

No. _____

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 SUPREME COURT OF OHIO OF APPEALS
FOR THE SIXTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

OFFICE OF THE OHIO PUBLIC DEFENDER

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CAPITAL CASE — NO EXECUTION DATE SET
QUESTION PRESENTED

The evidence in the state court record suggested that Sean Carter suffers from organic brain damage. Carter's trial attorneys performed deficiently, to his prejudice, when they refused the trial court's offer to provide Carter with the medical testing necessary to establish Carter's organic brain impairment. Prior to federal court, however, Carter had been unable to develop the evidence demonstrating that he had organic impairment, because—despite his requests—the state appellate courts denied him a hearing and the funding to do so in violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985).

The Federal District Court, however, granted Carter the funding and hearing necessary to establish his organic brain impairment. But the federal courts mistakenly found that *Cullen v. Pinholster*, 563 U.S. 170 (2011), prohibited them from considering this evidence to establish prejudice.

When the state court denies a petitioner's claim that his counsel were ineffective for failing to present his organic brain impairment, without affording him a hearing or granting him funding to secure expert evidence, is the federal court wrong in its conclusion that *Cullen v. Pinholster* precludes the federal court from considering the evidence establishing organic impairment, solely because it was developed in federal habeas proceedings?

LIST OF PARTIES

The Petitioner is Sean Carter, an Ohio death row inmate housed at 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).

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PETITION FOR A WRIT OF CERTIORARI

The Office of the Ohio Public Defender, on behalf of Petitioner Sean Carter, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion, *Carter v. Bogan*, 900 F.3d 754 (6th Cir. 2018), is reproduced at App. A. The District Court's opinion, *Carter v. Bradshaw*, No. 3:02CV524, 2015 U.S. Dist. LEXIS 133948 (N.D. Ohio Sept. 30, 2015), is reproduced at App. B.

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its opinion on August 20, 2018. Petitioner files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Section 2254(d) of Title 28 of the United States Code, provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A Trumbull County Ohio Grand Jury indicted 18-year-old Sean Carter for one count of aggravated murder. Appended to that count were three capital specifications. Carter was also indicted for one count of aggravated burglary, one count of aggravated robbery, and one count of rape. After various pretrial hearings, including two hearings to determine Carter's competence to stand trial, he was tried to a jury.

The jury convicted Carter of aggravated murder and two death specifications, aggravated robbery, rape, and criminal trespass on March 20, 1998. He was sentenced to death on April 2, 1998.

Carter appealed his case to the Ohio Supreme Court, which affirmed his convictions and sentence. *State v. Carter*, 89 Ohio St.3d 593, 734 N.E.2d 345 (2000). Sixth Circuit Appendix at vol. XVII, pp. 4816-4829 (hereinafter "App."). A post-conviction petition was filed on April 13, 1999. The trial court denied the petition without providing Carter funding for an expert and without a hearing on August 30, 1999. The Court of Appeals affirmed that decision. *State v. Carter*, CASE NO. 99-T-0133, 2000 Ohio App. LEXIS 5935 (Ct. App. Dec. 15, 2000). App. at vol. XIX, pp. 5182-97. The Ohio Supreme Court declined to accept jurisdiction on May 2, 2001. *State v. Carter*, 91 Ohio St.3d 1509, 746 N.E.2d 612 (2001). App. at vol. XIX, p. 5262.

On January 15, 2003, Carter filed an application to reopen his direct appeal pursuant to App. R. 26(B) in the Ohio Supreme Court. The Ohio Supreme Court denied the application to reopen on March 19, 2003.

On March 19, 2002, Carter initiated federal habeas proceedings, pursuant to 28 U.S.C. § 2254. He was at that time incarcerated in Oakwood Correctional

Institution, a psychiatric hospital. Habeas counsel, concerned that Carter remained incompetent to assist in his appeals given his refusal to even meet with his attorneys and his desire to volunteer for execution, commenced habeas proceedings by filing a suggestion of incompetence. Counsel also filed an *ex parte* motion requesting the appointment of a mental health expert to assist counsel in assessing Carter's competency and, on April 23, 2002, the District Court granted that motion. *Carter v. Bradshaw*, No. 3:02CV524, 2015 U.S. Dist. LEXIS 133948 (N.D. Ohio Sept. 30, 2015) Doc. # 10.

