# APPENDIX

TABLE TO CONTENTS

# A-1. Order Denying Rehearing with Dissent

No. 17-2076

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



CARL BURNIE WELLBORN, )
)
Petitioner-Appellant, )
)
v. ) ORDER
)
MARY BERGHUIS, Warden, )
)
Respondent-Appellee. )

Before: GUY, COOK, and DONALD, Circuit Judges.

Carl Burnie Wellborn, a former Michigan prisoner proceeding through counsel, petitions for rehearing of this court's May 16, 2018, order denying him a certificate of appealability. The application for a certificate of appealability arose from the district court's judgment denying Wellborn's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254.

Upon careful consideration, this panel concludes that the court did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a). Accordingly, Wellborn's petition for rehearing is **DENIED**.

**BERNICE BOUIE DONALD, Circuit Judge, dissenting.** I disagree with my colleagues' conclusion that this court did not misapprehend or overlook any point of law or fact in its May 16, 2018, order, in which the court ruled that reasonable jurists could not debate the district court's procedural ruling in light of *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). As Petitioner noted, other jurists have adopted his proposed interpretation of *Weaver*—that he can meet the *Strickland* standard by establishing fundamental unfairness. *See, e.g., Ledet v. Davis*, No. 4:15-cv-882, 2017 WL 2819839, at *14 (N.D. Tex. June 28, 2017) ("The burden is on the defendant to show either a reasonable probability of a different outcome in his case or that

the particular public-trial violation was so serious as to render his trial fundamentally unfair."); *In re Salinas*, 408 P.3d 344, 353 (Wash. 2018) (McCloud, J., concurring) ("[*Weaver*] listed a showing of 'fundamental unfairness' as an alternative to proof of 'prejudice' as a means of gaining relief."). Reasonable jurists could also debate whether Wellborn's petition "states a valid claim of the denial of a constitutional right." *Dufresne v. Palmer*, 876 F.3d 248, 252 (6th Cir. 2017) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Therefore, I would grant Wellborn's rehearing petition and his application for certificate of appealability as to his claim that *Weaver* altered the standard for establishing actual prejudice. I respectfully dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

# A-2 Order Denying Motion for COA

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: August 16, 2018

Ms. Colleen P. Fitzharris
Federal Defender Office
613 Abbott Street
Fifth Floor
Detroit, MI 48226

Mr. James R. Gerometta
Federal Defender Office
613 Abbott Street
Fifth Floor
Detroit, MI 48226

Ms. Raina I. Korbakis
Office of the Attorney General
of Michigan
P.O. Box 30217
Lansing, MI 48116

Re: Case No. 17-2076, *Carl Wellborn v. Mary Berghuis*
Originating Case No. : 1:05-cv-00346

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jill Colyer
Case Manager
Direct Dial No. 513-564-7024

Enclosure

No. 17-2076

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



CARL BURNIE WELLBORN,

Petitioner-Appellant,

v.

MARY BERGHUIS, Warden,

Respondent-Appellee.

ORDER

Carl Burnie Wellborn, a former Michigan prisoner proceeding through counsel, appeals the district court's judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254.[1] He has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1).

Based on his sexual abuse of his granddaughters, A.F. and C.R., a Kent County jury convicted Wellborn of one count of first-degree criminal sexual conduct ("CSC"), in violation of Michigan Compiled Laws § 750.520b(1)(b), and two counts of second-degree CSC, in violation of Michigan Compiled Laws § 750.520c(1)(a) and (b). The trial court imposed prison terms of ten to thirty years and ten to fifteen years, respectively. On direct appeal, Wellborn—who is Caucasian—argued in part that he was denied a jury drawn from a fair cross-section of the community based on a "glitch" in Kent County's jury selection software. That glitch, it was later revealed, had systematically excluded African Americans from the county's jury pool. *See Ambrose v. Booker*, 684 F.3d 638, 640-43 (6th Cir. 2012) ("*Ambrose II*"). The Michigan Court of Appeals found that Wellborn had defaulted his fair cross-section claim by failing to object to the jury venire at trial. The state appellate court affirmed Wellborn's convictions, *People v.*

[1] Wellborn was incarcerated at the time he filed his habeas petition, "which is all the 'in custody' provision of 28 U.S.C. § 2254 requires." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

*Wellborn*, No. 242229, 2003 WL 22961704 (Mich. Ct. App. Dec. 16, 2003) (per curiam), and the Michigan Supreme Court denied leave to appeal.

In 2005, Wellborn filed a pro se federal habeas petition raising, among other grounds, his fair cross-section claim. The district court referred the matter to a magistrate judge, who found that Wellborn had defaulted his fair cross-section claim and failed to demonstrate cause to excuse his default. The district court adopted the magistrate judge's report and recommendation and denied Wellborn's petition, but granted a COA on his fair cross-section claim.

This court consolidated Wellborn's appeal with the appeals of Joseph Ambrose and Gregory Carter, two similarly situated petitioners, and found that the three petitioners had shown cause to excuse the default of their fair cross-section claims. *Ambrose II*, 684 F.3d at 645-49. This court reversed and remanded the cases for a determination of whether the petitioners could also show actual prejudice to excuse their default. *Id.* at 652. "[P]etitioners must show actual prejudice to excuse their default," this court held, "even if the error is structural." *Id.* at 649. In so holding, this court instructed the lower courts to assess the petitioners' claims using the prejudice standard for ineffective-assistance-of-counsel claims set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Ambrose II*, 684 F.3d at 652.

On remand, the same counsel was appointed to represent the three petitioners and, although the cases proceeded on separate tracks, petitioner Ambrose's case became the de facto lead case. The district court granted Ambrose habeas relief, finding that he had demonstrated "a reasonable probability that a more diverse jury would have been less likely to convict him" and that he had made a prima facie showing of a fair cross-section violation. The district court based its decision in part on the testimony of Dr. Samuel Sommers, who "essentially testified that a more diverse jury would have been less likely to convict Ambrose because African-American jurors are statistically less likely to convict than their Caucasian counterparts."

On the government's appeal in Ambrose's case, this court again reversed. *Ambrose v. Booker*, 801 F.3d 567, 582 (6th Cir. 2015) ("*Ambrose IV*"). This court held that the district court erred in applying the prejudice standard set forth in *Hollis v. Davis*, 941 F.2d 1471, 1482 (11th

Cir. 1991), rather than the more stringent standard of *Strickland*. *See Ambrose IV*, 801 F.3d at 577-78. This court also found that the district court erred in relying on Dr. Sommers's testimony. *Id.* at 579-80. As properly applied, this court observed, the actual prejudice standard required the district court to "consider whether, in light of the underrepresentation of African Americans in the jury venire, 'there is a reasonable probability that . . . the result of the proceeding would have been different.'" *Id.* at 578 (quoting *Strickland*, 466 U.S. at 694). Concluding that Ambrose had failed to show actual prejudice, this court reversed and remanded for entry of judgment denying Ambrose habeas relief. *Id.* at 580-82. The Supreme Court denied certiorari.

"[A]pplying the actual prejudice standard announced in *Ambrose II*, as clarified in *Ambrose IV*," the magistrate judge entered a report recommending that Wellborn's habeas petition be denied. The magistrate judge reasoned that Wellborn could not demonstrate actual prejudice because "[t]he prosecution's case against [him] was strong" and "the defense evidence was weak." The district court adopted the report and recommendation, denied Wellborn's petition, and declined to issue a COA. The district court also denied Wellborn's subsequent motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59.

In his COA application, Wellborn argues that he was required to show only fundamental unfairness, rather than a reasonable probability of a different outcome, in light of the Supreme Court's decision in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). Wellborn argues, in the alternative, that he can satisfy the actual prejudice standard as clarified in *Ambrose IV*.

A COA may issue "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 when a district court has denied a habeas petition for procedural reasons, "the petitioner must show, 'at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Dufresne v. Palmer*, 876 F.3d 248, 253 (6th Cir. 2017) (per curiam) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

If a petitioner has procedurally defaulted his claims, "federal habeas review of the claims is barred unless 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 miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). It is undisputed that Wellborn has demonstrated cause for the default of his fair cross-section claim, *see Ambrose II*, 684 F.3d at 649, and the only issue before this court is whether Wellborn can establish actual prejudice, *see Ambrose IV*, 801 F.3d at 578. That inquiry hinges on whether there is "a reasonable probability that a different (*e.g.*, properly selected) jury would have reached a different result, 'a probability sufficient to undermine confidence in the outcome of the trial.'" *Id.* (quoting *Strickland*, 466 U.S. at 694).

Wellborn argues that the Supreme Court's decision in *Weaver* abrogated *Ambrose IV* and articulated a new standard for demonstrating actual prejudice, that is, *Strickland* prejudice. After *Weaver*, he contends, a petitioner can show *Strickland* prejudice by establishing *either* the reasonable probability of a different outcome *or* fundamental unfairness. Not so. The Court in *Weaver* assumed, for analytical purposes only, that the petitioner could show *Strickland* prejudice by establishing that counsel's errors rendered his trial fundamentally unfair. *Weaver*, 137 S. Ct. at 1911. The Court did not, however, decide whether this interpretation was correct. *See id.* *Weaver* thus did not abrogate *Ambrose IV*, and Wellborn's burden remains the same: To demonstrate actual prejudice, he must show "a reasonable probability that a different (*e.g.*, properly selected) jury would have reached a different result." *Ambrose IV*, 801 F.3d at 578 (citing *Strickland*, 466 U.S. at 694).

Reasonable jurists could not debate the district court's conclusion that Wellborn failed to make the required showing. "'The most important aspect to the [actual prejudice] inquiry is the strength of the case against the defendant,' which requires courts to take a 'careful look at the transcripts involved.'" *Id.* at 580 (alteration in original) (quoting *Ambrose II*, 684 F.3d at 652). In this case, the transcripts reveal that the prosecution presented strong evidence of Wellborn's

guilt of first-degree CSC under section 750.520b(1)(b) and second-degree CSC under section 750.520c(1)(a) and (b).

At trial, A.F. testified that Wellborn is her step-grandfather. When she visited him, Wellborn "would use his fingers, he would put his penis in [her] [illegible] and he would use his tongue on [her] vagina." A.F. further testified that Wellborn "would kiss [her], and then he'd use his fingers and put them in [her] vagina." Wellborn also made A.F. "ejaculate him with [her] hands." A.F. testified that she was fourteen at the time of this abuse, which occurred at Wellborn's home in Kent County.

C.R. testified that Wellborn is her grandfather. When she visited him, Wellborn "would try touchin' [C.R.'s] boobs. He would French kiss [her] – well, try to French kiss [her]. He would try to reach down [her] pants." On one occasion, Wellborn reached his hand down the front of C.R.'s pajamas and went "[a] little bit" underneath her underwear. C.R. testified that she was ten or eleven at the time of this abuse, which occurred at Wellborn's home on Big Pine Island Lake (in Kent County). Another of Wellborn's granddaughters, A.R., testified that Wellborn had also sexually abused her. And Wellborn's stepdaughter, A.F.'s mother, testified that Wellborn had sexually abused her as a child, too.

Wellborn and his wife testified in his defense. Wellborn firmly denied A.F.'s and C.R.'s allegations. His theory of the case was that various family members and local officers had manipulated A.F. and C.R. into fabricating their testimony. But Wellborn offered no meaningful support for this theory. "[T]o successfully argue that it is reasonably probable that a different jury would have accepted the defense theory, and thus have reached a different result, a defendant must show that there is some support for that theory." *Ambrose IV*, 801 F.3d at 581. Given the strength of the prosecution's evidence and the tenuous nature of Wellborn's defense, reasonable jurists could not debate the district court's conclusion that he failed to establish actual prejudice.

Finally, Wellborn cannot avail himself of the fundamental-miscarriage-of-justice exception to the prejudice requirement. *See Coleman*, 501 U.S. at 750. That exception applies

when "a constitutional violation has probably resulted in the conviction of one who is actually innocent," *Murray v. Carrier*, 477 U.S. 478, 479-80 (1986), and generally requires a petitioner to present "new reliable evidence . . . that was not presented at trial," *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Wellborn has failed to identify any such evidence.

Because reasonable jurists could not debate the district court's procedural ruling, Wellborn's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: May 16, 2018

Mr. James R. Gerometta
Federal Defender Office
613 Abbott Street
Fifth Floor
Detroit, MI 48226

Ms. Raina I. Korbakis
Office of the Attorney General
of Michigan
P.O. Box 30217
Lansing, MI 48116

Re: Case No. 17-2076, *Carl Wellborn v. Mary Berghuis*
Originating Case No. : 1:05-cv-00346

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jill Colyer
Case Manager
Direct Dial No. 513-564-7024

cc: Mr. Thomas Dorwin
Ms. Colleen P. Fitzharris
Mr. John S. Pallas

Enclosure

No mandate to issue

# A-3. Order Denying Motion to Alter Judgment

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARL WELLBORN,

Petitioner,

v.

MARY BERGHUIS,

Respondent.
_____/

CASE NO. 1:05-CV-346

HON. ROBERT J. JONKER

**ORDER DENYING MOTION TO AMEND JUDGMENT**

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. The Magistrate Judge recommended that the habeas corpus petition be denied. (ECF No. 88.) Overruling Petitioner's objections, the Court approved and adopted the Report and Recommendation. (ECF No. 93.) Judgment entered in January 2017. (ECF No. 94.) Petitioner moves to amend the Judgment under FED. R. CIV. P. 59(a)(2) and for a certificate of appealability to be granted. (ECF No. 95.)

Rule 59(a)(2) permits a court, after a non-jury trial, to "open the judgment if one has been entered, take additional testimony, amend findings of facts and conclusions of law, and direct the entry of a new judgment." Rule 59(e) provides that a motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment. As the Sixth Circuit summarized in *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 833-34 (6th Cir. 1999), motions to alter or amend judgment under Rule 59(e) may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. *See also ACLU v. McCreary County*, 607 F.3d 439, 450 (6th Cir. 2010).

Petitioner premises his motion on what he describes as a potential change in controlling law. (ECF No. 95, PageID.924.) He points out that his habeas petition failed because he could not meet the actual prejudice requirement necessary to excuse procedural default detailed in *Ambrose v. Booker*, 801 F.3d 567, 577-78 (6th Cir. 2015). (*Id.*) He notes that at the time he filed his motion to amend, the Supreme Court had recently granted certiorari in a case that might alter controlling law applicable to his case, *Weaver v. Massachusetts*, No. 16-240, Pet. for Cert.; Order List, 580 U.S. ___ (2017). (*Id.*) Petitioner asserts that "[i]f the Supreme Court [in *Weaver*] finds that prejudice should be presumed in cases involving an underlying structural error, the Sixth Circuit's approach to the resolution of cases involving structural error must be fundamentally altered." (ECF No. 95, PageID.924.) Petitioner's motion to amend hinges upon the outcome of the decision in *Weaver*.

The Supreme Court has since issued a merits decision, *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). The Court determined that actual prejudice is not presumed in an ineffective assistance case based on counsel's failure to object to an underlying structural error. *Id.* To succeed on an ineffective assistance claim, even if there is underlying structural error, a defendant must show prejudice. *Weaver*, 137 S. Ct. at 1912-23. Nothing about *Weaver* suggests the Sixth Circuit's approach to Petitioner's case must change. In light of the *Weaver* decision, Petitioner's motion fails.

**ACCORDINGLY, IT IS ORDERED**:

Petitioner's Motion to Amend Judgment (ECF No. 95) is **DENIED**.

Dated: August 15, 2017

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

# A-4. Judgment

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARL BURNIE WELLBORN,

Petitioner,

v.

MARY BERGHUIS,

Respondent.
_____/

CASE NO. 1:05-CV-346

HON. ROBERT J. JONKER

**JUDGMENT**

In accordance with the Order Approving and Adopting Report and Recommendation entered this day, Judgment is entered in favor of Respondent Mary Berghuis and against Petitioner Carl Burnie Wellborn.

Dated: January 13, 2017

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

# A-5 Order Approving and Adopting Report and Recommendation

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARL BURNIE WELLBORN,

Petitioner,

v.

MARY BERGHUIS,

Respondent.
_____/

CASE NO. 1:05-CV-346

HON. ROBERT J. JONKER

**ORDER APPROVING AND ADOPTING REPORT AND RECOMMENDATION**

The Court has reviewed Magistrate Judge Kent's Report and Recommendation (ECF No. 88) and Petitioner's Objections to Report and Recommendation (ECF No. 92). Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

> The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b)(3). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981). The Court has reviewed de novo the claims and evidence presented to the Magistrate Judge; the

Report and Recommendation itself; and Petitioner's objections. After its review, the Court finds the Magistrate Judge correctly concluded that Petitioner is not entitled to habeas corpus relief.

In his objections, Petitioner primarily supplements and expands upon arguments already presented in his previous briefing (ECF Nos. 69 - 74; ECF No. 85). Petitioner's objections fail to deal in a persuasive way with the Magistrate Judge's analysis. The Magistrate Judge carefully and thoroughly considered the evidentiary record, the parties' arguments, and the governing law. The Magistrate Judge properly analyzed all claims. Nothing in Petitioner's Objections changes the fundamental analysis the Magistrate Judge details in the Report and Recommendation. Accordingly, the Court concludes that Petitioner is not entitled to federal habeas relief, for the very reasons the Report and Recommendation delineates.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a petitioner may not appeal in a habeas corpus case unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). The Federal Rules of Appellate Procedure extend to district judges the authority to issue certificates of appealability. FED. R. APP. P. 22(b); see also, *Castro v. United States*, 310 F.3d 900, 901-02 (6th Cir. 2002) (the district judge "must issue or deny a [certificate of appealability] if an applicant files a notice of appeal pursuant to the explicit requirements of Federal Rule of Appellate Procedure 22(b)(1)"). However, a certificate of appealability 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 obtain a certificate of appealability, Petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

While Petitioner is not required to establish that "some jurists would grant the petition for habeas corpus," he "must prove 'something more than an absence of frivolity' or the existence of mere 'good faith.'" *Id.* (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). In this case, Petitioner has not made a substantial showing of the denial of a constitutional right. Therefore, he is not entitled to a certificate of appealability.

The Magistrate Judge properly concluded that Petitioner is not entitled to the habeas corpus relief he seeks. Petitioner is not entitled to a certificate of appealability.

Accordingly, **IT IS ORDERED** that the Report and Recommendation of the Magistrate Judge (ECF No. 88) is **APPROVED AND ADOPTED** as the opinion of the Court.

**IT IS FURTHER ORDERED** that:

1. Petitioner's Petition for Writ of Habeas Corpus (ECF No. 1) is **DENIED**; and

2. Petitioner is **DENIED** a certificate of appealability.

Dated: January 13, 2017

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

# A-6. Report and Recommendation

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARL BURNIE WELLBORN,

Petitioner, Case No. 1:05-cv-346

v. Honorable Robert J. Jonker

MARY BERGHUIS,

Respondent.
_____/

**REPORT AND RECOMMENDATION**

This is a habeas corpus action brought by a former state prisoner pursuant to 28 U.S.C. § 2254.[1] The petition was denied, petitioner successfully appealed, and the matter is now before the Court on remand from the Sixth Circuit Court of Appeals. The sole issue under review is whether petitioner has demonstrated actual prejudice to excuse the procedural default of his second habeas claim.

## I. Background

Petitioner, Carl Burnie Wellborn, is married to Lee Ann Wellborn ("Mrs. Wellborn"). He is the step-father to Mrs. Wellborn's two daughters, Lisa and Deana. He is also the step-grandfather to Lisa's daughter AF, and Deana's daughters CR and AR. Mrs. Wellborn is the biological mother of Lisa and Deana, and the biological grandmother of AF, CR and AR. Mrs. Wellborn's ex-husband, Mr. Faunce, is the biological father of Lisa and Deana, and the biological grandfather of AF, CR and AR.

[1] Michigan Department of Corrections records reflect that petitioner was discharged on September 3, 2016. *See* http://mdocweb.state.mi.us/OTIS2/otis2.aspx reference Carl Burnie Wellborn No. 407313.

Petitioner was charged with two counts of first-degree criminal sexual conduct (CSC), M.C.L. § 750.520b(1)(b), and two counts of second-degree CSC, M.C.L. § 750.520c(1)(a) and (b). The victims were his step-granddaughters, AF and CR. After a trial in the Kent County Circuit Court, the jury returned a verdict of guilty on Count I (first-degree CSC involving AF), Count II (second-degree CSC involving AF), and Count III (second-degree CSC involving CR). Trial Trans. V at 99-105, 109-111 (docket no. 28); Trial Trans. VI at 6 (docket no. 21); Verdict Form (docket no. 80); *People v. Wellborn*, No. 242229, 2003 WL 22961704 at *1 (Mich. App. Dec. 16, 2013).[2] The Kent County Circuit Court sentenced petitioner to 10 to 30 years imprisonment for the first-degree CSC conviction and 10 to 15 years imprisonment for each of the second-degree CSC convictions. Sent. Trans. at 13 (docket no. 22). The Michigan Court of Appeals affirmed petitioner's convictions and the Michigan Supreme Court denied his application for leave to appeal. *People v. Wellborn*, 2003 WL 22961704 at *1-3; *People v. Carl Burnie Wellborn III*, 470 Mich. 886 (June 30, 2004).

On May 16, 2005, petitioner filed the present federal habeas action seeking relief on the following grounds:

> I. Whether petitioner was denied his right to the effective assistance of counsel where counsel forewent the opportunity to introduce evidence of a complainant's prior false allegations of sexual abuse which resulted in the petitioner's acquittal, and where counsel agreed that the acquittal was inadmissible?
>
> A. Was petitioner's acquittal of the complainant's allegations in the Montcalm County case admissible as evidence of prior false allegations of sexual abuse, in conjunction with the Sixth Amendment

[2] At the conclusion of the trial, the defense moved for a directed verdict on all charges. Trial Trans. V at 3. The trial court granted the motion as to one count of first-degree CSC involving AF, because the victim was not certain whether the alleged sexual act occurred in Montcalm County or Kent County. *Id.* at 5.

confrontation clause and the Fourteenth [sic] Due Process Clause right to present a complete defense.

B. Was petitioner's trial counsel's concession that the prior acquittal was not admissible, a deprivation of petitioner's Sixth Amendment right to the effective assistance of counsel in conjunction with the Sixth Amendment confrontation clause and Fourteenth Amendment due process clause right to present a complete defense.

II. Whether petitioner was denied his constitutional right to a jury drawn from a venire representative of a fair cross-section of the community where Kent County has publicly acknowledged that due to a computer error, nearly seventy-five percent of the county's eligible jurors were being excluded in such a way as to under-represent African-Americans and other minorities?

Report and Recommendation (R&R) at PageID.194-195 (Sept. 16, 2008) (docket no. 32).

In an R&R entered on September 16, 2008, the magistrate judge recommended that the petition be denied. *See* R&R (docket no. 32). In reaching this determination, the magistrate judge found that the ineffective assistance of trial counsel claims failed on the merits, and that the jury venire claim was procedurally defaulted. *Id.* Shortly thereafter, the Sixth Circuit issued its opinion in *Smith v. Berghuis,* 543 F.3d 326 (6th Cir. 2008), which held that Kent County's method of selecting jurors violated the habeas petitioner's Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community. Although the jury selection error in *Smith v. Berghuis* did not involve the computer error at issue in this case, in an abundance of caution, the outstanding R&R was dismissed as moot and the matter remanded for issuance of a new R&R, with instructions to consider the impact of *Smith v. Berghuis* on petitioner's claims. *See* Order (docket no. 36).

The second R&R addressed petitioner's jury venire claim in pertinent part as follows:

> In his second habeas claim, Petitioner contends that he was denied his constitutional right to a jury drawn from a fair cross-section of the community. The Sixth Amendment guarantees a criminal defendant an impartial jury drawn from a fair cross-section of the community. *Duren v. Missouri*, 439 U.S. 357, 358-59

(1979); *Taylor v. Louisiana*, 419 U.S. 522, 526-31 (1975). The petit jury does not have to mirror the community, but distinct groups cannot be systematically excluded from the venire. *See United States v. Jackman,* 46 F.3d 1240, 1244 (2nd Cir., 1995).

While acknowledging this right in its entirety, the rule in Michigan has for some time been that a defendant can be precluded from raising the issue on appeal if he does not timely raise it at trial. *See People v. McCrea,* 303 Mich. 213, 278 (1942). In *People v. Carter*, 462 Mich. 206 (2000), the Michigan Supreme Court stated that a defendant cannot waive an objection to an issue at trial and then make a claim of error on appeal. In that instance, the court found that because the defendant's counsel had expressed satisfaction with the trial court's jury instructions, the defendant had waived the issue. *Id.*

To establish a *prima facie* violation of the fair cross-section requirement, Petitioner bore the burden of proving "that a distinctive group was under-represented in his venire or jury pool, and that the under-representation was the result of systematic exclusion of the group from the jury selection process." *People v. Smith,* 463 Mich. 199 (2000), citing *Duren v. Missouri, supra*.

Petitioner, a Caucasian, argues that systematic errors in the Kent County Jury Management System caused a disproportionately low number of jury notices to be sent to residences in zip codes with proportionally larger African-American and other minority populations. (Pet'r's Br. in Supp. of Pet. at 36, 42-43.) Relying mainly on newspaper articles, Petitioner argues in part that:

> In a story that first appeared in the July 30, 2002, Grand Rapids Press, Kent County officials conceded that their own review of their computer system revealed that "nearly seventy-five percent of the County's 454,000 eligible residents were excluded from potential jury pools since spring 2001", and that "[m]any blacks were excluded from the . . . jury pools due to a computer glitch that selected a majority of potential candidates from the suburbs." The chief judge of the Kent County Circuit Court, George Buth, was quoted as saying, "There has been a mistake - a big mistake." The article states that trouble-shooters detected the error in mid-July of 2002, and that the error had gone undetected for sixteen months. (Appendix E, page 1 of 4 of article of July 30, 2002 attached).

(Pet'r's Br. in Supp. of Pet. at 38.).

In Petitioner's case, jury selection occurred on March 19, 2002. (Pet'r's Br. in Supp. of Pet. at 36.) This would have been within the period during which the computer error purportedly occurred in the Kent County Jury Management System.

Petitioner, however, did not challenge the jury array at trial. If he felt the jury venire looked too much like him, he did not say so. At the close of jury voir dire, Petitioner's counsel stated: "Your Honor, the defense is satisfied with the panel." (Tr. I, 169.) The jury was then empaneled and sworn. There were no objections regarding the composition of the jury array at any time during the trial, much less during the voir dire, and trial counsel's statement constitutes an express waiver of the issue.

Although this Court cannot discern the race of the individual members of the jury array from the trial record, because Petitioner did not preserve the issue, Petitioner now contends that "[o]ut of approximately 70 potential jurors available to serve that day, I saw only 2 African-Americans present. There were no African-American jurors or alternates on my jury." (App. J. to Pet'r's Br. in Supp. of Pet.; docket #2.) Petitioner's statement indicates he was well aware of the composition of the jury venire when he chose to accept the jury.

The Michigan Court of Appeals determined that Petitioner waived his challenge to the venire and jury selection process because his trial counsel expressed satisfaction with the jury's composition. (MCOA Op. at 2.) When a state-law default prevents further state consideration of a federal issue, the federal courts ordinarily are precluded from considering that issue on habeas corpus review. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991); *Engle v. Isaac*, 456 U.S. 107 (1982). A procedural default is "a critical failure to comply with state procedural law." *Trest v. Cain,* 522 U.S. 87, 89 (1997). It will bar consideration of the merits of a federal claim if the state rule is actually enforced and is an adequate and independent ground for the state court's decision. *Coleman v. Thompson,* 501 U.S. 722, 750 (1991); *Monzo v. Edwards,* 281 F.3d 568, 576 (6th Cir., 2002).

To determine whether a petitioner procedurally defaulted a federal claim in state court, the Court must consider whether: (1) the petitioner failed to comply with an applicable state procedural rule; (2) the last state court rendering judgment on the claim at issue actually enforced the state procedural rule so as to bar that claim; and (3) the state procedural default is an "independent and adequate" state ground properly foreclosing federal habeas review of the federal constitutional claim. *See Hicks v. Straub,* 377 F.3d 538, 551 (6th Cir. 2004); *accord Lancaster*, 324 F.3d at 436-37; *Greer v. Mitchell*, 264 F.3d 663, 672 (6th Cir. 2001); *Buell v. Mitchell*, 274 F.3d 337, 348 (6th Cir. 2001).

A state law procedural rule is adequate and independent when it was "firmly established and regularly followed" at the time of the asserted procedural default. *Rogers v. Howes*, 144 F.3d 990, 992 (6th Cir. 1998) (citing *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)). To be timely under Michigan law, a challenge to the jury array must be made before the jury has been impaneled and sworn. It is clear that this rule was well-established at the time of Petitioner's trial. *See People v. McCrea*,

> 6 N.W.2d 489, 514 (Mich. 1942); *People v. Hubbard*, 552 N.W.2d 493, 497-8, 498 (Mich Ct. App. 1996) ("A challenge to the jury array is timely if it is made before the jury has been empaneled and sworn. . . an expression of satisfaction with a jury made at the close of voir dire examination waives a party's ability to challenge the composition of the jury thereafter empaneled and sworn."); *People v. Stephen*, 188 N.W.2d 105, 106 (Mich. Ct. App. 1971).
>
> * * *
>
> . . . Petitioner's failure to comply with the state's independent and adequate state procedural rule, i.e., making an objection to the jury array before the jury has been impaneled and sworn, caused Petitioner to default his claim in state court. *See Wainwright v. Sykes*, 433 U.S. 72, 86-88 (1977); *West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996).
>
> If a petitioner procedurally defaulted his federal claim in state court, the petitioner must demonstrate either: (1) cause for his failure to comply with the state procedural rule and actual prejudice flowing from the violation of federal law alleged in his claim, or (2) that a lack of federal habeas review of the claim will result in a fundamental miscarriage of justice. *See House v. Bell*, 547 U.S. 518, 536-37 (2006); *Murray v. Carrier*, 477 U.S. 478, 495 (1986); *Hicks*, 377 F.3d at 551-52. The miscarriage-of-justice exception only can be met in an "extraordinary" case where a prisoner asserts a claim of actual innocence based upon new reliable evidence. *House*, 547 U.S. at 537. A habeas petitioner asserting a claim of actual innocence must establish that, in light of new evidence it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Petitioner has made no such claim or showing of actual innocence in this case.

R&R at PageID.291-294, 295-296 (Feb. 29, 2009) (docket no. 38).

Based on the record in this case, the magistrate judge concluded that,

> Petitioner has failed to demonstrate cause for his procedural default. As a result, this claim is procedurally barred on habeas review, as it must be.

*Id.* at PageID.300. Because petitioner did not demonstrate cause for the procedural default, it was unnecessary for the magistrate judge to address the prejudice prong.

Finally, the magistrate judge concluded that the decision in *Smith v. Berghuis* was easily distinguishable on the facts because the alleged systematic exclusion of African-Americans

in *Smith* did not involve the computer error at issue in the present case. Rather, the jury selection process at issue in *Smith* involved practices which ended nearly ten years before petitioner's trial, i.e., assigning jurors to district court panels prior to assigning jurors to circuit court panels and excusing jury duty absences for social and economic reasons such as lack of transportation, child care and the inability to take time off of work. *Id.* at PageID.300-301.[3] Ultimately, the magistrate judge recommended that the petition be denied. *Id.* `The district judge adopted the recommended disposition, and this Court denied the petition, finding that the ineffective assistance of counsel claims raised in Issue I failed on the merits, and that the jury venire claim raised in Issue II was procedurally defaulted. *See* Order (docket no. 45). However, the Court issued a certificate of appealability "as to Petitioner's claim concerning his right under the Sixth Amendment to a jury drawn from a fair cross-section of the community." *Id.* at PageID.345.

Petitioner appealed the decision to the Sixth Circuit, where his case was joined with two other cases which involved the same alleged computer problem in the jury selection, *Ambrose v. Booker*, 781 F. Supp.2d 532 (E.D. Mich. 2011) ("*Ambrose I*"), and *Carter v. Lafler*, 1:09-cv-215 (W.D. Mich. Jan. 8, 2010). *See Ambrose v. Booker*, 684 F.3d 638 (6th Cir. 2012) ("*Ambrose II*"). However, the three cases reached different results, i.e., the habeas petition was granted in *Ambrose I* and denied in *Carter* and *Wellborn*. The Sixth Circuit reversed and remanded all three cases in *Ambrose II*.

