge reaffirmed the members of the three-judge panel, acknowledged their inclusion in the waiver form, and accepted the waiver as knowing, voluntary, and intelligent. Moreover, it was established under Ohio law that Davis’s

¹²To do so, the Majority frames Davis’s argument as granular: “here those unique circumstances included the waiver’s naming of three particular judges to the panel. But this is not a unique circumstance that has been clearly established.” Maj. Op. at 18 (stating that “[t]he identity of a sentencing judge has never been one of those likely consequences” (quotations omitted)). But Davis argues that he was “assured”—or promised—the specific three-judge panel without knowing that that assurance would not apply under certain circumstances—“if those judges were not available.” D. 53 (Appellant Suppl. Br. at 15) (quoting *Brady*, 397 U.S. at 755 for the proposition that “a waiver is invalid if induced through ‘unfulfilled or unfulfillable promises’”). Stated differently, Davis argued that he was induced by an unfulfillable promise in direct violation of *Brady*.

jury waiver would bind him upon resentencing. *See State v. Foust*, 823 N.E.2d 836, 852 (Ohio 2004) (“The waiver of the right to trial by jury in a capital case applies to both the guilt phase and the penalty phase of the trial.”); *Davis XI*, 2011 WL 646404, at *7 (“[T]he Ohio legislature has statutorily foreclosed the possibility of withdrawing a jury waiver after a panel of three judges determines guilt.”). Therefore, to the extent the Majority suggests Davis’s understanding that his jury waiver would bind him at resentencing was “private,” this contention is contradicted by the record and Ohio law. Rather than requiring that the court search for “myths to bust,” the record and law make clear that Davis’s explicit concern with the specific three-judge panel could in no way be considered a “private belief.” *Cf.* Maj. Op. at 19 (quotations omitted).

For the reasons explained above, Davis was induced to waive his jury right based on the unfulfillable promise of a specific three-judge panel. Accordingly, I would find that Davis’s waiver was not knowing and voluntary and that he is therefore entitled to relief on this claim.

C. Ineffective Assistance of Counsel

Davis brought two ineffective-assistance-of-counsel claims that, in my view, warrant relief. The first is based on counsel’s failure to move for Judge Nastoff’s recusal, and the second is based on counsel’s failure to investigate and prepare two witnesses. I will address each in turn.

1. The Recusal Claim

Davis claims that trial counsel at his third sentencing hearing were constitutionally ineffective for failing to move to recuse Judge Nastoff for bias or the appearance thereof, given his death-penalty prosecution of Davis’s nephew. The Ohio Court of Appeals concluded that trial counsel’s decision not to seek Judge Nastoff’s recusal was strategic and therefore it did not constitute ineffective assistance of counsel. *State v. Davis*, No. CA2012-12-258, 2013 WL 4806935, at *6 (Ohio Ct. App. Sept. 9, 2013) (*Davis XIII*). Because the Ohio Court of Appeals adjudicated this claim on the merits—at least as to *Strickland*’s performance prong—the deference requirements of § 2254(d) apply to that prong.

To demonstrate ineffective assistance of counsel, a petitioner typically must show “that counsel’s performance was deficient” and “that the deficient performance prejudiced the

defense.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the context of judicial-bias ineffective-assistance-of-counsel claims, however, a defendant need not prove prejudice under *Strickland* because, if proven, “judicial bias is a structural defect.” *Coley v. Bagley*, 706 F.3d 741, 750 (6th Cir. 2013) (citing *Arizona. Fulminante*, 499 U.S. 279, 309–10 (1991)). In other words, a *Strickland* claim based on judicial bias has two prongs: (1) judicial bias and (2) deficient performance.¹³ Accordingly, the operative questions are whether Judge Nastoff’s potential for bias violated due process, and, if so, whether the Ohio Court of Appeals unreasonably applied Supreme Court precedent in determining that trial counsel’s decision not to seek recusal was reasonable. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (holding that, if trial counsel’s failure to litigate a constitutional claim competently “is the principal allegation of ineffectiveness,” petitioner must also prove that the underlying constitutional claim is “meritorious”).

a. Judicial Bias

The Ohio Court of Appeals did not address the issue of whether Judge Nastoff’s potential bias rose to the level of constitutional error and instead simply concluded that the decision of Davis’s trial counsel not to seek Judge Nastoff’s recusal was strategic. *See Davis XIII*, 2013 WL 4806935, at *6. The judicial-bias portion of Davis’s claim is therefore subject to de novo review. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (explaining that when no “state courts below [have] reached” a prong of a petitioner’s claim, “our review is not circumscribed by” AEDPA’s requirements); *Rayner v. Mills*, 685 F.3d 631, 638–39 (6th Cir. 2012) (holding that when a state court reviews only one portion of a claim in disposing of the claim, we review de novo any portions of the claim that the state court did not review). The Majority offers no reason that the Supreme Court’s guidance in *Wiggins* and our prior precedent in *Rayner* ought not to apply here. Instead, the Majority simply assumes that AEDPA deference applies to the judicial-bias prong of Davis’s claim even though no state court reviewed it. *See Maj. Op.* at 20–21 (finding that “Davis’s claim fails on AEDPA review because it is not clearly established that a

¹³The Majority contends that it is incorrect to frame this claim as having two *Strickland* prongs. But even if, as the Majority suggests, counsel’s performance and the merits of the underlying judicial-bias claim should be considered together under the performance prong of *Strickland*, de novo review would still apply because, as explained below, the state court unreasonably applied *Strickland* to the performance prong. *See infra* Part I.C.1.b.

judge’s prior involvement in the prosecution of a defendant’s family member creates ‘an impermissible risk of actual bias’ in the defendant’s case.” (quoting *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016))). Seeing no reason not to apply the binding rule of *Wiggins* and *Rayner*, I review de novo this prong of Davis’s claim.

The Supreme Court has held that judicial bias violates due process when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The standard is objective, and thus courts ask “not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009). This is because “both the appearance and reality of fairness” must be preserved so that litigants are assured “that the arbiter is not predisposed to find against [them].” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

This case is analogous to *Williams v. Pennsylvania*, which concluded that “there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.” 579 U.S. at 8. In coming to its decision in *Williams*, the Court reasoned that there is “a risk that the judge ‘would be so psychologically wedded’ to his or her previous position as a prosecutor that the judge ‘would consciously or unconsciously avoid the appearance of having erred or changed position.’” *Id.* at 9 (quoting *Withrow*, 421 U.S. at 57). Likewise, the Court concluded that “the judge’s ‘own personal knowledge and impression’ of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties’ arguments to the court.” *Id.* at 9–10 (quoting *In re Murchison*, 349 U.S. 133, 138 (1955)).

This logic applies with equal force to Judge Nastoff’s role as a prosecutor in cross-examining Thompson’s family and friends. As part of his strategy during the Thompson trial, then-prosecutor Nastoff, argued that Thompson had his friends and family members come into court to lie on his behalf. R. 4-46 (Postconviction Pet. Ex. N at 1207) (Page ID #6458) (Nastoff arguing that Thompson “buil[t] [his] alibi by lying, by getting [his] friends and family to come in, that’s important when you lie. You know, it’s a mockery, it’s an absolute mockery. A lie is

nothing but a tool.”); *see also id.* at 1205 (Page ID #6456) (Nastoff describing Lawrence Jones as a liar who told Thompson that he (Jones) would “clear [Thompson’s] name right off the map. Blood [is] thicker than water. You my family,” and arguing that Thompson’s family and friends “aren’t set to snitch”).

Although it is true that Judge Nastoff served as a prosecutor in Thompson’s case and not in Davis’s prior case, he did have significant personal involvement as a prosecutor in the cross-examination, and therefore the undermining and discrediting of critical mitigation evidence such that he formed an opinion that was pertinent to Davis’s mitigation case. *See* R. 4-46 (2011 Postconviction Pet. Ex. D, Menashe Aff. ¶ 23) (Page ID #6279) (noting that “[i]t would be difficult, if not impossible, to put aside Judge Nastoff’s prior opinions about *the veracity and strength* of the mitigation” (emphasis added)). Specifically, as discussed above, Judge Nastoff formed negative opinions about the mitigation evidence presented by Thompson and Davis’s relatives during Thompson’s trial. *See* R. 4-46 (2011 Postconviction Pet. Ex. D, Menashe Aff. ¶ 23) (Page ID #6279). Judge Nastoff was necessarily a biased actor because it was his job as a prosecutor to represent the interests of the state. *Cf. Coley*, 706 F.3d at 749–51. Thus, there is an impermissible risk that Judge Nastoff’s critical view of the mitigation evidence from his time as a prosecutor would carry more weight than the arguments that Davis actually presented to the court. Similarly, given his view of Thompson’s family and friends, there is a danger that Judge Nastoff remained “psychologically wedded” to his position as a prosecutor and thus would not want to give the appearance of reversing his position on their credibility.

The Majority’s analysis of the judicial-bias prong sidesteps the facts of this case by claiming that “Davis has never identified the alleged overlapping evidence between” the trials. Maj. Op. at 22. Specifically, the Majority contends that Carol Smith—Davis’s sister and Thompson’s mother who testified at Davis’s sentencing hearing—is too “tenuous” an overlap because her testimony at Davis’s sentencing was “unrelated to Thompson” and she did not testify at Thompson’s mitigation trial. *Id.* The Majority’s suggestion that Smith’s testimony at Davis’s sentencing needed to be related to Thompson ignores the source of Judge Nastoff’s bias (and notably absent from the Majority is any discussion of Judge Nastoff’s actual biased statements). Instead, the relevant overlap is in Davis’s and Thompson’s shared friends and family members

No. 21-3404

Davis v. Jenkins

Page 49

more broadly. At the third sentencing, Davis’s mitigation strategy was almost entirely reliant on his family members’ and close friends’ testimony. The mitigation witness list included the following family members and close family friends: Victor Davis, Sherry Davis, Charles Tipton, Alluster Tipton, Carol Smith, and Rick Rotundo. R. 5-7 (2009 Mitigation Hr’g Tr. Vol. I at 78) (Page ID #8268) (V. Davis, brother); *id.* at 98 (Page ID #8288) (S. Davis, daughter); *id.* at 104–05 (Page ID #8294–95) (C. Tipton, stepfather); *id.* at 113–14 (Page ID #8303–04) (A. Tipton, mother); R. 5-8 (2009 Mitigation Hr’g Tr. Vol. III at 207–08) (Page ID #8397–98) (Rotundo, neighbor and family friend). It was therefore vital that his family members were credible to the panel.

Davis’s and Thompson’s family were close knit and spent a significant amount of time together. Davis had the closest relationships with his siblings Smith and Elliot Davis. R. 5-7 (2009 Mitigation Hr’g Tr. Vol. I at 85) (V. Davis) (Page ID #8275). Multiple generations, at times, lived under the same roof. *Id.* at 82 (V. Davis) (Page ID #8272) (explaining that he lived with his mother and siblings, as well as his “grandmother, her sister, [Victor’s] great aunt, her eldest sister, [Victor’s] grandmother’s eldest brother, and his wife”). Smith, at the time that she testified in Davis’s trial, lived with Davis’s mother and stepfather. *Id.* at 104 (Page ID #8294) (C. Tipton). Smith also testified about gatherings that involved the extended family. *Id.* at 128–29 (Smith) (Page ID #8318–19) (explaining that Davis’s extended family, including his living, non-incarcerated siblings and his daughter, have had family gatherings since Davis’s incarceration). This overlap is significant. That Davis does not identify a specific piece of evidence is not the point. Davis’s mitigation defense relied on the credibility of his family members, and Judge Nastoff had a particularly negative view of this family’s credibility based on his experience prosecuting Thompson.

The three-judge panel, including Judge Nastoff, “considered the testimony of [Davis’s] friends and family concerning his dysfunctional family and childhood experiences” and found “the testimony to be unconvincing and entitled to little or no weight.” R. 4-39 (2009 Sent’g Op. at 9) (Page ID #4932). “The panel . . . also considered the testimony of Sherry Davis and the fact that she has forgiven [Davis] for purposefully killing her mother” and “afford[ed] this factor very

little weight.” *Id.* In other words, Judge Nastoff and the panel concluded that all six of Davis’s friends and family members were unconvincing.

Because Davis relied principally on his family members during his sentencing hearing, “the probability of actual bias on the part of” Judge Nastoff as it relates to the veracity and strength of Davis’s mitigation evidence “[wa]s too high to be constitutionally tolerable,” *Withrow*, 421 U.S. at 47, especially in a death-penalty case.

b. Performance

The remaining question is therefore whether the Ohio Court of Appeals unreasonably applied clearly established federal law in determining that trial counsel’s recusal decision was not deficient performance. The Ohio Court of Appeals provided little reasoning for its holding, other than the fact that trial counsel were aware that Judge Nastoff had prosecuted Thompson and still chose not to challenge him. *Davis XIII*, 2013 WL 4806935, at *6.

When addressing the performance prong, the state court explained that Davis’s counsel stated on the record that “they were aware of Judge Nastoff’s prior participation in Thompson’s prosecution [Davis’s nephew’s prosecution], but chose not to seek recusal.” *Davis XIII*, 2013 WL 4806935, at *6. The court then stated that “[t]he decision not to seek recusal of the judge can *only* be viewed as strategic and *will not form the basis* of an ineffective counsel claim.” *Id.* (emphasis added) (quoting *State v. Nuhfer*, No. L-07-1125, 2009 WL 806905, at *3 (Ohio Ct. App. Mar. 20, 2009)).¹⁴ The court concluded that Davis’s ineffective-assistance claim therefore failed. *Id.* This analysis was an unreasonable application of *Strickland* because the court “simply assumed that counsel’s [decision] w[as] motivated by strategy” without determining whether that decision was reasonable under the circumstances. *Dickerson v. Bagley*, 453 F.3d 690, 697 (6th Cir. 2006). Most notably missing from its analysis was any consideration of whether there was an unconstitutionally high risk of bias, and the reasonableness of counsel’s investigation into the potential for bias. Although trial counsel’s strategic choices are protected,

¹⁴The Majority appears to conclude that the Supreme Court of Ohio’s reliance on *Nuhfer* means that it applied the correct standard. Maj. Op. at 21. But the Majority identifies aspects of *Nuhfer* that the state supreme court did not cite. Instead, the Supreme Court of Ohio identified a *quote* that it used as an irrebuttable presumption. There is no reason to believe that the Supreme Court of Ohio chose a specific quote but, in reality, intended to use a broader portion of *Nuhfer*. Rather than rewrite the state supreme court opinion, I take it as it is.

they must be “reasonable” based on the “totality of the circumstances.” *Strickland*, 466 U.S. at 681 (quotations omitted). By deferring to counsel’s determination with no consideration of “the totality of the circumstances,” *Strickland*, 466 U.S. at 681 (quotations omitted), the Ohio Court of Appeals unreasonably applied *Strickland*. *Cf. Dickerson*, 453 F.3d at 697 (“[T]he state court unreasonably applied clearly established Supreme Court precedent when it simply assumed that counsel’s oversights were motivated by strategy.”).

Here, Davis’s trial counsel performed deficiently, because no competent attorney would reasonably choose to proceed with a capital-sentencing hearing before a court that was constitutionally deficient. Davis is therefore entitled to relief on this claim. *See McKernan v. Superintendent Smithfield SCI*, 849 F.3d 557, 566–67 (3d Cir. 2017) (finding that trial counsel performed deficiently in “advis[ing] his client to proceed before a court that was structurally deficient” as a result of the judge’s potential for bias, which the Third Circuit concluded was “something no competent attorney would ever do”).

Rather than engage with the record, the Majority flatly repeats and reaffirms the state supreme court opinion’s flaws, enshrining them into Sixth Circuit law. The Supreme Court has instructed that “*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision. . . . Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.” *Wiggins*, 539 U.S. at 527. In other words, the fact of an investigation says nothing about its reasonableness. Nonetheless, the Majority—in conflict with Supreme Court precedent—concludes that the state court properly applied “a strong presumption” that Davis’s counsel performed a reasonable expectation based on the court’s “assum[ption] that counsel made at least some investigation,” *Maj. Op.* at 21, without any consideration of “the reasonableness of the investigation,” *Wiggins*, 539 U.S. at 527. For the reasons explained above, the state supreme court unreasonably applied *Strickland* and, had counsel moved for Judge Nastoff’s recusal, such a motion would have been successful. I would therefore find that Davis is entitled to relief on his Judicial-Bias Claim.

2. The Failure-to-Investigate Claim

a. AEDPA Deference

Davis next argues that trial counsel at his third sentencing hearing were constitutionally ineffective for failing reasonably to investigate, prepare for, and present mitigation testimony from Cynthia Mausser and Dr. Robert Smith. The Ohio Court of Appeals concluded that the decision to call Mausser as well as the “decision to engage, or not engage, in a particular line of questioning” with Mausser and Smith were “presumed to be the product of sound trial strategy” and therefore did not constitute ineffective assistance of counsel. *Davis XIII*, 2013 WL 4806935, at *5.¹⁵

Although *Strickland* established that it is “strongly presumed” that counsel performed adequately and reasonably exercised their professional judgment in making decisions, it did not create an irrebuttable presumption that any act with strategic implications is reasonable and cannot constitute deficient performance. 466 U.S. at 690. The Supreme Court has confirmed that taking the approach that the Ohio Court of Appeals took constitutes an incorrect reading of *Strickland*. See *Wiggins*, 539 U.S. at 527 (“*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.”). Moreover, by concluding that it would “not question counsel’s strategic decision” regarding questioning witnesses, the Ohio Court of Appeals unreasonably applied *Strickland* by imposing a far higher presumption of reasonableness than *Strickland* requires, and by altogether failing to consider the reasonableness of the investigation and preparation that supported trial counsel’s choices, as required by *Wiggins*. *Davis XIII*, 2013 WL 4806935, at *5. The Ohio Court of Appeals’ decision on the merits rests entirely on this unreasonable application of *Strickland* and *Wiggins*.

¹⁵In an effort to revise the Ohio Court of Appeals’ opinion to fit its argument, the Majority again, *see supra* n.14, contends that the state court’s invocation of a specific quote from prior case should be read as a citation to a broader portion of that underlying opinion. Maj. Op. at 23–24. Rather than rewrite the state court opinion, I take it as it is.

The Supreme Court’s precedents also clearly establish that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. Here, trial counsel promised in their opening statement that Mausser would provide specific testimony, despite failing adequately to investigate what her testimony would be. Counsel then compounded this failure to investigate by calling Mausser to testify even after being warned by the prosecution that Mausser would not provide the promised testimony. This court has previously held that it is an unreasonable application of clearly established law to conclude that trial counsel did not perform deficiently in such a scenario. *English v. Romanowski*, 602 F.3d 714, 728–29 (6th Cir. 2010); *see also Avery*, 548 F.3d at 436–37 (holding that a court of appeals may look to its own decisions to determine whether a legal principle has been clearly established by the Supreme Court). This logic applies with equal force to Davis’s counsel in their failure to adequately investigate what testimony Mausser would provide before promising the specifics of her testimony in an opening argument.

As noted above, the Ohio Court of Appeals failed to address the fact that Davis raised his claim under the rubric of trial counsel’s failure to *investigate* and *prepare for* Mausser and Dr. Smith’s testimony, R. 4-46 (2011 Postconviction Pet. ¶¶ 64–65, 76–77) (Page ID #6248, 6251), instead characterizing the claim as grounded only in trial counsel’s strategic decision to call Mausser and engage in particular lines of questioning with Mausser and Dr. Smith, *see Davis XIII*, 2013 WL 4806935, at *5. The Ohio Court of Appeals thus did not adhere to the Supreme Court’s instruction that, in such cases, the “principal concern” is “not whether counsel should have presented” certain mitigation evidence, but instead “whether the investigation supporting counsel’s decision . . . was *itself* reasonable.” *Wiggins*, 539 U.S. at 522–23 (emphasis in original). For these reasons, I review de novo Davis’s claim that trial counsel failed to adequately investigate and prepare for Mausser and Dr. Smith’s testimony.

b. Performance

Davis’s Failure-to-Investigate Claim rests on three interrelated deficiencies: (1) counsel “promised the panel it would hear certain testimony []from Cynthia Mausser” even though counsel was “on notice that [Mausser] could not deliver that testimony,” (2) counsel “failed to properly investigate and prepare” Mausser and Dr. Robert Smith, and (3) because of the failure

No. 21-3404

Davis v. Jenkins

Page 54

to investigate and prepare, counsel “elicited harmful testimony . . . from Dr. Smith.” D. 53 (Appellant Suppl. Br. at 20–21). I will address the testimony of Mausser and Smith in turn and evaluate counsel’s investigation and preparation as it relates to each witness.

i. Cynthia Mausser

Rather than consider the facts of this case, the Majority instead insists that defense counsel’s investigation related to Mausser was presumptively reasonable because there was “at least some prior investigation” and “defense counsel were so confident that the prosecution was incorrect that they were ready to testify under oath that that is not what [they] were told.” Maj. Op. at 24 (quotations omitted). But, for the reasons discussed below, defense counsel’s confidence only serves to underscore the lack of reasonable investigation.

During Davis’s counsel’s opening statement, counsel told the three-judge panel to expect Mausser, the Chair of the Ohio Parole Board, to explain that because of Davis’s “prior record[] [and] the fact that he committed the second murder[] while he was still on parole from the first murder, . . . he will not be paroled.” R. 5-7 (2009 Mitigation Hr’g Tr. Vol. I at 36–37) (Page ID #8225–26). Counsel intended to use this testimony to argue that, although a life without the possibility of parole was not available as a sentencing option, it was “a very de facto possibility in this case.” *Id.* at 37 (Page ID #8226). Counsel were aware that, because the case had been pending for approximately 25 years and Davis was requesting a sentence of life with parole eligibility after serving 30 years, the panel was concerned that Davis would be parole eligible soon. *Id.* at 38 (Page ID #8227).

In her postconviction affidavit, Mausser explained that she “never told defense counsel that Mr. Davis would never be paroled.” R. 4-46 (Postconviction Ex. F ¶ 4) (Page ID #6365). She explained that she “cannot predict” the outcome of Davis’s parole case, in part, because she cannot “predict what other Parole Board members would do.” *Id.* ¶ 6 (Page ID #6365). Likewise, Mausser could not even testify as expected regarding her own opinion because “[d]efense counsel did not provide [her with] Mr. Davis’s entire file which would [have been] necessary . . . to give any opinion on whether [she] would likely vote to parole Mr. Davis.” *Id.* ¶ 7 (Page ID #6366); *see also* R. 5-7 (2009 Mitigation Hr’g Tr. Vol. I at 181–82) (Mausser)

No. 21-3404

Davis v. Jenkins

Page 55

(Page ID #8371–72) (testifying before the panel that she had only “a very small amount of the information” that she would need to give an accurate opinion).

Before counsel presented Mausser’s testimony during the 2009 mitigation hearing, the state objected, arguing that the prosecutor had “spoken to Ms. Mausser” and that, because the parole board included “seven to twelve people,” Mausser told the state “that she would not be in a position to be able to testify whether or not she would vote for parole” and that “she could not say what a majority of the board would do.” *Id.* at 133 (Page ID #8323). Defense counsel then conceded that they would “be *in a position of surprise and affirmative damage* if she testifie[d] as the prosecution . . . suggest[ed] because [defense counsel], in fact, interviewed her four months ago and . . . that [wa]s not what [they] were told.” *Id.* at 137 (Page ID #8327) (emphasis added).

Mausser then testified “as the prosecution . . . suggest[ed].” *Id.* She initially stated that certain aspects of Davis’s case—such as his prior murder conviction and the fact that his later crime occurred while he was on probation—would negatively impact his parole request. *Id.* at 154–55, 159–61 (Mausser) (Page ID #8344–45, 8349–51). She also explained that Davis would score negatively in terms of his criminal history and that he would likely not be granted parole at his first parole hearing. *Id.* at 154–55, 175 (Mausser) (Page ID #8344–45, 8365). Mausser hypothesized that someone like Davis “would likely spend a large portion of the remainder of [his] life in prison.” *Id.* at 175 (Mausser) (Page ID #8365).

On cross examination, however, she revealed that, although she had access to some of Davis’s file, she did not have most of the materials that would be relevant for her to make a parole determination. *Id.* at 181–82 (Mausser) (Page ID #8371–72). If not granted parole at the initial hearing, Mausser explained, Davis would be eligible for a second hearing within ten years. *Id.* at 179–80 (Mausser) (Page ID #8369–70). Mausser also stated that she could be terminated at any point and that she could not predict how any of the other members of the parole board would vote. *Id.* at 177, 183–84 (Mausser) (Page ID #8367, 8373–74). Finally, and most notably, Mausser explained that she could not state with “any level of certainty” how the board would vote on Davis’s parole eligibility or even how she would vote when Davis became eligible for parole. *Id.* at 188–89 (Mausser) (Page ID #8378–79).

In the sentencing opinion, the court emphasized that “Mausser could not . . . state with any certainty if or when [Davis] might be paroled if th[e] Court imposed a sentence less than death.” R. 4-39 (2009 Sent’g Op. at 6–7) (Page ID #4929–30). When weighing the mitigating and aggravating circumstances, the panel reasoned that Mausser’s testimony was “highly speculative and unconvincing and entitled to no weight.” *Id.* at 10 (Page ID #4933).

This court has previously explained that counsel’s performance can be considered constitutionally deficient due to failure to conduct a reasonable investigation if counsel promises the factfinder evidence that they cannot deliver. In *English*, 602 F.3d at 728–29, we held that counsel was ineffective because “it was objectively unreasonable for English’s trial attorney to decide before trial to call [English’s then-girlfriend] as a witness, make that promise to the jury, and then later abandon that strategy, all without having fully investigated [his then-girlfriend] and her story prior to opening statements.” Likewise, in *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000), we explained that “defense counsel’s failure to have questioned [the witness] in this regard prior to trial is inexcusable” because “[d]efense counsel should have known [the witness’s] opinion on this ultimate issue and should have prepared accordingly.” These cases are not only analogous to the facts at issue here, but they also align with Supreme Court’s instruction that the “principal concern” is “not whether counsel should have presented” certain mitigation evidence, but instead “whether the investigation supporting counsel’s decision . . . *was itself reasonable*” such that counsel’s strategic decision was an informed one. *Wiggins*, 539 U.S. at 522–23; *see also Williams v. Taylor*, 529 U.S. 362, 395–96 (2000). Today, the Majority makes the first inquiry its principal concern while wholly ignoring the latter.

Although counsel spoke with Mausser before trial, it is apparent that counsel did not know that she would testify that she could not determine whether Davis would ever be paroled. R. 5-7 (2009 Mitigation Hr’g Tr. Vol. I at 137) (Page ID #8327). Thus, counsel either did not ask Mausser this key question that framed their entire mitigation case and nonetheless called this witness without knowing her “opinion on this ultimate issue,” *Combs*, 205 F.3d at 288, or counsel asked Mausser this question and knew the answer was not what counsel promised during opening, *English*, 602 F.3d at 728–29. This is reinforced by Mausser’s affidavit, in which she states that counsel either never asked her this question or, if they did, she did not give the answer

that they promised during their opening argument. See R. 4-46 (Postconviction Ex. F ¶¶ 4, 6) (Page ID #6365). Either way, counsel failed to conduct a reasonable investigation and counsel's "confidence" in their belief that Mausser would testify differently does not make their investigation sufficient. Cf. Maj. Op. at 24. Accordingly, I would find that counsel performed deficiently because counsel failed adequately to investigate and prepare for Mausser's testimony.

ii. Robert Smith

After presenting Mausser's testimony, counsel compounded the above-described error with the testimony they elicited from Smith. Despite the concern that Davis could be paroled, Smith did not testify about whether Davis would succeed outside of prison. Instead, Smith diagnosed Davis with borderline personality disorder and alcohol dependence at the time of the offense. R. 5-8 (2009 Mitigation Hr'g Tr. Vol. III at 248) (Page ID #8438). Smith described many of the characteristic behaviors of individuals with borderline personality disorder, including "very dramatic mood swings" and "unwarranted aggressive behavior that comes about with minor provocation." *Id.* at 257, 261 (Page ID #8447, 8451). And Smith noted that, in people with these disorders, there is often "[i]mpulsivity that is severe, they act and then think about it afterwards. They are not really considering their actions and what the consequences will be." *Id.* at 263 (Page ID #8453); see also *id.* ("It is a chronic disorder."). Finally, Smith explained that Davis had adjusted and would continue positively to adjust in a structured prison environment but that Davis would have struggled to adjust in the community if there was no clear structure. *Id.* at 258 (Page ID #8448). Along those same lines, Smith testified that "Borderlines and people with alcohol dependence do very well in a structured environment," explaining:

"[I]n a prison setting [they] don't have a lot of decisions to make, [they] don't have lots of opportunities to act out and [they] also don't form lots of relationships. [They] are pretty much restricted in what [they] get to do, when [they] get to do it, and [they] have supervision at all times regarding what [they] [are] doing."

Id. at 283–84 (Page ID #8473–74).

When considering Smith's testimony, the resentencing court identified a glaring deficiency: "Smith failed to forecast [Davis's] behavior or recommend a treatment plan, should

No. 21-3404

Davis v. Jenkins

Page 58

he eventually be released from prison.” R. 4-39 (2009 Sent’g Op. at 8) (Page ID #4931). In his postconviction affidavit, Smith explained that he was not aware that his opinion about whether Davis would succeed on parole was relevant. R. 4-46 (Postconviction Ex. I ¶ 11) (Page ID #6382). Smith stated that, had he been asked, he would have testified that Davis’s experience living in a structured setting for approximately 25 years at the time of resentencing had taught Davis “to accept external rules and expectations” and had allowed Davis to “develop[] coping strategies to deal effectively with frustration, annoyance, disappointment, etc.” *Id.* ¶ 12 (Page ID #6382).

The Majority claims that counsel’s failure to elicit this testimony was reasonable because “Mausser’s testimony was that Davis would likely not be paroled before the end of his natural life.” Maj. Op. at 24. But, as already explained, Mausser’s testimony was wholly inconclusive on whether Davis would be paroled before the end of his natural life. Thus, Smith’s testimony about Davis’s potential for success if he were to remain incarcerated does not impact the negative effects of the lack of testimony about whether Davis would succeed if released on parole. Indeed, without the latter testimony from Smith, Smith and Mausser’s combined testimony could support only a sentence of life without the possibility of parole, and that sentence was not an available option. Instead, the closer option to life without the possibility of parole—indeed the sentence that was ultimately imposed—was a death sentence. For the reasons explained above, I would find that counsel’s investigation and preparation of Smith’s testimony was also constitutionally deficient.

c. Prejudice

Because the Ohio Court of Appeals held that trial counsel’s performance was not deficient, it did not address the prejudice prong of Davis’s claim, and thus I review de novo whether Davis was prejudiced by trial counsel’s performance. *See Wiggins*, 539 U.S. at 534; *Williams v. Anderson*, 460 F.3d 789, 804 (6th Cir. 2006). To show prejudice, Davis must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. This probability must be “sufficient to undermine confidence in the outcome.” *Id.*

No. 21-3404

Davis v. Jenkins

Page 59

Here, Davis was prejudiced by trial counsel's deficient performance. The sentencing panel described Mausser's testimony as "highly speculative and unconvincing" and determined it was "entitled no weight" as a mitigating factor. R. 4-39 (2009 Sent'g Op. at 10) (Page ID #4933). Following Davis's second sentencing hearing, however, without Mausser's testimony, the Ohio Supreme Court found that the probability that Davis would never be paroled if he were not sentenced to death was entitled to "some weight in mitigation." *State v. Davis*, 584 N.E.2d 1192, 1198 (Ohio 1992) (*Davis IV*). Including Mausser's testimony as they did, therefore, demonstrably detracted from Davis's case in mitigation. The 2009 panel's sentencing opinion also highlighted the fact that "Dr. Smith failed to forecast Defendant's behavior or recommend a treatment plan, should he eventually be released from prison," which demonstrates that such evidence would have been beneficial to the panel in weighing mitigation evidence. R. 4-39 (2009 Sent'g Op. at 8) (Page ID #4931). Thus, Dr. Smith's testimony did in fact prejudice Davis.

The Majority fails to discuss the testimony that Dr. Smith would have provided, had trial counsel effectively prepared him for the parole issue. Specifically, Dr. Smith would have testified that "with time, maturity, and freedom from drugs and alcohol, someone with Borderline Personality Disorder will gain insight and develop coping skills that would enable him to adjust to living in the outside world." R. 4-46 (2011 Postconviction Pet. Ex. I, Smith Aff. ¶ 12) (Page ID #6382). He also would have testified that Davis "at the present time is a different person than he was when he was admitted to [the Ohio Department of Rehabilitation and Correction] in 1984." *Id.* Furthermore, Dr. Smith would have testified that:

Having been in a structured setting for the past 27 years, [Davis] has learned to accept external rules and expectations regarding his behavior. He has developed coping strategies to deal effectively with frustration, annoyance, disappointment, etc. He has learned to weigh the potential consequences of his decisions and actions.

Id. Finally, he would have "explained that the parole process itself would provide [Davis] with significant structure and guidelines that would assist him in successfully re-entering society." *Id.* ¶ 13) (Page ID #6382).

No. 21-3404

Davis v. Jenkins

Page 60

This testimony would have left the state-court panel with a substantially different picture of Davis than Smith’s actual testimony provided, because his actual testimony focused on Davis’s state of mind in 1984 such that Smith did not explain how Davis had changed in the intervening years and why Davis could now be paroled without necessarily presenting a danger to the community. Smith’s proffered testimony would have strengthened the evidence of Davis’s good behavior while in prison, because it would have established how his behavior was demonstrative of broader changes that Davis had made that would also allow him to live successfully outside of a carceral environment. Instead, the state-court panel was left with the impression that Davis would be dangerous were he to be paroled, and that, as a result of Mausser’s testimony, imposing a death sentence was the only way to prevent his release.

The issue of whether Davis would be paroled, and if so, whether he would present a danger to society was plainly a major factor in the panel’s decision regarding whether to impose a death sentence. The errors that trial counsel made in investigating and preparing Mausser’s and Smith’s testimony are substantial enough to undermine any confidence in the outcome of the sentencing hearing. Trial counsel’s deficient performance likely negatively impacted the weight the panel assigned to several of Davis’s mitigating factors, and thus there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

Perhaps recognizing that counsel’s errors prejudiced Davis, the Majority contends that “Davis cannot show prejudice because the [Supreme Court of Ohio’s] independent review . . . cured any error” by “g[iving] weight to the ‘likelihood that Davis will never be released from prison.’” Maj. Op. at 25 (quoting *Davis XIV*, 9 N.E.3d at 1056). Even if the Warden did not forfeit this argument by failing to raise it at any point before this case reached en banc review, and even assuming that it is proper to consider the Ohio Supreme Court opinion as opposed to the Ohio Court of Appeals opinion that assessed Davis’s Failure-to-Investigate Claim, *see* D. 59 (Appellant Suppl. Reply Br. at 13), this argument lacks merit. The Ohio Supreme Court first determined that it “afford[ed] *no weight* to the testimony of the chair of the parole board regarding the likelihood of parole for a person in Davis’s situation” because the “testimony was speculative.” *Davis XIV*, 9 N.E.3d at 1056 (emphasis added). In other words, it came to the

same conclusion as the sentencing court on this issue. *See* R. 4-39 (2009 Sent’g Op. at 10 (Page ID #4933)). The court then determined that it was likely that, based on Davis’s age, he would not be released from prison and that “deserve[d] some weight.” *Davis XIV*, 9 N.E.3d at 1056. The court determined only that it was *possible* that Davis would not be released on parole. Thus, this “weighing” does not actually address the prejudice created by Mausser’s testimony because the possibility of parole remained.

Moreover, the Ohio Supreme Court necessarily could not consider the evidence that Smith and Mausser *did not present*. Had Mausser been provided the relevant materials and been properly prepared, she would have been able to testify credibly to whether she would be likely to vote to grant Davis parole, such that her opinion could have been given at least some—as opposed to no—weight. *See Davis XIV*, 9 N.E.3d at 1056; R. 4-46 (Postconviction Ex. F ¶ 7) (Page ID #6366). Smith’s additional testimony would have explained how Davis would have adjusted if released, which remained a concern to the Ohio Supreme Court. The reweighing of evidence, under these circumstances, therefore, cannot cure the prejudice because the court did not address the issues created by Mausser’s testimony and could not assess testimony from both Mausser and Smith that was not in the record. *Cf. Lundgren v. Mitchell*, 440 F.3d 754, 782–83 (6th Cir. 2006) (finding that the state court cured any potential prejudice because it reweighed the evidence and omitted the alleged prosecutorial misconduct from the otherwise complete record); *Post v. Bradshaw*, 621 F.3d 409, 419–20 (6th Cir. 2010) (finding that “[a]ny error was cured when the Ohio Supreme Court . . . independently reweighed the aggravating and mitigating factors and affirmed the sentence of death” because the state court omitted the improper evidence from the otherwise complete record). Accordingly, for the reasons explained above, Davis was prejudiced by counsel’s failure to investigate and prepare Mausser’s and Smith’s testimony. I would therefore hold that Davis is entitled to relief on this claim.

II. CONCLUSION

Today’s Majority finds both that Davis must be held to his 1984 jury waiver and that the waiver was knowing and voluntary, despite the fact that the promise that induced Davis’s waiver is not being enforced. Excising the promise of the three-judge panel from the jury waiver, the Majority enforces the waiver against Davis while simultaneously holding that the aspect of the

Case: 21-3404 Document: 66-2 Filed: 09/05/2024 Page: 82 (91 of 122)
Case: 21-3404 Document: 64-2 Filed: 08/30/2024 Page: 62 (82 of 93)

Case: 21-3404 Document: 63-2 Filed: 08/20/2024 Page: 62 (64 of 65)

No. 21-3404

Davis v. Jenkins

Page 62

waiver that benefits Davis is not enforceable. At bottom, the Majority creates a rule that allows death-eligible defendants to be induced by unenforceable promises to waive their constitutional right to a jury trial, leaving these individuals with no recourse to vindicate their constitutional rights. This plainly contradicts binding Supreme Court precedent. Likewise, the Majority finds that the state court properly applied *Strickland*'s presumption to counsel's failure to move for recusal and decision to present incomplete mitigating evidence, even though the state court *never assessed* the adequacy of counsel's investigation and preparation. This, too, conflicts with longstanding Supreme Court precedent. I therefore respectfully dissent.

Case: 21-3404 Document: 62 Filed: 08/19/2024 Page: 1

No. 21-3404

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

VON CLARK DAVIS, *Petitioner-Appellant*,
v.
WARDEN, *Chillicothe Correctional Institution*, *Respondent*.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CASE NO. 2:16-cv-00495**

**PETITIONER-APPELLANT VON CLARK DAVIS'S
MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING**

THIS IS A DEATH PENALTY CASE

Joseph Medici

Federal Public Defender

Erin G. Barnhart (0079681)

Lead/Trial Counsel

Jordan S. Berman (0093075)

Co-Counsel

Assistant Federal Public Defenders

Office of the Federal Public Defender for the Southern District of Ohio

Capital Habeas Unit

10 West Broad Street, Suite 1020

Columbus, OH 43215-3469

Telephone: (614) 469-2999

Facsimile: (614) 469-5999

Erin_Barnhart@fd.org

Jordan_Berman@fd.org

Counsel for Petitioner-Appellant Von Clark Davis

Now that “*Chevron* is overruled,” *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, ___, 144 S. Ct. 2244, 2273 (2024), *Loper* and its concurring opinions raise a fundamental question of exceptional importance: whether AEDPA deference, like *Chevron* deference, unconstitutionally “compels judges to abdicate their Article III ‘judicial Power.’” *Id.* at 2274 (Thomas, J., concurring) (quoting § 1). (See Davis’s 28(j) letter, R. 61.) This consequential issue warrants this Court’s attention and briefing now, especially where it is likely to recur in the numerous habeas cases which are or will be pending before this Court in the near future.

The majority and concurring opinions in *Loper* emphasize that the judicial function requires federal courts to exercise “independent judgment,” free from constraints imposed by non-Article III decisionmakers. *See Loper*, 144 S. Ct. at 2257; *id.* at 2274 (Thomas, J., concurring) (same); *id.* at 2283 (Gorsuch, J., concurring) (the Framers “made a considered judgment to build judicial independence into the Constitution’s design.”). As Justices Thomas and Gorsuch have explained, *Chevron*’s requirement that Article III courts “defer” to Article II agencies’ interpretations of law thus violates the Constitution. *Id.* at 2274 (Thomas, J., concurring) (“Because the judicial power requires judges to exercise their independent judgment, the deference that *Chevron* requires contravenes Article III’s mandate.”); *id.* at 2285 (Gorsuch, J., concurring) (“*Chevron* deference . . . precludes

courts from exercising the judicial power vested in them by Article III to say what the law is.”).

Loper’s elimination of *Chevron* deference shows that AEDPA deference is also impermissible. Consider Judge Easterbrook’s opinion about the constitutionality of AEDPA in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev’d on other grounds*, 521 U.S. 320 (1997). Judge Easterbrook reasoned that AEDPA deference could not violate Article III since if the court were to reach that conclusion, it would mean, among other things, “that deference in administrative law under *Chevron* is unconstitutional.” *Id.* at 871. He was correct: *Chevron* deference and AEDPA deference rise and fall together. Now that there is “a tombstone on *Chevron* no one can miss,” *Loper*, 144 S. Ct. at 2275 (Gorsuch, J., concurring), AEDPA deference must face the identical fate.

If an Article II bureaucrat’s “reasonable” interpretation of federal law cannot constrain an Article III court’s independent judgment, *id.* at 2285 (Gorsuch, J., concurring), neither can a “reasonable” decision made by a non-Article III state court. Just as “deference” to non-Article III civil servants is prohibited by the Constitution, so too is “deference” to non-Article III state court judges under 28 U.S.C. §2254(d). *See also Lindh*, 96 F.3d at 890 (Ripple, J., dissenting) (AEDPA deference violates Article III because, under § 2254(d), “the lower federal court must accept as the federal rule of decision the state court’s view as preferable to its own.”).

As Justice Gorsuch pointed out, the Framers set apart Article III judges from state court judges to ensure absolute judicial independence. *Id.* at 2284. That is the genius of Article III. The Framers knew that anything less than independent adjudications posed a threat to individual liberty and enforcement of the Constitution and federal law. That is especially true where non-Article III actors are not insulated from political pressures. *See* The Federalist Papers, No. 81 (“State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.”).

This Court’s adjudication of Davis’s case by applying § 2254(d) deference would not provide the *independent adjudication* that Article III requires. Rather, § 2254(d) would demand that this Court’s Article III decision-making process and the outcome of this case be subjected to—and fully *dependent upon*—what non-Article III actors said or did and how *they* viewed or interpreted the Constitution, the same way *Chevron* made Article III adjudications dependent upon administrators’ interpretations of federal law. Because it makes the Article III judges of this Court beholden to state court judges’ interpretation and application of the Constitution, § 2254(d) violates Article III. Article III’s *independence* requirement does not permit an adjudication of Davis’s rights that *depends upon* (and incorporates) the views of state court judges who, like Article II bureaucrats, lack the independence of Article III judges.

Accordingly, and to quote Justice Thomas, “the type of deference required by [AEDPA] violates the Constitution,” *Loper*, 144 S. Ct. at 2275 (Thomas, J., concurring), because it disrupts the structural safeguards the Framers designed to provide Americans with “practical and real protections for individual liberty,” *id.* at 2274. With Davis’s life and liberty at stake, this Court must provide Davis *de novo* “plenary Article III adjudication” of the question whether he is in custody in violation of the Constitution, 28 U.S.C. § 2241(c)(3), rather than providing the less-than-robust, non-independent adjudication superimposed on this inquiry by § 2254(d). *See Axon Enter. v. FTC*, 598 U.S. 175, 203 (2023) (Thomas, J., concurring) (“If private rights are at stake, the Constitution likely requires plenary Article III adjudication.”).

This motion’s limited discussion of *Loper* and Article III, and Davis’s even more abbreviated discussion of such issues in his Rule 28(j) letter, (R. 61), confirm that *Loper*, the concurring opinions of Justices Thomas and Gorsuch, and the *Lindh* opinions of Judges Easterbrook and Ripple warrant further exploration by the parties and this Court. Davis’s truncated discussion of these profound issues in his Rule 28(j) letter is not adequate under the circumstances. *See Covenant Medical Ctr. v. Burwell*, 603 F. App’x 360, 363 (6th Cir. 2015) (noting limited nature of a Rule 28(j) letter as insufficient for a full and fair adjudication of an issue).

Davis has explained why he should prevail even under the deference demanded by § 2254(d). (*See* Davis’s Supp. Br. at 12-13, 20-25, 27-28; Supp. Reply Br. at 6, 11-12, 14-17.) In light of the Supreme Court’s intervening decision in *Loper*, this Court should order Davis and the Warden to file supplemental briefs addressing whether Davis is entitled to *de novo* review and to relief for the additional or alternative reason that AEDPA deference under 28 U.S.C. § 2254(d) violates Article III of the Constitution. *See e.g., In re MCP*, No. 24-7000, 2024 U.S. App. Lexis 15890 *6 (6th Cir. June 28, 2024) (ordering supplemental briefing in light of *Loper*); *United States v. Cogdill*, No. 22-5603, 2024 U.S. App. Lexis 18756 (6th Cir. July 29, 2024) (ordering supplemental briefing to address impact of *Erlinger v. United States*, 602 U.S. ___, 144 S. Ct 1840 (2024)); *United States v. Williams*, No. 23-6115, R. 14 (6th Cir. June 26, 2024) (ordering supplemental briefing on impact of *United States v. Rahimi*, 602 U.S. ___, 144 S. Ct. 1889 (2024), limited to 20 pages).

Respectfully submitted,

Joseph Medici
Federal Public Defender

By

/s/ Erin G. Barnhart
Erin G. Barnhart (0079681)
Trial attorney
Jordan S. Berman (0093075)
Co-counsel
Assistant Federal Public Defenders

Federal Public Defender's Office
for the Southern District of Ohio
Capital Habeas Unit
10 W. Broad Street, Suite 1020
Columbus, Ohio 43215
Phone: (614) 469-4141
erin_barnhart@fd.org
jordan_berman@fd.org

Counsel for Petitioner-Appellant

Case: 21-3404 Document: 66-2 Filed: 09/05/2024 Page: 90
Case: 21-3404 Document: 64-3 Filed: 08/30/2024 Page: 8

(99 of 122)
(90 of 93)

Case: 21-3404 Document: 62 Filed: 08/19/2024 Page: 8

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2024, I electronically filed the foregoing **PETITIONER-APPELLANT VON CLARK DAVIS'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING** with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send notification of such filing to the email address of opposing counsel on file with the Court.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)
Assistant Federal Public Defender
Co-counsel for Petitioner-Appellant



Case: 21-3404 Document: 61 Filed: 08/14/2024 Page: 1

FEDERAL PUBLIC DEFENDER SOUTHERN DISTRICT OF OHIO

Natalie Olmstead
CHU Chief

Joseph Medici
Federal Public Defender

Richard Monahan
First Assistant

OFFICES

COLUMBUS | 10 West Broad Street, Suite 1020 • Columbus, Ohio 43215 • 614-469-2999
CINCINNATI | 250 East 5th Street, Suite 350 • Cincinnati, Ohio 45202 • 513-929-4834
DAYTON | 1 South Main Street, Suite 490 • Dayton, Ohio 45402 • 937-225-7687

August 14, 2024

Kelly L. Stevens
Clerk of the Court
United States Court of Appeals
for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202-3988

Re: *Davis v. Jenkins*, 6th Cir. No. 21-3404
Fed. R. App. P. 28(j) Notice of Supplemental Authority

Dear Clerk Stevens:

We respectfully provide notice of *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, 144 S.Ct. 2244 (2024).

Loper overruled the “*Chevron* Doctrine,” holding, under the Administrative Procedure Act (APA), federal courts must not defer to agency interpretations of statutes. *See* 144 S. Ct. at 2263-70. *Loper* explained that under Article III, the federal judiciary must independently declare the law, *id.* at 2257-58, and the APA incorporates this understanding of the judicial function, *id.* at 2261-62.

Justice Thomas emphasized *Chevron* unconstitutionally “compels judges to abdicate their Article III ‘judicial Power.’” *Id.* at 2274 (Thomas, J., concurring) (quoting § 1). Justice Gorsuch also noted federal courts did not traditionally “defer” to “reasonable” interpretations of law propounded by non-Article III agencies. *Id.* at 2283 (Gorsuch, J., concurring). Critically, such “deference” fails to insulate Article III adjudications “from power and politics . . . as the federal judicial oath demands,” unfairly tilting the scales of justice in favor of “the most powerful.” *Id.* at 2285-86.

Davis has argued that he is entitled to *de novo* review. *See* Supp. Br. at 12-13, 20-25, 27-28; Supp. Reply Br. at 6, 11-12, 14-17. *Loper* provides an alternative basis for granting Davis *de novo* review and relief.

FEDERAL PUBLIC DEFENDER
SOUTHERN DISTRICT OF OHIO

Section 2254(d) violates Article III in the same way as *Chevron* when it requires federal courts to defer to interpretations or applications of federal law by non-Article III actors (state courts) which are not “unreasonable.” *See Loper*, 144 S. Ct. at 2283 (Gorsuch, J., concurring). Just as this Article III Court is not bound by “reasonable” legal interpretations of federal bureaucrats, it cannot be bound by reasonable-but-incorrect legal decisions of *state* entities. This is especially true where §2254(d) deference compromises the Constitution’s “practical and real protections for individual liberty,” which depend on fidelity to the separation of powers the Framers enshrined in the Constitution. *See id.* at 2274 (Thomas, J., concurring) (internal quotation marks omitted). Article III courts are “not at liberty to surrender, or to waive” their duty to independently interpret laws. *Id.* at 2283 (Gorsuch, J., concurring) (internal quotation marks omitted); *see also id.* at 2258 (majority op.) (same).¹

Respectfully submitted,

Joseph Medici

Federal Public Defender

by

/s/ Erin G. Barnhart

Erin G. Barnhart (0079681)

Trial attorney

Jordan S. Berman (0093075)

Co-counsel

Assistant Federal Public Defenders

Federal Public Defender’s Office

for the Southern District of Ohio

Capital Habeas Unit

10 W. Broad Street, Suite 1020

Columbus, Ohio 43215

Phone: (614) 469-4141

erin_barnhart@fd.org

jordan_berman@fd.org

Counsel for Petitioner-Appellant

¹ Davis is unable to fully set forth the argument that *Loper* demonstrates the unconstitutionality of AEDPA deference within the limits of this Rule 28(j) letter. Accordingly, he will also submit a motion for supplemental briefing requesting adequate space in which to do so.

