
No. 26-

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID SANDERS

Petitioner

v.

LAURA PLAPPERT, WARDEN

Respondent

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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File Name: 26a0064p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAVID LEE SANDERS,

Petitioner-Appellant,

v.

LAURA PLAPPERT, Warden,

Respondent-Appellee,

UNITED STATES OF AMERICA,

Intervenor.

No. 16-6152

Appeal from the United States District Court for the Eastern District of Kentucky at Lexington.
No. 5:03-cv-00455—Amul R. Thapar, District Judge.

Argued: January 29, 2025

Decided and Filed: March 3, 2026

Before: SILER, GIBBONS, and STRANCH, Circuit Judges.

COUNSEL

ARGUED: Brian M. Pomerantz, Carrboro, North Carolina, for Appellant. Kristin L. Conder, OFFICE OF THE SOLICITOR GENERAL, Frankfort, Kentucky, for Appellee. David Lieberman, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. **ON BRIEF:** Brian M. Pomerantz, Carrboro, North Carolina, David M. Barron, KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY, Frankfort, Kentucky, for Appellant. Kristin L. Conder, Christopher Henry, Stephanie L. McKeehan, OFFICE OF THE SOLICITOR GENERAL, Frankfort, Kentucky, for Appellee. David Lieberman, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor.

GIBBONS, J., delivered the opinion of the court in which SILER, J., concurred. STRANCH, J. (pp. 40–78), delivered a separate dissenting opinion.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Petitioner David Lee Sanders was sentenced to death for the murder and robbery of two men inside a Kentucky convenience store in 1987. A jury rejected Sanders's only defense: that he was not guilty by reason of insanity. After Sanders's initial sentencing, a protracted series of proceedings followed, which yielded four Kentucky Supreme Court decisions, three denials of certiorari from the U.S. Supreme Court, and a federal district court decision (and reconsideration). Before us now, Sanders makes two main arguments. First, he argues that the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which narrows our ability to grant habeas relief when a state court decision has already decided a petitioner's claim on the merits, is unconstitutional. Second, he argues that ambiguous jury instructions regarding his insanity defense, deficient performance by trial counsel, and cumulative error violated his constitutional rights.

We hold that AEDPA is constitutional and, applying it to Sanders's claims, the Kentucky Supreme Court's decisions on jury instructions and several of Sanders's ineffective assistance of counsel claims were not contrary to law and did not involve an unreasonable application of federal law. As for Sanders's claims not accorded AEDPA deference, we hold that they still fail under de novo review because Sanders fails to show prejudice. Finally, Sanders's cumulative-error claim was procedurally defaulted and otherwise lacks merit. Thus, we affirm the district court's denial of Sanders's habeas petition in its entirety.

I.

On January 28, 1987, a customer stopped by the Boone Variety Store near Richmond, Kentucky. Upon entering the store, she was confronted with a horrific scene. Behind the counter, Jim Brandenburg lay slumped over. Near the door, Wayne Hatch was face down, gurgling in a pool of his blood. Both men had bullet holes in the back of their heads. Two bank bags had been taken from the store, and the men's wallets had been stolen. Less than an hour earlier, Sanders had stopped by the store. After paying for his purchases, Sanders asked

Brandenburg, who was behind the counter, if he could use the phone. Brandenburg directed Sanders to the payphone. Sanders then called his mother and confirmed he would come over on Thursday evening. Then he called his wife to let her know he would not come home until Friday.

Sanders then went into his truck and retrieved two loaded guns. He reentered the store, where he saw Brandenburg behind the counter with his back to him. Sanders walked to the counter, placed the barrel of one of his guns against the back of Brandenburg's head, and pulled the trigger, killing him. Sanders then took Brandenburg's wallet, as well as a bag of money sitting on the counter. Hatch then entered the store through the front door while Sanders still had his gun out. Although it is uncertain how Hatch got on the floor, Sanders shot Hatch in the back of the head while he was lying face down on the floor and took his wallet. Sanders then drove home, tossing some items he had stolen out the window.¹

A.

Based on the timing of the murders and outgoing calls from the store's telephone, it did not take long for officers to suspect Sanders was responsible. When police first interviewed Sanders, he denied committing the murders and told various stories supporting his innocence. However, as the evidence accumulated, Sanders eventually confessed. After Sanders's confession, concerns about his mental health developed. On the day of his confession, the jail psychologist, Dr. John Moffit, wrote a letter to the trial judge stating that he felt that Sanders "[was] suicidal at this time, and hence, all precaution should be taken to prevent him from acting on these impulses."² DE 165-1, Moffit Ltr, Page ID 2813. A few weeks later, Sanders's attorney, J. Kevin Charters, moved to commit Sanders to a state institution for a mental health examination, believing that he might be mentally ill. In response, the Kentucky state trial court ordered Sanders to be moved to the Kentucky Correctional Psychiatric Center ("KCPC"), where he was to be evaluated for competence to stand trial, competency at the time the crimes were committed, and for any other mental issues.

¹These facts, which were presented to the jury before it recommended a sentence of death, are undisputed.

²The next day, Moffit also wrote a notarized letter reiterating his concerns and describing Sanders as "possibly of the dissociative [d]isorder type." DE 167-1, Moffit Ltr., Page ID 4020.

A month and a half later, Dr. Candace Walker from KCPC sent her report to the trial court. The report concluded that Sanders suffered from no mental illness that could absolve him of responsibility for his crime. According to the report, Sanders understood the proceedings against him, was of at least average intelligence, and could cooperate with his attorney in his defense. The report also concluded that Sanders did not suffer from any mental disease or defect that could prevent him from conforming his conduct to the law and that there was no evidence that he was suffering from a mental defect when he committed the alleged crimes. Finally, the report also noted that Sanders described his background, particularly his childhood, differently to various KCPC members.

One of the KCPC team members involved in the report was Dr. Frank Flenning. Flenning wrote an independent report that was not included in the ultimate Walker report. Flenning's report was more mixed and concluded that there was some evidence to suggest that Sanders suffered from a mental deficiency resulting from traumatic experiences in his childhood. But notably, the existence of this report was never made known to any of the parties or presented to the jury. This is likely due to Walker's report that they had "found no medical evidence to indicate that he was suffering from such a disorder at the time of the alleged crime." DE 165-4, Walker KCPC Pretrial Competency Evaluation Rep., Page ID 2819. Such a statement indicated that Walker's team was unanimous in its conclusion.

Sanders's attorney also did not interview Walker or any member of her team. Instead, Charters opted to retain Dr. Stuart Cooke, a clinical psychologist, to testify on Sanders's behalf. Cooke interviewed Sanders and administered various tests—all within two and a half hours. Cooke also interviewed Sanders's brother and read the Walker report. With this information, Cooke concluded that Sanders suffered from a depersonalization disorder during the time of the crime and could not control his actions.

B.

At trial, Sanders asserted an insanity defense. The defense called two witnesses: Sanders himself and Cooke. Sanders admitted to shooting and killing Brandenburg and Hatch but insisted he could not control himself. Sanders testified that as he went to his truck, he felt

“funny” and remembered telling himself: “Oh God no. Not – not again. You are not going to do it again.” DE 166-3, Trial Tr., Page ID 3781. Sanders testified that he tried to stop himself but could not. Sanders further told the jury: “I watched my left hand raise, and it had a loaded gun in it. I could not stop it. . . . I didn’t watch that man fall, I didn’t want that to happen. I didn’t want any of that to happen.” *Id.* at 3782–83.

Next, the defense called Cooke to the stand. Cooke corroborated Sanders’s testimony and told the jury that Sanders suffered from a depersonalization disorder, causing him to lose control of his body and his awareness of reality. In response, the prosecution called Walker to the stand. Walker described the full battery of psychological tests performed on Sanders. After a month and a half of testing, Walker testified that, while Sanders likely had a personality disorder, he did not suffer from any disease that would impair his competence. She noted that Sanders had never presented any evidence of depersonalization disorder. Instead, Walker suggested that Sanders’s shifting stories and attempts to manipulate staff members suggested that he may have been attempting to fabricate a mental illness to avoid responsibility.

According to Sanders, Cooke’s credibility was significantly undermined in the prosecutor’s closing argument in several ways that support ineffective assistance of counsel argument. First, Cooke mispronounced his last name as “Saunders,” a fact the prosecution pointed out to the jury. Second, Cooke made a few factual mistakes such as testifying that he saw Sanders on a date and time when Sanders was unquestionably in court. Third, Cooke only interviewed and tested Sanders for two and a half hours, far less than the one and a half months of extensive testing Walker and her team had conducted.

After all the testimony was completed, the court gave the jury instructions on four offenses: two counts of murder and two counts of first-degree robbery. Sanders did not object to any of these instructions. The court listed each count and told the jury it could only find Sanders guilty “if they believe[d] from the evidence beyond a reasonable doubt [that he committed the crimes.]” DE 166-4, Trial Tr., Page ID 3914–16. After listing these offenses, the court further told the jury that they “shall find [Sanders] not guilty” for reasons of insanity if they “believe[d] from the evidence” that Sanders could not control his actions. *Id.* 3917. This is a different standard than the beyond a reasonable doubt standard. Under Kentucky law, trial courts instruct

juries that they can find insanity under the lower standard of “from the evidence.” *Gall v. Commonwealth*, 607 S.W.2d 97, 110 (Ky. 1980), *overruled on other grounds by Payne v. Commonwealth*, 623 S.W.2d 867 (Ky. 1981). The jury instructions, as the jury heard and read them, were as follows:

Even though you might otherwise find the defendant guilty of the offenses mentioned in instructions number 2, 3, 4 and 5, [(murder and robbery instructions)] if you *believe from the evidence* that at the time David Lee Sanders committed these offenses, if he did so, he was of unsound mind, you shall find him not guilty and say in your verdict that you find him not guilty on the ground of insanity. Before the defendant can be excused from the ground of insanity, you must *believe from the evidence* that at the time of the act in question the defendant as a result of mental disease or defect, A, did not have substantial capacity to appreciate the criminal nature of the act or, B, if he did have such capacity he did not have substantial capacity to conform his conduct to the requirements of the law. The term “mental disease” or “defect” does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

DE 166-4, Trial Tr., Page ID 3916–17 (emphases added).

The jury found Sanders guilty on all counts.

C.

Having been found guilty of the murders, Sanders’s trial proceeded to the penalty phase. The entire penalty proceeding, including the closing argument by Charters, lasted about an hour. Sanders first presented testimony from his employer, his neighbor, the assistant principal of his high school, and his sister. All expressed shock that Sanders had committed these crimes and told the jury that he was a good person. After these four witnesses, Sanders himself testified. Sanders testified that he could not control his actions and did not even need the money he stole. Sanders also told the jury that the evaluators at KCPC did not appropriately understand him or his mental issues. Sanders did not testify to, and was not asked by his counsel, about any childhood abuse that he had suffered. The jury recommended, and the court imposed a sentence of death for Sanders’s killing of Brandenburg and Hatch. *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1990) (“*Sanders I*”).

D.

After Sanders's conviction and sentence, a series of appeals and collateral attacks followed. First, Sanders directly appealed to the Kentucky Supreme Court, which affirmed his sentence. *Sanders I*, 801 S.W.2d at 684. The Kentucky Supreme Court rejected his argument that the trial court had failed to specify the burden of proof, noting that in Kentucky, the common insanity instruction is "believed 'from the evidence.'" *Id.* at 679 (citing *Gall*, 607 S.W.2d at 110). Sanders subsequently petitioned for a writ of certiorari, which the U.S. Supreme Court denied. *Sanders v. Kentucky*, 502 U.S. 831 (1991).

Sanders then pursued several postconviction proceedings in Kentucky state court, seeking to vacate his death sentence. *Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 2002) ("*Sanders II*"), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *see also* Ky. Rule of Crim. Pro. 11.42 (Kentucky criminal procedure rule for modifying a defendant's sentence). In *Sanders II*, the Kentucky Supreme Court considered and rejected all of Sanders's arguments that his counsel was constitutionally defective. *Sanders II*, 89 S.W.3d at 394. Sanders filed another petition for a writ of certiorari, which the U.S. Supreme Court again denied. *Sanders v. Kentucky*, 540 U.S. 838 (2003).

Sanders then petitioned for a writ of habeas corpus in federal court in 2003. The district court held Sanders's petition in abeyance, so Sanders could exhaust his state court claims. In 2011, the Kentucky Supreme Court again rejected all of Sanders's claims for post-conviction relief. *Sanders v. Commonwealth*, 339 S.W.3d 427 (Ky. 2011) ("*Sanders III*"). Sanders filed a third petition for a writ of certiorari, which the U.S. Supreme Court denied once again. *Sanders v. Kentucky*, 566 U.S. 907 (2012).

Having exhausted all his state claims, Sanders returned to federal court to file a supplemental petition for writ of habeas corpus. In February 2015, the district court denied Sanders's petition on all grounds. In June 2016, the district court first granted Sanders a Certificate of Appealability ("COA") for his argument that Charters had provided constitutionally ineffective assistance of counsel by failing to appropriately prepare and present mitigating evidence at the trial's penalty phase. Then, in May 2017, the district court granted

Sanders a COA for his claims that the jury instructions on insanity had violated due process, that the Kentucky Supreme Court had unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), and that Sanders had sustained cumulative prejudice due to his counsel's deficiencies. We later granted additional COAs concerning whether Charters had rendered ineffective assistance of counsel for (1) "failing to retain an adequate mental-health expert"; (2) "not pursuing leads relating to the evaluation of a mental-health expert"; (3) "inadequately preparing Sanders to testify during the trial's sentencing phase"; and (4) "repeatedly failing to move for additional evaluation of Sanders's competency." CA6 R.34-1, Order of the Court, at 3–4.

At this point, we again held Sanders's case in abeyance while he pursued a new claim in Kentucky state court arising from a recent Kentucky Supreme Court decision, which Sanders argued called into question the correctness of the state trial court's previous ruling denying his motion to reopen. Ultimately, the Kentucky Supreme Court rejected Sanders's request to reopen his case. *Sanders v. Commonwealth*, 2022 WL 3640912, at *4 (Ky. Aug. 18, 2022) ("*Sanders IV*").

Now back before us, Sanders argues in his supplemental briefing that § 2254(d) of AEDPA is unconstitutional. *See* 28 U.S.C. § 2254(d). Because the constitutionality of a federal statute was called into question, the United States exercised its statutory right to intervene as an independent party. *See* 28 U.S.C. § 2403(a). Thus, we are now presented with two general claims: (i) whether AEDPA is unconstitutional and (ii) whether Sanders's constitutional rights were violated during his state trial proceedings under AEDPA review.

II.

Sanders brings a habeas petition under § 2254(d) of AEDPA, which limits our ability to grant remedial relief to a state prisoner whose claims were previously adjudicated on the merits in the state court. *Reiner v. Woods*, 955 F.3d 549, 556 (6th Cir. 2020). Under AEDPA, we may only grant a writ of habeas corpus if the claim disputed in the underlying state court proceeding "(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.” 28 U.S.C. § 2254(d)(1), (2). The Supreme Court has regularly “reminded” courts that this test is “difficult to meet.” *White v. Woodall*, 572 U.S. 415, 419 (2014) (citation omitted).

Under § 2254(d)(1), or the “contrary to” clause, “a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). State prisoners must make two basic showings. *See Bergman v. Howard*, 54 F.4th 950, 957 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 2445 (2023). First, they must identify a “clearly established” principle of “Federal law” that the “Supreme Court” has pronounced. 28 U.S.C. § 2254(d)(1). This language allows prisoners to seek relief based on just one source: Supreme Court decisions. *Id.* Even more narrowly, prisoners must rely on the “holdings” of those decisions; the Court’s *dicta* does not clearly establish binding law. *Woodall*, 572 U.S. at 419 (citation omitted). Second, once a prisoner has identified a clearly established holding with specificity, the prisoner must show that a state court’s denial of relief was “contrary to” or an “unreasonable application” of this holding. 28 U.S.C. § 2254(d)(1); *Bergman*, 54 F.4th at 961. “A state decision cannot be ‘contrary to’ a Supreme Court holding unless it adopts a conflicting legal rule or reaches the opposite result in a case with materially identical facts.” *Fields v. Jordan*, 86 F.4th 218, 232 (6th Cir. 2023) (en banc) (citation omitted), *cert. denied*, *Fields v. Plappert*, 144 S. Ct. 2635 (2024).

Under § 2254(d)(2), or the “unreasonable application” clause, “a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the [petitioner’s] case.” *Williams v. Taylor*, 529 U.S. at 413. “[T]he state court’s factual findings are presumed correct unless rebutted by the habeas petitioner by clear and convincing evidence.” *Moore v. Mitchell*, 708 F.3d 760, 775 (6th Cir. 2013) (citation omitted). In short, federal habeas relief is available only if the state court’s decision was “objectively unreasonable.” *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *Joseph v. Coyle*, 469 F.3d 441, 468 (6th Cir. 2006). A federal court sitting in habeas review may not supersede a state court’s factual determination just because “[r]easonable minds reviewing the record might disagree about the finding in question.”

Brumfield v. Cain, 576 U.S. 305, 314 (2015) (citation omitted). In fact, under the “unreasonable determination of the facts” prong, the burden is higher than “clear error.” *Davis v. Ayala*, 576 U.S. 257, 271 (2015).

Under either clause, the petitioner must show that the state court’s ruling was “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Thus, the state court’s determination also cannot be unreasonable if “fairminded jurists” could disagree on the decision. *See id.* at 101. Section 2254(d) is a “purposefully demanding standard,” and it requires that state court determinations “be given the benefit of the doubt.” *Haight v. Jordan*, 59 F.4th 817, 831 (6th Cir. 2023) (quotations omitted), *cert. denied*, 144 S. Ct. 578 (2024). That is because habeas under AEDPA is not for ordinary error correction; it is a way for federal courts to police the edges of the Constitution and “guard against extreme malfunctions in the state criminal justice systems[.]” *Harrington*, 562 U.S. at 102. Ultimately, we are prohibited from issuing a remedy merely because we conclude in our independent judgment that the state court reached a mistaken, or even clearly erroneous, result. *Price v. Vincent*, 538 U.S. 634, 641 (2003); *Fields*, 86 F.4th at 232.

Because the district court did not conduct an evidentiary hearing and relied exclusively on the state court record in its habeas decision, we review both the district court’s legal and factual findings de novo. *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 460 (6th Cir. 2015).

III.

Before applying AEDPA, we must address its constitutionality. Sanders contends that the deference provision of AEDPA, *see* 28 U.S.C. § 2254(d), is unconstitutional for two distinctive, but overlapping reasons. First, Sanders argues that in eliminating “*Chevron* deference,” *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) also renders “AEDPA deference” unconstitutional. *See* 603 U.S. at 413. In particular, Sanders directs us to the concurrences of Justices Thomas and Gorsuch, which claim that *Chevron* deference violates our Constitution’s separation of powers. *See id.* at 413–16 (Thomas, J., concurring); *id.* at 416–48

(Gorsuch, J., concurring). Second, Sanders argues that even putting *Loper Bright* aside, AEDPA intrudes upon our Article III powers by forcing us to abdicate our constitutional responsibility to “say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177 (1803). We disagree and join every court that has addressed this issue and affirm the constitutionality of AEDPA.

A.

AEDPA deference is constitutional. The Supreme Court has dealt with AEDPA several times and has never cast doubt on its constitutionality. In *Williams v. Taylor*, the Supreme Court explicitly noted the constraints AEDPA places on the power of a federal habeas court, holding that “the writ may issue only if” the decision “was contrary to clearly established Federal law, as determined by the Supreme Court of the United States” or “involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.” 529 U.S. 362, 412 (2000) (citation modified) (citing § 2254(d)(1)). After saying so, the Supreme Court applied AEDPA—and has continued to do so for decades. Just a few years ago, the Supreme Court explicitly stated that “[w]hen Congress supplies a constitutionally valid rule of decision, federal courts must follow it. In AEDPA, Congress announced such a rule.” *Brown v. Davenport*, 596 U.S. 118, 127 (2022); *see also Renico v. Lett*, 559 U.S. 766, 769 (2010) (applying AEDPA deference and holding “that the Michigan Supreme Court’s application of federal law was not unreasonable” so no habeas relief was available).

The argument that AEDPA deference is unconstitutional has been rejected in every circuit to consider the question.³ Backing up our precedent are many cases in the district courts of our circuit upholding AEDPA deference.⁴ And the Constitution commands us “to construe

³For example, *Lindh v. Murphy*, 96 F.3d 856, 868–71 (7th Cir. 1996), *rev’d on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997); *Green v. French*, 143 F.3d 865, 874–75 (4th Cir. 1998); *Crater v. Galaza*, 491 F.3d 1119, 1121–29 (9th Cir. 2007); *Evans v. Thompson*, 518 F.3d 1, 12 (1st Cir. 2008); *Cobb v. Thaler*, 682 F.3d 364, 376–77 (5th Cir. 2012). The Tenth Circuit has also rejected the claim that AEDPA is unconstitutional in two unpublished opinions. *See Bonomelli v. Dinwiddie*, 399 F. App’x 384, 387 (10th Cir. 2010); *Olona v. Williams*, 13 F. App’x 745, 747 (10th Cir. 2001). We recently held that AEDPA deference was constitutional, albeit in an unpublished decision with minimal briefing. *Miles v. Floyd*, No. 24-1096, 2025 WL 902800 (6th Cir. Mar. 25, 2025).

⁴For example, *Bowling v. Parker*, 882 F. Supp. 2d 891, 899 (E.D. Ky. 2012); *Parrish v. Simpson*, No. 3:09-CV-254-H, 2010 WL 750204, at *2 (W.D. Ky. Feb. 26, 2010); *Byrd v. Trombley*, 580 F. Supp. 2d 542, 551 (E.D. Mich. 2008); *Dennis v. Mitchell*, 68 F. Supp. 2d 863, 875 (N.D. Ohio 1999), *aff’d on other grounds, Dennis v. Mitchell*, 354 F.3d 511 (6th Cir. 2003); *Norris v. Warden, NCI*, No. 2:08-cv-732, 2010 WL 883847, at *1–2 (S.D.

the law with ‘[c]lear heads . . . and honest hearts,’ not with an eye to policy preferences that ha[ve] not made it into the statute.” *Loper Bright*, 603 U.S. at 403–04 (quoting 1 Works of James Wilson 363 (J. Andrews ed. 1896) (first and second alterations in original)).

B.

“The writ of habeas corpus indisputably holds an honored position in our jurisprudence.” *Engle v. Isaac*, 456 U.S. 107, 126 (1982); *see also Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (“The writ of habeas corpus plays a vital role in protecting constitutional rights.”). But the scope of the writ of habeas corpus has been limited by Congress. The Supreme Court has “long recognized that ‘the power to award the writ by any of the courts of the United States, must be given by written law,’ and we have likewise recognized that judgments about the proper scope of the writ are ‘normally for Congress to make.’” *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *Bollman*, 8 U.S. at 94 and *Lochnar v. Thomas*, 517 U.S. 314, 323 (1996)) (citation omitted). Of course there are still *some* constraints. *See Boumediene v. Bush*, 553 U.S. 723, 745 (2008). Therefore, by no means should our opinion today be read to say that Congress has complete control over habeas. Like the Supreme Court, we acknowledge that in a few instances there may be limits.

We cannot ignore the Constitution’s longstanding history of allowing significant—but not plenary—limiting factors on habeas relief in our constitutional analysis. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015) (“In separation-of-powers cases this Court has often ‘put significant weight upon historical practice.’”) (citation omitted). It should not escape our attention that the ebb and flow—restrictions and extensions—of habeas can be conceptualized as both judicially created and congressionally created depending on which ebb and which flow we are examining. Here, we focus on Congress’s role in extending or restricting habeas, not the courts. In so doing, we see no indication that Congress has ever been

Ohio Mar. 9, 2010). And further still are mountains of caselaw in the district courts of the other circuits that have not yet ruled on this question, all adhering to the same analysis—too many to list in full. *See, e.g., McCoy v. Smith*, No. 17-2162, 2018 WL 3304343, at *4 (E.D. Pa. July 5, 2018); *Atkins v. Pringle*, No. 3:22-cv-110, 2023 WL 11996936, at *9 (D.N.D. Mar. 14, 2023); *Nelson v. Williams*, No. 20-cv-00757-CMA, 2021 WL 7161830, at *35 (D. Colo. Dec. 14, 2021); *Ingram v. Stewart*, No. 1:17-cv-01464-LSC, 2021 WL 1208867, at *7 (N.D. Ala. Mar. 31, 2021).

constitutionally *required* to extend habeas beyond AEDPA (although they are certainly allowed to).

C.

Against this backdrop, Sanders claims that the history of the Madisonian Compromise indicates that AEDPA cannot stand. In so doing, he misapplies the Madisonian Compromise, which, properly understood, provides significant support for the idea that Congress can regulate habeas with respect to jurisdiction and remedies. We draw three important principles from the Madisonian Compromise, and all three of them support AEDPA. One, the Constitution presumes state courts are competent to adjudicate federal constitutional rights. Two, Congress has broad powers to regulate the jurisdiction of inferior federal courts. Three, Congress has broad powers to regulate our ability to grant remedies.

1.

Underlying the Madisonian Compromise was an explicit understanding that state courts had a role in interpreting the federal Constitution. This was the understanding at the Founding: “When . . . we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.” The Federalist No. 82, at 403 (Alexander Hamilton) (Dover Thrift Edition 2014). And this is the understanding today: “[S]tate courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.” *Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990).

Sanders interjects and raises the specter of state courts acting inappropriately, citing Federalist No. 22 and the risk of “bias[ed] local views and prejudices.” The Federalist No. 22, at 105 (Alexander Hamilton) (Dover Thrift Edition 2014). There are a few things to note about this passage. First, it is included in the discussion of the Supreme Court of the United States, *not in that of inferior federal courts*. *Id.* at 105. Additionally, Hamilton’s example related to the interpretation of federal treaties, which could be subject to many different interpretations and local biases. The fear was that (as was a problem with the old Articles of Confederation, *see*

Smith v. Turner, 48 U.S. 283, 569 (1849); *Medellin v. Texas*, 552 U.S. 491, 543–44 (2008) (Breyer, J., dissenting)) there would be no uniform treaty interpretation. Without a single Supreme Court engaged in uniform interpretation, Hamilton rhetorically asked: “[i]s it possible that foreign nations can either respect or confide in such a government?” The Federalist No. 22 at 106 (Alexander Hamilton).

It is incorrect to view the federal writ of habeas corpus as a *constitutionally required* instrument by which the lower federal courts serve as courts of special review for every state court criminal judgment pursuant to adequate jurisdiction. Not only does such a view conflict with explicit Supreme Court precedent, but it also undermines our federalist system. Intervention under habeas is “an affront to the State and its citizens who returned a verdict of guilt after considering the evidence before them.” *Shinn v. Ramirez*, 596 U.S. 366, 390 (2022). To continue, an understanding of habeas unable to be regulated in any way by Congress does not accord with the purpose of habeas as articulated by our history or the Supreme Court; habeas relief is not intended for “ordinary error correction,” but to police the bounds of constitutionality—i.e., to ensure clear egregious constitutional violations do not stand. *Harrington*, 562 U.S. at 102 (citation omitted). Not to grapple with this conception of AEDPA is to upset the delicate federal system created by our Constitution and the Supreme Court. *See Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998). Congress’s decision in limiting habeas remedies serves the “well-settled meaning and function of habeas corpus in the federal system.” *Harrington*, 562 U.S. at 104. Sanders had three opportunities to petition the U.S. Supreme Court for direct review of his federal constitutional issues, and his petitions were denied each time. *See, e.g., Sanders*, 502 U.S. at 831; *Sanders*, 540 U.S. at 838; *Sanders*, 566 U.S. at 907. Congress is not constitutionally required to give him de novo review in the federal district court and this court of appeals on top of the de novo review he already received in the Supreme Court.

The Madisonian Compromise left the decision of the reach of federal courts to Congress, not to the judiciary and no matter how much we may desire the writ of habeas corpus to be unlimited, its scope is not solely within our control. And while Article III grants power to the federal courts, it also serves as a check on our power. *See Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 517 (D.C. Cir. 2018) (Edwards, J., concurring) (“Under Article

III, jurisdiction is limited both by the bounds of the ‘judicial power’ as articulated in Article III, § 2, and by the extent to which Congress has vested that power in the lower courts, *see* U.S. Const. art. III, § 1.”).

2.

Lastly, Congress can regulate a federal court’s ability to grant remedies. For example, the Supreme Court case of *Lauf v. E.G. Shinner & Co.* concerned a federal law under which no federal court “shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute[.]” 303 U.S. 323, 329 (1938). The Supreme Court held that this remedy-stripping provision of the law comported with Article III, specifically stating that “[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States . . . It follows that in issuing the injunction [the district court] exceeded its jurisdiction.” *Id.* at 330. So, we know that Congress can limit remedies.

Within habeas, even valid constitutional rules do not necessarily have retroactive effect. *Teague v. Lane*, 489 U.S. 288, 310 (1989). Relief can be restricted for successive habeas petitions. *McCleskey v. Zant*, 499 U.S. 467, 494–95 (1991). Habeas review can be limited for issues not fully preserved. *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 (1977). Thus, the proposition that habeas remedies for adjudged violations can be restricted is unsurprising and fairly uncontroversial. The Supreme Court has explicitly told us so. *See Felker*, 518 U.S. at 658 (upholding the constitutionality of habeas restrictions even “[t]hrough the Act impose[s] new conditions on our authority to grant relief[.]”); *see also Lonchar*, 517 U.S. at 322 (explicitly noting that restrictions on the writ of habeas corpus can be made by Congress).

AEDPA is a statute that limits relief and jurisdiction *except when* the underlying decision was contrary to Supreme Court precedent or involved an unreasonable application of its precedent. This represents a constitutionally sound and permissible policy decision taken by Congress that (1) adheres to the structure of Article III and (2) balances the importance of the finality of state judgments with Congress’s belief that federal courts should still police the

outward bounds. *Cf. Dretke v. Haley*, 541 U.S. 386, 393 (2004) (noting the importance of “States’ finality and comity interests” in dealing with habeas).

Sanders seems to misunderstand what federal courts do in AEDPA review. According to him, we are forced to take in the state court’s constitutional interpretation as our own. That is *not* true. We undertake our own legal analysis under AEDPA. Then we ask whether the Constitutional violation was so egregiously wrong that habeas relief is merited under AEDPA. If not, we exercise restraint. That end result—judicial restraint in the face of reasonable competing views—is not a subversion of the Constitution; instead, it upholds core constitutional principles: Congressional control over jurisdiction and remedies and leeway for state courts to analyze their own criminal law, *Shinn*, 596 U.S. at 390, particularly so if that is what Congress desires.⁵ Congress has the power to delineate our lines of habeas review. The existence of AEDPA deference is in the hands of Congress, not the judiciary.

D.

Next, Sanders points to *United States v. Klein* to argue that AEDPA violates our independent adjudicatory powers. 80 U.S. 128 (1871). But if anything, *Klein* and its progeny help further bolster our conclusion that AEDPA is constitutional. In *Robertson v. Seattle Audubon Society*, the Supreme Court held that *Klein*’s holding did not invalidate a Congressional law that targeted a specific case by name and substituted in new environmental standards to replace old ones. 503 U.S. 429, 434–35, 441 (1992).

Next came *Bank Markazi v. Peterson*, in which Congress passed a specific statute designating a particular set of assets owned by Iran at a New York bank that would be available to satisfy specific judgments for victims of terrorism sponsored by Iran. 578 U.S. 212 (2016). The Supreme Court read *Klein* narrowly and held that this statute was fine because Congress can

⁵In upholding AEDPA, the Seventh Circuit has said the following: “How much leeway does the “unreasonable application” language create? None on questions of interpretation. It does not authorize or permit state courts to deviate from the Constitution. Federal courts acting within their jurisdiction are always entitled to interpret the law independently. Section 2254(d)(1) as we read it does no more than regulate relief. It tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called ‘unreasonable.’ Historical practice [] likewise counseled restraint in use of the writ. Other rules limiting the remedy abound.” *Lindh*, 96 F.3d at 870.

direct courts to “apply a new legal standard to undisputed facts.” *Id.* at 230. One sees the comparison between AEDPA habeas relief and that “new legal standard” to “undisputed facts” immediately. AEDPA is merely Congress’s articulation of a “new legal standard” for habeas. Going further, the Supreme Court in *Bank Markazi* even noted that this “new legal standard” created by Congress could leave “only one possible outcome” to the case and still be permissible under *Klein* and the Constitution. *See id.* Thus, *Klein* and its progeny, if anything, support the constitutionality of AEDPA. Congress has the power to articulate new legal standards even if the articulation of these new legal standards changes the odds of victory. And Congressional grants of jurisdiction are a *prerequisite* to judicial power.

E.

The caselaw and the history show that AEDPA is constitutional. In response, Sanders contends that the Supreme Court’s holding in *Loper Bright* wipes the slate clean and eliminates all the aforementioned precedent and history. We disagree.

Loper Bright concerned an interpretation of the APA and did not hold that all sorts of deference are unconstitutional. *See* 603 U.S. at 398 (“*Chevron* defies the command of the APA that ‘the reviewing court’—not the agency whose action it reviews—is to ‘decide *all* relevant questions of law’ and ‘interpret . . . statutory provisions.’” (quoting 5 U.S.C. § 706) (alterations in original)). Moreover, AEDPA is a poor comparator for agency deference—AEDPA does not mandate deference to a state court’s constitutional determination; it just states that a court cannot grant habeas relief merely because its own independent interpretation differs.

The issue with *Chevron* deference was that it *mandated* the Court to accept an interpretation of the law that was not its own. *See id.* at 427–28, 430–31 (Gorsuch, J., concurring). AEDPA *does not* mandate that federal courts accept a state court’s federal constitutional interpretation as their own, it only prevents those federal courts from intervening when the state courts make reasonable decisions as opposed to *Chevron*, which forced a court to defer to an agency decision so long as it is reasonable before even being allowed to engage in its own independent statutory analysis. *See id.* at 397 (noting that so long as the agency’s interpretation of the statute is reasonable, the court “had to set aside the traditional interpretive

tools and defer to the agency”); *see also Chevron*, 467 U.S. at 840. With AEDPA, even if a circuit court decides a state court’s interpretation of the Constitution is “reasonable” that state supreme court’s interpretation will not be considered binding law in the circuit. For AEDPA to be unconstitutional, the law would have to state that if a state court’s interpretation of a federal constitutional right is reasonable, the federal court must adopt it as its own. But AEDPA does not say that.

The Supreme Court has repeatedly warned circuit courts against such behavior: “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). For these reasons, we join every other circuit to address this issue and reaffirm AEDPA’s constitutionality.⁶

IV.

Moving to the application of AEDPA, Sanders’s various claims can be consolidated into three issues: (1) the jury instructions incorrectly defined the burden of proof for insanity defenses and violated Sanders’s due process rights; (2) Sanders’s trial counsel was ineffective in failing to (a) obtain an adequate mental health expert; (b) present mental health testimony from a psychologist and guard who observed Sanders after his arrest; (c) investigate and present mitigating evidence about Sanders’s childhood abuse; (d) prepare for the penalty phase testimony; and (e) request more competency evaluations as Sanders’s health deteriorated; and (3) the cumulative prejudice of trial counsel’s ineffectiveness prejudiced him at trial. None of these arguments has merit.

A.

As discussed, Sanders’s insanity was his sole defense at trial. In giving its instructions to the jury, the trial court repeatedly reiterated that Sanders’s crime had to be proven “beyond a

⁶And we reiterate that our analysis is solely confined within habeas constituting collateral attacks on state court judgments. Our opinion does not speak to the Supreme Court’s direct review of state supreme court decisions on federal constitutional law. *See Martin v. Hunter’s Lessee*, 14 U.S. 304, 323 (1816).

reasonable doubt.” DE 166-4, Trial Tr., Page ID 3914–15. But in dealing with the insanity defense, the judge told the jury that the defense would be established if the jury “believe[d it had] from the evidence.” *Id.* 3914–17. While the words of the two jury instructions are different and create different standards, Sanders contends that they were improperly blended so as to imply that his insanity defense—like his criminal offenses—must be established beyond a reasonable doubt. Because of these ambiguous jury instructions, Sanders argues that his Fourteenth Amendment due process rights were violated, and that the Kentucky Supreme Court clearly erred in holding otherwise. We disagree.

1.

In Kentucky, while the prosecution must prove the crime beyond a reasonable doubt, the defendant’s insanity defense need only be proven by a preponderance of the evidence. *Ball v. Commonwealth*, 81 Ky. 662, 664 (1884). But Kentucky does not use the phrase “preponderance of the evidence” and instead prefers the phrase “[believe] from the evidence.” *Gall*, 607 S.W.2d at 110; *see, e.g., Hall v. Commonwealth*, 645 S.W.3d 383, 404 (Ky. 2022) (noting that a “believe from the evidence” instruction “appropriately incorporated the preponderance standard”). The question we must decide is whether this Kentucky rule, which was used to affirm the jury instructions that led to Sanders’s conviction, was unconstitutional as applied to Sanders and whether it was contrary to or involved an unreasonable application of clearly established federal law as articulated by the Supreme Court. *See* 28 U.S.C. § 2254(d)(1).

There is no due process requirement with respect to a state’s choice of a burden of proof for establishing an insanity defense. *See Leland v. Oregon*, 343 U.S. 790, 798–99 (1952). That decision is left up to the states. *See Engle v. Isaac*, 456 U.S. 107, 120 (1982). However, once the state has settled on the burden of proof, the defendant has a due-process interest in having the appropriate burden of proof applied. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

2.

The Kentucky Supreme Court’s ultimate disposition of Sanders’s claims regarding the jury instruction issue was short. In its entirety, the court reasoned as follows:

It is further submitted that the instructions failed to specify the burden of proof regarding the defense of insanity. The jury was instructed that it might find the defendant not guilty by reason of insanity if it believed “from the evidence” that he was insane at the time of the offenses. We find no error in this instruction.

Sanders I, 801 S.W.2d at 679 (citing *Gall*, 607 S.W.2d at 110).

A relevant and on-point case is *Boyde v. California*. 494 U.S. 370 (1990). There, the U.S. Supreme Court held that the proper inquiry when determining whether ambiguous jury instructions were unconstitutional is “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.” *Id.* at 380. With this case available (although not cited), the Kentucky Supreme Court held that the jury instructions were not erroneous. *Sanders I*, 801 S.W.2d at 679. To be sure, the court did not elaborate on its reasoning. Nonetheless, “[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits[.]”⁷ *Johnson v. Williams*, 568 U.S. 289, 301 (2013). And because the claim was adjudicated on the merits, AEDPA deference applies. *Robinson v. Howes*, 663 F.3d 819, 822–23 (6th Cir. 2011). Sanders fails to show that the Kentucky Supreme Court’s decision “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.” 28 U.S.C. § 2254(d)(1).

As the district court noted, fair-minded jurists can conclude that the jury instructions were not confusing in this instance. In our system of justice, we presume that jurors are fitted for their duty “by their natural intelligence and their practical knowledge[.]” *Aetna Life Ins. v. Ward*, 140 U.S. 76, 88 (1891). This is particularly true in criminal trials. *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985). The rule in Kentucky applies a similar presumption and thread of logic. The two standards of “beyond a reasonable doubt” and “believe from the evidence” are arguably materially different. Kentucky, trusting the natural abilities of its citizens—an undeniably fair choice—has crafted a rule that replaces “preponderance from the evidence” with “believe from the evidence.” In so doing, Kentucky made the reasonable decision that it would be

⁷Although a defendant can rebut that presumption subject to certain requirements, Sanders does not attempt to do so here. See *Johnson*, 568 U.S. at 301.

unnecessarily redundant to include the phrase “preponderance of.” *See also Pryor v. Rose*, 724 F.2d 525, 530 n.3 (6th Cir. 1984). Ultimately, the trial court accurately stated the law, and a defendant is not entitled to his specific choice of words. *United States v. Frederick*, 406 F.3d 754, 765 (6th Cir. 2005).

Thus, the question in applying *Boyde* and similar cases here is whether it is unreasonable for the Kentucky Supreme Court to conclude that the jury instructions, which had no conflict on their face and expressly conformed to its longstanding practice, prevented the jurors from considering constitutionally relevant evidence at Sanders’s guilt or mitigation proceedings. We hold that a fair-minded jurist could take the position that the jury instructions were constitutionally valid.

B.

We turn to Sanders’s claims of ineffective assistance of counsel. Under the Sixth Amendment, criminal defendants have a “right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation omitted). To establish a violation of this right, Sanders must prove two things. First, he must show that his counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed [to] the defendant by the Sixth Amendment.” *Id.* at 687. “Judicial scrutiny of counsel’s performance must be highly deferential.” *Id.* at 689. We must be careful to avoid needlessly second-guessing strategic decisions made by counsel on the ground. *Id.* Second, Sanders must show that his counsel’s deficient performance prejudiced his defense. *Id.* at 687.

In confronting most of Sanders’s *Strickland* claims, we apply AEDPA review. Even without AEDPA, we are already “highly deferential” to the performance of the underlying counsel. *Id.* at 689. Habeas review, itself highly deferential, adds another layer of deference. So our review of Sanders’s ineffective assistance of counsel habeas claims under AEDPA must be “doubly deferential.” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). Thus, “it is no longer enough for [Sanders] to show that his attorney made a decision that no reasonable lawyer would have made. He now must show that ‘every fairminded jurist would agree that every reasonable

lawyer would have made a different decision.’’ *Fields*, 86 F.4th at 240 (quoting *Dunn v. Reeves*, 594 U.S. 731, 739–40 (2021)) (citation modified).

Sanders makes five ineffective assistance of counsel claims. He asserts that Charters failed to (1) obtain an adequate mental health expert; (2) present mental health testimony from a psychologist and guard who observed him after his arrest; (3) investigate and present mitigating evidence about his childhood abuse; (4) prepare for the penalty phase testimony; and (5) request additional competency evaluations as his health deteriorated. We ultimately find that the Kentucky Supreme Court did not contravene clearly established federal law in rejecting ineffective assistance of counsel arguments in claims one, three, and four. As to claim two, while the Kentucky Supreme Court may have contravened clearly established law in its analysis, we need not address that issue as Sanders’s claim would still fail under de novo review because he cannot show prejudice. And although the Kentucky Supreme Court did not reach claim five, he also fails to show prejudice under de novo review. We address each claim in turn.

1.

When insanity is a defense, a mental health expert must be provided to an indigent defendant.⁸ *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). We give trial counsel broad discretion in selecting a mental health expert and determining how much time to dedicate to the expert’s preparation. *See Dunn*, 594 U.S. at 739. This is because we recognize that there are many ways to try a case and counsel may sometimes choose to prioritize resources differently depending on the specifics of a given case. *See Harrington*, 562 U.S. at 106; *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003). Ultimately, “counsel [is] entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.” *Harrington*, 562 U.S. at 107 (citation modified). Sanders’s first claim—failure to obtain an adequate mental health expert—has two parts. The first part concerns Charters’s failure to interview or retain Flenning. The second part concerns Charters’s failure to adequately prepare Cooke for his testimony.

⁸Note, however, that Sanders is not an indigent defendant.

a.

As a reminder, Sanders was evaluated for one and a half months by Walker and her team, who concluded that Sanders suffered from no mental defect that would prevent him from being responsible for the murders. Unbeknownst to Sanders or his counsel, one of the members of Walker's team—Flenning—produced a personal sub-report that was more sympathetic to Sanders's insanity defense. Flenning concluded that the evidence showed that Sanders suffered from a mental deficiency. Sanders argued to the Kentucky Supreme Court in *Sanders II* that Charters's failure to interview and retain Flenning constituted ineffective assistance of counsel. 89 S.W.3d at 385–86. The Kentucky Supreme Court disagreed, noting that Charters had access to the full report and there may have been reasons he did not pursue the leads in Walker's report because the “report did not support the defense of insanity and could actually damage Sanders[.]” *Id.* And relatedly, the Kentucky Supreme Court held that there was likely no prejudice because the Flenning report would have been likely used by the prosecution to convincingly argue to the jury that Sanders changed his story depending on who he was talking to, as stated in the Walker report.

Under the “doubly deferential” standard, *Knowles*, 556 U.S. at 123, under which we evaluate AEDPA *Strickland* claims, we cannot ignore the Kentucky Supreme Court's legal reasoning on this issue. The Walker report gave Charters no indication that any evidence existed that might contradict it. If anything, the report's use of the pronoun “we” in setting out its conclusion would indicate to a reasonable attorney that further digging into the members of Walker's team would only lead to more information that would be *prejudicial* and not helpful to Sanders's defense. In hindsight, Charters may have been mistaken not to inquire further into any potential disagreement among team members. “But hindsight bias is the very thing that *Strickland*'s deferential standard counsels against[.]” *Hale v. Cool*, 122 F.4th 637, 649 (6th Cir. 2024). An attorney in Charters's position had limited time and resources and was presented with a report that, by all indications, was prejudicial to his client. Rather than interviewing individual team members, Charters opted to retain a counter-expert. We do not believe that *every* fairminded jurist would agree that *no reasonable lawyer* would have done something differently. For that reason, we deny habeas relief on this claim. *See Fields*, 86 F.4th at 240.

b.

Ultimately, rather than pursue the Walker report, Charters opted to retain Cooke, who offered to provide his services pro bono. Cooke evaluated Sanders only a little over a week before trial and only for around two and a half hours. Based on the information obtained from this short examination, Cooke testified during trial that Sanders could not control his actions. The contrast between Cooke's short, cursory evaluation and Walker's long, multi-member evaluation was highlighted by the prosecution and likely significantly hurt Cooke's credibility with the jury.

According to Sanders, Charters's extremely limited preparation constituted ineffective assistance of counsel. The Kentucky Supreme Court disagreed. *See Sanders II*, 89 S.W.2d at 387–88. The court noted that Cooke's testimony had the intended effect: Cooke reduced the negative impact of the Walker report by disagreeing with it. *Id.* at 387. Analyzing the U.S. Supreme Court case of *Ake v. Oklahoma*, the Kentucky Supreme Court noted that Sanders was merely entitled to a state-provided psychiatrist, not to multiple examinations merely because he did not like the results of the state-provided psychiatrist. *Id.* at 387–88. Ultimately, Cooke testified that, in his opinion, Sanders could not control his actions, and that his work—along with Walker's comprehensive team—satisfied Sanders's right to have access to qualified mental health experts. *Id.*

In *Ake*, the U.S. Supreme Court was presented with the question “whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question.” 470 U.S. at 70. The Court answered that a psychiatrist must be provided. *Id.* at 80. In particular, “the State must, at a minimum, assure the [indigent] defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.” *Id.* at 83; *see also McWilliams v. Dunn*, 582 U.S. 183, 198 (2017).

From the outset, Sanders was not an indigent defendant, thus making it unclear if *Ake*'s command applies here. *See* 470 U.S. at 83; *see also Durr v. Mitchell*, 487 F.3d 423, 433 (6th

Cir. 2007) (stating *Ake*'s holding as applying to indigent defendants). We need not decide *Ake*'s reach, however, as Sanders's claim can be resolved even if *Ake* applies. Cooke was a licensed psychologist with extensive educational and clinical experience. He testified in Sanders's defense, using his expert knowledge to conclude that Sanders was not responsible for his actions.

Given the significance of the proceedings against Sanders, it is understandable that he would believe that if Cooke had spent more time on his case, the result might have been more favorable to him. But Cooke was apparently given enough time to come to a clear conclusion. Considering our doubly deferential standard of review under AEDPA and *Strickland*, we cannot conclude that every fair-minded jurist would conclude that every reasonable lawyer would have acted differently from Charters. Therefore, we cannot grant habeas relief on Sanders's habeas claim that Charters was constitutionally defective in his preparation of Cooke.

c.

Sanders further draws our attention to *Rogers v. Dzurenda*, 25 F.4th 117 (9th Cir. 2022). In *Rogers*, the Ninth Circuit was *not* reviewing Rogers's *Strickland* claim under AEDPA. Instead, it was reviewing his *Strickland* claim de novo. See *Rogers*, 25 F.4th at 1181 ("On appeal, the State does not challenge the district court's decision not to apply AEDPA deference to the state court's adjudication of Rogers's ineffective assistance of counsel claim. Because the ineffective assistance of counsel claim before the district court was never adjudicated on the merits by the Supreme Court of Nevada, we review Rogers's [*Strickland* claim] de novo." (footnote omitted)). From our perspective, this greatly affects the relevance of *Rogers* to Sanders as AEDPA deference is among the narrowest forms of review compared with de novo—the most lenient. See *Burt v. Titlow*, 571 U.S. 12, 19 (2013) ("AEDPA erects a formidable barrier to federal habeas relief[.]"). Thus, we are not persuaded by *Rogers*.

2.

Second, we address Sanders's ineffective assistance of counsel claim arising from Charters's failure to present testimony from the jail psychologist and two prison guards regarding Sanders's behavior after his arrest. When Sanders was initially arrested, the jail psychologist wrote a letter to the trial judge requesting that Sanders be taken to a psychiatric

hospital because he was showing signs that he could be suicidal. According to Sanders, three witnesses during his time in his initial jail cell could have testified to his disturbed mental state. The deputy jailers could have testified that Sanders was in tears and banging his head against the wall and that the jail psychologist, Moffit, could have testified that Sanders was suffering from major psychological problems. Charters did not follow up, and Sanders alleges that such actions constituted ineffective assistance of counsel. The Kentucky Supreme Court disagreed, reasoning that this evidence was needlessly cumulative given that Sanders had testified to his mental state and that counsel's decision not to present cumulative testimony was not ineffective assistance of counsel. *See Sanders II*, 89 S.W.3d at 391.

Even if the Kentucky Supreme Court erred on this point, Sanders's claim still fails under *de novo* review because he has not provided any evidence of what the two jailers or psychologists would have said and thus, cannot prove prejudice under *Strickland*. To establish prejudice, a defendant must introduce evidence establishing what would have been said (such as an affidavit). *See Tinsley v. Million*, 399 F.3d 796, 810 (6th Cir. 2005). This is the defendant's burden. *See Hale*, 122 F.4th at 646. Sanders claims there is evidence in the form of a video recording of his behavior immediately after his arrest. But it is still unclear whether the jailers saw the contents of this videotape. The question is not what happened, but what the jailers' testimony would be. Without this evidence, Sanders fails to satisfy his burden.

Sanders's allegations regarding Moffit are supported by *some* evidence. There is the February 3, 1987, letter Moffit wrote asking that Sanders be placed in psychiatric care. There is also a February 4, 1987, notarized letter reiterating concerns raised in the prior letter and noting that Sanders might be dissociative. However, while this is some evidence, Sanders still fails to show how it would have affected the proceedings' outcome. Sanders claims that calling Moffit would have strengthened Cooke's testimony and his diminished capacity defense, but the letter makes no such assertions. Instead, the letter merely states that Moffit had reason to believe that Sanders suffered from mental deficiency; the letter does *not* suggest that Moffit would have supported Sanders had he testified. Because we do not know, Sanders has not satisfied his burden. *See Baze v. Parker*, 371 F.3d 310, 322 (6th Cir. 2004).

Nor was Charter's failure to use Moffit as an expert witness ineffective assistance of counsel. Moffit's letters merely recommend that Sanders be examined for mental deficiencies. The letters do not represent a diagnosis—just an initial concern. Charters chose instead to use his own independent expert, given his limited resources. *See Clardy v. Pounds*, 126 F.4th 1201, 1210 (6th Cir. 2025) (noting the latitude we give counsel in how they secure expert witnesses with limited resources); *see also Mammone v. Jenkins*, 49 F.4th 1026, 1052 (6th Cir. 2022) (“[S]electing an expert is the classic example of a strategic choice made by counsel.”). In sum, even putting aside AEDPA deference, Sanders still cannot show that failure to introduce corroborating testimony from the two jailers or psychologist prejudiced him or that Charters's decision not to use Moffit as a witness was ineffective assistance of counsel.

3.

During the penalty phase of his trial, Sanders's employer, neighbor, assistant principal of his high school, and his sister testified. Sanders himself also testified. He claims that had Charters engaged in any real preparation as required under *Strickland*, he would have interviewed his family and friends and discovered an abundance of additional mitigating evidence. In so doing, Sanders asks us to consider evidence not in the state court record. We are barred from doing so and find that the Kentucky Supreme Court's decision on this issue cannot be disturbed under AEDPA.

a.

The Kentucky Supreme Court rejected Sanders's claim on what, at first blush, appeared to be procedural grounds. *See Sanders II*, 89 S.W.3d at 390–91. The court noted that Sanders failed to offer the content of any testimony from the additional witnesses and thus failed under Kentucky state procedural rules. *See id.* at 390⁹). But then the Kentucky Supreme Court went on to discuss *Strickland* and held that Charter's decision not to call these additional witnesses could have been a strategic one that should not be second-guessed. *See id.* at 390. The district

⁹The procedural rule refers to Ky. Rule of Crim. Pro. 11.42(2), which states that “[t]he motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.”

court initially held that this was a procedural decision by the Kentucky Supreme Court that relied exclusively on state procedural law and that Sanders failed to attach any affidavits to show why the state court's procedural bar should be ignored. Therefore, the district court dismissed Sanders's habeas claim because the question of his procedural default was an independent decision that could support the state judgment. *See Lovins v. Parker*, 712 F.3d 283, 295–96 (6th Cir. 2013) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)).

But after reflecting on its decision, the district court sua sponte ordered both parties to brief the issue. Both parties agreed that the Kentucky Supreme Court's decision was on the merits. Therefore, the district court re-analyzed its decision regarding the mitigation evidence under AEDPA deference and, after applying AEDPA, held that the state court's application of *Strickland* did not overcome AEDPA deference.

Generally, a federal habeas court is precluded from hearing claims that were “procedurally defaulted” on state procedural grounds. *Shinn*, 596 U.S. at 371. But procedural default can be overcome if the prisoner can “demonstrate ‘cause’ to excuse the procedural defect and ‘actual prejudice’ if the federal court were to decline to hear his claim.” *Id.* (citation omitted). In so doing, “[o]ften a prisoner with a defaulted claim will ask a federal habeas court not only to consider his claim but also to permit him to introduce new evidence to support it.” *Id.* But under AEDPA, we are prohibited from expanding the factual record developed in the state court. *Id.*; *see Frazier v. Huffman*, 343 F.3d 780, 797 (6th Cir. 2003); *see also* 28 U.S.C. § 2254(e)(2). That is unless the petitioner’s “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 this new fact must “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.” 28 U.S.C. § 2254(e)(2)(A)–(B); *see also Shinn*, 596 U.S. at 371.

Under procedural default, in determining whether an exception applies, a federal court considers what new evidence *would* be presented. So, before the district court ordered more briefing on whether the Kentucky Supreme Court's decision was on the merits, it also slightly

changed its position on the procedural default issue and allowed Sanders to file various affidavits so it could decide whether there was an exception to procedural default. As a result, before the district court decided that the Kentucky Supreme Court decision was on the merits, Sanders filed six affidavits.¹⁰

These affidavits were not before the Kentucky Supreme Court. They *could* be relevant if we were considering procedural default. The district court initially analyzed the Kentucky Supreme Court's analysis on mitigation evidence and held that the claim was procedurally defaulted, and Sanders did not present sufficient affidavits to overcome procedural default. The district court then changed its mind on the affidavits and allowed Sanders to submit new affidavits to consider whether this new evidence could be looked at by the habeas court. But then the district court had second thoughts about whether this was even a procedural default case and asked for further briefing. After briefing, the district court reversed itself and held that the Kentucky Supreme Court's decision was on the merits.

b.

Because the Kentucky Supreme Court's decision was on the merits, we cannot consider the new affidavits. But even if it were not, these new affidavits cannot overcome the barrier from *Shinn*. The district court correctly held that the Kentucky Supreme Court's decision on Sanders's *Strickland* claim was a merits analysis.

When a state court is presented with a federal claim, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington*, 562 U.S. at 99. To overcome this presumption the state court must "clearly and expressly" state in its decision that the judgment is because of a state procedural bar. *Harris v. Reed*, 489 U.S. 255, 263 (1989) (quotation omitted). But the court analyzed Sanders's claim under *Strickland* without any indication that his claim could solely be decided on state procedural grounds. *See Sanders II*, 89 S.W.3d at 390. Given the presumption

¹⁰These affidavits are from people who did not testify at Sanders' penalty phase. In order, they are from his aunt, his sister, his younger brother, his older brother, his neighbor, and his maternal cousin.

that the state court decided the merits unless it states otherwise, the Kentucky Supreme Court decided Sanders's *Strickland* claim on the merits.

c.

Sanders suggests that we should consider these six affidavits in our analysis, regardless of whether the ineffective assistance of counsel claim was a merits or procedural decision, because his new evidence is so substantial that it has created a “new” claim not yet adjudicated by the Kentucky Supreme Court.

Sanders lost in the Kentucky Supreme Court, in part, because there was insufficient evidence in the Kentucky 11.42 motion at the trial level. *See Sanders II*, 89 S.W.3d at 390. If that is true, according to Sanders, then the new affidavits so changed the facts that a new claim before the federal district court is created under habeas and there is no AEDPA deference to apply. Essentially, Sanders's claim is a *new* one not considered by the Kentucky Supreme Court, which had an incomplete record. Therefore, we need not apply AEDPA deference as the principles of “comity, finality, and federalism” are not implicated. *See Gordon v. Braxton*, 780 F.3d 196, 202 (4th Cir. 2015) (quotation omitted). Alternatively, Sanders asserts that he is bringing a separate ineffective assistance of counsel claim based on evidence not raised in the prior ineffective assistance of counsel claim because of that prior post-conviction counsel's incompetence. Because this separate collateral attack is a habeas claim *not* attacking a state supreme court's decision on the merits, AEDPA deference does not apply.

To further clarify, a state prisoner challenging the merits of a state court's constitutional decision cannot rely on new evidence to assess the state court's claim under AEDPA.¹¹ *Upshaw v. Stephenson*, 97 F.4th 365, 372 (6th Cir. 2024). Therefore, we cannot consider these affidavits to challenge the Kentucky Supreme Court's merits decision. Sanders argues that if the Kentucky Supreme Court's decision was on the merits with respect to the evidence before it, then the new evidence in federal court substantially improved his *Strickland* allegations to create a new claim.

¹¹This is different from a procedural default, where new evidence can be considered subject to a few exceptions. *See Shinn*, 596 U.S. at 371.

Thus, Sanders argues, because his claim was not technically considered on the merits in the state courts, AEDPA deference does not apply.

There are two problems with this. First, “AEDPA requires habeas petitioners to exhaust their claims in state court before turning to a federal court for relief.” *Stermer v. Warren*, 959 F.3d 704, 720 (6th Cir. 2020). Therefore, if it is true that the new evidence has transformed Sanders’s ineffective assistance of counsel claim on mitigation into a new claim, then Sanders has failed to exhaust that new habeas claim anyway. Thus, his claim is now procedurally defaulted. *See Shinn*, 596 U.S. at 371.

Second, Sanders’s new evidence does not fundamentally alter his ineffective assistance of counsel claim. New evidence does not transform a claim into a new one just by strengthening the thrust of the original argument. *See Franklin v. Jenkins*, 839 F.3d 465, 474 (6th Cir. 2016). “Simply put, for purposes of AEDPA, ‘[n]ew evidence does not usually give rise to a new claim; it merely provides additional proof of a claim already adjudicated on the merits.’” *Id.* at 474–75 (citation modified). But here, the “new” evidence is simply more evidence for the same ineffective assistance of counsel claim he already brought to the Kentucky Supreme Court—that Charters failed to do appropriate research and obtain mitigating testimony. For these two reasons, there is no “new” habeas claim outside the scope of AEDPA.

d.

Having established that we cannot consider these six affidavits, we now analyze Sanders’s ineffective assistance of counsel claim that Charters did not develop appropriate mitigation evidence, based solely on evidence from the state record and through the doubly deferential lens of AEDPA and *Strickland*.

i.

There are three reports to consider on this issue. The first is Walker’s KCPC report. The report notes Sanders’s inconsistent statements. At times, Sanders described his life as very good; other times, he said otherwise particularly with respect to his childhood. To Flenning, Sanders said he was forced to work at age four and did not get to play with other children. Sanders also

described conflict with his parents. He said they beat him with a “tobacco stick” or “barbed wire.” DE 165-4, Walker Rep., Page ID 2823. Sanders also said his father was a “heavy drinker” and that he had been charged in the recent past with “Assault 3rd degree and several other charges.” *Id.* at 2824. From this, the report ultimately concluded that Sanders may have suffered some degree of abuse as a child. This report was available to Charters at the time of the trial.

The second report was produced by Dr. Roger H. Fisher in 1994, during state post-conviction proceedings. Fisher, along with a few other experts, had evaluated Sanders in another case. Fisher illuminates Sanders’s background even more. Fisher notes that, according to Sanders, his father essentially used him and his siblings as a captive work force while he was drinking. Sanders’s father hit him constantly—often when he was drunk, but also sometimes when Sanders did not complete a job in the way his father wanted. The third report is the Flenning report. Flenning reiterates Sanders’s abusive childhood. The report also states that Sanders’s mother abused him as well. Essentially, Sanders grew up alienated from his family and spoke only to his dog and himself.

ii.

Before Sanders’s trial and penalty phase, Charters had access to the Walker report that indicated the potential of abuse. Charters did not investigate further or use this evidence at the mitigation phase of the trial. The Kentucky Supreme Court applied *Strickland* and found that this did not constitute ineffective assistance of counsel. *See Sanders II*, 89 S.W.3d at 390–91. Sanders cites several Supreme Court cases concerning the duty to conduct thorough investigations of the evidence to argue that the Kentucky Supreme Court’s holding contradicted clearly established law. But most of these were decided after *Sanders II* and therefore, cannot be used to show that the Kentucky Supreme Court’s decision was contrary to clearly established federal law. *See Stewart v. Wolfenbarger*, 468 F.3d 338, 346 (6th Cir. 2006). Only one—*Williams v. Taylor*—was decided before *Sanders II*. 529 U.S. at 362 (plurality opinion). In *Williams*, the Supreme Court held that counsel was ineffective under *Strickland* when counsel “failed to introduce available evidence” that the defendant had a horrible upbringing, was intellectually disabled, and was non-violent in prison. *Id.* at 396.

Williams also elaborated on the proper standards for evaluating claims under AEDPA. First, interpreting the “the contrary to” prong of AEDPA, the Supreme Court held that a state court decision conflicts with clearly established law if it applies a rule that contradicts the governing law in a previous decision. 28 U.S.C. § 2254(d)(1); *see* 29 U.S. at 405 (plurality opinion). Or it is contrary if it applies the correct law to “materially indistinguishable” facts from a prior Supreme Court decision but arrives at a contrary result. *Id.* at 406. However, *Williams* notes that a state court decision that identifies the correct *Strickland* rule and applies it to reject the prisoner’s claim is not “diametrically different,” or “opposite in character or nature,” or “mutually opposed” to *Strickland*. *Id.*

Second, interpreting the “unreasonable application” prong, *Williams* concluded that a state court’s decision is contrary to federal law when it identifies the correct legal principle but unreasonably applies it to the facts. 28 U.S.C. § 2254(d)(1); *see Williams*, 529 U.S. at 413. It was not until 2011 that the Supreme Court established the rule that federal habeas relief is precluded so long as “fairminded jurists could disagree” on whether the law was unreasonably applied.¹² *See Harrington* 562 U.S. at 101 (quotation omitted).

Per *Williams*, a state court decision can also conflict with federal law if it reaches a different conclusion despite confronting “materially indistinguishable facts” from a prior Supreme Court decision. *See* 529 U.S. at 405. In *Williams*, the Virginia Supreme Court erred in misreading *Strickland* as being supplemented by *Lockhart v. Fretwell*, 506 U.S. 364 (1993) to require a separate inquiry into fundamental fairness even *after* a *Strickland* claim is satisfied. *See Williams*, 529 U.S. at 393 (plurality opinion). By contrast, the Kentucky Supreme Court did not misapply *Strickland* here. The Virginia Supreme Court also had access to a wealth of mitigating evidence that should have been presented. *Id.* at 370. Here, the mitigation evidence consisted of just three reports—one of which Charters could not have known existed; another created after the conviction; and the third potentially prejudicial to his own client. And all three

¹²Part II of Justice Stevens’s opinion in *Williams* rejects that idea stating that a decision can be unreasonable even if jurists disagree. *See* 529 U.S. at 377. But that part of the decision was not joined by Justices Kennedy and O’Connor, so it constituted only a plurality. *See id.* at 367. Instead, Justice O’Connor’s concurrence became the majority opinion on the unreasonable interpretation prong. *Id.* at 399. Justice O’Connor noted the difficulty in defining that term and narrowly held that a decision can be incorrect but not unreasonable. *Id.* at 411.

contain second-hand reports of Sanders's abuse with no verification in the state court record. *Cf. Mitchell v. The Hartford*, No. 3:05CV-432-H, 2006 WL 1548956, at *5 (W.D. Ky. June 2, 2006) ("These statements are second hand and completely unverified.") There are no direct reports in the record now before us. Accordingly, we cannot grant habeas relief for Charters's failure to offer more mitigation evidence at the penalty stage of Sanders's trial.

4.

Sanders next argues that Charters rendered ineffective assistance of counsel because he failed to appropriately advise and prepare him for his penalty phase testimony. The Kentucky Supreme Court rejected this claim because Sanders presented nothing but speculation as to why he was inadequately prepared to testify. *See Sanders II*, 89 S.W.3d at 391. The district court denied Sanders's habeas petition because he failed to show prejudice under *Strickland* and the Supreme Court of Kentucky reasonably denied him relief. We agree.

After Sanders's conviction, there was little time to prepare for the penalty stage. In fact, the first thing the state trial court said after Sanders's conviction was, "I didn't have any idea we would get to this stage this quickly." DE 166-4, Trial Tr., Page ID 3956. Because Charters was unprepared to begin the penalty phase testimony, he asked the court to recess that day (Friday) so he could prepare over the weekend. The trial court hesitated, and Charters stated that he already "put on what would normally be the mitigation stuff," but just wanted to check with a few family members if they wanted to testify about the personal effects the death penalty would have on them. *Id.* 3958. In response, the trial court told Charters that this type of mitigation is likely inadmissible. After a brief recess, Charters reiterated that he wanted the court recessed until Monday and that he could bring in several people from the community who knew Sanders growing up to testify about his childhood. The court obliged.

On Monday, Charters presented four witnesses in Sanders's defense (his employer, neighbor, assistant principal of his high school, and sister). The entire questioning took less than 20 minutes. Because Sanders had not testified, the court wanted the record to reflect that he knew he had the right to testify but did not want to. So, the trial court conducted a colloquy, reminding Sanders of his rights. The court then asked Sanders whether he wanted to testify, to

which he responded, “I don’t know.” DE 166-5, Trial Tr., Page ID 3978. The court then recessed so Sanders and Charters could discuss whether Sanders would testify. After four minutes, the court readjusted, and Sanders testified.

Sanders’s testimony on the stand was scattered. He testified that he was not guilty of the crimes and that his mental health professionals failed to help him. Charters asked Sanders if he would cooperate with mental health professionals if offered treatment, but Sanders equivocated and insisted he had already cooperated. Sanders ended his testimony stating, “I just – I just don’t understand what happened to me. Those people at KCPC told me I might not ever understand what happened. I asked those people to help me, and they didn’t have time. They had a lot of people there, more people coming in all the time, and they didn’t have time to talk to me.” DE 166-5, Trial Tr. Page ID 3982–83.

The prosecution seized on Sanders’s testimony at closing. It noted that Sanders continued to blame others. The prosecution also stated that Sanders did not say he would cooperate with future treatments and asked the jury, “[d]oesn’t that scare you[?]” *Id.* 3991. The prosecution also pointed out that Sanders never once expressed any remorse for his crime: “No remorse at all. He told you today he might be a little bit guilty, but he was mostly not guilty, much of him was not guilty. How scar[y] is that, to know that that man would be allowed to live?” *Id.* 3997.

Sanders argues that Charters’s preparation fell short under the *Strickland* standard and that it prejudiced him. The Kentucky Supreme Court disagreed, holding that Sanders presented nothing but speculation that he was not fully informed of his rights and had not been adequately prepared to testify. *See Sanders II*, 89 S.W.3d at 391. *Strickland* has two prongs: (1) ineffective assistance of counsel and (2) prejudice, which Sanders must satisfy. *See* 466 U.S. at 687. In Sanders’s postconviction proceedings, the Kentucky Supreme Court reasonably concluded that Sanders had failed to indicate what Charters should have done and what would have been different. *See Sanders II*, 89 S.W.3d at 391.

The same holds true today. Sanders presents no evidence about what would have gone differently had Charters served as adequate counsel.¹³ *Contra Rogers v. Mays*, 69 F.4th 381, 390 (6th Cir. 2023) (to show *Strickland* prejudice the petitioner must “show a reasonable probability that the trial would have gone differently but for counsel’s errors”). Instead, Sanders only theorizes as to what would have gone differently, such as he would have shown more remorse during his testimony or would not have testified at all, which presumably would have made the jury not recommend the death penalty. But this only leaves us “with pure speculation on whether the outcome of the trial or the penalty phase could have been any different, [which is] an insufficient basis for a successful claim of prejudice.” *Baze*, 371 F.3d at 322. This is not to say that a defendant can *never* show prejudice when his counsel fails to prepare him to testify, and he then testifies. We conclude only that the Kentucky Supreme Court’s conclusion that Sanders did not show prejudice based on the record before it, which included overwhelming aggravating evidence against Sanders, was reasonable and not contrary to federal law. Accordingly, we cannot grant Sanders habeas relief on this claim.

5.

Sanders argues that Charters’s failure to call for a second competency evaluation for Sanders constituted a *Strickland* violation. Although we review this claim de novo, and not under AEDPA, we disagree.

After confessing to the crime and being arrested, Sanders began displaying signs of mental incompetence. This led Charters to move to commit Sanders to a state institution and have his mental health evaluated. The Kentucky state court granted the motion and ordered Sanders moved to KCPC. There, after one and half months of study, Walker produced her report finding Sanders competent. Despite being found competent, Charters continued to have concerns. At the beginning of Sanders’s trial, Charters asked the judge if he could get a doctor visit for Sanders, stating that Sanders had “gone two nights now unable to sleep and he’s – I’m losing him. I’m losing his attention. He can’t concentrate.” DE 166-2, Trial Tr., Page ID 3725. The state court permitted Charters to make “arrangements” with the jail, but Charters did not

¹³Inadequate preparation, by itself, does not show prejudice. *See Wise v. Bowersox*, 136 F.3d 1197, 1207 (8th Cir. 1998).

request a new competency evaluation. After Sanders was found guilty, Charters told the court that Sanders was physically unable to testify that day, although after the weekend Sanders could testify.

After the jury's recommendation of death, the state court asked Charters and Sanders whether there was any reason that it should not impose judgment at that time. In response Charters stated: "I do not believe that Mr. Sanders is competent at this stage of the proceedings. I don't believe that he understands the nature of what is happening right now. I think he understands what you are doing, but he does not understand why. And I question whether he has the ability to go through this stage." DE 166-6, Trial Tr., Page ID 4007. So, the trial court conducted its own colloquy and asked Sanders whether he understood what was happening. Sanders said that he did, but that he did not "understand how it's come this far." *Id.* 4008. The trial court continued, asking Sanders if he understood that he had been found guilty of the crimes of murder and robbery and that it was the state court's job to sentence him. Sanders said that he understood. Satisfied, the court found him competent.

In *Sanders I*, the Kentucky Supreme Court held that, under these facts, the trial court "was not required to order a competency hearing pursuant to RCr 8.06." 801 S.W.2d at 682 (citing Ky. Rule. Crim. Pro. 8.06)). In *Sanders II*, the Kentucky Supreme Court held that because Sanders had already brought his claim that Charters should have requested another competency evaluation in *Sanders I*, Sanders could not re-raise it. *See* 89 S.W.3d at 391. In so doing, the Kentucky Supreme Court misread *Sanders I*, which concerned the *trial court's* independent responsibility to order another competency evaluation; in *Sanders II*, Sanders brought a separate claim that *Charters* should have requested one. Therefore, the Kentucky Supreme Court in *Sanders II* did not reach the merits on this issue and AEDPA does not apply, and we review Sanders's *Strickland* claim de novo.

Constitutionally, trying an incompetent defendant violates due process. *See Godinez v. Moran*, 509 U.S. 389, 396 (1993). . The test is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding[s] of the proceedings against him." *Drope v. Missouri*, 420 U.S. 162, 170 n.7 (1975) (quotation omitted). Otherwise, someone who

became “‘mad’ after the commission of an offense . . . should not be tried, ‘for how can he make his defense?’” *Id.* at 171 (quoting 4 W. Blackstone Commentaries, *24)). Charter’s failure to seek another competency hearing is governed by *Strickland*. Thus, Sanders must show both deficient performance and prejudice. *See United States v. Dubrule*, 822 F.3d 866, 881 (6th Cir. 2016). To demonstrate prejudice, Sanders must show that if Charters had sought a new competency hearing, there is a reasonable probability that the outcome of the proceeding would have been different. *Id.* at 881–82.

We agree with the district court’s finding that Sanders has failed to establish a reasonable probability that he would have obtained a second competency hearing if Charters requested one. Sanders had already received a comprehensive, six-week evaluation before trial. From this evaluation, he was found competent to stand trial. “There is no right to a continual succession of competency hearings in the absence of some new factor.” *Pate v. Commonwealth*, 769 S.W.2d 46, 47 (Ky. 1989). To obtain another competency evaluation, Sanders would have had to convince the judge that a new factor or change in his condition warranted one. *See id.* The only new factors were a statement that Sanders was having trouble paying attention and that, before sentencing, Charters believed Sanders understood what was happening but not why. But it is understandable that Sanders may have been stressed and indecisive about whether to testify. *See Cox v. Compton*, No. 98-6209, 2000 WL 84458, at *3 (6th Cir. Jan. 12, 2000) (“[C]onfusion and indecision do not seem to us inconsistent with legal competence, which requires only an ability to understand the proceedings and to consult rationally with defense counsel.”); *United States v. Van Dyke*, 605 F.2d 220, 226 (6th Cir. 1979) (“[S]ome degree of emotional strain exists in every criminal proceeding[.]”).

In addition, before sentencing, when Charters raised the issue of competence again, the state court conducted its own colloquy and was satisfied that Sanders was competent. Thus, these three situations together with the fact that Sanders already had an intensive six-week mental health evaluation and was found by the trial court to be competent, indicate that there is no reasonable possibility that, if Charters had asked for another mental competency evaluation, it would have been granted. Therefore, under de novo review, Sanders cannot satisfy the prejudice

prong of *Strickland*. Accordingly, no *Strickland* violation arises from Charters's failure to ask for a second competency evaluation.

C.

Finally, Sanders argues that the cumulative effect of Charter's errors prejudiced him. According to Supreme Court precedent, while we analyze each *Strickland* claim individually, we should aggregate each alleged ineffective assistance of counsel violation and consider, as a whole, whether there was prejudice. *See Rompilla*, 545 U.S. at 393; *Williams*, 529 U.S. at 399; *see also Mackey v. Russell*, 148 F. App'x 355, 368–69 (6th Cir. 2005). Sanders did not initially raise his cumulative prejudice argument in state court. He later brought it before the Kentucky Supreme Court in *Sanders III*. *See* 339 S.W.3d at 436 (“(36) cumulative prejudice”). There, the Kentucky Supreme Court held that this claim, among many others, was barred for Sanders's failure to bring it in either *Sanders I* (direct review) or *Sanders II* (the initial collateral attack). *See id.* at 437. Therefore, the Kentucky Supreme Court relied “on a procedural bar to dispose of the claim at hand,” and Sanders's cumulative prejudice claim was not adjudicated on the merits. *See Barton*, 786 F.3d at 464.

As a result, Sanders's claim for cumulative prejudice was procedurally defaulted, and we cannot hear his claim unless he shows cause. *Haliym v. Mitchell*, 492 F.3d 680, 690 (6th Cir. 2007). To show cause, Sanders must establish “some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986). No such cause exists in this record. Sanders's cumulative prejudice claim thus fails.

V.

Accordingly, we uphold the constitutionality of AEDPA. Applying AEDPA to some claims and reviewing other claims de novo, we deny Sanders's habeas petition.

DISSENT

JANE B. STRANCH, Circuit Judge, dissenting. In my view, the majority opinion misinterprets Supreme Court caselaw regarding the appropriate role of federal courts and thereby errs in holding constitutional a law that requires courts to abdicate the authority the founders vested in the federal courts. Longstanding precedent demonstrates that AEDPA is unconstitutional. Further, regardless of the standard of review issue in this case, Sanders is entitled to habeas relief. Therefore, I respectfully dissent.

I. BACKGROUND**A. State Conviction**

On January 28, 1997, David Lee Sanders, by his own admission, shot two men at the Boone Variety Store in Madison County, Kentucky. He walked into the store and purchased orange juice and candy. He used the store's pay phone. He walked out to his car, got his gun from the car, and returned to the store. He approached the store's counter where the store's owner was standing. The owner was writing something with his back towards Sanders. Sanders shot him in the back of the head. When another customer entered the store, Sanders shot that man too. He took money from both men.

Shortly after Sanders was arrested, he began showing disturbing mental health symptoms. The psychiatrist at the jail where Sanders was initially held after his arrest wrote a letter to the court expressing concern for Sanders's emotional state, worrying that Sanders was suicidal. Sanders's retained counsel moved for Sanders to be committed to a state institution for evaluation of competence and "neurological health" because he was in such a state of mental anguish that he was having difficulty assisting with his own defense and displaying symptoms including pain, dizziness, and sensitivity to light.

The court ordered that Sanders be transferred to the Kentucky Correctional Psychiatric Center (KCPC) where he would be evaluated for competency to stand trial, competency at the

time of the crime, and any physio-neurological defects or deficiencies. After observing Sanders for a month and a half, a team of mental health professionals from KCPC produced a report. The KCPC team of psychiatrists concluded that Sanders did not suffer from a psychotic illness or major affective disorder, that he did not suffer from hallucinations, delusions, or paranoia, and that there was no evidence of central nervous system dysfunction. As a result, the KCPC Report indicated that Sanders had no condition that would render him not criminally responsible. The Report further concluded that Sanders understood the nature of the proceedings against him and was competent to stand trial.

In the lead up to trial, Sanders's counsel failed to interview any of the professionals who had treated or evaluated Sanders either at the jail or at KCPC. Instead, during the week before trial, counsel contacted Dr. Cooke, an independent expert who met with Sanders for three hours just days before testifying, to do an evaluation. Dr. Cooke reviewed the KCPC Report and police reports and interviewed one of Sanders's brothers but was not provided with any other psychiatric information about Sanders. Dr. Cooke concluded that Sanders suffered from "depersonalization disorder" at the time of the crime.

At trial, the defense presented an insanity defense based on the testimony of exactly two witnesses: Dr. Cooke and Sanders himself. Sanders admitted to having shot both victims as well as to having shot another woman in an earlier incident. He described significant amnesia regarding the incident and testified that, at the time he was unsure why he was acting the way he was and was unable to stop himself. Dr. Cooke then testified briefly. He was accepted as an expert and testified that Sanders suffered from depersonalization disorder at the time of the crime. He explained that a person with such a disorder will "feel[] that they are not themselves any longer, that they are somehow outside of their body, watching themselves do something . . . [and] that they do not have any control any longer over their body." R. 166-3, Trial Tr., PageID 3857-58. Such symptoms, Dr. Cooke explained, can strike suddenly, without any warning. He concluded that, at the time of the crime, Sanders "did not have any control over what was happening to him." *Id.* at PageID 3858.

Several key facts undermined Dr. Cooke's credibility. First, he had only evaluated Sanders for three hours (as compared to the KCPC doctors who had evaluated him over a month

and a half). Second, perhaps because of his rushed preparation, he was caught in several errors at trial, which the prosecutor made a point of highlighting to the jury at closing argument. He misstated the date on which he had evaluated Sanders, testifying to having evaluated Sanders at a time when the jury knew Sanders had been in trial. He even misstated Sanders's name, calling him "Saunders."

After testimony, the jury was instructed. The court began with a series of instructions setting out the elements of the State's burden for each crime with which Sanders was charged. Each began with uniform language instructing the jury that "You will find the defendant, David Lee Sanders, guilty under this instruction if and only if you believe from the evidence beyond a reasonable doubt all of the following[.]" The court then instructed the jury on the insanity defense:

Instruction number seven, Insanity. Even though you might otherwise find the defendant guilty of the offenses mentioned in instructions number 2, 3, 4 and 5, if you believe from the evidence that at the time David Lee Sanders committed these offenses, if he did so, he was of unsound mind, you shall find him not guilty and say in your verdict that you find him not guilty on the ground of insanity. Before the defendant can be excused on the ground of insanity, you must believe from the evidence that at the time of the act in question the defendant as a result of mental disease or defect, A, did not have substantial capacity to appreciate the criminal nature of the act or, B, if he did have such capacity he did not have substantial capacity to conform his conduct to the requirements of the law. The term "mental disease" or "defect" does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

R. 166-4, Trial Tr., PageID 3916-17. Sanders was found guilty and sentenced to death. *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1990).

B. Post-Trial Proceedings

Sanders appealed his convictions, raising a host of issues. *Id.* Relevant here, Sanders argued that the jury instructions given at his trial were misleading as to the burden of proof for insanity because the instructions failed to explain a burden other than "beyond a reasonable doubt." *Id.* at 679. The Kentucky court analyzed the issue in its entirety as follows:

It is further submitted that the instructions failed to specify the burden of proof regarding the defense of insanity. The jury was instructed that it might find the

defendant not guilty by reason of insanity if it believed “from the evidence” that he was insane at the time of the offenses. We find no error in this instruction. *See Gall v. Commonwealth, Ky.*, 607 S.W.2d 97 at 110.

Id. The court affirmed Sanders’s conviction. *Id.* at 684.

Sanders then initiated postconviction proceedings in the Kentucky courts pursuant to Kentucky Rule of Criminal Procedure 11.42. He raised multiple claims of ineffective assistance of counsel, including the claims that counsel was ineffective for failing to acquire competent psychiatric testimony either from a Dr. Flenning who had worked on the KCPC team of psychiatrists, or by better preparing Dr. Cooke. *Sanders v. Commonwealth*, 89 S.W.3d 380, 385-88 (Ky. 2002).

During his post-conviction proceedings, Sanders introduced evidence that Dr. Flenning had prepared a separate report from the one produced by the KCPC team as a whole. This report had never been acquired by the State and was not turned over to the defense. *Id.* at 385-86. It was not referenced in the KCPC Report. In fact, the KCPC Report represented itself as summarizing all of the findings of the team of psychologists including Dr. Flenning. The Flenning Report came to conclusions more favorable to Sanders than the KCPC Report, including that there was “strong evidence for an atypical psychosis” such as “pseudo-neurotic schizophrenia.” R. 165-16, PageID 3346-47. Dr. Flenning also concluded that “[u]nder unusual stresses and circumstances he has the potential for brief psychotic episodes wherein he would experience a loss of contact with reality and possibly delusional thinking.” *Id.* at PageID 3347.

Sanders also introduced evidence that he had been evaluated for a different murder case by a team of independent experts who, unlike Dr. Cooke, had time to adequately evaluate Sanders and prepare reports with conclusions. Two experts examined Sanders over the course of several sessions, and both concluded, as Dr. Cooke did, that Sanders suffered dissociative episodes characterized by depersonalization in which his ability to control himself was impaired. Both concluded that Sanders lacked the capacity to conform his conduct to the requirements of the law at the time of Sanders’s other crimes. The state trial court denied Sanders’s post-conviction claims. *Sanders*, 89 S.W.3d at 384.

Sanders's appeal from his post-conviction proceedings again reached the Kentucky Supreme Court. *Id.* The Kentucky court reasoned that, even if Sanders's counsel should have acquired Dr. Flenning's report, there was no prejudice because "[t]he use of the Flenning report to cross-examine Dr. Walker, or by calling Dr. Flenning as a witness would have resulted in a reinforcement of the argument by the prosecutor about inconsistencies in Sanders'[s] statements and illustrate that Sanders repeatedly changed his version of various events as he was interviewed by different evaluators." *Id.* at 386.

As for Sanders's claim that his counsel had failed to provide him with adequate expert representation in the form of Dr. Cooke, the court reasoned:

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), commented that "Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on the likelihood of future dangerousness." Sanders was sent on his own motion to KCPC for a six-week psychiatric evaluation by a team of social workers, psychologists, a psychiatrist and a neurologist. . . . The fact that an additional evaluation might be beneficial to the defense does not add credibility to his claim. The trial judge stated that Sanders submitted reports from a psychologist, a psychiatrist and a Ph.D. These experts were retained in connection with a defense of charges resulting from a 1986 shooting in Lincoln County. As correctly observed by the trial judge, the reports and the testimony would have made no difference in the outcome of the trial. The jury rejected the opinion offered by Dr. Cooke and there is no reason to believe they would have accepted a similar opinion simply because it came from a different defense expert. Dr. Cooke indicated that he was willing to testify that in his opinion Sanders satisfied the legal standard for insanity. Thus, Sanders had access to qualified mental health experts to establish his insanity defense. His complaints about ineffectiveness are without merit.

Id. at 387-88. The Kentucky Supreme Court affirmed the district court's decision to deny Sanders's postconviction claim. *Id.* at 394.

Sanders filed a petition for a writ of habeas corpus in federal district court on December 18, 2003, alleging that the Kentucky Supreme Court had acted unreasonably under or contrary to federal law. The district court denied the petition.

II. STANDARD OF REVIEW

Because the district court did not hold an evidentiary hearing, we review both the district court's legal conclusions and the district court's factual findings de novo. *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 460 (6th Cir. 2015). The majority opinion concludes that, because this is a habeas action, this court's ability to grant relief is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See generally* 28 U.S.C. § 2254. AEDPA prohibits a federal habeas court from granting relief on "any claim that was adjudicated on the merits in State court proceedings unless" the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," as determined by the Supreme Court of the United States, *id.* § 2254(d)(1), or the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

The first fundamental question we must answer is whether this so called "AEDPA deference" is constitutionally permissible. The majority opinion holds that it is. I would hold that the § 2254(d) standard is unconstitutional. Analysis of this issue begins with the fact that Congress has granted federal courts jurisdiction to determine whether a prisoner is being held in violation of the Constitution. The fundamental issue is whether, when a federal court exercises that grant and finds the imprisonment unconstitutional, Congress can make that court's ability to grant relief dependent on deference to a state interpretation of the Constitution. As explained below, I would hold that such a rule is not constitutional and would, therefore, review Sanders's constitutional claims de novo without deference to the state courts.

A. Unconstitutional Deference

In *The Federalist Papers No. 78*, Hamilton recognized that the judiciary must be "truly distinct from both the legislative and executive. For I agree that there is no liberty, if the power of judging be not separated from the legislative and executive powers." *The Federalist No. 78* (quotation omitted). He noted that "[t]he interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a

fundamental law. It therefore belongs to them to ascertain its meaning.” *Id.* The historical development of that stark separation of powers sheds light on the force it should have.

The current text of Article III of the Constitution is the result of a compromise between two factions at the constitutional convention. James Madison originally proposed a federal judiciary that would exclusively resolve all questions of federal law at least at the appellate level. Letter from James Madison to George Washington (Apr. 16, 1787), in 9 *The Papers of James Madison* 382, 384 (Robert A. Rutland, et al. eds., 1975) [hereinafter *Madison Papers*]. His opponents wanted to leave federal question jurisdiction to the state courts, giving them a duty to apply national law, and to exclude lower federal courts entirely. 1 *The Records of the Federal Convention of 1787*, at 244-45 (Max Farrand ed. 1911) [hereinafter 1 Farrand]. At the same time, there was significant debate as to whether there should be a national legislative veto for state laws not in the national interest. Compare Letter from James Madison to Thomas Jefferson (March 19, 1787), in *Madison Papers* 317, 318-19 (setting forth a case for a national negative), and 2 *The Records of the Federal Convention of 1787*, at 27 (Max Farrand ed. 1911) [hereinafter 2 Farrand] (arguing that the negative is “essential to the efficacy [and] security of the” government), with *id.* at 28 (arguing that the negative would “disgust” all states and noting that it failed three states to seven). The compromise between these positions was to delegate to judges (including federal judges) the task of voiding unconstitutional state law. See 2 Farrand 28-29 (proposing a prototype of the Supremacy Clause immediately after the failure of the national negative); *id.* at 38-39 (unanimously approving the addition of inferior federal courts the day after the failure of the national negative to review questions of federal law).