---

[3] The Court notes that the Supreme Court reversed and remanded the Sixth Circuit's decision in *Smith v. Berghuis*. *See Berghuis v. Smith*, 559 U.S. 314 (2010) (contrary to the Sixth Circuit's decision, the Michigan Supreme Court's decision on direct review, which rejected the petitioner's claim that his jury was not drawn from a fair cross section of the community, was consistent with the Supreme Court's decision in *Duren* and did not involve an unreasonable application of clearly established federal law). On remand, this Court's 2006 judgment denying the petition was affirmed. *Smith v. Woods*, 505 Fed. Appx. 560 (6th Cir. 2012).

As an initial matter, the Sixth Circuit summarized petitioner's claim as follows:

> These habeas petitions involve the far-reaching effects of an unintentional computer glitch that caused the systematic underrepresentation of African-Americans in the jury pools of Kent County, Michigan. The three petitioners received separate jury trials in Kent County in either 2001 or 2002. At jury selection, the petitioners did not object to the racial composition of their respective jury venires, and were subsequently convicted. A few months later, the Grand Rapids Press published a story detailing how Kent County's jury selection software had a computer glitch that had systematically excluded African-Americans from the jury pool. In light of these revelations, the petitioners each filed motions for post-conviction relief in state court. The state court found that the petitioners had waived these claims by failing to object to the racial composition of the jury venire during voir dire.
>
> * * *
>
> Carl Wellborn was convicted of sexually abusing his granddaughters by a Kent County Jury in March 2001. *Wellborn v. Berghuis*, No. 1:05-cv-346, 2009 WL 891708, at *8-14 (W.D.Mich. Mar. 31, 2009) (report and recommendation). On direct appeal, Wellborn claimed that he was denied a jury drawn from a fair cross-section of the community based on the Kent County computer glitch. The Michigan Court of Appeals found that Wellborn had defaulted his fair cross-section claim because he failed to raise it before the jury was sworn. *Id.* at *14. The Michigan Court of Appeals affirmed Wellborn's convictions, and the Michigan Supreme Court denied leave to appeal. *Id.* Wellborn raised a variety of claims in his habeas petition, but only appeals his fair cross-section claim. The district court found that this claim was procedurally defaulted, and held that there was no cause to excuse the default. *Id.* at *3. Because the petitioner observed the juror array, the court reasoned, he was on notice of a potential underrepresentation. *Id.* The court found that the petitioner must show evidence that the underrepresentation was intentionally concealed, a showing Wellborn did not make. *Id.* at *3-4. The court acknowledged that the Eastern District had addressed the computer glitch and excused procedural default, but found Wellborn's case distinguishable on two grounds: Wellborn was white and there was overwhelming evidence of Wellborn's guilt. *Id.* at *3–4. Wellborn filed this timely appeal.

*Ambrose II*, 684 F.3d at 640, 644.

Ultimately, the Sixth Circuit found that this Court erred in finding that petitioner did not demonstrate cause to excuse the procedural default, stating in pertinent part:

> There is no dispute that petitioners defaulted their claims by failing to object to the jury venire at trial, in violation of Michigan's contemporaneous objection rule.

> *See, e.g., People v. Dixon*, 217 Mich. App. 400, 552 N.W.2d 663, 667 (1996). However, petitioners have shown "cause and prejudice" sufficient to excuse the default under *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The cause inquiry "ordinarily turn[s] on whether . . . some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule," and is satisfied by "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). As discussed below, petitioners have shown cause because the factual basis for the claim -- the computer glitch – was not reasonably available to counsel, and petitioners could not have known that minorities were underrepresented in the jury pool by looking at the venire panel. Moreover, the Supreme Court has found cause to excuse a procedural default in a factually similar case. *See Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988).

*Id.* at 645.

However, the Sixth Circuit did not address whether petitioners met the "prejudice" prong sufficient to excuse a procedural default. Rather, that court remanded the cases to their respective trial courts for a determination of whether actual prejudice existed, instructing the courts to utilize the prejudice standard for ineffective assistance of counsel claims set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

> Because the district courts here did not address actual prejudice, a remand is necessary. We are then left with the question of the proper standard on remand. We are guided in part by the Eleventh Circuit's analysis of a similar question in *Hollis v. Davis*, 941 F.2d 1471, 1480 (11th Cir.1991). In that case, the petitioner claimed that his counsel was ineffective for failing to object to Alabama's systematic exclusion of African-American jurors from grand and petit juries. To excuse this default, the *Hollis* court required that petitioner show actual prejudice, which involved determining whether there was a reasonable probability that "a properly selected jury [would] have been less likely to convict." *Id.* at 1482. The Eleventh Circuit's analysis is persuasive. The most important aspect to the inquiry is the strength of the case against the defendant. As the Eleventh Circuit reasoned, "a transcript could show a case against [petitioner] so strong, and defense so weak, that a court would consider it highly improbable that an unbiased jury could acquit." *Id.* at 1483 (internal quotation marks omitted). In that circumstance, actual prejudice would not be shown.
>
> Although the instant petitions do not involve a *Strickland* claim, this standard is appropriate because it balances the competing demands of constitutionally

> protected equal protection interests and comity toward the state courts. We recognize that the application of the actual prejudice standard in cases such as these presents a particularly challenging charge to the district courts below to answer the question, "what would have happened?" The law nonetheless requires that the question be answered – with a careful look at the transcripts involved, and with judgment that takes into account a fair balance of the competing interests of comity toward the final judgments of the state's criminal processes and the protection of constitutional equal protection interests.

*Ambrose II*, 684 F.3d at 652 (footnote omitted).

On remand, this Court appointed as petitioner's counsel, Attorney Bradley R. Hall of the Federal Defender Office for the Eastern District of Michigan, who was also counsel for the petitioner in the Eastern District case of *Ambrose v. Booker*. The Eastern District case proceeded as the *de facto* lead case on remand. Order (docket no. 57); *see* Order granting "Stipulation to adjourn briefing schedule in anticipation of evidentiary hearing in *Ambrose v. Booker*" (docket no. 68). This Court also appointed Attorney Hall as counsel for petitioner in *Carter v. Lafler,* 1:09-cv-215 (Order, docket no. 60). On September 16, 2013, the court held an evidentiary hearing in *Ambrose v. Booker*, in which petitioner called an expert witness, Samuel Sommers, Ph.D., who "essentially testified that a more diverse jury would have been less likely to convict Ambrose because African-American jurors are statistically less likely to convict than their Caucasian counterparts." *Ambrose v. Booker*, 24 F. Supp. 3d 626, 640 (E.D. Mich. 2014) ("*Ambrose III*"). Ultimately, the court concluded that "[b]ased on Dr. Sommers's testimony, and the fact that there is a reasonable probability that a properly selected jury in Ambrose's case would have included at least one African American, Ambrose has demonstrated actual prejudice to excuse his default so long as the evidence against him was not overwhelming." *Id.* at 653. The court went on to address the merits of the claim and found that "Ambrose has satisfied his prima facie showing of a violation

of the fair cross-section requirement; a showing that has not been rebutted by the State. His habeas petition will be granted." *Id.* at 658.

Respondent appealed and, once again, the Sixth Circuit reversed. *See Ambrose v. Booker*, 801 F.3d 567 (6th Cir. 2015) ("*Ambrose IV*"). In *Ambrose IV*, the Sixth Circuit found that the district court applied the wrong prejudice standard on remand and reiterated that the actual prejudice standard in *Strickland* applied:

> As an initial matter, the district court on remand should not have applied a less stringent *Hollis* – rather than the *Strickland* – prejudice standard to determine whether to excuse Ambrose's procedural default. The "actual prejudice" inquiry outlined in *Ambrose v. Booker*, 684 F.3d 638, 652 (2012), was intended to mirror the inquiry required by *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts must consider whether, in light of the underrepresentation of African Americans in the jury venire, "there is a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Stated another way, courts must ask, is there a reasonable probability that a different (e.g., properly selected) jury would have reached a different result, "a probability sufficient to undermine confidence in the outcome of the trial." *Id.*

*Ambrose IV*, 801 F.3d at 577-78.

Next, the Sixth Circuit stated that the district court in *Ambrose III* should not have relied on Dr. Sommers' testimony in reaching its result:

> The district court also should not have relied on Dr. Sommers' expert testimony -- in which Dr. Sommers stated that racially diverse juries are less likely to convict than all-white juries -- in making the court's "actual prejudice" determination. Dr. Sommers' testimony is not relevant to the "actual prejudice" determination because it: (1) does not support a finding that a different jury would have reached a different result; (2) lacks any individualized assessment of the case against Ambrose; and (3) relies on impermissible racial stereotypes.

*Id.* at 579 (6th Cir. 2015).

Then, the Sixth Circuit found that petitioner did not demonstrate actual prejudice, stating in pertinent part:

> Ultimately, under the stricter *Strickland* standard, and without consideration of Dr. Sommers' testimony, Ambrose has failed to show actual prejudice to excuse his procedural default. Though a careful review of the record reveals some inconsistencies in the trial testimony of the two victims, and the prosecution, admittedly, failed to explain why Ambrose – after carjacking the victims at gunpoint and stealing their possessions – would later abandon the car with a cell phone, gold and silver jewelry, and a watch still inside, these issues on their own do not create a reasonable probability that a different jury would have reached a different result, a probability sufficient to undermine confidence in the outcome. "The most important aspect to the [actual prejudice] inquiry is the strength of the case against the defendant," which requires courts to take a "careful look at the transcripts involved."

*Id.* at 580. Ultimately, the Sixth Circuit concluded that "[b]ecause Ambrose failed to show actual prejudice to excuse his procedural default, his petition for writ of habeas corpus should have been denied." *Id.* at 582. Finally, petitioner sought a writ of certiorari, which the Supreme Court denied on June 13, 2016. *See Ambrose v. Romanowski*, 136 S. Ct. 2461 (2016). Based on this record, the Court will now evaluate petitioner's claim by applying the actual prejudice standard announced in *Ambrose II*, as clarified in *Ambrose IV*.

## II. Evidence presented at trial

### A. Prosecution's case in chief

#### 1. AF's testimony

As discussed, petitioner was charged with criminal sexual conduct involving his two step-granddaughters, AF and CR. The evidence presented at trial also included brief testimony from a third step-granddaughter, AR, regarding alleged sexual abuse. At the time of her testimony in 2002, AF was sixteen years old and in the 10th grade. Trial Trans. II at 30-31 (docket no. 18). AF gave the following testimony. Petitioner and Mrs. Wellborn lived with her family on two separate occasions, in Virginia and in Michigan. *Id.* at 34-35. AF was five years old when she lived in Virginia. *Id.* at 35. At that time, petitioner started doing "sexual things" to her. *Id.* The first time,

petitioner ejaculated on her in the middle of the night. *Id.* at 35-36. She did not tell anyone of that incident. *Id.* at 36.

AF's family moved to Michigan and settled in Montcalm County. *Id.* at 36-37. Petitioner and Mrs. Wellborn moved in with AF's family in 1998. *Id.* at 38. Between May and September 1998, when AF was approximately 12 years old, petitioner came into her bedroom three or four times a week, kissed her using his tongue, inserted his fingers in her vagina, and placed his penis in her mouth. *Id.* at 38-40, 87. These incidents occurred at night. *Id.* Several times, AF tried to scream but petitioner covered her mouth, laid on her or hit her so she would be quiet. *Id.* at 40, 53-56. Petitioner also choked her. *Id.* at 56-57. However, she did not tell anyone of the sexual contact because petitioner threatened to harm her or her family. *Id.* at 40-41, 56. On family outings, she "didn't do many things with him alone" and always tried to have somebody with her. *Id.* at 41. Petitioner and Mrs. Wellborn eventually moved to a house in Kent County. *Id.* at 41-42.

AF visited petitioner and Mrs. Wellborn at their new house in Kent County because she missed her grandmother. *Id.* at 42. AF would spend nights at the house. *Id.* at 42. While visiting them, AF stated that

> [I]t was just the same stuff over and over again. He would use his fingers, he would put his penis in my [mouth] and he would use his tongue on my vagina. Just the same things over and over again.

*Id.* at 43. AF stated that when she went into the computer room, petitioner would kiss her, "use his fingers and put them in my vagina," and "then I tried stopping him but I couldn't." *Id.* at 43-44. He would do this while she was dressed, and then he would unbutton her clothes. *Id.* at 44. AF tried to scream, but could not. *Id.* at 43. AF played with petitioner's penis with her hands until he was ready to ejaculate, which he did in the bathroom. *Id.* at 45.

AF described the incidents as occurring "maybe every other weekend or whenever we went over there." *Id.* at 43. Although AF had both male and female cousins, petitioner "would say that how he just wanted the girls to come over, and he never wanted the boys over." *Id.* at 45. AF testified "I always tried having someone there . . . [b]ecause I didn't feel safe." *Id.* During the encounters, Mrs. Wellborn was either busy with the other children or not home. *Id.* at 43.

Petitioner also initiated phone sex with AF on two or three occasions, at which time he would ask AF what she was wearing and if she was going to come over so he could fool around with her. *Id.* at 80-81. AF stated that she would usually hang up the phone. *Id.* at 81. When asked if he put his penis in her mouth, AF stated "[t]hat would usually happen at my house" (in Montcalm County) and that "[i]t didn't really happen at his" (in Kent County). *Id.* at 43.

In 1998, when she was about 13 years old, AF told her mother (petitioner's step-daughter Lisa) that she did not feel comfortable around petitioner but did not go into any details. *Id.* at 46-47, 81-83. AF did not tell her mother about petitioner's actions because she was scared; petitioner had threatened to hurt her and her family, and she did not want anything to happen to either herself or her family. *Id.* at 47, 83-84. When her mother asked AF if she wanted to go to the police, AF answered "no." *Id.* at 47, 84-85. Before approaching her parents a second time, AF talked to her friend RS about petitioner's sexual advances. *Id.* at 48-49. RS told AF that she would go to the police if AF did not do something. *Id.* at 48. AF finally disclosed everything to her parents in March 2001, which prompted them to call the police. *Id.* at 48-49.

The police conducted investigations in Montcalm and Kent Counties. *Id.* at 49. In accordance with those investigations, AF received a physical examination. *Id.* at 49-50. While the examination did not reveal any genital warts, AF was aware that her cousin, AR, had genital warts.

*Id.* at 59. This was significant because AF's mother mentioned that petitioner had genital warts in the past and that AR could have received the warts from him. *Id.* at 59-60, 65. AF spoke with her cousin AR regarding the sexual abuse. *Id.* at 76-77. AF told AR that petitioner had been touching her. *Id.* at 77. When AF asked AR where petitioner touched her, AR pointed to her vagina. *Id.* at 77-78. When AF approached another cousin, AR's sister CR, to discuss petitioner's actions, CR refused to talk about it and just started to cry. *Id.* at 78-79.

Both AF's mother and her aunt Deana (CR and AR's mother) confided in AF that petitioner had tried sexually assaulting them when they were younger. *Id.* at 62-65. AF's mother also told her that petitioner raped some other girls in Virginia; however when AF later learned that petitioner did not rape anyone in Virginia, she did not ask her mother why she lied about the rapes. *Id.* at 65-68.

**2. CR's testimony**

CR was thirteen years old and in the seventh grade at the time of the trial. *Id.* at 92, 94, 120. CR gave the following testimony. She lived with petitioner in Virginia for a few months when she was six years old. *Id.* at 95, 121-22. During that time, petitioner used to kiss her by putting his tongue in her mouth and on one occasion walked into a room with no underwear and "showed himself" to CR and her friend. *Id.* at 97. Petitioner's sexual advances in Virginia occurred less than ten times. *Id.* at 123. CR's family relocated to Michigan and lived with her aunt, AF's mother (Lisa). *Id.* at 97-98. Petitioner did not make any sexual advances toward CR during the time that CR lived with her aunt. *Id.* at 98. However, after petitioner moved to Kent County, he would try to French kiss CR, reached down her pants once, and touched her breasts. *Id.* at 96, 100. When asked if petitioner was trying to hug her, CR testified that "[m]ost people don't hug you by grabbing

your boobs." *Id.* at 100. On one occasion, while CR was sitting on petitioner's lap and watching television, petitioner had his hands around her stomach and tried to reach down the front of her pajama pants. *Id.* at 100-01. His hand went underneath her underpants but she "grabbed his hand and told him not to." *Id.* at 101. When petitioner tried to touch her breasts in the computer room, she would say "don't" and he would leave the room. *Id.* at 101-02. CR estimated that petitioner attempted to sexually assault her on less than ten occasions. *Id.* at 102. CR never reported any of the sexual advances because she was afraid that no one would believe her "[b]ecause I just thought that it's something that doesn't happen." *Id.* at 102-03.

In or about 1998 or 1999, when Lisa asked CR if petitioner sexually assaulted her, CR lied and replied "no". *Id.* at 103-04, 107-09, 111. In 2000, when she was about eleven years old, CR finally spoke up when her cousin AF spoke up, and when she learned that petitioner had been touching her younger sister, AR. *Id.* at 103-04, 122. At that point in time, CR's family went to the police. *Id.* at 104 (docket no. 17).

**3. AR's testimony**

AR testified that she was nine years old and in the third grade at the time of the trial. Trial Trans. II at 125-26, 131. AR testified that petitioner would touch her "private[s]" while in an upstairs room, and that he would touch her underneath her clothes. *Id.* at 135-38, 140.

**4. Lisa's testimony**

Lisa (AF's mother) is petitioner's step-daughter. *Id.* at 149-50. Lisa gave the following testimony. Petitioner lived with Lisa's family in Virginia for five to six months and in Montcalm County, Michigan, for almost a year. *Id.* at 151-54. At one point in time, AF told her that she did not want to spend so much time with petitioner and did not like sitting on his lap. *Id.* at 155.

Lisa attributed the conversation to her daughter being a teenager. *Id.* at 155. At that time, petitioner mentioned that AF was being rude and ignoring him. *Id.* at 155-56, 176-77. Afterward, Lisa noticed that AF was very distant with petitioner, started to keep to herself, to have eating problems, and to experience headaches and anxiety attacks. *Id.* at 156, 160. AF also requested "100 times" that a lock be placed on her bedroom door, but Lisa and her husband refused. *Id.* at 156. When Lisa and her husband finally agreed to place a lock on AF's door, "[petitioner] had a fit and said it was a fire hazard and talked us out of it." *Id.*

After talking with a friend and counselor, AF approached her step-father, and then Lisa, to talk about petitioner's actions. *Id.* at 158-59. Upon speaking with AF, Lisa called her sister Deana, because Deana's daughter CR was also involved. *Id.* at 159. After Deana came to Lisa's house to discuss the allegations, Lisa called 911. *Id.* at 159-60.

After the present criminal case commenced, Lisa talked with AF about petitioner's sexual advances toward her when she was sixteen years old. *Id.* at 161-62. When asked if she hated petitioner, Lisa stated "[n]o, never have." *Id.* at 161. On the contrary, Lisa stated that she paid to move petitioner and her mother twice, and that she "financially supported them to have them with my family." *Id.* When describing petitioner's sexual advances toward her, Lisa stated that when petitioner tried to "touch" her, his exact words to her were "If you say anything to your mother, you know she won't believe you. She believes whatever I tell her to believe." *Id.*

Lisa also clarified that petitioner's alleged rape of a minor occurred in Michigan (rather than Virginia), and that AF must have overheard Lisa talking about it with another adult because she did not discuss it with AF. *Id.* at 162-63. The story was related to Lisa by a relative, who stated that a number of years ago, petitioner was having sex with a minor who lived either next-

door or a couple of houses down the street, that Mrs. Wellborn left him at the time, and that petitioner's house burned down. *Id.* at 162. On cross-examination, Lisa testified that back in 1998, she did not remember AF telling her that petitioner had threatened AF, only that AF felt uncomfortable around petitioner. *Id.* at 168-69. When Lisa approached her niece CR to see if she had any problems with petitioner, CR answered "[n]o, I don't want to talk about it." *Id.* at 170-72.

**5. Dr. Palusci's testimony**

Dr. Vincent Palusci gave the following testimony as an expert in pediatrics. Trial Trans. III at 3, 7-8 (docket no. 19). AF had been referred to Dr. Palusci for a medical evaluation of digital and oral genital contact. *Id.* at 11. Dr. Palusci performed the medical evaluation, including a genital examination, on March 22, 2001. *Id.* at 10, 15. The doctor did not find any injuries, cuts, or bruises, and the laboratory results did not reveal any sexually transmitted diseases. *Id.* at 13-16. Dr. Palusci also examined CR for digital genital contact but did not find any injuries. *Id.* at 17, 19. He did not obtain a separate laboratory specimen for sexually transmitted diseases because CR recently underwent tests related to menstrual irregularities. *Id.* at 19-20. Finally, Dr. Palusci examined AR (the youngest of the three step-granddaughters) for digital genital contact on April 5, 2001. *Id.* at 20-22. He found genital warts near AR's urethra. *Id.* at 22. The doctor testified that genital warts can be sexually transmitted, and that to be transmitted, the wart tissue has to be directly transferred to the infected area by contact. *Id.* at 22, 32, 47. However, the doctor did not know the source of the contact. *Id.* at 32-33. In explaining his findings, Dr. Palusci testified that it is not typical to find scarring or substantial injuries from digital or oral genital contact especially when there has been a significant delay in time. *Id.* at 24, 47-48. Finally, Dr. Palusci referred all three of petitioner's step-granddaughters to counseling. *Id.* at 17, 20, 23-24.

**6. Deana's testimony**

Deana is petitioner's step-daughter and the mother of CR and AR. *Id.* at 48-49. She gave the following testimony. Deana's family lived with petitioner in Virginia. *Id.* at 50. When Deana's family returned to Michigan, they initially lived with her sister Lisa. *Id.* at 51. In March 2001, Lisa called Deana at work and asked her to come home. *Id.* at 53-54. When she arrived, Deana asked CR if petitioner ever touched her. *Id.* at 54-56. CR became very upset and cried. *Id.* at 56. Shortly thereafter, Lisa came to Deana's home to discuss petitioner's alleged sexual abuse of the step-granddaughters, at which time they called the police. *Id.* at 56-57. Deana also testified that CR would not go to petitioner's house alone, that CR became depressed and quiet, and that CR complained of stomach problems. *Id.* at 57-58.

**7. RS's testimony**

RS was a schoolmate of AF. RS was eighteen years old at the time of trial. RS testified that she played volleyball with AF at the high school. *Id.* at 95-96. RS was a few years older than AF. Around January 2001, after RS had driven AF and others to participate in a volleyball fund raiser, she chatted with AF on hotmail messenger. *Id.* at 95-98. During the messaging, which lasted about an hour, AF stated that petitioner had sexually abused her. *Id.* at 98, 102-103, 106. Upon receiving that information, RS told AF that she had to speak with her parents about it first and that she (RS) was going to tell the police. *Id.* at 103. RS gave AF one week to have the talk. *Id.* at 103. When AF did not approach her parents during that time, RS met with the school counselor and the police were called. *Id.* at 103-04. AF also gave RS a handwritten letter. *Id.* at 108-110. The letter talked about many incidents of petitioner molesting AF, such as "masturbating in front of her, him going inside her, making her give him oral sex, him fondling her, feeling her

pretty much up [sic]." *Id.* at 110-11. RS had the letter for two days, but gave it back to AF because she (AF) had to give the letter to Child Protective Services. *Id.* at 108-10.

**8. Detective Kik's testimony**

Detective Diane Kik testified that she works in the Kent County Sheriff's Department. *Id.* at 113-14. On March 8, 2001, Detective Kik met with Lisa and Deana, and later individually with AF, CR and AR. *Id.* at 115-16. During her interview, AR did not indicate any problems with petitioner. *Id.* at 116. On cross-examination, petitioner's counsel addressed various discrepancies in the police report prepared by Detective Kik: that the first person AF told about the sexual abuse was not RS; that there was no statement made that "[petitioner] put his penis inside her vagina"; and, that the detective did not ask AF, and AF did not volunteer, a statement that "[petitioner] had grabbed my boobs." *Id.* at 123-27.

**9. Mr. Cottrell's testimony**

Tom Cottrell, the Program Director of the Child Sexual Abuse Treatment Program at the YWCA, gave the following testimony as an expert in the field of "exposure to sexual assault." Trial Trans. IV at 3-4, 7 (docket no. 20). The program provides counseling to families of sexual abuse. *Id.* at 4. Eighty percent of the cases of sexual abuse in a family do not result in immediate disclosure, with disclosure generally occurring anywhere between a matter of weeks to 30 to 40 years. *Id.* at 10. A sexual abuse victim may not want to disclose due to fear, loyalties to the offender, or loyalties to other family members. *Id.* at 10-11. Disclosure may occur when a victim finds that a sibling was also abused. *Id.* at 15. Mr. Cottrell further stated that any child who is being sexually abused is confused about what is happening to them. *Id.* at 29.

**B. Defense case in chief**

**1. Petitioner's testimony**

Petitioner gave the following testimony in his defense. *Id.* at 31. Petitioner is married to Mrs. Wellborn, has two step-daughters, Lisa and Deana, and three step-granddaughters, AF, CR and AR. *Id.* at 32-33. He is six feet, five inches tall, and his weight fluctuated between 340 pounds and 455 pounds. *Id.* at 32. He denied sexually assaulting Lisa, AF, CR and AR. *Id.* at 35-37, 53. Petitioner and Mrs. Wellborn "did everything" with the grandchildren and he was horrified by the allegations made against him. *Id.* at 34-36. He claimed that the allegations of sexual assault are the result of Mrs. Wellborn's ex-husband, Mr. Faunce, attempting to re-enter their lives after fifteen years. *Id.* at 37-38; *see also id.* at 108-109. Petitioner testified that Mr. Faunce "was gone for 15 years because of problems with the law enforcement community, reappeared, was asked to come back into the family, and my wife and I did not agree that -- I don't want to get into a whole other story here -- my wife and I did not agree that we could comfortably go to holidays and everything with this individual present." *Id.* at 38.

Petitioner also testified that he never raped a girl in Virginia or had his house burned down as a form of revenge. *Id.* at 37, 40-41. In 1998, Lisa and Deana did not approach petitioner to say that either AF or CR were uncomfortable around him. *Id.* at 51-52. Later, in 2000, petitioner and Mrs. Wellborn refused to spend the holidays with her daughters if Mr. Faunce was present. *Id.* at 38-39. This upset Lisa, whom petitioner described as a "control freak" who "controls the family." *Id.* at 38. Before Christmas 2000, Lisa and Deana also approached petitioner's wife about leaving him because petitioner abused her for 17 years (by not allowing her to have friends, a car, or a job).

*Id.* at 39. Petitioner also claimed that Mrs. Wellborn filed a false police report against him. *Id.* at 39-40.

On cross-examination, petitioner testified that the assistant prosecutor, Attorney Becker, persuaded AF to lie. *Id.* at 57. When Attorney Becker asked petitioner how he persuaded AF to lie, petitioner accused the prosecutor of "trying to double-talk" him. *Id.* at 58. Then, petitioner stated that he was not accusing Attorney Becker of manipulating the victims, but rather he was accusing his step-daughter Lisa of manipulating the victims. *Id.* at 58-59. Petitioner also testified about a conspiracy against him, which included law enforcement and family members. *Id.* at 61. Specifically, Lisa manipulated people by "[t]hreats, screaming like a banshee, conning people, stealing, lying, bad checks [sic]." *Id.* at 61. Petitioner accused the detective (Kik) of covering up Lisa's past record of illegal behavior. *Id.* at 62. Petitioner also accused Lisa of manipulating him on other occasions, e.g., having him lie to prospective employers about her job qualifications. *Id.* at 66. In summary, according to petitioner, all of the allegations against him were "a bunch of lies" and that his step-daughters, the detective and the prosecutor were "trying to get me." *Id.* at 59-60.

**2. Mrs. Wellborn's testimony**

Mrs. Wellborn gave the following testimony for the defense. *Id.* at 72-73. She described her daughter Lisa as controlling. *Id.* at 84. Mrs. Wellborn never saw petitioner discipline AF, CR or AR, and did not notice any bruises or scrapes on the three children when they spent the night at her house. *Id.* at 75, 81-82. She never heard any screams in the middle of the night or any cries for help from any of her granddaughters. *Id.* at 81. Neither AF, CR nor AR indicated to her that they were scared of petitioner. *Id.* at 82.

At some point in time, Mrs. Wellborn went to talk to AF and CR at their school. *Id.* at 86-88. When Mrs. Wellborn asked AF about what was going on with petitioner, AF told her that Lisa told AF that petitioner raped a girl in Virginia, and that AF did not want that to happen to her, CR or AR. *Id.* at 86-87. According to Mrs. Wellborn, AF "was acting like it was a game, not serious" and AF also told her that according to the detectives, petitioner could get the help he needed if he stays in jail. *Id.* at 86-87. During the conversation, Mrs. Wellborn did not argue with AF or "belittle" her. *Id.* Then, Mrs. Wellborn and AF met CR in the hallway and went into the office. When Mrs. Wellborn asked CR what was going on with petitioner, CR screamed that she wanted it to end. *Id.* at 88-89. At that time, school officials ended the conversation. *Id.* at 89. On cross-examination, Mrs. Wellborn denied that she accused AF and CR of lying. *Id.* at 93. Mrs. Wellborn also stated that she has chosen petitioner's side of the controversy and does not see her daughters or granddaughters any more. *Id.*

**C. Prosecution's rebuttal**

On rebuttal, AF testified that Mrs. Wellborn pulled AF out of class, accused her of fabricating the sexual abuse charges, and called her a slut, a whore, and a bitch. *Id.* at 96-97, 100. Mrs. Wellborn also pulled CR from her class. *Id.* at 98. CR started crying and saying that Mrs. Wellborn could not tell her that it never happened. *Id.* AF and CR were both crying. *Id.* at 98. The school counselor tried to escort Mrs. Wellborn out of the building, but she fought back. *Id.* at 98-99. Eventually, the counselor got some help and Mrs. Wellborn was removed from the school. *Id.*

CR testified that she talked to Mrs. Wellborn and AF in the high school counseling office. *Id.* at 105. During the conversation, Mrs. Wellborn said that this never happened, that they (AF and CR) were lying about it, and that they were "big liars" and "little bitches". *Id.* at 105-108.

Mr. Faunce's current wife, Erma Faunce, gave brief testimony, apparently to rebut petitioner's statements regarding Mr. Faunce's "problems with the law enforcement community" and Faunce's attempt to re-enter his biological family's lives after a 15 year absence. Mrs. Faunce testified that she and her husband have been married for 17 years and moved to Michigan in April 2000. *Id.* at 109. Prior to that time, they were missionaries residing in Florida. *Id.*

Finally, Detective Kik testified regarding an interview with petitioner on May 27, 2001, where she told petitioner about the sexual abuse allegations. *Id.* at 111-13. Petitioner stated that the allegations of AF and CR were not true. *Id.* at 113. Petitioner denied touching the girls but mentioned that he could have touched them by accident. *Id.* at 114, 118. While petitioner mentioned that Lisa was controlling and angry with him, he did not say anything about Mr. Faunce being involved. *Id.* at 114-15. When asked why AF would make this up, petitioner blamed the allegations on Lisa's controlling behavior. *Id.* at 120.

**III. Discussion**

To determine whether petitioner demonstrated actual prejudice sufficient to excuse the procedural default, "courts must ask, is there a reasonable probability that a different (e.g., properly selected) jury would have reached a different result, a probability sufficient to undermine confidence in the outcome of the trial." *Ambrose IV*, 801 F.3d at 578 (internal quotation marks omitted). "The most important aspect to the actual prejudice inquiry is the strength of the case against the defendant, which requires courts to take a careful look at the transcripts involved." *Id.* at 580 (internal quotation marks and brackets omitted). Actual prejudice does not exist where the trial transcript showed that the prosecution's case against the petitioner was so strong, and the

defense was so weak, "that a court would consider it highly improbable that an unbiased jury could acquit." *Id.* at 575, quoting *Ambrose II*, 684 F.3d at 652.

After reviewing the trial transcript in detail, the Court concludes that petitioner has failed to demonstrate actual prejudice necessary to excuse his procedural default. The prosecution's case against petitioner was strong. The Court summarized that evidence when it addressed the merits of petitioner's ineffective assistance of counsel claims:

> [T]he prosecution introduced overwhelming evidence of Petitioner's guilt. [AF], [CF] and [AR] testified regarding several instances of sexual assault by Petitioner in Kent County. [AF] testified that Petitioner put his fingers in her vagina and his tongue in her vagina on several occasions. (Tr. II, 42-44.) Most of the sexual encounters occurred in the computer room of Petitioner's residence. (Tr. II, 43.) The first encounter [AF] remembered in the computer room was when Petitioner kissed her and put his fingers in her vagina. (Tr. II, 44.) At Petitioner's request, [AF] also used her hands to play with his penis. (Tr. II, 45.)
>
> [CR] testified that Petitioner would try to French kiss her, reach down her pants and touch her breasts. (Tr. II, 96, 100-02.) Petitioner, however, only tried to reach down her pants once. (Tr. II, 101-02.) [CR] told him no and stopped his hand. (Tr. II, 101.) While [CR] was in the computer room, Petitioner would also try to touch her breasts. (Tr. II, 102.) [CR] estimated that Petitioner attempted to sexually assault her on less than ten occasions. (Tr. II, 102.)

R&R (Feb. 27, 2009) at PageID.285.

In contrast, the defense evidence was weak. "[T]o successfully argue that it is reasonably probable that a different jury would have accepted the defense theory, and thus have reached a different result, a defendant must show that there is some support for that theory." *Ambrose IV*, 801 F.3d at 581. Here, petitioner testified that he did not sexually abuse any of the step-granddaughters. Petitioner's theory is that the victims were manipulated into giving false testimony because: Mr. Faunce was attempting to re-enter their lives after a 15-year absence; the victims were being controlled by his step-daughter Lisa; and there was some type of conspiracy

among his step-daughters, the detective and the prosecutor to "get him." However, petitioner presented no evidence with respect to the victims' specific allegations made against him, to support his theory that the victims were being manipulated to lie about the numerous instances of sexual abuse, or to establish a conspiracy between his step-daughters, the detective and the prosecutor or to explain how they manipulated the victims' testimony.

Finally, petitioner contends that a different jury would have reached a different result for two additional reasons. First, petitioner contends that the jury was deadlocked on one of the counts and that "[a] different jury easily could have resolved the deadlock differently." Petitioner's Brief (docket no. 69, PageID.454). Petitioner's cursory argument does not address how the alleged deadlocked jury meets the actual prejudice test articulated by the Sixth Circuit in *Ambrose II* or *Ambrose IV*. Furthermore, the argument is not persuasive. While petitioner refers to the jury as "deadlocked," there is no evidence that jury was deadlocked, e.g., that a mistrial was imminent or that the trial judge found it necessary to give the jury a coercive instruction to break a deadlock. *See generally*, *People v. Sullivan*, 392 Mich. 324, 334, 220 N.W.2d 441 (1974) (cautioning that an instruction given by the trial judge which "can cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement" should not be used). Here, the record reflects that during their deliberations, the jury asked the trial court whether they could have a verdict on one or two counts and be undecided on one. Trial Trans. VI at 3 (docket no. 21). The Court advised the jury that they could enter such a verdict if they were genuinely satisfied that further efforts would not result in a "reasonable likelihood of resolving the count on which your are undecided." *Id.* However, if the jury felt that more work could get a resolution of the undecided matter, then the preference is to "continue to work to resolve everything." *Id.* The trial judge

further told the jury that if they did not believe that there was a reasonable prospect of resolving what was undecided, "tell me that and tell me what matters you have decided, and that's an acceptable resolution of this case at this time." *Id.* at 3-4. The record reflects that the jury deliberated and entered a verdict later that afternoon on all three counts. *Id.* at 5-6. The fact that the jury posed a question to the judge during their deliberation does not establish that a different jury would have decided the case differently.

Second, petitioner contends that a jury in a different county acquitted him of "the very same conduct that represents two of the three charges in this case, in a trial that featured most of the same witnesses." Petitioner's Brief at PageID.454) (emphasis omitted). Based on his sparse submissions, it appears that petitioner is referring to a trial held in Montcalm County, Michigan, *People v. Carl Wellborn*, 1:H-192-FH, in which he was found not guilty. *See* Excerpt of Jury Trial (list of witnesses) (docket no. 73); Trial Trans. (jury verdict) (docket no. 74).[4] Once again, petitioner's cursory argument does not address the actual prejudice test articulated by the Sixth Circuit in *Ambrose II* or *Ambrose IV*. The fact that a jury found petitioner not guilty of committing certain crimes in Montcalm County is irrelevant to whether a different jury in the present case would have found petitioner not guilty of committing separate and distinct crimes in Kent County.

While there were some inconsistencies in the victims' testimony, their accounts of the sexual abuse, coupled with the testimony of the other prosecution witnesses, provided strong evidence against petitioner. In contrast, the defense evidence, which boiled down to petitioner's testimony that his step-daughters, a detective, a prosecutor and Mr. Faunce manipulated the victims

[4] The Court notes that while the jury found petitioner not guilty on five counts of criminal conduct, it does not identify the crimes charged. Trial Trans. (docket no. 74).

to falsely accuse him of sexual abuse, is weak. Given this evidence, it is not reasonably probable that a different jury would have reached a different result. *See Ambrose IV*, 801 F.3d at 578, 581. Petitioner has failed to demonstrate actual prejudice sufficient to excuse the procedural default. Accordingly, the petition should be denied.

## IV. Recommendation

For the foregoing reasons, I respectfully recommend that the habeas corpus petition be denied.

Dated: December 2, 2016

/s/ Ray Kent
RAY KENT
United States Magistrate Judge

ANY OBJECTIONS to this Amended Report and Recommendation must be served and filed with the Clerk of the Court within fourteen (14) days after service of the report. All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to serve and file written objections within the specified time waives the right to appeal the District Court's order. *Thomas v. Arn,* 474 U.S. 140 (1985); *United States v. Walters,* 638 F.2d 947 (6th Cir. 1981).

A-7 Opinion & Judgment

6th Circuit AMBROSE

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Leonard Green
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: June 28, 2012

Mr. James R. Gerometta
Federal Defender Office
613 Abbott Street, Fifth Floor
Detroit, MI 48226

Mr. Bradley R. Hall
Federal Defender Office
613 Abbott Street, Fifth Floor
Detroit, MI 48226

Mr. John S. Pallas
Mr. Bernard Eric Restuccia
Office of the Michigan Attorney General
Appellate Division
P.O. Box 30217
Lansing, MI 48909

Mr. Kenneth Robert Sasse
Federal Defender's Office
653 S. Saginaw Street, Suite 105
Flint, MI 48502

Re: Case Nos. 11-1430/10-1247/09-1539, *Ambrose, et al. v. Booker, et al.*
Originating Case Nos.: 06-13361 (Grand Rapids); 05-00346 & 09-215 (Bay City).

Dear Counsel,

The court today announced its decision in the above-styled cases.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Leonard Green, Clerk

Cathryn Lovely
Deputy Clerk

cc: Ms. Tracey Cordes
Mr. David J. Weaver

Enclosures

Mandate to issue.

*RECOMMENDED FOR FULL-TEXT PUBLICATION*
Pursuant to Sixth Circuit Rule 206

File Name: 12a0200p.06

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

---

11-1430

JOSEPH AMBROSE,
*Petitioner-Appellee,*
*v.*
RAYMOND D. BOOKER,
*Respondent-Appellant.*

10-1247

GREGORY CARTER,
*Petitioner-Appellant,*
*v.*
BLAINE LAFLER,
*Respondent-Appellee.*

09-1539

CARL BURNIE WELLBORN,
*Petitioner-Appellant,*
*v.*
MARY BERGHUIS,
*Respondent-Appellee.*

Nos. 11-1430/10-1247/09-1539

Appeals from the United States District Court
for the Eastern District of Michigan at Bay City
and the Western District of Michigan at Grand Rapids.
No. 06-13361—Thomas L. Ludington; District Judge;
Nos. 09-215; 05-346—Robert J. Jonker, District Judge.

Argued: February 28, 2012

Decided and Filed: June 28, 2012

Before: MERRITT and ROGERS, Circuit Judges, and POLSTER, District Judge.*

---

* The Honorable Dan Aaron Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

## COUNSEL

**ARGUED:** B. Eric Restuccia, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant in 11-1430. Bradley R. Hall, FEDERAL PUBLIC DEFENDER OFFICE, Detroit, Michigan, for Appellee in 11-1430. Bradley R. Hall, FEDERAL PUBLIC DEFENDER OFFICE, Detroit Michigan, for Appellants in 10-1247 and 09-1539. John S. Pallas, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellees in 10-1247 and 09-1539. **ON BRIEF:** B. Eric Restuccia, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant in 11-1430. Bradley R. Hall, Kenneth R. Sasse, FEDERAL PUBLIC DEFENDER OFFICE, Detroit, Michigan, for Appellee in 11-1430. Bradley R. Hall, James R. Gerometta, FEDERAL PUBLIC DEFENDER OFFICE, Detroit Michigan, for Appellants in 10-1247 and 09-1539. John S. Pallas, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellees in 10-1247 and 09-1539. Debra M. Gagliardi, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee in 10-1332. Gregory Carter, Manistee, Michigan, pro se.

## OPINION

ROGERS, Circuit Judge. These habeas petitions involve the far-reaching effects of an unintentional computer glitch that caused the systematic underrepresentation of African-Americans in the jury pools of Kent County, Michigan. The three petitioners received separate jury trials in Kent County in either 2001 or 2002. At jury selection, the petitioners did not object to the racial composition of their respective jury venires, and were subsequently convicted. A few months later, the Grand Rapids Press published a story detailing how Kent County's jury selection software had a computer glitch that had systematically excluded African-Americans from the jury pool. In light of these revelations, the petitioners each filed motions for post-conviction relief in state court. The state court found that the petitioners had waived these claims by failing to object to the racial composition of the jury venire during *voir dire*.

The petitioners each filed a § 2254 habeas petition. The Western District of Michigan denied two of the petitions—*Carter v. Lafler*, No. 10-1247, and *Wellborn v. Berghuis*, No. 09-1539—holding that the petitioners had not shown cause to excuse their

procedural default. In *Ambrose v. Booker*, No. 11-1430, the Eastern District of Michigan granted habeas relief. The *Ambrose* court held that the petitioner could not have known of the computer glitch, presumed prejudice because the glitch caused a structural error, and then granted the petition on the merits. Remand in all three cases is appropriate because the petitioners have shown cause to excuse their defaults, but federal-state comity requires that the district court find actual prejudice before granting relief.

## I.

### 1. Ambrose

On April 19, 2001, a Kent County jury convicted Joseph Ambrose of two counts of armed robbery, one count of carjacking, and one count of felony-firearm possession. *Ambrose v. Booker*, 781 F. Supp. 2d 532, 535 (E.D. Mich. 2011). Ambrose sought leave to appeal; however, his appointed counsel withdrew and the Michigan Court of Appeals determined that Ambrose's appeal was frivolous. *Id.* Ambrose did not appeal to the Michigan Supreme Court.

On July 30, 2002, the Grand Rapids Press reported that a computer glitch had an impact on Kent County's system for selecting jury venires. The glitch was introduced accidentally by the county when it assumed control of the jury selection computer program from a private vendor in April 2001. The problem came to light in 2002, when a local high school teacher, Wayne Bentley, completed a study of minority representation on Kent County juries. Bentley found that the underrepresentation of minorities was statistically significant, and shared his findings with county officials. The county subsequently conducted an internal study that revealed that "nearly 75 percent of the county's 454,000 eligible residents were excluded from potential jury pools since spring 2001" and that "[m]any blacks were excluded from . . . jury pools due to a computer glitch that selected a majority of potential candidates from the suburbs." The chief judge of the Kent County Circuit Court, George Buth, stated, "There has been a mistake—a big mistake."

In light of these revelations, Ambrose initiated state post-conviction proceedings. Ambrose requested relief from judgment, claiming he was denied his right to be tried by a jury drawn from a fair cross-section of the community. The trial court denied Ambrose's motion because, among other things, Ambrose failed to object to the venire panel before the jury was empaneled. The Michigan Court of Appeals denied leave to appeal, as did the Michigan Supreme Court. *See People v. Ambrose*, 706 N.W.2d 16 (Mich. 2005) (unpublished table decision).

Ambrose then filed this habeas petition in the United States District Court for the Eastern District of Michigan. The district court referred the matter to a magistrate judge, who held an evidentiary hearing at which four items of evidence were introduced. First, the magistrate judge heard the testimony of Wayne Bentley, the teacher that uncovered the disparate representation. Second, the magistrate judge heard testimony from Terry Holtrop, the case manager for the Kent County Circuit Court. *Ambrose*, 781 F. Supp. 2d at 537-38. Holtrop explained how Bentley's evidence spurred an internal investigation by the County, culminating in the Kent County Jury Management System Report (hereafter "the Report") dated August 1, 2002. The Report described how a transfer of control over a database—from a private vendor to the County in an effort to cut costs—caused the error :

> [I]n the initial set-up of the Oracle database to accommodate the driver's license and State ID data from the State file, an error was made in one parameter. Whether this was a programming error, the carry-over of a setting that existed within the Sybase database, misinterpreting instructions, or simply human error, that is now almost impossible to determine. The parameter that was entered within the database was 118,169. What should have been inserted within this setting was the total number of records in the State File, or 453,981 in 2001.
>
> The net effect of this incorrect parameter is that the Jury Management System performed a random selection against the first 118,169 jurors on the file. The percentage of jurors selected per Zip Code was proportional to the Zip Code composition of the first 118,169 records—but not Kent County as a whole. The total pool of prospective jurors from the State File is of course 3.8 times larger than the 118,169 and hence the type of jury pull data as is evidenced in the various tables included in this report, for the second half of 2001 and the first half of 2002.

> The next logical question being, why then did the jury pull from Zip Code 49341 jump so dramatically for 2001, from an average of 3.8% up to 10.24% . . . and why did the jury pulls from Zip Code 49507 decline from an average of 8.56% to 2.13%?
>
> The answer being that in 1998 (as was mentioned previously) the State File did not come in random order, but rather in Zip Code order . . . lowest numbers to highest numbers. In subsequent years, new prospective jurors (either based on age or having moved to the County) were added to the end of the database. Existing prospective jurors (those that were on file the previous year) would simply have address information updated based on what the State provided. Their position in the dataset would not change. Therefore, the first 118,169 records of the dataset have a high percentage of lower numbered zip codes. As indicated on the map included in his packet, all the Zip Codes with the lower numbers are located outside of the Grand Rapids metro area.

Third, the magistrate judge considered statistical analysis submitted by Dr. Paul Stephenson, a statistician who used different methodologies to evaluate the impact of the glitch. Dr. Stephenson first compared the percentage of eligible African-Americans in Kent County and the actual percentage in the venire. He found an absolute disparity of 6.03% and a comparative disparity of 73.1% fewer African-American members than would be expected.[1] While Dr. Stephenson believed that these disparities were useful "descriptive statistics," he did not believe they were "viable for inferential purposes." Stephenson next used both a standard deviation and binomial test, and found that although the tests provided "insufficient evidence to demonstrate that the representation

---

[1] The Tenth Circuit has explained the differences between the measures:

> Absolute disparity measures the difference between the percentage of a group in the general population and its percentage in the qualified wheel. For instance, if Asians constitute 10% of the general population and 5% of the qualified wheel, the absolute disparity is 5%.
>
> Comparative disparity measures the decreased likelihood that members of an underrepresented group will be called for jury service, in contrast to what their presence in the community suggests it should be. This figure is determined by dividing the absolute disparity of the group by that group's percentage in the general population. In the example above, the comparative disparity is 50%: Asians are half as likely to be on venires as they would be if represented in proportion to their numbers in the community.

*United States v. Shinault*, 147 F.3d 1266, 1272 (10th Cir. 1998) (formatting altered).

of Blacks or African-Americans in [a specific] venire is biased, this is in part due to the size of the venire." Stephenson also noted "while it would be less likely, one also could expect approximately 2% of all venires to contain no . . . African-American members." Stephenson then employed a "Chi-square Goodness-of-fit test." Using this test, Dr. Stephenson found that "there is essentially no chance of acquiring the results we obtained if the selection process for potential jurors is unbiased. As a result, there is overwhelming evidence to conclude that the selection process for terms during the first months of 2002 was biased." Dr. Stephenson concluded that "the analysis presented in this report demonstrates that a systematic bias did exist in the selection of individuals summoned for jury duty during the first three months of 2002. This bias would have inevitably led to under representation of . . . African-Americans in the terms during this period of time."

Fourth, the magistrate judge considered a report by Dr. Edward Rothman, who analyzed the composition of the Kent County Jury Pool between January 1998 and December 2002. Dr. Rothman used the census figures from the 2000 census, at which time African-Americans comprised 8.24% of the population of Kent County. Dr. Rothman applied these figures to the period April 2001 to August 2002, and concluded that there was a 3.45% absolute disparity between jury-eligible African-Americans and those who appeared on jury venires. Rothman found a comparative disparity of 42%. Based on these four pieces of evidence, the magistrate judge concluded that Petitioner had proven a prima facie case of a fair cross-section claim.

The district court adopted the magistrate judge's report and recommendation. *Ambrose*, 781 F. Supp. 2d at 545-46. First, the district court held that Ambrose had not procedurally defaulted his claim. The court acknowledged that district courts had split on the issue of procedural default with regard to the Kent County computer glitch, but the court concluded that Ambrose had shown good cause to excuse his default because he could not have known of the glitch. *Id.* at 542-43. Second, the district court found that the number of African-Americans in the jury pool was not "fair and reasonable in relation to the number of such persons in the community." *Id.* at 543-44. The district

court recognized that the absolute disparity of 3.45% fell below the 10% mark established by *Swain v. Alabama*, 380 U.S. 202, 208-09 (1965). However, this 10% mark was not a bright-line rule; to hold otherwise would prevent fair cross-section claims in areas where the minority population was less than 10%. *Ambrose*, 781 F. Supp. 2d at 543-44. Finally, the district court held that the systematic exclusion did not need to be intentional. *Id.* at 545. The district court granted a conditional writ of habeas corpus and respondents timely appealed.

**2. Carter**

Gregory Carter's habeas petition was reviewed by both the Eastern and Western Districts of Michigan, which came to opposite conclusions. A jury convicted Carter of armed robbery of a convenience store in Kent County, Michigan. At trial, the prosecution presented "overwhelming" evidence of the robbery, including a videotape which showed Carter robbing the store. *Carter v. Lafler*, No. 1:09-cv-215, 2010 WL 160814, at *1 (W.D. Mich. Jan. 8, 2010). Petitioner was sentenced to two years' incarceration for a felony firearm charge to be served consecutively with a term of 15 to 40 years' imprisonment for the armed robbery. *Id.* Carter did not object to the venire panel at trial, and did not challenge the panel's composition at any stage of his direct appeal.

In light of the revelations about the problems with Kent County's jury selection system, Carter initiated state post-conviction proceedings under M.C.R. 6.501. In his motion, Carter challenged the composition of the jury based on flaws in the Kent County jury selection system, and raised an ineffective assistance of counsel claim. The trial court denied the motion, reasoning that Carter had defaulted by failing to object to the venire's composition before the jury was empaneled. Further, the trial court found that Carter's ineffective assistance of counsel claim failed under Michigan's version of *Strickland v. Washington*, 466 U.S. 668 (1984). Carter applied for leave to appeal, but both the Michigan Court of Appeals and Michigan Supreme Court denied the application "for failure to meet the burden of establishing entitlement to relief under MCR

6.508(D)." *People v. Carter*, No. 254482 (Mich. App. Aug. 20, 2004); *People v. Carter*, 696 N.W.2d 714 (Mich. 2005) (table opinion).

Carter filed a habeas petition in the United States District Court for the Eastern District of Michigan. The district court held that there was cause and prejudice to excuse Carter's procedural default. *Carter v. Lafler*, No. 06-cv-10552, 2009 WL 649889, at *3 (E.D. Mich. Mar.10, 2009). The district court recognized that Carter had procedurally defaulted by failing to object at trial to the composition of the venire panel. The default was excused, however, because the district court found that Carter could not have known about the systematic exclusion caused by the computer glitch at the time the jury was sworn. *Id.* Having excused the default, the court determined that an evidentiary hearing was necessary to determine whether Carter's jury was empaneled during the period impacted by the computer glitch. *Id.* at *4-5. Because Carter was imprisoned in the Western District of Michigan, and because the trial had occurred in the Western District, the court transferred the action "for an evidentiary hearing and determination on the Sixth Amendment claim." *Id.* at *5.

Upon receiving the case, the Western District of Michigan assigned the case to a magistrate judge. The magistrate judge recommended that the district court deny the habeas petition as procedurally defaulted without an evidentiary hearing. *Carter v. Lafler*, No. 1:09-cv-215, 2010 WL 160814, at *4-13 (W.D. Mich. Jan. 8, 2010). The district court adopted this recommendation because the court determined that Carter had not shown good cause for his procedural default. *Id.* at *3. Although Carter was unaware of the computer glitch at the time of his trial, the district court held that the racial composition of the jury venire gave him notice of his claim. *Id.* Carter timely appeals.

**3. Wellborn**

Carl Wellborn was convicted of sexually abusing his granddaughters by a Kent County Jury in March 2001. *Wellborn v. Berghuis*, No. 05-cv-346, 2009 WL 891708, at *8-14 (W.D. Mich. Mar. 31, 2009) (report and recommendation). On direct appeal, Wellborn claimed that he was denied a jury drawn from a fair cross-section of the

community based on the Kent County computer glitch. The Michigan Court of Appeals found that Wellborn had defaulted his fair cross-section claim because he failed to raise it before the jury was sworn. *Id.* at *14. The Michigan Court of Appeals affirmed Wellborn's convictions, and the Michigan Supreme Court denied leave to appeal. *Id.*

Wellborn raised a variety of claims in his habeas petition, but only appeals his fair cross-section claim. The district court found that this claim was procedurally defaulted, and held that there was no cause to excuse the default. *Id.* at *3. Because the petitioner observed the juror array, the court reasoned, he was on notice of a potential underrepresentation. *Id.* The court found that the petitioner must show evidence that the underrepresentation was intentionally concealed, a showing Wellborn did not make. *Id.* at *3-4. The court acknowledged that the Eastern District had addressed the computer glitch and excused procedural default, but found Wellborn's case distinguishable on two grounds: Wellborn was white and there was overwhelming evidence of Wellborn's guilt. *Id.* at *3-4. Wellborn filed this timely appeal.

## II.

As an initial matter, the parties disagree on the standard of review. The Antiterrorism and Effective Death Penalty Act ("AEDPA") requires federal courts to grant considerable deference to state courts and presume the correctness of state court fact finding. 28 U.S.C. § 2254(d), (e)(1). However, this deferential standard applies only to claims that state courts have adjudicated on the merits. Respondents admit that "the State court . . . refus[ed] to examine the merits of Petitioner's claim." Even without this concession, it is evident that the state courts rejected petitioners' fair cross-section claims on procedural grounds, based on the failure to object to the jury panel at trial. For this reason, AEDPA deference does not apply and the court reviews legal conclusions *de novo* and findings of fact for clear error. *See, e.g., Dyer v. Bowlen*, 465 F.3d 280, 283–84 (6th Cir. 2006).

**1. Cause for Procedural Default**

There is no dispute that petitioners defaulted their claims by failing to object to the jury venire at trial, in violation of Michigan's contemporaneous objection rule. *See, e.g.*, *People v. Dixon*, 552 N.W.2d 663, 667 (Mich. Ct. App. 1996). However, petitioners have shown "cause and prejudice" sufficient to excuse the default under *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The cause inquiry "ordinarily turn[s] on whether . . . some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule," and is satisfied by "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). As discussed below, petitioners have shown cause because the factual basis for the claim—the computer glitch—was not reasonably available to counsel, and petitioners could not have known that minorities were underrepresented in the *jury pool* by looking at the *venire panel*. Moreover, the Supreme Court has found cause to excuse a procedural default in a factually similar case. *See Amadeo v. Zant*, 486 U.S. 214 (1988).

It is undisputed that petitioners lacked actual knowledge of the glitch, and the record demonstrates that they could not have reasonably known of the error at the time the jury was sworn. The glitch was a mistyped parameter in the software, buried in a mountain of computer code, that was only discovered after a broad statistical analysis led to an extensive internal investigation. This is not the type of error that would be reasonably discoverable by a defendant at jury selection. The difficulty of detecting this problem is underscored by the fact that the glitch persisted for nearly two years without detection by defendants, judges, or Kent County officials.

Further, looking at the venire panel did not provide petitioners with notice of their claims. Petitioners' claims arise from the right "to be tried by an impartial jury *drawn from sources* reflecting a cross section of the community." *Berghuis v. Smith*, 130 S. Ct. 1382, 1387 (2010) (emphasis added). A petitioner raising this claim is challenging the pool from which the jury is drawn, and not necessarily the venire panel

directly before him. Accordingly, the composition of one panel does not indicate whether a fair cross-section claim exists.

The irrelevance of the composition of a single venire panel is underscored by the fact that a petitioner may bring a claim even if minorities are included in his panel. The Sixth Amendment guarantees only the opportunity for a representative jury, not a representative jury itself. *United States v. Biaggi*, 909 F.2d 662, 678 (2d Cir. 1990). The focus, therefore, is on the procedure for selecting juries, and not the outcome of that process. As the First Circuit eloquently put it:

> [T]o hold that a litigant is not entitled to a representative jury when the jury venires are drawn from a fair cross-section of the community but that the cross-section requirement can be dispensed with when the dice fall a particular way in an individual case undermines the analytical foundation upon which the right to a jury drawn from a cross-section of the community is based.

*Barber v. Ponte*, 772 F.2d 982, 993 (1st Cir. 1985), *vacated on other grounds*, 772 F.2d 996 (1st Cir. 1985) (*en banc*). It may be true that a venire panel's composition may put a petitioner on notice of a procedural irregularity in some instances, for example in areas where the minority population is so high that the probability of an all-white panel is minuscule. However, where the minority population is comparatively small, the actual composition of the venire panel does not provide reasonable notice of the existence or non-existence of a fair cross-section claim. As the district court persuasively stated in *Ambrose*:

> [R]equiring a defendant to make a contemporaneous objection based simply on an anecdotal view of the jury's racial composition defies logic; any individual panel could over represent a "distinctive" group even though the group might be underrepresented in the jury venire as a whole. A gaze into the jury gallery tells you nothing and, in fact, can be misleading. To also suggest that an effective defense attorney must investigate the jury assembly process in every case conditioned upon his client's loss of the right is unnecessary and wasteful.

*Ambrose v. Booker*, No. 06–13361–BC, 2011 WL 1806426, at *2 (E.D. Mich. May 11, 2011). Here, each petitioner saw only one venire panel, which did not alert any

of the petitioners to the systematic underrepresentation. Even the judges and Kent County officials who were confronted with venire panels daily did not notice the underrepresentation. To say that petitioners should have looked at a single venire panel and noticed something that the officials failed to notice for sixteen months rings hollow.[2]

Even if the composition of one venire panel were relevant, the absence of minorities on a panel would not have alerted petitioners that a fair cross-section claim existed. Due to the small size of the African-American population in Kent County, it is entirely possible that a defendant could receive an all-white juror array even if there were no underrepresentation of African-Americans in the jury pool. Dr. Stephenson concluded as much after conducting a standard deviation test and a binomial test on the Kent County jury pool. Stephenson Report, at 3. Because of Kent County's small African-American population (8.25%) and the small size of venire panels, Dr. Stephenson concluded that one "could expect approximately 2% of all venires to contain no Black or African-American members." *Id.* at 4. Even if the computer had been glitch-free, petitioners could have received a panel without a single African-American panel member. Given the small minority population in Kent County, if petitioners had faced an all-white jury panel, they could have believed that there was no underrepresentation problem.

Moreover, the Supreme Court has found cause to excuse a procedural default in a factually similar case. In *Amadeo v. Zant*, a district attorney conspired with the jury commissioners of a Georgia county to systematically exclude African-Americans and women from the jury pool. 486 U.S. 214 (1988). The wrongdoers purposefully underrepresented minorities, but were careful to keep representation within a presumptively valid statistical range (under 10%). The petitioner did not object at trial

---

[2]Respondents contend on the contrary that a fair cross-section claim requires proof that the specific venire underrepresented minorities. However, respondents misstate the holding of the case on which they rely for this proposition. In *United States v. Williams*, 264 F.3d 561, 568 (5th Cir. 2001), the court stated: "[Defendant] must demonstrate . . . not only that [African–Americans] were not adequately represented on his jury but also that this was the general practice in other venires." *Id.* (quoting *Timmel v. Phillips*, 799 F.2d 1083, 1086 (5th Cir. 1986)). This did not establish a requirement that a defendant prove that the venire have actual underrepresentation, but instead was explaining that proving underrepresentation on one venire was insufficient to maintain a fair cross-section claim. *Id.*

to the racial composition of the jury venire. Several months later, the petitioner learned of a memorandum that detailed a scheme "to underrepresent black people and women on the master jury lists from which . . . juries were drawn." *Id.* at 217. The memorandum was hidden in a public record—intermingled with irrelevant data—and only discovered in unrelated litigation. The Supreme Court excused the procedural default, reasoning that the memorandum was not reasonably available to petitioner's lawyers. *Id.* at 224. The court based its decision on the fact that petitioner's lawyers did not deliberately bypass a jury challenge. *Id.* at 226-28. Similarly, in this case, petitioners could not have discovered the computer glitch prior to trial and did not deliberately bypass a jury challenge. Further, the memorandum in *Amadeo* was filed in publicly accessible records whereas here the error was contained in a single line of code in the jury selection software. It would make little sense to excuse a failure to discover a publicly filed memorandum, but require petitioners to scour non-public programming codes of jury selection software. Accordingly, under the reasoning of *Amadeo*, petitioners' defaults are excused.

Respondents attempt to distinguish *Amadeo*, but are ultimately unsuccessful. Respondents first argue that, unlike in these cases, the officials in *Amadeo* deliberately reduced the minority representation in the juror pool. Although this may be true, the focus of the cause-and-prejudice test is not on the intent of the officials but rather on petitioners' knowledge of the underrepresentation. For example, if a government official intended to conceal an intentional underrepresentation, there would be no good cause to excuse procedural default if the petitioner discovered the scheme. Therefore, a government official's lack of intent is irrelevant.

Respondents do not persuasively explain how the disparity in this case was any more detectable than the one in *Amadeo*. Respondents argue that the scheme in *Amadeo* was specifically tailored to avoid detection by keeping the underrepresentation within statistically presumptive levels. They contend that systematic underrepresentation is discoverable unless a scheme exists that was specifically tailored to avoid detection. It is true that the government officials in *Amadeo* endeavored to conceal the

underrepresentation by keeping it to less than 10% absolute disparity. *Amadeo*, 486 U.S. at 218. However, in these cases, the absolute disparity was only 3.45%; the underrepresentation would be at least as difficult to detect.

Policy considerations also support this reasoning. First, finding good cause to excuse the default does not undermine the purpose of the contemporaneous objection rule. The purpose of preservation requirements, such as the objection rule, is to allow the trial court to correct errors and ensure that a trial is fair in the first instance. *See United States v. Young*, 470 U.S. 1, 15 (1985). In the ordinary case, a contemporaneous objection allows a trial court to fix an error at the outset of trial, saving valuable time and resources. *See United States v. Lowry*, No. 91-6169, 1992 WL 92746, at *4 (6th Cir. Apr. 22, 1992). However, in this case, even if petitioners had objected prior to the empanelment of the jury, the trial court could not have remedied the error. Had the trial court granted the hypothetical contemporaneous objection, it would have dismissed the jury panel and asked the Kent County Commissioners to draw a new panel. This panel would have come from the same jury pool, affected by the same yet-to-be discovered computer glitch. The underrepresentation would have persisted even if petitioners had objected at trial.

Second, the procedural default rule was not intended to bar defaults such as petitioners'. The Supreme Court has made clear that the test is intended to prevent defense counsel from defaulting in state court for strategic gain. As the Court stated, "defense counsel may not make a tactical decision to forgo a procedural opportunity—for instance, an opportunity to object at trial or to raise an issue on appeal—and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court." *Reed v. Ross*, 468 U.S. 1, 14 (1984) (internal citations omitted). In this case, respondents do not—nor could they—contend that petitioners tactically declined to raise a pre-trial challenge to their venire panels. Petitioners' claims are premised on the fact that they were unaware of the defects in the challenged jury selection procedure. Respondents would be hard-pressed to argue that petitioners tactically relied on the computer glitch of which they did not know.

Third, were we to hold that petitioners cannot demonstrate cause, we would be instituting a *de facto* requirement that defense attorneys in Kent County automatically raise fair cross-section objections. A prudent lawyer in such a situation would recognize that a failure to raise a fair cross-section claim would bar a later assertion of the right should a computer glitch—or even a scheme such as the one in *Amadeo*—come to light. Such a result would run counter to the lawyer's duty to avoid frivolous litigation, as well as the procedural default doctrine's concern with judicial efficiency. Instead, finding cause to excuse petitioners' failure to object would leave open a critical safety valve to deal with real fair-cross-section claims.

