18-6724

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROGER LEE OZIER — PETITIONER
(Your Name)

vs.

SHANE JACKSON, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals 6th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROGER LEE OZIER
(Your Name)
E.C. Brooks Correctional Facility
2500 S. Sheridan Drive
(Address)

Muskegon Heights, Michigan 49444
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I.

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN MR. OZIER'S CONVICTION FOR ARMED ROBBERY AND BANK ROBBERY.

II.

PETITIONER WAS DENIED HIS RIGHT TO CONFRONTATION WHEN TRIAL ATTORNEY COULD NOT CROSS-EXAMINE HIS PAROLE AGENT ABOUT HER MOTIVES, PREJUDICE OR BIAS SHE MAY HARBOR IN IDENTIFYING HIM FROM SURVEILLANCE VIDEO.

III.

PETITIONER'S SIXTH AMENDMENT TO CONFRONTATION WAS VIOLATED WHEN HE WAS DENIED THE OPPORTUNITY TO CROSS-EXAMINE THE INFROMANT AND DETECTIVE STILES WHO ACCUSED HIM OF BANK ROBBERY, COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

IV.

PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND CALLING TO TRIAL A EYEWITNESS.

V.

PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE FO TRIAL COUNSEL WHEN TRIAL COUNSEL FAILED TO CHALLENGE PETITIONER'S ARREST WITHOUT PROBABLE CAUSE, CREATING A RADICAL DEFECT RENDERING THE PROCEEDING VOID AND APPELLATE COUNSEL FOR FAILING TO RAISE ISSUE ON DIRECT APPEAL.

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TABLE OF AUTHORITIES CITED

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the Michigan Supreme court appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 13, 2018.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 13, 2018, and a copy of the order denying rehearing appears at Appendix E.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was November 18, 2014. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL AMENDMENTS

Const. Amendment 5th

Const. Amendment 4th

Const. Amendment 6th

Const. Amendment 14th

STATUTES

MCL 750.531-A

MCL 750.529

AEDPA 2254

28 USC 2254(d)

MCL 777.62

MCL 777.64

STATEMENT OF THE CASE

Petitioner was tried and convicted in Jackson County Michigan Circuit Court for count I Armed Robbery MCL 750.529, and count II Bank Robbery, MCL 750.531-A which occurred early in the morning of October 8, 2012. In No. 12-004932-FH, he was convicted on both counts for the robbery of the Aeroquip Credit Union in Jackson, Michigan.

He was sentenced to a prison term of 30-50 years on both counts. Petitioner appealed of right to the Michian Court of Appeals, which affirmed his conviction in an unpublished opinion issued November 18, 2014 (per curiam). Petitioner sought leave to appeal to the Michigan Supreme Court, People v Ozier, No. 317217 Leave denied 863 NW2d 69 Mich 2015).

Petitioner then filed a Post-conviction motion for Relief from judgment (Dk. 6-8), which was denied. People v Ozier, No.12-4931-FH (Jackson County Circuit Court October 29, 2015) (Dk. 6-11). The Michigan Appellate Courts denied Petitioner's Post-conviction appeal, People v Ozier, No. 330360 (Michigan Court of Appeals, January 29, 2016) (Dk. 6-12) Leave demoed 499 Mich 930, 878 NW2d 857 (Mich. 2016 (Dk. 6-13).

Petitioner filed a timely Pro Se Petition for Writ of Habeas Corpus in this case on August 4, 2016.

TRIAL FACTS

On October 8, 2012, the Aeroquip Credit Union in Jackson, Michigan was robbed approximately at 9:00 a.m., Blackman Township authorities received a call and responded to the credit union. (TT2, April 29, 2013 pg. 8). The area was canvassed and

a witness Allen Miracle, informed the investigators that a car had pulled into a car wahs bay (TT1, April 29, 2013 pg. 165). Video footage showed the occupants exit the vehicle and discard trash into the trash island.

Detective Gina Gettle testified that she recovered evidence from the trash island and video footage was recovered. (TT1, April 29, 2013 pg. pg. 211-12, 222, 228).

Two individuals were identified from the car was video footage, Daruis Griffin and Henry Lee Brown. (TT2, April 30, 2013 pg. 21, 35). Two days later one of the detectives, Detective Stiles, in this particular case, reported that he received a tip that Roger Ozier was the passenger in the car and the person that had gone in and robbed Aeroquip Credit Union. (TT2, April 30, 2013 pg. 22).

Neither detective knew Mr. Ozier nor had they any contact with him. However, they arranged and orchestrated an unduly suggestive identification procedure by showing video footage of only one person to parole agent, Denise Welhusen, in the presence of police, she identified the person as Mr. Ozier. (TT2, April 30, 2013 pg. 68).

A search warrant was issued and executed at the residence of Petitioner. No money, no mask no hooded sweat shirt, no glasses, no gloves and no weapon. Absolutely nothing recovered linking Mr. Ozier to the robbery.

The ensuing investigation was hastily completed, recovered evidence from the car wash was never tested for DNA or finger prints. Subsequently, Petitioner was arrested and charged with armed robbery and bank robbery.

At trial Petitioner's parole agent testified over objection.

REASONS FOR GRANTING THE PETITION

In an attempt to cross-examine her regarding how long her contact with Mr. Ozier had been the day she met him, she responded; "until he was taken into custody." Petitioner was denied the right to corss-examine the agent regarding any bias, motive, or prejudice she may harbored against him in identifying him. (TT2, April 30, 2013 pg. 69.) Moreover, it was an abuse of discretion in allowing her to testify, she was in no better position than the jury to make an identification.

Neither the informant nor Detective Stiles who accused Mr. Ozier of robbing the bank appeared at trial or the preliminary examination.

Mr. Wecker, a bank customer who followed the robber after the robbery, gave a statement to police identifying the vehicle and the robber as being caucasian, did not appear at trial.

Daruis Griffin, an alleged co-defendant, sought to curry favor with the prosecutor and entered into a plea agreement to testify against Mr. Ozier, for his testimony, Griffin was given a plea to unarmed robbery and immediately released from jail. (TT2, April 30, 2013. Additional facts appear in the argument to follow.

I.

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN MR. OZIER'S CONVICTION FOR ARMED ROBBERY AND BANK ROBBERY.

"MIS-CARRIAGE OF JUSTICE"

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) governs all habeas petitions filed after its effective

date. Lindh v Murphy, 521 U.S. 320, 326 (1997). Under (AEDPA) in order to obtain habeas relief a state prisoner must show that the state adjudication of the claim on the merits: (1) Resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 USC 2254(d).

A decision is contrary to clearly established Federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] has on a set of material indistinguishable facts." Williams v Taylor, 529 U.S. 362 (2000). A decision is based on an un reasonable application of Supreme Court precedent if the state court identifies the correct governing legal rule from the [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case." Id. Possible error by the state court is not sufficient to justify granting the habeas petition, the state court's application of Federal law must have been objectively unreasonable, Wiggins v Smith, 539 U.S. 510, 520-21 (2003) (quoting Williams 529 U.S. at 409.

To determine whether "AEDPA deference" applies, a heabeas court must consider which state court "decision" is to be reviewed, and whether that decision adjudicated a claim on the merits. Federal Habeas Courts "look through summary denials of claims by state appellate courts and review instead the last reasoned state-court decision." Ylst v Nunnmaker, 501 U.S. 797, 806 (1991).

Here, the Michigan Supreme Court's summary denials of Petitioner's Applications for leave to appeal were not decisions on the merits. Instead, the court "looks through" the state Supreme Court's denials of discretionary review to the last reasoned state court decision on the issues.

Most of the time a claim eligible to considered on the merits will have been "adjudicated on the merits in state court proceedings," and thus AEDPA deference applies. But when a Petitioner brings a claim that was raised in the state court but was not decided on the merits, because the state court simply failed to decide the claim without explanation,the [state] courts did not reach the merits of [the Petitioner's constitutional] claim, Federal Heabeas review is not subject to the deferential standard that applies under AEDPA to any claim that was not adjudicated on the merits in state court proceedings, instead, the claim is reviewed de novo. Cone v Bell, 129 S.Ct. 1769, 1784 (2009), (quoting 28 U.S.C. 2254(d).

Petitioner's claim herein was not adjudicated on the merits. In the instatnt case, petitioner raised insufficiency of the evidence in the Michigan Court of Appeals. Jackson v Virginia, 443 U.S. 307 (1979). Courts must apply the Jackson standard "with explicit reference to the substantive "elements" of the criminal offense as defined by state law." Id at 324 n. 16.

In the Michigan Court of Appeals, petitioner raised the claim- The Identification evidence was insufficient to sustain the conviction for armed and bank robbery. The court in its opinion dated November 18, 2014 held that petitioner had been identitied as the robber, completely ignoring the armed element.

Discussion

A.

The due process clause of both the state and federal constitutions prohibit a criminal conviction absent proof beyond a reasonable doubt that the accused is guilty of all of the essential elements of the crime charged. In re Winship, 387 U.S. 359 (1970), see also Jackson v Virginia, 443 U.S. 307 (1979).

Guilty verdicts must be supported by sufficient evidence to ensure that the petitioner's due process rights under the 5th and 14th Amendments of the United States Constitution are being protected. In re Winship, 397 U.S. 358 (1970).

As the United States Supreme Court held in In re Winship, "[n]o man should be deprived of his life under the forms of the law unless jurors who try him are able upon their consciences, to say that the evidence berore him... is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." Id. at 363.

Thus, a conviction as in the present case, based upon insufficient evidence is unconstitutional and must be dismissed. The evidence produced at trial failed to satisfy this beyond a reasonable doubt burden of proof. Jackson v Virginia, 443 U.S. 307 (1979).

On October 8, 2012, Tammy Walker, was working as a bank teller at the Aeroquip Credit Union in Jackson, Michigan when it was robbed by a lone individual. Ms. Walker testified the robber did not say he was armed. (TT1, 4/29/2013 pg. 156). Did not announce that it was a "stick up" or made any threats. (TT1 4/29/2013 pg. 156-57). She testified that she did not see a

gun or knife. (TT1, 4/29/2013 pg. 157). Did not see an article fashioned as a weapon. (TT1 4/29/2013 pg. 158). Did not see the outline of a gun. (TT1, 4/29/2013 pg. 157). When the robber removed his hand from the hoodie pocket, did not see a weapon. (TT1, 4/29/2013 pg. 157). Did not know if his index finger was extended as if the barrel of a gun. (TT1, 4/29/2013 pg. 158). Did not see a bulge from a heavy object. (TT1, 4/29/2013 pg. 159).

To establish armed robbery in the state of Michigan based on the use of a feigned weapon, prosecutors must put forward evidence sufficient "for a rational trier of fact to conclude that the defendant used some article... to lead complaint to reasonably believe defendant has a dangerous weapon." People v Taylor, 628 NW2d 55, 61 (Mich. Ct. App 2001).

A victims subjective belief alone is insufficient to sustain an armed robbery conviction. Id. at 59. In People v Saenz, 307 NW2d 675, 677 (Mich 1981) (per curiam) (explaining that relying on the victim's reasonable belief that the defendant has a weapon based on the circumstances "addresses only consideration and ignores the requirement that thebelief must be induced by the use or fashion of any article with which the assailant is armed.

When viewed cumulatively the bank teller's testimony, the testimony of the alleged co-defendant and the prosecutor's opening statement to the jury; "I'm going to tell you right now that there was not an actual gun involved in this case." (TT1, 4/29/2013 pg. 109). Its clear that no armed robbery ever occurred.

Because of the facts forementioned, its clear that a mis-carriage of justice has occurred and this Honorable Court can waive any and all procedural bars and adjudicate the claim upon the merits.

B.

