APPENDIX A

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TERRENCE JAMAL WILLIAMS, aka Terrance Jamal Williams (State Prisoner #588573),
Petitioner-Appellant,

v.

SHERRY L. BURT, Warden,
Respondent-Appellee.

No. 18-1461

Appeal from the United States District Court
for the Eastern District of Michigan at Bay City.
No. 1:13-cv-14493—Thomas L. Ludington, District Judge.

Argued: January 30, 2020

Decided and Filed: February 11, 2020

Before: SUTTON, BUSH, and READLER, Circuit Judges.

COUNSEL

ARGUED: Yaira S. Dubin, O'MELVENY & MYERS LLP, New York, New York, for Appellant. Scott R. Shimkus, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Jennifer Sokoler, Anton Metlitsky, Catherine Nagle, O'MELVENY & MYERS LLP, New York, New York, for Appellant. Scott R. Shimkus, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

OPINION

CHAD A. READLER, Circuit Judge. Terrence Williams (often referred to as "Terrance Williams" in court documents) was sentenced to life imprisonment without parole for his role in

a drive-by shooting outside a Detroit nightclub. That verdict and sentence came at the close of an eventful trial—one marked by outbursts, threats toward witnesses, and offensive language—transgressions committed by witnesses, spectators, and counsel alike. After a particularly contentious incident involving a witness and defense counsel, the court took protective action, temporarily closing the courtroom to spectators before reopening it a few days later.

On direct appeal, and now in this habeas proceeding, Williams argues that the temporary closure violated his Sixth Amendment right to a public trial. Terry Price, Williams's trial counsel, failed to object to the closure, however, meaning that Williams defaulted his public trial claim in the state proceeding. And he has not overcome that failure by showing that his counsel was constitutionally ineffective, which might otherwise constitute cause and prejudice excusing the default. We accordingly **AFFIRM** the judgment of the district court.

BACKGROUND

Following an evening at a nightclub in southwest Detroit, Carl Hairston, Jerrance Lewis, and Thomas Cook left the club together in the same vehicle. As they drove away, a light-blue minivan pulled up next to them. From an open door, a passenger inside the minivan wielding an AK-47 fired more than twenty shots into the neighboring vehicle. The vehicles collided, tearing off the open minivan door. The minivan then sped off, leaving Hairston dead, Lewis severely injured, and Cook unharmed.

Following an investigation, officers recovered a burned minivan with its rear passenger-side door missing. Tracing the minivan, and aided by a lead that "Joe Green" was involved in the shooting, officers discovered that the vehicle was registered to Juanita Williams, the mother of Terrence Williams and Joseph Green.

When he recovered from his wounds, Lewis identified Williams and Green as his assailants. The two were well-known to Lewis. In addition to seeing them driving the same minivan previously, Lewis had fought with Williams and Green on prior occasions. During one of those engagements, Williams shot Lewis in the hand.

Williams and Green were indicted on charges for murder and assault with intent to murder. A four-week trial followed. But irregularities emerged almost right away, starting with the testimony of Cook, who served as the prosecution's first witness. Though Cook had signed a pre-trial statement indicating that his assailants were driving a light-blue minivan, at trial Cook claimed not to know what vehicle the assailants were driving. The prosecution attributed Cook's inconsistent testimony to intimidation from spectators in the courtroom. The trial court, however, found no basis to believe there had been "any overt attempt to influence [Cook's] testimony."

Improper spectator participation also became a concern during the testimony of Williams's mother and of his maternal aunt. On each occasion, the court was informed that spectators were coaching the witnesses and having inappropriate conversations with them about their respective testimony. The court warned the spectators that improper communication or other interference would result in exclusion from the remainder of the trial. Despite this warning, the court did not exclude a spectator who, a few days later, was seen "making gestures and mouthing words" during the testimony of the mother of the deceased victim.

These episodes came to a head when Lewis took the stand. The night before his preliminary examination, Lewis's home was firebombed. Undeterred, Lewis gave testimony consistent with his prior statement to officers, testifying on direct that Green and Williams were the shooters. While off the stand, Lewis told the prosecutor that, as he was testifying, he felt he was being threatened by glares and gestures from defense counsel. And on the third day of his testimony, after completing a portion of cross-examination, Lewis openly accused defense counsel of threatening behavior. As Lewis left the stand, the following exchange occurred between Lewis, defendant Green, the prosecutor, and defense counsel:

Lewis.	You see that?
Prosecutor.	I did see that. Yeah, I did see that with Mr. Price looking at the witness.
Lewis.	Telling me I'm dead and all this.
Prosecutor.	Wait a minute. I've been watching him during the trial. These witnesses—
Green.	They just making that little n* * * * * lying.

Green's Counsel.	Hey. Hey. Hey.
Lewis.	Get the f* * * on. What you talking about, boy? Get on.
Court Officer.	Have a seat. Have a seat. Have a seat.
Prosecutor.	Mr. Lewis, you're all right, don't let these people get to you. You should be ashamed of yourself.
Williams's Counsel.	You should be ashamed of yourself. You don't know what you talking about.
Lewis.	I know you 'bout to get—
Williams's Counsel.	How you gonna play me? He ain't no boss of nothing.

To allow cooler heads to prevail, the court called a recess. When trial reconvened, defense counsel denied any intent to intimidate Lewis, claiming that his looks and gestures were just his way of studying Lewis as he testified. Despite an admonition from the court, defense counsel stated his intention to continue his conduct.

At that point, the court decided that closing the courtroom was the best path forward. Citing repeated interference from spectators, the court remarked that emotions were "running much higher than almost any other case I've had . . . they have to get under control." In the interest of securing the courtroom and preserving the integrity of the proceedings, the court announced that the courtroom would remain closed for the remainder of the day, with the decision regarding the closure of subsequent proceedings to be decided at a later date. Defense counsel did not object to the closure.

The courtroom remained closed for the remaining two days of Lewis's testimony, as well as during the entirety of the testimony of Williams's cellmate, Cornelius Ware. Testifying in the closed courtroom, Ware stated that Williams confessed to the crime while the two were in jail together. Following Ware's testimony, the trial was reopened to the public.

Once the prosecution rested, Williams presented his case. Williams testified along with four others, each of whom contradicted the narrative offered by the prosecution. At the close of its deliberations, the jury convicted Williams of first-degree premediated murder and assault with intent to murder. The court sentenced Williams to serve life in prison without parole for the former and twenty to thirty years in prison for the latter.

On direct appeal, Williams argued, among other things, that the closure of the courtroom violated his Sixth Amendment right to a public trial, and that his counsel was ineffective for failing to object to this and other issues at trial. *See generally Williams*, No. 286097, 2011 WL 6004067 (Mich. App. Dec 1, 2011). In view of defense counsel's failure to preserve the issue through an objection, the state appeals court applied plain error review to Williams's public trial claim. *Id.* at *5. Yet even under that nominal standard, the appeals court found that counsel's conduct fell below Sixth Amendment standards, rendering counsel's assistance constitutionally ineffective. *Id.* at *11. Citing the strength of the government's case, however, the appeals court concluded that "the result of the proceeding would not have been different" if counsel had performed differently, and accordingly denied relief on that ground. *Id.* The Michigan Supreme Court denied Williams leave to appeal. *People v. Williams*, 812 N.W.2d 747 (Mich. 2012) (mem.); *People v. Williams*, 817 N.W.2d 56 (Mich. 2012) (mem.).

Following his state court proceedings, Williams filed in federal court a petition for relief under 28 U.S.C. § 2254. Among the claims raised in the petition were those regarding a public trial and ineffective assistance of counsel. After the district court denied relief, we granted Williams a certificate of appealability for his public trial claim as well as for his ineffective assistance of counsel claim (limited to counsel's failure to object to the courtroom closure). *Williams v. Burt*, No. 18-1461 (6th Cir. Aug. 30, 2018).

ANALYSIS

Part and parcel of federal habeas corpus litigation is an accompanying bevy of procedural rules and requirements, from myriad common law standards to a variety of federal statutes. While familiar to the federal courts, application of this body of authority is not always easy or straightforward. *Thomas v. Romanowski*, 362 F. App'x 452, 455 (6th Cir. 2010) (describing the landscape surrounding habeas procedural bars as a "complicated and changing area of law"). Today's case is no exception.

A. Williams's appeal turns on the application of the procedural default bar to awarding habeas relief. In respecting that settled rule, we must answer at the outset whether Williams has forfeited a right he seeks to enforce in this habeas proceeding by defaulting the claim during his

underlying Michigan state court proceedings. *Wade v. Timmerman-Cooper*, 785 F.3d 1059, 1068 (6th Cir. 2015). Sometimes, a petitioner neglects to raise a claim during the entirety of his state court proceeding, yet later seeks to pursue the claim through federal habeas litigation. In that circumstance, out of respect to the relevant state's finality interests, the petitioner typically is deemed to have procedurally defaulted the claim, meaning we will not then review it in a habeas posture. *Lovins v. Parker*, 712 F.3d 283, 304–05 (6th Cir. 2013) (holding that the petitioner's claim under *Chambers v. Mississippi*, 410 U.S. 284 (1973), was procedurally defaulted because he failed to raise it in state court).