Carter's habeas petition was filed on May 1, 2002, without Carter's signature, while Carter was still in the psychiatric hospital. *Id.* Doc. # 13. Carter had refused to meet with his attorneys during his state court proceedings and leading up to his habeas proceedings. The Warden requested that the District Court dismiss the habeas petition as lacking authorization from Carter.

After Carter's six-and-a-half month stay at Oakwood—January 6, 2002 to June 26, 2002—he was transported back to Ohio's death row. Two days after Carter's release from the hospital, Carter agreed to a visit with federal habeas counsel and signed an affidavit affirming that he wanted to continue to pursue his appeals. The District Court ordered that Carter sign his May 1, 2002 habeas petition, and Carter's counsel filed a signed habeas petition on November 6, 2002.

During the pendency of Carter's habeas proceedings, issues related to his competency resurfaced. Ultimately, the District Court granted discovery, testing, and a competency hearing.

The District Court conducted the competency hearing on May 1, 2006. On May 2, 2006, the District Court ordered Carter's counsel to arrange for Dr. Bob Stinson and Dr. Phillip Resnick to observe Carter's interaction with his counsel. Carter's counsel objected to this observation, based on attorney-client privilege, and filed a petition for writ of mandamus with the U.S. Court of Appeals for the Sixth Circuit. That court granted the writ of mandamus on November 5, 2007.

On September 29, 2008, the District Court found Carter incompetent and dismissed Carter's case, prospectively tolling his habeas petition's one-year statute of limitations until Carter regained competency. Thereafter, the Sixth Circuit determined that Carter's right to competency in habeas proceedings could be found in 18 U.S.C. § 4241 and amended the District Court's judgment to order that Carter's petition be stayed indefinitely with respect to any claims that require his assistance. *Carter v. Bradshaw*, 644 F.3d 329 (6th Cir. 2011). This Court vacated the Sixth Circuit's opinion and remanded, holding that 18 U.S.C. § 4241 does not confer upon incompetent federal habeas petitioners a statutory right to suspend their habeas proceedings. *Ryan v. Gonzales*, 568 U.S. 57 (2013).

The Sixth Circuit remanded Carter's case to the District Court where his habeas proceedings resumed. On September 30, 2015, the District Court denied Carter's petition for writ of habeas corpus. *Carter v. Bradshaw*, No. 3:02CV524, Doc. # 231-32. Carter filed a timely notice of appeal with the Sixth Circuit, which affirmed the District Court's ruling. *Carter v. Bogan*, 900 F.3d 754 (6th Cir. 2018).

STATEMENT OF FACTS

Sean Carter was only 18 years old when he murdered his adoptive grandmother, Veader Prince. Carter, unable to find any other place to stay, entered Ms. Prince's home through a window. Prince became insistent that he leave, and an argument turned into a struggle during which Carter stabbed Prince repeatedly with a knife. Carter later admitted to murdering Prince, although he described it as "going off" and could not provide exact details of what happened during the assault. During the autopsy, Carter's semen was found in Ms. Prince's rectum.

Following indictment, Carter's competency quickly became a question. Carter was genetically predisposed to schizophrenia; he developed a severe mental illness that manifested itself very early in his life and gradually took control of his behavior in his late teens. App. at vol. XXI, p. 5443. Carter's mother suffered from severe schizophrenia, his half uncle had a documented history of schizophrenia and substance abuse, and his half aunt was diagnosed with Schizophrenia Paranoid Type. *Id.* at vols. XXI-XXII, pp. 5487-5710. With at least three biological relatives who had been diagnosed with schizophrenia, his risk of having schizophrenia was significantly higher than the general population.

By the age of two, Carter was described as lacking in spontaneity, being fearful of others, and exhibiting violent behavioral reaction. At four, he was identified as being withdrawn, exhibiting a flat affect, and suffering with anxiety. *Id.* at vol XXII, p. 5612. When he was just six years old, it was documented that he was suspicious of others, affectively unresponsive, withdrawn, depressed, and aloof—sometimes just

staring off into space. Perhaps most prophetic of all was the assertion that he was schizoid-prone and at risk of losing contact with reality. *Id.* at 5669.