PROCEDURAL CONCERNS:

Petitioner's appointed counsel in his brief filed with the Michigan Court of Appeals, raised the the issue that: The identification evidence was insufficient to sustain petitioner's conviction for armed robbery and bank robbery, citing Jackson v Virginia, 443 U.S. 307 (1979), explaining that every element of thecrime charged must be proved by sufficient evidence. The Michigan Court of Appeals chose not to address whether there was proof of every element beyond a reasonable doubt. The Federal District Court failed to address whether there was evidence on every element as well when it denied Mr. Ozier's habeas petition.

Petitioner has maintained his actual innocence in all courts and has consistently requested that any and all procedural bars be waived. In the instant case, no armed robbery occurred and therefore the "MIS-CARRIAGE OF JUSTICE" exception is applicable here.

The Sixth Circuit Court of Appeals in it decision held that petitioner changed the theory of the claim. The state did not raise "procedural default" in the District Court and didn't raise it until petitioner was granted a Certificate of Appealability (COA).

The Court determined that petitioner had procedurally defaulted the for failure to establish cause for and prejudice from his default or actual innocence, he is not entitled to relief on his insufficiency-of-evidence claim. The Court completely ignored that

a "MIS-CARRIAGE OF JUSTICE" has reared its ugly head.

When a State's return to a habeas corpus petition fails to dispute the factual allegations contained within the habeas petition, it essentially admits those allegations to be true. Dickens v Jones, 203 F.Supp 2d 354, 360 (E.D. Mich 2002). (Cristini v McKee, 526 F.2d 888 (6th Cir. 2008).

The state having failed to raise procedural default in the District Court, accordingly, courts have held that the state waived this issue. See Harris v Pulley, 885 F.2d 1354, 1367 (9th Cir. 1988) (state waived abuse of writ argument because of failure to raise it in District Court.

Moreover, in Grandberry v Greer, 481 U.S. 129 (1987), the Supreme Court held that although theres a strong presumption in favor of requiring a petitioner to exhaust his available remedies, the failure to do so is not an absolute bar to appellate consideration of his petition--i.e., the doctrine of exhaustion is discretionary, not jurisdictional.

When its evident that a "MIS-CARRIAGE OF JUSTICE" has occurred, non-exhaustion should be waived. See Grandberry, 481 U.S. at 135.

This Court in its opinion in Trest v Cain, 522 U.S. 87, 89 (1997) held; procedural default is a defense that the state is obligated to raise and failure to do so could act as a waiver thereafter...

Petitioner Ozier has asserted and has shown by the record which is clear and convincing evidence, that no armed robbery ever occurred. The Prosecutor's opening statement to the jury; "We know there was no weapon." The bank teller's testimony; I seen

gun, knife, bulge or article fashioned as a weapon. He made no threats, did not announce that it eas a stick up/robbery, he made no gestures and when he removed his hand from his pocket; there was no weapon. The co-defendant's testimony; "There was no intention to make anyone believe there was a weapon."

The state knew of these facts prior to trial, they were ignored and they maliciously proceeded against petitioner, trying and convicting him of armed robbery and bank robbery.

Its evident that a "MIS-CARRIAGE OF JUSTICE" has occurred and the lower federal courts have completely ignored the egregious error.

The mis-carriage of justice exception waives any and all procedural bars. Federal courts may consider a procedurally defaulted claim "if the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in a fundamental "MIS-CARRIAGE OF JUSTICE." Coleman v Thompson, 501 U.S. 722 (1997). Coleman, 501 at 750.

Petitioner pleads with this Honorable Court to grant certiorari on this claim.

II.

PETITIONER WAS DENIED HIS RIGHT TO CONFRONTATION WHEN TRIAL ATTOTNEY COULD NOT CROSS EXAMINE HIS PAROLE AGENT ABOUT HER MOTIVES, PREJUDICE OR BIAS SHE MAY HARBOR IN IDENTIFYING HIM FRO SURVEILLANCE VIDEO.

The states use of Denise Welhusen (parole agent as an identification witness violated the 5th and 14th Amendments due process Clause, it was an abuse of discretion in allowing her to do so. She was in no better position than the jury to determine who was in the video. Moverover, it violated the 6th Amendments confontation Clause when petitioner couldn't effectively cross-examine her regarding any bias, prejudice or her motives for identifying him from surveillance video.

This honorable Court has held that a petitioner has the right to cross-examine an adverse witness regarding any motive, bias or prejudice they may harbor. Davis v Alaska, 415 U.S. 308 (1974).

The Michigan Court of Appeals denied petitioner relief holding that he was able to cross-examing the witness by asking relevant questions. Completely ignoring the fact when the agent was asked; "When you first came in contact with Mr. Ozier, how long was that for? She responded, "Until he was taken into custody." (TT2, April 30, 2013 pg. 69).

The statement was made at a critical moment in the trial. Detective Boulter had previously testified and was allowed to give an illegal impermissible overview of the case by stating that there had been several robberies in the area. The agent's testimony led the jury to believe petitioner was involved in the

earlier robberies. (TT2, April 30, 2013 pg. 9).

The Federal District Court held that the United States Supreme Court had not ruled or decided a case regarding a parole agent testifying and identifying a parolee in video footage.

Under the(AEDPA), it does not require state and fedral courts to wait for some nearly identical factual pattern before a legal rule must be applied. Panetti v Quarterman, 127 S.Ct. 2842 (2007).

Petitioner cited United States v Calhoun, 544 F.2d 291 (1976), the Sixth Circuit Court of Appeals granted Calhoun a new trial. this case bdfore the court and Calhoun supra, are analogous to one another. Calhoun cited Davis v Alaska, 415 U.S. 308 (1974) and Smith v Illinois, 390 U.S. 129 (1968). Petitioner presented the exact same argument with identical facts and has been denied. Equal Protection of the Law requires that, "if you do for one, you must do for all." Its clear and obvious that petitioner is being denied "EQUAL PROTECTION OF THE LAW."