But Williams's circumstance is not so straightforward. Williams failed to preserve his public trial issue in the state trial court, but he then raised the issue on appeal. And the reason he gave the appellate court for his initial failure was the ineffective assistance he received from his trial counsel, a right the Constitution, through the Sixth Amendment, ensures to him. *Strickland v. Washington*, 466 U.S. 668, 685–86 (1984).

Before we find that Williams has procedurally defaulted his public trial claim, then, we must conclude that: (1) Williams failed to comply with a state procedural rule; (2) the Michigan state courts enforced the rule; (3) the Michigan procedural rule is an adequate and independent state ground for denying review of Williams's federal constitutional claim; and (4) Williams cannot show cause and prejudice excusing the default. *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010) (en banc). There is little doubt Williams's circumstances meet each of the first three markers: The Michigan courts enforced a well-recognized procedural rule requiring that a litigant, to preserve an issue for appeal, first raise the issue below.

True, in enforcing its procedural bar, the Michigan Court of Appeals did not entirely "deny review" of Williams's claim, in the strictest sense of the phrase. As is common practice in the Michigan courts (and in other courts too, including ours), the appeals court instead gave Williams's public trial claim truncated consideration, reviewing the claim only for plain error in view of the fact that Williams raised the claim for the first time on appeal. *See People v. Carines*, 597 N.W.2d 130, 137–39 (Mich. 1999). For purposes of federal habeas review, however, a state court's decision to employ plain error review to otherwise abandoned arguments does not excuse a petitioner's default. *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006)

(citing *Scott v. Mitchell*, 209 F.3d 854, 866 (6th Cir. 2000)). Across many cases, we have consistently held that application of the plain error standard to an unpreserved claim does not save a petitioner from a defense of procedural default raised at the habeas stage. *See, e.g.*, *id.* at 765; *Fleming v. Metrish*, 556 F.3d 520, 530 (6th Cir. 2009) (citing *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000)).

That settled practice seeks to balance two weighty—but sometimes competing—virtues of our legal system: avoiding injustice on the one hand, and preserving comity on the other. As to the former, it is well understood that preventing manifest injustice is a core function of any reviewing court. *See Lundgren*, 440 F.3d at 765 ("Plain error analysis is more properly viewed as a court's right to overlook procedural defects to prevent manifest injustice, but is not equivalent to a review of the merits."). Plain error review plays a critical role in helping avoid such injustice, and so we understandably do not seek to encourage state courts to forego such efforts. *Id.* But by the same token, the procedural default bar honors fundamental features of our federal system of government. With an eye on state-federal comity concerns, we, sitting as a federal tribunal, customarily refuse to disturb state court judgments on grounds neglectfully not raised in state court. *Williams v. Anderson*, 460 F.3d 789, 799 (6th Cir. 2006) (citing *Coleman v. Thompson*, 501 U.S. 722, 731 (1991)). Enforcing the procedural default bar against the backdrop of a state court's earlier plain error review thus respects the interests of justice in the state's legal system while honoring the federalism and comity principles that animate many habeas procedural limitations. *See id.*; *see, e.g.*, 28 U.S.C. § 2254(d).

B. With the first three procedural default factors resolved against him, Williams emphasizes the fourth. That is, he contends there is cause and prejudice to excuse his procedural default in state court. The reason? Williams says his counsel was constitutionally ineffective.

Generally speaking, counsel's deficient performance in state court can serve as grounds for excusing a petitioner's procedural default. *Kelly v. Lazaroff*, 846 F.3d 819, 829 (6th Cir. 2017) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). In assessing whether counsel functioned in such a deficient manner as to constitute cause and prejudice excusing the default, we measure counsel's performance against the familiar backdrop of *Strickland*. As the Supreme Court explained there, the right to effective assistance of counsel is grounded in the Sixth

Amendment's fundamental guarantee of the right to counsel for criminal defendants. 466 U.S. at 686 (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). In view of that fundamental right, counsel will be deemed constitutionally "ineffective" where she commits errors so serious as to effectively deny a defendant the right to counsel, if those errors result in prejudice to the defendant. *Id.* at 687. Satisfying the *Strickland* standard, however, is difficult. *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) ("Surmounting *Strickland*'s high bar is never an easy task.").

Before making that assessment, we note one issue regarding the lens through which we view the *Strickland* factors as part of the broader procedural default analysis. Because the Michigan Court of Appeals addressed Williams's ineffective assistance of counsel claim on the merits, and as we sit in collateral review of those proceedings, the State contends that our review is governed by the exacting standards set forth in the Antiterrorism and Effective Death Penalty Act (or AEDPA). *See* 28 U.S.C. § 2254(d). Satisfying AEDPA's standards is difficult by design. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Before we may award habeas relief, AEDPA requires not just that we find the state court's decision to be wrong. Rather, we must conclude that its decision was so far off the mark as to constitute "an unreasonable application of clearly established Federal law." *Johnson v. Genovese*, 924 F.3d 929, 933 (6th Cir. 2019) (quoting 28 U.S.C. § 2254(d)). Coupling that deferential standard with the demanding *Strickland* standard would put in place a nearly insurmountable obstacle to Williams's path to relief. *See Harrington*, 562 U.S. at 105 ("The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.") (internal quotations and citations omitted).

Unlike when reviewing Williams's habeas claim on the merits, however, we have sometimes said that AEDPA deference does not cabin our review of the cause and prejudice aspect of procedural default. *Hall v. Vasbinder*, 563 F.3d 222, 236–37 (6th Cir. 2009). We need not decide whether this position is correct today. *Cf. Stewart v. Trierweiler*, 867 F.3d 633, 638 (6th Cir. 2019); *Richardson v. Lemke*, 745 F.3d 258, 273 (7th Cir. 2014). Williams's claim fails even under the more friendly *de novo* standard of review.

Trial Counsel's Performance Was Deficient. We first consider whether Williams was effectively deprived of his right to counsel by his attorney's errors. In doing so, we "indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

One indicator of counsel's deficiencies, says Williams, was counsel's combative behavior during and after Lewis's testimony. Counsel indisputably argued with Lewis, then sixteen years old, as Lewis left the witness stand. Counsel may also have been mouthing threats to Lewis during his testimony. These misdeeds, the record suggests, were the proverbial straw that broke the court's back. Following this episode, and after additional contemplation, the trial court closed the proceedings temporarily.

Counsel's actions fell well outside the acceptable range of conduct. It is difficult to imagine a legitimate strategic objective counsel sought to achieve through his combative conduct, in particular, openly confronting a minor who, after barely surviving a murder attempt, seeing a friend shot and killed, and having his home firebombed on the eve of his testimony, bravely testified for multiple days in the ensuing murder trial. Even if one could divine such a strategy, counsel's methods for executing it were neither reasonable nor professional. *See id.*

These antics alone, however, are not enough to demonstrate constitutionally deficient performance. Satisfying the *Strickland* standard requires more than just demonstrating deficiency; it also requires demonstrating a cause-and-effect relationship between the deficient performance and any prejudice suffered by the defendant. *Id.* at 687. And while counsel's conduct towards Lewis reflected deficient performance, that is not the prejudicial event Williams says demonstrates ineffective assistance under *Strickland*. Rather, says Williams, it was the trial court's decision to close the courtroom during the remainder of Lewis's testimony (and the entirety of Ware's).

That turns our attention, then, to counsel's failure to object to that decision. In challenging that aspect of his counsel's performance, Williams faces the same hurdle: Counsel's decision not to object to the closure is presumed to have been a reasonable strategic decision under *Strickland*. *Johnson v. Sherry*, 586 F.3d 439, 446 (6th Cir. 2009). Turning back the clock

to the period following Lewis's testimony, there are reasons why counsel might have objected to closing the courtroom, including to allow the defendant's family to be present at all points of the trial. But there are also reasons why counsel might have chosen, as he did, not to object to closing the courtroom. One would be to keep the victim's relatives out of the jury's view. Another would be to keep sensitive proceedings private. And yet another could be the desire to avoid drawing the jury's attention to the intimidation of witnesses that allegedly had been occurring in the courtroom to that point.

Absent other indicators, counsel's failure to object could fairly be described as a judgment call by counsel, something that rarely amounts to constitutionally ineffective assistance. *See Strickland*, 466 U.S. at 689. But here, there is one other indicator to consider—one that may have served as a less appropriate reason for counsel to forgo objecting to the closure. That is counsel's role in causing the closure. While an objection would have honored Williams's right to a public trial, it also may well have put the spotlight on counsel's questionable courtroom antics that precipitated the closure. In that way, counsel may have been conflicted in his motives; his decision may have been influenced as much by his personal interests as those of his client. Taking all of this together, counsel's failure to object, combined with the specter of a conflict of interest, constituted deficient performance in this specific setting. *See Whiting v. Burt*, 395 F.3d 602, 610–11 (6th Cir. 2005) (explaining that conflicts of interest that adversely affect counsel's performance can sustain a claim for ineffective assistance).

