

No. 17-1806

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**

Jan 09, 2018

DEBORAH S. HUNT, Clerk

SEAN LEE STRANDBERG,

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Petitioner-Appellant,

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v.

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O R D E R

CARMEN DENISE PALMER, Warden,

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Respondent-Appellee.

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Sean Lee Strandberg, a Michigan prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Strandberg requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). He also requests leave to proceed in forma pauperis.

A jury found Strandberg guilty of one count of first-degree criminal sexual conduct and three counts of second-degree criminal sexual conduct. He was sentenced to serve twelve to thirty years of imprisonment for the first-degree criminal sexual conduct conviction and four to fifteen years of imprisonment for each second-degree criminal sexual conduct conviction, to run concurrently. The Michigan Court of Appeals affirmed Strandberg's convictions. *People v. Strandberg*, No. 305381, 2012 WL 4465162 (Mich. Ct. App. Sept. 27, 2012). The Michigan Supreme Court denied leave to appeal.

After unsuccessfully pursuing state post-conviction relief, Strandberg filed this habeas corpus petition, raising the following grounds for relief: (1) "the trial court[']s curative instruction [did not] cure[] any harm from the polygraph evidence" admitted at trial; (2) "the prosecutor's improper comments that misstated evidence, misquoted witness's testimony, and vouched for the complainant's credibility" during closing argument violated his constitutional

rights; and (3) he was denied effective assistance of trial counsel because counsel did not “object to the prosecutor’s improper comments during” closing argument. On the recommendation of a magistrate judge and over Strandberg’s objections, the district court denied Strandberg’s habeas corpus petition and denied a certificate of appealability.

A certificate of appealability may issue only if a petitioner makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “A petitioner satisfies this standard by demonstrating 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). A certificate of appealability analysis is not the same as “a merits analysis.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, “[a] ‘court of appeals should limit its examination [at the [certificate of appealability] stage] to a threshold inquiry into the underlying merit of [the] claims,’ and ask ‘only if the District Court’s decision was debatable.’” *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 327, 348).

In his first ground for relief, Strandberg argued that the trial court did not provide the jury with a proper curative instruction following a witness’s polygraph testimony. During cross-examination, prosecution witness Erin Matuz testified that Strandberg “was interviewed” and “was offered a polygraph as well” in response to defense counsel’s inquiry as to whether an investigation and interview were conducted. After the jury had been excused, Strandberg moved for a mistrial, but the trial court denied his motion, finding that Matuz’s improper polygraph testimony was responsive to defense counsel’s question and unintentional. The trial court provided a curative instruction, advising the jury that they were “to disregard” Matuz’s polygraph testimony and could “not consider it for any purpose in the case.” The trial court informed the jury that polygraph evidence was “completely irrelevant to anything [they] have to decide” and that even if Strandberg took a polygraph examination, the results are “insufficiently reliable,” they “wouldn’t ever hear the results anyway” because they “assess witness credibility

and the weight to be given to everybody's testimony," and Strandberg "has no obligation to take one, even if it was offered."

Strandberg argued that the curative instruction "did not cure the prejudicial error, instead it only served to highlight it in the minds of the jury." He argued that his case presented a credibility contest between himself and the victim and that Matuz's polygraph testimony "was critical in assessing [his] credibility." He argued that the polygraph testimony allowed the jury to infer that he either submitted to a polygraph examination and failed it or refused to submit to a polygraph examination because he feared he would fail it.

The Michigan Court of Appeals found no error in the trial court's denial of Strandberg's motion for a mistrial following Matuz's "reference to the fact that [Strandberg] was offered a polygraph." *Strandberg*, 2012 WL 4465162, at \*1. The appellate court pointed out that: the polygraph reference "was an inadvertent misstep by one witness, unrelated to any efforts by the prosecution to place the information before the jury"; the trial court's finding that Matuz's polygraph reference was "responsive to the question posed by defense counsel" was not clearly erroneous; "there was only one, brief reference to the polygraph examination"; Matuz "did not mention the polygraph to enhance her credibility but to confirm that [Strandberg] had been investigated and provided an opportunity to speak on the allegations" and "no argument [was] made to suggest that the polygraph had any bearing on credibility or truthfulness"; and "the results of a polygraph examination were not introduced into evidence." *Id.* at \*1-2. The appellate court also noted that Matuz's comment did not disclose whether Strandberg "submitted to a polygraph test"; that the trial court's curative instructions were thorough; and that the court presumes that jurors follow the instructions they receive. *Id.* at \*2.

This claim is not cognizable in a federal habeas corpus proceeding. Federal habeas corpus relief is unavailable for Strandberg's polygraph claim because it is based on alleged violations and errors of state law regarding the admission of evidence. *See Wilson v. Corcoran*, 562 U.S. 1, 5 (2010); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Strandberg failed to show that any error on the part of the state trial court was "sufficiently egregious to amount to a denial

of" a constitutional right. *See Pulley v. Harris*, 465 U.S. 37, 41 (1984). "The Supreme Court has never held that statements implying the results of a polygraph or similar test render the defendant's trial fundamentally unfair, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments." *Maldonado v. Wilson*, 416 F.3d 470, 477 (6th Cir. 2005). In adopting the magistrate judge's recommendation, the district court emphasized that the "state courts resolved this issue as a state law evidentiary question." Reasonable jurists would not debate the district court's rejection of Strandberg's first ground for relief. *See Miller-El*, 537 U.S. at 327.

In his second ground for relief, Strandberg argued that the prosecutor committed misconduct during closing argument. He argued that "the prosecutor misstated admitted evidence, misquoted a witness's testimony and vouched for the complainant's credibility" during closing argument. He also argued that the prosecutor told the jury that he "'confessed' and made other statements" not supported by the record.

Strandberg has abandoned his argument that the prosecutor improperly vouched for the victim's credibility because he does not request a certificate of appealability for that claim. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002). Strandberg also waived appellate review of this argument because he did not object to the magistrate judge's recommended disposition of it despite being advised to do so in order to properly preserve any objections for appeal. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985). Although a waiver may be excused "in the interests of justice," *id.* at 155, no basis for excusing the waiver is evident in this case. *See Javaherpour v. United States*, 315 F. App'x 505, 510 (6th Cir. 2009).

The Michigan Court of Appeals considered and rejected Strandberg's prosecutorial-misconduct claim based on the contention "that the prosecution argued facts not in evidence." *Strandberg*, 2012 WL 4465162, at \*5. After reviewing the record, that court concluded that "the majority of the statements referenced by [Strandberg] were correct statements of the evidence or reasonable inferences arising from the evidence." *Id.* The Michigan Court of Appeals also noted that, even if the prosecutor "misstated a fact," Strandberg failed to demonstrate any prejudice

inasmuch as “the jury was instructed to rely on the evidence and specifically informed that . . . ‘the lawyers statements and arguments are [not] evidence.’” *Id.*

A prosecutor’s comments at trial will not rise to the level of prosecutorial misconduct unless 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)). It is permissible for a prosecutor “to argue ‘reasonable inferences from the evidence’” presented at trial, *Webb v. Mitchell*, 586 F.3d 383, 396-97 (6th Cir. 2009) (quoting *Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000)), and “to respond to the defense’s strategies, evidence and arguments” during closing argument. *Bedford v. Collins*, 567 F.3d 225, 233 (6th Cir. 2009).

The district court determined that the opinion of the Michigan Court of Appeals was neither contrary to, nor an unreasonable application of, Supreme Court precedent. *See* 28 U.S.C. § 2254(d). The district court pointed out that, during closing argument, the prosecutor “did not refer to [Strandberg’s] recorded interview as a confession”; requested “the jury to draw fair inferences from the testimony”; and, after defense counsel presented a common-sense argument concerning the victim’s testimony, “responded to defense counsel’s theory” and “did not mischaracterize the victim’s testimony” in doing so. Reasonable jurists could not disagree with the district court’s rejection of Strandberg’s second ground for relief. *See Miller-El*, 537 U.S. at 327.

In his third ground for relief, Strandberg argued that he was denied effective assistance of trial counsel because counsel did not “object to the prosecutor’s improper comments” during closing argument, as asserted in his second ground for relief. He argued that if counsel had objected to the prosecutor’s comments, “the jury would have returned a different verdict in this case.”

The Michigan Court of Appeals concluded that trial counsel was not ineffective “for failing to object to statements made by the prosecution during closing arguments.” *Strandberg*,

2012 WL 4465162, at \*7. The state appellate court found that the challenged comments were “permissible arguments or reasonable inferences arising from the evidence.” *Id.*

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to “show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. The prejudice inquiry requires the defendant to “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “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) (citations omitted).

Because Strandberg’s prosecutorial-misconduct claims lacked merit, the district court concluded that he could not establish an ineffective-assistance-of-trial-counsel claim based on his prosecutorial-misconduct claims. Counsel is not ineffective for failing to raise a meritless objection. *See Sutton v. Bell*, 645 F.3d 752, 755 (6th Cir. 2011). Reasonable jurists would not debate the district court’s rejection of Strandberg’s third ground for relief. *See Miller-El*, 537 U.S. at 327.

Accordingly, the application for a certificate of appealability is **DENIED**, and the motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

  
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Deborah S. Hunt, Clerk

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

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SEAN LEE STRANDBERG,

Petitioner, Case No. 1:16-cv-211

v.

Honorable Paul L. Maloney

CARMEN PALMER,

Respondent.

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**REPORT AND RECOMMENDATION**

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254. Petitioner Sean Lee Strandberg is presently incarcerated at the West Shoreline Correctional Facility in Muskegon Heights, Michigan. On June 10, 2011, a Muskegon County Circuit Court jury, after a three day trial, convicted Petitioner of first-degree criminal sexual conduct (CSC-I), MICH. COMP. LAWS § 750.521b(1)(b), and three counts of second-degree criminal sexual conduct (CSC-II), based on Petitioner's molestation of his fourteen-year-old daughter. On July 6, 2011, the court sentenced Petitioner to 12 to 30 years for the CSC-I conviction, concurrent to 4 to 15 years for each CSC-II convictions.

Petitioner appealed his convictions to the Michigan Court of Appeals. The court of appeals affirmed the trial court by unpublished opinion dated September 27, 2012. *People v. Strandberg*, No. 305381, 2012 WL 4465162 (Mich. Ct. App. Sep. 6, 2012). Petitioner applied for leave to appeal to the Michigan Supreme Court. On May 29, 2013, that court denied leave. *People*

*v. Strandberg*, 830 N.W.2d 771 (Mich. 2013). Petitioner did not apply to the United States Supreme Court for a writ of certiorari.

Petitioner then returned to the Muskegon County Circuit Court, where he filed a motion for relief from judgment under MICH. CT. R. 6.500 *et seq.* claiming that Petitioner's appellate counsel was ineffective for not raising an issue as requested by Petitioner. The trial court denied the motion initially (Op. and Ord., ECF No. 12-12), and upon reconsideration (Op. and Ord., ECF No. 12-14). The Michigan Court of Appeals and Michigan Supreme Court denied Petitioner's applications for leave to appeal on December 9, 2014, (Ord., ECF No. 12-15, PageID.1242) and December 22, 2015, (Ord., ECF No. 12-16, PageID.1313), respectively.

Petitioner filed his habeas petition (ECF No. 1), on February 15, 2016, raising the following issues:

- I. The Michigan Court of Appeals holdings on the curative instruction violates Petitioner's Sixth and Fourteenth Amendment rights.
- II. Prosecutor's improper comments denied Petitioner his Sixth and Fourteenth Amendment rights.
- III. Counsel was ineffective for failing to object to prejudicial comments by the prosecutor.

(Pet., ECF No. 1, PageID.6-9.) On August 16, 2016, Respondent filed an answer to the petition, (ECF No. 11.), along with the state-court record, pursuant to Rule 5, Rules Governing § 2254 Cases,

(ECF No. 12).<sup>1</sup> Petitioner filed his reply on September 28, 2016. (ECF No. 16.) Petitioner has also filed a motion to stay proceedings and hold his petition in abeyance. (ECF No. 14.)

Upon review and applying the standards required by the Antiterrorism and Effective Death Penalty Act of 1996, PUB. L. 104-132, 110 STAT. 1214 (AEDPA), I find that Petitioner's claims are without merit. Accordingly, I recommend that the petition and the motion to stay proceedings be denied.

#### **Factual background**

Petitioner's fourteen-year-old daughter testified that, during the summer of 2010, Petitioner squeezed her breasts on several occasions (Trial Tr. I, ECF No. 12-4, PageID.502-505), inserted his penis between her labia majora while they were in a swimming pool (*Id.*, PageID.505-513), inserted his penis between her butt cheeks while they were in a swimming pool (*Id.*, PageID.513-517), and groped her vaginal area while they were riding a "quad" (*Id.*, PageID.517-518).

On the last day of testimony, Child Protective Services Specialist Erin Matuz testified regarding her investigation of the allegations against Petitioner. (Trial Tr. III, ECF No. 12-6, PageID.720-750.) The investigation included the initial interview of Petitioner's daughter. (*Id.*) defense counsel's cross-examination of Ms. Matuz included the following exchange:

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<sup>1</sup>The Rule 5 materials include several transcripts of the trial court proceedings. The transcripts shall be referenced as follows:

Preliminary Examination Transcript	(Prelim. Examination Tr., ECF No. 12-2, PageID.____)
June 6, 2011 Motion Hearing Transcript	(Mot. Hr'g Tr., ECF No. 12-3, PageID.____)
June 7, 2011 Trial Transcript (Volume 1)	(Trial Tr. I, ECF No. 12-4, PageID.____)
June 8, 2011 Trial Transcript (Volume 2)	(Trial Tr. II, ECF No. 12-5, PageID.____)
June 9, 2011 Trial Transcript (Volume 3)	(Trial Tr. III, ECF No. 12-6, PageID.____)
June 10, 2011 Trial Transcript (Volume 4)	(Trial Tr. IV, ECF No. 12-7, PageID.____)
July 6, 2011 Sentencing Transcript	(Sentencing Tr., ECF No. 12-8, PageID.____).

Petitioner's counsel: Is it because you don't like Mr. Strandberg?

Ms. Matuz: I've never met him prior to this.

Petitioner's counsel: Another interesting point. You didn't do an investigation and talk to the person who is being accused of child abuse and neglect?

Ms. Matuz: As stated previously, the investigation was coordinated with the Muskegon County Sheriff's Department and as part of the investigation, he absolutely was interviewed. He was offered a polygraph as well.

Petitioner's counsel: Well, Judge-

The Court: Next question.

(Trial Tr. III, ECF No. 12-6, PageID.733-734.) When Ms. Matuz's testimony was complete, the jury was excused and the trial court immediately addressed the reference to the polygraph. (*Id.*, PageID.750.) Petitioner's counsel requested a mistrial. (*Id.*, PageID.750-751.) The trial court concluded the reference was not a willful violation of Michigan's evidentiary prohibition against the introduction of polygraph evidence. (*Id.*, PageID.750-758.) Accordingly, the trial court denied the mistrial request and, instead, decided to read a curative instruction. (*Id.*, PageID.758-764.) The court and Petitioner's counsel crafted this curative instruction:

Now the other thing I have to talk to you about is a part of Ms. Matuz's testimony though. I need to talk about her testimony when she mentioned the word polygraph. Frankly that was a mistake by her. For that reason, I'm ordering you to disregard it. And to not consider if for any purpose in the case. It's all really completely irrelevant to anything you have to decide. And I told you before, I try not to keep secrets from you and so here are my reasons for saying it. Number one, is that even if Mr. Strandberg took one, we don't allow them into evidence in court cases. I mean, people can use them on TV and things like that. But under Michigan Law, they don't, they're insufficiently reliable. So even if one was taken, you wouldn't ever hear the results anyway. You are the persons who assess witness credibility and the weight to be given to everybody's testimony. The second reason is this. You might have surmised that there may be some other proceedings affecting the family in some

other court. And I don't have a clue about any of this negotiations about polygraph stuff or anything like that. Mr. Strandberg has no obligation to take one, even if it was offered. And if I let the attorneys get into who's going to take one or who wasn't or who was going to be there or where they were going to do it. And then we'd just spend two more days working on that. So that really gets us off on a sideshow that really is irrelevant to anything we have to do. So I thought I need to talk to you about that. So do you have any questions about that? Alright. Just take one of those things like that Men in Black movie and just flashy thing and just take it out of your memory and I'm confident you can do that.

(*Id.*, PageID.768-769.)

### Discussion

This action is governed by the AEDPA. *See Penry v. Johnson*, 532 U.S. 782, 792 (2001). The AEDPA "prevents federal habeas 'retrials'" and ensures that state court convictions are given effect to the extent possible under the law. *Bell v. Cone*, 535 U.S. 685, 693-94 (2002). The AEDPA has "drastically changed" the nature of habeas review. *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). This standard is "intentionally difficult to meet." *Woods v. Donald*, 575 U.S. \_\_\_, 135 S. Ct. 1372, 1376 (2015) (internal quotation marks omitted).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This Court may consider only the "clearly established" holdings, and not the dicta, of the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Bailey*, 271 F.3d

at 655. In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Lopez v. Smith*, 135 S. Ct. 1, 3 (2014); *Bailey*, 271 F.3d at 655. Moreover, “clearly established Federal law” does not include decisions of the Supreme Court announced after the last adjudication of the merits in state court. *Greene v. Fisher*, 132 S. Ct. 38 (2011). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time of the state-court adjudication on the merits. *Miller v. Stovall*, 742 F.3d 642, 644 (6th Cir. 2014) (citing *Greene*, 132 S. Ct. at 44).

A federal habeas court may issue the writ under the “contrary to” clause if the state court applies a rule different from the governing law set forth in the Supreme Court’s cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Bell*, 535 U.S. at 694 (citing *Williams*, 529 U.S. at 405-06). “To satisfy this high bar, a habeas petitioner is required to ‘show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.’” *Woods*, 2015 WL 1400852, at \*3 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). In other words, “[w]here the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner’s claims.” *White v. Woodall*, 572 U.S. \_\_\_, 134 S. Ct. 1697, 1705 (2014) (quotations marks omitted).

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue made by a state court is presumed to be correct, and the petitioner has the burden of rebutting the presumption by clear and

convincing evidence. 28 U.S.C. § 2254(e)(1); *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003); *Bailey*, 271 F.3d at 656. This presumption of correctness is accorded to findings of state appellate courts, as well as the trial court. See *Sumner v. Mata*, 449 U.S. 539, 546 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989).

I. Motion to stay

Petitioner has filed a motion to stay these proceedings and hold them in abeyance so that he might return to the state courts to exhaust new claims based on newly discovered evidence. The relief requested by Petitioner was authorized by the Supreme Court in *Rhines v. Weber*, 544 U.S. 269 (2005), but “only in limited circumstances.” *Id.*, at 277.<sup>2</sup> Under *Rhines*, a district court may, in its discretion, stay the mixed petition pending prompt exhaustion of state remedies if there is “good cause” for the petitioner’s failure to exhaust, if the petitioner’s unexhausted claims are not “plainly meritless” and if there is no indication that the petitioner engaged in “intentionally dilatory litigation tactics.” *Rhines*. at 278.

Petitioner proposes a return to the state courts based on “newly discovered evidence” that will demonstrate:

1. The complainant’s claim that she went to bed early to avoid the defendant during the relevant time frame is false. Petitioner has evidence that shows the complainant was up way after Petitioner went to bed.
2. The complainant’s claim that Petitioner would make the family leave the Christmas Eve party at her great grandmother’s house early, at about 6:30 to

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<sup>2</sup>It is worthy of note that Petitioner’s situation is not the situation for which the *Rhines* Court created the stay and abeyance remedy. The *Rhines* Court created the remedy for petitioners who filed petitions containing exhausted and unexhausted claims, known as mixed petitions. Petitioner’s petition includes only exhausted claims. The claims he now wishes to raise in the state court are new claims that are not presently part of his petition. Another district court in this circuit has concluded that *Rhines* should be applied even where the unexhausted claims are not presently part of the petition. See *Phillips v. Warden, Nobles Corr. Inst.*, No. 2:16-cv-00763, 2017 WL 1419985 (S.D. Ohio Apr. 21, 2017). This Court will proceed accordingly.

7:00 p.m. is false. Petitioner has evidence that they never left until after 9:00 p.m.

3. The statement in complainant's written message to Petitioner's niece that complainant was afraid of men since she was nine-months old is false. Petitioner has evidence that the complainant is currently not afraid of men.

(Pet.'s Br., ECF No. 14, PageID.1406.) Petitioner indicates the first two "false" statements were made in letters to the trial court judge from the complainant and her mother, written in connection with Petitioner's sentencing. (ECF No. 14-1, PageID.1424-1425.) The third "false" statement was purportedly made in an exchange between the complainant and her cousin regarding the "false" statements the complainant's mother wrote in her letter to the judge. (ECF No. 14-1, PageID.1419-1421.) Petitioner "proves" the falsity of the statements by attaching his own handwritten statement, as well as handwritten statements from his relatives, that simply contend the earlier statements are false. (ECF No. 14-1, PageID.1413-1418, 1422-1423, 1426-1427.)

There is nothing in the handwritten statements of Petitioner or his family that constitutes proof of anything relevant to the jury's conviction of Petitioner on the CSC charges. Neither the letters, nor the allegedly false statements in them, nor the subject matter of those statements, were any part of the trial. They were not introduced as exhibits at Petitioner's trial; indeed, they could not have been introduced because they did not even exist yet. Nor is any of the evidence "new." The statements relate to facts that preceded the trial and sentencing. Petitioner's family members testified at trial. If the matters bore any relevance whatsoever to the determination of Petitioner's guilt, Petitioner could have simply solicited the information contained in the handwritten statements at that time.

The only conceivable benefit Petitioner's "newly discovered evidence" might afford him, would be if it demonstrated Petitioner were actually innocent. Even then, under the circumstances here, Petitioner could only use that showing to overcome a procedural bar to some other habeas claim. In *Herrera v. Collins*, 506 U.S. 390, 400 (1993), the Supreme Court stated: "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." But the *Herrera* Court did not close the door completely, stating in dicta: "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Id.* at 417. Thus, even without the occurrence of any independent constitutional violation during the state criminal proceeding, federal habeas relief might be warranted for "truly persuasive demonstration of actual innocence," provided: (1) the habeas petition seeks relief in a capital case, in which case such a demonstration of actual innocence "would render the execution of a defendant unconstitutional"; and (2) there is "no state avenue open to process such a claim." *Id.* The Supreme Court emphasized that "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Id.*; *see also House v. Bell*, 547 U.S. 518, 555 (2006) ("In *Herrera*, however, the Court described the threshold for any hypothetical freestanding innocence claim as 'extraordinarily high.'"); *Cress v. Palmer*, 484 F.3d 844, 854-55 (6th Cir. 2007).

Two years after *Herrera*, the Supreme Court held that a claim of actual innocence can be raised "to avoid a procedural bar to the consideration of the merits of [the petitioner's] constitutional claims." *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). "[I]n an extraordinary case,

where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.” *Murray v. Carrier*, 477 U.S. 478, 496 (1986). In *Schlup*, the Supreme Court held that a credible showing of actual innocence was sufficient to enable a court to reach the merits of an otherwise procedurally barred habeas petition. *Schlup*, 513 U.S. at 317. The actual innocence claim in *Schlup* is “not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.” *Id.* at 315 (citing *Herrera*, 506 U.S. at 404). Thus, the Supreme Court distinguished between a procedural innocence claim, which can permit a petitioner to overcome procedural obstacles that would otherwise preclude review of underlying constitutional claims, and a substantive or “free-standing” claim of innocence discussed in *Herrera*.

This Court may grant habeas corpus relief only when the state court has violated or unreasonably applied a clearly established holding of the Supreme Court. *See* 28 U.S.C. § 2254(d); *Williams*, 529 U.S. at 412. The Sixth Circuit repeatedly has held that free-standing claims of actual innocence are not cognizable on habeas corpus review. *See Cress*, 484 F.3d at 854 (citing cases). Because the Supreme Court has never recognized a free-standing claim of actual innocence, Petitioner is not entitled to habeas relief on that ground. Moreover, even if Petitioner could invoke this exception and obtain habeas relief on his freestanding innocence claim, he would have to meet both of the requirements set forth above and then overcome the “extraordinarily high” threshold. Petitioner fails the first requirement. This is not a capital case, and thus, the concern about the unconstitutionality of executing a defendant who has shown persuasive evidence of actual innocence is not implicated. *See Herrera*, 506 U.S. at 417 (“We first point out the obvious - that this is not,

in fact, a capital case.”). Petitioner, therefore, cannot obtain habeas corpus relief on his freestanding claim of actual innocence.

Because the new claim Petitioner seeks to exhaust would not entitle him to habeas relief, he is not entitled to a stay during the pendency of his efforts to exhaust the claim in state court. *Rhines*, 544 U.S. at 277 (holding that granting stay and abeyance requires the presentation of a non-frivolous claim).

## II. The curative instruction for the “polygraph” reference

Turning to the Petitioner’s habeas claims that are properly before the Court, Petitioner contends first that Ms. Matuz’s reference to the polygraph rendered his trial fundamentally unfair. The Michigan Court of Appeals carefully reviewed Petitioner’s claim that he was prejudiced by the witness’ reference:

It is plain error to reference a polygraph test or a defendant’s refusal to take a polygraph. *People v. McGhee*, 709 N.W.2d 595, 616 (Mich. Ct. App. 2005); *People v. Kahley*, 744 N.W.2d 194, 196 n.1 (Mich. Ct. App. 2007). However, although reference to a polygraph examination is always error, it is not necessarily error that requires a mistrial. *People v. Ortiz-Kehoe*, 603 N.W.2d 802, 806 (Mich. Ct. App. 1999). “A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.” *Id.* at 806. In deciding whether a mistrial is an appropriate remedy for the mention of a polygraph, we may consider:

- (1) [W]hether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster the witness’s credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted.

*Id.*, citing *People v. Yatooma*, 271 N.W.2d 184, 186-187 (Mich. Ct. App. 1978). Here, because defendant objected and received a cautionary instruction, the first factor weighs in defendant’s favor. *Id.* However, the second factor favors the prosecution because the witness’s reference to the polygraph examination was an

inadvertent misstep by one witness, unrelated to any efforts by the prosecution to place the information before the jury.

\* \* \*

Having viewed the [witness's] testimony in its entirety, the trial court determined the answer was responsive to the question posed by defense counsel. A trial court's finding of fact may not be set aside unless "clearly erroneous." MICH. CT. R. 2.613(C). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v. Antwine*, 809 N.W.2d 439, 440 (Mich. Ct. App. 2011). Given that the witness explained early in her testimony that her investigation was coordinated with law enforcement, defense counsel's questions about the investigation and defendant's opportunity to "talk" could reasonably be taken as inviting commentary on the investigation generally. As such, we cannot conclude that the trial court's finding that her answer was responsive was clearly erroneous. Mich. Ct. R. 2.613(C).

\* \* \*

The third factor also weighs in favor of the prosecution because there was only one, brief reference to the polygraph examination. The fourth factor favors the prosecution because the witness did not mention the polygraph to enhance her credibility but to confirm that defendant had been investigated and provided an opportunity to speak on the allegations. There was no argument made to suggest that the polygraph had any bearing on credibility or truthfulness. Finally, the fifth factor also weighs in favor of the prosecution because the results of a polygraph examination were not introduced into evidence. Indeed, from the witness' statement, it is not even apparent if defendant submitted to a polygraph test. On the whole, it cannot be said the trial court erred in denying defendant's motion for a mistrial. This conclusion is supported by the trial court's thorough curative instructions which informed the jury that polygraphs were unreliable and inadmissible. The jurors were also told they could not consider the polygraph for "any purpose." "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v. Abraham*, 662 N.W.2d 836, 845 (Mich. Ct. App. 2003). Here, any potential harm to defendant was cured by the court's thorough instructions. *Ortiz-Kehoe*, 603 N.W.2d at 807.

*Strandberg*, 2012 WL 4465612 at \*1-2 (parallel citations omitted).

The Michigan Court of Appeals looked solely to state law to resolve the claim as Petitioner raised it on his direct appeal. The state court's conclusions that: (1) admission of the

reference was error as a matter of state law and (2) the error did not warrant a mistrial as a matter of state law; are binding upon this Court. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983). The Sixth Circuit repeatedly has recognized “that a state court’s interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.” *Stumpf v. Robinson*, 722 F.3d 739, 746 n.6 (6th Cir. 2013) (quoting *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005)).

Because it is not the province of a federal habeas court to re-examine state-law determinations on state-law questions, *Bradshaw*, 546 U.S. at 76; *Estelle*, 502 U.S. at 68, this Court may only grant relief if Petitioner is able to show that the state court’s evidentiary ruling was in conflict with a decision reached by the Supreme Court on a question of law or if the state court decided the evidentiary issue differently than the Supreme Court did on a set of materially indistinguishable facts. *Sanders v. Freeman*, 221 F.3d 846, 860 (6th Cir. 2000). Petitioner has not met this difficult standard. As the Sixth Circuit Court of Appeals explained in *Maldonado v. Wilson*, 416 F.3d 470 (6th Cir. 2005):

The Supreme Court has never held that statements implying the results of a polygraph or similar test render the defendant’s trial fundamentally unfair, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments. Further, we are aware of no federal court of appeals that has found a due process violation warranting a grant of habeas relief under these facts. Indeed, three circuits have rejected habeas petitioners’ claims that testimony about truth testing violated the petitioners’ due process rights. Notably, two reached this conclusion under pre-AEDPA de novo review. *Weston v. Dormire*, 272 F.3d 1109, 1113 (8th Cir. 2001) (AEDPA deference); *Cacoperdo v. Demosthenes*, 37 F.3d 504, 510 (9th Cir. 1994) (de novo review); *Escobar v. O’Leary*, 943 F.2d 711, 720 (7th Cir. 1991) (de novo review). While these cases are distinguishable from the present one in important respects, they do not imply that testimony regarding truth testing violates due process. Finding a due process violation here would necessarily imply that the Constitution requires all states to have rules of evidence precluding some testimony

about truth tests. No Supreme Court precedent demands this result, and the state court's decision therefore was not unreasonable under 28 U.S.C. § 2254(d).

*Maldonado*, 416 F.3d at 477-478 (footnote omitted). Although a decade has passed since the *Maldonado* decision, it remains the case that the Supreme Court has never held that reference to a polygraph test renders a trial fundamentally unfair. Put simply, Petitioner has failed to demonstrate that the state court's decision is contrary to or an unreasonable application of clearly established federal law. He has similarly failed to show that the factual determinations upon which the state court's decision are based are unreasonable on this record. Accordingly, Petitioner is not entitled to habeas relief.

### III. Prosecutorial misconduct

In order for a petitioner to be entitled to habeas relief on the basis of prosecutorial misconduct, the petitioner must demonstrate that the prosecutor's improper conduct "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)). "[T]he touchstone of due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). In evaluating the impact of the prosecutor's misconduct, a court must consider the extent to which the claimed misconduct tended to mislead the jury or prejudice the petitioner, whether it was isolated or extensive, and whether the claimed misconduct was deliberate or accidental. *See United States v. Young*, 470 U.S. 1, 11-12 (1985). The court also must consider the strength of the overall proof establishing guilt, whether the conduct was objected to by counsel and whether a curative instruction was given by the court. *See*

*id.* at 12-13; *Darden*, 477 U.S. at 181-82; *Donnelly*, 416 U.S. at 646-47; *Berger v. United States*, 295 U.S. 78, 84-85 (1935).

“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)). Indeed, “[t]he Supreme Court has clearly indicated that the state courts have substantial breathing room when considering prosecutorial misconduct claims because ‘constitutional line drawing [in prosecutorial misconduct cases] is necessarily imprecise.’” *Slagle v. Bagley*, 457 F.3d 501, 516 (6th Cir. 2006) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974)). Thus, 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*, 132 S. Ct. 2148, 2155 (2012) (internal quotation omitted).

Petitioner takes issue with two types of prosecutorial misconduct: (1) the prosecutor vouched for the victim’s credibility; and (2) the prosecutor argued facts not in evidence. Each contention is addressed below.

A. Vouching

The Sixth Circuit has generally recognized two types of objectionable vouching. See *Johnson v. Bell*, 525 F.3d 466, 482 (6th Cir. 2008); *Brown v. McKee*, 231 F. App’x 469, 478 (6th Cir. 2007) (citing *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999)); but see *Wogenstahl v. Mitchell*, 668 F.3d 307, 328-29 (6th Cir. 2012) (treating the two aspects of vouching as part of a

single standard).<sup>3</sup> The first type impermissibly places the government's prestige behind the witness to bolster the witness' credibility. *Francis*, 170 F.3d at 550; *United States v. Carroll*, 26 F.3d 1380, 1388-89 (6th Cir. 1994); *Drew v. Collins*, 964 F.2d 411, 419 (5th Cir. 1992). In the second type of impermissible vouching, also known as bolstering, the prosecutor invites the jury to believe that there is other evidence, known to the prosecutor but not introduced into evidence, justifying the prosecutor's belief in the defendant's guilt. See *Francis*, 170 F.3d at 551; *United States v. Medlin*, 353 F.2d 789, 796 (6th Cir. 1965); *Henderson v. United States*, 218 F.2d 14, 19 (6th Cir. 1955).

Petitioner complains that the prosecutor impermissibly vouched and/or bolstered when he argued that if the victim was telling a lie, she told "a giant, awful, whopper of a lie . . ." (Trial Tr. IV, ECF No. 12-6, PageID.858.) The Michigan Court of Appeals concluded the argument was not misconduct:

Defendant first argues that the prosecutor impermissibly vouched for the victim's credibility. It is well recognized that "the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v. Bahoda*, 531 N.W.2d 659, 667 (Mich. 1995). However, a prosecutor may argue, based on the facts and testimony presented, that a witness is worthy of belief. *People v. Dobek*, 732 N.W.2d 546, 556 (Mich. Ct. App. 2007). A review of the record reveals that the prosecutor did not claim special knowledge of the victim's veracity, instead, based on facts before the jury, the prosecutor argued that the victim was worthy of belief. This was not misconduct. *Id.*

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<sup>3</sup>Notwithstanding the Sixth Circuit's continuing application of its own precedent on vouching, see *Wogenstahl*, 668 F.3d at 328 29 (citing *Johnson v. Bell*, 525 F.2d 466, 482 (6th Cir. 2008)), the Supreme Court has not directly held that vouching amounts to prosecutorial misconduct. Given the Supreme Court's recent admonitions to the courts regarding the limits of clearly established general principles, it is doubtful that vouching has been clearly established by the Supreme Court as a due process violation. See, e.g., *Lopez v. Smith*, 135 S. Ct. 1, 3 (2014) (holding, with respect to a claim of self-representation, that "[c]ircuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.'") (quoting *Marshal v. Rodgers*, 133 S. Ct. 1446, 1450 (2013); *White v. Woodall*, 134 S. Ct. 1697, 1703 (2014) (same, respecting a claim regarding the privilege against self-incrimination); *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) ("The highly generalized standard for evaluating claims of prosecutorial misconduct set forth in *Darden* bears scant resemblance to the elaborate, multistep test employed by the Sixth Circuit here.").

*Strandberg*, 2012 WL 4465162 at \*5. Close examination of the prosecutor's closing argument supports the Michigan Court of Appeals' determination. The prosecutor reviewed the victim's testimony and the circumstances surrounding her claims to support his argument that her testimony was worthy of belief. The state court's conclusion that such argument is not objectionable is in no way contrary to clearly established federal law. Petitioner has failed to establish entitlement to habeas relief on this claim.

B. Arguing facts not in evidence

Petitioner contends that the prosecutor made statements of fact in his arguments that were not supported by record evidence. Specifically, Petitioner claims: (1) the prosecutor told the jury that Petitioner confessed based on what Petitioner had said in a recorded interview with police, an interview that was played for the jury (Trial Tr. III, ECF No. 12-6, PageID.864-867, 888-891); and (2) the prosecutor improperly told the jury that the defense argument regarding the impossibility of first-degree criminal sexual conduct was unsupported by the evidence when it was supported.<sup>4</sup>

“It is improper for a prosecutor, during closing arguments, to bring to the attention of the jury any ‘purported facts that are not in evidence and are prejudicial’” *Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000) (citing *United States v. Wiedyk*, 71 F.3d 602, 610 (6th Cir. 1995)). Nonetheless, “prosecutors ‘must be given leeway to argue reasonable inferences from the evidence.’” *Id.* (citing *United States v. Collins*, 78 F.3d 10021, 1040 (6th Cir. 1996)).

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<sup>4</sup>Petitioner's “impossibility” defense was premised on his assertion that Petitioner could not have committed the act as the victim testified because it occurred in a swimming pool. Defense counsel argued that if, as the victim testified, Petitioner had bent her forward to insert his penis between her labia majora, the victim would have been underwater. (Trial Tr. III, ECF No. 12-6, PageID.879-883.) The prosecutor responded by noting it was not clear from the testimony how far Petitioner had bent the victim forward. (*Id.*, PageID.884-885.) Petitioner claims the testimony supports the argument.

The Michigan Court of Appeals resolved Petitioner's prosecutorial misconduct claims as follows:

Next, defendant argues that the prosecution argued facts not in evidence. As a matter of law, [the] prosecutor may not "mischaracterize the evidence presented," *People v. Watson*, 629 N.W.2d 411, 422 (Mich. Ct. App. 2001), or "argue a fact to the jury that is not supported by evidence," [*People v. Callon*, 662 N.W.2d 501, 513 (Mich. Ct. App. 2003)]. However, "a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Id.* Defendant presents numerous statements from the prosecution that he claims were not based on the evidence. Having reviewed the record, we conclude the majority of the statements referenced by defendant were correct statements of the evidence or reasonable inferences arising from the evidence. As such, they do not constitute prosecutorial misconduct. *Id.* However, we agree with defendant that the prosecutor misstated testimony by suggesting defendant's wife removed the victim from the home for two or three days after she learned of the abuse and that the victim told a friend about the abuse weeks before she revealed the abuse to anyone else. The record shows that defendant's wife returned to the family home one day after learning of the abuse and that the victim's friend could not remember precisely when the victim disclosed the abuse. However, defendant has not shown how such misstatements (or any of his claimed prosecutorial misstatements) altered the outcome of the proceedings. [*People v. Carines*, 597 N.W.2d 130, 139 (Mich. 1999)]. Moreover, to the extent the prosecution misstated a fact, the jury was instructed to rely on the evidence and specifically informed that the "the lawyers statements and arguments are evidence." Any potential prejudice arising from the prosecution's statements was cured by the jury instructions. *People v. Unger*, 749 N.W.2d 272, 292 (Mich. Ct. App. 2008).

*Strandberg*, 2012 WL 4465162 at \*5.<sup>5</sup>

The standard applied by the state court was entirely consistent with clearly established federal law. Moreover, the state court's factual determinations are entirely reasonable on this record. Petitioner's contention that the prosecutor treated the recorded interview like a confession finds no support in the record. The prosecutor did the opposite, stating "this is not . . . what we call a confession" and "[w]e didn't produce this statement as a confession" and "I'm not saying this is a

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<sup>5</sup>In Petitioner's habeas petition and supporting brief, he raises only the two instances of arguing facts not in evidence identified above. He does not raise the issue regarding the duration of the victim's removal from the family home in this Court.

confession.” (Trial Tr. III, ECF No. 12-6, PageID.865.)<sup>6</sup> The record also supports the conclusion that the prosecutor’s argument regarding “impossibility” was simply encouraging the jury to draw fair inferences from the testimony. The fact that the prosecutor, relying on the same evidence, asked the jury to draw an inference contrary to the inference advocated by defense counsel, does not render the prosecutor’s argument improper. Petitioner’s prosecutorial misconduct claim is without merit.

IV. Ineffective assistance of trial counsel

Petitioner maintains that his trial counsel rendered ineffective assistance in violation of the Sixth Amendment when he failed to object to the instances of prosecutorial misconduct identified above. In *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), the Supreme Court established a two-prong test by which to evaluate claims of ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, the petitioner must prove: (1) that counsel’s performance fell below an objective standard of reasonableness; and (2) that counsel’s deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. A court considering a claim of ineffective assistance must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. The defendant bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *see also Nagi v. United States*, 90 F.3d 130, 135 (6th Cir. 1996) (holding that counsel’s strategic decisions were hard to attack). The court must determine whether, in light of the circumstances as they existed at the time of counsel’s actions, “the identified acts or omissions were outside the wide range of

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<sup>6</sup>The prosecutor likened Petitioner’s statement in a draft letter to the victim that she did nothing bad or wrong to a confession that she was not lying; but that is not the argument that Petitioner claims rose to the level of unconstitutional prosecutorial misconduct. (Trial Tr. III, ECF No. 12-6, PageID.867.)

professionally competent assistance.” *Strickland*, 466 U.S. at 690. Even if a court determines that counsel’s performance was outside that range, the defendant is not entitled to relief if counsel’s error had no effect on the judgment. *Id.* at 691.

Moreover, as the Supreme Court repeatedly has recognized, when a federal court reviews a state court’s application of *Strickland* under § 2254(d), the deferential standard of *Strickland* is “doubly” deferential. *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)); *see also Burt v. Titlow*, 134 S. Ct. 10, 13 (2013); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011); *Premo v. Moore*, 562 U.S. 115, 122 (2011). In those circumstances, the question before the habeas court is “whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Id.*; *Jackson v. Houk*, 687 F.3d 723, 740-41 (6th Cir. 2012) (stating that the “Supreme Court has recently again underlined the difficulty of prevailing on a *Strickland* claim in the context of habeas and AEDPA . . . .”) (citing *Harrington*, 562 U.S. at 102).

The Michigan Court of Appeals rejected Petitioner’s ineffective assistance claim:

Defendant also argues that counsel was ineffective for failing to object to statements made by the prosecution during closing arguments. As discussed, the majority of the prosecution’s statements were proper argument that the victim was worthy of belief, [*People v. Dobek*, 732 N.W.2d 546, 556 (Mich. Ct. App. 2007)], permissible arguments or reasonable inferences arising from the evidence, [*People v. Callon*, 662 N.W.2d 501, 513 (Mich. Ct. App. 2003)]. . . . Objection to these proper statements would have been futile, and defense counsel was not ineffective for failing to raise such meritless objections. [*People v. Snider*, 608 N.W.2d 502, 517 (Mich. Ct. App. 2000); *People v. Thomas*, 678 N.W.2d 631, 636-637 (Mich. Ct. App. 2004)].

*Strandberg*, 2012 WL 4465162 at \*7. The state court’s determination is neither contrary to nor an unreasonable application of *Strickland*. As the Michigan Court of Appeals recognized, counsel’s failure to raise a meritless issue does not constitute ineffective assistance of counsel. *See Smith v.*

*Bradshaw*, 591 F.3d 517, 523 (6th Cir. 2010); *O'Hara v. Brigano*, 499 F.3d 492, 506 (6th Cir. 2007); *Chegwidden v. Kapture*, 92 F. App'x 309, 311 (6th Cir. 2004); *Harris v. United States*, 204 F.3d 681, 683 (6th Cir. 2000). “Omitting meritless arguments is neither professionally unreasonable nor prejudicial.” *Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013). Accordingly, Petitioner is not entitled to habeas relief.

**Recommended Disposition**

For the foregoing reasons, I respectfully recommend that Petitioner’s motion to stay and abey these proceedings be denied and that the habeas corpus petition be denied. I further recommend that a certificate of appealability be denied. See *Slack v. McDaniel*, 529 U.S. 473 (2000).

Dated: May 18, 2017

/s/ Ray Kent

RAY KENT

United States Magistrate Judge

**NOTICE TO PARTIES**

Any objections to this Report and Recommendation must be filed and served within 14 days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

SEAN LEE STRANDBERG, #807970,	)	
	)	Petitioner,
	)	
	)	No. 1:16-cv-211
-v-	)	
	)	
	)	Honorable Paul L. Maloney
CARMEN PALMER,	)	
	)	Respondent,
	)	

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**ORDER ADOPTING REPORT AND RECOMMENDATION**

Sean Strandberg, a state prisoner, filed a petition for habeas relief under 28 U.S.C. § 2254. The magistrate judge issued a report, recommending the petition be denied. (ECF No. 17.) Strandberg filed objections. (ECF No. 18.)

After being served with a report and recommendation (R&R) issued by a magistrate judge, a party has fourteen days to file written objections to the proposed findings and recommendations. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). A district court judge reviews de novo the portions of the R&R to which objections have been filed. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Only those objections that are specific are entitled to a de novo review under the statute. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986) (per curiam) (holding the district court need not provide de novo review where the objections are frivolous, conclusive or too general because the burden is on the parties to “pinpoint those portions of the magistrate’s report that the district court must specifically consider”).

The Court has reviewed Strandberg’s objections. Generally, the discussion of the relevant law in the R&R addresses Strandberg’s concerns.

1. Stay. Strandberg does not object to the recommendation that his motion to stay be denied.

2. Polygraph Evidence. Strandberg argues that the polygraph evidence introduced at his trial could not be cured by an instruction to the jury. To be clear, at trial, a witness testified that Strandberg “was offered a polygraph[.]” (ECF No. 12-6 PageID.734.) There was no testimony about the results of a polygraph or even if Strandberg accepted or declined the offer.

Strandberg’s objection is overruled. The relevant law was summarized on pages 12-14 of the R&R (PageID.1455-57). The state courts resolved this issue as a state law evidentiary question. The opinions cited by Strandberg are not in conflict with the decision reached by the state courts. None of the decisions cited by Strandberg address a set of facts similar to what occurred at Strandberg’s trial.

3. Prosecutorial Misconduct.

A. Vouching. Strandberg does not object to the portion of the R&R that addresses his claim that the prosecutor improperly vouched for or bolstered the victim’s testimony.

B. False Testimony. Strandberg generally complains that a detective presented false testimony about what was said during Strandberg’s recorded interview. Strandberg asserts the prosecutor then used the false testimony in closing, knowing the testimony was false. In his objection, Strandberg does not identify the allegedly false testimony.

Strandberg's objection is overruled. First, this issue was addressed in the state court proceedings, where it was resolved in a manner consistent with clearly established federal law. (R&R at 18 PageID.1461.) Second, Strandberg's objection is too vague for the Court to resolve. Even reading the petition, it is not clear about which of the prosecutor's statements Strandberg complains. The prosecutor did not refer to the recorded interview as a confession; the prosecutor repeatedly stated the opposite, that the statements were not a confession. (R&R at 18 PageID.1461, quoting ECF No. 12-6 PageID.865.)

**C. Mischaracterizing the Victim's Testimony.** Strandberg complains that the prosecutor mischaracterized the victim's testimony. The dispute is over the phrase "bent over."

Strandberg's objection is overruled. The magistrate judge concluded that the prosecutor's argument was simply asking the jury to draw fair inferences from the testimony, a conclusion wholly supported by the transcript. Defense counsel raised this issue in closing, arguing that the victim's testimony did not make sense. The prosecutor then responded to defense counsel's theory. The prosecutor did not mischaracterize the victim's testimony, which can be found at ECF No. 12-4 PageID.510.

**4. Ineffective Assistance of Counsel.** Strandberg acknowledges this claim relies on his claim of prosecutorial misconduct. Because the Court finds that Strandberg has not adequately established a claim for prosecutorial misconduct, Strandberg's claim for ineffective assistance of counsel must fail. Any objection on this issue is overruled.

The Court has reviewed the petition for the purpose of deciding whether to grant a certificate of appealability. The magistrate judge recommended denying a certificate of appealability, a recommendation to which Strandberg did not object. The Court agrees with the recommendation. Reasonable jurists would not disagree with the manner in which Strandberg's claims were resolved.

For these reasons, the Report and Recommendation (ECF No. 17) is **ADOPTED** as the Opinion of this Court. Strandberg's motion to stay the proceedings (ECF No. 14) is **DENIED**. A certificate of appealability is also **DENIED**.

**IT IS SO ORDERED.**

Date: June 9, 2017

/s/ Paul L. Maloney

Paul L. Maloney  
United States District Judge

No. 17-1806

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

FILED  
Jun 05, 2018  
DEBORAH S. HUNT, Clerk

SEAN LEE STRANDBERG,

)

Petitioner-Appellant,

)

v.

)

O R D E R

CARMEN DENISE PALMER, Warden,

)

Respondent-Appellee.

)

)

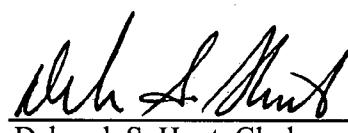
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Before: BOGGS, CLAY, and KETHLEDGE, Circuit Judges.

Sean Lee Strandberg, a Michigan prisoner proceeding pro se, petitions for rehearing of this court's January 9, 2018, order denying his application for a certificate of appealability.

On careful consideration, the court concludes that it did not overlook or misapprehend any "point of law or fact" when it issued its order. *See* Fed. R. App. P. 40(a)(2). The petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk