No. 16-____

IN THE

Supreme Court of the United States

ARTHUR EUGENE SHELTON,

Petitioner,

v.

GREG MCQUIGGIN, WARDEN,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Chad A. Readler
Counsel of Record
JONES DAY
325 John H. McConnell Blvd.
Columbus, Ohio 43215
(614) 469-3939
careadler@jonesday.com

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Counsel for Petitioner

QUESTION PRESENTED

Under *Schriro v. Landrigan*, 550 U.S. 465 (2007), is a habeas petitioner entitled to an evidentiary hearing where his allegations would entitle him to relief and are not contravened by the record, as at least three circuits have held, or must the petitioner already have factual support for his allegations, as four other circuits have now held.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arthur Shelton respectfully requests that this Court grant certiorari to review the final judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's unreported opinion (Pet. App. 1a–12a) is available at 2016 U.S. App. LEXIS 10139. The unreported decision of the District Court for the Eastern District of Michigan denying Shelton's petition for a writ of habeas corpus (Pet. App. 13a–48a) is available at 2014 U.S. Dist. LEXIS 108717. The district court's order granting a certificate of appealability (Pet. App. 49a–52a), likewise unreported, is available at 2014 U.S. Dist. LEXIS 108711.

JURISDICTION

The Sixth Circuit issued its opinion on June 1, 2016. (Pet. App. 1a.) On August 11, 2016, Justice Kagan granted an extension of time to file a petition for certiorari up to and including October 29, 2016. (Pet. App. 64a.) This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

INTRODUCTION

Habeas corpus proceedings provide criminal defendants a means for vindicating a state court's violation of a defendant's constitutional rights. More often than not, that vindication is aided by an evidentiary hearing in federal court, a familiar process through which defendants can develop factual support for the allegations in their petition. Despite the familiar, settled nature of this aspect of habeas procedure, however, the circuit courts are nonetheless

deeply divided over *when* a defendant is entitled to probe his constitutional allegations by way of an evidentiary hearing.

The Court likely thought it had resolved this question a decade ago in *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). There, the Court articulated a seemingly straightfoward standard for determining whether an evidentiary hearing is warranted: "whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."

Yet in the decade that followed, the circuit courts have split deeply over the application of that standard—specifically, on the nature of the allegations required to obtain a hearing. Three circuits—the Third, Fifth, and Tenth—permit a hearing where the allegations, if true, would entitle the petitioner to relief, and where they are not *contradicted* by the existing record. At least three other circuits, however—the First, Ninth, and Eleventh—permit a hearing only if the allegations are not "conclusory" or "speculative," for instance, as those courts have explained, where the allegations are *supported* by the existing record.

Below, a divided panel of the Sixth Circuit joined the First, Ninth, and Eleventh Circuits in rejecting a request for an evidentiary hearing in instances where the Third, Fifth, and Tenth Circuits would allow such a hearing. In the latter three circuits, a hearing is appropriate where the petition's allegations, if true, would entitle the habeas petitioner to relief—even if the allegations could be deemed somewhat conclusory or speculative in nature. The circuit courts have sim-

ilarly split on the standard to be applied to record evidence developed at the time of the petition's filing. While three circuits ask simply whether the petition's allegations are contradicted by the record, four other circuits (including the Sixth Circuit below) look for evidence of the opposite, namely, whether the allegations are supported by the record. Whether a habeas defendant is afforded an opportunity to develop her constitutional allegations thus turns more on the circuit in which her petition is filed than the nature of the claims themselves.

The Court should grant *certiorari* review to resolve this deep split in the circuits, and should reverse the decision below. Asking whether a petition's allegations are contradicted by the record (as do the Third, Fifth, and Tenth Circuits) is faithful to *Schriro*'s teachings that courts should not be "forced to reopen factual disputes that were conclusively resolved in the state courts," *id.* at 475. The opposite approach, employed below and in three other circuits, which turns in part on whether record evidence at the time of filing supports the petition, is less faithful to *Schriro's* command that hearings themselves be utilized to "enable an applicant to prove the petition's factual allegations." *Id.* at 474.

This latter approach (employed below) also makes little practical sense. After all, one purpose of an evidentiary hearing is to afford a petitioner the means to legally compel the production and presentation of supporting evidence. In many cases, the evidence confirming a violation of the petitioner's constitutional rights will lie outside her control, obtainable only with the subpoena power provided by a hearing. Yet without the power to obtain that evidence, a petition-

er may have little choice but to state her allegations in somewhat conclusory or speculative terms.

That is precisely the case here. Arthur Shelton was charged in Michigan state court with first degree murder, which carries a mandatory life sentence in Michigan. The prosecution offered his trial counsel a plea deal of 17 to 30 years for second-degree murder. His counsel rejected the offer without conveying it to Shelton—a clear violation of Shelton's Sixth Amendment right to effective counsel—and later told him he would get less time if he went to trial. While Shelton was ultimately convicted of second-degree murder, he was given a substantially longer sentence of 27 to 47 years.

Shelton filed a habeas petition claiming ineffective assistance of counsel. Because his appellate counsel did not assert this issue on direct appeal, however, the habeas claim was procedurally defaulted unless Shelton could excuse the default by showing his appellate counsel was likewise ineffective in failing to assert the issue. To do so, Shelton alleged that his appellate counsel should have known that trial counsel failed to convey the plea offer, or that he at least had reason to investigate the issue. As an example, Shelton alleged that trial counsel's file may have revealed to appellate counsel trial counsel's unilateral rejection of the plea.

While these allegations, if true, would entitle Shelton to habeas relief, and at the very least would have entitled him to an evidentiary hearing in at least three circuits, the Sixth Circuit held that Shelton is not entitled to an evidentiary hearing because his allegations were based on "speculation" and not made

under oath. But without the subpoena power that comes with an evidentiary hearing, Shelton had no means to develop an evidentiary basis for his allegations. That evidence lies exclusively with his trial and appellate counsel. In other words, Shelton was denied the only mechanism by which he could prove he was deprived of his constitutional right to effective assistance of counsel.

This Court should grant certiorari review to resolve the deep split over the proper standard for obtaining an evidentiary hearing and to ensure that defendants are afforded effective means to vindicate violations of their constitutional rights.

STATEMENT OF THE CASE

A. On October 18, 2004, Shelton shot and killed his roommate, Larry Hooper. (Pet. App. 2a, 15a.) He admitted as much at trial. (*Id.*) His only defense was insanity. (*See* Pet. App. 2a, 20a–21a.)

Shelton had a history of mental health problems, dating back to 1987. (Pet. App. 17a.) On the night of the incident, he and Hooper were having a discussion about religion. (Pet. App. 19a.) When Hooper told Shelton that he did not believe in God, the discussion became heated. (*Id.*) Shelton went to his bedroom, but then heard a loud noise from the living room. (*Id.*) After grabbing his pistol and returning to the living room, he realized it was only the wind slamming the front door closed. (*Id.*)

As Shelton started back toward his bedroom, he looked at Hooper and saw "fire in his eyes." (*Id.*) At that point, as even the State's expert psychologist agreed, Shelton believed Hooper was the devil and thought Hooper was going to kill him. (Pet. App.

90a–91a; *see also* Pet. App. 2a, 19a–20a.) Hooper tipped his hat and reached for his pocket knife. (Pet. App. 19a–20a.) Shelton "jumped and . . . started shooting him in the head." (*Id.*) After firing five times, Shelton thought Hooper was still moving, so he retrieved a shotgun from his bedroom and shot Hooper several more times in the head. (*See* Pet. App. 45a, 60a–61a.)

Fearful that Hooper still might somehow come after him, Shelton kept a live round racked in the shotgun in case Hooper started to move again. (*See* Pet. App. 16a, 81a–84a.) Shelton then called the police and told them that he had killed Hooper. (Pet. App. 15a.) The officer on the phone instructed Shelton to leave the house through the front door, but Shelton refused, explaining that he did not want to pass Hooper's body because "opposites attract." (*Id.*) By "opposites attract," Shelton meant that he feared Hooper's spirit would jump into him. (Pet. App. 87a.) Shelton agreed to exit through the back door instead. (Pet. App. 15a.)

Police officers arrived and arrested Shelton. (*Id.*) Once he was confident the police officers believed in God because he refused to talk to anyone that did not, Shelton cooperated with the police and confessed to shooting Hooper. (*Id.*) He even acknowledged that he knew he could be going to prison for life. (Pet. App. 17a.)

B. Shelton was charged with first-degree premeditated murder and possession of a firearm during the commission of a felony. (Pet. App. 14a.) In the ensuing six months, he was found mentally incompetent to stand trial three times. (*See* Pet. App. 69a.) It was

not until more than eight months after the incident when he was found competent. (*See* Pet. App. 70a.)

At trial, mental health experts testified for both sides. (Pet. App. 2a.) Shelton's expert testified that Shelton was legally insane when he killed Hooper. (Pet. App. 20a.) The State's expert, while acknowledging that it was "a very close call" (Pet. App. 92a–93a), disagreed because he believed Shelton could distinguish between right and wrong (Pet. App. 20a). The trial court rejected the charge of first-degree murder, but found Shelton guilty but mentally ill of second-degree murder, and guilty of possession of a firearm during the commission of a felony. (Pet. App. 2a.)

Despite the downgrade to second-degree murder, Shelton was still eligible for a life sentence. (Pet. App. 3a.) The court ultimately imposed a sentence of 25 to 45 years, plus two years for the firearm offense, served consecutively. (*Id.*)

With a new attorney, Shelton appealed, asserting two assignments of error: "(1) the preponderance of the evidence demonstrated that Shelton was not guilty by reason of insanity, and (2) the finding that Shelton was mentally ill violated due process." (*Id.*) The state court of appeals rejected both arguments, affirming Shelton's convictions, and the Michigan Supreme Court denied leave to appeal. (*Id.*)

C. Shelton filed for post-conviction relief asserting various grounds, including ineffective assistance of trial counsel for rejecting a plea offer without informing Shelton. (Pet. App. 4a, 21a–22a.) Specifically, as Shelton stated in his affidavit filed with the motion, his trial counsel informed him that while Shelton was

in the forensic center for psychiatric evaluation, the prosecutor made a plea offer of 17 to 30 years for second-degree murder. (Pet. App. 78a.) Shelton's attorney rejected the offer "because it was not a good offer" and Shelton "would get less time if [he] went to trial." (*Id.*) When Shelton later inquired about the offer, his attorney advised him that it was no longer available. (*Id.*)

The Michigan trial court denied Shelton's motion under Michigan Court Rule 6.508(D)(3)(b)(i) (Pet. App. 4a), which prohibits relief from judgment if the defendant failed to raise the argument on direct appeal absent (a) good cause for failing to raise the issue on appeal, and (b) actual prejudice, M.C.R. 6.508(D)(3). The court determined that Shelton could not show actual prejudice because he "failed to establish by a preponderance of the evidence that a plea bargain offer was made and that [he] would have accepted it." (Pet. App. 56a.) The court also refused to hold an evidentiary hearing on Shelton's motion. (Pet. App. 62a.) Both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. (Pet. App. 3a–4a.)

D. With his state court avenues for relief exhausted, Shelton filed his petition for a writ of habeas corpus, which the district court denied. (Pet. App. 4a.) Although the district court determined that "[t]he state court's determination that no offer was made is an unreasonable determination of the facts of the case," it also concluded that Shelton had not established that his counsel's ineffective assistance prejudiced him because Shelton did not prove that either he or the court would have accepted the plea

offer. (Pet. App. 36a–38a.) The district court granted a certificate of appealability. (Pet. App. 4a.)

E. On appeal, the Sixth Circuit determined that Shelton's claim was procedurally defaulted under federal habeas law. (Pet. App. 10a.)

i. A habeas claim is procedurally defaulted when:

> "(1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default."

(Pet. App. 5a.) The state rule at issue was M.C.R. 6.508(D)(3)'s requirement that ineffective assistance claims be raised on direct appeal. (*Id.*) Shelton argued his default was excused by cause and prejudice because he received ineffective assistance of appellate counsel in failing to raise the claim on direct appeal. (Pet. App. 6a.)

The Sixth Circuit determined that Shelton's plea offer claim was not sufficiently "obvious" such that his appellate counsel could be considered ineffective for failing to raise it. (*See* Pet. App. 7a.) According to the court, "[w]hile there is enough to have alerted Shelton's appellate counsel to the existence of an offer, there is, of course, a significant difference between knowing about the existence of a plea offer and having some reason to think that the offer was not communicated to Shelton." (Pet. App. 8a.) The trial record provided no basis for appellate counsel to believe the offer was not communicated. (*See id.*) The

court also reasoned that appellate counsel had no reason to investigate a potential ineffective assistance claim because "Shelton has not claimed that he told his appellate counsel about his trial counsel's failure to communicate a plea offer to him." (*Id.*) Thus, "[w]ithout any knowledge of the alleged violation or any clue to suggest that he investigate the claim, Shelton's appellate counsel could not have provided ineffective assistance." (Pet. App. 9a.)

ii. The Sixth Circuit likewise rejected Shelton's request for an evidentiary hearing to prove the ineffectiveness of his appellate (and trial) counsel. (Pet. App. 9a–10a.) Citing *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007), the court explained that "[i]n deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." (Pet. App. 9a.) The court found Shelton did not meet that standard because "he has not made any allegations that his appellate counsel knew or should have known about the facts underlying his [ineffective assistance of trial counsel] claim." (*Id.*) The court rejected Shelton's allegation that "trial counsel's file may have confirmed for appellate counsel the offer's unilateral rejection" as "pure speculation" that "was not made under oath, and therefore does not meet the standard by which to grant an evidentiary hearing." (Pet. App. 10a.)

iii. Judge Donald dissented. As explained in her dissent, Shelton should receive an evidentiary hearing. (Pet. App. 10a–12a.) In Judge Donald's view, "[t]aken as a whole, the record does contain an allegation that Shelton's appellate counsel could have

known that his trial counsel withheld the plea offer." (Pet. App. 11a.) She specifically took issue with the standard the majority applied in rejecting an evidentiary hearing, finding it contrary to "the Supreme Court's standard" announced in *Schriro*. (*Id.*) "At no point does *Schriro* say that the allegations must have been made under oath, or that they cannot be based on speculation." (*Id.*)

"[I]f Shelton's allegations are true, he would be entitled to habeas relief." (Pet. App. 12a.) Accordingly, under *Schriro*, Shelton is entitled to an evidentiary hearing where he "could further develop the factual record to solicit testimony from appellate counsel, trial counsel, and other witnesses" to determine "with greater certainty what appellate counsel knew or did not know." (*Id.*) But the majority's decision "forecloses even exploring . . . a plausible habeas claim." (*Id.*)

REASONS FOR GRANTING THE PETITION

Certiorari review is warranted here for several reasons. *First*, the Sixth Circuit's decision below furthers a deep circuit split regarding the nature of the allegations necessary to obtain an evidentiary hearing under *Schriro*. At least three circuits have held that a petitioner is entitled to an evidentiary hearing if his allegations, if true and not contravened by the existing record, would entitle him to habeas relief. On the other hand, at least four circuits, now including the Sixth Circuit, hold that an evidentiary hearing is warranted only when the petitioner's allegations are not speculative or conclusory, for example, where they are supported by the existing record. This split of authority not only undermines the

Court's holding in *Schriro*, but it also threatens to vitiate the constitutional rights of defendants who can establish a violation only through an evidentiary hearing.

Second, the proper standard for obtaining an evidentiary hearing is a frequently recurring issue. Thousands of habeas petitions are filed every year, a great many of which seek evidentiary hearings to support their claims. Courts facing such a request apply the *Schriro* standard. If there is any hope of them doing so uniformly, that standard must be clarified. Just as critical, any of the thousands of habeas petitioners seeking to vindicate their constitutional rights must understand the burden they face in requesting an evidentiary hearing—to what extent are they obligated to obtain supporting evidence before even invoking the judicial process.