At 16, Carter appeared to have had his first psychotic episode. He was described as emotionally distant, lacking in trust, uncommunicative, unpredictable, and explosive. He suffered from memory loss and presented as distant and detached, resistant with hostility, experiencing feelings of persecution, and experiencing hallucinations. *Id.* at vol. XXI, pp. 5443-49.

At the age of 18, just two years after his first psychotic break at 16, Carter was charged with the instant offense.

The first competency hearing for Carter was on December 26, 1997. *Id.* at vol. I, pp. 27-131. Because Carter had attempted to kill himself multiple times before trial, the State refused to unshackle him during court hearings out of fear of what he would do. Defense counsel Consolodane requested that Carter have his handcuffs removed, and the prosecutor objected to unshackling Carter “either by his feet or his hands,” based on the recommendations of Chief Deputy Darby Vaughn of the Warren Police Department. *Id.* at 29. Deputy Vaughn then told the trial court that he wanted the shackles to remain because Carter “is in the ward upstairs and has made several attempts on his own life. He’s suicidal.” *Id.* at 30.

The only expert who testified was Dr. Stanley Palumbo. Dr. Palumbo, a State’s witness, testified that Carter told him that he heard voices—sometimes believed to be the voice of the devil—but Dr. Palumbo did not notice Carter responding to hallucinations during their interviews. *Id.* at 47-48. Dr. Palumbo acknowledged that

Carter's mother suffered from schizophrenia. *Id.* at 56. He testified that Carter's psychological limitations did not affect his competency. *Id.* at 62-63. At the conclusion of the first competency hearing, the trial court ruled from the bench that Carter "is competent to stand trial." *Id.* at 127.

With Carter being found competent, the trial was set to begin. Carter had pled not guilty by reason of insanity, and defense counsel had contacted Dr. Steven King to conduct an evaluation of Carter's mental state for that plea. Carter maintained an irrational hostility toward one of his own counsel, and he communicated to the doctors who examined him that he intended to harm or kill his attorney. Carter's competence became an issue again when Dr. King raised concerns about his competency to stand trial. *Id.* at vol. II, p. 508.

The trial court then held a second competency hearing, on February 26, 1998. Dr. King testified at the second hearing, as did Dr. Palumbo. A third expert, Dr. Robert Alcorn, testified for the State. *Id.* at vols. II-III, pp. 592-903.

Dr. King testified that Carter was not able to assist in his defense. *Id.* at vol. II, p. 611. Carter was suffering from a psychosis and should be hospitalized for evaluation and treatment. Dr. King evaluated Carter on February 23, 1998. Dr. King reviewed some of Carter's records and found that in 1995, at the request of detention center staff, Carter was psychologically evaluated and found to be guarded, experiencing hallucinations, exhibiting unusual mannerisms, presenting as detached and distant, displaying an unusual affect, and appearing distracted at times for no apparent reason. With Dr. King, Carter was restless, he intermittently laughed

inappropriately, he was threatening, hostile, and demanding at times. He intermittently sang and recited lyrics, and he reported symptoms that were consistent with a psychotic disorder, including auditory hallucinations, visual hallucinations, and a running commentary of his thoughts being broadcast out loud. *Id.* at 598-627.

Dr. Palumbo had also noted that Carter told him that he sometimes gets depressed, which gets him laughing. *Id.* at 705. Carter told Dr. Palumbo that he experienced auditory hallucinations, noting that he heard voices that sounded like a “ghost” that calls his name, and that while they bother him, he does not allow them to get on his nerves. *Id.* at 708. Dr. Palumbo appeared to question the legitimacy of Carter’s hallucinations. He also disregarded the apparent issues with Carter and his relationship with his own counsel: “If there was a disagreement it was related more to his own personality style and his questions about his attorneys proceeding for him on his behalf.” *Id.* at 673.

As for Dr. Alcorn, he credited every questionable thing Carter said and did to “malingering.” *Id.* at 838. When Dr. Alcorn described to the trial court specific hallucinations that Carter had described to him, he immediately followed it up with allegations of faking.