Case: 21-3404 Document: 66-2 Filed: 09/05/2024 Page: 93
Case: 21-3404 Document: 64-4 Filed: 08/30/2024 Page: 3

(102 of 122)
(93 of 93)

Case: 21-3404 Document: 61 Filed: 08/14/2024 Page: 3

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2024, I electronically filed the foregoing **Federal Rule of Appellate Procedure 28(j) letter** with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send notification of such filing to the email address of opposing counsel on file with the Court.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)

Assistant Federal Public Defender

Co-counsel for Petitioner-Appellant

Case No. 17-5772

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**UNITED STATES OF AMERICA,
Plaintiff-Appellee,**

v.

**JEFFERY HAVIS,
Defendant-Appellant.**

On appeal from the United States District Court
for the Eastern District of Tennessee

MOTION FOR *EN BANC* RECONSIDERATION

Andrew Byerly Birge, United States Attorney, Western District of Michigan
Donald Q. Cochran, United States Attorney, Middle District of Tennessee
Russell M. Coleman, United States Attorney, Western District of Kentucky
D. Michael Dunavant, United States Attorney, Western District of Tennessee
Robert M. Duncan, Jr., United States Attorney, Eastern District of Kentucky
Benjamin C. Glassman, United States Attorney, Southern District of Ohio
Justin E. Herdman, United States Attorney, Northern District of Ohio
J. Douglas Overbey, United States Attorney, Eastern District of Tennessee
Matthew Schneider, United States Attorney, Eastern District of Michigan

Debra A. Breneman
Assistant United States Attorney
800 Market Street, Suite 211, Knoxville, TN 37902
(865) 545-4167

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REASONS TO VACATE OR MODIFY THE OPINION 3

 I. The Court relied heavily upon an incorrect factual premise. 3

 II. The Court erroneously concluded that Application Note 1
 is inconsistent with, and an improper expansion of, the text
 of § 4B1.2(b)..... 9

CERTIFICATE OF COMPLIANCE 13

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Cases

<i>Azar v. Allina Health Servs.</i> , 139 S. Ct. 1804 (2019)	10-11
<i>Bragdon v. Abbott</i> , 524 U.S. 624 (1998)	8-9
<i>Carver v. Lehman</i> , 558 F.3d 869 (9th Cir. 2009).....	1
<i>Stinson v. United States</i> , 508 U.S. 36 (1993)	9
<i>United States v. Allen</i> , 711 F. App'x 781 (6th Cir. 2017)	2
<i>United States v. Benson</i> , No. 93-5493, 1994 WL 188504 (6th Cir. May 12, 1994)	2
<i>United States v. Chavez</i> , 660 F.3d 1215 (10th Cir. 2011).....	2
<i>United States v. DeLeon</i> , 330 F.3d 1033 (8th Cir. 2003).....	6
<i>United States v. Dolt</i> , 27 F.3d 235 (6th Cir. 1994).....	2
<i>United States v. Evans</i> , 699 F.3d 858 (6th Cir. 2012).....	2
<i>United States v. Galloway</i> , 439 F.3d 320 (6th Cir. 2006).....	2
<i>United States v. Havis</i> , No. 17-5772, __ F.3d __, 2019 WL 2376070 (6th Cir. June 6, 2019) (<i>en banc</i>) (<i>per curiam</i>).....	<i>passim</i>
<i>United States v. Hughley</i> , 192 F. App'x 447 (6th Cir. 2006)	2
<i>United States v. Landers</i> , 58 F. App'x 108 (6th Cir. 2003)	2
<i>United States v. Lange</i> , 862 F.3d 1290 (11th Cir. 2017)	2
<i>United States v. Larry</i> , No. 96-2438, 1997 WL 810004 (6th Cir. Dec. 30, 1997)	2

<i>United States v. Mendoza-Figueroa</i> , 65 F.3d 691 (8th Cir. 1995)	2
<i>United States v. Nieves-Borrero</i> , 856 F.3d 5 (1st Cir. 2017)	2
<i>United States v. Rone</i> , 147 F. App'x 490 (6th Cir. 2005)	2
<i>United States v. Solomon</i> , 592 F. App'x 359 (6th Cir. 2014)	2
<i>United States v. Winstead</i> , 890 F.3d 1082 (D.C. Cir. 2018).....	2

Statutes

21 U.S.C. § 802(8).....	9
21 U.S.C. § 802(11).....	9
21 U.S.C. § 841.....	10, 11
28 U.S.C. § 994(h).....	3, 10
28 U.S.C. § 994(p).....	8

Rules, Regulations, Sentencing Guidelines, and Other Materials

Brief of the United States, <i>Stinson v. United States</i> , 1993 WL 469118 (Feb. 11, 1993).....	9
<i>Comments of the Federal Defenders on the 1989 Proposed Guidelines Amendments</i>	6
Fed. R. App. P. 35(a)	1
H.R. 2063, 104th Cong., § 2(3) (1995).....	4
H.R. 2259, 104th Cong. § 1(3) (1995).....	4
Sentencing Act of 1987, § 21, Pub. L. 100-182, 101 Stat. 1266 (1987)	5

Transcript of U.S. Sent’g Comm’n Public Hr’g (Apr. 7, 1989)	6
U.S.S.G. § 4B1.2.....	<i>passim</i>
U.S. Sent’g Comm’n, Rules of Practice & Procedure 4.1 (2016)	3
133 Cong. Rec. 31950 (1987).....	5
51 Fed. Reg. 35080 (Oct. 1, 1986).....	4
52 Fed. Reg. 3920 (Feb. 6, 1987).....	4
52 Fed. Reg. 18046 (May 13, 1987).....	4
52 Fed. Reg. 44674 (Nov. 20, 1987)	4, 5
53 Fed. Reg. 1286 (Jan. 15, 1988)	5
53 Fed. Reg. 15530 (Apr. 29, 1988).....	5
54 Fed. Reg. 9122 (Mar. 3, 1989).....	6
54 Fed. Reg. 21348 (May 17, 1989).....	7
60 Fed. Reg. 14054 (Mar. 15, 1995)	7
60 Fed. Reg. 25074 (May 10, 1995).....	7
62 Fed. Reg. 152 (Jan. 2, 1997).....	7
62 Fed. Reg. 26616 (May 14, 1997).....	7
65 Fed. Reg. 7080 (Feb. 11, 2000).....	7
65 Fed. Reg. 26880 (May 9, 2000)	7
66 Fed. Reg. 59330 (Nov. 27, 2001).....	7
67 Fed. Reg. 37476 (May 29, 2002).....	7

68 Fed. Reg. 75340 (Dec. 30, 2003).....	7
69 Fed. Reg. 28994 (May 19, 2004).....	7
72 Fed. Reg. 4372 (Jan. 30, 2007)	7
72 Fed. Reg. 28558 (May 21, 2007).....	7
74 Fed. Reg. 4802 (Jan. 27, 2009)	7
74 Fed. Reg. 21750 (May 8, 2009)	7
80 Fed. Reg. 2570 (Jan. 16, 2015)	8
80 Fed. Reg. 25782 (May 5, 2015)	8
80 Fed. Reg. 49314 (Aug. 17, 2015)	8
80 Fed. Reg. 70294 (Nov. 13, 2015).....	8
81 Fed. Reg. 4741 (Jan. 27, 2016)	8

The United States seeks reconsideration of the *en banc* decision in this case, based on this Court’s inherent discretion to vacate or modify an opinion before issuance of the mandate. *See, e.g., Carver v. Lehman*, 558 F.3d 869, 878-79 (9th Cir. 2009) (noting that “opinions can be . . . amended or withdrawn” until the mandate issues); *see also* Fed. R. App. P. 35(a) (providing that matters may be “heard *or reheard* by the court of appeals *en banc*”) (emphasis added).

INTRODUCTION

This Court recently held that “[t]he Guidelines’ definition of ‘controlled substance offense’ does not include attempt crimes,” and that the Sentencing Commission exceeded its authority by issuing commentary that listed attempts and other inchoate offenses as “controlled substance offenses” for purposes of U.S.S.G. § 4B1.2(b). *United States v. Havis*, No. 17-5772, __ F.3d __, 2019 WL 2376070, at *4 (6th Cir. June 6, 2019) (*en banc*) (*per curiam*). The Court agreed with defendant Jeffery Havis that the commentary—Application Note 1 to § 4B1.2—“*add[ed]* an offense not listed in the guideline” without subjecting that change to the notice-and-comment requirements of the Administrative Procedure Act or Congressional review. *Id.* at *2-*3 (emphasis original). (*See also* Doc. 34, Havis Petition for Rehearing *En Banc* at 6-8, 12-13; *but see* Doc. 59, Havis Response at 3 (asserting that “commentary’s validity in no way depended on whether the Commission chose to send it to Congress”).) In

doing so, the Court discarded a quarter-century of circuit precedent¹ and widened an inter-circuit split² about whether attempt offenses are controlled substance offenses under § 4B1.2(b), without the benefit of comprehensive briefing or argument to the full Court.

As detailed below, this Court relied heavily on an incorrect factual premise, supplied by Havis, about the process by which the Sentencing Commission adds or amends commentary to the Guidelines.³ The Court also

¹ See, e.g., *United States v. Solomon*, 592 F. App'x 359, 361 (6th Cir. 2014) (“Application Note 1 to § 4B1.2 of the Guidelines makes clear that ‘controlled substance offense’ includes attempt to commit a controlled substance offense.”); accord *United States v. Allen*, 711 F. App'x 781, 783 (6th Cir. 2017); *United States v. Evans*, 699 F.3d 858 (6th Cir. 2012); *United States v. Hughley*, 192 F. App'x 447, 455 (6th Cir. 2006); *United States v. Galloway*, 439 F.3d 320, 322-24 (6th Cir. 2006); *United States v. Rone*, 147 F. App'x 490, 492 (6th Cir. 2005); *United States v. Landers*, 58 F. App'x 108, 110 (6th Cir. 2003); *United States v. Larry*, No. 96-2438, 1997 WL 810004, at *1-2 (6th Cir. Dec. 30, 1997); *United States v. Dolt*, 27 F.3d 235, 237 (6th Cir. 1994); *United States v. Benson*, No. 93-5493, 1994 WL 188504, at *5 (6th Cir. May 12, 1994).

² The First, Eighth, Tenth, and Eleventh Circuits have all determined that § 4B1.2's commentary is a “binding interpretation” of the definition of “controlled substance offense. E.g., *United States v. Lange*, 862 F.3d 1290, 1294-95 (11th Cir. 2017); *United States v. Nieves-Borrero*, 856 F.3d 5, 9 (1st Cir. 2017); *United States v. Chavez*, 660 F.3d 1215, 1226-28 (10th Cir. 2011); *United States v. Mendoza-Figueroa*, 65 F.3d 691, 692-94 (8th Cir. 1995) (*en banc*). The D.C. Circuit, by contrast, has held that the term “controlled substance offense” in § 4B1.2(b) does not include attempts to distribute controlled substances). *United States v. Winstead*, 890 F.3d 1082, 1090-91 (D.C. Cir. 2018).

³ Specifically, Havis previously asserted that “[c]ommentary . . . is neither subject to the APA’s notice-and-comment and hearing requirements,

overlooked the effect of its rationale on a common federal drug offense which Congress specifically listed in 28 U.S.C. § 994(h) as one that should constitute a career-offender predicate. The United States thus urges the Court to grant *en banc* reconsideration and schedule briefing and argument.

REASONS TO VACATE OR MODIFY THE OPINION

I. The Court relied heavily upon an incorrect factual premise.⁴

Although the Court’s opinion states that “commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment,” *Havis*, 2019 WL 2376070, at *3, the Sentencing Commission has in fact published most, if not all, of its commentary in the Federal Register and solicited public comments before submitting the amendments for Congressional review. *See* U.S. Sent’g Comm’n, Rules of Practice & Procedure 4.1 (2016) (“to the extent practicable, the Commission shall endeavor to include amendments to . . . commentary in any submission of guideline amendments to Congress”). On occasion, Congress has explicitly

nor reviewed by Congress.” (Doc. 34, *Havis* Petition for Rehearing *En Banc* at 7.) But he now concedes that the commentary at issue was “published [for comment] and sent to Congress.” (Doc. 59, *Havis* Response at 5.)

⁴ Although the United States did not present this argument in its prior briefing, as *Havis* points out (Doc. 59, *Havis* Response at 2), neither did it concede the relevant premise; rather, the United States sought to defend the district court and panel decision using a different line of reasoning. (*See generally* Doc. 44, Gov’t Response.)

modified commentary submitted to it by the Commission, *e.g.*, H.R. 2063, 104th Cong. § 2(3) (1995); H.R. 2259, 104th Cong. § 1(3) (1995), strongly suggesting that Congress reviews amendments to the commentary, not just amendments to the Guidelines text.

The commentary at issue here passed through both “gauntlets” this Court described as safeguards against separation-of-powers violations. *Havis*, 2019 WL 2376070, at *2-*3. Since the initial Guidelines Manual in 1987, the commentary to § 4B1.2 has defined controlled substance offense as including an attempt. *Sentencing Guidelines for United States Courts*, 52 Fed. Reg. 44674, 44729 (Nov. 20, 1987). Both the text and commentary of the initial Guidelines underwent extensive review via the notice-and-comment process before they were sent to Congress in May 1987. *E.g.*, *Preliminary Draft of Sentencing Guidelines*, 51 Fed. Reg. 35080 (Oct. 1, 1986); *Proposed Sentencing Guidelines and Policy Statements*, 52 Fed. Reg. 3920 (Feb. 6, 1987); *Sentencing Guidelines for United States Courts*, 52 Fed. Reg. 18046 (May 13, 1987). In October 1987, *i.e.*, shortly before the Guidelines took effect, the Commission revised and expanded the commentary by, *inter alia*, adding this:

“Controlled substance offense” means any of the federal offenses identified in the statutes referenced in § 4B1.2, or substantially equivalent state offenses. . . . *This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and*

other offenses that are substantially equivalent to the offenses listed.

U.S.S.G. § 4B1.2, cmt. (n.2) (1987) (emphasis added).

The next month, the Commission re-published the October 1987 version of the Guidelines in the Federal Register, again inviting public comments.

See generally Sentencing Guidelines for United States Courts, 52 Fed. Reg. 44674

(Nov. 20, 1987). The Commission also declared its intent to resubmit “these revisions to Congress upon commencement of the next amendment period.”

Id. at 44674 (noting a plan to send to Congress, after a comment period, all future revisions to the Guidelines text or commentary, so as to “eliminate any questions as to the[] validity and effectiveness” of the commentary). And the Commission thereafter resubmitted its October 1987 version of the Guidelines to Congress, *see Sentencing Guidelines for United States Courts*, 53 Fed. Reg. 15530 (Apr. 29, 1988), which did not disapprove it.⁵

⁵ In the meantime, the Commission had “formally adopted the revisions . . . published in the Federal Register” by invoking the “emergency guidelines promulgation authority” conferred by the Sentencing Act of 1987, § 21, Pub.L. 100-182, 101 Stat. 1266 (1987). *Sentencing Guidelines for the United States Courts*, 53 Fed. Reg. 1286 (Jan. 15, 1988). Congress had given the Commission such authority to “facilitate the operation of the first set of guidelines which nearly everyone recognizes will need quick technical and in some cases substantive amendments to succeed.” *See* 133 Cong. Rec. 31950 (1987) (statement of Rep. Fish), *available at* <https://archive.org/details/congressionalrec133lunit/page/n843> (last accessed June 20, 2019). That authority “temporarily and specifically exempt[ed] the Commission only from the normal Congressional-

In 1989, the Commission sought to revise § 4B1.2's commentary to state that "[t]he terms 'crime of violence' and 'controlled substance offense' include aiding and abetting, conspiring, and attempting to commit such offenses," so it published the proposed amendment in the Federal Register and invited public comments. *Sentencing Guidelines for United States Courts*, 54 Fed. Reg. 9122, 9162 (Mar. 3, 1989). The public comments received by the Commission included a written objection by the Federal Public and Community Defenders, who asserted that the commentary's inclusion of attempts and other inchoate offenses in the definitions of "controlled substance offense" and "crime of violence" would "redefin[e]" the Guidelines terms and "expand them well beyond the statutory definitions that the Guidelines copy."⁶ *Comments of the Federal Defenders on the 1989 Proposed Guidelines Amendments* at 48 (Exhibit 1, attached). The Commission ultimately submitted the amendment to Congress,

approval process," without altering the notice-and-comment process required by the APA. *United States v. DeLeon*, 330 F.3d 1033, 1037 (8th Cir. 2003).

⁶ Although Havis suggests that the commentary was "a *fait accompli*" by 1989, such that public comment could not have affected it (*e.g.*, Doc. 59, Response at 5), a representative of the American Bar Association "commend[ed]" the Commission during the 1989 proceedings for "putting [even technical and] non-controversial amendments before the public for comment and consideration" and "for the openness of its process," including its "effort to solicit as much and as detailed comment from as many different aspects of the criminal justice system and the public as [it] could." Transcript of U.S. Sent'g Comm'n Public Hr'g (Apr. 7, 1989) at 64, 71 (statement of Sam Buffone, American Bar Association) (Exhibit 2, attached).

see *Amendments to the Sentencing Guidelines for United States Courts*, 54 Fed. Reg.

21348, 21379 (May 17, 1989), which did not disapprove it.

Every subsequent revision to, or re-promulgation of, Application Note 1 was also subjected to notice-and-comment, followed by congressional review:

Amendment	Notice and Request for Comment	Submission to Congress
528	<i>Sentencing Guidelines for United States Courts</i> , 60 Fed. Reg. 14054, 14055 (Mar. 15, 1995)	<i>Amendments to the Sentencing Guidelines for United States Courts</i> , 60 Fed. Reg. 25074, 25087 (May 10, 1995)
546	<i>Sentencing Guidelines for United States Courts</i> , 62 Fed. Reg. 152, 181 (Jan. 2, 1997)	<i>Sentencing Guidelines for United States Courts</i> , 62 Fed. Reg. 26616, 26632 (May 14, 1997)
600	<i>Sentencing Guidelines for United States Courts</i> , 65 Fed. Reg. 7080, 7089 (Feb. 11, 2000)	<i>Sentencing Guidelines for United States Courts</i> , 65 Fed. Reg. 26880, 26897-98 (May 9, 2000)
642	<i>Sentencing Guidelines for United States Courts</i> , 66 Fed. Reg. 59330, 59334 (Nov. 27, 2001)	<i>Sentencing Guidelines for United States Courts</i> , 67 Fed. Reg. 37476, 37490 (May 29, 2002)
674	<i>Sentencing Guidelines for United States Courts</i> , 68 Fed. Reg. 75340, 73571-74 (Dec. 30, 2003)	<i>Sentencing Guidelines for United States Courts</i> , 69 Fed. Reg. 28994, 29025 (May 19, 2004)
709	<i>Sentencing Guidelines for United States Courts</i> , 72 Fed. Reg. 4372, 4398 (Jan. 30, 2007)	<i>Sentencing Guidelines for United States Courts</i> , 72 Fed. Reg. 28558, 28575 (May 21, 2007)
736	<i>Sentencing Guidelines for United States Courts</i> , 74 Fed. Reg. 4802, 4822 (Jan. 27, 2009)	<i>Sentencing Guidelines for United States Courts</i> , 74 Fed. Reg. 21750 (May 8, 2009)

Amendment	Notice and Request for Comment	Submission to Congress
795	<i>Sentencing Guidelines for United States Courts</i> , 80 Fed. Reg. 2570, 2572-74 (Jan. 16, 2015)	<i>Sentencing Guidelines for United States Courts</i> , 80 Fed. Reg. 25782, 25794 (May 5, 2015)
798	<i>Sentencing Guidelines for United States Courts</i> , 80 Fed. Reg. 49314, 49315-16 (Aug. 17, 2015); <i>see also</i> <i>Sentencing Guidelines for United States Courts</i> , 80 Fed. Reg. 70294 (Nov. 13, 2015) (extending the deadline for comments)	<i>Sentencing Guidelines for United States Courts</i> , 81 Fed. Reg. 4741, 4742-45 (Jan. 27, 2016)

The submission of the commentary to § 4B1.2 to both the notice-and-comment process and Congressional review undercuts the key premise of this Court’s conclusion that the Commission exceeded its authority in issuing the commentary. *Havis*, 2019 WL 2376070, at *1. Although the Sentencing Commission is only statutorily required to “promulgate [for notice-and-comment] . . . and submit to Congress amendments to *the guidelines*,” 28 U.S.C. § 994(p) (emphasis added), according similar treatment to commentary alleviates any concern that the Commission is amending the substance of the Guidelines *sub silentio*. *Havis*, 2019 WL 2376070, at *3. The inference that Congress has understood, and approved, of the inclusion of attempt crimes in the definition of “controlled substance offense” is strongly reinforced by Congress’s three decades of approval of the definition and its accompanying application note. *Cf. Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (“When

administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.”).⁷

II. The Court erroneously concluded that Application Note 1 is inconsistent with, and an improper expansion of, the text of § 4B1.2(b).

The inclusion of attempted drug-distribution crimes as “controlled substance offense[s],” is in any event the best interpretation of the text of Section 4B1.2(b). Although the Court reasoned that the “text of § 4B1.2(b) . . . makes clear that attempt crimes do not qualify as controlled substance offenses,” *Havis*, 2019 WL 2376070, at *3 (finding “no term [to] bear that construction”), the background understanding of the term “distribute” includes attempt crimes. In particular, the federal Controlled Substances Act defines “distribute” as “to deliver a controlled substance,” 21 U.S.C. § 802(11), and “deliver,” in turn, as “the actual, constructive, or *attempted transfer* of a controlled substance,” 21 U.S.C. § 802(8) (emphasis added). Indeed, under

⁷ The Supreme Court’s statement in *Stinson v. United States*, 508 U.S. 36, 46 (1993), that commentary is “not reviewed” by Congress must be viewed in context: in that case, the relevant Guidelines commentary had been amended only after *Stinson* had been sentenced and had unsuccessfully sought relief on appeal. See Brief of the United States, *Stinson v. United States*, 1993 WL 469118, at *3-*7 (Feb. 11, 1993).

this Court’s reasoning, it is unclear how a violation of 21 U.S.C. § 841(a)(1) for distributing a controlled substance would qualify as a controlled substance offense under § 4B1.2(b), because the least culpable conduct criminalized by that statute is the “attempted transfer” of a controlled substance. *See Havis*, 2019 WL 2376070, at *2 (“if the least culpable conduct falls outside [the Guidelines’ definition of ‘controlled substance offense’], then the statute is too broad to qualify”).

Perhaps the best evidence that Congress did not mean for § 4B1.2(b) to exclude § 841(a)(1) violations is its separate directive to the Sentencing Commission to establish Guidelines ranges “at or near the maximum” for certain types of defendants, including those whose current or prior convictions are for “an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841).” 28 U.S.C. § 994(h). In other words, Congress directed the Commission from the outset to promulgate § 4B1.1 for career offenders, and to deem § 841 convictions qualifying predicates. *See* 28 U.S.C. § 994(h)(1)(B), (2)(B). Because Congress’s own definition of “distribute” in the Controlled Substances Act includes attempts, it would be reasonable to infer that Congress understood, when approving the Guidelines, that the word “distribution” in § 4B1.2(b) likewise included attempts. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) (“This Court does not lightly assume that Congress

silently attaches different meanings to the same term in the same or related statutes.”). Had Congress understood § 4B1.2(b)’s definition of controlled substance offense to call into question the inclusion of § 841(a)(1) drug-distribution offenses, it presumably would have disapproved it or modified it in accordance with its statutory mandate for increased sentences for recidivist drug offenders.

The Court’s decision casts doubt on whether a common federal drug offense is a controlled substance offense, despite clear statutory language that the offense should qualify. As noted above, the Court’s decision also widens an inter-circuit split and upends decades of settled precedent within the circuit. Under those circumstances, further briefing and argument to the full Court would assist the Court in its decision-making process. The Court should vacate its *per curiam* opinion and set the case for briefing and argument.

Respectfully submitted,

Andrew Byerly Birge
United States Attorney
Western District of Michigan

Benjamin C. Glassman
United States Attorney
Southern District of Ohio

Donald Q. Cochran
United States Attorney
Middle District of Tennessee

Justin E. Herdman
United States Attorney
Northern District of Ohio

Russell M. Coleman
United States Attorney
Western District of Kentucky

J. Douglas Overbey
United States Attorney
Eastern District of Tennessee

D. Michael Dunavant
United States Attorney
Western District of Tennessee

Matthew Schneider
United States Attorney
Eastern District of Michigan

Robert M. Duncan, Jr.
United States Attorney
Eastern District of Kentucky

By: s/ Debra A. Breneman
Debra A. Breneman
Assistant United States Attorney
800 Market Street, Suite 211
Knoxville, Tennessee 37902
(865) 545-4167

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Rules 35(b)(2)(A) and 40(b)(1) of the Federal Rules of Appellate Procedure, in that it contains 3,366 words, excluding the cover, table of contents, table of authorities, signature block, and certificates of counsel. This certification is based on the word count of the word-processing program used by the United States, Microsoft Word 2016.

s/ Debra A. Breneman
Debra A. Breneman
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that, on June 20, 2019, this motion was filed electronically and notice of its filing will be sent by operation of the Court's electronic filing system to all parties listed on the filing receipt, including counsel for defendant.

s/ Debra A. Breneman
Debra A. Breneman
Assistant United States Attorney

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Kelly L. Stephens
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: August 30, 2024

Ms. Erin Gallagher Barnhart
Federal Public Defender's Office
Capital Habeas Unit
1660 W. Second Street
Suite 750
Columbus, OH 43215

Re: Case No. 21-3404, *Von Davis v. Charlotte Jenkins*
Originating Case No.: 2:16-cv-00495

Dear Ms. Barnhart,

The enclosed motion for en banc reconsideration is being returned to you unfiled.