Respondents rely on a number of our cases in this context, but these cases are factually or analytically distinguishable. First, respondents rely on *United States v. Boulding,* a case involving two federal defendants who failed to object to the racial diversity of the jury panel until after the jurors were sworn. 412 F. App'x 798, 800 (6th Cir. 2011). Defendants' counsel explained that he had not objected during jury selection because he did not want to offend or alienate the jury. *Id.* at 802. We held that "defendants' counsel had ample opportunity to make an objection, and could have done so in a sidebar or requested a recess if concerned about the objection's effect on the jury." *Id.* at 802. This case is distinguishable from the instant case in at least two ways. First, the default in *Boulding* was precisely the type of strategic default contemplated by the court in *Reed.* Counsel wanted to avoid offending the jury, so he withheld his objection until after the jury was empaneled. Here, respondents cannot show that petitioners strategically withheld their objections. Second, the *Boulding* defendant knew of the potential objection but chose to wait to object until it was untimely. Petitioners, by contrast, did not know of the underrepresentation of minorities in the jury pool until months after their trials. This again goes to the motive of the failure to object: in *Boulding* it was strategic, here it was unwitting.

Notwithstanding respondents' arguments to the contrary, *United States v. Blair*, 214 F.3d 690, 699 (6th Cir. 2000), is also distinguishable. In *Blair,* the defendant "failed to recognize or chose to ignore a potential challenge to the jury selection plan" because

this court had not yet decided that the plan violated the Equal Protection Clause. *Blair* held that a defendant must raise a claim if the factual basis is known, even if no court has ruled on the legal implications of those specific facts. Here, in contrast, petitioners did not know of the factual basis of the claim.

Finally, respondents argue that because other defendants are able to raise fair cross-section claims by looking at the venire panel, petitioners should have too. However, the cases on which respondents rely do not involve a similarly subtle absolute disparity or a hidden cause of underrepresentation. *See United States v. Buchanan*, 213 F.3d 302, 309 (6th Cir. 2000) (overturned on other grounds); *United States v. Jackman*, 46 F.3d 1240, 1243 (2d Cir. 1995). In the ordinary case, fair cross-section claims should be raised at jury selection. However, where the underrepresentation is as obscure as the one in this case—due to a small minority population and a small absolute disparity—a failure to object must be excused.

**2. Prejudice for Procedural Default**

Having shown cause, petitioners must show actual prejudice to excuse their default, even if the error is structural. The Supreme Court has held that a petitioner must show "actual prejudice" to excuse a default. In *Francis v. Henderson*, 425 U.S. 536 (1976), a defendant was convicted in state court of murder. He first raised a challenge to the racial composition of his grand jury in his § 2254 petition. The Court held that a petitioner must show both cause and "actual prejudice" to excuse the procedural default. The Court stated, "[t]he presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." *Id.* at 542 n.6 (quoting *Davis v. United States*, 411 U.S. 233, 245 (1973)) (the "*Henderson-Davis* rule").

This circuit has accordingly declined to presume prejudice for the purposes of procedural default when considering structural error claims, although we have not yet addressed the issue in the context of a fair cross-section claim. For example, in *Keith v. Mitchell*, 455 F.3d 662, 673 (6th Cir. 2006), a defendant failed to object to the

exclusion of three scrupled jurors[3] during his murder trial. Defendant relied on *Gray v. Mississippi*, 481 U.S. 648 (1987), in which the Supreme Court stated that the exclusion of a scrupled juror is not subject to the harmless error analysis. The *Keith* defendant sought to extend *Gray*'s holding to "obviate any requirement for him to demonstrate prejudice resulting from his procedural default." *Keith*, 455 F.3d at 674. This court declined in part because *Gray* had not been extended by the Supreme Court or any federal court of appeals to the procedural default context. More importantly, we reasoned that extending *Gray* to the procedural default context would require us to ignore the fundamental differences between direct and collateral review in the federalist system. *Id.* at 675. We concluded that the argument for the "extension of *Gray* is weakened, not because the issue is any less important, but because considerations of federalism and respect for the state trial process demand that it be so." *Id.* The procedural default doctrine is "grounded in concerns of comity and federalism"; therefore, "[w]hen a federal court vacates the judgment of a state trial court, a showing of actual prejudice is required to insure that defaulted claims are considered only when they will have made a difference." *Id.*

This court has expressly found the *Henderson-Davis* rule to apply to a jury selection claim, albeit in dicta on a direct review of a federal appeal. In *United States v. Ovalle,* 136 F.3d 1092 (6th Cir. 1998), four defendants raised challenges to the Eastern District of Michigan's jury selection plan on direct appeal. Two of the defendants raised timely objections to the plan; therefore, we determined that all defendants were entitled to relief because the state court had the opportunity to address the problem. *Id.* at 1108-09. However, we noted that the non-objecting defendants would not have otherwise been entitled to relief because they had failed to show cause and actual prejudice under the *Henderson-Davis* rule, even though the error was structural. Petitioner attempts to distinguish this case by arguing that it was a federal case, applying Federal Rule of Criminal Procedure 12. However, in *Henderson*, the Supreme Court explicitly rejected

[3]That is, jurors who had expressed reservations about recommending a death sentence.

the notion that the federal courts could strictly impose procedural requirements and then review a state's requirements in a different fashion. The Court stated, in pertinent part:

> If, as *Davis* held, the federal courts must give effect to these important and legitimate concerns in §2255 proceedings, then surely considerations of comity and federalism require that they give no less effect to the same clear interests when asked to overturn state criminal convictions.

*Henderson*, 425 U.S. at 541. *Ovalle* reflects this court's "actual prejudice" requirement.

Other circuits have required a petitioner to show "actual prejudice," even where the petitioner claimed a structural error had occurred. In *Purvis v. Crosby*, 451 F.3d 734 (11th Cir. 2006), the Eleventh Circuit refused to presume prejudice where an ineffective assistance of counsel claim arose from a failure to object to a structural error. The court reasoned that allowing the petitioner to dress up a procedural default as an ineffective counsel claim would allow the defendant to circumvent *Henderson* and *Davis*. *Id.* at 742-43. Similarly, the Seventh Circuit declined to presume prejudice for the purposes of procedural default notwithstanding a petitioner's claims that alleged perjured testimony and an alleged *Brady* violation constituted structural error. *Ward v. Hinsely*, 377 F.3d 719, 725 (7th Cir. 2004). The Seventh Circuit reasoned that "[t]he procedural default doctrine is grounded in concerns of comity and federalism. These concerns are in no way diminished if the federal claim raised before the federal habeas court is one of structural error." *Id.* at 726 (internal citations and quotation marks omitted).

Comity requires us to avoid overturning defaulted claims absent a showing of actual prejudice. Given the Supreme Court's express language, and the procedural default rule's roots in comity and federalism, a petitioner must show that he was actually prejudiced regardless of the nature of the underlying constitutional claim. The purpose of the procedural default rule is to protect state court procedures from undue federal intervention. Federal courts are accordingly closely circumscribed in their review of defaulted claims. Although the nature of the procedural right is important, federal courts should not reverse state court decisions unless a petitioner can show that the outcome would have been different.

In arguing for presuming prejudice on habeas in this case, petitioners cite a number of our cases that are distinguishable. *Quintero v. Bell*, 368 F.3d 892 (6th Cir. 2004), is distinguishable because, in that case, counsel's error was so egregious that prejudice could not be reasonably disputed. Trial counsel had failed to object to the inclusion of seven jurors that had served on juries that had convicted petitioner's co-conspirators. *Id.* at 893. We held that failing to object was an "abandonment of 'meaningful adversarial testing' *throughout* the proceeding," which made "'the adversary process presumptively unreliable.'" *Id.* (quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984)). The same cannot be said about the failure to raise a fair cross-section claim. In *Quintero*, the disputed jurors had already convicted petitioner's co-conspirators. A fair cross-section claim does not present the same danger because there is not the same inevitability of result.

Petitioners also rely on language in *Johnson v. Sherry*, 586 F.3d 439, 444 (6th Cir. 2009), a case in which we addressed a defaulted claim arising from a courtroom closure. We suggested a "strong likelihood" that if the performance was deficient, it would be deemed prejudicial, reasoning in part that the right to a public trial is a structural guarantee. The tentative and conditional nature of this language—in a case that, unlike this one, involved *Strickland* prejudice regarding a court closure claim—is not sufficient to overcome our reading of the clear import of Supreme Court and Sixth Circuit precedent to the jury selection cases we have before us.

Finally, petitioners parse language from three Supreme Court cases, but cannot show how these cases require a different result. In *United States v. Frady*, 456 U.S. 152, 170 (1982), for instance, the Court's holding was that the petitioner had to show actual prejudice to overcome his default in not objecting to a jury instruction, and that he had not done so. The Court rejected Frady's argument that prejudice was not required for the jury instruction claim, without saying anything about whether presumed prejudice for the jury instruction claim would meet the "actual prejudice" requirement for overcoming procedural default. Second, petitioners claim that the Court in *Amadeo v. Zant* declined to impose an "actual prejudice" requirement. However, the *Amadeo* court

declined to reach the issue of prejudice because it was conceded by the government below. 486 U.S. at 228 n.6. Third, petitioners argue that Justice Thomas's dissent from the denial of a writ of certiorari in *Bell v. Quintero*, 125 S. Ct. 2240 (2005), somehow demonstrates *Henderson* is no longer valid. Justice Thomas noted that "[t]he Court of Appeals'[s] holding also rests on a confusion—the idea that the presence of a structural error, by itself, is necessarily related to counsel's deficient performance and warrants a presumption of prejudice." *Id.* at 2242. Because the writ was not granted, petitioner infers that the majority rejected Justice Thomas's opinion. However, there are a multitude of reasons that certiorari may not have been granted. The fact that Justice Thomas reiterated the *Henderson-Davis* rule in his dissent does not mean the majority took the other position.

Because the district courts here did not address actual prejudice, a remand is necessary. We are then left with the question of the proper standard on remand. We are guided in part by the Eleventh Circuit's analysis of a similar question in *Hollis v. Davis*, 941 F.2d 1471, 1480 (11th Cir. 1991). In that case, the petitioner claimed that his counsel was ineffective for failing to object to Alabama's systematic exclusion of African-American jurors from grand and petit juries. To excuse this default, the *Hollis* court required that petitioner show actual prejudice, which involved determining whether there was a reasonable probability that "a properly selected jury [would] have been less likely to convict." *Id.* at 1482. The Eleventh Circuit's analysis is persuasive. The most important aspect to the inquiry is the strength of the case against the defendant.[4] As the

[4]This is not to say that the race of the jurors, defendant, and victim must be ignored. For example, the Fifth Circuit recognized actual prejudice in a case involving an all-white jury, a black defendant, and a white victim who was allegedly raped. *See Huffman v. Wainwright*, 651 F.2d 347, 350 (5th Cir. 1981). Relying on *Huffman*, the Eleventh Circuit reasoned:

> In *Strickland* terms, if we compared the result reached by an all white jury, selected by systematic exclusion of blacks, with the result which would have been reached by a racially mixed jury, we would have greater confidence in the latter outcome, finding much less probability that racial bias had affected it. This principle was recognized in *Huffman*, 651 F.2d at 350:
>
> > Huffman was a black man accused of raping a white woman. A mixed-race jury might clearly have a special perception in a mixed race case. His defense was consent. His jury was all white. Although a constitutionally drawn jury may be all white, or all black, depriving Huffman of the chance of having a mixed-race jury would seem to meet the prejudice requirements for relief.

Eleventh Circuit reasoned, "a transcript could show a case against [petitioner] so strong, and defense so weak, that a court would consider it highly improbable that an unbiased jury could acquit." *Id.* at 1483 (internal quotation marks omitted). In that circumstance, actual prejudice would not be shown.

Although the instant petitions do not involve a *Strickland* claim, this standard is appropriate because it balances the competing demands of constitutionally protected equal protection interests and comity toward the state courts. We recognize that the application of the actual prejudice standard in cases such as these presents a particularly challenging charge to the district courts below to answer the question, "what would have happened?" The law nonetheless requires that the question be answered—with a careful look at the transcripts involved, and with judgment that takes into account a fair balance of the competing interests of comity toward the final judgments of the state's criminal processes and the protection of constitutional equal protection interests.

## III.

The district court orders in all three cases are reversed, and the cases are remanded for further proceedings consistent with this opinion.

---

*Hollis*, 941 F.2d at 1482 (internal citations and quotation marks omitted).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 11-1430/10-1247/09-1539

FILED
Jun 28, 2012
LEONARD GREEN, Clerk

11-1430

JOSEPH AMBROSE,
Petitioner-Appellee,
*v.*
RAYMOND D. BOOKER,
Respondent-Appellant.

10-1247

GREGORY CARTER,
Petitioner-Appellant,
*v.*
BLAINE LAFLER,
Respondent-Appellee.

09-1539

CARL BURNIE WELLBORN,
Petitioner-Appellant,
*v.*
MARY BERGHUIS,
Respondent-Appellee.

Before: MERRITT and ROGERS, Circuit Judges; POLSTER, District Judge.

**JUDGMENT**

On Appeals from the United States District Court
for the Eastern District of Michigan at Bay City
and the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court orders in all three cases are REVERSED, and the cases are REMANDED for further proceedings consistent with this opinion.

**ENTERED BY ORDER OF THE COURT**

Leonard Green, Clerk

# A-8. Order & Judgment
# Approving Report & Recommendation

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARL BURNIE WELLBORN,

Petitioner,

v.

MARY BERGHUIS,

Respondent.
_____/

CASE NO. 1:05-CV-346

HON. ROBERT J. JONKER

**ORDER AND JUDGEMENT**
**APPROVING REPORT AND RECOMMENDATION**

The Court has reviewed the Magistrate Judge's Report and Recommendation (docket # 38) and Petitioner's Objection to Report and Recommendation (docket # 43). Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

> The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b)(3). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981).

The Court has reviewed de novo the claims and evidence presented to Magistrate Judge Brenneman; the Report and Recommendation itself; and Petitioner's Objection. After its review, the Court finds the Report and Recommendation to be both factually sound and legally correct. Mr. Wellborn was convicted in Kent County Circuit Court on one count of first degree criminal sexual conduct, and two counts of second degree criminal sexual conduct. The evidence presented against Mr. Wellborn was graphic and overwhelming, as detailed by the Magistrate Judge in his Report and Recommendation. Nothing in Mr. Wellborn's objections establishes a basis to undermine the validity of the jury's conviction.

Mr. Wellborn's first objection to the Report and Recommendation reiterates his claim that his earlier acquittal in Montcalm County Circuit Court for separate charges of sexual abuse should have been admissible at trial in Kent County Circuit Court (Pet.'s Objections to Report and Recommendation, docket # 43, at 1-9.) He argues that exclusion of evidence of the earlier acquittal violated his rights under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. (*Id.*) The Report and Recommendation has already meticulously and accurately analyzed whether the exclusion of acquittal testimony violated the Constitution. (*See* Report and Recommendation, docket # 38, at 19-23.) Mr. Wellborn's objections fall particularly flat because, as the Report and Recommendation points out, even assuming that the exclusion of acquittal testimony violated Mr. Wellborn's constitutional rights, only harmless error ensued, because Mr. Wellborn "still managed to introduce evidence of his acquittal during the Kent County trial, and the evidence overwhelmingly demonstrated that [Mr. Wellborn] was guilty." (*Id.* at 20.)

Mr. Wellborn also recapitulates his claims of ineffective assistance of counsel, tied to the same underlying factual predicate. (Pet.'s Objections to Report and Recommendation, docket # 43, at 2-9.) The Report and Recommendation has already carefully and accurately explained why Mr. Wellborn's claims of ineffective assistance fail. (*See* Report and Recommendation, docket # 38, at 23-28.) His objections identify nothing that attacks the reasoning of the Magistrate Judge. In particular, the record overwhelmingly establishes Petitioner's guilt, as found by the jury, and there is no plausible reason to believe that an effort by trial counsel to admit evidence of Petitioner's prior acquittal on unrelated charges would have changed the result. This is particularly true in this case where Petitioner managed to get the fact of his prior acquittal before the jury despite the court's pre-trial ruling barring the evidence based on state evidentiary law.

Mr. Wellborn is now also asserting that the trial in Kent County created double jeopardy by trying him on the new criminal sexual conduct charges despite his earlier acquittal on unrelated charges. (Pet.'s Objections to Report and Recommendation, docket # 43, at 5.) Mr. Wellborn has never raised the issue in the "double jeopardy" package before, and it is procedurally improper for him to do so for the first time in his objections to the Magistrate's Report and Recommendation on his federal habeas claim. Moreover, even if the claim were procedurally proper, it could not possibly succeed on the merits because the record plainly indicates that the Montcalm County proceeding involved separate charges of sexual abuse. (See Report and Recommendation, docket # 38, at 25.)

Finally, Mr. Wellborn asserts again a violation of his constitutional right to a jury drawn from a fair cross-section of the community. (Amendment of Objection to Report and Recommendation, docket # 43, at 1-3.) Mr. Wellborn is a Caucasian. He now wishes to object that

the jury venire empaneled for his case was too much like him, and not drawn from a fair cross-section of the community. Mr. Wellborn relies principally on a newspaper article indicating that an entirely unintentional computer glitch may have resulted in jury venires that under-represented African Americans near the time of Petitioner's Kent County criminal trial. Even though Mr. Wellborn is white, and any computer glitch resulted in a venire more like Mr. Wellborn than he would otherwise have drawn, he is entitled to assert a fair cross section claim under applicable law. *See Holland v. Illinois*, 493 U.S. 474, 477 (1990) ("[T]he Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community, whether or not the systematically excluded groups are groups to which he himself belongs.") Mr. Wellborn is not, however, excused from complying with the well-established state court rule that he lodge an objection to the composition of the jury venire at the time of trial if he wishes to preserve the question for subsequent challenge. This he did not do. To the contrary, his counsel expressly stated that the defense was satisfied with the jury panel. (Report and Recommendation, docket # 38, at 30.)

The rule that a litigant must challenge the composition of the jury venire at trial to preserve possible objections is no mere technicality. It serves a critical function in ensuring access to and preservation of proofs necessary to address the issue on the merits. In this case, for example, once the parties accepted the jury panel, there was no need to record the race or other potentially relevant demographic characteristics of the jurors involved. Accordingly, the record of the case does not include any information regarding the racial composition of the original jury venire, the jurors excused for cause, the jurors peremptorily excused or the jurors ultimately seated on the jury. The trial occurred seven years ago, in March of 2002, and such information may well be unavailable

even after extensive factual digging. Both state and federal courts reasonably require litigants to object to a jury venire at the time of trial to avoid such practical difficulties. After all, if a litigant is in fact satisfied with the appearance of the venire – and there is no reason to doubt that a white defendant such as Mr. Wellborn was satisfied with a jury venire and ultimate jury that was, if anything, too much like him – there is no good reason to stop the proceedings, especially when the underlying trial requires the logistical and emotional burden of presenting testimony of several minor victims related by blood or marriage to the Petitioner.

Mr. Wellborn admits he failed to make any objection to the jury venire at the time of trial, but he claims this is not fatal to his claim. Citing *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008), Mr. Wellborn argues that the Magistrate Judge erred in concluding that his claim is procedurally barred on habeas review. (*Id.*) *Smith* did involve the merits of a fair cross section claim, but it did not address the dispositive procedural default issue in this case. In *Smith*, the defendant properly objected to the composition of the jury venire panel and petit jury at trial, preserving the issue for appeal. *See Smith v. Berghuis*, 543 F.3d 326, 330 (6th Cir. 2008). Mr. Wellborn did not. Accordingly, *Smith* is ultimately of no help to Mr. Wellborn on the procedural default issue.

Of course, even a procedural default may be excused upon a showing of cause and actual prejudice, or to avoid a fundamental miscarriage of justice, as noted by the Magistrate Judge. (Report and Recommendation, docket # 38, at 33.) The overwhelming evidence of Petitioner's guilt is enough to preclude any possible finding of a fundamental miscarriage of justice. That, combined with Petitioner's status as a Caucasian seeking to lodge a belated complaint to a predominantly or all white jury might also be thought to preclude a finding of actual prejudice, though the Supreme Court has indicated that at least in some cases prejudice may be presumed based on a violation of

the fair cross section requirement. *See Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (Prejudice is presumed where discrimination tainted grand jury selection.) But even assuming Petitioner could establish presumed prejudice here, he cannot meet his burden of establishing cause for his procedural default. Petitioner absolutely personally observed the racial composition of his jury venire and finally selected jury. He says there were only two African Americans on the 70-person venire, and none on his final jury. Apparently he was content with this as a white defendant because his counsel said the defense had no objection to the panel. If Petitioner was unhappy with the distribution he could have said so even if he had no reason to know at the time the particulars of a possible computer glitch that contributed to the composition of the array. (*See* Report and Recommendation, docket # 38, at 33-34, 36-37 (discussing *People v. Hubbard*, 552 N.W. 2d 493 (Mich. Ct. App. 1996); *People v. Oliphant*, 399 Mich. 472 (1976); *People v. Bryant*, No. 21442, 2004 WL 513664 (Mich. Ct. App. March 16, 2004); *People v. Barnes*, No. 244590, 2004 WL 1121901 (Mich. Ct. App. Jan. 15, 2004).)

Petitioner's reliance on *Amadeo v. Zant*, 486 U.S. 214 (1988) is misplaced. *Amadeo* involved a death penalty case in which the district attorney and jury commissioners of Putnam County, Georgia, intentionally engineered a scheme to under-represent African Americans and women in the County's juries, and to conceal the scheme by keeping the under-representation sufficiently subtle to fall within the presumptively acceptable statistical guidelines of prevailing case law. (Report and Recommendation, docket # 38, at 35.) The very point of the intentional and diabolical scheme was to exclude African Americans and women in a way that made it virtually impossible to detect. A litigant looking at any given venire, intentionally engineered to under-represent African Americans and women, was not automatically on notice of a problem. Under

those unique circumstances, the Court refused to set aside that the trial court's factual finding that defense counsel did not intentionally bypass a jury challenge, and permitted the habeas claim to proceed.

This case is entirely different. There is no allegation – much less evidence – of any intentional effort to exclude any particular racial or gender group from the jury venire. At most, Petitioner claims based on a newspaper article that an inadvertent computer glitch for some undetermined period of time may have had the unintended effect of limiting the number of African Americans summoned for jury duty. Moreover, in this case, unlike *Amadeo*, there was no subtlety at all in the actual number, according to Petitioner's claims. Petitioner says there were only two African Americans on the 70-person venire, and none on his final jury. A litigant who was actually dissatisfied with the number of available African American jurors in this scenario was plainly on notice that these percentages of African Americans did not reflect the population percentages in the County. That was all Petitioner needed to lodge an objection, if he wished to do so. He did not. Instead, he affirmatively accepted the jury panel that looked just like him.

The Court is mindful of three decisions from the Eastern District of Michigan that find cause sufficient to exclude procedural default based on the Kent County computer glitch at issue here. The cases are, to some extent, factually distinguishable. In the first place, none involved a petitioner who affirmatively accepted the jury panel in the trial court after seeing that the panel, if anything, was more demographically like the petitioner than the petitioner had reason to expect based on population alone. Second, none of the cases involve a situation detailing overwhelming trial evidence of a petitioner's guilt. But despite these distinctions, the Court must respectfully disagree with these decisions to the extent they read *Amadeo* to excuse procedural default on these

facts. This Court believes that the decisions fail to distinguish between the intentional scheme at issue in *Amadeo*, and the inadvertent glitch at issue here. The Court further believes that the decisions fail to recognize that the petitioners in their cases, unlike the petitioner in *Amadeo*, were on notice of a possible jury venire objection simply from looking at the racial composition of the people appearing in court. Indeed, in one of the Eastern District decisions, the Court noted that the petitioner might be able to establish the merits of his claim based on "absolute disparity" alone. *Carter v. Lafler*, No. O6-CV-10552, 2009 WL 649889, at *5 (E.D. Mich. March 10, 2009). If "absolute disparity" may be enough to establish the merits of petitioner's claim, then *a fortiori* it has to be enough to require petitioner to object to the venire at the time of trial. Accordingly, this Court respectfully declines to follow his colleagues in the Eastern District on this issue.

**Certificate of Appealability**

Before a habeas petitioner may appeal the Court's dismissal of his petition, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(A) (Lexis through P.L. 110-180); FED. R. APP. P. 22(b)(1). Thus the Court must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); FED. R. APP. P. 22(b)(1); In re *Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997).

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this showing, the petitioner must demonstrate that reasonable jurists could "debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented

were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983)).

When a district court rejects a habeas petition on the merits, the required "substantial showing" is "straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. But when a district court denies a habeas claim on procedural grounds without addressing the claim's merits, the petitioner must demonstrate both that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484 (emphasis added). If the district court invokes a plain procedural bar to dispose of the case, "a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted." *Id.*

The Court is denying Petitioner's petition on the merits to the extent that Petitioner claims a violation of his rights under the Confrontation Clause under the Sixth Amendment and the Due Process Clause under the Fourteenth Amendment, and to the extent that Petitioner claims a violation of his right to effective assistance of counsel under the Sixth Amendment. The Court believes that no reasonable jurist would find its conclusions on these issues "debatable or wrong." *See* Slack, 529 U.S. 484. Therefore, the Court will not issue a certificate of appealability on these questions.

The Court is denying Petitioner's claim concerning the jury venire composition on procedural grounds, but in a unique setting. Reasonable jurists could certainly conclude either that

the district court has erred in denying the jury venire composition claim on procedural grounds or that Petitioner should be allowed to proceed further. Indeed, this has already happened in three similar cases. *See Parks v. Warren*, 574 F. Supp.2d 737, 744-47 (E.D. Mich. 2008); *Powell v. Howes*, No. 05-71345, 2007 WL 1266398 (E.D. Mich. May 1, 2007); *Carter v. Lafler*, No. O6-CV-10552, 2009 WL 649889 (E.D. Mich. March 10, 2009). The Court will therefore issue a certificate of appealability on this question.

**ACCORDINGLY, IT IS ORDERED** that the Report and Recommendation of the Magistrate Judge (docket # 38) is approved and adopted as the opinion of the Court.

**IT IS FURTHER ORDERED** that:

1. Petitioner's petition for a writ of habeas corpus is **DENIED**.
2. A certificate of appealability as to Petitioner's claims under the Confrontation Clause under the Sixth Amendment and the Due Process Clause under the Fourteenth Amendment, and as to Petitioner's claim of ineffective assistance of counsel under the Sixth Amendment, is **DENIED**.
3. A certificate of appealability as to Petitioner's claim concerning his right under the Sixth Amendment to a jury drawn from a fair cross-section of the community is **GRANTED**.

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE

Dated: March 31, 2009

# A-9. Report and Recommendation

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

| | | |
|---|---|---|
| CARL BURNIE WELLBORN, Petitioner, | ) | Case No. 1:05-cv-346 |
| v. | ) | Honorable Robert J. Jonker |
| MARY BERGHUIS, Respondent. | ) | **REPORT AND RECOMMENDATION** |

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254. On September 16, 2008, I issued a Report and Recommendation denying Petitioner's application for habeas corpus relief (docket #32). Petitioner filed an objection (docket #35) to the Report and Recommendation on October 27, 2008. Following issuance of the Report and Recommendation, the Sixth Circuit issued a decision in *Smith v. Berghuis,* 543 F.3d 326 (6th Cir. 2008), which held that a state trial court violated a defendant's Sixth Amendment right to an impartial jury, drawn from a fair cross-section of the community. Because Petitioner also raises a challenge to his Sixth Amendment right to jury drawn from a fair cross-section of the community in his petition, the Court remanded this action to me to address the impact of *Smith,* 543 F.3d 326, on Petitioner's case. Upon careful review of *Smith,* 543 F.3d 326, which is discussed in Section II of this Report, and applying the Antiterrorism and Effective Death Penalty Act, PUB. L. 104-132, 110 STAT. 1214 (AEDPA) standards, I find that *Smith* does not alter the result in this case for reasons not addressed in *Smith*, and that Petitioner's grounds for habeas corpus relief remain without

merit or are procedurally defaulted. As a result, further briefing from the parties regarding *Smith,* 543 F.3d 326, is not necessary. I again recommend that the petition be denied.

After a jury trial, Petitioner was convicted of one count of first-degree criminal sexual conduct (CSC), MICH. COMP. LAWS § 750.520b(1)(b), and two counts of second-degree CSC, MICH. COMP. LAWS § 750.520c(1)(a) and (b), in the Kent County Circuit Court. On May 13, 2002, the Kent County Circuit Court sentenced Petitioner to ten to thirty years' imprisonment for the first-degree CSC conviction and ten to fifteen years' imprisonment for each of the second-degree CSC convictions. In his *pro se* petition, Petitioner raises the following grounds for habeas corpus relief:

I. WHETHER PETITIONER WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FOREWENT THE OPPORTUNITY TO INTRODUCE EVIDENCE OF A COMPLAINANT'S PRIOR FALSE ALLEGATIONS OF SEXUAL ABUSE WHICH RESULTED IN THE PETITIONER'S ACQUITTAL, AND WHERE COUNSEL AGREED THAT THE ACQUITTAL WAS INADMISSIBLE?

   A. WAS PETITIONER'S ACQUITTAL OF THE COMPLAINANT'S ALLEGATIONS IN THE MONTCALM COUNTY CASE ADMISSIBLE AS EVIDENCE OF PRIOR FALSE ALLEGATIONS OF SEXUAL ABUSE, IN CONJUNCTION WITH THE SIXTH AMENDMENT CONFRONTATION CLAUSE AND THE FOURTEENTH DUE PROCESS CLAUSE RIGHT TO PRESENT A COMPLETE DEFENSE.

   B. WAS PETITIONER'S TRIAL COUNSEL'S CONCESSION THAT THE PRIOR ACQUITTAL WAS NOT ADMISSIBLE, A DEPRIVATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN CONJUNCTION WITH THE SIXTH AMENDMENT CONFRONTATION CLAUSE AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSE RIGHT TO PRESENT A COMPLETE DEFENSE.

II. WHETHER PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A JURY DRAWN FROM A VENIRE REPRESENTATIVE OF A FAIR CROSS-SECTION OF THE COMMUNITY WHERE KENT

> COUNTY HAS PUBLICLY ACKNOWLEDGED THAT DUE TO A COMPUTER ERROR, NEARLY SEVENTY-FIVE PERCENT OF THE COUNTY'S ELIGIBLE JURORS WERE BEING EXCLUDED IN SUCH A WAY AS TO UNDER-REPRESENT AFRICAN-AMERICANS AND OTHER MINORITIES?

(Pet'r's Br. in Supp. of Pet., vi, docket #2.) Respondent filed an answer to the petition (docket #12) stating that Petitioner's grounds for habeas relief should be denied because they are without merit or are procedurally defaulted. Because I find that Petitioner's grounds for habeas corpus relief are without merit or are procedurally defaulted, I recommend that the petition be denied.

## Procedural History

### A. Trial Court Proceedings

The state prosecution arose from Petitioner's alleged sexual relationship with two young step-granddaughters, Alicia Faunce and Clorissa Rolfe, while Petitioner lived in Kent County. Petitioner was charged with two counts of first-degree CSC for sexual penetration with Alicia Faunce and two counts of second-degree CSC, one count for sexual contact with Alicia Faunce and one count for sexual contact with Clorissa Rolfe.[1] (Tr. V, 99-105.) On March 19, 21, 22, 25, 26 and 27, 2002, the Kent County Circuit Court tried Petitioner before a jury.

Alicia Faunce, Petitioner's step-granddaughter, testified first for the prosecution. (Tr. II, 30, 33.) At the time of her testimony, Alicia was sixteen years old and in tenth grade. (Tr. II, 30-31.) Alicia's mother and step-father are Lisa and Todd Thompson. (Tr. II, 32.) Alicia testified that

---

[1]Transcripts from the trial will be numbered I through VI as follows:
Transcript of March 19, 2002, vol. I, docket #17 (Tr. I);
Transcript of March 21, 2002, vol. II, docket #18 (Tr. II);
Transcript of March 22, 2002, vol. III, docket #19 (Tr. III);
Transcript of March 25, 2002, vol. IV, docket #20 (Tr. IV);
Transcript of March 26, 2002, vol. V, docket #28 (Tr. V); and
Transcript of March 27, 2002, vol. VI, docket #21 (Tr. VI).

Petitioner lived with her family on two separate occasions, in Virginia and in Michigan. (Tr. II, 34-35.) Alicia was five years old when she lived in Virginia. (Tr. II, 35.) She stated that Petitioner started doing "sexual things" to her in Virginia. (Tr. II, 35.) The first time Petitioner ejaculated on Alicia in the middle of the night. (Tr. II, 35-36.) She did not tell anyone of that incident. (Tr. II, 36.)