Third, this case provides an ideal vehicle for reviewing the question presented. The opposing views of *Schriro* are now clearly defined, with at least seven circuits having weighed in, dividing roughly equally. The Sixth Circuit's decision below likewise drew a dissenting opinion.

Further, this appeal turns squarely on the proper standard for obtaining an evidentiary hearing, as demonstrated by Judge Donald's opinion in dissent that one should be ordered. There is no dispute that trial counsel's failure to convey the plea offer would constitute ineffective assistance of counsel, mandating resentencing. Nor should be there be any dispute that if Shelton's allegation that appellate counsel should have known to pursue the plea offer claim is true, Shelton likewise received ineffective assistance

of appellate counsel, excusing the procedural default of his trial counsel claim.

This case also perfectly demonstrates the need for an evidentiary hearing by a great many habeas petitioners. Like the claims of many petitioners, Shelton could not prove his underlying claim—that appellate counsel should have known to raise the plea offer argument and to question trial counsel and discover his files—without an evidentiary hearing.

I. THE CIRCUIT COURTS ARE DIVIDED ON WHETHER HABEAS PETITIONERS MUST PROVIDE EVIDENCE SUPPORTING THEIR ALLEGATIONS TO OBTAIN AN EVIDENTIARY HEARING.

The decision below further deepened a circuit split over the proper standard for determining whether habeas petitioners are entitled to an evidentiary hearing. The Sixth Circuit joined at least three other circuits in effectively requiring petitioners to present evidence supporting their claim to obtain an evidentiary hearing even where that evidence is only attainable through an evidentiary hearing. At least three other circuits follow a different approach—one more in line with the standard announced in *Schriro*—that calls for an evidentiary hearing where the petitioner's allegations would entitle him to relief and are not contradicted by the existing record.

A. Nearly a decade ago, this Court considered the standard for granting an evidentiary hearing. In *Schriro*, the petitioner was convicted of murder in state court and sentenced to death. 550 U.S. at 469–71. At the sentencing hearing, the petitioner's counsel attempted to present testimony from family mem-

bers as mitigating evidence, but the petitioner directed them not to testify. *See id.* at 469. When the court questioned him, the petitioner agreed that he "instructed [his] lawyer that [he] do[es] not wish for [counsel] to bring any mitigating circumstances to [the court's] attention." *Id.* And when the court asked the petitioner whether there were any "mitigating circumstances [the court] should be aware of," he responded "[n]ot as far as I'm concerned." *Id.*

After receiving a death sentence, the petitioner filed a post-conviction petition in state court arguing ineffective assistance of counsel for failure to investigate other mitigating evidence. *Id.* at 471. The state court rejected the claim based on the petitioner's statements at the sentencing hearing and declined to hold an evidentiary hearing. *Id.* The district court did the same with his subsequent habeas petition, but the Ninth Circuit reversed, ordering an evidentiary hearing. *Id.* at 472.

The Supreme Court reversed the Ninth Circuit. The Court concluded that the district court did not abuse its discretion in denying an evidentiary hearing. *Id.* at 481. "Even assuming the truth of all the facts [the petitioner] sought to prove at the evidentiary hearing, he still could not be granted federal habeas relief because the state courts' factual determination that [the petitioner] would not have allowed counsel to present any mitigating evidence at sentencing is not an unreasonable determination of the facts under § 2254(d)(2) . . . ." *Id.*

In reaching that result, the Court described the standard for ordering an evidentiary hearing: "In deciding whether to grant an evidentiary hearing, a

federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.* at 474. Further, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.* Otherwise, "district courts would be forced to reopen factual disputes that were conclusively resolved in the state courts." *Id.* at 475. Applying that standard, the Court found that the existing record evidence—the petitioner's statements at the sentencing hearing that he "informed his counsel not to present any mitigating evidence"—refuted the petitioner's claim because he could not establish prejudice for his counsel's failure to investigate evidence the petitioner would have refused to allow anyway. *Id.* at 475–77. Thus, no evidentiary hearing was warranted. *See id.* at 477.

B. In the wake of that decision, two lines of authority have developed in the courts of appeals regarding the nature of the allegations necessary to obtain an evidentiary hearing under the *Schriro* standard.

i. Several courts hold that a habeas "petitioner is entitled to an evidentiary hearing . . . so long as his allegations, if true and *not contradicted by the existing factual record*, would entitle him to habeas relief." *Littlejohn v. Trammel*, 704 F.3d 817, 858 (10th Cir. 2013) (emphases added). The Third, Fifth, and Tenth Circuits all follow this principle, as has the Ninth Circuit in at least one case. *See, e.g.*, *Lee v. Glunt*, 667 F.3d 397, 406–07 (3d Cir. 2012); *Williams v. Beard*, 637 F.3d 195, 211 (3d Cir. 2011); *Palmer v.*

Hendricks, 592 F.3d 386, 393 (3d Cir. 2010); *Richards v. Quarterman*, 566 F.3d 553, 562–63 (5th Cir. 2009); *Fairbank v. Ayers*, 650 F.3d 1243, 1251 (9th Cir. 2011); *Littlejohn*, 704 F.3d at 858; *Young v. Simmons*, 486 F.3d 655, 679–80 (10th Cir. 2007); *Coronado v. Ward*, 517 F.3d 1212, 1217 n.2 (10th Cir. 2008).

In *Lee*, for example, the Third Circuit reversed and ordered an evidentiary hearing. 667 F.3d at 407–08. The habeas petition claimed a due process violation because his murder conviction was based on unreliable expert testimony that the petitioner started the fire. *See id.* at 400. Relying on alleged developments in fire science, the petitioner sought an evidentiary hearing because "his expert need[ed] the opportunity to independently review the evidence from the scene of the fire to fully develop the facts underlying [his] claim that the expert testimony admitted at his trial was fundamentally unreliable." *Id.* at 404. Even though the petitioner did not yet possess the evidence to support his theory, the court, applying *Schriro*, determined that a hearing was warranted because his "allegations, if proven, set forth a prima facie case for granting [the petitioner] habeas relief" and those "allegations are *not contradicted by the existing record*." *Id.* at 407 (emphasis added). "Once [the petitioner] is granted discovery on remand, the District Court will *only then* be able to determine whether the factual allegations underlying [the petitioner's] claims are refuted by the expanded record." *Id.* (emphasis added); *see also id.* (The petitioner "has alleged sufficient facts to demonstrate that discovery is essential to the development of his federal claims.").

Richards provides another example from the Fifth Circuit. In that case, the petitioner was convicted of

murder and sought habeas relief based on ineffective assistance of counsel, including for failing to present exculpatory evidence and failing to offer the petitioner's medical records as evidence. 566 F.3d at 558–59. During state habeas proceedings, the petitioner's trial counsel submitted an affidavit explaining that she presented all exculpatory evidence available to her and that she "could not present a medical records 'alibi' with a clear conscience based on my duty as a lawyer." *Id.* at 559. After the state court denied relief, the federal district court held an evidentiary hearing where the petitioner and his trial counsel both testified. *Id.* at 560. The district court then granted habeas relief. *Id.* at 560–61.

The Fifth Circuit affirmed, holding that the district court properly held an evidentiary hearing. *Id.* at 562–63, 572. Like the Third Circuit in *Lee*, the Fifth Circuit applied the *Schriro* standard: "whether an evidentiary hearing could 'enable an applicant to prove the petitioner's factual allegations, which, if true, would entitle the applicant to federal habeas relief.'" *Id.* at 563 (quoting *Schriro*, 550 U.S. at 474). Because the petition "alleged serious failures by [trial counsel] which are not *refuted by the record*," and which, if true, would entitle the petitioner to relief, a hearing was warranted. *Id.* (emphasis added); *see also id.* at 563 n.3 (court questioning the lack of fulsome explanations for trial counsel's actions in her affidavit).

The circuits that ascribe to this view of *Schriro* focus not on the manner in which the habeas petition's allegations are made—*e.g.*, whether they are made under oath or with supporting evidence already in the record—but instead on the nature of those allega-

tions and whether they are refuted by the existing record. *See id.* at 563; *Lee*, 667 F.3d at 407; *see also Williams*, 637 F.3d at 211–12 (affirming denial of evidentiary hearing because petitioner "was afforded a full and complete hearing" in state court and he "identifie[d] no potential facts which a second evidentiary hearing is likely to unearth").

ii. Other circuits take the opposite approach. These circuits, including the First, Ninth, and Eleventh, ask not whether the allegations are *refuted* by the existing record, but whether they are *supported* by it, or whether the petitioner can provide evidence supporting the allegations even before an evidentiary hearing. Courts following this approach will deny evidentiary hearings if the petition's allegations are "speculative," "conclusory," for instance, where they are not "support[ed]" by "the record." *Boyd v. Allen*, 592 F.3d 1274, 1306–07 (11th Cir. 2010); *see also, e.g.*, *Garuti v. Roden*, 733 F.3d 18, 25 (1st Cir. 2013); *Whittaker v. McDaniel*, 268 F. App'x 594, 597 (9th Cir. 2008); *Gonzalez v. Knowles*, 515 F.3d 1006, 1014 (9th Cir. 2008); *Chavez v. Sec. Fla. Dep't of Corr.*, 647 F.3d 1057, 1061 (11th Cir. 2011); *San Martin v. McNeil*, 633 F.3d 1257, 1271 (11th Cir. 2011); *Allen v. Sec'y Fla. Dep't of Corr.*, 611 F.3d 740, 745 (11th Cir. 2010).

In *Garuti*, the petitioner sought habeas relief arguing his counsel was ineffective due to inadequate consultation. *See* 733 F.3d at 20, 25. He submitted an affidavit alleging his counsel spent "minimal" time consulting with him about the facts of the case, including two in-person consultations "not of any great duration" and "a few" "brief[]" phone calls, and that counsel responded to his letters with only "a few rela-

tively short letters" that did not address the facts "in any degree of detail." *Id.* at 25. The First Circuit affirmed the denial of an evidentiary hearing because these allegations "are non-specific in nature and conclusory," and fail to provide "specific information" regarding the consultations. *Id.* The court also held that "[t]he trial court record . . . provides no support for [the petitioner's] claim of inadequate consultation," and "[t]hus, the inadequate consultation claim provided no basis for an evidentiary hearing." *Id.* at 26.

The Ninth Circuit likewise denied an evidentiary hearing in *Whittaker*. 268 F. App'x at 597. The petitioner argued his guilty plea was invalid because he was incompetent due to medication he was taking. *See id.* at 596. He submitted his medical records to the district court and requested an evidentiary hearing. *See id.* at 597. The Ninth Circuit reasoned that "conclusory allegations unsupported by any offer of proof do not entitle a *habeas* petitioner to an evidentiary hearing." *Id.* Accordingly, the petitioner was "not entitled to an evidentiary hearing because he has made no specific allegations and offered no evidence explaining how his medication affected his ability to consult with a lawyer or understanding the plea proceeding." *Id.* *See also Hill v. Ozmint*, 339 F.3d 187, 201 (4th Cir. 2003) (holding petitioner was not entitled to discovery and hearing to obtain the videotape of trial because his allegation that video may show "inappropriate array of uniformed officers in the courtroom during his trial" was "entirely speculative" and not otherwise supported by the existing record).

C. With the decision below, the Sixth Circuit has now aligned itself with the circuits that refuse evidentiary hearings if the petitioner does not provide evidentiary support for his allegations. Despite acknowledging that Shelton's claim for ineffective assistance of trial counsel "may have been significant" (Pet. App. 7a)—indeed, this Court has explicitly held that failure to communicate a plea offer is a Sixth Amendment violation, *see Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012)—the Sixth Circuit held that Shelton's claim was procedurally defaulted for failing to raise it on direct appeal (Pet. App. 5a–6a).

More to the point, the court also denied Shelton's request for an evidentiary hearing on his claims of ineffective assistance of trial and appellate counsel. (*See* Pet. App. 9a–10a.) After repeating the *Schriro* standard, the court held Shelton was not entitled to a hearing because "he has not made any allegations that his appellate counsel knew or should have known about the facts underlying his IATC claim." (Pet. App. 9a.) Shelton did specifically allege that "trial counsel's file may have confirmed for appellate counsel the [plea] offer's unilateral rejection," but the Sixth Circuit rejected that allegation as "pure speculation" and "not made under oath." (Pet. App. 10a.) It "therefore does not meet the standard by which to grant an evidentiary hearing." (*Id.*)

Of course, at this stage, Shelton cannot do more than speculate about what is in trial counsel's file regarding the plea offer, or what appellate counsel may have otherwise known about the plea offer, because he has not had the opportunity to conduct discovery in advance of an evidentiary hearing. The evidence to prove that he was deprived of his Sixth Amend-

ment right is beyond his control, and the courts have denied him the very mechanism he needs to obtain it. In other words, the Sixth Circuit placed Shelton in the unwinnable position that the First Circuit warned against: "[I]t would create a 'classic catch-22' if a habeas defendant were obliged to submit admissible evidence to the habeas court in order to be accorded an evidentiary hearing, when the defendant is seeking the hearing because he cannot, without subpoena power or mechanisms of discovery, otherwise secure such evidence." *Teti v. Bender*, 507 F.3d 50, 62 (1st Cir. 2007) (internal quotation marks and brackets omitted).

If, on the other hand, the court had applied the standard followed by the Third, Fifth, and Tenth Circuits, Shelton would have received an evidentiary hearing and thus access to the evidence necessary to prove his claim. As the dissent below pointed out, Shelton's allegations meet the *Schriro* standard because, if proven true, they "would entitle him to habeas relief." (Pet. App. 11a.) *Schriro* does not require "that the allegations must have been made under oath, or that they cannot be based on speculation." (*Id.*) Additionally, the allegations are not refuted by the existing record.

D. This circuit split threatens to undermine the constitutional rights of defendants. In some jurisdictions, defendants will have the chance to discover and present evidence that they were deprived of a constitutional right in state court. In others, they will not. Like Shelton, some defendants may be convicted or given longer sentences because they received constitutionally ineffective assistance of counsel, but if the supporting evidence is beyond their control, they may

never be able to vindicate that right. *Cf. Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

This Court's review of the decision below is essential to resolve the deep circuit split on the standard for obtaining an evidentiary hearing in habeas cases and to cease the erosion of defendants' constitutional rights.

II. THE SIXTH CIRCUIT'S DECISION ADDRESSES A RECURRING LEGAL ISSUE.

The question of the proper standard for obtaining an evidentiary hearing arises with considerable frequency. Approximately 20,000 habeas petitions are filed in any given year. *See* United States Courts, Caseload Statistics Data Tables, Table C-2, at 3, https://goo.g1/Wn64r7 (last visited October 25, 2016) (19,848 habeas petitions filed in 2014; 19,295 filed in 2015). Many seek evidentiary hearings to discover and present evidence supporting their claims.

Each time a petition seeks an evidentiary hearing, the court will have to apply the proper standard to determine if a hearing is warranted. While *Schriro* provides the general standard, courts are not interpreting it uniformly in judging whether a petition's factual allegations are sufficient for a hearing.

And uniformity in this area is critical. In most cases, petitioners are ultimately seeking to vindicate their constitutional rights. A petitioner's ability to do

so should not vary depending on the location of the federal court where he must file.

This split in the circuits, moreover, creates confusion for defendants looking to file habeas petitions, the vast majority of whom are pro se and without critical knowledge of the intricate legal requirements. Absent guidance from this Court, defendants may not understand their obligations in preparing a meritorious petition. For example, to what extent are they obligated to obtain supporting evidence before filing? And how should they frame their factual allegations; must they be included in a sworn affidavit? These questions faced by petitioners are likewise frequently recurring, reinforcing the need for this Court's review.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

This is an ideal case for resolving the circuit split furthered below for three reasons.

