

No. 11-7376

In the Supreme Court of the United States

TYRONE NOLING,

Petitioner,

v.

DAVID BOBBY, Warden,

Respondent.

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

**BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI**

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CAPITAL CASE—NO EXECUTION DATE SET

QUESTION PRESENTED

When a state court is presented with a federal constitutional claim, adjudicates the claim on the merits, and denies relief, should federal courts afford that decision AEDPA deference?

LIST OF PARTIES

The Petitioner is Tyrone Noling, an inmate at the Ohio State Penitentiary.

The Respondent is David Bobby, Warden of the Ohio State Penitentiary. Bobby is substituted for his predecessor, Margaret Bradshaw. *See* Fed. R. Civ. P. 25(d).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
INTRODUCTION.....	1
COUNTERSTATEMENT.....	2
A. A jury convicted Noling of aggravated murder and aggravated robbery, and the trial court sentenced him to death.	2
B. The Ohio Supreme Court affirmed Noling’s convictions and sentence, and this Court denied certiorari.....	4
C. The federal courts denied Noling’s habeas petition.	6
REASONS FOR DENYING THE WRIT.....	6
A. The Sixth Circuit properly invoked AEDPA because the Ohio Supreme Court adjudicated Noling’s claim “on the merits.”	7
B. The Ohio Supreme Court reasonably determined that Noling received a fair trial.....	10
CONCLUSION.....	14

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Cavazos v. Williams</i> , No. 11-465 (<i>petition for cert. granted</i> Jan. 13, 2012)	10
<i>Childers v. Floyd</i> , No. 11-42 (<i>petition for cert. filed</i> July 6, 2011).....	10
<i>Darden v. Wainwright</i> , 477 U.S. 168 (1986).....	2, 11
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637 (1974).....	9, 11
<i>Early v. Packer</i> , 537 U.S. 3 (2002) (<i>per curiam</i>)	8, 11
<i>Greer v. Miller</i> , 483 U.S. 756 (1987).....	2, 12
<i>Harrington v. Richter</i> , 131 S. Ct. 770 (2011).....	8, 11
<i>Noling v. Bradshaw (In re Noling)</i> , 651 F.3d 573 (6th Cir. 2011).....	6, 13
<i>Noling v. Bradshaw</i> , No. 5:04 CV 1232, 2008 U.S. Dist. LEXIS 7650 (N.D. Ohio Jan. 31, 2008).....	6
<i>Smith v. Phillips</i> , 455 U.S. 209 (1982).....	8
<i>Noling v. Ohio</i> , 539 U.S. 907 (2003).....	5
<i>State v. Noling</i> , 781 N.E.2d 220 (2003).....	5
<i>State v. Noling</i> , 781 N.E.2d 88 (Ohio 2002).....	<i>passim</i>
<i>State v. Noling</i> , No. 2007-P-0034, 2008 Ohio App. LEXIS 2044 (Ohio Ct. App. May 16, 2008), <i>discretionary review denied</i> , 898 N.E.2d 967 (Ohio 2008).....	5

State v. Noling,
No. 96-P-0126, 1999 Ohio App. LEXIS 3095 (Ohio Ct. App. June 30, 1999)4

State v. Noling,
No. 98-P-0049, 2003 Ohio App. LEXIS 4508 (Ohio Ct. App. Sept. 19, 2003),
discretionary review denied, 802 N.E.2d 154 (Ohio 2004).....5

United States ex rel. Shaw v. De Robertis,
755 F.2d 1279 (7th Cir. 1985).....9

United States v. Burden,
600 F.3d 204 (2d Cir. 2010)12

United States v. Mapp,
170 F.3d 328 (2d Cir. 1999)9

United States v. Sanchez,
659 F.3d 1252 (9th Cir. 2011).....12

United States v. Suarez,
601 F.3d 1202 (11th Cir. 2010).....12

United States v. Wilson,
135 F.3d 291 (4th Cir. 1998).....9

United States v. Wright,
625 F.3d 583 (9th Cir. 2010).....9

Weeks v. Angelone,
528 U.S. 225 (2000).....12

STATUTES

28 U.S.C. § 2254(d).....1, 2, 7, 11

INTRODUCTION

Petitioner Tyrone Noling seeks to vacate his conviction for the brutal murder and robbery of an elderly couple. He asserts that the Ohio Supreme Court failed to adjudicate his claim that “the prosecutor committed prejudicial misconduct during his improper impeachment” of Noling’s accomplice. Pet. at 18. Therefore, he says the Sixth Circuit should not have applied deference under the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2254(d).

