No. 16-2172

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 13, 2018
DEBORAH S. HUNT, Clerk

ROUMMEL INGRAM,

Petitioner-Appellant,

v.

JOHN PRELESNIK,

Respondent-Appellee.

ORDER

BEFORE: MERRITT, GRIFFIN, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.[1] No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

[1] Judge White recused herself from participation in this ruling.

Appendix A

NOT RECOMMENDED FOR PUBLICATION
File Name: 18a0175n.06

No. 16-2172

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROUMMEL INGRAM, Petitioner-Appellant, v. JOHN PRELESNIK, Respondent-Appellee.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: MERRITT, GRIFFIN, and DONALD, Circuit Judges.

GRIFFIN, Circuit Judge.

Petitioner Roummel Ingram appeals the district court's judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. A Michigan state court jury convicted Ingram of armed robbery, assault with intent to do great bodily harm, felonious assault, and three counts of possession of a firearm during the commission of a felony, all for his involvement in a robbery of a liquor store that ended with Ingram shooting the store clerk. After two unsuccessful attempts at post-conviction relief in the Michigan courts, he filed the instant habeas petition in the United States District Court for the Eastern District of Michigan, which denied his petition on the merits without addressing respondent's procedural default defenses. Our court granted Ingram a certificate of appealability (COA) on two claims: ineffective assistance of counsel for failure to raise and preserve a claim related to Ingram's warrantless

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 16-2172, *Roummel Ingram v. John Prelesnik*
Originating Case No. : 2:12-cv-13107

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. David J. Weaver

Enclosure

Mandate to issue

Appendix C

arrest, and denial of his Sixth Amendment right to a public trial. For the reasons that follow, we affirm the denial of habeas relief, albeit on grounds that differ from the district court.

I.

In 2007, a Michigan jury convicted Ingram of armed robbery, M.C.L. § 750.529, assault with intent to do great bodily harm less than murder, § 750.84, felonious assault, § 750.82, and three counts of possession of a firearm during the commission of a felony, § 750.227b. *People v. Ingram*, No. 273086, 2007 WL 4245642, at *1 (Mich. Ct. App. Dec. 4, 2007). His convictions stemmed from a robbery of a convenience store in Farmington Hills, Michigan. The Michigan Court of Appeals summarized the facts as follows:

> [Ingram]'s convictions arise out of the July 5, 2005, robbery of the Mug & Jug Wine Shop in Farmington Hills. Co-defendant Shannon McGriff entered the store with [Ingram] while another co-defendant, Kim Thomas, waited in a vehicle at the rear of the store. During the robbery, [Ingram] beat a store employee, Matthew Al-Sheikh, with a gun and threatened to shoot Al-Sheikh if he did not open a safe. [Petitioner] and McGriff took money from a cash register and drawer, but left without opening the safe. [Ingram] shot Al-Sheikh in the chest before he and McGriff fled out the back door.

Id. A security camera captured the robbery but did not record the shooting.

This robbery was the third over the course of approximately three weeks in June and July of 2005 conducted by Ingram and his compatriots, with the other two robberies taking place in nearby Saint Clair Shores, Michigan. On June 14, 2005, a Citi-Financial bank location was robbed at gun point by a single male. On July 1, 2005, a Wireless Giant store was robbed at gunpoint by two males. Shortly after the "Mug and Jug" robbery, Farmington Hills police received a tip from an informant that petitioner and McGriff "were overheard bragging at a party that they had committed several robberies in the [Detroit] area." On the basis of this tip, Farmington Hills police and members of a county-wide police task force began surveilling

Ingram's home. During this surveillance, officers observed a Ford Thunderbird arrive at Ingram's house, and a Law Enforcement Information Network check revealed it was wanted for an armed robbery in Saint Clair Shores. After Saint Clair Shores officers were alerted to the Thunderbird's presence at Ingram's house, they took a photographic lineup to the victims of the Citi-Financial and Wireless Giant robberies. Only the Citi-Financial victim, Aisha Mercer, was able to pick Ingram out of the lineup.

Based on this positive identification, Saint Clair Shores police directed Farmington Hills police to arrest Ingram. At this time, however, surveilling officers saw Ingram enter a gold Ford Taurus with two other individuals, and observed the three drive away from the home. Farmington Hills police pulled the vehicle over and arrested all three occupants, including Ingram. Ingram eventually waived his *Miranda* rights, confessed to his involvement in the robberies, and admitted he shot the store clerk at the "Mug and Jug."

At trial, defense counsel conceded that Ingram committed armed robbery and felonious assault, but argued that defendant was not guilty of the charged greater offense of assault with intent to commit murder because the store clerk was shot due to the gun accidentally discharging. *Ingram*, No. 273086, 2007 WL 4245642, at *1. During the presentation of evidence, the prosecution called John Parish to testify. Before he was called to the stand, the prosecutor asked to excuse the jury, at which time she asked the trial judge to "clear[] and secure[]" the courtroom during his testimony. The prosecutor explained that Parish "is an informant that [the prosecution] would like to put on the stand. [And] [i]t has come to the attention of the People that this informant has been receiving death threats as well as his father is receiving death threats because of his participation in this case." Defense counsel responded that he did not know anything about any death threats, but that Ingram had the right to a public trial. Further, defense

counsel argued that, while there may be concerns about some of Ingram's family members making threats against Parish, Ingram's family had an interest in being able to be present and observe the trial. After both sides argued, the trial court stated, simply: "All right. For this witness only I'm going to order that the courtroom be cleared completely." At a later point in the trial proceedings, when the prosecution asked that the courtroom remain closed to the public during the testimony of an additional prosecution witness, the court explained its position on the closure. Thereafter, the court denied the prosecutor's second request for closure.

The jury found Ingram guilty of the lesser offense of assault with intent to do great bodily harm less than murder, and found him guilty of armed robbery, felonious assault, and three counts of possession of a firearm in the commission of a felony, but acquitted him of assault with intent to commit murder. The trial court sentenced him to 285 months to 40 years' imprisonment for armed robbery, 80 months to 10 years' imprisonment for assault with intent to do great bodily harm less than murder, and 2 to 4 years' imprisonment for felonious assault, all consecutive to two years' imprisonment for the three counts of felony firearm. He unsuccessfully sought postconviction relief in the Michigan courts and habeas relief in the district court below.