The express purpose of allowing federal judges this power was to avoid situations in which state judges, loyal to state law, would misapply national law to preserve their own state law. Letter from James Madison to George Washington (Apr. 16, 1787) in *Madison Papers* 382, 384. Even those opposed to Madison’s positions acknowledged that there was a need for federal courts to protect “national rights.” 1 Farrand 124 (noting that Rutledge and Sherman, staunch opponents of Madison’s schemes, agreed that there was a need for a federal judiciary to protect national rights). Madison argued that the purpose of lower federal courts was to ensure there was a remedy “after improper [v]erdicts in State tribunals obtained under the [biased] directions

of a dependent Judge” and to step in when the states persisted in behavior violative of the Constitution. *Id.* This history indicates that the Founders would have objected to a rule that required federal courts to subject their interpretation of the Constitution, even in a single case, to that of the state courts. Doing so would undermine the very purpose of lower federal courts—stopping biased state judges from circumventing the Constitution.

The Court in *Loper Bright Enterprises v. Raimondo*¹ recognized the problems with a federal court deferring to non-Article III actors:

The Framers also envisioned that the final “interpretation of the laws” would be “the proper and peculiar province of the courts.” . . . To ensure the “steady, upright and impartial administration of the laws,” the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches. . . . This Court embraced the Framers’ understanding of the judicial function early on. In the foundational decision of *Marbury v. Madison*, Chief Justice Marshall famously declared that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”

603 U.S. 369, 385 (2024) (citations omitted). But the Court in *Loper Bright* was by no means setting out a new argument regarding the special role of Article III courts. *Stern v. Marshall* teaches that “[A]rticle III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government’s ‘judicial Power’ on entities outside Article III. That is why we have long recognized that, in general, Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’” 564 U.S. 462, 484 (2011). As far back as 1824, the Supreme Court in

¹Although *Loper Bright*’s explanation of the role of federal courts is instructive, I agree with the majority opinion that the holding of *Loper Bright* has no bearing on the constitutionality of AEDPA. *Loper Bright* did deal with deference, but in a different context. The Supreme Court’s decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* read the Administrative Procedure Act (APA) to permit Article III courts to defer to reasonable agency interpretations of statutes even where those statutes did not expressly delegate authority to the agency. 467 U.S. 837, 842-43 (1984). In other words, *Chevron* read the APA as creating a rule of decision for Article III courts interpreting other statutes. *Loper Bright* overturned *Chevron* on statutory grounds, holding that the APA creates no such rule of decision. 603 U.S. at 412. That holding is not applicable to habeas cases, because habeas cases are not decided under the APA. Additionally, Justices Thomas and Gorsuch both wrote concurrences in which they expressed the belief that *Chevron* style deference—i.e., a rule of decision by which Article III courts must defer to a non-Article III entity as to the reading of a document that did not expressly delegate interpretive authority to the entity—would be unconstitutional even if Congress had actually dictated it in the APA. *Id.* at 413-15 (Thomas, J., concurring); *id.* at 433 (Gorsuch, J., concurring). But the Supreme Court majority did not reach a conclusion as to this reading of the Constitution.

Cohens v. Virginia held that it would be “treason[ous] to the [C]onstitution” for Article III courts to defer to a state reading of the Constitution and decline to provide an independent reading simply because the matters were doubtful. 19 U.S. (6. Wheat.) 264, 404 (1821). Presumably, Congress cannot mandate that courts commit treason against the Constitution.

Of those courts that have upheld AEDPA, most have conceded that a rule requiring the federal courts to defer to a non-Article III actor as to the proper interpretation of the Constitution would be unconstitutional. In the words of the Seventh Circuit, “Congress lacks power to revise the meaning of the Constitution or to require federal judges to ‘defer’ to the interpretations reached by state courts. Once the judicial power is brought to bear by the presentation of a justiciable case or controversy within a statutory grant of jurisdiction, the federal courts’ independent interpretive authority cannot constitutionally be impaired.” *Lindh v. Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc). And the majority opinion in this case does not contend that Congress can mandate that Article III courts accept state interpretations of the Constitution. Maj. Op. at 16.

B. Unconstitutional Dictation of Remedies

The next question, then, is whether Congress can create an end run around the unconstitutionality of deference to the state courts by saying that Article III courts can recognize a state’s unconstitutional actions but cannot do anything about them unless the state acted unreasonably. Congress can, of course, limit the types of cases in which courts can grant remedies, and what types of remedies courts may give, even for constitutional violations. *Felker v. Turpin*, 518 U.S. 651, 658 (1996) (“We conclude that although the Act does impose new conditions on our authority to grant relief, it does not deprive this Court of jurisdiction to entertain original habeas petitions.”). Thus, it is possible that, in some cases, a state court could violate a defendant’s rights and a reviewing federal court would be unable to grant a remedy. As multiple circuits reviewing this issue have noted, the idea that Article III courts would be confronted with a constitutional violation and unable to remedy the issue is not new:

Plain error doctrine authorizes courts to correct forfeited errors only in rare circumstances. The harmless error rule plays a similar, albeit less severe, function. Qualified immunity can prevent meritorious constitutional plaintiffs

from recovering. In the habeas context, the Supreme Court's retroactivity doctrine creates a chasm between valid claims and the right to relief. Supreme Court precedent similarly forecloses federal habeas relief for state prisoners convicted on the basis of evidence obtained in an unconstitutional search and seizure. In short, federal courts routinely deny relief even for known constitutional violations. The distinction between rights and remedies is fundamental.

Cobb v. Thaler, 682 F.3d 364, 375 (5th Cir. 2012) (citations omitted).

What AEDPA does, however, is subtly different from what occurs in all those other types of cases. It does not just provide a limit on relief for the underlying constitutional violation; it makes relief dependent on the state law regarding that violation—which state law may, itself, be unconstitutional. In the situations discussed above, it is the nature of the violation (e.g., retroactivity, qualified immunity, Fourth Amendment violations on habeas) or some fact with no constitutional valence that determines whether relief may be granted (e.g., the strength of the evidence in harmless error cases, or the lack of an objection in plain error cases). AEDPA makes a federal court's decision to grant habeas relief dependent on the substance, not only of the underlying constitutional violation, but on the rule of decisional law the state announces when it decides the prisoner's case. As Judge Ripple noted when the Seventh Circuit considered this issue:

There is a qualitative difference—a constitutional difference—between fixing the time frame at which federal law will be applied and requiring that the federal court defer to any application of constitutional principle that cannot be characterized as unreasonable. Under the latter approach, mandated by the amended statute, the federal court must be content with a careful application of the Constitution, even if it is wrong. In essence, the federal court is free to have its own opinion of what federal law requires, but it must grant or deny the writ on the basis of another non-federal tribunal's view.

Lindh v. Murphy, 96 F.3d 856, 889 (7th Cir. 1996) (Ripple, J., dissenting).

To see this distinction, consider two hypothetical prisoners: Joe and Bob. In Joe's case, a constitutional violation, X, happens under circumstances A, B, and C. The state supreme court takes up Joe's case and decides that X was not a constitutional violation and that, in any case, it was harmless under circumstances A, B, and C. In Bob's case, the same constitutional violation, X, occurs, under the same circumstances, A, B, and C. The state supreme court takes up Bob's

case and decides that X was not a constitutional violation and never reaches the harmlessness analysis. Imagine further, that, in fact, under the Constitution, X is a constitutional violation and is not harmless.

Despite the fact that the same constitutional violation, X, occurred under the same circumstances, A, B, and C, in Joe’s and Bob’s trials, a federal court’s ability to grant relief is materially different in each case due to the different handling by the state courts. In Joe’s case, even if the federal court finds that there was a constitutional violation and that the state court acted unreasonably in holding otherwise, that court cannot grant relief unless the state court was also unreasonable in analyzing harmlessness. *Brown v. Davenport*, 596 U.S. 118, 122 (2022). In Bob’s case, if the federal court reaches harmlessness, it can grant relief after mere de novo review. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005). The rule of decisional law announced by the state supreme court in Joe’s case but not in Bob’s—that violation X is not harmless under circumstances A, B, and C—is, therefore, playing a material role in the federal court’s decisionmaking separate from the role played by the underlying violation.

The question, then, is not merely whether there can be a constitutional violation for which Congress prohibits Article III courts from granting relief—clearly there can be. It is whether Congress can make a court’s ability to grant relief for a constitutional violation dependent on the existence of a reasonable state law saying that the act in question is not a violation. More broadly, can Congress say that Article III courts cannot grant relief for a constitutional violation for which they could otherwise grant relief if a particular non-Article III actor happens to have a different interpretation of the Constitution?

First of all, the idea that we can simply say “Congress has broad powers to regulate the jurisdiction of inferior federal courts . . . [and] to regulate our ability to grant remedies” and have done with the question would have absurd results. Maj. Op at 13. Taken to its logical extreme, this reasoning would allow Congress to pass a law saying that, while federal courts have jurisdiction to decide whether the laws of Congress (or of some state) are constitutional, Article III courts can only grant relief where there is no reasonable interpretation of the Constitution that would permit such a law. After all, in cases where the law was unconstitutional but reasonable, courts would not be prohibited from saying whether the law was constitutional, only from

granting relief. But *Marbury v. Madison* teaches that Congress cannot do that. 5 U.S. 137, 177-78 (1803). Congress cannot pass a law requiring courts to give effect to an unconstitutional law:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual.

Id. In other words, Article III courts cannot recognize that a law is unconstitutional and then apply it anyway to a particular case, letting it—rather than the Constitution—dictate the outcome of the case. At the very least, this teaches that, while Congress can prohibit Article III courts from granting relief for a constitutional violation in some cases, the fact that Congress dictates relief rather than directly dictating a rule of constitutional decision does not automatically make permissible Congress’s attempts to interfere with constitutional adjudication by Article III courts. So, there must be some intermediate rule governing when Congress can and cannot prohibit Article III courts from granting relief that distinguishes between cases like plain error review and cases like the hypothetical in which Congress simply prohibits courts from granting relief from any of its reasonable but unconstitutional laws.

Two decisions provide some guidance on the matter. First, in *United States v. Klein*, certain kinds of relief were due to individuals residing in the South who had not participated in

the Civil War. 80 U.S. 128, 137 (1871). The Court ruled that, under the Constitution, those who had been pardoned were, likewise, entitled to relief. *Id.* at 141-42. Unhappy with that ruling, Congress tried to use its ability to strip courts of jurisdiction to deny jurisdiction where there was evidence of a pardon. *Id.* at 143-44. The Court reasoned:

Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make “such exceptions from the appellate jurisdiction” as should seem to it expedient.

But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty. It provides that whenever it shall appear that any judgment of the Court of Claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso further declares that every pardon granted to any suitor in the Court of Claims and reciting that the person pardoned has been guilty of any act of rebellion or disloyalty, shall, if accepted in writing without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal, of the act recited; and on proof of pardon or acceptance, summarily made on motion or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed.

It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the

intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

Id. at 145-46. From *Klein* we can draw a simple principle: Congress cannot use its power to regulate procedure to functionally effectuate an unconstitutional rule of decision. Congress can regulate relief in some ways, just as it can regulate jurisdiction. But Congress cannot use its power to regulate relief to functionally create an erroneous rule of decision any more than it can tailor jurisdiction to do the same. Tracking the logic of *Klein*, if Congress is permitted to require courts to ascertain the existence of an incorrect but reasonable non-Article III interpretation of the Constitution prohibiting relief and, as a result, declare that no relief can be provided, then Congress is permitted to functionally create an unconstitutional rule of decision.

Congress can create rules of relief like plain error that are just that: rules of relief. Similarly, Congress can strip the courts of jurisdiction to hear certain types of cases as acknowledged in *Klein*. *Id.* at 145. But Congress can gerrymander neither relief nor jurisdiction as a “means to an end” to force courts to functionally decide cases by an unconstitutional rule of decision put forward by a non-Article III actor (in *Klein*’s case Congress, in AEDPA’s the state court). *Id.*

Second, in *Reynoldsville Casket Co. v. Hyde*, after the Supreme Court had already found an Ohio “tolling” provision of its statute of limitations unconstitutional, Court precedent indicated that such prior ruling applied to all pending cases. 514 U.S. 749, 750-71 (1995). The Supreme Court of Ohio, however, held that the prior ruling “may not be retroactively applied to bar claims in state courts which had accrued prior to the announcement of that decision.” *Id.* at 751-72. Hyde argued, as the defenders of AEDPA do today, that the Court should “look at what the Ohio Supreme Court has done, not through the lens of ‘retroactivity,’ but through that of ‘remedy.’” *Id.* at 752. The plaintiff’s stance was that the State could simply decline to provide to the defendant any remedy for the unconstitutionality of the tolling provisions. *Id.* As examples, she cited both qualified immunity and *Teague*. *Id.* at 757. The Court reasoned, however,

Thus, Hyde asks, why not look at what the Ohio Supreme Court has done in this case as if it were simply an effort to fashion a remedy that takes into consideration her reliance on pre-*Bendix* law? Here, the remedy would actually consist of providing *no* remedy for the constitutional violation or, to put the matter more precisely, of continuing to toll the 2-year statute of limitations in pre-*Bendix* cases, such as hers[.] . . . [W]e do not see how, in the circumstances before us, the Ohio Supreme Court could change a legal outcome that federal law, applicable under the Supremacy Clause, would otherwise dictate simply by calling its refusal to apply that federal law an effort to create a remedy. The Ohio Supreme Court's justification for refusing to dismiss Hyde's suit is that she, and others like her, may have reasonably relied upon pre-*Bendix* law[.] . . . But, this type of justification—often present when prior law is overruled -- is the very sort that this Court, in *Harper*[v. *Virginia Dept. of Taxation*, 509 U.S. 86 (1993)], found insufficient to deny retroactive application of a new legal rule (that had been applied in the case that first announced it). If *Harper* has anything more than symbolic significance, *how could virtually identical reliance, without more, prove sufficient to permit a virtually identical denial simply because it is characterized as a denial based on 'remedy' rather than 'nonretroactivity'?*

Id. at 753-54 (emphasis added). The upshot of this case is similar to the upshot of *Klein*: courts cannot simply substitute an unconstitutional reading of the law for a constitutional one by couching what they are doing in the language of “remedy” or “jurisdiction.” Where the effect of the choice of “remedy” is functionally the application of a different rule of decision, the choice of “remedy” is as unconstitutional as the original rule of decision was.

The full impropriety of AEDPA deference under the reasoning of *Klein* and *Reynoldsville Casket Co.* is evidenced by an analogous hypothetical. Suppose Congress appointed a partisan, political body to decide constitutional questions (e.g., a committee of partisan constitutional scholars) and then empowered courts to grant relief only in cases where that body's interpretation of the Constitution would suggest that the court could grant relief or where that body's interpretation was unreasonable. True, under that framework courts could still “decide what the law is,” but in close questions they could grant relief only where the partisan political body interpreted the Constitution in the same way.

In this hypothetical, the “relief,” owed to a plaintiff whose rights were violated under an Article III court's reading of the Constitution but not under the partisan body's would be like the “remedy” in *Reynoldsville Casket Co.* For all practical purposes, the “remedy” would be whatever the plaintiff would have received under the partisan body's interpretation of the

Constitution, just as Hyde’s “remedy” was effectively the continued application of the unconstitutional tolling provision. *Id.* at 753-54. As in *Klein*, our ability to grant relief would be “founded solely on . . . a rule of decision” prescribed by a non-Article III actor. 80 U.S. at 146. Neither situation could stand, and if common sense did not tell us that Congress’s insertion of a partisan body of constitutional arbiters into the decisionmaking of the court system was unconstitutional, *Reynoldsville Casket Co.* and *Klein* would.

Crucially, this hypothetical is identical to AEDPA except that the non-Article III body to whose musings Article III courts must subject their ability to grant relief is different. That difference is immaterial. As the history described above demonstrates, the Continental Congress expressly rejected the idea that States should be treated as though their interpretations of constitutional law were equal to the federal courts’ interpretations in finality and independence. Letter from James Madison to George Washington (Apr. 16, 1787) in *Madison Papers* 382, 384. The framers considered state courts to be just as much political entities as federal legislative and executive bodies. *Id.* Thus, the fact that the hypothetical above involves a panel of partisan experts and AEDPA involves state courts makes no difference. The necessary conclusion, then, is that Congress cannot use its power to regulate relief to, for all practical intents and purposes, force Article III courts to defer to state courts’ interpretation of the Constitution any more than Congress could simply mandate directly that Article III courts defer to state law.

One final case draws together these principles and applies them to a closely analogous set of facts. In *St. Joseph Stock Yards Co. v. United States*, the Court considered the constitutionality of an order of the Secretary of Agriculture fixing maximum rates for the stock yard’s services. 298 U.S. 38 (1936). The stock yards alleged that the rates were unconstitutionally “confiscatory” under the Fifth Amendment, but a representative of the Secretary of Agriculture had already concluded that they were not after conducting his investigation and hearing. *Id.* at 46. The district court that initially reviewed the case thought that, under the Packers and Stockyards Act, it could not reject the findings of the Secretary of Agriculture regarding the constitutionality of the rates if those findings were “supported by substantial evidence.” The Court explained why the district court was wrong:

[T]he Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. *Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation.* Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. *But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.* That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But, if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. *Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.*

Id. at 52 (emphases added). Congress, with AEDPA, has attempted to do the same thing the Court found impermissible in *St. Joseph Stockyards*: using a “legislative arrangement” designed to give effect to an unconstitutional action of a non-Article III entity on grounds that the same non-Article III entity reviewed the action and said it was not unconstitutional. Such a law cannot stand.

AEDPA deference is unconstitutional. The fact that it uses a limitation on relief rather than an explicit decisional rule to force Article III courts to subordinate their understanding of the Constitution to that of state courts does not make it any less unconstitutional. Congress may place some limitations on Article III courts’ ability to grant relief in habeas cases, but it may not

make the ability of those courts to grant relief for a constitutional violation dependent on the existence of a state law saying that the act in question is not a violation.

C. The Developing Law Regarding AEDPA's Constitutionality

As noted above, there exists a long history of historical and legal discussion regarding the separation of power between our judicial and legislative branches of government. The principles undergirding that discussion address the relationship between Article III courts and state law as well as the role of legislative enactments such as AEDPA deference and have given rise to much scholarly and judicial debate. *See, e.g.*, Anthony G. Amsterdam & James S. Liebman, *Loper Bright and the Great Writ*, 56 Colum. Hum. Rts. L. Rev. 54 (2024); Transcript of Oral Argument at 80, 114, 127, *Relentless, Inc. v. Dep't of Com.* 603 U.S. 369 (2024) (No. 22-1219) (companion case to *Loper Bright*). Drawing from these debates, the majority opinion puts forward a series of arguments in favor of the constitutionality of AEDPA deference.

It first suggests that Supreme Court precedent dictates that AEDPA is constitutional. Maj. Op. at 11. But the Supreme Court has never squarely considered whether AEDPA is constitutional. Indeed, it has declined to do so. Although the issue of AEDPA's constitutionality was presented in *Williams v. Taylor*, 529 U.S. 362 (2000), the Court declined to grant certiorari on that issue. *Compare* Petition for a Writ of Certiorari, *Williams*, 529 U.S. 362 (No. 98-8384) (presenting four proposed questions for the Supreme Court's review, the fourth being the constitutionality of § 2254(d)), *with Williams v. Taylor*, 526 U.S. 1050 (1999) (granting certiorari only as to the first three questions). While the Supreme Court has often applied AEDPA deference, it has merely *assumed* its constitutionality. *See, e.g.*, *Brown v. Davenport*, 596 U.S. 118, 127 (2022). But the Court has never held that it is constitutional. And while other circuits have addressed and rejected the argument that AEDPA deference is unconstitutional, our circuit has not done so in a published opinion.²

²Nor are jurists quite as unanimous as is suggested. Most circuits that have found the deference provision of AEDPA constitutional had at least one voice raising the alarm of unconstitutionality, and often multiple voices. *See, e.g.*, *Evans v. Thomas*, 524 F.3d 1 (1st Cir. 2008) (Lipez, J., dissenting from denial of rehearing en banc); *Crater v. Galaza*, 508 F.3d 1261, 1261 (9th Cir. 2007) (Reinhardt, J., dissenting from denial of rehearing en banc); *Irons v. Carey*, 505 F.3d 846, 854 (9th Cir. 2007) (Noonan, J., concurring); *Davis v. Straub*, 445 F.3d 908, 908 (6th Cir. 2006) (Martin, J., dissenting from denial of rehearing en banc); *Lindh*, 96 F.3d at 885 (Ripple, J., dissenting). In

The Second argument raised is that restrictions on the writ of habeas corpus are consistent with historical tradition. Maj. Op. at 12. Because the scope of habeas review has historically been quite narrow, the argument goes, any newly gerrymandered limit on habeas relief that narrows the scope of the relief closer to historical levels must be acceptable. But to frame the historically narrow scope of habeas review as an indication that Congress can restrict habeas in novel ways now is to misread our nation’s constitutional history. As Justice O’Connor made clear, there is a reason habeas review was historically narrow, and it has nothing to do with congressional narrowing of the scope of relief to vindicate unconstitutional state actions:

While it is true that [prior to the 1900s] a state prisoner could not obtain the writ if he had been provided a full and fair hearing in the state courts, this rule governed the merits of a claim under the Due Process Clause. It was not a threshold bar to the consideration of *other* federal claims, because, with rare exceptions, there *were* no other federal claims available at the time. . . . [T]he guarantees of the Bill of Rights were not yet understood to apply in state criminal prosecutions. The only protections the Constitution afforded to state prisoners were those for which the text of the Constitution explicitly limited the authority of the States, most notably the Due Process Clause of the Fourteenth Amendment. And in the area of criminal procedure, the Due Process Clause was understood to guarantee no more than a full and fair hearing in the state courts. *See, e.g., Ponzi v. Fessenden*, 258 U.S. 254, 260, 66 L. Ed. 607, 42 S. Ct. 309 (1922) (“One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that”).

Thus, when the Court stated that a state prisoner who had been afforded a full and fair hearing could not obtain a writ of habeas corpus, the Court was propounding a rule of constitutional law, not a threshold requirement of habeas corpus. This is evident from the fact that the Court did not just apply this rule on habeas, but also in cases on direct review.

Write v. West, 505 U.S. 277, 297-98 (1992) (O’Connor, J., concurring). In other words, historical limits on habeas did not exist due to some congressional restriction. There existed no provision for courts to say “the state acted unconstitutionally, but our hands are tied because Congress says so.” It was because habeas then, as today, was only available for violations of

circuits that have not decided the issue, there are district courts that have expressed grave reservations. *See, e.g., Figueroa v. Walsh*, No. 00-CV-1160, 2008 WL 1945350, at *6-8 (E.D.N.Y. May 1, 2008) (denying relief because the habeas petition was a successive motion but noting that AEDPA deference is probably unconstitutional). In the First Circuit, moreover, district courts have expressed concern that, while AEDPA deference has been held constitutional in the circuit, the way it is actually applied may not be. *See Woods v. Medeiros*, 465 F. Supp. 3d 1, 15-16 (D. Mass. 2020).

federal law. The state could violate constitutional law only if it violated the Due Process Clause, and the Due Process Clause was violated only if the state failed to give the prisoner a full and fair hearing. *Id.* If habeas was unavailable, it was because the state was not understood to have acted unconstitutionally in the first place, not because the state acted unconstitutionally and the federal courts were prohibited from granting relief. *Id.* Thus, the historical tradition argument tells us nothing about what restrictions Congress can impose when there is genuine unconstitutional conduct.

The third argument reminds us that state courts have “a role in interpreting the federal Constitution.” Maj. Op. at 13 (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990)). The majority opinion is quite right to note that state courts have traditionally been conceived of as competent evaluators of the Constitution. *See* The Federalist No. 82. But it is one thing to find that the state courts are competent to do so in the first instance, and another to say that a federal court must enforce an admittedly erroneous state court reading of the Constitution once a federal court is presented with that interpretation. The history demonstrates that the balance struck by the Madisonian compromise included the concession that state courts could interpret the Constitution, along with the creation of federal courts to correct improper applications of federal law by state courts. 2 Farrand 28-39; *see also* James S. Liebman & William F. Ryan, “*Some Effectual Power*”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 730-33 (1998) (summarizing the conception of the Supremacy Clause by the convention as a substitute for a national negative to handle unconstitutional state actions).

The Supreme Court, moreover, rejected the argument that state court competence has any bearing on a federal court’s responsibility to correct unconstitutional state actions in 1821. *Cohens*, 19 U.S. 264. In *Cohens*, the defendants had been convicted of selling lottery tickets in violation of Virginia law. *Id.* at 375. The defendants argued that their convictions were illegal under federal law, and the Virginia courts rejected their arguments. *Id.* Virginia argued that, because state courts have concurrent authority to interpret the Constitution, a reviewing federal court should not re-examine the state court’s decisions and overturn them. *Id.* at 320-21. The Supreme Court rendered a full-throated rejection of this argument:

But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own Courts, rather than on others. There is certainly nothing in the circumstances under which our constitution was formed; nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union.

Id. at 387-88. In sum, while state courts have concurrent authority to interpret the Constitution, their authority is not so broad as to make it appropriate for a reviewing federal court to decline to disturb their decisions when those decisions are unconstitutional.

The final argument posited is that Congress can narrow the scope of an Article III court's jurisdiction to hear habeas cases and regulate the scope of the remedies Article III courts can give and the circumstances in which we can give them. But this inherently bows to the same remedies argument the Warden puts forward; it accepts that even if we cannot be commanded to defer to the states, Congress can use its power to strip jurisdiction or prescribe remedies to create a remedies rule that has the same effect. As discussed above, this runs directly afoul of the rule set forth in *Klein*: Once Congress has granted jurisdiction over a type of case, Congress cannot use its power to regulate procedure to functionally effectuate an unconstitutional rule of decision. 80 U.S. at 145-46.

Faced with the tension between the outcome it reaches and *Klein*'s holding—that, once Article III courts have been given jurisdiction, Congress cannot use jurisdiction or remedies to impose a rule of decision—the majority opinion attempts to narrow *Klein*. It cites later precedent which, it claims, demonstrates that *Klein* did not actually prohibit Congress from dictating a rule of decision to Article III courts. Maj. Op. at 16-17 (citing *Bank Markazi v. Peterson*, 578 U.S. 212, 230 (2016)). But *Bank Markazi* does not prove the point.

Bank Markazi concerned Congress’s ability to dictate how we interpret laws passed by Congress itself. It considered the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C § 8772, which made a set of assets held by a New York Bank for Bank Markazi—the central bank of Iran—available to satisfy judgments gained under existing law against Iran by victims of terror attacks sponsored by Iran. 578 U.S. at 215. Under prior law victims had been able to sue foreign governments for “personal injury or death” caused by terrorism but could only recover damages in the form of property used for commercial activity in the United States. *Id.* at 216-17. Section 8772 added the assets of Bank Markazi to the pot of money victims could recover from and made the money available to victims with pending cases. *Id.* at 218.

Bank Markazi held that § 8772 had appropriately amended the prior laws and appropriately made those amendments applicable to pending cases. *Id.* at 226-28. The Supreme Court determined that Congress was well within its rights to do so and that doing so was functionally different than attempting to dictate that courts apply an incorrect reading of the law. *Id.* Thus, it concluded that *Klein* was not implicated at all because Congress was simply creating new, narrow, and highly specific legislation about a particular subject matter, rather than trying to interfere with Article III adjudication. *Id.* at 228. The Supreme Court made clear that its holding rested on the fact that Congress had the power to modify the underlying law. *Id.* It differentiated *Klein* as follows:

Lacking authority to impair the pardon power of the Executive, Congress could not direct a court to be instrumental to that end. In other words, the statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe.

Id. (citation modified).

Bank Markazi does not confer on Congress the power to use remedies or other procedural rules to effectuate a rule of decision that it could not otherwise impose. It stands for the simple proposition that Congress can change its own laws in narrow ways, and those changes may affect the outcome of cases adjudicated under that legislation. AEDPA represents a much more significant assertion of power than the law at issue in *Bank Markazi*. There, Congress was attempting to modify its own laws, which it has every right to do, to ensure that the adjudication

of those laws will reach the intended outcome. In AEDPA, however, Congress attempted to modify the legal standards for the interpretation of the Constitution—standards which, in the words of *Bank Markazi*, it was “powerless to prescribe”—through improper remedies provisions. *Id.*

The Supreme Court, moreover, has explicitly reaffirmed the key holding of *Klein*, as described in section II.B, within the last decade. In *Patchak v. Zinke*, the Secretary of the Interior took federal lands into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians pursuant to the Indian Reorganization Act. 583 U.S. 244, 246-47 (2018). Patchak sued, claiming that the Indian Reorganization Act did not permit the land to be taken into trust, and while that suit was pending, Congress passed the Gun Lake Trust Land Reaffirmation Act. *Id.* at 248. The Gun Lake Act provided that the Secretary of the Interior had the right to take the land into trust, made that provision binding on all pending suits, and stripped courts of jurisdiction to hear any challenge relating to that land. *Id.*

The Supreme Court again held, as it had in *Bank Markazi* that “Congress violates Article III when it compels findings or results under old law. But Congress does not violate Article III when it changes the law.” *Id.* at 250 (citation modified). The Court noted that changing the law to strip jurisdiction over an entire class of cases regardless of the legal merits of those cases was well within Congress’s power, as was changing the law so that the Secretary’s actions were legal. *Id.* at 257. It reasoned that the key distinction between the Gun Lake Act and the law in *Klein* was that the jurisdiction stripping in the Gun Lake Act removed the court’s power in *all* cases in that subject matter rather than simply cases where the court was inclined to interpret the law differently than Congress. *Id.* The Court explained:

[T]he statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe. Congress had no authority to declare that pardons are not evidence of loyalty, so it could not achieve the same result by stripping jurisdiction whenever claimants cited pardons as evidence of loyalty. Nor could Congress confer jurisdiction to a federal court but then strip jurisdiction from that same court once the court concluded that a pardoned claimant should prevail under the statute.

Patchak’s attempts to compare § 2(b) to the statute in *Klein* are unpersuasive. Section 2(b) does not attempt to exercise a power that the Constitution vests in another branch. And unlike the selective jurisdiction-stripping statute in *Klein*, § 2(b) strips jurisdiction over every suit relating to the Bradley Property. Indeed, *Klein* itself explained that statutes that do “nothing more” than strip jurisdiction over “a particular class of cases” are constitutional. That is precisely what §2(b) does.

Id. In other words, Congress cannot have it both ways. It can strip courts of jurisdiction to hear certain types of cases, but when Congress does so, it must do so for all cases in the relevant class. Congress cannot strip courts of jurisdiction only in cases where courts are going to do something Congress does not like while conferring courts with jurisdiction to do things Congress does like.

Far from establishing that *Klein* was cabined to its facts, modern doctrine confirms that the principles in *Klein* are alive and well. Congress can change the law that courts must interpret, and when it does so, there may be implications for pending cases, implications to which we must give effect. *Bank Markazi*, 578 U.S. at 228. Congress can even do so in response to highly particularized situations. *Id.* at 226-228. But where Congress cannot change the underlying law—as in constitutional cases—it cannot pass new laws forcing courts to interpret the old law in a particular way. *Id.* at 228. And although Congress can strip jurisdiction over a whole class of cases regardless of outcome, Congress cannot use jurisdiction to effectuate its preferred interpretation. *See Patchack*, 583 U.S. at 257.

This leads directly back to the conclusion set out in Section II.B. Because Congress cannot unilaterally change the Constitution, Congress cannot prescribe rules of decision under the Constitution. *Bank Markazi*, 578 U.S. at 228. Though Congress can strip courts of jurisdiction it cannot use jurisdictional rules to change things only when a court would reach a certain outcome. *Patchack*, 583 U.S. at 257. *Reynoldsville Casket Co.* teaches that these same restrictions apply to Congress’s attempted use of remedies, 514 U.S. at 753-54, and AEDPA runs afoul of those restrictions.

AEDPA deference is a wolf in sheep’s clothing. It may be dressed up as a simple remedies provision, but in substance, AEDPA contains Congress’s attempt to use remedies to do what it cannot do on its own: force Article III courts to enforce and give credence to

unconstitutional actions by state courts that deprive prisoners of their constitutional rights. It disrupts the delicate balance of power between state courts and Article III federal courts established by the Founders in 1787. Congress asks that we look only to the sheep. Over a century of Supreme Court caselaw demands that we acknowledge the wolf. AEDPA is unconstitutional.

III. CONSTITUTIONAL CLAIMS

I turn now to a review of the constitutional issues inherent in Sanders's case. On each claim Sanders must prove both constitutional error and prejudice to be successful. *Brecht v. Abrahamson*, 507 U.S. 619, 622-23 (1993). I begin by setting out two constitutional errors in Sanders' trial³ and then address the prejudice flowing from the two errors. For the reasons discussed above, I review all matters of law de novo—the proper analysis given the above conclusions about the constitutionality of AEDPA deference.

A. Constitutional Error

1. The Insanity Instruction

As the majority opinion notes, the Due Process Clause of the Fourteenth Amendment does not mandate that states apply a particular burden of proof for the insanity defense. *Leland v. Oregon*, 343 U.S. 790, 798-99 (1952). Some states require that the state prove, beyond a reasonable doubt, that the defendant was not insane. *Id.* Others require that the defendant prove that he was insane but disagree as to the quantum of proof required. *Id.* This variation is permissible and is not grounds for habeas relief. *Id.* Nor may federal courts second guess state court interpretation of state statutes regarding the burden of proof in habeas proceedings. *Engle v. Isaac*, 456 U.S. 107, 120 (1982). The states get to decide what the burden of proof is, both as a legislative matter and as a matter of statutory interpretation.

Once a state has established the decisional rules by which a jury may convict a defendant, however, it is a violation of the Due Process Clause for the state to give an erroneous jury

³Because Sanders is entitled to relief on at least one of the insanity jury instructions or his counsel's failure to retain and prepare an expert witness, I do not reach his remaining claims.

instruction that sets forth different decisional rules. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). As the court explained in *Hicks*:

Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id. (citations omitted). As a result, habeas relief may be granted where jury instructions erroneously define the burden of proof. *Id.*

Kentucky allows a defendant to prove he is not guilty by reason of insanity by a preponderance of the evidence. *Gall v. Commonwealth*, 607 S.W.2d 97, 110 (Ky. 1980) (describing the preponderance standard as correct although admonishing that other language is better for describing the standard to a jury); *see also Ball v. Commonwealth*, 81 Ky. 662, 664-65 (Ky. 1884) (approving the preponderance standard for the insanity defense). Neither party disputes in this case that insanity must be proved only by a preponderance of the evidence in Kentucky. It would, therefore, be a violation of Sanders's due process rights, cognizable on habeas review, for the Kentucky court to instruct the jury to apply any other standard of review.

In cases where the claim is that the instruction was ambiguous and subject to an erroneous construction, the question is whether there is a "reasonable likelihood" that the jury has applied the instruction in an unconstitutional way (i.e., a way that applies an erroneous burden of proof). *Waddington v. Sarausad*, 555 U.S. 179, 190-91 (2009) (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). In making this determination, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). Further, in coming to an understanding of whether a jury might be misled, the court must keep in mind that "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. . . . [C]ommonsense understanding of the instructions in the light of all that has taken place at the trial likely [is] to prevail over technical hairsplitting." *Boyde v. California*, 494 U.S. 370, 380-81 (1990).

In this case, immediately before the challenged instruction, the trial court had repeated the following instruction four times: that the jury should take an action “if, and only if you believe from the evidence, beyond a reasonable doubt” some fact or facts. R. 165-5, Jury Instr., PageID 2830-2833. After the challenged instruction there was an instruction “you shall find the defendant in this case not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty.” *Id.* at PageID 2837. In other words, there was variation between the different instructions, but they all associated the words “from the evidence” with the words “beyond a reasonable doubt.” The challenged instruction was near identical to that in the other instructions. It instructed the jury to find Sanders not guilty on the ground of insanity “if you believe from the evidence that . . . he was of unsound mind.” R. 166-4, PageID 3916-17. The instructions did not clarify that this was a lower burden or a different burden.

In *Spisak v. Mitchell*, our court considered a case where the jury instructions explicitly required unanimity for the jury to find aggravating circumstances but were silent about the rule that unanimity is not required to find mitigating circumstances. 465 F.3d 684, 710-11 (6th Cir. 2006), *rev’d on other grounds* 522 U.S. 945 (2007). The language used to describe the mitigating circumstances and the procedures the jury was instructed to use to find that the mitigating circumstances outweighed the aggravating circumstances mirrored the language and procedures used for aggravation instructions with the above exception. *Id.* We held that, under those circumstances, because “the jury was never told, either expressly or impliedly, that individual jurors may consider mitigating factors in the weighing process regardless of the lack of agreement with other jurors as to the presence of that factor,” there was a reasonable likelihood that the jury applied a unanimity standard to their analysis of mitigating circumstances. *Id.* (granting habeas relief).

A similar issue arises here. The jury had been repeatedly instructed that, to find something “from the evidence,” they needed to find it “beyond a reasonable doubt.” It was never clarified that “beyond a reasonable doubt” was an additional requirement for those instructions, rather than one associated with finding something “from the evidence.” The jury was then told it needed to find insanity “from the evidence”—the same language used in the beyond a reasonable doubt instruction. This mirroring is enough to raise a reasonable likelihood that the jury would

apply the “beyond a reasonable doubt” standard to insanity too, even if it was not directly instructed to, just as the mirroring of the aggravation instructions could cause the jury to apply an unstated unanimity requirement in *Spisak*.⁴

The Warden argues, quoting the district court, that

A jury could understand Kentucky’s formulation as distinguishing between “from the evidence” and “from the evidence beyond a reasonable doubt.” Jurors can reasonably be expected to identify the significance of the explicit absence of “beyond a reasonable doubt” following “from the evidence” in the instructions on insanity. See, e.g., *Gall*, 607 S.W.2d at 110 (“There is no reason to suppose or suspect that the jurors were ignorant bumpkins.”). In each reference to the state’s burden, the trial judge specifically included “beyond a reasonable doubt,” but omitted that phrase when discussing the burden for Sanders’ insanity defense.

Appellee’s Br. 30. This argument fails for several reasons. First, if it was the case that courts could reasonably presume under *Boyde* that jurors would reason from the absence of a few words that different standards applied to identical procedures described similarly, *Spisak* could not have been decided as it was. After all, in *Spisak*, the jury was explicitly told it must be unanimous as to aggravation and was not told so about mitigation. *Id.* at 709-10. Yet, in that case, this court did not assume that the jurors would reason from absence. *Id.* at 711.

Second, applicable to both this case and *Spisak*, it would be irresponsible to presume that jurors parsed the instructions for subtle shades of meaning, identifying the significance of the absence of just a few words from one instruction. *Boyde*, 494 U.S. at 380-81. Instead, this court must presume that the jurors used the common sense understanding of the instructions. Consider an example: I tell my clerk on Monday to “cite check a document, being careful to check all case citations as well as the record citations” then use that exact language to direct her on Tuesday and on Wednesday, but, on Thursday, I simply say conduct a “cite check.” The commonsense assumption is not that this one time she does not need to check the record cites—it is that I used

⁴The majority elides the issue by asking whether the jury would notice the difference between the phrase “beyond a reasonable doubt” and “believe from the evidence,” which, the majority argues, are “different standards.” Maj. Op. at 19. But that overlooks the key problem—the “beyond a reasonable doubt” instructions were phrased as “believe from the evidence, beyond a reasonable doubt,” raising the substantial likelihood that the jury would associate the “believe from the evidence” language with the “beyond a reasonable doubt” standard and fail to recognize the difference between “believe from the evidence” alone and “believe from the evidence, beyond a reasonable doubt.”

a shorthand for the same instruction I had given three times before. Similarly, in this case, one reasonable interpretation of the instructions that the jury must “believe [the elements] from the evidence, beyond a reasonable doubt” is that assessing the evidence under a “beyond a reasonable doubt” standard is part and parcel of “believ[ing] from the evidence.” Under that understanding, the next time the judge instructed the jury that it must believe something “from the evidence,” the correct understanding of that instruction would be that the jury must make such a finding “beyond a reasonable doubt.”

Third, even if one were to assume that the jurors were being closely attentive to small changes in language, the instructions given in this case might stymie them. The final instruction on burdens used language to describe the State’s burden that was different from all the other preceding instructions. It instructed that the jury must be “satisfied from the evidence alone, and beyond a reasonable doubt” as opposed to simply “believ[ing] from the evidence, beyond a reasonable doubt.” R. 166-4, PageID 3918. A close parse of this distinction, paying attention to omitted and changed words, might suggest that this was a different standard. For instance, being satisfied from the evidence “alone” as opposed to simply believing “from the evidence” suggests that, in the former case, the evidence must be considered in isolation, whereas in the latter case, one can consider the evidence and other things. But, confusingly, these two pieces of language were intended to describe the same standard—the State’s burden of proof. If similar but not identical language with subtly different meanings can be used to describe the same standard in one instance, it is not clear how the jury was to parse out that the lack of identical language in the insanity instruction imposed an entirely new standard that had never been explained to them.

To be sure, the Supreme Court has emphasized that, to determine whether a given instruction was impermissibly ambiguous, courts should consider not only the whole jury charge, but also the full trial record. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Here, there was nothing in the broader instructions that would have mitigated the ambiguity of the insanity instruction. Sanders’s counsel did nothing to clear up the confusion because he did not discuss the burden of proof in his closing argument at all. The State did not clear things up either—instead, it arguably made things worse. The State asserted in its closing argument that Sanders must “prove to your satisfaction that he was mentally ill.” R. 166-4, Trial Tr., PageID 3931.

This does not specify a standard of proof. Nor did the State specify the standard of proof at any other time. Further, in explaining that the State had met its burden, the prosecutor asserted, “I submit to you that we have done that. We have gone even beyond that. We have shifted the burden. The burden lies on the defendant to prove his insanity.” *Id.* This suggests that the State’s burden has been shifted to the defendant, and not that the defendant has a new, different type of burden. It reinforces the idea created by the jury instructions that the defendant’s burden was the same as the State’s: beyond a reasonable doubt. Therefore, the use of these jury instructions was constitutional error.

2. Failure to Retain and Prepare Experts

Sanders alleges that his counsel was deficient because he failed to timely retain and adequately prepare Dr. Cooke. This claim turns on whether counsel’s failure to timely prepare an expert and to provide that expert with the necessary resources to conduct a proper analysis fell below an objective standard of reasonableness. *Richey v. Mitchell*, 395 F.3d 660, 683-84 (6th Cir. 2005), *rev’d on other grounds Bradshaw v. Richey*, 546 U.S. 74 (2005).

The Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68 (1985) set the threshold for what services must be procured from a psychiatrist for a defendant pleading insanity. *Ake* was decided in the context of an indigent defendant who pled insanity. *Id.* at 72. His counsel requested that the court appoint a psychiatrist to perform an examination on behalf of the defendant or provide funds so that the defense could arrange one. *Id.* The trial court denied counsel’s request. The Supreme Court held that, “when the State has made the defendant’s mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant’s ability to marshal his defense.” *Id.* at 80. The court reasoned that:

[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State’s psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.

We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 82-83. The court reasoned that the requirement that indigent defendants have access to a competent psychiatrist to conduct an appropriate examination and assist in evaluation, preparation, and presentation was part and parcel of ensuring that the defendant received his right to due process under the Fourteenth Amendment, on par with the right to effective assistance of counsel. *Id.* at 76.

In *McWilliams v. Dunn*, the Supreme Court applied the standard set forth in *Ake* and held that a defendant has not received an adequate defense if his psychiatrist, while competent and qualified, is given so little time to prepare that he cannot effectively assist counsel in reviewing information, preparing for trial, and effectively presenting a case. 582 U.S. 183, 199 (2017). Further, the mental health expert must be sufficiently independent from the prosecution to effectively assist in those roles. *Id.* at 198. Thus, a court ordered evaluation by state psychiatrists was not sufficient to replace a psychiatrist who would specifically assist the defense. *Id.*

Sanders was not indigent, so there was no requirement that the State provide him with funds for a psychiatrist. But it is hardly reasonable to say that there is a threshold of representation so “crucial to the defendant’s ability to marshal his defense” that the State must provide it to indigent defendants because otherwise “the risk of an inaccurate resolution of sanity issues is extremely high,” but counsel is not ineffective when they fail for no strategic reason to ensure its provision. *Ake*, 470 U.S. at 80-82; accord *Skaggs v. Parker*, 235 F.3d 261, 272-73 (6th Cir. 2000) (noting that counsel was ineffective because his incompetence led to a failure to present an expert who was even marginally competent under *Ake*). “The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance,” and a defendant’s rights are violated where counsel fails to provide such assistance. *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). A

counsel's failure to ensure that a defendant receives even the baseline assistance required to satisfy the Fourteenth Amendment for indigent defendants is ineffective assistance.

The Ninth Circuit recently considered an analogous case, *Rogers v. Dzurenda*, 25 F.4th 1171 (2022). Rogers's counsel pursued an insanity defense, but she did not begin preparing the only expert who could testify to insanity until a month before trial, leaving the expert unable to prepare an opinion. *Id.* at 1184-85. She did not provide that expert with all the psychiatric information available to her, nor did she provide him with a complete investigation of Rogers's background and childhood history. *Id.* at 1185-86. Counsel gave the expert the opportunity to conduct only a "brief evaluation" of the defendant. *Id.* at 1178. She failed to adequately discuss potential lines of cross examination with the expert and prepare potential responses to the testimony of State witnesses. *Id.* at 1185-86. The court concluded that Rogers's counsel had been ineffective for failing to give the expert adequate time, sufficient information to form a supported version of his conclusion, and enough preparation to withstand cross examination. *Id.* at 1184-86.

A more extreme version of the same facts occurred here. Sanders's counsel pursued an insanity defense, but he did not begin preparing Dr Cooke, the only expert who could testify to insanity, until a few days before trial—far less than the month in *Rogers*—leaving him unable to prepare a report. He did not provide Dr. Cooke with all the information available to him, or with a complete investigation of Sanders's background and childhood (having never done one). Counsel allowed Dr. Cooke time to do only a cursory evaluation of a few hours the day before jury selection. He failed to prepare Dr. Cooke to testify sufficiently such that the doctor would be able to adequately remember Sanders's name or even respond to questions about the differences between Cooke's conclusions and the KCPC Report. For the same reasons stated in *Rogers*, that was deficient performance.

B. Prejudice

Even outside the bounds of AEDPA, we may only grant relief in a habeas case if the constitutional errors present in a defendant's trial "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638; *see also Miller v.*

Genovese, 994 F.3d 734, 744 (6th Cir. 2021) (“We find prejudice when we have ‘grave doubt about whether a trial error of federal law had substantial and injurious effect.’”).

Much depended in this trial on the expert, Dr. Cooke. The difference between the presence and the absence of competent expert testimony from one party can materially alter the outcome of a trial. *Richey*, 395 F.3d at 687-88. Where defense counsel has failed to present an expert or has presented only an incompetent expert as to a question crucial to the defense, federal courts have found such substantial prejudice that a state court decision to the contrary was unreasonable. *Id.* The necessity of competent expert testimony in an insanity defense is precisely the reason courts are required to ensure that indigent defendants are provided with it: “the testimony of psychiatrists can be crucial and a virtual necessity if an insanity plea is to have any chance of success.” *Ake*, 470 U.S. at 82 (quotations omitted). The Supreme Court has recognized that “without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State’s psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high.” *Id.* Without such effective assistance, “a defense may be devastated.” *Id.* at 83.

One of two things must be true: (1) the jury found Dr. Cooke lacking in credibility, or (2) the jury found Dr. Cooke credible. Begin with the first (and more likely) scenario: Dr. Cooke was not credible. If Dr. Cooke was not credible, Sanders was functionally putting on a case with no expert testimony. Even worse, there were only two witnesses to Sanders’s insanity defense: Dr. Cooke and Sanders himself. Sanders, as the defendant, was not likely to be taken seriously, and, in any case, while he could describe his symptoms, he was unable to explain their medical significance. So, Sanders was putting on an insanity case without a single credible witness who could explain Sanders’s putative insanity to the jury: precisely the “devastating” situation envisioned by *Ake*. *Id.*

As discussed above, both our caselaw and the Supreme Court’s caselaw squarely recognize that, where a defendant does not receive the benefit of competent psychiatric testimony, the addition to the defendant’s case of an expert who can testify directly and credibly as to the defendant’s insanity might well make a difference in the verdict in an insanity case.

See, e.g., Ake, 470 U.S. at 83 (“It is in [insanity] cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success.”).

This case presents even more reason to believe that the difference between a credible expert and a non-credible expert might have had a “substantial and injurious effect” on the jury’s verdict than the generic insanity case. After trial, several experts considered the same evidence Dr. Cooke would have been able to present if properly prepared and concluded that Sanders was insane. R. 165-14, PageID 3333-34; R. 165-15, PageID 3341. This suggests that Dr. Cooke’s conclusion was not simply an aberration that the jury would be likely to disregard had it been presented by a well-prepared witness. It was a conclusion, supported by facts, that reasonable people, even people with expertise and the skepticism that accompanies it, could believe. It suggests that it was possible with sufficient preparation, to put on a compelling case for insanity. And yet, Sanders’s trial counsel certainly did not, because the sole expert witness to insanity was not credible. Therefore, in the scenario where Dr. Cooke was simply not credible, there is a reasonable probability that his lack of credibility was a significant deciding factor in the jury’s conclusion that Sanders was not insane. The fact that Dr. Cooke’s lack of credibility was the result of counsel’s unprofessional errors raises grave doubt as to whether those unprofessional errors had a substantial and injurious effect or influence on the jury’s verdict.

The Warden contends, however, that Cooke was not so lacking in credibility as to render the use of his services prejudicial to Sanders. Taking the Warden at her word, consider the second scenario described above: Sanders was credible. In this scenario, Sanders had a credible expert who concluded in no uncertain terms that Sanders was insane, and yet, the jury found that he had not met his burden of proof of establishing insanity. Thus, we must consider whether the erroneous jury instructions given by the court had a substantial injurious effect in producing that outcome.

“This court is mindful that a habeas petitioner faces an uphill battle in establishing that an erroneous jury instruction is so prejudicial that he or she is entitled to habeas relief.” *Barker v. Yukunis*, 199 F.3d 867, 876 (1999). The improper instruction must have infected the entire trial. *Id.* But “[a]lthough the burden is undeniably heavy, of course, this does not mean that a jury

instruction may never rise to such proportions.” *Id.* *Barker* is instructive. In *Barker*, the defendant argued that she had attacked the victim in of self-defense to prevent herself from being raped, but the trial court had erroneously refused to instruct the jury that, under Michigan law, Barker was entitled to use deadly force to resist an imminent rape. *Id.* at 870. We acknowledged that we had no way of knowing for sure whether the jury’s conviction was a result of disbelieving the evidence Barker presented that the force she used was necessary to prevent rape or a result of the improper jury instruction. *Id.* at 873. But we noted that, where there was “sufficient evidence in the record to support a rational conclusion” that Barker had acted in self-defense, “the district court’s failure to specifically instruct the jury that she was justified in using deadly force to resist a rape had a substantial and injurious effect or influence in determining the jury’s verdict and resulted in actual prejudice.” *Id.* at 873-74.

A similar situation presents itself here. Sanders presented credible evidence that he was legally insane in the form of credible expert testimony from Dr. Cooke. This is the kind of legally sufficient evidence that gives a defendant a “reasonable chance at success.” *Ake*, 470 U.S. at 83. As in *Barker*, it was the kind of evidence that could lead to the “rational conclusion” that Sanders had met his burden of proof. *Barker*, 199 F.3d 874. Yet, as in *Barker*, the trial judge cut that reasonable chance off at the knees by giving instructions that foreclosed the possibility that a juror, believing by a preponderance of the evidence, but not beyond a reasonable doubt, that Sanders was insane, would find him so. The same result is demanded: there is grave doubt as to whether the erroneous instruction had a substantial and injurious effect on the verdict. *Id.* at 873.

Thus, either position taken as to Dr. Cooke’s credibility leads to the same result: Sanders was prejudiced by the constitutional errors at his trial.

IV. CONSTITUTIONAL CLAIMS UNDER AEDPA

Even if AEDPA deference was constitutional (as the Majority opinion concludes), Sanders’ constitutional arguments would still succeed.

As to the insanity jury instructions, the Kentucky Supreme Court acted contrary to or unreasonably under the *Boyde* standard when it held that there was no error in the jury

instructions. The state court's reasoning was limited to a citation to *Gall v. Commonwealth*, 607 S.W.2d 97 (Ky. 1980). In that case, the court considered whether the defendant had been prejudiced by an instruction that informed the jury that it must find that the defendant met his burden of proving insanity "by a preponderance of the evidence." *Id.* at 110. The court reasoned:

Instruction No. 3 presented the defense of insanity, and was in correct form except for its use of the words, "by a preponderance of the evidence" in lieu of "from the evidence." Again, this portion of the instruction was given exactly as requested by Gall. Now, as a result, we find his appellate counsel crying out that "preponderance of the evidence" should have been defined. This court disapproves the use of that terminology. "From the evidence" is sufficient in all civil cases, and with the qualifying phrase "beyond a reasonable doubt" it is sufficient in a criminal case. We would not for that reason, however, reverse this judgment. There is no reason to suppose or suspect that the jurors were ignorant bumpkins.

Id. *Gall* stands for the proposition that instructing the jury that the plaintiff must meet its burden "from the evidence" in a civil case is an acceptable (and even preferable) substitute for "by a preponderance of the evidence" in civil cases and "from the evidence beyond a reasonable doubt" is acceptable in criminal cases. It appears the court in *Sanders* reasoned that "from the evidence," being sufficient for civil cases, was also sufficient for criminal cases in which the defendant had a preponderance burden.

That is the wrong legal rule. The question is not merely whether requiring the jury to find insanity "from the evidence" sufficiently explains the preponderance standard in a vacuum (as it would be in a civil case). It is whether *in the context of the jury instructions in this case* there is a "reasonable likelihood" that a juror could get confused and apply the wrong standard. *Boyde*, 494 U.S. at 380 (quoting *Estelle*, 502 U.S. at 72). The trial court neither identified nor applied this test. Instead, the court relied on reasoning that looks at the phrase "from the evidence" in a vacuum rather than in the context of the overall charge, as required by *Cupp*. 414 U.S. at 146-47 (noting that a jury instruction may not be viewed "in isolation"). The state court applied the wrong test and thereby acted contrary to clearly established federal law. *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (O'Connor, J., concurring) ("A state-court decision will

certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases.”).

Where the state court erred by applying a rule contrary to clearly established federal law or by unreasonably applying clearly established federal law, even under AEDPA, the next step is to consider the merits of the petitioner’s constitutional claim *de novo*. *Fulcher v. Motley*, 444 F.3d 791, 799 (6th Cir. 2006). And, as set forth in Section III.A.1, Sanders has succeeded in demonstrating that his constitutional rights were violated. Thus, even under the AEDPA standard, the inappropriate jury instructions violated Sanders’s due process rights.

Turn then to the failure to retain and prepare experts. The state court seemingly recognized that a counsel’s failure to ensure that a defendant receives adequate assistance under *Ake* could constitute deficient performance. But the state court held that *Ake* was satisfied, first, because “Sanders was sent on his own motion to KCPC for a six-week psychiatric evaluation by a team of social workers, psychologists, a psychiatrist and a neurologist.” *Sanders*, 89 S.W.3d at 387. The court reasoned that *Ake* “does not hold that an indigent defendant has a constitutional right to choose the psychiatrist.” *Id.* Second, as to Dr. Cooke, the court reasoned “Dr. Cooke indicated that he was willing to testify that in his opinion Sanders satisfied the legal standard for insanity. Thus, Sanders had access to qualified mental health experts to establish his insanity defense.” *Id.* at 388.

Both of these justifications for counsel’s failure to prepare Dr. Cooke are contrary to or unreasonable under Supreme Court precedent. *McWilliams* demonstrates the impropriety of both. There, the Supreme Court held that it was not merely wrong, but an unreasonable application of *Ake* to find that a defendant’s rights had been satisfied by an evaluation done by individuals who are not “available to the defense and independent from the prosecution.” *McWilliams*, 582 U.S. at 188, 197-99 (requiring an expert sufficiently independent that they may assist the defense and finding a violation of rights even though there had been a full evaluation by a court ordered “Lunacy Commission”). Because *McWilliams* made no new law and merely determined the bounds of “proper application” of *Ake*, its holdings are applicable to cases like this one that were decided after *Ake*, even if they were decided before *McWilliams* and must now be evaluated under AEDPA. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). In this case, The

KCPC evaluation was not an independent evaluation and, thus, to rely upon it in lieu of a competent defense mental health expert sufficiently independent to assist in the preparation of a defense is not reasonable any more than reliance on the Lunacy Commission rendered the state court decision in *McWilliams* reasonable.

Similarly, in *McWilliams*, the Court found a violation of clearly established rights even though the defense expert had reached conclusions favorable to the defense because the expert was not given time to adequately assist with preparation and presentation. *Id.* at 190, 198. And the Court found that a state court decision—which reasoned that *McWilliams*’s rights under *Ake* had been satisfied because *McWilliams* had been provided with a psychiatrist to examine him—was unreasonable because that psychiatrist had not been given time to adequately prepare and assist in the presentation of the defense. *Id.* at 198-99. Thus, despite the state court’s claim in this case, the fact that Dr. Cooke formed a conclusion favorable to Sanders is not the end of the inquiry. The question is whether Dr. Cooke was given sufficient time to adequately play the role that a defense mental health expert should play. As in *McWilliams*, the state’s assumption in this case—that an expert who was unable to fully assist the defense in the preparation and presentation of a case is adequate under *Ake* merely because he provided a finding of insanity—rendered the state decision on the matter unreasonable. Thus, even under AEDPA, Sanders meets the high bar to demonstrate that the state court’s finding of a lack of prejudice was contrary to or unreasonable under clearly established federal law.

Finally, consider the prejudice flowing from each error. The state never conducted a harmlessness analysis as to Sanders’ jury instruction claim. Thus, even under AEDPA, the prejudice flowing from the jury instruction claim would be analyzed under the *Brecht* test applied above rather than the § 2254(d) standard and the analysis and the outcome would be identical to that set forth in Section III.B: Sanders suffered prejudice from the constitutional error. *Fry v. Pliler*, 551 U.S. 112, 120-21 (2007). The state court reached prejudice for Sanders’ claim of ineffective assistance of counsel. *Sanders*, 89 S.W.3d at 388. Therefore, if AEDPA were constitutional, we would review the prejudice prong of that claim with AEDPA deference.

But, once again, the state court did not apply the correct test. It reasoned:

The jury rejected the opinion offered by Dr. Cooke and there is no reason to believe they would have accepted a similar opinion simply because it came from a different defense expert. Dr. Cooke indicated that he was willing to testify that in his opinion Sanders satisfied the legal standard for insanity.

Id. In other words, because Dr. Cooke reached the conclusion that Sanders wanted, there is no reason to believe a more prepared expert could have done anything more. This is unreasonable under federal law. At the time of the Kentucky Supreme Court opinion, there was already precedent that credibility matters, and that a change in the credibility of a witness may change the outcome of a trial. *See, e.g., Strickler v. Green*, 527 U.S. 263, 289 (1999) (holding that evidence which reduces the credibility of a state witness may change the outcome of a trial); *Skipper v. South Carolina*, 476 U.S. 1, 8-9 (1986) (holding that testimony from a credible witness may change the outcome of a trial even where it asserts the same base facts as the testimony given by a witness who was inherently not credible). The state court disregarded its duty to consider whether counsel's errors robbed Sanders, not of an expert to testify to insanity, but of a credible expert capable of rendering the services necessary to the defense. Because the state court acted unreasonably under this precedent, Sanders's claim succeeds even under AEDPA.

V. CONCLUSION

For the foregoing reasons, I would reverse the district court's judgments and grant the writ of habeas corpus. I, therefore, respectfully dissent.

No. 16-6152

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

May 14, 2026

KELLY L. STEPHENS, Clerk

DAVID LEE SANDERS,

Petitioner-Appellant,

V.

LAURA PLAPPERT, Warden,

Respondent-Appellee.

ORDER

BEFORE: SILER, GIBBONS, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Stranch would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

2015 WL 711262

Only the Westlaw citation is currently available.
United States District Court, E.D. Kentucky,
Central Division, at Lexington.

David Lee SANDERS, Petitioner,

v.

Randy WHITE, Warden, Respondent.

Civil No. 03–455–ART.

I

Signed Feb. 18, 2015.

Attorneys and Law Firms

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MEMORANDUM OPINION & ORDER

AMUL R. THAPAR, District Judge.

*1 In June 1987, a Kentucky jury convicted Petitioner David Lee Sanders of murdering James Brandenburg and Wayne Hatch. The jury sentenced Sanders to death. Sanders admits that he killed both men, but claims that he was insane at the time. He alleges in his habeas petition that numerous errors—errors by the judge, jury, appellate courts, and counsel alike—produced an unconstitutional conviction and death sentence. R. 73. He seeks to supplement those allegations through motions for additional discovery, R. 78, an evidentiary hearing, R. 79, funds for a clinical psychologist, R. 80, and an expansion of the record, R. 97 (collectively, the “evidentiary motions”). The Court denied the motions without prejudice, choosing instead to address them concurrently with Sanders' habeas petition. *See* R. 110. Sanders presents a litany of claims, some with multiple subparts. All told, he identifies thirty-three errors that he believes entitle him to relief. On all thirty-three, Sanders is not entitled to habeas relief, nor is he entitled to the additional evidence he seeks.

BACKGROUND

On January 28, 1987, Sanders walked into Boone Variety Store to buy a few items and to use the phone. He called

his parents to find out if he needed to help his father work on a barn that day—he did—then called his wife to let her know that he would be helping his father and spending the night with his parents. Finished with his business in the store, he walked outside to his truck, retrieved two guns, and reentered the store. He shot and killed the proprietor, James Brandenburg, and a customer, Wayne Hatch. Sanders killed both men with a single shot to the back of the head. Sanders got in his truck and went home, tossing some of Hatch's items out of the window and off of a bridge along the way.

On January 31, Kentucky State Police Detectives Skip Benton and Robert Stephens, along with Madison County Commonwealth's Attorney Tom Smith, drove to Flemingsburg, Kentucky, to question Sanders—the first of several police interrogations. They interrogated Sanders about the Madison County murders and a similar shooting that occurred a few weeks before in Lincoln County. Sanders steadfastly denied killing Brandenburg and Hatch or having any part in the Lincoln County shooting. Sanders admitted that he did drive to Madison County that afternoon and showed Detective Benton where he parked the day of the murders. Later that day, Detective Benton had Sanders' truck taken to the state police post in Madison County to be searched for evidence.

On February 2, Sanders and his wife called the Kentucky State Police to see when the truck would be released. Detective Benton told them that it could be released to someone whose name was on the Bill of Sale. Sanders went to retrieve the truck that evening. Upon Sanders' arrival at the state police post, Detective Benton *Mirandized* him and, along with Stephens and Smith, interrogated him again. They arrested Sanders between 8:30 p.m. and 9:00 p.m. that night and put him in the drunk tank.

*2 Before long, Sanders began to break down. He started hitting his head against the wall and would later report that he wanted to kill himself. He finally told one of the jailors to find Detective Benton. When Benton arrived early the next morning, Sanders confessed to killing Brandenburg and Hatch. Sanders also admitted to the Lincoln County shooting.

A grand jury indicted Sanders on two charges of capital murder and two charges of first-degree robbery. Sanders retained Kevin Charters as defense counsel. Two weeks after his arrest, Sanders asked for psychiatric help; so the court sent him to the Kentucky Correctional Psychiatric Center (“KCPC”) for evaluation. Though Sanders requested

treatment for his neurological health, the court directed KCPC to also evaluate whether Sanders was competent to stand trial and whether he had been insane when he committed the murders. After a forty-day evaluation by a team of psychologists, psychiatrists, and social workers, the KCPC concluded that Sanders was competent to stand trial and was not insane at the time of the murders. In late May, a week before Sanders' trial, he secured the pro bono services of Dr. Stuart Cooke, a clinical psychologist. Dr. Cooke spent an afternoon evaluating Sanders and concluded that Sanders was insane when he shot Brandenburg and Hatch.

Sanders' trial took place during the first week of June 1987. He offered insanity as his sole defense. During the Commonwealth's case-in-chief, Detective Benton testified about his interrogations of Sanders, including Sanders' inconsistent stories and confession. He also testified about the similarities between the Lincoln County and Madison County shootings. A firearms examiner testified that the bullet removed from Brandenburg and the bullet removed from the Lincoln County victim, Ethel Rankin, were fired from the same gun—a gun Sanders admitted he borrowed from his brother.

The Commonwealth called Sanders' wife to testify. She detailed Sanders' actions the morning of the shooting, recounted some of his past, and declared that he was a good father to her two children. She insisted that he would not hurt anyone and said that their marriage had been happy. She also described two incidents where Sanders hit her—she said that she provoked him and that he felt awful for doing it.

Sanders testified in his own defense. He admitted that he killed Brandenburg and Hatch and shot Rankin. He recounted the events of both shootings, testifying that he felt like he was watching himself commit the crimes from outside his own body.

Dr. Cooke also testified for the defense. Dr. Cooke concluded that Sanders had a [depersonalization disorder](#)—a disorder where a person feels like he has lost control over his own body. He believed that this illness prevented Sanders from conforming his conduct to the law.

In rebuttal, the Commonwealth presented testimony from Dr. Candace Walker, the clinical psychologist who led the KCPC evaluation team. She described the evaluation and presented the team's findings. Though Sanders had some type of personality disorder, Walker concluded, he was

not insane. She said that the team considered but quickly rejected Dr. Cooke's diagnosis. Throughout the KCPC's extensive evaluation, Walker's team could not find evidence of [psychosis](#) or the type of mental illness that would prevent Sanders from understanding the criminality of his conduct. In Walker's opinion, Sanders showed no remorse and was motivated by a desire for money.

***3** The jury found Sanders guilty on both counts of murder and on both counts of robbery. The penalty phase of trial was short; the Commonwealth moved and the court agreed to incorporate all of the guilt-phase evidence into the sentencing phase. Sanders presented a total of about ten minutes of mitigation testimony from four witnesses. Sanders also took the stand himself. He cried throughout his eight-minute statement, stated he did not understand what happened or why, and blamed the KCPC for not giving him the help he needed. After the close of evidence and arguments, the jury found two aggravating circumstances supporting a death sentence: (1) the murders were committed during the course of a robbery, and (2) the murders were intentional and resulted in multiple deaths. The jury recommended and the court imposed a sentence of death.

After trial, Sanders completed three rounds of appeals over the course of two decades. On direct appeal, Sanders presented forty separate grounds for relief. He challenged everything from *voir dire* to the constitutionality of Kentucky's death-penalty and execution scheme. The Kentucky Supreme Court ultimately denied relief on all claims. [Sanders v. Commonwealth](#), 801 S.W.2d 665 (Ky.1990) (“*Sanders I*”). Sanders then moved for post-conviction relief, alleging that his attorney had provided deficient representation. The Kentucky Supreme Court again denied relief. [Sanders v. Commonwealth](#), 89 S.W.3d 380 (Ky.2002) (“*Sanders II*”), *overruled on other grounds by* [Leonard v. Commonwealth](#), 279 S.W.3d 151 (Ky.2009). In 2003, Sanders filed a claim for federal habeas relief in this Court. R. 9. A little over one year later, the Court held proceedings in abeyance to allow Sanders to exhaust several claims in state court. R. 32. Sanders presented dozens of grounds for relief to the Kentucky courts. The Kentucky Supreme Court denied Sanders' third relief effort, concluding that each claim should have been presented in either of his prior appeals. [Sanders v. Commonwealth](#), 339 S.W.3d 427 (Ky.2011) (“*Sanders III*”). Sanders then returned to this Court. He now presents thirty-three separate claims that he argues entitle him to relief.

DISCUSSION

I. Federal Habeas Corpus for State Prisoners

A. Anti-Terrorism and Effective Death Penalty Act

Federal court is the forum of last resort for prisoners convicted in state courts. Federal habeas corpus is not a mechanism for ordinary error correction; that process is better left in the hands of the sovereign state responsible for the petitioner's conviction. Rather, federal courts “guard against extreme malfunctions” of the state system. *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) (internal quotation marks omitted).

This principle is reflected in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which governs federal review of state-court criminal convictions. Under AEDPA, where the state court adjudicated a prisoner's claims on the merits, a federal court may grant relief only if the state court decision (a) was “contrary to” clearly established Federal law, as defined by the Supreme Court; (b) involved an “unreasonable application” of clearly established Federal law, as defined by the Supreme Court; or (c) was based on an “unreasonable determination” of the facts, in light of the evidence presented to the state court. See 28 U.S.C. § 2254(d). AEDPA's standards are difficult to meet—this is a feature of the habeas structure, not a bug. *Richter*, 131 S.Ct. at 786.

*4 Under AEDPA, a state court's decision is measured against then-existing federal law. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398–99 (2011). Under § 2254(d)(1), a state court's decision is “contrary to” clearly established law if it applies a rule that “contradicts the governing law set forth” in applicable Supreme Court decisions. *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (O'Connor, J.).¹ A decision is also contrary to federal law if the state court analyzes “materially indistinguishable” facts from the relevant Supreme Court decision and then reaches the opposite conclusion. *Id.* at 406. But, generally, so long as a state court identifies and applies the correct Supreme Court rule to the facts of the case, the resulting decision is not “contrary to” clearly established federal law. *Id.*

¹ Justice O'Connor wrote a separate concurrence. However, this portion of her opinion represents the opinion of the Court.

The “unreasonable application” prong of § 2254(d)(1) is similarly weighted in favor of state court decisions. For a petitioner to succeed under this prong, the state court's

application of clearly established federal law “must be objectively unreasonable.” *White v. Woodall*, 134 S.Ct. 1697, 1702 (2014) (internal quotation marks omitted). Indeed, a federal court applying this standard does not ask whether the state court decision was incorrect—for a decision might be incorrect but not unreasonable. See *Richter*, 131 S.Ct. at 785. “[E]ven ‘clear error’ will not suffice” to render a state court decision unreasonable. *Woodall*, 134 S.Ct. at 1702. Rather, a petitioner must show that the state court's decision was “so lacking in justification” that the error was “beyond any possibility for fairminded disagreement.” *Richter*, 131 S.Ct. at 786–87.

Along the same lines, § 2254(d)(2) allows for relief if the state court based its decision on an “unreasonable determination of the facts.” A state court's “factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.” *Wood v. Allen*, 558 U.S. 290, 301 (2010). Where “[r]easonable minds reviewing the record might disagree” about the correctness of the state court's factual findings, a federal court cannot grant relief. *Id.* (alteration in original) (internal quotation marks omitted).²

² Section 2254(e)(1) states that “a determination of a factual issue made by a State court shall be presumed to be correct” and the petitioner must rebut that presumption “by clear and convincing evidence.” Both the Supreme Court and Sixth Circuit have left open the resolution of the interplay between § 2254(d)(2) and § 2254(e)(1). See *Burt v. Titlow*, 134 S.Ct. 10, 15 (2013) (“We have not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1), and we need not do so here.”); *Rice v. White*, 660 F.3d 242, 254 n. 6 (6th Cir.2011). The difference in the burden between the two standards does not affect the outcome here. Therefore, the Court will rely on the “unreasonable determination” standard set out in § 2254(d)(2). See *Wood*, 558 U.S. at 849 (noting that § 2254(e)(1) is “arguably more deferential” to the state court).

AEDPA deference applies even if the state court opinion summarily denies habeas relief. See *Richter*, 131 S.Ct. at 784–85 (holding that AEDPA deference applied to a “one-sentence summary order” denying relief). Even though a state-court decision might have no discussion or reasoning, reviewing federal courts must “presume[] that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” *Id.* Indeed, a state court “need not cite or even be aware of” Supreme Court precedent to receive AEDPA-deference.

Id. at 784 (citing *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam)). The absence of explanation from the state court does not relieve habeas petitioners of their burden. They must still demonstrate that “there was no reasonable basis for the state court to deny relief.” *Id.*

*5 The *Richter* standard also applies where a state court addresses state-law issues but “rejects a federal claim without expressly addressing that claim.” *Johnson v. Williams*, 133 S.Ct. 1088, 1096 (2013). When a state court discusses only some of the petitioner’s claims, federal habeas courts must still “presume that the federal claim was adjudicated on the merits.” *Id.* Either the petitioner or the state may rebut the presumption. The Supreme Court outlined several possible routes of rebuttal. For instance, a petitioner could show that the state standard is less protective than the federal standard or that the “state court had overlooked his federal claim.” *Id.* at 1097. The state could rebut the presumption by demonstrating that the petitioner forfeited his federal claim by not developing it. *Id.* at 1096.

B. State Rules

AEDPA is not the only limit on federal habeas relief. A federal habeas court cannot reevaluate state-court decisions based on matters of state law or grant relief based on an alleged state law error. See 28 U.S.C. § 2241; *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991).

Nor may federal courts or habeas petitioners ignore state procedural rules. When a state court declines to address a claim because the petitioner did not comply with state procedural rules, then that claim is procedurally defaulted. See *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991). With two exceptions, a federal habeas court may not grant relief on a procedurally defaulted claim. *Id.*; *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). The first exception allows a prisoner to raise a defaulted claim in federal court if he can demonstrate both (a) cause for the default and (b) prejudice from the violation of federal law. *Coleman*, 501 U.S. at 750. The other exception, while not at issue here, allows the prisoner to raise such a claim if the federal court’s failure to consider the claim “will result in a fundamental miscarriage of justice.” *Id.*

A state post-conviction attorney’s error—whether through ignorance or inadvertence—is not “cause” to excuse procedural default. *Coleman*, 501 U.S. at 752–54. In the absence of a constitutional right to the assistance of an attorney in state post-conviction proceedings, there can be no

attendant constitutional right to the *effective* assistance of an attorney in those proceedings. *Id.* at 752 (citing *Wainwright v. Torna*, 455 U.S. 586 (1982)).

The Supreme Court carved out exceptions to the *Coleman* bar: post-conviction attorney error may establish the “cause” prong of a defaulted ineffective assistance of trial counsel (“IATC”) claim either where IATC claims may only be raised in post-conviction proceedings, *Martinez v. Ryan*, 132 S.Ct. 1309, 1318–21 (2013), or where it is “highly unlikely” that a defendant would have a “meaningful opportunity to raise” an IATC claim in his direct appeal, *Trevino v. Thaler*, 133 S.Ct. 1911, 1921 (2013). *Martinez* and *Trevino* are limited to IATC claims—*Coleman* controls all other claims. *Martinez*, 132 S.Ct. at 1316 (“*Coleman* held that an attorney’s negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial.”); *Hodges v. Colson*, 727 F.3d 517, 540 (6th Cir.2013) (holding that post-conviction attorney error cannot excuse procedural default of a competency claim).³

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The courts of appeals generally agree. See *Dansby v. Hobbs*, 766 F.3d 809, 833–34. (8th Cir.2014) (declining to extend *Martinez* to ineffective assistance of appellate counsel or trial error claims); *Reed v. Stephenson*, 739 F.3d 753, 778 n. 16 (5th Cir.2014) (holding that *Coleman* controls defaulted claims of ineffective assistance of appellate counsel); *Banks v. Workman*, 692 F.3d 1133, 1147–48 (10th Cir.2012) (same). But see *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1292–96 (9th Cir.2013) (extending *Martinez* and *Trevino* to ineffective assistance of direct appeal counsel claims).

C. Relation Back

*6 Sanders filed his initial habeas petition in December 2003. R. 9. In October 2013, Sanders filed an amended habeas petition. R. 73. In order to meet the statute of limitations for new claims in his amended petition, Sanders contends that his new claims “relate back” to his original habeas petition pursuant to *Federal Rule of Civil Procedure* 15. R. 73 at 90–95.⁴ Because the Court determines that Sanders is not entitled to relief on any of the claims he presents in his amended petition, it need not decide whether those claims relate back to the original habeas petition. The Court will assume that the claims relate back to the original habeas petition.

4

The Court cites to the page number listed on CM/ECF. That may not correspond to the pagination in the briefing.

D. Procedural Default

After Sanders filed his federal habeas petition, he moved to stay the case. R. 29; R. 32 (order granting motion to stay). While the Court held his case in abeyance, Sanders returned to the Kentucky Supreme Court and presented over thirty-six claims for habeas relief in a motion under [Rule 60.02 of the Kentucky Rules of Civil Procedure](#). See *Sanders III*, 339 S.W.3d at 431. Sanders already raised a number of the claims on direct appeal and in his [Kentucky Rule of Criminal Procedure \(“RCr”\) 11.42](#) motion. See *Sanders I*, 801 S.W.2d at 669, 671, 672–74, 676–77, 679–80, 683 (resolving eleven claims for constitutional error that Sanders maintains occurred during trial); *Sanders II*, 89 S.W.3d at 385–91 (raising nine claims based on ineffective assistance of counsel and one claim related to the prosecution's *Brady* obligations). The Kentucky Supreme Court did not evaluate the claims individually. 339 S.W.3d at 437.

In its response to Sanders' federal habeas petition, the Commonwealth argues that Sanders procedurally defaulted on each of these thirty-six claims. See R. 85 at 7–9. The Commonwealth notes that the *Sanders III* court rejected the claims for not having been brought during the direct appeal or the [RCr 11.42](#) proceeding. Accordingly, the Commonwealth claims that the *Sanders III* court relied on an adequate and independent state law of procedure that foreclosed federal review. *Id.* But that rule does not apply to the claims that Sanders *did* present on direct appeal and in his [RCr 11.42](#) motion but presented again in his [Rule 60.02](#) motion. In *Cone v. Bell*, the Supreme Court held that a claim is not procedurally defaulted where—like here—it is presented to the state court more than once. See 556 U.S. 449, 467 (2009); see *id.* at 466–67 (“When a state court refuses to readjudicate a claim ... the court's decision does not indicate that the claim has been procedurally defaulted. To the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts and thus is ripe for federal adjudication.”).

Sanders properly presented his eleven claims of constitutional error, nine claims for ineffective assistance of trial counsel, and his *Brady* claim on direct appeal and collateral review. That he again raised the issues in his [Rule 60.02](#) motion has no effect on the availability of federal habeas relief. *Bell*, 556 U.S. at 466–67. Accordingly, the Commonwealth cannot successfully argue that Sanders procedurally defaulted on those claims that he brought before the Kentucky Supreme Court on multiple occasions. So the Court may consider those claims in Sanders' federal habeas petition.

II. Procedurally Defaulted Claims (Claims 8.5, 10.5, 10.6, 10.7, 10.8, 10.9, 22.5, 22.6, and 29).

*7 Sanders concedes that the following claims are procedurally defaulted: His Fourteenth Amendment claims based on the prosecution's definition of “reasonable doubt” during *voir dire*, which also implicates the Sixth Amendment right to a jury trial (8.5), the denial of a defense-based psychiatric expert and improper disclosures from the neutral psychiatric expert (10.5), Sanders' incompetence to stand trial (10.6), the trial court's failure to hold a trial competency hearing (10.7), Sanders' incompetence at sentencing (22.5), the trial court's failure to hold a sentencing competency hearing (22.6), and the prosecution's failure to correct Dr. Walker's false testimony at trial (29); a Fifth Amendment claim based on the introduction at trial of statements made during Sanders' KCPC evaluation (10.9); and a Sixth Amendment claim based on Charters' conflict of interest (10.8). R. 111 at 4–5. None of the claims, with the exception of claim 10.8, is itself an IATC claim. Sanders “relies solely on ineffective assistance of initial-review collateral proceeding counsel to excuse the [procedural] default” of the above claims. *Id.* For the defaulted claims that are not IATC claims, the *Coleman* bar applies, meaning that post-conviction attorney error cannot excuse his default. Consequently, the Court will deny Sanders' petition for relief, R. 9, R. 73, and the evidentiary motions as to those claims, R. 78, R. 79, R. 111.

That leaves claim 10.8, in which Sanders alleges that Charters had a conflict of interest. R. 73 at 148. According to Sanders, his family gave his original court-appointed attorney \$2,000.00 to hire a psychologist or psychiatrist. *Id.* at 149. After replacing the court-appointed attorney, Charters used the money for his fee instead of for hiring a psychologist or psychiatrist—or so Sanders claims. *Id.* This arrangement created a pecuniary conflict of interest, Sanders argues, because Charters had to choose between hiring an expert to help Sanders and pocketing the money for himself. *Id.* at 152–55.

An attorney's conflict of interest may establish the “denial of the ‘right to have the effective assistance of counsel’ “ guaranteed by the Sixth Amendment. *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980) (quoting *Glasser v. United States*, 315 U.S. 60, 76 (1942)). Because a conflict of interest is a form of ineffective assistance, Sanders may escape procedural default only by showing cause through the *Martinez–Trevino* gateway and prejudice.

Under *Martinez* and *Trevino*, Sanders may satisfy the “cause” prong if he establishes the following: (1) his IATC conflict-of-interest claim is “substantial”; (2) his state post-conviction counsel was ineffective; (3) the state post-conviction proceeding was the “initial” review for the IATC claim; and (4) the state’s post-conviction procedures “makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise” the IATC claim. *Trevino*, 133 S.Ct. at 1921. In this case, the trial court proceeding in *Sanders II* was the initial review for the IATC claim. See *Martinez*, 132 S.Ct. at 1320.

*8 The Court cannot reach Sanders’ *Trevino* argument because Sanders’ gateway to the merits—ineffective assistance of post-conviction counsel—is itself procedurally barred. When a habeas petitioner relies on ineffective assistance of counsel to excuse a procedural default, his argument of ineffective assistance must still follow the rules regarding procedural default and exhaustion. Both of those rules are relevant to Sanders’ claim here. First, he must exhaust. That requires presenting the ineffective-assistance argument “to the state courts as an independent claim before it may be used to establish cause for a procedural default.” *Murray v. Carrier*, 477 U.S. 478, 489 (1986). Second, “a procedurally defaulted ineffective-assistance-of-counsel claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the ‘cause and prejudice’ standard with respect to the ineffective-assistance claim itself.” *Carpenter*, 529 U.S. at 450–51. Here, Sanders has not exhausted and has procedurally defaulted on his ineffective-assistance-of-post-conviction-counsel argument.⁵

⁵ Even though Kentucky does not argue failure to exhaust or procedural default with respect to the ineffectiveness of post-conviction counsel, the Court may raise exhaustion and procedural default *sua sponte*. See *Clinkscale v. Carter*, 375 F.3d 430, 436 (6th Cir.2004); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir.2000).

On exhaustion, Sanders had the opportunity in *Sanders III* to argue that his post-conviction counsel in *Sanders II* was ineffective. *Sanders III*, 339 S.W.3d at 435. Indeed, Sanders made two specific arguments that his *Sanders II* counsel was ineffective: (1) counsel was ineffective for failing to argue that evidence of a prior crime admitted at trial was improper and (2) counsel was ineffective for failing to argue that Sanders’ trial counsel was ineffective for not removing

a victim from the courtroom. *Id.*; see Brief for Appellant at 32–34, *Sanders III*, 339 S.W.3d 427 (Ky.2011). Sanders also broadly contended that he was effectively without an attorney while his post-conviction motion was pending in *Sanders II*. *Id.* None of those points encompassed a claim that Sanders’ trial counsel was ineffective due to a pecuniary conflict-of-interest. The *Sanders III* court rejected Sanders’ claims of ineffective assistance of post-conviction counsel, explaining that such claims were “limited to counsel’s performance on direct appeal” and did not extend to post-conviction relief. 339 S.W.3d at 435.

Sanders failed to exhaust the available state remedies because he did not take advantage of the opportunity, in *Sanders III*, to present his argument to the Kentucky courts. As Sanders recognized, he could have brought his ineffective assistance of post-conviction counsel claims in *Sanders III*. And he brought two such claims. But Sanders left out any claim that his attorney was ineffective for failing to cite his trial counsel’s conflict of interest. Because Sanders omitted that claim, he failed to exhaust the available state remedies. See *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). That the Kentucky Supreme Court rejected the other post-conviction-counsel claims in *Sanders III* does not relieve Sanders of his obligation to make use of his only opportunity to present that specific argument to the state court. See *Engle v. Isaac*, 456 U.S. 107, 130 (1982); *Johnson v. Beckstrom*, Civil No. 08–194–ART, 2011 WL 3439135, at *1 (E.D.Ky. Aug. 5, 2011).

*9 Additionally, Sanders’ failure to exhaust renders his argument that post-conviction counsel was ineffective procedurally defaulted. Where a petitioner does not exhaust “and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred,” the petitioner has procedurally defaulted. *Coleman*, 501 U.S. at 735 n. 1; see also *Awkal v. Mitchell*, 613 F.3d 629, 646 (6th Cir.2010) (en banc) (“If an unexhausted claim would be procedurally barred under state law, that claim is procedurally defaulted for purposes of federal habeas review.” (internal quotation marks omitted)). Kentucky courts would now find Sanders’ contention that his post-conviction counsel was ineffective procedurally barred. At this time, Sanders could exhaust his ineffective-assistance-of-post-conviction-counsel argument only by proceeding under Kentucky Civil Rule 60.02 in Kentucky courts. As the Kentucky Supreme Court has explained, that avenue of relief is solely for errors that “were unknown and could not have been known to the moving party by exercise of reasonable diligence and in time to

have otherwise been presented to the court.” *Sanders III*, 339 S.W.3d at 437 (internal quotation marks omitted). But Sanders knew about this issue. As discussed above, he could have raised his argument that post-conviction counsel (in *Sanders II*) was ineffective during *Sanders III*. Moreover, Sanders was aware of the underlying conflict-of-interest issue during *Sanders III* because he included that claim (a separate claim from the allegation that his post-conviction counsel was ineffective for not raising the conflict-of-interest claim) in his briefing in *Sanders III*. See Motion for Relief from Judgment at 112–13, *Sanders III*, 339 S.W.3d 427 (Ky.2011).

Because Sanders did not present this argument to the Kentucky courts in *Sanders III*, the Kentucky Supreme Court would find an attempt to bring that claim now procedurally barred. That results in Sanders procedurally defaulting his argument in this court. Additionally, the Court gave Sanders the opportunity to present *all* his unexhausted claims to the Kentucky courts in 2004. See R. 32. Sanders cannot now have another chance at Kentucky courts.

