

No. 25-

IN THE
Supreme Court of the United States

RANDY A. THOMAS,

Petitioner,

v.

CYNTHIA DAVIS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant's right to be present at all critical stages of trial includes the right to be present for a trial court's response to a jury's request for additional instructions.

Whether a defendant must show that his presence during the trial court's response to a jury's request for additional instructions would have changed the outcome of trial.

Whether a district court's fact finding that counsel was absent during a critical stage of trial should be reviewed for clear error.

PARTIES TO THE PROCEEDINGS

The petitioner is Randy A. Thomas (“Mr. Thomas”) in his personal capacity. Respondent is Cynthia Davis, the Warden for the Southern Ohio Correctional Facility (“State”).

PRIOR PROCEEDINGS RELATED TO THIS CASE

State of Ohio v. Randy A. Thomas, Summit Cnty. Comm. Pleas No. 13-07-2069 (Feb. 12, 2014) (sentencing order)

State of Ohio v. Randy A. Thomas, Summit Cnty. Comm. Pleas No. CR-2013-07-2069 (Feb. 3, 2015) (order denying petition for post-conviction relief)

State of Ohio v. Randy A. Thomas, 9th Dist. Summit No. 27266, 2015-Ohio-2935 (denying Petitioner's direct appeal)

Randy A. Thomas v. Harold May, N.D. Ohio No. 5:20-cv-02628-JPC, Appendix 7a–39a (writ of habeas corpus denied and certificate of appealability issued on March 31, 2025)

Randy A. Thomas v. Cynthia Davis, 6th Cir. No. 25-3340, Appendix 1a–6a (habeas appeal denied on February 18, 2026)

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INTRODUCTION

This case presents an opportunity for this Court to fill in an outcome-determinative gap in its right to presence jurisprudence by answering whether a defendant, as opposed to counsel alone, has the right to be personally present during a trial court's response to a jury's request for additional instructions.

The District Court found that neither Mr. Thomas nor his counsel were present when the trial judge answered a jury's substantive question about Mr. Thomas's self defense claim, but nonetheless denied Mr. Thomas's habeas petition. The Sixth Circuit did not accept those fact findings—that alone is reversible error.

Instead the Sixth Circuit found that Mr. Thomas could not prevail on his right to presence claim because this Court has not yet answered whether the right to be personally present at all critical stages of trial applies to the trial court's response to a jury's request for additional instructions. The Sixth Circuit also found that Mr. Thomas could not succeed on his right to counsel claim since the record was silent as to whether his counsel was present.

The Sixth Circuit's decision leaves Mr. Thomas and others in cases like this one in a catch-22. When a trial judge answers a jury question outside the presence of a defendant and counsel, the defendant cannot prevail on a right to personal presence claim since there is no precedent from this Court. On the other hand, where the record is silent as to whether counsel was present, a defendant must somehow prove a negative and show that counsel was not present to prevail under this Court's precedent in *United*

States v. Cronin, 466 U.S. 648 (1984) (absence of counsel during a critical stage of trial is structural error where prejudice is presumed).

Without guidance from this Court, circuit courts are split on whether the right to be present at all critical stages should be analyzed under the Confrontation Clause or the Due Process Clause. The Sixth, Eighth, Ninth, and Eleventh Circuits find the right to personal presence sounds in the Fifth Amendment's Due Process Clause. And those circuits disagree on whether *Stincer* applies to jury deliberations, or instead only to pre-trial and other trial stages. The Fifth Circuit applies the Sixth Amendment Confrontation Clause to the exclusion of the Due Process Clause. This absence of clarity creates inconsistent outcomes regarding the defendant's constitutional right to be present at all critical stages.

Therefore, this Court should grant certiorari to review whether: (1) a trial court's response to a jury's request for additional instruction outside the defendant's personal presence is a structural error, or prejudicial, such that it requires reversal; (2) a defendant must show that his presence would have changed the outcome of trial to prevail on a due process claim; and (3) a circuit court reviews a district court's findings of fact on a habeas petition for clear error.

OPINIONS BELOW

The District Court denied Mr. Thomas's writ of habeas corpus pursuant to 28 U.S.C. § 2254. The District Court's opinion is reported at *Thomas v. May*, No. 5:20-cv-

2628, 2025 WL 957237 (N.D. Ohio Mar. 31, 2025). *See* App. 7a–39a. The Sixth Circuit’s opinion affirmed the District Court’s decision denying habeas relief. The Sixth Circuit’s opinion is reported at *Thomas v. Davis*, No. 25-3340, 2026 WL 464708 (6th Cir. Feb. 18, 2026). *See* App. 1a–6a.

JURISDICTION

The Sixth Circuit entered judgment on February 18, 2026. *See Thomas v. Davis*, No. 25-3340, 2026 WL 464708 (6th Cir. Feb. 18, 2026). Petitioner timely requested an extension for time on May 7, 2026 to timely file a petition for writ of certiorari by June 19, 2026. Under Supreme Court Rule 30.1, a federal holiday allows for the filing to be submitted the next business day, which is June 22, 2026. Sup. Ct. R. 30. Petitioner requests a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provision involved is 28 U.S.C. § 2254. *See* App. 46a–49a.

STATEMENT OF THE CASE

I. Mr. Thomas Shot Mr. Smith in Self-Defense.

In April 2013, Mr. Thomas encountered Anthony Smith, whom Mr. Thomas knew to be a violent gang member, selling drugs in front of Mr. Thomas’s grandparents’ home. Petition, R. 1, PageID 17. When Mr. Thomas asked him to go elsewhere, Mr. Smith challenged Mr. Thomas to a fight, and Mr. Thomas agreed. *Id.* at PageID 18.

Mr. Smith ran toward Mr. Thomas. *Id.* at PageID 18. Mr. Thomas threw a punch toward Mr. Smith, but missed. *Id.* Mr. Smith pulled a gun on Mr. Thomas, and Mr. Thomas knocked the gun from his hand. *Id.* As Mr. Thomas was picking up the gun, Mr. Smith charged back toward him. *Id.* Mr. Thomas then shot Mr. Smith in self-defense. *Id.* Mr. Smith died from his wounds a short time later. Dist. Ct. Order, R. 22, PageID 3024.

II. The Trial Court Responded to the Jury's Question Without Mr. Thomas or His Counsel.

Mr. Thomas was indicted on one count of aggravated murder with a firearm specification. Indictment, R. 9-1, PageID 150. Mr. Thomas pled not guilty and argued he shot Mr. Smith in self-defense. Dist. Ct. Order, R. 22, PageID 3024.

The case went to a jury trial, where the court instructed the jury on Mr. Thomas's self-defense claim as follows: "To establish a claim of self defense, the defendant must prove by the greater weight of the evidence that (A) he was not at fault in creating the situation giving rise to the dispute. . . ." Jury Instructions, R. 9-1, PageID 193-94. The jury instructions did not define what "at fault" meant. *Id.*

During deliberations, the jury sent the following question to the trial judge:

Under Self Defense, Part (A) states "he was not at fault in creating the situation that gave rise to the dispute[. . .]" We are having trouble analyzing the issue of "fault." If he were say

“10%” at fault for having agreed to fist fight, is he considered at fault as it pertains to the wording in this section.

Handwritten Jury Question, R. 9-1, PageID 201.

Ohio law answers the jury’s question: “A ‘non-deadly aggressor’ who begins an encounter may justifiably defend himself against a deadly attack. . .” Dissent, R. 9-1, PageID 309 (quoting *State v. Hendrickson*, 4th Dist. Athens No. 08CA12, 2009-Ohio-4416, ¶ 61). Even though *Hendrickson* is on point—and exculpatory for Mr. Thomas—the trial court told the jury that it could not provide clarity, and gave the following written response:

You must re-review and apply your collective understanding of the meaning of the terms used in the jury instructions. The court cannot further define the meaning of those terms.

Judge’s Handwritten Answer, R. 9-1, PageID 202.

The record was initially silent about whether Mr. Thomas or his counsel was present for the trial court’s response to the jury’s question. Decision, R. 9-1, PageID 297. Mr. Thomas supplemented the record with his affidavit that he was not present for any jury questions during trial, his lawyers never discussed the jury questions with him, and he did not waive his presence for the jury questions. Petition for Post-Conviction Relief, R. 9-1, PageID 383, ¶ 8. The record remains silent on whether Mr. Thomas’s counsel was present for the trial court’s response. Dist. Ct. Order, R. 22, PageID 3026.

The jury found Mr. Thomas not guilty of aggravated murder but found him guilty of the lesser-included offense of murder with a firearm specification. Journal Entry, R. 9-1, PageID 203. Mr. Thomas was sentenced to nineteen years to life in prison. Sentencing Entry, R. 9-1, PageID 204.

III. The District Court Denied Mr. Thomas's Habeas Petition.

Mr. Thomas exhausted his state-level appeals and filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Ohio. Petition, R. 1. On grounds four and thirteen, Mr. Thomas argued that he was deprived of his Fifth, Sixth, and Fourteenth Amendment rights to be present at all critical stages of trial when the court answered the jury's questions outside the presence of Mr. Thomas and his counsel. Petition, R. 1, PageID 28–29, 37–38.

The District Court denied Mr. Thomas's petition. First, the District Court recognized that the jury's question "went to the heart of Mr. Thomas's claim at trial of self defense. . . ." Dist. Ct. Order, R. 22 PageID 3042. Therefore, the appellate court's treatment of the jury question as a critical stage of the proceeding was not clearly erroneous. *Id.*

The District Court made fact findings that neither Mr. Thomas nor his counsel were present for the trial court's response to the jury's question. *Id.* at 3039. The District Court also agreed that such absence was structural error. *Id.* at 3043. The Supreme Court has routinely held that the denial of counsel at a critical stage of criminal proceedings

constitutes structural error, that is, *per se* reversible error that can never be treated as harmless. *United States v. Cronin*, 466 U.S. 648 (1984).

