No. _____

In the Supreme Court of the United States

BILL COOL, WARDEN,

Petitioner,

v.

NATHANIEL JACKSON,

Respondent.

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

APPENDIX

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TABLE OF CONTENTS

Page

APPENDIX A

RECOMMENDED FOR PUBLICATION

Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0164p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 21-3207/3280

NATHANIEL JACKSON,

Petitioner-Appellee / Cross-Appellant,

v.

BILL COOL, Warden,

Respondent-Appellant / Cross-Appellee.

Appeal from the United States District Court for the Northern District of Ohio at Youngstown.

No. 4:07-cv-00880–James S. Gwin, District Judge.

Argued: March 18, 2024

Decided and Filed: August 6, 2024

Before: MOORE, COLE, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Jana M. Bosch, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellant/Cross-Appellee. Adam M. Rusnak, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE SOUTHERN DISTRICT OF OHIO, Columbus, Ohio,

for Appellee/Cross-Appellant. **ON BRIEF:** Jana M. Bosch, Benjamin M. Flowers, Diane R. Brey, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellant/Cross-Appellee. Adam M. Rusnak, Paul R. Bottei, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE SOUTHERN DISTRICT OF OHIO, Columbus, Ohio, for Appellee/Cross-Appellant.

OPINION

GRIFFIN, Circuit Judge.

The Great Writ of Habeas Corpus is an extraordinary remedy that "guard[s] against extreme malfunctions in the state criminal justice systems." *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (internal quotation marks omitted). This case is the epitome of such an extreme judicial malfunction.

Petitioner Nathaniel Jackson was convicted of a capital offense and sentenced to death. But Jackson's sentencing proceeding was blatantly unconstitutional at its core due to the trial- court judge's bias and misconduct, as well as his exclusion at sentencing of relevant mitigating evidence. The prejudicial judicial bias and misconduct included numerous ex parte communications between the judge and prosecutor regarding substantive sentencing issues and the ghost writing by the prosecutor of the judge's opinion sentencing Jackson to death. In state court, when this unethical conduct came to light, the Ohio appellate courts publicly reprimanded the trial judge and ordered him to conduct new sentencing proceedings: the judge was to "personally review and evaluate the appropriateness of the death penalty" and "prepare an entirely new sentencing entry."

On remand, Jackson moved to present three additional volumes of mitigating evidence. The trial judge denied the motion, and he orally resentenced Jackson based on the stale, ten-year- old mitigation record. A few hours after the resentencing hearing concluded, the judge issued a second opinion sentencing Jackson to death that was functionally identical to the original, corrupted opinion and contrary to the Ohio Court of Appeals' specific instructions on remand. Nevertheless, the Ohio appellate courts affirmed Jackson's sentence.

Jackson then filed a petition for a writ of habeas corpus in federal district court. The district court granted Jackson's petition on his claim that he was unconstitutionally denied the opportunity to present relevant mitigating evidence at his resentencing proceedings, but it denied Jackson's other claims, including that the trial judge was unconstitutionally biased. The warden appeals the district court's habeas grant, and Jackson cross appeals regarding his judicial-bias and ineffective-assistance-of-counsel claims.

We affirm the district court in part and reverse in part. We first hold that Ohio's standard for assessing the potential for judicial bias is contrary to clearly established federal law as defined by the Supreme Court. And on de novo review, Jackson has demonstrated that the trial judge was unconstitutionally biased. Second, the Supreme Court has clearly established that when a trial court is determining whether to impose the death penalty, capital defendants have a right to present any and all relevant mitigating evidence supporting a sentence less than death, including at resentencing

proceedings, and Ohio's failure to provide Jackson that right violated the Eighth Amendment. Therefore, we affirm the district court's issuance of a writ of habeas corpus on Jackson's mitigating-evidence claim, reverse the district court's denial of Jackson's habeas petition on his judicial-bias claim, and remand for further proceedings consistent with this opinion.

I.

Nathaniel Jackson and Donna Roberts conspired to kill Roberts's former husband, Robert Fingerhut. *See, e.g.*, *State v. Jackson*, 73 N.E.3d 414, 419 (Ohio 2016); *State v. Roberts*, 850 N.E.2d 1168, 1174–75 (Ohio 2006). In 2001, they executed their plan: Jackson broke into Fingerhut's home and fatally shot him. The couple left a conspicuous trail of letters and phone calls, which enabled their quick apprehension. In 2002, they were each separately indicted, tried, and convicted in Ohio state court of aggravated burglary, aggravated robbery, and aggravated murder with two death-penalty specifications—murder during an aggravated burglary and murder during an aggravated robbery.

At Jackson's and Roberts's mitigation hearings, the juries recommended that the court impose the death penalty. [1] The trial judge, Trumbull County

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[1] Ohio death-penalty proceedings involve three phases: the guilt phase (trial and jury verdict); the mitigation (or penalty) phase (presentation of mitigating and aggravating evidence and jury makes a recommendation on death sentence); and the sentencing phase (if jury recommended death penalty, judge decides whether to impose the death penalty). *See* Ohio Rev. Code §§ 2929.03(B)–(D), (F). Some practitioners consider both the mitigation and sentencing phases as part of the overall "sentencing" proceedings. For this opinion, we use the term

Court of Common Pleas Judge John M. Stuard, followed those recommendations and imposed death sentences for both Jackson and Roberts. On direct appeal, the Ohio appellate courts affirmed Jackson's convictions and sentence and soon after denied his petition for post-conviction relief. *State v. Jackson*, 839 N.E.2d 362, 325 (Ohio 2006); *State v. Jackson*, 2006 WL 1459757, at *1 (Ohio Ct. App.), *appeal denied* 855 N.E.2d 1258 (Ohio 2006) (unpublished table decision).

However, in Roberts's direct appeal, the Ohio Supreme Court affirmed her convictions but vacated her death sentence due to Judge Stuard's ex parte use of the prosecutor in preparing Roberts's sentencing opinion. *Roberts*, 850 N.E.2d at 1172. At Roberts's sentencing hearing, her counsel noticed that the prosecutor "was looking at a document and appeared to be reading along with [Judge Stuard]." *Id.* at 1188. Roberts's counsel vehemently objected, and Judge Stuard conceded that he had engaged in ex parte communications with the prosecution in drafting the sentencing opinion—apparently, Judge Stuard had given notes to the prosecutor outlining the sentence to be imposed with supporting reasons and tasked the prosecutor with drafting the opinion and making revisions. This conduct plainly violated Ohio law's requirement in death-penalty cases that the trial court personally weigh the evidence and draft the sentencing opinion, Ohio Rev. Code § 2929.03(F), so the Ohio Supreme Court vacated Roberts's sentence and remanded for resentencing.

"sentencing proceedings" to encompass both the mitigation and sentencing phases.

After Judge Stuard's conduct surfaced in Roberts's case, Jackson moved for new sentencing proceedings and asked the Ohio Supreme Court to disqualify Judge Stuard. Judge Stuard responded, conceding that he had engaged in the same ex parte communications with the prosecutor's office in drafting Jackson's sentencing opinion. *In re Disqualification of Stuard*, 863 N.E.2d 636, 637 (Ohio 2006) (mem.). Nevertheless, the single Ohio Supreme Court justice tasked with adjudicating the petition declined to disqualify Judge Stuard because, in his view, there was no record of hostility or bias toward either party. *Id.* at 638.

Jackson's motion for new sentencing proceedings remained pending for nearly three years. Only after Jackson initiated a mandamus action to compel a ruling; Jackson again sought Judge Stuard's disqualification; and the Ohio Supreme Court publicly reprimanded Judge Stuard for violating two canons of Ohio's code of judicial conduct based on his ex parte communications with the prosecution, *Disciplinary Couns. v. Stuard*, 901 N.E.2d 788, 792 (Ohio 2009), did Judge Stuard rule on the motion—he denied Jackson a new sentencing hearing. The Ohio Court of Appeals reversed. *State v. Jackson*, 941 N.E.2d 1221, 1225–26 (Ohio Ct. App. 2010). Because Judge Stuard's improper conduct was the same in both cases, the court afforded Jackson "the same relief" it gave to Roberts, and on remand for resentencing proceedings, it ordered Judge Stuard to "personally review and evaluate the appropriateness of the death penalty, prepare an entirely new sentencing entry[,] . . . and conduct whatever other proceedings are required by law and consistent with this opinion." *Id.* at 1226.

Nearly two years later, in 2012, Judge Stuard denied a motion for his recusal and resentenced Jackson. During the resentencing hearing, Judge Stuard permitted Jackson to offer an allocution, in which Jackson described his good behavior on death row. However, Judge Stuard denied Jackson's motion to introduce three volumes of mitigating evidence that he had not proffered at his first sentencing proceedings. This evidence included statistics on Ohio death-row inmates, affidavits from Jackson's family members, his own affidavit expressing dissatisfaction with his trial counsel, psychological information showing his intellectual disabilities, his school records, and his criminal history. The court therefore relied on the ten- year-old record made at Jackson's mitigation hearing.

Judge Stuard again imposed the death penalty. He issued the second sentencing opinion—which largely mirrored the original opinion—mere hours after the resentencing hearing. Apart from adding some introductory paragraphs explaining the additional procedural history, making minor typographical and grammatical changes, and rewriting a few paragraphs describing the trial evidence, the second sentencing opinion was "almost identical" to the first. *Jackson*, 73 N.E.3d at 433. *Compare*, 2002 Opinion, R. 47-6, PageID 10070–81, *with* 2012 Opinion, R. 47-17, PageID 13477–93. Indeed, it did not even mention Jackson's new allocution or request to admit additional mitigating evidence.

The Ohio Supreme Court affirmed Jackson's second death sentence. *Jackson*, 73 N.E.3d at 419. Relevant here, the court rejected Jackson's claims that Judge Stuard was biased, that Judge Stuard erred in

denying him the opportunity to present additional mitigating evidence, and that his attorneys at the penalty-phase stage were ineffective. *Id.* at 423–25, 427–30, 437–39.

Meanwhile, Jackson filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Ohio, raising 37 grounds for relief. The district court granted his petition on one ground, holding that the Ohio state courts violated Jackson's Eighth Amendment right to present mitigating evidence at his capital resentencing proceedings and that the Ohio Supreme Court's decision affirming his death sentence was an unreasonable application of and contrary to clearly established Supreme Court precedent. *Jackson v. Houk*, 2021 WL 698590, at *8–11 (N.D. Ohio Feb. 23, 2021). It otherwise rejected his claims and denied him a certificate of appealability.

The warden timely appealed to this court, and Jackson cross appealed, requesting a certificate of appealability on additional grounds for relief. We granted that application in part, adding two more claims for our review. Thus, these consolidated appeals present three claims: (1) whether Judge Stuard was unconstitutionally biased in violation of the Fourteenth Amendment; (2) whether Jackson was denied the opportunity to present additional relevant mitigating evidence at his second sentencing proceedings in violation of the Eighth Amendment; and (3) whether Jackson's trial counsel were ineffective at the penalty-phase stage in violation of the Sixth Amendment.

II.

In habeas proceedings, we review a district court's legal conclusions de novo and its factual findings for clear error. *Upshaw v. Stephenson*, 97 F.4th 365, 370 (6th Cir. 2024). Our review of the state court's decision, however, is more deferential. *See id.* Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal courts shall not grant a writ of habeas corpus for a claim adjudicated on the merits in state-court proceedings unless the adjudication of the claim either "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Tolliver v. Sheets*, 594 F.3d 900, 915–16 (6th Cir. 2010) (quoting 28 U.S.C. § 2254(d)).

A state-court decision is "contrary to" clearly established Supreme Court precedent "if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). And a state-court decision employs an "unreasonable application" of clearly established Supreme Court precedent "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." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). In reviewing whether a state-court decision was "contrary to" or an "unreasonable application" of

Supreme Court precedent, "we look to the last reasoned state court decision" that adjudicated the relevant claim on the merits. *Mack v. Bradshaw*, 88 F.4th 1147, 1154 (6th Cir. 2023). Only if a petitioner can surpass AEDPA's "daunting standard," *id.*, do we apply de novo review to his claims, *Rice v. White*, 660 F.3d 242, 251–52 (6th Cir. 2011) (unreasonable-application prong); *Issa v. Bradshaw*, 904 F.3d 446, 453 (6th Cir. 2018) (contrary- to prong). Under such review, "no deference is due" to the state court's faulty decision. *See Panetti v. Quarterman*, 551 U.S. 930, 948 (2007).

III.

Jackson first asserts that he was denied a fair tribunal, in violation of the Fourteenth Amendment's Due Process Clause, because Judge Stuard was unconstitutionally biased against him. And he contends that the Ohio Supreme Court, in the last reasoned state-court decision to address this claim, applied a standard contrary to the federal standard for evaluating judicial bias, so we should review this claim de novo. We agree.

A.

The right to a fair, unbiased judge in criminal cases is undoubtedly clearly established. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" (quoting *In re Murchison*, 349 U.S. 133, 136 (1955) (alteration in original)). "[T]he Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997) (internal quotation marks

and citations omitted). Judicial bias, which "is a deep-seated favoritism or antagonism that makes fair judgment impossible," is "constitutionally unacceptable." *Coley v. Bagley*, 706 F.3d 741, 750 (6th Cir. 2013) (citing *Mayberry v. Pennsylvania*, 400 U.S. 455, 465–66 (1971); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

The standard for assessing the risk of judicial bias under federal law is also clearly established. This standard is an "objective" one, requiring recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton*, 556 U.S. at 872 (quoting *Withrow*, 421 U.S. at 47). To conduct this inquiry, "[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Id.* at 881 (internal quotation marks omitted). Because a finding of judicial bias is a structural defect that affects the entire proceeding, it is not subject to a harmless-error analysis. *Cf. Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *see Railey v. Webb*, 540 F.3d 393, 399 (6th Cir. 2008).

B.

On direct appeal from his resentencing proceedings, Jackson asserted that "he was denied a fair and impartial trial judge on resentencing." *Jackson*, 73 N.E.3d at 423. Based on Judge Stuard's improper ex parte communications and collaboration with the prosecutor; refusal to recuse himself; statements on the record expressing disagreement with the necessity of resentencing; refusal to consider Jackson's mitigating evidence at resentencing; and

issuance of a second sentencing opinion mirroring the original, tainted one mere hours after the resentencing hearing, Jackson claimed that Judge Stuard was biased against him in violation of the Fourteenth Amendment. *Id.* at 423–25, 433. Assessing this claim under Ohio law's subjective standard for judicial bias, the Ohio Supreme Court rejected Jackson's argument. *Id.* at 423, 425. Because Jackson had "fail[ed] to demonstrate that Judge Stuard had actual bias and acted with 'ill will' or formed 'a fixed anticipatory judgment' against him," the Ohio Supreme Court denied relief on this ground. *Id.* at 425 (quoting *State ex rel. Pratt v. Weygandt*, 132 N.E.2d 191, 192 (Ohio 1956)). [2]

We hold that Ohio law's subjective judicial-bias standard is contrary to clearly established federal law. *Compare Pratt*, 132 N.E.2d at 195 (establishing a

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[2] The warden contends that Jackson procedurally defaulted his judicial-bias claim, arguing that Jackson failed to fairly present it to the state courts. One way a habeas petitioner procedurally defaults a claim is by "failing to raise a claim in state court"—i.e., that he did not "fairly present[]" the claim to the state court—"and pursue that claim through the state's ordinary appellate review procedures." *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006) (internal quotation marks omitted). "To fairly present a claim to a state court[,] a petitioner must assert both the legal and factual basis for his or her claim." *Id.* (emphasis omitted). Jackson did just that: he claimed that "he was denied a fair and impartial trial judge on resentencing" because "Judge Stuard's bias denied him due process in violation of the Fourteenth Amendment." *Jackson*, 73 N.E.3d at 423, 425. And he supported this argument by highlighting the factual circumstances (ex parte communications, denying Jackson a resentencing, disciplinary actions taken against Judge Stuard, refusing to admit wrongdoing, etc.) that we rely on here. Thus, this claim is not procedurally defaulted.

subjective standard for judicial bias), *with Caperton*, 556 U.S. at 881 (holding that the judicial-bias inquiry is objective, not subjective). *See also Rippo v. Baker*, 580 U.S. 285, 286–87 (2017) (per curiam) (vacating a state court's judgment finding no bias because the state court "applied the wrong legal standard"). Ohio's "actual" judicial-bias standard predates the Supreme Court's objective judicial-bias standard by over 50 years, and the Ohio Supreme Court erred in using this outdated standard when assessing Jackson's judicial-bias claim. Because the state court "applie[d] a rule different from the governing law set forth in [the Supreme Court's] cases," that decision is "contrary to" clearly established federal law under § 2254(d)(1). *Bell*, 535 U.S. at 694. Thus, we review the merits of Jackson's judicial-bias claim de novo. *Issa*, 904 F.3d at 453.

Judge Stuard's most egregious conduct was his facilitation of and participation in multiple ex parte communications—and in turn, ethical violations—related to Jackson's sentencing opinion. *Disciplinary Couns.*, 901 N.E.2d at 791. Without informing Jackson, Judge Stuard approached the prosecutor to ghost write Jackson's sentencing opinion. After consulting Judge Stuard's incomplete notes, the prosecutor used his discretion to create a draft opinion. Judge Stuard reviewed the prosecutor's draft, edited it, and told the prosecutor "to make the corrections." *Id.* at 790. The prosecutor did so—but he also incorporated another prosecutor's "editorial suggestions." *Id.* That version eventually became Judge Stuard's first opinion ordering Jackson's execution.

These ex parte communications were neither innocent nor harmless. Judge Stuard did not have an innocuous conversation with the prosecutor in a public setting, *Getsy v. Mitchell*, 495 F.3d 295, 309–12 (6th Cir. 2007) (en banc), nor did he ask the prosecutor to draft a ministerial order that benefited Jackson, *Whisenhant v. Allen*, 556 F.3d 1198, 1208–10 (11th Cir. 2009). Instead, Judge Stuard secretly recruited the prosecutor to draft the entirety of an opinion sentencing Jackson *to death*: he left the prosecutor to turn his two pages of incomplete, handwritten notes into a twelve-page opinion outlining the facts and procedural history, weighing the aggravating and mitigating factors (while characterizing Jackson's mitigating evidence as "self-serving," "not convincing," and "lack[ing] sincerity"), and ultimately imposing the death penalty. Although "ex parte contact does not, in itself, evidence any kind of bias," it is hard to imagine a more "extreme" case of bias from ex parte contact than this one. *Getsy*, 495 F.3d at 311 (citations omitted).

And Judge Stuard's conduct evidencing bias did not stop there. After his improper ex parte contacts came to light, he refused to accept responsibility, stating that he did "nothing wrong." During his disciplinary proceedings, Judge Stuard downplayed his conduct by claiming that the prosecution was simply performing a ministerial task and purportedly gained no tactical advantage from writing the opinion. The Disciplinary Counsel and Ohio Supreme Court disagreed: they found that Judge Stuard violated two ethical canons in Ohio's judicial code of conduct and publicly reprimanded him for doing so. *Disciplinary Couns.*, 901 N.E.2d at 791–92.

Despite these findings—and years after Jackson had moved for relief—Judge Stuard refused to recuse himself or grant Jackson a new sentencing hearing. Instead, he had to be directed by the Ohio Court of Appeals to afford Jackson a new hearing and "personally" draft a new, untainted opinion "evaluat[ing] the appropriateness of the death penalty." *Jackson*, 941 N.E.2d at 1226. Two years later—to ensure that he disposed of the case before it would be transferred to another judge upon his retirement—Judge Stuard held Jackson's resentencing proceeding (where, as discussed below, he improperly denied Jackson the opportunity to present mitigating evidence). And at that hearing, he took the time to express his disagreement for the need to hold a resentencing hearing, claiming that the higher courts "misunderstood what occurred" but that he was nonetheless required to abide by their rulings.

That very afternoon, Judge Stuard issued his second sentencing opinion. Functionally, the second opinion was "almost identical" to the original. *Jackson*, 73 N.E.3d at 433. Even though Judge Stuard was directed to "personally review and evaluate the appropriateness of the death penalty" and "prepare *an entirely new sentencing entry*," *Jackson*, 941 N.E.2d at 1226 (emphasis added), he declined to scrap the corrupted opinion and instead marginally modified it to include the new procedural posture among other minor changes. He did so because he viewed the need for the hearing "in a very narrow light": "to conduct this re-sentencing based on a review of the evidence that was presented during the trial" and do nothing more. Indeed, the new sentencing opinion failed to mention anything that occurred at the resentencing hearing.

Considering the totality of the circumstances, we conclude that the objective risk of Judge Stuard's bias against Jackson was "too high to be constitutionally tolerable." *Caperton*, 556 U.S. at 872 (citation omitted). Unbeknownst to Jackson, Judge Stuard enlisted the prosecutor to draft his opinion sentencing Jackson to death. After his unethical behavior was exposed, he delayed Jackson's resentencing; declined to accept responsibility for his impropriety; and refused to issue an untainted, personally crafted sentencing opinion. Judge Stuard could impose the death penalty, but he could not be bothered to draft an opinion explaining why. These actions show a "deep-seated" favoritism toward the prosecution and antagonism toward Jackson, "mak[ing] fair judgment impossible." *Coley*, 706 F.3d at 750. Jackson must demonstrate only an objective risk of bias, and he has done at least that.

Further, by asking the prosecutor to draft the original sentencing opinion for him, Judge Stuard essentially allowed the prosecution to "act[] as both accuser and judge in [Jackson's] case." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). True, Judge Stuard informed the prosecutor he would impose the death penalty, but the two pages of notes he provided to the prosecutor (which were "not very detailed") can hardly provide support for the harshest sentence tolerated in the American justice system. Instead, the prosecutor had significant discretion in explaining why the aggravating circumstances outweighed Jackson's purportedly insincere and unconvincing mitigating evidence. Judge Stuard's decision to involve the prosecution in this critical decision in Jackson's case and his failure to cure the effects of that egregious error, even after being ordered to do so,

suggests, at minimum, a risk of bias in favor of the prosecution and against Jackson. *Cf. id.*; *Bracy*, 520 U.S. at 905.

The warden's arguments to the contrary are unconvincing. The warden focuses on the "few narrow circumstances" in which the Supreme Court has found an unconstitutional risk of bias, and he claims that Jackson's case is too dissimilar. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *Caperton*, 556 U.S. at 884; *Mayberry*, 400 U.S. at 466; *Murchison*, 349 U.S. at 136; *Williams*, 579 U.S. at 14. But given our de novo review, *Issa*, 904 F.3d at 453, we need not confine our analysis to these cases. We instead analyze Judge Stuard's conduct under a broader lens. [3] *See Caperton*, 556 U.S. at 880 ("[D]isqualifying criteria cannot be defined with precision. Circumstances and relationships must be considered." (internal quotation marks omitted)). And even if this claim was not subject to de novo review, the "general standard" for establishing a claim of unconstitutional judicial bias is clearly established. *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) (citation omitted); *see also Caperton*, 556 U.S. at 872. For the reasons we have articulated, the risk of Judge Stuard's bias was too high to be constitutionally tolerable.

In sum, Judge Stuard failed to act as a fair tribunal, denying Jackson his Fourteenth

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[3] Moreover, the warden disaggregates Jackson's claimed instances of judicial bias. But when analyzing the risk of judicial bias, we look at "all the circumstances" collectively. *Caperton*, 556 U.S. at 872; *see also Coley*, 706 F.3d at 750 (considering whether the defendant's arguments "cumulatively establish[ed] the requisite probability of actual bias").

Amendment right to an unbiased, neutral arbiter. As such, Jackson is entitled to a writ of habeas corpus on his judicial-bias claim.

IV.

Next, Jackson claims that the trial court's exclusion of additional mitigating evidence during his resentencing proceedings violated his Eighth Amendment right to present all relevant mitigating evidence that might provide a basis for imposing a sentence less than death. And he contends that the Ohio Supreme Court's rejection of this claim was an unreasonable application of and contrary to the rights clearly established in *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Skipper v. South Carolina*, 476 U.S. 1 (1986), and their progeny. We agree, as we have previously held that these cases clearly established that "a defendant be 'permitted to present any and all relevant mitigating evidence that is available,' [and] . . . at resentencing, a trial court must consider any new evidence that the defendant has developed since the initial sentencing hearing." *Davis v. Coyle*, 475 F.3d 761, 774 (6th Cir. 2007) (quoting *Skipper*, 476 U.S. at 8). That holding was correct then, and today we reiterate that *Lockett*, *Eddings*, and *Skipper* require capital sentencing courts to consider any and all relevant mitigating evidence presented at the time of sentencing, with no exception for cases where prior sentencing proceedings had been held. For the following reasons, the district court correctly concluded that Jackson is entitled to relief on this claim.

A.

As in *Davis*, we first outline the clearly established Supreme Court precedent confirming Jackson's right to present all relevant mitigating evidence at his death-penalty sentencing proceedings. To comply with the Eighth Amendment, the death penalty may "not be imposed under sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion); *see also generally Furman v. Georgia*, 408 U.S. 238 (1972). The Eighth Amendment therefore requires "individualized sentencing determinations in death penalty cases," *Stringer v. Black*, 503 U.S. 222, 230 (1992), meaning the sentencing court must consider "the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death," *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

Before *Lockett*, the Supreme Court had opined that judges in capital sentencings are "authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959). In *Lockett*, the Supreme Court squarely endorsed this rule: "the sentencer, in all but the rarest kind of capital case, [must] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604 (footnotes omitted). In doing so, the Court reaffirmed the well-established principle that "an individualized decision

is essential in capital cases" because the death penalty "is so profoundly different from all other penalties" and "[t]he need for treating each defendant in a capital case with that degree of respect due [to] the uniqueness of the individual is far more important than in noncapital cases." *Id.* at 605. Accordingly, because the *Lockett* defendant's sentencing court considered only a "limited range of mitigating circumstances" when determining whether to impose the death penalty, the Supreme Court remanded for a resentencing, where the sentencing court was to conduct an individualized consideration of all the defendant's mitigating evidence. *Id.* at 606–09.

The Supreme Court then extended *Lockett* in *Eddings*, where the Court held unconstitutional a capital sentence in which the sentencing judge excluded evidence of the defendant's family history. *Eddings*, 455 U.S. at 113. Noting that the exclusion of such evidence violated *Lockett*, the *Eddings* Court held that, "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Id.* at 113–14. Of course, sentencing courts may assign the appropriate weight to mitigating evidence, *id.* at 114–15, and they retain their "traditional authority . . . to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense," *Lockett*, 438 U.S. at 604 n.12. But post-*Eddings*, "they may not give [mitigating evidence] no weight by excluding such evidence from their consideration." 455 U.S. at 115. As such, the *Eddings* Court vacated the defendant's death sentence and remanded for resentencing proceedings for the state court to

consider "all relevant mitigating evidence," including evidence regarding the defendant's rough upbringing and family history. *Id.* at 117.