The failure to object, moreover, may have precipitated a constitutional error by the trial court. Closing the courtroom is in tension with the "presumption of openness" favoring public trials. *United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015) (quoting *Waller v. Georgia*, 467 U.S. 39, 46 (1984)). Only rare circumstances justify courtroom closures. *Waller*, 467 U.S. at 44–45. One notable example is the repeated disruption of courtroom proceedings. *Drummond v. Houk*, 797 F.3d 400, 401 (6th Cir. 2015). With the scales thus tipped dramatically in favor of open proceedings, a trial court must explain in detail its reasoning for closing the courtroom, including whether it considered alternative measures, and how it narrowly tailored the remedy it is imposing to achieve the specific interests it seeks to protect. *Simmons*, 797 F.3d at 413 (quoting *Waller*, 467 U.S. at 48).

This is where we find some fault with the trial court. No one doubts the difficult situation the court faced in trying this murder case. Even from a cold record, one can easily feel the hot tempers in the courtroom. The trial participants had a lengthy history of animosity, the courtroom was crowded, and the spectators were animated. The court had admonished at least three spectators, and other spectators were raising security concerns. *See Williams*, 2011 WL 6004067, at *8. To the court's eye, passions in the courtroom were "running much higher than almost any other case I've had." *Id.* But in then taking the considerable step of closing the courtroom altogether for some of Lewis's (and all of Ware's) testimony, the court's explanation was wanting. It did not explain, for instance, how closing the courtroom to the public would prevent another altercation between Lewis and defense counsel, the event that precipitated the closure. It did not explain how closing the courtroom would tamp down emotions for the participants, who would still engage with each other and with observers once the participants left the courtroom.

Nor did the court appear to consider any alternatives to complete closure, or to justify the remedy it employed. *Cf. United States v. Brazel*, 102 F.3d 1120, 1155 (11th Cir. 1997) (requiring courtroom spectators to show identification before entering the courtroom where spectators were allegedly engaging in conduct that might intimidate witnesses). For instance, in justifying the closure for Ware's testimony, the court cited vague security concerns shared by courtroom security officers surrounding transporting a prisoner. Those concerns might fairly be a basis for modifying courtroom procedures, and we appropriately afford deference to security officers and others in how to run a courthouse. *See Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 49–50 (1985) (recognizing that courtroom security officers have "considerable expertise in transporting prisoners"); *see also United States v. Moonda*, 347 F. App'x 192, 201 (6th Cir. 2009) (finding that a district court properly "heeded [a] Marshal's warning" regarding "logistical difficulties and safety hazards" in structuring a criminal trial). But to take the dramatic step of closing a courtroom, especially for one or more reasons that might otherwise appear to be rather customary aspects of everyday courthouse life, the trial court needed to say more. In the absence of a more fulsome record, the closure seemingly was not "narrowly tailored" to the ends the court sought to achieve. *Waller*, 467 U.S. at 45. And given those flaws, counsel likely would have been justified in objecting to that procedure, or, at the very least, in

suggesting alternative measures or demanding additional explanation. Whether an error occurred, however, ultimately does not affect today's outcome, as Williams cannot establish that his defense was prejudiced by the closure.

Williams Fails To Establish Prejudice Resulting From The Courtroom Closure. Williams claims he was prejudiced by what he alleges was a deprivation of his public trial right. Like the right to effective counsel, the public trial right is also secured by the Sixth Amendment. "In all criminal prosecutions," the Sixth Amendment commands, "the accused shall enjoy the right to a . . . public trial." U.S. Const. amend. VI. The right serves to promote the interests of fairness, accuracy, and transparency for the defendant, and for the public more broadly. *Waller*, 467 U.S. at 46. With its constitutional pedigree, the public trial right is considered a fundamental aspect of criminal trial proceedings, meaning that violations of the right typically are recognized as structural errors, for which prejudice to the defendant is presumed. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

In *Weaver*, however, the Supreme Court retreated from its historical practice of uniformly treating a public trial violation as a structural error that presumes prejudice to the defendant. It concluded that a different approach was appropriate in instances where a defendant ties together public trial and ineffective assistance of counsel claims. Unnecessary trial closures, while structural errors, the Supreme Court explained, "[do] not lead to fundamental unfairness in every case." *Id.* at 1908. And in the specific posture in which the defendant seeks a second chance at a public trial claim, having passed on the claim once before, the defendant carries the burden to demonstrate prejudice. *Id.* at 1913. That result strikes "the proper balance between the necessity for fair and just trials and the importance of finality of judgments." *Id.*

In view of *Weaver*'s clear command, it is nonetheless fair to ask whether the rule in *Weaver* applies in today's setting. *Weaver*, it bears noting, involved a courtroom closure during *voir dire*, not during the trial's guilt phase, a fact not lost on the Supreme Court. The Supreme Court went out of its way to explain that its decision represented binding authority only when trial proceedings are closed during jury selection. *Id.* at 1907. We thus have some room to consider *Weaver*'s applicability to trial proceedings other than the *voir dire* phase.

Before *Weaver*, a fractured panel of this Court held on collateral review, in considering whether counsel's ineffective assistance excused the petitioner's procedural default, that prejudice is presumed for trial closures during the guilt phase. *Sherry*, 586 F.3d at 443; *but see id.* at 450 (Kethledge, J., dissenting) (arguing that "clearly established Supreme Court precedent [did not] require[] the Michigan state courts to apply a presumed-prejudice standard" in examining the petitioner's public trial claim). Today appears to be our first occasion to revisit this landscape in *Weaver*'s aftermath. Honoring intervening Supreme Court authority is a critical duty for any lower court, including ours. *See, e.g.*, *Northeast Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686, 720 (6th Cir. 2016) ("Although one panel may not disturb the ruling of a prior panel absent en banc review, an intervening Supreme Court decision gives us the right to revisit [the] question.") (citations omitted).

Turning to *Weaver*, the Supreme Court, in requiring a defendant to establish prejudice resulting from the closed proceeding, emphasized the need to balance the twin goals of fairness and finality. 137 S. Ct. at 1913. We see no reason why those same principles are not equally in play during the guilt phase. Just as much as during *voir dire*, and perhaps even more, given the time and resources invested in a trial proceeding, and given the judgment that ensues, the interest in finality is substantial, if not at its apex, following a jury verdict. *See id.* at 1912. Fairness concerns, of course, are also of critical importance during the guilt phase, and the public trial right helps ensure that judges, counsel, and witnesses alike perform properly their designated functions in the criminal justice process. *See Waller*, 467 U.S. at 46. But that is seemingly no less true for *voir dire*, which ensures the proper functioning of perhaps the most vital part of the criminal justice process, the impartial jury. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."); *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) ("Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled."). There is no reason to think, then, that the jury (like the judge and the parties), must not also operate under the public eye. After all, the scrupulous eyes of the public put key trial players through their paces during *voir dire* just as they do during the guilt phase. We see no sufficient distinction between

the two phases that would justify setting aside *Weaver* and imposing a different prejudice standard for public trial violations during the guilt phase.

We note one other distinction between *Weaver* and today's case. While today's case arises in a habeas posture, *Weaver* was a direct review case. That *Weaver* was decided on direct review proves all the more why Williams is not entitled to habeas relief today. If finality interests justify raising the prejudice bar when a public trial violation is couched in a claim for ineffective assistance of counsel on direct review, *Weaver*, 137 S. Ct. at 1913–14, that bar should not be any lower when we sit in collateral review of a state criminal conviction (and one over a decade old at that).

We thus hold that a criminal defendant, to satisfy the *Strickland* standard in the context of a failure to object to a potential public trial violation during the guilt phase, must show prejudice by demonstrating that, as explained in *Weaver*, but for the alleged error, there is "a reasonable probability of a different outcome in [his] case or . . . that the . . . violation was so serious as to render the trial fundamentally unfair." *Id.* at 1911. This burden, we recognize, is a heavy one. *Id.* at 1910 (noting the "difficulty" a court faces in "assessing the effect of the error" (quoting *United States v. Gonzales-Lopez*, 548 U.S. 140, 149 n.4 (2006))). And here, it is too much for Williams to bear. The vast majority of his trial took place in an open setting, transcripts were made available from the limited sessions that took place behind closed doors, and the closure had no discernable effect on the judge, counsel, or jury. In that sense, the error here "did not pervade the whole trial." *Id.* at 1913. Nor did the temporary closure "lead to basic unfairness," *id.*, in the way other structural errors have been deemed to do, for instance, where a judge is improperly biased, or where jurors are excluded on the basis of race. *Id.* at 1911 (collecting cases). In other words, much like the defendant in *Weaver*, Williams has not alleged that the jury, judge, or prosecutor "failed to approach their duties with the neutrality and serious purpose that our system demands." *Id.* at 1913.

Having forcefully advanced many arguments to this point, Williams's argument addressing the public trial violation's effect on his conviction is less persuasive. Perhaps the only evidence that might suggest prejudice to Williams is a purported affidavit from Lewis recanting his trial testimony. In that affidavit, Lewis attested that he relied largely on rumors in

testifying against Williams, and that he now believes that testimony to be false. Recantations are understandably viewed with a skeptical eye. *Matthews v. Ishee*, 486 F.3d 883, 895 (6th Cir. 2007) (citing *United States v. Chambers*, 944 F.2d 1253, 1264 (6th Cir. 1991)). And that skepticism is all the more appropriate here given that the affidavit is not a part of our record, was apparently filed only in state court, and even then, was filed after the underlying district court decision here. But even accepting Lewis's claim as true, it is difficult to see how the courtroom remaining open would have done much, if anything, to remedy the earlier problem with his testimony. All of Lewis's direct examination, and part of his cross examination too, occurred in the traditional courtroom setting, fully open to the public. During that time, Lewis testified consistently that Green and Williams were the assailants in the nightclub shooting. And he said the same in the closed courtroom; Lewis's story did not change from open proceedings to closed. Having had some opportunity to change his testimony once the proceedings were held in the absence of spectators, the consistency in Lewis's testimony undercuts the idea that the closed proceedings emboldened Lewis to lie. And more to the point, to accept Williams's contention today, one would need to believe that Lewis, had he concluded his testimony in an open courtroom, would have contradicted his earlier three days of testimony. We see no evidence to that effect.

All of this, moreover, must be considered in the context of the broader evidentiary record. Setting Lewis's testimony aside, there remained substantial indicia of Williams's guilt. Chief among them, Williams had a long history of conflict with the victims, police recovered a burned minivan with a missing rear door that traced to Williams's mother, and Ware testified that Williams admitted to the crime while they were incarcerated together.

All told, we see no basis to conclude that Williams was prejudiced by the closure of the courtroom such that his procedural default should be excused. *See Weaver*, 137 S. Ct. at 1910 ("[I]n some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint."). Nor will we order the significant undertaking of an evidentiary hearing when a claim of prejudice is based on little more than speculation. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations . . . a district court is not required to hold an evidentiary

hearing."); *see also Weaver*, 137 S. Ct. at 1912 (recognizing that "the rules governing ineffective-assistance claims 'must be applied with scrupulous care'") (quoting *Premo v. Moore*, 562 U.S. 115, 122 (2011)).

* * * * *

Williams has failed to clear *Strickland*'s high bar. That means he cannot demonstrate cause and prejudice excusing his procedural default. That also means we may not review the merits of his public trial claim. *Coleman*, 501 U.S. at 750. And as his claim for habeas relief on ineffective assistance grounds, all agree, is measured against the demanding AEDPA standard of review, it likewise fails. *See Harrington*, 562 U.S. at 102.

For these reasons, we **AFFIRM** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

TERRENCE JAMAL WILLIAMS,

Petitioner,

Case No. 1:13-cv-14493
Honorable Thomas L. Ludington

v.

STEVEN RIVARD,

Respondent.
_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS, DENYING CERTIFICATE OF APPEALABILITY, AND DENYING LEAVE TO APPEAL IN FORMA PAUPERIS

Petitioner, Terrence Jamal Williams, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 1. Petitioner is incarcerated at the Muskegon Correctional Facility in Muskegon, Michigan. He challenges his convictions for first-degree premeditated murder and assault with intent to murder. Respondent, through the Attorney General's Office, has filed an answer in opposition to the petition. For the reasons set forth below, the petition will be denied, as will a certificate of appealability and leave to appeal in forma pauperis.

I.

Petitioner's convictions arise from a May 15, 2007 shooting, which resulted in life-threatening injuries to Jerrance Lewis ("Lewis") and in the death of Carl Hairston ("Hairston"), outside of the Perfect Beat nightclub on Fort Street in Detroit ("Perfect Beat shooting"). That evening, Hairston drove his mother's Chevy Tahoe to the Perfect Beat Night Club, along with his friends Lewis and Thomas Cook ("Cook"). The Michigan Court of Appeals described the underlying facts, which are presumed to be correct on habeas review, *see* 28 U.S.C. § 2254(e)(1); *Wagner v. Smith*, 581 F.3d 410, 413 (6th Cir. 2009), as follows:

> [Hairston, Lewis, and Cook] left the [Perfect Beat] shortly before closing, reentered their vehicle and traversed Fort Street in front of the club for several minutes while listening to loud music. Williams (then age 20) approached the Tahoe from behind while driving a light blue minivan. Williams pulled parallel to the driver's side of the Tahoe. The rear, passenger-side sliding door of the minivan opened and Green (then age 22) fired more than 20 shots from an AK–47 at the Tahoe. The minivan collided with the Tahoe and the minivan's door was torn off in the fray. Hairston was struck with several bullets and was pronounced dead on arrival at the hospital. Lewis was shot numerous times in the abdomen and side, required three surgeries to repair internal damage, and was hospitalized for a month. Cook escaped unharmed. He fled the scene and was only secured as a trial witness through the significant efforts of the prosecutor and law enforcement officers.
>
> Investigating officers soon received an anonymous tip that "Joe Green" was involved in the shooting, but they were unable to locate any suspects on that information alone. Investigators then discovered a burned minivan, missing its sliding rear door, abandoned in a field. The door recovered on Fort Street perfectly matched the minivan. The officers traced the vehicle's identification number and learned that it was registered to Juanita Williams, the mother of [Petitioner] and defendant "Joe Green." When Lewis recovered sufficiently to speak to the officers, he specifically identified defendants by name as his attackers. Lewis indicated that he had seen defendants driving the minivan in the past and clearly saw their faces during the shooting. Lewis then confirmed defendants' identities through a photographic line-up.
>
> Green and Williams had a long-standing feud with Hairston and Lewis. Lewis admitted that the two groups fought each time they met, sometimes with weapons. The parties stipulated that Williams had previously shot Lewis in the hand. Cornelius Wade, a jailhouse informant, testified that Williams confessed to the drive-by shooting while housed in the Wayne County Jail. According to Wade, a man name[d] Armond hired Williams and Green to kill Lewis and Hairston to avenge the robbery of Armond's carwash (which served as a front for a drug-dealing and gambling operation). Wade alleged that a man named Aaron Campbell was at the Perfect Beat on the night of the shooting and contacted defendants by telephone to alert them of Hairston's and Lewis's presence. The prosecution also presented evidence that someone threw a firebomb into and fired a barrage of bullets at Lewis's home the night before defendants' preliminary examination.

People v. Williams, No. 286097, 2011 WL 6004067, at *1–2 (Mich. Ct. App. Dec. 1, 2011). The Detroit Police Crime Lab analyzed the ballistics evidence in the case. At the trial, Detroit Police Officer David Pouch testified as an expert of firearms and tool mark identification. He explained that five of the shell casings found at the scene of the Perfect Beat shooting were fired from the

same weapon and two were fired from another weapon. ECF No. 17-31 at 63. Those shell casings were also compared to the shell casings recovered from the firebombing and shooting of Lewis's home. Officer Pouch testified that five of the shell casings were fired from the same weapon as the Perfect Beat shooting.

Petitioner and Green were tried jointly at a 24-day jury trial in Wayne County in 2008. They both asserted alibi defenses. Additionally, Petitioner "presented evidence from his friends Jamaal and Jameel Croft, who claimed to have been standing outside the Perfect Beat at the time of the shooting, and asserted that the minivan's occupants were heavy-set Mexican or Caucasian men." *Id.* at 2. Petitioner and Green also attempted to establish that the minivan had been stolen before the shooting. The jury convicted Petitioner of first-degree premeditated murder and assault with intent to murder ("AWIM"). Thereafter, the Court sentenced Petitioner to life in prison without parole for the murder conviction and 20 to 30 years' imprisonment for AWIM.

In 2010, Petitioner, through counsel, filed an appeal raising two issues: 1) that he was entitled to a retrial based on newly discovered evidence; and 2) that the trial court violated his rights by closing the courtroom during the testimony of key witnesses. The Michigan Court of Appeals remanded the case for an evidentiary hearing to determine if retrial was necessary due to the newly discovered evidence. Specifically, the Detroit Police Crime Lab was closed in 2008 due to an unacceptable error rate, leading to an audit by the Michigan Department of State Police. Sergeant Reinhard Pope, a firearms and tool marks examiner at the Michigan Department of State Police Forensics Laboratory, testified at the evidentiary hearing. As part of the audit of the Detroit Police Crime Lab, he examined the ballistics evidence from the Perfect Beat shooting and from the shots fired at Lewis's home. Sergeant Pope's analysis revealed that only three of the bullets had been fired from the same firearm at the Perfect Beat shooting. When he compared those bullets

to those found at Lewis's home, he concluded that he could not "identify or eliminate them as having been fired from the same firearm," as the Perfect Beat shooting, thus contradicting Officer Pauch's testimony at the original trial. ECF No. 17-42 at 33. The trial court denied Petitioner's motion, concluding that the discrepant ballistic evidence would not make a different result probable on retrial.

The Michigan Court of Appeals affirmed Petitioner's convictions. *Williams*, 2011 WL 6004067 at 14. Petitioner filed an application for leave to appeal in the Michigan Supreme Court, raising the same claims raised in the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal. *People v. Williams*, 491 Mich. 921 (2012). The Michigan Supreme Court later denied a motion for reconsideration. *People v. Williams*, 492 Mich. 859 (2012). Petitioner then filed a motion for relief from judgment, which was also denied. *People v. Williams*, No. 07-010617-02-FC, Wayne Cir. Ct. Opinion and Order (July 23, 2013). Thereafter, Petitioner filed the instant petition for habeas relief, and obtained a stay to exhaust additional issues in the state courts. He filed an amended petition on December 15, 2014, raising the following claims:

I. A new trial is warranted due to newly discovered evidence;

II. The trial court violated his Sixth Amendment rights by closing the trial to the public and allowing witnesses to face away from him as they testified;

III. Trial counsel was ineffective;

IV. The trial court lacked jurisdiction; and

V. Appellate counsel was ineffective.

II.

The petitioner's claims are reviewed against the standards established by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). The AEDPA provides:

> 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 proceedings.

28 U.S.C. § 2254(d).

"A state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court cases]' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [this] precedent.'" *Mitchell v. Esparza*, 540 U.S. 12, 15–16 (2003) (per curiam) (*quoting Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). "[T]he 'unreasonable application' prong of the statute permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (*quoting Williams*, 529 U.S. at 413). However, "[i]n order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous. The state court's application must have been 'objectively unreasonable.'" *Wiggins*, 539 U.S. at 520–21 (citations omitted). *See also Williams*, 529 U.S. at 409. "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), *quoting Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Put another way,

> Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal . . . . As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Id. at 786-87 (internal quotation omitted).

Section 2254(d)(1) limits a federal habeas court's review to a determination of whether the state court's decision comports with clearly established federal law as determined by the Supreme Court at the time the state court renders its decision. *See Williams,* 529 U.S. at 412. Section 2254(d) "does not require citation of [Supreme Court] cases – indeed, it does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002). "[W]hile the principles of "clearly established law" are to be determined solely by resort to Supreme Court rulings, the decisions of lower federal courts may be instructive in assessing the reasonableness of a state court's resolution of an issue." *Stewart v. Erwin*, 503 F.3d 488, 493 (6th Cir. 2007), *citing Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003); *Dickens v. Jones*, 203 F. Supp. 2d 354, 359 (E.D. Mich. 2002).

Lastly, a federal habeas court must presume the correctness of state court factual determinations. See 28 U.S.C. § 2254(e)(1). A petitioner may rebut this presumption only with clear and convincing evidence. *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998).

III.

A.

Petitioner first argues that he is entitled to a new trial on the basis of newly discovered evidence as a result of the Michigan State Police Crime Lab's re-examination of the ballistics evidence. The Michigan Court of Appeals addressed this issue as follows:

> We agree with the trial court's conclusion that the reanalysis of the ballistic evidence was newly discovered, noncumulative evidence that could not have been discovered before the first trial. We also agree with the trial court that the new ballistic evidence would not make a different result probable on retrial. Williams inaccurately argues that the debunked ballistics evidence was a cornerstone of the prosecutor's closing argument. In reality, the prosecutor's reference to the shell casings' commonality was a brief portion of her 47–page closing argument. The thrust of the prosecutor's argument was that the witnesses supporting the prosecution theory testified consistently regarding the details of the crime and their testimonies were corroborated by the physical evidence. The physical evidence was not limited to the debunked ballistic analysis; it included the location and number of shell casings found at the scene, the trajectory of the bullets compared to the position of the victims' bodies, the minivan door left in the middle of Fort Street, and defendants' mother's burned minivan found abandoned in a field. The witnesses supporting the defense theory, on the other hand, could not agree on the details surrounding the shooting and gave incredible, fluctuating accounts.
>
> Moreover, the prosecution did not need to conclusively prove that the shell casings found at the Perfect Beat and Lewis's home were fired from a single weapon to make its point. The jury could reasonably infer that the timing of the firebombing was not a coincidence and was orchestrated to prevent Lewis from testifying at the preliminary examination. Given Lewis's consistent identification of defendants as the perpetrators from the moment he awoke after surgery, Ware's testimony regarding Williams' jailhouse confession,[1] defendants' undeniable connection to the van, the timing of the firebombing, and the incredibility of the testimony given by Tracey George and the Croft brothers, a different result on retrial is improbable. Therefore, the trial court did not abuse its discretion in denying Williams' motion.

Williams, 2011 WL 6004067 at 4 (internal citation and quotation omitted).

Petitioner's argument that he is actually innocent based upon the newly analyzed evidence is not cognizable on federal habeas review. *Hence v. Smith*, 37 F. Supp. 2d 970, 980 (E.D. Mich. 1999). "A claim that a habeas petitioner is entitled to relief based upon the failure of a state trial judge to grant him a trial on the basis of newly discovered evidence is not cognizable in a habeas proceeding." *Monroe v. Smith*, 197 F. Supp. 2d 753, 763 (E.D. Mich. 2001) (citing *J.C. Dickey v. Dutton,* 595 F. Supp. 1, 2 (M.D. Tenn. 1983)). Accordingly, Petitioner does not state a claim upon which relief can be granted.

[1] Cornelius Ware is a jailhouse informant who was incarcerated with Petitioner at the Wayne county Jail.

Even if the claim were cognizable, the Michigan Court of Appeals' analysis of this issue was reasonable. Motions for a new trial based upon newly discovered evidence, even on direct appeal, "are disfavored and should be granted with caution." *United States v. Turns*, 198 F.3d 584, 586 (6th Cir. 2000). When a defendant moves for a new trial based on newly discovered evidence, he or she must show that the evidence: 1) was discovered after the trial; could not have been discovered earlier with due diligence; 3) is material and not merely cumulative or impeaching; and 4) would likely produce an acquittal if the case were retried. *United States v. Turns*, 198 F.3d 584, 587 (6th Cir. 2000). Here, the trial court reasonably concluded that Petitioner failed to meet the fourth prong of the test because of the ample, non-ballistic evidence against him, including eyewitness testimony corroborated by other physical evidence. Petitioner has not demonstrated that the Michigan Court of Appeals' dispensation of this matter is unreasonable and therefore he is not entitled to habeas relief on this claim.

B.

1.

Petitioner asserts that the trial court violated his Sixth Amendment right to a public trial by closing the courtroom during the testimony of two key witnesses, Lewis and Ware. Lewis was injured in the passenger seat of the Chevy Tahoe on the night of the shooting and testified for four days during the trial. During his testimony, he identified Petitioner and his co-defendant as the shooters. He also testified that he and Hairston had a long-standing grudge with the co-defendants, which had erupted into violence in the past. Ware testified as a jailhouse informant, contending that Petitioner spoke to him about his case, specifically, that a man paid Petitioner and his brother to "take care of" Hairston. ECF No. 17-22 at 96.

The Michigan Court of Appeals accurately described the incidents leading up to the courtroom closure as follows:

> Throughout the proceedings "emotions ran high." The attorneys squabbled and threatened each other and showed disrespect to the trial judge. The courtroom was filled with antagonistic spectators with rivalries of their own. On the second day of witness testimony, the prosecutor indicated that Cook was frightened of certain spectators in the courtroom and did not want to testify. The court declined the prosecutor's request to clear the courtroom because Cook declined to identify the specific spectators that caused his fear and the court observed no "overt attempt to influence" his testimony.
>
> The prosecutor renewed her request the following day, explaining, "In the witness room, I spoke with [Cook] about his concern testifying in this courtroom. He indicated that he did not want to testify. He has to go back to that neighborhood, and he knows the people in the courtroom . . . ." Cook then took the stand and altered his testimony from the statements he had previously made to the police. Specifically, Cook suddenly denied seeing the blue minivan during the shooting. The prosecutor opined, "The only thing that I can garnish from that is that the people in the back row are the people he knows from that neighborhood[.] The back row was the individuals that Mr. Cook indicated were people he didn't want to testify in front of."
>
> That same day, the prosecutor observed defendants' step-grandfather (G.Johnson) coaching Tracey George regarding her demeanor on the stand and the content of her testimony. The prosecutor summarized the conversation she overheard as follows:
>
> > I then hear him saying to her, you need to say this. You didn't sign this. And she called you a liar, and you need to say, this man is seated in the courtroom telling the witness what to say on a break. That's tantamount to witness tampering.
>
> The court instructed G. Johnson not to tamper with the witnesses.
>
> Two days later, G. Johnson violated the court's instructions and coached Juanita Williams regarding her testimony. A member of Hairston's family, later identified as E. Smith, overheard G. Johnson instruct Juanita regarding her demeanor and tone on the witness stand. In response, attorney Price informed the court that E. Smith was Hairston's brother and that he had been "shooting nasty glances" at another spectator in the courtroom.
>
> Another four days later, attorney Price informed the court that a specific spectator had been "making gestures and mouthing words" to a witness who was testifying on the stand. Attorney Price further accused the spectator of "being too demonstrative to the jury."

The following day, the court finally had enough. As the jurors were exiting for a break, Lewis queried to prosecutor Towns, "You see that?" The following heated discussion occurred:

> *Ms. Towns.* I did see that. Yeah, I did see that with Mr. Price looking at the witness.
>
> *[Lewis].* Telling me I'm dead and all this.
>
> *Ms. Towns.* Wait a minute. I've been watching him during the trial. These witnesses—
>
> *Mr. Green.* They just making that little n* * * * * lying.
>
> *[Attorney] Johnson.* Hey. Hey. Hey.
>
> *[Lewis].* Get the f* * * on. What you talking about, boy? Get on.
>
> *Court Oficer.* Have a seat. Have a seat. Have a seat.
>
> *Ms. Towns.* Mr. Lewis, you're all right, don't let these people get to you. You should be ashamed of yourself.
>
> *Mr. Price.* You should be ashamed of yourself. You don't know what you talking about.
>
> *[Lewis].* I know you 'bout to get—
>
> *Mr. Price.* How you gonna play me? He ain't no boss of nothing.

The court then forced a break to reduce the tension in the courtroom.

Upon reconvening, the prosecutor indicated that she spoke with the then 16–year–old Lewis that morning regarding his demeanor on the stand.

> He asked me, "Why is that guy griming me?" [2] From other references in the transcript, we assume the prosecutor accused attorney Price of "grimming" Lewis, not "griming." To "grim" means "to get smart with or show attitude." <http:// www.urbandictionary.com/define.php?term=grim> (accessed November 15, 2011).
>
> And he pointed right at Mr. Price . . . .
>
> * * *

> And again, he pointed right at Mr. Price. I said, "Don't look at him, just look where you need to look, testify, tell the truth, end of story." That sort of keyed me on to watch Mr. Price's expressions towards this witness during his testimony. There were at least three times I can count where I almost objected to approach the bench to draw the Court's attention to it. But I thought you know what, I'm just gonna wait for a while.
>
> At one point while he was testifying, my victim's family in the back started saying things to me[.] I could hear them saying, "Look at him, look at him."
>
> At that point, I just turned my head and I watched Mr. Price. And I have been doing this going on 16 years, and I know what a quote/unquote "grim" look looks like. I'm telling the Court I watched him engage in witness intimidation with a 16 old [sic] witness on the stand. He was staring him down. He was cocking his head sideways. He was looking him up and down. He was griming my 16–year–old witness.
>
> Now, it's painful enough that the Court has to admonish people in the audience to not engage in witness intimidation, but when the lawyers are sitting here doing it, it's offensive and reprehensible.

Attorney Price denied any nefarious intent and asserted his "right to study a witness while that witness testifies." Yet, he stated, "I can have any kind of look on my face I want." Even after the court chastised Price, he indicated, "I'm gonna continue to scrutinize this guy here . . . and I'm gonna continue to look at him and I don't see why I can't look at him."

The court ultimately indicated that "passions" amongst the lawyers were "running much higher than almost any other case I've had ... they have to get under control." The court continued:

> The emotions are high in this case. I have had to admonish two people in the back row already. I have had to admonish one person in the second row. And I do believe that these people have been separate [sic] by—I guess, you know, their support for who they are, I have no idea.
>
> * * *
>
> But at the time I did the admonishment, which was last week, okay, and now we just had another outburst and I have been approached for security reasons that this is getting much too intense . . . . [W]e're having to refer to people who are watching this as opposed to just based upon the witnesses here in the courtroom and the legal

> arguments of the attorney. We're dragging these people into it all the time as to whether or not someone's talked to someone else and this has to stop. It has to absolutely stop.
>
> And for the rest of this day, this courtroom is going to be cleared for security reasons. It was chaos when I left here. I don't know if I'm going to do this for the remainder of the entire trial, but I know I'm doing it for today. And it is solely for security. Emotions are flying way out there and there's reactions to what happens here between witnesses, defendants—I mean, I hear the defendants, they're upset. I heard the witness, he's upset. And I saw people in the back row upset.
>
> So that's the rule for the rest of this day and we'll revisit the issue when it comes up for the next day of trial.

The courtroom remained closed throughout the rest of Lewis's testimony. Ware testified immediately after Lewis and the court officer refused the public entrance into the courtroom at that time. The trial judge was not initially aware of the situation. However, she later learned from the court officer that the courtroom had remained clear of spectators because Ware was a convicted felon who had been transferred on writ from prison to the courtroom. The trial judge agreed with her court officer that the courtroom should remain closed during Ware's testimony for this security reason.

Williams, 2011 WL 6004067 at *5–8.

The Court of Appeals noted that Petitioner's counsel had not made a contemporaneous objection to the closure and went on to review the claim for plain error, concluding that the court made findings sufficient to properly enter a closure order, and narrowly tailored the closure to only exclude spectators during Lewis and Ware's testimony. Respondent asserts that this issue is procedurally defaulted because Petitioner failed to make a contemporaneous objection to the courtroom closure. In the alternative, Respondent argues that the claim fails on the merits.

When the state courts clearly and expressly rely on a valid state procedural bar, federal habeas review is barred unless petitioner can demonstrate "cause" for the default and actual prejudice from 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 (1991). If a petitioner fails to show cause for his or her 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 claims presented even in the absence of a showing of cause for procedural default. *Murray v. Carrier,* 477 U.S. 478, 495–96 (1986). 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 (1995).

Petitioner asserts that any default is excused because his trial attorney was ineffective for failing to make timely objections. Attorney error can constitute cause to excuse a procedural default only if it rises to the level of constitutionally ineffective assistance of counsel under the standard set forth by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Analyzing whether an attorney's failure to raise or preserve claims constitutes ineffective assistance requires an analysis of the merits of the claims a petitioner asserts should have been, but were not, raised or preserved. While the procedural default doctrine precludes habeas relief on a defaulted claim, it is not jurisdictional. *Trest v. Cain,* 522 U.S. 87, 89 (1997). Judicial economy sometimes counsels reaching the merits of a claim or claims if the merits are "easily resolvable against the habeas petitioner, whereas the procedural-bar issues involve complicated issues of state law." *Lambrix v. Singletary,* 520 U.S. 518, 525 (1997). Accordingly, the Court will proceed directly to the consideration of the merits of Petitioner's Sixth Amendment claims. *See Arias v. Hudson,* 589 F.3d 315, 316 (6th Cir. 2009) (*Lambrix* permits courts to skip procedural default issues and reject claims on the merits where the merits present more straightforward grounds for decision).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." U.S. Const. amend. VI. "The central aim of a criminal proceeding must be to try the accused fairly." *Waller v. Georgia,* 467 U.S. 39, 46 (1984). The public-trial guarantee was created to further that aim. *Id., citing Gannett Co. v. DePasquale,* 443 U.S. 368, 380, 99 (1979). A public trial helps to ensure that judge and prosecutor carry out their duties responsibly, encourages witnesses to come forward, and discourages perjury. *Id.*

The violation of the constitutional right to a public trial is a structural trial error, not subject to the harmless error analysis. *Id.* at 49–50, n. 9. A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The right to a public trial, however, is not absolute. The closure of a courtroom may be justified by "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press–Enter. Co. v. Superior Court of Cal., Riverside Cnty.,* 464 U.S. 501, 510 (1984) (internal quotation omitted). Specifically, a courtroom closure does not violate the Sixth Amendment where: (1) the party seeking to close the courtroom advances an overriding interest that is likely to be prejudiced by an open courtroom; (2) the party seeking closure demonstrates that the closure is no broader than necessary to protect that interest; (3) the trial court considers reasonable alternatives to closing the proceeding; and (4) the trial court makes findings adequate to support the closure. *Waller*, 467 U.S. at 48.

Petitioner is not entitled to relief on this claim. The Michigan Court of Appeals found that the trial court made "findings specific enough that a reviewing court can determine whether the closure order was properly entered," and had "wisely balanced defendants' rights to a public trial

with the need for courtroom security." *Williams*, 2011 WL 6004067 at * 8 (citing *Waller*, 467 U.S. at 45). These conclusions are based on a reasonable application of clearly established federal law.

The trial court closed the courtroom for part of one day during a twenty-five day trial because of security concerns and the need to protect testifying witnesses. The trial testimony reveals a chaotic scene, with intense altercations between the prosecutor and defense attorneys, accusations of witness tampering and intimidation (in some cases, by a defense attorney), and at least one witness altering his testimony due to perceived threats by spectators. "[C]ourts have held that the need to protect a witness from intimidation justifies closure of the courtroom." *Nolan v. Money*, 534 F. App'x 373, 380 (6th Cir. 2013) (citing *United States v. Brazel*, 102 F.3d 1120, 1156 (11th Cir. 1997)). *See also, e.g., Presley v. Georgia*, 558 U.S. 209, 215 (2010) ("There are no doubt circumstances where a judge could conclude that . . . safety concerns are concrete enough to warrant closing *voir dire*."). Petitioner has not demonstrated that the Michigan Court of Appeals' analysis was unreasonable and therefore is not entitled to relief on this claim.

2.

Petitioner sets forth a second Sixth Amendment argument, asserting that the trial court violated his right of confrontation by *sua sponte* ordering Lewis to turn his chair to face the jury during his testimony. The Michigan Court of Appeals reviewed this claim for plain error because Petitioner failed to make a contemporaneous objection to the trial court's ruling. The Court of Appeals concluded that the trial court erred in ordering Lewis to turn away from Petitioner without citing any grounds for the action, but that the error was ultimately harmless because the remaining evidence was more than sufficient to support the convictions. Respondent contends that the claim is procedurally defaulted, or, in the alternative, that the claim fails on its merits. For the reasons

outlined above, the Court will proceed directly to the consideration of the merits of Petitioner's claim.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Although face-to-face confrontation is "the core of the values furthered by the Confrontation Clause," the Supreme Court has "nevertheless recognized that it is not the *sine qua non* of the confrontation right." *Maryland v. Craig*, 497 U.S. 836, 844 (1990) (internal quotation and citation omitted). Instead, the Confrontation Clause is "generally satisfied when the defense is given full and fair opportunity to probe and expose . . . infirmities, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985). As such, it is not necessary to have a face-to-face encounter in every instance in which testimony is admitted against a defendant. *Craig*, 497 U.S. at 847.

Here, the trial court *sua sponte* required Lewis to turn away from Petitioner to face the jury during his testimony. The Michigan Court of Appeals concluded that the trial court erred by making no record as to whether this action was "necessary to further an important state interest" or "to protect the witness." *Williams*, 2011 WL 6004067 at 10. However, the Court of Appeals went on to hold that the trial court's error was harmless because the remaining evidence in the case was more than sufficient to support the convictions and overcome any error.

Confrontation Clause violations are subject to harmless error review. *Bulls v. Jones,* 274 F.3d 329, 334 (6th Cir. 2001). The standard for showing harmless error on collateral review is "considerably less favorable" to a habeas petitioner than the standard which is applied on direct review. On direct review, before a federal constitutional error can be held harmless, the court must

be able to declare that the error was harmless beyond a reasonable doubt. However, the harmless-error test for collateral review is different. A federal court can grant habeas relief only if the trial error had a substantial and injurious effect or influence upon the jury's verdict. *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993). Under this standard, a habeas petitioner is not entitled to habeas relief unless he or she can establish that the trial error resulted in "actual prejudice." *Id.* Thus, a federal-habeas court can grant habeas relief only if a habeas petitioner carries the burden of showing that a Confrontation Clause error had a substantial and injurious effect or influence on the jury's verdict. *Bulls v. Jones,* 274 F.3d 329, 335 (6th Cir. 2001). The Sixth Circuit has explained that a court should consider the following factors to determine whether a Confrontation Clause error is harmless: "(1) the importance of the witness' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross examination otherwise permitted; and (5) the overall strength of the prosecution's case." *See Jensen v. Romanowski,* 590 F.3d 373, 379 (6th Cir. 2009) (citing *Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986)).

Here, Petitioner has failed to show that Lewis's position facing the jury when testifying had a substantial and injurious effect or influence on the verdict. Throughout his four days of testimony, Lewis repeatedly identified Petitioner as one of the assailants. His testimony was supported by Ware's statements. In addition, Petitioner's mother's burned minivan perfectly matched the door found at the Perfect Beat shooting, corroborating Petitioner's participation. Moreover, when "viewed through the deferential lens of AEDPA, the state court's harmlessness ruling must stand" because based on the record in this case, the Michigan Court of Appeals reasonably rejected any potential error in the trial court's positioning of Lewis during his testimony

as harmless error. *See Kennedy v. Warren,* 428 F. App'x 517, 522, 523 (6th Cir. 2011). Petitioner is not entitled to habeas relief on this claim.

C.

To establish that he or she received ineffective assistance of counsel, a petitioner must show, first, that counsel's performance was deficient and, second, that counsel's deficient performance prejudiced the petitioner. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). A petitioner may show that counsel's performance was deficient by establishing that counsel's performance was "outside the wide range of professionally competent assistance." *Id.* at 689. This "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687.

To satisfy the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A court's review of counsel's performance must be "highly deferential." *Id.* at 689. Habeas relief may be granted only if the state-court decision unreasonably applied the standard for evaluating ineffective-assistance-of-counsel claims established by *Strickland. Knowles v. Mirzayance*, 556 U.S. 111, 122-23 (2009). "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." *Id.* at 123 (internal quotation omitted).

In the instant case, Petitioner argues that his trial attorney was ineffective for three reasons: 1) counsel's failure to object to the courtroom closure; 2) counsel's role in and failure to object to the trial court's repositioning of Lewis during testimony; and 3) counsel's failure to investigate the

case against him and present evidence of another shooter. The Court will address each of these arguments in turn.

1.

The Michigan Court of Appeals concluded that counsel was not constitutionally ineffective because any objection he could have made to the court's decision to close the courtroom would have been futile. This analysis was reasonable. The trial court made specific findings on the record that it would briefly close the courtroom to the public based on security concerns and potential witness intimidation. As addressed above, the trial transcript provides ample evidence to support the trial court's reasoning, such as reported witness tampering.

A motion to keep the courtroom open would have been futile and "failing to make a futile motion is neither unreasonable nor prejudicial." *Jacobs v. Sherman*, 301 F. App'x 463, 470 (6th Cir. 2008) (citing *Strickland*, 466 U.S. at 687). Moreover, it is reasonable to assume that trial counsel made the decision not to challenge the closure because any objection could have drawn more attention to the potential intimidation of prosecution witnesses, and may have painted his client in a bad light. *See Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (the reviewing court is "required not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [counsel] may have had for proceeding as they did." (internal quotations omitted)). *See also Johnson v. Sherry*, 465 F. App'x 477, 481 (concluding that counsel was not constitutionally ineffective where he "weighed the minimal benefits against the significant costs of objecting to the closure, and decided against it."). As such, trial counsel was not ineffective for failing to object to the court's brief closure to the public.

2.

Trial counsel's behavior with respect to the court's order that Lewis face the jury during part of his testimony is a closer case, but Petitioner is likewise not entitled to relief on this claim. The Michigan Court of Appeals described counsel's performance as "unprofessional conduct" that "fueled the court's decision to reposition Lewis on the witness stand," for which the attorney could "not be deemed effective." *Williams*, 2011 WL 6004067 at *11. Specifically, the Court of Appeals pointed to the attorney's alleged "griming" of the sixteen-year old witness and failure to make a contemporaneous objection to the court's order. However, the Court of Appeals further reasoned that, even if counsel had not made these errors, the result of the proceeding would have been the same, because of the ample evidence presented to link Petitioner to the shooting. There is no error in the Court of Appeal's reasoning. Petitioner has not shown a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. He is not entitled to habeas relief on this issue.

3.

Petitioner argues that trial counsel was ineffective because he failed to thoroughly investigate the crime or identify other potential suspects, including prosecution witness Lewis. Petitioner first raised this claim in a motion for relief from judgment. The trial court denied relief because "all of the evidence defendant points to which he argues establishes his innocence was presented at trial." *People v. Williams*, No. 07-010617-02-FC, Wayne Cir. Ct. Opinion and Order at 2-3, 6 (July 23, 2013). The Michigan Court of Appeals also denied relief because Petitioner was alleging "grounds for relief that could have been raised previously" and "failed to establish both good cause for failing to previously raise the issues and actual prejudice from the irregularities alleged[.]" *People v. Williams*, No. 319908, Mich. Ct. App. Order (Feb. 27, 2014).

This claim is procedurally defaulted. Habeas relief may be precluded on claims that a petitioner has not presented to the state courts in accordance with the state's procedural rules. *See Wainwright v. Sykes,* 433 U.S. 72 (1977); *Couch v. Jabe,* 951 F.2d 94 (6th Cir. 1991). In *Wainwright,* the United States Supreme Court explained that a petitioner's procedural default in the state courts will preclude federal habeas review if the last state court rendering a judgment in the case rested its judgment on the procedural default. 433 U.S. at 85.

In such a case, a federal court must determine not only whether a petitioner has failed to comply with state procedures, but also whether the state court relied on the procedural default or, alternatively, chose to waive the procedural bar. "A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed,* 489 U.S. 255, 263-64 (1989). The last explained state court judgment should be used to make this determination. *Ylst v. Nunnemaker,* 501 U.S. 797, 803-805 (1991). If the last state judgment is a silent or unexplained denial, it is presumed that the last reviewing court relied upon the last reasoned opinion. *Id.*

Here, the Michigan Court of Appeals rendered the last reasoned opinion. In dismissing Petitioner's ineffective assistance of counsel claim, the court relied upon a state procedural bar—Michigan Court Rule 6.508(D)(3)—in denying relief. *See Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010) (referring to M.C.R. 6.508(D)(3) as the "procedural default rule."). Reliance upon Michigan Court rule 6.508(D)(3) is an "independent and adequate state ground sufficient for procedural default," requiring Petitioner to raise the claim during his direct appeal. *See, e.g., McFarland v. Yukins*, 356 F.3d 688, 698 (6th Cir. 2004).

A state prisoner who fails to comply with a state's procedural rules waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. *Coleman,* 501 U.S. at 753; *Gravley v. Mills,* 87 F.3d 779, 784-85 (6th Cir. 1996). Petitioner asserts that appellate counsel was ineffective for failing to raise this claim in the motion to remand. Attorney error can constitute cause to excuse a procedural default only if it rises to the level of constitutionally ineffective assistance of counsel under the standard set forth by the United States Supreme Court in *Strickland,* 466 U.S. 668. As set forth in Section III(E), below, appellate counsel was not constitutionally ineffective. Thus, Petitioner cannot establish cause to excuse his default. The Court need not address the issue of prejudice when a petitioner fails to establish cause to excuse a procedural default. *See Smith v. Murray,* 477 U.S. 527, 533 (1986); *Long v. McKeen,* 722 F.2d 286, 289 (6th Cir. 1983).

Additionally, Petitioner has not established that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception requires a showing that a constitutional violation probably resulted in the conviction of one who is actually innocent. *Schlup v. Delo,* 513 U.S. 298, 326-27 (1995). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States,* 523 U.S. 614, 624 (1998). "To be credible, [a claim of actual innocence] requires petitioner to support his [or her] allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup,* 513 U.S. at 324. Petitioner has made no such showing. His ineffective assistance of counsel claim based on trial counsel's alleged failure to investigate is thus barred by procedural default and does not warrant habeas relief.

Even if the Court could excuse the procedural default, Petitioner would still not be entitled to relief. The state court's decision is neither contrary to Supreme Court precedent nor an unreasonable application of federal law to the facts. Well-established federal law requires that defense counsel conduct a reasonable investigation into the facts of a defendant's case, or make a reasonable determination that such investigation is unnecessary. *Wiggins*, 539 U.S. at 522–23; *Strickland*, 466 U.S. at 691; *Stewart v. Wolfenbarger*, 468 F.3d 338, 356 (6th Cir. 2007). The duty to investigate "includes the obligation to investigate all witnesses who may have information concerning . . . guilt or innocence."); *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005). Decisions as to what evidence to present and whether to call certain witnesses, however, are presumed to be matters of trial strategy. When making strategic decisions, counsel's conduct must be reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). The failure to call witnesses or present evidence constitutes ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *Chegwidden v. Kapture*, 92 F. App'x 309, 311 (6th Cir. 2004); *Hutchison v. Bell*, 303 F.3d 720, 749 (6th Cir. 2002). Here, Petitioner does not demonstrate that trial counsel's alleged failure to investigate other potential suspects deprived him of a substantial defense. As noted by the trial court, trial counsel actually *did* present evidence that someone else was driving the van during the Perfect Beat shooting. Two witnesses testified that the driver of the van was Mexican or Caucasian, and not African American like Petitioner. As stated by the trial court, "[d]efense counsel was able to bring out on cross-examination the conflicting identification testimony of the prosecution's eyewitness and presented evidence that defendant was not involved in the crime." *Williams*, No. 07-010617-02-FC at 3. Thus, Petitioner is not entitled to relief on this claim.

D.

Petitioner next argues that he is entitled to habeas relief because the complaint against him lacked probable cause, and therefore the district and circuit court lacked jurisdiction to proceed against him. The determination of whether a state court is vested with jurisdiction under state law over a criminal case is a function of the state courts, not the federal courts. *Wills v. Egeler,* 532 F. 2d 1058, 1059 (6th Cir. 1976). *See also Daniel v. McQuiggin,* 678 F.Supp. 2d 547, 553 (E.D. Mich. 2009). "A state court's interpretation of state jurisdictional issues conclusively establishes jurisdiction for purposes of federal habeas review." *Strunk v. Martin*, 27 F. App'x. 473, 475 (6th Cir. 2001). Petitioner's claim that the trial court lacked jurisdiction to try his case raises an issue of state law, and is therefore not cognizable in federal habeas review. *See Spalla v. Foltz*, 788 F.2d 400, 405 (6th Cir. 1986) (holding that the petitioner's claim that the trial court lacked jurisdiction was not cognizable on federal habeas review).

E.

Finally, Petitioner asserts that appellate counsel was ineffective in three ways. First, he argues that appellate counsel erred by failing to brief trial counsel's lack of objection to the courtroom closure. Second, he asserts that appellate counsel failed to raise trial counsel's failure to investigate the facts of the case in her motion to remand. Finally, Petitioner contends that appellate counsel was ineffective by failing to provide transcripts in time for him to prepare a Standard 4 Brief.

The *Strickland* standard also applies to claims of ineffective assistance of appellate counsel. *See Whiting v. Burt,* 395 F.3d 602, 617 (6th Cir. 2005). It is well-established that a criminal defendant does not have a constitutional right to have appellate counsel raise every non-frivolous issue on appeal. *See Jones v. Barnes,* 463 U.S. 745, 751 (1983). The United States Supreme Court has explained:

> For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . . Nothing in the Constitution or our interpretation of that document requires such a standard.

Id. at 754. Strategic and tactical choices regarding which issues to pursue on appeal are "properly left to the sound professional judgment of counsel." *United States v. Perry,* 908 F.2d 56, 59 (6th Cir. 1990). In fact, "the hallmark of effective appellate advocacy" is the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail." *Smith v. Murray,* 477 U.S. 527, 536 (1986) (quoting *Barnes,* 463 U.S. at 751–52). "Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of appellate counsel be overcome." *Monzo v. Edwards,* 281 F.3d 568, 579 (6th Cir. 2002). Appellate counsel may deliver deficient performance and prejudice a defendant by omitting a "dead-bang winner," which is defined as an issue which was obvious from the trial record and would have resulted in a reversal on appeal. *See Meade v. Lavigne,* 265 F. Supp. 2d 849, 870 (E.D. Mich. 2003).

Here, Petitioner has failed to show that appellate counsel's performance fell outside the wide range of professionally competent assistance by omitting the ineffective assistance of trial counsel claims that Petitioner raised for the first time in his post-conviction motion for relief from judgment. Petitioner's appellate counsel filed a claim of appeal and motion for remand, raising the following two claims: 1) Petitioner was entitled to a new trial on the basis of newly discovered ballistic evidence, and 2) the trial court violated Petitioner's right to a public trial by closing the courtroom and violated his Sixth Amendment right to confrontation by ordering Lewis to face the jury during his testimony. Petitioner has not shown that appellate counsel's strategy in presenting these two claims and not raising other claims was deficient or unreasonable. Moreover, the Court

of Appeals granted the motion to remand on the basis of newly discovered evidence, indicating that counsel's performance was not deficient.

Relatedly, the Court of Appeals concluded that Petitioner failed to demonstrate that, but for counsel's alleged failure to provide a timely copy of the trial transcripts to allow Petitioner to file a Standard 4 brief, the results of the appeal would have been different. This conclusion is reasonable, given that the claims Petitioner wished to raise were ultimately meritless. Because Petitioner's ineffective assistance of trial counsel claim is without merit, Petitioner is unable to show that appellate counsel's failure to raise this claim on his appeal of right was deficient, and thus fails to establish that he was denied the effective assistance of appellate counsel. *See Coleman v. Metrist,* 476 F. Supp. 2d 721, 733 (E.D. Mich. 2007).

IV.

Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253. Rule 11 of the Rules Governing Section 2254 Proceedings now requires that the Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). A petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (citation omitted). In this case, reasonable jurists would not debate the conclusion that the petition fails to state a claim upon which habeas corpus relief should be granted. Therefore, the Court will deny a certificate of appealability. The Court will also deny permission

to appeal in forma pauperis because any appeal of this decision could not be taken in good faith. 28 U.S.C. § 1915(a)(3).

V.

Accordingly, it is **ORDERED** that the petition for a writ of habeas corpus, ECF No. 1, is **DENIED** and the matter is **DISMISSED**.

It is further **ORDERED** that a certificate of appealability and permission to appeal in forma pauperis are **DENIED**.

Dated: April 3, 2018

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on April 3, 2018.

s/Kelly Winslow
KELLY WINSLOW, Case Manager