APPENDIX A

Sixth Circuit Court of Appeals Opinion

January 19, 2018

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Nos. 16-2429/2474

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 19, 2018
DEBORAH S. HUNT, Clerk

MARK DAVID BAILEY,	)	
	)	
Plaintiff-Appellee/Cross-Appellant,	)	
	)	ON APPEAL FROM THE
v.	)	UNITED STATES DISTRICT
	)	COURT FOR THE WESTERN
BLAINE LAFLER, Warden,	)	DISTRICT OF MICHIGAN
	)	
Respondent-Appellant/Cross-Appellee.	)	OPINION
	)	
	)	

BEFORE: ROGERS, COOK, and STRANCH, Circuit Judges.

JANE B. STRANCH, Circuit Judge. Mark Bailey brought a habeas corpus petition seeking to overturn his 2005 conviction for the 1989 murder of Mary Pine, arguing primarily that the State of Michigan withheld evidence that prevented him from presenting a complete defense. The district court granted the petition on that claim, while dismissing two other habeas claims regarding ineffective assistance of counsel and admission of evidence of other bad acts. Bailey and the State each appeal the dismissal and grant of these habeas claims, respectively. We agree with the district court that the State violated *Brady v. Maryland* when it withheld evidence that could have altered the Michigan courts' and jury's views of the case. But as a federal court considering a state prisoner's habeas petition, our decision is constrained by the review standard of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under that standard,

we are compelled to REVERSE the district court's partial grant of Bailey's habeas petition. We also AFFIRM the district court's partial denial of Bailey's habeas petition.

I. BACKGROUND

On the evening of February 15, 1989, police found seventy-nine-year-old Mary Pine dead in the bathroom of her home in Big Rapids, Michigan. Pine had been stabbed and beaten over the head, and she was found with an electrical cord wrapped around her neck. Bailey, then a nineteen-year-old resident of Big Rapids, sometimes did yard work for Pine. In an interview the day after the murder, Bailey told the police that he had shoveled snow from Pine's driveway on the day of the murder.

On the night of the murder and in the days afterward, multiple detectives tried to follow snow tracks leading away from Pine's house and to identify shoes that matched those tracks. Detective Richard Miller followed the snow tracks from Pine's house for nearly a mile and became familiar with the tread pattern and gait displayed by these tracks. Detective George Pratt also observed the snow tracks outside Pine's home on the evening of February 15. The next morning, he went to Bailey's home and saw a partial footprint in the ice that he believed contained the same pattern as a print he saw in Pine's yard. He also saw similar prints near a gravel pit where Pine's car, which was missing from her garage after the murder, had been found.

Both Detectives Miller and Pratt attempted to identify shoes with the tread pattern they had observed in the snow tracks. Pratt interviewed Bailey twice after the murder and recovered a pair of shoes Bailey initially said he had worn on the day of the murder, though Bailey later claimed to have worn a different pair of shoes that day.

During the investigation, police noticed similarities between the Pine murder and the 1980 murder of 89-year-old Stella Lintemuth[1] in Big Rapids, at which time Bailey would have been ten years old. Police sought to determine if the same killer was responsible. In March 1989, the Mecosta County prosecutor sent Bailey's fingerprints to the Department of State Police to determine if they matched fingerprints discovered at the scene of the Lintemuth murder. The resulting laboratory report concluded that Bailey's fingerprints did not match those from the Lintemuth murder. In April 1989, at the State's request, the Department of State Police prepared a profile of the potential killer of both Lintemuth and Pine, noting that there were "several similarities" between the two murders. In May 1990, also at the State's request, the FBI Academy at Quantico issued a profile report further detailing the similarities between the two crimes and concluding that "one offender is most likely responsible for both crimes."

The FBI report included several paragraphs describing similarities between the 1980 and 1989 murders. Both victims were elderly white females who lived alone in single-family homes in the same area of Big Rapids, Michigan. Both victims had left their doors unlocked, neither had any known enemies, and both had the same causes of death: stab wounds and blunt trauma in excess of what was required to cause death. In both cases, an electrical cord was wrapped around the neck or face of the victim, but served no apparent purpose in the cause of death. Both murders probably occurred in the daytime by right-handed offenders who entered the homes without breaking in and committed the murders using objects found in the home, which they then left near the bodies. The FBI Report concluded that neither murder showed evidence of theft or sexual assault, but the State has disputed that conclusion on appeal. Specifically, the Stated noted that unlike in the Lintemuth murder, Pine's car and some jewelry were missing, and her

[1] Some parts of the record spell the 1980 victim's name as Lintenmuth. This opinion will follow the convention of the district court and magistrate judge in spelling the 1980 victim's name as Lintemuth.

pants and underwear had been pulled down and she was stabbed in the vaginal and buttocks areas.

After receiving the fingerprint report, the state police report, and the FBI report, the State chose not to prosecute Bailey. The Pine murder investigation went cold for nearly fifteen years.

In 2003, while incarcerated on unrelated charges, Bailey was a cellmate of Robert Gene Thompson for about six months. Thompson testified that, while they were cellmates, Bailey confessed to having murdered Pine. According to Thompson, Bailey described his actions on the day of the murder extensively, matching various details from the police investigation in 1989. After learning of Thompson's claim that Bailey had confessed in detail, the State reinitiated its investigation of Bailey and, in 2005, Bailey went to trial for the Pine murder. Thompson, who was serving a life sentence for first-degree felony murder, testified at Bailey's trial in exchange for the State's agreement to aid Thompson in his efforts to obtain a new trial for himself.

The defense sought to present evidence from the 1980 Lintemuth murder to argue that the similarity of the crimes suggests that one killer was likely responsible for both, as the FBI had concluded, and that because Bailey was ten years old at the time of the 1980 murder, he was probably not responsible for either murder. The defense was not aware that the State possessed the lab report finding that Bailey's fingerprints did not match those recovered from the 1980 murder (and neither was the court). During pre-trial hearings, the trial court granted the prosecution's motion to exclude all evidence related to the 1980 murder, ruling (without providing any reasoning on the record) that evidence "regarding another murder of an elderly person when the defendant would have been about 10 years old . . . is not to be brought before the jury." *People v. Bailey*, No. 265803, 2007 WL 2141362, at *7 (Mich. Ct. App. July 26, 2007) (quoting the trial court).

Certain issues arising at trial are relevant on appeal. Detective Miller testified about his opinions concerning the snow tracks and the shoes that might have left them. Bailey's counsel objected that Miller could not provide such expert opinions. The trial court gave the prosecutor an opportunity to lay the foundation for Miller's opinions, and Miller testified that his testimony was based on familiarity with the tracks gained from following them for a mile, and the picture he had taken of one of the tracks, which he had with him at trial. The court instructed the jury that "those things" that Miller "just said" were "used to make his observations," and although Miller was not qualified as an expert, his testimony "would be an observation as opposed to an expert opinion." Miller testified that he had tracked footprints on many occasions during his thirty-four years as a police officer.

The prosecution also called an expert in footwear identification, Officer Gary Truszkowski, to testify. Truszkowski reviewed footwear impressions from the snow outside Pine's home and determined that they were consistent with Bailey's shoes. The prosecutor asked Truszkowski about a report prepared by defense expert Dr. Frederick, who reviewed photographs of Bailey's shoes and the snow tracks and noted that a lateral mark on one of Bailey's shoes was not evident in one of the photographs of tracks. Truszkowski testified that the mark was too fine to make much of an impression in the snow. Defense counsel objected, stating that he had agreed to admit Dr. Frederick's report without calling him to testify on the understanding that the prosecutor's expert (Truszkowski) would discuss only his own report, without criticizing that of Dr. Frederick. After discussion between counsel and the court, the attorneys agreed to offer both Dr. Frederick's report and the report of an FBI expert; both reports concluded that there was insufficient clarity or detail in the snow tracks to make a positive identification or elimination. Bailey agreed in court to this arrangement. On cross-examination, Truszkowski clarified that he

agreed with Dr. Frederick and the FBI that it was not possible to draw a positive identification from the tracks.

The trial court also admitted evidence of prior burglaries committed by Bailey over defense counsel's objection. Three Big Rapids residents testified that in 1986 they had hired Bailey to mow their lawns and he had entered their homes during the daytime and taken small amounts of cash. Each resident had confronted Bailey about the incidents and each time he admitted his actions. Each resident testified that Bailey had never acted antagonistic, belligerent, rude, or hostile to them, and in fact he had been polite and had backed away when confronted. A friend of Bailey's also testified that he had participated in several of the burglaries with Bailey, and that although he had spent a lot of time with Bailey in 1986, he had never seen any violent tendencies in him.

The prosecution told the court that it intended to offer this evidence to show Bailey's "pattern or scheme ('MO')" of being hired to do lawn jobs and then committing daytime burglaries, which it argued was consistent with the events leading to the Pine murder. The court instructed the jury that it could consider the burglaries only to the extent they showed a plan, system, characteristic scheme, or modus operandi or to the extent they showed who committed the Pine murder; the court instructed the jury not to consider this evidence for any other purpose, including whether Bailey was a bad person or was likely to commit crimes.

The jury convicted Bailey of first-degree premeditated murder and first-degree felony murder. Bailey was sentenced to life imprisonment without parole for one count of first-degree murder. The Michigan Court of Appeals rejected all of Bailey's arguments on direct appeal. Most importantly, the appeals court rejected Bailey's argument that the trial court's exclusion of evidence relating to the 1980 murder denied Bailey's right to present a complete defense in

violation of *Holmes v. South Carolina*, 547 U.S. 319 (2006). *People v. Bailey*, No. 265803, 2007 WL 2141362, at *7–*8 (Mich. Ct. App. July 26, 2007) (per curiam) (discussing *Holmes*'*s* holding that evidence indicative of third-party guilt should be excluded "when it is too remote, when it lacks a connection with the charged crime, when it can have no other effect than to cast a bare suspicion upon another, or when it raises merely a conjectural inference that another person committed the crime"). On direct appeal, the State argued that the state police report linking the two murders arguably supported Bailey's identity as the killer in both cases, despite the fact that he was ten years old in 1980, and despite the fact that the State knew but did not disclose that Bailey's fingerprints did not match those recovered from the 1980 murder scene. The Michigan Supreme Court summarily denied Bailey's application for leave to appeal.

In 2007, two years after Bailey's conviction but one month before the state appellate court issued its opinion, the Mecosta County prosecutor initiated charges against Scott Graham for the 1980 Lintemuth murder. In 2009, after the Michigan Supreme Court had denied Bailey leave to appeal but before Bailey filed his habeas petition, Graham was convicted of the Lintemuth murder, largely based on the evidence that his fingerprints matched those found at the scene (presumably the same fingerprints that did not match Bailey's).

In 2009, Bailey filed a petition for habeas relief in federal court and the magistrate judge granted Bailey's motion for discovery seeking production of the criminal file in the Graham prosecution. From this discovery, Bailey's counsel learned for the first time in 2010 that fingerprints had been recovered from the 1980 murder scene, that police had tested Bailey's fingerprints against those, and that they did not match. The prosecution had not informed either Bailey or the state trial or appellate courts about these facts or the existence of the fingerprint lab report, although it was in the State's possession. The magistrate judge then granted Bailey's

motion to amend his habeas petition to add a claim concerning the fingerprint report under *Brady v. Maryland*, 373 U.S. 83 (1963), and stayed the case to allow Bailey to properly exhaust his *Brady* claim in the state court.

The state court, with Bailey's original trial judge presiding, denied Bailey's motion for relief from judgment, concluding that the fingerprint evidence had no impact on the Michigan Court of Appeals's conclusion that there was merely a speculative connection between the 1980 and 1989 murders. The Michigan Court of Appeals and Supreme Court each denied leave to appeal.

Back in federal court, the magistrate judge granted Bailey's motion to reopen the case, and issued a Report and Recommendation concluding that all of Bailey's habeas claims failed and no certificate of appealability should issue. Bailey filed objections. The district court disagreed and granted habeas relief for violations of *Brady* and *Holmes*. The district court denied Bailey's claims on ineffective assistance of counsel and the admission of the testimony on Bailey's burglaries, but issued a certificate of appealability on all four claims. The State timely appealed, and Bailey cross-appealed.

II. ANALYSIS

In appeals of decisions on habeas corpus petitions, we review the district court's legal conclusions de novo and its factual findings for clear error. *Foster v. Wolfenbarger*, 687 F.3d 702, 706 (6th Cir. 2012). Federal courts reviewing habeas petitions regarding claims adjudicated on the merits by state courts are governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d).

Under AEDPA, a federal court may grant habeas relief if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable

determination of the facts in light of the evidence presented in the State court proceeding." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schiro v. Landrigan*, 550 U.S. 465, 473 (2007). A state court's decision is not unreasonable "so long as fairminded jurists could disagree on [its] correctness." *Harrington*, 562 U.S. at 101 (internal quotation marks omitted).

A. *Brady* and *Holmes*

Bailey argues that the trial court's rejection of his *Brady* claim was an unreasonable application of *Brady v. Maryland* and its progeny. A *Brady* claim has three elements: (1) evidence favorable to the accused (2) was suppressed by the State, whether willfully or inadvertently, (3) and prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Because the State does not dispute that the evidence here was favorable and suppressed, only prejudice is at issue in this case.

To establish prejudice the defendant must show that "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." *Id.* at 289 (internal quotation marks omitted). A "reasonable probability" does not mean "more likely than not" in the *Brady* context, however. *Id.*; *see also id.* at 298 (Souter, J., concurring, joined by Kennedy, J.) (explaining that "the term 'probability' raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, 'more likely than not'"). Rather, *Brady* prejudice requires a showing that, without the suppressed evidence, the defendant did not receive "a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 290 (majority opinion). "[T]he question is whether the

favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* (citation and internal quotation marks omitted).

As both the trial court and the district court recognized, the *Brady* claim in this case involves an embedded *Holmes* claim. Bailey's *Brady* claim can succeed only if he shows prejudice, which requires showing that the suppressed fingerprint report would have undermined confidence in the jury's verdict. This necessarily entails a showing that the fingerprint report would have been entered into evidence and discussed before the jury. But because the trial court barred all discussion of the 1980 murder, the question at issue is whether knowledge of the fingerprint report would have altered the trial or appellate courts' rulings on the exclusion of the 1980 murder evidence. In other words, showing *Brady* prejudice requires showing a reasonable probability that the Michigan Court of Appeals would have ruled differently on Bailey's *Holmes* claim if it had known about the fingerprint report. If so—if there is a reasonable probability that disclosure of the suppressed fingerprint evidence would have led the state appellate court to vacate Bailey's conviction—then the suppressed evidence necessarily would have undermined confidence in the original verdict, satisfying *Brady*'s prejudice prong. If not, then the exclusion of the fingerprint evidence was irrelevant, and the *Brady* claim fails.