Then in *Skipper*, recognizing once more that "the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence," the Supreme Court again reversed a death sentence. 476 U.S. at 4 (internal quotation marks omitted). There, the trial court disregarded *Eddings* by refusing to allow the defendant to present testimony from several witnesses that the defendant "made a good adjustment" during his time in jail awaiting trial. *Id.* at 3–4. While the state courts prohibited the defendant from presenting this evidence because it was relevant only to his "future adaptability to prison life," which the trial court deemed "not a[t] issue in this case," *id.* at 3 (emphasis omitted), the Supreme Court disagreed, holding that such evidence was "relevant evidence in mitigation of punishment" because it might have served "as a basis for a sentence less than death," *id.* at 4 (citation omitted). In other words, even post- offense conduct may be considered mitigating, and it therefore "may not be excluded from the sentencer's consideration" if it shows that "the defendant would not pose a danger if spared (but incarcerated)." *Id.* at 5. Accordingly, the Supreme Court remanded for resentencing, at which the defendant was "permitted to present any and all relevant mitigating evidence that is available." *Id.* at 8.

The Supreme Court has repeated these clearly established principles time and time again. *See, e.g.*, *Hitchcock v. Dugger*, 481 U.S. 393, 398–99 (1987) ("[I]t could not be clearer that the advisory jury was

instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of [*Skipper*, *Eddings*, and *Lockett*]."); *Kansas v. Marsh*, 548 U.S. 163, 175 (2006) ("In aggregate, our precedents confer upon [capital] defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence."); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) ("[The Supreme Court has] firmly established that sentencing [courts] must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.").

Notably, we have applied *Lockett*, *Eddings*, and *Skipper* to resentencing proceedings that took place after the defendant's initial opportunity to present mitigating evidence. *See Davis*, 475 F.3d at 774 ("*Skipper* requires that, at resentencing, a trial court must consider any new evidence that the defendant has developed since the initial sentencing hearing." (citation omitted)). Today, we reinforce *Davis*'s correct analysis and follow its holding—which remains consistent with clearly established Supreme Court precedent and by which we are bound. *See, e.g.*, *Rodgers*, 569 U.S. at 64; *Smith v. Stegall*, 385 F.3d 993, 998 (6th Cir. 2004); *Tolliver*, 594 F.3d at 916 n.6; *Hill v. Hofbauer*, 337 F.3d 706, 716 (6th Cir. 2003).

Therefore, we hold that *Lockett*, *Eddings*, *Skipper*, and their progeny clearly established that capital defendants have a right to present during their sentencing proceedings "any and all relevant mitigating evidence that is available." *Skipper*, 476 U.S. at 8; *see also Stegall*, 385 F.3d at 998 (explaining that, while the federal circuit courts cannot create clearly established law under AEDPA, we may "determine whether a legal principle or right ha[s] been clearly established by the Supreme Court"). This principle is broad because "[w]hen the choice is between life and death," the Eighth and Fourteenth Amendments require the sentencing court to consider the "defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604–05.

B.

In light of this clearly established federal law, the question then becomes whether the Ohio Supreme Court's decision affirming the trial court's exclusion of additional mitigating evidence at Jackson's resentencing was an unreasonable application of, or contrary to, this clearly established law. Unquestionably, the answer is yes.

Start with the unreasonable-application prong of § 2254(d)(1): the Ohio Supreme Court "identifie[d] the correct governing legal principle . . . but unreasonably applie[d] that principle to the facts of [Jackson's] case." *Taylor*, 529 U.S. at 413. Despite correctly identifying *Lockett*, *Eddings*, and *Skipper*, the Ohio Supreme Court reasoned that Jackson could not present additional mitigating evidence during his resentencing proceedings because "[t]he United States

Supreme Court has not determined that a capital defendant has a categorical constitutional right to introduce new mitigation evidence that is discovered after a sentencing hearing in which the defendant was given an opportunity to present all the mitigation evidence he desired." *Jackson*, 73 N.E.3d at 427. But the Supreme Court has held that trial courts may not refuse to consider any relevant mitigating evidence in death-penalty cases, *Eddings*, 455 U.S. at 115, and in turn, that capital defendants may present "any and all relevant mitigating evidence that is available" at the time the court is considering whether to impose the death penalty, *see Skipper*, 476 U.S. at 5, 8. Here, the trial court was considering whether to impose the death penalty at Jackson's resentencing, yet it prevented him from presenting relevant mitigating evidence. *Jackson*, 941 N.E.2d at 1226. The Ohio Supreme Court's attempt at narrowing the Supreme Court's purposely broad rule is unavailing and violates the principle clearly defined by *Lockett*, *Eddings*, and *Skipper*. Thus, the Ohio Supreme Court unreasonably applied clearly established Supreme Court precedent by prohibiting Jackson from presenting all available, relevant mitigating evidence at his resentencing proceedings.

For many of the same reasons, the Ohio Supreme Court's decision was also contrary to clearly established Supreme Court precedent. Recall that a state-court decision is "contrary to clearly established federal law" if, for example, "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law." *Carter v. Mitchell*, 829 F.3d 455, 468 (6th Cir. 2016) (alteration in original)

(quoting *Taylor*, 529 U.S. at 405). [4] Here, the relevant question of law—whether the trial court must consider all relevant mitigating evidence when determining a sentence in capital proceedings—is one that the Supreme Court has squarely answered. Yet the Ohio Supreme Court refused to follow the Supreme Court's answer to that question. The Ohio Supreme Court unreasonably narrowed the *Lockett-Eddings-Skipper* rule so much that it reached a conclusion opposite to that of the Supreme Court. *Compare Jackson*, 73 N.E.3d at 430 ("No binding authority holds that the Eighth Amendment requires a resentencing judge to accept and consider new mitigation evidence at a limited resentencing when the defendant had the unrestricted opportunity to present mitigating evidence during his original mitigation hearing."), *with Eddings*, 455 U.S. at 114 ("[T]he sentencer [may not] refuse to consider . . . any relevant mitigating evidence."). Therefore, we also hold that the Ohio Supreme Court applied a standard contrary to that of the Supreme Court by categorically excluding Jackson's proffered mitigating evidence at his second capital sentencing proceedings.

The warden resists our conclusions, arguing that the Supreme Court has never considered "whether and when a defendant may introduce new mitigating

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[4] Because we find that the Ohio Supreme Court's decision was contrary to clearly established Supreme Court precedent on a question of law, we need not consider Jackson's alternative argument that this decision was also contrary to such precedent by "confront[ing] facts that are materially indistinguishable from [the] relevant Supreme Court precedent and arriv[ing] at an opposite result." *Carter*, 829 F.3d at 468 (internal quotation marks omitted).

evidence in 'a proceeding on remand for the limited purpose of correcting an error that occurred *after* the defendant had had a full, unlimited opportunity to present mitigating evidence to the sentencer.'" But this argument fails to recognize that a "lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law," given that "a general standard" from relevant Supreme Court cases can "supply such law." *Rodgers*, 569 U.S. at 62 (citation omitted). The general standard from *Lockett*, *Eddings*, and *Skipper* is that, when choosing a capital defendant's sentence, "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" *Skipper*, 476 U.S. at 4 (quoting *Eddings*, 455 U.S. at 114). And, given that Judge Stuard was instructed to "evaluate the appropriateness of the death penalty" on remand, *Jackson*, 941 N.E.2d at 1226, it is immaterial that the relevant proceeding was a *re*sentencing or that much of Jackson's proffered mitigating evidence was available (though not compiled or discovered) at the time of his first sentencing. *See Davis*, 475 F.3d at 774. The bottom line is that Judge Stuard was again tasked with deciding whether to impose the death penalty on Jackson, so *Lockett*, *Eddings*, and *Skipper*'s general, clearly established standard applied to Jackson's resentencing.

In sum, the Ohio Supreme Court issued an opinion that was an unreasonable application of and contrary to *Lockett* and its progeny, which require sentencing courts, when deciding whether to impose the death penalty, to consider all relevant mitigating evidence the defendant presents during his sentencing proceedings, regardless of when the proceedings take place, when the mitigating evidence was discovered,

or whether prior sentencing proceedings had been held. We therefore analyze Jackson's mitigating-evidence claim de novo. *See Rice*, 660 F.3d at 251– 52; *Issa*, 904 F.3d at 453.

C.

Considering this clearly established Supreme Court precedent, our de novo review is simple. Pursuant to the Eighth and Fourteenth Amendments, *Lockett*, *Eddings*, and *Skipper* entitled Jackson to present "any and all" relevant mitigating evidence he had compiled at the time of his resentencing proceedings, yet the trial court prevented him from doing so. The fact that Jackson had already been sentenced once is irrelevant. Jackson was not subject to any sentence, so Judge Stuard was tasked with determining whether the death penalty or life in prison was the appropriate sentence, given all the relevant circumstances—both aggravating and mitigating. But Judge Stuard refused to allow Jackson to present all the relevant mitigating circumstances, meaning he violated Jackson's Eighth Amendment rights—a violation that the Ohio appellate courts affirmed. For these reasons, Jackson is entitled to a writ of habeas corpus on his mitigating-evidence claim.

V.

Finally, Jackson claims that his attorneys at the mitigation-phase stage provided ineffective assistance of counsel. However, Jackson asks us to pretermit consideration of this claim if we grant his petition on any other grounds. And at oral argument, the warden agreed with that proposed procedure. Given our conclusions concerning Jackson's other claims, and pursuant to Jackson's unopposed request, we decline

to address Jackson's ineffective-assistance claim. *See, e.g.*, *Thomas v. Westbrooks*, 849 F.3d 659, 667 (6th Cir. 2017) (pretermitting consideration of the petitioner's additional claims after granting him habeas relief on one claim); *Davis*, 475 F.3d at 775 ("Because we must remand the case for yet another sentencing hearing, we need not address in detail each of the remaining allegations of constitutional error raised before this court by Davis.").

VI.

For these reasons, we affirm the district court's grant of Jackson's petition for a writ of habeas corpus under 28 U.S.C. § 2254 for his mitigating-evidence claim, reverse the denial of his petition on his judicial-bias claim, and decline to address his ineffective-assistance-of-counsel claim. We remand to the district court for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

NATHANIEL JACKSON,

Petitioner,

vs.

MARC V. HOUK,

Respondent.

Case No. 4:07-cv-00880

OPINION & ORDER
[Resolving Doc. 64]

JAMES S. GWIN, UNITED STATES DISTRICT COURT JUDGE:

Nathaniel Jackson, an inmate sentenced to death by the State of Ohio, petitions for habeas corpus relief under 28 U.S.C. § 2254.[1] He raises 37 Grounds of relief. Respondent Warden Marc C. Houk answered.[2] Petitioner filed a traverse.[3]

The Petitioner Jackson briefing does a markedly poor job. Because of defective pleading, Petitioner Jackson gives a plausible argument with regard to only a single claim.

Indeed, most of Jackson's petition suffers two fatal flaws. First, the petition fails to argue within the

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[1] Doc. 64; Doc. 65.
[2] Doc. 71.
[3] Doc. 73.

AEDPA framework. Jackson's habeas briefing copies many of his arguments from his state-court briefs, sometimes verbatim Because Jackson simply copies state court briefing, Jackson fails to identify the relevant last-in-time state-court adjudication for his challenges, let alone explain how the relevant adjudications are (1) contrary to or an unreasonable application of clearly established federal law or (2) based on an unreasonable interpretation of the facts. Second, Jackson's habeas grounds consist of conclusory, sometimes incoherent arguments, and most arguments fail to muster any persuasive factual or legal support.

Still, in Ground 30, Petitioner Jackson establishes that the state courts violated Jackson's constitutional rights when it denied Jackson the opportunity to present updated mitigation evidence at his 2012 resentencing.

Therefore, the Court **GRANTS** Jackson's habeas corpus petition on Ground 30 and remands to the state trial court for resentencing.

I. Background

A. Trial Evidence

For expediency, the Court reproduces the Ohio Supreme Court' summary of the facts established at trial. Under 28 U.S.C. § 2254, the Court presumes these facts to be correct.[4]

> {¶ 5} Donna Roberts lived with Robert Fingerhut, her former husband, in Howland Township,

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[4] *Davis v. Ayala*, 576 U.S. 257, 271 (2015) (citing 28 U.S.C. § 2254 (e)(1)).

Trumbull County. Fingerhut, who operated Greyhound bus terminals in Warren and Youngstown, owned two insurance policies on his life, both of which named Roberts as sole beneficiary. The total death benefit of the two policies was $550,000.

{¶ 6} At some point, Jackson began an affair with Roberts. In 2001, the affair was interrupted by Jackson's confinement in the Lorain Correctional Institution. While Jackson was in prison, he and Roberts exchanged numerous letters and spoke on the telephone. Prison authorities recorded many of their telephone conversations.

{¶ 7} Passages from the letters and telephone calls indicated that the two plotted to murder Fingerhut. Jackson repeatedly pledged to kill Fingerhut upon Jackson's release from prison. In one letter, Jackson wrote, "Donna I don't care what you say but Robert has to go! An[d] I'm not gonna let you stop me this time." At Jackson's request, Roberts purchased a ski mask and a pair of gloves for Jackson to use during the murder. On the day before Jackson was released, he and Roberts had one final recorded conversation. Jackson told her, "I got to do this Donna. I got to." He also told Roberts his plan: "I just need to be in that house when he come home. * * * Baby it ain't gonna happen in the house."

{¶ 8} Jackson was released on December 9, 2001. Roberts drove to Lorain to pick him up, spent that night with him in a motel, and spent much of the next two days with him as well. On December 11, 2001, Fingerhut was shot to death at his home.

{¶ 9} When police responded to the crime scene, Roberts was hysterical and asked them to do whatever was necessary to catch the killer. She also reported that Fingerhut's car had been stolen. During a search of the house, the police found, in a dresser in the master bedroom, 145 handwritten letters and cards that Jackson had sent to Roberts. In the trunk of Roberts's car, the police found a bag with Jackson's name on it containing clothes and 139 letters that Roberts had sent to Jackson. On December 12, Fingerhut's car was found in Youngstown.

{¶ 10} On December 21, 2001, Jackson was arrested at a friend's house in Youngstown. Jackson had a bandage around his left index finger at the time of his arrest. The police seized a pair of bloodstained gloves with the left index finger missing and a pair of tennis shoes from the house. The tread pattern on the shoes was consistent with a shoe print left in blood near Fingerhut's body.

{¶ 11} During a subsequent police interview, Jackson said, "I just didn't mean to do it, man." He then related his version of what happened, essentially claiming that he shot Fingerhut in self-defense. Jackson claimed to have known Fingerhut for a couple of years. Jackson said that on the evening of December 11, he approached Fingerhut about getting a job at the Youngstown bus terminal. They met later that evening, and Jackson sold Fingerhut "some weed." He then asked Fingerhut if he could go to Fingerhut's house to "chill" before starting work the next day, and Fingerhut gave Jackson a ride to Fingerhut's home. According to Jackson, after they went inside

the home, Fingerhut started making racial comments and other disparaging remarks toward him. Fingerhut then pulled a revolver, Jackson tried to grab it, and Fingerhut shot Jackson in the finger as Jackson reached for the gun. Jackson then took the gun from Fingerhut during the "tussle" and shot him twice. Jackson was unsure where the shots hit Fingerhut but said that Fingerhut was still breathing when Jackson fled the house and drove away in Fingerhut's car.

{¶ 12} Fingerhut's autopsy showed that he had been shot three times, including a penetrating gunshot wound to the top of the head that was determined to be fatal. There was also a laceration between Fingerhut's left thumb and index finger, and further examination showed that the fatal bullet hit his hand before entering the top of his head. Gunshot residue on the body indicated that the distance from the muzzle of the firearm to the head wound was 24 inches or less.

{¶ 13} Finally, expert testimony established that the DNA profile of bloodstains found inside Fingerhut's car and on its trunk-release lever matched Jackson's DNA profile.[5]

B. Relevant State-Court Procedural History

In separate trials before the same judge, two juries separately convicted Petitioner Nathaniel Jackson and Donna Roberts of capital murder and recommended death sentences for both.[6] The trial

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[5] *State v. Jackson ("Jackson III")*, 73 N.E.3d 414, 419-20 (Ohio 2016).
[6] *Id.* at 420.

judge, Judge Stuard, imposed death in both cases.[7] Petitioner Jackson's sentence was affirmed after a direct appeal and a postconviction relief petition.[8]

1. Donna Roberts's Direct Appeal and Resentencing

Petitioner Jackson's coconspirator, Donna Roberts, appealed her conviction and sentence. In Roberts's direct appeal, the Ohio Supreme Court affirmed Roberts's conviction.[9] However, the Ohio Supreme Court vacated her death sentence based on the following facts:

> {¶ 154} At the sentencing hearing, the court read aloud its sentencing opinion and imposed the death penalty on Roberts. As the court was doing so, defense counsel noticed that the prosecutor was looking at a document and appeared to be reading along with the trial judge. At the end of the court's reading, defense counsel raised a "vehement" objection to the prosecution's apparent ex parte involvement with the sentencing opinion.
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> {¶ 155} The trial judge conceded that the prosecution had participated in the drafting of the opinion without the knowledge of defense counsel. The trial judge stated that he had given notes to the prosecutor and had instructed the prosecutor, "[T]his is what I want." The [trial] court added that the opinion had to be corrected six or seven times. The trial judge apologized to defense counsel for

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[7] *Id.* at 420-21.

[8] *State v. Jackson ("Jackson I")*, 839 N.E.2d 362 (Ohio 2006); *State v. Jackson*, 111 Ohio St. 3d 1469 (2006).

[9] *State v. Roberts*, 850 N.E.2d 1168, 1188 (Ohio 2006).

not providing them with a copy of the opinion before the sentencing hearing.[10]

In its decision vacating Roberts's sentence, the Ohio Supreme Court observed that Ohio law gives the trial court sole responsibility for weighing the evidence and drafting death-sentence opinions.[11] In Roberts's case, the Ohio Supreme Court concluded that the trial court's delegation of responsibility to the prosecution violated Ohio law.[12] The Ohio Supreme Court explained that its "conclusion is compelled particularly in light of the trial court's ex parte communications about sentencing with the prosecutor in preparing the sentencing opinion."[13] Accordingly, the Ohio Supreme Court remanded Roberts's case to the trial court for resentencing.[14]

At the resentencing, Judge Stuard again sentenced Donna Roberts to death.[15]

2. Jackson's Resentencing and Second Direct Appeal

Following the Ohio Supreme Court's decision vacating Roberts's death penalty, on August 15, 2006, Petitioner Jackson requested the trial court's

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[10] *State v. Roberts*, 850 N.E.2d at 1188.
[11] *State v. Roberts*, 850 N.E.2d at 1188.
[12] *Id.* at 1189.
[13] *Id.*
[14] *Id.* at 1190. Notably, in January 2009, the Ohio Supreme Court publicly reprimanded Judge Stuard for his *ex parte* communications with a prosecutor in the *Roberts* case. *Jackson III*, 73 N.E.3d at 422.
[15] *State v. Roberts*, 998 N.E.2d 1100, 1103 (Ohio 2013).

permission to move for a new sentencing hearing.[16] The trial court did not immediately rule on Jackson's motion.

On October 5, 2006, Jackson filed an affidavit of disqualification in the Ohio Supreme Court against the trial judge, Judge Stuard, seeking to prevent Judge Stuard from presiding over any further trial or postconviction proceedings in his case.[17] Judge Stuard responded to Jackson's affidavit of disqualification, contending that he could continue to preside over Jackson's case.[18]

On November 29, 2006, Ohio Chief Justice Moyer denied Jackson's disqualification request.[19] ChiefJustice Moyer concluded that the record "does not compel [Judge Stuard's] disqualification for any alleged bias or prejudice."[20] Justice Moyer explained:

> [Judge Stuard] acknowledges that he held the same kind of communications with the prosecuting attorney's office in both the *Roberts* and *Jackson* capital cases before sentencing each of them to death, and he denies that any hearing is needed in his courtroom in the Jackson case to establish that fact. The judge states that he is prepared to reconsider the evidence and impose a new sentence in this case just as he has been ordered to do in the related *Roberts* case. He contends that his ex parte

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[16] *State v. Jackson ("Jackson II")*, 941 N.E.2d 1221, 1223 (Ohio Ct. App. 2010).
[17] *Jackson III*, 73 N.E.3d at 421.
[18] *In re Disqualification of Stuard*, 863 N.E.2d 636, 637 (Ohio 2006).
[19] *Id.* at 638.
[20] *Id.*

> communications with the prosecuting attorney's office were administrative rather than substantive, and he states that the prosecuting attorney's office simply typed up his notes after he had independently weighed the evidence and reached a decision about the proper sentences for the two defendants.[21]

As of January 2008, Judge Stuard still had not ruled on Jackson's request for leave to move for a new sentencing hearing. On January 8, 2008, Petitioner Jackson brought a mandamus action to require Judge Stuard to rule on Petitioner's motion.[22] On February 15, 2008, nearly 18 months after Jackson moved for leave to file a new a new sentencing hearing, the trial judge granted Jackson's motion.[23]

On February 29, 2008, Jackson moved "for a new trial and/or sentencing hearing" on the grounds that the prosecution impermissibly collaborated in the drafting of the sentencing opinion.[24]

In mid-May 2008, Petitioner Jackson filed a second disqualification affidavit against Judge Stuard in the Ohio Supreme Court.[25] Petitioner argued, *inter alia*, that Jackson was entitled to the same relief afforded by the Ohio Supreme Court in the *Roberts* case—namely a resentencing—and implied that Judge

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[21] *Id.* at 637.
[22] Doc. 48-8 at 49. On April 9, 2008, the Ohio Supreme Court dismissed Petitioner's mandamus action. *State ex rel. Jackson v. Stuard*, 884 N.E.2d 64 (Ohio 2008).
[23] *Jackson III*, 73 N.E.3d at 422.
[24] *Jackson III*, 73 N.E.3d at 422.
[25] *Jackson III*, 73 N.E.3d at 422; Doc. 47-3 Page ID 8550-8569.

Stuard should be disqualified for his failure to grant this relief.[26]

The Chief Justice denied this second disqualification attempt.[27] The Chief Justice explained that "an affidavit of disqualification is not a vehicle to contest matters of substantive or procedural law," and "the judge's alleged failure to provide timely rulings on motions is not a concern that can be addressed through an affidavit of disqualification."[28]

On May 4, 2009, Judge Stuard denied Jackson's motion for a new trial and sentencing hearing.[29] Jackson appealed the denial to the state appellate court.[30]

On October 15, 2010, the Ohio Eleventh District Court of Appeals granted Jackson's appeal and reversed Judge Stuard's denial of Jackson's motion for resentencing.[31] The state appeals court held that the trial judge's use of the prosecutor to assist in preparing the sentencing opinion in Jackson's case was improper, vacated Jackson's sentence, and remanded for resentencing.[32] The state appellate court mandated:

> In the case at bar, . . . the fact pattern is factually the same as that in *Roberts*. The record before us establishes that the same drafting procedures involving the sentencing entry that occurred in

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[26] *Jackson III*, 73 N.E.3d at 422; Doc. 47-3 Page ID 8562-8567.
[27] Doc. 47-9.
[28] *Id.* at 203 (internal quotation marks and citation omitted).
[29] *Jackson III*, 73 N.E.3d at 422.
[30] *Id.*
[31] *Jackson II*, 941 N.E.2d at 1224.
[32] *Id.* at 1226

> *Roberts* took place in the instant matter. . . . Based on the Supreme Court of Ohio's holding in *Roberts*, appellant is entitled to the same relief afforded to his co-defendant. Thus, the trial judge must personally review and evaluate the appropriateness of the death penalty, prepare an entirely new sentencing entry as required by R.C. 2929.03(F), and conduct whatever other proceedings are required by law and consistent with this opinion.[33]

On August 14, 2012, the trial court conducted Jackson's resentencing hearing.[34] At the start of the hearing, Jackson requested that Judge Stuard recuse himself.[35] Judge Stuard denied the request.[36]

Important to this habeas action, Petitioner Jackson also sought to offer new evidence at his resentencing hearing. Judge Stuard denied Jackson's motion to introduce additional mitigating evidence, though Judge Stuard allowed Jackson to offer an allocution.[37]

Judge Stuard resentenced Jackson to death.[38] In his second sentencing opinion, released later that afternoon, Judge Stuard made only small changes to the original sentencing opinion that was drafted by the prosecution:

> {¶ 91} The 2002 and 2012 sentencing opinions are very similar. The 2002 sentencing opinion

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[33] *Jackson II*, 941 N.E.2d at 1226.
[34] *Jackson III*, 73 N.E.3d at 422.
[35] *Id.*
[36] *Id.*; Doc 47-17 Page ID 13507.
[37] *Jackson III*, 73 N.E.3d at 422.
[38] *Id.*

> summarized the trial-phase evidence, discussed the aggravating circumstances and mitigating evidence, and explained why the trial court concluded that "the aggravating circumstances, outweighed, by proof beyond a reasonable doubt, the collective mitigating factors." The 2012 sentencing opinion added three new introductory paragraphs explaining the reasons for Jackson's resentencing proceedings. Two other paragraphs were rewritten to discuss the trial-phase evidence in a different way. Otherwise, the two opinions are almost identical.[39]

Additionally, the second sentencing opinion made no references to Jackson's allocution.[40]

On appeal from the resentencing, the Ohio Supreme Court upheld the second death sentence.[41] The Court will describe the Ohio Supreme Court's affirmance below.

C. Relevant Federal Habeas Procedural History

On October 31, 2007, Petitioner Nathaniel Jackson filed this habeas corpus action.[42] On March 20, 2008, Jackson filed a motion for a stay and abeyance, indicating he had appealed the trial court's denial of his postconviction relief petition to the Ohio Eleventh District Court of Appeals.[43] Jackson indicated he had

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[39] *Id.* at 433.
[40] *Id.* at 430-31.
[41] *Jackson III*, 73 N.E.3d at 427.
[42] Doc. 14.
[43] Doc. 28 at 2.

also moved for a new sentencing hearing before the trial court.[44]

On April 18, 2008, the Court granted a stay pending exhaustion of Jackson's state-court remedies.[45] The Court ordered Jackson to notify this Court upon exhaustion.[46]

On March 2, 2018, Jackson moved for leave to file an amended habeas petition. Petitioner Jackson said he had finally exhausted his state-court remedies.[47] That same day, Petitioner filed his amended petition and a brief in support.[48]

On March 15, 2018, the Court lifted the stay and construed Petitioner's amended petition as a first-in-time habeas petition.[49] On October 1, 2018, the Warden filed his return.[50] On March 31, 2019, Petitioner Jackson filed his traverse.[51]

On February 24, 2020, Petitioner moved to stay his July 15, 2020 execution.[52] On March 9, 2020, the Court granted Petitioner's motion to stay his execution pending the Court's adjudication of his habeas petition.[53]

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[44] *Id.* at 3.
[45] Doc. 33.
[46] *Id.*
[47] Doc. 63.
[48] Doc. 64 (amended petition); Doc. 65 (brief in support).
[49] Doc. 67.
[50] Doc. 71.
[51] Doc. 73.
[52] Doc. 76.
[53] Doc. 79.

II. Legal Standards

A. Substantive Law

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[54] governs a federal court's review of a state prisoner's habeas corpus petition. AEDPA limits federal review to a petitioner's claims that he is in custody in violation of the Constitution, laws, or treaties of the United States.[55]

AEDPA prohibits federal courts from granting a habeas petition for any claim that the state court adjudicated on the merits unless the state court's decision:

> "(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 upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[56]

Under the "contrary to" clause of § 2254(d)(1), "a federal court must find a violation of law 'clearly established' by holdings of the Supreme Court, as opposed to its dicta, as of the time of the relevant state court decision."[57] The state court need not have been aware of the relevant Supreme Court precedent, so long as neither its reasoning nor its result contradicts

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[54] Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[55] 28 U.S.C. § 2254(a).
[56] 28 U.S.C. § 2254(d); *see also Miller v. Francis*, 269 F.3d 609, 614 (6th Cir. 2001).
[57] *Miller*, 269 F.3d at 614 (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

it.[58] In order to have an "unreasonable application of . . . clearly established Federal law," the state-court decision must be "objectively unreasonable," not merely erroneous or incorrect.[59]

Under § 2254(d)(2), a state court's determination of fact will be unreasonable only if it represents a "clear factual error."[60] Therefore, the state court's determination of facts must conflict with clear and convincing evidence to the contrary.[61] "This standard requires the federal courts to give considerable deference to state-court decisions."[62] State court factual determinations are presumed to be correct.[63]

B. Procedural Barriers to Habeas Review

Before a federal court will review the merits of a petition for a writ of habeas corpus, a petitioner must overcome several procedural hurdles. Specifically, the petitioner must surmount the barriers of exhaustion, procedural default, and time limitation.

As a general rule, a state prisoner must exhaust all possible state remedies or have no remaining state remedies before a federal court will review a petition for a writ of habeas corpus.[64]

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[58] *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (per curiam).
[59] *Williams*, 529 U.S. at 405.
[60] *Wiggins v. Smith*, 539 U.S. 510, 528-29 (2003).
[61] *Id.*
[62] *Ferensic v. Birkett*, 501 F.3d 469, 472 (6th Cir. 2007).
[63] *Ayala*, 576 U.S. 271.
[64] 28 U.S.C. § 2254(b) and (c); *see Baldwin v. Reese*, 541 U.S. 27 (2004).

To be properly exhausted, each claim must have been "fairly presented" to the state courts.[65] Fair presentation requires that the state courts be given the opportunity to see both the factual and legal basis for each claim.[66] Each claim must be presented to the state courts as a federal constitutional issue, not merely as an issue arising under state law.[67]

Moreover, the claim must be presented to the state courts under the same legal theory in which it is later presented in federal court.[68] It cannot rest on a legal theory which is separate and distinct from the one previously considered and rejected in state court.[69]

The procedural default doctrine serves to bar habeas review of federal claims that a state court declined to address because the petitioner did not comply with a state procedural requirement.[70] Although procedural default is sometimes confused with exhaustion, exhaustion and procedural default are distinct concepts.[71] Failure to exhaust applies where state remedies are still available at the time of the federal petition.[72] In contrast, where state court remedies are no longer available, procedural default rather than exhaustion applies. [*17] [73]

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[65] *See e.g. Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009); *Frazier v. Huffman*, 343 F.3d 780, 797 (6th Cir. 2003).
[66] *Wagner*, 581 F.3d at 414.
[67] *Koontz v. Glossa*, 731 F.2d 365, 369 (6th Cir. 1984).
[68] *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998).
[69] *Wong*, 142 F.3d at 322.
[70] *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).
[71] *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006).
[72] *Id.* at 806 (citing *Engle v. Isaac*, 456 U.S. 107, 125 n. 28 (1982)).
[73] *Williams*, 460 F.3d at 806.

Procedural default may occur in two ways. First, a petitioner procedurally defaults a claim if he fails to comply with state procedural rules in presenting his claim to the appropriate state court, and the state court enforced that rule and declined to reach the merits of a petitioner's claims.[74] Second, a petitioner may procedurally default a claim by failing to raise a claim in state court and no longer having a remedy available to him to exhaust his claims.[75]

To overcome procedural default, a petitioner must show cause for the default and actual prejudice that resulted from the alleged violation of federal law.[76] "Cause" is a legitimate excuse for the default, and "prejudice" is actual harm resulting from the alleged constitutional violation.[77] If a petitioner fails to show cause for his procedural default, the Court need not address the issue of prejudice.[78] A petitioner may also demonstrate a fundamental miscarriage of justice will occur if the claims are not considered; a fundamental miscarriage of justice results from the conviction of one who is "actually innocent."[79]

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[74] *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986).
[75] *Williams*, 460 F.3d at 806 (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)); *see also Baston v. Bagley*, 282 F. Supp. 2d 655, 661 (N.D. Ohio 2003) ("Issues not presented at each and every level [of the state courts] cannot be considered in a federal Habeas Corpus Petition."); *see also State v. Moreland*, 50 Ohio St. 3d 58, 62 (1990) (failure to present a claim to a state court of appeals constituted a waiver).
[76] *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).
[77] *Castro v. Harris*, No. 1:18-CV-1167, 2018 WL 3829101, at *3 (N.D. Ohio Aug. 13, 2018).
[78] *See Smith v. Murray*, 477 U.S. 527, 532 (1986).
[79] *Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006) (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

Simply stated, a federal court may review only federal claims that were evaluated on the merits by a state court. Claims that were not so evaluated, either because they were never presented to the state courts (i.e., exhausted) or because they were not properly presented to the state courts (i.e., were procedurally defaulted), are generally not cognizable on federal habeas review.

Furthermore, there is a one-year statute of limitation for filing a § 2254 petition.[80] The limitation period runs from the date on which the judgment became final by the conclusion of a petitioner's direct appeals or the date on which the time for seeking such review expired, whichever later occurs.[81]

III. Discussion

Petitioner Jackson raises 37 claims in his habeas corpus petition. Due to defective pleading, Jackson fails to satisfy his burden as to most claims. As to Ground 30, however, Petitioner establishes that the state courts denied Jackson his constitutional rights under the Eighth and Fourteenth Amendments to the U.S. Constitution.

The analysis below explains why Petitioner succeeds on Ground 30, but fails on all other Grounds. The Court addresses claims that share the same deficiency together.[82]

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[80] 28 U.S.C. § 2244(d)(1) and (2).
[81] *Id.*
[82] Some Grounds are discussed in more than one grouping.]

A. Petitioner Establishes in Ground 30 that the Trial Court Violated His Constitutional Rights When It Denied Jackson the Opportunity to Present New Mitigation Evidence at His Resentencing.

Ground 30 argues that, at Petitioner's 2012 resentencing, the trial court constitutionally erred by not considering "any new evidence that Jackson had proffered in favor of a sentence of less than death."[83] Specifically, Petitioner alleges:

> The trial judge three times stated that he would not consider any new or additional evidence that supported a sentence of less than death. [8/14/12 Tr. 5, 14]. Twice the judge stated that he had already drafted his sentencing opinion. [Tr 22, 27]. Almost immediately following the resentencing hearing, the judge filed his sentencing opinion. That opinion reflected that the judge had not considered any new evidence that Jackson had proffered in favor of a sentence of less than death. It also reflected that the judge had not considered any information from Appellant's allocution.[84]

In response, the Warden argues that there is no clearly established law "as to whether a defendant on resentencing like Jackson is entitled to a complete 'do-over' of mitigation."[85]

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[83] Doc. 65 at 99.

[84] *Id.* at 99-100. Because Petitioner copies this argument from a state-court brief, his provided citations are unhelpful.

[85] Doc. 71 at 48. In the alternative, the Warden implies that, to the extent the trial court erred by not considering mitigation evidence, this error was cured by the Ohio Supreme Court's consideration of the evidence in its independent sentencing

As a preliminary matter, the Court observes that Petitioner's Ground 30 is a mere rewrite of an argument Jackson made to the Ohio Supreme Court.[86]

Despite Jackson's responsibility to identify the last reasoned state court opinion on Ground 30, Petitioner fails to identify the last relevant state-court ruling, let alone explain how that relevant ruling is contrary to clearly established federal law. Given this briefing failure, the Court could find that Petitioner defectively pleaded Ground 30. The Court declines to do so, however, because it is persuaded that it should overlook the briefing inadequacies to consider the merits.

Clearly established federal law provides that a capital defendant has a constitutional right to mitigate his sentence.[87] In *Lockett v. Ohio*,[88] the U.S. Supreme Court overturned an Ohio death-penalty statute that permitted a sentencer to consider only a

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under O.R.C. 2929.05. *Id.* at 47. The Court rejects this alternative argument. Though the Ohio Supreme Court discussed the evidence that Jackson *wanted* to introduce at his resentencing, the Ohio Supreme Court held that such evidence could not be introduced. *Jackson III*, 73 N.E.3d at 430. Thus, assuming the trial court erred in excluding the updated mitigation evidence at the resentencing, it is not fair to say that the Ohio Supreme Court cured the error by considering Jackson's desired new evidence—because the new evidence was never in the record.

[86] Compare the text of habeas Ground 30, Doc. 65 Page ID 23496-23499, with the text of Proposition 5, Jackson's second direct appeal brief, Doc 48-7 Page ID 15409-15416.

[87] *Lockett v. Ohio*, 438 U.S. 586, 608-09 (1978) (plurality); *Furman v. Georgia*, 408 U.S. 238 (1972).

[88] 438 U.S. 586 (1978).

limited range of mitigating circumstances.[89] The Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[90]

In *Eddings v. Oklahoma*,[91] the U.S. Supreme Court extended its *Lockett* rule, holding that sentencers considering capital punishment "may not give [mitigating evidence] no weight by excluding such evidence from their consideration."[92] In other words, "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence."[93]

In *Skipper v. South Carolina*,[94] the U.S. Supreme Court applied its *Lockett-Eddings* rule to the prison-behavior context.[95] Skipper involved near identical claims to Jackson's Ground 30 claim.

South Carolina convicted Skipper of capital murder and rape.[96] The South Carolina trial court sentenced Skipper to death.

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[89] *Id.*
[90] *Id.* at 604 (emphasis in original).
[91] 455 U.S. 104 (1982).
[92] *Eddings*, 455 U.S. at 115 (emphasis in original).
[93] *Eddings*, 455 U.S. at 113-14.
[94] 476 U.S. 1 (1986).
[95] *Skipper*, 476 U.S. at 3.
[96] *Id.* at 2.

After conviction and at Skipper's sentencing hearing, the trial court rejected as irrelevant Skipper's offer of evidence "regarding [Skipper's] good behavior during the other seven months he spent in jail awaiting trial" and testimony that Skipper "made a good adjustment" while awaiting trial.[97] The jury sentenced Skipper to death.[98]

The U.S. Supreme Court vacated Skipper's death sentence because Skipper had a right to place before the sentencing jury all relevant evidence in mitigation of punishment—including his good prison behavior.[99]

In the capital context, a sentencing authority may consider a defendant's past conduct as indicative of his probable future behavior, so "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating" and, under *Eddings*, may not be excluded from the sentencer's consideration.[100]

In *Davis v. Coyle*, the Sixth Circuit interpreted *Lockett, Eddings*, and *Skipper* and applied their holdings to a like case.[101] Indeed, *Davis* concerned a defendant who had been given an opportunity to present all relevant mitigating evidence at his initial sentencing hearing, but was denied an opportunity to present new mitigating evidence at his resentencing.[102] The Sixth Circuit vacated Davis's second death sentence and held that:

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[97] *Id.* at 4.
[98] *Id.*
[99] *Id.* at 4.
[100] *Id.* at 5.
[101] *Davis v. Coyle*, 475 F.3d 761, 774 (6th Cir. 2007).
[102] *Id.* at 768-70.

> [T]he decision of the three-judge panel to exclude testimony concerning his exemplary behavior on death row in the time between the two sentencing hearings violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, and that the state courts' decisions affirming the panel's ruling were contrary to the those of the Supreme Court of the United States in *Lockett, Eddings*, and *Skipper*.[103]

The *Davis* court concluded that "the holding in *Skipper* . . . requires that, at resentencing, a trial court must consider any new evidence that the defendant has developed since the initial sentencing hearing."[104]

In the instant case, the Ohio Supreme Court somehow rejected the *Davis* Court's reading of *Lockett, Eddings, Skipper*:

> To hold, as [*Davis v. Coyle*] does, that a new mitigation hearing must be held, even though no constitutional error infected the original one, would transform the right to present relevant mitigation into a right to *update* one's mitigation. Such a right has no clear basis in *Lockett* or its progeny.[105]

The Ohio Supreme Court said that it was not bound by *Davis* or any "rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court."[106]

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[103] *Id.* at 770.
[104] *Id.* at 774 (citing *Skipper*, 476 U.S. at 8).
[105] *Jackson III*, 73 N.E.3d at 429 (quoting *Roberts*, 998 N.E.2d at 1108).
[106] *Id.* at 428 (quoting *Roberts*, 998 N.E.2d at 1108).

But the *Davis* Court correctly interpreted the U.S. Supreme Court's *Lockett, Eddings, Skipper* holdings. The Ohio Supreme Court's finding guts the Supreme Court's requirement that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating" and "[u]nder *Eddings*, such evidence may not be excluded from the sentencer's consideration."[107]

Rejecting the core holdings of *Lockett, Eddings, Skipper*,[108] the Ohio Supreme Court rejected Jackson's claims that he had a right to present new and updated mitigation evidence at his resentencing:

> Jackson was given a full opportunity to present mitigating evidence during his initial sentencing hearing. Accordingly, Jackson was not entitled to improve or expand his mitigating evidence simply because the court of appeals required the judge to resentence him and prepare a new sentencing opinion.[109]

Davis v. Coyle interpreted Supreme Court requirements. This Court is bound by *Davis* and the Sixth Circuit's understanding of the dictates of the Supreme Court's *Lockett, Eddings*, and *Skipper* precedent. In addition, the Ohio Supreme Court's interpretation destroys the Supreme Court's holding

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[107] *Skipper*, 476 U.S. at 5.

[108] The Ohio Supreme Court concluded that "[n]o binding authority holds that the Eighth Amendment requires a resentencing judge to accept and consider new mitigation evidence at a limited resentencing when the defendant had the unrestricted opportunity to present mitigating evidence during his original mitigation hearing." *Id.* at 430.

[109] *Id.*

that defendants be given a chance to offer mitigating evidence.

