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Nos. 18-1105/1496

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIAN BOYKINS,

Petitioner-Appellant,

v.

ROBERT NAPEL, Warden,

Respondent-Appellee.

ORDER

Brian Boykins, a pro se Michigan prisoner, appeals two orders of the district court. In Case No. 18-1105, Boykins appeals the district court's judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. In Case No. 18-1496, Boykins appeals the district court's order denying his motion for reconsideration, or, in the alternative, for an evidentiary hearing. Boykins moves the court for a certificate of appealability (COA) and to proceed in forma pauperis in each case.

A jury convicted Boykins of armed robbery, kidnapping, carrying a concealed weapon, felon in possession of a firearm, and possessing a firearm during the commission of a felony. The trial court sentenced Boykins to an aggregate term of 25 to 50 years in prison, plus an additional two years of imprisonment for possessing a firearm while committing a felony. The Michigan Court of Appeals affirmed, *People v. Boykins*, No. 285476, 2009 WL 3465423 (Mich. Ct. App. Oct. 27, 2009), and the Michigan Supreme Court denied Boykins leave to appeal, *see People v. Boykins*, 780 N.W.2d 833 (Mich. 2010) (mem.).

In 2011, Boykins filed a motion for relief from judgment in the trial court, raising claims of prosecutorial misconduct and ineffective assistance of trial counsel. The trial court denied the motion, the Michigan Court of Appeals denied Boykins's delayed application for leave to appeal,

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and the Michigan Supreme Court denied leave to appeal, *see People v. Boykins*, 830 N.W.2d 403 (Mich. 2013) (mem.).

In 2013, Boykins filed a § 2254 habeas petition in the district court, raising five claims: (1) the prosecutor engaged in misconduct by introducing prejudicial evidence to the jury, and his trial counsel was ineffective for failing to object; (2) his trial counsel was ineffective for not calling a witness who could have discredited the prosecution's case; (3) his trial counsel was ineffective for not investigating evidence that would have proven his actual innocence; (4) the prosecutor committed misconduct during the preliminary examination, and his trial counsel was ineffective for not objecting to the misconduct; and (5) his trial counsel was ineffective for not objecting to inadmissible evidence, failing to investigate his actual innocence, and failing to ensure that the court-appointed private investigator investigated the case on his behalf. The district court held Boykins's petition in abeyance while he returned to state court to exhaust a claim that was based on alleged newly discovered evidence.

In 2014, Boykins filed another motion for relief from judgment in the trial court, raising claims of actual innocence based on newly discovered evidence and ineffective assistance of trial counsel. The trial court denied the motion, the Michigan Court of Appeals dismissed Boykins's delayed application for leave to appeal, and the Michigan Supreme Court denied leave to appeal, *see People v. Boykins*, 886 N.W.2d 424 (Mich. 2016) (mem.).

In 2017, the district court lifted the stay and granted Boykins leave to supplement his claims. Boykins's amended petition added a claim that the post-conviction court abused its discretion in denying his motions to compel and for discovery. On October 23, 2017, the district court entered an order denying Boykins's claims on the merits and declining to issue a COA.

On November 9, 2017, Boykins filed a motion asking the district court to reconsider its order denying his habeas petition. Boykins then filed a "motion for clarification and support of re-consideration," or, alternatively, for an evidentiary hearing on his claims. That motion was dated November 20, 2017, and docketed as filed on November 27, 2017. On January 12, 2018, the district court entered an order denying Boykins's first motion for reconsideration and

declining to issue a certificate of appealability on that order. Boykins then filed a notice of appeal from the district court's denial of his habeas petition and motion for reconsideration. Boykins's appeal was docketed in this court as No. 18-1105.

The district court concluded that Boykins's notice of appeal transferred jurisdiction to this court, and, consequently, that it did not have subject matter jurisdiction to rule on his second motion for reconsideration. Accordingly, on April 10, 2018, the court entered an order denying that motion. Boykins filed another notice of appeal, and that case was docketed as No. 18-1496. The Clerk of Court consolidated both of Boykins's appeals for disposition.

In No. 18-1105, Boykins moves the court for a COA on the following issues: (1) whether his trial counsel was ineffective for not establishing his actual innocence because he failed to conduct a reasonable investigation; (2) whether his trial counsel committed fraud on the trial court by misleading the court concerning his contacts with the private investigator; and (3) whether he has newly discovered evidence of actual innocence. By limiting his COA application to these issues, Boykins has forfeited appellate review of his remaining claims. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under the Antiterrorism and Effective Death Penalty Act, a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts 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 to the state courts. 28 U.S.C. § 2254(d).

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Boykins's first claim is that his trial attorney failed to establish his actual innocence by not investigating his case. Boykins was convicted of kidnapping Nathan Brown off of a Detroit street and robbing him of $87, his watch, and his wedding ring. The investigative trail led straight to Boykins because when Boykins released Brown from his car, Brown kicked onto the street Boykins's cell phone bill, which contained his address, and his offender information sheet from the Michigan Department of Corrections, which had his photograph on it. *See Boykins*, 2009 WL 3465423, at *2.

In his first motion for relief from judgment, Boykins claimed that he and Brown had taken a cab together to the area where the robbery took place to buy drugs, and that Brown falsely accused him of kidnapping and robbery because Brown thought that Boykins had cheated him in the drug deal. Boykins claimed that the cab driver would have corroborated his story had his attorney conducted an investigation. Boykins also claimed that his sister subsequently obtained photographs of the area that would have impeached Brown's testimony that he was sitting on some steps waiting for the bus to arrive when Boykins kidnapped him. Boykins claimed that the pictures and his sister's accompanying affidavit would have shown there were no steps where Brown said he was sitting. Finally, Boykins claimed that his attorney failed to obtain the surveillance video from the office where his subsequent parole revocation hearing took place. Boykins claimed that the video would have shown that Brown, who testified at the hearing, was wearing the watch and the wedding ring that supposedly were stolen in the robbery.

The trial court rejected this claim because the evidence that Boykins submitted with his motion (his sister's affidavit) in fact showed that counsel did conduct an investigation into the case and either rejected Boykins's theory of the case or thought that the evidence was irrelevant to the issue of guilt. The court thought that the only value of Boykins's evidence was to impeach Brown on a collateral matter, i.e., whether there were steps at the location. The court concluded therefore that Boykins's attorney did not provide deficient representation. The district court concluded that Boykins failed to provide evidentiary support for his claims concerning the cab driver and the surveillance video, such as affidavits from the proposed witnesses, and therefore

that Boykins could not establish that he was prejudiced by his attorney's representation. The district court also found that the trial court reasonably determined that counsel was not ineffective because photographs showing a lack of steps would only have impeached Brown on a collateral matter, and that, in any event, Brown's testimony did not include any statement that he had sat on any steps by the bus stop.

To establish ineffective assistance of counsel, the petitioner must establish both (1) that his trial "counsel's representation fell below an objective standard of reasonableness" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). Trial counsel has a duty to conduct a reasonable investigation into the petitioner's case or to make a reasonable decision that an investigation is not necessary. *See id.* at 691. When a habeas petitioner claims that his attorney was ineffective because he failed to investigate a potential trial witness, the petitioner must support the claim with evidence, such as an affidavit from the witness, describing the specific facts about which the witness could have testified. *See Fitchett v. Perry*, 644 F. App'x 485, 489 (6th Cir. 2016).

Boykins did not present any evidence demonstrating that there actually was a cab driver and that the cab driver would have provided testimony sufficient to corroborate his claim that Brown fabricated the kidnapping and the robbery. Similarly, Boykins did not present any evidence demonstrating that a surveillance video from the parole office existed and that the video, if it existed, would have shown that Brown was wearing the watch and ring that he claimed were stolen. Instead, Boykins only speculates that the cab driver and surveillance video would have supported his claim of innocence. As to the photographs of the bus stop, an attorney does not perform deficiently by failing to impeach a witness on a collateral matter. *Cf. Campbell v. United States*, 364 F.3d 727, 735 (6th Cir. 2004) (holding that counsel did not provide ineffective assistance when he failed to impeach a witness on minor inconsistencies in the witness's testimony). Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

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The trial court approved funds so that Boykins's attorney could obtain the assistance of a private investigator, and counsel represented to the court that he had been in contact with the investigator. After he was convicted, Boykins obtained a letter from the detective agency stating that it did not have a record of his case. Thus, in this second claim, Boykins argues that his attorney was ineffective and committed fraud on the trial court by not using the private investigator to establish his innocence. In addition to the cab driver and the surveillance video, Boykins argues his attorney should have investigated Brown's employer's records in order to establish Brown's whereabouts on the day in question, and the owner of the car that the prosecution claimed was used in the kidnapping and robbery. Boykins claims that the employment records would have shown that Brown could not have been at the scene when he claimed, and the owner of the car would have established that he did not drive the car and that it was not used in any crime. This claim is essentially an extension of Boykins's contention that his attorney did not investigate his case.

As discussed, reasonable jurists would not debate whether Boykins's attorney provided deficient representation with respect to the cab driver and surveillance video. Boykins did not raise any claim concerning the car that was used in the offense in his habeas petition or supplement, and consequently he has forfeited appellate review of that issue. *See Elzy*, 205 F.3d at 886. Boykins's petition did discuss counsel's failure to investigate Brown's employment records, but the district court did not specifically address this issue in its order denying his petition. Nevertheless, reasonable jurists would not debate whether Boykins was entitled to relief on this claim because, given his claim in his first motion for relief from judgment that he had been with Brown in a cab at the time of the offense for the purpose of buying drugs, Brown's employment records would not have established any fact of consequence at trial. *See* Mich. R. Evid. 401.

Boykins's third claim concerns his alleged new evidence of his innocence, specifically an incident report from the Detroit Police Department that stated that the offense occurred at 12:00 a.m., or about fourteen hours before the incident actually occurred. Boykins argued that this

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report supports his claim that Brown fabricated the incident. The trial court rejected this claim because Boykins failed to show that the prosecution did not disclose the report in discovery, the report was not newly discovered under state law, the time reflected in the report was obviously a simple typographical error, and the result of his trial would not have been different had the report been available for use at trial. The district court construed this as a claim that the prosecution failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and concluded that it was meritless because Boykins failed to show that the prosecution suppressed the report. The district court concluded further that the report was not material because Brown was impeached at trial about discrepancies in his testimony concerning the time the incident took place.

To prevail on a *Brady* claim, the petitioner must demonstrate that the prosecution suppressed favorable evidence, *see Apanovitch v. Houk*, 466 F.3d 460, 474 (6th Cir. 2006), and Boykins has not shown that the trial court clearly erred in finding that he failed to establish that the prosecution did not disclose the report. *See* 28 U.S.C. § 2254(e)(1). Nor has Boykins shown that the trial court clearly erred in finding that there was a simple typographical error in the report. *See id.* And reasonable jurists would not debate whether this report was material, i.e., reasonably likely to have produced a different result at trial, because it was cumulative impeachment evidence, and because Boykins admits that he was with Brown. *See Brooks v. Tennessee*, 626 F.3d 878, 893 (6th Cir. 2010). Reasonable jurists therefore would not debate the district court's resolution of this claim.

In No. 18-1496, Boykins moves the court for a COA on the district court's denial of his second motion for reconsideration. As stated, the district court concluded that it did not have subject matter jurisdiction to consider the motion once Boykins filed his notice of appeal. To obtain a COA, Boykins must show that reasonable jurists would debate whether the district court should have resolved his motion for reconsideration differently. *See United States v. Hardin*, 481 F.3d 924, 926 & 926 n.1 (6th Cir. 2007). And because Boykins seeks review of a procedural

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ruling of the district court, he must also demonstrate that his Rule 59 motion is debatable on the merits. *See Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017).

Boykins subsequently filed his second motion for reconsideration which the district court denied on the basis that it lacked jurisdiction. Based on the sequence and dates of the filings, this may be incorrect.

Nevertheless, reasonable jurists would not debate whether Boykins was entitled to relief from the district court's judgment under Rule 59(e). Boykins's second motion for reconsideration was nothing more than a rehash of the arguments that the district court had already considered and rejected in denying his habeas petition and his first motion for reconsideration. Rule 59(e) is not a vehicle to reargue a case, *see Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998), and, as already discussed, reasonable jurists would not debate whether Boykins has any meritorious grounds for relief from his convictions and sentence. Finally, reasonable jurists would not debate whether Boykins was entitled to an evidentiary hearing on his claims. *See Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011).

In summary, the court **DENIES** Boykins's COA application in each case and **DENIES** as moot his motions to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN BOYKINS,

Petitioner,

v.

ROBERT NAPEL,

Respondent,

_____/

Civil No. 2:13-CV-12768
HONORABLE SEAN F. COX
UNITED STATES DISTRICT JUDGE

OPINION AND ORDER DENYING THE PETITION FOR WRIT OF HABEAS CORPUS AND DECLINING TO GRANT A CERTIFICATE OF APPEALABILITY OR LEAVE TO APPEAL *IN FORMA PAUPERIS*

Brian Boykins, ("petitioner"), presently confined at the Saginaw Correctional Facility in Saginaw, Michigan, filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction for armed robbery, M.C.L.A. 750.529, kidnapping, M.C.L.A. 750.349, carrying a concealed weapon, M.C.L.A. 750.227, felon in possession of a firearm, M.C.L.A. 750.224f, possession of a firearm in the commission of a felony, M.C.L.A. 750.227b, and being a fourth felony habitual offender, M.C.L.A. 769.12. For the reasons that follow, the petition for writ of habeas corpus is DENIED.

I. Background

Petitioner was convicted following a jury trial in the Wayne County Circuit Court.

The victim, Nathan Brown, testified that around noon on September 14, 2007, he was out shopping in the City of Detroit. The victim purchased some liquor, leaving him with about eighty seven dollars. The victim left the store and went to the bus stop. Before reaching the bus stop, the victim saw petitioner sitting in a car. Petitioner signaled the victim to come over to him. As the

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victim approached the car, he saw that petitioner had a gun. Petitioner ordered the victim to get inside the vehicle. The victim complied. Petitioner did a U-turn, drove a couple of blocks, and then pulled over. Petitioner then demanded money from the victim. After the victim handed him the money, petitioner grabbed the victim's watch and ring. Petitioner also seized the brown paper bag containing the victim's recent store purchases. (Tr. 2/14/08, pp. 56-61).