The state trial court correctly understood that Bailey's post-conviction *Brady* claim depended on whether the fingerprint report would have impacted the appeals court's *Holmes* ruling (on direct appeal). Because AEDPA applies to *Brady* claims, the question we must decide is whether fairminded jurists would disagree on the correctness of the state trial court's rejection of Bailey's post-conviction *Brady* claim. *See Bell v. Howes*, 703 F.3d 848, 854 (6th Cir. 2012) (applying AEDPA to a *Brady* claim). The trial court rejected Bailey's *Brady* claim by concluding that the fingerprint report would have had no impact on the appeals court's *Holmes*

analysis. The appeals court, without knowledge of the fingerprint report, had concluded that the connection between the 1980 and 1989 murders was so remote that exclusion of the evidence related to the 1980 murder purportedly showing third-party guilt did not violate *Holmes*. Therefore, to show that the trial court's *Brady* ruling was unreasonable under AEDPA, Bailey must show that fairminded jurists would not disagree that the fingerprint report would have altered the appeals court ruling on his *Holmes* claim on direct appeal.[2]

We start by examining both the appellate court's decision on the *Holmes* claim and the trial court's post-conviction decision on the *Brady* claim. Bailey argued on direct appeal that the trial court's exclusion of any discussion of the 1980 murder prevented him from presenting a complete defense, in violation of *Holmes*. The "Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes*, 547 U.S. at 324 (internal quotation marks omitted). "This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Id.* (internal quotation marks and brackets omitted). *Holmes* listed several examples of Supreme Court cases discussing evidentiary rulings that were arbitrary or disproportionate to their purposes. *Id.* at 325–26. By contrast, *Holmes* referred approvingly to the widespread acceptance of rules excluding evidence offered by criminal defendants to show third-party guilt "where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote." *Id.* at 327 (quoting 40A Am. Jur. 2d, Homicide § 286, pp. 136–38 (1999)).

[2] The State argues that *Brady* described a trial right, and thus we should consider only the suppression's impact on Bailey's trial, not its impact on his appeal. Whatever the nature of *Brady* right generally, *Brady* prejudice depends on whether suppressed evidence would have undermined confidence in the jury's verdict. In this case, if the suppressed evidence's disclosure would have led the appeals court to vacate Bailey's conviction, then the suppressed evidence necessarily would have undermined confidence in his *trial* verdict, satisfying *Brady*'s prejudice prong.

The Michigan Court of Appeals rejected Bailey's *Holmes* argument on direct appeal, concluding that the trial court did not err in applying Michigan's rule that "evidence tending to incriminate another is admissible if it is competent and confined to substantive facts which create *more than a mere suspicion* that another was the perpetrator." *Bailey*, 2007 WL 2141362 at *8 (emphasis added) (quoting *People v. Kent*, 404 N.W.2d 668, 674 (Mich. Ct. App. 1987)). After reciting the *Holmes* standard, the appellate court determined that "[u]nder the circumstances presented, and considering the similarities between the crimes as well as the differences, a reasonable and principled decision would include one that finds nothing more than the creation of mere suspicion, a conjectural inference, excessive remoteness, or an inadequate connection." *Id.*

When Bailey learned of the suppressed fingerprint evidence and brought a post-conviction *Brady* claim, the trial court rejected it based on the following reasoning:

> The addition of evidence showing that Defendant's prints did not match those left at the Lintemuth crime scene does not in any way strengthen Defendant's claim regarding third party guilt. . . . The fact that Defendant's fingerprints did not match a particular set of prints left at the Lintemuth scene is not material to Defendant's guilt or innocence because this does not show that a third party committed the murder in this case. . . . This additional evidence does nothing to affect the [Michigan] Court of Appeals holding that the police [and FBI] profiles or perceived similarities between the Lintemuth and Pine murders was not enough to bring evidence of third party guilt before the jury. It was not and is not because it continues to be the case that the set of fingerprints added to the other evidence creates no more than a "mere suspicion, a conjectural inference, excessive remoteness, or an inadequate connection" to support a claim that a third party was responsible for the murder of Mary Pine.

Under AEDPA, the question before us now is whether all fairminded jurists would instead conclude that the fingerprint evidence would have changed the appeals court's *Holmes* holding. There is arguably a significant flaw in the trial court's analysis. The trial court reasoned that even if the fingerprint evidence suggested that Bailey did not commit the 1980 murder, it did not strengthen the *relationship* between the 1980 and 1989 murders, and therefore would not in any

way affect the Michigan Court of Appeals's *Holmes* ruling. As the district court reasoned, however, the trial court considered the fingerprint evidence in isolation, rather than in the context of the "whole case."

The fingerprint lab report was not the only evidence withheld—the State also did not disclose the very fact that it had requested that lab report. The State's investigatory choices surrounding and following the fingerprint report complete the story of the State's 1989–1990 investigation and demonstrate the *State's* belief, at least originally, in a link between the 1980 and 1989 murders. Police suspected Bailey immediately after the murder and investigated him thoroughly at that time. Investigators also recognized that there were similarities between the 1980 Lintemuth murder and the Pine murder. They asked for the FBI's opinion and the FBI concluded that the same person most likely committed both murders. To try to determine if Bailey was that single person, investigators had his fingerprints tested against those recovered from the 1980 murder scene. After learning that the fingerprints did not match, the State chose not to prosecute Bailey, and did not reinitiate its case for fifteen years. By withholding the fingerprint report, the State not only suppressed evidence that Bailey was not responsible for the 1980 murder, but also obscured the full arc of its investigation into the Pine murder. The State's request to test Bailey's fingerprints against those from the 1980 murder demonstrates the State's belief that the results of that test (i.e., the suppressed fingerprint report), and the 1980 murder in general, were "sufficiently connect[ed]" to the Pine murder, not "speculative or remote." *Holmes*, 547 U.S. at 327 (internal quotation marks omitted). Full knowledge of the investigatory timeline would have allowed the Michigan courts (and the jury) to see that it was the fingerprint report that likely convinced the State that Bailey was not responsible for the Pine murder—demonstrating that the State itself believed in 1990 that a third party was likely responsible for

killing Pine. The trial court considering Bailey's post-conviction *Brady* claim overlooked this consequence of the State's nondisclosure.

The Michigan trial court's original decision to exclude the 1980 murder evidence, and the appeals court's decision that such evidence created no more than a mere suspicion of third-party guilt, thus lacked the full picture of why the State chose not to prosecute Bailey in 1990. But the fact remains that, even with knowledge of the fingerprint report and the corresponding understanding of the State's investigation, the Michigan Court of Appeals could have still found the connection between the two murders too attenuated to reverse the verdict. The murders were nine years apart and, in addition to some similarities, included meaningful differences. Fairminded jurists could conclude that, even with knowledge of the fingerprint report, the two murders were sufficiently attenuated to permit exclusion of evidence of the 1980 murder under *Holmes*. AEDPA therefore requires that we reverse the district court's grant of Bailey's habeas petition.

Separate from his *Brady* claim, Bailey also challenges the Michigan Court of Appeals's *Holmes* claim directly. In other words, Bailey argues that even ignoring the suppressed evidence, all fairminded jurists would find the rejection of his *Holmes* claim on direct appeal to be incorrect. Because we concluded in our *Brady* analysis above that fairminded jurists could disagree on the *Holmes* analysis *with* knowledge of the suppressed evidence, we must also conclude that fairminded jurists could disagree without it. Bailey's independent *Holmes* claim thus also fails under AEDPA.

B. Ineffective Assistance of Counsel

Bailey cross-appeals the district court's denial of habeas relief for ineffective assistance of counsel, which requires a showing that counsel's performance fell below an objective standard of reasonableness and prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687–

88 (1984). Courts defer to a counsel's discretionary choices if they might be considered sound trial strategy, and must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. AEDPA review of ineffective assistance of counsel claims is "doubly" deferential, asking "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.

Bailey first argues that his trial counsel was ineffective for failing to timely object to the testimony of Detectives Miller and Pratt regarding the snow tracks they followed and their opinions regarding which shoes might have left those tracks. Bailey argues that this testimony was improperly admitted as expert testimony. On direct appeal, the Michigan Court of Appeals rejected this argument, concluding that any objection would have been futile because the opinions were based on the Detectives' own perceptions and thus admissible under Michigan Rule of Evidence 701. *Bailey*, 2007 WL 2141362 at *6. On habeas review a federal court may not "reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). Moreover, we agree with the district court that the Michigan Court of Appeals correctly applied Michigan law, because the Detectives' testimony was based on their direct observations and personal conclusions based on those observations. Therefore, we affirm the district court's denial of habeas relief for Bailey's first claim of ineffective assistance of counsel.

Second, Bailey argues that his trial counsel was ineffective for agreeing to admit Dr. Frederick's expert report and an FBI report about whether the snow tracks were made by Bailey's shoes in lieu of calling Dr. Frederick and the author of the FBI report to testify in person. The Michigan Court of Appeals rejected this argument by concluding that Bailey himself had arguably waived this claim when he affirmatively agreed to this arrangement during trial, and, even if not, the decision was within the range of reasonable trial strategy. *Bailey*,

2007 WL 2141362 at *7. We agree. Calling the experts to testify could have hurt Bailey by drawing attention to the experts' conclusions that the tracks corresponded to Bailey's shoe size and type. It is also unlikely that the decision not to call the experts prejudiced Bailey. The jury saw these experts' reports, and the most Dr. Frederick and the FBI could conclude was that the evidence was insufficient to make any definite conclusions regarding which shoes made the snow tracks; neither expert could necessarily exclude Bailey's shoes.

Besides *Strickland*, Bailey argues that the Michigan court opinions were contrary to *United States v. Chronic*, which held that a presumption of prejudice applies if counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." 446 U.S. 648, 659 (1984). In this case, however, Bailey's trial counsel effectively cross-examined the prosecution's expert, Truszkowski, eliciting the concession that (like Dr. Frederick and the FBI author) he could not confirm that Bailey's shoes made the snow impressions. *See Bailey*, 2007 WL 2141362 at *7 n.5.

For these reasons, we affirm the district court's denial of habeas relief for Bailey's second claim of ineffective assistance of counsel, especially given the double deference due under *Strickland* and AEDPA.

C. Admission of Other Bad Acts Evidence

Finally, Bailey also cross-appeals the district court's denial of habeas relief for the trial court's admission of other bad acts, specifically the evidence of Bailey's burglaries. Bailey argues that although the district court admitted evidence of the burglaries to show a common scheme or plan, the prosecution argued on opening and closing that the evidence showed a modus operandi and established Bailey's identity as the person who murdered Pine. The Michigan Court of Appeals rejected this argument, concluding that the trial court did not abuse its discretion in admitting the evidence to show a plan or scheme under Michigan Rule of

Evidence 404(b)(1). *Bailey*, 2007 WL 2141362, at *3. As noted above, the state court's decision on state law is usually unreviewable on federal habeas review, and that is especially so regarding rulings on the admission or exclusion of evidence. *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003).

Habeas relief may be warranted, however, when "an evidentiary ruling is so egregious that it results in a denial of fundamental fairness" and thus violates due process. *Id.* *Bugh* held that as of 2003 there was no clearly established Supreme Court precedent holding that the admission of other bad acts as propensity evidence violated due process. *Id.* at 512–13. Bailey cites no Supreme Court authority establishing such a principle since 2003 (or at all). Therefore, the Michigan Court of Appeals decision on this issue was not contrary to any decision of the U.S. Supreme Court, as required for habeas relief under AEDPA. We affirm the district court's denial of habeas relief for the trial court's admission of the evidence of the prior burglaries.

III. CONCLUSION

For the foregoing reasons, we are constrained to REVERSE the district court's grant of Bailey's habeas petition for violations of *Brady* and *Holmes*. We AFFIRM the district court's denial of Bailey's habeas petition for ineffective assistance of counsel and the admission of other bad acts evidence.

APPENDIX B

Opinion

September 20, 2016

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARK DAVID BAILEY #201511, Plaintiff,	)	
	)	No. 1:09-cv-460
-v-	)	
	)	HONORABLE PAUL L. MALONEY
BLAINE C. LAFLER Respondent.	)	

OPINION

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 271–82 (1999) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

As framed by the State, this case presents questions that ordinarily have easy answers in a *Brady* analysis.

Can evidence excluding a defendant from "Murder 1" be "exculpatory" in a trial for an unrelated "Murder 2"? Likewise, can "prejudice ensue" when the State suppresses exculpatory evidence from "Murder 1" in a trial for "Murder 2"?

The answer to both questions is ordinarily "no," as evidence from one crime is rarely relevant to another crime.

But the facts in this case are far from ordinary.

In this case, an FBI profile report linked "Murder 1" with "Murder 2" early on; and the report concluded that one suspect was likely responsible for both murders because the "signatures" left at each crime scene (both in a rural West Michigan town) were eerily similar.

Nearly two decades after the profile report was prepared, Petitioner Mark David Bailey was charged for "Murder 2." Mr. Bailey sought to introduce the profile report, along with the fact that he was ten-years-old at the time of "Murder 1," as evidence which would, in his view, cast a reasonable doubt as to his own responsibility for "Murder 2."

The trial court excluded the report and all references to the earlier murder—without any legal analysis or explanation—and the issue was preserved for appeal.

On appeal, the State argued that the profile report actually *supported* a conclusion that Mr. Bailey, despite his age, committed "Murder 1."

The Michigan Court of Appeals, while acknowledging Mr. Bailey's right to introduce evidence of third-party guilt and conceding the issue on appeal was "arguable," ultimately concluded that the profile report amounted to "mere suspicion" or a "conjectural inference," and the trial court did not abuse its discretion by excluding the evidence.

Troublingly, unbeknownst to Mr. Bailey, his lawyer, and all state judges who grappled with the evidentiary issues to that point, the State, while investigating Mr. Bailey for "Murder 2," had requested and received a fingerprint analysis of latent prints found at the scene of "Murder 1" that *excluded* Mr. Bailey as a suspect in "Murder 1"—even though the State knew he was only ten at the time of that crime. (And again, the State nonetheless argued on appeal that the profile report *supported* Mr. Bailey's responsibility for "Murder 1," despite his age.)

As framed by the facts, the *Brady* questions in this case, therefore, are much more precise than those the State contends are presented.

Was the evidence that excluded Mr. Bailey as a suspect in "Murder 1" "exculpatory" for Mr. Bailey's trial for "Murder 2"—when the State's own evidence (partially disclosed and partially suppressed) together suggested that a suspect other than Mr. Bailey likely committed "Murder 2"? Likewise, did "prejudice ensue" when the State suppressed the exculpatory evidence from "Murder 1" prior to Bailey's trial for "Murder 2"—when the effect of the suppression was to partially blind the state judges' analysis of important evidentiary questions and ultimately violate Bailey's right to present a complete defense by introducing probative evidence of third-party guilt?

The answer to both questions is "yes"; Mr. Bailey, therefore, is entitled to a new trial.

I. STATEMENT OF FACTS & PROCEDURAL HISTORY

Plaintiff Mark David Bailey, a prisoner under the control of the Michigan Department of Corrections, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Magistrate Judge Philip J. Green issued a report and recommendation recommending that Petitioner's claims in Grounds I to IV be denied on the merits and claim under Ground V be dismissed as procedurally defaulted.

The facts themselves are beyond genuine dispute, as reported by the Magistrate Judge. Accordingly, the Court **ADOPTS** the Magistrate Judge's summary facts contained in his report, with the exception of a few omitted facts and his characterization of certain facts that lead to erroneous legal conclusions. (*See* ECF No. 83 at PageID.946–60.) The Court will highlight and add relevant facts as it sees fit throughout this opinion.

To begin, however, establishing a timeline of this case is helpful.

A. April 1980: 89-year-old Stella Lintemuth is murdered in Big Rapids. The murder would go unsolved for decades.

B. February 1989: 79-year-old Mary Pine is murdered in Big Rapids. There are marked similarities between this murder and the earlier, unsolved murder in 1980. Mark David Bailey is a suspect early on.

C. March 15, 1989: After the investigators send Bailey's fingerprints for examination to determine whether they matched fingerprints left at the scene at the Lintemuth homicide, the Michigan State Police submits a laboratory report showing the latent prints from the Lintemuth homicide did not belong to Bailey. This information is suppressed from Bailey.