The court found Carter competent to stand trial.

Carter’s behavior during the trial was indicative of an incompetent individual. For example, during voir dire while his counsel was questioning Juror No. 259 about her knowledge of some of the State’s witnesses, Carter blurted out, “I am missing my

lunch.” *Id.* at vol. IV, p. 1064. He spoke up again a little later, in front of another prospective juror, who then remarked that she “heard that, you know, he was examined for competency.” *Id.* at 1106.

Carter did not make it through opening statements before interrupting the proceedings, again in front of the jury:

Excuse me. Would I have to go through this, through this trial? Can I just plead guilty to it?

Id. at vol. VII, p. 2321. Briefly thereafter, when the jury was out of the room, defense counsel told the court that Carter did not want to attend his own trial. *Id.* at 2326. The judge responded that he would research the issue, and that prompted Carter to speak out. Carter said, over and over, that “I don’t want to be here at the trial.” *Id.* at 2329. *See also* pp. 2327, 2328, 2331, 2332, 2333. He also, yet again, asked to plead guilty: “Can I plead guilty and not be at the trial and then, then they have the trial and I just get sentenced? I am guilty to it. Can I just go up there and tell the story?” *Id.* at 2331. The court did not accept his guilty plea. *See id.*

Carter then lunged at the judge. As the trial court put it, Carter “lost complete control, indicated to the Court that he would act up and, in fact, proceeded to jump around, went crazy causing the deputies, four deputies to restrain him and put him in leg irons.” *Id.* at 2334. Defense counsel entered into a stipulation at that time that, “until he can regain control of himself,” Carter would be removed from the courtroom and able to watch the trial on a television monitoring system. *Id.* at 2335. Carter was tried and sentenced to death for this crime on April 2, 1998.

Carter's competency did not improve throughout his appeals. His appellate and federal habeas counsel also recognized the need for the organic testing that trial counsel had failed to obtain. In state post-conviction proceedings, Carter's counsel requested the funding necessary for such testing so that he could support the claim of ineffective assistance of counsel. But the state courts refused to provide it.

Finally, in federal habeas proceedings, the District Court granted Carter the funds to hire an expert "to determine if Mr. Carter suffers from organic brain damage" in order to "demonstrate whether trial counsel was ineffective for turning down the trial court's offer" of providing such expertise. Dr. Michael M. Gelbort, Ph.D. determined that, "[i]n both statistical and functional senses [Carter] is impaired, demonstrates significant cognitive defects, and does not have the requisite underlying neuropsychological abilities to act or behave in an adaptive and goal directed fashion at an independent level." App. at vol. XXII, pp. 5774-83 (Gelbort Aff., p. 3).

On September 29, 2008, the Federal District Court found Carter incompetent, and the Sixth Circuit upheld that finding and stayed Carter's federal habeas proceedings. This Court reversed the Sixth Circuit (*see Ryan v. Gonzales*, 568 U.S. 57 (2013)). By the time the District Court was to consider Gelbort's report and testimony in evaluating Carter's case for habeas relief on remand, this Court had issued its decision in *Cullen v. Pinholster*. The District Court and Sixth Circuit then refused to consider the very evidence the District Court had allowed Carter to amass.

They then denied Carter's claim that his trial counsel were ineffective for failing to develop and present in mitigation the evidence of his organic brain damage.

Carter now has concrete evidence of his organic brain damage that his trial counsel failed to obtain. In postconviction, the state courts refused to provide Carter the funding and means through which to obtain that evidence. The federal courts finally provided him the help he needed, and then he was not allowed to rely upon the finding of organic brain damage. This is fundamentally unfair.

REASONS FOR GRANTING THE WRIT

I. It is unreasonable for a state court to first deny an indigent petitioner the funds and ability to obtain the supporting medical evidence to establish his organic brain impairment, but then deny petitioner's claim because of his failure to attach supporting medical evidence.