As the victim exited the car, he kicked out a cell phone bill that had been lying in the vehicle, along with another envelope with a picture. The picture was part of a Michigan Department of Corrections [MDOC] Offender Tracking Information System [OTIS] printout with petitioner's picture on it that had been in the car. The victim waited until petitioner was some distance off, before picking up the phone bill and picture. The victim testified that he called the police and that it took them about an hour to respond to the call. The victim gave the phone bill and the picture that was in the envelope to the police. (*Id.*, pp. 7-9, 62-65).

On February 14, 2008, Officer Lestine Jackson of the Detroit Police Department went to the address on the cell phone bill and noticed a white car in the driveway that matched the description of the car that the victim said his assailant had been driving. The next day, the same officers who went to petitioner's address saw petitioner walking on Grand River. Officer Jackson recognized petitioner based on his picture from OTIS. Officer Jackson had her partner turn around. The two officers confronted and arrested petitioner. (*Id.*, pp. 90-93).

Petitioner's conviction was affirmed on appeal. *People v. Boykins,* No. 285476 (Mich.Ct.App. October 27, 2009); *lv. den.* 486 Mich. 905, 780 N.W.2d 833 (2010).

Petitioner then filed a post-conviction motion for relief from judgment with the Wayne County Circuit Court, which was denied. *People v. Boykins,* No. 07-021072-FC (Wayne County

Circuit Court, Nov. 10, 2011). The Michigan appellate courts denied petitioner leave to appeal. *People v. Boykins,* No. 310158 (Mich.Ct. App. Oct. 24, 2012); *lv. den.* 494 Mich. 855, 830 N.W.2d 403 (2013).

Petitioner then filed motions to compel discovery and for a bill of particulars, which were denied. *People v. Boykins,* No. 07-021072-FC (Wayne County Circuit Court, Nov. 29, 2012). The Michigan appellate courts denied petitioner leave to appeal. *People v. Boykins,* No. 316419 (Mich.Ct.App. Nov. 27, 2013); *leave den.* 497 Mich. 902, 856 N.W.2d 33 (2014).

Petitioner filed a petition for writ of habeas corpus, which was held in abeyance so that petitioner could return to the state courts and exhaust additional claims. *Boykins v. McKee*, No. 2:13-CV-12768, 2013 WL 4776065 (E.D. Mich. Sept. 6, 2013).

Petitioner filed a second post-conviction motion for relief from judgment with the Wayne County Circuit Court, which was denied. *People v. Boykins,* No. 07-021072-FC (Wayne County Circuit Court, May 20, 2015). The Michigan appellate courts denied petitioner leave to appeal. *People v. Boykins,* No. 328556 (Mich.Ct. App. Nov. 25, 2015); *lv. den.* 500 Mich. 880, 886 N.W.2d 424 (2016).

On February 8, 2017, this Court granted the motion to lift the stay and to amend the petition. (ECF # 23). Petitioner seeks habeas relief. Petitioner's original and amended petitions are often rambling and incoherent, but it appears that petitioner seeks habeas relief on the following grounds: (1) prosecutorial misconduct, (2) ineffective assistance of trial counsel, (3) ineffective assistance of appellate counsel, and (4) newly discovered evidence of actual innocence that had been suppressed.

II. Standard of Review

28 U.S.C. § 2254(d), as amended by The Antiterrorism and Effective Death Penalty Act of

1996 (AEDPA), imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (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.

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11. "[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." *Harrington v. Richter*, 562 U.S. 86, 101 (2011)(citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Therefore, in order to obtain habeas relief in federal court, a state prisoner is required to show that the state court's rejection of his claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington,* 562 U.S. at 103. A habeas petitioner should be denied relief as long as it is within the "realm of

possibility" that fairminded jurists could find the state court decision to be reasonable. *See Woods v. Etherton,* 136 S. Ct. 1149, 1152 (2016).

III. Discussion

A. The prosecutorial misconduct claim.

Petitioner contends that he was denied a fair trial because of prosecutorial misconduct. [1]

"Claims of prosecutorial misconduct are reviewed deferentially on habeas review." *Millender v. Adams*, 376 F.3d 520, 528 (6th Cir. 2004)(citing *Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir. 2003)). A prosecutor's improper comments will be held to violate a criminal defendant's constitutional rights only if they "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). In order to obtain habeas relief on a prosecutorial misconduct claim, a habeas petitioner must show that the state court's rejection of his prosecutorial misconduct claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Parker v. Matthews*, 567 U.S. 37, 48 (2012)(quoting *Harrington*, 562 U.S. at 103).

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[1] Respondent contends that petitioner's prosecutorial misconduct and various ineffective assistance of trial counsel claims are procedurally defaulted, because he raised them for the first time in his first post-conviction motion for relief from judgment and failed to show cause for failing to raise these issues in his appeal of right, as well as prejudice, as required by M.C.R. 6.508(D)(3). Petitioner claims that his appellate counsel was ineffective for failing to raise his claims in his appeal of right. Ineffective assistance of counsel may establish cause for procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). Given that the cause and prejudice inquiry for the procedural default issue merges with an analysis of the merits of petitioner's defaulted claims, it is more expeditious to consider the merits of these claims. *See Cameron v. Birkett,* 348 F. Supp. 2d 825, 836 (E.D. Mich. 2004). Additionally, petitioner could not have procedurally defaulted any ineffective assistance of appellate counsel claim, because state post-conviction review was the first opportunity that he had to raise this claim. *See Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010).

Petitioner claims that the prosecutor committed misconduct by admitting portions of his OTIS printout into evidence, because the printout was more prejudicial than probative and that it basically amounted to "other acts" evidence prohibited by M.R.E. 404(b). The prosecutor sought to admit the OTIS printout into evidence to establish petitioner's identity as the perpetrator. Defense counsel stipulated to the introduction of the printout into evidence as long as it was redacted to omit references to petitioner's prior convictions. The judge agreed to admit the OTIS printout into evidence with petitioner's picture on it but with his prior record redacted from the picture. (Tr. 2/14/08, p. 7-9).

Although petitioner alleges prosecutorial misconduct, his claim "amounts in the end to a challenge to the trial court's decision to allow the introduction of this evidence." *Webb v. Mitchell*, 586 F.3d 383, 397 (6th Cir. 2009). "A prosecutor may rely in good faith on evidentiary rulings made by the state trial judge and make arguments in reliance on those rulings." *Cristini v. McKee*, 526 F.3d 888, 900 (6th Cir. 2008). The judge agreed to admit the OTIS printout after the parties stipulated to its admission. The OTIS printout was relevant to establish petitioner's identity as the perpetrator because it had been inside of the car used during the robbery and kidnapping. The Sixth Circuit observed that "[t]he Supreme Court has never held (except perhaps within the capital sentencing context) that a state trial court's admission of *relevant* evidence, no matter how prejudicial, amounted to a violation of due process." *Blackmon v. Booker*, 696 F.3d 536, 551 (6th Cir. 2012)(emphasis original). In any event, there was no violation of clearly established federal law for the prosecutor to rely on the trial judge's ruling in admitting this "other acts" evidence in petitioner's trial, regardless if the trial judge's ruling was correct, thus petitioner is not entitled to habeas relief on his first claim. *See Key v. Rapelje*, 634 F. App'x. 141, 146–47 (6th Cir. 2015).

B. The ineffective assistance of counsel claims.

Petitioner alleges the ineffective assistance of trial and appellate counsel.

To show that he or she was denied the effective assistance of counsel under federal constitutional standards, a defendant must satisfy a two prong test. First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In so doing, the defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.* In other words, petitioner must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. *Strickland,* 466 U.S. at 689. Second, the defendant must show that such performance prejudiced his defense. *Id.* 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). The Supreme Court's holding in *Strickland* places the burden on the defendant who raises a claim of ineffective assistance of counsel, and not the state, to show a reasonable probability that the result of the proceeding would have been different, but for counsel's allegedly deficient performance. *See Wong v. Belmontes*, 558 U.S. 15, 27 (2009). The *Strickland* standard applies as well to claims of ineffective assistance of appellate counsel. *See Whiting v. Burt,* 395 F.3d 602, 617 (6th Cir. 2005).

More importantly, on habeas review, "the question 'is not whether a federal court believes

the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable-a substantially higher threshold.'" *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)(quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard." *Harrington v. Richter*, 562 U.S. at 101. Indeed, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles,* 556 U.S. at 123 (citing *Yarborough v. Alvarado*, 541 U.S. at 664). Pursuant to the § 2254(d)(1) standard, a "doubly deferential judicial review" applies to a *Strickland* claim brought by a habeas petitioner. *Id.* This means that on habeas review of a state court conviction, "[A] state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself."*Harrington*, 562 U.S. at 101. "Surmounting *Strickland's* high bar is never an easy task." *Id.* at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

Petitioner contends that he was constructively denied the assistance of counsel because his attorney was not appointed to represent him until the day of the preliminary examination and he only met his counsel five to ten minutes before the preliminary examination. [2]

The Supreme Court has held that in cases where a criminal defendant has been denied counsel at a preliminary hearing, "the test to be applied is whether the denial of counsel ... was harmless error." *Coleman v. Alabama*, 399 U.S. 1, 11 (1970)(citations omitted); *see also Adams v. Illinois,* 405 U.S. 278, 282-83 (1972)("the lack of counsel at a preliminary hearing involves less

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[2] *See* ECF # 1, PG ID 59.

danger to 'the integrity of the truth-determining process at trial' than the omission of counsel at the trial itself or on appeal.")(internal quotation omitted). The Sixth Circuit has applied a harmless error analysis on habeas review of claims that a habeas petitioner was denied the right to counsel at a preliminary examination or hearing in a state criminal proceeding. *See Takacs v. Engle*, 768 F.2d 122, 124 (6th Cir.1985); *McKeldin v. Rose*, 631 F.2d 458, 460–61 (6th Cir.1980); *See also Dodge v. Johnson,* 471 F. 2d 1249, 1252 (6th Cir. 1973)(record failed to establish that lack of counsel at preliminary examination prejudiced petitioner's rights at trial or in any way tainted finding of guilt).

Petitioner failed to allege or to show that he was actually prejudiced by trial counsel's allegedly inadequate preparation time at the preliminary examination; he is not entitled to relief on his claim. *See Burgess v. Booker*, 526 F. App'x. 416, 432–33 (6th Cir. 2013).

As part of his prosecutorial misconduct claim, petitioner alleges that his trial counsel was ineffective for failing to object to the prosecutor's misconduct in admitting the OTIS printout into evidence.

To show prejudice under *Strickland* for failing to object to prosecutorial misconduct, a habeas petitioner must show that but for the alleged error of his or her trial counsel in failing to object to the prosecutor's improper questions and arguments, there is a reasonable probability that the proceeding would have been different. *Hinkle v. Randle,* 271 F. 3d 239, 245 (6th Cir. 2001). This Court determined that the prosecutor did not commit misconduct, thus, petitioner is unable to establish that he was prejudiced by counsel's failure to object. *See Slagle v. Bagley,* 457 F.3d 501, 528 (6th Cir. 2006).

As a related claim, petitioner argues that trial counsel was ineffective for stipulating to the admission of the OTIS printout into evidence.

As mentioned when discussing petitioner's prosecutorial misconduct claim, *infra*, the OTIS printout was relevant and admissible to establishing petitioner's identity because the victim found the printout in the car that was used during the robbery. The failure to object to relevant and admissible evidence in not ineffective assistance of counsel. *See Alder v. Burt,* 240 F. Supp. 2d 651, 673 (E.D. Mich. 2003). Petitioner was not prejudiced by defense counsel's decision to stipulate to the admission of this evidence, in light of the fact that this same evidence would have been introduced anyway in a more lengthy process without stipulations from counsel. *See Burke v. U.S.,* 261 F. Supp. 2d 854, 862 (E.D. Mich. 2003).

Petitioner next claims that trial counsel was ineffective for failing to call a taxi cab driver to establish that he had picked up the victim and petitioner at Wyoming and Fennel Streets at about 2:45 p.m. on the day of the incident. Petitioner claims that the cab driver drove him and the victim to an undisclosed location to purchase crack cocaine. Petitioner contends that the victim fabricated the robbery and kidnapping allegation because he was angry that petitioner cheated him out of the drug deal. Petitioner claims that the cab driver's testimony would rebut the victim's testimony that he had never met petitioner prior to that day. Petitioner further claims that trial counsel was ineffective for failing to obtain a surveillance videotape from the MDOC Lawton Parole Office from October 3, 2007. Petitioner claims that this videotape would show that the victim was wearing the watch and ring that he claimed petitioner had previously stolen from him.

Petitioner raised this claim in his first post-conviction motion for relief from judgment and his appeal from the denial of this motion. The Court has reviewed the petitioner's motion for relief from judgment and his post-conviction appeal. [3] Petitioner failed to attach any affidavits from the

[3] *See* ECF ## 27-7, 27-13, 27-17.

alleged taxi cab driver or from any employees of the parole office regarding the surveillance videotape, nor did he provide the Michigan trial or appellate courts with a copy of the alleged videotape. Petitioner has not provided this information to this Court either. Conclusory allegations of ineffective assistance of counsel, without any evidentiary support, do not provide a basis for habeas relief. *See Workman v. Bell,* 178 F.3d 759, 771 (6th Cir. 1998). By failing to present any evidence to the state courts in support of his ineffective assistance of claim, the petitioner is not entitled to an evidentiary hearing on his ineffective assistance of counsel claim with this Court. *See Cooey v. Coyle*, 289 F.3d 882, 893 (6th Cir. 2002)(citing 28 U.S.C. § 2254(e)(2)(A)(ii)). Petitioner has failed to attach any offer of proof or any affidavits sworn by the proposed witnesses. Petitioner has offered, neither to the Michigan courts nor to this Court, any evidence beyond his own assertions as to whether the witnesses would have been able to testify and what the content of these witnesses' testimony would have been. In the absence of such proof, petitioner is unable to establish that he was prejudiced by counsel's failure to call the cab driver or any personnel from the parole office to testify at trial, so as to support the second prong of an ineffective assistance of counsel claim. *See Clark v. Waller,* 490 F.3d 551, 557 (6th Cir. 2007).

Moreover, petitioner's counsel was not ineffective for failing to present any evidence that the victim and petitioner had been together prior to the robbery because it would have undercut the misidentification defense that petitioner's counsel presented at trial and would have been inconsistent with a prior statement that petitioner gave to the police. Officer Richard Firsdon testified that he spoke to petitioner after he was arrested. Petitioner told Officer Firsdon that he did not know the victim and was not present at Wyoming and Intervale Streets on the afternoon of February 14, 2008. (Tr. 2/14/08, pp. 108-110). Defense Counsel argued in closing argument that

there was no evidence that petitioner committed the crime, pointing out that petitioner had told the police after his arrest that he did not know the victim. (Tr. 2/19/08, pp. 12-17). Counsel was not deficient in failing to introduce any evidence that the victim had previously known petitioner, because such evidence would have undercut defense counsel's misidentification defense. *See Thao v. Conover*, 159 F. App'x. 842, 846 (10th Cir. 2005); *see also Poindexter v. Mitchell,* 454 F.3d 564, 573-75 (6th Cir. 2006)(counsel was not deficient in failing to pursue of "heat of passion" defense, in light of the fact that such a defense would have been inconsistent with petitioner's continued insistence that he had no involvement in the crime).

Petitioner next claims that trial counsel was ineffective for failing to call his sister, LaTrese Lindsey, to testify that she took pictures of the area around the bus stop where the victim had been waiting for the bus. Ms. Lindsey in an affidavit that she signed indicates that there were no steps near the bus stop. Petitioner claims that this would have impeached the victim's testimony that he had been sitting on some steps at the bus stop while waiting for the bus.

The trial court rejected petitioner's claim on post-conviction review, finding that Ms. Lindsey's proposed testimony would have involved impeaching the victim on a collateral matter. *People v. Boykins,* No. 07-021072-FC, * 5 (Wayne County Circuit Court, Nov. 10, 2011).

The state court's decision was reasonable. The issue of whether the victim was sitting or standing at the bus stop involved a collateral issue at best, thus counsel was not ineffective for failing to impeach the victim about this minor inconsistency. *See Sowell v. Anderson*, 663 F.3d 783, 801 (6th Cir. 2011). [4]

[4] This Court, in fact, has reviewed the victim's testimony and there is no indication by him that he sat on any steps by the bus stop. (Tr. 2/14/08, pp. 56-85).

Petitioner finally appears to argue that appellate counsel was ineffective for failing to raise his prosecutorial misconduct and ineffective assistance of trial counsel claims on his appeal of right.

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, 396-397 (1985). However, court appointed counsel does not have a constitutional duty to raise every nonfrivolous issue requested by a defendant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Petitioner's prosecutorial misconduct and ineffective assistance of trial counsel claims are without merit. "[A]ppellate 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)). Because none of these claims can be shown to be meritorious, appellate counsel was not ineffective in the handling of petitioner's direct appeal. Petitioner is not entitled to habeas relief on his ineffective assistance of appellate counsel claim.

C. The newly discovered evidence/actual innocence claim.

Petitioner next claims that he has newly discovered evidence that establishes his actual innocence. Petitioner points to a copy of a Detroit Police Department incident report which states that the robbery was reported to have taken place on September 14, 2007 at 12:00 a.m. [5] Petitioner claims that this report would establish that the victim fabricated the entire incident because the actual crime was reported as having taken place between 3:30 p.m. and 3:45 p.m. Petitioner claims that this report was withheld from the defense by the prosecution. Petitioner claims he only obtained this report after a family member obtained it after making a Freedom of Information request to the Detroit Police.

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[5] *See* Petitioner's Exhibit C, ECF # 21, PG ID 231-232.

To the extent that petitioner is raising a freestanding actual innocence claim, he would not be entitled to habeas relief. In *Herrera v. Collins*, 506 U.S. 390, 400 (1993), the Supreme Court held that claims of actual innocence based on newly discovered evidence fail to state a claim for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. Federal habeas courts sit to ensure that individuals are not imprisoned in violation of the constitution, not to correct errors of fact. *Id., see also McQuiggin v. Perkins,* 133 S. Ct. 1924, 1931 (2013)("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence"). Freestanding claims of actual innocence are thus not cognizable on federal habeas review, absent independent allegations of constitutional error at trial. *See Cress v. Palmer,* 484 F.3d 844, 854-55 (6th Cir. 2007)(collecting cases).

To the extent that petitioner is claiming that the state court denied his request for post-conviction discovery on this or other evidence he would not be entitled to relief. Petitioner's claim that the Michigan courts wrongfully denied him post-conviction relief is non-cognizable. This Court notes that "[t]he Sixth Circuit consistently held that errors in post-conviction proceedings are outside the scope of federal habeas corpus review." *Cress v. Palmer,* 484 F. 3d at 853. Thus, a federal habeas corpus petition cannot be used to mount a challenge to a state's scheme of post-conviction relief. *See Greer v. Mitchell,* 264 F. 3d at 681. The reason for this is that the states have no constitutional obligation to provide post-conviction remedies. *Id.* (citing to *Pennsylvania v. Finley,* 481 U.S. 551, 557 (1987)). Petitioner's claim that the trial court erred in his post-conviction proceedings by denying his discovery request is not cognizable on habeas review. *See Moreland v. Bradshaw*, 635 F.Supp.2d 680, 726–27 (S.D.Ohio Apr.10, 2009).

Petitioner's main complaint appears to be that the prosecutor deliberately withheld this

evidence.

To prevail on his claim, petitioner must show (1) that the state withheld exculpatory evidence and (2) that the evidence was material either to guilt or to punishment irrespective of good faith or bad faith of the prosecution. *Brady v. Maryland,* 373 U.S. 83, 87 (1963). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley,* 473 U.S. 667, 683 (1985). In *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999), the Supreme Court articulated three components or essential elements of a *Brady* claim: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. "Prejudice (or materiality) in the *Brady* context is a difficult test to meet." *Jamison v. Collins*, 291 F.3d 380, 388 (6th Cir. 2002).

Petitioner is not entitled to habeas relief because he failed to show that the prosecutor withheld this report from defense counsel. Petitioner raised this claim in his second motion for relief from judgment. The judge rejected the claim in part because petitioner failed to show that he had been deprived of this police report by the prosecution. *People v. Boykins,* No. 07-021072-FC, * 4 (Wayne County Circuit Court, May 20, 2015). A habeas petitioner bears the burden of showing the prosecution suppressed exculpatory evidence. *See Bell v. Howes*, 703 F.3d 848, 853 (6th Cir. 2012). Conclusory allegations by a habeas petitioner, without any evidentiary support, do not provide a basis for habeas relief. *See, e.g., Washington v. Renico,* 455 F. 3d 722, 733 (6th Cir. 2006). Allegations that are merely conclusory or which are purely speculative cannot support a *Brady*

claim. *See Burns v. Lafler,* 328 F. Supp. 2d 711, 724 (E.D. Mich. 2004). Petitioner has made no showing that this report was never furnished by the prosecutor to petitioner.

Moreover, counsel was already furnished with other police reports that established that the victim had told the police that the incident happened at noon or 12:00 p.m, which conflicted with other information that the incident was reported as having occurred between 3:30 p.m. and 3:45 p.m. The victim testified at trial that the robbery took place around twelve o'clock p.m. (Tr. 2/14/08, p. 56, 67). Defense counsel confronted the victim with the fact that he had previously testified at the preliminary examination that the incident might have taken place between 3:00 p.m. and 3:30 p.m. (*Id.*, pp. 68-69, 72). Defense counsel later elicited testimony from Officer Jackson that her police report reflected that the victim had reported the robbery and kidnapping happening around 3:30 p.m. (*Id.*, pp. 105-06). "Evidence that is "merely cumulative" to evidence presented at trial is 'not material for purposes of *Brady* analysis.'" *Brooks v. Tennessee*, 626 F.3d 878, 893 (6th Cir. 2010)(*quoting Carter v. Mitchell*, 443 F.3d 517, 533 n. 7 (6th Cir. 2006)). The victim had already been impeached with the fact that he had given the police two different times in which the incident transpired, thus, any additional impeachment evidence regarding the time of the incident would have been cumulative and its alleged non-disclosure did not violate *Brady. Id.,* at 893-94. [6]

IV. Conclusion

The Court will deny the petition for writ of habeas corpus. The Court will also deny a certificate of appealability to petitioner. In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To

[6] In light of the fact that other police reports indicate that the robbery and kidnapping took place around 12:00 p.m., the 12:00 a.m. time reference in this other police report may very well have been a typographical error.

demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). When a district court rejects a habeas petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims to be debatable or wrong. *Id.* at 484. [7] The Court will deny petitioner a certificate of appealability because he failed to make a substantial showing of the denial of a federal constitutional right. *See also Millender v. Adams,* 187 F. Supp. 2d 852, 880 (E.D. Mich. 2002). The Court further concludes that petitioner should not be granted leave to proceed *in forma pauperis* on appeal, as any appeal would be frivolous. *See* Fed.R.App. P. 24(a).

V. ORDER

Based upon the foregoing, **IT IS ORDERED** that:

(1) The petition for a writ of habeas corpus is **DENIED WITH PREJUDICE.**

(2) A certificate of appealability is **DENIED.**

(3) Petitioner will be denied leave to appeal *in forma pauperis.*

Dated: October 23, 2017

s/Sean F. Cox
Sean F. Cox
U. S. District Judge

I hereby certify that the foregoing is a true copy of the original on file in this Office.
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY: _____ Deputy

[7] "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254.

Nos. 18-1105/1496

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 20, 2018
DEBORAH S. HUNT, Clerk

BRIAN BOYKINS,

Petitioner-Appellant,

v.

ROBERT NAPEL, WARDEN,

Respondent-Appellee.

ORDER

Before: KEITH, BOGGS, and GIBBONS, Circuit Judges.

Brian Boykins petitions for rehearing en banc of this court's order entered on July 10, 2018, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

It is further ORDERED that the motion to file a supplement to the petition is DENIED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C

Nos. 18-1105/1496

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 04, 2018
DEBORAH S. HUNT, Clerk

BRIAN BOYKINS,

Petitioner-Appellant,

v.

ROBERT NAPEL, WARDEN,

Respondent-Appellee.

ORDER

Before: KEITH, BOGGS, and GIBBONS, Circuit Judges.

Brian Boykins, a pro se Michigan prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v Brian Boykins

Docket No. 328556

LC No. 07-021072-FC

Michael J. Riordan
Presiding Judge

Michael J. Talbot

Cynthia Diane Stephens
Judges

The Court orders that the delayed application for leave to appeal the Wayne Circuit Court's May 20, 2015 order is DISMISSED for lack of jurisdiction. Defendant has not asserted a retroactive change in law or presented newly discovered evidence supporting his successive motion for relief from judgment as required by MCR 6.502(G)(2), and he may not appeal the denial of a successive motion for relief from judgment, MCR 6.502(G)(1).

It is further ordered that the motion to remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), is DENIED as moot since this Court lacks jurisdiction to consider the underlying delayed application for leave to appeal.

The motion to waive fees is GRANTED and fees are WAIVED for this case only.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

NOV 25 2015
Date

Chief Clerk

APPENDIX D.

STATE OF MICHIGAN
THIRD CIRCUIT COURT
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

v

Hon. Margaret M. Van Houten
Case No: 07-021072-01-FC

BRIAN BOYKINS,
Defendant.

/

OPINION AND ORDER

At a session of Court held at the Frank Murphy Hall of Justice in the City of Detroit, Wayne County, Michigan,

On: MAY 20 2015

Present: Hon. Margaret M. Van Houten
Circuit Court Judge

This matter is before the court on criminal defendant's successive motion for relief from judgment. For the reasons stated below, the court will deny this motion.

On February 19, 2008, defendant was convicted at a jury trial of Robbery—Armed (MCL 750.529), Kidnapping (MCL 750.349), Weapons—Carrying Concealed (MCL 750.227), Weapons—Firearms – Possession by Felon, (MCL 750.224f) and Weapons—Felony Firearm (MCL 750.227b). He was sentenced as a habitual offender—fourth offense (MCL 769.12) to terms of prison ranging from two to twenty-five to fifty years. The Michigan Court of Appeals affirmed defendant's conviction. *People v. Boykins,* unpublished opinion per curiam of the Michigan Court of Appeals, issued October 27, 2009 (Docket No. 285476), lv den *People v. Boykins,* application denied April 28, 2010 (Docket No. 140235). Defendant then filed a motion for relief from judgment with the circuit court, which was denied on November 10, 2011. His

APPENDIX E

application for leave to appeal was denied by the Michigan Court of Appeals. *Id.*, issued October 24, 2012 (Docket No. 310158). Defendant's Motion for Bill of Particulars and Motion to Compel Disclosure or Discovery brought before the trial court was denied on November 29, 2012 and application for leave to appeal that order was denied by the Michigan Court of Appeals, *People v. Boykins,* order issued November 27, 2013 (Docket No. 316469), lv den *People v. Boykins,* application denied November 25, 2014 (Docket No. 148565). Defendant now brings this second successive motion for relief from judgment alleging newly discovered evidence.

The "newly discovered evidence" defendant refers to in his motion was obtained by a family member through the Freedom of Information Act: a copy of Detroit Police Department incident report number 070914052 4.1, describing the incident defendant was ultimately convicted of. Defendant claims that the report was not among the discovery provided to defense before trial, and that had it been handed over, trial counsel could have cross-examined the victim about the time of day this occurred. Essentially, he argues, because this particular incident report states that the event was "Reported on: September 14, 2007 12:00 am," and the incident actually "Occurred on: September 14, 2007 3:30 pm Occurred between: September 14, 2007 3:45 pm," the prosecutor produced perjured testimony by the victim. Specifically, that the victim fabricated the entire event because there was no way that it could be reported at 12:00a.m. on the date of the incident if it occurred between 3:30 and 3:45p.m.

As this is not defendant's first motion for relief from judgment, Michigan Court Rule 6.502(G), which governs successive motions for relief from judgment, applies:

> (1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction.

(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 evidence defendant presents fails the *People v. Cress,* 468 Mich 678, 664 NW2d 174 (2003) four-prong test for whether evidence is newly discovered. In order to succeed on a motion for relief from judgment alleging newly discovered evidence, it must first be shown that the evidence itself, and not its materiality, is newly discovered. Second, the evidence must not be cumulative. Third, the evidence could not have been discovered and produced at trial, using reasonable diligence. Finally, the new evidence must make a different result probable at trial. *Id.,* 468 Mich 678, 692; 664 NW2d 174 (2003). The burden rests with the defendant "on all parts of the *Cress* test, ... to make an affirmative showing that [he] could not, using reasonable diligence, have discovered and produced the evidence at trial[.]" *People v. Rao,* 491 Mich 271, 279-280; ___ NW2d ___ (2012). The Court in *Rao* went on to state:

> It is equally well established that 'motions for a new trial on the ground of newly discovered evidence are looked upon with disfavor, and the cases where this court has held that there was an abuse of discretion in denying a motion based on such grounds are few and far between." The rationales underlying such disfavor are premised on both the "principle of finality" and "the policy of the law ... to require of parties care, diligence, and vigilance in securing and presenting evidence.

The Michigan Court of Appeals stated in *People v. Vinson,* unpublished order of the Court of Appeals, entered July 26, 2012 (Docket No. 303593), that "Our Supreme Court has determined that evidence cannot be deemed newly discovered 'if the defendant or defense counsel was aware of the evidence at the time of trial.'" Thus, the court in *Vinson* distinguished between newly discovered and newly available evidence. ". . . [E]vidence cannot be deemed newly discovered 'if the defendant or defense counsel was aware of the evidence at the time of trial.'" *Id.* at 5, citing *Rao, supra.* In *Vinson*, the Court found that even though the prosecution presented evidence at trial that meant defendant could not be ruled out as the perpetrator and that

evidence was ultimately found to be inaccurate, it was still not newly discovered. The Court reasoned that the evidence had always been "potentially available." *Id.* "That he did not realize he should have sought to question the test results does not vitiate that the *Cress* test requires that the defendant prove that he *could not* have discovered the evidence." *Id.*

Here, it is clear that this evidence defendant presents is not newly discovered but instead newly available. First of all, defendant has failed to provide an offer of proof that he was deprived of the incident report in the first place. Moreover, this evidence fails all four prongs of the *Cress* analysis. Defendant has not shown that the evidence itself is newly discovered. He has not shown that it is more than just merely cumulative – in fact, the body of the report only bolsters his conviction. Defendant has tried to make a simple error into grounds for a new trial – of course the victim could not have reported the crime more than fourteen hours before it occurred. However, even if the victim had been cross-examined as to this issue at trial, it still would not make a different result probable upon retrial. Defendant's convictions have withstood a trial of his peers as well as a full gamut of appellate review. Furthermore, as in *Vinson,* just because defendant did not realize he should have sought the incident report prior to trial (if indeed that was the case) does not vitiate that the *Cress* test requires the defendant to prove that he could not have discovered the evidence. Defendant has not shown that the evidence now offered is newly discovered.

Since defendant has failed to show either newly discovered evidence or a retroactive change in law, as required for a subsequent motion for relief from judgment pursuant to MCR 6.502(G)(2), the Court lacks the authority to address his substantive argument regarding ineffective assistance of counsel.

Thus, **IT IS HEREBY ORDERED**, for the reasons stated above, that defendant's motion for relief from judgment is hereby **DENIED**.

MAY 20 2015

Date

Hon. Margaret M. Van Houten
Circuit Court Judge

Newly Discovered Evidence

Order

Michigan Supreme Court
Lansing, Michigan

October 26, 2016

Robert P. Young, Jr.,
Chief Justice

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

153059

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 153059
COA: 328556
Wayne CC: 07-021072-FC

BRIAN BOYKINS,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the November 25, 2015 order of the Court of Appeals is considered, and it is DENIED, because the defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

a1017

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 26, 2016

Clerk

APPENDIX F.

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff

-v-

Honorable Daniel A. Hathaway
3CC No: 07-021072-01

BRIAN K. BOYKINS,
Defendant

OPINION & ORDER

INTRODUCTION

This matter is before the court on defendant's motion for relief from judgment. For the reasons stated below, the court will deny this motion.

FACTS AND PROCEDURAL HISTORY

On February 19, 2008, following a jury trial, defendant was found guilty of armed robbery, MCL 750.529, kidnapping, MCL 750.349, carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224F, and felony firearm, MCL 750.227B-A. On March 21, 2008, defendant was sentenced to a term of incarceration of twenty-five to fifty years for the armed robbery and kidnapping counts, five to fifteen years for the CCW and the felon in possession counts, and the statutorily mandated two year consecutive term for the felony firearm count. Defendant's sentence was ordered to be served consecutive to defendant's parole sentence. Defendant's conviction and sentence were affirmed in *People v Boykins,* an unpublished opinion per curiam of the Court of Appeals, decided October 27, 2009 (COA Docket: 285476), lv den, 486 Mich 905, 780 NW2d 833 (2010), issued April 28, 2010 (SC Docket: 140235). Defendant now brings the current motion for relief from judgment pursuant to MCR 6.500 et seq.

APPENDIX G

STANDARD OF REVIEW

MCR 6.508 - Procedure; Evidentiary Hearing; Determination

> (B) Decision Without Evidentiary Hearing. After reviewing the motion and response, the record, and the expanded record, if any, the court shall determine whether an evidentiary hearing is required. If the court decides that an evidentiary hearing is not required, it may rule on the motion or, in its discretion, afford the parties an opportunity for oral argument.
>
> (D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion:
>
> > (3) Alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates:
> >
> > (a) Good cause for failure to raise such grounds on appeal or in the prior motion, and
> >
> > (b) Actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
> >
> > > (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;
> > >
> > > (iii) In any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

ANALYSIS

In order to be entitled to relief, defendant must show good cause for failing to raise the issues currently before the court on appeal. *People v Clark*, 274 Mich App 248; 732 NW2d 604 (2007), lv den, 479 Mich 851; 734 NW2d 212 (2007), recon den, 480 Mich 864, 737 NW2d 732 (2007). Defendant makes no attempt to address the good cause prong of MCR 6.508(D)(3)(a) and explain why the issues currently before the court were not argued on appeal, consequently relief cannot be granted as a matter of law. Notwithstanding this conclusion, defendant's motion would fail on the merits as well.

Defendant's first issue is a claim of prosecutorial misconduct and ineffective assistance of trial counsel. Defendant asserts that trial counsel's failure to object to the prosecutor's impermissible

admission of a computer screen printout from the Michigan Department of Corrections (MDOC) Offender Tracking Information System (OTIS) violated his right to a fair trial and amounted to ineffective assistance of counsel.

On direct appeal, defendant raised the issue of insufficient evidence for his conviction on the felon in possession of a firearm charge. Specifically, defendant argued that the people failed to establish the prior conviction element of the crime. Defendant claimed that the admission of the redacted OTIS printout, which was admitted for the sole purposes of establishing defendant's identification, was more prejudicial than probative and was improperly used by the jury to establish his prior conviction. The Court of Appeals rejected this argument reasoning that the parties had stipulated to defendant's prior felony conviction. Regarding the admission of the OTIS printout, the Court of Appeals said: "Assuming, without deciding, that this was error, it was not outcome determinative. Notwithstanding the error, defendant's conviction did not result in a miscarriage of justice." Accordingly, this court finds the issue moot.

Defendant next argues that trial counsel was ineffective for "abandoning appellant's [defendant] defense and failing to call exculpatory and/or alibi witnesses."

Michigan reviews ineffective assistance of counsel claims following *Strickland v. Washington*, 446 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984), which held that there must be: (1) unreasonable performance by counsel; and (2) prejudice, a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt respective guilt; a reasonable probability is one sufficient to undermine confidence in the outcome. In *People v Pickens*, 446 Mich 298, 521 NW2d 797 (1994), the court held that a defendant claiming ineffective assistance of counsel must show that his trial counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth amendment, and that such errors prejudiced the defense so as to deprive the defendant of a fair trial. In doing so, defendant must overcome the strong presumption that the attorney's actions constituted sound trial strategy. *People v Toma*, 462 Mich 281, 302-03; 613

NW2d 694 (2000). Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must how a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600. Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001), citing *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below and objective standard of reasonableness under prevailing professional norms. *Id.* at 714, citing *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must also demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *Id.* at 714, citing *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Decisions regarding what evidence to present, and whether to call or question witnesses, are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In the present case, defendant argues that counsel did not call a taxi cab driver who defendant claims could have rebutted the testimony of the victim and established that defendant and the victim did have a prior relationship. Defendant also asserts that video surveillance footage of a local MDOC Parole office would have corroborated that previous relationship. Finally, defendant claims that while he was incarcerated during the pendency of the trial, his sister LaTrese Lindsey, took photographs of the bus stop where the incident occurred. Defendant claims those photos would have shown that indeed there were no steps upon which to sit and wait, as the victim had testified to.

Defendant has offered an affidavit from Ms Lindsey in which she claims that she spoke with trial counsel and was asked if she knew of the existence of any witnesses to the incident, to which she replied in the negative. The affidavit goes on to say that she offered to testify about the photographs and that counsel became "argumentative" and informed her that he would call her if he needed her.

Defendant's theory of the case is that the allegations of the armed robbery and kidnapping were fabricated by the victim over a disputed drug deal and that had counsel thoroughly investigated the matter, sought the production of the video tapes, and called the cab driver and LaTrese Lindsey to testify, the outcome of the trial would have been different.

Given the above, the court does not find that counsel delivered an unreasonable performance or that he acted contrary to established professional norms. Indeed, the affidavit of LaTrese Lindsey belies defendant's assertion that counsel was ineffective. It is clear by the affidavit that counsel did in fact investigate elements of the case and may very well have considered and rejected defendant's theory or thought the supposed evidence irrelevant in regards to defendant's culpability. The only value that the proposed evidence appears to offer goes to its ability to impeach the victim on a collateral matter and has no bearing on whether defendant did or did not commit the crime.

"Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). "Declining to raise objections can often be consistent with sound trial strategy." *Id.* at 253. "A failed strategy does not constitute deficient performance." *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). The method by which counsel chooses to establish the facts is a matter of trial strategy. The Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will the Court assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A reviewing

court will not interfere with the trier of fact's role in determining the credibility of the witnesses or the weight of the evidence. *People v Williams,* 268 Mich App 416, 419; 707 NW2d 624 (2005).

Given the offer of proof contained herein, the court finds that it would not have provided any exculpatory insight and is a collateral matter at best, of which the alleged failure of the defense attorney to address, simply does not amount to ineffective assistance of counsel. Accordingly, the court finds that defendant has failed to demonstrate actual prejudice as required by MCR 6.508(D)(3)(b).

CONCLUSION

For the aforementioned reasons, defendant's motion for relief from judgment, motion for new trial, and motion for evidentiary hearing are hereby DENIED. IT IS SO ORDERED.

DANIEL A. HATHAWAY
CIRCUIT COURT JUDGE

11-10-11
DATE

Court of Appeals, State of Michigan

ORDER

People of MI v Brian K Boykins

Docket No. 310158

LC No. 07-021072-FC

Michael J. Talbot
Presiding Judge

E. Thomas Fitzgerald

William C. Whitbeck
Judges

The Court orders that the motion to waive fees is GRANTED for this case only.

The motion to supplement the application is GRANTED.

The delayed application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).

Presiding Judge

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

OCT 2 4 2012
Date

Chief Clerk

APPENDIX H

People v. Boykins, 2013 Mich. LEXIS 780

Supreme Court of Michigan

May 28, 2013, Decided

SC: 146374

Reporter

2013 Mich. LEXIS 780 * | 494 Mich. 855 | 830 N.W.2d 403 | 2013 WL 2339518

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v BRIAN K. BOYKINS, Defendant-Appellant.

Prior History: **[*1]** COA: 310158. Wayne CC: 07-021072-FC.

People v. Boykins, 2009 Mich. App. LEXIS 2260 (Mich. Ct. App., Oct. 27, 2009)

Core Terms

order of the court

Judges: Robert P. Young, Jr., Chief Justice. Michael F. Cavanagh, Stephen J. Markman, Mary Beth Kelly, Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Justices.

Opinion

Order

APPENDIX I

On order of the Court, the application for leave to appeal the October 24, 2012 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

Content Type: Cases

Terms:

Narrow By: custom: Custom

Date and Time: Dec 17, 2018 07:51:06 p.m. CST

APPENDIX

STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, No. 07-21072

vs. Hon. DIANE HATHAWAY

BRIAN BOYKIN,

Defendant.

LEGAL AID AND DEFENDER'S ASSOC.
STATE DEFENDER'S OFFICE
JAMES A. PARKER, P53832
Attorney for Defendant
645 Griswold, Suite 2350
Detroit, MI 48226

ORDER FOR INVESTIGATION
At a session held in the Wayne County Circuit Court, County of Wayne on:

PRESENT: HONORABLE: DIANE MARIE HATHAWAY
CIRCUIT COURT JUDGE

Upon Motion and for good cause shown, IT IS ORDERED that Iverson Agency be and hereby is appointed defense investigator for the Defendant Herein.

IT IS FUTHERED ORDERED that THE SAID Iverson Agency be allowed by the Sheriff to interview the Defendant and other relevant witnesses, who may also be incarcerated, in the Wayne County Jail.

IT IS FURTHER ORDERED that the said Iverson Agency will be paid in accordance with the appropriate Court Rule of this Honorable Court on behalf of indigent Defendants.

NOV 26 2007

HONORABLE CIRCUIT COURT JUDGE

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APPENDIX J

Approved for entry:

Wayne County Prosecutor

JAMES A. PARKER, P53832
Attorney for Defendant

Dated:

Additional material from this filing is available in the Clerk's Office.