No.

IN THE
Supreme Court of the United States

DAX HAWKINS,

Petitioner,

v.

JEFFREY WOODS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The federal courts of appeals are split on two questions that dictate the deference owed to state courts in actions brought under 28 U.S.C. § 2254. The state court in Petitioner's case rejected his *pro se* claim of ineffective assistance of counsel after concluding he had submitted "no evidence" to support it. During the Section 2254 proceedings, however, it came to light that Petitioner had, in fact, supported that claim with a detailed affidavit that he attached to a motion for an evidentiary hearing. Until then, the State had incorrectly argued that Petitioner failed to file the affidavit and that he also did not make a timely request for such a hearing. In affirming denial of the petition, the Sixth Circuit nonetheless gave deference to the state appellate court on the ground that it had adjudicated the ineffective-assistance claim "on the merits," and it hypothesized ways in which the state court might have found the affidavit unpersuasive had the state court actually considered it.

The questions presented are:

(1) Whether a state court "adjudicat[es] on the merits" a petitioner's ineffective-assistance-of-counsel claim where it neither considers a material part of the record supporting the claim nor grants a timely request for an evidentiary hearing to develop that claim.

(2) Whether a federal court that gives deference to a state court decision under 28 U.S.C. § 2254(d) may hypothesize ways to find important evidence unpersuasive, where the state court's reasoned decision did not consider that evidence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion denying habeas relief (Pet. App. 1a) is unreported. The district court's opinion denying habeas relief (Pet. App. 14a) is also unreported. The Michigan Supreme Court's summary denial of Petitioner's *pro se* application for leave to appeal (Pet. App. 72a) is reported at 728 N.W.2d 418. The decision of the Michigan Court of Appeals rejecting Petitioner's ineffective-assistance claim (Pet. App. 73a) is unreported. Finally, the decision of the Michigan Court of Appeals denying Petitioner's motion to remand for an evidentiary hearing (Pet. App. 82a) is also unreported.

JURISDICTION

The Sixth Circuit entered its judgment on May 23, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

INTRODUCTION

This case gives the Court the opportunity to resolve two circuit conflicts that dictate the level of deference owed to state courts under 28 U.S.C. § 2254. The lower court here took one side of each split. First, the Sixth Circuit gave deference to the state court on the ground that its decision was "on the merits" even though the state court overlooked key evidence when making its decision and had declined a proper remand request for the evidentiary hearing that would have provided other proof the state court found lacking. Second, the federal court gave only one-sided deference: It credited the state court's *conclusion* that Petitioner's claim lacked merit, but in doing so it went well beyond the state court's express *reasoning*, instead weighing for itself key evidence that the state court never considered in order to find that a "fair-minded jurist" *could have* relied upon its hypothesized reasons for discounting that evidence.

This case squarely presents both conflicts. Petitioner was convicted of murder and assault with intent to commit murder resulting from a drug deal gone bad. He had a meritorious alibi defense, but his lawyer abandoned it without speaking to a single alibi witness and with no notice to Petitioner. Counsel instead proceeded with the factually implausible and legally flawed defense that Petitioner participated in the drug delivery but not the shooting. During Petitioner's direct appeal, he invoked the Michigan courts' established procedure for remanding to the trial court for an evidentiary hearing on his claim that he was denied effective assistance of counsel. The court of appeals denied the motion, stating that

it saw no need for a hearing. Months later, when the merits panel affirmed the conviction, it mistakenly believed that the record was devoid of evidence supporting the claim. It also reasoned that the claim was unsupportable in the absence of an evidentiary hearing, with no acknowledgement that Petitioner had requested one in accordance with the rules. The State later opposed Section 2254 relief, arguing that Petitioner never made a timely motion for an evidentiary hearing and that he had failed to file an affidavit that would support his claims. After the federal district court denied relief, Petitioner's appointed appellate counsel discovered that the State was wrong on both points. Petitioner *had* attached a detailed affidavit to a timely motion for an evidentiary hearing. The affidavit went into great detail, naming several witnesses and multiple items of physical evidence capable of establishing that his attorney gave the trial judge false reasons for abandoning the meritorious alibi defense and that the attorney utterly failed to investigate Petitioner's strong alibi. By the State's own account, the state appellate court never considered this evidence.

The district court denied the petition yet again despite this revelation. The Sixth Circuit affirmed. It deferred to the state appellate court's "on the merits" ruling even though the state court had apparently believed there was no affidavit and its opinion made no mention of Petitioner's request for the evidentiary hearing. And because the state court merits panel did not seem to realize Petitioner had filed this detailed affidavit, the Sixth Circuit needed to hypothesize reasons of its own for discounting the value of evidence that the state court never even

considered or passed upon. The upshot is that Petitioner will remain incarcerated for the rest of his life because (i) the state court never considered a crucial piece of evidence supporting his claim (having simply overlooked it); and (ii) the federal courts deferred to the state court decision as if no such mistake had been made.

The Sixth Circuit incorrectly held that AEDPA requires the federal courts to disregard evident, fundamental state court errors like this one by giving the resulting state court decisions unwarranted deference. First, it held that a claim has been "adjudicated on the merits" under 28 U.S.C. § 2254(d) even if "the state court did not consider the 'full' record; namely, the Affidavit Hawkins submitted." Pet. App. 6a-7a. The federal court therefore gave unwarranted deference to the state court *result* despite a serious error in getting to that result. Second, the Sixth Circuit tried to fix this error in the state court's "adjudication of the claim" (*id.*) by attaching the label "deference" to reasoning that the state court never employed. In particular, the Sixth Circuit improperly hypothesized reasons the state appellate court *could have* given for discounting the affidavit that it had failed to consider, rather than applying *de novo* review as §§ 2254(d)(1) and (d)(2) require when there is no relevant determination to which the federal court can apply deference.

On both counts, the Sixth Circuit solidified splits among the federal courts of appeals. The Fourth and Tenth Circuits, in contrast to the First and Sixth Circuits, hold there is no "adjudication on the merits" under AEDPA where the state court rests its decision on a materially incomplete record. The second

split is 3-2. The Fourth and Ninth Circuits, consistent with this Court's recent decision in *Brumfield* v. *Cain*, 135 S. Ct. 2269 (2015), have concluded that federal courts should not hypothesize alternative rationales for a state court's ultimate decision where its reasoning was clearly articulated and plainly flawed. The Sixth Circuit joins the Third and Eighth Circuits in holding instead that this Court's decision in *Harrington* v. *Richter*, 562 U.S. 86 (2011), requires federal courts to identify reasonable bases that *could have* supported the state court's decision, regardless of whether the state court gave different, flawed reasons.

The decision below well illustrates why deference must be rejected in both circumstances. AEDPA does not require federal courts to pretend that a state court considered a key part of the record when the state court plainly failed to do so. And AEDPA did not legislate an "all roads lead to upholding the conviction" type of deference in which federal courts defer to a state court's conclusions (so long as the conclusion is to sustain the conviction), but replace the state court's actual reasoning with new reasons if needed (and only so long as the new reasons also support sustaining the conviction). No person should be forced to spend time in prison, let alone the rest of his life, because a court's clear oversight led it to believe that the record was incurably devoid of "the facts necessary to decide either prong of the *Strickland* analysis." *Massaro* v. *United States*, 538 U.S. 500, 505 (2003). This Court should grant review to resolve the conflicts over those circumstances in which AEDPA deference is applicable. Doing so will, at long last, give Petitioner the unencumbered oppor-

tunity he is owed under the law to establish that he was unjustly convicted as a direct result of constitutionally deficient assistance of counsel.

STATEMENT OF THE CASE

1. On October 19, 2003, at approximately 11:25 p.m., Earl Riley and Jason Taylor were shot multiple times as they sat in their car waiting to complete a purchase of drugs from their two assailants. Taylor, who survived the incident, identified Petitioner "and an unknown dark-skinned man as the shooters." Pet. App. 2a. This other person was never identified. Petitioner has consistently denied being present at, or involved in, the drug deal and shooting. After a four-day trial, a jury convicted Petitioner of first-degree murder, assault with intent to commit murder, and related firearms offenses.

On direct appeal, Petitioner timely filed a *pro se* brief raising three claims challenging his conviction, including ineffective assistance of counsel. He also filed a motion to remand for an evidentiary hearing on that Sixth Amendment claim pursuant to *People* v. *Ginther*, 212 N.W.2d 922 (Mich. 1973), and Mich. Ct. R. 7.211(C)(1)(a).[1] The motion stated: "[A] com-

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[1] *Ginther* is Michigan's vehicle for addressing the predicament that ineffective-assistance claims often require the development of facts outside the trial record. *Ginther* held that a convicted defendant in such a situation should "seek to make a separate record factually supporting the claims" through an evidentiary hearing. 212 N.W.2d at 925. Michigan courts consistently have recognized since then that "[o]rdinarily, when a claim . . . is based upon counsel's failure to interview and call witnesses, it is *essential* to receive testimony . . . at a *Ginther* hearing in order to assess the claim." *People* v. *Reeder*, No.

plete and factual record needs to be developed so that Defendant can adequately present his claims for proper appellate review." Pet. App. 93a. Petitioner, who had remained incarcerated since before trial, also complied with the Michigan Court Rules by attaching his "Affidavit and Offer of Proof." He explained that "if granted an [e]videntiary hearing, he will produce before the trial court, those witnesses listed in his Affidavit," who he represented would testify that trial counsel "neglected to interview them" and misrepresented to the trial court "that they were uncooperative." Pet. App. 96a.

Petitioner's affidavit described in meticulous detail his alibi, trial counsel's failure to investigate or present the alibi defense, and trial counsel's dishonesty in explaining his deficient performance. The affidavit detailed how Petitioner had informed counsel that on the night of the drug deal and shooting, he was with his fiancée and several friends at night clubs in Detroit, including locations with surveillance cameras and employees that would also corroborate his account. The affidavit also recounted Petitioner's conversation with counsel in which Petitioner explained that records from his mobile phone provider would show that, contrary to Taylor's testimony, the two never spoke by phone the night of the shooting. Pet. App. 84a-86a. Petitioner therefore "insisted that [counsel] employ an alibi defense on [his] behalf," and counsel agreed to investigate the alibi. Pet. App. 86a. Petitioner took counsel at his word. It was

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[Footnote continued from previous page]
207497, 1999 WL 33430005, at *1 (Mich. Ct. App. Nov. 12, 1999) (emphasis added).

not until much later that Petitioner learned of counsel's failure to investigate the defense.

Counsel's own conduct confirmed the important role of this defense. A week before trial, he filed a notice of alibi that correctly named four of the witnesses who would testify in support of Petitioner's defense. But counsel failed to include any information in the notice other than their names.

On the day of trial, the State challenged the timeliness and sufficiency of counsel's notice. Rather than agree to cure the defects, counsel abruptly announced that he was abandoning the alibi defense. The sole reason he gave was that the witnesses had been uncooperative. Pet. App. 3a, 87a, 92a-93a. Without so much as discussing an alternative defense with Petitioner, counsel went on to give an opening statement in which he told the jury that not only was Petitioner, in fact, at the scene of the shooting, he was one of the two persons purporting to sell drugs to the victims. Counsel's new defense was that Petitioner participated only in the drug sale and that his accomplice was the lone shooter. Pet. App. 87a. Apart from the obvious problem that neither counsel nor Petitioner was in a position to name or otherwise identify this accomplice, counsel neglected to account for uncontroverted physical evidence showing that both of the drug dealers participated in the murder and assault—*i.e.*, ballistics results proved that two different guns were fired at the victims from different locations. *See* Pet'r C.A. Br. 11 (discussing evidence in trial transcript).

Shocked by the opening statement, Petitioner confronted counsel after the first day of trial ended

and pointed out what should have been obvious. Counsel's newly announced theory falsely placed Petitioner at the scene of the crime and prevented him from testifying in support of his alibi defense. Counsel brushed Petitioner off, saying he had "been doing this long enough to know how to beat a case." Pet. App. 88a.

Later that same day, Petitioner called his fiancée from jail and asked what counsel had meant when he represented to the judge that the alibi witnesses were uncooperative. She informed Petitioner that this was not true; rather, counsel and his investigator had declined to interview *any* of the alibi witnesses because they were unable to gather in one place at the same time for a single interview session. Pet. App. 88a. When Petitioner confronted counsel with this information, he responded that "the wheels [are] already in motion" and that if Petitioner wanted to "beat this thing . . . then just let me do my job." *Id.* Penned in by counsel's unilateral decisions, Petitioner confirmed on the record at the close of the case that he would not testify or present his alibi defense, and the jury convicted him. T. Tr. Vol. III (Apr. 6, 2005) (D. Ct. Dkt. No. 6-8), at 76:16-77:12.

In the motion to remand that Petitioner filed as part of his direct appeal in March 2006, he stated: "[I]f granted an [e]videntiary hearing, he will produce before the trial court, those witnesses listed in his Affidavit, who will provide relevant testimony that defense counsel not only neglected to interview them, but that counsel's rendition to the trial court that they were uncooperative, was completely false." Pet. App. 96a. The state appellate court summarily denied the motion in April 2006 for "failure to per-

suade the Court of the need to remand at this time." Pet. App. 4a, 82a. This order rejecting a remand under *Ginther* made no reference to Petitioner's detailed affidavit.

2. Months later, in October 2006, the merits panel in Petitioner's case affirmed his conviction. When the appellate court rejected his ineffective-assistance claim, it limited its review to "mistakes apparent on the record" from the trial court "because a *Ginther* hearing was never conducted." Pet. App. 77a-78a. The court did not once mention Petitioner's affidavit, even though it was the only evidence in the record on each key aspect of the ineffective-assistance claim. Indeed, as the federal district court later noted, "none of the state court decisions refer to it." Pet. App. 53a. Instead, in the course of rejecting Petitioner's claim, the state appellate court repeatedly (and wrongly) asserted that Petitioner had presented "no evidence" and "no support" for his factual contentions. Pet. App. 77a-79a. Without the affidavit, the *only* record evidence of counsel's performance was his statement to the trial judge that the alibi witnesses were uncooperative. The Michigan Supreme Court summarily denied Petitioner's application for leave to appeal.

3. Only after Petitioner filed his *pro se* petition for habeas relief in federal court under 28 U.S.C. § 2254(d) did the reason for the state courts' failure to consider or even mention his affidavit become apparent. The State argued in response to the petition that the Michigan Court of Appeals appropriately "limit[ed] its review to the existing trial record . . . because Petitioner failed to properly preserve the issue by timely moving for a Ginther hearing to pre-

sent evidence in support of the claim" and failed to submit the affidavit in the state proceedings. State Answer in D. Ct., at 21. The district court accepted this explanation, adding that the affidavit on which Petitioner based his claim "d[id] not appear in the state court record filed by [the State]." Pet. App. 52a. Concluding that the affidavit "was never filed in the state courts," the district court declined to consider it and rejected the ineffective-assistance claim. Pet. App. 53a.

Petitioner received a certificate of appealability for his ineffective-assistance claim and was appointed counsel. His new attorney soon discovered that the State's representation to the district court was wrong. Petitioner *had* properly filed the affidavit (along with his timely motion for remand) in the Michigan Court of Appeals, and the affidavit should have been included in the Rule 5 materials that the State filed in the district court. Because the affidavit "may have a bearing on the . . . resolution of Hawkins's ineffective-assistance claim," a panel of the Sixth Circuit vacated the district court's judgment and remanded the case. Pet. App. 29a.

On remand, the State explained that it had "fail[ed] to file Hawkins' Affidavit as part of the Rule 5 material" because it "was not provided to the State by the Michigan Court of Appeals." State Supp. Br. in D. Ct., at 12 (referring to it as an "inadvertent" "error[]" that the State promised to work with the courts to prevent from recurring). No explanation has ever been given for the Michigan Court of Appeals' failure to realize that Petitioner had filed the affidavit.

Petitioner renewed his ineffective-assistance claim on remand, arguing, among other things, that AEDPA deference was inappropriate *first* because there had been no adjudication on the merits under § 2254(d) due to the state appellate court's failure to consider the affidavit and *second* because that failure resulted in a decision that unreasonably applied clearly established federal law and that was based on an unreasonable determination of the facts in light of the evidence before the state court.

Even with Petitioner's affidavit finally acknowledged as part of the record, the district court again rejected Petitioner's ineffective-assistance claim and declined his request for an evidentiary hearing. The affidavit had identified no fewer than six witnesses and multiple other sources of evidence that, as Petitioner explained to counsel, would confirm his whereabouts on the evening of the shooting: He named two women who were with him at a bar called the "Locker Room" and a jazz club called "Baker's Lounge" from approximately 7:45 p.m. to 9:00 p.m., the same time that Taylor testified he met up with Petitioner. Pet. App. 84a-85a. Petitioner told counsel that Baker's Lounge had surveillance cameras that would confirm his presence. Petitioner then left Baker's Lounge, picked up his fiancée, Nyree Phillips, and at approximately 9:45 p.m. met Eric Gibson and Adan Knowles at another club. Their waitress at that second club was a woman named "Anessa," who Petitioner explained could confirm that the group stayed at the club until approximately 1:30 a.m. Pet. App. 85a-86a. On top of all that, Petitioner provided counsel his mobile phone number and explained that his call records at Nextel would contra-

dict Taylor's claims that the two spoke several times on the phone the evening of the shooting to arrange the drug deal. Pet. App. 84a. Yet even with the affidavit "properly before the Court" and with no evidence in the trial record to refute these facts, the district court reasoned that "[t]he adjudication by the state courts rejecting Petitioner's claim is . . . unassailable on habeas review given the limitations of review place[d] on the Court by § 2254(d)." Pet. App. 25a-26a. The district court opined that Petitioner's affidavit was "self-serving" and contained "hearsay statements," Pet. App. 18a-19a, 26a, even though the state courts had said no such thing (indeed, they said nothing at all) about the affidavit.

4. The court of appeals affirmed. Because the Michigan Supreme Court had summarily denied Petitioner's request for review, the Sixth Circuit looked through to the decision of the Michigan Court of Appeals. Pet. App. 6a.[2] As a threshold matter, the Sixth Circuit held that the state court's decision rejecting Petitioner's ineffective-assistance claim "was an adjudication on the merits," even if "the state court did not consider the 'full' record; namely, the Affidavit Hawkins submitted." Pet. App. 6a-7a.

The court rejected Petitioner's arguments that deference to the state court's resolution of the ineffective-assistance claim was inappropriate under §§ 2254(d)(1) and (d)(2). Even if the state court "overlooked or disregarded" the affidavit, the panel stated, there were potential reasons—again, unmentioned by the state court—why a fair-minded jurist

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[2] *See Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991).

could have found the affidavit insufficient to support Petitioner's claims. Pet. App. 9a-13a. In particular, the court hypothesized that a state court might have either found the affidavit "self-serving" or concluded that, in light of the trial record, Petitioner could not prove counsel's deficiencies "[w]ith only his own affidavit for support," Pet. App. 11a-12a, even though the affidavit was offered as support for holding the type of hearing authorized by state law at which multiple witnesses and other evidence could be presented.

Affording the state court's decision deference, the panel rejected Petitioner's ineffective-assistance claim. Admitting that the trial record, unlike Petitioner's affidavit, "does not contain evidence concerning the investigation counsel indicated he had undertaken," the court nonetheless concluded that "it would not be objectively unreasonable for a fair-minded jurist to conclude that counsel's conduct involved a reasonable strategic decision not to pursue an alibi defense because witnesses were not cooperative." Pet. App. 12a-13a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted to resolve two important questions that have divided the federal courts of appeals on the scope of habeas proceedings available where a state court has failed to consider critical evidence or has committed other errors evident in the record.