Neither the Federal Rules of Appellate Procedure nor the Rules of the Sixth Circuit make any provision for rehearing/reconsideration of an opinion of the en banc court. Therefore, the motion is not accepted for filing.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Jordan S. Berman
Ms. Jana Minich Bosch
Mr. Thomas Elliot Gaiser
Mr. Michael Jason Hendershot
Mr. Stephen E. Maher

No. 21-3404

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VON CLARK DAVIS, *Petitioner-Appellant*,
v.
WARDEN, Chillicothe Correctional Institution, *Respondent*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CASE NO. 2:16-cv-00495

MOTION TO STAY MANDATE PENDING DISPOSITION OF
PENDING MOTIONS AND/OR PETITION FOR WRIT OF CERTIORARI

THIS IS A DEATH PENALTY CASE

Joseph Medici

Federal Public Defender

Erin G. Barnhart (0079681)

Lead/Trial Counsel

Jordan S. Berman (0093075)

Co-Counsel

Assistant Federal Public Defenders

Office of the Federal Public Defender for the Southern District of Ohio

Capital Habeas Unit

10 West Broad Street, Suite 1020

Columbus, OH 43215-3469

Telephone: (614) 469-2999

Facsimile: (614) 469-5999

Erin_Barnhart@fd.org

Jordan_Berman@fd.org

Counsel for Petitioner-Appellant Von Clark Davis

INTRODUCTION

This Court currently has pending before it two motions from Von Clark Davis: (1) Davis's Motion for Leave to File Motion for En Banc Reconsideration, (Doc. 66-1), and (2) his Motion for Supplemental Briefing, (Doc. 62). Should the Court grant Davis's Motion for Leave, (Doc. 66-1), the Court will then have pending before it Davis's Motion for En Banc Reconsideration, (Doc. 66-2).

The en banc Court should stay issuance of its mandate pending disposition of Davis's motions. Should the Court deny Davis the relief requested in those motions, this Court should, alternatively, stay its mandate pending disposition of a petition for writ of certiorari. *See* Fed. R. App. P. 41(d).

I. This Court should stay its mandate until disposition of Davis's pending motions.

In his Motion for Leave to file Motion for En Banc Reconsideration, (Doc. 66-1), Davis has requested that this Court order the filing and consideration of his Motion for En Banc Reconsideration, (Doc. 66-2). His Motion for En Banc Reconsideration itself would seek vacation of this Court's August 20, 2024 en banc decision, (Doc. 63), supplemental briefing of his constitutional challenges to 28 U.S.C. §2254(d) as requested in his still-pending Motion for Supplemental Briefing, (Doc. 62), determination of his constitutional challenges to 28 U.S.C. §2254(d) as raised in his Notice of Supplemental Authority under Rule 28(j), (Doc. 61), and entry of a new judgment granting him habeas corpus relief.

After issuing an opinion, this Court properly stays its mandate to allow it to conduct further proceedings and to rule on any pending motions. *See United States v. Musaibli*, No. 22-1013, 2022 U.S. App. Lexis 22898 at *1 (6th Cir. Aug. 17, 2022) (staying mandate pending disposition of government’s motion to reassign case to a new judge on remand). Staying the mandate enables the Court to order further proceedings and grant relief or to revise its judgment as it deems appropriate. *See also Myers v. Holder*, 661 F.3d 1178-79 (9th Cir. 2011) (staying mandate pending Board of Immigration Appeals’ disposition of a motion to reopen).

This Court should therefore stay its mandate pending further proceedings on, and final disposition of, Davis’s Motion for Leave to file Motion for En Banc Reconsideration, (Doc. 66-1), his Motion for Supplemental Briefing, (Doc. 62), and his Motion for En Banc Reconsideration (Doc. 66-2), should the Court grant him leave to file it.

II. Alternatively, this Court should stay its mandate pending disposition of a petition for writ of certiorari.

Should this Court deny Davis the relief he seeks in his pending motions, however, Davis would seek review in the United States Supreme Court. Under Federal Rule of Appellate Procedure 41(d)(1), Davis is entitled to a stay of the mandate pending disposition of a petition for writ of certiorari, if his “petition would present a substantial question and . . . there is good cause for a stay.”

On certiorari, this capital case would present substantial questions worthy of Supreme Court review, which would include: (1) Whether 28 U.S.C. § 2254(d) violates Article III and the Separation of Powers; (2) Whether this Court has misapprehended or misapplied 28 U.S.C. § 2254(d) by failing to recognize specific Supreme Court cases as providing clearly established law governing Davis's claims; and (3) Whether this Court has erroneously denied Davis habeas corpus relief. The sharp divide between the majority and dissenting opinions in the en banc decision confirms that a petition for writ of certiorari would present substantial questions. In addition, Davis has good cause for a stay, because, absent a stay, his capital conviction and resulting death sentence would become final on habeas review and subject to execution.

Accordingly, were this Court to deny Davis the relief he requests in his motions, this Court should stay its mandate pending a petition for writ of certiorari, as it has in other en banc capital habeas cases. *See e.g.*, Order, *Fields v. Jordan*, No. 17-5065, Doc. 120-1 (6th Cir. Nov. 28, 2023); *Rogers v. Mays*, No. 19-5427, 2023 U.S. App. Lexis 15412, at *1 (6th Cir. June 20, 2023) (en banc). *See also*, *e.g.*, *Raglin v. Shoop*, No. 19-3361, 2022 U.S. App. Lexis 19119, at *1 (6th Cir. July 11, 2022) (panel order staying mandate in Ohio capital habeas corpus case).

CONCLUSION

This Court should stay its mandate pending further proceedings on, and disposition of, Davis's pending motions. Alternatively, this Court should stay its mandate pending disposition of a petition for writ of certiorari.

Respectfully submitted,

Joseph Medici
Federal Public Defender

by

/s/ Erin G. Barnhart
Erin G. Barnhart (0079681)

Trial attorney

Jordan S. Berman (0093075)

Co-counsel

Assistant Federal Public Defenders
Federal Public Defender's Office
for the Southern District of Ohio
Capital Habeas Unit

10 W. Broad Street, Suite 1020

Columbus, Ohio 43215

Phone: (614) 469-4141

erin_barnhart@fd.org

jordan_berman@fd.org

Counsel for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE

Counsel for Petitioner-Appellant Von Clark Davis hereby certifies that the foregoing motion complies with the type-volume limitations provide in Federal Rules of Appellate Procedure Rules 27(d)(2)(A). The relevant portions of the foregoing brief contain 736 words in Times New Roman (14-point) proportional type. The word processing software used to prepare this motion was Microsoft Word 2016.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)
Assistant Federal Public Defender
Co-counsel for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2024, I electronically filed the foregoing **PETITIONER-APPELLANT VON CLARK DAVIS’S MOTION TO STAY MANDATE PENDING DISPOSITION OF PENDING MOTIONS AND/OR PETITION FOR WRIT OF CERTIORARI** with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send notification of such filing to the email address of opposing counsel on file with the Court.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)
Assistant Federal Public Defender
Co-counsel for Petitioner-Appellant

No. 21-3404

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

VON CLARK DAVIS, *Petitioner-Appellant*,

v.

WARDEN, Chillicothe Correctional Institution, *Respondent*.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO**

CASE NO. 2:16-cv-00495

MOTION FOR EN BANC RECONSIDERATION

THIS IS A DEATH PENALTY CASE

Joseph Medici

Federal Public Defender

Erin G. Barnhart (0079681)

Lead/Trial Counsel

Jordan S. Berman (0093075)

Co-Counsel

Assistant Federal Public Defenders

Office of the Federal Public Defender for the Southern District of Ohio

Capital Habeas Unit

10 West Broad Street, Suite 1020

Columbus, OH 43215-3469

Telephone: (614) 469-2999

Facsimile: (614) 469-5999

Erin_Barnhart@fd.org

Jordan_Berman@fd.org

Counsel for Petitioner-Appellant Von Clark Davis

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. Reconsideration is warranted here.	2
II. On reconsideration, the en banc Court should vacate its Opinion and order briefing on the constitutionality of AEDPA deference.....	3
III. On reconsideration, the en banc Court should undertake de novo review and grant Davis habeas corpus relief.	7
CONCLUSION.....	13
CERTIFICATE OF COMPLIANCE.....	14
CERTIFICATE OF SERVICE	
Opinion (en banc), Doc. 63.....	Exhibit 1
Motion for Leave to File Supplemental Briefing, Doc. 62.....	Exhibit 2
Rule 28(j) Notice of Supplemental Authority, Doc. 61	Exhibit 3

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Beck v. Alabama</i> , 447 U.S. 625 (1980).....	6
<i>Grzegorzcyk v. United States</i> , 597 U.S. ___, 142 S. Ct. 2580 (2022).....	6
<i>Lawrence v. Chater</i> , 516 U.S. 163 (1996) (per curiam).....	6
<i>Lindh v. Murphy</i> , 96 F.3d 856 (7th Cir. 1996) (en banc), overruled on other grounds, 521 U.S. 320 (1997).....	8
<i>Loper Bright Enterprises v. Raimondo</i> , 603 U.S. ___, 144 S. Ct. 2244 (2024).....	passim
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950).....	7
<i>Shrader v. CSX Transp., Inc.</i> , 70 F.3d 255 (2d Cir. 1995)	2
<i>Tennessee v. Becerra</i> , No. 24-5220, 2024 U.S. App. Lexis 21521 (6th Cir. Aug. 26, 2024)	7
<i>United States v. Boler</i> , No. 23-4352, 2024 U.S. App. Lexis 21379 (4th Cir. Aug. 23, 2024)	8
<i>United States v. Brooks</i> , 245 F.3d 291 (3d Cir. 2001)	5
<i>United States v. Chandler</i> , No. 22-1786, 2024 U.S. App. Lexis 21204 (3d Cir. Aug. 22, 2024)	8
<i>United States v. Klein</i> , 80 U.S. 128 (1871).....	8-12

United States v. Rogers,
925 F.2d 1285 (10th Cir. 1991) 6

United States v. Trumbull,
No. 23-912, 2024 U.S. App. Lexis 21289 (9th Cir. Aug. 22, 2024) 8

Webster v. Cooper,
558 U.S. 1039 (2009).....6

Statutes

28 U.S.C. § 2241(c)(3).....11

28 U.S.C. § 2253 5

28 U.S.C. § 2254(d)*passim*

Other Authorities

Fed. R. App. P. 27(d)(2)(A).....14

Fed. R. App. P. 28(j)*passim*

Fed. R. App. P. 35(b)(1)(B) 2

Fed. R. App. P. 35(b)(2)(A) 14

Fed. R. App. P. 40(a)(2).....2

INTRODUCTION

This Court heard oral arguments in this en banc case on March 20, 2024, and issued an opinion on August 20, 2024. (Doc. 63) (attached as Exhibit 1). In between, Von Clark Davis had filed a Notice of Supplemental Authority under Federal Rule of Appellate Procedure 28(j), (Doc. 61) (attached as Exhibit 3), and a Motion for Leave to File a Supplemental Brief, (Doc. 62) (attached as Exhibit 2). The Court's August 20, 2024 Opinion did not address the arguments Davis raised in his Rule 28(j) Letter, and the Court did not rule on his motion requesting supplemental briefing. Because the Court had overlooked these matters, Davis attempted to file a Motion for En Banc Reconsideration on August 30, 2024. (Doc. 64). Later that day, the motion was returned to undersigned counsel "unfiled." (*See* Letter, Doc. 65-2.)

Following a conversation with the Clerk, Davis filed a Motion for Leave to file his Motion for Enc Banc Reconsideration on September 5, 2024. (Doc. 66.) On September 13, 2024, the en banc Court issued an Order, (Doc. 68), granting the motion for leave to file the en banc reconsideration motion, ordering the Warden to file a response, and denying Davis's pending motion for supplemental briefing, (Doc. 62), as moot.¹

¹ While Davis's motion for supplemental briefing was procedurally mooted by the Court's issuance of its August 20, 2024 Opinion, the substantive arguments for additional briefing Davis made in it apply with equal force to

Davis accordingly now files this motion, which has been updated from his initial version, (Doc. 64), in light of the events recounted above. He respectfully moves for reconsideration of the en banc court's opinion of August 20, 2024. On reconsideration, the en banc Court should (1) vacate and withdraw its August 20, 2024 Opinion, (Doc. 63), (2) order briefing on the constitutionality of 28 U.S.C. § 2254(d), and (3) ultimately, grant Davis habeas corpus relief.

I. Reconsideration is warranted here.

Reconsideration by the en banc Court is warranted if it has overlooked significant matters, including arguments “that might reasonably be expected to alter the conclusion reached by the court.” *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). *Cf.* Fed. R. App. P. 40(a)(2) (rehearing warranted where court has “overlooked or misapprehended” a “point of law or fact”). Reconsideration is especially warranted if an overlooked issue is one of exceptional importance. *Cf.* Fed. R. App. P. 35(b)(1)(B). That is precisely the case here.

On August 14, 2024, Davis filed a Notice of Supplemental Authority under Federal Rule of Appellate Procedure 28(j), (Doc. 61). He noted that *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, 144 S. Ct. 2244 (2024) “provides an alternative basis for granting Davis *de novo* review and relief.” (Davis's Rule 28(j)

this motion for en banc reconsideration. To the extent Davis did not already reference them, he now affirmatively incorporates all those arguments into this motion. (*See* Doc. 62.)

Letter, Doc. 61, at 1.) The Warden did not submit a response to this filing.

Nevertheless, the Court did not address *Loper* in its en banc Opinion.

Davis explained that because the limits of the 28(j) letter prevented him from fully setting forth his *Loper*-based arguments that AEDPA deference violates the Constitution, he would also be filing a motion for supplemental briefing requesting adequate space in which to do so. (Doc. 61 at 2 n.1.) Davis filed that motion on August 19, 2024. (Davis’s Motion for Supplemental Briefing, Doc. 62). The Court issued its Opinion the day after Davis filed his motion, on August 20, 2024. (Doc. 63.) It did so without ruling on that pending motion. It has now denied that motion as moot, (*see* Order, Doc. 68), but Davis maintains his request for additional briefing for the reasons stated in it and in the present motion, *see* n.1, *supra*.

II. On reconsideration, the en banc Court should vacate its Opinion and order briefing on the constitutionality of AEDPA deference.

Because the Court overlooked both the arguments Davis raised in his Rule 28(j) letter and his (now procedurally mooted) motion to supplement the briefing, this Court should grant this motion for reconsideration.

Davis has asserted that he is entitled to de novo review and habeas corpus relief because 28 U.S.C. § 2254(d) violates Article III of the Constitution, notably in light of *Loper*. In their concurring opinions in that case, Justices Thomas and Gorsuch explain the unconstitutionality of Article III judges giving “deference” to

legal conclusions reached by non-Article III actors. (*See* Davis’s Notice of Supplemental Authority, Doc. 61.) As Davis has argued:

Section 2254(d) violates Article III in the same way as *Chevron* when it requires federal courts to defer to interpretations or applications of federal law by non-Article III actors (state courts) which are not ‘unreasonable.’ *See Loper*, 144 S. Ct. at 2283 (Gorsuch, J., concurring). Just as this Article III Court is not bound by ‘reasonable’ legal interpretations of federal bureaucrats, it cannot be bound by reasonable-but-incorrect legal decisions of *state* entities.

(*Id.* at 2.) In its en banc Opinion, however, this Court failed to mention or engage with Davis’s argument at all.

Instead, the en banc Opinion concluded with the statement that, “[i]n the habeas context, federal courts *may not displace with their own judgment* the valid adjudications of state courts.” (Doc. 63-2 at 28 (emphasis added).) But *Loper* explains that Article III demands that this Court declare the law and exercise its own “independent judgment” on the question of whether Davis is in custody in violation of the Constitution, regardless of what the state courts may have concluded. (Davis’s Rule 28(j) Letter, Doc. 61, at 1); (Davis’s Motion for Supplemental Briefing, Doc. 62, at 2).

That is, contrary to the en banc Opinion denying relief, post-*Loper*, the judgment of a non-Article III state court *cannot displace* the independent judgment of an Article III court exercising the Judicial Power of the United States over

Davis’s claims for habeas corpus relief. This is faithful to the Framers’ understanding and crafting of Article III. (*See* Davis’s Motion for Supplemental Briefing, Doc. 62, at 2-4 (citing, *e.g.*, The Federalist Papers, No. 81).) Davis made this point before this Court issued its en banc Opinion:

The majority and concurring opinions in *Loper* emphasize that the judicial function requires the federal courts to exercise “independent judgment,” free from constraints imposed by non-Article III decisionmakers. *See Loper*, 144 S. Ct. at 2257; *id.* at 2274 (Thomas, J., concurring); *id.* at 2284 (Gorsuch, J., concurring) (the Framers “made a considered judgment to build judicial independence into the Constitution’s design.”). As Justices Thomas and Gorsuch have explained, *Chevron*’s requirement that Article III courts “defer” to Article II agencies’ interpretations of law thus violates the Constitution. *Id.* at 2274 (Thomas, J., concurring) (“Because the judicial power requires judges to exercise their independent judgment, the deference that *Chevron* requires contravenes Article III’s mandate.”); *id.* at 2285 (Gorsuch, J., concurring) (“*Chevron* deference . . . precludes courts from exercising the judicial power vested in them by Article III to say what the law is.”).

(*Id.* at 1-2). The en banc Court, however, overlooked Davis’s Article III argument, as raised in his Rule 28(j) Letter, (Doc. 61) and in his Motion for Supplemental Briefing, (Doc. 62).

Davis thus presents clear grounds for en banc reconsideration. In *United States v. Brooks*, 245 F.3d 291, 292 (3d Cir. 2001), a panel including then-Judge Alito granted rehearing to address a constitutional challenge to 28 U.S.C. § 2253 because the “issue was inadvertently not addressed in [our] decision.” That is the

appropriate course here as well. *See also United States v. Rogers*, 925 F.2d 1285, 1286 (10th Cir. 1991) (granting rehearing “to consider the severance issue which we inadvertently did not address in our previous opinion.”). Likewise, after reconsideration, the en banc Court should order briefing on the constitutionality of deference under § 2254(d).

Reconsideration, rather than a request for certiorari, promotes judicial efficiency because the Article III issue was raised in this Court but not decided. In the past, the Supreme Court has remanded cases, “flagging a particular issue that [the court of appeals] does not appear to have fully considered.” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *see also Webster v. Cooper*, 558 U.S. 1039 (2009) (granting, vacating, and remanding for court of appeals to consider applicability of a January 2009 Supreme Court decision that was not mentioned by court of appeals in March 2009 denial of relief). Since Davis has now flagged this undecided issue, reconsideration would eliminate the need for this extra step and save judicial resources.

Further, this Court should also grant reconsideration because failure to consider Davis’s constitutional challenge to § 2254(d) would violate due process. This is a capital habeas corpus proceeding, and given the nature of the penalty he faces, Davis is entitled to the most expansive due process protections available. *Cf. Beck v. Alabama*, 447 U.S. 625 (1980); *Grzegorzcyk v. United States*,

597 U.S. ___, 142 S. Ct. 2580, 2585 (2022) (Sotomayor, J., dissenting) (“[D]eprivations of process, particularly where the stakes for individual litigants are high, are unjust in and of themselves.”). Davis has a fundamental due process “right to be heard.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Davis has been denied his fundamental right: He has not been heard at all on his arguments challenging the standard of review that the en banc court has now used to deny him relief. Under the circumstances, absent reconsideration and a full and proper airing of Davis’s Article III challenges, Davis will be denied his right to due process of law.

III. On reconsideration, the en banc Court should undertake de novo review and grant Davis habeas corpus relief.

On reconsideration, this Court should ultimately conclude that 28 U.S.C. § 2254(d) violates Article III; that Davis is entitled to de novo review of his claims; and that he is entitled to habeas corpus relief.

As Davis will explain in more detail if granted additional briefing, *Loper* and the concurring opinions of Justices Thomas and Gorsuch lead to the conclusion that Article III courts cannot, without violating Article III, defer to the decisions or adjudications of non-Article III decisionmakers. *See, e.g., Loper*, 144 S. Ct. at 2284-85 (Gorsuch, J., concurring).

Now that “*Chevron* deference has fallen,” *Loper* and its concurring opinions have “open[ed] the door to new challenges” to deference. *Cf. Tennessee v.*

Becerra, No. 24-5220, 2024 U.S. App. Lexis 21521 at *21 (6th Cir. Aug. 26, 2024). These challenges should include Davis’s Article III challenge to AEDPA deference. Davis’s Article III challenge is “profoundly important,” and “though *Loper Bright*’s holding does not reach this case, its reasoning” and the reasoning of Justices Thomas and Gorsuch “cast[] doubt” on the continuing vitality of AEDPA deference. *Cf. United States v. Chandler*, No. 22-1786, 2024 U.S. App. Lexis 21204 at *4 (3d Cir. Aug. 22, 2024) (Bibas, J., dissenting from denial of rehearing en banc); *see also id.* at * 3-4 (Justice Gorsuch’s *Loper* concurrence indicates that “lenity trumps deference” now that *Chevron* has been overruled); *United States v. Boler*, No. 23-4352, 2024 U.S. App. Lexis 21379 at *8 n.4 (4th Cir. Aug. 23, 2024) (recognizing that *Loper* “calls into question *Auer* [*v. Robbins*, 519 U.S. 452 (1997)] deference”); *United States v. Trumbull*, No. 23-912, 2024 U.S. App. Lexis 21289 at *27 (9th Cir. Aug. 22, 2024) (Bea, J., concurring) (even where *Loper* did not “expressly overrule” a type of deference, courts “should hesitate to expand” that deference following *Loper*’s “landmark” ruling).

As Davis pointed out in his Motion for Supplemental Briefing, (Doc. 62), the Seventh Circuit previously linked the constitutionality of AEDPA deference to the constitutionality of *Chevron* deference. *See Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *overruled on other grounds*, 521 U.S. 320 (1997). And the Supreme Court’s foundational ruling in *United States v. Klein*, 80 U.S. 128

(1871), also supports the conclusion that if *Chevron* deference is unconstitutional, AEDPA deference must be unconstitutional as well. Proper resolution of Davis’s “profoundly important” Article III challenge requires briefing and careful consideration of *Klein*, which also involved Congress’ attempt to impose a rule of deference upon the federal judiciary.

Klein concerned individuals whose property had been confiscated during the Civil War. In early 1863, Congress passed a law allowing those individuals to receive compensation if they could prove that they had never given “any aid or comfort to the present rebellion.” *Klein*, 80 U.S. at 131 (emphasis removed). Later that year, President Lincoln granted full pardons to anyone who “desired to resume their allegiance” to the United States and took “a prescribed oath of allegiance.” *Id.* at 131-32. V.F. Wilson (whose property was at issue, and whose estate administrator was Klein) took the prescribed oath in 1864. *Id.* at 132.

In 1870, however, Congress attempted to vitiate the effect of these pardons. It mandated that no pardon was admissible or could be used as evidence for a claim of compensation; it required that federal courts at all levels had to immediately dismiss many cases involving pardons, *id.* at 134, 143-44; and it declared that a Presidential pardon was to be considered “conclusive evidence” that the individual “*did* give aid to the rebellion” under certain circumstances, *id.* at 134, 144 (emphasis added).

The Supreme Court concluded that the 1870 Act violated constitutional separation-of-powers principles. *Id.* at 147. As relevant here, it held unconstitutional the Congressional provisions purporting to deprive the Supreme Court of jurisdiction over cases proving loyalty through a pardon, making a pardon “conclusive evidence” of disloyalty, and requiring the lower court to dismiss a claim “forthwith” upon receipt of such evidence. *Id.* at 145-45. These provisions, the Court explained, were “founded solely on the application of a rule of decision.” *Id.* at 146. By requiring a federal court to declare its jurisdiction had ceased, these provisions unconstitutionally “prescribe[d]” for the judiciary “a rule for the decision of a cause in a particular way[.]” *Id.* And in doing so, Congress effectually required the federal courts to render their decisions in cases or controversies *not* by using their independent judgment about what justice requires, but by acting in ways that facilitated the outcomes that Congress wanted:

In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed [by the 1870 Act] to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to decide it in its own favor? *Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?* We think not

Id. (emphasis added).

The crux of the Article III problem in *Klein* was the same as that identified by Justices Thomas and Gorsuch in *Loper*: under Congress’s 1870 Act, “the court [was] forbidden to give the effect to evidence which, *in its own judgment* . . . *should have* . . . give[n] it an effect precisely contrary.” *Id.* at 147 (emphasis added). That is, Congress purported to tell the Article III courts *to not exercise their independent judgment* about the effect of a presidential pardon, but instead to *defer* to what Congress said the “legal effect” of a presidential pardon should be. *Id.* at 148.

The separation-of-powers violation identified in *Klein* establishes that 28 U.S.C. § 2254(d) is also unconstitutional. Like the 1870 Act, § 2254(d) “prescribe[s] a rule for the decision of a cause in a particular way,” *Klein*, 80 U.S. at 146, namely, for how this Court is to adjudicate whether Davis is “in custody in violation of the Constitution or laws or treaties of the United States,” 28 U.S.C. § 2241(c)(3). Section 2254(d) does so by demanding *how* this Article III court must adjudicate Davis’s claims: 1) examine the case for the existence of a state-court adjudication (like the 1870 Act instructed federal courts to do regarding the existence of a presidential pardon), and 2) determine the “legal effect” of any such adjudication by applying the rule of decision established by Congress in § 2254(d) (like the 1870 Act required federal courts to do regarding the rule of decision it prescribed for cases involving a pardon). This rule of decision requires this Court

to deny relief upon finding an erroneous-but-not-unreasonable state court decision. This is so even if this Article III court concludes, in its independent judgment, that Davis is actually in custody in violation of the Constitution. In this way, the effect of AEDPA deference parallels the 1870 Act's mandate that the federal courts deny relief based on the existence of a presidential pardon even when, in the federal court's independent judgment, relief would be appropriate under the substantive governing law.

