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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MALIK ALLAH-U-AKBAR, fka Odraye G. Jones,
Petitioner-Appellant,

v.

MARGARET BRADSHAW, Warden,
Respondent-Appellee.

No. 24-3581

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 1:03-cv-01192—Solomon Oliver, Jr., District Judge.

Argued: April 17, 2025

Decided and Filed: October 9, 2025

Before: MOORE, COLE, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Kathryn Bailey, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Pittsburgh, Pennsylvania, for Appellant. Katie Rose Talley, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Kathryn Bailey, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Pittsburgh, Pennsylvania, for Appellant. Katie Rose Talley, Charles L. Wille, BRENDA S. Leikala, T. Elliot Gaiser, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

MOORE, J., delivered the opinion of the court in which COLE, J., concurred. GRIFFIN, J. (pp. 18–25), delivered a separate dissenting opinion.

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OPINION

KAREN NELSON MOORE, Circuit Judge. In a prior appeal, this court granted Petitioner-Appellant Malik Allah-U-Akbar a conditional writ of habeas corpus, “vacating [his] death sentence unless the State of Ohio conducts a new penalty-phase proceeding within 180 days of remand.” *Jones v. Bradshaw*, 46 F.4th 459, 489 (6th Cir. 2022). The state did not comply with the writ. The district court then converted this conditional writ to an unconditional writ. The unconditional writ ordered the state “to vacate the death sentence imposed by the Ashtabula County, Ohio, Court of Common Pleas . . . and unconditionally release Jones from custody no later than five business days from the date of entry of” the order entered on February 29, 2024. *Jones v. Bradshaw*, No. 1:03 CV 1192, 2024 WL 895153, at *11 (N.D. Ohio Feb. 29, 2024). The state did not fully comply with the unconditional writ until May 29, 2024, roughly ninety days after the unconditional writ was entered. In response, Allah-U-Akbar filed a motion for relief from the unconditional writ, and sought as a sanction for noncompliance an order barring the state from reprosecuting the death penalty. The district court denied this request on the merits.

For the reasons that follow, although we agree with Allah-U-Akbar that we have jurisdiction over this appeal, we nevertheless **AFFIRM** the judgment of the district court.

I. BACKGROUND

Our previous opinion that granted Allah-U-Akbar’s conditional writ accurately and thoroughly discusses the relevant factual and procedural history prior to the mandate issued from that appeal. *Jones*, 46 F.4th at 465–69. We pick up where it leaves off. On August 22, 2022, we remanded this “case to the district court with instructions to issue a writ of habeas corpus vacating [Allah-U-Akbar’s] death sentence unless the State of Ohio conducts a new penalty-phase proceeding within 180 days of remand.” *Id.* at 489. This was a conditional writ. “A conditional writ of habeas corpus delays a defendant’s release ‘to afford the State an opportunity to remedy the specific constitutional violation identified by the [federal] court.’” *Smith v. Davis*,

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Nos. 25-3381/3383, 2025 WL 1826652, at *4 (6th Cir. July 2, 2025) (Order) (quoting *Jennings v. Stephens*, 574 U.S. 271, 285–86 (2015) (Thomas, J., dissenting)). “If the state fails to satisfy the writ’s condition within the time set, the writ ‘springs to life’ and requires the petitioner’s immediate release from custody.” *Id.* (quoting *Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006)).

There is no dispute that the district court entered a conditional writ with which the state did not comply. Following a series of orders granting extensions to the time to comply with the writ (because of delays related to state-court judicial recusals, defense preparations, and hearings related to Allah-U-Akbar’s competency), the state had until November 22, 2023, to comply with the conditional writ. *Jones v. Bradshaw*, No. 1:03 CV 1192, 2024 WL 3161944, at *1 (N.D. Ohio June 24, 2024); *see also Jones*, 2024 WL 895153, at *1–5. The state did not comply with the November 22, 2023, deadline, and so Allah-U-Akbar filed a motion for an unconditional writ. *Jones*, 2024 WL 895153, at *5. The motion sought that the court: “(1) issue an unconditional writ of habeas corpus, because the State has failed to conduct a resentencing proceeding within the time specified in the Sixth Circuit’s conditional writ and subsequent order granting Respondent’s request for an extension of time; and (2) prohibit the State from conducting a resentencing proceeding or at a minimum, from seeking the death penalty.” *Id.*

The district court granted in part and denied in part this request. The district court granted Allah-U-Akbar’s request for unconditional release, relying on circuit precedent holding that a district court retains jurisdiction to ensure compliance with a conditional writ and that failure to comply “requires the petitioner’s release from custody.” *Id.* at *5–6 (quoting *Satterlee v. Wolfenbarger*, 453 F.3d 362, 369 (6th Cir. 2006) (quoting *Fisher v. Rose*, 757 F.2d 789, 791 (6th Cir. 1985))). There was no dispute that Allah-U-Akbar suffered from the unconstitutional death sentence at the time of the order on February 29, 2024, and so the district court ordered his release. *Id.* The district court denied Allah-U-Akbar’s request to bar the state from conducting a new penalty phase or at least from pursuing the death penalty. *Id.* at *6–11. Although the state was noncompliant with the conditional writ, “the state-court record reveal[ed] proceedings straining under the weight of a federal court’s mandate and exceedingly complex legal, procedural, and administrative issues—such as [Allah-U-Akbar’s] competency to stand trial and

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his request to represent himself in a capital case; the burden on the defense to investigate and present mitigation evidence in a case more than a quarter-of-a-century old; and containing pre-trial publicity amidst intense public interest.” *Id.* at *8. The district court also found that many of the delays in the state court were attributable to Allah-U-Akbar himself. *Id.* at *9.

Accordingly, the district court entered an unconditional writ ordering the state “to vacate the death sentence imposed by the Ashtabula County, Ohio, Court of Common Pleas . . . and unconditionally release [Allah-U-Akbar] from custody no later than five business days from the date of entry of” the order entered on February 29, 2024. *Id.* at *11. No party disputes that the district court had the authority to enter this order on February 29, 2024, when Allah-U-Akbar (1) continued to suffer from the constitutionally infirm death sentence and (2) remained in state prison rather than county jail.

On March 1, 2024, the next business day after the entry of the unconditional writ, “the county prosecutor filed in the state trial court a request for an arrest warrant on the original 1998 Indictment in [Allah-U-Akbar’s] case.” *Jones*, 2024 WL 3161944, at *1. Then, on March 5, 2024, three business days after entry of the unconditional writ, “the Warden released [Allah-U-Akbar] into the custody of the Ashtabula County Sheriff.” *Id.* But no other action was taken to effectuate the district court’s order to vacate Allah-U-Akbar’s unconstitutional death sentence. *Id.* at *1–2. More than two weeks later,¹ the county prosecutor filed a motion to vacate the death sentence. *Id.* at *2. The state trial court granted the motion on May 29, 2024, “formally vacat[ing] the sentence through an entry in its docket.” *Id.*

The district court entered judgment on the unconditional writ on June 24, 2024, even though its memorandum and opinion had issued on February 29, 2024. R. 299 (Judgment Entry) (Page ID #14118). The district court did so in response to Allah-U-Akbar’s motion for the district court to either: (1) enter a judgment pursuant to Rule 58(a) or (2) extend the time to appeal the February 29, 2024, order. R. 298 (06/24/24 Order at 1) (Page ID #14111). The district court agreed with Allah-U-Akbar (over the Warden’s objections) that a separate

¹Between the time that Allah-U-Akbar was released from prison and the filing of the county prosecutor’s motion, Allah-U-Akbar filed an appeal in his state case. *Jones*, 2024 WL 3161944, at *2. “[T]he [state] court therefore stayed all proceedings, including the resentencing hearing it had set for May 20, 2024.” *Id.*

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judgment was necessary following the district court's order granting in part Allah-U-Akbar's motion for an unconditional writ. *Id.* at 4–5 (Page ID #14114–15). The district court found that “it appears that a separate judgment entry for this court's February 29, 2024, decision granting the unconditional writ was required under Civil Rule 58(a).” *Id.* at 5 (Page ID #14115). Because the district court's grant of Allah-U-Akbar's “motion for an unconditional writ effectively amended the Sixth Circuit's judgment granting the conditional writ, a separate judgment entry serves Rule 58(a)'s goal of ‘clariy[ing] what the ultimate result [was], benefiting both the parties (for purposes of enforcement and clarity of legal obligation) and the judicial system (for providing a clear time period for taking an appeal)[,]’ and was required.” *Id.* (alterations in original) (quoting *Kunz v. DeFelice*, 538 F.3d 667, 673 (7th Cir. 2008)). The district court also granted, in the alternative, Allah-U-Akbar's request for an extension of time to file an appeal related to the February 29, 2024, order. *Id.* at 6–7 (Page ID #14116–17).

Allah-U-Akbar timely appealed both the February and June orders, R. 300 (Notice of Appeal at 1–2) (Page ID #14119–20), and the parties have briefed the merits of both orders, *see, e.g.*, Akbar Br. at 3, 61; Warden Br. at 19, 24.

II. HABEAS JURISDICTION²

On April 17, 2025, we ordered the parties to file supplemental briefing “addressing whether the federal courts continue to have subject-matter jurisdiction over this case.” D. 31. We raised the issue of whether we retained subject-matter jurisdiction over this appeal after the state fully complied with the district court's unconditional writ and vacated Allah-U-Akbar's sentence. *See Mason v. Mitchell*, 729 F.3d 545, 549–50 (6th Cir. 2013) (clarifying the jurisdictional limits of the habeas statutes).

We hold that we have jurisdiction to reach the merits of Allah-U-Akbar's appeal as it relates to both the unconditional writ entered in February 2024 and the Rule 60(b) order entered in July 2024. There are two ways to think about jurisdiction in this appeal. Under both scenarios, we have jurisdiction to address the merits of Allah-U-Akbar's appeal. In the first,

²The Warden separately raises a standing argument. Warden Suppl. Br. at 7–8. The crux of this argument is that the Warden has no control over Allah-U-Akbar's present confinement. *Id.* As explained below, Allah-U-Akbar does not challenge his current confinement. In this context, the Warden's arguments miss the mark.

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district courts have jurisdiction to enter an unconditional writ when a state fails to comply with the terms of a conditional writ, and so we may properly address Allah-U-Akbar's timely appeal of this judgment. In the second, district courts also have jurisdiction pursuant to Federal Rule of Civil Procedure 60(b) to sanction a state for noncompliance with strict terms of a conditional or unconditional writ. So we may also reach the merits of Allah-U-Akbar's Rule 60(b) motion seeking relief from the state's apparent noncompliance with the unconditional writ entered on February 29, 2024. We explain this rationale in greater detail below.

A. February 29, 2024 Order

Because the district court had jurisdiction to enter an unconditional writ on February 29, 2024, we have jurisdiction to hear an appeal of that order. That the state later complied with the conditional writ does not strip us of jurisdiction. At the time that the district court entered the unconditional writ, Allah-U-Akbar indisputably suffered from an unconstitutional death sentence. Even though the state subsequently complied with the unconditional writ (albeit almost three months late), under binding precedent, we retain jurisdiction to review the decision to issue an unconditional writ but decline to bar the state from pursuing the death penalty.

A straightforward application of *Mason v. Mitchell* resolves any concern about our jurisdiction to hear Allah-U-Akbar's appeal from the February order. *Mason* addressed the exact scenario presented by this appeal and held that a court of appeals retains jurisdiction to review a district court's decision to convert a conditional writ to an unconditional writ despite the state's subsequent compliance. 729 F.3d at 549–50. Simply plugging in the Warden and Allah-U-Akbar for the parties in *Mason* demonstrates the one-to-one fit. “The [Warden] is correct to point out that federal courts may not exercise ‘continuing oversight of subsequent state court proceedings following the state’s compliance with a grant of a conditional writ of habeas corpus.’” *Id.* at 549 (quoting *Girts v. Yanai*, 600 F.3d 576, 581 (6th Cir. 2010)). “However, ‘[a] federal district court retains jurisdiction to determine whether a party has complied with the terms of a conditional order in a habeas case.’” *Id.* (alteration in original) (quoting *Gentry*, 456 F.3d at 692). “The [Warden’s] argument that the district court lacked jurisdiction to consider [Allah-U-Akbar’s] motion fails, because [his] claim is that the [Warden] failed to comply with the condition contained in the conditional writ—that the [Warden]” vacate his sentence or

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conduct a resentencing hearing by November 22, 2023. *Id.* “As we have explained, conditional writs ‘would be meaningless’ if a habeas court could not determine compliance with them and order sanctions accordingly.” *Id.* (quoting *Satterlee*, 453 F.3d at 369 n.5).

“[Allah-U-Akbar’s] subsequent removal from death row by the [Warden] does not render the federal court powerless to enforce the full meaning of the conditional writ.” *Id.* “We recognize that a state’s compliance with a conditional writ through the vacatur of a petitioner’s unconstitutional conviction or sentence within the window of time permitted by the habeas court’s order generally will divest the court of jurisdiction.” *Id.* at 550 (citing *Eddleman v. McKee*, 586 F.3d 409, 413 (6th Cir. 2009)). “However, if a state fails to release the petitioner from the unconstitutional judgment within the time period prescribed by the conditional writ, the habeas court has jurisdiction to consider the noncompliance and impose sanctions.” *Id.* “Accordingly, the district court in this case had jurisdiction to consider whether the [Warden] complied with the conditional writ and whether the death penalty may be sought at the penalty-phase retrial. In turn, we have jurisdiction to consider the district court’s judgment.” *Id.*

Mason firmly and unequivocally establishes that we have jurisdiction to hear Allah-U-Akbar’s appeal of the February 29, 2024, unconditional writ. Because the district court had jurisdiction to enter that order, so too do we have jurisdiction to hear the appeal from that judgment. Dismissing the appeal in its entirety based on Allah-U-Akbar’s separate appeal of the Rule 60(b) motion would be improper.

B. Rule 60(b) Order

Addressing jurisdiction under Rule 60(b) is a little more complicated, but ultimately a straightforward application of binding precedent resolves this dispute as well. Our court addressed this issue in *D’Ambrosio v. Bagley*, which we re-affirmed in *Mason*. *D’Ambrosio*, 656 F.3d 379 (6th Cir. 2011); *Mason*, 729 F.3d at 550. Those cases held that district courts have jurisdiction to ensure compliance with either a conditional or unconditional writ. If a state is noncompliant with the writ, then the district court may impose sanctions pursuant to Rule 60(b) even after the writ is fully complied with.

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As applied here, because the district court had jurisdiction to enter the writ initially, it retained jurisdiction under Rule 60(b) to provide relief from that judgment and sanction the state's noncompliance. This remained true even after the state belatedly complied with the order. Although a district court may not sanction a state for actions or events that take place after compliance with a conditional or unconditional writ, a district court nevertheless may consider events up to the point of compliance. Here, that was May 29, 2024, nearly three months after the district court initially entered its unconditional writ. We see no reason to stray from the rationale announced in *D'Ambrosio* and *Mason*.

The Warden argues that the district court lacked jurisdiction "because the federal courts' jurisdiction over [Allah-U-Akbar] ended once [his] unconstitutional death sentence was vacated." *See Mason*, 729 F.3d at 549; *see* Warden Suppl. Br. at 3–4. The Warden "is correct to point out that federal courts may not exercise 'continuing oversight of subsequent state court proceedings following the state's compliance with a grant of a conditional writ of habeas corpus.'" *Mason*, 729 F.3d at 549 (quoting *Girts*, 600 F.3d at 581). "However, '[a] federal district court retains jurisdiction to determine whether a party has complied with the terms of a conditional order in a habeas case.'" *Id.* (alteration in original) (quoting *Gentry*, 456 F.3d at 692). "As we have explained, conditional writs 'would be meaningless' if a habeas court could not determine compliance with them and order sanctions accordingly." *Id.* (quoting *Satterlee*, 453 F.3d at 369 n.5).

This basic rule applies with equal force when a petitioner seeks relief from an unconditional writ with which the state has failed to comply (or belatedly complied). *D'Ambrosio*, 656 F.3d at 388–90. "It has been long established that no independent federal jurisdictional basis is needed to support a Rule 60(b) motion proceeding. A Rule 60(b) motion is considered a continuation of the original proceeding. If the district court had jurisdiction when the suit was filed, it has jurisdiction to entertain a Rule 60(b) motion. This jurisdiction is not divested by subsequent events." *Id.* at 388 (quoting *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755, 762 (6th Cir. 2002)). "This supports the district court's continuing jurisdiction over its grant of an unconditional writ of habeas corpus pursuant to a Rule 60(b) motion as long as it had jurisdiction to grant the unconditional writ in the first place[.]" *Id.*

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As *D'Ambrosio* explains, the decisions in *Girts* and *Satterlee* suggest “that a determination regarding reprosecution is connected to the unconditional writ, and any determination to issue the writ, including a ruling on a Rule 60(b) motion for relief from judgment, necessarily involves contemplation of whether to bar reprosecution.” *Id.* at 389.

In short, so long as a district court had jurisdiction to bar reprosecution when it entered a conditional or unconditional writ of habeas corpus, it may provide relief from the writ pursuant to Rule 60(b), even if the unconstitutional judgment was vacated after entry of the writ. This is appropriate so long as the request is sought as a sanction for the state’s noncompliance with the writ. *See Satterlee*, 453 F.3d at 370; *Girts*, 600 F.3d at 580–82; *D'Ambrosio*, 656 F.3d at 388–90; *Mason*, 729 F.3d at 549–50. Because the state here did not comply with the district court’s unconditional writ until May 29, 2024, nearly three months after it ordered the state to vacate Allah-U-Akbar’s sentence within five business days of February 29, 2024, the district court had jurisdiction to consider sanctions pursuant to Rule 60(b). This is true despite the fact that the state later vacated Allah-U-Akbar’s unconstitutional sentence.

The procedural history of *D'Ambrosio* is instructive on this point. The district court in *D'Ambrosio* entered a conditional writ in July 2004, “requiring the state either to set aside D’Ambrosio’s convictions and sentences or to conduct another trial.” 656 F.3d at 381. A week before the trial was set, the state prosecutor notified defense counsel of key additional evidence, and so the trial was postponed until after the 180-day timeframe established by the conditional writ. *Id.* After conducting an evidentiary hearing on the state’s motion to enlarge the timeframe for complying with the conditional writ, the district court denied the motion and issued an unconditional writ. *Id.* at 382. The unconditional writ expunged D’Ambrosio’s criminal record but permitted the state to pursue reprosecution to the extent allowed by state law. *Id.*; *see also D'Ambrosio v. Bagley*, 619 F. Supp. 2d 428, 430 (N.D. Ohio 2009).

Before the state could reprosecute, the state’s key witness died. *D'Ambrosio v. Bagley*, 688 F. Supp. 2d 709, 712–13 (N.D. Ohio 2010). The state initially withheld this fact from both D’Ambrosio and the district court. *Id.* Shortly after D’Ambrosio learned about the witness’s death, he filed a Rule 60(b) motion in the district court asking it “to vacate its April 27 Order and enter a new order barring any prosecution in connection with” the murder. *Id.* By the time

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D'Ambrosio filed his motion and the district court entered its ruling, “[f]or nearly six months, D'Ambrosio ha[d] been physically released from the Ohio State Penitentiary. For nearly a month, D'Ambrosio ha[d] been free from even jail confinement, in that he ha[d] been released on bond and ha[d] been living with a friend in Cleveland. Neither the State of Ohio, nor the Cuyahoga County Common Pleas Court, nor the Cuyahoga County Prosecutor, consider[ed] D'Ambrosio to be confined in any manner by the conviction and death sentence that ha[d] been vacated[.]” *Id.* at 714.

Thus, despite the fact that D'Ambrosio was released from confinement and had his convictions vacated pursuant to the district court's unconditional writ, the district court nevertheless granted his Rule 60(b) motion and barred reprosecution. *Id.* at 735. The district court's analysis rested on the fact that “it [was] undisputed that, on April 27, 2009, D'Ambrosio was still subject to restraints imposed by virtue of his unconstitutional conviction.” *Id.* at 720 n.12. Because the district court had jurisdiction *then* to grant D'Ambrosio the relief he sought, i.e., a bar on reprosecution of the death sentence, the district court retained jurisdiction pursuant to Rule 60(b) to sanction the state for its substantial inequitable conduct. *Id.* at 721, 731–32. We affirmed this decision on appeal. *D'Ambrosio*, 656 F.3d at 390.

The same logic applies here. Because the state did not fully comply with either the conditional or unconditional writ until Allah-U-Akbar's sentence was vacated on May 29, 2024, the district court had jurisdiction pursuant to Rule 60(b) to bar reprosecution of the death penalty based on potentially inequitable conduct committed up to the date of compliance. The conditional writ required the state either to vacate Allah-U-Akbar's unconstitutional sentence or to conduct a new penalty phase by November 22, 2023. It did neither by this date. When the district court entered the unconditional writ on February 29, 2024, the district court ordered the state to vacate Allah-U-Akbar's death sentence and release him “from custody no later than five business days from the date of entry of this Order.” *See Jones*, 2024 WL 895153, at *11.

This leads to the parties' dispute about when exactly the state complied with the unconditional writ. In our estimation, the state did not comply with the unconditional writ until May 29, 2024, when the state court formally vacated the sentence on the record. Although *Eddleman* indicates that a formal order is not necessary to satisfy the demands of the writ, those

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additional indicia indicating vacatur are not here. 586 F.3d at 412. Whereas in *Eddleman*, the state court, local prosecutor, and defense counsel all agreed that the unconstitutional judgment had been vacated, no similar agreement appears here. *See id.* As the Warden informed the district court on the docket, its compliance came in fits and spurts. Initially, the state complied with the order only in part—it released Allah-U-Akbar from custody within five business days of the order. *See Jones*, 2024 WL 3161944, at *1; *see also* R. 288 (Notice at 1) (Page ID #13295). As the Warden argued below, this did not constitute a vacatur of the unconstitutional sentence because the Warden had no authority to vacate the sentence, only to transfer his person. R. 292 (Opp’n to Rule 60(b) Mot. at 3) (Page ID #14082) (“[T]he warden possesses no authority to vacate a criminal sentence.”). As such, merely transferring Allah-U-Akbar did not constitute full compliance with the district court’s unconditional writ. As a matter of fact, the state did not comply with the unconditional writ until it formally vacated Allah-U-Akbar’s sentence on May 29, 2024. *Jones*, 2024 WL 3161944, at *1–2; *see also* R. 296 (Notice at 1) (Page ID #14098). Because the state did not fully comply with the district court’s unconditional writ until May 29, 2024, Rule 60(b) was the appropriate mechanism for the district court to consider sanctions against the state for its belated compliance. *See Jones*, 2024 WL 3161944, at *3 n.3 (noting jurisdiction to enter the order pursuant to Rule 60(b)).

The Warden’s reliance on *Eddleman* and *Gillispie* does not persuade otherwise. Warden Suppl. Br. at 3–4. As we have already explained, the state did not comply with either the conditional or unconditional writ until May 29, 2024. This means that the district court had jurisdiction to consider all events leading up to that date in assessing the appropriateness of sanctioning the state’s belated compliance. *Girts*, *D’Ambrosio*, and *Mason* explain why *Eddleman* and *Gillispie* do not apply here.

As *Girts* explains, “the holding of *Eddleman* must be seen as merely a sensible reaffirmation of the principle announced in *Fisher v. Rose*, . . . that federal courts do not have continuing oversight of subsequent state court proceedings following the state’s *compliance* with a grant of a conditional writ of habeas corpus.” 600 F.3d at 581 (emphasis added) (internal citation omitted). But here, it is indisputable that the state did not comply with the terms of either the conditional writ or the unconditional writ until May 29, 2024. The conditional writ

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required the state to vacate Allah-U-Akbar's sentence or conduct a new penalty hearing by November 22, 2023. It did not do so. The unconditional writ ordered the state to vacate Allah-U-Akbar's sentence within five business days of February 29, 2024. It did not do so. And although the district court determined additional sanctions were not warranted on the merits, it was not without jurisdiction to reach this decision.

D'Ambrosio confirms this reading. As *D'Ambrosio* explains, "*Eddleman* is different from" cases like *D'Ambrosio's* and Allah-U-Akbar's because "[t]he unconstitutional judgment[s] against [them] [were] still subject to the district court's jurisdiction when the district court granted the unconditional writ[s]." 656 F.3d at 387. The issue in *D'Ambrosio* was "further complicated by the fact that the district court did not bar *D'Ambrosio's* re prosecution when it initially granted the unconditional writ of habeas corpus, but *D'Ambrosio's* use of Rule 60(b) resolve[d] any further jurisdictional questions." *Id.* at 388. This is because the district court retained jurisdiction "over its grant of an unconditional writ of habeas corpus pursuant to a Rule 60(b) motion as long as it had jurisdiction to grant the unconditional writ in the first place, which it did here." *Id.* The same is true with the district court here in its adjudication of Allah-U-Akbar's Rule 60(b) motion. The district court had jurisdiction through Rule 60(b) to consider the state's belated compliance with the clear terms of its unconditional writ. Without this authority, federal courts would be powerless to ensure that the states comply with properly issued writs.

Mason reaffirmed *D'Ambrosio's* analysis. In *Mason*, "[t]he State argue[d] that the district court lacked jurisdiction to grant *Mason* relief, because the federal courts' jurisdiction over *Mason's* case ended once *Mason's* unconstitutional death sentence was vacated." 729 F.3d at 549. This is the same argument being made by the Warden today. We reject the argument for the same reasons as *Mason*. "[A] federal district court retains jurisdiction to determine whether a party has complied with the terms of a conditional order in a habeas case." *Id.* (quoting *Gentry*, 456 F.3d at 692). "*Mason's* subsequent removal from death row by the State does not render the federal court powerless to enforce the full meaning of the conditional writ." *Id.* Timely compliance with a writ "generally will divest the court of jurisdiction. However, if a state fails to release the petitioner from the unconstitutional judgment within the time period prescribed by

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the conditional writ, the habeas court has jurisdiction to consider the noncompliance and impose sanctions.” *Id.* at 550 (citation omitted). “Accordingly, the district court in this case had jurisdiction to consider whether the State complied with the conditional writ and whether the death penalty may be sought at the penalty-phase retrial.” *Id.* And, as already explained, *D’Ambrosio* holds that this reasoning applies with equal force after entry of an unconditional writ with which the state does not timely comply. *See* 656 F.3d at 387–88.

It is for these same reasons that *Gillispie* does not control here. The court in *Gillispie* stated that “the district court’s assertion of a prospective interest in the conditional writ’s enforcement is flatly inconsistent with our decision in *Eddleman*.” *Gillispie v. Warden, London Corr. Inst.*, 771 F.3d 323, 328 (6th Cir. 2014). *Gillispie* is different on the facts and in its procedural posture. *Id.* at 326. Unlike here, the state in *Gillispie* followed all of the conditions of the writ within the time prescribed by the conditional writ. *Id.* Moreover, the district court in *Gillispie* never filed an unconditional writ as a sanction for the state’s noncompliance with a conditional writ.

Gillispie should not be read more broadly to stand for the proposition that a district court has no jurisdiction to entertain a Rule 60(b) motion when the state has failed to comply with an unconditional writ in the timeframe demanded by that writ. When *Gillispie* states that a district court cannot “continue to enforce the terms of a conditional writ after the petitioner is no longer in custody pursuant to an unconstitutional judgment[,]” it must be read as simply reaffirming the basic proposition that timely compliance with a writ ends federal jurisdiction over that writ. *Id.* at 329. Reading *Gillispie* and *Eddleman* more broadly runs headlong into *Mason*, *D’Ambrosio*, and *Girts*. *Mason* reaffirmed *D’Ambrosio* and *Girts* that district courts have jurisdiction under Rule 60(b) to ensure that a writ is enforced. To whatever extent *Gillispie* tries to distinguish *D’Ambrosio*, it cannot be read to limit district courts from enforcing a writ where the state is noncompliant with the exact terms of the writ. Even if *Gillispie* intended to stand for a broader proposition, *Mason* is the earlier published decision, so it controls. *See Salmi v. Sec’y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

In sum, *Girts*, *D’Ambrosio*, and *Mason* explain why we have jurisdiction to hear Allah-U-Akbar’s appeal from the district court’s Rule 60(b) order. Because the state failed to comply

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with the terms of the district court's unconditional writ, the district court had jurisdiction to consider sanctions. The district court could consider only the events leading up to the state's compliance with the writ on May 29, 2024. Accordingly, the district court had jurisdiction when it denied Allah-U-Akbar's motion on the merits, and so the panel also has jurisdiction on appeal.

III. ANALYSIS

On the merits, we affirm the district court's decision to deny Allah-U-Akbar's request to bar reprosecution of the death penalty. We affirm both the February 29, 2024, unconditional writ and the June 24, 2024, order on Allah-U-Akbar's Rule 60(b) motion.

A. February 29, 2024 Order

Allah-U-Akbar challenges the district court's conclusion that he did not demonstrate extraordinary circumstances justifying a bar on the reprosecution of the death penalty when the district court issued the unconditional writ in February 2024. Akbar Br. at 3. Although "the district court's factual findings must be reviewed for clear error, the legal conclusion concerning whether those facts rise to the level of 'extraordinary circumstances' should be reviewed *de novo*." *Girts*, 600 F.3d at 583 (quoting *United States v. Jeross*, 521 F.3d 562, 581–82 (6th Cir. 2008)).

"[W]hen 'a prisoner is released because a state fails to retry the prisoner by the deadline set in a conditional writ, the state is not precluded from rearresting petitioner and retrying him under the same indictment.'" *Mason*, 729 F.3d at 551 (quoting *Satterlee*, 453 F.3d at 370). "Nonetheless, 'in extraordinary circumstances, such as when the state inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period or if the state's delay is likely to prejudice the petitioner's ability to mount a defense at trial, a habeas court may forbid reprosecution.'" *Id.* (quoting *Satterlee*, 453 F.3d at 370). "[T]roubling" conduct on the part of the state is not enough. *Id.* at 552 (quoting *Girts*, 600 F.3d at 584–85). "[E]ven when the state 'undoubtedly did almost nothing to retry [the petitioner] during the 180-day period,'" we have found barring reprosecution of the death penalty inappropriate. *Id.* at 552 (quoting *Girts*, 600 F.3d at 584–85). Instead, Allah-U-Akbar must demonstrate that the state engaged in "substantial inequitable conduct." *Id.* (quoting *D'Ambrosio*, 656 F.3d at 383). In addition to substantial

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wrongdoing or bad faith on the part of the state, substantial inequitable conduct also includes “wrongfully retaining and delaying the production of . . . exculpatory evidence[.]” *Id.* (alteration in original) (quoting *D’Ambrosio*, 656 F.3d at 383).

We agree with the district court that at the time of the unconditional writ, Allah-U-Akbar had not demonstrated that there were extraordinary circumstances justifying a bar on reprosecuting the death penalty. As the district court found, “the state-court record reveals proceedings straining under the weight of a federal court’s mandate and exceedingly complex legal, procedural, and administrative issues—such as [Allah-U-Akbar’s] competency to stand trial and his request to represent himself in a capital case; the burden on the defense to investigate and present mitigation evidence in a case more than a quarter-of-a-century old; and containing pre-trial publicity amidst intense public interest.” *Jones*, 2024 WL 895153, at *8. Although there were lengthy delays in proceeding with a new penalty phase, many of those delays were attributable to Allah-U-Akbar. *See id.* at *4, 9. Allah-U-Akbar sought to proceed pro se, which required determining his competency. *Id.* at *9. Both the state and Allah-U-Akbar sought at various times to disqualify the state trial judge assigned to the sentencing proceedings. *Id.* at *2, 8. The state-court delays associated with Allah-U-Akbar’s competency evaluations and the various disqualification proceedings are undoubtedly troubling. But this series of events is not due to bad faith or wrongdoing on the part of the state, nor does it rise to the level of substantial inequitable conduct that would warrant a bar on the death penalty.

For example, the state’s conduct up to February 29, 2024, was unlike the “substantial inequitable conduct” that supported the penalty bar in *D’Ambrosio*. 656 F.3d at 383 (quoting *D’Ambrosio*, 688 F. Supp. 2d at 727–28). There, the state wrongfully withheld evidence that “would have substantially increased a reasonable juror’s doubt of D’Ambrosio’s guilt,” the state repeatedly and wrongfully delayed D’Ambrosio’s re-trial, “the State’s counsel baselessly attacked the state trial judge,” and the state submitted evidence before the federal district court “that, charitably, only [could] be described as ‘strain[ing] credulity[.]’” *Id.* (quoting *D’Ambrosio*, 688 F. Supp. 2d at 727–28). If that were not enough, “the man around whom the entire theory of the State’s case revolve[d] [was] no longer available for trial, a fact the State knew but withheld from D’Ambrosio, the state court, and” the federal district court. *Id.* (quoting

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D'Ambrosio, 688 F. Supp. 2d at 727–28). In *D'Ambrosio*, the state repeatedly withheld key information, failed to disclose this information to the petitioner or the court, and thereby substantially prejudiced D'Ambrosio's ability to ensure a fair trial. Although the reasons for delays in Allah-U-Akbar's case are no doubt troubling, *see Jones*, 2024 WL 895153, at *7, the state's actions do not rise to the level of substantial inequitable conduct in a comparable way here. There does not appear to be bad faith or wrongdoing on the part of the state, and Allah-U-Akbar is not similarly prejudiced from undergoing a fair sentencing proceeding.

For these reasons, we affirm the district court's decision to enter an unconditional writ vacating Allah-U-Akbar's unconstitutional sentence, but declining to bar the state from reprosecuting the death penalty.

B. Rule 60(b) Order

We also affirm the district court's decision denying Allah-U-Akbar's Rule 60(b) motion. We review this decision for abuse of discretion. *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009). As explained above, the state did not vacate Allah-U-Akbar's unconstitutional sentence until May 29, 2024, nearly three months after the district court issued the unconditional writ requiring vacatur within five business days of February 29, 2024. Although there was a lengthy delay in compliance with the unconditional writ, Allah-U-Akbar has not demonstrated that the district court abused its discretion when it denied his motion.

The state partially complied with the unconditional writ when it transferred Allah-U-Akbar to the Ashtabula County jail. R. 288 (Notice at 1) (Page ID #13295). A few weeks later, on March 22, 2024, the county prosecutor filed a motion in the state court to vacate Allah-U-Akbar's unconstitutional sentence. R. 296-1 (05/29/24 Judgment Entry) (Page ID #14100). Although this motion came well after the deadline imposed by the unconditional writ, it does not demonstrate bad faith or misconduct on the part of the county prosecutor. The state court did not immediately act on the motion because it believed it lacked jurisdiction to do so. R. 288-2 (03/12/24 Judgment Entry at 1) (Page ID #13298); R. 296-1 (05/29/24 Judgment Entry) (Page ID #14100). That the state court delayed its ruling to ensure its jurisdiction, although perhaps misguided, does not indicate bad faith or wrongdoing. We agree with Allah-U-Akbar that more

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could have been done to ensure the unconditional writ was fully complied with in a timely manner. *See* Akbar Br. at 49–50. Ultimately, however, the delay was only temporary, and “resentencing proceedings are advancing.” *Jones*, 2024 WL 3161944, at *5. We agree with the district court’s conclusion that no bad faith or “inexcusable neglect” prompted this lengthy delay. *Id.* Although it is troubling that the Warden, the county prosecutor, and the state court did not take accountability to ensure compliance with a federal court’s unconditional writ, *see* Akbar Br. at 55–61, this delay does not rise to the level of extraordinary circumstances warranting relief.

Allah-U-Akbar also argues that the state’s continued reliance on Dr. James Eisenberg’s tainted testimony constitutes an independent basis for granting relief under Rule 60(b)(6). Akbar Br. at 52–55; *see Jones*, 46 F.4th at 467–68 (summarizing Dr. Eisenberg’s testimony). Allah-U-Akbar notes that Dr. Eisenberg’s testimony was used to assess his competency in the proceedings related to the resentencing phase. Akbar Br. at 53–54. While Allah-U-Akbar argues the use of Dr. Eisenberg’s testimony constitutes the same constitutional deficiency, it does not. We first granted Allah-U-Akbar habeas relief only because he received ineffective assistance of counsel at his penalty-phase trial. To whatever extent Allah-U-Akbar believes that the state is conducting a constitutionally infirm resentencing proceeding that does not suffer from that same constitutional defect, that is an independent constitutional claim which Allah-U-Akbar will have the opportunity to litigate in the state courts and potentially in post-conviction proceedings. It is not an independent basis for asserting sanctions against the state for its belated compliance with the unconditional writ.

IV. CONCLUSION

For these reasons, we **AFFIRM** the judgment of the district court.

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OPINION

GRIFFIN, Circuit Judge, dissenting.

I would dismiss and hold that, because the State of Ohio has vacated petitioner’s unconstitutional death sentence, we no longer possess subject-matter jurisdiction.¹ Therefore, I respectfully dissent.

I.

Subject-matter jurisdiction refers to the types of cases that fall “within a court’s adjudicatory authority.” *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). “We have an independent obligation to check both our own jurisdiction and the district court’s,” and if we lack jurisdiction, we have “no power but to dismiss the case.” *Taylor v. Owens*, 990 F.3d 493, 496 (6th Cir. 2021).

Congress drew clear boundaries for the federal courts’ jurisdiction over habeas cases in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244 *et seq.* Section 2254(a) allows federal courts to consider a request for habeas relief from “a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” *Id.* § 2254(a). Likewise, § 2241, which defines the “[p]ower to grant [the] writ,” provides that “[t]he writ of habeas corpus shall not extend to a prisoner unless,” among other scenarios, “[h]e is in custody in violation of the Constitution or laws or treaties of the United States.” *Id.* § 2241(c)(3). The term “unless” introduces the condition that limits the rule, meaning the clause that follows “unless” must be satisfied for a petitioner to properly invoke AEDPA. In other words, “[t]he subject[-]matter jurisdiction of the habeas courts is limited explicitly to petitioners from applicants who allege they are in ‘custody’ in violation of federal law.” 17B Wright & Miller’s Federal Practice

¹I would join Section III of the majority’s opinion affirming the judgment of the district court were we to possess jurisdiction.

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& Procedure § 4262 n.5 (3d ed. last updated May 21, 2025) (quoting Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. Rev. 991, 999 (1985)).

“An unconstitutional death sentence” can satisfy the in-custody-in-violation-of-federal-law requirement “because it is a judgment imposed without authority.” *In re Campbell*, 874 F.3d 454, 462 (6th Cir. 2017) (order) (per curiam). Thus, federal courts may grant a writ of habeas corpus and order the vacatur of unconstitutional death sentences, *see id.*, as we and the district court did here, *see Jones v. Bradshaw*, 46 F.4th 459, 489 (6th Cir. 2022).

But that we once had subject-matter jurisdiction over Allah-U-Akbar’s case does not mean we still do. Our obligation to evaluate our jurisdiction is “continuing,” *Campanella v. Com. Exch. Bank*, 137 F.3d, 885, 890 (6th Cir. 1998), and “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action,” *Watson v. Cartee*, 817 F.3d 299, 302–03 (6th Cir. 2016) (quoting Fed. R. Civ. P. 12(h)(3)).

A vacated sentence is one that “never occurred.” *Hewitt v. United States*, 145 S. Ct. 2165, 2174 (2025). And “once the unconstitutional judgment is gone, so too is federal jurisdiction under § 2254.” *Eddleman v. McKee* 586 F.3d 409, 413 (6th Cir. 2009); *see also Lane v. Williams*, 455 U.S. 624, 630–32 (1982) (a habeas sentencing appeal becomes moot once the sentence is served, absent collateral consequences); *Brown v. Vanihel*, 7 F.4th 666, 669–71 (7th Cir. 2021) (vacatur of a criminal sentence moots a habeas appeal).

II.

Our jurisdiction under AEDPA ended when the state court vacated Allah-U-Akbar’s death sentence because, at that point, he was no longer “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). Applying that plain language to this case’s procedural history compels that result.

Our 2022 review of Allah-U-Akbar’s petition addressed 14 claims, only one of which we found meritorious: his claim of ineffective assistance of counsel at his penalty-phase trial. *Jones*, 46 F.4th at 470–71, 487–89. Based on that constitutional violation, we held that Allah-U-Akbar was “entitled to a new sentencing hearing” and thus remanded to the district court with

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instructions to issue a conditional writ of habeas corpus, “vacating [Allah-U-Akbar’s] death sentence unless the State of Ohio conducts a new penalty-phase proceeding within 180 days of remand.” *Id.* at 489.² So Allah-U-Akbar’s death sentence was the sole aspect of his state-court judgment that we found unconstitutional. Because the state court vacated that unconstitutional death sentence, Allah-U-Akbar is no longer “in custody in violation of [federal law].” 28 U.S.C. § 2254(a). We therefore lack jurisdiction over his appeal of the district court’s entry of an unconditional writ and its order denying Allah-U-Akbar’s Rule 60(b) motion.

The principles announced in *Eddleman* support this conclusion. There, after the state vacated the petitioner’s sentence, the district court granted extensive additional relief. *Eddleman*, 586 F.3d at 411–12. But we held that the district court (and we) lacked jurisdiction to consider the petitioner’s motion or appeal because “once the unconstitutional judgment is gone, so too is federal jurisdiction under § 2254.” *Id.* at 413–14; *see also Gillispie v. Warden, London Corr. Inst.*, 771 F.3d 323, 328 (6th Cir. 2014) (reaffirming *Eddleman*’s § 2254 analysis); *Smith v. Davis*, No. 25-3381, 2025 WL 1826652, at *10–11 (6th Cir. July 2, 2025) (per curiam) (Thapar, J., dissenting) (explaining that “a district court loses jurisdiction if the state vacates the habeas petitioner’s unconstitutional conviction that formed the basis of the conditional writ”); *Brown*, 7 F.4th at 669–70 (citing *Eddleman* and *Gillispie* and agreeing that vacatur of the relevant conviction “end[s] federal jurisdiction” over a habeas petition). Indeed, upon the state’s compliance with the writ, “[t]he responsibility of ensuring that he received not only a fair trial, but a timely one, then passed to the [state court] in the first instance.” *Eddleman*, 586 F.3d at 413.

It is unimportant that, unlike in *Eddleman*, the district court had jurisdiction to enter the unconditional writ in this case. The plain text of AEDPA, as *Eddleman* correctly recognized, divests federal courts’ jurisdiction immediately upon vacatur, at which point the remainder of a criminal prosecution shifts back to the state, where it belongs. *See id.* Here, because Allah-U-Akbar is no longer in custody pursuant to a judgment that violates the “Constitution or laws or

²A conditional writ of habeas corpus—the type our remand called for—allows the state time to correct the identified constitutional error. *Satterlee v. Wolfenbarger*, 453 F.3d 362, 369 (6th Cir. 2006). We prefer this type of relief, which respects both comity and state sovereignty and gives the state a chance to cure the error. *Gentry v. Death*, 456 F.3d 687, 692 (6th Cir. 2006).

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treaties of the United States,” we lack jurisdiction over his habeas petition. The state’s failure to timely vacate Allah-U-Akbar’s sentence does not alter this conclusion.

III.

The majority posits two bases for federal jurisdiction to review the district court’s entry of the unconditional writ and denial of the Rule 60(b) motion. But neither complies with AEDPA’s clear language.

A.

First, the majority reasons that, because the district court had jurisdiction to enter the unconditional writ which ordered the state to vacate the death sentence and unconditionally release Allah-U-Akbar within five business days, we have jurisdiction to determine whether the State of Ohio can be sanctioned for not strictly complying with the writ, even though Allah-U-Akbar’s unconstitutional sentence has already been vacated. In so holding, “the majority erroneously considers compliance with the precise terms of the conditional-writ order to be the primary jurisdictional inquiry.” *D’Ambrosio v. Bagley*, 656 F.3d 379, 391 (6th Cir. 2011) (Boggs, J., dissenting). Only AEDPA can confer our jurisdiction to review the district court’s disposition of Allah-U-Akbar’s petition for habeas relief. And under AEDPA, the threshold jurisdictional inquiry is whether the petitioner is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). As explained, because Allah-U-Akbar’s unconstitutional death sentence has been vacated, he no longer meets the statutory requirement for federal habeas jurisdiction.