The state court did not consider at all the critical evidence underlying Petitioner's claim of ineffective assistance of counsel. Faced with the reality that the state court simply overlooked Petitioner's affidavit,

the Sixth Circuit nonetheless applied the deference that is reserved for adjudications on the merits and, indeed, expanded that deference beyond the scope that would be proper even in cases where deference does apply.

First, the Sixth Circuit held that a state court has "adjudicated" a claim "on the merits" under § 2254(d) *any time* it expressly considers and rejects the claim, even where it has indisputably failed to consider critical evidence in the record before it. Pet. App. 6a-7a. That position—also held by the First Circuit, *see*, *e.g.*, *Garuti* v. *Roden*, 733 F.3d 18, 22-24 (1st Cir. 2013)—is flatly contrary to the precedents of the Fourth and Tenth Circuits, which hold that a state court "judgment on a materially incomplete record is *not* an adjudication on the merits for purposes of § 2254(d)." *Winston* v. *Pearson*, 683 F.3d 489, 496 (4th Cir. 2012) ("*Winston II*") (internal quotation omitted; emphasis added); *see also*, *e.g.*, *Wilson* v. *Workman*, 577 F.3d 1284 (10th Cir. 2009) (en banc). It is also contrary to *Johnson* v. *Williams*, 133 S. Ct. 1088 (2013), in which this Court explained that "[a] judgment is normally said to have been rendered on 'on the merits' only if it was 'delivered after the court . . . heard and *evaluated* the evidence and the parties' substantive arguments.'" *Id.* at 1097 (quoting *Black's Law Dictionary* 1199 (9th ed. 2009)).

Second, the Sixth Circuit reaffirmed its position that, even where a state court has "totally disregarded" critical evidence, this Court's interpretation of AEDPA in *Harrington* v. *Richter*, 562 U.S. 86 (2011), requires federal courts to defer by hypothesizing reasons a state court *could* have found the evidence unpersuasive. *Davis* v. *Carpenter*, 798 F.3d 468, 475

(6th Cir. 2015). The Third and Eighth Circuits have likewise interpreted *Richter* to require federal courts to search for *any* reasonable justification for a state court's decision, even where the state court clearly expresses the actual, unreasonable basis for its conclusion. *See*, *e.g.*, *Garrus* v. *Sec'y, Pa. Dep't of Corr.*, 694 F.3d 394, 411 & n.16 (3d Cir. 2012) (en banc); *Williams* v. *Roper*, 695 F.3d 825, 831-32, 834-37 (8th Cir. 2012). That interpretation of *Richter* is incorrect and directly conflicts with this Court's decision in *Brumfield* v. *Cain*, 135 S. Ct. 2269 (2015), as well as decisions in the Fourth and Ninth Circuits recognizing that "[d]eference under 28 U.S.C. § 2254(d) . . . extend[s] only to the points actually determined by the state . . . court in its reasoned decision." *Grueninger* v. *Dir., Va. Dep't of Corr.*, 813 F.3d 517, 526 (4th Cir. 2016); *Cuero* v. *Cate*, --- F.3d ----, 2016 WL 3563660, at *3 (9th Cir. June 30, 2016). "*Richter*'s hypothetical inquiry" has no place "where the state court's real reasons can be ascertained" and miss the mark. *Hittson* v. *Chatman*, 135 S. Ct. 2126, 2127 (2015) (Ginsburg, J., concurring in denial of certiorari, joined by Kagan, J.).

These splits are well developed and deep. The courts of appeals considering the "adjudication on the merits" issue have expressly considered the opposing side's reasoning and rejected it. *See Garuti*, 733 F.3d at 23 (citing the Fourth and Tenth Circuits' decisions and holding that First Circuit precedent had "rejected th[ose] view[s]"). And the Seventh Circuit recognized a year ago that the "debate over" whether AEDPA requires courts to "engag[e] in the exercise of trying to construct reasons" to support a state court's ultimate result was "ripening for a reso-

lution." *Kubsch* v. *Neal*, 800 F.3d 783, 806 (7th Cir. 2015) (considering constitutional claim *de novo* out of caution because of "this uncertainty in whether we may 'complete' the state court's reasoning").

This case is an excellent vehicle for resolving these ongoing divisions. The Michigan Court of Appeals, the last state court to issue a reasoned decision on Petitioner's claim, utterly failed to consider the single most important piece of evidence in the record regarding his trial counsel's ineffectiveness. The Sixth Circuit held that, notwithstanding this failure, AEDPA required it to indulge, under the guise of deference, any potential argument that could have undermined Petitioner's affidavit and his ineffective-assistance claim. This Court should grant review to correct that error and resolve the disagreements among the lower courts on the two important questions presented.

I. THE DECISION BELOW ENTRENCHES THE EXISTING CIRCUIT SPLIT ON THE QUESTION WHETHER A STATE COURT DECISION THAT FAILS TO CONSIDER CRITICAL EVIDENCE IS AN ADJUDICATION "ON THE MERITS" UNDER AEDPA.

"AEDPA sharply limits the circumstances in which a federal court may issue a writ of habeas corpus," but its limitations apply "only when a federal claim was 'adjudicated *on the merits* in State court.'" *Williams*, 133 S. Ct. at 1094, 1097 (quoting 28 U.S.C. § 2254(d)). "A judgment is normally said to have been rendered 'on the merits' *only* if it was 'delivered after the court . . . heard and *evaluated* the evidence and the parties' substantive arguments.'" *Id.* at 1097

(quoting *Black's Law Dictionary* 1199 (9th ed. 2009)) (first emphasis added).

In *Harrington* v. *Richter*, this Court "held that, when a state court issues an order that summarily rejects without discussion *all* the claims raised by a defendant, including a federal claim[,] . . . the federal habeas court must presume (subject to rebuttal) that the federal claim was adjudicated on the merits." *Williams*, 133 S. Ct. at 1091; *see Richter*, 562 U.S. at 101-02. A petitioner may rebut that presumption, however, where there is an "indication" to the contrary. *Williams*, 133 S. Ct. at 1094. In *Williams*, for example, the Court explained that where there is clear evidence "that a federal claim was inadvertently overlooked in state court," it cannot be said that the state court heard and evaluated the relevant evidence. *Id.* at 1097.

A. Before this Court's decision in *Richter*, a number of lower courts had held that "judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d)." *Winston* v. *Kelly*, 592 F.3d 535, 555-56 (4th Cir. 2010) ("*Winston I*"); *see also*, *e.g.*, *Brown* v. *Smith*, 551 F.3d 424, 428-29 (6th Cir. 2008) (no adjudication on the merits of a *Brady* claim where the materials "that form the basis of the claim" were not before the state court).

The courts of appeals have disagreed sharply on whether *Richter*'s presumption of adjudication "on the merits" applies where a state court has issued a reasoned decision that fails to consider critical available evidence. The Sixth Circuit's decision reinforces its stance on the wrong side of that divide.

B. The Fourth and Tenth Circuits maintain that there is no adjudication "on the merits" in such a situation. In *Winston II*, the respondent argued that *Richter* had "impeached the legal framework of *Winston I*," requiring the Fourth Circuit to treat a state court decision as an adjudication on the merits even though the state court had unreasonably denied the petitioner's attempts to introduce material evidence. 683 F.3d at 498. The Fourth Circuit rejected that argument and reaffirmed its previous approach. *Richter*, the Fourth Circuit explained, dealt with whether "a summary decision from a state habeas court constitutes an adjudication on the merits"; its reasoning is "inapposite" where the petitioner "does not contest the thoroughness of the state-court decision but rather . . . the state court's refusal to allow [him] to develop the record" with "material . . . evidence." *Id.* at 502. Because "*Richter* mentions nothing of possible defects in a state-court decision save the summary nature of its disposition," the Fourth Circuit concluded, it remained true that a state court's decision on a "materially incomplete" set of facts despite a petitioner's "diligent[]" efforts to "develop the record" was not an adjudication on the merits under AEDPA. *Id.* at 496-97, 502 (internal quotation omitted). The Fourth Circuit has reaffirmed its view on multiple occasions. *See*, *e.g.*, *Morva* v. *Zook*, 821 F.3d 517, 527 (4th Cir. 2016).

The Tenth Circuit takes a similar approach. Relying on the same dictionary definition that this Court cited in *Williams*, the Tenth Circuit held that "[w]hen the state court has not considered the material evidence that a defendant submitted to support the substance of his arguments, it has not adjudicat-

ed that claim on the merits." *Wilson* v. *Workman*, 577 F.3d 1284, 1291 (10th Cir. 2009) (en banc) (relying on *Black's Law Dictionary* definition of "on the merits"); *cf. Williams*, 133 S. Ct. at 1097 (relying on same definition in next edition of *Black's Law*). That rule, the court explained, "comports with the general purposes and structure of AEDPA as well as its language," as "federalism and comity" counsel deference "only for decisions the state court has actually made." *Wilson*, 577 F.3d at 1293. "These purposes are not served when the state court has never considered the substance of the claim in the first place." *Id.*[3] Since this Court decided *Richter*, the Tenth Circuit has adhered to its position despite multiple opportunities to join the other side of the split. *See*, *e.g.*, *Wilson* v. *Trammell*, 706 F.3d 1286 (10th Cir. 2013); *Lott* v. *Trammell*, 705 F.3d 1167 (10th Cir. 2013).

In either of these circuits, the outcome of Petitioner's case would have been different. The Fourth

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[3] After deciding *Wilson*, the Tenth Circuit recognized an error in describing how the Oklahoma procedural rule at issue there operates. *See Lott* v. *Trammell*, 705 F.3d 1167, 1212-13 (10th Cir. 2013) (noting error in assumption that Oklahoma state courts could deny evidentiary hearings for ineffective-assistance claims without specifically considering whether the proposed evidence would be sufficient to support the claim under *Strickland*). The Tenth Circuit nonetheless has reaffirmed its holding that a state court's failure to "consider the material evidence that a defendant submitted" when evaluating the merits of a claim deprives the resulting decision of deference under AEDPA. *Wilson*, 577 F.3d at 1291; *see Lott*, 705 F.3d at 1213 (applying *Wilson*'s standard in light of the Oklahoma courts' clarification of the state procedural rule).

Circuit in *Winston II*, for example, found that a state court's unreasonable refusal to grant an evidentiary hearing at which important evidence would have been developed was sufficient to strip the resulting decision of AEDPA deference. *See* 683 F.3d at 496-97. And in the Tenth Circuit, federal courts must "be sure" that a state court "in fact considered" evidence proffered to it in order for there to be an adjudication on the merits. *Lott*, 705 F.3d at 1213. The record in this case leaves no doubt that the state court simply failed to consider Petitioner's affidavit when rejecting his claim—"none of the state court decisions refer to it," Pet. App. 53a, and the state appellate court "inadvertently" failed to include the affidavit in the record for federal habeas review. State C.A. Br. 14. And, more serious than the error in *Winston*, the state court incorrectly faulted Petitioner for the fact that an evidentiary hearing did not take place for him to develop his claim.

C. In the First and Sixth Circuits, on the other hand, a state court's clear failure to consider critical evidence has no impact on whether it has adjudicated a claim "on the merits." *See Cruz* v. *Superintendent*, No. 13-CV-2414 (JMF), 2016 WL 2745848, at *7-8 (S.D.N.Y. May 11, 2016) (describing the split over whether a state court has adjudicated a claim on the merits where it "render[ed] judgment on a 'materially incomplete record'"). Indeed, both courts have specifically considered and rejected the Fourth and Tenth Circuits' approach.

In *Atkins* v. *Clarke*, 642 F.3d 47 (1st Cir. 2011), a habeas petitioner "relie[d] on" *Winston I* and *Wilson* to support his argument "that 'when the state court makes . . . findings on an incomplete record, it has

not made an adjudication on the merits to which we owe any deference.'" *Id.* at 49 (quoting *Wilson*, 577 F.3d at 1290). The First Circuit rejected the petitioner's argument, concluding that those cases had been "overruled" by this Court's decision in *Cullen* v. *Pinholster*, 563 U.S. 170 (2011). 642 F.3d at 49.

The First Circuit reaffirmed its position two years later in *Garuti* v. *Roden*, 733 F.3d 18 (1st Cir. 2013). Again, the petitioner "urge[d] that the [state court's] decisions" rejecting his federal claims "were based on an incomplete record," and argued that the court should follow *Winston I* and *Wilson*. *Id.* at 22-23. Recognizing that "these decisions by other courts appear to support Garuti's position," the court refused to follow them because *Atkins* "held that those cases . . . were essentially overruled by *Pinholster*" and because it believed *Richter* was also to the contrary. *Id.* at 23.

The Sixth Circuit sided with the First Circuit in *Ballinger* v. *Prelesnik*, 709 F.3d 558 (6th Cir. 2013). There, again, a petitioner "relie[d] heavily upon the decision in" *Winston II* to argue that a state court had failed to consider material facts by denying him an opportunity to develop them at an evidentiary hearing. *Id.* at 562. Noting that the Fourth Circuit's approach "may be appealing," the Sixth Circuit nonetheless agreed with the First Circuit that "the plain language of *Pinholster* and *Harrington* precludes it." *Id.* (citing *Atkins*, 642 F.3d at 49).

The petitioner in *Ballinger* had relied on previous Sixth Circuit precedent—*Brown* v. *Smith*, 551 F.3d 424 (6th Cir. 2008)—that was similar to *Winston II*. The Sixth Circuit agreed that "[i]n *Brown*,

we concluded that the state court had not issued a decision on the merits because highly relevant documents were absent from the trial court record." 709 F.3d at 561-62 (citing *Brown*, 551 F.3d at 428-29). But after *Richter*, the Sixth Circuit held, that "is no longer the law." *Id.* at 562.

The Sixth Circuit has since reaffirmed *Ballinger*'s approach several times, including in this case. *See*, *e.g.*, *Loza* v. *Mitchell*, 766 F.3d 466, 494-95 (6th Cir. 2014) (citing *Ballinger* and reasoning that "it is unlikely that *Brown* remains good law in light of *Pinholster* and *Harrington*"). And here, it made clear that it fully appreciates the far-reaching implications of its position: Even if a "state court d[oes] not consider the 'full' record"—here, by overlooking or disregarding Petitioner's affidavit—its decision will be treated as an adjudication on the merits. Pet. App. 6a.

* * *

The boundary for what is or is not a decision "on the merits" is vitally important, as it controls whether AEDPA's "deferential architecture" applies to a petitioner's claim. *Williams*, 133 S. Ct. at 1097. The division among the circuits on this issue is stark, well developed, and deep. The Court should grant certiorari in this case to make clear that where the record shows that a state court has not "heard and *evaluated*" critical evidence that already exists, it has not rendered a decision "on the merits" under § 2254(d). *Id.*

II. THE DECISION BELOW CONTRAVENES THIS COURT'S PRECEDENTS AND DEEPENS A CIRCUIT SPLIT ON WHETHER AEDPA ALLOWS FEDERAL COURTS TO HYPOTHESIZE ALTERNATIVE RATIONALES WHERE A STATE COURT'S REASONED DECISION PROVIDES AN INSUFFICIENT BASIS FOR REJECTING THE PETITIONER'S CLAIM.

The decision below also merits review because the Sixth Circuit's approach to errors by state courts in AEDPA cases contravenes this Court's decision in *Brumfield* v. *Cain*, 135 S. Ct. 2269 (2015), and conflicts with the approaches taken by other lower courts. As Justice Ginsburg (joined by Justice Kagan) has noted, "where the state court's real reasons can be ascertained, the § 2254(d) analysis can and should be based on the actual 'arguments or theories [that] supported . . . the state court's decision,'" not hypothetical reasons the state court possibly could have relied upon to reach the same result. *Hittson*, 135 S. Ct. at 2127-28 (Ginsburg, J., concurring in denial of certiorari, joined by Kagan, J.) (quoting *Richter*, 562 U.S. at 102).

A. In *Richter*, this Court faced the question how to apply AEDPA deference where the only state court to reject a petitioner's federal claim issued no opinion explaining its reasoning. 562 U.S. at 96-97. Where that is the case, the Court held, "a habeas court must determine what arguments or theories supported or, *as here, could have supported*, the state court's decision" and then evaluate those arguments or theories deferentially. *Id.* at 102 (emphasis added). In that narrow circumstance, "a federal habeas court can assess whether the state court's decision '*involved* an

unreasonable application of . . . clearly established Federal law' . . . only by hypothesizing reasons that might have supported it." *Hittson*, 135 S. Ct. at 2127 (Ginsburg, J., concurring in denial of certiorari, joined by Kagan, J.) (quoting 28 U.S.C. § 2254(d)(1)).

B. Three courts of appeals—the Third, Sixth, and Eighth Circuits—have read *Richter* to require federal courts to hypothesize reasons that "could have supported" a state court's ultimate judgment *even* where the state court made its actual reasoning clear. The Eighth Circuit, for example, has concluded that, after *Richter*, a federal court must "examine the *ultimate legal conclusion* reached by the [state] court, . . . not merely the statement of reasons explaining the state court's decision. . . . [T]he proper question is whether there is 'any reasonable argument' that the state court's *judgment* is consistent with" clearly established federal law. *Williams* v. *Roper*, 695 F.3d 825, 831-32 (8th Cir. 2012) (emphases added); *see also*, *e.g.*, *Woods* v. *Norman*, --- F.3d ----, 2016 WL 3147748, at *4 (8th Cir. June 6, 2016) (following *Roper*'s approach). *Richter*, the majority reasoned, was "premised on the text of § 2254(d) and the meaning of 'decision' and 'unreasonable application,' not on speculation about whether the state court actually had in mind reasons that were 'reasonable' when it denied relief" in an unexplained decision. 695 F.3d at 837.

Dissenting in *Roper*, Judge Melloy wrote that "[w]hile AEDPA may not require state courts to explain their decisions, it does not allow federal courts to ignore a state court's explanation that fails to meet the AEDPA standard." 695 F.3d at 847 (Melloy, J., dissenting). Indeed, he noted, "[t]o defer

to a hypothetical conclusion rather than the conclusion actually offered by the state court, as the majority now does, is to create an even more heightened standard than has been previously acknowledged in AEDPA cases." *Id.* at 848. *Richter*, he concluded, was limited to "deal[ing] with how the AEDPA standard applies to state courts' summary, unexplained, or indeterminate denials, and does not justify ignoring reasons given by a state court to support its decision." *Id.* at 847.

The Third Circuit has taken a similarly expansive view of AEDPA deference in cases where a state court offers reasoning that could be challenged as inadequate. In *Garrus* v. *Secretary of Pennsylvania Department of Corrections*, 694 F.3d 394 (3d Cir. 2012) (en banc), the Third Circuit noted that the state court had determined that the "prior conviction exception" to this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), "permitted the sentencing judge to find" certain facts. 694 F.3d at 399. Despite knowing the state court's express reasoning on that point, the Third Circuit did not stop there. Instead, it concluded that "under AEDPA, we 'must determine what arguments or theories supported or . . . could have supported the state court's decision'" and so conducted a "thorough and circumspect examination of the potential arguments or theories" that might otherwise have justified the state court's judgment. *Id.* at 411 & n.16. Later cases in the Third Circuit have also skipped analyzing the state court's express reasoning on the claim at issue, concluding that the "prescribed path" in AEDPA cases includes this exercise in hypothesizing potential reasons that "could have supported . . . the state court's

decision." *Eley* v. *Erickson*, 712 F.3d 837, 846 (3d Cir. 2013) (quoting *Richter*, 562 U.S. at 102).

The Sixth Circuit takes the same view, expressly holding that under *Richter*, "we review the state court's 'decision,' not the court's intermediate reasoning." *Davis* v. *Carpenter*, 798 F.3d 468, 475 (6th Cir. 2015). Thus, in *Davis*, where the state court had considered and rejected a petitioner's *Strickland* claim, it did not matter whether "the state court[] [had] 'totally disregarded'" important testimony, as the petitioner claimed. *Id.* "[H]owever deficient some of the court's reasoning might be," the Sixth Circuit held, so long as a federal court could conceive of some line of argument that "'*could have supported*'" the state court's "*decision*" under AEDPA's deferential standards, the petitioner's claim must fail. *Id.* (quoting *Richter*, 562 U.S. at 102) (emphases in original).

As described above, the Sixth Circuit carried out the very same approach in this case. It did not matter whether the state court "overlooked or disregarded" the affidavit, because the federal court was able to hypothesize reasons a state court could have given for finding that evidence unpersuasive. Pet. App. 9a, 11a (suggesting that one could find Petitioner's allegations in the affidavit "self-serving" or could disbelieve them on the supposition that no "other witnesses or evidence" supported his claims). Thus, "[w]ith only his own affidavit for support," the panel concluded, it would not have been unreasonable under AEDPA's deferential standard for the state courts to reject his ineffective-assistance claim. Pet. App. 12a. *At no point*, however, did the panel ever suggest that the state court considered the affidavit at all, let

alone find it unpersuasive for any of these *post hoc* reasons.

C. The Fourth and Ninth Circuits have rightly rejected this approach and held that AEDPA deference "extend[s] only to the points actually determined by the state . . . court in its reasoned decision." *Grueninger* v. *Dir., Va. Dep't of Corr.*, 813 F.3d 517, 526 (4th Cir. 2016); *see also Cannedy* v. *Adams*, 706 F.3d 1148, 1159 (9th Cir. 2013) ("The critical inquiry under § 2254(d) is whether . . . it would have been reasonable to reject Petitioner's allegation of deficient performance *for any of the reasons expressed by* the [state court].") (emphasis added).

Rejecting the rule in the Third, Sixth, and Eighth Circuits, these courts have reasoned that "by its terms, *Richter* is limited to cases where a state court's decision is unaccompanied by an explanation." *Grueninger*, 813 F.3d at 525 (internal quotation omitted). "The situation is different when there is a state-court decision explaining the rejection of a claim"; in that circumstance, the basis for the state court's decision is evident, and "it is *that reasoning* that we are to evaluate against the deferential standards of § 2254(d)." *Id.* at 525-26 (emphasis added); *see also Cannedy*, 706 F.3d at 1157-59.

The courts on both sides of this split have carefully considered and rejected the opposing views, leaving it highly unlikely that any will change their positions absent this Court's intervention. The dissenting judge in *Cannedy*, for example, raised arguments similar to those that have prevailed in the Third, Sixth, and Eighth Circuits. *See* 706 F.3d at 1166-67 (Kleinfeld, J., dissenting) ("*Richter* holds,

not that we should evaluate reasonableness based upon 'the reasons expressed,' as the majority says, or merely 'what arguments or theories supported' the California decision, but also what arguments 'as here, *could have* supported the state court's decision.'") (quoting *Richter*, 562 U.S. at 102). The majority expressly rejected the argument that courts must "evaluate all the hypothetical reasons" in favor of a state court's decision, because it "rests on an overly broad reading of *Richter*." *Id.* at 1157 (majority opinion). The Ninth Circuit then denied rehearing en banc over the dissent of six judges who expressed their agreement with Judge Kleinfeld's view. *Cannedy* v. *Adams*, 733 F.3d 794, 802-03 (9th Cir. 2013) (O'Scannlain, J., dissenting from denial of rehearing en banc) ("If the majority had asked the correct question—whether any argument or theory could have supported the state court's summary denial of Cannedy's ineffective assistance claim—it would have found habeas relief unwarranted. . . . It suffices to say that fair-minded judges could have found several reasons for rejecting Cannedy's habeas petition."). The Ninth Circuit just recently reinforced its position. *Cuero* v. *Cate*, --- F.3d ----, 2016 WL 3563660, at *3 (9th Cir. June 30, 2016).

The Fourth Circuit correctly recognized in *Grueninger* that this Court's decision in *Brumfield* supports the minority side of the split. *See Grueninger*, 813 F.3d at 526-27. The respondent in *Brumfield* suggested that the Court could affirm the lower court's denial of an *Atkins* competency claim on habeas review "because the record evidence failed to show" that the petitioner had made out a key component of his claim. This Court held, though, that be-

cause "the state trial court never made any [such] finding," there was "no determination on that point to which a federal court must defer in assessing whether Brumfield satisfied § 2254(d)." 135 S. Ct. at 2282. Citing *Richter*, the Court explained that it "requir[es] federal habeas courts to defer to hypothetical reasons [a] state court might have given for rejecting [a] federal claim where there is no 'opinion explaining the reasons relief has been denied.'" *Id.* at 2282-83 (quoting *Richter*, 562 U.S. at 98). Similarly here, the Michigan Court of Appeals made "no determination on" how Petitioner's affidavit affected his *Strickland* claim. Rather, the court failed to consider the affidavit altogether.

* * *

Last year, the Seventh Circuit noted that "[t]his debate over methodology under § 2254(d)" was "ripening for a resolution" by this Court. *Kubsch* v. *Neal*, 800 F.3d 783, 806 (7th Cir. 2015). Various circuits had staked out their positions, and other courts were "uncertain[] . . . whether we may 'complete' the state court's reasoning" where its expressed reasons fail to satisfy AEDPA. *Id.* With the division becoming more entrenched—not less—as time passes, the Court should grant certiorari to "make[] clear that where the state court's real reasons can be ascertained, the § 2254(d) analysis can and should be based on the actual 'arguments or theories [that] supported . . . the state court's decision.'" *Hittson*, 135 S. Ct. at 2127-28 (Ginsburg, J., concurring in denial of certiorari, joined by Kagan, J.) (quoting *Richter*, 562 U.S. at 102).

III. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE BOTH OF THESE IMPORTANT QUESTIONS.

This case presents the Court with an excellent opportunity to answer these important questions regarding AEDPA's application.

As described above, the state court's opinion and the procedural history of this case make plain that the state court rejected Petitioner's *Strickland* claim without considering the affidavit on which the claim was premised.

Instead of holding that this fundamental failure entitled Petitioner to *de novo* federal review of his claim, the Sixth Circuit deemed the error irrelevant. Acting in accordance with its precedents, it (1) held that the state court's decision was still an adjudication "on the merits" under § 2254(d) and (2) hypothesized reasons that the state court never even hinted at for why a fair-minded jurist could have found the affidavit unpersuasive.

Those two critical legal determinations were dispositive in this case, and there is intractable division in the lower courts over how deference operates in such circumstances. Absent this Court's review, the Sixth Circuit's erroneous conclusions at both steps condemn Petitioner to a life sentence without *any* court having considered on its own accord whether the facts alleged in his affidavit suffice to entitle him to relief under *Strickland*. A decision in his favor on either of the questions presented would be sufficient to grant him *de novo* federal review in which he would then be able to develop a record for his ineffective-assistance claim. *See Brumfield*, 135 S. Ct. at

2275-76 (under *Pinholster*, "federal habeas courts may 'take new evidence in an evidentiary hearing' when § 2254(d) does not bar relief").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 22, 2016

APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 16a0277n.06

No. 15-1195

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
May 23, 2016
DEBORAH S. HUNT, Clerk

DAX HAWKINS,

Petitioner-Appellant,

v.

JEFFREY WOODS, Warden,

Respondent-Appellee.

/

On Appeal from the United States District Court for the Eastern District of Michigan

Before: GUY, BATCHELDER, and COOK, Circuit Judges.

RALPH B. GUY, JR., Circuit Judge. Petitioner Dax Hawkins, a Michigan prisoner, was convicted by a jury of murder, assault with intent to commit murder, and two related firearm offenses. Hawkins appeals for a second time from the district court's denial of habeas corpus relief with respect to his claim that trial counsel rendered ineffective as-

sistance. For the reasons that follow, we affirm the district court's judgment.

I.

At about 11:25 p.m. on October 19, 2003, Jason Taylor and Earl Riley were shot multiple times while seated in Taylor's car waiting to complete a drug transaction in Detroit, Michigan. Riley was dead when the police arrived, but Taylor survived five gunshot wounds and identified Dax Hawkins and an unknown dark-skinned man as the shooters. The unknown man was never found. However, Taylor testified that he knew Hawkins from childhood, and that he had been selling marijuana to Hawkins in quantities of one to twenty pounds for six to twelve months prior to the shooting. Further, according to Taylor, Hawkins had arranged and participated in the failed transaction that ended in the shooting.

Taylor testified, under a grant of immunity, that Hawkins purchased a couple of pounds of marijuana from him between about 8:30 or 9:00 p.m. on the night of the shooting. During that transaction, Hawkins said he had another customer who wanted to purchase 20 or 25 pounds of marijuana and would be there in about an hour. Taylor said he could do it, and told Hawkins to call when the buyer was available. When Hawkins called, Taylor took Riley with him and drove to meet Hawkins and his customer with two plastic garbage bags of marijuana. Although an agreement was reached, the buyer did not produce the money and Taylor and Riley left with the marijuana.

A short time later, Hawkins called Taylor and said the buyer had been suspicious but had the mon-

ey and wanted to complete the transaction. Taylor took Riley with him to meet Hawkins and the buyer again, and the marijuana was transferred to the trunk of the other car. Then, at Hawkins' suggestion, both cars were driven around the block and onto another street to avoid being seen completing the transaction. Taylor parked in front, waited a few minutes, and then called Hawkins who said he was counting the money.

Taylor testified that Hawkins walked up to his car from behind, got into the rear passenger seat, and said there might be a problem with the grams. As Taylor turned to respond, he saw Hawkins with a gun and felt and heard Hawkins shooting. He also saw the buyer run up and start shooting. Taylor saw Riley slumped over, and awoke in the hospital with lasting injuries. A few months later, Hawkins was located in federal custody where he was being held on a probation violation and extradited to Michigan.

Hawkins asserted an alibi defense and counsel filed a notice of alibi stating that Hawkins "was not at the scene of the crime but was at [Club] Dot.Com on Grand River in the City of Detroit, Michigan." The notice listed four witnesses: Nikia Brockington, Nyree Phillips, Eric Gibson and Adan Knowles. Prior to jury selection, however, defense counsel stated on the record that he was no longer planning to call the alibi witnesses because he "investigated it and saw that none of them were cooperative." Instead, defense counsel attacked the credibility of Taylor, who was the only witness to identify Hawkins, and argued that the unknown buyer was the sole shooter. At the close of the prosecution's case, defense counsel referred to the alibi witnesses again and stated: "I

already put on the record at the beginning of the case that I wasn't planning on calling them. And I want to confirm with Mr. Hawkins his agreement that I'm not to call them." Hawkins affirmatively agreed.

Hawkins did not testify, and the jury found him guilty of all counts. At sentencing, Hawkins maintained his innocence and insisted that he had been at Club Dot.Com at the time of the shooting. The trial judge sentenced Hawkins to life in prison for first-degree murder, 50 to 100 years for assault with intent to commit murder, and lesser terms for the felon-in-possession and felony firearm convictions.

Appellate counsel filed an unsuccessful motion for new trial, and raised four claims of error on direct appeal that are not before this court. Hawkins raised several more claims of error in a pro se supplemental brief, including one for ineffective assistance of counsel. His supplemental brief referred to and was accompanied by a pro se motion to remand for an evidentiary hearing under *People v. Ginther*, 212 N.W.2d 992 (Mich. 1973). Hawkins also filed an amended motion to remand, to which he appended his own sworn "Affidavit and Offer of Proof" dated March 9, 2006. In that Affidavit, Hawkins provided the details of his alibi defense and claimed that counsel had abandoned an alibi defense unilaterally, against his wishes, and without conducting a proper investigation.

The Michigan Court of Appeals denied both the motion to remand and the amended motion to remand in a single order "for failure to persuade the Court of the need to remand at this time." Six months later, the Michigan Court of Appeals issued a

reasoned decision affirming Hawkins' convictions and expressly limited its review of his ineffective-assistance-of-counsel claims to mistakes apparent from the record because no *Ginther* hearing had been held. The Michigan Supreme Court subsequently denied the application for leave to appeal because it was "not persuaded that the questions presented should be reviewed."

This pro se petition for writ of habeas corpus followed, asserting the same claims that were raised on direct appeal. The district court denied habeas relief with respect to each of the claims, but granted a certificate of appealability on the sole claim of ineffective assistance of counsel. After appointing counsel to represent Hawkins, this court remanded for reconsideration of the claim because it was discovered that several state-court records—including his Affidavit and Offer of Proof—had been omitted from the Rule 5 materials filed in the district court. After supplemental briefing, the district court reexamined the ineffective-assistance-of-counsel claim and again denied habeas relief. This appeal followed.

II.

This court reviews the legal basis for the district court's decision *de novo*, and any factual findings for clear error. *Awkal v. Mitchell*, 613 F.3d 629, 633 (6th Cir. 2010). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), habeas relief may not be granted with respect to a claim that was "adjudicated on the merits in State court proceedings" unless it "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," 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) and (2). A petitioner must overcome the limitations of § 2254(d)(1) and (2) on the record that was before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398, 1400 n.7 (2011). Hawkins argues that AEDPA deference should not apply because the state court decision was based on an unreasonable determination of the facts, involved an unreasonable application of clearly established law, and did not adjudicate the claim on the merits. These arguments are addressed in turn.

A. Adjudication on the Merits

Looking through the Michigan Supreme Court's summary denial, we review the Michigan Court of Appeals' decision because it was the last reasoned state-court decision to address the claim that trial counsel rendered constitutionally ineffective assistance. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Under *Strickland*, which is incorporated into Michigan's standard, a defendant must show (1) that his counsel's performance fell below an objective standard of reasonableness and (2) that the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Ballinger v. Prelesnik*, 709 F.3d 558, 561 (6th Cir. 2013).

Hawkins contends that the state-court decision was not an adjudication "on the merits" because the state court did not consider the "full" record; namely, the Affidavit Hawkins submitted in support of remand for a *Ginther* hearing. However, the state

court's denial of remand for an evidentiary hearing on these claims does not make its subsequent decision rejecting those claims anything other than an adjudication "on the merits." *Ballinger*, 709 F.3d at 561-62; *see also Lint v. Prelesnik*, 542 F. App'x 472, 481-82 (6th Cir. 2013). Also, the state court's summary denial of the motion to remand is presumed to be a decision on the merits. *See Nali v. Phillips*, 681 F.3d 837, 852 (6th Cir. 2012). It is evident that the reasoned state-court decision expressly rejecting Hawkins' claims that trial counsel performed deficiently was an adjudication on the merits for purposes of § 2254(d). *See Wiggins v. Smith*, 539 U.S. 930, 953-54 (2003); *Rayner v. Mills*, 685 F.3d 631, 638 (6th Cir. 2012).[1]

B. Due Process Principles

Hawkins argues that AEDPA deference should not apply because the Michigan Court of Appeals denied his motion to remand for a *Ginther* hearing and then disregarded the Affidavit he submitted in support of remand for a *Ginther* hearing. That is, relying on the unreasonable-application clause of § 2254(d)(1), Hawkins contends that the state court's rejection of his deficient-performance claims under *Strickland* involved "an antecedent unreasonable application of" long-established due process princi-

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[1] We assume that the state-court decision was not an adjudication on the merits with respect to the prejudice prong—except for the finding that Hawkins "fail[ed] to demonstrate any prejudice from his trial counsel's strategic decision to waive presentation of the Nextel representative." *See Rayner*, 683 F.3d at 638.

ples. *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

In *Panetti*, the Court held that the state court's competency determination was dependent on an unreasonable application of clearly established Supreme Court precedent because the state court failed to comply with the procedures required by *Ford v. Wainwright*, 477 U.S. 399 (1986), for determining a prisoner's competency to be executed. *Panetti*, 551 U.S. 934-35. Addressing a similar argument by the petitioner in *Loza*, this court held that AEDPA deference could not be avoided under *Panetti* because the state court's ruling—that the requirements for discovery on a claim of selective prosecution had not been met—did not involve an unreasonable application of *United States v. Armstrong*, 517 U.S. 456, 460 (1996). *Loza v. Mitchell*, 766 F.3d 466, 493-94 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 2829 (2015); *see also Wiley v. Epps*, 625 F.3d 199, 206-07 (5th Cir. 2010) (applying *Panetti* where state-court decision involved unreasonable application of requirements for adjudication of claim under *Atkins v. Virginia*, 536 U.S. 304 (2002)).

To the extent Hawkins can be understood to argue that the state court erred or abused its discretion in denying remand for a *Ginther* hearing under M.C.R. 7.211(C), a perceived violation of state law would not be a basis for federal habeas relief. *Hayes v. Prelesnik*, 193 F. App'x 577, 584 (6th Cir. 2006) (citing *Baze v. Parker*, 371 F.3d 310, 322-23 (6th Cir. 2004)). On appeal, Hawkins relies on *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), for the general proposition that long-standing due process protections guarantee affected parties notice and a meaningful oppor-

tunity to be heard on federal constitutional claims. However, this frames the clearly established Supreme Court precedent at too high a level of generality and "is far too abstract to establish clearly the specific rule [petitioner] needs." *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam). Hawkins has not identified any Supreme Court precedent specifically holding that due process requires an evidentiary hearing or establishing other procedural requirements for adjudicating a claim of ineffective assistance of counsel. *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014); *see also Hayes*, 193 F. App'x at 584-85 (rejecting claim that due process afforded a right to an evidentiary hearing to develop a claim of ineffective assistance of counsel). Thus, as the district court recognized, *Panetti* is of no avail to Hawkins because he has not identified clearly established Supreme Court precedent that affords him the antecedent due process protection he seeks.

C. *Strickland*

Hawkins contends that, whether his Affidavit was overlooked or disregarded, the state court's rejection of his claim that counsel's performance was deficient was based on an unreasonable determination of the facts and involved an unreasonable application of *Strickland*. "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). Further, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Harrington v. Richter*, 562

U.S. 89, 101 (2011) (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)).[2]

Relying on § 2254(d)(2), Hawkins argues that the state court unreasonably found the evidence did not support his claim of a conflict between him and counsel concerning trial strategy or refute counsel's statement that he had investigated his alibi defense. As noted earlier, the state-court record shows that counsel asserted an alibi defense claiming that Hawkins had been at the Dot.Com nightclub at the time of the shooting. But, counsel abandoned the defense prior to jury selection, stating that he had investigated and found the witnesses were not cooperative, and Hawkins affirmatively agreed with that decision at the close of the prosecution's case.

Contradicting the trial court record, Hawkins claimed in his Affidavit that he was blindsided by counsel's unilateral decision and was "dead set against" pursuing a defense that placed him at the scene and foreclosed him from testifying on his own behalf. Hawkins explained that he called his fiancée Nyree Phillips after the first day of trial and was told by her that defense counsel's investigator did not interview the alibi witnesses because they could not all

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[2] Although 28 U.S.C. § 2254(e)(1) provides that "a determination of a factual issue made by a State court shall be presumed correct," the interplay between § 2254(e)(1) and § 2254(d)(2) remains unresolved. *Wood*, 558 U.S. at 299; *see also McMullen v. Booker*, 761 F.3d 662, 670 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1534 (2015). Because the State does not argue that § 2254(e)(1)'s standard applies, we need not resolve this open question. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2282 (2015).

meet at the same time. Not only are such self-serving averments viewed with skepticism, but waiver of the right to testify is presumed from a defendant's silence at trial. *See, e.g.*, *Thomas v. Perry*, 553 F. App'x 485, 487 (6th Cir. 2014); *Freeman v. Trombley*, 483 F. App'x 51, 58 (6th Cir. 2012); *United States v. Webber*, 208 F.3d 545, 551 (6th Cir. 2000). More importantly, whether or not it might be debatable, it was not an unreasonable determination of fact for the state court to find that Hawkins had not demonstrated that there was a conflict with counsel concerning trial strategy.

It was not unreasonable for the state court to find support was lacking for the assertion that other witnesses or evidence supported his alibi defense: namely, Charmaine Wright, a woman named Maria, the manager of Baker's Lounge, or surveillance camera footage from Baker's Lounge. There is no dispute that neither these witnesses nor the surveillance camera were mentioned in the trial court record. Instead, Hawkins presented the state court with his own affidavit stating that he provided his attorney with a detailed account of where, when, and with whom he claimed to have been on the night of the shooting. That included his claim that he went to the Locker Room bar in Detroit at 7:45 p.m., where he met up with Charmaine, Maria, and several other women; that Charmaine and her friends joined him at Baker's Lounge in Detroit from 8:30 p.m. until approximately 9:00 p.m.; and that he invited them to come to a "going away" party for him at Club Dot.Com. Hawkins stated that he left Baker's at 9:00 p.m., picked up his fiancée, and met Eric Gibson and Adan Knowles at Club Dot.Com, where they had a

party from 9:45 p.m. until 1:30 a.m. because Hawkins was surrendering to federal custody the next day. Hawkins also identified Nikia Brockington as a witness to his whereabouts that night. But, in his affidavit, Hawkins acknowledged having advised his attorney that Charmaine and Nikia were unwilling to testify on his behalf and that Maria had familial ties to the surviving victim. With only his own affidavit for support, Hawkins has not shown that the state court's decision was based on an unreasonable determination of the facts. *Wood*, 558 U.S. at 301.

Finally, Hawkins argues that the state court's rejection of his claim that counsel was ineffective involved an unreasonable application of *Strickland*. Importantly, when a claim is governed by both *Strickland* and § 2254(d)(1), review of the state court's decision is doubly deferential because counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. On habeas review, federal courts must afford "both the state court and the defense attorney the benefit of the doubt." *Burt*, 134 S. Ct. at 13. Thus, "the question is not whether counsel's actions were reasonable," but "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.

Here, a fair-minded jurist could conclude that counsel did as he said he had, and made sufficient investigation of the alibi defense to support a reasonable strategic decision not to pursue the alibi defense. Although the record does not contain evidence concerning the investigation counsel indicated he

had undertaken, "the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt*, 134 S. Ct. at 17 (quoting *Strickland*, 466 U.S. at 689). Moreover, it would not be objectively unreasonable for a fair-minded jurist to conclude that counsel's conduct involved a reasonable strategic decision not to pursue an alibi defense because witnesses were not cooperative, and to rely instead on challenging the prosecution's evidence and attacking the credibility of the one eye witness. *See Harrington*, 562 U.S. at 109; *Hale v. Davis*, 512 F. App'x 516, 522 (6th Cir. 2013).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAX HAWKINS,

Petitioner,

v.

JEFFREY WOODS,

Respondent,

_____/

Case Number
2:08-cv-12281
Hon. Gerald E. Rosen
Chief United States
District Court Judge

OPINION AND ORDER DENYING DENYING PETITION FOR WRIT OF HABEAS CORPUS, AND GRANTING A CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS

This matter is on remand from the United States Court of Appeals for the Sixth Circuit. The directed this Court to reconsider Petitioner's ineffective-assistance-of-counsel claim in light of an affidavit provided by Petitioner to the State courts that was not included in the record filed with this Court.

Petitioner was convicted in the Wayne Circuit Court of first-degree murder and lesser offenses. He filed his petition for a writ of habeas corpus on April 28, 2008, asserting that his trial attorney provided ineffective assistance of counsel by failing to call alibi witnesses at his trial.

The Court denied the petition on January 11, 2011, finding in part that Petitioner's claim was without merit because he did not provide the state court with any offer of proof regarding his claim. Petitioner appealed this decision to the Sixth Circuit. During the appeal, counsel for Petitioner discovered that Petitioner had filed his own affidavit in support of his claim in the state courts, but Respondent had failed to include it in the portion of the state court record filed with this Court. In light of this discovery, the Sixth Circuit remanded the case back to this Court to reconsider Petitioner's claim. Specifically, the Court found: because these documents may have a bearing on the district court's resolution of Hawkins's ineffective-assistance- of-counsel claim, remand is appropriate." *Hawkins v. Rivard*, Order, No. 11-1147 (6th Cir. Feb. 18, 2014). The parties have filed supplemental briefs, and the matter is now ready for decision.

I. Background

The facts relevant to the issue remanded for the Court's consideration concern Petitioner's direct appeal. During the jury selection process, defense counsel told the trial judge that he would not be calling the witnesses listed in Petitioner's notice of alibi because they had not been cooperative. Later at trial, counsel again stated that the alibi witnesses would not be called, and Petitioner indicated that he agreed.

After Petitioner filed his claim of appeal in the Michigan Court of Appeals, he filed a pro se motion to remand the case back to the trial court for the purpose of obtaining an evidentiary hearing to devel-

op a record in support of his ineffective-assistance-of-counsel claim. He attached his own affidavit to the motion. The affidavit alleges that he informed his attorney before trial that he had alibi witnesses he wished to call. He also alleges that telephone records would corroborate his claim that he was not at the scene of the crime. According to the affidavit, his attorney told him that he would investigate the matter, but on the eve of trial counsel told him that the witnesses had been uncooperative and would not be called. Petitioner objected, but his counsel told him that the "wheels were in motion" and that he would proceed without the witnesses. The affidavit also states that Petitioner learned that two of his alibi witnesses were unwilling to testify on his behalf because they had familial ties with the surviving victim. After the first day of trial Petitioner spoke with his fiancee – a third alibi witness -- who indicated that defense counsel had lied to him, that she was willing to testify, and defense counsel's private detective did not interview any of the witnesses because they could not agree on a time to collectively meet. Petitioner also alleged in his affidavit that he wanted to testify about his whereabouts during the time of the shooting, but defense counsel instead chose to put him at the scene of the crime and assert that he did not participate in the crime.

The Michigan Court of Appeals denied Petitioner's pro se motion to remand, "pursuant to Michigan Court Rule 7.211(C)(1) . . . for failure to persuade the Court of the need for a remand at this time." *People v. Hawkins*, Order, No. 262699 (Mich. Ct. App. April 19, 2006). The rule relied upon by the court of appeals, Rule 7.211(C)(1), creates the authority for the

court of appeals to order a remand, and it sets forth the requirements for the motion–including the necessity for the motion to be accompanied by an affidavit or offer of proof regarding the facts that need development. Then, in what Petitioner describes as a "whipsaw," the Michigan Court of Appeals affirmed Petitioner's conviction and denied relief with respect to Petitioner's claim by finding that "there is no evidence in the lower court record to support the assertion [that there was a conflict between his counsel's strategy and his own version of events," and "defense counsel stated that he had investigated the alibi witnesses and found that none of them were cooperative." *People v. Hawkins*, No. 262677, *3 (Mich. Ct. App. Oct. 19, 2006).

II. Analysis

Petitioner asserts that the state court's failure to hold an evidentiary hearing on Petitioner's ineffective-assistance of counsel claim itself violated due process. He further argues that given the full record, the state court's conclusion that his claim was without merit was objectively unreasonable in light of the clearly established Supreme Court standard. Respondent contends that the state court did not err in failing to grant an evidentiary hearing, and that Petitioner has not demonstrated that his counsel was ineffective.

1. Failure to Hold Evidentiary Hearing in State Court

Petitioner asserts that the state court's failure to hold an evidentiary hearing on his ineffective-assistance-of-counsel claim violated his rights under

the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

While it is true that Petitioner supported his motion for remand with his own affidavit, he did not provide an offer of proof or affidavits from the uncalled witnesses nor records from the phone company. Self-serving affidavits are regarded with extreme suspicion. *Thomas v. Perry*, 553 Fed. Appx. 485, 487 (6th Cir. Mich. 2014); *United States v. Bass*, 460 F.3d 830, 839 (6th Cir. 2006). Moreover, the affidavit does not allege that the uncalled witnesses actually would have testified at a remand hearing or that they would testify in the manner Petitioner alleges. Petitioner offered no evidence to the Michigan courts or to this Court beyond his own assertions as to whether his witnesses would have been able to testify and what the content of these witnesses' testimony would have been. In the absence of those allegations, Petitioner failed to establish that at an evidentiary hearing he could demonstrate that his counsel was ineffective. See *Clark v. Waller*, 490 F. 3d 551, 557 (6th Cir. 2007); *Thompkins v. Pfister*, 698 F.3d 976, 987 (7th Cir. 2012); *Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000); but see *Clinkscale v. Carter*, 375 F.3d 430, 443-444 (6th Cir. 2004) (panel unable to locate any authority requiring Petitioner to supply affidavits of uncalled alibi witnesses).

Beyond this, Petitioner's affidavit suggests that at an evidentiary hearing he would only have sought to testify on his own behalf that the alibi witnesses would have testified, and that they would have testified favorably to his defense. Of course, such testimony by Petitioner would have constituted inadmissible hearsay. See Michigan Rule of Evidence 802.

The weight of the affidavit is diminished by the fact that it is based on hearsay. *Terrell v. Pfister*, 443 Fed. Appx. 188, 194 (7th Cir. 2011). In any event, the Sixth Circuit has held that a state court need not consider inadmissible evidence in deciding an ineffective assistance claim. *Stewart v. Wolfenbarger*, 468 F.3d 338, 353 (6th Cir. 2006).

Furthermore, in *Lint v. Prelesnik*, the Sixth Circuit held that the Petitioner had not sufficiently supported his ineffective-assistance-of-counsel claim where the only evidence he provided was his own self-serving statement and hearsay statements. *Id.*, 542 Fed. Appx. 472, 483 (6th Cir. Mich. 2013). It follows that the failure of the state court to hold an evidentiary hearing on his ineffective-assistance-of-counsel claim, in which Petitioner would have primarily relied on inadmissible hearsay, did not offend notions of due process.

Petitioner relies on two cases to demonstrate that he was entitled to a hearing in the state court. First, in *Panetti v. Quarterman*, 551 U.S. 930 (2007), a death penalty case, the Supreme Court found that the state court violated clearly established federal law when it failed to hold a hearing under *Ford v. Wainwright*, 477 U.S. 399 (1986), to determine the petitioner's competency to be executed. *Panetti* is inapplicable to this case because *Ford* itself required that a hearing be held on the competency issue. By contrast, here there is no clearly established Supreme Court law, and Petitioner cites none, that a hearing is required to adjudicate an ineffective-assistance-of-counsel claim. *Harris v. Haeberlin*, 752 F.3d 1054 (6th Cir. 2014), is similarly inapplicable. In that case, the Sixth Circuit found that the state court

had erred by denying the petitioner a hearing on his claim that prosecutors at his state trial had exercised certain peremptory strikes in a racially discriminatory manner. *See Batson v. Kentucky,* 476 U.S. 79 (1986). After finding that a *Batson* violation has occurred, the Court ordered that an evidentiary hearing be conducted to remedy the violation. By contrast, here no violation of Petitioner's right to the effective assistance of counsel has been found. In fact, the Sixth Circuit has found that there is no clearly established Supreme Court law which recognizes a constitutional right to a state court evidentiary hearing to develop a claim of ineffective assistance of counsel–even on direct appeal. See *Hayes v. Prelesnik*, 193 Fed. App'x 577, 584-85 (6th Cir. 2006); *Washington v. Hoffner*, 2013 U.S. Dist. LEXIS 163232, 31-32 (E.D. Mich. July 1, 2013).

Petitioner also relies on several Michigan cases to support his claim that a hearing was required. These cases do not concern federal constitutional requirements and in any event have no bearing here. It is well-settled that a perceived violation of state law may not provide a basis for federal habeas relief. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The Court may grant a writ of habeas corpus only on the ground that the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Finally, Petitioner contends that the state court's failure to hold a hearing but then proceeding to make findings of fact in deciding Petitioner's claim constituted an unreasonable determination of the facts in light of the evidence presented contrary to 28 U.S.C. § 2254(d)(2), entitling him to relief. Petitioner cites

no precedent holding that the failure to hold an evidentiary hearing on an ineffective-assistance-of-counsel claim by itself may entitle a Petitioner to habeas relief under § 2254(d)(2). In fact, the Sixth Circuit has held to the contrary. See *Cowans v. Bagley*, 639 F.3d 241, 236-48 (6th Cir. 2011) ("Nothing in § 2254(d)(2) . . . suggests we defer to a state court's factual findings only if the state court held a hearing on the issue.").

Nor is Petitioner entitled to a hearing in this Court or to otherwise expand the record. Petitioner attached two affidavits from proposed alibi witness–Knowles and Gibson–to his habeas petition. The affidavits are dated in 2007, after the completion of Petitioner's direct appeal, and they therefore could not have been part of the record before the state courts. The United States Supreme Court made it clear that federal habeas review under 28 U.S.C. §2254(d) 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, 179 L. Ed. 2d 557 (2011). Consequently, Petitioner is precluded from introducing into the habeas proceeding information that was not presented to the state courts. See, e.g., *Hanna v. Ishee*, 694 F.3d 596, 606 (6th Cir. 2012) (stating that even if a court conducted an evidentiary hearing on a claim adjudicated by the state court, it would have to "disregard newly obtained evidence"). These two affidavits, therefore, cannot be considered by the Court.

Accordingly, Petitioner has failed to demonstrate that he was entitled to a hearing in the state court, or that the failure to hold a hearing violated due process.

2. Merits of Ineffective-Assistance-of-Counsel Claim

Given the record properly before the Court, Petitioner has failed to demonstrate that he was denied the effective assistance of counsel.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth a two-prong test for determining whether a habeas petitioner has received ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient. This requires showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Second, the petitioner must establish that counsel's deficient performance prejudiced the defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial or appeal. *Id*.

As to the performance prong, Petitioner must identify acts that were "outside the wide range of professionally competent assistance" in order to prove deficient performance. *Strickland*, 466 U.S. at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id*. at 689. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id*. at 690. Petitioner bears the burden of overcoming the presumption that the challenged actions were sound trial strategy. *Id*. at 689.

To satisfy the prejudice prong under *Strickland*, Petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional er-

rors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id*. "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *Id*. at 686.

The Supreme Court has confirmed that a federal court's consideration of ineffective-assistance-of-counsel claims arising from state criminal proceedings is quite limited on habeas review due to the deference accorded trial attorneys and state-appellate courts reviewing their performance. "The standards created by *Strickland* and [section] 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Harrington*, 131 S.Ct. at 788 (internal and end citations omitted). "When [section] 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id*.

Here, during the jury selection process, defense counsel stated that he was no longer planing to call alibi witnesses. He stated "I investigated it and saw that none of them were cooperative." Tr. 4-4-05, at 3-4. Then at the close of the prosecutor's case, defense counsel again indicated to the court that he had submitted a witness list, but stated "I already put on the record at the beginning of the case that I wasn't planning on calling them. And I want to confirm with Mr. Hawkins his agreement that I'm not to call

them." Petitioner indicated his agreement. T 4-6-05, at 76-77. With respect to

the cell phone records, a representative from Nextel was listed on the prosecutor's witness list. The prosecutor stated that her remaining endorsed witnesses would be cumulative, and defense counsel agreed to waive them. Id., at 75.

As stated, counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. According defense counsel this presumption, his failure to call alibi witnesses to testify at Petitioner's trial may have been a matter of reasonable trial strategy, and thus did not constitute ineffective assistance of counsel. Counsel indicated on the record that he would not call the witnesses because they were uncooperative. It was not unreasonable to refrain from calling witnesses who might not testify as Petitioner desired. In fact, Petitioner's own affidavit indicates that some of the witnesses had connections to the surviving victim. Counsel instead reasonably chose to rely on discrediting the prosecution's witnesses by challenging their credibility and the strength of the surviving victim's identification of Petitioner as his assailant. See *Hale v. Davis*, 512 F. App'x 516, 522 (6th Cir. 2013) (citation omitted) ("To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates . . . . In light of the record here there was no basis to rule that the state court's determination was unreasonable.").

Trial counsel may also have chosen not to call the alibi witnesses because they were related to or close to Petitioner, and therefore the jury may not have viewed them as credible. See *Stadler v. Berghuis*, 483 F. App'x 173, 176-177 (6th Cir. 2012) (finding that defense counsel's strategic decision not to pursue an alibi defense given his concerns about family members' credibility was reasonable).

Counsel was also not ineffective for failing to call Petitioner as a witness in his own defense. When a tactical decision is made by an attorney that a defendant should not testify, the defendant's assent is presumed. *Gonzales v. Elo*, 233 F. 3d 348, 357 (6th Cir. 2000). A trial court has no duty to inquire sua sponte whether a defendant knowingly, voluntarily, or intelligently waives his right to testify. *United States v. Webber*, 208 F. 3d 545, 551-52 (6th Cir. 2000). Waiver of the right to testify may be inferred from a defendant's conduct. Here, Petitioner did not alert the trial court at the time of trial that he wanted to testify. Thus, his failure to do so constitutes a waiver of this right. *Id*. Because the record properly before the Court is devoid of any indication by Petitioner that he disagreed with counsel's advice that he should not testify, Petitioner has not overcome the presumption that he willingly agreed to counsel's advice not to testify or that his counsel rendered ineffective assistance of counsel. *Gonzales*, 233 F. 3d at 357.

The adjudication by the state courts rejecting Petitioner's claim is therefore unassailable on habeas review given the limitations of review place on the Court by § 2254(d). The factual basis Petitioner asserted was that his counsel had failed to investigate

and call certain witnesses at trial. While it is true that counsel "must engage in a reasonable investigation or come to a defensible decision that a particular investigation is unnecessary," *Strickland*, 466 U.S. at 691, "[a] *Strickland* claim based on counsel's failure to investigate a potential witness requires a specific, affirmative showing of what the missing witness's testimony would be, and this typically requires at least an affidavit from the overlooked witness." *Thompkins v. Pfister*, 698 F.3d 976, 987 (7th Cir. 2012). The state court was not provided with affidavits other than his self-serving one. Based on the record properly before the Court therefore, Petitioner's conclusory allegations do not satisfy the standard for obtaining habeas relief under § 2254(d). The petition will therefore be denied.

III. Certificate of Appealability

Before Petitioner may appeal this decision, a certificate of appealability must issue. See 28 U.S.C. § 2253(c)(1)(a); FED. R. APP. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court denies a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, a court may not conduct a full merits review, but

must limit its examination to a threshold inquiry into the underlying merit of the claims. *Id*. at 336-37. The Court concludes that a certificate of appealability is warranted in this case because reasonable jurists could debate the Court's assessment of Petitioner's claim. The Court will also grant permission to appeal in forma paueris.

V. Conclusion

For the foregoing reasons, **IT IS ORDERED** that the petition for a writ of habeas corpus is **DENIED** and the matter is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that a certificate of appealability is **GRANTED**.

IT IS FURTHER ORDERED that permission to appeal in forma pauperis is **GRANTED.**

s/Gerald E. Rosen

Chief Judge, United States District Court

Dated: January 26, 2015

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on January 26, 2015, by electronic and/or ordinary mail.

s/Julie Owens

Case Manager, (313) 234-5135

APPENDIX C

No. 11-1147

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 18, 2014
DEBORAH S. HUNT, Clerk

DAX HAWKINS,
Petitioner-Appellant,
v.
STEVE RIVARD,
Respondent-Appellee.

O R D E R

Before: MOORE and GILMAN, Circuit Judges; GRAHAM, District Judge.*

Dax Hawkins appeals a district court's order denying his petition for a writ of habeas corpus, filed under 28 U.S.C. § 2254. He moves to remand the ac-

* The Honorable James L. Graham, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

tion to the district court so that the district court may consider relevant evidence that was in the state-court record, but omitted from the Rule 5 materials. The State of Michigan has not responded to the motion.

The district court denied Hawkins's habeas petition on the merits of his claim that counsel was ineffective for failing to present an alibi defense. Its resolution of this claim was based in part on its finding that the affidavits of support he provided in his habeas petition were never presented to the state courts. Hawkins has established that relevant documents that were filed in the state courts were omitted from the Rule 5 materials. Because these documents may have a bearing on the district court's resolution of Hawkins's ineffective-assistance claim, remand is appropriate. *See Adams v. Holland*, 330 F.3d 398, 406 (6th Cir. 2003) ("[A] [d]istrict [c]ourt must make a review of the entire state court trial transcript in habeas cases, and where substantial portions of that transcript were omitted . . . a habeas case should be remanded . . . for consideration in light of the full record.").

The motion to remand is **GRANTED**. The district court's opinion and order denying Hawkins's petition for a writ of habeas corpus is **VACATED**, and this case is **REMANDED** for further proceedings.

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt

Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAX HAWKINS, Petitioner, v. THOMAS BIRKETT, WARDEN, Respondent, _____/	Case No. 2:08-CV-12281 HONORABLE GERALD E. ROSEN CHIEF UNITED STATES DISTRICT JUDGE

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND GRANTING CERTIFICATE OF APPEALABILITY

I. Introduction

Petitioner, Dax Hawkins, was convicted in Wayne Circuit Court of first-degree murder, MICH. COMP. LAWS, 750.316, assault with intent to commit murder, MICH. COMP. LAWS 750.83, felon in possession of a firearm, MICH. COMP. LAWS 750.224f, and possession of a firearm during the commission of a felony, MICH. COMP. LAWS 750.227b. Petitioner's pro se petition for writ of habeas corpus, filed under 28 U.S.C. §2254, asserts that he is being held in custody

at a Michigan correctional facility in violation of his constitutional rights. For the reasons that follow, the Court will deny the petition.

II. Background

The charges against Petitioner arose from a drug-transaction that resulted in two men being shot. One of the men died, but the other one survived and identified Petitioner – a person he had known since childhood – as one of the perpetrators.

The evidence presented at Petitioner's jury trial largely consisted of the testimony of police officers, medical personnel, and other investigators who testified regarding observations made at the scene of the shooting and the condition of the victims.

The key to the trial was the testimony of the surviving victim, Jason Taylor. Taylor testified that he bought and sold marijuana. Taylor had known Petitioner since childhood, and he had been engaged in transactions involving one-to-twenty pounds of marijuana with him.

Taylor testified that on October 19, 2003, sometime between 8:00 - 9:00 p.m., he sold a pound of marijuana to Petitioner. During the transaction, Petitioner told Taylor that he had a customer who wanted to purchase 20 to 25 pounds of marijuana. Taylor responded that he could fill the order, and he told Petitioner to call him when the buyer was available.

After receiving a call from Petitioner, Taylor put two garbage bags of marijuana in the trunk of his van and brought Earl Riley with him. Taylor and Riley met Petitioner and the customer, but the deal fell

through when the customer said he did not have the funds.

Soon thereafter, Petitioner called Taylor again and told him that the customer had been suspicious, but that he had the money and was ready to complete the transaction. Taylor suggested a new meeting place. Taylor and Riley drove to the location, and they met Petitioner and the customer who arrived in a sedan. Riley placed the two garbage bags of marijuana in the trunk of the sedan and then returned to Taylor's car. Taylor called Petitioner on his cell phone, and Petitioner told him that he was counting the money.

Petitioner then approached and climbed into the back seat of Taylor's car. Petitioner said there might be a problem with the "ounces." When Taylor turned in his seat to respond, Petitioner produced a gun and started shooting. Blood splattered on the window, and Riley slumped forward again the dashboard. Taylor felt himself get shot in the neck. He then saw Petitioner's customer run up from the sedan and start shooting into his car as well. Taylor was shot multiple times, but he survived. Riley was shot in the head and died of his wounds. The police received a "shots fired" call at 11:25 p.m.

The case against Petitioner relied on Taylor's identification of Petitioner; there were no eyewitnesses to the shooting or other evidence presented to link Petitioner to the crime presented at trial. The defense did not present any witnesses.

Following arguments, instructions, and deliberations, the jury returned a verdict of guilty on all counts. The trial court subsequently sentenced Peti-

tioner to mandatory life in prison for the murder conviction, 50-to-100 years for the assault conviction, and lesser terms for the firearm convictions.

Petitioner filed an appeal of right in the Michigan Court of Appeals. His appointed appellate counsel filed a brief that raised four claims:

> I. Defendant was denied due process when gory pictures were introduced into evidence.
>
> II. Defendant was denied due process when evidence of prior, uncharged, crimes were admitted into evidence.
>
> III. Defendant was deprived of due process when the court denied his motion for a new trial.
>
> IV. Defendant was denied of due process when the prosecutor discussed penalty.

Petitioner also filed a pro se supplemental brief that raised three additional claims:

> I. Defendant was deprived of the effective assistance of counsel where trial counsel created a conflict of interest during the trial proceedings which infringed upon defendant's right to testify on his own behalf, as well as his right to confrontation. Counsel was equally ineffective for failure to present defendant's alibi defense, investigate supportive leads, and for failure to object to the trial court's defective instructions on reasonable doubt.
>
> II. The trial court deprived defendant of his Sixth and Fourteenth Amendment rights to a fair trial where the court gave a defective reasonable doubt instruction which permitted the jury to

find guilt based on a degree of proof below that required by the due process clause.

III. Defendant was denied his state and federal constitutional right to due process where the prosecutor knowingly presented false testimony. At a minimum, defendant is entitled to a remand for an evidentiary hearing.

Petitioner also filed a motion to remand in the Michigan Court of Appeals seeking an evidentiary hearing on his claim of ineffective assistance of counsel. Though the motion references an attached offer of proof and affidavit from Petitioner, no such supporting documents appear to have been included with the filing. The Michigan Court of Appeals denied the motion for remand under MICH. CT. R. 7.211(C)(1).

The Michigan Court of Appeals thereafter affirmed Petitioner's convictions in an unpublished opinion. *People v. Hawkins,* 2006 Mich. App. LEXIS 3077 (Mich. Ct. App. Oct. 19, 2006).

Petitioner filed an application for leave to appeal in the Michigan Supreme Court and raised the same seven claims that had been presented to the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal. *People v. Hawkins,* 728 N.W.2d 418 (Mich. 2006).

Petitioner then filed the instant petition for writ of habeas corpus in which he raises the same claims that he presented to the state courts during his direct appeal.

III. Standard of Review

Review of this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pursuant to the AEDPA, Petitioner is entitled to a writ of habeas corpus only if he can show that the state court's adjudication of his claims on the merits-

> (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). Simply stated, under section 2254(d), Petitioner must show that the state court's decision "was either contrary to, or an unreasonable application of, [the Supreme] Court's clearly established precedents, or was based upon an unreasonable determination of the facts." *Price v. Vincent*, 538 U.S. 634, 639 (2003).

A state court's decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A state court's decision is an "unreasonable application of" clearly established federal law "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 prisoner's case." *Id*. at 413. A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

IV. Discussion

A. Inflammatory Photographs

Petitioner first claims that the admission of gory photographs rendered his trial fundamentally unfair in violation of due process. Specifically, Petitioner challenges the admission of several photographs depicting the physical condition of the surviving victim, Taylor, while he was hospitalized. The trial court admitted the photographs over defense counsel's objection. Respondent asserts that the claim is not cognizable.

It is "not the province of a federal habeas court to reexamine state-court determinations on state-court questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). A federal court is limited in federal habeas review to deciding whether a state-court conviction violates the Constitution, laws, or treaties of the United States. *Id*. Thus, errors in the application of state law, especially rulings regarding the admissibility of evidence, are usually not questioned by a federal habeas court. *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000); *see also Stephenson v. Renico*, 280 F.Supp.2d 661, 666 (E.D. Mich. 2003).

The Michigan Court of Appeals addressed this issue and rejected it on the merits:

> Defendant argues that the trial court violated his due process rights in admitting photographs of Jason Taylor in the hospital. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich. 272, 278; 662 N.W.2d 12 (2003). Photographs are admissible if they are relevant under MICH. R. EVID. 401 and their probative value is not substantially outweighed by the danger of unfair prejudice under MICH. R. EVID. 403. *People v. Mills*, 450 Mich. 61, 66, 75; 537 N.W.2d 909, *mod* 450 Mich. 1212 (1995). Defendant was charged with assault with intent to murder Taylor, so his intent to kill was directly at issue in the case. Evidence of the type, placement, and number of injuries bears on a defendant's intent to kill. *See id*. at 71-72. However, MICH. R. EVID. 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Under the circumstances, defendant fails to demonstrate that the danger of unfair prejudice substantially outweighed the probative value of the photographs. The photographs are not particularly grisly or provocative, and like the photographs in *Mills*, they accurately represented Taylor's injuries. *Mills, supra* at 77. Therefore, the trial court did not abuse its discretion in admitting the photographs of Taylor at the hospital.

Hawkings, *supra*, at 2-3.

The Court of Appeals determined that allowing the pictures of the victim to be admitted into evidence was not an abuse of discretion. A habeas review is very deferential to the findings of the lower state courts. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Without, at a minimum, an abuse of discretion, there cannot be a violation of fundamental fairness. Petitioner must show that "the state trial court's evidentiary ruling was 'so egregious' that it effectively denied [him] a fair trial. *Fleming v. Metrish*, 556 F.3d 520, 535 (6th Cir. 2009) (*citing Baze v. Parker*, 371 F.3d 310, 324 (6th Cir. 2004)).

The admission of the photograph was not fundamentally unfair. The photographs were relevant to the issue of Petitioner's intent, and the Michigan Court of Appeals noted that they were not particularly provocative. The Sixth Circuit has found no due process violation in far more extreme cases involving photographs of murder victims. *See, e.g. Biros v. Bagley*, 422 F.3d 379, 391 (6th Cir. 2005) (holding that admission of photographs depicting murder victim's severed head, her severed head held near her torso and severed breast, and her torso with her severed head and severed breast replaced on torso, did not deprive defendant of fair trial, and thus did not warrant federal habeas relief).

The Court concludes that the state court adjudications of this issue was not contrary to, or an unreasonable application of clearly established Supreme Court precedent. Petitioner is not entitled to habeas relief regarding this claim.

B. Evidence of Prior Bad Acts

Petitioner next claims that the admission of evidence that Petitioner engaged in prior marijuana transactions with Taylor amounted to the admission of prior-bad-acts evidence contrary to MICH. R. EVID. 404(b). Defense counsel made no objection to the admission of this evidence at trial. Accordingly, when the unpreserved claim was presented to the Michigan Court of Appeals, it limited its review to the "plain error" standard. Respondent asserts that this adjudication resulted in a procedural bar to habeas review.

Federal habeas relief may be precluded on claims that a petitioner has not presented to the state courts in accordance with the state's procedural rules. *Wainwright v. Sykes*, 433 U.S. 72, 85-87 (1977). Such a procedural default occurs when a petitioner fails to comply with a state procedural rule, the rule is relied upon by the state courts, and the procedural rule is "adequate and independent." *White v. Mitchell*, 431 F.3d 517, 524 (6th Cir. 2005). Procedural default may be excused where the petitioner demonstrates cause and prejudice for his failure to comply with the state procedural rule, or when a petitioner establishes that failing to review the claim would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Combs v. Coyle*, 205 F.3d 269, 274 (6th Cir. 2000).

Petitioner's prior-bad-acts claim was procedurally defaulted by virtue of his failure to object to the introduction of the evidence of prior drug transactions in the trial court which resulted in appellate

review under the more restrictive "plain error" standard. It is well-established that the Michigan Court of Appeals' application of plain-error review constitutes the invocation of an independent and adequate procedural rule that bars federal review of the merits of his claim absent a showing of "cause and prejudice." *Fleming v. Metrish*, 556 F.3d 520, 524 (6th Cir. 2009).

Even if Petitioner were to establish cause to excuse his default, his showing of prejudice would fall short because his defaulted claim does not present a cognizable issue. *See Bey v. Bagley*, 500 F.3d 514, 519 (6th Cir. 2007). The admission of other acts evidence against Petitioner at his state trial does not entitle him to habeas relief because there is no clearly established Supreme Court law which holds that a state violates a habeas petitioner's due process rights by admitting such evidence. *Bugh v. Mitchell*, 329 F. 3d 496, 512 (6th Cir. 2003); *Adams v. Smith*, 280 F. Supp. 2d 704, 716 (E.D. Mich. 2003). Morever, appraisals of the probative and prejudicial value of evidence are entrusted to the sound discretion of a state trial court judge, and a federal court considering a habeas petition must not disturb that appraisal absent an error of constitutional dimensions. *See Dell v. Straub*, 194 F. Supp. 2d 629, 645 (E.D. Mich. 2002).

The chief concern in admitting prior acts evidence is that the jury will conclude that the defendant has a propensity to commit the type of crime for which he is standing trial. But in the present case, evidence that Petitioner and Taylor had engaged in prior marijuana transactions did not suggest a propensity to rob and murder drug dealers. Indeed, defense counsel used the evidence of prior successful

and mutually profitably marijuana transactions between Petitioner and Taylor to demonstrate that Petitioner did not have a motive to kill Taylor and lose the benefit of their partnership. Accordingly, Petitioner fails to show that the trial court's admission of this evidence deprived him of his fundamental right to a fair trial or resulted in any other violation of his constitutional rights. Petitioner is not entitled to habeas corpus relief with respect to this claim.

C. Denial of Motion for Mistrial

Petitioner next claims that the trial court erroneously denied his motion for a mistrial when a police officer testified that Petitioner had fled Michigan following the crime. Specifically, Michigan State Trooper Steven Kramer testified that he was part of the Alliance Fugitive Taskforce. He testified that he was in the process of filing a federal flight warrant when he located Petitioner at a federal correctional facility in Kentucky. Defense counsel moved for a mistrial, arguing that the trooper's testimony unfairly implied that Petitioner had fled Michigan. The trial court denied the motion. Petitioner raised the issue again during his appeal of right, but the Michigan Court of Appeals denied the claim on the merits:

> Defendant next argues that the trial court violated his due process rights in denying his motion for mistrial on the basis of Michigan State Trooper Steven Kramer's testimony, which implied that defendant fled the jurisdiction. We disagree. Appellate courts review for abuse of discretion a trial court's denial of a motion for mistrial. *People*

> *v. Cress*, 468 Mich. 678, 691; 664 N.W.2d 174 (2003). Although Kramer testified that he was in the process of filing a federal flight warrant for defendant, he explained that it was not necessary because defendant had been detained. Therefore, any prejudice from the testimony was necessarily minor, and the trial court was in the best position to determine the effect on the jury. *People v. Grove*, 455 Mich. 439, 476; 566 N.W.2d 547 (1997). We also note that the trial court denied the prosecutor's request for a jury instruction on flight. We defer to the trial court's determination that the evidence did not warrant a new trial. *Id.*

Hawkins, *supra*, at 4-5.

Petitioner essentially argues that the trooper's testimony was not admissible as evidence of flight under Michigan law because he had been ordered to present himself to federal authorities in Kentucky. To the extent Petitioner's argument is based upon an alleged misapplication of state law, he has failed to state a claim upon which habeas relief may be granted. *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). A question concerning a perceived error of state law serves as a basis for habeas corpus relief only when the petitioner is denied fundamental fairness in the trial process. *Estelle, supra.* The rulings by a state's highest court with respect to state law are binding on the federal courts. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). Furthermore, the Supreme Court has "reemphasize[d] that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle*, 502 U.S. at 68.

The federal courts are bound by decisions of an intermediate state appellate court unless convinced that the highest state court would decide the issue differently. *Olsen v. McFaul*, 843 F.2d 918, 929 (6th Cir. 1988).

To the extent that Petitioner asserts that his federal constitutional rights were violated, his claims are without merit. Under established federal law, a trial court has the discretion to grant or deny a motion for mistrial in the absence of a showing of manifest necessity. *Walls v. Konteh*, 490 F.3d 432, 436 (6th Cir. 2007); *Clemmons v. Sowders*, 34 F.3d 352, 354-55 (6th Cir. 1994). In *Gori v. United States*, 367 U.S. 364, 368-69 (1961), the Supreme Court, quoting Justice Story, emphasized that the scope of a trial judge's discretion with regard to declaring a mistrial is broad:

> [T]he law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.

Gori, 367 U.S. at 368-69 (*quoting United States v. Perez*, 22 U.S. 579 (1824)).

The Michigan Court of Appeals deferred to the trial court's determination that the evidence did not necessitate a mistrial. While it was the prosecutor's theory that Petitioner turned himself in to federal authorities on another warrant for the purpose of avoiding arrest on the murder charge, the trial court ultimately did not instruct the jury on evidence of flight as probative of consciousness of guilt. The jury was informed that Petitioner had been located in a federal facility for an unspecified reason. Because the jury already knew, at a minimum, that Petitioner was engaged in narcotics trafficking, this information was not particularly harmful to his defense. It did not create that type of urgent circumstance that necessitated the granting of a mistrial. The Michigan Court of Appeals decision to reject this claim on the merits was therefore not objectively unreasonable.

D. Prosecutor's Comment Regarding Penalty

Petitioner next claims that the prosecutor committed misconduct when she referred to the fact that Michigan does not have the death penalty during her closing argument. Specifically, during her closing argument the prosecutor commented on the circumstances of Riley's death:

> Earl Riley made a wrong choice. He knew that he was there as a back up for a late night drug deal. But I want you to tell me what did Earl Riley do to get executed? How was Earl Riley a threat to defendant?
>
> Dax Hawkins didn't bring him into this world. Dax Hawkins has no right to take him

> out of this world. What was Earl Riley's crime?
>
> We don't have a death penalty here in Michigan, ladies and gentlemen. I don't care if you have a room full of marijuana that fills up this courthouse, you still don't get a death penalty for that. Trial Tr. 4-6-05, at 111.

The Michigan Court of Appeals addressed this claim on the merits and found that the comment did not inject the issue of penalty into the trial:

> Defendant argues that the prosecutor committed misconduct during her closing argument by explaining, incidentally, that Michigan does not permit the death penalty. We disagree. "Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo." *People v. Abraham*, 256 Mich. App. 265, 272; 662 N.W.2d 836 (2003). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial . . . ." *Id*. Generally, jurors may not consider the sentencing ramifications of their verdict. *People v. Goad*, 421 Mich. 20, 27, 36; 364 N.W.2d 584 (1984). Therefore, a prosecutor's intentional reference to the death penalty's applicability is an improper statement that amounts to misconduct.
>
> However, defendant fails to demonstrate that the prosecutor intended to inject the issue of defendant's penalty into the trial. Taken in context, the prosecutor directed the improper reference to Riley's "execution," and

> presented the rhetorical question of what misdeed Riley could have committed to warrant defendant's infliction of such a severe penalty. The argument accurately stated the law, and the prosecutor limited the argument somewhat to the victim's possession of marijuana. Because the prosecutor did not directly link the lack of death penalty to defendant's murder charges, the effect of the prosecutor's improper reference is questionable. Moreover, although the trial court overruled defendant's objection, it immediately responded that the prosecutor was not discussing defendant's potential penalty, but arguing his guilt. The trial court explained that the prosecutor's comments were pure argument and offered that "I don't think that has anything to do with this case." The prosecutor immediately redirected the jury to the case's facts and away from the penalty issue. The trial court later instructed the jury not to consider the potential sentence or penalty. Under the circumstances, the trial court ameliorated much of the prejudice caused by the prosecutor's argument, and, assuming arguendo that the error rose to a constitutional level, it was not structural and was harmless beyond a reasonable doubt. *People v. Bauder*, 269 Mich. App. 174, 179-180; 712 N.W.2d 506 (2005).

Hawkins, *supra*, at 5-7.

The United States Supreme Court has stated that prosecutors must "refrain from improper methods calculated to produce a wrongful conviction."

Berger v. United States, 295 U.S. 78, 88 (1935). When a petitioner seeking habeas relief makes a claim of prosecutorial misconduct, the reviewing court must consider that the touchstone of due process is the fairness of the trial, not the culpability of the prosecutor. On habeas review, a court's role is to determine whether the conduct was so egregious as to render the entire trial fundamentally unfair. *Serra v. Michigan Department of Corrections*, 4 F. 3d 1348, 1355-1356 (6th Cir. 1993). When analyzing a claim of prosecutorial misconduct, a court must initially decide whether the challenged statements were improper. *Boyle v. Million*, 201 F. 3d 711, 717 (6th Cir. 2000). If the conduct is improper, the district court must then examine whether the statements or remarks are so flagrant as to constitute a denial of due process and warrant granting a writ. *Id.* In evaluating prosecutorial misconduct in a habeas case, consideration should be given to the degree to which the challenged remarks had a tendency to mislead the jury and to prejudice the accused, whether they were isolated or extensive, whether they were deliberately or accidentally placed before the jury, and, except in the sentencing phase of a capital murder case, the strength of the competent proof against the accused. *Serra,* 4 F. 3d at 1355-56; *See also Simpson v. Warren,* 662 F. Supp. 2d 835, 853 (E.D. Mich. 2009).

When a jury has no sentencing function, it should "reach its verdict without regard to what sentence might be imposed." *See Shannon v. United States*, 512 U.S. 573, 579 (1994) (*citing Rogers v. United States*, 422 U.S. 35, 40 (1975)). Consequently, it is arguably improper for a prosecutor to comment on a defendant's possible punishment during the

guilt phase of a trial. *See United States v. Bennett*, 47 Fed. Appx. 844, 846 (9th Cir. 2002).

The Michigan Court of Appeals' decision that the comment did not render Petitioner's trial fundamentally unfair is neither contrary to Supreme Court precedent nor an unreasonable application of federal law. The prosecutor's comment did not allude to any punishment Petitioner would receive if found guilty, but rather it characterized the crime itself as an unjust imposition of the death penalty on Riley for his dealing in drugs. The prosecutor did not make an improper reference to possible penal consequences for Petitioner, and in fact, the trial court instructed the jury that they should not consider possible penalties in reaching a verdict. Even if the comment could be construed as a reference to the penalty Petitioner would face, it was isolated in nature, did not tend to mislead the jury, and did not prejudice Petitioner given the curative instructions. The prosecutor's comment did not render Petitioner's trial fundamentally unfair. Habeas relief is not warranted on this claim.

E. Ineffective Assistance of Trial Counsel

Petitioner next asserts that he was denied the effective assistance of trial counsel. Petitioner alleges that he had a viable alibi defense that his trial counsel refused to present at trial despite Petitioner's insistence that he do so.

Petitioner appended his own affidavit along with the affidavits of Eric Gibson and Adan Knowles to his petition. The affidavits purport to account for Petitioner's whereabouts on the night of the crime. Pe-

titioner claims that he was at the Locker Room bar from about 7:45 to 8:30 p.m. with Nikia Brockington, Charmaine Wright, and a woman with the first name of Maria. From there, Petitioner claims that he went to Baker's Lounge, and then finally to the Club.com bar, where he stayed until 1:30 a.m. At the last establishment, Petitioner asserts he was with Nyree Phillips, Eric Gibson, and Adam Knowles, and he remembers being served by a waitress named Anasia.

Petitioner asserts that he vehemently disagreed with his trial counsel's strategy of conceding that Petitioner was in the victims' car, but claiming that Taylor falsely accused Petitioner of participating in the crime. Petitioner acknowledged that Charmaine, Nikia, and Maria had some connection with Taylor that led to them to not cooperate with the defense investigator. He claims that he learned from Nyree Phillips that the defense investigator did not meet with his other alibi witnesses because he could not arrange a time to meet with them all as a group. Petitioner lastly asserts that defense counsel failed to obtained security videotapes from the bars and failed to use cell phone records that would have corroborated his alibi defense.

The Michigan Court of Appeals rejected the claim on the merits by essentially finding that the claim was based on evidence outside of the record, and because Petitioner had failed to secure an evidentiary hearing on the claim prior to the court's review:

> Defendant next claims that he was deprived of effective assistance of counsel by a

conflict of interest created when trial counsel employed a strategy that involved placing defendant at the scene of the shooting. We disagree. Because a *Ginther* [*People v. Ginther*, 390 Mich. 436; 212 N.W.2d 922 (1973)] hearing was never conducted, our review is limited to mistakes apparent on the record. *People v. Riley* (After Remand), 468 Mich. 135, 139; 659 N.W.2d 611 (2003). When claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v. Smith*, 456 Mich. 543, 556-557; 581 N.W.2d 654 (1998). Although defendant asserts that there was a conflict between his counsel's strategy and his own version of events, there is no evidence in the lower court record to support this assertion. Therefore, defendant has failed to show that trial counsel was ineffective because of an actual conflict of interest.

Similarly, defendant contends that trial counsel was ineffective in failing to pursue an alibi defense or call an endorsed witness, a Nextel representative, to testify. Defense counsel stated that he had investigated the alibi witnesses and found that none of them were cooperative. Counsel confirmed that defendant agreed with the decision not to call alibi witnesses Nikia Brockington, Adan Knowles, Eric Gibson, and Nyree Phillips, to testify at trial. Defendant stated his assent on the record, thereby waiving any error. *See*

People v. Carter, 462 Mich. 206, 215-216; 612 N.W.2d 144 (2000). Likewise, defendant fails to demonstrate any prejudice from his trial counsel's strategic decision to waive presentation of the Nextel representative. Where counsel's conduct involves a choice of strategies, it is not deficient. *See People v LaVearn*, 448 Mich. 207, 216; 528 N.W.2d 721 (1995). The fact that a particular strategy is not successful does not demonstrate that counsel was ineffective. *People v. Matuszak*, 263 Mich. App. 42, 61; 687 N.W.2d 342 (2004).

Defendant also contends that his alibi could have been supported by Charmain Wright, a woman named Maria, the proprietor of a nightclub, and the surveillance camera from a nightclub that defendant claims to have visited at the time of the shootings. However, these witnesses were never provided on a notice of alibi or discussed on the record, and there is no mention of the surveillance camera on the record. Our review is limited to mistakes apparent on the record, which provides no support for defendant's assertions. *See Riley, supra* at 139. Therefore, defendant's claim of ineffective assistance of counsel fails.

> Defendant also claims that counsel deprived him of his right to testify. However, defendant fails to present any evidence that his trial counsel coerced his decision not to testify, and the right is waived, "if defendant, as in this case, decides not to testify or acquiesces in his attorney's decision that he not testify. . . ." *People v. Simmons*, 140 Mich. App. 681, 684-685; 364 N.W.2d 783 (1985).

Hawkins, *supra*, at 7-10.

1. The Effect of Petitioner's Affidavits

When Petitioner presented his ineffective assistance of counsel claim to the Michigan Court of Appeals and Michigan Supreme Court, he did not support it with the three affidavits that he has appended to the present petition. The failure to so support his claim in the state court restricts the scope of review of his claim in this Court.

Petitioner's own affidavit is labeled "Affidavit and Offer of Proof" and it bears the caption and case number for his state court appeal of right. Both Petitioner's supplemental pro se brief and his motion to remand filed in the Michigan Court of Appeals make reference to an "Affidavit and Offer of Proof" to support the ineffective assistance of counsel claim. The affidavit and motion to remand both appear to be dated March 9, 2006. Respondent's Notice of Filing Rule 5 Material (dkt. 6) states that it includes "Michigan Court of Appeals 262677." Yet the affidavit does not appear in the state court record filed by Respondent. Petitioner's application for leave to appeal filed in the Michigan Supreme Court makes refer-

ence to his affidavit as well, but the affidavit is also absent from that portion of the state court records.

The Michigan Court of Appeals denied Petitioner's motion to remand for an evidentiary hearing on his ineffective assistance of counsel claim with citation to Michigan Court Rule 7.211(C)(1). Among other things, that rule provides that a motion to remand "must be supported by affidavit or offer of proof regarding the facts to be established at a hearing." Accordingly, it appears to the Court that Petitioner's "Affidavit and Offer of Proof" - perhaps through inadvertence or neglect - was never filed in the state courts; it does not appear in the state court record, and none of the state court decisions refer to it.

The situation is clearer with respect to the affidavits of Eric Gibson and Adan Knowles. Gibson's affidavit is dated April 27, 2007, and Knowles's affidavit is dated April 26, 2007. These affidavits were executed after the Michigan Supreme Court denied leave to appeal in Petitioner's case on March 26, 2007. Accordingly, they could not have been presented to the state courts.

AEDPA restricts the ability of a district court to consider evidence presented in support of a habeas claim that was not first presented to the state courts. 28 U.S.C. § 2254(e)(2) states that if an applicant for a writ of habeas corpus has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claim.

Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim by a habeas petitioner is not established unless there is a lack

of diligence, or some greater fault, attributable to the prisoner or prisoner's counsel. *Williams v. Taylor*, 529 U.S. 420, 432 (2000). Diligence will require that the petitioner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law. *Id.* at 435. If a defendant's request for an evidentiary hearing in the state courts is denied because of his failure to abide by the state law requirement that he support his request with affidavits or other evidentiary proffers, he was not met the "diligence" requirement of § 2254(e)(2). *See Cooey v. Coyle*, 289 F. 3d 882, 893 (6th Cir. 2002)("By failing to submit evidence [to the state court], Cooey barred himself from developing the claim further, and is not now entitled to an evidentiary hearing.")

As noted by the Michigan Court of Appeals in this case, Michigan has a requirement that a request for an evidentiary hearing be supported by an adequate offer of proof. MICH. CT. R. 7.211(C)(1). Under this rule, a motion to remand must be supported by affidavit or offer of proof regarding the facts to be established at a hearing. Petitioner's failure to make a sufficient offer of proof as required by this rule renders his attempt to develop the factual basis of his claim less than diligent under § 2254(e)(2). See *Moore v. Berghuis*, No. 00-CV-73414, 2001 U.S. Dist. LEXIS 3025, 2001 WL 277047, at *7 (E.D. Mich. Feb. 28, 2001) (Steeh, J.). Petitioner's own failure to ensure that his affidavit was filed along with his motion to remand is attributable to him and not the state. Therefore, Petitioner is barred from enlarging the record with the three affidavits attached to his petition or from obtaining a hearing to offer other evidence in support of his claim.

2. The Merits of Petitioner's Claim

To show that Petitioner was denied the effective assistance of counsel under federal constitutional standards, he must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must prove that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed by the Sixth Amendment. *Id*. at 687. Second, the petitioner must establish that the deficient performance prejudiced the defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial or appeal. *Id*.

With respect to the performance prong, a petitioner must identify acts that were "outside the wide range of professionally competent assistance" in order to prove deficient performance. *Id.* at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id*. at 689. The court must recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690.

To satisfy the prejudice prong under *Strickland*, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Id*. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id*. "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of

the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *McQueen v. Scroggy*, 99 F.3d 1302, 1311-12 (6th Cir. 1996). Under *Strickland*, a court must presume that decisions by counsel as to whether to call or question witnesses are matters of trial strategy. *See Hutchison v. Bell*, 303 F.3d 720, 749 (6th Cir. 2002).

Because Petitioner's claim is dependant on facts not contained in the record, there is no basis for concluding that the state court adjudication of the claim involved an unreasonable application of this standard. Moreover, the existing record contradicts Petitioner's claim that his trial counsel deficiently neglected to raise an alibi defense. On the first morning of trial, the prosecutor objected to the Alibi Notice on the grounds that it did not list contact information for the four listed witnesses - Brockington, Knowles, Gibson, and Phillips - nor describe the location of Club.com. Defense counsel responded by stating that it was no longer planing to call these witnesses. He stated "I investigated it and saw that none of them were cooperative." Tr. 4-4-05, at 3-4. Then at the close of the prosecutor's case, defense counsel again indicated to the court that he had submitted a witness list, but stated "I already put on the record at the beginning of the case that I wasn't planning on calling them. And I want to confirm with Mr. Hawkins his agreement that I'm not to call them." Petitioner indicated his agreement. T 4-6-05, at 76-77. With respect to the cell phone records, a representative from Nextel was listed on the prosecutor's witness list. The prosecutor stated that her remaining endorsed witnesses would be cumulative, and defense counsel agreed to waive them. Id., at 75.

Accordingly, this is not a case where defense counsel failed to investigate the potential of presenting an alibi defense. Defense counsel filed a notice of alibi, listing four of the witnesses Petitioner claims should have been called. The notice of alibi listed the bar, Club.com, as the location Petitioner claimed to be when the crime occurred. But defense counsel represented to the court that the witnesses were not cooperative, and Petitioner stated on the record that he agreed with the decision not to call them.

The existing record does not support Petitioner's claim. If anything, the record indicates that Petitioner's purported alibi witnesses were not willing to cooperate with defense counsel. Even Petitioner hints at this fact in his affidavit where he acknowledges that several of the witnesses had some connection with Taylor and were not willing to cooperate with defense. Furthermore, Petitioner stated on the record at the close of the prosecutor's case that he agreed not to call any witnesses. While Petitioner's on-the-record consent may not insulate defense counsel's decision from review, it does belie Petitioner's allegation that he was vehement about presenting an alibi defense. Petitioner has not and cannot overcome the presumption that defense counsel's decision to forego an alibi defense in favor of the defense that was presented was not the product of a legitimate strategic decision.

The same holds true for counsel's failure to call Petitioner as witness in his own defense. When a tactical decision is made by an attorney that a defendant should not testify, the defendant's assent is presumed. *Gonzales v. Elo*, 233 F. 3d 348, 357 (6th Cir. 2000). A trial court has no duty to inquire sua sponte

whether a defendant knowingly, voluntarily, or intelligently waives his right to testify. *United States v. Webber*, 208 F. 3d 545, 551-52 (6th Cir. 2000). Waiver of the right to testify may be inferred from a defendant's conduct. Here, Petitioner did not alert the trial court at the time of trial that he wanted to testify. Thus, his failure to do so constitutes a waiver of this right. *Id*. Because the record is void of any indication by Petitioner that he disagreed with counsel's advice that he should not testify, Petitioner has not overcome the presumption that he willingly agreed to counsel's advice not to testify or that his counsel rendered ineffective assistance of counsel. *Gonzales*, 233 F. 3d at 357.

Given the limitations of review created by Petitioner's failure to support his claim factually in the state courts, the adjudication of this claim by the Michigan Court of Appeals did not involve an unreasonable application of clearly established Supreme Court law.

F. Reasonable Doubt Jury Instruction

Petitioner next claims that the jury instructions diminished the beyond-a-reasonable-doubt standard. He also claims that his trial counsel was ineffective for failing to object to the jury instruction on these grounds. Respondent asserts that the claim is procedurally defaulted because the instruction was not objected to at trial.

While the procedural default doctrine precludes habeas relief on a defaulted claim, it is not jurisdictional. See *Trest v. Cain*, 522 U.S. 87, 89 (1997). Thus, while a procedural default issue should ordi-

narily be resolved first, "judicial economy sometimes dictates reaching the merits of [a claim or claims] if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated." *Barrett v. Acevedo*, 169 F.3d 1155, 1162 (8th Cir. 1999) (internal citations omitted). Here because review of Petitioner's jury instruction claim is intertwined with his ineffective assistance of trial counsel claim, the Court will proceed to the merits of the claim.

The Supreme Court has held that "[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). However, "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is 'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (*quoting Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). The Supreme Court has held "the defendant must show both that the instruction was ambiguous and that there was 'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Waddington v. Sarausad,* 129 S.Ct. 823, 831, 172 L. Ed. 2d 532 (2009) (*quoting Estelle*, 502 U.S. at 72).

"[S]o long as the court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising

the jury of the government's burden of proof. Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.'" *Victor v. Nebraska*, 511 U.S. 1, 5 (1994))(citations omitted) (alterations in original).

The trial court defined the prosecutor's burden of proof as follows:

> Oh, I'm sorry. I forgot something. Sit back down again.
>
> I forgot to tell you that the standard of proof, of course, is proof beyond a reasonable doubt. That is the standard.
>
> So what you're asked to do is use reason and common sense. Reasonable doubt, a doubt for which you can assign a reason for having.
>
> Now, a reasonable doubt is not a flimsy, or vain, or imaginary doubt. It's not a hunch, a feeling, a possibility of innocence, or a theory that may arise in your mind.
>
> It is a fair, honest, and reasonable doubt. The kind of a doubt that would make you hesitate before making an important decision.
>
> If you have a doubt, you must have a reason for having that doubt. It's not a flimsy or imaginary doubt.
>
> If you can say that you have an abiding conviction to a moral certainty that the People have met their proofs and you have no

reasonable doubt, you bring back a verdict of guilty.

If you don't have a reasonable doubt - I'm sorry, if you have a reasonable doubt, bring back a verdict of not guilty.

If you have no reasonable doubt, then bring back a verdict of guilty.

Now again, the People do not have to prove this case to you beyond all doubt. They don't have to prove it to you beyond a shadow of a doubt, which I'm sure most of you have heard before. It's reasonable doubt.

Now, what you're asked to do is to bring your everyday common sense, and your everyday experiences with you into the jury room. You don't leave it outside the door. You apply your everyday common sense and reasonableness when you're reviewing the evidence.

And what we're asking you to do is use your common sense, review the evidence, and draw conclusions.

And again, a reasonable doubt is not a flimsy, or vain, imaginary, or fictitious doubt. Or a hunch, or a feeling, or a possibility of innocence. It's a fair, honest and reasonable doubt. The kind of a doubt that you should have a reason for having. Tr. 4-7-05, at 30-32.

Petitioner identifies three flaws with this instruction. First, he asserts that the trial court failed to instruct the jury that a reasonable doubt can arise from a *lack* of evidence, whereas the jury was in-

structed to consider only their common sense and review of the evidence. Next, Petitioner asserts that a reasonable doubt was erroneously limited to doubts to which the jury could *assign a reason*. Finally, Petitioner asserts that the court erroneously equated the level of certainty to satisfy the standard with an *abiding conviction to a moral certainty*.

1. Lack of Evidence

Petitioner first contends that the trial court gave a defective reasonable doubt instruction because it instructed the jurors that "you apply your everyday common sense and reasonableness when you're reviewing the evidence. And what we're asking you to do is use your common sense, review the evidence, and draw conclusions." Petitioner complains that the jury was not specifically told that they could also consider the *lack* of evidence in drawing their conclusions. The fact that the trial court did not instruct the jurors that a reasonable doubt could arise from a lack of evidence does not render the instruction infirm. *See United States v. Diaz*, 176 F.3d 52, 101-02 (2nd Cir. 1999);*United States v. Rogers*, 91 F.3d 53, 56-57 & n. 2 (8th Cir. 1996); *United States v. Baskin*, 280 U.S. App. D.C. 366, 886 F. 2d 383, 388 (D.C. Cir. 1989); *Ashe v. United States*, 288 F.2d 725, 730 (6th Cir. 1961). Indeed, "[T]hat a lack of evidence may cause one to have a reasonable doubt is self-evident." *Rogers*, 91 F. 3d at 57.

2. Assigning a Reason to Doubt

Next, the trial court defined a reasonable doubt as one to which a reason can be assigned. The Sixth Circuit has not ruled on this specific language. But the Second Circuit, reviewing similar - but more problematic - language, has said that "instructing a jury that a reasonable doubt is 'a doubt for which some good reason can be given' fundamentally misstates the reasonable doubt standard." *Chalmers v. Mitchell*, 73 F.3d 1262, 1274 (2d Cir. 1996) (emphasis added). The Fifth Circuit, on the other hand, although having recorded its "reservations" about so-called "articulation" language that appears to require a "serious doubt for which [a juror] could give a good reason," *see, e.g., Humphrey v. Cain*, 120 F.3d 526, 529 (5th Cir. 1997) ("*Humphrey I*"); *reasoning adopted by Humphrey v. Cain*, 138 F.3d 552, 553 (5th Cir. 1998) (en banc) ("*Humphrey II*") (emphasis added), has nonetheless repeatedly observed that "the Supreme Court has never expressed disfavor with such language." *Muhleisen v. Ieyoub*, 168 F.3d 840, 844 (5th Cir. 1999).

Here, the trial court's instruction is distinct from the instructions criticized in the Second and Fifth Circuits in two ways: first, there is no normative qualifier, i.e., "good" or "serious," attached to the contemplated "reason"; second, inviting a juror to picture a "reason" for doubt that he or she might merely "have" is rather different from suggesting that there might be a "reason" that the juror can "give" during deliberations. Indeed, the Fifth Circuit, in *Humphrey I*, focused its concern not on the concept of an abstract "reason," but on a juror potentially being called on to "give" a reason - and not just any reason,

but a "good" or "serious" one. The court explained that "inarticulate and undecided jurors" might be "less likely to give defendants the benefit of their doubts" if they perceived the law as "requiring articulation of good reasons." *Humphrey I*, 120 F.3d at 531. The court explained its fear that "a juror favoring guilt would have a powerful tool if he could demand that undecided jurors articulate good reasons for considering an acquittal." *Id*.

If anything, the instruction that a reasonable doubt is merely "[a] doubt which you can assign a reason for having" without qualifying what is meant by "reason" seems rather circular. It does not suggest a requirement of any additional showings by the jurors. The complained of language did not require the jurors to actually identify (either expressly or mentally) the actual reason for their doubt, nor did it attempt to quantify such reason. Rather, the explanation in effect told the jurors that a reasonable doubt is one based in reason. Being capable of having a reason for one's doubt - without being called on to express or identify it - is merely the opposite of having a doubt that is "flimsy or imaginary" and is something very different from "a hunch, or a feeling."

This aspect of the instruction does not give rise to the fears expressed in *Humphrey I*, and it did not shift the burden of proof to the defense in contravention of Petitioner's Due Process rights.

3. Moral Certainty

Finally, Petitioner lastly asserts that the use of the term "moral certainty" in the reasonable doubt instruction impermissibly lowered the burden of

proof. In *Cage v. Louisiana*, 498 U.S. 39 (1990), the Supreme Court held that an instruction that defined reasonable doubt in terms of "grave uncertainty" and "actual substantial doubt," and required conviction based upon "moral certainty," could have been interpreted by a reasonable juror as allowing a finding of guilt based upon a degree of proof below that required by the Due Process Clause. *Cage*, 498 U.S. at 41 (1990). In reversing the conviction, the Supreme Court found that terms like "substantial" and "grave," in common parlance, "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Id*. When combined with the reference to "moral certainty," a reasonable juror could have been confused by the instruction and interpreted it to overstate the required degree of uncertainty. *Id*.

In *Victor, supra,* the Supreme Court limited its holding in *Cage*, and reasoned that the mere use of the term "moral certainty" in a jury instruction defining reasonable doubt by itself did not violate due process. The Court determined that the term "moral certainty," read in the context of the instruction in *Victor*, merely impressed upon the jury the need to reach a subjective state of near-certitude of guilt. The Court found no reasonable likelihood that the jury would have understood the phrase to be disassociated from the evidence in that case. *Victor*, 511 U.S. at 14-16. The Court also found that use of the term "moral certainty" in the Nebraska jury instruction on reasonable doubt did not violate due process because the jurors were further instructed that they had to have an abiding conviction as to the defendant's guilt; the instruction equated doubt sufficient

to preclude moral certainty with doubt that would cause a reasonable person to hesitate to act; and the jurors were told that they should be governed solely by the evidence introduced before them, without indulging in speculation, conjectures, or inferences not supported by the evidence. *Id*. at 21-22. The Court distinguished these jury instructions from the instruction found unconstitutional in *Cage*, noting that in *Cage* the instruction merely told the jury that they had to be morally certain of the defendant's guilt without any additional explanations that would give meaning to the phrase "moral certainty." *Id*.

The Sixth Circuit has held that the use of the term "moral certainty" does not automatically render a jury instruction on reasonable doubt fundamentally unfair. In *Austin v. Bell*, 126 F.3d 843, 847 (6th Cir. 1997), the Sixth Circuit Court of Appeals ruled that a reasonable doubt instruction which stated that moral certainty was required to convict the defendant on a criminal charge, did not impermissibly lower the burden of proof. The instruction in that case included an additional statement that reasonable doubt was engendered by "an inability to let the mind rest easily" after considering all of the proof in the case. *Id.* That language, the court believed, lent content to the phrase "moral certainty." *Id.* In context, the court concluded, the phrase did not create a reasonable likelihood that the jury impermissibly applied the jury instruction. *Id.*; *see also Cone v. Bell*, 243 F.3d 961, 971-72 (6th Cir. 2001), *reversed on other grounds by Bell v. Cone*, 535 U.S. 685 (2002).

The reasonable doubt instruction in this case correctly conveyed to the jurors the degree of certainty they must possess according to the Constitution

before they could convict. Like the acceptable jury instruction in *Victor*, the trial court's reasonable doubt instruction referred to an "abiding conviction" as to the defendant's guilt and equated doubt sufficient to preclude moral certainty with doubt causing jury members to "hesitate before making an important decision." The trial court also instructed the jury that the prosecutor carried the burden of proof, that Petitioner was presumed innocent, and that the presumption of innocence "starts at the beginning of the trial [and] goes into the jury room while you are deliberating"; and that the petitioner was not required to come forward with any evidence. Tr. 4-7-05, at 8-9. Accordingly, the use of the term "moral certainty" in the jury instruction did not dilute the prosecutor's burden of proof.

None of Petitioner's challenges to the reasonable-doubt instruction have merit. The jury was adequately instructed on the prosecutor's burden of proof. Petitioner is therefore not entitled to habeas relief on this claim.

G. Prosecutor's Presentation of False Testimony

Petitioner's last claim asserts that the prosecutor knowingly presented false testimony when she allowed Jason Taylor to testified about receiving phone calls from Petitioner on the night of the shooting and for allowing him to testify that he was shot in the hip. Petitioner alleges that phone records would prove that he did not call Taylor on the night of the shooting and medical records would show that Taylor was not shot in the hip.

"[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972) (internal quotation omitted). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). A conviction obtained by the knowing use of perjured testimony must be set aside "if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .'" *Giglio*, 405 U.S. at 154 (*quoting Napue*, 360 U.S. at 271); *see also United States v. Agurs*, 427 U.S. 97, 103 (1976). In order to prove this claim, a petitioner must show that (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false. *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1999).

Taylor testified that after he was shot in the neck, he slumped forward and felt a shot on the left side of his back. Tr. 4-5-05, at 43. The prosecutor had Taylor stand and indicate the locations of his wounds. Among his other wounds, Taylor apparently pointed to his right hip. Id., at 45. Petitioner alleges that Taylor's medical records do not indicate anything about a gunshot wound to the hip.

"While a prosecutor may not knowingly use perjured testimony, a prosecutor is not required to ensure that prosecution witnesses' testimony be free from all confusion, inconsistency, and uncertainty." *Jackson v. Lafler*, No. 06-CV-15676, 2009 U.S. Dist. LEXIS 39574, 2009 WL 1313316, *12 (E.D. Mich. May 11, 2009). The fact that a witness contradicts herself or changes her story does not establish per-

jury. *See United States v. Wolny*, 133 F.3d 758, 763 (10th Cir. 1998); *United States v. Lebon*, 4 F.3d 1, 2 (1st Cir. 1993). Here, there is no dispute that Taylor was shot multiple times while he was seated in the driver's seat of his car. The fact that his description of his various wounds might have been vague or inconsistent does not demonstrate that the witness provided false testimony, that the prosecutor purposefully elicited false testimony, or that she misrepresented the facts.

Similarly, Petitioner has offered no information to indicate that Taylor's testimony regarding the various telephone conversations he had with Petitioner was untrue. The prosecutor had a representative from the phone company listed as a witness and presumably prepared to testify that the calls were made, but she waived the presentation of this witness on the grounds that the testimony would be cumulative. Petitioner has offered nothing to suggest that Taylor's testimony regarding the phone calls was false. Accordingly, this claim does not provide a basis for granting habeas relief.

VI. Certificate of Appealability

A petitioner must receive a certificate of appealability ("COA") in order to appeal the denial of a habeas petition for relief from either a state or federal conviction. 28 U.S.C. §§ 2253(c)(1)(A), (B). A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a federal district court rejects a habeas claim on the merits, the substantial showing threshold is met if the petitioner

demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)(citation omitted). In applying this standard, a district court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of the petitioner's claims. *Id*. at 336-37.

With respect to Claim 5, alleging ineffective assistance of counsel, the Court concludes that jurists of reason may find the assessment of the claim debatable. While the Court finds that the claim must fail because of Petitioner's failure to support it factually in the state courts, another jurist of reason may find that Petitioner's efforts in the state court were nevertheless diligent. If the affidavits appended to the petition were properly before the Court it would put the claim on a much stronger footing. Accordingly, the Court will grant a certificate of appealability with respect to this claim.

The Court concludes that jurists of reason would not find the Court's assessment of Petitioner's remaining claims debatable or wrong. The Court thus declines to issue Petitioner a certificate of appealability with respect to these claims.

VII. Conclusion

For the reasons stated above, the state courts' rejection of Petitioner's claims did not result in a decision that was contrary to Supreme Court precedent, an unreasonable application of Supreme Court precedent, or an unreasonable determination of the facts. Accordingly, the petition for a writ of habeas corpus is **DENIED.**

VI. ORDER

Based upon the foregoing, IT IS ORDERED that the petition for a writ of habeas corpus is **DENIED WITH PREJUDICE.**

IT IS FURTHER ORDERED That a certificate of appealability is **GRANTED** with respect to Petitioner's Claim 5, alleging ineffective assistance of counsel, but it is **DENIED** with respect to Petitioner's other claims.

IT IS FURTHER ORDERED that petitioner is granted leave to appeal *in forma pauperis.*

s/Gerald E. Rosen

Chief Judge, United States District Court

Dated: January 11, 2011

I hereby certify that a copy of the foregoing document was served upon counsel of record on January 11, 2011, by electronic mail and upon Dax Hawkins, #532345, St. Louis Correctional Facility, 8585 N. Croswell Road, St. Louis, MI 48880 byordinary mail.

s/Ruth A. Gunther

Case Manager

APPENDIX E

Order **Michigan Supreme Court**
Lansing, Michigan

March 26, 2007

132624

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v

SC: 132624
COA: 262677
Wayne CC: 04-008265-01

DAX MICHAEL HAWKINS,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the October 19, 2006 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 26, 2007 s/Corbin R. Davis
Clerk

APPENDIX F

STATE OF MICHIGAN COURT OF APPEALS

DEFENDANT'S COPY

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DAX MICHAEL HAWKINS, Defendant-Appellant.	UNPUBLISHED October 19, 2006 No. 262677 Wayne Circuit Court LC No. 04-008265-01

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. The trial court sentenced defendant to life in prison for the murder conviction, 50 to 100 years in prison for the assault with intent to commit murder conviction, 5 to 10 years for the felon-in-possession conviction, and 2 years in prison for the

felony-firearm conviction. We affirm. This case arises from a shooting which left one victim, Earl Riley, dead and another victim, Jason Taylor, seriously wounded.

Defendant argues that the trial court violated his due process rights[1] in admitting photographs of Jason Taylor in the hospital. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Katt,* 468 Mich 272, 278; 662 NW2d 12 (2003). Photographs are admissible if they are relevant under MRE 401 and their probative value is not substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Mills,* 450 Mich 61, 66, 75; 537 NW2d 909, mod 450 Mich 1212 (1995). Defendant was charged with assault with intent to murder Taylor, so his intent to kill was directly at issue in the case. Evidence of the type, placement, and number of injuries bears on a defendant's intent to kill. See *id.* at 71-72. However, MRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Under the circumstances, defendant fails to demonstrate that the danger of unfair prejudice substantially outweighed the probative value of the photographs. The photographs are not particularly grisly or provocative, and like the photographs in *Mills,* they accu-

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[1] Defendant frames several of his issues as constitutional in nature, even though they boil down to general claims of error. See *WA Foote Mem Hosp v Dep't of Pub Health,* 210 Mich App 516, 524; 534 NW2d 206 (1995). Because defendant fails to demonstrate any error on these issues, we do not address the constitutional implications of the alleged errors.

rately represented Taylor's injuries. *Mills, supra* at 77. Therefore, the trial court did not abuse its discretion in admitting the photographs of Taylor at the hospital.

Defendant contends that the trial court violated his due process rights in admitting evidence that he purchased marijuana from Taylor. We disagree. Defendant failed to preserve this issue, so we review it for plain error affecting substantial rights. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999). A prosecutor may not introduce evidence of other crimes, wrongs, or acts in order to prove a defendant's character or propensity for criminal behavior. MRE 404(b)(1). However, evidence of other acts may be admissible to prove motive, opportunity, intent, preparation, scheme, or plan. *Id.* Here, the evidence of prior marijuana sales between defendant and Taylor was relevant to prove defendant's motive for killing Riley and assaulting Taylor. "Without such evidence, the factfinder would be left with a chronological and conceptual void regarding the events" leading to the assault. *People v VanderVliet,* 444 Mich 52, 81; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). No request was made for a limiting instruction and none was given. Under the circumstances, the probative value—providing a motive or intent—was not substantially outweighed by any prejudicial effect the evidence may have created. Accordingly, defendant has failed to demonstrate plain error on this issue.

Defendant next argues that the trial court violated his due process rights in denying his motion for mistrial on the basis of Michigan State Trooper Steven Kramer's testimony, which implied that defend-

ant fled the jurisdiction. We disagree. Appellate courts review for abuse of discretion a trial court's denial of a motion for mistrial. *People v Cress,* 468 Mich 678, 691; 664 NW2d 174 (2003). Although Kramer testified that he was in the process of filing a federal flight warrant for defendant, he explained that it was not necessary because defendant had been detained. Therefore, any prejudice from the testimony was necessarily minor, and the trial court was in the best position to determine the effect on the jury. *People v Grove,* 455 Mich 439, 476; 566 NW2d 547 (1997). We also note that the trial court denied the prosecutor's request for a jury instruction on flight. We defer to the trial court's determination that the evidence did not warrant a new trial. *Id.*

Defendant argues that the prosecutor committed misconduct during her closing argument by explaining, incidentally, that Michigan does not permit the death penalty. We disagree. "Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo." *People v Abraham,* 256 Mich App 265, 272; 662 NW2d 836 (2003). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial . . . ." *Id.* Generally, jurors may not consider the sentencing ramifications of their verdict. *People v Goad,* 421 Mich 20, 27, 36; 364 NW2d 584 (1984). Therefore, a prosecutor's intentional reference to the death penalty's applicability is an improper statement that amounts to misconduct.

However, defendant fails to demonstrate that the prosecutor intended to inject the issue of defendant's penalty into the trial. Taken in context, the prosecutor directed the improper reference to Riley's "execu-

tion," and presented the rhetorical question of what misdeed Riley could have committed to warrant defendant's infliction of such a severe penalty. The argument accurately stated the law, and the prosecutor limited the argument somewhat to the victim's possession of marijuana. Because the prosecutor did not directly link the lack of death penalty to defendant's murder charges, the effect of the prosecutor's improper reference is questionable. Moreover, although the trial court overruled defendant's objection, it immediately responded that the prosecutor was not discussing defendant's potential penalty, but arguing his guilt. The trial court explained that the prosecutor's comments were pure argument and offered that "I don't think that has anything to do with this case." The prosecutor immediately redirected the jury to the case's facts and away from the penalty issue. The trial court later instructed the jury not to consider the potential sentence or penalty. Under the circumstances, the trial court ameliorated much of the prejudice caused by the prosecutor's argument, and, assuming arguendo that the error rose to a constitutional level, it was not structural and was harmless beyond a reasonable doubt. *People v Bauder,* 269 Mich App 174, 179-180; 712 NW2d 506 (2005).

Defendant next claims that he was deprived of effective assistance of counsel by a conflict of interest created when trial counsel employed a strategy that involved placing defendant at the scene of the shooting. We disagree. Because a *Ginther*[2] hearing was never conducted, our review is limited to mistakes

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

apparent on the record. *People v Riley (After Remand),* 468 Mich 135, 139; 659 NW2d 611 (2003). When claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith,* 456 Mich 543, 556-557; 581 NW2d 654 (1998). Although defendant asserts that there was a conflict between his counsel's strategy and his own version of events, there is no evidence in the lower court record to support this assertion. Therefore, defendant has failed to show that trial counsel was ineffective because of an actual conflict of interest.

Similarly, defendant contends that trial counsel was ineffective in failing to pursue an alibi defense or call an endorsed witness, a Nextel representative, to testify. Defense counsel stated that he had investigated the alibi witnesses and found that none of them were cooperative. Counsel confirmed that defendant agreed with the decision not to call alibi witnesses Nikia Brockington, Adan Knowles, Eric Gibson, and Nyree Phillips, to testify at trial. Defendant stated his assent on the record, thereby waiving any error. See *People v Carter,* 462 Mich 206, 215-216; 612 NW2d 144 (2000). Likewise, defendant fails to demonstrate any prejudice from his trial counsel's strategic decision to waive presentation of the Nextel representative. Where counsel's conduct involves a choice of strategies, it is not deficient. See *People v LaVearn,* 448 Mich 207, 216; 528 NW2d 721 (1995). The fact that a particular strategy is not successful does not demonstrate that counsel was ineffective. *People v Matuszak,* 263 Mich App 42, 61; 687 NW2d 342 (2004).

Defendant also contends that his alibi could have been supported by Charmain Wright, a woman named Maria, the proprietor of a nightclub, and the surveillance camera from a nightclub that defendant claims to have visited at the time of the shootings. However, these witnesses were never provided on a notice of alibi or discussed on the record, and there is no mention of the surveillance camera on the record. Our review is limited to mistakes apparent on the record, which provides no support for defendant's assertions. See *Riley, supra* at 139. Therefore, defendant's claim of ineffective assistance of counsel fails.

Defendant also claims that counsel deprived him of his right to testify. However, defendant fails to present any evidence that his trial counsel coerced his decision not to testify, and the right is waived, "if defendant, as in this case, decides not to testify or acquiesces in his attorney's decision that he not testify . . . ." *People v Simmons,* 140 Mich App 681, 684-685; 364 NW2d 783 (1985).

Defendant next contends that the trial court's reasonable doubt instructions were defective. We disagree. Defendant challenges the trial court's failure to instruct the jury that reasonable doubt may arise from the lack of evidence, asserting that this omission suggested a lesser standard of proof. Defendant also challenges the trial court's use of the phrase "moral certainty," and suggests that the instructions shifted the burden of proof. Defendant's failure to either request the jury instruction or object to the trial court's failure to give the instruction sua sponte precludes defendant from seeking plenary review. *People v Gonzalez,* 468 Mich 636, 642; 664 NW2d 159 (2003). We will only review the issue for

plain error affecting his substantial rights. *Id.* at 643. As long as the trial court instructs the jury that the prosecution must prove defendant's guilt beyond a reasonable doubt, no particular form of words is required. *Victor v Nebraska,* 511 US 1, 5; 114 S Ct 1239; 127 L Ed 2d 583 (1994).

A reviewing court's inquiry is whether there is a reasonable likelihood that the jury misunderstood the instructions to mean that the prosecution was not required to prove every element of the charged offenses beyond a reasonable doubt. *Id.* at 6. The trial court in the instant case stated three times that reasonable doubt was a doubt that you should have a reason for having, and stated twice that reasonable doubt was an honest and reasonable doubt. The trial court also instructed the jurors that they should use reason and common sense. The trial court made at least four references to the prosecutor having the burden of proof. Therefore, the trial court's omission of an instruction on the lack of evidence did not render the reasonable doubt instructions defective. *People v Hubbard (After Remand),* 217 Mich App 459, 487-488; 552 NW2d 493 (1996). The court's explanation that "reasonable doubt" was not a "hunch" and should be a doubt that you should have a reason for having did not shift the burden of proof, *id.* at 488, and the instructions regarding "moral certainty" did not taint the court's instructions. *Victor, supra* at 14-15. Finally, because the trial court's reasonable doubt instruction was not defective, defense counsel was not required to make a futile objection opposing it. *People v Wilson,* 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002).

Defendant argues that the prosecutor knew or should have known that Taylor committed perjury when he testified that he was shot in the hip and that he communicated with defendant on the day of the murder. We disagree. Defendant again failed to preserve this issue in the trial court, so we will not reverse his conviction on this basis unless we find plain error that affected his substantial rights. *Carines, supra.* Although "the prosecutor may not knowingly use false testimony to obtain a conviction," *People v Lester,* 232 Mich App 262, 277; 591 NW2d 267 (1998), defendant fails to substantiate his claim that the prosecutor should have known that the testimony was false, and ultimately fails to demonstrate any prejudice from the testimony. Photographs were available to demonstrate that Taylor was indeed shot, and defendant had every opportunity to challenge Taylor's credibility on the specifics of the matter. Similarly, there is no indication that Taylor's testimony regarding the telephone communication was false, or that the prosecutor had any reason to know of its alleged falsity. See *id.* Therefore, defendant does not demonstrate any plain error affecting his substantial rights in the admission of Taylor's testimony regarding the telephone calls or the specific injuries Taylor received.

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood

APPENDIX G

Court of Appeals, State of Michigan

ORDER

People of MI v Dax Michael Hawkins	Michael J. Talbot Presiding Judge
Docket No. 262677	Christopher M. Murray
LC No. 04-008265-01	Karen M. Fort Hood Judges

The Court orders that the motion for leave to file an amended motion to remand is GRANTED.

However, the Court orders that the motion to remand and amended motion to remand pursuant to MCR 7.211(C)(1) are DENIED for failure to persuade the Court of the need to remand at this time.

s/Michael J. Talbot

Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

APR 19 2006	s/Sandra Schultz Mengel
Date	Chief Clerk

APPENDIX H

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	Court of Appeals No. 262677 Lower Court No. 04-8265-01
-vs-	
DAX MICHAEL HAWKINS, Defendant-Appellant. _____/	

AFFIDAVIT AND OFFER OF PROOF

STATE OF MICHIGAN)
)ss.
COUNTY OF GRATIOT)

DAX MICHAEL HAWKINS, being first sworn, deposes and says as follows:

1. I am the Defendant in the instant case.

2. I proclaim my innocence.

3. I was not present when the charged offense occurred, and I declare under the penalties of perjury that I was not involved, nor participated in the instant offense in any form or fashion.

4. My trial attorney was David Cripps, who also represented me at my preliminary examination.

5. Upon learning the time and date that the instant offense occurred, and that my accuser was Jason Taylor, I provided Mr. Cripps with a detailed account of my whereabouts and who I was with on October 19, 2003, during the hours of the offense.

6. During my preliminary examination, Jason Taylor testified that he first met up with me around 8:30 or 9:00pm on October 19, 2003. At which point, I allegedly set up a deal for another person to purchase 24-lbs of marijuana from him shortly thereafter. Mr. Taylor further testified that he and I called each other back and forth about six times before the transaction took place, where he was subsequently shot. The shooting itself (according to the police) took place at approximately 11:15pm.

7. After hearing Jason Taylor's testimony, I informed Mr. Cripps that I had a Nextel phone, with the number listed as (248)789-8825, and that a print-out of my phone records would show that I didn't talk to Jason at all that night. That since Jason testified that he had my phone number stored in his cell phone, this was easily verifiable.

8. I also told Mr. Cripps that around 7:45pm, or close thereto, that I stopped in at the "Locker Room," which is a Club/Bar located on Livernois and Curtis, in Detroit. That while there, I ran into Charmaine Wright, Maria (whose last name I don't know), and a few other females that were with Charmaine. After having a drink, Charmaine and her friends accompanied me to

"Baker's Lounge," which is a Jazz/Blues lounge located at Livernois and 8-Mile Rd. While There, I invited Charmaine and her friends to my going away party that I was having at Club Dot.Com, located at GrandRiver and OuterDrive, in Detroit. I explained to Mr. Cripps that it was not unusual for me to bounce from club to club, that I'm known as a "Cluber," which means that I frequent many clubs, and whatever club has the most happening at that time is where I usually try to enjoy myself the most. AT any rate, I brought it to Mr. Cripps' attention that "Baker's" was equipped with a surveillance-camera, which could prove that I, along with Charmaine and her friends arrived before 8:30pm and didn't leave until approximately 9:00pm. Furthermore, that the manager of Baker's would remember me because I'm a regular there.

9. I felt this information was important because Jason Taylor places me meeting up with him between the hours of 8:30 and 9:00pm, and that was simply not the case.

10. I further explained to Mr. Cripps that after I left Baker's, I went and picked up my fiancee, Nyree Phillips, and went straight to Club dot.Com, where we met up with Eric Gibson, and Adan Knowles, which was around 9:45pm. We didn't leave Club Dot.Com until approximately 1:30am. My whole purpose for being there that night was to celebrate my going away party because I had been ordered by a federal judge to self surrender into federal custody on 10/24/03, in Manchester Kentucky. As I informed Mr, Cripps, the lady who works at Club dot.Com, and who

served our group that night, is named Anessa, and that she could verify that my friends, fiancee, and I, were all at the club, and that we didn't leave until right before closing.

11. Based on these facts, and because Jason Taylor falsely placed me at the scene of the crime, I insisted that Mr. Cripps employ an alibi defense on my behalf. At which point, he assured me that he would, and that he would have an investigator speak with my witnesses.

12. Although I provided Mr. Cripps with the names Charmaine Wright, and Nikia Brockington as witnesses for certain times frames, there came a point where both Charmaine and Nikia became reluctant to testify on my behalf. The reason being, is that "Maria," who was with Charmiane and others at the "LockerRoom," and who accompanied me to Baker's, has familial ties to Jason Taylor. According to Charmaine, Maria stated to her that Jason Taylor suspected me of somehow being involved in what happened to him because the person that shot him "allegedly" used my name as a reference in order to purchase marijuana from him. Since Maria knew where both Charmaine and Nikia lived, and both women were familiar with Jason Taylor, based on the advice of their parents not to get involved because of fear of retaliation, Charmaine and Nikia elected not to testify or give statements on my behalf. When I informed Mr. Cripps of this, his response was that he'd just use my other witnesses.

13. However, during the first day of my trial, Mr. Cripps came to see me in the holding cell prior to me entering the court room. I asked him were my witness present, and he responded by saying that although he hadn't seen them, he was sure that they were either in the building, or on their way.

14. Nevertheless, when I was brought into the court room, prior to picking the jury, Mr. Cripps told the judge that my alibi witnesses were uncooperative, so he wasn't pursuing my alibi defense. In my mind, I knew this couldn't be true. In any event, after picking the jury, during opening statements, unbeknownst to me, and definitely without my consent, Mr. Cripps placed me at the scene of the crime. I was dead-set against Mr. Cripps' method of defending me. It was wrong, and it wasn't true. I was never at the scene, despite what Jason Taylor testified to. After the jury was excused for the first day, Mr. Cripps and I argued about his placing me at the scene of the crime. My position was that him placing me at the scene prevented me from testifying, because there was no way that I was going to get on the stand and perjure myself by saying I was there, irregardless of what he thought my best defense was. Nor was I willing at that point, to show the jury that we were at odds.

15. Mr. Cripps' position was that Jason Taylor's sworn statement and his pre-lim exam testimony doesn't have me committing any crime, and because of that, I didn't need to take the stand. While I continued to disagree with Mr. Cripps, he simply dismissed what I had to say, and told me

that "he's been doing this long enough to know how to beat a case."

16. When I was taken back to the County Jail after my first day of trial, I called home and asked my fiancee what Mr. Cripps meant by suggesting that she and the rest of my witnesses were uncooperative. My fiancee, Nyree Phillips, told me that Mr. Cripps lied to me, and for that matter, lied to the judge. That Mr. Cripps had her talk to an investigator, that while she provided the investigator with the names and phone numbers of all my witnesses, the investigator wanted all the witnesses in one place so that he could take everyone's statement at the same time. Because everyone had conflicting schedules as to when they could become available, the investigator neglected to interview or take statements from any of my witnesses, despite having their individual phone numbers and addresses.

17. When I confronted Mr. Cripps with this information the next day during my second day of trial, he just looked at me and said, "Look, the wheels already in motion, do you want to beat this thing or not, if so, then just let me do my job." Based on this exchange, I felt that Mr. Cripps was using his position as an attorney to make me feel inferior to him, and to intimidate me into refraining from questioning his decisions concerning my case.

18. Had it not been for Mr. Cripps' fabricated defense which falsely placed me at the scene of the crime, I would have exercised my Constitutional right to testify in my own defense.

19. I would have testified under oath, that on October 19, 2003, I did in fact see Jason Taylor. I ran into him at a Shell Gas Station on 6-Mile and the Lodge Fwy Service Drive, in Detroit. That we spoke and exchanged greetings, that I invited Jason to my going away party that night, which he stated that he'd try and make it. It was at that point that Jason told me that he was trying to unload 25 to 30-lbs of marijuana at once, and did I know of anybody that might be interested. I told Jason that there were only two people that I could think of at that moment, and that I would check for him. I told him to get back with me in a couple hours, that I still had a few errands to run. This was around 3:00 to 3:30pm. Around 6:00pm, or close thereto, Jason called me and asked me did I come up with anything. I told him that "Raphael Glover" was interested, and gave him Raphael's number. That was the last time I had spoken to Jason Taylor on October 19, 2003.

20. I would have further testified that Jason Taylor was familiar with Raphael Glover, that the two were no stranger's to one another. And, that I had no clue as to whether the two actually met up that night. I would have also explained to the jury that it would have been impossible for me to have met up with Jason between 8:30 and 9:00pm, because I was at Baker's Lounge during that time with Charmaine, Maria, and few other females. That right around 9:00pm, I left Baker's and went to pick up my fiancee from home. And, from there we went straight to Club. Dot.Com, where we met up with Eric Gibson, and Adan Knowles, at about 9:45pm, for the purpose of cel-

ebrating my going away party. I would have testified that there were other "Cluber's" there who were familiar with me, including our waitress, Anessa, who could verify my whereabouts during the time the shooting of Jason Taylor and Eric Riley occurred. I would have also testified that I was innocent of the charged offense, that I did not shoot Eric Riley or Jason Taylor, nor encourage or help facilitate anyone else to do so. I would have relayed to the jury everything that I told my attorney, David Cripps, and answered any other questions posed to me by the proecution regarding the charged offense to the best of my knowledge, information, and belief.

Fuerther, Deponent sayeth not.

Subscribed and sworn to before me
March 9, 2006
s/John M. Kelly

Notary Public, Gratiot County, Michigan
My Commission Expires: 5/22/07

JOHN M. KELLY
NOTARY PUBLIC GRATIOT CO, MI
MY COMMISSION EXPIRES May 22, 2007

s/ Dax Michael Hawkins
Dax Michael Hawkins

APPENDIX I

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, -vs- DAX MICHAEL HAWKINS, Defendant-Appellant. _____/	Court of Appeals No. 262677 Lower Court No. 04-8265-01

AMENDED MOTION TO REMAND

NOW COMES Defendant-Appellant DAX MICHAEL HAWKINS, in pro per, and moves this Honorable Court to grant this Amended Motion to Remand pursuant to MCR 2.118(A)(1), and MCR 2.119(B)(1)(a) thru (c), and says in support thereof that:

1. Defendant-Appellant was convicted of first degree murder, felony murder, assault with intent to murder, felony-firearm, and felon-in-possession of a firearm, on April 7, 2005, by a Wayne County Jury, the Honorable Leonard Townsend presiding.

2. Defendant was sentenced to natural life for the murder convictions, 50 to 100 years for the assault with intent to murder, two years for the felony fire-

arm, and 60 months to 10 years for the felon in possession charge.

3. Defendant now files this Amended Motion to Remand pursuant to MCR 7.211, as the following issues require the development of a factual record for appellate consideration of the issues:

I. DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL CREATED A CONFLICT OF INTEREST DURING THE TRIAL PROCEEDINGS WHICH INFRINGED UPON DEFENDANT'S RIGHT TO TESTIFY ON HIS OWN BEHALF, AS WELL AS HIS RIGHT TO CONFRONTATION. COUNSEL WAS EQUALLY INEFFECTIVE FOR FAILURE TO PRESENT DEFENDANT'S ALIBI DEFENSE, INVESTIGATE SUPPORTIVE LEADS, AND FOR FAILURE TO OBJECT TO THE TRIAL COURT'S DEFECTIVE INSTRUCTIONS ON REASONABLE DOUBT.

(A) During Defendant's trial, defense counsel, David Cripps, disingenuously informed the Court that Defendant's alibi witnesses were uncooperative. Hence, he was no longer pursuing an alibi defense. This, gesture however, was in response to the prosecution's concerns that defense counsel' s Notice of an alibi defense did not meet the statutory requirements.

As set forth in Defendant's Affidavit and offer of Proof, defense counsel's excuse for not presenting his alibi defense was false, as Defendant's witnesses

were in fact willing to testify on his behalf, and still are.

(B) In presenting a defense, trial counsel erroneously placed Defendant at the scene of the crime. This too, was false, and prevented Defendant from testifying in his own defense, as Defendant's testimony would have undoubtedly communicated to the jury that Defendant and defense counsel were at odds. Counsel's choice of defense, aside from being false, created a conflict of interest which infringed upon Defendant's constitutional right to testify.

(C) Though the trial record reflects that Defendant brought counsel's deficient performance to the trial court's attention during sentencing, a complete and factual record needs to be developed so that Defendant can adequately present his claims for proper appellate review.

II. THE TRIAL COURT DEPRIVED DEFENDANT OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL WHERE THE COURT GAVE DEFECTIVE REASONABLE DOUBT INSTRUCTIONS WHICH PERMITTED THE JURY TO FIND GUILT BASED ON A DEGREE OF BELOW THAT REQUIRED BY THE DUE PROCESS CLAUSE.

During the instructional phase of Defendant's trial, the trial court erroneously instructed the jury that Reasonable Doubt meant "a doubt for which you can assign a reason for having it," that it wasn't a possibility of "innocence", that it was the kind of doubt "that you should have a reason for having." This improperly required a higher standard of doubt

than the reasonable doubt standard actually requires under In re Winship. On the other hand, the trial court's reference to "moral certainty" as it related to the prosecution's burden, allowed a finding of guilt based on a degree of proof below that required by the due process clause, in violation of the United States Supreme Court holding in Cage v. Louisiana, 111 SCt 328, 329-330 (1990). Trial counsel's failure to object to these instructions, prevented the trial court from correcting this constitutional error, which ultimately deprived Defendant of his Sixth and Fourteenth Amendment rights to a fair trial.

In lieu of defense counsel's failure to object, a record should be made that reflects defense counsel's reasoning for failure to protect Defendant's right to a fair trial.

III. DEFENDANT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS WHERE THE PROSECUTOR KNOWINGLY PRESENTED FALSE TESTIMONY. AT A MINIMUM, DEFENDANT IS ENTITLED TO A REMAND FOR AN EVIDENTIARY HEARING.

(A) The Prosecution's theory at trial was that Defendant, through a series of phone calls, navigated the victim, Jason Taylor, into an ambush where Defendant intended to rob and kill Jason Taylor. It was the prosecution's position that because Taylor trusted Defendant, Defendant was able to get in the back seat of Taylor's car without drawing suspicion, and catch Taylor and his associate off guard, thereby shooting them both. To establish this, the prosecutor elicited testimony from Taylor that he and Defend-

ant had engaged in a series of phone calls right up to the moment the shooting occurred. That it was Defendant who told him what street to turn onto, etc. Furthermore, that when he (Taylor) initially got shot, it was in his hip, and based on Defendant's seating arrangement in his car, Defendant was the only person who could have administered the hip wound.

(B) The prosecution relied heavily on Taylor's false testimony during closing arguments to show motive, preparation, and scheme. However, This was contrary to Taylor's pre-lim exam testimony, where he stated that he did not know where the shots came from, and that he had no idea whether or not Defendant was still in the back seat when the shooting started. Taylor also described his wounds during the pre-lim exam, and as supported by his medical records which were admitted into evidence at trial, Taylor was never treated for a hip wound.

Significantly, the prosecutor endorsed on its witness list, a Nextel phone representative, which was published before the jury, but was never called. While a print-out of Defendant's phone records will positively show that Defendant had not talked at all with Jason Taylor during the time in which Taylor claims he was making a drug deal and was subsequently shot; And, Taylor's medical record will show that he never sustained a hip injury on the night in question, the jury was never made aware that Taylor was testifying falsely on these critical points.

(C) Accordingly, Taylor was the only witness against Defendant, and while perjured testimony violates a defendant's right to due process, (see People v

Cassell, 63 Mich App 226 (1975).), the jury was never apprised of Taylor's false testimony, which deprived the trier of fact the opportunity to adequately assess Taylor's credibility.

4. MCR 7.211(C)(1)(a), states that a motion to remand must identify an issue sought to be reviewed on appeal and show:

> "(i) that the issue should be initially decided by the trial court;
> **or**
> (ii) that development of a factual record is required for appellate consideration of the issue. A motion under this subrule must be supported by affidavit or offer of proof regarding the facts to be established at the hearing."

5. Pursuant to MCR 7.211(C)(1)(a), Defendant has attached an Affidavit and Offer of Proof, and asserts therein, that if granted an Evidentiary hearing, he will produce before the trial court, those witnesses listed in his Affidavit, who will provide relevant testimony that defense counsel not only neglected to interview them, but that counsel's rendition to the trial court that they were uncooperative, was completely false.

WHEREFORE, FOR THE FOREGOING REASONS, Defendant-Appellant respectfully requests that this Honorable Court grant this Motion to Remand.

Respectfully submitted,

BY: s/Dax Michael Hawkins

DAX MICHAEL HAWKINS #532345
In Pro Per
St. Louis Correctional Facility
8585 N. Croswell Rd.
St. Louis, MI 48880

Date: March 9, 2006