UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHESTER LARVELL STARNES, JR.,

Petitioner,

v. Case No. 1:17-CV-209

SHIRLEE HARRY, HON. GORDON J. QUIST

Respondent.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

This is a habeas corpus action brought by Chester Starnes, Jr., a state prisoner, under 28 U.S.C. § 2254. On November 6, 2014, a jury in Ingham County Circuit Court found Starnes guilty of assault with intent to commit criminal sexual conduct involving penetration and assault by strangulation. On January 28, 2015, the state court sentenced Starnes as a habitual offender-fourth offense to concurrent prison terms of 25 years to 37 years, 6 months. Starnes sought relief from his conviction in Michigan state courts, without success. On March 3, 2017, he filed this habeas corpus petition. (ECF No. 1.) Respondent filed a thorough, 66-page response, arguing that the Court should deny the petition. (ECF No. 9.) Magistrate Judge Phillip Green issued a Report and Recommendation (R & R), recommending that the Court deny Starnes' petition and deny a certificate of appealability. (ECF No. 15.) Starnes filed objections to the R & R after the Court granted him an extension of time to file. (ECF No. 19.)

state that he, himself, smoked, but said that after Martin began to prepare her bong, the two of them sat around "just talking and laughing, having a good time." (ECF No. 10-4 at PageID.249–50.) Martin testified that she asked Starnes to bring marijuana over, and answered positively when asked, "had you hung out with [Starnes] before in that similar capacity, hang out, smoke, do stuff like that?" (*Id.* at PageID.220.) Martin did not specifically say whether Starnes smoked marijuana on the night in question. Accordingly, the Court agrees with Starnes that the record does not appear to contain *specific* testimony that he smoked marijuana that night. But this is not a material or dispositive issue for his habeas petition—it is an insignificant factual mistake in the R & R. It does not affect the sufficiency of the evidence analysis or other analyses in the R & R.

Starnes attacks the R & R as "c[oming] up with . . . false statements," and argues there was insufficient physical evidence. Starnes focuses his argument on Martin's testimony and purported inconsistencies and alleged perjury. The R & R quoted the Michigan Court of Appeals' thorough discussion of this issue. (ECF No. 15 at PageID.676–77.) Starnes misconstrues the analysis and has not shown it to be in error. Starnes also makes overly broad arguments regarding the sufficiency of the evidence but does not meet the difficult standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Both the R & R and the Michigan Court of Appeals adequately addressed these issues and the Court does not find error.

Starnes also appears to attack the validity of his prior conviction of aggravated battery in Cook County, Illinois. This conviction qualified him for habitual offender sentencing under Michigan law. Starnes does not deny that he was convicted; Starnes argues that he was tried for murder only, and could not be convicted of battery. The merits of his June 28, 1995, conviction in Illinois are not cognizable under this habeas review.

IT IS HEREBY ORDERED that the magistrate judge's Report and Recommendation (ECF No. 15) is **AFFIRMED AND ADOPTED** as the Opinion of this Court and Petitioner's objections (ECF No. 19) are **OVERRULED**.

IT IS FURTHER ORDERED that Petitioner's Petition for Writ of Habeas Corpus (ECF No. 1) is **DENIED**.

IT IS FURTHER ORDERED that a Certificate of Appealability is **DENIED**.

A separate judgment will issue.

Dated: May 1, 2018

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHESTER LARVELL STARNES, JR.,

Petitioner,

v.

SHIRLEE HARRY,

Respondent.
_____/

Case No. 1:17-cv-209

Honorable Gordon J. Quist

REPORT AND RECOMMENDATION

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Petitioner Chester Larvell Starnes, Jr., is incarcerated with the Michigan Department of Corrections at the Earnest C. Brooks Correctional Facility in Muskegon Heights, Michigan. On November 6, 2014, an Ingham County Circuit Court jury found Petitioner guilty of assault with intent to commit criminal sexual conduct involving penetration, MICH. COMP. LAWS § 750.520g(1), and assault by strangulation, MICH. COMP. LAWS § 750.84(1)(b). On January 28, 2015, the court sentenced Petitioner as a habitual offender-fourth offense, MICH. COMP. LAWS § 769.12, to concurrent prison terms of 25 years to 37 years, 6 months.

On March 3, 2017, Petitioner filed his habeas corpus petition raising four grounds for relief, paraphrased as follows:

I. Verdicts of guilty based upon insufficient evidence constituted a denial of due process.

II. Imposition of twenty-five year minimum sentences upon unsubstantiated finding that Petitioner was a fourth habitual felony offender constituted reversible error.

III. Prosecutor failed to correct false testimony of its star witness.

IV. Ineffective assistance of appellate counsel in that he failed to master the trial record.

(Pet., ECF No. 1, PageID.3-5.) Respondent has filed an answer to the petition (ECF No. 9), stating that the grounds should be denied because issue I is without merit, issues II and III are procedurally defaulted and without merit, and issue IV is unexhausted and without merit. Upon review and applying the standards of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA), I find that the grounds are meritless. Accordingly, I recommend that the petition be denied.

