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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Carter v. Bogan

United States Court of Appeals for the Sixth Circuit

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900 F.3d 754 *; 2018 U.S. App. LEXIS 23069 **; 2018 FED App. 0175P (6th Cir.) ***

SEAN CARTER, Petitioner-Appellant, v. BOBBY BOGAN, JR., Warden, Respondent-Appellee.

Subsequent History: Rehearing, en banc, denied by ***Carter v. Bogan***, *2018 U.S. App. LEXIS 30973 (6th Cir., Oct. 31, 2018)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of Ohio at Toledo. No. 3:02-cv-00524—Benita Y. Pearson, District Judge.

Carter v. Bradshaw, 2015 U.S. Dist. LEXIS 133948 (N.D. Ohio, Sept. 30, 2015)

Core Terms

incompetent, competency hearing, mitigation, proceedings, competency, ineffective, state court, trial court, competent to stand trial, district court, adjudicated, amend, trial counsel, subclaim, grounds for relief, direct appeal, merits, mental illness, phase, clearly established federal law, guilty plea, disorder, aggravated, attorneys, sentence, Appeals, suicide, proposition of law, habeas proceeding, present evidence

Case Summary

Overview

HOLDINGS: [1]-The district court properly denied the prisoner's petition for habeas relief pursuant to *28 U.S.C.S. § 2254* following the imposition of the death sentence because his competency to stand trial pursuant to *Ohio Rev. Code Ann. § 2945.37(G)* had been properly adjudicated and considered on the merits in the state proceedings, and the findings of the state's highest court were not unreasonable in light of the evidence presented to the trial court; [2]-Petitioner did not establish ineffectiveness of counsel pursuant to the *Sixth Amendment* because, inter alia, he did not present any reasonable argument that counsel did not adequately investigate or present mitigating evidence, and there was no showing that counsel's mitigation theory, by presenting evidence of petitioner's antisocial personality disorder pursuant to *Ohio Rev. Code Ann. § 2929.04*, was objectively unreasonable.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

HN1[] Review, Antiterrorism & Effective Death Penalty Act

When reviewing a district court's grant or denial of a petition for a writ of habeas corpus, the reviewing court will examine its conclusions of law de novo and its factual findings for clear error. Additionally, where a petitioner has filed his habeas petition after 1996, the scope of appellate review is further restricted by the *Antiterrorism and Effective Death Penalty Act (AEDPA)*, which was designed to prevent federal habeas retrials and to ensure that state-court convictions are given effect to the extent possible under law.

Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Clearly Established Federal Law

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Contrary to Clearly Established Federal Law

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Unreasonable Application

HN2[] Review, Antiterrorism & Effective Death Penalty Act

Among other things, the *Antiterrorism and Effective Death Penalty Act (AEDPA)* limits the circumstances under which courts may grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in a state court. *28 U.S.C.S. § 2254(d)*. More specifically, under *AEDPA*, courts may grant a writ only if the state court's 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.

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Clearly Established Federal Law

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Contrary to Clearly Established Federal Law

HN3[] Contrary & Unreasonable Standard, Clearly Established Federal Law

A state court's adjudication of a claim is contrary to clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. In contrast, an unreasonable application of clearly established federal law occurs where the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case. For purposes of *Antiterrorism and Effective Death Penalty Act (AEDPA)*, clearly established federal law only refers to the

holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision.

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Unreasonable Application

HN4[] Contrary & Unreasonable Standard, Unreasonable Application

To be clear, an unreasonable application of federal law is different from an incorrect application of federal law. Stated more bluntly, under the unreasonable application clause of *28 U.S.C.S. § 2254(d)(1)*, it does not matter whether a federal habeas court might conclude in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly. Rather, a federal habeas court may issue the writ pursuant to this clause only where the relevant state-court decision applied clearly established federal law in an objectively unreasonable manner, only where the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.

Criminal Law & Procedure > Habeas Corpus > Review > Scope of Review

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Unreasonable Application

HN5[] Review, Scope of Review

Review under *28 U.S.C.S. § 2254(d)(1)* is limited in two additional, important ways. First, notwithstanding the language of *28 U.S.C.S. § 2254(e)(2)*, review is restricted to the record that was before the court that adjudicated the claim on the merits. Second, when determining whether the unreasonable application standard is met, courts must consider the rule's specificity; that is because the range of reasonable judgment can depend in part on the nature of the relevant rule. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

Criminal Law & Procedure > Habeas Corpus > Review > Scope of Review

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Unreasonable Application

HN6[] Review, Scope of Review

As regards *28 U.S.C.S. § 2254(d)(2)*, it imposes a highly deferential standard when reviewing claims of factual error by a state court. The U.S. Supreme Court has been clear that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. Stated differently, it is not enough that reasonable minds reviewing the record might disagree with the state court's factual determination; rather, the record must compel the conclusion that the state court had no permissible alternative but to arrive at the contrary conclusion. Equally important, it is not enough for the petitioner to show some unreasonable determination of fact; additionally, the petitioner must show that the resulting state court decision was based on that unreasonable determination.

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard

Evidence > Burdens of Proof > Clear & Convincing Proof

HN7[] Standards of Review, Contrary & Unreasonable Standard

The U.S. Supreme Court has warned against merging the independent requirements of *28 U.S.C.S. §§ 2254(d)(2)* and *(e)(1)*. That said, the Supreme Court has yet to clarify the relationship between *§ 2254(e)(1)*, under which a petitioner bears the burden of rebutting the state court's factual findings by clear and convincing evidence, and *§ 2254(d)(2)*. That court has explicitly left open the question of whether *§ 2254(e)(1)* applies in every case presenting a challenge under *§ 2254(d)(2)*.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Competency to Stand Trial

Criminal Law & Procedure > Defenses > Insanity

HN8[] Pretrial Motions & Procedures, Competency to Stand Trial

The criminal trial of an incompetent defendant violates due process. It is equally well-established that one who lacks either a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or a rational as well as factual understanding of the proceedings against him is not competent to stand trial. Accordingly, where there is substantial doubt as to a defendant's capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense, a trial court must sua sponte order an evidentiary hearing on the issue.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Competency to Stand Trial

HN9[] Pretrial Motions & Procedures, Competency to Stand Trial

While the Supreme Court has yet to prescribe a standard for determining when a trial court should hold evidentiary proceedings on the matter of competency, the Sixth Circuit has previously used the following test: whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial. Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but even one of these factors standing alone may, in some circumstances, be sufficient. Where, however, a trial court has already held a competency hearing and deemed the defendant competent, it need not reevaluate its determination unless presented with qualitatively different evidence.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Competency to Stand Trial

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Unreasonable Application

Criminal Law & Procedure > Habeas Corpus > Review > Scope of Review

HN10[] Pretrial Motions & Procedures, Competency to Stand Trial

In the context of a habeas petition, because competence to stand trial is a question of fact

and because Ohio law incorporates the Drope standard for competency, *Ohio Rev. Code Ann. § 2945.37(G)*, a petitioner challenging an Ohio court's finding of competence is subject, at minimum, to the strictures of *28 U.S.C.S. § 2254(d)(2)*. In other words, not only must a petitioner show that the state court's determination was unreasonable, but he may not draw upon any extrarecord evidence to make his argument. When assessing whether a petitioner has met this burden, it is important to keep in mind that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.

Criminal Law & Procedure > Habeas Corpus > Review > Scope of Review

HN11 **Review, Scope of Review**

By its terms *28 U.S.C.S. § 2254(d)* bars relitigation of any claim adjudicated on the merits in state court, subject only to the exceptions in *§§ 2254(d)(1)* and *(2)*. There is no text in the statute requiring a statement of reasons.

Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Criminal Law & Procedure > ... > Review > Standards of Review > Presumption of Correctness

HN12 **Appeals, Capital Punishment**

To succeed on an ineffective-assistance-of-trial-counsel claim, a defendant must make two showings. First, he must show that counsel's performance was deficient, i.e., that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the *Sixth Amendment*. This requires the defendant to identify specific acts or omissions by the counsel that were outside the wide range of professionally competent assistance. When reviewing counsel's performance, courts indulge a strong presumption that under the circumstances, the challenged action might be considered sound trial strategy. Second, the defendant must establish that the deficient performance prejudiced the defense. For an error to be prejudicial, it is not enough that it had some conceivable effect on the outcome of the proceeding. Rather, there must be a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Where a defendant challenges a death sentence, the question at this stage is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN13 **Review, Antiterrorism & Effective Death Penalty Act**

Where the *Antiterrorism and Effective Death Penalty Act (AEDPA)* applies, the petitioner faces a particularly daunting task in establishing ineffective assistance of counsel. Where a state court has adjudicated an ineffective-assistance-of-counsel claim on the merits, reviewing courts use a doubly deferential standard of review that gives both the state court and the defense attorney the benefit of the doubt. In other words, rather than simply examining whether counsel satisfied Strickland's deferential standard, those courts ask whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN14 **Specific Claims, Ineffective Assistance of Counsel**

Where an ineffectiveness of counsel claim was adjudicated on the merits in state postconviction proceedings, the question before the reviewing court is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Criminal Law & Procedure > Habeas Corpus > Review > Scope of Review

HN15 **Review, Scope of Review**

Where a petitioner's claim was adjudicated on the merits, the federal appellate court's review is limited to the record that was before the state's highest court. Evidence introduced in federal court has no bearing on *28 U.S.C.S. § 2254(d)(1)* review. When the federal appellate court conducts a *§ 2254(d)(1)* review, it is reviewing the decision of the state court, not the underlying claim.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN16 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

To establish ineffective assistance of counsel, the petitioner must show that there is a reasonable probability that save for counsel's errors, the result of the proceedings would have been different.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel

Evidence > ... > Presumptions > Particular Presumptions > Regularity

Legal Ethics > Client Relations > Duties to Client > Effective Representation

HN17[] **Counsel, Effective Assistance of Counsel**

A licensed practitioner is generally held to be competent, unless counsel has good reason to believe to the contrary.

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN18[] **Specific Claims, Ineffective Assistance of Counsel**

Ohio state law recognizes Antisocial Personality Disorder (ASPD) as a statutory mitigating factor. Specifically, in Ohio, ASPD qualifies as a mitigating factor pursuant to *Ohio Rev. Code Ann. § 2929.04(B)(7)*. Considering personality disorder with antisocial features as a mitigating factor, *§ 2929.04(B)(7)* is a catchall provision that permits a jury to consider any other factors that are relevant to the issue of whether the offender should be sentenced to death. *§ 2929.04(B)(7)*. The failure to introduce evidence of a similar disorder can be prejudicial, even under the deferential standard of the *Antiterrorism and Effective Death Penalty Act (AEDPA)*.

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Evidence > ... > Presumptions > Particular Presumptions > Regularity

Criminal Law & Procedure > ... > Review > Standards of Review > Presumption of Correctness

HN19[] **Specific Claims, Ineffective Assistance of Counsel**

To succeed on an ineffective-assistance-of-counsel claim, a habeas petitioner must overcome the presumption that the challenged action constituted sound trial strategy.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN20[] **Capital Punishment, Mitigating Circumstances**

In Ohio, mercy is not a mitigating factor and thus is irrelevant to capital crime sentencing.

Counsel: ARGUED: Rachel Troutman, OFFICE OF THE OHIO PUBLIC DEFENDER, Columbus, Ohio, for Appellant.

Christopher S. Ross, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

ON BRIEF: Rachel Troutman, Kandra Roberts, OFFICE OF THE OHIO PUBLIC DEFENDER, Columbus, Ohio, John P. Parker, Cleveland, Ohio, for Appellant.

Charles L. Wille, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

Judges: Before: COLE, Chief Judge; BOGGS and ROGERS, Circuit Judges.

Opinion by: BOGGS

Opinion

[*759] **[***1]** BOGGS, Circuit Judge. In September 1997, Sean Carter raped and killed

Veader Prince, his adoptive grandmother. *State v. Carter, 89 Ohio St. 3d 593, 2000-Ohio 172, 734 N.E.2d 345, 347 (Ohio 2000)*. Prior to trial, **[***2]** Carter's competency twice became a topic of controversy, leading to two hearings on the matter. *Id. at 355-56*. Both times, Carter was deemed competent to stand trial. *Ibid.* Carter was subsequently found guilty of aggravated murder and of two capital specifications and was sentenced to death. *Id. at 350*. Having exhausted his state-court appeals, Carter now brings this habeas corpus petition, alleging that he was incompetent at both the guilt and penalty phases of his **[**2]** trial and that his counsel were constitutionally ineffective. The district court denied the petition, *Carter v. Bradshaw, No. 3:02CV524, 2015 U.S. Dist. LEXIS 133948, 2015 WL 5752139, at *1 (N.D. Ohio Sept. 30, 2015)*, and for the following reasons, we affirm.

I

A

In 1981, when he was 18 months old, Sean Carter ("Carter") was removed from his birth mother following a referral to a children service's agency in Trumbull County, Ohio. *Carter, 734 N.E.2d at 347, 359*. When a caseworker investigated, she found Carter's mother—who suffered from schizophrenia—to be incoherent and Carter to be dirty, suffering from an enlarged **[*760]** stomach, and tied by his ankle to the leg of a couch. *Id. at 359*. After passing through several foster homes, Carter was eventually adopted by Evely Prince Carter when he was ten years old. *Id. at 347, 359*. However, in February 1997, just shy of Carter's eighteenth birthday, Evely Prince Carter threw him out of her home, leading Carter to go live with her mother, Veader Prince ("Prince"). *Id. at 347*. And there he stayed until his incarceration in July for theft. *Ibid.*

On September 13, 1997, Prince returned home to an unwelcome surprise. Unbeknownst to her, Carter had been released from jail and had let himself into her home. *Id. at 347*. Upon discovering him, Prince directed her son, who was with her at the time, to give Carter **[**3]** the keys and title to his car; she then told Carter not to come back. *Id. at 348-49*. The Supreme Court of Ohio summarized the subsequent events:

> According to Carter's confession, after he obtained the car keys from [the victim's son], he left Prince's house and drove around for a while. He attempted to stay at his aunt's house, but could not. He returned to Prince's house and, since the door was locked, climbed through the bedroom window. He had called out to Prince, hoping to convince her to allow him to stay there for a week. They got **[***3]** into an argument and Prince told him to leave. He kept telling her that he had nowhere to go.
>
> She tried to push him out the door and he started to beat her. At some point, he got a knife from the kitchen and started stabbing her. He described it as just "going off" and could not provide exact details of what happened during the assault, although he did remember hitting her in the face and stabbing her in the neck.
>
> The next thing Carter remembered was being in the kitchen and washing his hands and the knife. He walked downstairs and saw Prince on the basement floor and then started to cover things up. He covered her with some clothes, moved the couch in her bedroom **[**4]** to cover up blood on the carpet, turned the water on in her bathroom and closed the door, and put a chicken in a pot on the stove and turned the stove on. He left a note on the kitchen table saying, "Took Sean to the hospital" in case someone saw blood in the house. He changed his clothes, since they were

> bloody. He then took about $150 from her purse and left.
> He originally took her keys, thinking he would take one of her vans, and actually put his bag of clothes in the van, but could not get the van started. He got into [the victim's son's] car and drove off. Since he did not have a license plate, he stopped to steal a plate from a car in Garrettsville. To remove and transfer the plates to his car, he used the knife that he had stabbed his grandmother with.

Id. at 349-50.

Late in the evening of September 14, Prince's body was discovered by her children. *Id. at 348*. An autopsy revealed that she had been stabbed 18 times, had suffered blunt-force trauma to the head, and had been anally raped. *Id. at 349*. Semen found in the victim's anus was later positively identified as Carter's. *Id. at 353*.

The next day, Carter was detained by police in Beaver County, Pennsylvania, and, after being given his *Miranda* warnings, he confessed to **[**5]** Prince's murder. *Id. at 349*. He was subsequently extradited to Ohio, where he was indicted for, *inter alia*, one count of aggravated murder with three capital specifications, namely, aggravated burglary, aggravated robbery, and rape. *Id. at 350*.

Prior to trial, a competency hearing was held at the request of defense counsel. **[*761]** Because Carter had attempted to commit suicide "several" times while in custody, his arms and legs were shackled throughout the proceedings, and he was guarded by three members of the Trumbull County Sheriff's Department. Despite these circumstances, the court concluded that Carter was **[***4]** competent to stand trial based upon the testimony of Dr. Stanley Palumbo, a court-appointed licensed psychologist. *Id. at 355*. According to Palumbo,

> [w]ith reasonable scientific certainty[,] Mr. Carter [was] competent to stand trial. Mr. Carter underst[ood] the nature of the proceedings against him and d[id] not suffer from any gross mental disorder that would [have] interfere[d] with his ability to participate in his defense. He d[id] not suffer from any mood disorder such as depression, which would [have] cause[d] him to have trouble following a witness's line of statements or [not] have the energy and interest **[**6]** in participating in his own defense in his own best interest.

Ibid. In its findings of fact, the court further noted that while "Palumbo testified that the Defendant does not trust his attorney, or any other attorney . . . Defendant's distrust of his attorney does not exhibit paranoid behavior since he distrusts all attorneys and not specifically his attorney." *Ibid.*

Shortly thereafter, Carter entered a plea of not guilty by reason of insanity. *Ibid.* In advance of the trial, the defense hired Dr. Steven A. King to assess Carter's mental state at the time of the crime. While interviewing Carter, King became concerned that Carter was not competent to stand trial based upon "several subtle signs of a psychotic disorder"—such as inappropriate laughter and auditory and visual hallucinations—as well as Carter's musing about killing Anthony Consoldane, one of his trial counsel. Following a motion by Carter's counsel, a second competency hearing was held on February 26, 1998.

At the hearing, three experts—King, Palumbo, and forensic psychiatrist Dr. Robert Alcorn—testified. *Id. at 355-56*. While King reiterated his diagnosis that Carter was incompetent—specifically, due to "his paranoia, his hostility and **[**7]** his inability to cooperate in his defense"—he acknowledged that "this was a

close call, this is a subtle case."[1] Palumbo and Alcorn, however, disagreed. Palumbo, who had examined Carter on four different occasions, testified that Carter understood the charges against him, at no time seemed to be responding to auditory or visual hallucinations, and did not demonstrate confusion or agitation. Palumbo **[***5]** further attributed Carter's anger towards his attorneys to personality issues and to "questions about his attorneys proceeding for him on his behalf." Alcorn echoed Palumbo's assessment, opining that Carter was aware of the nature of the proceedings against him, that Carter had attempted to feign signs of mental illness during one of his interviews, and that Carter's antipathy towards Attorney Consoldane was related to Carter's assessment of Consoldane's performance. At the conclusion of the hearing, the trial court once again found Carter competent to stand trial, noting that even King had acknowledged that the issue was borderline and that a defendant's distrust of or hostility towards his attorney does not necessarily equate with incompetence. *Id. at 356*.

[*762] Two **[**8]** weeks later, during the trial's opening statements, Carter interrupted defense counsel to express his desire to plead guilty. After the statements concluded, a brief recess was held, at which time Carter informed the court that he did not wish to attend the proceedings. Initially, the trial judge stated that he would hold off on deciding that matter, as he wished to research the issue to ensure that Carter's rights were adequately protected. Carter was, however, insistent that he did not want to attend the trial; and after asking whether he would be removed if he "acted up" in court, he lunged at the judge. The court described the ensuing events:

> [w]hat happened is basically the Defendant 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. And he struggled very violently with them. And he has promised to the Court that he intends to continue that type of activity throughout the trial if he's required to be here.

Defense counsel agreed with this characterization of the incident and stipulated that until Carter could control himself, Carter would **[**9]** monitor the proceedings via television in a separate room. The trial judge then directed defense counsel to inform the court if Carter changed his mind about attending the proceedings.

On March 20, 1998, Carter was convicted of one count of aggravated murder and of two capital specifications, namely, that the murder was committed in connection with rape and in connection with aggravated robbery. *Id. at 350*. Following a penalty hearing, the jury **[***6]** recommended a sentence of death; and on April 2, 1998, the trial court adopted the jury's recommendation.[2] *Ibid.*

Represented by new counsel, Carter immediately appealed his conviction and sentence, raising fourteen propositions of law; for purposes of this appeal, however, only two are relevant.

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[1] During oral arguments, Carter's habeas counsel stated that King had merely described the question of Carter's mental illness as a "close call." While this is technically correct, in his competency report, King wrote, "as a result of Mr. Carter's psychosis, he is presently not capable of assisting his defense." (Emphasis added). Logic therefore dictates that King also viewed the question of competence to be a "close call."

[2] Carter was also convicted of aggravated robbery, rape, and the lesser-included offense of criminal trespass on the aggravated-burglary charge. *Carter, 734 N.E.2d at 350*. The court sentenced Carter to 30 days of imprisonment for criminal trespass, ten years for aggravated robbery, and ten years for rape, with the latter two sentences running consecutively.

Proposition of Law No. 4

U.S. Const. amend. XIV and *Ohio Const. art. I, §§ 1*, 2, and 16, require [the] trial court, when presented with bona fide evidence and good faith claims that a criminal defendant is incompetent to stand trial, to examine all reasonably available evidence.

Proposition of Law No. 5

Ineffective assistance of counsel violates not only a capital defendant's rights to effective counsel under *U.S. Const. amend. VI* and *XIV*[,] and *Ohio Const. art. I, §§ 1* and 10; but also rights to a fair and impartial jury trial and a reliably determined sentence, **[**10]** as guaranteed by [ ] *U.S. Const. amend.[ ] V*, *VI*, *VIII*, and *XIV* and by *Ohio Const.[ ] art. I, §§ 5*, *9*, *10*, and *16*.

*Carter, 2015 U.S. Dist. LEXIS 133948, 2015 WL 5752139, at *5* (alterations in original). As part of the latter proposition of law, Carter argued that trial counsel were constitutionally ineffective because they failed to accept the trial court's offer of MRI testing for Carter.

On September 13, 2000, the Supreme Court of Ohio affirmed Carter's conviction and death sentence. *Carter, 734 N.E.2d at 350*. With respect to the former proposition of law, the court noted that Carter's argument focused solely on his alleged inability to assist counsel during the proceedings. *Id. at 355*. After a careful review of **[*763]** the record—during which it emphasized that two experts had found Carter to be competent, while the third had characterized the issue as a "close call"—the court concluded that "[t]he trial court's findings of fact fail to support Carter's claim that the court's [competency] decision was unreasonable, arbitrary, or unconscionable." *Id. at 356*. As regards Carter's ineffective-assistance-of-counsel claims, the Supreme Court of Ohio held that they were "speculative" given the record. *Id. at 356-57*. For instance, concerning Carter's claim regarding the failure to pursue MRI testing, the court noted **[***7]** that **[**11]** there was no way to know whether Carter had been prejudiced by counsels' decision absent the forgone MRI; and because the claim required extrarecord evidence, it could "not appropriately [be] considered on direct appeal" under Ohio law. *Id. at 357*.

B. State-Court Postconviction Proceedings

While his direct appeal was pending, Carter also filed a "petition to vacate or set aside conviction," which the trial court interpreted as a petition for postconviction relief. *State v. Carter, No. 99-T-0133, 2000 Ohio App. LEXIS 5935, at *2 (Ohio Ct. App. Dec. 15, 2000)*. In relevant part, Carter raised the following causes of action:

SECOND CAUSE OF ACTION

Petitioner was incompetent to stand trial because his paranoid personality did not permit him to trust his lawyers. He therefore could not and did not work cooperatively with counsel, a basic component of competence to stand trial. Further, counsel was physically afraid of Petitioner, which resulted in a diminution of the attorney-client relationship, and counsel failed to present out of court evidence by an expert witness who acknowledged that counsel could not possibly have an effective working relationship with Petitioner.

. . .

Petitioner's trial counsel failed to (a) present all evidence of Petitioner's incompetence; **[**12]** (b) make a complete record on Petitioner's behalf so that Petitioner could defend his life and liberty on appeal if convicted; and (c) present,

through direct or cross examination, all expert evidence of Petitioner's incompetence to stand trial.

FIFTH CAUSE OF ACTION

Petitioner's trial counsel violated the duty to conduct [an investigation of possible mitigating factors] by:
(A) failing to fully investigate Petitioner's medical and social history; and
(B) failing to hire a mitigation expert to assist in discovery of relevant information.

On August 30, 1999, the trial court dismissed the petition without a hearing, finding that Carter "ha[d] failed to show substantive grounds for relief as to any of the claims set forth" therein. *See ibid.* Specifically, the court held that the aforementioned causes of action were barred by the doctrine of res judicata, as the issues had been or could have been raised before the Supreme Court of Ohio on direct appeal. In the alternative, the court found that dismissal of the claims **[***8]** without a hearing was warranted because Carter had failed to "submit[] evidentiary documents which contain sufficient facts to demonstrate the denial of a constitutional right **[**13]** and resultant prejudice[.]"

On September 29, 1999, Carter appealed the postconviction trial court's decision, alleging two errors.

Assignment of Error No. 1

The trial court erred in denying appellant an evidentiary hearing on his petition for post-conviction relief, thus depriving appellant of liberties secured by *U.S. Const. amend. VI* and *XIV*, and Ohio Const. art. I [§§] 1, 2, 10, and 16, **[*764]** including meaningful access to the courts of this State.

Assignment of Error No. 2

The trial court erred in applying the principles of *res judicata*, thus depriving appellant of liberties secured by *U.S. Const. amend. VI* and *XIV*, and Ohio Const. art. I, [§§] 1, 2, 10, and 16.

*Id. at *2-3*. On December 15, 2000, the Court of Appeals of Ohio affirmed the judgment of the trial court, holding that the first assignment of error was "without merit" and, therefore, that the second one was moot. *Id. at *13*. In doing so, the court noted that (1) it did not appear that Carter's counsel performed inadequately during the mitigation phase of the trial and (2) Carter had not submitted evidentiary documents that would have entitled him to a hearing on his claim of ineffective assistance of counsel during the mitigation phase. *Id. at *10, 13*. Once again, Carter appealed the decision,[3] but on May 2, 2001, the Supreme Court of Ohio declined jurisdiction and dismissed **[**14]** the case as not involving any substantial constitutional question. *State v. Carter, 91 Ohio St. 3d 1509, 746 N.E.2d 612 (Ohio 2001)* (Table).

Nearly one-and-three-quarters years later, Carter filed an application with the Supreme Court of Ohio to reopen his direct appeal on

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[3] On appeal, Carter raised the following propositions of law:

Proposition of Law No. 1

Denial of an Evidentiary Hearing Where a Petition for Post-Conviction relief States Operative Facts is a denial of meaningful access to the courts of this State in contravention of *Ohio Const. art. I, §§[]1* and *16*; *U.S. Const. amend[.] XIV*.

Proposition of Law No. 2

Res judicata may not be applied to defeat claims raised in a post-conviction petition where a direct appeal is still pending and the matters raised in the petition have not been previously adjudicated.

the grounds that he had been denied effective **[***9]** assistance of appellate counsel. In particular, Carter alleged that appellate counsel had failed to raise "all instances of prosecutorial misconduct and ineffective assistance of [trial] counsel, and the failure of the trial court to ensure that Mr. Carter was competent to stand trial and to safeguard his right to be present." On March 19, 2003, the court denied the application without discussion. *State v. Carter, 98 Ohio St. 3d 1486, 2003- Ohio 1189, 785 N.E.2d 470 (Ohio 2003)* (Table).

C. Federal Habeas Corpus Proceedings

In March 2002, prior to Carter's **[**15]** filing an application to reopen his direct appeal, the Office of the Ohio Public Defender ("OPD") initiated habeas corpus proceedings on the Petitioner's behalf by filing a suggestion of incompetence. In its application, the OPD noted that Carter—who, at that time, may have waived further review of his case and have volunteered for execution—was then being held at a facility for inmates with severe mental illness and that his case worker had said that Carter was mentally ill. Because Carter was not represented by counsel and had refused to meet with the office's representatives, the OPD simultaneously filed a motion for the appointment of counsel and an *ex parte* motion for the appointment of a mental-health expert to determine whether Carter was competent to waive federal review of his conviction and death sentence. The district court granted the motions, and on May 1, 2002, habeas counsel filed a petition for a writ of habeas corpus, pursuant to *28 U.S.C. § 2254*, on Carter's behalf. In July 2002, counsel withdrew OPD's *ex parte* request after Carter met with them and stated that he wanted to pursue his case in federal court with their representation.

Carter, who amended his petition three times between **[**16]** May 2002 and October 2005, raised nine claims on habeas review.

GROUND FOR RELIEF ONE

[*765] Sean Carter was incompetent at both the culpability and penalty phases of his trial. Therefore, his convictions and sentence of death are in violation of his rights under the *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendments to the United States Constitution*.

GROUND FOR RELIEF TWO

Sean Carter's right to effective assistance of counsel during the mitigation phase was violated when counsel failed to investigate, prepare, and present relevant mitigating evidence. *U.S. Const. amend[ ]. VI*, *VIII*, *XIV*.

[*10] GROUND FOR RELIEF THREE**

Sean Carter's rights to a fair trial and an impartial jury were violated by prosecutor misconduct at the culpability phase of Mr. Carter's trial. *U.S. Const. amend. VI* and *XIV*.

GROUND FOR RELIEF FOUR

The trial court denied Sean Carter his rights under the *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendments to the United States Constitution* by failing to instruct the jury properly at the conclusion of the culpability phase.

GROUND FOR RELIEF FIVE

Sean Carter was denied his right to the effective assistance of counsel under the *Sixth* and *Fourteenth Amendments to the United States Constitution* when his attorneys failed to object and properly preserve numerous errors that occurred

during the pre-trial proceedings and the culpability phase of the trial.

GROUND FOR RELIEF SIX

Sean Carter was denied the effective assistance of **[**17]** counsel in his direct appeal as of right, in violation of his rights under the *Fifth*, *Sixth*, *Eighth* and *Fourteenth Amendments to the United States Constitution*.