The Framers deliberately crafted judicial independence into Article III to guard against action from the political branches like the 1870 Act, *Chevron* deference, and AEDPA. *See Loper*, 144 S. Ct. at 2284 (Gorsuch, J., concurring). In 1870, Congress skewed the federal courts' adjudication of cases or controversies in favor of the government and against a class of claimants who, as former confederates, were politically disfavored. In 1996, Congress did the same thing, favoring States at the expense of the politically disfavored class of convicted persons seeking habeas relief.

As was the case in *Klein*, Congress "passed the limit which separates the legislative from the judicial power" in enacting 28 U.S.C. § 2254(d). *Klein*, 80 U.S. at 147. Section 2254(d) is unconstitutional, and Davis is entitled to de novo review of the constitutional claims for which he seeks habeas relief.

CONCLUSION

This Court should grant en banc reconsideration. Because this Court has overlooked Davis's challenge to the constitutionality of 28 U.S.C. § 2254(d), it should vacate its en banc opinion. This Court should address Davis's challenge fully, including by granting his request to fully brief the issue. Following appropriate additional proceedings, this Court should then issue an en banc decision concluding that Davis is entitled to habeas corpus relief.

Respectfully submitted,

Joseph Medici
Federal Public Defender

by

/s/ Erin G. Barnhart
Erin G. Barnhart (0079681)

Trial attorney

Jordan S. Berman (0093075)
Co-counsel

Assistant Federal Public Defenders
Federal Public Defender's Office
for the Southern District of Ohio
Capital Habeas Unit
10 W. Broad Street, Suite 1020
Columbus, Ohio 43215
Phone: (614) 469-4141
erin_barnhart@fd.org
jordan_berman@fd.org
Counsel for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE

Counsel for Petitioner-Appellant Von Clark Davis hereby certifies that the foregoing motion complies with the type-volume limitations provide in Federal Rules of Appellate Procedure 27(d)(2)(A) and 35(b)(2)(A). The relevant portions of the foregoing brief contain 3027 words in Times New Roman (14-point) proportional type. The word processing software used to prepare this motion was Microsoft Word 2016.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)

Assistant Federal Public Defender

Co-counsel for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2024, I electronically filed the foregoing **PETITIONER-APPELLANT VON CLARK DAVIS’S MOTION FOR EN BANC RECONSIDERATION** with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send notification of such filing to the email address of opposing counsel on file with the Court.

/s/ Erin G. Barnhart

Erin G. Barnhart (OH 0079681)

Assistant Federal Public Defender

Co-counsel for Petitioner-Appellant

State v. Davis

Supreme Court of Ohio

October 22, 2013, Submitted; April 22, 2014, Decided

No. 2011-0538

Reporter

139 Ohio St. 3d 122 *; 2014-Ohio-1615 **; 9 N.E.3d 1031 ***; 2014 Ohio LEXIS 842 ****; 2014 WL 1622936

THE STATE OF OHIO, APPELLEE, v. DAVIS, APPELLANT.

Subsequent History: Reconsideration denied by State v. Davis, 139 Ohio St. 3d 1473, 2014-Ohio-3012, 2014 Ohio LEXIS 1711, 11 N.E.3d 1194 (July 9, 2014)

Stay granted by State v. Davis, 139 Ohio St. 3d 1487, 2014-Ohio-3216, 2014 Ohio LEXIS 1936, 12 N.E.3d 1232 (July 24, 2014)

US Supreme Court certiorari denied by Davis v. Ohio, 574 U.S. 1202, 135 S. Ct. 1494, 191 L. Ed. 2d 452, 2015 U.S. LEXIS 1686 (Mar. 2, 2015)

Prior History: [****1] APPEAL from the Court of Appeals for Butler County, No. CA2009-10-263,

State v. Davis, 2011-Ohio-787, 2011 Ohio App. LEXIS 681 (Ohio Ct. App., Butler County, Feb. 22, 2011)

Disposition: Judgment affirmed.

Counsel: Laurence E. Komp and John P. Parker; and Midwest Center for Justice, Ltd., and Alan M. Freedman, for appellant.

Michael T. Gmoser, Butler County Prosecuting Attorney, and Michael A. Oster Jr., Chief, Appellate Division, for appellee.

Judges: O'CONNOR, C.J., and O'DONNELL, LANZINGER, KENNEDY, and FRENCH, JJ., concur. O'NEILL, J., concurs in affirming the conviction and dissents as to the sentence, for the reasons stated in his dissenting opinion in State v. Wogenstahl, 134 Ohio St.3d 1437, 2013-Ohio-164, 981 N.E.2d 900.

Opinion by: PFEIFER

Opinion

[*122] [***1036] PFEIFER, J.

[**P1] While on parole from a prior conviction of murder in the second degree, appellant Von Clark Davis shot Suzette Butler to death on December 12, 1983. A three-judge panel found him guilty of aggravated murder with a prior-conviction specification and sentenced him to death.

[**P2] On December 12, 1983, Davis offered Mark "Poppa" Lovette \$60 in exchange for a favor. He then drove Lovette to a pawn shop, where Lovette bought a Raven P.25 semi-automatic handgun using Davis's money. Lovette gave the gun to Davis. Davis then gave Lovette more money and took him to a different [****2] store to buy ammunition.

[**P3] When Davis discovered that the ammunition did not fit the Raven, he took Lovette to a local gun store. There, Lovette bought a box of PMC .25-caliber automatic rounds, which he gave to Davis. Davis loaded the Raven and placed it under the driver's seat. After dropping Lovette off, Davis and Wade Coleman rode around drinking beer for 30 minutes to an hour.

[**P4] Later that day, Suzette Butler met her friend, Mona Aldridge, at the American Legion post in Hamilton. Shortly thereafter, Davis arrived. Davis and Butler had lived together for a time but had recently separated. Davis spoke with Butler at the bar, and

139 Ohio St. 3d 122, *122; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1036; 2014 Ohio LEXIS 842, ****2

eventually they sat together at a table and Aldridge joined them. Aldridge testified at trial that she did not observe any argument or harsh words between them.

[P5] [*123]** After a short time, Butler told Aldridge that she would be "right back" and asked Aldridge to watch her jacket, cigarettes, and drink. Davis and Butler then walked out the front door. Several minutes later, Aldridge checked on Butler, saw Davis pointing a gun at Butler's head, and panicked and retreated into the bar. Within moments, several people entered the bar saying that someone had been shot.

[P6]** Reginald **[****3]** Denmark and Cozette Massey witnessed the shooting. As they walked in front of the American Legion post, they saw a man and a woman talking. Two shots rang out, and they saw the woman—later identified as Butler—fall. As she fell, another shot was fired. Finally, once Butler was down, the man bent down and shot her in the head. Both Massey and Denmark identified Davis as the shooter.

[P7]** An autopsy performed the next day revealed that Butler had died of multiple gunshot wounds to the left side of her head. Stippling around one of the entrance wounds indicated that the muzzle of **[***1037]** the murder weapon had been less than 20 inches from Butler's head when the shot causing that wound had been fired.

[P8]** Four spent PMC shell casings were collected at the murder scene. Ronald Dye, a criminalist with the Ohio Bureau of Criminal Identification and Investigation, examined the shells and concluded that all four had been chambered in the same gun. Dye examined the four bullets removed from Butler's head and determined that they had been fired from a handgun manufactured by either Raven or Astra.

[P9]** The grand jury returned a two-count indictment against Davis. Count One charged him with the aggravated murder of **[****4]** Butler with prior calculation and design, R.C. 2903.01(A), with a firearm specification under R.C. 2929.71. Count One also carried a death specification under R.C. 2929.04(A)(5), alleging that Davis had been previously convicted of an offense an essential element of which was the purposeful killing of, or attempt to kill, another. Count Two charged Davis with having a weapon while under disability, R.C. 2923.13(A)(2). Davis waived his right to a jury trial and was tried to a three-judge panel.

[P10]** Davis testified on his own behalf at his 1984 trial. He admitted that Lovette had purchased a gun for him, but claimed that he had given the gun to a man named "Silky Carr" of Lexington, Kentucky. Davis also testified that he left Carr and Butler talking in front of the American Legion on the night of the murder and drove away. "Silky Carr," however, was never located.

[P11]** The panel found Davis guilty of all charges and specifications. After conducting the penalty phase, the panel sentenced Davis to death. The court of appeals affirmed the conviction and death sentence.

[P12]** Davis appealed to this court, and we affirmed his conviction. *State v. Davis*, 38 Ohio St.3d 361, 528 N.E.2d 925 (1988) ("*Davis I*"). **[****5]** We also determined **[*124]** that the panel had improperly weighed a nonstatutory aggravating circumstance against the mitigating factors when it sentenced him to death and that the error could not be cured by independent review. Accordingly, we vacated the death sentence. *Id.* at 367-373. We further held that when a reviewing court vacates a death sentence imposed by a three-judge panel due to error occurring at the penalty phase, the state may seek a death sentence on remand (with two exceptions not germane to this case). *Id.* at syllabus. Accordingly, we remanded for resentencing "solely for the purpose of determining whether the remaining aggravating circumstance outweighs the mitigating factors presented by [Davis], beyond a reasonable doubt." *Id.* at 373.

[P13]** On remand, the same three-judge panel that had originally sentenced Davis conducted the resentencing hearing in August 1989. The panel considered only the evidence presented in mitigation at Davis's 1984 trial. Davis was not permitted to introduce evidence concerning his adjustment to prison life or to present the testimony of a psychologist to provide a "psychological update" of **[****6]** Davis covering the period since his 1984 conviction and sentence.

[P14]** The panel again sentenced Davis to death. On appeal, the court of appeals affirmed the sentence. We also affirmed the sentence. *State v. Davis*, 63 Ohio St.3d 44, 584 N.E.2d 1192 (1992) ("*Davis II*").

[P15]** In 2007, the United States Court of Appeals for the Sixth Circuit granted habeas corpus relief and required that **[***1038]** Davis be resentenced, on the ground that the panel on resentencing should have allowed Davis to introduce additional mitigating evidence. *Davis v. Coyle*, 475 F.3d 761 (6th Cir.2007).

139 Ohio St. 3d 122, *124; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1038; 2014 Ohio LEXIS 842, ****6

[P16]** By the time of the subsequent resentencing, one of the original panel members had died, and the other two were no longer on the bench. Accordingly, the trial court convened a three-judge panel consisting of three new judges. Complying with the Sixth Circuit's decision, the new panel heard further mitigating evidence in September 2009 and sentenced Davis to death. The court of appeals affirmed. *State v. Davis*, 12th Dist. Butler No. CA2009-10-263, 2011-Ohio-787.

[P17]** The cause is now before this court on appeal as of right. Davis raises five propositions of law challenging his death sentence. For the reasons that follow, we conclude that **[****7]** all five propositions of law lack merit, and we affirm the judgment of the court of appeals.

I. Attempt to Withdraw Jury Waiver

[P18]** In his first proposition of law, Davis contends that during his resentencing in 2009, the trial court should have allowed him to withdraw the jury waiver that he had executed before trial in 1984.

[*125] A. Factual and Procedural Background

[P19]** On May 8, 1984, Davis executed a written waiver of his right to a jury trial and election of trial to a three-judge panel. The waiver states:

I, Von Clark Davis, defendant in the above cause, appearing in open court this 8th day of May, 1984, with my attorneys * * * do hereby voluntarily waive my right to trial by jury and elect to be tried by a court to be composed of three judges, consisting of Judges Henry J. Bruewer, William R. Stitsinger, and John R. Moser, all the same being the elected judges of the General Division of the Court of Common Pleas of Butler County who are engaged in the trial of criminal cases, pursuant to Ohio Revised Code Section 2945.06.

I am waiving said trial by jury, and making this election to be tried by a court to be composed of three judges, with full knowledge of my right under the Constitution of the **[****8]** United States and of Ohio to a trial by a jury consisting of twelve jurors, whose verdict must be unanimous; with full knowledge of the consequences of such waiver and election under the laws of the State of Ohio; and without any compulsion, undue influence, promises or inducements of any kind made to me by anyone.

I further state that I have received the advice and counsel of my attorneys, with which I am satisfied, and being fully advised by them do hereby make this waiver and election of my own free will and accord.

[P20]** In *Davis I*, Davis disputed the voluntariness of his jury waiver. He argued that the trial court's refusal to sever the aggravated-murder charge from the charge of having a weapon under disability "'forced' him to choose a hearing by a three-judge panel." 38 Ohio St.3d at 363, 528 N.E.2d 925. We rejected that claim. *Id.* at 364.

[P21]** After we in *Davis I* remanded the case to the trial court for resentencing, Davis filed a motion to withdraw his jury waiver. The trial court denied the motion. Davis challenged that decision on his subsequent **[***1039]** appeal, arguing that his 1984 waiver was not "an 'informed choice,'" because in 1984 he did not realize that his choice could ultimately affect **[****9]** his eligibility to be resentenced to death in the event that his death sentence was vacated. *Davis II*, 63 Ohio St.3d at 48-49, 584 N.E.2d 1192.

[P22]** This argument was advanced, in part, because in 1987, three years after Davis's trial, we held that after a death sentence imposed after a jury trial was vacated, the trial court could not impanel a new jury on remand and therefore that the defendant could not be resentenced to death. *State v. Penix*, 32 Ohio St.3d 369, 372-373, **[*126]** 513 N.E.2d 744 (1987). We distinguished *Penix* in *Davis I*, holding at the syllabus that in a case tried to a three-judge panel, *Penix* did not apply and that a defendant in that situation would be eligible to receive a death sentence on remand. *See also Davis I* at 373.

[P23]** In *Davis II*, we did not accept Davis's argument that the holding in *Penix* should apply to him. *Id.* at 48. (The General Assembly later amended R.C. 2929.06 to abrogate the *Penix* rule. *See State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 6.) We also rejected Davis's argument that his 1984 waiver was not an "informed choice." *Davis II* at 48-49.

[P24]** In 2007, in federal habeas corpus litigation, Davis argued that the trial court had erred by **[****10]** denying the motion to withdraw his waiver of a jury, raising the same challenge to his jury waiver that we had rejected in *Davis II*. The Sixth Circuit rejected it as well. *Davis v. Coyle*, 475 F.3d at 779-780. In dictum, however, the Sixth Circuit expressed the view that "there is a

139 Ohio St. 3d 122, *126; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1039; 2014 Ohio LEXIS 842, ****10

legitimate question as to whether a criminal defendant should be held to a jury waiver entered almost 25 years before his newly-mandated sentencing hearing." *Id.* at 780. As a result of the federal litigation, the case again returned to the trial court for resentencing.

[P25]** In the trial court in 2008, Davis moved to withdraw his jury waiver. The trial court denied the motion on several independent grounds. The trial court determined that the validity of the jury waiver had been litigated in *Davis II* and in *Davis v. Coyle*; hence, res judicata barred Davis from litigating its validity. Alternatively, the court determined that R.C. 2945.05 permitted withdrawal only "before the commencement of the trial." Moreover, the court stated that R.C. 2929.06(B) expressly vested "exclusive responsibility to determine Defendant's sentence in a three judge panel and not in a jury."

[P26]** On appeal, the court of appeals rejected Davis's **[****11]** claim that the trial court's denial of the motion to withdraw the jury waiver was erroneous. The court held that the claim was barred by the law-of-the-case doctrine and by principles of res judicata. 2011-Ohio 787 at ¶ 16-28. The court of appeals then went on to also reject Davis's jury-waiver claims on their merits. *Id.* at ¶ 29-39.

B. Law of the Case/Res Judicata

[P27]** The law-of-the-case doctrine provides that the "decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404, 1996 Ohio 174, 659 N.E.2d 781 (1996), quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 11 Ohio B. 1, 462 N.E.2d 410 (1984). The doctrine **[*127]** "precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are **[***1040]** barred." *Sauline* at 404-405.

[P28]** Res judicata operates in a similar way.

"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 **[****12]** 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."

(Emphasis sic.) *State v. Szegefky*, 77 Ohio St.3d 93, 95, 1996 Ohio 337, 671 N.E.2d 233 (1996), quoting *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

[P29]** The state argues that these doctrines bar Davis from making any further challenge to the validity of his 1984 jury waiver. Both doctrines apply, however, only to arguments that were available to be pursued in a first appeal and to claims that either were or could have been raised at trial or on appeal. A claim that Davis's 1984 jury waiver was invalid ab initio because it was less than knowing, voluntary, and intelligent at the time it was made would be barred in the current appeal. But that is not Davis's principal argument here. Instead, Davis claims that he should have been permitted to withdraw the waiver as to the 2009 resentencing proceeding. Davis also claims that changed circumstances since 1984 rendered the waiver less than knowing, voluntary, and intelligent as to **[****13]** the 2009 resentencing. Davis could not have raised these claims in his earlier appeals.

[P30]** Davis's claims center on the fact that the three-judge panel that sentenced him in 2009 was not the same three-judge panel before which he had expected to be tried and sentenced when he waived a jury trial in 1984. Davis could not have raised these arguments during his initial appeal that was resolved in 1988 or in his later appeal that was resolved in 1992. In his original sentencing and his 1989 resentencing, Davis was sentenced by the specific panel mentioned in his jury waiver: Judges Bruewer, Stitsinger, and Moser. In 2009, he was sentenced by a different panel. Thus, the factual basis of his claims did not exist before 2009.

[P31]** One portion of Davis's argument is barred by res judicata. Davis asks us to reconsider our holding in *Davis II* in light of *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). In *Padilla*, the court held that a **[*128]** defendant's counsel has a duty to advise the defendant of certain immigration-related collateral consequences of a guilty plea, in particular the possibility of deportation. *Id.* at 374. Davis argues that the trial court should have advised him **[****14]** of the "collateral consequences" of his jury waiver at the time of his original jury waiver. We conclude that this claim could have been raised on Davis's first appeal in *Davis I*. *Padilla* is inapposite in any event. *Padilla*'s holding concerns what an attorney must advise a defendant before the defendant enters a plea of guilty. It says nothing about what a trial court must advise a defendant before accepting a jury waiver.

139 Ohio St. 3d 122, *128; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1040; 2014 Ohio LEXIS 842, ****14

[P32]** Davis's first proposition of law rests mainly on arguments that he could not have raised on appeal in 1988 or 1992. Those arguments are not barred by res judicata or the law-of-the-case doctrine, and Davis may pursue them in the instant **[***1041]** appeal. Accordingly, we will address the merits of Davis's first proposition of law.

C. Merits

1. R.C. 2929.06(B)

[P33]** When a criminal conviction is reversed on appeal and remanded for retrial, the general rule is that a jury waiver executed in the original trial is voided, and the defendant is entitled to a jury trial on remand unless he again validly waives that right. *See* 6 LaFave, Israel, King & Kerr, *Criminal Procedure*, Section 22.1(h), 36 (3d Ed.2007). *See, e.g., United States v. Groth*, 682 F.2d 578, 580 (6th Cir.1982); *People v. Schwartz*, 3 Ill.2d 520, 524, 121 N.E.2d 758 (1954).

[P34]** **[****15]** In the cases cited above, a conviction was either reversed on appeal or was set aside, necessitating a retrial on the issue of guilt or innocence. In this case, Davis's conviction was not reversed or set aside. Furthermore, in a capital case in Ohio, when the initial trial and sentencing proceedings were held before a three-judge panel, impaneling a jury solely for the purpose of resentencing is precluded by statute. *See* R.C. 2929.06(B), which states:

Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing.

[*129] Under this provision, because Davis had been tried to a three-judge panel, he was not entitled to a jury on resentencing.

[P35]** Davis asks us to "be guided by" the rule **[****16]** of lenity, codified in R.C. 2901.04(A), in considering this issue. He fails to explain precisely how the rule of lenity is pertinent. "The rule of lenity is a principle of statutory construction that provides that a court will not interpret a criminal statute so as to increase the penalty it imposes on a defendant if the intended scope of the statute is ambiguous." *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶ 38. The rule applies only "to the construction of ambiguous statutes." *Id.* at ¶ 40. *See Morgan v Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 1994 Ohio 380, 626 N.E.2d 939 (1994) (rule of lenity does not apply when statute is unambiguous). Davis identifies no ambiguity in R.C. 2929.06(B), and we perceive no ambiguity to which we could apply the rule of lenity.

[P36]** Citing *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, syllabus, Davis contends that he "no longer stood convicted under Ohio law" once the Sixth Circuit granted relief from his death sentence because a final judgment of conviction requires a sentence as well as a guilty verdict. But *Baker* involved a consideration of the elements that must be included in a trial court's judgment entry to constitute **[****17]** a final, appealable order. The existence of a final, appealable order is not at issue here. The question before us is whether Davis could have been resentenced by a three-judge panel pursuant to R.C. 2929.06(B) or was entitled to a jury trial for his resentencing.

[P37]** Given the clear command of R.C. 2929.06(B), Davis cannot obtain the relief **[***1042]** he seeks unless the application of R.C. 2929.06(B) violated his constitutional rights. We turn, then, to the constitutional issues raised by Davis.

2. Constitutionality

[P38]** Davis's principal contention appears to be that his original 1984 jury waiver, even if valid at the time it was made, cannot be considered knowing, voluntary, and intelligent when applied to his resentencing in 2009. *See State v. Campbell*, 414 N.J.Super. 292, 298, 998 A.2d 500 (App.Div.2010) ("one cannot knowingly waive rights in connection with an unanticipated second trial"). In this regard, Davis emphasizes that the 2009 resentencing was conducted before a three-judge panel composed of different judges than the panel that had tried the case in 1984. In particular, his 1984 waiver specifically stated that he "waive[d his] right to trial by jury and elect[ed] to be tried by a court to **[****18]** be composed of three judges, consisting of Judges Henry J. Bruewer, William R. Sitsinger, and John R. Moser * * *."

[P39]** **[*130]** The starting point for constitutional analysis of Davis's claim is the recognition that although the Sixth Amendment guarantees the right to trial by jury, neither the Sixth nor the Eighth Amendment creates a constitutional right to be sentenced by a jury, even in a capital case. "[D]espite its unique aspects, a capital sentencing proceeding involves the same

139 Ohio St. 3d 122, *130; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1042; 2014 Ohio LEXIS 842, ****18

fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual. * * * The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Spaziano v. Florida*, 468 U.S. 447, 459, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). *See also Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion); *Harris v. Alabama*, 513 U.S. 504, 515, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) ("The Constitution permits the trial judge, acting alone, to impose a capital sentence").

[P40]** Because there is no constitutional right to be sentenced by a jury, the Sixth Amendment does not require a waiver in **[****19]** order for a defendant to be sentenced without a jury. "Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Schnecko v. Bustamonte*, 412 U.S. 218, 237, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Thus, even were we to hold the 1984 jury waiver insufficient or inapplicable as to the 2009 resentencing hearing, we would find no constitutional bar to conducting that hearing without a jury pursuant to R.C. 2929.06(B).

[P41]** Davis's argument that his 1984 waiver could not be knowing and intelligent when applied to his 2009 resentencing because of changed circumstances appears to require that a defendant waiving a jury trial possess more information than courts have usually held sufficient for a knowing and intelligent jury waiver. "A defendant is sufficiently informed to make an intelligent waiver if he was aware that a jury is composed of 12 members of the community, he may participate in the selection of the jurors, the verdict of the jury must be unanimous, and * * * a judge alone will decide guilt or innocence should he waive his jury trial **[****20]** right." *United States v. Martin*, 704 F.2d 267, 273 (6th Cir.1983). *See also United States ex rel. Williams v. DeRobertis*, 715 F.2d 1174, 1180 (7th Cir.1983) (defendant must understand that the choice he faces is to be judged by a jury composed of people from the community as opposed to having his guilt or innocence determined by a judge); **[***1043]** *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 44-48.

[P42]** Finally, we address Davis's contention that *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), entitled him to have his resentencing hearing tried to a jury. *Duncan* holds that the Sixth Amendment right to a jury trial "is fundamental to the American scheme of justice" and that **[*131]** the Fourteenth Amendment incorporates it and "guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." *Id.* at 149. *Duncan* says nothing about jury sentencing, and—as we have already noted—there is no constitutional right to be sentenced by a jury.

[P43]** R.C. 2929.06(B) requires that resentencing be done by a three-judge panel if the original trial was held before a three-judge panel. **[****21]** Nothing in the Sixth Amendment prohibits the application of R.C. 2929.06(B) to this case. Therefore, we overrule Davis's first proposition of law.

II. Retroactivity and Ex Post Facto Claims

[P44]** In his third proposition of law, Davis contends that R.C. 2929.06(B), as amended, cannot be applied to him because he murdered Butler before the amended statute took effect. As explained earlier, the members of the three-judge panel that had tried and sentenced Davis in 1984 (and that had resentenced him in 1989) were unavailable in 2009. Hence, the 2009 resentencing took place before a panel of three different judges, none of whom had participated in the original trial.

[P45]** When a death sentence is nullified for error in the sentencing phase, R.C. 2929.06(B) provides: "If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing." This provision took effect October 16, 1996. The statute was originally designated R.C. 2929.06(A)(2) (*see* Sub.S.B. No. 258, 146 Ohio Laws, Part VI, 10539, 10548-10549) and received its current designation in 1998 (*see* Sub.S.B. No. 107, 147 Ohio Laws, Part IV, 7435, 7438). *See State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, at ¶ 6. **[****22]** R.C. 2929.06(E), effective March 23, 2005, expressly provides that R.C. 2929.06 applies to all offenders sentenced to death for an aggravated murder committed on or after October 19, 1981 (*see* Sub.H.B. No. 184, 150 Ohio Laws, Part III, 5043, 5051). *See White* at ¶ 8.

[P46]** Davis contends that at the time of Butler's murder on December 12, 1983, Ohio law did not allow a capital defendant to be resentenced to death by a different three-judge panel than the one that had originally tried and sentenced him. He contends that the imposition of a death sentence on him by a new three-judge panel pursuant to amended R.C. 2929.06(B) violates the Retroactivity Clause of the Ohio Constitution and the Ex Post Facto Clause of the United States Constitution. The state argues that Ohio law already permitted a capital defendant who had been tried by a three-judge panel and whose case was remanded for

139 Ohio St. 3d 122, *131; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1043; 2014 Ohio LEXIS 842, ****22

resentencing to be resentenced to death by a different three-judge panel and, therefore, that R.C. 2929.06(B) did not change the law. We have never decided this point, and we need not decide it here.

[*132] A. The Ohio Constitution's Retroactivity Clause

[P47]** Article II, Section 28 of the Ohio Constitution provides: "The general **[****23]** assembly shall have no power to pass retroactive laws." In determining whether a statute's retroactive application violates the Constitution, a court must determine **[****1044]** whether the General Assembly intended the statute to apply retroactively. *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 522 N.E.2d 489 (1988), paragraph one of the syllabus. If retroactive application was intended, the court must determine whether the challenged statute is substantive or remedial. *Id.* at paragraph three of the syllabus. "[T]he constitutional test for substantive legislation focuses on new laws that reach back in time and create new burdens, deprivations, or impairments of vested rights." *Bielat v. Bielat*, 87 Ohio St.3d 350, 359, 2000 Ohio 451, 721 N.E.2d 28 (2000). See generally *Van Fossen* at 107.

[P48]** We have recently considered whether R.C. 2929.06(B) violates the Retroactivity Clause. As to the first part of the test, we held: "The General Assembly has clearly expressed its intent that R.C. 2929.06(B) apply retroactively." *White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, at paragraph two of the syllabus. As to the second part, we held: "R.C. 2929.06(B) is remedial, not substantive. Hence, the Retroactivity Clause of the Ohio Constitution **[****24]** does not bar its retroactive application in cases where the aggravated murder was committed before its enactment, but the death sentence was set aside after its enactment." *Id.* at paragraph three of the syllabus.

[P49]** In *White*, a capital defendant had been convicted of aggravated murder with death specifications and sentenced to death after a jury trial. After the enactment of R.C. 2929.06(B), he obtained habeas corpus relief from his death sentence, obliging the trial court to resentence him. *Id.* at ¶ 1-2. At his resentencing, White argued that R.C. 2929.06(B) could not constitutionally be applied to a case involving a crime committed before its enactment. The trial court concluded that the Retroactivity Clause prohibited the application of R.C. 2929.06(B) to White's resentencing. The court of appeals reversed. *Id.* at ¶ 12-14. We affirmed that decision, stating:

[T]he application of R.C. 2929.06(B) to White's resentencing would not increase White's potential sentence, impair any of White's vested or accrued rights, violate any reliance interest or any reasonable expectation of finality, or impose any new burdens on him. We therefore hold that R.C. 2929.06(B) is remedial, not substantive. **[****25]** Hence, the Retroactivity Clause of the Ohio Constitution does not bar its retroactive application in cases where the aggravated murder was committed before its enactment, but the death sentence was set aside after its enactment.

[*133] *Id.* at ¶ 48.

[P50]** Davis was sentenced by a three-judge panel, but in all relevant respects his situation is indistinguishable from White's for purposes of the inquiry here. He murdered Butler on December 12, 1983, before the General Assembly enacted R.C. 2929.06(B). His death sentence was set aside on January 29, 2007, more than ten years after R.C. 2929.06(B) took effect. As in White's case, R.C. 2929.06(B) did not increase Davis's potential sentence, which was the same before and after the amendment of R.C. 2929.06.

[P51]** Neither does the amended statute impair any vested or accrued rights. Davis claims entitlement to the right to be resentenced under the law as it stood in 1983. But, similar to the defendant in *White*, Davis cannot be regarded as having a "vested or accrued" right to be resentenced under the former law. Davis's right to be resentenced under the former law could not exist until several intervening **[***1045]** events took place, including the setting aside of his **[****26]** death sentence. By the time his death sentence was set aside in 2007, R.C. 2929.06(B) and (E) had been adopted, so Davis's right to be resentenced under former law never attained the status of a "vested or accrued" right. *White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, at ¶ 34-37.

[P52]** Finally, R.C. 2929.06(B) did not impose any new burden on Davis. The burden he faced on resentencing was the same burden he faced on December 12, 1983: that of defending a death-penalty proceeding. *White* at ¶ 41. Moreover, Davis "can point to no event preceding the enactment of R.C. 2929.06(B) and (E) that entitled him to a reasonable expectation of finality." *Id.* at ¶ 43. Hence, "retroactive application of R.C. 2929.06(B) to [Davis's] resentencing does not create a new burden 'in the constitutional sense.'" *Id.* at ¶ 44, quoting *State ex rel. Matz v. Brown*, 37 Ohio St.3d 279, 281, 525 N.E.2d 805 (1988).

139 Ohio St. 3d 122, *133; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1045; 2014 Ohio LEXIS 842, ****26

[P53]** We reject Davis's claim that the application of R.C. 2929.06(B) to his resentencing violates the Retroactivity Clause of the Ohio Constitution.

B. The Ex Post Facto Clause

[P54]** Article I, Section 10 of the United States Constitution provides: "No State shall * * * pass any * * * ex post facto Law." In **[****27]** *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648, 3 Dall. 386 (1798), Justice Chase identified the four kinds of laws that come within the Ex Post Facto Clause:

1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts **[*134]** a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal rules of evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

(Emphasis sic.) The United States Supreme Court has adopted Justice Chase's definition of "ex post facto laws" as authoritative. *See, e.g., Stogner v. California*, 539 U.S. 607, 611, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003); *Carmell v. Texas*, 529 U.S. 513, 525, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000).

[P55]** In *White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, at ¶ 64, we rejected an Ex Post Facto Clause challenge to R.C. 2929.06(B), stating: "We hold that R.C. 2929.06(B) does not fall **[****28]** within any of the four categories of ex post facto laws identified in *Calder*. Hence, its application in this case does not violate the Ex Post Facto Clause." We therefore reject Davis's Ex Post Facto Clause claim, and with it his third proposition of law.

III. Claim that the Trial Panel Gave Insufficient Weight to Mitigating Evidence

[P56]** In his second proposition of law, Davis contends that the three-judge panel violated the Eighth Amendment, as construed in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), by giving either insufficient weight or no weight at all to his mitigating evidence. Davis contends that *Eddings* requires the sentencer in a capital case to assign some weight to any relevant mitigating evidence. *Eddings* holds: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to **[****1046]** consider, *as a matter of law*, any relevant mitigating evidence." (Emphasis sic.) *Id.* at 113-114. The sentencer in a capital case "may not give [mitigating evidence] no weight by excluding such evidence from [its] consideration." *Id.* at 114-115.

[P57]** During the 2009 resentencing proceedings, the defense called **[****29]** as a mitigation witness Cynthia Mausser, the chair of the Ohio Parole Board. Mausser explained the parole process and the factors the parole board examines in determining whether to grant parole. Defense counsel asked Mausser a hypothetical question, based on the situation in this case, about a defendant who was paroled from a second-degree-murder conviction, was convicted of a second murder with death specifications, and was sentenced to death, but who was subsequently resentenced to "30 to life." Mausser testified that "that person * * * would likely spend a large portion of the remainder of their life in prison."

[P58]** In the sentencing opinion, the resentencing panel specifically stated that it had "considered the testimony of Cynthia Mausser offered to show the **[*135]** probability that Defendant would never be released from prison if given a sentence less than death." The panel found that Mausser's testimony was "entitled to no weight" because it was "highly speculative and unconvincing."

[P59]** *Eddings* does not require a court to give any particular weight to relevant mitigating evidence. *Eddings* states that a sentencing court "may not give [relevant mitigating evidence] no weight by excluding such **[****30]** evidence from [its] consideration." *Id.*, 455 U.S. at 114-115, 102 S.Ct. 869, 71 L.Ed.2d 1. Thus, a court may not refuse to consider relevant mitigating evidence (as the trial court did in *Eddings*) and therefore give it no weight as a result of that refusal. But *Eddings* does not preclude a court from considering mitigating evidence and determining that it deserves no weight. *Eddings* "expressly refused to dictate what weight or importance to assign to particular mitigating factors." *State v. Brewer*, 48 Ohio St.3d 50, 56, 549 N.E.2d 491 (1990), citing *Eddings* at 114-115 and 117. The court in *Eddings* stated that the sentencer is permitted to "determine the weight to be given relevant mitigating evidence," *id.* at 114-115, and in vacating the death penalty further stated: "On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them." *Id.* at 117.

139 Ohio St. 3d 122, *135; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1046; 2014 Ohio LEXIS 842, ****30

[**P60] Although the Eighth Amendment "requires the sentencer to listen" to relevant mitigating evidence, *Eddings* at 115, fn.10, it does not require the sentencer to reach any particular conclusion about the weight of that evidence. Thus, [****31] the United States Supreme Court has described as "settled" the proposition "that the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer." *Harris v. Alabama*, 513 U.S. at 512, 115 S.Ct. 1031, 130 L.Ed.2d 1004, citing *Eddings* at 113-115. We have stated that "courts need not give weight to relevant mitigating evidence simply because they must consider such evidence under Supreme Court precedents." *State v. Richey*, 64 Ohio St.3d 353, 369, 1992 Ohio 44, 595 N.E.2d 915 (1992). *Accord State v. Mitts*, 81 Ohio St.3d 223, 235, 1998 Ohio 635, 690 N.E.2d 522 (1998); *State v. LaMar*, 95 Ohio St.3d 181, 209-210, 2002 Ohio 2128, 767 N.E.2d 166 (2002).

[**P61] Davis also complains that the resentencing panel gave insufficient weight to various factors offered in mitigation. [***1047] Specifically, he complains that the panel gave "little weight" to his personality disorder, to his good behavior in prison, and to the fact that his daughter has forgiven him for killing her mother. The panel likewise gave "little or no weight" to Davis's dysfunctional family and childhood experiences and found that the love and support of Davis's family and friends "does [****32] not deserve significant weight." Davis argues that these determinations [*136] "improperly discounted" the mitigating evidence that he adduced and thereby violated the Eighth Amendment.

[**P62] "[T]he Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer." *Harris*, 513 U.S. at 512, 115 S.Ct. 1031, 130 L.Ed.2d 1004. Capital sentencing requires a "reasoned *moral* response to the defendant's background, character, and crime." (Emphasis sic.) *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring). The weight to be given mitigating factors "is necessarily an individual decision by the fact finder." *Richey*, 64 Ohio St.3d at 369-370, 595 N.E.2d 915. It is subject to correction by means of independent appellate reweighing and is not a matter of law. *See State v. Mills*, 62 Ohio St.3d 357, 376, 582 N.E.2d 972 (1992); *State v. Fox*, 69 Ohio St.3d 183, 191, 193, 1994 Ohio 513, 631 N.E.2d 124 (1994).

[**P63] In his brief, Davis quotes a statement from *Porter v. McCollum*, 558 U.S. 30, 42, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), which he describes as a case in which a state supreme [****33] court "'either did not consider or unreasonably discounted the mitigation evidence' adduced in a post conviction hearing." However, unlike this case, *Porter* did not involve a claim that the sentencing court had given insufficient weight to, and thus failed to fully consider, mitigating evidence. *Porter* involved a claim that defense counsel had rendered ineffective assistance by failing to investigate, discover, and present relevant mitigating evidence. Similarly, *Wiggins v. Smith*, 539 U.S. 510, 534-538, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and *Rompilla v. Beard*, 545 U.S. 374, 390-393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), also cited by Davis, are ineffective-assistance cases involving trial counsel's failure to investigate and present mitigating evidence.

[**P64] The issue in *Porter* was whether the petitioner had demonstrated ineffective assistance under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Porter* at 38-39. Under the prejudice prong of *Strickland*, the petitioner in *Porter* was required to "show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence." *Id.* at 41. [****34] To assess that probability, the *Porter* court considered "'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[hed] it against the evidence in aggravation.'" *Id.*, quoting *Williams v. Taylor*, 529 U.S. 362, 397-398, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

[**P65] The *Porter* court was not directly reviewing a trial court's weighing of aggravation against mitigation in the penalty phase; it was reviewing a state court's analysis of an ineffective-assistance claim on collateral review. In evaluating the prejudice component of that claim, the court considered the likelihood [*137] that had the evidence been presented in the penalty phase, the sentencer would have given it decisive weight. In the context of assessing prejudice while analyzing an ineffective-assistance claim, the *Porter* court determined [***1048] that the state court had erred by "unreasonably discount[ing] the mitigation evidence adduced in the postconviction hearing." *Id.*, 558 U.S. at 42, 130 S.Ct. 447, 175 L.Ed.2d 398. Thus, *Porter* does not stand for the proposition that the Eighth Amendment forbids a sentencer to "discount" mitigating evidence introduced at [****35] the penalty phase of the trial.

[**P66] Davis also argues that by giving little or no weight to two categories of mitigating evidence, the resentencing panel acted inconsistently with the weight that we gave to similar mitigating evidence in our independent review in *Davis II*. In *Davis II*, 63 Ohio St.3d at 50-51, 584 N.E.2d 1192, we gave "some, but very little, weight in mitigation" to Davis's "nature and character," including his disciplinary record in prison while he was serving his sentence for his 1971 murder conviction. At his 2009 resentencing hearing, Davis adduced evidence of his good behavior while on death row, and the resentencing panel gave "little weight" to that evidence.

139 Ohio St. 3d 122, *137; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1048; 2014 Ohio LEXIS 842, ****35

This is not inconsistent with our giving "some, but very little, weight" to similar evidence in *Davis II*. Davis creates the claimed inconsistency by omitting the phrase "but very little" when he selectively quotes *Davis II* on this point.

[P67]** In *Davis II* at 51, we assigned "some weight" to Davis's personality disorder based on psychologist Dr. Roger Fisher's testimony in the 1984 mitigation hearing. The resentencing panel here heard testimony from a different psychologist, Dr. Robert Smith, who testified that Davis **[****36]** has a borderline personality disorder. The panel found "that Dr. Smith's diagnosis, even if valid, is entitled to little weight in mitigation." In *Davis II*, we reviewed the record of the 1984 mitigation hearing; the resentencing panel here was evaluating the evidence presented in the 2009 mitigation hearing. There is nothing inconsistent about the slightly different conclusion because the conclusions were based on different testimony.

[P68]** Finally, Davis argues that by giving little weight to his good behavior in prison, the resentencing panel was inconsistent with the Sixth Circuit's statement in *Davis v. Coyle*, 475 F.3d at 773, that this evidence is "highly relevant." Davis's argument "is inconsistent with the *Eddings* court's express refusal to usurp the weighing function of state courts." *State v. Cooley*, 46 Ohio St.3d 20, 39, 544 N.E.2d 895 (1989), citing *Eddings*, 455 U.S. at 114-115 and 117, 102 S.Ct. 869, 71 L.Ed.2d 1.

[P69]** Davis's second proposition of law is overruled.

[*138] IV. Delay in Execution of Death Sentence

[P70]** Davis was originally sentenced to death in 1984. In his fifth proposition of law, he contends that "[e]xecuting [him] after such a lengthy stay on death row constitutes cruel and **[****37]** unusual punishment." To support this claim, Davis cites separate opinions of justices of the United States Supreme Court in cases in which the full court denied writs of certiorari. See *Lackey v. Texas*, 514 U.S. 1045, 1045-1047, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995) (Stevens, J., respecting the denial of certiorari); *Thompson v. McNeil*, 556 U.S. 1114, 1114-1116, 129 S.Ct. 1299, 173 L.Ed.2d 693 (2009) (Stevens, J., respecting the denial of certiorari); *id.* at 1119-1121 (Breyer, J., dissenting from the denial of certiorari). But see *Knight v. Florida*, 528 U.S. 990, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999) (Thomas, J., concurring in the denial of certiorari) (rejecting "proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed"); *Foster v. Florida*, **[***1049]** 537 U.S. 990, 123 S.Ct. 470, 154 L.Ed.2d 359 (2002) (Thomas, J., concurring in the denial of certiorari).

[P71]** Numerous courts have rejected claims that delays between the imposition and the execution of a death sentence constitute cruel and unusual punishment. See *Fearance v. Scott*, 56 F.3d 633, 638-639 (5th Cir.1995); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir.1995); **[****38]** *Free v. Peters*, 50 F.3d 1362 (7th Cir.1995); *Ex parte Bush*, 695 So.2d 138, 139-140 (Ala.1997); *State v. Schackart*, 190 Ariz. 238, 259, 947 P.2d 315 (1997); *People v. Massie*, 19 Cal.4th 550, 574, 79 Cal.Rptr.2d 816, 967 P.2d 29 (1998); *Rose v. State*, 787 So.2d 786, 805 (Fla.2001); *Halvorsen v. Commonwealth*, 258 S.W.3d 1, 11 (Ky.2007), fn. 31 (collecting cases); *State v. Smith*, 280 Mont. 158, 183-185, 931 P.2d 1272 (1996); *State v. Moore*, 256 Neb. 553, 563-566, 591 N.W.2d 86 (1999). In *Moore*, the Nebraska Supreme Court stated that "[i]t would be a mockery of justice to conclude that delays caused by satisfying the Eighth Amendment themselves violate it." *Id.* at 565.

[P72]** Davis argues that because he has been resentenced twice due to error in the sentencing proceedings, the resulting delay is the state's fault, not his. See, e.g., *Elledge v. Florida*, 525 U.S. 944, 945, 119 S.Ct. 366, 142 L.Ed.2d 303 (1998) (Breyer, J., dissenting from the denial of certiorari) (opining that a lengthy delay was caused by "the State's own faulty procedures," not by "frivolous appeals"). We are not persuaded. As the Eighth Circuit stated in *Chambers v. Bowersox*, 157 F.3d 560 (8th Cir.1998):

[D]elay, in large part, **[****39]** is a function of the desire of our courts * * * to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone's life. Chambers's strongest argument is that the **[*139]** State has had to try him three times before getting it right. That is true, but there is no evidence, not even a claim, that the State has deliberately sought to convict Chambers invalidly in order to prolong the time before it could secure a valid conviction and execute him. * * * Delay has come about because Chambers, of course with justification, has contested the judgments against him, and, on two occasions, has done so successfully.

Id. at 570.

[P73]** American courts have stated other reasons why Eighth Amendment execution-delay claims should not be recognized. Sustaining such claims by "placing a substantial premium on speed rather than accuracy" could create a disincentive for "err[ing] on

139 Ohio St. 3d 122, *139; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1049; 2014 Ohio LEXIS 842, ****39

the side of caution." *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir.1995). *Accord State v. Moore*, 256 Neb. at 565-566, 591 N.W.2d 86. "[I]t is unclear * * * whether, even if it were held that delay in the [execution] of the death penalty constitutes cruel and unusual punishment, commutation of the death [****40] penalty will turn out to be the appropriate remedy." *McKenzie* at 1467.

[**P74] Davis cites five decisions by foreign and international courts that, in his view, establish an international norm recognizing that long postsentencing delays of executions are cruel. *Vatheeswaran v. Tamil Nadu*, 2 S.C.R. 348, 353 (India 1983); *Pratt v. Atty. Gen. for Jamaica*, 3 S.L.R. 995, 2 A.C. 1, 4 All E.R. 769 (Privy Council 1993) (en banc); *Soering v. United Kingdom*, 11 Eur.Hum.Rts.Rep. 439 (Eur.Ct.Hum.Rts.1989); *Catholic Comm. for Justice & Peace in Zimbabwe v. Atty. Gen.*, 1 Zimb.L.R. 239, 14 Hum.Rts.L.J. 323 (1993); *Minister of Justice v. Burns*, 1 [***1050] S.C.R. 283 (Canada 2001). Davis contends that these decisions support his Eighth Amendment claim because we must look to international norms when interpreting the Eighth Amendment's guarantee against cruel and unusual punishment. See *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Although *Roper* does discuss "international opinion" in support of its Eighth Amendment holding, *id.* at 575-578, the role of international opinion in this inquiry is much more limited than Davis would have it.

[**P75] *Roper* held that the infliction of the death penalty for [****41] crimes committed before age 18 is cruel and unusual punishment within the meaning of the Eighth Amendment. *Id.* at 578. *Roper* reached this conclusion by considering "[t]he evidence of national consensus against the death penalty for juveniles." *Id.* at 564. The court concluded that "the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles * * * as 'categorically less culpable than the average [*140] criminal.'" *Id.* at 567, quoting *Atkins v. Virginia*, 536 U.S. 304, 316, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The court also analyzed whether the penological justifications for the death penalty applied to juvenile murderers and concluded that they did not. *Roper* at 568-572. Finally, the court stated that "[o]ur determination * * * finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." *Id.* at 575. Specifically, the court stated that [****42] "only seven countries other than the United States have executed juvenile offenders since 1990" and that all seven had either abolished or publicly disavowed capital punishment for juveniles since then. *Id.* at 577. This led the court to "acknowledge the overwhelming weight of international opinion against the juvenile death penalty." *Id.* at 578.

[**P76] The *Roper* court cited and discussed the nearly universal rejection of a particular practice as establishing that the practice in question was rejected by "the overwhelming weight of international opinion." *Id.*, 543 U.S. at 575-578, 125 S.Ct. 1183, 161 L.Ed.2d 1. Although it referred to world opinion, *Roper* established that world opinion is not controlling in Eighth Amendment jurisprudence, stating: "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Id.* at 578.

[**P77] In this case, Davis fails to show that lengthy waits between sentencing and execution contravene "our society's evolving standards of decency." *Id.* at 563. Absent some such showing, the foreign cases Davis cites cannot advance his Eighth Amendment claim.

[**P78] Davis also argues that "[b]ecause [****43] of the long delays between sentencing and execution, and the conditions in which the condemned are kept, execution of the death penalty in [his] case constitutes 'cruel, inhuman or degrading treatment or punishment' in violation of Article VII of the International Covenant on Civil and Political Rights [ICCPR]." As Davis concedes, however, the ICCPR was approved by the United States Senate subject to the reservation that "'cruel, inhuman, or degrading treatment or punishment' means the cruel and unusual treatment or punishment [***1051] prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." *Buell v. Mitchell*, 274 F.3d 337, 371 (6th Cir.2001), quoting 138 Cong.Rec. S-4781-01, 4783 (1992). Thus, the ICCPR provides no basis, independent of the Eighth Amendment, for [*141] holding that delay between execution and sentence deprives the state of the right to execute the death sentence against Davis. Furthermore, the ICCPR is not self-executing and hence could not be enforced by courts in the absence of a federal statute implementing it. *Buell* at 372. See also *Halvorsen v. Commonwealth*, 258 S.W.3d at 11 (rejecting ICCPR claim in context of challenge to execution [****44] delay). We reject Davis's ICCPR claim and his Eighth Amendment claim.

[**P79] Davis's fifth proposition of law is overruled.

V. Independent Sentence Review

139 Ohio St. 3d 122, *141; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1051; 2014 Ohio LEXIS 842, ****44

[P80]** In his fourth proposition of law, Davis contends that the aggravating circumstance in his case does not outweigh the mitigating factors beyond a reasonable doubt. R.C. 2929.05 requires this court to independently review the death sentence imposed on Davis. We must determine whether the evidence supports the jury's finding of an aggravating circumstance, whether the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt, and whether the death sentence is proportionate to those affirmed in similar cases.

A. Aggravating Circumstance

[P81]** Davis was convicted of a single death specification: that "[p]rior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another * * *." R.C. 2929.04(A)(5). At trial, the state introduced a certified copy of a 1971 judgment entry of conviction in case No. 21655, in which Von C. Davis was convicted of murder in the second degree under former R.C. 2901.05. The purposeful killing of another was an essential **[****45]** element of second-degree murder under former R.C. 2901.05. *State v. Butler*, 11 Ohio St.2d 23, 32, 227 N.E.2d 627 (1967). The parties stipulated the authenticity of the judgment entry and the fact that the defendant was the same Von C. Davis referred to in the judgment entry. In *Davis II*, 63 Ohio St.3d at 50, 584 N.E.2d 1192, we found "that the aggravating specification was proved beyond a reasonable doubt."

B. Mitigating Factors

[P82]** At his 2009 resentencing, Davis called 11 witnesses, including relatives, acquaintances, and experts. There was no evidence concerning any of the specific mitigating factors enumerated in R.C. 2929.04(B)(1) through (6). The mitigating evidence presented falls under the "catchall" factor of R.C. 2929.04(B)(7), which requires consideration of "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death." Davis cites the following mitigating factors: his upbringing in a dysfunctional **[*142]** family, his personality disorders, his good behavior in prison, the love of his family and friends, his daughter's forgiveness for having killed her mother, his remorse, the unlikelihood that he will ever be released from prison if sentenced **[****46]** to a life term, and his advanced age. We will discuss each of these and other factors in turn.