Discussion

I. Factual allegations

On November 4, 2014, Petitioner and his cousin Tommeica both took the stand in the courtroom of Ingham County Circuit Court Judge Joyce Draganchuk. (Trial Tr. II, ECF No. 10-4.) Both testified regarding the events of Tuesday night, February 4, 2014. Up to a point, their testimony was entirely consistent. Both testified that Petitioner traveled to Tommeica's apartment in Ingham County, Michigan, that night. (*Id.*, PageID.220-222, 249-250.) Both testified that Petitioner brought marijuana for them to smoke. (*Id.*) Both testified that it was not the first time the two had gotten together for that purpose. (*Id.*) Both testified that Tommeica

packed the bong and they started smoking. (*Id.*) At that point, however, the stories diverge.

Tommeica testified that Petitioner was drunk when he arrived. After she took a couple hits from the bong, Petitioner attacked her. He choked her and stated his intention to force her to have sexual intercourse with him. He succeeded in pulling down her pants. She fought him; they wrestled. Eventually, Tommeica, more than a foot shorter and one-hundred pounds lighter than Petitioner, secured Petitioner in a headlock. Petitioner pushed her into the wall with sufficient force to dislodge all of the pictures hanging there. She made a break for the front door, but Petitioner caught her and threw her in the bathroom. In the bathroom, Petitioner positioned her on the sink and again began to choke her. Petitioner exposed his penis. In an attempt to gain an advantage, Tommeica grabbed Petitioner's penis and pretended to yield. Instead, however, she ran to the kitchen and grabbed a butcher knife. She approached Petitioner. He retreated. Tommeica again made an attempt to exit by the front door, but Petitioner blocked her path. She grabbed her cell phone and fled out the back door. She made it through the snow to her aunt's apartment. Once inside at her aunt's house she called the police. Tommeica testified that, in the tussle, her lip had been cut and bruised. She also testified that Petitioner had hurt her arm. Photographs taken by the police revealed marks on her neck from Petitioner's efforts to choke her.

According to Petitioner, Tommeica took more than two or three hits from the bong. Things remained peaceful until Petitioner eventually headed to the bathroom.

As he came out of the bathroom, he caught Tommeica going through his pockets, apparently looking for money. Petitioner claims Tommeica got in his face. He became angry, grabbed her around the neck and pushed her. Tommeica's foot caught on the rug and she fell into the wall. Tommeica then asked Petitioner not to kill her. He was taken aback by that misinterpretation of the events. She demanded he leave. He left. He was stunned when the police arrested him some time later.

The jurors were instructed on the two crimes of which they convicted Petitioner; however, they were also instructed on the crime of assault and battery as a lesser included offense for both charges. (Trial Tr. III, ECF No. 10-5, PageID.302.) After deliberating for two and one-half hours, the jury asked to hear the testimony of Tommeica, her aunt, and Petitioner again. (*Id.*, PageID.311.) The court instructed them to rely on their memories and, if that failed, to narrow their request to something more focused that would not require rehearing almost the entire trial.

After another fifteen minutes of deliberation, the jury informed the court they had reached a verdict on the strangulation count, but were deadlocked on the assault with intent to commit criminal sexual conduct count. (*Id.*, PageID.313.) The trial court gave the jurors the deadlocked jury instruction. Less than two hours later, the jury returned its verdict.

At sentencing, Petitioner's habitual offender status was an important issue. That status, combined with the severity of Petitioner's crimes, took the minimum sentence outside of the guideline minimum range of 34 to 134 months, (Sentencing Information Reports, ECF No. 10-8, PageID.427, 429.) to a statutory mandatory

minimum of at least 25 years, MICH. COMP. LAWS § 769.12. Although Petitioner convinced the court that a prior murder conviction had been set aside, the court concluded that Petitioner had failed to demonstrate that another count from that same criminal incident had been set aside. Accordingly, Petitioner was sentenced as a habitual offender-fourth offense. (Sentencing Tr. II, ECF No. 10-7.)

Petitioner, with the assistance of counsel, directly appealed his convictions and sentences. In the brief Petitioner filed with the assistance of counsel, he raised his first two habeas issues. (Appellant's Br., ECF No. 10-8, PageID.382.) Petitioner raised his third and fourth habeas issues in the appellate court by way of a *pro per* brief. (Appellant's Standard 4 Br., ECF No. 10-8, PageID.485, 495.) By opinion dated May 12, 2016, the Michigan Court of Appeals affirmed Petitioner's convictions and sentences. (Mich. Ct. App. Op., ECF No. 10-8, PageID.356.)

Petitioner then filed an application for leave to appeal in the Michigan Supreme Court raising the same issues he raised in the Michigan Court of Appeals, plus one new issue regarding the scoring of the sentencing guidelines. (App. for Leave to Appeal, ECF No. 10-9, PageID.510-513; Mot. to Supplement, ECF No. 10-9, PageID.601-604.) The Michigan Supreme Court denied leave by order entered December 28, 2016.

When Petitioner raised his sentencing guidelines argument in the supreme court, he also raised it by motion in the trial court. The trial court denied Petitioner's motion without prejudice pending completion of his direct appeal. (Ingham Cnty. Cir. Ct. Order, ECF No. 10-10, PageID.613-615.) Petitioner renewed his motion after the

Michigan Supreme Court denied leave. The trial court denied the motion by opinion and order entered March 1, 2017, concluding that Petitioner had raised the issue in the Michigan Supreme Court and that the supreme court had denied relief. (Ingham Cnty. Cir. Ct. Op. & Order, ECF No. 10-13.)

Two days later, Petitioner filed his habeas petition in this Court.

