No. 18-8682

In the Supreme Court of the United States

SEAN CARTER,

Petitioner,

v.

WANZA JACKSON-MITCHELL, Warden,

Respondent.

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

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

BENJAMIN M. FLOWERS*
State Solicitor
**Counsel of Record*
DIANE R. BREY
Deputy Solicitor
BRENDA S. LEIKALA
Senior Assistant Attorney General
Office of the Ohio Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@ohioattorneygeneral.gov

Counsel for Respondent
Wanza Jackson-Mitchell

CAPITAL CASE – NO EXECUTION DATE SET

QUESTIONS PRESENTED

Did the Sixth Circuit err when it followed Supreme Court precedent forbidding federal habeas courts from awarding habeas relief based on facts never presented in any state-court proceeding?

LIST OF PARTIES

The Petitioner is Sean Carter, an Ohio death row inmate at the Warren Correctional Institution.

The Respondent is Wanza Jackson–Mitchell, the Warden of Warren Correctional Institution. Jackson–Mitchell is substituted for her predecessor, Bobby Bogan, Jr. *See* Fed. R. Civ. P. 25(d).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 3

REASONS FOR DENYING THE WRIT 10

I. Carter did not press, and the Sixth Circuit did not resolve, an *Ake* claim below. 11

II. The Sixth Circuit properly assessed Carter's ineffective-assistance claim with reference only to evidence that was available in state court. 13

III. This is a bad vehicle for reviewing the question presented, because the Sixth Circuit gave an alternative and independent justification for its decision. 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Ake v. Oklahoma,
470 U.S. 68 (1985) .....*passim*

Atkins v. Virginia,
536 U.S. 304 (2002) 18

Barraza v. Cockrell,
330 F.3d 349 (5th Cir. 2003) 12

Brumfield v. Cain,
135 S. Ct. 2269 (2015) 17, 18

Burt v. Titlow,
571 U.S. 12 (2013) 15, 21

Carter v. Bogan,
900 F.3d 754 (6th Cir. 2018) .....*passim*

Carter v. Bradshaw,
583 F. Supp. 2d 872 (S.D. Ohio 2008)..... 7, 8

Carter v. Bradshaw,
644 F.3d 329 (6th Cir. 2011) 8

Carter v. Bradshaw,
No. 3:02-cv-524, 2015 U.S. Dist. LEXIS 133948 (N.D. Ohio Sept. 30, 2015).....*passim*

Cullen v. Pinholster,
563 U.S. 170 (2011) .....*passim*

Cutter v. Wilkinson,
544 U.S. 709 (2005) 11

Grant v. Lockett,
709 F.3d 224 (3d Cir. 2013)..... 15

Gulbrandson v. Ryan,
738 F.3d 976 (9th Cir. 2013) 15

Harrington v. Richter,
562 U.S. 86 (2011) 12, 17, 21

Ryan v. Gonzales,
568 U.S. 57 (2013) ..... *passim*

Sexton v. Beaudreaux,
138 S. Ct. 2555 (2018) 20

State v. Carter,
89 Ohio St. 3d 593 (2000) ..... *passim*

State v. Carter,
98 Ohio St. 3d 1486 (2003) 6

State v. Carter,
No. 99-T-133, 2000 Ohio App. LEXIS 5935 (Ohio Ct. App. 2000) 5, 6, 7, 19

Strickland v. Washington,
466 U.S. 668 (1984) 16, 20, 21

Williams v. Taylor,
529 U.S. 362 (2000) 12

Statutes

28 U.S.C. § 2254 ..... *passim*

INTRODUCTION

Sean Carter murdered and anally raped his adoptive grandmother in 1997. He robbed her, too. After hearing this evidence and convicting him of murder, a jury recommended the death penalty. The trial court accepted that recommendation.

In this habeas case, Carter contends that he was prejudiced by ineffective assistance from his trial counsel. According to Carter, those attorneys should have obtained an MRI of his brain, which *might* have detected organic brain damage that *might* have been useful in the mitigation phase of his case. To obtain relief under this theory, Carter cannot simply show that he is right—it is not enough to establish that his attorneys provided ineffective assistance in violation of the Sixth Amendment right to counsel. The reason is the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which governs this habeas case. AEDPA permits federal courts to award habeas relief to prisoners in state custody *only if* they are in custody pursuant to a state-court judgment that either: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2).