A. Post-conviction litigation.

During Carter's post-conviction proceedings, he argued that trial counsel failed to fully investigate his medical and social history.¹ While it is true that there was no expert opinion attached to Carter's post-conviction petition regarding his organic brain impairment, it is also true that Carter lacked the funding to obtain an expert who could opine on the issue. Post-conviction counsel requested the "opportunity to conduct discovery to develop the evidence" necessary for his claims and requested the "funds necessary to substantiate the claims herein asserted." Despite Carter's status as an indigent defendant, the State Court erroneously denied his request for funding and discovery, thus denying him the opportunity to develop and provide the necessary extra-record evidence to prove his claims. *See generally, Ake v. Oklahoma*, 470 U.S. 68 (1985). The state courts rejected Carter's claims that trial counsel were ineffective for failing to obtain and present mitigation evidence of his organic brain impairment "[w]ithout affording him an evidentiary hearing or granting him time or funding to

¹ During direct appeal, the Ohio Supreme Court was presented with trial counsel's failure to obtain neurological testing or present evidence of Carter's brain damage in mitigation. It determined that the claim was not appropriate for direct appeal review, given that it required "proof outside the record, the report from the MRI." *State v. Carter*, 89 Ohio St.3d 593, 606, 734 N.E.2d 345, 357 (2000).

secure expert advice” in violation of his Fourteenth Amendment right to due process. *Brumfield v. Cain*, 135 S. Ct. 2269, 2273 (2015).

The state courts faulted Carter for failing to attach the necessary evidentiary documents. (Appellant did not submit any evidentiary documents or point to any evidence outside of the record that would indicate that he was entitled to relief or a hearing on this claim) (*State v. Carter*, CASE NO. 99-T-0133, 2000 Ohio App. LEXIS 5935 at *10 (Ct. App. Dec. 15, 2000)) (Appellant's inability or unwillingness to aid his attorneys in the defense of his case is well-documented in the record. Neither his petition for postconviction relief nor his brief raise new grounds or point to anything outside the record to demonstrate that he is entitled to relief or a hearing) (*Id.* at *13). But, at every step of the way, the state courts denied him the necessary tools and funds to obtain the evidence and attach it to his petition.

Post-conviction counsel argued on appeal and to the Ohio Supreme Court that Carter was being denied meaningful access to the courts in violation of the Fourteenth Amendment. App. at vol. XVIII, pp. 5015-16. *See generally, Ake v. Oklahoma*. Counsel argued, “It does no good and it does not satisfy the Constitution simply to say that courts are open and doing business, while at the same time denying meaningful access to redress legal wrongs.” *Id.* To the Supreme Court, he pointed out that “[o]ne cannot effectively defend life or liberty if denied the ability to present and litigate constitutional violations *dehors* the record in the only forum available for doing so: a post-conviction proceeding.” App. at vol. XIX, p. 5214. After the state court of appeals denied Carter’s post-conviction petition, the Ohio Supreme Court declined

jurisdiction. Thus, no state court provided Carter with any funding to obtain an expert like Dr. Gelbort, Ph.D.

B. The state courts improperly denied Carter, an indigent death row defendant, funding for experts to assist in the presentation of his defense in violation of the Fourteenth Amendment to the United States Constitution.

Because Carter is indigent, he had to rely on the courts to provide the funding necessary to obtain experts. *See generally, Ake*. At a criminal trial, it is the prosecution's burden to prove the elements of the crime beyond a reasonable doubt. The prosecution's ability to meet that burden would be severely diminished if it did not have meaningful access to available resources. If the State could not obtain search warrants, compel DNA samples, subpoena witnesses, and all the other resources available to it upon request, there would be few convictions.

Just as the prosecution's ability to effectively prosecute a criminal case would be severely diminished without resources, an Ohio defendant's ability to effectively defend himself against criminal charges is also severely diminished without meaningful access to resources. This Court has long recognized "that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Id.* at 77. That is the very position in which an Ohio post-conviction petitioner finds himself. He has no discovery power or right to a hearing, and then—just as happened here—the state courts deny the post-conviction petition on bases such as the doctrine of *res judicata*

and lack of factual development. *See Brumfield v. Cain* at 2273 (“Without affording him an evidentiary hearing or granting him time or funding to secure expert evidence, the state court rejected petitioner’s claim. That decision, we hold, 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)(2). Petitioner was therefore entitled to have his Atkins claim considered on the merits in federal court.”) An Ohio post-conviction petitioner cannot meet his burden without the necessary due process to which he is entitled.