Therefore, the Court finds that the Ohio Supreme Court's decision to prevent Jackson from presenting mitigating evidence at his resenting hearing "was both an unreasonable application of the *Skipper* decision and contrary to the holding in that opinion and its antecedent cases."[110]

Consequently, the Court grants Jackson's habeas corpus petition on Ground 30.

B. Petitioner Fails to Meet His § 2254 Burden as to All Other Grounds Due to His Conclusory Argumentation and His Failure to Argue Within the AEDPA Framework.

Petitioner, represented by counsel, has submitted defective briefing. There are two primary problems.

The first problem is that Petitioner employs conclusory argumentation in nearly every Ground. Throughout the petition and traverse, Petitioner asserts that a prosecutor's conduct or a state court's decision violated his constitutional rights without explaining how his rights were violated—or pursuant to what U.S. Supreme Court authority.

For example, Ground 24 states, in its entirety:

> A free standing *Atkins* claim has not yet been raised in the Ohio courts in spite of substantial credible evidence including IQ scores of 70 and 72 in high school. Petitioner is entitled to the effective

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[110] *Davis*, 475 F.3d at 773.

assistance of counsel. *Strickland, Evitts, Martinez*.[111]

Ground 24, like many of Petitioner's other Grounds, is not a fully developed argument. It fails to provide any useful factual or legal citations. It fails to explain how it would overcome a procedural default. It does not explain the standard for effective assistance of counsel or how Petitioner's attorneys failed to meet this standard. This Ground is defective on its face.

The second and arguably more significant problem is that Petitioner does not argue within the AEDPA framework. As explained above, to secure relief under AEDPA, a state prisoner's habeas petition cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication (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 upon an unreasonable determination of the facts.[112] In making this determination, the Court looks to the last reasoned state-court adjudication of a petitioner's claim.[113]

In his opening brief, Petitioner fails to argue most Grounds within the appropriate framework. For many Grounds, he merely copies arguments from his various state-court briefs. With this approach, he does not identify the relevant last-in-time state-court decision, let alone explain how the decision is (1)

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[111] Doc. 65 at 66.
[112] 28 U.S.C. § 2254(d).
[113] *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018); *Williams v. Mitchell*, 792 F.3d 606, 612 (6th Cir. 2015).

contrary to or an unreasonable application of federal law or (2) based on an unreasonable determination of facts.

For example, with Ground 11, Petitioner challenges the trial court's adjudication of his suppression motion.[114] This Ground fails to acknowledge the Ohio Supreme Court's consideration (and rejection) of this challenge,[115] let alone explain how the Ohio Supreme Court's decision warrants AEDPA relief.

In the Warden's answer, the Warden argues that the Court should dismiss Jackson's petition on the basis of his defective pleading.[116] The Warden argues that to do otherwise would require the Court to dive through thousands of pages of records, identify which state-court decisions Petitioner should have challenged, and conjure arguments for Petitioner on how the relevant state court-decisions violate clearly established law or are based on unreasonable interpretations of facts.[117] The Warden says that such an exercise would make the Court act as the Petitioner's advocate.[118]

In the Petitioner's traverse, Petitioner attempts to cure his AEDPA pleading deficiency in two ways.[119]

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[114] Doc. 65 at 35.
[115] *Jackson I*, 839 N.E.2d at 371-74.
[116] *See generally* Doc. 71; *see id.* at 102 (concise recitation of Warden's argument).
[117] *E.g., id.* at 29-31.
[118] *E.g.*, Doc. 71 at 39.
[119] Petitioner also simply states that his pleading is not defective: "Mr. Jackson has met his pleading requirements as reflected in his [filings]. Any argument by the Warden that the pleading

First, Jackson argues that AEDPA is unconstitutional.[120] For this proposition, Jackson relies on a news article, law review articles, and non-binding judicial opinions criticizing AEDPA.[121]

This argument is unpersuasive. Jackson cites no binding authority for his proposition that AEDPA is unconstitutional. Moreover, the Court observes that the Sixth Circuit and the U.S. Supreme Court have considered many AEDPA cases—including challenges to the statute's constitutionality—and neither court has found the statute to be unconstitutional.[122] On the contrary, "there is universal agreement among each circuit that AEDPA deference is constitutional."[123]

Jackson's second attempt to cure his pleading deficiency also fails. For many Grounds, Petitioner's traverse reproduces his opening brief's argument and tacks on a perfunctory statement to the effect of "the state court violated AEDPA"—without actually identifying the appropriate last state-court decision or explaining how the state-court decision violates AEDPA.[124]

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requirements have not been met is unsupported by the record and law." Doc. 73 at 19. Ironically, Petitioner's assertion that his pleading is not defective is unsupported by the record and law.

[120] *Id.* at 13 ("AEDPA violates the federal Constitution and this case must be decided without its application.").

[121] *Id.* at 13-14.

[122] *See, e.g., Felker v. Turpin*, 518 U.S. 651, 664 (1997) (holding that AEDPA did not unconstitutionally suspend the writ).

[123] *Betts v. Tibbals*, No. 1:11-CV-01107, 2014 WL 4794530, at *3 (N.D. Ohio Sept. 24, 2014).

[124] For example, In Petitioner's traverse, he repeat's his Ground 30 argument and adds the following statement at the end with

Jackson's belated, half-hearted attempt to situate his Grounds within the AEDPA framework misses the mark.

In short, nearly all of Petitioner's Grounds are defectively pleaded and are denied on this basis. Though Petitioner has failed to meet his burden as to all but Ground 30, the Court provides further analysis as to why his other Grounds fail below.

C. Petitioner Defectively Pleads Grounds 1-5, 11-12, 27, 31-32, and 36 by Repeating His State-Court Arguments Without Challenging the Last Reasoned State-Court Opinion.

Petitioner's Grounds 1-5, 11-12, 27, 31-32, and 36 are mere rewrites of his state-court appellate arguments.[125]

• Ground 1 copies Jackson's direct appeal brief Proposition 2.[126]

• Ground 2 copies Jackson's direct appeal brief Proposition 3.[127]

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no further analysis: "The Ohio courts violated 2254(d)(1) and (d)(2)." Doc. 73 at 49.

[125] This list is not comprehensive. The Court considers other arguments Petitioner copied from his state-court briefs separately.

[126] Compare the text of habeas Ground 1, Doc. 65 Page ID 23410-23416, with the text of Proposition 2, Jackson's direct appeal brief, Doc 34-14 Page ID 1333-1342.

[127] Compare the text of habeas Ground 2, Doc. 65 Page ID 23416-23421, with the text of Proposition 3, Jackson's direct appeal brief, Doc 34-14 Page ID 1343-1357. Both arguments assert the same 10 sub claims with a concluding assertion of "cumulative error."

• Ground 3 copies Jackson's direct appeal brief Proposition 4.[128]

• Ground 4 copies Jackson's direct appeal brief Proposition 5.[129]

• Ground 5 copies Jackson's direct appeal brief Proposition 6.[130]

• Ground 11 copies Jackson's direct appeal brief Proposition 1.[131]

• Ground 12 copies Jackson's application to reopen the first direct appeal.[132]

• Ground 27 copies Jackson's second direct appeal brief Proposition 2.[133]

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[128] Compare the text of habeas Ground 3, Doc. 65 Page ID 23421-23422, with the text of Proposition 4, Jackson's direct appeal brief, Doc 34-14 Page ID 1358-1362. Both arguments assert the same 4 sub claims with a concluding assertion of "cumulative error."

[129] Compare the text of habeas Ground 4, Doc. 65 Page ID 23423, with the text of Proposition 5, Jackson's direct appeal brief, Doc 34-14 Page ID 1363-1368.

[130] Compare the text of habeas Ground 5, Doc. 65 Page ID 23424, with the text of Proposition 6, Jackson's direct appeal brief, Doc 34-14 Page ID 1369-1373.

[131] Compare the text of habeas Ground 11, Doc. 65, Page ID 23430-23431, with the text of Proposition 1, Jackson's direct appeal brief, Doc 34-14 Page ID 1328-1332.

[132] Compare the text of habeas Ground 12, Doc. 65 Page ID 23431-23439 with the text of the application to reopen the first direct appeal, Doc 34-16 Page ID 1640-1653.

[133] Compare the text of habeas Ground 27, Doc. 65 Page ID 23477-23491, with the text of Proposition 2, Jackson's second direct appeal brief, Doc 48-7 Page ID 15382-15396.

• Ground 31 copies Jackson's second direct appeal brief Proposition 6.[134]

• Ground 32 copies Jackson's second direct appeal brief Proposition 7.[135]

• Ground 36 copies Jackson's application to reopen the second direct appeal.[136]

Repeating arguments presented to the state courts is not necessarily a problem. Indeed, to satisfy the exhaustion requirement explained above, petitioners must present arguments to the federal courts that the state courts have already had an opportunity to consider below.[137]

The problem is that Petitioner repeats his state-court appellate arguments—sometimes nearly verbatim—without identifying the ultimate outcome of his state-court challenges. By repeating his arguments without identifying the last relevant state-court decisions, Petitioner essentially asks this Court to conduct a de novo review.

"We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a de novo matter."[138]

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[134] Compare the text of habeas Ground 31, Doc. 65 Page ID 23499-23501, with the text of Proposition 6, Jackson's second direct appeal brief, Doc 48-7 Page ID 15416-15419.
[135] Compare the text of habeas Ground 32, Doc. 65 Page ID 23501-23501, with the text of Proposition 7, Jackson's second direct appeal brief, Doc 48-7 Page ID 15420-15423.
[136] Compare the text of habeas Ground 36, Doc. 65 Page ID 23505-23506, with the text of the application to reopen the second direct appeal, Doc 48-7 Page ID 15756-15765.
[137] *Koontz v. Glossa*, 731 F.2d 365, 369 (6th Cir. 1984).
[138] *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004).

"The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."[139] In answering this question, "a federal court must 'review the last state court decision adjudicated on the merits.'"[140]

By repeating his state-court arguments and ignoring the last reasoned state-court opinion, Petitioner has defectively pleaded Grounds 1-5, 11-12, 27, 31-32, and 36. The Court declines to review Petitioner's state-court challenges de novo. The Court also declines to identify the relevant state-court adjudications of Petitioner's challenges and conjure arguments on Petitioner's behalf for why these adjudications violate clearly established federal law or are based on unreasonable determinations of facts.

Accordingly, Grounds 1-5, 11-12, 27, 31-32, and 36 fail.

D. Ground 6 Improperly Challenges Petitioner's 2002 Sentencing that the Ohio Supreme Court Vacated.

In Ground 6, Petitioner Jackson attacks the trial court's December 9, 2002 sentencing.[141] Jackson argues that he "was deprived of the right to individualized sentencing and his liberty interest in the statutory sentencing scheme when the trial court considered and weighed both alternatives under R.C.

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[139] *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).
[140] *Williams*, 792 F.3d at 612 (quoting *Gagne v. Booker*, 680 F.3d 493, 511-12 (6th Cir. 2012)).
[141] Doc. 65 at 27.

2929.04(A)(7) in violation of the Fifth, Eighth and Fourteenth Amendments of the federal Constitution."[142]

Ground 6 fails because the Ohio Supreme Court vacated the trial court's December 9, 2002 sentencing. Thus, Petitioner attacks a sentencing entry that is no longer operative.[143]

Even if Petitioner had attacked the proper judgment, his Ground would still fail. Jackson's Grounds 6 takes issue with the weight the trial judge assigned to various sentencing factors,[144] but there is no clearly established federal law mandating how factors must be weighed. Instead, clearly established federal law says that state courts imposing the death penalty "must consider all relevant mitigating evidence and weigh it against the evidence of aggravating circumstances[, but] [federal courts] do not weigh the evidence for them."[145]

E. Grounds 7 and 8 Argue that Petitioner's Death Sentence Is Unconstitutional on Proportionality Grounds, But Clearly Established Federal Law Imposes No Proportionality Requirement.

In Ground 7, Petitioner argues that his death sentence was disproportional relative to other Ohio

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[142] *Id.*

[143] A § 2254 petitioner "seeks invalidation . . . of the judgment authorizing [his] confinement." *Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005). Petitioner Jackson's Ground 6 challenges a judgment that is not authorizing his confinement.

[144] Doc. 65 at 27.

[145] *Eddings*, 455 U.S. at 117 (first alteration in the original).

sentences.[146] With Ground 8, Petitioner argues that Ohio's proportionality-review process is flawed because it fails to include death-eligible cases in which a life sentence has been imposed.[147]

Grounds 7 and 8 fail because the U.S. Constitution does not require any assessment of "proportionality."[148] Absent a showing that the Ohio capital punishment system operates in an arbitrary and capricious manner, Jackson "cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty."[149]

To the extent Ground 8 challenges Ohio's proportionality-review scheme directly, this argument also fails. The Sixth Circuit has upheld the constitutionality of the Ohio proportionality-review scheme on numerous occasions.[150] In fact, the Sixth Circuit has explicitly held that in "limiting proportionality review to other cases already decided by the reviewing court in which the death penalty has been imposed, Ohio has properly acted within the wide latitude it is allowed."[151]

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[146] Doc. 65 at 29.
[147] *Id.* at 30.
[148] *Pulley v. Harris*, 465 U.S. 37, 44-45 (1984).
[149] *McCleskey v. Kemp*, 481 U.S. 279, 306-07 (1987); *accord Getsy v. Mitchell*, 495 F.3d 295, 305-06 (6th Cir. 2007).
[150] *Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 854 (6th Cir. 2017) (collecting cases).
[151] *Buell v. Mitchell*, 274 F.3d 337, 369 (6th Cir. 2001).

F. Ground 9 and 10 Argue that Ohio's Capital Punishment Scheme Is Unconstitutional, But Clearly Established Federal Law Does Not Support this Claim.

In Grounds 9 and 10, Petitioner argues that "Ohio's capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of [*Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)] and its progeny."[152] Specifically, Petitioner argues that Ohio's scheme unconstitutionally gives trial courts discretion to dismiss death-penalty specifications when a defendant pleads guilty but not when a defendant goes to trial.[153]

Grounds 9 and 10 fail because the U.S. Supreme Court has never held unconstitutional a state capital-punishment scheme where a trial judge has discretion to dismiss death penalty specifications only for defendants who plead guilty.

In support of Grounds 9 and 10, Petitioner relies on a Supreme Court Justice's concurring opinion. This concurring opinion was not endorsed by the other justices, so its rationale is not clearly established federal law.[154]

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[152] Doc. 65 at 31--32.

[153] *Id.* at 32.

[154] "'Clearly established law,' as the Supreme Court has reminded us, 'includes only the holdings, as opposed to the dicta, of [the Supreme] Court's decisions.'" *Frazier v. Jenkins*, 770 F.3d 485, 495 (6th Cir. 2014) (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014)).

Petitioner relies on Justice Blackmun's concurrence in *Lockett v. Ohio*.[155] As discussed above, in *Lockett*, a plurality of the Supreme Court held unconstitutional an Ohio death-penalty statute that did not permit individualized consideration of mitigating factors in capital cases.[156]

In the concurrence, Justice Blackmun said that he only partially joined the plurality and concurred "for an additional reason not relied upon by the plurality."[157] This "additional reason" is the argument that Petitioner now makes—that Ohio's death penalty scheme is unconstitutional because the scheme gives trial courts discretion to dismiss death penalty specifications when a defendant pleads guilty, but the scheme does not give this discretion when a defendant goes to trial.[158]

Because the majority did not embrace Judge Blackman's concurrence's reasoning, the reasoning is not clearly established federal law.[159]

G. Grounds 10 and 35 Argue that Ohio's Capital Punishment Scheme Is Unconstitutional, But Clearly Established Federal Law Does Not So Hold.

In Grounds 10 and 35, Petitioner argues that the death penalty and Ohio's capital punishment scheme

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[155] 438 U.S. at 618 (J. Blackmun, concurring).
[156] *Lockett*, 438 U.S. at 605-06 (plurality).
[157] *Id.* at 613 (J. Blackmun, concurring).
[158] *Id.* at 618 (J. Blackmun, concurring).
[159] "'Clearly established law,' as the Supreme Court has reminded us, 'includes only the holdings, as opposed to the dicta, of [the Supreme] Court's decisions.'" *Frazier*, 770 F.3d at 495 (quoting *White*, 572 U.S. at 419).

violate international law.[160] Specifically, Petitioner says that "[i]nternational law is part of our law," and he lists a series of about 10 "international law documents."[161]

Petitioner fails to elaborate on any of these allegedly binding international law documents. He does not explain what the documents are, what they do, why they are binding, or how they apply here. He does not even allege that that the documents prohibit the death penalty or Ohio's capital punishment scheme. For the sake of argument, the Court assumes that the documents prohibit the death penalty.

Grounds 10 and 35 fail due to their incomprehensibility and underdevelopment.[162] Additionally, the Grounds fail because the Supreme Court has never held that international law forbids the death penalty.[163] "There is no indication that international law influences rulings under the federal constitution regarding the death penalty."[164]

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[160] Doc. 65 at 32-33, 107.
[161] *Id.* at 32.
[162] *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) ("[I]t is the habeas applicant's burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner.").
[163] *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, 'it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law.'" *[Carey v.] Musladin*, 549 U.S. [70] at 77 [(2006)] (quoting 28 U.S.C. § 2254(d)(1)). Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized.").
[164] *Brinkley v. Houk*, 866 F. Supp. 2d 747, 840 (N.D. Ohio 2011), *amended in part*, No. 4:06 CV 0110, 2012 WL 1537661 (N.D. Ohio Apr. 30, 2012), *and aff'd*, 831 F.3d 356 (6th Cir. 2016).

H. Ground 13 Argues that the Trial Court Violated the Constitution When It Failed to Allow Petitioner to Conduct Postconviction Discovery, But Clearly Established Law Does Not Provide a Constitutional Right to Postconviction Discovery.

With Ground 13, Petitioner argues that, in his postconviction proceeding, the trial court violated the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution by failing to provide the Petitioner with the opportunity to conduct discovery.[165] Petitioner fails to identify any case, let alone a Supreme Court case, that says that the Constitution gives a right to postconviction discovery.

Ground 13 fails because there is no federal constitutional right to postconviction discovery.[166]

I. Grounds 14, 15, 17, and 18 Are Procedurally Defaulted.

In Grounds 14, 15, 17, and 18, Petitioner challenges alleged errors stemming from his postconviction relief proceeding. With Ground 14, Petitioner says he was denied adequate funding for experts.[167] With Ground 15, Petitioner says the state failed to disclose exculpatory evidence.[168] With Ground 17, Petitioner says the trial court improperly

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[165] Doc. 65 at 42-43.

[166] *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one")).

[167] Doc. 65 at 44-45.

[168] *Id.* at 45-46.

employed res judicata.[169] With Ground 18, Petitioner rehashes a series of his postconviction arguments.[170]

In his answer, the Warden argues that Petitioner procedurally defaulted Grounds 14, 15, 17, and 18 because the state courts denied the corresponding postconviction claims for untimely presentation.[171]

In his traverse, Petitioner fails to rebut the Government's procedural default argument. Petitioner says only the following: "The Petitioner maintains that all issues have been properly preserved for this Court's review."[172]

The Warden is correct; Grounds 14, 15, 17, and 18 are procedurally defaulted. Grounds 14, 15, 17, and 18 stem from Petitioner's second postconviction relief petition.[173] Petitioner filed this petition after his 2012 resentencing.[174] The petition raised 19 grounds—18 of which attacked Petitioner's 2002 conviction, rather than his limited 2012 resentencing.[175]

A state trial court rejected these 18 claims as untimely:

> Defendant/Petitioner Jackson filed his post-conviction relief petition on June 28, 2013. First, the Court finds Jackson's petition is untimely pursuant to R.C. 2953.21(A)(2). Further, the Court finds Jackson's petition does not fall within the

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[169] *Id.* at 48-51.
[170] *Id.* at 51-62.
[171] *Id.* at 67.
[172] Doc. 73 at 19.
[173] *See* Doc. 48-8 at 32-64.
[174] *Id.*
[175] *Id.*

> exception to the one-hundred-eighty day rule as set forth in R.C. 2953.23(A)(1)(a)&(b) & (A)(2). Despite the re-sentencing in this matter which took place on August 14, 2012, the time period does not toll again for post-conviction relief. "Ohio case law indicates that the time limit for a postconviction relief petition runs from the original appeal of the conviction, and that a resentencing hearing does not restart the clock for postconviction relief purposes as to any claims attacking the underlying conviction." *State v. Piesciuk*, 12th Dist. No. CA2009-10-251, 2010-Ohio-3136, ¶ 12 (internal citations omitted).[176]

A state appeals court upheld the trial court's denial, and the Ohio Supreme Court declined to accept jurisdiction.[177]

In view of this state-court rejection on timeliness grounds, Petitioner procedurally defaulted Grounds 14, 15, 17, and 18 when (1) he failed to comply with to R.C. 2953.21(A)(2), and (2) the state court enforced that rule and declined to reach the merits of Petitioner's claims.[178]

The Petitioner does not demonstrate cause or prejudice for the procedural default of these grounds for relief and does not present a viable "actual innocence" claim.[179] Grounds 14, 15, 17, and 18 are procedurally defaulted.

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[176] Doc. 48-15 at 51.
[177] *Id.* at 126.
[178] *Maupin*, 785 F.2d at 138.
[179] *Lundgren*, 440 F.3d at 764 (citing *Murray*, 477 U.S. at 496).

J. Ground 16 Argues that a Trial Judge Erred by Interjecting Opinions and Personal Knowledge into Factual Findings, But Petitioner Waived this Ground Because It Is Conclusory and Undeveloped.

In Ground 16, Petitioner argues that, in his postconviction proceeding, a trial judge violated Petitioner's constitutional rights when the judge "relied upon his personal knowledge to make findings of facts."[180]

Petitioner describes several instances in which the trial judge allegedly improperly injected his opinion and personal knowledge into the court's factual findings. For example, Petitioner says that, for one postconviction claim, Petitioner argued that his counsel had failed to adequately prepare for interviewing mitigation witnesses, such as family and friends.[181] In rejecting this claim, the judge allegedly opined that preparation for such interviews should not take too long.[182] Petitioner says that this opinion interjection, and others like it, were inappropriate.

Ground 16 fails. Petitioner fails to specifically identify the postconviction decision that he challenges. Despite the thousands of pages in the record, Petitioner provides no useful record citations for his factual allegations.[183] But even if he had

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[180] Doc. 65 at 46.
[181] *Id.* at 47.
[182] *Id.*
[183] Petitioner provides two record citation: "(p.25, findings of facts, conclusions of law)" and "(P. 26)." *Id.* But Petitioner fails to

provided such a citation, Petitioner fails to identify any case, let alone a Supreme Court case, that says that the Constitution prohibits the trial judge's alleged interjections.

"[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones."[184]

K. Grounds 19, 20, 22, 25, 26, 28, and 32 Generally Argue that the Trial Judge Was Unconstitutionally Biased—Primarily Due to His Reliance on a Prosecutor to Draft the Death Sentence Opinion—But the Grounds are Defectively Pleaded.

Grounds 19, 20, 22, 25, 26, 28, and 32 generally argue that Jackson's trial judge, Judge Stuard, was unconstitutionally biased. The Grounds rely on several bases but focus on the trial judge's reliance on a prosecutor to draft the death-sentence opinion.

Grounds 19, 20, 22, 25, 26, and 28 share the same deficiencies as the rest of Jackson's petition. Namely, the Grounds uniformly (1) fail to challenge the appropriate state-court decision, (2) consist of conclusory, sometimes incoherent argument, and (3) rely on arguments copied, sometimes verbatim, from

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identify where these pincites come from or where they are on the Court's docket.

[184] *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) (citation omitted).

state-court briefs. As described in subsection B, these Grounds fail due to their defective pleading.

But even if Petitioner had stated his argument properly, his Grounds would fail. Properly asserted, Petitioner's Grounds 19, 20, 22, 25, 26, 28 and 32 would argue that the Ohio Supreme Court's affirmance of the trial court's 2012 resentencing (1) was contrary to, or an unreasonable application of, clearly established federal law and (2) was based upon an unreasonable determination of the facts. The Court will discuss why each argument fails in turn.

1. In Affirming of the Trial Court's 2012 Resentencing, the Ohio Supreme Court's Rejection of Petitioner's Judicial Bias Arguments Did Not Violate Clearly Established Federal Law.

Petitioner's above-mentioned Grounds implicate two reasons why the Ohio Supreme Court's affirmance of the trial court's 2012 resentencing might have violated clearly established federal law. First, the Grounds suggest that Jackson's 2012 resentencing was tainted by Judge Stuard's *ex parte* contacts with the prosecutor. Second, the Grounds suggest that Judge Stuard was unconstitutionally biased. Neither argument is persuasive.

a) The U.S. Supreme Court Has Not Held that Ex Parte Judge-Prosecutor Communications Violate a Defendant's Constitutional Rights.

As a preliminary matter, the Court observes that Petitioner has waived the *ex parte* contacts argument

by failing to raise this argument in his final Ohio Supreme Court appeal.[185]

But even if the argument were properly before this Court, the Ground would fail because there is no clearly established federal law providing that judge-prosecutor *ex parte* communications always violate a defendant's federal constitutional rights. Petitioner identifies no such case, and the Court knows of none.

The only U.S. Supreme Court case that involves *ex parte* judicial communications— [*42] *Rushen v. Spain*[186]—concerned *ex parte* communications between a judge and a juror.[187] There, the Supreme Court held that an *ex parte* judicial communication with a juror was not structural error requiring reversal.[188] Instead, the Court held that such *ex parte* contact was subject to harmless error analysis.[189]

Relevant to the instant case, the *Rushen* Court noted that the Government had "apparently conceded, in both federal and state court, that the undisclosed *ex parte* communications established federal constitutional error."[190] The Court thus said they "assume[d], without deciding, that respondent's

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[185] *Williams*, 460 F.3d at 806 (citing *O'Sullivan*, 526 U.S. at 848); *see Baston*, 282 F. Supp. 2d at 661 ("Issues not presented at each and every level [of the state courts] cannot be considered in a federal Habeas Corpus Petition."); *see also Moreland*, 50 Ohio St. 3d at 62 (failure to present a claim to a state court of appeals constituted a waiver).

[186] 464 U.S. 114 (1983) (per curiam).

[187] *Id.* at 116.

[188] *Id.* at 117-19.

[189] *Id.*

[190] *Rushen*, 464 U.S. at 118 n.2.

constitutional rights to presence and counsel were implicated" in such a case.[191]

In light of this Supreme Court language, the Supreme Court has not said whether juror-judge *ex parte* communications—or any other *ex parte* communications—violate a defendant's constitutional rights. Where Supreme Court cases "give no clear answer to the question presented, let alone one in [the defendant's] favor, 'it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law.'"[192] Accordingly, the *ex parte* contact argument fails.

b) Petitioner's Judicial Bias Claim Is Based on Factual Circumstances that the U.S. Supreme Court Has NotRecognized as Posing an Unconstitutionally High Risk of Bias.

Petitioner argues that Judge Stuard was unconstitutionally biased. Petitioner raises various factual bases underlying his judicial bias claim: (1) Judge Stuard relied upon the prosecution to draft the initial sentencing opinion, and the 2012 revised sentencing opinion remained almost identical to the initial opinion; (2) Judge Stuard delayed ruling on several of Petitioner's motions;[193] (3) Judge Stuard

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[191] *Id.*

[192] *Van Patten*, 552 U.S. at 126 (quoting *Musladin*, 549 U.S. at 77).

[193] To the extent Petitioner refers to Judge Stuard's delay in ruling on Jackson's motion for a new trial until after a mandamus action was filed against him, this claim is

denied Jackson's motion for a new sentencing hearing after stating in an affidavit that he was prepared to grant the motion; and (4) the 2012 resentencing opinion did not discuss Petitioner's 2012 allocution.[194]

The U.S. Supreme Court has not clearly established that any of Petitioner's factual bases pose an unconstitutionally high risk of judicial bias. The clearly established federal law of judicial bias is:

"Due process requires a fair trial before a judge without *actual bias* against the defendant or an interest in the outcome of his particular case."[195] Because of the difficulty in determining "whether a judge harbors an actual, subjective bias," the courts look to "whether, as an objective matter, the average judge in [that judge's] position is likely to be neutral, or whether there is *an unconstitutional potential for bias*."[196]

The Supreme Court has recognized constitutionally impermissible, objective indicia of bias in limited circumstances. The Sixth Circuit has construed the Supreme Court judicial bias case law narrowly and has held that the Supreme Court

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procedurally defaulted. The Ohio Supreme Court rejected this argument as res judicata. *Jackson III*, 73 N.E.3d at 423.

[194] Doc. 65 at 96; Doc. 73 at 40.

[195] *United States v. Armstrong*, 517 U.S. 456, 468 (1996) (emphasis added); *see also In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness requires an absence of *actual* bias in the trial of cases.") (emphasis added)).

[196] *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (emphasis added) (internal quotations omitted); *see also Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 883 (2009).

recognizes unconstitutional potential for bias in only four types of circumstances[197]:

> (1) "when the judge has a financial interest in the outcome of the case";[198]
>
> (2) "when the judge is trying a defendant for certain criminal contempts";[199]
>
> (3) "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent";[200] and
>
> (4) "where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case."[201]

The Sixth Circuit characterizes these four situations as "extreme" and instructs that the judicial bias precedents must be framed "narrowly."[202]

Petitioner's allegations, though troubling, do not fall within the four recognized categories of constitutionally impermissible, objective indicia of bias. Therefore, the Court cannot conclude that the Ohio Supreme Court's rejection of Petitioner's judicial bias claims was contrary to or an unreasonable application of clearly established federal law.

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[197] *Johnson*, 946 F.3d at 918 n.3.
[198] *Caperton*, 556 U.S.at 890 (Roberts, C.J., dissenting).
[199] *Id.* (Roberts, C.J., dissenting).
[200] *Id.* at 884 (majority opinion).
[201] *Williams*, 136 S. Ct. at 1910.
[202] *Williams*, 136 S. Ct. at 1910.

2. The Ohio Supreme Court's Affirmance of Jackson's 2012 Resentencing Was Not Based upon an Unreasonable Determination of the Facts in Light of the Evidence Presented in the State-Court Proceeding.

Having established the Ohio Supreme Court's rejection of Petitioner's judicial bias claims was not contrary to or an unreasonable application of clearly established federal law, the Court now turns to the second AEDPA argument that Petitioner could have made. Properly asserted, Petitioner's Grounds 19, 20, 22, 25, 26, 28, and 32 would argue that the Ohio Supreme Court's finding that Judge Stuard's continued participation in the 2012 resentencing presented an unconstitutional risk of bias given the evidence presented.

The Ohio Supreme Court affirmance found that Jackson had not shown that Judge Stuard harbored an actual bias against him during the 2012 resentencing: "Despite his bias claims, Jackson fails to show that Judge Stuard displayed 'a hostile feeling or spirit of ill will' toward him."[203] The Ohio Supreme Court rejected each of Jackson's actual bias arguments, stating that (1) "Judge Stuard's failure to provide the relief that Jackson believes was warranted does not establish actual bias;"[204] (2) "Judge Stuard's rulings in Jackson's case [such as his rejection of new mitigation evidence at the resentencing hearing] were not inconsistent with the

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[203] *Jackson III*, 73 N.E.3d at 424 (quoting *State ex rel. Pratt v. Weygandt*, 132 N.E.2d 191, 192 (Ohio 1956)).
[204] *Id.*

court of appeals' directive and did not display bias;"[205] and (3) Judge Stuard's failure to consider Jackson's allocution "does not prove that Judge Stuard harbored a hostile feeling or a spirit of ill will against Jackson or his attorneys during the proceedings."[206]

Whether an individual harbors actual bias is a question of fact.[207] State-court findings of fact are "presumed to be correct."[208] The petitioner can rebut that presumption, but only upon a showing of error by clear and convincing evidence.[209] And a habeas court will not overturn a state-court adjudication unless it "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."[210]

"[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance."[211]

Here, Jackson, who merely repeats his state-court arguments, offers no clear and convincing evidence why the state-court finding that Judge Stuard was not actually biased is incorrect. Without such argument or evidence, the Court cannot now find that Ohio Supreme Court's rejection of the bias argument

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[205] *Jackson III*, 73 N.E.3d at 425.
[206] *Id.*
[207] *Patton v. Yount*, 467 U.S. 1025, 1036-38, 1037 n. 12 (1984) (trial court's determination of juror bias during voir dire is question of fact); *U.S. v. Powell*, 226 F.3d 1181, 1188 (10th Cir. 2000) (stating that actual bias is a question of fact).
[208] 28 U.S.C. § 2254(e)(1).
[209] *Id.*
[210] 28 U.S.C. § 2254(d)(2).
[211] *Wood v. Allen*, 558 U.S. 290, 301 (2010).

related to the trial court's 2012 resentencing was based upon an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding.

In sum, even if properly asserted, Petitioner Jackson's judicial bias Grounds fail on the merits.

L. Ground 21 and 31 Argue that the Trial Court Violated the Constitution When It Failed to Refer to His Allocution in the 2012 Sentencing Opinion, But Clearly Established Federal Law Does Not Provide a Constitutional Right to Allocution.

With Ground 21 and 31, Petitioner argues that, in his 2012 resentencing, the "trial court denied the [P]etitioner a meaningful opportunity for allocution before imposing a death sentence in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal Constitution."[212] Petitioner says that he was able to allocute, but the 2012 opinion did not reference his allocution.[213]

Ground 21 and 31 fail because the Supreme Court has not recognized a constitutional right to allocution,[214] let alone a right to have the allocution referenced in sentencing opinions.

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[212] Doc. 65 at 65, 102-04.
[213] *See id.*
[214] *United States v. Lawrence*, 735 F.3d 385, 407 (6th Cir. 2013).

M. Ground 23 Argues that Jackson's Execution Would Violate *Atkins v. Virginia*, Because Jackson Has Had Low IQ Scores, But Jackson's Argument Is Underdeveloped and He Failed to Exhaust this Claim.

With Ground 23, Petitioner argues he is not eligible for the death penalty under *Atkins v. Virginia*[215] because of his low IQ.[216]

In *Atkins*, the Supreme Court held that executions of intellectually disabled criminals were "cruel and unusual punishments" prohibited by Eighth Amendment.[217] The Supreme Court left "to the [s]tate[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[218]

In *State v. Ford*, the Ohio Supreme Court mandated that trial courts consider the following factors in determining death-penalty eligibility:

> (1) intellectual-functioning deficits (indicated by an IQ score approximately two standard deviations below the mean—i.e., a score of roughly 70 or lower when adjusted for the standard error of measurement), (2) significant adaptive deficits in any of the three adaptive-skill sets (conceptual,

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[215] 536 U.S. 304 (2002).

[216] Doc. 65 at 65-66.

[217] *Atkins*, 536 U.S. at 320-21. This Court uses the term "intellectual disability" in lieu of "mental retardation."

[218] *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416-17 (1986)) (second and third alterations in original).

social, and practical), and (3) the onset of these deficits while the defendant was a minor.[219]

In Ground 23, Jackson says, without any citation, that he had IQ test scores of 70 and 72 in high school and has the mind of an 11-year-old child.[220] He says that he therefore cannot be executed.[221] Jackson acknowledges that he did not raise this claim below.[222]

Ground 23 fails for at least two reasons. First, Jackson failed to exhaust his state-court remedies by not raising his *Atkins* claim until federal habeas review.[223] Second, Jackson's argument is underdeveloped—as evidenced by his failure to offer any citation or support—and he therefore fails to meet his burden.[224]

Moreover, the Court observes that Jackson's own defense psychologist determined his IQ was 84.[225]

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[219] *State v. Ford*, 140 N.E.3d 616, 655 (2019).
[220] Doc. 65 at 65-66.
[221] *Id.* at 66.
[222] *Id.*
[223] *Williams*, 460 F.3d at 806.
[224] *Visciotti*, 537 U.S. at 25 ("[I]t is the habeas applicant's burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner."); *McPherson*, 125 F.3d at 995-96 ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones." (citation omitted)).
[225] *Jackson III*, 73 N.E.3d at 429 ("Jackson asserts that during his mitigation hearing, information was presented indicating that he was a good student, had a positive upbringing, and had average intellectual ability with an IQ score of 84."); *see also* Doc. 47-16 Page ID 13007-13013 (defense psychologist Dr. McPherson report).

N. Ground 24 Argues that Petitioner's Trial, Appellate, and Postconviction Counsel Were Ineffective for Failing to Raise the Atkins claim in State Court, But Petitioner Waived this Ground Because It Is Conclusory and Undeveloped.

Ground 24 states, in its entirety, the following: "A free standing *Atkins* claim has not yet been raised in the Ohio courts in spite of substantial credible evidence including IQ scores of 70 and 72 in high school. Petitioner is entitled to the effective assistance of counsel. *Strickland, Evitts, Martinez*."[226]

Ground 24 fails because it is not a fully developed argument.[227]

O. Ground 29 Argues that Petitioner's Constitutional Rights Were Violated When He Had Only One Attorney at His 2012 Resentencing Hearing, But Clearly Established Federal Law Does Not Mandate Representation by Two Attorneys at Such a Hearing.

Ground 29 says that an Ohio statue provides that any defendant who "faces the death penalty" must be

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[226] Doc. 65 at 66.

[227] *Visciotti*, 537 U.S. at 25 ("[I]t is the habeas applicant's burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner."); *McPherson*, 125 F.3d at 995-96 ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones." (citation omitted)).

appointed two attorneys.[228] Petitioner says that, at his 2012 resentencing, only one attorney represented him.[229] He argues that the trial court therefore violated the Ohio statute.[230] Jackson argues, without elaboration, that this circumstance also violated his federal constitutional rights.[231]

Ground 29 fails because "federal habeas corpus relief does not lie for errors of state law."[232] "[I]t is only noncompliance with federal law that renders a State's criminal judgments susceptible to collateral attack in the federal courts."[233]

Moreover, Ground 29 fails because the U.S. Supreme Court has never held that the U.S. Constitution mandates that defendants have two attorneys at a sentencing hearing.

P. Ground 33 Is a Mere Rewrite of Petitioner's State-Court Brief and Is Not Cognizable on Federal Habeas Review.

In Ground 33, Petitioner copies verbatim two paragraphs from a multi-page argument Jackson presented to the Ohio Supreme Court.[234] In the original argument, Jackson asked the Ohio Supreme Court to merge certain charges and specifications and

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[228] Doc. 65 at 98.
[229] *Id.* at 97-99.
[230] *Id.*
[231] *Id.* at 99.
[232] *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *accord Cooey v. Coyle*, 289 F.3d 882, 901-02 (6th Cir. 2002) (holding that claim that "Ohio court did not apply Ohio law correctly . . . is not justiciable in federal habeas proceedings").
[233] *Wilson v. Corcoran*, 562 U.S. 1, 16 (2010) (per curiam).
[234] *Cf.* Doc. 65 at 105-06 *with* Doc. 48-7 Page ID 15423-15429.

then "remand" the case "to permit the prosecution to elect as to which specification and underlying felony it wants to go forward with."[235] Reproduced here, out of context, Jackson's two paragraphs make no sense. The Court reviewing this federal habeas petition is not sitting as a supervisory court over a lower state court and cannot afford the relief Petitioner requests.

Ground 33 fails because it is not a cognizable federal habeas claim.[236]

Q. Grounds 34 and 37 Argue that Cumulative Errors in Jackson's Prosecution Require His Conviction to Be Reversed and His Death Penalty to Be Vacated, But Clearly Established Federal Law Does Not Recognize a Cumulative Error Claim.

In Grounds 34 and 37, Petitioner argues that the cumulative effect of the errors at his trial and during his appeals has deprived him of his constitutional rights.[237] Petitioner also argues that, due to the errors' cumulative effect, his "death sentence is based on a constitutionally flawed process."[238]

Grounds 34 and 37 fail. "[T]he law of [the Sixth] Circuit is that cumulative error claims are not

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[235] Doc. 48-7 Page ID 15429.
[236] *Visciotti*, 537 U.S. at 25 ("[I]t is the habeas applicant's burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner.").
[237] Doc. 65 at 106, 109, 121-22.
[238] *Id.* at 106.

cognizable on habeas because the Supreme Court has not spoken on this issue."[239]

IV. Conclusion

The Court **GRANTS** Jackson's petition. The Court **ISSUES** a writ of habeas corpus under 28 U.S.C. §2254.

IT IS SO ORDERED.

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

Dated: February 23, 2021

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[239] *Williams*, 460 F.3d at 816 (citing *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005)).

APPENDIX C

Nos. 21-3207/3280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATHANIEL JACKSON,

Petitioner-Appellee/Cross-Appellant,

v.

BILL COOL, WARDEN,

Respondent-Appellant/Cross-Appellee.

ORDER

Before: MOORE, COLE, and GRIFFIN, Circuit Judges.

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ KELLY L. STEPHENS
Kelly L. Stephens, Clerk

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* Judge Murphy recused himself from participation in this ruling.