To circumvent AEDPA’s jurisdictional requirement, the majority relies on *Mason v. Mitchell*, 729 F.3d 545, 550 (6th Cir. 2013), in which a panel of our court held under similar circumstances that “if a state fails to release the petitioner from the unconstitutional judgment within the time period prescribed by the conditional writ, the habeas court has jurisdiction to consider the noncompliance and impose sanctions.” But whether sanctions are warranted and whether a prisoner is incarcerated in violation of federal law are two discrete questions, only one of which (the latter) we have jurisdiction to decide under AEDPA. Instead of asking whether the petitioner remained “in custody in violation of the Constitution or laws or treaties of the United

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States” at the time of appellate review, 28 U.S.C. § 2254(a), the *Mason* court erroneously applied its notions of federal judicial supremacy and power to issue sanctions to exercise jurisdiction over an individual whose unconstitutional death sentence had been vacated by the state (albeit belatedly, like in *Allah-U-Akbar*’s case).

Ignoring AEDPA’s jurisdictional requirement and citing no alternative statutory authority, the *Mason* panel relied only on *D’Ambrosio*, 656 F.3d at 379. But *D’Ambrosio* did not support *Mason*’s novel expansion of federal jurisdiction over habeas petitions—nor does it support our exercise of jurisdiction here. Notably, in *D’Ambrosio*, the state never complied with the writ. *Id.* at 381–82. In *Mason* and in *Allah-U-Akbar*’s case, by contrast, the states eventually complied by vacating the death sentences. Indeed, in holding that “the district court continued to retain jurisdiction over *D’Ambrosio*’s case,” the *D’Ambrosio* court emphasized this precise distinction by distinguishing *Eddleman*: “*D’Ambrosio*’s convictions were never ‘vacated’ as *Eddleman*’s convictions were.” *Id.* at 388. The vacatur of the unconstitutional death sentence in *Mason* should have put it in line with *Eddleman*, not *D’Ambrosio*. Yet *Mason* cited no precedent or statutory authority that justified its exercise of jurisdiction after the petitioner was no longer “in custody pursuant to the judgment of a State court” nor “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

In short, *Mason* contravenes AEDPA’s clear command. Moreover, because it is “irreconcilable” with the earlier-decided *Eddleman*, it should not be followed. See *Helphenstine v. Lewis Cnty.*, 60 F.4th 305, 316–17 (6th Cir. 2023); see also 6 Cir. R. 32.1(b).

B.

Alternatively, the majority holds that we have jurisdiction to review the denial of *Allah-U-Akbar*’s Rule 60(b) motion because “[i]f a state is noncompliant with the writ, then the district court may impose sanctions pursuant to Rule 60(b) even after the writ is fully complied with.” For its Rule 60(b) analysis, the majority relies on *D’Ambrosio* and *Mason*, as well as *Girts v. Yanai*, 600 F.3d 576 (6th Cir. 2010). But none of these cases say anything about review of a Rule 60(b) motion after vacatur of an unconstitutional sentence. And all three cases are either at

odds with the earlier-decided *Eddleman* or grapple little, if at all, with AEDPA's language, and none should be read to authorize what the statute does not.

Regarding *D'Ambrosio*, although Rule 60(b) "is considered a continuation of the original proceeding," 656 F.3d at 388 (citation modified), its general rule of continuing jurisdiction is limited by AEDPA, particularly where the "original proceeding" terminated by way of compliance. Unlike *D'Ambrosio*, where the state never complied with the unconditional writ, here the state vacated Allah-U-Akbar's sentence and thus complied with the writ. Thus, the district court could no longer arguably exercise jurisdiction or amend its judgment under Rule 60(b) because the "original proceeding"—i.e., the habeas petition for relief from unconstitutional confinement—was terminated. The state's failure to *timely* comply with the writ does not change the fact that compliance stripped the district court of its AEDPA-created jurisdiction over this habeas case.

Charter Township of Muskegon v. City of Muskegon, 303 F.3d 755 (6th Cir. 2002) does not alter this conclusion. The majority opinion, like *D'Ambrosio*, cites it for the proposition that when a district court has jurisdiction to enter a judgment it possesses continuing jurisdiction to adjudicate a related 60(b) motion. But jurisdiction in that case stemmed from diversity of citizenship. It was thus not restricted by AEDPA's limited grant of habeas jurisdiction and is therefore not controlling here.

The majority's reliance on *Girts* fares no better. It attempts to soften *Eddleman*'s holding by pointing to a statement in *Girts* that "*Eddleman* must be seen as merely a sensible reaffirmation of the principle announced in *Fisher v. Rose*, 757 F.2d 789 (6th Cir. 1985), that federal courts do not have continuing oversight of subsequent state court proceedings following the state's compliance with a grant of a conditional writ of habeas corpus." *Girts*'s limited reading of *Eddleman*, though, does not alter *Eddleman*'s fundamental holding: The vacatur of a "criminal judgment remove[s] the predicate for federal habeas jurisdiction." *Gillispie*, 771 F.3d at 326 (citing *Eddleman*, 586 F.3d at 413). That proposition, articulated in *Eddleman* and reaffirmed in *Gillispie*, aligns with AEDPA's clear language conferring jurisdiction only when a state prisoner is in custody in violation of federal law. Rule 60(b) cannot be used to skirt that requirement, as the "[r]ule authorizes the court only to grant '[r]elief' from an order granting the

writ, not to enforce the order after the unconstitutional judgment is gone.” *Gillispie*, 771 F.3d at 330.

Finally, the majority warns that “conditional writs ‘would be meaningless’ if a habeas court could not determine compliance with them and order sanctions accordingly” (quoting *Mason*, 729 F.3d at 549). While such a grant of jurisdiction may make good policy, we are limited to the subject-matter jurisdiction Congress authorized in AEDPA. Indeed, the Supreme Court has warned that “we may not engraft our exceptions onto the statutory text.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 70 (2019) (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 556–57 (2005)). AEDPA channels federal habeas jurisdiction narrowly: A federal court possesses it when a person is “in custody pursuant to the judgment of a State court 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). Once the unconstitutional judgment is vacated, the role of the federal courts ends per AEDPA. Whether to expand that role is a “policy choice for Congress to resolve.” *Soto v. United States*, 605 U.S. 360, 375 (2025) (citation modified).

IV.

In sum, although the district court ordered the sentence to be vacated within five days and the state court took 95 days to do so, that delay does not change the relevant fact: Allah-U-Akbar is no longer “in custody in violation of [federal law]” and we therefore have no jurisdiction on appeal. 28 U.S.C. § 2241(c)(3). To retain subject-matter jurisdiction after compliance in this context would contravene AEDPA’s text and would “give short shrift to the State’s sovereign interest in its final judgment.” *Brown v. Davenport*, 596 U.S. 118, 133 (2022) (citation modified). Indeed, habeas corpus safeguards individual liberty, but it does so without displacing the state’s primary responsibility for criminal law enforcement. *Hodge v. Plappert*, 136 F.4th 648, 658 (6th Cir. 2025). “Defining and enforcing the criminal law” typically falls within the state’s sovereign prerogative. *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). To expand federal jurisdiction so that we may police the state’s timelines or punish delay after the state has already vacated an unconstitutional sentence would encroach upon that function.

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V.

Because the State of Ohio has vacated the previous basis for our subject-matter jurisdiction—Allah-U-Akbar’s unconstitutional death sentence—we no longer possess jurisdiction and thus I would dismiss this appeal.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-3581

MALIK ALLAH-U-AKBAR, fka Odraye G. Jones

Petitioner - Appellant,

v.

MARGARET BRADSHAW, Warden,

Respondent - Appellee.

FILED
Oct 09, 2025
KELLY L. STEPHENS, Clerk

Before: MOORE, COLE, and GRIFFIN, Circuit Judges.

JUDGMENT

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

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is
AFFIRMED.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ODRAYE G. JONES (n/k/a Malik Allah-U-Akbar),	:	CASE NO. 1:03 CV 1192
	:	
Petitioner,	:	JUDGE SOLOMON OLIVER, JR.
	:	
vs.	:	
	:	
MARGARET BRADSHAW, Warden,	:	MEMORANDUM OF OPINION
	:	AND ORDER
Respondent.	:	

Before the court in this capital habeas corpus case is Petitioner Odraye Jones' motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. (Doc. 289.)¹ Specifically, he argues that the court should reopen its judgment granting his request for an unconditional writ and denying his request that it bar the State from resentencing him (Doc. 287), reorder Jones' unconditional release from custody, and bar the State of Ohio from conducting further resentencing proceedings in state court. (See Doc. 289 at 11.)² Respondent Warden

¹ This case was transferred to the undersigned upon the death of United States District Court Judge David A. Katz. In addition, Jones has legally changed his name to Malik Allah-U-Akbar. (See Doc. 198.) The court will continue to refer to him as Jones in this Memorandum of Opinion and Order, however, for the sake of clarity and continuity.

² For ease of reference, all citations to page numbers of documents filed in the court's electronic court filing system ("ECF") are to the ECF-assigned page numbers of the individual documents, not to the documents' original page numbers or the ECF "PageID" numbers.

Margaret Bradshaw opposes the motion. (Doc. 292.) And Jones has replied to Respondent's opposition brief. (Doc. 294.) For the reasons stated below, the court denies Jones' motion.

RELEVANT PROCEDURAL HISTORY

On August 22, 2022, the Sixth Circuit Court of Appeals granted Jones a conditional writ of habeas corpus ordering that his case be "remand[ed] to the district court with instructions to issue a writ of habeas corpus vacating Jones's death sentence unless the State of Ohio conducts a new penalty-phase proceeding within 180 days of remand." *Jones v. Bradshaw*, 46 F.4th 459, 487-89 (6th Cir. 2022). However, the State failed to conduct a new sentencing hearing in the Ashtabula County Court of Common Pleas within the mandated 180-day period, which ultimately expired on November 22, 2023. (*See* Doc. 287 at 9.)

On November 30, 2023, Jones filed a motion in this court asking it to issue an unconditional writ of habeas corpus due to the State's noncompliance with the conditional writ and bar state resentencing proceedings. (Doc. 278.) After conducting a hearing on the matter, this court filed a memorandum of opinion and order on February 29, 2024, granting Jones' motion to issue an unconditional writ of habeas corpus and ordering Jones' release from state prison within five business days of the date of the Order, but denying his request to bar retrial and allowing Jones' subsequent arrest and resentencing. (Doc. 287.)

On March 1, 2024, the county prosecutor filed in the state trial court a request for an arrest warrant on the original 1998 Indictment in Jones' case. (Doc. 290 (Pet. Supp. App. III) at 157 (March 1, 2024, Warrant).) On March 5, 2024, the Warden released Jones into the custody of the Ashtabula County Sheriff. (Doc. 288 (Notice of Pet.'s Release).) Jones was rearrested under the warrant and placed in the Ashtabula County Jail. (Doc. 289 at 4.) But no action was taken at that

time by the Warden, the prosecution, Jones' counsel, or the trial court to effectuate this court's Order to vacate Jones' 1998 sentencing judgment within five business days. (*See* Ashtabula County Court of Common Pleas Docket, Case No. 1997 CV 221.)

Meanwhile, on March 4, 2024 – two business days after this court's decision ordering the unconditional writ was issued – Jones filed a notice of appeal in the state trial court relating to two pretrial decisions. (*See* Doc. 288-2 (Judgment Entry 3/12/2024, Case No. 1997 CV 221).) On March 12, 2024, the state trial court issued a judgment entry stating that Jones' notice of appeal had divested the court of jurisdiction “except to take action in aid of the appeal, until the case is remanded to it by the appellate court,” and the court therefore stayed all proceedings, including the resentencing hearing it had set for May 20, 2024. (*Id.*) The court noted that the notice of appeal was “the third filing by a litigant that has divested this Court of jurisdiction and delayed this Court in commencing the New Penalty Phase in a timely manner.” (*Id.*)

On March 22, 2024, the county prosecutor filed in the state trial court a motion to vacate Jones' death sentence pursuant to this court's Order. (Doc. 290 (Pet. Supp. App. III) at 737-41.) In it, she states that, “[t]he State of Ohio now seeks to vacate . . . [Jones'] death sentence” (*Id.* at 739.) She conceded that the trial court generally lacks jurisdiction over the case pending Jones' appeal, but argued that the trial court still has the authority to enter an order vacating the sentence under Ohio law, which recognizes that, “the trial court does retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appeals judgment, such as collateral issues like contempt, appointment of a receiver and injunction.” (*Id.* (quoting *State ex rel. Special Prosecutors v. Judges, Ct. Com. Pl.*, 55 Ohio St. 2d 94, 97 (Ohio 1978)).) “As we are already operating under the assumption that the death

sentence has been vacated,” she added, the trial court’s vacatur of Jones’ sentence while the case is on appeal “would not be inconsistent with the Court’s duties in this case and would not undermine the Defendant’s filing of a notice of appeal.” (*Id.* at 740.) She therefore asked the court “to comply with the District Court’s ruling and vacate the death sentence, so that going forward the record is in compliance therewith,” as the State has released Jones from Respondent’s custody, rearrested him on the Indictment, and he is now in the county sheriff’s custody. (*Id.*)

On May 29, 2024, the state trial court granted the State’s motion to vacate Jones’ original sentence and formally vacated the sentence through an entry in its docket. (*See* Doc. 296-1 (Judgment Entry of May 29, 2024, in Ashtabula County Court of Common Pleas, Case No. 1997 CR 221).)

Jones has now filed a motion under Federal Civil Rule 60(b), asking the court to reopen its February 29, 2024 judgment, granting his request for an unconditional writ and denying his request that it bar the State from resentencing him, reorder his unconditional release from custody, and bar the State of Ohio from conducting further resentencing proceedings in state court. (*See* Doc. 289 at 11.) Respondent opposes the motion. (Doc. 292.)

ANALYSIS

Federal Civil Rule 60(b) enumerates specific circumstances in which a party may seek relief from a final judgment and request reopening of the case, such as fraud, mistake, and newly discovered evidence. *See* Fed. R. Civ. P. 60(b). Jones bases his motion on Rule 60(b)(5), which applies when “the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable,” and on Rule 60(b)(6), a catchall provision that permits a court to lift a judgment for “any other

reason that justifies relief.” (Doc. 289 at 8.) Rule 60(b)(6) is available only in “extraordinary circumstances,” and those conditions “rarely occur” in habeas cases. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

Jones argues that the State’s noncompliance with the unconditional writ constitutes a “‘significant change’ in the factual and legal landscape of this action and has ‘altered the equitable basis’ for this Court’s February 29, 2024, judgment declining to bar retrial” under Rule 60(b)(5). (Doc. 289 at 8 (quoting Fed. R. Civ. P. 60(b)(5)).) He further claims his case presents “extraordinary circumstances” under Rule 60(b)(6) because the State has been “perpetually noncompliant with *both* the conditional and unconditional writs.” (*Id.* (emphasis in original).) Jones cites as support Respondent’s “inexcusable neglect” in failing to comply with the unconditional writ by: (1) ensuring that a copy of this court’s Order granting the unconditional writ was immediately filed with the state trial court; (2) ensuring that the State file a motion requesting that the trial court immediately vacate the unconstitutional death sentence before moving for an arrest warrant; (3) timely notifying this court by the compliance deadline that the state trial court still had not vacated the death sentence; and (4) seeking an extension of time to comply with the writ, an order for sanctions, or other appropriate relief in this court. (Doc. 294 at 3.)

Respondent counters that the only one responsible for the delay in obtaining the vacatur is Jones himself through his notice of appeal in the state trial court. (Doc. 292 at 3.) In particular, she notes that the Warden has no authority to vacate a criminal sentence, and adds that her release of Jones to the custody of county authorities “is an implicit recognition that the sentencing

judgment is no longer a valid basis for imprisoning [Jones] in a state correctional institution.” (*Id.*)

Respondent’s argument that Jones’ sentence has been “vacated” even without a formal court order stating as much is persuasive. The Sixth Circuit addressed the issue of when a judgment is considered “vacated” for purposes of determining whether the district court had jurisdiction after issuing an unconditional writ of habeas corpus in *Eddleman v. McKee*, 586 F.3d 409 (6th Cir. 2009), and *D’Ambrosio v. Bagley*, 656 F.3d 379 (6th Cir. 2011).³ In doing so, the circuit court did not require a formal judgment entry vacating the unconstitutional state-court judgments at issue, but instead looked at the totality of circumstances to make its determination.

In *Eddleman*, the district court initially granted a conditional writ, which the circuit court upheld, requiring the state to release the petitioner unless a date for a new trial was scheduled within forty-five days. *Eddleman*, 586 F.3d at 411. Instead of retrying the petitioner, however, the state decided to vacate his convictions, release him, and then rearrest him pursuant to the original information. *Id.* The petitioner moved for the district court to grant an unconditional writ barring retrial because the state had failed to comply with the conditional writ. *Id.* The district

³ Jurisdiction is not at issue in this case, however. In federal habeas cases, once an unconstitutional state-court judgment is vacated, the district court loses jurisdiction over the matter. *Eddleman*, 586 F.3d at 412-13 (citing 28 U.S.C. § 2254(a) (federal courts “shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States”)). But a district court has continuing jurisdiction over the grant of an unconditional writ of habeas corpus pursuant to a Rule 60(b) motion “as long as it had jurisdiction to grant the unconditional writ in the first place,” which this court did here. *D’Ambrosio*, 656 F.3d at 388; *see also Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006) (federal district courts generally “retain jurisdiction to determine whether a party has complied with the terms of a conditional order in a habeas case”). Regardless of whether Jones’ sentence was “vacated” or not, therefore, this court has jurisdiction to rule on Jones’ Rule 60(B) motion.

court initially denied this motion, but after the date for the petitioner's trial was delayed for almost a year, the petitioner renewed his motion and the district court agreed to grant an unconditional writ barring his reprosecution. *Id.* at 411–12. On appeal, the state challenged the district court's jurisdiction to issue the unconditional writ, claiming that the unconstitutional conviction had been vacated and that the petitioner was being held pursuant to the information and not the conviction. *Id.* at 412.

The Sixth Circuit agreed. It stressed that the petitioner's later arraignment and bond hearing in state court “confirm[ed] that his prior conviction had been set aside.” *Id.* Also, it observed, “counsel for both [the petitioner] and the State represented to the court, and the court itself agreed, that [the petitioner's] unconstitutional conviction had been vacated.” *Id.* Even though the record in the trial court was devoid of any written order to that effect, and “the better practice certainly would have been for the state court to have entered a written order,” the court concluded that “[t]he record ma[de] clear, nonetheless, that [the petitioner's] conviction was vacated.” *Id.*

In *D'Ambrosio*, the district court also initially granted a conditional writ, requiring the state to either set aside the petitioner's convictions and sentences or conduct another trial within a certain time period. *D'Ambrosio*, 656 F.3d at 381. The state chose the retrial option, but did not comply within the mandate time period, so the district court issued an unconditional writ, initially permitting reprosecution, but later barring retrial upon the petitioner's Rule 60(b) motion. *Id.* at 382-83. The respondent appealed, arguing that the district court lacked jurisdiction to issue the unconditional writ in part because the petitioner's convictions were vacated, divesting the district court of jurisdiction. *Id.* at 385; *see Girts v. Yanai*, 600 F.3d 576, 582 (6th Cir. 2010) (“a district

court sitting in habeas has jurisdiction to consider the circumstances that exist up until either the state complies with a conditional writ or the court issues an unconditional writ, but does not have jurisdiction to consider circumstances that unfold after the state complies with the writ”).

The Sixth Circuit disagreed with this argument, distinguishing the case from *Eddleman*. It found the totality of the circumstances demonstrated that the petitioner’s convictions were never “vacated” as the *Eddleman* petitioners were, because the state clearly signified during post-writ proceedings in state court that it had chosen the writ’s retrial option and therefore remained subject to the district court’s jurisdiction, rather than the vacatur option, in which case the district court would have been divested of jurisdiction. *Id.* at 387-88.⁴ Thus, the court concluded that, unlike in *Eddleman*, the respondent had offered no proof “that [the petitioner’s] record was expunged or that the district court or state took any action to actually vacate [his] convictions.” *Id.* at 388. It emphasized that “[s]tatements of confused parties and judges do not vacate convictions. What vacates a conviction is an entry in the court docket, which—depending on the

⁴ The circuit court explained:

For example, in her initial brief to this court, the warden acknowledged that the state had chosen the retrial option, stating that “[w]hen retrial proceedings commenced in State court, ... the State was proceeding with the retrial option afforded under the conditional writ issued by the District Court.” In addition, if the state had considered D'Ambrosio's conviction to have been vacated, then the prosecution would have had no need to move the district court for an enlargement of time to retry D'Ambrosio, as it did on March 4, 2009. Moreover, the prosecution filed a request for retrial with the state court on September 30, 2008, notifying the court that the prosecution had to either set aside D'Ambrosio's conviction and sentence or conduct another trial within 180 days, and signifying that it was choosing the latter course of action.

D'Ambrosio, 656 F.3d at 387-88 (footnote omitted).

state’s procedures—is likely made through a court order, or clear actions by the court signifying a vacatur.” *Id.*

Here, it is true that the parties failed to ensure that the trial court entered the proper order vacating Jones’ sentence within the prescribed time period of this court’s Order. And, it is unclear why the State “assumed” that the trial court would vacate the sentencing judgment *sua sponte*. Nevertheless, similar to *Eddleman*, the circumstances show that the State took “clear actions . . . signifying a vacatur.” *D’Ambrosio*, 656 F.3d at 388. The Warden released Jones into the custody of the Ashtabula County Sheriff within the time period set forth in the unconditional writ; he was rearrested under a warrant on the original 1998 Indictment; and, he was incarcerated in the Ashtabula County Jail, where he remains. Jones argues that unlike the petitioner in *Eddleman*, he was not rearraigned and afforded a bond hearing. (Doc. 289 at 5.) But, the writ at issue here relates only to Jones’ sentencing, not to his conviction as in *Eddleman*, so no rearraignment or new bond was required. *D’Ambrosio*, on the other hand, presents an entirely different set of facts than this case and does not apply here; this court’s unconditional writ offered no choice between retrial and vacatur like the conditional writ did in *D’Ambrosio*.

Moreover, even if Jones’ sentence was not vacated within the prescribed time period, the noncompliance with the deadline for vacatur does not constitute a “significant change” in the case that has “altered the equitable basis” of this court’s judgment under Rule 60(b)(5), or rise to the level of an “extraordinary circumstance” warranting relief under Rule 60(b)(6). The trial court has now granted the State’s motion to vacate Jones’ original sentence and formally vacated the sentence through an entry in its docket, and the resentencing proceedings are advancing. Additionally, it appears to be attorney error and the timing of Jones’ appeal that led to the lack of

a court order vacating the sentence rather than any bad faith or “inexcusable neglect” on the State’s part such that this court would reopen the case under Rule 60(b) and bar a new sentencing hearing.

Accordingly, Jones’ motion for relief from judgment pursuant to Federal Civil Rule 60(b) (Doc. 289) is denied.

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR. _____
UNITED STATES DISTRICT JUDGE

June 24, 2024

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ODRAYE G. JONES (n/k/a Malik Allah-U-Akbar),	:	CASE NO.: 1:03 CV 1192
	:	
Petitioner,	:	
	:	JUDGE SOLOMON OLIVER, JR.
vs.	:	
	:	
MARGARET BRADSHAW, Warden,	:	
	:	
Respondent.	:	<u>JUDGMENT ENTRY</u>

For the reasons contained in the Memorandum of Opinion and Order filed on February 29, 2024 (Doc. 287), this court grants in part and denies in part Petitioner’s Motion to Issue Unconditional Writ of Habeas Corpus and to Bar Retrial (Doc. 278). The court further certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could be taken in good faith. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

June 24, 2024

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ODRAYE G. JONES (n/k/a Malik Allah-U-Akbar),	:	Case No.: 1:03 CV 1192
	:	
Petitioner,	:	
	:	JUDGE SOLOMON OLIVER, JR.
vs.	:	
	:	
MARGARET BRADSHAW, Warden,	:	
	:	MEMORANDUM OF OPINION
Respondent.	:	AND ORDER

Before the court in this capital habeas corpus case is Petitioner Odraye Jones’ “Motion to Issue Unconditional Writ of Habeas Corpus and Bar Retrial.” (Doc. 278.)¹ Specifically, Jones asks this court to: (1) issue an unconditional writ of habeas corpus due to the State of Ohio’s failure to comply with the Sixth Circuit Court of Appeal’s conditional writ directing this court to issue an absolute writ vacating Jones’ death sentence unless the State conducted a new penalty-phase proceeding within 180 days of remand; and (2) bar the State from conducting a new penalty-phase trial, or at a minimum, from seeking the death penalty. (Doc. 278 at 1.)²

¹ This case was transferred to the undersigned upon the death of United States District Court Judge David A. Katz. In addition, Jones has legally changed his name to Malik Allah-U-Akbar. (*See* Doc. 198.) The court will continue to refer to him as Jones in this Memorandum of Opinion and Order, however, for the sake of clarity and continuity.

² For ease of reference, all citations to page numbers of documents in the court’s electronic court filing system (“ECF”) are to the ECF-assigned page numbers of the

Respondent has filed a brief in opposition to the motion (Doc. 279), to which Jones has replied (Doc. 280). For the following reasons, the court grants the motion in part and denies it in part.

RELEVANT PROCEDURAL HISTORY

Nearly twenty-six years ago, on May 5, 1998, a jury in Ashtabula County, Ohio, convicted Odraye Jones for the aggravated murder of Police Officer William Glover with four capital specifications. On June 11, 1998, the jury recommended a sentence of death, which the trial court accepted and imposed. *See State v. Jones*, 91 Ohio St. 3d 335, 335-37 (Ohio 2001) (providing a detailed account of Jones' crimes and trial). Jones' convictions and sentence were affirmed on direct appeal, and he was unsuccessful in state post-conviction proceedings. *See id.* (direct appeal); *State v. Jones*, 2002 WL 737074 (Ohio Ct. App. Apr. 26, 2002) (post-conviction relief).

Jones first sought habeas corpus relief before another judge in this court in October 2003, raising thirty-four grounds for relief. (Doc. 17.) After a long and complex course of litigation, the court resolved Jones' habeas proceedings in October 2015, denying his petition. (*See* Doc. 233.)

Jones appealed that judgment, and on August 22, 2022, the Sixth Circuit affirmed Jones' convictions, but held that the ineffective assistance of counsel during the penalty phase of his trial rendered Jones' death sentence unconstitutional. *Jones v. Bradshaw*, 46 F.4th 459, 487-89 (6th Cir. 2022). Relying on the recent United States Supreme Court decision in *Buck v. Davis*, 580 U.S. 100 (2017), the court found that Jones' trial counsel were ineffective for allowing the jury to hear "racially prejudicial" expert testimony during the sentencing phase of trial. *Jones*, 46 F.4th at

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

487-89. The circuit court granted a conditional writ of habeas corpus ordering that the case be “remand[ed] to the district court with instructions to issue a writ of habeas corpus vacating Jones’s death sentence unless the State of Ohio conducts a new penalty-phase proceeding within 180 days of remand.” *Id.* at 489.

Respondent petitioned for rehearing *en banc*, which the circuit court denied on October 7, 2022. *Jones v. Bradshaw*, 2022 WL 10219982 (6th Cir. Oct. 7, 2022). The court’s mandate then issued on November 17, 2022 (*see* Doc. 268 (Mandate)), making the 180-day deadline for the State’s compliance with the writ May 16, 2023.

The state-court proceedings initially moved at a steady pace. Twelve days after the mandate issued on November 29, 2022, the State filed a motion requesting the court activate Jones’ case and set a date for the resentencing proceeding in the Ashtabula County Court of Common Pleas (Case No. 1997 CR 00221). The trial court appointed counsel for Jones four days later, and on December 15, 2022, ordered that Jones be transferred from death row at the Chillicothe Correctional Institution to the Ohio State Penitentiary to facilitate his access to counsel and travel to court.

But the case soon presented several difficult legal and procedural issues, causing significant delays and jeopardizing compliance with the writ’s deadline. Those issues, as documented by the trial court’s docket and judgment entries and transcripts of court proceedings, include:

Recusals. The first two judges assigned to the case recused themselves with no written explanation: the first judge, on December 20, 2022; and the next, on January 3, 2023. That same day, a third judge was assigned, Judge David Schroeder, who still presides over the case. Once

assigned, Judge Schroeder immediately scheduled the first status conference for January 27, 2023, already more than two months into the writ's 180-day period.

Defense Preparation. Within days of being appointed, defense counsel began the process of obtaining from the court funds for mitigation experts and an investigator, stressing the difficulties in gathering and presenting mitigation evidence and witnesses for a twenty-five-year-old case. The trial court granted each defense request.

Affidavits of Disqualification. On April 10, 2023, and May 5, 2023, the prosecutor filed in the Ohio Supreme Court affidavits seeking to disqualify Judge Schroeder on the grounds that he was biased or prejudiced against her, the State of Ohio, and Jones, and that he could not be impartial and open-minded in the capital case. The first was dismissed on procedural grounds; the second was denied on the merits on July 11, 2023. The trial-court proceedings were stayed 92 days while the affidavits were pending. On October 27, 2023, Jones, acting *pro se*, also filed an affidavit of disqualification regarding the judge, which the Ohio Supreme Court promptly denied three days later.

Jones' Self-Representation Request and Competency Determinations. Three days after the mandate issued, on December 20, 2022, Jones, acting *pro se*, filed a pleading entitled "Invocation of Right to Self Representation/Objection to Appointment of Counsel." On January 3, 2023, his counsel followed up with a "Notification of Defendant's Assertion of Right of Self-Representation," advising the court that from their first meeting with Jones on December 30, 2022, Jones had insisted that he wished to represent himself. On January 23, 2023, defense counsel filed a more specific motion asking the court to determine Jones' competency to represent himself and a memorandum regarding Jones' competency to stand trial. Jones' disruptive

behavior at the January 27 status conference, however, prompted defense counsel to make an unopposed oral motion to have Jones' competency to stand trial evaluated.³ The court granted the motion on February 1, 2023, and ordered an evaluation of Jones by Dr. Jessica Hart of the Forensic Psychiatric Center of Northeast Ohio, Inc. The court was clear that it could not conduct a hearing on Jones' request to proceed *pro se* until competency was determined.

On March 7, 2023, the court received Dr. Hart's reports on Jones' competency to represent himself and to stand trial. Two days later, Jones' counsel requested an evidentiary hearing. On March 27, 2023, defense counsel moved to obtain a second opinion regarding Jones' competency, which the court granted on April 4, 2023. Jones, however, refused to participate in the evaluation by the defense's chosen expert, Dr. Bob Stinson, on April 10, 2023. On July 25, 2023, after the proceedings had been stayed because of the prosecutor's disqualification affidavits, the court received a letter from Dr. Stinson regarding his meeting with Jones. In the letter, Dr. Stinson suggested that Jones be committed to Twin Valley Behavioral Health for a twenty-day inpatient evaluation, which the court then ordered on August 1, 2023. But Jones again refused to cooperate with the examiner, Dr. Kevin Edwards. The court received a report from Dr. Edwards on August 31, 2023. All three experts opined that Jones was competent to stand trial.

The court conducted a hearing regarding Jones' competency on September 8, 2023. That morning, defense counsel requested yet another evaluation given the problems encountered by Drs. Stinson and Edwards with Jones. The trial court denied the motion due to time constraints. At the hearing, Dr. Hart testified that she found Jones "appropriate, intelligent, and articulate"

³ The trial court noted in a judgment entry dated March 30, 2023, that the transcript of the status conference was "replete with multiple instances of the Defendant's interruption of the proceeding and use of foul language directed at counsel and the Court."

during her eighty-minute interview with him; that Jones had no history or current symptoms of mental illness; and that he had the ability and capacity to assist in his defense, though he chose not to at times. She concluded that Jones was legally competent to stand trial. Dr. Edwards' testimony concurred with Dr. Hart's. Dr. Stinson did not testify at all. Defense counsel proffered that they could not communicate with Jones or formulate any trial strategy because of Jones' refusal to cooperate with them. According to the trial court's judgment entry, there was no testimony from any witness refuting the methodology or the conclusions of either Dr. Hart or Dr. Edwards.

The court then held a hearing on Jones' request to represent himself on September 29, 2023. On October 5, 2023, it decided that Jones was competent to stand trial and granted his request to represent himself – with appointed standby counsel and several other conditions regarding Jones' courtroom behavior and performance. The following day, Jones signed a written "Waiver of Counsel" in open court.

Once Jones began to represent himself, issues arose concerning Jones' ability to perform his legal work in prison and the role of standby counsel. The court worked with prison officials to establish procedures for Jones to receive mail and file motions in a timely manner, and his access to legal documents, proper equipment, and other necessary resources. The court also clarified the role of standby counsel.

The Parties' Positions Regarding Procedure to Extend Mandate Period. From the first status conference on January 27, 2022, the trial court and both parties agreed that an extension of time for compliance with the conditional writ would be necessary due to the many challenging issues that had arisen, but they did not always agree on the proper or best way to obtain additional

time. The county prosecutor informed the court at the initial conference that her office would file a motion for additional time in the circuit court if the Ohio Attorney General's Office did not. However, on February 7, 2023, the prosecution instead filed a motion in the state trial court "to take judicial notice" and "to vacate the sentencing entry" pursuant to Ohio Civil Rules.

At a second status conference on February 14, 2023, the State, through the chief assistant prosecutor, again expressed an intent to move for additional time to satisfy the conditional writ in district court, assuring the court "that the State was prepared to take the next appropriate steps" with the district court. On February 17, 2023, the trial court denied the State's motion and set a date for the resentencing proceedings of April 3, 2023, stating that it would not entertain any continuance of that date "unless [a motion was] accompanied by an order from the appropriate federal court granting this court an extension of the 180 day conditional writ."

At a third status conference on February 24, 2023, the parties discussed the "insurmountable issues" in conducting a new penalty-phase trial. Defense counsel indicated that they would file a motion to continue the proceedings with the trial court, which the chief assistant prosecutor stated would be attached to the Attorney General's Office's motion for additional time to comply with the writ in federal court. Defense counsel filed the motion with the trial court on March 3, 2023.

At the next status conference, however, on March 13, 2023, the prosecutor told the court for the first time that filing a motion for extension of time in federal court was "indeed up to the defense," and the State would not be filing such a motion. Defense counsel stated that he first learned of the prosecutor's change of position on this matter the week before and noted that Jones' federal habeas counsel believed a motion for additional time should be filed in the circuit court, as

“it was the Circuit that issued the writ.”

The next day, however, Jones’ counsel filed a motion in this court to extend the circuit court’s mandated 180-day deadline for completion of the penalty-phase proceedings by 270 days, or until February 10, 2024, to give them adequate time to prepare. (Doc. 269 at 2, 4.) Respondent did not oppose the motion. (Doc. 270.) On March 24, 2023, this court denied Jones’ motion on the ground that it did not have the authority to modify the Sixth Circuit’s mandated deadline for compliance with the writ. (Doc. 272.) Three days later, however, the trial court, at the fifth status conference, granted Jones’ motion to continue the penalty-phase trial until “a later time.”

On April 7, 2023, just about a month before the conditional writ’s deadline was to expire, Respondent filed a motion with the Sixth Circuit asking it to determine that the State had complied with the terms of the conditional writ or that the trial court may issue necessary continuances. (Case No. 07-3766, Doc. 333.) Jones opposed the motion. (Case No. 07-3766, Doc. 334.) The circuit court denied the motion on May 10, 2023. (Case No. 07-3766, Doc. 335-2.) It noted that, as the state trial court had not vacated Jones’ death sentence, the State had “not yet satisfied the [writ’s] imposed obligation or demonstrated substantial compliance.” (*Id.* at 4.) And because the State had until May 16, 2023, to comply, it concluded, the district court lacked the authority to issue the writ, rendering the motion premature. (*Id.* at 4-5.) The circuit court further stated a “preference” for the State to “request an extension of time,” but stressed that was not the relief Respondent had sought. (*Id.* at 5.)

The next day, on May 11, 2023, Respondent moved the circuit court for a 190-day extension of time, or until November 22, 2023, within which to comply with the conditional writ. (Case No. 07-3766, Doc. 349-1.) She argued that the proceedings related to Jones’ competency to

stand trial and to represent himself had made it impossible to meet the writ's deadline of May 16, 2023. (*Id.*) The court granted the motion. (Case No. 07-3766, Doc. 339-1.)

On July 13, 2023, the trial court set a new date for the penalty-phase trial of October 23, 2023. But on October 6, 2023, the court extended that date to May 20, 2024, as “[a]ll parties agreed [at a status conference that day], that in light of the Court’s decision . . . that [Jones was] now representing himself, the current date create[d] multiple issues and [was] unrealistic”

On October 24, 2023, Respondent filed a second motion with the Sixth Circuit for an additional 248 days, or until July 26, 2024, to satisfy the writ’s conditions, because the trial court had *sua sponte* moved the sentencing proceedings to May 20, 2024, after Jones was granted permission to represent himself. (Doc. 279 at 5.) Jones opposed the motion. (*Id.*) The circuit court denied the State’s motion in an unexplained order on November 14, 2023. (Doc. 277.)

The conditional writ’s deadline expired on November 22, 2023. Nevertheless, the state trial court has moved forward with the jury selection process, and Jones has filed numerous motions, including motions for discovery. The court also has filed orders regarding the role of standby counsel, courtroom decorum, and trial preparation. On January 23, 2024, four days after a status conference had taken place, the court ordered Jones to “file a typed brief by February 9, 2024, explaining to this court the limited remand from the Sixth Circuit Court of Appeals and explaining why this court should not reinstate standby counsel as lead counsel.” Jones filed a brief referencing that order on February 5, 2024.

Represented by habeas counsel, Jones has now filed a motion asking this court to: (1) issue an unconditional writ of habeas corpus, because the State has failed to conduct a resentencing proceeding within the time specified in the Sixth Circuit’s conditional writ and

subsequent order granting Respondent’s request for an extension of time; and (2) prohibit the State from conducting a resentencing proceeding or at a minimum, from seeking the death penalty. (Doc. 278 at 1.) Respondent opposes the motion. (Doc. 279.) Notably, however, she states that she “does not oppose the vacation of Jones’ death sentence.” (*Id.* at 6.) But she argues that the court should not bar the State from conducting a new penalty-phase trial. (*Id.* at 6-8.)

This court conducted a hearing on the record on Jones’ motion on February 15, 2024. (Doc. 281.)

ANALYSIS

A. Unconditional Release

Conditional grants of the writ of habeas corpus provide the state with a window of time within which it may cure constitutional error. *Satterlee v. Wolfenbarger*, 453 F.3d 362, 369 (6th Cir. 2006). “[T]he sole distinction between a conditional and an absolute grant of the writ of habeas corpus is that the former lies latent unless and until the state fails to perform the established condition, at which time the writ springs to life.” *Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006). Accordingly, “[w]hen the state fails to cure the error, i.e., when it fails to comply with the order’s conditions, ‘[a] conditional grant of a writ of habeas corpus *requires* the petitioner’s release from custody.’” *Satterlee*, 453 F.3d at 369 (quoting *Fisher v. Rose*, 757 F.2d 789, 791 (6th Cir.1985) (emphasis in original)); *see also Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring) (“Conditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is always release.”); *Henderson v. Frank*, 155 F.3d 159, 168 (3d Cir. 1998); *Phifer v. Warden*, 53

F.3d 859, 864–65 (7th Cir. 1995)); 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure* § 33.3, at 1684 (5th ed. 2005) (“If the state fails to act within the time set for retrial (or for some other proceeding) to occur, the petitioner must be released from custody immediately.”).

Conditional writs are final orders, which “ordinarily and ideally operate automatically, that is, without the need for the district court to act further.” *Gentry*, 456 F.3d at 692 (citation and internal quotation marks omitted). But federal district courts generally retain jurisdiction to determine whether a party has complied with the terms of a conditional writ. *Id.*

Here, the Sixth Circuit granted Jones a conditional writ on August 22, 2022, ordering that his case be remanded “to the district court with instructions to issue a writ of habeas corpus vacating Jones’s death sentence unless the State of Ohio conducts a new penalty-phase proceeding within 180 days of remand.” *Jones*, 46 F.4th at 489. Respondent petitioned for rehearing *en banc*, which was denied on October 7, 2022. *Jones*, 2022 WL 10219982. The circuit court’s mandate then issued on November 17, 2022. (*See* Doc. 268 (Mandate).) When the mandate issued, the court’s writ became effective and the judgment became final. *Mason v. Mitchell*, 729 F.3d 545, 551 (6th Cir. 2013) (citing Fed. R. App. P. 41(c)). The 180-day clock for the conditional writ, therefore, began to run on November 17, 2022, and was set to expire on May 16, 2023. The Sixth Circuit subsequently, upon Respondent’s request, extended that time period 190 days, or until November 22, 2023. The State, however, did not conduct the resentencing proceeding or vacate Jones’ death sentence before that date.

Accordingly, because the State failed to comply with the conditions of the Sixth Circuit’s writ, the circuit court’s mandate requires this court to order that Jones’ unconstitutional death

sentence be vacated and that Jones be immediately released from custody. Indeed, Respondent concedes that “Jones’ adjudged sentence of death should be vacated.” (Doc. 279 at 6.)

B. Resentencing Proceeding

Jones further asks this court to bar the State from conducting a new penalty-phase trial, or at least prohibit it from seeking the death penalty. (*See* Doc. 278 at 49.)

The Sixth Circuit has explained that “[i]n a typical case in which a prisoner is released because a state fails to retry the prisoner by the deadline set in a conditional writ, the state is not precluded from rearresting petitioner and retrying him under the same indictment.” *Satterlee*, 453 F.3d at 370 (internal quotation marks and citations omitted); 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure* § 33.3, at 1685–86 (5th ed. 2012) (“federal courts usually permit rearrest and retrial after the time period specified in the conditional release order has elapsed and the prisoner has been released”). This applies to conditional writs ordering a resentencing as well as those requiring a reprosecution. *See, e.g., Lovins v. Parker*, 604 Fed. Appx. 489, 491 (6th Cir. 2015) (affirming district court’s decision to permit the state to rearrest and resentence the petitioner after the state failed to comply with a conditional writ’s deadline); *Means v. Phillips*, 136 F. Supp. 3d 872, 893-96 (W.D. Tenn. 2015) (ordering the unconditional release of the petitioner where the state failed to satisfy a conditional writ and permitting the state to rearrest and resentence the petitioner).

