No. 20-1834

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID SAYLOR,

Petitioner-Appellant,

v.

NOAH NAGY, Warden,

Respondent-Appellee.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Paul D. Borman

BRIEF FOR RESPONDENT-APPELLEE

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Dated: July 1, 2021

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The State requests oral argument under Federal Rule of Appellate Procedure 34(a). This case presents significant factual and legal arguments, and oral argument will aid the Court in its decision-making process.

Specifically, this case involves a petitioner who admitted to a horrible crime against a child yet seeks to overturn a valid plea 13 years later. Because there are several claims in this appeal—and several procedural disputes underlying those claims—the State respectfully requests oral argument.

STATEMENT OF ISSUES PRESENTED

1. A habeas petitioner challenging counsel's performance during plea negotiations must demonstrate deficient performance, prejudice, and that the state court did not unreasonably apply Supreme Court precedent. Here, Saylor alleges that counsel did not advise him of regulatory provisions associated with his plea. But he has not proved that counsel failed to give that advice or that he would have rejected the plea had he known of those provisions. Has Saylor met his high burden of demonstrating that counsel was ineffective?

2. The *Ex Post Facto* Clause prohibits retrospective application of a law that increases punishment. Here, the provision enforcing the 25-year mandatory-minimum sentence was enacted after Saylor said he first committed the offense. But he agreed to the sentence, he never raised an *ex post facto* claim in the highest state court, and, in any event, he admitted that he repeatedly committed the offense *after* the provision was enacted. Is Saylor entitled to relief on his *ex post facto* claim?

3. A habeas petitioner claiming ineffective assistance of appellate counsel must show deficient performance, prejudice, and that the state court did not unreasonably apply Supreme Court precedent. Here, Saylor claims that appellate counsel should have raised an *ex post facto* claim on direct appeal, but that underlying claim is meritless. And, regardless, he never raised his appellate-counsel challenge in the Michigan Supreme Court. Is Saylor entitled to relief on his ineffective-assistance-of-appellate-counsel claim?

INTRODUCTION

David Saylor sexually abused his toddler daughter—repeatedly, for nearly two years. He turned himself in to the police and later confessed in open court, but he almost immediately regretted his candidness. Over 13 years later, Saylor is still trying to undo a valid plea agreement, but his constitutional arguments are unavailing. He provides no proof that counsel gave him bad advice during plea negotiations and no credible argument that he would have rejected the plea offer and stood trial for five life offenses. Nor does he provide any persuasive explanation for why his sentence formed an *ex post facto* violation when he admitted that he committed the offense repeatedly for two years—including *after* the 25-year mandatory minimum provision was enacted. He also cannot overcome a myriad of procedural hurdles that bar habeas relief. All told, the district court correctly rejected Saylor's claims; this Court should affirm.

STATEMENT OF THE CASE

In May 2008, David Saylor was charged with five counts of sexually assaulting two of his young daughters. At a scheduled preliminary examination, Saylor chose instead to plead guilty to one

count. In doing so, he admitted to recurring abuse over the prior two years:

> [The prosecutor.] Sir did you have ah, your daughter from the time she was two until four perform fellatio on you while giving her a bath ah, in the family bathtub.
>
> THE DEFENDANT. (no verbal answer)
>
> [The prosecutor]. Did you make her suck your penis?
>
> THE DEFENDANT. Yes sir.
>
> [The prosecutor]. And that was repeatedly?
>
> THE DEFENDANT. Yes sir.
>
> [The prosecutor]. And you came forward and actually showed yourself to the Sheriff Department and confessed to those as well?
>
> THE DEFENDANT. Yes sir.
>
> * * *
>
> [The prosecutor]. And it was between the dates of June 1st, of '06 through April 26, of '08?
>
> THE DEFENDANT. Yes.
>
> [The prosecutor]. Thank you.
>
> And she was two to four years of age at the time?
>
> THE DEFENDANT. Yes.

(5/22/08 Prelim. Examination Waiver & Circuit Ct. Plea, R. 28-1, Page ID #621–22.) In exchange for Saylor's plea, the prosecution agreed to dismiss the remaining four charges and recommend a 25 to 40-year prison sentence. (*Id.* at 613.)

Thirteen days later, Saylor filed a motion to withdraw his plea. He argued that his attorney did not sufficiently explain the consequences of the plea offer and instead led him to believe that he would get life in prison if he did not accept. (6/3/08 Pet. to Set Plea Aside, R. 9-13, Page ID #293.) The trial court denied the motion. (7/2/08 Judge's Op. Tr., R. 9-4, Page Id #106–07.) The court then sentenced Saylor to 25 to 40 years in prison. (7/9/08 Sentence Tr., R. 9-6, Page ID #179.) The court also ordered Saylor to comply with the requirements of the Michigan Sex Offender Registration Act and to submit to lifetime electronic monitoring. (*Id.* at 179–80.)

Saylor applied for leave to appeal in the Michigan Court of Appeals. In his first claim, he argued that his counsel was ineffective for failing to advise him that he would be subject to lifetime electronic monitoring and required to register as a sex offender if he pleaded guilty. (2/22/11 Appl. for Leave to Appeal, R. 9-13, Page ID #269–72.)

In his second claim, he argued that he did not fully understand the consequences of his plea because counsel mistakenly advised him that he would have been sentenced to life in prison if he did not plead guilty. (*Id.* at 273–76.) The Michigan Court of Appeals denied the application "for lack of merit in the grounds presented." (3/30/11 Mich. Ct. App. Order, R. 9-13, Page ID #259.) Saylor raised those claims again (along with two additional claims not at issue here) in an application for leave to appeal in the Michigan Supreme Court, but that court also denied the application, stating that it was "not persuaded that the questions presented should be reviewed" by that court. *People v. Saylor*, 801 N.W.2d 35 (Mich. 2012) (order).

Over a year later, Saylor filed a motion for relief from judgment. Among other claims, he argued that the trial court judge was unconstitutionally biased, that imposing a 25-year mandatory minimum sentence in his case violated his due process right to notice, and that his appellate counsel was ineffective for failing to raise those arguments on direct appeal. (5/28/13 Mot. for Relief from J., R. 9-5, Page ID #112–16.) Saylor later amended his motion, asserting that his challenge to the 25-year mandatory minimum statute was an *Ex Post*

Facto Clause challenge. (6/17/13 Def.'s Supplement to Mot. for Relief from J., R. 9-7, Page ID #182–85.) He then amended his motion again, this time saying that he wished to raise an additional claim that his counsel was ineffective for failing to advise him that he would be subject to lifetime electronic monitoring if he pleaded guilty and that his plea was invalid as a result. (6/27/13 Am. Mot. for Relief from J., R. 9-8, Page ID #188–89.)