Alicia later moved with her family to Michigan and eventually settled in Montcalm County. (Tr. II, 36-37.) In 1998, Petitioner and Alicia's grandmother, moved in with Alicia's family in Montcalm County. (Tr. II, 38.) As many as three or four times a week between May and September 1998, Petitioner came into Alicia's bedroom at night, kissed her passionately with his tongue, inserted his fingers in her vagina, and placed his penis in her mouth. (Tr. II, 38-40, 87.) Several times, Alicia tried to scream but Petitioner covered her mouth, laid on her or hit her so she would be quiet. (Tr. II, 40, 53-56.) Petitioner also choked her. (Tr. II, 56-57.) Alicia did not tell anyone of the sexual contact because Petitioner threatened that he would harm her or her family. (Tr. II, 40-41, 56.) Petitioner and Alicia's grandmother eventually moved to a house in Kent County. (Tr. II, 41-42.)

Alicia visited her grandmother and Petitioner at their new residence in Kent County because she missed her grandmother. (Tr. II, 42.) She also spent the night at Petitioner's house. (Tr. II, 42.) Alicia testified that Petitioner put his fingers in her vagina, his penis in her mouth, and his tongue in her vagina on several occasions. (Tr. II, 42-44.) Most of the sexual encounters occurred in the computer room of Petitioner's home. (Tr. II, 43.) The first encounter Alicia remembered in the computer room was when Petitioner kissed her and put his fingers in her vagina. (Tr. II, 44.) During those times, Alicia's grandmother was busy with the other children or she was

not home. (Tr. II, 43.) Alicia tried to scream, but she could not. (Tr. II, 43.) She also tried to stop Petitioner. (Tr. II, 44.)

Petitioner put his penis in Alicia's mouth. (Tr. II, 44.) Alicia testified, however, that Petitioner put his penis in her mouth at Alicia's house in Montcalm County rather than Petitioner's house in Kent County. (Tr. II, 37, 42, 44.) She was not sure if that happened at Petitioner's house. (Tr. II, 44.) Alicia also played with Petitioner's penis with her hands until he was ready to ejaculate. (Tr. II, 45.) Petitioner would then ejaculate in the bathroom. (Tr. II, 45.) In addition, Petitioner initiated phone sex with Alicia on two or three occasions. (Tr. II, 80-81.) Petitioner would ask Alicia what she was wearing and if she was going to come over so he could fool around with her. (Tr. II, 81.)

In 1998, Alicia told her mother that she did not feel comfortable around Petitioner but did not go into any details. (Tr. II, 46-47, 81-83.) Alicia did not tell her mother about Petitioner's actions because she was scared. (Tr. II, 47.) Alicia, however, said that Petitioner threatened to hurt her and her family. (Tr, II, 83-84.) She did not want anything to happen to her or her family. (Tr. II, 47.) When her mother asked Alicia if she wanted to go to the police, Alicia answered "no." (Tr. II, 47, 84-85.) Alicia thought Petitioner would stop because he was moving out of their house. (Tr. II, 85.)

Before approaching her parents a second time, Alicia talked to her friend Renee about Petitioner's sexual advances. (Tr. II, 48-49.) Renee told Alicia that she would go to the police if Alicia did not do something. (Tr. II, 48.) Alicia finally disclosed everything to her parents. (Tr. II, 48-49.) Her parents then called the police. (Tr. II, 49.)

The police conducted investigations in Montcalm and Kent Counties. (Tr. II, 49.) In accordance with those investigations, Alicia received a physical exam. (Tr. II, 49-50.) The physical exam did not reveal any genital warts on Alicia but Alicia was aware that her cousin, Ann Marie Rolfe, had genital warts. (Tr. II, 59.) Alicia's mother mentioned that Ann Marie could have received the genital warts from Petitioner because he used to have genital warts. (Tr. II, 59-60, 65.) Alicia's mother and aunt, Deana Rolfe, confided in Alicia that Petitioner tried sexually assaulting them when they were younger. (Tr. II, 62-65, 161-62, 164.) Alicia's mother also told her that Petitioner raped some other girls in Virginia. (Tr. II, 65-66.) Alicia later learned that Petitioner did not rape anyone in Virginia. (Tr. II, 67-68.) Alicia did not ask her mother why she lied about the Virginia incident. (Tr. II, 68.)

After 1997, Alicia and her cousins developed a buddy system when they went to Petitioner's house because they felt uncomfortable. (Tr. II, 75.) However, the system did not work as the girls often became separated at Petitioner's house. (Tr. II, 75-76.)

Alicia spoke with her cousin, Ann Marie Rolfe, regarding the sexual abuse. (Tr. II, 76-77.) Alicia told Ann Marie that Petitioner had been touching her. (Tr. II, 77.) When Alicia asked Ann Marie where Petitioner touched her, Ann Marie pointed to her vagina. (Tr. II, 77-78.) Alicia talked to Ann Marie about the sexual abuse before the police interviewed her. (Tr. II, 77-78.) When Alicia approached another cousin, Clorissa Rolfe, about Petitioner, Clorissa refused to talk about it. (Tr. II, 78-79.) Clorissa just started to cry. (Tr. II, 79.)

Clorissa Rolfe, Petitioner's step-granddaughter, testified that she was thirteen and in the seventh grade at the time of the trial. (Tr. II, 92, 94, 120.) Clorissa lived with Petitioner in Virginia for a few months when she was six years old. (Tr. II, 95, 121-22.) At that time, Petitioner

would try to put his tongue in Clorissa's mouth and he flashed her. (Tr. II, 97.) Petitioner's sexual advances occurred no more than ten times in Virginia. (Tr. II, 123.)

Clorissa's family eventually relocated to Michigan. (Tr. II, 97.) Petitioner also moved to Michigan but lived with the family of Clorissa's aunt, Lisa Thompson. (Tr. II, 98.) While Petitioner was living with Clorissa's aunt, he did not make any sexual advances toward Clorissa. (Tr. II, 98.) When he moved to Kent County, however, Petitioner would try to French kiss Clorissa, reach down her pants and touch her breasts. (Tr. II, 96, 100-02.) Petitioner only tried to reach down her pants once. (Tr. II, 101-02.) On that occasion, Clorissa told Petitioner no and grabbed his hand. (Tr. II, 101.) While Clorissa was in the computer room at Petitioner's house, Petitioner also tried to touch her breasts. (Tr. II, 102.) Clorissa estimated that Petitioner attempted to sexually assault her on less than ten occasions. (Tr. II, 102.) Clorissa never reported any of the sexual advances because she was afraid that no one would believe her. (Tr. II, 102-03.)

Around 1998 or 1999, Clorissa's aunt and uncle asked Clorissa if Petitioner sexually assaulted her. (Tr. II, 103, 107-08.) Clorissa lied and replied no. (Tr. II, 104, 109, 111.) In 2000, Clorissa finally spoke up when she learned that Petitioner had been touching her younger sister, Ann Marie Rolfe. (Tr. II, 103, 122.) Clorissa's family then went to the police. (Tr. I, 104.) Clorissa also participated in a physical exam. (Tr. II, 105.)

Ann Marie Rolfe, Petitioner's step-granddaughter, testified that she was nine years old and in the third grade at the time of the trial. (Tr. II, 125-26, 131.) Ann Marie stated that Petitioner would touch her "private[s]" while in an upstairs room. (Tr. II, 135-38.) During her testimony, Ann Marie received assistance from a therapist because she has a speech impediment. (Tr. II, 138-39.) Petitioner would touch her underneath her clothes. (Tr. II, 140.)

Lisa Thompson, Petitioner's step-daughter, testified for the prosecution. (Tr. II, 149-50.) Ms. Thompson is Alicia Faunce's mother and Clorissa and Ann Marie Rolfe's aunt. (Tr. II, 150.) Petitioner lived with Ms. Thompson's family in Virginia for five to six months, (Tr. II, 151-52), and in Montcalm County, Michigan, for almost a year, (Tr. II, 153-54). At one point, Ms. Thompson's daughter, Alicia, came to her and stated that she did not want to spend so much time with Petitioner and she did not like sitting on his lap. (Tr. II, 155.) Ms. Thompson attributed the conversation to her daughter being a teenager. (Tr. II, 155.) At that time, Petitioner mentioned that Alicia was being rude and ignoring him. (Tr. II, 155-56, 176-77.) Afterward, Ms. Thompson noticed that Alicia was very distant with Petitioner. (Tr. II, 156.) Alicia started to keep to herself, and she experienced headaches and anxiety attacks. (Tr. II, 160.) Alicia also requested a lock to be put on her bedroom door but Petitioner "had a fit." (Tr. II, 156.)

After this case came out, Ms. Thompson talked with Alicia about Petitioner's sexual advances toward her when Ms. Thompson was sixteen years old. (Tr. II, 161-62.) Ms. Thompson also clarified that the alleged rape of a minor by Petitioner occurred in Michigan rather than Virginia. (Tr. II, 162.) Alicia must have overheard Ms. Thompson talking with her sister about the rape because Ms. Thompson did not discuss it with Alicia. (Tr. II, 162-63.)

After talking with a friend and counselor, Alicia approached her step-father, and then Ms. Thompson, to talk about Petitioner's actions. (Tr. II, 158-59.) Upon speaking with Alicia, Ms. Thompson called her sister, Deana Rolfe, at work because Clorissa was also involved. (Tr. II, 159.) Deana came to Ms. Thompson's house to discuss the allegations. (Tr. II, 159.) Ms. Thompson then called 911. (Tr. II, 159-60.)

On cross-examination, Ms. Thompson testified that she did not remember Alicia telling her that Petitioner threatened Alicia. (Tr. II, 168.) In 1998, Alicia only mentioned that she felt uncomfortable around Petitioner to Ms. Thompson. (Tr. II, 168-69.) Ms. Thompson also approached her niece, Clorissa Rolfe, to see if she had any problems with Petitioner. (Tr. II, 170-71.) Clorissa answered "[n]o, I don't want to talk about it." (Tr. II, 172.)

Dr. Vincent Palusci testified as an expert in pediatrics. (Tr. III, 3, 7-8.) On March 22, 2001, Dr. Palusci performed a genital exam and a medical evaluation of Alicia Faunce. (Tr. III, 10, 15.) Alicia had been referred to Dr. Palusci for a medical evaluation of digital and oral genital contact. (Tr. III, 11.) While Dr. Palusci found some redness, irritation and evidence of poor hygiene in Alicia's genital exam, he did not find any injuries, cuts, or bruises. (Tr. III, 13-15.) Dr. Palusci also obtained a laboratory specimen from Alicia's vagina. (Tr. III, 15.) The laboratory results did not reveal any sexually transmitted diseases. (Tr. III, 16.) Dr. Palusci then examined Clorissa Rolfe for digital genital contact but did not find any injuries. (Tr. III, 17, 19.) He did not obtain a laboratory specimen from Clorissa because Clorissa recently underwent a pap smear. (Tr. III, 19-20.) Finally, Dr. Palusci examined Ann Marie Rolfe for digital genital contact on April 5, 2001. (Tr. III, 20-22.) He found genital warts near Ann Marie's urethra. (Tr. III, 22.) Genital warts can be sexually transmitted. (Tr. III, 22.) For genital warts to be transmitted, the wart tissue has to be directly transferred to the infected area by contact. (Tr. III, 32, 47.) However, Dr. Palusci did not know the source of the contact. (Tr. III, 32-33.) No one mentioned that Petitioner had a history of genital warts to Dr. Palusci. (Tr. III, 34-36.) Dr. Palusci referred Alicia, Clorissa and Ann Marie to counseling. (Tr. III, 17, 20, 23-24.) Dr. Palusci testified that it is not typical to find scarring or

substantial injuries from digital or oral genital contact especially when there has been a significant delay in time. (Tr. III, 24, 47-48.)

Deana Rolfe, Petitioner's step-daughter, testified that Clorissa and Ann Marie Rolfe are her daughters. (Tr. III, 48-49.) Deana's family lived with Petitioner in Virginia. (Tr. III, 50.) When Deana's family returned to Michigan, she first lived with the family of her sister, Lisa Thompson. (Tr. III, 51.) Petitioner was not living at Ms. Thompson's house at that time. (Tr. III, 51.)

In March 2001, Ms. Thompson called Deana at work to go home. (Tr. III, 53-54.) When she arrived home, Deana asked Clorissa if Petitioner ever touched her. (Tr. III, 54-56.) Clorissa became very upset and cried. (Tr. III, 56.) Soon after, Ms. Thompson came to Deana's home to discuss the allegations of sexual abuse by Petitioner. (Tr. III, 56.) They called the police. (Tr. III, 56-57.) Deana had noticed that Clorissa would not go to Petitioner's house alone. (Tr. III, 57-58.) She also found Clorissa to be depressed, quiet and complained of stomach problems. (Tr. III, 58.) Deana testified that she never told Alicia Faunce that Petitioner sexually assaulted her in Virginia. (Tr. III, 67-68.)

Renee Sattler testified that she played volleyball with Alicia Faunce at Central Montcalm High School. (Tr. III, 95-96.) Around January, she talked with Alicia on instant messenger. (Tr. III, 98, 106.) Alicia stated that Petitioner sexually assaulted her. (Tr. III, 102.) Upon receiving that information, Ms. Sattler told Alicia that she had to speak with her parents. (Tr. III, 103.) Ms. Sattler gave Alicia one week to talk with her parents. (Tr. III, 103.) When Alicia did not approach her parents within one week, Ms. Sattler met with the school counselor, and the police were eventually called. (Tr. III, 103-04.) Alicia also gave Ms. Sattler a handwritten letter (Tr. III,

108), but requested it back to give to Child Protective Services (Tr. III, 109-10). The letter mentioned all of the instances that Petitioner molested Alicia. (Tr. III, 110-11.) "It talked about him masturbating in front of her, him going inside of her, making her give him oral sex, him fondling her, feeling her pretty much up." (Tr. III, 111.) The letter implied that Petitioner put his penis inside her vagina on one occasion. (Tr. III, 111-13.)

Detective Diane Kik testified that she works as a police officer in the Kent County Sheriff's Department. (Tr. III, 113-14.) On March 8, Detective Kik met with Lisa Thompson and Deana Rolfe, and then Alicia Faunce, and Clorissa and Ann Marie Rolfe. (Tr. III, 115-16.) During Alicia's meeting, Alicia mentioned that she told Jena Emma first about the sexual abuse rather than Renee Sattler. (Tr. III, 123.) Alicia also told Detective Kik that Petitioner previously molested a girl and the girl's father burned down a house, but she did not indicate where that occurred. (Tr. III, 120-22.) Detective Kik also interviewed Ann Marie but she denied being touched at all by Petitioner, including hugs and kisses. (Tr. III, 129-30, 132, 147.) Ann Marie's mother attended the interview because of Ann Marie's speech impediment. (Tr. III, 117, 133.)

Tom Cottrell testified as the Program Director of the Child Sexual Abuse Treatment Program at the YWCA. (Tr. IV, 3.) The Child Sexual Abuse Treatment Program provides counseling to families of sexual abuse. (Tr. IV, 4.) He testified as an expert in the field of "exposure to sexual assault victims." (Tr. IV, 7.) Mr. Cottrell testified that eighty percent of the cases of sexual abuse in a family do not have immediate disclosure. (Tr. IV, 10.) The disclosure time can run from a matter of weeks to thirty or forty years. (Tr. IV, 10.) A sexual abuse victim may not want to disclose due to fear, loyalties to the offender, or loyalties to other family members. (Tr. IV, 10-11.) Disclosure may occur when a victim finds that a sibling was also abused. (Tr. IV,

15.) Mr. Cottrell noted that if a child hears that someone raped another person or somebody has a sexually transmitted disease, the child may not necessarily make a false accusation. (Tr. IV, 28-29.) Any child who has been sexually abused is confused about what is happening to them. (Tr. IV, 29.) At the conclusion of Mr. Cottrell's testimony, the prosecution rested. (Tr. IV, 30.)

Petitioner testified in his defense. (Tr. IV, 31.) Petitioner is married to Lee Ann Wellborn and has two step-daughters, Lisa Thompson and Deana Rolfe, and three step-granddaughters, Alicia Faunce, Clorissa Rolfe and Ann Marie Rolfe. (Tr. IV, 32-33.) Petitioner denied sexually assaulting Lisa Thompson, Alicia Faunce, and Clorissa and Ann Marie Rolfe. (Tr. IV, 35-37, 53.) He also stated that he never raped a girl in Virginia or had his house burned down as a form of revenge. (Tr. IV, 37, 40-41.) Petitioner claims that the allegations of sexual assault are a result of Ms. Wellborn's ex-husband attempting to re-enter their lives after fifteen years. (Tr. IV, 37-38.) In 2000, Petitioner and his wife refused to spend the holidays with their daughters if their biological father was present. (Tr. IV, 38-39.) This upset Ms. Thompson, who Petitioner described as a "control freak." (Tr. IV, 38.) Petitioner alleges that Ms. Thompson controls the family through threats, stealing and conning people. (Tr. IV, 38, 61-62.) Before Christmas 2000, Ms. Thompson and Deana Rolfe also approached Ms. Wellborn about leaving Petitioner because he allegedly abused Ms. Wellborn. (Tr. IV, 39-40.)

Petitioner testified that he does not have genital warts. (Tr. IV, 41.) He also denied placing his elbow on Alicia's neck or throat to choke her so she would not scream. (Tr. IV, 44.) Petitioner never placed a hand on any of his step-granddaughters, even to discipline them. (Tr. IV, 45-47.) In 1998, Ms. Thompson and Deana Rolfe did not approach Petitioner to say that Alicia or Clorissa was uncomfortable around him. (Tr. IV, 51-52.) Petitioner stated that all of the allegations

were a bunch of lies and everyone, the victims, the prosecutors, and the detectives, were trying to get him. (Tr. IV, 59-60.)

During cross-examination, Petitioner testified that he won the criminal sexual conduct case brought against him in Montcalm County. (Tr. IV, 60.) Petitioner also stated that Alicia was the only step-granddaughter to testify in the Montcalm County case. (Tr. IV, 60-61.) At the Montcalm County hearing, Petitioner never mentioned any problems with Ms. Thompson. (Tr. IV, 67-69.)

Lee Ann Wellborn, Petitioner's wife, testified for the defense. (Tr. IV, 72-73.) Ms. Wellborn stated that she never saw Petitioner discipline Alicia Faunce, Clorissa Rolfe or Ann Marie Rolfe. (Tr. IV, 75.) In November 2000, Ms. Wellborn called the police after an argument with Petitioner. (Tr. IV, 76-79.) Ms. Wellborn testified that Ms. Thompson requested that she call the police. (Tr. IV, 78.) Ms. Thompson and Deana Rolfe were both upset when Ms. Wellborn would not leave Petitioner after the argument. (Tr. IV, 80.)

Ms. Wellborn did not notice any bruises or scrapes on Alicia, Clorissa or Ann Marie when they spent the night at their house. (Tr. IV, 81-82.) She never heard any screams in the middle of the night or any cries for help from any of her granddaughters. (Tr. IV, 81.) Alicia, Clorissa and Ann Marie never indicated that they were scared of Petitioner. (Tr. IV, 82.) Ms. Wellborn also described her daughter, Ms. Thompson, as controlling. (Tr. IV, 84.)

Ms. Wellborn met with Alicia and Clorissa at their school. (Tr. IV, 86-88.) Alicia mentioned to Ms. Wellborn that she heard Petitioner raped a girl in Virginia from her mother, Ms. Thompson, and Alicia did not want that to happen to her, Clorissa or Ann Marie. (Tr. IV, 86-87.)

When Ms. Wellborn spoke with Clorissa at school, Clorissa screamed that she wanted it to end. (Tr. IV, 88-89.) At that time, school officials ended the conversation. (Tr. IV, 89.)

Ms. Wellborn testified that she does not have genital warts. (Tr. IV, 91.) Ms. Wellborn also mentioned that she no longer has any contact with her daughters or granddaughters. (Tr. IV, 93.)

On rebuttal, the prosecutor called Alicia Faunce to the stand. (Tr. IV, 95.) Alicia testified about the incident at her high school with her grandmother, Lee Ann Wellborn. (Tr. IV, 96.) When Ms. Wellborn visited Alicia at school, she accused Alicia of fabricating the sexual abuse charges and called her a slut. (Tr. IV, 96-97.) Ms. Wellborn also pulled Clorissa from her class. (Tr. IV, 98.) Clorissa started crying and saying that Ms. Wellborn could not tell her that it never happened. (Tr. IV, 98.) The school counselor eventually escorted Ms. Wellborn out of the building. (Tr. IV, 98-99.)

The prosecutor also called Clorissa Rolfe on rebuttal. (Tr. IV, 104.) Clorissa testified regarding the incident at her school. (Tr. IV, 105.) She talked to her grandmother and Alicia in the high school counseling office. (Tr. IV, 105.) Clorissa mentioned that her grandmother accused her of lying about the whole thing and called both Alicia and her, "little bitches." (Tr. IV, 105, 107.)

Detective Diane Kik testified on rebuttal. (Tr. IV, 111.) Detective Kik interviewed Petitioner on May 27, 2001 and told him about the sexual abuse allegations. (Tr. IV, 111-13.) Petitioner stated that Alicia and Clorissa were lying. (Tr. IV, 113.) Detective Kik asked Petitioner whether he touched the girls. (Tr. IV, 114.) Petitioner denied touching the girls but mentioned that he could have touched them by accident. (Tr. IV, 114, 118.) While Petitioner mentioned that Ms.

Thompson was controlling and angry with him, he did not say anything about Ms. Thompson's or Deana Rolfe's biological father being involved. (Tr. IV, 114-15.) When asked why Alicia would make this up, Petitioner blamed the allegations on Ms. Thompson's controlling behavior. (Tr. IV, 120.)

After deliberating, the jury returned a verdict of guilty of one count of first-degree CSC and two counts of second-degree CSC.[2] (Tr. VI, 6.)

**B. Direct Appeal**

Petitioner appealed as of right to the Michigan Court of Appeals. His brief raised all of the issues in his application for habeas corpus relief. (*See* Def.-Appellant's Br. on Appeal, docket #23.) Petitioner filed a motion to remand on the issue of the jury venire, which was denied by the Michigan Court of Appeals on March 13, 2003 because "the issue that defendant attempts to raise has been forfeited by the failure of defendant to raise it before the jury was sworn." (Mar. 13, 2003 Mich. Ct. App. Order, docket #23.) Petitioner then filed a motion for reconsideration. The Michigan Court of Appeals denied the motion on April 21, 2003. (Apr. 21, 2003 Mich. Ct. App. Order, docket #23.) By unpublished opinion dated December 16, 2003, the Michigan Court of Appeals rejected all appellate arguments and affirmed Petitioner's convictions and sentences. (*See* Dec. 16, 2003 Mich. Ct. App. Op. (MCOA Op.), docket #23.)

Petitioner filed a *pro per* application for leave to appeal to the Michigan Supreme Court. Petitioner raised the same claims rejected by the Michigan Court of Appeals. By order entered June 30, 2004, the Michigan Supreme Court denied his application for leave to appeal

---

[2]At the conclusion of the trial, the defense moved for a directed verdict on all charges. (Tr. V, 3.) The Kent County Circuit Court granted the motion as to one count of first-degree CSC of sexual penetration, to wit, penis in mouth with Alicia Faunce, because Alicia was not certain whether the sexual act occurred in Montcalm County or Kent County. (Tr. V, 5, 100, 110.)

because it was not persuaded that the questions presented should be reviewed. (*See* June 30, 2004 Mich. Order, docket #24.)

**Standard of Review**

This action is governed by the Antiterrorism and Effective Death Penalty Act, PUB. L. 104-132, 110 STAT. 1214 (AEDPA). *See Penry v. Johnson*, 532 U.S. 782, 792 (2001). 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). The AEDPA has "drastically changed" the nature of habeas review. *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). 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).

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*, 271 F.3d at 655. In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Bailey*, 271 F.3d at 655; *Harris v. Stovall*, 212 F.3d 940, 944 (6th Cir. 2000). "Yet, while the principles of 'clearly established law' are to be determined solely by resort to Supreme Court rulings, the decisions of lower federal courts may be instructive in assessing the reasonableness of a state court's resolution of an issue." *Stewart v. Erwin*, 503 F.3d

488, 493 (6th Cir. 2007). 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 [the petitioner's] conviction became final." *Onifer v. Tyszkiewicz*, 255 F.3d 313, 318 (6th Cir. 2001). A decision of the state court may only be overturned if (1) it applies a rule that contradicts the governing law set forth by the Supreme Court, (2) it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result; (3) it identifies the correct governing legal rule from the Supreme Court precedent but unreasonably applies it to the facts of the case; or (4) it either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend a principle to a context where it should apply. *Bailey*, 271 F.3d at 655 (citing *Williams*, 529 U.S. at 405-07); *see also Bell*, 535 U.S. at 694; *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003).

A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411; *accord Bell*, 535 U.S. at 699. Rather, the issue is whether the state court's application of clearly established federal law is "objectively unreasonable." *Williams*, 529 U.S. at 409.

Where the state court has not articulated its reasoning, the federal courts are obligated to conduct an independent review to determine if the state court's result is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented. *See Harris*, 212 F.3d at 943; *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003). Where the circumstances suggest that the state court actually considered

the issue, the review is not *de novo*. *Onifer*, 255 F.3d at 316. The review remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA. *Harris*, 212 F.3d at 943. However, the Sixth Circuit recently has clarified that where the state court clearly did not address the merits of a claim, "there are simply no results, let alone reasoning, to which [the] court can defer." In such circumstances, the court conducts *de novo* review. *McKenzie*, 326 F.3d at 727 (limiting *Harris* to those circumstances in which a result exists to which the federal court may defer); *see also Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (reviewing habeas issue *de novo* where state courts had not reached the question); *Maples v. Stegall*, 340 F.3d 433, 437 (6th Cir. 2003) (recognizing that *Wiggins* established *de novo* standard of review for any claim that was not addressed by the state courts).

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*, 324 F.3d at 429; *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). Applying the foregoing standards under the AEDPA, I find that Petitioner is not entitled to relief.

## Discussion

### I. Ground I: Confrontation and Due Process Clauses and Ineffective Assistance of Counsel

Petitioner raised a compound claim in his first ground of habeas corpus relief based on the failure of the defense to introduce evidence in the Kent County trial of Petitioner's acquittal

from a previous criminal sexual conduct trial in Montcalm County. Petitioner presented the issue as a claim under the Confrontation and Due Process Clauses and as several claims of ineffective assistance of counsel.

Petitioner was previously tried before a jury in Montcalm County Circuit Court on allegations of sexual abuse by Alicia Faunce. The Montcalm County jury acquitted Petitioner of all charges. Prior to the current trial, the prosecutor moved *in limine* in Kent County Circuit Court to exclude evidence of Petitioner's acquittal from his previous trial in Montcalm County. (Mar. 18, 2002 Pretrial Motions Transcript (Pretrial Mots. Tr.), 3-4; docket #16.) Petitioner's trial counsel agreed to refrain from introducing the acquittal in the present trial but requested to use the Montcalm County trial transcripts for impeachment purposes. (Pretrial Mots. Tr., 4.) The trial court held that the attorneys could reference the trial transcripts for impeachment purposes so long as the attorneys referred to the Montcalm County trial as "a hearing in Montcalm." (Pretrial Mots. Tr., 11-12; Tr. V, 19.)

A. Confrontation and Due Process Clauses

Petitioner argues that his prior acquittal in Montcalm County Circuit Court should have been admissible as evidence of false allegations of sexual abuse under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. (Pet'r's Br. in Supp. of Pet., vi, docket #2.) While Petitioner raised those claims in his direct appeal, the Michigan Court of Appeals failed to address whether the exclusion of evidence of Petitioner's acquittal violated the Confrontation Clause or the Due Process Clause. When the state court clearly did not address the merits of the claim, the district court will apply *de novo* review. *See McKenzie,* 326 F.3d at 727; *Wiggins,* 539 U.S. at 534; *Maples*, 340 F.3d at 437.

The Supreme Court has determined that criminal defendants have the right to a "meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984). The right is derived from the Confrontation Clause of the Sixth Amendment and from the Due Process Clause of the Fourteenth Amendment. *See Chambers v. Mississippi,* 410 U.S. 284, 302 (1973); *Washington v. Texas,* 388 U.S. 14, 19 (1967) ("[j]ust as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process law."). The Supreme Court, however, repeatedly has recognized that the right to present a defense is subject to reasonable restrictions. *See United States v. Scheffer,* 523 U.S. 303, 308 (1998); *Taylor v. Illinois,* 484 U.S. 400, 410 (1988) (the Sixth Amendment does not confer on the accused an "unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence"); *Rock v. Arkansas,* 483 U.S. 44, 55 (1987); *Chambers,* 410 U.S. at 295; *see also Wong v. Money,* 142 F.3d 313, 325 (6th Cir. 1998). Indeed, "[a] defendant's interest in presenting . . . evidence may thus bow to accommodate other legitimate interests in the criminal trial process." *Scheffer,* 523 U.S. at 308 (citations omitted) (internal quotations omitted).

Even assuming Petitioner's rights were infringed under the Confrontation Clause or Due Process Clause by the exclusion of the acquittal testimony, the trial court's error was harmless. Confrontation Clause and Due Process Clause errors are subject to harmless-error analysis. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 691 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Chapman v. California*, 386 U.S. 18, 21-22 (1967). On habeas review, a court must assess harmlessness under the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), regardless

of whether the state appellate court recognized the error and reviewed it for harmlessness. *See Hargrave v. McKee*, 248 F. App'x 718, 728 (citing *Fry v. Pliler*, 127 S. Ct. 2321, 2328 (2007)); *see also Vasquez v. Jones*, 496 F.3d 564, 574-75 (6th Cir. 2007). The *Brecht* standard requires the Court to consider whether the constitutional error in the state criminal trial had a "substantial and injurious effect" on the result. If upon review of the entire record, the court is convinced that "the error did not influence the jury, or had but very slight effect," the conviction must stand. *O'Neal v. McAninch*, 513 U.S. 432, 437-38 (1995); *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). The alleged constitutional errors did not influence the jury or had a very slight effect on the jury because Petitioner still managed to introduce evidence of his acquittal during the Kent County trial, and the evidence overwhelmingly demonstrated that Petitioner was guilty.

During cross-examination by the prosecutor, Petitioner testified regarding his prior acquittal as follows:

> Q So the four of us are trying to get you? Is there anybody else involved? What about Lisa's husband?
>
> A Lisa's husband does what he's told.
>
> Q He does what he's told? So just the four – what about the prosecutor, you know, up in Montcalm? She was – she was part of this conspiracy, too?
>
> A **I won that case.**
>
> Q But she's part of the conspiracy, correct?
>
> A **Obviously, she tried to – tried me and lost.**
>
> Q But that was a different case, right?
>
> A Same people.
>
> Q No. Because you just said the other two girls weren't up there. They didn't allege anything up in Montcalm –

A You just said they weren't, that we talked about –

Q Mr. – Mr. Wellborn, why don't you listen to my questions. You just said yourself that Alicia was the only one up in Montcalm, correct?

A Right. That was charging me.

Q The other two girls didn't testify up there, did they?

A No, they didn't.

(Tr. IV, 60-61) (emphasis added.) As a result, the evidence of Petitioner's acquittal was before the jury.

Moreover, Petitioner failed to show that any error was not harmless error, because the prosecution introduced overwhelming evidence of Petitioner's guilt. Alicia Faunce, Clorissa Rolfe and Ann Marie Rolfe testified regarding several instances of sexual assault by Petitioner in Kent County. Alicia testified that Petitioner put his fingers in her vagina and his tongue in her vagina on several occasions. (Tr. II, 42-44.) Most of the sexual encounters occurred in the computer room of Petitioner's residence. (Tr. II, 43.) The first encounter Alicia remembered in the computer room was when Petitioner kissed her and put his fingers in her vagina. (Tr. II, 44.) At Petitioner's request, Alicia also used her hands to play with his penis. (Tr. II, 45.)

Clorissa testified that Petitioner would try to French kiss her, reach down her pants and touch her breasts. (Tr. II, 96, 100-02.) Petitioner, however, only tried to reach down her pants once. (Tr. II, 101-02.) Clorissa told him no and stopped his hand. (Tr. II, 101.) While Clorissa was in the computer room, Petitioner would also try to touch her breasts. (Tr. II, 102.) Clorissa estimated that Petitioner attempted to sexually assault her on less than ten occasions. (Tr. II, 102.)

Ann Marie testified that Petitioner would touch her "private[s]" while in an upstairs room. (Tr. II, 135-38.) Petitioner would touch her underneath her clothes. (Tr. II, 140.)

Upon review of the entire record, "without stripping the [allegedly] erroneous action from the whole," I find that any error by the trial court had, at best, only a "very slight effect" on the jury's determination of Petitioner's guilt or innocence in this case. *O'Neal*, 513 U.S. at 437-38; *Kotteakos*, 328 U.S. at 764-65. Therefore, Petitioner is not entitled to habeas relief on his constitutional claims under the Confrontation and Due Process Clauses.

B. Ineffective Assistance of Trial Counsel

In his first ground for habeas relief, Petitioner also argues that his trial counsel violated his Sixth Amendment right to the effective assistance of counsel: (a) by failing to introduce evidence of Petitioner's acquittal from his Montcalm County trial; and (b) by conceding that the prior acquittal was not admissible as evidence in violation of state law and of Petitioner's rights under the Confrontation Clause and Due Process Clause. (Pet'r's Br. in Supp. of Pet., vi, docket #2.)

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. To establish a claim of ineffective assistance of counsel, the petitioner must prove: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced 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. The defendant bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *see also Nagi v. United States,* 90 F.3d 130, 134-35 (6th Cir. 1996) (holding that counsel's strategic decisions were hard to attack). The court must determine whether, in light of the circumstances as they existed

at the time of counsel's actions, "the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. 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 defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694.

A claim of ineffective assistance of counsel presents a mixed question of law and fact. Accordingly, the Court must apply the unreasonable application prong of § 2254(d)(1). Under the "unreasonable application" standard, the state court identifies the correct governing legal rule from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Wiggins v. Smith,* 539 U.S. 510, 520 (2003); *Williams,* 529 U.S. at 412-13; *Barnes v. Elo,* 339 F.3d 496, 501 (6th Cir. 2003).

1. **State Law Claims**

Petitioner asserts that his trial counsel violated his Sixth Amendment right to the effective assistance of counsel for failing to introduce evidence of his prior acquittal at trial and conceding that the prior acquittal was not admissible as evidence. Petitioner claims that the evidence would have shown prior false allegations of sexual abuse by Alicia Faunce, and, thus, was admissible under state law. The Michigan Court of Appeals addressed those evidentiary issues as follows:

> [Petitioner] first argues that he was deprived of his constitutional right to the effective assistance of counsel because trial counsel agreed with the prosecutor to exclude evidence of [Petitioner]'s acquittal in a Montcalm County case involving similar charges brought by one of the complainants in this case. Because [Petitioner] failed to move for a new trial or an evidentiary hearing regarding his ineffective assistance claim, this Court's review is limited to mistakes apparent on the record.

*People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We find no merit to [Petitioner]'s argument.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984), on remand 737 F2d 894 (CA 11, 1984); *People v. Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001).

No ineffective assistance is apparent from the record. Trial counsel's representation did not fall below an objective standard of reasonableness because his concession on the inadmissibility of the acquittal was consistent with the law. In *People v Bolden*, 98 Mich App 452; 296 NW2d 613 (1980), the defendant argued that the trial court erred in precluding the jury from knowing that he was acquitted of the charges that comprised the prior similar acts evidence. Relying on *People v Oliphant*, 399 Mich 472; 250 NW2d 443 (1976), the *Bolden* Court held that the trial court did not err in excluding evidence of the acquittal, reasoning as follows:

> We find this reasoning [that of *Oliphant* ] equally applicable to our consideration. The prosecutor must produce evidence sufficient to show that defendant "probably committed the other acts", *People v Cook*, 95 Mich App 645; 291 NW2d 152 (1980). If he or she can satisfy that burden, the jury should not be confused by the additional information of an acquittal which could mislead them into believing that the defendant absolutely did not commit the prior similar acts. The fact that another jury harbored a reasonable doubt as to defendant's guilt of the other offense does not negate the substantive value of the testimony to establish identity, scheme, plan, etc. in the case at bar. The issue should not be clouded by encouraging speculation regarding the verdict reached in a separate trial on a separate offense involving a different complainant. Defendant's rights were sufficiently protected by the trial court's limiting instructions concerning the purpose of similar acts testimony. [*Bolden, supra* at 461.] [FN1]

Moreover, while instructing the jury, the trial court said that it would not have admitted evidence of [Petitioner]'s acquittal even if the parties had not agreed to exclude it because the evidence was irrelevant. The trial court explained that there is no meaningful comparison between the two trials because there [we]re different juries, different prosecutors, and different accusations. [FN2] Because counsel is not required to advocate a meritless position, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), trial counsel's decision to forego mentioning the acquittal did not amount to objectively unreasonable assistance, let alone unreasonable assistance

> affecting the jury's verdict. We find no merit to [Petitioner]'s ineffective assistance of counsel claim.
>
> FN1. Although a subsequent panel of this Court "expressed its support" for Judge Allen's partial dissent in *Bolden* on this issue, see *People v Nabers*, 103 Mich App 354, 364; 303 NW2d 205, *rev'd on other grounds*, 411 Mich 1046 (1981), that statement was dicta since it does not appear that either party raised as an issue in that case the admissibility of an acquittal. Furthermore, as was noted in *US v Gricco*, 277 F3d 339, 352-353 (CA 3, 2002), at least ten of the federal circuits (including the Sixth Circuit) have held that, except for purposes of determining whether the prosecution of a [Petitioner] is barred by double jeopardy or collateral estoppel, "evidence of prior acquittals is generally inadmissible." *Id.* at 352. That is so because judgments of acquittal "may not present a determination of innocence, but rather only a decision that the prosecution has not met its burden of proof beyond a reasonable doubt." *Id.*
>
> FN2. The trial court instructed the jury in this manner because, during cross-examination, [Petitioner] testified that the victim had previously "tried me and lost."

(MCOA Op. at 1-2, docket #23.)

The Michigan Court of Appeals' conclusion was not an unreasonable application of *Strickland*. Before trial, the prosecutor moved *in limine* to exclude evidence of Petitioner's previous acquittal in Montcalm County Circuit Court. (Pretrial Mots. Tr., 3-4.) Petitioner's trial counsel agreed to exclude evidence of the acquittal as long as he could use certain testimony from the Montcalm County trial to impeach testimony in the present Kent County trial. (Pretrial Mots. Tr., 4.) The appellate court held that trial counsel's concession regarding the inadmissibility of Petitioner's acquittal was consistent with Michigan law; and, thus, counsel's representation did not fall below an objective standard of reasonableness. Counsel was not required to advocate a meritless position. (MCOA Op. at 1-2.) The state court's determination of admissibility of evidence under state law is not reviewable by this Court. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Defense counsel cannot be deemed deficient for failing to make a futile motion to admit evidence of Petitioner's acquittal. *See United States v. Sanders*, 404 F.3d 980, 986 (6th Cir. 2005) (counsel cannot be ineffective for failing to object to what was properly done); *Harris v. United States*, 204 F.3d 681, 683 (6th Cir. 2000) (failure by counsel to do something that would have been futile is not ineffective assistance); *United States v. Hanley*, 906 F.2d 1116, 1121 (6th Cir. 1990) (counsel not ineffective for failing to pursue motions that would have been futile); *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir.1994) ("[f]ailure to raise meritless objections is not ineffective lawyering; it is the very opposite."). Petitioner therefore failed to satisfy the performance prong of the *Strickland* standard regarding his claim of ineffective assistance of counsel based on state evidentiary law.

2. **Constitutional Law Claims**

Petitioner also argues that his trial counsel was ineffective under the Sixth Amendment for failing to introduce evidence of Petitioner's prior acquittal as evidence of prior false allegations of sexual abuse in violation of the Confrontation and the Due Process Clauses. (Pet'r's Br. in Supp. of Pet. at 28; docket #2.) The Michigan Court of Appeals failed to address whether the exclusion of the acquittal evidence by trial counsel violated Petitioner's Sixth Amendment right to the effective assistance of counsel. As stated above, the district court must apply *de novo* review. *See McKenzie,* 326 F.3d at 727; *Wiggins,* 539 U.S. at 534; *Maples*, 340 F.3d at 437.

The Court need not address whether counsel was deficient for failing to seek admission of the acquittal evidence under the Confrontation Clause or the Due Process Clause. When deciding ineffective-assistance claims, courts need not address both components of the inquiry 'if the defendant makes an insufficient showing on one.'" *Campbell v. United States*, 364 F.3d 727,

730 (6th Cir. 2004) (quoting *Strickland*, 466 U.S. at 697). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. Even if counsel's performance was found to be constitutionally deficient, Petitioner cannot demonstrate the necessary prejudice under the second *Strickland* prong. *See id.* at 694. Petitioner must prove that there exists a reasonable probability that, but for counsel's errors, the result of the trial would have been different to show that Petitioner had been prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. at 694. Reasonable probability is defined as a probability "sufficient to undermine confidence in the outcome." *Id.*

As stated in Section (I)(A), the alleged error by Petitioner's trial counsel did not prejudice Petitioner because he still managed to introduce evidence of his Montcalm County acquittal during the Kent County trial, and the evidence nevertheless overwhelmingly showed that Petitioner was guilty. Petitioner therefore fails to demonstrate a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. Accordingly, Petitioner is not entitled to habeas corpus relief on his claim that counsel was constitutionally ineffective for failing to introduce of Petitioner's acquittal in Montcalm County under the Confrontation and the Due Process Clauses.

**II. Jury Venire**

In his second habeas claim, Petitioner contends that he was denied his constitutional right to a jury drawn from a fair cross-section of the community. The Sixth Amendment guarantees a criminal defendant an impartial jury drawn from a fair cross-section of the community. *Duren v. Missouri*, 439 U.S. 357, 358-59 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 526-31 (1975). The petit

jury does not have to mirror the community, but distinct groups cannot be systematically excluded from the venire. *See United States v. Jackman,* 46 F.3d 1240, 1244 (2nd Cir., 1995).

While acknowledging this right in its entirety, the rule in Michigan has for some time been that a defendant can be precluded from raising the issue on appeal if he does not timely raise it at trial. *See People v. McCrea,* 303 Mich. 213, 278 (1942). In *People v. Carter*, 462 Mich. 206 (2000), the Michigan Supreme Court stated that a defendant cannot waive an objection to an issue at trial and then make a claim of error on appeal. In that instance, the court found that because the defendant's counsel had expressed satisfaction with the trial court's jury instructions, the defendant had waived the issue. *Id.*

To establish a *prima facie* violation of the fair cross-section requirement, Petitioner bore the burden of proving "that a distinctive group was under-represented in his venire or jury pool, and that the under-representation was the result of systematic exclusion of the group from the jury selection process." *People v. Smith,* 463 Mich. 199 (2000), citing *Duren v. Missouri, supra.*

Petitioner, a Caucasian, argues that systematic errors in the Kent County Jury Management System caused a disproportionately low number of jury notices to be sent to residences in zip codes with proportionally larger African-American and other minority populations. (Pet'r's Br. in Supp. of Pet. at 36, 42-43.) Relying mainly on newspaper articles, Petitioner argues in part that:

> In a story that first appeared in the July 30, 2002, Grand Rapids Press, Kent County officials conceded that their own review of their computer system revealed that "nearly seventy-five percent of the County's 454,000 eligible residents were excluded from potential jury pools since spring 2001", and that "[m]any blacks were excluded from the . . . jury pools due to a computer glitch that selected a majority of potential candidates from the suburbs." The chief judge of the Kent County Circuit Court, George Buth, was quoted as saying, "There has been a mistake - a big mistake." The article states that trouble-shooters detected the error in mid-July of

> 2002, and that the error had gone undetected for sixteen months. (Appendix E, page 1 of 4 of article of July 30, 2002 attached).

(Pet'r's Br. in Supp. of Pet. at 38.).

In Petitioner's case, jury selection occurred on March 19, 2002. (Pet'r's Br. in Supp. of Pet. at 36.) This would have been within the period during which the computer error purportedly occurred in the Kent County Jury Management System. Petitioner, however, did not challenge the jury array at trial. If he felt the jury venire looked too much like him, he did not say so. At the close of jury voir dire, Petitioner's counsel stated: "Your Honor, the defense is satisfied with the panel." (Tr. I, 169.) The jury was then empaneled and sworn. There were no objections regarding the composition of the jury array at any time during the trial, much less during the voir dire, and trial counsel's statement constitutes an express waiver of the issue.

Although this Court cannot discern the race of the individual members of the jury array from the trial record, because Petitioner did not preserve the issue, Petitioner now contends that "[o]ut of approximately 70 potential jurors available to serve that day, I saw only 2 African-Americans present. There were no African-American jurors or alternates on my jury." (App. J. to Pet'r's Br. in Supp. of Pet.; docket #2.) Petitioner's statement indicates he was well aware of the composition of the jury venire when he chose to accept the jury.

The Michigan Court of Appeals determined that Petitioner waived his challenge to the venire and jury selection process because his trial counsel expressed satisfaction with the jury's composition. (MCOA Op. at 2.) When a state-law default prevents further state consideration of a federal issue, the federal courts ordinarily are precluded from considering that issue on habeas corpus review. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991); *Engle v. Isaac*, 456 U.S. 107 (1982). A procedural default is "a critical failure to comply with state procedural law." *Trest v.*

*Cain,* 522 U.S. 87, 89 (1997). It will bar consideration of the merits of a federal claim if the state rule is actually enforced and is an adequate and independent ground for the state court's decision. *Coleman v. Thompson,* 501 U.S. 722, 750 (1991); *Monzo v. Edwards,* 281 F.3d 568, 576 (6th Cir., 2002).

To determine whether a petitioner procedurally defaulted a federal claim in state court, the Court must consider whether: (1) the petitioner failed to comply with an applicable state procedural rule; (2) the last state court rendering judgment on the claim at issue actually enforced the state procedural rule so as to bar that claim; and (3) the state procedural default is an "independent and adequate" state ground properly foreclosing federal habeas review of the federal constitutional claim. *See Hicks v. Straub,* 377 F.3d 538, 551 (6th Cir. 2004); *accord Lancaster*, 324 F.3d at 436-37; *Greer v. Mitchell*, 264 F.3d 663, 672 (6th Cir. 2001); *Buell v. Mitchell*, 274 F.3d 337, 348 (6th Cir. 2001).

A state law procedural rule is adequate and independent when it was "firmly established and regularly followed" at the time of the asserted procedural default. *Rogers v. Howes*, 144 F.3d 990, 992 (6th Cir. 1998) (citing *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)). To be timely under Michigan law, a challenge to the jury array must be made before the jury has been impaneled and sworn. It is clear that this rule was well-established at the time of Petitioner's trial. *See People v. McCrea*, 6 N.W.2d 489, 514 (Mich. 1942); *People v. Hubbard*, 552 N.W.2d 493, 497-8, 498 (Mich Ct. App. 1996) ("A challenge to the jury array is timely if it is made before the jury has been empaneled and sworn. . . an expression of satisfaction with a jury made at the close of voir dire examination waives a party's ability to challenge the composition of the jury thereafter empaneled and sworn."); *People v. Stephen*, 188 N.W.2d 105, 106 (Mich. Ct. App. 1971).

It is too late to raise the issue for the first time on appeal. *Id.* A rule designed to arm trial judges with the information needed to rule reliably "serves a governmental interest of undoubted legitimacy." *Lee v. Kemna*, 534 U.S. 362, 385 (2002). The trial court cannot address issues not brought to its attention. By contrast, see *Jackman*, *supra*, where the issue was raised prior to jury selection and a hearing on the issue held prior to the jury being sworn. *Jackman*, 46 F.3d at 1243. Contemporaneous objections allow the court to address the problem while something can be done to correct it. Failing to address perceived problems when they can be corrected is simply an attempt to get a second bite at the apple. A person would not watch his home being built on a cement block foundation, only to demand upon completion of the house that poured concrete be used instead. A defendant cannot be afforded the opportunity to sit quietly and obtain a verdict under one set of rules when he knows there may be a problem, only to demand a new trial with different rules if he is found guilty. If there is a problem during trial, it is incumbent upon the party, if he is aware of that problem or would be with due diligence, not to blind side the court, but to bring it to the court's attention. *Id.* at 1248 ("... in the absence of a timely objection to the jury selection process, courts will retain the discretion to uphold convictions.").

Petitioner failed to meet his burden of proof with regard to systematic exclusion of jurors, and his belated attempt to offer inadmissible hearsay evidence in the form of newspaper articles does not change that fact.[3] Petitioner's failure to raise the issue in the trial court also left the appellate courts in this case with a record devoid of any competent evidence to consider in support of Petitioner's allegations. Consequently, the appellate courts had no means of conducting a meaningful review of his allegations on appeal. *See, People v. McKinney,* 258 Mich. App. 157,

[3]Michigan appellate courts may not take judicial notice of newspaper articles as they constitute inadmissible hearsay. *See, Baker v. General Motors Corp.*, 420 Mich. 463 (1984).

161-2 (2003). Petitioner's failure to comply with the state's independent and adequate state procedural rule, i.e., making an objection to the jury array before the jury has been impaneled and sworn, caused Petitioner to default his claim in state court. *See Wainwright v. Sykes*, 433 U.S. 72, 86-88 (1977); *West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996).

If a petitioner procedurally defaulted his federal claim in state court, the petitioner must demonstrate either: (1) cause for his failure to comply with the state procedural rule and actual prejudice flowing from the violation of federal law alleged in his claim, or (2) that a lack of federal habeas review of the claim will result in a fundamental miscarriage of justice. *See House v. Bell*, 547 U.S. 518, 536-37 (2006); *Murray v. Carrier*, 477 U.S. 478, 495 (1986); *Hicks*, 377 F.3d at 551-52. The miscarriage-of-justice exception only can be met in an "extraordinary" case where a prisoner asserts a claim of actual innocence based upon new reliable evidence. *House*, 547 U.S. at 537. A habeas petitioner asserting a claim of actual innocence must establish that, in light of new evidence it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Petitioner has made no such claim or showing of actual innocence in this case.

To show cause sufficient to excuse a failure to raise claims on direct appeal, Petitioner must point to "some objective factor external to the defense" that prevented him from raising the issue in his first appeal. *Murray*, 477 U.S. at 488; *see McCleskey v. Zant*, 499 U.S. 467, 497 (1991). For cause, Petitioner argues that the factual basis for his claim was not reasonably available to counsel at the time of trial.

But, of course, it was. Simply seeing an array when the deficiency is apparent provides adequate notice. In light of Petitioner's purported all-white jury, and 70-person venire

panel with only two African-Americans, of which Petitioner has admitted he was well aware of at the time, Petitioner and his counsel were placed on notice of the basis of his claim as soon as they viewed the jury array.

In *Hubbard, supra* at 498, the court emphasized the significance of viewing the array. The court in that case held that the defendant was not required to challenge the juror allocation process "before defendant actually viewed the array." (Emphasis added.) Once the defendant viewed the array he raised his objection. The difference between *Hubbard* and the present case is that the defendant in *Hubbard* made his challenge after viewing the array and *prior* to the jury being sworn, and Petitioner did not.

Similarly, in *People v. Oliphant,* 399 Mich. 472, 501 (1976), the defendant waited until after the jury selection and until the first day of trial to challenge the jury array, alleging that it deprived him of his right to an impartial jury drawn from a fair cross section of the community because of the absence of persons between the ages of 18 and 21. The Michigan Supreme Court held the challenge to be untimely because the claim was based "on the fact that no persons between the ages of 18 and 21 *appeared on the array.*" (emphasis added).

By contrast, in *People v. Bryant,* ___ Mich. App. ___, 2004 WL 513644 (3/16/04), a defendant was convicted in Kent County during the same period as plaintiff in this case but *did* make a timely objection during the voir dire process that he had been deprived of his Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community. As a result of his timely objection, he was determined to have preserved his claim and was afforded an evidentiary hearing by the Michigan Court of Appeals.

Thus, the law in Michigan is unequivocal that you are considered on notice once you have viewed the array and you must raise a timely objection before the jury is empaneled and sworn.

Petitioner has adopted an alternative line of reasoning, arguing that the error was not procedurally defaulted because he could not have known the legal basis for his challenge to the jury venire earlier, since the purported computer glitch had not been discovered. In support of his position, Petitioner relies on *Amadeo v. Zant,* 486 U.S. 214 (1988). This was a death penalty case in which the district attorney and the jury commissioners in Putnam County, Georgia, intentionally engineered a scheme to cause African-Americans to be under-represented in the county's juries. The scheme included a cover-up to mask the impropriety by keeping the percentage of black jurors within statistical guidelines mentioned in prevailing case law. *See, Amadeo v. Kemp,* 816 F. Supp. 1502, 1508 (11th Cir., 1987) (dissent).[4] In other words, the discrepancy was not obvious at the venire. The Supreme Court held that the district court's factual finding that the defendant's lawyers had not deliberately bypassed the jury challenge, because the deceit of the prosecutor and the jury commissioners had been intentionally hidden, was not clearly erroneous. *Amadeo v. Zant,* 486 U.S. at 225.

While this argument has found some traction with two other habeas cases arising out of Kent County during this period and currently pending in the Eastern District of Michigan,[5] the argument fails to distinguish between having notice of a defect in the jury venire, and knowing the underlying reason for the discrepancy.

---

[4] *Amadeo v. Kemp* was the court of appeals decision in the *Amadeo v. Zant* case.

[5] *Parks v. Warren,* 574 F. Supp.2d 737, 744-47(E.D. Mich. 2008); *Powell v. Howes,* 2007 WL 1266398, at *4-5 (E.D. Mich. May 1, 2007). These cases are not binding authority on this Court, and I do not find their analysis of *Amadeo*, 486 U.S. 214, to be persuasive for the reasons stated above.

The Michigan Court of Appeals has addressed Petitioner's argument that the reason for the purported discrepancy in the venire panel could not have been known to some defendants at the time of their trials, but has been careful to make the distinction between the opportunity defendants had to notice the fact of a discrepancy and raise the issue, and not knowing the reason why it occurred. In *People v. Barnes,* No. 244590, 2004 WL 1121901 at *3 (Mich. App. Jan. 15, 2004) (unpublished), the court observed:

> We recognize that perhaps the alleged unconstitutional jury selection *process* could not have been specifically identified at the time of trial. *But, in light of the all-white jury, it was incumbent on defendant to make a timely challenge or raise an objection. A concern on defendant's part about the ratio makeup of the venire should have arisen, and a timely challenge may very well have led to discovery of possible problems in the selection process. . . . [B]ecause one of the elements is under-representation in a specific defendant's jury array or venire, defendant, when faced with an all-white jury, could have, minimally, raised an objection below.* (emphasis added).

In the *Amadeo* case, unlike the present case and the situation in *Barnes,* simply viewing the array would not have alerted Amadeo to the discrepancy, since the representation of blacks on the venire was approximately 50%.[6] *Amadeo v. Kemp,* 816 F.2d 1503, 1506. This was because "the discriminatory scheme was designed to make detection by defendants nearly impossible. The jury pool appeared to be fairly integrated." (Emphasis added.) *Id.* at 1509, 1511. Since Amadeo had no meaningful opportunity to object at voir dire, the Supreme Court, in this capital case, focused on whether he should have discovered, by the time of the voir dire, the "smoking gun" (or incriminating memo) which had been concealed by county officials. *Amadeo*

[6]The actual jury in the *Amadeo* case contained an even number of blacks and whites as well. *Id.*

*v. Zant, supra* at 223-4. Thus, *Amadeo v. Zant* provides no guidance in the present case,[7] nor are the Michigan cases contrary to the *Amadeo* holding.

Where it is apparent upon viewing the array that it does not represent a fair cross-section of the community, it is, of course, not necessary to know the reason why in order to object. Rather, it is by raising the question that a court has the opportunity to inquire and determine if there has been a constitutional violation. For the federal courts to ignore the established state requirement of a timely objection is not only an affront to the state courts, but it simply gives Petitioner (and presumably countless other unhappy defendants convicted in Kent County during this same period) a second bite at the apple, because of the possibility of a constitutional violation that could have been investigated at the time and was not.[8]

Petitioner has failed to demonstrate cause for his procedural default. As a result, this claim is procedurally barred on habeas review, as it must be.

The facts in *Smith,* 543 F.3d 326, are easily distinguished from those in this case. In *Smith,* the Sixth Circuit held that the petitioner's Sixth Amendment right to a trial by an impartial jury drawn from a fair cross-section of the community was violated when the underrepresentation of African Americans in a Kent County jury venire panel occurred as a result of systematic exclusion, due to circumstances unrelated to the present case. *Smith*, 543 F.3d at 345. Smith was

---

[7]There is no allegation of active concealment in this case by the Kent County officials. Even Petitioner contends only that a computer glitch in the Kent County Jury Management System caused the exclusion of minorities in the jury pool. (Pet'r's Br. in Supp. of Pet. at 38.)

[8]While it may not be determinative of this issue, the possibility of going back and redetermining the actual racial makeup of the jurors summoned during this period is probably not feasible. For example, the Kent County Circuit Court summoned 17,578 jurors in 2002, nearly 17% of which did not appear. 2002 Annual Report of the 17th Judicial Circuit Court at 18-19. This court is not aware of any attempt by the circuit court at that time to systematically collect or maintain the race of each juror summoned, whether they appeared or not. At best, the court would probably be left with statistical conjecture. This simply reinforces the importance of the state rule on timely objections.

tried in 1993, when Kent County assigned jurors to district court panels prior to assigning jurors to circuit court panels. *Id.* at 331-32. Kent County also excused jury duty absences for several social and economic reasons such as lack of transportation, child care or inability to take time off from work. *Id.* at 332, 340. Smith, an African American, argued that both of those practices resulted in the underrepresentation of African Americans on the Kent County venire panels. *Id.* at 339. The practice at issue in *Smith* ended in 1993. Petitioner's trial occurred almost ten years later, in 2002, and involved a completely different problem: a computer glitch in the Kent County Jury Management System that purportedly affected the number of minorities in the jury pool by overlooking certain zip codes. (Pet'r's Br. in Supp. of Pet. at 38.)

Further, in stark contrast to the present case, Smith properly objected to the composition of the jury venire panel and petit jury prior to the jury being sworn. *Smith*, 543 F.3d at 330. After denying Smith's request, the trial court found that "there's nothing to indicate to me that . . . the manner of selecting jurors is anything other than impartial and that there's been any type of subjective selection of jurors to create a problem in terms of representation." *Id.* Because the issue was properly preserved, the habeas court did not need to address whether Smith had procedurally defaulted his claim. The Sixth Circuit, therefore, was able to address the merits of Smith's claim. Here, Petitioner never objected to the composition of the jury venire panel, and his claim is procedurally defaulted on habeas review. This Court therefore need not address the merits of Petitioner's claim.

**Recommended Disposition**

For the foregoing reasons, I respectfully recommend that the habeas corpus petition be denied.

Dated: February 27, 2009

/s/ Hugh W. Brenneman, Jr
HUGH W. BRENNEMAN, JR.
United States Magistrate Judge

**NOTICE TO PARTIES**

Any objections to this Report and Recommendation must be filed and served within eleven (11) 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 objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).

# A-10. Order Dismissing Report and Recommendation

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARL BURNIE WELLBORN,

Petitioner,

v.

MARY BERGHUIS,

Respondent.
_____/

CASE NO. 1:05-CV-346

HON. ROBERT J. JONKER

**ORDER**

This matter is before the Court on the Report and Recommendation of the Magistrate Judge (docket # 32) and Petitioner's Objections to the Report and Recommendation (docket # 35). Since the date of the Report and Recommendation and Objections, the Sixth Circuit has issued new authority that appears to bear directly on the issues in this case. *See Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008). This new authority should be considered before any judgment enters in the case. Accordingly, **IT IS ORDERED**: the matter is referred again to the Magistrate Judge for further briefing and other proceedings as appropriate in light of *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008). The existing Report and Recommendation and the Plaintiff's objections to it, are DISMISSED as moot in light of an anticipated new Report and Recommendation including analysis of the new appellate authority.

Dated: February 6, 2009

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE

# A-11. Report and Recommendation

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

CARL BURNIE WELLBORN,

Petitioner,

v.

MARY BERGHUIS,

Respondent.

Case No. 1:05-cv-346

Honorable Robert J. Jonker

**REPORT AND RECOMMENDATION**

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254. After a jury trial, Petitioner was convicted of one count of first-degree criminal sexual conduct (CSC), MICH. COMP. LAWS § 750.520b(1)(b), and two counts of second-degree CSC, MICH. COMP. LAWS § 750.520c(1)(a) and (b), in the Kent County Circuit Court. On May 13, 2002, the Kent County Circuit Court sentenced Petitioner to ten to thirty years' imprisonment for the first-degree CSC conviction and ten to fifteen years' imprisonment for each of the second-degree CSC convictions. In his *pro se* petition, Petitioner raises the following grounds for habeas corpus relief:

I. WHETHER PETITIONER WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FOREWENT THE OPPORTUNITY TO INTRODUCE EVIDENCE OF A COMPLAINANT'S PRIOR FALSE ALLEGATIONS OF SEXUAL ABUSE WHICH RESULTED IN THE PETITIONER'S ACQUITTAL, AND WHERE COUNSEL AGREED THAT THE ACQUITTAL WAS INADMISSIBLE?

A. WAS PETITIONER'S ACQUITTAL OF THE COMPLAINANT'S ALLEGATIONS IN THE MONTCALM COUNTY CASE ADMISSIBLE AS EVIDENCE OF PRIOR FALSE ALLEGATIONS OF SEXUAL ABUSE, IN CONJUNCTION WITH THE SIXTH

AMENDMENT CONFRONTATION CLAUSE AND THE FOURTEENTH DUE PROCESS CLAUSE RIGHT TO PRESENT A COMPLETE DEFENSE.

B. WAS PETITIONER'S TRIAL COUNSEL'S CONCESSION THAT THE PRIOR ACQUITTAL WAS NOT ADMISSIBLE, A DEPRIVATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN CONJUNCTION WITH THE SIXTH AMENDMENT CONFRONTATION CLAUSE AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSE RIGHT TO PRESENT A COMPLETE DEFENSE.

II. WHETHER PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A JURY DRAWN FROM A VENIRE REPRESENTATIVE OF A FAIR CROSS-SECTION OF THE COMMUNITY WHERE KENT COUNTY HAS PUBLICLY ACKNOWLEDGED THAT DUE TO A COMPUTER ERROR, NEARLY SEVENTY-FIVE PERCENT OF THE COUNTY'S ELIGIBLE JURORS WERE BEING EXCLUDED IN SUCH A WAY AS TO UNDER-REPRESENT AFRICAN-AMERICANS AND OTHER MINORITIES?

(Pet'r's Br. in Supp. of Pet., vi, docket #2.) Respondent filed an answer to the petition (docket #12) stating that Petitioner's grounds for habeas relief should be denied because they are without merit or procedurally defaulted. Upon review and applying the Antiterrorism and Effective Death Penalty Act, PUB. L. 104-132, 110 STAT. 1214 (AEDPA) standards, I find that Petitioner's grounds for habeas corpus relief are without merit or procedurally defaulted. Accordingly, I recommend that the petition be denied.

## Procedural History

### A. Trial Court Proceedings

The state prosecution arose from Petitioner's alleged sexual relationship with two young step-granddaughters, Alicia Faunce and Clorissa Rolfe, while Petitioner lived in Kent County. Petitioner was charged with two counts of first-degree CSC for sexual penetration with Alicia

Faunce and two counts of second-degree CSC, one count for sexual contact with Alicia Faunce and one count for sexual contact with Clorissa Rolfe.[1] (Tr. V, 99-105.) On March 19, 21, 22, 25, 26 and 27, 2002, the Kent County Circuit Court tried Petitioner before a jury.

Alicia Faunce, Petitioner's step-granddaughter, testified first for the prosecution. (Tr. II, 30, 33.) At the time of her testimony, Alicia was sixteen years old and in tenth grade. (Tr. II, 30-31.) Alicia's mother and step-father are Lisa and Todd Thompson. (Tr. II, 32.) Alicia testified that Petitioner lived with her family on two separate occasions, in Virginia and in Michigan. (Tr. II, 34-35.) Alicia was five years old when she lived in Virginia. (Tr. II, 35.) She stated that Petitioner started doing "sexual things" to her in Virginia. (Tr. II, 35.) The first time Petitioner ejaculated on Alicia in the middle of the night. (Tr. II, 35-36.) She did not tell anyone of that incident. (Tr. II, 36.)

Alicia later moved with her family to Michigan and eventually settled in Montcalm County. (Tr. II, 36-37.) In 1998, Petitioner and Alicia's grandmother, moved in with Alicia's family in Montcalm County. (Tr. II, 38.) As many as three or four times a week between May and September 1998, Petitioner came into Alicia's bedroom at night, kissed her passionately with his tongue, inserted his fingers in her vagina, and placed his penis in her mouth. (Tr. II, 38-40, 87.) Several times, Alicia tried to scream but Petitioner covered her mouth, laid on her or hit her so she would be quiet. (Tr. II, 40, 53-56.) Petitioner also choked her. (Tr. II, 56-57.) Alicia did not tell

[1]Transcripts from the trial will be numbered I through VI as follows:
Transcript of March 19, 2002, vol. I, docket #17 (Tr. I);
Transcript of March 21, 2002, vol. II, docket #18 (Tr. II);
Transcript of March 22, 2002, vol. III, docket #19 (Tr. III);
Transcript of March 25, 2002, vol. IV, docket #20 (Tr. IV);
Transcript of March 26, 2002, vol. V, docket #28 (Tr. V); and
Transcript of March 27, 2002, vol. VI, docket #21 (Tr. VI).

anyone of the sexual contact because Petitioner threatened that he would harm her or her family. (Tr. II, 40-41, 56.) Petitioner and Alicia's grandmother eventually moved to a house in Kent County. (Tr. II, 41-42.)

Alicia visited her grandmother and Petitioner at their new residence in Kent County because she missed her grandmother. (Tr. II, 42.) She also spent the night at Petitioner's house. (Tr. II, 42.) Alicia testified that Petitioner put his fingers in her vagina, his penis in her mouth, and his tongue in her vagina on several occasions. (Tr. II, 42-44.) Most of the sexual encounters occurred in the computer room of Petitioner's home. (Tr. II, 43.) The first encounter Alicia remembered in the computer room was when Petitioner kissed her and put his fingers in her vagina. (Tr. II, 44.) During those times, Alicia's grandmother was busy with the other children or she was not home. (Tr. II, 43.) Alicia tried to scream, but she could not. (Tr. II, 43.) She also tried to stop Petitioner. (Tr. II, 44.)

Petitioner put his penis in Alicia's mouth. (Tr. II, 44.) Alicia testified, however, that Petitioner put his penis in her mouth at Alicia's house in Montcalm County rather than Petitioner's house in Kent County. (Tr. II, 37, 42, 44.) She was not sure if that happened at Petitioner's house. (Tr. II, 44.) Alicia also played with Petitioner's penis with her hands until he was ready to ejaculate. (Tr. II, 45.) Petitioner would then ejaculate in the bathroom. (Tr. II, 45.) In addition, Petitioner initiated phone sex with Alicia on two or three occasions. (Tr. II, 80-81.) Petitioner would ask Alicia what she was wearing and if she was going to come over so he could fool around with her. (Tr. II, 81.)

In 1998, Alicia told her mother that she did not feel comfortable around Petitioner but did not go into any details. (Tr. II, 46-47, 81-83.) Alicia did not tell her mother about

Petitioner's actions because she was scared. (Tr. II, 47.) Alicia, however, said that Petitioner threatened to hurt her and her family. (Tr, II, 83-84.) She did not want anything to happen to her or her family. (Tr. II, 47.) When her mother asked Alicia if she wanted to go to the police, Alicia answered "no." (Tr. II, 47, 84-85.) Alicia thought Petitioner would stop because he was moving out of their house. (Tr. II, 85.)

Before approaching her parents a second time, Alicia talked to her friend Renee about Petitioner's sexual advances. (Tr. II, 48-49.) Renee told Alicia that she would go to the police if Alicia did not do something. (Tr. II, 48.) Alicia finally disclosed everything to her parents. (Tr. II, 48-49.) Her parents then called the police. (Tr. II, 49.)

The police conducted investigations in Montcalm and Kent Counties. (Tr. II, 49.) In accordance with those investigations, Alicia received a physical exam. (Tr. II, 49-50.) The physical exam did not reveal any genital warts on Alicia but Alicia was aware that her cousin, Ann Marie Rolfe, had genital warts. (Tr. II, 59.) Alicia's mother mentioned that Ann Marie could have received the genital warts from Petitioner because he used to have genital warts. (Tr. II, 59-60, 65.) Alicia's mother and aunt, Deana Rolfe, confided in Alicia that Petitioner tried sexually assaulting them when they were younger. (Tr. II, 62-65, 161-62, 164.) Alicia's mother also told her that Petitioner raped some other girls in Virginia. (Tr. II, 65-66.) Alicia later learned that Petitioner did not rape anyone in Virginia. (Tr. II, 67-68.) Alicia did not ask her mother why she lied about the Virginia incident. (Tr. II, 68.)

After 1997, Alicia and her cousins developed a buddy system when they went to Petitioner's house because they felt uncomfortable. (Tr. II, 75.) However, the system did not work as the girls often became separated at Petitioner's house. (Tr. II, 75-76.)

Alicia spoke with her cousin, Ann Marie Rolfe, regarding the sexual abuse. (Tr. II, 76-77.) Alicia told Ann Marie that Petitioner had been touching her. (Tr. II, 77.) When Alicia asked Ann Marie where Petitioner touched her, Ann Marie pointed to her vagina. (Tr. II, 77-78.) Alicia talked to Ann Marie about the sexual abuse before the police interviewed her. (Tr. II, 77-78.) When Alicia approached another cousin, Clorissa Rolfe, about Petitioner, Clorissa refused to talk about it. (Tr. II, 78-79.) Clorissa just started to cry. (Tr. II, 79.)

Clorissa Rolfe, Petitioner's step-granddaughter, testified that she was thirteen and in the seventh grade at the time of the trial. (Tr. II, 92, 94, 120.) Clorissa lived with Petitioner in Virginia for a few months when she was six years old. (Tr. II, 95, 121-22.) At that time, Petitioner would try to put his tongue in Clorissa's mouth and he flashed her. (Tr. II, 97.) Petitioner's sexual advances occurred no more than ten times in Virginia. (Tr. II, 123.)

Clorissa's family eventually relocated to Michigan. (Tr. II, 97.) Petitioner also moved to Michigan but lived with the family of Clorissa's aunt, Lisa Thompson. (Tr. II, 98.) While Petitioner was living with Clorissa's aunt, he did not make any sexual advances toward Clorissa. (Tr. II, 98.) When he moved to Kent County, however, Petitioner would try to French kiss Clorissa, reach down her pants and touch her breasts. (Tr. II, 96, 100-02.) Petitioner only tried to reach down her pants once. (Tr. II, 101-02.) On that occasion, Clorissa told Petitioner no and grabbed his hand. (Tr. II, 101.) While Clorissa was in the computer room at Petitioner's house, Petitioner also tried to touch her breasts. (Tr. II, 102.) Clorissa estimated that Petitioner attempted to sexually assault her on less than ten occasions. (Tr. II, 102.) Clorissa never reported any of the sexual advances because she was afraid that no one would believe her. (Tr. II, 102-03.)

Around 1998 or 1999, Clorissa's aunt and uncle asked Clorissa if Petitioner sexually assaulted her. (Tr. II, 103, 107-08.) Clorissa lied and replied no. (Tr. II, 104, 109, 111.) In 2000, Clorissa finally spoke up when she learned that Petitioner had been touching her younger sister, Ann Marie Rolfe. (Tr. II, 103, 122.) Clorissa's family then went to the police. (Tr. I, 104.) Clorissa also participated in a physical exam. (Tr. II, 105.)

Ann Marie Rolfe, Petitioner's step-granddaughter, testified that she was nine years old and in the third grade at the time of the trial. (Tr. II, 125-26, 131.) Ann Marie stated that Petitioner would touch her "private[s]" while in an upstairs room. (Tr. II, 135-38.) During her testimony, Ann Marie received assistance from a therapist because she has a speech impediment. (Tr. II, 138-39.) Petitioner would touch her underneath her clothes. (Tr. II, 140.)

Lisa Thompson, Petitioner's step-daughter, testified for the prosecution. (Tr. II, 149-50.) Ms. Thompson is Alicia Faunce's mother and Clorissa and Ann Marie Rolfe's aunt. (Tr. II, 150.) Petitioner lived with Ms. Thompson's family in Virginia for five to six months, (Tr. II, 151-52), and in Montcalm County, Michigan, for almost a year, (Tr. II, 153-54). At one point, Ms. Thompson's daughter, Alicia, came to her and stated that she did not want to spend so much time with Petitioner and she did not like sitting on his lap. (Tr. II, 155.) Ms. Thompson attributed the conversation to her daughter being a teenager. (Tr. II, 155.) At that time, Petitioner mentioned that Alicia was being rude and ignoring him. (Tr. II, 155-56, 176-77.) Afterward, Ms. Thompson noticed that Alicia was very distant with Petitioner. (Tr. II, 156.) Alicia started to keep to herself, and she experienced headaches and anxiety attacks. (Tr. II, 160.) Alicia also requested a lock to be put on her bedroom door but Petitioner "had a fit." (Tr. II, 156.)

After this case came out, Ms. Thompson talked with Alicia about Petitioner's sexual advances toward her when Ms. Thompson was sixteen years old. (Tr. II, 161-62.) Ms. Thompson also clarified that the alleged rape of a minor by Petitioner occurred in Michigan rather than Virginia. (Tr. II, 162.) Alicia must have overheard Ms. Thompson talking with her sister about the rape because Ms. Thompson did not discuss it with Alicia. (Tr. II, 162-63.)

After talking with a friend and counselor, Alicia approached her step-father, and then Ms. Thompson, to talk about Petitioner's actions. (Tr. II, 158-59.) Upon speaking with Alicia, Ms. Thompson called her sister, Deana Rolfe, at work because Clorissa was also involved. (Tr. II, 159.) Deana came to Ms. Thompson's house to discuss the allegations. (Tr. II, 159.) Ms. Thompson then called 911. (Tr. II, 159-60.)

On cross-examination, Ms. Thompson testified that she did not remember Alicia telling her that Petitioner threatened Alicia. (Tr. II, 168.) In 1998, Alicia only mentioned that she felt uncomfortable around Petitioner to Ms. Thompson. (Tr. II, 168-69.) Ms. Thompson also approached her niece, Clorissa Rolfe, to see if she had any problems with Petitioner. (Tr. II, 170-71.) Clorissa answered "[n]o, I don't want to talk about it." (Tr. II, 172.)

Dr. Vincent Palusci testified as an expert in pediatrics. (Tr. III, 3, 7-8.) On March 22, 2001, Dr. Palusci performed a genital exam and a medical evaluation of Alicia Faunce. (Tr. III, 10, 15.) Alicia had been referred to Dr. Palusci for a medical evaluation of digital and oral genital contact. (Tr. III, 11.) While Dr. Palusci found some redness, irritation and evidence of poor hygiene in Alicia's genital exam, he did not find any injuries, cuts, or bruises. (Tr. III, 13-15.) Dr. Palusci also obtained a laboratory specimen from Alicia's vagina. (Tr. III, 15.) The laboratory results did not reveal any sexually transmitted diseases. (Tr. III, 16.) Dr. Palusci then examined Clorissa Rolfe

for digital genital contact but did not find any injuries. (Tr. III, 17, 19.) He did not obtain a laboratory specimen from Clorissa because Clorissa recently underwent a pap smear. (Tr. III, 19-20.) Finally, Dr. Palusci examined Ann Marie Rolfe for digital genital contact on April 5, 2001. (Tr. III, 20-22.) He found genital warts near Ann Marie's urethra. (Tr. III, 22.) Genital warts can be sexually transmitted. (Tr. III, 22.) For genital warts to be transmitted, the wart tissue has to be directly transferred to the infected area by contact. (Tr. III, 32, 47.) However, Dr. Palusci did not know the source of the contact. (Tr. III, 32-33.) No one mentioned that Petitioner had a history of genital warts to Dr. Palusci. (Tr. III, 34-36.) Dr. Palusci referred Alicia, Clorissa and Ann Marie to counseling. (Tr. III, 17, 20, 23-24.) Dr. Palusci testified that it is not typical to find scarring or substantial injuries from digital or oral genital contact especially when there has been a significant delay in time. (Tr. III, 24, 47-48.)

Deana Rolfe, Petitioner's step-daughter, testified that Clorissa and Ann Marie Rolfe are her daughters. (Tr. III, 48-49.) Deana's family lived with Petitioner in Virginia. (Tr. III, 50.) When Deana's family returned to Michigan, she first lived with the family of her sister, Lisa Thompson. (Tr. III, 51.) Petitioner was not living at Ms. Thompson's house at that time. (Tr. III, 51.)

In March 2001, Ms. Thompson called Deana at work to go home. (Tr. III, 53-54.) When she arrived home, Deana asked Clorissa if Petitioner ever touched her. (Tr. III, 54-56.) Clorissa became very upset and cried. (Tr. III, 56.) Soon after, Ms. Thompson came to Deana's home to discuss the allegations of sexual abuse by Petitioner. (Tr. III, 56.) They called the police. (Tr. III, 56-57.) Deana had noticed that Clorissa would not go to Petitioner's house alone. (Tr. III, 57-58.) She also found Clorissa to be depressed, quiet and complained of stomach problems. (Tr.

III, 58.) Deana testified that she never told Alicia Faunce that Petitioner sexually assaulted her in Virginia. (Tr. III, 67-68.)

Renee Sattler testified that she played volleyball with Alicia Faunce at Central Montcalm High School. (Tr. III, 95-96.) Around January, she talked with Alicia on instant messenger. (Tr. III, 98, 106.) Alicia stated that Petitioner sexually assaulted her. (Tr. III, 102.) Upon receiving that information, Ms. Sattler told Alicia that she had to speak with her parents. (Tr. III, 103.) Ms. Sattler gave Alicia one week to talk with her parents. (Tr. III, 103.) When Alicia did not approach her parents within one week, Ms. Sattler met with the school counselor, and the police were eventually called. (Tr. III, 103-04.) Alicia also gave Ms. Sattler a handwritten letter (Tr. III, 108), but requested it back to give to Child Protective Services (Tr. III, 109-10). The letter mentioned all of the instances that Petitioner molested Alicia. (Tr. III, 110-11.) "It talked about him masturbating in front of her, him going inside of her, making her give him oral sex, him fondling her, feeling her pretty much up." (Tr. III, 111.) The letter implied that Petitioner put his penis inside her vagina on one occasion. (Tr. III, 111-13.)

Detective Diane Kik testified that she works as a police officer in the Kent County Sheriff's Department. (Tr. III, 113-14.) On March 8, Detective Kik met with Lisa Thompson and Deana Rolfe, and then Alicia Faunce, and Clorissa and Ann Marie Rolfe. (Tr. III, 115-16.) During Alicia's meeting, Alicia mentioned that she told Jena Emma first about the sexual abuse rather than Renee Sattler. (Tr. III, 123.) Alicia also told Detective Kik that Petitioner previously molested a girl and the girl's father burned down a house, but she did not indicate where that occurred. (Tr. III, 120-22.) Detective Kik also interviewed Ann Marie but she denied being touched at all by

Petitioner, including hugs and kisses. (Tr. III, 129-30, 132, 147.) Ann Marie's mother attended the interview because of Ann Marie's speech impediment. (Tr. III, 117, 133.)

Tom Cottrell testified as the Program Director of the Child Sexual Abuse Treatment Program at the YWCA. (Tr. IV, 3.) The Child Sexual Abuse Treatment Program provides counseling to families of sexual abuse. (Tr. IV, 4.) He testified as an expert in the field of "exposure to sexual assault victims." (Tr. IV, 7.) Mr. Cottrell testified that eighty percent of the cases of sexual abuse in a family do not have immediate disclosure. (Tr. IV, 10.) The disclosure time can run from a matter of weeks to thirty or forty years. (Tr. IV, 10.) A sexual abuse victim may not want to disclose due to fear, loyalties to the offender, or loyalties to other family members. (Tr. IV, 10-11.) Disclosure may occur when a victim finds that a sibling was also abused. (Tr. IV, 15.) Mr. Cottrell noted that if a child hears that someone raped another person or somebody has a sexually transmitted disease, the child may not necessarily make a false accusation. (Tr. IV, 28-29.) Any child who has been sexually abused is confused about what is happening to them. (Tr. IV, 29.) At the conclusion of Mr. Cottrell's testimony, the prosecution rested. (Tr. IV, 30.)

Petitioner testified in his defense. (Tr. IV, 31.) Petitioner is married to Lee Ann Wellborn and has two step-daughters, Lisa Thompson and Deana Rolfe, and three step-granddaughters, Alicia Faunce, Clorissa Rolfe and Ann Marie Rolfe. (Tr. IV, 32-33.) Petitioner denied sexually assaulting Lisa Thompson, Alicia Faunce, and Clorissa and Ann Marie Rolfe. (Tr. IV, 35-37, 53.) He also stated that he never raped a girl in Virginia or had his house burned down as a form of revenge. (Tr. IV, 37, 40-41.) Petitioner claims that the allegations of sexual assault are a result of Ms. Wellborn's ex-husband attempting to re-enter their lives after fifteen years. (Tr. IV, 37-38.) In 2000, Petitioner and his wife refused to spend the holidays with their daughters if their

biological father was present. (Tr. IV, 38-39.) This upset Ms. Thompson, who Petitioner described as a "control freak." (Tr. IV, 38.) Petitioner alleges that Ms. Thompson controls the family through threats, stealing and conning people. (Tr. IV, 38, 61-62.) Before Christmas 2000, Ms. Thompson and Deana Rolfe also approached Ms. Wellborn about leaving Petitioner because he allegedly abused Ms. Wellborn. (Tr. IV, 39-40.)

Petitioner testified that he does not have genital warts. (Tr. IV, 41.) He also denied placing his elbow on Alicia's neck or throat to choke her so she would not scream. (Tr. IV, 44.) Petitioner never placed a hand on any of his step-granddaughters, even to discipline them. (Tr. IV, 45-47.) In 1998, Ms. Thompson and Deana Rolfe did not approach Petitioner to say that Alicia or Clorissa was uncomfortable around him. (Tr. IV, 51-52.) Petitioner stated that all of the allegations were a bunch of lies and everyone, the victims, the prosecutors, and the detectives, were trying to get him. (Tr. IV, 59-60.)

During cross-examination, Petitioner testified that he won the criminal sexual conduct case brought against him in Montcalm County. (Tr. IV, 60.) Petitioner also stated that Alicia was the only step-granddaughter to testify in the Montcalm County case. (Tr. IV, 60-61.) At the Montcalm County hearing, Petitioner never mentioned any problems with Ms. Thompson. (Tr. IV, 67-69.)

Lee Ann Wellborn, Petitioner's wife, testified for the defense. (Tr. IV, 72-73.) Ms. Wellborn stated that she never saw Petitioner discipline Alicia Faunce, Clorissa Rolfe or Ann Marie Rolfe. (Tr. IV, 75.) In November 2000, Ms. Wellborn called the police after an argument with Petitioner. (Tr. IV, 76-79.) Ms. Wellborn testified that Ms. Thompson requested that she call the

police. (Tr. IV, 78.) Ms. Thompson and Deana Rolfe were both upset when Ms. Wellborn would not leave Petitioner after the argument. (Tr. IV, 80.)

Ms. Wellborn did not notice any bruises or scrapes on Alicia, Clorissa or Ann Marie when they spent the night at their house. (Tr. IV, 81-82.) She never heard any screams in the middle of the night or any cries for help from any of her granddaughters. (Tr. IV, 81.) Alicia, Clorissa and Ann Marie never indicated that they were scared of Petitioner. (Tr. IV, 82.) Ms. Wellborn also described her daughter, Ms. Thompson, as controlling. (Tr. IV, 84.)

Ms. Wellborn met with Alicia and Clorissa at their school. (Tr. IV, 86-88.) Alicia mentioned to Ms. Wellborn that she heard Petitioner raped a girl in Virginia from her mother, Ms. Thompson, and Alicia did not want that to happen to her, Clorissa or Ann Marie. (Tr. IV, 86-87.) When Ms. Wellborn spoke with Clorissa at school, Clorissa screamed that she wanted it to end. (Tr. IV, 88-89.) At that time, school officials ended the conversation. (Tr. IV, 89.)

Ms. Wellborn testified that she does not have genital warts. (Tr. IV, 91.) Ms. Wellborn also mentioned that she no longer has any contact with her daughters or granddaughters. (Tr. IV, 93.)

On rebuttal, the prosecutor called Alicia Faunce to the stand. (Tr. IV, 95.) Alicia testified about the incident at her high school with her grandmother, Lee Ann Wellborn. (Tr. IV, 96.) When Ms. Wellborn visited Alicia at school, she accused Alicia of fabricating the sexual abuse charges and called her a slut. (Tr. IV, 96-97.) Ms. Wellborn also pulled Clorissa from her class. (Tr. IV, 98.) Clorissa started crying and saying that Ms. Wellborn could not tell her that it never happened. (Tr. IV, 98.) The school counselor eventually escorted Ms. Wellborn out of the building. (Tr. IV, 98-99.)

The prosecutor also called Clorissa Rolfe on rebuttal. (Tr. IV, 104.) Clorissa testified regarding the incident at her school. (Tr. IV, 105.) She talked to her grandmother and Alicia in the high school counseling office. (Tr. IV, 105.) Clorissa mentioned that her grandmother accused her of lying about the whole thing and called both Alicia and her, "little bitches." (Tr. IV, 105, 107.)

Detective Diane Kik testified on rebuttal. (Tr. IV, 111.) Detective Kik interviewed Petitioner on May 27, 2001 and told him about the sexual abuse allegations. (Tr. IV, 111-13.) Petitioner stated that Alicia and Clorissa were lying. (Tr. IV, 113.) Detective Kik asked Petitioner whether he touched the girls. (Tr. IV, 114.) Petitioner denied touching the girls but mentioned that he could have touched them by accident. (Tr. IV, 114, 118.) While Petitioner mentioned that Ms. Thompson was controlling and angry with him, he did not say anything about Ms. Thompson's or Deana Rolfe's biological father being involved. (Tr. IV, 114-15.) When asked why Alicia would make this up, Petitioner blamed the allegations on Ms. Thompson's controlling behavior. (Tr. IV, 120.)

After deliberating, the jury returned a verdict of guilty of one count of first-degree CSC and two counts of second-degree CSC.[2] (Tr. VI, 6.)

**B. Direct Appeal**

Petitioner appealed as of right to the Michigan Court of Appeals. His brief raised all of the issues in his application for habeas corpus relief. (*See* Def.-Appellant's Br. on Appeal, docket #23.) Petitioner filed a motion to remand on the issue of the jury venire, which was denied by the

[2]At the conclusion of the trial, the defense moved for a directed verdict on all charges. (Tr. V, 3.) The Kent County Circuit Court granted the motion as to one count of first-degree CSC of sexual penetration, to wit, penis in mouth with Alicia Faunce, because Alicia was not certain whether the sexual act occurred in Montcalm County or Kent County. (Tr. V, 5, 100, 110.)

Michigan Court of Appeals on March 13, 2003 because "the issue that defendant attempts to raise has been forfeited by the failure of defendant to raise it before the jury was sworn." (Mar. 13, 2003 Mich. Ct. App. Order, docket #23.) Petitioner then filed a motion for reconsideration. The Michigan Court of Appeals denied the motion on April 21, 2003. (Apr. 21, 2003 Mich. Ct. App. Order, docket #23.) By unpublished opinion dated December 16, 2003, the Michigan Court of Appeals rejected all appellate arguments and affirmed Petitioner's convictions and sentences. (*See* Dec. 16, 2003 Mich. Ct. App. Op. (MCOA Op.), docket #23.)

Petitioner filed a *pro per* application for leave to appeal to the Michigan Supreme Court. Petitioner raised the same claims rejected by the Michigan Court of Appeals. By order entered June 30, 2004, the Michigan Supreme Court denied his application for leave to appeal because it was not persuaded that the questions presented should be reviewed. (*See* June 30, 2004 Mich. Order, docket #24.)

**Standard of Review**

This action is governed by the Antiterrorism and Effective Death Penalty Act, PUB. L. 104-132, 110 STAT. 1214 (AEDPA). *See Penry v. Johnson*, 532 U.S. 782, 792 (2001). 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). The AEDPA has "drastically changed" the nature of habeas review. *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). 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).

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*, 271 F.3d at 655. In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Bailey*, 271 F.3d at 655; *Harris v. Stovall*, 212 F.3d 940, 944 (6th Cir. 2000). "Yet, while the principles of 'clearly established law' are to be determined solely by resort to Supreme Court rulings, the decisions of lower federal courts may be instructive in assessing the reasonableness of a state court's resolution of an issue." *Stewart v. Erwin*, 503 F.3d 488, 493 (6th Cir. 2007). 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 [the petitioner's] conviction became final." *Onifer v. Tyszkiewicz*, 255 F.3d 313, 318 (6th Cir. 2001). A decision of the state court may only be overturned if (1) it applies a rule that contradicts the governing law set forth by the Supreme Court, (2) it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result; (3) it identifies the correct governing legal rule from the Supreme Court precedent but unreasonably applies it to the facts of the case; or (4) it either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend a principle to a context where it should apply. *Bailey*, 271 F.3d at 655 (citing *Williams*, 529 U.S. at 405-07); *see also Bell*, 535 U.S. at 694; *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003).

A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411; *accord Bell*, 535 U.S. at 699. Rather, the issue is whether the state court's application of clearly established federal law is "objectively unreasonable." *Williams*, 529 U.S. at 409.

Where the state court has not articulated its reasoning, the federal courts are obligated to conduct an independent review to determine if the state court's result is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented. *See Harris*, 212 F.3d at 943; *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003). Where the circumstances suggest that the state court actually considered the issue, the review is not *de novo*. *Onifer*, 255 F.3d at 316. The review remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA. *Harris*, 212 F.3d at 943. However, the Sixth Circuit recently has clarified that where the state court clearly did not address the merits of a claim, "there are simply no results, let alone reasoning, to which [the] court can defer." In such circumstances, the court conducts *de novo* review. *McKenzie*, 326 F.3d at 727 (limiting *Harris* to those circumstances in which a result exists to which the federal court may defer); *see also Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (reviewing habeas issue *de novo* where state courts had not reached the question); *Maples v. Stegall*, 340 F.3d 433, 437 (6th Cir. 2003) (recognizing that *Wiggins* established *de novo* standard of review for any claim that was not addressed by the state courts).

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*, 324 F.3d at 429; *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). Applying the foregoing standards under the AEDPA, I find that Petitioner is not entitled to relief.

## Discussion

### I. Ground I: Confrontation and Due Process Clauses and Ineffective Assistance of Counsel

Petitioner raised a compound claim in his first ground of habeas corpus relief based on the failure of the defense to introduce evidence in the Kent County trial of Petitioner's acquittal from a previous criminal sexual conduct trial in Montcalm County. Petitioner presented the issue as a claim under the Confrontation and Due Process Clauses and as several claims of ineffective assistance of counsel.

Petitioner was previously tried before a jury in Montcalm County Circuit Court on allegations of sexual abuse by Alicia Faunce. The Montcalm County jury acquitted Petitioner of all charges. Prior to the current trial, the prosecutor moved *in limine* in Kent County Circuit Court to exclude evidence of Petitioner's acquittal from his previous trial in Montcalm County. (Mar. 18, 2002 Pretrial Motions Transcript (Pretrial Mots. Tr.), 3-4; docket #16.) Petitioner's trial counsel agreed to refrain from introducing the acquittal in the present trial but requested to use the Montcalm County trial transcripts for impeachment purposes. (Pretrial Mots. Tr., 4.) The trial court held that the attorneys could reference the trial transcripts for impeachment purposes so long as the attorneys

referred to the Montcalm County trial as "a hearing in Montcalm." (Pretrial Mots. Tr., 11-12; Tr. V, 19.)

A. Confrontation and Due Process Clauses

Petitioner argues that his prior acquittal in Montcalm County Circuit Court should have been admissible as evidence of false allegations of sexual abuse under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. (Pet'r's Br. in Supp. of Pet., vi, docket #2.) While Petitioner raised those claims in his direct appeal, the Michigan Court of Appeals failed to address whether the exclusion of evidence of Petitioner's acquittal violated the Confrontation Clause or the Due Process Clause. When the state court clearly did not address the merits of the claim, the district court will apply *de novo* review. *See McKenzie,* 326 F.3d at 727; *Wiggins,* 539 U.S. at 534; *Maples*, 340 F.3d at 437.

The Supreme Court has determined that criminal defendants have the right to a "meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984). The right is derived from the Confrontation Clause of the Sixth Amendment and from the Due Process Clause of the Fourteenth Amendment. *See Chambers v. Mississippi,* 410 U.S. 284, 302 (1973); *Washington v. Texas,* 388 U.S. 14, 19 (1967) ("[j]ust as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process law."). The Supreme Court, however, repeatedly has recognized that the right to present a defense is subject to reasonable restrictions. *See United States v. Scheffer,* 523 U.S. 303, 308 (1998); *Taylor v. Illinois,* 484 U.S. 400, 410 (1988) (the Sixth Amendment does not confer on the accused an "unfettered right to offer testimony that is incompetent, privileged, or otherwise

inadmissible under standard rules of evidence"); *Rock v. Arkansas,* 483 U.S. 44, 55 (1987); *Chambers,* 410 U.S. at 295; *see also Wong v. Money,* 142 F.3d 313, 325 (6th Cir. 1998). Indeed, "[a] defendant's interest in presenting . . . evidence may thus bow to accommodate other legitimate interests in the criminal trial process." *Scheffer,* 523 U.S. at 308 (citations omitted) (internal quotations omitted).

Even assuming Petitioner's rights were infringed under the Confrontation Clause or Due Process Clause by the exclusion of the acquittal testimony, the trial court's error was harmless. Confrontation Clause and Due Process Clause errors are subject to harmless-error analysis. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 691 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Chapman v. California*, 386 U.S. 18, 21-22 (1967). On habeas review, a court must assess harmlessness under the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), regardless of whether the state appellate court recognized the error and reviewed it for harmlessness. *See Hargrave v. McKee*, 248 F. App'x 718, 728 (citing *Fry v. Pliler*, 127 S. Ct. 2321, 2328 (2007)); *see also Vasquez v. Jones*, 496 F.3d 564, 574-75 (6th Cir. 2007). The *Brecht* standard requires the Court to consider whether the constitutional error in the state criminal trial had a "substantial and injurious effect" on the result. If upon review of the entire record, the court is convinced that "the error did not influence the jury, or had but very slight effect," the conviction must stand. *O'Neal v. McAninch*, 513 U.S. 432, 437-38 (1995); *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). The alleged constitutional errors did not influence the jury or had a very slight effect on the jury because Petitioner still managed to introduce evidence of his acquittal during the Kent County trial, and the evidence overwhelmingly demonstrated that Petitioner was guilty.

During cross-examination by the prosecutor, Petitioner testified regarding his prior acquittal as follows:

Q So the four of us are trying to get you? Is there anybody else involved? What about Lisa's husband?

A Lisa's husband does what he's told.

Q He does what he's told? So just the four – what about the prosecutor, you know, up in Montcalm? She was – she was part of this conspiracy, too?

A **I won that case.**

Q But she's part of the conspiracy, correct?

A **Obviously, she tried to – tried me and lost.**

Q But that was a different case, right?

A Same people.

Q No. Because you just said the other two girls weren't up there. They didn't allege anything up in Montcalm –

A You just said they weren't, that we talked about –

Q Mr. – Mr. Wellborn, why don't you listen to my questions. You just said yourself that Alicia was the only one up in Montcalm, correct?

A Right. That was charging me.

Q The other two girls didn't testify up there, did they?

A No, they didn't.

(Tr. IV, 60-61) (emphasis added.) As a result, the evidence of Petitioner's acquittal was before the jury.

Moreover, Petitioner failed to show that any error was not harmless error, because the prosecution introduced overwhelming evidence of Petitioner's guilt. Alicia Faunce, Clorissa

Rolfe and Ann Marie Rolfe testified regarding several instances of sexual assault by Petitioner in Kent County. Alicia testified that Petitioner put his fingers in her vagina and his tongue in her vagina on several occasions. (Tr. II, 42-44.) Most of the sexual encounters occurred in the computer room of Petitioner's residence. (Tr. II, 43.) The first encounter Alicia remembered in the computer room was when Petitioner kissed her and put his fingers in her vagina. (Tr. II, 44.) At Petitioner's request, Alicia also used her hands to play with his penis. (Tr. II, 45.)

Clorissa testified that Petitioner would try to French kiss her, reach down her pants and touch her breasts. (Tr. II, 96, 100-02.) Petitioner, however, only tried to reach down her pants once. (Tr. II, 101-02.) Clorissa told him no and stopped his hand. (Tr. II, 101.) While Clorissa was in the computer room, Petitioner would also try to touch her breasts. (Tr. II, 102.) Clorissa estimated that Petitioner attempted to sexually assault her on less than ten occasions. (Tr. II, 102.)

Ann Marie testified that Petitioner would touch her "private[s]" while in an upstairs room. (Tr. II, 135-38.) Petitioner would touch her underneath her clothes. (Tr. II, 140.)

Upon review of the entire record, "without stripping the [allegedly] erroneous action from the whole," I find that any error by the trial court had, at best, only a "very slight effect" on the jury's determination of Petitioner's guilt or innocence in this case. *O'Neal*, 513 U.S. at 437-38; *Kotteakos*, 328 U.S. at 764-65. Therefore, Petitioner is not entitled to habeas relief on his constitutional claims under the Confrontation and Due Process Clauses.

B. Ineffective Assistance of Trial Counsel

In his first ground for habeas relief, Petitioner also argues that his trial counsel violated his Sixth Amendment right to the effective assistance of counsel: (a) by failing to introduce evidence of Petitioner's acquittal from his Montcalm County trial; and (b) by conceding that the

prior acquittal was not admissible as evidence in violation of state law and of Petitioner's rights under the Confrontation Clause and Due Process Clause. (Pet'r's Br. in Supp. of Pet., vi, docket #2.)

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. To establish a claim of ineffective assistance of counsel, the petitioner must prove: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced 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. The defendant bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *see also Nagi v. United States,* 90 F.3d 130, 134-35 (6th Cir. 1996) (holding that counsel's strategic decisions were hard to attack). The court must determine whether, in light of the circumstances as they existed at the time of counsel's actions, "the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. 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 defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694.

A claim of ineffective assistance of counsel presents a mixed question of law and fact. Accordingly, the Court must apply the unreasonable application prong of § 2254(d)(1). Under the "unreasonable application" standard, the state court identifies the correct governing legal rule

from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Wiggins v. Smith,* 539 U.S. 510, 520 (2003); *Williams,* 529 U.S. at 412-13; *Barnes v. Elo,* 339 F.3d 496, 501 (6th Cir. 2003).

1. **State Law Claims**

Petitioner asserts that his trial counsel violated his Sixth Amendment right to the effective assistance of counsel for failing to introduce evidence of his prior acquittal at trial and conceding that the prior acquittal was not admissible as evidence. Petitioner claims that the evidence would have shown prior false allegations of sexual abuse by Alicia Faunce, and, thus, was admissible under state law. The Michigan Court of Appeals addressed those evidentiary issues as follows:

> [Petitioner] first argues that he was deprived of his constitutional right to the effective assistance of counsel because trial counsel agreed with the prosecutor to exclude evidence of [Petitioner]'s acquittal in a Montcalm County case involving similar charges brought by one of the complainants in this case. Because [Petitioner] failed to move for a new trial or an evidentiary hearing regarding his ineffective assistance claim, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We find no merit to [Petitioner]'s argument.
>
> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984), on remand 737 F2d 894 (CA 11, 1984); *People v. Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001).
>
> No ineffective assistance is apparent from the record. Trial counsel's representation did not fall below an objective standard of reasonableness because his concession on the inadmissibility of the acquittal was consistent with the law. In *People v Bolden*, 98 Mich App 452; 296 NW2d 613 (1980), the defendant argued that the trial court erred in precluding the jury from knowing that he was acquitted of the charges that comprised the prior similar acts evidence. Relying on *People v Oliphant*, 399 Mich 472; 250 NW2d 443 (1976), the *Bolden* Court held that the trial court did not err in excluding evidence of the acquittal, reasoning as follows:

> We find this reasoning [that of *Oliphant* ] equally applicable to our consideration. The prosecutor must produce evidence sufficient to show that defendant "probably committed the other acts", *People v Cook*, 95 Mich App 645; 291 NW2d 152 (1980). If he or she can satisfy that burden, the jury should not be confused by the additional information of an acquittal which could mislead them into believing that the defendant absolutely did not commit the prior similar acts. The fact that another jury harbored a reasonable doubt as to defendant's guilt of the other offense does not negate the substantive value of the testimony to establish identity, scheme, plan, etc. in the case at bar. The issue should not be clouded by encouraging speculation regarding the verdict reached in a separate trial on a separate offense involving a different complainant. Defendant's rights were sufficiently protected by the trial court's limiting instructions concerning the purpose of similar acts testimony. [*Bolden, supra* at 461.] [FN1]

Moreover, while instructing the jury, the trial court said that it would not have admitted evidence of [Petitioner]'s acquittal even if the parties had not agreed to exclude it because the evidence was irrelevant. The trial court explained that there is no meaningful comparison between the two trials because there [we]re different juries, different prosecutors, and different accusations. [FN2] Because counsel is not required to advocate a meritless position, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), trial counsel's decision to forego mentioning the acquittal did not amount to objectively unreasonable assistance, let alone unreasonable assistance affecting the jury's verdict. We find no merit to [Petitioner]'s ineffective assistance of counsel claim.

FN1. Although a subsequent panel of this Court "expressed its support" for Judge Allen's partial dissent in *Bolden* on this issue, see *People v Nabers*, 103 Mich App 354, 364; 303 NW2d 205, *rev'd on other grounds*, 411 Mich 1046 (1981), that statement was dicta since it does not appear that either party raised as an issue in that case the admissibility of an acquittal. Furthermore, as was noted in *US v Gricco*, 277 F3d 339, 352-353 (CA 3, 2002), at least ten of the federal circuits (including the Sixth Circuit) have held that, except for purposes of determining whether the prosecution of a [Petitioner] is barred by double jeopardy or collateral estoppel, "evidence of prior acquittals is generally inadmissible." *Id.* at 352. That is so because judgments of acquittal "may not present a determination of innocence, but rather only a decision that the prosecution has not met its burden of proof beyond a reasonable doubt." *Id.*

FN2. The trial court instructed the jury in this manner because, during cross-examination, [Petitioner] testified that the victim had previously "tried me and lost."

(MCOA Op. at 1-2, docket #23.)

The Michigan Court of Appeals' conclusion was not an unreasonable application of *Strickland.* Before trial, the prosecutor moved *in limine* to exclude evidence of Petitioner's previous acquittal in Montcalm County Circuit Court. (Pretrial Mots. Tr., 3-4.) Petitioner's trial counsel agreed to exclude evidence of the acquittal as long as he could use certain testimony from the Montcalm County trial to impeach testimony in the present Kent County trial. (Pretrial Mots. Tr., 4.) The appellate court held that trial counsel's concession regarding the inadmissibility of Petitioner's acquittal was consistent with Michigan law; and, thus, counsel's representation did not fall below an objective standard of reasonableness. Counsel was not required to advocate a meritless position. (MCOA Op. at 1-2.) The state court's determination of admissibility of evidence under state law is not reviewable by this Court. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Defense counsel cannot be deemed deficient for failing to make a futile motion to admit evidence of Petitioner's acquittal. *See United States v. Sanders*, 404 F.3d 980, 986 (6th Cir. 2005) (counsel cannot be ineffective for failing to object to what was properly done); *Harris v. United States*, 204 F.3d 681, 683 (6th Cir. 2000) (failure by counsel to do something that would have been futile is not ineffective assistance); *United States v. Hanley*, 906 F.2d 1116, 1121 (6th Cir. 1990) (counsel not ineffective for failing to pursue motions that would have been futile); *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir.1994) ("[f]ailure to raise meritless objections is not ineffective lawyering; it is the very opposite."). Petitioner therefore failed to satisfy the performance prong of the *Strickland* standard regarding his claim of ineffective assistance of counsel based on state evidentiary law.

2. **Constitutional Law Claims**

Petitioner also argues that his trial counsel was ineffective under the Sixth Amendment for failing to introduce evidence of Petitioner's prior acquittal as evidence of prior false allegations of sexual abuse in violation of the Confrontation and the Due Process Clauses. (Pet'r's Br. in Supp. of Pet. at 28; docket #2.) The Michigan Court of Appeals failed to address whether the exclusion of the acquittal evidence by trial counsel violated Petitioner's Sixth Amendment right to the effective assistance of counsel. As stated above, the district court must apply *de novo* review. *See McKenzie,* 326 F.3d at 727; *Wiggins,* 539 U.S. at 534; *Maples*, 340 F.3d at 437.

The Court need not address whether counsel was deficient for failing to seek admission of the acquittal evidence under the Confrontation Clause or the Due Process Clause. When deciding ineffective-assistance claims, courts need not address both components of the inquiry 'if the defendant makes an insufficient showing on one.'" *Campbell v. United States*, 364 F.3d 727, 730 (6th Cir. 2004) (quoting *Strickland*, 466 U.S. at 697). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. Even if counsel's performance was found to be constitutionally deficient, Petitioner cannot demonstrate the necessary prejudice under the second *Strickland* prong. *See id.* at 694. Petitioner must prove that there exists a reasonable probability that, but for counsel's errors, the result of the trial would have been different to show that Petitioner had been prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. at 694. Reasonable probability is defined as a probability "sufficient to undermine confidence in the outcome." *Id.*

As stated in Section (I)(A), the alleged error by Petitioner's trial counsel did not prejudice Petitioner because he still managed to introduce evidence of his Montcalm County acquittal during the Kent County trial, and the evidence nevertheless overwhelmingly showed that Petitioner was guilty. Petitioner therefore fails to demonstrate a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. Accordingly, Petitioner is not entitled to habeas corpus relief on his claim that counsel was constitutionally ineffective for failing to introduce of Petitioner's acquittal in Montcalm County under the Confrontation and the Due Process Clauses.

**II. Jury Venire**

In his second habeas claim, Petitioner contends that he was denied his constitutional right to a jury drawn from a fair cross-section of the community. The Sixth Amendment guarantees a criminal defendant an impartial jury drawn from a fair cross-section of the community. *Duren v. Missouri*, 439 U.S. 357, 358-59 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 526-31 (1975). The petit jury does not have to mirror the community, but distinct groups cannot be systematically excluded from the venire. *See, United States v. Jackman,* 46 F.3d 1240, 1244 (2nd Cir., 1995).

Notwithstanding this right, the rule in Michigan has for some time been that a defendant can be precluded from raising the issue on appeal if he does not timely raise it at trial. In *People v. Carter*, 462 Mich. 206 (2000), the Michigan Supreme Court stated that a defendant cannot waive an objection to an issue at trial and then make a claim of error on appeal. In that instance, the court found that because the defendant's counsel had expressed satisfaction with the trial court's jury instructions, the defendant had waived the issue. *Id.*

To establish a *prima facie* violation of the fair cross-section requirement, Petitioner bore the burden of proving "that a distinctive group was under-represented in his venire or jury pool, and that the under-representation was the result of systematic exclusion of the group from the jury selection process." *People v. Smith,* 463 Mich. 199 (2000), citing *Duren v. Missouri, supra.*

Petitioner, a Caucasian, argues that systematic errors in the Kent County Jury Management System caused a disproportionately low number of jury notices to be sent to residences in zip codes with proportionally larger African-American and other minority populations. (Pet'r's Br. in Supp. of Pet. at 36, 42-43.) Relying mainly on newspaper articles, Petitioner argues in part that:

> In a story that first appeared in the July 30, 2002, Grand Rapids Press, Kent County officials conceded that their own review of their computer system revealed that "nearly seventy-five percent of the County's 454,000 eligible residents were excluded from potential jury pools since spring 2001", and that "[m]any blacks were excluded from the . . . jury pools due to a computer glitch that selected a majority of potential candidates from the suburbs." The chief judge of the Kent County Circuit Court, George Buth, was quoted as saying, "There has been a mistake - a big mistake." The article states that trouble-shooters detected the error in mid-July of 2002, and that the error had gone undetected for sixteen months. (Appendix E, page 1 of 4 of article of July 30, 2002 attached).

(Pet'r's Br. in Supp. of Pet. at 38.).

In Petitioner's case, jury selection occurred on March 19, 2002. (Pet'r's Br. in Supp. of Pet. at 36.) This would have been within the period during which the computer error purportedly occurred in the Kent County Jury Management System. Petitioner, however, did not challenge the jury array at trial. If he felt the jury venire looked too much like him, he did not say so. At the close of jury voir dire, Petitioner's counsel stated: "Your Honor, the defense is satisfied with the panel." (Tr. I, 169.) The jury was then empaneled and sworn. There were no objections regarding the

composition of the jury array at any time during the trial, much less the voir dire, and trial counsel's statement constitutes an express waiver of the issue.

Although this Court cannot discern the race of the individual members of the jury array from the trial record, because Petitioner did not preserve the issue, Petitioner now contends that "[o]ut of approximately 70 potential jurors available to serve that day, I saw only 2 African-Americans present. There were no African-American jurors or alternates on my jury." (App. J. to Pet'r's Br. in Supp. of Pet.; docket #2.) Petitioner's statement indicates he was well aware of the composition of the jury venire when he chose to accept the jury.

The Michigan Court of Appeals determined that Petitioner waived his challenge to the venire and jury selection process because his trial counsel expressed satisfaction with the jury's composition. (MCOA Op. at 2.) When a state-law default prevents further state consideration of a federal issue, the federal courts ordinarily are precluded from considering that issue on habeas corpus review. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991); *Engle v. Isaac*, 456 U.S. 107 (1982). A procedural default is "a critical failure to comply with state procedural law." *Trest v. Cain,* 522 U.S. 87, 89 (1997). It will bar consideration of the merits of a federal claim if the state rule is actually enforced and is an adequate and independent ground for the state court's decision. *Coleman v. Thompson,* 501 U.S. 722, 750 (1991); *Monzo v. Edwards,* 281 F.3d 568, 576 (6th Cir., 2002).

To determine whether a petitioner procedurally defaulted a federal claim in state court, the Court must consider whether: (1) the petitioner failed to comply with an applicable state procedural rule; (2) the last state court rendering judgment on the claim at issue actually enforced the state procedural rule so as to bar that claim; and (3) the state procedural default is an

"independent and adequate" state ground properly foreclosing federal habeas review of the federal constitutional claim. *See Hicks v. Straub,* 377 F.3d 538, 551 (6th Cir. 2004); *accord Lancaster*, 324 F.3d at 436-37; *Greer v. Mitchell*, 264 F.3d 663, 672 (6th Cir. 2001); *Buell v. Mitchell*, 274 F.3d 337, 348 (6th Cir. 2001).

A state law procedural rule is adequate and independent when it was "firmly established and regularly followed" at the time of the asserted procedural default. *Rogers v. Howes*, 144 F.3d 990, 992 (6th Cir. 1998) (citing *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)). To be timely under Michigan law, a challenge to the jury array must be made before the jury has been impaneled and sworn. It is clear that this rule was well-established at the time of Petitioner's trial. *See People v. McCrea*, 6 N.W.2d 489, 514 (Mich. 1942); *People v. Hubbard*, 552 N.W.2d 493, 497-8, 498 (Mich Ct. App. 1996) ("A challenge to the jury array is timely if it is made before the jury has been empaneled and sworn. . . an expression of satisfaction with a jury made at the close of voir dire examination waives a party's ability to challenge the composition of the jury thereafter empaneled and sworn."); *People v. Stephen*, 188 N.W.2d 105, 106 (Mich. Ct. App. 1971).

It is too late to raise the issue for the first time on appeal. *Id.* A rule designed to arm trial judges with the information needed to rule reliably "serves a governmental interest of undoubted legitimacy." *Lee v. Kemna*, 534 U.S. 362, 385 (2002). The trial court cannot address issues not brought to its attention. Contemporaneous objections allow the court to address the problem while something can be done to correct it. A person would not watch his home being built on a cement block foundation, only to demand upon completion of the house that poured concrete be used instead.

Furthermore, failing to address perceived problems when they can be corrected, is simply an attempt to get a second bite at the apple. A defendant should not be afforded the opportunity to sit quietly and obtain a verdict under one set of rules when he knows there is a problem, only to demand a new trial with different rules if he is found guilty. If there is a problem during trial, it is incumbent upon the party, if he is aware of that problem or would be with due diligence, to bring it to the court's attention.

Petitioner failed to meet his burden of proof with regard to systematic exclusion of jurors, and his belated attempt to offer inadmissible hearsay evidence in the form of newspaper articles does not change that fact.[3] Petitioner's failure to raise the issue in the trial court also left the appellate courts in this case with a record devoid of any competent evidence to consider in support of Petitioner's allegations. Consequently, the appellate courts had no means of conducting a meaningful review of his allegations on appeal. *See, People v. McKinney,* 258 Mich. App. 157, 161-2 (2003). Petitioner's failure to comply with the state's independent and adequate state procedural rule, i.e., making an objection to the jury array before the jury has been impaneled and sworn, caused Petitioner to default his claim in state court. *See Wainwright v. Sykes*, 433 U.S. 72, 86-88 (1977); *West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996).

If a petitioner procedurally defaulted his federal claim in state court, the petitioner must demonstrate either: (1) cause for his failure to comply with the state procedural rule and actual prejudice flowing from the violation of federal law alleged in his claim, or (2) that a lack of federal habeas review of the claim will result in a fundamental miscarriage of justice. *See House v. Bell*, 547 U.S. 518, 536-37 (2006); *Murray v. Carrier*, 477 U.S. 478, 495 (1986); *Hicks*, 377 F.3d at 551-

[3]Michigan appellate courts may not take judicial notice of newspaper articles as they constitute inadmissible hearsay. *See, Baker v. General Motors Corp.*, 420 Mich. 463 (1984).

52. The miscarriage-of-justice exception only can be met in an "extraordinary" case where a prisoner asserts a claim of actual innocence based upon new reliable evidence. *House*, 547 U.S. at 537. A habeas petitioner asserting a claim of actual innocence must establish that, in light of new evidence it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Petitioner has made no such claim or showing of actual innocence in this case.

To show cause sufficient to excuse a failure to raise claims on direct appeal, Petitioner must point to "some objective factor external to the defense" that prevented him from raising the issue in his first appeal. *Murray*, 477 U.S. at 488; *see McCleskey v. Zant*, 499 U.S. 467, 497 (1991). For cause, Petitioner argues that the factual basis for his claim was not reasonably available to counsel at the time of trial.

But, of course, it was. Simply seeing an array when the deficiency is apparent provides adequate notice. In light of Petitioner's purported all-white jury, and 70-person venire panel with only two African-Americans, of which Petitioner has admitted he was well aware, Petitioner and his counsel were placed on notice of the basis of his claim as soon as they viewed the jury array.

In *Hubbard, supra* at 498, the court pointed out the significance of viewing the array, holding that the defendant was not required to challenge the juror allocation process "before defendant actually viewed the array." Once the defendant viewed the array he raised his objection. The difference between *Hubbard* and the present case is that the defendant in *Hubbard* made his challenge after viewing the array and *prior* to the jury being sworn, and Petitioner did not.

In *People v. Oliphant,* 399 Mich. 472, 501 (1976), the defendant waited until the first day of trial to challenge the jury array, alleging that it deprived him of his right to an impartial jury drawn from a fair cross section of the community because of the absence of persons between the ages of 18 and 21. The Michigan Supreme Court held the challenge to be untimely because the claim was based "on the fact that no persons between the ages of 18 and 21 *appeared on the array.*" (emphasis added).

In *People v. Bryant,* ___ Mich.. App. ___, 2004 WL 513644 (3/16/04), a defendant was convicted in Kent County during the same period as plaintiff but *did* make a timely objection during the voir dire process that he had been deprived of his Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community. As a result of his timely objection, he was determined to have preserved his claim and was afforded an evidentiary hearing by the Michigan Court of Appeals.

Thus, the law in Michigan is unequivocal that you are considered on notice once you have viewed the array and you must raise a timely objection before the jury is empaneled and sworn.

Petitioner has adopted an alternative line of reasoning, arguing that the error was not procedurally defaulted because he could not have known the legal basis for his challenge to the jury venire earlier, since the purported computer glitch had not been discovered. In support of his position, Petitioner relies on *Amadeo v. Zant,* 486 U.S. 214 (1988). This was a death penalty case in which the district attorney and the jury commissioners in Putnam County, Georgia, intentionally engineered a scheme to cause African-Americans to be under-represented in the county's juries. The scheme included a cover-up to mask the impropriety by keeping the percentage of black jurors within statistical guidelines mentioned in prevailing case law. *See, Amadeo v. Kemp,* 816 F. Supp.

1502, 1508 (11th Cir., 1987) (dissent).[4] The Supreme Court held that the district court's factual finding that the defendant's lawyers had not deliberately bypassed the jury challenge, because the deceit of the prosecutor and the jury commissioners had been intentionally hidden, was not clearly erroneous.

While this argument has found some traction with two other habeas cases arising out of Kent County during this period and currently pending in the Eastern District of Michigan,[5] the argument fails to distinguish between having notice of a defect in the jury venire, and knowing the underlying reason for the discrepancy.

The Michigan Court of Appeals has addressed Petitioner's argument that the reason for the purported discrepancy in the venire panel could not have been known to some defendants at the time of their trials, but has been careful to make the distinction between the opportunity defendants had to notice the fact of a discrepancy and raise the issue, and not knowing the reason why it occurred. In *People v. Barnes,* No. 244590, 2004 WL 1121901 at *3 (Mich. App. Jan. 15, 2004) (unpublished), the court observed:

> We recognize that perhaps the alleged unconstitutional jury selection *process* could not have been specifically identified at the time of trial. *But, in light of the all-white jury, it was incumbent on defendant to make a timely challenge or raise an objection. A concern on defendant's part about the ratio makeup of the venire should have arisen, and a timely challenge may very well have led to discovery of possible problems in the selection process. . . . [B]ecause one of the elements is under-representation in a specific defendant's jury array or venire, defendant, when faced with an all-white jury, could have, minimally, raised an objection below.* (emphasis added).

---

[4] *Amadeo v. Kemp* was the court of appeals decision in the *Amadeo v. Zant* case.

[5] *Parks v. Warren,* 2008 WL 3050051, at *5-8 (E.D. Mich. July 31, 2008); *Powell v. Howes,* 2007 WL 1266398, at *4-5 (E.D. Mich. May 1, 2007). These cases are not binding authority on this Court, and I do not find their analysis of *Amadeo*, 486 U.S. 214, to be persuasive for the reasons stated above.

In the *Amadeo* case, unlike the present case and the situation in *Barnes,* simply viewing the array would not have alerted Amadeo to the discrepancy, since the representation of blacks on the venire was approximately 50%.[6] *Amadeo v. Kemp,* 816 F.2d 1503, 1506. This was because "the discriminatory scheme was designed to make detection by defendants nearly impossible. The jury pool appeared to be fairly integrated." *Id.* at 1509, 1511. Since Amadeo had no meaningful opportunity to object at voir dire, the Supreme Court in this capital case focused on whether he should have discovered, by the time of the voir dire, the "smoking gun" (or incriminating memo) which had been concealed by county officials. *Amadeo v. Zant, supra* at 223-4. Thus, *Amadeo v. Zant* provides no guidance in the present case,[7] nor are the Michigan cases contrary to the *Amadeo* holding.

Where it is apparent upon viewing the array that it does not represent a fair cross-section of the community, it is, of course, not necessary to know the reason why in order to object. Rather, it is by raising the question that a court has the opportunity to inquire and determine if there has been a constitutional violation. For a court to ignore the requirement of a timely objection is simply to give a Petitioner (and presumably countless other unhappy defendants convicted during this same period) a second bite at the apple, because of the possibility of a constitutional violation that could have been investigated at the time and was not.[8]

---

[6]The actual jury in the *Amadeo* case contained an even number of blacks and whites as well. *Id.*

[7]There is no allegation of active concealment in this case by the Kent County officials. Even Petitioner contends only that a computer glitch in the Kent County Jury Management System caused the exclusion of minorities in the jury pool. (Pet'r's Br. in Supp. of Pet. at 38.)

[8]While it may not be determinative of this issue, the possibility of going back and redetermining the actual racial makeup of the jurors summoned during this period is probably not feasible. For example, the Kent County Circuit Court summoned 17,578 jurors in 2002, nearly 17% of which did not appear. 2002 Annual Report of the 17th Judicial Circuit Court at 18-19. This court is not aware of any attempt by the circuit court at that time to systematically collect or maintain the race of each juror summoned, whether they appeared or not. At best, the court would probably be left with statistical conjecture. This simply reinforces the importance of the state rule on timely objections.

Petitioner has failed to demonstrate cause for his procedural default. As a result, this claim is procedurally barred on habeas review, as it must be.

**Recommended Disposition**

For the foregoing reasons, I respectfully recommend that the habeas corpus petition be denied.

Dated: September 16, 2008

/s/ Hugh W. Brenneman, Jr.
HUGH W. BRENNEMAN, JR.
United States Magistrate Judge

**NOTICE TO PARTIES**

Any objections to this Report and Recommendation must be filed and served within eleven (11) 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 objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).

# A-12. The Michigan Supreme Court Order

dw5030587A

# Order

Entered: June 30, 2004

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices



125540

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

CARL BURNIE WELLBORN III,
Defendant-Appellant.

SC: 125540
COA: 242229
Kent CC: 01-005099-FC

/

On order of the Court, the application for leave to appeal the December 16, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

s0622

CARL BURNIE WELLBORN v MARY BERGHUIS
USDC NUMBER 05-CV-346
HONORABLE GORDON J. QUIST

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 30, 2004

Corbin R. Davis
Clerk

2005030587

FILED - 17

STATE OF MICHIGAN 06 JAN -6 AM 9:16

COURT OF APPEALS

U.S. DISTRICT COURT
WESTERN DISTRICT MICH.
BY: fdl MB

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL BURNIE WELLBORN III,

Defendant-Appellant.

UNPUBLISHED
December 16, 2003

No. 242229
Kent Circuit Court
LC No. 01-005099-FC

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b), and two counts of second-degree CSC, MCL 750.520c(1)(a) and (b). He was sentenced to ten to fifteen years' imprisonment for the second-degree CSC convictions and to ten to thirty years' imprisonment for the first-degree CSC conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was deprived of his constitutional right to the effective assistance of counsel because trial counsel agreed with the prosecutor to exclude evidence of defendant's acquittal in a Montcalm County case involving similar charges brought by one of the complainants in this case. Because defendant failed to move for a new trial or an evidentiary hearing regarding his ineffective assistance claim, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We find no merit to defendant's argument.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984), on remand 737 F2d 894 (CA 11, 1984); *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001).

No ineffective assistance is apparent from the record. Trial counsel's representation did not fall below an objective standard of reasonableness because his concession on the inadmissibility of the acquittal was consistent with the law. In *People v Bolden*, 98 Mich App 452; 296 NW2d 613 (1980), the defendant argued that the trial court erred in precluding the jury from knowing that he was acquitted of the charges that comprised the prior similar acts evidence.

-23-

Relying on *People v Oliphant*, 399 Mich 472; 250 NW2d 443 (1976), the *Bolden* Court held that the trial court did not err in excluding evidence of the acquittal, reasoning as follows:

> We find this reasoning [that of *Oliphant*] equally applicable to our consideration. The prosecutor must produce evidence sufficient to show that defendant "probably committed the other acts", *People v Cook*, 95 Mich App 645; 291 NW2d 152 (1980). If he or she can satisfy that burden, the jury should not be confused by the additional information of an acquittal which could mislead them into believing that the defendant absolutely did not commit the prior similar acts. The fact that another jury harbored a reasonable doubt as to defendant's guilt of the other offense does not negate the substantive value of the testimony to establish identity, scheme, plan, etc. in the case at bar. The issue should not be clouded by encouraging speculation regarding the verdict reached in a separate trial on a separate offense involving a different complainant. Defendant's rights were sufficiently protected by the trial court's limiting instructions concerning the purpose of similar acts testimony. [*Bolden, supra* at 461.][1]

Moreover, while instructing the jury, the trial court said that it would not have admitted evidence of defendant's acquittal even if the parties had not agreed to exclude it because the evidence was irrelevant. The trial court explained that there is no meaningful comparison between the two trials because there are different juries, different prosecutors, and different accusations.[2] Because counsel is not required to advocate a meritless position, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), trial counsel's decision to forego mentioning the acquittal did not amount to objectively unreasonable assistance, let alone unreasonable assistance affecting the jury's verdict. We find no merit to defendant's ineffective assistance of counsel claim.

Defendant next argues that he was denied his constitutional right to a jury drawn from a venire representative of a fair cross section of the community because of a computer "glitch." Defendant has waived his challenges to the venire and the jury selection process because his defense counsel expressed satisfaction with the jury's composition. *People v McKinney*, 258 Mich App 157, 161-162; 670 NW2d 254.

---

[1] Although a subsequent panel of this Court "expressed its support" for Judge Allen's partial dissent in *Bolden* on this issue, see *People v Nabers*, 103 Mich App 354, 364; 303 NW2d 205, rev'd on other grounds, 411 Mich 1046 (1981), that statement was dicta since it does not appear that either party raised as an issue in that case the admissibility of an acquittal. Furthermore, as was noted in *US v Gricco*, 277 F3d 339, 352-353 (CA 3, 2002), at least ten of the federal circuits (including the Sixth Circuit) have held that, except for purposes of determining whether the prosecution of a defendant is barred by double jeopardy or collateral estoppel, "evidence of prior acquittals is generally inadmissible." *Id.* at 352. That is so because judgments of acquittal "may not present a determination of innocence, but rather only a decision that the prosecution has not met its burden of proof beyond a reasonable doubt." *Id.*

[2] The trial court instructed the jury in this manner because, during cross-examination, defendant testified that the victim had previously "tried me and lost."

Defendant also argues that the sentencing court erred in failing to credit him with forty-eight additional days served between the time he was convicted and the date of his sentencing. Reviewing this preserved question of law de novo, *People v Givans,* 227 Mich App 113, 124; 575 NW2d 84 (1997), we disagree.

MCL 769.11b, the relevant provision regarding jail credit for time served, provides as follows:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

On appeal, defendant contends that he is entitled to an additional forty-eight days of jail time for the time he served from the date of his conviction, March 27, 2002, through the date of his sentencing on May 13, 2002. But the sentencing court stated during sentencing that defendant's three concurrent sentences were to begin on March 27, 2002, "the day he was remanded to custody on these matters," rather than the date of defendant's sentencing. The judgment of sentence also indicates that the beginning sentence date was March 27, 2002, the day that defendant was convicted, rather than May 13, 2002, the day that defendant was sentenced. Because defendant's sentences include the forty-eight days defendant served from the date of his conviction to the date of his sentence, there is no need to give defendant additional credit for those days. Accordingly, there is no merit to defendant's argument.

Affirmed.

/s/ Richard Allen Griffin
/s/ Christopher M. Murray

# A-13. Michigan Court of Appeals Order

# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL BURNIE WELLBORN III,

Defendant-Appellant.

UNPUBLISHED
December 16, 2003

No. 242229
Kent Circuit Court
LC No. 01-005099-FC

Before: Griffin, P.J., and Neff and Murray, JJ.

NEFF, J. *(concurring).*

I concur in the result in this case. I write separately to express the opinion that our courts have established no per se rule concerning the admissibility of evidence of a prior acquittal and no such rule should be inferred from the decision in this case. It is clear from our decisions that evidence of an acquittal may be admissible under certain circumstances. *People v Oliphant*, 399 Mich 472, 496 n 12; 250 NW2d 443 (1976); *People v Bolden (Bolden I)*, 92 Mich App 421, 425; 285 NW2d 210 (1979). As the *Bolden II* Court acknowledged, 98 Mich App 452, 459-460; 296 NW2d 613 (1980), the critical distinction between that case and both *Oliphant* and *Bolden I*, is that in the latter cases the jury was aware of the defendant's acquittal.

In this case, unlike in *Oliphant* and the *Bolden* cases, the acquittal did not relate to similar acts evidence admitted under MRE 404(b). That is, the prosecutor did not seek the admission of the similar acts charged in the Montcalm County trial in which defendant was acquitted. Here, the acquittal evidence was at issue only because defense counsel planned to use the Montcalm County complainant's testimony in the earlier trial concerning an alleged act in Virginia to impeach her testimony in the Kent County trial. The prosecutor did not object to defense counsel's use of the testimony for impeachment purposes, as long as there was no mention of the acquittal. Defense counsel agreed. Because the acquittal was unrelated to the similar acts evidence defense counsel sought to admit, counsel's agreement was not unreasonable. Defendant's claim of ineffective assistance fails because he has not overcome the presumption that counsel's decision was a matter of trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Because the prosecutor was not seeking admission of the similar acts underlying defendant's acquittal, the analysis in *Oliphant, supra* at 498 n 14, cited in *Bolden II, supra* at 460-461, and cited by the majority in this case, is inapposite. Moreover, the cited reasoning in *Oliphant* concerned an issue of double jeopardy and cannot be considered an authoritative consideration of the principles governing the admissibility of acquittal evidence in conjunction with similar acts under MRE 404(b).

/s/ Janet T. Neff