1. Family Background

[P83]** Davis's mother (Alluster Tipton), stepfather (Charles Tipton), and two siblings (Victor L. Davis and Carol Smith) testified about Davis's childhood and early family life. Davis was born in 1946. His parents, Nicholas and Alluster Davis, were **[***1052]** married in 1945. They had five children together: Elliot, Von, Carol, and Victor Davis, and another child who died as an infant. During their marriage, Alluster testified, Nicholas "was in and out" of the household. Carol Smith and Victor Davis testified that Nicholas left home when they were very young and that they had only vague memories of him. Alluster testified that Nicholas's drinking caused problems in their marriage.

[P84]** When Von was nine or ten years old, his mother began dating Charles Tipton. They married in 1962 and were married at the time of the mitigation hearing in 2009. Tipton testified that he and Von were "very close" and went fishing together every weekend before Von went to prison, but that they never discussed "personal issues." Tipton considers Von a son rather than a stepson.

2. Borderline Personality Disorder and **[****47]** Alcohol Dependence

[P85]** Dr. Robert Smith, a defense-engaged clinical psychologist and certified addiction specialist, interviewed Davis twice. He interviewed Alluster and Charles Tipton, three of Davis's siblings, and Patrick Rotundo, Davis's lifelong friend. Dr. Smith also reviewed interviews conducted by investigators, school and medical records, police reports, and evaluations by other experts. Based on the above, Dr. Smith compiled what he described as a "comprehensive psychosocial history" of Davis.

[P86]** Dr. Smith formed the opinion that Davis suffered from two psychological disorders—alcohol dependence and borderline personality disorder—when he murdered Butler. In Dr. Smith's opinion, these disorders "interfered with his cognitive functioning" and "impaired or diminished his ability at the time of the offense." Dr. Smith explained that borderline personality disorder is correlated with backgrounds characterized by an extreme lack of adequate parental supervision and nurturing. As a result, "these individuals * * * don't develop a sense of themselves."

[P87]** According to Dr. Smith, Davis's father was 16 years old and his mother was 17 years old when they married in 1945. They were "volatile **[****48]** and angry with one another and had lots of fights and arguments" and "numerous separations"

139 Ohio St. 3d 122, *142; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1052; 2014 Ohio LEXIS 842, ****48

[*143] during their marriage of about nine years. Nicholas Davis was an alcoholic, unfaithful to his wife, and verbally abusive to his wife and children. During his marriage to Alluster, he was "basically * * * absent." He disappeared for significant periods and did not support his family while absent. Davis had no contact with his father from age 12 until he reached adulthood, when Davis impulsively went AWOL from the Navy to visit Nicholas.

[**P88] Alluster was often away from home herself, leaving her children in the care of her mother and aunt. When Nicholas was absent, she engaged in a series of relationships with other men. According to Dr. Smith, Alluster had three children by three different men in addition to the children she had by Nicholas. These relationships were brief; two of them lasted for a year each, and one lasted for three years. She also "abused alcohol occasionally."

[**P89] There was no bond between Davis and his parents, and he had no experience of "love, nurturing or intimacy" during his early years. Dr. Smith explained that young children rely on parents to set boundaries and teach values. [****49] Nicholas and Alluster "had significant problems that prevented them from being able to be there" for Davis. They failed to provide "consistency" for Davis as he was growing up.

[**P90] [***1053] In 1962, Alluster married Charles Tipton. Dr. Smith stated that Tipton "was the one hope that [Davis] had" for stability, "but it came too late." By the time Tipton married Alluster, Davis had largely formed his personality. Davis had already begun abusing alcohol and "running the streets" rather than spending time at home.

[**P91] Dr. Smith observed that Davis displayed classic symptoms of borderline personality disorder. These included a pattern of "unstable, intense relationships"; impulsivity; inappropriate, intense anger; depression; "[t]ransient, stress-related paranoid ideation"; identity disturbance; and a lack of a "sense of direction." Dr. Smith defined a "personality disorder" as a "personality style" that causes a person to act in "self-defeating" ways. He explained that borderline personalities "need relationships * * * desperately and * * * are very frightened of losing what relationships they have." They tend to "idealize" others and expect too much of others. Yet they also tend to misinterpret situations [****50] and to suspect the motives of others. Thus, they experience "dramatic mood swings" between "idealizing you" and "wanting to push you away." Because they lack "coping strategies" for stress, borderline personalities overreact to minor provocations. They engage in outbursts of disproportionate anger and "unwarranted aggressive behavior."

[**P92] Dr. Smith also noted that Davis had indicated that he had "consumed some amount of beer and hard liquor" before killing Butler. Dr. Smith testified that intoxication, like borderline personality disorder, can distort one's perceptions [*144] and cause impulsivity and mood swings. Thus, there is a "synergy between" alcohol dependency disorder and borderline personality disorder, and a person with both disorders "is more impaired than if they had the one disorder alone."

3. Good Behavior in Prison

[**P93] Scott Nowak, a "correctional program specialist" at the Ohio State Penitentiary in Youngstown, worked with death-row inmates and other inmates who had the highest security classification. He testified that Davis had been living on the death row "honor block" since May 2006. He also testified that a death-row inmate had to go 36 months without committing a major rule [****51] violation to be placed on the waiting list for the honor block.

[**P94] Jerome Stineman, a volunteer in the Alcoholics Anonymous ("AA") program at the Southern Ohio Correctional Facility when Davis was an inmate there, had known Davis since 1989 or 1990. Stineman testified that Davis had participated in AA meetings every week for approximately three years from 1990 to 1993.

[**P95] Dr. Smith testified that Davis had shown that "within the institution he does well." Dr. Smith testified that people with a borderline personality usually "do very well in a structured environment." He explained that the borderline personality has problems with "impulsivity [and] poor decision making and difficulty with relationships." Dr. Smith testified that in prison, the inmate has "clear-cut rules," supervision "at all times," few decisions to make, and few opportunities to "act out" or form relationships. Moreover, an alcohol-dependent inmate has a "greatly reduced" likelihood of access to alcohol in prison.

4. Love of Family and Friends; Forgiveness of Daughter

[**P96] Charles Tipton testified: "Growing up, [Davis] was a child that every parent would want to have. Never a day in trouble." Davis's mother, brother, and sister [****52] each testified that they had maintained their relationships with Davis with [***1054] visits, phone calls, and letters. Each stated that Davis was meaningful and important to them, and each asked the panel to spare his

139 Ohio St. 3d 122, *144; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1054; 2014 Ohio LEXIS 842, ****52

life. Victor Davis said that Von had had "a spiritual awakening" while incarcerated. Carol Smith considered him "a good person deep inside."

[**P97] Fran Welland of London, England, testified that she had been corresponding with Davis since 1992, had exchanged hundreds of letters with him in that time, and had visited him three times since 1996. She described Davis as "open and generous with his feelings" and not manipulative. She praised his sense of humor and testified that his execution would "tear [her] apart."

[**P98] [*145] Sherry Davis is the daughter of Von Davis and Ernestine Franklin Davis, whom Davis murdered in 1970. Sherry had felt hatred toward her father for a long time, but she forgave him because she did not want to carry that burden through life. Since then, she had formed a strong bond with him. She had visited him, corresponded with him, and spoken to him on the telephone. She stated, "I would not like to see my father taken away from me as well."

5. Remorse and Acceptance of Responsibility

[**P99] [****53] Fran Welland testified that in a recent letter to her, Davis had expressed remorse for having killed two people. Victor Davis testified that Davis had always expressed remorse to him and had never denied responsibility or blamed anyone except himself for Butler's murder. Dr. Smith testified that Davis admitted that he had killed Butler and that he had been "dishonest" when he had denied guilt at his trial in 1984. Dr. Smith testified that Davis clearly stated at their first meeting "that he had no * * * desire to excuse what he did" and also stated that "he was going to acknowledge that and own that completely."

6. Unlikelihood of Release

[**P100] The defense called as a mitigation witness Cynthia Mausser, the chair of the Ohio Parole Board. Mausser explained how the parole board determines whether to grant or deny parole. When considering release, the board will order a "clinical risk assessment," which includes an interview with the prisoner by a "psychology assistant," a file review, and an assessment of whether 24 "risk factors" are present. The resulting report is approved by a supervising psychologist. The board also considers the seriousness of the offense and the inmate's criminal history [****54] and history of parole violations. Mausser testified that the average time served for an aggravated-murder conviction is about 27 years.

[**P101] Defense counsel asked Mausser to assume the facts of this case and asked whether she had "an opinion of whether that individual is likely to be paroled in the future." Mausser testified that in her opinion, "that person * * * would likely spend a large portion of the remainder of their life in prison" and was unlikely to be paroled on his first appearance before the board. On cross-examination, Mausser testified that after an inmate's first review, he could come up for a new hearing every year and would be entitled to at least one hearing every ten years. Mausser conceded that she had never sat on a parole hearing for an inmate convicted of aggravated murder with death specifications who received a life sentence. She further testified that the amount of weight to give any particular factor was within the discretion of each individual board member and that she could not say with certainty how the board would vote if Davis ever became eligible for parole.

[***1055] [*146] 7. Cost of Life Imprisonment vs. Cost of Death Row

[**P102] At his resentencing hearing, Davis asked the sentencing [****55] panel to take into account that it is more expensive to hold a person on death row than to imprison him for life. Defense witness Scott Nowak testified that inmates transferred off death row are generally transferred to "Level 3 security institutions." These institutions have a lower officer-to-inmate ratio than the penitentiary at Youngstown, where Nowak worked and where death row was located at the time of the hearing.

8. Evidence from the 1984 Mitigation Hearing

[**P103] At his 1984 mitigation hearing, Davis had called four witnesses. Allister and Charles Tipton gave testimony consistent with their 2009 testimony. Charles Tipton also stated that Davis had been honorably discharged from the Navy.

[**P104] John Bohlen of the Adult Probation Department of the Butler County Court of Common Pleas testified that Davis's prison record from his 1971 conviction showed no significant disciplinary problems. Davis had studied in prison, earning an associate's degree in business administration and three years' worth of credit toward a bachelor's degree from Urbana College. He had also been awarded a certificate in vocational training in auto-body repair and in masonry and had received on-the-job training as a dental [****56] technician. His record also showed that he had been diagnosed with compulsive personality disorder.

139 Ohio St. 3d 122, *146; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1055; 2014 Ohio LEXIS 842, ****56

[P105]** Clinical psychologist Dr. Roger Fisher, the executive director of the Butler County Center for Forensic Psychiatry, testified about his interview with Davis before the 1984 mitigation hearing. He agreed with the diagnosis of compulsive personality disorder and with another diagnosis of Davis as an "active-detached individual with schizoid trends." Based on Davis's vocational history, Dr. Fisher described him as "quite * * * hard working" and "very dedicated to doing a good job for people who employ him."

C. Weighing

[P106]** The mitigating factors that Davis emphasized most strongly during his mitigation hearing were his dysfunctional family background and the personality disorders allegedly caused by that background. These factors, although relevant here, are entitled to little weight.

[P107]** Dr. Smith testified that the symptoms of borderline personality disorder include dramatic mood swings, impulsivity, and outbursts of disproportionate anger. The murder of Suzette Butler, however, was not an impulsive act or the product of an angry outburst. The trial court found Davis guilty of killing Butler **[****57]** with prior calculation and design. Several hours before the murder, Davis used a **[*147]** straw purchaser to acquire a gun and ammunition, making three trips to various stores to accomplish the purchases. Aldridge, Denmark, and Massey testified that Davis did not appear to be arguing or fighting with Butler immediately before the murder.

[P108]** In *State v. Raglin*, 83 Ohio St.3d 253, 270-273, 1998 Ohio 110, 699 N.E.2d 482 (1998), a defense expert testified that the defendant suffered from several psychological and neuropsychological disorders, including borderline personality disorder. The expert further testified that the defendant suffered from a "lack of impulse control" that deprived him of substantial capacity to conform to the law. *Id.* at 273. We determined that this factor deserved "limited weight." *Id.* "[P]erhaps [the] most important" reason for our conclusion was that "the nature and circumstances of the offense clearly indicate **[***1056]** a lack of impulsive behavior in the planning and execution of the robbery, in the killing that occurred during the robbery, or in appellant's actions immediately following the robbery and killing." *Id.*

[P109]** Evidence at trial indicated that Davis had consumed alcohol on the day of the **[****58]** murder. This is entitled to at least some weight as a mitigating factor. The record does not make clear how much alcohol Davis drank that day. In any event, this court has held that voluntary intoxication deserves little weight in mitigation. *State v. Campbell*, 95 Ohio St.3d 48, 51, 2002 Ohio 1626, 765 N.E.2d 334 (2002).

[P110]** Davis retains the love and support of his family and friends. This is entitled to some weight. So are his honorable naval service and his vocational history. The fact that his daughter Sherry forgave him for murdering her mother deserves little if any weight. Sherry testified that she forgave Davis in order to further her own healing. Her forgiveness does not necessarily reflect anything favorable in Davis's history, character, or background.

[P111]** We afford no weight to the testimony of the chair of the parole board regarding the likelihood of parole for a person in Davis's situation who does not receive a sentence of death. This testimony was speculative. Even she could not predict how her fellow board members might vote. Nevertheless, given his age (67), the likelihood that Davis will never be released from prison is credible enough to deserve some weight. See *State v. Bradley*, 42 Ohio St.3d 136, 149, 538 N.E.2d 373 (1989) **[****59]** (court should consider probability that defendant will never be released from prison).

[P112]** Davis established that he had a record of good behavior in prison, both during his earlier incarceration and on death row. This is relevant mitigation, *Skipper v. South Carolina*, 476 U.S. 1, 4-5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), and is entitled to some weight.

[P113]** **[*148]** "Retrospective remorse" is entitled to little weight. *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 119; *State v. Post*, 32 Ohio St.3d 380, 394, 513 N.E.2d 754 (1987).

[P114]** The allegedly lower cost of life imprisonment compared to imposition of the death penalty is not a legitimate mitigating factor. Relevant mitigating evidence includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion). "Evidence of cost effectiveness of the death sentence does not bear on a defendant's character, prior record or the circumstances of the offense." *Al-Mosawi v. State*, 1996 OK CR 59, 929 P.2d 270, 287

139 Ohio St. 3d 122, *148; 2014-Ohio-1615, **2014-Ohio-1615; 9 N.E.3d 1031, ***1056; 2014 Ohio LEXIS 842, ****59

(Okla.Crim.App.1996). Moreover, "[o]nce the legislature [****60] has resolved to create a death penalty that has survived constitutional challenge, it is not the place of this or any court to permit counsel to question the * * * economic wisdom of the enactment." *Johnson v. State*, 660 So.2d 637, 646 (Fla.1995). See *State v. Kayer*, 194 Ariz. 423, 440, 984 P.2d 31 (1999); *State v. Clark*, 851 So.2d 1055, 1083-1084 (La.2003); *State v. Brown*, 902 S.W.2d 278, 295 (Mo.1995).

[P115]** Finally, we find no mitigating features in the nature and circumstances of the offense, which was both calculated and brazen.

[P116]** The aggravating circumstance here, the prior conviction of murder, is one that this court has described as "very **[***1057]** strong," *State v. Taylor*, 78 Ohio St.3d 15, 34, 1997 Ohio 243, 676 N.E.2d 82 (1997), and "significant," *State v. Carter*, 64 Ohio St.3d 218, 228, 1992 Ohio 127, 594 N.E.2d 595 (1992). "A prior murder conviction can be even more grave than other aggravating circumstances." *Taylor* at 34. The mitigating factors are not strong. We conclude that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.

D. Proportionality

[P117]** We have approved death sentences in cases in which the prior-murder-conviction specification under R.C. 2929.04(A)(5) was the sole aggravating **[****61]** circumstance presented. *Taylor*; *State v. Mapes*, 19 Ohio St.3d 108, 19 Ohio B. 318, 484 N.E.2d 140 (1985).

VI. Conclusion

[P118]** For the foregoing reasons, we affirm the judgment of the court of appeals, affirming Davis's sentence of death.

Judgment affirmed.

O'CONNOR, C.J., and O'DONNELL, LANZINGER, KENNEDY, and FRENCH, JJ., concur.

[*149] O'NEILL, J., concurs in affirming the conviction and dissents as to the sentence, for the reasons stated in his dissenting opinion in *State v. Wogenstahl*, 134 Ohio St.3d 1437, 2013-Ohio-164, 981 N.E.2d 900.

State v. Davis

Court of Appeals of Ohio, Twelfth Appellate District, Butler County

September 9, 2013, Decided

CASE NO. CA2012-12-258

Reporter

2013-Ohio-3878 *; 2013 Ohio App. LEXIS 4040 **; 2013 WL 4806935

STATE OF OHIO, Plaintiff-Appellee, - vs - VON CLARK DAVIS, Defendant-Appellant.

Subsequent History: Discretionary appeal not allowed by State v. Davis, 143 Ohio St. 3d 1441, 2015-Ohio-3427, 2015 Ohio LEXIS 2152, 36 N.E.3d 188 (2015)

US Supreme Court certiorari denied by Davis v. Ohio, 2016 U.S. LEXIS 893 (U.S., Jan. 25, 2016)

Prior History: **[**1]** CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS. Case No. CR1983-12-0614.

State v. Davis (In re Nastoff), 134 Ohio St. 3d 1232, 2012 Ohio 6339, 983 N.E.2d 354, 2012 Ohio LEXIS 3254 (2012)

Disposition: Judgment affirmed.

Counsel: Michael T. Gmoser, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Hamilton, Ohio, for plaintiff-appellee. Carpenter Lipps & Leland, LLP, Kort Gatterdam and Erik P. Henry, Columbus, Ohio, for defendant-appellant.

Judges: S. POWELL, J. HENDRICKSON, P.J., and RINGLAND, J., concur.

Opinion by: S. POWELL

Opinion

S. POWELL, J.

[*P1] Appellant, Von Clark Davis, appeals from the Butler County Court of Common Pleas decision dismissing his most recent petition for postconviction relief without first holding an evidentiary hearing or permitting him to conduct discovery. For the reasons outlined below, we affirm.

[*P2] In 1971, Davis was sentenced to life imprisonment after he pled guilty to second-degree murder in connection with the stabbing death of his estranged wife, Ernestine Davis. In 1983, after being released on parole, Davis shot and killed his estranged girlfriend, Suzette Butler. Butler died as a result of multiple gunshot wounds to the head. Two eyewitnesses identified Davis as the shooter. The following year, Davis was found guilty of aggravated murder by a three-judge panel and sentenced to death.

[*P3] This court affirmed **[**2]** Davis' conviction and sentence in *State v. Davis*, 12th Dist. Butler No. CA84-06-071, 1986 Ohio App. LEXIS 6919, 1986 WL 5989 (May 27, 1986). However, although affirming his conviction on appeal, the Ohio Supreme Court vacated Davis' death sentence in *State v. Davis*, 38 Ohio St.3d 361, 528 N.E.2d 925 (1988), and remanded the matter to the trial court for resentencing. On remand, the three-judge panel once again imposed the death penalty. This court affirmed the panel's decision to resentence Davis to death in *State v. Davis*, 12th Dist. Butler No. CA89-09-123, 1990 Ohio App. LEXIS 4717, 1990 WL 165137 (Oct. 29, 1990). The Ohio Supreme Court affirmed that decision in *State v. Davis*, 63 Ohio St.3d 44, 584 N.E.2d 1192 (1992).

[*P4] On October 8, 1993, Davis filed a petition for postconviction relief requesting the court to vacate or set aside his convictions and sentences in both the 1983 murder of Suzette Butler and the 1971 murder of Ernestine Davis. After holding a

hearing on the matter, the trial court dismissed the petition. This court affirmed the trial court's decision dismissing the petition in *State v. Davis*, 12th Dist. Butler No. CA95-07-124, 1996 Ohio App. LEXIS 4263, 1996 WL 551432 (Sept. 30, 1996). The Ohio Supreme Court subsequently declined review in *State v. Davis*, 77 Ohio St.3d 1520, 674 N.E.2d 372 (1997). **[**3]** This court later denied Davis' motion to reopen his appeal, a decision the Ohio Supreme Court affirmed in *State v. Davis*, 86 Ohio St.3d 212, 1999 Ohio 160, 714 N.E.2d 384 (1999).

[*P5] In 2001, after exhausting the state appellate process, Davis filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio. The district court denied the petition in *Davis v. Bagley*, S.D. Ohio No. C-1-97-402, 2002 U.S. Dist. LEXIS 28977, 2002 WL 193579 (Jan. 17, 2002). However, in *Davis v. Coyle*, 475 F.3d 761 (6th Cir.2007), the Sixth Circuit Court of Appeals reversed and remanded the matter to the trial court with instructions that a three-judge panel conduct a third sentencing hearing. *Id.* at 774-775. In so holding, the Sixth Circuit determined the previous three-judge panel erred by improperly precluding Davis from introducing any evidence of his good behavior while on death row. *Id.* at 772. On December 19, 2007, the trial court granted Davis' request for a third sentencing hearing in compliance with the Sixth Circuit's mandate.

[*P6] A third sentencing hearing was subsequently held on September 8 through September 10, 2009, with Judge Andrew Nastoff presiding. Over the course of the two-day hearing, Davis provided extensive **[**4]** evidence and testimony from, among others, Scott Nowak, Davis' current prison case manager, Cynthia Mausser, the Chairperson of the Ohio Parole Board, and Jeremy Stineman, a volunteer who conducted Alcoholics Anonymous meetings with death row inmates, including Davis. The three-judge panel also heard testimony from Davis' mother, Alluster Tipton, step-father, Charles Tipton, younger sister, Carol Smith, younger brother, Victor Davis, daughter, Sherry Davis, and two friends, Rick Rotundo and Fran Welland. Following this hearing, the three-judge panel once again sentenced Davis to death. This court affirmed Davis' death sentence in *State v. Davis*, 12th Dist. Butler No. CA2009-10-263, 2011 Ohio 787. Davis' appeal from that decision is still pending before the Ohio Supreme Court in Case No. 2011-0538.

[*P7] On October 21, 2011, Davis filed his most recent petition for postconviction relief, as well as a request for an evidentiary hearing and leave of court to conduct discovery. In a decision issued on November 26, 2012, the trial court dismissed Davis' postconviction relief petition without first holding a hearing after finding Davis failed to establish any substantive grounds for relief. Davis **[**5]** now appeals from the trial court's decision, raising three assignments of error for review.

[*P8] Assignment of Error No. 1:

[*P9] TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 1, 2, 5, 9, 10, 16, AND 20, ARTICLE I OF THE OHIO CONSTITUTION.

[*P10] In his first assignment of error, Davis claims the trial court erred in denying his petition for postconviction relief because he received ineffective assistance of counsel during his initial trial, as well as during his third sentencing hearing. We disagree.

[*P11] Petitions for postconviction relief are governed by R.C. 2953.21, which states, in pertinent part:

(A)(1) Any person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the constitution of the United States may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate **[**6]** relief.

[*P12] A postconviction proceeding is not an appeal of a criminal conviction, but a collateral civil attack on a criminal judgment. *State v. Calboun*, 86 Ohio St.3d 279, 281, 1999 Ohio 102, 714 N.E.2d 905 (1999); *State v. Bell*, 12th Dist. Butler No. CA2001-08-197, 2002 Ohio 1341, ¶ 5. A trial court properly denies a postconviction relief petition without a hearing if the supporting affidavits, the documentary evidence, the files, and the records of the case do not demonstrate that the petitioner set forth sufficient operative facts to establish substantive grounds for relief. *State v. Dillingham*, 12th Dist. Butler Nos. CA2012-02-037 and CA2012-02-042, 2012 Ohio 5841, ¶ 8.

[*P13] In a postconviction petition asserting ineffective assistance of counsel, such as the case here, the petitioner must first show that "his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial." *State v. Widmer*, 12th Dist. Warren No. CA2012-02-008, 2013 Ohio 62, ¶ 132. A trial counsel's

performance will not be deemed ineffective unless the petitioner demonstrates that "counsel's representation fell below an objective standard of reasonableness [**7] and that there exists a reasonable probability that, were it not for counsel's errors, the result of the proceeding would have been different." *State v. Ullman*, 12th Dist. Warren No. CA2002-10-110, 2003 Ohio 4003, ¶ 43; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). A petitioner's failure to satisfy either prong is fatal to an ineffective assistance of counsel claim. *State v. Ayers*, 12th Dist. Warren Nos. CA2010-12-119 and CA2010-12-120, 2011 Ohio 4719, ¶ 49; *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000 Ohio 448, 721 N.E.2d 52 (2000).

[*P14] A trial court's decision resolving a postconviction claim of ineffective assistance of counsel "will be upheld absent an abuse of discretion when the trial court's finding is supported by competent and credible evidence." *Widmer*, 2013 Ohio 62 at ¶ 133. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Thornton*, 12th Dist. Clermont No. CA2012-09-063, 2013-Ohio-2394, ¶ 34; *State v. Hancock*, 108 Ohio St. 3d 57, 2006 Ohio 160, ¶ 130, 840 N.E.2d 1032.

[*P15] Davis argues several reasons why he believes he received ineffective assistance of counsel. Initially, Davis [**8] argues he received ineffective assistance of counsel during his third sentencing hearing when counsel allegedly failed to investigate and present mitigating evidence regarding his "exemplary prison record." Specifically, Davis claims that he received ineffective assistance of counsel when he was "never asked by his attorneys for names of other guards, caseworkers, or other prison personnel" who could have testified favorably on his behalf.

[*P16] However, contrary to his claims otherwise, Davis explicitly states as part of his submitted affidavit that he "discussed with my attorneys all my certificates, job evaluations, good conduct as well as guards and case managers that have seen me in prison since 1984." In addition, Davis readily admits that his counsel did call Scott Nowak, Davis' current prison case manager, and Jerome Stineman, a volunteer who, for several years, conducted Alcoholic Anonymous meetings with Davis on death row. As pertinent here, Stineman testified that Davis regularly attended Alcoholics Anonymous meetings where he was an active participant. Nowak also specifically testified as to Davis' good behavior and noted Davis' position in the "extended privilege unit" or "honor [**9] block."

[*P17] Counsel also introduced an institutional summary of Davis' work history indicating he had been employed in five different capacities while in prison, as well as his successful participation in programs teaching stress management, anger management, positive thinking, and meetings for military veterans. The institutional summary also noted Davis' good behavior while on death row as he had only been involved in one instance of misconduct occurring in 1990 since being placed back in prison in 1984.

[*P18] After a thorough review of the record, we find the evidence presented at Davis' third sentencing hearing demonstrates his strong work ethic, good behavior, and trustworthiness while in prison. In turn, we agree with the trial court's decision finding any additional testimony regarding his "exemplary prison record" would have been cumulative. Nevertheless, Davis claims that providing "the details would have saved his life." However, such a claim is purely speculative and is otherwise not supported by the record.

[*P19] Furthermore, relying on the Sixth Circuit's decision in *Coyle*, Davis also argues that counsel was ineffective for failing to provide testimony from three Department of Corrections [**10] employees: Oscar McGraw, the death row unit manager, Herb Wendler, Davis' former prison case manager, and some third unnamed party, who could have offered information regarding Davis' behavior while on death row following his 1984 conviction and 1989 resentencing hearing. According to the Sixth Circuit:

Although there could conceivably be some question about the relevance of such evidence in the abstract, the record in this case establishes without doubt that it was highly relevant to the single aggravating factor relied upon by the state — that future dangerousness should keep Davis on death row.

Id., 475 F.3d at 773.

[*P20] However, as the state aptly recognizes, the Sixth Circuit's decision in *Coyle* did not hold the testimony from these three specific individuals must be introduced. Rather, the Sixth Circuit merely found the three-judge panel erred by improperly precluding Davis from introducing *any evidence* of his good behavior while on death row contrary to the United States Supreme Court's decision in *Skipper v. South Carolina*, 476 U.S.1, 106 S.Ct. 1669, 90 L. Ed. 2d 1 (1986). *See Id.* at 772.

[*P21] As noted above, Davis provided the testimony of Nowak, Davis' current prison case manager, and Stineman, a volunteer [**11] who conducted Alcoholic Anonymous meetings with Davis. Both provided extensive testimony regarding Davis' behavior

on death row, including, but not limited to, Davis' position in the "extended privilege unit" or "honor block." Counsel also introduced an institutional summary of Davis' work history, his successful participation in a variety of prison programs, and his single instance of misconduct. Contrary to Davis' claim otherwise, we find this evidence more than sufficient to combat the state's claims regarding Davis' future dangerousness that the Sixth Circuit deemed "highly relevant" upon resentencing.

[*P22] Moreover, it is well-established that counsel's "decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Johnson*, 12th Dist. Butler No. CA2011-09-169, 2013 Ohio 856, ¶ 32; *State v. Hanna*, 95 Ohio St.3d 285, 2002 Ohio 2221, ¶ 118, 767 N.E.2d 678. As this court has consistently stated, even debatable trial tactics and strategies do not constitute ineffective assistance of counsel. *State v. Grinstead*, 194 Ohio App.3d 755, 2011 Ohio 3018, ¶ 41, 958 N.E.2d 177 (12th Dist.); *State v. Bai*, 12th Dist. Butler No. CA2010-05-016, 2011 Ohio 2206, ¶ 136; **[**12]** *State v. Conway*, 109 Ohio St.3d 412, 2006 Ohio 2815, ¶ 101, 848 N.E.2d 810. Because this court will not second-guess counsel's decisions, we find no merit to Davis' claim that he received ineffective assistance of counsel due to their strategic decision not to call these additional witnesses at his third sentencing hearing.

[*P23] Davis next argues he received ineffective assistance of counsel during his third sentencing hearing when counsel allegedly failed to investigate and present mitigating evidence from his unit file regarding his "exemplary prison record," opting instead to present only the institutional summary. However, as noted above, and as the trial court explicitly found, the institutional summary conveyed the substance of the entire unit file; namely, that Davis was a well-behaved and hard-working prisoner who took advantage of the self-help and education opportunities available to him in prison. Rather than potentially inundating the panel with the entire unit file, counsel made the sound and strategic decision to distill the mitigating portions of his unit file into a summary. Again, "reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Hendrix*, 12th Dist. Butler No. CA2000-03-054, 2001 Ohio App. LEXIS 4130, 2001 WL 1078976, *2 (Sept. 17, 2001) **[**13]**. Therefore, we find counsel's decision to submit the institutional summary, as opposed to Davis' entire unit file, did not amount to ineffective assistance of counsel.

[*P24] Next, Davis argues he received ineffective assistance of counsel during his third sentencing hearing when counsel made the decision to call Cynthia Mausser, the Chair of the Ohio Parole Board, as well as Dr. Robert Smith, a clinical psychologist, as witnesses on his behalf. Davis also argues that counsel was ineffective in failing to call John Lee, a mitigation specialist and investigator. However, as stated previously, the "decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *Johnson*, 2013 Ohio 856 at ¶ 32; *Hanna*, 95 Ohio St. 3d 285, 2002 Ohio 2221 at ¶ 118, 767 N.E.2d 678.

[*P25] Furthermore, although Davis takes exception to the questioning of Mausser and Dr. Smith, we will not question counsel's strategic decision to engage, or not engage, in a particular line of questioning as these decisions are presumed to be the product of sound trial strategy. Again, this court "is not permitted to use the benefit of **[**14]** hindsight to second-guess the strategies of trial counsel." *State v. Walker*, 12th Dist. Fayette No. CA2009-02-002, 2010 Ohio 329, ¶ 23. "[T]he fact that the trial strategy was ultimately unsuccessful or that there was another possible and better strategy available does not amount to ineffective assistance of counsel." *State v. Murphy*, 12th Dist. Butler No. CA2009-05-128, 2009 Ohio 6745, ¶ 43. Therefore, we find counsel's decision whether to call Mausser, Smith and Lee as witnesses at his third sentencing hearing does not amount to ineffective assistance of counsel.

[*P26] Davis next argues that he received ineffective assistance of counsel during his third sentencing hearing when counsel failed to seek removal of Judge Nastoff from the three-judge panel.¹ Judge Nastoff had previously been part of a prosecution team against Lahrar Thompson, Davis' nephew, wherein Thompson was sentenced to death after also being convicted of aggravated murder. Yet, at his third sentencing hearing, Davis' counsel explicitly stated that they were aware of Judge Nastoff's prior participation in Thompson's prosecution, but chose not to seek recusal. "[T]he decision not to seek recusal of the judge can only be **[**15]** viewed as strategic and will not form the basis of an ineffective counsel claim." *State v. Nuhfer*, 6th Dist. Lucas No. L-07-1125, 2009 Ohio 1474, ¶ 22. This is particularly true in this case considering counsel's direct knowledge of Judge Nastoff's prior participation in Thompson's prosecution. See generally *State v. Morgan*, 10th Dist. Franklin No. 12AP-241, 2012 Ohio 5773, ¶ 24 (finding no ineffective assistance of counsel in failing to move for recusal of trial court judge resulting from his involvement in

¹The Ohio Supreme Court denied Davis' request to disqualify Judge Nastoff from ruling on his petition for postconviction relief at issue here in *In re Disqualification of Nastoff*, 134 Ohio St. 3d 1232, 2012 Ohio 6339, 983 N.E.2d 354.

previous prosecution of appellant in 1991 rape and kidnapping case). Therefore, we find counsel's decision not to seek recusal of Judge Nastoff from the three-judge panel does not amount to ineffective assistance of counsel.

[*P27] Davis also argues that he received ineffective assistance during his third sentencing hearing when counsel allegedly told him he was eligible for a life sentence without the possibility of parole. However, as the trial court correctly found, the **[**16]** only evidence in support of this assertion comes from Davis' own self-serving affidavit. "[T]his evidence by itself is insufficient to mandate a hearing or to justify granting the petition for postconviction relief." *State v. Isbell*, 12th Dist. Butler No. CA2003-06-152, 2004 Ohio 2300, ¶ 14, citing *State v. Kapper*, 5 Ohio St.3d 36, 38, 5 Ohio B. 94, 448 N.E.2d 823 (1983); *State v. Williams*, 74 Ohio App.3d 686, 699, 600 N.E.2d 298 (8th Dist.1991); see also *State v. Richards*, 12th Dist. Clermont No. CA97-06-059, 1997 Ohio App. LEXIS 5587, 1997 WL 779084, *2 (Dec. 15, 1997) (stating "[s]elf-serving affidavits submitted by a petitioner in support of a claim for postconviction relief are insufficient to trigger the right to a hearing or to justify granting the petition under R.C. 2953.21").

[*P28] Moreover, even if counsel did mistakenly inform Davis that he was eligible to be sentenced to life without the possibility of parole, Davis cannot claim any resulting prejudice as the record clearly indicates he preferred to be sentenced to death when confronted with the potential life sentence without the possibility of parole. In fact, in an interview conducted on July 7, 2009, Davis specifically stated that he "would rather go to Lucasville" than be sentenced to life in **[**17]** prison without the possibility of parole.² Therefore, we find Davis' claim lacks merit and does not amount to ineffective assistance of counsel.

[*P29] Finally, Davis argues that he received ineffective assistance from his original trial counsel when they failed to advise "him of the collateral consequence of his waiver of a jury trial." However, as this court has previously determined, Davis' habitual challenges regarding his jury waiver are barred by the doctrine of res judicata. As this court explicitly stated in *State v. Davis*, 12th Dist. Butler No. CA2009-10-263, 2011 Ohio 787:

A review of Davis' earliest appeals reveals that he failed to directly challenge his jury waiver. Because he could have challenged his jury waiver on due process or other grounds within his first two appeals, the doctrine of res judicata applies to his current challenge.

Id. at ¶ 20.

[*P30] The same rationale applies here. It is well-established that a trial court may dismiss a postconviction relief petition on the basis of the doctrine of res judicata. *State v. Schroyer*, 12th Dist. Clermont No. CA2005-05-032, 2006 Ohio 1782, ¶ 20.

[18]** Therefore, Davis' claims that he was subject to ineffective assistance of counsel regarding his jury waiver are now barred. See *State v. Lindsey*, 12th Dist. Brown No. CA2002-02-002, 2003 Ohio 811, ¶ 23.

[*P31] In light of the foregoing, because Davis failed to set forth sufficient operative facts to establish substantive grounds for relief, we find the trial court did not abuse its discretion in dismissing Davis' petition for postconviction relief. Accordingly, Davis' first assignment of error is overruled.

[*P32] Assignment of Error No. 2:

[*P33] APPELLANT'S JUDGMENT AND SENTENCE ARE VOID OR VOIDABLE BECAUSE OHIO'S POST-CONVICTION PROCEDURES DO NOT PROVIDE AN ADEQUATE CORRECTIVE PROCESS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 1, 2, 5, 9, 10, 16, AND 20 OF THE OHIO CONSTITUTION.

[*P34] In his second assignment of error, Davis argues that Ohio's statutory scheme providing for postconviction relief is unconstitutional because it does not "provide an adequate corrective process." However, this court has already determined that "[t]he statutory procedure for postconviction relief constitutes an adequate corrective process." *Lindsey*, 2003 Ohio 811 at ¶ 13;

[19]** *State v. Goff*, 12th Dist. Clinton No. CA2000-05-014, 2001 Ohio 4215, 2001 WL 208845, *9; see also *State v. Lawson*, 12th Dist. Clermont No. CA2011-07-056, 2012 Ohio 548, ¶ 26. Other districts have held the same. See *State v. Trimble*, 11th Dist. Portage No. 2007-P-0098, 2008 Ohio 6409, ¶ 108; *State v. Frazier*, 6th Dist. Lucas No. L-07-1388, 2008 Ohio 5027, ¶ 70; *State v. Elmore*, 5th Dist. Licking No. 2005-CA-32, 2005 Ohio 5940, ¶ 143-149; *State v. Hessler*, 10th Dist. Franklin No. 01AP-1011, 2002 Ohio 3321, ¶ 73. We see no reason to deviate from this prior precedent. Accordingly, Davis' second assignment of error is without merit and overruled.

²In Ohio, executions take place at the Southern Ohio Correctional Facility located in Lucasville.

2013-Ohio-3878, *2013-Ohio-3878; 2013 Ohio App. LEXIS 4040, **19

[*P35] Assignment of Error No. 3:

[*P36] THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW APPELLANT TO CONDUCT DISCOVERY OR GRANT AN EVIDENTIARY HEARING IN VIOLATION OF APPELLANT'S RIGHTS UNDER R.C. 2953.21 AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

[*P37] In his third assignment of error, Davis argues the trial court erred by denying his request to conduct discovery and hold an evidentiary hearing. We disagree.

[*P38] As this court has consistently stated, a petition for postconviction relief "does not provide a petitioner a second opportunity [*20] to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the petition." *State v. Rose*, 12th Dist. Butler No. CA2012-03-050, 2012 Ohio 5957, ¶ 16, citing *Hessler*, 2002 Ohio 3321 at ¶ 32. In order to obtain a hearing, "the petitioner must show that there are substantive grounds for relief that would warrant a hearing based upon the petition, the supporting affidavits, and the files and records in the case." *State v. Vore*, 12th Dist. Warren Nos. CA2012-06-049 and CA2012-10-106, 2013 Ohio 1490, ¶ 11, quoting *State v. Watson*, 126 Ohio App.3d 316, 324, 710 N.E.2d 340 (12th Dist.1998); see also R.C. 2953.21(C). Substantive grounds for relief exist where there was such a denial or infringement of the petitioner's constitutional rights so as to render the judgment void or voidable. *Calhoun*, 86 Ohio St.3d at 282. The burden is on the petitioner to show that the claimed errors resulted in prejudice before a hearing on a postconviction relief petition is warranted. *Widmer*, 2013 Ohio 62 at ¶ 164.

[*P39] A petitioner seeking postconviction relief is also not automatically entitled to discovery to support his claim for relief. Again, "[a] postconviction proceeding is [*21] not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment." *Calhoun*, at 281. In turn, because postconviction relief is not a constitutional right, "it affords a petitioner no rights beyond those granted by the controlling statute, R.C. 2953.23." *Lanston*, 2012 Ohio 548 at ¶ 16. According to R.C. 2953.23, "there is no requirement of civil discovery in post-conviction proceedings." *State v. Samatar*, 10th Dist. Franklin No. 03AP-1057, 2004 Ohio 2641, ¶ 23, citing *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office*, 87 Ohio St.3d 158, 1999 Ohio 314, 718 N.E.2d 426 (1999). Discovery may be warranted, however, when the petitioner sets forth operative facts that would demonstrate a substantive claim for relief. *Lanston* at ¶ 18. A petitioner sets forth operative facts by attaching documentary evidence dehors the record, which if true constitute a constitutional error in his case. *State v. Leonard*, 157 Ohio App.3d 653, 2004 Ohio 3323, ¶ 36, 813 N.E.2d 50 (1st Dist.).

[*P40] After a thorough review of the record, and as we have already discussed at length in overruling Davis' first assignment of error, we find the trial court did not abuse its discretion in denying Davis' postconviction relief petition without [*22] first holding a hearing. As noted above, the trial court properly determined that Davis' claims alleging ineffective assistance of counsel lacked merit and were otherwise barred by res judicata. Therefore, we likewise find no abuse of discretion in the trial court's decision not to hold an evidentiary hearing and to deny Davis' request to conduct discovery in this matter. Accordingly, Davis' third assignment of error is overruled.

[*P41] Judgment affirmed.

HENDRICKSON, P.J., and RINGLAND, J., concur.

IMAGED

COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

STATE OF OHIO

CASE NO. CR 83 12 0614

Plaintiff: *State in Common Pleas Court*
BUTLER COUNTY, OHIO

vs.

VON CLARK DAVIS

MOTION FOR NOTICE OF
PROSPECTIVE THREE-JUDGE PANEL

APR 27 1986

Defendant: *EDWARD S. ROBB, JR.*
: : : CLERK : :

Defendant hereby moves for an Order that defendant be notified by the Court forthwith as to the names of the three Common Pleas Judges who would be appointed to hear the case at bar in the event that defendant does elect to have this case tried before a three-Judge panel.

Michael Shanks

MICHAEL SHANKS
315 S. Monument Avenue, P. O. Box 687
Hamilton, Ohio 45012
Telephone: (513) 868-7600

John A. Garretson

JOHN A. GARRETSON
A Legal Professional Association
Attorneys for Defendant
118 S. Second Street, P. O. Box 60
Hamilton, Ohio 45012
Telephone: (513) 868-2074

MEMORANDUM

The basis of this Motion is that, in order to provide defendant with effective assistance of counsel in this case, as provided by the Sixth and Fourteenth Amendments to the United States Constitution,

60

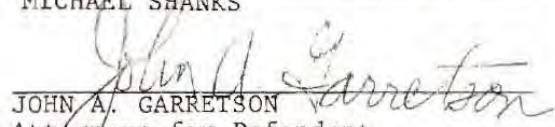
VON CLARK DAVIS v. WARDEN
CASE NO. 2:16-cv-00495
APPENDIX - Page 178

IMAGED

and equivalent Ohio Constitutional provisions, defendant must be notified of the names of the three Judges who would be selected to determine the issues in this case, in the event that defendant does choose to waive his right to trial by jury in this case. Defendant cannot make a valid, fully informed decision as to whether or not he should waive his right to trial by jury in this case unless he can be notified in advance of the names of the three Judges that would serve in the event that defendant does waive his right to jury trial.

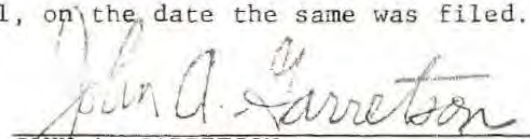
Defendant further moves that he be allowed to conduct a voir dire hearing of the three Judges who would be selected, in the event that defendant does waive his right to a jury trial in this case.


MICHAEL SHANKS


JOHN A. GARRETSON
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was hand-delivered to John F. Holcomb, Prosecuting Attorney, Butler County Court House, Hamilton, Ohio 45011, on the date the same was filed.


JOHN A. GARRETSON
Attorney for Defendant

STATE OF OHIO : CASE NO. CR83-12-0614
Plaintiff : IN THE COURT OF COMMON PLEAS
STATE OF OHIO, BUTLER COUNTY
vs.
VON CLARK DAVIS : JURY WAIVER AND ELECTION OF
THREE-JUDGE PANEL
Defendant :
MAY 8 1984

EDWARD S. ROBB, JR.
CLERK

I, Von Clark Davis, defendant in the above cause, appearing in open court this 8th day of May, 1984, with my attorneys, Michael D. Shanks and John A. Garretson, do hereby voluntarily waive my right to trial by jury and elect to be tried by a court to be composed of three judges, consisting of Judges Henry J. Bruewer, William R. Stitsinger, and John R. Moser, all the same being the elected judges of the General Division of the Court of Common Pleas of Butler County who are engaged in the trial of criminal cases, pursuant to Ohio Revised Code Section 2945.06.

I am waiving said trial by jury, and making this election to be tried by a court composed of three judges, with full knowledge of my right under the Consitution of the United States and of Ohio to a trial by a jury consisting of twelve jurors, whose verdict must be unanimous; with full knowledge of the consequences of such waiver and election under the laws of the State of Ohio; and without any compulsion, undue influence, promises or inducements of any kind made to me by anyone.

I further state that I have received the advice and counsel of my attorneys, with which I am satisfied, and being fully advised by them do hereby make this waiver and election of my own free will and accord.


VON CLARK DAVIS

WITNESSES:


MICHAEL D. SHANKS
Attorney for Defendant


JOHN A. GARRETSON
Attorney for Defendant

This jury waiver and election to be tried by a three-judge panel is hereby accepted and entered upon the journal of this Court.

ENTER

BRUEWER, J.

OFFICE OF
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO
JOHN F. HOLCOMB
PROSECUTING ATTORNEY

BUTLER COUNTY
COURTHOUSE
P. O. BOX 515
HAMILTON, OHIO 45012

J 378 P 909

ones you're going to submit and then we'll get....

Mr. Shanks: Okay...Your Honor, in regard to the prosecution list, we're willing to submit the motion to dismiss, which was...#1 on the list, the second, on the Motion for Pretrial Hearing, ah, that's been ruled on and actually we have had the assistance of the Court in all those matters and we were once submitted as indicated.

The Motion for Notice of Prospective Three-Judge Panel this Court knows what we wish in that regard is some information as to who a prospective three-judge panel would...-what the panel would consist of, what judges, so we can inform Mr. Davis of that fact and have him make the (unclear)...

By the Court: For the record, you know the three judges would be the ones that are here in the General Division, it would be Judge Stitsinger, Judge Moser and myself.

Mr. Garretson: Thank you.

Mr. Shanks: The fifth Motion, the Motion to Insulate the Venire and Jury from the Media, we believe we have substantial case law and authority and the memoranda speaks specifically of that and we're going to submit that also.

The Sixth Motion, the Motion for Individual Sequestered Voir Dire, we have discussed that at a prior motion hearing. It is my understanding at this point in time and the Court can correct me if I'm wrong, that more than likely what we

485

Mr. Davis: With both attorneys.

By the Court: Alright, we'll permit the Election then. If you think an Entry should be in here, we'll put an Entry on.

Mr.--Eichel: I think that Waiver is sufficient, your Honor.

By the Court: Alright, that's all we'll have this morning.

Mr. Garretson: Thank you your Honor.

AND THEREUPON, on the 8th day of May, 1984, the following Election of a Three Judge Panel was put on record in open Court as follows:

By the Court: Mr. Davis, you're brought over here today because of some information that your attorneys passed on to the Court, wherein, you indicated to them and they indicated to me that you want to waive your right to have this matter tried by a jury of twelve people and submit it to a panel of three judges?

Mr. Davis: That is correct.

By the Court: Is that correct?

Mr. Davis: That is correct.

By the Court: And in that regard, did you execute this form...it seems to bear your signature?

Mr. Davis: Yes it is.

501

By the Court: And before you signed it, you read it?

Mr. Davis: Read it, uh-uhm.

By the Court: And your attorneys explained it to you?

Mr. Davis: Yes, they did.

By the Court: Now you understand that when you do this, that the panel of judges will hear the evidence and make a decision on the matter and you're giving up your right to have twelve people make that decision. Now, all twelve of those people would have to be convinced of your guilt or not guilty, either way, and all twelve of them would have to be convinced before they could sign a verdict one way or the other. Do you want to give up your right to have twelve people make this decision?

A. Yes I do.

By the Court: Now, you know the same burden of proof is on the State whether you go to the jury or to the jury, I mean, or to the jury or to the Court, a panel of three judges. I mean, the three judges would have to listen to the evidence and be convinced beyond a reasonable doubt of your guilt or innocence, before they could make a finding and all three of the Judges would have to be unanimous in that finding do you understand?

Mr. Davis: Yes I do.

By the Court: Is anybody forcing you to do what

502

you're doing here today?

Mr. Davis: No one.

By the Court: You do this of your own free will?

Mr. Davis: My own free will, yes I did.

By the Court: You understand that this is a death penalty case and the same...the Court...I mean, the three judge panel, have to make that same determination ah, in the event they get that far?

Mr. Davis: Yes...yes I do.

By the Court: Any reasons that you know of why you shouldn't...you don't want to do this, I mean, is there any reason that you....

Mr. Davis: No, I can't find any reason why wouldn't want to right now, no.

By the Court: Does the Prosecution have anything/^{you want}to say here?

Mr. Sage: Your Honor, do you think you should...it'd be proper to go over, rather it's required for a Court to be unanimous in it's verdict?

By the Court: I just indicated that to him.

Mr. Sage: Oh, I'm...okay, I'm sorry.

Mr. Eichel: Your Honor, it's our understanding that the Court must be unanimous in it's verdict as to guilt and punishment also and a majority of the panel can rule on all

503

other matters pertaining to evidence as provided in the Statute.

By the Court: Do you understand what he's saying?

Mr. Davis: Yes, uh-uhm.

By the Court: He's saying that the majority that the Court could rule on evidence and findings of fact, but the ultimate conclusion of your guilt or innocence would have to be determine by unanimous vote of all the three judges.

Mr. Garretson: As well^{as}/the penalty phase obviously if it ever got to that.

By the Court: And it goes to all ~~phases~~ except as to the rulings on the evidence and findings of fact. Well, if nobody else has anything further to say we'll have three judges will be here^{tomorrow}, you know who they are, and they're in this form here. It'll be myself and Judge Moser and Judge Stitsinger.

Mr. Davis: Yes....

By the Court: So we'll see you then.

Mr. Davis: Thank you.

Mr. Sage: (unclear) visit the scene....

Mr. Eichel: We'll join in that motion...

Mr. Garretson: Yeah.

Mr. Sage: Are we going to do that before....that's always done before opening statement.

504

Mr. Shanks: No, it's not always, I think there is...
(unclear)...

By the Court: Well, that'll be the first ruling that
the three Judges will make in the morning.

(End of hearing.....)

505