The State courts’ dismissal of all of Carter’s grounds for relief without a hearing or funding, based upon an unreasonable determination of the facts, prevented Carter from having a fair and reasonable opportunity to identify all relevant claims and to have those claims heard and decided. Carter is entitled to have his claims heard by the federal courts.

II. When the state courts base their decision on an unreasonable determination of the facts, the federal court can properly consider new evidence.

Carter was finally given the ability to support his claim when, in federal habeas proceedings, the District Court granted him the funding to do so. Dr. Michael M. Gelbort, Ph.D. determined, “[i]n both statistical and functional senses [Carter] is impaired, demonstrates significant cognitive defects, and does not have the requisite underlying neuropsychological abilities to act or behave in an adaptive and goal directed fashion at an independent level.” App. at vol. XXII, p. 5776. The court then permitted—and the Warden did not oppose—expansion of the record to include the affidavit of Dr. Michael M. Gelbort, Ph.D.

The District Court mistakenly believed it could not consider this evidence presented in federal habeas discovery due to *Pinholster*, which was decided while this case was pending in the District Court. The Sixth Circuit agreed and then found that, absent that evidence, there was “no basis” supporting Carter’s claims. *Carter v. Bogan*, 900 F.3d at 776.

What happened to Carter is akin to what occurred in *Brumfield*:

After *Atkins* was decided, petitioner, a Louisiana death-row inmate, requested an opportunity to prove he was intellectually disabled in state court. Without affording him an evidentiary hearing or granting him time or funding to secure expert evidence, the state court rejected petitioner’s claim. That decision, we hold, 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)(2). Petitioner was therefore entitled to have his *Atkins* claim considered on the merits in federal court.

Brumfield at 2273; *see also, Ake*. Carter was suffering from organic brain impairment that would have been significant mitigating evidence. The state courts’ denial of Carter’s claim, without granting funding and an evidentiary hearing, was a decision based upon an unreasonable determination of the facts. Thus, *Pinholster* should not bar federal review of the evidence obtained in federal habeas discovery.

The strictures of § 2254(e)(2) on expansion of the record (or an evidentiary hearing) do not apply where the habeas petitioner “has not failed to develop—i.e., has been diligent in developing—the factual basis of his claim in state court.” *Robinson v. Howes*, 663 F.3d 819, 823-24 (6th Cir. 2011). (citing *Williams v. Taylor*, 529 U.S. 420, 432 (2000)). “[F]ailure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.” *Williams*, 529 U.S. at 432. “Diligence for purposes of §

2254(e)(2) depends upon ‘whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in the state court.’” *McAdoo v. Elo*, 365 F.3d 487, 500 (6th Cir. 2004) (quoting *Williams*, 529 U.S. at 435). Carter has been diligent in his efforts to develop the factual basis for his claims in State court proceedings.

The merits of the claim were never actually ruled on in state court. Thus, *Pinholster* does not place any restraints on a federal court’s consideration of the evidence in the expanded habeas record. *Pinholster*, 563 U.S. at 219, n.11, 230, n.20. *See also, e.g., Robinson*, at 823 (“However, if the claim was never ‘adjudicated on the merits’ in state court, the claim does not fall under 28 U.S.C. §2254(d) and *Pinholster* does not apply.”); *Fitzpatrick v. Robinson*, 723 F.3d 624, 637 (6th Cir. 2013). *See also Littlejohn v. Trammell*, 704 F.3d 817, 857 n.21 (10th Cir. 2013).

Thus, the evidence developed in federal habeas discovery granted by the District Court should have been reviewed. This Court should now remand the case to the Sixth Circuit for consideration of the evidence it mistakenly believed was barred from federal review.

The Sixth Circuit went further in denying Carter’s claim and determined that counsel’s “seemingly curious decision not to obtain neurological testing” did not amount to deficient performance “in light of Dr. King’s testimony at the second competency hearing.” *Carter*, 900 F.3d at 777. The Sixth Circuit suggested that, without test results indicating that Carter did not suffer from brain damage, counsel could suggest the possibility that he did have brain damage to the jury. *See id.* FN.

11. The court stated that “trial counsel could have leveraged uncertainty over the existence of organic brain damage to Carter’s benefit” and that it “must consider how trial counsel could have used the jury’s uncertainty over the existence of organic brain damage to Carter’s advantage.” *Id.*

The record does not support the court’s speculations about trial counsel’s decision-making process, and the strict limitations of federal habeas review certainly do not permit it to defer to a fact that is contrary to the record. Contrary to the court’s speculation, trial counsel presented testimony through Dr. McPherson that downplayed Carter’s potential organic impairment. Dr. McPherson, though having never tested Carter for brain impairment, testified that his seizures were simply “emotionally keyed rather than being purely a function of internal disruption of his organic system.” App. vol. X, p. 3367. In other words, Carter’s counsel had not left the jury with the impression that Carter potentially suffered from brain impairment, so they were not attempting to avoid confirmation that he was not, in fact, organically impaired. The court’s speculative reasons for denying Carter relief are belied by the record.

Moreover, both federal courts conflated Dr. King’s testimony that neurological testing was not necessary to determine **competency** as support for the premise that neurological testing was not necessary for **mitigation**. *Carter* at 777. Just as the District Court did, the Sixth Circuit appears to interpret Dr. King’s testimony at Carter’s second competency hearing to suggest that neurological testing would have been wholly unnecessary. This is a complete misinterpretation of the expert’s

testimony. Dr. King only reviewed materials and provided an opinion relevant to competency at the second competency hearing.

Dr. King never conducted a mitigation evaluation on Carter, nor was he ever tasked with such a review. Nonetheless, Dr. King did, even in his review limited to sanity and then to competency, notice the value in neurological testing. Dr. King testified that an MRI “would be able to determine whether or not there was **organic brain damage**” and that it would be “important in determining...what is actually wrong with Sean...in terms of a comprehensive assessment...it would be helpful.” App. vol. II, pp. 607-08 (emphasis added).

Instead of considering Dr. King’s statements in context, the federal courts focused on a single line of Dr. King’s testimony at the competency hearing in which he answered “no” to the trial court’s question of whether an MRI would assist in rendering opinions involving **either sanity or competency or mental defect**. See *Carter* at 777. This is not the relevant question.

After Dr. King’s testimony at the second competency hearing, it appears that the trial court itself saw the necessity of an MRI. The court acknowledged that evidence of brain damage would be useful in mitigation, stating that it was “relative to the mitigation phase of trial” and granted funding. Inexplicably, it was Carter’s own counsel who then unreasonably declined the court’s offer.

Trial counsel had before them a number of additional indicators that their client suffered from organic brain impairment. Trial counsel were reasonably apprised of signs pointing to brain dysfunction. Counsel’s failure to investigate and

present evidence of brain impairment cannot be discounted as strategic. *See Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

The prosecution took advantage of trial counsel's failures. In cross-examining Dr. McPherson, the State asked about Carter's seizures and the results of a prior CT scan, and asked, "But I think your testimony was that this apparently cleared up and it's probably emotional?" App. at vol. X, p. 3401. Dr. McPherson replied, "That's correct." *Id.* This testimony is factually inaccurate, but trial counsel did not know that because they never pursued an MRI to find out the truth.

CONCLUSION

The federal courts' blind eye to the record evidence led it to incorrectly determine that Carter did not suffer prejudice from his counsel's deficient performance. Had the jury been presented with evidence of Carter's organic brain impairment, there exists a reasonable probability that at least one juror would have voted against a sentence of death. *Strickland v. Washington*, 466 U.S. 668 (1984). Evidence of brain dysfunction in conjunction with evidence of Carter's family history of mental illness and schizophrenia, horrendous childhood, and bizarre behaviors in the courtroom, would have minimized his moral culpability to a jury determining whether he should live or die. This Court should remand the case to the Sixth Circuit with instructions that it order the District Court to re-evaluate Carter's claims with the evidence developed in federal court.

Alternatively, this Court should grant penalty phase relief based on counsel's deficient performance and the prejudice that resulted.

RESPECTFULLY SUBMITTED,
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