No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LAMARR ROBINSON, PETITIONER

v.

CONNIE HORTON, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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SUBMITTED: APRIL 21, 2020

QUESTION PRESENTED

By statute and this Court's case law, a state prisoner must exhaust available state court remedies on direct appeal before a federal court considers granting habeas corpus relief. This Court holds that in order to exhaust a claim a state prisoner must "fairly present" the substance of a federal habeas corpus claim to the state's highest court. With this in mind, the question presented is:

1. Does a prisoner "fairly present" the substance of his federal habeas corpus claim to the state's highest court, when he utilizes a commonly used, unofficial form to incorporate by reference "the issues as raised in my Court of Appeals brief."

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PETITION FOR A WRIT OF CERTIORARI

Lamarr Robinson, the Petitioner, respectfully asks this Court to issue a Writ of Certiorari to review his undisputed unconstitutional sentence and the subsequent denial of Habeas Corpus review by both the Federal District Court and the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The Michigan Court of Appeals enters its decision affirming Robinson's sentence on October 22, 2015, attached at App. 56a.

The Michigan Supreme Court denies habeas corpus review on May 2, 2016, decision attached hereto. (App. 55a).

The Judgment of the United States District Court, Eastern District of Michigan, in *United States v. Lamarr Robinson*, No. 2L16-cv-12721, is entered on July 27, 2018, and is attached to this Petition. (App. 16a). In that decision, the District Court denies habeas review and rejects Robinson's claim that his sentence violates the Sixth Amendment to the United States' Constitution, incorrectly concluding that this Court's decision in "*Alleyne* is inapplicable to petitioner's case."

The Opinion of the Sixth Circuit Court of Appeals in *Robinson v. Horton,* No. 18-1979, is rendered on February 13, 2020, published as *Lamarr Robinson v. Connie Horton*, 950 F. 3d 337 (6th Cir. 2020), and attached to this Petition. (App. 1a). In its decision, the Sixth Circuit vacates the above portion of the District Court's decision dealing with Robinson's Sixth Amendment violation and sentencing claim, deciding that "Robinson's claims plainly have merit," but determines that such claims are

not exhausted before the state courts, and thus, habeas corpus review cannot be granted. As a result, the Sixth Circuit remands the case to the district court for further proceedings to determine if Robinson can present good cause for his failure to exhaust his sentencing claim before the Michigan Supreme Court.

The Sixth Circuit denies panel reconsideration and *En Banc* review on March 13, 2020, attached hereto. (App. 71a).

JURISDICTION

Jurisdiction to review the Judgment by Writ of Ceritorari is conferred on this Court by 28 U.S.C. §1254(1) and United States Supreme Court Rule 10.

The Opinion of the Sixth Circuit Court of Appeals is entered on February 13, 2020. (App. 1a). *En Banc* review is requested but denied on March 13, 2020. (App. 71a). Jurisdiction is generally conferred upon the Court of Appeals pursuant to 28 U.S.C. §1291.

This petition is timely filed pursuant to Supreme Court Rule 13.1 and 13.3.

STATUTORY AND CONSTITIUTIONAL PROVISIONS

28 U.S.C. § 2254 provides, in relevant part:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State;

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Robinson is convicted by a jury of assault with intent to commit murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony in the Michigan state court system. The evidence at trial establishes that at the time, Robinson and his alleged victim, Jamel Chubb, are both dating the same woman. Gas station surveillance video captures an individual wearing a hoodie and riding a bike approach Chubb and shoot him while he is pumping gas. A front seat passenger identifies Robinson as the shooter, and cellular telephone tracking data places Robinson in the area of the gas station at the time of the shooting. The defense claims misidentification, lack of credibility, and unreliable cellular phone tracking data as its defense at trial.

At the time of his sentencing, Michigan utilizes a complex sentencing regime, using offense categories, dual axis scoring grids and mandatory minimum ranges. The guidelines operate by "scoring" offense-related variables (OVs) and offender-related, prior record variables (PRVs) that are used to calculate total points to place inside a sentencing grid to yield a guidelines range, within which a judge chooses a mandatory minimum sentence. As the court below summarizes, "Michigan trial judges found facts in order to "score" the OVs and PRVs, which in turn determined

the minimum sentencing range for each offense." (App. 4A). Using this system, Robinson is assessed 181 OV points, placing him at OV Level VI on the applicable sentencing grid. He is sentenced as a fourth habitual offender to "concurrent terms of 47-1/2 to 120 years' imprisonment for the assault and felon-in-possession convictions, to be served consecutive to two years' imprisonment for the felony-firearm conviction." (Id.).

Robinson appeals to the Michigan Court of Appeals, raising, among other claims, that he is entitled to resentencing on the basis of this Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013), which requires that any fact that increases the mandatory-minimum sentence for an offense be treated as an element of that offense that must be submitted to a jury and proven beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 103-104 (2013). In this appeal, he argues that the Michigan sentencing scheme utilized to calculate his mandatory minimum sentence violates his Sixth Amendment right to have such issues decided by a jury. All courts agree.

While on appeal, the Michigan Supreme Court decides *People v. Lockridge*, 870 N.W. 2d 502 (Mich. 2015), finding that *Alleyne* "applies to Michigan's sentencing guidelines and renders them constitutionally deficient," *Id.* at p. 506, to the extent they require "judicial fact-finding beyond facts admitted by the defendant or found by the jury to score OVs that mandatorily increase the floor of the guidelines minimum sentence range." *Id.*

In light of *Alleyne* and *Lockridge*, the Michigan Court of Appeals agrees with Robinson that three of the offense variables found to apply to his case are "scored based on impermissible judicial fact-findings." *Robinson*, 2015 WL 6438239, at 13. The court nevertheless affirms the sentence, however, and denies resentencing, finding that the other variables "were based on facts admitted by defendant or found by the jury verdict, and were sufficient to sustain the minimum number of OV points necessary for defendant's score to fall in the cell of the sentencing grid under which he was sentenced." *Id.*(App. 69A).

Robinson then files an application for leave to appeal to the Michigan Supreme Court. In that application, Robinson specifically checks a box denoting that he raises the "issues as raised in my Court of Appeals brief," which uncontrovertibly includes the *Alleyne* and Sixth Amendment sentencing violations. The application form is developed by an organization called "Prison Legal Services of Michigan, Inc." and is not the official state form. Nevertheless, it is widely used and accepted by the Michigan Supreme Court at the time. It is also noteworthy that Robinson's letter to the Clerk of the Michigan Supreme Court instructs the clerk to "notify me if there are any deficiencies in this current filing," though no deficiencies are ever raised by the clerk. The Michigan Supreme Court denies leave to appeal, finding it is "not persuaded that the questions presented should be reviewed by this Court." *People v. Robinson*, 877 N.W. 2d 729, 730 (Mich. 2016). Noticeably absent from the Michigan Supreme Court's decision is any reference to a procedural error because of the forms used by Robinson.

Robinson then files a petition for writ of habeas corpus in the United States District Court for the Eastern District of Michigan. There, he raises the issue of whether the state trial court violates his Sixth Amendment right to a trial by jury "by using factors that had not been submitted to a jury and proven beyond a reasonable doubt or admitted to by petitioner." The District Court rejects the claim and denies habeas review, concluding that "*Alleyne* is inapplicable to petitioner's case," and notes the lack of federal law to rely upon, citing that the Michigan Supreme Court's *Lockridge* decision is insufficient because habeas corpus review "prohibits the use of lower court decisions in determining whether the state court decision is contrary to, or an unreasonable application of, clearly established federal law." (App. 47A). Robinson files a Notice of Appeal.

Four days thereafter, the Sixth Circuit Court of Appeals holds that "*Alleyne* clearly established the unconstitutionality of Michigan's mandatory sentencing regime." *Loren Robinson v. Woods*, 901 F. 3d. 710, 714 (6th Cir. 2018). Now, a federal court agrees that "the Michigan trial court's use of judge-found facts to score mandatory sentencing guidelines that resulted in an increase of petitioner's minimum sentence violated petitioner's Sixth Amendment rights." *Id.* at p. 718. At this point, it is unquestioned that Lamarr Robinson's sentence is unconstitutional.

The Sixth Circuit grants a certificate of appealability to Robinson on the Sixth Amendment sentencing claim only. Ultimately, the Sixth Circuit agrees with the District Court's denial of habeas corpus on February 13, 2020. See *Robinson v. Horton*, 950 F. 3d 337, 348 (6th Cir. 2020). Then, the Court denies rehearing and *en*

banc review. (App. 71a). The Court of Appeals concludes that despite having merit, and unquestionably being sentenced unconstitutionally, Robinson's claim is prohibited from habeas review because he failed to exhaust all state court remedies below, specifically failing to "fairly present" the claim to the Michigan Supreme Court. (App. 14A).

As a result of this Opinion, this Petition follows.

REASONS FOR GRANTING THE PETITION

I. The Question Presented in This Case is One of Great Constitutional and Recurring Importance.

At issue in this case is whether a *pro se* defendant's effort to incorporate by reference issues presented to a state supreme court through the use of an unofficial form is sufficient to satisfy the exhaustion of state remedies required for federal habeas review to be granted.

The most concerning line in the Sixth Circuit's decision is that "the outcome in this case might be different had the language in the form referring back to the earlier brief appeared in an official form prepared by the State." (App. 12a). Obviously, the court put great stock in the official form, stating that it "bolsters the conclusion that Robinson did not fairly present his sentencing claim to the Michigan Supreme Court." (Id.). The use of an official form should not make a difference to the outcome of this case. Here, Robinson, a *pro se* defendant, completes a form that he thinks is adequate to preserve his issues for appeal to the Michigan Supreme Court, and for good reason. The form includes language in the application allowing Robinson to specifically check a box denoting that he raises the "issues as raised in my Court of Appeals brief," which uncontrovertibly includes the Federal *Alleyne* sentencing violations.

For all intended purposes, his belief that this language is sufficient, is correct. The Michigan Supreme Court accepts the form in its entirety, including the pre-printed language on the form, as a means of perfecting Robinson's appeal. Clearly, the Michigan Supreme Court's acceptance of such an application is

evidence that it considers the form adequate to offer it fair notice of the issues that Robinson is raising to it. If the unofficial form utilized by Robinson is somehow deficient, then presumably, the Michigan Supreme Court would have rejected its filing entirely and refused to issue any opinion on whether or not it would hear such issues. Instead, the Court accepts the form, files it, and ultimately determines that it is "not persuaded that the questions presented should be reviewed by this Court." *People v. Robinson*, 877 N.W. 2d 729, 730 (Mich. 2016). (App. 55A). There is no mention that the form is inadequate or improper for a defendant to use when presenting claims to the Court. This is particularly noteworthy given Robinson's request for the client to notify him if there are any deficiencies with the filing.

In addition, review is warranted because the Sixth Circuit's holding will have implications for an untold number of pending or yet-to-be-filed habeas petitions percolating through the criminal justice system from Michigan, and other state Courts around the country. Although the form utilized by Robinson is unofficial, it is almost certain that many other criminal defendants have used the same, or similar forms to present appellate issues to state courts that are currently in the habeas review pipeline. In addition, many copies of such forms remain in prison libraries, with trial and appellate attorneys, with prisoners or their families, or otherwise in circulation. Thus, the question presented will arise on a daily basis in the district courts, and is likely to be reviewed almost weekly in the courts of appeals, thus giving rise to the need for a clear uniform rule for determining fair

presentation. The importance of such a crucial decision has obvious effects on all future criminal defendants and the criminal justice system as a whole.

In addition, this case is an ideal vehicle to decide the specific issue presented. The Sixth Circuit itself recognizes the gravity of the facts in this case, acknowledging that "this case presents an unfortunate situation," that "the habeas petition has an unquestionably valid claim on the merits," (App. 2a), and that "Robinson's claims plainly have merit." (Id., p. 13). Thus, this case offers a clean vehicle for this Court to decide this issue because it is undisputed that Robinson's Sixth Amendment constitutional rights are violated. Nevertheless, the Sixth Circuit refuses to offer Robinson any relief for the undeniable violation of his federal constitutional rights as guaranteed by the Sixth Amendment and by this Court in *Alleyne.*

This Court should grant certiorari to review and address this important and recurring issue.

II. The Sixth Circuit's decision further splits the Circuit courts.

"An application for a writ of habeas corpus on behalf of a person in state custody pursuant to the judgment of a State court shall not be granted unless it appears that - (A) the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. §2254(b)(1)(A). In *Picard v. Connor,* 404 U.S. 270 (1971), this Court held that the exhaustion requirement requires state prisoners to "fairly present" federal claims to each appropriate state court in order to give the State an "opportunity to pass upon and correct" alleged violations of federal rights. *Id.* at

512. Unfortunately, the issue of "fair presentation" is a question that continues to divide the federal circuits which utilize varying and differing tests to decide if such a standard is satisfied. This circuit split is becoming more entrenched, the variation and unpredictability in fair-presentation decisions is growing more pronounced, and the disposition of habeas petitioners' claims depend on the jurisdiction in which the petition is filed rather than the merit of the case. Review is necessary to resolve this conflict.

For instance, some circuits apply a "strict presentation" requirement that the grounds relied upon must be presented face-up and squarely to the highest state Court. See *Baker v. Corcoran,* 220 F.3d 276 (4th Cir. 2000) and *Isaacs v. Head,* 300 F.3d 1232, 1254 (11th Cir. 2002). Other circuits apply a multi-factor test that is much less exacting. See *Ramirez v. Attorney General,* 280 F.3d 87, 90, 94-95 (2nd Cir. 2001); *McCandless v. Vaughn,* 172 F.3d 255, 261 (3rd Cir. 1999); *Wilson v. Briley,* 243 F.3d 325, 327 (7th Cir. 2001). The First Circuit considers an issue fairly presented if it is "closely interwoven" with another claim explicitly raised to the Court. See *Williams v. Holbrook,* 691 F.2d 3, 7-8 (1st Cir. 1982). Now, in this case, the Sixth Circuit weighs in prohibiting an issue from being "fairly presented" when a criminal defendant incorporates the issue by reference to a previous lower court filing or decision.

This Court should grant this petition for writ of certiorari in this federal habeas corpus case to resolve the conflict and direct all courts clearly about what constitutes exhaustion or "fair presentation" of a federal claim to a state court.

III. The Sixth Circuit misapplies this Court's decision in *Baldwin v. Reese*, 541 U.S. 27 (2004).

The Sixth Circuit incorrectly applies this Court's decision in *Baldwin v. Reese*, 541 U.S. 27 (2004) to opine that Robinson did not "fairly present" his sentencing claim to the Michigan Supreme Court. In *Baldwin*, the respondent, Reese, files a petition for discretionary review in state court, whereby he asserts that he received ineffective assistance of both trial and appellate counsel. However, he only claims in that petition that the trial counsel's conduct, not appellate counsel, violates federal law. *Baldwin v. Reese*, 541 U.S. 27, 30 (2004). In addition, he never raises the federal issue pertaining to his appellate counsel at any level prior to filing the petition for discretionary review, (*Id.*), so there is no indication of what his argument might be pertaining to a federal violation.

It is noteworthy that this Court's decision in *Baldwin* states that:

> We consequently hold that *ordinarily* a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so. *Baldwin v. Reese*, 541 U.S. 27, 32 (2004), emphasis added.

With the qualification of "ordinarily," this Court allows that sometimes, a state prisoner may "fairly present" a claim even if the court must read beyond a brief or similar document. This is one of those cases. In fact, there is one simple line in the Sixth Circuit's decision that supports *Baldwin's* inapplicability: "*Baldwin* did not involve a situation in which a filing with a state's supreme court attempted to 'incorporate' arguments presented to a lower court." (App. 10a). This fact is distinguishing, and the *Baldwin* decision inapplicable.

Next, the fundamental assumption initially made by this Court in *Baldwin* is that the "petition by itself did not properly alert" the court of the issue presented. Here, on the other hand, the clear language of the application for leave to appeal to the Michigan Supreme Court indicates that Robinson alerts the Michigan Supreme Court that: "I want the Court to consider the issues *as raised in my Court of Appeals brief* and the additional information below." This is a factually significant difference from the *Baldwin* case, as there, the federal issue of ineffective appellate counsel was never previously raised at all. Here, the violation of Robinson's Sixth Amendment rights as protected by *Alleyne* is not only raised but is uniformly acknowledged as occurring.

Furthermore, unlike in *Baldwin*, here, there is no wild goose chase for the court to partake in Robinson's case. In *Baldwin*, the federal issue concerning ineffective assistance of counsel was never raised at any stage in the courts below. Here, the language of the application makes clear that the exact same issues Robinson raised in his specific brief to the Court of Appeals below are being raised to the Michigan Supreme Court. By referencing one specific document, the Michigan Supreme Court could see what issues are being raised. Thus, it is clear that the Sixth Circuit incorrectly applied this Court's decision in *Baldwin* to the facts herein. Review by this Court is now warranted to correct this error.

IV. The Sixth Circuit's decision conflicts with the decision of the United States Supreme Court in *Ross v. Moffitt*, 417 U.S. 600 (1974).

The Sixth Circuit decision overlooks and conflicts with this Court's decision in *Ross v. Moffitt*, 417 U.S. 600 (1974). In that case, this Court addresses an indigent defendant's right to appellate counsel. It requires:

> that the state appellate system be 'free of unreasoned distinctions,' and that indigents have an adequate opportunity to present their claims fairly within the adversary system. The State cannot adopt procedures which leave an indigent defendant 'entirely cut off from any appeal at all,' by virtue of his indigency, or extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.' *Ross v. Moffitt*, 417 U.S. 600, 612 (1974).

This is precisely what the Sixth Circuit's decision in Robinson's case accomplishes: it penalizes Robinson's *pro se* status for not knowing specific procedural rules that a wealthier, represented defendant might have known about due to their ability to afford appellate counsel. As a result, the Sixth Circuit's opinion cuts off Robinson's ability to pursue his direct appeal of a clear and undisputed Sixth Amendment *Alleyne* violation.

In addition, this Court decides that in discretionary appeals, an appellant is not denied meaningful access to the state Supreme Court when a state makes a decision not to appoint appellate counsel. This Court's reasoning of this opinion is applicable to Robinson's case. This Court explains:

> At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. *These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review. Ross v. Moffitt*, 417 U.S. 600, 615 (1974), emphasis added.

Thus, this Court holds that a defendant does not need appointed appellate counsel because the record below supports the unrepresented defendant's presentation of his case to the higher reviewing courts, through briefs, opinion, and transcripts of the lower court proceedings. This is precisely what Robinson did in this case, and what he is now being penalized for by the Sixth Circuit. The tension between the Sixth Circuit's decision herein and this Court's holding in *Ross v. Moffitt* is clear, and review is necessary to resolve it.

V. The Sixth Circuit incorrectly decides Robinson's case when concluding that he did not "fairly present" his sentencing claim to the Michigan Supreme Court.

The Sixth Circuit incorrectly decides this case. One big mistake upon which the Court bases its decision is that Robinson's application to appeal to the Michigan Supreme Court was somehow inadequate under Michigan law to exhaust his state options. The panel points to Mich. Ct. R. 7.305(A)(1) and finds that "Robinson did not fairly present his sentencing claim to the Michigan Supreme Court, thus failing to exhaust that claim in state court." (App. 11a). But there has never been such a factual or legal finding to support this decision by the Michigan Supreme Court itself. In fact, it is undisputed that the Michigan Supreme Court denies the application for leave to appeal because it is "not persuaded that the questions presented should be reviewed by this Court," (App. 5a), not because of some procedural error or technicality.

The Sixth Circuit overlooks that the form used by Robinson to file his *pro se* application for appeal in 2015, is treated by all parties at the time, including the

Michigan Supreme Court, as the *de facto* official form of pleading. Until now, with the Sixth Circuit's published decision, nobody has ever suggested or implied that reliance on that, or similar forms, is inadequate for exhaustion purposes under federal law.

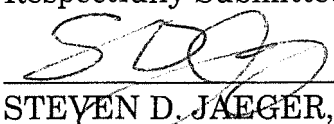
The Sixth Circuit also incorrectly determines that Robinson's application to the Michigan Supreme Court does not consist of "the questions presented for review" as required by Michigan Court Rule 7.305(A)(1). (App. 10-11a). Instead, the record clearly supports that Robinson presented the questions for review as "the issues raised in my Court of Appeals brief." How much clearer did Robinson have to be? What more did he need to do? With a review of this one specific document the Court has knowledge of the issues Robinson is presenting to it.

The Sixth Circuit fails to recognize that Robinson proceeds throughout this appeal in a largely unrepresented *pro se* manner. Had the Sixth Circuit given adequate weight to this crucial fact, it would not so easily dismiss his efforts at preserving and presenting his issues to the various appellate courts. The Court discounts or entirely dismisses this fact and instead holds him accountable for knowledge of the intricacies of what it incorrectly interprets to be Michigan procedural law. (See App. 10-11a). Such is exemplified by the Court's assertion that its "conclusion is reinforced by the relevant Michigan Court Rules." (App. 11a). However, this conclusion is incorrect. These errors of fact and law exemplify that this Court's review should be granted, and that reversal is warranted.

CONCLUSION

This case presents an important issue involving a clear violation of an individual's fundamental rights under the Sixth Amendment to the United States Constitution and this Court's holding in *Alleyne*. Nevertheless, relief is denied to Robinson by the Sixth Circuit due to what it deems to be a failure to exhaust state remedies by inadequately presenting the issue to the Michigan Supreme Court. By accepting review of this case, this Court can resolve the question presented and clarify what process is acceptable for future habeas defendants to utilize. This Petition for Writ of Certiorari should be granted, and the decision below reversed. Alternatively, this Court could consider and grant summary reversal.

Respectfully Submitted,



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Submitted: April 21, 2020

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IN THE SUPREME COURT OF THE UNITED STATES

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CONNIE HORTON, RESPONDENT

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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SUBMITTED: APRIL 21, 2020

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UNITED STATES COURT OF APPEALS
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Re: Case No. 18-1979, *Lamarr Robinson v. Connie Horton*
Originating Case No. : 2:16-cv-12721

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. Lamarr Robinson
Mr. David J. Weaver

Enclosures

Mandate to issue.

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0045p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LAMARR ROBINSON,

Petitioner-Appellant,

v.

CONNIE HORTON, Warden,

Respondent-Appellee.

No. 18-1979

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:16-cv-12721—Denise Page Hood, Chief District Judge.

Argued: December 13, 2019

Decided and Filed: February 13, 2020

Before: GILMAN, KETHLEDGE, and READLER, Circuit Judges.

COUNSEL

ARGUED: Steven D. Jaeger, THE JAEGER FIRM PLLC, Erlanger, Kentucky, for Appellant. Rebecca A. Berels, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Steven D. Jaeger, THE JAEGER FIRM PLLC, Erlanger, Kentucky, for Appellant. Linus Banghart-Linn, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Lansing, Michigan, for Appellee. Lamarr Robinson, Kincheloe, Michigan, pro se.

OPINION

RONALD LEE GILMAN, Circuit Judge. This case presents an unfortunate situation in which, despite the fact that the habeas petitioner has an unquestionably valid claim on the merits,

procedural grounds preclude our ability to grant him relief. That petitioner, Lamarr Robinson, was convicted of various offenses by a Michigan trial court in 2011 and sentenced under Michigan's then-existing sentencing scheme. The Michigan Court of Appeals affirmed his conviction and sentence, and the Michigan Supreme Court declined to hear his case. Robinson then filed a petition for a writ of habeas corpus in federal court, which the district court denied.

On appeal to this court, Robinson's sole claim is that a series of judicial decisions postdating his sentencing have established that his sentence was imposed in violation of the Sixth Amendment to the U.S. Constitution. The state of Michigan does not contest that conclusion, but it does persuasively argue that Robinson is not entitled to habeas relief because he failed to exhaust his sentencing claim in state court. For the reasons set forth below, we **VACATE** the portion of the district court's decision dealing with Robinson's sentencing claim and **REMAND** the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background

"The facts as recited by the Michigan Court of Appeals are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1)." *Shimel v. Warren*, 838 F.3d 685, 688 (6th Cir. 2016). That court summarized the facts of Robinson's case as follows:

> A jury convicted the 39-year-old defendant of shooting 20-year-old Jamel Chubb at a Detroit gas station on May 13, 2010. The prosecution presented evidence that defendant and Chubb were both dating 19-year-old Jessica Taylor, whom defendant had been dating for a couple of years. Defendant learned about the relationship between Taylor and Chubb, and thereafter followed them on multiple occasions and sent several text messages to both Taylor and Chubb. On the day of the shooting, the men had a brief encounter at Taylor's mother's Livonia residence. Upon leaving, defendant told Taylor, "Don't let me catch y'all in the hood." Later that day, Chubb, Taylor, Jasmine Miller, and Kayana Davies were all at Miller's Detroit residence, and ultimately went to a local gas station. The gas station surveillance video captured an individual wearing a hoodie and riding a bike approach Chubb and shoot him as he was pumping gas. Taylor, who was in the front passenger seat of the vehicle, identified defendant as the shooter. Cellular phone tracking evidence also placed defendant in the area of the gas station at the time of the shooting. The defense theory at trial was

> misidentification, and the defense argued, inter alia, that Taylor's identification was not credible and the cell phone tracking evidence was not reliable.

People v. Robinson, No. 321841, 2015 WL 6438239, at *1 (Mich. Ct. App. Oct. 22, 2015) (per curiam).

B. Proceedings in state court

Robinson's trial took place in January 2011, and he was sentenced the following month. A jury convicted Robinson of assault with intent to commit murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony. *Id.* At the time, Michigan had a complex sentencing regime in place, which this court has summarized as follows:

> Michigan's sentencing regime operated through the use of offense categories, dual axis scoring grids, minimum ranges, and a holistic focus on offender and offense characteristics. Generally speaking, the guidelines operate by "scoring" offense-related variables (OVs) and offender-related, prior-record variables (PRVs). These OV and PRV point totals are then inputted into the applicable sentencing grid to yield the guidelines range, within which judges choose a minimum sentence.

Loren Robinson v. Woods, 901 F.3d 710, 716 (6th Cir. 2018) (citations and footnotes omitted). In other words, Michigan trial judges found facts in order to "score" the OVs and PRVs, which in turn determined the minimum sentencing range for each offense.

The trial judge in Robinson's case assessed points for a number of the relevant OVs. *Robinson*, 2015 WL 6438239, at *13. Robinson received a total of 181 OV points, placing him at OV Level VI on the applicable sentencing grid. *Id.* On this basis, the trial judge sentenced Robinson as a fourth habitual offender to "concurrent terms of 47-1/2 to 120 years' imprisonment for the assault and felon-in-possession convictions, to be served consecutive to two years' imprisonment for the felony-firearm conviction." *Id.* at *1.

Robinson then appealed to the Michigan Court of Appeals, raising a variety of claims. In a supplemental brief before that court, he argued that he was entitled to resentencing on the basis of the Supreme Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013). The Supreme Court has long held that the Sixth Amendment's right to a trial by an impartial jury, in

conjunction with the Due Process Clause, "requires that each element of a crime be proved to the jury beyond a reasonable doubt." *Id.* at 104 (citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995), and *In re Winship*, 397 U.S. 358, 364 (1970)). In *Alleyne*, the Court concluded that any fact that increases the mandatory-minimum sentence for an offense is an element of that offense that must be submitted to a jury for consideration. *Id.* at 103.

While Robinson's case was pending on appeal, the Michigan Supreme Court decided *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015), in which the Court held that the rule set forth in *Alleyne* "applie[d] to Michigan's sentencing guidelines and render[ed] them constitutionally deficient." *Id.* at 506. The Michigan Supreme Court determined that the guidelines were deficient to the extent that they required "judicial fact-finding beyond facts admitted by the defendant or found by the jury to score [OVs] that *mandatorily* increase the floor of the guidelines minimum sentence range." *Id.* (emphasis in original). As a remedy, the *Lockridge* Court decided to sever the relevant statute "to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." *Id.*

In reviewing Robinson's case in light of *Alleyne* and *Lockridge*, the Michigan Court of Appeals agreed with Robinson that three of the variables that were found to apply to his case were "scored based on impermissible judicial fact-finding." *Robinson*, 2015 WL 6438239, at *13. The court concluded, however, that Robinson was not entitled to resentencing because the other variables "were based on facts admitted by defendant or found by the jury verdict, and were sufficient to sustain the minimum number of OV points necessary for defendant's score to fall in the cell of the sentencing grid under which he was sentenced." *Id.* Accordingly, the court affirmed Robinson's sentence, along with his conviction.

Robinson then proceeded to file an application for leave to appeal to the Michigan Supreme Court. He later filed a motion to supplement the application. The Michigan Supreme Court granted the motion to supplement the application, but then denied the application for leave to appeal. It simply noted that it was "not persuaded that the questions presented should be reviewed by this Court." *People v. Robinson*, 877 N.W.2d 729, 730 (Mich. 2016) (mem.).

C. Proceedings in federal court

Robinson next filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. He raised a range of claims, including that the state trial court violated his Sixth Amendment right to a trial by jury "by using factors that had not been submitted to a jury and proven beyond a reasonable doubt or admitted to by petitioner" in assessing his sentence. The district court rejected this claim, concluding that "*Alleyne* is inapplicable to petitioner's case." It noted that the Michigan Supreme Court in *Lockridge* had previously come to a different result, but concluded that the applicable standard of habeas review "prohibits the use of lower court decisions in determining whether the state court decision is contrary to, or an unreasonable application of, clearly established federal law." The district court also determined that *Lockridge* did not render the principle that Robinson was relying on "clearly established" for the purposes of habeas review, and so it denied Robinson relief on this claim. After rejecting all of Robinson's other claims, the court denied his habeas petition and declined to issue a certificate of appealability (COA).

Robinson responded by filing a notice of appeal and a motion in this court seeking a COA. Just four days after Robinson filed his notice of appeal, another panel of this court issued its decision in *Loren Robinson v. Woods*, 901 F.3d 710 (6th Cir. 2018). In *Loren Robinson*, this court came to essentially the same conclusion that the Michigan Supreme Court had reached in *Lockridge*. The *Loren Robinson* court held that "*Alleyne* clearly established the unconstitutionality of Michigan's mandatory sentencing regime." *Id.* at 714. In light of *Alleyne*, this court determined that "the Michigan trial court's use of judge-found facts to score mandatory sentencing guidelines that resulted in an increase of petitioner's minimum sentence violated petitioner's Sixth Amendment rights." *Id.* at 718.

Robinson's motion for a COA had asserted eight grounds for relief, including his argument that he was entitled to resentencing under *Alleyne*. On the basis of *Loren Robinson*, this court granted his motion for a COA with respect to the *Alleyne* claim. It denied the motion with respect to all of his other claims. After an initial round of briefing before this court in which Robinson acted pro se, this court entered an order directing that counsel be appointed for

Robinson and that a new briefing schedule be issued. Such briefing has now been completed, making this case ripe for a decision.

II. ANALYSIS

A. Standard of review

We review a district court's legal conclusions in habeas proceedings de novo and its findings of fact under the clear-error standard. *Braxton v. Gansheimer*, 561 F.3d 453, 457 (6th Cir. 2009). Federal courts may not provide relief on habeas claims that were previously adjudicated on the merits in state court unless the state-court adjudication either (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Ayers v. Hall*, 900 F.3d 829, 834–35 (6th Cir. 2018). A state-court decision is "contrary to" clearly established federal law if the state court "applies a rule that contradicts the governing law set forth in the Supreme Court's cases, or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from the Supreme Court's precedent." *Ayers*, 900 F.3d at 835 (brackets, citations, and internal quotation marks omitted).

B. Exhaustion

The State's sole argument before this court is that Robinson failed to exhaust his sentencing claim in the Michigan courts. This argument has potential merit because, "[b]efore a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). The exhaustion doctrine, first announced by the Supreme Court in *Ex parte Royall*, 117 U.S. 241 (1886), is now codified by statute. *See* 28 U.S.C. § 2254(b)(1); *see also O'Sullivan*, 526 U.S. at 842. Exhaustion of state remedies requires that petitioners "fairly presen[t]" federal claims to state courts in order to give them the opportunity to correct violations of federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)).

In states such as Michigan with a two-tiered appellate system—that is, those that have both an intermediate appellate court and a state supreme court—a petitioner must present his claims to the state supreme court in order to satisfy this exhaustion requirement. *O'Sullivan*, 526 U.S. at 839–40, 845. The exhaustion doctrine "is not a jurisdictional matter," but it is a "threshold question that must be resolved before [the court] reach[es] the merits of any claim." *Wagner v. Smith*, 581 F.3d 410, 415 (6th Cir. 2009) (citations omitted).

In the district court, the State argued that Robinson had failed to exhaust his sentencing claim in the Michigan courts, in addition to arguing that he was not entitled to relief on the merits. The district court, citing *Prather v. Rees*, 822 F.2d 1418, 1422 (6th Cir. 1987), noted that "[a]n unexhausted claim may be adjudicated if the unexhausted claim is without merit, such that addressing the claim would be efficient and would not offend the interest of federal-state comity." Accordingly, the district court did not address the State's exhaustion argument and simply rejected Robinson's sentencing claim on the merits.

On appeal, the State renews its exhaustion argument, contending that Robinson did not exhaust his state-court remedies because he failed to raise his sentencing claim before the Michigan Supreme Court. Robinson filed two documents before the Michigan Supreme Court: a pro per application for leave to appeal, and a pro per motion to supplement his application for leave to appeal. The State asserts that neither of these documents raises any claim of sentencing error under either *Alleyne* or *Lockridge*.

Robinson counters that he did exhaust his sentencing claim because the following preprinted language was included in his application for leave to appeal to the Michigan Supreme Court: "I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below." The form he submitted was apparently prepared by a prison legal-services organization, with the above-quoted language preprinted on the form. Robinson contends that because the sentencing issue was presented to the Michigan Court of Appeals (which the State does not dispute), this language served to fairly present the issue to the Michigan Supreme Court as well. With the exception of this single sentence, Robinson did not otherwise mention the sentencing claim in either his application for leave to appeal or in his motion to supplement that application.

In their briefing on the exhaustion issue, both parties closely parse the quoted sentence. Their arguments primarily deal with whether the language in the form should be deemed to have effectively incorporated the briefing before the Michigan Court of Appeals. Neither party, however, spends much space addressing the more important subject of whether, assuming that it was intended to do so, that language was sufficient to "fairly present" the claim to the Michigan Supreme Court. *See Duncan*, 513 U.S. at 365.

Our analysis must begin with the Supreme Court's decision in *Baldwin v. Reese*, 541 U.S. 27 (2004). Michael Reese, who had previously been convicted in an Oregon state court of kidnapping and attempted sodomy, brought collateral-relief proceedings in the state-court system. In Reese's petition for discretionary review by the Oregon Supreme Court, he asserted that he had received ineffective assistance of both trial and appellate counsel. *Id.* at 29. Reese's petition did not indicate that his ineffective-assistance-of-appellate-counsel claim was based on federal law. *Id.* at 30. After the Oregon Supreme Court denied the petition, Reese sought a writ of habeas corpus in federal court.

The Supreme Court rejected Reese's argument that, because the justices of the Oregon Supreme Court had the opportunity to read the lower-court opinion and thus be alerted to the federal nature of the claim, the claim had been fairly presented to them. *Id.* at 30–31. It reasoned that such a requirement would impose serious burdens on state appellate courts, particularly those with the power of discretionary review. *Id.* at 31–32. The Court also noted that the Oregon Rules of Appellate Procedure instruct "litigants seeking discretionary review to identify clearly in the petition itself the legal questions presented, why those questions have special importance, a short statement of relevant facts, and the reasons for reversal." *Id.* at 31 (citing Or. R. App. P. 9.05(7) (2003)). Accordingly, the Supreme Court held that

> ordinarily a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so.

Id. at 32.

In short, *Baldwin* stands for the proposition that if a filing does not "fairly present" a claim on its own, the fact that the claim might be apparent from other documents in a lower court will not satisfy the exhaustion requirement. But *Baldwin* did not involve a situation in which a filing with a state's supreme court attempted to "incorporate" arguments presented to a lower court.

The Ninth Circuit, however, expressly addressed this incorporation-by-reference issue in *Gatlin v. Madding*, 189 F.3d 882 (9th Cir. 1999). In a petition for review to the California Supreme Court, a petitioner had written: "Petitioner incorporate's [sic] herein the arguments raised by his appellate counsel on Direct Appeal on this issue." *Id.* at 885. The Ninth Circuit held that this language was insufficient to "fairly present" the claim at issue. *Id.* at 888–89. It largely relied on the California Rules of Court, which "expressly prohibit[ed] the incorporation by reference of authorities or argument from another document." *Id.* at 888.

As both *Baldwin* and *Gatlin* indicate, the courts have looked to the relevant state procedural rules for guidance. In the present case, the Michigan Court Rules set out the requirements for exactly what a party must file in an application for leave to appeal to the Michigan Supreme Court. Those rules provide that a party must file an application consisting of the following:

> (a) a statement identifying the judgment or order appealed and the date of its entry;
>
> (b) the questions presented for review related in concise terms to the facts of the case;
>
> (c) a table of contents and index of authorities conforming to MCR 7.212(C)(2) and (3);
>
> (d) a concise statement of the material proceedings and facts conforming to MCR 7.212(C)(6);
>
> (e) a concise argument, conforming to MCR 7.212(C)(7), in support of the appellant's position on each of the stated questions and establishing a ground for the application as required by subrule (B); and
>
> (f) a statement of the relief sought.

Mich. Ct. R. 7.305(A)(1).

Based on these authorities, we conclude that Robinson did not "fairly present" his sentencing claim to the Michigan Supreme Court, thus failing to exhaust that claim in state court. His sentencing claim was not referenced by name at all in his application for leave to appeal or in his motion to supplement that application. The only line that could have even arguably been read to refer to it was the one line, quoted above, referring to "the issues as raised in my Court of Appeals brief." As in *Baldwin*, this is insufficient to fairly present the claim because the Michigan Supreme Court would have had to "read beyond" the application to "alert it to the presence" of Robinson's sentencing claim. *See Baldwin*, 541 U.S. at 32.

Our conclusion is reinforced by the relevant Michigan Court Rules. Although these Rules do not explicitly proscribe the practice of incorporation by reference in applications for leave to appeal, they do direct that a party include both "the questions presented for review related in concise terms to the facts of the case" and "a concise argument . . . in support of the appellant's position on each of the stated questions" in such an application. Mich. Ct. R. 7.305(A)(1)(b), (e). Neither Robinson's application for leave to appeal nor his motion to supplement that application described the question presented with respect to his sentencing claim or provided any type of argument in support of his position on that issue.

The case of *Dye v. Hofbauer*, 546 U.S. 1 (2005) (per curiam), which Robinson cites, does not point toward a contrary result. In *Dye*, this court had denied habeas relief on the grounds that the habeas petition filed in the district court "presented the prosecutorial misconduct claim in too vague and general a form." *Id.* at 4. The Supreme Court reversed, noting that the "habeas corpus petition made clear and repeated references to an appended supporting brief, which presented Dye's federal claim with more than sufficient particularity." *Id.* It cited Rule 10(c) of the Federal Rules of Civil Procedure. Rule 10(c) provides that "[a] statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion." *Dye*, however, dealt with the presentation of a claim in a habeas petition, not in a state-court filing, and the Federal Rules of Civil Procedure of course do not apply in state court. In other words, Rule 10(c) explicitly authorizes incorporation by reference, whereas the relevant Michigan Court Rules relating to applications for leave to appeal do not.

The outcome in this case might be different had the language in the form referring back to the earlier brief appeared in an official form prepared by the State. But that is not what happened. Instead, the form that Robinson used was apparently developed by an organization called "Prison Legal Services of Michigan, Inc." That form differs from the official form that appears on the Michigan Courts' website. *See* Michigan Courts, *Pro Per Application for Leave to Appeal in a Criminal Case to the Michigan Supreme Court*, http://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/ClerksOfficeDocuments/Pro-Per_MSC_Criminal-Application_06-2016_FillableForm.pdf (last visited Feb. 13, 2020).

The official form bolsters the conclusion that Robinson did not fairly present his sentencing claim to the Michigan Supreme Court. That form notes that it "was created by the Clerk's Office of the Michigan Supreme Court" and that it "satisfies the formatting and structural requirements of the court rules if it is completed in accordance with the instructions." *Id.* at i. Most importantly, the official form warns individuals that "[i]f you do not raise an issue in the Supreme Court by writing it out in the application form, it will not be addressed by the Supreme Court even if it was raised in the Court of Appeals." *Id.* at ii. Similarly, in the section where applicants are instructed to list the issues that they want to present, they are told to "write out those issues you want to raise in the Supreme Court that were raised in the Court of Appeals." *Id.* at vi. Robinson's application for leave to appeal came nowhere close to meeting these requirements.

Despite Robinson's failure to exhaust his sentencing claim, the exhaustion doctrine would not bar our review of that claim if there were "an absence of available State corrective process" or if "circumstances exist[ed] that render[ed] such process ineffective to protect the rights of the applicant." *See* 28 U.S.C. § 2254(b)(1)(B); *see also Wagner v. Smith*, 581 F.3d 410, 419 (6th Cir. 2009). Robinson, however, has such an available avenue for relief in this case. As the State points out, Robinson may file a motion for relief from judgment under Subchapter 6.500 of the Michigan Court Rules. Robinson has not yet filed such a motion, and there is no time limit on filing one. Moreover, Robinson concedes that, for these same reasons, this option is still available to him. Section 2254(b)(1)(B) therefore does not provide a basis for Robinson's unexhausted habeas claim to proceed.

C. Disposition

The only remaining question, then, is how to dispose of this case. In its briefing, the State initially requested that we affirm the district court's denial of habeas relief on the grounds of failure to exhaust. At oral argument, the State revised this request and instead asked us to remand the case with instructions for the district court to dismiss the sentencing claim without prejudice. The State clarified that the reason for this revision is that the district court's decision on that claim has now been shown to be wrong on the merits.

Robinson's counsel did not address the issue of how we should dispose of the case if we determine that the sentencing claim had not been exhausted, instead simply asking us to reverse the denial of his habeas petition. In the initial round of briefing when Robinson was acting pro se, however, Robinson requested in the alternative that we direct the district court to stay the case administratively and hold it in abeyance pending his exhaustion of the state-court claims.

In the past, where a district court has denied a habeas petition on the merits, and this court determined on appeal that the petition contained unexhausted claims, this court has often remanded the case to the district court to address how to proceed in the first instance. *See, e.g.*, *Hickey v. Hoffner*, 701 F. App'x 422, 426–27 (6th Cir. 2017); *Wagner*, 581 F.3d at 419–20. We conclude that this is the appropriate course of action in this case as well, particularly given that the disposition issue has not been addressed in any depth in the parties' briefing.

In *Harris v. Lafler*, 553 F.3d 1028 (6th Cir. 2009), this court described four options that a district court may pursue under similar circumstances:

> (1) dismiss the mixed petition [a petition containing both exhausted and unexhausted claims] in its entirety; (2) stay the petition and hold it in abeyance while the petitioner returns to state court to raise his unexhausted claims; (3) permit the petitioner to dismiss the unexhausted claims and proceed with the exhausted claims; or (4) ignore the exhaustion requirement altogether and deny the petition on the merits if none of the petitioner's claims has any merit.

Id. at 1031–32 (citations and emphasis omitted). The Supreme Court in *Rhines v. Weber*, 544 U.S. 269 (2005), approved the use of the "stay and abeyance" procedure in certain situations, discussing that procedure "in the context of 'mixed petitions,' [while] other circuits

have found it appropriate for petitions containing solely unexhausted claims." *Hickey*, 701 F. App'x at 426 n.5 (citing *Mena v. Long*, 813 F.3d 907, 912 (9th Cir. 2016)).

In the present case, we have a petition that was initially a mixed petition but now contains just one unexhausted claim, since all of the other claims have previously been dismissed. The third option enumerated in *Harris* is therefore unavailable to the district court because there are no exhausted claims that may proceed. In addition, the fourth option is unavailable because Robinson's sentencing claim undoubtedly has merit in light of this court's holding in *Loren Robinson v. Woods*, 901 F.3d 710 (6th Cir. 2018), that "*Alleyne* clearly established the unconstitutionality of Michigan's mandatory sentencing regime." *Id.* at 714.

On remand, then, the district court should decide whether to dismiss Robinson's petition (now consisting of only the sentencing claim) without prejudice for failure to exhaust, or to stay the petition and hold it in abeyance while Robinson returns to state court to exhaust that claim. In *Rhines*, the Supreme Court held that stay and abeyance is appropriate only "when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court" and when the claims are not "plainly meritless." 544 U.S. at 277. Robinson's claims plainly have merit, as noted above. The key question on remand, therefore, will be whether Robinson can present good cause for his failure to exhaust his sentencing claim before the Michigan Supreme Court.

III. CONCLUSION

For all of the reasons set forth above, we **VACATE** the portion of the district court's decision dealing with Robinson's sentencing claim and **REMAND** the case to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-1979

LAMARR ROBINSON,

Petitioner - Appellant,

v.

CONNIE HORTON, Warden,

Respondent - Appellee.

FILED
Feb 13, 2020
DEBORAH S. HUNT, Clerk

Before: GILMAN, KETHLEDGE, and READLER, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the portion of the district court's decision dealing with Lamarr Robinson's sentencing claim is VACATED, and the case is REMANDED to the district court for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAMARR VALDEZ ROBINSON,

Petitioner,

v.

CONNIE HORTON,[1]

Respondent.
_____/

Civil No. 2:16-CV-12721
HONORABLE DENISE PAGE HOOD
CHIEF UNITED STATES DISTRICT JUDGE

OPINION AND ORDER DENYING THE PETITION FOR A WRIT OF HABEAS CORPUS, DENYING A CERTIFICATE OF APPEALABILITY, AND GRANTING PETITIONER LEAVE TO APPEAL *IN FORMA PAUPERIS*

Lamarr Valdez Robinson, ("Petitioner"), confined at the Chippewa Correctional Facility in Kincheloe, Michigan, filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction for assault with intent to commit murder, M.C.L.A. § 750.83, felon in possession of a firearm, M.C.L.A. § 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), M.C.L.A. § 750.227b. The trial court sentenced petitioner as a fourth habitual offender, M.C.L.A. § 769.12, to concurrent terms of 47–1/2 to 120 years' imprisonment for the

[1] The Court amends the caption to reflect the current warden of petitioner's incarceration.

assault and felon-in-possession convictions, to be served consecutive to two years' imprisonment for the felony-firearm conviction. For the reasons that follow, the petition for a writ of habeas corpus is DENIED.

I. Background

Petitioner was convicted following a jury trial in the Wayne County Circuit Court. This Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals, which are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1). *See e.g. Wagner v. Smith,* 581 F.3d 410, 413 (6th Cir. 2009):

> A jury convicted the 39–year–old defendant of shooting 20–year–old Jamel Chubb at a Detroit gas station on May 13, 2010. The prosecution presented evidence that defendant and Chubb were both dating 19–year–old Jessica Taylor, whom defendant had been dating for a couple of years. Defendant learned about the relationship between Taylor and Chubb, and thereafter followed them on multiple occasions and sent several text messages to both Taylor and Chubb. On the day of the shooting, the men had a brief encounter at Taylor's mother's Livonia residence. Upon leaving, defendant told Taylor, "Don't let me catch y'all in the hood." Later that day, Chubb, Taylor, Jasmine Miller, and Kayana Davies were all at Miller's Detroit residence, and ultimately went to a local gas station. The gas station surveillance video captured an individual wearing a hoodie and riding a bike approach Chubb and shoot him as he was pumping gas. Taylor, who was in the front passenger seat of the vehicle, identified defendant as the shooter. Cellular phone tracking evidence also placed defendant in the area of the gas station at the time of the shooting. The defense theory at trial was misidentification, and the defense argued, inter alia, that Taylor's

identification was not credible and the cell phone tracking evidence was not reliable.

People v. Robinson, No. 321841, 2015 WL 6438239, at *1 (Mich. Ct. App. Oct. 22, 2015).

Petitioner's conviction was affirmed. *Id., lv. den.* 499 Mich. 916; 877 N.W.2d 729 (2016).

Petitioner seeks a writ of habeas corpus on the following grounds:

I. Defense counsel stipulated to the admission of cell phone tower evidence placing someone using a phone used by the petitioner in the general area.

II. Defense counsel stipulated to the introduction of testimony of irrelevant sex tapes, did not object to lines of questioning regarding those tapes and did not object to the introduction of text messages or testimony portraying petitioner in a bad light.

III. Defense counsel failed to object to the prosecutor's misconduct of referencing facts not in evidence and the prosecutor's appeal to sympathy in both opening and closing arguments. Defense counsel's failure to object denied petitioner of his right to effective counsel and due process of law.

IV. The prosecution failed to produce sufficient evidence to identify petitioner as a perpetrator of the offenses beyond a reasonable doubt.

V. Petitioner was denied the effective assistance of counsel contrary to the Sixth Amendment where counsel failed to call material and alibi witness; for an expert witness; the cumulative effect of error deprived

petitioner of a fair trial and due process.

VI. Petitioner was denied due process of law and a fair trial by the presentation of false evidence known to be such by the prosecutor.

VII. Petitioner is entitled to resentencing under *Alleyne v. United States*, 133 SCT 2151 (2013). Where OV4, OV5, and OV7 were not found by a jury due process requires that petitioner be sentenced on accurate information.

VIII. Petitioner was denied a fair trial and impartial trial by aggressively questioning Kayana Davies and using tones to intimidate a witness; trial judge was apparently bias during sentencing by supporting the people's position on sentencing.

II. Standard of Review

28 U.S.C. § 2254(d), as amended by The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an

> unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11. "[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011)(citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Therefore, in order to obtain habeas relief in federal court, a state prisoner is required to show that the state court's rejection of his claim "was so lacking in justification

that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington,* 562 U.S. at 103. A habeas petitioner should be denied relief as long as it is within the "realm of possibility" that fairminded jurists could find the state court decision to be reasonable. *See Woods v. Etherton,* 136 S. Ct. 1149, 1152 (2016).

III. Discussion

A. Claims ## 1, 2, 3, and 5. Ineffective assistance of counsel.

Petitioner alleges that he was denied due process and the effective assistance of counsel when trial counsel stipulated to testimony given by an expert for the prosecution, when trial counsel stipulated and failed to object to irrelevant testimony, when trial counsel failed to object to prosecutorial misconduct, and when trial counsel failed to call various witnesses.

To show that he was denied the effective assistance of counsel under federal constitutional standards, a defendant must satisfy a two prong test. First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth

Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In so doing, the defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.* Petitioner must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. *Strickland,* 466 U.S. at 689. Second, the defendant must show that such performance prejudiced his defense. *Id.* To demonstrate prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. "*Strickland*'s test for prejudice is a demanding one. 'The likelihood of a different result must be substantial, not just conceivable.'" *Storey v. Vasbinder*, 657 F.3d 372, 379 (6th Cir. 2011)(quoting *Harrington*, 562 U.S. at 112). The Supreme Court's holding in *Strickland* places the burden on the defendant who raises a claim of ineffective assistance of counsel, and not the state, to show a reasonable probability that the result of the proceeding would have been different, but for counsel's allegedly deficient performance. *See Wong v. Belmontes*, 558 U.S. 15, 27 (2009).

On habeas review, "the question 'is not whether a federal court

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

doubt, but must also affirmatively entertain the range of possible reasons that counsel may have had for proceeding as he or she did. *Cullen v. Pinholster,* 563 U.S. 170, 196 (2011).

Petitioner first alleges that trial counsel was ineffective by stipulating to testimony given by the prosecution's expert witness.

The trial court judge qualified Larry Smith as an expert in "the workings of Metro PSC" and how it stored, recorded and registered data, finding that "[S]mith's testimony, which was based on the cell phone records as well as Smith's specialized knowledge regarding Metro PCS cell phone towers, helped the jury understand information at issue in the case that an average juror would not have previously known." *People v. Robinson*, 2015 WL 6438239, at *2. The Michigan Court of Appeals also found that "[a]ny objection by defense counsel to Smith testifying in that capacity [] would have been futile." *Id.*

Federal habeas courts "'must defer to a state court's interpretation of its own rules of evidence and procedure' when assessing a habeas petition." *Miskel v. Karnes*, 397 F.3d 446, 453 (6th Cir. 2005)(quoting *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988)). Because the Michigan Court of Appeals determined that this evidence was admissible under Michigan

law, this Court must defer to that determination in resolving petitioner's ineffective assistance of counsel claim. *See Brooks v. Anderson*, 292 F. App'x 431, 437-38 (6th Cir. 2008). The failure to object to relevant and admissible evidence is not ineffective assistance of counsel. *See Alder v. Burt,* 240 F. Supp. 2d 651, 673 (E.D. Mich. 2003).

Petitioner has failed to show a reasonable probability that Larry Smith's expert testimony would have been excluded had an objection been made by trial counsel. Therefore, petitioner is not entitled to habeas relief based on trial counsel's failure to object to the admission of this evidence. *See Pillette v. Berghuis*, 630 F. Supp. 2d 791, 802 (E.D. Mich. 2009); *aff'd in part and rev'd in part on other grds,* 408 F. App'x 873 (6th Cir. 2010); *cert. den.* 132 S. Ct. 125 (2011). Petitioner is not entitled to relief on his first claim.

Petitioner alleges that he was denied the effective assistance of trial counsel when counsel stipulated to the introduction of testimony regarding irrelevant sex tapes and text messages.

Petitioner claims that trial counsel was ineffective by failing to object to this evidence because it was not admissible under M.R.E. 404(b) and it was too prejudicial.

When defense counsel focuses on some issues to the exclusion of others, there is a strong presumption that he or she did so for tactical reasons, rather than through sheer neglect, and this presumption has particular force where an ineffective assistance of counsel claim is asserted by a federal habeas petitioner based solely on the trial record, where a reviewing court "may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive." *See Yarborough v. Gentry,* 540 U.S. 1, 5-6 (2003)(quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)). In the present case, counsel may very well have made a strategic decision not to object to this testimony, so as to avoid bringing undue attention to the evidence. *See Cobb v. Perini,* 832 F.2d 342, 347-48 (6th Cir. 1987). "[N]ot drawing attention to [a] statement may be perfectly sound from a tactical standpoint[,]."*United States v. Caver*, 470 F.3d 220, 244 (6th Cir. 2006). Stated differently, petitioner is unable to show that counsel's failure to object to this evidence—thus drawing attention to it—was deficient, so as to support an ineffective assistance of counsel claim. *See Smith v. Bradshaw*, 591 F.3d 517, 522 (6th Cir. 2010).

Furthermore, the Michigan Court of Appeals found that "[t]he

challenged evidence was relevant to factual issues in this case." *People v. Robinson*, 2015 WL 6438239, at *3. The Michigan Court of Appeals also found that the evidence was not unduly prejudicial, and that "defendant has not shown that defense counsel's failure to object to the evidence was objectively unreasonable." *Id.* at *4. Petitioner is not entitled to habeas relief on his ineffective assistance of trial counsel claim pertaining to the admission of testimony regarding the sex tapes or text messages, because the evidence was admissible and was found to be not unduly prejudicial. Petitioner is not entitled to relief on his second claim.

Petitioner alleges that counsel was ineffective for failing to object to various forms of prosecutorial misconduct. Petitioner first claims that the prosecutor improperly referenced facts not in evidence in both opening and closing argument. Petitioner further claims that the prosecutor attempted to invoke the jury's sympathy during opening and closing argument.

To show prejudice under *Strickland* for failing to object to prosecutorial misconduct, a habeas petitioner must show that but for the alleged error of his trial counsel in failing to object to the prosecutor's improper questions and arguments, there is a reasonable probability that

the proceeding would have been different. *See Hinkle v. Randle,* 271 F.3d 239, 245 (6th Cir. 2001).

Petitioner claims that the prosecutor improperly argued that petitioner was a controlling, possessive, and manipulative boyfriend. The Michigan Court of Appeals rejected petitioner's claim, finding:

> Substantial evidence was submitted on the record which could lead to a reasonable inference that defendant was jealous of Taylor's relationship with Chubbs, which the prosecutor argued was his motive for the crime.
>
> Defendant raises several specific instances of prosecutor misconduct. During closing argument, the prosecutor stated that defendant took the same path as the shooter, which defendant asserts was unsupported by the record. However, contrary to defendant's assertion, the prosecutor's remarks regarding defendant's location were supported by Smith's testimony and the cell phone records, and reasonable inferences arising from the evidence. The prosecutor's argument that Taylor was "able to see" the shooter's face was based on Taylor's testimony that she saw defendant's face. The prosecutor's argument that defendant had "facial hair right around his chin like [witness Tremaine Maddox] said" the shooter had was a reasonable inference from the evidence that defendant had facial hair on the date of the shooting and Maddox's description of the shooter as having a full facial beard. Defendant contends that there was no evidence from which the prosecutor could infer that defendant had left a hickey on Taylor's neck on the day of the shooting, but Taylor testified that defendant put a hickey on her neck on May 13, 2010, and Miller testified that Taylor had a "big purple mark on her neck" that day. Also, in a text message to Chubb, defendant himself wrote, "How u think she got the hicky fool & when u was knockin I was bustn." The prosecutor's references to other women, relationships, or phone numbers, e.g., "Terri" and

> "Nicole," were direct references from testimony and text messages that were admitted into evidence. Taylor testified that she knew Nicole Waller was the mother of defendant's children and had spoken to her on the phone before. Accordingly, we conclude that the prosecutor's remarks were not clearly improper.

People v. Robinson, 2015 WL 6438239, at *5.

The Michigan Court of Appeals found that the remarks made by the prosecutor during opening and closing arguments were supported by the record. The Michigan Court of Appeals also found that "to the extent that the prosecutor's remarks could be considered impermissible references, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the results of the proceeding would have been different." *Id.* Petitioner's claim is meritless.

Petitioner alleges that trial counsel was ineffective by failing to object to the prosecutor's comments that improperly appealed to the jury's sympathy.

The Michigan Court of Appeals rejected petitioner's argument finding that "the trial court intervened and directed the prosecutor to rephrase her argument." The Michigan Court of Appeals further found that "the trial court's instructions that the lawyers' statements and arguments are not evidence, and that the case should be decided on the basis of evidence

were sufficient to dispel any possible prejudice." *Id.* at *6.

Petitioner has failed to show that counsel was ineffective for failing to object to the prosecutor's closing argument, in light of the fact that the Michigan Court of Appeals found on direct appeal that the remarks were not improper. *See Finks v. Timberman-Cooper,* 159 F. App'x 604, 611 (6th Cir. 2005); *Campbell v. United States,* 266 F. Supp. 2d 587, 589-90 (E.D. Mich. 2003). Petitioner cannot likewise show that trial counsel was ineffective by failing to object to the prosecutor's argument to ask the jury to sympathize with the victim. The trial court intervened and then properly instructed the jury that arguments given by the attorneys are not evidence. Because the prosecutor's conduct was either not improper or harmless error, counsel's failure to object to the prosecutor's comments and questions was not ineffective assistance of counsel. *See Meade v. Lavigne,* 265 F. Supp. 2d 849, 866 (E.D. Mich. 2003). Petitioner is not entitled to relief on his third claim.

In his fifth claim, petitioner alleges that trial counsel was ineffective for failing to investigate and call various witnesses.

Petitioner claims that trial counsel was ineffective for failing to call Vanessa Hudson and Nicole Haller as alibi witnesses. Petitioner also

claims that trial counsel was ineffective for failing to call Tracey May, Jasmine Bradford, and Charles Mitchell as res geste witnesses. Petitioner further claims that trial counsel was ineffective for failing to call petitioner to testify. Lastly, petitioner claims that trial counsel was ineffective for failing to call an expert witness.

As an initial matter, the Michigan Court of Appeals rejected petitioner's claim in part because he failed to submit affidavits from Haller, Bradford, or Mitchell. *People v. Robinson*, 2015 WL 6438239, at *8. Petitioner has also not provided this Court with any affidavits from these witnesses concerning their proposed testimony and willingness to testify on petitioner's behalf. Conclusory allegations of ineffective assistance of counsel, without any evidentiary support, do not provide a basis for habeas relief. *See Workman v. Bell,* 178 F.3d 759, 771 (6th Cir. 1998). Petitioner has failed to attach any offer of proof or any affidavits sworn by the proposed witnesses. Petitioner has offered, neither to the Michigan courts nor to this Court, any evidence beyond his own assertions as to whether the witnesses would have been able to testify and what the content of these witnesses' testimony would have been. In the absence of such proof, petitioner is unable to establish that he was prejudiced by

counsel's failure to call these witnesses to testify at trial, so as to support the second prong of an ineffective assistance of counsel claim. *See Clark v. Waller,* 490 F.3d 551, 557 (6th Cir. 2007).

The Michigan Court of Appeals rejected petitioner's claim that trial counsel was ineffective for failing to call Ms. Hudson as an alibi witness, because trial counsel could have reasonably concluded that her credibility could have been called into question:

> Hudson avers that she went to Waller's house "around 3:30 or 4 p.m ." to explain to Waller why defendant had her dance clothes and her van, and that she thereafter left with defendant to pick up parts for defendant to fix her van. Hudson further avers that she was with defendant "from 4 to 5:30 p.m." Defendant avers that he texted Hudson, "911 where are u," because Waller was threatening to burn Hudson's dance clothes. The cell phone records show that defendant sent this "911" text at 5:28 p.m., contrary to Hudson's declaration that she and defendant were already together. It would have been reasonable for counsel to anticipate that the prosecutor would question the credibility of Hudson, and counsel reasonably may have determined that the credibility issues would have seriously undermined any progress defense counsel had made in presenting the misidentification defense and discrediting the prosecution's witnesses.

People v. Robinson, 2015 WL 6438239, at *8.

Under *Strickland*, a court must presume that decisions by counsel as to whether to call or question witnesses are matters of trial strategy. *See Hutchison v. Bell*, 303 F.3d 720, 749 (6th Cir.2002).

Defense counsel's failure to call alibi witnesses to testify at petitioner's trial was a matter of reasonable trial strategy, and did not constitute ineffective assistance of counsel, where counsel instead chose to rely on discrediting the prosecution's witness by challenging the strength of her identification of petitioner as the shooter. *See Hale v. Davis*, 512 F. App'x 516, 521-22 (6th Cir. 2013). Indeed, "[t]o support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates. All that happened here is that counsel pursued a course that conformed to the first option ... In light of the record here there was no basis to rule that the state court's determination was unreasonable." *Id.* (quoting *Richter*, 131 S. Ct. at 790)).

Defense counsel was not ineffective in failing to call Ms. Hudson as an alibi witness in light of the fact that her proposed testimony about the time that she was with petitioner from 4:00 to 5:30 p.m. could have been impeached by evidence that petitioner sent Ms. Hudson a text message at 5:28 p.m. asking where she was. Because Ms. Hudson's proposed alibi was inconsistent with petitioner's text message and could have been subjected to impeachment on this basis, counsel was not ineffective for

failing to present an alibi defense. *See e.g. Thurmond v. Carlton,* 489 F. App'x 834, 841 (6th Cir. 2012)(trial counsel's decision not to call an alibi witness did not amount to ineffective assistance where the statements of the petitioner and his alibi witness were inconsistent with each other and internally).

Petitioner further claims that trial counsel was ineffective for failing to call Tracey Mayes as a res gestae witness. The Michigan Court of Appeals rejected this claim as follows:

> With regard to the proposed res geste witnesses, May averred in an affidavit that he observed Taylor "duck face forward" after shots were fired, which defendant sought as support for a conclusion that Taylor could not have seen the shooter. May's testimony, even if assumed true, would have been cumulative to the testimony of Davies that Taylor ducked down. Other than providing information that was adequately covered through another witness, defendant does not state what new helpful information May could have offered that would have affected the outcome of the trial.

People v. Robinson, 2015 WL 6438239, at *8.

Petitioner was not prejudiced by counsel's failure to call Mr. May because his proposed testimony was cumulative of other testimony presented at trial in support of petitioner's claim that Ms. Taylor had ducked down at the time of the shooting. *Wong,* 558 U.S. at 22-23.

Petitioner further claims that trial counsel was ineffective for failing to

call him to testify. The Michigan Court of Appeals rejected this claim:

> There is no basis to conclude that counsel's performance deprived defendant of his constitutional right to testify. The record shows that, after the prosecution rested, defense counsel stated on the record that he and defendant had discussed whether defendant was going to testify and that defendant had elected not to testify. Defendant acknowledged to the court that he did not want to testify. Defendant never expressed disagreement with counsel's statement that he did not wish to testify, did not claim that he was ignorant of his right to testify, or that defense counsel had coerced him into not testifying. The decision whether to call defendant as a witness was a matter of trial strategy and defendant has not identified or offered any evidence to overcome the strong presumption of sound strategy.

People v. Robinson, 2015 WL 6438239, at *9 (internal citation omitted).

When a tactical decision is made by an attorney that a defendant should not testify, the defendant's assent is presumed. *Gonzales v. Elo*, 233 F.3d 348, 357 (6th Cir. 2000). A federal court sitting in habeas review of a state court conviction should have "a strong presumption that trial counsel adhered to the requirements of professional conduct and left the final decision about whether to testify with the client." *Hodge v. Haeberlin*, 579 F.3d 627, 639 (6th Cir. 2009)(internal citation omitted). To overcome this presumption, a habeas petitioner must present record evidence that he somehow alerted the trial court to his desire to testify. *Id.* Because the record is void of any indication by petitioner that he disagreed with

counsel's advice that he should not testify, petitioner has not overcome the presumption that he willingly agreed to counsel's advice not to testify or that his counsel rendered ineffective assistance of counsel. *Gonzales,* 233 F.3d at 357.

Moreover, petitioner failed to show that he was prejudiced by counsel's advice concerning whether he should testify or not. Petitioner merely stated that he would have testified that he had nothing to do with the crime, without providing any details of his proposed testimony, which is insufficient to establish prejudice based upon counsel's allegedly deficient advice concerning whether he should testify or not. *Hodge,* 579 F.3d at 641 (defendant did not demonstrate prejudice required to establish claim of ineffective assistance of counsel based upon defense counsel's alleged impairment of his right to testify at capital murder trial where defendant did not provide details about substance of his testimony and merely speculated that his testimony would have had impact on jury's view of certain witnesses' credibility and of his involvement in murders).

Petitioner finally claims that trial counsel was ineffective for failing to call an expert to challenge the prosecution expert's testimony on cell phones. A habeas petitioner's claim that trial counsel was ineffective for

failing to call an expert witness cannot be based on speculation. *See Keith v. Mitchell,* 455 F.3d 662, 672 (6th Cir. 2006). Petitioner has offered no evidence to this Court that he had an expert on cell phones who would have impeached the prosecution expert's testimony concerning the cell phone evidence in this case. Petitioner is not entitled to relief on his fifth claim.

B. Claim # 4. The sufficiency of the evidence claim.

Petitioner alleges that there was insufficient evidence to identify him as the perpetrator of the offenses beyond a reasonable doubt.

It is beyond question that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship,* 397 U.S. 358, 364 (1970). But the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is, "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). This inquiry, however, does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Instead, the relevant question is whether, after viewing

the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 318-19 (internal citation and footnote omitted)(emphasis in the original).

A federal habeas court may not overturn a state court decision that rejects a sufficiency of the evidence claim merely because the federal court disagrees with the state court's resolution of that claim. Instead, a federal court may grant habeas relief only if the state court decision was an objectively unreasonable application of the *Jackson* standard. *See Cavazos v. Smith,* 565 U.S. 1, 2 (2011). "Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold." *Id.* For a federal habeas court reviewing a state court conviction, "the only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 566 U.S. 650, 656 (2012). A state court's determination that the evidence does not fall below that threshold is entitled to "considerable deference under [the] AEDPA." *Id.*

Petitioner claims that the prosecutor offered no evidence to prove, beyond a reasonable doubt, that petitioner was the perpetrator of the offenses. Under Michigan law, "[t]he identity of a defendant as the perpetrator of the crimes charged is an element of the offense and must be proved beyond a reasonable doubt." *Byrd v. Tessmer*, 82 F. App'x 147, 150 (6th Cir. 2003)(citing *People v. Turrell*, 25 Mich. App. 646, 181 N.W.2d 655, 656 (1970)).

In the present case, the Michigan Court of Appeals found that Taylor positively identified petitioner as the shooter, finding sufficient evidence to sustain his conviction as follows:

> Taylor unequivocally identified defendant as the shooter at trial. Taylor was sitting in the front seat of Chubb's car, while Chubb was standing on the side of the vehicle, pumping gas. Defendant approached on a bike and, as Chubb's body fell, Taylor saw defendant's face. Taylor testified that she had no trouble perceiving what occurred. Taylor had been in an intimate relationship with defendant for two years. From this evidence, a jury could reasonably infer that Taylor was familiar with defendant and could identify him under the circumstances. Although defendant emphasizes that Taylor did not initially identify him as the shooter, Taylor explained that she did not initially identify defendant because she feared retribution. After deciding to come forward, Taylor consistently identified defendant as the shooter to the police, at the preliminary examination, and at trial. The jury was free to believe or disbelieve Taylor's testimony, including her explanation for her belated identification of defendant as the shooter. The credibility of identification testimony is a question of fact for the jury, and

> Taylor's testimony, if believed, was sufficient to establish defendant's identity as the shooter. Further, apart from Taylor's positive and unequivocal identification of defendant, the prosecution presented evidence that a cell phone linked to defendant was in the area at the time of the shooting and that defendant had communicated via text about obtaining a .45–caliber gun—the same caliber that was used to shoot Chubb. Accordingly, when viewed in a light most favorable to the prosecution, there was sufficient evidence for the jury to identify defendant as the perpetrator beyond a reasonable doubt.

People v. Robinson, 2015 WL 6438239, at *7.

The Court notes that "the testimony of a single, uncorroborated prosecuting witness or other eyewitness is generally sufficient to support a conviction." *Brown v. Davis,* 752 F.2d 1142, 1144 (6th Cir. 1985)(internal citations omitted). Taylor unequivocally identified petitioner at trial as the shooter based of her personal observations. This evidence was sufficient to support petitioner's convictions. *See Thomas v. Perry,* 553 F. App'x 485, 487–88 (6th Cir. 2014).

Petitioner's cell phone activity near the crime scene at the time of the crime was also circumstantial evidence that was sufficient to establish petitioner's identity. *See United States v. Starnes*, 552 F. App'x 520, 525 (6th Cir. 2014).

Because there were multiple pieces of evidence to establish petitioner's identity as the perpetrator of the shooting, the Michigan Court

of Appeals did not unreasonably apply *Jackson v. Virginia* in rejecting petitioner's sufficiency of evidence claim. *See Moreland v. Bradshaw*, 699 F.3d 908, 919-21 (6th Cir. 2012). Petitioner is not entitled to relief on his fourth claim.

C. Claim # 3. The perjury claim.

Petitioner alleges that the prosecutor knowingly presented perjured testimony by allowing Taylor to testify that petitioner was the shooter when her initial police statement did not identify him as the shooter. Petitioner further claims that perjured testimony was presented when Taylor testified that she could see the shooter, when other eyewitnesses testified that they all ducked down, in the car, at the time of the shooting.

The deliberate deception of a court and jurors by the presentation of known and false evidence is incompatible with the rudimentary demands of justice. *Giglio v. United States*, 405 U.S. 150, 153 (1972). There is also a denial of due process when the prosecutor allows false evidence or testimony to go uncorrected. *Napue v. Illinois*, 360 U.S. 264, 269 (1959)(internal citations omitted). To prevail on a claim that a conviction was obtained by evidence that the government knew or should have known to be false, a defendant must show that the statements were

actually false, that the statements were material, and that the prosecutor knew they were false. *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998). However, a habeas petitioner must show that a witness' statement was "indisputably false," rather than misleading, to establish a claim of prosecutorial misconduct or a denial of due process based on the knowing use of false or perjured testimony. *Byrd v. Collins*, 209 F.3d 486, 517-18 (6th Cir. 2000).

Mere inconsistencies in a witness' testimony do not establish the knowing use of false testimony by the prosecutor. *Coe*, 161 F.3d at 343. Additionally, the fact that a witness contradicts himself or herself or changes his or her story also does not establish perjury either. *Malcum v. Burt,* 276 F. Supp. 2d 664, 684 (E.D. Mich. 2003)(citing *Monroe v. Smith*, 197 F. Supp. 2d 753, 762 (E.D. Mich. 2001)). A habeas petition should be granted if perjury by a government witness undermines the confidence in the outcome of the trial. *Id.*

At trial, Taylor testified:

> Well, I was turned around in the seat. And then when Jamel just fell, I had seen him just pointing the gun, and then he just rode off.

(T. 1/27/2011, p. 37)

When asked why she did not identify petitioner in the earlier police report as the shooter, Taylor testified:

> I was scared that something would happen to me for telling. And, I don't know, I was just scared.

(*Id.*, p. 43).

Petitioner failed to show that Ms. Taylor testified falsely when she identified him as the shooter at trial. Conclusory allegations of perjury in a habeas corpus petition must be corroborated by some factual evidence. *Barnett v. United States*, 439 F.2d 801, 802 (6th Cir.1971). Petitioner presented no evidence that Ms. Taylor's trial testimony was false. Taylor did not testify falsely and indicated that the inconsistency in her earlier statement to the police was because she was afraid. Petitioner is not entitled to relief on his third claim.

D. Claim # 7. The sentencing guidelines claim.

Petitioner claims his sentencing guidelines were incorrectly scored.

Respondent submits that petitioner's seventh claim is unexhausted.

As a general rule, a state prisoner who seeks federal habeas relief must first exhaust his available state court remedies before raising a claim in federal court. 28 U.S.C. § 2254(b) and (c). *See Picard v. Connor*, 404 U. S. 270, 275-78 (1971). Although exhaustion is not a jurisdictional issue, "it

is a threshold question that must be resolved" before a federal court can reach the merits of any claim contained in a habeas petition. *See Wagner v. Smith,* 581 F.3d 410, 415 (6th Cir. 2009).

A habeas petitioner's failure to exhaust his state court remedies does not deprive a federal court of its jurisdiction to consider the merits of the habeas petition. *Granberry v. Greer*, 481 U.S. 129, 131 (1987). An unexhausted claim may be adjudicated if the unexhausted claim is without merit, such that addressing the claim would be efficient and would not offend the interest of federal-state comity. *Prather v. Rees,* 822 F.2d 1418, 1422 (6th Cir. 1987); *see also* 28 U.S.C. § 2254(b)(2).

Petitioner's claim that the state trial court incorrectly scored or calculated his sentencing guidelines range under the Michigan Sentencing Guidelines is not a cognizable claim for federal habeas review, because it is a state law claim. *See Tironi v. Birkett*, 252 F. App'x 724, 725 (6th Cir. 2007)*; Howard v. White,* 76 F. App'x 52, 53 (6th Cir. 2003); *Whitfield v. Martin,* 157 F. Supp. 2d 758, 762 (E.D. Mich. 2001). Petitioner had " no state-created interest in having the Michigan Sentencing Guidelines applied rigidly in determining his sentence." *See Mitchell v. Vasbinder,* 644 F. Supp. 2d 846, 867 (E.D. Mich. 2009). Petitioner "had no federal

constitutional right to be sentenced within Michigan's guideline minimum sentence recommendations." *Doyle v. Scutt,* 347 F. Supp. 2d 474, 485 (E.D. Mich. 2004). Any error by the trial court in calculating his guideline score would not merit habeas relief. *Id.* Petitioner's claim that the state trial court improperly departed above the correct sentencing guidelines range would not entitle him to habeas relief, because such a departure does not violate any of petitioner's federal due process rights. *Austin v. Jackson*, 213 F.3d 298, 301 (6th Cir. 2000).

Petitioner further alleges that the trial court judge violated his Sixth Amendment right to a trial by jury by using factors that had not been submitted to a jury and proven beyond a reasonable doubt or admitted to by petitioner when scoring these guidelines variables under the Michigan Sentencing Guidelines.[2]

On June 17, 2013, the United States Supreme Court ruled that any fact that increases the mandatory minimum sentence for a crime is an element of the criminal offense that must be proven beyond a reasonable doubt. *See Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013).

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[2] Under Michigan law, only the minimum sentence must presumptively be set within the appropriate sentencing guidelines range. *See People v. Babcock,* 469 Mich. 247, 255, n. 7, 666 N.W.2d 231 (2003)(citing M.C.L.A. § 769.34(2)). The maximum sentence is not determined by the trial judge but is set by law. *See People v. Claypool,* 470 Mich. 715, 730, n. 14, 684 N.W.2d 278 (2004)(citing M.C.L.A. § § 769.8).

Alleyne is an extension of the Supreme Court's holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004), in which the U.S. Supreme Court held that any fact that increases or enhances a penalty for a crime beyond the prescribed statutory maximum for the offense must be submitted to the jury and proven beyond a reasonable doubt. In reaching this conclusion, the Supreme Court overruled *Harris v. United States*, 536 U.S. 545 (2002), in which the Supreme Court had held that only factors that increase the maximum, as opposed to the minimum, sentence must be proven beyond a reasonable doubt to a fact finder. *Alleyne,* 133 S. Ct. at 2157-58. The Supreme Court, however, indicated that its decision did not mean that every fact influencing judicial discretion in sentencing must be proven to a jury beyond a reasonable doubt. *Id.* at 2163.

Alleyne is inapplicable to petitioner's case, because the Supreme Court's holding in "*Alleyne* dealt with judge-found facts that raised the mandatory minimum sentence under a statute, not judge-found facts that trigger an increased guidelines range," which is what happened to petitioner in this case. *See United States v. Cooper*, 739 F.3d 873, 884 (6th Cir. 2014); *see also United States v. James*, 575 F. App'x 588, 595

(6th Cir. 2014)(collecting cases and noting that at least four post-*Alleyne* unanimous panels of the Sixth Circuit have "taken for granted that the rule of *Alleyne* applies only to mandatory minimum sentences."); *Saccoccia v. Farley*, 573 F. App'x 483, 485 (6th Cir. 2014)("But *Alleyne* held only that 'facts that increase a mandatory statutory minimum [are] part of the substantive offense.'...It said nothing about guidelines sentencing factors...."). The Sixth Circuit, in fact, has ruled that *Alleyne* did not decide the question whether judicial fact finding under Michigan's indeterminate sentencing scheme violates the Sixth Amendment. *See Kittka v. Franks*, 539 F. App'x 668, 673 (6th Cir. 2013).

The Court is aware that the Michigan Supreme Court recently relied on the *Alleyne* decision in holding that Michigan's Sentencing Guidelines scheme violates the Sixth Amendment right to a jury trial. *See People v. Lockridge*, 498 Mich. 358; 870 N.W.2d 502 (Mich. 2015). However, petitioner cannot rely on *Lockridge* to obtain relief with this Court. The AEDPA standard of review found in 28 U.S.C. § 2254 (d)(1) prohibits the use of lower court decisions in determining whether the state court decision is contrary to, or an unreasonable application of, clearly established federal law. *See Miller v. Straub,* 299 F.3d 570, 578-579 (6th

Cir. 2002). "The Michigan Supreme Court's decision in *Lockridge* does not render the result 'clearly established' for purposes of habeas review." *Haller v. Campbell*, No. 1:16-CV-206, 2016 WL 1068744, at *5 (W.D. Mich. Mar. 18, 2016). In light of the fact that the Sixth Circuit has ruled that *Alleyne* does not apply to sentencing guidelines factors, reasonable jurists at a minimum could disagree about whether *Alleyne* applies to the calculation of Michigan's minimum sentencing guidelines. *Id.* at *6. "*Alleyne* therefore did not clearly establish the unconstitutionality of the Michigan sentencing scheme and cannot form the basis for habeas corpus relief." *Id.; see also Perez v. Rivard,* No. 2:14-CV-12326, 2015 WL 3620426, at *12 (E.D. Mich. June 9, 2015)(petitioner not entitled to habeas relief on claim that his sentencing guidelines were scored in violation of *Alleyne*). Petitioner is not entitled to relief on his seventh claim.

E. Claim # 8. The judicial misconduct claim.

Petitioner claims that he was denied a fair trial because of judicial misconduct. Respondent contends that petitioner's eighth claim is procedurally defaulted.

When the state courts clearly and expressly rely on a valid state procedural bar, federal habeas review is also barred unless petitioner can

demonstrate "cause" for the default and actual prejudice as a result of the alleged constitutional violation, or can demonstrate that failure to consider the claim will result in a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991). If a petitioner fails to show cause for his procedural default, it is unnecessary for the court to reach the prejudice issue. *Smith v. Murray*, 477 U.S. 527, 533 (1986). However, in an extraordinary case, where a constitutional error has probably resulted in the conviction of one who is actually innocent, a federal court may consider the constitutional claim presented even in the absence of a showing of cause for procedural default. *Murray v. Carrier*, 477 U.S. 478, 479-80 (1986). However, to be credible, such a claim of innocence requires a petitioner to support the allegations of constitutional error with new reliable evidence that was not presented at trial. *Schlup v. Delo*, 513 U.S. 298, 324 (1995). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 624 (1998).

Respondent contends that petitioner's eighth claim is procedurally defaulted because petitioner failed to object to the alleged misconduct at the trial level.

Petitioner claims that the trial court judge's statements to Davies denied him of a fair trial. At trial, Davies was asked by the prosecutor whether she saw petitioner in the courtroom and to point to where he was seated and indicate what he was wearing. Davies did not verbally answer the prosecutor's questions, but instead began crying. The trial court judge excused the jury for lunch and thereafter addressed Davies:

> Young lady, let me tell you something. I don't know why you're crying or what you're afraid of, but you'd better get afraid of me because I'm not going to spend a lot of time begging you to answer questions, because I can send you to jail, and I will do so.

(T. 1/28/2011, p. 103)

In rejecting his claim, the Michigan Court of Appeals indicated that because petitioner did not object to the challenged remarks during his trial, appellate relief was precluded absent a showing of plain error which affected petitioner's substantial rights. *People v. Robinson*, 2015 WL 6438239, at *13. In this case, the Michigan Court of Appeals clearly indicated that by failing to object at trial, petitioner had not preserved his claim pertaining to the comments made by the trial court judge to Davies. The fact that the Michigan Court of Appeals engaged in plain error review of petitioner's claim does not constitute a waiver of the state procedural

default. *Seymour v. Walker,* 224 F.3d 542, 557 (6th Cir. 2000). Instead, this court should view the Michigan Court of Appeals' review of petitioner's claim for plain error as enforcement of the procedural default. *Hinkle v. Randle,* 271 F.3d 239, 244 (6th Cir. 2001). Petitioner's eighth claim is therefore procedurally defaulted.

In the present case, petitioner has not offered any reasons to excuse the procedural default. Because petitioner has not alleged or demonstrated any cause for his procedural default, it is unnecessary to reach the prejudice issue regarding his defaulted claim. *Smith*, 477 U.S. at 533; *see also Malcum v. Burt,* 276 F. Supp. 2d 664, 677 (E.D. Mich. 2003). Additionally, petitioner has not presented any new reliable evidence to support any assertion of innocence which would allow this Court to consider petitioner's eighth claim as a ground for a writ of habeas corpus in spite of the procedural default. Petitioner's sufficiency of evidence claim is insufficient to invoke the actual innocence doctrine to the procedural default rule. *Malcum,* 276 F. Supp. 2d at 677. Because petitioner has not presented any new reliable evidence that he is innocent of these crimes, a miscarriage of justice will not occur if the Court declines to review petitioner's procedurally defaulted claim on the merits. *Id.*

IV. Conclusion

The Court denies the petition for a writ of habeas corpus.

A habeas petitioner must receive a certificate of appealability ("COA") in order to appeal the denial of a habeas petition for relief from either a state or federal conviction.[3] 28 U.S.C. §§ 2253(c)(1)(A), (B). A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a federal district court rejects a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000).

This Court denies a certificate of appealability because reasonable jurists would not find this Court's assessment of the claims to be debatable or wrong. *See Slack v. McDaniel*, 529 U.S. at 484.

Although this Court will deny a certificate of appealability to petitioner, the standard for granting an application for leave to proceed *in*

---

[3] Effective December 1, 2009, the newly created Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), 28 U.S.C. foll. § 2254; *see also Strayhorn v. Booker*, 718 F. Supp. 2d 846, 875 (E.D. Mich. 2010).

forma pauperis (IFP) is a lower standard than the standard for certificates of appealability. *See Foster v. Ludwick,* 208 F. Supp. 2d 750, 764 (E.D. Mich. 2002). Whereas a certificate of appealability may only be granted if petitioner makes a substantial showing of the denial of a constitutional right, a court may grant IFP status if it finds that an appeal is being taken in good faith. *Id.* at 764-65; 28 U.S.C. § 1915(a)(3); Fed. R.App.24 (a). "Good faith" requires a showing that the issues raised are not frivolous; it does not require a showing of probable success on the merits. *Id,* at 765. Although jurists of reason would not debate this Court's resolution of petitioner's claims, the issues are not frivolous; therefore, an appeal could be taken in good faith and petitioner may proceed *in forma pauperis* on appeal. *Id.*

V. ORDER

IT IS ORDERED that:

(1) the Petition for a Writ of Habeas Corpus is **DENIED.**

(2) a Certificate of Appealability is **DENIED.**

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

S/Denise Page Hood
Denise Page Hood
Chief Judge, United States District Court

Dated: July 27, 2018

I hereby certify that a copy of the foregoing document was served upon counsel of record on July 27, 2018, by electronic and/or ordinary mail.

S/LaShawn R. Saulsberry
Case Manager

Order

Michigan Supreme Court
Lansing, Michigan

May 2, 2016

Robert P. Young, Jr.,
Chief Justice

152728 & (87)

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

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 152728
COA: 321841
Wayne CC: 10-006297-FC

LAMARR VALDEZ ROBINSON,
Defendant-Appellant.

_____/

On order of the Court, the motion to supplement application is GRANTED. The application for leave to appeal the October 22, 2015 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

t0418

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

May 2, 2016

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMARR VALDEZ ROBINSON,

Defendant-Appellant.

UNPUBLISHED
October 22, 2015

No. 321841
Wayne Circuit Court
LC No. 10-006297-FC

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent terms of 47-1/2 to 120 years' imprisonment for the assault and felon-in-possession convictions, to be served consecutive to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

A jury convicted the 39-year-old defendant of shooting 20-year-old Jamel Chubb at a Detroit gas station on May 13, 2010. The prosecution presented evidence that defendant and Chubb were both dating 19-year-old Jessica Taylor, whom defendant had been dating for a couple of years. Defendant learned about the relationship between Taylor and Chubb, and thereafter followed them on multiple occasions and sent several text messages to both Taylor and Chubb. On the day of the shooting, the men had a brief encounter at Taylor's mother's Livonia residence. Upon leaving, defendant told Taylor, "Don't let me catch y'all in the hood." Later that day, Chubb, Taylor, Jasmine Miller, and Kayana Davies were all at Miller's Detroit residence, and ultimately went to a local gas station. The gas station surveillance video captured an individual wearing a hoodie and riding a bike approach Chubb and shoot him as he was pumping gas. Taylor, who was in the front passenger seat of the vehicle, identified defendant as the shooter. Cellular phone tracking evidence also placed defendant in the area of the gas station at the time of the shooting. The defense theory at trial was misidentification, and the defense argued, inter alia, that Taylor's identification was not credible and the cell phone tracking evidence was not reliable.

I. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises three separate ineffective assistance of counsel claims in his principal brief on appeal. Because he failed to raise these claims below in a motion for a new trial or request for an evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). "To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice." *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013), citing *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Nix*, 301 Mich App at 207. "A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

A. EXPERT WITNESS

Defendant argues that defense counsel was ineffective for failing to object to the admission of Larry Smith's expert testimony or request a *Daubert*[1] hearing regarding that testimony. We disagree. At trial, the court qualified Smith as an expert in "the workings of Metro PCS" and how its records are stored, recorded, and registered. Smith thereafter provided cell phone tracking testimony that placed defendant in the area of the gas station at the time of the shooting.

"[T]he determination regarding the qualification of an expert and the admissibility of expert testimony is within the trial court's discretion." *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). MRE 702 governs the admissibility of expert testimony and provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 requires "a court evaluating proposed expert testimony [to] ensure that the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case." *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012). This inquiry, however, is a flexible one and must be tied to the facts of the particular case; thus, the factors for determining reliability may be different depending upon the type of expert testimony offered, as well as the facts of the case. *Id.*, citing

[1] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

Daubert v Merrell Dow Pharm, Inc, 509 US 579, 591; 113 S Ct 2786; 125 L Ed 2d 469 (1993); *Kumho Tire Co v Carmichael*, 526 US 137, 150; 119 S Ct 1167; 143 L Ed 2d 238 (1999).[2]

Defendant has not overcome the strong presumption that trial counsel's performance was within the range of reasonable professional conduct. *Payne*, 285 Mich App at 190. We are disinclined to declare that testimony of this nature should be considered "junk science," as requested by defendant. Defendant cannot direct this Court's attention to any Michigan case where cell phone tracking evidence presented by an expert witness has been rejected. Further, Smith's testimony, which was based on the cell phone records as well as Smith's specialized knowledge regarding Metro PCS cell phone towers, helped the jury understand information at issue in the case that an average juror would not have previously known. See *Kowalski*, 492 Mich at 121 (proffered testimony must involve a matter that is beyond the common understanding of the jury). For example, average jurors do not have the benefit of being trained in the functions of cell phone towers, derivative tracking, and techniques of locating or plotting origins of cell phone calls using cell phone records. Smith testified regarding these methods, and explained how this data was reflected in the cell phone records. Thus, Smith provided reliable testimony that assisted the jurors in understanding how defendant's cell phone records placed him (or his phone) in the area of the shooting.

Further, even assuming that defense counsel should have objected, defendant cannot show the probability that, but for counsel's errors, the result of the proceedings would have been different. *Nix*, 301 Mich App at 207. Defendant has not sufficiently challenged Smith's qualifications to render an opinion using cell phone records and towers to track locations. As defendant observes, Smith testified that he was a Metro PCS "custodian of records," and had been employed by the company for approximately three years. Smith explained that his position included the "storage and accuracy of [Metro PCS] phone records, such as subscriber information, call detail records, and text messages." Before defense counsel stipulated to Smith's qualifications, however, Smith testified that he had been trained in "how [Metro PCS] cellphone towers work," and "how handsets that belong or are purchased through Metro PCS register with those towers." He had also trained others on how the cellphone towers work. A witness is qualified to testify as an expert based on knowledge, skill, experience, training, or education. MRE 702. Because Smith's testimony demonstrated that he was qualified to provide the challenged cell phone tracking testimony based on his experience and training, any objection by defense counsel to Smith testifying in that capacity or to request a *Daubert* hearing would have been futile. Counsel is not ineffective for failing to raise a meritless objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

B. ADMISSION OF EVIDENCE

[2] Indicia of reliability relevant to scientific fields include testability, publication, and peer review, known or potential rate of error, and general acceptance in the field. *Daubert*, 509 US at 593-594. The United States Supreme Court has explained, however, that reliability concerns may differ depending on the type of expertise offered, and whether that expertise is based on personal knowledge, experience, or skill. *Kumho Tire Co*, 526 US at 150.

1. TAYLOR'S TESTIMONY AND EVIDENCE OF TEXT MESSAGES

During trial, Taylor testified about her relationships with both defendant and Chubb, and regarding numerous text message exchanges that occurred between the parties in the days leading up to the shooting. Defendant highlights that Taylor testified regarding a text exchange on May 6, 2010, when she and defendant discussed that she might have a sexually transmitted disease (STD), and that defendant referenced her hanging around Chubb. She and defendant later went to a clinic. Defendant blamed her for the STD, but based on the report, she knew she had gotten it from him. Taylor also testified that defendant recorded them having sex without her knowledge. Taylor stated that defendant told her to tell Chubb she was pregnant and she did so, even though she was not pregnant. Defendant further highlights that Smith read through several text messages exchanged between Taylor's, defendant's, and Chubb's phones, and text messages exchanged between defendant's and other women's cell phones.

Generally, all relevant evidence is admissible unless otherwise provided for in the court rules or the state or federal constitutions. MRE 402; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" MRE 403. Here, we conclude that the challenged evidence was relevant to factual issues in this case. While defendant highlights certain evidence, he ignores other evidence that ties in with the emphasized evidence, which shows the complete picture that the prosecution was trying to give the jury. The prosecution theorized that defendant's attempted manipulation and control of Taylor and Chubb culminated in a state of mind that led him to shoot Chubb, which was directly relevant to the prosecution's theory of the case and correspondingly weakened defendant's theory of the case. The evidence, presented in Taylor's testimony and text messages, provided context for the jury to understand the parties' relationship, and how defendant attempted to stop Taylor from seeing Chubb. The evidence also demonstrated that defendant was jealous of Taylor's relationship with Chubb and the level of animosity defendant had toward Chubb, which was probative of motive and intent. Regarding the existence of a sex tape, on the day of the shooting, defendant texted Chubb that he would release his and Taylor's sex tape as his frustration grew about Taylor and Chubb's relationship. Thus, Taylor's testimony about the existence of a sex tape was relevant. Defendant's defense of misidentification enhanced the value of the evidence, as the evidence tended to shed light on the likelihood that defendant committed the crimes.

Further, we are not persuaded that the evidence was unduly prejudicial. All evidence offered by the parties is prejudicial to some extent, but, pursuant MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Unfair prejudice exists where there is "a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury" or "it would be inequitable to allow the proponent of the evidence to use it." *Id.* at 75-76. We are not persuaded that the jury would not have been able to rationally weigh the

evidence. Accordingly, defendant has not shown that defense counsel's failure to object to the evidence was objectively unreasonable. *Nix*, 301 Mich App at 207.[3]

2. SABRINA JOHNSON'S TESTIMONY ABOUT A SEX TAPE

Defendant argues that defense counsel should have objected to the prosecutor eliciting from his stepmother her knowledge that defendant had a sex tape featuring celebrity Kim Kardashian. Defendant argues that "[t]he introduction of evidence regarding celebrities and their sexual proclivities presented a substantial risk of distracting and confusing the jury, and had no probative value." Defendant's argument is without merit. Defendant's stepmother's testimony was directly related to text messages that defendant sent before and after the shooting. As defendant was exchanging hostile text messages with Chubb, Chubb stopped responding. The last text that defendant sent, which he sent twice, stated, "Oh, yeah, I'm puttnn [sic] our sex tape in the hood and the net." Approximately a half hour after the shooting, defendant had a text exchange with his stepmother. During the exchanges, they discussed a sex tape and Kim Kardashian. The prosecutor theorized that, based on the evidence, defendant and his stepmother were discussing the sex tape that defendant possessed of him and Taylor. In closing argument, the prosecutor asked the jury to notice the similarity in appearance between Kardashian and Taylor. Thus, contrary to what defendant suggests, Johnson's testimony was not a random interjection about defendant owning a celebrity sex tape, but was relevant to a text message exchange that occurred in close proximity to the shooting and was probative to defendant's state of mind. We also disagree with defendant's argument that the evidence should have been excluded under MRE 403 because it was unduly prejudicial. Accordingly, defendant has not shown that defense counsel's failure to object to the evidence was objectively unreasonable. *Nix*, 301 Mich App at 207.

3. MILLER'S TESTIMONY

Miller, a friend of Taylor and Chubbs, testified that Taylor had lived with her and with defendant at times. When testifying about whether she had texted defendant directly, she testified:

> *A.* One night [defendant and Taylor] had got into a fight, and I'm not quite sure exactly what they were fighting about. But they got into a fight, and I had told him like instead of you putting your hands on her and, you know degrading her, then you can send her to my house.

---

[3] Defendant makes a general statement that the challenged evidence was also inadmissible pursuant to MRE 404(a), but does not specifically analyze the evidence under the court rule. MRE 404(a) provides that "[e]vidence of a person's character or a trait of character is not admissible for the purposes of proving action in conformity therewith[.]" Our review of the record reveals that that the evidence was not offered to show that defendant acted in conformity, contrary to MRE 404(a).

Q. So, you would communicate with the defendant by text?

A. Yes, I have.

We agree that Miller's testimony about defendant fighting Taylor at some unspecified time could be considered objectionable. MRE 404(b). But applying the appropriate level of deference to defense counsel's decision made during the course of trial, his failure to object to the testimony does not establish ineffective assistance of counsel. Defense counsel reasonably could have opted at that moment to avoid placing emphasis on, and highlighting to the jury, that one brief statement. "[T]his Court will not second-guess defense counsel's judgment on matters of trial strategy." *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

C. PROSECUTORIAL MISCONDUCT

Defendant next contends defense counsel was ineffective for failing to object to the prosecutor improperly "referenc[ing] facts not in evidence" and appealing to the juror's sympathy in opening statement and closing argument.

Defendant argues that, in opening and closing argument, the prosecutor referenced facts not in evidence. A prosecutor may not argue facts that are not supported by the evidence, but is free to argue the evidence and all reasonable inferences arising from it as it relates to the prosecutor's theory of the case. *People v Unger*, 278 Mich App 210, 236, 241; 749 NW2d 272 (2008). Further, the prosecutor need not state their inferences in the blandest possible language. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). When reviewing a prosecutor's remarks, "this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id.* at 64. Defendant, generally, asserts that the prosecution argued that defendant was a controlling, possessive, and manipulative boyfriend, which he claims was not supported by the evidence. We disagree. Substantial evidence was submitted on the record which could lead to a reasonable inference that defendant was jealous of Taylor's relationship with Chubbs, which the prosecutor argued was his motive for the crime.

Defendant raises several specific instances of prosecutor misconduct. During closing argument, the prosecutor stated that defendant took the same path as the shooter, which defendant asserts was unsupported by the record. However, contrary to defendant's assertion, the prosecutor's remarks regarding defendant's location were supported by Smith's testimony and the cell phone records, and reasonable inferences arising from the evidence. The prosecutor's argument that Taylor was "able to see" the shooter's face was based on Taylor's testimony that she saw defendant's face. The prosecutor's argument that defendant had "facial hair right around his chin like [witness Tremaine Maddox] said" the shooter had was a reasonable inference from the evidence that defendant had facial hair on the date of the shooting and Maddox's description of the shooter as having a full facial beard. Defendant contends that there was no evidence from which the prosecutor could infer that defendant had left a hickey on Taylor's neck on the day of the shooting, but Taylor testified that defendant put a hickey on her

neck on May 13, 2010, and Miller testified that Taylor had a "big purple mark on her neck" that day. Also, in a text message to Chubb, defendant himself wrote, "How u think she got the hicky fool & when u was knockin I was bustn." The prosecutor's references to other women, relationships, or phone numbers, e.g., "Terri" and "Nicole," were direct references from testimony and text messages that were admitted into evidence. Taylor testified that she knew Nicole Waller was the mother of defendant's children and had spoken to her on the phone before. Accordingly, we conclude that the prosecutor's remarks were not clearly improper.

To the extent that the prosecutor's remarks could be considered impermissible references, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Nix*, 301 Mich App at 207. Despite defense counsel's failure to object, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, that the jury was to decide the case based only on the properly admitted evidence, and that the jury was to follow the court's instructions. It is well established that jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235. Consequently, defendant has failed to establish an ineffective assitance of counsel claim.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's comments that improperly appealed to the jury's sympathy. Specifically, defendant points to comments that were made during rebuttal argument that "went to great lengths to cast aspersions upon [defendant's] general character that the judge chose to interrupt to ask the prosecutor to rephrase her rebuttal statement." Before the trial court intervened, the prosecutor had stated:

> Do you remember Jasmine Mille saying, you know, you hear the shots, and they kind of register in your head, and then you get down. Okay. This happened very quickly. There is nothing inconsistent about Kayana's testimony and Jessica's testimony. And I want you to think real hard about why this girl was so scared to get up here and even look in that man's direction.
>
> You can end the terror. You can end the defendant's reign of terror. It's up to you. This is a one-shot deal. If you do not give justice to Jamel, if you do not bring back a verdict of guilty today—
>
> *The court*: Excuse me, Counsel.
>
> *The prosecutor*: Yes, Judge.
>
> *The court*: You're going to rephrase your argument.
>
> *The prosecutor*: Thank you.

Prosecutors may not resort to arguments that ask jurors to sympathize with the victim. *Dobek*, 274 Mich App at 79. However, here, even if the prosecutor's argument could be considered objectionable, the trial court intervened and directed the prosecutor to rephrase her argument. Further, the trial court's instructions that the lawyers' statements and arguments are not evidence, and that the case should be decided on the basis of the evidence were sufficient to dispel any possible prejudice. *Unger*, 278 Mich App at 235. Therefore, defendant cannot

demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. Consequently, defendant has failed to establish an ineffective assitance of counsel claim.

II. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. We disagree with defendant's additional claims.

A. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecutor presented insufficient evidence that he was the person who shot Chubb. We disagree. Challenges to the sufficiency of the evidence are reviewed de novo to "determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Russell*, 297 Mich App 707, 721; 825 NW2d 623 (2012) (citation omitted). "This Court reviews the evidence in the light most favorable to the prosecution." *Id.*

Defendant challenges only whether there was sufficient evidence to establish his identify as the shooter. "[I]dentity is an element of every offense." *Yost*, 278 Mich App at 356. Therefore, it is axiomatic that the prosecution must prove the identity of the defendant as the perpetrator of the charged offense beyond a reasonable doubt. See *Russell*, 297 Mich App at 721. Positive identification by a witness may be sufficient to support a conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). "The credibility of identification testimony is for the trier of fact to resolve that we do not resolve anew." *Id.*

Taylor unequivocally identified defendant as the shooter at trial. Taylor was sitting in the front seat of Chubb's car, while Chubb was standing on the side of the vehicle, pumping gas. Defendant approached on a bike and, as Chubb's body fell, Taylor saw defendant's face. Taylor testified that she had no trouble perceiving what occurred. Taylor had been in an intimate relationship with defendant for two years. From this evidence, a jury could reasonably infer that Taylor was familiar with defendant and could identify him under the circumstances. Although defendant emphasizes that Taylor did not initially identify him as the shooter, Taylor explained that she did not initially identify defendant because she feared retribution. After deciding to come forward, Taylor consistently identified defendant as the shooter to the police, at the preliminary examination, and at trial. The jury was free to believe or disbelieve Taylor's testimony, including her explanation for her belated identification of defendant as the shooter. The credibility of identification testimony is a question of fact for the jury, and Taylor's testimony, if believed, was sufficient to establish defendant's identity as the shooter. Further, apart from Taylor's positive and unequivocal identification of defendant, the prosecution presented evidence that a cell phone linked to defendant was in the area at the time of the shooting and that defendant had communicated via text about obtaining a .45-caliber gun—the same caliber that was used to shoot Chubb. Accordingly, when viewed in a light most favorable to the prosecution, there was sufficient evidence for the jury to identify defendant as the perpetrator beyond a reasonable doubt.

B. INEFFECTIVE ASSISTANCE – FAILURE TO CALL WITNESSES

Defendant next argues that defense counsel should have called Vanessa Hudson and Nicole Waller (his former girlfriend) as alibi witnesses; Tracey Mayes, Jasmine Gradford, and Charles Mitchell as res gestae witnesses; himself; and an expert witness. Defendant avers in an affidavit submitted with his standard 4 brief that he informed defense counsel about Hudson, Waller, and Mayes. Thus, accepting defendant's claim, defense counsel was aware of the proposed witnesses. "Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy." *Russell*, 297 Mich App at 716. Trial counsel's failure to a call a witness is only considered ineffective assistance if it deprived the defendant of a substantial defense. *Id.* "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Defendant attempts to establish the factual predicate for his claim with affidavits from Hudson, Mayes, and himself, which are attached to his standard 4 brief. It is, however, "impermissible to expand the record on appeal." *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). But even considering these affidavits, defendant's ineffective assistance claim fails.

With regard to the proposed alibi witnesses, defendant has not overcome the presumption that defense counsel purposely declined to call Hudson and Waller as a matter of sound trial strategy. The failure to call an alibi witness does not constitute ineffective assistance of counsel if counsel reasonably believes that the purported alibi witness will not provide an effective alibi. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995). Hudson avers that she went to Waller's house "around 3:30 or 4 p.m." to explain to Waller why defendant had her dance clothes and her van, and that she thereafter left with defendant to pick up parts for defendant to fix her van. Hudson further avers that she was with defendant "from 4 to 5:30 p.m." Defendant avers that he texted Hudson, "911 where are u," because Waller was threatening to burn Hudson's dance clothes. The cell phone records show that defendant sent this "911" text at 5:28 p.m., contrary to Hudson's declaration that she and defendant were already together. It would have been reasonable for counsel to anticipate that the prosecutor would question the credibility of Hudson, and counsel reasonably may have determined that the credibility issues would have seriously undermined any progress defense counsel had made in presenting the misidentification defense and discrediting the prosecution's witnesses. The fact that a defense strategy ultimately fails does not establish ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Further, there is no record evidence that defendant's former girlfriend, Waller, was both available and willing to testify favorably on defendant's behalf. Defendant has not provided a witness affidavit from her, or identified any other evidence of record establishing that she actually could have provided favorable testimony at trial. Defendant has not established that he was prejudiced by defense counsel's failure to call this witness at trial.

With regard to the proposed res gestae witnesses, Mayes averred in an affidavit that he observed Taylor "duck face forward" after shots were fired, which defendant sought as support for a conclusion that Taylor could not have seen the shooter. Mayes's testimony, even if assumed true, would have been cumulative to the testimony of Davies that Taylor ducked down. Other than providing information that was adequately covered through another witness, defendant does not state what new helpful information Mayes could have offered that would have affected the outcome of the trial. With regard to Gradford and Mitchell, there is no record

evidence that either proposed witness was both available and willing to testify favorably on defendant's behalf. Absent such a showing, defendant has not established that he was prejudiced by defense counsel's failure to call the witnesses at trial.

Defendant, as a criminal defendant, had a fundamental constitutional right to testify at trial. US Const, Am XIV; Const 1963, art 1, §§ 17, 20. "Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant." *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). "[I]f defendant . . . decides not to testify or acquiesces in his attorney's decision that he not testify, the right will be deemed waived." *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985) (citation and quotations omitted).

There is no basis to conclude that counsel's performance deprived defendant of his constitutional right to testify. The record shows that, after the prosecution rested, defense counsel stated on the record that he and defendant had discussed whether defendant was going to testify and that defendant had elected not to testify. Defendant acknowledged to the court that he did not want to testify. Defendant never expressed disagreement with counsel's statement that he did not wish to testify, did not claim that he was ignorant of his right to testify, or that defense counsel had coerced him into not testifying. The decision whether to call defendant as a witness was a matter of trial strategy and defendant has not identified or offered any evidence to overcome the strong presumption of sound strategy. *Payne*, 285 Mich App at 190.

Defendant has not made an offer of proof regarding the substance of any favorable testimony that an expert witness on cell phones could have offered. A defendant cannot establish his claim of ineffective assistance of counsel using speculation that an expert would have testified favorably. *Id.* Moreover, defendant has failed to overcome the presumption that defense counsel's decision not to call an expert witness was reasonable trial strategy. *Id.* Through means of cross-examination, defense counsel challenged the strength and reliability of the cell phone tracking evidence, and elicited arguable bases for the jurors to question its accuracy. For example, defense counsel elicited on cross-examination that the cell phone tower information did not allow Metro PCS to pinpoint the exact point from where a call was made. Defendant has failed to show that defense counsel's strategy was objectively unreasonable, or that he was prejudiced by the absence of an expert at trial.

Finally, we reject defendant's argument that the cumulative effect of several minor errors denied him a fair trial. Because multiple errors have not been found, there can be no cumulative effect that denied defendant a fair trial. *Unger*, 278 Mich App at 258.

C. PROSECUTOR'S MISCONDUCT

As defendant acknowledges, he did not object to prosecutor misconduct at trial. We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Gibbs*, 299 Mich App 473, 482; 830 NW2d 821 (2013). Reversal is not required "where a curative instruction could have alleviated any prejudicial effect." *People v Bennett*, 290 Mich App 465, 476; 802 NW2d 627 (2010).

1. PERJURY

Defendant argues that the prosecutor knowingly presented perjured testimony by Taylor. We disagree. A defendant's right to due process "is violated when there is any reasonable likelihood that a conviction was obtained by the knowing use of perjured testimony." *People v Gratsch*, 299 Mich App 604, 619; 831 NW2d 462 (2013), vacated in part on other grounds 495 Mich 876 (2013). Thus, a prosecutor has "an obligation to correct perjured testimony that relates to the facts of the case or a witness's credibility." *Id.*

In his argument, defendant highlights instances where Taylor's testimony about the identification of the shooter differed from her initial police statement, in which she did not identify defendant as the shooter, or that her claim that she could see the shooter was debilitated by other eyewitnesses who stated that all the witnesses ducked down. However, the inconsistencies listed by defendant do not establish that the prosecutor knowingly used perjured testimony to obtain defendant's conviction. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Although Taylor's trial testimony that defendant was the shooter differed from her initial statement to the police, there was no indication that the prosecutor sought to conceal this inconsistency from defendant. *Id.* In fact, during direct examination, Taylor admitted that she did not initially tell the police that defendant was the shooter because she was afraid. Additionally, testimony that conflicts with other witnesses' testimony does not lead to the conclusion that the prosecutor knowingly used perjured testimony. The prosecution is not obligated to disbelieve its own witness merely because the witness's testimony is contradicted by testimony from another witness. See *People v Lester*, 232 Mich App 262, 278-279; 591 NW2d 267 (1998), overruled in part on other grounds in *People v Chenault*, 495 Mich 142; 845 NW2d 731 (2014). Defendant's argument does not involve an issue of perjury, but of credibility. Defense counsel fully explored the credibility problems with Taylor's testimony, as well as other prosecution witnesses, and the jury had an opportunity to observe the video recording of the shooting. This Court will not "interfere with the jury's determinations regarding . . . the credibility of the witnesses." *Unger*, 278 Mich App at 222.

2. "OTHER ACTS OF PROSECUTORIAL MISCONDUCT"[4]

Defendant contends that the prosecutor improperly misled the jury during opening statement when she made several statements that were not supported by the record. "Opening statement is the appropriate time to state the facts that will be proved at trial." *Ericksen*, 288 Mich App at 200. When a prosecutor states that evidence will be presented that later is not presented, reversal is not required if the prosecutor acted in good faith and the defendant was not prejudiced by the statement. *People v Wolverton*, 227 Mich App 72, 76-77; 574 NW2d 703 (1997).

Defendant points to several comments by the prosecutor during opening statement that he claims were improper. For example, the prosecutor stated that defendant was threatening the victim, that defendant called Chubb "little boy" as they were discussing Taylor, that Taylor texted "leave us alone," and that, after the shooting, defendant sent a text message bragging

[4] We decline to readdress those issues of prosecutorial error that were also raised by appellate counsel and have already been addressed in this opinion.

about the shooting. Contrary to what defendant argues, the prosecutor's statements, viewed in context, were clearly designed to show what she intended to prove during trial. Subsequently, the prosecutor presented evidence of numerous text messages, including those that showed that defendant taunted Chubb, texted "News 2, 4, 7" after the shooting, and Taylor's testimony that she texted "leave us the f*ck alone" using Chubb's phone. Even if the evidence did not develop exactly as the prosecutor stated during opening statement, defendant has not shown that the prosecutor acted in bad faith in making the statements, or that he was prejudiced. *Id.*

Defendant also asserts that the prosecutor's statement that "We know where you are when you make a phone call, or the area that you're in when you make a phone call," was improper. The prosecutor's reference, also made during opening statement, was designed to show that she intended to prove during trial that a cell phone linked to defendant was in the area of the BP gas station at the time of the shooting, and that, after the shooting, the cell phone was pinned in the same direction in which the shooter fled. During trial, the prosecutor presented evidence of defendant's cell phone records, maps of cell phone towers and where the phone registered, and the expert testimony of Smith, who interpreted the information for the jury. Smith explained that defendant's cell phone was in the area of the BP gas station around the time of the shooting, registered at a tower southwest of the gas station after the shooting, and registered at a different tower southwest of the gas station a half hour later. Given this evidence, defendant has not shown that the prosecutor acted in bad faith in making the emphasized statement. *Id.* Accordingly, defendant has not established plain error affecting his substantial rights in regard to the prosecutor's opening statement.

Defendant next lists several comments made by the prosecutor during closing argument where defendant contends that the prosecutor impermissibly expressed her personal opinion about the case with inflammatory and unsupported remarks that were highly prejudicial. For example, defendant notes that the prosecutor argued that defendant was angry, exhibited actions of someone who did not fairly fight a younger 20-year-old man, and was manipulating Taylor; she also suggested views of the meaning of certain text messages. Although prosecutors may not express a personal opinion about a defendant's guilt, *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995), they are afforded great latitude when arguing at trial, *Dobek*, 274 Mich App at 66. In arguing this claim, defendant ignores that prosecutors may argue the evidence and all reasonable inferences that arise from the evidence as it relates to their theory of the case, and they need not state their inferences in the blandest possible language. *Id.* After reviewing the record, including the comments cited by defendant, we conclude that the prosecutor's remarks were part of a permissible argument that was focused on presenting the prosecutor's theory of the case, based on the evidence and reasonable inferences arising from it, and countering defendant's claim that Taylor misidentified him. The prosecutor's argument, which urged the jurors to use their common sense in evaluating the evidence, was responsive to the theories presented at trial and, viewed in context, was not clearly improper.

Defendant also argues that, during rebuttal argument, the prosecutor impermissibly referred to the defense argument as a "red herring." The prosecutor used the phrase in the following context:

> The marijuana in this case, that is a *red herring*. Everyone told you that the marijuana belonged to Jessica. Jessica told you, "That marijuana belonged to me."
>
> * * *
>
> Now, I don't mean to thumb my nose at the law . . . . Kids get high. Kids smoke marijuana. Hey, this does not make them the drug dealer of the century to be targeted for a drug hit. Okay?
>
> This is a personal shooting done by someone who had a personal ax to grind . . . . [Emphasis added.]

Although it is generally improper for a prosecutor to argue that defense counsel has attempted to mislead the jury through the use of "red herrings," *Unger*, 278 Mich App at 238, a "prosecutor may fairly respond to an issue raised by the defendant." *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). Further, an otherwise improper remark might not warrant reversal if the prosecutor is responding to the defense counsel's argument. *Dobek*, 274 Mich App at 64; *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Viewed in context, the prosecutor's remark, made during rebuttal argument, did not suggest that counsel was trying to mislead the jury, but fairly responded to defense counsel's suggestion in his closing argument that the "execution style" shooting could have been related to Chubb buying or selling drugs, or owing someone money. The prosecutor's remark was responsive to an isolated part of counsel's closing argument, and was based on reasonable inferences from the evidence. *Unger*, 278 Mich App at 236. Consequently, the prosecutor's remark was not clearly improper.

Further, even if any of the prosecutor's challenged remarks were improper, the trial court's instructions that the lawyers' statements and arguments were not evidence and that the case should be decided on the basis of the evidence were sufficient to dispel any possible prejudice. See *id.* at 235. Accordingly, defendant cannot establish plain error affecting his substantial rights on the basis of the prosecutor's challenged comments. In addition, multiple errors have not been found, so there can be no cumulative effect that denied defendant a fair trial. *Dobek*, 274 Mich App at 107.

D. SENTENCING

Defendant next argues that he is entitled to resentencing because the trial court engaged in impermissible judicial fact-finding to score the sentencing guidelines, contrary to *Alleyne v United States*, 570 US___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). Because defendant did not object to the scoring of the guidelines at sentencing on the basis of *Alleyne*, this issue is unpreserved and appellate review is limited to plain error affecting substantial rights. *People v Lockridge*, ___ Mich ___, ___; ___ NW2d ___ (2015) (Docket No. 149073); slip op at 30.

In *Alleyne*, 133 S Ct at 2159, 2163, the United States Supreme Court held that because "mandatory minimum sentences increase the penalty for a crime," any fact that increases the mandatory minimum is an "element" that must "be submitted to the jury and found beyond a reasonable doubt." In *Lockridge*, ___ Mich at ___; slip op at 1-2, our Supreme Court held that Michigan's sentencing guidelines are constitutionally deficient under *Alleyne* to the extent that

"the guidelines *require* judicial fact-findings beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e. the 'mandatory minimum' sentence under *Alleyne*." To remedy the constitutional violation, the Court severed MCL 769.34(2) to the extent that it makes the sentencing guidelines, as scored based on facts beyond those admitted by the defendant or found by the jury, mandatory. *Id.* at ___; slip op at 3. The Court explained that a sentencing court must still score the guidelines to determine the applicable guidelines range, but a guidelines range calculated in violation *Alleyne* is now advisory only. *Id.* at ___; slip op at 3.

Defendant received a total of 181 OV points, placing him in OV Level VI (100+ points) on the applicable sentencing grid. MCL 777.62. This guidelines range was based on the scoring of OVs 1, 2, 3, 4, 5, 6, 7, and 12. Defendant asserts that OV 4 (psychological injury to victim), MCL 777.34, OV 5 (psychological injury to member of victim's family), MCL 777.35, and OV 7 (aggravated physical abuse), MCL 777.37, were scored based on impermissible judicial fact-finding. We agree. However, defendant is not entitled to resentencing because OVs 1, 2, 3, and 6 were based on facts admitted by defendant or found by the jury verdict, and were sufficient to sustain the minimum number of OV points necessary for defendant's score to fall in the cell of the sentencing grid under which he was sentenced. See *Lockridge*, ___ Mich at ___; slip op at 32. Thus, no plain error occurred.

E. JUDICIAL BIAS

Defendant next argues that he was denied a fair trial based on judicial bias. Specifically, defendant asserts that the trial court aggressively questioned Davies in order to intimidate her and exhibited bias during sentencing. We disagree.

"The question whether judicial misconduct denied defendant a fair trial is a question of constitutional law that this Court reviews de novo." *People v Stevens*, 498 Mich 162, 168; ___ NW2d ___ (2015). However, because defendant did not object to the challenged behavior in the trial court, this issue is unpreserved. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In *Stevens*, 498 Mich at 170-171, our Supreme Court explained:

> A trial judge's conduct deprives a party of a fair trial if a trial judge's conduct pierces the veil of judicial impartiality. A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party. [Citations omitted.]

A fact-specific inquiry is required. *Id.* at 171. "A single inappropriate act does not necessarily give the appearance of advocacy or partiality, but a single instance of misconduct may be so egregious that it pierces the veil of impartiality." *Id.*

> In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors, including the nature of the judicial conduct, the tone and

> demeanor of the trial judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions. This list of factors is not intended to be exhaustive. [*Id.* at 172 (citations omitted).]

Defendant asserts that the trial court exhibited misconduct while questioning Davies. After taking the stand, Davies began crying, and the trial court sent the jury to lunch. The trial court then addressed Davies, stating, "I don't know why you're crying or what you're afraid of, but you'd better get afraid of me because I'm not going to spend a lot of time begging you to answer questions, because I can send you to jail, and I will do so." Later, Davies testified that she had been warned not to testify. Defendant challenges the court's comments, arguing that the court was unfairly harsh toward Davies, who was simply emotional remembering the traumatic event of the shooting. Defendant does not, however, show how the trial court's statements impacted his trial or exhibited judicial bias toward defendant. Indeed, Davies was a witness for the prosecution. Furthermore, the court's comments were made outside the presence of the jury and, thus, there was no reasonably likelihood that the comments improperly influenced the jury. Accordingly, we do not agree that the trial court's statements to Davies denied defendant a fair trial.

Defendant also argues that the trial court exhibited bias at sentencing when the trial court "testified for the victim's mother[.]" At sentencing, in regard to the victim's mother, the trial court stated:

> But you're going to tell me that this lady walks in there every single day, she looks at the son that she brought into this world that she believed was going to as least go to college and be something in this society, and he's a vegetable; and you don't think she doesn't need professional [help]. I disagree with you.

Here, again, defendant fails to show how the trial court's statement at sentencing denied him a fair trial or influenced the jury. Defendant also summarily claims that the Detroit Police Department conducted unfair line up procedures during its investigation, but cites no support, legal or factual, for his contention. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008) (a party must support his position with references to the record); *Payne*, 285 Mich App at 195 (appellant may not merely announce his position and leave it to this Court to discover and rationalize his claims). Accordingly, defendant's claim lacks merit.

Finally, we note that, to the extent that any of defendant's allegations raised on appeal were not specifically addressed by this Court, all arguments were reviewed and found to lack merit.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly

No. 18-1979

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 13, 2020
DEBORAH S. HUNT, Clerk

LAMARR ROBINSON,

Petitioner-Appellant,

v.

CONNIE HORTON, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: GILMAN, KETHLEDGE, and READLER, Circuit Judges.

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Larsen recused herself from participation in this ruling.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: March 13, 2020

Mr. Steven D. Jaeger
The Jaeger Firm
23 Erlanger Road
Erlanger, KY 41018

Re: Case No. 18-1979, *Lamarr Robinson v. Connie Horton*
Originating Case No.: 2:16-cv-12721

Dear Mr. Jaeger,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Linus Richard Banghart-Linn
Rebecca Ashley Berels
Mr. John S. Pallas

Enclosure

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMARR VALDEZ ROBINSON,
(Print the name you were convicted under on this line.)

Defendant-Appellant.

Supreme Court No. _____
(Leave blank.)

Court of Appeals No. 321841
(From Court of Appeals decision.)

Trial Court No. 10-6297-01-FC
(See Court of Appeals brief or Presentence Investigation Report.)

INSTRUCTIONS: Answer each question. Add more pages if you need more space. **NOTE:** If you are appealing a Court of Appeals decision involving an administrative agency or a civil action, you will have to replace **this page** with one containing the relevant information for that case.

PRO PER APPLICATION FOR LEAVE TO APPEAL

1. I was found guilty on (Date of Plea or Verdict) 1/31/10

2. I was convicted of (Name of offense) AWIM; Possession of Firearm by Felon; FFA

3. I had a ☐ guilty plea; ☐ no contest plea; ☒ jury trial; ☐ trial by judge. (Mark one that applies.)

4. I was sentenced by Judge VERA MASSEY JONES (Print or type name of judge) on 2/15/2011 (Print or type date you were sentenced)

in the 3rd Judicial - Wayne (Name of county where you were sentenced) County Circuit Court to 47.5 (Put minimum sentence here) years 00 months

to 120 (Print or type maximum sentence) years 00 months, and to 2 (Minimum sentence) years _____ months to 2 (Maximum sentence) years _____ months.

I am in prison at the Saginaw Corr. Facility (Print or type name of prison) in Freeland, (Print or type city where prison is located.), Michigan.

5. The Court of Appeals affirmed my conviction on 10/22/15 (Print or type date stamped on Court of Appeals decision),

in case number 321841 (Print or type number on Court of Appeals decision). A copy of that decision is attached.

6. ☒ This application is filed within 56 days of the Court of Appeals decision. (It MUST be received by the Court within 56 days of date on Court of Appeals decision in criminal cases and 42 days in civil cases. **Delayed applications are NOT permitted, effective September 1, 2003.**)

RECEIVED
NOV 30 2015
LARRY S. ROYSTER
CLERK SUPREME COURT

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

LAMARR V. ROBINSON, Defendant-Appellant CA No. 321841

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 on page 7.

GROUNDS - ISSUES RAISED IN COURT OF APPEALS

7. I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below.

ISSUE I:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

DEFENSE COUNSEL STIPULATED TO THE ADMISSION OF CELL PHONE TOWER EVIDENCE PLACING SOMEONE USING A PHONE BY MR. ROBINSON IN CLOSE PROXIMITY TO THE AREA OF THE SHOOTING AT A TIME JUST BEFORE AND AFTER THE SHOOTING. DEFENSE COUNSEL SHOULD HAVE OBJECTED TO THE ADMISSION OF THIS EVIDENCE, OR REQUESTED A DAUBERT HEARING, OR AT THE VERY LEAST CALLED AN EXPERT.....

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☒ 2. The issue raises a legal principle which is very important to Michigan law.
- ☒ 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- ☒ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in "B" apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

See COA Brief and additional pages on Issue I.

PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

LAMARR VALDEZ ROBINSON, Defendant-Appellant CA No. 321841

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8, on page 7.

ISSUE II:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

DEFENSE COUNSEL STIPULATED TO THE INTRODUCTION OF TESTIMONY REGARDING IRRELEVANT SEX TAPES, DID NOT OBJECT TO LINES OF QUESTIONING REGARDING THOSE TAPES, AND DID NOT OBJECT TO THE INTRODUCTION OF TEXT MESSAGES OR TESTIMONY PORTRAYING MR. ROBINSON IN A BAD LIGHT. DEFENSE COUNSEL'S FAILURE TO OBJECT DENIED MR. ROBINSON HIS RIGHT TO EFFECTIVE COUNSEL AND DUE PROCESS OF LAW.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☒ 2. The issue raises a legal principle which is very important to Michigan law.
- ☒ 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- ☒ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

See COA Brief and additional pages.

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

LAMARR VALDEZ ROBINSON, Defendant-Appellant CA No. 321841

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 on page 7.

ISSUE III:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

DEFENSE COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S MISCONDUCT OF REFERENCING FACTS NOT IN EVIDENCE AND THE PROSECUTOR'S APPEAL TO SYMPATHY IN BOTH OPENING AND CLOSING ARGUMENTS DEFENSE COUNSEL'S FAILURE TO OBJECT DENIED MR. ROBINSON HIS RIGHT TO EFFECTIVE COUNSEL AND DUE PROCESS OF LAW.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☐ **1.** The issue raises a serious question about the legality of a law passed by the legislature.
- ☒ **2.** The issue raises a legal principle which is very important to Michigan law.
- ☒ **3.** The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- ☑ **4.** The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

See COA Brief and additional pages.

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

LAMARR VALDEZ ROBINSON, Defendant-Appellant CA No. 321841

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 on page 7.

ISSUE IV:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

DID THE PROSECUTION FAIL TO PRODUCE LEGALLY SUFFICIENT EVIDENCE TO IDENTIFY APPELLANT AS A PERPETRATOR OF THE OFFENSES BEYOND A REASONABLE DOUBT?

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☐ **1.** The issue raises a serious question about the legality of a law passed by the legislature.
- ☒ **2.** The issue raises a legal principle which is very important to Michigan law.
- ☒ **3.** The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- ☒ **4.** The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

See COA In Pro Per Supplemental Brief as Issue I and additional pages.

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

LAMARR VALDEZ ROBINSON, Defendant-Appellant CA No. 321841

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 on page 7.

ISSUE V:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

WAS THE DEFENDANT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL CONTRARY TO THE SIXTH AMENDMENT WHERE COUNSEL FAILED TO CALL MATERIAL AND ALIBI WITNESSES; WAS COUNSEL INEFFECTIVE FOR FAILURE TO INVESTIGATE AND MOVE THE TRIAL COURT FOR AN EXPERT;DID THE CUMULATIVE EFFECT OF ERRORS DEPRIVE DEFENDANT OF A FAIR TRIAL AND DUE PROCESS.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☒ 2. The issue raises a legal principle which is very important to Michigan law.
- ☒ 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- ☒ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up 4any facts about this issue, explain here. If you need more space, you can add more pages.)

See COA Supplemental Brief and additional pages.

FOR MORE ISSUES, ADD PAGES. GIVE THE SAME INFORMATION. NUMBER EACH ISSUE.

PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

LAMARR VALDEZ ROBINSON, Defendant-Appellant CA No. 321841

NEW ISSUES - INSTRUCTIONS: If you want the Supreme Court to look at errors which were not raised in the Court of Appeals by your attorney or you, check **YES** in "8." Answer parts **A, B,** and **C** for each new issue you raise. There is space provided for 2 new issues. You can add more pages. If you do not have new issues, go to question 9 on page 8.

8. ☐ YES, I want the Court to consider the additional grounds for relief contained in the following issues. The issues were not raised in my Court of Appeals brief. MCR 7.302(F)(4).

ISSUE VI:

A. (State the new issue you want the Court to consider.) WAS DEFENDANT-APPELLANT DENIED DUE PROCESS OF LAW AND A FAIR TRIAL BY THE PRESENTATION OF FALSE EVIDENCE KNOWN TO BE SUCH BY THE PROSECUTOR, WHERE JESSICA TAYLOR ADMITTED TO SEEING THE SHOOTER CONTRARY TO FACTS PRESENTED AT TRIAL?DID THE MULTIPLE ACTS OF PROSECUTORIAL MISCONDUCT DENY DEFENDANT A FAIR TRIAL AND WARRANT A NEW TRIAL AND/OR REVERSAL?

B. The Court should review this issue because: (Check all the ones you think apply to your case, but you must check at least one.)

☐ **1.** The issue raises a serious question about the legality of a law passed by the legislature.

☒ **2.** The issue raises a legal principle which is very important to Michigan law.

C. (Explain why you think that your choices in B above apply to this issue in your case. List any cases and citations, laws, or court rules, etc. which support your argument. Explain how they apply to this issue. State the facts which support and explain this issue. If these facts were not presented in court, explain why. You can add more pages.)

See COA Supplemental Brief and additional pages.

RELIEF REQUESTED

9. For the above reasons I request that this Court *GRANT* leave to appeal, *APPOINT* a lawyer to represent me, and *GRANT* any other relief it decides I am entitled to receive.

(Date)

Lamarr V. Robinson #221610
(Print your name and number here.)

Lamarr V. Robinson
(Sign your name here.)

9625 Pierce Road - MDOC
(Print your address here.)

Freeland, MI 48623

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN
(Print the name of the opposing party, e.g., "People of the State of Michigan.")
Plaintiff-Appellee,

v

LAMARR V. ROBISON
(Print the name you were convicted under on this line.)
Defendant-Appellant.

Supreme Court No. _____ (Leave blank.)

Court of Appeals No. 321841 (From Court of Appeals decision.)

Trial Court No. 10-6297-FC (See Court of Appeals brief or Presentence Investigation Report.)

MOTION FOR WAIVER OF FEES AND COSTS

Appellant, pursuant to MCR 7.319(7)(h) and MCL 600.2963, for the reasons stated in the attached affidavit of indigency, requests that this Court: (Check the ones that apply to you.)

☒ GRANT a waiver pursuant to MCR 7.319(7)(h) of all fees required for filing the attached pleadings because the provisions of MCL 600.2963, requiring prisoners to pay filing fees do not apply to appeals from a decision involving a criminal conviction or appeals from a decision of an administrative agency. The statute applies *exclusively* to prisoners filing civil cases and appeals in civil cases.

☑ GRANT a waiver pursuant to MCR 7.319(7)(h) of all fees required for filing the attached pleadings because the provisions of MCL 600.2963, requiring only indigent prisoners to pay court filing fees violates the equal protection provision of the Michigan Constitution, Art I, Sec 2.

☐ Temporarily waive the initial partial payment of filing fees for the attached pleadings and order the Michigan Department of Correction to collect and pay the money to this Court at a later date in accordance with MCL 600.2963, when the money becomes available in appellant's prison account. If the Court does not allow this, I will be prevented from filing the attached pleading in a timely manner.

☐ Allow an initial partial payment of $_____ of the fee for filing the attached pleadings and order the Michigan Department of Correction to collect the remaining money and pay it to this Court at a later date in accordance with MCL 600.2963, as additional money becomes available in my prison account. If the Court does not allow this, I will be prevented from filing the attached pleading in a timely manner.

November 23, 2015
(Date)

Lamarr V. Robison
(Sign your name here.)

LAMARR V. ROBINSON #221610
(Print your name and number here.)

9625 Pierce Road-MDOC
(Print your address here.)
Freeland, MI 48623

RECEIVED
NOV 30 2015
LARRY S. ROYSTER
CLERK SUPREME COURT

 PLSM SELF-HELP PACKET PAGE 1 OF 1 PLSM S4163 08.14.03

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,
(Print the name of the opposing party, e.g. "People of the State of Michigan.")

Plaintiff-Appellee,

v

LAMARR VALDEZ ROBINSON,
(Print the name you were convicted under on this line.)

Defendant-Appellant.

Supreme Court No. _____ (Leave blank.)

Court of Appeals No. 321841 (From Court of Appeals decision.)

Trial Court No. 10-6297-FC (See Court of Appeals brief or Presentence Investigation Report.)

AFFIDAVIT OF INDIGENCY

1. My name is Lamarr V. Robinson (Type or print your name here.). I am in prison at Saginaw Corr. Fac. (Name of prison) in Freeland (city where prison is located) MI.

My prison number is 221610 (Your prison number.). My income and assets are: (Check the ones that apply to you.)

- ☐ My only source of income is from my prison job and I make $_____ per day.
- ☒ I have no income.
- ☒ I have no assets that can be converted to cash.
- ☒ I can not pay the filing fees for the attached application.

I ask this Court to waive the filing fee in this matter.

RECEIVED
NOV 30 2015
LARRY S. ROYSTER
CLERK SUPREME COURT

I declare that the statements above are true to the best of my knowledge, information and belief.

November 24, 2015 (Date)

Lamarr V. Robinson (Sign your name here.)

Lamarr V. Robinson #221610 (Print your name here.)

PROOF OF SERVICE

On November 24, 2015, I mailed by U.S. mail one copy of the documents checked below: (Put a check mark by the ones you mailed.)

- ☒ Affidavit of Indigency and Proof of Service
- ☒ Motion to Waive Fees and Costs
- ☐ Statement of Prisoner Account (this is not necessary in criminal appeals)
- ☒ Pro Per Application for Leave to Appeal with a copy of Court of Appeals Decision
- ☒ Court of Appeals Brief
- ☒ Supplemental Court of Appeals Brief

TO: WAYNE (Name of county where you were sentenced) County Prosecutor, 1441 St. Antoine St., 12th Flr. (Address)

Detroit (City), MI 48226 (Zip Code).

I declare that the statements above are true to the best of my knowledge, information and belief.

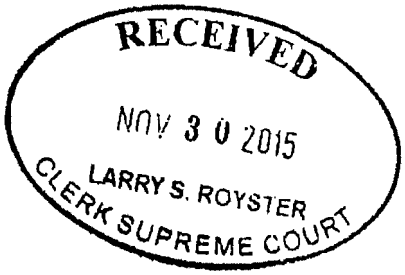
November 24, 2015 (Date)

Lamarr V. Robinson (Sign your name here.)

Lamarr V. Robinson (Print your name here.)

COVER LETTER

November 24, 2015
(Put Today's Date)



Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: PEOPLE OF THE STATE OF MICHIGAN v LAMARR V. ROBINSON
(Print the name of the opposing party, e.g., "People of the State of Michigan.") (Print the name you were convicted under here.)

Supreme Court No. _____ (Leave blank - the Clerk will assign a number for you.)
Court of Appeals No. 328141 (Get this number from the Court of Appeals decision.)
Trial Court No. 10-6297-01-FC (Get this number from Court of Appeals brief or Presentence Investigation Report.)

Dear Clerk:

Enclosed please find the original of the pleadings checked below. (Put a check mark by the items you are sending.) I am indigent and can not provide seven copies. Please file them.

- X Affidavit of Indigency/Proof of Service
- X Motion to Waive Fees and Costs
- ___ Statement of Prisoner Account (this is not necessary in criminal appeals)
- X Pro Per Application for Leave to Appeal
- X Court of Appeals Decision (You **must** enclose a copy of the Court of Appeals decision.)
- X Court of Appeals Brief (This is not necessary, but it is a good idea.)
- X Supplemental Court of Appeals Brief (This is not necessary, but it is a good idea.)
- X Other Motion to Remand

Thank you.

Sincerely,

Lamarr V. Robinson
(Sign your name here.)
Lamarr V. Robinson
(Print or type your name here.)
#221610
(Print or type your prisoner number here.)
9625 Pierce Road - MDOC
(Print or type your address here.)
Freeland, MI 48623
(Print or type your City, State, and Zip Code here.)

Copy sent to: WAYNE County Prosecutor
(Fill in the county where you were convicted.)

INSTRUCTIONS

1. You will need 2 copies and the original of this letter and the pleadings listed above.
2. Mail the original of this letter and all the pleadings listed above to the Supreme Court Court Clerk.
3. Mail 1 copy of letter and pleadings to the prosecutor in the county where you were convicted.
4. Keep 1 copy of letter and pleadings for your file.

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

LAMARR VALDEZ ROBINSON,
Defendant-Appellant In Pro Per
/

MI SCT No. 152728
MI COA No. 321841
LC No. 10-6297-01-FC

DEFENDANT-APPELLANT'S IN PRO PER MOTION TO SUPPLEMENT APPLICATION FOR LEAVE TO APPEAL

NOW COMES Lamarr V. Robinson, Defendant-Appellant In Pro Per and moves this Honorable Court for Leave to Supplement/Amend his Application for Leave to Appeal the Michigan Court of Appeals' affirming his conviction on October 22, 2015. This Court may hear this matter under MCR 7.316(A)(1)(3) allowing general amendments.

Defendant notes that the Wayne County Prosecutor has not responded to his application for Leave to Appeal the Michigan Court of Appeals opinion affirming his conviction. Therefore, Defendant moves to amend/supplement his current filing as follows:

THE COURT OF APPEALS' OPINION AFFIRMING THAT DEFENDANT WAS NOT DENIED INEFFECTIVE ASSISTANCE OF COUNSEL IS WRONG AND WILL CAUSE A MANIFEST INJUSTICE BECAUSE TRIAL COUNSEL SHOULD NOT HAVE STIPULATED TO SMITH AS AN EXPERT.

Defendant contends that it is "Black Letter" law that a jury should not be allowed to speculate. **People v. Duncan,** 402 Mich 1 (1977). The role of the judge is "to filter out expert evidence that is unreliable, not to admit only evidence that is unassailable. The inquiry is not into whether an expert's opinion is necessarily correct or universally accepted. The inquiry is into whether the opinion is rationally derived from a sound foundation." **People v. Unger,** 278 Mich App 210 (2008).

Here, the trial court immediate recognized that Mr. Smith was not an expert but a [records custodian]. Counsel rather than object to Smith's testimony simply stipulated to allow him to testify. (T2 147-148). Smith testimony as [an expert], was materially unreliable because it could not pin point that defendant was in the area the cell tower reported. The record at trial demonstrates that Smith admitted that due to [limited] capacity, calls can and often do register with towers other than those closest to where the call was placed. (164). On cross examination Smith admitted that the distance ranges he provided about the cell towers were only approximations, (199), and that such information did not allow Metro PCS to pinpoint where in an approximate radius as big as seven miles a call was made. (200) Here, the jury was allowed to speculate - because the prosecution basically lead them to place greater importance on the cell phone custodian's testimony than the facts that were presented, showing the unreliability of Smith's testimony.

Matter of fact, in both the opening and closing, the prosecution relied on this general area identified, by claiming "We know where you are when you make a phone call". See (T1 123).

This Court should note that the time these calls were made were at rush hour and in the area of Detroit's two busiest thoroughfares, 7 and 8 mile Roads, and three County lines in a 7 mile radius (Wayne/Oakland/Macomb) all boarder 8 mile road. Further, Metro PCS is one of the most affordable cellular plans for all ages.

It was appropriate that trial counsel should have objected to this testimony since the voir dire did not support that Smith could shed any light on the location of the defendant at the time of the shooting. Most, egregiously and incredibly. the records custodian states that Metro PCS's system does not convert time zone for their record accuracy. Had counsel objected such objection would not have been meritless as opined by the Court of Appeals. A Daubert hearing was appropriate in this case

Lastly most cases that have been accepted with the use of Cell Phones Expert were cited to have been contract phones, See **In re Application of U.S. for an Order for Prospective Cell Site Location Info on a Certain Cellular Telephone,** 460 F Supp2d 448. 451 **n. 3** (S.D NY 2000). not month-to-month cell phones because the FCC does not allow actual GPS tracking unless all the requirements are made under such contracts The exemption for establishing caller location is the 911 capability used by law enforcement.

The Court of Appeals further cites that no Michigan case has rejected cell phone tracking evidence Defendant directs this Court to the Federal Circuits that have rejected cell phone evidence and its analysis of use as evidence See **U.S. v. Evans,** 892 F Supp2d 949 (N D Ill 2012); **U.S. v. Sepulveda,** 115 F3d 882, 891 (11th Cir. 1997)(rejecting cell phone analysis on reliability as evidence)

The use of Smith as an expert allowed the jury to speculate that there was any indication of his reliability as an expert.

The Court of Appeals opinion that the average juror would not have understood GPS Cell Phone Information This assessment of defendant's jury was speculative because it fains that jurors are not abreast to current technologies. Cell phones have been in use in society for nearly 30 years and companies that offer their service explains GPS, Text messaging, and parental programming of their children's phones for GPS locations for safety and security of both their children and their phones. The opinion of the Court of Appeals is not only incorrect but defies the social norm - because people usage and understanding of cell phones on the average understand GPS as a feature readily accepted in their daily lives. See **COA Slip Op. at 3**.

THE COURT OF APPEALS' OPINION AFFIRMING DEFENDANT'S CONVICTION WAS WRONG REGARDING THE ADMISSION OF IRRELEVANT TESTIMONY OF THE SEX TAPES, COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO TEXT MESSAGES OR DEFENDANT BEING PORTRAYED IN A BAD LIGHT

B. ADMISSION OF EVIDENCE

It is well-established law, that "[B]efore inquiring into acts of misconduct, the prosecutor, out of the presence of the jury, must first substantiate that such misconduct actually occurred." **People v. Dorrikas,** 354 Mich 303 (1958).

The Court of Appeals opinion regarding Taylor's testimony is clearly wrong because the evidence as testified by Taylor of STD, or that Taylor falsely claimed to be pregnant and defendant's relationship with other women was not relevant to who shot Mr. Chubbs or why Chubbs was the target of the assault. Although, the prosecutor's version adds a flare that defendant was popular with women, it did not establish that he either manipulated them or whether their relationships were good, bad or indifferent.

The record supports the inference that Taylor used defendant for material gain, purses, clothing and money and in exchange Taylor was a friend with benefits. Further, Taylor's testimony reflects that she did the same with Mr. Chubbs and alleges that the drugs found at the scene of the shooting on Chubbs possession were in fact hers.

SABRINA JOHNSON'S TESTIMONY ABOUT A SEX TAPE WAS IRRELEVANT UNDER MRE 403

The Court of Appeals opined that Sabrina Johnson's testimony about a sex tape about Kim Karadashian was not unduly prejudicial. **Slip Op. at p. 5.**

This ruling by the Court of Appeals is contrary to this Court's holding in **People v. Mills,** 450 Mich 61, 75-76 (1995);**People v. Vasher,** 449 Mich 494, 501 (1995)(evidence presents the danger of unfair prejudice when it threatens the fundamental goals of MRE 403: accuracy and fairness . . . . The perceived danger here is that the jury would decide that this evidence is more probative of a fact than it actually is).

The Court of Appeals explain no nexus why the sex tapes of Kim Kardashian was still relevant. This tape was highly publicized and it was not introduced at trial as evidence. It was improper for the prosecutor to support its argument in closing that Taylor was similar in appearance to Kardashian - it was not relevant and only stated to arouse passion to convict on other than the evidence. This Court should note that Taylor is mixed "Asian" while Kardashian is Armenian. Counsel should have objected to this argument as confusion of the issue and misleading the jury. MRE 403

MILLER'S TESTIMONY

Defendant contends that ineffective assistance permeated his trial as pointed out that trial counsel failed to object to objectionable testimony of Miller.

In trial questions answers should be limit to yes or no answers. The questioning of Miller was a simple question had she ever texted the defendant directly? Per the Court of Appeals' reference Miller editorialized her answer. This answer should have been [partially] striken, where it interject that defendant had assaulted Taylor. See **People v. Holguin,** 141 Mich App 268 (1985)(partial striking is appropriate). The answer further had no connection to the specific instances of conduct of acts prior in time to the acts charged. The prosecution must limited its examination as to time and place in order to ensure relevance. The assault on Taylor was an uncharged act and was not substantiated that it actually occurred. See **People v. Robinson,** 70 Mich App 606 (1976)(failure to conduct a pretrial hearing on the evidence, coupled with a failure to instruct on the use of character evidence was reversible error).

The Court of Appeals opined that the testimony about defendant fighting Taylor at some unspecified time could be considered objectionable. **MRE 404(b)**. But applied deference to defense counsel's decision during the course of trial does not establish ineffective assistance of counsel. The **Strickland** standard of review is a mixed question of law and fact not entitled to the presumption of correctness. **Strickland,** 466 US at 698. Therefore, the COA's legal conclusion is subject to review. Counsel's failure to object is ineffective when it causes a procedural default by failure to object under the contemporaneous objection rule

Defendant contends that ineffective assistance of counsel permeated his trial as pointed out by the numerous instances where counsel failed to object to objectionable witnesses testimony and statements made by the Wayne County prosecutor

It is established trial court decorum that examined witnesses answers should be limited to yes or no answers. The question asked of Miller was simple; had she ever texted the defendant directly? Per the Court of Appeals reference Miller editorialized her answser, and reference an assualt on Taylor as a prior "BAD ACTS". See **Michelson v. United States,** 335 US 469, 476 (1948)(stating improper character evidence "weighs too much with a jury. .overpersuades them as to prejudice one with a bad general record and deny him a fair opporutunity to defend against a particular charge"). This answer was not objected to nor did counsel move to strike. See **People v. Pipes,** 475 Mich 267, 277 (2006)(in order to properly preserve an issue for appeal, a defendant must "raise objections at a time when the trial court has an opportunity to correct the error").

Miller did not indicate when the text message occurred or if she had direct knowledge that defendant had assaulted Taylor. The fact was the testimony was objectionable as narrative. See **Clark v. Field,** 42 Mich 342 (1880). The prevailing norm was a contemporaneous objection. Defendant has demonstrated IAC, because failure to object falls below the prevailing professional norms and this "Bad Acts" evidence was prejudicial to defendant. **People v. Armstrong,** 490 Mich 281, 289-90 (2011). The fact that this claim was not presented in a motion to remand can be attributed to IAC of appellate counsel which could not be raised on direct appeal. The Court of Appeals did agree that the testimony was objectionable. **COA Slip Op. at *6.**

THE COURT OF APPEALS AFFIRMING DEFENDANT'S CONVICTION ON THE GROUNDS OF PROSECUTORIAL MISCONDUCT WAS WRONG AND WILL CAUSE A MANIFEST INJUSTICE TO DEFENDANT; IT WAS ERROR TO CONCLUDE THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO MULTIPLE ACTS OF PROSECUTORIAL MISCONDUCT.

The Court of Appeal opined that they agreed that the prosecution did not introduce unsupported assertion when it stated that the defendant took the same path as the shooter. **Slip Op. at *6.** The COA further ruled that Smith's testimony supports the defendant's location. **Id. at 6.** This was pointed out in the appellate brief that that was not the testimony of Smith. Smith testified that the distance ranges he provided about the cell towers were only approximations, (T2 *199), and that such information did not allow Metro PCS to pinpoint where in an approximate radius as big as seven miles a call was made (200). The Prosecutor statement was not supported by the evdence. See **People v. Dinsmore,** 103 Mich App 600 (1981)(a prosecutor may not make a statement of fact to the jury which is not supported by the evidence).

The inference in this case, were clearly false and constituted nothing more than a choice of reasonable probabilities. See **United States v. Van Hee,** 531 F2d 352, 357 (6th Cir. 1976)(holding that evidence that at most establishes no more than a choice of reasonable probabilities cannot said to be sufficiently substantial to sustain a criminal conviction upon appeal).

Although a jury may infer facts from other facts that are established by inferences, each chain in the chain of inferences must be sufficiently strong to avoid a lapse into speculation. See **Plaskowski v. Betts,** 256 F3d 687, 693 (7th Cir. 2001)(granting habeas relief where there was insufficient evidence that the petitioner participated in first-degree murder for which he was convicted).

Defendant contend that "references to "Terri" and "Nicole" though admitted into evidence were improper because there was no foundation laid to the relevance of other phone calls or text message which were related to the shooting of the victim.

It is axiomatic, that every offered item of evidence is necessarily packaged as an argument or claim about what it is and how it is specific to the case. See **MRE 901** (requiring showing that evidence is "what its proponent claims").

It is common linguistic practice of courts to equate facts and evidence. To meet the foundation requirement, evidence must be case-specific, assertive, and probably true. Whether Nicole was the mother of defendant children held no legal relevance, nor the fact that Taylor spoke to her in the past, since the only relevant time period was the time leading to the shooting or shortly therefore. The references to Nicole and Terri were generalization and did not assert a fact that is part of the unique narrative of case-specific. The purported evidence fails to inform the jury about anything case-specific and was therefore irrelevant.

APPEAL FOR JURORS TO SYMPATHIZE W/VICTIM

Appeals to the jury to sympathize with the victim constitute improper argument. **People v. Watson,** 245 Mich App 572, 591 (2001). The Court of Appeals failed to review this claim of appealing to the sympathy of the jury for a miscarriage of justice. **People v. Dalesandro,** 165 Mich App 569 (1988). Because this claim involves the interpretation of Appellant's constitutional rights, this Court must employ the de novo standard of review. **Cardinal Mooney High School v. Michigan High School Athletic Assoc.,** 437 Mich 75, 80 (1991). Questions of prosecutorial misconduct are decided case by case. **People v. Mack,** 190 Mich App 7, 19 (1991). This Court should examine the trial record and evaluate the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. **Id.**

Defendant contends that defense was ineffective for failing to object and move for a mistrial.

SUFFICIENCY OF EVIDENCE

A claim that the evidence at trial was in sufficient to support a conviction is a question of law that is reviewed de novo under a test where one views the evidence in the light most favorable to the prosecution to determine whether there was sufficient evidence to justify a reasonable trier of fact in finding that each of the essential elements of the offense was proven beyond a reasonable doubt. **Jackson v. Virginia,** 443 US 307 (1979); **People v. Hampton,** 407 Mich 354, 366 (1979).

The Michigan Court of Appeals placed great importance on the fact that the victim was now the current love interest of the defendant's ex-girlfriend and that defendant was jealous and possessive. **See COA Slip Op. at *4.** However, the Michigan Court of Appeals completely ignored that defendant had been in a longer relationship with Nicole Waller as his children mother and that Taylor had recently had sex with defendant and given her a hickey. **Slip Op. at 6-7.**

The Court of Appeals further overlooked the possiblity that Jamal Chubbs was a drug dealer and the motive was simply drug related.

In this case, the meager circumstantial evidence was simply too weak to convict defendant of these crimes, particularly since much of it was conjecture camouflaged as evidence. **Plaskowski,** 256 F3d at 693. The evidence is insufficient to support defendant's conviction for AWIM and FFA because none of the evidence puts defendant at the scene of the crime. In addition, the eyewitness identification is faulty and suspect, there were no fingerprints removed from the crime scene evidence, no gun found that would link defendant to the murder. No bike or clothing. Numerous witnesses testified that the shooter was much younger.

The Michigan Court of Appeals ignored that Hudson, Waller were not called and not interviewed for counsel to make a decision supported by a reasonable investigation. **Strickland v. Washington,** 466 US 668, 690-91 (1984).

The Court of Appeals making a jury's assessment is not part of the Strickland standard or to review the believability of the evidence. An alibi defense is a substantial defense as recognized by law. Thus, "[A] defendant is entitled to have his counsel prepare, investigate and present all substantial defense. **People v. Kelley,** 186 Mich App 524, 526 (1990).

In conclusion, this Court is asked to review his application and find both ineffective assistance of trial and appellate counsels, prosecutorial misconduct and that there was insufficiency of evidence to find defendant guilty of the crimes committed.

RELIEF REQUEST

WHEREFORE, by the reasons stated Defendant-Appellant Lamarr V. Robinson, humbly prays this Honorable Court "GRANT" his application for leave to appeal the Michigan Court of Appeals decision to affirm his conviction, order remand for an evidentiary hearing on ineffective assistance of counsel grounds and claims of proscutorial misconduct or any relief this Court deems appropriate.

Respectfully submitted,

Date: April 17th /2016

/s/ Lamarr V. Robinson 4/2/16
Lamarr V. Robinson, #221610
Defendant-Appellant In Pro Per
Saginaw Correctinal Facility
9625 Pierce Road
Freeland, MI 48623

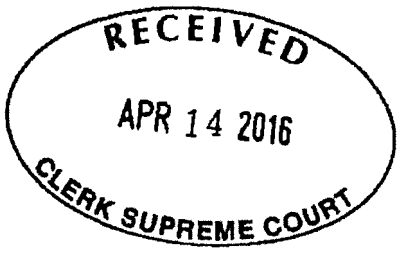
PROOF OF SERVICE

I, Lamarr V. Robinson, declared that on this 17th day of April, 2016, I did serve a copy of Defendant-Appellant's In Pro Per Motion to Supplement Application for Leave to Appeal on:

Clerk MI Supreme Court
P.O. Box 30052
Lansing, MI 48909

AND

Wayne County Prosecutor Office
Attn: Kym L. Worthy P38875 PA
1441 St. Antoine Street, 12 Floor
Detroit, MI 48226



This service was complete by handing these documents to an Employee of the Michigan Department of Correction w/accompanying LEGAL EXPEDITE MAIL Form for affixing proper U.S postage and handling.

Date: _____/____/2016

/s/_____
Defenant-Appellant In Pro Per

Date: April 11, 2016

TO: Clerk Michigan Supreme Court
P O. Box 30052
Lansing, MI 48909

RE: People v. Lamarr V. Robinson, MISCT No. 152728; MICOA No. 321841
MOTION TO SUPPLEMENT APPLICATION FOR LEAVE TO APPEAL MISCT

Dear Court Clerk:

Please find enclosed Defendant-Appellant's In Pro Per Motion to Supplement Application for Leave to Appeal to the Michigan Supreme Court. Please docket my filings and notify me if there are any deficiencies in this current filing.

In closing any assistance or information to may provide will be greatly appreciated. Thank you in advance for your time an cooperations.

Respecfully

/s/Lamarr V. Robinson #221610

Lamarr V. Robinson #221610
Defendant-Appellant In Pro Per
Saginaw Correctional Facility
9625 Pierce Road - MDOC
Freeland, MI 48623

K. MORRIS
Notary Public, State of Michigan
County of Saginaw
My Commission Expires 02-17-2022
Acting in the County of Saginaw

cc: MISCT Clerk
File

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

LAMARR VALDEZ ROBINSON, #221610,

Defendant-Appellant In Pro Per. /

COA No. 321841

LC No. 10-6297-01-FC

Wayne County Prosecutor
Attorney for Plaintiff-Appellee

DEFENDANT-APPELLANT'S STANDARD FOUR

SUPPLEMENTAL BRIEF - [AMENDED]

BY: Lamarr V. Robinson #221610
Defendant-Appellant In Pro Per
Saginaw Correctional Facility
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ISSUE IV

DEFENDANT IS ENTITLED TO RESENTENCING ALLEYNE V. UNITED STATES, 133 SCT 2151 (2013), WHERE OV 4, OV 5 AND OV 7 WERE NOT FOUND BY A JURY. DUE PROCESS REQUIRES THAT DEFENDANT BE SENTENCED ON ACCURATE INFORMATION. US CONST AMS VI, XIV.

STANDARD OF REVIEW: Where the issues in a case concern the proper interpretation and application of the legislative sentencing guidelines, MCL 777.11 et seq., they are legal questions that appellate court reviews de novo. **People v. Perkins**, 468 Mich 448, 4562 (2003). Constitutional issues like questions of statutory construction are subject to review de novo. **County of Wayne v. Hathcock**, 471 Mich 455 (2004). A trial court's scoring of guidelines is reviewed to determine whether the court properly exercised its discretion and whether the evidence supports the scoring. **People v. Houston**, 261 Mich App 463, 471 (2004).

PRESERVATION: This challenge to scoring of sentence guideline was preserved in part at sentencing. **People v. Kimble**, 470 Mich 305 (2004). The scoring of OVs 4 and 5 may be reviewed for plain error.

DISCUSSION

MCL 777.22(1) guides the sentencing court when scoring crimes against a person, to score offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20. Score offense variables 5 and 6 for...., or assault with intent to commit murder. Defendant is this case was found guilty of Assault with Intent to Murder, MCL 750.83. See Amended Judgment of Sentence.

On February 15, 2011, Defendant was sentenced to 47.5 years to 120 years for the AWIM. Defendant contends he is entitled to have his guidelines corrected where the trial court's scoring determination was not found by the jury. Defendant does concede that he is a 4th Habitual by the sentencing record. MCL 769.12; MCL 777.21(3)(c).

Defendant does not agree that OV 4 should be scored for psychological injury to the victim at 10 points, OV 5 should not be scored at 15 points for psychological injury to member of victim's family or that OV 7 should be scored at 50 points for excessive brutality. (ST, 5-7). Counsel did object to the scoring of OV 7. (ST at 7).

The record at trial depicts that the victims was shot, but was not shot multiple times. Nor does the record show that suspect continued firing bullets into Mr. Chubbs body. (ST at 6).

Matter of fact, the opinion of the sentencing judge is not supported by the jury's findings and violates the Sixth Amendment.

In Michigan, the construction of the offense description is not actual defined by law, MCL 777.6, states:

"The offense description in part 2 of this chapter are for assistance [only] and the statutes listed govern applications of the sentencing guidelines."

Constitutional finding by the Court for sentencing must be "beyond a reasonable doubt' to reduce findings of fact in a criminal trial to a preponderance of the evidence violates the Sixth Amendment.

ARGUMENT

Defendant contends that resentencing or correction of his sentencing guidelines is appropriate because there is no trial record that supports these scorings. Defendant must be sentenced on the basis of accurate information. **Townsend v. Burke**, 334 US 736 (1948); **People v. Malkowski**, 385 Mich 244 (1971).

OV 4

Defendant contends that the trial court erred where it improperly assumed without evidence that Mr. Chubbs would necessarily have suffered psychological injury to support the scoring of OV 4.

In this case, the victim is in a coma, in a vegetative state. He cannot complain of psychological injury. This Court is direct to as similar case in **People v. Beeler**, ___ Mich App ___ (COA #250927, 1/11/05).

In **Beeler**, the scoring of OV 4 was supported in an Assault with Intent to Do Great Bodily Harm where the victim suffered internal and external injuries resulting in a coma and was currently in a severely impaired condition, the scoring of OV 4 was supported by evidence that the victim was being treated by a social worker for his psychological injury.

No such evidence was presented to the trial court in this case.

In another unpublished case, **People v. Tyrpin, ___ Mich App ____ (COA #243603, 1/15/03)**, where the trial court correctly refused to assess points for serious psychological injury to a victim pursuant to OV 4, where the defense presented evidence that the complainant had not been psychologically harmed and the prosecution in response failed to provide evidence of the complainant's psychological history when requested by the court. Here the prosecutor presented no evidence of psychological injury or the history of the victim even those it was known that Mr. Chubbs was in a come after the shooting. 10 points should not be scored as it is not supported by the record.

OV 5

Defendant contends that he should not have been scored 15 points for OV 5, since the record is void of psychological injury to the victim's family.

The Presentence Investigation Report in the **"VICTIM'S IMPACT STATEMENT "** indicates:

On 02/09/11, writer made contact with the victim's mother. Ms. Chubbs verified that the victim, Jamel Vincent Chubb, age 20, suffered from multiple gun shot wounds and is still in a coma. She states that the victim was placed in a nursing home and is currently paralyzed. The victim's mother states that she is glad that justice was served, but there will never be enough justice for her son's suffering. She did not respond to any request for restitution for the within offense."

In **People v. Swaizer**, ___ Mich App ___ (COA #253443, 6/16/05), the Court of Appeals concluded that the trial court erred by scoring 15 points for OV 5 in a case of second-degree murder where the record is devoid of evidence to support such scoring, although relatives spoke at the sentencing but did not demonstrate serious psychological injury. Here, the PSIR indicates no psychological injury to Ms. Chubbs but the court improperly assumed the psychological injury was present. See (ST at 5). It was improper for the court to attest for Ms. Chubbs absent a finding on the record. The proper determination was to determine what Ms. Chubbs said or proved in the sentencing record. This record is silent with regards to serious psychological injury. The Court in **People v. Drohan**, 475 Mich 140 (2006), held that, as long as a defendant has received a sentence within the statutory maximum, "a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." Id. at 164.

Thus, Due Process forbids a sentencing judge from relying on materially false or unreliable information. See **United States v. Tucker**, 404 US 443, 447-449 (1972).

Although, the sentencing guidelines would not change, these corrections can be made without resentencing but as a correction to the record.

OV 7 Aggravated Physical Abuse

Defendant was scored 50 points for excessive brutality for the shooting that occurred to the victim. The trial record indicate that Mr. Chubbs was shot once in the base of his skull. The follows discourse occurred at sentencing:

MR. WASHINGTON: Number seven, it says victim was treated with sadism, torture, or excessive brutality. I know we're going to differ on that one, but

THE COURT: No, I don't think you and I are. The prosecutor may have something to say. But that one, he shot him any number of times, and then walked - - well, went right back over and just executed the man, except the man is still alive. How do you say that's sadism?

MS. POWELL: Your Honor, its excessive brutality. It was an automatic weapon placed at the base of the victim's skull. Eight rounds were fired. If you remember, as the victim fell after being shot in the head, he continued firing bullets into Mr. Chubb's body.

MR. WASHINGTON: You know, during the testimony where the firearm expert testified at the nature of an automatic or semi-automatic weapon, that it discharged quickly. And I think that the tape showed that the shots were fired in excess of a rapid, rapid number of times.

THE COURT: The big problem was the one at the base of the head. That's the big problem. That's the one that shows the intent to kill. and with the number of shots, I guess I have to agree with the prosecutor. I agree with the prosecutor.

MR. WASHINGTON: All right. Well, I placed an objection.

THE COURT: So the fifty points will stay. Anything else?
ST at 6-7.

Defendant contends that the articulation by the court was double count an already scored OV (OV6 - Intent to kill or injure), Defendant was scored 50 points. (ST at 6).

Defense counsel properly raised that the weapon used was an automatic or semi-automatic weapon, the charge was **AWIM**. The simple fact that the victim is alive, after an attempt to be murdered by a single gun shot does not fix the definition of excessive brutality or sadism. "Sadism" by law 'must be based on conduct beyond that necessary to commit the offense itself' and here there is no evidence that defendant engaged in any conduct beyond that inherent to the commission of assault with an intent to murder.

In **People v. Elenini.** 485 Mich 876 (2009), the Court ruled that the trial court erred in scoring 50 point for **OV7** because the victim was not subject to extreme or prolonged pain or humiliation. Additionally, the plain language of **MCL 777.37** indicates that it should be reserved for "depraved criminal behavior that seeks gratification from unnecessarily torturing, brutalizing, or terrorizing a victim. See **People v. Martin,** unpublished opinion (COA #265385, 4/10/07).

Defendant further contends that the video evidence does not support that the shooter stood over the victim and shot him again in the body after the shot to the head.

It is no outside the norm or excessive for a firearm to harm another whether with or without to intent to injure or kill. Therefore, a weapons efficiency has also been calculated in OVs 1, 2, 3. OV7 should be scored at 0 points.

Remand is appropriate where counsel did not object to these scorings or failed to make an offer of proof that the sentencing court and prosecutor employed the incorrect facts to the scorings, and such scoring were errors of law and fact.

A sentence is appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing in a motion for resentencing, or in a motion to remand. **People v. Kimble,** 470 Mich at 310-311. The Court may further review this claim under ineffective assistance of trial counsel at sentencing. **People v. Pickens,** 446 Mich 298 (1994).

ISSUE V

DEFENDANT-APPELLANT WAS DENIED A FAIR AND IMPARTIAL TRIAL BY AGGRESSIVELY QUESTIONING KAYANA DAVIES, AND USING TONES TO INTIMIDATE A WITNESS; TRIAL JUDGE WAS APPARENTLY BIAS DURING SENTENCING BY SUPPORTING THE PEOPLE'S POSITION ON SENTENCING. US CONST AMS VI, XIV.

STANDARD OF REVIEW: A criminal defendant has a constitutional right to a fair trial. US. Const Ams VI, XIV; MI Const 1963, art 1, §§ 17, 20. Constitutional questions are reviewed de novo. **People v. Swint**, 225 Mich App 353 (1997).

DISCUSSION

Whether a defendant had a fair and impartial trial is always reviewable because it questions the sound maintenance of a judicial process. See **People v. Pickett**, 339 Mich 294 (1954). A trial judge can pierce the veil of judicial impartiality by aggressively questioning a witness or undermining the adversarial testing of the Confrontation Clause. US Const Am VI. A judge must be cautious about interjecting themselves into a criminal trial. This is especially true when the trial judge uses harsh tone to a witness or demean them which may prevent answering questions and the truth-seeking process.

Here, Defendant questions the way the Court treated Kayana Davies. Ms. Davies had experience a traumatic event by seeing Jamel Chubbs, after he had been shot after pumping gas at a BP gas station. The only fault Ms. Davies had was crying while recalling the shooting. (T3, 102-103). The Court admonished and demeaned Davies by threatening her to be afraid of the judge. (103)

The Court further threatened to jail Davies who had not refused to answer any questions. These threats and comments were inappropriate since the admonishment was not supported by the record. Davies had cooperated fully with counsels during their questioning.

Davies admitted she had been warned about testifying, although it was not established that defendant had anything to do with the warning. (108-109).

Defendant makes a record that he had not received fair treatment contrary to the Fourteenth Amendment, since Jamel Chubbs was the son of a Detroit Police Department employee. This was reflected in unfair line-ups procedures by the DPD, where a witness had been brought to the police station, asked to identify the suspect, and known police officers participated in the live line-up.

The biasness of the court was actuated by her statements at sentencing which favored the People and assumed facts not in evidence.

ARGUMENT

In **Tumey v. State of Ohio,** 273 US 510 (1927), the Court noted that deprival of an impartial judge was a structural error and reviewable for harmless error.

Defendant contends he should have a new trial by a different judge because of the appearance of impartiality. See **People v. Stevens,** ___ **Mich** ____ **(Docket No. 149380, 7/23/15).** A cumulative error review is required to determine whether the trial court pierce the veil of impartiality.

Defendant contends that Davies was held by Sheriffs under the order of the court. Questioned by the prosecutor who inferred that defendant had intimidated Davies. Yet no one took into account that Davies was in a stressful situation by recounting this tragic event in her life.

SENTENCING

Due process requires that a judge possess neither actual or apparent bias. **Sheppard v. Maxwell,** 384 US 333, 361 (1966).

The veil of impartiality was pierced where the trial court at sentencing testified for the victim's mother Ms. Chubbs. (ST 5-7). The trial court's reasoning at sentencing amounted to double scoring of offense variables scored. (See Issue IV).

A new trial or resentencing is required by this denial of a fair trial and sentencing under due process.

RELIEF REQUESTED

WHEREFORE, by the foregoing reasons, Defendant-Appellant asks that this Honorable Court reverse his conviction, make the necessary corrections to his sentence or remand this case to the trial court for an evidentiary hearing.

Respectfully submitted,

September 22, 2015

/s/ Lamarr V. Robinson

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