Even if the Court could reach the *Martinez–Trevino* factors, Sanders has not established that his conflict-of-interest claim is “substantial.” *Trevino*, 133 S.Ct. at 1921. A conflict of interest requires the petitioner to “show [] that his counsel actively represented conflicting interests” and that the conflict impaired his interests. *Cuyler*, 446 U.S. at 350. Conclusory allegations will not suffice; rather the petitioner must “point to specific instances in the record to suggest an actual conflict or impairment of [his] interests.” *United States v. Hall*, 200 F.3d 962, 965–66 (6th Cir.2000) (internal quotation marks omitted). Only after such a showing is prejudice presumed. *Cuyler*, 446 U.S. at 349–50. But the Supreme Court has not expanded the Sixth Amendment conflict-of-interest doctrine to include pecuniary conflicts, see *Mickens v. Taylor*, 535 U.S. 162, 174 (2002), and the Sixth Circuit has cautioned against applying *Cuyler* broadly, *Moss v. United States*, 323 F.3d 445, 473 n. 25 (6th Cir.2003) (“[T]he *Mickens* rationale compels our strong hesitation to apply [*Cuyler v. Sullivan*] to conflicts of interest cases arising outside of the joint representation context.”). Indeed, the conflict Sanders alleges—between an attorney’s funds and his client’s interests—“is the same theoretical conflict that exists ... in any pro bono or underfunded appointment case.” *Williams v. Calderon*, 52 F.3d 1465, 1473 (9th Cir.1995). Such claims are more appropriately viewed as fee disputes, which are usually adjudicated under *Strickland*, not *Cuyler*. See *United States v. O’Neil*, 118 F.3d 65, 72 (2d Cir.1997) (“To the extent that the attorney shirks his ethical obligation to dutifully represent

his client as a result of a fee dispute, we believe *Strickland* provides the appropriate analytic framework.”); *Bonin v. Calderon*, 59 F.3d 815, 827 (9th Cir.1995) (“[A]n assertion of conflict based on the fact that payment for any investigation or psychiatric services could have come from counsel’s pocket forc[ing] counsel to choose between [the client’s] interests and his own ... do [es] not typically create actual conflicts under *Cuyler*.” (internal quotation marks omitted)); *United States v. Taylor*, 139 F.3d 924, 932 (D.C.Cir.1998); *Yohey v. Collins*, 985 F.2d 222, 227 (5th Cir.1993). Under *Strickland*, Sanders has not presented a substantial claim. Sanders does not demonstrate how it was unreasonable for Charters to use the services of the KCPC and Dr. Cooke, nor does Sanders attempt to show prejudice under *Strickland*. As a result, his claim of ineffective assistance is not “substantial” for purposes of *Martinez–Trevino* and his underlying conflict-of-interest claim is procedurally defaulted.

III. Claim 26: Kentucky’s Death Penalty Proportionality Review .

*10 Sanders objects to Kentucky’s death penalty proportionality review under the Eighth and Fourteenth Amendments. R. 73 at 204. Consistent with its standard practice, the Kentucky Supreme Court compared Sanders’ case to only those cases where a death penalty was imposed, not to cases where the jury found similar aggravating factors but did not impose a death sentence. Sanders contends that this practice is unconstitutional. *Id.* at 204–05. He also argues that Kentucky improperly considered verdicts handed down before the Supreme Court declared the death penalty unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972), and cases where the death sentence was later reversed or where clemency was granted. R. 73 at 208.

This Court considered and rejected similar objections in *Bowling v. Parker*, Civil No. 03–28–ART, 2012 WL 2415167, at *8–10 (E.D. Ky. June 26, 2012). The same analysis applies here. A death sentence is unconstitutional if it “is grossly out of proportion to the severity of the crime.” *Coker v. Georgia*, 433 U.S. 584, 592 (1977). But “when a life has been taken deliberately by the offender,” the death penalty is not “invariably disproportionate to the crime.” *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). In determining whether one defendant’s death sentence is proportional, a comparative proportionality review is not constitutionally required. See *Pulley v. Harris*, 465 U.S. 37, 50 (1984); *McQueen v. Scroggy*, 99 F.3d 1302, 1333–34 (6th Cir.1996), *overruled on other grounds by In re Abdur’Rahman*, 392 F.3d 174, 179–82 (6th Cir.2004) (en banc) (“There is no federal

constitutional requirement that a state appellate court conduct a comparative proportionality review.”). Indeed, a defendant “cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty.” *McCleskey v. Kemp*, 481 U.S. 279, 306–07 (1987). And Sanders admits that “[p]roportionality review in capital cases is generally not required.” R. 73 at 211.

Kentucky's framework—requiring a comparative proportionality review—goes beyond the Constitution's mandate. Kentucky law requires the Kentucky Supreme Court to consider “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” Ky.Rev.Stat. § 532.075(3)(c). In doing so, the Kentucky Supreme Court must “include in its decision a reference to those similar cases which it took into consideration.” *Id.* § 532.075(5). The Supreme Court has explained that similar appellate procedures from Georgia were “a check against the random or arbitrary imposition of the death penalty.” *Gregg*, 428 U.S. at 206. By going beyond what the Constitution requires, Kentucky's framework does not create an Eighth Amendment violation.

Sanders also contends that Kentucky's decision to set up a comparative proportionality review afforded him a due process right. Kentucky has violated this due process right, he argues, because the review relies on pre-*Furman* cases and analyzes only cases where the death penalty was imposed. R. 73 at 212. This Court dealt with the same issue in *Bowling*, 2012 WL 2415167, at *8–10. As an initial matter, it is unlikely that Kentucky's proportionality review established a due process right. See *Bowling v. Parker*, 344 F.3d 487, 521–22 (6th Cir.2003). Even assuming Sanders had a due process right emanating from the proportionality review, there was no clearly established federal law in 1990 requiring consideration of cases where the defendant did not receive a death sentence. See *Bowling*, 344 F.3d at 522. Nor did the Kentucky Supreme Court commit error by considering pre-*Furman* cases. The court could have viewed those cases as evidence of the sentences juries handed down in similar cases. Indeed, the Kentucky Supreme Court would have violated state law by failing to consider pre-*Furman* cases. As a result, Sanders is not entitled to relief based on a due process violation stemming from Kentucky's comparative proportionality review.

IV. Juror and Voir Dire Claims: 2, 3, 5, 8, and 9.

*11 The Sixth and Fourteenth Amendments guarantee to a criminal defendant a trial by an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 726–27 (1992) (quoting *Irvin v. Dowd*, 366 U.S. 717, 721–22 (1961)). Due process requires only “a jury capable and willing to decide the case solely on the evidence before it.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982). In deciding whether juror bias violates due process, courts perform a two-prong analysis: (1) whether the juror swore that he “could set aside any opinion he might hold and decide the case on the evidence” and (2) whether the trial court should have believed the juror's declaration of impartiality. *Patton v. Yount*, 467 U.S. 1025, 1036–37 (1984). The answer to those questions, the Supreme Court says, “is plainly one of historical fact.” *Id.* As such, a state court's answer is entitled to deference. *Id.* at 1037 n. 12; *Rushen v. Spain*, 464 U.S. 114, 120 (1983).

A. Claim 2: Failure to remove jurors Meinzer and Warren.

Sanders asserts that the seating of jurors John Meinzer and George Warren violated his right to an impartial jury, though he did not challenge either juror during *voir dire*. Sanders first challenged Meinzer on direct appeal in *Sanders I*. He challenged Warren for the first time as part of an ineffective-assistance-of-counsel claim in *Sanders II*. In both cases, the Kentucky Supreme Court found that the jurors were qualified to sit on the jury. See *Sanders I*, 801 S.W.2d at 669 (Meinzer); *Sanders II*, 89 S.W.3d at 388 (Warren). Sanders alleges that the Kentucky Supreme Court mishandled the law and took an unreasonable view of the facts in reaching that conclusion. R. 73 at 107–110. In his federal petition, Sanders requests an evidentiary hearing to rectify the factual errors and omissions. In any event, he argues, he is entitled to federal habeas relief on the law. See R. 110. But Sanders is wrong. He is not entitled to the relief he seeks.

Meinzer. Meinzer approached the bench twice in response to questions during general *voir dire*. After general *voir dire*, counsel and the court questioned him in individual *voir dire*. During his first visit to the bench, Meinzer informed the court that he knew of one of the victims, Mr. Brandenburg. VR 06/01/87, 10:04:13–10:05:33 (Tape 3, 01:04:41–01:06:02).⁶ Meinzer worked the third shift as a respiratory therapist at the hospital, while Mr. Brandenburg's wife worked the day shift in the hospital's business office. *Id.* Meinzer advised the court and counsel that he met Mr. Brandenburg at a hospital Christmas party and had “a couple drinks” with him at the party, which Meinzer said “was about the extent” of their

acquaintance. *Id.* According to Meinzer, the whole interaction lasted “a couple minutes.” *Id.* In response to a question from the court, Meinzer stated that his acquaintance with Mr. Brandenburg would not affect his ability to render a fair and impartial verdict based solely on the evidence. *Id.* Defense counsel inquired whether Meinzer's acquaintance with Mrs. Brandenburg would make him “embarrassed if [he] did not return a guilty verdict.” *Id.* Meinzer replied that he did not know Mrs. Brandenburg well, but was aware she worked at the hospital. *Id.* As the Kentucky Supreme Court described the exchange, counsel was “evidently satisfied with a negative response” and declined to challenge Meinzer for cause or by peremptory strike. *Sanders I*, 801 S.W.2d at 669.

6 “VW” refers to the video recording of Sanders' trial.

*12 When the court called Meinzer back to the bench a few minutes later for further questioning, Meinzer stated that he had heard “the talk” around the hospital about the murder. VR 06/01/87, 10:17:48–10:18:23 (Tape 3, 01:18:15–01:18:50). He again stated that he could render a verdict based solely on the evidence presented in court, putting aside anything he “might have heard at the hospital.” *Id.* Defense counsel again declined to challenge Meinzer's inclusion in the jury pool.

After general *voir dire* of the jury pool, the court called the potential jurors into chambers for individual *voir dire*. During individual *voir dire*, the court asked Meinzer if he had heard, read, or seen anything about the case that he would not be able to put out of his mind. VR 06/01/87, 10:33:16–10:38:23 (Tape 3, 01:33:42–01:38:50). Meinzer replied, “not that I know of.” *Id.* Meinzer then volunteered that he had read articles on the case in the local newspaper, but did not remember much except a photo of the roped-off store. *Id.* The court closed individual *voir dire* by asking if there was any reason Meinzer could not give both sides a fair trial; Meinzer said “no.” *Id.* Defense counsel did not inquire any further about potential bias or challenge Meinzer's seating on the jury.

Sanders finally challenged Meinzer on direct appeal. The Kentucky Supreme Court noted that Sanders' argument was unduly belated, but addressed the challenge anyway. The court held that counsel “reasonably and responsibly found [Meinzer] to be competent, qualified, and impartial.” *Sanders I*, 801 S.W.2d at 669. The court went on to hold that even if counsel had moved to excuse Meinzer, the trial court's denial of that motion would not have constituted reversible error. *Id.* The court based its holding on a determination that Meinzer's “passing acquaintance” with the Brandenburgs and “passing

familiarity with the reported circumstances of the crime” did not suffice to imply bias. *Id.*

Sanders asserts that the Kentucky Supreme Court's factual determinations were unreasonable. In his federal petition, Sanders presents a distorted recitation of the facts that is inconsistent with the record evidence. Sanders converts Meinzer's statement that he had “a couple drinks” with Mr. Brandenburg at a party into “Juror Meinzer ... used to have drinks with the victim.” R. 73 at 105. Meinzer and Mrs. Brandenburg worked different shifts in different departments in the hospital; but Sanders describes this relationship as Meinzer “work[ing] with” Mrs. Brandenburg. *Id.*

Though Sanders offers an alternative description of the facts, he presents no basis for finding that the *Sanders I* recitation was unreasonable. Meinzer said he did not know Mrs. Brandenburg well and just had “a couple drinks” at a party with Mr. Brandenburg. See *Sanders I*, 801 S.W.2d at 669. The Kentucky Supreme Court was hardly unreasonable in taking Meinzer at his word—as defense counsel evidently did at the time. This is especially true given that trial counsel had the opportunity to explore potential bias during *voir dire* and was satisfied as to Meinzer's impartiality. Given the evidence before it, the Kentucky Supreme Court was not unreasonable in finding that Meinzer had a “passing acquaintance” with the Brandenburgs.

*13 Sanders' strongest claim for relief might be Meinzer's statement that he heard “the talk” around the hospital about the trial, which Sanders characterizes as “Juror Meinzer had heard so much at the hospital about the case that he referred to it as the ‘talk’ at the hospital.” R. 73 at 105. But the Constitution does not guarantee a panel of jurors who have heard nothing about the case before trial. See *Skilling v. United States*, 561 U.S. 358, 380–81 (2010) (“[J]uror impartiality ... does not require *ignorance*.”); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (“[S]carcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.”). Rather, due process requires that the jury be “capable and willing to decide the case solely on the evidence before it.” *Smith*, 455 U.S. at 217. Confronted with possible juror bias via pretrial publicity, the ultimate question for the court is whether the juror should be believed when he says he can render an impartial verdict. *Mu'Min v. Virginia*, 500 U.S. 415, 425 (1991). The trial court here asked Meinzer four times, in four different ways, if he could render an impartial verdict. Meinzer affirmed that he could. In the crucible of the courtroom, where one can see a

juror's responses, body language, and the like, the trial court—and defense counsel—both believed Meinzer's assurances. See *Skilling*, 561 U.S. at 396 (holding that the defendant's failure to challenge a juror for cause was “strong evidence” that the defendant was convinced the juror was unbiased). Sanders does not offer any basis for rejecting that on-the-scene determination.

Sanders also contends that the Kentucky Supreme Court unreasonably applied “the law.” R. 73 at 110. Sanders does not cite or identify the relevant law that the Kentucky Supreme Court allegedly applied unreasonably. According to Sanders, the fact that Meinzer had “knowledge of the case” and a “relationship with the victim and his wife” required Meinzer's dismissal. *Id.* But Sanders does not point to any clearly established law mandating that result. Rather, the relevant Supreme Court law requires courts to ask whether the juror swore he could be impartial and, if so, whether the court should have believed him. See *Smith*, 455 U.S. at 217; *Patton*, 467 U.S. at 1036–37. The Kentucky Supreme Court accurately applied the *Smith* and *Patton* standard to the facts it found. As a result, habeas relief is not appropriate under the unreasonable application prong. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

Warren. According to Sanders, the trial court's failure to remove Warren from the jury amounted to a violation of Sanders' due process rights. R. 73 at 107. Sanders' mother had alerted the court that she had seen Warren speaking with Colonel Hatch at some point during trial. Colonel Hatch was the prosecution's last witness and the father of one of the victims. The court, prosecution, and defense counsel met with Warren. In that meeting, Warren volunteered that he knew Colonel Hatch “a long time ago;” Hatch was an administrator at a hospital when Warren's mother died. Warren stated that Hatch “did [Warren's family] a lot of favors, I mean, ya know he talked to us when my mother died.” Warren stated that he did not know the victim, that he did not know Colonel Hatch was the victim's father until trial, and that his prior acquaintance would not “weigh on his mind in any manner.” Rather, he kept “[his] own mind.” VR 6/04/87, 12:30:30–12:31:55 (Tape 6, 1:11:12–1:13:20).

*14 Sanders did not object to Warren's presence on the jury at trial or on direct appeal. In *Sanders II*, Sanders alleged that counsel was ineffective for failing to question and challenge Warren. Finding no prejudice from the alleged error, the court denied the claim. *Sanders II*, 89 S.W.3d at 388. In *Sanders III*, Sanders presented the Sixth-and-Fourteenth-Amendments

version of his challenge to Warren, which he presses in his federal petition, alleging that the court should have removed Warren. The court denied the claim, holding that Sanders should have presented the claim in *Sanders II*. *Sanders III*, 339 S.W.3d at 435, 438. Despite having two opportunities to present the claim, he failed to do so. On the third try, the Kentucky Supreme Court held that he failed to meet state procedural requirements and denied relief. That holding would ordinarily constitute procedural default of the claim and bar federal habeas relief. See *Coleman*, 501 U.S. at 729–30.⁷

7 The Commonwealth asserts both that the claim is procedurally barred on the basis of *Sanders III* and that the Kentucky Supreme Court fully considered the claim in *Sanders II*. R. 85 at 8–11. It is unclear if the Commonwealth's argument that *Sanders II* fully considered the claim refers only to the ineffective assistance claim, or if it is an affirmative concession that *Sanders II* adjudicated the underlying claim on the merits. If it is the latter, then Sanders would not procedurally default the claim. See *Cone v. Bell*, 556 U.S. 449, 467 (2009) (“A claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration—not when the claim has been presented more than once.”). The Court need not resolve this issue as it addresses Sanders' argument on the merits.

In his federal petition, Sanders argues that the *Sanders II* consideration of his IATC claim counts as an “adjudication on the merits,” and so the claim is not procedurally defaulted. This position has some merit. The Third Circuit has held that a claim is adjudicated on the merits where the state court considered the claim under the prejudice prong of an IATC claim. See *Moore v. Penn. Dep't of Corr.*, 457 F. App'x 170, 178 (3d Cir.2012) (citing *Albrecht v. Horn*, 485 F.3d 103, 116 (3d Cir.2007)). The court reasoned that where the state court identifies the correct legal principle and applies it to the petitioner's claim, the court has adjudicated the claim on the merits for AEDPA purposes. *Id.* (citing *Richter*, 131 S. Ct at 783–85). Even if *Moore* is correct and Sanders' claim is not procedurally defaulted, he would still not be entitled to relief.

According to the *Sanders II* court, Sanders failed to establish any prejudice because he did not demonstrate what bias further questioning of Warren might have revealed. *Sanders II*, 89 S.W.3d at 388. The court went on to hold that Warren did not have a close enough acquaintance with Colonel Hatch to establish bias. *Id.*

Sanders argues that the Kentucky Supreme Court unreasonably determined the facts surrounding Warren's bias. See 28 U.S.C. § 2254(d)(2). He argues that the Kentucky courts should not have believed Warren's declarations of impartiality. Jurors were asked during *voir dire* if they knew any of the victims or witnesses; Warren said that he did not. Sanders claims this was not an oversight; rather, Warren “intentionally failed to disclose” his acquaintance with Colonel Hatch. R. 73 at 107. Why would Warren do such a thing? Because, the argument goes, he wanted to get on the jury to secure a conviction. The Kentucky Supreme Court's failure to recognize this, Sanders argues, means its decision was based on an unreasonable determination of the facts.

***15** Sanders' argument is unpersuasive. Though Warren did not disclose his acquaintance with Colonel Hatch during *voir dire*, he offered a reason for the omission: he did not know the victim and did not realize that Colonel Hatch was the victim's father. As in his objections to Meinzer, Sanders offers an inflated recitation of the facts. For example, Sanders quotes Warren as saying that Hatch “did a lot of favors” for Warren's family, but ignores the context of that quotation. Evidently, doing “a lot of favors” amounted to talking to Warren's family when his mother died—a more limited relationship than Sanders insinuates. Sanders focuses on the fact that Warren appears to say he knew Hatch “a long time.” R. 73 at 109. But Warren says that he knew Hatch “a long time ago.” While the video recording is not a model of clarity, the latter phrase is more consistent with the rest of Warren's testimony. Warren talks about his relationship with Hatch only in the context of a few events at a hospital—it is unlikely that Warren would say he knew Hatch “a long time” based solely on those instances.

Given that Warren discussed only a few interactions with Hatch around the time Warren's mother died, the Kentucky Supreme Court could reasonably conclude that their limited interactions did not rise to the level of juror bias. And Warren stated that his acquaintance with Hatch would not impact his decision-making “in any way” and that he “keeps [his] own mind.” The trial court believed him. While Sanders came to disagree almost two decades after the fact, he offers no basis for declaring that the Kentucky Supreme Court was unreasonable in reaching the same conclusion as the trial court. Because Warren affirmed his impartiality and had limited interactions with Hatch, the Kentucky Supreme Court reasonably found that their relationship was not sufficient to “imply bias.” *Sanders II*, 89 S.W.3d at 388. Warren's presence on the jury does not entitle Sanders to the relief he seeks.

Sanders also contends that the Kentucky Supreme Court unreasonably applied clearly established law by failing to consider the impropriety of both Warren speaking to a witness and the content of that conversation. But no clearly established federal law requires specific consideration of these points. As discussed in relation to Meinzer, the inquiry for juror bias is whether the juror swore he could be impartial, and if so, whether the court should believe him. See *Smith*, 455 U.S. at 217; *Patton*, 467 U.S. at 1036–37. Warren said that he could be impartial. The court and defense counsel were evidently satisfied with that answer. See *Skilling*, 561 U.S. at 396. Under the facts found by the Kentucky Supreme Court, it was not objectively unreasonable, and in fact was likely correct, to conclude that Sanders' “allegation of bias on the part of the juror is merely speculative.” *Sanders II*, 89 S.W.3d at 388.

Nor is Sanders entitled to the evidentiary hearing he seeks on this claim. The Supreme Court held that “review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011). Because Sanders must meet his burden under § 2254(d)(1) using only the state-court record, the Court cannot grant him an evidentiary hearing to expand that record. See *id.* at 1399–1400. And Sanders cannot receive a hearing by relying on § 2254(d)(2)'s “unreasonable determination of the facts.” That section is specifically limited to “the evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d)(2); see also *Pinholster*, 131 S.Ct. at 1415–16 (Sotomayor, J., dissenting) (explaining that § 2254(d)(2) “more logically depends on the facts presented to the state court”); *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 464 (6th Cir.2012). Both §§ 2254(d)(1) and 2254(d)(2) restrict this Court's scope of consideration to the facts that were before the state court. Accordingly, Sanders is not entitled to an evidentiary hearing.

***16 Ineffective Assistance of Trial Counsel.** In his discussion of jurors Meinzer and Warren, Sanders briefly asserts that “trial counsel's failure to request their excusal was deficient performance that prejudiced Sanders.” R. 73 at 109. Sanders does not elaborate on this *Strickland* claim. See *Strickland v. Washington*, 466 U.S. 668 (1984). With no further argumentation (or even a citation to *Strickland*), the Court need not consider Sanders' argument. See *Frazier v. Jenkins*, 770 F.3d 485, 501 n. 9 (6th Cir.2014) (“This cursory argument has been waived, for issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” (internal

quotation marks and alterations omitted)). In fact, he does not identify which Kentucky Supreme Court decisions on ineffective assistance were unreasonable, and, as a result, makes no argument as to why they were unreasonable. Nor does Sanders elaborate on either prong of the ineffective-assistance analysis. With no developed argumentation on this *Strickland* claim, Sanders is not entitled to relief.

B. Claim 3: The trial judge improperly commented *ex parte* to the prosecutor about juror Meinzer.

Sanders argues that the trial judge abandoned his role as a neutral arbiter by making an *ex parte* comment to the prosecutor about juror Meinzer after his second bench conference. The record reflects just that. After Meinzer and defense counsel left the bench and were out of earshot, the trial judge turned to the prosecutor. The judge lowered his voice, partially shielded his mouth with his hand, and uttered five words about Meinzer—“He’s dying to get on.” VR 06/01/87, 10:18:27–10:18:30 (Tape 3, 01:18:56–01:18:59).

On direct appeal, the Kentucky Supreme Court concluded that it could not condone the trial judge’s comment. But the court declined to find that his remark amounted to a constitutional violation and held that there was no prejudice to Sanders’ rights to due process, a fair trial, or rational sentencing. *Sanders I*, 801 S.W.2d at 669–70. This Court agrees. While there is no question that the trial judge’s *ex parte* comment was inappropriate, under federal law, it amounted to exactly what Sanders claims it is: an *ex parte* comment.

Sanders, however, contends that by finding some justification in his complaint and perceiving no prejudice on direct appeal, the Kentucky Supreme Court found a constitutional violation and applied harmless error analysis. R. 73 at 113–114. But he is mistaken in his assessment of the Kentucky Supreme Court opinion. Acknowledging “some justification” to Sanders’ complaint is not the same as finding a constitutional violation. The court simply noted that, as a general matter, the trial judge should not have made the comment. Any number of things can happen during a trial that should not happen—judges are not above making mistakes—but not all such mistakes have a constitutional dimension. See, e.g., *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (“[M]ost matters relating to judicial disqualification do not rise to a constitutional level.” (quotations and alterations omitted)); *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974) (stating that erroneous jury instructions do not always “rise to the level of constitutional error”).

*17 The Kentucky Supreme Court’s holding does not contradict or unreasonably apply clearly established federal law. No Supreme Court opinion squarely addresses *ex parte* communication between the judge and prosecutor or articulates a constitutional right to a trial free from such *ex parte* comments. Sanders cites to Justice Marshall’s dissent in *Rushen v. Spain*, 464 U.S. 114 (1983), and two Sixth Circuit opinions: *United States v. Barnwell*, 477 F.3d 844 (6th Cir.2007) (concluding that *ex parte* communications between the trial judge and government deprived the defendant of constitutional rights) and *United States v. Minsky*, 963 F.2d 870 (6th Cir.1992) (same). However, a dissent is not clearly established federal law—for AEDPA purposes or otherwise. Nor are decisions from the courts of appeals clearly established law under AEDPA.⁸ See 28 U.S.C. § 2254(d)(1); *Lopez v. Smith*, 135 S.Ct. 1, 2 (2014) (“We have emphasized ... that [AEDPA] prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is ‘clearly established.’”). With no clearly established law, there is nothing for the Kentucky Supreme Court to contradict or apply-unreasonably or not-meaning that Sanders cannot obtain relief.

⁸ Sanders also asserts, without supporting authority, that an *ex parte* communication is “structural error” and thus cannot be harmless. See R. 73 at 114. There is no basis in Supreme Court precedent for this proposition.

Unlike *Rushen*, this case involves an *ex parte* comment between a trial judge and a prosecutor—not between a judge and a juror. But even if *Rushen* could be analogized to this case, *Sanders I* is not “contrary to” or an “unreasonable application of” the *Rushen* decision. Why? Because the Supreme Court did not even analyze the constitutional dimensions of *ex parte* communication between a judge and juror in that per curiam opinion. See 464 U.S. at 117 n. 2 (“Whether the error was of constitutional dimension in this case is not before us. Because we find that no actual prejudice was shown, we assume, without deciding, that respondent’s constitutional rights to presence and counsel were implicated in the circumstances of this case.”). *Rushen* merely reiterated that while *ex parte* judge–juror communications should be disclosed to the parties, a failure to do so does not always require reversal. 464 U.S. at 119. So *Rushen* does not clearly establish that a judge’s *ex parte* communication with a juror necessarily amounts to a constitutional violation—let alone a judge’s *ex parte* communications with a prosecutor. And *Sanders I* is consistent with that ruling because the Kentucky Supreme Court concluded that the challenged *ex*

parte communication was inappropriate without rising to a constitutional violation.

The *Rushen* Court contemplated that any prejudicial effect of an undisclosed *ex parte* conversation could be ascertained by a post-trial hearing. *Id.* at 119–20. However, nothing in the *Rushen* opinion requires state courts to hold such a hearing. So the Kentucky Supreme Court did not misapply *Rushen* by forgoing an evidentiary hearing before concluding that the judge's *ex parte* comment did not prejudice Sanders. In the absence of a clear rule—as opposed to a non-binding statement of best practices—it is difficult to say that the Kentucky Supreme Court incorrectly applied *Rushen*, much less did so *unreasonably*. See *Richter*, 131 S.Ct. at 786 (“It is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme Court].” (quotation marks and alteration omitted)). Moreover, Sanders has not even alleged that the constitutional violation stems from the lack of a hearing. He has not requested an evidentiary hearing on the claim in his federal proceedings, nor has he indicated what a hearing would have revealed. See R. 110. In short, he offers no basis to conclude that he suffered any prejudice from the lack of a post-trial hearing.

*18 Sanders' last avenue for relief is § 2254(d)(2)'s “unreasonable determination of the facts” standard. But that claim also fails. Neither party disputes that the trial judge told the prosecution that Meinzer was “dying to get on” the jury. The Kentucky Supreme Court recognized this comment in its opinion. *Sanders I*, 801 S.W. 2d at 669. The court explained that the remark was “brief” and did not specify whether Meinzer was disposed to “serve and convict, or to serve and acquit.” *Id.* This, too, is consistent with the record. The video recording of the *ex parte* communication reveals that the statement consisted of five words (“He's dying to get on”) spanning all of two seconds. VR 06/01/87, 10:18:27–10:18:29 (Tape 3, 01:18:56–01:18:58). The Kentucky Supreme Court reasoned that the remark merely conveyed the judge's own opinion about Meinzer's attitude—one that was as observable by counsel as by the trial judge. *Sanders I*, 801 S.W.2d at 669. This conclusion is also consistent with the record. The video recording shows that counsel for both sides were present for Meinzer's bench approaches and individual *voir dire*. VR 06/01/1987, 10:04:14–10:05:37; 10:17:47–10:18:24 (Tape 3, 01:04:42–01:06:06; Tape 3, 01:18:15–01:18:52). On these facts, it was not *unreasonable* for the Kentucky Supreme Court to conclude that the trial court merely said out loud what

both parties could see for themselves. While the Kentucky Supreme Court also concluded that it could not condone the trial judge's statement, *Sanders I*, 801 S.W.2d at 669, this admonition does not demonstrate that it unreasonably characterized the *ex parte* comment.

Sitting as the reviewing court in the first instance, the Court may have described the facts surrounding the *ex parte* comment differently. But that is not grounds to find that the Kentucky Supreme Court's description was “unreasonable” or to grant relief on a federal habeas petition. See *Wood*, 558 U.S. at 301 (“[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.”).

The trial judge's *ex parte* remark to the prosecutor was unnecessary and inappropriate. Judges function as neutral arbiters, not as advocates. Much like umpires who simply call balls and strikes and do not themselves line up to bat for a team, judges must stay neutral in litigation. However, federal law does not clearly establish that *ex parte* comments by trial judges deprive defendants of constitutional rights. Given the state of the law, the Kentucky Supreme Court was reasonable in finding that the trial judge's *ex parte* comment, while improper, did not impair Sanders' constitutional rights.

C. Claim 5: The trial court failed to permit adequate voir dire of juror King on the death penalty.

In individual *voir dire*, Sanders' counsel sought to ask juror Ronnie King the following question: “If a person were found guilty, based on the facts, of a double murder, would you give more consideration to the death penalty than any of the other three alternatives?” The Commonwealth objected. The trial court sustained the objection because, in its view, Kentucky law prohibited hypothetical questions. Sanders' counsel attempted to ask another death-penalty related question. The Commonwealth again objected, and the trial court sustained the objection. The trial court then asked King “Do you feel that there are certain cases where a murder might be involved where twenty years might be appropriate, certain cases where life in prison might be appropriate, certain cases where life in prison without parole for twenty-five years might be appropriate, and certain cases where the death penalty might be appropriate?” King responded that “after hearing the evidence and then instructions from you, I would weigh all of it.” The court asked again: “well would you go back and just because it was a murder case, ... say death penalty is the only thing I am going to recommend.” King answered “no sir, I would just have to hear, you know, the

evidence and how the crime was committed” before reaching a decision. VR 6/1/1987 14:50:42–14:53:01 (Tape 3 4:42:40–4:45:00); *Sanders I*, 801 S.W.2d at 671–72.

***19** On direct appeal, the Kentucky Supreme Court held that the court should have allowed the “double murder” question because Sanders was on trial for two charges of murder. *Sanders I*, 801 S.W.2d at 671–72. The court then concluded that the subsequent *voir dire* questions from the court and King's answers to those questions served to both eradicate “any possible prejudice” to Sanders and demonstrate that King was qualified. *Id.* at 672.

Sanders first argues that *de novo* review, as opposed to the strictures of § 2254(d), applies because the *Sanders I* decision employed harmless error. But the Kentucky Supreme Court did not apply harmless error after finding a constitutional violation.⁹ Rather, the court found that the error did not violate Sanders' constitutional rights. Specifically, the Kentucky Supreme Court said that, as a general matter, the trial court should have allowed the double-murder question. *Sanders I*, 801 S.W.2d at 672. But this acknowledgment does not mean that the error was automatically one of constitutional magnitude. See, e.g., *Caperton*, 556 U.S. at 876; *Donnelly*, 416 U.S. at 645. And, here, the error was not of constitutional magnitude: the *Sanders I* court concluded that the juror was qualified, which is the relevant constitutional inquiry. See *Morgan*, 504 U.S. at 729 (“[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.”). Because the Kentucky Supreme Court did not find a constitutional error, the Court applies § 2254(d) to its decision.

⁹ Even if the Kentucky Supreme Court had found a harmless constitutional violation, this Court would not employ *de novo* review. Rather, the Court would analyze the decision under harmless error. See *Fry v. Pliler*, 551 U.S. 112, 116–20 (2007). Sanders could only get relief if the error “had [a] substantial and injurious effect or influence in determining the jury's verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (internal quotation marks omitted). That standard is at least as deferential to the state court as AEDPA. *Fry*, 551 U.S. at 116–17.

Under § 2254(d), the Kentucky Supreme Court's decision was not contrary to, nor an unreasonable application of, clearly established law. In looking at whether a juror's views on capital punishment are grounds for exclusion, the relevant standard is “whether the juror's views would prevent or

substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (internal quotation marks omitted). In applying that broad standard, the Kentucky courts receive “more leeway ... in reaching outcomes in case-by-case determinations.” *Richter*, 131 S.Ct. at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). By finding that King was qualified and that Sanders was not prejudiced by the trial court's erroneous curtailment of Sanders' *voir dire*, the Kentucky Supreme Court applied the correct standard. See *Morgan*, 504 U.S. at 729. King said that he would determine the appropriateness of the death penalty based on the evidence and gave no indication of any bias. The Kentucky Supreme Court emphasized that King gave “definite responses” that he would decide based “upon the evidence and the court's instructions.” *Sanders I*, 801 S.W.2d at 672. Indeed, there is no evidence that King had any bias. Accordingly, the Kentucky Supreme Court's decision that King was qualified was not unreasonable.

***20** Nor did the Kentucky Supreme Court or the trial court unreasonably determine the facts under § 2254(d)(2). In the context of juror *voir dire*, the Supreme Court (pre-AEDPA) explained that a federal habeas court must determine only whether the factual findings are “fairly supported by the record.” *Wainwright*, 469 U.S. at 433. Under AEDPA, the court can grant relief only if the factual findings were unreasonable. *Wood*, 558 U.S. at 301.

Nothing in King's statements to the trial court suggested that he would be partial or biased. In fact, he stated to the court, multiple times, that he would weigh the evidence to determine whether the death penalty or prison would be appropriate. Even though Sanders' counsel could not ask King about his views on double murder, the Kentucky Supreme Court reasonably concluded that the rest of King's responses sufficed to demonstrate his impartiality. Because King explained, in no uncertain terms, that he would sentence a defendant based solely on the evidence at trial, the Kentucky Supreme Court acted reasonably in its factual determination. Accordingly, Sanders is not entitled to relief on Claim 5.

D. Claim 8: The prosecutor violated Sanders' rights by defining “reasonable doubt” during *voir dire*.

During *voir dire*, the prosecutor asked potential jurors if they understood that the Commonwealth's burden of proving Sanders' guilt beyond a reasonable doubt “does not mean beyond all doubt or a shadow of a doubt?” *Sanders I*, 801 S.W.2d at 671; see also VR 6/2/1987 13:32:50–13:33:15

(Tape 4 2:23:03–2:23:25). The prosecutor then asked if any of the jurors would “hold the Commonwealth to a higher standard of proof than the reasonable doubt standard?” *Id.* These are common questions asked during *voir dire*. Unsurprisingly, defense counsel did not object. *Id.* On direct appeal, Sanders argued that the prosecutor violated Kentucky law by attempting to define “reasonable doubt” when the prosecutor used “beyond all doubt” and “shadow of a doubt” in comparison. *Sanders I*, 801 S.W.2d at 671. Despite counsel's failure to object at trial, the Kentucky Supreme Court “[a]ssum[ed], without deciding” that the prosecutor's questions were erroneous but the court was “wholly unconvinced” that the error had any impact on the jury's verdict or sentence. *Id.*

In his federal petition, Sanders claims that the prosecutor's questioning amounted to prosecutorial misconduct and violated his rights in two ways. R. 73 at 118. First, the comments contravened Kentucky law, which bars defining “reasonable doubt.” See *Commonwealth v. Callahan*, 675 S.W.2d 391 (Ky.1984). Second, the prosecutor impermissibly lowered the government's burden of proof. The Constitution requires proof of a criminal charge beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 361–63 (1970). According to Sanders, the prosecutor's comments violated Sanders' constitutional rights by lowering that burden.

*21 Sanders' claim suffers from three flaws. Each flaw is fatal to Sanders' claim for relief: Sanders cannot get federal relief for state-law violations, did not exhaust his claims in state court, and does not present a claim that could prevail under AEDPA. The first is a *McGuire* problem: to the extent that Sanders alleges that the prosecutor violated state law, he cannot obtain federal habeas relief. *McGuire*, 502 U.S. at 67 (“[F]ederal habeas corpus relief does not lie for errors of state law.” (internal quotation marks omitted)). State law violations appear to have formed the substance of Sanders' claim before his federal petition. In *Sanders I*, Sanders' two-paragraph argument focused entirely on the state law issue. See Appellant's Brief at 69–70, *Sanders I*, 801 S.W.2d 665 (1990). His only reference to federal law was the undeveloped assertion that he was “denied ... due process,” without any argument or explanation as to how.¹⁰ *Id.* The Kentucky Supreme Court certainly appeared to think his claim was based on state law as its two-sentence opinion on the claim framed the issue as a state-law error.

¹⁰ Sanders' argument in *Sanders I* reads in full:

During voir dire the prosecutor informed the jury that reasonable doubt did not require proof of guilt beyond all doubt or beyond a shadow of a doubt. Tape 3, 6–1–87, 13:23:52. That discussion of reasonable doubt was in conflict with established Kentucky case law and RCr 9.56. It denied appellant due process. 14th Amdt., U.S. Const.; § 11., Ky. Const.

As this Court has held, “Having prohibited the court from definition of the term ‘reasonable doubt’, in the instructions by RCr. 9.56(2), we can hardly condone a client-serving definition by defense counsel or prosecutor in voir dire, opening statement or closing argument.” *Commonwealth v. Callahan*, Ky., 675 S.W.2d 391, 393 (1984). “[A]ll counsel shall refrain from any expression of the meaning or definition of the phrase ‘reasonable doubt’.” *Id.* at 393. Recently, this Court has reiterated that it was error when “[t]he prosecutor improperly defined reasonable doubt to the jury, as prohibited” by *Callahan*. *Sanborn v. Commonwealth*, Ky., 35 K.L.S. 7, at 20, — S.W.2d — (1988).

The second flaw in Sanders' petition on this claim is lack of exhaustion. Failure to exhaust a claim in state court bars consideration of the claim in federal habeas proceedings. 28 U.S.C. § 2254(b)(1)(A). Sanders did not present a substantive allegation of a constitutional violation until his federal petition. While exhaustion does not require “citing book and verse on the federal constitution” to the state court, a petitioner must present the state court with his federal habeas claim. *Picard v. Connor*, 404 U.S. 270, 277–78 (1971). This requirement means presenting the state court with the same claim he later raises in federal court. *Id.* at 276. Sanders has not done so. He presented *no* substantive constitutional argument in state court. His premised his entire appeal on Kentucky's prohibition on defining “reasonable doubt,” which is not sufficient to exhaust his federal claim. See *Anderson v. Harless*, 459 U.S. 4, 6–7 (1982) (finding that a federal claim was not “fairly presented” to the state court because the argument focused entirely on alleged violations of state law). The statement that he was “denied ... due process” is not a developed argument, and therefore is not a fair presentation of his claim to the state court. See *Slaughter v. Parker*, 450 F.3d 224, 236 (6th Cir.2006) (holding that simply citing to a constitutional amendment is not enough to exhaust). His failure to exhaust bars federal relief.

Finally, even assuming that Sanders sufficiently presented his federal claim in state court, he is still not entitled to habeas relief. See *Baldwin v. Reese*, 541 U.S. 27, 31 (2004) (“A litigant wishing to raise a federal issue can easily indicate

the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim ‘federal.’). While *Sanders I* does not explicitly address the federal claim, the Court still applies AEDPA deference pursuant to *Johnson* and *Richter*. *Johnson*, 133 S.Ct. at 1096 (deferring to a state court’s decision under AEDPA even where the state court “rejects a federal claim without expressly addressing that claim”). *Sanders* could get *de novo* review only by demonstrating that the Kentucky courts overlooked his claim. See *id.* at 1097. Because *Sanders* makes no such argument, the Court will proceed under the regular AEDPA framework.

*22 The Kentucky Supreme Court’s holding does not contravene or unreasonably apply clearly established federal law.¹¹ A prosecutor’s comments violate due process only if they “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). The *Darden* rule “is a very general one,” which gives state courts “more leeway ... in reaching outcomes in case-by-case determinations.” *Parker v. Matthews*, 132 S.Ct. 2148, 2155 (2012). Because of the rule’s generality, habeas relief is appropriate only if there is “no possibility [that] fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme] Court’s precedents.” *Richter*, 131 S.Ct. at 786.

11

Sanders contends that *Sanders I* applied harmless error to this issue, and therefore his claim should be reviewed outside the boundaries of § 2254(d). As discussed previously, review of a state court’s harmless error determination is reviewed under the *Brecht* standard, not *de novo*. Here, however, the Kentucky Supreme Court did not apply harmless error to the federal constitutional claim because it did not address that claim. It applied harmless error to the state-law issue. The Court will presume that the federal decision was on the merits and not under harmless error.

Fairminded jurists would likely all agree that the Kentucky Supreme Court’s decision did not conflict with then-existing Supreme Court precedent. *Sanders* does not direct the Court to any Supreme Court cases from or before 1990 forbidding prosecutors from attempting to define “reasonable doubt” at trial, let alone barring such attempts during *voir dire*. Nor does *Sanders* cite to any Supreme Court cases holding that

“beyond any doubt” or “beyond a shadow of a doubt” are unconstitutional ways to distinguish “beyond a reasonable doubt.” Cf. *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam) (holding that the combined effect of the phrases “such doubt as would give rise to a grave uncertainty” and “an actual substantial doubt” resulted in unconstitutional definition of “reasonable doubt”), *overruled on other grounds by McGuire*, 502 U.S. at 72 n. 4.

Then-existing Supreme Court case law on reasonable doubt, as set out in *Boyde v. California*, 494 U.S. 370 (1990) (not cited by *Sanders*), involved jury instructions, not *voir dire*. The standard from *Boyde* turns on whether there is a reasonable likelihood that, given the instructions presented, the jury applied a lower standard of proof than “reasonable doubt.” See *id.* at 380; *McGuire*, 502 U.S. at 72 & n. 4. *Boyde*, however, noted that “prosecutorial misrepresentations ... are not to be judged as having the same force as an instruction from the court.” *Boyde*, 494 U.S. at 384–85. Even assuming that *Boyde* applies to *voir dire*, *Sanders* has offered no reasons why the prosecutor’s comparison unreasonably applied or contravened *Boyde*. He provides no basis for concluding that the prosecutor articulated a lower standard of proof, or that the prosecutor’s comments led the jury to apply a lower standard of proof. While the Supreme Court has questioned the wisdom of attempting to define “reasonable doubt,” it has not gone so far as to hold that the conduct at issue here is unconstitutional or even erroneous. See *Holland v. United States*, 348 U.S. 121, 140 (1954) (“Attempts to explain the term ‘reasonable doubt’ do not usually result in making it any clearer to the minds of the jury.” (internal quotation marks omitted)).

*23 Similarly, *Sanders* does not link the prosecution’s attempted definitions of reasonable doubt to any cases regarding prosecutorial misconduct. See *Donnelly*, 416 U.S. at 647 (“[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.”); cf. *Darden*, 477 U.S. at 181–82 (holding that prosecutor’s reference to defendant as an “animal” in closing argument did not deprive defendant of a fair trial). Because the Kentucky Supreme Court’s decision was not contrary to, or an unreasonable application of, Supreme Court case law, relief on this claim is not appropriate.

E. Claim 9: The trial court constructively deprived *Sanders* of a peremptory strike by failing to strike potential juror Lanter for cause.

During *voir dire*, Robert Lanter stated that he could decide the case solely upon the evidence, consider all of the penalty options, and impose a sentence according to the evidence. VR 06/01/87, 16:41:00–16:42:50 (Tape 4 at 00:02:14–00:04:04). He also affirmed that he could follow the court's instructions. *Id.* at 16:42:50–16:43:30 (00:04:04–00:04:44). The trial court then asked him if there was any reason that he could not be fair and impartial. Lanter responded that he had been robbed when an assailant pointed a gun at his head and was “a little paranoid” over the incident. *Id.* at 16:46:03–16:46:37 (00:07:17–00:07:51). He indicated that he hoped this would not affect him, but said, “I never know.” *Id.* at 16:46:37–16:46:44 (00:07:51–00:07:58). Defense counsel then inquired whether Lanter could be objective in a case involving a robbery and a gun pointed at the victim's head; Lanter again expressed hope that he would be impartial and acknowledged that one can never be sure. *Id.* at 16:46:54–16:47:25 (00:08:08–00:08:39). The court asked Lanter if he could set aside any feelings he might have stemming from being a robbery victim and decide the case solely on the evidence, to which he replied “I think I've come out of the trauma.” *Id.* at 16:47:49–16:48:31 (00:09:03–00:09:45). Defense counsel challenged Lanter for cause; the court overruled the objection. *Id.* at 16:48:31–16:48:36 (00:09:45–00:09:50). Sanders subsequently used a peremptory challenge to excuse Lanter. See *Sanders I*, 801 S.W.2d at 670.

Sanders argues that the trial court's failure to strike non-juror Lanter for cause forced him to use one of his peremptory strikes, R. 73 at 124, and violated his due process rights. In *Sanders I*, the Kentucky Supreme Court, after “review[ing] the interrogation,” was “unable to conclude that the trial court's ruling was clearly erroneous and an abuse of discretion.” *Id.* While the *Sanders I* court did not discuss the federal law basis of its holding, the Court still applies the deferential AEDPA standard. See *Johnson*, 133 S.Ct. at 1096. For Sanders to succeed, he must show that there was “no reasonable basis” for the *Sanders I* decision. *Richter*, 131 S.Ct. at 784.

*24 Under AEDPA, the Kentucky Supreme Court's decision was not unreasonable for one straightforward reason: Lanter did not sit on the jury. Criminal defendants enjoy a constitutional right to an impartial jury. *United States v. Martinez–Salazar*, 528 U.S. 304, 307 (2000). A defendant is not deprived of any constitutional right where no biased juror sat on the jury. *Skilling*, 561 U.S. at 395 n. 31 (citing *Martinez–Salazar*, 528 U.S. at 307). Peremptory challenges are “one means to achieve the constitutionally required end

of an impartial jury,” *Martinez–Salazar*, 528 U.S. at 307, but standing alone, they “are not of constitutional dimension,” *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). Indeed, one primary purpose of a peremptory challenge is to cure a trial judge's erroneous for-cause ruling. *Skilling*, 561 U.S. at 395 n. 31. When a defendant so uses a challenge, he has not “lost” a peremptory strike, nor has he been deprived of a constitutional right. *Id.*; *Martinez–Salazar*, 528 U.S. at 315–16. Even assuming that Lanter was unqualified, Sanders was not deprived of any constitutional right by being forced to use a peremptory strike to remove him.

Sanders contends that this case is distinguishable from *Skilling*, *Martinez–Salazar*, and *Ross* because of the nature of Kentucky law. R. 73 at 128–29. Under Kentucky law, “the failure to strike a clearly biased juror for cause, necessitating the use of a peremptory strike to ensure an unbiased jury, is the denial of a substantial right.” *McDaniel v. Commonwealth*, 341 S.W.3d 89, 93 (Ky.2011) (citing *Shane v. Commonwealth*, 243 S.W.3d 336, 340 (Ky. 2007)). Sanders contends that Kentucky law would grant him a new trial because he used his peremptory challenge on a biased juror. Because state law would require a new trial, Sanders says, he has a due process right to a new trial under the United States Constitution as well. R. 73 at 128–29.

Sanders is incorrect. See *Bowling v. Haeberlin*, Civil No. 03–28–ART, 2012 WL 4498647, at *23–24 (E.D.Ky. Sept. 28, 2012) (“Individuals who do not actually sit on the jury that renders a verdict have no impact on a defendant's right to an impartial jury.”). Under *Rivera v. Illinois*, the Supreme Court held that “the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern.” 556 U.S. 148, 157 (2009). Any errors denying peremptory challenges are “matter[s] for the State to address under its own laws.” *Id.* The simple fact that the state's adjudication of peremptory challenge is “at odds with state law” is “not constitutionally significant.” *Id.* at 159–60. Thus, the trial court's refusal to strike Lanter for cause is “not constitutionally significant.” *Id.*

Finally, Sanders has not demonstrated that the “loss” of one of his peremptory challenges resulted in a fundamentally unfair trial. The Supreme Court has acknowledged that the loss of peremptory challenges could create a fundamentally unfair trial in a couple exceptional circumstances. If “the trial judge repeatedly or deliberately misapplied the law or acted in an arbitrary or irrational manner,” *Rivera*, 556 U.S. at 160, or if the loss of a peremptory challenge “result[ed] in

the seating of any juror who should have been dismissed for cause,” *Martinez–Salazar*, 528 U.S. at 316, then the petitioner might be able to establish a constitutional violation. Sanders, however, has not argued that those situations occurred at his trial. As a result, relief on this claim is not merited.

V. Trial Error Claims: 11, 11.5, 13, 14, 17, 18, and 28.

A. Claim 11: The trial court improperly admitted evidence of another shooting.

*25 About one month before the murders of Brandenburg and Hatch, a similar shooting occurred in nearby Lincoln County. A man robbed a bait shop and shot the proprietor in the back of the head. The proprietor survived. Law enforcement determined that the assailant used the same gun in both the Lincoln County shooting and the murders of Brandenburg and Hatch. After Sanders' arrest, he initially denied any involvement with the Lincoln County shooting. Later, however, he admitted committing both crimes, in essentially the same manner. Prosecutors tried Sanders for the Madison County murders before trying him for the Lincoln County shooting. See *Sanders I*, 801 S.W.2d at 674–75.

Before trial on the Madison County murders, Sanders moved to exclude evidence of the Lincoln County shooting. *Id.* at 674. The court denied the motion because the evidence tended to show intent and a common scheme or plan between the two attacks. *Id.* The Commonwealth presented evidence of the Lincoln County shooting, including investigative details and Sanders' confession, during its case-in-chief. The court then admonished the jury to consider the Lincoln County evidence “only in as far as it may tend to show, if you believe it does, knowledge or intent or pattern of conduct on the defendant's part.” *Id.*; VR 6/3/87 12:06:52–12:07:34 (Tape 5 at 2:54:00–2:54:42).

On direct appeal, Sanders challenged the trial court's admission of the evidence. The Kentucky Supreme Court held that admitting the evidence in conjunction with the limiting instruction was not an abuse of discretion. *Sanders I*, 801 S.W.2d at 675. The evidence tended to establish the intent, identity, and plan of action of the Lincoln County assailant. *Id.* The court explained that intent and identity are elements of both intentional murder and first-degree robbery. Because the Commonwealth had to prove each element of the charged crimes and the Lincoln County evidence served that purpose, the evidence was admissible. *Id.* at 674–75.

In his federal petition, Sanders renews his argument regarding the Lincoln County evidence. R. 73 at 165. To the extent that Sanders' claim rests on an alleged violation of Kentucky rules of evidence, he cannot obtain relief in federal court. See *McGuire*, 502 U.S. at 67; *Bey v. Bagley*, 500 F.3d 514, 519 (6th Cir.2007) (“[A] state court's violation of its own evidentiary law does not, *ipso facto*, provide a basis upon which a federal court may grant habeas relief.”). Under federal law, Sanders argues that admission of the evidence violated his right to due process. According to Sanders, the Kentucky Supreme Court's decision to the contrary was an unreasonable application of clearly established law and an unreasonable determination of facts. See R. 73 at 171.

In his federal petition, Sanders argues that admission of the Lincoln County evidence was so unfairly prejudicial as to deprive him of a fair trial in three ways: First, it effectively placed him on trial for two separate criminal acts. Second, the Commonwealth did not need to introduce the evidence to prove intent because Sanders conceded that he committed the murders. And third, despite the limiting instruction during the *guilt* phase of the trial, the court told the jury, without a limiting instruction, that it could consider all of the guilt-phase evidence during the *penalty* phase. Even though the *Sanders I* court did not expressly address Sanders' federal law argument, the Court still applies the deferential AEDPA standard. See *Johnson*, 133 S.Ct. at 1096. Sanders does not rebut the presumption under *Johnson* that AEDPA still applies. Under the AEDPA standard, none of Sanders' arguments entitle him to habeas relief. See R. 73 at 169–71.

*26 To assess the merits of Sanders' arguments, the Court must first identify the relevant “clearly established federal law,” as it existed in 1990. The case Sanders offers, *Michelson v. United States*, is neither squarely on point nor the last word on the matter. 335 U.S. 469 (1948). *Michelson* held that once a criminal defendant presents testimony of his own good reputation, the government is permitted to cross-examine the witness. *Id.* at 485–87. Sanders' case is markedly different. Where *Michelson* involved character evidence, Sanders' claim relates to evidence specifically admitted for purposes other than for bolstering or attacking character—a distinction recognized by both the Federal Rules of Evidence and Kentucky evidence law. See Fed.R.Evid. 404(b); *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky.1982).

Unlike *Michelson*, *Dowling v. United States*, 493 U.S. 342 (1990), is squarely on point and provides what was, at the time of *Sanders I*, the final word on “other acts” evidence.¹² So

Dowling is the “clearly established federal law” that *Sanders I* must be tested against. In *Dowling*, the Supreme Court addressed the due process implications of “prior bad acts” evidence. 493 U.S. at 352. There, the prosecution sought to introduce evidence of prior acquitted conduct against Dowling. *Id.* at 343–44. During Dowling's trial on bank-robbery charges, the prosecution called the victim from a different burglary—one for which Dowling had previously been acquitted. *Id.* The trial court allowed the testimony, but gave the jury a limiting instruction. *Id.* at 345–46.

12 The Supreme Court decided *Dowling* in January of 1990, more than eight months before the Kentucky Supreme Court decided *Sanders I*.

The Supreme Court held that the admission of the testimony did not violate due process. *Id.* at 353. To succeed under the Due Process Clause, the *Dowling* Court explained, a petitioner must show that the admission of the evidence “violate[d] fundamental concepts of justice.” *Id.* at 352 (internal quotation marks omitted). It is not the common evidentiary issue that satisfies such a high standard. Rather, the Due Process Clause “has limited operation” because the Supreme Court has “defined the category of infractions that violate ‘fundamental fairness’ very narrowly.” *Id.* at 352. The evidence of Dowling's previous acquitted conduct did not “merit[] this kind of condemnation,” “[e]specially in light of the limiting instructions provided by the trial judge.” *Id.* at 353; see also *Perry v. New Hampshire*, 132 S.Ct. 716, 723 (2012) (“Apart from the[] guarantees [of the rights to counsel, compulsory process, and confrontation of witnesses], we have recognized, state and federal statutes and rules ordinarily govern the admissibility of evidence....”).

Proceeding to the merits of Sanders' petition, his first and second complaints, which relate to the admissibility of the evidence at trial, are foreclosed by *Dowling*. For Sanders to receive habeas relief, he must show that the Kentucky Supreme Court unreasonably applied *Dowling*. The evidence of the Lincoln County shooting constitutes a constitutional error only if it were “so extremely unfair that its admission violate[d] ‘fundamental conceptions of justice.’” *Dowling*, 493 U.S. at 352 (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). Under that standard, the Kentucky Supreme Court had flexibility in reaching its decision.

*27 The Kentucky Supreme Court's decision was reasonable because there is no basis to distinguish the Lincoln County evidence from the evidence the Supreme Court concluded was admissible in *Dowling*. Both involved previous crimes,

and there is no principled reason to differentiate the burglary in *Dowling* from the Lincoln County shooting here. In fact, reasonable jurists would likely consider the *Dowling* burglary to be *more* constitutionally problematic because it involved acquitted conduct. The Lincoln County shooting was only dismissed. A dismissal, unlike an acquittal, does not necessarily involve a decision on the merits of the underlying charge. As the *Dowling* Court acknowledged, the potential pitfalls and prejudice associated with the admission of other bad acts are better addressed through the rules of evidence rather than through the Due Process Clause. *Id.* The same reasoning applies here. Like in *Dowling*, the judge in Sanders' trial gave limiting instructions to the jury, further minimizing the potential for a due process violation. *Id.* at 353 (“Especially in light of the limiting instructions provided by the trial judge, we cannot hold that the introduction of [the witness's] testimony merits this kind of condemnation.”). Under *Dowling*, the *Sanders I* court could reasonably conclude that the admission of the Lincoln County evidence did not violate Sanders' right to due process. Accordingly, *Sanders I* was not contrary to, or an unreasonable application of, clearly established law, nor did it unreasonably determine the facts. See *Wilson v. Corcoran*, 131 S.Ct. 13, 17 (2010) (holding that an unreasonable determination of the facts must result in a constitutional violation to be cognizable under AEDPA).

The second way in which Sanders argues he was denied a fair trial is that the jury considered the Lincoln County evidence without any limiting instruction in the penalty phase. Sanders contends that the court's instruction to the jury that it could consider his lack of prior criminal history as a mitigating factor *ensured* that the jury would consider the Lincoln County evidence. But this is pure speculation. Sanders offers no reason, argument, or authority for the proposition that evidence may be admitted for a specific purpose, but later float freely through the evidentiary ether, free from the shackles of its limiting instruction.

Even if, at the penalty phase, the jury disregarded the trial court's guilt-phase limiting instruction, the Kentucky Supreme Court could have reasonably found that the jury was permitted to consider the evidence of the Lincoln County shooting at the penalty phase. The Supreme Court has not established a constitutional right precluding a jury from considering a defendant's previous criminal acts during the penalty phase. In *Williams v. New York*, 337 U.S. 241, 251–52 (1949), the Supreme Court held that a trial judge could look to crimes for which the defendant was a suspect, but

had never been convicted, in deciding whether to impose the death penalty. The Supreme Court reiterated, in a non-death penalty case relying in part on *Williams*, that sentencing bodies may “consider[] a defendant's past criminal behavior, even if no conviction resulted from that behavior.” *Nichols v. United States*, 511 U.S. 738, 747 (1994); see also *Tuilaepa v. California*, 512 U.S. 967, 976 (1994). Citing no clearly established law to the contrary, Sanders does not show that the Kentucky Supreme Court was unreasonable in allowing the jury to consider the Lincoln County shooting at the penalty phase.

B. Claim 11.5: Sanders' sentence is based in part on criminal charges that the Commonwealth dismissed.

*28 In 1996, the Commonwealth dismissed the Lincoln County charges. R. 73 at 172. Sanders argues that his Madison County sentence and conviction must be vacated because they were secured in part by evidence from a dismissed charge. See *id.* at 173–75. In *Sanders III*, the Kentucky Supreme Court denied this claim, finding that Sanders, “with the exercise of reasonable diligence, could have ... brought” the claim in his direct appeal or in his initial state post-conviction petition (the *Sanders II* petition). *Sanders III*, 339 S.W.3d at 437. The Lincoln County charges, however, were dismissed after Sanders filed his *Sanders II* petition. R. 73 at 171–72; Motion to Vacate, Set Aside, or Correct Sentence Pursuant to RCr 11.42, Madison Circuit Court, No. 87–CR–018 (Feb. 9, 1993). It appears that Sanders could not have amended that petition when he appealed the initial denial of his RCr 11.42 motion to the Kentucky Supreme Court, see *Brock v. Commonwealth*, 479 S.W.2d 644, 646 (Ky.1972), nor could he have filed a successive RCr 11.42 motion, see *Fraser v. Commonwealth*, 59 S.W.3d 448, 454 (Ky.2001).

The Court will assume that Sanders could have presented this claim only in *Sanders III*, not during his direct appeal or initial petition. As such, the Kentucky Supreme Court did not adjudicate the claim on the merits in *Sanders III*. While it denied relief on an independent and adequate state ground, its basis for the denial was an erroneous conclusion that Sanders could have brought the claim in an earlier proceeding. Because that conclusion was incorrect, § 2254(d)'s limitations do not apply. See *Jalowiec v. Bradshaw*, 657 F.3d 293, 303 (6th Cir.2011) (holding that the federal court could adjudicate the claim *de novo* where state's “enforcement of the procedural bar was ... erroneous” (citing *Cone v. Bell*, 556 U.S. 449 (2009))). Outside of the confines of AEDPA, the Court reviews the Kentucky Supreme Court's decision *de novo*.

Many of the same principles discussed above in claim 11 apply here. To the extent that Sanders objects to the Lincoln County evidence as a matter of state evidence law, he cannot obtain federal habeas relief. See *McGuire*, 502 U.S. at 67; *Bey*, 500 F.3d at 519. Nor did the trial court offend due process by admitting the later-dismissed Lincoln County evidence during the guilt phase of Sanders' trial. Under *Dowling*, there was no constitutional error in admitting the evidence of the Lincoln County shooting. That result does not change because the state later dismissed the charge. The act of dismissal does not suddenly thrust the evidence into the narrow “category of infractions that violate ‘fundamental fairness.’” *Dowling*, 493 U.S. at 352. Rather, the same *Dowling* analysis controls. In *Dowling*, the Supreme Court held that a trial court could admit evidence of a crime for which the defendant had been tried and acquitted. *Id.* at 352–54. Admitting dismissed conduct poses even less of a due process concern than does admitting acquitted conduct. Unlike acquitted conduct, in which a jury has found the defendant not guilty, dismissed conduct reveals nothing about the guilt or innocence of the suspect. It would be odd if the Constitution nevertheless barred evidence of charged-but-dismissed crimes while approving the use of acquitted ones. The admission of the Lincoln County evidence was not a violation of the Due Process Clause—the subsequent dismissal does not alter that fact.

*29 Sanders contends that *Johnson v. Mississippi* barred use of the Lincoln County evidence at his trial. 486 U.S. 578 (1988). *Johnson* forbids basing a death sentence—even in part—on a reversed or vacated conviction. *Id.* at 584–86. In that case, the jury found three aggravating circumstances supporting the death penalty, including the defendant's robbery conviction in New York, and sentenced the defendant to death. After the Mississippi conviction and sentence, New York vacated the robbery conviction. *Johnson*, 486 U.S. at 581–83. The Supreme Court held that the vacatur of the New York robbery conviction precluded its use as an aggravating circumstance supporting the death penalty. *Id.* at 584–85.

Sanders' conviction and sentence do not violate *Johnson* for two reasons. First, *Johnson* considered a vacated conviction, which is different from a dismissed charge. Vacatur indicates that the conviction was somehow unlawful. Dismissal of a charge says nothing about the lawfulness or merits of the charge. *Johnson's* holding made clear that the constitutional infirmity rested in part on the fact that “the jury was allowed to consider evidence that has been revealed to be

materially inaccurate.” 486 U.S. at 590. The dismissal of the Lincoln County shooting does not relate to the veracity or accuracy of Sanders' involvement in that crime. Rather, the dismissal could have been tied to the Commonwealth's success in securing a conviction and death sentence for the Madison County murders. After all, prosecuting the Lincoln County shooting would have wasted prosecutorial resources as Sanders had already received the death penalty. The Constitution does not require the government to prosecute *all* pending charges against a defendant just to preserve a conviction on one.

Second, the Lincoln County evidence did not form the basis of the aggravating factors for Sanders' sentence. In *Johnson*, the jury identified the (subsequently vacated) robbery conviction as one of the aggravating factors supporting the death penalty. 486 U.S. at 581. Sanders' jury made no such finding with respect to the Lincoln County shooting. During Sanders' formal sentencing, the trial court stated that the jury found two statutory aggravating factors: (1) the crime was committed during a 1st-degree robbery, and (2) the crime resulted in multiple deaths. VR 06/26/87, 10:04:25–10:04:45 (Tape 9 00:04:26–00:04:46). Sanders does not argue that these two factors were insufficient to support the death penalty or that the jury offered them as a pretense to cover its real consideration of the Lincoln County shooting. Indeed, the jury was not constitutionally precluded from considering the Lincoln County shooting. See *Williams*, 337 U.S. at 247. But Sanders can do no more than speculate that the jury even considered the Lincoln County shooting at all during sentencing. See *Donnelly*, 416 U.S. at 644. Because the Lincoln County shooting was dismissed, not vacated, and the crime did not form the basis of an aggravating factor, *Johnson* does not control here and Sanders is not entitled to habeas relief.

C. Claim 13: Detective Benton's testimony on Sanders' mental state violated the Due Process Clause.

*30 During cross-examination, Detective Skip Benton testified that “most of what [Sanders] sa[id]” in his third interview with police “makes sense.” On redirect, the prosecution asked Benton to explain what parts of the interview “made sense.” Specifically, the prosecution asked whether Benton was referring to “the facts [Sanders] told you or the assertions that he made that he couldn't control himself and was just sort of watching this from out in nowhere?” Benton responded “No, I can't honestly say I still believe that of what he was saying.” He continued: “That's not what I meant that made sense. No, the part about the way the crime

occurred ... that makes sense.” VR 6/3/87 13:37:30–13:41:23 (Tape 5 3:14:45–3:18:38).

On direct appeal in *Sanders I*, Sanders argued that Benton's testimony was improper testimony on the ultimate issue of Sanders' mental state. Brief for Appellant at 50–52, *Sanders I*, 801 S.W.2d 665. The Kentucky Supreme Court rejected that argument. It found that defense counsel “initially solicited an opinion from the witness” and that the prosecution's questioning “legitimately pursued the matter within the proper scope of redirect examination.” *Sanders I*, 801 S.W.2d at 676. Sanders now contends that Benton's testimony, as a lay witness, on Sanders' mental state was fundamentally unreliable testimony that violated due process. R. 73 at 178–79.

Sanders' argument fails for two reasons. First, he procedurally defaulted his claim. In his briefing on direct appeal in *Sanders I*, Sanders argued that Benton's testimony was improper because it was testimony on the “ultimate issue.” Brief for Appellant at 50–52, *Sanders I*, 801 S.W.2d 665. He made no argument that the testimony was unreliable. In *Sanders III*, however, Sanders shifted gears and made the argument he now asserts: that Benton's testimony “was likely to mislead the jury because it bore the imprimatur of a professional.” Motion for Relief from Judgment at 41, *Sanders III*, 339 S.W.3d 427. The *Sanders III* court rejected that argument because that claim could have been brought on direct appeal or in Sanders' first petition for post-conviction relief. 339 S.W.3d at 437. Because that is an independent and adequate state procedural ground, Sanders' claim is procedurally defaulted; Sanders does not attempt to demonstrate cause and prejudice. See *Coleman*, 501 U.S. at 750.

Second, even if Sanders did not procedurally default this claim, he is still not entitled to relief. According to Sanders, the Kentucky Supreme Court's decision in *Sanders I* was “unreasonable in light of the law.” R. 73 at 178. As discussed above in claims 11 and 11.5, the admissibility of evidence is generally a matter of state evidentiary rules. To rise to a due process violation, the alleged error must fit within the “category of infractions” that the Supreme Court has defined “very narrowly.” *Dowling*, 493 U.S. at 352. The evidence must be “so extremely unfair that its admission violates fundamental conceptions of justice.” *Id.* (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). Under such a “general rule,” the Kentucky Supreme Court has “more leeway ... in reaching outcomes in case-by-case determinations.” *Richter*, 131 S.Ct. at 786. Sanders is entitled

to habeas relief only if there is “no possibility fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme] Court’s precedents.” *Richter*, 131 S.Ct. at 786.

*31 Fairminded jurists could find that Benton’s testimony was not so fundamentally unfair as to violate due process. See *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (explaining that a petitioner bears “the heavy burden” of demonstrating that a state ruling “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” (internal quotation marks omitted)). Benton never made a direct affirmative statement that Sanders was insane. One could reasonably view his response—“I can’t honestly say I still believe that of what he was saying”—as Benton’s assessment of Sanders’ credibility, not his mental state. It was also reasonable to conclude that Benton’s response to defense counsel that Sanders’ story “made sense” permitted the prosecution to ask for clarification on which parts of the story “made sense.” See *Sanders I*, 801 S.W.2d at 676. Without the prosecution’s follow-up question, the jury may have interpreted Benton’s testimony as supporting Sanders’ insanity defense. Additionally, other witnesses testified in more depth on Sanders’ mental health. The prosecution and defense both offered testimony from psychologists on the issue. A reasonable jurist could determine that the jury placed more emphasis on that detailed and expert testimony than on Benton’s one statement. The *Sanders I* court could reasonably find that Benton’s testimony did not so infect the trial as to violate the Due Process Clause. Accordingly, the Court must deny relief on this claim.

D. Claim 14: The trial court impermissibly admitted victim-impact testimony during the guilt phase of trial.

During the guilt phase of Sanders’ trial, James Brandenburg’s wife, Loquetta Brandenburg, testified about James’ activities on the day he was murdered, where he was born, that he had siblings and children, the length of his marriage, and his church membership. VR 6/3/87 at 9:03:19–9:16:37 (Tape 5 00:04:21–00:17:39). Colonel Alden Hatch, Wayne Hatch’s father, testified that Wayne Hatch was an engineer and inventor, was active in his church, had served in the Army and in the National Guard, had siblings, and was a Boy Scout leader. He also identified sympathy-inducing pictures of Wayne. VR 6/3/87 at 16:35:18–16:41:07 (Tape 6 01:00:11–01:06:00).

Sanders challenged the guilt-phase testimony of both witnesses. See Brief of Appellant at 66–69, *Sanders*

I, 801 S.W.2d 665. The Kentucky Supreme Court did not specifically mention Brandenburg or Hatch. But it “considered ... all errors enumerated by way of appeal,” “reviewed all legal errors enumerated,” and concluded that no error substantially prejudiced Sanders’ rights. *Sanders I*, 801 S.W.2d at 683–84. Sanders asserts that the Kentucky Supreme Court’s decision was contrary to, or an unreasonable application of, federal law.

The Court must defer to the Kentucky Supreme Court’s decision under AEDPA even where, as here, the court issues a summary denial of Sanders’ claims. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1402 (2011) (citing *Richter*, 131 S.Ct. at 786). In these circumstances, a petitioner can clear the “unreasonable application” hurdle of § 2254(d)(1) only by showing that there was no reasonable basis for the state court’s decision. *Id.* The federal habeas court must determine what arguments or theories could have supported the state court’s decision, and then determine whether “fairminded jurists could disagree” about whether those theories are inconsistent with Supreme Court precedent. *Id.* (quoting *Richter*, 131 S.Ct. at 786).

*32 There are at least three reasons why the Kentucky Supreme Court decision would not have involved an “unreasonable application” of clearly established federal law: (1) No clearly established law specifically prohibited victim-impact testimony at the guilt phase of a capital trial; (2) the Kentucky Supreme Court could have reasonably determined that any error resulting from the testimony was harmless; and (3) the court could have reasonably found that the testimony was not so unduly prejudicial as to violate Sanders’ constitutional rights.

First, Sanders does not point to any clearly-established federal law prohibiting victim-impact testimony at the guilt phase of a capital trial. Sanders interprets the Supreme Court’s opinion in *Payne v. Tennessee* as stating that, at the time of his sentencing, constitutional law “categorically prohibited” victim-impact evidence at “any stage” of death penalty litigation. R. 73 at 180 (citing *Payne*, 501 U.S. 808 (1991)). But Sanders misstates *Payne*, as the case articulates no such rule.

Payne overruled two Supreme Court decisions that held that victim-impact testimony is inadmissible at the *sentencing phase* of a capital trial. See 501 U.S. at 830 (overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989)). So, at the time Sanders’ conviction became final, clearly established federal law

prohibited, at most, victim-impact testimony during the *sentencing* phase of a capital trial—not evidence presented during the *guilt* phase of the trial, as was done in Sanders' case. Because Supreme Court silence does not create “clearly established federal law,” there was nothing for the Kentucky Supreme Court to contravene or unreasonably apply at the guilt phase of Sanders' trial.

The Due Process Clause does, however, prohibit evidence that is so unduly prejudicial that the trial is fundamentally unfair. *Payne*, 501 U.S. at 825. The *Sanders I* court reasonably applied this legal rule by analyzing whether the Brandenburg and Hatch testimony substantially prejudiced *Sanders*. 801 S.W.2d at 684. Sanders' only avenue for relief is to establish that the court erred in applying that law—that it unreasonably found that the Brandenburg and Hatch testimony was not unduly prejudicial.

The *Payne* Court set a high bar for what constitutes “unduly prejudicial” victim impact evidence. The facts of that case are brutal. Pervis Payne attacked 28-year-old Charisse Christopher and her two children, 3-year-old Nicholas and 2-year-old Lacie, repeatedly slashing and stabbing them with a butcher knife. *Payne*, 501 U.S. at 811–13. When police arrived at the scene, Charisse and Lacie were already dead from multiple stab wounds. See *id.* at 812. But emergency workers managed to save Nicholas after “seven hours of surgery and a transfusion of 1,700 cc's of blood.” See *id.* At sentencing, the prosecution called Charisse's mother, Mary Zvolanek, to testify about how Charisse's son, Nicholas, “had been affected by the murders of his mother and sister.” *Id.* at 814. She told the jury that Nicholas “cries for his mom” and “doesn't seem to understand why she doesn't come home.” *Id.* Zvolanek said that Nicholas also “cries for his sister Lacie” and “comes to me many times during the week and asks me, Grandmama, do you miss my Lacie.” *Id.* Notwithstanding the undoubtedly heart-wrenching nature of Zvolanek's testimony, the Supreme Court affirmed Payne's death sentence. The *Payne* Court held that defendants claiming a due process violation must show that witness testimony “is so unduly prejudicial that it renders the trial fundamentally unfair.” *Id.* at 825. Zvolanek's testimony did not cross the line into fundamental unfairness, even though it undoubtedly moved the jurors. *Id.* at 826–27; *id.* at 831–32 (O'Connor, J., concurring).

*33 When viewed against the backdrop of *Payne*, neither Mrs. Brandenburg's nor Colonel Hatch's testimony even approaches unduly prejudicial. Both witnesses focused on the

personal characteristics of the victims: their families, jobs, regular activities, and the like. The *Payne* Court explained that evidence designed to show the victim's “uniqueness as an individual human being” is unobjectionable. 501 U.S. at 823 (approvingly discussing evidence that “showed that the victim was an out-of-work, mentally handicapped individual”). Notably, neither witness described the harm they suffered as a result of the murders—nothing akin to relaying a 3-year-old's unanswered cries for his brutally murdered mother and sister.

Any possible guilt-phase prejudice was further mitigated by the fact that Sanders confessed that he killed Brandenburg and Hatch. At the end of the day, the most powerful evidence of Sanders' guilt came out of his own mouth on the witness stand. The only disputed issue during the guilt phase of the trial related to Sanders' mental illness—an issue on which victim-impact testimony had no bearing. Accordingly, the Kentucky Supreme Court would not have unreasonably applied federal law by concluding that the victim-impact testimony at the guilt phase was not so prejudicial as to deprive Sanders of due process.

E. Claim 17: The prosecutor denigrated the insanity defense and shifted the burden of proof to Sanders.

Insanity Defense. Sanders testified at trial. During direct examination, he admitted that he killed Brandenburg and Hatch, but asserted that he had no control over his actions. He said it was as if he were watching himself from outside of his body. *Sanders I*, 801 S.W.2d at 677. During cross-examination, the prosecutor asked whether Sanders was floating around the courtroom; whether Sanders was in a second life; and whether Sanders had been under a spell. The prosecutor also referred to the “good” David Sanders and the “bad” David Sanders. *Id.* At one point, Sanders' counsel appeared to object, saying “I don't think it's necessary to get into this sarcasm and what have you.” The trial court did not rule on that objection as Sanders continued to testify. VR 6/4/87 14:32:45–15:08:00 (Tape 6 3:14:01–3:49:16).

During closing argument, the prosecutor mocked much of Sanders' psychiatric evidence. Defense counsel objected at the beginning of the prosecutor's discussion of that evidence, but the trial court overruled the objection. The prosecutor continued with his argument, which included referring to Dr. Cooke as “the good doctor” and characterizing Dr. Cooke's diagnosis of a *dissociative disorder* as “psychobabble.” He similarly suggested that Sanders fabricated his headaches and sensitivity to light after talking to a lawyer at the jail. He called

the insanity defense the “insanity trip or trick.” He went so far as to say that Dr. Cooke’s analysis, if taken to its logical extreme, would absolve anyone of liability for murder so long as that person was “repress[ing] a bad day or a bad week or a bad month ... and this anger builds up inside.” VR 06/05/87 at 10:50:04–11:08:22 (Tape 7 at 01:30:38–01:48:57).

***34** On direct appeal, Sanders argued that the prosecutor’s questions and argument amounted to prosecutorial misconduct in violation of both the Kentucky and United States Constitutions. Brief of Appellant at 46–47; 52–58, *Sanders I*, 801 S.W.2d 665. The Kentucky Supreme Court addressed the state-law issues and agreed that the prosecutor’s tone in cross-examination was “less than exemplary.” But the court concluded that the cross-examination “substantially and not unfairly addressed a crucial issue” that Sanders himself raised. *Sanders I*, 801 S.W.2d at 677. Closing argument, the court said, was “not ... entirely commendable,” but did not “exceed[] acceptable bounds.” *Id.* at 680. Rather, the prosecutor’s argument addressed properly admitted evidence and was not “outrageous” enough to merit reversal. *Id.*

The Kentucky Supreme Court did not specifically address the federal prong of Sanders’ claim, but, as previously discussed, it need not do so to receive deference under AEDPA. *Packer*, 537 U.S. at 8. Rather, the AEDPA standards apply even where “a state court rejects a federal claim without expressly addressing that claim.” *Johnson v. Williams*, 133 S.Ct. 1088, 1096 (2013).¹³ The relevant “clearly established federal law” governing prosecutorial misconduct in the form of improper argument is *Darden v. Wainwright*, 477 U.S. 168 (1986). In *Darden*, the Supreme Court held that a petitioner is entitled to relief only where the prosecutor’s comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* at 181 (quoting *Donnelly*, 416 U.S. at 643). The *Darden* rule “is a very general one,” which gives state courts “more leeway ... in reaching outcomes in case-by-case determinations.” *Parker*, 132 S.Ct. at 2155. Habeas relief is appropriate only if there is “no possibility fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme] Court’s precedents.” *Richter*, 131 S.Ct. at 786.

¹³ Sanders does not attempt to rebut the presumption from *Johnson*. See *supra*.

The facts of *Darden* are instructive here. In that case, the prosecutor made a number of comments in his closing argument reflecting his emotional reaction to the case,

including indicating that the defendant was an “animal,” stating that the defendant should be released only if he was kept on a leash, and expressing on at least four occasions a wish that the defendant had died in brutal fashion. 477 U.S. at 180–81 nn. 11, 12. The Supreme Court observed that the prosecutor “did not manipulate or misstate the evidence,” and that much of the argument was a response to the defense’s closing argument. *Id.* at 181–82. The Court further noted that the trial court repeatedly instructed jurors to make their decision on the basis of the evidence alone, and that closing arguments did not constitute evidence. *Id.* at 182. Finally, the strength of the evidence of the defendant’s guilt and defense counsel’s opportunity to have the last word in closing argument ensured that the trial was not “fundamentally unfair.” *Id.* at 182–83.

***35** The Kentucky Supreme Court’s decision in *Sanders I* did not conflict with or unreasonably apply *Darden*. The court could have reasonably found that the prosecutor’s conduct in Sanders’ case was less egregious than the *Darden* prosecutor’s comments. Despite the “less than exemplary” nature of the prosecutor’s conduct during Sanders’ trial, the prosecutor did not attempt to dehumanize Sanders. Nor did he express a personal desire to see Sanders killed. Sanders does not contend that the prosecutor misstated any of the evidence introduced at trial. Rather, a reasonable jurist could find that the prosecutor’s cross-examination questions addressed Sanders’ direct examination testimony—Sanders said he felt like he was watching from outside his body during the murders; the prosecutor inquired as to whether he felt that way during trial. Similarly, the prosecutor’s closing arguments related to evidence admitted at trial (Dr. Cooke’s evaluation and report) or arguments presented by the defense (Sanders’ headaches and explanation of his insanity).

Though prosecutors should never stoop to this level, the error does not receive *de novo* review. Rather, the Court applies the deferential AEDPA standard. Under AEDPA, the Kentucky Supreme Court reasonably concluded that the less-than-professional behavior did not constitute prosecutorial misconduct. Because those comments were less prejudicial than the constitutionally acceptable comments in *Darden*, the *Sanders I* court reasonably determined that Sanders was not entitled to relief on this issue.

Sanders also makes a fleeting reference to a claim of ineffective assistance of trial counsel based on counsel’s failure to object to the prosecution’s closing argument. R. 73 at 185. Sanders does not elaborate on this *Strickland* claim.

See *Strickland v. Washington*, 466 U.S. 668 (1984). With no further argumentation (or even a citation to *Strickland*), the Court need not consider Sanders' argument. See *Frazier v. Jenkins*, 770 F.3d 485, 501 n. 9 (6th Cir.2014) (“This cursory argument has been waived, for issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” (internal quotation marks and alterations omitted)). Even if the Court were to reach the merits, Sanders has not met his burden. See *Pinholster*, 131 S.Ct. at 1403 (explaining that the combination of *Strickland* and AEDPA creates “doubly deferential” review). Trial counsel did object to the prosecutor's closing argument, but was overruled. VR 6/5/1987 at 10:51:45–10:51:57 (Tape 7 at 1:32:20–1:32:32).

Burden of Proof. During his closing argument, the prosecutor stated that “a person is presumed to intend the normal and logical consequences of his acts.” VR 06/05/87 at 10:49:10–10:49:16 (Tape 7 at 01:29:50–01:29:56). According to Sanders, the prosecutor's statements to the jury that the law presumes intent impermissibly shifted the burden of proof to Sanders. He claims that his mental state was the only contested issue at trial. The law, Sanders argues, required the prosecution to prove that he intended to kill Brandenburg and Hatch; only then would Sanders be required to prove his insanity as an affirmative defense. R. 73 at 183–84.

*36 The Kentucky Supreme Court reviewed the prosecutor's closing argument and held that it did not “exceed[] acceptable bounds.” *Sanders I*, 801 S.W.2d at 680. As with several other issues, *Sanders I* did not expressly address federal law in denying Sanders' claim. The Court presumes that the Kentucky Supreme Court adjudicated the issue on the merits. Accordingly, habeas relief is appropriate only if there is “no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents.” *Richter*, 131 S.Ct. at 786.

In his federal habeas petition, Sanders offers *Sandstrom v. Montana*, 442 U.S. 510 (1979) as the relevant clearly established federal law. In that case, the Supreme Court held that, where intent is an element of a crime, it was unconstitutional for the court to instruct the jury that “the law presumes that a person intends the ordinary consequences of his voluntary acts.” *Id.* at 512. While Sanders insists that *Sandstrom* extends to a prosecutor's comments, its holding is limited to instructions from the court. *Id.* at 524. Under AEDPA, clearly established law refers only “to the holdings, as opposed to the dicta, of th[e] [Supreme]

Court's decisions as of the time of the relevant state-court decision.” *Yarborough v. Alvarado*, 541 U.S. 652, 660–61 (2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). Even though the prosecutor's statement at Sanders' trial was the same as the one held unconstitutional in *Sandstrom*, that decision's holding did not encompass statements from prosecutors. Because clearly established law precludes only the court—and not the prosecutor—from making such a statement, the Kentucky Supreme Court did not unreasonably apply *Sandstrom* in *Sanders I*.

Sandstrom is not the only relevant clearly established law from the Supreme Court. Under *Boyde v. California*, the “proper inquiry” in deciding the constitutionality of a jury instruction is “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.” 494 U.S. 370, 380 (1990). While the Supreme Court set out that standard with regard to instructions from the trial court, *Boyde* also acknowledged that a prosecutor's misstatement of the law could violate due process. *Id.* at 385. A prosecutor's misstatement is “not to be judged as having the same force as an instruction from the court” but rather must be “judged in the context in which [it is] made.” *Id.* at 384–85. *Boyde* appears to establish a watered-down form of the “reasonable likelihood” standard for a prosecutor's statements regarding jury instructions. Under AEDPA, the question is whether the Kentucky Supreme Court unreasonably applied *Boyde* in concluding that the prosecutor's comments were not out of bounds.

Here, the *Sanders I* court reasonably found that the prosecutor's comments did not violate Sanders' due process rights. First, the trial court never repeated the prosecutor's comments in the jury instructions and specifically told the jury that the law “presumes the defendant to be innocent of the crime.” VR 06/05/87 at 10:28:15–10:28:20 (Tape 7 at 1:08:50–1:08:55). Second, the trial court also instructed the jury that it had to find, from the evidence and beyond a reasonable doubt, that Sanders had the intent to commit the murders. *Id.* at 10:22:25–10:10:23:55 (1:03:00–1:04:30). Third, the trial court explicitly defined “intentionally”: “A defendant acts intentionally with respect to a result or to conduct when his conscious objective is to cause that result or to engage in that conduct.” *Id.* at 10:25:25–10:25:50 (1:06:00–1:06:25). The trial court did not mention any presumption with regard to intent, and Sanders does not contend that the trial court's statements were improper. Finally, the trial court instructed the jury that its duty was

to “weigh the evidence that you've heard carefully and to deliberate and reach a verdict pursuant to the evidence that you've heard and the court's instructions.” *Id.* at 11:22:00–11:22:25 (2:02:35–2:03:00).

*37 Fariminded jurists could reasonably conclude that the jury relied on the trial court's instructions and ignored the prosecutor's comment. The jury had specific instructions from the court on the presumption of innocence and the definition of “intentionally.” The jury was told to use those instructions in reaching the verdict, and a “jury is presumed to follow its instructions.” *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). The jury had a copy of the court's instructions in the jury room but did not have a transcript of the prosecutor's closing argument. Even though the prosecutor improperly referred to a presumption of intent, reasonable jurists could find that the jury followed the instructions given by the trial court as opposed to the one misstatement by the prosecutor in closing. Accordingly, the *Sanders I* court acted reasonably, and the Court denies Sanders relief on claim 17.

F. Claim 18: The trial court erred when instructing the jury on the burden of proof for the insanity defense.

At trial, the court did not use the phrase “preponderance of the evidence” when instructing the jury on the burden of proof for Sanders' insanity defense. R. 73 at 186–87; see *Gall v. Commonwealth*, 607 S.W.2d 97, 110 (Ky.1980), overruled on other grounds by *Payne v. Commonwealth*, 623 S.W.2d 867 (Ky.1981). Sanders did not object to the instruction at trial. Under Kentucky law, courts instruct juries that they may find an insanity defense “from the evidence” and avoid using the phrase “preponderance of the evidence.” *Id.* Sanders argues that the trial court's jury instructions on his insanity defense were constitutionally defective because they omitted the phrase “preponderance of the evidence.” R. 73 at 188–93.

The trial court followed Kentucky law by using the phrase “from the evidence” in its instruction on the insanity defense. When the trial court instructed the jury as to the state's burden, it stated that the jury could find Sanders guilty of murder (or robbery) “if and only if” the jury believed “from the evidence beyond a reasonable doubt” that Sanders committed the elements of murder (or robbery). VR 6/5/1987 10:22:23–10:25:00 (Tape 7 1:03:00–1:05:37). The trial court used that language—“from the evidence beyond a reasonable doubt”—four times. *Id.* When instructing the jury as to Sanders' insanity defense, however, the court explained that the jury would have to find “from the evidence” that Sanders satisfied the elements of an insanity defense. VR 6/5/1987

10:26:06–10:27:43 (Tape 7 1:06:42–1:08:20). The judge used that formulation three times. *Id.* Finally, at the end of his instructions, the judge reiterated that the jury would have to find “from the evidence alone and beyond a reasonable doubt” that Sanders was guilty of the crimes. VR 6/5/1987 10:28:29 (Tape 7 1:09:06). But the court never used the words “preponderance of the evidence.” As a result, Sanders argues, the instructions violated his constitutional rights.