D. April 1989–May 1990: Two profiles are completed in response to a request by the Big Rapids Police Department and the Department of State Police.

E. April 4, 1989: State Police report remarks on the noticeable similarities of the two murders, and surmises that both were committed by the same suspect.

F. May 31, 1990: The FBI Academy at Quantico issues a detailed report in response to the Big Rapids Police Department. The expert report concludes "that one offender is most likely responsible for both crimes."

G. June 2005: Bailey is charged with murder for the Pine homicide, and the matter proceeds to trial.

H. June 9, 2005: In the context of addressing evidentiary disputes, Judge Matuzak concludes: "And, also, regarding another murder of an elderly person when the defendant would have been about 10 years old, that is not to be brought before the jury." No legal explanation is given for the exclusion.

I. June 23, 2005: Judge Hill-Kennedy memorializes the previous oral ruling : "IT IS HEREBY ORDERED the People's motion to exclude the defense from offering evidence of other homicides is GRANTED."

J. July 29, 2005: Bailey is convicted of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b), arising from the February 1989 killing of 79-year-old Big Rapids resident Mary Pine. The Trial Court sentenced Bailey to life imprisonment without parole for one count of first-degree murder. The trial court excluded evidence pertaining to the earlier 1980 murder of Stella Lintemuth, despite the fact that profile reports concluded that the same perpetrator was likely responsible for both crimes. Bailey would have been ten-years-old at the time of the 1980 murder.

K. June 2007: Mecosta County prosecutor initiates criminal charges against Scott Elwood Graham for the 1980 Lintemuth homicide.

L. July 26, 2007: After Bailey appeals his conviction to the Michigan Court of Appeals arguing, among other things, that the trial court erred when it excluded evidence concerning the then-unsolved 1980 murder of Stella Lintemuth and the related third-party-guilt theory, the Court of Appeals rejects Bailey's claim holding that, although police profiles provided by the FBI and the Michigan State Police noted "several similarities" between the two killings, there was not enough "direct" evidence that another person committed the murder to find the trial court abused its discretion. The Court of Appeals finds that "[u]nder the circumstances presented, and considering the similarities between the crimes as well as the differences, a reasonable and principled decision would include one that finds nothing more than the creation of mere suspicion, a conjectural inference, excessive remoteness, or an inadequate connection."

M. February 29, 2008: Bailey's application for leave to appeal to the Michigan Supreme Court is summarily denied.

N. 2008: Scott Elwood Graham is extradited to the State of Michigan to face charges for the 1980 murder of Stella Lintemuth.

O. 2009: Graham is convicted of the 1980 murder of Stella Lintemuth based largely upon fingerprints matched at the murder scene.

P. May 19, 2009: Bailey files a Petition for Habeas Corpus under 28 U.S.C. § 2254.

Q. April 8, 2010: Magistrate Judge Scoville grants Bailey's motion for discovery in part seeking production of the criminal file in the Graham prosecution. All evidence existing at the time of Bailey's trial in July 2005 is discoverable.

R. August 2010: Bailey's counsel receives a fingerprint report from 1989 that had excluded Bailey from the 1980 murder.

S. September 2010: Magistrate Judge Scoville granted Bailey's motion to amend his complaint and stay the case to add the *Brady* claim in response to the fingerprint report excluding Bailey from the earlier homicide. Judge Scoville stayed the case to allow Bailey to properly exhaust his *Brady* claim and bring the claim in state court as a 6.500 motion. Judge Scoville in his R&R concluded:

> "Petitioner has met his burden of showing a plausible *Brady* violation at the pleading stage. Given the admitted similarities in the two murders, as found by the FBI, the fingerprint evidence in the Lintemuth case was arguably favorable to petitioner. The state does not deny that the evidence was not produced to the defense at the time of trial. And it is at least arguable that the

> exculpatory fingerprint evidence, in conjunction with the FBI and State reports, would have induced a reasonable doubt in the mind of at least one juror. Therefore, amending the petition to assert a *Brady* claim cannot be deemed futile."

(ECF No. 49 at PageID.409.)

T. May 11, 2011: Judge Hill-Kennedy issues an order denying Bailey's motion for relief from judgment. He concludes:

> "Upon review of the record generally, it is mere speculation to allege that such a violation occurred. There has been no claim that trial counsel for Defendant was ineffective for choosing not to pursue the admission of facts about the Lintemuth homicide. This Court finds the record does not support Defendant's *Brady* claim. Consequently, even if this Court held that the issue of third party guilt was preserved and that the police profiles were part of the record on appeal, Defendant's 6.500 Motion should be denied because his alleged *Brady* violation is without merit based upon a lack of relevance, no impact on an otherwise speculative connection, and mere speculation that *Brady* was in some manner violated."

(ECF No. 64-2 at PageID.846.)

U. July 2013: Magistrate Judge Scoville grants Bailey's motion to reopen the case.

V. September 2013: Bailey files an amended petition including the *Brady* claim. The claim clearly "related back" to the original petition.

W. November 2015: Magistrate Judge Green issues a Report and Recommendation, concluding that all of Bailey's claims for relief should fail and a certificate of appealability should not issue in any respect.

X. December 2015: Bailey files objections to the Report and Recommendation.

Next, the Court wishes to provide context to this opinion going forward by fleshing out the similarities between the 1980 and 1989 homicides, as described by the FBI.

On May 31, 1990, an "FBI crime analysis" was prepared at Quantico. (ECF No. 61-3 at PageID.625.) A police investigative analyst, supervisory special agent, and other members of the National Center for the Analysis of Violent Crime (NCAVC) worked together on the report. (*Id.*) The conclusions were based on "knowledge drawn from the

personal investigative experience, educational background, and research conducted by the[] crime analysts as well as other NCAVC members." (*Id.*)

First, the report analyzed the victimology, generally, noting that both victims: were elderly, white females; "lived alone in a single-family home"; resided "in the same general part of Big Rapids, Michigan"—a small town; and "left the door unlocked." Neither had any known enemies. (*Id.* at PageID.625–26.) Then, the report noted the very similar natures of the medical examiner's reports, noting both victims: "suffered multiple stab wounds"; fractures, including of the skull; had an "electrical cord around" the neck or head; and had identical causes of death—"stab wounds" and "blunt trauma." (*Id.* at PageID.626.) The report then summarized all known "similarities between the two [crime] scenes that would suggest that both crimes were most likely committed by the same offender." (*Id.* at PageID.627.)

> In both cases, the victimology is very similar, as is the demographics of their residences. In each case, an electrical cord was wrapped around the neck or face of the victim, but served no apparent useful purpose insofar as cause of death is concerned. Severe blunt trauma, focused on the head area of both victims, reflects significant hostility and anger felt by the assailant. The age and circumstances of both victims indicate this anger and hostility are directed toward elderly females.
>
> While the time of death for Stella Lintenmuth is estimated to be in the early morning, Mary Pine was killed between 3:10 p.m. and 6:50 p.m. Both could be described as daylight offenses, thereby increasing the risk level to the offender.
>
> In the case of Lintenmuth, the weapon used was positioned on her body by the offender, and in the case of Mary Pine, the broken handles of two separate weapons were apparently positioned on a newspaper near the point of assault. These factors indicate that the offender had a personal need to do this, and the significance would be known only to the offender.

In both cases, the offender apparently arrived on foot, entered the residence without the need for forced entry, and utilized several weapons that were available at the scene. No ransacking of either residence was evident, and no theft of property from either victim could be established. The injuries of both victims were consistent with the offender being right-handed, and no sexual assault of either victim could be established.

The amount of violence carried out against the victims was well in excess of that required to cause death and is consistent with an offender who is feeling a high level of anger and hostility. Considering the close proximity of the two murders, as well as the disposal site of Pine's car, it is likely that both victims were known to the offender through observations or some other association. The anger displayed by the offender is likely to be displaced aggression because of his feelings about a significant female in his life or elderly women in general.

The weapons used in both offenses were weapons of opportunity obtained from the victims' homes. This indicates that the offender may not have access to or own a weapon, such as a knife or gun. Both victims were inside unlocked houses, affording the offender quick and easy access. These two aspects indicate crimes of opportunity. However, the ages and circumstances of the victims and the time of day the crimes were committed indicate that the offender knew what to expect when he entered the victims' residences.

There is no apparent theft motive displayed in either case. Items that cannot be located, however, such as two rings and a pendant belonging to Mary Pine, may have been taken by the offender. If such is, in fact, the case, the reason for taking such items would likely be related to souvenirs for his own use in re-experiencing the event, rather than for financial gain.

The absence of seminal fluid at either crime scene and no penile penetration on either victim suggest that the offender was motivated by anger, hostility, and frustration. The stabbing of the vaginal area of Mary Pine is likely a product of the same motivation.

Based on similarities of these two crimes as set out above, and when considered with the size of the community and the proximity of the crimes to each other, it is our opinion that one offender is most likely responsible for both crimes.

(*Id.* at PageID.627–28.)[1] [2]

III. LEGAL FRAMEWORK

With respect to dispositive motions, a magistrate judge issues a report and recommendation, rather than an order. After being served with a report and recommendation (R&R) issued by a magistrate judge, a party has fourteen days to file written objections to the proposed findings and recommendations. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). A district court judge reviews de novo the portions of the R&R to which objections have been filed. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Only those objections that are specific are entitled to a de novo review under the statute. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986) (per curiam) (holding the district court need not provide de novo review where the objections are frivolous, conclusive or too general because the burden is on the parties to "pinpoint those portions of the magistrate's report that the district court must specifically consider"). Failure to file an objection results in a waiver of the issue. *United States v. Sullivan*, 431 F.3d 976, 984 (6th Cir. 2005); *see also Thomas v. Arn*, 474 U.S. 140, 155 (upholding the Sixth Circuit's practice). The district judge may then accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

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[1] The Court will note that each of the alleged differences between the cases that the State's counsel advanced at oral argument are patently inconsistent with the report. (*See, e.g., id.* at PageID.627 ("[N]o sexual assault of either victim could be established.") ("No ransacking of either resident was evident, and no theft of property from either victim could be established."); PageID.628 ("There is no apparent theft motive displayed in either case.").)

[2] The Court will further note that the decision of the state trial court to admit a host of prejudicial 404(b) evidence of Mr. Bailey's prior burglary convictions is at least called into question by the report, because the report concludes: "[t]here is no apparent theft motive in either case." (*Id.*)

Of course, in the AEDPA context, "[f]ederal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown that the earlier state court's decision 'was contrary to' federal law then clearly established in the holdings of this Court, § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412 (2000); or that it 'was based on an unreasonable determination of the facts' in light of the record before the state court, § 2254(d)(2)." *Harrington v. Richter*, 562 U.S. 86, 100 (2011).

IV. ANALYSIS

Mr. Bailey raises three objections to the Report and Recommendation; he "maintains that conclusions as to Issues I, II, and III [or A, B, and C here] are debatable and/or wrong." (ECF No. 91 at PageID.1020.) Mr. Bailey has waived Issues IV and V. (*See id.*)

A. Right to Present a Complete Defense & Right to Due Process

Mr. Bailey's *Brady* and third-party guilt claims are inextricably intertwined. The claims together reveal the ultimate constitutional error: Bailey was not allowed to introduce the probative evidence that strongly suggested a person other than Bailey was "most likely responsible for both crimes[, including the Pine homicide]." (ECF No. 71.)

i. Legal Framework: Right to Present a Complete Defense & Third-Party Guilt

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), *accord Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

"This right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes*, 547 U.S. at 324 (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)).

As a general rule, evidence of third-party guilt is treated the same as other evidence—it should be allowed unless "its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Id.* However, because the ability to produce evidence of third-party guilt implicates the right "to present a complete defense[,] . . . . [t]his right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.* at 319 (quoting *Scheffer*, 523 U.S. at 308).

In *Holmes*, the Supreme Court cited approvingly to the South Carolina Supreme Court's underlying evidentiary rules. *See id.* at 327 (citing, e.g., 41 C.J.S., Homicide § 216, pp. 56–58 (1991) ("Evidence tending to show the commission by another person of the crime charged may be introduced by the accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded").)

However, the Supreme Court criticized the South Carolina Supreme Court because it "radically changed and extended the rule" by focusing on the "the strength of the prosecution's case" and excluding evidence of alleged statements of guilt made by a third-party. *Id.* at 328–29. Thus, the Court vacated the judgment of the state court notwithstanding that direct, forensic evidence was otherwise overwhelming.

ii. Legal Framework: Right to Due Process & Brady Violations

In *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Bagley*, 473 U.S. 667 (1985), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material, either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The Court has held that "[t]here are three components of a true *Brady* violation: [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999); *see also Kyles v. Whitley*, 514 U.S. 419, 433 (1995). Prejudice and materiality are established by showing that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 281 (quoting *Bagley*, 473 U.S. at 682); *see also Cone v. Bell*, 129 S. Ct. 1769, 1783 (2009).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. "[T]he question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, 527 U.S. at 290 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). Put another way, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 289–290.

"Under the standard stated above, the reviewing court may consider directly *any adverse effect* that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." *Bagley*, 473 U.S. at 682 (emphasis added).

iii. Brady Violation: Analysis

Since the fingerprint analysis was indisputably withheld from Mr. Bailey and all state judges through direct appeal, this Court permitted Mr. Bailey to amend his petition to add the *Brady* claim. Mr. Bailey then had to exhaust that claim in state court by filing a motion for relief from judgment. The order denying that motion was erroneous in several respects.

1. The trial court's erroneous *Brady* analysis.

In May 2011, the state trial court issued an order denying Bailey's motion for relief from judgment, concluding in relevant part:

> Upon review of the record generally, it is mere speculation to allege that such a violation occurred. There has been no claim that trial counsel for Defendant was ineffective for choosing not to pursue the admission of facts about the Lintemuth homicide. This Court finds the record does not support Defendant's *Brady* claim. Consequently, even if this Court held that the issue of third party guilt was preserved and that the police profiles were part of the record on appeal, Defendant's 6.500 Motion should be denied because his alleged *Brady* violation is without merit based upon a lack of relevance, no impact on an otherwise speculative connection, and mere speculation that *Brady* was in some manner violated.

(ECF No. 64-2 at PageID.846.)

Respectfully, the state trial court's decision is "based on an unreasonable determination of the facts" in light of the record *and* "contrary to" clearly established federal law, *see Strickler*, 527 U.S. at 281 (quoting *Bagley*, 473 U.S. at 682); *see also Cone v. Bell*,

129 S. Ct. 1769, 1783 (2009). The trial court's opinion denying the motion for relief from judgment suffers from several legal and logical defects.

First, the state trial court erroneously concluded that "[t]he issue of the admissibility of evidence of third party guilt was not preserved for [direct] appeal," even though the Court of Appeals fully considered and ruled on the merits of Mr. Bailey's appeal with respect to that very issue. It is axiomatic that when confronted with a post-judgment motion, a trial court cannot rewrite the previous appellate record. Surprisingly, the trial court held Mr. Bailey "waived" an issue after the appeals court had ruled on the merits of that issue—but then the trial court nonetheless rested on the appeal court's merits conclusion that Mr. Bailey had lost on that derivative issue as the basis for denying his *Brady* claim.

In reality, the State never argued that the "third-party guilt" issue was not preserved on direct appeal; accordingly, any reasonable jurist would have found the State's waiver argument was waived on a motion for relief from judgment. *See, e.g., Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) (collecting cases) ("They have, as so often before, waived waiver."); *People v. McGraw*, 771 N.W.2d 655, 661 n.36 (Mich. 2009) ("Because the prosecution failed to raise the issue of defendant's waiver, we need not consider it.").[3]

Second, the state trial court did not perform a proper *Brady* analysis; to the extent it finally arrived at a legal framework, the state trial court noted:

[3] The State also filed a motion for sanctions in state court in response to the motion for relief from judgment, arguing that Defense counsel "created and contrived the record on appeal" and "somehow duped the Michigan Attorney General's Office, the Court of Appeals, and now a Federal District Court." In one of its briefs, the State argued: "[C]ounsel suggests because no court or prosecutor ever caught Ms. Niewenhuis' slight of hand on the third party guilt preservation issue, it is too late to now fix this attempted injustice." (ECF No. 63-5 at PageID.799.) In other words, the State argued the waiver doctrine should apply to Mr. Bailey on a post-judgment motion but not the State on direct appeal. This argument was patently frivolous, and the state trial court inexplicably bought it.

> Under *Brady*, the government has a duty in a criminal case to disclose evidence that is both favorable to the defense and material to a defendant's guilt or punishment. *Stickler* [sic] *v. Greene*, 527 US 263, 280 (1999). The crux of Defendant's *Brady* claim is that the People did not turn over evidence that Defendant's fingerprints did not match fingerprints left at the Lintemuth homicide scene. The significance of this information flows directly from the conclusion that a single killer was responsible for the murders of both Mary Pine and Stella Lintemuth. However, it is for this reason that Defendant's 6.500 Motion raising a *Brady* violation should be denied. As stated by the Court of Appeals in denying Defendant's direct appeal in 2007, "there was not enough direct evidence that another person committed the murder to find that the trial court abused its discretion in excluding the evidence." *Bailey*, 2007 WL 2141362 at *8.

(ECF No. 64-2 at PageID.850.)

In other words, from the outset, the state trial court skipped over the *Brady* analysis—the effect of the fingerprints on "the whole case," including the previous evidentiary rulings and Mr. Bailey's ability to present a complete defense (as was his constitutional right).

Instead, the trial court circularly concluded the withheld fingerprint analysis was not relevant by citing to the same Court of Appeals decision that was drafted in a world where the fingerprint analysis was not known to exist. Indeed, the world on direct appeal was one where the prosecutor used the profile reports as a sword by arguing those reports supported Mr. Bailey as a suspect in the earlier homicide, while withholding forensic evidence that excluded Mr. Bailey from that very homicide.[4]

Thereafter, the state trial court continued its erroneous analysis:

[4] And it's not as if that evidence was stuffed away in an unknown case file of an unrelated murder; the fingerprint analysis of the Lintemuth homicide was produced during the investigation of the Pine homicide, because investigators suspected Bailey may have been responsible for both murders. In addition, the profile reports were the subject of the underlying evidentiary dispute on the third-party guilt issue. To withhold very material evidence to that evidentiary dispute that would, at a minimum, be favorable to the defense in the context of that weighty dispute is indefensible.

> The addition of evidence showing that Defendant's prints did not match those left at the Lintemuth crime scene does not in any way strengthen Defendant's claim regarding third party guilt. It was after the Mary Pine trial that the set of fingerprints was shown to belong to Scott Graham. The fact that Defendant's fingerprints did not match a particular set of prints left at the Lintemuth crime scene is not material to Defendant's guilt or innocence because this does not show any direct evidence that a third party committed the murder in this case. Indeed, the only relevance of the conviction of Scott Graham for the Lintemuth murder and evidence showing that Defendant's prints did not match those left at the Lintemuth crime scene is directly related to the two police profiles. This additional evidence does nothing to affect the Court of Appeals holding that the police profiles or perceived similarities between the Lintemuth and Pine murders was not enough to bring evidence of third party guilt before the jury. It was not and is not because it continues to be that the set of fingerprints added to the other evidence creates no more than a "mere suspicion, a conjectural inference, excessive remoteness, or an inadequate connection" to support a claim that a third party was responsible for the murder of Mary Pine. *Id.*; [*see also*] *Holmes*, 547 U[.]S[.] 319; *People v*[.] *Kent*, 157 Mich[.] App[.] 780, 793; 404 N[.]W[.]2d 668 (1987).

(ECF No. 64-2 at PageID.850.)

The state trial court used various vacuums to analyze the record: the fingerprint analysis wasn't exculpatory because it (in a vacuum) only excluded Bailey from the earlier murder and said nothing about Bailey's involvement in the later murder; the profile reports weren't admissible in the first place because they (in another vacuum) casted "mere suspicion"; and the sum of the fingerprints with the profile reports together only created "mere suspicion" because the Court of Appeals (in yet another vacuum), unaware of the fingerprint analysis, had held that the profile reports were not admissible.

A *Brady* analysis requires the Court to analyze whether the withheld evidence "put[s] the whole case in . . . a different light." *Strickler*, 527 U.S. at 290. In other words, a proper analysis requires a court to look at the effects of suppression on the "whole case," not

individual pieces of evidence viewed in different vacuums. Even putting aside the trial court's analysis, its ultimate conclusion—"it continues to be that the set of fingerprints added to the other evidence creates no more than," for example, "an inadequate connection' to support a claim that a third party was responsible for the murder of Mary Pine" (ECF No. 64-2 at PageID.850)—is logically, factually, and legally untenable, as the Court will demonstrate. On this, "fairminded jurists could [not] disagree." *Harrington*, 562 U.S. at 101.

Using a proper analysis, this Court must evaluate: a) if the withheld fingerprint analysis would have changed the state court conclusions that the profile reports created a "conjectural inference," standing alone; and b) if so, and the evidence together would have been admitted, if the suppression of the evidence casts any doubt on the fairness of Mr. Bailey's trial.

2. The profile reports, together with the fingerprint analysis, are exculpatory as to both the earlier *and* the later murder.

First, the fingerprint analysis *and* the profile reports are together directly exculpatory as to both the earlier *and* later murders. To explain how the Court arrives at this conclusion, it's important to logically map out the conclusion drawn from the reports—in a world with and without the fingerprint analysis as disclosed:

1. Two profile reports conclude that given the community context and crime scene signatures of both crimes, Person A [someone else] or B [Bailey] is, in one of the report's words,[5] "most likely responsible for both [Crimes 1 and 2]." Person B was only ten-years-old during Crime 1; however, despite his age, the State suggests the profile reports *support* that Person B [Bailey] committed Crime 1.[6]

[5] The FBI report's conclusion is relatively more detailed and relevant to the logic here.

[6] On direct appeal, the State argued that the reports supported Mr. Bailey's guilt in the earlier murder, despite the fact that Bailey was only ten-years-old. (*See* ECF No. 91 at PageID.1006 ("Not only does the MSP report fail to exclude [Petitioner Bailey] as a suspect in the charged murder, *it arguably supports [Petitioner Bailey's] identity* by suggesting that if both murders were committed by the same person, the killer would have been young . . . .").) Of course, the State advanced this argument despite knowing that he was forensically excluded from the earlier murder. That evidences bad faith.

2. Absent any other information other than that in "1", the reports (arguably) cast only a "conjectural inference" that Person B [Bailey] did not commit Crime 2.
3. **However, a forensic analysis excludes Person B [Bailey] from Crime 1.**
4. **In light of "3," the reports conclude that Person A [someone else] "is most likely responsible for both [Crimes 1 and 2]," and not Person B [Bailey].**
5. **Accordingly, the reports conclude, in light of "3," that Person B [Bailey] "is most likely [not] responsible for . . . Crime[] . . . 2."**

This analysis is sound—the final, logical conclusion amounts to much more than a "mere suspicion" or "conjectural inference." It's the State's own profile reports—one from the FBI at Quantico, no less—concluding that Bailey "is most likely [not] responsible for . . . Crime[] . . . 2." *Cf. Bourjaily v. U.S.*, 483 U.S. 171, 179–80 (1987) ("Individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.").

Thus, the fingerprint analysis is *the* logical lynchpin that *confirms* the probative value of the profile reports *and* the fingerprint analysis together for the proposition that either a) Mr. Bailey did not, in fact, commit either murder; or more subtly and cogently, b) the same "true signature" of someone other than Mr. Bailey was left at both crime scenes, and Mr. Bailey could not have left the first signature. *See* David McCord, *"But Perry Mason Made it Look so Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else is Guilty*, 63 Tenn. L. Rev. 917, 948 (1996) (collecting cases) ("One type of evidence work[s] as a magic charm for defendants, invariably sufficing to produce a reversal for exclusion of the evidence at trial: the defendant is charged with a crime that was

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On collateral attack, the State now argues that the fact that Bailey was only ten-years-old shows that the addition of the fingerprint analysis would not have altered the original decision of the Court of Appeals. The Court finds this about-face is nonsense, and can only conclude the Court of Appeals at least read and considered the State's (bad-faith) argument in its calculus, even if that argument was not specifically cited.

committed in the same 'signature' manner as other crimes, *i.e.*, the propensity evidence was so strong as to constitute a unique *modus operandi*, *and* the defendant had evidence that he could not have committed one or more of the other crimes.").

As shown above, it's logically untenable to conclude, as the state trial court did, that "the addition of evidence showing that Defendant's prints did not match those left at the Lintemuth crime scene does *not in any way* strengthen Defendant's claim regarding third party guilt." (ECF No. 64-2 at PageID.850 (emphasis added).)

One other logical error advanced by the State is that the reports *and* the fingerprint analysis *together* are only exculpatory to the earlier homicide. True, the *fingerprint analysis*, standing alone, is only exculpatory as to the earlier homicide. True again, the *profile reports*, standing alone, only cast "a conjectural inference" that Bailey might not have committed the later homicide because he might not have committed the earlier homicide. True finally, for the sake of deference, the profile reports *and* the fact that Bailey was ten at the time of the earlier homicide, may not be sufficiently relevant, particularly if the State argues that the reports support Bailey's guilt of the earlier crime, despite his age. *See supra* note 6; *see also* McCord, *Admissibility of Evidence Offered by a Criminal Defendant*, *supra*, at 949 ("Defendants claiming exculpation via propensity evidence regularly lose by failing to *negate the possibility* that they perpetrated the other offenses." (emphasis added)). However, as demonstrated above, the reports (given the fingerprint analysis "negate[d] the possibility," *see* McCord, *supra*, at 949, that Mr. Bailey committed the earlier crime) have great probative value and are exculpatory for Mr. Bailey as to the *second murder* and his trial.

Since the "the reviewing court may consider directly *any adverse effect* that the prosecutor's failure to respond *might have had* on the . . . presentation of the defendant's case," *Bagley*, 473 U.S. at 682 (emphasis added), this Court concludes that the profile reports *and* fingerprint analysis, married together, are exculpatory as to *both* the earlier *and* the later homicides. On this, yet again, "fairminded jurists could [not] disagree." *Harrington*, 562 U.S. at 101. The next question, then, is whether the suppression of exculpatory evidence can "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, 527 U.S. at 290 (quoting *Kyles*, 514 U.S. at 435).

3. Prejudice ensued; Mr. Bailey did not receive a fair trial.

The Court concludes that Mr. Bailey did not receive a constitutionally sound trial, *see Crane*, 476 U.S. at 690, because in retrospect, given the suppressed evidence, Mr. Bailey did not have "a meaningful opportunity to present a complete defense." *Id.*; *accord Holmes*, 547 U.S. at 331.[7] However, in order to demonstrate prejudice under *Brady*, the Court still must look to whether the fingerprint analysis can "reasonably be taken to put the whole case in such a different light to undermine confidence in the verdict." *Strickler*, 527 U.S. at 290

[7] Perhaps in a small way, the Court's holding in *Holmes*, 547 U.S. at 329 is in tension with the third prong under *Brady*. In *Holmes*, the Court confirmed that the right to present evidence of third-party guilt is absolute, and evidentiary rules that measure the strength of the evidence of third-party guilt against the strength of other evidence in the case are unconstitutional. By contrast, in order to satisfy the prejudice prong for a *Brady* analysis, a court must implicitly look to the relative strength of the rest of the evidence.

What happens, then, when the effect of suppression was to deprive an individual of his right to present a complete defense in contravention of *Holmes*, 547 U.S. at 329? *Must* the Court still look to the relative strength of other evidence for prejudice under *Brady* when it would be *prohibited* from doing so at the outset under *Holmes*? If so, and the prosecution had virtually indisputable forensic evidence (like the facts in *Holmes*), then could it be said that a *Brady* violation did not occur when probative evidence of third-party guilt was nonetheless suppressed, like in *Holmes*? This would seem to have the unfortunate result of encouraging suppression of any evidence of third-party guilt in cases where the prosecution otherwise presented very strong evidence of guilt. Thankfully, this case does not present such a quandary.

(quoting *Kyles*, 514 U.S. at 435). In some ways, that test reads harsher than it is. Put another way, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 289–90.

The Court must emphasize that the strength of the State's case against Bailey was relatively weak—and certainly much weaker than the case in *Holmes*, 547 U.S. at 319 (a case with "strong forensic evidence"), where the Supreme Court found that the defendant's right to introduce third-party guilt had been abridged.[8]

The State itself in its charging document announced: "The case against Defendant is largely circumstantial in nature." (ECF No. 58-1 at PageID.522.) The Court agrees—and concludes that the circumstantial evidence was not even cumulatively *strong*. Further, each card in the deck was stacked against Mr. Bailey, from a questionable decision admitting 404(b) evidence to the ruling foreclosing him from pointing the finger elsewhere.

Consequently, it's not hard to see how a juror may have found a "reasonable doubt" existed in light of probative evidence, for example, that the same signature of someone other than Mr. Bailey was left at two crime scenes linked by expert profile reports. *See* Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:37 (4th ed. 2013) ("Since the prosecutor bears the burden of proving guilt beyond a reasonable doubt, which includes proving that the *defendant* did the deed (and not someone else), arguably even slight evidence pointing toward another as the guilty party might raise a reasonable doubt.").

[8] In fact, in *Holmes*, the appellant was entitled to a new trial because he did not get to introduce a probative piece of third-party-guilt evidence, despite the fact that the prosecution's other forensic evidence was nearly overwhelming.

Of course today, Mr. Bailey could also point at the person who has since been convicted of the Lintemuth homicide. *See infra* Part IV.A.iv.3.

Nevertheless, the failure to disclose the fingerprint analysis left the Court of Appeals (on direct appeal) to find no abuse of discretion in the profile reports' exclusion because the reports (without the fingerprint analysis) raised only a "conjectural inference" that Person B did not commit Crime 2. *See supra* note 6. That ruling, absent the *Brady* evidence, might be a ruling entitled to AEDPA deference (though a very close call given Mr. Bailey's age). *Cf.* McCord, *Admissibility of Evidence Offered by a Criminal Defendant*, *supra*, at 949 ("Defendants claiming exculpation via propensity evidence regularly lose by failing to *negate the possibility* that they perpetrated the other offenses." (emphasis added)).

The Court need not, however, definitively decide whether the state courts erred, as a constitutional matter, in a world without the suppressed evidence.[9]

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[9] In rejecting Mr. Bailey's third-party guilt claim on direct appeal, the Court of Appeals held, in relevant part:

> In *People v. Kent,* 157 Mich. App. 780, 793; 404 N.W.2d 668 (1987), this Court stated that "evidence tending to incriminate another is admissible if it is competent and confined to substantive facts which create more than a mere suspicion that another was the perpetrator."
>
> Here, defendant is not relying on any direct evidence that another person committed the murder, e.g., someone else was seen driving the victim's car after the killing, someone else was seen entering the home, or someone else made an inculpatory statement. Rather, defendant is arguing that the 1980 murder indirectly shows that someone else committed the charged murder because the same perpetrator necessarily had to be involved in both killings, given the similarities between the crimes. While it may be arguable on some level, we find no abuse of discretion with respect to the trial court's evidentiary ruling. Under the circumstances presented, and considering the similarities between the crimes as well as the differences, a reasonable and principled decision would include one that finds nothing more than the creation of mere suspicion, a conjectural inference, excessive remoteness, or an inadequate connection. Accordingly, reversal is unwarranted.