Moreover, the Court of Appeals held that it was an abuse of discretion in allowing the parole agent to testify and further explained that Calhoun couldn't effectively cross-examine the agent without more prejudical information being revealed to the jury which would affect substantial rights and is not harmless error.

The Circuits differ regarding such identification testimony. The 5th, 7th and the 9th, inter alia, allows it- stating that there had been a long standing relationship between the agent and parolee. In the present case, petitioner only knew his agent one month, having transferred from another location.

Rule 10 is applicable here, there is the existence of a conflict

between the decision of which review is sought and a decision of another appellate court on the same issue. This Honorable Court has maintained that it is an important function of the Supreme Court is to resolve disagreements among lower courts about specific legal issues.

Petitioner humbly ask this Honorable Court to issue certiorary on this claim before the Court.

III.

PETITIONER'S SIXTH AMENDMENT TO CONFRONTATION WAS VIOLATED WHEN HE WAS DENIED THE OPPORTUNITY TO CROSS-EXAMINE THE INFORMANT AND DETECTIVE STILES WHO ACCUSED HIM OF BANK ROBBERY, COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

The U.S. Constitution, Amendment VI provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with witnesses against him..." "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes; confrontation." Crawford v Washington, 541 U.S. 36, 68-9, 124 S.Ct. 1354 (2004).

Detective Boulter testified taht Detective Stiles reported two days after the robbery of the Aeroquip Credit Union that he received a tip from a known informant that Roger Ozier was the passenger in the car and the one who entered and robbed the credit union. (TT2, 4/30/2013 pg. 21-22).

Neither Detective Stiles nor the informant were called to testify at trial. Petitioner had no prior opportunity to cross-examine these two witnesses. Their statements were testimonial, and used to arrest and prosecute Petitioner.

In the case before the Court, without objection, the following testimony occurred with Detective Boulter concerning Detective Stiles who reported that Petitioner was the robber.

Q At some point, however, you changed directions as to Mr. Brown? "Note, Mr. Brown was identified as the person in the video by Detective Boulter and two other detectives."

A That is correct.

Q Could you explain how that happened please?

A Yes, Sir. One of the things that we do as a major Crimes Task Force is we come together regularly to update each other on what's going on. Often times we may have little pieces that we're responisbile for as working the investigation, but my responsibility as lead detective is to coordinate thes meetings to make sure the pen gets put to the paper and we sit down reegularly when we're investigating these caes.

Two days after this robbery we came together, sat down and one of the detectives, Detective Stiles in this particular case, reported that he had received a tip taht Roger Ozier was the passenger and the person that had gone in and robbed Aeroquip Credit Union.

Ultimately we took taht information retrieved a picture of Mr. Ozier and did a comparison of that. I felt equally as comfortable that Mr. Ozier "could have been this person coming out of the passenger side of the vehicle and subsequently the robber. (TT2, 4/30/2013 pg. 21-21).

The informant's tip was central to the prosecutions case in chief. As in United States v Cromer, 389 F.3d 662 (2004), the state repeatedly used the statement. First, in the prosecutor's opening statement to the jury. (TT1, 4/29/2013 pg. 116)... Secondly, when Detective Boulter testified. (TT2, 4/30/2013 pg. 21-22). And lastly, in the prosecutor's closing argument. (TT@, 4/30/2013 pg. 124).

Moreover, the informant provided petitioner's name for the purpose of establishing the truth of the matter by asserting that Mr. Ozier had participated in the illegal activity at the

In its Opinion, the Michigan Court of Appeals held: "We conclude, therefor, defendant's trial counsel should have objected to the admission of this testimony and was deficient in failing to do so." However, defendant has not shown that either the evidentiary errors or counsel's failure to object affected his substantial rights, i.e, the errors did not affect the outcome of trial."

Justice Rehnquist delivered the opinion of the Court in Delaware v Arsdall, 106 S.Ct. 1431 (1986), this Court held: "While some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole, see e.g., Strickland v Washington, 466 U.S. 668 (1984) (ineffective assistance of counsel), the focus of the prejudice inquiry in determing whether the confrontation right has been violated must be on the particular witness, "NOT ON THE OUTCOME OF THE ENTIRE TRIAL."

The Court further concluded, "It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to "[confrontation]" because use of that right would not have affected the jury's verdict. Arsdall, Supra, 106 S.Ct. 1436.

The very fact that the informant is confidential- i.e., that not even his identity is disclosed to the defendant- heightens the dangers involved in allowing a declarant to bear testimony without confrontation. The allowance of anonymous accusations of crime without any opportunity for cross-examination would make a mockery of the Confrontation Clause. Cf. Silva, 380 F.3d at 1020.

The Sixth Circuit warned against the potential for abuse when police testify to the out-of-court statements of a confi-

dential informant. United States v Cromer, 389 F.3d 662 (6th Cir. 2004).

The Michigan Court of appeals decision is contrary to clearly established Federal Law. The Court mis-characterized the evidence by saying the defendant car was identified. In reality, the car did not blong to petitioner. The identification of police regarding video footage taken from the car wash and not actual bank surveillance. This violated due process, and the fact police were allowed to testify to petitioner's guilty which invaded the province of the jury. When viewed cumulatively, petitioner was denied a fair trial.

IV.

PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND CALLING TO TRIAL A EYEWITNESS.

The Sixth Amendment to the United States Constitution provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right to...have the Assistance of Counsel for his defense.

In order for a defendant to prevail on an ineffective assistance of counsle claim, he must comply with the familiar two-prong test set forth in Strickland v Washington, 466 U.S. 668 (1984).

The first prong requires defendant to prove that his trial counsel's represenation was deficient in that it "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 668.

Present during the robbery was a bank customer, Mark Wecker, he made a statement to police, that he followed the robber out of the bank and the perpetrator entered into a silver or gray GM vehicle and described the robber as being caucasian. (TT2, 4/30/2013 pg. 31,33).