However, “[t]he broad discretion of the habeas court in fashioning a proper remedy allows a district court to bar the state from reprosecuting the habeas petitioner in ‘extraordinary circumstances.’” *D’Ambrosio v. Bagley*, 656 F.3d 379, 391 (6th Cir. 2011) (quoting *Satterlee*, 453 F.3d at 370). A habeas court may forbid reprosecution “[i]n extraordinary circumstances,

such as when the state inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period or if the state’s delay is likely to prejudice the petitioner’s ability to mount a defense at trial” *Satterlee*, 453 F.3d at 370 (internal quotation marks, alteration, and citation omitted); *see also Girts v. Yanai*, 600 F.3d 576, 580-86 (6th Cir. 2010), and *D’Ambrosio*, 656 F.3d at 384 (both reaffirming *Satterlee*’s holding that federal courts have the authority to bar a habeas petitioner’s re prosecution).⁴

Barring re prosecution, however, is an “‘extreme remedy.’” *D’Ambrosio v. Bagley*, 688 F. Supp. 2d 709, 725 (N.D. Ohio 2010) (quoting *Cave v. Singletary*, 84 F.3d 1350, 1359 (11th Cir. 1996) (Kravich, J., dissenting)). While circuit courts generally support the proposition that habeas courts may bar retrial under special circumstances, “it appears that only a few district courts have ever done so outside circumstances where ‘the grant of habeas corpus is premised on a theory which inevitably precludes further trial.’” *D’Ambrosio*, 688 F. Supp. 2d at 726 (quoting *DiSimone v. Phillips*, 518 F.3d 124, 127 (2nd Cir. 2008)). Indeed, “even after the state fails to retry the petitioner during the period of time provided by the conditional writ, the state routinely maintains the opportunity to retry the petitioner following his release.” *Girts*, 600 F.3d at 585.

Here, Jones cites numerous circumstances that arose during his state resentencing proceedings that he contends entitle him to an order barring a new penalty-phase trial, including: (1) the delay in the start of the proceedings caused by two unexplained judicial recusals; (2) the

⁴ Nevertheless, Respondent argues that this court lacks authority to prohibit the State from resentencing Jones once he is released because the State failed to satisfy the conditional writ, relying on *Pitchess v. Davis*, 421 U.S. 482 (1975). (Doc. 279 at 6-7.) The Sixth Circuit explicitly rejected this argument, however, in *D’Ambrosio* and affirmed that *Satterlee*’s holding establishing the “extraordinary-circumstances” standard is binding precedent. *D’Ambrosio*, 656 F.3d at 384-85.

delay in determining the validity of Jones' waiver of counsel and continuance of proceedings while the issue was pending; (3) the court-appointed competency examiner's reliance on a report of the defense expert whose prejudicial, racist testimony at the penalty phase of his trial formed the basis of the Sixth Circuit's ruling that defense counsel provided constitutionally ineffective assistance and of the court's conditional writ; (4) the trial court's error in finding Jones competent to represent himself; (5) the delay caused by judicial disqualification proceedings; (6) the alleged prejudicial pre-trial publicity, the prosecutor's alleged violations of the trial court's gag order, and the trial court's failure to rule on the defense's motion for change of venue due to pretrial publicity; (7) Jones' allegedly improper confinement at the Ohio State Penitentiary rather than the Ashtabula County Jail and his difficulties representing himself given the conditions there; (8) the trial court's refusal to use Jones' new name; (9) the State's alleged "misleading representations" to state and federal courts in seeking an extension of the writ's deadline; and (10) the passage of time since Jones' trial and the fact that he has been imprisoned for longer than the statutory minimum penalty for aggravated murder. (Doc. 278 at 6-37.)

Jones relies for support primarily on the decision of another judge on this court in *D'Ambrosio v. Bagley*, 688 F. Supp. 2d 709 (N.D. Ohio) (O'Malley, J.). In that case, the petitioner was convicted of aggravated murder and sentenced to death. *Id.* at 711. The district court issued a conditional habeas writ based on the prosecution's withholding of exculpatory evidence, ordering the state to retry him within a specified period of time. *Id.* at 711-12. The state failed to comply with the writ's deadline, however, and the court issued an unconditional writ. *Id.* at 712. It ultimately barred the state from retrying the petitioner upon D'Ambrosio's motion for relief from judgment under Federal Civil Rule 60(b) when it learned that the state had

again withheld and delayed the production of potentially exculpatory evidence and failed to inform the defense or state court of a key witness' death for nearly three months – a witness who would have been available for trial during the mandate period. *Id.* at 712-13, 731.⁵ The court concluded, “the State’s inequitable conduct led to material prejudice against D’Ambrosio’s ability to defend himself at a new trial [and] shocks the conscience.” *Id.* at 731.

Far more analogous to this case, however, is the Sixth Circuit’s decision in *Lovins v. Parker*, 604 Fed. Appx. 489 (6th Cir. 2015). In *Lovins*, the petitioner was convicted of second-degree murder. *Id.* at 490. The district court denied the petitioner’s habeas petition, but the circuit court reversed the district court’s denial with respect to his sentence. *Id.* The circuit court issued a conditional writ directing the state to release Lovins if it did not initiate proceedings within a specified time to either resentence him to the presumptive statutory sentence of twenty years or provide a new sentencing hearing. *Id.* The state failed to act within the mandate period, and the district court ordered the petitioner released but denied his request to prohibit the state from rearresting and resentencing him. *Id.* Lovins was released but immediately rearrested and was resentenced to twenty years. *Id.* On appeal, the Sixth Circuit affirmed the district court’s refusal to bar resentencing, agreeing with the district court that the facts of the case did not rise to the level of “extraordinary circumstances” under *Satterlee*. *Id.* at 491. It reasoned:

Three facts weigh against granting exceptional relief. First, the state’s failure to comply with the conditional writ, while troubling, was not committed in bad faith. The state asserted that it failed to act due to miscommunication between state entities. Second, the state’s error lasted a relatively short period of time, and the state quickly complied with the writ after the error was brought to its attention. Finally and

⁵ The district court also noted that the state’s counsel “baselessly attack[ed]” the state trial judge and supplied questionable testimony to the court. *D’Ambrosio*, 688 F. Supp. 2d at 728.

importantly, Lovins’s conviction is valid. Only the length of his sentence is at issue. At the time of release, Lovins had served approximately eleven years and six months of a twenty-three-year sentence. Accordingly, when he was resentenced to twenty years, he had not served time on an invalid conviction or served more than the statutory maximum of twenty years. Similarly, because his conviction was not at issue, the state’s delay was not “likely to prejudice the petitioner’s ability to mount a defense at trial.” *Satterlee*, 453 F.3d at 370 (internal quotation marks omitted).

Id. The court, however, permitted the state to rearrest the petitioner and resentence him. *Id.* at 492.

Similarly, here, the factors Jones sets forth do not constitute “extraordinary circumstances” as contemplated by *Satterlee*. While the unsuccessful judicial disqualification proceedings initiated by the prosecutor did cause significant delay, the court cannot say that, when viewed in the context of the prosecution’s overall conduct during the remand proceedings, that action alone warrants a bar on a resentencing trial. The State did not engage in the type of inexcusable and prejudicial conduct exhibited in *D’Ambrosio*. Rather, the state-court record reveals proceedings straining under the weight of a federal court’s mandate and exceedingly complex legal, procedural, and administrative issues – such as Jones’ competency to stand trial and his request to represent himself in a capital case; the burden on the defense to investigate and present mitigation evidence in a case more than a quarter-of-a-century old; and containing pre-trial publicity amidst intense public interest. As outlined above, from the start of the proceedings, the state court and both parties were well aware of the writ’s deadline and diligent in their efforts to keep the proceedings moving, while also committed to protecting Jones’ constitutional rights and

conducting a fair trial.⁶ The proceedings have advanced at a steady pace even since the conditional writ expired.

Many of the delays in the state-court proceedings were attributable to establishing Jones' competency to stand trial, which Jones' counsel requested, and the validity of Jones' waiver of counsel, which Jones himself initiated through a *pro se* motion. Defense counsel either requested or agreed to all proceedings related to those two matters, such as evaluations (additional evaluators were required because Jones refused to cooperate after the first evaluation) and hearings, as they were both necessary to protect Jones' rights and reasonable given the complexity of the factual and legal issues involved. *See United States v. Dubrule*, 822 F.3d 866, 875 (6th Cir. 2016) (requiring competency “to stand trial or proceed to sentencing” (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam))); *Cassano v. Shoop*, 1 F.4th 458, 466 (6th Cir. 2021) (“where a defendant clearly, unequivocally, and timely invokes the right to self-representation, the trial court must inform the defendant of the dangers and disadvantages of self-representation, and conduct a searching or formal inquiry to ensure that [the] waiver [of counsel] is knowing, intelligent, and voluntary”) (internal quotation marks and citations omitted). Jones, therefore, suffered no prejudice from those delays.

⁶ The judicial recusals, for example, did not cause excessive delay in the initial proceedings, as Jones suggests. (Doc. 278 at 6-7.) The state-court proceedings began twelve days after the mandate issued on November 29, 2022, when the State filed a motion to activate Jones' case and to set a date for the resentencing proceeding. The trial court appointed counsel for Jones four days later, and on December 15, 2022, ordered that Jones be transferred from death row to a prison closer to the court. The first judge recused herself on December 20, 2022; and the second, on January 3, 2023. The next judge was assigned that same day and still presides over the case. Two days later, he set a status conference for January 27, 2023.

Moreover, as Respondent points out, the defense itself, through counsel, filed a motion to continue the sentencing proceedings with the trial court and a motion to extend the writ's deadline in this court, stressing the difficulties in gathering and presenting mitigation evidence and witnesses in a twenty-five-year-old capital case. Defense counsel also requested a continuance of a status conference and the hearing regarding Jones' self-representation request. The State did not oppose these requests.

In addition, Jones complains that Respondent's and the prosecution's communications to the state and federal courts regarding their plans to seek an extension of the writ's deadline or otherwise satisfy the writ were misleading and an attempt to evade the oversight of the federal courts. (Doc. 278 at 38-44.) While the communications at issue were confusing at best and misleading at worst, ultimately, Respondent filed two motions for additional time with the proper court, the circuit court, which granted the first, providing an extra 190 days. The communications in and of themselves, therefore, did not result in any delays and did not prejudice Jones.

Also critical here, as in *Lovins* and unlike *D'Ambrosio*, is the fact that only Jones' sentence is at issue; his convictions remain valid. Any delays, therefore, were not "likely to prejudice [Jones'] ability to mount a defense at trial." *Lovins*, 604 Fed. Appx. at 491 (quoting *Satterlee*, 453 F.3d at 370). And Jones "has not served time on an invalid conviction or . . . more than the statutory *maximum* [possible sentence.]" *Id.* (emphasis added); see also *Means*, 136 F. Supp. 3d at 894. Under current Ohio law, when a federal court vacates a death sentence "because of error that occurred in the sentencing phase of the trial," the trial court that originally sentenced the offender must conduct a new sentencing hearing, following proper procedures as outlined by statute governing sentencing for capital offenses, and impose a sentence of death, life

imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment. Ohio Rev. Code § 2929.06(B). If the sentencer decides to impose a sentence other than death, it must impose one of the sentences of life imprisonment that could have been imposed at the time of the offense for which he was sentenced to death, determined as specified by statute, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified by statute. *Id.* At the time of Jones' offense, in November 1997, the available sentences for capital offenses other than death were life imprisonment without parole, with parole eligibility after serving twenty years, or with parole eligibility after serving thirty years. Ohio Rev. Code § 2929.03(C)(2)(a)(i) (1996 H.B. 180, eff. 1-1-97). Therefore, none of these sentences would be greater than the maximum sentence possible, death.

Nevertheless, Jones argues that he is entitled to a bar on a new sentencing trial because he has “surpassed the statutorily authorized *minimum* sentence triggering parole eligibility,” which he states is a sentence of life imprisonment with eligibility of parole after twenty-five years.⁷ (Doc. 278 at 47-48 (emphasis added).) Or, at a least, he claims, this court should forbid the State from seeking the death penalty. (*Id.* at 1.) While the court recognizes the equitable appeal of Jones' argument, Jones does not cite, and this court cannot find, any authority that allows it to prohibit the State on this ground from conducting a resentencing proceeding or seeking the death penalty pursuant to a circuit court's mandate when that procedure and sentence are expressly

⁷ The court notes, however, that, as explained above, in 1997, the earliest time of eligibility for parole after receiving a life sentence for a capital offense was twenty years. That changed to twenty-five years in 2005. *See* Ohio Rev. Code § 2929.03(C)(2)(a)(i) (2004 H.B. 184, eff. 3-23-05).

permitted under Ohio statutory law. *See* Ohio Rev. Code §§ 2929.03(C)(2)(b), 2929.06(B); *Austin v. Jackson*, 213 F.3d 298, 300-01 (6th Cir. 2000) (challenges to a state court’s interpretation and application of state sentencing laws generally are not cognizable in federal habeas corpus, and “[a]s long as the sentence remains within the statutory limits, trial courts have historically been given wide discretion in determining ‘the type and extent of punishment for convicted defendants’” (quoting *Williams v. New York*, 337 U.S. 241, 245 (1949))). Jones also argues that “[t]he passage of time since [his] first trial . . . will compromise the vitality of [his] defense.” (Doc. 278 at 48.) But, again, Jones seeks to mitigate his sentence in these resentencing proceedings, not defend his convictions. *See also Girts*, 600 F.3d at 584 n.5 (stating the court’s “belief that a long prison term . . . [does] not automatically lead to barring retrial”).

Finally, as Respondent further argues, many circumstances Jones points to are not necessarily relevant to this motion. (Doc. 279 at 10.) *Satterlee*’s extraordinary-circumstances standard clearly focuses on the nature of the *state’s* conduct in “*fail[ing] to act* within the prescribed time period” and whether the “*state’s delay*” prejudiced the petitioner. *Satterlee*, 453 F.3d at 370 (emphasis added). The Sixth Circuit framed the issue in *Lovins* as: “whether the State of Tennessee should be barred from rearresting and resentencing Lovins because its failure to comply with the terms of our writ of habeas corpus was ‘inexcusable.’” *Lovins*, 604 Fed. Appx. at 490. The issue before this court is not whether a new and separate constitutional error occurred during the mandate period, which clearly would present exhaustion issues. *See* 28 U.S.C. § 2254(b) and (c) (AEDPA requires that state prisoners exhaust all state remedies, or have no remaining state remedies, before a federal court will review a petition for a writ of habeas corpus). The Sixth Circuit touched on this issue in its decision in the *D’Ambrosio* case:

Further, in raising the issue of Espinoza’s death in his Rule 60(b) motion, D’Ambrosio was not seeking an unconditional writ barring reprosecution of a new and never-before-raised due process claim, but was instead seeking the modification – in order to bar reprosecution – of the unconditional writ based on the *Brady* violation and the failure to comply with the conditional writ. This is the sort of argument envisioned by the “extraordinary circumstances” standard, which permits barring reprosecution “if the state’s delay is likely to prejudice the petitioner’s ability to mount a defense at trial.” *Satterlee*, 453 F.3d at 370. D’Ambrosio argued that the loss of a key witness was a collateral consequence of the state’s noncompliance with the original writ based on the *Brady* violation that had occurred but was not known to the court or the parties when the court originally issued its unconditional writ, and that this constituted the sort of “extraordinary circumstances” sufficient to bar reprosecution. The district court had jurisdiction to make this determination.

D’Ambrosio, 656 F.3d at 389.

Accordingly, Jones’ reliance on the “numerous constitutional errors . . . percolating in [the] retrial proceedings” for purposes of this motion is misplaced. (*See, e.g.*, Doc. 278 at 46-47.) His allegations relating to the trial court’s ruling on Jones’ competency to stand trial and request to represent himself, the continuance of proceedings while the self-representation request was pending, judicial bias based on the trial court’s refusal to use Jones’ new name, and prejudicial pretrial publicity may better form the basis of claims in a second-in-time habeas petition once those claims are exhausted in state court.⁸ Similarly, Jones’ allegations concerning deficiencies in

⁸ In an apparent attempt to avoid this exhaustion problem and align his case with *D’Ambrosio*, Jones argues that the court-appointed competency examiner’s reliance on a report of the same defense expert whose prejudicial, racist testimony at the penalty phase of his trial formed the basis of the ineffective-assistance-of-counsel violation and resulting conditional writ “[t]ranspos[ed] the same constitutional error that occurred in his first capital sentencing proceeding onto his retrial [in violation of] due process.” (Doc. 278 at 17 n.12.) But Jones’ claim here is new; it is not a continuation of the constitutional violation that occurred in his original trial, as in *D’Ambrosio*. The error at Jones’ trial was ineffective assistance of counsel relating to defense counsel’s presentation of an expert’s racialized testimony to the jury regarding Jones’ diagnosis and propensity for violence for sentencing purposes, which is different from a due process violation based on a court-appointed competency evaluator’s reliance *in part* (she also, for example, conducted a lengthy interview of Jones) on the expert’s report for a pretrial competency evaluation,

his current prison conditions can be asserted in a civil rights action under 42 U.S.C. § 1983. *See Nelson v. Campbell*, 541 U.S. 637, 643 (2004) (constitutional claims that challenge the conditions of a prisoner’s confinement fall outside of the core of habeas corpus and may be brought pursuant to a separate civil rights action under 42 U.S.C. § 1983).

Accordingly, Jones has not demonstrated that his case presents “extraordinary circumstances” such that this court should prohibit the State from conducting a new penalty-phase trial as mandated by the Sixth Circuit or from seeking the death penalty.

CONCLUSION

For the reasons stated above, Petitioner Odraye Jones’ Motion to Issue Unconditional Writ of Habeas Corpus and Bar Retrial is granted as to Jones’ request to make the conditional writ of habeas corpus, issued by the Sixth Circuit Court of Appeals on August 22, 2022, an unconditional writ of habeas corpus. The motion is denied as to Jones’ request that the State be prohibited from conducting a new penalty-phase trial or from seeking the death penalty.

Accordingly, the court orders Respondent to vacate the death sentence imposed by the Ashtabula County, Ohio, Court of Common Pleas in Case No. 1997 CR 00221 and unconditionally release Jones from custody no later than five business days from the date of entry of this Order. The State is not prohibited from rearresting and resentencing Jones on the convictions in that same case.

which is not relevant to the underlying mitigation and sentencing issues in Jones’ resentencing proceedings. Jones wishes to avoid the often protracted process of state-court direct appeals and post-conviction proceedings and federal habeas proceedings (*see id.* at 47), but AEDPA still governs this habeas case.

1:03-cv-1192, *Jones v Bradshaw*

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

February 29, 2024

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 22a0196p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ODRAYE G. JONES, n/k/a Malik Allah-U-Akbar,
Petitioner-Appellant,

v.

MARGARET BRADSHAW, Warden,
Respondent-Appellee.

Nos. 07-3766/15-4308

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 1:03-cv-01192—David A. Katz, District Judge.

Argued: May 12, 2022

Decided and Filed: August 22, 2022

Before: MOORE, COLE, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Kathryn Bailey, FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF PENNSYLVANIA, Pittsburgh, Pennsylvania, for Appellant. Charles L. Wille, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Kathryn Bailey, FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF PENNSYLVANIA, Pittsburgh, Pennsylvania, for Appellant. Charles L. Wille, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

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OPINION

GRIFFIN, Circuit Judge.

A jury convicted petitioner Odraye Jones of capital murder. During the penalty phase, Jones’s counsel presented testimony from a clinical psychologist who diagnosed Jones with Antisocial Personality Disorder. The psychologist testified that Black men with this disorder (including Jones) would commit more murders—he claimed that about one in four “African-American urban males” suffered from the disorder, and the only treatment for them was to “throw them away, lock them up.” After hearing this testimony, the jury recommended the death penalty. The court accepted the recommendation and sentenced Jones to death.

Jones challenged his conviction and sentence through direct appeal and post-conviction review in Ohio’s courts, all of which affirmed the conviction and sentence. He then sought federal habeas relief. The district court denied Jones’s petition for a writ of habeas corpus, his proposed amendment to that petition, and a motion for relief from judgment filed pursuant to Federal Rule of Civil Procedure 60(b). We heard argument on thirteen issues certified for appeal from these orders and will affirm the district court’s judgment on all thirteen.

But after that argument, we issued a separate certificate of appealability for an additional issue: whether Jones received ineffective assistance of counsel during the penalty phase because his attorneys failed to prepare expert witnesses properly, as shown by the psychologist’s racialized testimony. We hold that this issue is not procedurally defaulted, and that on our de novo review of the merits, trial counsel performed ineffectively by presenting racialized evidence during the penalty phase. Jones is entitled to a new sentencing. Accordingly, we remand the case to the district court with instructions to issue a writ of habeas corpus vacating Jones’s death sentence unless the State of Ohio conducts a new penalty phase proceeding within 180 days of remand.

I.

A.

Petitioner Odraye Jones¹ was tried and convicted for the murder of Officer William D. Glover, Jr., of the Ashtabula City Police Department. On direct appeal, the Ohio Supreme Court summarized the facts of the case as follows:

On November 17, 1997, a dispatcher for the Ashtabula City Police Department advised officers that appellant Odraye G. Jones, an individual with outstanding felony warrants, had been spotted in the 900 block of West 43rd Street in Ashtabula. A week earlier, appellant had told his cousin, Jimmie Lee Ruth, that he “was facing a lot of time for robbing Isaac Coleman” and that he “was going to shoot at the police if they ever tried to arrest him.”

Officer William D. Glover, Jr., responded to the dispatcher’s call. Officer Glover found appellant with a friend, Anthony Gene Barksdale, and Jimmie Lee Ruth walking together on West 43rd Street. Officer Glover followed the three men to the home of one of their friends, Flo Chapman. Barksdale knocked on the door of the Chapman home while Ruth and appellant stood behind him on the porch. Officer Glover approached the Chapman home, got out of his car, and beckoned to appellant. Ruth testified that Officer Glover told appellant, “[C]ome on, you know why I’m here. I don’t want no problem. I’m just doing my job.” Appellant jumped off the side of the porch and began running down the side of the Chapman home. Officer Glover pursued him. Not long after the pursuit commenced, appellant turned around, pulled a .38 caliber revolver from his pocket, and began firing shots at Officer Glover.

After firing the first shot, appellant began to approach Officer Glover, firing several more shots. Officer Glover fell to the ground. Appellant turned and fled. He ran to a nearby fence and began to climb through a hole in it. Appellant then stopped, turned around, and ran back to where Officer Glover lay. Appellant kicked Officer Glover in the chest. The kick was done with such force that it left a large bruise on Officer Glover’s chest that was visible to the paramedics who later treated Officer Glover at the scene. After kicking Officer Glover, appellant fled the scene.