II. AEDPA standard

The AEDPA "prevents federal habeas 'retrials'" and ensures that state court convictions are given effect to the extent possible under the law. *Bell v. Cone*, 535 U.S. 685, 693-94 (2002). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). This standard is "intentionally difficult to meet." *Woods v. Donald*, 575 U.S. __, 135 S. Ct. 1372, 1376 (2015) (internal quotation omitted).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This Court may consider only the "clearly established" holdings, and not the dicta, of the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). In

determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Lopez v. Smith*, 135 S. Ct. 1, 3 (2014); *Bailey*, 271 F.3d at 655. Moreover, "clearly established Federal law" does not include decisions of the Supreme Court announced after the last adjudication of the merits in state court. *Greene v. Fisher*, 565 U.S. 34 (2011). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time of the state-court adjudication on the merits. *Miller v. Stovall*, 742 F.3d 642, 644 (6th Cir. 2014) (citing *Greene*, 565 U.S. at 38).

A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in the Supreme Court's cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Bell*, 535 U.S. at 694 (citing *Williams*, 529 U.S. at 405-06). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods*, 135 S. Ct. at 1376 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). In other words, "[w]here the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *White v. Woodall*, 572 U.S. ___, 134 S. Ct. 1697, 1705 (2014) (internal quotations omitted).

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue made by a state court is presumed to be correct, and the petitioner has the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003); *Bailey*, 271 F.3d at 656. This presumption of correctness is accorded to findings of state appellate courts, as well as the trial court. *See Sumner v. Mata*, 449 U.S. 539, 546 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989).

III. Sufficiency of the Evidence

Petitioner argues that there was insufficient evidence to convict him of assault with intent to commit criminal sexual conduct or assault by strangulation. The foundation of his argument is a claim that Tommeica gave so many inconsistent accounts of that evening that her testimony is inherently incredible.

A Section 2254 challenge to the sufficiency of the evidence is governed by the standard set forth by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), which is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." This standard of review recognizes the trier of fact's responsibility to resolve reasonable conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* Issues of credibility may not be reviewed by the habeas court under this standard. *See Herrera v. Collins*, 506 U.S. 390, 401-02 (1993). Rather, the habeas court is

required to examine the evidence supporting the conviction, in the light most favorable to the prosecution, with specific reference to the elements of the crime as established by state law. *Jackson*, 443 U.S. at 324 n.16; *Allen v. Redman*, 858 F.2d 1194, 1196-97 (6th Cir. 1988).

The *Jackson v. Virginia* standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. Moreover, because both the *Jackson* standard and AEDPA apply to Petitioner's claims, "the law commands deference at two levels in this case: First, deference should be given to the trier-of-fact's verdict, as contemplated by *Jackson*; second, deference should be given to the Michigan Court of Appeals' consideration of the trier-of-fact's verdict, as dictated by AEDPA." *Tucker v. Palmer*, 541 F.3d 652, 656 (6th Cir. 2008). This standard erects "'a nearly insurmountable hurdle'" for petitioners who seek habeas relief on sufficiency-of-the-evidence grounds. *Davis v. Lafler*, 658 F.3d 525, 534 (6th Cir. 2008) (quoting *United States v. Oros*, 578 F.3d 703, 710 (7th Cir. 2009)).

In resolving Petitioner's sufficiency claim, the Michigan Court of Appeals applied the following standard:

> Due process requires that evidence of every element of a crime be proven beyond a reasonable doubt in order to sustain a criminal conviction. *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979), citing *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). In determining whether the prosecution has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecution to ascertain whether a rational trier of fact could find the defendant guilty beyond a

> reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). Direct and circumstantial evidence, as well as all reasonable inferences that may be drawn, when viewed in a light most favorable to the prosecution, must be considered to determine whether the evidence was sufficient to support the defendant's conviction. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

(Mich. Ct. App. Op., ECF No. 10-8, PageID.358 (footnote omitted).) The court of appeals relied upon *People v. Tennyson*, which in turn relies upon *People v. Hardiman* as authority for the appropriate standard. The *Hardiman* court, in turn, relied upon *People v. Wolfe*, 489 N.W.2d 748 (Mich. 1992). The *Wolfe* court acknowledged that the Michigan courts were simply applying the *Jackson v. Virginia* standard. *Wolfe*, 489 N.W.2d at 750. Thus, at a minimum, it appears the Michigan Court of Appeals applied the correct standard.

Moreover, the court of appeals applied the standard correctly. It identified the elements of both offenses and then considered the evidence to assess whether, construed in a light most favorable to the prosecution, the prosecution had proven those elements beyond a reasonable doubt. (Mich. Ct. App. Op., ECF No. 10-8, PageID.358-359.) The state appellate court reasoned:

> Here, defendant does not contest that any specific element of either crime was unsupported by sufficient evidence, but argues that Martin's testimony was not credible, whereas defendant's version of events was accurate. However, in a sufficiency challenge, "[a]n appellate court does not determine credibility; it merely ensures that the jurors were given the chance to hear the admissible evidence necessary to make their decision." *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005). Jurors who view the testimony of the witnesses "are in a superior position to determine the credibility" of the witnesses. *People v Wright*, 44 Mich App 111, 116; 205 NW2d 62 (1972). Thus, this Court will "not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses." *People v Ortiz*, 249 Mich App 297, 300-301; 642 NW2d 417 (2001) (citations omitted).

(Mich. Ct. App. Op., ECF No. 10-8, PageID.359.) The Michigan Court of Appeals' determination was entirely consistent with, and not contrary to or an unreasonable application of, *Jackson v. Virginia*; accordingly, Petitioner is not entitled to habeas relief on his sufficiency challenge.

The Michigan Court of Appeals went on to consider Petitioner's argument regarding the credibility of Tommeica's testimony as a great-weight-of-the-evidence challenge. (*Id.*, PageID.359-360.) The court rejected that challenge as well. Petitioner invites this Court to review that result.

The assertion that the verdict was against the great weight of the evidence does not state grounds for habeas corpus relief. The extraordinary remedy of habeas corpus lies only for a violation of the Constitution. 28 U.S.C. § 2254(a). The Michigan courts apply the great-weight-of-the-evidence standard to determine whether to grant a new trial. *See People v. Lemmon*, 576 N.W.2d 129, 137 (Mich. 1998). This question is distinct from the due-process guarantee offended by insufficient evidence and "does not implicate issues of a constitutional magnitude." *Id.* at 133 n.8. As a consequence, a "weight of the evidence claim" is purely a matter of state law and is not cognizable on habeas review. *See* 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) ("[I]t is only noncompliance with federal law that renders a state's criminal judgment susceptible to a collateral attack in the federal courts."); *Estelle v. McGuire*, 502 U.S. 62, 68 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *accord Chatman v. Warden Ross Corr. Inst.*, No. 2:10–cv–

1091, 2013 WL 1663919, at *10 (S.D. Ohio Mar. 26, 2013); *Underwood v. Berghuis*, No. 1:08–cv–642, 2011 WL 693 8471, at *15 (W.D. Mich. Aug. 8, 2011) ("Since a 'weight of the evidence claim' is purely a matter of state law, it is not cognizable on habeas review."). Because this Court lacks authority to review a state court's application of its own law, the state-court determination that the verdict was not against the great weight of the evidence is final.

IV. Twenty-five Year Minimum Sentence

Petitioner next argues that his due process rights were violated because he was sentenced based on inaccurate information. A sentence may violate due process if it is based upon material "misinformation of constitutional magnitude." *Roberts v. United States,* 445 U.S. 552, 556 (1980), *quoted in Koras v. Robinson,* 123 F. App'x 207, 213 (6th Cir. Feb. 15, 2005); *see also United States v. Tucker,* 404 U.S. 443, 447 (1972); *Townsend v. Burke,* 334 U.S. 736, 741 (1948). To prevail on such a claim, the petitioner must show (1) that the information before the sentencing court was materially false, and (2) that the court relied on the false information in imposing the sentence. *Tucker*, 404 U.S. at 447; *United States v. Polselli*, 747 F.2d 356, 358 (6th Cir. 1984); *Koras,* 123 F. App'x at 213 (quoting *United States v. Stevens,* 851 F.2d 140, 143 (6th Cir. 1988)). A sentencing court demonstrates actual reliance on misinformation when the court gives "explicit attention" to it, "found[s]" its sentence "at least in part" on it, or gives "specific consideration" to the information before imposing sentence. *Tucker*, 404 U.S. at 444, 447.

The information Petitioner challenges as inaccurate is the prosecutor's proof of his third prior felony. At the second sentencing hearing, the prosecutor offered a certified record from the Cook County, Illinois clerk of the court. (Sentencing Tr. II, ECF No. 10-7, PageID.336.) The record disclosed the following convictions: (1) June 28, 1985, convictions for aggravated criminal sexual assault, armed robbery, aggravated kidnapping, and pandering; (2) a January 28, 1993, conviction for unlawful use of a weapon by a felon; and (3) June 28, 1995, convictions for murder and aggravated battery with a firearm. (*Id.*, PageID.336-339; Cook Cnty. Records, ECF No. 10-8, PageID.431-435.) The presentence investigation report indicated that the murder conviction had been set aside. (Sentencing Tr. II, ECF No. 10-7, PageID.339.) The prosecutor acknowledged as much. (*Id.*, PageID.336.) Nonetheless, the trial court counted the aggravated battery with a firearm conviction because there had been no showing that the aggravated battery conviction had been set aside. (*Id.*, PageID.339-340.) Thus, there can be no question that the trial court relied upon that felony conviction in imposing sentence.

The Michigan Court of Appeals concluded that Petitioner's challenge to his sentence did not warrant any relief:

> Defendant argues that there was no documentation provided regarding the aggravated battery with a firearm conviction and that the trial court therefore wrongfully concluded that it was still valid. We note that defendant's conviction for aggravated battery with a firearm was not in fact overturned. In *People v Cooper*, 194 Ill 2d 419, 438; 743 NE 2d 32 (2000), the Illinois Supreme Court affirmed the appellate court's decision reversing defendant's murder conviction and expressly affirmed defendant's conviction for aggravated battery with a firearm.
>
> . . .

> Here, the trial court accepted defendant's correction, as well as the prosecution's report, that defendant's murder conviction had been overturned, and did not include that conviction in its calculation. However, trial court noted that the PSIR stated that the murder conviction, but not the aggravated battery conviction, had been overturned. There is a presumption that the information contained in the PSIR is accurate unless the defendant raises an effective challenge. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). Here, defendant stated that he had no corrections to the PSIR. Moreover, the record includes a certified Cook County Order of Sentence and Commitment to the Illinois Department of Corrections, dated June 28, 1995, that listed defendant's convictions for murder and aggravated battery with a firearm. According to MCL 769.13(5)(a),(d), and (e), "[t]he existence of a prior conviction may be established" by, among other methods, "[a] copy of a judgment of conviction," "[i]nformation contained in a presentence report," and "[a] statement of defendant."
>
> Defendant argues that there was no proof that defendant's conviction for aggravated battery with a firearm had not also been set aside, and that the trial court relied on speculation that it had not been set aside. However, the Illinois order of sentence and the PSIR lists the offense as valid and, unlike the murder conviction, there was no argument that the aggravated battery with a firearm conviction had been overturned on appeal. Defendant did not argue or establish that the aggravated battery with a firearm conviction was inaccurate. That the murder conviction was reversed was not evidence that the aggravated battery with a firearm conviction was reversed. Thus, given the documentation provided to the trial court, and the acquiescence of defendant, the trial court properly excluded defendant's murder conviction and properly included defendant's conviction for aggravated battery with a firearm as a prior felony. It was not an abuse of discretion for the trial court to find that defendant was previously convicted of the felony of aggravated battery with a firearm, which constituted a third previous felony conviction and provided the basis for sentencing as a fourth habitual offender.

(Mich. Ct. App. Op., ECF No. 10-8, PageID.361-362.)

Although the Michigan Court of Appeals relied on state law, its determination does not run afoul of clearly established federal law. Under clearly established

federal law, as under state law, it is Petitioner's obligation to show that the information before the sentencing court was false. He has utterly failed to make that showing. Instead, the uncertainty that dogged the trial court's determination at the sentencing hearing has been resolved. The third conviction, the conviction upon which the trial court relied to trigger the 25-year mandatory minimum sentence, had been affirmed by the Illinois appellate courts. (Ill. Op, ECF No. 10-8, PageID.455-470.) Petitioner most certainly was aware of that fact when he made his arguments in the Michigan appellate courts and in this Court.

Petitioner is not entitled to habeas relief on this issue.

V. Perjurious Testimony

The remaining arguments were raised for the first time in Petitioner's pro per brief in the Michigan Court of Appeals. Petitioner contends his trial was unfair because the prosecutor knew Tommeica's testimony to be false yet failed to correct it. The Supreme Court repeatedly has recognized that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' " *Giglio v. United States*, 405 U.S. 150, 153 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)); *see also Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment."). To establish such a claim, Petitioner must show "(1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989) (citations

omitted). *See also Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998). Petitioner bears the burden of demonstrating that the testimony was actually perjured. *Lochmondy*, 890 F.2d at 822. "[M]ere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony." *Id.*

Petitioner contends that Tommeica testified falsely at trial that Petitioner was drunk as demonstrated by her testimony at the preliminary examination that Petitioner did not drink that night. (Appellant's Standard 4 Br., ECF No. 10-8, PageID.488-490.) Petitioner argues that Tommeica provided additional false testimony including testimony that: Petitioner choked her and pulled her hair; Petitioner took her head and attempted to hit it against the mirror; and Tommeica testified that Petitioner exposed himself, but could not say whether he was circumcised. (*Id.*, PageID.494-495.)

The Michigan Court of Appeals considered Petitioner's challenges under the following standards:

> "A State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction." *People v Smith*, 498 Mich 466, 475-476; 870 NW2d 299 (2015), quoting *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). The prosecution has a constitutional obligation to report when a government witness lies under oath because the Due Process Clause of the Fourteenth Amendment guarantees that "criminal prosecutions must comport with prevailing notions of fundamental fairness." *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). "It is inconsistent with due process" for the prosecution to fail to correct false testimony from a prosecution witness, even if the prosecution did not solicit the false testimony. *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986), citing *Giglio v United States*, 405 US 150; 92 S Ct 763; 31 L Ed 2d 104 (1972). The prosecution has a duty to correct false evidence, and Michigan courts recognize that "the prosecutor may not knowingly use false testimony to obtain a conviction." *Herndon*, 246 Mich App at 417.

> The duty to correct the false testimony of a witness presents when the false testimony appears. *Wiese*, 425 Mich at 455, citing *Napue*, 360 US at 269. The prosecution must correct false testimony impacting the credibility of the witness because a defendant's guilt or innocence may depend on the jury's credibility determinations. *Wiese*, 425 Mich at 454, citing *Napue*, 360 US at 269. Failure to correct false testimony requires reversal if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *People v Canter*, 197 Mich App 550, 568; 496 NW2d 336 (1992), citing *Giglio*, 405 US at 154; *Wiese*, 425 Mich at 454.

(Mich. Ct. App. Op., ECF No. 10-8, PageID.363.) The appellate court relied on state authorities that, in turn, relied on clearly established federal law.