GROUND FOR RELIEF SEVEN

The death penalty as administered by lethal injection in the state of Ohio violates Sean Carter's rights to protection from cruel and unusual punishment and to due process of law as guaranteed by the *United States Constitution amend [ ]. VIII* and *XIV*.

GROUND FOR RELIEF EIGHT

Sean Carter is seriously mentally ill. Therefore, his death sentence is in violation of his rights under the *Eighth* and *Fourteenth Amendments*.

GROUND FOR RELIEF NINE

Sean Carter will not be competent and sane to be executed. Sean's execution while he is incompetent and insane, violates the *Eighth* and *Fourteenth Amendments to the United States Constitution*.

*Carter, 2015 U.S. Dist. LEXIS 133948, 2015 WL 5752139, at *10* (alterations in original). On the same day that Carter filed his third amended petition, he also filed a motion to expand the record and moved for a competency determination and to stay the proceedings.

In late November 2005, the district court granted Carter's motion for a competency determination, and granted in part and denied in part his motion to expand the record. Of particular note, the court refused to expand the record to include (1) an affidavit from Ida Magee, who served as Carter's foster mother prior to his adoption by Evely Prince **[**18]** Carter, (2) a **[***11]** psychosocial history of Carter prepared by Albert Linder, a psychiatric social worker, (3) a letter from psychologist Dr. Douglas Darnall that detailed Carter's mental illness, (4) an April 1994 chemical-dependency assessment of Carter by the Portage County Juvenile Court, and (5) a March 1995 Department of Youth Services evaluation. The court's refusal was based on the grounds that Carter had not been diligent in presenting that evidence to the Ohio courts. *See 28 U.S.C. § 2254(e)(2)*.

Five months later, on May 1, 2006, the district court finally conducted a hearing to determine whether Carter was competent **[*766]** to proceed with his habeas petition. The next day, the court ordered Carter's counsel to arrange for both parties' experts to observe habeas counsels' interactions with Carter, presumably to assess his purported "inability to communicate with counsel in a meaningful way concerning the facts and issues in his case." After the court denied Carter's objection to the order—specifically, that it threatened to violate his attorney-client privilege—he sought a Certificate of Appealability ("COA"), pursuant to *28 U.S.C. § 1292(b)*. And although the district court also denied Carter's motion to certify the appeal, **[**19]** it granted his request to stay discovery pending a resolution of the issue by the Sixth Circuit. In November 2007, we granted Carter's request for mandamus relief and set aside the district court's order.

In September 2008, nearly three years after Carter filed his motion for a competency determination, the district court held that the

Petitioner was incompetent to proceed with his federal habeas litigation. Carter v. Bradshaw, 583 F. Supp. 2d 872, 873 (N.D. Ohio 2008), *vacated*, 644 F.3d 329 (6th Cir. 2011), *rev'd* Ryan v. Gonzales, 568 U.S. 57, 133 S. Ct. 696, 184 L. Ed. 2d 528 (2013). According to the district court, Carter was incompetent because he was unable to assist habeas counsel in developing the removal-from-trial, competency, and ineffective-assistance-of-counsel claims that were raised in his petition. The court based this finding on its determination that Carter:

> could not reasonably be expected to recall and describe how well he was able to view the trial once he was removed from it . . . , [ ] would be unable to elaborate on conversations he had with defense counsel regarding his competency . . . [, and] does not have the present capability to judge and express to habeas counsel what mitigating evidence from his social and family background defense counsel should have introduced during the sentencing phase of trial because of **[**20]** his limited capacity to recall and convey the details about any such events.

[*12]** Carter, 583 F. Supp. 2d. at 882.[4] The court accordingly dismissed the case without prejudice and prospectively tolled the one-year statute of limitations set forth in 28 U.S.C. § 2244(d). Id. at 884-85.

On appeal, a panel of this court amended the district court's judgment, directing that Carter's habeas proceedings be stayed with respect to those claims for which Carter's assistance was "essential." Carter, 644 F.3d at 337. It did so on the grounds that pursuant to 18 U.S.C. § 4241, federal habeas petitioners facing the death penalty for state criminal convictions have a statutory right to competence. *Ibid.* The Supreme Court subsequently granted certiorari "to determine whether § 4241 provide[d] a statutory right to competence in federal habeas proceedings." Gonzales, 568 U.S. at 64.

On January 8, 2013, the Supreme Court unanimously vacated the judgment of the Sixth Circuit. Gonzales, 568 U.S. at 77. In so doing, the Court also addressed Carter's argument that the stay was a proper exercise of the Northern District of Ohio's "equitable power to stay proceedings when [it] determine[s] that habeas petitioners are mentally incompetent." Id. at 73. "For purposes of resolving the[] case[]," the Court noted that Carter's first, second, and fifth habeas claims had been "adjudicated **[**21]** on the merits in state postconviction proceedings and, thus, were subject to review **[*767]** under [*28 U.S.C.] § 2254(d)*." Id. at 74, 75, 75 n.15-16. Accordingly, the Court concluded that these claims did not warrant a stay because "[a]ny extrarecord evidence that Carter might have concerning [them] would be . . . inadmissible." Id. at 75 (citing Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)).

Upon remand, the district court denied Carter's petition for a writ of habeas corpus. Carter, 2015 U.S. Dist. LEXIS 133948, 2015 WL 5752139, at *1. Having done so, the court then issued a COA as to Carter's: (1) "First ground for relief regarding his competency to stand trial," (2) "Second ground for relief relating to his trial counsel's ineffective assistance during the mitigation phase of trial," and (3) "Fifth ground for relief relating to his trial counsel's ineffective assistance regarding his competency to stand trial." 2015 U.S. Dist. LEXIS 133948, [WL] at *52. We subsequently denied Carter's application to expand the COA

[4] The district court also stated that it was "inclined" to find that "Carter's mental illness prevent[ed] him from truly comprehending the nature of the habeas proceedings." Carter, 583 F. Supp. 2d at 881.

and his request that we order both a competency evaluation and a limited stay in the **[***13]** proceedings. Accordingly, only the aforementioned three issues are before this court. *See* 28 U.S.C. § 2253(c).

II

HN1[] When reviewing a district court's grant or denial of a petition for a writ of habeas corpus, we examine its conclusions of law de novo and its factual findings for clear error. *Hand v. Houk, 871 F.3d 390, 406 (6th Cir. 2017)*. Additionally, because **[**22]** Carter filed his habeas petition after 1996, the scope of our review is further restricted by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), *Stojetz v. Ishee, 892 F.3d 175, 190 (6th Cir. 2018)*, which was designed to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law[,]" *Bell v. Cone, 535 U.S. 685, 693, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)*.

HN2[] Among other things, AEDPA limits the circumstances under which we may grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in a state court. *See 28 U.S.C. § 2254(d)*. More specifically, under AEDPA, we may grant a writ only if the state court's 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.

Ibid. ***HN3***[] A state court's adjudication of a claim is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than **[**23]** the Supreme Court on a set of materially indistinguishable facts." *Stojetz, 892 F.3d at 192* (quoting *Van Tran v. Colson, 764 F.3d 594, 604 (6th Cir. 2014)*). In contrast, an "unreasonable application" of clearly established federal law occurs where "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the [petitioner's] case." *Williams v. Taylor, 529 U.S. 362, 413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. For purposes of AEDPA, "clearly established federal law" only "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Lockyer v. Andrade, 538 U.S. 63, 71, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)* (quoting *Williams, 529 U.S. at 412*).

[*14]** ***HN4***[] To be clear, "an *unreasonable* application of federal law is different from **[*768]** an *incorrect* application of federal law." *Renico v. Lett, 559 U.S. 766, 773, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010)* (quoting *Williams, 529 U.S. at 410*). Stated more bluntly, under the "unreasonable application" clause of *§ 2254(d)(1)*, it does not matter whether a federal habeas court might "conclude[] in its independent judgment that the [state court] applied clearly established federal law erroneously or incorrectly[.]" *Gagne v. Booker, 680 F.3d 493, 513 (6th Cir. 2012)* (en banc) (first two alterations in original) (quoting *Williams, 529 U.S. at 411*). Rather, a federal habeas court may issue the writ pursuant to this clause only where the relevant state-court decision applied clearly established federal law in an objectively unreasonable **[**24]** manner, *Lett, 559 U.S. at 773*, i.e., only where "the state court's ruling . . . was 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, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)*.

HN5[↑] Review under *§ 2254(d)(1)* is limited in two additional, important ways. First, notwithstanding the language of *28 U.S.C. § 2254(e)(2)*, review is restricted to the record that was before the court that adjudicated the claim on the merits. *Pinholster, 563 U.S. at 181, 184*. Second, when determining whether the "unreasonable application" standard is met, courts must consider the rule's specificity; that is because "the range of reasonable judgment can depend in part on the nature of the relevant rule." *Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)*. "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Ibid.*

HN6[↑] As regards *28 U.S.C § 2254(d)(2)*, it too imposes a highly deferential standard when reviewing claims of factual error by a state court. *See Burt v. Titlow, 571 U.S. 12, 18, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013)*. The Supreme Court has been clear that "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Ibid.* (quoting *Wood v. Allen, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010)*). Stated differently, it is not enough that reasonable minds reviewing the record might **[**25]** disagree with the state court's factual determination; rather, the record must "*compel* the conclusion that the [state] court had no permissible alternative" but to arrive at the contrary conclusion. *Rice v. Collins, 546 U.S. 333, 341-42, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006)* (emphasis added). Equally important, "it is not enough for the petitioner to show **[***15]** *some* unreasonable determination of fact; [additionally], the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice v. White, 660 F.3d 242, 250 (6th Cir. 2011)* (emphasis added).[5]

III

A

It is well-established that ***HN8***[↑] "the criminal trial of an incompetent defendant **[*769]** violates due process." *Cooper v. Oklahoma, 517 U.S. 348, 354, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996)* (quoting *Medina v. California, 505 U.S. 437, 453, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992)*; *see also Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)*. It is equally well-established that one who lacks either a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him" is not competent to stand trial. *Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)* (per curiam). Accordingly, where there is substantial doubt as to a defendant's "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense[,]" *Drope, 420 U.S. at 171*, a trial court "must sua sponte order an evidentiary hearing on the . . . issue[,]" *Williams v. Bordenkircher, 696 F.2d 464, 466 (6th Cir. 1983)* (citing **[**26]** *Pate v. Robinson, 383*

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[5] In *Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*, ***HN7***[↑] the Supreme Court warned against "merg[ing] the independent requirements of ***§§ 2254(d)(2)*** and ***(e)(1)***." *Id. at 341*. That said, the Supreme Court has yet to clarify the relationship between ***§ 2254(e)(1)***, under which a petitioner "bears the burden of rebutting the state court's factual findings 'by clear and convincing evidence[,]'" and ***§ 2254(d)(2)***. *Titlow, 571 U.S. at 18* (quoting ***28 U.S.C. § 2254(e)(1)***); *see also Wood, 558 U.S. at 300* ("[W]e have explicitly left open the question [of] whether ***§ 2254(e)(1)*** applies in every case presenting a challenge under ***§ 2254(d)(2)***[.]")

U.S. 375, 385, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966))*.

HN9[↑] While the Supreme Court has yet to prescribe a standard for determining when a trial court should hold evidentiary proceedings on the matter of competency, we have previously used the following test: "whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." *Filiaggi v. Bagley, 445 F.3d 851, 858 (6th Cir. 2006)* (quoting *Williams, 696 F.2d at 467*). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in **[***16]** determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient." *Black v. Bell, 664 F.3d 81, 102 (6th Cir. 2011)* (alterations in original) (quoting *Drope, 420 U.S. at 180*). Where, however, a trial court has already held a competency hearing and deemed the defendant competent, it need not reevaluate its determination unless presented with qualitatively different evidence. *See Franklin v. Bradshaw, 695 F.3d 439, 450 (6th Cir. 2012)*.

HN10[↑] Because competence to stand trial is a question of fact, *see Thompson v. Keohane, 516 U.S. 99, 111, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)*, and because Ohio law incorporates the *Drope* standard for competency, *see O.R.C. § 2945.37(G)*,[6] a petitioner challenging an Ohio court's finding of competence is subject, at minimum,[7] to the strictures **[**27]** of *28 U.S.C. § 2254(d)(2)*, *see Filiaggi, 445 F.3d at 858-59* (reviewing Supreme Court of Ohio's competency determination, **[*770]** which was made pursuant to Ohio law, under *28 U.S.C. § 2254(d)(2)* and *(e)(1)*); *see also Black, 664 F.3d at 102* (stating that a state court's competency-to-stand-trial determination is entitled to deference under *28 U.S.C. § 2254(e)(1)* provided that "the state court's legal standard for determining whether a defendant is competent is not contrary to or an unreasonable application of clearly established Supreme Court precedent"). In other words, not only must a petitioner show that the state court's determination was unreasonable, but he may not draw upon any extrarecord evidence to make his argument. *See Pinholster, 563 U.S. at 185*. When assessing whether a petitioner has met this burden, it is important to keep in mind "that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Titlow, 571 U.S. at 18* (quoting *Wood, 558 U.S. at 301*).

[*17]** B

Although Carter frames his first cause of action

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[6] *O.R.C. § 2945.37(G)* states:

> A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is *incapable of understanding the nature and objective of the proceedings* against the defendant *or of assisting in the* ***[**28]*** *defendant's defense*, the court shall find the defendant incompetent to stand trial and shall enter an order authorized by *section 2945.38* of the Revised Code.

Ibid. (emphasis added).

[7] We say "at minimum" because the Supreme Court has yet to clarify the relationship between ***28 U.S.C. §§ 2254(d)(2)*** and ***2254(e)(1)***, *see Titlow, 571 U.S. at 18*, and, thus, Carter's competency challenge may also be subject to the strictures of ***28 U.S.C. § 2254(e)(1)***, *see Black, 664 F.3d at 102*. However, because Carter fails to show that the Supreme Court of Ohio's determination was unreasonable in light of the evidence presented in the state court proceedings, we need not analyze his claim under ***28 U.S.C. § 2254(e)(1)***.

as a single claim—namely, that he was incompetent at both the guilt and penalty phases of the trial—it actually consists of two analytically distinct parts. In his first subclaim, Carter raises a question of fact. Specifically, he asserts that "the trial court's [and the Supreme Court of Ohio's] determination of Carter's competency was unreasonable based upon the evidence available at the state court proceeding[,]" both because the courts either ignored or misinterpreted relevant evidence and because they credited flawed expert testimony. Petitioner Br. 22, 27, 31. Carter supports this subclaim, at least in part, by pointing to the following evidence, which he contends the state courts overlooked or did not properly credit: his family history of schizophrenia, his hallucinations as a juvenile and during his competency evaluations, his attempts at suicide while in state custody, his expressed desire to kill one of his trial attorneys, his purported lack of understanding of the role **[**29]** of trial counsel, and his desire to receive the death penalty. *Id.* at 22-26.

In contrast, Carter's second subclaim—i.e., that even if the trial court's initial determination was not unreasonable, evidence that arose after the competency hearings should have led the court to reevaluate its finding, *id.* at 32—is an issue of law, *see* Hill v. Anderson, 881 F.3d 483, 510-11 (6th Cir. 2018) (assessing a petitioner's failure-to-hold-a-competency-hearing claim pursuant to *28 U.S.C. § 2254(d)(1)*); *see also* Franklin, 695 F.3d at 450 ("[T]he trial court's failure to hold a midtrial competency hearing *sua sponte* was not a 'decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.'" (citing *28 U.S.C. § 2254(d)(1)*)). *But see* id. at 451 (indicating later that failure-to-hold-a-*sua-sponte*-competency-hearing claim is subject to review pursuant to *28 U.S.C. § 2254(d)(2)*). Specifically, Carter cites his outbursts in court—most notably, his interrupting defense counsel's opening statement to express his desire to plead guilty and his subsequent attempt to assault the trial judge—as evidence that the trial court should have revisited the finding it made at the second competency hearing. Petitioner Br. 25, 32.

As already detailed, Carter raised this competency claim on direct appeal, where it was adjudicated on the merits. Carter, 734 N.E.2d at 355-56. With **[**30]** respect to Carter's first subclaim, the Supreme Court of Ohio acknowledged that the record contained some indications **[***18]** of Carter's being incompetent, but emphasized that such evidence was insufficient to overcome the opinions of the expert witnesses, two of whom testified that Carter was competent **[*771]** to stand trial and the third of whom "admitted that the question of competence was a close call." *Ibid.* The court accordingly held that the trial court did not abuse its discretion in finding Carter competent because that decision was not "unreasonable, arbitrary, or unconscionable" in light of the findings of fact. Id. at 356. As regards the denial of Carter's second subclaim, the Supreme Court of Ohio did not explicitly discuss it; nevertheless, that too qualifies as an adjudication on the merits for the purposes of *28 U.S.C. § 2254(d)*. *See* Richter, 562 U.S. at 98 **HN11**[⬆] ("By its terms *§ 2254(d)* bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in *§§ 2254(d)(1)* and *(2)*. There is no text in the statute requiring a statement of reasons.").

C

As a preliminary matter, it is simply not true that the Supreme Court of Ohio failed to consider the host of evidence that Carter points to. In arriving at its conclusion that the **[**31]** trial court's findings of fact did not support Carter's competency claim, the

Supreme Court of Ohio explicitly recognized Carter's suicide attempts while awaiting trial, his "apparent disagreements with counsel[,]" his desire to "enter a plea and get it over[,]" and his "lung[ing] at the judge to be removed from the courtroom." *Carter, 734 N.E.2d at 356, 356 n.3*. Furthermore, while discussing the expert witnesses' testimony, the court noted Carter's "anger and irritability with his attorneys," including his having expressed a desire to kill Consoldane, as well as his "bizarre behavior"—presumably, his auditory and visual hallucinations—during his competency interview with Dr. King. *Id. at 355-56*. At most, then, the court can be faulted for a relatively minor oversight, namely, not explicitly considering Carter's family history of mental illness.

i

Turning now to Carter's first subclaim, the Supreme Court of Ohio's decision affirming the trial court's competency determination was not unreasonable in light of the evidence presented in state court. At Carter's second competency hearing, Drs. Palumbo and Alcorn testified that Carter was competent to stand trial, while Dr. King—who testified that Carter was **[***19]** incompetent—described the **[**32]** issue as a "close call."[8] Given that, all else equal, it is not unreasonable for a court to credit the diagnoses of two experts over that of a third (especially when that contrary opinion is heavily qualified), *see O'Neal v. Bagley, 743 F.3d 1010, 1023 (6th Cir. 2013)* ("With expert testimony split, as it often is, the state court chose to credit [two experts] over [a third expert], and we cannot say from this vantage that it was unreasonable to do so"); *cf. Franklin, 695 F.3d at 449*, Carter must show that the Supreme Court of Ohio was unreasonable to credit the opinions of Drs. Palumbo and Alcorn.

He does not come close to doing so. In his brief, Carter points to evidence that he claims was "enough" to establish his incompetence, such as his family history of schizophrenia, his hallucinations, his attempts at suicide, his desire to plead guilty, and his expressed desire to kill one of his trial counsel. Petitioner Br. 22-26. However, while Carter may very well be correct that such evidence is "enough," the question before us is whether such evidence *compels* a determination of incompetence, *see Collins, 546 U.S. at 341*. And because not every suicidal person—or everyone who has a family history of schizophrenia, a desire to plead **[*772]** guilty, or a very low opinion of lawyers—is incompetent **[**33]** to stand trial, it does not. Carter therefore fails to carry his burden under *28 U.S.C. § 2254(d)(2)*.

ii

As for Carter's assertion that the trial court should have held a third competency hearing *sua sponte*, the judgment of the Supreme Court of Ohio was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Hill, 881 F.3d at 510* (quoting *Richter, 562 U.S. at 103*). While Carter's courtroom behavior was outlandish, it was either cumulative of evidence presented at the competency hearings or demonstrated an ability to engage in means-end reasoning to achieve a stated goal. For instance, during the second competency hearing, both Palumbo and Alcorn testified that Carter had expressed a desire to avoid trial and to plead guilty. Specifically, Palumbo informed the trial court that Carter had "state[d that] he want[ed] to plead guilty, he doesn't want to have to go through all of this," while Alcorn said:

> **[***20]** [Carter] clearly indicated a wish to be able to plead guilty and get it over with.

[8] *See supra* p.4 n.1.

> He said he didn't want to go through a trial . . . . And [when] I inquired whether he would prefer to plead guilty and not have to go through a trial so that he wouldn't **[**34]** have to sit through a recitation of the terrible things that he had done[,] . . . he agreed with me about that.

Given this, Carter's standing up in open court and declaring his desire to plead guilty—while certainly unwise—merely reiterated information that had been considered by the court in its prior competency determinations.

The same is true of Carter's "lunging" at the trial judge. Immediately preceding the incident, Carter repeatedly stated, in chambers, that he did not wish to attend the trial and asked why he would not be allowed to plead guilty. Upon being advised by the court to speak with his lawyer about pleading guilty, Carter said, "I don't want to be here, don't want to be over in the court. Like, if I act up in here or something, like get restrained, they take me over there if I did that?" *Carter, 2015 U.S. Dist. LEXIS 133948, 2015 WL 5752139, at *23*. Shortly after the trial judge warned him that there would be repercussions to "acting up" and directed that Carter be taken back to the courtroom, the Petitioner attempted to attack the judge. *Ibid.* Then, after being restrained, Carter "promised to the Court that he intends to continue that type of activity throughout the trial if he's required to be here." *Ibid.* On this record, there **[**35]** is no indication that Carter's behavior was anything other than a calculated effort "to be removed from the courtroom[,]" *Carter, 734 N.E.2d at 356 n.3*, and, thus, that the incident was of the same kind as evidence already considered during the second competency hearing. Accordingly, we cannot say that the Supreme Court of Ohio unreasonably applied clearly established federal law when it adjudicated this subclaim.

IV

A

Carter's remaining causes of action involve allegations of ineffective assistance of trial counsel. Specifically, Carter argues that his counsel were constitutionally ineffective because they neither (1) protected his right to be competent to stand trial nor (2) properly presented mitigating evidence during the trial's penalty phase. Petitioner Br. 33, 47. Because these claims are analyzed under the same framework, we group them together for ease of exposition.

[*773] *HN12*[↑] **[***21]** To succeed on an ineffective-assistance-of-trial-counsel claim, a defendant must make two showings. First, he must show that counsel's performance was deficient, i.e., that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. This requires the defendant to identify specific acts **[**36]** or omissions by the counsel that were "outside the wide range of professionally competent assistance." *Id. at 690*. When reviewing counsel's performance, we "indulge a strong presumption" that "under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id. at 689* (quoting *Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)*).

Second, the defendant must establish that "the deficient performance prejudiced the defense." *Id. at 687*. For an error to be prejudicial, "[i]t is not enough . . . that [it] had some conceivable effect on the outcome of the proceeding." *Id. at 693*. Rather, there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 694*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* Where a defendant challenges a death sentence, the question at this stage is "whether there is a reasonable probability that,

absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id. at 695*.

HN13[↑] Because AEDPA applies to this case, Carter faces a particularly daunting task in establishing ineffective assistance of counsel. Where a state court has adjudicated **[**37]** an ineffective-assistance-of-counsel claim on the merits, we use a "doubly deferential standard of review that gives both the state court *and* the defense attorney the benefit of the doubt." *Titlow, 571 U.S. at 15* (quotation marks omitted) (emphasis added) (citing *Pinholster, 563 U.S. at 190*). In other words, rather than simply examining whether counsel satisfied *Strickland*'s deferential standard, we ask "whether there is *any reasonable argument* that counsel satisfied *Strickland*'s deferential standard." *Richter, 562 U.S. at 105* (emphasis added).

[*22]** B

Carter's second claim details three ways in which trial counsel were allegedly ineffective in protecting his right to be competent to stand trial: (1) by not presenting "material and relevant information regarding Carter's predisposition to and symptoms of mental illness[,]" (2) by not presenting "additional evidence of Carter's continual decline into incompetency[,]" and (3) by not "request[ing] a competency hearing after the commencement of trial." Petitioner Br. 33. More specifically, Carter faults his counsel for, respectively, (1) "fail[ing] to provide reports by psychiatric social worker Albert Linder and psychologist Dr. Douglas Darnall to any of the experts . . . [, which described] Carter [as] suffering **[**38]** from symptoms [indicative of] a major psychiatric disorder" and failing to adequately investigate and present evidence of Carter's suicide attempts; (2) not testifying during the competency hearings "about their personal experience in attempting to work with Carter and the effect of the breakdown in communication on their ability to prepare a constitutionally adequate defense"; and (3) not requesting a third competency hearing following Carter's outbursts at the start of the trial. *Id.* at 40-44.

[*774] Carter presented part of this claim on direct appeal and then again during postconviction proceedings. In both instances, Carter asserted that trial counsel had failed to "fully present evidence of incompetence" because they neither testified about nor filed affidavits detailing their experience of working with Carter. On direct appeal, the Supreme Court of Ohio rejected Carter's argument, stating that it was "speculative" in light of the record. *Carter, 734 N.E.2d at 356*. On postconviction appeal, the Court of Appeals of Ohio rejected Carter's claim, finding that Carter's "inability or unwillingness to aid his attorneys in the defense of his case [was] well-documented in the record." *Carter, 2000 Ohio App. LEXIS 5935, at *13*. ***HN14***[↑] Because this claim was adjudicated on the **[**39]** merits in state postconviction proceedings, *see Gonzales, 568 U.S. at 75, 75 n.16*, the question before us is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter, 562 U.S. at 105*.[9]

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[9] In his Reply Brief, Carter argues that we are not bound by the Supreme Court's determination that his ineffective-assistance-of-trial-counsel claims were adjudicated on the merits in state postconviction proceedings because it is dicta. Reply Br. 15. In support of this position, he notes that (1) the Supreme Court granted certiorari on a "narrow question," namely, "[w]hether *section 4241* provides a statutory right to competence in federal habeas proceedings" and (2) "the issue [was not] previously decided in the Sixth Circuit from which the [warden] sought a Petition for Writ of Certiorari." *Id.* at 14-15.

While it is true that the Supreme Court granted certiorari with respect to the aforementioned "narrow question," there is no

[*23]** There is. To see why, it first bears repeating that ***HN15***[↑] because Carter's claim was adjudicated on the merits, our review is limited to the record that was before the Ohio Court of Appeals, *Pinholster, 563 U.S. at 185* (holding, *inter alia*, that "evidence introduced in federal court has no bearing on *§ 2254(d)(1)* review"). Accordingly, in reviewing Carter's ineffective-assistance-of-trial-counsel claim, we may not consider the reports of Linder and Darnall, which were introduced for the first time during federal habeas proceedings. This makes sense, as when we conduct a *§ 2254(d)(1)* review, we are reviewing the decision of the state court, not the underlying claim.

Moving on to Carter's assertion that counsel were constitutionally ineffective for failing to present evidence of his **[*775]** suicide attempts and for not testifying about the breakdown in their relationship with Carter, the subclaim is meritless because he does not establish prejudice. It is undisputed that witnesses at the two competency hearings testified regarding these matters. At the first hearing, **[**40]** which Palumbo attended, a Trumbull County deputy sheriff informed the court that he had objected to the removal of Carter's handcuffs at the hearing because Carter had attempted to commit suicide while in custody. Then, at the second competency hearing, Dr. King relayed conversations that he had had with Carter's counsel regarding the difficulties they had faced in working with the Petitioner:

> **[***24]** I've had conversations with his counsel as frequent as today and they have indicated to me that he is uncooperative with them, he is not working with them, that actually he is very hostile when put under any pressure, and that they are actually not only apprehensive but even afraid of him.

*Carter, 2015 U.S. Dist. LEXIS 133948, 2015 WL 5752139, at *28*. King also testified that Carter had expressed a desire to kill one of his trial counsel—whom Carter deemed to be an "idiot," to be "playing slick," and to not caring about the case—and that he (King) believed the threat to be sincere. And in case the court somehow overlooked the depth of Carter's antipathy towards counsel, it was driven home by Alcorn, who testified that Carter had "specifically requested that I inform the court that Mr. Consoldane was a, quote, 'Dumb fuck.'" Based upon this record, there **[**41]** is a reasonable argument to be made that any additional evidence on these matters would have been cumulative and thus would not have generated a reasonable probability that the outcome of the competency hearings would have been different. The district court therefore correctly determined that the Ohio Court of Appeals did not unreasonably apply *Strickland* when adjudicating this subclaim. *Carter, 2015 U.S. Dist. LEXIS 133948, 2015*

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reason to treat its adjudicated-on-the-merits determination as dicta. For starters, we find no basis in the case law for Carter's assertion that the Supreme Court's holdings are limited to the issues on which certiorari is granted; nor does Carter provide any support for that claim. Rather, in *Humphrey's Ex'r v. United States, 295 U.S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935)*, the Court seemed to define dicta as expressions that "go beyond the case[.]" *Id. at 627*. Here, however, the Supreme Court made its adjudicated-on-the-merits finding "[f]or purposes of resolving [Carter's] case[.]" *Gonzales, 568 U.S. at 74*. Presumably, that is because (1) Carter did not argue in his brief to the Court that there was a statutory right to be competent in habeas proceedings, (2) Carter "argued at length in [his] brief[] and at oral argument that district courts have the equitable power to stay proceedings when they determine that habeas petitioners are mentally incompetent[,]" and (3) the underlying issue in the case was whether a stay was appropriate. *Gonzales, 568 U.S. at 73-74*. In determining that the district court erred in exercising its discretion to grant a stay, the Court based its decision, in relevant part, on the fact that the ineffective-assistance-of-trial-counsel claims were adjudicated on the merits in state court and, thus, that they would not benefit from Carter's assistance as "[a]ny extrarecord evidence that Carter might have concerning these claims would be . . . inadmissible." *Id. at 75*. The Supreme Court's adjudicated-on-the-merits determination is therefore part of its holding in *Gonzales*.

WL 5752139, at *26.

Finally, because there is no merit to Carter's claim that the trial court erred in failing to hold a third competency hearing *sua sponte, see supra* pp. 19-20, there is also no merit to his subclaim that counsel were constitutionally ineffective for failing to request a competency hearing after the commencement of trial, *see* Franklin, 695 F.3d at 451 ("[T]here being no merit to the underlying claim (trial-court error in not *sua sponte* ordering another hearing), there could be no merit to th[e] claim [that trial counsel were ineffective in the guilt phase in failing to request another competency hearing."). After all, **HN16**[↑] to establish ineffective assistance of counsel, Carter must show that there is a reasonable probability that save for counsels' errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 694. The problem for Carter is that **[**42]** the trial court was aware of almost all of the evidence that he now cites in support of this ineffective-assistance-of-counsel subclaim. *See* Petitioner Br. 45. For instance, during the two competency hearings, the court had been made aware of Carter's suicide attempts and of the difficult relationship that existed between Carter and his attorneys. And the trial judge had witnessed first-hand Carter's courtroom antics, including his attempt to attack the judge. Given this—and given that we cannot consider Carter's remaining evidence, namely, the reports of **[***25]** Linder and Dr. Darnall—a reasonable argument can be made that trial counsels' failure to request a third competency hearing did not prejudice Carter.

C

In his third, and final, cause of action, Carter contends that counsel failed in two ways to "adequately investigate, prepare, and present mitigating evidence that was **[*776]** available at the time of [his] trial." Petitioner Br. 47. First, Carter argues that counsel did a poor job explaining the evidence introduced during the trial's penalty phase and did not accurately portray Carter's character, history, and background. *Ibid.* Most notably, Carter criticizes counsel for their decision to **[**43]** decline the trial court's offer of an MRI for mitigation purposes—which, Carter contends, would have shown that he was suffering from organic brain damage. *Id.* at 54-55. As evidence of his trial counsels' ineffectiveness, he also points to the numerous documents that were submitted to the district court when he litigated his competence to assist habeas counsel. *Id.* at 59-60.

Second, Carter criticizes counsels' mitigation theory—namely, that Carter suffers from Antisocial Personality Disorder—as "incoherent and damaging." *Id.* at 50. Instead of presenting the jury with "an image of a mechanical killer who was unable to feel emotion, have sympathy for others or express remorse[,]" Carter contends that counsel should have introduced "information about the impact a structured prison environment could have [had] on Carter[.]" *Id.* at 47. Lastly, the Petitioner argues that relief is warranted because counsel presented a "mercy theory" of mitigation, which was not permitted in Ohio at the time of his trial. *Id.* at 53-54.

Carter's claim evolved at various stages of the proceedings. On direct appeal, Carter limited himself to arguing that counsel were ineffective for failing to accept the trial court's offer of MRI testing. The Supreme Court of Ohio **[**44]** concluded that the claim was not appropriately considered on direct appeal as there was "no way of knowing what, if anything, would have been discovered[.]" Carter, 734 N.E.2d at 357. During postconviction proceedings, however, Carter expanded his focus, asserting that counsel were ineffective for failing to fully investigate his medical and social history—which, presumably, includes their failure to pursue neurological testing—and for failing to

hire a mitigation expert to assist in the discovery of relevant **[***26]** information. *Carter, 2000 Ohio App. LEXIS 5935, at *8*. After detailing the testimony of two mitigation experts who testified at Carter's sentencing hearing, the Court of Appeals of Ohio rejected these assertions as "not [being] supported by the record." *Id. at *9-10*.

i

Concerning Carter's first subclaim—that trial counsel did not adequately investigate or present mitigating evidence—the judgment of the Ohio Court of Appeals did not involve an unreasonable application of clearly established federal law. Because Carter's claim was adjudicated on the merits in state court, *see id. at *10*; *see also Gonzales, 568 U.S. at 75, 75 n.16*, our review is limited to the record that was before the Ohio Court of Appeals, *Pinholster, 563 U.S. at 185*. The district court was therefore correct not to consider "evidence developed in federal **[**45]** habeas proceedings[,]" to wit, the Magee affidavit, the Linder report, the Darnall letter, the 1994 Portage County Juvenile Court chemical-dependency assessment, and an affidavit stating that Carter had been enrolled in a learning-disability program while in elementary school. *See* Petitioner Br. 59-60; *see also 2015 U.S. Dist. LEXIS 133948, 2015 WL 5752139, at *33, 36, 38*.

Absent the foregoing evidence, there is simply no basis for concluding that counsel "failed to fairly depict Carter's character, history and background, including his childhood neglect and trauma, serious mental illness, family history of mental illness, [and] substance abuse[,]" Petitioner Br. 47. As the Court of Appeals of Ohio observed, two defense witnesses testified extensively on these matters during the trial's mitigation phase. *See Carter, 2000 **[*777]** Ohio App. LEXIS 5935, at *9-10*. For instance, Nancy Dorian, a psychologist who oversaw Carter's foster placement on behalf of children's services, recounted the emotional difficulties he experienced at a young age—such as having an attachment disorder, being "schizoid-prone," and having difficulty getting along with others—as well as the abuse that he suffered at the hands of his mother, e.g., his being "tied to a chair and left alone" for long periods of time. *See id. at *9*. **[**46]** Likewise, Dr. Sandra McPherson, a clinical psychologist who conducted a thorough review of Carter's medical and social history, detailed the Petitioner's traumatic first few years of life; how he later suffered from emotionally-triggered seizures, an attachment disorder, and hearing issues due to neglect; how he was removed from a foster situation that was his "only chance" for a positive outcome and placed with a family that was emotionally abusive; how he was removed **[***27]** from that family and eventually placed with the Carters, who were not prepared to deal with his many psychological issues; and his genetic predisposition to schizophrenia. In light of this testimony—and the over 200 pages of social service, medical, and legal records that were introduced during the mitigation phase of the trial—trial counsels' performance was not "outside the wide range of professionally competent assistance" with respect to the presentation of evidence of Carter's childhood trauma, mental illness, and substance abuse. *See Strickland, 466 U.S. at 690*.

Carter's first subclaim therefore rests upon his counsels' seemingly curious decision not to obtain neurological testing for Carter; upon closer examination, however, that decision **[**47]** did not amount to deficient performance in light of Dr. King's testimony at the second competency hearing. In reviewing counsels' decision, it is important to keep in mind that ***HN17***[⬆] "[a] licensed practitioner is generally held to be competent, unless counsel has good reason to believe to the

contrary." *Fautenberry v. Mitchell, 515 F.3d 614, 625 (6th Cir. 2008)* (alteration in original) (quoting *Lundgren v. Mitchell, 440 F.3d 754, 772 (6th Cir. 2006)*). Given this, unless a petitioner shows that counsel had "good reason" to believe the practitioner to be incompetent, "it [is] objectively reasonable for counsel to rely upon the doctor's opinions and conclusions." *Ibid.* Here, when King was asked by the trial judge at the second competency hearing whether "an MRI would . . . assist us in this case to render any psychological opinions involving either sanity or competency *or mental defect*[,]" King replied "no."[10] Given that Carter does not suggest that King was incompetent, and given that counsels' mitigation strategy centered on Carter's traumatic upbringing and subsequent mental illness, counsel could have plausibly determined that an MRI would not have furthered Carter's defense.[11] It therefore cannot be said that **[***28] **[*778]** Carter's counsels' performance was constitutionally deficient, let alone that there is no reasonable **[**48]** argument that counsel satisfied *Strickland*'s deferential standard, *Richter, 562 U.S. at 105*.

ii

The second half of Carter's third cause of action—that counsel were constitutionally ineffective because their mitigation theory was objectively unreasonable, *see* Petitioner Br. 52—is likewise meritless. To begin with, contrary to Carter's suggestions, ***HN18***[⬆] Ohio state law recognizes Antisocial Personality Disorder ("ASPD") as a statutory mitigating factor. *See Esparza v. Sheldon, 765 F.3d 615, 623 (6th Cir. 2014)* (citing *State v. Seiber, 56 Ohio St. 3d 4, 564 N.E.2d 408, 416 (Ohio 1990)*. Specifically, in Ohio, ASPD qualifies as a mitigating factor pursuant to *O.R.C. § 2929.04(B)(7)*, *Seiber, 564 N.E.2d at 416*; *see also State v. Wesson, 137 Ohio St. 3d 309, 2013- Ohio 4575, 999 N.E.2d 557, 583 (Ohio 2013)* (considering personality disorder with antisocial features as a mitigating factor), a catchall provision that permits a jury to consider "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death[,]" *O.R.C. § 2929.04(B)(7)*. Moreover, given that we have recognized that "the *failure* to introduce evidence of a similar disorder" can be prejudicial, even under AEDPA's deferential standard, *Esparza, 765 F.3d at 623* (citing *Williams v. Anderson, 460 F.3d 789, 805 (6th Cir. 2006)*, there is no basis for Carter's suggestion that it was per se ineffective performance for counsel to present evidence of Carter's ASPD, *see* Petitioner Br. 51 ("It is well accepted, since at least 1988 . . . that the defense presentation of [ASPD] . **[**49]** . . is not mitigating evidence that favors a life sentence.").

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[10] Carter's counsel mischaracterized this portion of Dr. King's testimony in at least one filing before the district court, stating that Dr. King's testimony was limited to the issue of Carter's sanity. *See* Amended Traverse to Return of Writ at 40-41, *Carter, 2015 U.S. Dist. LEXIS 133948, 2015 WL 5752139* (No. 3:02CV524).

[11] At oral argument, Carter argued that trial counsels' decision could not have been strategic because there would have been no downside to pursuing an MRI. Stated more expansively, his federal habeas counsel asserted that even if the MRI had shown that Carter did not suffer from organic brain damage, he would not have been harmed by that revelation as the absence of such an injury would not have ruled out the possibility of mental illness.

This argument ignores, however, the way in which trial counsel could have leveraged uncertainty over the existence of organic brain damage to Carter's benefit. Put differently, in assessing whether a negative MRI result would have harmed Carter's defense, we must consider how trial counsel could have used the jury's uncertainty over the existence of organic brain damage to Carter's advantage. So long as the jury did not have a definitive answer to the question of whether Carter had such damage, counsel could suggest that Carter did indeed suffer from it. Of course, such an insinuation is not as helpful to Carter as actual proof, but it is better than if the MRI showed no damage whatsoever. Accordingly, counsel could have reasonably determined that it was better to hedge their bets than to pursue MRI testing.

Nor was the choice of mitigation strategy otherwise deficient. As noted earlier, ***HN19***[⬆] to succeed on an ineffective-assistance-of-counsel claim, a petitioner must overcome the presumption that the challenged action constituted sound trial strategy. *Strickland, 466 U.S. at 689*. While it is true that counsels' mitigation theory did not present Carter in a flattering light, it was clear and coherent given the available evidence, for instance, the fact that Drs. Palumbo, King, Alcorn, and McPherson had all diagnosed Carter with ASPD. Simply put, counsel sought **[***29]** to lessen Carter's blameworthiness for a brutal crime by leveraging an uncontested psychiatric diagnosis to explain "how [Carter] developed and why he developed the way he did[.]" Counsels' strategy, then, was to impress upon the jury the importance of judging Carter by a different standard when assessing the wrongfulness of his actions than it would judge one who, despite having been nurtured as a child, had chosen to commit the crime in question. It cannot plausibly be said that counsels' reliance on nuanced moral reasoning—i.e., that an individual's blameworthiness for a given act can change based **[**50]** upon the circumstances of his or her upbringing—fell outside the wide range of professionally competent assistance.

To be clear, counsels' strategy was not a plea for mercy. Carter is quite correct that had defense counsel simply **[*779]** made a plea for mercy, their performance would have been, at minimum, deficient. That is because***HN20***[⬆] in Ohio, mercy "is not a mitigating factor and thus [is] irrelevant to sentencing[.]" *State v. Lorraine, 66 Ohio St. 3d 414, 613 N.E.2d 212, 216 (Ohio 1993)*. However, notwithstanding the district court's characterization of counsels' theory of mitigation as a "plea for mercy," *Carter, 2015 U.S. Dist. LEXIS 133948, 2015 WL 5752139, at *35*, defense counsel never argued as such. Rather, as detailed above, their argument was premised on a statutorily recognized mitigating factor. Given that Carter's entire argument here rests upon the district court's mischaracterization, there is no merit to it.

Finally, while Carter may be correct that an alternative mitigation theory would have been more successful, that does not show that the Ohio courts unreasonably applied clearly established federal law in rejecting his *Strickland* claim. The sole basis for Carter's alternative mitigation theory is an affidavit by Dr. Bob Stinson—a psychologist who examined the records available to the trial attorneys at the **[**51]** time of the mitigation hearing—that was introduced during federal habeas proceedings. As we have repeatedly noted, however, we cannot consider such evidence when reviewing a claim adjudicated on the merits in state court. *Pinholster, 563 U.S. at 185*. Accordingly, other than his bald assertion that evidence of adaptability to life in prison is "a vital component of *any* mitigation presentation where the jury is choosing between life and death[,]" Petitioner Br. 60-61 (emphasis added), Carter provides no grounds for discarding the strong presumption that counsels' decision constituted sound trial strategy, *see Strickland*, **[***30]** *466 U.S. at 689*, let alone that he was prejudiced by their decision. Thus, counsel were not constitutionally ineffective for their choice of mitigation strategy.

V

For the foregoing reasons, we **AFFIRM** the decision of the district court denying the petition for a writ of habeas corpus.

End of Document

Carter v. Bradshaw

United States District Court for the Northern District of Ohio, Eastern Division

September 30, 2015, Decided; September 30, 2015, Filed

CASE NO. 3:02CV524

Reporter
2015 U.S. Dist. LEXIS 133948 *; 2015 WL 5752139

SEAN CARTER, Petitioner, v. MARGARET BRADSHAW, Respondent.

Subsequent History: Affirmed by *Carter v. Bogan, 900 F.3d 754, 2018 U.S. App. LEXIS 23069 (6th Cir.), 2018 FED App. 175P (6th Cir.) (6th Cir. Ohio, Aug. 20, 2018)*

Prior History: *Carter v. Tibbals, 518 Fed. Appx. 441, 2013 U.S. App. LEXIS 7893 (6th Cir.), 2013 FED App. 386N (6th Cir.) (6th Cir. Ohio, Apr. 18, 2013)*

Core Terms

state court, trial court, competency, mitigation, murder, merits, trial counsel, argues, proceedings, defaulted, grounds for relief, attorneys, procedurally, competent to stand trial, amend, aggravated robbery, competency hearing, aggravated, direct appeal, closing argument, exhaustion, courtroom, state-court, records, courts, rape, sentence, waived, defense counsel, federal court

Counsel: **[*1]** For Sean Carter, Petitioner: Rachel G. Troutman, LEAD ATTORNEY, Lisa M. Lagos, Office of the Ohio Public Defender - Columbus, Columbus, OH.

For Margaret Bradshaw, Respondent: Charles L. Wille, LEAD ATTORNEY, Office of the Attorney General - Capital Crimes Section, State of Ohio, Columbus, OH; Jocelyn S.K. Lowe, LEAD ATTORNEY, Office of the Attorney General - East Gay Street, State of Ohio, Columbus, OH.

Judges: Benita Y. Pearson, United States District Judge.

Opinion by: Benita Y. Pearson

Opinion

ORDER

[Resolving ECF No. 129]

Before the Court is Petitioner Sean Carter's amended petition for writ of habeas corpus, filed pursuant to *28 U.S.C. § 2254*.[1] Through this petition, Carter challenges the constitutionality of his convictions and death sentence, rendered by an Ohio court. ECF No. 129. Respondent Margaret Bradshaw[2] ("the State") filed an amended return of writ. ECF No. 138. Carter then filed an amended traverse. ECF No. 226. For the following reasons, the Court denies Carter's amended petition for writ of habeas corpus.

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[1] This case was transferred to the undersigned from United States District Court Judge Peter C. Economus on June 1, 2011.

[2] From the parties' filings, it appears that Norm Robinson, not Margaret Bradshaw, is the current **[*2]** Warden. For consistency with the docket, however, the Court continues to list Margaret Bradshaw as the defendant.

FACTUAL HISTORY

On September 25, 1997, an Ohio county grand jury indicted Carter for the aggravated murder and rape of his adoptive grandmother, Veader Prince. The Ohio Supreme Court set out the following account of Carter's crime upon considering Carter's direct appeal of his conviction and sentence:

> Evely Prince Carter adopted Sean Carter when he was ten years old. Carter had been taken from his birth mother in 1981, due to neglect and abuse. Evely Carter lived in close proximity to her mother, Veader Prince ("Prince"), the victim in this case. In February 1997, Carter had been thrown out of Evely Carter's house and began living with Prince, his adoptive grandmother. He stayed there until July 1997, when he was incarcerated at the Geauga County Jail for theft.
>
> On Saturday, September 13, 1997, Vernon Prince, Prince's son, stopped by to see his mother and noticed Carter sleeping in her house. Prince was not there. As Vernon Prince was leaving, Prince pulled in the driveway and upon being questioned, told Vernon Prince that she did not know that Carter was there. Prince and **[*3]** Vernon Prince went inside the house and Prince talked to Carter. When she came out of the room where Carter had been sleeping, Prince asked Vernon Prince to give Carter the keys and title to his car (blue 1984 Chevette) so that Carter could leave. Vernon Prince complied with this request. Vernon Prince also gave his mother some money ($250) before he left. At that time, Carter was still in Prince's house.
>
> That same day, Evely Carter worked from 2:00 p.m. until 10:00 p.m. During her shift, she received a telephone call from her husband, informing her that Carter had been released from jail. She stopped at Prince's house after she got off work, arriving at 10:45 p.m. She tried to enter the door and found that it was locked, something her mother had never done. She knocked on her mother's window and then her mother opened the door.
>
> Prince explained to Evely Carter that the door was locked because she "told that boy [Carter] that he wasn't allowed to come back here." When Evely Carter saw her mother that night, Prince was wearing a white turban with a long john top underneath a white T-shirt and long john bottoms.
>
> Evely Carter went to work the next day, Sunday, September 14, and did not get **[*4]** off work until 11:00 p.m. Her husband called her at work and told her that she should check on her mother because no one could find her. Evely Carter went to Prince's house. She entered and called out for her mother. There was no answer. She left Prince's house to get her husband and returned with him to Prince's house. At that time it was midnight.
>
> Also on Sunday, another of Prince's sons, Travis Prince, had gone to Prince's house around 10:00 a.m. He had walked into her bedroom and heard water running in the bathroom. Though the door to the bathroom was closed, he could tell the light was on. He went into the kitchen of the house and saw chicken in a pot on the stove, simmering. Travis Prince left the house.
>
> When he returned later in the day, he saw the same scene. This time, he opened the bathroom door, and upon discovering that it was empty, he turned the water off. He yelled for his mother and, getting no answer, became alarmed. He returned to the kitchen to turn off the stove and then began going through each room calling for his mother.

After searching the house and yard, he returned to the kitchen and noticed a note on the table that said, "Took Sean to the hospital." At that **[*5]** point he had not noticed any blood in the house. He did not think it was Carter, because he believed that Carter was still in the county jail. Since he could not find her, her purse, or her keys, he decided that his mother must have given a ride to someone, and ceased being concerned. Travis Prince left the house around 7:00 p.m., and returned to his apartment.

When he arrived home, he called his brother-in-law, Jerry Carter (Evely Carter's husband), and asked if he had seen Prince, but he had not. Jerry Carter went to Prince's house and could not find Prince. He told Travis Prince that Evely Carter would check again at 11:00 p.m., after she got off work. Travis Prince met the Carters at his mother's house around 11:15 p.m., and talked to neighbors to see if they knew anything about Prince's absence. Jerry and Evely Carter and their nephew, James Shoper, began to search the area.

They searched the garage and the cars in the driveway. Evely Carter noticed a garbage bag with clothes in one of the vans. They went back into the house, and then down into the basement. Evely Carter noticed a chair that had blood on it. As they continued searching the basement, they saw Prince's feet sticking **[*6]** out of a pile of clothes on the basement floor. They called the police immediately.

Once the clothes were removed, Prince was found lying face down on the basement floor. She was wearing only a white T-shirt, which was covered with blood and had holes. Her glasses were pushed up on her head and one of the lenses was missing, found later on the floor of the basement. Her dentures were discovered in the master bedroom. Prince's body appeared to have lacerations on her hands and face. Police found significant bloodstains on the carpet in the master bedroom, on a couch, and on the mattress. They also found droplets and stains of blood on the stairs and the walls leading to the basement.

An autopsy revealed that Prince had suffered eighteen stab wounds, a subarachnoid hemorrhage caused by blunt trauma, abrasions, and contusions to her right thigh. The left side of her face was swollen, indicating blunt trauma. One stab wound nicked the aorta, which was the immediate cause of death. Other forensic testing revealed the presence of sperm, located on a swab taken from the rectum of the victim. The swabs taken of the mouth and vagina were negative. DNA testing matched the rectal swab to Carter. **[*7]**

After talking to the family during the investigation, the police placed a "pick-up and hold" order on Carter. They learned that another of Prince's sons had been in jail with Carter, and that Carter had made a remark to him about not getting along with his grandmother.

On September 15, 1997, Daniel Hepler, a police officer with the Chippewa Township Police in Beaver County, Pennsylvania, was on patrol when he noticed a vehicle backed in among some small trees. The car had Ohio plates and he called the dispatcher to run the plate number. Hepler approached the vehicle and noticed a person (Carter) sleeping in the back seat. He knocked on the window and asked Carter to get out of the car. Carter had no identification or registration information for the vehicle. Carter told Hepler his name was "Bill Carl" and gave him a date of birth; a computer search revealed that no such person existed. The license plate information came back as registered to a

Chrysler vehicle, even though the vehicle was a Chevrolet. Because the name and date of birth provided by Carter were false and the car's registration was fraudulent, Hepler told Carter that he was going to issue a citation and tow the car.

While **[*8]** waiting for the tow truck to arrive, Hepler did a plain view inspection of the car for personal effects. Carter stated he did not want anything from the car. Hepler found two sets of keys and some money, which he gave to Carter. When the tow truck arrived, Hepler transported Carter to the police department. Carter appeared confused and kept asking Hepler where he was.

When the vehicle registration came back as not matching the vehicle, Hepler obtained the vehicle identification number (VIN) and ran it through the computer. The car was registered to Vernon Prince. Hepler obtained a phone number and telephoned the Prince residence. The woman who answered the phone informed Hepler that the man he had in custody was wanted for murder.

Hepler contacted the Trumbull County Sheriff's Department and verified that Carter was wanted for questioning relating to a murder. Carter was placed in a holding cell while detectives from the sheriff's department traveled to Pennsylvania.

Major James Phillips, Sergeant Hyde, and Lieutenant Borger traveled to Chippewa Township to question Carter. After giving Carter his Miranda warnings and obtaining a waiver of his rights, Phillips and Hyde obtained an audio **[*9]** and video confession to the murder of Veader Prince.

According to Carter's confession, after he obtained the car keys from Vernon Prince, he left Prince's house and drove around for a while. He attempted to stay at his aunt's house, but could not. He returned to Prince's house and, since the door was locked, climbed through the bedroom window. He had called out to Prince, hoping to convince her to allow him to stay there for a week. They got into an argument and Prince told him to leave. He kept telling her that he had nowhere to go.

She tried to push him out the door and he started to beat her. At some point, he got a knife from the kitchen and started stabbing her. He described it as just "going off" and could not provide exact details of what happened during the assault, although he did remember hitting her in the face and stabbing her in the neck.

The next thing Carter remembered was being in the kitchen and washing his hands and the knife. He walked downstairs and saw Prince on the basement floor and then started to cover things up. He covered her with some clothes, moved the couch in her bedroom to cover up blood on the carpet, turned the water on in her bathroom and closed the **[*10]** door, and put a chicken in a pot on the stove and turned the stove on. He left a note on the kitchen table saying, "Took Sean to the hospital" in case someone saw blood in the house. He changed his clothes, since they were bloody. He then took about $150 from her purse and left.

He originally took her keys, thinking he would take one of her vans, and actually put his bag of clothes in the van, but could not get the van started. He got into Vernon Prince's car and drove off. Since he did not have a license plate, he stopped to steal a plate from a car in Garrettsville. To remove and transfer the plates to his car, he used the knife that he had stabbed his grandmother with.

Upon direct questioning by the officers, Carter denied taking off his grandmother's clothes or raping her, but admitted she was wearing only a T-shirt when he left her.

> After Carter signed a waiver allowing his car to be searched, the knife was found in the car. He waived extradition and was brought back to Ohio for prosecution.

State v. Carter, 89 Ohio St. 3d 593, 593-97, 2000-Ohio-172, 734 N.E.2d 345, 347-50 (Ohio 2000). These facts are entitled to a presumption of correctness until rebutted by clear and convincing evidence. *28 U.S.C. § 2254(e)(1)*; *Hoffner v. Bradshaw, 622 F.3d 487, 495 (6th Cir. 2010)*.

PROCEDURAL HISTORY

A. State-Court Proceedings

The Trumbull County Grand Jury indicted **[*11]** Carter on four counts on September 25, 1997. The first count was for aggravated murder in violation of *Ohio Rev. Code § 2903.01(B)*. The aggravated murder charge carried three capital specifications: that the murder was committed while Carter was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary, aggravated robbery, and rape, all in violation of *Ohio Rev. Code § 2929.04(A)(7)*. Carter also was indicted for aggravated burglary in violation of *Ohio Rev. Code § 2911.11(A)(1)*; aggravated robbery in violation of *Ohio Rev. Code § 2911.01(A)(1)* and/or *§ 2911.01(A)(3)*; and rape in violation of *Ohio Rev. Code § 2907.02(A)(2)*. App. vol. I at 51-53.

Carter's trial commenced on March 12, 1998. Trial Tr. vol. VIII at 2237. Attorneys Anthony Consoldane and James Lewis represented him. On March 20, 1998, a jury found Carter guilty of aggravated murder and two of the capital specifications, those relating to aggravated robbery and rape. The jury also found Carter guilty of aggravated robbery, rape, and the lesser-included offense of criminal trespass on the aggravated burglary charge. Trial Tr. vol. XV at 3243-45. Following a mitigation hearing, on March 26, 1998, the jury rendered a verdict of death for the aggravated murder of Prince. Trial Tr. vol. XVI at 3408. On April 2, 1998, the trial court adopted the recommendation of the jury and **[*12]** sentenced Carter to death for aggravated murder. *Id.* at 3421-22. The court also sentenced Carter to a thirty-day term of imprisonment for the criminal-trespass conviction, ten years for the aggravated-robbery conviction, and ten years for the rape conviction. *Id.* at 3413-14.

Carter filed a timely appeal to the Trumbull County Court of Appeals on May 11, 1998. App. vol. III at 4-5. He was represented by Thomas Zena and John Juhasz. *See id.* at 63. He raised fourteen propositions of law, which he stated as follows:

> 1. Failure to allege every element of a crime in the indictment results in a void conviction; and, in a capital case where the death penalty specification is based upon such offense, the death sentence is likewise void. *Ohio Const. art. I, §§ 1*, 2, 9, 10, and 16.
>
> 2. Failure of a trial court to instruct a jury on lesser[-]included offenses, when warranted by the evidence, deprives a capital defendant of the ability to remain free from cruel and unusual punishment, and deprives a capital defendant of due process of law because the failure to instruct on lesser[-]included offenses impermissibly restricts the jury's choice to a finding of guilty on capital murder or acquittal. *Ohio Const. art. I, §§ 1*, 2, 9, and 16; *U.S. Const. amend. VIII* and *XIV*.
>
> 3. A criminal defendant is denied his right to a fair trial in **[*13]** violation of *U.S. Const. amend. VI* and *XIV*, and *Ohio Const.[] art. I, §§ 1*, *2*, *5*, *10*, and *16*[,]

when the prosecuting attorney impermissibly bolsters witness['s] testimony and engages in misconduct and improper argument.
4. *U.S. Const. amend. XIV* and *Ohio Const. art. I, §§ 1*, 2, and 16, require [the] trial court, when presented with bona fide evidence and good faith claims that a criminal defendant is incompetent to stand trial, to examine all reasonably available evidence.
5. Ineffective assistance of counsel violates not only a capital defendant's rights to effective counsel under *U.S. Const. amend. VI* and *XIV*[,] and *Ohio Const. art. I, §§ 1* and 10; but also rights to a fair and impartial jury trial and a reliably determined sentence, as guaranteed by [] *U.S. Const. amend.[] V*, *VI*, *VIII*, and *XIV* and by *Ohio Const.[] art. I, §§ 5*, *9*, *10*, and *16*.
6. A reviewing court may not compare death sentences only with other death sentences and still follow the constitutional demands for a proportionality review, nor may a reviewing court conduct a meaningful proportionality review without sufficient data on jurors' rationale for choosing a life sentence over the death penalty, for to do so violates the guarantees of *U.S. Const. amend. VIII* and *XIV*; *Ohio Const. art. I, §§ 1* and 9.

7. The Ohio capital laws, both as enacted and as interpreted, deny a capital defendant meaningful appellate **[*14]** review, an indispensable ingredient in imposing a death sentence consistent with *U.S. Const. Amend. VIII* and *XIV* and *Ohio Const. art. I, §§ 1*, 2, 9, and 16.
8. *Ohio Const. art. IV, §§ 2(B)(2)(c)* and 3(B)(2), as amended, deprive[] a defendant sentenced to death [of] due process of law, equal protection of the laws, *Ohio Const. art. I, §§ 1*, 2, and 16; and the exercise of a weight[-] of[-]the[-]evidence review by the Supreme Court of Ohio is not authorized by the Ohio Constitution.