The trial court denied the motion. (10/22/13 Order, R. 9-11, Page ID #237, 240.) The court first determined that Saylor's judicial-bias claim was meritless and untimely. (*Id.* at 238–39.) It then held that Saylor's *ex post facto* claim was meritless because Saylor admitted to an offense that occurred before *and after* the 25-year mandatory-minimum statute became effective. (*Id.* at 239.) Alternatively, the court held, Saylor waived the claim because he voluntarily agreed to plead guilty in exchange for the prosecution recommending a 25-year minimum sentence. (*Id.*) Next, the court acknowledged that there was no reference to the lifetime-electronic-monitoring requirement during Saylor's plea, but it determined that Saylor had not demonstrated good cause and actual prejudice for failing to raise the claim on direct appeal,

as required by Michigan Court Rule 6.508(D)(3). (*Id.* at 239–40.) Within its analysis, the court noted that, given that Saylor voluntarily turned himself into the police, confessed to the continued abuse, and faced multiple other charges with severe consequences, Saylor had failed to demonstrate a reasonable likelihood that he would have foregone the plea had he been advised of the lifetime-electronic-monitoring requirement. (*Id.*) Finally, the trial court determined that neither trial nor appellate counsel were ineffective. (*Id.* at 240.)

Saylor applied for leave to appeal in the Michigan Court of Appeals, but that court denied the application, citing Michigan Court Rule 6.508(D). He did not apply for leave to appeal in the Michigan Supreme Court. (4/1/15 Aff. of Larry Royster, R. 9-16, Page ID #436.)

Not finding relief in state court, Saylor turned to the federal system. In the district court, he filed a habeas petition raising the same claims that were denied by the state courts. (12/2/14 Pet., R. 1, Page ID #4–14.) The State initially filed a motion to dismiss the petition because it was not timely filed. (6/8/15 Mot., R. 8, Page ID #46.) The district court granted the motion. (10/19/15 Op. and Order, R. 11, Page ID #446, 454.) But Saylor appealed, and this Court granted a certificate

of appealability (COA). Order at 3–4, *Saylor v. Brewer*, No. 15-2469 (6th Cir. Oct. 31, 2016), Doc. 6-1. The State moved to stay the appeal while it petitioned for a writ of certiorari in the Supreme Court from this Court's decision in *Holbrook v. Curtin*, 833 F.3d 612 (6th Cir. 2016). 2/16/17 Motion to Hold Appeal in Abeyance, Doc. 12-1. This Court granted the State's motion. 2/16/17 Letter to Counsel, Doc. 13. After the Supreme Court denied the petition for a writ of certiorari, *Woods v. Holbrook*, 137 S. Ct. 1436 (2017), the State conceded in this Court that Saylor's habeas petition was timely and moved to remand to the district court to decide the underlying claims in the first instance, 6/19/17 Motion to Remand at 3, Doc. 16. Because the State conceded "the sole issue on appeal," this Court vacated the district court's judgment and remanded the case. 9/7/17 Order, Doc. 17-2.

On remand, the district court considered each of Saylor's claims and rejected them. (7/28/20 Op. and Order, R. 29, Page ID #634–50.) The court therefore denied the petition and denied a COA. (*Id.* at 650.) Saylor appealed again, and this Court granted a COA as to whether:

> (1) the trial court abused its discretion by denying Saylor's motion to withdraw his plea, where, due to the ineffective assistance of plea counsel, he did not understand the consequences of his plea; (2) plea counsel rendered

> ineffective assistance by failing to properly advice Saylor that the consequences of his plea included lifetime electronic monitoring and sex offender registration; (3) his sentence violates the Ex Post Facto Clause because his offense occurred before an amendment to the statute of conviction; (4) appellate counsel rendered ineffective assistance by failing to raise the above claims asserting ineffective assistance of plea counsel and an Ex Post Facto violation; and (5) the district court erred by denying the above claims without possessing the charging document.

(1/20/21 Order, Doc. 11-2.)

STANDARD OF REVIEW

This Court reviews the district court's legal conclusions de novo and its factual findings for clear error. *Fleming v. Metrish*, 556 F.3d 520, 524 (6th Cir. 2009). "The standard for reviewing state-court determinations on habeas, by contrast, is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), codified at 28 U.S.C. § 2254(d)." *Id.*; *Ivory v. Jackson*, 509 F.3d 284, 291 (6th Cir. 2007). AEDPA prevents a federal court from granting habeas corpus relief based on any claim "adjudicated on the merits" in state court, unless the petitioner can establish that the state court adjudication:

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

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

28 U.S.C. § 2254(d).

Under the "contrary to" clause of § 2254(d)(1), the petitioner must establish that "the state court arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law or . . . decide[d] a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Metrish v. Lancaster*, 569 U.S. 351, 357 n.2 (2013) (internal quotation marks and citation omitted).

Under the "unreasonable application" clause of § 2254(d)(1), the petitioner must establish that, after "identif[ying] the correct governing legal principle from the Supreme Court's decisions, [the state court] unreasonably applie[d] that principle to the facts of [his] case." *Hill v. Curtin*, 792 F.3d 670, 676 (6th Cir. 2015) (en banc) (alteration omitted). "[T]he state court's decision must have been more than incorrect or erroneous[;]" rather, it must have been "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 520–21 (2003)). "[E]ven 'clear error'

will not suffice." *White v. Woodall*, 572 U.S. 415, 419 (2014). Again, the state court's determinations of law and fact must be "so lacking in justification" as to give rise to error "beyond any possibility for fairminded disagreement." *Dunn v. Madison*, 138 S. Ct. 9, 12 (2017) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

Under § 2254(d)(2), the "unreasonable determination" subsection, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Wood v. Allen*, 558 U.S. 290, 293 (2010). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Burt v. Titlow*, 571 U.S. 12, 15 (2013) (internal quotation marks and citation omitted).

SUMMARY OF ARGUMENT

On appeal, Saylor raises four constitutional challenges to his confinement. None warrant the drastic remedy of habeas relief.

First, Saylor focuses on what his counsel failed to tell him before pleading guilty, but he provides no proof that counsel actually failed to

give that advise. Although the state court that took Saylor's plea did not advise him that he would be required to register as a sex offender and be subjected to lifetime electronic monitoring, that does not necessarily mean that his counsel did not so advise him. And even if counsel did fail to so advise him, there is no clearly established federal law that deems that failure to be ineffective assistance. Moreover, Saylor has not demonstrated prejudice; given that he avoided five potential life sentences in exchange for his plea, his unsupported contention that he would have rejected the deal had he known of the regulatory requirements is unpersuasive.

Second, Saylor claims that the 25-year mandatory-minimum sentence provision of his conviction was unconstitutionally retroactively applied to him. But Saylor *agreed* to the 25-year minimum sentence; indeed, that was part of the consideration of his plea agreement. He thus waived (and procedurally defaulted) any claim that his 25-year sentence was unlawful. This claim is also procedurally defaulted because Saylor never raised it in the Michigan Supreme Court. And even putting aside the two defaults, no *ex post facto* violation occurred here because the provision at issue was applied prospectively, not

retroactively—Saylor admitted on the record that he committed the offense repeatedly, including on dates after the provision went into effect. Because the state court's decision denying this claim was not contrary to or an unreasonable application of clearly established federal law, habeas relief should be denied.

Third, Saylor argues that his appellate counsel was ineffective for failing to raise the *ex post facto* claim on direct appeal. But Saylor did not raise this claim in the Michigan Supreme Court during his collateral attack, rendering it procedurally defaulted. In any event, counsel was not required to raise every non-frivolous issue; effectively winnowing out weaker arguments—as appellate counsel did here—is a strong litigation tactic. And considering that the underlying claim is meritless, appellate counsel was not ineffective. At the very least, it was not contrary to, or an unreasonable application of, clearly established federal law for the state court to deny the claim.

Fourth and finally, Saylor asserts that a state court judge was unconstitutionally biased and that appellate counsel should have raised a judicial-bias claim on direct appeal. But neither the district court nor this Court granted a COA on those issues, so they cannot be considered.

In the end, this Court should affirm the district court's decision denying habeas relief.

ARGUMENT

I. The Michigan Court of Appeals reasonably denied Saylor's claim that counsel was ineffective during plea bargaining.

In his first claim on appeal, Saylor argues that counsel was ineffective when advising him to plead guilty. He claims that counsel never told him that he would be required to register as a sex offender or be subject to lifetime electronic monitoring as a result of his conviction. He also suggests that counsel improperly coerced him by telling him that he would get a life sentence if he went to trial. Neither allegation amounts to constitutionally ineffective assistance such that Saylor's plea was unknowing. And, in any event, the Michigan Court of Appeals' decision denying this claim was not contrary to, or an unreasonable application of, clearly established federal law. Therefore, the district court correctly denied habeas relief.

A. Review of ineffective-assistance claims is highly deferential.

A claim of ineffective assistance of counsel is governed by the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one." *Richter*, 562 U.S. at 105.

To succeed on an ineffective-assistance-of-counsel claim, a petitioner must show, first, that counsel's performance was deficient and, second, that prejudiced resulted from counsel's action or inaction. *Wilson v. Parker*, 515 F.3d 682, 698 (6th Cir. 2008) (citing *Strickland,* 466 U.S. at 687–88).

Regarding the first *Strickland* prong, deficient performance, review of counsel's performance is "highly deferential." *Strickland*, 46 U.S. at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* "*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state

of mind." *Richter*, 562 U.S. at 110. And a reviewing court is "required not simply to give the attorney the benefit of the doubt, but to affirmatively entertain the range of possible reasons [petitioner's] counsel may have had for proceeding as they did." *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (quotation marks and citations omitted).

The second *Strickland* prong, prejudice, requires a petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The defendant must "affirmatively prove," not just allege, prejudice. *Strickland*, 466 U.S. at 693. "*Strickland's* test for prejudice is a demanding one. 'The likelihood of a different result must be substantial, not just conceivable.' " *Storey v. Vasbinder*, 657 F.3d 372, 379 (6th Cir. 2011) (quoting *Richter*, 562 U.S. at 112). *See further United States v. Boone*, 62 F.3d 323, 327 (10th Cir. 1995) ("[A]ll that the Defendant urges is speculation, not a reasonable probability that the outcome would have been different. Accordingly, he cannot establish prejudice.").

Moreover, criminal defendants are entitled to the effective assistance of counsel during the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). "[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*." *Missouri v. Frye*, 566 U.S. 134, 140 (2012). For prejudice, the petitioner must show that "the outcome of the plea process would have been different with competent advice." *Lafler*, 566 U.S. at 163. If the plea offer is accepted, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

But once a defendant enters a guilty plea, review of any claims arising before the plea is foreclosed. "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). "Thus, after the entry of an unconditional guilty plea, the defendant may challenge only the court's jurisdiction and the voluntary

and intelligent character of the plea itself." *Werth v. Bell*, 692 F.3d 486, 495 (6th Cir. 2012).

B. On habeas review, Saylor's ineffective-assistance claim is doubly deferential.

Not only must Saylor meet the high burden of demonstrating that counsel performed deficiently and that he was prejudiced as a result, but he also must overcome AEDPA's deferential limitations. This is because the Michigan Court of Appeals declined to grant him leave to challenge his plea, finding "lack of merit in the grounds presented." (3/30/11 Mich. Ct. App. Order, R. 9-13, Page ID #259.) Such an order is a merits adjudication that is entitled to AEDPA deference. *See Richter*, 562 U.S. at 99 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."); *see also Werth v. Bell*, 692 F.3d 486, 491, 492–93 (2012) (holding that AEDPA deference applies to a Michigan Court of Appeals order that denied leave "for lack of merit in the grounds presented").

Because AEDPA deference applies, review of Saylor's ineffective-assistance claim is even further limited because this Court must give deference to both counsel and the state appellate court reviewing counsel's performance. The Supreme Court has stressed that the "standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (citations omitted). Thus, a habeas petitioner claiming ineffective assistance of counsel "must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance." *Bell v. Cone*, 535 U.S. 685, 698–99 (2002); *Durr v. Mitchell*, 487 F.3d 423, 435 (6th Cir. 2007). On habeas review, the 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 v. Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)) (internal quotation marks omitted). "And, 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." *Mirzayance*, 556 U.S. at 123.

C. Saylor has not proved that counsel's advice was deficient.

The chief problem with Saylor's arguments that counsel's advice during the plea-bargaining process was deficient is that they rest on unsupported assumptions. Saylor has never offered any proof that counsel only spoke with him for five minutes and told him to "take the deal or he would surely get life in [p]rison." (6/3/08 Pet. to Set Plea Aside, R. 9-13, Page ID #293.) Indeed, he has never even attested to that fact *himself*—the fact is merely a hearsay allegation contained in a pleading signed by Saylor's original appellate counsel. (*Id.*) Without any proof—other than one attorney's own say-so—that counsel gave the advice he now complains of, Saylor has failed to demonstrate the factual predicate of his claim.

And even if he had, he has failed to meet his burden of demonstrating that the advice was deficient. Saylor *was* subject to life in prison (or any term of years) if he was convicted following a trial. *See* Mich. Comp. Laws § 750.520b(2)(a). Given his confession to the crimes

(*see* 12/18/07 Plea Tr., R. 9-2, Page ID #79), a conviction was likely. And given the trial court judge's views on the case—"in my 37 years as an attorney and 11 years on the bench, this is one of the most disgusting cases I've had" (7/9/08 Sentence Tr., R. 9-6, Page ID #178)—a life sentence following a trial was probable. Put differently, counsel's advice—that Saylor would be convicted at trial and subject to life imprisonment—was accurate. Counsel did not perform deficiently by giving accurate advice. Nor did counsel's accurate advice render Saylor's decision to plead guilty based on that advice involuntary. *See United States v. Juncal*, 245 F.3d 166, 172 (2d Cir. 2001) ("[D]efense counsel's blunt rendering of an honest but negative assessment of appellant's chances at trial, combined with advice to enter the plea," does not "constitute improper behavior or coercion that would suffice to invalidate a plea."); *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976) ("Advice even strong urging by those who have an accused's welfare at heart, based on the strength of the State's case and the weakness of the defense, does not constitute undue coercion."); *Robertson v. State*, 502 S.W.3d 32, 36 (Mo. Ct. App. 2016) ("Plea counsel has a duty to advise her client of the strength of the State's case.