II.

"In an appeal from the denial of habeas relief, we review the district court's legal conclusions de novo and its factual findings for clear error." *Scott v. Houk*, 760 F.3d 497, 503 (6th Cir. 2014). Under the Antiterrorism and Effective Death Penalty Act, a state conviction may only be overturned for an issue adjudicated on the merits if it (1) "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) "was based on an unreasonable determination of the

facts in light of the evidence presented" to the state court. 28 U.S.C. § 2254(d). A claim for habeas relief based upon the first type must show that the state court "arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or that it "confront[ed] facts that are materially indistinguishable from a relevant Supreme Court precedent and arrive[d] at a result opposite" to that reached by the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted). But when "a state court fails to address federal law, § 2254 does not apply, and the decision is reviewed de novo." *Dando v. Yukins*, 461 F.3d 791, 796 (6th Cir. 2006).

III.

Our court granted petitioner a COA on two issues: ineffective assistance of counsel relating to his claim that state trial and appellate counsel failed to raise and preserve his claim of a warrantless arrest, and violation of his public trial right when the state trial judge closed the courtroom entirely during examination of one of the prosecution's witnesses. Respondent defends both on the merits and on procedural default grounds. The Supreme Court has held that federal courts are not *required* to address a procedural default issue before deciding against the petitioner on the merits. *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997); 28 U.S.C. § 2254(b)(2). Therefore, this court will address his ineffective assistance claim on the merits, given that it is an analytically cleaner tack. Furthermore, because "this court may affirm the decision of the district court if it is correct for any reason, even a reason different from that relied upon by the district court," *Taylor v. McKee*, 649 F.3d 446, 450 (6th Cir. 2011), we will address the issue of procedural default on his public trial claim.

A.

Ingram first contends that his trial and appellate counsel were ineffective for failing to "raise and preserve" issues relating to his warrantless arrest. As in all cases alleging ineffective assistance of counsel, we turn to *Strickland v. Washington*'s well-worn framework: a criminal defendant claiming ineffective assistance of counsel must prove that (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the defense. 466 U.S. 668, 687 (1984). The deficient performance prong is "measured against an objective standard of reasonableness under prevailing professional norms." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotation marks and citations omitted). Under the prejudice prong, "[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." *Strickland*, 466 U.S. at 694. The typical habeas "double deference," *see Cullen*, 563 U.S. at 190, does not apply here, for the state court never addressed the issue on the merits. *See Harrington v. Richter*, 562 U.S. 86, 98 (2011).

When the underlying issue relating to ineffective assistance is a Fourth Amendment challenge, the habeas petitioner must show that the "Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). In this case, Ingram claims that his arrest was made without probable cause and, therefore, his subsequent confession while in police custody was inadmissible as flowing from an illegal arrest.[1]

[1]At oral argument, petitioner averred that respondent "waived" any claim that Ingram's arrest was supported by probable cause by failing to raise this argument in his appellate brief. But it is petitioner's burden to show both that counsel was constitutionally ineffective, *Strickland*, 466 U.S. at 694, and ultimate entitlement to habeas relief, *cf. Cullen*, 563 U.S. at 181.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. The "ultimate touchstone" in this area of law is "reasonableness." *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (citation omitted). "In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). The existence of probable cause depends on reasonable conclusions drawn from the facts known to an arresting officer at the time of the arrest. *United States v. Pearce*, 531 F.3d 374, 380–81 (6th Cir. 2008) (quoting *Devenpeck*, 543 U.S. at 152). And the subjective intent of the arresting officer does not matter. *Whren v. United States*, 517 U.S. 806, 813 (1996).

"Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Logsdon v. Hains*, 492 F.3d 334, 341 (6th Cir. 2007) (quoting *Henry v. United States*, 361 U.S. 98, 102 (1959)). "No overly-burdensome duty to investigate applies to officers faced with the prospect of a warrantless arrest." *Id.* And probable cause does not have to relate to a crime that actually results in a conviction. *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979) ("The validity of the arrest does not depend on whether the suspect actually committed a crime[.]"); *Devenpeck*, 543 U.S. at 152–54 (finding that there is no Fourth Amendment violation when the criminal offense for which there is probable cause to arrest is not "closely related" to the offense stated by the arresting officer at

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And petitioner is appealing from a district court decision that found sufficient probable cause to support his arrest, which this court reviews on appeal.

the time of arrest). Part of the difficulty in assessing petitioner's Fourth Amendment claim on the merits arises from the fact that the state trial court was never requested to hold a hearing and elicit testimony from the arresting officer. However, after evaluating the information in the record—the police reports, affidavits, and officer narratives—it is our view that the arresting officer had probable cause to arrest Ingram.

On the day of the arrest, Ingram was surveilled by officers from the county-wide task force, who had already received a tip on July 11, 2005, that "Romeo [sic] Ingram and Shannon McGriff might be responsible for the Armed Robbery and shooting" "at the Mug and Jug." Officers then saw a Ford Thunderbird linked to the robberies at his residence. Shortly after Ingram left his residence, the surveilling officers received word from the Saint Clair Shores police department that Aisha Mercer, the eye-witness victim of one of the robberies, identified Ingram from a photo lineup. On the basis of this information the officers had probable cause to arrest Ingram.[2]

Firsthand observations are entitled to a presumption of reliability. *See, e.g., Peet v. City of Detroit*, 502 F.3d 557, 564 (6th Cir. 2007). The Supreme Court has also held that police departments and officers can rely upon a radio bulletin or flyer stating that another police department has found probable cause to arrest a suspect, as long as the initiating department actually had probable cause. *United States v. Hensley*, 469 U.S. 221, 230–31 (1985). This is true even if the arresting department and officers do not know the specific facts establishing the probable cause. *Id.* Here, the arresting officers were told that a victim of one of the robberies had positively identified Ingram, and that the Saint Clair Shores police had probable cause to