As Officer Glover was pursuing appellant, another Ashtabula City Police Officer, Robert Stell, was en route in his patrol car. Officer Stell located appellant several blocks away from the scene of the shooting, still running. Officer Stell got out of his car and ordered appellant to stop. Appellant ignored the command and continued running. Officer Stell pursued appellant on foot. Appellant led Officer

¹During federal habeas proceedings, petitioner legally changed his name to Malik Allah-U-Akbar. For purposes of clarity and continuity, we continue to refer to petitioner by his former name.

Stell into a nearby apartment complex. He stopped at the door of an apartment and began attempting to force his way inside. While appellant managed to squeeze part of his body through the door, the occupant of the apartment prevented appellant from fully entering. As appellant was struggling to enter the apartment, Officer Stell began to approach appellant. Officer Stell drew his weapon and ordered appellant to the ground. Appellant did not immediately respond. Appellant threw his revolver behind him. The gun landed in some nearby shrubbery. Officer Stell again ordered appellant to the ground and, this time, appellant complied. Officer Stell held appellant at gunpoint until assistance arrived. Officers recovered the weapon and appellant was placed under arrest. This gun was later matched to fired cartridge casings recovered at the scene of the shooting, live cartridges found on appellant at the time of his arrest, and bullets taken from Officer Glover's body. All of the ammunition was hollow point. This type of ammunition is designed to open up on impact, causing larger wounds.

Officer Glover had sustained gunshot wounds to the top of his head and to the area just below his right eye. He also sustained a bullet wound to his right shoulder. The gunshot wound to the top of Officer Glover's head and the wound to his face were both fired from a distance of less than one foot. The suddenness of appellant's attack had apparently caught Officer Glover by surprise. Officer Glover's duty weapon was found in Officer Glover's holster. The holster's strap was snapped securely shut.

Paramedics transported Officer Glover to Ashtabula County Medical Center for emergency treatment. After Officer Glover's condition had been stabilized, he was life-flighted to Cleveland's Metro-Health Hospital. X-rays and CT scans revealed substantial damage to Officer Glover's brain. Officer Glover had severe cerebral swelling and profuse bleeding from his nose and mouth. Neurological assessments revealed minimal brain stem function. Officer Glover died from his gunshot wounds the following morning, November 18, 1997.

State v. Jones, 744 N.E.2d 1163, 1169–70 (Ohio 2001).²

Shortly thereafter, Jones was indicted for aggravated murder with specifications for killing Officer Glover for the purpose of escaping apprehension and for knowingly and purposefully causing the death of a law enforcement officer. *Jones v. Bradshaw*, 489 F. Supp. 2d 786, 793 (N.D. Ohio 2007). The trial court found Jones to be indigent and appointed David Doughten and Robert Tobik to represent him.

²We defer to the state court's factual findings and presume they are correct, absent a showing of clear and convincing evidence to the contrary. See *Hodgson v. Warren*, 622 F.3d 591, 598 (6th Cir. 2010).

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Trial began just six months after Jones was indicted. And during that time, the relationship between Jones and his appointed counsel deteriorated. Two hours after the jury was sworn in, attorney David Per Due filed an entry of appearance, having been retained by Jones's family that day. The trial court held a hearing the following day to discuss the status of Jones's representation. But after hearing from Jones and the attorneys, the court denied Jones's motions for Per Due to substitute as counsel and for a continuance, finding that Jones's relationship to his court-appointed counsel had not broken down beyond repair and that the request for a continuance was made in bad faith and for purposes of delay. The trial proceeded as scheduled with Doughten and Tobik representing Jones.

At the close of trial, the jury found Jones guilty of aggravated murder. During the penalty phase, the court explained to the jury that they had four sentence options: (1) life in prison without parole eligibility for 25 years; (2) life in prison without parole eligibility for 30 years; (3) life in prison without the possibility of parole; or (4) death.

Jones presented extensive evidence of his social history of neglect and trauma, including testimony and records about his mother, Darlene, to establish mitigating circumstances. Trial counsel also presented expert evidence from local clinical psychologist Dr. James Eisenberg, which we focus on for this appeal.

Dr. Eisenberg interviewed Jones six times before trial, for approximately 14 hours total. In his written report, which he sent to trial counsel in the middle of trial, Dr. Eisenberg noted that Jones had "possible neuropsychological impairment," and he "should therefore be evaluated for such impairment." Dr. Eisenberg found Jones "surprisingly intelligent and articulate," despite acknowledging that an IQ of 86 "place[d] him in the low average range of intelligence." Dr. Eisenberg conducted "a test designed to assess a number of the major patterns of personality and emotional disorders" on Jones but concluded that his answers were "self-contradictory and rarely given," so the test results were "not valid."

Dr. Eisenberg diagnosed Jones with "Antisocial Personality Disorder with features of attachment disorder" based on "overwhelming" evidence. Dr. Eisenberg noted that there was a "first-degree biological" risk from Jones's "equally antisocial and drug dependent mother."

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Despite referring to Jones's deceased mother, Darlene,³ as a baseline, Dr. Eisenberg did not review Darlene's medical records; instead, he reviewed criminal "Docket Summaries" about Darlene. Dr. Eisenberg ultimately concluded that "[Jones's] behavior reflects his survival instincts and his personality reflects the lack of effective empathy and moral development."

During the penalty phase, trial counsel began by saying that "Odraye Jones was not born bad." But, counsel explained, Jones was "just kind of ang[ry] and bitter at the world. Not even sure why." Counsel explained that Dr. Eisenberg "is going to try to explain the effect of having no close family relationships, no proper guidance, no nurturing from day one, the [e]ffect it might have."

Dr. Eisenberg testified that he had diagnosed Jones with Antisocial Personality Disorder (APD), which he defined as "someone that engages in a wide variety of misconduct beginning in early to mid[-]adolescence continuing to violate the rights of others and to engage in conduct which normally would be considered to either be illegal or exploitative in some way." He stated that APD can occur "in the environment of dysfunction, lack of effective role modeling, access to criminal conduct, lack of appropriate discipline and continuing to act out in antisocial ways." Dr. Eisenberg called APD "an easy disorder to diagnose," and testified that "overwhelming" evidence showed that Jones suffered from APD. He explained to the jury that he reached this diagnosis "based on review of [Jones's] juvenile records, his first contacts with the Juvenile Court system in 1990. His behavior as a juvenile and then continuing on his behavior as an adult and the conflicts he's had with the court as an adult and more importantly, you know, [the *Diagnostic and Statistical Manual of Disorders*, Fourth Edition] is a guideline for this diagnosis." In other words, Dr. Eisenberg's diagnosis was based largely on Jones's criminal record.

Dr. Eisenberg went on to testify that "to be antisocial means that you violate the rights of others; that you take advantage of others; you steal from others. That you don't have a sense of empathy for what it means to cause harm[.]" An individual with APD has a "need for immediate gratification which puts aside rational thinking," the consequence of which is the involvement in

³Darlene committed suicide by drug overdose when Odraye was 13 years old.

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“a lot of what we call unmotivated antisocial behavior, anything minor from shoplifting to trespassing to more major crimes of criminal conduct to arson . . . [and] murder”

Dr. Eisenberg testified that APD is curable, but he also testified that shortly after Darlene’s death, it was “too late to make any effective real change in [Jones’s] life.” In Dr. Eisenberg’s view, the “best treatment [for someone with APD] is to keep them away from others. . . . [T]he best treatment for the antisocial, if the violations are severe, is to throw them away, lock them up[.]” He emphasized this point again later in his testimony: “We’re talking about [a] pervasive pattern of behavior that runs the risk of engaging in serious criminal conduct and, if you’re not stopped, ultimately most antisocials are likely to run the risk of the kind of situation [Jones is] in right now.”

On cross-examination, Dr. Eisenberg agreed that “in the general population one to three percent of the general population can be diagnosed with [APD]” but that in “urban African American males,” the percentage was much higher, “15 to 25 percent, maybe even 30 percent[.]” And on re-direct, defense counsel had the following exchange with Dr. Eisenberg:

Q. There was some testimony about although the percentage used by [the prosecutor] was 15 to 20 percent of the African American urban males have been diagnosed and very few actually commit a homicide. Do you remember those questions?

A. Yes.

Q. Is it your opinion that more could result but it’s just the happenstance they’re placed in that either causes it or has it not happen?

A. **The statistics are that one out of four African males of the age 25 are incarcerated in some capacity or on some kind of strict probation. So that would eliminate those individuals from engaging in this conduct. So part of it is incarceration itself that precludes homicide.**

(Emphasis added.) Then, on re-cross, Dr. Eisenberg agreed that APD is “common among people in jail, in prison,” “[c]ommon among murderers,” and testified that thirty percent of “murderers on death row” had APD.

In closing, the prosecutor cited Dr. Eisenberg’s testimony to argue that “perhaps some people are born bad.” And defense counsel reiterated the prevalence and incurability of APD in Black men:

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I think it's a quarter of the urban males, I don't know the statistics, come up with, urban [B]lack American youth, come up with [APD]. Is that surprising? A number of people in prison with this. Is that surprising? And Dr. [Ei]senberg said it's really untreatable. This isn't a situation you can treat. This is something that we can't say give him some treatment. It's untreatable; you have to put him out of society until it runs its course.

After deliberating, the jury found that the aggravating circumstances outweighed the mitigating factors and recommended that Jones be sentenced to death. The trial court held a sentencing hearing, accepted the jury's recommendation, and imposed a death sentence.

Jones timely appealed the judgment, raising fifteen assignments of error. Ultimately, the Supreme Court of Ohio rejected Jones's arguments, affirmed the judgment of the trial court, and upheld the death sentence. *State v. Jones*, 744 N.E.2d at 1170–71.

Jones also collaterally attacked his conviction, but the trial court denied his petition and Ohio Court of Appeals affirmed. *State v. Jones*, No. 2000-A-83, 2002 WL 737074, at *8 (Ohio Ct. App. Apr. 26, 2002). The Ohio Supreme Court denied Jones's petition for review, *State v. Jones*, 774 N.E.2d 767 (Ohio 2002) (table op.), and later denied his motion to reopen his direct appeal, *State v. Jones*, 841 N.E.2d 315 (Ohio 2006) (table op.).

B.

In 2003, Jones filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Northern District of Ohio and later amended his petition with assistance of counsel. The district court denied Jones's amended petition but certified for appeal five of his claims. *Jones*, 489 F. Supp. 2d at 849–52. We then expanded the certificate of appealability (COA) on Jones's motion to include a challenge to Ohio's lethal injection protocol. Six months later, we remanded the case to the district court on Jones's motion for "limited discovery and factual development" of his lethal injection challenge. And six years after that, while the case remained in the district court, Jones returned to our court and requested that we "expand the limited remand" so that he could file an "Amendment and Supplement" to his § 2254 petition. We granted his motion, authorizing the district court to consider Jones's assertion that there was cause to excuse his procedural default of additional claims under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013).

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Accordingly, Jones filed his Amendment and Supplement with the district court and argued that those cases allowed him to amend his petition to include some additional claims.

In 2015, the district court concluded proceedings related to Jones's lethal injunction protocol by transferring the action back to our court. In a separate order, the district court also rejected the claims brought in Jones's Amendment and Supplement. The court first reasoned that Federal Rule of Civil Procedure 60 applied, rather than Rules 15 or 59(e), because judgment was entered before Jones filed his Amendment and Supplement, and the mandatory twenty-eight-day period for filing a Rule 59(e) motion had passed. Under the Rule 60(b) standard, the district court concluded that the claims brought in Jones's supplement were not cognizable because they were not based on newly discovered evidence and did not fit within the narrow confines for which *Martinez* and *Trevino* authorize courts to set aside procedural default caused by ineffective postconviction counsel. Jones filed a notice of appeal after the district court's rejection of his supplement and later filed an application for a COA in the district court. The district court granted a COA on eight additional issues arising out of the Amendment and Supplement.

Thereafter, Jones filed a Rule 60(b) motion in the district court, claiming that the district court had erred in its resolution of three of the claims presented in his original habeas petition.⁴ The Warden responded that Jones's motion should be transferred to our court as an application to file a second or successive habeas petition because the claims had not actually been presented in Jones's petition for habeas relief. We held the appeal in abeyance while the district court resolved the motion. In May 2019, the district court granted in part the Warden's motion by characterizing a portion of Jones's motion as a second or successive habeas petition and sending two of the claims to our court under 28 U.S.C. § 2244. It denied relief on the remaining claim, which had alleged that Jones's counsel was ineffective for introducing racialized evidence during the sentencing phase of his trial, because it concluded that claim was procedurally defaulted.

⁴Jones's motion requested that the district court follow the procedure outlined in *First Nat'l Bank of Salem v. Hirsch*, 535 F.2d 343 (6th Cir. 1976), by issuing a provisional order if it were inclined to grant his motion. The district court did not follow the *Hirsch* procedure.

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Jones then filed a motion in the first-in-time appeal to expand the COA to include the denial of his Rule 60(b) motion and filed a separate notice of appeal arising out of the district court's denial of his racialized evidence claim, which was docketed as Case Number 19-3611. Although both these filings dealt with the same subject, we granted in part Jones's request for an expanded COA and ordered the parties to file supplemental briefs on Jones's Rule 60(b) claim raising ineffective assistance of counsel based on presentation of racialized evidence in Case Number 07-3766, while also dismissing as untimely Jones's separate appeal in Case Number 19-3611. We also denied Jones's corrected application for authorization to file a second or successive habeas petition.

And finally, we sua sponte granted a COA on one additional issue: whether trial counsel were ineffective during the penalty phase of trial for failing to properly prepare expert witnesses, based on Dr. Eisenberg's presentation of racialized testimony.⁵

C.

In sum, we must resolve issues arising from three separate COAs.

First, Jones's appeal of the district court's order denying his first-in-time habeas petition remains pending with a COA on the following issues: (1) whether the trial court erroneously submitted an "acquittal-first" instruction to the jury; (2) whether the trial court erred when it denied Jones's request to have counsel of his choosing; (3) whether trial counsel were ineffective for failing to highlight certain information during the mitigation phase; (4) whether trial counsel were ineffective for failing to investigate and present mitigating evidence; and (5) whether trial counsel were ineffective because animosity existed between Jones and his counsel. *See Jones*, 489 F. Supp. 2d at 850–52.

Second, the district court granted COAs on eight issues related to its order denying relief from Jones's Amendment and Supplement: (1) whether the district court failed to comply with

⁵This COA framed the claim as whether trial counsel were ineffective for failing to "properly prepare expert witnesses *or* to present proper mitigation evidence" at the penalty phase. (Emphasis added.) The mitigation-evidence issue was already before our court on Jones's appeal of the district court's order denying his first-in-time habeas petition and is discussed *infra* at § III.C. Thus, this COA granted review for only one new issue: ineffective assistance of counsel based on Dr. Eisenberg's racialized testimony.

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the mandate of the court of appeals to allow the filing and full consideration of supplemental or amended pleadings related to the ineffective assistance of trial counsel; (2) whether Federal Rule Civil Procedure 15 applies to Jones's proposed amendment to his habeas petition, when it was filed after the notice of appeal but prior to appellate review and with permission from the court of appeals; (3) whether the district court correctly denied the claims of counsel's ineffectiveness concerning an eyewitness's testimony identifying Jones as the shooter and her initial statement to the police identifying Anthony Barksdale as the shooter; (4) whether trial counsel were ineffective for failing to offer compelling and available evidence demonstrating that a change of venue was necessary to protect Jones's constitutional right to a jury composed of a fair cross section of his community; (5) whether *Martinez* applies to claims other than trial counsel ineffectiveness that state post-conviction counsel overlooked, and whether Jones's claim that he was denied his constitutional right to a public trial is cognizable despite no procedural default; (6) whether the interests of justice would best be served by considering additional evidence in reviewing the counsel-of-choice claim; (7) whether Jones made a sufficient showing to warrant discovery; and (8) whether Jones was entitled either to be represented by different counsel in his motion for the appointment of counsel or to proceed pro se.⁶

And third, we must consider whether trial counsel were ineffective during the penalty phase of trial for failing to properly prepare expert witnesses, based on Dr. Eisenberg's presentation of racialized testimony.

We address the fourteen issues before us roughly in that order.

II.

Before we take up any of the substantive claims for habeas relief that Jones has presented, we must first consider issues relating to his representation. Several times through these proceedings, Jones asked the district court and our court to appoint him new counsel or allow him to proceed pro se. In February 2016, Jones's counsel filed a "Motion for the Appointment of Counsel to Argue Petitioner's Requests for New Counsel and/or to Proceed Pro Se" in the district court. The district court denied that motion as moot because we had already

⁶The eighth issue was resolved by the district court in a separate order.

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issued an order denying a motion Jones filed with us to remove his counsel and proceed pro se. Jones now argues that the district court abused its discretion by not appointing him new counsel for the limited purpose of arguing in favor of new habeas counsel, or for Jones to proceed pro se.

In death penalty cases where counsel have been appointed to represent indigent defendants under 18 U.S.C. § 3599, district courts apply the “interests of justice” standard when determining whether to substitute appointed counsel. *See Martel v. Clair*, 565 U.S. 648, 652 (2012). Section 3599 contemplates that an attorney appointed under its authority may be “replaced by similarly qualified counsel upon the attorney’s own motion or upon motion of the defendant.” 18 U.S.C. § 3599(e); *see also Clair*, 565 U.S. at 657. But defendants do not have “the right to counsel of their choice.” *Christeson v. Roper*, 574 U.S. 373, 377 (2015).

Jones relies on *Christeson* to support his claim that he was entitled to appointment of counsel because forcing his existing counsel to make the arguments would be akin to expecting an attorney to litigate his or her own ineffectiveness. Courts do not require counsel to “make such . . . argument[s], which threaten[] their professional reputation and livelihood.” *Id.* at 378. However, that case involved the substitution of counsel, as opposed to the appointment of *independent* counsel to make the substitution *argument*. Nothing in our precedent holds that defendants have a right to additional counsel—while represented—to separately argue for substitution of counsel. Thus, we conclude that the district court did not abuse its discretion by declining to appoint Jones additional counsel to litigate his motion to substitute counsel. To the extent Jones seeks review of the district court’s refusal to appoint counsel to advocate for him to proceed pro se, the district court did not abuse its discretion for the same reason.

III.

Moving now to the district court’s denial of Jones’s § 2254 petition, our review is constrained by the heightened standards imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) because his claims were adjudicated on the merits in state court proceedings. 28 U.S.C. § 2254(d). Under AEDPA, it is petitioner’s burden to demonstrate that the state court’s decision “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme

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Court of the United States.” § 2254(d)(1). That, in turn, means that “the applicable substantive law is limited to federal law ‘clearly established’ by the holdings of Supreme Court decisions.” *Jackson v. Smith*, 745 F.3d 206, 210 (6th Cir. 2014) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

A.

Jones first takes issue with a juror unanimity instruction that was given in his case, arguing that the state trial court erroneously instructed the jury that it was required to unanimously find that the mitigating factors outweighed the aggravating circumstances before considering a life sentence, contrary to *Mills v. Maryland*, 486 U.S. 367 (1988). In *Mills*, the Supreme Court invalidated a death sentence where the jury was instructed such that reasonable jurors “may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance.” *Id.* at 384.

The instructions used by the state trial court do not suffer from the same defect recognized in *Mills*. The instructions here read in relevant part:

It is not necessary that you, the jury, unanimously agree on the existence of a mitigating factor before that factor can be weighed against the aggravating circumstances.

The procedure which you must follow in arriving at your verdict in this phase of the trial as prescribed by statute and in this regard, you the trial jury, shall consider all of the testimony and evidence relevant to the aggravating circumstances and mitigating factors raised at both phases of the trial, and the final arguments of counsel. You shall then determine whether the State of Ohio proved beyond a reasonable doubt that the aggravating circumstances Odraye G. Jones was found guilty of committing are sufficient to outweigh the mitigating factors present in this case beyond a reasonable doubt.

* * *

If after a consideration of the relevant evidence raised at trial which is relevant to the two aggravating circumstances Odraye G. Jones was found guilty of committing, the mitigating factors and any other factors in mitigation of the imposition of the sentence of death and the arguments of counsel that are relevant to the penalty that should be imposed upon Odraye G. Jones, all twelve members of this jury find that the State of Ohio proved beyond a reasonable doubt that the aggravating circumstances the defendant was guilty of committing are sufficient

to outweigh the mitigating factors in this case, then it will be your duty to find that the sentence of death shall be imposed upon Odraye G. Jones.

If you make such a determination, you should do so as if your decision is absolute and will be carried out. If, however, after consideration of the evidence raised at trial that is relevant to the two aggravating circumstances Odraye G. Jones was found guilty of committing, the statutory mitigating factors and any other factors in mitigation of the imposition of the sentence of death and the arguments of counsel that are relevant to the penalty that should be imposed upon Odraye G. Jones, you find that the State of Ohio has failed to prove beyond a reasonable doubt that the aggravating circumstances he was guilty of committing are sufficient to outweigh the mitigating factors presented in this case, then it will be your duty to determine which of the life sentence alternatives should be imposed: a sentence of life imprisonment without parole eligibility until 25 full years of imprisonment have been served, the sentence of life imprisonment without parole eligibility until 30 full years of imprisonment have been served, or life imprisonment without the possibility of parole.

* * *

You are not required to unanimously find that the State failed to prove that the aggravating circumstances outweigh the mitigating factors before considering one of the life sentence options. In other words, you should proceed to consider and choose one of the life sentence options if any one or more of you conclude the State has failed to prove that the aggravating circumstances outweigh the mitigating factors.

(Emphases added.) On direct appeal, the Supreme Court of Ohio recognized that “a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors.” *Jones*, 744 N.E.2d at 1180 (quoting *State v. Brooks*, 661 N.E.2d 1030, 1042 (Ohio 1996)). It further explained that “no specific language” is required to convey this point, and that the trial court’s instructions adequately conveyed the need for a unanimous verdict before imposing the death penalty. *Id.*

In *Smith v. Spisak*, 558 U.S. 139, 148–49 (2010), the Supreme Court rejected a nearly identical claim brought by an Ohio habeas petitioner challenging jury instructions that “mirror[]” those at issue here. See Pet’r’s Opening Br. at 32 n.10. The *Spisak* Court observed that the jury instructions and jury forms at issue differed significantly from those in *Mills* because they “made clear that, to recommend a death sentence, the jury had to find, unanimously and beyond a reasonable doubt, that each of the aggravating factors outweighed any mitigation circumstances”

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and they “did not say that the jury must determine the existence of each individual mitigating factor unanimously.” *Spisak*, 558 U.S. at 148. And because the jury instructions did not present “the circumstance that *Mills* found critical,” the Court “conclude[d] that [the Ohio Supreme Court]’s decision upholding these forms and instructions was not ‘contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States’ in *Mills*.” *Id.* (quoting § 2254(d)(1)) (alteration in original)). Jones’s claim that the Ohio Supreme Court’s decision was contrary to *Mills* must fail for the same reason given by the Court in *Spisak*. Moreover, Jones’s argument that the verdict form contradicted Ohio Supreme Court precedent regarding juror unanimity as to the balancing of the aggravating and mitigating factors is unavailing because *Spisak* makes clear that there is no clearly established federal law on the matter. *Id.* at 149 (“Whatever the legal merits of the rule or the underlying verdict forms in this case were we to consider them on direct appeal, the jury instructions at *Spisak*’s trial were not contrary to ‘clearly established Federal law.’” (quoting § 2254(d)(1))).

Finally, we will not consider Jones’s additional jury-instruction claims because they were not certified for appellate review. *See Abdur’Rahman v. Colson*, 649 F.3d 468, 473 (6th Cir. 2011) (explaining that a COA is a jurisdictional prerequisite to review and declining to address claims that, while related to the claims authorized by the COA, were analytically distinct).

B.

We next take up Jones’s claim that his right of counsel of his choosing was violated by the trial court’s denial of his motions to substitute counsel and for a continuance—after the jury had been empaneled—to allow his newly-retained counsel to prepare for trial.⁷ Jones presented this claim to the Ohio Supreme Court, which summarized the underlying facts as follows:

⁷We note that the district court granted a separate COA to Jones concerning whether trial counsel were ineffective because animosity existed between him and his counsel. *Jones*, 489 F. Supp. 2d at 851. Jones argues that trial counsel were ineffective for failing to request an ex parte hearing to address the breakdown of his relationship with counsel. But Jones concedes that this argument “was not presented to the courts of Ohio” and “was first presented in the Amendment/Supplement.” Therefore, the district court should have held this claim to be procedurally defaulted, and it improvidently granted a COA.

On May 14, 1998, approximately two hours after the jury was sworn, attorney David Per Due filed an entry of appearance with the trial court. The following morning, a hearing was held. Present at this hearing were appellant's court-appointed counsel, the prosecution, and Per Due. Appellant indicated to the trial court that he wanted Per Due to represent him. Appellant stated that he had a "conflict of interest" with the court-appointed attorneys who had been representing him to that point. Specifically, appellant felt that his court-appointed attorneys were "mostly concerned with saving [his] life." He further stated that "if [they] can't win the case for me, then [they] can't do nothing for me." Appellant's court-appointed attorneys explained to the trial court that their relationship with the appellant had been "pretty good" and that there existed an open line of communication between themselves and appellant. They acknowledged appellant's concern that they were not concentrating upon acquittal. They further noted that appellant was concerned that the relationship between themselves and the prosecution had, to that point, been too cordial. Appellant concurred with this assessment.

The trial court offered to let Per Due assist appellant's court-appointed counsel. However, the trial court would not allow Per Due to act as lead counsel because he had not been death-penalty certified by this court. When the court asked Per Due if he would be ready to commence with trial the following Monday, he responded, "Absolutely not." Instead, Per Due requested a four-month continuance. He further indicated that he would be unwilling to assist appellant's court-appointed attorneys as third counsel.

The court denied Per Due's motions for entry and a continuance, concluding that the relationship between appellant and his court-appointed attorneys did not warrant a change in counsel. The court further concluded that the request for continuance was made in bad faith and for purposes of delay. The trial court noted that there had never been, up to that point, any indication that there was a lack of cooperation or trust between appellant and his attorneys.

Jones, 744 N.E.2d at 1173–74.

Quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988), the Supreme Court of Ohio observed that, "[w]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate . . . rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." 744 N.E.2d at 1174. Accordingly, the court balanced Jones's right to counsel against the public interest in the prompt and efficient administration of justice by considering "the timeliness of the motion; the adequacy of the court's inquiry into the defendant's complaint; and whether the conflict between the attorney and client was so great that

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it resulted in a total lack of communication preventing an adequate defense.” *Id.* (quoting *United States v. Jennings*, 83 F.3d 145, 148 (6th Cir. 1996)). After review of the trial court’s “extensive inquiry” into Jones’s relationship with his trial counsel, the Ohio Supreme Court ultimately concluded that the trial court had correctly “balanc[ed] the accused’s right to the representation of his chosen counsel against the interests of the public in the prompt and efficient administration of justice,” and found that “the public’s interests outweighed those of the appellant.” *Id.* at 1175. Thus, it found “no abuse of discretion in the trial court’s refusal to substitute Per Due for court-appointed counsel.” *Id.*

On habeas review, the district court concluded that the Ohio Supreme Court did not unreasonably apply Supreme Court precedent. *Jones*, 489 F. Supp. 2d at 823. Now on appeal, Jones rehashes his argument that the Ohio court’s resolution of this issue was an unreasonable application of clearly established federal law because, in his view, *Wheat* applies only to situations where “a criminal defendant’s right under the Sixth Amendment to his chosen attorney is qualified by the fact that the attorney has represented other defendants charged in the same criminal conspiracy.” Instead, he relies on the Supreme Court’s general statement in *Powell v. Alabama*, that “a defendant should be afforded a fair opportunity to secure counsel of his own choice.” 287 U.S. 45, 53 (1932).

We do not agree with Jones that the Ohio Supreme Court unreasonably applied federal law. The central teaching of *Wheat* is that a criminal defendant’s right to counsel of his choosing is not unlimited. *See* 486 U.S. at 158–59. The Court explained that “while the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.” *Id.* at 159. Thus, the Ohio Supreme Court accurately stated the law—including that Jones had a “*presumptive* right to employ his own chosen counsel”⁸—balanced the requisite factors, and determined that “the trial court correctly found that the public’s interests

⁸Jones argues that he is entitled to habeas relief because “[n]either the trial court nor the Ohio Supreme Court applied a presumption in favor of counsel of choice.” That is incorrect. *See Jones*, 744 N.E.2d at 1174 (acknowledging petitioner’s “presumptive right to employ his own chosen counsel”) (emphasis and citation omitted).

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outweighed those of the appellant.” *Jones*, 744 N.E.2d at 1174–75 (quotation omitted). Given “a trial court’s wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar,” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (internal citations omitted), we conclude that the Ohio Supreme Court’s decision was not an unreasonable application of federal law and deny habeas relief on this claim.

C.

Next, Jones argued in his § 2254 petition that he received ineffective assistance of counsel during the penalty phase of his trial. He asserts that his trial counsel rendered ineffective assistance both by failing to effectively investigate his background and then by failing to highlight certain mitigation evidence at trial. Because these claims are intertwined, we address them together.

On direct appeal, Jones argued that his counsel were ineffective for submitting medical records relating to his mother, Darlene, without further explanation. The Ohio Supreme Court rejected this claim:

The record indicates that appellant’s defense counsel had presented an abundance of evidence regarding appellant’s mother, including her inability to form an attachment with appellant and the effect her suicide had upon him. The subtle tactical choices that appellant now challenges were decisions that lay within the realm of professionally reasonable judgment. We further find that defense counsel’s failure to highlight to the jury specific items of mitigation contained in exhibits submitted to it could not have affected the outcome of the trial, especially in light of the weight and gravity of the aggravating circumstances.

Jones, 744 N.E.2d at 1184.

Then, in state postconviction proceedings, Jones argued that his trial counsel were ineffective for failing to investigate additional medical records involving a head injury Jones had suffered and additional information about Darlene. He also argued that his counsel were ineffective for failing to introduce testimony of his father and paternal grandmother. The trial court rejected Jones’s ineffective assistance claims arising out of these issues because it determined that the evidence would have been cumulative:

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[A]ll of the subject matters of [the testimony of potential witnesses not called by appellant's counsel], to-wit: the absent parenting of the biological father, the noninvolvement in [appellant's] life by his paternal grandmother, his drug use, gang membership, and emotional upset after the death of his mother, . . . Darlene Jones' drug use, criminal involvement, and abnormal home life, the cultural violence in which [appellant] was raised as well as the death of close friends and relatives and its effect upon his psychological and emotional development, the effect of the physical assault by Maceo Hull and how [it] caused [appellant] to be distrustful of others, and the general violence to which he was exposed were all covered and testified to by those witnesses that were called as mitigation witnesses.

Jones, 2002 WL 737074, at *3 (alterations in original). The Ohio Court of Appeals agreed that any additional evidence on these subjects would have been cumulative. *Id.* That court also explained that “[t]here was substantial testimony as to the nature and extent of [Jones]’s injuries during the penalty phase,” so any additional medical records establishing Jones’s treatment for his head injuries would not have changed the outcome of the penalty phase of trial. *Id.* at *3–4.

Jones now says that those determinations were unreasonable applications of federal law. His argument relies largely on *Wiggins v. Smith*, 539 U.S. 510 (2003), where the Supreme Court clarified how the ineffective assistance of counsel standard set forth in *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984), applies in mitigation proceedings. We find *Wiggins* distinguishable.

There, the petitioner’s trial counsel relied solely on a presentence report and social service records, which revealed that Wiggins’ “mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there; he had frequent, lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone for days without food.” *Wiggins*, 539 U.S. at 524–25. Counsel conducted no additional investigation into the petitioner’s upbringing. *Id.* at 524. On postconviction review, Wiggins’ counsel investigated and learned the following, which included repeated incidences of sexual abuse:

[P]etitioner’s mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins’ abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men

while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner—an incident that led to petitioner's hospitalization. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically, and, as petitioner explained to [the social worker investigating Wiggins' social history], the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor.

Id. at 516–17 (citations omitted). The Supreme Court held that Wiggins received ineffective assistance from his trial counsel for counsel's failure to conduct a reasonable investigation. *Id.* at 534–35. In doing so, the court explained that when “assessing the reasonableness of an attorney's investigation . . . 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.” *Id.* at 527. And therefore, because the records available to Wiggins' trial counsel would have compelled a reasonable attorney to investigate further, the Court concluded that “counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.” *Id.* at 527–28. Accordingly, the Court held that petitioner's clearly established right to effective assistance of counsel under *Strickland* was violated and that the Maryland Court of Appeals' application of *Strickland* was objectively unreasonable. *Id.* at 528.

Jones, on the other hand, was able to elicit testimony from numerous witnesses close to him (as well as from court-appointed experts) to convey to the jury aspects of his social history including neglect, abandonment, violence, a lack of a stable home and family, the impact of his mother's suicide, and the mental health struggles affecting both Darlene and him.

We see no unreasonable application of clearly established federal law in the state courts' conclusions. Though Jones may have found that trial “counsel's presentation of Darlene's suicide was far from compelling,” that does not demonstrate that trial counsel were not aware—as in *Wiggins*—of her passing or that trial counsel did not adequately investigate or present mitigating evidence. The Ohio Court of Appeals thus concluded that any additional mitigation

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evidence from other witnesses or documentary records would have been cumulative, so his counsel were not ineffective. That conclusion was reasonable. *See Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam) (reversing grant of habeas relief because “it was not unreasonable for . . . counsel not to identify and interview” additional witnesses beyond those who testified at trial); *Lang v. Bobby*, 889 F.3d 803, 815 (6th Cir. 2018) (affirming denial of habeas relief based upon alleged failure of counsel to investigate petitioner’s background and failure to effectively present mitigation evidence).

So too was the Ohio Court of Appeals’ conclusion that Jones had not been prejudiced by his counsels’ failure to present such testimony. Ultimately, the jury received a trove of information regarding Jones’s upbringing, including the trauma and neglect he suffered, as well as information about Darlene’s troubled life and eventual suicide, and Jones has not shown a reasonable probability that the outcome would have been different if the additional evidence of this “multi-generational dysfunction” had been introduced by his trial counsel. *See Wong v. Belmontes*, 558 U.S. 15, 20 (2009); *Jackson v. Bradshaw*, 681 F.3d 753, 769–70 (6th Cir. 2012) (affirming denial of habeas relief on ineffective-assistance claim for failure to investigate and present mitigating evidence where court could not conclude “that a larger pool of information of the same type already offered was reasonably likely to have altered the jury’s balancing decision”); *see also Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005) (“[T]o establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing.”); *cf. Carter v. Bell*, 218 F.3d 581, 596–97 (6th Cir. 2000) (vacating death sentence for ineffective assistance of counsel because trial counsel conducted no independent investigation into defendant’s background and instead relied solely on information volunteered by defendant).

IV.

A.

Having concluded that none of the claims presented for review from Jones’s § 2254 petition warrant relief, we turn next to issues raised by his appeal from the district court’s denial of his Amendment and Supplement. In this filing, Jones argued that he should be allowed to

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present additional claims because recent Supreme Court decisions of the time, *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), provided an avenue, in limited circumstances, to excuse procedural default of claims lost through ineffective assistance of postconviction counsel. The district court construed Jones's motion under Rule 60(b) and concluded that none of the claims presented in the Amendment and Supplement fit within the narrow confines for which *Martinez* and *Trevino* allowed the court to set aside procedural default.

Now on appeal, the Warden contends that Jones's pleading was a second-or-successive habeas petition in disguise under the rule set forth in *Moreland v. Robinson*, 813 F.3d 315 (6th Cir. 2016), meaning that Jones was required to obtain precertification from this court before presenting his claims to the district court for review. She therefore argues that the district court lacked jurisdiction over Jones's pleading. See § 2244(b)(3)(A). In *Moreland*, we reconciled two prior decisions, *Clark v. United States*, 764 F.3d 653 (6th Cir. 2014), and *Post v. Bradshaw*, 422 F.3d 419 (6th Cir. 2005), addressing whether a post-judgment motion to amend or supplement should be treated as a second or successive petition. "*Clark* held that a post-judgment petition was not second or successive in a case where the petition was filed before the expiration of the time to appeal the district court's denial of the first petition, while our earlier decision in *Post v. Bradshaw* held that a habeas petition was a second or successive petition where the petition was filed during the pendency of the appeal from denial of the first petition." *Moreland*, 813 F.3d at 324 (internal citation omitted). The *Moreland* court reconciled these decisions by concluding that "a Rule 60(b) motion or a motion to amend that seeks to raise habeas claims is a second or successive habeas petition when that motion is filed after the petitioner has appealed the district court's denial of his original habeas petition or after the time for the petitioner to do so has expired." *Id.* Put differently, "if the district court has not lost jurisdiction of the original habeas petition to the court of appeals, and there is still time to appeal, a post-judgment motion is not a second or successive habeas petition." *Id.*

The petitioner in *Moreland* filed his Rule 60 motion after the time to appeal had passed, so we held that his Rule 60 motion was a second or successive habeas petition and turned to whether the proposed claims presented in his Rule 60 motion could pass the gatekeeping

requirements of 28 U.S.C. § 2244. *Id.* at 324–25. Section 2244(b)(2) provides that claims not presented in a prior habeas petition shall be dismissed from a second or successive petition unless:

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

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The *Moreland* court concluded that the petitioner could not meet these requirements even though he—like Jones—relied on *Martinez/Trevino*. *Id.* at 325–26. We first held that the rule established by *Martinez* and expanded by *Trevino* “was equitable, not constitutional,” and thus could not be used to satisfy § 2244(b)(2)(A)’s gatekeeping requirement. *Id.* at 326. And second, we concluded that *Moreland*’s claims did not rely on evidence that was unavailable at the time of his original habeas petition. *Id.* Accordingly, the court held that the claims presented in the Rule 60 motion could not be presented in a second or successive habeas petition. *Id.*

We agree with the Warden that *Moreland* controls here—with one caveat. All but one of Jones’s proposed claims were newly-raised and properly considered second-or-successive (and thus subject to § 2244 and its gatekeeping requirements). Specifically, Jones argued for the first time in the Amendment and Supplement that: (1) his trial counsel were ineffective for their handling of Theresa Taylor’s testimony (with multiple subclaims); (2) that they were ineffective for failing to call a man named Ricky Turner to testify that an alternative suspect, Barksdale, had allegedly confessed to killing Officer Glover; and (3) that his right to a public trial was violated when courthouse deputies did not allow three of his friends to attend the trial. Because these claims were raised for the first time after judgment had entered, and they do not attack a procedural defect in the original denial of Jones’s habeas petition, they should have been construed as a second or successive habeas petition that the district court lacked jurisdiction to consider in the first instance. *See id.*; *see also Post*, 422 F.3d at 424–25. In other words, while

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we may have authorized an expansion of the remand to consider Jones's procedurally defaulted claims, *Moreland* confirms that doing so was error.⁹ For these claims, the proper procedure was for Jones to file a second or successive habeas petition and establish that his new claims fit within those gatekeeping requirements.

However, Jones's Amendment and Supplement also raised an ineffective assistance claim arising from his trial counsel's failure to support his motion for a change of venue with empirical evidence that would have demonstrated that the jury venire did not represent a fair cross-section of the community. This claim cannot be characterized as second-or-successive because it was presented in Jones's original pleadings—specifically, in his "Final Traverse," which Jones filed with leave of court. The district court did not resolve this claim in its opinion and order denying Jones's petition for a writ of habeas corpus, and it is not presented for review as part of Jones's appeal from that order.

Accordingly, we will first consider whether any of Jones's second-or-successive claims can proceed through § 2244's gatekeeping requirements before returning to resolve this analytically distinct claim under *Martinez/Trevino* and Rule 60(b).

B.

As noted above, Jones has not requested precertification to file a second or successive habeas petition. But even if he had, we conclude that his claims do not meet the gatekeeping requirements of § 2244 because they do not rely on a new rule of constitutional law made retroactive to cases on collateral review or upon newly discovered evidence that establishes his actual innocence. *See* § 2244(b)(2).

As a general matter, we have already decided that neither *Martinez* nor *Trevino* satisfy § 2244(b)(2)(a) as a new rule of constitutional law because those cases establish only an equitable exception to our general rule of procedural default. *Moreland*, 813 F.3d at 326. Nor do Jones's claims rely on any factual predicate that could not have been discovered previously

⁹To the extent one could argue that we authorized Jones to file a second or successive habeas petition by granting his motion to expand the limited remand, we do not agree. Our order did not reference § 2244 or analyze whether the proposed claims could pass § 2244(b)(2)'s narrow gatekeeping requirements.

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that would be sufficient to establish that no reasonable factfinder would have found him guilty of killing Officer Glover. § 2244(b)(2)(B)(i)–(ii).

The first issue raised in petitioner’s Amendment and Supplement relates to his trial counsels’ cross-examination of eyewitness Theresa Taylor.¹⁰ This claim was clearly available at the time Jones filed his original habeas petition, so it is not cognizable in a second-or-successive petition. *See* § 2244(b)(2)(B)(i). His next claim arose from his counsels’ failure to call a man named Ricky Turner as a witness. In an affidavit executed in 2015, Turner stated that on the day Office Glover was shot, he heard a rumor that Anthony Barksdale was the shooter. He further claimed that he was in a bar with Barksdale at some point after the shooting but before Jones’s trial, where Barksdale allegedly admitted to shooting Officer Glover and denied that Jones had been the shooter. Turner further claimed that he was never interviewed by police or Jones’s counsel, and that he would have relayed his conversation with Barksdale if he had been asked. But Jones has not established that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence” or that Turner’s testimony would have turned the tides such that no reasonable factfinder would have found Jones guilty of murder—particularly in light of the overwhelming evidence of Jones’s guilt.¹¹ *See* § 2244(b)(2)(B)(i)–(ii). Finally, regarding Jones’s claim that he was denied his right to a public trial, he asserts that his postconviction counsel was deficient for not raising this issue on collateral review, meaning that it was necessarily available at the time Jones filed his § 2254 petition and was based on previously discovered evidence. *See* § 2244(b)(2)(B)(i)–(ii).

In sum, these additional claims not presented in Jones’s § 2254 petition do not fit within § 2244’s gatekeeping requirements for second-or-successive habeas petitions, so he cannot obtain review of them.

¹⁰There are actually two claims arising out of counsels’ handling of Taylor’s testimony. First, petitioner argues that it was unreasonable to impeach Taylor for her inconsistent statements, rather than attempting to bolster her first-in-time statement implicating another person in the murder. Second, he claims that his counsel rendered ineffective assistance by failing to call an expert witness to vouch for the credibility of Taylor’s first statement. Because these claims rise and fall together for purposes of § 2244, we address them together.

¹¹Jones’s cousin testified that Jones told him that he intended to shoot a police officer if confronted for the earlier robbery, two eyewitnesses identified Jones as the shooter, and law enforcement observed Jones discarding the pistol used in the shooting moments before he was apprehended.

C.

As discussed above, Jones presented a claim in his final traverse that his trial counsel were ineffective for failing to “offer any evidence” to support the argument that the jury venire was not a fair cross-section of the community. The district court did not address this claim in its opinion and order denying Jones’s § 2254 petition and did not grant a certificate of appealability on the issue.¹² But Jones did not seek reconsideration of the court’s decision, nor did he move to expand the certificate of appealability to seek review of the omitted claim. And when Jones did raise the claim again—eight years after the district court denied his § 2254 petition—he argued that the claim had been handled so poorly by his postconviction counsel that even though it was raised, it had been procedurally defaulted.

