

663. The district court agreed, noting that "[i]n his state habeas petition, [Kasi] did not provide a single suggestion of a single fact present in the government's files which would go to the issue of his guilt or innocence, or the punishment imposed upon him." *Kasi*, 200 F. Supp. 2d at 599. As noted by the magistrate judge and district court, Kasi

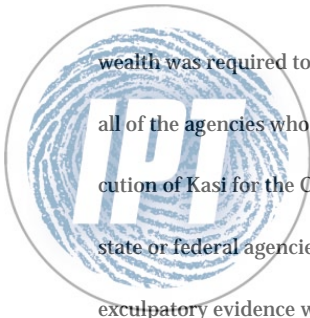
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failed to establish a basis for his claim that the federal agency files contained material evidence.

3.

Although we agree that Kasi has failed to make the requisite showing to establish an ordinary *Brady* claim, the district court's conclusion in this regard does not completely address Kasi's argument on appeal. Kasi asserts that he need not make the normal showing that exculpatory evidence exists which was not brought forward. Rather, he asserts that was denied due process because, under *Kyles v. Whitley*, 514 U.S. 419 (1995), the Commonwealth was required to conduct a *Brady* review of the FBI's files in order to locate and produce any exculpatory evidence that *might* exist within them.

In *Kyles*, the Supreme Court held that, because materiality for *Brady* purposes is measured in terms of the cumulative effect of suppressed evidence, the prosecutor is "assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." *Kyles*, 514 U.S. at 437. This, the Court held, "means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.*

Succinctly stated, Kasi claims that, under *Kyles*, the Common-



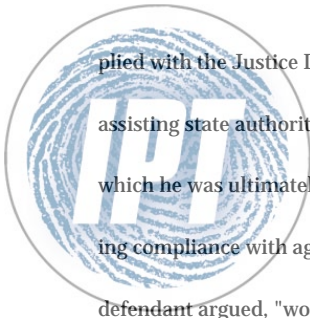
wealth was required to conduct a *Brady* review of all of the files of all of the agencies who assisted in the investigation, arrest, and prosecution of Kasi for the CIA murders, regardless of whether they were state or federal agencies. And, Kasi asserts, he need not point to any exculpatory evidence which was withheld to establish a violation of his *Brady* rights, as he would otherwise be required to do, so long as he establishes that no review was undertaken by the prosecutor. This absolute duty to review federal agency files must be imposed upon the Commonwealth, Kasi argues, because state criminal defendants will otherwise be left with no mechanism for obtaining exculpatory evidence to which they would otherwise be entitled under *Brady*.

Although Kasi's *Brady* claim is an interesting one, we find it to be procedurally and analytically flawed. As an initial premise, we reject

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Kasi's claim that *Kyles* imposes a duty upon a state prosecutor to conduct a *Brady* review of federal agency files. The FBI files requested by Kasi are in the possession of federal authorities, over whom the Commonwealth has no authority. *See Williams*, 170 F.3d at 434 & n.3; *Smith*, 159 F.3d at 882-83. Thus, the state prosecutor has no more authority to demand that the FBI allow him access to its files so that he can conduct a *Brady* review than the state court has to compel the FBI to allow the state criminal defendant such access.

Kasi's claim that there must be some exception to the *Touhy* bar in cases such as his because there is no mechanism by which he can assert his constitutional right to disclosure of the documents is also without merit. In *Williams*, the state criminal defendant also argued that we should "carve out an exception to the doctrine of sovereign immunity" discussed in *Smith*, "and rule that he need not have com-

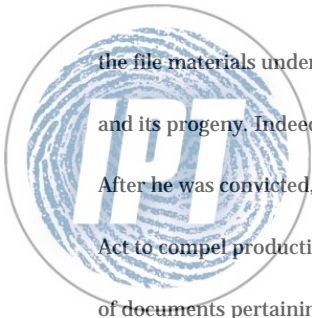


plied with the Justice Department's regulations, because the FBI was assisting state authorities in their investigation of the state crimes for which he was ultimately indicted." *Williams*, 170 F.3d at 434. Requiring compliance with agency regulations in such circumstances, the defendant argued, "would be tantamount to sanctioning a federal agency's decision to withhold potentially exculpatory evidence from a state criminal defendant." *Id.*

We rejected the claim, holding that a state criminal defendant who seeks investigative file materials from a federal agency must do so under the applicable agency regulations and that "[t]he proper method for judicial review of the agency's final decision pursuant to its regulations is through the Administrative Procedure Act ('APA')." *Id.*; see also 5 U.S.C.A. §§ 701-706 (West 1996). If "aggrieved by the response of a federal law enforcement agency made under its regulations," the state criminal defendant is not without a remedy. *Williams*, 170 F.3d at 434. He "may assert his constitutional claim to the investigative information before the district court, which possesses authority under the APA to compel the law enforcement agency to produce the requested information in appropriate cases." *Id.*⁷

⁷ As we noted in *Williams*, [o]n review, district courts have jurisdiction to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or

Accordingly, the Administrative Procedure Act provides an appropriate procedure for judicial review of a decision by a federal agency to withhold investigation materials from a state criminal defendant, in which the state criminal defendant can proffer any perceived rights to



the file materials under the constitutional principles set forth in *Brady* and its progeny. Indeed, Kasi availed himself of such a procedure.

After he was convicted, he sued under the Freedom of Information Act to compel production by the Department of Justice and the FBI

of documents pertaining to him. In response, the FBI released por-

tions of its files, but withheld others under a FOIA exception for "in-

vestigatory files compiled for law enforcement purposes whose

release ` could reasonably be expected to interfere with enforcement

proceedings." *Kansi*, 11 F. Supp. 2d at 43-44 (quoting 5 U.S.C.A.

552(b)(7)(A) (West 1996)). Kasi thereafter demanded the remainder

of the documents, asserting in part that the information sought might

be exculpatory under *Brady*. The district court rejected the demand

and dismissed the case. Apparently, Kasi did not choose to pursue an

appeal of that ruling to the District of Columbia Court of Appeals.

In this case, we are presented with the much narrower issue of

whether the Virginia Supreme Court's rejection of Kasi's *Brady* claim

was contrary to or an unreasonable application of the principles set

forth by the Supreme Court in *Brady* and *Kyles*. It clearly was not

and, therefore, Kasi is not entitled to habeas relief on this basis.

IV.

Kasi's final contention is that he was deprived of a fair trial, as

guaranteed by the Due Process Clause of the Fourteenth Amendment,

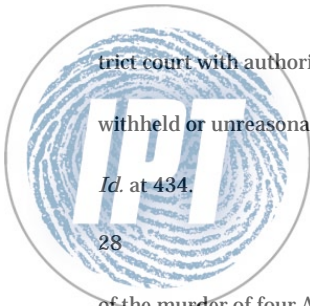
because the state trial court refused his request to conduct individual

voir dire of the jurors to determine if they had acquired knowledge

otherwise not in accordance with law," including action that is

"contrary to constitutional right, power, privilege, or immunity."

5 U.S.C.A. § 706(2)(A)-(B). In addition, the APA vests the dis-



strict court with authority to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C.A. § 706(1).

Id. at 434.

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of the murder of four Americans that had occurred in Karachi, Pakistan, while the trial was in progress.

A.

No one disputes the high profile nature of this case. Indeed, the record reveals that some heightened security measures were taken to protect the jurors from the outset, including maintaining the confidentiality of their identities and, while not sequestering them, bringing them to the courthouse in a group from an off-site meeting location. After the jury rendered its verdicts in the guilt phase, the members submitted a note to the trial court inquiring as to whether they should be aware of any activities or information regarding their personal safety and whether there were any precautions or security measures available to them through the Commonwealth. In sum, the jurors requested "a security briefing as to possible risks [they] may encounter." J.A. 446. Kasi's counsel requested individual voir dire of the jurors to determine if there had been any discussion or speculation of danger and moved, in the alternative, for a mistrial. The trial court denied both motions. Instead, the court brought the jurors in collectively, assured them that the security measures that had been taken were the same measures taken in any potential capital and high-publicity case, assured them that the court was aware of no particular danger to them in this case, and invited them to individually express any particular concerns through another note. No further concerns were expressed by the jurors, and the court later commented that he



had observed no further signs of concern.

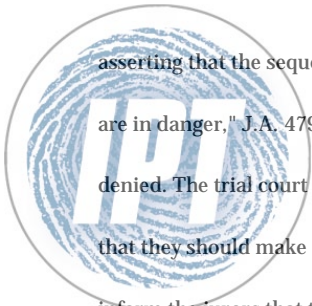
Two days later, four Americans were murdered in Karachi, Pakistan. News media raised the possibility that the killings were related to the conviction of Kasi as retaliation by his sympathizers. Kasi's

counsel brought the news reports to the court's attention the following morning and requested individual voir dire of the jurors to determine if any had knowledge of the event. The trial court denied this motion, as well as a follow-up motion for a mistrial, noting that defense counsel's fear that members of the jury would not be honest in a group setting was speculative. Instead, the court ruled that it would be best to conduct a slightly heightened questioning of the members of the jury as a group. Thus, the trial court brought the jury in and conducted his usual inquiry as to whether anyone had been exposed to any media

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accounts about the trial, and then added a comment that the court was "particularly concerned about . . . news articles that were on the front page of various newspapers and on TV and on the radio related by the press to this case." J.A. 467. There was no response to either inquiry, and trial resumed.

Later that same day, the trial court noted that the press coverage and requests for press credentials had escalated since the Karachi murders, and the court expressed concern that the coverage had shifted from the reporting of facts and events of the trial to "opinion and speculation." J.A. 471. In view of this "crazy" reporting, J.A. 472, and to avoid having to deal with a defense motion for a mistrial each day based upon the escalated and sensationalized coverage, the trial court ruled that it would be best to sequester the jury for the balance of the sentencing phase and for their deliberations. Kasi's counsel,



asserting that the sequestration would send "a terrible signal that they are in danger," J.A. 479, again moved for a mistrial, which was denied. The trial court then brought the jurors in and advised them that they should make preparations for sequestration, taking care to inform the jurors that the sequestration had become necessary because

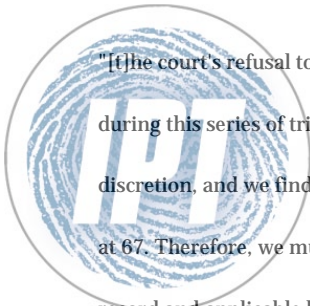
the trial was in the finishing stages and that he felt they needed to be protected from press coverage, which had become very opinionated.

Shortly after being informed that the jury would be sequestered, a single juror wrote a private note advising the trial court that she had heard the beginnings of a report about Americans being shot and killed in Pakistan before she could turn off her clock-radio that morning. In the note, the juror stated that she did not bring up the matter earlier because she was not sure if the report was related to the case, but that the sequestration decision had caused her to consider the possibility that it might be related. After consulting with counsel, the court and counsel conducted individual voir dire of this juror. The juror repeatedly stated that she did not know at the time she heard the report, and still did not know, whether the Pakistani incident was related to the trial. She further testified that she had not discussed the matter with any of the other jurors and that, in any event, the portion of the report she had heard would have no effect upon her ability to be fair and impartial and to decide the case based solely upon the law and the evidence. Defense counsel's request to conduct individual voir dire of the remaining members of the jury regarding their knowl-

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edge of the incident was again denied, as were the subsequent motions for mistrial.

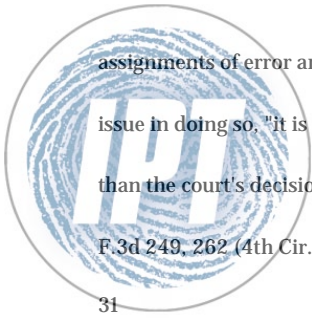
On direct appeal, the Virginia Supreme Court summarily held that



"[t]he court's refusal to grant [Kasi's] repeated motions for a mistrial during this series of trial events was an exercise of the court's sound discretion, and we find no abuse of that discretion." *Kasi*, 508 S.E.2d at 67. Therefore, we must conduct an independent review of the record and applicable law to determine whether the result reached by the state court was "contrary to," or "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d)(1); see *Bell*, 236 F.3d at 163.

B.

As an initial matter, we address the Commonwealth's assertion that Kasi procedurally defaulted this claim by arguing summarily and under Virginia caselaw that the trial court abused its discretion by not allowing individual voir dire regarding the Karachi killings on direct appeal, and by not raising the issue at all on state habeas review. See *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam) (reversing grant of writ of habeas corpus where petitioner, on direct appeal in state court, claimed that evidentiary ruling violated state law but did not claim violation of any federal constitutional right). The trial transcript reveals that Kasi's counsel clearly objected to the trial court's refusal to conduct individual voir dire as a violation of his right to a fair and impartial jury under *both* the United States Constitution and the Virginia Constitution, and it appears that he pursued his claim on direct appeal to the Virginia Supreme Court. Thus, we are satisfied that the federal constitutional claim presented in Kasi's federal habeas petition was "'fairly presented' to the state court[]" for decision and is properly considered here. *Corcoran*, 220 F.3d at 288. Although the Supreme Court of Virginia summarily dismissed Kasi's



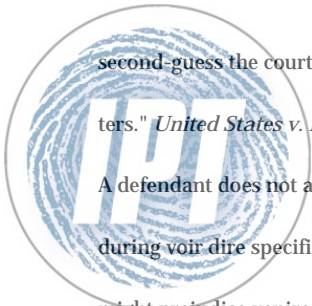
assignments of error and did not discuss the federal constitutional issue in doing so. "it is the petitioner's argument to the court rather than the court's decision that is dispositive." *Weeks v. Angelone*, 176 F.3d 249, 262 (4th Cir. 1999).

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C.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a state criminal defendant the right to be tried "by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."

Irvin v. Dowd, 366 U.S. 717, 722 (1961) (internal quotation marks omitted). Voir dire examination is a principal means of enabling the court to ensure that an impartial jury decides the case. *See Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) ("Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges"); *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion) ("Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored").

It is well established, however, that a trial court has "broad discretion in conducting the voir dire of the jury, and particularly in phrasing the questions to be asked." *United States v. Jones*, 608 F.2d 1004, 1007 (4th Cir. 1979); *see, e.g., Mu'Min*, 500 U.S. at 424 (noting that "the trial court retains great latitude in deciding which questions should be asked on voir dire"); *Ristaino v. Ross*, 424 U.S. 589, 594 (1976) ("Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." (internal quotation marks omitted)). And, "[p]art and parcel of [this] deference to the trial court's conduct of voir dire is a reluctance to



second-guess the court's decision to refuse inquiry into certain matters." *United States v. Lancaster*, 96 F.3d 734, 739 (4th Cir. 1996).

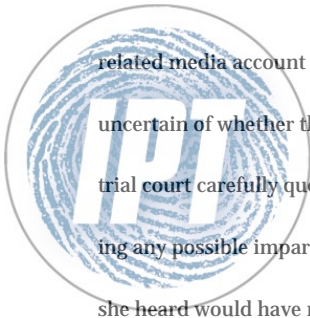
A defendant does not always have the right "to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him." *Ristaino*, 424 U.S. at 595.

Rather, "the State's obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant." *Id.* at 595 (footnote omitted).

Thus, we have held that, "[i]n the context of cases . . . in which the proposed voir dire question does not address issues of racial or ethnic prejudice," the trial court "need not pursue a specific line of questioning on voir dire, provided the voir dire as a whole is reasonably sufficient to uncover bias or partiality in the venire." *Lancaster*, 96 F.3d at 739-40.

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In this case, the trial court conducted its usual voir dire of the jury on the morning after the news stories emerged concerning the Karachi murders, inquiring as to whether any member of the jury had "received any information from the media, friends, family, anywhere, in any way related to th[e] case." J.A. 467. Receiving no response, the court then went further to inform the jury that the court was "particularly concerned about . . . news articles that were on the front page of various newspapers and on TV and on the radio related by the press to th[e] case" and advised the jury that it "want[ed] to be sure that nobody has anything that you need to bring to our attention about anything that you have heard." J.A. 467. Prompted by the court's sequestration of the jury due to increased press coverage, a single juror later came forward out of concern that she may have heard a



related media account that morning. This juror, however, remained uncertain of whether the account was related and, in any event, the trial court carefully questioned the juror on an individual basis regarding any possible impartiality, receiving multiple assurances that what she heard would have no effect upon her ability to render a verdict based solely upon the facts and evidence presented during the trial.

Kasi has pointed to nothing that would indicate that any of the other jurors had heard about the Karachi killings, nor is there any indication that any member of the group would not or did not truthfully respond to the trial court's questions to the group.

Finding that the trial court's questions were sufficient to ensure the absence of any bias or prejudice on the part of the jury, the trial court denied Kasi's motions for individual voir dire and, in the alternative, for mistrial, and the Virginia Supreme Court found that the trial court did not abuse its discretion in this regard. We agree. Having reviewed the voir dire conducted by the trial court, we too are satisfied that it was sufficient to assure that Kasi was tried by a fair and impartial jury. Because the Virginia Supreme Court's decision that the trial court did not abuse its discretion in refusing to allow individual voir dire was not contrary to or an unreasonable application of federal law, as determined by the United States Supreme Court, we reject the claim for habeas relief on this basis as well.

V.

For the foregoing reasons, we conclude that the district court correctly denied Kasi's petition for habeas relief. Accordingly, we deny Kasi's request for a certificate of appealability and dismiss the appeal.

DENIED AND APPEAL DISMISSED