[2]While petitioner contends that the police narratives contained inconsistent dates or conflated the facts of the various robberies, (Pet. Br., p. 20-22), these mere scrivener's errors or inconsistencies are insufficient to undermine our finding of probable cause.

arrest him. Even assuming the inconsistencies in the police narratives were not scrivener's error, and the Oakland County officers were actually given erroneous dates or were mistakenly told that the identifying witness was from one of the other two robberies, they were reasonably entitled to rely on the information from the Saint Clair Shores police. *Id.* And that information, coupled with the Ford Thunderbird's presence at Ingram's residence and the informant's tip that Ingram and his cohorts were bragging about the robberies, sufficed for probable cause to arrest Ingram. *Id.*; *Peet*, 502 F.3d at 563–64. Thus, Ingram's warrantless arrest was constitutional and his trial and appellate counsel did not provide ineffective assistance for failing to challenge his arrest given that no Fourth Amendment violation occurred. *Kimmelman*, 477 U.S. at 375.

B.

Ingram next challenges the trial court's decision to close the courtroom to the public during the testimony of one of the prosecution's witnesses. As he did below, respondent defends both on procedural default grounds and on the merits. We resolve this issue on procedural default grounds, contrary to the district court's merits analysis. *See Taylor*, 649 F.3d at 450.

The Supreme Court has described procedural default as one of "two fundamental tenets of federal review of state convictions," along with the related concept of exhaustion. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). Under the doctrine of procedural default, "a federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule." *Id.* This is so because "a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance," and "concerns of comity and federalism" ground the procedural

default doctrine. *Coleman v. Thompson*, 501 U.S. 722, 730, 732 (1991). We have held that a habeas petitioner procedurally defaults a claim if:

> (1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default.

Guilmette v. Howes, 624 F.3d 286, 290 (6th Cir. 2010) (en banc) (quoting *Tolliver v. Sheets*, 594 F.3d 900, 928 n.11 (6th Cir. 2010)). This court may excuse the application of the procedural-default doctrine if it would result in a "fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

Ingram did not raise this issue until his *second* motion for relief from judgment in state court. The Michigan Court of Appeals and Michigan Supreme Court both denied Ingram's applications for leave to appeal the trial court's denial of his second motion under Michigan Court Rule § 6.502(G):

> (G) Successive Motions.
>
> > (1) Except as provided in subrule (G)(2), . . . one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.
> >
> > (2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

Our court has held that § 6.502(G) acts as an adequate and independent state ground for denying review sufficient to procedurally default a claim. *Morse v. Trippett*, 37 F. App'x 96, 106 (6th Cir. 2002). Because the Court of Appeals and Supreme Court denied leave to appeal on this ground, his public trial claim is procedurally defaulted unless he can show "cause and

prejudice excusing the default," *Guilmette*, 624 F.3d at 290, or that it would result in a "fundamental miscarriage of justice," *Coleman*, 501 U.S. at 750.

Not so, argues Ingram. Instead, he contends that the Court of Appeals and Supreme Court orders were *unexplained* orders, and that the last reasoned judgment in this case is the trial court's denial of Ingram's motion for relief from judgment under Rule § 6.508(D)(3). The United States Supreme Court held in *Ylst v. Nunnemaker* that, for purposes of procedural default, the judgment or order with which this court is concerned is "the last *explained* state-court judgment." 501 U.S. 797, 805 (1991). The Court defined an "unexplained order" as "an order whose text or accompanying opinion does not disclose the reason for the judgment." *Id.* at 802. In other words, "[t]he essence of unexplained orders is that they say nothing." *Id.* at 804.

Here, the Court of Appeals denied leave to appeal because:

> Appellant has failed to demonstrate his entitlement to an application of any of the exceptions to the general rule that a movant may not appeal the denial of a successive motion for relief from judgment. [Mich. Ct. Rule §] 6.502(G).

The Supreme Court denied leave because: "Defendant's motion for relief from judgment is prohibited by [Mich. Ct. Rule §] 6.502(G)." *People v. Ingram*, 828 N.W.2d 382 (Mich. 2013). The Supreme Court's order denying leave on the grounds of Rule § 6.502(G) is not unexplained, because it provides a reason for the judgment. *Ylst*, 501 U.S. at 802. And, unlike the Michigan Rule at issue in *Guilmette*, § 6.502(G) has no component that could be characterized as denying leave on substantive, rather than procedural, grounds. *See Guilmette*, 624 F.3d at 291 ("Because the form orders in this case citing Rule 6.508(D) are ambiguous as to whether they refer to procedural default or denial of relief on the merits, the orders are unexplained."); *cf. Ylst*, 501 U.S. at 805 (holding that a state order was "unexplained" when, though "it was not utterly silent, neither was it informative with respect to the question" of whether a procedural bar was

applied). The same is true for the Court of Appeals order. Therefore, this claim is procedurally defaulted based upon the explained orders of the Michigan Supreme Court and Court of Appeals.[3]

Ingram may present this procedurally defaulted claim in habeas proceedings only if he proves cause and prejudice. "Habeas petitioners cannot rely on conclusory assertions of cause and prejudice to overcome procedural default; they must present affirmative evidence or argument as to the precise cause and prejudice produced." *Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006). The cause question "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). "Such factors may include 'interference by officials,' attorney error rising to the level of ineffective assistance of counsel, and 'a showing that the factual or legal basis for a claim was not reasonably available.'" *Hargrave-Thomas v. Yukins*, 374 F.3d 383, 388 (6th Cir. 2004) (quoting *McCleskey v. Zant*, 499 U.S. 467, 493–94 (1991)). Ineffective assistance of counsel only suffices if the deficient performance purporting to provide cause for the default would be sufficient to merit its own independent constitutional claim. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

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[3]Ingram's broader argument on this point is wholly untenable. He argues that the state trial court decision must be the last reasoned decision because Mich. Ct. Rule § 6.502(G)(1) provides that he "may not appeal the denial or rejection of a successive motion." This argument ignores both the caveat in § 6.502(G)(1) that the bar on successive motions is "[e]xcept as provided in subrule (G)(2)," and that appeals *actually* occurred in this case. In fact, the Michigan Supreme Court order notes that leave to appeal was denied not because the *appeal* was barred, but because Ingram's "*motion* for relief from judgment is prohibited by MCR 6.502(G)." (emphasis added). He also would have a difficult time explaining his interpretation of Rule § 6.502(G) as a complete ban on appeals, given the over-900 Michigan Supreme Court orders that deny leave to appeal citing that rule. *See, e.g.*, *People v. McDonald*, 904 N.W.2d 863 (Mich. 2018) (order).

Ingram cannot show cause for his failure to raise the public trial claim within Michigan's procedural rules, i.e., on direct appeal or in his first motion for relief from judgment. Clearly, Ingram and his appellate counsel had the factual and legal basis for this claim available; his trial counsel actually objected to the trial court's closing of the courtroom on "public trial," Sixth Amendment grounds. And he correctly does not raise ineffective assistance of counsel as cause to excuse this default, because his failure to raise the claim in his first pro se motion for relief from judgment in state court precludes a finding of cause based upon ineffective assistance. *See Martinez v. Ryan*, 566 U.S. 1, 15 (2012) (holding that, with a limited exception not relevant here, attorney error in a postconviction proceeding cannot establish cause).

Instead, Ingram contends that cause for his failure to comply with Michigan's procedural rules arises from the new rule of law established in *Presley v. Georgia*, 558 U.S. 209, 213–15 (2010), wherein the Supreme Court held that the right to a public trial extended to the voir dire context, and that trial courts must consider lesser alternatives to complete closure. *See Reed v. Ross*, 468 U.S. 1, 16 (1984) ("[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures."). But as Ingram's cited precedent makes clear, his "new" rule of law is not truly novel. In fact, the majority opinion is littered with language that supports just the opposite conclusion. *Presley*, 558 U.S. at 209 ("The Supreme Court of Georgia's affirmance contravened this Court's clear precedents."); *id.* at 213 ("In the instant case, the question then arises whether it is so well settled that the Sixth Amendment right extends to jury *voir dire* that this Court may proceed by summary disposition. The point is well settled . . . ."); *id.* at 214 ("The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not only from this Court's

precedents but also from the premise that the process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.") (alteration and citation omitted).

Because *Presley* did not establish a new rule of law, Ingram has failed to establish cause for his failure to abide by Michigan's procedural rules and his habeas claim relating to his public trial right is procedurally defaulted. Moreover, his confession and the other evidence presented against him at trial preclude a finding that the application of the procedural-default doctrine would result in a "fundamental miscarriage of justice," *Coleman*, 501 U.S. at 750, which is generally defined as cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent," *Murray*, 477 U.S. at 496. Nowhere in Ingram's briefing does he attempt to argue that he is actually innocent of the crime. And even if he did, his confession would all but foreclose that argument. Therefore, we hold that Ingram's Sixth Amendment claim for habeas relief is procedurally defaulted.

IV.

We affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROUMMEL INGRAM,

Petitioner,

Case Number: 12-13107
Honorable David M. Lawson

v.

JOHN PRELESNIK,

Respondent.
_____/

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION FOR AN EVIDENTIARY HEARING

This matter is before the Court on the petitioner's motion for a certificate of appealability. On July 12, 2016, the Court denied the petitioner's habeas corpus petition, entered judgment, and denied a certificate of appealability on all issues raised in the petition. The petitioner now seeks a certificate of appealability on four of the issues rejected by this Court. Because the Court previously denied a certificate of appealability, the Court will construe the motion for a certificate of appealability as a motion for reconsideration of its order denying a certificate of appealability.

Motions for reconsideration may be granted pursuant to E.D. Mich. LR 7.1(h)(1) when the moving party shows (1) a "palpable defect," (2) that misled the court and the parties, and (3) that correcting the defect will result in a different disposition of the case. E.D. Mich. LR 7.1(h)(3). A "palpable defect" is a defect which is obvious, clear, unmistakable, manifest, or plain. *Mich. Dep't of Treasury v. Michalec*, 181 F. Supp. 2d 731, 734 (E.D. Mich. 2002) (citations omitted). "Generally . . . the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court." E.D. Mich. LR 7.1(h)(3). The petitioner's motion essentially reiterates the arguments that he previously advanced in his petition, and he has failed to

Appendix D

establish any palpable defect in the Court's ruling denying a certificate of appealability. The Court finds that reasonable jurists would not disagree with this determination. The Court therefore will deny the petitioner's motion.

The petitioner also notes in his motion for a certificate of appealability that he filed a motion for an evidentiary hearing that was never addressed by this Court. The petitioner filed his original habeas corpus petition on July 10, 2012. On that same day, he also filed a motion to hold his petition in abeyance and a motion for an evidentiary hearing. On August 20, 2012, the Court granted the petitioner's motion to hold his petition in abeyance to permit him to exhaust his claims in state court and terminated the motion for an evidentiary hearing.

On May 16, 2013, the Court granted the petitioner's motion to reinstate, but the petitioner failed to renew his motion for an evidentiary hearing. However, "[f]ederal courts sometimes will ignore the legal label that a pro se litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category. They may do so in order to avoid an unnecessary dismissal, to avoid inappropriately stringent application of formal labeling requirements, or to create a better correspondence between the substance of a pro se motion's claim and its underlying legal basis." *Castro v. United States*, 540 U.S. 375, 381-82 (2003) (collecting cases) (citations omitted). Here, it appears that the petitioner assumed his motion for an evidentiary hearing would automatically be reopened when the Court granted his motion to reinstate his habeas petition. It is clear now that the petitioner intended the motion for an evidentiary hearing to be considered, and the Court will do so now.

Under 28 U.S.C. § 2254(e),

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and

convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The petitioner's motion raises five issues that he believes were incorrectly decided by the state trial court. He is not seeking an evidentiary hearing from this Court. Rather he is asking the Court to remand his case for an evidentiary hearing in the state trial court. The issues, in essence, are the earliest iterations of the issues he presented in his amended habeas petition, which was denied. To the extent that the motion can be construed as a request for an evidentiary hearing before this Court, the petitioner has failed to rebut the presumption of correctness of the state court determinations. Nor has the petitioner identified a new rule of constitutional law made retroactive to cases on collateral review, and he has not identified any factual disputes that could not have been previously discovered through the exercise of due diligence. Therefore, the motion for an evidentiary hearing will be denied.