First, this case cleanly raises the question presented. To start, the legal bases underlying Shelton's ineffective assistance claims are well settled. Failing to communicate a plea offer constitutes ineffective assistance in violation of the Sixth Amendment. *Frye*, 132 S. Ct. at 1408. Further, "an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default" of a habeas claim. *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012). And appellate counsel's failure to raise on appeal a "clearly stronger" issue than those presented likewise constitutes ineffective assistance. *Joshua v. DeWitt*, 341 F.3d 430, 441 (6th Cir. 2003). Thus, if Shelton's al-

legations are true—that his trial counsel rejected a plea offer without informing him and that his appellate counsel should have known to raise that issue on appeal—Shelton would be entitled to resentencing. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1389 (2012) (holding resentencing is a proper remedy for failure to communicate a plea offer).

The Sixth Circuit denied Shelton's petition based solely on his procedural default for failing to raise ineffective assistance of trial counsel on direct appeal. (*See* Pet. App. 6a–10a.) The court refused to excuse that default based on appellate counsel's ineffectiveness solely because it determined, based on the existing record, that appellate counsel had no indication that the plea offer was not communicated to Shelton. (*See* Pet. App. 8a–9a.) And it denied an evidentiary hearing on that issue (and Shelton's underlying trial counsel claim) solely because it found Shelton's allegations that appellate counsel should have known to investigate the plea offer issue were "pure speculation" and "not made under oath." (*See* Pet. App. 10a.) The dissent disagreed with the standard the majority applied in denying a hearing and would have remanded to the district court to hold such a hearing. (*See* Pet. App. 10a–12a.) The outcome of Shelton's appeal thus turns squarely on the proper standard for obtaining an evidentiary hearing.

Second, the question presented is now ripe for certiorari review. Nearly a decade has elapsed since the Court decided *Schriro* and two opposing interpretations of the *Schriro* standard have developed. Those interpretations, moreover, are now clearly defined. At least seven circuits have confronted the issue, and they have divided nearly down the middle.

Third, the circumstances of Shelton's case perfectly demonstrate the need for an evidentiary hearing even where a petitioner cannot support every aspect of his claim with evidence upon filing. Shelton received constitutionally ineffective assistance of counsel when his lawyer failed to inform him of a favorable plea offer. Yet, because Michigan requires that ineffective assistance claims be raised on direct appeal (*see* Pet. App. 5a), Shelton could only vindicate his Sixth Amendment right if he somehow knew prior to his appeal that his trial counsel was obligated to convey the plea offer—unlikely for any layman, let alone one with a history of mental health problems—or by proving that his appellate counsel was likewise ineffective. *Cf. Massaro v. United States*, 538 U.S. 500, 503–04 (2003) (holding for federal habeas petitions that ineffective assistance claims need not be raised on direct appeal). And because the proof of appellate counsel's ineffectiveness is beyond his control, Shelton's only hope is an evidentiary hearing. A hearing provides the only mechanism for defendants like Shelton to procure the evidence necessary to show they were deprived of a constitutional right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Chad A. Readler
Counsel of Record
JONES DAY
325 John H. McConnell Blvd.
Columbus, Ohio 43215
(614) 469-3939
careadler@jonesday.com

OCTOBER 28, 2016

Counsel for Petitioner

APPENDIX

APPENDIX A

ARTHUR EUGENE SHELTON, Petitioner-Appellant, v. GREG MCQUIGGIN, Warden, Respondent-Appellee.

16A0288N.06 CASE NO. 14-2093

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2016 U.S. APP. LEXIS 10139; 2016 FED APP. 0288N (6TH CIR.)

JUNE 1, 2016, FILED

*** * ***

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

Shelton v. McQuiggin, 2014 U.S. Dist. LEXIS 108717 (E.D. Mich., July 29, 2014)

DISPOSITION: AFFIRMED.

COUNSEL: For Arthur Eugene Shelton, Petitioner - Appellant: Kenneth Grose, Jones Day, Columbus, OH.

Arthur Eugene Shelton, Petitioner - Appellant, Pro se, Kincheloe, MI.

For GREG MCQUIGGIN, Warden, Respondent - Appellee: Andrea M. Christensen-Brown, Raina I. Korbakis, Assistant Attorney General, Office of the Attorney General of Michigan, Lansing, MI.

JUDGES: BEFORE: SILER, COOK, and DONALD, Circuit Judges. BERNICE BOUIE DONALD, Circuit Judge, dissenting.

OPINION BY: SILER

OPINION

SILER, Circuit Judge. Petitioner Arthur Shelton appeals the district court's denial of his writ of habeas corpus filed under 28 U.S.C. § 2254. In 2004, Shelton shot and killed his roommate, Larry Hooper. At a bench trial, Shelton was found guilty but mentally ill of second-degree murder and guilty of possession of a firearm during the commission of a felony. He was sentenced to twenty-five to forty-five years' imprisonment for murder and a two-year consecutive term for the firearm-related offense. For the reasons explained below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At trial, Shelton admitted to killing Hooper, testifying that he saw "fire in [Hooper's] eyes" and believed that Hooper was the devil and going to kill him. In addition, both sides introduced testimony from mental health experts about Shelton's sanity at the time of the murder. The trial court concluded that Shelton lacked premeditation and deliberation required for first-degree murder but the state had demonstrated beyond a reasonable doubt that Shelton was guilty but mentally ill[1] for the offense of second-degree murder.

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[1] Under Michigan law, a trier of fact can determine that a defendant is "mentally ill," but not legally insane. Mich. Comp. Laws § 768.36. A determination that the defendant is "mentally

Because the trial court found Shelton guilty of second-degree murder, he could have received a life sentence. However, the court imposed the sentence recommended by the prosecution of twenty-five to forty-five years' imprisonment for murder and two years for the firearm charge. Shelton objected to the sentence, inquiring as to why the state recommended a greater term of imprisonment at sentencing than its prior plea offer of seventeen to thirty years. The trial court explained that those offers are between the prosecution and defense and added that Shelton's sentence "could have easily been life without parole or [a] life sentence."

On direct appeal, Shelton raised only two issues: (1) the preponderance of the evidence demonstrated that Shelton was not guilty by reason of insanity, and (2) the finding that Shelton was mentally ill violated due process. The Michigan Court of Appeals affirmed Shelton's conviction, finding sufficient evidence in the record to conclude that Shelton was mentally ill but not legally insane and that no due process violation occurred. *People v. Shelton,* No. 268078, 2007 Mich. App. LEXIS 1661, 2007 WL 1791704, at *5–6 (Mich. Ct. App. June 21, 2007). The Michigan Supreme Court denied Shelton's application for leave to appeal, *People v. Shelton,* 480 Mich. 925, 740 N.W.2d 262 (Mich. 2007) (mem.), and his motion for reconsideration, *People v. Shelton,* 480 Mich. 1078, 744 N.W.2d 133 (Mich. 2008) (mem.).

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ill" "does not absolve a defendant of criminal responsibility; rather, it affords him psychiatric treatment." *People v. Stephan*, 241 Mich. App. 482, 616 N.W.2d 188, 194 (Mich. Ct. App. 2000).

After denial of his appeals, Shelton filed for post-conviction relief with the trial court, advancing for the first time theories of ineffective assistance of trial counsel ("IATC") and ineffective assistance of appellate counsel ("IAAC"). The trial court denied relief on the basis that Shelton "failed to make any meritorious arguments which establish that, but for any alleged errors, he would have had a reasonably likely chance of acquittal." *See* Mich. Ct. R. 6.508(D)(3)(b)(i). Shelton's application of leave to appeal to the Michigan Court of Appeals was denied, as was his application to the Michigan Supreme Court. *People v. Shelton,* 488 Mich. 852, 787 N.W.2d 496 (Mich. 2010) (mem.).

Having exhausted his state court options for relief, Shelton filed a pro se petition for a writ of habeas corpus with the district court. Similar to his post-conviction motion, Shelton focused his basis for relief upon IATC and IAAC. *Shelton v. McQuiggin,* No. 10-14741, 2014 U.S. Dist. LEXIS 108717, 2014 WL 3827207, at *1 (E.D. Mich. July 29, 2014). The district court denied Shelton's petition but granted a certificate of appealability on one claim: whether Shelton's trial attorney was ineffective for failing to inform Shelton of a plea offer before rejecting it in violation of the Sixth Amendment.

ANALYSIS

Before even reaching the merits of Shelton's claim for relief, the parties disagree about the proper standard of review. The parties debate whether the more deferential standard articulated by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, or de novo review applies to the state court

adjudications of Shelton's claims. Although the parties raise interesting arguments, we instead decide this case on the issue of procedural default.

"In order to respect the finality of state-court decisions and preserve the principles of federalism, federal courts follow the doctrine of procedural default." *Kennedy v. Mackie,* No. 14-2342, 2016 U.S. App. LEXIS 1051, 2016 WL 232133, at *9 (6th Cir. Jan. 19, 2016) (citing *Martinez v. Ryan,* 132 S. Ct. 1309, 1316, 182 L. Ed. 2d 272 (2012)). Procedural default occurs when:

> (1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default.

Guilmette v. Howes, 624 F.3d 286, 290 (6th Cir. 2010) (en banc) (quoting *Tolliver v. Sheets,* 594 F.3d 900, 928 n. 11 (6th Cir. 2010)). Here, the state trial court in denying Shelton's post-conviction motion cited Michigan Court Rule 6.508(D)(3)(b)(i), which limits relief to the showing of "good cause" and "actual prejudice" for grounds that "could have been raised on appeal from the conviction and sentence or in a prior motion." Mich. Ct. R. 6.508(D)(3). A Michigan state court's reliance on Rule 6.508(D)(3) operates as a procedural bar for habeas review if "*clearly and expressly invoked*." *Henderson v. Palmer,* 730 F.3d 554, 561 (6th Cir. 2013) (citation and internal quotation marks omitted). Shelton concedes that the state court expressly invoked Rule 6.508(D)(3).

A procedurally defaulted claim will be forfeited, unless a petitioner "demonstrates cause for the default and prejudice from the asserted error." *House v. Bell,* 547 U.S. 518, 536, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (citations omitted). One method of demonstrating "cause" to excuse procedural default is by showing that petitioner's appellate counsel was ineffective. *See Jones v. Bell,* 801 F.3d 556, 562 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 878, 193 L. Ed. 2d 735 (2016). Under this test, a petitioner must show (1) that his "counsel's performance was deficient" and (2) that "the deficient performance prejudiced the defense." *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Shelton contends that IAAC excuses his procedural default. The district court did not address the issue of procedural default, finding that the "[a]pplication of a procedural bar would not affect the outcome of this case, and the Court deems it more efficient in this case to proceed directly to the merits." *Shelton,* 2014 U.S. Dist. LEXIS 108717, 2014 WL 3827207, at *5.

With respect to the first prong under *Strickland*, Shelton asserts that his appellate counsel raised two weak arguments on his direct appeal rather than the much stronger IATC claim. Although effective appellate representation does not require that all nonfrivolous arguments be made, appellate counsel must "exercise reasonable professional judgment." *Joshua v. DeWitt,* 341 F.3d 430, 441 (6th Cir. 2003) (citation omitted). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Sanders v. Curtin,* 529 F. App'x 506, 521

(6th Cir. 2013) (quoting *Monzo v. Edwards,* 281 F.3d 568, 579 (6th Cir. 2002)). Moreover, not only must the issue omitted be significant, but it must also be "obvious." *McFarland v. Yukins,* 356 F.3d 688, 711 (6th Cir. 2004) (listing factors relevant to determining whether appellate counsel was ineffective).

Although Shelton's IATC claim may have been significant, we find that it was not obvious. It is important to note at the outset that Shelton's appellate counsel's performance should "not be reviewed with hindsight, but judged 'within the context of the circumstances at the time of the alleged errors.'" *Hicks v. United States,* 122 F. App'x 253, 258 (6th Cir. 2005) (quoting *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996)). At the time of Shelton's appeal, his appellate counsel had only the following colloquy between the trial court and Shelton to even suggest the existence of a plea offer:

> [Shelton]: The original offer was 17 to 30 . . . . If their original offer was 17 to 30, why would they go way higher?
>
> [The Court]: Plus two for the firearm.
>
> [Shelton]: . . . . Well, it was 15 to 30, plus two more for the firearm, 17 to 30. That was their offer to begin with.
>
> [The Court]: Well, Mr. Schwartz, I do know this. I don't participate in the offers. That's between the prosecutor's office and the defense attorney. The parties will sometimes come and approach me and ask me whether I'd be inclined to give a Cobbs' evaluation in terms of the sentence.

> You can talk to Mr. Schwartz. You made the decision you made and that was their offer. And I heard the trial, I heard things that weren't presented to me, et cetera, and again this could have easily been life without parole or life sentence, Mr. Shelton, in light of the heinous nature of the crime.

While this is enough to have alerted Shelton's appellate counsel to the existence of an offer, there is, of course, a significant difference between knowing about the existence of a plea offer and having some reason to think that the offer was not communicated to Shelton. Simply put, there was little to give Shelton's appellate counsel pause, considering that the trial court's statement seems to imply that Shelton made the decision not to accept the plea offer and Shelton never made any attempt to refute that claim. Indeed, Shelton's apparent knowledge of the terms of the offer would have suggested to appellate counsel that the plea offer *had* been communicated.

In a supplemental authority filed with this court, Shelton reminds us that *Strickland* imposes a duty on a defendant's counsel to investigate potential claims. *See Strickland,* 466 U.S. at 688. True enough, but Shelton has given us nothing to suggest that his appellate counsel had any reasons to investigate his IATC claim. In fact, the only evidence that supports Shelton's contention that his counsel failed to communicate the plea offer to him—the affidavits filed by Shelton and his sister—were produced *after* Shelton's direct appeal. Further, Shelton has not claimed that he told his appellate counsel about his trial counsel's failure to communicate a plea offer to him, despite the fact that

Shelton acknowledged in his motion for post-conviction relief that he met with his appellate counsel. Without any knowledge of the alleged violation or any clue to suggest that he investigate the claim, Shelton's appellate counsel could not have provided ineffective assistance.

Shelton's supplemental authority also suggests that he is entitled to an evidentiary hearing. Presumably, this request is made with respect to his IAAC claim. "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan,* 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007). The problem with granting Shelton an evidentiary hearing on this issue is simple: he has not made any allegations that his appellate counsel knew or should have known about the facts underlying his IATC claim.[2] Rather, the

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[2] We contrast this case with the facts of *McClellan v. Rapelje*, No. 2:08-CV-10735, 2011 U.S. Dist. LEXIS 63053, 2011 WL 2447999 (E.D. Mich. June 14, 2011), *aff'd*, 703 F.3d 344 (6th Cir. 2013). Similar to Shelton, the petitioner in McClellan sought an evidentiary hearing regarding his IAAC claim in order to excuse the procedural default of his IATC claim. *McClellan*, 2011 U.S. Dist. LEXIS 63053, 2011 WL 2447999, at *7. Unlike Shelton though, the petitioner provided a factual basis—specifically, two letters sent to the petitioner's appellate counsel requesting that counsel investigate the IATC claim—to justify an evidentiary hearing on his IAAC claim prior to the district court's ruling on whether to grant a hearing. Op. and Order Granting Evidentiary Hearing at 9–10, *McClellan*, 2011 U.S. Dist. LEXIS 63053, 2011 WL 2447999. Because of those letters, the district court had a sufficient basis in order to grant an evidentiary hearing to determine whether the petitioner's appellate counsel

most pointed statement Shelton has made on this issue thus far has been the suggestion that his "trial counsel's file may have confirmed for appellate counsel the offer's unilateral rejection." But this allegation is pure speculation, was not made under oath, and therefore does not meet the standard by which to grant an evidentiary hearing. For that reason, no evidentiary hearing is warranted.

CONCLUSION

Petitioner is unable to excuse his procedurally defaulted ineffective assistance of trial counsel claim and has not demonstrated a sufficient basis to remand for an evidentiary hearing.

AFFIRMED.

DISSENT BY: BERNICE BOUIE DONALD

DISSENT

BERNICE BOUIE DONALD, Circuit Judge, dissenting.

The majority acknowledges that ineffective assistance of appellate counsel can excuse a procedural default. It accepts that failure to convey a plea bargain offer in these circumstances would constitute ineffective assistance of trial counsel. It even admits that Shelton's claim of ineffective assistance of trial counsel "may have been significant." (Slip op. 5). Yet the majority refuses even to grant Shelton an evidentiary hearing to explore his troubling accusations because, in its view, he "has not made any allegations that his appellate

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made a strategic decision in not raising the IATC claim on direct appeal or just failed to adequately investigate the claim. *Id.* at 11.

counsel knew or should have known about the facts underlying" his ineffective assistance of trial counsel claim (Slip op. 7). Since the record indicates otherwise, I must respectfully dissent.

Taken as a whole, the record does contain an allegation that Shelton's appellate counsel could have known that his trial counsel withheld the plea offer. The majority itself cites the plea colloquy in state court and acknowledges that the transcript should have put appellate counsel on notice that there was a plea offer (Slip op. 6). In a supplemental filing, Shelton argues that investigating "trial counsel's file may have confirmed for appellate counsel the offer's unilateral rejection." (Appellate R. 37 at 2).

Without citation to authority, the majority claims that this allegation fails to meet the standard for granting an evidentiary hearing because it was based on pure speculation and not made under oath. (Slip op. 8). However, under the Supreme Court's standard for granting an evidentiary hearing the majority cited merely sentences earlier in the opinion, (Slip op. 7); *Schriro,* 550 U.S. at 474, Shelton qualifies. *Schriro* held that an evidentiary hearing is appropriate when the hearing would allow a petitioner to prove his factual allegations true, and those allegations would entitle him to habeas relief. *Schriro,* 550 U.S. at 474. At no point does *Schriro* say that the allegations must have been made under oath, or that they cannot be based on speculation. If Shelton's trial counsel in fact withheld a plea deal, he received ineffective assistance of trial counsel. If conducting a reasonable investigation would have informed appellate counsel about a unilateral plea rejection, but he did not conduct such an

investigation, Shelton received ineffective assistance of appellate counsel that would excuse a procedural default. Therefore, if Shelton's allegations are true, he would be entitled to habeas relief.

Ultimately, there is so much we do not know. Since *Schriro* poses no bar, the wisest course would be to conduct an evidentiary hearing. That way, the district court could further develop the factual record to solicit testimony from appellate counsel, trial counsel, and other witnesses. This would allow us to know with greater certainty what appellate counsel knew or did not know, and what really transpired regarding the plea offer. Since today's ruling forecloses even exploring what I consider to be a plausible habeas claim, I respectfully dissent.

APPENDIX B

ARTHUR EUGENE SHELTON, Petitioner, v. GREG McQUIGGIN, Respondent.

Case Number 10-14741

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2014 U.S. Dist. LEXIS 108717

July 29, 2014, Decided
July 29, 2014, Filed

*** * ***

COUNSEL: Arthur Shelton, Petitioner, Pro se, IONIA, MI.

For Greg McQuiggin, Warden, Respondent: Raina I. Korbakis, Michigan Department of Attorney General, Habeas Corpus Division, Lansing, MI.

JUDGES: Honorable DAVID M. LAWSON, United States District Judge.

OPINION BY: DAVID M. LAWSON

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Arthur Eugene Shelton was found guilty but mentally ill of second-degree murder and a firearm offense following a bench trial in the Wayne County, Michigan circuit court. The evidence allowed no doubt that Shelton perpetrated a brutal homicide

by shooting Larry Hooper many times at close range. The only issue in dispute at trial was Shelton's mental state. Each side called qualified mental health experts as witnesses. The court accepted the testimony of the prosecution's expert witness and rejected Shelton's insanity defense. Shelton now has filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254, alleging that (1) the evidence demonstrated he was not guilty by reason of insanity, (2) the judgment of guilty but mentally ill violated his right to due process, (3) his trial attorney was ineffective, (4) the trial court should have considered manslaughter as a lesser offense of murder, and (5) his appellate attorney was ineffective because he did not raise all his claims on direct appeal. The respondent argues that the petition should be denied because the state appellate court's decision on the petitioner's first two claims was objectively reasonable and the petitioner's remaining claims were not properly preserved under the State's procedural rules. The Court concludes that the state court rulings on the petitioner's claims were not contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. The habeas petition therefore will be denied.

I.

The petitioner was charged with first-degree premeditated murder and possession of a firearm during the commission of a felony after he fatally shot his roommate, Larry Hooper, in 2004. The non-expert evidence at the petitioner's bench trial in state court was summarized accurately by the Michigan Court of Appeals as follows:

Taylor Police Officer David Cowell testified that on October 18, 2004, at approximately 9:44 p.m., he was manning the phone lines at the police station when a call came in from Shelton. Shelton identified himself and his home address, and told Officer Cowell that he had just killed his roommate, Larry Hooper, with a .22 pistol and a shotgun. Shelton stated that the pistol was in his bedroom and the shotgun was at his feet. Officer Cowell testified that the call was unlike any other call he had ever received in that Shelton stated that Hooper was the devil and that he shot Hooper "hopefully enough" and "as many times as I could; I still want to keep going." Shelton indicated he wanted to make sure that Hooper was "gone." Officer Cowell instructed Shelton to come out of the house via the front door. Shelton indicated that he did not want to pass Hooper's body because "opposites attract." Shelton went on to repeat, "opposites attract," several times. Instead of leaving through the front door, Shelton indicated that he would leave through the back door. The phone call was recorded and the tape was received into evidence during trial.

Officers soon arrived on the scene and arrested Shelton, who was cooperative. Shelton told the officers several times that he did not want to talk to anyone unless that person believed in God. He further stated that he trusted the officers because he believed that the officers believed in God. Shelton also stated that he shot Hooper because Hooper was "evil" and "possibly the devil." Shelton talked to the

officers about God and being an Eagle Scout. Shelton stated that he could be trusted to tell the truth because he was an Eagle Scout. Shelton also indicated that there was cocaine in his bedroom.

A search of Shelton's house turned up a revolver and a box of ammunition from atop the bed in his bedroom and a shotgun from the hallway. The revolver contained five spent casings and one live round; the shotgun contained one live round in the chamber and three in the magazine. Spent shotgun casings were also found in the hallway. In Shelton's bedroom, officers found one packet of cocaine and a tin of marijuana.

Hooper was found dead in a seated position on the living room couch. Most of his head was missing. According to the medical examiner's report, Hooper, a 62-year-old, died of multiple gunshot wounds to the head and chest. The death was ruled a homicide.

Officer Stephen Schwein interviewed Shelton a few hours after his arrest and after advising him of his *Miranda*[1] rights. The interview, although not transcribed, was videotaped, received into evidence and played in court. Shelton did not appear to be under the influence of any substance during the interrogation. His demeanor was "very calm" and "very focused." According to Shelton, he and Hooper were roommates. On the evening of the killing,

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Shelton and Hooper were having an extensive conversation concerning Hooper's not believing in God. There was also some discussion about a Jude letter, which was referred to as a "chain letter." Shelton indicated that, at some point during the conversation, Hooper tipped his hat, an action that Shelton believed to be an expression of Hooper's intention to kill him. Shelton also believed that Hooper was armed with a pocketknife. Consequently, Shelton went to his bedroom and retrieved a pistol. He returned to the living room, stood behind Hooper, who was seated on the couch, and shot Hooper multiple times in the head. Shelton indicated that he thought Hooper was "still kicking," so he went back to his bedroom, retrieved a shotgun, and shot Hooper in the head multiple times. Hooper stated that he was not sorry for shooting Hooper. At some points during the interview, *Shelton* became sidetracked and began talking of God, a Jude letter, and being an Eagle Scout. Officer Schwein found it necessary to refocus *Shelton* several times. *Shelton* indicated that he understood the difference between right and wrong. He further stated that he knew what he did was wrong and he would be going to prison for life. Neither a hat nor a weapon were found on or near Hooper's body.

Shelton also testified at trial. He indicated that his psychological problems started around 1987 when he got carbon monoxide poisoning. From that point on, he suffered from anxiety attacks and depression, and spent time in a

hospital for treatment of depression. In 1999, Shelton's children had him committed because of his severe mood swings and his belief that he had the cure for cancer. After his discharge in 1999, he did not receive any further treatment for his psychological conditions. Shelton admitted to the occasional use of marijuana and cocaine. He stated that he quit drinking in February 2004. He said that for the 12 years preceding the incident, he was taking prescribed pain medication because of problems with his right hand. Approximately eight days prior to the incident, Shelton stopped taking the pain medication because his hand started to feel better. He testified that two nights before the incident, the numbers seven and 11 popped into his head, and he became convinced that he should play those numbers in the lottery because of his idea that "opposites attract."

According to Shelton, the day before the incident, he was convinced that it was "judgment day" and the skies would open up at noon. He said that he often had sleepless nights and the night before the incident was particularly sleepless. He testified that he lay awake thinking about how opposites attract. He testified that he was not sure if he did any drugs on the day of the incident, but he may have ingested a line of cocaine earlier in the day. (In an earlier psychological evaluation, Shelton indicated that in addition to possibly ingesting cocaine, he smoked a few puffs of a marijuana cigarette on the day in question.) Shelton

testified that he felt "real good" on the day in question. He said that:

> I thought I was the closest man to God alive. All my prayers were being answered. I really had gotten almost total use of my hand back which they didn't expect me to get a whole lot of use of it at all and through all the therapy and that I was regaining all use of it. I felt better than I ever felt in my life, really. It was hard to explain.

Shelton also indicated that he believed he was "the firstborn king of the United States." He went on to say that on the evening of the shooting, he and Hooper, his roommate of two years, began having a discussion about religion. Hooper told Shelton that Hooper did not believe in God. Shelton testified that he himself was a firm believer in God. According to Shelton, Hooper was a violent man who had a sordid criminal past. Shelton testified that the discussion became heated, and Hooper became belligerent in a few instances. At that point, according to Shelton, he had "no intentions of hurting anybody." Shelton testified that after he retreated to his bedroom, he heard a loud noise coming from the living room. He said that he grabbed his pistol and went to investigate. He realized that the noise was only wind slamming the front door shut. Shelton testified that as he started to walk back toward his bedroom, "I looked at Larry and he looked at me and his eyes—he had fire in his eyes and he tipped his hat and he reached for his pocket

knife and I thought he was going to kill me and I jumped and I started shooting him in the head." Shelton said that because Hooper was still moving, he retrieved a shotgun from his bedroom and continued shooting. Shelton testified that he was "very fearful" and afraid of Hooper because he believed Hooper "was the devil himself" and that Hooper was coming after him, trying to kill him. Shelton stated that:

> A. [I]t was never my wish to kill a man in my life. I'm very sorry it happened, but I mean, at that given moment, like I said, I thought he was going to kill me.
>
> Q. And you thought he was the devil?
>
> A. Yes, I did.
>
> Q. All right. And you believed he was the devil?
>
> A. Yes, I did. At that time I believed he was the devil himself.

Shelton testified that at the time of trial, he no longer was of the belief that Hooper was the devil. He was sorry he had killed Hooper.

See People v. Shelton, No. 268078, 2007 Mich. App. LEXIS 1661, 2007 WL 1791704, at *1–3 (Mich. Ct. App. June 21, 2007).

Mental health experts testified at trial for both sides. The defense experts offered opinions that the petitioner was legally insane when he killed Hooper, and the State's expert said that he believed the petitioner had the capacity to distinguish right from wrong when he fired the fatal shots. At the conclusion of the trial, the trial court stated that it

could not find the petitioner guilty of first-degree premeditated murder because the elements of premeditation and deliberation were lacking. Instead, the court found the petitioner guilty but mentally ill of second-degree murder, Mich. Comp. Laws § 750.317, and guilty as charged of possession of a firearm during the commission of a felony, Mich. Comp. Laws § 750.227b. On December 19, 2005, the trial court sentenced the petitioner to a prison term of 25 to 40 years for murder and a consecutive two-year term for the firearm offense.

On direct appeal, the petitioner argued that (1) the preponderance of the evidence showed he was not guilty by reason of insanity and (2) the trial court's judgment of guilty but mentally ill violated his right to due process of law. The court of appeals disagreed and affirmed the petitioner's convictions, *Shelton,* 2007 Mich. App. LEXIS 1661, 2007 WL 1791704, and the state supreme court denied leave to appeal, *People v. Shelton,* 480 Mich. 925, 740 N.W.2d 262; 480 Mich. 925, 740 N.W.2d 262 (2007) (table). On February 19, 2008, the Michigan Supreme Court denied reconsideration. *People v. Shelton,* 480 Mich. 1078, 744 N.W.2d 133; 480 Mich. 1078, 744 N.W.2d 133 (2008) (table).

On August 15, 2008, the petitioner filed a motion for relief from judgment in which he alleged that his trial attorney was ineffective because he (1) rejected a plea offer without informing him of the offer, (2) failed to challenge the petitioner's statements to the police, and (3) failed to request that the petitioner appear at trial in an unmedicated state. The petitioner also alleged that the cumulative effect of trial counsel's errors violated his right to effective

assistance of counsel. Additionally, the petitioner alleged that the trial court violated his right to due process by declining or ignoring counsel's request to consider manslaughter as a lesser offense. The petitioner argued in the alternative that defense counsel was ineffective by failing to request manslaughter properly or by failing to object to the trial court's refusal to consider manslaughter as a lesser offense. Finally, the petitioner argued that appellate counsel was ineffective by failing to raise all his claims on direct appeal.

The trial court denied the petitioner's motion under Michigan Court Rule 6.508(D)(3)(b)(i) because the petitioner failed to establish that, but for the alleged errors, he would have had a reasonably likely chance of acquittal. The petitioner appealed the trial court's decision, but the Michigan Court of Appeals denied leave to appeal for failure to establish entitlement to relief under Rule 6.508(D). *People v. Shelton,* No. 294379, 2009 Mich. App. LEXIS 2976 (Mich. Ct. App. Dec. 29, 2009) (unpublished). On September 9, 2010, the Michigan Supreme Court denied leave to appeal for the same reason. *People v. Shelton,* 488 Mich. 852, 787 N.W.2d 496; 488 Mich. 852, 787 N.W.2d 496 (2010) (table).

On November 30, 2010, the petitioner filed his habeas corpus petition. He asserts the following grounds for relief in his supporting briefs: (1) the preponderance of the evidence showed that he was not guilty by reason of insanity; (2) the judgment of guilty, but mentally ill, violated his right to due process of law; (3) his trial attorney deprived him of effective assistance; (4) the trial court violated his right to due process by not considering manslaughter

as a lesser-included offense, and trial counsel was ineffective for failing either to make a proper request or for failing to object to the court's refusal to consider manslaughter as a lesser offense; and (5) appellate counsel was ineffective for failing to raise claims three and four on direct appeal. Pet. at 4–5. The respondent argues that the petitioner procedurally defaulted claims three and four. A procedural default is not a jurisdictional bar to a review of the merits of an issue, *see Howard v. Bouchard,* 405 F.3d 459, 476 (6th Cir. 2005), and "federal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson v. Jones,* 351 F.3d 212, 215 (6th Cir. 2003) *(*citing *Lambrix v. Singletary,* 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997)). Application of a procedural bar would not affect the outcome of this case, and the Court deems it more efficient in this case to proceed directly to the merits.

II.

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), which govern this case, "circumscribe[d]" the standard of review federal courts must apply when considering an application for a writ of habeas corpus raising constitutional claims, including claims of ineffective assistance of counsel. *See Wiggins v. Smith,* 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Because Shelton filed his petition after the AEDPA's effective date, its standard of review applies. Under that statute, if a claim was adjudicated on the merits in state court, a federal court may grant relief only if

the state court's adjudication "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 if the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). "Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the *dicta*, of [the Supreme] Court's decisions." *White v. Woodall, U.S.,* 134 S. Ct. 1697, 1702, 188 L. Ed. 2d 698 (2014) (internal quotation marks and citations omitted). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter,* 562 U.S. 86, 131 S. Ct. 770, 786–87, 178 L. Ed. 2d 624 (2011).

The distinction between mere error and an objectively unreasonable application of Supreme Court precedent creates a substantially higher threshold for obtaining relief than *de novo* review. The AEDPA thus imposes a highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be "given the benefit of the doubt." *Renico v. Lett,* 559 U.S. 766, 773, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010) (finding that the state court's rapid declaration of a mistrial on grounds of jury deadlock was not unreasonable even where "the jury only deliberated

for four hours, its notes were arguably ambiguous, the trial judge's initial question to the foreperson was imprecise, and the judge neither asked for elaboration of the foreperson's answers nor took any other measures to confirm the foreperson's prediction that a unanimous verdict would not be reached" (internal quotation marks and citations omitted)); *see also Dewald v. Wriggelsworth,* 748 F.3d 295, 298–99 (6th Cir. 2014); *Bray v. Andrews,* 640 F.3d 731, 737–39 (6th Cir. 2011); *Phillips v. Bradshaw,* 607 F.3d 199, 205 (6th Cir. 2010); *Murphy v. Ohio,* 551 F.3d 485, 493–94 (6th Cir. 2009); *Eady v. Morgan,* 515 F.3d 587, 594–95 (6th Cir. 2008); *Davis v. Coyle,* 475 F.3d 761, 766–67 (6th Cir. 2007); *Rockwell v. Yukins,* 341 F.3d 507, 511 (6th Cir. 2003) (en banc). Moreover, habeas review is "limited to the record that was before the state court." *Cullen v. Pinholster, U.S.,* 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011).

A.

In his first and second habeas claims, the petitioner alleges that he was legally insane when he committed the crimes and, therefore, he had a constitutional right to a finding of not guilty by reason of insanity. He also argues that the trial court's judgment of guilty but mentally ill violated his right to due process because evidence of guilt, that is, his criminal responsibility, was insufficient.

The Michigan Court of Appeals determined that the elements of second-degree murder were readily established at trial and that the only remaining question was whether the evidence established that the petitioner was insane at the time of the offense. The court of appeals noted that the trial court, as trier of fact, was entitled to believe the prosecution's

expert, who testified that the petitioner was not legally insane, and the trial court was not bound to accept the defense expert's opinion that the petitioner was legally insane when he killed Mr. Hooper. The court of appeals concluded that a rational trier of fact could find the petitioner guilty but mentally ill of second-degree murder, and therefore the petitioner was not deprived of his right to due process. *People v. Shelton,* 2007 Mich. App. LEXIS 1661, 2007 WL 1791704, at *5.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The critical inquiry on habeas review of the sufficiency of the evidence to support a criminal conviction is

> whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. . . . [T]his inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (internal citation and footnote omitted) (emphases in original). In the habeas context, "[t]he *Jackson* standard must be applied 'with explicit reference to the substantive

elements of the criminal offense as defined by state law .'" *Brown v. Palmer,* 441 F.3d 347, 351 (6th Cir. 2006) (quoting *Jackson,* 443 U.S. at 324 n. 16).

"A reviewing court does not reweigh the evidence or redetermine the credibility of the witnesses whose demeanor has been observed by the trial court." *Matthews v. Abramajtys,* 319 F.3d 780, 788 (6th Cir. 2003) (citing *Marshall v. Lonberger,* 459 U.S. 422, 434, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983)). A habeas court must defer to the fact finder for its assessment of the credibility of witnesses. *Id.* "[A] reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *McDaniel v. Brown,* 558 U.S. 120, 133, 130 S. Ct. 665, 175 L. Ed. 2d 582 (2010) (citations omitted). Accordingly, "[t]he mere existence of sufficient evidence to convict . . . defeats a petitioner's claim." *Matthews,* 319 F.3d at 788–89. "The state need not rule out every hypothesis except that of guilt beyond a reasonable doubt, and the reviewing court need not be convinced of [the] petitioner's guilt beyond a reasonable doubt." *Walker v. Russell,* 57 F.3d 472, 475 (6th Cir. 1995) (citing *Neal v. Morris,* 972 F.2d 675, 677–78 (6th Cir. 1992)).

"Two layers of deference apply to habeas claims challenging evidentiary sufficiency." *McGuire v. Ohio,* 619 F.3d 623, 631 (6th Cir. 2010) (citing *Brown v. Konteh,* 567 F.3d 191, 204–05 (6th Cir. 2009)). First, the Court "must determine whether, viewing the trial testimony and exhibits in the light most favorable to the prosecution, *any rational trier of fact* could have

found the essential elements of the crime beyond a reasonable doubt." *Brown v. Konteh,* 567 F.3d at 205 (citing *Jackson,* 443 U.S. at 319) (emphasis in original). Second, if the Court were "to conclude that a rational trier of fact could *not* have found a petitioner guilty beyond a reasonable doubt, on habeas review, [the Court] must still defer to the *state appellate court's* sufficiency determination as long as it is not unreasonable." *Ibid.*

The petitioner does not argue that the evidence at trial failed to establish the elements of second-degree murder, which are that the petitioner killed another human being with malice and without justification or excuse. *See People v. Smith,* 478 Mich. 64, 70, 731 N.W.2d 411, 414–15 (2007). Similarly, both sides agreed that the petitioner was mentally ill at the time. The disputed fact, and the one on which the petitioner insists he should have prevailed, is whether the petitioner's mental illness rendered him legally insane.

Under Michigan law, "[a]n individual is legally insane if, as a result of mental illness . . . or as a result of being mentally retarded . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." Mich. Comp. Laws § 768.21a(1). "The defendant has the burden of proving the defense of insanity by a preponderance of the evidence." Mich. Comp. Laws § 768.21a(3). A defendant

> may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following:

> (a) The defendant is guilty beyond a reasonable doubt of an offense.
>
> (b) The defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time of the commission of that offense.
>
> (c) The defendant has not established by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.

Mich. Comp. Laws § 768.36(1).

The mental health expert witnesses who testified at the petitioner's trial disagreed on the capacity element of the petitioner's insanity defense. The petitioner called Dr. Steven Miller, a forensic psychologist, who testified that, from the time of the petitioner's arrest on October 18, 2004 until December of that year, he was not on medication and he exhibited psychotic symptoms, delusional ideas, grandiosity, and distortions of reality. Dr. Miller concluded from those symptoms that the petitioner was mentally ill. Dr. Miller further concluded that the petitioner met the definition of insanity when he committed the crime because

> he had bipolar disorder. He was in a state of mania. He was in a state where he was believing grandiose ideas. He had thoughts about the decedent that were obviously unrealistic and distorted and he was acting on

> those thoughts and he was unable to stop himself from acting on those thoughts.

Trial Tr., Nov. 3, 2005, at 12.

Dr. Miller did not believe that the petitioner had the capacity to understand the nature and quality of the wrongfulness of his conduct because of the perceptions he had, the distortions of reality that he experienced, and the things he thought about himself and the victim at the time. *Id*. at 24. The fact that the petitioner had said he was crouching in the hallway and keeping an eye on the victim out of fear that the victim would move was an indication that the petitioner was deranged and insane, because the victim was missing most of his head by then. *Id*. at 32. Another indication of the petitioner's insanity, according to Dr. Miller, was the petitioner's comment that he feared the victim's evil soul would jump into his body. *Id*. at 33. Dr. Miller opined that the petitioner's "judgment was woefully lacking" and, based on the petitioner's understanding of what was going on, he could not stop himself. *Id*. at 35. The petitioner did not fully appreciate that his conduct was wrong because, in his mind, he had done the right thing. *Id*. at 38.

> On rebuttal, the prosecution presented Dr. George Watson, Jr., a forensic psychologist who opined that, although Shelton was mentally ill at the time of the offense, he did not qualify as being legally insane. Dr. Watson indicated that the fact that Shelton was calm and composed after the shooting and submitted to an interrogation in which he acknowledged that his disclosures could send him to prison for life, appears to strongly connote a capacity to

appreciate wrongfulness as well as a capacity to conform his conduct to the requirements of the law.

Further, Dr. Watson found it significant that Shelton felt compelled to kill Hooper not only because he believed Hooper was the devil, but owing also to more rational reasons. Dr. Watson reasoned:

> In his account to this examiner at the time of the instant clinical interview, Mr. Shelton's account sounded both themes. His grandiosity at the time and the intensity of his dispute with Mr. Hooper (in which the latter was portrayed as the devil) were stressed, but he also invoked a number of concerns about his safety from Mr. Hooper based upon the latter's reported criminal history, which Mr. Shelton may well have elaborated. Yet his account also suggested a certain serendipity, that is, that he initially armed himself because of hearing a loud sound, not because he had entered the bedroom intent upon getting the means to kill Mr. Hooper. This particular nuance does not come through as clearly in the tape of his interrogation, although Mr. Shelton does convey the immediacy of his perception that Mr. Hooper posed a mortal threat to him.
>
> With regard to another feature of the alleged offense, which raises questions about the defendant's mental state and capacity to conform, that is, his use of

> multiple pistol and shotgun blasts to Mr. Hooper's head, the interrogation tape and interview are informative. Rather than being, solely, a delusionally-based idea that these extreme measures were necessary to kill "the devil," it was also Mr. Shelton's contention that Mr. Hooper had survived previous attempts on his life by gunshots and this was why he was concerned that he was dead. If he had been unsuccessful, the victim's presumed capacity for vengeance against the defendant and his family was his concern.

Shelton, 2007 Mich. App. LEXIS 1661, 2007 WL 1791704, at *3. Dr. Watson also mentioned the petitioner's history of substance abuse, and he acknowledged the possibility that the drugs that the petitioner ingested on the day of the shooting "served to intensify [the petitioner's] paranoid ideas and impulsivity." 2007 Mich. App. LEXIS 1661, at *4.

The state court of appeals found that the record supports Dr. Watson's conclusion that the petitioner was not legally insane when he shot Mr. Hooper. That conclusion was reasonable, and therefore it is entitled to deference. *Brown v. Konteh,* 567 F.3d at 205. The trial evidence indicated that the petitioner followed a police cadet's instructions after the shooting, Trial Tr., Nov. 28, 2005, at 31, and he was able to explain the sequence of events to one of the responding officers, *id.* at 65. Although the petitioner had to be refocused more than once during his subsequent interview with a detective, he appeared to understand everything that the detective asked him. *Id.* at 91–93. Additionally, he stated during the

interview that he realized what he had done was wrong and that what he was telling the officer would hurt him and result in him going to prison for life. *Id.* at 99.

The trial court, as trier of fact, was not bound to accept the defense expert's testimony to the exclusion of all other evidence. *United States v. Newman,* 889 F.2d 88, 92 n.2 (6th Cir. 1989). A rational trier of fact could conclude from Dr. Watson's testimony that the petitioner was mentally ill, but sane when he shot the victim. Thus, the evidence was constitutionally adequate to support the petitioner's convictions of guilty but mentally ill of second-degree murder and felony firearm.

B.

The petitioner alleges next that he was deprived of the effective assistance of counsel when his trial attorney (1) rejected a plea offer without informing him of the offer, (2) failed to challenge the petitioner's statements to the police, and (3) failed to request that the petitioner appear at trial in an unmedicated state. The petitioner also alleges that the cumulative effect of trial counsel's errors violated his right to effective assistance of counsel. The trial court was the last state court to issue a reasoned decision on these claims, and it found no merit in them.

The two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), governs the Court's analysis of ineffective assistance of counsel claims. *Towns v. Smith,* 395 F.3d 251, 258 (6th Cir. 2005). To establish a claim of ineffective assistance of counsel, a defendant must show both deficient performance

and prejudice. *Premo v. Moore,* 562 U.S. 115, --, 131 S. Ct. 733, 739, 178 L. Ed. 2d 649 (2011) (quoting *Knowles v. Mirzayance,* 556 U.S. 111, 122, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009)).

Because of the high deference accorded state court determinations by AEDPA, establishing that counsel was ineffective and, therefore, the petitioner was denied his right to counsel under the Sixth Amendment is difficult. The Supreme Court recently explained:

> "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky,* 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) . . . . The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland,* 466 U.S. at 690.
>
> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id*., at 689; *Lindh v. Murphy,* 521 U.S. 320, 333, n.7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles,* 556 U.S. at 123. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. *Ibid*. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable.

> The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Richter, 131 S. Ct. at 788.

On habeas review, "[t]he question 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.'" *Knowles,* 556 U.S. at 123 (quoting *Schriro v. Landrigan,* 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007)). Moreover, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Ibid.* (citing *Alvarado,* 541 U.S. at 664).

1.

The petitioner alleges that while he was confined in the state forensic center for a competency evaluation, the prosecution offered to recommend a sentence of 17 to 30 years if the petitioner pleaded guilty to second-degree murder. The petitioner contends that his trial attorney rejected the offer before consulting him and later informed him and his sister that he had rejected the offer because it was no good.

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye,* -- U.S. --, --, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012).

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been

> rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Id. at 1409.

The trial court stated on post-conviction review of the petitioner's claim that the petitioner had failed to establish by a preponderance of the evidence that a plea bargain offer was made. *Shelton*, No. 05-006409-01-FC, at *4 (Wayne Cnty. Cir. Ct. Feb. 3, 2009). The record contradicts that finding. At his sentencing, the petitioner objected to the trial court's sentence of 25 to 45 years for the murder conviction on the ground that the original offer was 15 to 30 years for the murder conviction plus two years for the firearm offense. The trial court agreed and stated that, although it had not participated in the plea negotiations, "that was their offer." Sentence Tr., Dec. 19, 2005, at 29–30. The state court's determination that no offer was made is an unreasonable determination of the facts of the case.

The next question is whether trial counsel rejected the offer without consulting the petitioner. In an

affidavit attached to the petitioner's post-conviction motion in state court, the petitioner averred that his trial attorney told him while he was in the forensic center that the prosecutor offered a plea and sentence agreement of 17 to 30 years, but that he (trial counsel) turned it down because it was not a good offer and because the petitioner would get less time if he went to trial. The petitioner's sister, Elaine Masten, also stated in an affidavit attached to the post-conviction motion that trial counsel informed her about a plea and sentence agreement and that counsel turned it down because it was not a good offer. Ms. Masten averred that trial counsel did not ask her opinion or what her brother would want to do about the offer. Dkt. No. 7-12, at 55, 57.

The trial court, on the other hand, insinuated at sentencing that the petitioner made the decision not to accept the offer. In response to the petitioner's comment about having received an offer of 17 to 30 years in prison, the court said, "You made the decision you made and that was their offer." Sentence Tr., Dec. 19, 2005, at 30.

Assuming that the prosecutor offered a sentence of seventeen to thirty years and that the petitioner's attorney rejected the offer without first consulting the petitioner, the petitioner has not established that counsel's deficient performance prejudiced him. He averred in his affidavit that, "When [he] further inquired about the offer, [trial counsel] advised [him] that the plea was no longer available." Aff., dkt. #7-12, at 55 ¶ 4. Nowhere in the affidavit or in the habeas petition does the petitioner say that he would have accepted the offer.

Nor has it been shown that the trial court would have accepted a guilty plea in return for a sentence of 17 to 30 years. The court stated at the sentencing that the petitioner's crime "rank[ed] among the five most heinous crimes I've presided over" and that the sentence quite easily could have been life imprisonment with or without the possibility of parole, given "the heinous nature of the crime." *Ibid*. The court then said that it was comfortable with the sentence it had given and that it was a fair sentence. *Ibid*.

The petitioner has failed to establish prejudice as a result of his attorney's allegedly deficient performance. Therefore, he has no right to relief on the basis of his first claim about trial counsel.

2.

The petitioner also alleges that trial counsel should have moved to suppress the petitioner's statements to the police. The petitioner argues that he was mentally unfit to answer questions, that he was incompetent to waive his constitutional rights, and that the police exploited his condition to obtain an inculpatory statement. The trial court rejected this claim on post-conviction review because the petitioner failed to present evidence that his waiver of *Miranda* rights was involuntary, and, even if it were involuntary, the petitioner had not overcome the strong presumption that counsel's failure to object to the admission of his statement was sound trial strategy.

A confession is considered involuntary if (1) the police extorted the confession by means of coercive activity; (2) the coercion in question was sufficient to

overbear the will of the accused; and (3) the will of the accused was in fact overborne "*because* of the coercive police activity in question." *McCall v. Dutton,* 863 F.2d 454, 459 (6th Cir. 1988) (emphasis in original). The ultimate question is "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." *Miller v. Fenton,* 474 U.S. 104, 112, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985). Factors to consider include the presence or absence of police coercion (a "crucial element"), length of interrogation, location of interrogation, continuity of interrogation, the suspect's maturity and education, the suspect's physical condition and mental health, and whether the suspect was advised of his or her *Miranda* rights. *Withrow v. Williams,* 507 U.S. 680, 693–94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993). Without coercive police activity, however, a confession should not be deemed involuntary. *Colorado v. Connelly,* 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) (stating that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the *Due Process Clause*"). The burden of proving that a confession was given involuntarily rests with the petitioner. *Boles v. Foltz,* 816 F.2d 1132, 1136 (6th Cir. 1987). Voluntariness need only be established by a preponderance of the evidence. *Ibid.*

The petitioner had a high school education, and it appears that he was forty-nine years old when the police interviewed him. He was offered a bag of cookies and a drink during the interview, and the interview itself lasted one-and-a-half to two hours.

There is no evidence of coercive police activity in this case, and the only factor that the petitioner cites as evidence of an involuntary confession is his mental illness. Although he was found incompetent to stand trial shortly after the police interviewed him,

> [d]uring the interview, [he] did not appear to be under the influence of any intoxicants, and for the most part was able to answer the officer's questions. The officer conducting the interview testified at trial the [the petitioner] appeared very calm and focused. Although [the petitioner] became sidetracked during the interview and began talking of God, a Jude Letter, and being an Eagle Scout, the officer was able to refocus [the petitioner] and continue with the interview.

Opinion, No. 05-006409-01-FC, at *5 (Wayne Cnty. Cir. Ct. Feb. 3, 2009).

Furthermore, it was reasonable trial strategy not to seek suppression of the petitioner's statement to the police, because his mental illness at the time supported the defense theory that he was legally insane when he shot Mr. Hooper. The Court therefore finds that defense counsel was not ineffective for failing to move to suppress the petitioner's statements to the police.

3.

The petitioner asserts that his trial attorney was ineffective by failing to ask the trial court whether the petitioner could testify in an unmedicated state to demonstrate the petitioner's demeanor while unmedicated. The trial court rejected this claim because the petitioner failed to explain (1) how his testimony would have differed had he not been on

medication when he testified and (2) how allowing him to testify in an unmedicated state was essential to his insanity defense.

The petitioner implies that without his medication, he would exhibit symptoms of mental illness, which would support his insanity defense. The petitioner argues in essence that he should have been able to present himself as a human exhibit to demonstrate his insanity at the time of trial. However, if he had stopped taking his medication and if he were demonstrating symptoms of mental illness, he could have been deemed incompetent to stand trial, as he was initially, and been unable to testify in his own defense.

In any event, the petitioner has not alleged that he was medicated against his will or even that he asked to stop taking his medication. Testifying in a medicated state enabled him to explain his history of mental illness and what his thought processes were when he committed the crime. He

> testified at trial that on the day before the shooting, he believed that it was "judgment day" and that the skies would open up at noon. He indicated that he believed that he was "the firstborn king of the United States." As to the shooting itself, [he] testified that he believed the victim, who was [his] roomate (sic), was the devil, and that the victim had fire in his eyes right before [he] shot him.

Opinion, No. 05-006409-01-FC, at 6 (Wayne Cnty. Cir. Ct. Feb. 3, 2009).

It was not essential to the petitioner's defense to testify in an unmedicated state. Therefore, defense

counsel was not ineffective by failing to seek permission to have the petitioner testify in an unmedicated state.

4.

Lastly, the petitioner alleges that the cumulative effect of trial counsel's errors violated his Sixth Amendment right to effective assistance of counsel. The trial court stated on review of this claim that it found no merit in any of the petitioner's claims about trial counsel, and therefore his cumulative-error argument failed.

This Court likewise has determined that trial counsel's alleged errors did not rise to the level of constitutionally ineffective assistance of counsel. Moreover, the Supreme Court has never held that cumulative errors may form the basis for issuance of a writ of habeas corpus. *Lorraine v. Coyle,* 291 F.3d 416, 447 (6th Cir. 2002). The petitioner's cumulative-error claim, therefore, does not entitle him to relief.

C.

The petitioner alleges next that the trial court violated his right to due process by declining or ignoring his attorney's request to consider manslaughter as a lesser offense. As a result, according to the petitioner, the trial court lacked an opportunity to consider whether the petitioner's weakness of mind or infirmity of temper left him so overcome by emotion that he was provoked to act from passion rather than judgment. The petitioner argues in the alternative that defense counsel was ineffective by failing to request manslaughter properly or by failing to object to the trial court's refusal to consider manslaughter as a lesser offense.

The trial court opined on review of the petitioner's claim that the evidence did not support a conviction for voluntary or involuntary manslaughter. The trial court stated that the evidence did not support a conviction for voluntary manslaughter because there was no evidence that the petitioner killed the victim in the heat of passion caused by adequate provocation. The trial court also stated that there was no evidence to support a verdict of involuntary manslaughter because there was nothing to show that the petitioner unintentionally or negligently caused the victim's death. As for trial counsel's failure adequately to request that the trial court consider manslaughter, the trial court stated that the evidence did not support a conviction of manslaughter and, therefore, trial counsel was not ineffective by failing to make the argument.

The Supreme Court has never found a due process violation arising from the lost opportunity for a lesser offense instruction except in death penalty cases. In *Beck v. Alabama,* 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), a death penalty case, the Court held that failing to allow a fact finder to consider a lesser offense can violate the Due Process Clause if the evidence at trial could convince the trier of fact that the lesser offense was committed instead of the greater one. *Id*. at 635–38; *see also Campbell v. Coyle,* 260 F.3d 531, 541 (6th Cir. 2001) (stating that "a *Beck* instruction is only required when 'there was evidence which, if believed, could reasonably have led to a verdict of guilt of a lesser offense,' but not the greater") (quoting *Hopper v. Evans,* 456 U.S. 605, 610, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982)). The Sixth Circuit has held that "failure to instruct on a lesser

included offense in a noncapital case is not 'such a fundamental defect as inherently results in a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure.'" *Scott v. Elo,* 302 F.3d 598, 606 (6th Cir. 2002) (quoting *Bagby v. Sowders,* 894 F.2d 792, 797 (6th Cir. 1990) (en banc)). The failure to consider manslaughter as an offense of conviction in this case does not entitle the petitioner to habeas relief under the Due Process Clause.

Moreover, the state court's determination that manslaughter was not committed amounted to a reasonable conclusion. In Michigan, "[t]he elements of voluntary manslaughter are: '(1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions.'" *People v. McMullan,* 284 Mich. App. 149, 156, 771 N.W.2d 810; 284 Mich. App. 149, 771 N.W.2d 810, 815–16 (2009) (quoting *People v. Sullivan,* 231 Mich. App. 510, 518, 586 N.W.2d 578; 231 Mich. App. 510, 586 N.W.2d 578, 582 (1998)). The provocation necessary to reduce a homicide from murder to voluntary manslaughter must be sufficient to cause a reasonable person to lose control. *Sullivan,* 231 Mich. App. at 518; 586 N.W.2d at 582.

The victim's alleged tipping of his hat and reaching in his pocket was not adequate conduct to provoke a reasonable person to lose control and react by repeatedly firing a gun. As explained by the trial court on post-conviction review:

> In his statement to police, defendant stated that he was having a conversation with the victim

> when the victim tipped his hat, which defendant believed to be an expression of the victim's intent to kill him. Defendant then went into his bedroom, retrieved a pistol and shot the victim several times in the head. After defendant noticed that the victim was still moving, he retrieved a shotgun and shot him in the head several more times. Defendant's version of the events differed only slightly at trial. At trial, defendant testified that he saw the victim tip his hat and then reach for his knife. However, no hat or knife was recovered on or near the victim by police.

Opinion, No. 05-006409-01-FC, at 7 (Wayne Cnty. Cir. Ct., Feb. 3, 2009).

A rational view of those facts does not support a judgment of voluntary manslaughter. The petitioner himself conceded at trial that, having learned the victim did not have a pocket knife on him, he would "still say [he] was in danger, but not as much danger" and he "could have fought that [him]self to a certain extent." Trial Tr., Nov. 29, 2005, at 74.

Involuntary manslaughter is "'the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.'" *People v. Herron,* 464 Mich. 593, 604, 628 N.W.2d 528; 464 Mich. 593, 628 N.W.2d 528, 535 (2001) (quoting *People v. Ryczek,* 224 Mich. 106, 110, 194 N.W. 609; 224 Mich. 106, 194 N.W. 609, 611 (1923)). In this case, there was no evidence tending to show that the petitioner killed the victim unintentionally or

negligently. Rather, as explained by the trial court, the petitioner "left the room after speaking with the victim, retrieved a pistol, shot the victim in the head, and then retrieved a shotgun and continued shooting because the victim was still moving." Opinion, No. 05-006409-01-FC, at 7–8 (Wayne Cnty. Cir. Ct. Feb. 3, 2009). A rational view of the evidence does not support a conviction of involuntary manslaughter.

The state court reasonably concluded that the evidence could not have led it to conclude that the petitioner was guilty of manslaughter, but not second-degree murder, because the elements of second-degree murder were satisfied. Further, the evidence adduced at trial did not warrant consideration of manslaughter, because there was inadequate provocation to support a finding of voluntary manslaughter, and there was no evidence of unintentional or negligent conduct to justify a finding of involuntary manslaughter. The trial court's finding -- that the facts did not support a finding of manslaughter -- was objectively reasonable. The petitioner, therefore, is not entitled to habeas relief on the basis of the trial court's failure to consider manslaughter when rendering a judgment.

D.

The petitioner's fifth claim is that his appellate attorney was ineffective by failing to allege on direct appeal that trial counsel was ineffective and that the trial court's refusal to consider manslaughter violated the petitioner's right to due process. The petitioner contends that the omitted issues were significant, obvious, and clearly stronger than the two claims that counsel did raise on direct appeal and that there was no reasonable justification for not raising the

issues. The trial court rejected this claim on the basis that the omitted claims lacked merit and an attorney is not required to make meritless arguments.

It is well-established that a criminal defendant does not have a constitutional right to have appellate counsel raise every non-frivolous issue on appeal. *See Jones v. Barnes,* 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). In fact, "the process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail . . . is the hallmark of effective appellate advocacy." *O'Sullivan v. Boerckel,* 526 U.S. 838, 858, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) (quotation marks and citations omitted).

The petitioner's claims about trial counsel and the trial court's failure to consider manslaughter have no merit, and there is not a reasonable probability that, but for appellate counsel's failure to raise those claims, the petitioner would have prevailed on appeal. Therefore, appellate counsel was not ineffective for failing to raise the petitioner's third and fourth claims on direct appeal. "Appellate counsel cannot be found to be ineffective for 'failure to raise an issue that lacks merit.'" *Shaneberger v. Jones,* 615 F.3d 448, 452 (6th Cir. 2010) (quoting *Greer v. Mitchell,* 264 F.3d 663, 676 (6th Cir. 2001)).

III.

For the reasons stated, the Court concludes that the state court did not contravene or unreasonably apply federal law as determined by the Supreme Court. Therefore, the petitioner has not established that he is presently in custody in violation of the Constitution of the United States.

Accordingly, it is **ORDERED** that the petition for a writ of habeas corpus is **DENIED**.

/s/ David M. Lawson

DAVID M. LAWSON

United States District Judge

Dated: July 29, 2014

JUDGMENT

In accordance with the opinion and order entered on this date,

It is hereby **ORDERED AND ADJUDGED** that the petitioner's petition for habeas corpus is **DISMISSED WITH PREJUDICE**.

/s/ David M. Lawson

DAVID M. LAWSON

United States District Judge

Dated: July 29, 2014

APPENDIX C

ARTHUR EUGENE SHELTON, Petitioner, v. GREG McQUIGGIN, Respondent.

CASE NUMBER 10-14741

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2014 U.S. DIST. LEXIS 108711

JULY 29, 2014, DECIDED
JULY 29, 2014, FILED

*** * ***

COUNSEL: Arthur Shelton, Petitioner, Pro se, IONIA, MI.

For Greg McQuiggin, Warden, Respondent: Raina I. Korbakis, Michigan Department of Attorney General, Habeas Corpus Division, Lansing, MI.

JUDGES: Honorable DAVID M. LAWSON, United States District Judge.

OPINION BY: DAVID M. LAWSON

OPINION

ORDER GRANTING IN PART CERTIFICATE OF APPEALABILITY

The petitioner, Arthur Eugene Shelton, presently confined at the Michigan Reformatory in Ionia, Michigan, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his convictions for second-degree murder and a firearm offense. The habeas petition alleges that (1) the evidence demonstrated he was not guilty by reason of insanity, (2) the judgment of guilty but mentally ill violated his right to due process,(3) his trial attorney was ineffective, (4) the trial court should have considered manslaughter as a lesser offense of murder, and (5) his appellate attorney was ineffective because he did not raise all his claims on direct appeal.

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts:

> The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Courts must either issue a certificate of

appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997). To receive a certificate of appealability, "a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (internal quotes and citations omitted).

The Court now concludes that the petitioner has shown that reasonable jurors could debate whether the petitioner's rights under the Sixth Amendment were violated because his trial counsel rejected a plea offer without first informing him of the offer. The failure to advise the petitioner about the plea offer could be found to satisfy the defective performance and prejudice prongs of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Therefore the Court will grant a certificate of appealability as to that claim.

The Court does not believe that the petitioner's other claims relating to whether the evidence demonstrated he was not guilty by reason of insanity, the judgment of guilty but mentally ill violated his right to due process, the trial court should have considered manslaughter as a lesser offense of murder, and his appellate attorney was ineffective because he did not raise all his claims on direct appeal were incorrectly decided by the state courts,

or that reasonable jurists could debate the Court's conclusions.

Accordingly, it is **ORDERED** that a certificate of appealability is **GRANTED** as to the petitioner's claim under the Sixth Amendment **ONLY**.

/s/ David M. Lawson

DAVID M. LAWSON

United States District Judge

Dated: July 29, 2014

APPENDIX D

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v- **Case No. 05-006409-01-FC**

ARTHUR E. SHELTON, **Hon. Gregory D. Bill**

Defendant.

OPINION

This criminal matter is before the Court on a motion for relief from judgment, motion for an evidentiary hearing, and motion for appointment of counsel filed by defendant Arthur Shelton, acting in *propria persona*. For the reasons stated below, the Court will deny the motions.

1. Procedural History

Following a bench trial, defendant was found guilty but mentally ill of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 25 to 45 years' imprisonment for the murder conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appealed and his convictions were affirmed. *People v Shelton*,

unpublished opinion per curiam of the Court of Appeals, decided June 21, 2007 (Docket No. 268078), 2007 Mich App Lexis 1661. The instant motion for relief from judgment followed.

2. Standards for Determining Motions for Relief From Judgment

MCR 6.508(D) limits a defendant's entitlement to relief from judgment. If the defendant raises grounds for relief other than jurisdictional defects, relief may not be granted unless the defendant demonstrates both good cause for failure to raise the alleged grounds for relief on appeal or in a prior motion and actual prejudice from the alleged irregularities that support the claim for relief. MCR 6.508(D)(3)(a) and (b). In order to demonstrate actual prejudice when challenging a conviction following a trial, a defendant must show that "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal." MCR 6.508(D)(3)(b)(i).

3. Analysis

A. Ineffective Assistance of Trial Counsel

Defendant first argues that he was denied the effective assistance of trial counsel based on several errors he alleges counsel made during trial. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). When reviewing a claim of ineffective assistance of counsel, a court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76–77; 601. NW2d 887 (1999).

"To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v Riley* (*After Remand*), 468 Mich 135, 140; 659 NW2d 611 (2003). To demonstrate that counsel's performance was deficient, a defendant must show that counsel's performance "fell below an objective standard of reasonableness . . . . In so doing, defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id* at 140. To establish that counsel's deficient performance prejudiced the defense, the defendant must establish that his counsel's representation was so prejudicial that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). This means defendant "must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 302–303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

Defendant first argues that counsel was ineffective for failing to communicate a plea bargain offer to defendant. Defendant asserts that the prosecution offered a sentence of 17 to 30 years' imprisonment in return for defendant's guilty plea and that defense counsel rejected this offer without conveying it to defendant. In support of this argument, defendant has presented affidavits from himself and his sister, Elaine Masten, in which they claim that counsel told them that the prosecutor had offered a plea agreement with a sentence of 17 to 30 years'

imprisonment, but that he had declined it without consulting defendant or his sister.

An attorney's failure to advise his client of a plea bargain offer may be ineffective assistance of counsel. *People v Williams*, 171 Mich App 234, 241–242; 429 NW2d 649 (1988). The defendant has the burden of proving by a preponderance of the evidence that a plea offer was made and that his counsel failed to communicate it to him. *Id*. Defendant must also prove by a preponderance of the evidence that he would have accepted the plea. *Id*.

The Court first notes that there is no evidence in the record that the prosecutor did, in fact, offer a plea bargain. In any event, defendant offers little evidence regarding whether he would have accepted the alleged plea deal. Defendant notes that he was cooperative with the police officers, expected to be punished for the offense, and that the first-degree murder charge carried a maximum penalty of life imprisonment. However, defendant never states that he would have taken the plea deal had it been offered. Further, the Court fails to discern how the fact that defendant cooperated with the police and expected to be punished evidences that defendant would have accepted a plea deal that would have included a sentence of 17 to 30 years' imprisonment. Accordingly, defendant has failed to establish by a preponderance of the evidence that a plea bargain offer was made and that defendant would have accepted it. The Court will not grant relief from judgment on this issue.

Defendant next argues that counsel was ineffective for failing to move to suppress defendant's statement to police, which defendant claims was taken while he

was incompetent to waive his *Miranda*[1] rights. In support, defendant points to the fact that he was found incompetent to stand trial shortly after he made the statement to police, and that the police officer who took his statement had to refocus defendant several times during the interview.

The statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights. *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). Whether a waiver was knowingly and intelligently made depends on the suspect's level of understanding, police conduct notwithstanding. *People v Daoud*, 462 Mich 621, 636; 614 NW2d 152 (2000). Only a basic understanding is required. *Id.* Factors for the court to consider include age, education, background, experience, intelligence level, and whether the suspect has the capacity to understand the warnings given, the nature of the rights, and the consequences if they are waived. *Id* at 634. No single factor is determinative. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant has failed to present evidence which would establish that his waiver of *Miranda* rights was involuntary. Although defendant argues that he was found incompetent to stand trial shortly after his statement was taken, the fact that defendant was subsequently found incompetent to stand trial is not dispositive as to whether defendant was incompetent to knowingly and voluntarily waive his *Miranda*

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

rights at the time his statement was taken. Defendant's interview was videotaped, received into evidence, and played at trial. During the interview, defendant did not appear to be under the influence of any intoxicants, and for the most part was able to answer the officer's questions. The officer conducting the interview testified at trial that defendant appeared very calm and focused. Although defendant became sidetracked during the interview and began talking of God, a Jude Letter, and being an Eagle Scout, the officer was able to refocus defendant and continue with the interview. Defendant has failed to point to anything in the interview which would tend to demonstrate that he was incompetent to waive his *Miranda* rights.

Further, even if defendant did not voluntarily and knowingly waive his *Miranda* rights, he has failed to show that counsel's failure to object to the admission of his statement was not sound trial strategy. Defendant's theory at trial was that he was insane when he committed the murder. Counsel may have believed that allowing defendant's statements in would aid this defense. As noted by defendant, during the interview, he started discussing the Eagle Scouts, God, and a Jude chain letter. Because defense counsel may have believed that admission of defendant's statement would help with the insanity defense, defendant has not overcome the strong presumption that counsel's decision not to object was sound trial strategy.

Next, defendant argues that he was denied the effective assistance of trial counsel where counsel failed to move for the Court to allow defendant to appear in court in an unmedicated state. Defendant

asserts that an appearance in an unmedicated state was essential to his insanity defense. However, defendant fails to explain how it was essential to his insanity defense that he appear in an unmedicated state. That is, he does not explain how his testimony would have differed had he not been on medication while he testified. Defendant testified at trial that on the day before the shooting, he believed that it was "judgment day" and that the skies would open up at noon. He indicated that he believed that he was "the firstborn king of the United States." As to the shooting itself, defendant testified that he believed the victim, who was defendant's roomate, was the devil, and that the victim had fire in his eyes right before defendant shot him. Given defendant's above testimony, the Court fails to discern, and defendant fails to explain, how allowing defendant to testify in an unmedicated state would have been essential to his insanity defense. Accordingly, defendant has not shown that he was denied the effective assistance of counsel where counsel failed to move to allow him to testify in an unmedicated state.

Finally, defendant argues that the cumulative effect of the above errors denied him the right to effective assistance of trial counsel. Because this Court finds no merit to any of the above claims of ineffective assistance of counsel, defendant's cumulative error argument must fail. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

B. Manslaughter

Defendant next argues that the Court violated his right to due process where it failed to consider manslaughter as a lesser included offense.

Defendant argues that the evidence would have supported a finding of voluntary or involuntary manslaughter.

Defendant was originally charged with first-degree murder, but was found guilty of second-degree murder. Like second-degree murder, both voluntary and involuntary manslaughter are necessarily included offenses of murder, distinguished only by the element of malice. *People v Mendoza*, 468 Mich 527, 540–541; 664 NW2d 685 (2003). Consequently, when a defendant is charged with murder, an instruction on voluntary manslaughter will be given if a rational view of the evidence supports a conclusion that defendant killed the victim in the heat of passion caused by adequate provocation, and without a lapse of time during which a reasonable person in defendant's position could have controlled that passion. *Id* at 535. An instruction on involuntary manslaughter is appropriate when a rational view of the evidence would support a conclusion that a defendant caused a death, unintentionally and negligently. *Id* at 540–541.

Here, there was no evidence presented that would support a conviction for voluntary or involuntary manslaughter. First, there was no evidence that defendant killed the victim in the heat of passion caused by adequate provocation. In his statement to police, defendant stated that he was having a conversation with the victim when the victim tipped his hat, which defendant believed to be an expression of the victim's intent to kill him. Defendant then went into his bedroom, retrieved a pistol and shot the victim several times in the head. After defendant noticed that the victim was still moving, he retrieved

a shotgun and shot him in the head several more times. Defendant's version of the events differed only slightly at trial. At trial, defendant testified that he saw the victim tip his hat and then reach for his knife. However, no hat or knife was recovered on or near the victim by police. Even if the victim tipped his hat as claimed by defendant, such an act did not amount to reasonable provocation. Accordingly, the Court did not err in failing to convict defendant of voluntary manslaughter.

The evidence also did not support an involuntary manslaughter conviction. There is nothing in the above testimony which would tend to show that defendant caused the death of the victim unintentionally or negligently. Rather, defendant left the room after speaking with the victim, retrieved a pistol, shot the victim in the head, and then retrieved a shotgun and continued shooting because the victim was still moving. Accordingly, the Court did not err in failing to convict the defendant of involuntary manslaughter.

Defendant also asserts that counsel was ineffective for failing to adequately request that the Court consider a manslaughter conviction. However, as stated above, the evidence in this case did not support a conviction of manslaughter. Accordingly, counsel could not be deemed ineffective for raising this meritless argument. *Riley*, *supra* at 142.

C. Ineffective Assistance of Appellate Counsel

Finally, defendant argues that he was denied the effective assistance of appellate counsel where counsel failed to raise the above arguments on appeal. However, even if appellate counsel failed to assert

any or all of these arguments, the representation of defendant's counsel could not be deemed ineffective since an attorney is not required to make meritless arguments. *Id*.

4. Conclusion

Defendant has failed to make any meritorious arguments which establish that, but for any alleged errors, he would have had a reasonably likely chance of acquittal. MCR 6.508(D)(3)(b)(i). Therefore, defendant has failed to prove actual prejudice which would require reversal of his convictions. Based on the foregoing, the Court will also deny defendant's motions for an evidentiary hearing and for appointment of counsel.

For the foregoing reasons, defendant's motion for relief from judgment, motion for an evidentiary hearing, and motion for appointment of counsel are denied.

DATED: s/Gregory Bill P34094
Circuit Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v- **Case No. 05-006409-01-FC**

ARTHUR E. SHELTON, **Hon. Gregory D. Bill**

Defendant.

ORDER

At a session of said Court held in the Frank Murphy Hall of Justice, Detroit, Wayne County, Michigan, on this:

FEB 03 2009

PRESENT: HON. GREGORY D. BILL
Circuit Judge

The Court being advised in the premises and for the reasons stated in the foregoing Opinion,

IT IS ORDERED that defendant's motion for relief from judgment, motion for an evidentiary hearing, and motion for appointment of counsel are **DENIED**.

s/Gregory Bill P34094
Circuit Judge

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

August 11, 2016

Mr. Chad A. Readler
Jones Day
325 John H. McConnell Blvd., Ste.600
Columbus, OH 43215

Re: Arthur Eugene Shelton
v. Greg McQuiggin, Warden
Application No. 16A149

Dear Mr. Readler:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kagan, who on August 11, 2016, extended the time to and including October 29, 2016.

This letter has been sent to those designated on the attached notification list.

Sincerely,
Scott S. Harris, Clerk
by: s/Michael Duggan
Michael Duggan
Case Analyst

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Chad A. Readler
Jones Day
325 John H. McConnell Blvd., Ste.600
Columbus, OH 43215

Clerk
United States Court of Appeals for the Sixth Circuit
524 Potter Stewart Courthouse
100 East Fifth Street
Cincinnati, OH 45202

APPENDIX F

Third Judicial Circuit of Michigan
REGISTER OF ACTIONS
CASE NO. 05-006409-01-FC

State of Michigan vs. Arthur Eugene Shelton

AC#20110004448-A

§

§

§

§

§

Location:	**Criminal Division**
Judicial Officer	**Bill, Gregory D.**
Filed on:	**06/20/2005**
Case Number History:	**04425112-01**
Case Tracking Number:	**04425112-01**
CRISNET/Incident No.:	**200400032292**
Transaction Control Number:	**W4-04002913X**

CASE INFORMATION

Offense	Deg	Date		
1. Homicide – Murder First Degree – Premeditated Arrest:	TAD23-Taylor PD	10/19/2004	Case Type:	**Capital Felonies**
			Case Status:	**02/03/2009 Final**
2. Weapons Felony Firearm Arrest:	TAD23-Taylor PD	10/19/2004		
3. Homicide – Murder– Second Degree Arrest:	TAD23-Taylor PD	10/19/2004		

Statistical Closures

11/30/2005	Bench Verdict

PARTY INFORMATION

Plaintiff	**State of Michigan**	*Lead Attorneys*	
		Guirguis, Christina	(313) 224-8788(W)
Defendant	**Shelton, Arthur Eugene**		
	White Male *SID*: M11687869W	**Schwartz, Seymour C.**	(248) 547-3686(W)
		Retained	
Appellate Attorney	**Branch, William F.**		

DATE	EVENTS & ORDERS OF THE COURT	INDEX
10/19/2004	Recommendation for Warrant	
10/20/2004	**Arraignment On Warrant** (Judicial Officer: Sutherland, William J) Resource: Court Rpt/Rec CR9999 NOT ON RECORD *Held*	
10/20/2004	**Plea** (Judicial Officer: Sutherland, William J)	

2. Weapons Felony Firearm

Defendant Stand Mute: Plea of Not Guilty Entered by Court

l. Homicide - Murder First Degree - Premeditated

Defendant Stand Mute: Plea of Not Guilty Entered by Court

10/20/2004 Warrant Signed

11/01/2004 **Competency Hearing** (Judicial Officer: Sutherland, William J)

Resource: Court Rpt/Rec CR9999 NOT ON RECORD

Defendant Found Mentally Incompetent To Stand Trial

12/17/2004 **Return Competency Hearing** (Judicial Officer: Sutherland, William J)

Resource: Court Rpt/Rec CR9999 NOT ON RECORD

Defendant Found Mentally Incompetent To Stand Trial

04/04/2005 **Return Competency Hearing** (Judicial Officer: Sutherland, William J)

Resource: Court Rpt/Rec CR9999 NOT ON RECORD

Defendant Found Mentally Incompetent To Stand Trial

06/08/2005 **Return Competency Hearing** (Judicial Officer: Sutherland, William J)

Resource: Court Rpt/Rec CR9999 NOT ON RECORD

Entry Canceled

06/20/2005 **Preliminary Exam** (Judicial Officer: Sutherland, William J)

Resource: Court Rpt/Rec 2968 Tanner, Sandra

Held: Bound Over

06/20/2005 Bound Over

06/20/2005 **Return Competency Hearing** (Judicial Officer: Sutherland, William J)

Resource: Court Rpt/Rec 7346 Daniels, Jennifer

Resource: Court Rpt/Rec CR9999 NOT ON RECORD

Resource: Court Rpt/Rec 2968 Tanner, Sandra

Found Competent

06/20/2005 Appearance By A Retained Attorney Filed

06/20/2005 Signed And Filed

06/20/2005 **Interim Condition for Shelton, Arthur Eugene** (Judicial Officer: Sutherland, William J)

– Remand

06/23/2005 **Trial Docket**

06/23/2005 Filed

06/23/2005 Case Assignment to AOI Docket

06/30/2005 **Arraignment On Information** (Judicial Officer: Bill, Gregory D.)
Resource: Court Rpt/Rec 38 Coury, Brion
Held

06/30/2005 **Calendar Conference** (Judicial Officer: Bill, Gregory D.)
Resource: Court Rpt/Rec 38 Coury, Brion
Held

06/30/2005 **Disposition Conference** (Judicial Officer: Bill, Gregory D.)
Resource: Court Rpt/Rec 38 Coury, Brion
Held

06/30/2005 **Interim Condition for Shelton, Arthur Eugene** (Judicial Officer: Bill, Gregory D.)
- Remand

07/14/2005 Notice Of Defense Of Insanity
07/14/2005 Filed

08/05/2005 **Disposition Conference** (Judicial Officer: Bill, Gregory D.)
Resource: Court Rpt/Rec 3326 Bauer, Becky
Continued to 08/05/2005 - - Shelton, Arthur Eugene

Held

08/31/2005 **Pre-Trial** (Judicial Officer: Bill, Gregory D.)

Resource: Court Rpt/Rec 3326 Bauer, Becky

Held

08/31/2005 To Adjourn

08/31/2005 Heard And Granted

09/20/2005 *CANCELED* **Jury Trial**

Scheduling Error
Not Held And/Or Disposed

10/04/2005 Motion To Produce Witness(es)

10/04/2005 Filed

10/31/2005 **Jury Trial** (Judicial Officer: Bill, Gregory D.)

Resource: Court Rpt/Rec CR9999 NOT ON RECORD

Adjourned: Incarcerated Defendant Not In Court

11/28/2005 *CANCELED* **Jury Trial**

Scheduling Error
Not Held And/Or Disposed

11/28/2005 **Bench Trial** (Judicial Officer: Bill, Gregory D.)

Resource: Court Rpt/Rec 38 Coury, Brion

In Progress

11/28/2005 Waiver of Trial by Jury Signed and Filed

11/28/2005 Signed And Filed

11/29/2005 **Bench Trial** (Judicial Officer: Bill, Gregory D.)

Resource: Court Rpt/Rec 38 Coury, Brion

In Progress

11/30/2005 **Bench Trial** (Judicial Officer: Bill, Gregory D.)

Resource: Court Rpt/Rec 38 Coury, Brion

Held

11/30/2005 Found Guilty By Bench Trial

11/30/2005 **Disposition** (Judicial Officer: Bill, Gregory D.)

2. Weapons Felony
Firearm

Guilty But Mentally
Ill

3. Homicide – Murder –
Second Degree

Guilty But Mentally Ill

11/30/2005 Order For DNA Sample

11/30/2005 Signed And Filed

11/30/2005 Refer To Probation For A Report

12/19/2005 **Sentencing** (Judicial Officer: Bill, Gregory D.)

Resource: Court Rpt/Rec 3326 Bauer, Becky

Held

12/19/2005 Disposition(Judicial Officer: Bill, Gregory D.)

1. Homicide – Murder First Degree – Premeditated

Dismissed

12/19/2005 Victims Rights Fees Signed and Filed

12/19/2005 **Sentence** (Judicial Officer: Bill, Gregory D.)

2. Weapons Felony Firearm

Prison Sentence

Condition – Adult

1. Adult Criminal Sentence, 427 DAYS CR 12/19/2005, Active 12/19/2005

SGL Range (Minimum 180 Months, Maximum 300 Months)

State Confinement:

Agency: Michigan Department of Corrections
Effective 12/19/2005
Term: 2 Yr 0 Mo 0 Days to 0 Yr 0 Mo 0 Days

3. Homicide – Murder – Second Degree

Prison Sentence

Condition – Adult

1. Adult Criminal Sentence, 427 DAYS CR 12/19/2005, Active 12/19/2005

State Confinement:

Agency: Michigan Department of Corrections
Effective 12/19/2005
Term: 25 Yr 0 Mo 0 Days to 45 Yr 0 Mo 0 Days

SGL Range (Minimum 180 Months, Maximum 300 Months)

01/25/2006 Claim Of Appeal (Circuit)

01/25/2005 Filed

02/28/2006 Transcript Of Sentence

02/28/2006 Filed

04/24/2006 Transcript Of Trial

04/24/2006 Filed

06/21/2007 Appellate Court Decision; Affirms Lower Court

06/21/2007 Granted - Order Signed and Filed

10/29/2007 Application For Leave To Appeal (Circuit)

10/29/2007 Denied By The Supreme Court

08/15/2008 Motion For Relief From Judgment

08/15/2008 Filed

In pro per

12/19/2008 Post Conviction (Judicial Officer: Bill, Gregory D.)

Resource: Court Rpt/Rec 01 NOT ON RECORD

Review Status of MRJ filed 08/15/2008

11/14/2008 *Reset by Court to 12/12/2008*

12/12/2008 *Reset by Court to 12/19/2008*

Waived

08/25/2008 Motion For Relief From Judgment

10/27/2008	*CANCELED* **Post Conviction**
	Scheduling Error
02/03/2009	Order Denying Motion for Relief from Judgment Signed & Filed
02/03/2009	Motion For Evidentiary Hearing
02/03/2009	Denied – Order Signed and Filed (Judicial Officer: Bill, Gregory D.)
02/03/2009	Motion
	For assignment of counsel
02/03/2009	Denied – Order Signed and Filed (Judicial Officer Bill, Gregory D.)
12/29/2009	Application For Leave To File A Delayed Appeal (Circuit)
12/29/2009	Denied By The Court Of Appeals
09/09/2010	Application For Leave To Appeal
	DENIED

FINANCIAL INFORMATION

No Financial Information Exists

APPENDIX G

STATE OF MICHIGAN)
)SS.
COUNTY OF MUSKEGON)

AFFIDAVIT OF FACT

I, Arthur Eugene Shelton, being first being duly sworn, deposes, and says:

1) I am the Defendant in Wayne County Circuit Court case number **05-006409-01**.

2) If called to testify, I am willing to testify to all facts herein.

3) Seymour C. Schwartz (P-29789) represented me in the above referenced case. I authorized my daughter Lisa Marie Shelton to pay Mr. Schwartz $15,000.00 up front and an additional $3,000.00 per day in case of trial. I also authorized attorney Schwartz to discuss the case with my sister, Elaine Masten.

4) Mr. Schwartz told me that while I was at the forensic center, the prosecutor offered a plea sentence agreement of 17 to 30 years for second-degree murder, however he turned it down because it was not a good offer and told me that I would get less time if I went to trial. When I further inquired about the offer, Mr. Schwartz advised me that the plea was no longer available.

5) After my arrest a police officer told me during booking that I was going to prison for life.

I declare that the above facts are true to the best of my knowledge, information, and belief.

Date: August 06, 2008

s/ S. Galiton

Notary Public

S. Galiton, Notary Public
Muskegon County, MI
My Commission Expires on 4/8/15

My Commission Expires:

Respectfully Submitted,

s/ Arthur Eugene Shelton

Arthur Eugene Shelton

APPENDIX H

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

File No. 05-6409

vs.

Waiver Trial

ARTHUR EUGENE SHELTON,

Defendant.

_____/

PROCEEDINGS TAKEN in the above-entitled cause, before the HONORABLE GREGORY D. BILL, Judge of the 3rd Judicial Circuit Court, City of Detroit, at Frank Murphy Hall of Justice, Courtroom 701, Detroit, Michigan, on November 28, 2005.

APPEARANCES:

CHRISTINA GUIRGUIS, Assistant Wayne County Prosecutor, appearing on behalf of the People.

SEYMOUR SCHWARTZ, Attorney-at-Law, appearing on behalf of the Defendant.

* * *

BRION COURY, CSR/CSMR/CER-0038
Official Court Reporter

[ORIGINAL]

Processed
Notice of Filing Sent
ZC 4-25-06
Clerk

* * *

[Page 28]

Q Okay.

And did he tell you that there was still one shell racked in the rifle in case he moved?

A Yes, he did.

Q Okay.

And did you ever have an opportunity to see the photographs of the crime scene?

A Yes. Yeah.

Q All right.

So you know what condition the deceased was in at the time that the phone call was made, do you not?

A Well, not at that time, I didn't, but now I do looking back, yes.

Q I understand.

You never heard any other shots being fired while he was on the phone with you, did you?

A No.

Q All right.

And you have no reason to believe that Mr. Shelton shot Mr. Hooper any other times after he called you, do you?

A While I was on the phone I didn't hear any gunshots.

Q Okay.

And in reviewing other police

* * *

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So all you did was find a gun with five rounds, empty rounds, correct, and one live round?

A That's correct.

Q All right.

What about the shotgun, were there any live rounds in the shotgun?

A Yes, there was.

Q How many, if you recall?

A There was one in the chamber and three in the magazine, too.

Q Now, the narcotics that you found, could you tell if anybody had used those narcotics that day?

A I don't know.

Q All right. So it was all packaged, correct?

A There was two packagings for that—there was two packagings and one with suspected cocaine in it.

Q Did you ever test it?

A No, I didn't.

Q Did anybody ever test it, if you know?

A I don't know.

Q Would it have been—well, doesn't matter. Strike that. Did you check those weapons to make sure they were legal or they hadn't been used in any other criminal activity?

* * *

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God; that the conversation escalated. There was conversation about this Jude letter and your client stated he had gone to the bathroom to shave and when he came out he saw Mr. Hooper tip his hat and again your client took that as his intentions of killing him, Mr. Shelton.

So he proceeded to the bedroom, retrieved the pistol, went out, shot Mr. Hooper several times, stated that he thought he was still kicking so he went and retrieved a shotgun out of the very same bedroom. He walked up behind Mr. Hooper and shot that shotgun several times into the victim's head.

Q But he left one shell racked, did he not?

A I didn't recover the firearms, sir, so I can't tell you firsthand the condition of it and what—how many rounds were live or spent in it.

Q Okay.

Did he tell you that he left one racked in case Mr. Hooper continued to move?

A He told me that, as he did Cadet Cowell, that he was holding the gun over Mr. Hooper in the event that he were to move again, yes.

Q All right.

But as we know, because we have the photographs, there's no way Mr. Hooper was ever going

* * *

APPENDIX I

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE
CRIMINAL DIVISION

THE PEOPLE OF THE
STATE OF MICHIGAN,

vs. File No. 05-6409

ARTHUR EUGENE SHELTON, Waiver Trial

Defendant.

PROCEEDINGS TAKEN in the above-entitled cause, before the HONORABLE GREGORY D. BILL, Judge of the 3rd Judicial Circuit Court, City of Detroit, at Frank Murphy Hall of Justice, Courtroom 701, Detroit, Michigan, on November 29, 2005.

APPEARANCES:

CHRISTINA GUIRGUIS, Assistant Wayne County Prosecutor, appearing on behalf of the People.

SEYMOUR SCHWARTZ, Attorney-at-Law, appearing on behalf of the Defendant.

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BRION COURY, CSR/CSMR/CER-0038

Official Court Reporter

* * *

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a .22 and three times with a shotgun?

A Yes.

Q You were still worried he was going to come after you?

A Yes.

Q All right. And is that when you called 911?

A Yes.

Q Did you call—well, let me ask you this. Did you—

A I called 911.

Q And what happened? What did 911 do?

A 911 asked me—because I was on my cell phone, they asked me what city I was in and I told them Taylor and they said they would dispatch me through to Taylor.

Q All right. And they put you through?

A Yes, sir.

Q Okay.

And then you had that conversation with 911, right?

A Yes.

Q With the officer?

A Yes.

Q Officer Cadet Cowell I think is—I don't remember—recall his name. Now, at one point you said you put down your gun, but you wouldn't go out the front door?

A Right.

Q Why was that?

A I didn't want Larry's spirit to jump into mine—into me.

Q Is that what you meant by opposites attract?

A Yes.

Q All right.

You said opposites attract; no, I want go out the front.

A Right.

Q But you would go out the back?

A Yes.

Q And did you back out the back door—

A I backed out.

Q — or walk out?

A I walked out the back door.

Q You walked out the back door, all right, because you wouldn't walk past him?

A Right.

Q All right. How did you feel after that happened?

A Like I just jumped out of an airplane without a parachute.

Q All right.

But had you—I think there was some conversation about—well, how did you feel? What did it feel like to jump out of the airplane without a parachute?

* * *

APPENDIX J

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE
CRIMINAL DIVISION

THE PEOPLE OF THE
STATE OF MICHIGAN, File No. 05-6409

vs. Waiver Trial

ARTHUR EUGENE
SHELTON,

Defendant.
_____/

PROCEEDINGS TAKEN in the above-entitled cause, before the HONORABLE GREGORY D. BILL, Judge of the 3rd Judicial Circuit Court, City of Detroit, at Frank Murphy Hall of Justice, Courtroom 701, Detroit, Michigan, on November 30, 2005.

APPEARANCES:

CHRISTINA GUIRGUIS, Assistant Wayne County Prosecutor, appearing on behalf of the People.

SEYMOUR SCHWARTZ, Attorney-at-Law, appearing on behalf of the Defendant.

* * *

BRION COURY, CSR/CSMR/CER-0038
Official Court Reporter

* * *

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psychotic thought disorder. That's what is at issue. So in other words, it's really what people seem to be arguing about or concerned about how serious or not is the severity of his delusions and his delusional perceptions which is arguably thoughts, not moods.

So that's why we were getting hung up on mood and I'm not really connecting because really what I see, the money is on the thoughts. The severity of the thoughts, the severity of his thought form disorder and the severity of his delusional thought disorder, that's what is at issue here in my understanding.

Q Okay.

So we're not really talking about his moods. We're talking about what he was thinking and how he was thinking that?

A Yes.

Q How he reacted to his thoughts?

A Yes, within the context of what has been understood as a mood disorder, yes.

Q Okay.

I think I get that. So when he says that he saw the guy as the devil, he believed that, right? He believed that?

A Yes, but he also believed that he wanted to kill him which is what I say in my report, which is what Mr. Shelton says and so, yes, you can pick out that he says he's the devil, but the sentence before that was, I thought he was going to kill me, so both things are true.

Yes, he thought that, plus I thought that he was going to kill me. I thought that he was going to kill these other people.

Q I get it. He thought he was going to kill other people, too, right?

A You don't have to be the devil to kill other people. You don't have to be the devil to kill or to pose a threat to you.

Q And I understand, but because he was the devil and because he was evil he believed that he was going to kill those other people. That's what he's been saying, isn't it?

A I don't feel that that is the only thing that he's saying.

Q Okay.

A He gave me this account about how he's going off probation. There were these other people who had ratted him out. He was going to go kill these other people. That's what he told me, not because he's the devil, not because he's pure evil, but because he had a grudge. He

* * *

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That was approximately an hour so I would say three hours in total.

Q All right.

So the second one would have been the one you did in connection with the criminal responsibility?

A No, no, no. Well, that was largely prompted by the fact that I had a chance to review the tape and I had some follow-up questions based upon that, but I think I also did have some other follow-up questions just based on the first interview.

So it was a combination of things that I addressed in the second interview, but I would say that given that the history taking and mental status assessment had largely happened in the first interview, the follow-up interview was really focused on the account and these questions and the interrogation.

Q All right.

Now, and then you called me and you and I talked some about this report and you indicated to me that this is, in your judgment, a very close call in terms of whether he made it over the hump or whatever it is, from mentally ill to mentally—to insanity?

A Well, yes, I think that—

Q Is that accurate?

A I think that's fair to say. I think any time I'm forming an opinion of mentally ill and

responsible, that shows that there really does have to be a very careful examination of the available information about capacity.

Q. All right.

And you evaluated it—you took into account the fact that he had re-racked the shotgun, that he refused to go forward, but would only back out of the house and then the ongoing mental health problems that he had when he saw Doctor Pizzi, who is one of your colleagues?

A Uh-huh.

Q Crystal Harrison, who is one of your colleagues, Doctor Cardasis, you took all of their reports into account?

A Well, yes, with the exception of, as I said, I don't think I was privy to the information about backing out of the house. I think that particular piece of it I don't think that I had prior to forming the opinion.

What I have said is that I did specifically ask about the number of times that he shot the Defendant—I mean, the victim, I'm sorry, why was that and I did represent in my report what his response to that was and so to that—to the extent to which that particular aspect was addressed, it was in that form.

MR. SCHWARTZ: I have no other

* * *