People of the State of Mich. v. Bailey, 2007 WL 2141362, at *7–8 (July 26, 2007) (per curiam).

We can infer that the Court of Appeals found the profile reports combined with Bailey's age at the time of the earlier murder were not sufficiently "probative," but neither the trial court nor the Court of Appeals discussed any risk of confusion, harassment, or prejudice. And it's difficult to see how the subject matter in the reports would have had any such adverse effect.

However, in a universe where the fingerprint analysis was disclosed, the analysis would have been the logical lynchpin for *requiring* the trial court to admit the evidence together,

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Regardless, while the Court of Appeals announced an otherwise acceptable evidentiary rule, it appeared to apply the rule in an unacceptable, restrictive manner just like the state courts in *Holmes*.

The Court of Appeals laid out its evidentiary standard—one relatively low in the third-party guilt context—that excludes evidence that creates "a mere suspicion that another was the perpetrator." However, at the outset of its analysis, the Court of Appeals criticized Mr. Bailey's argument because he was not "relying on any *direct* evidence that another person committed the [Pine] murder . . ." *Id.* (emphasis added). The Court reasoned that "defendant is arguing that the 1980 murder *indirectly* shows that someone else committed the charged murder because the same perpetrator necessarily had to be involved in both killings, given the similarities between the crimes." *Id.* (emphasis added). The Court then acknowledged that Bailey's contention was "arguable on some level," but without any further analysis, concluded: "[W]e find no abuse of discretion with respect to the trial court's evidentiary ruling" because "a reasonable and principled decision would include one that finds nothing more than the creation of mere suspicion, a conjectural inference, excessive remoteness, or an inadequate connection." *Id.*

The Court of Appeals implied that only "direct" (and not "circumstantial"?) evidence would suffice. But the State itself in its charging document announced: "The case against Defendant is largely circumstantial in nature." (ECF No. 58-1 at PageID.522.) And the Court more or less *assumed* that Bailey had, in fact, tried to present "indirect" evidence of his innocence (or third-party guilt), but found that insufficient because he had, at most, only "*indirectly* show[n] that someone else committed the charged murder," instead of providing "direct evidence that another person committed the [charged] murder . . . ." Bailey, 2007 WL 2141362, at *8. Confining a defendant to only producing "direct evidence that another person committed the murder" is likely too restrictive to survive constitutional muster, even with AEDPA deference. There is a wide swath of evidence between that which creates "mere suspicion" and "direct evidence that another person committed the murder." The Court of Appeals thus turned the analysis for whether the evidence is *probative* on its head, requiring a "smoking gun."

An FBI report, prepared in the context of the investigation of the *Pine* homicide, that concludes "one offender is most likely responsible for both crimes" (ECF No. 61-3 at PageID.628)—along with the fact that Bailey was ten-years-old at the time of the earlier crime—likely "raises a reasonable inference as to the defendant's own innocence." *Holmes*, 547 U.S. at 319. That evidentiary package itself does not have to "suffice" to overcome other evidence; and the evidence by itself does not have to raise a "reasonable doubt" so as to demand acquittal as a whole. The evidence of third-party guilt must be analyzed "independently" for "probative value," "undue risk of harassment, prejudice or confusion of the issues." *Id.* at 329.

Moreover, the evidence *excluding* Bailey, while not *directly* implicating a specific party, rises to a level of more than "mere suspicion" given the fact that the FBI report "document[ed] and detail[ed] multiple similarities between the victims' characteristics and deaths," *Bailey*, 2007 WL and concluded that "one offender is most likely responsible for both crimes." (ECF No. 61-3 at PageID.628.)

Finally and most importantly, Mr. Bailey and all the state judges were unaware of the fingerprint analysis that excluded Mr. Bailey from the 1980 crime. By contrast, the Court of Appeals only had the State's dishonest representation that Mr. Bailey could have been responsible for the 1980 murder, when it knew that he was, in fact, not responsible for that murder.

Thus, even if the Court of Appeals did not commit reversible error on the available facts under *Holmes*, the Court of Appeals would have reached a different conclusion with forensic evidence definitively excluding Bailey from the 1980 murder. And of course, given the evidence masked from a *Brady* violation, the reports together with the fingerprint analysis together "undermine confidence" in the verdict.

because a defendant must have "a meaningful opportunity to present a complete defense." *See Holmes*, 547 U.S. at 324 (quoting *Crane*, 476 U.S. at 690).

Armed with the fingerprint analysis from the outset,[10] the state courts would have had to permit Mr. Bailey to present the profile reports (or at least the content of the reports in some form, *see infra* Part IV.iv.1) and fingerprint analysis together as *probative* evidence—"probative" (balanced against "potential adverse effects"), after all, is the constitutional floor, *see Holmes*, 547 U.S. 329—that may have cast a reasonable doubt that Mr. Bailey's signature was left at both scenes. In response to Mr. Bailey's motion for relief from judgment, the trial court's *Brady* analysis—to the extent it was even done—was clearly "contrary to" *Brady* and its progeny and *Holmes*, and it was based on an "unreasonable determination of the facts."

iv. Other Ancillary Evidentiary Issues

At oral argument, the State proffered three additional objections to Mr. Bailey's *Brady* claim: 1) the evidence of the other crimes would not have been admissible regardless of the third-party guilt angle, because the reports themselves would have been inadmissible for other reasons including, for example, lack of reliability under *Daubert*; 2) the differences in the crimes would have nonetheless made evidence of the prior homicide not admissible; and 3) Scott Graham, the individual eventually convicted of the earlier, Lintemuth murder was not a plausible suspect for the later, Pine murder.

[10] While that conclusion is debatable in light of Mr. Bailey's age, *see supra* notes 6, 9—indeed, the Court of Appeals still found the issue "arguable" the first time around—the State argued to the Court of Appeals that the reports supported Mr. Bailey's identity as the perpetrator in the earlier crime, despite his age. That argument could never have been advanced to the Court of Appeals if the fingerprint analysis had been disclosed. While it's difficult to conclude what weight the Court of Appeals placed on that particular argument, the State demonstrated bad faith and is not entitled to any particular benefit of the doubt in that regard. Further, as Mr. Bailey's counsel pointed out during oral argument, the State requested the fingerprint analysis even when it *knew* about Mr. Bailey's age at the time of the first murder.

The Court finds that the State has waived these arguments because it did not develop any of those arguments in its response to the amended petition. (*See, e.g.*, ECF No. 67 at PageID.903 ("[T]he State would add the following comment to its original Answer. . . . [In response to Petitioner's motion for relief from judgment], the prosecution points out that the profiles were hedged with several disclaimers and also shows that the two murders are not as similar as might appear at first blush. It is also noted that the profiles themselves would have been inadmissible leaving defense counsel to only argue the similarities, such as they were."); *cf. United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) ("[I]t is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). The State does not even assert why, for example, the reports would have been "inadmissible" for all purposes—and Graham is not referenced.

Nonetheless, the Court will briefly respond to those concerns.

1. Admissibility of the Reports or Subject Matter in the Reports

First, and most importantly, the constitutional right to "present a complete defense" trumps applications of state evidentiary rules in certain contexts. *See Holmes*, 547 U.S. at 326. The Constitution effectively creates a floor—a defendant must be allowed to present "relevant evidence" of third-party guilt, provided that the evidence is not, for example, "repetitive" and does not "pose[] an undue risk of harassment, prejudice, [or] confusion of the issues." *Id.* (citing *Crane*, 476 U.S. at 689–90). Accordingly, to the extent the unacceptable extension of an otherwise acceptable state rule infringes upon a defendant's right to present a complete defense, the rule as extended must yield to the constitutional floor. *See id.*; *cf.* Stephen Michael Everhart, *Putting a Burden of Production on the*

Defendant Before Admitting Evidence that Someone Else Committed the Crime Charged: Is it Constitutional?, 76 Neb. L. Rev. 272 (1997) ("Although these courts use the language of the 'relevancy rules' when discussing the relevancy test, in effect they look to the weight and the sufficiency of the evidence in connecting the third party with the crime charged.").[11]

Second, assuming relevancy (which is undeniable) and, for example, a lack of prejudice (there is none), at least one of several evidentiary avenues would require, if not the reports themselves, at least the reports' *contents* to be admitted through in-court testimony of the authoring witnesses. After all, the state courts did not only refuse to admit the reports—Mr. Bailey was not allowed to even *reference* the other murder or the similar circumstances or signature evidence. Whether the reports themselves were formally admitted alone misses the broader constitutional problem with the exclusion of what is contained *in* the reports—by the trial court's ruling, Mr. Bailey was not allowed to refer to another murder that left the same or similar signature in a small area of a small West Michigan town.

When a report, such as the FBI Quantico report in this case, is based on "specialized knowledge" and opines on crime scene signatures, or "modus operandi," the report's *author* may be called to testify to his opinions at trial. *See, e.g.*, *People v. Prince*, 156 P.3d 1015, 1045 (Cal. 2007) (holding an FBI special agent from the National Center for the Analysis of Violent Crime—the same Center that submitted the report in Mr. Bailey's case—could "testify

[11] In practice, this means that the defendant typically faces a lower bar than the prosecution when it comes to 404(b)-type evidence, for example, in large part because of the constitutional consideration of a defendant's right to present evidence of third-party guilt. *See* Mueller & Kirkpatrick, *supra*, § 4:37 ("[D]efense proof of third-party acts or crimes should be admissible if they have significant features in common with the charged offense, even though the resemblance is not so extensive, and the common features are not so rare or unique, that they satisfy the 'signature' standard that applies when such evidence shows the defendant's prior crimes or acts and is offered to prove guilt on a *modus operandi* theory.").

as an expert on crime scene analysis and 'signature crimes'") ("[I]t may aid [jurors] to learn from a person with extensive training in crime scene analysis, who has examined not only the evidence in the particular case but has in mind his or her experience in analyzing hundreds of other cases, whether certain features that appear in all charged crimes are comparatively rare, and therefore suggest in the expert's opinion that the crimes were committed by the same person."); *see also* McCormick on Evidence § 13 (7th ed. 2016) ("[T]he courts frequently allow experienced police officers to testify on such topics as the modus operandi for various crimes . . . ."); *cf.* David C. Ormerod, *The Evidential Implications of Pyschological Profiling*, 1996 Crim. L. Rev. 863, 879 ("The question can be posed as follows: Does the fact that an expert witness is of the opinion that a specific person other than the accused is more likely to be the perpetrator make it more or less likely that the accused committed the crime? It is submitted that, subject to the arguments about reliability . . . the evidence is sufficiently relevant.").

While usually "crime scene" experts are called by the prosecution, Mr. Bailey could call the authoring agents to testify as to their conclusions that cast doubt on Mr. Bailey's guilt—and suggest the signature of someone else was left at both crime scenes; of course, the reports could then be used for recollection or impeachment purposes, as necessary. *See* Mueller & Kirkpatrick, *supra*, § 4:37 (discussing "impeachment by contradiction").

In addition, similar factual evidence of the prior murder could potentially be admitted as a type of reverse-404(b) evidence, even without the reports themselves. *Cf. People v. Major*, 285 N.W.2d 660, 663 (Mich. 1979) ("The distinguishing, peculiar or special characteristics which are common to the acts and thus personalize them are said to be the

defendant's 'signature' which identifies him as the perpetrator, or, if his identity is not contested, negates the suggestion that his behavior in performing the challenged act was unintended, accidental, a mistake, or otherwise innocent.").

But the state courts foreclosed any opportunity to Mr. Bailey, holding that any "reference" to the earlier, similarly signed murder was barred.

Moreover, at least the FBI report *itself* would probably be admissible under one of the many exceptions to the hearsay rule. The first avenue is MRE 803(8)(B).

"Consistent with the intent of Congress, FRE 803(B) should be interpreted to allow the introduction of police reports of matters observed pursuant to duty *when offered by a criminal defendant*." *Solomon v. Shuell*, 457 N.W.2d 669, 686 n.7 (Mich. 1990) (Boyle, J., concurring, but writing for a majority of four justices in this part) (emphasis in original) (citing *U.S. v. Smith*, 521 F.2d 957 (D.C. Cir. 1975)); *see id.* at 686 n.9 ("Substantial federal authority holds that routine police reports made in a nonadversarial setting are admissible in criminal cases as well . . . ."). This is because "[t]he history of parts (B) and (C) of FRE 803(8) evidence no intent to exclude routine reports that might be generated during a police investigation, but rather to preclude the admission of reports which might *endanger the confrontation rights of a criminal defendant*." *Id.* (Boyle, J., concurring) (emphasis added); *see People v. Stacy*, 484 N.W.2d 675, 683 (Mich. Ct. App. 1992) ("Rule 803(8)(B)'s prohibition of the use, in criminal cases, of writings reflecting certain matters observed by law enforcement officers is premised upon the concern for a criminal defendant's confrontation rights."); *see also U.S. v. Oates*, 560 F.2d 45, 69 (2d Cir. 1977) ((quoting 120 Cong. Rec. 2389 (1974) (statement of Rep. Dennis)) (noting the amendment was introduced because "in

a criminal case[,] the defendant should be confronted with the accuser to give him the chance to cross examine").

When a criminal *defendant* seeks to introduce police reports, concerns regarding trustworthiness, prejudice, and the Confrontation Clause vanish.[12] Most (if not all) jurisdictions that have considered this issue allow defendants to introduce reports under the equivalent of MRE 803(8)(B). *See* 2 McCormick on Evidence § 296 (7th ed. 2016) ("However, the language of [FRE 803(8)(A)(ii) (the equivalent to MRE 803(8)(B))] appears to prohibit the admission of all records of matters observed in criminal cases, which, if read literally, would exclude use by the defense as well as the prosecution. This meaning is not what Congress had in mind, and the cases have construed the provision to permit the defendant to introduce police reports under (A)(ii)."). And the Michigan Supreme Court, at least through Justice Boyle's dicta, appears to agree. *Shuell*, 457 N.W.2d at 686 n.7.

Likewise, MRE 803(6) provides a possible avenue for admission because these particular reports were not, for example, "prepared for use in litigation." *Attorney General v. John A. Biewer Co., Inc.*, 363 N.W.2d 712, 720 (Mich. Ct. App. 1985); *see, e.g., U.S. v. Carneglia*, 256 F.R.D. 384, 391 (E.D.N.Y. 2009) (collecting cases) ("A criminal defendant may offer police reports under the business records hearsay exception in Federal Rule of Evidence 803(6).") In fact, the profile reports were prepared nearly two decades prior to Mr. Bailey's trial as a part of the ordinary course of crime scene analysis.

[12] And other constitutional concerns, such as a defendant's right to introduce probative evidence of third-party guilt, come into play.