Carter claims that the state-court decisions rejecting his ineffective-assistance-of-counsel claims rest "on an unreasonable determination of the facts," § 2254(d)(2). Specifically, he points to evidence, which he developed during his *federal* habeas proceedings, that supposedly shows he has neurological

impairments. This, he says, shows that trial counsel prejudiced him by failing to obtain a brain scan before mitigation proceedings. Carter further suggests, apparently relying on *Ake v. Oklahoma*, 470 U.S. 68 (1985), that the federal courts may consider this later-developed evidence because he was not able to develop it in state court.

The Sixth Circuit rejected this theory, correctly recognizing that AEDPA and binding Supreme Court precedent forbid federal habeas courts from awarding relief based on evidence that was not "presented in the State court proceeding." § 2254(d)(2). *See also* § 2254(d)(1); *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011); *Carter v. Bogan*, 900 F.3d 754, 767–68, 770-779 (6th Cir. 2018). Indeed, in Carter's last trip to this Court, the Court unanimously recognized that *Pinholster* applied to the claims at issue in this case, precluding consideration of any evidence developed after Carter's state-court proceedings. *Ryan v. Gonzales*, 568 U.S. 57, 75 & n.15 (2013); *see also Carter v. Bogan*, 900 F.3d at 774 n.9.

Regardless, the Sixth Circuit supported its denial of habeas relief with an independent justification: counsel's performance was not even deficient. To prove an ineffective-assistance claim, a plaintiff must show *both* deficient performance by counsel and prejudice. Any (contemporaneous) evidence of neurological defects would go to prejudice. But even then, Carter would have to show deficient performance. And the Sixth Circuit unanimously held that counsel *did not* perform deficiently by declining to pursue a brain scan. *Carter*, 900 F.3d at 777–78. For one thing, counsel could reasonably rely on the testimony of a medical expert who stated

that a brain scan would not help Carter's case. Moreover, there were valid strategic reasons *not* to get a brain scan. Among other things, the absence of a brain scan created "uncertainty over the existence of organic brain damage," which counsel could have used "to Carter's benefit" in mitigation. Had the brain scan resolved that uncertainty *against* Carter—had it shown no organic brain damage—that strategic option would have been eliminated. *Id.* at 777 n.11.

In sum, Carter's claim for relief fails. First, the Sixth Circuit rightly refused to upset a state conviction based on evidence developed in federal habeas proceedings. Second, the failure to consider that evidence ended up being irrelevant, because the Sixth Circuit rejected Carter's ineffective-assistance claim on an independent basis. Third, Carter does not allege a circuit split; he seeks pure error correction. Therefore, the fact that the Sixth Circuit did not err defeats his argument for certiorari.

STATEMENT

1. When Sean Carter's adoptive mother threw him out of the home, he moved in with his adoptive grandmother, Veader Prince, in Trumbull County, Ohio. *State v. Carter*, 89 Ohio St. 3d 593, 593 (2000). He moved out temporarily to serve time at a local jail for theft. But he completed his sentence in 1997, and at that point tried to move in with Prince once more. He did not ask for permission. Rather, he entered the home and went to sleep when Prince was out of the house. Upon learning of this, Prince told her son, Vernon Prince, to give Carter the keys and title to Carter's car so that Carter could leave her house. Vernon did as asked, and Prince told Carter never to return. *Id.* at 593–94.

But Carter did return, hoping he could convince Prince to let him stay. When she refused, Carter grabbed a knife from the kitchen, stabbed Prince eighteen times, and anally raped her. *Id.* at 595–96. He covered her corpse in a pile of clothes and cleaned up a bit more. In case someone noticed the blood in the house, he left a note on the kitchen table that said: "Took Sean to the hospital." *Id.* at 596. Carter took $150 from Prince's purse, changed his clothes, and put his bag of clothes in one of his grandmother's vans. When he could not start the van, he took Vernon Prince's car instead and drove off. He stole another car's licenses plates to disguise his identity. *Id.*

Pennsylvania police found Carter in the stolen car. *Id.* at 595. Upon learning that Carter was wanted for murder in Trumbull County, Ohio, they informed the Trumbull County Sheriff's Office. *Id.* at 596. When deputies arrived in Pennsylvania to question Carter, he waived his *Miranda* rights and confessed to the murder. *Id.* Carter claimed that he remembered stabbing Prince, but that the next thing he could recall was washing off his hands and the knife in Prince's kitchen.

2. An Ohio jury convicted Carter of aggravated murder with two capital specifications (for aggravated robbery and rape). The jury also convicted him of aggravated robbery, rape, and criminal trespass. *Id.* at 597. After the penalty-phase trial, the jury recommended a death sentence for Carter on the aggravated murder charge and specifications. The trial court accepted their recommendation, sentencing Carter to death. *Id.* at 597.

Before the jury trial commenced, Carter had two competency hearings, both of which ended in his being found competent to stand trial. *Id.* at 603–05. At the first competency hearing in December 1997, Dr. Stanley Palumbo testified that Carter understood the nature of the proceedings against him and was competent to stand trial. *Id.* at 604. After Carter entered a plea of not guilty by reason of insanity, in February 1998, the trial court appointed three experts to examine Carter for sanity at the time of the offense: Dr. Palumbo (the court's expert), Dr. Robert Alcorn (an expert for the State), and Dr. Steven King (an expert for Carter).

Because Dr. King expressed some concerns about Carter's behavior during an interview, the trial court ordered a second competency hearing. All three doctors testified. Dr. Palumbo, after reexamining Carter, adhered to his prior opinion that Carter was competent. *Id.* at 604. Dr. Alcorn likewise opined that Carter was competent to stand trial, *id.*, and stated that he believed Carter to be "malingering" and not mentally ill, *State v. Carter*, No. 99-T-133, 2000 Ohio App. LEXIS 5935, at *13 (Ohio Ct. App. 2000). Dr. King disagreed. He opined that Carter was not able to assist in his own defense, in part because of his stated desire to kill one of his own attorneys. However, Dr. King admitted that the question of Carter's competence was "a close call." *Carter,* 89 Ohio St. 3d at 604. Additionally, when asked by the trial court whether, in his opinion "an MRI would not assist us in this case to render any psychological opinions involving either sanity or competency or mental defect?", Dr. King answered: "No." *See Carter v. Bradshaw*, No. 3:02-cv-524, 2015 U.S. Dist. LEXIS 133948, at *79-*81 (N.D. Ohio Sept. 30, 2015) (quoting

Trial Tr., Vol. VI, at 564–66). Notwithstanding the double negative, all parties and the court understood Dr. King as stating that an MRI would not help determine whether Carter was competent or suffered from a mental defect. In light of Dr. King's testimony, the state trial court asked Carter's counsel if Carter needed funds for an MRI. One of Carter's lawyers responded that he "'wanted that done for the competency,' but that he would decline the court's offer of funding for mitigation purposes 'unless we can find some other organic evidence that would substantiate that.'" *Id.* at *94–*95 (quoting Trial Tr., Vol. VII, at 870); *see also Carter*, 89 Ohio St. 3d at 606.

The Supreme Court of Ohio, on direct appeal, affirmed Carter's conviction and death sentence. *Carter*, 89 Ohio St. 3d 593. The court concluded that "[a] review of the proceedings does not warrant" "disregard[ing] the opinions of the experts" concerning Carter's competency to stand trial, and that the trial court's decision on competency was not "unreasonable, arbitrary or unconscionable." *Id.* at 605.

3. Carter unsuccessfully pursued state-postconviction relief. *See State v. Carter*, No. 99-T-133, 2000 Ohio App. LEXIS 5935 (Ohio Ct. App. 2000), *dismissed and review denied*, 91 Ohio St. 3d 1509 (2001); *see also State v. Carter*, 98 Ohio St. 3d 1486 (2003) (denying application to reopen direct appeal). In his postconviction case, Carter argued that his counsel was ineffective for failing to investigate his medical and social history or hire a mitigation specialist. The Ohio Court of Appeals rejected his argument as "not supported by the record," noting in the

process that Carter had not submitted any evidentiary documents or pointed to any evidence outside of the record that would indicate he was entitled to relief or a hearing on this claim. *Carter*, 2000 Ohio App. LEXIS 5935, at *8–*10.

4. Carter filed his federal habeas petition in 2002. At that point, the District Court held a competency hearing of its own to determine whether Carter was competent to assist with his federal habeas case.

At that hearing, two psychologists testified on behalf of Carter: Dr. Robert Stinson and Dr. Michael Gelbort. Neither had testified at his trial or in state-postconviction proceedings. Dr. Gelbort, a clinical neuropsychologist, testified that Carter's ability to learn and retain information was poor. Dr. Stinson testified that Carter, as of 2005, was suffering from schizophrenia, as well as depressive disorder, a personality disorder, and substance dependence in remission. Stinson also testified about Carter's childhood and mental health history, noting that Carter's birth mother was diagnosed with schizophrenia prior to his birth, and relating Carter's experiences in foster care and two adoptive placements. *Carter v. Bradshaw*, 583 F. Supp. 2d 872, 874–77 (S.D. Ohio 2008). (Carter's trial counsel in 1998 also had also presented evidence of Carter's family history and mental health history through Dr. Nancy Dorian and Dr. Sandra McPherson. *See Carter*, 900 F.3d at 776–77; *see also* No. 16-3474 (6th Cir.), R.24-10, at 3363–3421.) None of the doctors or psychologists who testified at any phase of Carter's 1998 trial concluded that Carter was then suffering from schizophrenia, although Dr. Dorian testified during the mitigation phase that Carter was "schizoid-prone," *State v. Carter*, 2000

Ohio App. LEXIS 5935, at *9, and Dr. King opined at the second competency hearing that Carter suffered from a "psychotic disorder not otherwise specified," No. 16-3474 (6th Cir.), R.24-02, at 649, 651. Dr. McPherson testified at the mitigation phase of Carter's criminal trial that he had an adjustment disorder, substance abuse, "periodic psychotic episodes," "some hallucinatory activity," and an antisocial, or borderline, personality disorder. No. 16-3474 (6th Cir.), R.24-10, at 3376–78. She testified that Carter had the "genetic potential" for schizophrenia, and that the emergence of schizophrenia was possible at some point. *Id.* at 3377.

The District Court found Carter incompetent to proceed with his federal habeas case, and dismissed the case without prejudice, prospectively tolling the statute of limitations. *Carter*, 583 F. Supp. 2d at 884–85. The Sixth Circuit largely agreed, though it amended the District Court's judgment to order Carter's habeas petition indefinitely stayed with regard to any habeas claims requiring Carter's assistance. *Carter v. Bradshaw*, 644 F.3d 329 (6th Cir. 2011).

This Court vacated that decision. In *Ryan v. Gonzales*, 568 U.S. 57 (2013), the Court took up Carter's case together with another case out of the Ninth Circuit (which is where the case's caption comes from), and held unanimously that there is no right to competency in federal habeas proceedings. *Id.* at 63. In the course of its opinion, the Court concluded that a stay would not aid Carter in winning relief on three of his habeas claims—including the ineffective-assistance-of-counsel claim raised here. The reason? Those claims were "adjudicated on the merits in state postconviction proceedings, and thus, were subject to review under" AEDPA. *Id.* at

75 & n.15. This meant there was no need to develop further evidence, because "[a]ny extra record evidence" relating to those claims—that is, evidence outside the state-court record—would "be inadmissible" under *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). *Id.* "Consequently, these claims [did] not warrant a stay." *Id.*

5. On remand, the District Court reviewed Carter's claims and denied his habeas petition. With respect to Carter's ineffective-assistance claim, the District Court noted that Carter's counsel could well have decided, for sound strategic reasons, that getting an MRI would pose a risk greater than its potential benefits. *Carter*, 2015 U.S. Dist. LEXIS 133948, at *95. For example, the District Court explained, "an MRI may have shown that Carter had no brain defect at all, and actually weakened Carter's position." *Id.* at *95. On top of this, Dr. King himself opined at the second competency hearing that an MRI would not have helped Carter establish a mental defect. *Id.*

The Sixth Circuit affirmed. It first stressed counsel's good-faith reliance on Dr. King's opinion. The court explained that, "unless a petitioner shows that counsel had 'good reason' to believe the [expert doctor] to be incompetent, 'it [is] objectively reasonable for counsel to rely upon the doctor's opinions and conclusions.'" *Carter*, 900 F.3d at 777. Because the mitigation strategy focused on Carter's traumatic upbringing and later mental illness, "counsel could have plausibly determined that an MRI would not have furthered Carter's defense." *Id.* Indeed, if the scans had come back showing no brain damage, counsel would have been blocked from suggesting that there might be a neurological explanation for

Carter's behavior during closing arguments. *See id.* n.11. On this basis, the Sixth Circuit concluded that Carter's counsel's performance, whether reviewed *de novo* or under AEDPA's deferential standard, was not constitutionally deficient. *Id*. at 777–78.

6. After the Sixth Circuit declined to rehear Carter's case *en banc*, Carter petitioned for a writ of certiorari.

REASONS FOR DENYING THE WRIT

There is a strange mismatch between Carter's briefing and the litigation below. His briefing here rests heavily on an alleged misapplication of *Ake v. Oklahoma*, 470 U.S. 68 (1985)—the case which held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id*. at 83. Carter's briefing in the Sixth Circuit below, however, did not even cite the case, and he did not seek relief for an *Ake* error.

Carter's theory seems to be this: First, the state-postconviction courts violated *Ake* by failing to give him sufficient resources to develop evidence of neurological impairment, which he could have used to show that his trial counsel's failure to obtain an MRI was prejudicial. Second, he later developed that evidence in federal court. *Ergo*, it was improper for the Sixth Circuit to ignore that later-developed evidence in Carter's habeas proceedings.

The Court should not grant review to hear Carter's argument. The argument does not implicate a circuit split; Carter does not even allege one. So Carter is seeking pure error correction. But the Sixth Circuit did not err. Rather, it correctly concluded that it could not consider evidence that was not before the state courts. *See below* 13–20. In any event, this is a bad vehicle for considering whether the Sixth Circuit erred by failing to consider evidence developed in federal court, because the Sixth Circuit supported its judgment with an alternative ground that would moot the issue: it held that Carter's counsel did not perform deficiently, which independently defeats any ineffective-assistance claim. *See below* 20–23.

This Court should deny the petition for a writ of certiorari.

I. CARTER DID NOT PRESS, AND THE SIXTH CIRCUIT DID NOT RESOLVE, AN *AKE* CLAIM BELOW.

Carter's entire claim is apparently premised on a supposed *Ake* error. Carter relies upon *Ake* to argue that the state-postconviction court should have granted him a hearing and funding to pursue his claims. See Pet.ii, 12.

There are a couple of problems with Carter's reliance on *Ake*. The first is that he did not make any *Ake* argument in the Sixth Circuit. Indeed, Carter's Sixth Circuit opening brief does not even cite the case. Because this is a "court of review, not of first view," the Court ought not consider this late-raised claim. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

The second problem with Carter's argument is that the state courts did not violate *Ake*—certainly Carter has not established a violation egregious enough to permit relief under AEDPA. *Ake* held "that when a defendant demonstrates to the

trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. The case did not establish a federal constitutional right to have a brain scan conducted for the mitigation phase of a capital criminal trial, or any right to have expert funding in *postconviction* proceedings. *See Barraza v. Cockrell*, 330 F.3d 349, 352 (5th Cir. 2003) (rejecting as meritless a claim that state and federal habeas courts' denial of funding to obtain additional mental examination of capital habeas petitioner violated *Ake*).

To establish his entitlement to relief under AEDPA, Carter would have to do even more than show an *Ake* error. Under 28 U.S.C. § 2254(d)(1), he would have to show that the state courts' decisions on the funding he sought were "contrary to" or an "unreasonable application of" Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state court's decision is "contrary to" the Court's cases *only if* "the state court applies a rule that contradicts the governing law set forth in [the Court's] cases," or "the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [its] precedent." *Id.* at 405–06. A state court's decision "unreasonably applies" Supreme Court precedent only if its application is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v.*

Richter, 562 U.S. 86, 103 (2011). Since *Ake* does not squarely apply to postconviction funding of the sort Carter says he was entitled to, the Ohio appellate court's rejection of Carter's ineffective-assistance claim without a hearing or funding for an additional expert (beyond the one appointed for him to assess his sanity and to testify at the competency hearing before his criminal trial) was not contrary to or an unreasonable application of clearly established federal law.

II. THE SIXTH CIRCUIT PROPERLY ASSESSED CARTER'S INEFFECTIVE-ASSISTANCE CLAIM WITH REFERENCE ONLY TO EVIDENCE THAT WAS AVAILABLE IN STATE COURT.

The reliance on *Ake* is, in truth, something of a side show. Carter's real complaint is that the Sixth Circuit refused to consider the evidence of mental impairment that he developed in his federal habeas proceedings. He does not point to any circuit split on this issue, but he does say the Sixth Circuit erred. It did not.

The Sixth Circuit properly applied *Cullen v. Pinholster*, 563 U.S. 170 (2011), to ignore evidence developed in the District Court after Carter's state-court proceedings were over. The Sixth Circuit correctly rejected Carter's attempt to show an unreasonable determination of the facts by the state court in light of evidence developed in federal habeas proceedings that did not exist at the time of the state-court proceedings.

1. To understand Carter's theory, it is necessary first to understand *Pinholster* and § 2254(d)(2).

Begin with *Pinholster*. In that case, this Court reversed the Ninth Circuit's ruling that upheld habeas relief for a petitioner based on evidence developed in federal district court, long after the petitioner's criminal trial. In state habeas

proceedings, Pinholster argued that his lawyers performed deficiently at the penalty stage of his capital-murder trial by failing to adequately investigate and present mitigating evidence, including evidence of his mental disorders. He supported his state-habeas petition with school, medical, and legal records, declarations from family members, and a psychiatrist's report (developed after trial) which diagnosed Pinholster with bipolar disorder and seizure disorders.

The California Supreme Court denied Pinholster's claim as without merit. *Id*. at 177–78. But Pinholster filed a habeas petition in federal court and obtained an evidentiary hearing. At the hearing, Pinholster presented testimony from two new medical experts, who suggested that Pinholster suffered from "organic personality syndrome" and "partial epilepsy and brain injury." *Id*. at 179. The federal district court granted habeas relief. The Ninth Circuit ultimately affirmed. It held that the district court, in deciding whether the state courts had unreasonably applied this Court's ineffective-assistance case law, properly considered the evidence developed in the federal proceedings. *Id*. at 180.

This Court reversed. It held that under § 2254(d)(1), a federal habeas court's review is limited to the record that was before the state court that adjudicated the claim on the merits. *Id*. at 180–81. As the Court observed, "[i]t would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court." *Id*. at 182–83. Accordingly, "evidence later introduced in federal court is irrelevant to § 2254(d)(1) review." *Id*. at 184. Because the state court's decision was reasona-

ble based on the evidence before it, Pinholster was not entitled to AEDPA relief. *Id.* at 198–203.

Now consider § 2254(d)(2). That subdivision of AEDPA, like § 2254(d)(1), sets forth a "highly deferential standard" which "demands that state-court decisions be given the benefit of the doubt." *Pinholster*, 563 U.S. at 181 (citations omitted). Section 2254(d)(2) provides that, if a federal habeas claim has been adjudicated on the merits in state court, habeas relief shall not be granted unless the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*." (emphasis added). So as the statute's text makes clear, § 2254(d)(2) says expressly what *Pinholster* interpreted § 2254(d)(1) to say implicitly: courts must limit their review under § 2254(d)(2) to the record before the state court. *See Pinholster*, 563 U.S. at 185 n.7; *accord Grant v. Lockett*, 709 F.3d 224, 231 (3d Cir. 2013); *Gulbrandson v. Ryan*, 738 F.3d 976, 993 & n.6 (9th Cir. 2013). Indeed, Justice Sotomayor's dissenting opinion in *Pinholster* stressed this textual difference in arguing that § 2254(d)(1), *in contrast to* § 2254(d)(2), should permit consideration of new evidence. 563 U.S. at 211 (Sotomayor, J., dissenting).

Finally, § 2254(e)(1) erects one more obstacle to obtaining relief under § 2254(d)(2). It states that the prisoner must rebut the state court's factual findings "by clear and convincing evidence." § 2254(e)(1); *accord Burt v. Titlow*, 571 U.S. 12, 18 (2013).

In sum, a habeas petitioner can prevail under §2254(d)(1) or (d)(2) only if he proves, based on evidence before the state courts, that the state courts very obviously erred.

2. Carter seeks relief under § 2254(d)(2). He wants to use new evidence, generated in federal court after his state proceedings were over, to show that the state courts made an "unreasonable finding of fact." Specifically, he says, his attorney should have pursued an MRI for use in Carter's mitigation proceedings. And he says the state courts made an unreasonable factual determination when they did not find that counsel's failure to get an MRI prejudiced Carter. Carter contends that he should be able to use the evidence of neurological problems that he developed in federal habeas proceedings to show that counsel's failure to obtain an MRI really was prejudicial—as any attorney's performance must be to violate the Sixth Amendment right to counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984).

Pinholster and § 2254(d)(2)'s plain text doom Carter's reliance on the evidence he developed in federal court. Again, federal habeas courts may award relief under § 2254(d)(2) *only if* the state court's adjudication of the petitioner's claims "resulted in a decision that was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*." § 2254(d)(2) (emphasis added). Thus, evidence that Carter developed *after* his state-court proceedings "is irrelevant to" his entitlement to relief under AEDPA. *Pinholster*, 563 U.S. at 184. The Sixth Circuit properly applied the foregoing principles in refusing to consider the evidence Carter developed in federal habeas proceedings.

The Sixth Circuit's decision is additionally consistent with this Court's discussion of Carter's habeas claims—including the ineffective-assistance claim raised here—in *Gonzales*, 568 U.S. 57. In that case, this Court cited *Pinholster* for the proposition that "evidence" outside the state-court record "that Carter might have concerning [his] claims would . . . be inadmissible." 568 U.S. at 75 & n.15. *See also Carter*, 900 F.3d at 766–67 & n.9 (discussing *Gonzales*). In sum, the Court already anticipated and spoke to the very issues in this case: Carter can prevail under § 2254(d) *only if* he shows his entitlement to relief based on the evidence before the state courts. He does not argue that he can make that showing, and he cannot.

3. Carter has three principal responses to this.

First, Carter argues that it is not fair to forbid the court from considering the new evidence. Pet.11, 15. The trouble with this argument is that Congress took a different view of the fairness issue. It enacted AEDPA because many thought that pre-AEDPA habeas rules were unfair *to the States and their citizens*, as they made it too easy for federal courts to subject state convictions to seemingly endless rounds of second-guessing. *See Harrington*, 562 U.S. at 103. Consistent with this, Congress included language in § 2254(d)(2) that expressly limits federal habeas courts to reviewing state-court findings based on "evidence presented *in the State court proceeding*." (emphasis added). If Carter thinks this is unfair, he should direct that complaint to Congress.

Second, Carter claims support from *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), which he seems to read as permitting the consideration of later-developed

facts. *See* Pet.15–16. It does not. Instead, *Brumfield* reflects the already-settled principle that habeas courts may "'take new evidence in an evidentiary hearing' *when § 2254(d) does not bar relief*." 135 S. Ct. at 2276 (quoting *Pinholster*, 563 U.S. at 185). At the same time, until the petitioner satisfies § 2254(d)(1) or (d)(2), federal habeas courts may not consider evidence never presented to the state courts.

Brumfield determined that a state court had incorrectly weighed evidence in denying the petitioner's request for a hearing to determine whether he was ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). Based on evidence *in the state-court record*, the Court concluded that the state court had made unreasonable findings of fact in denying the request. *Brumfield*, 135 S. Ct. at 2277–82. As a result, the petitioner satisfied § 2254(d)(2). And *that* "entitled" the petitioner "to have his *Atkins* claim considered on the merits in federal court," where the District Court would be able to consider newly developed evidence. *Id.* at 2273. In other words, the petitioner could present new evidence to the federal court only because he *first* showed that the state court made an unreasonable determination of the facts "in light of the evidence presented in the State court proceeding." § 2254(d)(2). *Brumfield* does not say, and does not even suggest, that the petitioner would have been able to prove that the state courts made unreasonable findings of fact based on *newly developed* evidence.

Carter inverts this when he argues that the federal habeas courts may consider his newly developed evidence *in order to determine whether* the state courts made unreasonable findings of fact. Nothing in *Brumfield* permits that,

which is hardly surprising, since § 2254(d)(2)'s plain text limits review to the state-court record.

Finally, Carter argues that the state courts did not actually rule on the merits of his claim. Pet.17. And since § 2254(d)(2) applies only with respect to claims that were "adjudicated on the merits in State court proceedings," Carter says, that section's deferential standards are not applicable *at all*. Carter is wrong. As this Court, the Sixth Circuit, and the District Court have all recognized, the state courts *did* adjudicate Carter's ineffective-assistance claim on the merits. *See Ryan*, 568 U.S. at 75 n.15; *Carter*, 900 F.3d at 776 & n.9; *see also Carter*, 2015 U.S. Dist. LEXIS 133948, at *24. The Ohio Supreme Court, on direct appeal, addressed and rejected Carter's claim that his attorney rendered inadequate performance when, after "the trial court offered to allow an MRI to be conducted on Carter," counsel decided not to "pursue[] the testing for use in the penalty phase." *Carter*, 89 Ohio. St. 3d at 606. Then, in state-postconviction proceedings, the Ohio Court of Appeals rejected Carter's argument "that he was denied effective assistance of counsel because trial counsel did not properly prepare for the penalty phase of the trial." *Carter*, 2000 Ohio App. LEXIS 5935, at *8. It also rejected Carter's argument that his "counsel performed inadequately at the mitigation phase of the trial." *Id.* at *10. The postconviction court surveyed the many things counsel did to help Carter's case, and concluded that counsel had performed adequately at both stages of Carter's trial. *Id*. at *8–*10.

In light of the Ohio state courts' decisions, the Sixth Circuit correctly concluded that the issue had been "adjudicated on the merits in state court," and that § 2254(d) therefore applied. *Carter*, 900 F.3d at 776. Certainly the Court did not commit the sort of egregious error that would justify pure error correction in this Court.

* * *

Because the Sixth Circuit's correct application of AEDPA does not implicate a split or an error (let alone an error egregious enough to warrant this Court's review), there is no good reason to grant Carter's certiorari petition.

III. THIS IS A BAD VEHICLE FOR REVIEWING THE QUESTION PRESENTED, BECAUSE THE SIXTH CIRCUIT GAVE AN ALTERNATIVE AND INDEPENDENT JUSTIFICATION FOR ITS DECISION.

The Sixth Circuit gave an alternative basis for ruling against Carter on his ineffective-assistance claim: it found that Carter's trial counsel did not perform deficiently. Since the Court could affirm on this ground without ever reaching the question presented, this is a bad vehicle for deciding whether and when courts may consider evidence developed after a petitioner's state-court proceedings.

1. "To prove ineffective assistance of counsel, a petitioner must demonstrate both deficient performance and prejudice." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018) (per curiam) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Proving deficient performance is no easy feat. The petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. That is, the petitioner "must show that counsel's representation fell below

an objective standard of reasonableness." *Id.* at 688. It is not enough to show that many or even most lawyers might have taken a different approach. If counsel's performance is at least defensible—if, for example, it is supported by strategic considerations—it is not deficient. *Id.* at 690.

On habeas review, the bar for obtaining relief is even higher. The reason is § 2254(d)(1). Once again, that section permits federal courts to award habeas relief based on claims adjudicated in state court *only if* the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In other words, a federal habeas court cannot award relief based on a state court's application of the law pertaining to deficiency if "fairminded jurists could disagree" as to whether the state court's decision is "inconsistent with the holding in a prior decision of this Court." *Harrington*, 562 U.S. at 102. As a result, the review of ineffective-assistance claims is "doubly deferential" in the AEDPA context. *Titlow*, 571 U.S. at 15. The "defense attorney" gets "the benefit of the doubt" because of the deferential *Strickland* standard, and the state court gets "the benefit of the doubt" because of § 2254(d)(1). *Id.*

2. Carter could not prove deficiency even on *de novo* review—and so he certainly cannot establish any entitlement to relief under the doubly deferential standard applicable under AEDPA. *Carter*, 900 F.3d at 777–78.

The Sixth Circuit concluded that trial counsel's failure to seek neurological testing was *not* deficient performance because it had strategic benefits. That is cor-

rect. First, Carter's lawyer was entitled to rely on Dr. King's testimony that an MRI of Carter was not needed to render opinions on his sanity, competency, or mental defects. After all, it is generally "objectively reasonable for counsel to rely upon" expert medical opinion, and nothing in this case makes Carter's counsel's reliance *un*reasonable. *Id*. at 777 (quoting *Fautenberry v. Mitchell*, 515 F.3d 614, 625 (6th Cir. 2008)). To the contrary, Dr. King's testimony might reasonably have led Carter's counsel to determine that, given the already-heavy focus on the difficulty of Carter's upbringing and his possible mental illness, an MRI could not have established anything additional of use. *Id*. Carter tries to suggest that Dr. King's answer about the usefulness of an MRI was limited to Carter's competency or sanity. *See* Pet.18–19. That is wrong. Dr. King answered "no" to the question whether "an MRI would . . . assist us in this case to render any psychological opinions involving either sanity or competency *or mental defect*." *Id*. at 777. In arguing otherwise, the Sixth Circuit explained, Carter "mischaracterized this portion of Dr. King's testimony." *Id*. at 777 & n.10.

Second, and perhaps more fundamentally, there were strategic reasons *not* to seek a brain scan. For example, an MRI could have shown Carter had no organic brain defect at all, which might have worsened Carter's position before the jury. *Carter*, 2015 U.S. Dist. LEXIS 133948, at *95. As the Sixth Circuit noted, without an MRI, the trial counsel could have "leveraged [the jury's] uncertainty over the existence of organic brain damage to Carter's benefit." *Carter*, 900 F.3d at 777 n. 11. Accordingly, while Carter's counsel might reasonably have chosen to seek a

brain scan, Carter cannot show that the Sixth Amendment *compelled* counsel to do so.

CONCLUSION

The Court should deny Carter's petition for writ of certiorari.

Respectfully submitted,

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS*
State Solicitor
**Counsel of Record*
DIANE R. BREY
Deputy Solicitor
BRENDA S. LEIKALA
Senior Assistant Attorney General
Office of the Ohio Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@ohioattorneygeneral.gov

Counsel for Respondent
Wanza Jackson-Mitchell