*38 Before reaching the merits of this claim, the Court must first clear a procedural hurdle. In *Sanders I*, the Kentucky Supreme Court discussed Sanders' burden-of-proof argument under only state law and summarily dismissed the argument. 801 S.W.2d at 679. In his direct-appeal brief, Sanders presented a constitutional argument in addition to the state law claim. Brief of Appellant at 95–96, *Sanders I*, 801 S.W.2d 665 (1990). That the Kentucky Supreme Court analyzed solely state law in its opinion does not affect this Court's deference, under AEDPA, to that court's decision. Because the *Sanders I* court denied habeas relief, the Court “presume[s]” that *Sanders I* adjudicated all of Sanders' claims, which includes the burden-of-proof argument under federal law. *Richter*, 131 S.Ct. at 784–85. While *Sanders I* provided no reasoning on the constitutional issue, AEDPA “does not require that there be an opinion from the state court explaining the state court's reasoning.” *Id.* at 784. Deferential review under AEDPA applies even where “a state court rejects a federal claim without expressly addressing that claim.” *Johnson v. Williams*, 133 S.Ct. 1088, 1096 (2013).¹⁴ To demonstrate his entitlement to habeas relief, Sanders must show that “there was no reasonable basis” for the Kentucky Supreme Court's decision. *Richter*, 131 S.Ct. at 784.

¹⁴ Sanders does not attempt to rebut the presumption from *Johnson* and *Richter*. See *supra*.

Under *Boyde v. California*, 494 U.S. 370 (1990), Sanders contends that there is a reasonable likelihood that the jury would have been confused as to the burden of proof for the insanity defense. In *Boyde*, the Supreme Court held that courts should evaluate erroneous jury instructions by looking at “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.” *Id.* at 380. In developing this standard, the Court relied on the fact that *Boyde* was a capital case. See *id.* (“There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case....”). According to

Sanders, the Kentucky Supreme Court unreasonably applied *Boyde*.

But Sanders fails to satisfy his burden to show that “there was no reasonable basis” for the conclusion in *Sanders I* that the jury instructions were not erroneous or a constitutional violation. *Richter*, 131 S.Ct. at 784. Kentucky may define the burden of proof for an affirmative defense as it sees fit. See *Patterson v. New York*, 432 U.S. 197, 206–07 (1977); see also *Smith v. United States*, 133 S.Ct. 714, 719 (2013) (shifting the burden of proving withdrawal from a conspiracy, an affirmative defense, to the defendant “does not violate the Due Process Clause”). Kentucky courts have resisted using “preponderance of the evidence” in jury instructions because it “is redundant and bad practice.” *Hardin v. Savageau*, 906 S.W.2d 356, 358 (Ky.1995). In Kentucky’s view, that phrase “might not be understood” and defining it “could confuse or mislead the jury.” *Id.* Here, the trial court dutifully instructed the jury using “from the evidence” under Kentucky law. The Kentucky Supreme Court concluded that there was no error in this instruction.

*39 Reasonable jurists could conclude that the jury would not have been confused by the instruction’s omission of “preponderance of the evidence.” See *Richter*, 131 S.Ct. at 876 (“A state court’s determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court’s decision.” (internal quotation marks omitted)). A jury could understand Kentucky’s formulation as distinguishing between “from the evidence” and “from the evidence beyond a reasonable doubt.” Jurors can reasonably be expected to identify the significance of the explicit absence of “beyond a reasonable doubt” following “from the evidence” in the instructions on insanity. See, e.g., *Gall*, 607 S.W.2d at 110 (“There is no reason to suppose or suspect that the jurors were ignorant bumpkins.”). In each reference to the state’s burden, the trial judge specifically included “beyond a reasonable doubt,” but omitted that phrase when discussing the burden for Sanders’ insanity defense. And the instructions on insanity did not mention “from the evidence” merely once in passing. The judge repeated “from the evidence,” standing alone, three times. That provided sufficient contrast with the rest of the instructions to avoid any potential confusion. Because of the divergence in the instructions, the Kentucky Supreme Court was not unreasonable in concluding that the instructions did not create a constitutional error. Accordingly, Sanders is not entitled to habeas relief on this claim.¹⁵

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Sanders asserts in conclusory fashion that the Kentucky Supreme Court made an unreasonable determination of the facts. R. 73 at 190. He does not say what facts were unreasonably determined. The Kentucky Supreme Court in *Sanders I* makes no mention of any factual findings relevant to this claim. Because the Court identifies no unreasonable factual determination, the Court rejects this claim.

G. Claim 28: The government failed to disclose exculpatory evidence, in violation of *Brady v. Maryland*.

As a result of a motion by his attorney, Sanders was transported to the KCPC for a mental evaluation. See TR Direct Appeal Vol. I at 19 (motion for a competency evaluation). At the KCPC, Sanders underwent a comprehensive examination. A team of social workers, psychologists, a psychiatrist, and a neurologist observed Sanders for twenty-four hours a day over a period of six weeks. VR 6/5/87 19:13:23–19:13:40 (Tape 7 00:34:39–00:34:56) (Testimony of Dr. Walker).

One of the KCPC team members, Dr. Frank Flenning, evaluated Sanders toward the end of his stay. Dr. Flenning memorialized his interview notes and summarized his findings and conclusions in a seven-page report. See Appellate Proceeding Record at 765–71 (Report of Dr. Flenning). In his report, Dr. Flenning describes (1) Sanders’ childhood and upbringing, (2) his recollections of the crimes and the subsequent investigation, and (3) his responses to the psychological tests. Dr. Flenning first noted how, as a child, Sanders was “severely punished” by his alcoholic father and his mother. *Id.* at 765. Dr. Flenning also recorded that Sanders admits he “was not really close to anyone” in his family while growing up. *Id.* And after describing Sanders’ performance on an array of psychological and psychiatric tests, Dr. Flenning concluded that there is “very strong evidence” that Sanders has an “atypical psychosis.” *Id.* at 769. Dr. Flenning found that a “highly unusual type of fragmentation” had taken place in Sanders’ personality structure. This, he reasoned, could explain Sanders’ “loss of contact with reality and possibly delusional thinking” under “unusual stresses and circumstances.” *Id.* at 770. Ultimately, Dr. Flenning concluded that Sanders suffered from an atypical psychosis that reflected characteristics typical of pseudo-neurotic schizophrenia. *Id.* at 769–70.

*40 But neither Sanders nor Charters ever saw Dr. Flenning’s report before trial. R. 73 at 333. Nor did they receive a complete summary of his conclusions. *Id.*

Instead, the lead KCPC investigator, Dr. Candace Walker, prepared a summary of the KCPC evaluation team's overall findings for the court and counsel ("KCPC Report"). See TR Direct Appeal Vol. I at 134–44 (Dr. Candace Walker's letter and KCPC Report). In this report, Dr. Walker only summarized Dr. Flenning's notes about Sanders' recollections of his childhood. See *id.* at 139–40. Nowhere in the KCPC Report, however, did Dr. Walker relay Dr. Flenning's clinical conclusions or his determination that Sanders suffered from an [atypical psychosis](#). Instead, Dr. Walker noted that Sanders contradicted himself during his time at KCPC by giving different accounts of his personal history to different evaluators. *Id.* at 136, 139, 140. She also summarized the KCPC team's findings as determining that Sanders did not suffer—and had not previously suffered—from a mental disease or defect. *Id.* at 143. Dr. Walker portrayed all the KCPC evaluators as concluding that Sanders did not suffer from any thought disorder, major affective disorder, or "psychotic illness." *Id.* at 143–44. The prosecution called Dr. Walker as a rebuttal witness. At trial, Dr. Walker provided testimony consistent with the KCPC Report. See generally VR 6/5/87 09:01:00–09:54:06 (Tape 7 00:02:19–00:55:21) (Testimony of Dr. Walker).

Sanders claims that the prosecution had an obligation to disclose Dr. Flenning's psychiatric report because it was material, exculpatory evidence that would have supported his insanity defense. He claims that, at the very least, Dr. Flenning's conclusions substantially undermined Dr. Walker's testimony. Because Dr. Walker served as a prosecution witness, Sanders argued, the prosecution's *Brady* obligations extended to information that would rebut Dr. Walker's testimony. R. 73 at 351–52. Dr. Walker testified that the KCPC team found Sanders to be "competent to deal with reality," and that there was "no evidence" that Sanders suffered from "any type of [psychosis](#) or serious psychological or psychiatric impairment." VR 6/5/87 at 09:14:35–09:14:52 (Tape 7 00:15:52–00:16:08); R. 73 at 351. Dr. Walker also said that Sanders did not suffer from a mental disease or defect. VR 6/5/87 at 09:14:55–09:15:16 (Tape 7 00:16:11–00:16:33). Because the prosecution did not disclose Dr. Flenning's report in which he found that Sanders suffered from [atypical psychosis](#), Sanders argues that the prosecution violated its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963). R. 73 at 334.

Brady requires prosecutors to disclose to the defendant evidence that is (1) exculpatory or could be used for impeachment, and (2) material—that is, evidence such that

there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 676, 682 (1985); *Brady*, 373 U.S. at 86–87. The prosecution has a duty to disclose under *Brady* even if the defendant does not request the evidence. *United States v. Agurs*, 427 U.S. 97, 107 (1976).

*41 The Kentucky Supreme Court concluded that no *Brady* violation occurred for three reasons. The court first determined that Dr. Flenning's report did not support Sanders' insanity defense and thus was not exculpatory. *Sanders II*, 89 S.W.3d at 385. The court also concluded that *Brady* did not require the prosecution to disclose Dr. Flenning's report because it was in the possession of a third party—not in the possession of the prosecution. *Id.* Finally, the Kentucky Supreme Court found that the prosecution did not need to disclose information that was already known to the defense. *Id.*

At the present stage, this Court's role is not to independently evaluate whether Sanders can prevail on his *Brady* claim. Under AEDPA, the Court must constrain its review to determining whether the Kentucky Supreme Court decided the issue contrary to federal law, or unreasonably applied *Brady* and other clearly established Supreme Court holdings to the facts of Sanders' case. See *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

The Kentucky Supreme Court identified and applied the *Brady* framework. *Sanders II*, 89 S.W.3d at 385. Where a state court " 'identifies the correct governing legal principle' in existence at the time," the appropriate inquiry is whether the state court unreasonably applied that principle. *Pinholster*, 131 S.Ct. at 1399 (quoting *Williams*, 529 U.S. at 413). Because the *Sanders II* court identified and applied *Brady*, the question is not whether the decision was "contrary to" *Brady*, but rather whether the court "unreasonably applied" *Brady* and its "clearly established" progeny. An "unreasonable" application is not merely an "incorrect" application of federal law. *Richter*, 131 S.Ct. at 785. And "clearly established law" under AEDPA refers to decisions of the Supreme Court rendered before the "state-court conviction became final." *Williams*, 529 U.S. at 390.

Under these standards, and assuming that Dr. Flenning's report was exculpatory, Sanders is not entitled to habeas relief. Why? Because the Kentucky Supreme Court's decision did not "unreasonably" apply clearly established law in

concluding that the prosecution had no obligation to disclose evidence in the control of the KCPC and of which Sanders and his attorney were already aware.

Sanders does not argue that the prosecution actually possessed Dr. Flenning's report. R. 73 at 339. Rather, he notes that the report "was at least in the prosecution's constructive possession." *Id.* The Supreme Court has held that prosecutors have a duty to learn of and disclose exculpatory evidence possessed by others working on behalf of the government in the case, including police. *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). The *Kyles* Court clarified that *Brady* evidence even includes information "known only to police investigators and not to the prosecutor." 514 U.S. at 438. But this rule does not help Sanders establish a *Brady* violation for two reasons. First, the Court decided *Kyles* in 1995—years after Sanders' conviction became final. So any rule in *Kyles* requiring the prosecution to disclose exculpatory evidence beyond its actual control was not "clearly established" federal law. *Williams*, 529 U.S. at 390. As a result, the Kentucky Supreme Court could reasonably conclude that the prosecutor had no obligation in 1987 to disclose evidence that he did not even possess.

***42** Second, even if the prosecution's duty to disclose evidence beyond its actual possession was "clearly established" before *Kyles*, Sanders' claim for relief fails. The Supreme Court has *never* extended the prosecution's *Brady*-disclosure obligations to information in the possession of witnesses like Dr. Walker. Sanders argues that the prosecutor's *Brady* obligation extends to evidence in the possession of *all* government entities, including those independently involved in the case. And because Dr. Walker testified as a government witness, Sanders argues, she operated as "an agent of the prosecution ... acting on the government's behalf." R. 73 at 340. For this reason, Sanders maintains that the prosecutor violated his *Brady* obligations by withholding Dr. Flenning's exculpatory report—evidence in the control of Dr. Walker, the prosecutor's agent. *Id.*

Sanders does not point to any case that expands the prosecutor's *Brady* obligation to evidence in the control of the witnesses and experts who simply testify for the prosecution. Nor is it likely that Sanders could identify a case establishing that rule. Even *Kyles* merely expanded the prosecutor's *Brady* duty to learn about and disclose favorable evidence to information known to entities, like the police, working on the prosecution's behalf in the case. 514 U.S. at 437–38. The

KCPC, while a government entity, was not working for the prosecution. Indeed, it was the court, not the prosecution, who requested that the KCPC evaluate Sanders. *See* Letter from the KCPC to the Honorable William Jennings (April 21, 1987), TR Direct Appeal, Vol. I at 134–35 ("Pursuant to your court order, the defendant, David Lee Sanders, has been received at the [KCPC] for evaluation and treatment."). The *Kyles* Court did not require the prosecutor to search for favorable evidence wherever it may appear—in the control of scientific expert witnesses, neutral state agencies, or the defense team. Any alternative reading of *Kyles* or related Supreme Court cases would frame the Supreme Court's precedents at an impermissibly "high level of generality." *See Lopez v. Smith*, 135 S.Ct. 1, 4 (2014) (per curiam) (quoting *Nevada v. Jackson*, 133 S.Ct. 1990, 1994 (2013) (per curiam)). And that framing would improperly extend clearly established federal law. *See White v. Woodall*, 134 S.Ct. 1697, 1706 (2014) ("[I]f a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision.") (internal citations omitted). As a result, the Kentucky Supreme Court could reasonably conclude that even under the rule of *Kyles*, the prosecution's *Brady* obligation did not extend so far as to reach the information in the KCPC's control.

But Sanders argues that Dr. Walker and the KCPC effectively functioned as the police by evaluating Sanders' mental condition. Nothing in the record, however, indicates that Dr. Walker or the KCPC functioned like traditional police who aid the prosecution in its investigatory functions. The police in *Kyles*, for example, recorded conversations with informants using microphones and took statements from eyewitnesses to the crime. In contrast, the KCPC evaluated Sanders at the request of defense counsel and pursuant to a court order. *See* TR Direct Appeal Vol. I at 19 (motion for a competency evaluation); *id.* at 21–22 (order for a mental evaluation). The KCPC was created as part of the Cabinet for Health and Family Services. 908 KAR 3:160 (West 2012). And the mission statement of the KCPC is to provide "professional objective and thorough forensic pretrial evaluations for the judicial system and quality inpatient psychiatric services of persons charged with or convicted of felony offenses." *See* Gregory S. Taylor, *Pre Trial Evaluation Program Kentucky Correctional Psychiatric Center*, Ky. Dep't of Public Advocacy, [http:// dpa.state.ky.us/library/manuals/mental/Ch12.html](http://dpa.state.ky.us/library/manuals/mental/Ch12.html) (last visited Feb. 11, 2015). Accordingly, the KCPC is not akin to the police and functions more like an arm of the courts. For these reasons,

the *Sanders II* court was reasonable in distinguishing the KCPC from the state agency that investigated child abuse in *Pennsylvania v. Ritchie*. See 89 S.W.3d at 386 (citing *Ritchie*, 480 U.S. 39 (1987)). Accordingly, the *Sanders II* court did not “unreasonably” apply clearly established federal law.

VI. Claim 27: Ineffective Assistance of Trial Counsel.

*43 Sanders contends that his trial counsel was constitutionally ineffective. He sets forth the following nine acts or omissions that he argues constituted ineffective performance:

1. Failure to obtain adequate, independent mental health assistance. (Subclaim 27(A) in Sanders' petition).
2. Failure to investigate and obtain records related to Sanders' evaluation at the KCPC, particularly the report of Dr. Flenning on the KCPC evaluation team. (27(B)).
3. Failure to obtain and present a videotape of Sanders, taken shortly after his arrest, which would have showed his psychological condition at the time of the murders and of his statements to police. (27(E)).
4. Failure to present testimony of three witnesses, Dr. John Moffitt, Roger Portwood, and Nolan Winkler, Jr., who would have testified about Sanders' psychological condition at the time of the murders and of his statements to police. (27(F)).
5. Failure to move to suppress Sanders' statements to police or introduce evidence of circumstances surrounding his interrogation. (27(G)).
6. Failure to assert marital privilege, failure to advise Sanders' wife of her testimonial privilege, and opening the door to testimony of Sanders' violence towards his wife. (27(H)).
7. Failure to prepare for and present mitigating evidence during the penalty phase. (27(I)).
8. Failure to consult with Sanders and prepare him for testifying during the penalty phase. (27(J)).
9. Failure to seek competency proceedings. (27(L)).¹⁶

¹⁶ Sanders withdrew subclaims (C), (D), (K), and (M).

Criminal defendants enjoy the right to effective assistance of counsel guaranteed by the Sixth Amendment. *Strickland*

v. Washington, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970)). In order to establish a violation of the right to effective assistance of counsel, a petitioner must demonstrate two things. First, he must show that his attorney's performance was deficient—that it fell outside the “wide range” of professional competence. *Id.* at 689. Courts must entertain a “strong presumption” that counsel performed reasonably. *Id.* Second, a petitioner must demonstrate that he was prejudiced by counsel's incompetence—that but for counsel's errors, there is a reasonable probability that the results of the proceeding would have been different. *Id.* at 694. This is a lighter showing than proof that the errors were more-probably-than-not outcome-determinative, but that is a distinction that matters “only in the rarest case.” *Richter*, 131 S.Ct. at 792. Failure to establish either prong is fatal to an ineffectiveness claim. *Strickland*, 466 U.S. at 700. So *Strickland* sets a high bar for relief. *Richter*, 131 S.Ct. at 788 (quoting *Kentucky v. Padilla*, 559 U.S. 356, 371 (2010)).

For state prisoners, AEDPA adds a wrinkle to *Strickland*'s already-deferential inquiry for state prisoners. Under AEDPA, federal courts only ask whether the state court reasonably applied *Strickland*. *Richter*, 131 S.Ct. at 785. The Supreme Court refers to this as “doubly deferential.” *Pinholster*, 131 S.Ct. at 1403 (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1420 (2009)). So the Court must grant deference to the Kentucky Supreme Court's assessment of Charters' performance. To succeed, Sanders must show that the Kentucky Supreme Court unreasonably applied *Strickland* to Sanders' claims that his trial counsel provided ineffective assistance. *Id.*

*44 Because the Kentucky Supreme Court applied the *Strickland* framework to ineffective-assistance-of-counsel claims 1–8, its decision is not “contrary to” *Strickland*. See *Williams*, 529 U.S. at 405–06 (explaining that a state-court decision that “appl[ies] the correct legal rule” from Supreme Court precedent does “not fit comfortably within § 2254(d)(1)'s ‘contrary to’ clause”). So, to obtain relief, Sanders must demonstrate that *Sanders II* was either an unreasonable application of *Strickland*, or based on an unreasonable determination of the facts. On each claim, Sanders has failed to carry his burden.

A. Claim 27(A): Failure to obtain adequate, independent mental health assistance.

Before his trial, Sanders voluntarily submitted to a mental examination at the KCPC. Appellate Proceeding Record at

697 (Sanders' signed request for voluntary admission for a mental evaluation at the KCPC). The KCPC evaluation was comprehensive: A team of social workers, psychologists, a psychiatrist, and a neurologist observed Sanders for twenty-four hours a day over a period of six weeks. VR 6/5/87 19:13:23–19:13:40 (Tape 7 00:34:39–00:34:56) (Testimony of Dr. Walker describing the KCPC examination as a “long, six-week, 24-hour observation”). Based on the team's collective observations of and interviews with Sanders, Dr. Candace Walker, the team leader, prepared a report for the trial judge and counsel. *See* TR Direct Appeal Vol. I at 134–44 (Dr. Candace Walker's letter and the KCPC Report). The report concluded that while Sanders may suffer from a mixed personality disorder, he did not suffer from a mental disease or defect that caused him to lack substantial capacity to conform his behavior to the requirements of the law. *Id.* at 143.

Charters did not rely on the KCPC's findings to construct Sanders' insanity defense. Instead, he secured the pro bono services of Dr. Stuart Cooke, a specialist in clinical and counseling psychology. *See generally* VR 6/4/87 15:39:56–16:06:31 (Tape 6 04:06:23–04:32:56) (Testimony of Dr. Cooke). Dr. Cooke interviewed Sanders, administered an array of psychological tests, reviewed the KCPC report, and read police reports of the crimes. VR 6/4/87 15:43:45–15:46:04 (Tape 6 04:10:12–04:12:30). Based on this information, Dr. Cooke testified that Sanders suffered from a [depersonalization disorder](#). *Id.* 15:46:17–15:47:33 (Tape 6 04:12:44–04:13:59). He explained that this condition is marked by dissociative episodes where Sanders would suddenly lose control of his actions. *Id.* In contrast to the KCPC team, Dr. Cooke concluded that Sanders was mentally ill and could not conform his behavior to the requirements of the law. *Id.* 15:55:37–15:55:59 (Tape 6 04:22:03–04:22:25).

Sanders believes that his insanity defense was ultimately unsuccessful because Charters failed to obtain the services of a paid “adequate, independent mental health” expert. R. 73 at 216. Sanders claims that, unlike Charters, any attorney providing “professionally competent assistance” under “prevailing professional norms,” *Strickland*, 466 at 690, would have at the very least: (1) used the \$2,000 that Sanders allegedly earmarked for a mental health expert to hire an expert witness instead of relying on state and pro bono evaluations, (2) contacted the hired expert well in advance of trial instead of days before the proceeding, and (3) provided the expert with existing documentation of Sanders' mental illness instead of withholding that evidence. *See* R. 73 at 217–21. Sanders argues that Charters should have retained

experts like the three specialists who prepared reports about Sanders' mental health for another case. *See* R. 73 at 223 (identifying Drs. Roger H. Fisher, Glenn M. Weaver, and Murray E. Tieger as alternative expert witnesses). These experts agreed with Dr. Cooke's assessment of Sanders' mental disorders. *See* Appellate Proceeding Record at 592–611 (Report of Dr. Fisher) (concluding that Sanders suffered from depersonalization and dissociative episodes); *Id.* at 613–18 (Report of Dr. Weaver) (observing that Sanders' dissociative episodes demonstrate that he suffers from a major psychiatric disorder); *Id.* at 927–28 (Letter from Dr. Tieger) (concluding that Sanders may have lower levels of control and the “potential for brief psychotic episodes”).

***45** Sanders claims that Charters' failures harmed him in two ways. First, neither the KCPC examination nor Dr. Cooke's evaluation provided him with a sufficiently strong defense-oriented mental health evaluation. R. 73 at 225–26. This failure, Sanders argues, deprived him of his due process right to competent psychiatric assistance in preparing an insanity defense under [Ake v. Oklahoma](#), 470 U.S. 68 (1985). *Id.* And second, because Dr. Cooke did not have sufficient time to prepare his testimony, he invited a strong rebuttal from the state's mental health expert who called his findings into question. *See, e.g.,* VR 6/4/87 16:01:58–16:02:06 (Tape 6 04:28:23–04:28:32) (Testimony of Dr. Cooke) (stating that he only examined Sanders for two-and-a-half to three hours); VR 6/4/87 16:02:15–16:02:23 (Tape 6 04:28:39–04:28:49) (Testimony of Dr. Cooke) (speculating about the day on which he examined Sanders); VR 6/5/87 19:13:23–19:13:40 (Tape 7 00:34:39–00:34:56) (Testimony of Dr. Walker) (describing the KCPC examination as a thorough “long, six-week, 24-hour observation”).

The Kentucky Supreme Court found that Charters' actions did not deprive Sanders of his constitutional right to effective assistance of counsel. [Sanders II](#), 89 S.W.3d at 387–88. Viewed under AEDPA's deferential standard, the *Sanders II* court did not “unreasonably” interpret the “deficiency” or “prejudice” prongs of *Strickland*, or underlying facts, in reaching this conclusion.

On the record before it, the *Sanders II* court reasonably found that Charters provided competent representation under *Strickland*, although he did not retain a paid mental health expert. Defense counsel rarely must pursue “any one ... approach” in litigation, especially when faced with limited resources. *See Richter*, 131 S.Ct. at 779. The court could therefore determine that Charters could properly devote

resources to other defense efforts after learning that Dr. Cooke was willing to provide his services pro bono. After all, Dr. Cooke conducted multiple tests just like the KCPC experts did. *See* TR Direct Appeal Vol. I at 134–44 (indicating that the KCPC team performed “neurological and neuropsychological consultations”); VR 6/4/1987 15:43:45–15:45:05 (Tape 6 04:10:11–04:11:31) (Testimony of Dr. Cooke) (noting the multiple tests that he administered to Sanders). And Dr. Cooke testified that he received a doctorate degree, just like the two KCPC neuropsychologists. *See* TR Direct Appeal Vol. I at 134–44 (noting that the psychological and neuropsychological testing was performed by two specialists who held doctorate degrees); VR 6/4/1987 15:40:24–15:42:57 (Tape 6 04:06:51–04:09:23) (Voor dire of Dr. Cooke) (revealing that he received a doctorate degree in clinical and counseling psychology). Ultimately, the decision to hire an expert is a “paradigmatic example” of the type of “strategic choic[e]” that is “virtually unchallengeable.” *Hinton v. Alabama*, 134 S.Ct. 1081, 1089 (2014) (quoting *Strickland*, 466 U.S. at 690). Given Dr. Cooke’s qualifications and the fact that he testified that he administered multiple tests to Sanders, the *Sanders II* court could reasonably conclude that Charters was “not ineffective [for] obtaining the services of Dr. Cooke.” 89 S.W. at 387.

***46** The *Sanders II* court offered another explanation for why Charters was not ineffective in failing to secure a paid mental health expert: The KCPC evaluation did not deprive Sanders of his right to competent psychiatric assistance. *Sanders II*, 89 S.W.3d at 387–88. The court found that Sanders was constitutionally entitled only to the comprehensive evaluation that he received at the KCPC—not necessarily to an evaluation conducted by experts of his choice. *Id.* Without a constitutional violation, the argument goes, Charters was not obligated to pursue a remedy for that violation. So Charters did not need to retain another mental health expert, paid or unpaid. This reasoning is consistent with the Supreme Court’s reasoning in *Kimmelman v. Morrison*. *See* 477 U.S. 365 (1986). There, the Court held that a defendant must first show that he experienced a constitutional violation before claiming his attorney improperly failed to remedy the constitutional violation. *See* 477 U.S. at 382.

In concluding that Charters was not deficient for failing to secure a paid expert to remedy a non-existent constitutional violation, the Kentucky Supreme Court supplied a “reasonable argument” for why Charters was not ineffective under *Strickland*. *Richter*, 131 S.Ct. at 788. This justification accordingly survives the doubly deferential

standard of review that AEDPA superimposes on the first prong of the *Strickland* inquiry. *See id.*

Neither was the Kentucky Supreme Court unreasonable when it found that Sanders suffered no prejudice from Charters’ failure to retain and prepare paid mental health experts. *Sanders II*, 89 S.W.3d at 388. Sanders argued that, but for his counsel’s deficient performance, he would have relied on experts like the three who submitted reports in connection with his trial in Lincoln County. Presenting their testimony and reports to the jury, he claimed, would have led to a different verdict in his case. R. 73 at 231. But the record reveals that this trio of experts would have presented the same conclusions that Dr. Cooke offered at trial. Consistent with Dr. Cooke’s testimony, Dr. Fisher concluded that Sanders suffered from depersonalization and dissociative episodes. Appellate Proceeding Record at 592–611; VR 6/4/1987 15:46:17–15:47:33 (Tape 6 04:12:44–04:13:59). Dr. Weaver also would have testified about Sanders’ dissociative episodes. Appellate Proceeding Record at 613–18. And Dr. Tieger would have testified that Sanders may have had lower levels of control and the “potential for brief psychotic episodes.” *Id.* at 927–28 (Letter from Dr. Tieger concluding that Sanders may exhibit “unpredictable outbursts of hostility”). This testimony is also consistent with Dr. Cooke’s conclusion that Sanders suffered from a disorder characterized by the periodic loss of control over his actions. VR 6/4/1987 15:46:17–15:47:33 (Tape 6 04:12:44–04:13:59). The Kentucky Supreme Court noted that the jury rejected these substantive expert opinions related to the insanity defense. Given the identical content of these alternate experts’ opinions, the Kentucky Supreme Court could reasonably have concluded these opinions, if included, would have had no impact on the trial. Because there is no “substantial” likelihood of a different outcome, Sanders fails to demonstrate prejudice under *Strickland*. 89 S.W.3d at 388; *Richter*, 131 S.Ct. at 792.

***47** Sanders argues that the jury would have accepted the alternative experts’ opinions because they would have been paid and better prepared for cross examination. R. 73 at 231. This is a conceivable possibility, at best. The jury might have been swayed by another expert’s performance on cross examination. But the court can only speculate about whether other “better prepared” experts would have answered questions on cross-examination any differently than Dr. Cooke did. A conceivable difference in the trial’s outcome is not enough for a court to find that a defendant was prejudiced by his counsel’s alleged deficient performance. *Richter*, 131 S.Ct. at 791–92. Where the experts were similarly qualified

and offered the same substantive testimony, the *Sanders II* court properly concluded that there was “no reason to believe” that the jury would have decided differently simply after hearing from a different mental health expert. At the very least, given the similarities between the expert that Charters used and the ones that Sanders wishes he had used, the decision was not an “unreasonable” interpretation of *Strickland*’s prejudice prong.

Other jurists could disagree with the Kentucky Supreme Court’s determination that Charters’ conduct did not violate Sanders’ rights under *Strickland*. But that is not enough to find that the court’s decision was so unreasonable as to surmount AEDPA’s “formidable barrier” to habeas relief. *Titlow*, 134 S.Ct. at 15–16. The *Sanders II* court provided logical explanations for why Charters made appropriate choices with limited resources and why presenting other experts was not substantially likely to change the outcome of this trial. Those conclusions had ample support in the record before the *Sanders II* court. So Sanders cannot show that the court’s decision was “so lacking in justification that there was an error ... beyond any possibility for fairminded disagreement.” *Richter*, 131 S.Ct. at 786–77.

B. Claim 27(B): Failure to obtain the report of Dr. Flenning on the KCPC evaluation team.

Sanders raises another ineffective-assistance-of-counsel claim related to his comprehensive evaluation at the KCPC. *See* R. 73 at 235. After Sanders’ six-week stay at the KCPC, the team of examining professionals released a report about Sanders’ mental condition to the trial judge, the prosecutor, and Charters. *See* TR Direct Appeal Vol. I at 134–44 (Dr. Candace Walker’s letter and the KCPC Report). Dr. Candace Walker, the team leader, drafted the report based largely on her evaluation of Sanders, the observations of Sanders by nursing personnel and corrections officers, and medical test results. In her report, Dr. Walker also summarized the conclusions that other psychologists and social workers drew from their interviews with Sanders. *Id.*

Dr. Walker determined that Sanders did not suffer from a psychotic illness, although he appeared to have a personality disorder. She also wrote that there was “no medical evidence” that he was suffering from a mental disease or defect at the time of the crimes. *Id.* at 135. Accordingly, Dr. Walker opined that Sanders had the capacity to appreciate the criminality of his conduct and to conform his conduct to the standard of the law. *Id.* In her report, Dr. Walker noted that Sanders gave inconsistent accounts of his personal history to the different

team members. *Id.* at 136. She also observed that he gave detailed accounts of the charged crimes to his evaluators. *Id.*

*48 Dr. Walker also summarized the findings of the social worker and other psychologists who observed and interviewed Sanders. In particular, she noted that Dr. Frank Flenning talked to Sanders about the physical abuse he experienced at the hands of his parents. *Id.* at 139. Dr. Flenning and Sanders discussed how Sanders did not feel close to anyone in his family growing up. *Id.* Finally, Dr. Walker noted that Sanders told Dr. Flenning that Sanders was expected to work on the farm starting at a young age. *Id.*

Nowhere in Dr. Walker’s report did she mention that Dr. Flenning also evaluated Sanders’ mental health. And though Dr. Walker discussed some of Dr. Flenning’s conclusions, she never mentioned that Dr. Flenning actually wrote his own report in which he arrived at a conclusion contradicting the KCPC team’s finding. In his independent report, Dr. Flenning recorded four main observations. First, he found that Sanders experienced a dissociative episode before committing the crime. Appellate Proceedings at 688. Second, after analyzing Sanders’ performance on a series of psychological tests, he concluded that there is “very strong evidence for an atypical psychosis.” *Id.* at 691. Third, he determined that a “highly unusual type of fragmentation” had taken place in Sanders’ personality, such that he had the potential for “brief psychotic episodes wherein he would experience a loss of contact with reality.” *Id.* Finally, Dr. Flenning noted that these episodes may be triggered by “unusual stresses.” *Id.*

Sanders claims that Charters was so deficient in his capacity as counsel for not unearthing Dr. Flenning’s report that he deprived Sanders of his constitutional right to effective representation. R. 73 at 235, 238 (citing *Strickland*, 446 U.S. at 688). The Kentucky Supreme Court disagreed. *Sanders II*, 89 S.W.3d at 386. The court noted that an effective attorney need only conduct a reasonable investigation. The investigation need not be similar to one that the best lawyer in the world would conduct were he “blessed ... with unlimited time and resources [and] with the inestimable benefit of hindsight.” *Id.*

Under the “doubly deferential” standard that AEDPA imposes on a review of *Strickland* claims, the *Sanders II* decision must stand. *See Mirzayance*, 556 U.S. at 123. There was no indication in Dr. Walker’s report that Dr. Flenning had produced his own report assessing Sanders’ mental health—let alone that his conclusions contradicted Dr. Walker’s

conclusions. Charters had no notice that Dr. Flenning would have written his own report, particularly because Dr. Walker summarized Dr. Flenning's "conclusions" and described the KCPC report as a summary of the "full psychiatric evaluation." TR Direct Appeal Vol. I at 135. Accordingly, it was reasonable for Charters not to spend his limited time hunting for Dr. Flenning's report—a document that he had no reason to believe even existed. At the very least, the Kentucky Supreme Court could reasonably find that Charters acted logically when he placed trust in Dr. Walker's summary of the KCPC findings. *Strickland's* deficient-performance prong is not necessarily violated where a defense attorney fails to regard the prosecution with suspicion and fact-check its documents. Accordingly, the Kentucky Supreme court's application of *Strickland* on the facts underlying this claim was not so "unreasonable" as to warrant habeas relief. *Richter*, 131 S.Ct. at 785.

C. Claim 27(E): Failure to present a videotape of Sanders taken shortly after the murders.

*49 On February 3, 1987, Sanders' appointed counsel, Ernie Lewis, videotaped Sanders at the Madison County Jail. On the tape, Sanders appears distraught and remorseful about the murders. See Tape 1 at 8:12–20:35. At trial, Charters sought to admit the videotape, which remained in Lewis's possession. See VR 5/22/1987 10:46:22–10:50:18 (Tape 2 07:16–11:14). Before ruling on the motion, the trial court requested a copy of the tape. See VR 5/22/1987 10:55:42–10:56:30 (Tape 2 16:38–17:25). Lewis was apparently willing to provide it, but wanted a signed attorney-client privilege waiver before doing so. *Sanders II*, 89 S.W.3d at 390; VR 6/1/1987 9:36:54–9:37:36 (Tape 3 37:24–38:06). The trial court did not rule on the motion, however, because no one produced the tape.

In his first state post-conviction motion in Madison Circuit Court, Sanders alleged that Charters was ineffective for failing to secure the tape and present it at trial. Motion to Vacate, Set Aside, or Correct Sentence Pursuant to RCr 11.42 at 48–49, Madison Circuit Court, No. 87–CR–018 (Feb. 9, 1993) (TR 2 at 150). But Sanders did not provide the videotape in his RCr 11.42 motion. Order Denying Motion to Vacate Pursuant to RCr 11.42 at 11, Madison Circuit Court, No. 87–CR–018 (Jan. 28, 1999) (TR. 4 at 13). After the Madison Circuit Court denied his RCr 11.42 motion, Sanders provided the tape in his motion for reconsideration. See Motion to Reconsider at 1–2, Madison Circuit Court, No. 87–CR–018 (Feb. 8, 1999) (TR. 4 at 25–27).

In *Sanders II*, the Kentucky Supreme Court relied on the absence of the videotape in finding that Sanders was not entitled to relief. *Sanders II*, 89 S.W.3d at 390 ("In the absence of the tape, there is nothing to complain about related to ineffective assistance."). It is unclear why the *Sanders II* court relied on the absence of the tape—the *Sanders II* court had acknowledged that Sanders filed a motion to reconsider, *id.* at 385, but it made no mention of the attached videotape from that motion. Though *Sanders II* does not explain whether the videotape was part of the record before it, the Kentucky Supreme Court could have reasonably concluded that the videotape was not properly before the court because it was not introduced in the initial RCr 11.42 motion. See *Ky. R.Crim. P. 11.42(2)*; *Short v. City of Olive Hill*, 414 S.W.3d 433, 441 n. 7 (Ky.Ct.App.2013) (explaining that a motion to reconsider "cannot be used to raise arguments and introduce evidence that should have been presented during the proceedings before entry of judgment").

But regardless of whether the videotape was properly before the state court, Sanders' claim fails. If the videotape was not properly part of the state court record, the Court may not consider the videotape on federal habeas review. See *Pinholster*, 131 S.Ct. at 1400 ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court."). Without the videotape, the Kentucky Supreme Court reasonably denied Sanders' ineffective-assistance-of-counsel claim. Sanders bore the burden of proving his claim of ineffective assistance, which included providing the relevant evidence. See *Strickland*, 466 U.S. at 687. If the Kentucky Supreme Court did not view the videotape, then it had no basis to find that Sanders' counsel was ineffective for failing to use it at trial. Rather, the only conclusion the court could reach, absent the videotape, was that Sanders failed to demonstrate that his counsel was ineffective. The Kentucky Supreme Court reasonably denied that claim if the videotape was not included in the record before it.

*50 Even if the videotape was part of the state record, the Kentucky Supreme Court's decision was still reasonable. The Court applies the "doubly deferential" standard for claims of ineffective assistance of counsel. *Pinholster*, 131 S.Ct. at 1403. In denying Sanders' ineffective-assistance claim, the Kentucky Supreme Court relied on the fact that "[t]here is nothing in the record to indicate that the prerequisite of [an attorney-client privilege] waiver was ever produced by Sanders." *Sanders II*, 89 S.W.3d at 390. The court did not

tie that conclusion to a specific *Strickland* prong, but the conclusion reasonably supports a finding that Charters was not deficient. The waiver had to be signed by Sanders, not Charters. Sanders offers no evidence that Charters had any role or responsibility for Sanders' decision not to sign the waiver. The *Sanders II* court could reasonably find that the question of whether to sign the waiver was left to Sanders and that Sanders' apparent decision not to sign the waiver does not render Charters' assistance ineffective. According to Sanders' brief, Charters must be responsible for the absence of the waiver because Sanders provided the videotape (and, presumably, the waiver) in his post-conviction proceeding. R. 73 at 252. But Sanders may not have wanted to disclose the videotape at trial, and then changed his mind after his conviction and death-penalty sentence. These scenarios are admittedly speculative; but Sanders bore the burden of proving the contrary. All this information is known to Sanders, yet he has not attached an affidavit or declaration attesting that he did or would have signed the waiver during his trial. Because the waiver had to be signed by Sanders, not Charters, it was reasonable for the Kentucky Supreme Court to conclude that the lack of a signed waiver by Sanders—without any explanation of its absence—precluded a finding that his counsel provided ineffective assistance.

D. Claim 27(F): Failure to investigate and present testimony from three witnesses.

After Sanders' arrest on February 2, 1987, he was placed on suicide watch in the Madison County Jail. According to Sanders, three witnesses had relevant testimony regarding his emotional and mental state immediately after his arrest: Deputy jailers Roger Portwood and Nolan Winkler, Jr. could have testified that Sanders was in tears, begged to speak with someone, beat his head against a wall, and expressed remorse for the murders. And Dr. John Moffitt, a psychiatrist who treated Sanders on February 3 and 4, could have testified that Sanders was emotionally distraught, suicidal, and might have been suffering from a serious psychiatric disorder. R. 73 at 254–55.

Sanders argues that Charters performed deficiently by failing to speak with these potential witnesses and present their testimony at trial. Sanders does not analyze the witnesses' testimony separately, but rather asserts that the absence of their testimony was prejudicial for two reasons: First, their testimony would have bolstered Sanders' insanity defense. Second, it would have aided in mitigation by demonstrating Sanders' remorse and diminished mental capacity. *See* R. 73 at 256–57.

*51 The Kentucky Supreme Court denied relief on this claim in *Sanders II*, 89 S.W.3d at 391. The court stated that Sanders had testified “extensively” about his emotional state and suicidal tendencies, so any additional testimony from the jailers or Dr. Moffitt would have been cumulative. *Id.* Citing one of its prior decisions, *Hodge v. Commonwealth*, 17 S.W.3d 824, 852 (Ky.2000), the court determined that Sanders was not prejudiced by the failure to present cumulative testimony. *Id.*

Sanders is not entitled to habeas relief on this *Strickland* claim because he provides no evidence that the witnesses would have testified at trial to what Sanders alleges in his brief. At a minimum, an affidavit from the witnesses or other evidence is necessary to confirm the content of their alleged testimony. *See United States v. Allen*, 254 F. App'x 475, 478 (6th Cir.2007) (declining to reach a claim of ineffective assistance where petitioner did not provide any “affidavits from the persons who would have potentially served as witnesses indicating the probative value of their testimony.”); *Tinsley v. Million*, 399 F.3d 796, 810 (6th Cir.2005) (“In the absence of any evidence showing that [the uncalled witnesses] would have offered specific favorable testimony, [the petitioner] cannot show prejudice from counsel's strategy recommendation not to introduce this evidence.”). Courts must rely on evidence, not the type of unsupported claims that Sanders provides in his brief about the witnesses' possible testimony. In the absence of any evidence showing that the witnesses would have actually supported Sanders' insanity defense or any other part of Sanders' defense, Sanders' claim fails. The Kentucky Supreme Court reasonably concluded that Sanders failed to prove that Charters' performance was deficient or that there is a reasonable probability the witnesses' testimony would have changed the outcome of the trial or sentencing phase.

In an abundance of caution, the Court could view the letters from Dr. Moffitt to Sanders' initial counsel and to the court as evidence of the testimony that Moffitt would have presented at trial—one of the letters is notarized. In those letters, Moffitt wrote that Sanders was “possibly homicidal” and suicidal and that Sanders might be suffering from a “*dissociative disorder*.” Motion to Vacate, Set Aside, or Correct Sentence Pursuant to RCr 11.42, Exhibit 5, Madison Circuit Court, No. 87–CR–018 (Feb. 9, 1993) (Exhibits PDF at 252–53). In both letters, Moffitt recommended that state psychiatrists evaluate Sanders. *Id.* But Moffitt was not making a diagnosis in his letter. Instead, he recommended that Sanders receive

a full battery of psychological tests. Both the KCPC and Dr. Cooke administered those tests to Sanders, and the parties presented their results to the jury. Nothing Moffitt wrote in his letters conclusively says that Sanders had a mental defect or contradicts Dr. Walker's testimony. Without any affirmative diagnosis from Moffitt, the Kentucky Supreme Court could reasonably find that Charters reasonably determined that the testimony would not have aided Sanders' mitigation defense. Additionally, Charters might not have wanted Moffitt to testify that Sanders was "possibly homicidal." Under the double-deference standard, the Kentucky Supreme Court was reasonable in concluding that Charters was not deficient for not calling Moffitt to testify.

***52** Sanders also makes a cursory request for an evidentiary hearing, stating only that the Court should "hold an evidentiary hearing if it is at all inclined to give [the government's argument that the testimony of the witnesses would have harmed Sanders] any weight." R. 96 at 143. Sanders does not request a hearing on this issue in general, nor does he attempt to meet the high threshold to obtain a hearing outlined in 28 U.S.C. § 2254(e)(2). See *Pinholster*, 131 S.Ct. at 1400 ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court."). Accordingly, Sanders has not demonstrated that a hearing is warranted.

E. Claim 27(G): Failure to suppress or mitigate Sanders' pre-trial confession.

Between January 31 and February 3, 1987, police spoke to or interrogated Sanders several times. According to Sanders, four of those conversations took place on January 31. Sanders was *Mirandized*, signed a waiver of his *Miranda* rights, and did not implicate himself in any criminal activity at that time. See R. 73 at 259; Motion to Vacate, Set Aside, or Correct Sentence Pursuant to [RCr 11.42](#), Exhibit 3, Madison Circuit Court, No. 87–CR–018 (Feb. 9, 1993) (Exhibits PDF at 109–37).

On February 2, just before 6:00 p.m., police interviewed Sanders again. He was *Mirandized*, informed that he was a suspect in a murder and robbery investigation, signed a written waiver of his *Miranda* rights, and began answering questions from the police. Motion to Vacate, Set Aside, or Correct Sentence Pursuant to [RCr 11.42](#), Exhibit 3, Madison Circuit Court, No. 87–CR–018 (Feb. 9, 1993) (Exhibits PDF at 109, 138–39). During that interrogation, Sanders admitted that he was at the gas station where Brandenburg and Hatch

were murdered around the time that they were killed, but he repeatedly denied killing the two men. Officers pushed back on his story, noting the obvious problem: if Sanders was there when the men were shot, but did not shoot them, then someone else must have done it, and Sanders surely saw who it was. *Id.* (Exhibits PDF at 163–64). Sanders resisted, insisting that he was alone at the gas station, but nevertheless did not kill Brandenburg and Hatch. *Id.* (Exhibits PDF at 165–75). Police insisted Sanders was lying and told him to confess. *Id.* The back-and-forth continued for just over an hour. At 7:05 p.m., the police turned off the recording of the interrogation. *Id.* (Exhibits PDF at 182). There is no information regarding how long the tape was off, but after the break, Sanders' tone changed. He stated that he picked up a hitchhiker, Donald Saylor, who then pulled a gun on him. *Id.* (Exhibits PDF at 182–85). After repeated denials from Sanders and pushback from the police, Sanders finally said he killed Saylor—insisting it was in self-defense. *Id.* (Exhibits PDF at 186). He told police that Saylor robbed the convenience store and killed Brandenburg and Hatch. Over the course of the interrogation, he told police that Saylor shot a woman at a store in nearby Lincoln County as well. *Id.* (Exhibits PDF at 204). By the end of the interview, Sanders broke down and admitted that he and Saylor robbed the gas station—but that Saylor made him do it. *Id.* (Exhibits PDF at 194). At one point, Sanders asked the detectives "Can you give me a few minutes?" Detective Benton responded "No." *Id.* (Exhibits PDF at 203). Later, Sanders told the detectives that Saylor shot Brandenburg, but Sanders shot Hatch. *Id.* (Exhibits PDF at 206). Then Sanders reiterated that he killed Saylor, specifically on the previous Wednesday. *Id.* (Exhibits PDF at 221). At that point, police informed Sanders that Saylor was not killed until Thursday—Sanders nevertheless insisted that he shot Saylor on Wednesday. *Id.* (Exhibits PDF at 223).

***53** At 12:01 a.m. on February 3, Sanders asked to speak to the police. He was again *Mirandized*. *Id.* (Exhibits PDF at 228). Before Detective Benton finished reading Sanders his rights, Sanders interjected "I want to talk to you." *Id.* (Exhibits PDF at 229). Benton asked Sanders directly "do you want a lawyer?" Sanders said no. *Id.* Sanders again signed a waiver of his rights. *Id.* During that interrogation, Sanders denied killing Saylor—he went so far as to say that he had never heard of Donald Saylor. *Id.* (Exhibits PDF at 231). But he admitted to both the Lincoln County and the Madison County shootings. *Id.* (Exhibits PDF at 231–32, 234).

At trial, Detective Benton recounted Sanders' confession and highlighted the inconsistencies in his statements. The Commonwealth used this testimony to paint Sanders as manipulative and deceptive. Charters did not move to suppress Sanders' interrogation statements. According to Sanders, Charters' failure to move to suppress the interrogation statements amounted to constitutionally ineffective aid. R. 73 at 269–76.

Again, Sanders must overcome the double-deference standard for ineffective-assistance-of-counsel claims. In the specific context of counsel's alleged failure to file a suppression motion, *Kimmelman v. Morrison* sets out the relevant inquiry. 477 U.S. 365, 375 (1986). So Sanders must show that the Kentucky Supreme Court unreasonably applied *Kimmelman*. Under *Kimmelman*, a petitioner challenging the effectiveness of his attorney for failing to move to suppress evidence must demonstrate that, in addition to the regular *Strickland* prongs, (1) the underlying motion is meritorious and (2) there is a "reasonable probability" that the verdict would have been different absent the excludable evidence. *Id.* In determining prejudice, "the court must consider the totality of the evidence before the judge or jury." *Id.* at 381 (quoting *Strickland*, 466 U.S. at 695). On habeas review, the Court looks only at whether the Kentucky Supreme Court reasonably applied *Kimmelman* and *Strickland*.

The Kentucky Supreme Court denied relief for lack of prejudice. *Sanders II*, 89 S.W.3d at 386–87. The court held that a motion to suppress would have been unsuccessful because Sanders' requests to stop the questioning or talk to a lawyer did not "even rise to the level of being 'equivocal.'" *Id.* at 387. Sanders' arguments that his statements were involuntary were "conclusory and unsupported." *Id.* at 386. But even if the statements had been suppressed, the court still concluded that "the outcome of the trial would not have been different" in light of the other evidence presented at trial. *Id.*

According to Sanders, his statements were not voluntary because his statements were the product of "coercive, insistent questioning." R. 73 at 271. He also claims that his *Miranda* waivers on February 2 and 3 were not knowing and voluntary. *Id.* at 270–74.

*54 The *Sanders II* court reasonably found that the suppression motion would not have been successful, and thus that Sanders did not suffer any prejudice from his counsel's failure to file the suppression motion. See *Premo v. Moore*, 131 S.Ct. 733, 741 (2011) (concluding that where

"suppression would have been futile," it was reasonable for the state court to conclude that counsel's "representation was adequate"). The court reasonably concluded that the motion would have been futile because Sanders' statements to the police were voluntary. In assessing voluntariness, the question is "whether a defendant's will was overborne in a particular case." *Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Courts must consider the "totality of all the surrounding circumstances" including the "characteristics of the accused and the details of the interrogation." *Id.*

Here, the *Sanders II* court held that Sanders' contention that his statements were involuntary "due to his state of mind is conclusory and unsupported." *Sanders II*, 89 S.W.3d at 387. In his briefing before the Court, Sanders only alleges that his "mental condition deteriorated during the time the tape recorder was turned off." R. 73 at 271. Sanders, however, must rely on more than his alleged deteriorating mental state to make a claim of involuntariness. See *Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (concluding that "a defendant's mental condition, by itself and apart from its relation to official coercion" may not "dispose of the inquiry into constitutional 'voluntariness'"). Here, there is no evidence of "the crucial element of police overreaching." *Id.* at 163. Sanders does not identify what acts by the police went beyond normal police-interrogation tactics. See *id.* at 163 n. 1 (identifying acts such as holding gun to defendant's head, interrogating for 36 hours without sleep, or interrogating for several days with little food as examples of police overreach). Absent any evidence of actual coercion, the Kentucky Supreme Court reasonably concluded that Sanders' statements to the police were voluntary.

The Kentucky Supreme Court also reasonably concluded that Sanders knowingly and voluntarily waived his *Miranda* rights. Sanders signed a *Miranda* waiver on February 2, 1987, at 5:56 p.m. Motion to Vacate, Set Aside, or Correct Sentence Pursuant to RCr 11.42, Exhibit 3, Madison Circuit Court, No. 87–CR–018 (Feb. 9, 1993) (Exhibit PDF at 110). When questioning resumed at 12:01 a.m. on February 3, 1987, Detective Benton again read Sanders his *Miranda* rights, and Sanders waived those rights both orally and in writing. *Id.* (Exhibit PDF at 228). The Supreme Court has stated that "[a]n express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver." *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). Here, the Kentucky Supreme Court found both express oral and written waivers. Based on those

findings, the Kentucky Supreme Court reasonably concluded that a suppression motion would not have been successful.

***55** Sanders contends that even if the initial waivers were voluntary, he later invoked his right to remain silent. According to Sanders, his question to the detectives—“Can you give me a few minutes?”—was an unequivocal assertion of his right to remain silent. The Kentucky Supreme Court reasonably determined that the question was not an unequivocal assertion. *Cf. Davis v. United States*, 512 U.S. 452, 462 (1994) (holding that defendant's statement—“Maybe I should talk to a lawyer”—was not an unequivocal request for counsel); *Berghuis v. Thompson*, 560 U.S. 370, 381 (2010) (noting no “principled reason to adopt different standards” for invoking right to remain silent and right to counsel). Sanders never explicitly stated that “he wanted to remain silent or that he did not want to talk with police.” *Id.* Requesting a break for “a few minutes” does not suggest that Sanders desired to completely cut off questioning. Reasonable jurists could find that asking for “a few minutes” necessarily implies that Sanders wanted to continue talking with police, but just wanted a pause. Because reasonable jurists would find that Sanders' question was not an unequivocal invocation of the right to remain silent, the Kentucky Supreme Court reasonably concluded that he did not invoke that right and that the suppression motion would not have been successful. Accordingly, the court reasonably denied the claim that Charters was constitutionally ineffective for not moving to suppress Sanders' statements from his conversations with the police.

F. Claim 27(H): Failure to assert or advise on marital privilege and opening the door to “wife beating” testimony.

Sanders' wife testified during the Commonwealth's case-in-chief. For approximately twenty minutes, Debbie Lynn Sanders painted a picture of the defendant that stood in stark contrast to the image that the prosecution cultivated over the course of the trial. *See* VR 6/3/1987 13:44:09–14:03:18 (Tape 5 03:21:23–03:40:30). Mrs. Sanders highlighted her spouse's character as a caring husband, loving father, and hard worker who experienced a rare dissociative episode that left him plagued by guilt. *Id.*

During the Commonwealth's direct examination, Mrs. Sanders primarily recounted the events that transpired on the day Sanders committed his crimes. Throughout her testimony, however, Mrs. Sanders indicated that she did not think that Sanders was guilty of any crime. *See* VR 6/3/1987

13:48:58–13:49:06 (Tape 5 03:26:12–03:26:20) (noting that she removed Sanders' vest from his vehicle after the police came by to question her about the crimes because she “knew David hadn't done anything”); *Id.* at 13:50:42–13:50:47 (Tape 5 03:27:56–03:28:01) (volunteering testimony about how she would have “sworn” that her husband had “nothing to do with [the crimes] whatsoever”); *Id.* at 13:51:49–13:52:20 (Tape 5 03:29:03–03:29:34) (recalling that she could not properly drive or sleep after the police questioned her because she was so upset).

***56** On cross-examination, Charters asked Mrs. Sanders whether her marriage was a happy one; she said it was. Mrs. Sanders narrated how at the beginning of their marriage, Sanders calmly dealt with her ex-husband, who came by the house armed and drunk. *Id.* at 13:56:55–13:56:59 (Tape 5 03:34:08–03:34:12). On one occasion, the ex-husband even struck Sanders. But Sanders did not harm the ex-husband in any way. *Id.* at 13:57:10–13:57:24 (Tape 5 03:34:24–03:34:38). She also noted that Sanders was “the only father [her daughters] know” and that she had no reason of any kind to believe that he was capable of becoming involved in criminal behavior. *Id.* at 13:57:40–13:58:00 (Tape 5 03:34:53–03:35:13). Indeed, Mrs. Sanders testified that she had guessed that other people must have gotten access to Sanders' truck to plant evidence of a crime because there was “no way” that he could hurt anyone or “do anything against anyone.” *Id.* at 13:58:07–13:58:28 (Tape 5 03:35:20–03:35:42). Mrs. Sanders described their family life positively. The family did not lack for material things and was financially stable. Sanders did not drink or do drugs. He played with the girls and played a little bit of basketball. The Sanders family would often watch rented movies together. *Id.* at 13:58:29–13:59:27 (Tape 5 03:35:43–03:36:40).

On redirect, the Commonwealth honed in on the “happy marriage” statement and asked if the Sanders' marriage had been violence-free. Mrs. Sanders then testified to two incidents of violence that occurred over the space of two days. One evening while driving, Sanders struck Mrs. Sanders and knocked her from the middle seat of the truck into the back seat—she indicated that she thought it was “[her] fault” because she had grabbed the steering wheel. VR 6/03/87 13:59:56–14:00:12 (Tape 5 03:37:09–03:37:25). The following day, Sanders attempted to smother her with a pillow in an incident that lasted “probably an hour.” *Id.* at 14:00:14–14:00:1426 (03:37:27–03:37:39).

On re-cross, Charters allowed Mrs. Sanders to explain the context behind the violent incidents. She noted that the first altercation occurred while the family was coping with a stressful situation. On New Year's Eve, Mrs. Sanders' sister accused Mrs. Sanders' ex-husband of raping Mrs. Sanders' niece—that is, the sister's daughter. Mrs. Sanders, her sister, and Sanders promptly drove the victim to the hospital for an examination. *Id.* at 14:00:56–14:01:15 (Tape 5 03:38:08–03:38:28). After staying up until “four in the morning,” Mrs. Sanders explained that she and her sister began to argue. Her sister wanted to kill Mrs. Sanders' ex-husband, while Mrs. Sanders explained that they were not even sure whether the ex-husband had committed a crime. *Id.* at 14:01:17–14:01:33 (Tape 5 03:38:30–03:38:46). Mrs. Sanders explained that her grabbing the steering wheel from Sanders during this argument scared him, so he pushed her to the back seat of the truck. *Id.* at 14:01:39–14:01:46 (Tape 5 03:38:52–03:38:59). She testified that Sanders told her to calm down and stop fighting. Sanders also told Mrs. Sanders that she would not resolve anything or find out what really happened by arguing. *Id.* at 14:02:12–14:02:24 (Tape 5 03:39:25–03:39:37).

***57** Mrs. Sanders testified that the second violent incident was a continuation of the previous day's turmoil. Mrs. Sanders explained that she was going “back and forth” with Sanders about the previous day's argument in the truck. *Id.* at 14:01:52–14:02:04 (Tape 5 03:39:05–03:39:17). All of a sudden, he began to smother her. Mrs. Sanders noted that Sanders was not able to explain how or why it happened and that he hated himself for acting the way he did. *Id.* 14:02:47–14:02:52 (Tape 5 03:40:00–03:40:04); *id.* at 14:02:52–14:02:57 (Tape 5 03:40:05–3:40:10). Within a split second, she testified, Sanders stopped what he was doing. He then cried “uncontrollably,” and Mrs. Sanders went to comfort him. *Id.* at 14:02:33–14:02:47 (Tape 5 03:39:46–03:40:00). Mrs. Sanders described how Sanders expressed extreme contrition for his actions and contemplated suicide. Immediately after he stopped pinning her down, Sanders found a pistol and said he would shoot himself because “he didn't think a man should ever hit a woman.” *Id.* at 14:02:58–14:03:10 (Tape 5 03:40:11–03:40:23).

Sanders argues that Charters erred in two ways with respect to Mrs. Sanders' testimony, rendering his assistance ineffective. Charters should have advised the couple about the marital testimonial privilege so that she could have refused to testify against Sanders. And Charters should not have inquired about the Sanders' marriage during cross-examination, thereby opening the door for the prosecution to ask about the

“highly prejudicial” incidents of domestic violence. R. 73 at 277. Sanders contends that Charters' behavior not only fell outside the wide range of actions that signify professional competence, but also negatively impacted both the guilt and sentencing phases of trial. R. 73 at 278–81.

1) Marital Testimonial Privilege

Sanders does not develop any argument as to why Charters' failure to advise Sanders or Mrs. Sanders of the marital testimonial privilege constitutes deficient performance. Besides referring to the issue in the heading of his habeas petition, he offers no cases or reasoning to support his argument. Claims that are “adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” *Taylor v. McKee*, 649 F.3d 446, 452 (6th Cir.2011) (citing *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir.1996)). Accordingly, Sanders has abandoned this portion of his ineffective assistance claim. But Sanders may have done so for good reason. Sanders, for example, never explains how Charters' failure to advise a non-client—Mrs. Sanders—violated his duty to his actual client—Sanders. So Sanders does not show how Charters acted contrary to an “objective standard of reasonableness” by failing to advise a non-client of an evidentiary privilege. *Strickland*, 466 at 688. And for the reasons given below, it made sense for Sanders not to assert the privilege himself.

2) Incidents of Domestic Violence

***58** The *Sanders II* court found that Charters' decision to question Mrs. Sanders about her marriage was reasonable and, accordingly, did not deprive Sanders of his right to effective assistance of counsel. 89 S.W.3d at 391. The court held that Charters actually used Mrs. Sanders' testimony to his advantage because she explained the violent incidents “so as to be consistent with the insanity defense.” *Sanders II*, 89 S.W.3d at 391.

Based the record before it, the *Sanders II* court was not unreasonable in determining that Charters' line of questioning was an appropriate tactic. Charters could have properly decided to ask Mrs. Sanders detailed questions about her marriage on cross-examination after seeing how favorable her opinion of Sanders was on direct. After all, Mrs. Sanders was a prosecution witness, yet she volunteered testimony on direct indicating that she did not think that Sanders could possibly have committed the offense. *See* 13:50:42–13:50:47 (Tape 5 03:27:56–03:28:01). And Charters could appropriately have sought to reveal the incidents of domestic

violence in order to establish that Sanders experienced dissociative episodes. Mrs. Sanders' testimony revealed that Sanders: (1) did not know why he had struck her, (2) cried uncontrollably immediately after doing so, and (3) wanted to kill himself out of remorse. VR 6/3/1987 14:02:33–14:02:47 (Tape 5 03:39:46–03:40:00); *id.* 14:02:58–14:03:10 (Tape 5 03:40:11–03:40:23). These facts exactly mirror the description of Sanders' behavior immediately following the murders in this case. *See* VR 6/4/1987 13:00:27–13:01:37 (Tape 6 01:41:50–01:43:00) (Testimony of David Sanders indicating that he did not know why he shot the convenience store clerk as he had no reason to do so); *id.* at 13:25:53–13:26:33 (Tape 6 02:07:14–02:07:54) (noting that he felt “the same way” as he did when he committed the first shooting at the convenience store when he shot the clerk and customer at the second convenience store); *id.* at 13:46:09–13:46:33 (Tape 6 02:27:28–02:27:52) (testifying that he didn't know why he was crying after the shootings); *id.* at 14:00:09–14:00:59 (Tape 6 02:41:28–02:42:17) (stating that he felt like he “had to die” when he was in jail because he committed the convenience store shooting). Mrs. Sanders' poised and clear testimony accordingly aided the defense in developing its case.

True, another defense attorney may have pursued a different line of questioning during the trial. The attorney may have thought it was unwise to invite testimony about incidents of domestic violence just to show that Sanders suffered from a mental illness. But simply because another attorney may have acted differently does not indicate that Charters' behavior, in this instance, fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 689. In any case, the *Sanders II* court would not have been unreasonable in arriving at this conclusion. *Strickland's* deficiency inquiry gives courts wide “leeway” in evaluating whether an attorney provided competent representation. *Richter*, 131 S.Ct. at 786. And the facts do not indicate that it was patently unreasonable for Charters to ask Mrs. Sanders to paint a more detailed picture of Sanders—even a picture that would reveal both his strengths and his vulnerabilities. Under this “doubly deferential” evaluation of Charters' conduct and in light of Mrs. Sanders' testimony, Sanders is not entitled to habeas relief on this claim.

***59** The *Sanders II* court did not address whether Charters' improper questioning prejudiced Sanders at the sentencing phase of trial. However, because the court completely denied all relief, it necessarily adjudicated all the components of this claim in a manner that would also deny habeas relief.

See Richter, 131 S.Ct. at 785 (holding that a state court need not give reasons before its decision can be deemed to have been “adjudicated on the merits”). The Court may therefore determine “what arguments or theories supported, or could have supported, the state-court decision” and then ask whether it is possible that “fair-minded jurists” could disagree that those arguments or theories are inconsistent” with Supreme Court precedent. *Id.* at 778.

Sanders argues that the wife beating testimony made him look like a future danger. He cites a number of social science studies that suggest future dangerousness tends to aggravate the jury and increase the likelihood of a death sentence. But Sanders does not establish that it made the difference in *this* case. Sanders ignores the fact that the jury found two aggravating factors to support recommending the death penalty: (1) the crime was committed during a 1st-degree robbery, and (2) the crime resulted in multiple deaths. VR 06/26/87 at 10:04:25–10:04:45 (Tape 9 at 00:04:26–00:04:46). Both aggravating factors were inherent in the conviction itself. Either one would have supported the death penalty by itself. Neither factor turned on whether Sanders had ever struck his wife.

Attorneys may disagree about whether Charters should have questioned Mrs. Sanders in a manner that revealed more information about Sanders' family life. But that disagreement would not change that fact that Charters' choice fell within the “wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689. At the very least, the Kentucky Supreme Court could find that Charters' trial strategy did not rob Sanders of his right to effective counsel. Because this is not a case where the court's decision was so unsupported by the record that there was “no possibility for fairminded disagreement,” habeas relief is unwarranted. *Titlow*, 134 S.Ct. at 12.

G. Claim 27(I): Failure to prepare for the penalty phase.

Sanders asserts that Charters conducted no mitigation investigation and presented less than 10 minutes of evidence during the penalty phase of the trial. Had Charters engaged in any meaningful preparation, Sanders argues, Charters would have interviewed Sanders' mother, brothers, grandparents, wife, relatives, friends, and clergyman. All of them could have given significant mitigation testimony. *See* R. 73 at 318 (claiming that Sanders' family members “could have testified to a wealth of mitigation, including the physical abuse Sanders suffered as a child”).

The *Sanders II* court rejected this claim on procedural grounds. *See* 89 S.W.3d at 390. The court concluded that Sanders' allegations of ineffective assistance were too vague and devoid of factual support to satisfy “the standards required by RCr 11.42(2).” *Id.* RCr 11.42(2) required Sanders to “state specifically the grounds on which the sentence is being challenged” and identify the facts on which he relies for support. The court pointed out that Sanders did not indicate what testimony his various relations, friends, and clergyman would have offered. *Sanders II*, 89 S.W.3d at 390. Because the Kentucky Supreme Court found Sanders failed to comply with a procedural pleading rule, the court summarily dismissed his claim. *Id.*

***60** The Court may address the merits of a claim only where (1) the Kentucky Supreme Court's decision “fairly appears to rest *primarily* on federal law,” (2) the decision appears to be “interwoven with the federal law,” or (3) the “adequacy and independence of any possible state law ground is not clear from the face of the opinion.” *Coleman v. Thompson*, 501 U.S. 722, 735 (1991) (emphasis added). Sanders argues that the Kentucky Supreme Court did not exclusively rely on state procedural grounds to resolve this ineffective-assistance claim, so the Court can reach the merits here. *See* R. 96 at 156–59. But the Court cannot adjudicate a claim on the merits just because the state court discussed both federal and state procedural law in its opinion.

The text of *Sanders II* reveals that the Kentucky Supreme Court did not rest its decision “primarily” on federal law. The court repeatedly referred only to RCr 11.42 to support its conclusion that Sanders made vague and general allegations insufficient to warrant habeas relief. 89 S.W.3d at 390. The court also cited two Kentucky Supreme Court cases interpreting RCr 11.42. *Id.* Neither did the court interweave federal and state law in arriving at its decision. Although the court made a passing, one-word reference to *Strickland*, the court did so only to explain that Sanders should have pled “specific facts” to support each prong of the *Strickland* test. *Id.* Taken as a whole, there is no ambiguity that the Kentucky Supreme Court relied primarily on RCr 11.42 in resolving Claim 27(I). *Cf.* *Haliym v. Mitchell*, 492 F.3d 680, 693 (6th Cir.2007) (determining that the state court primarily relied on federal law to resolve a claim where the court “explicitly stated that it was adjudicating the claim on the merits” and expressly declined to rule on state procedural grounds). So there is no “good reason to question whether there is an independent and adequate state ground” supporting the Kentucky Supreme Court's decision. *O'Guinn v. Dutton*,

88 F.3d 1409, 1422 (6th Cir.1996) (quoting *Coleman*, 501 U.S. at 739). Accordingly, Sanders procedurally defaulted on Claim 27(I).

Absent an adequate showing that Sanders may overcome his procedural default, the Court is barred from entertaining the claim. *Burroughs v. Makowski*, 282 F.3d 410, 413 (6th Cir.) *modified on reh'g*, 35 F. App'x 402 (6th Cir.2002). Sanders argues that he had cause for procedurally defaulting on his ineffective assistance of trial counsel claim. R. 96 at 158–59; *Coleman*, 501 U.S. at 750 (permitting federal habeas courts to excuse procedural default for cause and prejudice resulting from the default). He points to the incompetence of his initial-review collateral attack counsel—the ones who prepared the RCr 11.42 motion. The incompetence of initial-review collateral attack counsel can provide cause for procedural default in some instances on claims for ineffective assistance of trial counsel. *See Trevino v. Thaler*, 133 S.Ct. 1911, 1921 (2013) (citing *Martinez v. Ryan*, 132 S.Ct. 1309, 1318–21 (2012)). But Sanders has not met his burden to demonstrate cause in this case. *See id.* (requiring a petitioner to show, among other things, that the “state procedural framework ... makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim for ineffective assistance of trial counsel on direct appeal”).

***61** Even if Sanders pled all the requirements for excusing procedural default under *Martinez* and *Trevino*, the Court cannot decide his claim. Why? Because the Court faces the same problem the Kentucky Supreme Court faced. Sanders failed to attach any affidavits to his habeas petition to show what mitigation testimony his family members, friends, or clergy would have offered. *See United States v. Bass*, 460 F.3d 830, 839 (6th Cir.2006) (finding that a court properly declined to hold a hearing on the issue of uncalled witnesses when the defendant failed to provide affidavits and relied only on his counsel's bare assertion of what the testimony would include). And absent such evidence, the Court would have no basis to determine that Sanders was prejudiced by his counsel's failure to introduce testimony from other mitigation witnesses. *See Tinsley v. Million*, 399 F.3d 796, 810 (6th Cir.2005) (noting that the petitioner could not show prejudice when his counsel failed to introduce affidavits or other evidence of what potential witnesses would say at the hearing). For these reasons, the Court cannot resolve Sanders' ineffective-assistance claim on the merits.

H. Claim 27(J): Failure to consult with and prepare Sanders to testify during sentencing.

During the trial, the prosecutor broached the subject of an instruction on Sanders' right not to testify. The court then recalled a recent case where the defendant alleged the trial was unfair because he was not apprised of his right to testify. Seeking to avoid a similar problem, the court held a conference in chambers to advise Sanders of his right to testify. VR 06/08/87 at 09:22:40–09:23:05 (Tape 8 at 00:28:13–00:28:37). During that conference, the court asked Sanders if he was aware that he had the right to testify; Sanders said that he was aware because Charters had told him. *Id.* at 09:23:40–09:24:12 (00:29:12–00:29:44). The court then asked if Sanders wanted to testify; Sanders said that he did not know. *Id.* at 09:24:12–17 (29:44–49). The court then directed Sanders to talk to his attorney. Sanders and Charters went off to a side room to talk for about three minutes. When they returned, Charters informed the court that Sanders would testify for “a few moments.” VR 06/08/87 at 09:22:25–09:27:40 (Tape 8 at 00:27:57–00:33:12).

Right after the chambers conference, Sanders took the stand. *See generally* VR 06/08/87 at 09:28:15–09:36:00 (Tape 8 at 33:47–41:32). Charters did not ask many questions, largely leaving Sanders to say whatever he felt he needed to. Sanders cried through most of his testimony. He said that he understood that he had been found guilty, but felt that in a bigger sense, he was not guilty. He said that he did not understand what happened or what was happening to him, but he knew something was wrong. He stated that he asked for help from his attorneys and from the KCPC, to no avail. When asked if he would cooperate with treatment, his response was to complain at length about the KCPC. He denied having any financial motivation to commit the murders and reiterated his need for mental health help. After this went on for about eight minutes, Charters asked the Commonwealth if it had any questions. The Commonwealth did not. VR 6/8/1987 09:35:51–09:35:56 (Tape 8 00:41:22–00:41:27). The court promptly excused Sanders from the stand. VR 06/08/87 at 09:28:15–09:36:00 (Tape 8 at 33:47–41:32).

*62 Sanders alleges that Charters performed deficiently by (1) failing to advise him of his right to testify and (2) failing to prepare him before he took the stand. The Kentucky Supreme Court found that Sanders “did not present anything but speculation” to argue that Charters did not apprise him of his right to testify or prepare him to take the stand. *Sanders II*, 89 S.W.3d at 391. Accordingly, the court denied relief. *Id.* For the reasons below, the Kentucky Supreme Court's decision on each of these points was a reasonable application of the *Strickland* standard.

1) Failure to Advise of Right to Testify

Sanders stated on the record that Charters informed him of his right to testify. *See* VR 09:23:40–09:24:12 (00:29:12–00:29:44). So the *Sanders II* court did not unreasonably determine that Charters informed Sanders of his rights—indeed, the record supports that conclusion. Because Charters informed Sanders of his right to testify, the Kentucky Supreme Court could reasonably find that Charters rendered constitutionally competent representation. Under the “doubly deferential” standard that AEDPA imposes on the *Strickland* inquiry, Sanders is not entitled to relief on this ground.

2) Failure to Prepare Before Testifying

Sanders argues that Charters rendered constitutionally deficient representation by not adequately preparing him to take the stand. Competent counsel, Sanders says, would have talked to him at length about the decision to testify and requested a recess to prepare him. Sanders also claims Charters failed to prepare him any time before the day he testified, as diligent counsel would do. R. 73 at 321. Furthermore, Sanders did not testify about his remorse, his numerous [head injuries](#), or his childhood abuse. This allowed the prosecutor to highlight his lack of remorse. R. 73 at 323–25. In his federal habeas petition, Sanders argues that this error was prejudicial because Sanders' unprepared testimony alienated the jury by denying his guilt and shifting blame for his problems to KCPC.

But Sanders did not make such a prejudice argument before the Kentucky Supreme Court. Indeed, the focus of his petition is to argue that Charters was ineffective for spending just three minutes with him right before his testimony. *See* Appellate Proceeding Record at 1372–74. And in making that argument, Sanders did not say what Charters could or should have said to him. He did not even disclose what Charters *did* say during their brief conversation. He simply insisted that Charters should have spent more time with him without any indication of what that would have accomplished.

Sanders' pleading deficiencies are fatal to his claim. In order to succeed on his *Strickland* claim, Sanders had to argue both that Charters was ineffective and that Sanders suffered prejudice from the deficient legal representation. He did not set forth any argument to establish the “prejudice” prong of the *Strickland* test. So the Kentucky Supreme Court could reasonably have found that he did not meet his burden of proof to satisfy the pleading requirements of [RCr 11.42](#). Given

his failure to establish both prongs of the *Strickland* test, the *Sanders II* court could reasonably have denied habeas relief. See, e.g., *Cornwell v. Bradshaw*, 559 F.3d 398, 415 (6th Cir.2009) (holding that a petitioner who failed to bear his burden to demonstrate prejudice under *Strickland* was properly denied habeas relief, given AEDPA's deference to state court decisions). For this reason, the Court cannot grant Sanders habeas relief on Claim 27(J).

I. Claim 27(L): Failure to seek competency proceedings.

*63 In his direct appeal brief, Sanders argued that the trial court erred in failing to order a competency hearing before his trial and his sentencing. See Appellate Proceeding Record at 2191–94. The *Sanders I* court found the claim to have no merit. 801 S.W.2d at 681–82. Sanders presented a different version of this claim in his collateral attack under Rule 11.42, arguing instead that his attorney was ineffective for failing to request competency hearings. Appellate Proceeding Record at 1374–75. The *Sanders II* court concluded—incorrectly—that the *Sanders I* court had already decided the claim for ineffective assistance of counsel for failure to request competency hearings. Accordingly, the *Sanders II* court assumed that Sanders could not again present the claim for review. 89 S.W.3d at 391. But the *Sanders I* court only decided whether the trial court erred by failing to order a competency hearing. That claim had nothing to do with Charters. Because the Kentucky Supreme Court denied review based on the erroneous conclusion that Sanders' claim had already been adjudicated on the merits, there is no bar to federal habeas review. See *Cone v. Bell*, 556 U.S. 449, 467–69 (2009). And since the Kentucky Supreme Court did not reach the merits, the Court reviews the claim *de novo*. *Robinson v. Howes*, 663 F.3d 819, 822–23 (6th Cir.2011). As explained below, even under *de novo* review, Sanders is not entitled to relief.

1) Facts

Sanders' attorneys paid close attention to his mental condition immediately after his arrest, throughout the guilt phase of the trial, and during the time between Sanders' trial and sentencing. Sanders had a mental and emotional breakdown shortly after he was booked into the Madison County Jail. In response, Sanders' appointed counsel and the Madison County jailers requested that he be treated by a physician. Dr. Moffitt treated Sanders and promptly recommended that he be transferred to a state psychiatric correctional facility. See TR Direct Appeal Vol. I at 17. Soon afterward, Charters took over as Sanders' counsel and also moved for a mental health evaluation. See *id.* at 19. A week later, the trial court

ordered Sanders to undergo a competency evaluation at the KCPC. See *id.* at 21–22. The KCPC issued a nine-page report, concluding that Sanders was competent to stand trial and was not legally insane when he killed Brandenburg and Hatch. *Id.* at 136–44.

Notably, Charters never informed the trial court that Sanders might have been suffering from a mental disorder during the guilt phase of the trial. Right before the prosecution opened its case-in-chief, however, Charters told the court that he needed to get a doctor to the jail to see Sanders. Charters explained that Sanders had gone two nights without sleep and that Charters was “losing [Sanders'] attention” because “[Sanders] can't concentrate.” The court said that Charters could work that out with the jailer. 06/03/87 at 09:02:14–09:02:44 (Tape 5 at 3:16–3:46). Charters again mentioned Sanders' health to the trial court the morning the penalty phase was scheduled to begin. Charters asked for a weekend continuance in part because Sanders was not “physically able” to take the witness stand that day. VR 06/05/87 at 09:06:12–09:06:27 (Tape 8 at 00:00:18–00:00:33). But in neither instance, did Charters indicate to the trial court that Sanders might be suffering from a mental disorder or seek a competency hearing.

*64 Charters raised an issue related to Sanders' mental health during the sentencing phase of the proceedings. At the beginning of Sanders' sentencing hearing, the court asked if there was any legal cause why Sanders should not be sentenced. Charters responded that, as he had privately relayed to the court, he did not believe that Sanders understood why he was being sentenced or that Sanders was competent to be sentenced. VR 06/25/87 at 10:00:53–10:01:06 (Tape 9 at 00:00:53–00:01:07). The court then asked Sanders if he understood that he was facing formal sentencing where the court would impose final judgment. Sanders said that he understood, but did not understand how it had “come this far.” VR 06/25/87 at 10:01:07–10:01:23 (Tape 9 at 00:01:07–00:01:23). The court explained that Sanders had been tried and found guilty of murder and robbery and would be sentenced as a result. The court then explained that it was the duty of the judge—not the jury—to impose a formal sentence. After shrugging his shoulders and looking at Charters, Sanders said he understood that. The judge then declared that there was no legal cause why judgment should not be imposed and proceeded with sentencing. VR 06/25/87 at 10:00:35–10:02:22 (Tape 9 at 00:00:36–00:02:23). Charters did not move for a competency hearing at this juncture.

2) Analysis

Sanders' claim for ineffective assistance fails because he has not established a "reasonable probability" that his verdict would have been different had Charters formally requested competency hearings. Sanders already received a six-week evaluation at the KCPC that ended just six weeks before trial. *See* Appellate Proceeding Record at 712 (Dr. Walker's letter indicating Sanders' evaluation lasted from March 3 to April 21, 1987). At the end of the evaluation, the KCPC team found that Sanders was competent to stand trial. *Id.* at 713. The KCPC team also concluded that Sanders understood "the nature of the proceedings against him and the possible penalties which could be imposed were he to be convicted." *Id.*

Given these facts, Sanders faced an uphill battle in demonstrating that he suffered prejudice from Charters' failure to request another competency hearing. To secure a competency hearing, Charters needed to call the trial judge's attention to reasonable grounds to doubt Sanders' competence. *Pate v. Commonwealth*, 769 S.W.2d 46, 47 (Ky.1989). But there is no indication that Sanders could have made this showing. The KCPC report concluded after a comprehensive evaluation that Sanders was competent, although he previously exhibited more serious symptoms of a mental breakdown at the Madison County Jail. The record contains no evidence that Sanders' competence changed in the time after the KCPC's evaluation. Indeed, Sanders does not even make that argument.

Though Charters did mention to the trial court that he was concerned about "losing" Sanders, he clarified that Sanders was having trouble paying attention due to lack of sleep. *See* VR 6/03/87 08:02:33–08:02:50 (Tape 5 00:03:25–00:03:42). The only other mention of Sanders' health involved his *physical* health—whether he was physically able to take the stand. VR 06/05/87 at 09:06:12–09:06:27 (Tape 8 at 00:00:18–00:00:33).

***65** Without reasonable grounds to find Sanders incompetent, there can be no "reasonable probability" that a motion for a competency hearing would have changed the outcome of his proceedings. *Richter*, 131 S.Ct. at 792.

In contrast to his statements to the court during trial, Charters explicitly stated before the sentencing hearing that Sanders may not be fully competent. Charters explained that he doubted that Sanders could understand why he was being sentenced. Yet Sanders responded to the trial judge's

questions by indicating that he understood that he was facing formal sentencing where the court would impose final judgment. Sanders only said that he could not understand how things had "come this far." VR 06/25/87 at 10:01:07–10:01:23 (Tape 9 at 00:01:07–00:01:23). But such a statement does not provide reasonable grounds to question Sanders' competency. Rather, the record suggests that Sanders was expressing disbelief and shock at the fact that he had been found guilty of murder—not that he literally could not understand the nature of the proceedings against him. Sanders' response indicates that the trial court would have had no reasonable grounds to order a competency hearing. And without grounds for a competency hearing, there is not even a remote possibility that ordering a competency hearing would have changed the outcome of trial. Sanders must show more than a possibility that the outcome would have been different if his attorney had requested a competency hearing. *Hart/Cross v. United States*, 89 F.3d 833 (6th Cir.1996).

Nothing in the record reveals that the trial court would have had any grounds to grant a new motion for a competency hearing after the trial began. So Sanders cannot demonstrate that he was prejudiced by Charters' failure to move for a competency hearing. Accordingly, Sanders is not entitled to habeas relief on this claim.

VII. Claim 34.5: Ineffective Assistance of Appellate Counsel

Sanders argues that his direct appeal counsel performed so deficiently as to be constitutionally ineffective. R. 73 at 365. Specifically, Sanders claims that his appellate counsel erred by failing to raise seven arguments: (1) The prosecutor's definition of reasonable doubt deprived Sanders of his right to trial by jury (Claim 8.5); (2) Sanders was deprived of his constitutional rights when he was denied a defense-based expert and when the mental health examiner divulged his statements to the prosecution (Claim 10.5); (3) Sanders was incompetent to stand trial (Claim 10.6); (4) The trial court violated Sanders' due process rights by failing to hold a competency hearing before trial (Claim 10.7); (5) Sanders' attorney had a conflict of interest, rendering his representation *per se* unconstitutional (Claim 10.8); (6) Introducing the statements Sanders made during his mental evaluation violated his constitutional rights (Claim 10.9); and (7) The trial court violated due process by failing to hold a competency hearing before Sanders' sentencing (Claim 22.6). *Id.* For the reasons below, the Court will only decide two of the ineffective-assistance-of-appellate-counsel ("IAAC") claims.

A. Sanders I Claims

*66 Sanders' appellate attorneys raised only two of the IAAC claims on direct appeal. *See* Appellate Proceeding Record at 2191–94 (“[Sanders] was denied due process of law by the trial court's failure to ... hold a competency hearing prior to both trial and sentencing.”). And the Kentucky Supreme Court adjudicated both of these claims on the merits in *Sanders I*, 801 S.W.2d at 681–82. Sanders does not argue that his appellate counsel performed deficiently by failing to adequately argue these two issues. Rather, he implies that his appellate counsel did not raise these arguments on appeal at all. *See* R. 73 at 362. But Sanders is wrong. Sanders' direct appeal counsel presented these two claims to the Kentucky courts and even cited to some of the same legal authorities that Sanders references in his federal habeas petition. *Compare*, e.g., Appellate Proceeding Record at 2193–94 (citing *Pate v. Robinson*, 383 U.S. 375 (1966) and Ky.Rev.Stat. § 504.100), with R. 73 at 145–46 (same). Because Sanders' appellate counsel actually raised these claims on appeal, Sanders' claim—that counsel was ineffective for not raising them—fails.

B. Unexhausted Claims

Early in the adjudication of Sanders' federal habeas petition, this Court stayed the case to let Sanders present his IAAC claims to the Kentucky courts in a Rule 60.02 motion. R. 32. Because Sanders only partially availed himself of that opportunity, he now raises in his habeas petition three IAAC claims that he never presented to the Kentucky courts. *Compare* R. 73 at 362 (claiming that direct appeal counsel was ineffective for failing to argue that (1) The prosecutor's definition of reasonable doubt deprived Sanders of his right to trial by jury (Claim 8.5); (2) Sanders was deprived of his constitutional rights when he was denied a defense-based expert and when the mental health examiner divulged his statements to the prosecution (Claim 10.5); and (3) Sanders' attorney had a conflict of interest, rendering his representation per se unconstitutional (Claim 10.8)) with Brief for Petitioner at 21, *Sanders III*, 339 S.W.3d 427 (Ky.2011) (No.2008–SC–000825–MR), 2009 WL 8181351, at *21 (raising different IAAC claims).

State prisoners must completely exhaust their available state court remedies by “fairly presenting” all their claims to the state courts. 28 U.S.C. § 2254(b), (c); *Rhines v. Weber*, 544 U.S. 269, 274 (2005). This exhaustion requirement bars Sanders from bringing to this Court any claims that he did not first bring to the Kentucky courts. *O'Sullivan v. Boerckel*,

526 U.S. 838, 842 (1999). But Sanders is trying to do just that. There is no indication in the record that Sanders ever presented these three IAAC claims to the Kentucky courts, and he does not introduce any evidence showing that he did present them. *See* Brief for Petitioner at 21, *Sanders III*, 339 S.W.3d 427 (Ky.2011) (No.2008–SC–000825–MR), 2009 WL 8181351, at *21. So Sanders has not carried his burden to demonstrate that he exhausted these claims. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir.1994).

*67 Because Sanders failed to exhaust three of his IAAC claims—and because no remedy remains available to exhaust them now—those claims are procedurally defaulted. *Landrum v. Mitchell*, 625 F.3d 905, 918 (6th Cir.2010) (“When the petitioner has failed to present the grounds to the state courts and ... no state remedy remains available, his grounds are procedurally defaulted.”). The Kentucky Supreme Court would only entertain new claims in another Rule 60.02 motion in truly “extraordinary situations.” *See Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky.1983) (quoting *Howard v. Commonwealth*, 364 S.W.2d 809, 810 (Ky.1963)) (emphasis added). But Sanders can point to nothing extraordinary. When the Court stayed this case so that Sanders could raise his IAAC claims before the Kentucky Supreme Court, that court determined that Sanders had properly exhausted those claims. *Sanders v. Commonwealth (Sanders III)*, 339 S.W.3d 427, 435 (Ky.2011). Though Sanders could have also exhausted these three IAAC claims at the same time, he chose not to raise them. Because Sanders cannot demonstrate extraordinary circumstances to justify that decision, the Rule 60.02 remedy is unavailable to him now. *See Gross*, 648 S.W.2d at 856 (requiring extraordinary circumstances); *Landrum*, 625 F.3d at 918 (conditioning procedural default on the unavailability of state remedies).

Neither can Sanders show cause for failing to bring his IAAC claims before the *Sanders III* court. *Hodges v. Colson*, 727 F.3d 517, 530–31 (6th Cir.2013) (affirming that even ineffective assistance of post-conviction counsel generally cannot excuse procedural default of ineffective-assistance-of-appellate-counsel claims) (citing *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)). Because courts need not consider claims that have been procedurally defaulted without cause, *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), the Court will not decide the three unexhausted IAAC claims Sanders raises in his federal habeas petition.

C. Remaining IAAC Claims

Sanders' remaining claims deal with his competency to stand trial (Claim 10.6) and statements he made during his mental evaluation (Claim 10.9). Sanders did not present his two remaining IAAC claims in his [RCr. 11.42](#) motion during the state court collateral review proceeding. *See* Appellate Proceeding Record at 501–66 (Motion to Vacate, Set Aside, or Correct Sentence Pursuant to [RCr. 11.42](#)). Rather, Sanders filed a federal habeas petition in this Court, sought a stay of the case, and then returned to the Kentucky Supreme Court to exhaust his IAAC claims in a [Rule 60.02](#) motion. *See* R. 29 (Motion to Stay); [Sanders III, 339 S.W.3d at 434–35](#). In reviewing Sanders' [Rule 60.02](#) motion, the Kentucky Supreme Court acknowledged that the Commonwealth recently changed its law to recognize IAAC claims in [RCr. 11.42](#) motions. *Id.* at 434 (citing [Hollon v. Commonwealth, 334 S.W.3d 431 \(Ky.2010\)](#)). But the court noted that *Hollon* only applied prospectively and so did not permit Sanders to raise his IAAC claims in state court. *Id.* (quoting *Hollon*, 334 S.W.3d at 429). As a result, the court determined that Sanders had properly exhausted his IAAC claims and presumed that this Court would consider the claims on federal habeas review. *Id.* at 435. At the same time, however, the Kentucky Supreme Court held that Sanders had had sufficient information—or could have obtained it by “reasonably diligence”—to raise his IAAC claims in his earlier [RCr. 11.42](#) motion. *Id.* at 437.

***68** Ordinarily, a petitioner's failure to raise claims at his first opportunity to do so constitutes procedural default. *See, e.g., Whiting v. Burt, 395 F.3d 602, 610 n. 6 (6th Cir.2005); Whitworth v. Price, 90 F. App'x 458, 460 (6th Cir.2004).* But the Kentucky Supreme Court did not explicitly hold that Sanders procedurally defaulted on his IAAC claims. And where the Kentucky state court does not enforce its procedural rules, this Court does not disregard the Commonwealth's interest in enforcing its laws by reaching the merits of a petitioner's habeas claim. [Berry v. Capello, 576 F. App'x 579, 588–89 \(6th Cir.2014\)](#); *see also Hudson v. Jones, 351 F.3d 212, 215–16 (6th Cir.2003)* (holding that federal habeas courts need not decide complicated procedural default issues before ruling on the merits of a petitioner's claim). Because the Kentucky Supreme Court did not reach the merits of the IAAC claims, this Court will evaluate the IAAC claim under a *de novo* standard of review. [Robinson, 663 F.3d at 822–23](#).

The *de novo* standard for resolving IAAC claims is simply another variation of the *Strickland* test for assessing whether counsel is constitutionally ineffective. Under the *Strickland* standard—as modified for IAAC claims—a petitioner is

entitled to habeas relief if he can show two things: (1) appellate counsel was objectively unreasonable in failing to find non-frivolous, arguable issues to appeal; and (2) a reasonable probability that, but for counsel's error, his appeal would have prevailed. [Smith v. Robbins, 528 U.S. 259, 285–86 \(2000\)](#); *see also McFarland v. Yukins, 356 F.3d 688, 699 (6th Cir.2004)*. In applying this test, the Court may consider factors like whether the omitted issues were “significant and obvious” and whether there existed arguably contrary authority on the omitted claims. [Mapes v. Coyle, 171 F.3d 408, 427–28 \(6th Cir.1999\)](#) (articulating a non-exhaustive list of eleven factors that a reviewing Court may consider when evaluating the performance of a direct appeal attorney).

The first prong of the IAAC test is deferential to the appellate attorney. Direct appeal counsel need not raise every non-frivolous claim and may select from among the claims to maximize the chances of a successful appeal. [Jones v. Barnes, 463 U.S. 745 \(1983\)](#). Generally, a petitioner may overcome the presumption of attorney competence where the non-appealed issues are “clearly stronger” than those appealed. [Mason v. Hanks, 97 F.3d 887, 893 \(7th Cir.1996\)](#) (quoting [Gray v. Greer, 800 F.2d 644, 646 \(7th Cir.1986\)](#)). And this Court need not even evaluate the first, or performance, prong of an IAAC claim that fails on the second, or prejudice, prong. *See Strickland, 466 U.S. at 697* (“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”).

To properly review an IAAC claim for prejudice, the federal habeas court must consider the merits of the issues not raised on direct appeal. [Willis v. Smith, 351 F.3d 741, 745 \(6th Cir.2003\)](#). But a review of the merits does not help Sanders' case. The factual record does not indicate that Sanders was incompetent to stand trial. Nor does Sanders demonstrate how the prosecution violated his constitutional rights when it introduced statements that Sanders made during a mental evaluation at the KCPC. Because Sanders cannot prevail on the merits of these claims, he cannot demonstrate that he suffered prejudice when his counsel failed to raise them.

1) Incompetency to Stand Trial (Claim 10.6)

***69** Sanders cannot prevail on his challenge to his own competency to stand trial because the trial court's competency determination finds sufficient support in the record. Before Sanders' trial, the court ordered him to undergo a comprehensive mental evaluation at the KCPC. *See* TR Direct Appeal Vol. I at 21–22 (Order for Sanders to be

evaluated at the KCPC). There, a team of social workers, psychologists, a psychiatrist, and a neurologist observed Sanders for twenty-four hours a day for six consecutive weeks. VR 6/5/87 19:13:23–19:13:40 (Tape 7 00:34:39–00:34:56) (Testimony of Dr. Walker describing the KCPC examination as a “long, six-week, 24-hour observation”). At the end of the examination, the KCPC team concluded that Sanders was competent to stand trial. TR Direct Appeal Vol. I at 134–44 (Dr. Candace Walker's letter concluding that Sanders was competent to stand trial and that he “underst[ood] the nature of the proceedings against him and the possible penalties which could be imposed were he to be convicted”).

In determining whether a defendant is competent to stand trial, a court considers medical opinions, as well as a defendant's irrational behavior and demeanor. See *Drope v. Missouri*, 420 U.S. 162, 180 (1975). The court can also consider defense counsel's doubts about his client's competence. See *Woodley v. Bradshaw*, 451 F. App'x 529, 538 (6th Cir.2011) (citing *Drope*, 420 U.S. at 178 n. 13). So to succeed on appeal, Sanders' appellate counsel would have had to convince the Kentucky Supreme Court that, based on a balance of the *Drope* factors, Sanders was incompetent. But the facts do not support this argument. The KCPC's extensive evaluation concluded that Sanders was competent to stand trial. And although Sanders' counsel told the trial court that he was “losing” Sanders, counsel clarified that he meant Sanders' attention was flagging because he had not been sleeping properly—an unsurprising reaction to the gravity of the trial. VR 6/03/87 08:02:33–08:02:50 (Tape 5 00:03:25–00:03:42). So Sanders' attorney did not directly call into question or raise doubts about Sanders' competence.

Even if the balance of factors weighed in favor of Sanders' competence, appellate counsel would still have had to overcome the traditional deference to competency determinations by trial courts. *Filiaggi v. Bagley*, 445 F.3d 851, 858 (6th Cir.2006) (citing *Thompson v. Keohane*, 516 U.S. 99, 110–11 (1995)). The balance of *Drope* factors makes it unlikely that appellate counsel could successfully challenge the trial court's competency finding. And Sanders points to no other facts that suggest a different result. Because Sanders did not demonstrate a reasonable probability that the claim would have succeeded on appeal, he cannot establish any prejudice from his counsel's decision not to bring the claim. *Smith*, 528 U.S. at 285–86. Accordingly, Sanders' direct appeal counsel was not constitutionally ineffective for failing to present the issue to the *Sanders I* court.

2) Statements during mental evaluation (Claim 10.9)

*70 Sanders cannot prevail on his Fifth–Amendment challenge to Dr. Walker's testimony because, in light of “arguably contrary” Supreme Court precedent, Sanders cannot demonstrate prejudice. See *Mapes*, 171 F.3d at 427–28. While Sanders was being evaluated at the KCPC, he spoke to a number of psychiatrists, social workers, and other KCPC employees. At trial, the prosecution introduced testimony from Dr. Candace Walker, a KCPC psychiatrist. In her testimony, Dr. Walker disclosed statements that Sanders made to KCPC personnel. See generally VR 06/5/87 09:01:00–09:53:50 (Tape 7 00:02:18–00:55:14) (Testimony of Dr. Walker). Sanders argues that, because he was not advised of his right to remain silent during his KCPC evaluation, Dr. Walker violated Sanders' right against self-incrimination by introducing his statements at trial. See R. 73 at 159 (identifying the right articulated in *Estelle v. Smith*, 451 U.S. 454, 468 (1981)).

But *Estelle* stands for a different rule: When the defendant does *not* present psychiatric evidence, the prosecution may not introduce statements the defendant made during a court-ordered competency hearing where the defendant was not aware that he “was assisting the State's efforts.” 451 U.S. at 466–68. The *Estelle* Court explicitly recognized that cases involving an insanity defense are different. 451 U.S. at 465–68, 472. When a defendant claims insanity as a defense, “his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case.” *Id.* at 465. Indeed, calling a psychiatrist to support an insanity defense necessarily “interject[s]” psychiatric evidence into the case and, as a result, forfeits *Estelle's* protection. 451 U.S. at 465–68, 472.

The Kentucky Supreme Court agrees. In *Sanborn v. Commonwealth*, the defendant could not prevent his psychiatrist from revealing his statements to evaluators because the statements rebutted psychiatric evidence that the defendant introduced. 892 S.W. 2d 542, 553 (Ky.1994) (citing *Estelle*, 451 U.S. at 472). The *Sanborn* court even found that the expert's testimony may go beyond the subject matter of the evaluation. See *id.* (“If the statements are necessary for the expert to formulate and explain her opinion, then the statements are admissible and are not violative of the defendant's rights.”).

Dr. Walker's testimony fits squarely within this exception: Her testimony highlighted the inconsistencies in the various

statements that Sanders made at the KCPC to support her ultimate conclusion that he may have been fabricating a mental disorder—a disorder that Sanders supported by introducing psychiatric evidence. VR 6/5/87 09:26:16–09:29:10 (Tape 7 00:25:32–00:28:35). Because *Estelle* and *Sanborn* provide authority that is “arguably contrary” to Sanders’ claim, *Mapes*, 171 F.3d at 427–28, there is no reasonable probability that Sanders would have prevailed on appeal. So Sanders has not demonstrated prejudice from his direct appeal counsel’s decision not to raise Claim 10.9 on appeal. Accordingly, Sanders’ claim that the counsel was constitutionally ineffective fails.

VIII. Cumulative Prejudice: Claim 36.

*71 In his final claim, Sanders argues that the Court should aggregate the errors that his attorney committed along with other constitutional violations that occurred during trial. R. 73 at 367. Taken together, Sanders argues, these errors were so prejudicial as to entitle him to habeas relief. *Id.* Though Sanders did not raise his cumulative-prejudice argument in his state court habeas proceeding, *see* Appellate Proceeding Record at 1323–88, he did exhaust the claim by presenting it to the Kentucky Supreme Court after he filed his federal habeas petition, *see Sanders III*, 339 S.W.3d at 436 (noting that Sanders presented the claim of cumulative prejudice). Because the Kentucky Supreme Court did not reach the merits of his cumulative-prejudice claim, the Court will review the claim *de novo*. *See Robinson*, 663 F.3d at 822–23.

The Court may only entertain a part of Sanders’ cumulative-prejudice claim because the Sixth Circuit does not allow petitioners to aggregate claims of constitutional error to demonstrate cumulative prejudice. *See Moore v. Parker*, 425 F.3d 250, 256 (6th Cir.2005). Thus, Sanders may only argue that the totality of his counsel’s errors resulted in prejudice under *Strickland*. *See Strickland*, 466 U.S. at 694 (holding that the appropriate test for prejudice is whether there is a “reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different”) (emphasis added); *id.* at 695 (“[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of ... circumstances did not warrant death.”).

The Court need not consider claims where it previously concluded that Charters did not perform deficiently under the first prong of *Strickland*. *See Mackey v. Russell*, 148 F. App’x 355, 369 (6th Cir.2005) (identifying instances where counsel was deficient and then aggregating those errors to determine

prejudice). So that leaves only two claims: that Charters failed to consult with Sanders before he took the stand (Claim 27(J)), and that he failed to request competency evaluations (Claim 27(L)).

Even taken together, Charters’ failure to move for a competency hearing and his failure to prepare Sanders to testify could not have prejudiced Sanders. Why? Because, as explained above, Sanders did not meet his burden to argue that he suffered *any* prejudice from Charters’ failure to prepare Sanders to take the stand. *See supra* at 113. The Court cannot aggregate prejudice from the only remaining claim where Sanders argues he suffered from Charters’ conduct—Claim 27(L). *See, e.g., Millender v. Adams*, 376 F.3d 520, 527 (6th Cir.2004) (“[W]e do not find more than one error to consider cumulatively.”). And in any case, Sanders did not demonstrate that he suffered prejudice in the single remaining claim. *See supra* at 116–18 (concluding that Sanders did not show that Charters’ failure to seek competency hearings created a “reasonable probability” that the outcome of his trial or sentencing would have been different). Accordingly, Sanders cannot get habeas relief on his cumulative-prejudice claim.

IX. Evidentiary Development

*72 Sanders seeks to conduct discovery and to hold an evidentiary hearing to find facts that he needs in order to develop several of his claims. *See* R. 78; R. 79. A habeas petitioner is generally entitled to discovery and an evidentiary hearing if he can allege facts that, if proven, would entitle him to habeas relief. *See Plummer v. Jackson*, 491 F. App’x 671, 675 (6th Cir.2012) (articulating the rule in the context of an evidentiary hearing); *Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir.2004) (interpreting the “good cause” provision of Rule 6 of the Rules Governing § 2254 Cases related to discovery); *see also Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir.2001) (citing *Bracy v. Gramley*, 520 U.S. 899 (1997)). But Sanders’ motion fails for three reasons: (1) the Court cannot consider new evidence when deciding claims that the Kentucky Supreme Court adjudicated on the merits in accordance with § 2254(d); (2) discovery will not help to resolve claims on which Sanders has procedurally defaulted without cause and prejudice; and, (3) even on the claims on which the Court could reach the merits, Sanders has not alleged facts that, if proven, would entitle him relief.

A. Claims the Kentucky Supreme Court Decided On the Merits

In 28 U.S.C. § 2254(d), Congress limited when federal courts may hold hearings in habeas proceedings. See *Pinholster*, 131 S.Ct. at 1398 (interpreting 28 U.S.C. § 2254(d)). The *Pinholster* Court found that the rule directed federal habeas courts to limit their review “to the record that was before the state court that adjudicated the claim on the merits.” *Id.* (interpreting the backward-looking language of § 2254(d)(1) as requiring federal courts to examine state-court decisions in light of the record as it existed at the time of the state court decision). So where the state court decides a claim on the merits, and this Court upholds that determination under § 2254(d), the Court may not conduct an evidentiary hearing. See *Hodges*, 727 F.3d at 541 (quoting *Pinholster*, 131 S.Ct. at 1400) (noting that the district court properly denied a motion for an evidentiary hearing because the evidence introduced would “have no bearing on § 2254(d)(1) review”); see also *Sadler v. Howes*, 541 F. App’x 682, 692 (6th Cir.2013) (“Because the state appellate court’s action satisfies § 2254(d)’s on-the-merits requirement, the district court’s denial of an evidentiary hearing was true to [*Pinholster*].”). The Court upheld all of the claims that the Kentucky Supreme Court decided on the merits. Accordingly, it may not grant Sanders’ motion for an evidentiary hearing, R. 79, on those claims.¹⁷

¹⁷ The Court upheld the Kentucky Supreme Court’s merits determination on the following claims for which Sanders requests an evidentiary hearing: Claim 2 (Failure to remove jurors Meinzer and Warren); Claim 27(A) (Failure to obtain adequate, independent mental health assistance), Claim 27(B) (Failure to obtain Dr. Flenning’s report from the KCPC), Claim 27(E) (Failure to obtain and present a videotape of Sanders taken shortly after his arrest), Claim 27(F) (Failure to present testimony of three witnesses), Claim 27(G) (Failure to move to suppress Sanders’ statements to the police), Claim 27(H) (Opening the door to testimony about Sanders’ violence towards his wife), Claim 27(J) (Failure to prepare Sanders before he testified during the penalty phase), and Claim 28 (Violation of the prosecution’s *Brady* obligation).

The same rationale governs the decision to deny Sanders’ motion for discovery on the claims that the Kentucky Supreme Court decided on the merits. Sanders seeks to depose his trial counsel, Charters, to determine whether Charters had a strategy or whether he rendered ineffective assistance at points during the trial. R. 78 at 14. But the Court already found the Kentucky Supreme Court’s decisions on these claims to be reasonable applications of clearly established federal law, under § 2254(d).

*73 Sanders also seeks to unearth evidence that may help him further develop a new argument related to his *Brady* claim. Sanders wants discovery to determine whether the prosecution had communications about, or actual possession of, a report authored by psychiatrist Dr. Frank Flenning at the KCPC. R. 78 at 23 (discussing *Brady* claim). Sanders maintains that the report is exculpatory evidence, since Dr. Flenning concluded that Sanders suffered from a form of psychosis. See *id.* If, as Sanders suspects, the government was in possession of the Flenning report or had communications about its contents, but did not disclose the report to him, Sanders argues that the prosecution committed a *Brady* violation. But Sanders did not argue either in his RCr 11.42 motion or in his federal habeas petition that the prosecution had actual access to Dr. Flenning’s report or information about the report. See R. 73 at 339–41 (developing the argument that the Flenning report was “at least in the prosecution’s constructive possession” and failing to argue that the prosecution also had actual possession of the information).

Sanders may only obtain discovery in a habeas proceeding “where specific allegations ... show reason to believe that [he] may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief.” *Williams*, 380 F.3d at 974 (quoting *Bracy*, 520 U.S. at 908–09). So even if Sanders were to find that the prosecution had access to Dr. Flenning’s report, he could not use the information to obtain relief on his habeas petition. Why? Because Sanders never presented the argument that the prosecution had actual access to *Brady* material in his habeas petition. Accordingly, Sanders is not entitled to discovery on this new claim that he develops for the first time in his motion for discovery.

Sanders may not present further evidence to decide claims that the Kentucky Supreme Court already adjudicated on the merits. See *Pinholster*, 131 S.Ct. at 1400 (holding that if a claim has been adjudicated on the merits by a state court, then the federal habeas court must conduct its review on the record as it existed when the state court adjudicated the claim). Accordingly, Sanders’ motion for discovery, R. 78, is denied as to claims that the Kentucky Supreme Court decided on the merits.

B. Claims that Sanders Procedurally Defaulted Without Cause and Prejudice

Sanders is not entitled to an evidentiary hearing to develop facts related to claims that he procedurally defaulted without

cause and prejudice.¹⁸ The Court cannot decide those claims because federal habeas corpus review is barred for procedurally defaulted claims where the state prisoner does not demonstrate cause or prejudice. See *Coleman*, 501 U.S. at 729–30. So it would make no sense to devote time and resources to develop facts in support of claims the Court cannot decide. See *Hodges*, 727 F.3d at 532 (holding that it was appropriate for the district court to deny both an evidentiary hearing and habeas relief where the claim was procedurally barred). In the absence of cause and prejudice, Sanders is not entitled to an evidentiary hearing on procedurally defaulted claims.

¹⁸ These claims are as follows: Claim 10.5 (Denial of a defense-based psychiatric expert and improper disclosures from the neutral psychiatric expert); Claim 10.8 (Sixth Amendment claim based on Charters' conflict of interest); Claim 10.9 (introduction at trial of Sanders' statements at the KCPC); Claim 27(I) (Failure to prepare mitigating evidence for the penalty phase), and Claim 29 (Failure to correct Dr. Walker's false testimony at trial).

*74 Sanders may not conduct discovery on his procedurally defaulted claims for similar reasons. Sanders asks to depose his initial-review collateral proceeding counsel to determine whether their ineffectiveness could excuse his procedural default of several claims. R. 78 at 22; R. 111 at 2.¹⁹ But ineffectiveness of initial-review collateral proceeding counsel can only excuse procedural default of a claim for ineffective assistance of trial counsel. See *Martinez*, 132 S.Ct. at 1318–21; *Trevino*, 133 S.Ct. at 1921. The only procedurally defaulted claim that fits the bill is Claim 10.8 (ineffectiveness claim based on Charters' conflict of interest). But Sanders did not properly present this claim to the Kentucky courts and, accordingly, it is now procedurally defaulted. No matter what Sanders might discover about his state habeas counsel, that evidence could not be considered to resolve an ineffectiveness claim presented for the first time in this federal habeas petition.

¹⁹ These claims are as follows: Claim 8.5 (the prosecutor's improper definition of reasonable doubt violated Sanders' right to a jury trial); Claim 10.5 (Denial of a defense-based psychiatric expert and improper disclosures from the neutral psychiatric expert); Claim 10.6 (Sanders was incompetent to stand trial); Claim 10.7 (the trial court failed to hold a competency hearing before trial); Claim 10.8 (ineffectiveness claim based on Charters' conflict of interest); Claim 10.9 (introduction at trial of Sanders' statements at the KCPC); Claim 22.5

(Sanders was incompetent at sentencing); Claim 22.6 (the trial court failed to hold a competency hearing); and Claim 29 (the prosecution failed to correct Dr. Walker's false testimony at trial).

C. Claims that the Court Considers on the Merits

The only claims on which the Court reaches the merits are Claim 27(L) (Failure to seek competency proceedings) and part of Claim 34.5 (Ineffective assistance of appellate counsel). Sanders requests an evidentiary hearing on both of these claims, arguing that he should have an opportunity to investigate facts that may support why Charters thought Sanders was incompetent and why Sanders' direct appeal counsel may have forgone some arguments. See R. 79 at 16; R. 93 at 14. He also seeks discovery on the claims by deposing his trial counsel, Charters, to determine whether Charters rendered ineffective assistance. R. 78 at 14.

When a court performs an independent review of a claim, it may conduct an evidentiary hearing pursuant to the AEDPA's hearing section, 28 U.S.C. § 2254(e), in order to permit the petitioner to present additional evidence. See *Van Tran v. Colson*, 764 F.3d 594, 621 (6th Cir.2014) (citing *Pinholster*, 131 S.Ct. at 1412 (Breyer, J., concurring)).

Here, however, a hearing is not necessary. Sanders has not shown that he was prejudiced by any of his attorneys' failures. So he cannot “allege facts that, if proven, would entitle him to habeas corpus relief.” *Gustafson v. Burt*, 467 F. App'x 434, 436 (6th Cir.2012). Even if a hearing were to reveal that Sanders' attorneys were objectively deficient, he could not succeed in showing that he was prejudiced by their failings. See *supra* at 116–18 (concluding that, without grounds for a competency hearing, Sanders could not establish more than a remote possibility that requesting a competency hearing would change the outcome of his trial or sentencing); see also *supra* at 125–27 (noting that Sanders could not establish a “reasonable probability” that his appellate counsel would have prevailed on the claims that his trial counsel was defective in failing to request a competency hearing and to suppress statements he gave during his psychological evaluation). Absent allegations that, if proven, would establish prejudice, Sanders is not entitled to an evidentiary hearing. Cf. *Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir.2003) (granting a motion for an evidentiary hearing where the petitioner “sufficiently alleged the deficient performance and the prejudice prongs of a *Strickland* claim”). The same rationale applies to Sanders' claim for discovery: even if he discovered that his attorneys were deficient, he has

not stated facts that show that he can demonstrate prejudice in order to obtain habeas relief.

***75** Because Sanders cannot prevail on his ineffective assistance claims, he is not entitled to habeas relief, no matter what evidence he may gather through discovery or at an evidentiary hearing. Accordingly, Sanders' motions for discovery and for an evidentiary hearing are denied as to Claim 27(L) and Claim 34.5.

X. Motion to Expand the Record and for a Psychologist

Sander seeks to expand the record to include an affidavit related to Claim 27(I) (Failure to prepare mitigating evidence for the penalty phase). He also asks for funds to hire an expert to investigate the childhood abuse that he suffered in order to explain the way the trauma impacted him later in life. R. 80. According to Sanders, securing the expert is necessary to resolving this claim. *Id.* By not raising this claim in state court, however, Sanders procedurally defaulted on this claim. *See*

supra at 109–10. Because Sanders has not demonstrated cause and prejudice to excuse the procedural default, the Court may not reach the merits of this claim. Accordingly, Sanders' motions to hire an expert, R. 80, and to expand the record, R. 97, are unnecessary to resolve Claim 27(I) and are therefore denied.

CONCLUSION

Accordingly, it is **ORDERED** that Sanders' petition for the writ of habeas corpus, R. 1, 73, motion for discovery, R. 78, motion for an evidentiary hearing, R. 79, motion for funds, R. 80, and motion to expand the record, R. 97 are **DENIED**.

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United States District Court, E.D. Kentucky,
Central Division, at Lexington.

David Lee SANDERS, Petitioner,

v.

Randy WHITE, Warden, Respondent.

Civil No. 03–455–ART.

I

Signed July 15, 2015.

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MEMORANDUM OPINION AND ORDER

AMUL R. THAPAR, District Judge.

*1 On February 18, 2015, the Court denied David Lee Sanders' petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See* R. 113. Sanders has since filed a motion to reconsider. *See generally* R. 115. Specifically, Sanders asks the Court to revisit the following issues: (1) whether the treatment of claims related to the trial court's failure to hold competency hearings (Claim 10.7 and Claim 22.6) was inconsistent; (2) whether Sanders' trial counsel rendered ineffective assistance by failing to present an adequate mitigation case (Claim 27(I)); (3) whether Sanders' trial counsel was ineffective for failing to discover a psychiatric report (Claim 27(B)); and (4) whether Sanders' counsel provided ineffective assistance by failing to produce a video taken of Sanders after his arrest (Claim 27(E)). *Id.* In support, Sanders identifies recent cases in the dynamic field of habeas law. *See id.* at 21–34 (citing to cases not mentioned in Sanders' habeas petition or reply memorandum in support of his habeas petition). In light of the new authority, justice requires the Court to reconsider its decision as to Claim 27(I).

BACKGROUND

The Court has previously summarized the facts of this case. *See* R. 113 at 2–6. The essential details related to the claims at issue in this order are as follows. On January 28, 1987, Sanders shot and killed the proprietor and a customer of a convenience store in Madison County, Kentucky, and took money from behind the counter. When police initially questioned him about his activities on that day, Sanders admitted to driving to Madison County but maintained that he did not kill anyone. On February 2, 1987, the police transported Sanders to the local jail. There, Sanders manifested troubling behaviors: he repeatedly hit his head against the cell wall and stated that he wanted to kill himself. Sanders' appointed counsel, Ernie Lewis, videotaped Sanders' bizarre actions. In his next interview with the police—on February 3, 1987—Sanders admitted to the murders. He explained that, during the murders, he could see himself shooting the men and was unable to stop himself.

Soon after Sanders confessed to the shootings, a grand jury indicted him on two charges of capital murder and two charges of first-degree robbery. Sanders' retained counsel, Kevin Charters, moved to evaluate Sanders' mental health and psychiatric condition. The trial court ordered the Kentucky Correctional Psychiatric Center (“KCPC”) to evaluate Sanders. As part of the evaluation, the trial court directed the KCPC to determine whether Sanders was competent to stand trial and whether he was insane at the time he committed the shootings. The KCPC conducted a series of tests and examinations over six weeks, employing multiple psychiatrists. The lead KCPC investigator, Dr. Candace Walker, summarized the team's collective findings in a report. The KCPC report concluded that, though Sanders may suffer from a mixed personality disorder, he was competent to stand trial and did not suffer from a mental condition that compromised his capacity to conform his behavior to the law. But the report did not mention the findings of one KCPC psychologist, Dr. Frank Flenning, whose findings were inconsistent with those from the other KCPC team members. In his individual report, Dr. Flenning had documented the physical abuse that Sanders experienced throughout his childhood at the hands of his parents. Dr. Flenning also concluded that Sanders experienced dissociative states, suffered from a fragmented personality, and had the potential for “brief psychotic episodes wherein he would experience a loss of contact with reality.”

*2 After his KCPC evaluation, Sanders went to trial, where he presented an insanity defense. At the conclusion of a week-long proceeding, the jury convicted Sanders of both murder counts and both robbery counts. After a weekend recess, the trial court conducted the penalty phase of the trial. Charters introduced mitigation testimony from the assistant principal of Sanders' former school, Sanders' neighbor, his boss, and his sister. After hearing this testimony, the jury deliberated and sentenced Sanders to death.

Sanders appealed the decision, but the Kentucky Supreme Court upheld the verdict. See *Sanders v. Commonwealth*, 801 S.W.2d 665 (Ky.1990) (*Sanders I*). He then filed a motion for post-conviction relief under Kentucky Rule of Criminal Procedure (“RCr”) 11.42. That, too, was denied. See *Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky.2002) (*Sanders II*). Sanders filed a petition for a writ of habeas corpus in this Court. Soon afterward, he obtained leave to present additional unexhausted claims to the state court. R. 32. The Kentucky Supreme Court again completely denied relief, determining that Sanders could have presented his latest batch of claims in his prior appeals. See *Sanders v. Commonwealth*, 339 S.W.3d 427 (Ky.2011) (*Sanders III*). After his third and final trip to the Kentucky courts, Sanders withdrew some claims from his federal habeas petition. When this Court denied relief on his amended petition, Sanders filed the present motion for reconsideration under Federal Rule of Civil Procedure 59.

DISCUSSION

Sanders may move to alter or amend the Court's judgment under Rule 59(e) based on previously unavailable evidence or an intervening change in controlling law. See *GenCorp. Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir.1999); see also *McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir.1999). The Court may also grant a Rule 59(e) motion in order to prevent manifest injustice. See *Besser v. Sepanak*, 478 F. App'x 1001 (6th Cir.2012) (per curiam) (citing *GenCorp.*, 178 F.3d at 834). But Sanders may not use his Rule 59(e) motion as a vehicle for re-arguing the case. See *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir.1998) (“[P]arties should not use [Rule 59(e) motions] to raise arguments which could, and should, have been made before judgment issued.”).

Sanders does not satisfy the Rule 59(e) standard to overturn the Court's judgment on four of the five disputed claims. Sanders does, however, present new authority that supports

reconsidering Claim 27(I). The new authority reflects recent developments in the law following the Supreme Court's decisions in *Martinez v. Ryan*, — U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, — U.S. —, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013). In light of these changes, the Court must revisit its previous decision.

I. Sanders does not meet the Rule 59(e) standard for vacating the Court's judgment as to Claims 10.7, 22.6, 27(B), and 27(E).

*3 Sanders asks the Court to clarify its ruling on two claims related to the trial court's failure to order competency hearings. See R. 115 at 1–2 (identifying Claim 10.7 and Claim 22.6). He argues that the Court both decided that the claims were procedurally defaulted and resolved on the merits in the Kentucky courts. *Id.* This, he notes, is not possible. Sanders does not present new evidence or law related to these claims, so the Court will not overturn its previous decision as to these issues. And to clarify, the Court determined that Sanders procedurally defaulted on both Claim 10.7 and Claim 22.6. See R. 113 at 12–13. Not only that, but Sanders conceded that he procedurally defaulted those claims. See *id.* (citing to R. 111 at 4–5). Sanders misquotes the opinion to conclude that the Court determined that these claims were resolved on the merits. He cites to pages describing how the Kentucky state courts reached the merits of different claims: that Sanders' *appellate counsel* was ineffective because he failed to challenge the lack of competency hearings before trial and sentencing. See R. 113 at 119–20.

Next, Sanders objects to the Court's decision on Claim 27(B)—that his counsel failed to obtain Dr. Flenning's psychiatric report. See R. 115 at 34–38. But Sanders merely rehashes arguments that he could have raised—and that he did raise—in his initial habeas petition. Compare R. 115 at 35–37 (arguing in his Rule 59 motion that Charters' conduct was “materially indistinguishable from what the Supreme Court found unreasonable in” *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)), with R. 73 at 312 (citing to *Wiggins* and other cases for the proposition that a “legion” of courts have found that the failure to present mitigation evidence amounted to ineffective assistance of counsel). For the same reasons articulated in the previous opinion, those arguments do not satisfy Sanders' burden to show that the Kentucky Supreme Court's decision was unreasonable. See R. 113 at 89–90. Because Sanders does not offer any previously unavailable new law and does not demonstrate a clear error of law in the Court's decision, the Court will not reconsider Claim 27(B).

Finally, Sanders contends that the Court “should have reviewed [Claim 27(E)] on the merits”—without any deference to the Kentucky Supreme Court. *See* R. 115 at 39. While Sanders' briefing is unclear, he appears to argue that the Court should have reviewed the claim *de novo* because he complied with Kentucky's procedural rules. *See id.* But, as the Court previously held, the Kentucky Supreme Court properly resolved Claim 27(E) on the merits. *See* R. 113 at 90–93 (applying deference to the state court's merits determination); *Sanders II*, 89 S.W.3d at 390 (concluding that “there is nothing to complain about related to ineffective assistance”). As a result, the Court may grant relief only if that decision was unreasonable. *See* 28 U.S.C. § 2254(d). Once again, however, Sanders' arguments do not rest on any new law or facts suggesting that the Kentucky Supreme Court's decision was unreasonable. Nor does Sanders establish any clear error requiring reconsideration. So Sanders' Rule 59(e) motion as to Claim 27(E) fails.

*4 Sanders also asks the Court to consider new arguments for granting relief on Claim 27(E). *See* R. 115 at 39 (arguing that Sanders should receive an evidentiary hearing because the state decision was based on a “materially incomplete record”). But Sanders may not use his Rule 59(e) motion as a vehicle to raise new arguments. *See Sault Ste. Marie Tribe of Chippewa Indians*, 146 F.3d at 374. Because Sanders could have raised this argument in his habeas petition or reply—but elected not to do so—he may not use a Rule 59 motion to raise them now.¹

¹ Attorneys face a persistent conundrum: how to preserve all colorable issues without obscuring strong claims in a heap of weaker claims. One strategy involves focusing the weight of a brief—and, consequently, the court's attention—on developing the meritorious issues and then dedicating only a short statement to preserving the remaining issues. In Sanders' petition (which totaled over 300 pages), such an approach would have allowed both the Court and the parties to efficiently devote their resources to resolving the most deserving claims.

II. Sanders points to recent case law signaling changes in habeas jurisprudence that support reconsideration of Claim 27(I).

Claim 27(I) concerns the failure of Sanders' trial counsel to prepare and present appropriate mitigation evidence during the penalty phase of the trial. Sanders objects to the Court's resolution of Claim 27(I) on two broad grounds: the

procedural default analysis and the alleged resolution of the merits. *See generally* R. 115 at 2–34. Before delving directly into the substance of Sanders' arguments, it is helpful to briefly review four issues related to Claim 27(I): (1) the factual background, (2) the Kentucky Supreme Court's decision, (3) Sanders' federal habeas petition and reply brief, and (4) this Court's previous decision.

The relevant factual background is short. Sanders' trial attorney, Charters, presented a total of ten minutes of mitigation testimony from four witnesses during the penalty phase of Sanders' trial. None of the witnesses spoke about the physical and emotional abuse that Sanders claims he suffered at the hands of his parents throughout his childhood. Nor did any of the witnesses testify about Sanders' previous head injuries. In the RCr 11.42 motion, Sanders' post-conviction counsel claimed that Charters' failure to develop robust mitigation evidence amounted to ineffective assistance of counsel. *See* Motion to Vacate, Set Aside, or Correct Sentence Pursuant to RCr 11.42 at 50–52, Madison Circuit Court, No. 87–CR–018 (Feb. 9, 1993), Appellate Proceedings at 550–52; *see id.* at 551 (arguing only that “Charters never interviewed key family members ... who could have provided information and testimony relevant as mitigation, including corroborated David[s] statements of physical abuse”).

The Madison Circuit Court rejected the claim (among others), and Sanders appealed to the Kentucky Supreme Court. *See* Order Denying Motion to Vacate Pursuant to RCr 11.42 at 11–12, Madison Circuit Court, No. 87–CR–018 (Jan. 28, 1999), Appellate Proceedings at 417–18. The Kentucky Supreme Court did not grant relief or an evidentiary hearing on Claim 27(I) because Sanders failed to describe the testimony that the witnesses would have offered. *Sanders II*, 89 S.W.3d at 390. As a result, Sanders' allegations did “not rise to the standards required by RCr 11.42(2),” and “summary dismissal” was appropriate. *Id.*; *see also* RCr 11.42(2) (“The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.”).

*5 In his federal habeas petition, Sanders detailed the mitigation evidence that Charters could have discovered and introduced at trial. *See* R. 73 at 287–92. Sanders also discussed clearly established Supreme Court precedent governing ineffective-assistance-of-counsel claims related to presenting mitigation evidence. *See id.* at 294–300. Sanders

contended that the Court may grant relief because the *Sanders II* court adjudicated Claim 27(I) based on an unreasonable application of clearly established law and an unreasonable determination of the facts. *Id.* at 315–18. As a secondary argument, Sanders suggested that the Kentucky Supreme Court may have denied Claim 27(I) based on a procedural rule, but that such a determination was improper. *See id.* at 319. Sanders developed his procedural default argument in greater detail in his reply brief. There, he argued first that the *Sanders II* court did not clearly rest its decision on a procedural rule. R. 96 at 156. And even if it did, he claimed, the court's determination was incorrect because he followed all procedural rules. *Id.* Finally, Sanders argued that, even if he did procedurally default on Claim 27(I), the default could be excused because it was due to the ineffective assistance of his post-conviction counsel. *See* R. 96 at 158–59. But Sanders did not cite any cases explaining why post-conviction counsel's ineffective performance would excuse procedural default of Claim 27(I) in that section of his brief.

This Court found that the *Sanders II* court unambiguously relied on a state procedural pleading rule to resolve Claim 27(I). *See* R. 113 at 108–09. And Sanders did not make an adequate showing of why he could overcome that procedural default. *See id.* at 110 (explaining that Sanders had the responsibility “to show, among other things, that the ‘state procedural framework ... makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim for ineffective assistance of trial counsel on direct appeal’ “ (quoting *Trevino v. Thaler*, —U.S. —, 133 S.Ct. 1911, 1921, 185 L.Ed.2d 1044 (2013))). In addition to its holding on Claim 27(I), the Court mentioned that it would not be able to completely decide Claim 27(I) even if Sanders had met the requirements for procedural default. *Id.* Why? Because there was no evidence—such as affidavits—that would show what testimony any potential witnesses would have provided at the penalty phase. *Id.* at 110–11. The Court concluded that, absent such evidence, it would not be able to grant Sanders complete relief on Claim 27(I) at the current stage of the proceedings. *Id.* at 111.

Now, in his motion for reconsideration, Sanders presents additional case law and arguments to further defend against procedural default. Specifically, Sanders sets forth three claims: (1) that he did not procedurally default on Claim 27(I) because he sufficiently pled his RCr 11.42 motion; (2) that the Kentucky Supreme Court could not find that he procedurally defaulted because the RCr 11.42(2) pleading rule was not “firmly established” or “regularly followed”; and (3) that,

even if he did procedurally default, he pled sufficient facts that would necessitate a hearing on whether the default could be excused. *See* R. 115 at 3–34.

*6 The Court will not address the first two arguments because they were—or could have been—raised in his habeas petition and reply. *See* R. 96 at 156 (arguing that the *Sanders II* court erred in its decision because Sanders did not procedurally default as a matter of fact); *see also Sault Ste. Marie Tribe of Chippewa Indians*, 146 F.3d at 374. Sanders introduces no intervening law and does not show a clear error of law, so the Court reiterates its original conclusion that the *Sanders II* court rightfully found that Sanders procedurally defaulted Claim 27(I) by failing to meet basic pleading standards pursuant to RCr 11.42(2). R. 113 at 108–10; *see also Hodge v. Haeblerlin*, 579 F.3d 627, 639 (6th Cir.2009) (“Criminal Rule 11.42 is a regularly followed procedural rule that constitutes an adequate and independent ground for denying a claim.”).

But Sanders' third claim—whether he can overcome that procedural default—is another matter. In order to determine whether the Court can excuse Sanders' procedural default of his ineffective-assistance-of-trial-counsel claim, Sanders must demonstrate cause for and prejudice from his default. *See Trevino*, 133 S.Ct. at 1917. To establish cause, Sanders may rely on the ineffectiveness of his initial post-conviction counsel if he satisfies the four prongs of *Martinez—Trevino*: (1) that the claim of “ineffective assistance of trial counsel” was a “substantial” claim; (2) that his initial state collateral review counsel was ineffective; (3) that the state collateral review proceeding was the “initial” review proceeding of the ineffective-assistance-of-trial-counsel-claim; and (4) that the state's procedural system “d[id] not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal” due to its “structure, design, and operation.” *Id.* at 1918, 1921.

At this stage of the proceedings, Sanders must allege facts that, if proven, entitle him to relief by way of excusing procedural default. *See* Rule 6(a) of the Rules Governing Section 2254 cases (“Habeas Rules”) (stating that a judge may, for good cause, authorize a habeas petitioner to conduct discovery under the Federal Rules of Civil Procedure); *see also Lynott v. Story*, 929 F.2d 228, 232 (6th Cir.1991) (explaining that habeas petitioner may conduct discovery “where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed,

be able to demonstrate” that he is entitled to relief (internal quotation marks omitted)).

Sanders does just that. He cites to new cases to support his claim that any procedural default of Claim 27(I) should be excused because of ineffective assistance of post-conviction counsel. See R. 115 at 21–33. Some cases were decided after Sanders filed his initial habeas petition, and others were published after he filed his reply brief. In light of this case law, Sanders' previously alleged facts constitute good cause. Because justice requires accounting for these developments in the law, Sanders should proceed to fact development to determine whether he can prevail on this argument.

A. Sanders has sufficiently pled that Claim 27(I) is a “substantial” claim.

*7 A “substantial” claim is one that is “debatable amongst jurists of reason.” See *Martinez*, 132 S.Ct. at 1318 (explaining that the claim must have “some merit,” and citing *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), which used the “debatable amongst jurists of reason” standard). To demonstrate that Claim 27(I) is “substantial,” Sanders must show that reasonable jurists could debate whether his trial counsel's performance was: (1) objectively unreasonable under prevailing professional norms; and (2) prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Sanders satisfies both criteria.

Under *Strickland's* first prong, reasonable jurists may disagree about whether Charters' performance was deficient. See *Strickland*, 466 U.S. at 687–88. According to Sanders, Charters did not investigate mitigation leads, presented only ten minutes of mitigation testimony, and did not present testimony about Sanders' childhood abuse. See R. 73 at 283–92. Sanders alleges that if Charters had followed up on “red flags,” he would have discovered, among other facts, the following testimony of family members: that Sanders' father was drunk and routinely beat Sanders, that his father tried to run Sanders over with a car, and that Sanders' mother also beat him to the point of unconsciousness. See R. 73 at 290–91; see also *id.* at 282 (claiming that the evidence is of the exact variety that “garners the most sympathy in jurors and that routinely results in a sentence” other than death). Reasonable jurists could find that Charters' failure to investigate and present that evidence constituted deficient performance. See, e.g., *Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (holding that counsel's failure to uncover and present voluminous

mitigating evidence at sentencing could not be justified as a tactical decision because trial counsel “did not fulfill their obligation to conduct a thorough investigation of the defendant's background”); *Wiggins*, 539 U.S. at 524 (holding that a decision not to expand investigation of mitigation evidence did not meet the prevailing professional standards in the state); *Rompilla v. Beard*, 545 U.S. 374, 390–93, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (concluding that failure to examine files containing mitigating evidence amounted to ineffective assistance that prejudiced the prisoner); *Cauthern v. Colson*, 736 F.3d 465, 485 (6th Cir.2013) (discussing that an attorney's failure to investigate possible mitigation evidence in a capital case amounts to deficient performance); *Greer v. Mitchell*, 264 F.3d 663, 676–77 (6th Cir.2001) (concluding that trial counsel's performance was deficient where it “appear[ed] that trial counsel did not begin preparing for the mitigation phase of the trial until after conviction”); *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir.1995) (finding deficient performance where “the lawyers made virtually no attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty”).

*8 Under *Strickland's* second prong, reasonable jurists could also debate whether Sanders suffered prejudice from Charters' failure to present additional mitigation testimony. See *Strickland*, 466 U.S. at 693. Reasonable jurists could conclude that there was at least a “reasonable probability” that a jury would have returned a different verdict after hearing about Sanders' repeated physical trauma and childhood abuse—abuse that included head injuries. *Id.* at 694; see *Cauthern*, 736 F.3d at 486 (“[I]t is clearly established law that evidence of abuse is significant to a jury's determination of moral culpability.”).

These detailed averments, when combined with the reasonable grounds for disagreement on the merits of an ineffective-assistance claim, demonstrate that Claim 27(I) is at least “substantial.” And through his specific allegations, Sanders establishes “good cause” for why he should proceed with evidentiary development on this prong of *Martinez-Trevino*. See *Bracy v. Gramley*, 520 U.S. 899, 908–09, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (holding that a court should permit discovery where a petitioner makes specific allegations that, if proved, show reason to believe that he is entitled to relief).

B. Sanders' allegations that his post-conviction counsel was ineffective merit further evidentiary development.

In his reply memorandum in support of his habeas petition, Sanders argues that the very fact that his initial review post-conviction counsel could not meet the basic pleading standard of [RCr 11.42\(2\)](#) demonstrates their ineffectiveness. *See* R. 96 at 159 (“Pleading with specificity is something that would have been easy for counsel to do. To the extent they failed to do so, that failure was an abdication of basic requirement of advocacy that amounts to deficient performance....”). The Warden, however, disputes that Sanders’ post-conviction counsel was ineffective. *See* R. 85 at 6. Faced with this conflict, the Court must determine whether Sanders made a showing of ineffective post-conviction counsel sufficient to warrant proceeding further with this argument. To do so, the Court must determine, among other things, whether post-conviction counsel’s failure to comply with [RCr 11.42\(2\)](#) in pleading Claim 27(I) was in line with prevailing professional standards. *Cf. Clark v. Poole*, 440 F.Supp.2d 235, 242 (W.D.N.Y.2006) (“Although trial counsel’s motion papers may have been inartfully drafted, they were not so plainly inadequate as to deprive [petitioner] of his Sixth Amendment right to counsel.”); *Boyd v. Hawk*, 965 F.Supp. 443, 452 (S.D.N.Y.1997) (“While counsel was sloppy [in drafting an omnibus discovery motion, petitioner] has failed to prove that counsel’s performance fell below prevailing professional norms”).

Given these conflicting allegations, and because Sanders’ petition demonstrates that Claim 27(I) is potentially meritorious, the Court cannot dismiss this prong of the *Martinez–Trevino* test outright. Instead, Sanders’ allegations of ineffective assistance justify additional evidentiary development. *See Bracy*, 520 U.S. at 908–09. To that end, as described below, Sanders may conduct discovery, move to expand the record, and seek an evidentiary hearing to develop facts on this limited issue: whether post-conviction counsel rendered ineffective assistance in failing to adequately plead Claim 27(I) in Sanders’ [RCr 11.42](#) motion before the Kentucky courts.

*9 Sanders suggests that the Court made two additional rulings to dismiss his allegations of ineffective assistance: He hints that the Court may have found that Sanders failed to exhaust his claim of ineffective assistance of post-conviction counsel and so could not rely on that claim to excuse his procedural default. *See* R. 115 at 25–27. Sanders also argues that the Court found his ineffectiveness allegations meritless because he failed to attach supporting affidavits. *Id.* at 31–33.

But neither conclusion is consistent with the Court’s prior opinion. First, the Warden did not argue that Sanders had to exhaust his ineffective-assistance claim before that ineffective assistance could excuse his default of Claim 27(I). *See generally* R. 85 at 5–7; 53–58. And the Court did not raise exhaustion *sua sponte*, although it could have. *See Day v. McDonough*, 547 U.S. 198, 206, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006) (quoting *Granberry v. Greer*, 481 U.S. 129, 133, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987)) (explaining that “federal appellate courts have discretion to consider a state prisoner’s failure to exhaust available state remedies ... despite the State’s failure to interpose the exhaustion defense”). Regardless, it is not clear that Sanders needed to exhaust his ineffective-assistance-of-post-conviction-counsel claims in the state courts. The *Martinez* Court, for example, did not find that the ineffective-assistance-of-post-conviction-counsel claim was barred for failure to exhaust, even though the petitioner first raised the claim in the federal habeas proceeding. *See Martinez*, 132 S.Ct. at 1314–15. And the only circuit court to confront this issue has found that exhaustion is not required. *See Dickens v. Ryan*, 740 F.3d 1302, 1322 n. 17 (9th Cir.2014) (“[W]here *Martinez* applies, there seems to be no requirement that the claim of ineffective assistance of [post-conviction] counsel as cause for an ineffective-assistance-of-sentencing-counsel claim be presented to the state courts.”); *see also Matthews v. Parker*, 651 F.3d 489, 499 (6th Cir.2011), *reversed on other grounds by Parker v. Matthews*, — U.S. —, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012) (holding that petitioner did not procedurally default ineffective-assistance-of-appellate-counsel claim where “[p]etitioner’s habeas petition was his first opportunity to raise [the claim]”).

This Court, however, stated otherwise when it declined to excuse Sanders’ procedural default of another ineffective-assistance-of-trial-counsel claim on account of ineffective assistance of post-conviction counsel. *See* R. 113 at 14–17 (discussing the failure to exhaust the claim for ineffective assistance of post-conviction counsel as it related to Claim 10.8). But, at the time, the Court did not have the benefit of the Ninth Circuit decision in *Dickens*. *See GenCorp.*, 178 F.3d at 834 (concluding that, where the movant introduces a change in the law, courts may reconsider a decision under [Rule 59\(e\)](#)). And in any case, the Court did not rest its holding on the lack of excuse for Sanders’ procedural default. *See* R. 113 at 17 (concluding that Claim 10.8 is not sufficiently “substantial” such that the procedural default could be excused by the ineffective assistance of post-conviction counsel). Accordingly, the prior opinion, R.

113, is modified to the extent that it required Sanders to exhaust his ineffective-assistance-of-post-conviction-counsel argument in order to excuse his procedural default of ineffective-assistance-of-trial-counsel claims. Cf. *GenCorp.*, 178 F.3d at 834 (permitting courts to grant motions under Rule 59(e) where the movant introduces a change in the law). However, the ultimate resolution of Claim 10.8 remains unchanged because the previous opinion relied on additional grounds for why Sanders could not excuse the procedural default of that claim.

***10** Sanders' second interpretation of the Court's prior opinion is also misguided. The Court did not require Sanders to attach affidavits to his habeas petition for the purpose of demonstrating why his ineffective-assistance-of-post-conviction-counsel claim could excuse the default of Claim 27(I). See generally R. 113 at 110. The Court noted, as an alternative ground, that it could not decide the merits of the claim without affidavits or other evidence needed to make a factual determination. *Id.* There is no law requiring habeas petitioners to set forth affidavits at the initial stages of the proceeding. Rather, factual development is necessary to move forward on the claim. See, e.g., *Bracy*, 520 U.S. at 908–09 (holding that a court should permit discovery where a petitioner makes specific allegations that, if proved, show reason to believe that he is entitled to relief). So Sanders may proceed with discovery to obtain the affidavits and evidence the Court needs to resolve this question. See *infra*.²

² The Sixth Circuit's recent decision in *West v. Carpenter*, No. 13–6538, 2015 WL 3889437 (6th Cir. June 25, 2015), does not affect the analysis. *West* held that *Martinez–Trevino* does not apply where the petitioner, after raising his ineffective-assistance-of-trial-counsel claim in the state's initial post-conviction proceeding, did not appeal that claim to the state post-conviction appellate court. *Id.* at *5. The failure to appeal the claim in state post-conviction proceedings is an independent procedural default that cannot be excused through *Martinez–Trevino*'s gateway. Here, Sanders did appeal his RCr 11.42 claim regarding inadequate penalty preparation to the Kentucky Supreme Court. See Appellant's Brief at 95–102, *Sanders II*, 89 S.W.3d 380, Appellate Proceedings at 1255–62. Further, the Warden does not argue that Sanders' procedurally defaulted by failing to appeal his claim.

C. The post-conviction proceeding was the initial review proceeding for Claim 27(I).

Sanders claimed that his post-conviction proceeding was the initial review proceeding for his ineffective-assistance-of-trial-counsel claim. See R. 73 at 43–44. The Warden did not dispute this allegation. See R. 85 at 5–6 (Warden's response discussing *Martinez v. Ryan*); R. 96 at 55 (acknowledging that the Warden does not dispute that the RCr 11.42 proceeding is the initial-review proceeding for Sanders' ineffective-assistance-of-trial-counsel claims). And Sanders' direct appeal did not dispose of any claims related to ineffective assistance of trial counsel. So the RCr 11.42 proceeding was the initial review proceeding for purposes of raising ineffective-assistance-of-trial-counsel claims.

D. Kentucky state courts do not provide a meaningful opportunity to raise ineffective-assistance-of-trial-counsel claims on direct appeal.

Sanders argued in his petition and reply that *Martinez–Trevino* applies to habeas cases in Kentucky. See generally R. 73 at 17, 99–104; see also R. 96 at 54–60. But he presents a stronger argument in his Rule 59(e) motion, citing to more contemporary cases that take into account recent developments in the Sixth Circuit. And, more importantly, the Sixth Circuit has recently decided that the *Martinez–Trevino* exception applies to Kentucky cases. See *Woolbright v. Crews*, No. 13–6115, 2015 WL 3939382, at *7 (6th Cir. June 29, 2015). Accordingly, Sanders satisfies the final element for excusing procedural default under *Martinez* and *Trevino* based on the ineffectiveness of his post-conviction counsel.

Sanders may now proceed to develop facts in support of his argument for why he has cause to excuse any procedural default of Claim 27(I). See *U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496, 508 (6th Cir.2008) (stating that the “governing principle” in a motion to reconsider a prior order is whether the decision will prevent an injustice). But this does not mean that Sanders will prevail on his *Martinez–Trevino* argument. Rather, he has made only a preliminary showing that *Martinez–Trevino* applies to his case. He must still prove—after developing his factual support—that his post-conviction counsel was actually ineffective and that Claim 27(I) is substantial in order to excuse his procedural default. See, e.g., *Woolbright*, 2015 WL 3939382, at *9 (remanding to district court to “first address whether [the petitioner] can demonstrate (1) the absence or ineffective assistance of his post-conviction counsel and (2) the ‘substantial’ nature of his underlying IATC claims”). If Sanders successfully establishes cause, the Court will then assess whether he “can establish prejudice from the alleged ineffective assistance of trial counsel.” *Id.*

III. Sanders may introduce, and the Court may consider, new evidence on cause (through *Martinez–Trevino*) and prejudice and on the merits of Claim 27(I).

*11 Rule 6(a) of the Habeas Rules empowers a court to authorize a habeas petitioner to conduct discovery under the Federal Rules of Civil Procedure when the habeas petitioner demonstrates “good cause.” Cases define “good cause” as where the court has reason to believe—based on specific allegations—that the petitioner could demonstrate that he is entitled to relief if the facts are fully developed. See *Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) (“In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.”). As discussed above, Sanders’ specific allegations allow him to proceed with evidentiary development.

Before courts may consider any new evidence introduced through discovery, however, petitioners normally must clear at least two obstacles. The Anti–Terrorism and Effective Death Penalty Act (“AEDPA”), for example, imposes strict requirements on the consideration of evidence not first developed in the state court. See 28 U.S.C. § 2254(e)(2). And where the state court decided a claim on the merits, the record on federal review is limited to the same evidence before the state court. See *Cullen v. Pinholster*, —U.S. —, —, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011).

Neither of these obstacles prevents Sanders from further evidentiary development of his argument under *Martinez–Trevino* to excuse the procedural default of Claim 27(I). AEDPA’s limitations do not apply to the *Martinez–Trevino* argument because the new evidence would be offered to support Sanders’ cause-and-prejudice argument, not his claim for relief on the merits of Claim 27(I). See, e.g., *Coleman v. Hardy*, 628 F.3d 314, 319 n. 2 (7th Cir.2010) (“We join the Third and Eleventh Circuits in finding that the requirements of 28 U.S.C. § 2254(e)(2)(A) do not have to be met in order for a court to hold an evidentiary hearing on whether the petitioner has met the ... threshold necessary to consider the merits of his procedurally defaulted claim.”); *McSwain v. Davis*, 287 F. App’x 450, 462 (6th Cir.2008) (“[Section] 2254(e)(2)’s use of the term ‘claim’ applies to a substantive request for the writ of habeas corpus rather than to an excuse for procedural default.”). And *Pinholster*’s limitations do not apply here because, in state court, there was no merits

adjudication of the ineffective-assistance-of-post-conviction-counsel issue or the merits of Claim 27(I). *McClellan v. Rapelje*, 703 F.3d 344, 351 (6th Cir.2013) (“*Pinholster* only applies to limit consideration of additional evidence when the state court has previously decided the same merits issue later presented to the federal court.”). If, with the aid of new evidence, Sanders can excuse his procedural default under *Martinez–Trevino*, he may then proceed to the merits of Claim 27(I).

But before he can submit new evidence on the merits of Claim 27(I), Sanders must still overcome the limitations in § 2254(e)(2). See *Holland v. Jackson*, 542 U.S. 649, 653, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004). This requirement applies to any new evidence, whether obtained through affidavits, discovery or an evidentiary hearing. *Id.*; see also *Landrum v. Mitchell*, 625 F.3d 905, 923–24 (6th Cir.2010). To introduce evidence under § 2254(e)(2), Sanders must first show either that (1) he was not at fault for failing to develop the factual basis of his claim in state court, or that (2) the exceptions to § 2254(e)(2) apply. See *Couch v. Booker*, 632 F.3d 241, 245 (6th Cir.2011). Next, the record must not foreclose the possibility of habeas relief. See *Schriro*, 550 U.S. at 474.

*12 Sanders would not be at fault for failing to develop the factual record if he exercised due diligence in developing and presenting that evidence. *Williams v. Taylor*, 529 U.S. 420, 434–35, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). The diligence inquiry depends upon whether Sanders “made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court.” *Id.* at 435. A petitioner’s diligence does not depend on whether he was successful in litigating his habeas claims in state court. *Id.*; see also *McFarland v. Yukins*, 356 F.3d 688, 712–13 (6th Cir.2004) (holding that petitioner was “diligent” where he specifically sought an evidentiary hearing in his state petition for post-conviction relief and the petition was denied); *Greer v. Mitchell*, 264 F.3d 663, 681 (6th Cir.2001) (same). Instead, “[a] petitioner is diligent when he requests, but is denied, an evidentiary hearing in state court.” *Washington v. Renico*, 455 F.3d 722, 731 n. 4 (6th Cir.2006) (citing *McFarland*, 356 F.3d at 712).

Here, Sanders sought an evidentiary hearing on Claim 27(I) when he raised it in his motion for post-conviction relief and on his appeal to the Kentucky Supreme Court. See Motion to Vacate at 62, Appellate Proceeding at 562; Appellant’s Brief at 100, *Sanders II*, 89 S.W.3d 380, Appellate Proceedings at 1260. That the Kentucky courts did not hold an evidentiary

hearing is of no moment. Similarly, the absence of any affidavits or other extrinsic evidence with Sanders' RCr 11.42 motion is irrelevant because Kentucky law does not require such support. See *Mills v. Commonwealth*, 170 S.W.3d 310, 325 (Ky.2005), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky.2009). Under Sixth Circuit precedent, Sanders' request for an evidentiary hearing on Claim 27(I) in state court establishes the diligence that will allow him to circumvent the restrictions of § 2254(e)(2). Because Sanders can overcome the limitations of § 2254(e)(2) on Claim 27(I), he may be entitled to an evidentiary hearing if he can excuse his procedural default. See *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), *overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992); *Woolbright*, 2015 WL 3939382, at *9 (discussing how the “absence of factual development ... nullifies a key advantage of bringing such [ineffective-assistance-of-trial-counsel] claims in collateral proceedings” and “hamstrings” courts' ability to adjudicate *Strickland* prejudice). If new evidence reveals that Sanders has not been diligent, however, the Court reserves the right to exclude evidence in its adjudication of the merits.

One last requirement remains. The Court need not conduct a hearing if the record otherwise contains evidence that forecloses relief for Sanders. *Schriro*, 550 U.S. at 474 (“It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.”). At this stage, the record contains no facts that would foreclose habeas relief on Claim 27(I).

***13** Before proceeding with full-fledged discovery, however, Sanders must submit sworn affidavits from the witnesses he identified in Claim 27(I) as having mitigation testimony. Rule 7 of the Habeas Rules permits the Court to expand the record by allowing the parties to file documents such as affidavits. Expanding the record may demonstrate that an evidentiary hearing is unnecessary. See 1976 Advisory Committee Notes to Rule 7 of the Habeas Rules (“Authorizing expansion of the record will, hopefully, eliminate some unnecessary hearings.”). In this case, affidavits from the mitigation witnesses would assist the Court in determining ineffectiveness and whether the absence of the potential testimony prejudiced Sanders, which is relevant to the *Martinez—Trevino* analysis, the prejudice prong of the cause-and-prejudice gateway and *Strickland* prejudice. See *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir.2014) (describing the overlapping nature of the *Martinez*

and *Strickland* inquiries); cf. *Kafo v. United States*, 467 F.3d 1063, 1067 (7th Cir.2006) (explaining the Seventh Circuit's rule in § 2255 cases that producing an affidavit is a threshold requirement for obtaining an evidentiary hearing). Sanders must also file a brief explaining the relevance of the affidavits to the *Martinez—Trevino* analysis. The Warden will have the opportunity to respond to Sanders' brief, as well as contest the veracity of the affidavits as permitted by Rule 7. See Rule 7(c) of the Habeas Rules (“The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.”).

CONCLUSION

Sanders' motion justifies reconsideration on two issues in his habeas petition: (1) whether his post-conviction counsel was ineffective as to excuse procedural default of an ineffective-assistance-of-trial-counsel claim under *Martinez—Trevino*, and (2) whether he alleged facts that, if proven, would be sufficient to show that he is entitled to relief on the underlying claim. So the Court reconsiders its prior opinion in part. And because Sanders alleged specific facts that, if proven, would entitle him to relief, he may progress with discovery on these discrete issues. In order to streamline the litigation, Sanders must first submit sworn affidavits from the potential mitigation witnesses that he identified in Claim 27(I). The affidavits must describe the testimony those witnesses would have offered at the penalty phase of Sanders' trial. The Warden may then respond to those submissions. After the Warden's response, the Court will determine if an evidentiary hearing or further discovery on Sanders' *Martinez—Trevino* argument and Claim 27(I) is warranted.

Accordingly, it is **ORDERED** that:

(1) Sanders' motion for reconsideration under [Federal Rule of Civil Procedure 59\(e\)](#), R. 115, is **GRANTED IN PART** and **DENIED IN PART**.

(2) The Court's previous judgment, R. 114, is **VACATED** as it applies to the resolution of Claim 27(I).

***14** (3) By **Monday, August 17, 2015**, Sanders **SHALL FILE** sworn affidavits from witnesses identified in Claim 27(I), detailing the mitigation testimony that they would have provided during the penalty phase. By **Monday, August 17, 2015**, Sanders also **SHALL FILE** a brief explaining

the relevance of the affidavits to his cause-and-prejudice argument.

(4) By **Tuesday, September 8, 2015**, the Warden **SHALL RESPOND** to both the affidavits and Sanders' brief.

(5) By **Tuesday, September 22, 2015**, Sanders may file a reply.

(6) If the affidavits demonstrate the need for an evidentiary hearing on Sanders' cause-and-prejudice argument, the Court will inform the parties. If Sanders establishes cause and prejudice for his procedural default on Claim 27(I), the Court will set a deadline to file a motion to expand the record or hold an evidentiary hearing on the merits of that claim.

(7) Sanders' motion for a certificate of appealability, R. 120, is **DENIED WITHOUT PREJUDICE**. Cf. *Jennings v. Stephens*, — U.S. —, —, 135 S.Ct. 793, 802, 190 L.Ed.2d 662 (2015) (“Whether or not [28 U.S.C. § 2253(c)] embraces a cross-appeal, it assuredly does not embrace the defense of a judgment on alternative grounds.”). Sanders may refile his certificate of appealability, if necessary, after resolution of the issues surrounding Claim 27(I).

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United States District Court, E.D. Kentucky,
Central Division at Lexington.

David Lee SANDERS, Petitioner,

v.

Randy WHITE, Warden, Respondent.

Civil No. 03-455-ART

I

Signed 06/21/2016

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

[Amul R. Thapar](#), United States District Judge

*1 It is serious business to question the fairmindedness of another judge. Almost thirty years ago, David Lee Sanders shot and killed two men execution-style. A Kentucky jury later convicted him and sentenced him to death. In a motion for post-conviction relief in state court, Sanders argued that his defense attorney provided ineffective assistance during the sentencing hearing when he failed to have Sanders's friends and family testify that Sanders was abused as a child. The Kentucky Supreme Court ultimately rejected that claim on the merits, which means the Antiterrorism and Effective Death Penalty Act—more commonly known as AEDPA—applies to the claim. *See* 28 U.S.C. § 2254. The problem for Sanders is that, in his briefs before the Kentucky Supreme Court, he failed to state exactly what his friends and family would have said on the stand had they been called to testify. Because of that failure, this Court has no basis on which to conclude that the justices of the Kentucky Supreme Court were being anything other than “fairminded” when they rejected Sanders's claim. Under AEDPA, that means he is not entitled to habeas relief.

I.

The Court has previously summarized the facts of this case on two occasions. *See* R. 128 at 2–4; R. 113 at 2–6. The essential details related to the claims at issue here are as follows. On January 28, 1987, Sanders shot and killed the owner and a customer of a convenience store in Madison County, Kentucky, and he took money from behind the counter. When police initially questioned him about his activities on that day, Sanders admitted to driving to Madison County but maintained that he did not kill anyone. On February 2, 1987, the police transported Sanders to the local jail. There, Sanders manifested troubling behaviors: He repeatedly hit his head against the cell wall and stated that he wanted to kill himself. Sanders's appointed counsel, Ernie Lewis, videotaped Sanders's bizarre actions. The next day, Sanders admitted to the murders in his interview with the police. He explained that, during the murders, he could see himself shooting the men and was unable to stop himself.

Soon after Sanders confessed to the shootings, a grand jury indicted him on two charges of capital murder and two charges of first-degree robbery. Sanders's retained counsel, Kevin Charters, moved to evaluate Sanders's mental health and psychiatric condition. The trial court ordered the Kentucky Correctional Psychiatric Center (“KCPC”) to evaluate Sanders. As part of the evaluation, the trial court directed the KCPC to determine whether he was insane at the time he committed the shootings and whether he was competent to stand trial. The KCPC conducted a series of tests and examinations over six weeks, employing multiple psychiatrists. The lead KCPC investigator, Dr. Candace Walker, summarized the team's collective findings in a report. The report concluded that, though Sanders may suffer from a mixed-personality disorder, he did not suffer from a mental condition that compromised his capacity to conform his behavior to the law. The report also concluded that he was competent to stand trial. But the report did not include the findings of one KCPC psychologist, Dr. Frank Flenning, whose findings were inconsistent with those reported. In his individual report, Dr. Flenning documented the physical abuse Sanders experienced throughout his childhood at the hands of his parents. Dr. Flenning also concluded that Sanders experienced dissociative states, suffered from a fragmented personality, and had the potential for “brief psychotic episodes wherein he would experience a loss of contact with reality.”

*2 After his KCPC evaluation, Sanders went to trial and presented an insanity defense. At the conclusion of a week-long proceeding, the jury convicted Sanders of both murder counts and both robbery counts. After a weekend recess, the trial court conducted the penalty phase of the trial. Charters introduced mitigation testimony from the assistant principal of Sanders's former school, Sanders's neighbor, his boss, and his sister. After hearing this testimony, the jury deliberated and sentenced Sanders to death.

Sanders appealed the decision, but the Kentucky Supreme Court upheld the verdict. See *Sanders v. Commonwealth*, 801 S.W.2d 665 (Ky. 1990) (*Sanders I*). He then filed a motion for post-conviction relief under *Kentucky Rule of Criminal Procedure* ("RCr") 11.42. That, too, was denied. See *Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 2002) (*Sanders II*). Sanders filed a petition for a writ of habeas corpus in this Court. Soon afterward, he obtained leave to present additional, unexhausted claims to the state court. R. 32. The Kentucky Supreme Court again denied relief, determining that Sanders could have presented his latest batch of claims in his prior appeals. See *Sanders v. Commonwealth*, 339 S.W.3d 427 (Ky. 2011) (*Sanders III*). After his third and final trip to the Kentucky courts, Sanders withdrew some claims from his federal habeas petition. When this Court denied relief on his amended petition, R. 113, Sanders filed a motion for reconsideration under *Federal Rule of Civil Procedure* 59. The Court granted that motion with respect to one of Sanders's claims, Claim 27(I). R. 128.

Initially, the Court held that Sanders had procedurally defaulted on that claim. R. 128 at 5 (citing R. 113 at 12–13). After reviewing the Kentucky Supreme Court's decision in more detail, however, the Court noticed that the state court seemed to have decided Claim 27(I) on the merits rather than on procedural grounds. Accordingly, the Court asked the parties to file supplemental briefs addressing whether the Kentucky Supreme Court had indeed adjudicated Claim 27(I) on the merits. R. 134. After some back and forth, both parties ultimately agreed that Sanders had not procedurally defaulted his claim and that the Kentucky Supreme Court had adjudicated the claim on the merits. R. 138; R. 139; R. 141. The Court therefore ordered the parties to brief the question whether Sanders could make the showing required under AEDPA, 28 U.S.C. § 2254. The parties filed those briefs. R. 143; R. 144; R. 146; R. 147. The Court must therefore consider whether Sanders has satisfied AEDPA with respect to Claim 27(I).

II.

In Claim 27(I), Sanders argues that his defense attorney provided constitutionally ineffective assistance when he failed "to investigate and prepare for [the] penalty phase" and failed "to present available mitigating evidence." R. 10-2 at 61; R. 73 at 268. Specifically, he says that, during the sentencing hearing, counsel should have presented evidence that Sanders had been abused as a child and that Sanders had suffered numerous [head injuries](#). R. 73 at 268. That evidence could have come from a variety of sources, Sanders says: his mother, brothers, grandparents, wife, relatives, and friends, as well as members of the clergy. *Id.* at 268–69.

Sanders made this argument before the Kentucky Supreme Court, R. 146-2 at 50–52, and the Kentucky Supreme Court rejected it on the merits. *Sanders II*, 89 S.W.3d 380, 390 (Ky. 2002). Despite initial disagreement, both parties now agree that the Kentucky Supreme Court's decision was a decision "on the merits" for the purposes of AEDPA. See R. 141 (answering "yes" to the question "does [the Warden] agree with Sanders that Claim 27(I) is not procedurally defaulted?"); R. 139 at 1 (agreeing that the Kentucky Supreme Court had reached the merits of Claim 27(I)). Because the state court adjudicated Claim 27(I) on the merits, this Court cannot grant habeas relief to Sanders unless he can satisfy AEDPA's gatekeeping requirements. See 28 U.S.C. § 2254(d).

*3 When AEDPA applies to a claim, a federal court generally must deny habeas relief. 28 U.S.C. § 2254(d). There are only three exceptions to that rule. First, a federal court may grant habeas relief if the state court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." *Id.* § 2254(d)(2). Alternatively, a federal court may grant habeas relief if the state court's adjudication "resulted in a decision that was contrary to ... clearly established [f]ederal law, as determined by the Supreme Court of the United States[.]" *Id.* § 2254(d)(1). Finally, a federal court may grant habeas relief if the state court's adjudication "resulted in a decision" that "involved an unreasonable application of ... clearly established [f]ederal law, as determined by the Supreme Court of the United States." *Id.* If a prisoner cannot show at least one of those things, then a federal court must deny his habeas petition.

A. Whether the Kentucky Supreme Court unreasonably determined the facts

Sanders first argues that the Kentucky Supreme Court unreasonably determined the facts. *See* R. 144-1 at 1; 28 U.S.C. § 2254(d)(2). Specifically, Sanders says that the state court did so when it said that Sanders did “not indicate what testimony [the unpresented family members] would have offered.” R. 144-1 at 2 (citing *Sanders II*, 89 S.W.3d at 390). In Sanders’s view, he indicated in his briefs what testimony the family members would have offered, and thus he says that the state court determined the facts unreasonably.

As an initial matter, this kind of determination—that a party has failed to provide enough detail in his brief—is not a determination of “fact” as that word is used in the AEDPA statute. True, “[i]n regard to § 2254(d), as in other contexts, the proper characterization of a question as one of fact or law is sometimes slippery.” *Thompson v. Keohane*, 516 U.S. 99, 110-11 (1995). The reason is that almost *any* statement in a judicial opinion is in some sense a statement of fact. When a judge says that a case states a certain point of law, for example, he is in some sense asserting a fact: that the judges who decided the case *in fact* decided it in a certain way. When a judge says that he “disagrees” with an argument, he is likewise asserting a fact: the fact that he disagrees. The date, the docket number, the name of the court—all of these are factual assertions, but surely none of them are “determinations of the facts” as that phrase is used in 28 U.S.C. § 2254. The Court would not grant habeas relief just because a case was miscaptioned, for example, even though that sort of thing does happen from time to time. And so, with a few exceptions not relevant here,¹ a “fact” for habeas purposes means “what happened.” *Thompson*, 516 U.S. at 111. That is, a factual issue is an issue about “basic, primary, or historical facts”—facts “in the sense of a recital of external events and the credibility of their narrators.” *Id.* (quotation marks and citations omitted). Whether a light was green or red, whether a death was caused by one act or another, whether a witness was lying or not lying: These are fact questions. They are questions about what happened out there in the world. They turn on “a subsidiary finding of historical fact or an appraisal of witness credibility.” *McMullan v. Booker*, 761 F.3d 662, 671 (2014). The question that the state court answered here—whether Sanders had been specific enough in his brief—is of course nothing like those questions. It is probably best understood as a legal question—*i.e.*, whether Sanders presented enough facts to rebut the presumption that counsel provided effective assistance—or

at the very least a mixed question of law and fact.² It is certainly not a purely “factual” question for the purposes of the AEDPA statute. When the state court answered that question, therefore, it did not “determin[e] the facts” at all, and thus likewise did not do so “unreasonabl[y].” 28 U.S.C. § 2254(d)(2).

¹ The Supreme Court has identified at least two kinds of “factual issues” that “extend[] beyond the determination of ‘what happened.’ ” *Thompson*, 516 U.S. at 464. They are “competency to stand trial” and “juror impartiality.” *Id.*

² Courts answer questions like this all the time. Sometimes these questions arise in procedural contexts, *e.g.*, when a court must decide whether a defendant has waived an argument. Sometimes these questions arise in more substantive contexts, *e.g.*, when a court must decide whether a complaint states a claim upon which relief can be granted. In none of these situations would we call these questions “factual” ones. Each of them is a question of law. The question here—whether Sanders provided enough facts to show that counsel was ineffective—falls on the substantive side. But it nevertheless is not a factual conclusion. *Cf. McMullan*, 761 F.3d at 671 (noting that “the effectiveness of counsel’s assistance” is a “legal” issue rather than a “factual” one).

*4 Moreover, even if the Court were to classify the Kentucky Supreme Court’s determination as a factual one, it was not unreasonable. “As [the Supreme Court has] observed in related contexts, ‘[t]he term ‘unreasonable’ is no doubt difficult to define.’ ” *Wood v. Allen*, 558 U.S. 290, 301 (2010) (citing *Williams v. Taylor*, 529 U.S. 362, 410 (2000)). Even so, the Supreme Court has made clear that “a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.” *Id.* Instead, a habeas petitioner must show that the state court’s decision was objectively “unreasonable,” which is a “substantially higher threshold.” *Schiro v. Landrigan*, 550 U.S. 465, 473, (2007). To do that, the petitioner needs to show that a “reasonable factfinder must conclude” that the state court decision was wrong. *Rice v. Collins*, 546 U.S. 333, 341 (2006).³

³ The Sixth Circuit has framed the standard as follows: the federal court “must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.” *McMullan*, 761 F.3d at 672. This appears to

be merely a different phrasing of the standard that the Supreme Court laid down in *Rice*.

In his brief before the Kentucky Supreme Court, Sanders provided very little information about what his friends and family would have said during the sentencing hearing if counsel had called them to the stand. Indeed, he provided only two sentences of detail about their hypothetical testimony. In the first sentence, he said that his family members “could have provided information and testimony relevant as mitigation, including corroborated [sic] David [sic] statements of physical abuse.” R. 146-1 at 51. In the second sentence, he said that friends and clergy “could relay information relevant to mitigation in the penalty phase of the trial.” *Id.* That is all the detail he provided. He attached no affidavits. He provided no summary of potential testimony. He did not even identify which friends and family he thinks would have testified. A “reasonable mind” could therefore agree with the Kentucky Supreme Court that Sanders had failed to “indicate what testimony [the unpresented family members] would have offered.” *Sanders*, 89 S.W.3d at 390.

Sanders responds in two ways. First, he says that when he mentioned “physical abuse,” that passing reference was enough to indicate what testimony the witnesses would have offered. This counterargument nicely highlights the problem with treating the Kentucky Supreme Court’s determination as a factual one. Yes, Sanders did mention that the witnesses would have said something about “physical abuse.” So Sanders did, in some sense, indicate what testimony the family members would have offered—at least at a very high level of generality. As explained above, however, what the Kentucky Supreme Court seems to have been saying is that Sanders was not specific enough about what the witnesses’ testimony would have been—and thus provided no basis on which the court could call defense counsel’s performance constitutionally deficient. That of course is a legal conclusion rather than a purely factual determination. In any event, given the scant detail Sanders provided in his briefs, a “reasonable factfinder” could believe that he failed to indicate what testimony those family members would have offered. *Rice*, 546 U.S. at 334. After all, he didn’t even say which family members would have testified. So this argument fails.

Second, Sanders argues that the Kentucky Supreme Court’s decision was based on an unreasonable determination of the facts because the court failed to give him an evidentiary hearing. R. 144-1 at 4 (arguing that Sanders “was thus entitled to a hearing based on the allegations he had made, and the failure to have provided that hearing ... renders any factual

findings to have been based on an unreasonable determination of the facts”). That argument would be a more compelling one if the Kentucky Supreme Court had said that “Sanders was never abused” or that “none of his family members would have testified that he had been abused.” But that is not what the state court said. Instead, the court said that Sanders failed to explain what his relatives would have testified to during his mitigation hearing. This is not a statement about “what happened” out in the world. This is a statement about the contents of Sanders’s brief. An evidentiary hearing would not have changed the contents of Sanders’s brief.⁴

4 It is possible that Sanders’s real argument is that the factual finding is unreasonable *because* the state court did not hold an evidentiary hearing. That is, he might be saying that it was unreasonable for the Kentucky Supreme Court to find—without first holding an evidentiary hearing—that he had failed to “indicate what testimony [the unpresented family members] would have offered.” R. 144-1 at 2. But “AEDPA does not make deference to state court fact-finding dependent on the adequacy of the procedures followed by the state court.” *Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010). So long as the ultimate factual determination was reasonable—which it was here—a petitioner cannot satisfy AEDPA merely by quibbling with the process used to reach that determination.

*5 In this way, Sanders’s situation is very different from the one at issue in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), a case that Sanders cites in support of his argument. There, a state rule gave a capital defendant the right to an evidentiary hearing only if he could “raise a ‘reasonable doubt’ as to [his] intellectual disability.” *Brumfield*, 136 S. Ct. at 2276. The state court determined that the defendant failed to raise a reasonable doubt, and the Supreme Court held that the state court’s determination was unreasonable. *Id.* at 2277–82. Here, by contrast, no Kentucky rule gives an inmate the right to an evidentiary hearing in order to develop an ineffective-assistance claim that the defendant pled skeletally in his brief. Thus, nothing in *Brumfield* suggests that the state courts unreasonably determined the facts when they failed to grant Sanders an evidentiary hearing. Sanders has therefore failed to make the showing required under 28 U.S.C. § 2254(d)(2).⁵

5 Alternatively, Sanders might be arguing that the Kentucky Supreme Court violated state law when it failed to grant him an evidentiary hearing. But a prisoner is not entitled to habeas relief just because the state courts misapplied state law. *Walker v. Engle*, 703 F.2d 959,

962 (6th Cir. 1983). So to extent that is Sanders's true argument, the Court need not address it.

B. Whether the Kentucky Supreme Court's decision was "contrary to" clearly established precedent from the United States Supreme Court

Sanders next argues that, when the Kentucky Supreme Court rejected Claim 27(I), it rendered a decision "contrary to" clearly established precedent from the United States Supreme Court. R. 144-1 at 7; see 28 U.S.C. § 2254(d)(1). There are two ways in which a state-court decision can be "contrary to [the Supreme Court's] clearly established precedent." *Williams*, 529 U.S. 362 at 405. The first is if "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Id.* at 406. Not even Sanders argues that the facts of his case are materially indistinguishable from any Supreme Court case. So he turns to the second way.

A state-court decision can also be "contrary to" clearly established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Id.* For example, *Strickland* makes clear that a prisoner can show prejudice (from ineffective assistance of counsel) by showing a "reasonable probability" that the result of the proceeding would have been different but for his attorney's errors. *Strickland*, 466 U.S. 668, 694 (1984). Thus, "[i]f a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed' to [the Supreme Court's] clearly established precedent[.]" *Williams*, 529 U.S. at 405–06. And thus the state court would have rendered a decision "contrary to" Supreme Court precedent. To render a decision "contrary to" Supreme Court precedent, therefore, the state court must depart from a rule that Supreme Court precedent has clearly established.

Here, Sanders raised an ineffective-assistance-of-counsel claim before the Kentucky Supreme Court. The "governing law" was therefore *Strickland*. Is that the law that the Kentucky Supreme Court applied? Indeed it was. The Kentucky Supreme Court cited *Strickland*, articulated the rule laid down in *Strickland*, and ultimately applied *Strickland*. See *Sanders II*, 89 S.W.3d at 390. Thus, the Kentucky

Supreme Court did not "appl[y] a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Williams*, 529 U.S. at 405. On the contrary, it applied the right rule and did so explicitly.

*6 Moreover, the Supreme Court has made clear that cases like this one do not implicate the "contrary to" clause of § 2254. "Assume, for example," the Supreme Court said in *Williams*, "that a state-court decision on a prisoner's ineffective-assistance claim correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim. Quite clearly, the state-court decision would be in accord with our decision in *Strickland* as to the legal prerequisites for establishing an ineffective-assistance claim." *Williams*, 529 U.S. at 406. Thus, the Court held, the state court's decision in such a case would not be "contrary to" Supreme Court precedent. *Id.* This is such a case.

Sanders responds that, in addition to applying the general rule laid down in *Strickland*, the Kentucky Supreme Court also should have applied the more specific rules laid down in the U.S. Supreme Court's later ineffective-assistance cases—specifically, *Porter*, *Van Hook*, *Wiggins*, and *Sears*. See *Porter v. McCollom*, 558 U.S. 30, 39 (2009); *Bobby v. Van Hook*, 558 U.S. 4, 7–8 (2009); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Sears v. Upton*, 561 U.S. 945, 954–56 (2010). In Sanders's view, those cases make clear that "the decision to forego any type of mitigation is automatically unreasonable if counsel did not first conduct a reasonable investigation, because without investigation, it is impossible to make a fully informed strategic decision." R. 144-1 at 8. When the Kentucky Supreme Court "failed to apply this governing rule," the argument seems to go, the state court rendered a decision "contrary to" Supreme Court precedent. *Id.*

There are several problems with this argument. One is rather fundamental. When the Kentucky Supreme Court decided Sanders's case, the United States Supreme Court had not yet decided the cases that Sanders now cites. As is evident from the captions above, *Porter* and *Van Hook* were decided in 2009, *Wiggins* in 2003, and *Sears* in 2010. To be "clearly established" federal law, the law must be "established" in the first place at the time that the state court made its decision. See, e.g., *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011). The "governing law" that Sanders points to was not yet established when the Kentucky Supreme Court rejected Claim 27(I) in 2002. Thus, the Kentucky Supreme Court's decision could not have been "contrary to" any of those cases.⁶

⁶ Sanders also cites *Claudy* and *Carter*, two cases that the United States Supreme Court decided before 2002. See *Pennsylvania v. Claudy*, 350 U.S. 116 (1956); *Carter v. Texas*, 177 U.S. 442 (1900). Those are not *Strickland* cases at all—indeed, they were decided before *Strickland*—so the Kentucky Supreme Court’s decision was not contrary to them.

There is another problem with Sanders’s argument.⁷ Sometimes the Supreme Court states rules at varying levels of generality over the course of several cases in the same line. See *Drummond v. Houk*, 797 F.3d 400, 403 (6th Cir. 2015) (recognizing this fact). For example, the Court laid down a general rule in *Strickland* that counsel must provide “reasonably effective assistance.” *Strickland*, 466 U.S. at 687. In later cases—such as the ones that Sanders cites—the Court has defined what that general rule means in more specific factual contexts. But so long as the state court cites and applies the general rule—*Strickland*—the state court’s failure to discuss explicitly the Court’s more specific rules does not mean that the state court has issued a decision “opposite in character or nature” to established Supreme Court precedent. *Williams*, 529 U.S. at 405. Far from it: by applying the more general *Strickland* standard, the state court ensured that it was sufficiently in the ballpark of established Supreme Court precedent and thus avoided making a ruling “contrary to” that precedent.

⁷ The fact that Sanders cites only cases that post-date the Kentucky Supreme Court decision should be the end of the matter. It is up to the petitioner—not the Court—to identify which Supreme Court cases the state court’s decision contradicts. Even so, he does make a passing reference to the Supreme Court’s decision in *Williams*, which was decided in 2000. And meanwhile some of the cases he cites—in particular *Wiggins* and *Porter*—cite to *Williams* as well. Since this is a death penalty case, the Court will assume that Sanders wishes to argue that the state court’s decision was contrary to *Williams* as well—or perhaps that he wishes to argue that these later cases are “illustrative” of the proper application of *Strickland*. See *Wiggins*, 539 U.S. at 522 (holding that the opinion in *Williams* was “illustrative of the proper application of [*Strickland*].”). And thus the Court will explain why the state court’s decision is not “contrary to” any of the cases that Sanders cites, regardless of whether they were decided before or after the Kentucky Supreme Court’s decision.