Finally, with respect to reliability, the Michigan Court of Appeals more or less assumed the trustworthiness of the reports as given on direct appeal. The starting point of that court's analysis was the relevance of the contents in the reports to Mr. Bailey's trial. Without knowledge of the fingerprint analysis, the Court concluded that the profile reports were simply not relevant in a trial for Crime 2. In light of the fingerprint analysis, however, it would be utterly illogical to conclude the profile reports were not "relevant." *Holmes*, 547 U.S. at 326; *see supra* Part IV.A.ii.2. Even if the state courts chose, for whatever reason, to hedge on the "relevance" question on 404(b) grounds, the *jury* would probably have to resolve the conditional factual questions. *Cf.* McCormick on Evidence § 53 (7th ed. 2016) (citing *Huddleston v. U.S.*, 485 U.S. 681 (1988) ("In *Huddleston*, the Court held that Rule 104(b) governs the foundational question of whether the accused committed an act of uncharged misconduct proffered under Rule 404(b), for example, another murder allegedly committed with the same distinctive modus operandi.").

All of this is to say that the admissibility of the reports or the underlying facts contained therein is not, as the State suggested at oral argument, in any grave doubt. To the contrary. At bottom, though, the State has waived any objection to the admissibility of grounds other than relevance, and Mr. Bailey is entitled to the full slate of evidentiary bases to admit evidence of the other murder, including the fact that a reliable report based on specialized knowledge of a special agent suggests that someone other than Mr. Bailey's signature was left at the crime scene. These evidentiary issues will ultimately be decided by the state trial judge—this time with all of the information available to the prosecution.

2. The alleged differences between the crime scenes.

In response to the State's second argument—the alleged differences in the two murders—the Court will note that the proffered differences do not exist, at least according to the report. (*See, e.g.*, ECF No. 61-3 at PageID.627 ("[N]o sexual assault of either victim could be established.") ("No ransacking of either resident was evident, and no theft of property from either victim could be established."); PageID.628 ("There is no apparent theft motive displayed in either case.")); *see also supra* note 1.

And several "signature" or "unique" elements were common to the senseless day-time murders of two elderly women whose residences were close in proximity in a small town in West Michigan. (*See, e.g.*, ECF No. 61-3 at PageID.627 (noting "[i]n each case, an electrical cord was wrapped around the neck or face of the victim, but served no apparent useful purpose insofar as cause of death is concerned") (noting that the weapons used were positioned on or near each of the victims' bodies, and "the significance [of the parallel positioning] would be known only to the [single] offender") (noting "[t]he weapons used in both offenses were weapons of opportunity obtained from the victims' homes") (noting "[t]here is no apparent theft motive displayed in either case").)

The general rule, at least for the prosecution, is that "crimes must be so similar as to be a 'signature' of the defendant"; "[i]t is not necessary, however, that the crimes be identical in every detail." *U.S. v. Hamilton*, 684 F.2d 380, 385 (6th Cir. 1982).

And it's difficult to see how the alleged differences—to the extent they even exist—would go to the admissibility of the evidence. Since the crime scenes arguably reflect the same signature, any differences would go to the weight, and not admissibility, of the evidence.

3. Scott Graham's plausible role in the second murder.

Of course, in some respects, *Brady* "prejudice" arguably could not be shown if Scott Graham—the individual convicted of the earlier murder—was forensically excluded from the later murder, just as Mark Bailey was forensically excluded from the 1980 murder. The logical basis for admitting evidence of the earlier homicide—including the expert reports—assumes that the individual whose signature was left at the earlier crime scene could have plausibly left his signature at the later crime scene. Otherwise, if Scott Graham was definitively excluded from being implicated in the later murder (e.g., he was incarcerated at the time), the reports and fingerprint analysis would arguably have zero relevance.

After oral argument, the State submitted a letter noting that "[t]here is no evidence [Scott Graham] ever visited Michigan after April of 1980," based upon the case file of the Lintemuth homicide. (ECF No. 94 at PageID.1024.) As Mr. Bailey notes, this is not evidence "excluding" Mr. Graham's involvement in the Pine homicide. (ECF No. 100 at PageID.1031.) The fact that Mr. Graham was living out of state at the time of the later murder does not render any evidence *irrelevant*—it would simply go to the weight of the third-party guilt evidence. (And it probably would not even attack the weight of the evidence with much force—Mr. Graham, after all, was also living out of state at the time of the 1980 murder.) Unless the State could show beyond peradventure that Mr. Graham could not have committed the later murder, Mr. Bailey has a constitutional right to point the finger in Mr. Graham's direction.

v. Conclusion: Right to Present a Complete Defense & Third-Party Guilt

For the reasons stated above, Mr. Bailey's objections to the Magistrate Judge's Report and Recommendation as to Issue I are **SUSTAINED**; the Magistrate Judge's Report is **ADOPTED IN PART** and **MODIFIED IN PART** and his Recommendation is **REJECTED** as to Issue I. Mr. Bailey is entitled to a new trial based upon the *Brady* violation in this case, which resulted in a deprivation of Mr. Bailey's right to present a complete defense and when analyzing the case as a whole, undermines the confidence in the verdict.

B. Petitioner's Right to Effective Assistance of Counsel

Mr. Bailey has preserved essentially two arguments with respect to ineffective assistance of counsel: 1) the failure to timely object to "prejudicial and improper testimony by footprint experts"; and 2) the failure to call expert rebuttal witnesses.

To establish an ineffective assistance claim, the petitioner must prove: (1) that counsel's performance performed below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally fair outcome. A court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The petitioner bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *see also Nagi v. United States*, 90 F.3d 130, 135 (6th Cir. 1996) (noting that counsel's strategic decisions were difficult to attack). The Court must determine whether, in light of the circumstances as they existed at the time of

counsel's actions, "the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

Moreover, as the Supreme Court has observed, while "'surmounting *Strickland*'s high bar is never an easy task,' . . . [e]stablishing that a state court's application was unreasonable under § 2254(d) is all the more difficult." *Harrington*, 562 U.S. at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). This double deference is an exceedingly high hurdle to meet. *Id.* at 105 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)) ("[W]hen the two apply in tandem, review is 'doubly' [deferential].").

On balance, as to these issues, the Magistrate Judge's Report and Recommendation is correct in all respects. (ECF No. 83 at PageID.972–977.)

As to the first issue, any objection to the testimony would have been without merit under state law because the all of the testimony with respect to the footwear impressions were admissible as personal observations under MRE 701. (*Id.* at PageID.973–74.)

With respect to the second issue, the Court finds that while a close call, the failure to call the witnesses fell within the realm of acceptable strategy. As the Magistrate Judge noted, "the[] expert testimony could have harmed Petitioner's case by calling attention to their conclusions that footprints at the scene of Ms. Pine's death corresponded to a shoe of the same size and type as Petitioner's." (*Id.* at PageID.976.)

As the Magistrate Judge noted, "Petitioner identifies no Supreme Court case in which causal prejudice has been presumed where defense counsel is present during the proceedings but offers expert reports in lieu of expert testimony, and proceeds to elicit a favorable

concession during cross-examination of the government's expert witness." (*Id.* at PageID.976–77.)

While perhaps not the model of effective assistance, any criticism of the trial tactics with respect to these two issues does not suffice to reverse the state courts in an area with "double deference." *See Harrington*, 562 U.S. at 105.

Mr. Bailey's objections as to Issue II are **OVERRULED**; the Magistrate Judge's Report and Recommendation as to Issue II is **ADOPTED**.

C. Petitioner's Right to Due Process for Excluding "Other Acts Evidence"

Bailey has a final objection that the evidence of Bailey's prior burglaries were admitted in error. When an evidentiary ruling is "so egregious that it results in a denial of fundamental fairness, it may violate due process and warrant federal habeas relief." *Bush v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003).

Admitting the prior burglaries as evidence certainly prejudiced Mr. Bailey. However, the trial court found the evidence to be more probative than prejudicial to a common "scheme, plan, or system relative to the burglaries." "[T]here is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). Likewise, "[t]here is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Id.*

The Court is concerned that the trial judge did not carefully evaluate whether the evidence supported a *common* "scheme, plan or system." The FBI's profile report, for example, concluded:

> There is no apparent theft motive displayed in either case. Items that cannot be located, however, such as two rings and a pendant belonging to Mary Pine, may have been taken by the offender. If such is, in fact, the case, the reason for taking such items would likely be related to souvenirs for his own use in re-experiencing the event, rather than for financial gain.

(ECF No. 61-3 at PageID.628.) If true, "[t]here was no apparent theft motive displayed in [the Lintemuth homicide]," *id.*, there obviously would have been an insufficient basis for admitting what is otherwise very prejudicial prior-acts evidence—and the State's entire theory of the case would have been called into question. *See supra* note 2. At Mr. Bailey's re-trial, the trial court should endeavor to evaluate this evidentiary ruling anew.

On balance, however, the Court cannot conclude that this evidentiary ruling was unconstitutionally "egregious," because first, "there is no clearly established Supreme Court precedent," *Bugh*, 329 F.3d at 512, to bar the admission of such evidence, and second, the trial court gave a sufficient curative instruction to the jury. (ECF No. 76.)

Accordingly, Mr. Bailey's objection as to Issue III is **OVERRULED**; the Magistrate Judge's Report and Recommendation as to Issue III is **ADOPTED**.

V. CONCLUSION

The Court will conclude by summarizing the State's absurdities in this case: the State requested profile reports in the context of investigating the later of two murders that the report found left the same or similar signatures at each scene; the reports concluded it was

likely the same person committed both crimes; the State nonetheless argued that the reports cast "bare suspicion" on Bailey's guilt in state court; but the State hid the fact that Bailey was forensically excluded from the earlier homicide while simultaneously arguing that the reports "arguably support[ed]" Bailey's guilt of the earlier homicide to the state appellate courts. The State now argues on one hand, the issue of third-party guilt was (retroactively) waived, but on the other, the *Brady* violation was not prejudicial because the Court of Appeals correctly concluded on the merits that the evidence of "third-party guilt" was "mere suspicion." Of course, however, neither the trial judge nor the Court of Appeals had the benefit of the fingerprint analysis in the first place and was only left with a blatantly misleading representation.

While the state trial court, when considering Mr. Bailey's *Brady* claim on a motion for relief from judgment, unfortunately accepted all of the State's arguments, that court's order was "contrary to" clearly established case law and erroneously misread the factual record.

The State's evidentiary gymnastics, particularly in the context of a *Brady* violation, must be rejected. If the State's circular reasoning won the day, a ruling would encourage prosecutors not to disclose probative evidence that is necessary for a defendant to have a "meaningful opportunity to present a complete defense."[13]

[13] In this case, if the Court held the failure to disclose the fingerprint analysis was not a *Brady* violation because the fingerprint analysis *alone* was not exculpatory, such a ruling would encourage the State to withhold just enough evidence to not trigger *Brady*, but disclose not quite enough evidence to allow a defendant to present a complete defense, as would be his constitutional right. The withheld information and the disclosed information together would have, in this unique case, created a different evidentiary outcome—allowing Mr. Bailey to present a complete defense—and casted the entire case in a different light.

ORDER

For the reasons contained in the accompanying opinion, the Court **ADOPTS IN PART** and **MODIFIES IN PART** the Magistrate Judge's Report, and the Court **REJECTS IN PART** and **ADOPTS IN PART** the Magistrate Judge's Recommendation. (ECF No. 83.)

The Court **GRANTS** Petitioner Mark David Bailey's amended petition (ECF No. 57) and **ISSUES** a conditional writ of habeas corpus on Petitioner's first claim. Petitioner's conviction will be vacated and the State of Michigan shall release Petitioner from custody unless he is retried within ninety days from the issuance of this writ.[14]

IT IS SO ORDERED.

Date: September 20, 2016

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

[14] "The District Court has power, in a habeas corpus proceeding, to "dispose of the matter as law and justice require." 28 U.S.C. § 2243. "Under the predecessors of this section, this court has often delayed the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that defects which render discharge necessary may be corrected." *Irvin v. Dowd*, 366 U.S. 717, 729 (1961) (citing *Mahler v. Eby*, 264 U.S. 32, 46 (1924)).

APPENDIX C

Opinion and Order

May 10, 2011

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MECOSTA

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

Hon. Scott Hill-Kennedy
Chief Circuit Court Judge
File No. 04-5394-FC

MARK DAVID BAILEY,

Defendant.

/

Peter M. Jaklevic (P49075)
Mecosta County Prosecutor
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Helen C. Nieuwenhuis (P41672)
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/

OPINION AND ORDER

FACTS AND PROCEDURAL HISTORY

On July 29, 2005, after a jury trial, Defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b), arising from the February 1989 killing of 79-year-old Big Rapids resident Mary Pine. The trial court sentenced defendant to life imprisonment without parole for one count of first-degree murder.

Defendant appealed his conviction to the Michigan Court of Appeals arguing, among other things, that the trial court erred when it excluded evidence concerning the then-unsolved 1980 murder of Stella Lintemuth and the related Third-Party Guilt theory. *People v Bailey*, 2007 WL 2141362 *7 (Mich App 2007). On July 26, 2007, the Michigan Court of Appeals rejected Defendant's Third-Party Guilt claim holding that, although police profiles provided by the FBI and the Michigan State Police noted "several similarities" between the two killings, there was not enough direct evidence that another person committed the murder to find that the trial court abused its discretion in excluding the evidence. *Id.* at *8. The Court of Appeals found that "[u]nder the circumstances presented, and considering the similarities between the crimes as well as the differences, a reasonable and principled decision would include one that finds nothing

more than the creation of mere suspicion, a conjectural inference, excessive remoteness, or an inadequate connection." *Id.*

Subsequently, on February 19, 2008, Defendant's application for leave to appeal to the Michigan Supreme Court was denied. On May 19, 2009, Defendant filed a Petition for Habeas Corpus. While Defendant's Habeas Petition was pending, Scott Elwood Graham was charged and convicted for murdering Stella Lintemuth. During the course of reviewing the file, Appellant counsel discovered that in 1989, Defendant's fingerprints were found to not match fingerprints found at the murder scene of Stella Lintemuth. Defendant maintains that the failure of the prosecution to disclose this fact constitutes a violation of the governments duty to disclose exculpatory evidence under *Brady v Maryland*, 373 US 83, 87 (1963). On October 22, 2010, the United States District Court, Western District of Michigan entered a stay upon Defendant's Habeas Petition so that Defendant could have an opportunity to exhaust his *Brady* claim in the state courts. On November 22, 2010, Defendant filed a Motion for Relief from Judgment/Motion to Set Aside or Modify Judgment with this Court.

Following a thorough review of both the briefs and the expanded record in this matter, Defendant's Motion for Relief from Judgment/Motion to Set Aside or Modify Judgment is denied for the reasons stated below.

LAW & ANALYSIS

A motion for relief from judgment under MCR 6.500 *et seq* is available to a criminal defendant who has exhausted all other options in the appellate process. MCR 6.502(C) states the procedural requirements for this motion. Defendant has met these requirements. This Court did not initially deny Defendant's motion pursuant to MCR 6.504(B)(2), and exercised its authority granted under MCR 6.507 to allow the parties to expand the record to be considered. Pursuant to MCR 6.508(B), after reviewing the motion and response, the record, and the expanded record, this Court finds that an evidentiary hearing and oral argument is not necessary, and will rule on the motion.

MCR 6.508(D) states that the "defendant has the burden of establishing entitlement to the relief requested." This rule also prohibits a court from granting relief to a defendant if the motion "alleges grounds for relief which were decided against the defendant in a prior appeal ... unless the defendant establishes that a retroactive change in the law has undermined the prior decision." MCR 6.508(D)(2). Additionally, a court may not grant relief on any ground "which could have been raised on appeal from the conviction and sentence ... unless the defendant demonstrates: (a) good cause for failure to raise such grounds on appeal or in the prior motion, and (b) actual prejudice from the alleged irregularities that support the claim for relief." MCR 6.508(D)(3).