9. Ohio's death penalty law, *Ohio Rev. Code Ann. §§ 2903.01*, *2929.02*, *2929.021*, *2929.022*, *2929.023*, *2929.03*, *2929.04*, and *2929.05* violates *U.S. Const. amend. V*, *VI*, *VIII*, and *XIV* and the immunities specified in *Ohio Const.[] art. I, §§ 1*, *2*, *5*, *9*, *10*, and *16*.
10. The preclusion of a mercy instruction prohibits trial juries from recommending life sentences where the aggravating circumstances outweigh the mitigating factors, but the jurors nonetheless conclude that the death sentence is not appropriate; therefore, Ohio's death penalty, with its mandatory death sentences[,] under certain circumstances violate[s] the state and federal constitutions.
11. The Ohio death penalty law involves an excessive and imprecise use of government power so as to encroach upon the "inalienable" liberties specified in the Ohio Constitution; *Ohio Const. art. I, §§ 1*, 2, 9, 10, 16, and 20.
12. Fundamental fairness and due process prohibits executions as a form of punishment. *U.S. Const. amend. XIV*; *Ohio Const. [a]rt. I, § 16*.

13. The death penalty **[*15]** violates *U.S. Const. amend. VIII* and *XIV* and *Ohio Const. art. I, §§ 1*, 2, 9, and 16[,] since the methods of execution violate evolving standards of human decency, an integral part of due process.
14. Imposition of a sentence of death upon a youthful offender with a poor family upbringing, inattention to psychological problems, and a resulting psychosis or antisocial personality is cruel and unusual punishment. *U.S. Const. amend. VIII* and *XIV*; *Ohio Const. art. I, § 9*.

App. vol. III at 65-76. The Ohio Supreme Court affirmed Carter's conviction and death sentence on September 13, 2000. *Carter, 89 Ohio St. 3d at 611, 734 N.E.2d at 360*.

Carter, still represented by Attorneys Juhasz and Zena, also appealed his conviction and sentence through state post-conviction proceedings, pursuant to *Ohio Rev. Code § 2953.21*. On April 13, 1999, he filed a petition to vacate or set aside his conviction in the Trumbull County Court of Common Pleas, which raised the following six causes of action:

> 1. The judgment against Petitioner is void or voidable because of the ineffective assistance of counsel.
>
> 2. Petitioner's conviction and death sentence is void or voidable because petitioner's trial counsel failed to a) present all evidence of petitioner's incompetence, b) make a complete record on petitioner's behalf so that petitioner could defend his life and liberty on appeal if convicted; and c) **[*16]** present, through direct or cross examination, all expert evidence of petitioner's incompetence to stand trial.
>
> 3. Remarks made by the prosecutor prejudicially affected substantial rights of the Petitioner to a fair trial, to effectively defend his life and liberty, to equal protection and benefit of the laws, to be free from cruel and unusual punishment, to have justice administered without denial and to due process of the law.
>
> 4. Petitioner was denied the effective assistance of trial counsel when his counsel failed to object to the improper comments of the prosecutor described in the previous cause of action.
>
> 5. Petitioner's conviction and death sentence are void or voidable because petitioner's trial counsel failed to investigate possible mitigating factors by making a thorough review of the Petitioner's background.
>
> 6. In order to have meaningful access to the courts, Petitioner must be afforded the opportunity to conduct discovery to develop the evidence which exists but which has not been made available to Petitioner, so that he may establish in a court of law the constitutional violations herein asserted, and the corresponding reasons why Petitioner's convictions and death sentences **[*17]** are void.

App. vol. IV at 2, 6, 15, 17, 18, 18-19, 19. The trial court dismissed Carter's post-conviction petition on August 30, 1999. *Id.* at 80-94.

Carter, represented by Attorney Juhasz, appealed the trial court's dismissal of his post-conviction petition on September 29, 1999. *Id.* at 95. He raised the following two assignments of error:

> 1. The trial court erred in denying Appellant an evidentiary hearing on his petition for post-conviction relief, . . . thus depriving Appellant of liberties secured by *U.S. Const. amend. VI* and *XIV*, and *Ohio Const. art. I, §§ 1*, 2, 10, and 16, including meaningful access to the courts of this State.
>
> 2. The trial court erred in applying the principles of *res judicata*, . . . thus depriving Appellant of liberties secured by *U.S. Const. amend. VI* and *XIV*, and *Ohio Const. art. I, §§ 1*, 2, 10, and 16.

App. vol. V at 10-11. The Trumbull County Court of Appeals affirmed the trial court's decision. *State v. Carter, 2000 Ohio App. LEXIS 5935 (Ohio App. Dec. 15, 2000)*; App. vol. V at 185-200.

Carter, still represented by Attorney Juhasz, then appealed that judgment to the Ohio Supreme Court on February 1, 2001. App. vol. V at 201-03. He set forth the following two propositions of law:

> 1. Denial of an evidentiary hearing where a

> petition for post conviction relief states operative facts is a denial of meaningful access to the courts of this State in contravention of *Ohio Constitution, Article 1, §§ 1* and *16*; *U.S. Constitution Amendment XIV*.
>
> 2. *Res judicata* may not be applied to defeat claims **[*18]** raised in a post conviction petition where a direct appeal is still pending and the matter raised in the petition has not been previously adjudicated.

App. vol. VI at 6. The court declined jurisdiction and dismissed the appeal on May 2, 2001. *State v. Carter, 91 Ohio St. 3d 1509, 746 N.E.2d 612 (2001)*; App. vol. VI at 62.

On January 15, 2003, Carter filed an application to reopen his direct appeal, or a *Murnahan* application, in the Ohio Supreme Court, pursuant to Rule XI, § 5 of the Ohio Supreme Court Rules of Practice. App. vol. III at 499-511. He was represented by Linda Prucha of the Ohio Public Defender's Office. In his application, he asserted that his appellate counsel failed to raise before the Ohio Supreme Court all instances of prosecutorial misconduct and ineffective assistance of counsel, and failed to ensure that he was competent to stand trial and to safeguard his right to be present. *Id. at 501-06*. The court denied the application on March 19, 2003. *State v. Carter, 98 Ohio St. 3d 1486, 2003-Ohio-1189, 785 N.E.2d 470 (Ohio 2003)*; App. vol. III at 548.

B. Federal Habeas Proceedings

On March 19, 2002, Carter's counsel, Linda Prucha and Christa Hohmann from the Ohio Public Defender's Office, initiated habeas corpus proceedings by filing a suggestion of incompetence, a motion to proceed in forma pauperis, an *ex parte* motion requesting the appointment of a mental **[*19]** health expert to assist counsel in assessing Carter's competency, and a motion for appointment of counsel. ECF Nos. 1, 3, 6, 7. The Court granted the motion for appointment of counsel, appointing Attorneys Prucha and Hohmann. ECF No. 8. Carter, who was housed at the time at a prison psychiatric facility due to mental illness, had denied requests to meet with representatives from the Public Defender's Office and had indicated his desire to waive his habeas review and volunteer for execution. The Court granted the motion for an expert evaluation, but Carter later withdrew the request after meeting with counsel and acknowledging his wish to proceed with his habeas case. ECF Nos. 10, 26.

On April 11, 2002, Carter filed an *ex parte* motion for an order directing the Ohio Department of Rehabilitation and Correction ("ODRC") to provide a copy of Carter's prison records, which the Court granted on April 23, 2002. ECF Nos. 9, 11. Carter filed a petition for writ of habeas corpus on May 1, 2002. ECF No. 13. He filed an amended petition on January 6, 2003. ECF No. 39.

Carter filed a motion to stay these proceedings and hold this case in abeyance pending exhaustion of state-court remedies on January **[*20]** 6, 2003, which the State opposed. ECF Nos. 40, 41. The Court granted the motion on February 20, 2003. ECF No. 45. On April 17, 2003, Carter notified the Court that he had completed his additional state-court proceedings. ECF No. 47. On May 1, 2003, Carter substituted Attorney Hohmann with Attorney Siobhan Clovis. ECF No. 50. The State filed a return of writ on September 16, 2003. ECF No. 79.

Carter filed a motion for leave to conduct discovery on October 15, 2003, which the State opposed. ECF Nos. 80, 92. The State filed a motion for leave to expand the record

on October 16, 2003, which the Court granted that same day. ECF Nos. 81, 84. The Court granted Carter's request for discovery on December 17, 2003. ECF No. 94.

Carter filed a second amended habeas petition on April 12, 2004. ECF No. 99. On April 28, 2004, Carter substituted Attorney David Hanson for Attorney Clovis. ECF No. 103. The State filed an amended return of writ on May 7, 2003. After twice requesting and receiving additional time, Carter filed his traverse on July 12, 2004. ECF No. 109. The State replied to Carter's traverse on July 23, 2004. ECF No. 113.

On July 12, 2004, Carter also filed a motion for evidentiary hearing. **[*21]** ECF No. 110. He further requested expert assistance to review medical records and the appointment of a neuropsychologist, which the Court granted. ECF Nos. 111, 116, 117. The State opposed Carter's motion. ECF No. 112. On May 9, 2005, Carter substituted Attorney Hanson with Attorney Melissa Callais. ECF No. 120. Carter twice requested, on April 18, 2005, and June 13, 2005, additional time for expert testing and evaluation, which the Court granted. ECF Nos. 118, 119, 123, 127.

On October 3, 2005, Carter filed a third amended habeas petition. ECF No. 129. Also that day, he filed a motion to expand the record and a motion for a competency determination and to stay his habeas proceedings. ECF Nos. 130, 132. The State opposed Carter's motion for a competency determination and to stay, and opposed in part his motion to expand the record. ECF Nos. 134, 135. On November 28, 2005, the State filed an amended return of writ. ECF No. 138.

On November 29, 2005, the Court granted in part and denied in part Carter's motion to expand the record and granted Carter's motion for competency determination. It scheduled a hearing on Carter's mental competency and stayed the case until it issued a ruling on **[*22]** that matter. ECF No. 139. On December 5, 2005, the State filed a motion to have Carter evaluated by the State's expert, which the Court granted on December 8, 2005. ECF No. 142, 143. On January 24, 2006, Carter filed a motion to expand the time for the evidentiary hearing, which was granted. ECF Nos. 152, 153. On April 20, 2006, the State filed a motion for an order to convey Carter to the Court for the hearing, which Carter opposed and the Court denied. ECF Nos. 155, 156. The Court conducted a five-hour hearing regarding Carter's competency to proceed in federal habeas on May 1, 2006. ECF No. 172.

On May 2, 2006, the Court ordered Carter's counsel to arrange for both parties' experts to observe Carter interacting with his counsel, and ordered the experts to file reports with the Court regarding their observations. ECF No. 171. Carter objected on the ground of attorney-client privilege on May 23, 2006, and the State replied. ECF No. 173. On October 5, 2006, the Court ordered that the observation should proceed. ECF No. 178. Carter then moved to certify the issue for appeal on October 27, 2006, which the State opposed. ECF Nos. 179, 182. The Court denied the certificate of appeal on **[*23]** February 1, 2007, but granted Carter a stay during the pendency of his pursuit of a writ of mandamus from the Sixth Circuit Court of Appeals. ECF No. 184. On November 5, 2007, the Sixth Circuit granted Carter's request for mandamus relief and set aside the Court's order requiring Carter to be observed by the State's expert witness while interacting with his habeas counsel. ECF No. 186.

On December 7, 2007, Carter filed a motion for an order directing the ODRC to provide updated records, which the State did not oppose. ECF Nos. 187, 190. The Court granted the motion on March 20, 2008. ECF No. 192. The parties also filed supplemental

briefs regarding Carter's competency. ECF Nos. 194, 195, 196. On September 29, 2008, the Court dismissed this case without prejudice and prospectively tolled the petition's one-year statute of limitations until Carter regained competency. ECF Nos. 197, 198.

The State appealed the Court's order on October 20, 2008. ECF No. 199. On May 26, 2011, the Sixth Circuit amended the 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, 337 (6th Cir. 2011)*. It concluded that although "[f]ederal habeas petitioners facing the **[*24]** death penalty for State criminal convictions do not enjoy a constitutional right to competence," such a right can be found in *18 U.S.C. § 4241*. *Id. at 333-34*.

On January 8, 2013, the United States Supreme Court unanimously vacated the Sixth Circuit's decision. *Ryan v. Gonzales, 568 U.S. 57, 133 S. Ct. 696, 184 L. Ed. 2d 528 (2013)*.[3] It held that *18 U.S.C. § 4241* does not confer upon incompetent federal habeas petitioners a statutory right to suspend their habeas proceedings. *Id. at 706-07*. It found that three of the claims that the district court determined might potentially benefit from Carter's assistance were adjudicated on the merits in state post-conviction proceedings. *Id. at 709*. Therefore, the Court concluded, these three claims were subject to *28 U.S.C. § 2254(d)*'s deferential review. *Id.* Because, under *Cullen v. Pinholster, 563 U.S. 170, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011)*, this type of review is confined to the record before the state court, these claims do not allow for Carter's extra-record assistance, and, consequently, a stay. *Gonzales, 133 S. Ct. at 709*. The Supreme Court remanded to this Court the issue of whether the "fourth" claim, ineffective assistance of appellate counsel, warranted a stay. *Id.* The Court noted that it was unclear from the record whether that claim was exhausted, but that if it was, its review also would be record-based. *Id.* It further observed that even if the claim was unexhausted and not **[*25]** procedurally defaulted, "an indefinite stay would be inappropriate." *Id.* Thus, the Court instructed:

> If a district court concludes that the petitioner's claim could substantially benefit from the petitioner's assistance, the district court should take into account the likelihood that the petitioner will regain competence in the foreseeable future. Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State's attempts to defend its presumptively valid judgment.

Id.

Carter, now represented by Rachel Troutman and Kelle Andrews of the Ohio Public Defender's Office, *see* ECF Nos. 204, 213, then filed a motion for an updated competency evaluation on May 3, 2013. ECF No. 214. The State opposed the motion. ECF No. 216. On March 31, 2014, the Court denied the motion without prejudice. ECF No. 221. It found that the remaining claim **[*26]** at issue, ineffective assistance of appellate counsel, was raised to the Ohio Supreme Court, which adjudicated it on the merits. The undersigned is therefore limited to the state-court record under *Pinholster, supra*, and may not consider any new evidence, including an updated competency evaluation. *Id.* at 10-11.

On July 29, 2014, Carter filed an amended traverse. ECF No. 226. The Court ordered the

[3] The Supreme Court consolidated Carter's case with that of Ernest Gonzales. In Gonzales's case, the Ninth Circuit granted a writ of mandamus ordering the district court to stay his habeas proceedings pending a competency determination. The Ninth Circuit found a statutory right to competence during habeas proceedings in *18. U.S.C. § 3599(a)(2)*. *Id. at 701*.

State to file a sur-reply on October 10, 2014, which it did on November 7, 2014, after seeking and receiving additional time. ECF Nos. 227, 228, 229. This case is now ripe for adjudication.

PETITIONER'S GROUNDS FOR RELIEF

Carter asserts nine grounds for relief. They are:

> 1. Sean Carter was incompetent at both the culpability and penalty phases of his trial. Therefore, his convictions and sentence of death are in violation of his rights under the *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendments to the United States Constitution*.
> 2. Sean Carter's right to effective assistance of counsel during the mitigation phase was violated when counsel failed to investigate, prepare, and present relevant mitigating evidence. *U.S. Const. amend[]. VI*, *VIII*, *XIV*.
>
> 3. Sean Carter's rights to a fair trial and an impartial jury were violated by prosecutor misconduct at the culpability phase of Mr. **[*27]** Carter's trial. *U.S. Const. amend. VI* and *XIV*.
> 4. The trial court denied Sean Carter his rights under the *Fifth*, *Sixth*, *Eighth*, and *Fourteenth Amendments to the United States Constitution* by failing to instruct the jury properly at the conclusion of the culpability phase.
> 5. Sean Carter was denied his right to the effective assistance of counsel under the *Sixth* and *Fourteenth Amendments to the United States Constitution* when his attorneys failed to object and properly preserve numerous errors that occurred during the pre-trial proceedings and the culpability phase of the trial.
> 6. Sean Carter was denied the effective assistance of counsel in his direct appeal as of right, in violation of his rights under the *Fifth*, *Sixth*, *Eighth* and *Fourteenth Amendments to the United States Constitution*.
> 7. The death penalty as administered by lethal injection in the state of Ohio violates Sean Carter's rights to protection from cruel and unusual punishment and to due process of law as guaranteed by the *United States Constitution amend[]. VIII* and *XIV*.
> 8. Sean Carter is seriously mentally ill. Therefore, his death sentence is in violation of his rights under the *Eighth* and *Fourteenth Amendments*.
> 9. Sean Carter will not be competent and sane to be executed. Sean's execution while he is incompetent and insane, violates the *Eighth* and *Fourteenth Amendments to the United States Constitution*.

ECF No. 129 at 7, 21, 34, 36, 37, 40, 41, 43, 48.

STANDARD OF REVIEW

Carter's petition for writ of habeas corpus is governed by **[*28]** the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), as it was filed after the Act's 1996 effective date. *Lindh v. Murphy, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997)*; *Murphy v. Ohio, 551 F.3d 485, 493 (6th Cir. 2009)*. AEDPA, which amended *28 U.S.C. § 2254*, was enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 'to further the principles of comity, finality, and federalism.'" *Woodford v. Garceau, 538 U.S. 202, 206, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003)* (quoting *(Michael) Williams v. Taylor, 529 U.S. 420, 436, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000)*). As the United States Supreme Court recently explained, the Act "recognizes a foundational principle of our federal system:

State courts are adequate forums for the vindication of federal rights." *Burt v. Titlow, 571 U.S. 12, 134 S. Ct. 10, 15, 187 L. Ed. 2d 348 (2013)*. AEDPA, therefore, "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Id.*

One of AEDPA's most significant limitations on the federal courts' authority to issue writs of habeas corpus is found in *§ 2254(d)*. That provision forbids a federal court from granting habeas relief with respect to a "claim that was adjudicated on the merits in State court proceedings" *unless* the state-court decision either:

> (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 **[*29]** in a decision that 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).

Habeas courts review the "last *explained* state-court judgment" on the federal claim at issue. *Ylst v. Nunnemaker, 501 U.S. 797, 805, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)* (emphasis in original). A state court has adjudicated a claim "on the merits," and AEDPA deference applies, regardless of whether the state court provided little or no reasoning at all for its decision. *Harrington v. Richter, 562 U.S. 86, 98, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)* ("[D]etermining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning."). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id. at 99*.

"Clearly established federal law" for purposes of the provision "is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)*. It includes "only the holdings, as opposed to the dicta, of Supreme Court decisions." *White v. Woodall, 572 U.S. 415, 134 S. Ct. 1697, 1702, 188 L. Ed. 2d 698 (2014)* (internal quotation **[*30]** marks and citations omitted). The state-court decision need not refer to relevant Supreme Court cases or even demonstrate an awareness of them; it is sufficient that the result and reasoning are consistent with Supreme Court precedent. *Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002)* (per curiam). And a state court does not act contrary to clearly established law when the precedent of the Supreme Court is ambiguous or nonexistent. *See, e.g., Mitchell v. Esparza, 540 U.S. 12, 17, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003)* (per curiam).

A state-court decision is contrary to "clearly established [f]ederal law" under *§ 2254(d)(1)* only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *(Michael) Williams, 529 U.S. at 412-13*. "[R]eview under *§ 2254(d)(1)* is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster, 131 S. Ct. at 1398*.

Ultimately, AEDPA's highly deferential standard requires that federal district courts sitting in habeas review give the state-court

decision "the benefit of the doubt." *Woodford v. Visciotti, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002)* (per curiam). "[A]n 'unreasonable application of' [Supreme Court] holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *Woodall, 134 S. Ct. at 1702* (quoting *Lockyer, 538 U.S. at 75-76*). "The critical **[*31]** point is that relief is available under *§ 2254(d)(1)*'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Id. at 1706-07* (quoting *Harrington, 562 U.S. at 102*).

A state-court decision is an "unreasonable determination of the facts" under *§ 2254(d)(2)* only if the court made a "clear factual error." *Wiggins v. Smith, 539 U.S. 510, 528-29, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*. The petitioner bears the burden of rebutting the state court's factual findings "by clear and convincing evidence." *Burt, 134 S. Ct. at 15*; *Rice v. White, 660 F.3d 242, 250 (6th Cir. 2011)*. This requirement mirrors the "presumption of correctness" AEDPA affords state-court factual determinations, which can only be overcome by clear and convincing evidence. *28 U.S.C. § 2254(e)(1)*.[4] The Supreme Court repeatedly has declined to define the "precise relationship" between *§ 2254(d)(2)* and *(e)(1)*. *Burt, 134 S. Ct. at 15*; *see also Wood v. Allen, 558 U.S. 290, 300, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010)*. It has explained, however, that it is

> incorrect . . ., when looking at the merits, to merge the independent requirements of *§ 2254(d)(2)* and *(e)(1)*. AEDPA does not require a petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in *§ 2254(e)(1)*, but that subsection pertains only to state-court determinations of factual issues, rather than decisions.

Miller-El v. Cockrell, 537 U.S. 322, 341, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). "[I]t **[*32]** is not enough for the petitioner to show some unreasonable determination of fact; rather, the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice, 660 F.3d at 250*. And, as the Supreme Court has cautioned, "'a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'" *Burt, 134 S. Ct. at 15* (quoting *Wood, 558 U.S. at 301*).

Indeed, the Supreme Court repeatedly has emphasized that *§ 2254(d)*, as amended by AEDPA, is an intentionally demanding standard, affording great deference to state-court adjudications of federal claims. In *Harrington v. Richter, supra*, the Supreme Court admonished that a reviewing court may not "treat[] the reasonableness question as a test of its confidence in the result it would reach under *de novo* review," and that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington, 562 U.S. at 102*; *see also Schriro v. Landrigan, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007)* ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect **[*33]** but whether that determination was unreasonable—a substantially higher threshold."). Rather, *§ 2254(d)* "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems" and does not

[4] ***Section 2254(e)(1)*** provides: "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." ***28 U.S.C. § 2254(e)(1)***.

function as a "substitute for ordinary error correction through appeal." *Harrington, 562 U.S. at 102-03* (internal quotation marks omitted). Thus, a petitioner "must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id. at 103*. This is a very high standard, which the Supreme Court readily acknowledges: "If this standard is difficult to meet, that is because it is meant to be." *Id. at 102*.

Nevertheless, the Supreme Court recognized in *Harrington* that AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Id.* "[E]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El, 537 U.S. at 340*. Rather, "under AEDPA standards, a federal court can disagree with a state court's factual determination and 'conclude the decision **[*34]** was unreasonable or that the factual premise was incorrect by clear and convincing evidence.'" *Baird v. Davis, 388 F.3d 1110, 1123 (7th Cir. 2004)* (quoting *Miller-El, 537 U.S. at 340*) (Posner, J.).

Federal courts, therefore, retain statutory and constitutional authority, absent suspension of the writ,[5] to remedy detentions by state authorities that violate federal law, as long as AEDPA's limitations are observed. *Rice, 660 F.3d at 251*. And the deference AEDPA demands is not required if those limitations do not apply. Federal habeas courts may, for example, review *de novo* an exhausted federal claim when a state court misapplied a procedural bar and did not review the claim on the merits. *See, e.g., Hill v. Mitchell, 400 F.3d 308, 313 (6th Cir. 2005)*. They likewise may review *de novo* claims adjudicated on the merits in state court if the petitioner meets the criteria for one of *§ 2254(d)*'s exceptions. *See Wiggins, 539 U.S. at 534* (performing *de novo* review under *Strickland*'s second prong because the state court unreasonably applied the law in resolving *Strickland*'s first prong); *Panetti v. Quarterman, 551 U.S. 930, 948, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007)* (holding that the unreasonable application of Supreme Court precedent under *§ 2254(d)(1)* permitted a plenary review of the "underlying [] claim . . . unencumbered by the deference AEDPA normally requires"); *see also Rice, 660 F.3d at 252* (citing *Henness v. Bagley, 644 F.3d 308 (6th Cir. 2011)*, and *Smith v. Bradshaw, 591 F.3d 517, 522, 525 (6th Cir. 2010)* (each applying *de novo* review to federal habeas claims where none of **[*35]** the AEDPA limitations applied)).

EXHAUSTION AND PROCEDURAL DEFAULT

In addition to *§ 2254(d)*'s limitations, AEDPA precludes habeas review of some claims that have not been properly exhausted before the state courts, or were procedurally barred by the state courts.

A. Exhaustion

Section 2254(b)(1) provides that a federal court may not award habeas relief to an applicant in state custody "unless it appears that—the applicant has exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant." *28 U.S.C. § 2254(b)(1)*;

[5] *See U.S. Const. art. I, § 9 cl. 2* ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

see also Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). "This requirement, however, refers only to remedies still available at the time of the federal petition." Engle v. Isaac, 456 U.S. 107, 125 n.28, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). If under state law there remains a remedy that a petitioner has not yet pursued, exhaustion has not occurred and the **[*36]** federal habeas court cannot entertain the merits of the claim. Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).

When a habeas court finds a claim to be unexhausted, it can, for good cause, stay the action and permit the petitioner to present his unexhausted claim to state court and then return to federal court for review of his perfected petition. Rhines v. Weber, 544 U.S. 269, 277, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005). The court need not wait for exhaustion, however, if it determines that a return to state court would be futile. Lott v. Coyle, 261 F.3d 594, 608 (6th Cir. 2001). In addition, AEDPA's *§ 2254(b)(2)* permits courts to deny unexhausted habeas claims on the merits when appropriate. *28 U.S.C. § 2254(b)(2)*; *see also* Rhines v. Weber, 544 U.S. 269, 277, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005) (a habeas court may deny unexhausted claims that are "plainly meritless"); Hanna v. Ishee, 694 F.3d 596, 610 (6th Cir. 2012) (denying petitioner's claim on the merits "notwithstanding a failure to exhaust" the claim).

The exhaustion doctrine is not a jurisdictional limitation on the federal courts. *See, e.g.,* Pudelski v. Wilson, 576 F.3d 595, 605-06 (6th Cir. 2009); Cain v. Redman, 947 F.2d 817, 820 (6th Cir. 1991). Thus, a state can waive the exhaustion requirement. *See, e.g.,* Harris v. Lafler, 553 F.3d 1028, 1032 (6th Cir. 2009). However, "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." *28 U.S.C. § 2254(b)(3)*. The Sixth Circuit has ruled that where a habeas respondent has taken contradictory positions regarding a petitioner's exhaustion of state **[*37]** remedies, courts will find an express waiver only where the respondent has "manifested a clear and unambiguous intent to waive the requirement." D'Ambrosio v. Bagley, 527 F.3d 489, 495 (6th Cir. 2008).

Here, the State represents in an introductory section of its return of writ that "all of Carter's claims are exhausted." ECF No. 138 at 21. Nevertheless, it adds, "Respondent expressly **does not** waive the exhaustion requirement." *Id.* (emphasis in original). The State's general disclaimer of any waiver of the exhaustion defense is not sufficiently clear and unambiguous in light of its representation that "all of Carter's claims are exhausted," combined with its failure to assert the defense or even mention the subject again. Accordingly, the Court finds that the State has waived the exhaustion requirement as to each of Carter's claims, and it will not engage in a *sua sponte* analysis of exhaustion where the State has failed to raise it. Moreover, as noted above, even if a claim is unexhausted, the Court may deny it on the merits. *28 U.S.C. § 2254(b)(2)*.

B. Procedural Default

Even when a state prisoner exhausts available state-court remedies, a federal court may not consider "contentions of general law which are not resolved on the merits in the state proceeding due **[*38]** to petitioner's failure to

raise them as required by state procedure." *Wainwright v. Sykes, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)*. If a "state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)*. To be independent, a state procedural rule and the state courts' application of it must not rely in any part on federal law. *Id. at 732-33*. To be adequate, a state procedural rule must be "'firmly established' and 'regularly followed'" by the state courts at the time it was applied. *Beard v. Kindler, 558 U.S. 53, 60-61, 130 S. Ct. 612, 175 L. Ed. 2d 417 (2009)*. If a petitioner fails to fairly present any federal habeas claims to the state courts but has no remaining state remedies, then the petitioner has procedurally defaulted those claims. *O'Sullivan, 526 U.S. at 848*; *Rust, 17 F.3d at 160*.

In *Maupin v. Smith, 785 F.2d 135 (6th Cir. 1986)*, the Sixth Circuit outlined the now familiar test to be followed when the state argues that a habeas claim is defaulted because of a prisoner's failure to observe a state procedural rule:

> First, the federal court must determine whether there is **[*39]** a state procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to comply with that rule. Second, the federal court must determine whether the state courts actually enforced the state procedural sanction -- that is, whether the state courts actually based their decisions on the procedural rule. Third, the federal court must decide whether the state procedural rule is an adequate and independent state ground on which the state can rely to foreclose federal review of a federal constitutional claim. Fourth, if the federal court answers the first three questions in the affirmative, it would not review the petitioner's procedurally defaulted claim unless the petitioner can show cause for not following the procedural rule and that failure to review the claim would result in prejudice or a miscarriage of justice.

Williams v. Coyle, 260 F.3d 684, 693 (6th Cir. 2001) (citing *Maupin, 785 F.2d at 138*) (further citations omitted).

In determining whether the *Maupin* factors are met, the federal court again looks to the last explained state-court judgment. *Ylst, 501 U.S. at 805*; *Combs v. Coyle, 205 F.3d 269, 275 (6th Cir. 2000)*. If the last state court rendering a reasoned opinion on a federal claim "clearly and expressly states that its judgment rests on a state procedural bar," then the claim is procedurally **[*40]** defaulted and barred from consideration on federal habeas review.[6] *Harris v. Reed, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989)*. Conversely, if the last state court to be presented with a particular federal claim reaches the merits of that claim, then the procedural bar is removed and a federal habeas court may consider the merits of the claim in its review. *Ylst, 501 U.S. at 801*.

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[6] An exception to this rule lies where "the later state decision rests upon a prohibition against *further* state review," in which case the decision "neither rests upon procedural default nor lifts a pre-existing procedural default, [and] its effect upon the availability of federal habeas is nil . . . ." *Ylst, 501 U.S. at 804 n.3*. In that case, habeas courts "look through" that later decision to the prior reasoned state-court judgment. *Id. at 805* ("state rules against [a] superfluous recourse [of state habeas proceedings] have no bearing upon [a petitioner's] ability to raise the [federal] claim in federal court").

As noted above, if a claim is procedurally defaulted, the federal court may excuse the default and consider the claim on the merits if the petitioner demonstrates that (1) there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error, or (2) a **[*41]** fundamental miscarriage of justice would result from a bar on federal habeas review. *Coleman, 501 U.S. at 750*.

A petitioner can establish cause in two ways. First, a petitioner may "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)*. Objective impediments include an unavailable claim, or interference by officials that made compliance impracticable. *Id.* Second, constitutionally ineffective assistance of counsel constitutes cause. *Id. at 488-89*.

If a petitioner asserts ineffective assistance of counsel as cause for a default, that ineffective-assistance claim must itself be presented to the state courts as an independent claim before it may be used to establish cause. *Id.* If the ineffective-assistance claim is not presented to the state courts in the manner that state law requires, that claim is itself procedurally defaulted and only can be used as cause for the underlying defaulted claim if the petitioner demonstrates cause and prejudice with respect to the ineffective-assistance claim. *Edwards v. Carpenter, 529 U.S. 446, 452-53, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000)*.

To establish prejudice, a petitioner must demonstrate that the constitutional error "worked to his actual and substantial disadvantage." *Perkins v. LeCureux, 58 F.3d 214, 219 (6th Cir. 1995)* (quoting *United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)*). "When a **[*42]** petitioner fails to establish cause to excuse a procedural default, a court does not need to address the issue of prejudice." *Simpson v. Jones, 238 F.3d 399, 409 (6th Cir. 2000)*.

Because the cause and prejudice standard is not a perfect safeguard against fundamental miscarriages of justice, the Supreme Court has recognized a narrow exception to the cause requirement where a constitutional violation has "probably resulted" in the conviction of one who is "actually innocent" of the substantive offense. *Dretke v. Haley, 541 U.S. 386, 392, 124 S. Ct. 1847, 158 L. Ed. 2d 659 (2004)* (citing *Murray, 477 U.S. at 495-96*). When the Court extended this exception to claims of capital sentencing error, it limited the exception in the capital sentencing context to cases in which the petitioner could show "'by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.'" *Id.* (quoting *Sawyer v. Whitley, 505 U.S. 333, 336, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992)*).

The Court will address the procedural default issues presented in this case when it reviews Carter's individual claims.

ANALYSIS OF PETITIONER'S GROUNDS FOR RELIEF

I. First and Fifth Grounds for Relief: *Competency to Stand Trial*

Carter claims in his first and fifth grounds for relief that both the trial court and his trial counsel failed to protect his **[*43]** constitutional right to be competent to stand trial. He argues that the trial court:

1. Failed to consider relevant information;
2. Relied too heavily on flawed expert testimony;
3. Failed to raise the competency issue

during the trial; and

4. Failed to obtain Carter's waiver of presence at the sentencing phase of trial.

ECF No. 129 at 8-19. Carter also complains that his trial counsel provided ineffective assistance when they:

1. Failed to prepare experts for, and present material evidence at, the competency hearings;

2. Failed to request a third competency hearing; and

3. Failed to preserve an adequate record for appeal regarding Carter's incompetence during his trial.

Id. at 8-9, 13-17, 38-39.

A. Procedural Posture

The State concedes that Carter raised his competency claims related to ineffective assistance of counsel in state courts, both on direct appeal and post-conviction, where they were adjudicated on the merits. ECF No. 138 at 32-33, 72. These claims, therefore, are preserved for federal habeas review.

The State argues, however, that although "Carter raised the general claim of incompetency on direct appeal," he did not raise his competency claims relating to trial-court error in state court, resulting in the **[*44]** claims' procedural default. *Id.* at 29, 32-33. Carter responds that "[a]ny procedural default of this claim is excused by the ineffectiveness of post-conviction counsel." ECF No. 226 at 16.

The Court finds that Carter raised his trial-court-error competency claims on direct appeal to the Ohio Supreme Court and in state post-conviction proceedings, and they were adjudicated on the merits.[7] *See* *Carter, 89 Ohio St. 3d at 603-05, 734 N.E.2d at 355-56*; *Carter, 2000 Ohio App. LEXIS 5935, at *5-13*. Over time, Carter certainly changed the emphasis of his legal arguments and marshaled new facts to support his claim. *See* App. vol. III at 126-36; App. vol. IV at 14-15; *id.* at 86-88; App. vol. V at 129-31. But the overarching constitutional basis for his claim—that the trial court and his trial counsel failed to protect his constitutional right to competency to stand trial—remained constant. *See* *Richey v. Bradshaw, 498 F.3d 344, 353-54 (6th Cir. 2007)* ("Where the legal basis for Richey's claim has remained constant, and where the facts developed in the district court merely substantiate it, we cannot say that the claim has been so 'fundamentally alter[ed]' from that presented to the state court as to preclude our review."). Thus, Carter's competency claims relating to trial-court error also are preserved for federal habeas review.[8]

B. Merits

As the Supreme Court has noted, "[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with

[7] The state post-conviction appellate court did not directly address Carter's trial-court-error **[*45]** competency claims, focusing instead on Carter's ineffective-assistance competency claims. Its decision dismissing the claims, however, is still considered an "adjudication on the merits" for purposes of AEDPA. *See* *Harrington 562 U.S. at 99*.

[8] The Supreme Court acknowledged as much in the *Gonzales* decision when it stated that Carter's competency claim, which it characterized as alleging that "Carter was incompetent to stand trial and was unlawfully removed from the trial proceedings," was "adjudicated on the merits in state postconviction proceedings and, thus, [was] subject to review under ***§ 2254(d)***." *Gonzales, 133 S. Ct. at 709 n.15*. *See, e.g.*, *Hanover Ins. Co. v. Am. Eng'g Co., 105 F.3d 306, 312 (6th Cir. 1997)* ("It is clear that when a case has been remanded by an appellate court, the trial court is bound to proceed in accordance with the mandate and law of the case as established by the appellate court.") (internal quotation marks and citation omitted).

counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)*; *see also Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)*. For this reason, the Court has held that a trial **[*46]** court's failure to observe procedures that will protect a defendant's right to competency to stand trial deprives him of his due process right to a fair trial. *Pate v. Robinson, 383 U.S. 375, 385-86, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)*.

Carter's competency has been at the forefront of his case from the very beginning. The Ohio Supreme Court set forth the following factual account of how this issue was treated at trial:

> In his fourth proposition of law, Carter argues that he was incompetent to stand trial "because his paranoid personality did not permit him to trust his lawyers." The trial court appointed an expert to examine Carter, and a hearing on competency was held, after which the trial court determined that Carter was competent to stand trial.
>
> The standard for competency is set out in *R.C. 2945.37(G)*, which provides: "A defendant is presumed competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial * * *."
>
> Carter does not argue that he was incapable of understanding **[*47]** the nature of the proceedings against him; instead, he focuses his argument on his inability to assist his defense counsel. During the first competency hearing, Dr. Stanley Palumbo opined, "With reasonable scientific certainty Mr. Carter is competent to stand trial. Mr. Carter understands the nature of the proceedings against him and does not suffer from any gross mental disorder that would interfere with his ability to participate in his defense. He does not suffer from any mood disorder such as depression, which would cause him to have trouble following a witness's line of statements or have the energy and interest in participating in his own defense in his own best interest."
>
> When questioned about Carter's relationship with his attorneys, and his not wanting to listen to his attorneys' advice, Dr. Palumbo commented, "It certainly sounds like he doesn't want to, but that's different from being able to."
>
> The trial court found Carter competent and denied a defense request for further examination. In his findings of fact, the court stated, "Dr. Palumbo testified that the Defendant does not trust his attorney, or any other attorney[;] however, Defendant's distrust of his attorney does **[*48]** not exhibit paranoid behavior since he distrusts all attorneys and not specifically his attorney."
>
> After the trial court found that Carter was competent, Carter entered a plea of not guilty by reason of insanity. The court appointed three experts to examine Carter for sanity at the time of the offense—Dr. Steven A. King, Dr. Robert Alcorn, and Dr. Stanley Palumbo.
>
> During Dr. King's interview with Carter, the doctor became concerned that Carter was not competent to stand trial. This concern prompted an evaluation on that issue by the other two doctors, and a second competency hearing. Carter waived his presence at the hearing.
>
> Dr. King testified that Carter exhibited bizarre behavior during his interview and indicated that he wanted to kill Tony

> Consoldane, his attorney. King further testified that Carter's thoughts kept him from cooperating with counsel. In Dr. King's opinion, Carter was not able to assist in his own defense. On cross-examination, King admitted that the question of competence was a close call.
>
> Dr. Palumbo did not change his prior opinion of competence after he re-examined Carter. He acknowledged that Carter expressed anger and irritability with his attorneys, but added **[*49]** that it was not unusual for defendants to be upset with their attorneys.
> Dr. Alcorn also examined Carter concerning Carter's relationship with his attorney. Alcorn testified that Carter did not think his attorney was doing a very good job, and that that was not an uncommon reaction given the situation Carter was in. He determined Carter to be competent to stand trial.
> At the conclusion of the second hearing, the trial court again found Carter competent to stand trial, stating, "I would indicate for the record that the distrust and/or hostility that a defendant has with an attorney, his own attorney, does not necessarily equate with competence."

Carter, 89 Ohio St. 3d at 603-04, 734 N.E.2d at 355-56.

The court went on to note that "Carter did not want to attend the court proceedings, indicating that he just wanted to enter a plea and get it over." *Id. at 605, 734 N.E.2d at 356*. It explained in a footnote:

> The record indicates that Carter was not happy about being shackled for court proceedings. Defense counsel waived Carter's presence for some preliminary hearings, and Carter himself waived his right to be present at the second competency hearing. Prior to the defense opening statement, Carter asked if he had to go through trial, or could he just plead guilty. A hearing **[*50]** out of the jury's presence was held and Carter stated he did not want to attend the trial. The trial court indicated some concerns about his waiving his presence at trial and Carter lunged at the judge in order to be removed from the courtroom. Carter watched the remainder of the trial from another room by remote video. Throughout the remainder of the trial, defense counsel would report to the court each day that Carter still did not want to attend trial. Carter wanted to be in court for the closing arguments in the trial phase, but only if he could be unshackled, which one of his attorneys refused to consent to. Carter also absented himself from the penalty-phase proceedings.

Id. at 605 n.3, 734 N.E.2d at 356 n.3.

The Ohio Court of Appeals provided this account of Carter's pre-trial competency hearings:

> On December 26, 1997, the trial court held a hearing to determine if appellant was competent to stand trial. At that hearing, Dr. Stanley Palumbo was called by the state. He testified that he met with appellant twice. He reviewed the police records in the case, custody records, and administered an intelligence test. The test revealed that appellant had an IQ between seventy and eighty, but Dr. Palumbo believed appellant **[*51]** was not trying because he had taken a previous test where he had scored ninety. Appellant would often answer "I don't know" rather than trying to answer questions correctly. He diagnosed appellant with an antisocial personality disorder, but did not believe he had a mental illness. He believed appellant was competent to stand trial because he

understood the proceedings, everybody's role in the proceedings, and that he was facing the death penalty. On cross-examination, appellant's attorneys questioned Dr. Palumbo extensively about appellant's social and medical history, which included seizures, hearing loss, and possible brain damage caused by a high fever.

Appellant called Deputy Darby Vaughn who testified that appellant had attempted suicide and attacked other prisoners while in jail, awaiting trial. Appellant's counsel requested funds for an MRI test and for a second expert, which the trial court denied. The trial court ruled that appellant was competent to stand trial and indicated that it did not believe that it was even a close question.

On February 26, 1998, during jury selection, the trial court held a second hearing to determine whether appellant was competent to stand trial. **[*52]** At that hearing, appellant called Dr. Stephen A. King who testified that, although appellant understood the proceedings, he had some sort of paranoia that prevented him from trusting and aiding his attorneys. Dr. Palumbo testified that he met with appellant two more times and determined that he wanted to plead guilty and was angry at his attorneys for insisting he go to trial. The state called Dr. Robert W. Alcorn who testified that appellant suffered from an antisocial personality disorder and had abused drugs in the past, but felt that he was "malingering" and not really mentally ill. The trial court again ruled that appellant was competent to stand trial.

*Carter, 2000 Ohio App. LEXIS 5935, at **11-13*.

1. Trial-Court Error

Carter claims that the trial court failed to protect his constitutional right to competency in several respects. The Ohio Supreme Court was the last state court to provide a reasoned opinion on these claims. It found that "[s]ome evidence indicates that while awaiting trial, Carter attempted suicide. Otherwise, his unwillingness to attend the court proceedings and sometimes apparent disagreements with counsel were the only indications in the record that raised a question of competence to stand trial." *Carter, 89 Ohio St. 3d at 605, 734 N.E.2d at 356*. The court **[*53]** concluded, "Carter asks this court to disregard the opinions of the experts. A review of the proceedings does not warrant that action. . . . The trial court's findings of fact fail to support Carter's claim that the court's decision was unreasonable, arbitrary, or unconscionable." *Id.* Although Carter does not address the AEDPA standards of review governing these claims, his claims challenge the Ohio court's decision as both an unreasonable application of clearly established federal law under *§ 2254(d)(1)*, and an unreasonable determination of the facts under *§ 2254(d)(2)*.

a. Failure to Consider Relevant Information

Carter first argues that the trial court failed to consider two pieces of evidence: a psychosocial history written by psychiatric social worker Albert Linder and a letter written by psychologist Dr. Douglas Darnall to defense counsel. ECF No. 129 at 8-9; ECF No. 226 at 18.

A state court's competency determination is treated as a question of fact under AEDPA's *§ 2254(d)(2)*. *Thompson v. Keohane, 516 U.S. 99, 111, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)*; *see also Filiaggi v. Bagley, 445 F.3d 851, 858-59 (6th Cir. 2006)* (a determination of competence is a factual finding, to which deference must be paid and a petitioner must

rebut with clear and convincing evidence under AEPDA *§§ 2254(d)(2)* and *(e)(1)*). The Supreme Court has explained that the competency issue "encompass[es] more **[*54]** than 'basic, primary, or historical facts,' [its] resolution depends heavily on the trial court's appraisal of witness credibility and demeanor. . . . [A] trial court is better positioned to make decisions of this genre, and [the Court] has therefore accorded the judgment of the jurist-observer 'presumptive weight.'" *Thompson, 516 U.S. at 111* (citations omitted).

The State attacks the weight of the evidence Carter contends the trial court should have reviewed, arguing that the trial court "considered all relevant information in considering Carter's competency." ECF No. 138 at 36-38. But that is of no consequence. Carter acknowledges that the report and letter "were never presented to the trial court and were not considered by the experts who testified that Sean Carter was competent to stand trial." ECF No. 129 at 9. A trial court cannot commit constitutional error by not considering evidence it was never given.

Moreover, as the State points out, the Court may not consider evidence outside the statecourt record. *Pinholster, 131 S. Ct. at 1398*. Indeed, the documents Carter identifies are not even in the Court's record. The Court denied Carter's request to expand the record in this case to include this evidence because Carter did not demonstrate **[*55]** that he was diligent in presenting it to the state court as required by *§ 2254(e)(2)*. ECF No. 139 at 8-9. This claim is meritless.

b. Reliance on Flawed Expert Testimony

Carter next claims that the trial court erred by relying on the "flawed" evaluations and testimony of the court-appointed expert, Dr. Palumbo, and State expert, Dr. Alcorn, in finding that Carter was competent to stand trial. ECF No. 129 at 9-13. Specifically, Carter complains that Dr. Palumbo failed to further investigate statements Carter made about his inappropriate laughing and suicidal thoughts; "question[ed] the legitimacy" of Carter's reported hallucinations, which were documented in multiple sources; failed to contact corrections officers to investigate Carter's "persecutory and paranoid complaints" about his lawyers; failed to discuss the severity and nature of Carter's mother's schizophrenia; did not appear to know that an aunt and uncle of Carter's also had been diagnosed with schizophrenia; and discounted "strong" evidence of clinical depression. ECF No. 129 at 9-10. As to Dr. Alcorn, Carter argues that he also failed to consult with jail personnel; made inaccurate statements "reflective of his cursory and inaccurate history and **[*56]** review of collateral records"; failed to make clear the relationship between Carter's mental illness and substance abuse; reported that he observed Carter to be actively hallucinating, yet dismissed this potentially psychotic phenomenon as not being genuine; failed to inquire more deeply into Carter's disorganized and confusing speech and sequential reasoning abilities; and mischaracterized Carter as an antisocial personality with substance abuse problems rather than having a "bona fide severe mental illness," or psychosis, which "would have made more sense" given Carter's "signs and symptoms," such as his remorse over the murder, "want[ing]" the death penalty, and hostility toward his attorneys and others. *Id.* at 11-12. Carter supports his allegations with an affidavit of an expert he retained in these federal habeas proceedings, which, again, the Court may not consider.

Carter's claim misses the mark. As the State argues, the issue here is not whether Drs. Palumbo and Alcorn were adequately prepared or persuasive. The issue is whether the Ohio Supreme Court decision affirming the

trial court's determination of Carter's competency was reasonable in light of the evidence presented. Carter faults the **[*57]** experts' methodology and conclusions, but he has not rebutted by clear and convincing evidence one factual finding underlying the Ohio Supreme Court's decision.

The Ohio high court acknowledged that there was some evidence calling into question Carter's competency to stand trial—namely, his suicide attempt, unwillingness to attend the court proceedings, and apparent disagreements with counsel. *Carter, 89 Ohio St. 3d at 605, 734 N.E.2d at 356*. But it correctly concluded that, in light of the proceedings as a whole, it could not "disregard the opinions of the experts." *Id.*

As the state court explained, the trial court was sharply attentive to, and fully informed about, Carter's competency. It appointed its own expert, Dr. Palumbo, and authorized funding for Carter's expert, Dr. King. The State also retained an expert, Dr. Alcorn. These experts evaluated Carter at length. The court then conducted two competency hearings, at which the experts testified and numerous exhibits were introduced.[9] Two of the experts, Drs. Palumbo and Alcorn, found Carter competent to stand trial. Carter's counsel had every opportunity to expose weaknesses in their investigation, evaluations and opinions through cross-examination and Dr. King's testimony. As **[*58]** the court further noted, even Dr. King admitted on cross-examination that the question of Carter's competency was "a close call, this is a subtle case." Trial Tr. vol. VI at 591.

Given the careful and thorough nature of these proceedings, Carter "has not shown that the trial court was *clearly* wrong in believing the State's expert." *Franklin v. Bradshaw, 695 F.3d 439, 449 (6th Cir. 2012)* (rejecting habeas petitioner's competency claim); *see also Hall v. Florida, 572 U.S. 701, 134 S. Ct. 1986, 1993, 188 L. Ed. 2d 1007 (2014)* (emphasizing the critical role the medical community and its clinical standards play in defining and determining intellectual disability when considering eligibility for the death **[*59]** penalty); *O'Neal v. Bagley, 743 F.3d 1010, 1022-23 (6th Cir. 2013)* ("For better or worse, as a habeas court, we are not in a position to pick and choose which evidence we think is best so long as the presumption of correctness remains unrebutted. . . . With expert testimony split, as it often is, the state court chose to credit [the two experts] over [petitioner's expert], and we cannot say from this vantage that it was unreasonable to do so."). Accordingly, the judgment of the Ohio Supreme Court in affirming the trial court's determination of Carter's competency was not unreasonable, or "beyond any possibility for fairminded disagreement." *Harrington, 562 U.S. at 103*.

c. Failure to Raise the Competency and Presence Issues during the Trial

Carter further argues that the trial court erred by failing to "inquire" further into Carter's competency or "ability to be present" once the trial began. ECF No. 129 at 13-17. In affirming the trial court's determination of Carter's competency, the Ohio Supreme Court did not directly address the fact that the trial court did not revisit the issue of Carter's competency

[9] At the first hearing, the State introduced Dr. Palumbo's competency evaluation as an exhibit. Trial Tr. vol. I at 18. At the second hearing, the State introduced the following exhibits: a 1995 Portage County Department of Youth Services evaluation and social history; and Dr. Alcorn's resume and two letters to the prosecutor stating his findings and opinion regarding Carter's competency. Trial Tr. vol. VI at 589, 606, 781, 783, 789. And the defense introduced the following exhibits: Dr. King's competency report and curriculum vitae; and two letters written in1984 from the Trumbull County Mental Health Center regarding Carter's mother's and uncle's schizophrenia. *Id.* at 556, 562.

after the second competency hearing. Carter, 89 Ohio St. 3d at 605, 734 N.E.2d at 356. And, although the state court found that Carter's refusal to attend his trial was a possible indication of incompetency, it **[*60]** expressed no disapproval of the trial court's handling of the matter. *See* id. at 605 n.3, 734 N.E.2d at 356 n.3. Nevertheless, the court's summary disposition of this claim constitutes an adjudication on the merits for AEDPA purposes, Harrington, 562 U.S. at 99, and, as an issue of law, must be reviewed under AEDPA's unreasonable-application prong, *§ 2254(d)(1)*. *See, e.g.,* Lewis v. Robinson, 67 F. App'x 914, 921-22 (6th Cir. 2003).

The Supreme Court has advised that "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Drope, 420 U.S. at 181. The Court has never "prescribe[d] a general standard with respect to the nature or quantum of evidence necessary to require resort to an adequate procedure" for determining competency. Id. at 172. Nevertheless, it has explained,

> evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; **[*61]** the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

Id. at 180; *see also* Robinson, 383 U.S. at 385 ("Where the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial," a trial judge has the duty to order a hearing *sua sponte*).

Carter identifies only one factor that should have prompted the trial court to inquire further into the issue of his competency once the trial began: Carter's absence from trial. Carter claims that the trial court had an obligation to "bring [him] back into the courtroom to question him as to his desire to be present, or to put on the record Sean's understanding of the proceedings." ECF No. 129 at 14 (emphasis omitted).

The Supreme Court long has recognized that "[o]ne of the most basic of the rights guaranteed by the *Confrontation Clause* [of the *Sixth Amendment*] is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (citing Lewis v. United States, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)). The Court has held, however, that a defendant may lose his right to be present at trial if, after a judge warns him that he will be removed if he continues his disruptive **[*62]** behavior, he still acts in a manner "so disorderly, disruptive, and disrespectful of the court" that the trial cannot continue with him in the courtroom. Id. at 343. The right to be present can be reclaimed, however, if the defendant is willing to conduct himself "consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Id.*

A defendant's competency and presence at trial are related. The Court has explained,

> Petitioner's absence bears on the analysis in two ways: first, it was due to an act which suggests a rather substantial degree of mental instability contemporaneous with the trial . . . ; second, as a result of

> petitioner's absence the trial judge and defense counsel were no longer able to observe him in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him.

Drope, 420 U.S. at 180-81 (citation omitted).

A review of the record demonstrates that the trial court took every reasonable and appropriate step to protect Carter's right to be present at his trial. The judge was careful to ensure that any waiver of that right was intelligent and voluntary in **[*63]** a lengthy colloquy in his chambers. He informed Carter of the importance of being present at trial, telling him, "I want to inform you that you have an absolute right to be at the trial. It's a very important thing that's being done and the [C]onstitution guarantees you the right to be here . . . ." Trial Tr. vol. XII at 2274. The judge also repeatedly pressed Carter to state affirmatively his desire to be absent from the courtroom during his trial. He said, for example, "So if I do decide to grant your request to not be here while you're being tried, . . . you're going to have to tell me on the record that that's what you want to do even though it would most likely hurt your case; do you understand that?" *Id.* at 2275.

The judge tried to put off making a decision regarding Carter's request until he had had time to research the issue. *Id.* But Carter repeatedly and emphatically told the judge he would not return to the courtroom. *See id.* ("That's what I want to do."); *id.* at 2276 ("I don't want to be here at the trial. . . . I don't want to. . . . I still don't want to, though. . . . I still don't want to."). Eventually, Carter left the judge no choice but to remove him from the courtroom. The following dialogue took place:

> The Defendant: **[*64]** . . . But I, I don't know. I don't want to be here, don't want to be over in the court. Like, if I act up in here or something, like get restrained, they take me over there if I did that?
> The Court: Again, I'm going to tell you, don't act up in court because then I would have to give you penalties for that, and I don't want to have to do that.
> The Defendant: Because I have more time or something? Is that more time or something?
> The Court: Yes.
> The Defendant: More time, that ain't nothing.
> The Court: It could —
> The Defendant: That ain't nothing.
> The Court: The point is, I'm going to take your request that you have given to me seriously.
> The Defendant: I ain't going over there, though.
> The Court: Hold on. I'm going to take your request seriously, to decide whether or not you can be tried without your presence, but I'm not going to get that until tomorrow. So I want you now to sit here in from of this jury and not act up. Can you do that for me?
> The Defendant: Yeah. But I, I don't want to.
> The Court: But will you do that for me today?
> The Defendant: No.
> The Court: No? You're going to act up, is that what you're telling me?
> The Defendant: Uh-huh.
> The Court: Okay. Why don't you have a seat outside.
>
> The **[*65]** Defendant: Who?
> The Court: You.
> The Defendant: Over there?
> The Court: Take him back in the courtroom for now.
> The Defendant: I ain't going over there.

Id. at 2279-81

At that point, as the judge described it on the record,

> What happened is basically the Defendant 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. And he struggled very violently with them. And he has promised to the Court that he intends to continue that type of activity throughout the trial if he's required to be here.

Id. at 2281-82.

The judge then took appropriate measures to ensure that Carter could watch the trial on a television monitor from a separate jury room and contact his attorneys if necessary. *Id.* at 2283. He also asked defense counsel to inform him if Carter would like to return to the courtroom and agree not to disrupt the proceedings. *Id.* at 2284. Finally, he gave the jury a cautionary instruction to disregard Carter's absence from the courtroom. *Id.* at 2290. Carter's counsel apprised the court throughout the trial of Carter's continued wish to remain outside the courtroom. *Id.* at 2535; Trial Tr. vol. XIII at 2573; Trial Tr. vol. XIV at 2691, 2808; Trial Tr. vol. **[*66]** XV at 3000; Trial Tr. vol. XVI at 3251.

Near the end of the guilt phase of Carter's trial, Carter's counsel informed the court that Carter now wished to be present in the courtroom and would promise not to be disruptive—but only on the condition that he be unshackled. The deputies did not think they could protect both of Carter's attorneys if Carter was unshackled, however, and one of the defense counsel, whom Carter had threatened to kill, would not waive that protection. The judge decided he would have to remain shackled. When advised of this, Carter chose to stay in the jury room. Trial Tr. vol. XV at 3094-97. The prosecutor noted on the record that Carter's "behavior has been very impulsive and he has acted up. We've heard him. People have complained that he's hollered in the back . . . ." *Id.* at 3097. The judge summed up,

> I have to balance [Carter's] Constitutional [r]ights against the protection of everyone that's in the courtroom. . . .
>
> . . . I think on balancing the whole situation I would allow him his Constitutional [r]ight to be present, but with shackles.
>
> Now having said that, it's my understanding that he does not wish to appear . . . .

Id. at 3098.

It is clear from this account that the trial court was patient, solicitous, and wholly reasonable **[*67]** in its treatment of Carter's presence in the courtroom. It also is clear that Carter expressly, voluntarily and intelligently waived his right to be present, both through his oral statements and his disruptive behavior, and continued to express that desire throughout the trial. Carter's conduct was not "beyond his rational control," as Carter suggests, ECF No. 129 at 17, but entirely rational. He clearly expressed his wish not to be present, thought of a way to make that happen (by "acting up"), asked about possible consequences for that conduct, and, after dismissing those consequences, lunged at the judge. He received that which he sought: removal from the courtroom. Later, when he agreed to return to the courtroom, he unreasonably conditioned his acquiescence on being unshackled and withdrew his agreement when his request was denied.

In sum, Carter's claim that the trial court erred by not "inquir[ing]" further into his absence is belied by the record. The trial court did indeed monitor the situation throughout Carter's trial, albeit through his counsel. And Carter points to nothing in the record that shows the judge

should have done something more, or that even if the judge had questioned **[*68]** Carter directly, the result would have been any different. Accordingly, the Ohio Supreme Court neither contravened nor misapplied clearly established Supreme Court precedent in concluding that the trial court did not violate Carter's due process rights by not inquiring further into his competency and removing him from the courtroom during his trial.

d. Failure to Obtain Carter's Waiver of Presence at the Sentencing Phase of Trial

Carter further maintains that the trial court should have obtained from Carter an express waiver of his right to be present before the sentencing phase of the trial. ECF No. 129 at 17-19. He relies on Supreme Court authority for the proposition that a constitutional right must be "knowingly and voluntarily waived . . . ." *Id.* at 17-18 (citing *Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)* and *Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)*).

This claim, too, is meritless. As noted above, just minutes into his trial, Carter voluntarily and unequivocally waived his right to be present in the courtroom. Carter cites no clearly established Supreme Court precedent requiring a second express waiver from a defendant before the sentencing phase of trial begins under these circumstances. Additionally, Carter's behavior in the courtroom and outside, in the presence of the **[*69]** trial judge, along with his communications to the trial judge certainly support a reasonably inferred continuation of that earlier made knowing and voluntary waiver of his right to be present in the courtroom during the sentencing phase.

2. Ineffective Assistance of Counsel

Carter also argues that his trial counsel provided ineffective assistance when they "failed to vigorously pursue the issue of his competence throughout the proceedings." ECF No. 129 at 38. The last state court to provide a reasoned decision on Carter's competency ineffective-assistance claims was the Ohio Court of Appeals. It stated,

> Appellant asserts that his attorneys failed to develop a complete record to show that he was incompetent to stand trial because his paranoid personality did not permit him to trust, or therefore consult with and aid, his lawyers. As evidence of that claim, appellant submits an affidavit from his trial attorney to attest to the following facts: appellant would not cooperate with his attorneys; appellant would not discuss any aspects of the case or his personal life with his attorneys; appellant stood and told the jury not to waste their time with the trial because he was guilty; appellant **[*70]** wanted to kill his attorney; both appellant's mother and uncle were paranoid schizophrenics; and appellant would only come out of the jury room during trial if his attorneys bribed him with candy. The record also shows that appellant told the court that he did not want to be present during the trial, just wanted to plead guilty, and he attempted to attack the court.

*Carter, 2000 Ohio App. LEXIS 5935, at **10-11*. After describing the hearings, as quoted above, the court concluded that Carter's

> inability or unwillingness to aid his attorneys in the defense of his case is well-documented in the record. Neither his petition for post-conviction 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.

2000 Ohio App. LEXIS 5935 at *13.

The Supreme Court long has recognized that the *Sixth Amendment* right to the effective assistance of counsel at trial "is a bedrock principle in our justice system." Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 1317, 182 L. Ed. 2d 272 (2012); *see also* Gideon v. Wainwright, 372 U.S. 335, 342-44, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). The Court announced a two-prong test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." Id. at 687. To determine if counsel's performance **[*71]** was "deficient" pursuant to *Strickland*, a reviewing court must find that the representation fell "below an objective standard of reasonableness." Id. at 688. It must "reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time." Id. at 689.

Second, the petitioner must show that he or she was prejudiced by counsel's errors. To do this, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" Id. at 693 (citation omitted). Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687.

If a petitioner fails to prove either deficiency or prejudice, his ineffective-assistance claim will fail. *Id.* Ineffective-assistance claims are mixed questions of law and fact. Id. at 698. Habeas courts review such claims, therefore, under AEDPA's "unreasonable application" prong, *§ 2254(d)(1)*. *See, e.g.,* Mitchell v. Mason, 325 F.3d 732, 737-38 (6th Cir. 2003).

The Supreme **[*72]** Court has emphasized that "'[s]urmounting *Strickland*'s high bar is never an easy task.'" Harrington, 562 U.S. at 105 (quoting Padilla v. Kentucky, 559 U.S. 356. 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)). It has explained,

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve.

Id. (internal quotation marks and citations omitted). Thus, "[j]udicial scrutiny of a counsel's performance must be highly deferential" and "every effort [must] be made to eliminate the distorting effects of hindsight . . . ." Strickland, 466 U.S. at 689. "*Strickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment,'" recognizing "'the constitutionally protected independence of counsel and . . . the wide latitude counsel must have in making tactical decisions.'" Pinholster, 131 S. Ct. at 1406-07 (quoting Strickland, 466 U.S. at 689-90).

The Court has observed that the standards imposed by *Strickland* and *§ 2254(d)* are both "highly deferential," so that in applying them together, "review is 'doubly' so." Harrington, 562 U.S. at 105 (internal quotation **[*73]** marks and citations omitted). It has cautioned:

> Federal habeas courts must guard against

> the danger of equating unreasonableness under *Strickland* with unreasonableness under *§ 2254(d)*. When *§ 2254(d)* applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Id.

a. Failure to Prepare Experts for, and Present Material Evidence Bat, the Competency Hearings

Carter argues that the state court's decision was contrary to, or an unreasonable application of, *Strickland* given his trial counsel's failure to provide to the experts, or present to the trial court, material evidence of his incompetency to stand trial. ECF No. 129 at 8-9, 38-39; ECF No. 226 at 16-19, 71. The Court disagrees.

(1) Additional Evidence of Incompetency

Carter most emphatically complains that his trial counsel did not present to his expert or the trial court the following records: the psychosocial history written by Albert Linder and letter Dr. Darnall wrote to defense counsel, discussed above; the affidavit of Ida Magee, Carter's foster mother; a 1994 chemical dependency assessment from the Portage County Juvenile Court **[*74]** Substance Abuse Awareness Department; and 1995 evaluation of the Portage-Geauga County Juvenile Detention Center. ECF No. 129 at 8-9; ECF No. 226 at 16-19.

The Court may not consider this evidence as it was not part of the state-court record. Moreover, Carter offers nothing more than conclusory allegations about his counsel's failure to give these particular documents, and other, unspecified "records of Sean's history," to Dr. King. There is nothing in the record to show what documents counsel actually possessed, or what documents they, or Dr. King himself, may have decided for strategic reasons to use in preparation of the competency evaluation or as evidence at the competency hearings. The record does show, however, that Dr King—like Drs. Palumbo and Alcorn—reviewed numerous informative documents in connection with his assessments of Carter's competency, presumably containing similar, if not identical, information to the documents to which Carter refers.[10]

(2) Attorneys' Testimony at Hearings

Carter also **[*76]** argues that his trial counsel should have testified at the two competency hearings about Carter's hostility toward them and refusal to assist in preparing his defense. ECF No. 129 at 38. Testifying, however, would have posed serious ethical concerns, possibly resulting in the disclosure of confidential or

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[10] Dr. King's report includes as "sources of information": Dr. Palumbo's competency evaluation, a social history prepared by a probations officer of the Portage County Department of Youth Services; a 1995 report prepared by the Portage **[*75]** County Juvenile Court Psychology Department; and an affidavit of an officer of the Trumbull County Sheriff's Department prepared in September 1997; and Carter's statement to the police after he was detained. ECF No. 88 at 31-32 (the State did not include pre-trial and trial exhibits in the appendix to the return of writ; instead, it later moved to expand the record to include them, which the Court granted. *See* ECF Nos. 81, 84, 85-89.). Dr. Palumbo, in turn, relied upon "a number of materials," including school and "Children's Services Board" records, and statements of Carter and "other family members and . . . individuals." Trial Tr. vol. I at 10 (the Court could not find in the record Dr. Palumbo's report, which presumably contained a more comprehensive list of sources). Dr. Alcorn reviewed similar documents, including Dr. Palumbo's evaluation, Carter's statements to police, an Ohio Bureau of Criminal Investigation report, 34 pages of Carter's letters and drawings, statements of relatives of Veader Prince and other witnesses; and more than 200 pages of records from an Ohio county children services board. Trial Tr. vol. VI at 784-85; ECF No. 88 at 22-23.

privileged information or the attorneys' disqualification from the case. *See* Ohio R. Prof. Conduct 1.6, 3.7. Moreover, Carter's attorneys did not need to testify themselves to make their difficulties in representing Carter clear to the court; they could do so effectively through questioning witnesses and their expert's testimony. One example is this exchange between defense counsel and Dr. Palumbo at the first competency hearing:

> Q: Now, he told you he doesn't like lawyers. Isn't that a form of paranoia?
>
> A: It may be, but I don't believe it is in this case.
>
> Q: Why would this case be any different?
>
> A: Because I've evaluated many individuals that have had difficulty with the law and I would say that most of them feel the same way, would not trust attorneys. That's a common statement.
>
> . . .
>
> Q: In this case already Mr. Carter has not listened to his attorneys' advice. We have asked to have the matter continued to prepare **[*77]** better for it.
>
> A: I don't know. Is that the case? I don't know.
>
> Q: Yeah, that's the case. Does that not show indication that he doesn't want to listen to his attorneys' advice?
>
> A: Excuse me. It certainly sounds like he doesn't want to, but that's different from being able to.
>
> Q: You are mixing up what he is able to do and tendencies of paranoia. I'm not asking what he is able to do, I'm saying does that not exhibit a sign of paranoia when somebody gives you sound advice and you just don't trust them so you won't listen to them.
>
> A: It may.
>
> Q: Do you feel that he is able to aid in his own defense?
>
> A Yes, sir.

Trial Tr. vol. I at 36-38. And Dr. King testified at the second competency hearing,

> I've had conversations with his counsel as frequent as today and they have indicated to me that he is uncooperative with them, he is not working with them, that actually he is very hostile when put under any pressure, and that they are actually not only apprehensive but even afraid of him.

Trial Tr. vol. VI at 568. The attorneys' testimony, therefore, would have been merely cumulative to what already was in the record.

(3) Evidence of Mental Illness

Carter further argues that his counsel failed to present evidence of his "severe **[*78]** mental illness" and "bizarre" behavior. ECF No. 129 at 8, 38. The record belies this claim. Carter's counsel thoroughly examined each of the experts about aspects of Carter's social and medical history that indicated mental illness, including seizures, hearing loss, learning disabilities, and possible brain damage and hallucinations. *See, e.g.*, Trial Tr. vol. I at 27-29, 90-92; Trial Tr. vol. VI at 564-69, 726. In particular, counsel presented Deputy Vaughn to testify at the first competency hearing that Carter had attempted suicide and acted aggressively toward others. Trial Tr. vol. I at 96-98. At the second hearing, they presented Dr. King, who testified that Carter exhibited bizarre behavior during his evaluations, such as laughing about his case and stating that he wanted to kill Attorney Consoldane. Trial Tr. vol. VI at 558-59. Carter's counsel also questioned the experts at both hearings about the significance of the fact that Carter's mother and maternal uncle were schizophrenic. Trial Tr. vol. I at 29-31; Trial Tr. vol. VI at 563-64, 731-34. And Attorney Lewis aggressively cross-examined Dr. Alcorn about the nature of Carter's hallucinations. Tr. vol. VI at 824-36.[11]

[11] Carter asserts that his trial counsel did not effectively cross-examine Drs. Palumbo and Alcorn "to reveal **[*79]** the

(4) Neuropsychological Examination

Finally, Carter argues that counsel was ineffective because they "did not request a neuropsychological examination." ECF No. 129 at 39. At the end of the first competency hearing, defense counsel requested funds for an MRI and expert to examine Carter for brain defects, based on Dr. Palumbo's testimony about Carter's seizures, learning disability, **[*80]** and hearing loss. Trial Tr. vol. I at 98-99. The trial court, having found Carter competent, denied the motion for a second expert, but reserved ruling on the MRI in the event it became relevant later for another purpose. *Id.* at 100-01. At the second competency hearing, Dr. King testified that it would be "comprehensive" to conduct an MRI test. The trial court then directly questioned Dr. King about the necessity for an MRI in this exchange:

> The Court: Do you need [an MRI] for any of your opinions, doctor?
> A: No.
> The Court: Well, then why do you suggest that he should?
> A: Well, what I'm saying is that it would add to a comprehensive workup. I'm not saying that it's necessary for me to make the diagnosis or render my opinion in this case.
> The Court: And I appreciate what you're saying but--of course I would be glad to order it if it would be helpful in some area, but if it's not going to be. You don't need it for your opinions, correct?
> A: No. No, I don't.
> The Court: Then can you tell me why it would be necessary for this case or to assist Mr. Consoldane?
> A: Well, Mr. Consoldane I think is implying that it would be helpful. I don't think he said it was necessary, so I think--
>
> Q: Well, let me ask it to you this **[*81]** way, would it be helpful to know this in treating him to make him competent to be able to stand trial?
> A: No.
> Q: No.
> A: No, I don't think so.
> . . .
> The Court: But in your opinion an MRI would not assist us in this case to render any psychological opinions involving either sanity or competency or mental defect?
> A: No.

Trial Tr. vol. VI at 564-66. At the end of the hearing, the judge stated that he would authorize an MRI for purposes of the mitigation phase of trial, but defense counsel explained that he had requested the test for competency alone and declined the court's offer of an MRI "unless we can find some other organic evidence that would substantiate that." Trial Tr. vol. VII at 869-70.

Given the opinion of the defense's own expert, Dr. King, that an MRI would be *useful* for purposes of a comprehensive psychiatric evaluation, but was not *necessary* for his evaluation of Carter's competency, Carter has not "overcome the presumption that, under the circumstances," not pursuing neurological testing or an MRI "was sound trial strategy."

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inconsistencies and inadequacies of their testimony, for example the failure to review all records and to interview collateral sources." ECF No. 129 at 39. But he does not cite to one example in the trial transcript in which counsel's cross-examination was deficient. Nor does he show "a reasonable probability that . . . the result of the proceeding would have been different" had counsel cross-examined the experts differently. *Strickland, 466 U.S. at 694*. The Court, therefore, will not address this claim. *See, e.g., United States v. Crosgrove, 637 F.3d 646, 663 (6th Cir. 2011)* ("Because there is no developed argumentation in these claims, the panel declines to address [the defendant's] general assertions of misconduct in witness questioning and closing statements."); *United States v. Hall, 549 F.3d 1033, 1042 (6th Cir. 2008)* ("'[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'") (quoting *United States v. Johnson, 440 F.3d 832, 846 (6th Cir. 2006)*).

Strickland, 466 U.S. at 689. *See also* *Morris v. Carpenter, Nos. 11-6322/6323, 802 F.3d 825, 2015 U.S. App. LEXIS 16833, 2015 WL 5573671, at *15 (6th Cir. Sept. 23, 2015)* ("Attorneys are entitled to rely on the opinions and conclusions of mental-health experts.") (citing *McGuire v. Warden, Chillicothe Corr. Inst., 738 F.3d 741, 758 (6th Cir. 2013)*; *Black v. Bell, 664 F.3d 81, 104-05 (6th Cir. 2011)*).

Accordingly, the Ohio appellate **[*82]** court reasonably applied *Strickland* in concluding that his trial counsel did not perform deficiently in their preparation for, and presentation of evidence at, Carter's competency hearings.

b. Failure to Request a Third Competency Hearing and Preserve an Adequate Record for Appeal Regarding Carter's Incompetence

Carter also complains that the state court was unreasonable in finding no deficiencies in his trial counsel's treatment of the competency issue after the trial began. ECF No. 129 at 14-15; ECF No. 226 at 71. As with the trial court, however, Carter fails to point to evidence that should have prompted defense counsel to request a third competency hearing. Furthermore, throughout the trial, counsel ensured that the record documented Carter's violent behavior in the courtroom, his refusal to attend the proceedings, and his desire to kill Attorney Consoldane. *See, e.g.*, Trial Tr. vol. XI at 2281; Trial Tr. vol. XIII at 2573; Trial Tr. vol. XV at 3094-99. This claim also fails.

II. Second and Fifth Grounds for Relief: *Ineffective Assistance of Counsel*

For his second and fifth grounds for relief, Carter alleges additional instances in which his trial counsel breached his *Sixth Amendment* right to effective assistance of counsel. He complains **[*83]** that counsel:

1. Failed to investigate, prepare, and present mitigating evidence;

2. Failed to object to certain instances of prosecutorial misconduct**;**
3. Failed "to present argument" concerning jury instructions on murder, manslaughter, theft, and gross sexual imposition, and the need for instructions on the lesser-included offenses of aggravated murder, aggravated robbery, and rape; and
4. "Negated" their own theory of the case during closing argument.[12]

ECF No. 129 at 21-34, 37-39.

A. Procedural Posture

Carter raised the first sub-claim, as listed above, on post-conviction to the trial court and court of appeals, which adjudicated it on the merits. *See* *Carter, 2000 Ohio App. LEXIS 5935, at **8-10*. Carter also raised the claim on appeal to the Ohio Supreme Court, but the court declined jurisdiction. *State v. Carter, 91 Ohio St. 3d 1509, 746 N.E.2d 612 (Ohio 2001)*. This claim, therefore, is preserved for federal habeas review.

The State argues that the second sub-claim, as listed **[*84]** above, is procedurally defaulted. Carter did not raise it on direct appeal. He did raise the claim on post-conviction, but the court denied it on the ground of *res judicata*, and Carter then failed to appeal that decision. ECF No. 138 at 71 (citing App. vol. IV at 18-19, 90-91). The Sixth Circuit consistently has recognized Ohio's doctrine of *res judicata*, barring courts from considering any issue that could have been,

[12] Carter added a fifth ineffective-assistance sub-claim in his traverse, regarding his trial counsel's failure to "review" and "notice" the defective indictment. The Court will not address this claim, however, as a district court may decline to review a claim that a party raises for the first time in his or her traverse. *Tyler v. Mitchell, 416 F.3d 500, 504 (6th Cir. 2005)*.

but was not, raised on direct appeal, as an "independent and adequate state ground" upon which to find a habeas claim procedurally defaulted. *See, e.g.,* *Jacobs v. Mohr, 265 F.3d 407, 417 (6th Cir. 2001)*.

Carter responds that he raised an ineffective-assistance claim regarding "some instances of prosecutorial misconduct" on direct appeal to the Ohio Supreme Court under his fifth proposition of law. He also contends that he raised this claim in his application to reopen his direct appeal, or *Murnahan* application, and, because the Ohio Supreme Court denied the petition without asserting a procedural bar, the claims are not defaulted. ECF No. 226 at 72-73. *Murnahan* applications allows capital defendants to present claims of ineffective assistance of appellate counsel to the Ohio Supreme Court within a prescribed 90-day time period. *Ohio S. Ct. Prac. R. 11.06(A)* **[*85]** (this rule was designated as Ohio S. Ct. Prac. R. XI, § 5 when Carter filed his application); *see also* *State v. Murnahan, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (Ohio 1992)*.

This claim is procedurally defaulted. Carter did not raise this claim on direct appeal. *See* App. vol. III at 137-42. Nor did he raise the claim in his *Murnahan* application. He mentioned this ineffective-assistance-of-*trial*-counsel claim there only as the basis for his ineffective-assistance-of-*appellate*-counsel claim; in other words, as a claim that his appellate counsel erred for not having raised on direct appeal. The claim, therefore, remains procedurally defaulted absent a showing of cause and prejudice, which Carter does not make. *Lott v. Coyle, 261 F.3d 594, 611-12 (6th Cir. 2001)*.

Carter raised the third sub-claim on direct appeal to the Ohio Supreme Court, which considered the claim on the merits. *See* *Carter, 89 Ohio St. 3d at 606, 734 N.E.2d at 357*. This claim is ripe for federal habeas review.

The State argues that the fourth sub-claim also is procedurally defaulted because, although the claim is based on the record, Carter failed to raise it on direct appeal. ECF No. 138 at 79. Carter neither acknowledges nor responds to this argument. The State is correct. In Ohio, where a defendant's ineffective-assistance claim "could [have been] fairly determined without examining **[*86]** evidence outside the record," and the defendant does not raise that claim on direct appeal, the *res judicata* doctrine precludes post-conviction relief for that claim. *State v. Cole, 2 Ohio St. 3d 112, 113-14, 2 Ohio B. 661, 443 N.E.2d 169, 171 (Ohio 1982)*. Carter, having failed to present this record-based claim to state courts and having no remaining state-court remedies, has therefore procedurally defaulted this claim. *O'Sullivan v. Boerckel, 526 U.S. 838, 848, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999)*.

B. Merits

1. Failure to Prepare for, and Present Evidence at, the Mitigation Phase of the Trial

Carter complains in his second ground for relief that his trial counsel failed to investigate, prepare, and present mitigating evidence, including evidence regarding Carter's childhood trauma, neglect and developmental difficulties; his serious mental illness; his family history of serious mental illness; his neurological dysfunction; his polysubstance abuse; and the impact the structured environment of prison would have had on him. ECF No. 129 at 21-34.

The last state court to rule on this claim was the Ohio Court of Appeals on post-conviction. Carter submitted as support for this claim an affidavit from an attorney, Gerald Ingram, who

averred that a mitigation specialist is "required" in capital cases, because criminal trial lawyers "are inadequate and incompetent **[*87]** to discover" mitigating evidence without such expert assistance. App. vol. IV at 26-27. The appellate court stated:

> Appellant argues that he was denied effective assistance of counsel because trial counsel did not properly prepare for the penalty phase of the trial. He asserts that the trial court could only resolve this claim through a hearing and reference to evidence outside the record. In his petition for post-conviction relief, appellant points to two specific reasons for the ineffectiveness of counsel:
>
> (A) failing to fully investigate petitioner's medical and social history; and
>
> (B) failing to hire a mitigation expert to assist in discovery of relevant information.
>
> The trial court ruled that appellant did not show substantive grounds for relief or a hearing in his claim that his trial counsel failed to investigate his medical and social history or hire a mitigation expert. The trial court found that appellant's trial counsel did hire a mitigation expert. On October 22, 1997, the trial court allowed funds for the hiring of mitigation experts, Sandra and Donald McPherson.
>
> At the sentencing hearing, appellant called Nancy Dorian, a psychologist for the children's services board who dealt with appellant's **[*88]** placement in foster care. She testified that appellant was emotionally flat, had little warmth and nurturing as a small child, had difficulty adjusting, had an inability to get along with people and was "schizoid-prone." She testified about appellant's situation with his birth mother, who was diagnosed as a schizophrenic, who neglected him and his sister and on at least one occasion tied appellant to the leg of a couch. Appellant was placed with different families during his childhood.
>
> Sandra McPherson testified at the penalty phase of trial and the record shows that she had conducted a thorough review of appellant's medical and social history, about which she testified to the jury. She corroborated much of Nancy Dorian's testimony and presented the jury with greater detail about appellant's background. This background included a history of mental illness in his family, developmental problems, trouble he had expressing himself, and that he never learned the boundaries of acceptable behavior. She concluded that he was unable to develop a "normal" capacity to think and feel.
>
> It does not appear from reading the record that appellant's counsel performed inadequately at the mitigation phase **[*89]** of the trial. Appellant's assertion that his counsel failed to investigate his medical and social history or to hire a mitigation specialist is not supported by the record. Furthermore, 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.

*Carter, 2000 Ohio App. LEXIS 5935, at **8-10*.

The Supreme Court repeatedly has held that counsel in capital cases have an "obligation to conduct a thorough investigation of the defendant's background" for mitigation purposes. *Williams v. Taylor, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. In *Strickland*, the Court noted that a capital sentencing proceeding "is sufficiently like a trial in its adversarial format and in the existence of standards for decision" that counsel's role in the two proceedings is

comparable: "to ensure that the adversarial testing process works to produce a just result under the standards governing decision." Strickland, 466 U.S. at 686.

Accordingly, the Supreme Court and Sixth Circuit have found ineffective assistance of counsel in capital cases where trial counsel failed to adequately investigate or present mitigating evidence at sentencing. *See, e.g.,* Rompilla v. Beard, 545 U.S. 374, 389-93, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (counsel ineffective for failing to examine court file of defendant's prior conviction **[*90]** which contained a range of vital mitigation leads regarding defendant's childhood and mental health problems); Wiggins v. Smith, 539 U.S. 510, 526, 534, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (counsel ineffective for failing to discover and present "powerful" evidence of petitioner's "excruciating life history" and instead "put on a halfhearted mitigation case"); Frazier v. Huffman, 343 F.3d 780, 795-99 (6th Cir. 2003) (counsel ineffective for failing to introduce any mitigating evidence in either guilt or penalty phases of trial when he was aware of petitioner's brain injury).

Nevertheless, "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." Rompilla, 545 U.S. at 383. *See, e.g.,* Wiggins, 539 U.S. at 525 (further investigation excusable when counsel has evidence suggesting it would be fruitless); Strickland, 466 U.S. at 699 (counsel could "reasonably surmise . . . that character and psychological evidence would be of little help"); Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) (finding limited investigation reasonable because all witnesses brought to counsel's attention provided predominantly harmful information).

The Supreme Court has advised courts to "begin with the premise that 'under the circumstances, the challenged action[s] might be considered sound trial **[*91]** strategy.'" Pinholster, 131 S. Ct. at 1404 (quoting Strickland, 466 U.S. at 689). Indeed, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." Strickland, 466 U.S. at 690. Thus, the Court repeatedly has held that counsel is not ineffective for deciding to offer little or no mitigating evidence where that decision is based on sound professional judgment. *See, e.g.,* Bell v. Cone, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); Strickland, 466 U.S. at 699-700; Burger, 483 U.S. at 793-95; Darden, 477 U.S. at 184.

Courts may infer from the record a trial attorney's strategic basis for a challenged decision. The Supreme Court has explained,

> Although courts may not indulge "*post hoc* rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, . . . neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect."

Harrington, 562 U.S. at 109 (citations omitted).

a. Investigation

Carter argues that the Ohio appellate court's conclusion that his "assertion that his counsel failed to investigate his medical and social history . . . [was] not supported by the record" contravenes or unreasonably applies Supreme Court precedent. First, **[*92]** he generally complains that his trial counsel "failed to

investigate Mr. Carter's background for mitigating evidence." ECF No. 226 at 48. But as the state court determined, the record contradicts this claim. Just twelve days after Carter was indicted, his counsel sought and received funding for an independent psychologist, investigator, and mitigation specialist. App. vol. I at 66-74; App. vol. II at 11-12. Carter himself concedes that the experts gathered "crucial documents substantiating the facts of [Carter's] traumatic childhood," including "a number of medical, legal, and social service records" that were eventually admitted into evidence. ECF No. 226 at 22-23.

More specifically, Carter claims his counsel or the experts they retained failed to uncover in their investigation the Linder report and Darnall letter, described above, which he contends document Carter's serious mental illness. ECF No. 226 at 30-31. But, again, the Court may not consider this evidence. *Pinholster, 131 S. Ct. at 1398*.

Carter also complains that his trial counsel "failed to investigate his history of drug abuse," and cites to records that report his drug use and related criminal charges but were not presented to the jury during mitigation. ECF No. 226 at **[*93]** 43-44. Again, Carter obtained some of these records in federal habeas proceedings, such as a chemical dependency assessment of Carter conducted for the Portage County Juvenile Court in April 1994 and pre-trial evaluations, and the Court may not consider this evidence. Another document to which he refers, "an evaluation" conducted by the Portage County Department of Youth Services ("DYS") dated June 16, 1995, is similar, if not identical to, a "social history" prepared by that agency, also dated June 16, 1995, that was introduced at Carter's competency hearing and therefore clearly in his counsel's possession. *See* ECF No. 88 at 8-17. In addition, another Portage County DYS evaluation of Carter, dated June 15, 1995, which contains information about Carter's drug use, also was introduced at the competency hearing. *See id.* at 1-7.

Carter's more troubling complaint concerns counsel's failure to obtain neurological testing for mitigation purposes. ECF No. 226 at 34-43. He argues that such testing would have uncovered evidence of organic brain damage based on evidence in the record from his childhood, including Carter's traumatic birth, drug use, withdrawn and anxious behavior, and history of seizures. **[*94]** [13] *Id.* at 34-35.

As explained above, the trial court informed defense counsel after the first competency hearing that he was inclined to authorize an MRI for mitigation purposes if they could "present evidence of a particularized need." Trial Tr. vol. I at 101. At the second competency hearing, Dr. King, the defense's expert, testified that an MRI would be "helpful" for a "comprehensive" psychiatric evaluation of Carter. Trial Tr. vol. VI at 568. However, when the judge directly asked Dr. King if "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 replied, "No." *Id.* at 566. At a later pretrial hearing, the judge again asked defense counsel if they would like to renew their motion requesting funds for an MRI, stating:

> The Court is mindful of the fact that mental defect and/or, just on a general basis as a mitigating factor, a mental condition could become important in this case should this case go to a second phase. That being the case, and your expert saying **[*95]** he would like to see that, Dr. King, I will now

[13] Carter also supports this argument with evidence obtained in discovery in these habeas proceedings, which the Court may not consider. *See* ECF No. 226 at 35-37.

> allow you to do that. . . . Do you wish to have that done?

Trial Tr. vol. VII at 870. Attorney Consoldone replied that he "wanted that done for the competency," but that he would decline the court's offer of funding for an MRI for mitigation purposes "unless we can find some other organic evidence that would substantiate that." *Id.*

Given Dr. King's express opinion that an MRI would *not* have advanced Carter's case for mitigation, it is possible that Carter's trial counsel decided that, for sound strategic reasons, the risk posed by an MRI was greater than its potential benefits: an MRI may have shown that Carter had no brain defect at all and actually weakened Carter's position. *See* *Morris v. Carpenter, Nos. 11-6322/6323, 802 F.3d 825, 2015 U.S. App. LEXIS 16833, 2015 WL 5573671, at *15 (6th Cir. Sept. 23, 2015)* ("Attorneys are entitled to rely on the opinions and conclusions of mental-health experts.") (citing *McGuire v. Warden, Chillicothe Corr. Inst., 738 F.3d 741, 758 (6th Cir. 2013)*; *Black v. Bell, 664 F.3d 81, 104-05 (6th Cir. 2011)*). Furthermore, the speculative nature of this claim precludes a showing of prejudice; without knowing the results of an MRI test, Carter cannot demonstrate that his counsel's decision to forgo the testing affected the outcome of the jury's sentencing.

The Ohio appellate court, therefore, reasonably determined that Carter's trial **[*96]** counsel were not constitutionally deficient in their efforts to prepare for the mitigation phase of trial.

b. Presentation of Evidence

Carter also contends that the Ohio appellate court was unreasonable in deciding that his trial counsel performed adequately during the mitigation phase of trial. He argues that counsel were ineffective in their "incomplete and inaccurate" presentation of evidence, focusing on three aspects of their performance: their cursory review of Carter's background and character; their incoherent and damaging theory of mitigation; and their failure to introduce compelling evidence. *See* ECF No. 226 at 21-46.

(1) Cursory Review of Carter's Background and Character

Carter complains generally that his counsel presented a "piecemeal," "haphazard," and "cursory" overview of Carter's background and character to the jury. *Id.* at 22, 29. The record clearly refutes this claim.

Defense counsel presented two witnesses, Dr. Sandra McPherson, a psychologist and mitigation specialist, and Nancy Dorian, a psychologist who oversaw Carter's family while working for a social services agency, who together painted a detailed and balanced portrait of Carter and his life. Dr. McPherson in particular **[*97]** provided a comprehensive review of Carter's family, academic, medical, psychological, and criminal history from his birth to the time of the trial, as well as her assessment of his present psychological functioning. *See, e.g.*, Trial Tr. vol. XVI at 3304-24.

Ms. Dorian's and Dr. McPherson's testimony was further supported by exhibits totaling hundreds of pages. *See* ECF No. 89. The State introduced Carter's Trumbull County Children Services case file, as well as school, medical, and juvenile court records. Defense counsel introduced three reports from Ms. Dorian regarding psychological evaluations she had conducted of Carter in 1983, 1985, and 1986. *See* ECF No. 89 at 1-4, 196-97; Trial Tr. vol. XVI at 3254-61. They also introduced Dr. McPherson's report, which summarized the information contained in the

other exhibits, as well as the reports of Drs. Darnall, Palumbo and Alcorn, and presented her psychological assessment of Carter and opinion of how his diagnostic status and functioning related to the crime. *See* ECF No. 89 at 5-13; Trial Tr. vol. XVI at 3304, 3327.

(2) Incoherent and Damaging Theory of Mitigation

Carter also argues that his trial counsel lacked a "comprehensive and coherent theory of mitigation." The jury, in his view, **[*98]** therefore "was unable to process, understand, or contextualize any of the evidence of Sean's traumatic background and mental illnesses . . . . Instead, they were presented with an image of a mechanical killer who was unable to feel emotion, have empathy . . ., or express remorse." ECF No. 226 at 20-21. He cites to Dr. McPherson's diagnosis of Carter as a "psychopathic character," and her testimony that persons with this disorder

> are so severely disrupted that they simply do not feel or see or comprehend the world in the same way that we do, and he seems to fulfill many of those kinds of traits. . . . He lacks an understanding of pain; he doesn't have the ability to know what other people are thinking, nor does he care; he's always alone . . . .

Id. at 22 (quoting Trial Tr. vol. XVI at 3318). Carter further points to defense counsel's reference to him as a "piece of machinery" in his closing statement. *Id.* (quoting Trial Tr. vol. XVI at 3369). He suggests that his counsel should have focused instead on the impact a structured prison environment could have had on him if he were given a life sentence. *Id.* at 20-21.

The evidence and argument about which Carter complains, however, supported what was a clear and well-developed **[*99]** theory of mitigation: that this young man committed a horrible crime because he was severely psychologically damaged through no fault of his own and by circumstances beyond his ability to control. It was, in essence, a plea for mercy, rather than Carter's proposed strategy of minimizing his psychopathy while stressing his potential for adapting well to prison life.

Dr. McPherson's diagnosis of Carter as psychopathic was preceded by her detailed account of Carter's traumatic first years of life, his early medical and mental illnesses, his positive foster placement and later disruptive adoptions by the Smith and Carter families, his troubled juvenile years, and his compromised intellectual functioning. Trial Tr. Vol. XVI at 3304-15. She stressed the negative impact his birth mother's neglect and the unsuccessful adoptions had on every aspect of his development, including delayed cognitive development, a seizure disorder, and attachment disorder as a young child, *id.* at 3305-06; inappropriate sexual behavior and aggression as a juvenile, *id.* at 3310-11; and ultimately, mental illness. She testified, for example, that without proper nurturing children "don't develop adequately the cognitive structures that underlie **[*100]** a lot of our thinking process. In the same way, . . .[c]hildren who are not loved don't develop the capacity to love or care for anybody, including themselves." *Id.* at 3312-13. She also explained his genetic predisposition to schizophrenic-like illnesses. *Id.* at 3316.

Carter focuses on Dr. McPherson's diagnosis and description of Carter's psychopathic features. But Dr. McPherson diagnosed Carter with several psychological disorders, including adjustment disorder with depressed mood, multiple substance abuse, periodic psychotic episodes, possible emergence of schizophrenia, antisocial personality disorder, and borderline personality disorder. *Id.* at 3315-20. And defense counsel softened her testimony about Carter's psychopathic

characteristics by eliciting Dr. McPherson's explanation that Carter's personality disorders were influenced by environmental, genetic, and physiological factors beyond his control. *Id.* at 3320-21.

Furthermore, defense counsel made their mitigation theory very clear to the jury. In concluding Dr. McPherson's direct examination, counsel elicited her opinion that given his troubled childhood and developmental problems, Carter's foster placement was his "only chance" for a positive outcome, assuming he received substantial assistance **[*101]** such as psychotherapy and special education; instead, he was placed with two adoptive families who were not "reasonable placement[s]" and never received the help he needed. *Id.* at 3321. His final question highlighted Dr. McPherson's conclusion that Carter "was both born and made and neither of these processes were under his control." *Id.* at 3323-24.

Counsel also reinforced their mitigation theory in closing argument. For example, and to put the statement that Carter challenges in context, counsel argued:

> We come into this world, we can be anything, but that nurturing develops the feeling for empathy, for remorse, for feelings for others that's so important.. . . If you do without that you will have purely a piece of machinery. You will have something that doesn't feel for other people, and that's the way it started out. That's the way Sean Carter came into this world. . . . The question is what was going to happen down the road to change, . . . to get him to develop his relationships to care?

Id. at 3369.

Carter may now object to his counsel's mitigation theory and argue that another theory would have been more successful, but, as the State asserts, that is precisely the type of second-guessing of counsel's strategy that *Strickland* **[*102]** prohibits. *See* ECF No. 138 at 90. Keeping in mind that in the mitigation phase of trial, "strategic choices made after thorough investigation . . . are virtually unchallengeable," *Strickland, 466 U.S. at 690*, it is enough that "counsel presented a theory of mitigation and provided evidence to support that theory. The jury simply rejected [it] . . . ." *Williams v. Coyle, 260 F.3d 684, 705 (6th Cir. 2001)*.

(3) Inaccurate and Incomplete Evidence

Carter argues more specifically that his trial counsel mischaracterized, failed to put into context, and ignored "compelling" mitigating evidence. First, he complains that, although Dr. McPherson testified that Carter was sexually abused, Trial Tr. vol. XVI at 3314, she conceded on cross-examination that it is possible that Carter himself reported the abuse and may have been lying, *id.* at 3328-29. Carter contends that trial counsel were deficient for not bringing to the attention of the jury records that show that Carter's half-uncle, who was diagnosed with schizophrenia, was "preoccupied with sexual activities" and "openly masturbates." ECF No. 89 at 200. Also, he notes, a social worker wrote in a 1984 letter that she was concerned about children who lived with him in part because of his inappropriate sexual conduct. ECF No. 88 at 45-46. There is no evidence, however, that Carter had any contact with this man, and this evidence would have had little, if any, mitigating value.

Carter next agues that his educational history was "erroneously characterized." ECF No. 226 at 23. Dr. McPherson testified that Carter had "the capacity for normal to slightly below **[*103]** intellectual function," but that he had a "complete lack or relative lack or

indifference to school." Trial Tr. vol. XVI at 3310. On cross-examination, she conceded that Carter did well in elementary school, earning A's and B's. *Id.* at 3340-41, 3354. Carter contends that trial counsel should have offered evidence that Carter was enrolled in a learning disability program during elementary school, and that his grades deteriorated once he was no longer in such a program. To support this argument, Carter cites to an affidavit filed in these federal habeas proceedings, which the Court may not consider and which does not cite to the record in any event. ECF No. 226 at 23-24.

In fact, records introduced at the mitigation phase of Carter's trial do not support Carter's claim. The records show that while Carter received special education tutoring in certain subjects in elementary school, he was placed in a regular classroom. ECF No. 89 at 33, 34, 40, 156, 168, 170. The Court also could not find any support in the record for Carter's assertion that he lacked special education services after elementary school and his grades declined as a result. There are no school records past the elementary school level. Dr. McPherson referenced **[*104]** in her report a "Psychological Report" from around 1995 that "indicated [Carter] was doing little work in school, chronic lying and rule-breaking was in evidence." ECF No. 89 at 9. She may have been referring to the 1995 Portage County DYS evaluation, described above, which stated that Carter's "academic performance in elementary school [was] basically average" but that by ninth grade "[h]is grades were consistently failing . . . ." ECF No. 88 at 2.

Carter next contends that his trial counsel did not offer sufficient evidence regarding his experience with the Smith family. He refers to overlooked evidence that the Smiths "emotionally abused" him by cursing and screaming at him and calling him names; did not understand his special needs; spanked him; did not initiate activities with him; and were overly critical of him. ECF No. 226 at 24. Carter does not cite to the record to support this claim.

Ms. Dorian and Dr. McPherson testified about many of these problems. Ms. Dorian testified about Mrs. Smith's difficulties in understanding Carter's intellectual and social limitations; her cursing when reprimanding Carter and when frustrated; and her insufficient interaction with Carter. Trial Tr. **[*105]** vol. XVI at 3290. Dr. McPherson testified that the Smiths "[did] another job on [Carter]"; he "[could not] meet their expectations" and they were "punitive." *Id.* at 3322-23. More evidence on this issue would have been cumulative. *See* *Eley v. Bagley, 604 F.3d 958, 968 (6th Cir. 2010)* ("'[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation.'") (quoting *Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir. 2007)*).

Carter also complains that his counsel should have presented evidence critical of the Carters, including that they were financially unstable, could not provide or seek out for him the psychological services he needed, and had accessible sexually explicit materials in the home. ECF No. 226 at 25-26. Instead, he argues, Dr. McPherson conceded on cross-examination that the Carters were "suitable persons to adopt children" and that they exhibited "heroic behavior" at their first meeting with Carter. *Id.* at 25 (quoting Trial Tr. vol. XVI at 3344, 3354). Trial counsel, he adds, called the Carters "a fine family" and Mrs. Carter a "nice woman, beautiful woman" during his closing argument. *Id.* (quoting Trial Tr. vol. XVI at 3375).

But Dr. McPherson did testify that the Carters did not provide the right environment for Carter to succeed. She noted, **[*106]** for example,

that the Carters were unprepared for the adoption, failed to give Carter the support services he needed, and had other children and responsibilities. Trial Tr. vol. XVI at 3308-09, 3323. She also testified that the Carter home was too sexually charged for Carter, with several females living there and an unrelated eighteen-year-old male who shared sexually explicit materials with him. *Id.* at 3309.

Moreover, Dr. McPherson's testimony about the Carters led to damaging rebuttal evidence and cross-examination, and more details about the family could have caused even more harm. *See* *Wong v. Belmontes, 558 U.S. 15, 25, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009)* (rejecting petitioner's "'more-evidence-is-better' approach to mitigation" where it would have opened door to evidence of past murders). For example, the prosecutor vigorously cross-examined Dr. McPherson about her testimony that the Carter household was not a good environment for Carter. He pointed out the Carters' many efforts to help Carter and their successes with him, and brought up Carter's sexual misconduct with his adoptive and birth sisters and other criminal behavior while he lived with them. Trial Tr. vol. XVI at 3351-58. Finally, it would be reasonable trial strategy to avoid criticizing a victim's family.

Carter further claims that **[*107]** his counsel failed to "elicit[] any of the positive information about Sean and his bond with Ms. Magee." ECF No. 226 at 22. He claims they should have had Ms. Magee testify to "humanize Sean and evoke images of him as a little boy who was trying hard to please but suffered serious, debilitating setbacks in his young life." *Id.* at 26-27. Carter refers to an affidavit of Ms. Magee, which was filed in this habeas case and the Court may not review. However, both Ms. Dorian and Dr. McPherson testified at length about Carter's positive relationship with Ms. Magee and the strides he made while in her care. *See, e.g.*, Trial Tr. vol. XVI at 3257, 3271-72, 3275, 3287-89, 3306-08, 3321-23. Ms. Dorian read to the jury from a social services report that stated, "Lately Mrs. Magee and this worker have observed Sean 'coming out of his shell.' He can now be described as 'all boy'. He takes swimming lessons, plays kickball and baseball. He loves cars, trucks, drawing and being read to." *Id.* at 3275. Ms. Dorian testified that she recommended that Carter remain with Ms. Magee permanently, *id.* at 3287-89, and Dr. McPherson agreed, as noted above, that Ms. Magee was Carter's "only chance" for a good outcome, *id.* at 3321. Ms. Magee's testimony, therefore, would have been cumulative.

In addition, Carter **[*108]** maintains that his trial counsel "failed to present an accurate and complete picture of his symptoms [of mental illness], their duration and severity, and the link between his mental illness and the offense." ECF No. 226 at 29. He claims, for example, that his counsel did not introduce "any evidence" during mitigation that he "was suffering from a serious mental illness at the time of the offense" or that he had a genetic predisposition to schizophrenia. *Id.* at 30, 32. He relies heavily on the affidavit of an expert and the Linder report and Darnall letter, as described above. These documents were produced in these proceedings, and the Court may not consider them.

In any event, this claim is flatly contradicted by the record. As the Court already has noted, Dr. McPherson testified in detail about Carter's early medical problems, such as his hearing loss and seizures, *see, e.g., id.* at 3305-07; his delayed cognitive development and attachment disorder, *see, e.g., id.* at 3305-06; and his psychological functioning and diagnoses, including his attachment disorder and genetic predisposition to, and possible emergence of, schizophrenia, *see, e.g., id.* at 3315-21, 3359-60. Dr. Dorian also testified regarding Carter's various mental illnesses.

See, e.g., ***[*109]*** *id.* at 3255-59. Any more evidence on this issue would have been cumulative.

Carter further asserts that his counsel introduced evidence of his drug and alcohol abuse "without any regard for explaining or contextualizing this devastating problem, or its interaction with his underlying illness." ECF No. 226 at 43-44. He concedes, however, that Dr. McPherson "noted" that Carter had abused drugs since age thirteen or fourteen. *Id.* at 43. And she testified that Carter's substance abuse interfered with her ability to predict whether he was becoming schizophrenic, because the substances can cause the same "lapsed thinking process" that signal the emergence of schizophrenia. Trial Tr. vol. XVI at 3316. Moreover, as noted above, Carter's counsel possessed much of the information to which Carter refers. They may have chosen not to introduce it because it conflicted with his mitigation theme. As Carter also concedes, Dr. McPherson was forced to admit on cross-examination that it was Carter's choice to "take drugs and inhale various things." *Id.* at 3335.

Finally, Carter complains that his trial counsel did not present any evidence of the positive impact a structured prison environment could have had on him. As discussed above, however, **[*110]** defense counsel's decision to present a different mitigation theme than Carter now proposes, and to focus on evidence supportive of that theme and omit other evidence not supportive, is a reasonable trial strategy.

Thus, Carter has not "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland, 466 U.S. at 689*. As the Supreme Court has explained,

> This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, or would have been apparent from documents any reasonable attorney would have obtained. It is instead a case, like *Strickland* itself, in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments."

Bobby v. Van Hook, 558 U.S. 4, 11-12, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009) (internal citations omitted). Accordingly, the Ohio appellate court also reasonably applied *Strickland* in determining that Carter's trial counsel were not constitutionally deficient in their presentation of mitigating evidence.

2. Failing to Object to Prosecutorial Misconduct

For his next sub-claim, Carter argues that his counsel **[*111]** were ineffective for failing to object to the numerous instances of prosecutorial misconduct described in his third ground for relief. ECF No. 226 at 68-70. Even if this claim were ripe for habeas review, it would fail. As the Court finds no merit in Carter's underlying claims of prosecutorial misconduct, there is no merit to his claim that his trial counsel was ineffective for failing to object to the challenged conduct. *See infra* Section IV.B.

3. Failing to Present Arguments Regarding Jury Instructions

Carter further argues that his trial counsel performed deficiently by failing to present arguments regarding jury instructions on lesser-included offenses. ECF No. 129 at 39. The Ohio Supreme Court was the last state court to provide a reasoned decision on this claim. It opined:

> Carter's last allegation is that counsel failed to present argument concerning jury instructions on lesser-included offenses. However, counsel did make a request for a lesser-included-offense instruction for all charges and presented argument as to each. There is nothing in the record that would indicate that if counsel had presented additional arguments they would have been successful. As set forth in the discussion **[*112]** of the second proposition of law, even if a lesser-included-offense instruction should have been given on aggravated murder (robbery), the remaining felony of rape still would have supported the aggravated murder count.

Carter, 89 Ohio St. 3d at 606, 734 N.E.2d at 357.

The Ohio Supreme Court's decision is reasonable. Moreover, because the Court finds no merit in Carter's underlying claims regarding these jury instructions, there is no merit to his claim that his trial counsel was ineffective for failing to present the jury instructions at issue. *See infra* Section V.B.

4. Negating Defense Theory of the Case During Closing Argument

Finally, Carter asserts that his trial counsel were ineffective when they "negated" his principal defense by telling the jury during closing argument that they could find Carter guilty of aggravated murder, aggravated robbery, and rape, even if they had reasonable doubt. This statement, he argues, undermined their argument for instructions on lesser-included offenses, and "[left] the jury with no choice but to find Carter guilty of the charges in the indictment." ECF No. 129 at 39; ECF No. 226 at 72 (citing Trial Tr. vol. XVI at 3185-86). Carter provides no legal authority or factual analysis to support this argument.

Even **[*113]** if this claim were preserved for habeas review, it is meritless. Carter's trial counsel did not "negate" his defense. Counsel argued to the jury that it "wouldn't bother [him]" if they found enough evidence to convict Carter on the various independent counts, even if they had "a little reasonable doubt" about those charges based on the evidence presented by the defense, but that there was too much reasonable doubt for them to find against Carter on the death-penalty specifications. Trial Tr. vol. XV at 3185-86. Any confusion caused by this brief and isolated argument was not great enough to undermine Carter's entire defense and would have been cured by the court's instructions on the correct burden of proof.

III. Sixth Ground for Relief: *Ineffective Assistance of Appellate Counsel*

For his sixth ground for relief, Carter asserts that his appellate counsel provided ineffective assistance of counsel on direct appeal by failing to raise the following claims:

> 1. All instances of prosecutorial misconduct;
> 2. All instances of ineffective assistance of trial counsel; and
> 3. The trial court's failure to ensure that Carter was competent throughout his trial and to protect his right to be present.

ECF No. 129 at **[*114]** 40.

A. Procedural Posture

The parties agree that this claim is preserved for federal habeas review, because Carter raised it in his *Murnahan* petition, which the Ohio Supreme Court summarily denied. ECF No. 138 at 90; ECF No. 226 at 76; *see also* ECF No. 221 at 11 (finding that the Ohio

Supreme Court's summary dismissal of Carter's *Murnahan* petition was presumptively an adjudication on the merits under). *Harrington, 562 U.S. at 99-100*.

B. Merits

The Supreme Court has held that a defendant is entitled to effective assistance of counsel in his first appeal as a matter of right. *Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985)*. The two-part test enunciated in *Strickland* is applicable to claims of ineffective assistance of appellate counsel. *Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000)*. Thus, Carter must demonstrate that his appellate counsel's performance was inadequate, and that the deficient performance so prejudiced the appeal that the appellate proceedings were unfair and the result unreliable. *Strickland, 466 U.S. at 687*.

An appellant has no constitutional right, however, to have every non-frivolous issue raised on appeal. *See Jones v. Barnes, 463 U.S. 745, 750-54, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)*. Tactical choices regarding issues to raise on appeal are properly left to the sound professional judgment of counsel. *See United States v. Perry, 908 F.2d 56, 59 (6th Cir. 1990)*. "[O]nly when issues are clearly stronger than those presented, will the presumption of effective **[*115]** assistance of [appellate] counsel be overcome." *Joshua v. DeWitt, 341 F.3d 430, 441 (6th Cir. 2003)* (internal quotation marks and citations omitted).

Here, because the Court finds Carter's claims for prosecutorial misconduct, ineffective assistance of trial counsel, and trial-court error relating to his presence at trial all lack merit, it follows that Carter cannot demonstrate that he was prejudiced by appellate counsel's failure to raise the claims on direct appeal. *See infra* Section IV; *supra* Sections I.B.1.c., II.B.

IV. Third Ground for Relief: *Prosecutorial Misconduct*

For his third ground for relief, Carter claims that he was denied a fair trial in violation of his due process rights by acts of prosecutorial misconduct. Specifically, he complains that the prosecution:

1. Stated personal beliefs about the strength of the State's case and Carter's guilt during closing argument in the following comments:
    a. "I believe in my side. I believe the evidence that we have that this defendant is guilty of all the charges. I wouldn't be here."
    b. Characterizing Carter's explanation as to why he went to the victim's house on the night of the murder as "absolutely absurd."
    c. Vouching for the State pathologist's testimony regarding bleeding in the victim's brain by **[*116]** stating, "I think Dr. Cox's explanation is better than the other doctor's."
2. Implied during direct examination of witness Major James Phillips of the Trumbull County Sheriff's Department that the trial judge believed Carter was guilty because he had signed the search warrants to obtain blood samples from Carter.
3. Used "pervasive" inflammatory language during closing argument, including:
    a. Speaking of the victim's constitutional rights, the "great indignity" and "brutality" of the crime, the victim's "unbelievable" death, and the victim's pain and suffering.
    b. Repeatedly reminding the jury that this was done by a grandson to his

grandmother.

c. Arguing that "it's absolutely necessary . . . that people like Sean Carter be put out of commission. His mission of terror, violence, is incredible."

d. Telling the jury that it was Carter's fault that they had to go through nude photographs of the victim and see her stab wounds, "blood all over the place," and swabs of her anal cavity.

4. Argued facts not in evidence during closing argument, including:

a. The statement, "you'll see him in the videotape. 'I don't have to say I'm sorry.'"

b. Referring to Carter as "a machine, a supposed human being." **[*117]**

c. Arguing that Michael and Shasta (other young relatives of the victim with whom the victim argued) didn't "come back and kill and rape grandma."

5. Mentioned prior calculation and design during rebuttal closing argument, when Carter was not charged with that.

ECF No. 129 at 34-36.

A. Procedural Posture

The State argues that sub-claims 1 and 2, as listed above, are procedurally defaulted, because the Ohio Supreme Court found them barred due to defense counsel's failure to object to the alleged misconduct at trial. ECF No. 138 at 47-49. Failure to adhere to Ohio's well-established "contemporaneous objection rule" is an independent and adequate state ground upon which to find habeas claims procedurally defaulted. *See, e.g.,* Keith v. Mitchell, 455 F.3d 662, 673 (6th Cir. 2006).

In response, Carter concedes that the Ohio Supreme Court "announced an intention to apply the plain error doctrine," which ordinarily will not resurrect a defaulted issue. *See, e.g., id.* However, he argues, the court failed to enforce the rule, and instead addressed the claims under "the general standard of review," rendering the claims ripe for habeas review. ECF No. 226 at 57-58 (citing Harris v. Reed, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989); Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986)). The State did not refute this argument; it "[a]ssum[ed] a lack of procedural default" **[*118]** in its sur-reply. ECF No. 229 at 13.

The claims are procedurally defaulted. In addressing these claims, the Ohio Supreme Court first noted that Carter's trial counsel did not object to the alleged misconduct at issue. As Carter acknowledges, the court then invoked the plain-error rule, quoting State v. Wade, 53 Ohio St. 2d 182, 373 N.E.2d 1244, paragraph one of the syllabus (Ohio 1978), *vac'd on other grounds, Wade v. Ohio, 438 U.S. 911, 98 S. Ct. 3138, 57 L. Ed. 2d 1157 (1978)*: "'A claim of error in a criminal case cannot be predicated upon the improper remarks of counsel during his argument at trial, which were not objected to, unless such remarks serve to deny the defendant a fair trial.'" Carter, 89 Ohio St. 3d at 602, 734 N.E.2d at 345. Indeed, the Ohio Supreme Court repeatedly has cited *Wade* as support for that doctrine. *See, e.g.,* State v. McKnight, 107 Ohio St. 3d 101, 141, 2005-Ohio-6046, 837 N.E.2d 315, 357-58 (Ohio 2005); State v. Hanna, 95 Ohio St. 3d 285, 297, 2002-Ohio-2221, 767 N.E.2d 678, 695 (Ohio 2002). The court proceeded to address the merits of the claims.

In "exceptional circumstances," Ohio courts may examine a claim that is otherwise waived for "plain error," when "but for the error, the outcome of the trial clearly would have been otherwise." State v. Long, 53 Ohio St. 2d 91, 96, 97, 372 N.E.2d 804, 807, 808 (Ohio 1978); *see also* Ohio Crim. R. 52(B) ("Plain errors or

defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). Under this rule, Ohio courts first determine whether there is an error, and then whether that **[*119]** error affected the trial's outcome. Contrary to Carter's argument, the Ohio Supreme Court did not forgo its plain-error review of Carter's prosecutorial-misconduct claims by examining whether an error was committed under prevailing law; that is exactly what the plain-error doctrine requires. And, finding no error, there was no need for the state court to undertake the next step in its plain-error analysis. There is no basis for the Court, therefore, to conclude that the state court did not apply the plain-error rule as it stated it would, and the claims' procedural default stands.

As to Carter's remaining prosecutorial-misconduct sub-claims, the State argues that Carter did not properly raise them in state court, and they are therefore procedurally defaulted. ECF No. 138 at 48. Carter counters that the sub-claims were raised in his *Murnahan* petition, and as the Ohio Supreme Court denied the petition without asserting a procedural bar, the claims are not defaulted. ECF No. 226 at 58. As explained above, a *Murnahan* petition does not resurrect an otherwise defaulted claim merely by referencing the claim as one that appellate counsel failed to raise on direct appeal. These claims also are **[*120]** procedurally defaulted.

B. Merits

Even if this claim were ripe for review, it lacks merit. The Supreme Court has observed, "Although the State is obliged to 'prosecute with earnestness and vigor,' it 'is as much [its] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" *Cone v. Bell, 556 U.S. 449, 469, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009)* (quoting *Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)*). In particular, a prosecutor's "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger, 295 U.S. at 88*. Thus, the Court has made clear, "while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones." *Id.*

The Supreme Court set forth the standard for claims of prosecutorial misconduct in habeas proceedings in *Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)*. It held that to prevail on such claims, "it 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.'" *Id. at 181* (quoting *Darden v. Wainwright, 699 F.2d 1031, 1036 (11th Cir. 1983)*). Rather, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)*; *see also United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)* ("Nevertheless, a criminal conviction **[*121]** is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.").

The Court emphasized in *Darden* that "the appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.'" *Darden, 477 U.S. at 181* (quoting *Donnelly, 416 U.S. at 642*; *see also Byrd v. Collins, 209 F.3d 486, 529 (6th Cir. 2000)* ("We do not possess supervisory

powers over state court trials."); *Cook v. Bordenkircher, 602 F.2d 117, 119 n.5 (6th Cir. 1979)* ("[I]t is the responsibility of the [state courts] to police their prosecutors; we have no such authority."). Past decisions of the Supreme Court demonstrate that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)*. The *Darden* standard "is a very general one, leaving courts 'more leeway . . . in reaching outcomes in case-by-case determinations . . .'" *Parker v. Matthews, 567 U.S. 37, 132 S. Ct. 2148, 2155, 183 L. Ed. 2d 32 (2012)* (quoting *Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)*). Indeed, federal habeas courts must adhere to *Darden*'s "highly generalized standard for evaluating claims of prosecutorial misconduct" and not circuit precedent. *Id.*

In *Darden*, the Supreme Court **[*122]** found that certain comments a prosecutor made during his closing argument "undoubtedly were improper." *Darden, 477 U.S. at 180*. Some remarks, it explained, implied that the death penalty would be the only guarantee against a future similar act; others incorporated the defense's use of the word "animal"; and several were offensive, reflecting an emotional reaction to the case. *Id.* But the Court concluded that in the broader context of the trial, the prosecutorial statements complained of did not deprive the petitioner of a fair trial. *Id. at 181-83*. It noted that the prosecutor's closing argument "did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id. at 182*. Also, "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense." *Id.* The trial court also instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and the arguments of counsel were not evidence. *Id.* The weight of the evidence against the petitioner was "heavy," the Court observed, including "overwhelming eyewitness and circumstantial evidence to support a finding **[*123]** of guilt on all charges," which "reduced the likelihood that the jury's decision was influenced by argument." *Id.* (internal quotation marks and citations omitted). And finally, it noted, defense counsel's tactical decision to present the petitioner as the only witness permitted counsel to give their summation before the State's closing argument and the chance to make a final rebuttal argument. *Id.*

As the Supreme Court advised decades ago,

> In reviewing criminal cases, it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal trial into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution.

Johnson v. United States, 318 U.S. 189, 202, 63 S. Ct. 549, 87 L. Ed. 704 (1943) (Frankfurter, J., concurring).

Because Carter's prosecutorial-misconduct claims were not adjudicated on the merits in state court, the Court reviews them *de novo*. *See, e.g., Hill v. Mitchell, 400 F.3d 308, 313 (6th Cir. 2005)*. That is true even when, as with Carter's first two sub-claims, as listed above, the state court found the claims waived and reviewed them for plain error. The Sixth Circuit has held that a state court's review of a procedurally **[*124]** barred claim for plain error does not constitute an "adjudication on the merits" under AEDPA. AEDPA deference does not apply to such claims, therefore, and federal courts review them *de novo*. *Lundgren v.*

Mitchell, 440 F.3d 754, 765 (6th Cir. 2006) ("Plain error analysis is more properly viewed as a court's right to overlook procedural defects to prevent manifest injustice, but is not equivalent to a review of the merits.").[14]

1. Improper Vouching

Carter first complains that the prosecutor impermissibly stated his personal beliefs about the strength of the State's case and Carter's **[*126]** guilt during closing argument with the following statement: "I believe in my side. I believe the evidence that we have that this defendant is guilty of all the charges. I wouldn't be here." ECF No. 129 at 34 (quoting Trial Tr. vol. XV at 3116). A prosecutor cannot insert his "personal beliefs into the presentation of his case," because his or her opinion carries the "imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence." *Young, 470 U.S. at 8-9*. "[S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports charges against the defendant . . . ." *Id. at 18-19*. Nevertheless, "'a state's attorney is free to argue that the jury should arrive at a particular conclusion based upon the record evidence.'" *Wogenstahl v. Mitchell, 668 F.3d 307, 331 (6th Cir. 2012)* (quoting *Caldwell v. Russell, 181 F.3d 731, 737 (6th Cir. 1999)*). The statement of which Carter complains is not improper, as it suggests that the prosecutor's belief is based on the evidence adduced at trial, not some special outside knowledge of the prosecutor.

Carter next argues that the prosecutor improperly characterized Carter's explanation about why he went to the victim's house on the night of the murder as "absolutely absurd." ECF No. 129 at 35 (quoting **[*127]** Trial Tr. vol. XV at 3116). "'[A] prosecutor may assert that a defendant is lying during her closing argument when emphasizing discrepancies between the evidence and that defendant's testimony.'" *Wogenstahl, 668 F.3d at 331* (quoting *United States v. Francis, 170 F.3d 546, 551 (6th Cir. 1999)*). Similarly, the prosecutor here was justified in commenting on the implausibility of Carter's account of the crime in light of the evidence.

Carter also claims that the prosecutor improperly vouched for the State pathologist's testimony regarding bleeding in the victim's brain by stating, "I think Dr. Cox's explanation

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[14] There appears to be an intra-circuit split on this issue. Prior to 2009, the Sixth Circuit followed the holding of *Lundgren, supra*, that AEDPA deference is not due where a state court reviews a petitioner's habeas claim for plain error. *See Fleming v. Metrish, 556 F.3d 520, 539 (6th Cir. 2009)* (Clay, J., concurring in part and dissenting in part) (providing a "litany of cases" following the "controlling rule in this circuit" that "[i]n the habeas context, this Court does not construe a state court's plain-error review as negating the determination that a claim has been procedurally defaulted"). However, in the 2009 *Fleming* case, *supra*, the Sixth Circuit found "no authority squarely on point on this key question" and rejected the principle that a "state court's application of plain-error review *per se* insulate[s] the claim from AEDPA deference." *Fleming, 556 F.3d at 531-32*. Rather, it distinguished prior precedent **[*125]** on this point and held that a state court's plain-error review of a claim "*can* be considered 'adjudicated on the merits' for the purpose of receiving deference under AEDPA" when the state court first determines the merits of the claimed error before finding that the error was "plain" and affected "substantial rights." *Id. at 532* (emphasis added). Then, last year, the Sixth Circuit reasserted its prior, *per se* rule, declaring, "We have repeatedly held that plain-error review is not equivalent to adjudication on the merits, which would trigger AEDPA deference." *Frazier v. Jenkins, 770 F.3d 485, 496 n.5 (6th Cir. 2014)*, *reh'g en banc denied* (Dec. 18, 2014). The Circuit has since acknowledged this split. *See id. at 506-07* (Sutton, J., concurring in part and concurring in the judgment) ("We have been down this road before, and *Fleming [, supra,]* tells us how to navigate it."); *Wade v. Timmerman- Cooper, 785 F.3d 1059, 1079 n.12 (6th Cir. 2015)*. When an intra-circuit split such as this occurs, the earliest decision controls, which in this case would be *Lundgren*. *See, e.g., McMellon v. United States, 387 F.3d 329, 332-33 (4th Cir. 2004)* (en banc); *Hiller v. Oklahoma, 327 F.3d 1247, 1251 (10th Cir. 2003)*; *Walker v. Mortham, 158 F.3d 1177, 1188 (11th Cir. 1998)*; *see also* Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 Fed. Cts. L. Rev. 17, 20 (2009).

is better than the other doctor's." ECF No. 129 at 35 (quoting Trial Tr. vol. XV at 3130). "'Improper vouching occurs when a prosecutor supports the credibility of a witness by indicating a personal belief in the witness's credibility thereby placing the prestige of the [government] behind the witness.'" *Wogenstahl, 668 F.3d at 328* (quoting *Johnson v. Bell, 525 F.3d 466, 482 (6th Cir. 2008)*). "'Generally, improper vouching involves either blunt comments or comments that imply that the prosecutor has special knowledge of facts not in front of the jury or of the credibility and truthfulness of witnesses and their testimony.'" *Id.* (quoting *Francis, 170 F.3d at 550*).

This particular statement is more problematic, because it is a deliberate statement of personal belief in the witness's credibility **[*128]** and suggests that the prosecutor may have special knowledge of facts not in evidence, namely, the prosecutor's experience with other expert witnesses. Placed in context, however, the statement is not improper. The prosecutor was discussing the two parties' experts' testimony and opinions based on the evidence, not the experts' credentials. Moreover, the challenged statement was one isolated comment made in the context of an extensive trial record, and the evidence against Carter was strong.

2. Implying Trial Court Believed in Carter's Guilt

Carter claims that the prosecutor improperly implied that the trial-court judge believed Carter was guilty during his direct examination of witness Major James Phillips of the Trumbull County Sheriff's Department, because the judge had signed the search warrants to obtain blood samples from Carter. ECF No. 129 at 35 (quoting Trial Tr. vol. XII at 2340). The prosecutor's examination at issue consisted of two short questions, establishing first that the police officer signed an affidavit supporting his request for a search warrant before the trial judge, and second that the judge issued the warrant. Carter speculates that the jury inferred from this testimony **[*129]** that the judge issued the warrant because he believed Carter was guilty, when, in fact, the testimony was limited to explaining the facts surrounding the issuance of a warrant for the collection of Carter's fluids, which were central to the State's case. This questioning was not improper.

3. Pervasive Use of Inflammatory Language

Carter accuses the prosecution of "pervasive" use of inflammatory language during closing argument, including: (1) speaking of the victim's constitutional rights, the "great indignity" and "brutality" of the crime, her "unbelievable" death, and the victim's pain and suffering; (2) repeatedly reminding the jury that a grandson had killed his grandmother; (3) arguing that "it's absolutely necessary . . . that people like Sean Carter be put out of commission. His mission of terror, violence, is incredible"; (4) telling the jury they had to go through nude photographs of the victim and look at stab wounds, "blood all over the place," and swabs of the victim's anal cavity because of Carter. ECF No. 129 at 35 (quoting Trial Tr. vol. XV at 3111, 3115).

"The prosecution necessarily has 'wide latitude' during closing argument to respond to the defense's strategies, evidence and arguments." **[*130]** *Wogenstahl, 668 F.3d at 329* (quoting *Bedford v. Collins, 567 F.3d 225, 233 (6th Cir. 2009)*). "Generally, 'a prosecutor cannot make statements calculated to incite the passions and prejudices of the jurors.'" *Id.* (quoting *Broom v. Mitchell, 441 F.3d 392, 412 (6th Cir. 2006)*). "At the same time, '[n]othing prevents the government from appealing to the jurors' sense of justice or from connecting the

point to the victims of the case.'" *Id.* (quoting *Bedford v. Collins, 567 F.3d 225, 233 (6th Cir. 2009)*). These statements were within the bounds of dramatic, though permissible, argument. Moreover, all of the complained-of statements are found on just two of twenty-five pages of transcript recording the prosecutor's closing argument. They were brief and general, and several of the statements were factually correct.

4. Arguing Facts not in Evidence

Carter also complains that the prosecution argued facts not in evidence during closing argument, including: (1) stating, "you'll see him in the videotape. 'I don't have to say I'm sorry.'"; (2) referring to Carter as "a machine, a supposed human being."; (3) arguing Michael and Shasta didn't "come back and kill and rape grandma." ECF No. 129 at 36 (quoting Trial Tr. vol. XV at 3118, 3120).

"It is improper for a prosecutor, during closing arguments, to bring to the attention of the jury any 'purported facts that are not in evidence and are prejudicial.'" *Byrd v. Collins, 209 F.3d 486, 535 (6th Cir. 2000)* (quoting **[*131]** *United States v. Wiedyk, 71 F.3d 602, 610 (6th Cir. 1995)*). "However, prosecutors 'must be given leeway to argue reasonable inferences from the evidence.'" *Id.* (quoting *United States v. Collins, 78 F.3d 1021, 1040 (6th Cir. 1996)*. These statements were not improper. The first was the prosecutor's interpretation of Carter's statement to police, not a deliberate attempt to mislead the jury into thinking Carter actually so stated, and the prosecutor repeatedly encouraged the jury to listen to the tapes for themselves. *See, e.g.*, Trial Tr. vol. XV at 3118. The second comment was more hyperbole than factual assertion. And the third comment did not introduce new facts. Evely Carter testified that her mother told her that she was going to treat Carter "just like I do Shasta [and] Michael" by not allowing him to return to her house, and explained on cross-examination that they were her niece and nephew. Trial Tr. vol. XII at 2547, 2567.

5. Mentioning Prior Calculation and Design

Finally, Carter complains that during rebuttal closing argument, the prosecutor improperly mentioned an element of a crime, prior calculation and design, with which Carter was not charged. ECF No. 129 at 36 (citing Trial Tr. vol. XV at 3201). This statement is harmless in context. The prosecutor stated after the challenged comment, "He's not charged with that. Sorry. I **[*132]** got carried away again." Trial Tr. vol. XV at 3201.

6. Cumulative Effect

Carter asserts that the cumulative effect of these acts of misconduct rendered his trial unfair. The "cumulative effect" of multiple acts of misconduct may be considered. *See Berger, 295 U.S. at 89*. However, determinations as to the impropriety or effect of a prosecutor's conduct at trial should account for the broader context in which the prosecutor's conduct took place. *Darden, 477 U.S. at 182*; *Young, 470 U.S. at 12*.

Viewing all of Carter's allegations of prosecutorial misconduct cumulatively and in the context of the entire trial, Carter's claims do not entitle him to habeas relief. There are few instances of improper conduct among these claims, and even if they and those that verged on improper were viewed cumulatively, Carter has failed to demonstrate that the misconduct was "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial." *See Wogenstahl, 668 F.3d at 335*. As the Supreme Court has noted, "[a litigant] is entitled to a fair trial but not a

perfect one, for there are no perfect trials." *McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)* (internal quotation marks and citations omitted).

V. Fourth Ground for Relief: *Trial-Court Error / Jury Instructions*

Carter claims for his fourth ground for relief that the trial court violated his right **[*133]** to due process by denying his request to instruct the jury on certain lesser-included offenses. ECF No. 129 at 36-37. He argues that the court should have instructed the jury on theft, in addition to aggravated robbery, because, although he admitted that he took some money from Mrs. Prince's purse, he did so only after the murder took place, and therefore did not use a deadly weapon or inflict serious physical harm while committing the act, as required for aggravated robbery under Ohio law. ECF No. 226 at 63-64. He contends that the court should have instructed the jury on gross sexual imposition, in addition to rape, because the defense presented evidence that the "lack of trauma to the rectum made it equally as plausible that the semen . . . could have been deposited outside the body and seeped into the rectum." *Id.* at 64. Finally, Carter asserts that the court should have instructed the jury on murder, in addition to aggravated murder, because the jury may have found that he did not commit the murder "while committing or attempting to commit" another felony, as required for aggravated murder under Ohio law; and manslaughter, because the jury may have believed that "Mrs. Prince argued **[*134]** with and eventually pushed Carter." *Id.* at 65. Failure to give these instructions, he concludes, impermissibly resulted in the jury being "'forced into an all-or-nothing choice between capital murder and innocence.'" *Id.* at 66- 67 (quoting *Spaziano v. Florida, 468 U.S. 447, 455, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984)*).

A. Procedural Posture

Carter raised this claim on direct appeal to the Ohio Supreme Court, which adjudicated the claim on the merits. *See Carter, 89 Ohio St. 3d at 599-602, 734 N.E.2d at 352-54*. This claim is therefore preserved for federal habeas review.

B. Merits

In considering this claim, the Ohio Supreme Court opined,

> In his second proposition of law, Carter argues that the trial court erred by failing to give the jury lesser-included-offense instructions on aggravated murder (murder and manslaughter requested), aggravated robbery (theft requested), and rape (gross sexual imposition requested). The trial court denied these requests.FN1 In *State v. Deem (1988), 40 Ohio St.3d 205, 533 N.E.2d 294*, paragraph three of the syllabus, this court set out the test used to determine whether one offense constitutes a lesser-included-offense of another:
>
> FN1. The trial court did grant the defense request to instruct on criminal trespass as a lesser-included-offense for aggravated burglary, and the jury did find Carter guilty of the lesser offense.
>
> "An offense may be a lesser included **[*135]** offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense."

An instruction on a lesser-included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense. . . .

Aggravated Robbery. Carter argues that the jury should have received a lesser-included-offense instruction because he did not take money until after Prince was dead.FN2 Carter argues that he did not form the intent to take the money until after his grandmother was dead, and even then, only when he realized that he needed money. Carter supports his reasoning by noting that he took only one hundred and fifty dollars from Prince's purse, even though the purse contained approximately four hundred and fifty dollars.

FN2. Carter did not raise any issue relating to the sufficiency or weight of the evidence concerning the aggravated robbery count. **[*136]**

Carter was indicted for aggravated robbery under *R.C. 2911.01(A)(1)* and *2911.01(A)(3)*. Those sections provide as follows:

"(A) No person, in attempting or committing a theft offense, as defined in *section 2913.01* of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:
"(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
" * * *
"(3) Inflict, or attempt to inflict, serious physical harm on another."

A "theft offense" is defined in *R.C. 2913.02* as follows:

"(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:
"(1) Without the consent of the owner or person authorized to give consent;
"(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
"(3) By deception;
"(4) By threat;
"(5) By intimidation."

Theft carries a lesser penalty than aggravated robbery. Further, one element of aggravated robbery, *R.C. 2911.01(A)(1)*, having a deadly weapon on or about the accused's person or under his or her control, is not required **[*137]** to prove theft. Thus, the first and third elements of the Deem test are clearly satisfied.

The issue becomes whether aggravated robbery, as statutorily defined above, can ever be committed without theft, as statutorily defined above, also being committed. We answer that question in the affirmative because aggravated robbery can be committed in the course of an "attempted theft." *R.C. 2913.02*; 2923.02. Theft requires the accused to actually obtain or exert control over the property or services of another; attempted theft does not. Since theft is not a lesser-included offense of aggravated robbery, the trial court did not err by not providing a lesser-including-offense instruction.

Rape. Carter argues that there was no "sexual conduct," i.e., penetration, to the anus of the victim. Instead, Carter presented a theory at trial that the semen was deposited on the outside of the body and seeped into the anus. The evidence in the record strongly supported the state's

theory that Carter's sperm, found in the victim's anus and positively identified through DNA testing, was placed there through the insertion of Carter's penis into the victim's anus. The evidence did not support an acquittal on the charge **[*138]** of rape.

Aggravated Murder. The distinguishing element of aggravated murder and murder is the commission of a murder during a felony. The felonies charged were rape and aggravated robbery. Here the evidence clearly supported the commission of a rape; therefore, the trial court properly denied a lesser-included-offense instruction on murder. . . .

Carter also argues that the theft of money from the victim did not occur "while" the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit the aggravated murder. Appellant suggests that implicit in the meaning of the word "while," as it appears in R.C. 2929.04(A)(7), is a requirement that there be evidence of some type of motivational nexus between the aggravated murder and the underlying felony, in this case the aggravated robbery.

This court has previously held that the robbery need not take place prior to or simultaneously with the murder and that a defendant "cannot escape the effect of the felony-murder rule by claiming that the aggravated robbery was simply an afterthought." . . . Accordingly, it was not error to fail to instruct on the lesser-included offense of murder, as it related to the aggravated **[*139]** robbery offense. Carter's second proposition of law is overruled.

Carter, 89 Ohio St. 3d at 599-602, 734 N.E.2d at 352-54 (citations omitted).

Carter claims that this decision contravened or unreasonably applied clearly established Supreme Court precedent. ECF No. 226 at 66. The Court disagrees.

The Supreme Court held in *Beck v. Alabama, 447 U.S. 625, 627, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)*, that the death penalty may not be imposed where the jury was "not permitted to consider a verdict of guilt of a lesser included non-capital offense, and [where] the evidence would have supported such a verdict," leaving the jury with the stark choice of convicting the defendant and sentencing him to death because a serious crime had been committed or finding him not guilty at all because the crime does not warrant death. The Court explained, however, that the constitutional right to a jury instruction on a lesser-included offense arises only if "the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater." *Id. at 635* (internal quotation marks and citations omitted). This is so because "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction **[*140]** of a capital offense—the failure to give the jury the 'third option' of convicting of a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id. at 637*.

Carter claims that the Ohio Supreme Court unreasonably applied *Beck* "[b]y focusing on the sufficiency of the evidence supporting the capital charge, [and thereby] in effect convert[ing] Carter's *Beck* claim into a challenge to the sufficiency of the evidence under *Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*." ECF No. 226 at 66. However, in *Hopper v. Evans, 456 U.S. 605, 613, 102 S. Ct. 2049, 72 L. Ed. 2d*

367 (1982), the Supreme Court made it clear that *Beck* held that "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." Id. at 611 (emphasis original). And the Court found in that case that the evidence not only supported the claim that the defendant intended to kill the victim, but his testimony and evidence that he shot the victim in the back during an armed robbery "affirmatively negated any claim that he did not intend to kill the victim." Id. at 613.

Thus, "[i]t is well established that a lesser-included-offense instruction is not required where the facts of a murder so strongly indicate intent to kill that the jury could not rationally have a reasonable doubt as to the defendant's **[*141]** intent." Smith v. Bradshaw, 591 F.3d 517, 524 (6th Cir. 2010). Indeed, "as a general matter, repeated violent conduct conclusively proves intent to kill." *Id.; see also* Slaughter v. Parker, 450 F.3d 224, 236-38 (6th Cir. 2006) (rejecting *Beck* claim since the "facts [that the victim was bludgeoned in the head and stabbed five times] foreclose the conclusion that [the defendant] acted with any mental state other than intent"); Abdus-Samad v. Bell, 420 F.3d 614, 629 (6th Cir. 2005) (rejecting *Beck* claim because "[t]he fact that [the defendant] shot the victim with a pistol five to six times makes it virtually impossible to find that the killing was accidental"); Campbell v. Coyle, 260 F.3d 531, 543-44 (6th Cir. 2001) (rejecting *Beck* claim because the number and location of the victim's five stab wounds "compelled a reasonable jury to find that the [defendant] possessed the intent to kill," despite evidence of a struggle).

Here, the Ohio Supreme Court reasonably applied Beck and its progeny by focusing on the evidence presented at Carter's trial, and considering whether it supported the greater charges of aggravated murder, aggravated robbery and rape, and negated the possibility of the lesser charges of murder, manslaughter, theft and gross sexual imposition, making the lesser-included instructions unnecessary. The state court reasonably found that the jury could not rationally have had a reasonable doubt **[*142]** that Carter committed aggravated robbery, and was guilty only of theft, because Carter stole the victim's money after he murdered her. Nor could the jury have had a reasonable doubt that the prosecution had proven each element of rape, despite Carter's argument that his semen "seeped" into the victim without any penetration. And finally, due to the severity and location of the victim's wounds, the jury could not rationally have had a reasonable doubt regarding Carter's intent to kill her, negating the need for the lesser-included murder and manslaughter instructions.

VI. Seventh Ground for Relief: *Method of Execution / Lethal Injection*

Carter argues for his seventh ground for relief that Ohio's method of execution by lethal injection violates the *Eighth Amendment* prohibition on cruel and unusual punishment and the *Due Process Clause of the Fourteenth Amendment*. ECF No. 129 at 41-43.

A. Procedural Posture

Carter raised this claim on direct appeal to the Ohio Supreme Court, which adjudicated the claim on the merits. *See* Carter, 89 Ohio St. 3d at 608, 734 N.E.2d at 358. This claim is therefore ripe for federal habeas review.

B. Merits

In addressing this claim, the Ohio Supreme Court stated,

> In his thirteenth proposition of law, Carter

argues that the death penalty is unconstitutional under the federal **[*143]** and Ohio Constitutions because the methods used to carry out the sentence, electrocution or lethal injection, are cruel and unusual punishment. While Carter argues that electrocution is cruel, this court and the United States Supreme Court have previously held that execution by electrocution does not violate the federal and Ohio constitutions. *In re Kemmler (1890), 136 U.S. 436, 443-444, 10 S.Ct. 930, 932, 34 L.Ed. 519, 522-523*; *State v. Coleman (1989), 45 Ohio St.3d 298, 308, 544 N.E.2d 622, 633*. The United States Supreme Court granted certiorari this term to a case that involved the issue of whether execution by electrocution violates the *Cruel and Unusual Punishment Clause*. *Bryan v. Moore (1999), 528 U.S. 960, 120 S.Ct. 394, 145 L.Ed.2d 306*. The court subsequently dismissed Bryan as improvidently granted after the Governor of Florida signed into law a bill allowing lethal injection as an option to the electric chair. *Bryan v. Moore, 528 U.S. 1133, 120 S.Ct. 1003, 145 L.Ed.2d 927*. Carter fails to cite any case in which lethal injection has been found to be cruel or unusual punishment. This proposition of law is overruled.

Carter, 89 Ohio St. 3d at 608, 734 N.E.2d at 358.

Carter's assertion that the Ohio Supreme Court's rejection of his lethal-injection methodof-execution claim was contrary to, or an unreasonable application of, Supreme Court precedent must be examined in the context of Supreme Court jurisprudence at the time that the state court rendered its decision. *See Lockyer v. Andrade, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)* ("In other words, 'clearly established Federal law' under *§ 2254(d)(1)* is the governing **[*144]** legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."). In 2000, when the Ohio Supreme issued its ruling in Carter, there was no Supreme Court precedent holding that lethal injection constitutes cruel and unusual punishment. The High Court did not even review a challenge to lethal injection until 2008, when it decided *Baze v. Rees, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008)*. Indeed, "[w]hile methods of execution have changed over the years, '[the Supreme] Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.'" *Glossip v. Gross, 135 S. Ct. 2726, 2732, 192 L. Ed. 2d 761 (2014)* (quoting *Baze, 553 U.S. at 48*). Carter's claim, therefore, is meritless.

VII. Eighth Ground for Relief: *Mental Illness*

For his eighth ground for relief, Carter contends that due to his serious mental illness, from which he suffered at the time of his offense and continues to suffer to this day, his execution would violate the *Eighth Amendment's* prohibition on cruel and unusual punishment. He cites *Atkins v. Virginia, 536 U.S. 304, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)*, in which the Supreme Court held that, in light of "our evolving standards of decency," executing an intellectually disabled offender violates the *Eighth Amendment's* ban on cruel and unusual punishment, and *Roper v. Simmons, 543 U.S. 551, 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)*, which similarly prohibits the execution of juvenile **[*145]** offenders. ECF No. 226 at 80-84.

A. Procedural Posture

The State argues that this claim is procedurally defaulted because Carter never raised it in state court. ECF No. 138 at 96. Carter does

not address the procedural posture of this claim. The State is correct; this claim is procedurally defaulted. *See* O'Sullivan, 526 U.S. at 848 (if a petitioner fails to fairly present any federal habeas claims to the state courts and has no remaining state remedies, then the petitioner has procedurally defaulted those claims); Jacobs v. Mohr, 265 F.3d 407, 417 (6th Cir. 2001) (Ohio's doctrine of *res judicata*, barring courts from considering any issue that could have been, but was not, raised on direct appeal, is an "independent and adequate state ground" upon which to find habeas claim procedurally defaulted).

B. Merits

Carter's claim appears to be what has been called a "free-standing actual innocence" claim, although Carter does not label it as such. In Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), the Supreme Court explained that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Id. at 404. The Court stated in dicta, however, that "in a capital case a truly persuasive **[*146]** demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional" regardless of whether any constitutional violation occurred during trial. Id. at 417. "Actual innocence" encompasses not just innocence of the underlying offense, but also the petitioner's eligibility for the death penalty. *See, e.g.,* Dretke v. Haley, 541 U.S. 386, 387, 124 S. Ct. 1847, 158 L. Ed. 2d 659 (2004) (citing Sawyer v. Whitley, 505 U.S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992)).

The Supreme Court has never applied such a claim, however, and recently declined to resolve whether a "free-standing" actual innocence claim is cognizable on federal habeas review. McQuiggin v. Perkins, 569 U.S. 383, 133 S. Ct. 1924, 1931, 185 L. Ed. 2d 1019 (2013). The Sixth Circuit has held that such a claim is not a valid ground for habeas relief. *See, e.g.,* Cress v. Palmer, 484 F.3d 844, 854-55 (6th Cir. 2007); Thomas v. Perry, 553 F. App'x 485, 487 (6th Cir. 2014). Moreover, the *Herrera* Court emphasized that "the threshold showing for such an assumed right would necessarily be extraordinarily high." Herrera, 506 U.S. at 417; *see also* House v. Bell, 547 U.S. 518, 520, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006).

Because this claim has not yet been recognized by the Supreme Court or the Sixth Circuit, relief on this claim is denied.

VIII. Ninth Ground for Relief: *Ford Claim*

Carter claims in his ninth ground for relief that his execution will violate the *Eighth* and *Fourteenth Amendments* under Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), because he is "currently severely mentally ill" and "too insane and incompetent to be executed." ECF No. 129 at 48. Carter withdrew this claim in his traverse, **[*147]** however, because it is premature under Panetti v. Quarterman, 551 U.S. 930, 947, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007), which holds that an *Eighth Amendment Ford* claim based on a petitioner's incompetency to be executed due to mental illness does not become ripe until the petitioner's execution date is set. ECF No. 226 at 85.

CERTIFICATE OF APPEALABILITY ANALYSIS

The Court must now determine whether to grant a Certificate of Appealability ("COA") for any of Carter's grounds for relief. The Sixth

Circuit has determined that neither a blanket grant nor a blanket denial of a COA is an appropriate means by which to conclude a capital habeas case as it "undermine[s] the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability." *Porterfield v. Bell, 258 F.3d 484, 487 (6th Cir. 2001)*; *see also Murphy v. Ohio, 263 F.3d 466 (6th Cir. 2001)* (remanding motion for certificate of appealability for district court's analysis of claims).

Habeas courts are guided in their consideration of whether to grant a COA by *28 U.S.C. § 2253*, which provides in relevant part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> (A) the final order in a habeas corpus proceeding in which the **[*148]** detention complained of arises out of process issued by a State court . . .
>
> (2) A certificate of appealability may issue under paragraph (12) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253. This language is identical to the requirements set forth in the pre-AEDPA statutes, requiring the habeas petitioner to obtain a Certificate of Probable Cause. The sole difference between the pre-and post-AEDPA statutes is that the petitioner must now demonstrate he was denied a *constitutional*, rather than federal, right. *Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)* (interpreting the significance of the revision between the pre-and post-AEDPA versions of that statute).

Furthermore, if a habeas claim is not procedurally defaulted, then the court need only determine whether reasonable jurists would find the district court's decision "debatable or wrong." *Id. at 484*. A more complicated analysis is required, however, when assessing whether to grant a COA for a claim the district court has determined is procedurally defaulted. In those instances, a COA should only issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason **[*149]** would find it debatable whether the district court was correct in its procedural ruling." *Id.*

After taking the above standards into consideration, the Court finds as follows:

The Court will not issue a COA for the Fourth, Fifth (as to sub-claim relating to failure to present argument about jury instructions), Sixth, and Seventh grounds for relief, finding that no reasonable jurist would debate the Court's conclusions on these claims.

Also, the Court will not issue a COA for the Third, Fifth (as to sub-claims relating to failure to object to prosecutorial misconduct and negating theory of the case); and Eighth grounds for relief, because they are procedurally defaulted.[15]

The Court will issue a COA for Carter's First ground for relief regarding his competency to stand trial, Second ground for relief relating to his trial counsel's ineffective assistance during the mitigation phase of trial, and Fifth ground for relief relating to his trial counsel's ineffective assistance regarding his competency to stand trial, finding that a reasonable jurist could debate the Court's conclusions regarding these claims.

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[15] As stated above, Carter withdrew his Ninth ground for relief. ECF No. 226 at 85.

CONCLUSION [*150]

For the foregoing reasons, the Court denies Carter's Petition for Writ of Habeas Corpus. The Court further certifies that, pursuant to *28 U.S.C. § 1915(a)(3)*, an appeal from this decision could be taken in good faith as to Carter's First ground for relief regarding his competency to stand trial, Second ground for relief relating to his trial counsel's ineffective assistance during the mitigation phase of trial, and Fifth ground for relief relating to his trial counsel's ineffective assistance regarding his competency to stand trial. The Court issues a certificate of appealability pursuant to *28 U.S.C. § 2253(c)* and *Federal Rule of Appellate Procedure 22(b)* as to those claims only. As to all remaining claims, the Court certifies that, pursuant to *28 U.S.C. § 1915(a)(3)*, an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. *28 U.S.C. § 2253(c)*; *Fed. R. App. P. 22(b)*.

IT IS SO ORDERED.

September 30, 2015

Date

/s/ Benita Y. Pearson

Benita Y. Pearson

United States District Judge

JUDGMENT ENTRY

The Court, having contemporaneously filed its Memorandum of Opinion and Order, hereby denies Petitioner Sean Carter's Amended Petition for a Writ of Habeas Corpus.

The Court further certifies that, pursuant to *28 U.S.C. § 1915(a)(3)*, an appeal from this decision could be taken in good **[*151]** faith as to Carter's (1) First ground for relief regarding his competency to stand trial, (2) Second ground for relief relating to his trial counsel's ineffective assistance during the mitigation phase of trial, and (3) Fifth ground for relief relating to his trial counsel's ineffective assistance regarding his competency to stand trial. The Court hereby issues a certificate of appealability pursuant to *28 U.S.C. § 2253(c)* and *Federal Rule of Appellate Procedure 22(b)* as to those claims only. As to all remaining claims, the Court certifies that, pursuant to *28 U.S.C. § 1915(a)(3)*, an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. *28 U.S.C. § 2253(c)*; *Fed. R. App. P. 22(b)*.

IT IS SO ORDERED.

September 30, 2015

Date

/s/ Benita Y. Pearson

Benita Y. Pearson

United States District Judge

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