*7 Consider the following example. Assume the Supreme Court laid down a general rule that all birds must be kept in

a cage. And assume the Court later laid down a more specific rule that, if the bird is an eagle, then it must be kept in an iron cage. If a state-court opinion said “all eagles must be kept in gold cages,” that opinion would indeed be “contrary to” the Supreme Court’s governing law. See *id.* For these two rules (if eagle, then iron cage; if eagle, then gold cage) are “diametrically different” from one another. *Id.* But what if the state-court opinion said only that “all eagles must be kept in cages?” True, such an opinion could have been more specific—the state court could have just skipped straight to iron cages. But it would be impossible to say that the state court had “contradict[ed]” the Supreme Court’s established precedent. *Id.*

So too here. The state court could have discussed the Supreme Court’s more specific ineffective-assistance cases, but since those cases are merely applications of *Strickland*, the state court did not “contradict” any Supreme Court case by citing *Strickland* alone. For the purposes of AEDPA’s “contrary to” clause, talking about *Strickland* itself is enough. In sum, Sanders has failed to show that the state court’s adjudication of his claim “resulted in a decision that was contrary to ... clearly established law as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1).

C. Whether the Kentucky Supreme Court unreasonably applied precedent from the United States Supreme Court

1. Standard of review

As an initial matter, the parties dispute the standard of review that the Court should apply. Claim 27(I) is of course a *Strickland* claim, and *Strickland* claims have two components: deficient performance and prejudice. 466 U.S. at 687. Under Sixth Circuit case law, “[w]hen a state court relied only on one *Strickland* prong to adjudicate an ineffective assistance of counsel claim, AEDPA deference does not apply to review of the *Strickland* prong not relied upon by the state court. The unadjudicated prong is reviewed de novo.” *Rayner v. Mills*, 685 F.3d 631, 638 (6th Cir. 2012); see also *Porter*, 130 S. Ct. 447, 452 (2009) (“Because the state court did not decide whether Porter’s counsel was deficient, we review this element of Porter’s *Strickland* claim [de novo].”). In Sanders’s view, the Kentucky Supreme Court rejected Claim 27(I) on deficient-performance grounds alone and did not reach the prejudice prong. See R. 144-1 at 14. Thus, Sanders concludes, the Court should apply AEDPA deference only to the state court’s determination of the performance prong and should review the prejudice prong de novo. *Id.* at 11.

The problem with that argument is that the true basis of the Kentucky Supreme Court's decision is hard to discern. Yes, the court did say that "[t]he decision as to whether or not to call family members as mitigation witnesses is a strategic one which will not be second-guessed by hindsight." *Sanders II*, 89 S.W.3d at 390–91 (citing *Fretwell v. Norris*, 133 F.3d 621 (8th Cir. 1998)). But that sentence states a legal *rule* rather than a legal *conclusion*. And nowhere did the state court flatly state that Sanders had failed to show deficient performance. Moreover, a court is of course at liberty to reject a *Strickland* claim on both performance *and* prejudice grounds—it is not as if a court must stop the analysis after determining that a defendant has failed to show deficient performance. And the state-court opinion suggests that the Kentucky Supreme Court might have done just that here. After all, the state court said that "[t]he burden is on Sanders to give specific facts to establish ineffective assistance of counsel claims, both as to unreasonable performance *and* prejudice," *id.* (emphasis added), before going on to reject Claim 27(I) without identifying which half of Sanders's burden he had failed to meet.

*8 What is a federal court to do in a situation like this, in which the state court undisputedly rejected a *Strickland* claim on the merits, but nowhere specified the specific reasoning? The nearest analogue seems to be the Supreme Court's opinion in *Harrington v. Richter*, 562 U.S. 86 (2011). There, the California Supreme Court rejected the petitioner's *Strickland* claim on the merits but failed to provide any reasoning at all. The Supreme Court ruled that in such situations, when "a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements of a multipart claim it found insufficient, for § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." *Harrington*, 562 U.S. at 98; see also *Johnson v. Williams*, 133 S. Ct. 1088, 1094 (2013) ("Although *Richter* itself concerned a state-court order that did not address *any* of the defendant's claims, we see no reason why the *Richter* presumption should not also apply when a state-court opinion addresses some but not all of a defendant's claims.").

It is true, of course, that the state court decision in *Harrington* was far more skeletal than the one here. The California Supreme Court there rejected the claim in a single sentence; the Kentucky Supreme Court here rejected it over several

paragraphs. Even so, as in *Harrington*, so too here: It is simply impossible for the Court to divine the true basis of the state court's decision—whether the state court rejected the claim on performance grounds, on prejudice grounds, or perhaps on both grounds. And in situations like that, *Harrington*—rather than *Porter*—seems to provide the relevant rule. After all, it is clear that the Court must apply AEDPA deference to at least one of the *Strickland* prongs. This is because the state court adjudicated Sanders's claim "on the merits," thus triggering the AEDPA statute. And if the Court cannot figure out which prong the state court adjudicated, then it cannot know which prong gets the deference and which prong gets the de novo review. The only remaining option is to apply the presumption from *Harrington*. Thus, the Court will apply AEDPA deference to both prongs of Sanders's ineffective-assistance claim.

2. Deficient performance

"Even [on direct] review, the standard for judging counsel's representation is a most deferential one." *Harrington*, 562 U.S. at 105. The question under *Strickland* is not whether Sanders's defense attorney "deviated from best practices or most common custom," but whether his "representation amounted to incompetence under 'prevailing professional norms.'" *Id.* (citing *Strickland*, 466 U.S. at 690). "On habeas review the standard is more deferential still." *Davis v. Carpenter*, 798 F.3d 468, 473 (6th Cir. 2015). Given that Sanders raised this claim before the Kentucky Supreme Court—which rejected it on the merits—the question here is whether any "fairminded jurist" could agree with the state court that counsel satisfied the reasonableness standard set forth in *Strickland*. *Harrington*, 562 U.S. at 101. "That standard is a general one, governing a great blue-water of attorney conduct: from pretrial discovery to plea-bargaining, from in-court trial tactics to post-verdict motions, from direct appeals to post-conviction challenges. The Supreme Court has charted only parts of that expanse." *Davis*, 798 F.3d at 473. The Supreme Court's *Strickland* cases "serve as navigation buoys, marking the points on which courts have foundered in the past—and thus should not approach again." *Id.* "If a defendant shows that his attorney failed to tell him about a potential plea deal, for example, then a state court should know [because of the Supreme Court's holding in *Missouri v. Frye*, 132 S. Ct. 1399 (2012)] that it cannot hold that counsel's performance was reasonable nonetheless And if a state court were to take that course anyway, we would say that no fairminded jurist would have done the same." *Id.*

*9 “But here the [Kentucky] courts found themselves in open water.” *Id.* In 2002, “[t]he Supreme Court ha[d] never reached the specific question[],” *id.*, that the Kentucky Supreme Court answered in this case: namely what kinds of evidence the Constitution requires a defense attorney to present during a sentencing hearing.⁸ Thus, when the Kentucky Supreme Court was adjudicating Sanders’s claim, “[t]he only buoy in sight, far off on the horizon, was the Court’s guidance in *Strickland* itself that counsel’s efforts must be within ‘the wide range of reasonable professional assistance[.]’ ” *Id.* (citing *Strickland*, 466 U.S. at 689).

⁸ Sanders cites several Supreme Court decisions that define in greater detail just what a defense attorney must do during a death-penalty sentencing hearing. In particular, he points out that the Supreme Court held in *Wiggins* that “a reviewing court must consider the reasonableness of the [defense counsel’s] investigation said to support [a given sentencing] strategy.” *Wiggins*, 539 U.S. at 527. But *Wiggins* was not decided until 2003. Thus, the Kentucky Supreme Court did not have the benefit of that case’s guidance when it adjudicated Sanders’s claim in 2002.

That rule is “as general as they come.” *Id.* And “[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.” *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). For “[a]pplying a general standard to a specific case can demand a substantial element of judgment.” *Id.* The question is therefore whether there is “any reasonable argument” that Sanders failed to show deficient performance, *i.e.*, that defense counsel provided ineffective assistance when he failed to have family and friends testify during Sanders’s sentencing hearing. *Harrington*, 562 U.S. at 89.

There are two such arguments here. First, Sanders’s brief in the Kentucky Supreme Court contained very little detail. As discussed above, Sanders provided hardly any information in his brief about what his friends and family members would have said if called. He said only that family members “could have provided information and testimony relevant as mitigation, including corroborated [sic] David [sic] statements of physical abuse,” and that friends and clergy “could relay information relevant to mitigation in the penalty phase of the trial.” R. 146-1 at 51. Provided with so few details, it would have been difficult for the Kentucky Supreme Court to label “professionally unreasonable” defense counsel’s decision not to call Sanders’s friends and family. And it would certainly be impossible for this Court

to characterize the state court’s refusal to apply that label as something that no fairminded jurist would do. *Harrington*, 562 U.S. at 98.

Second, there is at least a “reasonable argument” that Sanders’s friends and family would have provided only cumulative testimony. Some federal circuit courts have held that a defense attorney need not present cumulative evidence, and the judges in those circuit courts are presumably fairminded ones. *See, e.g., Van Poyck v. Florida Dep’t of Corrections*, 290 F.3d 1318, 1324 (11th Cir. 2002). Here, Sanders did testify—albeit during the guilt phase—that his parents had abused him: that his father was an alcoholic, that his mother hit him in the head with a piece of firewood, that his father would call him names, that his parents never told him that they loved him before he was arrested, and that his father hit him with tobacco sticks, water hoses, and pieces of fan belt. Video Record, June 4, 1987, 14:13-14:19. Given the scant details that Sanders provided in his brief—and especially given that Sanders said that friends and family would have “corroborated” what he testified to, R. 146-1 at 2—it is entirely possible that the testimony would have been cumulative. And thus a fairminded jurist could hold that counsel provided constitutionally adequate assistance here.

*10 None of this is to say that defense counsel did a good job, of course. If the allegations made in Sanders’s habeas briefs are true—unsupported as they were by any affidavits—then it seems like defense counsel provided very poor assistance. Counsel put on fewer than ten minutes of mitigation evidence, and even that evidence was not very helpful to Sanders’s defense. *See* Video Record, June 8, 1987, 9:13-9:21. But AEDPA is an unusual law. It contemplates that a federal judge might realize that a prisoner’s constitutional rights have been violated but nevertheless forbids the judge from granting habeas relief based on that realization alone. *See Williams*, 529 U.S. at 412 (O’Connor, J., concurring) (noting that AEDPA has modified “the role of federal habeas courts in reviewing petitions filed by state prisoners” by placing “a new constraint [§ 2254(d)] on the power of a federal habeas court to grant a state prisoner’s application for a writ of habeas corpus[.]”). Instead, AEDPA requires the prisoner to show that the state-court process itself was defective, and defective in one specific way: inconsistent with a United States Supreme Court decision in a way that no fairminded jurist could overlook. Given the scant record before the state court here, this Court has no way of saying that the state court’s decision was defective in that way.

3. Prejudice

To prevail on an ineffective-assistance claim, a defendant must also show prejudice. That means he “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. In this context, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

That is the standard on direct review. When AEDPA applies to a claim, however, the prisoner must show more than simple prejudice. He must show that all fairminded jurists would hold that he was prejudiced. The question presented then is whether any fairminded jurist could reject the idea that, if defense counsel had called Sanders’s friends and family to the stand, there would have been a reasonable probability that the jury would have given Sanders a sentence other than death.

A fairminded jurist could certainly reject that notion. Sanders admitted that he had killed two men execution-style. He showed little remorse during his sentencing hearing, testifying that “in a way I’m guilty; in a way I’m not guilty.” Video Record, June 8, 1987, 9:28. He blamed the psychiatric hospital for failing to help him. *Id.* at 9:29. And he never apologized for his crimes. *Id.* Moreover, Sanders had already testified that he had been abused as a child. Video Record, June 4, 1987, 14:13-14:19. And his brief before the Kentucky Supreme Court failed to specify exactly what his family and friends would have said if called to the stand to supplement his testimony. R. 146-1 at 51. Given this record, a fairminded jurist could hold that Sanders had failed to show that the presence of this additional mitigation evidence would have changed the outcome.

In sum, when the state court rejects an ineffective-assistance claim on the merits, but fails to specify whether it did so on performance or prejudice grounds, the federal habeas court must consider whether a fairminded jurist could reject the claim on either performance or prejudice grounds. Given the record presented to the Kentucky Supreme

Court, a fairminded jurist could hold that Sanders failed to show deficient performance. And a fairminded jurist could likewise hold that he failed to show prejudice. For both of those reasons, Sanders has failed to show that, when the Kentucky Supreme Court rejected his claim, the state court unreasonably applied any holding of the United States Supreme Court.

Conclusion

Sanders has failed to show that, when the Kentucky Supreme Court rejected Claim 27(I), the court rendered a “decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.” 28 U.S.C. § 2254(d)(2). Nor has he shown that the Kentucky Supreme Court’s decision “was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). This Court therefore cannot grant him habeas relief. 28 U.S.C. § 2254(d). That said, “reasonable jurists could debate” the Court’s ruling, which means Sanders is entitled to a certificate of appealability. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

*11 Accordingly, it is **ORDERED** as follows:

- (1) Sanders’s petition for a writ of habeas corpus with respect to Claim 27(I) is **DENIED**.
- (2) Sanders’s motion to alter or amend judgment with respect to Claim 27(I), R. 115, is **DENIED**.
- (3) Sanders’s application for a certificate of appealability with respect to Claim 27(I), R. 116, is **GRANTED**.

This the 21st day of June, 2016.

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David Lee SANDERS, Petitioner,

v.

Randy WHITE, Warden, Respondent.

Civil No. 03-455-ART

I

Signed 05/16/2017

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

Amul R. Thapar, United States District Judge

*1 David Lee Sanders shot two men execution-style in a convenience store. Although he admitted to the murders—and another shooting—he told the jury he was insane at the time. The jury nevertheless found him guilty and sentenced him to death, an outcome Sanders has been challenging ever since. Most recently, he brought a federal habeas petition stating over forty claims for relief, all of which this Court denied. R. 113; R. 150.

Sanders now wants to bring many of those claims before the Sixth Circuit. To do so, he needs a certificate of appealability. 28 U.S.C. § 2253. As shown below, the Court has grounds for issuing one, but only as to Claim 18 and specific aspects of Claims 27(F) and 36. See *id.* § 2253(c)(3) (“The certificate of appealability ... shall indicate which specific issue or issues satisfy the showing required[.]”).

I. The law

This Court sits in essence as a court of third instance. In the first, the Kentucky state courts declined to grant Sanders relief. In the second, this Court declined to overturn that decision. Now the question is whether a reasonable jurist

could disagree with this Court's decision about the state courts' decision. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). First of all, a reasonable jurist would need to know how the Court made its decision.

a. AEDPA

Sanders was sentenced in state court, first brought his habeas claims in state court, and first saw them denied in state court. The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) tells the Court how to review state courts. 28 U.S.C. § 2254.

AEDPA respects comity, *i.e.*, it prevents federal courts from pretending to be what they are not: better than state courts at applying law. See *Harrington v. Richter*, 526 U.S. 86, 102–03 (2011). Since they are not, AEDPA makes it difficult for federal courts to overturn state-court decisions. The one time AEDPA permits a federal court to review a habeas claim *de novo*—deciding the merits of the claim for itself—is when the state court has not decided the merits of that claim for *itself*. See *Robinson v. Howes*, 663 F.3d 819, 823 (6th Cir. 2011) (“Claims that were not ‘adjudicated on the merits in State court proceedings’ receive the pre-AEDPA standard of review: *de novo* for questions of law (including mixed questions of law and fact), and clear error for questions of law.”). Sometimes, for example, a state court will improperly find a claim procedurally barred. See *Walker v. Martin*, 562 U.S. 307, 316 (2011) (noting that state procedural rules are inadequate unless “firmly established and regularly followed.” (quoting *Beard v. Kindler*, 558 U.S. 53, 60 (2009))). And in that case, the federal court will review the claims *de novo* to ensure that someone does.

Otherwise, federal-court review of state-court habeas decision is quite circumscribed. If a state procedural rule is adequate—firmly established, regularly followed—a federal court must respect it. Thus, if a petitioner “defaults” a claim by failing to comply with such a rule, a federal court must generally decline to hear it. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). If the state court reached the merits of the claim, a federal court may consider them, too. But it may overturn the state court's decision in only one of three limited circumstances: where that decision (1) “was contrary to ... clearly established Federal law,” (2) “involved an unreasonable application of [] clearly established Federal law,” or (3) “was based on an unreasonable determination of

the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

*2 In the claims he seeks to appeal, Sanders argues that the state court either contradicted (circumstance one) or unreasonably applied (circumstance two) federal law. Not just any federal law will do, however. Sanders must show that the Kentucky Supreme Court either disregarded or mishandled some “clearly established Federal law[] as determined by the *Supreme Court of the United States*.” 28 U.S.C. § 2254(d)(1) (emphasis added). And that law must have been around when the Kentucky Supreme Court decided his habeas claims. See *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011).

To have reached a decision “contrary to” that law, the state court basically must have missed an on-point Supreme Court case while doing its legal research. Specifically, the court must have either applied a rule that “contradicts” one that the Supreme Court has set forth or decided the opposite of what the Supreme Court did on “materially indistinguishable” facts. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). As a corollary, if the state court identifies and applies the right rule—as articulated by the Supreme Court—it has not made a decision “contrary to” federal law. *Id.* at 406.

But it still might have applied that rule unreasonably, in which case a federal court would have to grant habeas relief. For AEDPA purposes, however, a state court’s decision must be deeply flawed to be considered unreasonable. A decision is not “unreasonable” just because a federal court disagrees with it. As the saying goes, reasonable minds can disagree; though they might disagree, they are both still reasonable. And AEDPA presumes that state courts are reasonable. When applying AEDPA, therefore, federal courts usually do not upset state-court decisions—even if a federal court believes a particular decision is “clear error.” *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014). Rather, to be considered “unreasonable,” a decision must be “so lacking in justification” that its incorrectness is “beyond any possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103. Imagine every judge in the country picked up the state-court decision and that each of them is reasonable. If none could possibly disagree that the state court had misapplied Supreme Court law, the decision is unreasonable. Then, and only then, does a petitioner have a claim under AEDPA’s third prong. But if some of those judges *could* disagree—in other words, if some could find the state court’s reasoning reasonable—the petition does not have a claim. *Id.* at 101–02. As with any standard that considers what a reasonable person would do

(while wearing robes or not), this standard is an “objective” one. *Woodall*, 134 S. Ct. at 1702. If a state-court decision was objectively reasonable, a federal habeas court may not displace it.

b. Certificates of appealability

The Court has already held that none of Sanders’s claims meet either the contrary-to-or unreasonable-application-of-federal-law standards. R. 113; R. 150. Sanders now wants to appeal some of those claims.

But AEDPA respects economy as well as comity. Thus, before appealing his claims, a petitioner needs a certificate stating that his claims are actually appeal worthy. Though this requirement “screens out issues unworthy of judicial time and attention,” *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012), it does not foreclose the appellate process entirely. If a petitioner can make a “substantial showing” that he has been denied a constitutional right, he deserves a certificate of appealability. 28 U.S.C. § 2253(c)(2). Here again, courts apply an objective standard, asking that imaginary reasonable jurist sitting on our shoulders what she would do. If “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,” the petition is appealable. *Slack*, 529 U.S. at 483–84. The standard demands modesty: Courts must acknowledge when they have ruled on a difficult issue that “deserve[s] encouragement to proceed further.” *Id.* (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

*3 With only a few exceptions—which the Court will explain as they arise—the Court reviewed and denied Sanders’s habeas claims under AEDPA, specifically its unreasonable-application prong. Before addressing those claims once more, it is important to define how the Court must address them. The Court is not permitted to decide Sanders’s claims anew: whether counsel was ineffective, whether the trial court mis-instructed the jury, and so on. The Kentucky Supreme Court has already decided those claims, and this Court has already found its decision objectively reasonable. Now Sanders must show that the Court was wrong or at least debatably wrong: that if another jurist were in the undersigned’s place, he might not have let the state court’s decision stand. *Slack*, 529 U.S. at 484. Sanders may appeal any claim for which this is true.

II. The claims

Sanders seeks to appeal twelve of his forty-plus habeas claims. R. 151. In eight of them he alleges that his trial attorney assisted him ineffectively; in one he challenges the trial court's jury instructions; in another he argues that the prosecution violated *Brady*; and in the last he contends that all these alleged errors prejudiced him cumulatively.

The Court will address the claims in the order Sanders has raised them here.

a. Ineffective-assistance claims

To prove that his lawyer was so deficient as to deprive him of his Sixth Amendment right to effective assistance of counsel, Sanders must show more than that his lawyer made some bad calls. That's because the Sixth Amendment guarantees defendants *effective*—not perfect—counsel. And “effective” encompasses a broad range of attorneys. Thankfully, it normally does not include those who are (literally) asleep on the job. *E.g.*, *United States v. Ragin*, 820 F.3d 609, 612–13 (4th Cir. 2016). But otherwise, courts “must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,” given that “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

The Supreme Court has turned that presumption into the two-prong *Strickland* test. To get his conviction overturned on account of his lawyer's performance, a defendant must first show that his lawyer's performance was indeed deficient. “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” *Id.* at 687. Second, a defendant must show that his lawyer's deficient performance prejudiced him. “This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial[.]” *Id.* Unless he can make both showings, the claim will fail. *Id.* And thus, if a defendant fails to satisfy either prong, the court will deny relief without considering the other one. *Id.* at 697.

As the Sixth Circuit has often said, “AEDPA, in conjunction with *Strickland*, requires [courts] to give double deference to the findings of the” state courts. *Brown v. McKee*, 460 Fed.Appx. 567, 579 (6th Cir. 2012); see *David v. Lafler*, 658 F.3d 525, 535 (6th Cir. 2011). Under *Strickland*, the

Kentucky courts were required to give deference to Sanders's lawyer; under AEDPA, meanwhile, this Court is required to give deference to the Kentucky courts' assessment of his performance. Thus—assuming the state court applied the right standard (a.k.a. *Strickland*)—the question is not whether Sanders's lawyer stepped outside of the wide professional boundaries that *Strickland* draws, but whether the state court was reasonable in determining that he did not. See *Richter*, 562 U.S. at 101. This Court decided that it was. Now that Sanders seeks to appeal, the question is more attenuated still: Could reasonable jurists find this Court's decision about the state court's decision wrong or at least debatable? *Slack*, 529 U.S. at 484.

i. Claim 27(L): Ineffective assistance for failure to seek competency proceedings.

*4 In Claim 27(L), Sanders argues that his trial attorney was ineffective for failing to request a competency evaluation after noticing that Sanders had lost the ability to concentrate at trial and sentencing. R. 73 at 313–316. Because the Kentucky Supreme Court denied this claim on erroneous procedural grounds, this Court reviewed it *de novo*. R. 113 at 114–15; see *Robinson*, 663 F.3d at 822. The Court assumed—without deciding—that counsel might have been deficient. R. 113 at 129. But this deficiency did not prejudice Sanders's case. Sanders had already gone through a six-week evaluation. His evaluators had found him competent to stand trial. See R. 113 at 117. And he was losing focus during trial largely because he was not getting enough sleep—not because he had suddenly become mentally incompetent. *Id.* Because “[n]othing in the record reveal[ed] that the trial court would have had any grounds to grant a new motion for a competency hearing after the trial began,” Sanders could not “demonstrate that he was prejudiced by [his attorney's] failure to move for a competency hearing.” *Id.* at 118–19. Thus, he had no *Strickland* claim.

Sanders contends that reasonable jurists could disagree with the Court in two ways. First, he argues that he must show “merely that he would have been entitled to a competency hearing if trial counsel had requested one,” R. 151 at 11—and not, as this Court held, go the extra step of showing a “ ‘reasonable probability’ that his verdict would have been different had [trial counsel] formally requested” such a hearing. R. 113 at 117. But Claim 27(L) is a claim of ineffective assistance of counsel.¹ To prove that claim, Sanders must show that his attorney acted unreasonably and

that his unreasonableness prejudiced Sanders's case. Thus, Sanders cannot show that his attorney violated his Sixth Amendment rights without showing reasonable probability that his trial would have come out differently if his lawyer had done things differently. *See, e.g., Hart/Cross v. United States*, 89 F.3d 833 (6th Cir. 1996) (table). This case is therefore unlike the Eleventh Circuit case that Sanders cites, *Davis v. Sec'y for Dep't of Corrs.*, 341 F.3d 1310, 1316 (11th Cir. 2003), which dealt with an attorney's failure to preserve an issue for appeal, not an attorney's alleged failure to halt—or at least delay—the trial itself by requesting a competency hearing.

¹ Sanders also says that “the failure to hold [a competency] violated [his] constitutional rights.” R. 151 at 8. To the extent he means to suggest that the trial court violated his rights by failing to hold one, he has already conceded that such a claim is procedurally defaulted here. *See* R. 113 at 12.

Even so, Sanders argues next, he *can* show that his lawyer prejudiced him. Because (he says) “reason existed to believe Sanders may have become incompetent” during his trial, the trial court would—or at least should—have granted a competency hearing had his lawyer asked for one. R. 151 at 7. In Kentucky, such a hearing is required “only” when a trial court sees “reasonable grounds to believe that the defendant is not mentally competent.” *Pate v. Commonwealth*, 769 S.W.2d 46, 47 (Ky. 1989). And Kentucky defendants have “no right to a continual succession of competency hearings in the absence of some new factor.” *Id.* Such “new factors” are difficult to show. *See, e.g., id.* (“The testimony of the psychiatrist that [the defendant] suffered from schizophrenia and was mildly retarded and defense counsel's statement that she could not communicate with the defendant as well as [the defendant]'s testimony that he did not remember confessing to the crimes was not sufficient to require the trial judge to hold a second competency hearing prior to sentencing.” (emphasis added)). Aside from alleging that he was “quite possibly” reaching a “boiling point” during trial, R. 151 at 8, Sanders offers no actual evidence of any new incompetence factor. Meanwhile, he had not only already undergone a six-week evaluation—where he was found competent—but he explicitly told the judge that he understood what was going on. *See* R. 113 at 116. The court would have had no reason (at least not that Sanders has shown) to grant another evaluation. And if the court had no reason to grant one, Sanders suffered no prejudice from his counsel's failure to ask for one.

*5 Sanders was therefore not deprived of his constitutional right to effective counsel. Because no reasonable jurist looking at the relevant facts and law could disagree, this claim does not warrant a certificate of appealability.

ii. Claim 27(J): Ineffective assistance for failing to prepare Sanders to testify during sentencing.

In Claim 27(J), Sanders asserts that his lawyer failed to tell him of his right to testify and, when Sanders decided to do so anyway during sentencing, failed to prepare him enough. R. 73 at 306–12. The Kentucky Supreme Court denied this claim as mere “speculation.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 391 (Ky. 2002), *overruled in part on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Because that court denied the claim on the merits, this Court reviewed it under AEDPA, concluding that the state court had reasonably applied the *Strickland* standard. Sanders himself stated on the record that counsel told him of his right to testify. And even if counsel prepared Sanders poorly for his moment on the stand, Sanders failed even to argue in state court that this preparation prejudiced him. Fairminded jurists could therefore agree with the state court that Sanders did not meet his burden to prove an ineffective-assistance claim. R. 113 at 112–14.²

² Sanders interprets the state-court decision as applying—and this Court's decision as reinforcing—a “procedural barrier” against his claim. R. 151 at 13. This Court might have given that impression when it said that “Sanders'[s] pleading deficiencies are fatal to his claim.” R. 113 at 114. So to clarify: The Kentucky Supreme Court denied this claim not because Sanders failed to go through particular motions. It denied this claim because Sanders failed to meet his burden of proof. That is a merits decision. And it was one that this Court found reasonable, since Sanders had not proven one of the *Strickland* elements (prejudice) that he was required to prove—which he could not have proven given that he had not even pled it. *See, e.g., Cornwell v. Bradshaw*, 559 F.3d 398, 415 (6th Cir. 2009) (holding that a petition who failed to show prejudice was properly denied habeas relief).

Sanders replies in three ways. First, he says reasonable jurists could debate whether his lawyer performed effectively—more specifically, (1) whether “an attorney could ever adequately prepare a defendant to testify” in just “three minutes,” the amount of time he and his lawyer allegedly

spent together right before he took the stand; (2) whether “a reasonable attorney would elicit the testimony trial counsel elicited from Sanders,” putting aside that counsel asked Sanders no questions and instead opted to just let him speak; (3) whether “a reasonable attorney would have advised Sanders not to testify ... that he was innocent and that everything was the state correctional psychiatric center’s fault,” as Sanders did; and (4) whether “Sanders suffered prejudice from the content of [his] testimony.” R. 151 at 15. Numbers one through three are deficiency arguments and thus do not help prove what Sanders needed but failed to prove in state court: that this deficiency prejudiced him.

Number four goes to prejudice, in that it states simply that Sanders was prejudiced. But his failure to prove this statement in the state court—rather than for the first time here—is exactly why the statement does not entitle Sanders to habeas relief. On AEDPA review, the Court is constrained by its role. Its role is not to decide Sanders’s claims; its role is to double-check the court that originally did so. And its oversight may not be too penetrating: As long as the state court’s decision was not so unreasonable that no reasonable jurist could fail to spot the problem, the Court must deny relief. So what matters are not the prejudice arguments that Sanders presents here; federal habeas review is not a chance to hone claims. What matters is how the state court ruled on the arguments he presented there. Because he presented none about prejudice, it was not clearly unreasonable—indeed, it was reasonable—for the state court to decide that Sanders had failed to prove his ineffective-assistance claim. For AEDPA purposes, if a federal court can say that much, then that is all it may say.

*6 Second, Sanders contends that he actually presented prejudice arguments before the Kentucky Supreme Court. In his brief to that court, he says, he described his case taking a turn for the worse because of these aspects of his testimony: “that he feels guilty,” “that he d[id]n’t know what to say to the jury,” and his “blaming the state psychiatric center [where he had been evaluated] for what happened and for not helping him.” *Id.* But these are all arguments that his *testimony* prejudiced him, not that his *lawyer’s conduct* prejudiced him. To conclude that his lawyer’s conduct prejudiced him—as the Court would need to conclude before ruling in his favor—the Court would need to believe that Sanders would have testified so differently had his lawyer prepared him differently that trial would have ended differently. And as the Kentucky Supreme Court explained, that belief could rest only on speculation—not a sufficient ground for habeas relief. See [Richter](#), 562

U.S. at 112 (“The likelihood of a different result must be substantial, not just conceivable.”).

Finally, Sanders argues that if this claim is speculative, it is speculative because Sanders has never received the evidentiary hearing to which he is entitled. R. 151 at 13–14. The Court has already explained why he is not entitled to such an additional hearing in *this* Court. R. 113 at 130–32. But Sanders still argues that he needs and deserves one for various claims. See *infra* Parts II.a.v–vii. This argument implies that the Court got things wrong because it did not have the facts necessary to get them right. So a recap is necessary. AEDPA “strongly discourage[s]” petitioners from “submit[ting] new evidence in federal court.” [Pinholster](#), 563 U.S. at 186. Generally, if the state court adjudicated the claim on the merits, the federal court may only consider that claim “on the record that was before the state court.” *Id.* at 185. If AEDPA did *not* deny Sanders relief—because the state court did not adjudicate his claim on the merits—the Court would have some leeway to develop evidence; the Court might need that evidence as it considers the claim afresh. But even then, since Sanders “failed to develop” the “factual basis” for these claims in state court, the Court could let him do so here only if he qualified for one of the limited exceptions provided in 28 U.S.C. § 2254(e)(2). He fails to argue that he does. Plus, the analysis need not go even that far. The state court adjudicated these claims on the merits (and this Court upheld its decision). Thus, AEDPA denies relief, and this Court is constrained to the record that was before the state court.³

3 Sanders has argued that the Kentucky Supreme Court unreasonably determined the facts when it called another of his claims too speculative without first holding an evidentiary hearing. See R. 144-1 at 2–4. He does not explicitly argue the same here. But in case he meant to do so impliedly, the Court has already explained that a statement like “this claim is too speculative” is “not a statement about ‘what happened’ out in the world,” which is what AEDPA means by “fact.” R. 150 at 10. Rather, it “is a statement about the contents of Sanders’s brief.” *Id.* An evidentiary hearing would not change those contents. At any rate, the state court did not unreasonably determine those contents. As explained above, they are indeed speculative.

But Sanders also asserts that the state court should have given him another chance to develop evidence. Its failure to do so, he says, shows that it denied his claim on improper procedural grounds. And so, the argument goes, this Court should have

reviewed the claim *de novo* (while presumably allowing him to develop more evidence).

The first proposition—that the state court was obliged to grant Sanders an evidentiary hearing—misconstrues Kentucky law. Citing [Kentucky Rule of Criminal Procedure 11.42](#) and [Fraser v. Commonwealth](#), 59 S.W.3d 448 (Ky. 2001), Sanders argues that if a petitioner alleges facts that “could, if proven, entitle the petitioner to relief, an evidentiary hearing must be held.” R. 151 at 13. But [Rule 11.42](#) actually says—and [Fraser](#) actually makes clear—that a hearing is required only “if there is a material issue of fact that cannot be conclusively resolved” on the record as it already exists. [Fraser](#), 59 S.W.3d at 452. If “the allegations in the motion can be resolved on the face of the record,” by contrast, “an evidentiary hearing is not required.” *Id.*; see [Ky. R. Crim. P. 11.42\(5\)](#) (“If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing.”). Thus, the state courts contradicted no state law by deciding this claim without an evidentiary hearing; the courts grant hearings when they are needed, not whenever they are requested. And more importantly, even if the state courts had contradicted state law, they contradicted no clearly established *federal* law.

*7 Understanding the actual reach of [Rule 11.42](#) answers Sanders's second proposition: that the Kentucky Supreme Court did not adjudicate his claim on the merits. Sanders seems to argue that the court blocked his claim with an improper procedural bar (which, if true, would entitle him to *de novo* review). R. 151 at 13–14. He interprets the court's decision as denying his claim because he failed to fulfill post-conviction pleading requirements, which, he says, the court should not have done without first granting him an evidentiary hearing. *Id.* As noted, however, such hearings are not necessary in all situations—only those in which the record contains a disputed issue of fact preventing the court from readily deciding the merits. And here, Sanders failed to put prejudice in dispute; as the Kentucky Supreme Court said, Sanders offered only speculation as to that necessary element of his ineffective-assistance claim. [Sanders](#), 89 S.W.3d at 391. Thus, according to Kentucky's clear procedural rules, the court could rule on the merits. And that is what it did. This case is therefore distinct from the one Sanders cites, [Gordon v. Braxton](#), 780 F.3d 196, 202–04 (4th Cir. 2015). There, the Fourth Circuit held that a state court had not decided a claim on the merits because the court declined to hear evidence on a material issue (counsel's failure to appeal). Crucially, though,

the petitioner had actually managed to put in dispute through his pleadings. *See id.*

Sanders's third proposition—that this Court should review this claim *de novo*—fails because the above two propositions fail and because it rests on a misreading of another law: this time, AEDPA itself. Sanders argues that AEDPA does not apply where the state court decides a claim based on an “incomplete” record. R. 151 at 14. Yet as explained, AEDPA has the same presumption as Kentucky's [Rule 11.42](#) against further factual development. Here, the Kentucky Supreme Court had enough facts before it to determine that Sanders's claims lack merit under *Strickland*. And this Court has enough facts before it to determine that his claims lack merit under AEDPA. Thus, AEDPA denies relief, and where AEDPA denies relief, the Court may only consider the facts that the state court was able to consider. *See Pinholster*, 563 U.S. at 185. AEDPA prevents—not requires—considering facts that the state court did not consider.

It might be debatable to say that every reasonable jurist would agree with how the Kentucky Supreme Court handled this claim. But it is undebatable that at least some would conclude that the court reasonably applied clearly established federal law while handling it. Thus, the Court may not grant permission to appeal this claim.

iii. Claim 27(B): Ineffective assistance for failing to obtain a copy of the Flenning report

In Claim 27(B), Sanders argues that his lawyer was ineffective because he failed to discover a report that one of his mental-health examiners—Dr. Flenning—wrote about him. R. 73 at 221–236. Although the evaluation team as a whole had found Sanders competent, Dr. Flenning wrote his own report, concluding that Sanders suffered from [atypical psychosis](#) and a fragmented personality. In the Kentucky Supreme Court, however, this claim failed at *Strickland* prong one. As that court noted, *Strickland* guarantees a “reasonable investigation” into the facts, and “[a] reasonable investigation is not the investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources but also with the inestimable benefit of hindsight would conduct.” [Sanders](#), 89 S.W.3d at 386. Sanders's lawyer, that court found, had provided such an investigation—a finding that this Court, being doubly deferential, determined a reasonable application of *Strickland*. The evaluation team's main report did not even mention that Dr. Flenning had

written a report of his own. Thus, “it was reasonable for [Sanders’s lawyer] not to spend his limited time hunting for [the] report—a document that he had no reason to believe even existed.” R. 113 at 89. And thus, it was reasonable for the state court to consider his conduct reasonable.

Sanders does not dispute that his evaluators’ main report makes no mention of any counter-report. He simply argues that “two facts” in the main report would have “suggested to trial counsel,” had he been reading a bit closer, “that Dr. Flenning may have produced a report.” R. 151 at 18. First “fact”: The main report “refers to a ‘psychological history’ that is not included,” thus implying the possible existence of other reports. *Id.* Second “fact”: The main report also “noted that Sanders discussed his childhood abuse with Dr. Flenning,” marking him as someone to whom Sanders spoke and with whom Sanders’s lawyer should have followed up. *Id.* “In light of these facts,” Sanders argues, “reasonable jurists could at least debate” this Court’s “conclusion that trial counsel had no indication that Dr. Flenning produced a report” and that counsel’s performance thus “could not be deficient.” *Id.* at 19.

*8 This argument illustrates why it is so important to pin down the exact question before a court on AEDPA review. By the time Sanders’s claim got to this Court, the question was not “Could his counsel have been deficient?” It was: “Could reasonable jurists agree with the state court that he was not deficient?” Sanders has shown why they would. As even he acknowledges, the main report never discusses, cites, or footnotes Dr. Flenning’s report; readers must infer its existence from other “facts.” Maybe a different lawyer would have drawn the inferences. In fact, maybe a better lawyer would have done so. But so would a lawyer with infinite time to read the report. And as the Kentucky Supreme Court noted, *Strickland* does not guarantee a lawyer with infinite time. *Sanders*, 89 S.W.3d at 386. Nor does it guarantee a better lawyer than the defendant had, as long as the one he had stayed within the broad range of permissible conduct. Sanders’s lawyer chose not to spend his limited time pursuing mystery reports. That choice was within his professional discretion. Because it was, the state court reasonably found that did not violate *Strickland*.

This case is therefore unlike *Porter* and *Wiggins*, the only clearly established Federal law, as determined by the Supreme Court of the United States, that Sanders cites. R. 151 at 19 (citing *Porter v. McCollum*, 558 U.S. 30 (2009); *Wiggins v. Smith*, 539 U.S. 510 (2003)). There, counsel failed to “take

the first step of interviewing witnesses or requesting records,” *Porter*, 558 U.S. at 39, or “abandoned their investigation of [their client’s] background after having acquired only rudimentary knowledge of his history from a narrow set of sources,” *Wiggins*, 539 U.S. at 524. But Sanders has not accused his lawyer of such dereliction here. Rather, he has accused his lawyer of failing to take a particular *next* step and of abandoning his research when another lawyer might have kept digging. For the reasons above, however, no reasonable jurist would say that *Strickland* required the extra digging. Thus, Sanders does not warrant a certificate of appealability on this claim.

iv. Claim 27(A): Ineffective assistance for failing to find an adequate mental-health expert

Sanders’s lawyer relied on a pro-bono expert to conduct a pro-defense mental-health examination instead of paying for better services with the funds that Sanders had supposedly earmarked for the purpose. In Claim 27(A), Sanders argues this decision was unreasonable and prejudicial. R. 73 at 202–215. But the Kentucky Supreme Court held that (1) counsel’s choice to accept pro-bono services, freeing up money for other uses, was a quintessential tactical decision and thus not unreasonable, and (2) the decision did not prejudice Sanders because his other experts would have said just what his free expert said. R. 113 at 83–86. And this Court believed both holdings reasonable applications of *Strickland*. *Id.*

Sanders now contests multiple aspects of that belief: First, that the state court could properly have concluded that counsel’s choice was reasonable because it let him focus more closely on other parts of the defense. Okay, Sanders says: Then “we must ask to what other defense efforts did trial counsel devote resources?” R. 151 at 24. But in fact, we do not. Sanders contends that his lawyer did nothing with his free time. Put aside the difficulty of proving a negative. Even if Sanders is right, that does not make his lawyer unreasonable. Because the reasonableness of this tactical choice does not depend on whatever else counsel happened to do with the time and money he freed up. His choice was reasonable *because* he freed up time and money by using a qualified expert at no expense. That is just Strategy 101, and “strategic choices” are “virtually unchallengeable.” *Strickland*, 466 U.S. at 690.

Second, Sanders contests that the state court could properly have found counsel’s choice reasonable because the pro-bono expert was as qualified as the others Sanders wanted. R. 113

at 84. Sanders says paper qualifications are not enough under *Hinton v. Alabama*, 134 S. Ct. 1081 (2014); if other experts would have been better, he says, his lawyer should have used them. R. 151 at 25–26. In *Hinton*, however, defense counsel himself thought (correctly) that his expert was not what the defense team really needed. *Id.* at 1088. Had Sanders's lawyer thought that here, then under *Hinton* it would have been unreasonable for him not to have shopped around for another expert. But there is no indication here that such a thought did—or had any reason to—cross his mind while he prepared for trial.

*9 Third, Sanders contests that a court can only speculate whether his preferred experts would have fared better than his pro-bono one. R. 151 at 26–27. There is hard evidence, according to Sanders, that they would have: Specifically, the prosecution tore holes into the pro-bono expert's testimony, holes that Sanders says his other experts would have sealed. *Id.* Were one inclined to agree with that argument, however, one could only do so by speculating that these other experts would have prepared differently, that their own presentations would not have other holes, and that the jury would have bought the defense's story but for the specific holes the pro-bono expert's testimony had. And speculation alone is not proof of prejudice. See *Richter*, 562 U.S. at 111–12.

Fourth, Sanders argues that even assuming counsel chose reasonably among experts, counsel failed to prepare reasonably the expert he chose. By (allegedly) contacting the pro-bono expert just a few weeks before trial, scheduling an examination for the eve of trial, and not providing the expert with certain state records, Sanders says, counsel undershot the level of preparation that the law requires. R. 151 at 29. By “law,” Sanders means opinions from the Ninth Circuit and one from the Sixth. But AEDPA does not require the Kentucky courts to apply holdings from the Ninth Circuit or even the Sixth. It requires them to reasonably apply those of the United States Supreme Court. Sanders cites no holding from that Court that the Kentucky Supreme Court failed to follow. Nor does he provide any evidence to show that the Kentucky Supreme Court failed to follow *Strickland* in a reasonable fashion. Indeed, he fails even to allege a “reasonable probability” that his trial would have come out differently had his lawyer prepared his expert differently. *Strickland*, 476 U.S. at 694.

Fifth, and finally, Sanders argues that his counsel's performance deprived him of his separate constitutional right—guaranteed by the Due Process Clause and *Ake v.*

Oklahoma, 470 U.S. 68 (1985)—to competent psychiatric assistance in preparing an insanity defense. “Once his attorney settled on an insanity defense,” Sanders argues, “he had an obligation to pursue an expert assistance that would support an insanity defense.” R. 151 at 25. Indeed: That is exactly what, by all accounts, he did.

After dealing with this claim the last time around, the Court wrote that “other jurists could disagree with the Kentucky Supreme Court's determination that [counsel's] conduct did not violate Sanders's rights under *Strickland*.” R. 113 at 87. Sanders agrees, and he argues that the Court must therefore grant a certificate of appealability. R. 151 at 24. Not so. For all the reasons above, other jurists could also agree with the Kentucky Supreme Court. And unless no reasonable jurist could agree with a state-court decision, a federal court has no power to overturn it. Because no reasonable jurist could disagree with *that*, the Court cannot issue a certificate of appealability on this claim.

v. Claim 27(H): Ineffective assistance for failing to advise Sanders's wife about the marital privilege and opening the door to testimony about domestic violence

In Claim 27(H), Sanders argues that his lawyer should have told Sanders's wife that she did not have to testify against Sanders. R. 73 at 263–68. He also argues that, while she was on the stand, his lawyer should not have asked whether hers was a happy marriage, “open[ing] the door” for the government to ask whether Sanders had ever been violent to her. R. 151 at 29. This Court considered counsel's performance reasonable and not prejudicial. It therefore concluded that fairminded jurists could agree with the Kentucky Supreme Court that this performance satisfied *Strickland*. R. 113 at 104–08.

*10 As an initial matter, Sanders argues that the Court did not need to consult with any hypothetical reasonable jurists at all. He believes the Court should have reviewed this claim⁴ *de novo*, not under AEDPA. R. 151 at 31–32. And he believes this because, he says, the Kentucky Supreme Court's analysis of the claim began and ended at this one sentence: “Sanders has previously raised the issue about the violent incidents in his direct appeal. It cannot be reargued at this point.” *Id.* at 31 (quoting *Sanders*, 89 S.W.3d at 391). If that court did in fact find this claim procedurally barred, that finding would have been erroneous. As Sanders points out, he argued on direct appeal that the *prosecution* violated his rights by getting

his wife talking about domestic violence, whereas, in his collateral attack, he argues that *his own lawyer* was deficient for enabling the prosecution to do so. *Id.* at 32.

4 Sanders now focuses only on the second half of his original claim: the questions that his lawyer asked his wife. Thus, he apparently does not seek to appeal the first half: that his counsel unreasonably failed to advise Mrs. Sanders (a non-client) about the marital privilege.

But the Kentucky Supreme Court did not in fact find this claim procedurally barred. Although the court wrote the two sentences Sanders recites, it went on to write “[t]he conduct of [Sanders’s] counsel was reasonable.” 89 S.W.3d at 391. That is a merits determination. The two earlier sentences merely clarify the claim before the court. And the court clearly knew it had an ineffective-assistance claim before it, for it explicitly stated its holding—that Sanders’s counsel acted reasonably—in ineffective-assistance terms. Because that holding is a merits holding, AEDPA applies.

Coming at it from a different angle, Sanders argues that the state court only *appeared* to adjudicate his claim on the merits—because actually, it could not have done so. Again he cites a Fourth Circuit case, *Gordon*, for the proposition that “[a] claim is not adjudicated on the merits when the state court makes its decision on a materially incomplete record.” *Gordon*, 780 F.3d at 202 (internal quotation marks omitted); see R. 151 at 33. Sanders argues that this proposition applies here because no state court gave him an evidentiary hearing on this claim. Even if this Court were obliged to follow a case from another circuit, however, *Gordon* does not change the result. There, the state court denied an evidentiary hearing on a material issue in actual dispute. See *Gordon*, 780 at 202–04. Further evidence might have meant habeas relief; as the record stood, though, there was just no way to know. Here, a court can take all of Sanders’s allegations as true and Sanders would still not prevail. Indeed, there is no dispute that the lawyers for both sides asked the questions Sanders says they asked. All the same, it is reasonable to think that the marriage-related questions defense counsel posed to Mrs. Sanders were useful. Her answers put Sanders in a better light than he had been in before (even if the prosecution later elicited answers that dimmed it). Thus, it was reasonable for the state court to conclude that Sanders has no *Strickland* claim without holding a separate evidentiary hearing first.

Sanders also argues—and here he gains better purchase—that the Court should at least have reviewed the prejudice element of his *Strickland* claim *de novo*. R. 151 at 33–

35. The Kentucky Supreme Court denied his claim under the deficiency prong, and when a state court applies one *Strickland* prong but not the other, the Court reviews the adjudicated prong under AEDPA and the “unadjudicated prong” *de novo*. *Rayner v. Mills*, 685 F.3d 631, 638 (6th Cir. 2012). Although this Court has acknowledged this rule in other cases, see *Bowling v. Haeberlin*, Civil No. 03-00028-ART, 2012 WL 4498647, at *6 (E.D. Ky. Sept. 28, 2012), it did not explicitly do so in this one. But this rule only affects this case if the state court unreasonably applied the first prong. Otherwise, no matter how closely the Court reviews his claim under the second prong, Sanders cannot get relief. And here, the Kentucky Supreme Court reasonably applied the first *Strickland* prong. So Sanders cannot get relief.

*11 He argues otherwise, mainly on the theory that his lawyer let things get out of control: He opened the door to violence questions with his questions about marriage, whereas, if he had meant to open it, he should have done so on direct examination when he could have “control[ed]” the witness better.⁵ R. 151 at 37–38. Given all this, Sanders says, it was “objectively unreasonable” for the state court not to dub his lawyer deficient. *Id.* at 37.

5 The colloquy at issue here occurred on cross.

Sanders might not agree with his lawyer’s strategy, but it was a strategy nonetheless. All things considered—and even though the prosecution might have had “gotcha” questions in hand—it was reasonable for counsel to ask Mrs. Sanders about the health of her marriage. Her testimony painted Sanders as a “kind husband” and a “loving father.” See R. 113 at 101. And her testimony about his violent episodes was not entirely damning. His wife confirmed that Sanders had not known why he hit her and had felt suicidally guilty afterwards. *Id.* at 105–06. This testimony supported Sanders’s claim that he turned violent only during “dissociative episodes,” and thus his overall insanity defense. Besides, no matter when counsel asked Mrs. Sanders about her marriage, he would have opened the same door for the government to ask about domestic abuse. So the alternative strategy Sanders suggests—*i.e.*, asking about the marriage on direct rather than cross—would have fared no better. (Not to mention that a lawyer has more “control” over a witness on cross, when he may ask leading question, than on direct, when he may not.) To be sure, different lawyers might have asked Mrs. Sanders different questions. But the Sixth Amendment guaranteed Sanders an effective lawyer, not a different lawyer. *Strickland*,

466 U.S. at 689. And the “strategic choices” his lawyer made are “virtually unchallengeable.” *Id.* at 690.

Thus, the Kentucky Supreme Court's decision—that counsel was reasonable—was itself reasonable. Although some jurists might disagree, others might look at this defense lawyering and call it strategic. At least, they could. Under AEDPA, that much is enough. And since that much is undebatable, this Court cannot issue a certificate of appealability.

vi. Claim 27(E): Ineffective assistance for failing to present a video of Sanders taken shortly after the murders

Before the lawyer who represented him at trial, Sanders had a court-appointed lawyer. That lawyer videotaped Sanders in jail shortly after arrest. Sanders appeared distraught. *See* R. 113 at 90 (discussing the tape). In Claim 27(e), Sanders argues that his trial lawyer was ineffective because he failed to obtain and show the jury a copy of the tape. R. 73 at 236–40. That's not to say he didn't try. Sanders's trial lawyer moved to admit the tape. But he could not give the trial court any tape to admit because the previous lawyer-turned-videographer “wanted a waiver of privilege signed by Sanders,” which Sanders apparently never signed. *Sanders*, 89 S.W.3d at 390. The Kentucky Supreme Court concluded that “[i]n the absence of the tape,” Sanders had “nothing to complain about related to ineffective assistance.” *Id.*

Since that is a conclusion about the merits of Sanders's claim, the Court applied AEDPA. The Court did find it “unclear why th[at] court relied on the absence of the tape,” given that Sanders had attached the tape to a later motion for reconsideration. R. 113 at 91. Nevertheless, this Court found the state court's conclusion reasonable under any possible version of events. That court could correctly have thought the tape was not in evidence: Under clear state procedural rules, a motion to reconsider “cannot be used to raise arguments and introduce evidence that should have been presented during the proceedings before entry of judgment.” *Short v. City of Olive Hill*, 414 S.W.3d 433, 441 n.7 (Ky. Ct. App. 2013); *see* Ky. R. Crim. P. 11.42(2) (requiring the motion for post-conviction relief itself “specify ... the facts on which the movant relies”). And if the tape was not properly before that court, this Court cannot consider it. *Pinholster*, 563 U.S. at 185 (“If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of [AEDPA] on the record that was before that state court.”). Moreover, even if the tape *was* in the record, the

state court still could have reasonably concluded that Sanders failed to prove his ineffective-assistance claim—specifically, the deficiency prong. That the tape exists does not prove that Sanders's trial lawyer was ineffective because he failed to obtain it. After all, it was Sanders's signature that the previous lawyer wanted before he would release the tape. And Sanders offered no evidence showing—or even an affidavit stating—that his trial lawyer prevented him from signing a waiver. *See* R. 113 at 92.

*12 Sanders now argues that the Court should review this claim *de novo* because the state court “improperly found [it] procedurally defaulted” and therefore never reached the merits. R. 151 at 45. The Kentucky Supreme Court did consider the merits of the claim, however—it simply did not find any. *Sanders*, 89 S.W.3d at 390 (“[T]here is nothing to complain about related to ineffective assistance. In addition, Sanders has not met his burden of establishing that the tape would have been admissible.”). As explained above, reasonable jurists could find that conclusion reasonable, with the tape in the record or not. Since the conclusion was reasonable, AEDPA prevents the Court from either providing habeas relief *or* re-determining the facts for itself. *See Pinholster*, 563 U.S. at 185.

Sanders responds that the state court could not have decided the merits of this claim reasonably because, “under Kentucky law,” the state court owed him an evidentiary hearing to develop the claim. R. 151 at 43–44. When a state court adjudicates a claim on the merits, however, AEDPA cares whether the court reasonably followed federal—not state—law. *See* 28 U.S.C. § 2254(d)(1). Sanders cites no federal law that the state court contradicted or misapplied by adjudicating his claim without a further hearing. As a matter of fact, he cites no such state law, either. In Kentucky, “[c]onclusory allegations which are not supported by specific facts do not justify an evidentiary hearing.” *Sanders*, 89 S.W.3d at 385 (citing *Sanborn v. Commonwealth*, 975 S.W.2d 905 (1998)). Sanders offers nothing but conclusions to show that his lawyer—rather than Sanders himself—was the reason why the tape did not make it to court sooner. This case is therefore unlike the one case Sanders cites, *Mills v. Commonwealth*, 170 S.W.3d 310 (Ky. 2005), where “the facts that [the petitioner] ha[d] alleged” in his post-conviction motion actually created “an issue of fact that c[ould not] be determined on the face of the record.” *Id.* at 340. Sanders's motions contain no such facts. Although he says that “the state court record does not *refute* [his] allegations,” R. 151 at 43 (emphasis added), a claim is not proven simply because it is not disproven.

Sanders himself must have presented some specific support for his claims to receive an evidentiary hearing, let alone habeas relief.

At the end of the day, this much is undebatable: A reasonable jurist could conclude that the Kentucky Supreme Court reasonably applied federal law in holding that Sanders had failed to prove his ineffective-assistance claim. Regardless of the tape's whereabouts *after* trial, the responsibility for procuring it *for* trial rested with Sanders himself—not his lawyer. There is no evidence that his lawyer prevented Sanders from carrying out that responsibility. Thus, this claim warrants neither habeas relief nor a certificate of appealability.

vii. Claim 27(F): Ineffective assistance for failing to speak with and to present testimony from three witnesses

By his own account, Sanders was distraught after his arrest. But his lawyer failed to speak with or to call to the stand two jailers who witnessed just how distraught he was. Nor did counsel call a doctor who apparently would have testified that Sanders might have been suffering from a psychiatric disorder. R. 73 at 240–45. Because Sanders himself testified “extensively” about his post-arrest state, however, the Kentucky Supreme Court concluded that his lawyer had not been ineffective for failing to show the jury more of the same. *Sanders*, 89 S.W.3d at 391. This Court found that conclusion reasonable because Sanders offered only speculation about what these potential witnesses would have said if called. Plus, the doctor in question never actually diagnosed Sanders, so counsel could have thought that his testimony would not help his client much. R. 113 at 94–95. Because these were “reasonable bas[e]s for the state court to deny relief,” this Court found itself forced to deny relief, too. *Richter*, 562 U.S. at 98.

*13 Sanders argues that fairminded jurists could disagree with the Court on three grounds. First, he asserts that the Court misapplied the procedural rules of habeas review, specifically by creating a new one. He points out—correctly—that “this Court faulted [him] for not attaching affidavits to his habeas petition” to indicate what these three witnesses would have said. R. 151 at 48. He then proceeds—incorrectly—to argue that the Court “fashion[ed] and impos[e]d” a new pleading requirement that all habeas petitioners supply such affidavits. *Id.* He then surveys the Rules Governing Section 2254 Cases, demonstrating that none imposes a formal “affidavit

requirement.” R. 151 at 48–53. He also argues that his habeas petition itself is enough like an affidavit to satisfy any such requirement. *Id.* at 56–59.

The Court did not deny Sanders's claim just because he failed to file anything titled “Affidavit.” The Court denied his claim because he has consistently failed to support it with evidence. To show that his lawyer simply had to call these witnesses—and that the state court was grievously mistaken in holding otherwise—Sanders must offer some evidence of what they would have said. That evidence will often, if not always, come in an affidavit. Yet Sanders offers no such evidence, giving this Court no grounds to grant habeas relief. This is true even if the Court considers his brief as an affidavit. Calling it something else does not make the statements in it any less speculative. The only requirement being imposed here is that habeas petitioners support their allegations with something beyond speculation. This Court did not “fashion” that requirement. It comes from the Supreme Court, which has said that speculation is not sufficient grounds for habeas relief, *Richter*, 562 U.S. at 111–12, and from the Sixth Circuit, which has added that “[i]n the absence of any evidence showing that [the witness] would have offered specific favorable testimony, [the petitioner] cannot show prejudice from counsel's strategy recommendation not to introduce this evidence,” *Tinsley v. Million*, 399 F.3d 796, 810 (6th Cir. 2005).

Second, Sanders argues that he deserved an evidentiary hearing to make his claims more concrete. R. 151 at 55. As elsewhere, he argues that he is “entitled” to such a hearing because, if he could prove what he speculates, “he would be entitled to habeas relief.” *Id.* But speculation is neither grounds for relief nor an open sesame for an evidentiary hearing. “[W]here,” as here, “the state court decides a claim on the merits, and this Court upholds that determination under [AEDPA], the Court *may not* conduct an evidentiary hearing.” R. 113 at 130 (emphasis added); see *Pinholster*, 563 U.S. at 185. In *Pope*, which Sanders cites, the defendant differed from Sanders in this important respect: He had proffered a “substantial body of evidence that he would develop if granted an evidentiary hearing.” See *Pope v. Sec’y for Dep’t of Corrs.*, 680 F.3d at 1271, 1294 (11th Cir. 2012). For the same reason, this case is distinct from *Gordon*, which Sanders cites again here. There, the petitioner—unlike Sanders—managed to put a material issue in actual dispute and thus, the Fourth Circuit said, deserved a better hearing than the one the state court had given him. *Supra* Part II.a.ii, v. Because Sanders has not managed the same showing as the *Pope* or *Gordon*

petitioners, these cases from other circuits do not entitle him to an evidentiary hearing here.

Finally, Sanders argues that the Kentucky Supreme Court's decision is contrary to clearly established federal law. The court concluded that additional mental-state witnesses "would have been cumulative" since the jury had already heard about Sanders's mental state, from Sanders himself no less. So defense counsel's choice "not to present such cumulative testimony was not ineffective." *Sanders*, 89 S.W.3d at 391. But Sanders points to *Skipper v. South Carolina*, where the Supreme Court held it improper for a trial court to exclude two jailers from testifying that a defendant had "made a good adjustment" during his time in jail. 476 U.S. 1, 3 (1986). "[C]haracterizing the evidence as cumulative," the Court said, would have been "implausible." *Id.* at 8. "The evidence petitioner was allowed to present on the issue of his conduct in jail"—like his own testimony that it was "satisfactory"—"was the sort of evidence that a jury naturally would tend to discount as self-serving." *Id.* Sanders reads *Skipper* as "clearly established Supreme Court law" that the "mitigation testimony of neutral witnesses is not cumulative of the arguably self-serving testimony of a capital defendant," here meaning Sanders. R. 151 at 60.

*14 To render a decision contrary to Supreme Court law, a state court must either flaunt a directly applicable holding or reach the opposite conclusion than the Supreme Court did on "materially indistinguishable facts." *Williams*, 529 U.S. at 405–06.⁶ The Kentucky Supreme Court did neither. As to the first, *Skipper* might clearly establish that a court cannot exclude neutral witnesses as cumulative when a defendant offers them to back up his own story. Yet it says nothing about whether counsel can choose to offer those witnesses in the first place. Had the state courts excluded Sanders's witnesses as an evidentiary matter, they would have contradicted *Skipper*. But they did not. Defense counsel never gave them the chance.

⁶ Sanders argues that the Kentucky Supreme Court "unreasonabl[y] appli[ed]" *Skipper*. R. 151 at 62. But that court never even cited, much less applied, *Skipper*. So the proper question is whether the court contradicted *Skipper*, i.e., failed to apply a holding that it allegedly should have applied.

As to the second, the facts of *Skipper* are distinct from the facts here. There, the only behavior evidence the petitioner had to offer—aside from his neutral witnesses—was his own rather obviously self-serving statement that his behavior was

satisfactory. Here, Sanders was not the only one to comment on his medical state; his own medical expert, among others, spoke to it, too. It was "implausible," on the facts before the *Skipper* Court, to call witness testimony cumulative. *Skipper*, 476 U.S. at 8. But it is not implausible to do so here. Counsel could reasonably have thought that the jury did not need lay observers to repeat what the expert said—especially since, even now, Sanders can only speculate about what the observers would have said themselves. And most importantly for present purposes, *Skipper* never said that lawyers are deficient if they choose not to present witnesses because they think the testimony will be cumulative. The Kentucky Supreme Court therefore did not contradict *Skipper* in holding that counsel's choice not to pursue additional witnesses was a reasonable trial strategy.

Although the Court cannot grant Sanders a certificate of appealability on any of these grounds, there is an issue on which it can grant one: whether the Kentucky Supreme Court unreasonably applied *Strickland*. The Court has already given Sanders permission to appeal Claim 27(I). R. 150 at 23. In that claim, as in this one, Sanders argues that his lawyer failed to seek out enough witnesses, specifically witnesses to the abuse he received as a child and the head injuries he suffered as a result. R. 73 at 268. For two reasons, this Court found that the Kentucky Supreme Court had not unreasonably applied *Strickland* in denying this claim. First, Sanders had "provided hardly any information" about what those witnesses would have said. R. 150 at 19. And second, there was "at least a 'reasonable argument' " that testimony from the witnesses would have been cumulative of Sanders's own. *Id.* at 20. But the Court recognized that "[t]he Supreme Court has charted only parts of th[e] expanse" of attorney conduct. *Id.* at 18 (quoting *Davis v. Carpenter*, 798 F.3d 468, 473 (6th Cir. 2015)). And "here the [Kentucky] courts found themselves in open water," *id.* at 19 (quoting *Davis*, 798 F.3d at 473), because the Supreme Court has not explained exactly "what kinds of evidence the Constitution requires a defense attorney to present," *id.* Thus, although the Court denied Sanders's habeas claim, it acknowledged that reasonable jurists might navigate these waters another way. It therefore granted him a certificate of appealability. *Id.* at 23.

*15 It must do the same here. Sanders argues that his lawyer's failure to present more mental-state witnesses "was not a strategic choice but a failure to investigate." R. 73 at 242. This claim is as speculative as Claim 27(I), and it too faces a reasonable counterargument that these witnesses would have just been cumulative anyway. But a different lawyer might

have done a more thorough job than counsel did here. And a reasonable jurist might think that his allegedly cursory lawyering amounted to constitutionally ineffective assistance. Such a jurist would debate this Court's conclusion that the state court applied *Strickland* reasonably. For that reason, a certificate of appealability shall issue.

To summarize: *Strickland* and AEDPA—and especially *Strickland* plus AEDPA—are difficult to satisfy. *Strickland* gives lawyers a lot of room to do their jobs, and AEDPA gives state courts a lot of room to do theirs. For the most part, it is indisputable that the Kentucky Supreme Court did not stray past the wide bounds of its discretion here. But a reasonable jurist might think it did when it reached Claim 27(F), specifically the question of how many witnesses a defense lawyer must call to prove a point. The Court must therefore grant a certificate of appealability as to that aspect of Sanders's ineffective-assistance claims, but it has no grounds to grant one as to any others.

b. Other claims

Beyond Claim 27, Sanders alleges that various other errors have plagued different stages of his case. He wants the Sixth Circuit to hear about the following ones.

i. Claim 26: Constitutionality of Kentucky's proportionality review

Kentucky law applies a comparative proportionality review in death-penalty cases. To determine whether imposing the penalty is constitutional in a given case, Kentucky law requires Kentucky courts to compare the case only to cases where the penalty was imposed, not to those where the jury might have found similar aggravating factors against a defendant but did not sentence him to death. See *Ky. Rev. Stat. (“KRS”) § 532.075*; R. 113 at 18–20 (describing this review). In Claim 26, Sanders argues that this style of review violates the Eighth and Fourteenth Amendments. R. 73 at 190–200. The Court has disagreed and denied the claim. R. 113 at 18–20. Sanders seeks to appeal because the Sixth Circuit has granted a certificate of appealability on the exact same issue in *Wheeler v. Simpson*. See R. 151 at 5–7. The Sixth Circuit has since decided *Wheeler*, and not in Sanders's favor. The court held that because “no Supreme Court precedent support[ed] [the petitioner's] notion that the Kentucky Supreme Court should have compared his cases to cases in which the death

penalty was not imposed”—the same notion Sanders argues here—“we conclude he is not entitled to relief on his claim.” *Wheeler v. Simpson*, No. 11-5707, 2017 WL 1089518 (6th Cir. Mar. 23, 2017). Thus, the appeals court has decided the issue that Sanders seeks to appeal. This Court need not send that court the same issue to decide again.

ii. Claim 10.8: Conflict of interest

In Claim 10.8, Sanders asserts that his family gave his lawyer \$2,000 to spend on an expert, money that the lawyer instead pocketed as his fee after finding the pro-bono expert. R. 73 at 134–141. This, Sanders argues, created a conflict of interest, a form of ineffective assistance that can violate defendants' Sixth Amendment rights. See *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980). Sanders seeks to bring this claim before the Sixth Circuit, but fails to mention his previous admission that this claim is procedurally defaulted. See R. 113 at 12. Although courts can consider defaulted ineffective-assistance claims if petitioners can show “cause” for defaulting them—as “cause” is defined in *Martinez* and *Trevino*—the Court has already explained that Sanders also defaulted the *Martinez-Trevino* password claim, *i.e.*, the claim that petitioners must assert before *Martinez* and *Trevino* can even apply. See R. 113 at 14–17. (Namely, he must show ineffective assistance of post-conviction, as opposed to trial, counsel.) True, the Court then proceeded to show how, “[e]ven if the Court could reach the *Martinez-Trevino* factors, Sanders has not established that his conflict-of-interest claim” satisfies them. *Id.* at 17. According to Sanders, reasonable jurists could debate the analysis that followed. R. 151 at 63–65. But even if they could, this claim would still not merit a certificate of appealability: Reasonable jurists could not debate the Sanders has defaulted it. And Sanders cannot appeal a claim that he cannot bring in the first place.

iii. Claim 18: The trial court gave erroneous jury instructions

***16** In Claim 18, Sanders argues that parts of the trial court's jury instructions violated the Due Process Clause. Sanders told the jury he was not guilty of the crimes charged because he was insane when he committed them. He also told them that, if he was guilty, he was “guilty but mentally ill” and thus should be sentenced to treatment rather than prison. R. 73 at 172; see *KRS §§ 504.130, .150* (establishing this defense). Although, in Kentucky, the defendant has the

burden of proving his own insanity or mental illness, he must only do so by a preponderance of the evidence. See *Ball v. Commonwealth*, 81 Ky. 662, 663–64 (1884). According to their “prevailing practice,” however, Kentucky courts do not use the word “preponderance” in jury instructions. *Hardin v. Savageau*, 906 S.W.2d 356, 359 (Ky. 1995). The idea being that the term “may not be easily understood and is essentially redundant,” telling jurors to do what they would do anyway: figure out which way the evidence leans. *Id.* Thus, Kentucky courts “merely instruct[] the jury that to render a verdict it must ‘believe’ or be ‘satisfied’ from the evidence.” *Id.*; see also *Gall v. Commonwealth*, 607 S.W.2d 97, 110 (Ky. 1980) (same), *overruled on other grounds by Payne v. Commonwealth*, 623 S.W.2d 867 (Ky. 1981). The trial court followed this practice here. It instructed the jurors that they could find Sanders either insane and not guilty or guilty but mentally ill “from the evidence,” omitting the phrase “by a preponderance of the evidence.” See R. 73 at 172–73.

Sanders argues that these instructions violated due process because they failed to tell the jury just how low his burden of proof really was. *Id.* at 172–79. The Kentucky Supreme Court denied that claim on the merits. This Court reviewed it under AEDPA, holding that “[r]easonable jurists could conclude that the jury would not have been confused” by the instruction as written. R. 113 at 71. After all, “[i]t is well established that [an] instruction ‘may not be judged in artificial isolation,’ but must be considered in the context of the instructions as a whole and the trial record.” *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). And the context of this instruction, the Court found, likely prevented any confusion. When the trial court discussed the *government’s* burden of proof, it explicitly used the phrase “beyond a reasonable doubt”; where the court discussed *Sanders’s* burden of proof, it explicitly did not. A reasonable juror could see the difference. R. 113 at 71. Thus, neither the state trial court (which gave the instruction) nor the Kentucky Supreme Court (which Okayed it) was so wrong as to require this Court’s intervention.

Sanders continues to think otherwise. He argues that the insanity and mental-illness instructions were more confusing than the Court reads them and that the Sixth Circuit should therefore give them a read, too. R. 151 at 66–67. Specifically, he argues that context is not really all that clarifying: that reasonable jurors would not look closely enough to “pick up on the fact that something was omitted from one instruction” and “that the omission matters.” *Id.* at 66. So, the theory goes, the befuddled jurors held Sanders to a higher standard than

state law required, depriving him of his due-process right to a fair trial, *i.e.*, a trial conducted according to the state’s rules. *Id.* at 66–67.

“[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction” amounts to “a due process violation.” *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). Some do. *Id.* (explaining the conditions under which a jury instruction will violate due process). But the Court concluded that the challenged instructions were not among them—and thus that the Kentucky Supreme Court neither contradicted nor unreasonably applied any clear federal law about confusing jury instructions when it denied Sanders’s claim. Sanders deserves to appeal that claim, however, if a reasonable jurist could debate the Court’s conclusion. Of course, that jurist would first need to find the instruction actually confusing. The first question is therefore whether reasonable jurists could find the insanity and mental-illness instructions more confusing than the Court did.

*17 They could. Context here is more of a prism than a window. Looking at it one way, the instruction was clear enough. After all, the instruction did not say that Sanders had to prove a mental illness “beyond a reasonable doubt.” But at the same time, the instruction did not specify that the burden was lower than that. Because the trial court never mentioned “preponderance,” the jury heard only one definition of any burden of proof: that the government’s burden was to prove its claims “beyond a reasonable doubt.” Without further instructions, a reasonable (though mistaken) juror could think that the same burden applied throughout. See *United States v. Takhalov*, 827 F.3d 1307, 1318 (11th Cir. 2016) (“After all, the average juror is not Mr. Spock. If he were, then a trial-court judge’s job would be much easier. He could instruct the jury in broad strokes—instructing only as to the bare elements of the crime, perhaps—and be confident that the jury would deduce all of the finer-grained implications that must logically follow. As it stands, however, the vast majority of American juries are composed exclusively of humans. And humans, unlike Vulcans, sometimes need a bit more guidance as to exactly what the court’s instructions logically entail.”).

But confusing instructions do not violate due process just because they are confusing. See *Middleton*, 541 U.S. at 437. The allegedly “ailing instruction” must have “so infected the entire trial that the resulting conviction violates due process.” *Estelle*, 502 U.S. at 72 (quoting *Cupp*, 414 U.S. at 147). If “‘there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates

the Constitution,” the instruction violates the Constitution. *Id.* (quoting *Boyd v. California*, 494 U.S. 370, 380 (1990)). The reasonable jurist who finds the challenged instructions clearly confusing would also find a “reasonable likelihood” that they led the jury to hold Sanders to a higher burden of proof than preponderance. If a jury can violate the Constitution by doing so, then that jurist would debate the Court’s conclusion that Claim 18 does not entitle Sanders to relief under AEDPA, and the Court would have to certify that claim for appeal. So the second question is whether, according to clearly established federal law, applying a higher than required burden of proof violates the federal Constitution.

It depends. Specifically, it depends on what Supreme Court case one reads. In some, the Court has said that a “ ‘mere error of state law’ is not a denial of due process” under the Constitution. *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982) (quoting *Gryger v. Burke*, 334 U.S. 728, 731 (1948)). Due process does not require any particular burden of proof for insanity defenses; for all the Constitution cares, the state can make defendants prove their insanity beyond a reasonable doubt. See *Leland v. Oregon*, 343 U.S. 790, 798–99 (1952). Kentucky does not. But that, of course, is state law. Thus, if a Kentucky trial judge instructs a jury to apply a higher burden than preponderance—or confuses them into doing so—his error would be one of state law, not of constitutional due process.

In other cases, the Court has said that due process entitles defendants to a trial that follows the state’s procedures. These cases treat the procedure as a right: By choosing the procedure, the state gives defendants a “liberty interest” in seeing the procedure followed. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). There may be no due-process right per se to seek a divorce in court, for example. But “having made access to the courts an entitlement or necessity” for those seeking a divorce, “the [s]tate may not deprive someone of that access” willy-nilly. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 n.5 (1982). Kentucky has chosen a low burden of proving mental illness. And it has codified that burden in a statute. See KRS § 504.130(1)(a) (“The defendant may be found guilty but mentally ill if: ... The defendant proves by a preponderance of the evidence that he was mentally ill at the time of the offense.”).⁷ Under the “entitlement” line of cases, Kentucky defendants might well have a liberty interest in being held to that particular burden.

⁷ The not-guilty-by-reason-of-insanity statute is not equally clear on the burden of proof. But it would likely

create an absurdity in the law to require different levels of proof for “insanity” and “mental illness,” two near synonyms—especially given Kentucky’s common-law practice of allowing defendants to prove insanity by mere preponderance. See *Ball*, 81 Ky. at 663–64.

*18 But it is not entirely clear which line of cases—“mere error” or “entitlement”—this one falls under. Both lines appear to be “clearly established [f]ederal law” in their own right. 28 U.S.C. § 2254(d)(1). They also contradict each other. And there appears to be no third line signaling when courts should apply one or the other. As such, it is unclear which “law” the Kentucky Supreme Court was supposed to apply. Since that is unclear, this Court cannot say whether that court contradicted or unreasonably applied the law it was supposed to apply. In the face of such uncertainty, it is prudent to ask the circuit court to take a look. Granted, one could argue the opposite: that—under AEDPA—uncertainty should *prevent* an appeal. If the law is unclear, then there was no clearly established federal law for the state court to contradict or to misapply. But AEDPA and prudence align here. Some reasonable jurist could think that one of the “entitlement” line of cases applies. That jurist could think that no other jurist would fail to see that the Kentucky Supreme Court was wrong for not applying it. And since this Court concluded the opposite, that jurist could debate the Court’s conclusion. So not only prudence, but also AEDPA, requires the Court to certify this claim for appeal. See *Slack*, 529 U.S. at 483–84.

iv. Claim 28: *Brady* violation

Claim 28 brings back Dr. Flenning, the mental-health evaluator and author of the favorable counter-report. Sanders argues that, by failing to tell him about this report, the prosecution violated its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose material evidence to the defense. But the Kentucky Supreme Court found the prosecution had complied with *Brady*. And this Court found that finding reasonable, mainly because the prosecution itself did not know or have any reason to know about the report—*Brady* does not require the prosecution to disclose what it doesn’t know. R. 113 at 75–79. Although *Brady* does require the prosecution to learn (and then disclose) information from people working on its behalf—such as the police, see *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999)—the Supreme Court has never extended that obligation to people not working for the prosecution, such as Dr. Flenning. Citing no case to the contrary, Sanders was unable to show that the Kentucky Supreme Court had contradicted or unreasonably applied any

clearly established federal law that existed when he was prosecuted.

But reasonable jurists would debate that, Sanders argues, because he *did* cite a case: *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). See R. 151 at 69 (citing R. 73 at 322). There, the Supreme Court held that the prosecution was obligated to disclose material information gathered by an investigatory agency. *Ritchie*, 480 U.S. at 57–58. But as this Court explained the first time it dealt with Sanders's argument, an investigatory agency—an arm of the state that responds to crime, like the prosecution itself—is different than the psychiatric center for which Dr. Flenning and Sanders's other evaluators worked and which under Kentucky law is essentially an arm of the courts. R. 113 at 78. Although the prosecution is obliged to learn information from its own agents, the Supreme Court has not extended the obligation to the court's agents. Sanders once again offers no law to the contrary; the Fourth Circuit case he cites does not count, of course, as it is not a “clearly established Federal law[] as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1).

Reasonable jurists hence could still agree that the prosecution had no reason to know about a side report that Sanders's evaluators did not even mention in their main report—and thus that the prosecution did not (since it could not) violate *Brady*. If this were debatable, Sanders would have the right to appeal his claim. But it is not, so he does not.

v. Claim 36: Cumulative Prejudice

In Claim 36, the last Sanders seeks to appeal, he argues that the Court should consider all the above “errors” in the aggregate. Even if one error did not prejudice him on its own, he argues, taken together they still prejudiced him cumulatively. R. 73 at 353–355. Because the Kentucky Supreme Court did not address the merits of this claim, this Court reviewed it *de novo*. R. 113 at 128–29. The above “errors” fit roughly into two types: errors by counsel (allegedly denying Sanders's right to effective assistance) and errors by the prosecution and the courts (allegedly denying his rights to due process and a fair trial). Courts can aggregate the first type: *Strickland* tells them to assess the odds “that but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 695 (emphasis added); see *Mackey v. Russell*, 148 Fed.Appx. 355, 369 (6th Cir. 2005) (aggregating counsel's deficiencies

to determine prejudice). But the Court found nothing to aggregate here. Sanders's counsel did perform deficiently in two ways: he failed to prepare Sanders to take the stand (Claim 27(J)) or to request further competency evaluations (Claim 27(L)). Both times, though, the Court held that these deficiencies had not prejudiced Sanders in any way. And zero plus zero still equals zero. R. 113 at 129. As to the other bucket of errors—those by the prosecution and the courts—the Court simply may not aggregate them. The way is blocked by *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005). Thus, the Court denied Sanders's cumulative-prejudice claim.

***19** Sanders now seeks a certificate of appealability on two grounds: first, “so the en banc [Sixth Circuit] and/or the United States Supreme Court has the opportunity to overrule *Moore*.” R. 151 at 73. Sanders offers three rather compelling reasons why one of those courts should do so. *Id.* at 71–73. First, he notes that the Supreme Court in its own cases seems comfortable considering the cumulative prejudice of trial errors. See *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973) (“We need not decide, however, whether this error alone would occasion reversal since Chambers' claimed denial of due process rests on the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit him to call other witnesses.”). Second, he says many other circuits allow aggregation. R. 151 at 72 (collecting cases). Third, he questions why a court can consider the cumulative impact of one type of error (ineffective assistance of counsel) but not others. *Id.* at 73. Assumedly, all errors prevent a defendant from receiving the process he is due.

Although these points might convince the Sixth Circuit to take a case that will allow it to reconsider *Moore*, this is not that case. For all the reasons given above, none of the errors that Sanders alleges were errors in fact. See *supra* Parts II.b.i–iv. At least, the Kentucky Supreme Court concluded they were not, and this Court found that reasonable jurists could agree with that conclusion. Under AEDPA, that means Sanders suffered no errors that can garner him habeas relief. So there are no errors to consider cumulatively, even if the Court could. Overturning *Moore* would therefore not change the result here. Reasonable jurists might still disagree with *Moore*. But they could not “debate whether (or, for that matter, agree that) [Sanders's] petition should have been resolved in a different manner.” *Slack*, 529 U.S. at 483–84. *Moore* or no *Moore*, Sanders is not entitled to habeas relief on these claims. As such, he is not entitled to appeal them singly or together.

Second, Sanders argues that if the Court grants a certificate of appealability for more than one ineffective-assistance claim, it should also grant a certificate as to the ineffective-assistance part of his cumulative-prejudice claim. R. 151 at 73. Indeed, “the clear mandate of *Strickland* and several other Supreme Court cases is that the effect of all counsel's errors is to be considered in toto.” *Mackey*, 148 Fed.Appx. at 368–69; see *id.* at 369 (citing cases). The Court has granted a certificate of appealability as to Claim 27(I), see R. 150, and it will grant one as to Claim 27(F), see *supra* Part II.a.vii. Both are ineffective-assistance claims. The Court must therefore pass along to the Sixth Circuit the ineffective-assistance part of Sanders's cumulative-prejudice claim. A reasonable jurist could hold that the failure to track down more witnesses—the basis of Claims 27(F) and 27(I)—was clear ineffective assistance. That jurist would disagree with the Court's conclusion that the Kentucky Supreme Court had reasonably applied *Strickland*. That jurist would also disagree with the Court's decision not to consider the combined effect of these alleged deficiencies. When a jurist sees that another

might disagree with him, he must let the circuit decide. *Slack*, 529 U.S. at 484.

III. Conclusion

Accordingly, it is **ORDERED** that Sanders's motion for a certificate of appealability, R. 151, is **GRANTED IN PART** and **DENIED IN PART**. The motion is granted as to:

- (1) Claim 18;
- (2) Claim 27(F), specifically as whether the Kentucky Supreme Court unreasonably applied *Strickland*; and
- (3) Claim 36, specifically as to whether Sanders suffered cumulative prejudice from the deficiencies alleged in Claims 27(F) and 27(I).

The motion is otherwise denied.

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801 S.W.2d 665
Supreme Court of Kentucky.

David Lee SANDERS, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

No. 87–SC–674–MR

Sept. 27, 1990.

Rehearing Denied Feb. 14, 1991.

Synopsis

Defendant was convicted by jury in the Madison Circuit Court, [William T. Jennings, J.](#), of two counts of murder and two counts of robbery in the first degree and was sentenced to death, and he appealed. The Supreme Court, Combs, J., held that: (1) seating of juror who had passing acquaintance with victim and victim's wife and passing familiarity with reported circumstances of crime did not deprive defendant of trial by impartial jury or due process, and other prospective jurors did not have to be excused for cause; (2) evidence implicating defendant in separate robbery in another county was relevant and admissible during Commonwealth's case in chief, and that evidence was not presented in excess detail; (3) use of word "recommend" in charge and verdict form did not, without more, imply diminution of jury's duty to fix sentence; and (4) sentence of death was not excessive or disproportionate.

Affirmed.

[Leibson, J.](#), concurred in result only and filed opinion.

Attorneys and Law Firms

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Frederic J. Cowan, Atty. Gen., [Rickie L. Pearson](#), Denise A. Garrison, Asst. Attys. Gen., Criminal Appellate Div., Frankfort, for appellee.

Opinion

COMBS, Justice.

David Lee Sanders appeals from a judgment of Madison Circuit Court sentencing him to death on each of two convictions for murder and to consecutive twenty year terms of confinement on two convictions of robbery in the first degree.

According to the overwhelming evidence, including his own trial testimony, Sanders, on January 28, 1987, killed and robbed the proprietor of a convenience store, and also killed and robbed a visitor who had happened into the store and upon the crime in progress. Each victim was shot once in the back of the head. At trial, insanity was offered as the sole defense.

I. REVIEW OF UNPRESERVED ISSUES

Appellant seeks review of forty-one listed issues, some of which comprise numerous sub-issues, and many of which were not preserved for review pursuant to [RCr 9.22](#) or [9.54](#). Indeed, more than a few of these questions were not even *raised* below. Except where the trial court has a duty to intervene *sua sponte* to prevent manifest injustice, considerable semantic agility is required in order to assign error to the court respecting issues with which it has not been presented.¹ Where the death penalty has been imposed, we nonetheless review allegations of these quasi errors. Assuming that the so-called error occurred, we begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel's failure to object, e.g., whether the failure might have been a legitimate trial tactic; and (2) if there is no reasonable explanation, whether the unpreserved error was prejudicial, i.e., whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed. [Cosby v. Commonwealth, Ky., 776 S.W.2d 367 \(1989\)](#); [Ice v. Commonwealth, Ky., 667 S.W.2d 671 \(1984\)](#). All unpreserved issues are subject to this analysis.

¹ Generally, once a judgment has become final, such issues constitute a collateral attack upon the judgment imposing sentence, and must be presented to the trial court pursuant to [RCr 11.42](#).

II. JURY SELECTION

Appellant contends that a number of errors compromised the integrity of the jury selection process. Claiming that he was

denied an impartial jury and due process of law, appellant names eight members of the jury panel who he argues should have been excused for cause, but were not. Trial counsel objected to only *669 three of the eight.² None of those three, and only one of the five challenged for the first time on appeal, sat on the final jury. It is elementary logic and sound law that a defendant's right to be tried by an impartial jury is infringed if and only if an unqualified juror participates in the decision of the case. *Randolph v. Commonwealth, Ky.*, 716 S.W.2d 253 (1986); *Sanborn v. Commonwealth, Ky.*, 754 S.W.2d 534 (1988); *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988).³

² The fact that counsel moved to exclude *some* prospective jurors certainly permits the inference that the others, unchallenged, were accepted by the defense as a matter of considered trial tactics. Where the competency of a juror is raised for the first time on appeal, and where, as here, the record fails to demonstrate an obvious bias antagonistic to the interests of the defendant, an appellant faces an enormous burden to establish that trial counsel's decision to accept the juror was not a reasonable exercise of professional judgment.

³ “Any claim that the jury was not impartial ... must focus not on [the stricken juror], but on the jurors who ultimately sat.” *Id.*, 108 S.Ct. at 2277.

In the present case, therefore, our attention focuses first on the one allegedly objectionable panelist who became a member of the final jury. The juror under scrutiny visited the bench twice in response to questions during general voir dire, and was also examined in individual voir dire. He advised the court and counsel that, although he did not know her well, he and the wife of one of the victims were employed at the same hospital, he as a respiratory therapist on the third shift, and she as a business office employee on the day shift. He added that he had been introduced to her husband at a Christmas party. This juror further volunteered that he had heard some talk about the crime at the hospital, and had read some accounts, not amounting to much, in the newspaper. Counsel for the defense inquired of the juror whether his verdict might be affected due to his acquaintanceship with the wife of the victim, and, evidently satisfied with a negative response, declined to challenge for cause, or by peremptory strike.

In light of the record, we see nothing amiss in the proposition that counsel reasonably and responsibly found this juror to be competent, qualified, and impartial. Moreover, had

the trial court been presented with a motion to excuse this juror for cause, we are not persuaded that denial of such motion would have amounted to an abuse of discretion. The juror disclaimed any bias. In our view, the facts that he had a passing acquaintance with the victim and the victim's wife, and a passing familiarity with the reported circumstances of the crime, are insufficient to demonstrate a probability of prejudice. Certainly the relationship here is of much less import than that in *Pennington v. Commonwealth, Ky.*, 316 S.W.2d 221 (1958), where the juror was a first cousin to the prosecution's key witness, or that in *Randolph v. Commonwealth, Ky.*, 716 S.W.2d 253 (1986), where the juror in question was an employee of the Commonwealth's Attorney. Nor do we find here significant additional circumstances implying bias, as was the case in *Sanborn v. Commonwealth, Ky.*, 754 S.W.2d 534 (1988), where a juror was first cousin by affinity to a key prosecution witness, and in addition responded on voir dire that he would have to lean toward what that witness might say. Cf. *Marsch v. Commonwealth, Ky.*, 743 S.W.2d 830 (1988); *Peters v. Commonwealth, Ky.*, 505 S.W.2d 764 (1974). We conclude that the lately contested seating of the juror in the present case deprived the defendant neither of trial by an impartial jury nor due process of law.

The appellant also complains, with some justification, that the trial judge commented to the prosecutor, *ex parte*, that this same juror was “dying to get on.” This brief remark casually conveyed a subjective opinion as to the juror's attitude toward service (an attitude as discernible by counsel as by the court); it conveyed no opinion that the juror was disposed either to serve and convict, or to serve and acquit. While we do not condone the comment, we are unable to perceive in it any prejudice to *670 defendant's rights to due process, a fair trial, or rational sentencing.

We next examine the three potential jurors whom the defense unsuccessfully challenged for cause. The first of these stated on voir dire that he could decide the case solely upon the evidence heard in court, and could consider all penalty options and impose sentence according to the evidence. He further affirmed that he could follow the court's instructions. The court then asked whether there was any reason why the juror could not be fair and impartial. He replied, “Only that I've been robbed myself with a gun put to my head ... I'm a little paranoid over that, I think.” When asked whether his experience would prevent him from being fair and impartial he replied, “I would hope not, but I never know.” Defense counsel inquired whether, if a case involved a gun pointed at

the victim's head and a robbery, the juror thought he could be objective and fair, to which he replied, "Well, you always think you can be objective. People with mental problems think they can be objective, but they aren't." Pursuing the possibility of bias, the court asked whether the juror could set aside whatever feelings he might have as a result of being a robbery victim and render a decision in this case upon the evidence heard. The juror replied, "I think I've come out of the trauma." The court, apparently satisfied that this juror was qualified, overruled the defendant's challenge for cause. Having reviewed the interrogation, we are unable to conclude that the trial court's ruling was clearly erroneous and an abuse of discretion. *Peters v. Commonwealth, Ky.*, 505 S.W.2d 764 (1974); *Scruggs v. Commonwealth, Ky.*, 566 S.W.2d 405 (1978); *Caldwell v. Commonwealth, Ky.*, 634 S.W.2d 405 (1982).

A second potential juror stated on voir dire that, as a member of the Berea Police Department, he had seen a teletype message alerting the department to look for a Chevrolet Blazer which reportedly had been seen in the vicinity of the crimes. He stated that he had no other involvement with the investigation, and did not know who owned the Blazer. (He added that his judgment would not be affected if it were to be shown that the defendant was driving that vehicle.) Upon further questioning, this juror acknowledged that he was acquainted with two of the three officers expected to testify for the Commonwealth. When asked by the court whether he would give more weight to the testimony of these officers, he responded that he would listen to all the evidence and give it all equal weight. He added that he had no information concerning the case and was not involved in any investigation with any officer expected to testify for the Commonwealth.

We cannot agree with the appellant that this juror "participated in the investigation" in any substantial way. The fact that he was a law enforcement officer was not sufficient reason to excuse him for cause. *Smith v. Commonwealth, Ky.*, 734 S.W.2d 437 (1987). Nor does the fact that the juror was acquainted with the officers who would testify for the Commonwealth establish bias as a matter of law. We conclude that the trial court did not abuse its discretion in denying the defense motion to excuse this juror for cause.

A third juror disclosed upon voir dire that he was acquainted, through his business, with one of the victims in the case. He stated that he had liked the victim, but also described the relationship as a casual one. When asked by the defense whether he had an opinion as to the guilt or innocence of the

accused, the juror replied, "Oh, no." Responding to the court, he indicated that he thought he could be fair and impartial, regardless of his relationship with the victim.

The record does not persuade us that this juror had such a close situational relationship with the victim as to compel a presumption of bias. See *Ward v. Commonwealth, Ky.*, 695 S.W.2d 404 (1985); *Sanborn v. Commonwealth, Ky.*, 754 S.W.2d 534 (1988). The trial court's ruling on the defense motion to excuse for cause was not clearly erroneous.

Having concluded that the trial court's actions in this sphere were not in error, we do not reach the question of whether the appellant's use of peremptory strikes to *671 remove these three jurors deprived him of a substantial right provided by state law or denied him due process. Cf. *Ross v. Oklahoma, supra*.

Appellant asserts various other errors and irregularities said to have occurred during the jury selection process. During voir dire the prosecutor posed the following questions:

In a criminal trial, do you realize that the Commonwealth has the burden of proving the defendant guilty beyond a reasonable doubt, that does not mean beyond all doubt or a shadow of a doubt? Would any of you all hold the Commonwealth to a higher standard of proof than the reasonable doubt standard?

Appellant now insists (although the issue was not preserved by contemporaneous objection) that within the first quoted question lies an attempted definition of the phrase "reasonable doubt," in violation of the rule established in *Commonwealth v. Callahan, Ky.*, 675 S.W.2d 391 (1984), that "all counsel shall refrain from any expression of the meaning or definition of the term 'reasonable doubt.'" Assuming, without deciding, that an error would have occurred had objection been raised and overruled,⁴ we are wholly unconvinced, considering the circumstances, that absent this putative error the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed.

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In *Callahan* the prosecutor's remarks included: "When I went to college I had some teachers that could practically prove to you that we weren't even here today. But that's not what reasonable doubt is. The judge has instructed you ... as to what reasonable doubt is and you read that and follow it." (In fact, the trial court had given no instruction on reasonable doubt, in accord with RCr 9.56.) This Court decided that the comments of the

prosecutor did not constitute any attempt to define reasonable doubt.

Appellant further submits that the trial court improperly restricted defense counsel's examination of two prospective jurors during individual voir dire. In the first instance, the juror indicated in response to questions from the court that he was "not much for capital punishment at all," and that "I don't think I can give someone death." Following the prosecutor's motion to excuse for cause, defense counsel, in an apparent attempt to rehabilitate the juror, asked if he could impose the death penalty against "an individual like Charles Manson." Objection to this question was sustained, in keeping with the rule of *White v. Commonwealth, Ky.*, 671 S.W.2d 241 (1984). Defense counsel then asked if the juror could think of any situation bad enough to justify the death penalty; the reply was that he could not, whereupon the Commonwealth's motion to excuse for cause was granted. It seems to us eminently clear that counsel's question regarding Charles Manson was correctly disallowed, and moreover that the information concerning the juror's attitude toward the death penalty sought to be elicited by the question was made perfectly plain by his response to counsel's ensuing question.

In the second instance a prospective juror responded to an inquiry of the court that he could consider all four sentencing options in the event of a conviction for murder. Upon questioning by the Commonwealth, the juror stated that he was in favor of the death penalty if guilt were proven beyond a reasonable doubt, and agreed with the prosecutor's leading amendment, "If the facts merit it?" Defense counsel asked whether the juror would lean toward imposition of the death penalty, as opposed to the other sentencing options, if a person were found guilty of double murder. An objection was sustained upon the grounds that the question posed a hypothetical situation. See *White v. Commonwealth, supra*. Defense counsel then asked, assuming that a defendant was convicted of murder, "Would you be more than likely to give the death penalty?" The Commonwealth objected to the phrase "more than likely," suggesting that the proper standard should be whether the juror would "automatically" vote for the death penalty. Without ruling on the objection, the court asked the juror what it considered to be the correct question: "Do you feel that there are certain cases where a murder might be involved where twenty *672 years might be appropriate, certain cases where life in prison might be appropriate, certain cases where life in prison without parole for twenty-five years might be appropriate, and other cases where the death penalty might be appropriate?" The juror answered that after hearing the evidence and the court's instructions he would weigh all of

the options. The court further inquired whether, in a murder case, the juror would recommend only the death penalty, to which the juror responded, "No ... I'd just have to hear the evidence, how the crime was committed, and all that first."

Because the defendant was to be tried simultaneously on two charges of murder, we believe that counsel's question regarding conviction of "double murder" was proper, and the juror should have been allowed to answer.⁵ However, we are convinced that the trial court's careful and detailed inquiries, and the juror's definite responses to the effect that his decision would depend upon the evidence and the court's instructions, served to eradicate any possible prejudice to the defendant, and to demonstrate that this juror was in fact qualified.

⁵ See *Morris v. Commonwealth, Ky.*, 766 S.W.2d 58 (1989). There the trial court forbade the use of the word "intentional" in questioning by defense counsel. We said, "this thwarted questioning relating to the sole crime with which [defendant] was charged, that of intentional murder."

Appellant further argues that the practice, exercised in this case, of removing for cause jurors definitely opposed to the death penalty is unconstitutional. We cannot agree. On the contrary, a venireman who cannot fairly and conscientiously consider the entire range of statutory penalties, in compliance with his oath and the instructions of the court, is not impartial, and should be excluded from the jury as not qualified to serve. See *Stanford v. Commonwealth, Ky.*, 734 S.W.2d 781 (1987); *Moore v. Commonwealth, Ky.*, 771 S.W.2d 34 (1989); *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).⁶

⁶ "In this case we address the question left open by our decision nearly 18 years ago in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968): Does the Constitution prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial? ... We hold that it does not." *Id.*, 476 U.S. at 165, 106 S.Ct. at 1760.

The appellant also objects (for the first time on appeal) to the prosecutor's use of peremptory challenges to remove six jurors who had expressed receptiveness to the defense of insanity. The contention is that the prosecutor's action violated

the appellant's rights to due process and an impartial jury drawn from a fair cross section of the community. Appellant would analogize the present situation to that in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), where it was held that the prosecution may not exercise peremptory challenges for the discriminatory purpose of eliminating from the jury members of the defendant's race.

We begin by noting that the constitution does not require that a petit jury represent a fair cross section of the community. As stated by the United States Supreme Court in *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986):

We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.

Id., 476 U.S. at 173, 106 S.Ct. at 1765.

Recalling that we have already determined, *supra*, that the jury which decided the present case was impartial, we are satisfied that our determination comports with the standard expressed by the *Lockhart* court:

[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of *673 the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.

Id., 476 U.S. at 184, 106 S.Ct. at 1770.

What remains of the appellant's argument, then, is a tenuous analogy with *Batson*. We do not deem either the holding or the rationale in *Batson* to be so broad as to apply to the exercise of peremptory challenges to remove jurors who share, among themselves and with the defendant, a sympathetic attitude toward a particular legal defense. The illegitimate tactic condemned in *Batson* was based upon the immutable characteristic of race shared by the defendant and the challenged jurors, and bore no morally or ethically cognizable relationship to the desirability or undesirability of the jurors, as jurors. It is inconceivable that the equal protection principles underlying the *Batson* decision extend to persons especially disposed to consider an insanity defense.

Finally, with respect to jury selection, appellant alleges that the procedure employed by the trial court in selecting the

jury substantially deviated from the requirements of RCr 9.36 and KRS 29A.060(2), with the result that the defendant was denied due process of law and his right to a fair trial. The trial court intended to seat a jury of twelve, plus two alternates, and to allow seventeen peremptory challenges, and therefore needed to qualify thirty-one jurors. At the conclusion of individual voir dire, forty jurors were qualified. Of these, the court seated thirty-one in the order in which they were originally called. Appellant contends that the court was required to place all forty names in the box and draw thirty-one randomly.

It may be conceded that the trial court's procedures deviated somewhat from those prescribed by rule and statute. We believe that the mischief lay in the decision to qualify forty potential jurors rather than thirty-one. See KRS 29A.060; RCr 9.30(1)(a); Administrative Procedures of the Court of Justice, Part Two, Section 12. Our fundamental objective is to preserve randomness in the selection of the legal jury, up to the point where peremptory challenges may be exercised. It is certainly arguable that qualification of "too many" jurors permits the court unduly to influence the composition of the legal jury, especially if the court has the option of eliminating the excess number by lot or by numerical order.⁷ However, it is clear that the potential for abuse demonstrated in the instant case is minuscule when compared to that presented in the case of *Robertson v. Commonwealth, Ky.*, 597 S.W.2d 864 (1980), relied upon by the appellant in urging reversal. Moreover, we note that defense counsel was informed by the court prior to trial that more than thirty-one prospective jurors would be death-qualified, and that counsel objected to the procedure neither at that time nor at the time of trial. In addition, counsel failed to object to the numerical seating of the first thirty-one jurors called as opposed to a random selection of thirty-one from the forty who qualified. It is quite reasonable to believe that counsel, who had questioned all forty on voir dire, concluded that the first thirty-one jurors were as desirable as, or more desirable than, the nine who were excused. Under the circumstances, we believe it incumbent upon appellant to demonstrate that he was prejudiced by the method of jury selection employed by the trial court, not only because of our rule that unpreserved issues require a showing of prejudice, but also because the rule of *Robertson v. Commonwealth, supra*, requires reversal as a matter of law only where there is a substantial irregularity in the jury selection process and where the error is preserved. In the present case the first thirty-one jurors who qualified were seated; the result was the same as if the jury selection procedures required by rule and statute had been followed exactly. It is therefore impossible for the

appellant to demonstrate any prejudice, and the irregularity in the procedure was harmless beyond all doubt.

7 We hasten to say that in the present case we ascribe no prejudicial motive to the trial court.

III. TRIAL—GUILT/INNOCENCE PHASE

Appellant assigns error to the admission, during the Commonwealth's case in chief, *674 of evidence implicating the defendant in a separate crime. Approximately one month prior to the events for which the defendant was on trial, in late December 1986, the proprietor of a bait shop in Lincoln County had been shot in the back of the head with a .25-caliber weapon, and robbed. Subsequent to the Madison County crimes, it was determined that one of the Madison County victims had been shot with the same gun. Following his arrest in connection with the Madison County incident, the appellant, after a series of blanket and then partial denials, stated to investigating officers that he had indeed committed the acts in both Lincoln and Madison counties. He indicated that both incidents had occurred in essentially the same way: he had parked his vehicle outside the store, gone inside and conducted a minor transaction, exchanging casual remarks with the person within, returned to his vehicle and gotten the gun (in Madison County two guns), re-entered the store, shot the victim in the back of the head, and taken money. In each case, the appellant claimed that he was powerless to control his actions. He indicated that he did not know why he had committed the acts, offering that he did not need money. It was as if, he said, that he were outside of his body, watching himself, unable to stop. At the time of trial, the appellant had not been tried for the Lincoln County crime.

In a pretrial motion *in limine*, the defendant asked that the Commonwealth not be permitted to introduce evidence respecting the events in Lincoln County. The trial court denied the motion, on grounds that the evidence was admissible to show intent or common scheme or plan. In the course of the Commonwealth's case in chief, the jury heard evidence of the Lincoln County crime, including investigative details of that crime, and the defendant's recorded statement, wherein he both confessed to the act, and denied a capacity for self-control. On two occasions, the trial court admonished the jury:

Ladies and gentlemen of the jury, the testimony you've heard concerning acts or conduct of the defendant upon another occasion in December in Lincoln County is to be

considered by you only in as far as it may tend to show, if you believe it does, knowledge or intent or pattern of conduct on the defendant's part.

It is contended on appeal that the evidence in question was irrelevant to any issue in the Madison County case; that such evidence was admissible, if at all, only on rebuttal; and that in any event the evidence of an independent crime was presented in unnecessary detail. In general, evidence of other criminal acts of an accused is inadmissible except in certain well-defined circumstances. See *Jones v. Commonwealth*, 303 Ky. 666, 198 S.W.2d 969 (1947); *Pendleton v. Commonwealth*, Ky., 685 S.W.2d 549 (1985). On the other hand, relevant evidence which is probative of an element of the crime charged is admissible, even though it may tend to prove the commission of other crimes. *Pendleton, supra*; *Jones v. Commonwealth*, Ky., 554 S.W.2d 363 (1977). As this Court stated in *O'Bryan v. Commonwealth*, Ky., 634 S.W.2d 153 (1982):

Evidence of the commission of crimes other than the one charged is admissible if, (1) it is offered to prove motive, intent, knowledge, identity, plan or scheme, or absence of mistake or accident; (2) such evidence is relevant to the issues other than proof of a general criminal disposition; and (3) the possibility of prejudice to the accused is outweighed by the probative worth and need for the evidence.

In a criminal prosecution, the Commonwealth bears the burden of proving each element of the statutory offense beyond a reasonable doubt. KRS 500.070. Intent is an element of the crime of intentional murder, and of the crime of robbery in the first degree. KRS 507.020(1)(a); KRS 515.020 and 514.030. Moreover, identification of the defendant as the perpetrator of the crime charged is an essential element in any criminal prosecution.

The record discloses a remarkable similarity between the respective crimes in Madison and Lincoln counties. In each, a victim, alone in a rural shop or store, was shot in the back of the head and robbed. The *675 same weapon was used in both crimes. Witnesses reported having seen a blue Chevrolet Blazer in the vicinity of each offense at the critical time. In addition, in the last of his disparate statements to investigators, the appellant's description of the crimes indicated a common *modus operandi*. In *O'Bryan, supra*, we stated the standard for the admissibility of evidence respecting a common scheme or plan:

Before evidence of other crimes can be admitted to show a scheme, plan or system, the evidence must show acts,

circumstances or crimes similar to, clearly connected with, and not too remote from the one charged.

In light of the *O'Bryan* standard, we are unable to conclude that the trial court abused its discretion in admitting the evidence concerning Lincoln County crime.

Nor can we agree with appellant that the evidence in question was admissible only on rebuttal. In the circumstances of this case, the common scheme or plan attributed to the defendant was probative both as to the identity and as to the intent of the perpetrator of the Madison County crimes. The evidence strongly indicated that both offenses were committed by the same person, making relevant to the present trial evidence that the defendant had committed the acts in Lincoln County. Moreover the similarity of results tends to establish that the offender intended to shoot and to rob the Madison County victims. Both identity and intent being elements which the Commonwealth must prove beyond a reasonable doubt in order to obtain a conviction, the evidence was properly admissible during the Commonwealth's case in chief.

We likewise cannot agree with the appellant that the evidence concerning the Lincoln County crime was presented in excess detail. If evidence of other crimes is admissible to show intent or identity or a common scheme or plan, the jury must weigh such evidence for what it is worth in establishing an element of the offense charged. The probative weight of that evidence is directly related to the degree of likelihood that the defendant actually committed the extrinsic acts alleged. In sum, we are of the opinion that the trial judge acted within the scope of his sound discretion in admitting the evidence, under admonition as to its limited purpose.

Appellant further complains, but did not object below, that the victim of the Lincoln County shooting, confined to a wheelchair, was present in the courtroom during the last day of the guilt/innocence phase of the trial. It is not alleged, and the record gives no indication, that any member of the jury was at any time aware of the victim's presence or identity. We therefore see no appreciable possibility that the jury was affected by her presence, or that the defendant suffered prejudice to his substantial rights.

It is also maintained that the Commonwealth improperly elicited from appellant's wife irrelevant and prejudicial testimony to the effect that he had struck her on one occasion, and had tried to smother her with a pillow on another. Mrs. Sanders was called by the Commonwealth during its case in chief. On cross examination, defense counsel asked, among

other things, whether her marriage to the defendant had been very happy, to which the witness replied affirmatively. Counsel also inquired whether the witness had any reason to think that the appellant would be capable of being involved in the crimes with which he was charged. The witness responded that she did not, and added that there was no way that her husband could hurt anyone or do anything against anyone. In response to redirect examination, the witness offered the testimony now objected to; on recross she explained that the incident when the defendant struck her was mostly her fault, in that she had provoked him, and added that the smothering incident was inexplicable, but that her husband had hated himself afterwards.

We see Mrs. Sanders' testimony during cross examination by the defense as substantially responsive to the questions posed, and as opening the door to the redirect examination conducted by the Commonwealth. Had the trial court been presented with an objection, therefore, admission *676 of this challenged testimony would not have constituted an abuse of discretion.

Over objection, the Commonwealth was allowed to introduce, through the pathologist, a total of six photographs of the two victims of the Madison County crimes. The appellant argues, as he argued at trial, that these photographs were irrelevant to any real issue in the case, in that there was no dispute about the fact that the defendant had shot and killed the two victims; he submits that the photographs only served to inflame the jury and to distract it from the real disputed issue, the sanity of the defendant. But, where a defendant has pled not guilty, it is indispensable to the Commonwealth's case to establish that a crime has in fact been committed. We agree with the trial court that the selected photographs offered into evidence were not gruesome or unduly prejudicial, but constituted relevant and probative evidence of the circumstances of the crime; we find in their admission no abuse of discretion.⁸ Cf. *Gall v. Commonwealth, Ky.*, 607 S.W.2d 97 (1980).

⁸ The photographs erroneously admitted in the case of *Holland v. Commonwealth, Ky.*, 703 S.W.2d 876 (1985), relied on by appellant, were of a very different nature. They depicted extensive animal mutilation of the corpse occurring subsequent to the murder, and did not "elaborate on the nature of the victim's injuries...." *Id.*, at 880.

Appellant argues, as an unpreserved issue, that a Kentucky State Police detective, on redirect examination by the Commonwealth, offered an opinion on what was to become

the ultimate issue in the case, i.e., the defendant's sanity at the time of the offense. As we have noted, the defendant had given various and contradictory statements regarding his knowledge of the crimes. On direct examination the detective recounted these statements, including the final one to the effect that the defendant had indeed committed the criminal acts, but had been unable to control himself. On cross examination, the detective, asked by defense counsel whether he believed the defendant's last version of events, replied that most of it had "made sense," whereas the earlier stories had not. On redirect, the prosecutor inquired whether the statement made sense to the witness with regard to the concrete facts related, or with regard to the defendant's reported state of mind. The witness replied:

Witness: I can't honestly say that I still believe that of what he was saying.

Prosecutor: Did that part of it make sense?

Witness: That's not what I meant that made sense, no. The part about the way the crime occurred ... makes sense....

In our view, the questioning by defense counsel on cross examination initially solicited an opinion from the witness; moreover, this questioning appears to have been a reasonable, calculated trial tactic. The Commonwealth legitimately pursued the matter within the proper scope of redirect examination, and created no reversible irregularity.

The appellant testified in his own defense. On direct examination, he stated that after his arrest he had told his attorney not to request bail. Defense counsel then asked the defendant why he had made this choice. The prosecutor's objection to this question was sustained. The defense did not offer to show by avowal what the defendant's answer would have been, but submits on appeal that the trial court's ruling constituted reversible error, and denied the defendant due process of law.

Even assuming that the trial court's ruling was in error, we are unable in the absence of an avowal to conclude that the defendant was prejudiced. See *Robertson v. Commonwealth*, 269 Ky. 317, 107 S.W.2d 292 (1937); *Cooley v. Commonwealth*, Ky., 459 S.W.2d 89 (1970). Appellant urges the assumption that the defendant would have given testimony to the effect that he knew he suffered from a mental abnormality, and had wanted to remain confined out of fear that otherwise he might again lose control of his behavior and harm someone. This self-serving testimony,

even if admissible, would have been of insignificant weight, and the defendant *677 incurred no substantial prejudice as a result of its exclusion.⁹

9 In any event the fact that the defendant had asked that he not be released was admitted, and the jury was as capable as the appellant or this Court of inferring a beneficent motive.

During his direct testimony, the defendant portrayed the crimes essentially as he had done in his last statement to investigators, admitting that he had committed the acts, but asserting that he had no control, that it was as if he were outside of his body, watching. Appellant asserts, in another issue not preserved, that the prosecution upon cross examination mocked and denigrated the defense. Among the prosecutor's questions were: whether the defendant was floating in the courtroom; whether the defendant was in a second life; whether he was at present under a spell; whether he was in a cloud; whether he was at present the bad David Sanders, or the good David Sanders. While the prosecutor's tone and attitude may have been less than exemplary, his questions substantially and not unfairly addressed a crucial issue which had been raised on direct examination. The prosecutor's conduct in the present case does not approach the egregious misconduct condemned in the decision of *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534 (1988).

Appellant further complains that the prosecutor cross examined him at length concerning lies contained in his various statements made to police. These statements, introduced by the Commonwealth during its case in chief, included one wherein the defendant had denied any knowledge of the crime, one wherein he alleged that the crimes had been committed by a hitchhiker whom he had picked up, another stating that the defendant and the hitchhiker had jointly committed the crimes, and a final statement admitting the acts but denying volition. In each succeeding statement, the defendant admitted that he had lied in the preceding one. Even had the defense objected at trial to the cross examination now complained of, nothing in the record persuades us that the trial court would have erred in permitting the questions. Once he has taken the stand and testified, a defendant's credibility is properly subject to impeachment by cross examination.

Similarly, because the defendant testified on direct examination that he had "a very happy marriage," and further testified as to an incident involving his wife's ex-husband, the prosecutor's questions regarding one occasion when the

defendant struck his wife, and another when he attempted to smother her, and regarding the defendant's confrontation with the ex-husband, while perhaps borderline, were not clearly beyond the scope of proper cross examination.

Presenting yet another issue which would ordinarily be unreviewable because not preserved, appellant maintains that the testimony of the state psychiatrist, introduced by the Commonwealth in rebuttal, contained inadmissible hearsay, bolstered the witness's own credibility, and included an inadmissible lay opinion. The doctor testified extensively concerning her evaluation of the defendant at the Kentucky Correctional Psychiatric Center, to which he had been referred prior to trial. Responding to a question as to whether she had observed any efforts by the patient to manipulate the people working with him, the doctor stated, in part:

The Chaplain spent a great deal of time with him attempting to counsel him. And it appeared that he came up with feelings that would indicate that he was sorry or whatever only at the urging of the Chaplain. The Chaplain commented that the patient did not appear to have a true regard for the victims, that he did not appear to have a true remorse. When the Chaplain would talk with him and maybe almost put words in his mouth, the patient would ... say he did. So we did feel that he had tendencies to be a manipulative type of person.

It is the appellant's position that the comments attributed to the Chaplain are inadmissible hearsay, and furthermore that the subject of remorse was irrelevant to the issue of guilt or innocence.

***678** In *Buckler v. Commonwealth, Ky.*, 541 S.W.2d 935 (1976), this Court adopted the following exception to the hearsay rule:

[A]n expert may properly express an opinion based upon information supplied by third parties which is not in evidence, but upon which the expert customarily relies in the practice of his profession.

...

We emphasize that the type of information which can be utilized by the expert in forming his opinion should be only that produced by qualified personnel and on which the expert would customarily rely in the day-to-day decisions attendant to his profession.

While the defendant, by timely objection, might have required the Commonwealth to establish that the Chaplain was a qualified person, and that the doctor customarily relies upon him in the practice of her profession, the earlier testimony of the psychiatrist indicates that the proper foundation could have been satisfactorily laid. The doctor had testified that a team approach was used to evaluate the defendant at KCPC. The quoted testimony fairly implies that the Chaplain regularly counsels KCPC patients, and is a qualified member of the team upon whom the psychiatrist ordinarily relies. We should of course prefer to have these inferences clearly confirmed by the record, but in the absence of an objection by the defendant, we conclude upon the record as it is that the doctor's testimony in this regard was acceptable.

And, while the subject of the defendant's remorse, in isolation, may well be irrelevant to the question of guilt or innocence, the record indicates that the question of remorse in the context presented was relevant to the psychiatrist's conclusion that the defendant is a manipulative type of person, which question in turn is clearly relevant to a determination of whether the patient in fact suffered from a mental disease or defect, or whether on the other hand he was a malingerer. This latter issue being crucial in the guilt/innocence phase of trial, the evidence as to the defendant's remorse, *vel non*, was relevant and admissible.

The appellant's contention regarding the expert's bolstering of her own credibility does not merit discussion.

Appellant also finds impropriety in the following testimony, unchallenged at trial:

Prosecutor: Did you find any explanation for why he did what he did?

Psychiatrist: Yes, but not a psychiatric one ...

Well, the only explanation I could come up with after the extensive evaluation that we did was ... just the money ... the obvious motives that you would find as an investigator. We did not find any kind of a psychiatric explanation for why the person would have committed the crimes.

The obvious import of this testimony is that, in the expert's opinion, the defendant had not committed the crimes while suffering from a significant mental disease or defect. This opinion was entirely proper in rebuttal to the preceding testimony of the defense psychiatrist, that in his opinion the defendant was insane at the time of the offenses. In

the absence of a diagnosed psychiatric abnormality, the state psychiatrist was left with no explanation for the defendant's acts other than "just the money," and "the obvious motives that you would find as an investigator." While these latter remarks may have been technically objectionable, as a practical matter they simply represent the imperative conclusion of the doctor's competent expert opinion that the defendant's behavior was not related to any special psychiatric condition. The statement of the expert's conclusion in alternative terms constituted in this case no undue prejudice to the defendant.

At trial, the defendant did not object to the court's instructions to the jury at the conclusion of the guilt/innocence phase. However, on appeal, he faults the instructions in several respects.

First, it is argued that the trial court should have instructed on extreme emotional disturbance, and the lesser included *679 offense of manslaughter in the first degree. At the same time, appellant submits that the *absence* of extreme emotional disturbance is an element of the offense of murder, and therefore must be proved by the Commonwealth beyond a reasonable doubt. In *Wellman v. Commonwealth, Ky.*, 694 S.W.2d 696 (1985), we stated that the "presence or absence of extreme emotional distress is a matter of evidence, not an element of the crime." And in *Gall v. Commonwealth, Ky.*, 607 S.W.2d 97 (1980), we said:

An instruction on murder need not require the jury to find that the defendant was not acting under the influence of extreme emotional disturbance unless there is something in the evidence to suggest that he was, thereby affording room for reasonable doubt in that respect.

We have also held that mental illness and extreme emotional disturbance are not the same thing, and that the latter becomes an issue only "when there is probative, tangible and independent evidence of initiating circumstances, such as provocation...." *Wellman, supra*, at 697. Cf. *McClellan v. Commonwealth, Ky.*, 715 S.W.2d 464 (1986).

While the present record reveals considerable evidence of mental illness, we are unable to locate any evidence at all that the defendant was acting under the influence of extreme emotional disturbance at the time of the crimes in Madison County. The Commonwealth therefore had no burden to prove the absence of extreme emotional distress. Moreover, because a manslaughter instruction is proper only where there is evidence to support the giving of the instruction, the trial

court's failure to instruct the jury on manslaughter in the first degree was not error. See *Wellman, supra*; *Gall, supra*.

Appellant further objects (now) that the trial court in its instructions failed to define reasonable doubt, to state the Commonwealth's burden of proof, and adequately to inform the jury of the presumption of innocence. With respect to reasonable doubt, we refer the appellant to the case of *Commonwealth v. Callahan, Ky.*, 675 S.W.2d 391 (1984), and to RCr 9.56(2). With respect to the presumption of innocence and the prosecution's burden of proof, we refer the appellant to the trial court's instruction No. 9:

The law presumes the defendant to be innocent of a crime, and the indictment shall not be considered as evidence or having any weight against him. You shall find the defendant in this case not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty. (Emphasis added.)

It is further submitted that the instructions failed to specify the burden of proof regarding the defense of insanity. The jury was instructed that it might find the defendant not guilty by reason of insanity if it believed "from the evidence" that he was insane at the time of the offenses. We find no error in this instruction. See *Gall v. Commonwealth, Ky.*, 607 S.W.2d 97 at 110.

The appellant next would have it that the instructions were erroneous in failing to inform the jury of the consequences of a verdict of not guilty by reason of insanity, or a verdict of guilty but mentally ill. Such information would have been irrelevant and would have had "no legitimate bearing on the jury's factual determination of guilt or innocence." *Payne v. Commonwealth, Ky.*, 623 S.W.2d 867 (1981); *Ice v. Commonwealth, Ky.*, 667 S.W.2d 671 (1984). Also see *Edwards v. Commonwealth, Ky.*, 554 S.W.2d 380 (1977). Where, as here, the jury has been properly instructed as to the verdicts it may return upon particular findings of fact, the argument that the jury, without information on consequences, cannot distinguish between the verdict of *not guilty* by reason of insanity and that of *guilty* but mentally ill is entirely unfounded.

Appellant next urges that inclusion in the instruction on insanity of the statutory language from KRS 504.020, that "the term mental disease or defect does not *680 include an abnormality manifested only by repeated criminal or

otherwise antisocial conduct,” had the effect of instructing that the defendant was presumed to be sane. We view the language complained of as merely stating a statutory limitation upon a statutory defense, requiring for a finding of insanity that there be some manifestation of abnormality other than repeated criminal conduct. The instruction exhibits no error in this respect.

Appellant insists that he was denied his rights to a fair trial and rational sentencing by improper and prejudicial comments made by the prosecutor during closing argument. In appellant's view, the prosecutor improperly ridiculed the insanity defense, misstated the law as to a presumption of sanity, demeaned the defendant, dwelt on evidence of other crimes, commented on the defendant's future dangerousness, and reenacted the crimes in an inflammatory fashion. We have carefully reviewed the prosecutor's argument to the jury, and, while we do not find it entirely commendable, neither do we find it exceeding acceptable bounds. In all respects complained of, the argument substantially addresses properly admitted evidence. The prosecutor's conduct cannot be characterized as so outrageous as to require reversal; certainly it does not fall into the category of argument condemned in our decisions in *Sanborn v. Commonwealth, Ky.*, 754 S.W.2d 534 (1988), and *Morris v. Commonwealth, Ky.*, 766 S.W.2d 58 (1989). See also *Marlowe v. Commonwealth, Ky.*, 709 S.W.2d 424 (1986); *Tamme v. Commonwealth, Ky.*, 759 S.W.2d 51 (1988).

IV. TRIAL–PENALTY PHASE

The defendant did not object below to the trial court's instructions to the jury during the penalty phase. On appeal, however, he asserts a variety of errors in those instructions. The first complaint is that the court's charge to the jury, and indeed the verdict form signed by the foreman of the jury, contained the word “recommend” when referring to the jury's duty to fix a sentence. In *Tamme v. Commonwealth, Ky.*, 759 S.W.2d 51 (1988), we held that, prospectively, “the word ‘recommend’ may not be used with reference to a jury's sentencing responsibilities in voir dire, instructions or closing argument.” Because the trial of the present case was begun (and concluded) prior to our decision in *Tamme*, our review of this issue is to be conducted under the standard of *Ward v. Commonwealth, Ky.*, 695 S.W.2d 404 (1985). Appellant argues that reversal is required by the following language in *Ward*:

[S]hould any inadvertent reference implying a diminution of the jury's duty in fixing a death penalty creep into any case, the trial judge should immediately inform the jury that their duty to fix the death penalty should be considered as if there were no possibility of review by any source.

We do not believe that the standard in *Ward* requires that the use of the word “recommend,” without more, implies a diminution of the jury's duty, necessitating an admonition. In *Ward*, the prosecutor stressed to the jury that their sentencing decision was “only a recommendation.” He went on to emphasize that the trial court might not choose to impose the death sentence, that the sentence would automatically be reviewed by the Supreme Court, that the governor must sign the death warrant, and again “it is only, I want to point this out again to you, a recommendation.” In the circumstances, we held that the prosecutor had clearly sought to divert the jurors from their true responsibility, by implying that the ultimate responsibility would lie elsewhere. Compare *Grooms v. Commonwealth, Ky.*, 756 S.W.2d 131 (1988), where, in the guilt/innocence instructions, the term “fix” appeared with respect to sentencing, while in the penalty instructions, the word “recommend” was used. We held, in essence, that the contrast between the terms “fix” and “recommend” implied to the jury that it did not bear final responsibility for imposition of the death penalty. In contrast to both *Ward* and *Grooms*, the present case discloses, apart from the mere use of the word “recommend,” no emphasis or implication tending to diminish the jury's sense *681 of responsibility. We therefore find no reversible error.

Appellant contends that the trial court ought to have instructed the jury upon sundry non-statutory mitigating circumstances which were supported by the evidence, ranging from the fact that he had been abused as a child to the fact that he was a “nice, quiet boy.” In fact, the court instructed the jury:

[Y]ou shall consider such mitigating or extenuating circumstances as have been presented to you in evidence, including but not limited to [statutory mitigating circumstances].

We deem this instruction utterly sufficient, and the appellant's argument utterly meritless.

Appellant insists that, when imposing sentence, the trial court refused to consider non-statutory mitigating evidence. The basis for this contention appears to be that the trial judge's report fails to list, in the blank provided, any non-statutory mitigating circumstances in evidence. Assuming without conceding that the court in this case was obligated

to consider non-statutory mitigating evidence, we find in the trial judge's report an act, as opposed to an omission, stating affirmatively that "based upon *all of the evidence* in this trial, I have no reason to disagree with the jury's recommendation ..." (Emphasis added.) Moreover, the court's final judgment and sentence of imprisonment states unequivocally that the court gave "due consideration to the evidence introduced at both stages of these proceedings and *the mitigating factors offered by the defendant....*" (Emphasis added.)

Returning to the instructions, appellant next proposes that the trial court should have peremptorily instructed the jury to consider in mitigation the factors of the appellant's youth (he was twenty-six) and the absence of a significant history of prior criminal activity. The instruction as given directed the jury to consider these factors if it believed from the evidence that they existed. We find the instruction correct.

Appellant further faults the penalty phase instructions for failing to require specific findings with regard to mitigating circumstances. Specific findings as to mitigating circumstances are not required by law or constitution. *Smith v. Commonwealth, Ky.*, 734 S.W.2d 437 (1987); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

We have examined the remaining plethora of unpreserved objections to the trial court's instructions during the penalty phase. We find no merit in these issues and, rather than prolong this opinion with unnecessary discussion, refer the appellant to the decisions in *Harper v. Commonwealth, Ky.*, 694 S.W.2d 665 (1985); *Smith v. Commonwealth, Ky.*, 734 S.W.2d 437 (1987); *Skaggs v. Commonwealth, Ky.*, 694 S.W.2d 672 (1985); and KRS 532.025.

Appellant alleges that the prosecutor was guilty of prejudicial misconduct during closing argument in the penalty phase of trial. Appellant points out that the prosecutor adverted to the defendant's lack of remorse and the prospect of his future dangerousness; resorted to name calling; and argued non-statutory aggravating factors (assaults on wife and alleged predisposition for violence). We have reviewed the entire closing argument, and find it indeed excessive in some particulars. However, we are not of the opinion that, absent the excesses, the jury's sentencing determination would have been any different.

The appellant complains further that the prosecutor in closing argument stated that the jury had already decided the

question of aggravating circumstances, i.e., multiple deaths and murder committed in the course of robbery in the first degree. In fact, the jury had found the defendant guilty of both murders, and guilty of two counts of robbery in the first degree. We therefore see no prejudicial error in the prosecutor's comment. See *Skaggs v. Commonwealth, Ky.*, 694 S.W.2d 672 (1985).

Prior to formal sentencing, defense counsel indicated that the defendant might not be competent at this stage of the proceedings. Appellant argues that a competency examination was called for at this *682 time, as well as in the course of the trial. Prior to trial a psychiatric evaluation had been conducted, on the defendant's motion, at the Kentucky Correctional Psychiatric Center. The evaluation concluded that the defendant was competent to stand trial. On the first day of trial, defense counsel informed the court that he was "losing" the defendant, but did not move for a competency evaluation. Given the circumstances, that the pretrial evaluation had concluded that the defendant was not insane, and was competent to stand trial, we do not perceive that the court was presented with reasonable grounds to believe that the defendant lacked the capacity to appreciate the nature and consequences of the proceedings against him or to participate rationally in his defense. See RCr 8.06; *Henley v. Commonwealth, Ky.*, 621 S.W.2d 906 (1981); *Pate v. Commonwealth, Ky.*, 769 S.W.2d 46 (1989); *Mozee v. Commonwealth, Ky.*, 769 S.W.2d 757 (1989). At sentencing, following counsel's intimations, the appellant acknowledged to the court that he understood that proceeding and the trial judge's role in imposing judgment. We conclude that the trial court was not required to order a competency hearing pursuant to RCr 8.06.

It is contended that the trial court, during the sentencing hearing, improperly considered the characteristics of the victims. The court remarked that the victims had no safeguards, and were given no opportunity to flee or to defend themselves. The court further commented that neither victim likely considered the probability of impending death, and added that neither of the victims "deserved the cold and cowardly manner in which they were executed...." The court's comments clearly have very little to do with the characteristics of the victims. Moreover, these remarks reflect no undue prejudice on the part of the trial court.

Appellant also asserts as error that the trial judge did not specifically find or consider mitigating factors, and moreover that he did not articulate what his sentencing role was. We

have examined these arguments and do not find them to be cogent.

V. ACCUMULATION OF ERRORS

Appellant maintains that, even if no single error or irregularity occurring in the course of his trial constitutes grounds for reversal, nevertheless the accumulation of individually harmless errors deprived him of a fair trial. Considering the entire record and the totality of circumstances, we are persuaded that the defendant received not a perfect, but a fair trial. We find neither any particular error nor any combination of errors so prejudicial as to require reversal.

VI. CONSTITUTIONALITY OF DEATH PENALTY

In a series of issues, appellant assaults the constitutionality of Kentucky's death penalty scheme. Appellant suggests that he was subjected to double jeopardy, in that, after receiving twenty year sentences on the convictions for robbery in the first degree, the robberies were also used, as aggravating circumstances, to increase the punishment for his murder convictions. We do not agree that the penalty imposed upon the murder convictions was a second sentence upon the convictions for armed robbery. The fact that the murders were committed in the course of robbery assigned to the defendant a particular status, placing him within the category of persons against whom the death penalty might be imposed according to statute. The situation is analogous to that encountered under our persistent felony offender statute, where a convicted defendant who has been convicted of a prior felony may receive an enhanced sentence due to his status as a persistent felony offender. The enhanced sentence is imposed for the crime lately proven, and not for the prior felony. *Malicoat v. Commonwealth, Ky.*, 637 S.W.2d 640 (1982). See also *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

Appellant next insists that, in his case, mitigating factors “outweigh” aggravating factors, and further that his sentence is disproportionate to sentences received by other defendants in similar cases. He concludes that his death sentence therefore *683 constitutes cruel and unusual punishment. Under *KRS 532.025(2)*, a sentencing jury is directed to give consideration to mitigating circumstances, as well as aggravating circumstances, supported by the record. Upon a finding beyond a reasonable doubt of the existence of an

aggravating circumstance, the jury *may* fix the penalty at death. We may only conclude that the statute contemplates that the jury will weigh the mitigating circumstances in the process of arriving at an appropriate penalty. Upon review, we consider not only whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, but also whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. *KRS 532.075(3)(a) and (c)*. This procedure, without requiring an express “weighing” of aggravating versus mitigating circumstances, effectively preserves a defendant's eighth amendment guarantees. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Skaggs v. Commonwealth, Ky.*, 694 S.W.2d 672 (1985); *Smith v. Commonwealth, Ky.*, 599 S.W.2d 900 (1980).

Appellant also argues that he is prejudiced by an inability to obtain access to the data collected by this Court pursuant to *KRS 532.075(6)*, in the course of proportionality review. Appellant need only refer to the death penalty decisions of this court in order to obtain the relevant data. *Harper v. Commonwealth, Ky.*, 694 S.W.2d 665 (1985); *Smith v. Commonwealth, Ky.*, 734 S.W.2d 437 (1987).

Appellant further asserts that this Court's method of proportionality review violates both the Federal Constitution and *KRS 532.075(3)(c)*, in that “review of only post–1970 cases where the death penalty was both imposed and affirmed ... is not sufficient to determine if the death penalty is being applied in an arbitrary and capricious manner.” Neither this bare, unelaborated assertion, nor the decisions in *White v. Commonwealth, Ky.*, 671 S.W.2d 241 (1984), and the *McQueen v. Commonwealth, Ky.*, 669 S.W.2d 519 (1984), are persuasive on this point.

Next, appellant submits that proportionality review pursuant to *KRS 532.075* is unconstitutional for lack of articulated standards used by this Court. It is also argued that the statute unconstitutionally delegates to the Court authority to determine criteria for proportionality review, and further that the Court is without constitutional authority to conduct such review. We deem it sufficient response to these arguments to note that proportionality review falls clearly within the constitutional appellate jurisdiction of this Court, and that determination of appellate matters according to law does not constitute an exercise of arbitrary power over the life of a convicted defendant. Unless we are constitutionally required to ignore our own previous decisions, and we do not believe

that we are, the argument that, in the course of review, this Court “relies on matters outside the record on appeal,” is baseless.

The remainder of the appellant's constitutional challenges, that the Commonwealth's death penalty law is unconstitutional on its face, that it operates in an arbitrary, discriminatory, and freakish manner, and that electrocution is cruel and unusual punishment, have repeatedly been presented, considered, and dismissed. See *Smith v. Commonwealth*, Ky., 734 S.W.2d 437 (1987); *White v. Commonwealth*, Ky., 671 S.W.2d 241 (1984); *Gall v. Commonwealth*, Ky., 607 S.W.2d 97 (1980); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

We have reviewed the entire record of the case, and have considered the punishment imposed as well as all errors enumerated by way of appeal. We have determined that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We further conclude that the evidence of record supports the jury's finding of statutory aggravating circumstances as enumerated in [KRS 532.025\(2\)](#). We have determined that the sentence of death in this case is neither excessive nor disproportionate to the penalty imposed in similar *684 cases,¹⁰ considering both the crime and the defendant. We have reviewed all legal errors enumerated, and have concluded that no error or accumulation of errors substantially prejudiced the rights of the defendant. The verdict is substantiated by the facts of record, and the sentence is valid.

¹⁰

Data have been compiled in accordance with [KRS 532.075\(6\)](#). We have considered all cases in which the death penalty was imposed after January 1, 1970: *Scott v. Commonwealth*, Ky., 495 S.W.2d 800 (1973); *Leigh v. Commonwealth*, Ky., 481 S.W.2d 75 (1972); *Lenston and Scott v. Commonwealth*, Ky., 497 S.W.2d 561 (1973); *Call v. Commonwealth*, Ky., 482 S.W.2d 770 (1972); *Caldwell v. Commonwealth*, Ky., 503 S.W.2d 485 (1972); *Tinsley and Tinsley v. Commonwealth*, Ky., 495 S.W.2d 776 (1973); *Galbreath v. Commonwealth*, Ky., 492 S.W.2d 882 (1973); *Caine and McIntosh v. Commonwealth*, Ky., 491 S.W.2d 824 (1973); *Hudson v. Commonwealth*, Ky., 597 S.W.2d 610 (1980); *Meadows v. Commonwealth*, Ky., 550 S.W.2d 511 (1977); *Self v. Commonwealth*, Ky., 550 S.W.2d 509 (1977); *Boyd v. Commonwealth*, Ky., 550 S.W.2d 507 (1977); *Gall v. Commonwealth*, Ky., 607 S.W.2d 97 (1980); *McQueen v. Commonwealth*, Ky., 669 S.W.2d 519 (1984); *White v. Commonwealth*, Ky., 671 S.W.2d

241 (1983); *Harper v. Commonwealth*, Ky., 694 S.W.2d 665 (1985); *Skaggs v. Commonwealth*, Ky., 694 S.W.2d 672 (1985); *Kordenbrock v. Commonwealth*, Ky., 700 S.W.2d 384 (1985); *Matthews v. Commonwealth*, Ky., 709 S.W.2d 414 (1986); *Marlowe v. Commonwealth*, Ky., 709 S.W.2d 424 (1986); *Bevins v. Commonwealth*, Ky., 712 S.W.2d 932 (1986); *Halvorsen and Willoughby v. Commonwealth*, Ky., 730 S.W.2d 921 (1986); *Smith v. Commonwealth*, Ky., 734 S.W.2d 437 (1987); *Stanford v. Commonwealth*, Ky., 734 S.W.2d 781 (1987); *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1988); *Simmons v. Commonwealth*, Ky., 746 S.W.2d 393 (1988); *Moore v. Commonwealth*, Ky., 771 S.W.2d 34 (1989). (In all cases preceding *Gall*, the death penalty was set aside for the reason that the statute under which the death penalties were imposed was invalid under *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).)

We affirm the convictions, and the sentences, including the sentences of death.

STEPHENS, C.J., and GANT, LAMBERT, VANCE and WINTERSHEIMER, JJ., concur.

LEIBSON, J., concurs in result only, and files a separate concurring opinion.

LEIBSON, Justice, concurring.

Respectfully, I concur in results only.

First, there were jurors who should have been excused for cause, but were not.

Second, the evidence of a similar offense in Lincoln County may well have been admissible in rebuttal as bearing on the insanity defense, *People v. Santarelli*, 49 N.Y.2d 241, 425 N.Y.S.2d 77, 401 N.E.2d 199 (1980), but it should not have been admitted during the Commonwealth's case-in-chief, because at that stage the highly inflammatory nature of the evidence far outweighed any probative evidentiary value.

Third, a jury should be instructed on the difference between a guilty but mentally ill and not guilty by reason of insanity verdict, because otherwise the difference is obscure and the instructions may be misleading. *Mitchell v. Commonwealth*, Ky., 781 S.W.2d 510 (1990), Leibson, J., dissenting. Here the defense did not specifically object to the instruction given at trial, so the issue may fail as a matter of trial tactics.

I concur in results with the Majority Opinion because this was not a close case. These errors were harmless beyond a reasonable doubt when considered in context and in light of the overwhelming evidence of premeditated, multiple murder.

All Citations

801 S.W.2d 665

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89 S.W.3d 380

Supreme Court of Kentucky.

David SANDERS, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Nos. 1999–SC–0115–MR, 1999–
SC–0195–MR, 1999–SC–0395–MR

|

June 13, 2002.

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Rehearing Denied Dec. 19, 2002.

Synopsis

Following the affirmance of his murder convictions and death sentences, 801 S.W.2d 665, defendant brought motion to vacate, set aside, or correct sentence. The Circuit Court, Madison County, William T. Jennings, J., denied the motion. Defendant appealed. The Supreme Court, Wintersheimer, J., held that: (1) defendant did not establish *Brady* violation regarding nondisclosure of material exculpatory evidence; (2) defense counsel was not ineffective in failing to seek funds from Commonwealth for additional mental health examination of defendant, in connection with insanity defense; (3) defendant's absence from in-chambers conference regarding prospective juror who had passing acquaintance with one victim's father did not violate due process; (4) trial counsel was not ineffective during voir dire or in failing to present additional mitigation witnesses during penalty phase; and (5) defendant had no constitutional right to postconviction discovery.

Affirmed.

Stumbo, J., filed a dissenting opinion in which Keller, J., joined.

Attorneys and Law Firms

*384 Elizabeth R. Stovall, Susan M.J. Martin, Department of Public Advocacy, Frankfort, KY, for appellant.

Albert B. Chandler III, Attorney General, Connie V. Malone, Assistant Attorney General, Ian G. Sonego, Assistant Attorney General, Criminal Appellate Division, Frankfort, KY, for appellee.

Opinion

WINTERSHEIMER, Justice.

This appeal is taken from an order of the Madison Circuit Court denying a RCr 11.42 motion by Sanders and his motion pursuant to CR 59.05. Sanders seeks relief from his conviction for two capital murders and two robberies for which he received two death sentences and two twenty-year sentences.

In 1987, Sanders was convicted of killing and robbing the proprietor of a convenience store and a visitor who was in the store. Each victim was shot once in the back of the head. At trial, insanity was the sole defense. In 1990, this Court affirmed the conviction on direct appeal in *Sanders v. Commonwealth, Ky.*, 801 S.W.2d 665 (1990). Sanders filed a petition for writ of certiorari in the United States Supreme Court which was denied in *Sanders v. Kentucky*, 502 U.S. 831, 112 S.Ct. 107, 116 L.Ed.2d 76 (1991), and rehearing was subsequently denied in *Sanders v. Kentucky*, 502 U.S. 1000, 112 S.Ct. 623, 116 L.Ed.2d 645 (1991). In 1993, he filed a RCr 11.42 motion in the circuit court which was denied by an order entered *385 January 28, 1999, without a hearing. In February 1999, Sanders filed a pro se notice of appeal and motion to suspend the rules until appointment of counsel. Shortly thereafter, counsel for the Department of Public Advocacy filed a CR 59 motion to reconsider. The attorney who filed the CR 59 motion also filed a notice of appeal from the January 1999 order denying RCr 11.42 relief. The circuit judge denied the CR 59.05 motion on March 9, 1999. A notice of appeal from this order was also filed. The three appeals in this case have been consolidated in this opinion.

I. Standard of Review

We believe it is prudent to again set out the standard of review of claims raised in a collateral attack pursuant to RCr 11.42. Such a motion is limited to issues that were not and could not be raised on direct appeal. *Sanborn v. Commonwealth, Ky.*, 975 S.W.2d 905 (1998). An issue raised and rejected on direct appeal may not be relitigated in these proceedings by claiming it amounts to ineffective assistance of counsel. *Brown v. Commonwealth, Ky.*, 788 S.W.2d 500 (1990); *Stanford v. Commonwealth, Ky.*, 854 S.W.2d 742 (1993).

Even in a capital case, a [RCr 11.42](#) movant is not automatically entitled to an evidentiary hearing. *Stanford, supra*. An evidentiary hearing is not required concerning issues refuted by the record of the trial court. *Stanford*. Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because [RCr 11.42](#) does not require a hearing to serve the function of a discovery deposition. *Sanborn, supra*.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), upheld the decision of a state court not to conduct an evidentiary hearing on claims of ineffective assistance of counsel. *Strickland, supra*, notes that the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment.

II. The Flenning Report

The right to confrontation was not violated because defense counsel cross-examined Dr. Walker without restriction. Due process does not require the prosecutor to disclose information already known by the defendant or counsel and available from a third party.

Sanders contends that the prosecutor was constitutionally required to obtain Dr. Flenning's report and provide it to his counsel pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We cannot agree. Essentially, his argument is that his attorney could have done a better job of arguing his insanity if he had additional information contained in the Flenning report. In considering the report together with all other reports involved, the conclusion by Dr. Flenning is not inconsistent with Dr. Walker's testimony at trial.

Sanders never denied his involvement in the crime, but he claims that the report supports his defense of insanity. Any evidence withheld must be favorable to the accused and be material to either guilt or punishment. *Brady, supra*. Our review of the Flenning report indicates that it is not exculpatory and it does not support the defense of insanity. Here, the only question to consider as to whether the report is exculpatory is if it supports the insanity defense. Original trial counsel had access to the report of Dr. Walker in which she summarized the interview with Dr. Flenning. Because this report did not support the defense of insanity and could *386 actually damage Sanders, it was not necessary to call the doctor as a witness.

Reliance by Sanders on *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), is misplaced because that case involved a government investigation of child abuse conducted by social workers employed by a Pennsylvania agency. The U.S. Supreme Court held that the investigation file should be reviewed by the trial court for potential exculpatory or impeachment information under *Brady* and rejected the argument that only a review by defense counsel would be constitutionally adequate. The investigators were not acting at the request of defense counsel and did not submit a report for review by defense counsel.

Sanders has the burden of establishing that there is a reasonable probability that the result of the trial would have been different if the allegedly withheld exculpatory documents were disclosed to the defense. *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Claim of error must establish prejudice so as to produce ineffective assistance of counsel. It is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceeding. *Strickland*.

Sanders argues that *Strickland* should not apply to his trial lawyer because that counsel was subsequently disbarred in an unrelated matter after this trial. *Kentucky Bar Ass'n v. Kevin Charters*, Ky., 89–SC–148–KB. There is no persuasive authority submitted by Sanders to presume that counsel was incompetent to try his criminal case. Other courts have applied *Strickland* in similar cases after rejecting the per se ineffectiveness argument. See *United States v. Rondon*, 204 F.3d 376 (2d Cir.2000); *State v. McCroy*, 259 Neb. 709, 613 N.W.2d 1 (2000). A reviewing court should consider the overall performance of counsel throughout the case in order to determine whether the acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. Cf. *Strickland*. A reasonable investigation is not the investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources but also with the inestimable benefit of hindsight would conduct. *Thomas v. Gilmore*, 144 F.3d 513 (7th Cir.1998); Cf. *Baze v. Commonwealth*, Ky., 23 S.W.3d 619 (2000).

An evidentiary hearing is not automatically necessary in every case to ascertain whether the performance of defense counsel was reasonable. Such an inquiry is objective in nature and is presumed to be reasonable. Cf. *Chandler v. United States*, 218 F.3d 1305 (11th Cir.2000).

The use of the Flenning report to cross-examine Dr. Walker, or by calling Dr. Flenning as a witness would have resulted in a reinforcement of the argument by the prosecutor about inconsistencies in Sanders' statements and illustrate that Sanders repeatedly changed his version of various events as he was interviewed by different evaluators. The circuit judge correctly rejected the complaints by Sanders about the testimony of Dr. Walker and the report of Dr. Flenning.

III. Pretrial Statements

Sanders contends that his trial counsel was ineffective for failing to move to suppress statements that he gave to police before trial. Trial counsel was not ineffective because he failed to seek suppression of Sanders' pretrial statements. We agree with the trial court that Sanders cannot establish prejudice connected with this claim because he has not shown that a motion to suppress would have been successful. *387 On the contrary, his alleged assertions of a desire to stop further questioning or to consult with an attorney do not even rise to the level of being "equivocal." His claim that his statements were involuntary due to his state of mind is conclusory and unsupported. In addition, in making a decision on prejudice, the Court should consider all the evidence presented against Sanders. Even if a motion to suppress his statement had been made and sustained, considering the strength of the other evidence presented against Sanders, the outcome of the trial would not have been different.

IV. Inconsistent Statements

Trial counsel was not ineffective because of the repeated inconsistencies in statements given by Sanders to police and KCPC staff. The mere fact that Sanders asked to talk to police during the sixth and final interview does not support an inference that the police were forcing him to speak against his will. Sanders testified at trial, admitted his guilt and was certainly free to explain the statements he made to police if they were a result of being coerced or intimidated by the police.

Trial counsel pursued a trial strategy consistent with the statements Sanders had provided to police during his last interview, admitting to the criminal acts, but denying responsibility by virtue of mental disassociative reaction. Trial counsel was not under a duty to try to convince the jury that Sanders had lied to the police because of the pressure

he felt from the officers. Sanders never made such a claim until he was interviewed years after the trial by mental health experts. Counsel is not ineffective simply because his client disregards his advice and the client chooses to do so even though what he says to those individuals undermines his defense posture. *Cf. Baze, supra.*

V. Dr. Cooke

Sanders alleges that he was denied effective assistance of counsel because his private defense attorney relied on an insanity defense but failed to move for funds for expert witnesses, or that he failed to withdraw once he realized Sanders was indigent and that funds would be needed for the psychiatric exams. Sanders claims that Attorney Charters, who had been hired by his father to replace a public defender, used money earmarked for a mental health expert for his own fee. Sanders reasons that because the circuit court failed to hold an evidentiary hearing he was denied the opportunity to develop the underlying facts of this claim.

We conclude that defense counsel was not ineffective in obtaining the services of a clinical psychologist, Dr. Cooke, free of charge, to serve as the defense mental health expert. Defense counsel cross-examined the prosecution witness, Dr. Walker, regarding disagreements with the testimony provided by Dr. Cooke. Thus, the testimony by Dr. Cooke was intended to reduce the negative effect of the report submitted by Dr. Walker of KCPC.

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), commented that "Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on the likelihood of future dangerousness." Sanders was sent on his own motion to KCPC for a six-week psychiatric evaluation by a team of social workers, psychologists, a psychiatrist and a neurologist. *Ake, supra*, does not hold that an indigent defendant has a constitutional right to choose the psychiatrist or to receive funds to hire his own. As noted in *388 *Crawford v. Commonwealth, Ky.*, 824 S.W.2d 847 (1992), a defendant is not entitled to an additional state provided examination or funds to hire additional experts simply because the initial evaluation is contrary to his defense. The fact that an additional evaluation might be beneficial to the defense does not add credibility to his claim. The trial judge stated that Sanders submitted

reports from a psychologist, a psychiatrist and a Ph.D. These experts were retained in connection with a defense of charges resulting from a 1986 shooting in Lincoln County. As correctly observed by the trial judge, the reports and the testimony would have made no difference in the outcome of the trial. The jury rejected the opinion offered by Dr. Cooke and there is no reason to believe they would have accepted a similar opinion simply because it came from a different defense expert. Dr. Cooke indicated that he was willing to testify that in his opinion Sanders satisfied the legal standard for insanity. Thus, Sanders had access to qualified mental health experts to establish his insanity defense. His complaints about ineffectiveness are without merit.

VI. Effective Cross-examination

Sanders complains that failing to obtain KCPC records in preparation for cross-examination of Dr. Walker was not a reasonable performance by defense counsel. We must disagree because trial counsel effectively cross-examined Dr. Walker. As we have mentioned before, this Court is not required to determine whether another counsel would have handled the case differently or even better. We will not turn back the clock and retry cases in an effort to second guess what might have been done. *Cf. Dorton v. Commonwealth, Ky.*, 433 S.W.2d 117 (1968); *Penn v. Commonwealth, Ky.*, 427 S.W.2d 808 (1968).

The [RCr 11.42](#) motion lists 17 points of ineffective assistance of counsel as it concerns the cross-examination of Dr. Walker. In his brief to this Court, Sanders has reduced that number to 15 points.

The records were not exculpatory and would not have created a reasonable probability of a different trial result. None of the KCPC evaluation staff concluded that Sanders was legally insane or lacked criminal responsibility. The conclusion by Dr. Walker that Sanders was sane and responsible for his conduct is consistent with the evaluation reports prepared by the KCPC employees.

VII. Juror Questioning

The fact that trial defense counsel did not question a juror who had a passing acquaintance with the father of the victim is not sufficient to demonstrate that counsel was ineffective. Sanders maintains that trial counsel was ineffective because

he did not question and did not move to strike a juror who was acquainted with the father of one of the victims. Sanders presents no information indicating the bias which would have been revealed through further questioning of the juror. We must conclude that this allegation of bias on the part of the juror is merely speculative, and that it does not establish any prejudice toward Sanders. The casual acquaintance was not the close relationship needed to imply bias on the part of the juror as found in *Marsch v. Commonwealth, Ky.*, 743 S.W.2d 830 (1987).

VIII. In Chambers Conference

Conducting a conference in chambers regarding the juror in the absence of Sanders, did not violate either his due process right to be present at all critical stages of the proceeding or his right to confront witnesses. He was not prejudiced by his absence from the brief, *389 three-minute conference. Sanders did not have a due process right to attend in person. His attorney was present and there is nothing that Sanders could have done by being present. His presence was not required to insure fundamental fairness. His due process rights were not violated. *Cf. Kentucky v. Stincer*, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). The proceedings did not involve any witness. There was no ineffective assistance of counsel.

IX. Failure to Repeat Voir Dire Questions

Sanders alleges that the failure of trial counsel to question potential jurors either as a group or individually about their knowledge of the case was ineffective. He claims that additional questioning would have produced information sufficient to support striking jurors for cause. We disagree.

The decisions of counsel during voir dire are generally considered to be matters of trial strategy. *Hodge v. Commonwealth, Ky.*, 17 S.W.3d 824 (2000). The trial judge questioned jurors about their relationships to the victims and their families as well as asking about exposure to pretrial publicity. Defense counsel did not have to repeat such questions. The voir dire was conducted in three phases. In the first phase, the trial judge questioned the panel; next, the jurors were questioned individually in chambers, and finally the prosecution and defense questioned the remaining potential jurors as a group. There is nothing in this procedure which shows that the decisions of the defense counsel were

so ill chosen that they could affect the entire proceedings. There was no ineffective assistance of counsel and there was no prejudice demonstrated by Sanders.

X. Peremptory Challenges

Sanders claims that the failure of counsel to move that six jurors be stricken for cause required the defense to use peremptory challenges to remove them. He claims that the use of the peremptory challenges, rather than those for cause, resulted in the constructive denial of peremptory challenges. We do not agree.

Trial counsel did seek to strike two of these jurors for cause, but the trial judge refused to do so and that decision was affirmed on direct appeal. There was nothing that would have supported a strike for cause. Sanders raised a number of issues related to the jury selection in his direct appeal but was rejected in all respects. Additional review does not reflect any ineffective assistance of counsel.

XI. Potential Insanity Strikes

Sanders argues that his defense counsel was ineffective for failing to move to strike for cause four jurors based on their response to voir dire questions as to insanity and alternately for failing to ask follow up questions of them. On direct appeal, Sanders raised a number of unpreserved jury challenges. In this instance, the answer given by the challenged jurors does not indicate that he was denied due process of law. The four jurors involved indicated that they could follow the instructions of the trial judge on insanity. Further voir dire examination was not necessary.

XII. Lack of Avowals/Bond

Sanders asserts that he was denied effective assistance because an avowal should have been made regarding 1) a videotape taken of him at the jail shortly after his arrest, and 2) his reasons for not seeking bond.

***390** Sanders' private attorney filed a motion to admit a videotape interview, but the trial judge reserved ruling and asked private counsel to get the tape for review prior to trial. The trial judge was not able to review the tape because the public advocate (Sanders' previous attorney) wanted a waiver

of privilege signed by Sanders. The delay in the ruling was a result of this desire to have a written waiver of the attorney/client privilege. There is nothing in the record to indicate that the prerequisite of a waiver was ever produced by Sanders. Moreover, this tape was not presented to the trial court at the [RCr 11.42](#) proceedings. In the absence of the tape, there is nothing to complain about related to ineffective assistance. In addition, Sanders has not met his burden of establishing that the tape would have been admissible. The apparent purpose was to show his state of mind. However, the only point in time in which his state of mind is germane is on the date of the crime, not subsequent thereto.

We find no authority permitting the admission of an unauthenticated tape of a defendant making a self-serving statement and exhibiting self-serving conduct. See *McQueen v. Commonwealth*, Ky., 948 S.W.2d 415 (1997); *Sanborn v. Commonwealth*, 892 S.W.2d 542 (1995).

The trial judge correctly ruled that the claim by Sanders concerning the bond issue was subject to summary dismissal based on its failure to meet the standards of [RCr 11.42\(2\)](#). *Foley v. Commonwealth*, Ky., 17 S.W.3d 878 (2000).

XIII. Lack of Penalty Phase Preparation

Sanders alleges that his counsel did not prepare for the penalty phase until the jury returned the verdict, leaving less than three days to prepare for the penalty phase. He contends that apart from his own testimony which lasted less than 8 minutes, testimony from witnesses presented by his counsel in the penalty phase only lasted 9 minutes and 46 seconds. Sanders also claims that counsel inadequately prepared him for testifying during the penalty phase, in that he only spoke with him for two minutes before the testimony.

The complaints by Sanders about inadequate investigation and failure to call additional witnesses in the penalty phase are not sufficient to require either relief or an evidentiary hearing. He asserts that additional family members were available to testify but does not indicate what testimony they would have offered. He also maintains that unidentified friends and clergy could have been called to testify, but does not offer any specifics as to what they would have testified about. The allegations are vague and general. They do not rise to the standards required by [RCr 11.42\(2\)](#). There is no statement about the facts on which he would rely to support his motion. Failure to provide factual support as required by [RCr 11.42](#)

provides the basis for summary dismissal of that part of his claim. *Foley, supra*.

The reasonableness of an investigation by defense counsel must take into consideration all the circumstances. It is not an investigation that the best criminal defense lawyer in the world would conduct. The burden is on Sanders to give specific facts to establish ineffective assistance of counsel claims, both as to unreasonable performance and prejudice which would produce an unreliable trial. *Strickland*. The decision as to whether or not to call family members as mitigation witnesses is a strategic one which will not be second-guessed by hindsight. See *Fretwell v. Norris*, 133 F.3d 621 (8th Cir.1998). See also *McQueen v. Com., supra*.

***391** Sanders testified on his own behalf during the penalty phase and stated that he was suffering from some kind of mental disease. He did not present anything but speculation to support his claim that he was not fully informed of his right to testify and was not adequately prepared for his testimony. The circuit judge properly denied his [RCr 11.42](#) request.

Sanders also complains that his trial counsel should have requested another competency evaluation. The same claim was raised during his direct appeal. It cannot be presented again at this time. *Sanborn, supra*.

XIV. Jail Employees and Psychologist

Sanders argues that his defense counsel was ineffective for not calling a psychologist and two jail employees to testify about his mental state after his arrest. Sanders did testify himself extensively about his emotional state and suicidal tendencies after his arrest. Additional testimony from either the psychologist or the jailers would have been cumulative. Cf. *Hodge v. Commonwealth, Ky.*, 17 S.W.3d 824 (2000). The fact that defense counsel determined not to present such cumulative testimony was not ineffective.

XV. Marital Privilege

Sanders argues that his counsel was ineffective for failing to advise his wife that she could refuse to testify, and that he asked questions which opened the door to damaging testimony. The wife had testified during the guilt phase. Sanders does not offer anything to indicate that the wife was advised or not advised of the marital privilege. The party

invoking the marital privilege has the burden of proving its applicability and Sanders has failed to do so.

Defense counsel was not ineffective for asking questions that allegedly opened the door to testimony about two violent incidents in the marriage. Defense counsel used the wife's testimony to positive advantage. She explained two violent incidents so as to be consistent with the insanity defense. Sanders had previously raised the issue about the violent incidents in his direct appeal. It cannot be reargued at this point. The allegations presented by Sanders do not support the argument that the trial judge should have conducted an evidentiary hearing about the privilege question. The conduct of counsel was reasonable.

XVI. Failure of Continuance for Further Evaluation

The argument by Sanders that his defense counsel should have requested a continuance in order to allow more time for a more thorough evaluation by Dr. Cooke fails to present any grounds sufficient to justify such a continuance and does not indicate what would have been gained by such a continuance. A review of the entire trial indicates that defense counsel did not hesitate to seek a continuance when he believed one was necessary. In the absence of a motion for a continuance, the presumption must be that counsel did not think one was needed. Cf. *Maye v. Commonwealth, Ky.*, 386 S.W.2d 731 (1965). Sanders has not met his burden of overcoming such a presumption. A review of the record indicates that the psychologist had adequate time to interview and test Sanders, as well as to consider the entire matter. There was no basis for requesting a continuance. [RCr 9.04](#); *Taylor v. Commonwealth, Ky.*, 545 S.W.2d 76 (1976).

XVII. Change of Venue

The claim by Sanders of ineffective assistance of counsel in failing to file a motion for change of venue, investigate pretrial ***392** publicity or seek an expert to support the change of venue motion is without merit. This Court had already determined on direct appeal that Sanders received a fair trial from an impartial jury. Sanders again did not meet his burden to plead specific facts in order to establish an ineffective assistance claim. He merely seeks to relitigate an issue that was disposed of on direct appeal. There was no prejudice resulting from the conduct of defense counsel.

XVIII. Discovery Motion

A careful review of the record indicates that Sanders cannot properly establish either unreasonable performance or prejudice with his claim that defense counsel was ineffective for failure to file a formal discovery motion.

Sanders requests this Court to overrule two cases which hold that post-conviction discovery is not required. *Sanborn, supra*; *Skaggs v. Redford, Ky.*, 844 S.W.2d 389 (1992).

The circuit court properly relied on the open discovery policy that was embodied in a standard discovery order in the circuit court which requires the Commonwealth to furnish a defense attorney with exculpatory evidence. The order also directs the Commonwealth and all law enforcement officers to comply with all reasonable requests for discovery and inspection. The absence of a formal discovery motion does not mean that defense counsel did not informally request or receive discovery. The failure to make an unnecessary motion is not unreasonable. The circuit court correctly noted that the KCPC records were available to Sanders as well as the Commonwealth.

Sanders fails to identify what he would have learned from the grand jury tape, the Flenning report and the results of relevant scientific tests or experiments, if such were undertaken. There is no prejudice arising from the rulings of the circuit court.

This Court declines to reconsider any of the arguments concerning post-conviction discovery. *RCr 11.42* does not authorize such proceedings and the cases of *Sanborn* and *Skaggs, supra*, are appropriately decided.

XIX. Psychiatrist Hearsay

The argument by Sanders that his counsel was ineffective for not objecting to a part of Dr. Walker's testimony as hearsay is without merit. This matter regarding comments by the KCPC chaplain that Sanders expressed remorse only when words were put into his mouth, was disposed of on direct appeal and cannot be relitigated at this time. *Sanborn*.

XX. Presumption of Sanity Comments

Contention that defense counsel should have objected to the alleged comments by the prosecutor on the presumption of sanity during closing argument was correctly rejected on direct appeal. It cannot be re-presented. *Sanborn*. Moreover, there is an absence of any allegation of prejudice.

XXI. Objection to Insanity Defense

The allegation that defense counsel should have objected to the prosecutor's cross-examination of Sanders relating to his insanity defense was rejected on direct appeal. The circuit court correctly denied this claim pursuant to *RCr 11.42(2)* because it failed to satisfy the requirements of the rule regarding specific pleadings. In addition, there is an absence of any allegation of prejudice.

XXII. Improper Comments

The claim that defense counsel should have objected to alleged improper comments *393 in the penalty phase closing argument did not satisfy the pleading requirements of specificity set out in *RCr 11.42(2)* and was thus subject to summary dismissal. In addition there was no allegation of prejudice of any sort. This matter was also raised on direct appeal and cannot be relitigated. *Sanborn*.

XXIII. Reasonable Doubt

Sanders claims that defense counsel was ineffective for not objecting when the prosecutor allegedly defined reasonable doubt during voir dire examination. This claim was not pled with the specificity required by *RCr 11.42(2)* and cannot be reconsidered because it was originally reviewed on direct appeal and rejected. It does not raise a question of prejudice as required by *Strickland*.

XXIV. Jury Selection

The claim that defense counsel should have objected to jury selection procedures was not properly presented with the specificity required by *RCr 11.42(2)* and had previously been rejected on direct appeal.

XXV. Penalty Phase Instruction

The claim that defense counsel should have objected to the penalty phase instruction is one that could have been raised on direct appeal. As an unpreserved claim, it was reviewed and rejected by the court on direct appeal; it cannot be considered again. In addition, this Court has repeatedly rejected the argument that the jury must be told that its findings on mitigation need not be unanimous. *Bowling v. Commonwealth, Ky.*, 873 S.W.2d 175 (1993). There is no probability that a differently worded instruction on mitigation would have resulted in any difference in outcome. It was not unreasonable for defense counsel not to object.

XXVI. “Recommended”

The claim that defense counsel should have objected to the use of the word “recommended” in the jury instructions by the trial court was considered and rejected on direct appeal. It cannot be reconsidered at this time. This Court originally determined that apart from the mere use of the word recommend, there was no emphasis or implication tending to diminish the responsibility of the jury.

XXVII. Failure to Emphasize

The failure of defense counsel to emphasize certain mitigating evidence in his closing argument during the penalty phase did not render his trial performance constitutionally deficient or unreasonable. As stated in *Strickland*, this Court is not going to second-guess counsel's choices of which things to stress and which avenues not to pursue as vigorously.

Sanders has not established any probability that the jury would have decided the case differently if counsel had argued the points raised now by Sanders. Sanders has failed to demonstrate any deficient performance by defense counsel.

XXVIII. Evidentiary Hearing

The circuit court correctly concluded that Sanders was not entitled to an evidentiary hearing to develop the factual basis for his RCr 11.42 claims. He did not present any circumstances which required an evidentiary hearing and the authorities he cites in this respect are unpersuasive.

It has been previously held that a motion for ineffective assistance must set out all the facts necessary to establish the existence of a constitutional violation and the court will not presume facts omitted from the motion to establish the existence of any violation. *Skaggs, supra*. Even the federal courts do not conduct an evidentiary hearing in death penalty cases when *394 presented with nothing other than conclusory statements regarding ineffective assistance. *Barnard v. Collins*, 958 F.2d 634 (5th Cir.1992). Ineffective assistance of counsel claims are reviewed under a standard of objective reasonableness and here, as in many other cases, the reasonableness of the performance of defense counsel can easily be determined from the trial record without an evidentiary hearing.

XXIX. Discovery

Sanders was not entitled to an evidentiary hearing, his discovery claims are not properly preserved and post-conviction discovery is not required by either the state or federal constitution. It was the failure of Sanders to comply with the requirements of the rule that resulted in the denial of his motions without hearing. His argument relating to discovery is not preserved, and he did not move for discovery during the course of his RCr 11.42 proceedings. RCr 9.22. This Court has repeatedly held that post-conviction discovery is not authorized. See *Foley v. Commonwealth, supra*. Restrictions imposed by this Court on collateral attack motions and proceedings pursuant to RCr 11.42 do not violate the constitutional prohibitions upon suspending the writ of habeas corpus. Similar arguments have been rejected by this Court and by federal courts. See *Freeman v. Page*, 208 F.3d 572 (7th Cir.2000); *Commonwealth v. Marcum, Ky.*, 873 S.W.2d 207 (1994); *Eubank v. State*, 130 Idaho 861, 949 P.2d 1068 (App.1997).

XXX. Relitigation

There is simply no federal constitutional right to relitigate issues raised on direct appeal in a collateral attack proceeding such as RCr 11.42. The standards adopted for review of unpreserved errors in this case on direct appeal are not contrary to *Strickland*. The standard of review for unpreserved errors has been consistently applied in appropriate circumstances by this Court in reviewing subsequent death penalty cases. See e.g. *Mills v. Commonwealth, Ky.*, 996 S.W.2d 473 (1999).

The decision of the Madison Circuit Court denying the [RCr 11.42](#) motion by Sanders and his motion pursuant to [CR 59.05](#) is affirmed.

LAMBERT, C.J., [COOPER](#), [GRAVES](#) and [JOHNSTONE](#), JJ., concur.

[STUMBO](#), J., dissents by separate opinion joined by [KELLER](#), J.

[STUMBO](#), Justice, dissenting.

Respectfully, I must dissent because of the failure to conduct an evidentiary hearing on three of the issues discussed herein. I believe that there should have been an evidentiary hearing held to inquire into: the allegation that trial counsel failed to make any preparation for the penalty phase; why trial counsel failed to call certain jail employees and the psychologist who examined Appellant soon after his arrest to provide evidence of his mental state; and counsel's alleged failure to advise Appellant's wife that she could escape testifying against him by asserting the marital privilege. [KRS 421.210\(1\)](#). Therefore, I would reverse and remand for a hearing.

The need for an evidentiary hearing is vital in the examination of counsel's performance during the penalty phase of the trial. At the conclusion of the guilt phase, counsel advised the court that the mitigation testimony had already been presented. The record establishes that the evidence presented by counsel during the penalty phase lasted less than twenty minutes, including Appellant's own testimony. *395 When the closing argument of counsel is reviewed, we find that there was no reference made to any testimony given during the guilt phase. Further, the argument that was made was extremely abbreviated and failed to include any discussion of mitigation evidence such as medical testimony that Appellant did indeed suffer from a personality disorder, that he repressed anger and his feelings, and that, during his testimony, Appellant did express remorse for his actions. An evidentiary hearing is necessary to determine whether counsel's actions were strategic or incompetent.

The first psychologist to examine Appellant did so during Appellant's pretrial incarceration when the jailer was concerned about Appellant's behavior. It was that professional's opinion that Appellant was under severe emotional stress, was suicidal, and was suffering from a serious psychiatric disorder, possibly of the [dissociative disorder](#) type. Appellant complains of his counsel's failure to call this psychologist as a witness to this condition as well as the failure to call two jail employees who witnessed that behavior. What could be more important to a diminished capacity defense than testimony from a trained mental health professional with access to the defendant immediately after the crime, supported by testimony from witnesses who were charged with Appellant's custody and welfare during incarceration? An evidentiary hearing is necessary to determine whether counsel decided not to call these witnesses as a part of trial strategy or out of incompetence.

The final issue that requires an evidentiary hearing is the question of whether Appellant's wife was advised of her right to refuse to testify against him as provided by [KRS 421.210\(1\)](#), as the marital privilege was statutory at the time this matter was tried. Mrs. Sanders' testimony described, among other things, telephone conversations between herself and her husband, talks with the police, and the fact that she gave the police a .22 pistol found in Appellant's truck. She also described an incident during which Appellant held a pillow over her face. This testimony would not have been admissible if Mrs. Sanders' invoked her right not to testify against her husband. There is nothing in the record that indicates that she was aware of that right and therefore, an evidentiary hearing should have been conducted. I would reverse and remand for further proceedings.

[KELLER](#), J., joins this dissent.

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NOT TO BE PUBLISHED
Supreme Court of Kentucky.

David SANDERS, Appellant

v.

COMMONWEALTH of Kentucky, Appellee

2021-SC-0171-MR

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AUGUST 18, 2022

ON APPEAL FROM MADISON CIRCUIT COURT,
HONORABLE [JEAN CHENAULT LOGUE](#), JUDGE, NO.
87-CR-00018

Attorneys and Law Firms

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MEMORANDUM OPINION OF THE COURT

*1 David Sanders appeals as a matter of right¹ from the Madison Circuit Court's order denying his motion to reopen his [RCr 2 11.42](#) proceeding pursuant to [CR 3 60.02\(e\)](#) and [\(f\)](#) and [RCr 10.02](#) and [10.06](#). On appeal, Sanders argues that this Court's recent decision in [Conley v. Commonwealth](#), 599 S.W.3d 756 (Ky. 2019), created a new entitlement for criminal defendants to funds for a mental health examination independent of that conducted by KCPC. Sanders argued in his prior appeals that he was entitled to an evaluation by a second, independent mental health expert. He now asserts that his claim should be reevaluated under the new rule announced in *Conley*. We disagree, as *Conley* did not create a new rule, it merely clarified the existing language of [KRS 31.185](#), which applies to *indigent* defendants and defense attorneys operating under Chapter 31 - the Department of Public

Advocacy. Since Sanders was not an indigent defendant, [KRS 31.185](#) and *Conley* do not apply to his situation. Even if they did apply, Sanders received the assistance of an independent mental health expert who examined him and testified at trial in support of Sanders' insanity defense. We have held already in Sanders' prior appeals that his expert's testimony, and defense counsel's retention of the expert's services, did not amount to error or ineffective assistance of counsel. Accordingly, we affirm the trial court's order denying Sanders' [CR 60.02](#) motion to reopen.

¹ [Ky. Const. § 110\(2\)\(b\)](#).

² Kentucky Rules of Criminal Procedure.

³ Kentucky Rules of Civil Procedure.

I. Background

This case has been making its way through Kentucky courts for over thirty-five years and has been reviewed by this Court multiple times. Thus, we develop the facts and procedural history only to the extent necessary to resolve the issue at hand. In 1987, Sanders was convicted of two counts of first-degree robbery and two counts of capital murder for killing and robbing the proprietor of a convenience store and a customer who happened to be in the store. Each victim was shot once in the back of the head. At trial, Sanders was represented by private counsel, presented a single defense (insanity), and was evaluated by an independent mental health professional, who testified as to Sanders' insanity at the time he committed the offenses.

Prior to Sanders' trial, at defense counsel's request, Sanders' mental health and psychiatric condition were evaluated by the Kentucky Correctional Psychiatric Center ("KCPC") to determine his competency to stand trial and whether he was insane at the time he committed the crimes. KCPC conducted a six-week psychiatric evaluation, with a team of social workers, psychologists, a psychiatrist, and a neurologist. Dr. Walker was the lead KCPC investigator and prepared a report summarizing the team's collective findings that Sanders was competent to stand trial and did not suffer from a mental condition that compromised his ability to conform his behavior to the law. Dr. Walker testified as the Commonwealth's rebuttal witness at trial.

*2 Sanders' counsel also retained Dr. Cooke, a clinical psychologist, to evaluate Sanders' mental condition and

serve as the defense mental health expert, on a pro bono basis. At trial, Dr. Cooke testified that Sanders satisfied the legal standards for insanity. However, based on the evidence presented, including Sanders' own testimony, the jury found Sanders' insanity defense unpersuasive and convicted him. Sanders received two death sentences for the murder convictions and two twenty-year sentences for the robbery convictions.

On direct appeal, this Court reviewed Sanders' forty-one alleged errors, both preserved and unpreserved, and affirmed the convictions and sentences. *Sanders v. Commonwealth*, 801 S.W.2d 665 (Ky. 1990). In 1993, Sanders filed a collateral attack pursuant to RCr 11.42 seeking to vacate, set aside, or correct his sentence, alleging twenty-six errors, including the one he now raises in his motion to reopen: that his trial counsel was ineffective for failing to seek funds to retain an additional independent mental health expert. The trial court denied him RCr 11.42 relief, and this Court affirmed. *Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 2002), overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Specifically, this Court found that Sanders' counsel was not ineffective as Sanders had access to a qualified mental health expert to establish his insanity defense; the jury simply rejected the opinion of Dr. Cooke. 89 S.W.3d at 387–88. Further, this Court held that Sanders presented no evidence that the jury would have accepted a similar opinion from a different/additional expert, and that Sanders' counsel effectively cross-examined the Commonwealth's expert at trial. *Id.*

In 2005, Sanders filed a motion to vacate his sentence pursuant to CR 60.02, essentially attempting to revive previously raised and resolved issues. The trial court denied his motion, which this Court affirmed. *Sanders v. Commonwealth*, 339 S.W.3d 427 (Ky. 2011). In 2019, Sanders filed yet another motion to vacate his sentence pursuant CR 60.02, seeking to have his prior RCr 11.42 proceedings reopened in light of this Court's decision in *Conley*. Sanders claims that under *Conley*, his trial counsel was ineffective for allowing KCPC to evaluate him and for not obtaining another – or better – independent mental health expert. According to Sanders, the *Conley* decision disavowed the legal basis for this Court's prior ruling rejecting this claim, thereby providing grounds for reopening his case.

The trial court denied Sanders' motion to reopen, noting that his claim concerning his trial counsel's performance had been fully litigated and determined by this Court not to have been

in error or to have resulted in ineffective assistance of counsel. The trial court further noted that even if Sanders had received the assistance of an additional mental health expert, the jury may not have been persuaded by that expert's testimony either. Sanders now appeals the trial court's denial of his motion to reopen.

II. Standard of Review

To be entitled to relief pursuant to CR 60.02, a movant must “affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.” *Foley v. Commonwealth*, 425 S.W.3d 880, 885 (Ky. 2014) (quoting *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997)). CR 60.02 is an extraordinary remedy and the standard for granting a motion is extremely high. *Id.* To reverse a lower court's ruling on a CR 60.02 motion, the appellant must show some “flagrant miscarriage of justice.” *Id.* at 886 (quoting *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983)).

*3 Moreover, “CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings.” *McQueen*, 948 S.W.2d at 416. Appellate courts review the denial of a CR 60.02 motion for an abuse of discretion. *Foley*, 425 S.W.3d at 886. “The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.*⁴

⁴ Sanders urges this Court to limit the application of the abuse of discretion standard for reviewing CR 60.02 motions and instead apply a de novo standard of review to what he argues is a mixed bag of factual findings and legal findings by the trial court. However, our abuse of discretion standard is well-settled with regards to CR 60.02 rulings and Sanders offers no compelling justification to disturb it.

III. Analysis

Sanders argues that under *Conley*, he was entitled to an additional independent mental health expert. He further contends that *Conley* created new law in this regard, which he asserts should apply retroactively to his case. We disagree.

In *Conley*, this Court held that the trial court's denial of an *indigent* defendant's initial request for funding for an independent mental health expert, and instead ordering that a criminal responsibility examination be conducted by KCPC, violated the defendant's constitutional right to the appointment of an independent mental health professional. 599 S.W.3d at 765. We stated that “if sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent mental health expert who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense.” *Id.* (quoting *Binion v. Commonwealth*, 891 S.W.2d 383, 385 (Ky. 1995), citing *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (holding indigents have a right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the same access to necessary mental health expert assistance as a person of means)). The *Conley* court noted that KCPC, by its own admission and policy, is not an institution that could fulfill that duty; that is, to act in the capacity of a defense expert witness. *Id.* Because *Conley*'s sanity was at issue from the start of the case, this Court ruled that the trial court's initial denial of the defendant's request for funding for a mental health expert constituted an abuse of discretion, in part due to the collateral errors resulting therefrom.⁵ *Id.*

⁵ The trial court's error in initially denying funds to *Conley* was compounded by the derivative errors that followed. While the trial court eventually granted funds to *Conley* to retain Dr. Conner, an independent mental health expert, because the trial court at the same time permitted the Commonwealth to commandeer Dr. Trivette, the KCPC evaluator, to testify against *Conley*, the trial court's later ruling granting *Conley* funds did not fully “get the train back on the tracks” because of the side-switching error, which led to other consequential errors. 599 S.W.3d at 767–68. Further, the error in *Conley* was constitutionally significant because it deprived *Conley* of the same advantage as would be available to a person of means, as mandated by *Ake*. *Id.* “A person of means would not have been subjected to the initial denial of funds or being sent to an institution that declared it could not act as an independent defense expert and would not have been subjected to the side-switching.” *Id.* These facts are substantially different from the case at hand.

*4 *Conley* clarified that the discretion afforded to trial courts under KRS 31.185 to authorize funding for an indigent defendant to secure the services of an independent mental health examiner is not unfettered under *Ake* and *Binion*.

Id. at 766. This Court did not create a new standard in *Conley*; we simply held that under the facts of that case, the trial court's exercise of its discretion was an abuse thereof. Importantly, KRS 31.185(1) applies to “[a]ny defending attorney operating under the provisions of this chapter” – Chapter 31 – which governs the Department of Public Advocacy. Since Sanders was represented by private counsel, *Conley* is simply inapplicable.

With respect to the competency of Sanders’ counsel, we previously concluded that “Sanders had access to qualified mental health experts to establish his insanity defense. His complaints about ineffectiveness are without merit.” *Sanders*, 89 S.W.3d at 388. Indeed, we found nothing problematic in Dr. Cooke's testimony, or Sanders’ counsel's retention of his services, noting that “[t]he fact that an additional evaluation might be beneficial to the defense does not add credibility to his claim.... The jury rejected the opinion offered by Dr. Cooke and there is no reason to believe they would have accepted a similar opinion simply because it came from a different defense expert.” *Id.*

Thus, we affirm the trial court's ruling that *Conley* does not justify reopening Sanders’ case under CR 60.02. And as this Court has already resolved Sanders’ claims, we likewise agree with the trial court that Sanders is barred from further litigating this issue. See, e.g., *St. Clair v. Commonwealth*, 451 S.W.3d 597, 612 (Ky. 2014) (holding that “issues decided in earlier appeals should not be revisited in subsequent ones[]”) (quoting *Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010) (stating that the law-of-the-case doctrine “refers to a handful of related rules giving substance to the general principle that a court addressing later phases of a lawsuit should not reopen questions decided by that court or by a higher court during earlier phases of the litigation[]”) (citation omitted)).

IV. Conclusion

For the foregoing reasons, we affirm the order of the Madison Circuit Court denying Sanders’ CR 60.02 motion to reopen.

All sitting. All concur.

All Citations

Not Reported in S.W. Rptr., 2022 WL 3640912

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FILED

MADISON CIRCUIT COURT
Division Two

JUN 09 1987

MADISON CIRCUIT COURT
EDRIC W. NEWMAN, CLERK

COMMONWEALTH OF KENTUCKY)

vs. Indictment No. 87-CR-018)

DAVID LEE SANDERS,)

Defendant)

INSTRUCTIONS

TO THE JURY

* * * * *

The Court gives the jury the following instructions:

INSTRUCTION NO. 1
(Authorized Verdicts)

The defendant, David Lee Sanders, is charged with four separate offenses, and you shall reach a separate verdict as to each offense.

Under the evidence in this case as to the offenses of: Count I-Murder, Count II-Murder, Count III-Robbery, 1st Degree, and Count IV-Robbery, 1st Degree, you may find the defendant not guilty; or you may find him not guilty by reason of insanity at the time of the offense; or you may find him guilty but mentally ill at the time of the offenses; or you may find the defendant guilty.

INSTRUCTION NO. 2
(Murder as to Jim Brandenburg)
COUNT I

You will find the defendant, David Lee Sanders, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Madison County, on or about the 28th day of January, 1987, he killed Jim Brandenburg by shooting him with a gun;

AND

(b) That in so doing he intended to cause Jim Brandenburg's death.

If you find the defendant guilty under this instruction, you will say so in your verdict and say no more.

INSTRUCTION NO. 3
(Murder as to Wayne O. Hatch)
COUNT II

You will find the defendant, David Lee Sanders, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Madison County, on or about the 28th day of January, 1987, he killed Wayne O. Hatch by shooting him with a gun;

AND

(b) That in so doing he intended to cause Wayne O. Hatch's death.

If you find the defendant guilty under this instruction, you will say so in your verdict and say no more.

INSTRUCTION NO. 4
(First-Degree Robbery of Jim Brandenburg)
COUNT III

You will find the defendant, David Lee Sanders, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Madison County, on or about the 28th day of January, 1987, while in the course of committing a theft from Jim Brandenburg, he used physical force upon Jim Brandenburg with intent to accomplish the theft;

AND

(b) In so doing he caused physical injury to Jim Brandenburg or he was armed with a deadly weapon.

If you find the defendant guilty under this instruction, you will say so in your verdict and say no more.

INSTRUCTION NO. 5
(First-Degree Robbery of Wayne O. Hatch)
COUNT IV

You will find the defendant, David Lee Sanders, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Madison County, on or about the 28th day of January, 1987, while in the course of committing a theft from Wayne O. Hatch, he used physical force upon Wayne O. Hatch with intent to accomplish the theft;

AND

(b) In so doing he caused physical injury to Wayne O. Hatch or he was armed with a deadly weapon.

If you find the defendant guilty under this instruction, you will say so in your verdict and say no more.

INSTRUCTION NO. 6
(Definitions)

- (a) "Intentionally" -- A defendant acts intentionally with respect to a result or to conduct when his conscious objective is to cause that result or to engage in that conduct.
- (b) "Physical Force"-- Means force used upon or directed toward the body of another person.
- (c) "Physical injury" -- Means substantial physical pain or any impairment of physical condition.

INSTRUCTION NO. 7
(Insanity)

Even though you might otherwise find the defendant guilty of the offenses mentioned in Instructions No. 2, No. 3, No. 4 and No. 5, if you believe from the evidence that at the time David Lee Sanders committed these offenses (if he did so) he was of unsound mind, you shall find him not guilty and say in your verdict that you find him not guilty on the ground of insanity.

Before the defendant can be excused on the ground of insanity you must believe from the evidence that at the time of the act in question the defendant, as a result of mental disease or defect, (a) did not have substantial capacity to appreciate the criminal nature of the act or, (b) if he did have such capacity, did not have substantial capacity to conform his conduct to the requirements of the law.

The term mental disease or defect does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

INSTRUCTION NO. 8
(Guilty but Mentally Ill)

If you find the defendant guilty of the offenses mentioned in Instructions No. 2, No. 3, No. 4 and No. 5, and if you further believe from the evidence that he was mentally ill at the time of the offense, you shall say in your verdict that you find him Guilty but Mentally Ill at the time of the offense. "Mental Illness" means substantially impaired capacity to use self-control, judgment or discretion in the conduct of one's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior or emotional symptoms can be related to physiological, psychological or social factors.

INSTRUCTION NO. 9
(Presumption of Innocence - Reasonable Doubt)

The law presumes a defendant to be innocent of a crime, and the indictment shall not be considered as evidence or having any weight against him. You shall find the defendant in this case not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

INSTRUCTION NO. 10
(Unanimous Verdict)

The verdict of the jury must be unanimous and be signed by one of you as foreman. Please use one of the forms provided at the end of these instructions to write your verdict.

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COMMONWEALTH OF KENTUCKY
MADISON CIRCUIT COURT
DIVISION TWO
NO. 87-CR-018

COMMONWEALTH OF KENTUCKY .
Plaintiff, .
v. . June 4, 1987
DAVID LEE SANDERS .
Defendant .
..... Jury Trial

PARTIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM T. JENNINGS, JUDGE,
MADISON CIRCUIT COURT, DIVISION TWO

APPEARANCES:

For the Plaintiff: Hon. Thomas J. Smith, III
For the Defendant: Hon. Kevin Charters

Lisa Colston, FCRR, RPR
Federal Certified Realtime Reporter

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1 the fog or you were not yourself and you don't
2 remember how you got there?

3 A No, sir, I do not remember.

4 MR. SMITH: That's all.

5 MR. CHARTERS: I don't have any
6 redirect.

7 THE COURT: You can step down,
8 David.

9 MR. CHARTERS: Let me check
10 something. Your Honor, the defense calls
11 Dr. Stuart Cooke.

12 THE COURT: All right, sir.

13 (Witness placed under oath)

14 **DIRECT EXAMINATION**

15 **BY MR. CHARTERS:**

16 Q Doctor, would you please state your name for the
17 jury.

18 A My name is Stuart Anderson Cooke.

19 Q And what is your profession, sir?

20 A I am a clinical psychologist.

21 Q Okay. Where have you practiced?

22 A I have practiced in Lexington for a little over
23 two years. Before that, I practiced in Minnesota
24 for approximately nine and a half years. And
25 before that, I did a post-doctoral internship at a

1 private psychiatric hospital in Virginia.

2 Q So what is your education?

3 A I received a BA degree in psychology from Kenyon
4 College in Gambier, Ohio in 1966. Then I received
5 an MA in counseling psychology from the University
6 of Kentucky in 1968. I then received a Ph.D. in
7 clinical and counseling psychology from the
8 University of Virginia in 1974. And then went on
9 to Eastern Virginia Medical School in Norfolk,
10 Virginia to do a post-doctoral internship. There
11 I worked in a private -- private psychiatric
12 hospital on the acute inpatient team and was
13 involved in treating seriously disturbed people
14 and doing psychological evaluations on them to
15 help psychiatrists and the people working with
16 them formulate a diagnosis and a treatment plan.

17 From there, I went up and worked at
18 Sioux Trails Mental Health Center in New Ulm,
19 Minnesota. When I went up there I was a clinical
20 psychologist. And when the clinical director
21 left, I took his -- on his responsibilities, which
22 involved doing evaluations for the courts of
23 people who were brought before the Court for
24 various types of crimes. We were frequently used
25 by the judges in the area to evaluate defendants

1 and not only for criminal responsibility but for a
2 competency to stand trial and very frequently for
3 presentence investigation to determine what the
4 best disposition of this particular individual
5 would be.

6 I was also called on by a number of judges
7 outside of our catchment area to do psychological
8 evaluations for them as well. And I have
9 continued that work. When I came down to
10 Lexington a little over two years ago, I continued
11 to do psychological evaluations for forensic
12 purposes.

13 Q Thank you.

14 MR. CHARTERS: Your Honor, I would
15 like the Court to qualify Dr. Cooke an expert
16 witness.

17 THE COURT: All right. I will let
18 you question him as to his opinions.

19 BY MR. CHARTERS:

20 Q Doctor, have you been asked by myself to do some
21 work in this particular case?

22 A Yes, you have.

23 Q And have you examined and dealt with
24 David Sanders, who is seated beside me here?

25 A Yes, I have.

1 Q Would you tell the jury, please, what you have
2 done with him and the members of his family and
3 what tests you've given him so far.

4 A I interviewed David Sanders here at the
5 Madison County Jail earlier this week. I then
6 administered the Wechsler Adult Intelligence Scale
7 to determine what his level of intellectual
8 functioning was. I then administered the
9 Rorschach, which is a projective technique to get
10 a picture into what was going on inside of David's
11 mind. I then administered the Minnesota
12 Multi-Phasic Personality Inventory, which is a --
13 basically, a personality instrument that has been
14 used for the past 20 or 30 years to assess both
15 criminal offenders and other types of people to
16 assess their basic personality structure. I also
17 administered the Millon Clinical Multi-Axial
18 Inventory, which is a more recently developed
19 instrument but is now in popular use and used very
20 widely in the court system to get a -- a second
21 measure of what David's personality was like.

22 I then interviewed David's brother, Roger,
23 concerning the childhood experiences that David
24 may have had while he was growing up and the
25 general character of the parenting that they

1 received in that household.

2 Q Did you also, Doctor, read and examine the
3 materials that were provided by the Commonwealth
4 as to police reports and interviews?

5 A Yes.

6 Q And did you receive from David Sanders and from
7 myself details as to this particular incident?

8 A Yes. I also received a copy of the evaluation
9 done at the correctional -- Kentucky Correctional
10 Psychiatric Institute --

11 Q All right.

12 A -- facility.

13 Q Based on all of that information, Doctor,
14 did you make a diagnosis of what happened to
15 David Sanders?

16 A Yes, I did.

17 Q Could you tell the jury what that is.

18 A The diagnosis is that David had a
19 depersonalization disorder during the two times in
20 which he robbed the stores, the one down in
21 Lincoln County and the incidents here in Madison
22 County.

23 This is a personality disorder in which the
24 person has the feeling of losing contact. It's a
25 depersonalization experience in which the person

1 feels that they are not themselves any longer,
2 that they are somehow outside of their body,
3 watching themselves do something. They have the
4 sense that they have lost control of control over
5 their body. Sometimes they lose control even over
6 their speech. They have contact with reality in
7 the sense that they are aware of the factual
8 aspects of what are -- what is going on. They are
9 aware of what is happening around them but have
10 the feeling that they do not have any control any
11 longer over their body. And I think in David's
12 case, he did not have any control over what was
13 happening to him.

14 MR. SMITH: Objection, if Your
15 Honor please. The conclusion is to be drawn
16 only by the jury and not the expert.

17 THE COURT: He can give his
18 opinion.

19 BY MR. CHARTERS:

20 Q Go ahead, Doctor.

21 A That is, basically, the diagnosis. I think David
22 has a long-term chronic avoidant personality
23 disorder, which has dated back to when he was a
24 younger child. And I think that this personality
25 disorder was one of the predisposing factors in

1 the depersonalization disorder occurring.

2 Q Doctor, when a person experiences one of these
3 things, do they have any warning that it is
4 coming?

5 A Rarely do they have any warning. These things
6 happen quite suddenly and dissipate a little bit
7 more slowly. But the characteristic of these
8 disorders is that they are very sudden. A person
9 does not have any warning signs that this is going
10 to happen.

11 Q If he does not have any warning signs at all, is
12 there any way that he can control his actions?

13 A No. There's no way that he can control his
14 actions. There's no way -- if he does not know it
15 is going to happen, there is no way that he can
16 prepare for it or anticipate that it is going to
17 happen.

18 Q Is this a rare situation?

19 A This is a fairly rare situation, yes.

20 Q Let me ask you about two or three of the symptoms
21 of it.

22 Is amnesia or short-term blackouts consistent
23 with it?

24 A Yes, it is. Yes, it is. In fact, amnesia, this
25 disorder falls under a broader category, which we

1 call the -- the dissociation disorders. One of
2 these -- there are several other disorders
3 included in this. One is the multiple personality
4 and one is amnesia. So it is very consistent that
5 someone may go into one of these states, commit
6 some action and not be able to remember it later
7 on.

8 Q Okay. Is it consistent that after one of these
9 states that they can perform things, like driving
10 from one destination to another, as if on
11 automatic pilot, do it and not remember it?

12 A They can.

13 Q Could the person commit these acts and within a
14 short time later be back to what -- their usual
15 self?

16 A Yes. That's one of the characteristics. Although
17 the sudden onset, the termination of the episode
18 is a little bit slower but typically rather quick.
19 You know, in this case it seemed to have occurred,
20 the onset, within a matter of minutes. And I
21 think it took, probably, 10 or 15 minutes for him
22 when he came out of it.

23 And -- and he had amnesia, amnesia for the
24 event, and did not know. He had the sense that
25 something was wrong but did not know what, that

1 something had happened. And that's not unusual,
2 too, where frequently people come out of this
3 realizing that there's a part of their life
4 missing, that something happened, they don't know
5 what it was, they can't remember it, and they are
6 not able to identify it.

7 Q Doctor, you've mentioned that you read the report
8 from what we call KCPC.

9 A Yes.

10 Q In that report, there is some reference to
11 long-term repressed anger.

12 A Yes.

13 Q From what you have learned about the childhood and
14 the parenting and the upbringing, is that the kind
15 of anger that we're talking about?

16 A Yes. Apparently David, as he explained to me and
17 as his brother, Roger, explained to me, they grew
18 up in a household where there was a good deal of
19 what we might call child exploitation, child
20 abuse, neglect. The father was an alcoholic,
21 frequently abusive. David described being beaten
22 with a -- the hose, being -- having firewood
23 thrown at him, being exploited to work on the farm
24 while his father went off and drank.

25 And I think that very frequently you may look

1 at David and say, "Why didn't he leave home
2 earlier?" He stayed in the home a relatively long
3 period of time for an adult person. You may say,
4 "Why didn't he leave, if the situation was so
5 bad?" But very typically we find, particularly
6 with children of alcoholics and abused children,
7 it's very difficult for them to leave the home
8 because they don't have the ego strength, they
9 don't have the self-concept, this -- the feeling
10 that they can make it on their own. And so they
11 -- they stick to something they know. It seems
12 irrational, but that's the way it seems to be,
13 that the more abused the child is, frequently the
14 more desperately they cling to the parent. And I
15 believe David said he was in -- in his middle 20s
16 before he left home.

17 Q Do you have an opinion, Doctor, as to why,
18 when this depersonalization took place and this
19 repressed anger came out, that it came out in the
20 form of terrible violence?

21 A I don't know what precipitated this -- these
22 particular episodes. I would imagine it was some
23 type of family discord. Typically, this anger is
24 buried so deeply it's difficult to tell; you know,
25 the anger dates from very early in the person's

1 life. And it just takes something, like, to
2 trigger it off.

3 Typically, the anger builds up and builds up.
4 And while a normal person will let their anger out
5 over a period of time and learn to deal with it,
6 someone who has an avoidant personality has
7 terrible problems dealing with anger because they
8 feel if they let themselves express the anger that
9 they have, that they will be even further ejected
10 by the people that they depend on. These people
11 need very much to be loved and cared for and are
12 very sensitive to any type of rejection or
13 criticism. So it becomes extremely difficult for
14 them to express anger, because they expect to be
15 rejected and that rejection is very, very
16 devastating for them.

17 So they tend to bottle anger up over a period
18 of years. And it may just be some little thing
19 that triggers this anger, that triggers this
20 depersonalization. And the depersonalization is
21 really a means whereby the person can disown the
22 anger and say, "Well, it's not really my anger.
23 It's not me doing this." And it is sort of like
24 there is another side of themselves that they lose
25 control over.

1 Q And one last thing. Doctor, after having read the
2 report from KCPC, do you have any disagreement
3 with that report?

4 A Well, they -- they said that he was not psychotic,
5 and I agree with that. He had no hallucinations
6 or delusions at the time. However, I believe he
7 was mentally ill and I believe that that mental
8 illness caused him to not be able to conform his
9 behavior to the requirements of the law. And so
10 on that point, that I had disagreed with the
11 report by KCPC.

12 MR. CHARTERS: Thank you, Doctor.

13 You may ask him.

14 **CROSS-EXAMINATION**

15 **BY MR. SMITH:**

16 Q You say, Doctor, in your opinion he was not
17 responsible for his acts at the time?

18 A That's right.

19 Q Okay. You said he was not psychotic. Can you
20 tell me what that means.

21 A A psychosis is a very serious form of mental
22 disease in which the person loses contact with
23 reality, and these people have hallucinations or
24 delusions. An hallucination is a disorder in
25 which you see, smell, or sense things that are not

1 there. A delusion, on the other hand, is where
2 you perceive reality in terms of the things we can
3 touch. But we think that people are plotting
4 against us or we have deep suspicions of other
5 people's motives. That is, basically, what a
6 psychosis is.

7 There are various forms of psychosis. There
8 is a psychotic depression in which the person
9 becomes so depressed they no longer have contact
10 with reality and have delusions. The more
11 frequent form of psychosis is schizophrenia, which
12 the person has a thought disorder in which their
13 actual thinking processes are so disordered that
14 they have lost contact with reality.

15 Q In many instances or in most instances where a
16 person does not have the requisite legal
17 responsibility for their acts, don't they in most
18 cases suffer from a psychosis or in the majority
19 of those cases?

20 A Very frequently, yes. They do suffer from a
21 psychosis. But the legal definition of insanity
22 does not proscribe a particular diagnosis. That's
23 left up to the experts in the field of mental
24 health to formulate the diagnosis.

25 Q But am I correct in saying that the majority of

1 those that fall under the category of being not
2 responsible are those that suffer from psychosis?

3 A That is correct.

4 Q You said here that the defendant had a lot of
5 anger repressed, stored -- bottled up. I would
6 reckon that is the best term to use.

7 Who was that anger against or directed
8 toward?

9 A That anger, I believe, came from early childhood
10 experiences towards his parents when he was abused
11 as a child and neglected.

12 Q All right. When he had these episodes -- I will
13 get to those in just a second.

14 But when he had these episodes, would they be
15 characterized by rage, that he was acting out in a
16 rage?

17 A I don't think you would characterize it as a -- a
18 rage, no. I would characterize it as an
19 expression of hostility.

20 Q All right. What exactly have you diagnosed him
21 as? I -- you said it faster than I could write
22 that 25 cent word down. Could you --

23 A Diagnosis, according to the Diagnostic and
24 Statistic Manual of Mental Disorders, the DSM-3,
25 are produced -- or published by the American

1 Psychiatric Association, on page 276 is diagnosis
2 300.60, depersonalization disorder.

3 Q Depersonalization disorder. All right, sir. What
4 is the effect of this depersonalization disorder
5 on the memory of the person? Would he have
6 short-term lapse of memory of the event or a
7 long-term lapse of memory of the event?

8 A Well, you can have depersonalization both with and
9 without amnesia. And the type of amnesia is not
10 determined by the depersonalization. The amnesia
11 is a forgetting of what happened. And there may
12 -- there are different types of amnesia. And
13 amnesia may be for a particular period, it may be
14 for particular events.

15 Q Like when we're talking about amnesia, are we
16 talking about something like this, selective
17 points of recall that had slipped away, or are we
18 talking about the whole event itself?

19 A Well, amnesia may be for various things for
20 various periods of time. A person may remember
21 certain things. A person may, you know, given a
22 particular stimulus remember certain parts of an
23 event. Amnesia may be for, you know, for just a
24 particular period of time. It may be for an
25 extended period of time.

1 Q The fact that he's been -- you've diagnosed him as
2 having this depersonalization disorder. Is he
3 cured now?
4 A No.
5 Q Okay. How much longer will it be?
6 A Well, I would think he would need extensive
7 psychiatric treatment.
8 Q Did you call Dr. Walker and discuss her report
9 with her?
10 A No.
11 Q How much time did you spend with the defendant?
12 A I spent about -- I think about two and a half to
13 three hours. I started at 9:30 and finished up
14 around 12, 12:30, I believe.
15 Q When did you see him?
16 A I think it was on Monday or Tuesday of this week,
17 beginning of this week.
18 Q And when did you see his brother, Roger?
19 A I saw him yesterday.
20 Q Okay. Have you talked with Lauren Sanders --
21 A No.
22 Q -- about this?
23 A No.
24 Q Have you talked with Bernice Sanders about this?
25 A No.

1 Q Debbie Sanders?

2 A No.

3 Q Do you know whether he has verbalized his previous
4 child abuse to many people besides yourself?

5 A I didn't hear the question.

6 Q Excuse me. Do you know whether he's told many
7 other people about the child abuse?

8 A I don't think he has. I don't think he's the type
9 of person who would talk about it.

10 Q Would it surprise you to learn that he has talked
11 to his wife about this and has told her that he
12 was abused as a child?

13 A It wouldn't surprise me if he had, no. This type
14 of personality, though, is not the type of
15 personality that goes out and talks to strangers
16 about what happened to them during their early
17 experience, during their early childhood.

18 Q You say not too many of us would do that if we had
19 that kind of problem, would we?

20 A Some do.

21 Q What sort of practice do you maintain now, Doctor?

22 A I am work -- I have two aspects of my practice.
23 I have part-time private practice and part-time
24 doing a computer psychological testing service.
25 In the private practice I do psychological

1 evaluations, child custody, I do marriage and
2 family therapy, long-term individual
3 psycho-therapy, evaluation of children, evaluation
4 of child abuse, called in frequently to make child
5 custody decisions.

6 Q All right. Have you done much, what we would
7 call, forensic psychological work --

8 A Yes.

9 Q -- in Kentucky?

10 A Yes.

11 Q Okay.

12 A And in -- and in Minnesota.

13 Q How long have you worked here in Kentucky?

14 A About a little over two and a half years. I came
15 here in December of 1985.

16 Q Doctor, let me ask you about --

17 MR. CHARTERS: Let me see that note
18 again, please, sir.

19 Q The testing that you gave him, did you administer
20 those tests yourself?

21 A Yes.

22 Q And you say there were how many tests? Four?

23 A There was the Rorschach. There was the MMPI.
24 There was the Millon.

25 Q The Wechsler?

1 A The Wechsler Intelligence Scale.

2 Q And the MMPI, is that one that is currently under
3 revision?

4 A That is being -- or there's a long-term project to
5 revise that, according to -- the work is being
6 done by Dr. Butcher up at the University of
7 Minnesota.

8 MR. CHARTERS: That's all.

9 THE COURT: Any redirect?

10 MR. CHARTERS: No further
11 questions, Your Honor.

12 THE COURT: All right. Dr. Cooke,
13 you can step down.

14 MR. CHARTERS: Your Honor, the
15 defense will rest.

16 THE COURT: All right.

17 (Partial Proceedings concluded at 4:06 p.m.)
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COMMONWEALTH OF KENTUCKY
MADISON CIRCUIT COURT
DIVISION TWO
NO. 87-CR-018

COMMONWEALTH OF KENTUCKY .
Plaintiff, .
v. . June 5, 1987
DAVID LEE SANDERS .
Defendant .
..... Jury Trial

PARTIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM T. JENNINGS, JUDGE,
MADISON CIRCUIT COURT, DIVISION TWO

APPEARANCES:

For the Plaintiff: Hon. Thomas J. Smith, III
For the Defendant: Hon. Kevin Charters

Lisa Colston, FCRR, RPR
Federal Certified Realtime Reporter

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1 (The following proceedings
2 commenced at 8:59 a.m.)

3 THE COURT: Madam Clerk, if you
4 would call the jury, please.

5 And, Ladies and Gentlemen, if you
6 would please raise your hand when your name
7 is called.

8 (Clerk calls roll)

9 THE COURT: All right. Counsel
10 approach, please.

11 (Intervening proceedings were had,
12 after which the following proceedings
13 occurred at 9:01 a.m.)

14 THE COURT: All right. Ma'am, if
15 you would come around and raise your right
16 hand, please.

17 (Witness placed under oath)

18 **REBUTTAL DIRECT EXAMINATION**

19 **BY MR. SMITH:**

20 Q Would you tell the jury your name, please, ma'am.

21 A My name is Candace Walker.

22 Q How are you employed, Dr. Walker?

23 A I'm a psychiatrist at the Kentucky Correctional
24 Psychiatric Center in LaGrange, Kentucky.

25 Q How long have you been so employed?

1 A I've been there since August 1986.

2 Q And what sort of educational training have you had
3 in order to hold your position?

4 A After graduation from medical school in 1978 at
5 the University of Louisville, I completed a
6 psychiatric residency, basic residency training at
7 University of Louisville, and a forensic
8 psychiatric fellowship at the Medical College of
9 Georgia in Augusta. And I'm board certified in
10 the specialty of psychiatry and licensed in the
11 state of Kentucky.

12 Q What is a -- you talked about forensic psychiatry.
13 What is that, please, ma'am.

14 A Well, forensic psychiatry has to do with
15 psychiatry as it relates to the law. You have
16 occasion to evaluate and discuss patients and
17 their psychiatric problems in relation to legal
18 problems that they may have had, criminal cases
19 that may come up, as we're involved in today, or
20 civil litigation, that type of thing.

21 Q And what sort of duties do you perform at the
22 Kentucky Correctional Psychiatric Center?

23 A I evaluate patients for, in the pretrial unit,
24 people who are sent to us from the 120 counties
25 within Kentucky by the court system to determine

1 primarily if they are competent to stand trial and
2 possibly the state of mind that they were in at
3 the time of crime -- of the crimes that they are
4 accused of.

5 Q Have you performed few or many of these
6 evaluations?

7 A I've performed many of them, probably
8 approximately 65 of them since I've been there.

9 Q And what approach do you take or how do you go
10 about evaluating someone when they are referred to
11 you?

12 A We have a patient referred to us by one of the
13 courts in Kentucky. He is generally screened by
14 the outpatient people in the area, comprehensive
15 care. And if it is determined that the patient
16 needs an inpatient evaluation to make an
17 evaluation, he is brought to KCPC.

18 At that point, he is seen by a team of
19 professionals. The team consists of a social
20 worker, who takes a psychiatric history from the
21 patient and determines what kind of situation his
22 life has been in up until now. He's seen by a
23 psychologist, who performs a series of
24 psychological tests on the patient. He is seen by
25 various other professionals that might be

1 involved, such as an internist for any kind of
2 physical problems. We have access to several
3 other facilities, like Tri-County Hospital, where
4 they can go for physical tests, like a CAT scan.
5 We have EEG facilities at Central State. Any type
6 of medical facility that we feel is necessary to
7 make a physical evaluation of the patient, we can
8 do.

9 As the psychiatrist in charge of the patient,
10 if he is assigned to me of the four psychiatrists
11 that we have, two of them being on pretrial, if he
12 is assigned to me, then I am the leader of that
13 team. I'm the person that makes the final
14 determination and puts all the evidence that the
15 team has gathered together to make a final
16 diagnosis and report to the Court.

17 I see the patient for the psychiatric
18 interviews and for the specific interviews that
19 have to do with his competency and with his crime.
20 And then I take the -- all of the other team
21 members' input and put that together.

22 We also have a 24 hour observation ability
23 there at that facility, which is very important in
24 evaluating a person's mental condition, especially
25 when he is under criminal indictment. We have

1 officers there that are trained not just to be
2 security officers but to observe behavior and to
3 document that behavior on a 24 hour basis, to
4 counsel with the patients as that might become
5 necessary. And we have nurses on duty around the
6 clock, on a 24 hour basis, also to observe
7 behavior, to give medications and whatever might
8 be needed. So this team is assigned to the
9 patient.

10 We have two pretrial teams. And each one is
11 headed by a psychiatrist. And that is the basic
12 approach that is used when we -- when we are
13 referred a patient.

14 Q All right. Do you know David Sanders?

15 A Yes, I do.

16 Q How did you have occasion to meet him?

17 A He was referred to our facility from the court.
18 And he was an inpatient there from March the 5th,
19 1987 until April 21st, 1987. He went through this
20 evaluation process I just described.

21 Q What? He just came up for a couple of days?

22 A No. He came up on March the 5th, 1987, and he was
23 an inpatient until April 21st, 1987. So he was
24 there --

25 Q So he stayed in the facility the whole time?

1 A Yes. He was -- he was an inpatient there.

2 He underwent the process I just described.

3 Q With respect to the defendant, David Sanders, what
4 sort of evaluation did you do on him?

5 A Well, using the team approach that I just
6 described, he was seen by a social worker and a
7 full history was obtained. The social worker that
8 originally saw him, after reviewing that history
9 and looking at some pertinent questions, I
10 assigned another social worker to do some further
11 investigation because of discrepancies given in
12 the history. So he was actually investigated by
13 two social workers.

14 We also performed a series of psychological
15 tests on him. He was seen by a psychologist for
16 that. Because his initial presentation raised the
17 question of some organic brain syndrome, the way
18 he was presenting, the symptoms he was giving, we
19 had him evaluated in a full physical examination,
20 which included not only a routine physical, as you
21 might receive from your internist, but a complete
22 blood count and blood chemistry, VDRL, serology,
23 and urinalysis. All of those are routine. And
24 those were all reported as normal.

25 But because of his possible organic

1 presentation, we did a CAT scan of the brain,
2 which is a computer tomogram x-ray, and an EEG of
3 the brain. Both of those were also reported as
4 normal. And, again, because of the question of
5 some organic problem that he might have, we had
6 him seen by a neurologist on a consultation basis.
7 And, again, the neurological evaluation was
8 normal.

9 So we had that evaluation for the organicity,
10 we had the psychological evaluation, and I saw him
11 for psychiatric interviews.

12 Q All right. Did you have a psychol -- what kind of
13 psychological tests did you have performed on him?

14 A The usual battery of psychological tests were
15 performed, which includes like an IQ test, where
16 his IQ was reported as normal. There were several
17 projective tests done, the Rorschach and draw a
18 person type test. The MMPI was done.

19 The first psychologist reported some unusual
20 findings in these tests, in that they were not
21 really consistent with any known psychiatric
22 disorder. Because the patient had such a
23 confusing presentation, we had him seen by a
24 neuropsychologist, who performed a particular
25 battery of specialized neuropsychological tests

1 which are -- is a -- like a step further than the
2 regular psychological testing.

3 Q Excuse me, Doctor. What do you mean by "confusing
4 presentation"?

5 A The presentation he initially brought in was not
6 consistent with a known psychiatric syndrome. At
7 first, it appeared that he might have some sort of
8 a brain tumor because he reported headaches,
9 visual symptoms, and some sort of vague something
10 that sounded like it might be a dissociative type
11 of reaction but it was not consistent with the
12 usual psychiatric syndromes that we see. It
13 raised the question of some sort of organic brain
14 syndrome.

15 So we did the very extensive organic workup
16 that I described, all of which was reported as
17 normal. And we reported to Mr. Sanders that we
18 did not find any brain tumor or any organic
19 problem that he needed to be concerned about.

20 Q What was his reaction?

21 A He had an unusual reaction, in that he appeared to
22 be angry with us. It appeared that he had --
23 rather than be relieved that he didn't have a
24 brain tumor, he appeared to be angry at us. And
25 he said that there was something very seriously

1 wrong with him and that nobody could find it. And
2 he was -- he was angry rather than relieved, which
3 we thought was unusual.

4 Another unusual and inconsistent thing about
5 his presentation was that he endorsed on the
6 psychological tests many different symptoms from
7 many different syndromes, yet his behavior on the
8 unit indicated that he was never out of touch with
9 reality. There was no observable evidence of
10 psychosis or psychotic decompensation, such as
11 hallucinations, delusions, being out of touch with
12 the environment at any time.

13 So in order to make sure that we had a full
14 evaluation, we did the neuropsychological battery.
15 And there was no evidence of any type of brain
16 damage found there. Sometimes very subtle brain
17 injury will show on neuropsychological, where it
18 does not show on even a CAT scan. So we -- that's
19 why we did that. But we didn't find anything.

20 Q You mentioned that he was given the psychological
21 tests, psychological tests such as the MMPI and
22 the Rorschach and the Wechsler test.

23 A The WAIS is the intelligence test that we used,
24 instead of Wechsler.

25 Q Okay.

1 A But it is a similar intelligence test.

2 Q How long would it take to give the defendant these
3 tests? Or how long did it take; do you know?

4 A Well, for our psychologists, each -- since they
5 were given twice, it took longer than usual. But
6 it would take several hours to give a battery of
7 tests. The patient often can take the MMPI back
8 to his living space, his cell, and complete it on
9 his own time.

10 And the -- the intelligence test would take a
11 couple of hours. The tests in all would often
12 take our psychologists four to six hours,
13 depending on the patient and the tests that he
14 selects.

15 Q In your professional opinion, do you think that
16 tests could be adequately administered in two and
17 a half to three hours?

18 A No. Particularly not since the -- the
19 presentation was confusing enough that some of
20 them had to be repeated. In other words, the
21 symptoms were not really consistent with a known
22 psychiatric syndrome that we're familiar with, and
23 so we had to repeat some of the tests.

24 Q All right. Doctor, pursuant to the various tests
25 that you gave him, both physical and mental,

1 pursuant to the team effort and discussion within
2 the team, were you able to form a professional
3 opinion as to the defendant's competence as of
4 January the 28th of 1987 and December the 29th of
5 1986, the dates that these two crimes -- or that
6 these crimes occurred on?

7 A Yes. To the best of our ability we were able to
8 do that. Current -- his current competence never
9 became very much of an issue. There was never any
10 indication that he was incompetent at the time of
11 the evaluation. And looking at all the evidence
12 which we pursued, which included the reports that
13 were made by the investigating officers and
14 collateral information obtained by family
15 interviews from our social worker, everything that
16 we were able to obtain indicated that he was
17 competent to deal with reality and that there was
18 no evidence of any type of psychosis or serious
19 psychological or psychiatric impairment at the
20 time in question.

21 Q Do you have an opinion as to whether or not he
22 suffered from mental disease or defect on those
23 two days?

24 A I think he suffers from a personality disorder.
25 But I don't think he suffers from a mental disease

1 or defect that would be of the severity that would
2 impair his competence, in the sense that the
3 question was asked us.

4 Q You talk about a personality disorder. Are you
5 familiar with what's called a DMS 3?

6 A DSM 3, Diagnostic and Statistical Manual 3. Yes,
7 I am familiar with that. That is a manual that
8 the mental health and behavioral sciences,
9 including psychiatry, use to attempt to classify
10 mental disorders so as to facilitate communication
11 amongst different professionals. They're
12 classified by symptomatology.

13 Q All right. Are you familiar with DMS 300.06,
14 depersonalization disorder, that term?

15 A Yes.

16 Q All right. Did you look to see whether or not the
17 defendant manifested that at all?

18 A We did. The defendant gave a story that was
19 somewhat indicative of a possible dissociative
20 disorder. Depersonalization disorder is classed
21 under the dissociative disorders. This group of
22 mental disorder that in -- that is seen and is
23 brought about and then -- and is -- the symptoms
24 are it includes a dissociation of ego functions.

25 And when we talk about ego functions, we talk

1 about the part of the person's psychological
2 makeup that deals with the external environment,
3 with his reality testing. Dissociative disorders
4 are disorders where ego functions can be
5 dissociated. And these would include memory,
6 identity, and possibly consciousness.

7 The depersonalization disorder is a
8 dissociative disorder where identity is most --
9 is the part that is dissociated. In other words,
10 the person feels unreal. He feels that he is in a
11 -- on automatic, he is watching himself.

12 This type of disorder I have seen many times
13 among people who have suffered a very severe
14 stress. The people that I've been most familiar
15 with the depersonalization type syndrome are
16 people who have, because of my own background,
17 which included working with war veterans, people
18 who have been under very severe stress and to have
19 at the time of an act been drawn by the emotional
20 stress to do two different things, such as a
21 person in a battle feels that he has to shoot on
22 the one hand but on the other hand he wants to say
23 behind where it is safe, in the fox hole. And he
24 will recall at times watching himself get up and
25 do something.

1 The disorder of -- of this type of magnitude
2 is generally always associated with some very
3 severe stress. Because the patient's presentation
4 did not include any particular stress, we didn't
5 consider that very strongly but we did look into
6 it. The presentation that he gave over time was
7 not consistent with that diagnosis. For one
8 thing, the story was different as told to
9 different people.

10 Q Excuse me. By who was this story told by?

11 A By the patient to different -- to different
12 members of the team as well as to different people
13 that had done the investigation before. As I
14 said, we reviewed the entire investigation. So
15 that kind of mitigated against that diagnosis.

16 Another thing is that we never observed any
17 type of dissociative phenomenon in the full six
18 weeks that he was there under 24 hour observation.
19 There was never any type of dissociation observed.
20 There was no stimulus given for a dissociation in
21 his story. And at one point on the ward he said
22 that he felt that he might be having one of these
23 spells that he had told us about. But he had
24 talked to someone and he was able to -- to abort
25 the spell. And that --

1 Q He was able to avoid having the spell?

2 A To avoid having it, yes. And that would not
3 really be consistent with that diagnosis.

4 Q Then, do you have an opinion as to whether or not
5 on the 29th of December of last year and
6 January the 28th of this year the defendant was
7 suffering from a depersonalization disorder?

8 A Well, as I -- as I said, we did consider that
9 diagnosis but we pretty well have -- we did rule
10 that out. And all of the evidence that we had
11 indicates that he was not suffering from such a
12 disorder at the times in question.

13 Q During the course of your interviews with the
14 defendant and review of the case files, did you
15 receive not only the Kentucky State Police report
16 from the Madison County shootings but the Kentucky
17 State Police report from the Lincoln County
18 shooting?

19 A Yes. We did receive that.

20 Q Did you have an opportunity to review both of
21 those?

22 A Yes.

23 Q Would you find it significant in your evaluation
24 of the defendant that he claims that he never
25 spent any of the money from any of the crimes?

1 A I wouldn't find that particularly significant in
2 making a psychiatric diagnosis. I think that one
3 of the -- as part of the investigation, it would
4 be significant in that it was one of the instances
5 where the story was different as told to different
6 people. Because at one point in the investigation
7 it was seen that he had said that he had spent
8 some of it. And if he says now that he didn't,
9 that would be another of the inconsistencies in
10 the -- in the story, as I -- that I pointed out.

11 Q Excuse me. In one of the stories that you have
12 received, he indicated he had spent some of the
13 money?

14 A Yes. At one -- at one point he had told one of
15 the questioning officers that he did spend some of
16 the money. I think he bought some tires or
17 something. He had -- he had said that he did
18 spend it. And if he says at another point that he
19 didn't spend it, that might be significant.

20 Q Did he remember -- in your discussions, with you,
21 did he remember whether or not he ever got Wayne
22 Hatch's wallet?

23 A He stated, as -- to us that he had remembered
24 watching himself shoot these two people and take
25 their wallets. So he said that he remembered

1 watching himself take it.

2 Q Did he say anything about whether he remembered
3 how the pistols or the .25-caliber pistol got into
4 his truck?

5 A He -- I am not sure if he was talking about the
6 .25 or the .22. But he said that he had guns in
7 the truck and that he had bought the pistol for
8 target practice.

9 Q Was there any inconsistency with that statement?

10 A Again, at one point in some of the other
11 questioning he had said that he had -- the -- the
12 -- his wife had told the police that he had bought
13 the gun for protection because she had some
14 trouble with her ex-husband. He did admit having
15 trouble with the wife's ex-husband. But then he
16 went into a -- a lot of detail for us about how he
17 would never hurt a person and he would never buy
18 the gun to -- to -- for protection. He only
19 wanted to buy it for target practice.

20 Q Did he indicate to you at all whether he had any
21 control over any of these bodily functions or
22 movements, such as eyes or anything like this,
23 during these robberies and murders?

24 A He stated that he could watch. It appeared that
25 he was saying he could watch himself do these

1 things, but he could not control -- he could not
2 stop himself. But he could watch.

3 And at one point I think he made the -- he
4 appeared to have made the decision to watch or not
5 to watch. But he -- he said that he couldn't
6 control anything else about his -- his movements.

7 Q What is a malingerer? If I'm pronouncing it
8 correctly.

9 A Well, a malingerer would be a person who was
10 fabricating. In psychiatric -- in psychiatric
11 practice, it would be fabricating a psychiatric
12 illness. It could be fabricating any other
13 illness, a back illness or whatever, for a gainful
14 reason, for a secondary gain. It would be
15 pretending to have something that you don't have.

16 Q Did you attempt to determine whether or not the
17 defendant was engaging in any malingering?

18 A Yes. In our particular type of psychiatry, you do
19 see people malingering more than possibly private
20 practice. Because there is a clearly defined
21 secondary gain, that being a criminal action.

22 And, so, when the -- the different versions
23 of his stories appeared to conflict and when we
24 didn't find a psychiatric syndrome that was
25 consistent with a known illness, we did go back

1 and re-read the reports and look for
2 inconsistencies. Because it was beginning to
3 appear that the patient had either consciously or
4 unconsciously, and probably consciously, decided
5 to appear to have a -- a psychiatric problem after
6 the fact.

7 It appeared that, in the reports, that he had
8 been questioned several times. And this
9 dissociative disorder that he was describing, or
10 this possible dissociative disorder, was brought
11 up after he had already been questioned at least
12 twice. The first time the story was given, that
13 he basically was innocent. The second time he
14 brought in a third-party or another party and said
15 that this man did it and I then killed him. And
16 on the third questioning, he had apparently
17 decided that he did the crimes but that he didn't
18 have any control. And in looking back over that
19 and in looking at his behavior on the unit over
20 time, we decided that it was very likely that the
21 patient's psychiatric illness was to a large
22 extent malingered.

23 Now, the patient does appear to be the kind
24 of person who -- who represses a lot of his
25 feelings and who denies impulses. And he may want

1 to believe that he couldn't do these things. But
2 there was no indication that the disorder itself
3 was real. He may get some feeling of relief
4 himself from saying that. It may -- you know,
5 part -- as part of coming up with this, he is able
6 to avoid responsibility for his actions. He
7 appeared to have those kind of tendencies. But we
8 did not see that the -- any of the psychiatric
9 syndromes that we investigated were real.

10 Q All right. Did you observe any efforts on his
11 part to manipulate the people that were working
12 with him?

13 A Yes. Yes, we did. He -- and that is consistent
14 with a personality disorder. We get that a lot in
15 our field, the patients being manipulative.

16 He -- at one point it was reported to me the
17 patient had wanted -- wanted something on the ward
18 and was given the procedures to obtain it. And
19 instead of signing the paper and going ahead with
20 the request, as per the rules, the patient became
21 angry and refused to -- to cooperate, instead
22 appeared to be -- according to the nurse, he
23 appeared to be rather -- it appeared that he would
24 rather be angry that we were denying his request
25 rather than to go through the rules. And a

1 disregard for rules and a consistent going against
2 the rules does go along with an anti-social
3 personality.

4 He did appear at times to be very emotionally
5 upset. And because at first we, of course, didn't
6 know what his disorder was and we -- you always
7 take a person at their word until you find out
8 otherwise. And the chaplain spent a great deal of
9 time with him, attempting to counsel him. And it
10 appeared that he came up with feelings that --
11 that would indicate he was sorry or whatever only
12 at the urging of the chaplain. The chaplain
13 commented that the patient did not appear to have
14 a true regard for the victims, that he did not
15 appear to have a true remorse. But when the
16 chaplain would talk with him and would maybe
17 almost put words in his mouth, the patient would
18 -- would say that he did.

19 So we did feel that he had tendencies to be a
20 manipulative type of person.

21 Q All right. You indicated earlier that under the
22 depersonalization disorder that it could be
23 triggered only by very severe stress.

24 From the story that you have heard and the
25 reports that you have, even from the defendant's

1 six or seven, do you see any stress significant
2 enough to bring on a depersonalization disorder at
3 either the Madison County robberies and murders or
4 the Lincoln County robbery and shooting?

5 A No. There didn't appear to be any kind of stress,
6 and the patient didn't say that there was. The
7 patient himself never said that he was under any
8 kind of emotional stress at the time or that the
9 victims had done anything to bring about any kind
10 of emotional reaction. There was nothing in the
11 reports that indicated an emotional crime scene.
12 There was nothing to indicate rage or violent
13 acting out at the scene. And the patient himself
14 could not find anything like that.

15 There's one depersonal -- one type of
16 dissociative disorder that we did also look into
17 that does not require an immediate stress. And
18 that is the multiple personality. Because the
19 patient had indicated to some people that he might
20 have had a violent childhood and have had some
21 abuse, we looked into that one also. Because it
22 would not necessarily have to have a stimulus at
23 the time. It could have been a long past
24 stimulus. And he did indicate that he had these
25 long past violent episodes to some people. Now,

1 to other people he indicated that his childhood
2 was very perfect and there was nothing wrong with
3 it. But to other people he indicated he had been
4 abused and that his father had been very violent
5 with him. And so we looked into that also,
6 because it would not require -- it would be
7 possible that he would have that kind of disorder
8 and not have a stimulus at the time.

9 But to have a multiple personality disorder,
10 it is one of those dissociations. And the person
11 has a complete dissociation of personality, to
12 where he has two separate identities or more.
13 And there was no indication in any of the family
14 member interviews or the long six week 24 hour
15 observation that the patient ever used another
16 name or that he ever became a different
17 personality or anything that -- or that he had
18 blackout periods, as a multiple personality would.

19 These periods that he described were not
20 blackouts at all. He had very, very good memory
21 for it. He just said that he couldn't do anything
22 about it. But he remembered details of the days
23 that most people probably would not remember if
24 given -- if questioned about a particular day in
25 your life. He had remembered all the specifics of

1 the -- the scene. There was no blackout to
2 indicate that -- that he might have had a multiple
3 personality. So we also ruled that out.

4 Q Would it be consistent with a malingerer to come
5 back in at a later time and have a very poor
6 memory of these events?

7 A Yes. Yes, it would. But at the time we saw him,
8 he did -- he never had a poor memory. His memory
9 was very good of all the events.

10 Q This is a very, very serious case. The charges
11 are extremely serious.

12 When you get a person who's charged like this
13 to evaluate, you being a physician, do you
14 actively hunt for an explanation as to what caused
15 the defendant or the person you are evaluating to
16 act the way he did?

17 A Yes. We -- we do that anyway. With any
18 evaluation you look for an explanation. And I
19 think that psychiatrists and other behavioral
20 scientists probably look harder than the average
21 person would for some sort of an explanation for
22 behavior that is very abnormal. I think that we
23 all want to believe that a person wouldn't do
24 anything this serious without something seriously
25 wrong with them. And that's why we did such an

1 extensive evaluation.

2 A person -- a personality disorder is
3 something wrong with a person. A person with a
4 personality disorder is not the average person.
5 But on the other hand, they are not out of control
6 of their faculties.

7 Q Right.

8 A So we did -- yes, we did a very extensive
9 evaluation.

10 Q Did you find any explanation for why he did what
11 he did?

12 A Yes. But not a psychiatric one.

13 Q What --

14 A Well, the only explanation I could come up with,
15 after the extensive evaluation that we did, was --
16 was just the money, that he just -- would be the
17 obvious motives that -- that you would find as an
18 investigator. We did not find any kind of a
19 psychiatric explanation for why the person would
20 have committed the crimes.

21 MR. SMITH: That's all, if Your
22 Honor please.

23 THE COURT: (Inaudible).

24 =====

25 =====

REBUTTAL CROSS-EXAMINATION

BY MR. CHARTERS:

Q Dr. Walker, if the -- you mentioned the tests.

Let's begin with that.

If -- you said that this -- an individual can take the tests back to their room and complete them on their own time and --

A The MMPI is a test that they can do that with.

Q And you could do the same thing in the Madison County jail, couldn't you?

A Yes.

Q So if Dr. Cooke handled it in that manner, that would be completely consistent with that, correct?

A Yes.

Q Now, in the report -- or on the telephone with me, Doctor, you talked about repressed anger.

Did you -- were you ever able to discover where that anger arose from, what he was angry about?

A He appeared to repress anger about everything. In talking with Mr. Sanders, he would say that his life was perfect, that his marriage was perfect, that his childhood had been perfect. And then when you got beyond that and talked with him in more depth, you would find that -- that this

1 really wasn't the case. And he did not like to
2 admit that he was angry. He -- he seemed to
3 repress anger about anything that would make a
4 person angry. He said at one point, "I get up in
5 the middle of the night and help people. If a
6 car's in the ditch or whatever, I get up and I --
7 and I take care of it even if I don't want to."
8 And he didn't like to admit that that would make
9 him angry or bother him or make him upset or that
10 he would be ticked off at the person or whatever.
11 It was like things are always fine with me. And
12 his anger would -- was something that he denied.

13 Whether he was doing that because he just did
14 not want to show a bad side of himself or because
15 it was a lifelong habit is hard to say. But it
16 was consistent that he always said that.

17 He apparently did not like to see himself or
18 did not want us to see himself as an angry person.
19 And the -- he did say that he had had an abusive
20 upbringing. And it appeared that he had been
21 angry for a long, long time.

22 Q Is it not consistent with many abused children
23 that they deny it, even stay within the home
24 longer than is reasonable, put up with more?

25 A Yes. That can happen.

1 Q So it's possible that he has had 26 years of anger
2 repressed?

3 A It's possible. It wasn't always repressed. There
4 were some eruptions. Like at one point he
5 consistently would say that he had a very perfect
6 marriage, yet on investigation we found out there
7 were some abusive episodes with the wife. So it
8 wasn't always repressed. He did erupt in violent
9 actions at times.

10 Q Was there ever an abusive episode, other than the
11 one instance of holding her down for a period of
12 time?

13 A There were two that I recall. One was where he
14 held her down. At some point -- there was an
15 abusive episode that went on for about an hour.
16 And at one point she apparently was held with a
17 pillow over her face off and on for about an hour.

18 And there was another point where he became
19 angry with her and backhanded her when they were
20 driving in the Blazer. And she was reported to
21 have gone back over the seat. So he must have
22 backhanded her pretty hard in the Blazer. Those
23 were the two that I recall.

24 Q Was that not, in fact, the same episode, that the
25 one thing being just the extension of the other

1 one?

2 A I don't -- I don't know --

3 Q You don't know?

4 A -- if that was one extension of the other. He was

5 -- the Blazer episode was on the road, while they

6 were driving. And the other one was at home.

7 So if it was, it was a very extended period.

8 Q You said that the -- they took a psychological --

9 or psychiatric history of him. What is that?

10 A Well, it is a psychosocial history, is actually

11 what it is, where the social worker goes into the

12 person's background, tries to find out even

13 prenatal and up through current. He questions

14 collateral sources, including the patient's

15 family, and puts together as much information as

16 possible on the patient, also interviewing the

17 patient extensively. So that's -- that's what the

18 history is.

19 Q Was that history given to you?

20 A Yes, it was.

21 Q How much abuse did it show from his childhood?

22 A Well, he was -- at -- from different people,

23 sometimes he would say that he didn't have any

24 problems. But at other points he would say that

25 he had very, very extensive abuse as a child.

1 Q All right. Now, what happens, Doctor, when anger
2 is repressed for years and years and finally
3 explodes? What happens?

4 A Well, a person who represses anger to the point of
5 finally exploding very often will act out in a
6 violent and emotional way.

7 Q Would that person have a warning that their anger
8 that they've repressed all this time is suddenly
9 going to burst out?

10 A Sometimes they do; sometimes they don't.

11 Q Well, if they did not know it was coming and acted
12 out in a violent manner, would that not advocate
13 them from responsibility? I mean, what could they
14 do to stop it?

15 A No, it wouldn't advocate them of responsibility.
16 It would be a loss of impulse control. Repressing
17 anger is not an unusual thing. We all do that.
18 You go to work and things don't go well. You may
19 not be able to slug your boss. You may repress
20 that and go home and you may later erupt and take
21 it out on a family member or a pet or someone and
22 the people are looking at you like "How could you
23 be taking this anger out on me?" And it was
24 repressed from an earlier time. That's not really
25 that abnormal, to repress anger.

1 Q But we're talking about years and years of it,
2 aren't we?

3 A The amount may be significant.

4 Q And loss of impulse control, what does that mean?

5 A Loss of impulse control is when you fail to
6 control your temper or your aggressive impulses.
7 And loss of impulse control is something that
8 people are generally held responsible for. If you
9 -- if you lose your temper and -- and act out,
10 you're -- it is not something that means you have
11 a mental disease.

12 Q Now, you mentioned blackouts. And in response to
13 Mr. Smith's questions, you said that he seemed to
14 have a vivid memory of what happened at the
15 incident.

16 But did he relate to you loss of memory,
17 amnesia after the incident and about the incident?

18 A He stated that he had memory problems. But we
19 couldn't find them. He said that he had had loss
20 of memory. But then he related it in very vivid
21 detail. And in all the testing that we gave him,
22 we didn't find any memory deficits. The problems
23 that he originally related with saying that I have
24 memory problems was one of the reasons why we did
25 the extensive organic workup.

1 Q But aren't we talking about two different things?

2 You are talking about his memory of the events.

3 A (Moved head up and down).

4 Q I'm talking about his loss -- short-term loss of
5 memory afterwards about the events.

6 A Well, short-term loss of memory about the events
7 and then total recovery of the memory about the
8 events would not be consistent with a known
9 psychiatric syndrome.

10 Q It wouldn't be consistent with depersonalization?

11 A Not really, no.

12 Q Can you --

13 A To -- to -- to not re -- to remember it at one
14 point and then to tell me that I forgot about it
15 and I didn't remember it and then to relate it in
16 vivid detail is not consistent, no.

17 Q Do you know any reason why a professional with
18 years and years of experience in this type of
19 thing would sit here yesterday and say yes, it is
20 very consistent?

21 A No. No, I don't.

22 Q How long did you personally spend with
23 David Sanders?

24 A With him one-to-one in interviews probably two to
25 two and a half hours. Many more hours reviewing

1 the records and with -- with other staff that
2 spent at least that much time. But personally I
3 only spent probably about two and a half hours.

4 MR. CHARTERS: All right.

5 I believe I don't have any more questions.

6 MR. SMITH: Judge, if I might
7 redirect.

8 **REBUTTAL REDIRECT EXAMINATION**

9 **BY MR. SMITH:**

10 Q The type of repressed anger that Mr. Charters was
11 talking about, the explosion of the anger, in your
12 opinion would it be consistent when this anger
13 erupts or explodes to find rage and other emotions
14 coming out?

15 A Yes. And that's another reason that we did not --
16 it is another thing that we use to rule out that
17 type of a reaction.

18 The type of person that he's describing I
19 have had occasion to treat and to evaluate. The
20 type of person who has been abused by a parent for
21 many years and who finally explodes in rage
22 because he can't take the abuse anymore, a
23 murderous rage, that person explodes in a rage
24 that is very inconsistent with the reports of the
25 crime scenes we have here.

1 There is a very emotional content to the
2 crime scene. There is rage taken out against the
3 victim, multiple gun shot wounds, all the
4 ammunition in the house being used up, and then
5 the body being hit. The rage is not something
6 that would expend itself in the type of action
7 that we see. Also, the rage was directed against
8 the victim -- against -- the victim of the rage
9 was the person who had been the abuser. It's
10 possible that a person could direct rage against
11 someone else if the abuser was not there. But
12 there would need to be some sort of a stimulus to
13 link that rage to that person, and we didn't see
14 that in this crime scene.

15 Q Would you expect a person with 26 years of
16 repressed hostility toward his father and his
17 mother to -- what would you say -- had it all
18 explode on the end of a month, three days before
19 his car payment, and shoot a complete stranger?

20 MR. CHARTERS: Your Honor, I object
21 to that.

22 THE COURT: Sustained.

23 Q Doctor, let me ask you: In your professional
24 opinion, did the defendant control this repressed
25 anger and exert the control as to when, where, and

1 how to release this anger, if indeed it was anger?

2 A The -- the crime scenes that we have and the
3 evidence that we have here does not -- is not
4 consistent with release of repressed anger.

5 MR. SMITH: That's all.

6 MR. CHARTERS: One further
7 question.

8 **REBUTTAL RECROSS-EXAMINATION**

9 **BY MR. CHARTERS:**

10 Q Doctor, in your experience in working with people,
11 particularly people who commit homicide, did it
12 surprise you and was it any significance to you
13 that this man has no significant criminal history
14 at all?

15 A Yes. That's why I sent the psych and social
16 worker to investigate his past history. Because
17 when I got the first report, again it was
18 inconsistent with any known psychiatric syndrome
19 and I felt that either this person had to have
20 some kind of a brain tumor or something had to
21 explain this. There had to be something in his
22 background. That's why we did the extensive
23 evaluation.

24 And the social worker did begin to uncover
25 some episodes that had not come out in the

1 beginning, such as the episode with his wife being
2 smothered and the episode in the Blazer. There
3 were also a couple of other times where the
4 patient indicated he had had some problems. But
5 apparently they -- he either got out of it or it
6 was not -- he wasn't convicted, somehow it wasn't
7 that bad. There was one thing where apparently he
8 was cited for littering. And he went into quite a
9 bit of detail to explain why that really wasn't
10 his fault, it was someone else. And then he had a
11 wreck after that, and he went into detail as to
12 how these other people caused that.

13 That began to show a pattern of not wanting
14 to take responsibility for -- for actions and that
15 kind of thing. But we did look at that and I did
16 think there was something unusual about that.
17 It's possible that we just don't know enough about
18 the defendant's history. When a person is faced
19 with this type of very, very serious crime,
20 getting a very detailed history is not that easy.
21 It may be that there was some things we did not --
22 we were not able to uncover. But, yes, that was
23 something that was unusual.

24 Q Well, Doctor, it sounds like you're almost in an
25 adversarial position with this man. You seem to

1 exhibit some prejudice.

2 He has an absence of criminal history and you
3 say that is significant so it must not be true.

4 A No. No, sir. I say that it was something that
5 was unusual and we had to investigate it.

6 Q But your investigation did not turn up a criminal
7 background, did it?

8 A It turned up some -- some predisposition to
9 violence. It did not turn up a criminal record,
10 which may indicate that the person is just now
11 beginning to act out in this way or it may
12 indicate that the person has not been caught.
13 We don't really know. I don't mean to sound
14 prejudice. I'm saying we don't know in that
15 particular --

16 Q But --

17 A -- question.

18 Q -- in the absence of not knowing, we have to
19 assume that there is none, don't we?

20 A We have to assume there is no arrest record.
21 That's all we can say.

22 Q Well, I mean, now, we had, for example, a
23 State Police officer who has lived and acted as an
24 officer in Lincoln County, where he grew up for a
25 number of years. And these troopers know

1 everything that moves when they stay in a county
2 that long. And I asked him, "Have you ever had a
3 problem with David Sanders?" And he said, "I just
4 knew his name. I've never had a problem with
5 David Sanders." So he's not hiding something he
6 got off of.

7 A No.

8 MR. CHARTERS: Okay. That's all.

9 THE COURT: All right. Any
10 redirect?

11 MR. SMITH: No.

12 THE COURT: All right. You can
13 step down, Dr. Walker.

14 THE WITNESS: Thank you.

15 THE COURT: You can stay or leave,
16 whichever you desire.

17 (Intervening proceedings were had,
18 after which the following proceedings
19 occurred at 10:20 a.m.)

20 THE COURT: All right. Is counsel
21 now ready for the Court to instruct the jury.

22 MR. SMITH: Yes.

23 MR. CHARTERS: Yes, sir.

24 THE COURT: Ladies and Gentlemen of
25 the Jury, I will now read you the

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COMMONWEALTH OF KENTUCKY
MADISON CIRCUIT COURT
DIVISION TWO
NO. 87-CR-018

COMMONWEALTH OF KENTUCKY .
Plaintiff, .
v. . June 5, 1987
DAVID LEE SANDERS .
Defendant .
..... Jury Trial

PARTIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM T. JENNINGS, JUDGE,
MADISON CIRCUIT COURT, DIVISION TWO

APPEARANCES:

For the Plaintiff: Hon. Thomas J. Smith, III
For the Defendant: Hon. Kevin Charters

Lisa Colston, FCRR, RPR
Federal Certified Realtime Reporter

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1 MR. CHARTERS: If you find him
2 guilty, you have to find beyond a reasonable
3 doubt that acting with intent and
4 responsibility he did this on purpose. All I
5 can ask you to do is to carefully, very
6 carefully consider all of the circumstances,
7 consider whether or not his actions were
8 consistent with that of a premeditated actor.
9 And remember him on that stand saying to
10 himself "Oh God not again." And driving to
11 that red light and trying to find his friend
12 Sonny, who was the city cop. "Sonny would
13 help me." And saying, "I believe in all my
14 heart that if that light had not turned red
15 and I could have gotten to that courthouse,
16 things would have been different."

17 God be with you in your
18 deliberations, and we will accept your
19 verdict. Thank you.

20 THE COURT: All right. Mr. Smith,
21 closing argument.

22 MR. SMITH: May it please the
23 Court, Mr. Charters.

24 Ladies and Gentlemen of the Jury,
25 when we first started out this trial, I told

1 you what we were going to prove to you. We
2 also indicated to you that to meet the
3 Commonwealth's burden or the Commonwealth's
4 responsibility to prove to your satisfaction
5 the elements of the crime, prove them to your
6 satisfaction beyond a reasonable doubt. And
7 I submit to you that we have done that. We
8 have gone even beyond that. We have shifted
9 the burden. The burden lies on the defendant
10 to prove his insanity. In other words, he
11 must prove to your satisfaction that he was
12 insane or he must prove to your satisfaction
13 that he was mentally ill. That burden does
14 not rest upon the Commonwealth. For a person
15 is presumed to intend their normal and
16 logical consequences of his acts. That's
17 what common sense, that's what experience
18 and, yes, that is what even the law tells us.
19 And he has a hard burden. We have met ours.

20 What has the defendant presented to
21 you to meet this burden, to show to you that
22 he was either insane, of unsound mind, or he
23 was mentally diseased or affected? Well,
24 let's take Dr. Cooke, good Dr. Cooke. He was
25 confused, first of all, about the defendant's

1 name. It is a very small part, point. He
2 came over here and called him Mr. Saunders.
3 It is David Sanders. What else did he do?
4 He interviewed him from two to three and a
5 half hours, during which he said he gave him
6 four different tests, was the testimony. I
7 wonder how much real interviewing, how much
8 real questioning did the doctor get into with
9 the defendant. He said, "All right. When
10 did your body and your soul part company?
11 When did you get out of your body?" How much
12 time did he really spend in finding out about
13 the real David Sanders? I submit to you,
14 Ladies and Gentlemen, he was more interested
15 in his routine practice where he dealt with
16 child abuse cases and these other things to
17 spend a whole lot of time with Mr. Saunders.
18 I don't think he was really paying attention.

19 What else do we know from the good
20 Dr. Cooke? Well, do you recall his testimony
21 that he saw Mr. Sanders or Saunders on Monday
22 or Tuesday of this week? And he saw him from
23 9:30 until noon. Do you remember he fumbled
24 through his records? Well, now, that just
25 made me wonder, which Sanders did he see?

1 Because as I recall, Mr. David Sanders, this
2 guy right here was sitting in this courtroom
3 all week long. Well, maybe, maybe not.
4 Maybe the good David Sanders was over at the
5 jail talking to the doctor and the bad David
6 Sanders was over here on trial. Well, no.
7 Maybe it was the other way around. I don't
8 know. It is a small point. But the point I
9 am trying to make to you is the doctor made a
10 mistake. He didn't pay very close attention
11 to what he was doing. And I submit to you
12 that you shouldn't give too much credence to
13 what he said. He didn't even bother to take
14 the time to write a report.

15 MR. CHARTERS: Your Honor, I'm
16 going to object to this.

17 THE COURT: Overruled.

18 MR. SMITH: Let's follow
19 Dr. Cooke's theory one step further, if we
20 extrapolate it or extend it out, about the
21 abused children. Let's see. If all people
22 who were abused as children commit crimes
23 when they are adults, and they don't talk
24 about their abuse, then does that give them
25 license to go out and commit crimes by

1 shooting people in the back of the head and
2 stealing their money? Well, let's take
3 Dr. Cooke's theory one step further and say
4 if we repress a bad day or a bad week or a
5 bad month, we don't talk about it, and this
6 anger builds up inside of us and we go out
7 here somewhere to a country store, is it
8 alright if we pull out a gun and shoot
9 somebody and steal their money? The doctor
10 says we can avoid responsibility if you take
11 his theory to its logical extreme.

12 Contrast Dr. Cooke's performance
13 with Dr. Walker's team approach. They had
14 the defendant for over 40 days. What did
15 they do with him? They didn't just give him
16 four little tests, psychological tests. They
17 gave him physical tests. They interviewed
18 him by two social psychologists, two social
19 workers. Not just one, but two. The doctor
20 spent two to three hours herself with him.
21 She interviewed the others. She even talked
22 to the chaplain about the defendant. And
23 what did she say about him? A decision that
24 was not reached likely, I can assure you from
25 the amount of time that the entire team put

1 in on it, she said that he was not suffering
2 from this dissociative disorder, this DMS 3,
3 the psychopath or whatever Dr. Cooke called
4 it. She said that in order for -- even if
5 someone who had this dissociative disorder,
6 in order for it to manifest itself or come
7 out, you had to have severe stress. She said
8 that none of this severe stress happened at
9 the time of the Lincoln County shooting, none
10 of the severe stress happened at the time of
11 the Madison County shootings and robberies.

12 What else did she tell us about the
13 defendant? Well, we found out that he got
14 caught in some more lies, didn't he? He said
15 that he had spent the money from Rankin's
16 Bait Shop, is one of the stories he told. I
17 thought he told us in here that he didn't
18 know what happened to that money. He said
19 that he couldn't control watching the
20 shootings, the executions, the ambush
21 assassinations. He couldn't watch those.
22 But what did he tell the good doctor? He
23 said, yeah, he could control what he watched
24 and what he didn't watched. And then he told
25 the doctor that he watched them. Will the

1 real David Sanders please stand up.

2 She told you that this man right
3 over here had a predisposition for violence.

4 MR. CHARTERS: Your Honor, that is
5 -- I object, that simply was not said.

6 THE COURT: Well, the jury will
7 recall for themselves what the evidence has
8 been in this case.

9 MR. SMITH: She also said that the
10 defendant did it for the money. She tried to
11 find an organic problem. Was it a brain
12 tumor? She tried to find psychological
13 reasons. Was he drunk, on drugs? Was there
14 some kind of psychosis? She couldn't find
15 anything. She did find that he did it for
16 the money.

17 And she found he was competent as
18 of January the 28th and he was competent as
19 of December the 29th. That's what we have
20 from the Commonwealth's standpoint, Ladies
21 and Gentlemen.

22 What else did the defendant present
23 to you to try to prove his insanity or mental
24 illness? Well, he took the stand. What did
25 we learn from him on the stand? He cried

1 longest and hardest when he was talking about
2 not getting help for himself, when he
3 couldn't make it through the red light, when
4 he couldn't do something to help himself.
5 That's when the volume of tears came. He
6 managed to keep up the crocodile tears when
7 he talked about the robberies. David Sanders
8 is concerned only with David Sanders and
9 avoiding the responsibility.

10 We find out that these spells he
11 takes start exactly at the time, every time
12 now, start exactly at the time he goes to his
13 truck and gets his gun. Now, when do these
14 spells stop? After he has disposed of the
15 evidence that could actually link him or
16 incriminate him with the crime. It is sort
17 of like this light switch over here, Ladies
18 and Gentlemen. You turn it on when it is
19 convenient and you turn it off when it is
20 convenient. Just like Mr. Sanders mental
21 spells, they come on at a certain time and
22 they turn off at a certain time. And it is
23 the same both times.

24 Oh. Dr. Walker also mentioned
25 another point. The defendant told you that

1 he couldn't control these mental spells of
2 coming and going. Well, she said that he was
3 about ready to have one down at KCPC. And
4 what happened? He prevented it. He sat down
5 and talked to somebody. He could control the
6 coming and going of his, quote, mental
7 spells. But he told you in here, Ladies and
8 Gentlemen, that he just -- they -- they hit
9 him like headaches, 'boom', they were on him
10 and 'boom' they were gone.

11 He is trying, Ladies and Gentlemen,
12 to avoid his responsibility. And he's asking
13 you to buy the bill of goods that he is
14 trying to sell you as temporary insanity.
15 Poof, presto, chango, back to normal again.

16 You know what else have you learned
17 from the defendant, not only from his
18 testimony but from Dr. Walker and the police
19 officers and listening to the two tapes of
20 him, was that he is a calculating, conniving,
21 devious person. Now, how do we know that?
22 Let me tell you. Each time he is presented
23 with a new fact or a new fact situation in
24 the entire series of crimes, what does he do?
25 He tries to maneuver around them or

1 incorporate them somehow into his previous
2 story. The first story was a flat outright
3 denial. "No, I didn't do it. I was there,
4 but I didn't do it." He denied having the
5 .22-caliber pistol in his truck. But then
6 shortly after Bob Stevens retrieves the
7 pistol with Detective Shouse and they take
8 the pistol in and give it to the Detective
9 Benton and they show it to the defendant,
10 said they got it from the truck, he said,
11 "Oh. I thought I kept that at the house.
12 My memory, I just -- I just forgot." Hmm.
13 The memory is starting to go on him. But he
14 remembers everything else pretty well. But
15 that's the first story. He is working the
16 .22 in.

17 And then the second story he is
18 confronted with the recovery of the .25. The
19 denial persists even after he comes down here
20 to the State Police Post on, what, Monday the
21 2nd to pick up his truck. Then Detective
22 Benton hits him with the fact, "Well, what
23 about this .25-caliber pistol that came from
24 your truck?" Well, he previously denied
25 knowing anything about that .25. He is hit

1 with the .25 and, 'boom', the second story
2 pops up, hitchhiker one. This is a denial.
3 He is putting himself in the position of a
4 victim. He is avoiding responsibility in
5 this story. He denies the killings. When he
6 is confronted with the recovery of the .25,
7 he comes out and he says, "Oh, yes, I had
8 that in the truck. I must have forgotten.
9 The hitchhiker got my gun, my .22 from me,
10 held it on me, made me tell him about where
11 that .25 was. He got the .25. The
12 hitchhiker went in the store and committed
13 the robberies and then I drove him to
14 Lexington, where I let him out and he gave me
15 the guns back." I don't know. The perfect
16 ending to that story would probably be
17 "Have a nice day."

18 Now, the police tell him, "I just
19 don't believe it." Well, when he is hit with
20 the fact that the police don't believe him
21 and it didn't make sense, what did he do? He
22 goes to the hitchhiker two story. This is
23 the third story, remember now, that he is
24 telling. He is trying to avoid
25 responsibility by denial, by putting himself

1 as a victim and by using self-defense. He
2 tells, basically, the same story. The only
3 difference now, when he realizes the other
4 story doesn't make sense, he says, "Oh. The
5 hitchhiker made me turn around in Fayette
6 County, come to Madison County. We went out
7 in the country and I shot him in self-defense
8 because he was going to kill me." And so
9 now, again, he is admitting a little bit more
10 but he is still denying responsibility for
11 his acts, making up lies as he goes along,
12 trying to confuse, connive. He is
13 calculating on how to avoid responsibility.

14 The police still don't believe him.
15 And then the police hit him with Donald
16 Saylor [ph]. Donald Saylor was found out in
17 the country dead. They hit him with it.
18 What does he do? He comes back in with the
19 Donald Saylor one story, pretty much like
20 hitchhiker two story. But he says Donald
21 Saylor was the one, not this hitchhiker I
22 didn't know.

23 The police still don't believe him.
24 And then they bring out the Donald Saylor
25 facts. Then we go into more stories. The

1 fourth story. In this instance, he is
2 presented with the facts again. He's
3 presented now with the information about the
4 .25-caliber pistol. If the .25-caliber
5 pistol was used by Saylor over here, who used
6 the .25-caliber pistol in Lincoln County?
7 Oops. We have got to work around that
8 somehow, folks. So now he says, "Well,
9 here's what happened in Lincoln County.
10 Donald Saylor had the .25, I had the .22."
11 Donald Saylor did that wrong. And then we
12 come back over to Madison County. And he
13 tells the story that you heard from Detective
14 Benton.

15 Now, at this time he goes in and
16 kills -- Saylor goes in and kills Jim
17 Brandenburg with the .25. And then by
18 accident, you heard him say on the stand, by
19 accident or impulse he kills Wayne Hatch. He
20 is taking these facts and he is weaving them
21 in and out and back and forth into his story
22 in order to avoid detection.

23 Then he goes to jail and he sits
24 down in the jail for a few hours. The police
25 still have not believed him. What does he

1 do? He comes up with still a fifth story,
2 Ladies and Gentlemen. The deny,
3 self-defense, accident, all of that is
4 previously taken away. Excuse me. He comes
5 up with a sixth story. The temporary
6 insanity comes out at the jail. In the
7 temporary insanity story he says, "I did not
8 kill Donald Saylor. But I killed the other
9 two and I shot Ms. Rankin. But I am not
10 responsible because it wasn't me that did it.
11 It was somebody else. It really wasn't the
12 real me. I was floating outside of my body."

13 Throughout the entire scenario, the
14 entire chain of events, every story he tells
15 the defendant has changed it to accommodate
16 every new fact that was introduced or brought
17 into it. The consistent theme, however, that
18 runs through the entire series of stories is
19 he's trying to avoid his responsibility for
20 his acts one way or another. If one lie
21 doesn't work, I will tell another.

22 But that's not the end of his
23 attempts to avoid responsibility. Now, after
24 he confesses what do we find out? His memory
25 goes bad. He can't remember a thing.

1 There's no memory problem whatsoever until
2 after he confesses. You remember, he came
3 in, told Skip where he got it, where he went
4 for breakfast, who he got, where he took
5 them, came -- what road he took, came down
6 here. Drew maps and pictures and diagrams.
7 He had perfect memory of everything up until
8 he confesses. After he confesses, 'boom',
9 his memory is shot.

10 Look through the whole process that
11 the defendant is filing here. He's looking
12 at what is facing him down the road. And he
13 comes up with a new formula every single time
14 to avoid the punishment. After he finally
15 settles on the insanity story, look how he
16 builds it. First of all, he tells Detective
17 Benton over here he can't control himself.
18 He is sort of floating outside of his body.
19 Secondly, after he talked to some lawyer over
20 at the jail, he adds headaches and he can't
21 stand the light. And then next he adds the
22 fact that he has got the red light story,
23 where he wants to get help, Ladies and
24 Gentlemen. He knows something is badly wrong
25 and he is going to go to this policeman. And

1 he tries to call Sonny up on the phone. And
2 he is looking through the phonebook to find
3 Sonny's name, but he can't remember Sonny's
4 last name. That doesn't jive too well. If
5 you don't know his last name, how are you
6 going to hunt him up in the phone book? And
7 then he decides to go down to the police
8 station or the courthouse and he gets the red
9 light, throws the road block up. It doesn't
10 really help -- he doesn't really want to help
11 himself, does he? Why not? Because he is
12 still packing those pistols. If he wanted to
13 help himself, he could throw those pistols
14 over the bridge, unless he needed those
15 pistols for some other purpose. Do you
16 reckon he is going to use those pistols to
17 make the February or March or April truck
18 payment?

19 Look at how he maneuvered around
20 before you when he was hit by contradicting
21 facts. Well, you recall, he testified to
22 you, he said, "Now, I didn't remember a thing
23 about Lincoln County until I got out on the
24 BG Parkway and I started driving. And I
25 pulled over and then it flashed back through

1 my mind." Then when he was hit with the fact
2 that when he talked to Mr. Ball and Deputy
3 Sheriff Brown at the State Police Post, you
4 recall him saying, "Well, yeah, I went down
5 to get my car -- or my truck realigned. And
6 at that time I was so nervous I was feeling
7 so badly about what I had done, I was so
8 upset about these terrible acts." He
9 remembered in the statement to Ball shooting
10 Ms. Rankin in the back of the head when he
11 went to get his truck worked on. How did he
12 handle it, Ladies and Gentlemen? He came up
13 with a third story to you. He said, "Well, I
14 didn't really remember at the recapping
15 place -- or at the alignment place. I
16 remembered when I was walking to go get a
17 hat." So now we have three different
18 versions of when he recalled Lincoln County.

19 As I have said, his memory didn't
20 fail him until after he confessed. Before he
21 confessed and tried the insanity trip -- or
22 trick, he had total recall. You remember he
23 remembered exactly what he bought, when he
24 bought it, how much he paid for it, when he
25 left home at 6:05. His memory was so good he

1 drew the diagrams for the police officers.
2 He remembered where the victim was standing.
3 Do you remember on one of the diagrams he put
4 a "D" where he was standing and a "B" where
5 Mr. Brandenburg was standing? He even said
6 that he never had blackouts. He had a good
7 memory until the insanity took over.

8 His various statements were riddled
9 with lies from one end to the other. He told
10 the police on at least 12 occasions that he
11 wasn't -- that he wouldn't lie or that he
12 wasn't lying to him. But, yet, he continued
13 on lying. Should you believe any different
14 about him up here?

15 He told the police 25 times that he
16 didn't kill Jim or Wayne. But, yet, he kept
17 on lying. He told the police 17 times he
18 never had the .25-caliber pistol. But he
19 did. We know that to be the truth. He told
20 the police eight times "I had lied. But I
21 won't lie anymore." And he kept right on
22 going, more lies and more lies. And still,
23 he was here yesterday, more and more. Will
24 it never stop? Will the killing never stop?
25 What's his motives for all the lies? Why

1 tell them? Why tell the police and the Judge
2 and the jury and psychiatrists? Well, I
3 submit to you, he told these lies to avoid
4 responsibility for these terrible acts. He
5 told these lies, and you've heard him tell
6 you himself, he said, "I don't want to die."
7 But he didn't give Wayne Hatch or
8 Jim Brandenburg that choice, did he? He
9 would do anything to beat the rap, anything
10 whatsoever.

11 Dr. Cooke has called these acts
12 DMS 3, depersonalization order, 300.06.
13 That's what the doctor called them. We call
14 them, Ladies and Gentlemen, MO, modus
15 operandi. It is a method of operation. I
16 submit to you that there is a method, there's
17 a plan, there's a scheme, there is a design
18 to every single thing he's done. That points
19 the finger of guilt, not insanity, at him.
20 They can't be insane acts if they've got the
21 method and the plan, the scheme, and the
22 design to them. They can't be.

23 Where there is rational
24 goal-directed behaviors, we've got in every
25 one of these crimes here, he has got an

1 intent, a reason for it, there's no mental
2 disease or defect when you've got
3 goal-directed behavior. It may not be right.
4 But simply because it is criminal doesn't
5 make it crazy.

6 In Lincoln County, what did he do?
7 He got his father's gun from the home shortly
8 before the crime. His mother couldn't say
9 exactly when. He couldn't say exactly when.
10 But it was shortly before the crime. We know
11 that. He was there at the home that day.
12 When would have been a better time to get the
13 gun? He passed by a bad wreck on the road in
14 Lincoln County. And as Mr. Charters eluded
15 to, he knows how the police operate down
16 there in Lincoln County. If there is a bad
17 wreck where a lot of people are killed, every
18 police officer in the county is going to be
19 there. And he passes by and he sees every
20 police officer in the county and he's got
21 this gun in his truck and he knows he needs
22 to make a truck payment and he sees the
23 grocery store, the bait shop open over here.
24 And he knows the cops aren't around. He
25 stops at the bait shop, which is a little

1 country store. He makes a small purchase,
2 saw where the money was, saw the clerk was
3 alone, made sure that no one was around when
4 he went back to the truck to get the car --
5 to the Blazer to get the gun. And then what
6 did he do? He walked in. And to make sure
7 there were no witnesses, he ambushes the
8 clerk by shooting her in the back of the
9 head. He didn't even give her fair warning.

10 Let me ask you: Would a trained
11 EMT know where to shoot somebody to make sure
12 they don't talk against you? And then he
13 took the money. He is in a hurry. If he's
14 smart, he's not going to linger around there
15 and let somebody come up and catch him. If
16 he is crazy, he is going to sit in the floor
17 and count out the dollar bills before he
18 takes off. Oh, no. He goes over, he grabs
19 the money he sees and off he takes. He is
20 smart. He's got to get out of there before
21 somebody else comes.

22 But what happens on the way out?
23 Two guys are pulling up. Somebody sees him.
24 Uh-oh. I'm spotted. What am I going to do?
25 What am I going to do? Oh. Alibi. Alibi.

1 Now, my Blazer doesn't need realigning, but
2 I'm going to take it and get it realigned
3 anyway and I'm going to write them a check
4 for it. Because about the time the shooting
5 in Lincoln County happened, I'm going to be
6 at the place where my Blazer is being
7 aligned. Okay. That takes care of my
8 whereabouts. And I have got to change the
9 way I look. How am I going to do that? I
10 will go get a hat. I don't wear a hat
11 generally. So he goes over to buy a hat to
12 change his looks. These are all rational,
13 conscious acts of a person motivated by one
14 thing. Not mental illness, not greed -- not
15 mental illness, not insanity. He's motivated
16 by greed. A man who is unemployed, who has
17 \$181 in the bank, has a \$292 truck payment
18 due in three days and he doesn't have any
19 money saved back. That's what motivated
20 David Sanders. That's what Dr. Walker said.

21 In Madison County, one month later,
22 we had a very, very similar situation. A man
23 who is still unemployed, he was working for
24 his father, I think he said he was just
25 helping his father out, he was sick during

1 part of January, you remember him testifying
2 that he was sick with the flu for a week or
3 so and couldn't work, he had \$61 in the bank.
4 The truck payment was either due or he had
5 just made it. He was out of money. At the
6 end of the month, the same man, who still has
7 the same gun that he used in Lincoln County,
8 in addition to that he's gotten another one,
9 he brought his other .22 with him, he stops
10 at another country store, makes a small
11 purchase, sees where the money bags are, saw
12 that the clerk was alone again. He observes
13 the area for a few minutes. While he makes
14 the necessary -- unnecessary phone call. I
15 say "unnecessary phone call." He had already
16 agreed with his wife he was going to stay in
17 Lincoln County. There was no purpose to call
18 her back. It might have been a purpose to
19 call his mother. But why his wife? He was
20 going to Lincoln County anyway, regardless of
21 the roads. What difference could it make?

22 The purpose of the phone call was
23 simple. You get next to the telephone, you
24 get up to the telephone and you get to see
25 where the cash register is and where the

1 money bags are and you can stand at the door
2 and look out and see what the traffic is like
3 and whether anybody is coming up and you can
4 case the joint. Because this time you want
5 to make sure you don't get seen by anybody
6 when you drive away or shoot the clerk in the
7 back of the head.

8 So after you've made your telephone
9 call, you go out to your truck and you get
10 your guns, you come back in, just like
11 Lincoln County. What do you do? Snatch up
12 behind the proprietor and you shoot him in
13 the back of the head. You don't even give
14 him fair warning. You don't even give him a
15 chance to go for his gun. You ambush him.
16 And then you steal his wallet and then you
17 steal his bank bags. Would a crazy man have
18 enough sense to grab the wallet too? I
19 submit to you that he wouldn't.

20 After he's committed this act, he
21 gets surprised again. Wayne Hatch on his way
22 home from work comes in. A typical customer
23 in a typical country store. And what happens
24 to Wayne Hatch? The defendant stuck the
25 .25-caliber pistol in his pocket. This

1 pistol was stuck down in his belt. And Wayne
2 Hatch comes in. And he knows -- he's already
3 told you he's finished up. All he has to do
4 is duck out the door, get in his truck and
5 take off. And he's beat the wreck. Wayne
6 Hatch doesn't get a very good look at him.
7 It is senseless. There is no need for it.
8 He pulls out the gun. He grabs Wayne Hatch.
9 He puts him down on the floor. He puts the
10 muzzle of the gun right smack-dab against
11 Wayne Hatch's head and he squeezes all the
12 way. 'Boom.' Wayne Hatch is dead.

13 Now, there's an old saying, Ladies
14 and Gentlemen, that practice makes perfect.
15 The first time he committed the act the lady
16 lived. The second time he committed the act,
17 Jim Brandenburg lived for two days. The
18 third time he committed the act, Wayne Hatch
19 lived for two hours. You just can't help but
20 learn. The next time he committed the act,
21 the next time, the future time, how long
22 would that victim get? Two minutes?

23 What does he do after he shoots
24 Wayne Hatch? It is not bad enough just to
25 silence the witness, but he's got to steal

1 his wallet too. From there where does he go?
2 Back to his truck to make his get-away. And
3 he's gone. He's got to get away from there
4 in a hurry. He can't be waiting around there
5 for other people to come and see.

6 What does he do next? The logical
7 thing. The thought-through thing. He stops
8 at the first location he can, gets the money
9 and gets rid of the evidence that will
10 incriminate him. The only evidence that will
11 incriminate him and link him to the crime, he
12 gets rid of it. He throws it over the
13 bridge. The only other thing that might
14 incriminate him are those pistols. But he's
15 keeping those pistols because we've got a
16 February truck payment and a March truck
17 payment and an April and so on. He keeps the
18 cash, too. If he were out of his mind, what
19 would he do with the cash? Well, he would
20 throw that over the bridge, too.

21 What we have here are cold,
22 calculating, conniving, devious acts by a
23 cold, calculating, conniving, devious man.
24 He is bent on taking the property of others
25 and leaving no witnesses to the act and

1 trying to avoid the responsibility. How much
2 different would it have been if he had gotten
3 on the stand and said, "Yes, I did it. I am
4 not lying anymore. I wasn't crazy. I'm
5 sorry." And take his responsibility. But,
6 oh, no, he is still trying to beat the rap.

7 Don't let him get away with it.
8 It is too serious. We've got two people
9 lying dead. A normal person who commits
10 crimes like this, it doesn't make them crazy,
11 ladies and Gentlemen, it makes them
12 (inaudible).

13 Find him guilty. Do your
14 responsibility. Don't avoid it. Thank you.

15 (Intervening proceedings were had,
16 after which the following proceedings
17 occurred at 12:01 p.m.)

18 (Bench conference commences)

19 THE COURT: I didn't have any idea
20 we would get to this stage this quickly.

21 MR. CHARTERS: Yeah.

22 THE COURT: I assume at this point
23 I ought to go ahead and start the penalty
24 phase.

25 You don't have anything to present