The Court Rule provides that "actual prejudice" means that "in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal" or that there existed an irregularity "so offensive to the

maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR. 6.508(D)(3)(b)(i) and (iii). Finally, a court "may waive the "good cause" requirement ... if it concludes that there is a significant possibility that the defendant is innocent of the crime."

As a preliminary matter, this Court examines whether Defendant properly preserved for appeal the admission of the Stella Lintemuth Homicide at trial. The Prosecution argues that this Court should not reach the merits of Defendant's *Brady* claim because he relies on documents not contained in the record and arguments – a Third-Party Guilt theory – not preserved at trial for appeal.

MCR 7.210(A)(1) states that in "an appeal from a lower court, the record exists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced." "The substance or transcript of excluded evidence offered at a trial and the proceedings at the trial in relation to it must be included as part of the record on appeal." MCR 7.210(A)(3). "Exhibits offered on appeal that were either not offered below or were excluded by trial court from settled record on appeal were not properly part of record on appeal." *Dora v Lesinski*, 351 Mich 579, 88 NW2d 592 (1958). Indeed, an appellate court on appeal will neither review nor consider matters outside the appeal record but instead will consider only those matters included in the record. *Masella v Bisson*, 359 Mich 512, 102 NW2d 468 (1960). In fact, an appellate court cannot go outside of the record even to save error. *Alderton v Wright*, 81 Mich 294, 45 NW 968 (1890); *See also Lake Oakland Heights Park Ass'n v Waterford Tp., Oakland County*, 6 Mich App 229, 148 NW2d 248 (1967).

In this case, Defendant argues that the issue of third party guilt was not properly preserved for appeal and should not have been considered by the Michigan Court of Appeals because there is nothing in the record to suggest that trial counsel ever made a request for the admission of the 1980 Lintemuth homicide, including the police profiles comparing the similarities of the 1980 Lintemuth murder with the 1989 Pine homicide and noting that it is likely that a single killer was responsible for both. While it is true that the trial court did make a ruling on the issue of whether the Lintemuth homicide could be used as evidence by Defendant, this matter was presented by the People as a motion to exclude. There is no record of Defendant ever objecting to this exclusion, nor is there any record of Defendant seeking to admit the two police profiles at issue in this case at the trial level, despite the fact he possessed the reports at the time. The first time Defendant has mentioned or appears to have attempted to utilize the police profiles was when he attached them to his appellate brief. Consequently, the People argue that Defendant did not properly preserve this issue for review on Appeal. This Court agrees.

The issue of the admissibility of evidence of third party guilt was not preserved for appeal. Moreover, the police profiles first introduced on appeal to the Michigan Court of Appeals are not part of the record as they were never offered at or before trial. Therefore, Defendant's Motion for Relief from Judgment is denied because his claimed *Brady* violation is rendered moot because the police profiles central to this claim were

never introduced as part of the record on appeal, and the issue of third party guilt was not properly preserved at trial. Consequently, the particular set of fingerprints found at the scene of the Lintemuth murder and determined not to be Defendant's prints are irrelevant.[1]

There is a second preliminary matter that when considered alone is outcome determinative. The third party guilt theory was raised to and considered by the Michigan Court of Appeals. Despite the fact that the police profiles appear not to have been a part of the record on appeal, and therefore not properly before the Court of Appeals, the Court considered the reports in reaching its decision. That a set of fingerprints was found at the Stella Lintemuth crime scene and these fingerprints did not belong to Defendant are of so little impact that it does not undo the established fact that procedurally the third party guilt theory has been previously addressed by the Court of Appeals and therefore cannot be raised anew in a 6.500 motion.

Even if the issue of third party guilt were properly preserved and the police profiles at issue in this case were properly part of the record on appeal, Defendant's 6.500 Motion raising a claim of a *Brady* violation should be denied. To the extent that the issues raised by Defendant in his Motion for Relief from Judgment could not "have been raised on appeal from the conviction and sentence" because the information was not discoverable until Scott Graham was charged in 2005, the new information alleged as a *Brady* violation is not material in that it does nothing to disturb the decision against the defendant by the Court of Appeals concerning the admissibility of third party guilt.

Under *Brady*, the government has a duty in a criminal case to disclose evidence that is both favorable to the defense and material to a defendant's guilt or punishment. *Stickler v Greene*, 527 US 263, 280 (1999). The crux of Defendant's *Brady* claim is that the People did not turn over evidence that Defendant's fingerprints did not match fingerprints left at the Lintemuth homicide scene. The significance of this information flows directly from the conclusion that a single killer was responsible for the murders of both Mary Pine and Stella Lintemuth. However, it is for this reason that Defendant's 6.500 Motion raising a *Brady* violation should be denied. As stated by the Court of Appeals in denying Defendant's direct appeal in 2007, "there was not enough direct evidence that another person committed the murder to find that the trial court abused its discretion in excluding the evidence." *Bailey*, 2007 WL 2141362 at *8.

The addition of evidence showing that Defendant's prints did not match those left at the Lintemuth crime scene does not in any way strengthen Defendant's claim regarding third party guilt. It was after the Mary Pine trial that the set of fingerprints was shown to belong to Scott Graham. The fact that Defendant's fingerprints did not match a particular set of prints left at the Lintemuth crime scene is not material to Defendant's guilt or

[1] In response to Defendant's 6.500 Motion, the People have moved this Court to strike all claims about the record on appeal and to impose sanctions on Defendant's appellant counsel. This Court is disinclined to impose sanctions pursuant to MCR 2.114(D). Moreover, this Court will consider the arguments asserted by Defendant without striking them from his pleadings pursuant to MCR 2.115(B).

innocence because this does not show any direct evidence that a third party committed the murder in this case. Indeed, the only relevance of the conviction of Scott Graham for the Lintemuth murder and evidence showing that Defendant's prints did not match those left at the Lintemuth crime scene is directly related to the two police profiles. This additional evidence does nothing to affect the Court of Appeals holding that the police profiles or perceived similarities between the Lintemuth and Pine murders was not enough to bring evidence of third party guilt before the jury. It was not and is not because it continues to be the case that the set of fingerprints added to the other evidence creates no more than a "mere suspicion, a conjectural inference, excessive remoteness, or an inadequate connection" to support a claim that a third party was responsible for the murder of Mary Pine. *Id.*; See also *Holmes*, 547 US 319; *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987).

Finally, it is alleged that the Prosecutor violated its obligation under *Brady*. Upon review of the record generally, it is mere speculation to allege that such a violation occurred. There has been no claim that trial counsel for Defendant was ineffective for choosing not to pursue the admission of facts about the Lintemuth homicide. This Court finds the record does not support Defendant's *Brady* claim. Consequently, even if this Court held that the issue of third party guilt was preserved and that the police profiles were part of the record on appeal, Defendant's 6.500 Motion should be denied because his alleged *Brady* violation is without merit based upon a lack of relevance, no impact on an otherwise speculative connection, and mere speculation that *Brady* was in some manner violated.

CONCLUSION

Defendant's Motion for Relief from Judgment is denied.

IT IS SO ORDERED.

Dated: 5/10/11

Scott Hill-Kennedy

Hon. Scott Hill-Kennedy (P41542)
Chief Judge of the 49th Circuit Court

Certificate of Service

The undersigned certifies that on the date below a copy of the within Order was served upon the parties of record in this cause by first class mail or personal service to their respective addresses on record.

Dated: 5-10-11

Aaron D. Hanke (P74525)
Law Clerk

APPENDIX D

Michigan Court of Appeals Decision
July 26, 2007

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK DAVID BAILEY,

Defendant-Appellant.

UNPUBLISHED
July 26, 2007

No. 265803
Mecosta Circuit Court
LC No. 04-005394-FC

Before: Murphy, P.J., and Zahra and Servitto, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b), arising from the February 1989 killing of the victim, 79-year-old Big Rapids resident Mary Pine. The trial court sentenced defendant to life imprisonment without parole for one count of first-degree murder. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court improperly permitted the prosecutor to elicit other acts evidence for the purpose of showing his modus operandi or identity, in contravention of a pretrial ruling that the other acts evidence of defendant's burglaries was admissible only as tending to show his plan, scheme, or system in committing burglaries. This Court reviews for a clear abuse of discretion a trial court's decision whether to admit evidence under MRE 404(b). *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Where a trial court selects a reasonable and principled outcome from a spectrum of possible principled outcomes, deference is given and the court's decision does not constitute an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (adopting this standard from *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 [2003], as the default abuse of discretion standard). A trial court's decision on a close evidentiary question ordinarily cannot constitute an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Defendant insists that the trial court's admission of the other acts evidence violates MRE 404(b). Subrule 404(b)(1) prohibits the admission of evidence of a defendant's other acts or crimes when introduced solely for the purpose of proving a defendant's character "to show that the person acted in conformity with character on a particular occasion." *Sabin*, *supra* at 56. But evidence of a defendant's other acts or crimes is admissible under the following circumstances: (1) the prosecutor offers the evidence for a proper purpose under MRE 404(b)(1), including to prove the defendant's scheme, plan, or system in doing an act; (2) the other acts evidence is

admissible as relevant under MRE 401 and 402, as enforced through MRE 104(b); and (3) any unfair prejudice arising from the admission of the other acts evidence does not substantially outweigh its probative value, MRE 403. *Starr*, *supra* at 496; *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003).

In satisfaction of the first element of the admissibility test, the prosecutor offered the other acts evidence, and the trial court admitted it, for a proper noncharacter purpose expressly contemplated by MRE 404(b)(1), to illustrate defendant's "scheme, plan, or system in doing an act." In both the prosecutor's pretrial notice of other acts and his amended notice, he identified the proposed theories of admissibility of evidence of defendant's prior burglaries as showing his plan, scheme or system in committing crimes, his identity through modus operandi, and, for felony murder purposes, his intent and motive in entering the victim's house. At the pretrial motion hearing, the court explained that it did not "have a problem with [the residential] burglaries being other acts that go, according to the exception, to plan or scheme."

During closing argument, the prosecutor repeatedly referred to defendant's "MO" or "modus operandi," which he initially defined as "a pattern of criminal behavior so distinct that separate crimes are recognized as the work of the same person." In his pretrial amended notice of other acts evidence, the prosecutor had used interchangeably the terms "MO" and "pattern or scheme." Therefore, it appears that the prosecutor simply may have conflated the pattern, scheme or system purpose under MRE 404(b)(1) with the identity through modus operandi exception.[1] But at no point during closing argument did the prosecutor impermissibly suggest that the jury could consider the other acts evidence as substantive evidence of defendant's guilt. *People v McGhee*, 268 Mich App 600, 635-636; 709 NW2d 595 (2005); *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992).

Even assuming that the prosecutor injected error into the proceedings by reiterating during closing argument that the burglaries constituted evidence of defendant's modus operandi, which he had defined as involving signature crimes, at no point during the prosecutor's lengthy argument did defendant raise any objection to his characterization of the other acts evidence as proving "modus operandi." *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003) (explaining that no error requiring reversal exists when a curative instruction, if requested, could have alleviated any prejudicial effect). We conclude that the prosecutor's mischaracterizations of the other acts evidence do not constitute plain, outcome determinative error for the reasons set forth in footnote 1 of this opinion and because the trial court instructed

[1] We note that use of other acts evidence relative to "identity" requires a higher degree of similarity, along with uniqueness and distinctiveness. *Sabin, supra* at 65-66. While the term "modus operandi," which simply means "[a] method of operating or a manner of procedure," Black's Law Dictionary (7th ed), is typically attached to the "identity" purpose under MRE 404(b)(1), *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), it is understandable that one can view "scheme, plan, or system in doing an act" as also entailing aspects of the concept of modus operandi. We find it highly unlikely that the jury made any distinction between the prosecutor's reference to scheme, plan, or system relative to the burglaries and the reference to modus operandi relative to the burglaries, such that it had any bearing on the verdict.

the jury that the statements and arguments of the attorneys did not constitute evidence.[2] *Id.* at 329. We note that the trial court never instructed the jury that "modus operandi" had some stronger legal significance, comparable to the law on "identity," beyond showing scheme, plan, or system.

Regarding the second element of the other acts admissibility test, i.e., relevance as defined by MRE 401, the Michigan Supreme Court has explained that

> evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot. [*Sabin, supra* at 63-64 (citation omitted).]

With respect to the killing of the victim in this case and the other acts evidence involving defendant's burglaries from other residences in the mid-1980s, these incidents share several common features. Defendant had obtained jobs mowing lawns for Robert King and Brian and Laurie Kelly, and also had performed yard work for the victim, such as lawn mowing and snow shoveling. Defendant's work at the Kelly and King residences in 1986 and his work for the victim apparently enabled him to become familiar with the comings and goings of the residences' occupants and take advantage of their absences by breaking and entering their unoccupied homes in the daytime. With regard to the victim, defendant told the police that he had shoveled the victim's driveway for free within days of her death, and he later told his former cellmate, Robert Thompson, that on the day of the victim's death, he happened to see her leave the house and took advantage of her absence to break and enter her house during the daytime. During the burglaries, defendant routinely stole change from the residences, except when King's possession of marijuana afforded defendant an opportunity to take drugs. In light of these multiple shared similarities, we find that a jury reasonably could infer that defendant employed a common plan, scheme, or system to achieve his repeated acts of breaking and entering the houses of Kelly, King, and the victim. *Sabin*, *supra* at 66. Stated differently, defendant's courses of conduct in breaking and entering the homes of yard-work employers Kelly, King, and the victim during daylight hours involve more than general similarity, they reflect "*such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations*." *Id.* at 64-65 (emphasis in original), quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249.

Some dissimilarities exist between the evidence that defendant burglarized the Kelly and King residences and that he broke and entered the victim's house on February 15, 1989, primarily that (1) defendant took drugs only from King's house, and (2) in this case defendant repeatedly beat and stabbed the victim, apparently to silence her when she returned home during the burglary, whereas none of his other burglaries involved any violent conduct. "On the basis of th[ese distinctions], one could infer that the uncharged and charged acts involved different modes

[2] Defendant lodged no objections to any of the trial court's instructions.

of acting, both in terms of [criminal] acts and the manner in which defendant allegedly perpetrated the [burglaries]." *Sabin*, *supra* at 67. In a case involving charged acts and other acts sharing sufficient common features to infer a plan, scheme, or system to do the acts, but that also "were dissimilar in many respects,"[3] the Michigan Supreme Court recommended that appellate courts defer to the trial court's comparison of the evidence:

> This case thus is one in which reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts. As we have often observed, the trial court's decision on a close evidentiary question such as this one ordinarily cannot be an abuse of discretion. We therefore conclude that the trial court did not abuse its discretion in determining, under the circumstances of this case, that the evidence was admissible under this theory of logical relevance. [*Id.* at 67-68 (citations omitted).]

Because defendant's robberies of the victim, King, and the Kellys shared several close similarities, we cannot conclude that the trial court abused its discretion by admitting the other acts evidence to show defendant's plan, scheme, or system in committing crimes, an expressly sanctioned purpose under MRE 404(b)(1).

