NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-1809

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NAYKIMA TINEE HILL,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
SHAWN BREWER, Warden,	)	MICHIGAN
	)	
Respondent-Appellee.	)	

ORDER

Before: NORRIS, ROGERS, and STRANCH, Circuit Judges.

Naykima Tinee Hill, a pro se Michigan prisoner, appeals a district court judgment dismissing her habeas corpus petition filed pursuant to 28 U.S.C. § 2254. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Hill challenges her convictions for first-degree home invasion, assault and battery, unlawful imprisonment, armed robbery, and extortion. The following evidence was introduced at trial:

> On the morning of March 7, 2007, Sherry Crofoot and her 13-year-old daughter, Samantha, were at their home on Cleveland Street in Saginaw. With them was Sherry's grandmother, Florence Karien. Samantha answered a knock at the door to find a black woman wearing a brown coat with a fur-trimmed hood standing on the porch. The woman, who was swaying and appeared disoriented, asked to use the Crofoots' phone and for a ride, both of which Sherry refused. When Sherry attempted to close the door, the woman pushed her way in, knocking Sherry back into the room. Inside the house, the woman punched Karien several times in the face, and then pulled Sherry into the bedroom. Grabbing a knife, the woman

> threatened Sherry with it and demanded money. Samantha brought her Karien's purse, and some money of her own. Eventually, the woman left the home.
>
> Michigan State Police Trooper Steven Escott was one who responded to the incident on Cleveland Street. With his police tracking dog, he followed a trail that first led to the porch of 407½ North Porter. Police later investigated the house, and recovered a brown coat with a knife in the pocket. Both the coat and the knife matched the victims' descriptions. The trail then led to a point near the corner of Holland and Bond Streets. Saginaw City police officers were there responding to complaints of a "loud and boisterous" woman. The woman in question turned out to be defendant, who was arrested. Before being taken to the police station, defendant was taken to the Cleveland Street address, where all three victims identified her as their assailant.

People v. Hill, No. 290031, 2010 WL 1873105, at *1 (Mich. Ct. App. May 11, 2010) (unpublished opinion).

On a day that trial was scheduled to begin, after having been reset several times, counsel orally moved to appoint an expert witness on the issue of eyewitness identification. The trial court denied the motion and renewed motions as untimely but granted a stay of proceedings so that Hill could pursue an interlocutory appeal. The Michigan Court of Appeals denied leave to appeal, reasoning that immediate review was not necessary. No appeal was filed with the Michigan Supreme Court.

The jury subsequently rejected Hill's defense of misidentification and convicted her of the above-mentioned offenses. The trial court imposed a total effective sentence of twenty-five to sixty years in prison.

On direct appeal, the Michigan Court of Appeals concluded that the trial court had violated the Confrontation Clause and committed reversible error by permitting a police detective (James Livingston) to introduce a statement from Jacqueline Sistrunk, a non-testifying witness who lived at the Bond Street home where Hill was arrested. *Hill*, 2010 WL 1873105, at *1-2. According to Livingston, Sistrunk indicated that Hill's coat was similar to a coat present at the Bond Street home and belonging to Sistrunk's boyfriend. *Id.* at *1. The Court of Appeals declined to address whether an expert witness should have been appointed because the trial court

had denied the motion as untimely and the issue was moot in light of the disposition of the appeal. *Id.* at *3. The State filed an appeal, and Hill filed a cross-appeal.

In a split decision, the Michigan Supreme Court reversed the lower court in part, reasoning that the error was harmless beyond a reasonable doubt in light of substantial identification evidence. *People v. Hill*, 796 N.W.2d 59, 59 (Mich. 2011). The court observed that:

> The prosecutor presented eyewitness identification testimony of the three victims who each independently identified defendant as their assailant. Such identification testimony was clear and unambiguous, and occurred after each victim had a full and sustained opportunity to observe defendant during their 25 to 30 minute ordeal. In addition, each victim identified the coat that was the subject of Sistrunk's out-of-court statement as the one worn by defendant during the attack. Therefore, even absent Sistrunk's out-of-court statement, the victims were able to connect the coat worn by their assailant to defendant. Further, two of the victims identified the knife that was found in the pocket of the coat as the knife that was taken from their home and wielded by defendant during the attack.

Id. The court concluded that the remaining issues did not need to be addressed. *Id.*

Justice Kelly dissented for several reasons. *Id.* at 60. First, the circumstances of the victims' initial identification of Hill were suggestive because she was in the back of a police car, and the victims admitted that a hood covered the attacker's forehead and hair during the robbery. *Id.* Second, the coat and knife were not found at the Porter Street house until a day after the police searched it, and the dog never alerted to Hill herself as the source of the scent. *Id.* Third, Hill contended that the police had ordered her to put on the shoes that she was wearing when arrested. *Id.* Fourth, there were two similar coats, and Sistrunk's boyfriend and others had visited both the Bond Street and Porter Street houses the day before the armed robbery. *Id.* at 60-61. Finally, the victims' original descriptions of the coats varied. *Id.* at 61.

In 2012, Hill filed a motion for relief from judgment in the trial court, raising claims of ineffective assistance of trial and appellate counsel. The trial court denied the motion in a reasoned order. The appellate courts denied leave to appeal in form orders, stating that Hill did not "meet the burden of establishing entitlement to relief under [Michigan Court Rule]

6.508(D)." *People v. Hill*, No. 313220 (Mich. Ct. App. July 3, 2013) (unpublished order), *perm. app. denied*, 840 N.W.2d 324 (Mich. 2013).

In her § 2254 petition, filed through counsel in 2014, Hill asserted that: (1) the trial court violated the Confrontation Clause by admitting Sistrunk's hearsay testimony; (2) the trial court violated Hill's right to present a defense by denying her motion to appoint an expert witness on eyewitness identification; (3) trial counsel rendered ineffective assistance by filing a late motion for appointment of an expert witness, by not filing a timely appeal in that matter with the Michigan Supreme Court, by introducing prejudicial and inadmissible evidence, and through the cumulative effect of his errors; and (4) appellate counsel rendered ineffective assistance by failing to raise the aforementioned issues. The State filed an answer, arguing that the claims were without merit and/or were procedurally defaulted.

The district court denied Hill's § 2254 petition. The court held that the Michigan Supreme Court's harmless-error analysis of the hearsay testimony was not objectively unreasonable, that the claims regarding the expert witness and ineffective assistance of trial counsel were procedurally defaulted, and that the claim of ineffective assistance of appellate counsel lacked merit. Nevertheless, the district court granted a certificate of appealability ("COA") as to all of Hill's claims.

In her pro se appeal, Hill reasserts all of the claims presented in her § 2254 petition. She newly argues that trial counsel rendered ineffective assistance by: allowing into evidence "blood on the pants," a knife, and a coat "without testing"; not informing the jury that she came into contact with the police because of a domestic dispute with Sistrunk and others; not arguing that her fingerprints were not on the Crofoots' phone; and not objecting to the lack of a proper lineup. Despite the district court's grant of a COA as to all claims, Hill moves for an extension of time to prepare a COA application.

In habeas actions, we review the district court's legal conclusions de novo and its factual findings for clear error. *Davis v. Lafler*, 658 F.3d 525, 530 (6th Cir. 2011). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not

grant a writ of habeas corpus as to a claim decided on the merits unless the state court proceedings:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2); *see also Davis*, 658 F.3d at 530. We may affirm a district court's dismissal for reasons other than those stated by the district court. *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 620 (6th Cir. 2010).

Hill first argues that habeas relief is warranted because of the Confrontation Clause violation.

On habeas review, a constitutional error requires reversal if it "had substantial and injurious effect or influence in determining the jury's verdict," i.e., it caused actual prejudice. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). For claims adjudicated on the merits by the state court, "the *Brecht* test subsumes the limitations imposed by AEDPA." *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015). Thus, the *Brecht* test encompasses the question of whether a state court reasonably applied the "harmless beyond a reasonable doubt" standard set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967). *Ruelas v. Wolfenbarger*, 580 F.3d 403, 412 (6th Cir. 2009); *see also Davis*, 135 S. Ct. at 2198; *Fry v. Pliler*, 551 U.S. 112, 120 (2007). A habeas court may, "before turning to *Brecht*, inquire whether the state court's *Chapman* analysis was reasonable. If it was reasonable, the case is over." *Ruelas*, 580 F.3d at 413.

"[A] state-court decision is not unreasonable if 'fairminded jurists could disagree' on [its] correctness." *Davis*, 135 S. Ct. at 2199 (second alteration in original) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). Rather, the decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* (quoting *Harrington*, 562 U.S. at 103).

The Confrontation Clause of the Sixth Amendment prohibits the admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable and the defendant previously had an opportunity to conduct cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). To determine whether a Confrontation Clause violation was harmless, a court conducting direct review considers factors set forth in *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

> These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id.

Although fair-minded jurists could disagree as to the correctness of the Michigan Supreme Court's decision, its decision was not unreasonable and was not contrary to *Chapman* and *Van Arsdall*. The court concluded that the erroneous admission of Sistrunk's out-of-court statement was harmless beyond a reasonable doubt because Sistrunk's statement was not important to the prosecution's case, other witnesses did identify Hill's coat, and other substantial identification evidence did support the case. Hill did not contend that cross-examination of other witnesses was restricted. Moreover, in addition to the evidence described by the state courts, a police officer testified about photographing apparent blood on Hill's pants. This comports with testimony from Ms. Karien that the attacker punched her multiple times in the face, causing blood to spurt and run down the front of her clothes. Also, the Michigan Court of Appeals's finding that the attacker appeared disoriented comports with Hill's own testimony that she was "out of it" and drunk at the time of her arrest.

Hill next argues that the trial court violated her right to present a defense by denying her motion to appoint an expert witness on eyewitness identification.

The district court concluded that Hill's claim regarding the denial of the motion to appoint an expert witness was procedurally barred because the trial court apparently denied the motion pursuant to Michigan Court Rule 2.401(I), which provides that a party must file a witness

list by the time directed by the court. Relying on unpublished Michigan cases, the district court deemed the rule to be an adequate and independent state ground that Michigan courts regularly followed. *See Martinez v. Ryan*, 566 U.S. 1, 9-10 (2012).

"To determine whether a state procedural rule was applied to bar a habeas claim," *Henderson v. Palmer*, 730 F.3d 554, 560 (6th Cir. 2013), we "look to the last reasoned state court opinion to determine the basis for the state court's rejection" of the claim. *Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010) (en banc); *see also Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

Here, the trial court's oral denial is the last reasoned decision because the Michigan Court of Appeals declined to address this issue on direct review, stating that the trial court had denied the motion as untimely and that the issue was moot in light of the disposition of the appeal. *Hill*, 2010 WL 1873105, at *1, *3. When denying the motion, the trial court stated that the trial had been reset several times, that counsel "kn[e]w the Court's pretrial order" and would have known of the need for the expert, and that all motions brought on the day of trial would be denied.

It is ambiguous whether the trial court relied on a procedural rule when denying the motion to appoint an expert. When considering whether a trial court's ruling is based on a procedural bar, "neither the mere availability nor the potential, or even obvious, applicability of . . . a [procedural] rule is determinative. To operate as a bar to habeas review, such a rule *must be clearly and expressly invoked*." *Henderson*, 730 F.3d at 561 (alteration in original) (quoting *Skinner v. McLemore*, 425 F. App'x 491, 495 (6th Cir. 2011)). Here, the trial court did not cite Rule 2.401(I), made only a general reference to a scheduling order, and spoke of prior delays in starting the trial.

In any event, the claim does not merit habeas relief. Although the Constitution requires criminal defendants to have "a meaningful opportunity to present a complete defense," *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), this right is not absolute, *Taylor v. Illinois*, 484 U.S. 400, 409 (1988), and may "bow to accommodate other legitimate interests in the criminal trial process," *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (quoting *Chambers v. Mississippi*, 410 U.S.

284, 302 (1973)). Thus, a habeas court must consider whether the exclusion of evidence infringes upon a "weighty interest" of the defendant in an "arbitrary or disproportionate" manner, and, if so, whether the resulting constitutional error could be deemed prejudicial under *Brecht*. *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Ferensic v. Birkett*, 501 F.3d 469, 472, 475-76 (6th Cir. 2007).

At most, Hill satisfies the first two considerations. First, Hill has a "weighty" interest in having an expert on eyewitness identification. *See Ferensic*, 501 F.3d at 478; *see also Thomas v. Heidle*, 615 F. App'x 271, 280 (6th Cir. 2015). The identity of the attacker was the central issue at trial, the prosecution relied upon eyewitnesses to identify the attacker, and Hill indicated in her state appellate brief that an expert could testify "on the impact of relevant, case-specific factors on an eyewitness's recollection," such as cross-racial identification and the presence of a weapon. *See Thomas*, 615 F. App'x at 281.

Second, the trial court's denial of Hill's motion was an arguably arbitrary decision. While "the proper functioning of the adversary system is indeed a legitimate, and nonarbitrary, consideration as a general matter," *Ferensic*, 501 F.3d at 477, the trial court did not consider imposing lesser sanctions or address whether there would be prejudice to the prosecution if the motion were granted, *see id.* at 477-78.