But Noling’s characterization of the Ohio Supreme Court’s decision is baseless. The state court reviewed Noling’s complaints of prosecutorial misconduct and explicitly determined that they “lack[ed] merit.” *State v. Noling*, 781 N.E.2d 88, 108 (Ohio 2002). Finding no prejudicial misconduct, the Ohio Supreme Court concluded that “Noling received a fair trial, and prosecutorial misconduct did not permeate the trial.” *Id.* at 111. The court held specifically that “the prosecutor’s improper cross-examination . . . does not require reversal of the jury’s verdict of guilt” because Noling suffered no prejudice. *Id.* at 100.

Because that holding is plainly an “adjudicat[ion] on the merits,” AEDPA applies. 28 U.S.C. § 2254(d). Noling nonetheless urges this Court to address what level of deference should apply when a reasoned state-court opinion fails to adjudicate a federal constitutional claim. But whatever the significance of that question, it simply is not presented by this case. The Ohio Supreme Court squarely considered the merits of Noling’s prosecutorial misconduct claim. AEDPA therefore applies.

And applying AEDPA, Noling offers no reason for review. Noling has not shown—or even alleged in his petition for certiorari—that the Ohio Supreme Court’s rejection of his prosecutorial misconduct claim was “contrary to, or . . . an unreasonable application of,” this Court’s precedent. 28 U.S.C. § 2254(d)(1). Nor could he. Because the trial court issued curative instructions, and because other abundant evidence established Noling’s guilt, Noling has not shown that he received an unfair trial. *Noling*, 781 N.E.2d at 100-101; see *Greer v. Miller*, 483 U.S. 756, 765-767 (1987); *Darden v. Wainwright*, 477 U.S. 168, 180-83 (1986).

In short, the Sixth Circuit correctly applied AEDPA deference and denied habeas relief. As a result, Noling’s request for certiorari should be denied.

COUNTERSTATEMENT

A. A jury convicted Noling of aggravated murder and aggravated robbery, and the trial court sentenced him to death.

On April 5, 1990, Noling shot and killed Bearnhardt and Cora Hartig during an armed robbery in Portage County, Ohio. *Noling*, 781 N.E.2d at 95. Two accomplices, Butch Wolcott and Joseph Dalesandro, testified at trial that on the day of the Hartig murders, they drove Noling and Gary St. Clair to the Hartigs’ home. *Id.* at 96. Noling carried a .25 caliber semiautomatic and two ammunition clips, and St. Clair brought a shotgun. *Id.* Noling knocked on the Hartigs’ door, and forced his way inside. *Id.* After about twenty to thirty minutes, Wolcott heard gunshots, a woman’s scream, and more gunshots, after which Noling and St. Clair came running out of the house. *Id.* Soon afterward, Noling admitted to Wolcott and Dalesandro that he had personally shot and killed the Hartigs. *Id.*

Two days later, the police found the Hartigs' bodies. *Id.* at 96-97. Cora and Bearnhardt had each been shot by a .25 caliber semiautomatic pistol, the type of gun Noling carried into the home. *Id.* at 97. Cora was shot five times and Bearnhardt three times. *Id.* Both died from gunshot wounds to the chest and other injuries. *Id.*