The district court rejected petitioner’s argument that the claim had been procedurally defaulted. And without any procedural default to excuse, it ruled that *Martinez/Trevino* did not apply. We agree. Jones preserved this claim by arguing in state postconviction proceedings that his counsel were ineffective for failing to present “available, compelling evidence in support of their Motion for Change of Venue” based upon Jones’s claim that a change of venue was required because the jury venire was not made up of a fair cross-section of the community. The Supreme Court has made clear that ineffective assistance in the initial-review collateral proceeding excuses procedural default when “the claim should have been raised,” but was not. *See Martinez*, 566 U.S. at 14. Here, the claim *was* raised in postconviction proceedings—albeit not supported by the right evidence in petitioner’s view—so there was no procedural default to excuse. Because Jones’s claim was not procedurally defaulted, that necessarily means that *Martinez* and *Trevino* do not apply, and accordingly, the district court did not err.

However, even if the district court erred by rejecting the claim on this basis, we would affirm on the alternative ground that Jones has not satisfied exceptional circumstances as

¹²However, the district court did address Jones’s claim that the Ohio Supreme Court unreasonably applied *Duren v. Missouri*, 439 U.S. 357 (1979), on direct appeal, concluding that “[t]he Ohio Supreme Court correctly identified the *Duren* test as the appropriate United States Supreme Court precedent to apply in this instance” and that “it reasonably applied that test to the facts presented in Jones’s case.” *Jones*, 489 F. Supp. 2d at 819 (citing *Jones*, 744 N.E.2d at 1172–73).

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required by Rule 60(b)(6).¹³ “Relief under Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination of litigation. This is especially true in an application of subsection (6) of Rule 60(b), which applies only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule.” *Ford Motor Co. v. Mustangs Unlimited, Inc.*, 487 F.3d 465, 468 (6th Cir. 2007) (alteration, quotation marks, and citations omitted). Relief under that subsection is limited to “unusual and extreme situations where principles of equity mandate relief.” *Id.* (citation omitted). “[T]he decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court’s conscience that justice be done in light of all the facts.” *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009) (citation omitted).

We conclude that Jones has not established extraordinary and compelling circumstances. A change in decisional law like *Martinez/Trevino* “is usually not, by itself, an ‘extraordinary circumstance’ meriting Rule 60(b)(6) relief,” *Stokes v. Williams*, 475 F.3d 732, 735 (6th Cir. 2007) (citation omitted), and that is certainly true when the change in law applies only weakly (at best) to the case at bar, see *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 752 (6th Cir. 2013) (“[E]ven if *Trevino* changed the law in some Ohio cases and even if a pure change in law could warrant Rule 60(b)(6) relief in truly extraordinary cases, there is nothing extraordinary about this case because the underlying reasons for the *Trevino* gloss on *Martinez* at best apply weakly in this case.”).

Moreover, Jones’s underlying claim for ineffective assistance based on his trial counsels’ failure to gather evidence that might prove a fair-cross-section *Duren* claim in support of his change-of-venue motion is meritless. First, Jones fails to establish that his counsels’ change-of-venue strategy was objectively unreasonable under prevailing professional norms. *Strickland*,

¹³To the extent that Jones argues that his Amendment and Supplement should be analyzed under Federal Rule of Civil Procedure 15, we disagree. The district court’s denial of Jones’s initial habeas petition constitutes an adverse judgment, and a motion to amend “after an adverse judgment” requires the movant to “shoulder a heavier burden” because of the “interest of protecting the finality of judgments and the expeditious termination of litigation[.]” *Clark*, 764 F.3d at 661 (quoting *Leisure Caviar, LLC v. United States Fish & Wildlife Serv.*, 616 F.3d 612, 615–16 (6th Cir. 2010)). And even if petitioner thinks *Moreland*’s harmonization of *Post* and *Clark* is “unconvincing” and “ripe for consideration en banc,” it remains binding on us. See *Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019).

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466 U.S. at 688–89. The record shows that trial counsel moved for a change of venue based on pre-trial publicity and, immediately after the jury was empaneled, for the additional reason that the racial make-up of the venire was not representative of the community. Jones’s counsel did not offer a fully articulated *Duren* claim in support of this motion, but any such argument would have faced the impediment of Ohio law deeming presumptively constitutional the use of voter registration lists to generate venires. *See State v. Moore*, 689 N.E.2d 1, 9 (Ohio 1998). And Jones admits to the difficulty of trial counsel bringing a stand-alone *Duren* claim, noting that the “necessary extra-record evidence means that the claim . . . only could have been adequately raised during post-conviction proceedings.” Jones presents no authority, nor can we find any, to support his claim that his counsels’ failure to request pre-trial discovery in support a change-of-venue motion was objectively unreasonable. Second, even if counsels’ performance were deficient, Jones does not attempt to demonstrate actual prejudice. Based on the overwhelming evidence against Jones, *see supra* n.11, it is far from clear that there is “a reasonable probability that a different . . . jury would have reached a different result.” *Ambrose v. Booker*, 801 F.3d 567, 578 (6th Cir. 2015). Consequently, Jones’s ineffectiveness claim fails to present unusual or extreme circumstances that might warrant equitable relief under Rule 60(b)(6).

For these reasons, the district court did not abuse its discretion by ruling that Jones’s ineffective assistance, fair-cross section claim did not satisfy extraordinary circumstances under Rule 60(b)(6).¹⁴

We affirm the district court’s denial of Jones’s Amendment and Supplement in full.

V.

Finally, we take up the issue presented in the most recent COA: whether trial counsel were ineffective for failing to prepare expert witnesses during the penalty phase.

¹⁴The district court also denied Jones’s motion for discovery because it was based upon the unsuccessful claims presented in Jones’s amendment and supplement. Because we agree with the district court as to the merits, we conclude that it was not an abuse of discretion to deny Jones’s motion for discovery.

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A.

The Warden contends that this claim is procedurally defaulted, so we cannot review it. Whether a claim is procedurally defaulted is a question we review *de novo*. *Hodges v. Colson*, 727 F.3d 517, 529 (6th Cir. 2013). Generally, we may not review federal claims that were procedurally defaulted in state courts. *Theriot v. Vashaw*, 982 F.3d 999, 1003 (6th Cir. 2020). “We have the option, however, to excuse a procedural default and review a defaulted claim on the merits if a petitioner demonstrates ‘(1) cause for the default and actual prejudice, or (2) that the failure to consider the claim will result in a fundamental miscarriage of justice.’” *Id.* (quoting *Williams v. Bagley*, 380 F.3d 932, 966 (6th Cir. 2004)).

Jones makes three arguments as to the procedural default of this claim: (1) he fairly presented the independent claim that appellate counsel was ineffective, constituting cause; (2) *Martinez* and *Trevino* allow us to reach the merits; and (3) the district court erred in adopting the state court’s procedural bar, so the claim is not procedurally defaulted. We disagree with the first two but find merit in his final argument.

First, Jones argues that he has demonstrated cause and prejudice to excuse any procedural default because he received ineffective assistance of appellate counsel on his direct appeal. But, as Jones conceded during oral argument, he never presented an ineffective-assistance-of-appellate-counsel claim to the district court. Thus, he cannot rely on such a claim to excuse the procedural default of his ineffective-assistance-of-trial-counsel claim. *See Seymour v. Walker*, 224 F.3d 542, 561 (6th Cir. 2000) (“Although Seymour raised these claims in her state postconviction proceeding, she did not raise them before the district court in the present habeas petition, and no certificate of appealability was issued with respect to them. Therefore, we may not consider them.”).

Second, Jones argues that *Martinez* and *Trevino* excuse any procedural default. But, as noted above, the *Martinez/Trevino* exception provides a limited avenue for courts to set aside procedural default caused by ineffective *postconviction* counsel, not procedural default caused by ineffective assistance of counsel on *direct appeal*. Thus, the *Martinez/Trevino* gateway is not open for Jones.

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Finally, Jones argues that his claim is not procedurally defaulted at all because the Ohio Court of Appeals erred when it applied its own procedural bar.

Generally, “when a state court decline[s] to address a prisoner’s federal claims because the prisoner had failed to meet a state procedural requirement[,] . . . the state judgment rests on independent and adequate state procedural grounds,” and we cannot review those federal claims. *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991). To determine whether a claim has been defaulted by a prisoner’s failure to observe a state procedural rule, we “must go through a complicated analysis.” *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). “First, the court must determine that there is a state procedural rule that is applicable to the petitioner’s claim and that the petitioner failed to comply with the rule.” *Id.* “Second, the court must decide whether the state courts actually enforced the state procedural sanction.” *Id.* “Third, the court must decide whether the state procedural forfeiture is an ‘adequate and independent’ state ground on which the state can rely to foreclose review of a federal constitutional claim,” which usually “involve[s] an examination of the legitimate state interests behind the procedural rule in light of the federal interest in considering federal claims.” *Id.* And finally, the petitioner must demonstrate “that there was cause for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.” *Id.* (citations and quotation marks omitted).

Jones argues that he satisfied the first *Maupin* condition because he complied with the procedural rule at issue (*res judicata*) and the Ohio Court of Appeals erred when it applied that rule. Thus, Jones argues, his claim is not procedurally defaulted, and because the claim has never been considered on its merits, he benefits from *de novo* review. *See Maples v. Stegall*, 340 F.3d 433, 436 (6th Cir. 2003). We agree.

In Ohio, *res judicata* “bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from [the judgment of convictions], any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment or conviction, or on an appeal from that judgment.” *State v. Cole*, 443 N.E.2d 169, 171 (Ohio 1982) (emphases and citation omitted). All claims, including ineffective-assistance-of-trial-counsel claims, must be raised on direct

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appeal. *Id.* Only claims involving evidence outside the trial record (sometimes referred to as evidence “*dehors*” the record) may be first raised in a petition for state post-conviction relief. *Id.*

But not all evidence will do. The Ohio Court of Appeals has explained that newly presented evidence must “meet some threshold standard of cogency; otherwise, it would be too easy to defeat the [res judicata rule] by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner’s claim beyond mere hypothesis and a desire for further discovery.” *State v. Lawson*, 659 N.E.2d 362, 367 (Ohio Ct. App. 1995) (citation omitted). Thus, “[t]o overcome the *res judicata* bar, evidence offered *dehors* the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record.” *Id.*

As the Warden points out, Ohio’s application of its res judicata rule is usually an adequate and independent state ground that triggers a finding of procedural default. *See, e.g., Gerth v. Warden, Allen Oakwood Corr. Inst.*, 938 F.3d 821, 829–30 (6th Cir. 2019). But “an incorrect application of a state *res judicata* rule does not constitute reliance on an adequate and independent state ground.” *Wogenstahl v. Mitchell*, 668 F.3d 307, 341 (6th Cir. 2012). Where a state court’s “res judicata ruling was factually incorrect[,] . . . it cannot be said that [a petitioner] failed to comply with a state procedural rule that was an ‘adequate and independent’ state ground under *Maupin*.” *Durr v. Mitchell*, 487 F.3d 423, 434–35 (6th Cir. 2007).

Indeed, we do not hesitate to conclude that Ohio courts erred in applying their res judicata rule under appropriate circumstances. *See, e.g., Morales v. Mitchell*, 507 F.3d 916, 937 (6th Cir. 2007) (holding that two new expert affidavits and a testifying expert’s post-trial affidavit precluded application of res judicata); *Greer v. Mitchell*, 264 F.3d 663, 675 (6th Cir. 2001) (finding evidence from “witnesses who never appeared at trial” to be “by definition *dehors* the record,” rendering the state court’s application of res judicata erroneous). Of course, this rule has limits, going beyond which will require a finding of procedural default. For example, a petitioner’s “outside evidence . . . of an expert affidavit concerning the standards of representation of a capital case,” will not suffice to excuse procedural default, *Hoffner v. Bradshaw*, 622 F.3d 487, 499 (6th Cir. 2010) (internal citation omitted), nor will affidavits from individuals who merely claim they would have testified at trial or provided more

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information if asked, *Wogenstahl*, 668 F.3d at 341–42. In short, if we conclude that a petitioner presented evidence outside the trial record that goes to the merits of an ineffective-assistance-of-trial-counsel claim, without which he could not have adequately pursued that claim on direct appeal, res judicata should not bar that claim on post-conviction review. And if, in that instance, the Ohio Court of Appeals erroneously determines that the claim is barred by res judicata, we may consider the merits of that claim de novo.

Applying this to Jones’s case is straightforward. On direct appeal, Jones did not raise an ineffective-assistance claim based on trial counsels’ choice to present Dr. Eisenberg’s testimony. *Jones*, 744 N.E.2d at 1184. Thus, he could not bring such a claim in a post-conviction proceeding unless it was accompanied by appropriate new evidence. In his post-conviction appeal, Jones did raise this ineffective-assistance claim and supported it with an affidavit from psychologist Hugh Turner. Dr. Turner, who had been contacted by postconviction counsel, interviewed Jones and conducted new testing. In Dr. Turner’s view, Dr. Eisenberg’s diagnosis of APD was incorrect: Jones primarily suffered from post-traumatic stress disorder. However, the Ohio Court of Appeals rejected that evidence and concluded the claim was barred by res judicata. *Jones*, 2002 WL 737074, at *6. Dr. Turner conducted new testing, which is, by definition, evidence outside the trial record. Thus, the Ohio Court of Appeals erred in applying its procedural bar. But before we so hold, we must address two concerns that lurk in the record.

First, the adequate and independent state ground doctrine is rooted in the principles of comity and federalism. If “a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the state judgment on direct review.” *Coleman*, 501 U.S. at 730. That would ignore “the State’s legitimate reasons for holding the prisoner.” *Id.* If we did not apply the adequate and independent state ground doctrine, state prisoners would be afforded “an end run around the limits of this Court’s jurisdiction and a means to undermine the State’s interest in enforcing its laws.” *Id.* at 731. And when the adequate and independent state ground is a procedural default, as here, “an additional concern comes into play. [The Supreme] Court has long held that a state prisoner’s federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any

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of his federal claims.” *Id.* In short, the state “should have the first opportunity to address and correct alleged violations of state prisoner’s federal rights.” *Id.*

Greer recognized this concern, noting that “[g]enerally, a federal habeas court sitting in review of a state-court judgment should not second guess a state court’s decision concerning matters of state law.” 264 F.3d at 675. But we went on to conclude that “when the record reveals that the state court’s reliance upon its own rule of procedural default [was] misplaced,” it is appropriate to second-guess a state court’s decision. *Id.* Notably, we did not discuss how much proof of error a petitioner must provide to circumvent the state court’s ruling—we just held that we may do so “when the record reveals” that an error occurred. *Id.* Must a petitioner present clear and convincing evidence that the state court erred, a preponderance of evidence that the state court erred, or just raise a doubt that the state court might have erred? It is not clear from *Greer*, and none of *Greer*’s progeny have considered this question. The principles of comity and federalism give us some pause: *Greer* should not be a golden ticket to de novo review in Ohio habeas cases. But, as our predecessors have done, we can leave the question unanswered, because Jones has satisfied any of these burdens. Jones has proven that his state post-conviction petition contained new, not-previously-available evidence, and the Ohio Court of Appeals erroneously rejected that evidence. In this case, given the clear and convincing evidence that the state court erred, we find it appropriate to disturb the state court’s ruling on state law.

Second, there is some disconnect between the extra-record evidence and the merits of the claim presented. While we have not examined precisely how closely related the new evidence must be to the merits of the claim presented, we know the outer limit is somewhere around *Hoffner* and *Wogenstahl*, where the “extra-record” evidence consisted of affidavits from lay witnesses bolstering an ineffective-assistance claim rather than affidavits from expert witnesses that bore on the merits of the claim. Here, the extra-record evidence is a new expert affidavit from Dr. Turner, opining that Jones’s primary diagnosis was post-traumatic stress disorder rather than APD. But the core of Jones’s claim is that trial counsel presented improper racialized

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evidence.¹⁵ Dr. Turner's affidavit does not address race at all; it simply challenges the propriety of Dr. Eisenberg's diagnosis. Thus, it is not immediately apparent how Dr. Turner's affidavit can be the "key" that unlocks the de novo "door" to the racialized evidence claim.

However, Dr. Turner *did* criticize Dr. Eisenberg's interpretation of Jones's test results and came to an alternate diagnosis. If Dr. Eisenberg had come to the same diagnosis as Dr. Turner, he would not have had occasion to testify that APD is a disease that affects a large percentage of "urban African American males," whose only chance at success is to be locked up. Put differently, if Dr. Turner's allegedly correct diagnosis was presented to the jury, Dr. Eisenberg's diagnosis (and the racialized testimony accompanying it) would not have been presented, thereby avoiding a potential constitutional violation. Thus, the affidavit is intertwined with the merits of Jones's ineffective-assistance claim and allows for de novo review.

Accordingly, we hold that the Ohio Court of Appeals erred in applying its own res judicata rule, so Jones's claim is not procedurally defaulted.

B.

Because the claim is not defaulted, AEDPA's deference does not apply, and we review the merits of Jones's claim de novo. *See Maples*, 340 F.3d at 436.

A successful ineffective-assistance claim requires a petitioner to demonstrate that: (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. The first prong is satisfied when a petitioner "show[s] that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The second prong is satisfied when the petitioner "show[s] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

¹⁵Jones is *not* bringing a claim that he was incorrectly diagnosed. He does make that argument as part of his mitigation evidence claim, but he does not do so here.

Relying on *Buck v. Davis*, 137 S. Ct. 759 (2017), Jones asserts that trial counsel were ineffective for “produc[ing] an expert who repeatedly told Mr. [Jones]’s jury that Black males are up to thirty times more likely to disregard the safety of others, run a high risk of injury to others, and to be contemptuous of the rights and suffering of others.” In *Buck*, a Texas jury convicted Duane Buck of murder. 137 S. Ct. at 767. At that time, imposition of the death penalty required a jury to find “unanimously and beyond a reasonable doubt—a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” *Id.* at 768 (citation and quotation marks omitted). If answered affirmatively, then the jury was asked to determine “whether mitigating circumstances nevertheless warranted a sentence of life imprisonment instead of death.” *Id.*

Trial counsel presented the testimony of psychologist Walter Quijano, who discussed the possibility of Buck’s future dangerousness using a seven-part test, with one part designated as “race.” *Id.* at 768–69. On cross-examination, Dr. Quijano agreed that “the race factor, [B]lack, increases the future dangerousness for various complicated reasons.” *Id.* at 769. The jury sentenced Buck to death. *Id.*

The Supreme Court determined that trial counsel performed deficiently because he presented Dr. Quijano’s testimony concerning race and violence and admitted his written report, even though “[c]ounsel knew that Dr. Quijano’s report reflected the view that Buck’s race disproportionately predisposed him to violent conduct; he also knew that the principal point of dispute during the trial’s penalty phase was whether Buck was likely to act violently in the future.” *Id.* at 775. The Court explained why the introduction of Dr. Quijano’s testimony was deficient:

Given that the jury had to make a finding of future dangerousness before it could impose a death sentence, Dr. Quijano’s report said, in effect, that the color of Buck’s skin made him more deserving of execution. It would be patently unconstitutional for a State to argue that a defendant is liable to be a future danger because of his race.

Id. The Court also explained its finding of prejudice:

Deciding the key issue of Buck’s dangerousness involved an unusual inquiry. The jurors were not asked to determine a historical fact concerning Buck’s

conduct, but to render a predictive judgment inevitably entailing a degree of speculation. Buck, all agreed, had committed acts of terrible violence. Would he do so again?

Buck's prior violent acts had occurred outside of prison, and within the context of romantic relationships with women. If the jury did not impose a death sentence, Buck would be sentenced to life in prison, and no such romantic relationship would be likely to arise. A jury could conclude that those changes would minimize the prospect of future dangerousness.

But one thing would never change: the color of Buck's skin. Buck would always be [B]lack. And according to Dr. Quijano, that immutable characteristic carried with it an "[i]ncreased probability" of future violence. Here was hard statistical evidence—from an expert—to guide an otherwise speculative inquiry.

Id. at 776 (citation omitted).

Racial evidence similarly infected Jones's case. Trial counsel focused on Dr. Eisenberg's testimony that "few" "urban African American males" diagnosed with APD actually commit murder, and in response, Dr. Eisenberg testified that "one out of four African males of the age 25 are incarcerated in some capacity or on some kind of strict probation. So that would eliminate those individuals from engaging in this conduct. So part of it is incarceration itself that precludes homicide." Dr. Eisenberg told the jury that, absent incarceration or probation, Black men diagnosed with APD would commit more murders. Much like the expert in *Buck*, Eisenberg's "opinion coincided precisely with a particularly noxious strain of racial prejudice"—that of Black men as "violence prone"—which offends the Constitution on its face and cannot be considered strategic. 137 S. Ct. at 776.

Buck therefore makes clear that Jones's trial counsel were ineffective for allowing the jury to hear Dr. Eisenberg's racially prejudicial testimony. And because, as part of the sentencing process, the jury passed judgment on whether this racist evidence *itself* was a mitigating factor, there is a reasonable probability that Jones would have received a lesser sentence if Dr. Eisenberg's testimony was not introduced. *See id.* at 776–77. Accordingly, we hold that Jones has satisfied both *Strickland* prongs and is entitled to a new sentencing.

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VI.

For these reasons, we affirm in part and reverse in part. We affirm in all respects the judgment of guilt entered on the jury's guilty verdict, but reverse the judgment of the death sentence because of the ineffective assistance of counsel at the penalty phase. We remand the case to the district court with instructions to issue a writ of habeas corpus vacating Jones's death sentence unless the State of Ohio conducts a new penalty-phase proceeding within 180 days of remand.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 07-3766/15-4308

ODRAYE G. JONES, n/k/a Malik Allah-U-Akbar,

Petitioner - Appellant,

v.

MARGARET BRADSHAW, Warden,

Respondent - Appellee.

FILED
Aug 22, 2022
DEBORAH S. HUNT, Clerk

Before: MOORE, COLE, and GRIFFIN, Circuit Judges.

JUDGMENT

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

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the case is AFFIRMED IN PART, REVERSED IN PART, and REMANDED to the district court with instructions to issue a writ of habeas corpus vacating Odraye G. Jones's death sentence unless the State of Ohio conducts a new penalty-phase proceeding within 180 days of the remand.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk