

No. 18-1342

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jul 17, 2018

DEBORAH S. HUNT, Clerk

SEAN DANIELS,

Petitioner-Appellant,

v.

SHANE JACKSON,

Respondent-Appellee.

ORDER

Sean Daniels, a pro se Michigan prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Daniels has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

In 2008, a Michigan jury convicted Daniels of first-degree premeditated murder, in violation of Michigan Compiled Laws § 750.316(1)(a), assault with intent to commit murder, in violation of Michigan Compiled Laws § 750.83, and possession of a firearm during the commission of a felony, in violation of Michigan Compiled Laws § 750.227b. Daniels's convictions stem from the November 2007 shooting death of Deshaun Williams and the nonfatal shooting of Jeanell Land. The trial court sentenced Daniels to life imprisonment for the murder conviction and a concurrent term of 240 to 480 months' imprisonment for the assault conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. On direct appeal, Daniels argued that trial counsel rendered ineffective assistance by: (1) objecting to the admission of autopsy photographs in the presence of the jury, rather than in a pretrial motion in limine; (2) engaging in conduct that resulted in repeated reprimands from the

trial judge; and (3) failing to make an opening statement and abruptly discontinuing his closing argument without informing the jury of the defense's theory of the case. He also argued that the prosecution presented insufficient evidence to establish his identity as the shooter. The Michigan Court of Appeals affirmed Daniels's convictions, *People v. Daniels*, No. 287769, 2010 WL 571841, at *3 (Mich. Ct. App. Feb. 18, 2010) (per curiam), and the Michigan Supreme Court denied Daniels's application for leave to appeal.

In 2011, Daniels filed a § 2254 petition, in which he raised the same issues that he advanced on direct appeal. The district court subsequently granted Daniels's motion to hold the habeas petition in abeyance and stay the proceedings so that he could return to the state courts to present unexhausted claims. Daniels thereafter filed a motion for relief from judgment in the trial court, in which he raised the following six grounds for relief: (1) he is actually innocent, and the prosecutor's office and police department withheld exculpatory evidence, presented false testimony, and manufactured evidence; (2) the trial judge committed misconduct; (3) the trial court provided improper jury instructions; (4) appellate counsel rendered ineffective assistance by failing to raise issues on direct appeal; (5) cumulative error denied him a fair trial; and (6) his convictions must be reversed because he demonstrated both good cause and prejudice under Michigan court rules and statutes. The trial court denied the motion for relief from judgment. The Michigan Court of Appeals and Michigan Supreme Court both denied Daniels's delayed application for leave to appeal because he "failed to meet the burden of establishing entitlement to relief under [Michigan Court Rule] 6.508(D)." *People v. Daniels*, No. 316725 (Mich. Ct. App. Oct. 29, 2013) (order), *perm. appeal denied*, 846 N.W.2d 548 (Mich. 2014).

In June 2014, Daniels reopened his habeas proceeding in the district court and amended his § 2254 petition to include the six claims that he advanced in his motion for relief from judgment. The district court addressed and denied all ten of Daniels's claims on the merits and declined to issue a COA.

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

show 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 § 2253(c), this court does not fully consider “the factual or legal bases adduced in support of the claims”; rather, this court conducts an overview of the claims and “a general assessment of their merits.” *Id.* at 336.

A. Ineffective Assistance of Trial Counsel

Daniels’s first three grounds for relief allege that his trial counsel rendered ineffective assistance. To establish ineffective assistance of counsel, the defendant must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The performance inquiry requires the defendant to “show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. The test for prejudice is whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. Establishing that a state court’s application of *Strickland* was unreasonable under § 2254(d) is more difficult—the standards created by *Strickland* and § 2254(d) are both “highly deferential,” and when the two apply in tandem, review is “doubly” so. *Harrington v. Richter*, 562 U.S. 86, 105 (2011). A habeas court, in reviewing a state court’s denial of a *Strickland* claim, may not grant the writ if “there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Id.*

In his first ground for relief, Daniels argues that trial counsel was ineffective for objecting to the admission of autopsy photographs in the jury’s presence rather than a pretrial motion in limine. Specifically, he argues that by arguing the issue in front of the jury, trial counsel created the impression that he was trying to keep relevant evidence from the jury. The

Michigan Court of Appeals rejected this argument on direct appeal, concluding that trial counsel's decision to object in front of the jury "appears to have been a deliberate strategy to communicate to the jury the importance of not being swayed by emotions and to cast [Daniels] as a victim of an overzealous prosecutor." *Daniels*, 2010 WL 571841, at *2. In reaching this conclusion, the Michigan Court of Appeals highlighted the fact that trial counsel "followed up on this point during his closing argument when he suggested that the photographs did not serve any legitimate purpose and were offered for an improper purpose." *Id.*

The district court concluded that the state appellate court's adjudication of this claim was not an unreasonable application of *Strickland*. The district court noted that autopsy photographs are routinely admitted into evidence in conjunction with a medical examiner's testimony. Given that the autopsy photographs were likely admissible, the district court concluded that "it was reasonable for defense counsel to conclude that the best he could do was to use an objection in front of the jury as an opportunity to argue that an 'intelligent jury' would not find the photographs useful." This strategic decision merits deference. *See Strickland*, 466 U.S. at 690. Reasonable jurists would not debate the district court's rejection of Daniels's first ground for relief. *See Miller-El*, 537 U.S. at 327.

Daniels's second ineffective-assistance-of-counsel claim concerns his trial counsel's generally aggressive style, which resulted in the trial judge reprimanding him several times for failing to examine witnesses properly and for being overly argumentative. Daniels claims that trial counsel's demeanor was detrimental to his case. The Michigan Court of Appeals rejected this claim, concluding that the record revealed that trial counsel's aggressive style was strategic. *Daniels*, 2010 WL 571841, at *2. In reaching this determination, the Michigan Court of Appeals noted that trial counsel referred to himself in closing argument as being like a more aggressive manager of a baseball team. *Id.* The Michigan Court of Appeals further concluded that Daniels "ha[d] not shown that counsel's conduct fell below an objective standard of reasonableness, and [Daniels] has not overcome the strong presumption of sound trial strategy under the circumstances." *Id.*

The district court concluded that the state appellate court's decision on this point was not unreasonable. The district court found that trial counsel's "style was not clearly ineffective. He persistently challenged the prosecution's case and did so within the bounds of acceptable courtroom decorum." Accordingly, trial counsel's strategic decision is entitled to deference. *See Strickland*, 466 U.S. at 690. Reasonable jurists would therefore not debate the district court's rejection of Daniels's second ground for relief. *See Miller-El*, 537 U.S. at 327.

In his third ground for relief, Daniels argues that trial counsel was ineffective for failing to present an opening statement and for discontinuing his closing argument after learning that he was subject to a thirty-minute time limit of which he was previously unaware. The Michigan Court of Appeals rejected this argument, concluding that trial counsel's decision to forgo an opening argument constituted sound trial strategy. *Daniels*, 2010 WL 571841, at *2. The Michigan Court of Appeals further concluded that trial counsel's decision to abort his closing argument was also "a matter of trial strategy," because trial counsel may have been "relying on jury sympathy and the potential perception that [the] defendant was not receiving a fair trial in order to obtain an acquittal because he had nothing else to argue in the way of evidence." *Id.* Finally, the Michigan Court of Appeals determined that Daniels had not shown that he was prejudiced by trial counsel's alleged errors.

The district court concluded that the state appellate court's rejection of this claim was not unreasonable. The district court agreed that Daniels had not shown that the outcome of his trial would have been different but for trial counsel's alleged errors. Moreover, although the district court acknowledged that trial counsel's decision to abort his closing argument was "an unusual circumstance," the court nonetheless concluded that trial counsel's decision to do so may have been "part of a strategy to persuade the jury that the deck was stacked against [Daniels] and he was not receiving a fair trial." Strategic decisions made after considering the law and facts are virtually unchallengeable. *See Strickland*, 466 U.S. at 689. In light of the double deference due under *Strickland* and § 2254, reasonable jurists would not disagree with the district court's

determination that the Michigan Court of Appeals reasonably determined that trial counsel was not ineffective. *See Richter*, 562 U.S. at 105.

B. Sufficiency of the Evidence

In his fourth ground for relief, Daniels contends that the prosecution presented insufficient evidence to establish his identity as the person who shot Williams and Land on the night in question. In reviewing the sufficiency of the evidence, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This standard demands two levels of deference when the state courts have rejected an insufficiency claim on the merits. *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009). First, this court analyzes the claim under the *Jackson* standard, whereby it may not “reweigh the evidence, re-evaluate the credibility of witnesses, or substitute [its] judgment for that of the jury.” *Id.* Second, this court defers to the state court’s “sufficiency determination as long as it is not unreasonable.” *Id.*

The Michigan Court of Appeals analyzed the evidence presented at trial and found it sufficient to support Daniels’s convictions. *Daniels*, 2010 WL 571841, at *3. Specifically, the court noted that Land positively identified Daniels at trial as the culprit, which alone was sufficient to support Daniels’s convictions. *Id.* The Michigan Court of Appeals further addressed and rejected Daniels’s argument that Land’s testimony was not credible, declining to interfere with the jury’s role of resolving issues of credibility. *Id.*

The district court concluded that the state court’s sufficiency-of-the-evidence determination was supported by the record. The district court determined that Land’s testimony alone was sufficient to establish that Daniels was the shooter. Additionally, the district court rejected Daniels’s challenge to Land’s credibility, which was appropriate considering “[a]n assessment of the credibility of witnesses is generally beyond the scope of federal habeas review of sufficiency of evidence claims.” *Matthews v. Abramajtys*, 319 F.3d 780, 788 (6th Cir. 2003).

Reasonable jurists would not disagree with the district court's resolution of Daniels's fourth ground for relief.

C. Prosecutorial Misconduct

In his fifth ground for relief, Daniels argues that the prosecutor committed misconduct by going to elaborate lengths to falsely prove that victim Williams received a gunshot wound to the head. Specifically, Daniels alleged that the prosecutor withheld medical records that established that Williams was not shot in the head, knowingly presented false testimony about a gunshot wound to Williams's head, provided the defense with inaccurate police reports, allowed crime scene photographs to be altered, knowingly introduced the altered photographs at trial, and intimidated the surviving victim, Land, into testifying that Williams was shot in the head. Daniels also argued that he is actually innocent. To be cognizable on habeas review, prosecutorial misconduct must have "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 denying Daniels's motion for relief from judgment, the state trial court rejected Daniels's claims that the prosecution fabricated evidence concerning the victim's gunshot wound to the head, coached Land to corroborate the allegedly fabricated evidence in her trial testimony, or knowingly allowed witnesses to give false testimony. The district court likewise rejected Daniels's claims, finding that his "arguments are based upon speculation about a far-reaching conspiracy to manufacture a head wound. Nothing more." A review of Daniels's habeas petition supports the district court's conclusion on this point. Moreover, with respect to Daniels's assertion that he is actually innocent, a stand-alone actual-innocence claim does not warrant habeas relief. See *Herrera v. Collins*, 506 U.S. 390, 404-05 (1993). Reasonable jurists would not disagree with the district court's resolution of this claim.

D. Judicial Misconduct

In his sixth ground for relief, Daniels contends that the trial judge committed misconduct, thus denying him a fair trial. Specifically, Daniels argues that the trial judge engaged in

misconduct by openly arguing with defense counsel, limiting defense counsel's closing argument to thirty minutes, and purportedly leaving the bench in the middle of defense counsel's closing argument. "[U]nless they amount to constitutional violations, prejudicial comments and conduct by a judge in a criminal trial are not proper subjects for collateral attack on a conviction." *Todd v. Stegal*, 40 F. App'x 25, 27 (6th Cir. 2002) (quoting *McBee v. Grant*, 763 F.2d 811, 818 (6th Cir. 1985)). To establish a claim of judicial misconduct that would entitle a defendant to habeas relief, the petitioner must show that the judge's comments and conduct reached "'a significant extent' and [were] adverse to the defendant 'to a substantial degree.'" *Id.* A judge's conduct at trial may be "characterized as 'bias' or 'prejudice'" only if "it is so extreme as to display clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994).

overlooked
bias

The district court concluded that the trial court's "expressions of impatience with defense counsel were limited and a reasonable response to defense counsel's combative style." The district court also concluded that the trial court's interactions with defense counsel neither undermined defense counsel's credibility nor demonstrated a deep-seated antagonism for Daniels. Daniels did not specifically identify which of the trial judge's comments amounted to misconduct, but instead appears to take umbrage with the trial judge's public admonishments of defense counsel in general. But "expressions of impatience, dissatisfaction, annoyance, and even anger" do not establish such bias or partiality. *Id.* at 555-56. Moreover, there is no Supreme Court precedent that would support a finding that the thirty-minute time limit for closing arguments amounted to judicial misconduct or a violation of due process. *See United States v. Currie*, 609 F.2d 1193, 1194 (6th Cir. 1979). Further, after an independent review of the record, the district court noted that, contrary to Daniels's assertion, the trial judge never left the bench during defense counsel's closing argument. The record supports the district court's conclusion on this point. Based on the foregoing, reasonable jurists would not disagree with the district court's resolution of this claim.

E. Jury Instructions

In his seventh ground for relief, Daniels argues that the trial court gave insufficient jury instructions. Specifically, he contends that the trial court: (1) gave an incorrect instruction as to the intent element of first-degree murder; and (2) failed to instruct the jury on manslaughter. He also challenges the procedures associated with the jury instructions. “To warrant habeas relief, jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair.” *Doan v. Carter*, 548 F.3d 449, 455 (6th Cir. 2008) (quoting *Austin v. Bell*, 126 F.3d 843, 846-47 (6th Cir. 1997)). Where a claim of error involves failure to give an instruction, the petitioner’s burden is “especially heavy” because “[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law.” *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). Error in or failure to give a jury instruction is reviewed for harmless error. *Mitzel v. Tate*, 267 F.3d 524, 534 (6th Cir. 2001); *see also Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). An error is not harmless if there is “a ‘reasonable probability’ that a trial error affected or influenced the verdict.” *Mitzel*, 267 F.3d at 534 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

Daniels failed to show that any error stemming from the trial court’s jury instructions affected or influenced the jury’s verdict. At trial, Land testified that she and Williams went together to a friend’s house on the night in question. She testified that Daniels was present at the friend’s house when she and Williams arrived. She further testified that, at some point that night, Daniels accused Williams of stealing his van. She testified that Daniels threatened to “shoot [Williams] in the face. I’m a kill this motherfucker. He got my van.” Land testified that Daniels then frisked people standing nearby in search of a firearm. She testified that Daniels was unable to locate a gun but subsequently called somebody on his phone and asked that person for a gun. Land testified that she and Williams then left in her car in an effort to deescalate the situation. She testified that she and Williams returned to their friend’s house approximately fifteen to thirty minutes later, at which time Daniels approached her car, again accused Williams

of stealing his van, and proceeded to shoot her and Williams. Land testified that Daniels fired at least four shots. This claim does not deserve encouragement to proceed further.

F. Ineffective Assistance of Appellate Counsel

In his eighth ground for relief, Daniels contends that his appellate counsel rendered ineffective assistance by failing to raise his habeas claims on direct appeal. The *Strickland* standard also applies to claims of ineffective assistance of appellate counsel. See *Willis v. Smith*, 351 F.3d 741, 745 (6th Cir. 2003). But Daniels has not shown that he was prejudiced by counsel's alleged errors because he has not identified any meritorious claim that could have been presented on 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)). Reasonable jurists therefore would not debate the district court's resolution of this claim.

G. Cumulative Error

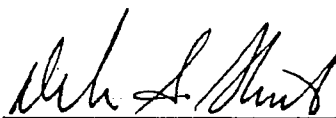
In his ninth ground for relief, Daniels contends that he was denied a fair trial based on cumulative error. Reasonable jurists would not debate the district court's denial of this claim. "[T]he law of [the Sixth Circuit] is that cumulative error claims are not cognizable on habeas [review] because the Supreme Court has not spoken on this issue." *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006).

H. Entitlement to Relief under Michigan Court Rule 6.508(D)

In his tenth ground for relief, Daniels argues that the state courts erroneously concluded that he did not meet his burden of establishing entitlement to relief under Michigan Court Rule 6.508(D). Reasonable jurists would not disagree with the district court's conclusion that errors committed in state post-conviction proceedings are not a basis for federal habeas relief. See *Alley v. Bell*, 307 F.3d 380, 386-87 (6th Cir. 2002).

Based on the foregoing, Daniels's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

A handwritten signature in cursive script, appearing to read "Deborah S. Hunt", written over a horizontal line.

Deborah S. Hunt, Clerk

No. 18-1342

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Sep 25, 2018

DEBORAH S. HUNT, Clerk

SEAN DANIELS,

Petitioner-Appellant,

v.

SHANE JACKSON,

Respondent-Appellee.

ORDER

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

Sean Daniels petitions for rehearing en banc of this court's order entered on July 17, 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.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

#14
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SEAN DANIELS,

Petitioner,

Case Number: 11-12199

Honorable Mark A. Goldsmith

v.

DUNCAN MACLAREN,

Respondent.

OPINION AND ORDER
DENYING PETITION FOR WRIT OF HABEAS CORPUS AND
DENYING A CERTIFICATE OF APPEALABILITY

Petitioner Sean Daniels, currently in the custody of the Michigan Department of Corrections, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He challenges his convictions for first-degree premeditated murder, Mich. Comp. Laws § 750.316(1)(a), assault with intent to commit murder, Mich. Comp. Laws § 750.83, and possession of a firearm during the commission of a felony, Mich. Comp. Laws § 750.227b.

The petition raises ten claims. For the reasons explained below, the Court denies the petition. The Court denies a certificate of appealability and grants Petitioner leave to proceed on appeal in forma pauperis.

I. BACKGROUND

The Michigan Court of Appeals provided this overview of the circumstances leading to Petitioner's convictions:

Defendant's convictions arise from the November 4, 2007, shooting death of Deshaun Williams and the nonfatal shooting of Jeanell Land, who was shot in the legs. Land, who had known defendant for approximately three months before the shooting, testified that defendant and Williams were involved in an argument after defendant discovered that his van was missing. During the argument, defendant told Williams, "If you got my van, motherf-----, I'ma shoot you in your face." Defendant then walked away and started frisking people who were outside to find a gun, and asked if they had a gun. Defendant said he was going to "shoot this motherf----- in the face. I'ma kill this motherf-----." He got my van." Defendant then called someone and asked for a gun. Williams and Land left the house in Land's car, but returned between 15 and 30 minutes later. Land heard defendant walk up to their car and ask, "You got my van, motherf-----?" Defendant then shot Williams and Land. Williams was shot three times, including once in the middle of the forehead, and Land was shot twice in the legs.

People v. Daniels, No. 287769, 2010 WL 571841, *1 (Mich. Ct. App. Feb. 18, 2010).

Petitioner was tried by a jury in Wayne County Circuit Court. He was convicted of first-degree premeditated murder, assault with intent to commit murder, and possession of a firearm during the commission of a felony, and, on July 29, 2008, sentenced to life imprisonment for the murder conviction, twenty to forty years for the assault conviction, and two years' imprisonment for the felony-firearm conviction.

Petitioner filed an appeal of right in the Michigan Court of Appeals. He claimed that he received ineffective assistance of counsel and that insufficient evidence established his identity as the shooter. The Michigan Court of Appeals affirmed Petitioner's conviction. Id.

Petitioner filed an application for leave to appeal in the Michigan Supreme Court. He raised the claims raised in the Michigan Court of Appeals and an additional claim regarding jury instructions. The Michigan Supreme Court denied leave to appeal. People v. Daniels, 783 N.W.2d 376 (Mich. 2010).

Petitioner then filed a habeas corpus petition. He later moved for a stay to allow him to exhaust additional claims in state court (Dkt. 16), which the Court granted (Dkt. 17).

Petitioner filed a motion for relief from judgment in the trial court. He raised six claims for relief: (i) prosecutor's office and police department withheld exculpatory evidence, presented false testimony, and manufactured evidence; (ii) judicial misconduct; (iii) improper jury instructions; (iv) ineffective assistance of appellate counsel; (v) cumulative error denied Petitioner right to a fair trial; and (vi) good cause and prejudice excuse any default. The trial court denied the motion. See 1/23/2013 Opinion (Dkt. 32-3.)

Petitioner filed an application for leave to appeal in the Michigan Court of Appeals. The Michigan Court of Appeals denied leave to appeal. People v. Daniels, No. 316725 (Mich. Ct. App. Oct. 29, 2013). Petitioner filed an application for leave to appeal in the Michigan Supreme Court, which was also denied. People v. Daniels, 846 N.W.2d 548 (Mich. 2014).

Petitioner moved to reopen this proceeding and to amend his petition. The Court granted the motion and allowed amendment of the habeas corpus petition. See 10/31/14 Opinion and Order (Dkt. 27). The habeas corpus petition raises these claims:

I. Petitioner was denied the effective assistance of counsel at trial where counsel objected to the admission of autopsy photographs after the medical examiner's testimony and in front of the jury rather than in a motion in limine prior to trial.

II. Petitioner was denied the effective assistance of counsel at trial where counsel had to be repeatedly reprimanded by the trial court for failing to examine witnesses properly and for arguing with the court.

III. Petitioner was denied the effective assistance of counsel at trial where counsel failed to present an opening statement, then refused to continue and complete his closing statement. When he was advised of a time limit, counsel ended his closing without informing the jury of Petitioner's theory of the case.

IV. There was insufficient evidence that Petitioner was the shooter.

V. Daniels was denied his Fifth Amendment rights by the Wayne County Prosecutor's office and Detroit Police Department withholding exculpatory evidence, use of false testimony and manufactured evidence by the prosecutor and medical examiner, Detroit Police, and complaining witness. Daniels is actually and legally innocent.

VI. The trial judge demonstrated judicial misconduct when he openly argued with defense counsel, imposed an exact time limit on defense counsel's closing argument, walking off the bench during defense counsel's closing arguments, and failed to recommend defense counsel continue representing Daniels during closing arguments, denying him a fair trial and his right to counsel.

VII. The trial court abused its discretion in managing the trial, depriving Daniels a fair trial and due process of law by giving improper and erroneous jury instructions as a whole.

VIII. Daniels was denied his right to effective assistance of appellate counsel by his appellate counsel's failure to raise trial counsel issues of error and issues pertaining to the trial judge's abuse of discretion.

IX. Daniels was denied a fair trial by cumulative error.

X. Daniels's conviction must be reversed where the state courts violated his right to equal protection where he demonstrated both good cause and prejudice under Michigan Court Rules and Statutes.

II. STANDARD OF REVIEW

Title 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, 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.

28 U.S.C. § 2254(d).

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, 405-406 (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 411.

The Supreme Court has explained that a “federal court’s collateral review of a state-court decision must be consistent with the respect due state courts in our federal system.” Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Thus, the AEDPA “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). 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).

The Supreme Court has emphasized “that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” Id. at 102. Furthermore, pursuant to section 2254(d), “a habeas court must determine what arguments or theories supported or . . . could have supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision” of the Supreme Court. Id. Habeas relief is not appropriate unless each ground that supported the state court’s decision is examined and found to be unreasonable under the AEDPA.

See Wetzel v. Lambert, 132 S. Ct. 1195, 1199 (2012). “If this standard is difficult to meet, that is because it was meant to be.” Harrington, 562 U.S. at 102. Although 28 U.S.C. § 2254(d), as amended by the AEDPA, does not completely bar federal courts from re-litigating claims that have previously been rejected in the state courts, it preserves the authority for a federal court to grant habeas relief only “in cases where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with” the Supreme Court’s precedents. Id. Indeed, section 2254(d) “reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.” Id. at 102-03. A “readiness to attribute error [to a state court] is inconsistent with the presumption that state courts know and follow the law.” Woodford v. Viscotti, 537 U.S. 19, 24 (2002). 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 state court’s factual determinations are presumed correct on federal habeas review. See 28 U.S.C. § 2254(e)(1). A habeas petitioner may rebut this presumption of correctness only with clear and convincing evidence. Id. Moreover, for claims that were adjudicated on the merits in state court, habeas review is “limited to the record that was before the state court.” Cullen v. Pinholster, 563 U.S. 170, 181 (2011).

III. ANALYSIS

A. Ineffective Assistance of Trial Counsel Claims (Claims I-III)

Petitioner argues that he was denied the effective assistance of counsel when his trial attorney: (1) objected to the admission of autopsy photographs after the medical examiner’s testimony and in front of the jury rather than in a pretrial motion in limine; (2) was repeatedly

reprimanded by the trial court for failing to examine witnesses properly and for arguing with the court; and (3) failed to present an opening statement and failed to complete his closing argument.

An ineffective assistance of counsel claim has two components. Strickland v. Washington, 466 U.S. 668 (1984). A petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defense. Id. at 687. To establish deficient representation, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id. at 688. In order to establish prejudice, a petitioner must show that, but for the constitutionally deficient representation, there is a "reasonable probability" that the outcome of the proceeding would have been different. Id. at 694.

The AEDPA "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Burt v. Titlow, 134 S. Ct. 10, 16 (2013). The standard for obtaining relief is "'difficult to meet.'" White v. Woodall, 134 S. Ct. 1697, 1702 (2014), quoting Metrish v. Lancaster, 133 S. Ct. 1781, 1786 (2013). In the context of an ineffective assistance of counsel claim under Strickland, 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."

Id.

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First, Petitioner argues that counsel was ineffective in objecting to the admission of autopsy photographs in the presence of the jury rather than a pretrial motion in limine. Dr. Cheryl Loewe, a deputy chief medical examiner for Wayne County, testified that she supervised the autopsy of the victim in this case. Dr. Loewe testified that, during the course of the autopsy, photographs

were taken to document the victim's wounds. She described the content of four exhibits which were composites of photographs of the victim. See 3/19/2008 Tr. at 62-63, Pg. ID 516-17 (Dkt. 8-6). The photographs were not published to the jury at that time. Id. At the conclusion of Dr. Loewe's testimony, defense counsel moved to exclude the photographs from evidence because they were unfairly prejudicial and unnecessary in light of Dr. Loewe's description of their content. Id. at 77-78, Pg. ID 531-32. Ultimately, the trial court admitted the photographs with some redactions.¹ Id. at 202, Pg. ID 656.

The Michigan Court of Appeals held that counsel was not ineffective in objecting to the admission of the photographs in the presence of the jury. The state court reasoned that defense counsel chose a strategy of trying to minimize the impact of the photographs by emphasizing, in front of the jury, that the photographs were offered for an improper purpose – to sway the jury on the basis of emotions rather than facts. Daniels, 2010 WL 571841 at *2. The state court found that this deliberate strategy of communicating to the jury “the importance of not being swayed by emotions and ... cast[ing] defendant as a victim of an overzealous prosecutor” was a reasonable one. Id. In evaluating the reasonableness of the state court's decision, this Court finds particularly relevant the fact that autopsy photographs are frequently admitted into evidence in conjunction with a medical examiner's testimony. Given this and anticipating that the photographs would be admissible, it was reasonable for defense counsel to conclude that the best he could do was to use an objection in front of the jury as an opportunity to argue that an “intelligent jury” would not find the photographs useful. Id. The Court finds that the state court's decision was not an unreasonable application of Strickland.

¹ The nature and extent of the redactions are not evident from the record.

Second, Petitioner argues that his defense counsel's generally aggressive style worked to the defense's detriment. In closing argument, defense counsel characterized his own style as more Billy Martin than Sparky Anderson.² The trial transcript shows that defense counsel was assertive and argumentative in his questioning of witnesses and, at times, truculent in his interactions with the court. But defense counsel's style was not clearly ineffective. He persistently challenged the prosecution's case and did so within the bounds of acceptable courtroom decorum. The Court, therefore, finds that the Michigan Court of Appeals' decision that defense counsel's aggressive style was strategic and calculated to challenge the prosecution's case at every turn is not unreasonable.

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Finally, Petitioner argues that defense counsel was ineffective in failing to present an opening statement and for discontinuing his closing argument after learning that he was subject to a time limit of which he was previously unaware. The Michigan Court of Appeals held that counsel's decision not to give an opening statement was a reasonable trial strategy. Daniels, 2010 WL 571841 at *2. Petitioner has failed to show that the state court's resolution of this claim was an unreasonable application of Supreme Court precedent. In addition, Petitioner has failed to show that there is a reasonable probability that the outcome of the trial would have been different had his attorney given an opening statement. See Moss v. Hofbauer, 286 F.3d 851, 863-64 (6th Cir. 2002)

² Billy Martin, best known for his several terms managing the New York Yankees, was considered one of the "most brilliant game managers" in baseball, but also one of the most notoriously combative. See Murray Chass, Billy Martin of the Yankees Killed in Crash on Icy Road, N.Y. Times, Dec. 26, 1989, at A1, D9. In contrast, Sparky Anderson, an equally successful manager of the Cincinnati Reds and Detroit Tigers, was known as a gentleman who encouraged his players to place their dirty clothes in a bin so that the clubhouse workers did not have to pick up after them. See Sparky Anderson, 1934-2010: 2 cities, 1 legend, Toledo Blade, Nov. 5, 2010.

Counsel's decision to abort his closing argument before completing it is an unusual circumstance. Defense counsel began his closing argument at 10:05 a.m. He discussed with the jury some general principles by which they should abide in deciding the case, including that they should reject any temptations to decide the case based on sympathy or emotion, and that they should not allow the dramatic autopsy photographs to impact their decision. 3/20/2008 Tr. at 36-44, Pg. ID 696-704 (Dkt. 8-7). After speaking for twelve minutes (10:17 a.m.), the court informed defense counsel that twenty minutes remained for his closing argument. Id. at 45, Pg. ID 705. Defense counsel and the trial court judge then engaged in a brief but testy exchange with defense counsel claiming that he was unaware of a time limit, seeking clarification on the time limit, and, ultimately, refusing to continue his closing argument. Id. at 45-47, Pg. ID 705-07. At 10:19 a.m., the jurors were excused. Id. at 47, Pg. ID 707. The trial court told defense counsel to let him know when he wished to resume his closing argument. Id. Defense counsel did not resume his closing argument. After twenty minutes, the jury reentered and jury instructions were provided. Id. at 47-48, Pg. ID 707-08.

On direct review, the Michigan Court of Appeals held that defense counsel's failure to complete his closing argument was neither ineffective nor prejudiced Petitioner. The state court explained:

[D]efense counsel's decision to discontinue his closing argument likewise may be deemed a matter of trial strategy. Given that there was strong eyewitness testimony against defendant, which defense counsel was unable to shake despite good efforts, defendant had no witnesses, and trial had been difficult, it is possible that defense counsel was relying on jury sympathy and the potential perception that defendant was not receiving a fair trial in order to obtain an acquittal because he had nothing else to argue in the way of evidence.[] Defendant has not demonstrated that counsel's strategy was unsound. In addition, defendant has not established prejudice. Defendant has not suggested what additional arguments could have been made by defense counsel that would have resulted in a reasonable probability of a different result. ...

not supported by the record

Daniels, 2010 WL 571841 at *2.

Defense counsel reacted petulantly to the trial court's admonition that twenty minutes remained of his time allotment. It is possible that defense counsel's reaction was part of a strategy to persuade the jury that the deck was stacked against Petitioner and he was not receiving a fair trial. And, the Supreme Court has recognized that "it might sometimes make sense to forgo closing argument altogether." Yarborough v. Gentry, 540 U.S. 1, 6 (2003). Nevertheless, the Court need not decide the reasonableness of that strategy because, even assuming that the strategy was an unreasonable one, Petitioner has not shown that the state court decision finding no resulting prejudice was contrary to or an unreasonable application of Supreme Court precedent. Petitioner ^{Shut} fails to identify particular arguments defense counsel could have made in closing argument that may have swayed the jurors. The trial was relatively short (approximately one and a half days of testimony) and so did not require a summary of weeks of testimony. The Michigan Court of Appeals' rejection of this claim was reasonable.

B. Sufficiency of the Evidence (Claim IV)

Next, Petitioner argues that the evidence was insufficient to establish beyond a reasonable doubt that he was the perpetrator. He argues that the prosecution's entire case rested on the testimony of one witness, Jeanell Land, and that her testimony, absent any corroboration, was insufficient to establish that he was the perpetrator.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). On direct review, review of a sufficiency of the evidence challenge must focus on whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). In the habeas context, “[t]he Jackson standard must be applied ‘with explicit reference to the substantive elements of the criminal offense as defined by state law.’” Brown v. Palmer, 441 F.3d 347, 351 (6th Cir. 2006), quoting Jackson, 443 U.S. at 324 n.16).

“Two layers of deference apply to habeas claims challenging evidentiary sufficiency.” McGuire v. Ohio, 619 F.3d 623, 631 (6th Cir. 2010), citing Brown v. Konteh, 567 F.3d 191, 204-05 (6th Cir. 2009). First, the Court “must determine whether, viewing the trial testimony and exhibits in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Brown, 567 F.3d at 205, citing Jackson, 443 U.S. at 319. Second, if the Court were “to conclude that a rational trier of fact could not have found a petitioner guilty beyond a reasonable doubt, on habeas review, [the Court] must still defer to the state appellate court’s sufficiency determination as long as it is not unreasonable.” Id. In short, “deference should be given to the trier-of-fact’s verdict, as contemplated by Jackson; [then] deference should be given to the [state court’s] consideration of the trier-of-fact’s verdict, as dictated by AEDPA.” Tucker v. Palmer, 541 F.3d 652, 656 (6th Cir. 2008) (citation omitted). The Jackson standard is “exceedingly general” and therefore Michigan courts are afforded “considerable leeway” in its application. Davis v. Lafler, 658 F.3d 525, 535 (6th Cir. 2011).

Under Michigan law, to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. People v. Anderson, 531 N.W.2d 780, 786 (Mich. Ct. App. 1995). Premeditation and deliberation may be established by evidence showing: “(1) the prior relationship of the parties; (2) the defendant’s actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant’s conduct after the homicide.” People v. Schollaert, 486 N.W.2d 312, 318 (Mich. Ct.

App. 1992). Direct or circumstantial evidence and reasonable inferences arising from that evidence may constitute satisfactory proof of the elements of an offense, People v. Jolly, 502 N.W.2d 177, 180 (Mich. 1993), including the identity of the perpetrator, Dell v. Straub, 194 F. Supp. 2d 629, 647 (E.D. Mich. 2002), and the defendant's intent or state of mind. People v. Dumas, 563 N.W.2d 31, 34 (Mich. 1997).

The Michigan Court of Appeals rejected Petitioner's invitation to find Land's testimony incredible because she gave a prior inconsistent statement to police and she smoked marijuana and drank alcohol the night of the shooting. Daniels, 2010 WL 571841 at *3. The state court held that assessing the credibility of witnesses was within the province of the jury, not the appellate court. Id. The court concluded that Land's testimony, by itself, was sufficient to establish Petitioner's identity. Id.

The Michigan Court of Appeals' conclusion is supported by the record. Petitioner challenges Land's credibility. But the Court does not have the benefit of observing Land's demeanor or voice inflections. The jury did have that benefit and obviously chose to credit Land's identification testimony. "A reviewing court does not reweigh the evidence or redetermine the credibility of the witnesses whose demeanor has been observed by the trial court." Matthews v. Abramajtyis, 319 F.3d 780, 788 (6th Cir. 2003); citing Marshall v. Lonberger, 459 U.S. 422, 434 (1983). Instead, faced with contradictory testimony, the Court "must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." McDaniel v. Brown, 558 U.S. 120, 133 (2010), quoting Jackson, 443 U.S. at 326. Land's testimony, if credited, supported the jury's finding that Petitioner was the shooter. Habeas relief is denied on this claim.

C. Prosecutorial Misconduct (Claim V)

Petitioner next argues that habeas relief should be granted because the prosecutor engaged in misconduct. The alleged misconduct centers on whether the victim received a gunshot wound to the head. Petitioner alleges that the prosecutor went to elaborate lengths to falsely prove that the victim received a gunshot wound to the head. According to Petitioner, the prosecutor withheld medical records which established that the victim was not shot in the head, knowingly presented false testimony about a gunshot wound to the victim's head, provided the defense with inaccurate police reports, allowed crime scene photographs to be altered and introduced knowingly altered photographs at trial, intimidated witness Janet Land to persuade her to testify that the victim was shot in the head.

*state we have
claim
meritless*

Respondent argues that this claim is procedurally defaulted and, alternatively, meritless. “[F]ederal 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). “Judicial economy might counsel giving the [other] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law.” Lambrix, 520 U.S. at 525. In this case, the Court finds that the interests of judicial economy are best served by addressing the merits of Petitioner’s claims.

To demonstrate a Brady violation, (1) “[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;” (2) “that evidence must have been suppressed by the State, either willfully or inadvertently;” and (3) “prejudice must have ensued.” Strickler v. Greene, 527 U.S. 263, 281-82 (1999), citing Brady v. Maryland, 373 U.S. 83 (1967). “There is no Brady violation where a defendant knew or should have known the
essential facts permitting him to take advantage of any exculpatory information, or where the

*Not in Facts or the
Records*

evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose.” Coe v. Bell, 161 F.3d 320, 344 (6th Cir. 1998) (internal quotation marks omitted). A defendant does not have to show that “disclosure of the evidence would have ultimately led to an acquittal;” he must, instead “establish that in the absence of the evidence he did not receive a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Gumm v. Mitchell, 775 F.3d 345, 363 (6th Cir. 2014), quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995).

Petitioner alleges that Williams’ gunshot wound to the head was staged and that the evidence was fabricated and witnesses convinced to lie. In support of this claim, he cites the Wayne County Medical Examiner’s report stating that the victim sustained “MGSWs [multiple gunshot wounds] to the body.” Medical Examiner’s Report, Ex. 1 to Petition, Pg. ID 1098 (Dkt. 22-1). He argues that the report would have specified that one of the wounds was to the head if that indeed had been true. He argues that medical documents which would have established Williams was not shot in the head have been withheld from him and that the many witnesses who testified to a head wound were coached, coerced or fooled into providing false testimony.

On collateral review in state court, the trial court found unpersuasive Petitioner’s argument that evidence that Williams suffered a gunshot wound to the head was fabricated. See 1/23/13 Order, Pg. ID 1401 (Dkt. 32-3). “Mere speculation and conjecture” are “simply not enough to demonstrate a Brady violation.” United States v. Guzman, 571 Fed. App’x 356, 365 (6th Cir. 2014). Accord Henness v. Bagley, 644 F.3d 308, 325 (6th Cir. 2011) (speculation about the potential that favorable evidence was withheld is, by itself, insufficient to establish a Brady violation). Here, Petitioner’s arguments are based upon speculation about a far-reaching

conspiracy to manufacture a head wound. Nothing more. He fails to show prosecutorial misconduct and habeas relief is denied.

D. Judicial Misconduct (Claim VI)

Petitioner next argues that he was denied a fair trial by the trial court's management of the proceedings and judicial rulings that, Petitioner's argues, evidenced judicial bias. Specifically, Petitioner maintains that the trial judge engaged in misconduct by openly arguing with defense counsel and by his handling of defense counsel's closing argument.

"[T]he Due Process Clause clearly requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy v. Gramley, 520 U.S. 899, 904-05 (internal quotation marks and citation omitted). An impartial judge is a necessary component of a fair trial. In re Murchison, 349 U.S. 133, 136 (1955). The Supreme Court established the standard for assessing claims of judicial bias in Liteky v. United States, 510 U.S. 540 (1994). "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Id. at 555. A judge's remarks that are "critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." Id. Even a judge's expressions of "impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display" do not, standing alone, establish a due process violation. Id. at 555-56.

The trial court's expressions of impatience with defense counsel were limited and a reasonable response to defense counsel's combative style. "A terse or frustrated exchange" does not constitute bias so long as it does not reveal an underlying bias. Ajanel-Gonzalez v. Sessions, 685 Fed. App'x 419, 428 (6th Cir. 2017). Here, the trial court's interactions with defense counsel

did not undermine defense counsel's credibility and did not demonstrate a deep-seated antagonism against Petitioner. Similarly, the trial court's actions during closing arguments did not evidence a high degree of favoritism or antagonism. The trial court advised defense counsel that he had twenty minutes remaining in closing argument, which would have provided him a total of approximately thirty minutes, about the same as the time used by the prosecutor for her closing argument. The record shows that the trial court judge did not, as Petitioner alleges, exit the courtroom during defense counsel's closing argument. Instead, when defense counsel refused to continue with his closing argument, the trial court dismissed the jury and then exited the courtroom. The trial court's failure to sit in silence in the courtroom in no way evidences any bias or antagonism. Habeas relief is denied.

E. Jury Instructions (Claim VII)

Petitioner raises several claims that jury instruction-related deficiencies violated his right to due process. He argues that the substance of the jury instructions were insufficient in four ways: the trial court gave an incorrect instruction on the intent element of first-degree murder; the trial court omitted an element of second-degree murder; the trial court referenced a potential manslaughter verdict, but failed to instruct the jury on the elements of manslaughter; and the trial court failed to give an Allen instruction. Second, Petitioner challenges the procedures associated with the jury instructions: the trial court failed to verify that the court reporter was present before responding to the jurors' note, resulting in ex parte communications with the prosecution and jury regarding the number of jurors to keep; trial court left the bench without noting defense counsel's objections; and the trial court did not provide defense counsel an opportunity to look at or approve the verdict form.

The Court first considers Petitioner's claims regarding the substance of the jury instructions. "It is a fundamental Constitutional law that no one may be convicted of a crime absent proof beyond a reasonable doubt of every fact necessary to constitute that crime." Glenn v. Dallman, 686 F.2d 418, 420 (6th Cir. 1982). To show that a jury instruction violates due process, a habeas petitioner must demonstrate both that the instruction was ambiguous and that there was 'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." Waddington v. Sarausad, 555 U.S. 179, 190-91 (2009) (citations omitted). A petitioner is entitled to habeas relief only if the defective jury instruction "so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973). A federal court may not grant the writ of habeas corpus on the ground that a jury instruction was incorrect under state law, Estelle v. McGuire, 502 U.S. 62, 71-72 (1991), and "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S. 145, 155 (1977). The jury instruction "must be considered in the context of the instructions as a whole and the trial record." Estelle, 502 U.S. at 72. A state court's finding that challenged jury instructions "adequately reflected the applicable state law and corresponding state charges" is binding on federal habeas review. White v. Steele, 629 F. App'x 690, 695 (6th Cir. 2015). "The exception is when the instruction is so flawed as a matter of state laws as to 'infect[] the entire trial' in such a way that the conviction violates federal due process." Rashad v. Lafler, 675 F.3d 564, 569 (6th Cir. 2012), quoting Kibbe, 431 U.S. at 154.

Petitioner argues that the trial court gave an incorrect instruction on the intent element of first-degree murder. Michigan's standard jury instruction for first-degree premeditated murder contains four elements: (1) that the defendant caused the death of the victim; (2) that the defendant

intended to kill the victim; (3) that the intent to kill was premeditated; and (4) that the killing was deliberate. See Mich. Crim. Jury Instructions 16.1(6) at 16-3-4 (2d ed.). The trial court instructed the jury that Petitioner must have intended to kill the victim, that the intent to kill was thought out beforehand, and that the killing was deliberate. 3/20/2008 Tr. at 56, Pg. ID 716 (Dkt. 8-7). Further the court instructed that first-degree premeditated murder is a specific intent crime, requiring a showing of only “one intent at the time of that act, and that is to commit the crime of murder, or to kill that person.” Id. Petitioner fails to identify specifically what portion of the trial court’s instruction fails to convey the intent element of first-degree premeditated murder. The instructions given comply with Michigan’s standard criminal jury instructions. Relief is denied on this claim.

Petitioner next argues that the trial court omitted an element of second-degree murder. In Michigan, the elements of the lesser-included offense of second-degree murder are: (1) a death; (2) caused by an act of the defendant; (3) with malice; and (4) without justification. People v. Mendoza, 664 N.W.2d 685, 689 (2003). Malice is defined as “an intent to commit an unjustified and inexcusable killing[,]” id. at 691 (citation omitted), or “the wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” People v. Werner, 659 N.W.2d 688, 692 (2002) (internal quotation marks and citation omitted). Although the trial court’s instruction on second-degree murder did not use the word “malice,” the instruction adequately conveyed the element of malice by requiring a finding that Petitioner had the intent to commit serious bodily harm or the intent to do an act that “created a very high risk of death or great bodily harm knowing that death or such harm would be the likely consequence of his action.” 3/20/2008 Tr. at 57, Pg. ID 717.

Petitioner next challenges the trial court’s reference to a potential manslaughter verdict, but failed to instruct the jury on the elements of manslaughter. The record does not support this

claim because the trial court instructed the jury on the elements of manslaughter. This claim is denied.

Petitioner next argues that the trial court erred in failing to give an Allen charge when the jury reported after three hours of deliberations that they were at an impasse. “[A] trial court may properly encourage a deadlocked jury to continue its deliberations and attempt to reach a verdict.” United States v. Aloï, 9 F.3d 438, 443 (6th Cir. 1993), citing Allen v. United States, 164 U.S. 492, 501-02 (1896). “A charge that strays too far from the charge approved in Allen will rise to the level of a constitutional violation only if ‘in its context and under all the circumstances, [the charge] ... was coercive.’” Id. quoting Williams v. Parke, 741 F.2d 847, 850 (6th Cir.1984) (additional internal quotation omitted). In this case, the trial court’s instruction to the jurors to continue deliberation was not coercive. The trial court reminded the jurors to approach deliberations with an open mind, but cautioned them not to change their minds simply for the purpose of reaching a verdict. 3/20/2008 Tr. at 76-77, Pg. ID 736-37. The Court finds no error in the trial court’s instruction.

The Court now turns to Petitioner’s challenges to the procedures associated with the jury instructions. First, Petitioner argues that the trial court failed to verify that the court reporter was present before responding to the jurors’ note and that this error constituted an improper ex parte communication. An ex parte communication is a “communication between counsel and the court when opposing counsel is not present.” Black’s Law Dictionary (10th ed. 2014). The situation presented here did not involve an ex parte communication as it is apparent from Petitioner’s claim and the record that neither defense counsel nor the prosecutor were absent during the court’s communication with the jury. See 3/20/08 Tr. at 79, Pg. ID 739.

Related to his ex parte communication claim, Petitioner argues that the trial court judge left the bench without noting defense counsel's objections. The trial court dismissed defense counsel's objection, noting that an ex parte communication did not occur because both attorneys were present. The judge then left the courtroom. Defense counsel continued to state his objections on the record. While the trial judge should have remained in the courtroom for the objections, the court already had found no ex parte communication. Counsel also lodged an objection to the trial court's failure to give an Allen charge. As discussed above, Petitioner has failed to show that the court's failure to give a specific Allen charge implicated his right to due process or a fair trial. Relief is denied on this claim.

Finally, Petitioner argues that the trial court improperly failed to provide defense counsel an opportunity to review or approve the verdict form. Petitioner does not allege that the verdict form was inaccurate or incorrect. He therefore has not shown that his due process rights were implicated by counsel's failure to review the verdict form.

F. Ineffective Assistance of Appellate Counsel (Claim VIII)

Petitioner raises a claim that his appellate attorney was ineffective in failing to raise claims raised in this habeas petition but not raised on direct appeal. The Supreme Court has held that a petitioner does not have a constitutional right to have appellate counsel raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 754 (1983). Strategic and tactical choices regarding which issues to pursue on appeal are "properly left to the sound professional judgment of counsel." United States v. Perry, 908 F.2d 56, 59 (6th Cir. 1990).

The claims raised in this petition and on collateral review in state court are meritless. Appellate counsel need not raise non-meritorious claims on appeal. Shaneberger v. Jones, 615

F.3d 448, 452 (6th Cir. 2010), citing Greer v. Mitchell, 264 F.3d 663, 676 (6th Cir. 2001).

Accordingly, the Court will deny habeas corpus relief on this claim.

G. Cumulative Effect of Alleged Errors (Claim IX)

Petitioner argues that the cumulative effect of the errors alleged in his petition violated his right to a fair trial. On habeas review, a claim that the cumulative effect of errors rendered a petitioner's trial fundamentally unfair is not cognizable. Sheppard v. Bagley, 657 F.3d 338, 348 (6th Cir. 2011), citing Moore v. Parker, 425 F.3d 250, 256 (6th Cir. 2005). Therefore, Petitioner is not entitled to relief on this claim.

H. State Court's Application of State Court Rule (Claim X)

Finally, Petitioner argues that the state court erred in finding that he did not satisfy the "cause and prejudice" requirement under Michigan Court Rule 6.508(D)(3) and his procedural default, therefore, should have been excused by the state court. Respondent asserts that this claim is not cognizable on federal habeas review.

"The Sixth Circuit consistently [has] held that errors in post-conviction proceedings are outside the scope of federal habeas corpus review." Cress v. Palmer, 484 F.3d 844, 853 (6th Cir. 2007). See Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) (holding that states have no constitutional obligation to provide post-conviction remedies); Greer v. Mitchell, 264 F.3d 663, 681 (6th Cir. 2001) ("[H]abeas corpus cannot be used to mount challenges to a state's scheme of post-conviction relief."); Kirby v. Dutton, 794 F.2d 245, 246 (6th Cir. 1986) (holding that habeas corpus is not the proper means by which prisoners should challenge errors or deficiencies in state post-conviction proceedings). Even if the state court improperly refused to review the merits of Petitioner's claims because it erred in applying the state's own post-conviction review procedures,

Petitioner's federal constitutional rights were not implicated because he had no constitutional right to post-conviction review.

IV. CERTIFICATE OF APPEALABILITY

Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253. Rule 11 of the Rules Governing Section 2254 Proceedings now requires that the Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." 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). The substantial showing threshold is satisfied when a petitioner demonstrates "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

In this case, the Court concludes that reasonable jurists would not debate the Court's conclusion that none of the claims in the habeas petition warrant relief. Therefore, the Court denies a certificate of appealability.

V. LEAVE TO PROCEED IN FORMA PAUPERIS

The standard for granting an application for leave to proceed in forma pauperis (IFP) is a lower standard than the standard for certificates of appealability. Foster v. Ludwick, 208 F.Supp.2d 750, 764 (E.D. Mich. 2002), citing United States v. Youngblood, 116 F.3d 1113, 1115 (5th Cir. 1997). While a certificate of appealability may only be granted if a petitioner makes a substantial showing of the denial of a constitutional right, a court may grant IFP status if it finds that an appeal is being taken in good faith. Id. at 764-765; 28 U.S.C. § 1915(a)(3); Fed. R. App. 24(a). "Good faith" requires a showing that the issues raised are not frivolous; it does not require a showing of probable success on the merits. Foster, 208 F.Supp.2d at 765. The Court finds that

an appeal could be taken in good faith and Petitioner may proceed in forma pauperis on appeal.

Id.

VI. CONCLUSION

For the reasons set forth above, the Court denies the petition for writ of habeas corpus, declines to issue a certificate of appealability, and grants leave to appeal in forma pauperis.

SO ORDERED.

Dated: March 13, 2018
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on March 13, 2018.

s/Karri Sandusky
Case Manager

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