Regarding defendant's burglary of Mike's Market on April 3, 1989, we located no trial court ruling on the admissibility of this evidence, which the prosecutor likewise had offered to show defendant's "pattern or scheme ('MO') in . . . gain[ing] familiarity with his intended burglary victims . . . ."[4] Melody Panek's trial testimony substantiated that, within a few weeks of the robbery, she met defendant, who had stopped at the market on a couple of occasions and politely engaged her in conversation. Defendant's robbery of the market was dissimilar from his other burglaries, primarily because the market was not a residential building and because he broke into the market at night. But in light of the evidence that, like the residential robberies of King, the Kellys, and the victim, defendant had visited the market and apparently familiarized himself with it shortly before he robbed it and, like the residential robberies, he entered the market when no one occupied the building, the trial court did not abuse its discretion by admitting evidence of the market break-in as tending to prove defendant's scheme, plan or system in committing robberies. Moreover, assuming error in relation to the burglary of the market, we conclude that it simply did not constitute plain error affecting defendant's substantial rights; the error was harmless as it did not affect the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

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[3] The *Sabin* Court stated that "[t]he charged act in this case, in contrast [to the previous acts], was the only time defendant assaulted the complainant." *Sabin, supra* at 67. Here, the charged act also differed in that defendant had not physically assaulted anyone in the previous burglaries.

[4] Given the trial court's final instructions advising the jury to consider the other acts evidence as proving defendant's "plan, system or characteristic scheme," the court presumably found evidence of the market robbery admissible for this purpose.

Because the trial court properly found that the other acts evidence established a scheme, plan, or system of committing burglaries, the other acts evidence tended to make more probable than not that the alleged burglary of the victim leading to the charged premeditated killing in this case in fact occurred. *Sabin*, *supra* at 63. In light of the significant probative value of the other acts evidence, no danger of unfair prejudice inherent in admitting the evidence substantially outweighed its probative value, especially given that the trial court twice cautioned the jury regarding the proper, limited purpose for which it could consider the evidence of other burglaries. *Id.* at 70-71.

II

Defendant next argues that the trial court erred by refusing to admit, pursuant to MRE 803(24), statements that the victim's deceased neighbor, Weston Wood, made to the police. This Court considers de novo legal questions "such as whether [the constitution,] a rule of evidence or statute precludes the admission of the evidence." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). This Court reviews for an abuse of discretion a trial court's decision whether to grant a motion for reconsideration under MCR 2.119(F). *People v Walters*, 266 Mich App 341, 350; 700 NW2d 424 (2005).

The Michigan Supreme Court recently summarized as follows the elements necessary to establish the residual hearsay exception's applicability:

> [E]vidence offered under MRE 803(24) must satisfy four elements to be admissible: (1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice. [*Katt*, *supra* at 279.]

"The first and most important requirement is that the proffered statement have circumstantial guarantees of trustworthiness equivalent to those of the categorical hearsay exceptions," and the "courts should consider the 'totality of the circumstances' surrounding each statement to determine whether equivalent guarantees of trustworthiness exist." *Id.* at 290-291. Factors relevant in determining whether certain statements possess particularized guarantees of trustworthiness include:

> "(1) the spontaneity of the statements, (2) the consistency of the statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal knowledge of the declarant about the matter on which he spoke, (7) to whom the statements were made, and (8) the time frame within which the statements were made." [*People v Geno*, 261 Mich App 624, 634; 683 NW2d 687 (2004) (citation and ellipsis omitted).]

Defendant urged the trial court to admit several statements that Wood made to the police, which he insisted supported his alibi in light of the evidence that he worked from 3:00 p.m. to 9:00 p.m. on February 15, 1989, considering that, according to Wood, the victim had brought

him the paper around 3:10 p.m. on that date. Defendant maintained that the consistency of the several statements of Wood taken shortly after the victim's killing, all made to the police within days or weeks of the victim's death, together with the absence of any motive for Wood to fabricate the information, demonstrated the reliability of his out-of-court statements. The prosecution countered that Wood's recollections of having seen the victim at around 3:00 p.m. lacked indicia of trustworthiness because he did not sign or otherwise adopt his statements, which the police transcribed, and because during a September 1990 interview with the police Wood denied that he had seen the victim around 3:00 p.m., expressing instead his belief that he had seen the victim around 2:00 p.m.

The admissibility of Wood's statements was decided initially before trial by another judge who did not preside over the jury trial, and the evidence was excluded. Before witness testimony commenced at trial, the trial court addressed the admissibility of Wood's statements in the context of defendant's motion for reconsideration. The trial court offered an extremely detailed analysis concerning the admissibility of Wood's statements. The court thoroughly and thoughtfully addressed the relevant admissibility factors in the factual context of this case. On review of the court's analysis, with which we mostly agree, we cannot conclude that the trial court erred in excluding the evidence or abused its discretion in denying the motion for reconsideration. We also point out that the final statement by Wood on the matter was during a police interview in which:

> Mr. Wood stated that if he previously made a statement that mentioned 3:00 PM or 3:10 PM as the time that Mrs. Pine left his home, that was incorrect. He said that he has no doubt about the time of Mrs. Pine's departure. He said that any variance would have been alerting for him and that she was always dependable with her visits. He emphasized that Mrs. Pine left his home at 2:00 P[M] not 3:00 PM on 2-15-89.

Wood, however, was also emphatic when he made his earlier claims that the time was 3:10 p.m., but then he also had initially told police that it was around 2:00 p.m. This inconsistency draws into question the trustworthiness of the statements. Given the two conflicting versions of events as described by Wood, and considering his final say on the matter, we find that defendant lacks a showing of prejudice with regard to the exclusion of the evidence. Reversal is unwarranted.

III

Defendant next raises several instances of alleged ineffective assistance of counsel. Because defendant failed to challenge his trial counsel's effectiveness in a motion for a new trial or an evidentiary hearing, this Court limits its review of this claim to mistakes apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice prong of the test, the defendant must "demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or

unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis in original). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Rodgers*, *supra* at 715.

We first conclude that defense counsel was not ineffective with respect to his handling of police officer testimony relating to the tracking of suspect footprints. Detective Richard Miller testified that, after arriving at the victim's house on the evening of February 15, 1989, and during the daylight hours on February 16, 1989, he examined the imprints made by the suspect's footwear, he became familiar with the pattern on the bottom of the suspect's footwear, and, while attempting to trace the route the suspect walked as well as locate other tracks similar to the suspect's, he carried a scaled photograph of the suspect's footprint. Miller recalled that on February 16, 1989, he went to the gravel pit where the victim's car was concealed, and that the footprints he saw going from the car "seemed to correspond to the foot tracks that we tracked outside of [the victim's] house . . . ." Miller also described that on February 17 or 18, 1989, he saw outside an Oak Street apartment tracks that looked larger than the suspect's footprints but had "tread wear [that] appeared quite similar." Because Miller hoped to learn what type of footwear made the impressions, he spoke with college student Douglas Chapman and examined his Nike tennis shoes, which had "a cut or mark on the heel of the shoe, which was totally different than the track we had associated with the homicide scene," and they were larger than the suspect's shoes.

To the extent that defense counsel did not timely object to Miller's testimony that the suspect's footprint trail to the victim's house seemed similar to the footprints found at the gravel pit and that Chapman's footprints appeared larger than the suspect's, any objection was futile. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Because Miller explained on the record that he premised his opinions on his own perceptions of the suspect's footprints, a photograph of the suspect's footprints, and an inspection of Chapman's shoes, and because his opinions were "helpful to a clear understanding of his testimony" regarding the course of his investigation, the trial court properly admitted Miller's testimony under MRE 701. See *Co-Jo, Inc v Strand*, 226 Mich App 108, 117; 572 NW2d 251 (1997) (fireman's testimony and observations regarding the speed and intensity of a fire were properly admitted under MRE 701 without necessity of expert qualifications where testimony was general in nature without reference to technical comparisons or scientific analysis).

Defense counsel lodged no objection to Detective George Pratt's similar testimony that he observed the suspect's footprints outside the victim's house on February 16, 1989, that he familiarized himself with the footprints, that outside defendant's address in the early morning hours of February 16, 1989, Pratt found "an impression in ice that appeared to contain the same pattern as the shoe print that I saw . . . behind [the victim's] home," and that he later observed near the victim's abandoned car "footwear impressions . . . similar to the impressions that [he] saw behind Mary Pine's home and also the type that appeared" outside defendant's address. But because Pratt likewise explained that he had based his opinions regarding footprint similarity on his own perceptions, his testimony also qualifies as admissible pursuant to MRE 701, and any objection would have been meritless.

Defendant's contention that his counsel provided ineffective assistance by not securing the presence of footwear experts to testify at trial also lacks merit. First, our review of the trial

transcripts reflects that defendant affirmatively expressed his concurrence in the prosecutor's and defense counsel's agreement to admit footwear analysis reports by E. H. Frederick, Ph.D., and the FBI, in lieu of calling Frederick and the FBI author as witnesses; defendant's agreement arguably waived and extinguished any claim of error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Regardless, decisions regarding what witnesses and evidence to present at trial involve matters of trial strategy, which this Court generally will not second-guess, and defense counsel's decision to introduce the reports of Frederick and the FBI, and to cross-examine prosecution footwear expert Gary Truszkowski regarding the basis for his opinions concerning the conclusions of these reports, falls within the range of reasonable trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).[5]

Lastly, defense counsel was not ineffective on the basis that he failed to request the cautionary dog tracking instruction, CJI2d 4.14. Two former state police dog handlers testified that they brought tracking dogs to the scene of the victim's murder on the evening of February 15, 1989; that their dogs were incapable of backtracking the suspect's footprints from the alley behind the victim's house toward their origin; that the dogs detected no track leading away from the victim's house, only a scent from the small distance between the victim's house, which had been contaminated with the scents of multiple officers, to an area near the front of the victim's garage; and that therefore, shortly after arriving, they put the dogs away. Because the evidence did not support a request by defense counsel for the cautionary instruction regarding dog tracking, counsel was not ineffective for failing to urge the trial court to read CJI2d 4.14. *Mack*, *supra* at 130.

IV

Defendant additionally asserts that the trial court's refusal to admit evidence of an unsolved 1980 Big Rapids killing, similar to the instant victim's killing, denied him his constitutional right to present a defense. "A criminal defendant has a state and federal constitutional right to present a defense." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002), citing US Const, Ams VI, XIV; Const 1963, art 1, § 13.

Defendant sought to introduce evidence of the 1980 murder of 90-year-old Big Rapids resident Stella Lintenmuth, which he maintained had many similarities to the charged killing of the victim in this case. Defendant reasoned that, in light of the killings' similarities, a reasonable inference existed that one person committed both crimes, and that he could not have committed them because in 1980 he was only ten years of age. At the pretrial motion hearing on June 9, 2005, the court concluded briefly that "regarding another murder of an elderly person when the defendant would have been about 10 years old, that is not to be brought before the jury."

In support of defendant's contention that one person must have killed both Lintenmuth and the victim, he offered an April 4, 1989, profile by the Michigan State Police and a May 31, 1990, FBI "crime analysis." The state police profile notes that there are "several similarities"

[5] Defense counsel elicited Truszkowski's concession that neither he, Frederick, nor the FBI author could "identify [defendant's] particular shoes as what made the impressions."

between the 1980 death of Lintenmuth and the 1989 killing of the victim, but the report does not provide any specifics. The FBI report documents and details multiple similarities between the victims' characteristics and deaths.

The issue of defense evidence of third-party guilt was addressed in *Holmes v South Carolina*, 547 US 319; 126 S Ct 1727; 164 L Ed 2d 503 (2006). The United States Supreme Court indicated that evidence tending to show that a person other than the defendant committed the charged crime may be introduced by the defendant when it is inconsistent with, and raises a reasonable doubt of, the defendant's guilt. *Id.* at 1733. The evidence should be excluded, however, when it is too remote, when it lacks a connection with the charged crime, when it can have no other effect than to cast a bare suspicion upon another, or when it raises merely a conjectural inference that another person committed the crime. *Id.*

In *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987), this Court stated that "evidence tending to incriminate another is admissible if it is competent and confined to substantive facts which create more than a mere suspicion that another was the perpetrator."

Here, defendant is not relying on any direct evidence that another person committed the murder, e.g., someone else was seen driving the victim's car after the killing, someone else was seen entering the home, or someone else made an inculpatory statement. Rather, defendant is arguing that the 1980 murder indirectly shows that someone else committed the charged murder because the same perpetrator necessarily had to be involved in both killings, given the similarities between the crimes. While it may be arguable on some level, we find no abuse of discretion with respect to the trial court's evidentiary ruling. Under the circumstances presented, and considering the similarities between the crimes as well as the differences, a reasonable and principled decision would include one that finds nothing more than the creation of mere suspicion, a conjectural inference, excessive remoteness, or an inadequate connection. Accordingly, reversal is unwarranted.

V

Defendant lastly maintains that the trial court infringed on his rights to counsel and to present a defense when it curtailed the scope of defense counsel's closing argument. Pursuant to MCL 768.29, a "trial court has broad discretion in regard to controlling trial proceedings," including counsel's arguments and the parties' introduction of evidence. *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002). Because defendant did not object to the trial court's ruling limiting closing argument, we consider this issue only to determine whether a plain error occurred that affected defendant's substantial rights. *Carines*, *supra* at 763-764.

When the prosecutor proposed a rebuttal character witness, the trial court correctly observed that defendant had injected the issue of his propensity for peaceful behavior, thus opening the door to evidence of his propensity for violence. Defense counsel had questioned the Kellys, King, and Michael Monica, defendant's burglary accomplice, regarding whether defendant ever had exhibited any aggressive, angry, or violent behavior, including when confronted with allegations of burglary. Nonetheless, the trial court, apparently referring to MRE 403, precluded the prosecutor from presenting rebuttal character testimony regarding a 1991 or 1992 sexual assault by defendant, which the trial court viewed as more prejudicial than probative. The trial court explained that, rather than permit the defense to emphasize inaccurate

character evidence, it deemed it fair to impose the narrow prohibition on the defense that it could not mention during closing argument that defendant never had behaved aggressively toward his prior victims.

Because the trial court has broad discretion to control trial proceedings, and because the trial court weighed competing considerations of fairness, specifically defendant's interest in precluding relevant but unfairly prejudicial rebuttal evidence and the prosecutor's interest in undercutting the inaccurate character testimony elicited by defendant, we conclude that the trial court did not abuse its discretion when it imposed the closing argument restriction. *Taylor*, *supra* at 522.

Even assuming that the limitation constitutes plain error, it did not affect the outcome of defendant's trial because the jury already had heard four witnesses testify concerning defendant's nonconfrontational behavior, defense counsel successfully addressed during his closing argument that defendant's "MO" involved robbing places when he "was certain nobody would be home" and that he took only "[p]op cans and minor change," defense counsel otherwise argued at length in attacking the prosecutor's evidence, and because substantial properly admitted evidence reasonably supported the jury's finding that defendant killed the victim. *Carines*, *supra* at 763-764.

Affirmed.

/s/ William B. Murphy
/s/ Brian K. Zahra
/s/ Deborah A. Servitto

APPENDIX E

Sixth Circuit Court of Appeals
Order Denying Rehearing
March 26, 2018

Nos. 16-2429/2474

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 26, 2018
DEBORAH S. HUNT, Clerk

MARK DAVID BAILEY,

Petitioner-Appellee/Cross-Appellant,

v.

BLAINE LAFLER, WARDEN,

Respondent-Appellant/Cross-Appellee.

O R D E R

BEFORE: ROGERS, COOK, and STRANCH, Circuit Judges.

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judges Griffin and White recused themselves from participation in this ruling.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: March 26, 2018

Ms. Helen C. Nieuwenhuis
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Suite 300
Grand Rapids, MI 49503

Re: Case No. 16-2429/16-2474, *Mark Bailey v. Blaine Lafler*
Originating Case No. : 1:09-cv-00460

Dear Ms. Nieuwenhuis,

The Court issued the enclosed Order today in these cases.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Pedro Celis
Mr. Bruce H. Edwards
Mr. John S. Pallas

Enclosure