Petitioner argues that his trial counsel rendered ineffective assistance in two ways; first, by failing to conduct a reasonable investigation into Mark Wecker; and second by failing to call Mark as a defense witness.

It is well established that counsel had a duty to make reasonable investigations or to make reasonable decisions that makes particular investigations unnecessary. Strickland, 466 U.S. at 691.

The duty to investigate derives from counsel's basic function, which is "to make the adversarial testin process work in the particular case." Kemmelman v Morrison, 477 U.S. 365, 384 (1986).

This duty includes that obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence. See Bryant v Scott, 28 F.3d 1411, 1419 (5th Cir. 1994) (citing Henderson v Sargent, 926 F.2d 706, 711 (8th Cir. 1991).

In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments..."Strickland, 466 U.S. at 691."

The relevant question is not whether counsel's choices were strategic, but whether they were reasonable. Roe v Flores-Ortega, 528 U.S. 470 (2000); accord Clinkscale, 375 F.3d at 443. A purportedly strategic decision is not objectively reasonable "when the attorney has failed to investigate his options and make a reasonable choice between them." Horton v Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) (cited in Combs, 205 F.3d at 288).

In the instant case, counsel attempted to argue to the jury in closing argument that Mr. Wecker made a statement to police about the vehicle and gave a description of the robber as being caucasian. (TT2, 4/30/2013 pg. 133). Wecker's statement about the vehicle proved to be accurate and correct. If called to testify, the jury could have weighed and assessed Mr. Wecker's testimony for truthfulness and reached the conclusion that his description of the robber was also accurate and correct.

Moreover, it would have provided Petitioner with a substantive defense. Certianly, with petitioner being African-american, and Mr. Wecker having followed someone other than that, undoubtedly could have affected the verdict.

The harmless error analysis applied to this case was an egregious error. There was no evidence linking petitioner to this robbery other than the coerced testimony of Danuis Griffin. Petitioner was not identified by any bank employee, he had no money, no hooded sweat shirt, no glasses, no gloves and was not seen by anyone with Griffin.

The introduction of the robbery packet to the jury was a shameful sham. It is clear that the attorney knew the importance of Mr. Wecker's testimony and failing to investigate and calling the witness to trial, denied his client a substantive defense the jury did not hear the "Whole transaction." Chambers v Mississippi, 410 U.S. 284, 294 (1973).

The Michigan Court of Appeals acknowledged that counsel's performance was deficient and not investigationg and calling Mr. Wecker to trial caused prejudice, Mr. wecker's testimony was exculpatory evidence for the the defense.

Because of the foregoing facts from the record, this Honorable Court shoul issue certiorary.

V.

PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN TRIAL COUNSEL FAILED TO CHALLENGE PETITIONER'S ARREST WITHOUT PROBABLE CAUSE, CREATING A RADICAL DEFECT RENDERING THE PROCEEDING VOID AND APPELLATE COUNSEL FOR FAILING TO RAISE ISSUE ON DIRECT APPEAL.

Petitioner asserts that he was denied his right to the effective assistance of counsel under Strickland v Washington, 466 U.S. 668 (1984) (trial), and its progeny Evitts v Lucey, 469 U.S. 387 (1985) (appeals).

First it must be proven that his trial counsel's representation was deficient in that it "fell below an objective standard of reasonableness." Secondly, petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of [his trial] would have been different.

Petitioner was arrested at 12:50 p.m. at the Catholic Charities, located in Jackson, Michigan. He was arrested without a warrant or probable cause.

According to testimony, two days after the bank robbery, a detective, Detective Stiles reported to Task Force, Sgt. Boulter that he received a tip fro an informant that Roger Lee Ozier, the petitioner before the court, was the passenger in the vehicle and ultimately the one who robbed the credit union. (TT2 April 30. 3013 pg. 21-22).

This information is unverified, A mere statement, by a police officer seeking an arrest warrant based on information provided by an informant's tip, that the informant is reliable is not sufficient to establish the

ficient to establish the informant's credibility.

It is well established by the Fourth Amendment, that a tip alone is insufficient to establish probable casue. In Aguilar v Texas, 378 U.S. 108, the Court held: "The informant's tip an essential part of the affidavit in this case, was not sufficient (even corroborated by other allegations) to provide the basis for a finding of probable cause that a crime was being committed.

Daruis Griffin, the alleged co-defendant had not been arrested and no statements were given to police by him. Griffin would have been the only person who could have offered any information to police that may have helped to establish probable cause to arrest Mr. Ozier.

The police, the parole agent's testimony and statements were not supported by anything other than mere "speculation" and impermissibly layered inferences." Skyes, 2004 Mich. App Lexis 1122.

The bank employees could not provide police with any information regarding the robber's identity. In fact, the bank customer who followed the robber after the robbery, identified him as being caucasian.

When seeking the warrant, the officer made omissions with reckless disregard by withholding facts in his ken that any reasonable person would have known that this was the kind of thing the judge would wish to know. Wilson v Russo, 212 F.3d 781 (2000).

The State and lower Federal Courts have allowed several flagrant misrepresentations, exaggerations, and omissions of evidence that were key to determining whether probable cause

existed to believe that the defendant had committed any crime.

First, the Michigan Court of Appeals mis-characterized the ownership of the vehicle allegedly used in the robbery as petitioner's. It did not belong to him and at no time had he possessed it. (TT2, 4/30/2013 pg. 78,79).

Secondly, the state court and lower federal courts misconstrued testimony by police who did not know petitioner, who never had any contact with petitioner as identification evidence. (TT2, 4/30/2013 pg. 217). Its impossible to identify someone you've never seen or had prior contact with.

The Fourth Amendment protects "[t]he right of the people to be secure in their person...against unreasonable seizures." Petitioner's arrest was "unreasonable," because it was based soley upon false evidence, rather than supported by probable causse. See Bailey v United States, 568 U.S. 186 (2013).