The Michigan Court of Appeals applied the standards as follows:

> Defendant cites as false Martin's statements that defendant was intoxicated when he arrived at her home, and that they discussed what he had been drinking. He also asserts that she falsely described his intoxicated state. Defendant states that this testimony was false because Martin testified at the preliminary examination that "[h]e drinks. But, he did not drink that night." However, defendant has not established that the trial testimony was false, or that the prosecution knew the trial testimony to be false. Although Martin's trial testimony may be seen as contradictory from her preliminary examination testimony, Martin was not directly asked during the preliminary examination whether defendant was intoxicated. During the preliminary examination, Martin was asked what happened after defendant arrived and she was sitting on the couch. Martin then testified that she smoked marijuana that defendant had provided, but that she was not drinking, and that defendant was not smoking marijuana and was not drinking that night. Thus, Martin may have been saying that defendant did not drink while with her, which was not contradictory to her trial testimony that he appeared intoxicated on arrival.
>
> In *Smith*, 498 Mich at 476, citing *United States v Martin*, 59 F 3d 767, 770 (CA 8, 1995), the Court noted that "not every contradiction is material" and "the prosecutor need not correct every instance of mistaken or inaccurate testimony." The "crucial inquiry for due process purposes" concerns "the effect of a prosecutor's failure to correct false testimony." *Smith*, 498 Mich at 476 (emphasis in original). The Court, in Smith, warned that it is particularly in contrast to due process where

> the prosecution reinforces and capitalizes on false testimony. *Id.* (citation omitted). Here, defendant has not demonstrated that Martin's testimony that he arrived intoxicated was false. Additionally, the prosecution did not rely on evidence of defendant's intoxication (which was not an element of either offense) to demonstrate his guilt, and did not mention defendant's intoxication in closing argument.

(Mich. Ct. App. Op., ECF No. 10-8, PageID.363-364.) The court of appeals determined that Petitioner had failed to demonstrate that Tommeica's testimony was false or that the issue of Petitioner's intoxication was material. Those determinations are not unreasonable on this record.

With respect to Petitioner's remaining claims of perjured testimony, the court of appeals considered only the adequacy of Petitioner's demonstration of falsity:

> Defendant also states that several of Martin's statements at trial were lies that the prosecution failed to correct. Defendant points to testimony that he pulled Martin's hair and that he tried to hit her head on the bathroom mirror. However, he does not offer any proof or argument regarding the alleged falsity of these statements or whether the prosecution knew them to be false. Additionally, defendant mentions Martin's preliminary examination testimony that she could not say whether defendant was circumcised; he maintains that this was a false statement or evidence that Martin lied, because she said that she had grabbed his penis in a lighted room. However, neither attorney asked Martin at trial about her preliminary examination testimony or whether defendant was circumcised, and Martin did not testify regarding the appearance of defendant's penis at trial and did not testify that defendant was or was not circumcised and therefore did not provide any testimony in contradiction of her preliminary examination testimony. Thus, defendant has not demonstrated that Martin provided perjured testimony that the prosecutor failed to correct. We further reject any suggestion that Martin's inability to recall one physical detail about defendant during a prolonged and intense encounter indicates that her testimony was false and the prosecution knowingly relied upon such falsity. *Herndon*, 246 Mich App at 417.

(Mich. Ct. App. Op., ECF No. 10-8, PageID.364.)

The trial court's factual determinations, on this record, are eminently reasonable. Moreover, Petitioner has failed to demonstrate that the Michigan Court of Appeals rejection of his prosecutorial misconduct claim is contrary to, or an unreasonable application of, *Giglio* or *Napue*. Accordingly, Petitioner is not entitled to habeas relief on this claim.

VI. Ineffective Assistance of Appellate Counsel

Finally, Petitioner claims that his appellate counsel rendered constitutionally ineffective assistance because he failed to raise the perjurious testimony issue considered above. In *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), the Supreme Court established a two-prong test by which to evaluate claims of ineffective assistance of counsel: (1) did counsel's performance fall below an objective standard of reasonableness; and (2) did counsel's deficient performance prejudice the defendant resulting in an unreliable or fundamentally unfair outcome. A court considering a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Even if a court determines that counsel's performance was outside that range, the defendant is not entitled to relief if counsel's error had no effect on the judgment. *Id.* at 691.

The *Strickland* standard applies to appellate counsel as well as trial counsel; but, an appellant has no constitutional right to have every non-frivolous issue raised on appeal. "'[W]innowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of

effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). To require appellate counsel to raise every possible colorable issue "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689. As the Supreme Court recently has observed, it is difficult to demonstrate that an appellate attorney has violated the performance prong where the attorney presents one argument on appeal rather than another. *Smith v. Robbins*, 528 U.S. 259, 289 (2000). In such cases, the petitioner must demonstrate that the issue not presented "was clearly stronger than issues that counsel did present." *Id.*

Moreover, when a federal court reviews a state court's application of *Strickland* under Section 2254(d), the deferential standard of *Strickland* is "doubly" deferential. *Harrington*, 562 U.S. at 105 (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)); *see also Burt v. Titlow*, 571 U.S. 12, 13 (2013); *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011); *Premo v. Moore*, 562 U.S. 115, 122 (2011). In those circumstances, the question before the habeas court is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*; *Jackson v. Houk*, 687 F.3d 723, 740-41 (6th Cir. 2012) (stating that the "Supreme Court has recently again underlined the difficulty of prevailing on a *Strickland* claim in the context of habeas and AEDPA . . . .") (citing *Harrington*, 562 U.S. at 102).