Accordingly, it is **ORDERED** that the petitioner's motion for reconsideration [dkt. #36] is **DENIED**.

It is further **ORDERED** that the petitioner's motion for an evidentiary hearing [dkt. #4] is

DENIED.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: August 17, 2016

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on August 17, 2016.

s/Susan Pinkowski
SUSAN PINKOWSKI

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROUMMEL INGRAM,

Petitioner,

Case Number: 12-13107
Honorable David M. Lawson

v.

JOHN PRELESNIK,

Respondent.
_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

An Oakland County, Michigan jury convicted petitioner Roummel Ingram of armed robbery, assault with intent to do great bodily harm less than murder, felonious assault, and three counts of possession of a firearm during commission of a felony. He was sentenced to minimum prison terms totaling more than 25 years. Ingram filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his convictions on the grounds that other-acts evidence was improperly admitted, he received ineffective assistance of trial and appellate counsel, a warrantless arrest violated his rights under the Fourth Amendment, and his right to public trial was violated. Warden John Prelesnik filed an answer to the petition contending that all of Ingram's claims are procedurally defaulted, with the exception of a portion of his ineffective assistance of counsel claim, and that all of the claims raised are meritless. The Court finds that the petitioner's claims lack merit. Therefore, the Court will deny the petition.

I.

The Michigan Court of Appeals accurately summarized the evidence adduced at the petitioner's Oakland County, Michigan circuit court trial as follows:

Appendix E

> Defendant's convictions arise out of the July 5, 2005, robbery of the Mug & Jug Wine Shop in Farmington Hills. Co-defendant Shannon McGriff entered the store with defendant while another co-defendant, Kim Thomas, waited in a vehicle at the rear of the store. During the robbery, defendant beat a store employee, Matthew Al-Sheikh, with a gun and threatened to shoot Al-Sheikh if he did not open a safe. Defendant and McGriff took money from a cash register and drawer, but left without opening the safe. Defendant shot Al-Sheikh in the chest before he and McGriff fled out the back door. Defense counsel conceded at trial that defendant committed the armed robbery and the charged felonious assault, but argued that defendant was not guilty of the charged greater offense of assault with intent to commit murder because Al-Sheikh was shot when the gun accidentally discharged. The jury acquitted defendant of assault with intent to commit murder, but found him guilty of the lesser offense of assault with intent to do great bodily harm less than murder.

People v. Ingram, No. 273086, 2007 WL 4245642, *1 (Mich. Ct. App. Dec. 4, 2007).

The petitioner was sentenced on February 14, 2006 to prison terms of 285 months to 40 years for armed robbery, 80 to 120 months for assault with intent to do great bodily harm, and two to four years for felonious assault, all of the foregoing to be served concurrently with one another and consecutively to three concurrent two-year prison terms for possession of a firearm during the commission of a felony.

The petitioner filed a direct appeal in the Michigan Court of Appeals raising these claims through counsel: (i) the trial court erred when it permitted the introduction of other-acts evidence; (ii) the trial court improperly sentenced the petitioner based upon facts not found by the jury beyond a reasonable doubt; and (iii) counsel was ineffective by failing to object to the sentences. The petitioner filed a *pro se* supplemental brief claiming that trial counsel was ineffective by admitting the petitioner's guilt to certain charges without the petitioner's consent. The Michigan Court of Appeals affirmed the petitioner's convictions and sentences. *People v. Ingram*, No. 273086, 2007 WL 4245642 (Mich. Ct. App. Dec. 4, 2007).

The petitioner filed an application for leave to appeal in the Michigan Supreme Court, raising the same claims asserted in the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal. *People v. Ingram,* 480 Mich. 1138, 746 N.W.2d 68 (2008).

On May 29, 2009, the petitioner filed a motion for relief from judgment in the trial court, raising claims that his arrest violated the Fourth Amendment and that his trial and appellate counsel were ineffective. The trial court denied the motion and the Michigan Court of Appeals and Michigan Supreme Court denied leave to appeal the trial court's decision. *People v. Ingram*, No. 302663 (Mich. Ct. App. Oct. 5, 2011); *People v. Ingram*, 491 Mich. 941, 815 N.W.2d 479 (2012).

While his appeal from the denial of his first motion for relief from judgment was pending, the petitioner filed a second motion for relief from judgment, raising a single claim addressing the alleged denial of his right to a public trial. The trial court denied the motion on December 2, 2011. The Michigan Court of Appeals and Michigan Supreme Court again denied leave to appeal. *People v. Ingram*, No. 310422 (Mich. Ct. App. Aug. 15, 2012); *People v. Ingram*, 493 Mich. 958, 828 N.W.2d 382 (2013).

On July 12, 2012, the petitioner filed the present petition for a writ of habeas corpus. The Court stayed the petition pending resolution of the petitioner's appeals from the denial of his second motion for relief from judgment in the state courts. After the petitioner concluded his state court appeals, he asked the Court to reinstate his habeas petition. The Court reinstated the petition, vacated the stay, and ordered the respondent to file a response. The petition raises these claims:

I. THE TRIAL COURT ERRED BY ALLOWING THE ADMISSION OF SIMILAR ACTS EVIDENCE.

II. TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO ADEQUATELY INVESTIGATE THE FACTS AND CONCEDING THE

PETITIONER'S GUILT ON FIVE OF THE SIX CHARGES WITHOUT THE PETITIONER'S EXPRESS CONSENT.

III. A WARRANTLESS ARREST OF THE PETITIONER VIOLATED HIS RIGHT TO BE FREE FROM UNLAWFUL SEARCH AND SEIZURE.

IV. TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE BY FAILING TO PRESERVE THE ISSUE OF ILLEGAL ARREST AND ADMISSION OF IDENTIFICATION EVIDENCE.

V. THE TRIAL COURT ERRED IN CLOSING THE COURTROOM TO THE PUBLIC.

Amended Pet. at 1-3.

The respondent filed an answer contesting the merits of the petition, and raising a procedural default defense for the prosecutorial misconduct claims.

The "procedural default" argument is a reference to the rule that the petitioner did not preserve properly some of his claims in state court, and the state court's denial of those claims on that basis is an adequate and independent ground for the denial of relief under state law, which is not reviewable here. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The Court finds it unnecessary to address this procedural question. It is not a jurisdictional bar to review of the merits, *Howard v. Bouchard*, 405 F.3d 459, 476 (6th Cir. 2005), and "federal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits," *Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003) (citing *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)). The procedural defense will not affect the outcome of this case, and it is more efficient to proceed directly to the merits.

II.

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), which govern this case, "circumscribe[d]" the

standard of review federal courts must apply when considering an application for a writ of habeas corpus raising constitutional claims, including claims of ineffective assistance of counsel. *See Wiggins v. Smith*, 539 U.S. 510, 520 (2003). Because Ingram filed his petition after the AEDPA's effective date, its standard of review applies. Under that statute, if a claim was adjudicated on the merits in state court, a federal court may grant relief only if the state court's adjudication "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 if the adjudication "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). "Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the *dicta*, of [the Supreme] Court's decisions." *White v. Woodall*, --- U.S. ---, 134 S. Ct. 1697, 1702 (2014) (internal quotation marks and citations omitted). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

The distinction between mere error and an objectively unreasonable application of Supreme Court precedent creates a substantially higher threshold for obtaining relief than *de novo* review. The AEDPA thus imposes a highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be "given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (finding that the state court's rapid declaration of a mistrial on grounds of jury deadlock was not unreasonable even where "the jury only deliberated for four hours, its notes were arguably

ambiguous, the trial judge's initial question to the foreperson was imprecise, and the judge neither asked for elaboration of the foreperson's answers nor took any other measures to confirm the foreperson's prediction that a unanimous verdict would not be reached" (internal quotation marks and citations omitted)); *see also Dewald v. Wriggelsworth*, 748 F.3d 295, 298-99 (6th Cir. 2014); *Bray v. Andrews*, 640 F.3d 731, 737-39 (6th Cir. 2011); *Phillips v. Bradshaw*, 607 F.3d 199, 205 (6th Cir. 2010); *Murphy v. Ohio*, 551 F.3d 485, 493-94 (6th Cir. 2009); *Eady v. Morgan*, 515 F.3d 587, 594-95 (6th Cir. 2008); *Davis v. Coyle*, 475 F.3d 761, 766-67 (6th Cir. 2007); *Rockwell v. Yukins*, 341 F.3d 507, 511 (6th Cir. 2003) (en banc). Moreover, habeas review is "limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011).

A.

The petitioner argues first that the trial court violated his right to due process by admitting evidence that he committed other robberies on June 14, and July 1, 2005, weeks and days before the robbery charged in this case. The Michigan Court of Appeals rejected the claim under state evidentiary rules, finding that the evidence was offered "to establish defendant's intent and common scheme or plan in doing an act." *Ingram*, 2007 WL 4245642 at *2. The court noted that the jury was given a limiting instruction on the proper purpose for that evidence. The court then explained:

> Here, the pertinent charge for purposes of reviewing the trial court's decision is the assault with intent to commit murder charge, because the material issue for which the prosecutor offered the evidence was to rebut defendant's claim of an accidental shooting. An actual intent to kill is required to establish assault with intent to commit murder. *People v. Taylor*, 422 Mich. 554, 567; 375 N.W.2d 1 (1985). "An actor's intent may be inferred from all of the facts and circumstances." *People v. Fetterley*, 229 Mich. App 511, 517-518; 583 N.W.2d 199 (1998). Relevant factors are "the nature of the defendant's acts constituting the assault, the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made."

> *Roberts v. People*, 19 Mich. 401, 416 (1870); *see also People v.. Brown*, 267 Mich. App 141, 149 n 5; 703 N.W.2d 230 (2005).
>
> Whether defendant was engaged in intended conduct when he shot the victim at the Mug & Jug Wine Store was probative of his intent. And whether defendant engaged in similar conduct during the few weeks preceding the shooting was probative of whether he was acting pursuit to a plan, as well as the type of experience that he brought into the charged robbery. Evidence that defendant had prior experience in confronting individuals with a gun to commit a robbery before the shooting might negate an otherwise reasonable assumption that he was an inexperienced robber whose gun discharged accidentally while he was mishandling it, causing him to flee out the back door.
>
> Therefore, the trial court did not abuse its discretion in finding that the evidence was relevant to defendant's intent and common scheme or plan in doing an act. Further, the trial court did not abuse its discretion in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under M.R.E. 403.

Ibid.

"[S]tate-court evidentiary rulings cannot rise to the level of due process violations unless they 'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000) (quoting *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996)). The Supreme Court has declined to hold that the admission of "other acts" evidence is so extremely unfair that it violates fundamental conceptions of justice. *Dowling v. United States*, 493 U.S. 342, 352-53 (1990). The Court has discussed when other-acts testimony is permissible under the Federal Rules of Evidence, *see Huddleston v. United States*, 485 U.S. 681 (1988), but has not addressed the issue in constitutional terms. Such matters are more appropriately addressed in codes of evidence and procedure than under the Due Process Clause. *Dowling*, 493 U.S. at 352. "There is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). Consequently, there is no

"clearly established federal law" to which the state court's decision could be "contrary" within the meaning of section 2254(d)(1). *Id.* at 513. The petitioner has not shown that he is entitled to habeas relief on this claim.

B.

Next, the petitioner argues that trial counsel was ineffective by failing to investigate the facts, conceding his guilt at trial, and that trial and appellate counsel were ineffective by failing to raise and preserve his claim that his Fourth Amendment rights were violated by his warrantless arrest.

The standard for obtaining habeas corpus relief is "'difficult to meet.'" *White v. Woodall*, --- U.S. ---, 134 S. Ct. 1697, 1702 (2014) (quoting *Metrish v. Lancaster*, 569 U.S. ---, ---, 133 S. Ct. 1781, 1786 (2013)). In the context of an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984), the standard is "all the more difficult" because "[t]he standards created by *Strickland* and § 2254(d) are both highly deferential and when the two apply in tandem, review is doubly so." *Harrington*, 562 U.S. at 105 (internal citations and quotation marks omitted). "[T]he question is not whether counsel's actions were reasonable"; but whether "there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Ibid.*

A violation of the Sixth Amendment right to effective assistance of counsel is established when an attorney's performance was deficient and the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. An attorney's performance is deficient if "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. The Supreme Court has "declined to articulate specific guidelines for

appropriate attorney conduct and instead [has] emphasized that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688) (internal quotes omitted)).

An attorney's deficient performance is prejudicial if "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Unless the petitioner demonstrates both deficient performance and prejudice, "it cannot be said that the conviction [or sentence] resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

The petitioner first argues that counsel was ineffective because he failed to investigate the facts of his case. That argument is based on the petitioner's belief that his trial attorney did not move to challenge his warrantless arrest on the ground that police lacked probable cause and the arrest was allegedly based upon an impermissibly suggestive lineup procedure. "Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

An "arrest without probable cause constitutes an unreasonable seizure in violation of the Fourth Amendment." *Ingram v. City of Columbus*, 185 F.3d 579, 592-93 (6th Cir. 1999). Probable cause supports an arrest if, at the time of arrest, the arresting officer had "reasonably trustworthy

information" that is sufficient to warrant a reasonable person to "conclude that an individual either had committed or was committing an offense." *United States v. Torres-Ramos*, 536 F.3d 542, 555 (6th Cir. 2008); *see also Lilly v. City of Erlanger*, No. 14-5069, 598 F. App'x 370, 375-76 (6th Cir. 2015) ("[A] determination of probable cause to arrest depends simply on whether, at the moment the arrest was made, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the arrestee had committed an offense.") (internal quotation marks and alterations omitted) ;*Criss v. City of Kent*, 867 F.2d 259, 262 (6th Cir. 1988) (holding that an "[a]rrest without a warrant does not violate the Fourth Amendment if probable cause exists").

In this case, officers with the Farmington Hills Police Department were conducting surveillance of the petitioner's residence based upon a tip from a confidential informant that the petitioner was involved in the party store robbery, when they were notified that a Macomb County robbery victim had identified the petitioner from a photographic lineup as one of the perpetrators. The St. Clair Shores Police Department requested the Farmington Hills police to arrest the petitioner. Farmington Hills police officers, who had seen the petitioner exit his home and enter the front passenger seat of a Ford Taurus, pursued the Taurus and arrested the petitioner. Based upon these facts, it was not unreasonable for the arresting officers to conclude that the petitioner had committed an offense.

The petitioner's challenge to the fairness of the photographic lineup does not change this analysis. Probable cause exists where an officer has knowledge that would warrant a "prudent man" to believe that an offense has been committed and the suspect committed it. *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964). Here, the officers involved were advised that a robbery victim positively

identified the petitioner from a photographic array as the perpetrator. A prudent officer would believe this was sufficient to justify an arrest of the petitioner. Police officers are not expected to await judicial review of the fairness of a lineup before effecting an arrest based upon a lineup identification. *See Arizona v. Evans*, 514 U.S. 1, 15-16 (1995) (holding that a police officer "was acting objectively reasonably when he relied upon the police computer record," even though the outstanding warrant on which the officer arrested defendant was the result of a clerical error). The petitioner has not shown that he could have succeeded on his Fourth Amendment claim, and therefore he cannot show that his attorney was ineffective when he did not challenge the arrest.

The petitioner argues that his appellate attorney was ineffective by failing to raise these Fourth Amendment claims on direct review. It is well established that a criminal defendant does not have a constitutional right to have appellate counsel raise every non-frivolous issue on appeal. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983). In fact, "the process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail . . . is the hallmark of effective appellate advocacy." *O'Sullivan v. Boerckel*, 526 U.S. 838, 858 (1999) (quotation marks and citations omitted).

The petitioner's complaints about trial counsel's handling of the Fourth Amendment claims have no merit, and there is no reasonable probability that, but for appellate counsel's failure to raise those claims, the petitioner would have prevailed on appeal. Therefore, appellate counsel was not ineffective by failing to raise the these claims on direct appeal. "Appellate counsel cannot be found to be ineffective for 'failure to raise an issue that lacks merit.'" *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010), quoting *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001).

Finally, the petitioner argues that trial counsel was ineffective when he conceded the petitioner's guilt at trial. He objects to this statement by defense counsel during closing argument: "You know we have a video that shows that clearly Mr. Ingram is in the store and this robbery went on. You can see all of that. That's one of the reasons why I've conceded to you that the armed robbery case is being made out." Tr., 1/31/06 at 33. The petitioner argues that counsel was ineffective because he failed to seek and obtain his consent before conceding guilt.

The Michigan Court of Appeals, applying the test for ineffective assistance of counsel articulated in *Strickland*, held that trial counsel's decision to concede the petitioner's guilt was reasonable trial strategy. The court of appeals correctly noted that an attorney is required to consult with his client regarding important tactical decisions, but rejected the petitioner's claim that counsel's concession that the petitioner committed certain acts was the functional equivalent of a guilty plea. *Ingram*, 2007 WL 4245642 at *4, *citing Florida v. Nixon*, 543 U.S. 175, 187-88 (2004). The court of appeals held that, in light of the substantial evidence against the petitioner, "defense counsel's strategy of admitting defendant's guilt on [the armed robbery and felonious assault charges] to improve defendant's chances for acquittal on the assault with intent to commit murder charge was not unsound." *Ibid.* The court of appeals further held that, given the admission of the petitioner's written confession to committing the armed robbery at trial, he failed to show any reasonable probability that the result of the trial would have been different without counsel's confession. *Ibid.*

The petitioner has not shown that the state court of appeals' assessment of his lawyer's trial strategy unreasonably applied *Strickland.* Trial counsel argued to the jury that the petitioner told the truth in his confession; that was a strategy for obtaining an acquittal on the assault with intent

to murder charge. He argued that counsel admitted in his confession that he committed the robbery, but denied any intent to kill the victim. Counsel reasoned that the petitioner was obviously being truthful by admitting to the robbery and that the jury therefore, also should find him truthful when he stated that the gun discharged accidentally. And that strategy turned out to be successful: the petitioner was acquitted of the assault with intent to murder charge. Counsel's admission in the face of the substantial evidence against the petitioner, including the petitioner's own confession, was reasonable and did not fall below an "objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The Court cannot conclude that "there is a reasonable probability that," but for counsel's trial strategy, "the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

Because the state courts reasonably applied federal law when they rejected that petitioner's arguments, habeas relief must be denied on this claim.

C.

Next, the petitioner argues that his rights under the Fourth Amendment were violated by the warrantless arrest. It is well settled that *Stone v. Powell*, 428 U.S. 465 (1976), bars a Fourth Amendment claim on habeas review, as long as the state has given the petitioner a full and fair opportunity to litigate the Fourth Amendment claim. *Id.* at 494.

The Sixth Circuit Court of Appeals employs a two-step analysis to determine whether a defendant was given a full and fair opportunity to litigate a Fourth Amendment claim in state court:

> First, the court must determine whether the state procedural mechanism, in the abstract, presents the opportunity to raise a fourth amendment claim. Second, the court must determine whether presentation of the claim was in fact frustrated because of a failure of that mechanism.

Machacek v. Hofbauer, 213 F.3d 947, 952 (6th Cir. 2000) (internal quotations omitted). "Michigan has a procedural mechanism which presents an adequate opportunity for a criminal defendant to raise a Fourth Amendment claim." *Robinson v. Jackson*, 366 F. Supp. 2d 524, 527 (E.D. Mich. 2005). Because Michigan provides a procedural mechanism for raising a Fourth Amendment claim, the petitioner may only demonstrate entitlement to relief if he establishes that presentation of his claim was frustrated by a failure of that mechanism. He has not done so. The petitioner's failure to litigate his Fourth Amendment claim on the grounds raised in this petition on direct review does not reflect a failure of the state process. *See Gates v. Henderson*, 568 F.2d 830, 840 (2d Cir. 1977) (holding that the defendant's failure to utilize state court corrective procedures to redress claimed Fourth Amendment violations did not render *Stone* inapplicable); *Williams v. Valenzuela*, No. 11-8461-AG, 2012 WL 6761722, *9 (C.D. Cal. Dec. 7, 2012) ("The fact that Petitioner and his counsel did not take advantage of [state court process for litigating search and seizure claims] is not important; the process was available to Petitioner and, therefore, his Fourth Amendment claim is not cognizable here."). Consequently, this claim is not cognizable.

D.

Finally, the petitioner alleges that his Sixth Amendment right to a public trial was violated when the trial court closed the courtroom to the public during the testimony of prosecution witness John Parish. The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The right is applicable to the states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968).

"The central aim of a criminal proceeding must be to try the accused fairly." *Waller v. Georgia*, 467 U.S. 39, 46 (1984). The public-trial guarantee was created to further that aim. *Ibid.* (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979). A public trial helps to ensure that judge and prosecutor carry out their duties responsibly, encourages witnesses to come forward, and discourages perjury. *Ibid.* The violation of the constitutional right to a public trial is a structural trial error, not subject to the harmless error analysis. *Id.* at 49-50, n.9.

A closure does not violate the Sixth Amendment where: (1) the party seeking to close the courtroom advances an overriding interest that is likely to be prejudiced by an open courtroom; (2) the party seeking closure demonstrates that the closure is no broader than necessary to protect that interest; (3) the trial court considers reasonable alternatives to closing the proceeding; and (4) the trial court makes findings adequate to support the closure. *Id.* at 48.

Before John Parish testified, the prosecutor requested outside the presence of the jury that the courtroom be closed during Parish's testimony because Parish and his father both had been receiving death threats based upon Parish's participation in the petitioner's case. In response, the petitioner's counsel cited the petitioner's right to a public trial, but recognized that there was concern that the petitioner's family members had made threats against Parish. The trial court decided to close the courtroom for Parish's testimony only.

The trial court identified the witness's safety as the overriding interest that justified a temporary closure of the courtroom. Courts have recognized that interest as sufficient to warrant closure. *Nolan v. Money*, 534 F. App'x 373, 380 (6th Cir. 2013). The closure here was no broader than necessary to achieve the goal. The courtroom was closed only for Parish's testimony despite the prosecution's request that the courtroom remain closed for co-defendant Kim Thomas's

testimony as well. And the trial court considered reasonable alternatives to complete closure. The court weighed the concerns presented by Parish's testimony versus Thomas's testimony. The court concluded that, although both may have been subjected to threats from the petitioner's family, the threats against Parish were far more compelling because he was a member of the general public and was not afforded any special protection by law enforcement personnel, even in light of his testimony and the threats against him. In contrast, Thomas was in the custody of the Michigan Department of Corrections and protected by deputies while at the courthouse to testify. Thomas, because he pleaded guilty to this same offense, would not be returning to the general public after his testimony, instead serving a term of imprisonment. The trial court therefore reopened the courtroom for Thomas's testimony. Additionally, the trial was transcribed so the public could learn what occurred while the courtroom was closed. *See Nolan,* 534 F. App'x at 380-81 (finding no violation of right to public trial based, in part, on the availability of a transcript from which the public could learn what occurred during the closure).

Finally, although the trial court did not make a lengthy on-the-record finding to support the closure, it is apparent from the record that the trial court credited Parish's concerns and the representations that he had received threats from family members, which caused him to be fearful. The trial court's decision to close the courtroom for Parish's testimony reasonably applied the factors articulated by the Supreme Court in *Waller v. Georgia.* The petitioner's request for habeas relief on this claim will be denied.

III.

The state courts reasonably applied federal law as established by the Supreme Court when addressing the petitioners' claims. Therefore, the petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

Accordingly, it is **ORDERED** that the petition for a writ of habeas corpus is **DENIED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: July 12, 2016

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on July 12, 2016.

s/Susan Pinkowski
SUSAN PINKOWSKI