Advice will not constitute coercion merely because it is unpleasant to hear.") (quotation marks, citation, and brackets omitted).

Saylor also argues that counsel did not inform him that he would be required to register as a sex offender and be subject to lifetime electronic monitoring as a result of his plea. But, again, he offers no proof that counsel's advice was lacking in this manner, save for his bare-boned assertions within his pleadings. While it is true that his plea colloquy *with the court* made no mention of those consequences, it does not necessarily follow that *counsel* made no mention of them when advising Saylor. Thus, he has failed to prove the factual predicate to his claim.

Was it the state trial court, then, that erred by failing to mention the statutory consequences of pleading guilty to Saylor's sex-based crime? Perhaps. But that is not the claim here. (*See* 4/19/21 Br. of Appellant, Doc. 20, Page 36 ("Here, the state court's application of federal law was objectively unreasonable because Saylor's *attorney* failed to advise him of the consequences of his plea, rendering the plea unknowing and the representation deficient.") (emphasis added); *see also* 1/20/21 Order (granting COA as to whether, "*due to the ineffective*

assistance of plea counsel, [Saylor] did not understand the consequences of his plea") (emphasis added).).

Even if this claim did involve the trial court's actions, he would not be entitled to relief. After Saylor's direct review concluded, the Michigan Supreme Court held in a separate case that a trial court must inform a defendant pleading guilty that mandatory lifetime electronic monitoring will apply and that failing to do so violates due process. *People v. Cole*, 817 N.W.2d 497, 503 (Mich. 2012). But the Michigan high court's view on the subject is irrelevant for purposes of this case. Only the "clearly established Federal law *as determined by the Supreme Court of the United States*" matters when determining whether habeas relief is available. 28 U.S.C. § 2254(d)(1) (emphasis added).

And not just any Supreme Court decision will do under § 2254(d)(1). "[C]learly 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*, 572 U.S. 415, 419 (2014) (internal quotation marks and citations omitted). Where no Supreme Court case has confronted "the specific question presented" by the habeas petitioner, "the state court's decision [cannot] be contrary to any

holding from this Court." *Woods v. Donald*, 575 U.S. 312, 317 (2015) (internal quotation marks and citation omitted). And "[i]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Richter*, 562 U.S. at 101 (internal quotation marks and citation omitted).

Saylor does not cite any Supreme Court holding or specific legal rule requiring a court (or counsel) to inform a defendant that lifetime electronic monitoring will result from a guilty plea. The only case he points to is *Mabry v. Johnson*, which highlighted the requirement that a defendant must be " 'fully aware of the direct consequences' " of a guilty plea to meet due process requirements. 467 U.S. 504, 509 (1984), quoting *Brady v. United States*, 397 U.S. 742, 755 (1970). But *Johnson* had nothing to do with lifetime electronic monitoring, and it did not purport to explain what amounts to a "direct consequence[ ]." And, again, Saylor here takes issue with his *counsel's* performance, not the trial court's—*Johnson* simply does not apply. Thus, the Michigan Court of Appeals' decision could not have been contrary to, or an unreasonable application of, that decision.

Although Saylor is correct that "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied," *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (internal quotation marks and citation omitted), a general principle provides a state court with more leeway in reaching a certain outcome. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). "The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *White v. Woodall*, 572 U.S. 415, 427 (2014) (quoting *Richter*, 562 U.S. at 103). In this case, it was not "so obvious" that the general principle at hand—that a defendant must be apprised of the direct consequences of a plea—must extend to informing a defendant of a post-incarceration regulatory-tracking scheme. In fact, this Court has held as much. *See Vaughn v. Holloway*, No. 16-5225, 2017 WL 7806615, at *3 (6th Cir. 2017) ("[T]here is no clearly established federal law holding that the Sixth Amendment right to effective counsel requires a defense attorney to

give [the] advice" that "pleading guilty would require [the petitioner] to register for life as a sex offender.").

Accordingly, Saylor has not overcome AEDPA's limitations with respect to the first *Strickland* prong.

D. Saylor has not demonstrated prejudice in any event.

Even if Saylor could overcome AEDPA's limitations and *Strickland*'s deferential standard regarding the deficient-performance prong, he cannot do so as to the prejudice prong. Specifically, he cannot "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

Quite simply, nothing in the record indicates that Saylor's decision to plead would have been affected in any way by the sex-offender regulatory requirements. When he decided to plead, Saylor's counsel noted that "a big portion" underlying his decision was that he did not want "to put his daughters through any . . . in court testimony." (12/18/07 Plea Tr., R. 9-2, Page ID #79.) And as the prosecutor then noted, his "full confession" probably also played a role. (*Id.*) Moreover, as already discussed, Saylor faced a potential life sentence for his crime,

see Mich. Comp. Laws § 750.520b(2)(a); securing a recommendation from the prosecutor for a term far less than life (Saylor was only 29 at the time) likely played a role in his decision. Also likely playing a role was the prosecution's agreement to dismiss four other life offenses, which, depending on how the facts came out at trial, could have subjected him to consecutive sentences. *See* Mich. Comp. Laws § 750.520b(3). These are the relevant factors underlying Saylor's decision. There is no evidence that being subjected to a registry and monitoring would have outweighed his desire to avoid a lifetime of incarceration.

Saylor suggests that the lack of evidence in his favor is the crux of his argument: the state court never allowed him to develop his claim and show that he would have rejected the plea had he known of the registry and monitoring requirements.[1] But to receive AEDPA

[1] Saylor points to the trial court's decision denying his motion for relief from judgment as the last reasoned state court decision to rule on the claim. Technically, that is true. But only because Saylor raised this claim twice, once on direct appeal and once on collateral review. On direct appeal, the Michigan Court of Appeals was the last state court to issue a reasoned opinion addressing the claim. Re-raising the claim on collateral review—where different rules and principles apply—does not somehow negate the AEDPA deference due the decision on direct appeal. Moreover, on collateral review the trial court alternatively

deference, a state court need not conduct an evidentiary hearing on a factual dispute. *See Ballinger v. Prelesnik*, 709 F.3d 558, 562 (6th Cir. 2013) (noting that a state court decision on the merits is still entitled to AEDPA deference even if an evidentiary hearing was not held); *Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012) ("[W]e have never held that a state court must conduct an evidentiary hearing to resolve every disputed factual question; such a per se rule would be counter not only to the deference owed to state courts under AEDPA, but to Supreme Court precedent."); *Valdez v. Cockrell*, 274 F.3d 941, 942 (5th Cir. 2001) ("We hold that a full and fair hearing is not a prerequisite to the application of 28 U.S.C. § 2254's deferential scheme."). "A state court's decision not to hold an evidentiary hearing does not render its fact-finding process unreasonable so long as the state court could have

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ruled that Saylor was precluded from relief under Michigan Court Rule 6.508(D)(2) because he had already raised the claim on direct appeal. (10/22/13 Order, R. 9-11, Page ID #240.) So if that is the last reasoned decision under review, the claim is procedurally defaulted. *See Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977) (holding that, if a state court relies on an "adequate and independent state law ground," habeas relief is barred absent a showing of cause and prejudice).

reasonably concluded that the evidence already adduced was sufficient to resolve the factual question." *Hibbler*, 693 F.3d at 1147.[2]

Here, the state court reasonably determined that an evidentiary hearing was unnecessary. As discussed above, Saylor faced significant prison time; indeed, he could have been incarcerated—at 29 years old—for the rest of his life. He chose to avoid that possibility. Even if Saylor considered registering as a sex offender and lifetime electronic monitoring as significant factors in the plea agreement, it was reasonable to conclude that those regulatory features did not outweigh the significant benefit that he received. Nothing procured at an evidentiary hearing would have inherently undermined the state court's reasonable conclusion.

In sum, the Michigan Court of Appeals' decision to deny relief on Saylor's ineffective-assistance-of-counsel claim was not contrary to, or

[2] Even if this Court were to find that the state court unreasonably denied Saylor an evidentiary hearing on this claim, a point the state does not concede, the remedy would not be to grant him a new trial, but rather to grant habeas relief conditioned on the Michigan Court of Appeals reconsidering its decision after remanding to the state trial court to conduct an evidentiary hearing on the ineffective-assistance-of-counsel claim. *See Ewing v. Horton*, 914 F.3d 1027 (6th Cir. 2019).

an unreasonable application of, clearly established federal law. The district court therefore correctly denied habeas relief.

II. The district court correctly denied habeas relief on Saylor's *ex post facto* claim because it is waived, twice procedurally defaulted, and meritless.

In his next argument on appeal, Saylor asserts that the 25-year mandatory-minimum provision of the first-degree criminal-sexual-conduct statute was unconstitutionally retroactively applied to him. But Saylor *agreed* to a 25-year minimum sentence; thus, the claim is waived (and procedurally defaulted). And he never raised this claim in the Michigan Supreme Court; thus, the claim is procedurally defaulted (again). And he committed his offense *after* the provision was enacted; thus, the claim is meritless. For all these reasons, habeas relief is not available.

A. Saylor waived his *Ex Post Facto* Clause claim.

Saylor first raised his *ex post facto* challenge in the state trial court on collateral review. In one of its alternative analyses, that court found the claim waived because Saylor knowingly and voluntarily agreed to plead guilty. (10/22/13 Order, R. 9-11, Page ID #239.)

Waiver is an "'intentional relinquishment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "One who waives his rights under a rule may not then seek appellate review of claimed deprivation of those rights, for his waiver has extinguished any error." *United States v. Griffin*, 84 F.3d 912, 924 (7th Cir. 1996) (citing *Olano*, 507 U.S. at 733–34), *see also Shahideh v. McKee*, 488 F. App'x 963, 965 (6th Cir. 2012) ("waiver is a recognized, independent and adequate state law ground for refusing to review alleged trial errors").

Saylor argues that the plea was not waived, but his arguments are unpersuasive. Notably, his plea *was* knowing and voluntary, despite his continued protestations to the contrary (as discussed above in section I). And in his other attempts to avoid the waiver, Saylor tries to add meaning to the state trial court's reasoning by claiming that the court ruled that any challenge to the sentence was waived simply by pleading guilty. But that is not what the court said. Rather, the court reasoned that, because Saylor agreed to plead guilty *in exchange for a recommended sentence with a 25-year mandatory minimum*, he waived any claim that the 25-year mandatory minimum did not apply. (*See*

10/22/13 Order, R. 9-11, Page ID #239.) In other words, it was not his agreement to plead guilty in a general sense that waived his claim, it was his underlying agreement that he was subject to a 25-year mandatory minimum sentence that waived his claim. The trial court's reasoning was sound.

Because Saylor waived this claim, he cannot seek review of the claim. This is because error—if it occurred—was extinguished.

B. This claim is procedurally defaulted—twice.

For *two* reasons, this Court cannot review the merits of Saylor's *ex post facto* claim.

To the extent a petitioner deprives the state court of the opportunity to review his claims by failing to follow reasonable state-court procedures, review of the claims is barred. Procedural default results where three elements are satisfied: (1) the petitioner failed to comply with a state procedural rule that is applicable to the petitioner's claim; (2) the state courts actually enforced the procedural rule in the petitioner's case; and (3) the procedural forfeiture is an 'adequate and independent' state ground foreclosing review of a federal constitutional claim." *White v. Mitchell*, 431 F.3d 517, 524 (6th Cir. 2006). In this

case, Saylor's *Miranda* claim is procedurally defaulted because he waived any claim of error.

Although waiver of an issue goes beyond a procedural default by actually extinguishing error, it also is a procedural default. *See McKissic v. Birkett*, 200 F. App'x 463, 471 (6th Cir. 2006)). Saylor failed to comply with a state procedural rule that requires defendants to forego appellate review of an issue after consenting to the alleged error in the trial court. *See People v. Carter*, 612 N.W.2d 144, 149–50 (Mich. 2000). This determination is made by looking at the last state court to issue a reasoned decision on the claim. *Amos v. Renico*, 683 F.3d 720, 726 (6th Cir. 2012). Here, that was the Saginaw County Circuit Court, which denied relief because Saylor waived review of any error resulting from a 25-year mandatory minimum sentence. This reason for denying relief constitutes a procedural default.

Saylor's *ex post facto* claim is also procedurally defaulted because he never raised the claim in the Michigan Supreme Court. (*See* 4/1/15 Aff. of Larry Royster, R. 9-16, Page ID #436.) Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust remedies available in the state courts. 28 U.S.C. § 2254(b)(1);

O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). To fulfill the exhaustion requirement, the prisoner must have fairly presented the federal claims to all levels of the state appellate system. *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995). Because Saylor did not raise his *ex post facto* claim in the Michigan Supreme Court, he did not fulfill the exhaustion requirement. And because he has already filed a motion for relief from judgment and has no remaining state-court remedy, the claim is considered exhausted, but procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161–62 (1996); *Landrum v. Mitchell*, 625 F.3d 905, 918 (6th Cir. 2010); *see also see* Mich. Ct. R. 6.501, Mich. Ct. R. 6.508(G)(1).[3]

A State prisoner who fails to comply with a state procedural rule waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged

[3] In the district court, the State did not assert that Saylor's failure to raise the claim in the Michigan Supreme Court constituted a procedural default. But this Court still retains discretion to consider the argument. *See White v. Mitchell*, 431 F.3d 517, 524 (6th Cir. 2005) ("We are nonetheless permitted to consider the procedural default issue even when raised for the first time on appeal if we so choose."); *Arias v. Lafler*, 511 F. App'x 440, 444 (6th Cir. 2013) ("We may choose to consider procedural default arguments even when they are raised for the first time on appeal.").

constitutional violation, or a showing of a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 748–50 (1991); *Sutton v. Carpenter*, 745 F.3d 787, 789–90 (6th Cir. 2014).

To establish cause, a petitioner must establish that some external impediment frustrated his ability to comply with the state's procedural rule. *See, e.g.*, *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Haliym v. Mitchell*, 492 F.3d 680, 690–91 (6th Cir. 2007). A petitioner must present a substantial reason to excuse the default. *Hall v. Vasbinder*, 563 F.3d 222, 236 (6th Cir. 2009); *see also Amadeo v. Zant*, 486 U.S. 214, 222–23 (1988) (reviewing a claim that a document was concealed by officials).

Saylor argues that his first claim—that counsel did not advise him of the full consequences of his plea—serves as cause. But again, as discussed above in section I, counsel's advice was not deficient. And even if it was, Saylor does not explain how counsel's failure to advise him about the sex offender registry and lifetime electronic monitoring means that he was not fully aware of the consequences of entering into the 25 to 40-year sentencing agreement. In other words, there is no correlation between counsel's alleged error and Saylor's decision to

agree that he was subject to a 25-year mandatory-minimum sentence. Moreover, Saylor has not demonstrated cause for his failure to raise the claim in the Michigan Supreme Court.[4] All told, Saylor has not shown cause to excuse the default.

And as for fundamental miscarriages of justice, that narrow exception is reserved for the extraordinary case in which the alleged constitutional error probably resulted in the conviction of one who is actually innocent of the underlying offense. *Dretke v. Haley*, 541 U.S. 386, 388 (2004); *Carrier*, 477 U.S. at 496. A claim of actual innocence "requires [the] petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Saylor is not innocent—he admitted to his appalling

[4] Saylor did argue in the district court that he misunderstood a letter from an attorney who represented him during his state-court collateral attack. (*See* App'x A, attached to 12/2/14 Pet., R. 1, Page ID #16.) But Saylor acknowledges that he was not represented at the time, and he does not explain why he was waiting for advice from an attorney who no longer represented him before filing his application for leave to appeal in the Michigan Supreme Court.

crimes against his daughter. Therefore, a miscarriage of justice will not occur if the Court does not reach the merits of this claim.

Unexcused procedural defaults can—and should—be the reason a habeas court declines to grant a prisoner relief. "Comity and federalism demand nothing less." *Benton v. Brewer*, 942 F.3d 305, 307 (6th Cir. 2019). And this Court has stressed the importance of considering a state's assertion of a procedural default defense. *Sheffield v. Burt*, 731 F. App'x 438, 441 (6th Cir. 2018) ("[W]here a straightforward analysis of settled state procedural default law is possible, federal courts cannot justify bypassing the procedural default issue."). Indeed, this Court has regularly enforced procedural defaults, including when the district court skips over the default entirely. *See Theriot v. Vashaw*, 982 F.3d 999, 1002 (6th Cir. 2020); *McKinney v. Horton*, 826 F. App'x 468, 478 (6th Cir. 2020); *Strong v. Nagy*, 825 F. App'x 239, 241 (6th Cir. 2020); *Williams v. Burt*, 949 F.3d 966, 970–71 (6th Cir. 2020); and *Stalling v. Burt*, 772 F. App'x 296, 297 (6th Cir. 2019).

Saylor's *ex post facto* claim is twice procedurally defaulted; therefore, habeas relief is barred. *See Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017).

C. The state court's decision denying Saylor's *ex post facto* claim was not contrary to, or an unreasonable application of, clearly established federal law.

Even if this Court bypasses the defaults, Saylor is not entitled to habeas relief.

Ex post facto laws are prohibited by the Constitution. U.S. Const. art. I, § 10, cl. 1. The Supreme Court has held that any law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed" is an unconstitutional *ex post facto* law. *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001) (quoting *Calder v. Bull*, 3 U.S. 386, 390 (1798)). "To fall within the *ex post facto* prohibition, a law must be retrospective—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (quotations and citations omitted).

Saylor was convicted of engaging in sexual penetration with a child under 13 years old. That crime is part of Michigan's first-degree criminal-sexual-conduct statute, which provides for a punishment "by imprisonment for life or any term of years." Mich. Comp. Laws §

750.520b(2)(a). The statute provides additional terms if certain conditions are met. If the offender is 17 or older and the victim is less than 13—which occurred here—then the statute adds that the prison term must be "not less than 25 years." § 750.520b(2)(b). This additional proscription of imprisonment was not added to the statute until August 28, 2006. *See* Mich. Comp. Laws § 750.520b(2) (2002) (providing that violation of the statute is "punishable by imprisonment in the state prison for life or for any term of years"); 2006 Mich. Pub. Acts No. 169 (codified as amended at Mich. Comp. Laws § 750.520b(2)(b)) (adding the 25-year mandatory minimum provision).

This history lesson matters because Saylor argues that the 25-year mandatory-minimum provision was enacted after the offense date, making the provision an unconstitutional *ex post facto* law as applied to this offense. But even he acknowledges that he admitted during his plea proceeding that the crime occurred between June 1, 2006, and April 26, 2008. (12/18/07 Plea Tr., R. 9-2, Page ID #86–87.) Most of that admitted time period was undisputedly after the August 28, 2006, amendment. Thus, the provision was not retroactively applied, and no *ex post facto* violation occurred.

Saylor tries to circumvent this straightforward analysis by claiming that "[t]he record is ambiguous" and that "ex post facto principles demanded an offense date to unambiguously guide the court in applying the proper version of the statute." (4/19/21 Br. of Appellant, Doc. 20, Page 40.) But he does not cite a single case—from the Supreme Court or any other court—that supports that proposition. Instead, he says that the exact date of the offense was an essential term of the plea agreement. Whether an essential term is missing may matter for determining whether an agreement has been reached, but Saylor does not explain why it is relevant within an *ex post facto* analysis. And, regardless, an exact date was *not* an essential term here; Michigan courts have held that time is not a material element in criminal-sexual-conduct cases involving a child victim, *People v. Dobek*, 732 N.W.2d 546, 564 (Mich. Ct. App. 2007), and "an imprecise time allegation would be acceptable" in such cases, "given their difficulty in recalling precise dates," *People v. Bailey*, 873 N.W.2d 855, 862 (Mich. Ct. App. 2015) (internal quotation marks and citations omitted).

Although Saylor pleaded guilty to only a single offense, he admitted that he repeated that offense for nearly two years—including

after the mandatory-minimum provision was enacted. (12/18/07 Plea Tr., R. 9-2, Page ID #86–87.) Because he admitted to committing the offense after the provision was enacted, and because no clearly established federal law requires a specific date be pinpointed, Saylor is not entitled to habeas relief on his *ex post facto* claim.

D. Remand to the district court is not warranted and would be a waste of judicial resources.

Saylor also says that it was improper for the district court to make its decision given that no charging documents were filed as part of the record in that court. But the date on the charging documents is irrelevant; what matters is the date that Saylor admitted on the record that he committed the assaults. The facts listed on the charging documents mean nothing for sentencing purposes until the accused acknowledges those facts (or until the prosecution proves them at trial). Here, Saylor admitted that he sexually assaulted his daughter repeatedly between June 1, 2006, and April 26, 2008. (12/18/07 Plea Tr., R. 9-2, Page ID #86–87.) Those are the relevant dates for the *ex post facto* analysis.

And, regardless, the dates listed on the charging documents *were* part of the district court record. The prosecution quoted them in his response to Saylor's motion for relief from judgment: "The offense date listed in the [sic] both the felony complaint and information in this case is '6/1/06 *thru* 4/26/08.' " (9/5/13 Answer to Mot., R. 9-9, Page ID #210.) The district court was not obligated to ignore the statement in that pleading simply because the actual document was not part of the record.

Moreover, this dispute over the record in the district court is nothing but academic. Even Saylor agrees that it would not have mattered had the charging documents been filed. (*See* 4/19/21 Br. of Appellant, Doc. 20, Page 43 ("And, in any event, including a range of dates in the complaint is no more responsive to the ex post facto problem than including it in a plea colloquy."). So despite his repeated complaints about a missing document in the record, the issue on appeal is clear: Is the *Ex Post Facto* Clause violated when a defendant pleads guilty to a single charge whereby he admits to conduct occurring both before and after the challenged law went into effect?

The answer (as discussed above) is no—or, at least, no Supreme Court precedent has held as much. Therefore, the district court correctly denied habeas relief.

III. The district court correctly denied Saylor's ineffective-assistance-of-appellate-counsel claim because it is procedurally defaulted and meritless.

In his final claim, Saylor argues that his appellate counsel was ineffective for failing to raise the *ex post facto* claim on direct appeal. But he never raised his ineffective-assistance-of-appellate-counsel claim in the Michigan Supreme Court, so it is procedurally defaulted. It is also meritless—counsel was not ineffective for winnowing out a weaker claim on direct appeal in favor of stronger claims. At the very least, the state court's decision denying relief on Saylor's ineffective-assistance-of-appellate-counsel claim was not contrary to or an unreasonable application of clearly established federal law. Habeas relief, therefore, should be denied.

A. This claim is procedurally defaulted.

Just like his *ex post facto* claim, Saylor never raised his ineffective-assistance-of-appellate-counsel claim in the Michigan

Supreme Court. (*See* 4/1/15 Aff. of Larry Royster, R. 9-16, Page ID #436.) Because he has already filed a motion for relief from judgment and has no remaining state-court remedy, the claim is considered exhausted, but procedurally defaulted. *See Gray*, 518 U.S. at 161–62.

And just like his *ex post facto* claim, he cannot excuse the default. His ineffective-assistance-of-appellate-counsel claim is therefore barred. *See Davila*, 137 S. Ct. at 2064. But even if this Court bypasses the default, the district court correctly denied habeas relief on this claim for the reasons discussed below.[5]

B. Saylor must meet a heavy burden to succeed on his ineffective-assistance-of-appellate-counsel claim.

"[T]he Constitution does not require States to grant appeals as of right to criminal defendants." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). But, "each State has created mechanisms for both direct appeal and state postconviction review, even though there is no constitutional mandate that they do so." *Lackawanna Cnty. Dist. Attorney v. Coss*,

[5] Again, the State did not assert below that Saylor's failure to raise the claim in the Michigan Supreme Court constituted a procedural default. But this Court still retains discretion to consider the argument. *See White*, 431 F.3d at 524; *Arias*, 511 F. App'x at 444.

532 U.S. 394, 402 (2001) (citation omitted). Under the Sixth and Fourteenth Amendments, a state criminal defendant has a right to the effective assistance of appellate counsel on his first appeal as of right. *Evitts,* 469 U.S. at 393–94.

As with an ineffective-assistance-of-trial-counsel claim, an ineffective-assistance-of-appellate-counsel claim requires a petitioner to show deficient performance and resulting prejudice. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000), (applying *Strickland* framework to an ineffective-assistance-of-appellate-counsel claim). *See also Smith v. Robbins*, 528 U.S. 259, 285 (2000) (holding that a petitioner who argued his appellate counsel rendered ineffective assistance by failing to file a merits brief must satisfy both prongs of *Strickland*).

The "deficient performance" prong of the two-part *Strickland* test requires showing that appellate counsel made an objectively unreasonable decision to raise other issues in place of the petitioner's claims. *Thompson v. Warden, Belmont Corr. Inst.*, 598 F.3d 281, 285 (6th Cir. 2010). Strategic and tactical choices regarding which issues to pursue on appeal are "properly left to the sound professional judgment of counsel." *United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990).

A petitioner also must establish that he suffered prejudice as a result of his attorney's allegedly deficient performance. *Mahdi v. Bagley*, 522 F.3d 631, 636 (6th Cir. 2008). To prevail on a claim that appellate counsel was ineffective, two elements must be established: (1) "counsel unreasonably failed to discover nonfrivolous issues," and (2) there is "a reasonable probability that, but for his counsel's unreasonable failure . . . he would have prevailed on his appeal." *Robbins*, 528 U.S. at 285. Appellate counsel can only be found to have provided ineffective assistance "if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal." *Howard v. Bouchard*, 405 F.3d 459, 485 (6th Cir. 2005) (citing *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001)). The question "is whether there was a reasonable probability that the appellate court . . . would have granted [the petitioner] a new trial" had the issue been raised. *Clark v. Crosby*, 335 F.3d 1303, 1312 n.9 (11th Cir. 2003).

Appellate counsel, however, "could be constitutionally deficient in omitting a dead-bang winner even while zealously pressing other strong (but unsuccessful) claims." *Page v. United States*, 884 F.2d 300, 302 (7th Cir. 1989). This is a heavy burden for a petitioner to meet, because

he must establish that his counsel's performance was "so manifestly ineffective that defeat was snatched from the hands of probable victory." *Jacobs v. Mohr*, 265 F.3d 407, 418 (6th Cir. 2001) (citing *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) (en banc)). The Supreme Court has rejected a claim that counsel is ineffective simply for not taking action when "there was nothing to lose by pursuing it." *Knowles v. Mirzayance*, 556 U.S. 111, 121–22 (2009).

Finally, even if a habeas petitioner prevails on a claim that appellate counsel was ineffective, the petitioner is entitled to a new direct appeal rather than a new trial. The appropriate remedy is to grant such a petitioner "an opportunity to pursue his direct appeal with effective assistance of counsel." *Mapes v. Tate*, 388 F.3d 187, 195 (6th Cir. 2004); *Hardaway v. Robinson*, 655 F.3d 445, 451 (6th Cir. 2011) (remanding the case "to the district court with instructions to issue a conditional writ directing the state to afford [the petitioner] a direct appeal"). "Such a narrow remedy neutralizes the constitutional violation." *Mapes*, 388 F.3d at 195.

C. Saylor has not met his heavy burden.

Saylor argues that his appellate counsel was ineffective because he did not raise the *ex post facto* claim on direct review. He is wrong for two reasons.

First, appellate counsel's decision not to include this claim was objectively reasonable. Even if the underlying *ex post facto* claim had arguable merit, that does not mean that appellate counsel was ineffective for not raising it. Strategic and tactical choices regarding which issues to pursue on appeal are "properly left to the sound professional judgment of counsel." *United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990). "Strategic decisions of counsel, including whether to raise some non-frivolous claims over others, fall well within the range of professional competence." *Hand v. Houk*, 871 F.3d 390, 411 (6th Cir. 2017). Indeed, the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983)). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption

of effective assistance of counsel be overcome." *Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

In deciding to raise claims that counsel's ineffectiveness rendered his plea unknowing instead of an *ex post facto* claim, counsel exercised discretion in choosing between multiple constitutional issues and winnowing out the one that he perceived to be the weakest. Indeed, given that Saylor continues to raise ineffective-assistance claims along with his *ex post facto* claim in this appeal, it is unclear whether he even believes that the *ex post facto* claim was "clearly stronger."

And, although Saylor's appellate counsel could have raised a third claim on direct appeal, he was not constitutionally required to do so. In addressing a claim in a habeas petition that appellate counsel was ineffective for failing to raise every nonfrivolous issue requested by the defendant, the Supreme Court quoted Justice Jackson's observation from nearly 70 years ago:

> "One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned

> errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one."

Barnes, 463 U.S. at 752 (quoting Jackson, *Advocacy Before the Supreme Court*, 25 Temple L.Q. 115, 119 (1951)). Here, by raising an *ex post facto* claim—even though Saylor admitted to conduct occurring after the relevant provision was enacted—Saylor's appellate counsel risked diluting the stronger issues. Counsel did not perform deficiently by strategically narrowing the arguments on appeal.

Second, Saylor's underlying *ex post facto* claim is meritless. As discussed above in section II, there is no dispute that Saylor acknowledged that he committed his offense both before *and after* the relevant provision was enacted. Saylor's argument that this claim would have been successful rests on unsupported suppositions and incorrect renditions of the law in Michigan. Not only does he not point to any Supreme Court precedent, but he also does not cite a single case from Michigan (or any other court) that would logically apply to the facts at issue here and afford him relief. Therefore, it was reasonable for the Saginaw County Circuit Court to conclude that the claim would

have failed on direct appeal and that appellate counsel was not ineffective for deciding not to raise a futile claim.[6]

Counsel's decision not to raise the claim was not "so manifestly ineffective that defeat was snatched from the hands of probable victory." *See Jacobs*, 265 F.3d at 418 (citing *Morrow*, 977 F.2d at 229.) The claim simply was not a "dead-bang winner." *See Page*, 884 F.2d at 302. Consequently, Saylor's ineffective-assistance-of-appellate-counsel claim fails, and this Court should affirm the district court's decision denying habeas relief.

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[6] Saylor also faults the state court for failing to make factual findings and apply those findings to the prejudice prong of the *Strickland* test. (4/19/21 Br. of Appellant, Doc. 20, Page 58–60.) He cites *Sears v. Upton*, in which the Supreme Court stated that courts should conduct a "probing and fact-specific analysis" of the prejudice prong. 561 U.S. 945, 955 (2010) (per curiam). But *Sears* was not a federal habeas case; it was a direct petition for certiorari from a Georgia state postconviction court. *See id.* at 946 n.1 (noting its jurisdiction under 28 U.S.C. § 1257 to review federal claims that were resolved on exclusively federal-law grounds). Thus, AEDPA deference did not apply. Where, as here, AEDPA deference *does* apply, a habeas court is "precluded from employing such exacting scrutiny; rather, [it is] required to determine whether the state court's adjudication was objectively unreasonable." *Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1252–53 (11th Cir. 2017) (noting that *Sears* is taken "out of context" when used to support a claim that is entitled to AEDPA deference).

IV. This Court should not expand the COA.

In his brief, Saylor spends significant time discussing a claim that he was denied due process because a state-court judge was unconstitutionally biased. He also discusses it within the context of his ineffective-assistance-of-appellate-counsel claim. But the district court denied those claims and refused to certify them for appeal. (7/28/20 Op. and Order, R. 29, Page ID #643–46, 648–49, 650.) This Court, too, refused to certify those claims. (1/20/21 Order, Doc. 11-2, Page 4.) Because these issues have not been certified for appeal, this Court may not consider them. *See* 28 U.S.C. § 2253(c)(1)(A) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. . .."); *Van Tran v. Colson*, 764 F.3d 594, 623 (6th Cir. 2014) ("This court cannot consider claims not certified for appeal, so those claims will not be addressed."); *Abdur'Rahman v. Colson*, 649 F.3d 468, 473 (6th Cir. 2011) ("[W]e may not consider claims not certified for appeal.").

CONCLUSION AND RELIEF REQUESTED

This Court should affirm the district court's opinion and order denying Saylor's petition.

Respectfully submitted,

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Dated: July 1, 2021

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 12,507 words.

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CERTIFICATE OF SERVICE

I certify that on July 1, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Respondent-Appellee, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Petition for Writ of Habeas Corpus	12/02/2014	R. 1	4-14, 16
Motion for Summary Judgment	06/08/2015	R. 8	46
Transcript of Proceedings Held on 12/18/2007	06/08/2015	R. 9-2	79, 86-87
Transcript of Proceedings Held on 07/02/2008	06/08/2015	R. 9-4	106-07
Transcript of Proceedings Held on 06/04/2013	06/08/2015	R. 9-5	112-16
Transcript of Proceedings Held on 07/09/2008	06/08/2015	R. 9-6	178-80
06/20/2013 Supplement to Motion	06/08/2015	R. 9-7	182-85
06/27/2013 Amended Motion for Relief from Judgment	06/08/2015	R. 9-8	188-89
09/05/2013 Response in Opposition to Motion	06/08/2015	R. 9-9	210
10/22/2013 Order Denying Motion	06/08/2015	R. 9-11	237-40

Michigan Court of Appeals Case No. 302633	06/08/2015	R. 9-13	259, 269-76, 293
Michigan Supreme Court Affidavit	06/08/2015	R. 9-16	436
Opinion and Order	10/19/2015	R. 11	446, 454
05/22/2008 Preliminary Examination Waiver & Circuit Court Plea Transcript	06/23/2020	R. 28	613, 621-22
Opinion and Order Denying Petition for Writ of Habeas Corpus	07/28/2020	R. 29	634-50