The Michigan Court of Appeals made quick work of Petitioner's ineffective assistance claim:

> A counsel's performance is deficient if it fell below an objective standard of professional reasonableness. *Jordan*, 275 Mich App at 667. Here, defendant argues that his appellate counsel was ineffective in failing to raise the issue of a failure to correct perjured testimony. "An appellate attorney's failure to raise an issue may result in counsel's performance falling below an objective standard of reasonableness if that error is sufficiently egregious and prejudicial." *People v Reed*, 198 Mich App 639, 646-467; 499 NW2d 441 (1993). However, appellate counsel is presumed to have functioned as a reasonable appellate attorney in selecting the issues presented. *Reed*, 449 Mich at 391; *People v Uphaus*, 278 Mich App 174, 186-187; 748 NW2d 899 (2008). "[A]ppellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance." *People v Pratt*, 254 Mich App 425, 430-431; 656 NW2d 866 (2002), citing *Reed*, 449 Mich at 391. Because defendant was not able to demonstrate that Martin testified falsely or that the prosecution knew she testified falsely and failed to correct the testimony, it was a reasonable strategy to decline to raise an issue with no demonstrable merit. Defendant has not overcome the presumption that his appellate counsel made a sound strategic decision in declining to present this issue.

(Mich. Ct. App. Op., ECF No. 10-8, PageID.364-365.)

Although the state appellate court cited state authorities as the foundation for its ineffective assistance standard, the standard is entirely consistent with *Strickland.* Moreover, the determination that appellate counsel's decision to forego the perjurious testimony argument was a sound strategic decision is unassailable. As set forth in detail above, the argument is entirely without merit. The Sixth Circuit has held that "'counsel cannot be ineffective for a failure to raise an issue that lacks merit.'" *Willis v. Smith*, 351 F.3d 741, 745 (6th Cir. 2003) (quoting *Greer*, 264 F.3d at 676). *See also Smith v. Bradshaw*, 591 F.3d 517, 523 (6th Cir. 2010). "Omitting meritless arguments is neither professionally unreasonable nor prejudicial." *Coley v.*

Bagley, 706 F.3d 741, 752 (6th Cir. 2013). In short, Petitioner has failed to demonstrate that the court of appeals' rejection of his ineffective assistance claim is contrary to, or an unreasonable application of, *Strickland*. Accordingly, he is not entitled to habeas relief on the claim.

Certificate of Appealability

Unless a certificate of appealability is issued, an appeal of the denial of a habeas corpus petition may not be taken. 28 U.S.C. § 2253(c)(1). A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* at 467.

I have examined each of Petitioner's claims under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). Under *Slack*, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, the Court may not conduct a full merits review, but must

limit its examination to a threshold inquiry into the underlying merit of Petitioner's claims. *Id.*

I find that reasonable jurists would not conclude that this Court's denial of Petitioner's claims is debatable or wrong.

Recommended Disposition

For the foregoing reasons, I recommend that the habeas corpus petition be denied. I further recommend that a certificate of appealability be denied. *See Slack v. McDaniel*, 529 U.S. 473 (2000).

Dated: March 15, 2018

/s/ Phillip J. Green
PHILLIP J. GREEN
United States Magistrate Judge

NOTICE TO PARTIES

ANY OBJECTIONS to this Report and Recommendation must be filed and served within fourteen days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. MICH. LCIVR 72.3(b). Failure to file timely and specific objections may constitute a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 458 (6th Cir. 2012); *United States v. Branch*, 537 F.3d 582, 587 (6th Cir. 2008). General objections do not suffice. *See McClanahan v. Comm'r of Social Security*, 474 F.3d 830, 837 (6th Cir. 2006); *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006).

No. 18-1585

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHESTER LARVELL STARNES, JR.,

Petitioner-Appellant,

v.

SHANE JACKSON,

Respondent-Appellee.

ORDER

Chester Larvell Starnes, Jr., a Michigan prisoner proceeding pro se, appeals the district court's judgment denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Starnes has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b). He has also filed a motion to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a).

In 2014, a Michigan jury convicted Starnes of assault with intent to commit sexual penetration, in violation of Michigan Compiled Laws § 750.520g(1), and assault by strangulation, in violation of Michigan Compiled Laws § 750.84(1)(b). These convictions stemmed from Starnes having assaulted his cousin in an effort to have sexual intercourse with her. The trial court sentenced Starnes as a habitual offender (fourth offense) to concurrent sentences of 300 to 450 months in prison. On direct appeal, Starnes, with the assistance of counsel, argued that his convictions were supported by insufficient evidence and that the trial court erroneously sentenced him as a habitual offender (fourth offense). Starnes thereafter filed a pro se supplemental brief, in which he argued that the prosecution knowingly presented and failed to correct perjured testimony, and that his appellate counsel rendered ineffective assistance

by failing to raise this issue on appeal. The Michigan Court of Appeals affirmed Starnes's convictions and sentence, *People v. Starnes*, No. 326249, 2016 WL 2772141, at *10 (Mich. Ct. App. May 12, 2016), and the Michigan Supreme Court denied his application for leave to appeal.

In March 2017, Starnes filed his § 2254 petition, in which he raised the following grounds for relief: (1) the evidence was insufficient to sustain his convictions; (2) the trial court erroneously determined that he was a habitual offender (fourth offense); (3) the prosecution presented and failed to correct perjured testimony and also made false statements during closing arguments; and (4) appellate counsel rendered ineffective assistance by failing to review the entire trial record. Over Starnes's objections, the district court adopted the magistrate judge's recommendation to deny the habeas petition and declined to issue a COA. This appeal followed.