The claim, however, fails upon consideration of the third factor—whether the constitutional error was prejudicial for purposes of habeas review. *See id.* at 480-81. Here, substantial evidence indicated Hill's guilt, as described above. The evidence did not consist entirely of eyewitness identifications, *see id.* at 470, but also of evidence such as footprints, tracking by a dog, and blood. Furthermore, there was no clear indication from the jury of uncertainty about the eyewitnesses' identification of Hill. *See id.* at 483-84. Although the jury did send a note to the judge that it "would like some further testimony," the record does not indicate that the testimony pertained to eyewitness identification, nor can that reasonably be assumed. Here, the prosecution witnesses included not only the eyewitnesses, but others who

provided incriminating evidence such as law enforcement officials and the woman who found the coat at the Porter Street house. Thus, any error was not prejudicial.

In her third claim, Hill argues that trial counsel rendered ineffective assistance by filing a late motion for appointment of an expert witness, by not filing a timely appeal in that matter with the Michigan Supreme Court, by introducing prejudicial and inadmissible evidence, and through the cumulative effect of his errors.

The district court concluded that this claim was procedurally defaulted because the trial court had stated in its denial of Hill's motion for relief from judgment that Hill had not shown that "but for the alleged error, Defendant would have [had] a reasonably likely chan[c]e of acquittal." The district court observed that the quoted phrase came from Michigan Court Rule 6.508(D)(3)(b)(i), which was an adequate and independent state ground for procedural default. Rule 6.508(D)(3) bars the trial court from granting a motion for relief from judgment where the claims could have been raised on direct appeal, unless the defendant demonstrates cause and "actual prejudice." For a defendant convicted at a trial, "actual prejudice means that . . . but for the alleged error, the defendant would have had a reasonably likely chance of acquittal." Mich. Ct. R. 6.508(D)(3)(b)(i).

As with the prior claim, we look to the last reasoned state-court decision to determine whether a state procedural rule bars the claim. *See Guilmette*, 624 F.3d at 291. Here, the trial court's denial is the last reasoned decision because the appellate courts denied leave to appeal in form orders citing Rule 6.508(D). *See id.*; *see also Brown v. Romanowski*, 845 F.3d 703, 711 (6th Cir.), *cert. denied*, 138 S. Ct. 93 (2017).

It is ambiguous whether the trial court relied on Rule 6.508(D)(3)(b)(i) when denying Hill's motion for relief from judgment. First, the court concluded that no ineffective assistance occurred with respect to the hearsay statement because its admission was harmless error. Next, the trial court concluded that no ineffective assistance occurred with respect to the denial of the motion for an appointed expert witness because Hill did not show that the trial court would have abused its discretion by denying the motion if the motion and subsequent appeal had been timely.

In denying the claims, the trial court did not cite Rule 6.508(D)(3)(b)(i) or mention Hill's failure to raise her claims of ineffective assistance of trial counsel on direct appeal. Furthermore, the trial used the apparent quotation from the rule only as an alternative ground for denying relief on the claims of ineffective assistance pertaining to the appointment of an eyewitness expert. Thus, trial court did not "clearly and expressly" invoke Rule 6.508(D)(3)(b)(i). *See Henderson*, 730 F.3d at 561.

In any event, the claim of ineffective assistance of trial counsel lacks merit. To establish a claim of ineffective assistance of trial counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, "[t]he 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. "Where review is under *Strickland* and AEDPA, a federal court's review of a state court's decision on a claim of ineffective assistance of counsel is 'doubly deferential.'" *Morris v. Carpenter*, 802 F.3d 825, 841 (6th Cir. 2015) (quoting *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013)).

Trial counsel's alleged deficient performance concerns his actions taken with respect to the hearsay statement of Sistrunk and the motion for the appointment of an expert witness. For the reasons stated above, Hill did not suffer prejudice from counsel's actions, and there is no reasonable probability that the result of her trial would have been different.

In her fourth claim, Hill asserts that appellate counsel rendered ineffective assistance by failing to raise the aforementioned issues. The *Strickland* standard also applies to claims of ineffective assistance of appellate counsel. *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010).

Hill cannot prevail on this claim. Because the aforementioned claims lack merit, Hill's appellate counsel did not render deficient performance by failing to raise them. *See id.*

Hill newly argues on appeal that trial counsel rendered ineffective assistance by: allowing into evidence "blood on the pants," a knife, and a coat "without testing"; not informing

the jury that she came into contact with the police because of a domestic dispute with Sistrunk and others; not arguing that her fingerprints were not on the Crofoots' phone; and not objecting to the lack of a proper lineup.

We decline to consider these claims. The claims were not raised below and have not been certified for appeal. *See Brown*, 845 F.3d at 719.

Accordingly, we **DENY** all pending motions and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Naykima Tinee Hill,

Petitioner, Case No. 14-cv-10350

v. Judith E. Levy
United States District Judge

Milicent Warren,

Respondent.

_____/

JUDGMENT

For the reasons stated in the opinion and order entered on today's date, it is ordered and adjudged that the petition for a writ of habeas corpus is denied with prejudice, and a certificate of appealability is granted.

IT IS SO ORDERED.

Dated: November 1, 2016
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on November 1, 2016.

s/Felicia M. Moses
FELICIA M. MOSES
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Naykima Tinee Hill,

Petitioner, Case No. 14-cv-10350

v. Judith E. Levy
United States District Judge

Milicent Warren,

Respondent.

_____/

OPINION AND ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS, AND GRANTING A CERTIFICATE OF APPEALABILITY [1]

Naykima Tinee Hill (Petitioner) has filed a petition for a writ of habeas corpus, through her attorney Gerald M. Lorence, pursuant to 28 U.S.C. § 2254. In her application, Petitioner challenges her conviction of three counts of armed robbery, M.C.L.A. § 750.529, and one count each of first degree home invasion, M.C.L.A. § 750.110a(2), extortion, M.C.L.A. § 750.213, and unlawful imprisonment, M.C.L.A. § 750.349b. For the reasons stated below, the petition for a writ of habeas corpus is denied.

I. BACKGROUND

Petitioner was convicted following a jury trial in the Saginaw County Circuit Court. This Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals, which are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1). *See Wagner v. Smith*, 581 F.3d 410, 413 (6th Cir. 2009).

> On the morning of March 7, 2007, Sherry Crofoot and her 13 year-old daughter, Samantha, were at their home on Cleveland Street in Saginaw. With them was Sherry's grandmother, Florence Karien. Samantha answered a knock at the door to find a black woman wearing a brown coat with a fur-trimmed hood standing on the porch. The woman, who was swaying and appeared disoriented, asked to use the Crofoots' phone and for a ride, both of which Sherry refused. When Sherry attempted to close the door, the woman pushed her way in, knocking Sherry back into the room. Inside the house, the woman punched Karien several times in the face, and then pulled Sherry into the bedroom. Grabbing a knife, the woman threatened Sherry with it and demanded money. Samantha brought her Karien's purse, and some money of her own. Eventually, the woman left the home.

People v. Hill, Case No. 290031, 2010 WL 1873105, at *1 (Mich. App. May 11, 2010).

Petitioner's conviction was affirmed in part and reversed in part on appeal. *Id.* The Michigan Supreme Court reversed and reinstated Petitioner's conviction. *People v. Hill*, 489 Mich. 881 (2011).

Petitioner seeks a writ of habeas corpus on the following grounds. First, Petitioner argues that the trial court violated the Confrontation Clause of the Sixth Amendment by admitting hearsay testimony from a witness whom the prosecutor failed to produce at trial, and that the Michigan Supreme Court was in error in finding that admission of the testimony was harmless error. Second, Petitioner argues that the trial court violated her Sixth Amendment right to present a defense by denying her motion to appoint an expert witness on eyewitness identification. In so doing, the trial court allegedly abused its discretion. Third, Petitioner argues that she was denied effective assistance of counsel, in pre-trial and trial matters, by counsel's erroneous and outcome-determinative mistakes, which prejudiced her and her Sixth Amendment right to a fair trial. Finally, Petitioner argues that she was denied effective assistance of counsel at the appellate level because counsel failed to raise significant claims in her appeal as of right to the Michigan Court of Appeals. (Dkt. 1 at 17.)

II. STANDARD OF REVIEW

Section 2254(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA) prohibits a court from granting habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication" resulted in a decision that (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

A state court decision is contrary to clearly established law "if the state court applies a rule that contradicts the governing law set forth in" Supreme Court cases or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003). An unreasonable application of clearly established law occurs when a state court's application of the law is "objectively unreasonable." *Id.* at 75–76. To meet this standard, a court may not rely only on "its

independent judgment that the relevant state-court decision applied [the law] erroneously or incorrectly." *Id.*

Under AEDPA's "highly deferential standard for evaluating state-court rulings," a federal court must presume "that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). "Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Rather, "a state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Thus, "a habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the Supreme Court. *Id.* at 102. Habeas relief is not appropriate unless each ground that supported the state court's decision is examined and found to be unreasonable under the AEDPA. *See Wetzel v. Lambert*, ___ U.S. ___, 132 S. Ct. 1195, 1199 (2012).

III. DISCUSSION

A. Claim One: Confrontation Clause

Petitioner contends that the trial court violated the Confrontation Clause of the Sixth Amendment by admitting hearsay from a witness who did not testify at trial, and that the Michigan Supreme Court erred in holding that admission of the statement was harmless. (Dkt. 1 at 27–28.) At trial, the prosecution was permitted to introduce Jacqueline Sistrunk's statement that she saw the Petitioner wearing "a brown hooded coat with fur around it," even though Sistrunk did not testify at trial. The Michigan Court of Appeals and Michigan Supreme Court agreed that admission of Sistrunk's out-of-court statement violated Petitioner's Sixth Amendment right to confrontation, but the Michigan Supreme Court found the admission to be harmless.

On habeas review, a court may choose whether to first review the question of whether a state court's harmless error analysis was unreasonable or to first apply the *Brecht* test to determine whether the trial error complained of "had substantial and injurious effect or influence in determining the jury's verdict." *Fry v. Pliler*, 551 U.S. 112, 119–20 (2007); *Ruelas v. Wolfenbarger*, 580 F.3d 403, 412–13 (6th Cir.

2009). As the Sixth Circuit has clarified, the *Brecht* test effectively covers both inquiries, and a court need not conduct both inquiries in all cases. *Ruelas*, 580 F.3d at 412–13.

This Court will assess whether the Michigan Supreme Court's harmlessness determination regarding the admission of the out-of-court statement was "objectively unreasonable." In determining whether a Confrontation Clause violation is harmless, a court must consider the facts of the case and the following factors: "(1) the importance of the witness' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross examination otherwise permitted; and (5) the overall strength of the prosecution's case." *Jensen v. Romanowski*, 590 F.3d 373, 379 (6th Cir. 2009); *see also Vasquez v. Jones*, 496 F.3d 564, 574 (6th Cir. 2007) (holding that Confrontation Clause violations are subject to harmless error review).

The Michigan Supreme Court held that substantial evidence existed to support Petitioner's convictions independent of the hearsay evidence:

> We REVERSE the judgment of the Court of Appeals in part because the admission of Jacqueline Sistrunk's out-of-court statement that she saw defendant wearing 'a brown hooded coat with fur around it,' was harmless error because it is clear beyond a reasonable doubt that the jury verdict would have been the same absent this error. The prosecutor presented eyewitness identification testimony of the three victims who each independently identified defendant as their assailant. Such identification testimony was clear and unambiguous, and occurred after each victim had a full and sustained opportunity to observe defendant during their 25 to 30 minute ordeal. In addition, each victim identified the coat that was the subject of Sistrunk's out-of-court statement as the one worn by defendant during the attack. Therefore, even absent Sistrunk's out-of-court statement, the victims were able to connect the coat worn by their assailant to defendant. Further, two of the victims identified the knife that was found in the pocket of the coat as the knife that was taken from their home and wielded by defendant during the attack. Accordingly, due to this substantial identification evidence, any error in the admission of Sistrunk's statement was harmless beyond a reasonable doubt.

People v. Hill, 489 Mich. at 882 (internal citations omitted).

In light of the evidence against Petitioner, exclusive of the out-of-court statement, the record demonstrates that the Michigan Supreme Court reasonably found the admission of Sistrunk's hearsay statement to be harmless error. Not all of the evidence presented by the prosecution and relied on by the Michigan Supreme Court was

consistent or strongly suggested Petitioner's guilt, as emphasized by Justice Kelly's partial concurrence and dissent. *See* 489 Mich. at 882–84. However, because harmless error review permits a state court to conduct "an evaluation of the totality of the evidence," *Kennedy v. Warren*, 428 F. App'x 517, 522 (6th Cir. 2011), Petitioner has not demonstrated that there is "no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98. Accordingly, this Court is unable to find that the Michigan Supreme Court's harmless error analysis was "objectively unreasonable," and Petitioner is not entitled to habeas relief on her first claim.

B. Claim Two: Appointment of an Eyewitness Expert

Petitioner next argues that the trial court violated her Sixth Amendment right to present a defense when it denied her motion to appoint an expert witness on the issue of eyewitness identification. (Dkt. 1 at 44.) Petitioner first raised her motion for a court-appointed expert on the day of her trial, and the trial court denied the motion as untimely. (Dkt. 6, Ex. 9 at 6.) Respondent argues that Petitioner has procedurally defaulted this claim and has not demonstrated cause and prejudice to excuse this default. (Dkt. 5 at 40–41.)

"A federal court will not review the merits of claims . . . that a state court declined to hear because the prisoner failed to abide by a state procedural rule" provided that the procedural rule is an adequate and independent state ground. *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1316 (2012). To be an adequate and independent state ground, the procedural rule must be "firmly established" and "the last state court" to rule on the issue must have "clearly and expressly stated that its judgment rested on a procedural bar." *Johnson v. Smith*, 219 F. Supp. 2d 871, 878 (E.D. Mich. 2002) (quoting *Simpson v. Sparkman*, 94 F.3d 199, 202 (6th Cir. 1996)). If the state court bases its decision on a substantive and alternative procedural ground, "the procedural default bar is invoked and the petitioner must establish cause and prejudice" to obtain federal review of the habeas petition. *Id.* at 879.

In this case, the Michigan Court of Appeals "decline[d] to address the issue because the trial court's reason for the denial was a lack of timeliness, and [because] the issue is moot." (Dkt. 6, Ex. 25 at 3.) Assuming that mootness is not a substantive basis for decision, this Court looks to the "last reasoned state court-decision disposing of the claim." *Henderson v. Palmer*, 730 F.3d 554, 560 (6th Cir. 2013) (quoting

Guilmette v. Howes, 624 F.3d 286, 291 (6th Cir. 2010) (en banc)). In this case, the last court to address the motion for an expert witness was the trial court, which denied the motion as untimely. Although neither the Michigan Court of Appeals nor the trial court expressly referenced the name of a rule, it is clear that both courts were relying on MCR 2.401(I), which states that "[n]o later than the time directed by the court under subrule (B)(2)(a) [scheduling orders], the parties shall file and serve witness lists," and provide the required information about the witnesses. Application of this Michigan Rule of Civil Procedure is discretionary, but this does not necessarily disqualify the rule as a procedural bar for the purposes of federal habeas review. *Beard v. Kindler*, 558 U.S. 53, 60–61 (2009). Here, mandatory application "would be more likely to impair [the trial judge's] ability to deal fairly with a particular problem than to lead to a just result" because it would deny judges the ability to address the circumstances of each case. *See id.* at 61. Further, MCR 2.401(I) has long been recognized and followed regularly by the state courts. *See, e.g., Todd v. Steiner*, Case No. 234007, 2003 WL 1950236, at *2, 4–5 (Mich. App. Apr. 24, 2003) (discussing MCR 2.401(I) and noting that it is firmly within the

authority of the trial court to enforce pretrial scheduling orders); *Kapp v. Evenhouse*, Case No. 216020, 2001 WL 716786, at * 2, 4 (Mich. App. Mar. 6, 2001) (upholding exclusion of untimely filed witness list); *In re SM*, Case No. 220706, 2000 WL 33389746, at *2 (Mich. App. Dec. 26, 2000) (same). Accordingly, MCR 2.401(I) constitutes an adequate and independent state ground that procedurally bars Petitioner's claim.

Petitioner's claim is procedurally defaulted unless she can demonstrate cause and prejudice. Petitioner argues that she received ineffective assistance of counsel at the trial and appellate levels, but these claims lack merit, as discussed below. Accordingly, Petitioner has not demonstrated cause to excuse her procedural default.

C. Claims Three and Four: Ineffective Assistance of Counsel

Petitioner brings several claims of ineffective assistance of counsel. First, Petitioner argues that trial counsel was ineffective because he (1) did not file a timely motion for an eyewitness expert; (2) failed to file a timely appeal of the issue to the Michigan Supreme Court after the Michigan Court of Appeals denied Petitioner's application for interlocutory review; and (3) decided to admit excludable and prejudicial testimony. (Dkt. 1 at 45–46.) These three errors allegedly

prejudiced Petitioner individually and cumulatively. (*Id.* at 46.) Second, Petitioner argues that appellate counsel was ineffective because he (1) failed to raise an ineffective assistance of counsel claim on appeal, and (2) other unspecified claims – ostensibly the other claims petitioner raises in this petition – on appeal. (Dkt. 1 at 71–72.) Respondent contends that Petitioner is procedurally defaulted on the claim against trial counsel and that she has not satisfied the ineffective assistance of counsel standard for either claim. (Dkt. 5 at 52–53, 59, 68.)

i. Procedural Default of Ineffective Assistance of Trial Counsel

After Petitioner directly appealed her conviction to the Michigan state courts, she moved for relief from judgment in the state trial court, asserting that her trial counsel had been ineffective. (Dkt. 6, Ex. 34 at 1–2.) The trial court denied Petitioner's motion, holding that there was no evidence to show that "but for the alleged error, Defendant would have a reasonably likely change [sic] of acquittal." (Dkt. 6, Ex. 33 at 2.) The court did not cite a specific procedural rule, but it is clear that the court's ruling was an application of MCR 6.508(D)(3)(b)(i), which states that a defendant is not entitled to post-appeal relief from a conviction unless "but for the alleged error, the defendant would have had a

reasonably likely chance of acquittal." The text of the rule is nearly verbatim what the trial court wrote, indicating that the trial court relied on this procedural rule to deny petitioner's motion.

The Sixth Circuit has held that MCR 6.508(D)(3) is an adequate and independent state ground sufficient for procedural default. *See Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010) (describing MCR 6.508(D)(3) as a "procedural-default rule"). Petitioner could have brought her ineffective assistance of trial counsel claims on direct appeal and is therefore procedurally defaulted unless she can show cause and prejudice. Petitioner has also asserted ineffective assistance of appellate counsel, but this claim is without merit as set forth below. Accordingly, Petitioner has not demonstrated cause to excuse her procedural default and is procedurally defaulted on her ineffective assistance of trial counsel claim. *See Martin v. Mitchell*, 280 F.3d 594, 606 (6th Cir. 2002) (noting that ineffective assistance of appellate counsel cannot constitute cause if the underlying claims have no merit); *Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir. 2000) (holding that ineffective assistance of appellate counsel can serve as cause to excuse procedural default if the claim has merit).

ii. Ineffective Assistance of Appellate Counsel

The Sixth Amendment guarantees a defendant the right to the effective assistance of counsel on the first appeal by right. *Evitts v. Lucey*, 469 U.S. 387, 396–97 (1985). To show that she was denied the effective assistance of counsel, Petitioner must demonstrate that "counsel's performance was deficient and that [she] was prejudiced as a result." *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To demonstrate prejudice, 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." *Strickland*, 466 U.S. at 694. "*Strickland*'s test for prejudice is a demanding one. 'The likelihood of a different result must be substantial, not just conceivable.'" *Storey v. Vasbinder*, 657 F.3d 372, 379 (6th Cir. 2011) (quoting *Harrington*, 562 U.S. at 112). "Appellate counsel cannot be found to be ineffective for failure to raise an issue that lacks merit." *Shaneberger*, 615 F.3d at 452.

The claims Petitioner argues should have been raised by appellate counsel are without merit. First, as discussed above, any violation of

Petitioner's right to confrontation was, according to the state courts, harmless error. Second, there is no clearly established right to an eyewitness expert, as the Supreme Court has never held this to be the case. Other federal courts have also reached this conclusion. *See, e.g.*, *Ford v. Dretke*, 135 F. App'x 769, 771–72 (5th Cir. 2005) (requiring appointment of an expert on eyewitness identification would be a new rule); *Jackson v. Ylst*, 921 F.2d 882, 886 (9th Cir. 1990) (habeas petitioner's claim that his due process rights were violated when he was denied the appointment of an expert on eyewitness identification proposed a new rule); *Spencer v. Hofbauer*, U.S.D.C. No. 2:06 12133, 2008 WL 324098, *9 (E.D. Mich. Feb. 6, 2008) (no clearly established Supreme Court law which requires the appointment of an expert in eyewitness identification). Thus, appellate counsel's performance was not deficient in raising this claim on appeal.

Finally, Petitioner is unable to demonstrate prejudice from any errors trial counsel may have made and therefore cannot meet the *Strickland* standard. The Michigan Supreme Court reasonably found that any errors made by trial counsel were harmless error given the amount of evidence supporting Petitioner's conviction. And, Petitioner

has not established prejudice from trial counsel's failure to file an interlocutory appeal regarding testimony of an expert on eyewitness identification because she failed to show that the Michigan Supreme Court would have been likely to grant her application for leave to appeal and order the appointment of such a witness. *See, e.g.*, *McKenzie v. Jones*, 100 F. App'x 362, 363–65 (6th Cir. 2004).

In sum, the claims that Petitioner argues her appellate counsel should have raised on direct appeal lack merit, and Petitioner therefore cannot establish that appellate counsel's performance fell below the *Strickland* standard.

IV. REQUEST FOR CERTIFICATE OF APPEALABILITY

The Court hereby denies the petition for a writ of habeas corpus, but will grant a certificate of appealability. Petitioner's constitutional claims have been rejected on the merits, but she has demonstrated that "reasonable jurists would find the district court's assessment of the constitutional claims debatable," *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003), as evidenced by Justice Kelly's partial dissent. *See* 489 Mich. at 882–84. Accordingly, the Court will issue a certificate of appealability.

V. ORDER

Accordingly, the petition for a writ of habeas corpus is DENIED with prejudice. The request for a certificate of appealability is GRANTED.

IT IS SO ORDERED.

Dated: November 1, 2016
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on November 1, 2016.

s/Felicia M. Moses
FELICIA M. MOSES
Case Manager