Nevertheless, the District Court denied Mr. Thomas's petition because habeas review requires more than just an incorrect outcome—there must be an unreasonable application of clearly established federal law. Dist. Ct. Order, R. 22, PageID 3045.

The District Court issued a certificate of appealability on grounds four and thirteen regarding “whether the absence of Mr. Thomas and his trial counsel at that critical stage of the proceedings amounts to structural error.” *Id.* at 3050. Mr. Thomas timely appealed. Notice of Appeal, R. 25, PageID 3054.

IV. The Sixth Circuit Improperly Required Mr. Thomas to Show that Neither He Nor His Counsel Were Present, Even Though Either Would Be Sufficient to Show Reversible Error.

On appeal to the Sixth Circuit, Mr. Thomas argued that this Court has routinely held that the denial of counsel at a critical stage of criminal proceedings constitutes structural error, that is, *per se* reversible error that can never be treated as harmless. *United States v. Cronin*, 466 U.S. 648 (1984). The District Court's fact findings that neither Mr. Thomas nor his counsel were present should have been reviewed for clear error. *Dixon v. Jamrog*, 121 Fed. App'x. 93, 94 (6th Cir. 2005). However, the Sixth Circuit ignored the District Court's fact findings and incorrectly reviewed the entire case de novo. App. 2a. Had the Sixth Circuit applied the correct standard of review,

it should have reversed the District Court’s denial of Mr. Thomas’s habeas petition. *United States v. Florence*, 150 F.4th 773, 780 (6th Cir. 2025).

And the Sixth Circuit has repeatedly held that applying harmless error review to a structural error, like the absence of counsel at a critical stage of trial, is both incorrect *and unreasonable*. *Edwards v. Burt*, 823 Fed. App’x. 326 (6th Cir. 2020); *French v. Jones*, 332 F.3d 430 (6th Cir. 2003); *Caver v. Straub*, 349 F.3d 340 (6th Cir. 2003); *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003); *Peoples v. Lafler*, 734 F.3d 503 (6th Cir. 2013).

However, the Sixth Circuit sidestepped the *Cronic* question by finding that Mr. Thomas “lacks any proof that his counsel was absent” during the trial court’s response to the jury’s question. App. 3a. Therefore, the Sixth Circuit ignored the absence of Mr. Thomas’s counsel and looked exclusively at Mr. Thomas’s absence.

The Sixth Circuit denied Mr. Thomas’s appeal because there is no precedent from this Court holding that the absence of a defendant (as opposed to counsel) during the trial court’s response to a substantive jury question is either a structural error, or prejudicial, such that it requires reversal under the Fifth, Sixth, or Fourteenth Amendments. App. 4a. (“Thomas contends that his absence was a ‘structural’ error that demanded relief regardless of prejudice—or, if harmless-error review applied, that his absence for a substantive jury question was necessarily prejudicial. But he fails to cite any precedent of the Supreme Court holding that the absence of the defendant alone at such a time required reversal.”).

Mr. Thomas now files his Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

When deciding whether to grant certiorari, this Court considers whether: (a) appellate courts are split on the same important matter; (b) a circuit court has so far departed from the accepted course of proceedings as to call for this Court to exercise its supervisory power; and (c) there is an important question of federal law that has not yet been decided by this Court. Sup. Ct. R. 10. This case presents all three.

I. This Court Should Exercise its Supervisory Power to Answer Whether Petitioner, as opposed to Counsel, has the Right to be Personally Present During a Post-trial Substantive Jury Question.

A. Background.

This Court has recognized the clearly established right of a criminal defendant to be present at all critical stages of trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970). There are two main aspects of this right. The first is that a defendant has a right to have *counsel* present at a critical stage of trial, and the second is that a defendant has a right to be *personally* present at a critical stage.

The U.S. Constitution “guarantees a defendant the right to have *counsel* present at all ‘critical’ stages of the criminal proceedings.” *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (citing *United States v. Wade*, 388 U.S. 218, 227–28 (1967)) (emphasis added); *Missouri v. Frye*,

566 U.S. 134, 140 (2012). This Court has highlighted that presence of counsel alone is not enough, it is the presence of “effective” counsel that satisfies this requirement. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

This Court has also recognized the right for a defendant to be personally present at all critical stages of trial. *United States v. Gagnon*, 470 U.S. 522, 526 (1985); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

B. This Court Has Not Yet Addressed Whether a Defendant Has a Right to Personal Presence During Responses to Substantive Jury Questions.

In the context of substantive jury questions, this Court has recognized the right for *counsel* to be present, but has not yet analyzed the defendant’s right to be *personally* present in that context. *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919) (supplemental jury instructions “ought to be given either in the presence of *counsel* or after notice and an opportunity to be present.”).

This Court has analyzed a defendant’s right to personal presence in numerous other pre-, mid-, and post-trial critical stages. *See, e.g., Hopt v. Utah*, 110 U.S. 574 (1884) (examination of jurors); *Lewis v. United States*, 146 U.S. 370 (1892) (peremptory challenges); *Schwab v. Berggren*, 143 U.S. 442 (1892) (review and scheduling of defendant’s execution); *Valdez v. United States*, 244 U.S. 432 (1917) (mid-trial inspection of the murder scene); *Snyder v. Massachusetts*, 291 U.S. 97 (1934) (jury’s view of the crime scene); *Illinois v. Allen*, 397 U.S. 337 (1970) (defendant’s disruptive trial conduct); *Rushen v. Spain*,

464 U.S. 114 (1983) (*ex parte* judge-juror communications); *United States v. Gagnon*, 470 U.S. 522 (1985) (judge-juror in-camera meetings); *Kentucky v. Stincer*, 482 U.S. 730 (1987) (in-chambers witness competency hearings); *Gomez v. United States*, 490 U.S. 858 (1989) (voir dire); *Crosby v. United States*, 506 U.S. 255 (1993) (in absentia trials).

The closest this Court has come to recognizing a defendant’s right to personal presence in this context was *Rushen v. Spain*. 464 U.S. 114 (1983). In *Rushen*, a juror recognized a defense witness as the murderer of the juror’s childhood best friend. *Id.* at 115–16. The judge made no record of two *ex-parte* discussions in-chambers with the juror about her concerns. *Id.* at 116. The jury convicted defendant of the above crimes and the defendant appealed. This Court held that the trial judge and juror’s communications were “innocuous” to the jury’s overall verdict. *Id.* at 117–21. However, the *Rushen* Court left the door open for reversal where the communication “relates to some aspect of the trial” and its prejudicial effect amounts to constitutional error. *Id.* at 119–20.

This Court recently denied certiorari in a case involving a defendant’s due process right to be personally present at a “special venire” proceeding before voir dire. *Sandoval v. State*, 665 S.W.3d 496, 506 (Tex. Crim. App. 2022), cert. denied, 144 S. Ct. 1166, 1166 (2024). According to Justice Jackson’s dissent, this Court should have granted certiorari because there, as here, the underlying issue “involve[d] clear constitutional and practical significance that this Court should have granted certiorari to resolve.” *Id.* at 1169 (Jackson, J. dissenting).

In *Sandoval*, a Texas trial court conducted a “special venire” proceeding outside the defendant’s presence, leading to numerous, unrecorded exchanges with prospective jurors. *Id.* at 1166–67 (Jackson, J. dissenting). Opposing denial of certiorari, the dissent criticized such exchanges as corrosive to both the defendant’s right to presence and to the overall accountability that such presence would otherwise provide. *Id.* at 1168 (Jackson, J. dissenting).

This is even more critical in the context of substantive jury questions during post-trial jury deliberations. Unlike *Sandoval*, Mr. Thomas’s absence did more than predispose the jury “to look unfavorably at the facts of the case”—it extinguished his self-defense claim. *Id.* at 1168 (Jackson, J. dissenting) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934)). Mr. Thomas’s absence thus and unquestionably “bears on ‘the fulness of his opportunity to defend against the charge.’” *Id.* (Jackson, J. dissenting) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934)).

C. This Court Should Accept Certiorari to Answer Whether a Defendant Has a Right to Personal Presence During a Trial Court’s Response to a Substantive Jury Question.

The Sixth Circuit’s decision creates a situation where it is impossible for a criminal defendant to prevail. Under a right to personal presence approach, Mr. Thomas needed to show that his absence from the trial judge’s answer to the jury’s question violated a clearly-established right as declared by this Court. But he could not do that because this Court has never answered that question. Yet this

Court's precedent in *Rushen* suggests that the trial court's *ex parte* response to the jury's questions should be grounds for reversal because they involved the very instructions relating to Mr. Thomas' self-defense claim.

Under a right to counsel approach, Mr. Thomas needed to show that his counsel was absent to show a violation under *Cronic*. But Mr. Thomas could not do that since the record was silent as to counsel's whereabouts. It is impossible for Mr. Thomas, or any defendant, to account for counsel's whereabouts at all times. A defendant is powerless to fill the record's silence with an affidavit since it would be inadmissible hearsay.

II. Lower Courts Reach Differing Outcomes on Whether the Right to Personal Presence Sounds Under the Sixth Amendment Confrontation Clause or the Fifth Amendment's Due Process Clause.

A. Background.

Lower courts disagree on whether the defendant's right to be present at a critical stage sounds under either the Sixth Amendment Confrontation Clause or the Fifth Amendment's Due Process Clause.

The Sixth Circuit, Ninth Circuit, and Eleventh Circuit analyze claims regarding the defendant's right to be present at a critical stage under the Fifth Amendment's Due Process Clause. However, the Fifth Circuit analyzes that right under the Sixth Amendment's Confrontation Clause. Finally, the Eighth Circuit analyzes the defendant's right to be present at a critical stage under both the Fifth and Sixth Amendment—forming a hybrid position.

B. The Sixth, Eighth, Ninth, and Eleventh Circuits Find the Right to Personal Presence Sounds in the Fifth Amendment's Due Process Clause.

The Sixth, Eighth, Ninth, and Eleventh Circuits find a defendant's right to personal presence sounds in the Fifth Amendment's Due Process Clause but are inconsistent how the right should be applied. This is because they apply this Court's precedent in *Stincer* differently.

This Court held that a right to be present at a competency hearing is not a violation of the Due Process Clause if the defendant's presence would not contribute to the fairness of the hearing. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). Under *Stincer*, a criminal defendant has a Fifth Amendment Due Process right to be personally present only when their presence has a relation, "reasonably substantial, to the fullness of the opportunity to defend against the charge." *Id.* (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934)). The *Stincer* Court relied on its earlier precedent in *Snyder*, which held that the defendant's personal presence at a jury's viewing of a crime scene was not guaranteed under Due Process since "presence would be useless, or the benefit but a shadow." *See Snyder*, 291 U.S. at 106–07. *Stincer* expanded *Snyder* and applied that test to all critical stages of trial. *Stincer*, 482 U.S. at 745. As demonstrated below, Circuit courts are split on whether a defendant must show that their presence would not be useless or but a shadow to succeed with a Due Process Clause claim.

**(1) The Ninth Circuit Applies *Stincer* to
Critical Stages of Pre-Trial and Trial, But
Not Jury Deliberations.**

The Ninth Circuit limits *Stincer* by recognizing the weight a jury assigns to a trial court's response to a jury question and appropriately requires a defendant's presence during that critical stage. *Frantz v. Hazey*, 533 F.3d 724, 742 (9th Cir. 2008).

In *Frantz*, the defendant was excluded from an in-chambers discussion with advisory counsel about how to answer a question from the deliberating jury. *Id.* at 727. In *Frantz*, as here, the record was silent as to whether the defendant was personally present. *Id.* at 731. The Ninth Circuit found that this was a critical stage and held that defendants have a due process right to be present in conferences when juror's notes are being discussed. *Id.* at 743.

According to *Frantz*, a trial judge's response to a substantive jury question is especially important because the jury will rely on it heavily when determining the guilt of the defendant. *Id.* at 742. Especially when it comes to a question of law related to the defendant's affirmative defense, the jury is even more likely to over-rely on the judge's response. *Id.* at 743. This is why courts have held that the proper procedure is for the trial judge to read the question to both counsels and request input on a response. *United States v. Giacalone*, 588 F.2d 1158, 1165–66 (6th Cir. 1978) (citing *United States v. Carter*, 491 F.2d 625, 633 (5th Cir. 1974)). This allows for the defendant, such as Mr. Thomas, to have input in the response given to the jury.

As discussed below, *Frantz* is the better approach and, had the Sixth Circuit applied *Frantz*, the outcome would have been fundamentally different.

(2) The Sixth and Eleventh Circuits Broadly Apply *Stincer* to All Stages of Trial.

On the other hand, the Sixth Circuit applies *Stincer* to all critical stages of trial where the defendant's presence would reasonably relate to the fullness of the opportunity to be heard. *United States v. Carson*, 796 Fed. App'x. 238, 246 (6th Cir. 2019). For example, in *Carson*, the Sixth Circuit held that a defendant's absence from an evidentiary hearing does not rise to the level of affecting the defendant's due process rights. *Id.* The Sixth Circuit affirmed its earlier rule that a "defendant's right to be present exists only when 'his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *Id.* (citing *United States v. Henderson*, 626 F.3d 326, 343 (6th Cir. 2010)).

Then in *McKinney*, the Sixth Circuit expanded *Carson* by finding that matters of law are not necessarily required to be held in the presence of the defendant, so there was no violation of the defendant's due process rights. *McKinney v. Horton*, 826 Fed. App'x. 468, 475 (6th Cir. 2020).

Like the Sixth Circuit, the Eleventh Circuit also follows the Fifth Amendment Due Process Clause right and applies *Stincer*. See *United States v. Thomason*, 940 F.3d 1166, 1171 (11th Cir. 2019) ("Due Process Clause grants criminal defendants a 'right to be present at any stage of the criminal proceeding[s] that is critical to its outcome if his presence would contribute to the fairness of the procedure.'").

But this Court in *Stincer* did not go so far as to require the defendant's personal presence to have changed the outcome of the trial. *Stincer*, 482 U.S. at 745. Lower courts, like the Sixth Circuit and Eleventh Circuit, created that rule on their own by broadly applying *Stincer* to all critical stages of trial and mis-interpreting the language in *Snyder* to require that the defendant prove an additional requirement—defendant's presence must contribute to the fairness of the trial by having a but-for impact on the outcome of the trial. *Id.* (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934)).

C. The Fifth Circuit Stands Alone as the Only Circuit that Applies the Sixth Amendment Confrontation Clause to the Exclusion of the Due Process Clause.

The Fifth Circuit, in similarly situated cases, declines to apply *Stincer* entirely and only evaluates the claim under the Sixth Amendment Confrontation Clause. Instead of addressing Due Process, the Fifth Circuit only addresses the Sixth Amendment, specifically the Confrontation Clause.

In *Graves*, the Fifth Circuit held that the defendant does not have a constitutional right to be personally present at the informal discussion between the judge and counsel. *United States v. Graves*, 669 F.2d 964, 972 (5th Cir. 1982). The Fifth Circuit held that the Confrontation Clause does not apply when the defendant is missing from a conference or argument on a question of law. *Id.* (citing Fed. R. Crim. P. 43(c)(3)).

The Sixth Circuit's decision is also at odds with the Fifth Circuit's decision in *McKissick*. In that case, the

Fifth Circuit addressed whether the defendant was present for an in-chambers meeting with counsel regarding the defendant's potential perjury. *McKissick v. United States*, 379 F.2d 754 (5th Cir. 1967); see *United States v. Lewis*, 420 F.2d 686, 687 (5th Cir. 1970) (discussing *McKissick*). The Fifth Circuit remanded the case to determine whether there was any prejudice occasioned by the defendant's absence.

Here, Mr. Thomas was not present for the trial court's response and the record is silent on whether his counsel was present. Therefore, had the Sixth Circuit applied the Fifth Circuit's standard in *McKissick*, it would have reached a different outcome and remanded the case for additional fact finding.

D. The Eighth Circuit Analyzes the Defendant's Right to be Present Under Both the Confrontation Clause and the Due Process Clause.

The Eighth Circuit analyzes the defendant's right to be present at a critical stage of trial under both the Confrontation Clause and the Due Process Clause. See *United States v. Gunter*, 631 F.2d 583 (8th Cir. 1980). In *Gunter*, the petitioner argued that an in-chambers meeting was a supplemental hearing regarding the admissibility of evidence, making it a critical stage where the right to personal presence attaches. *Id.* at 589. The Eighth Circuit decided that the defendant, through his counsel, waived the right to be personally present at the in-chambers meeting because defendant's attorney did not object to the defendant's personal presence at the meeting. *Id.* at 589. The Eighth Circuit also applied

the Federal Rule of Criminal Procedure 43(c)(3) to find that the defendant did not have a due process right to be personally present at the meeting because the meeting addressed a question of law. *Id.*

The Eighth Circuit correctly identified that “a defendant’s right to be present is constitutionally grounded in either the right to confrontation of the sixth amendment or the right to due process of the fifth and fourteenth amendments.” *Id.* (citing *Jackson v. Hutto*, 508 F.2d 890, 891 (8th Cir. 1975)). However, the Eighth Circuit failed to acknowledge the distinction between a defendant’s right to *personal* presence and the defendant’s right to have *counsel* present. Even though *Gunter* involved the defendant’s *personal* absence from chambers during a critical stage (which should be analyzed under the Sixth Amendment), the Eighth Circuit proceeded to analyze both the Sixth Amendment and Due Process standards (which would ordinarily be used to analyze the absence of counsel). The Eighth Circuit also applied *Snyder* similar to how the Sixth Circuit applies *Stincer*—the defendant need not be present when their presence would be useless, or the benefit but a shadow. *Id.*

E. The Outcome of Mr. Thomas’s Petition Would Have Been Different in Another Circuit, and this Court Should Adopt the *Frantz* Rule.

As demonstrated, the void in this Court’s right to personal presence jurisprudence has left Circuit Courts to apply different tests and reach different outcomes. Had Mr. Thomas’s case been in the Ninth or Fifth Circuits, he likely would have prevailed. Instead, his claim was no match for the Sixth Circuit’s overly broad and harsh application of *Stincer*.

This Court should adopt the approach in *Frantz* and hold that the defendant's presence is critical to the fairness of the trial. *Frantz v. Hazey*, 533 F.3d 724, 742 (9th Cir. 2008). This Court should reject the Sixth Circuit's approach to *Stincer* and clarify that *Stincer* should only apply to pre-trial and trial conferences and hearings regarding the law. However, once the jury begins deliberations, the defendant's right to be present resumes—as the importance of the communications with the jury overrides the justifications in *Stincer*. The Sixth Circuit's approach improperly discounts the defendant's impact on how the judge responds to a question from the jury.

Excluding a defendant from a uniquely critical and structural stage of trial withholds fairness that is afforded under the Due Process Clause. Mr. Thomas was excluded from the trial court's response that directly impacted his defense. Without the opportunity to defend himself, Mr. Thomas was denied his due process in a critical stage that carried significant weight in the outcome of Mr. Thomas's trial.

By applying *Stincer* narrowly, the Ninth Circuit's approach in *Frantz* gives the appropriate weight the defendant's presence where, as here, trial court's response to a jury's question will determine the outcome of trial. This Court should grant certiorari and clarify that *Stincer* does not apply to responses to substantive jury questions and adopt the *Frantz* approach regarding conversations between the court and parties after jury deliberations begin.

III. The Sixth Circuit Erred in Applying *De Novo* Review to the District Court’s Fact Finding that Mr. Thomas’s Counsel Was Not Present at a Critical Stage of Trial.

The Sixth Circuit reviews a district court’s findings of fact for clear error and its conclusions of law *de novo*. *Dixon v. Jamrog*, 121 Fed. App’x. 93, 94 (6th Cir. 2005); *see also Garcia v. Quarterman*, 454 F.3d 441, 444 (5th Cir. 2006); *Register v. Thaler*, 681 F.3d 623, 626 (5th Cir. 2012). Although AEDPA affords deference to state court decisions, a district court is free to make its own fact findings based on the record. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (“deference does not imply abandonment or abdication of judicial review.”). These cases recognize that the district court judge is in the best position to review the record, evidence, and make a factual finding—circuit courts respect those fact findings and review for clear error.

The Sixth Circuit should have applied clear error standard to the findings of fact made by the District Court. The District Court made fact findings that neither Mr. Thomas nor his counsel were present for the trial court’s response to the jury’s question. Dist. Ct. Order, R. 22, PageID 3045. The District Court also agreed that such absence was structural error. *Id.* The District Court’s fact findings that neither Mr. Thomas nor his counsel were present should have been reviewed for clear error. *Dixon*, 121 Fed. App’x. at 94. However, the Sixth Circuit ignored the District Court’s fact findings and incorrectly reviewed the entire case *de novo*. App. 2a. Had the Sixth Circuit applied the correct standard of review, it should

have reversed the District Court's denial of Mr. Thomas's habeas petition.

This Court should grant certiorari to confirm that a district court's fact findings on a habeas petition should be reviewed for clear error, not *de novo*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT,
FILED FEBRUARY 18, 2026**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 25-3340

RANDY A. THOMAS,

Petitioner-Appellant,

v.

CYNTHIA DAVIS, WARDEN,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OHIO

Before: KETHLEDGE, BUSH, and NALBANDIAN,
Circuit Judges.

KETHLEDGE, Circuit Judge. Randy Thomas appeals the district court's denial of his petition for a writ of habeas corpus. We reject his arguments and affirm.

In April 2013, Thomas visited his grandparents' house in Akron, Ohio. While he was there, he saw Anthony Smith selling drugs in front of the house, so Thomas asked Smith to move along. Smith responded by challenging Thomas

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to a fight. Thomas accepted, and the two met on a nearby street. Thomas threw the first punch, after which Smith pulled out a gun; Thomas slapped the gun out of Smith's hand and picked it up. Smith then charged at him, Thomas says, so Thomas shot Smith. Smith died shortly thereafter.

An Ohio grand jury later indicted Thomas on one count of aggravated murder. He pled not guilty. At trial, Thomas argued that he had shot Smith in self-defense. The trial judge instructed the jury that Thomas's claim of self-defense required him to show that he was not "at fault" in "creating the situation giving rise to the dispute." R. 9-1, Ex. 11. During its deliberations, the jury wrote a note to the judge with several questions, including a request to clarify the self-defense instruction:

We are having trouble analyzing the issue of "fault." If he were say "10%" at fault for having agreed to fist fight, is he considered at fault as it pertains to the wording in this section?

In response, the judge wrote:

You must re-review and apply your collective understanding of the meaning of the terms used in the jury instructions. The court cannot further define the meaning of those terms.

Nothing in the record shows whether the judge consulted the parties before he sent that response. After further deliberation, the jury found Thomas not guilty of aggravated murder, but guilty of murder, a lesser-included

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offense. The court sentenced Thomas to between 19 years and life in prison.

Thomas appealed, arguing that the trial court had denied him (among other things) his constitutional right to be present when the court responded to the jury's question about the self-defense instruction. The Ohio Court of Appeals declined to reach this argument because, it said, the record on the issue was undeveloped. The court otherwise affirmed his conviction. Thomas then sought post-conviction relief in the trial court, raising the same claim. In that proceeding, he offered an affidavit in which he said he had not been present for any jury questions and had not waived his right to be present. The trial court denied his petition on that claim, as did the Ohio Court of Appeals. The Supreme Court of Ohio declined review. Thomas later sought habeas relief in federal court under 28 U.S.C. § 2254, which the district court denied. This appeal followed.

We review de novo the district court's denial of Thomas's petition for a writ of habeas corpus. *Mammone v. Jenkins*, 49 F.4th 1026, 1041 (6th Cir. 2022). To obtain the writ here, Thomas must show that the Ohio Court of Appeals's decision to deny him relief was contrary to or unreasonably applied "clearly established" federal law, as determined by the holdings of the Supreme Court. *Jones v. Bradshaw*, 46 F.4th 459, 472 (6th Cir. 2022) (quoting § 2254(d)(1)).

As an initial matter, we review the state court's "decision" to deny Thomas relief, not the court's

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intermediate reasoning. *Davis v. Jenkins*, 115 F.4th 545, 557-58 (6th Cir. 2024) (en banc); *Davis v. Carpenter*, 798 F.3d 468, 475 (6th Cir. 2015); *Holland v. Rivard*, 800 F.3d 224, 236 (6th Cir. 2015). Our task is to determine what arguments or theories supported the state-court decision, or could have supported it; and then to determine whether fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the Supreme Court. *Carpenter*, 798 F.3d at 475; see *Pouncy v. Palmer*, 846 F.3d 144, 160 (6th Cir. 2017). Thus, so long as the Ohio Court of Appeals reached a decision that reasonably applied Supreme Court precedent—however deficient some of the court’s reasoning might have been—we must deny the writ. See *Carpenter*, 798 F.3d at 475.

Thomas claims that the trial judge responded to the jury’s question in the absence of his counsel, which Thomas says would violate the Sixth Amendment. But a petitioner must prove “all facts necessary to show a constitutional violation.” *Black v. Carpenter*, 866 F.3d 734, 744 (6th Cir. 2017). And here Thomas admits he lacks any proof that his counsel was absent at that time. Pet’r Reply Br. at 2. So this claim is meritless.

Thomas also argues that, by responding to the jury’s question when Thomas himself was absent, the trial judge violated his putative constitutional right to be present then. True, a defendant has a right to be present at any stage of a criminal proceeding “critical to its outcome if his presence would contribute to the fairness of the procedure.” *Kentucky v. Stincer*, 482 U.S. 730, 745, 107

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S. Ct. 2658, 96 L. Ed. 2d 631 (1987). But if the defendant's absence was harmless, then a reviewing court does not reverse the conviction. *See Arizona v. Fulminante*, 499 U.S. 279, 306-07, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

Here, the jury wrote a note to the judge asking him to clarify the meaning of "fault"—a legal element of Thomas's claim of self-defense. Yet the judge declined to give a substantive answer. Instead, he simply responded that the jurors should rely on their own understanding of the instruction (to which Thomas had not objected, either during the charge conference or when the judge instructed the jury). Thereafter, during Thomas's post-conviction proceedings, Thomas argued only that his absence prevented him from challenging the instruction as unconstitutionally vague. The state countered that nothing in the record showed that Thomas himself could have meaningfully raised any legal arguments.

We must deny the writ if any legal theory consistent with clearly established federal law could have supported the Ohio Court of Appeals's decision to deny Thomas relief on this claim. *Carpenter*, 798 F.3d at 475. And the record before that court, as the state said, lacked any evidence that Thomas could have capably raised legal objections to the jury instructions, or otherwise have contributed to the judge's response to the jury. The state court could therefore have reasonably concluded that Thomas's absence did not affect the verdict in any way.

Thomas contends that his absence was a "structural" error that demanded relief regardless of prejudice—or,

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if harmless-error review applied, that his absence for a substantive jury question was necessarily prejudicial. But he fails to cite any precedent of the Supreme Court holding that the absence of the defendant alone at such a time required reversal. Thomas therefore has not met his burden to show that all fairminded jurists would agree that the state court's decision was inconsistent with clearly established federal law.

The district court's judgment is affirmed.

**APPENDIX B — OPINION OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT
OF OHIO, FILED MARCH 31, 2025**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:20-cv-2628
Judge J. Philip Calabrese
Magistrate Judge Darrell A. Clay

RANDY J. THOMAS,

Petitioner,

v.

HAROLD MAY, WARDEN,

Respondent.

OPINION AND ORDER

In 2014, Petitioner Randy J. Thomas was convicted of murder with a firearm specification at a jury trial in State court. He was sentenced to prison for 19 years to life with parole eligibility after 15 years. In his petition for a writ of habeas corpus, Petitioner contends that this conviction violates his constitutional rights under the Second, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 4, and 10 of the Ohio Constitution.

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The Magistrate Judge recommends that the Court deny Mr. Thomas's petition. Mr. Thomas objects. For the reasons stated below, the Court **OVERRULES** Petitioner's objections, **ADOPTS** the Magistrate Judge's report and recommendation, and **ISSUES** a certificate of appealability under 28 U.S.C. § 2253(c).

FACTUAL AND PROCEDURAL BACKGROUND

On April 13, 2013, Mr. Thomas visited his grandmother's house in Akron, Ohio, where a man named Anthony Smith was selling drugs outside. Mr. Thomas asked Smith to go down the street instead. (ECF No. 9-1, PageID #282.) Smith responded by challenging Mr. Thomas to a fist fight. (*Id.*) Mr. Thomas accepted the challenge and suggested that they travel one street away to hold their fight uninterrupted. (*Id.*, PageID #294.) The two men entered their respective cars and drove to the suggested location. No one witnessed the altercation that subsequently occurred between them. (*Id.*) Mr. Thomas testified that he swung at Smith but missed. (*Id.*, PageID #282.) Then, Smith pulled out a gun. Mr. Thomas knocked the gun out of Smith's hand and got control of it. (*Id.*) When Smith started toward him, Mr. Thomas shot Smith. (*Id.*)

Phyllis Brown, a resident on the street where the men fought, testified that she heard three gunshots, looked out her window, and saw Mr. Thomas holding a handgun. (*Id.*, PageID #294.) She stated that Mr. Thomas was standing several feet from Smith, who was prostrate on the ground. (*Id.*) Brown then saw Mr. Thomas enter his car and drive away from the scene, leaving Smith behind. (*Id.*) Also,

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Brown testified that she saw Smith try to start his car unsuccessfully and enter a nearby house for first aid. (*Id.*) She went outside to assist Smith, who was bleeding heavily from gunshot wounds. (*Id.*) No firearm was located at the scene of the fight, and Smith died from his wounds a short time later. (*Id.*)

A. Trial

On August 9, 2013, a grand jury returned an indictment charging Mr. Thomas with one count of aggravated murder with a firearm specification. (ECF No. 9-1, PageID #150.) He pled not guilty to the charge on August 28, 2013, asserting that he shot Mr. Smith in an act of self-defense. (*Id.*, PageID #286 & #926.)

A.1. Pretrial Motions

Barely a month before trial, Mr. Thomas moved for the appropriation of funds for an investigator to support his defense. (*Id.*, PageID #151-54.) On November 6, 2013, the State trial court granted Mr. Thomas's motion and authorized defense counsel to retain an investigator, but the State trial court held the trial date for December 9, 2013, as scheduled. (*Id.*, PageID #155.)

Mr. Thomas moved to suppress testimony from a purported expert on gangs and evidence discovered during a search of his brother's vehicle. (*Id.*, PageID #161-66.) After a suppression hearing on December 3, 2013 (continued to January 3, 2014), the State trial court ruled that the expert on gangs could testify at trial. (*Id.*,

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PageID #173.) It denied Mr. Thomas's motion to suppress the evidence from the vehicle because Mr. Thomas lacked standing to challenge the search. (*Id.*, PageID #174-83.) Additionally, Mr. Thomas filed a motion *in limine* to exclude eyewitness testimony from Phyllis Brown (*id.*, PageID #169-71), which the State trial court also denied (*id.*, PageID #184-86).

A.2. The Jury's Question

A jury trial commenced on January 29, 2014 and ran through February 3, 2014, when the jury retired to deliberate. (*Id.*, PageID #203.) During deliberations on February 4, 2014, the jury sent a note to the trial judge listing three questions. The first two questions requested records or transcripts from the trial. (*Id.*, PageID #201.) The third question asked about the jury instruction on self-defense:

Under Self Defense, Part (A) states "he was not at fault in creating the situation that gave rise to the dispute [...]". We are having trouble analyzing the issue of "fault." If he were say "10%" at fault for having agreed to fist fight is he considered at fault as it pertains to the wording in this section?

(*Id.*) In response to that question, the trial judge wrote back:

You must re-review and apply your collective understanding of the meaning of the terms

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used in the jury instructions. The court cannot further define the meaning of those terms.

(*Id.*, PageID #202.) The record contains no indication that the trial judge contemporaneously informed or consulted the parties about the jury's communication or the trial court's response. Later that day, the jury returned a verdict of not guilty on the aggravated murder charge but found Mr. Thomas guilty of the lesser included offense of murder with a firearm specification. (ECF No. 9-1, PageID #203.)

On February 5, 2014, the trial court sentenced Mr. Thomas to life in prison with parole eligibility after 15 years, 3 years of incarceration on the firearm specification, and to an additional 1-year sentence from another case, each to be served consecutively, for a total of 19 years to life imprisonment. (ECF No. 9-1, PageID #204.)

B. Direct Appeal

On March 3, 2014, Mr. Thomas appealed his conviction and sentence and the denials of his motion to suppress and motion *in limine*. (*Id.*, PageID #206). He raised fourteen assignments of error in the appeal. As relevant here, Mr. Thomas (1) argued that the State trial court violated his constitutional rights by answering the jury's question about the self-defense instruction outside of his presence, which also violated his right to a public trial; (2) challenged the sufficiency of the evidence; and (3) raised ineffective assistance of counsel—for failing to raise self-defense in the opening statement and throughout the

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trial. (*Id.*, PageID #213-14.) Over a dissent, which would have reversed on the basis of the jury question and the instructions on self-defense even under plain error review, the State appellate court overruled each objection and affirmed Mr. Thomas's conviction. (*Id.*, PageID #282-310; *see also Thomas I*, 2015-Ohio-2935 (Ohio App. Ct.).)

Mr. Thomas appealed to the Ohio Supreme Court (ECF No. 9-1, PageID #311-27), which declined to exercise jurisdiction to hear the appeal (*id.*, PageID #328). Mr. Thomas filed a petition for a writ of certiorari to the United States Supreme Court, which also denied review. (*Id.*, PageID #329-30.)

C. Petition for Post-Conviction Relief

Under Section 2953.21 of the Ohio Revised Code, Mr. Thomas petitioned for post-conviction relief on November 10, 2014. (*Id.*, PageID #331-93.) As relevant here, he challenged his conviction based on (1) his absence from the courtroom for the jury's question and response, which also violated his right to a public trial; and (2) ineffective assistance of counsel in many respects. (*Id.*, PageID #331-93.) On February 3, 2015, the State trial court denied the petition. (*Id.*, PageID #413-18.)

On appeal, the State appellate court affirmed in part and reversed in part. (*Id.*, PageID #518-32; *see State v. Thomas*, 2016-Ohio-5507, ¶ 1 (Ohio Ct. App.) ("*Thomas II*").) Again, one judge dissented, in part. (ECF No. 9-1, PageID #530-32 (Carr, J., dissenting in part); *Thomas II*, 2016-Ohio-5507, ¶¶ 27-34 (Carr, J., dissenting in part).)

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The State appellate court ruled that the State trial court should have held a hearing on Mr. Thomas's claims of ineffective assistance of counsel. (ECF No. 9-1, PageID #526; *Thomas II*, 2016-Ohio-5507, ¶ 21.) Mr. Thomas sought review at the Ohio Supreme Court, which declined to exercise jurisdiction (ECF No. 9-1, PageID #534-35, #566), as did the United States Supreme Court (*id.*, PageID #567-68).

On remand, the State trial court held an evidentiary hearing on May 9 and 10, 2018 (*id.*, PageID #569-613), then denied his petition on June 25, 2018 (*id.*, PageID #614-41). Mr. Thomas appealed on the basis of ineffective assistance of counsel, specifically contending that counsel failed to investigate and present available evidence about his state of mind and to retain a mental health expert. (*Id.*, PageID #642 & #673.) On October 16, 2019, the State appellate court affirmed. (*Id.*, PageID #793-802; *see also State v. Thomas*, 2019-Ohio-4247, at *4 (Ohio Ct. App. Oct. 16, 2019) ("*Thomas III*").) Again, one judge dissented. (*Id.*) The Ohio Supreme Court declined to exercise jurisdiction (*id.*, PageID #843), and the United States Supreme Court denied certiorari on October 5, 2020 (*id.*, PageID #844-917).

D. Habeas Petition

On November 23, 2020, Mr. Thomas filed a petition for a writ of habeas corpus. (ECF No. 1.) His petition asserts fifteen grounds for relief, challenging the self-defense jury instruction as vague (ground one) and unlawfully placing the burden of proof on him (ground three); the State trial

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court's response to the jury's question outside his presence (ground two, ground four, ground five, ground twelve, and ground thirteen); the refusal of an instruction on a lesser included offense (ground six); jury misconduct (ground seven); ineffective assistance of counsel (ground eight, ground eleven, ground fourteen, and ground fifteen), sufficiency of the evidence (ground ten); and cumulative error (ground nine). (ECF No. 1, PageID #24-47.)

The Magistrate Judge issued a report and recommendation that the Court dismiss grounds one, two, three, five, seven, and twelve as procedurally defaulted, dismiss grounds six and nine as not cognizable on habeas review, and dismiss grounds four, ten, eleven, thirteen, fourteen, and fifteen on the merits. (ECF No. 18.) Petitioner filed timely objections. (ECF No. 20.) Though Petitioner's objections are not numbered or organized under headings, the Court counts six objections to the Magistrate Judge's report and recommendation, which the Court groups as follows:

First, Petitioner objects by averring that the Magistrate Judge failed to examine or analyze his arguments that application of the Antiterrorism and Effective Death Penalty Act of 1996 violates the Thirteenth and Fourteenth Amendments and is otherwise unconstitutional. (ECF No. 20, PageID #2999.)

Second, Petitioner objects to the Magistrate Judge's recommendation that grounds two, five, and twelve are procedurally defaulted. (ECF No. 20, PageID #3018.) Also, he objects to the Magistrate Judge's finding that

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ground six is not cognizable on habeas review. (*Id.*, PageID #3017.)

Third, Petitioner objects to the Magistrate Judge's analysis and conclusions on ground four and ground thirteen, which address the right to be present at all stages of the proceedings. (*Id.*, PageID #3004.)

Fourth, Petitioner objects to the Magistrate Judge's analysis of his insufficient evidence claim (ground ten). (*Id.*, PageID #3004.) In this regard, Petitioner also objects to the finding that there was insufficient briefing on the issue. (*Id.*, PageID #3006.)

Fifth, Petitioner objects that the Magistrate Judge conducted an insufficient analysis of his ineffective assistance of counsel claims. (*Id.*, PageID #3006-14.)

Respondent did not file a brief addressing any of these objections.

STANDARD OF REVIEW

A district court judge may direct a Magistrate Judge to submit "proposed findings of fact and recommendations for the disposition, by a judge of the court," 28 U.S.C. § 636(b)(1)(B), of a petition for a writ of habeas corpus, which the Court does by Local Rule, *see* L.R. 72.2. When reviewing a report and recommendation, if a party objects within the allotted time, the district court is required to "make a de novo determination of those portions of the report or specified proposed findings or recommendations

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to which the objection is made.” 28 U.S.C. § 636(b)(1)(C); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981). Objections must be specific, not general, and should direct the Court’s attention to a particular dispute. *Howard v. Secretary of Health & Hum. Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). “The filing of objections to a magistrate’s report enables the district judge to focus attention on those issues--factual and legal--that are at the heart of the parties’ dispute.” *Thomas v. Arn*, 474 U.S. 140, 147, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

Upon review, the court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge.” 28 U.S.C. § 636(b)(1)(C). Importantly, the Court’s job is not to conduct a free-wheeling examination of the entire report and recommendation, but only to address any specific objections that a party has advanced to some identified portion of it. Accordingly, it is the Court’s task in this matter to review the Magistrate Judge’s report and recommendation de novo, based on the specific objections that Petitioner raises.

ANALYSIS

Where a petitioner is “in custody in violation of the Constitution or laws or treaties of the United States,” he is entitled to a writ of habeas corpus. 28 U.S.C. §§ 2241(c)(3) & 2254(a). The writ tests the fundamental fairness of State court proceedings resulting in the deprivation of an individual’s liberty. *See, e.g., Brown v. Allen*, 344 U.S. 443, 463, 73 S. Ct. 397, 97 L. Ed. 469 (1953); *Powell*

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v. Collins, 332 F.3d 376, 388 (6th Cir. 2003) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)); *Skaggs v. Parker*, 235 F.3d 261, 266 (6th Cir. 2000). 28 U.S.C. § 2254(d) provides:

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

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

“With the AEDPA, Congress limited the source of law for habeas relief to cases decided by the United States Supreme Court.” *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998); *see also Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

A State court adjudication is “contrary to” Supreme Court precedent under Section 2254(d)(1) “if the state court arrives at a conclusion opposite to that reached by

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[the Supreme] Court on a question of law,” or “if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent” and arrives at a different result. *Williams*, 529 U.S. at 405. “Avoiding these pitfalls does not require citation of [Supreme Court] cases—indeed, it does not even require awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.” *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002).

Under Section 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law. *See Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (citing *Williams*, 529 U.S. at 410). A State court adjudication involves “an unreasonable application of” Supreme Court precedent under Section 2254(d)(1) in one of two ways: (1) if the State court identifies the correct governing legal rule from the Supreme Court’s cases[,] but unreasonably applies it to the facts of the particular State prisoner’s case; or (2) if the State court either unreasonably extends a legal principle from the Court’s precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *See Williams*, 529 U.S. at 407.

Petitioner makes numerous objections to the report and recommendation. Most of his arguments, though styled as objections, reconstruct the underlying grounds for relief asserted in his original habeas petition. However, some are sufficiently specific to allow review.

*Appendix B***I. Constitutionality of the AEDPA**

In his traverse, Petitioner argues for the first time that the AEDPA is unconstitutional. (ECF No. 13, PageID #2646-67.) Specifically, he contends that the Act violates the Thirteenth and Fourteenth Amendments. He takes issue with the Act's deference to State-court judgments and to the limitations on review in the federal courts. Ordinarily, failing to raise an argument in his petition waives the argument. Accordingly, the Magistrate Judge did not address these arguments and did so properly.

Although the argument is waived, the Court notes that Petitioner's counsel has unsuccessfully raised similar arguments for more than a decade. *See, e.g., Betts v. Tibbals*, No. 1:11-cv-01107, 2014 U.S. Dist. LEXIS 135398, 2014 WL 4794530, at *3 (N.D. Ohio Sept. 24, 2014) ("Moreover, Betts' current counsel has made this exact same argument before the Sixth Circuit in the past but to no avail.") (citing *Andera v. Tibbals*, No. 1:11-cv-2606, 2012 U.S. Dist. LEXIS 149227, 2012 WL 4955290, at *1 (N.D. Ohio Oct. 17, 2012)). A panel of the "Sixth Circuit has never concluded that the AEDPA is unconstitutional." *Betts*, 2014 U.S. Dist. LEXIS 135398, 2014 WL 4794530, at *3 (cleaned up). Additionally, courts in this District have upheld the AEDPA as constitutional, finding "universal agreement" among the Circuits that deference to State courts as envisioned under the Act does not violate an individual's constitutional rights. *Id.*

Bowling v. Parker, 882 F. Supp. 2d 891 (E.D. Ky. 2012), addresses most of the arguments Petitioner makes

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here. There, the court reinforced the principle that “state courts are capable interpreters of federal constitutional law” and are, not unlike federal courts, “bound to ‘guard and protect rights secured by the Constitution.’” *Id.* at 895-96 (quoting *Ex parte Royall*, 117 U.S. 241, 251, 6 S. Ct. 734, 29 L. Ed. 868 (1886)). Because lower federal courts derive their power from statutes, Congress can “expand or contract lower federal courts’ power to grant habeas relief to state prisoners.” *Id.* at 896-97; *see also id.* at 898 (“But even if [Section] 2254(d)(1) did limit the sources of law a lower federal court could rely on, such a restriction would be constitutional.”). Additionally, the limitation imposed by Congress is “logical” because State courts are not bound by the federal appellate courts, only the Supreme Court, which remains the final word on judicial interpretation of the Constitution. *Id.* at 898-99, 901.

Nor does the AEDPA violate the Suspension Clause because it “only modifies the conditions in which a federal court can grant relief;” it does not “withdraw jurisdiction.” *Id.* at 902. Habeas relief is subject to a high bar because it is a last resort “against extreme malfunctions,” rather than mere “error correction,” which should have occurred on direct appeal. *Id.* Indeed, Mr. Thomas had ample opportunity to pursue his claimed errors in State court. In any event, even if the AEDPA were unconstitutional as applied to Mr. Thomas, the Court would consider the petition without application of the Act, which leaves untouched many of the common-law principles to which he objects.

Because Petitioner waived this argument, which has no merit in any event, at least as applied here, the Court

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applies the AEDPA to the grounds for relief presented in the petition.

II. Procedural Default and Issues Not Cognizable in Habeas

As a general rule, a petitioner must demonstrate that he has “exhaust[ed] all available opportunities to pursue his claim in state court.” *Gerth v. Warden, Allen Oakwood Corr. Inst.*, 938 F.3d 821, 826-27 (6th Cir. 2019). A federal court may not consider a habeas petition unless a State prisoner has presented their claim to the State courts in accordance with their procedural rules. *See Shinn v. Ramirez*, 596 U.S. 366, 371, 142 S. Ct. 1718, 212 L. Ed. 2d 713 (2022). A petitioner may procedurally default a claim by failing to raise it in State court and pursue it through the State’s appellate review procedures. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). If State law no longer allows the petitioner to raise or appeal the claim at the time of the habeas petition, the claim is procedurally defaulted. *Id.*; *see also Shinn*, 596 U.S. at 371.

Procedural default may be excused where a petitioner can show that an external factor prevented him from complying with the procedural rule at issue, through no fault of his own, and that the alleged constitutional violation resulted in actual prejudice. *Coleman v. Thompson*, 501 U.S. 722, 753, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). And if “the last state court rendering a judgment in the case” reached the merits notwithstanding a petitioner’s failure to raise and present an issue according to the State’s rules, procedural default does not apply. *Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d

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308 (1989); *see also Victor v. Neb*, 511 U.S. 1, 19, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

The Magistrate Judge determined that Petitioner procedurally defaulted six of his grounds for relief--ground one (challenging the self-defense jury instruction as vague), ground three (regarding the burden of proof for self-defense), ground seven (jury misconduct), and grounds two, five, and twelve (relating to the State trial court's response to the jury's question). (ECF No. 18, PageID #2946.) Petitioner objects to this recommendation on grounds two, five, and twelve. (ECF No. 20, PageID #3018.) On these grounds, the Magistrate Judge determined that petitioner failed to follow the Ohio Rules of Appellate Procedure. (ECF No. 18, PageID #2954; *see Maupin v. Smith*, 782 F.2d 135, 138 (6th Cir. 1986).) He also objects to the Magistrate Judge's recommendation that ground six (instruction on a lesser included offense) be denied as non-cognizable in federal habeas corpus proceedings. (*Id.*, PageID #2984; ECF No. 20, PageID #3017.)

II.A. Jury Question

Rule 16 of the Ohio Rules of Appellate Procedure requires an appellant to include in his brief an "argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." Ohio R. App. P. 16(A)(7). Rule 12 empowers appellate courts to "disregard an assignment

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of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App. R. 16(A).” Ohio R. App. P. 12(A)(2); *see also Campbell v. Bunting*, No. 1:14-cv-1187, 2015 U.S. Dist. LEXIS 109496, 2015 WL 4984871, at *1 (N.D. Ohio Aug. 19, 2015) (“Ohio App. R. 12(A)(2) . . . empowers the court to disregard any assignment of error the appellant fails to brief in conformity with Rule 16(A)”).

On direct appeal, Mr. Thomas raised three assignments of error. However, the State appellate court found that he failed properly to support his arguments. On that basis, it overruled the assignments of error. (ECF No. 18, PageID #2958; *Thomas I*, 2015 Ohio 2935, 2015 WL 4464893, at *9-10.) Petitioner objects that he sufficiently briefed the issue on direct appeal such that “there is no procedural default.” (ECF No. 20, PageID #3018.) But the State appellate court found otherwise. On a petition for a writ of habeas corpus, the Court’s review is limited to whether the State courts determined that a petitioner failed to follow the procedural rules, not correctness of that determination. *Maupin v. Smith*, 782 F.2d 135, 138-39 (6th Cir. 1986). Moreover, examination of Petitioner’s briefing on direct appeal confirms the ruling of the State appellate court. His brief contains two short paragraphs supporting these grounds for review and failed to provide support or develop an argument. (*See* ECF No. 9-1, PageID #263.) For these reasons, the Court determines that Petitioner failed to preserve these claims for federal habeas review and, therefore, **OVERRULES** Petitioner’s objections.

*Appendix B***II.B. Lesser Included Offense**

Also, Petitioner asserts that the State trial court erred in refusing to instruct the jury on the lesser charges of “Voluntary Manslaughter and Reckless Homicide and violated the Sixth and Fourteenth Amendments of the federal Constitution.” (ECF No. 1, PageID #30.) In his report and recommendation, the Magistrate Judge recommends that the Court dismiss this ground because it is not cognizable on federal habeas corpus review. (ECF No. 18, PageID #2988.) In *Beck v. Alabama*, 447 U.S. 625, 638, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), the Supreme Court held that in capital cases, a court must instruct the jury as to a lesser included non-capital offense. However, the Supreme Court declined to decide whether this requirement extends to non-capital cases. *Id.* at 635 n.7. Nor has the Sixth Circuit required an instruction on a lesser included offense in non-capital cases: “[W]e are not required to extend *Beck* to noncapital cases.” *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir. 1990) (en banc) (explaining that *Beck* arises from Eighth Amendment concerns, not the Fourteenth Amendment’s Due Process Clause). (See ECF No. 9, PageID #107 (collecting cases).) Finding that clearly established Supreme Court precedent does not support Petitioner’s claim, the Magistrate Judge recommends denying relief on this ground as not cognizable under habeas corpus review. (ECF No. 18, PageID #2986.)

Petitioner objects, arguing that the State trial court’s refusal to instruct the jury on the accused’s theory of the case violated his due process rights. (ECF No. 20, PageID

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#3017.) In support, Petitioner relies on cases from the Second Circuit. *See Harris v. Alexander*, 548 F.3d 200 (2d Cir. 2008); *Jackson v. Edwards*, 404 F.3d 612 (2d Cir. 2005); *Davis v. Strack*, 270 F.3d 111 (2d Cir. 2001); *see also Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999). Each of these cases involved the State trial court's failure to instruct a jury on the defendant's theory of defense. In each, the court found that the failure to instruct violated due process, the appellate court's affirmation of which was objectively unreasonable. *Harris v. Alexander*, 548 F.3d at 205-06; *Jackson*, 404 F.3d at 627-28; *Davis*, 270 F.3d at 132.

Without question, a defendant "is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973). However, a defendant is not entitled to such an instruction if the evidence would not so permit. The Sixth Circuit has determined that review of a decision whether the evidence supports a jury instruction on a lesser included offense is generally not cognizable on habeas review, even on a due-process theory. *Bagby*, 894 F.2d at 794. That result might differ in the Second Circuit, but the Court sees no exceptional circumstances warranting such a departure here.

In this case, the jury received instructions on aggravated murder and the lesser included offense of murder. (ECF No. 18, PageID #2998.) Having received an instruction on a lesser included offense, this case does not

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present the type of circumstances warranting examination and second-guessing of the trial record on collateral review. After all, the jury rejected Petitioner's self-defense argument and found Mr. Thomas guilty of murder. For these reasons, the Court **OVERRULES** Petitioner's objection to the Magistrate Judge's recommendation on ground six.

III. Review Under the AEDPA

The Magistrate Judge addressed Petitioner's remaining grounds for relief on the merits under the AEDPA.

III.A. Right to Presence (Ground Four and Ground Thirteen)

While deliberating, the jury submitted a question to the State trial court about the self-defense jury instruction, and the court apparently provided a written answer without notifying either party or making a record in open court. (ECF No. 9-1, ¶¶ 12-13, PageID #522; *id.*, PageID #241-42; ECF No. 1, PageID #37.) The jury asked for clarification on the degree of fault of a defendant claiming self-defense:

Under Self Defense, Part (A) states "he was not at fault in creating the situation that gave rise to the dispute [. . .]". We are having trouble analyzing the issue of "fault." If he were say "10%" at fault for having agreed to fist fight is he considered at fault as it pertains to the wording in this section?

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(ECF No. 9-1, PageID #201.) In response to that question, the trial judge wrote back:

You must re-review and apply your collective understanding of the meaning of the terms used in the jury instructions. The court cannot further define the meaning of those terms.

(*Id.*, PageID #202.) Listed as ground four and ground thirteen in his petition, Petitioner argues that this response to the jury's question violated his right to be present at all critical stages of trial under the Sixth and Fourteenth Amendments. (ECF No. 1, PageID #28 & #37.)

In his report and recommendation, the Magistrate Judge recommends that the Court deny grounds four and thirteen. (ECF No. 18, PageID #2968.) On direct appeal, the State appellate court, with one judge dissenting, found that the record lacked sufficient evidence to determine whether Mr. Thomas was absent from proceedings relating to the jury's question and declined to review the issue. (ECF No. 9-1, ¶ 47, PageID #297-98; *Thomas I*, 2015-Ohio-310, ¶ 47; *see also* ECF No. 9-1, ¶ 75, PageID #307-08.) On appeal after remand, the State appellate court assumed that the question from the jury presumed a critical stage of the proceedings requiring Mr. Thomas's presence but determined that there was not prejudice from his absence. (ECF No. 9-1, ¶¶ 12-13, PageID #522-23; *Thomas II*, 2016-Ohio-5607, ¶ 13.) Viewing Mr. Thomas's absence as more fundamental and structural, the dissenting judge disagreed. (ECF No. 9-1, PageID #532; *Thomas II*, 2016-Ohio-5607, ¶¶ 32-33.)

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Clearly established Supreme Court precedent supports the right of an accused to be present at all critical stages of a 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, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)); *see also United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (cleaned up). This right derives from the Sixth Amendment’s Confrontation Clause; but where, as here, the issue does not involve confronting the evidence against a person, the right sounds in due process. *Gagnon*, 470 U.S. at 526 (citing *Allen*, 397 U.S. at 338). “A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner.” *Crowe v. United States*, 200 F.2d 526, 528 (6th Cir. 1952) (quoting *Lewis*, 146 U.S. at 372.) “The right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant.” *Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983).

III.A.1. Critical Stage of the Proceedings

A “critical” stage of the proceedings is one that holds “significant consequences for the accused.” *Bell v. Cone*, 535 U.S. 685, 695-96, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Van v. Jones*, 475 F.3d 292, 313 (6th Cir. 2007). A question from the jury that goes to the defendant’s core theory of the case presents a critical stage of the proceedings. Indeed, the State appellate court treated it as such. (ECF No. 9-1, ¶¶ 12-13, PageID #522-23; *Thomas II*, 2016-Ohio-5607, ¶ 13.) Although Respondent contends

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that a jury's question does not present a critical stage of the proceedings (ECF No. 9, PageID #101), its cases do not speak to the facts and circumstances of this case. For example, in *Martin v. Moore*, No. 2:12-cv-878, 2013 U.S. Dist. LEXIS 176073, at *32 (S.D. Ohio Dec. 16, 2013), the trial judge answered two questions from the jury in the presence of counsel, who waived the defendant's presence. And in *Simmons v. Sheets*, No. 2:09-cv-1077, 2011 U.S. Dist. LEXIS 27502, at *83-84 (S.D. Ohio Feb. 23, 2011), the jury's question took only one minute to resolve, making it factually unlikely to have implicated a fundamental right of the defendant.

Further, Respondent argues that the Supreme Court's failure specifically to hold that a defendant's absence, without a waiver, from a proceeding during deliberations when the State trial court responds to a jury's question forecloses relief. (ECF No. 9, PageID #101.) This position does not hold up. Even under the AEDPA's source-of-law provision, federal courts may look for guidance to the decisions of other courts applying the principles that the Supreme Court has determined. *See, e.g., French v. Jones*, 332 F.3d 430, 436 (6th Cir. 2003). Moreover, Respondent draws a fine line between responding to a question and giving a supplemental instruction, a distinction which finds no support in the Supreme Court's jurisprudence. Because of the nature of the jury's question, this is not a case where a defendant's "presence would be useless, or the benefit but a shadow." *Snyder v. Massachusetts*, 291 U.S. 97, 106-07, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). In any event, the State appellate

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court here treated the jury's question as constituting a critical stage of the proceeding. As a mixed question of law and fact, *see id.* at 435, the Court gives deference to that finding. Because the jury's question went to the heart of Mr. Thomas's claim at trial of self-defense, that finding is not clearly erroneous.

III.A.2. Harmless Error and Structural Error

As a general rule, constitutional error does not demand automatic reversal. *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Ordinarily, a petitioner must also show that the error was not harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). On habeas review, an error may be considered harmless unless it had "substantial and injurious effect or influence in determining the jury's verdict." *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)). However, that principle has limits. Structural errors "by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988). In other words, a court should not apply harmless error review to claims of structural error. Indeed, "constitutional error" occurs, without the need to show prejudice, "when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronin*, 466 U.S. 648, 659 n.25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (collecting cases).

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In this case, the absence of Mr. Thomas when the State trial court answered the jury’s question about self-defense constitutes an error. The question comes down to whether that error is structural—an issue on which the State appellate court divided. The majority applied harmless error review and found that Mr. Thomas “cannot demonstrate prejudice. . . . His claim of prejudice stems strictly from his inability to challenge the court’s allegedly vague answer through an objection.” (ECF No. 9-1, PageID #522; *Thomas II*, 2016-Ohio-5607, ¶ 13.) A dissenting judge saw the error as structural: “Whether his presence, and his input on the appropriate answer, would have made a difference in the trial court’s answer is a different issue than the one Thomas raised.” (ECF No. 9-1, PageID #532; *Thomas II*, 2016-Ohio-5607, ¶ 32.)

Under the AEDPA, the question is whether the State courts’ adjudication of this issue meets the standard in Section 2254(d) for relief. *Brown v. Davenport*, 596 U.S. 118, 122, 142 S. Ct. 1510, 212 L. Ed. 2d 463 (2022). For its conclusion that Petitioner could not show prejudice, the State appellate court majority relied on *State v. Davison*, 2011-Ohio-1528, ¶ 7 (Ohio Ct. App.), which in turn traces through *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 100, back to the Supreme Court’s decision in *Snyder*. In *Snyder*, the Supreme Court assumed that “in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” 291 U.S. at 105-06. However,

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“the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.” *Hale*, 2008-Ohio-3426, ¶ 100, 119 Ohio St. 3d 118, 892 N.E.2d 864 (quoting *Snyder*, 291 U.S. at 107-08). This determination must be made on the record as a whole. See *Gagnon*, 470 U.S. at 526-27 (citing *Snyder*, 291 U.S. at 115).

With this background, the question in this case is exceedingly close—even under the AEDPA’s deferential standard. On the one hand, structural error involving the absence of counsel at a critical stage of the proceedings does not admit harmless error analysis. *Chronic*, 466 U.S. at 659 n.25; *Holloway v. Arkansas*, 435 U.S. 475, 489, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978); *French*, 332 F.3d at 438. In this regard, the State appellate court’s dissent appears to have the better of the argument.

On habeas review, however, the question is not whether the Court would make the same decision as the State courts in the first instance, but whether the State courts’ adjudication meets the standard under Section 2254(d). Under Section 2254(d)(1), an *unreasonable* application of federal law is not the same as an *incorrect* application of it. See *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (citing *Williams*, 529 U.S. at 410). On the record as a whole, the State courts’ decision that the State trial judge’s written response to the jury, made outside the presence of Mr. Thomas, his counsel, or the prosecutor, did not violate his constitutional rights is not unreasonable. At bottom, the State courts might have erred in determining whether some form of harmless

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error analysis applied and its proper formulation. But the Court cannot say that the State courts' adjudication was contrary to or an unreasonable application of clearly established federal constitutional law as determined by the Supreme Court. Therefore, the Court **OVERRULES** Petitioner's objection.

III.B. Sufficiency of the Evidence (Ground Ten)

As his tenth ground for relief, Petitioner argued that the evidence is insufficient to maintain a murder conviction. (ECF No. 1, PageID #34.) The Magistrate Judge recommended that the Court deny this ground because Petitioner did not show that the State courts unreasonably applied *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), or unreasonably determined the facts. (ECF No. 18, PageID #2969.) Petitioner objects by rearguing his case on the issue. However, objections must be specific, and a petitioner may not generally object to the Magistrate Judge's recommendations.

On this issue, the only objection that Defendant makes with any specificity is that the Magistrate Judge failed to analyze the cases cited. (ECF No. 20, PageID #3006.) As the Magistrate Judge noted, however, the Court must defer to the jury's determinations when resolving conflicts in testimony, weighing the evidence, and drawing reasonable inferences from that evidence; a reviewing court is not permitted to substitute its own opinion for that of the jury. *Jackson*, 443 U.S. at 318-19 & n.13. Additionally, on habeas review, a federal court must

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defer to a State appellate court’s “consideration of the trier-of-fact’s verdict, as dictated by AEDPA.” *Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir. 2011) (quoting *Tucker v. Palmer*, 541 F.3d 652, 656 (6th Cir. 2008)). Even if the Magistrate Judge failed to consider Petitioner’s cases to his satisfaction, the record shows that the double deference due on a challenge to the sufficiency of the evidence on collateral review leaves no doubt that Mr. Thomas’s conviction meets the standard for relief under Section 2254(d). Therefore, the Court **OVERRULES** Petitioner’s objections on ground ten.

III.C. Ineffective Assistance of Counsel

The Sixth and Fourteenth Amendments to the Constitution afford criminal defendants the right to “reasonably effective assistance” of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). To succeed on a claim of ineffective assistance of counsel, a petitioner must show that (1) the performance of counsel fell below an objective standard of reasonableness, such that counsel was not functioning as the counsel guaranteed by the Sixth Amendment, and (2) the ineffectiveness of the counsel prejudiced the petitioner’s defense. *Strickland*, 466 U.S. at 687-88. Counsel enjoy the presumption that they discharge their duties in a sufficiently effective manner and exercise reasonable professional judgment based on the circumstances at the time. *Id.* at 690.

To thwart a petitioner’s temptation “to second-guess counsel’s assistance after conviction or adverse sentence,

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and [because] it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. In other words, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (cleaned up). To establish prejudice, a petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In his petition, Mr. Thomas asserted that trial counsel was ineffective because (1) he failed to discuss self-defense during his opening statement (ground eleven); (2) he failed to investigate and present available evidence of Mr. Thomas's state of mind (ground fourteen); and (3) he failed to properly utilize a mental health expert at trial (ground fifteen). (ECF No. 1, PageID #34-35 & #39-48.)

III.C.1. Ground Eleven

Applying *Strickland*, the Magistrate Judge recommended that the Court deny Petitioner relief on ground eleven. At trial, Mr. Thomas's counsel focused in his opening statement on intent—not self-defense. (ECF No. 18, PageID #2975-76.) On appeal, the State appellate court reasoned that this opening statement resulted from the strategy of directing the defense's case in response to how the prosecution's case unfolded and to secure an acquittal on the aggravated murder charge. (ECF No.

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9-1, PageID #282; *Thomas I*, 2015-Ohio-2935, ¶ 13.) The Magistrate Judge reached the same conclusion. (ECF No. 18, PageID #2976.) Therefore, he determined that the record does not contain evidence sufficient to overcome the presumption that counsel's choice not to mention self-defense in the opening statement was trial strategy. (*Id.*)

Petitioner objects that “[t]he law required that the jury understand [his] weaknesses . . . so it could properly apply the law of self-defense” and that the Magistrate Judge “practically ignored all of the case law and facts cited by Thomas.” (ECF No. 20, PageID #3007.) Because of trial counsel's alleged failure, Petitioner contends that “[t]he jury was deprived of this information which is relevant to his conduct and state of mind and how he perceived the threat from the victim.” (*Id.*, PageID #3010.)

But the cases on which Petitioner relies do not help him meet the *Strickland* standard. For example, Petitioner cites *State v. Moses*, 2014-Ohio-1748, ¶ 40 (Ohio Ct. App.), which recites the elements for establishing self-defense and the burden of proof. And in *State v. Jackson*, 22 Ohio St. 3d 281, 284, 22 Ohio B. 452, 490 N.E.2d 893 (1986), the Ohio Supreme Court analyzed jury instructions on the issue. But the record provides no reason to think that trial counsel was unaware of Ohio law on self-defense. Only *State v. Bradley*, 42 Ohio St. 3d 136, 538 N.E.2d 373 (1989), speaks to opening statements. In dissent, one justice saw no trial strategy in completely waiving opening statement, in his view making that decision ineffective on the facts presented. *Id.* at 156 (Wright, J., dissenting).

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Petitioner's argument focuses on self-defense as the key to the case. (See ECF No. 20, PageID #3007.) But the Court is not tasked with determining whether another strategy might have proved more effective. Indeed, under *Strickland*, the inquiry avoids such second-guessing in hindsight. Counsel had a clear strategy during opening statement. Therefore, the Court **OVERRULES** Petitioner's objections to ground eleven.

III.C.2. Ground Fourteen and Ground Fifteen

Petitioner claims that his trial counsel rendered constitutionally deficient performance when he failed to present evidence of his "very low intelligence" that would allow a jury to step into his shoes in the claim of self-defense and when his counsel failed to hire a mental health expert to testify regarding the available health records. (ECF No. 1, PageID #39-48.) In his Report and Recommendation, the Magistrate Judge found no error sufficient to warrant relief and recommended that the Court deny both grounds fourteen and fifteen. (ECF No. 18, PageID #2984.)

Petitioner's objections are limited. He maintains that the Magistrate Judge "made the same error" as the State courts when he "failed to properly analyze or discuss the impact of [Mr. Thomas's] state of mind in this self defense case." (*Id.*, PageID #3012.) Whatever the importance of Mr. Thomas's state of mind, the evidence in the record fails to overcome the presumption that counsel strategically omitted Mr. Thomas's mental health records and evidence.

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(ECF No. 18, PageID #2977-78.) The record developed on post-conviction relief shows that trial counsel was aware of this evidence, but did not want to introduce it because it might negatively affect the jury's view of Mr. Thomas. (ECF No. 9, PageID #137-39.) Petitioner has not demonstrated that his counsel performed deficiently or that, but for his trial counsel's performance, the jury would have accepted his claim of self-defense and found him not guilty of murder. Accordingly, the Court **OVERRULES** Petitioner's objections on grounds fourteen and fifteen.

CERTIFICATE OF APPEALABILITY

Without a certificate of appealability, a habeas petitioner cannot appeal a final order in a habeas proceeding. 28 U.S.C. § 2253(c)(1). Issuance of a certificate of appealability requires a petitioner to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This means that the petitioner must show that reasonable jurists would find the district court's determination of the relevant constitutional claims debatable or incorrect. *Tennard v. Dretke*, 542 U.S. 274, 282, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004). The petitioner need not show that the appeal would succeed to be eligible for a certificate of appealability. *Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

Based on this standard, the Court issues a certificate of appealability on ground four and ground thirteen (relating to Mr. Thomas's right to be present for the State trial court's response to the jury's question). Reasonable

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jurists could fairly debate whether the absence of Mr. Thomas and his trial counsel at that critical stage of the proceedings amounts to structural error. Indeed, the State appellate court disagreed on that question. Therefore, the Court issues a certificate of appealability.

CONCLUSION

For the foregoing reasons, the Court the Court **OVERRULES** Mr. Thomas' objections (ECF No. 20), **ADOPTS** the Magistrate Judge's report and recommendation (ECF No. 18), **DISMISSES** the petition, and issues a certificate of appealability on ground four and ground thirteen.

SO ORDERED.

Dated: March 31, 2025

/s/ J. Philip Calabrese
J. Philip Calabrese
United States District Judge
Northern District of Ohio

**APPENDIX C — RELEVANT CONSTITUTIONAL
AND STATUTORY PROVISIONS**

U.S. Const. Amend. 5

**Criminal actions—Provisions concerning—Due
process of law and just compensation clauses.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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U.S. Const. Amend. 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

*Appendix C***U.S. Const. Amend. 14**

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives—Power to reduce apportionment.] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.] No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office,

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civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.] The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

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28 U.S.C. § 2253

Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(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 detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

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(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

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28 U.S.C. § 2254

State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

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(3) 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.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

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

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) 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

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to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

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

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is

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unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS § 2254].

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28 U.S.C. § 2255

**Federal custody; remedies on motion
attacking sentence**

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

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(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

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(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.