Starnes seeks a COA on the following issues: (1) trial counsel rendered ineffective assistance by failing to investigate the evidence, interview the victim and other witnesses, and impeach the victim and other witnesses during cross-examination; (2) appellate counsel rendered ineffective assistance by failing to review the entire trial record; (3) the prosecution presented and failed to correct perjured testimony and also made false statements during closing arguments; (4) his convictions are supported by insufficient evidence; and (5) trial counsel rendered ineffective assistance by failing to object to the trial court's refusal to reread pertinent trial testimony to the jury prior to its deliberations. Starnes has abandoned all other claims by failing to raise them in his COA application. *Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under § 2253(c), this court does not fully consider "the factual or legal bases adduced in support of the claims"; rather,

this court conducts an overview of the claims and "a general assessment of their merits." *Id.* at 336.

Ineffective Assistance of Trial Counsel

Starnes is not entitled to a COA on his ineffective-assistance-of-trial-counsel claims because he failed to raise those claims in the district court. This court generally will not consider claims raised for the first time on appeal, unless exceptional circumstances are present. *See United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006). No exceptional circumstances are present here.

Sufficiency of the Evidence

Starnes argues that his convictions are supported by insufficient evidence. In reviewing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In a federal habeas proceeding, a review of a sufficiency claim is doubly deferential: "First, deference should be given to the trier-of-fact's verdict, as contemplated by *Jackson*; second, deference should be given to the Michigan Court of Appeals' consideration of the trier-of-fact's verdict, as dictated by [the Antiterrorism and Effective Death Penalty Act]." *Tucker v. Palmer*, 541 F.3d 652, 656 (6th Cir. 2008).

Starnes claimed in his habeas petition that the State's "evidence—which consisted entirely of the testimony of the [victim]—resulted in a credibility contest between me and the victim. I was not able to prove my innocence because the prosecution painted a picture to the jury that I was a monster." Starnes further claimed that "this conduct tainted the jury to the extent that I was found guilty based on the feelings of the jury for the victim and not on the facts of the case." Thus, Starnes's argument is actually a challenge to the weight, not the sufficiency, of the State's evidence. The magistrate judge noted that claims challenging the weight of the evidence are not cognizable in a § 2254 proceeding because such claims are a matter of state law. *See Nash v. Eberlin*, 258 F. App'x 761, 764 n.4 (6th Cir. 2007). The district court adopted the

magistrate judge's resolution of this claim. Accordingly, jurists of reason could not disagree with the district court's resolution of this issue or conclude that it deserves encouragement to proceed further. Moreover, even when construed as a challenge to the sufficiency of the evidence, this claim does not deserve encouragement to proceed further because "the assessment of the credibility of witnesses is generally beyond the scope of review." *Schlup v. Delo*, 513 U.S. 298, 330 (1995); *Moreland v. Bradshaw*, 699 F.3d 908, 918 (6th Cir. 2012).

Prosecutorial Misconduct

Starnes also argues he was denied his right to a fair trial when the prosecutor elicited and left uncorrected the victim's allegedly perjured testimony concerning his actions and behavior on the night in question. Specifically, Starnes claimed that the prosecutor failed to correct the victim's false testimony that he, among other things, was intoxicated, pulled her hair, and tried to hit her head against a bathroom mirror.

"[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (citations omitted); *see also Giglio v. United States*, 405 U.S. 150, 153 (1972). The Supreme Court "has consistently held that a conviction obtained by the knowing [or uncorrected] use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (footnote omitted). To establish that the testimony affected the jury and, thus, violated due process, a petitioner must demonstrate that the statement was actually false, that it was material, and that the prosecution knew the statement was false. *Brooks v. Tennessee*, 626 F. 3d 878, 894-95 (6th Cir. 2010).

The Michigan Court of Appeals determined that Starnes had failed to show that any part of the victim's trial testimony was false or that the prosecution knowingly relied upon any false testimony. *Starnes*, 2016 WL 2772141, at *8-9. In addition to noting Starnes's lack of evidence

regarding this claim, the state appellate court also noted that, contrary to Starnes's assertions, the victim's trial testimony did not necessarily contradict her preliminary examination testimony. *Id.* Upon an independent review of the record, the magistrate judge concluded that the state appellate court's determinations on these points were reasonable and that the state appellate court's resolution of this claim was neither contrary to, nor an unreasonable application of, *Napue* or *Giglio*. The district court adopted the magistrate judge's resolution of this claim. Given the lack of evidence presented, reasonable jurists would not debate the district court's resolution of this prosecutorial-misconduct claim.

Ineffective Assistance of Appellate Counsel

Finally, Starnes argues that his appellate counsel rendered ineffective assistance. Within his habeas petition, Starnes argued that appellate counsel rendered ineffective assistance by "fail[ing] to master the trial record," thus requiring him to raise additional claims in a pro se supplemental brief. However, Starnes has not shown that the arguments advanced in his pro se supplemental brief were meritorious. Therefore, he has failed to make a substantial showing that appellate counsel was ineffective for failing to raise his pro se issues on direct appeal. *See Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010). Moreover, Starnes failed to articulate within his § 2254 petition any other issues that his appellate counsel should have raised on direct appeal. Reasonable jurists could not debate the district court's resolution of this claim.

Accordingly, Starnes's COA application is **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk