No._____

IN THE
SUPREME COURT OF THE UNITED STATES

SAAD A. BAHODA,

Petitioner,

v.

SHERMAN CAMPBELL, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARY
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

Saad A. Bahoda, #215121
In Propria Persona
Gus Harrison Correction Facility
2727 E. Beecher Street
Adrian, Michigan 49221

APPENDIX A.

JUNE 17, 2019, SIXTH CIRCUIT COURT OF APPEALS

ORDER DENYING CERTIFICATE OF APPEALABILITY

PAGES 1-4

No. 19-1339

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAAD BAHODA,

Petitioner-Appellant,

v.

SHERMAN CAMPBELL,

Respondent-Appellee.

ORDER

Saad Bahoda, 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. Bahoda has filed an application for a certificate of appealability.

Bahoda was sentenced to three to fifteen years of imprisonment after being convicted by a jury of assault with intent to do great bodily harm less than murder. The Michigan Court of Appeals affirmed Bahoda's conviction and sentence, and the Michigan Supreme Court denied leave to appeal. *People v. Bahoda*, No. 316879, 2016 WL 3267081 (Mich. Ct. App. June 14, 2016) (per curiam), *perm. app. denied*, 892 N.W.2d 362 (Mich. 2017). Bahoda then filed a § 2254 petition, arguing that he received ineffective assistance of trial counsel, he received ineffective assistance of appellate counsel, the trial court sentenced him on inaccurate information, and his sentence was based on impermissible judicial fact-finding. The district court denied the § 2254 petition and declined to issue a certificate of appealability. Bahoda now moves for a certificate of appealability on his claims that he received ineffective assistance of trial and appellate counsel. Bahoda has forfeited review of the issues that he raised in the district court but did not raise in his

application for a certificate of appealability. *See* 28 U.S.C. § 2253(c)(3); *Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

A certificate of appealability 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 petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where the state courts have adjudicated the petitioner's claims on the merits, the relevant question is whether the district court's application of 28 U.S.C. § 2254(d) to those claims is debatable by jurists of reason. *See id.* at 336-37.

To prove ineffective assistance of counsel, a petitioner must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *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)). Generally, prejudice means "a reasonable probability . . . that but for such conduct the outcome of the proceedings would have been different." *Williams v. Anderson*, 460 F.3d 789, 800 (6th Cir. 2006). In habeas proceedings, the district court must apply a doubly deferential standard of review: "[T]he question [under § 2254(d)] is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Reasonable jurists would not find it debatable whether the district court erred in rejecting Bahoda's claim that he received ineffective assistance of trial counsel when counsel failed to request a self-defense jury instruction. Under Michigan law, an individual not engaged in the commission of a crime may use deadly force against another anywhere he has the legal right to be without a duty to retreat when that individual honestly and reasonably believes that the use of

deadly force is necessary to prevent imminent death or great bodily harm. Mich. Comp. Laws § 780.972(1)(a). The Michigan Court of Appeals determined that counsel was not ineffective in failing to request a self-defense instruction because Bahoda did not have a legally viable claim of self-defense since he was committing a crime by carrying a concealed weapon and acting in self-defense was not a defense to carrying a concealed weapon. *Bahoda*, 2016 WL 3267081, at *4. Although the Michigan Supreme Court held in *People v. Triplett*, 878 N.W.2d 811, 815 (Mich. 2016) (per curiam), that a defendant can assert self-defense to the charge of carrying a concealed weapon, at the time of Bahoda's trial, acting in self-defense was not a defense to carrying a concealed weapon. *See People v. Townsel*, 164 N.W.2d 776, 777 (Mich. Ct. App. 1968) (per curiam). Because Bahoda did not have a legally viable claim of self-defense on the date of his trial and because counsel does not have an obligation to predict developments in the law, counsel's failure to request a self-defense instruction was not unreasonable. *See Snider v. United States*, 908 F.3d 183, 192 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 1573 (2019) (mem.). Additionally, to the extent that Bahoda asserts that he was entitled to the self-defense instruction because he was never charged or convicted of carrying a concealed weapon, he has failed to offer any evidence rebutting the state court's determination that he had a concealed pocketknife, which he used as a dangerous weapon. *See* 28 U.S.C. § 2254(e)(1).

Reasonable jurists would not find it debatable whether the district court erred in rejecting Bahoda's claim that he received ineffective assistance of trial counsel when counsel failed to investigate fraudulent affidavits that were submitted to the trial court in support of a pretrial motion. Bahoda argues that his entire defense was tainted by the suspicion that he had engaged in witness tampering. However, Bahoda has failed to make a substantial showing of prejudice because the fraudulent affidavits were not admitted as evidence nor were they referenced at trial. *See Hutchison v. Bell*, 303 F.3d 720, 748 (6th Cir. 2002).

Reasonable jurists would not find it debatable whether the district court erred in rejecting Bahoda's claim that he received ineffective assistance of trial counsel when counsel failed to argue that a prosecution witness's attorney had a conflict of interest. Bahoda argues that, because he

consulted with an attorney that a prosecution witness later retained, that witness should have been prevented from testifying. Despite Bahoda's assertions to the contrary, he has failed to make a substantial showing of prejudice because the witness offered only testimony consistent with Bahoda's own statements. *See Bahoda*, 2016 WL 3267081, at *5.

Reasonable jurists would not find it debatable whether the district court erred in rejecting Bahoda's claim that he received ineffective assistance of appellate counsel when counsel abandoned an evidentiary hearing on Bahoda's motion for a new trial. Bahoda argues that without the evidentiary hearing, he was unable to develop a factual record in support of his ineffective-assistance claims. Bahoda is unable to show that counsel acted unreasonably or that he was prejudiced by counsel's decision to waive an evidentiary hearing because he has failed to identify what additional evidence would have been presented. *See Hutchison*, 303 F.3d at 748. In any event, Bahoda has failed to rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 669.

Based upon the foregoing, the court **DENIES** the application for a certificate of appealability.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B.

FEBRUARY 27, 2019, UNITED STATES DISTRICT COURT

OPINION AND ORDER DENYING PETITION

WRIT OF HABEAS CORPUS

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAAD BAHODA,

Petitioner,

Case No. 17-cv-13505
Hon. Matthew F. Leitman

v.

SHERMAN CAMPBELL,

Respondent.
/

JUDGMENT

The above entitled came before the Court on a Petition for a Writ of Habeas Corpus. In accordance with the Opinion and Order entered on February 27, 2019:

(1) The Petition for a Writ of Habeas Corpus is DENIED WITH PREJUDICE.

(2) A Certificate of Appealability is DENIED.

(3) Petitioner is granted leave to appeal *In Forma Pauperis*.

Dated at Flint, Michigan, this 27th day of February, 2019.

DAVID J. WEAVER
CLERK OF COURT

By: s/Holly A. Monda
Deputy Clerk

Approved:

s/Matthew F. Leitman
MATTHEW F. LEITMAN
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAAD BAHODA,

Petitioner,

Case No. 17-cv-13505
Hon. Matthew F. Leitman

v.

SHERMAN CAMPBELL,

Respondent.
/

OPINION AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS (ECF #1), (2) DENYING A CERTIFICATE OF APPEALABILITY, AND (3) GRANTING PERMISSION TO APPEAL IN FORMA PAUPERIS

Petitioner Saad Bahoda is a state prisoner in the custody of the Michigan Department of Corrections. On April 11, 2013, a jury in the Macomb County Circuit Court found Bahoda guilty of assault with intent to do great bodily harm, Mich. Comp. Laws § 750.84. The state trial court thereafter sentenced Bahoda as a habitual felony offender to 3 to 15 years in prison to be served consecutively to a life sentence for which he was on parole when the assault occurred.

On October 26, 2017, Bahoda filed a petition for a writ of habeas corpus in this Court pursuant to 28 U.S.C. § 2254. (*See* Pet., ECF #1.) The petition raises five claims: (1) Bahoda was denied the effective assistance of counsel when his trial attorney failed to request a self-defense jury instruction, (2) Bahoda was denied the

> Defendant's conviction arose from an incident at a "hookah lounge" located next to a restaurant where defendant was attending a family function. Defendant left the restaurant, intervened in a fight between his nephew and Nadeem Edward, and ended up cutting Edward with a pocketknife. Defendant testified at trial that he used his knife against Edward in self-defense. Defendant filed two posttrial motions for a new trial based on ineffective assistance of counsel. One motion was filed by counsel and alleged that trial counsel, Steven Kaplan, was ineffective for failing to request a jury instruction on self-defense. The other motion was filed by defendant and alleged additional claims against Kaplan, as well as claims against two other attorneys, Robert Berg, who previously represented defendant, and Brian Legghio, who allegedly consulted defendant, but never represented him. The trial court denied both motions without conducting a Ginther hearing even though the parties had initially agreed to a *Ginther* hearing on the issue raised in counsel's motion.

People v. Bahoda, 2016 WL 3267081, at *1 (Mich. Ct. App. June 14, 2016).

After Bahoda was convicted, he pursued a direct appeal in the Michigan Court of Appeals. His brief on appeal, filed by appellate counsel, raised the following claims:

> I. The trial court abused its discretion in denying the motion for new trial on the basis of ineffective assistance of trial counsel where trial counsel inexplicably failed to request a self-defense instruction although the evidence supported it. Bahoda was denied his constitutional right to the effective assistance of counsel when trial counsel failed to request a self-defense instruction, which prejudiced Bahoda, entitling him to a new trial.
>
> II. Bahoda's Sixth Amendment right to effective counsel was violated when attorney Robert Berg allowed forged affidavits to be submitted to the court in pretrial proceedings without having investigated them.

On June 14, 2016, the Michigan Court of Appeals affirmed Bahoda's convictions and sentence in an unpublished opinion. *See Bahoda*, 2016 WL 3267081. Bahoda then filed an application for leave to appeal in the Michigan Supreme Court, raising the same claims as in his initial appeal. The Michigan Supreme Court denied leave to appeal by form order. *See People v. Bahoda*, 892 N.W.2d 362 (Mich. 2017) (Table).

II

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires federal courts to uphold state court adjudications on the merits unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

(1993). Prejudice, under *Strickland*, requires showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Under AEDPA, claims of ineffective assistance of counsel are subject to a "doubly deferential" standard of review. *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (quotation omitted). "[T]he question" for this Court "is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

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Bahoda first claims that his trial attorney, Steven Kaplan, was ineffective for failing to request a self-defense instruction. Bahoda argues that Kaplan should have requested such an instruction because the evidence created a question of fact for the jury as to whether Bahoda was in fear for his safety or for the safety of his sister when he waived the knife out in front of him during the altercation in the parking lot.[1]

[1] In state court, Bahoda asserted that he was entitled to a self-defense instruction both under common law and under Michigan's Self-Defense Act. In the petition, Bahoda limits his claim to entitlement to an instruction under the Self-Defense Act. (*See* Pet., ECF #1 at Pg. ID 29-33.)

in a place he has the legal right to be, and (c) "honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself . . . ." MCL 780.972(1)(a).

While the SDA does not impose any duty to retreat, it does require that the defendant not be engaged in the commission of a crime. Here, defendant was engaged in the commission of a crime: he had a pocketknife concealed on or about his person, which was used as a dangerous weapon (CCW), MCL 750.227(1). While the SDA "does not diminish an individual's right to use deadly force . . . in self-defense . . . as provided by the common law of this state in existence on October 1, 2006," MCL 780.974, this Court had long ago rejected self-defense as a defense to CCW. *People v. Townsel*, 13 Mich. App. 600, 601 (1968).

When the crime was committed, the common-law defense of self-defense had been recognized as a legitimate defense to the charge of felon in possession of a firearm, *People v. Dupree*, 486 Mich. 693, 712 (2010), and as of the time of trial, Dupree had been extended to a claim of self-defense under the SDA, *People v. Guajardo*, 300 Mich. App. 26, 40 (2013), but those cases had not been extended to other possessory offenses such as CCW. Because defendant did not have a legally viable claim of self-defense, Kaplan was not ineffective for failing to request an instruction thereon. "Trial counsel's failure to request an instruction inapplicable to the facts at bar does not constitute ineffective assistance of counsel." *People v. Truong (After Remand)*, 218 Mich. App. 325, 341 (1996). Further, while Kaplan could have argued for an extension of the law to CCW, which would in turn warrant an instruction on self-defense, "defense counsel's performance cannot be deemed deficient for failing to advance a novel legal argument." *People v. Reed*, 453 Mich. 685, 695 (1996) (footnote omitted). Therefore, Kaplan was not ineffective for failing to request a self-defense instruction that was not available at the time of trial.

where state court determined that habeas petitioner was not entitled to protection of Self-Defense Act under facts of the case).

In the petition, Bahoda highlights that after his trial, the Michigan Supreme Court held that a defendant could assert a self-defense defense to the charge of carrying a concealed weapon ("CCW"). *See People v. Triplett*, 878 N.W.2d 811 (Mich. 2016). Bahoda insists that this change in the law underscores that (1) he (Bahoda) may not have been guilty of CCW because he would have had a self-defense defense to that charge, (2) he was thus entitled to a self-defense instruction under the Self-Defense Act, and (3) Kaplan should have requested a self-defense instruction. The Court disagrees. At the time of Bahoda's trial, "self-defense [was] not a defense to CCW." *People v Townsel*, 164 N.W.2d 776, 777 (Mich. App. 1968). Generally, trial counsel is not charged with anticipating a change in the law when requesting jury instructions, and here it was not unreasonable for Kaplan not to have anticipated the change in self-defense law. Indeed, even after Bahoda's trial, the Michigan Court of Appeals held in a published opinion that the Self-Defense Act did *not* apply when the defendant was engaged in the crime of carrying a concealed weapon. *See People v. Triplett*, 870 N.W.2d 333 (Mich. App. 2015) *rev'd Triplett*, 878 N.W.2d 811. Thus, Bahoda has not shown that Kaplan was ineffective for failing to request a self-defense instruction.

reasons that if Berg had investigated the matter before filing the line-up motion, Allie would never have been compelled to testify against Bahoda at trial.

The Michigan Court of Appeals reviewed this claim on direct appeal and rejected it:

> Defendant also argues that Berg made a serious error by presenting the false affidavits because it turned out that Allie was involved in their procurement. According to defendant, that in turn led to the possibility that Allie could be criminally charged and it was only due to a grant of immunity that she testified against defendant. Defendant has not shown that he was prejudiced by the alleged error. There is nothing to indicate that Allie would not have testified against defendant but for the alleged grant of immunity and the testimony she provided established only that defendant was at the restaurant, that he went to the lounge after being informed that his nephew needed his help, and that he later left and went home, which corresponds with defendant's own testimony. Allie had no information regarding what happened when defendant went to the lounge and thus her testimony did not disprove or otherwise call into question defendant's testimony that he acted in self-defense, or Kaplan's argument that defendant lacked the requisite intent to commit murder or inflict great bodily harm.
>
> We also reject any suggestion that defendant was prejudiced, not by the fact that Allie testified against him, but by the fact that her decision to testify "completely eliminated the possibility of a 'misidentification' defense." Apart from the fact that this contention is completely contrary to defendant's claim that self-defense, not misidentification, was the "real defense," defendant does not clearly explain how the prosecutor's decision to call Allie prevented him from claiming misidentification as a defense. Nor does defendant clearly explain how this rendered Berg's representation

3

Bahoda's next allegation of ineffective assistance of counsel concerns an alleged conflict of interest by attorney Brian Legghio. Bahoda says he consulted with Legghio prior to trial but did not retain Legghio. Legghio later represented Allie and negotiated an agreement giving her immunity in exchange for her trial testimony (at Bahoda's trial) on behalf of the prosecution. (The immunity agreement gave Allie protection from possible liability in connection with the false affidavit scheme described above.) Bahoda argues that Legghio had an actual conflict of interest at the time he negotiated Allie's immunity agreement because Legghio had previously consulted with Bahoda. Bahoda insists that Legghio improperly aided the prosecution by arranging for Allie to testify against him. Bahoda contends that Kaplan, Bahoda's trial counsel, should have moved to suppress Allie's testimony as a result of Legghio's alleged conflict.

The Michigan Court of Appeals considered this claim on direct review and rejected it:

> Defendant also argues that Kaplan was ineffective because he failed to raise the fact that Legghio had a conflict of interest, and failed to move to preclude Allie from testifying or to disqualify the prosecutor due to that conflict of interest. The record shows that defendant consulted Legghio on one occasion several months before trial, but did not retain him. Defendant contends that Legghio later represented Allie and secured a grant of immunity for her in exchange for her testimony, and that the rules against conflicts of interest prevented Legghio

> false affidavit scheme. But Allie never offered such testimony at trial and her actual testimony was consistent with defendant's own testimony that he was at the restaurant, went to the lounge, and later went home. Therefore, the alleged conflict of interest that resulted in Allie testifying for the prosecution did not prejudice defendant.
>
> Defendant contends that through investigation of the false affidavit scheme, the prosecutor secured Allie's cooperation and threatened to reveal the scheme at trial and file additional charges against defendant "unless he limited his trial defense." This claim is not supported by the record. When the affidavits were first presented, the trial court and Berg both agreed that they would be admissible at trial for impeachment purposes, while the prosecutor argued that they were admissible as substantive evidence as well. Later, both defendant and his attorney moved to exclude the evidence. Counsel's motion was denied before trial. At trial, Kaplan advised the court that "in light of our defense," the evidentiary hearing was not necessary. He later stated that "in light of our defense in this case, the prosecution will not be introducing evidence regarding the alleged witness tampering and intimidation." The prosecutor added, "I think we had made a record last Thursday at the final pretrial and that the statements by the defense are still accurate today, and it's going to be . . . yes, I did it. It's just the level of intent that they're attacking rather than who did." At best, this suggests that the parties may have had an agreement that the prosecution would not introduce evidence regarding the false affidavit scheme and implicate defendant in that scheme if defendant did not use the affidavits to impeach the prosecution's witnesses regarding their identification of defendant, not that the prosecution somehow forced defendant to give up his defense of misidentification.

Bahoda, 2016 WL 3267081, at ** 4-5.

concurrent representation."). Bahoda is therefore not entitled to habeas relief on this ground.

4

Bahoda's final claim of ineffective assistance of counsel concerns his appellate counsel, Daniel Rust, who, Bahoda says, abandoned the claim for an evidentiary hearing on his motion for new trial. The Michigan Court of Appeals considered this claim on direct review and rejected it on the ground that an evidentiary hearing was not required because the claims could be resolved based on the existing record:

> As noted, the parties had initially agreed to a *Ginther* hearing on counsel's motion for a new trial. The hearing was delayed for more than a year because several attorneys appointed to represent defendant on appeal were allowed to withdraw. By the time the matter came before the trial court, appellate counsel asked that the court rule on the basis of the briefs alone. The parties ultimately agreed to have the trial court determine whether a hearing was necessary to resolve the issues raised in the motions, and the trial court determined that they lacked merit, and tacitly concluded that a *Ginther* hearing was not necessary. And, because defendant's claims of ineffective assistance of counsel lack merit, further factual development of the record was unnecessary. Therefore, the trial court did not abuse its discretion in declining to hold an evidentiary hearing, *People v. Unger*, 278 Mich. App. 210, 217 (2008), and appellate counsel was not ineffective for failing to demand a hearing.

Bahoda, 2016 WL 3267081, at *7.

> First, he argues that he was sentenced on the basis of inaccurate information, or the trial court misapprehended the law, because the trial court erroneously believed that defendant would be required to serve a lesser sentence, of approximately two to four years, on his prior conviction. We reject this argument because there is nothing in the record to suggest that the trial court considered how much time defendant would serve on his prior conviction when passing sentence. Instead, that issue was only discussed in the context of a possible plea before trial. Additionally, both defendant and his attorney advised the court that defendant may not be required to complete his life sentence and "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *People v. Griffin*, 235 Mich.App 27, 46; 597 NW2d 176 (1999). Most significantly, defendant and his attorney disagreed on how much time defendant would have to serve on his life sentence and, at the end of the discussion, the trial court recognized that defendant was going back to prison for the parole violation even though it did not know how long defendant would serve for that violation. At sentencing, the court sentenced defendant for assault with intent to do great bodily harm conviction, without any comment on how much time defendant would be required to serve for his parole sentence. Therefore, defendant has not shown a right to relief on this ground.

Bahoda, 2016 WL 3267081, at *7.

This decision was not unreasonable. The Court has reviewed this claim of error related to Bahoda's sentence and disagrees with Bahoda that the trial court sentenced him based on inaccurate information and/or a misunderstanding of his sentence. Bahoda has therefore not shown an entitlement to habeas relief on this ground.

require the jury to find either that defendant actually caused bodily injury, *see People v. Dillard*, 303 Mich.App 372, 378; 845 NW2d 518 (2013), or that any injury sustained by the victim necessitated medical treatment, and these facts also were not admitted by defendant. Further, but for judicial fact-finding in scoring OV 3, defendant would be in OV Level III (25 to 35 points), instead of OV Level IV (35–49 points), and his sentencing guidelines range would be 10 to 23 months (or 10 to 28 months as a second-offense habitual offender), instead of 19 to 38 months (or 19 to 47 months as a second-offense habitual offender). MCL 777.21(3)(a); MCL 777.65. Because the trial court sentenced defendant before *Lockridge* was decided, when application of the guidelines was mandatory, and judicial fact-finding in the scoring of OV 3 increased the floor of defendant's sentencing guidelines range, defendant has shown a Sixth Amendment violation. However, we conclude that defendant is not entitled to appellate relief.

The remedy for a *Lockridge* violation is to remand the case to the trial court to determine whether it would have imposed a materially different sentence but for the constitutional error (i.e., whether the court would have imposed a different sentence knowing that the guidelines are advisory, and not mandatory). *Lockridge*, 498 Mich. at 395–398; *Stokes*, 312 Mich.App at 198-199. In this case, that determination has already been made. The trial court had the opportunity to reconsider its sentence when deciding defendant's post-sentencing motion, which was heard after *Lockridge* was decided. The court noted that "defendant's sentence in this matter was calculated on the basis of offense variables calculated in violation of the Sixth Amendment pursuant to the holding in *Lockridge*." It concluded, however, that "[n]otwithstanding the fact that the guidelines were advisory, the Court finds that the sentence suggested by the guidelines was reasonable," and it stated that "even if the Court had recognized the guidelines as advisory only at the time it imposed defendant's sentence, the Court would nevertheless have

2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). A federal district court may grant or deny a certificate of appealability when the court issues a ruling on the habeas petition. *See Castro v. United States*, 310 F.3d 900, 901 (6th Cir. 2002).

Here, jurists of reason would not debate the Court's conclusion that Bahoda has failed to demonstrate entitlement to habeas relief with respect to any of his claims because they are all devoid of merit. Therefore, the Court will **DENY** Bahoda a certificate of appealability.

Finally, although this Court declines to issue Bahoda a certificate of appealability, the standard for granting an application for leave to proceed *in forma pauperis* on appeal is not as strict as the standard for certificates of appealability. *See Foster v. Ludwick*, 208 F.Supp.2d 750, 764 (E.D. Mich. 2002). 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 *in forma pauperis* status if it finds that an appeal is being taken in good faith. *See id.* at 764-65; 28 U.S.C. § 1915(a)(3); Fed. R.App.24 (a). Although jurists of reason would not debate this Court's resolution of Bahoda's claims, an appeal could be taken in good faith.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAAD BAHODA,

Petitioner,

Case No. 17-cv-13505
Hon. Matthew F. Leitman

v.

SHERMAN CAMPBELL,

Respondent.

/

ORDER (1) CONSTRUING MOTION TO ISSUE CERTIFICATE OF APPEALABILITY (ECF #11) AS MOTION FOR RECONSIDERATION, (2) DENYING MOTION, AND (3) DIRECTING THE CLERK OF THE COURT TO TRANSFER THE MOTION TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

On February 27, 2019, this Court issued an Opinion and Order in which it denied Petitioner Saad Bahoda a writ of habeas corpus. (*See* Op. and Order, ECF #9.) In that Opinion and Order, the Court declined to grant Bohada a certificate of appealbility because "jurists of reason would not debate the Court's conclusion that Bahoda ha[d] failed to demonstrate entitlement to habeas relief with respect to any of his claims." (*Id.* at Pg. ID 2248.)

On March 28, 2019, Bahoda filed a notice of appeal. (*See* Notice, ECF #12.) He also filed what he called a "Motion for a Certificate of Appealability." (*See* Mot., ECF #11.) The Court will construe Bahoda's motion as a motion for reconsideration of the Court's earlier decision declining to grant him such a certificate.

Bahoda has failed to establish that he is entitled to relief. Under this Court's local rules, a party moving for reconsideration "must not only demonstrate a palpable defect by which the court and the parties and other persons entitled to be heard on the motion have been misled but also show that correcting the defect will result in a different disposition of the case." E.D. Mich. Local Rule 7.1(h)(3). Bahoda has failed to satisfy either requirement. Accordingly, Bahoda's motion (ECF #11) is **DENIED**.

Moreover, where, as here, the Court has denied a habeas petitioner a certificate of appealability, "[t]he proper procedure ... is for the petitioner to file a motion for a certificate of appealability before the appellate court in the appeal from the judgment denying the [petition]." *Sims v. U.S.*, 244 F.3d 509 (6th Cir. 2001) (citing Fed. R.App. P. 22(b)(1)). Bahoda should therefore direct his request for a certificate of appealability to the United States Court of Appeals for the Sixth Circuit, where his appeal is pending. The Court, in the interests of justice, **DIRECTS** the Clerk of the Court to transfer Bahoda's motion for a certificate of appealability (ECF #11) to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1631.

IT SO ORDERED.

s/Matthew F. Leitman
MATTHEW F. LEITMAN
UNITED STATES DISTRICT JUDGE

Dated: May 6, 2019

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on May 6, 2019, by electronic means and/or ordinary mail.

s/Holly A. Monda
Case Manager
(810) 341-9764

APPENDIX C.
AUGUST 6, 2019, SIXTH CIRCUIT COURT OF APPEALS
ORDER DENYING PANEL REHEARING
PAGES 28-29

No. 19-1339

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 06, 2019
DEBORAH S. HUNT, Clerk

SAAD BAHODA,

Petitioner-Appellant,

v.

SHERMAN CAMPBELL,

Respondent-Appellee.

ORDER

Before: SUHRHEINRICH, BATCHELDER, and NALBANDIAN, Circuit Judges.

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

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

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

19-1339

Saad Bahoda
#215121
Gus Harrison Correctional Facility
2727 E. Beecher Street
Adrian, MI 49221

APPENDIX D.

AUGUST 21, 2019, SIXTH CIRCUIT COURT OF APPEALS

ORDER DENYING REHEARING EN BANC

PAGES 30-31

No. 19-1339

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 21, 2019
DEBORAH S. HUNT, Clerk

SAAD BAHODA,

Petitioner-Appellant,

v.

SHERMAN CAMPBELL,

Respondent-Appellee.

ORDER

Before: SUHRHEINRICH, BATCHELDER, and NALBANDIAN, Circuit Judges.

Saad Bahoda petitions for rehearing en banc of this court's order entered on June 17, 2019, 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

*Judge Larsen recused herself from participation in this ruling.

19-1339

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