A grand jury indicted Noling on two counts of aggravated felony murder (with capital specifications), two counts of aggravated robbery, and one count of aggravated burglary. *Id.* at 98. Testimony at trial revealed that Noling committed a spree of robberies near the Hartigs' home in the days before the Hartig murders. *Id.* at 96. Noling suggested "the idea that old people were getting their . . . Social Security checks early in the month and . . . would be the best target to rob." *Id.* Noling planned to knock at their homes, ask to use the phone because his car had broken down, and then hold them up. *Id.* Implementing this plan, Noling robbed two other families in the area on the day before and the day of the Hartig murders. *Id.*

Wolcott and Dalesandro testified against Noling at trial, as did others to whom he confessed. *Id.* at 95-98, 101. Before trial, St. Clair had also agreed to testify against Noling, but then changed his mind. *Id.* at 98, 100-101; Sixth Circuit Appellee Appendix at 508. When the prosecution called St. Clair to the stand, he admitted that he had pled guilty to aggravated robbery and aggravated murder in connection with the Hartig murders, and that he had received a sentence of twenty years to life. *Noling*, 781 N.E.2d at 98. But he then denied that he or Noling

participated in the Hartig murders. *Id.* The prosecutor impeached St. Clair with his prior statements accusing Noling of the Hartig murders. *Id.* at 100.

The jury convicted Noling on all counts, and following a penalty hearing, recommended that Noling be sentenced to death. *Id.* at 98. The trial court sentenced Noling to death on both aggravated murder counts, and imposed consecutive prison terms for the remaining counts. *Id.* The Ohio court of appeals affirmed the convictions and sentence. *See State v. Noling*, No. 96-P-0126, 1999 Ohio App. LEXIS 3095 (Ohio Ct. App. June 30, 1999).

B. The Ohio Supreme Court affirmed Noling's convictions and sentence, and this Court denied certiorari.

On direct appeal, the Ohio Supreme Court affirmed Noling's conviction and sentence. *Noling*, 781 N.E.2d at 95. Noling argued, among other things, that the state's cross-examination and impeachment of St. Clair violated Noling's due-process rights. District Court Appendix ("Apx.") Vol. 6 at 32, 35, 68, 77-78, 167-68 (Appellant Br., Direct Appeal, Ohio Supreme Court). In particular, Noling objected to the prosecutor's use of St. Clair's prior inconsistent statements implicating Noling in the murder. *Id.* at 68, 77-78, 167-68. Alleging trial error and prosecutorial misconduct, Noling asserted that St. Clair's impeachment resulted in an unfair trial. *Id.*

Performing a detailed independent review, the Ohio Supreme Court determined that Noling's claims had no merit. *Noling*, 781 N.E.2d at 100-101, 108, 111, 118. As to the claim that the trial court erred in allowing St. Clair's impeachment, the Ohio Supreme Court noted that the trial court issued a curative

jury instruction, and the court presumed that the jury considered the substance of the inconsistent statement “*only* as it reflected upon St. Clair’s credibility.” *Id.* at 101 (emphasis in original). Moreover, the court found that the prosecutor’s allegedly improper tactics did not “prejudice[] Noling in light of the other abundant evidence establishing Noling’s guilt.” *Id.* Thus, the Ohio Supreme Court concluded that “the prosecutor’s improper cross-examination of St. Clair does not require reversal of the jury’s verdict of guilt.” *Id.* at 100.

The state high court then rejected Noling’s prosecutorial misconduct claim. Because Noling failed to raise the misconduct claim pertaining to St. Clair’s impeachment before the court of appeals, he waived that issue. *Id.* at 108. Nonetheless, the court held that the claim “lack[ed] merit.” *Id.* And having determined that the cross-examination caused no prejudice, the court concluded that “Noling received a fair trial, and prosecutorial misconduct did not permeate the trial.” *Id.* at 111.

The Ohio Supreme Court affirmed the conviction and sentence, and denied Noling’s motion for reconsideration. *See State v. Noling*, 781 N.E.2d 220 (Ohio 2003). Noling then filed a petition for certiorari, which this Court denied. *See Noling v. Ohio*, 539 U.S. 907 (2003).

Noling next filed a petition for state post-conviction relief, which the state courts also denied. *State v. Noling*, No. 98-P-0049, 2003 Ohio App. LEXIS 4508 (Ohio Ct. App. Sept. 19, 2003), *discretionary review denied*, 802 N.E.2d 154 (Ohio 2004). And after commencing his federal habeas action, Noling filed a successive

petition for state post-conviction relief, which was also denied. *State v. Noling*, No. 2007-P-0034, 2008 Ohio App. LEXIS 2044 (Ohio Ct. App. May 16, 2008), *discretionary review denied*, 898 N.E.2d 967 (Ohio 2008).

C. The federal courts denied Noling's habeas petition.

Noling also petitioned the federal courts for habeas relief. Noling again raised prosecutorial misconduct claims, alleging that the cross-examination of St. Clair rose to the level of a due process violation and led to an unfair trial. *Noling v. Bradshaw*, No. 5:04 CV 1232, 2008 U.S. Dist. LEXIS 7650, at *81, *87 (N.D. Ohio Jan. 31, 2008). Rejecting Noling's misconduct claims, the district court found no error in the State's cross-examination of St. Clair. *Id.* at *101. And because Noling could not show that "the prosecution's cross-examination of St. Clair tainted his trial and rendered it fundamentally unfair," Noling could not establish a due process violation. *Id.* at *87, *101.

Finding no grounds for relief, the district court dismissed Noling's habeas petition. *Id.* at *165. A unanimous Sixth Circuit panel agreed. *Noling v. Bradshaw (In re Noling)*, 651 F.3d 573, 575 (6th Cir. 2011). It held that the Ohio Supreme Court's rejection of Noling's claim of prosecutorial misconduct was not contrary to, or an unreasonable application of, United States Supreme Court precedent. *Id.* Thus, the Sixth Circuit affirmed the district court's denial of habeas relief. *Id.*

REASONS FOR DENYING THE WRIT

Noling's petition is not worthy of this Court's review. The Ohio Supreme Court plainly adjudicated Noling's prosecutorial misconduct claim on the merits, and the Sixth Circuit correctly applied AEDPA deference to that decision

Noling nonetheless urges this Court to address what level of deference applies when a reasoned state-court opinion “fails . . . to address the merits of a federal constitutional claim.” Pet. at 10. But whatever the significance of that abstract legal question, it is simply not presented in this case. The Ohio Supreme Court squarely considered the merits of Noling’s claim. AEDPA therefore applies.

Finally, in applying AEDPA deference, the Sixth Circuit correctly denied habeas relief. Because the trial court issued curative instructions, and because other abundant evidence established Noling’s guilt, Noling has not established a due process violation. Accordingly, the Ohio Supreme Court reasonably determined that Noling received a fair trial. This Court should deny review.

A. The Sixth Circuit properly invoked AEDPA because the Ohio Supreme Court adjudicated Noling’s claim “on the merits.”

Noling contends that AEDPA does not apply here. He asserts that the Ohio Supreme Court failed to consider the merits of his “claim that the prosecutor committed prejudicial misconduct during his improper impeachment of St. Clair.” Pet. at 18. He contends even that the court was “utter[ly] silen[t]” about that claim. *Id.* at 9. Therefore, he says, the Sixth Circuit should have addressed the merits of that claim de novo. *Id.* at 16, 22. But Noling’s characterization of the Ohio Supreme Court’s decision is entirely off base. The Ohio Supreme Court squarely considered the merits of Noling’s claim. AEDPA therefore applies.

Under AEDPA, federal courts on habeas review must defer to the state courts “with respect to any claim that was adjudicated on the merits.” 28 U.S.C. § 2254(d). The state court is presumed to have adjudicated the claim on the merits “[w]hen a

federal claim has been presented to a state court and the state court has denied relief.” *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011). That presumption is only overcome “when there is reason to think some other explanation for the state court’s decision is more likely.” *Id.* at 785.

The Ohio Supreme Court’s decision plainly “involve[d] a determination of the merits of [Noling’s] claim.” *Id.* Noling presented his improper impeachment claim to that court in his fourteenth proposition of law, along with his other misconduct claims. *Noling*, 781 N.E.2d at 108; Apx. Vol. 6 at 35, 165, 167-68 (Appellant Br., Direct Appeal, Ohio Supreme Court). The Ohio Supreme Court reviewed Noling’s complaints of prosecutorial misconduct, and—in the section of its decision specifically titled “Prosecutorial Misconduct”—determined that these claims “lack[ed] merit.” *Noling*, 781 N.E.2d at 108. The state court then denied all of Noling’s misconduct claims, concluding that “Noling received a fair trial, and prosecutorial misconduct did not permeate the trial.” *Id.* at 111. That is, without a doubt, an adjudication on the merits. *Harrington*, 131 S. Ct. at 786 (AEDPA deference is afforded to “[a] state court’s determination that a claim lacks merit.”).

A state court is not required “to give reasons before its decision can be deemed to have been ‘adjudicated on the merits.’” *Id.* at 785. But, when the state court does explain its reasoning, that decision receives AEDPA deference even if the state court fails to cite relevant Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). Here, the state court provided cogent reasons for rejecting Noling’s claim. Quoting this Court’s decision in *Smith v. Phillips*, 455 U.S.

209, 219 (1982), the Ohio Supreme Court observed that, “[t]he touchstone of [the prosecutorial misconduct] analysis ‘is the fairness of the trial, not the culpability of the prosecutor,’” *Noling*, 781 N.E.2d at 109. Because *Noling* received a fair trial, the court correctly rejected his prosecutorial misconduct claims. *Id.* at 111.

And, furthermore, it is well-settled that, to constitute a due process violation warranting reversal, a prosecutor’s improper statements must lead to prejudice. *See, e.g., Donnelly v. DeChristoforo*, 416 U.S. 637, 639 (1974) (analyzing whether a prosecutor’s remarks were “sufficiently prejudicial” to violate due process rights); *United States v. Wright*, 625 F.3d 583, 609-10, 613 (9th Cir. 2010); *United States v. Mapp*, 170 F.3d 328, 337-38 (2d Cir. 1999); *United States v. Wilson*, 135 F.3d 291, 299 (4th Cir. 1998); *cf. United States ex rel. Shaw v. De Robertis*, 755 F.2d 1279, 1281 n.1 (7th Cir. 1985) (“To carry this burden, [a petitioner] must show that it is at least likely that the misconduct complained of affected the outcome of his trial—i.e., caused the jury to reach a verdict of guilty when otherwise it might have reached a verdict of not guilty.”). The state court here specifically determined that “the prosecutor’s improper cross-examination of St. Clair does not require reversal of the jury’s verdict of guilt” because *Noling* suffered no “actual prejudice[].” *Noling*, 781 N.E.2d at 100-101. The Ohio Supreme Court also noted that the trial court issued curative instructions and “other abundant evidence” supported the guilty verdict. *Id.* The state court, therefore, explicitly considered the factors relevant to *Noling*’s constitutional claim.

Because the Ohio Supreme Court adjudicated Noling's claim on the merits, the Sixth Circuit correctly applied AEDPA when reviewing the state court's decision. Thus, this case is not, as Noling suggests, an appropriate vehicle for deciding what standard of review applies when a reasoned state-court opinion is silent on the merits of a particular federal constitutional claim. That question is simply not presented by this case. Two other petitions before the Court do raise that issue. *See* Petition for Writ of Certiorari, *Cavazos v. Williams*, No. 11-465 (*petition for cert. granted* Jan. 13, 2012); Petition for Writ of Certiorari, *Childers v. Floyd*, No. 11-42 (*petition for cert. filed* July 6, 2011). But this case does not.

Notably, there may also be an argument that Noling's claim is procedurally defaulted. The state chose to proceed in the district court as though the claim were decided on the merits. But Noling failed to raise this issue to the Ohio court of appeals, *see Noling*, 781 N.E.2d at 108; Apx. Vol. 5 at 127, 149-53 (Appellant Br., Direct Appeal, Ohio Court of Appeals), and the Ohio Supreme Court found that it was waived, *Noling*, 781 N.E.2d at 108.

In any event, the Ohio Supreme Court also reviewed and rejected Noling's claim on the merits. Because the state court explicitly determined that Noling's prosecutorial misconduct claim "lack[s] merit," Noling's request for certiorari should be denied. *Id.*

B. The Ohio Supreme Court reasonably determined that Noling received a fair trial.

Noling's petition fails to challenge the substance of the Ohio Supreme Court's decision. Understandably so, because the state court reasonably adjudicated his

claim. A state court's determination that a claim lacks merit precludes federal habeas relief unless the petitioner demonstrates that "there was no reasonable basis for the state court to deny relief." *Harrington*, 131 S. Ct. at 784. And Noling cannot show that the Ohio Supreme Court's rejection of his claim "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by" this Court. 28 U.S.C. § 2254(d).

On the contrary, the Ohio Supreme Court's decision rejecting Noling's misconduct claim is in line with well-established federal law. To warrant habeas relief, a prosecutor's egregious conduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643. It "is not enough that the prosecutor[']s remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation marks omitted). A prosecutor's comments are reversible error only if they "deprive [the] petitioner of a fair trial." *Id.*

The state court, consistent with these federal standards, concluded that "Noling received a fair trial, and prosecutorial misconduct did not permeate the trial." *Noling*, 781 N.E.2d at 111. Because Noling did not establish a due process violation, the state court properly rejected Noling's claims.

"[N]either the reasoning nor the result" of the state-court decision conflicts with this Court's precedent. *Early*, 537 U.S. at 8. The factors routinely considered by federal courts when assessing an alleged due process violation include "the severity of the misconduct," "the measures adopted by the [trial] court to cure the

misconduct,” and “the certainty of conviction absent the improper statements.” *United States v. Burden*, 600 F.3d 204, 222 (2d Cir. 2010); *see, e.g., United States v. Sanchez*, 659 F.3d 1252, 1256-57 (9th Cir. 2011); *United States v. Suarez*, 601 F.3d 1202, 1218-19 (11th Cir. 2010). Applying those same factors, the state court held that “the prosecutor’s improper cross-examination of St. Clair does not require reversal of the jury’s verdict of guilt” because the trial court issued curative instructions and “other abundant evidence establish[ed] Noling’s guilt.” *Noling*, 781 N.E.2d at 100-01; *see also Greer*, 483 U.S. at 765-67 (no due process violation where jury received curative instructions and properly admitted evidence established guilt beyond a reasonable doubt).

As the Ohio Supreme Court observed, the trial court instructed the jury to consider the substance of the inconsistent statement read by the prosecutor only as it reflected upon St. Clair’s credibility. *Noling*, 781 N.E.2d at 101; *see also Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (“A jury is presumed to follow its instructions.”).

The Ohio Supreme Court also noted the compelling evidence of Noling’s guilt introduced at trial:

Noling admitted to Wolcott, Dalesandro, and others that he had personally shot and killed the Hartigs. Wolcott and Dalesandro also directly placed Noling inside the Hartigs’ home with a .25 caliber semiautomatic pistol, the type of weapon used to kill the Hartigs. Moreover, St. Clair’s total disclaimer of guilt, on behalf of Noling and himself, lacked any credibility because St. Clair had pled guilty to the murder of the Hartigs.

Noling, 781 N.E.2d at 101. All told, the Ohio Supreme Court reasonably concluded that Noling failed to establish that any prosecutorial misconduct rendered his trial unfair.

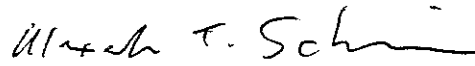
The Ohio Supreme Court's decision rejecting Noling's misconduct claim is not contrary to, or an unreasonable application of, any precedent from this Court. Accordingly, applying AEDPA's deferential standard of review, the Sixth Circuit correctly reviewed and denied Noling's habeas claim. *In re Noling*, 651 F.3d at 575.

Noling provides no basis for review by this Court.

CONCLUSION

For these reasons, the Court should deny the Petition.

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