In the present case, the complaint is bare bones, an adequate basis for a finding of probable cause must appear on the face of the complaint pursuant to which the arrest warrant is issued. Giordenello v United States, 357 U.S. 480 (1958) Hn. 12.

Officer Boulter, on his own complaint, obtained a warrant for petitioner's arrest, his complaint was not based on his personal knowledge, did not indicate the source of his belief that petitioner had committed a crime and set forth no other sufficient basis for a finding of probable cause.

The impropriety of this arrest is obvious, police had a crime but they did not have a culprit. There was no tangible evidence linking petitioner to the crime. In violation of the 4th Amendment, an arrest without probable cause occurred.

In violation of the 5th Amendment, which reads in pertinent part; "No person shall be deprived of life, liberty, or property, without "due process of the law"..."

Moreover, application of the exclusionary rule protects Fourth Admendment guarantees in two respects: in terms of deterring lawless conduct by officers, and by closing the dorrs of the courts to any use of evidence unconstitutionally obtained.

This case lies at the cross roads of the Fourth and Fifth Amendments. Petitioner was arrested without probable cause and without a warrant, in violation of the Fourth Amendment, and he was deprived of life, liberty in violation of due process of the law of the Fifth Amendment.

The lower federal courts have held in this case, that a illegal arrest will not cause a conviction to be over turned. However, the courts have completely ignored that petitioner has been denied due process because of the illegality. When due process requires that you have probable cause and a warrant to arrest and convict an amenrican citzen, anything other than that is a violation of due process which shall over turn convictions.

REMEDY

Petitioner is convicted of both armed and bank robbery but armed robbery is a Class A offense while bank robbery, by whatever means committed is a Class C offense. Id. Thus, a conviction for armed robbery will invariably result in a greater recommended sentence under the guidelines then a conviction for bank robbery even though both are life offenses. See MCL 777.62 (Class A grid) and MCL 777.64 (Class C grid).

Petitioner asserts that sentencing without the armed robbery would inevitably be less severe, and due to the disparate sentencing treatment and the fact petitioner was sentenced for the armed robbery first to a sentence of 30 to 50 years. His sentence for bank robbery alone would be considerably less.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Roger Lee Lynn

Date: October 18, 1988

No. 17-1803

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROGER LEE OZIER,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
SHIRLEE HARRY, Warden,)
)
Respondent-Appellee.)

Roger Lee Ozier, a Michigan prisoner proceeding pro se, appeals the order of the district court denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. He applies for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

A Michigan jury found Ozier guilty of bank robbery and armed robbery in connection with the 2012 robbery of a bank in Blackman Township, Michigan. The trial court sentenced Ozier as a habitual offender, fourth offense, to concurrent prison terms of thirty to fifty years for each conviction. The Michigan Court of Appeals affirmed on direct appeal, and the Michigan Supreme Court denied Ozier leave to appeal. *People v. Ozier*, No. 317217, 2014 WL 6468105 (Mich. Ct. App. Nov. 18, 2014) (per curiam), *perm. app. denied*, 863 N.W.2d 69 (Mich. 2015) (mem.). Ozier sought post-conviction relief in the trial court, which was denied. The Michigan Court of Appeals and the Michigan Supreme Court denied him leave to appeal.

Ozier subsequently filed the current § 2254 petition, raising the following claims: (1) the trial court improperly admitted prior bad acts evidence (count 1); (2) insufficient evidence existed to sustain his convictions (count 2); (3) he was denied his rights to confrontation and effective assistance of counsel (counts 3, 4, 5, 7, and 8); and (4) the police and prosecutors

deprived him of due process by failing to analyze exculpatory evidence (count 6). The district court rejected Ozier's claims on the merits and declined to issue a COA for any of the issues that he raised.

Ozier now seeks a COA from this court on all of the claims raised in his habeas petition, except for counts one and six, which he has abandoned by failing to include them in his COA application. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam). To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate "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). When reviewing a district court's application of the standards of review of 28 U.S.C. § 2254(d), this court asks whether reasonable jurists could debate if the district court erred in concluding that the state-court adjudication neither (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"; nor (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Miller-El*, 537 U.S. at 336.

In count two, Ozier argued that insufficient evidence existed to sustain his convictions. First, he maintained that prosecutors failed to establish the "armed" element needed to sustain his armed-robbery conviction. Second, he argued that the evidence was insufficient to prove that he was the perpetrator, maintaining that the incriminating testimony of Darius Griffin, his co-defendant, was not credible.

This court reviews sufficiency-of-evidence claims considering whether, after viewing the evidence in the light most favorable to the government, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Warshak*, 631 F.3d 266, 308 (6th Cir. 2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

When assessing the sufficiency of evidence, this court "do[es] not weigh the evidence, assess the credibility of the witnesses, or substitute [its] judgment for that of the jury." *United States v. Wright*, 16 F.3d 1429, 1440 (6th Cir. 1994). "All reasonable inferences and resolutions of credibility are made in the jury's favor." *United States v. Washington*, 702 F.3d 886, 891 (6th Cir. 2012). Circumstantial evidence alone can establish sufficiency of evidence. *Id.* The inquiry involves two layers of deference: one to the jury's verdict and a second to the state court's decision under § 2254(d). *See Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam).

Under Michigan law, a person is guilty of armed robbery if, in the course of committing the robbery, that person "possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon." Mich. Comp. Laws § 750.529. To establish armed robbery based on the use of a feigned weapon, prosecutors must put forward evidence sufficient "for a rational trier of fact to conclude that defendant used some article . . . to lead complainant to reasonably believe defendant had a dangerous weapon." *People v. Taylor*, 628 N.W.2d 55, 61 (Mich. Ct. App. 2001). A victim's subjective belief alone is insufficient to sustain an armed robbery conviction. *Id.* at 59. A person is guilty of bank robbery if he, "with the intent to commit the crime of larceny, or any felony, . . . put[s] in fear any person for the purpose of stealing from any . . . depository of money, bond or other valuables." Mich. Comp. Laws § 750.531.

Reasonable jurists would not dispute the district court's denial of Ozier's sufficiency-of-the-evidence claim as it relates to Ozier's conviction for bank robbery. The Michigan Court of Appeals found that sufficient evidence existed to sustain Ozier's conviction, including the testimony of Griffin. The court also referenced a surveillance video showing an individual, identified by multiple witnesses as Ozier, exiting the vehicle involved in the robbery and putting on a hooded sweatshirt consistent with a sweatshirt witnesses indicated the robber wore.

As an initial matter, Ozier's attack on the sufficiency of the evidence supporting the bank robbery conviction, specifically as it relates to Griffin's credibility, does not entitle him to a

COA. Ozier's assertion that Griffin provided self-serving testimony is an attack on Griffin's credibility, which this court may not evaluate in a sufficiency-of-the-evidence analysis. *See Wright*, 16 F.3d at 1440. There was otherwise sufficient evidence to sustain Ozier's conviction for bank robbery. This included the testimony of Griffin, who asserted that he and Ozier jointly carried out the robbery, and the surveillance tape, which multiple witnesses established showed Ozier exiting the vehicle used in connection with the robbery and donning the robber's attire. A rational trier of fact could conclude from these facts that Ozier was guilty of bank robbery. *See Warshak*, 631 F.3d at 308. And thus jurists of reason could not disagree with the district court's resolution of this claim or conclude that this claim should be encouraged to proceed further.

Ozier's sufficiency claim as it relates to his armed-robbery conviction raises procedural-default concerns because Ozier did not raise the claim before the Michigan state courts in his direct appeals. *See Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Richardson v. Elo*, 974 F. Supp. 1100, 1104 (E.D. Mich. 1997) (explaining that when a petitioner fails to raise a claim in his appeal of right, such claim is procedurally defaulted under Michigan's court rules (citing M.C.R. 6.508(D)(3))). Procedural default prevents federal habeas corpus review of the defaulted claim unless the petitioner can demonstrate cause and prejudice for the default, or that he is actually innocent. *See Bousley v. United States*, 523 U.S. 614, 622 (1998). .

But procedural default is a defense that the state is obligated to raise. *Trest v. Cain*, 522 U.S. 87, 89 (1997). The government did not raise the defense in its response to Ozier's petition. And although this court may sua sponte address procedural default, we have emphasized that we will not do so "as a matter of course" so as to prevent, among other things, depriving a petitioner of the opportunity to respond to the issue. *Howard v. Bouchard*, 405 F.3d 459, 476 (6th Cir. 2005) (quoting *Flood v. Phillips*, 90 F. App'x 108, 114 (6th Cir. 2004)). We will thus consider whether reasonable jurists could debate the district court's resolution of the claim or conclude that the claim should be encouraged to proceed further.

As previously noted, to sustain a conviction for armed robbery under Michigan law, prosecutors must establish that the defendant was armed—that the defendant possessed a weapon

or an article made to look like a weapon, or that the defendant represented orally or otherwise that he possessed a weapon. *See* Mich. Comp. Laws § 750.529. Griffin testified during trial that neither he nor Ozier had a weapon during the robbery and that they did not have any plans to make it seem like either individual was in possession of a weapon. Laura Hayes, the branch manager of the bank that was robbed, testified that on the day of the robbery, she saw the robber enter the bank in a disguised appearance and rob the bank while keeping his right hand in his pocket. She claimed that she did not see a weapon of any kind displayed. Tammy Walker, a teller at the bank, testified that the robber had his right hand in his pocket and directed her to "put [her] hands on the counter" and hand over the bank's money. She stated that she assumed the robber was armed but acknowledged on cross-examination that the robber did not present a weapon, say that he was armed, announce it was a stick up, or threaten her with violence. Walker in fact indicated that she saw the outline of his hand in his pocket but did not see the outline of a gun, and that she assumed the robber was armed based on the robber's disguised appearance and the presence of his hand in his pocket. Moreover, Walker stated that the robber removed his hand from his pocket during the robbery to collect money on the counter and that she did not see a gun. It is arguable that this evidence cumulatively establishes, at most, that Walker subjectively believed the robber to be armed based on his disguised appearance and the presence of his hand in his pocket, which would be insufficient to sustain an armed-robbery conviction. *See, e.g.*, *People v. Banks*, 563 N.W.2d 200, 201 (Mich. 1997) ("[A] subjective belief that a weapon exists is insufficient to satisfy the armed robbery statute."); *People v. Saenz*, 307 N.W.2d 675, 677 (Mich. 1981) (per curiam) (explaining that relying on the victim's reasonable belief that the defendant had a weapon based on the circumstances "addresses only one consideration and ignores the requirement that the belief must be induced by the use or fashion of 'any article' with which the assailant is armed"). Accordingly, this issue deserves encouragement to proceed further, especially because the district court failed to address this argument when it denied Ozier's habeas petition. *See Miller-El*, 537 U.S. at 327.

Ozier's remaining claims concern his rights under the Confrontation Clause and to effective assistance of counsel. In claim three, he contends that Detective Christopher Boulter, a Blankman Township police officer, should not have been permitted to testify that Mark Wecker, a witness to the robbery, described the vehicle used in the robbery as grey or silver in color. In claim five, he asserted that Boulter should not have been permitted to testify that another officer informed him of an anonymous tip implicating Ozier in the robbery. The district court denied these claims and reasonable jurists could not disagree with that resolution.

First, Confrontation Clause violations are subject to harmless error review. *Vasquez v. Jones*, 496 F.3d 564, 574 (6th Cir. 2007). Habeas relief may be granted on a Confrontation Clause violation only where the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The testimony at issue, whether testimonial or not, did not have such an effect or influence because there was other evidence in the record that addressed the same facts. For example, Griffin testified both to Ozier's involvement in the robbery and to the identifying features of the vehicle used in the robbery, and the vehicle was recorded by a nearby car wash's surveillance camera. Second, because the testimony was harmless, Ozier cannot show that his attorney's failure to object to it was prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Hall v. Vasbinder*, 563 F.3d 222, 236 (6th Cir. 2009) ("The prejudice prong of the ineffective assistance analysis subsumes the *Brecht* harmless-error review."); *Dobbs v. Trierweiler*, No. 16-2209, 2017 WL 3725349, at *2 (6th Cir. Apr. 7, 2017). Thus, Ozier's ineffective assistance claim must also fail. Reasonable jurists would not debate the district court's conclusion that the state court's decision on these matters was consistent with clearly established law and was based on reasonable determinations of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d).

In count seven, Ozier alleged that trial counsel performed ineffectively by failing to investigate and ultimately call Wecker as a witness, and that appellate counsel performed ineffectively by failing to raise the trial counsel's failure to do so on appeal. Ozier alleged that

Wecker identified the robber as Caucasian and that Wecker's testimony would have exonerated Ozier, who is African-American.

To prevail on an ineffective-assistance-of-counsel claim, a litigant must establish: (1) that counsel was deficient and (2) that the deficient performance prejudiced the litigant's defense. *Strickland*, 466 U.S. at 687. Counsel's performance is considered deficient when "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* In the appellate context, counsel can perform deficiently by failing to raise an issue clearly stronger than the issues counsel did raise. *See Smith v. Robbins*, 528 U.S. 259, 288 (2000). To establish prejudice, a petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Reasonable jurists would not debate the district court's denial of Ozier's seventh claim. Ozier raised this claim for the first time in his post-conviction motion. The state trial court rejected the claim pursuant to Michigan Court Rule 6.508(C)(3), finding that Ozier could have raised the claim on direct appeal and had not shown cause for or prejudice from his failure to do so. The government raised procedural default in its response to Ozier's petition. But the district court nevertheless considered the claim on its merits. The district court rejected the claim because (1) Ozier failed to provide evidence showing that Wecker would have testified that the perpetrator was Caucasion, and (2) because Ozier's counsel introduced Wecker's description of the perpetrator through a defense exhibit and called the jury's attention to the description during closing arguments. Because Wecker's statement was presented to the jury and Ozier has failed to explain how Wecker's in-person testimony would have changed the outcome of his trial, Ozier cannot show prejudice from trial counsel's performance. And because trial counsel did not perform ineffectively, appellate counsel did not perform ineffectively by failing to raise an ineffective-assistance-of-trial-counsel claim. *See Mapes v. Coyle*, 171 F.3d 408, 413-14 (6th Cir. 1999) (noting that "there can be no constitutional deficiency in appellate counsel's failure to

raise meritless issues"). Reasonable jurists would not debate the district court's resolution of this claim.

In count eight, Ozier alleged that trial counsel performed ineffectively by failing to challenge the alleged illegality of Ozier's arrest, and that appellate counsel performed ineffectively by failing to raise trial counsel's asserted deficiency on appeal. The district court denied this claim because even an illegal arrest would not have resulted in Ozier's release from custody or prevent him from being prosecuted and convicted. As such, the district court held that counsel was not ineffective for failing to file a motion to dismiss on this basis. Reasonable jurists would not debate the district court's resolution of this claim. "An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction." *United States v. Crews*, 445 U.S. 463, 474 (1980). Because an illegal arrest is not itself a defense to conviction, counsel did not perform ineffectively by failing to challenge Ozier's arrest, and appellate counsel did not perform ineffectively by failing to challenge trial counsel's actions. *See Mapes*, 171 F.3d at 413-14.

Finally, in count four, Ozier alleged that he was denied his right to confrontation because he was prevented from effectively cross-examining his parole officer, who provided identification testimony during trial. Ozier maintained that he could not effectively cross-examine his parole officer because doing so risked prejudicing him by revealing that he was on parole.

The Confrontation Clause "guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (quoting U.S. Const. amend. VI). "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)). To establish a Confrontation Clause violation, a defendant must show that he was "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could

appropriately draw inferences relating to the reliability of the witness.'" *Van Arsdall*, 475 U.S. at 680 (quoting *Davis*, 415 U.S. at 318).

Reasonable jurists would not debate the district court's denial of Ozier's fourth claim. The Michigan Court of Appeals rejected the claim, finding that Ozier was able to reasonably question his parole officer on relevant topics that avoided mention of his probation and that any error was otherwise harmless in light of other identification testimony provided during trial. In his petition and COA application, Ozier relied on *United States v. Calhoun*, 544 F.2d 291 (6th Cir. 1976) to argue that the state court erred in admitting this testimony. In *Calhoun*, this court determined that a district court abused its discretion by allowing the defendant's parole officer to testify against the defendant during trial. *See id.* at 296. The court found the testimony prejudicial because the defendant would be unable to effectively cross-examine the parole officer without exposing that the defendant had been on parole. *Id.* at 295. But *Calhoun* expressly declined to determine whether this amounted to a violation of the Confrontation Clause. *Id.* at 294-95 ("[W]e elect not to reach the constitutional issues and hold instead that, upon the record here, it was an abuse of discretion by the trial judge to have permitted the testimony...."). And even if it did decide the constitutional issue, *Calhoun* is not "clearly established law, as determined by the Supreme Court," 28 U.S.C. § 2254(d). So the Michigan Court of Appeals' failure to consider *Calhoun* cannot therefore provide a basis for habeas relief. Ozier was not otherwise deprived of the opportunity to effectively cross-examine the parole officer and, in fact, cross-examined the officer on several topics, including the reliability of her identification of Ozier. Reasonable jurists would not debate the district court's conclusion that the state court's decision on this matter was neither an unreasonable application of clearly established law nor an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d).

For the foregoing reasons, Ozier's application is **GRANTED** in part, specifically with respect to his sufficiency-of-evidence claim relating to his armed-robbery conviction, and

DENIED in part. The Clerk's Office is directed to issue a briefing schedule for the certified claim.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk