APPENDIX

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

File Name: 20a0464n.06
Case Nos. 19-1302/1304

DEMETRIUS WILLIAM EDWARDS,
Petitioner-Appellant,
v.

SHERRY BURT, WARDEN,
Respondent-Appellee.

BRYANT LAMONT ROYSTER,
Petitioner-Appellant,
v.

KEVIN LINDSEY, WARDEN,
Respondent-Appellee.

Filed August 5, 2020

On appeal from the United States
District Court for the Eastern
District of Michigan

Before: GUY, SUTTON, and GRIFFIN, Circuit Judges.

RALPH B. GUY, JR., Circuit Judge. Following a joint bench trial in state court, Demetrius Edwards and Bryant Royster were convicted of murder in the shoot-

ing death of Cedell Leverett as he sat in his car outside a shopping mall in Michigan. After Edwards and Royster exhausted their appeals in state court, they each filed a habeas petition in federal court. Denying their claims in separate albeit overlapping orders, the district court granted certificates of appealability on their common claim that the absence of defense counsel during the trial judge's solo visit to the crime scene was a *per se* violation of the Sixth Amendment. Concluding that the state court's rejection of this claim was neither contrary to nor an unreasonable application of Supreme Court precedent, we affirm.

I.

A.

The Michigan Court of Appeals, which issued the last reasoned state court decision on the matter, explained that, on September 24, 2010,

> Edwards was free on a GPS tether to "settle [his] affairs," having been sentenced just the day before for a prior armed robbery conviction. Apparently, those affairs included a trip to the Eastland Mall with Royster and two acquaintances, Devante Smith and Jaisaun Holt.
>
> Around 8:30 p.m., the decedent, Cedell Leverett, was sitting in the driver's seat of his Mercedes parked in the valet area of Eastland Mall. Another car was parked nearby. Deborah Gaca observed Edwards get out of the other car, and run towards the valet area in a crouched position. Edwards was holding a gun. Royster, who was standing outside the driver's side of the other car, yelled "Pop him, pop that mother f***** good." Edwards then fired four

shots into the Mercedes at close range, killing Leverett. Edwards ran back to the other car, which was backing out, and fled the scene. Police … found over $3,000 in the decedent's pocket. Corroborating Edwards's and Royster's presence at the Eastland Mall during this time were a surveillance video and Edwards's tether records.

Holt confirmed in a police interview (which he later disavowed at trial) that Edwards intended "to get [the decedent's] glasses and he hit him," before Royster whisked them away in the car. Although Holt also elaborated that Edwards claimed to have shot the decedent after the decedent brandished a firearm, police found no weapons in or around the Mercedes or on the decedent's person during their investigation immediately after the shooting. Devante claimed the others left the Eastland Mall without him.

Deonte Smith, Devante's brother, … stated [in a police interview] that he saw defendants, Holt, and his brother (Devante) at a high school football game sometime after the shooting. At the game, "they" told Deonte they had seen a man walking around the Eastland Mall with a diamond watch and $12,000 to $15,000 cash in his pocket. Holt kept tabs on this man and reported to Edwards by phone. Edwards "bragged" to Deonte that he tracked the man outside and tried to rob the man of his watch, but because the man was reaching for something, Edwards shot him. Others at the football game told Edwards he was stupid for not getting anything.

> [Edwards was arrested] a week after the shooting [when] a security officer at the Northland Mall in Southfield saw Edwards toss a gun under an SUV in the parking lot while fleeing a fight. Edwards was arrested at the scene. Royster was apparently arrested shortly thereafter. Subsequent tests of the gun revealed that this weapon had fired the shell casings and bullet fragments found in and around the Mercedes and inside [Leverett].

People v. Edwards, et al., Nos. 318000/318025, 2015 WL 1069275, at *1-2 (Mich. Ct. App. Mar. 10, 2015) (per curiam) (footnote omitted), *lv. to appeal denied*, 870 N.W.2d 67, 67 (Mich. Oct. 15, 2015) (mem.). Someone who had been with Leverett on the day of the shooting gave police a diamond watch and sunglasses, which Leverett's daughter said she had seen Leverett wearing earlier on the day he was killed. *Id.* at *2.

Deborah Gaca, who worked at a store in the Eastland Mall, testified that she walked an elderly customer out of the mall entrance where she witnessed the shooting. Shown photographs of the area, Gaca was questioned about what she saw, where she was standing, and the lighting conditions at the time of the shooting. On the next day of trial, the judge announced that "the attorneys would accompany [him] to the crime scene" at lunch on the following day. *Edwards*, 2015 WL 1069275, at *7. When defendants' attorneys "indicated their clients' desire to [also] attend this viewing, the [judge] canceled the visit unless defendants "change[d] their mind."" *Id.* (third alteration in original). That exchange occurred on the morning of July 30, 2013.

The defendants apparently relented, as two days later the judge described a trip to the crime scene that took place without Edwards or Royster. Although the defendants were not there, their attorneys were both present along with the judge, the prosecutor, the eyewitness, and others. A record was made of that visit with the concurrence of defense counsel. In particular, Gaca indicated where she had been standing when the shooting occurred and explained that she did not move except to back up against the pole when she saw the gunman running back to the getaway car. The judge would later find that Gaca stood 50 feet away from the shooting—not 20 feet as she had testified. But that first crime scene visit was not the basis of the claim here.

Instead, after the record was made of the first visit, the trial judge disclosed in open court that he had also made a separate nighttime visit to the crime scene by himself.

> THE COURT: Anything else? And I will say that the night before I, myself, went out just to look at the lighting around the place. I went at approximately 10:00 P.M. to see what it looked like, [what] the lighting was like at the mall from the area where we were standing yesterday. Anything else to put on the record regarding that?
>
> [Prosecutor]: Not regarding that, Your Honor.
>
> THE COURT: Okay.
>
> [Counsel for Royster]: No, Your Honor.
>
> [Counsel for Edwards]: No.

(Tr. Trans. 8/1/13, pp. 37-38.) As this exchange reflects, defendants' attorneys did not object to the judge's solo crime scene visit on any basis. Nor did defense counsel lodge any objection after the judge rendered his oral decision, which briefly referenced both crime scene visits and his own observation that the area "was very well lit." (Tr. Trans. 8/5/13, p. 59.) Even when the judge asked counsel if there was anything else to put on the record, both defense attorneys responded that they had nothing to add. (*Id.* at 63.)[1]

Both Edwards and Royster were found guilty of first–degree felony murder and sentenced to life without parole. Edwards was also convicted of two related firearm offenses for which he received additional terms of imprisonment. The Michigan Court of Appeals affirmed in a consolidated opinion, and the Michigan Supreme Court denied leave to appeal.

B.

On direct appeal, Edwards and Royster argued, among other things, that the two crime scene visits violated their rights in a number of ways. The Michigan Court of Appeals found that all claims pertaining to the first visit had been waived because the defense attorneys were present, agreed to the questions posed to the eyewitness, and stipulated to the admission of her responses into evidence. *Id.* at *7 & *12. Aside from that waiver, the court also declared that its review of the crime scene visits "would be for outcome determinative

[1] Although it is not entirely clear which visit occurred first, the state court identified the visit with defense counsel as the "first visit" and the trial judge's solo visit as the "second." Because the sequence is immaterial to this appeal, the visits are referred to the same way here.

error" because "Edwards failed to object to either visit" and, more specifically, "Royster lodged no objection [to the second visit] on [his] novel theory (or on any other ground)." *Id.* at *7 & *12 (citing *People v. Carines*, 597 N.W.2d 130, 138-39 (Mich. 1999) (holding that the plain–error rule extends to unpreserved claims of constitutional error)).[2]

Having identified plain error as the standard of review, the state court proceeded to consider what rights a criminal defendant has "[w]ith respect to the fact–finder's viewing of a crime scene." *Id.* at *7. Specifically, the court said that, at least where there is a jury, "the viewing constitutes a critical stage of a criminal proceeding which a criminal defendant has the right to attend with the assistance of counsel." *Id.* (citing *People v. Kurylczyk*, 505 N.W.2d 528, 531 (Mich. 1993) (discussing Sixth Amendment right to have counsel at photographic lineup), and *People v. Kent*, 404 N.W.2d 668, 674 (Mich. App. 1987) (identifying a defendant's statutory right to be present during a jury view of the crime scene as recognized in *People v. Mallory*, 365 N.W.2d 673, 68083 (Mich. 1984))). The state court then assumed that the same would be true when the judge in a bench trial views "a crime scene in the absence of [a] defendant or his counsel." *Id.* (citing *United States v. Walls*, 443 F.2d 1220, 1222-23 (6th Cir.

[2] Petitioners insist on appeal that defense counsel did, in fact, lodge an objection that made repeated objections unnecessary. Not only was that argument newly raised in reply, but it is also inconsistent with the undisputed record. Defense counsels' initial objection to conducting the first crime scene visit *with counsel* but without the defendants simply could not substitute for an objection when the trial judge disclosed that he had made an unconsented to solo visit to the crime scene without the presence of the defendants or their counsel.

1971), and *Payne v. United States*, 697 A.2d 1229, 1234-35 (D.C. 1997)). Lastly, the court added that Confrontation Clause protections are neither absolute nor as broad in scope as the right to be present at trial. *Id.*

Turning to Edwards's claims, the state court found no error requiring reversal. For the first visit, any error "certainly was not outcome determinative in light of the overwhelming evidence against Edwards." *Id.* at *8. As to the second visit, the state court concluded:

> Likewise, even if the court's second viewing were improper, it did not violate Edwards's substantial rights. The court indicated that its only purpose was to confirm the lighting of the parking lot. That fact was of little consequence in light of the other incriminating evidence, especially the surveillance video, tether, and forensic evidence. Again, Edwards was not prejudiced, and, not surprisingly, he makes no claim that he was actually innocent or that this fundamentally affected the proceedings in an adverse way.

Id. This plain error review would seem to encompass all the claims made with respect to the judge's solo visit to the crime scene—including the absence–of–counsel claim. Yet, in the next paragraph, the state court separately rejected the argument that the absence of counsel was structural error requiring automatic reversal under *United States v. Cronic*, 466 U.S. 648, 659 (1984). *Id.*

That detour, although brief, expressed agreement with the post–*Cronic* decisions of "every federal circuit court of appeals" that have held "an absence of counsel at a critical stage may, under some circumstances, be reviewed for harmless error." *Edwards*, 2015 WL

1069275, at *8 (quoting *People v. Murphy*, 750 N.W.2d 582, 586 (Mich. 2008) (Markman, J., concurring separately) (noting citation to, among others, *Satterwhite v. Texas*, 486 U.S. 249 (1988), *Ellis v. United States*, 313 F.3d 636, 643 (1st Cir. 2002), and *United States v. Lampton*, 158 F.3d 251, 255 (5th Cir. 1998)). Without further analysis, the Michigan Court of Appeals concluded that the "facts fall squarely in line with this authority and we see no compelling reason to deviate today." *Id.* As a result, reversal was "not warranted." *Id.*

Later in the opinion, Royster's parallel absence–of–counsel claim was also rejected. "Like Edwards, Royster also challenges the trial [judge's] second viewing of the crime scene, with the added wrinkle of an alleged Confrontation Clause violation." *Id.* at *12. Because Royster lodged no objection below, the Michigan Court of Appeals said it was "looking for outcome determinative error that adversely affected the proceedings or resulted in the conviction of an innocent defendant." *Id.* (citing *Carines*, 597 N.W.2d at 143). Referring back to its earlier discussion of a criminal defendant's rights, the court agreed that the judge's "second viewing of the crime scene was not only erroneous, but imprudent." *Id.* Assuming error, the state court found that Royster could not "get around the mountain of incriminating evidence against him" and added that, "besides our prior analysis," Royster's "vulgar encouragement to Edwards" "eradicates any pretense of actual innocence especially considering that the trial court's second visit was to view the lighting in the parking lot." *Id.* Finally, in discussing Royster's "near carbon–copy subset of the issues his codefendant present[ed] on appeal," the state court again applied plain error review. Addressing the two crime scene visits, the court stated that, "as we have repeatedly concluded, the evidence of

Royster's guilt absent these visits was clear and he is not actually innocent." *Id.*

The district court found that procedural default barred review of petitioners' claim that the absence of counsel during the second crime scene visit constituted a *per se* violation of the Sixth Amendment. We review the district court's legal conclusions *de novo* and any findings of fact for clear error. *See Robinson v. Howes*, 663 F.3d 819, 825 (6th Cir. 2011).

II.

A claim that was procedurally defaulted in state court cannot be reviewed on the merits unless the default is excused by showing either cause for the default and actual prejudice from the constitutional violation, or that failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Procedural default occurs when: "(1) the petitioner failed to comply with a state procedural rule that is applicable to the petitioner's claim; (2) the state courts actually enforced the procedural rule in the petitioner's case; and (3) the procedural forfeiture is an 'adequate and independent' state ground foreclosing review of a federal constitutional claim." *Willis v. Smith*, 351 F.3d 741, 744 (6th Cir. 2003) (citation omitted).

The district court found procedural default based on failure to comply with Michigan's contemporaneous objection rule, which we have recognized as both "a well–established and normally enforced procedural rule." *Taylor v. McKee*, 649 F.3d 446, 451 (6th Cir. 2011). At the outset, petitioners insist that their *Cronic* claim could not be defaulted in this way because "a per se violation of a defendant's right to effective as-

sistance of counsel does not require the defendant to preserve the error below." *Hunt v. Mitchell*, 261 F.3d 575, 582 (6th Cir. 2001) (citing *Powell v. Alabama*, 287 U.S. 45, 57-58 (1932)). But petitioners misread *Hunt*, which did not involve procedural default. In fact, this court rejected the very same argument in *Carruthers v. Mays*, 889 F.3d 273, 289 (6th Cir. 2018). There, Carruthers argued "that a claim of total deprivation of counsel at a critical stage in the criminal proceedings cannot be defaulted because it alleges structural constitutional error." *Id.* As we explained, however, "[f]orfeiture and procedural default are distinct concepts," so "proclaiming that a right may not be forfeited or waived does not necessarily mean the right may not be procedurally defaulted." *Id.* (citing *Hodges v. Colson*, 727 F.3d 517, 540 (6th Cir. 2013)).

Under Michigan law, the failure to object limits an appellate court to Michigan's version of plain error review. *Carines*, 597 N.W.2d at 138-39; *see also People v. Vaughn*, 821 N.W.2d 288, 303-04 (Mich. 2012). Enforcement of a state court's contemporaneous objection rule is "an adequate and independent state ground barring federal habeas review," and a state court's plain error review does not revive a procedurally defaulted claim. *Awkal v. Mitchell*, 613 F.3d 629, 64849 (6th Cir. 2010) (en banc) (citation omitted); see also *Wogenstahl v. Mitchell*, 668 F.3d 307, 337 (6th Cir. 2012). But for procedural default to bar habeas review, the state court must have "clearly and expressly" relied on the procedural bar in rejecting the claim. *See Smith v. Cook*, 956 F.3d 377, 385 (6th Cir. 2020) (quoting *Coleman*, 501 U.S. at 734). We cannot say that the state court did so here.

Certainly, the state court found that defense counsel failed to object to the second crime scene view on any of the grounds raised on appeal. Broadly invoking

the contemporaneous objection rule, the state court lumped all the claims concerning the crime scene visits together and found that neither Edwards nor Royster had demonstrated "outcome determinative error." That reliance on the procedural bar would seem to encompass the absence of counsel at the second crime scene visit—except that the court proceeded to specifically reject the claim that the denial of counsel was structural error requiring automatic reversal under *Cronic*. What to make of this detour is not clear.

Was it meant to be part of the plain error review? It was not framed as a prong of Michigan's plain error review. Nor was it cast as an alternative holding, as the state court had done with respect to the first crime scene visit. Instead, the court addressed the claim of structural error under *Cronic*, but concluded that the absence of counsel in this case was subject to harmless error review. *Edwards*, 2015 WL 1069275, at *8. This explicit rejection of presumed prejudice under *Cronic* and application of harmless error review—standing apart from and untethered to the state's procedural bar—leaves us unable to say on which ground or grounds the state court relied in rejecting the claim of a *per se* violation of the Sixth Amendment. Because the last reasoned state court decision did not appear to clearly and expressly rely on the state procedural rule, habeas review is not barred. *Smith*, 956 F.3d at 385; *see also Clinkscale v. Carter*, 375 F.3d 430, 441-42 (6th Cir. 2004).[3]

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[3] Even if this was not the case, we would not be required to address procedural default "before deciding against the petitioner on the merits." *Bales v. Bell*, 788 F.3d 568, 573 (6th Cir. 2015) (quoting *Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003)).

III.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs the scope of our review only if the claim has been "adjudicated on the merits in State court." *Johnson v. Williams*, 568 U.S. 289, 292 (2013) (quoting 28 U.S.C. § 2254(d)). We presume that a claim was adjudicated on the merits when the state court denies relief on a properly presented federal claim. *See Harrington v. Richter*, 562 U.S. 86, 99 (2011). That presumption is a strong one that may be rebutted only in limited circumstances, such as "when there is reason to think some other explanation for the state court's decision is more likely." *Id.* at 99-100. For instance, a petitioner may rebut the presumption "[w]hen the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court." *Johnson*, 568 U.S. at 303.

Royster contends that his *Cronic* claim was "inadvertently overlooked" since it was not specifically mentioned in the portion of the state court decision addressing his arguments on appeal. But "the presumption prevails even when the state court's opinion wholly omits discussion of the federal claim." *Smith*, 956 F.3d at 386 (citing *Johnson*, 568 U.S. at 304). Nor is this case like *Brown v. Romanowski*, where the presumption was rebutted by evidence that the state court addressed every claim made in the original post–conviction motion but did not address *any* of the claims raised in the amended petition. 845 F.3d 703, 711-12 (6th Cir. 2017). Here, the state court recognized that Royster was making the same claims as Edwards with respect to the second crime scene visit. And, the fact that the state court referred back to its earlier analysis undercuts the conclusion that the absence–of–counsel claim was inadvertently overlooked.

Seeking to avoid AEDPA deference, both petitioners argue that their *Cronic* claim was not adjudicated on the merits because the claim was purportedly reviewed for plain error. This court "has not been a paragon of clarity about whether a state court's plain–error ruling amounts to a ruling on the merits under AEDPA." *Stewart v. Trierweiler*, 867 F.3d 633, 638 (6th Cir. 2017). But, as we explained in *Stewart*, AEDPA governs review of "a state court's plain–error analysis if it 'conducts any reasoned elaboration of an issue under federal law.'" *Id.* (quoting *Fleming v. Metrish*, 556 F.3d 520, 531 (6th Cir. 2009)). Petitioners point to several pre–*Fleming* decisions as controlling, but as *Fleming* explained and *Stewart* reiterated, those earlier decisions "stand only for the proposition that a state court's plain–error analysis cannot resurrect an otherwise defaulted claim." *Id.* To the extent that the state court may have applied plain error review to petitioners' *Cronic* claim, that would not have necessarily precluded it from being adjudicated on the merits. *See Phillips v. Hoffner*, 755 F. App'x 481, 498-99 (6th Cir. 2018) (Kethledge, J., concurring in judgment) (explaining that *Stewart* "resolves the ambiguity").

Finally, the presumption prevails even when the state court imperfectly analyzes a petitioner's federal claim. *See Smith*, 956 F.3d at 386. Here, the state court described a jury's view of a crime scene as a critical stage of the proceeding to which a criminal defendant has a "right to attend with the assistance of counsel." *Edwards*, 2015 WL 1069275, at *7. In support, the court's citation coupled cases recognizing a defendant's statutory right to be present under Michigan law and describing generally the Sixth Amendment right to counsel at a critical stage of the criminal proceeding. *Id.* Notwithstanding the state court's purported appli-

cation of plain error review, the fact remains that the decision specifically rejected the claim that the absence of counsel required automatic reversal under *Cronic*. *Id.* at *8. And, any doubt that the state court was addressing the core of the claim under federal law is dispelled by its endorsement of the view that, as "every federal circuit court of appeals has stated, post–*Cronic*, [] an absence of counsel at a critical stage may, under some circumstances, be reviewed for harmless error." *Id.* (citations omitted). We consider the state court's decision rejecting the claim of structural error under *Cronic* to be a merits adjudication for purposes of AEDPA.

IV.

Under AEDPA, federal habeas relief may not be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). Petitioners did not argue that the decision was factually erroneous, so our task is to measure the state court's decision against the Supreme Court's holdings at the time of that decision. *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

A.

"[T]he Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process," as well as the right to proceed without counsel when done so voluntarily and intelligently. *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) (per curiam) (citation omitted); *see also United States v. Gouveia*, 467 U.S. 180, 188 (1984) (holding

"right to counsel does not attach until the initiation of adversary judicial proceedings"). A claim of ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice under *Strickland*, and even *Cronic* found that it was error to have reversed the defendant's conviction without demonstrating prejudice under *Strickland*. *See Bell v. Cone*, 535 U.S. 685, 695-96 (2002) (discussing *Strickland v. Washington*, 466 U.S. 668 (1984), and *United States v. Cronic*, 466 U.S. 648, 659 (1984)). *In Cronic*, however, the Supreme Court also identified three circumstances in which the denial of counsel would be "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 695 (quoting *Cronic*, 466 U.S. at 658-59). This *Cronic* structural–error exception is "narrow," *Florida v. Nixon*, 543 U.S. 175, 190 (2004), as "most constitutional errors can be harmless," *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991).

Petitioners invoked the first of the *Cronic* circumstances: namely, "when there is a 'complete denial of counsel' at, or counsel is 'totally absent' from, a 'critical stage of the proceedings.'" *Clark v. Lindsey*, 936 F.3d 467, 470 (6th Cir. 2019) (quoting *Cronic*, 466 U.S. at 658-59 & n. 25). The denial of counsel must occur during a "critical stage," which is a term the Court has used "to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused." Bell, 535 U.S. at 696 (citing *Hamilton v. Alabama*, 368 U.S. 52 (1961) (no counsel present at arraignment), and *White v. Maryland*, 373 U.S. 59 (1963) (per curiam) (no counsel present at entry of plea)). Also, to warrant a presumption of prejudice, there must be a "complete" denial of counsel. *Cronic*, 466 U.S. at 659; *see also Penson v. Ohio*, 488 U.S. 75, 88 (1988)

(withdrawal of counsel on appeal). Although *Cronic*'s rule for presuming prejudice is settled, the precise contours of when it applies are not. *See, e.g., Woods v. Donald*, 575 U.S. 312, 317-18 (2015) (per curiam), *rev'g Donald v. Rapelje*, 580 F. App'x 277 (6th Cir. 2014).[4]

B.

A state court's decision is contrary to clearly established federal law when it "applies a rule that contradicts" or "confronts a set of facts that are materially indistinguishable from [the Supreme Court's] precedent" but reaches a different result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). The Supreme Court has warned that this standard cannot be met by framing the issue at too high a level of generality. *See Woods*, 575 U.S. at 317-18 (citing *Lopez v. Smith*, 574 U.S. 1, 5-6 (2014) (per curiam)).

There is no dispute that the Supreme Court has never held that the absence of counsel during a crime scene view by the fact–finder—whether a judge or jury—constitutes a complete denial of counsel at a critical stage of the criminal proceeding for which prejudice must be presumed. Because no Supreme Court decision has confronted that specific question, the state court's rejection of the claim of *Cronic* error could not be contrary to any holding of the Supreme Court. That is true as to both the question of whether the crime scene viewing was a "critical stage" of the proceedings

[4] The other two circumstances in which prejudice need not be shown are: when counsel fails to subject the case to meaningful adversarial testing; and when competent counsel would very likely be unable to render effective assistance under the circumstances. *See Bell*, 535 U.S. at 696 (citing and quoting *Cronic*, 466 U.S. at 659-62). Neither situation was at issue here.

and the contention that the denial of counsel constitutes structural error under *Cronic*. *See id.* at 317 (explaining that similarity to other trial events that have been held to be a "critical stage" does not make a state court decision "contrary to" clearly established Supreme Court precedent); *Glebe v. Frost*, 574 U.S. 21, 23-24 (2014) (per curiam) (holding that even if limits to closing argument violated the right to counsel, "it was not clearly established that [the] mistake ranked as structural error").

C.

A state court unreasonably applies clearly established Supreme Court precedent if it correctly identifies the legal rule but unreasonably applies it to the facts of the petitioner's case. *Williams*, 529 U.S. at 407. This requires that the decision be "objectively unreasonable, not merely wrong," and "even 'clear error' will not suffice." *White v. Woodall*, 572 U.S. 415, 419 (2014) (quoting *Lockyer*, 538 U.S. at 75-76). A state court's decision is objectively unreasonable only if it is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. This deference is particularly warranted when, as here, the Supreme Court's decisions "give no clear answer to the question presented, let alone one in [petitioner's] favor." *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (per curiam). We conclude that petitioners' claim of *Cronic* error cannot clear this hurdle. But first, a few of petitioners' arguments need addressing.

1.

To start, we are not persuaded that respondents confessed structural error under *Cronic* in their state court pleadings. Although one brief said "[t]his crime–scene visit was extremely important to the defense," that discussion related specifically to the *first* crime scene visit where Gaca was questioned. (Edwards, Page ID # 1601.) In another brief, the State conceded that "the visit made to the scene by the judge at night … was error" because the trial judge did so without the knowledge or consent of counsel. (Royster, Page ID # 1342.) But nothing about either concession was an admission of *structural* error. The state court found, or at least assumed, that the judge's solo visit to the crime scene was erroneous and imprudent—as would we. Indeed, we have held in a direct appeal that it was reversible error for a trial judge to have denied the defendant and his attorney the opportunity to attend a viewing of the crime scene. *See United States v. Walls*, 443 F.2d 1220, 1222-23 (6th Cir. 1971). Importantly, however, *Walls* explained that the reversal was based on this court's supervisory authority, and expressly declined to decide whether it would be "error of Constitutional dimensions" to conduct the view without the defendant or his attorney. *Id.* at 1223 n.3.

Nor is this court bound by the state court's finding that the judge's crime scene visit was "a critical stage of a criminal proceeding which a criminal defendant has the right to attend with the assistance of counsel." *Edwards*, 2015 WL 1069275, at *7 (citations omitted). Petitioners argue that it is binding because "a state court's interpretation of *state law*, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam) (em-

phasis added). But the critical question—whether the absence of counsel at the crime scene visit constituted a *per se* violation of the Sixth Amendment under *Cronic*—is not a matter of *state* law. What would be binding is the state court's conclusion that Michigan's statutory right to be present at trial extends to a fact-finder's viewing of a crime scene because it is part of the trial. Because we assume that Michigan would consider the judge's crime scene view to be part of the trial, we also assume that petitioners had a Sixth Amendment right to the assistance of counsel at such a viewing.

That being the case, petitioners understandably rely on this court's statement in *Green v. Arn* that "[i]t is difficult to perceive a more critical stage of trial than the taking of evidence on the defendant's guilt." 809 F.2d 1257, 1263 (6th Cir. 1987), *vacated on other grounds and reinstated*, 839 F.2d 300 (6th Cir. 1988). Although prejudice was presumed in *Green*, a close reading reveals that it mattered to the decision that defense counsel was absent from the trial for a "critical" part of an afternoon during which a key government witness was cross–examined by the codefendant's counsel. *Id.* at 1260-61. We also acknowledged that some absences of defense counsel during trial may have no constitutional significance, *id.* at 1261, and that "a harmless error analysis is appropriate in some instances," *id.* at 1263. Ultimately, even if we could be convinced that the judge's second viewing of the crime scene was comparable to the taking of evidence, *Green* still would not be controlling.

Not only did *Green* pre–date AEDPA, but circuit precedent may not be used "to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme Court] has not an-

nounced." *Marshall*, 569 U.S. at 64; *see also Glebe*, 574 U.S. at 24 (reiterating that "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court'") (citation omitted). To collapse the distinction between an unreasonable application and what we might believe to be an incorrect or erroneous application of Supreme Court precedent "would defeat the substantial deference that AEDPA requires." *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam). This brings us back to the unreasonable application prong of § 2254(d)(1).

2.

The Michigan Court of Appeals rejected petitioners' claim that the judge's second crime scene viewing was structural error under *Cronic*, concluding that "an absence of counsel at a critical stage may, under some circumstances, be reviewed for harmless error." *Edwards*, 2015 WL 1069275, at *8 (quoting *Murphy*, 750 N.W.2d at 586-87 (Markman, J., concurring) (collecting cases)). Petitioners contend that the application of harmless error review was objectively unreasonable because the absence of counsel at *every* critical stage requires automatic reversal under *Cronic*. But that is not necessarily the case—it depends on what the state court meant by "critical stage."

As two of the circuit court decisions cited in *Murphy* explain, the absence of counsel at a critical stage of the proceeding may violate the Sixth Amendment without warranting a presumption of prejudice under *Cronic*. *See Ditch v. Grace*, 479 F.3d 249, 255 (3d Cir. 2007) ("Under an expansive reading of *Cronic*, a denial of counsel at any critical stage … would warrant a presumption of prejudice. However, we conclude that *Cronic* should be read in a more limited fashion.");

United States v. Owen, 407 F.3d 222, 228 (4th Cir. 2005) (rejecting argument that "denial of counsel at *any* 'critical stage' of the trial process requires automatic reversal").

The Supreme Court has sometimes used the phrase "critical stage" broadly to refer to proceedings where a right to counsel attaches but the denial of counsel is nonetheless subject to harmless error analysis (such as in *Coleman v. Alabama*, 399 U.S. 1 (1970), and *United States v. Wade*, 388 U.S. 218 (1967)). *See Owen*, 407 F.3d at 227-28. However, *Cronic* relied on earlier Supreme Court decisions that used the phrase "critical stage" more narrowly to refer to proceedings for which there is a right to counsel *and* "at which [the] denial of counsel necessarily undermines the reliability of the entire criminal proceeding" (such as in *Hamilton* and *White*). *Id.* at 228. Recognizing this distinction, *Owen* held that its assumption that the "federal arraignment was a 'critical stage' within the meaning of *Wade*" did not commit the court to the conclusion that the denial of counsel required automatic reversal under *Cronic*. *Id.* The same would be true for the state court here.

Although the Supreme Court has not commented on this reading of its critical–stage jurisprudence, it is consistent with its descriptions of *Cronic's* rule of presumed prejudice. In *Roe*, the Court described *Cronic* as recognizing structural error "when the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent." *Roe v. Flores–Ortega*, 528 U.S. 470, 484 (2000). And in *Woods*, the Court reiterated that "*Cronic* applies in 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" *Woods*, 575 U.S. at 318 (quoting *Cronic*, 466 U.S. at 658). In other words, unless the state court used the

phrase "critical stage" as a short–hand for *Cronic* error, it would not have been objectively unreasonable to also conclude that the petitioners' denial–of–counsel claim could be reviewed for harmless error.

Countering in reply, petitioners point to the statement by another circuit court that it would be "contrary to" *Cronic* if the state court found a "critical stage" but nonetheless conducted harmless error review. *See Musladin v. Lamarque*, 555 F.3d 830, 838 n.6 (9th Cir. 2009). That decision does not help petitioners for several reasons. Most importantly, it is evident from the court's analysis that its conclusion was based on its use of the phrase "critical stage" to mean *Cronic* error for which prejudice must be presumed. *Id.* at 838-40. Also, because the state court provided no reasons for rejecting the claim, it was assumed that "the state court found that the stage at issue [] was not a 'critical stage' such that *Cronic* require[d] automatic reversal." *Id.* at 838 n.6. Ultimately, the court in *Musladin* reviewed the denial of counsel claim for harmless error after determining that "the state court's decision *not* to apply *Cronic* to Musladin's case was *not* objectively unreasonable." *Id.* at 843 (emphasis added).

Similarly, we also do not know why the Michigan Court of Appeals rejected the claim of structural error under *Cronic*. The only hint is that the state court described a crime scene viewing to be a "critical stage" at which "a criminal defendant has the right to attend with the assistance of counsel." *Edwards*, 2015 WL 1069275, at *7. That only tells us that the state court found a right to counsel; not that there was a *Cronic* error. So, as in *Musladin*, AEDPA limits our inquiry to determining whether the state court's decision not to apply *Cronic*'s rule of presumed prejudice was objectively unreasonable.

Moreover, interpreting *Cronic* error this way also properly situates it as a narrow exception to the Supreme Court's broadly stated harmless error rule. *See Fulminante*, 499 U.S. at 307-08 (distinguishing constitutional violations that result in structural error from those that involve "trial error" occurring in the presentation of evidence "which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt"). Speaking generally in *Satterwhite*, the Court explained that some constitutional violations "by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can *never* be considered harmless." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) (emphasis added). More particularly, "Sixth Amendment violations that pervade the entire proceeding fall within this category." *Id.* (citing *Hamilton* and *White* (absence of counsel at arraignment affected entire proceeding because defenses not asserted were irretrievably lost), *Holloway v. Arkansas*, 435 U.S. 475 (1978) (conflict of interest in representation throughout proceeding), and *Gideon v. Wainwright*, 372 U.S. 335 (1963) (total deprivation of counsel throughout the entire proceeding)). Without citing *Cronic*, the Court cited the same cases as *Cronic* to illustrate Sixth Amendment errors that could never be considered harmless.

In *Satterwhite*, the question was whether harmless error analysis applied to an erroneous admission of psychiatric testimony obtained in violation of a capital defendant's Sixth Amendment right to consult with counsel prior to submitting to certain psychiatric examinations. *Id.* at 255-56 (citing *Estelle v. Smith*, 451 U.S. 454, 471 (1981)). What is important for our purposes is that the Court expressly rejected a rule of automatic

reversal and, in doing so, distinguished *Hamilton*, *White*, *Holloway*, and *Gideon* because those were "all cases in which the deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding." *Id.* at 257. Instead, harmless error analysis applied to the *Estelle* claim because "the evil caused by [the] Sixth Amendment violation [was] limited to the erroneous admission of particular evidence at trial." *Id.* (discussing cases). The Supreme Court has not addressed how *Cronic*'s rule of presumed prejudice fits with *Satterwhite*'s description of Sixth Amendment violations that constitute structural error. But whatever daylight might be between them, *Satterwhite* confirms that *Cronic* error is properly understood as a narrow exception to the harmless error rule.

3.

As discussed, we assume that the trial judge's solo visit to the crime scene violated the petitioners' Sixth Amendment right to counsel. A *per se* violation of the Sixth Amendment requiring automatic reversal under *Cronic* occurs when there is a "complete denial of counsel" at, or counsel is "totally absent" from, a "critical stage" of the criminal proceedings. *Cronic*, 466 U.S. at 658-59 & n.25. Lacking "a comprehensive and final one–line definition of 'critical stage,'" this court has identified the common thread in the Supreme Court's decisions to be "whether there was a reasonable probability that [the defendant's] case could suffer significant consequences from his total denial of counsel at the stage." *Van v. Jones*, 475 F.3d 292, 312-13 (6th Cir. 2007). Under AEDPA's unreasonable application prong, state courts have broad discretion in adjudicating *Cronic* claims because the precise contours of the right remain unclear. *Woods*, 575 U.S. at 318.

It bears repeating that petitioners were represented by counsel at trial, including during the judge's first visit to the crime scene when the eyewitness demonstrated where she had been standing in relation to the shooting. It was the judge's nighttime view of the crime scene that occurred without the prior knowledge or presence of defense counsel. The state court found that the only purpose of that visit was to confirm the lighting conditions in the parking lot. The judge's unsupervised crime scene view was improper, but it was not itself a "critical stage" of the proceeding where "defenses may be [] irretrievably lost, if not then and there asserted," *Hamilton*, 368 U.S. at 54, or one where "rights are preserved or lost," *White*, 373 U.S. at 60. Nor is it akin to a complete denial of summation, *see Herring v. New York*, 422 U.S. 853, 864-65 (1975), or a total lack of counsel on appeal, *see Penson*, 488 U.S. at 88-89. At least it would not be an unreasonable application of *Cronic* for the state court to say so.

If the stage is the trial, the claim must be that the temporary absence of counsel at the judge's unsupervised view of the crime scene held such significant consequences for the defendants that a presumption of prejudice was warranted. The judge's observation—that the area was well lit—was not evidence offered by the government. It was also not evidence of the lighting conditions at the time of the shooting. Gaca was shown photographs of the scene and testified about what she saw, where she was standing, and the lighting conditions when the shooting occurred. The denial of counsel resulted in the fact–finder's improper receipt of information or evidence relevant to the assessment of the eyewitness's credibility, although her credibility was also tested both in court and at the first crime scene visit. And, because the visit was disclosed at trial,

defense counsel had an opportunity to dispute whether the lighting conditions had changed. Notably, the judge's observation was not directly inculpatory, and the Michigan Court of Appeals found that it was "of little consequence in light of the other incriminating evidence, especially the surveillance video, tether, and forensic evidence." *Edwards*, 2015 WL 1069275, at *8.

The Michigan Court of Appeals could reasonably have concluded that denial of counsel at the judge's unsupervised view of the crime scene was not a "complete" denial of counsel at a critical stage of the proceeding. *See*, *e.g.*, *United States v. Roy*, 855 F.3d 1133, 1148 (11th Cir. 2017) (en banc) ("Because the brief [seven–minute] period during which Roy's counsel was absent [was] not itself a 'stage of his trial,' Roy did not suffer 'the complete denial of counsel' for 'a critical stage of his trial.'" (quoting *Cronic*, 466 U.S. at 659)); *Sweeney*, 766 F.3d at 861 ("Sweeney's counsel's brief absence [during the direct examination of a cooperating coconspirator] was not a 'complete' absence because it only lasted three minutes."). Moreover, it would not have been objectively unreasonable for the state court to conclude that the absence of counsel at a fact-finder's second limited crime scene view would not likely render the proceedings "presumptively unreliable." *Roe*, 528 U.S. at 484; *see also Schmidt*, 911 F.3d at 484-85 (finding a fairminded jurist could conclude that limitation on counsel's participation during *in camera* questioning of defendant was not presumptively prejudicial).

When the Supreme Court's decisions "give no clear answer to the question presented, let alone one in [petitioners'] favor," we cannot conclude that the state court unreasonably applied clearly established Supreme Court precedent. *Wright*, 552 U.S. at 126. Here, within

the constraints of AEDPA, and mindful of the broad discretion state courts have in adjudicating claims of *Cronic* error, a fairminded jurist could conclude that a presumption of prejudice was not warranted by the denial of counsel during the judge's limited nighttime view of the crime scene. *See Woods*, 575 U.S. at 317-18.

V.

The judgments of the district court denying habeas relief with respect to petitioners' claim of structural error under *Cronic* are **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:17-cv-10103

DEMETRIUS WILLIAM EDWARDS,
Petitioner,

v.

MARK MCCULLICK,
Respondent.

Filed July 17, 2018
Hon. George Caram Steeh

OPINION AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS, (2) GRANTING A CERTIFICATE OF APPEALABILITY WITH RESPECT TO PETITIONER'S THIRD CLAIM, AND (3) DENYING A CERTIFICATE OF APPEALABILITY WITH RESPECT TO PETITIONER'S REMAINING CLAIMS

This is a habeas case filed by a Michigan prisoner under 28 U.S.C. § 2254.[1] Petitioner Demetrius William

[1] Petitioner was tried with co-defendant Bryant Lamont Royster, who was also convicted of first-degree murder. Royster filed a petition under § 2254, raising the same claims raised by Petitioner. See *Royster v. Trierweiler*, Eastern District of Michigan Case No. 2:17-cv-10101. That petition will be adjudicated in a separate opinion, though there is a substantial overlap between the two cases.

Edwards was convicted after a bench trial in the Wayne Circuit Court of first-degree felony murder, MICH. COMP. LAWS § 750.316. Petitioner was sentenced to life imprisonment.

The petition raises four claims: (1) Petitioner's right to a public trial was violated when the courtroom was cleared of members of the public during his preliminary examination, (2) Petitioner was denied adequate notice of the charges because the felony information omitted the element of malice from the felony murder charge, (3) Petitioner's right to be personally present, his right to confront witnesses, and his right to counsel were violated during two mid-trial visits to the crime scene, and (4) Petitioner was denied the effective assistance of counsel by his attorney's failure to investigate prosecution witness Deonte Smith prior to trial.

The Court finds that Petitioner's claims are without merit or barred by his state court procedural defaults. Therefore, the petition will be denied. The Court will, however, grant a certificate of appealability with respect to Petitioner's third claim, but it will deny a certificate of appealability with respect to his other claims.

I. BACKGROUND

The Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals, which are presumed correct pursuant to 28 U.S.C. § 2254(e)(1). *See Wagner v. Smith*, 581 F.3d 410, 413 (6th Cir. 2009):

> This case is the latest and—with life sentences—now the last of these young defendants' routine disrespect for the rule of law. The facts of this case stretch back to the evening of September 24, 2010. On that day, Edwards was

free on a GPS tether to "settle [his] affairs," having been sentenced just the day before for a prior armed robbery conviction. Apparently, those affairs included a trip to the Eastland Mall with Royster and two acquaintances, Devante Smith and Jaisaun Holt.

Around 8:30 p.m., the decedent, Cedell Leverett, was sitting in the driver's seat of his Mercedes parked in the valet area of Eastland Mall. Another car was parked nearby. Deborah Gaca observed Edwards get out of the other car, and run towards the valet area in a crouched position. Edwards was holding a gun. Royster, who was standing outside the driver's side of the other car, yelled, "Pop him, pop that mother f***** good." Edwards then fired four shots into the Mercedes at close range, killing Leverett. Edwards ran back to the other car, which was backing out, and fled the scene. Police subsequently arrived and found over $3,000 in the decedent's pocket. Corroborating Edwards's and Royster's presence at the Eastland Mall during this time were a surveillance video and Edwards's tether records.

Holt confirmed in a police interview (which he later disavowed at trial) that Edwards intended "to get [the decedent's] glasses and he hit him," before Royster whisked them away in the car. Although Holt also elaborated that Edwards claimed to have shot the decedent after the decedent brandished a firearm, police found no weapons in or around the Mercedes or on the decedent's person during their investigation immediately after the shooting. Devante

claimed the others left the Eastland Mall without him.

Deonte Smith, Devante's brother, provided further information regarding the shooting during a police interview. Deonte stated that he saw defendants, Holt, and his brother (Devante) at a high school football game sometime after the shooting. At the game, "they" told Deonte they had seen a man walking around the Eastland Mall with a diamond watch and $12,000 to $15,000 cash in his pocket. Holt kept tabs on this man and reported to Edwards by phone. Edwards "bragged" to Deonte that he tracked the man outside and tried to rob the man of his watch, but because the man was reaching for something, Edwards shot him. Others at the football game told Edwards he was stupid for not getting anything.

About a week after the shooting, a security officer at the Northland Mall in Southfield saw Edwards toss a gun under an SUV in the parking lot while fleeing a fight. Edwards was arrested at the scene. Royster was apparently arrested shortly thereafter. Subsequent tests of the gun revealed that this weapon had fired the shell casings and bullet fragments found in and around the Mercedes and inside the decedent at the Eastland Mall one week earlier. In addition, police interviewed another individual who had previously accompanied the decedent on the day of his death and whom the police found at the scene of the Eastland Mall after the shooting. That individual surrendered a diamond watch and sunglasses. Notably, the decedent's daughter saw the decedent wearing a

> diamond watch and sunglasses earlier that same day.
>
> The case subsequently proceeded to trial at the conclusion of which the court made its findings on the record. As noted, the court acquitted defendants of first-degree premeditated murder, but found them guilty of the offenses at issue. Defendants were sentenced, and this appeal followed.

People v. Edwards, 2015 WL 1069275, at *1-2 (Mich. Ct. App. March 10, 2015).

Following his conviction and sentence, Petitioner filed an appeal of right. His appellate counsel filed an amended brief on appeal, raising what now form his four habeas claims among the six claims raised:

> I. Defendant Edwards was deprived of his structural right to a public trial when the district court judge expelled the members of the public in attendance at the preliminary examination at the end of business hours and proceeded to conduct the preliminary examination in the complete absence of the general public and ultimately secured testimony from Deonte Smith, this error seriously affecting the fairness, integrity, and public reputation of the judicial proceedings because the preliminary examination testimony of Deonte Smith which was secured in violation of defendant Edwards' Sixth Amendment right to a public trial was ultimately introduced at the trial itself and relied upon by the trier of fact.
>
> II. Reversal is required where the trial court failed to comply with MCR 6.402(b) by neglect-

ing "by personally addressing the defendant" to ascertain, whether defendant Edwards had voluntarily chosen to give up his Sixth Amendment right to trial by jury, given the strong presumption against waiver of fundamental constitutional rights and that waiver cannot be presumed to be voluntarily from a silent record.

III. The felony murder conviction must be vacated where the trial court judge's factual findings were fundamentally inconsistent with the guilty of felony murder verdict, given that the trial court judge acquitted defendant Edwards of felony murder when he concluded that there was no proof of malice and when he declared that he did.

IV. Violation of defendant Edwards' Sixth and Fourteenth Amendment right to adequate notice of charge require reversal, where defendant Edwards was charged with felony murder, but the felony information and the statute itself omitted the essential *mens rea* of malice element, leaving Defendant Edwards completely unaware of the prosecution's duty to prove this element and hindering his ability to prepare to disprove it.

V. Defendant Edwards was (1) deprived of his right to be present during all critical stages of the proceedings where he was excluded from the viewing of the alleged scene of the crime over his objection, without adequate justification for his exclusion; (2) denied his right to confrontation when one of the star witnesses was permitted to attend the viewing of the al-

leged scene of the crime and permitted to provide additional testimony in defendant Edwards' absence; (3) deprived of his Sixth Amendment right to counsel during a critical stage of the proceedings when the trial court judge who was also the trier of fact reported to the alleged scene of the crime, for a second time, without defendant Edwards, his attorney, or the prosecutor and relied on evidence that he gathered during his solo viewing to convict defendant Edwards.

VI. Defendant Edwards was deprived of his Sixth Amendment right to the effective assistance of counsel where trial court counsel failed to conduct a pretrial investigatory interview of essential prosecution witness Deonte Smith, who was the only witness who supported that the homicide occurred during the commission of an attempted larceny.

Petitioner also filed a supplemental *pro se* brief raising an additional five claims:

I. Mr. Edwards is entitled to a new trial because the constitutional requirement that the felony information set forth every element of the crime charged was abdicated where the felony murder statute does not completely define the crime of felony murder, and the felony information in this case lacked the essential element of malice contrary to U.S. Const. Ams. VI, XIV, resulting in a failure to charge a criminal offense, thus this portion of the information must be quashed.

II. Mr. Edwards is entitled to a new trial because he was denied his Sixth and Fourteenth

Amendment right to a public trial by the court's removal of the public from the preliminary examination at the end of business hours, and proceeded with the examination to secure the testimony of Mr. Deonte Smith, who for some unknown reason did not want to testify in public. Smith subsequently refused to testify at trial on the ground of privilege and his recorded testimony was used to convict Mr. Edwards, then a new trial is required.

III. Mr. Edwards is entitled to a new trial because the trial court's factual findings were inconsistent with the guilty of felony murder verdict to the extent that the trial judge concluded that Appellant did not initially intend to kill the decedent. Thus, Appellant's felony murder conviction must be vacated in absence of a judicial finding of the element of malice.

IV. Mr. Edwards is entitled to a new trial because trial counsel was ineffective for failing to object to: (a) the felony information which charged no crime, (b) the closure of the courtroom during preliminary examination, (c) the trial court's failure to comply with MCR 6.402, (d) the trial court's second visit to the crime scene without counsel or notice to defendant and opportunity to be heard on any objections, and failing to investigate contrary to U.S. Const. Ams. VI and XIV; Const. 1963, Art. I, sec. 20.

V. Mr. Edwards is entitled to a new trial because the register of actions show that there was no criminal complaint filed in this case and the filing of a recommendation for a warrant

> does not constitute a complaint as defined by MCR 6.101. Thus, in absence of a filed complaint, lawful judicial authority is absent and the proceedings are without legal force or effect.

The Michigan Court of Appeals affirmed Petitioner's convictions in an unpublished opinion. *Edwards*, 2015 WL 1069275. Petitioner subsequently filed an application for leave to appeal in the Michigan Supreme Court filed by his current counsel. The application raised what now form his four habeas claims, as well as additional claims not present in this action. The Michigan Supreme Court denied the application because it was not persuaded that the questions presented should be reviewed. *People v. Edwards*, 870 N.W.2d 68 (Mich. Oct. 15, 2015)(Table).

II. STANDARD OF REVIEW

28 U.S.C. § 2254(d)(1) curtails a federal court's review of constitutional claims raised by a state prisoner in a habeas action if the claims were adjudicated on the merits by the state courts. Relief is barred under this section unless the state court adjudication was "contrary to" or resulted in an "unreasonable application of" clearly established Supreme Court law.

"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.

"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). "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." *Richter*, 562 U.S. at 103 (internal quotation omitted).

III. ANALYSIS

A. Public Trial

Petitioner's first claim asserts that his right to a public trial was violated when the state district judge cleared members of the public from the courtroom during the first day of the preliminary examination. Petitioner claims that the error was prejudicial because after the courtroom was cleared witness Deonte Smith provided what Petitioner claims is the only evidence that the murders were perpetrated during the course of a robbery. Respondent asserts in part that the claim

is procedurally defaulted because no contemporaneous objection was made to the closure of the courtroom.[2]

The Sixth Amendment to the United States Constitution guarantees that a criminal defendant, "shall enjoy the right to a … public trial." U.S. Const. Amend. VI. This right is made applicable to the States through the Fourteenth Amendment. *Presley v. Georgia*, 558 U.S. 209, 212 (2010) (citing *In re Oliver*, 333 U.S. 257 (1948)). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.*, at 270 n.25 (quotation marks and citation omitted). "In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

The *Waller* Court identified four factors a court must consider, and findings a court must make, before excluding members of the public from the courtroom: (i)"the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced," (ii) "the closure must be no broader than necessary to protect that interest," (iii) "the trial court must consider reasonable alternatives to closing the proceeding,"

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[2] Petitioner asserts that Respondent abandoned its procedural default defense because it conflates the concept of "forfeiture" and "waiver." See Dkt. 8, Reply Brief, at 18-19. Petitioner's assertion is incorrect. Respondent's Answer clearly asserts that review of this claim is barred by Petitioner's procedural default in addition to being waived. See Dkt. 6, Response, at 30-31.

and (iv) "it must make findings adequate to support the closure." *Id.* at 48.

Like many other constitutional rights held by the criminally accused, however, the right to a public trial may be forfeited or waived if not asserted. See *Levine v. United States*, 362 U.S. 610, 619 (1960) ("The continuing exclusion of the public in this case is not to be deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom at the final stage of the proceeding, thereby giving notice of the claim now made and affording the judge an opportunity to avoid reliance on it. This was not a case of the kind of secrecy that deprived petitioner of effective legal assistance and rendered irrelevant his failure to insist upon the claim he now makes. Counsel was present throughout, and it is not claimed that he was not fully aware of the exclusion of the general public.").

As the Sixth Circuit explained:

> While we agree that the right to a public trial is an important structural right, it is also one that can be waived when a defendant fails to object to the closure of the courtroom, assuming the justification for closure is sufficient to overcome the public and media's First Amendment right to an open and public trial proceeding. See *Freytag v. Commissioner*, 501 U.S. 868, 896 (1991) ("[T]he Sixth Amendment right to a trial that is 'public,' provide[s] benefits to the entire society more important than many structural guarantees; but if the litigant does not assert [it] in a timely fashion, he is foreclosed.") (collecting cases); see also *Peretz v. United States*, 501 U.S. 923, 936-37 (1991) (citing *Lev-*

> *ine v. United States*, 362 U.S. 610, 619 (1960)). Because [the habeas petitioner] failed to object to the closure, his claim is procedurally defaulted unless he can show cause and prejudice for the default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)."

Johnson v. Sherry, 586 F.3d 439, 444 (6th Cir. 2009).

Here, neither counsel for Petitioner nor counsel for his co-defendant objected to the removal of members of the public during the preliminary examination.

The record indicates that for about a half-hour during the first day of the preliminary examination, proceedings were interrupted by repeated disturbances by members of the public, prompting the court to remove member of the public from the hearing. In the midst of an otherwise unremarkable examination of a witness by the prosecutor during the preliminary examination, there appears an alarming entry in the record: "(At 3:54 p.m. to 3:55 p.m., riot in courtroom)." Dkt. 7-3, at 76. The next fifteen pages of the record describe the tumult in the courtroom and the court's efforts to retain control over the proceedings:

- The court warns anyone that is standing that they will be arrested. *Id.* at 76.
- A police officer orders an unidentified man out of the courtroom. *Id.*
- The court warns the people in the courtroom about the dangers of a mob mentality. *Id.* at 77.
- Two people leave the courtroom crying . *Id.*

• A member of the public accuses one of the defendants of saying, "that's why that motherfucker dead." *Id.*

• A member of the public accuses one of the defendants of spitting on a girl in the courtroom. *Id.*

• The record indicates, "(At 3:59 p.m. to 4:00 p.m., another riot in courtroom and in hallway)." *Id.* at 78-79.

• The court orders one side of the gallery, apparently the side there in support of the defendants, to leave. *Id.* at 79.

• A woman is arrested after swearing. *Id.*

• The court orders that both "sides" will be removed and it will "hold court in private." *Id.* at 80.

• A man asks the court what happened to his wife, saying that "her head is swelled up this big. We're supposed to be protected in here." *Id.*

• The court indicates that police from seven jurisdictions are present. *Id.*

• A police chief asks for an additional ten minutes before removing the second half of the gallery, apparently those present in support of the victim. *Id.*

• The court indicates that it will attempt to "clear the area so you don't get jumped by anybody where we don't have security cameras, or anybody there to help you." *Id.* at 81.

- A police lieutenant indicates that the second side of courtroom will not be removed because "we assume the problem is gone." *Id.*

- A few minutes later, the court reverses course again and indicates that the second side will, in fact, be removed "[after] it's clear outside, these people will be released." *Id.* at 82.

- The court states: "This is very, very disturbing. I have never—I've been here thirty-five years, and I have never had anything close to anything like this. Nothing close." *Id.* at 83.

- The court warns defendant Edwards that if he stands up again he will be "banished from the rest of the proceedings." *Id.*

- A witness is brought in a scout car, "[b]ut we didn't want to bring him through. … With everything that's going on. … They'll be bringing him right through the side." *Id.* at 91.

- The court removes the rest of the public at 4:29, stating: "I'm going to now empty the courtroom. I'm advised that it should be safe for you. The police will be out there looking to make sure none of you are jumped, or anything. But I can't guarantee your safety." *Id.* at 100.

- After the courtroom is emptied, the examination of Deonte Smith continues until 5:59. *Id.* at 181.

At no point in the proceedings did either attorney for the defendants object to any of the actions of the court. On the next morning of the preliminary examination the court indicated that it had entered an order agreed upon by the parties limiting access of the public for the remainder of the preliminary examination:

The Court: I have created an Order that provides for limited seating. I asked defense counsel for the name of the witnesses that they would like to have present, and they gave me a list. The, and for the—not the Attorney General, the prosecuting office, for the victim's family. And we have, and I have entered an Order yesterday limiting it to these people that were agreed to ... .

* * *

And so we are all satisfied at this point. I understand we're going to place on the record that between all the parties, we have no objections to proceeding with this reduced access to the public. We did provide that the public could be these witnesses, but also any other members of the press with credentials, and of course, what we call resources of police response.

So, Ms. Towns [the prosecutor], are we in agreement on that?

Ms. Towns: Yes, Judge. That's fine with the People.

The Court: And Mr. Glanda [counsel for Edwards]?

Mr. Glanda: Yes, Judge.

The Court: And Ms. Diallo [counsel for Royster]?

Ms. Diallo: No objection on behalf of Mr. Royster.

Dkt. 7-5, at 3-5.

"In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

A four-part test is used to determine whether a claim is procedurally defaulted: (1) there exists a state procedural rule that is applicable to the petitioner's claim and the petitioner failed to comply with the rule, (2) the state courts actually enforced the state procedural sanction, (3) the state procedural ground is an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim, and (4) the petitioner has not demonstrated cause for failing to follow the procedural rule and actual prejudice. *Stone v. Moore*, 644 F.3d 342, 346 (6th Cir. 2011).

The first inquiry is whether there exists a procedural rule applicable to Petitioner's claim, and whether Petitioner violated it. Michigan courts "have long recognized that, in general, an issue is not properly preserved for appeal if it is not raised before the trial court." *People v. Bauder*, 712 N.W.2d 506, 510 (Mich. Ct. App. 2005) (citing *People v. Grant*, 520 N.W.2d 123, 128 (Mich. 1994)). Petitioner's counsel did not comply with the procedural rule when he failed to object to the state district court's actions during the disruptions on the first day of the preliminary examination. When the matter was discussed the next morning, counsel agreed to the Court's order limiting access of the public to the remainder of the preliminary examination, and he made

no objection regarding the court's actions of the previous day. Accordingly, Petitioner failed to comply with Michigan's contemporaneous objection rule, and, therefore, the first prong of the procedural default test is met.

Next, the Michigan Court of Appeals enforced the procedural sanction. In determining whether state courts have relied on a procedural rule to bar review of a claim, a court looks to the last reasoned opinion of the state courts and presumes that higher state courts not rendering an explained decision enforced the bar as well. *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)). Furthermore, this court has recognized that "[p]lain error analysis … is not equivalent to a review of the merits," and plain error review enforces rather than waives procedural default rules. *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006); *Hinkle*, 271 F.3d at 244 (characterizing plain error review as the enforcement of a procedural default). The Michigan Court of Appeals, the last state court to issue a reasoned opinion reviewing Petitioner's public trial claim, found that it was subject to plain error review:

> "[A] defendant's right to a public trial is subject to the forfeiture rule articulated in *People v. Carines*, [460 Mich. 750; 597 N.W.2d 130 (1999)] ... ." *People v. Vaughn*, 491 Mich. 642, 646; 821 N.W.2d 288 (2012). Thus, for [Petitioner] to prevail on this unpreserved issue, he must show plain error affecting his substantial rights, i.e., outcome determinative error.

Edwards, 2015 WL 1069275, *3. The Michigan Supreme Court subsequently denied leave to appeal by unexplained order. Therefore, the state courts en-

forced the contemporaneous-objection procedural sanction.

Third, the Court must determine whether the procedural bar was an "adequate and independent" state ground foreclosing a merits review of Petitioner's claim. The adequate and independent state ground doctrine "applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman*, 501 U.S. at 729-30. "The adequacy of a state procedural bar turns on whether it is firmly established and regularly followed; a state rule is independent if the state court actually relies on it to preclude a merits review." *Biros v. Bagley*, 422 F.3d 379, 387 (6th Cir. 2005) (citing *Abela v. Martin*, 380 F.3d 915, 921 (6th Cir. 2004) (citation omitted)). The Sixth Circuit has recognized that Michigan's contemporaneous objection rule is regularly followed. *Simpson v. Jones*, 238 F.3d 399, 409 (6th Cir. 2000) (citing *Draper v. Adams*, No. 98-1616, 2000 WL 712376, at *9 (6th Cir. 2000) (unpublished table decision)).

Petitioner argues that enforcement of the contemporaneous objection rule does not provide an adequate basis to bar review of his public trial claim because the Supreme Court has enforced the right despite a lack of objection at trial. See Dkt. 8, Reply Brief, at 19-22 (citing *In re Oliver*, 333 U.S. 257, 272 (1948); *Gannet Co v. DePasquale*, 443 U.S. 368, 375 (1979); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 560 (1980); *Waller*, 467 U.S. at 42 n. 2; *Presley*, 130 S.Ct. at 724 ("The public has a right to be present whether or not any party has asserted the right.")). Most of the cases relied upon by Petitioner, however, do not concern application of the existent habeas corpus procedural-default doctrine to a public trial claim. The one case that does, *Waller*, un-

dermines Petitioner's position. The footnote cited by Petitioner states that four of the five habeas petitioners had objected at trial, and that as to the petitioner that did not object, the case was remanded to determine whether his public trial claim was procedurally barred. Accordingly, the *Waller* court recognized that a contemporaneous objection rule is an adequate ground for defaulting a public trial claim. Moreover, the Court notes that under binding Sixth Circuit precedent the procedural default doctrine applies to public trial claims. See *Bickham v. Winn*, 888 F.3d 248, 251 (6th Cir. 2018); *Johnson*, 586 F.3d at 444; (6th Cir. 2009). Finally, the Court notes that the justification for closing the proceeding here—rioting and ensuring the physical safety of members of the public—was sufficient to overcome the public and media's First Amendment right to an open and public proceeding. The Court cannot conceive of a more appropriate reason for closing a proceeding.

Because Petitioner failed to comply with a state procedural rule constituting an adequate and independent state ground for the state court's decision, review of his public trial claim is barred unless he can "demonstrate … that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error." *Stone*, 644 F.3d at 346 (quoting *Maupin*, 785 F.2d at 138).

"[C]ause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Petitioner's reply brief does not attempt to assert cause to excuse his default, choosing instead to argue that Respondent waived the defense or that the defense does

not apply to public trial claims. Accordingly, Petitioner has completely failed to demonstrate cause to excuse the procedural default of his public trial claim.

Nevertheless, it should be noted that Petitioner's supplemental pro se brief filed in the Michigan Court of Appeals argued that his counsel was ineffective for failing to object to the closure of the courtroom. Ineffective assistance of counsel only suffices if the deficient performance purporting to provide cause for the default would be sufficient to merit its own independent constitutional claim. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). In order to prevail on a claim of ineffective assistance of counsel, Petitioner "must show both that his counsel's performance was deficient and that the deficient performance prejudiced the defense." *Hodges v. Colson*, 711 F.3d 589, 613 (6th Cir. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). To show deficiency, Petitioner must establish that "counsel made errors so serious that [he] was not functioning as the 'counsel' guaranteed … by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Petitioner has failed to demonstrate that his counsel performed deficiently in failing to object to the closure of the courtroom. Specifically, nothing in the record suggests that the court would have been inclined to keep the courtroom open to the unruly mob present had an objection been made by counsel. Rather, it is reasonable to conclude that had defense counsel asserted Petitioner's right to a public proceeding and cited *Waller*, the court simply would have gone over the *Waller* factors and ruled that closure was nonetheless warranted.

Where, as here, a petitioner fails to show cause, the Court need not consider whether he has established prejudice. See *Smith v. Murray*, 477 U.S. 527, 533 (1986); *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982).

Finally, Petitioner has not established that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception to the procedural default rule 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) (citation omitted). "To be credible, [a claim of actual innocence] requires petitioner to support his 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. This claim, therefore, is procedurally defaulted.

B. Notice of Charges

Petitioner's second claim asserts that he had insufficient notice of the charges against him because the Felony Information failed to notify him of the requirement that first-degree felony murder requires that the accused acted with malice. Petitioner further asserts that, contrary to the decision of the Court of Appeals rejecting this claim, a defective charging instrument cannot be cured by the testimony offered at a preliminary examination or by the language contained in a different count of the charging document.

As it did with Petitioner's first claim, the Michigan Court of Appeals found that review of this claim was limited to "plain error" because the claim was not preserved in the trial court. *Edwards*, 2015 WL 1069275, *7. Accordingly, for the same reasons outlined above, review of Petitioner's second claim is procedurally

barred from review, and Petitioner has failed to demonstrate cause to excuse the default.

Nevertheless, the claim is without merit. The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to be informed of the nature and cause of the accusation." U.S. Const., Amend. VI. The Sixth Circuit has explained this right, as applied to the States through the Fourteenth Amendment, as follows:

> The due process clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him to permit adequate preparation of his defense. *In re Ruffalo*, 390 U.S. 544 (1968); *Blake v. Morford*, 563 F.2d 248 (6th Cir. 1977); *Watson v. Jago*, 558 F.2d 330, 338 (6th Cir. 1977). This requires that the offense be described with some precision and certainty so as to apprise the accused of the crime with which he stands charged. Such definiteness and certainty are required as will enable a presumptively innocent man to prepare for trial. *Combs v. Tennessee*, 530 F.2d [695, 698 (6th Cir. 1976)].

Koontz v. Glossa, 731 F.2d 365, 369 (6th Cir. 1984).

After finding that the claim was defaulted, the Michigan Court of Appeals rejected Edwards' claim as follows:

> The felony information coupled with the preliminary examination was constitutionally sufficient to dispel the ignorance that Edwards claims was plaguing him below. With respect

to felony murder, the information alleged that Edwards "did while in the perpetration or attempted perpetration of a larceny, murder one [sic] Cedell Leverett; contrary to MCL 750.316(1)(b)," punishable by [l]ife without parole." This fairly apprised Edwards of the nature of the offense as required by court rule and statute. See MCR 6.112(D) (requiring the information to set forth the notice required by MCL 767.45, in addition to the substance of the accusation and the applicable penalty, among other things), and MCL 767.45(1)(a) (requiring the information to contain "[t]he nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged."). Moreover, the facts presented at the preliminary examination mirror those presented at trial. They showed Edwards approaching the decedent in a crouched position and holding a gun with the intent to rob him. "Malice may … be inferred from the use of a deadly weapon." *Carines*, 460 Mich. at 759. A gun is a dangerous weapon. See *People v. Parker*, 417 Mich. 556, 565 (1983). Accordingly, the felony information, framed with reference to this evidence, fairly apprised Edwards of the requisite intent of this offense.

Edward's argument that had he known that felony murder requires a malicious intent, he would have testified that he lacked malice when he shot the decedent, defies common sense. Although the information did not expressly contain a "malice" theory in support of the felony murder charge, the information for the first-degree premeditated murder charge

> explicitly alleged that Edwards acted "deliberately, with the intent to kill … ." (Emphasis added.) Malice includes the intent to kill. *Smith*, 478 Mich. at 318-319. Even with this notice, Edwards elected not to testify.
>
> In light of this, Edwards was fully apprised of the nature of the charges against him and his ability to defend against them was certainly not prejudiced.

Edwards, 2015 WL 1069275, *8.

This decision was not unreasonable. Petitioner's argument hinges on the premise that it is unreasonable to expect a lay person to understand that a charging document that alleged the accused "did while in the perpetration or attempted perpetration of a larceny, murder one [sic] Cedell Leverett; contrary to MCL 750.316(1)(b)," required the prosecutor to prove that he acted with malice. See, e.g., Dkt. 8, Petitioner's Reply, at 24 ("No fair-minded jurist would expect a non-lawyer criminal defendant to review a charging instrument and somehow recognize that a critical element was amiss from one of the charged offenses, then expect the same layman criminal defendant to look for the omitted element amongst another separate and distinct charge and carry that element over to the defective charge.").

The argument completely ignores the fact that at all times during state court proceedings Petitioner was represented by presumptively competent counsel. The Supreme Court has stated that "'it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of [the offense charged]." *Marshall v. Lonberger*, 459 U.S. 422, 436 (1983) (quoting

Henderson v. Morgan, 426 U.S. 637, 647 (1976)). Here, the requirement to prove malice to support a charge of first-degree felony murder was established by the Michigan Supreme Court in 1980. See *People v. Aaron*, 409 Mich. 672 (1980). Aside from the fact that the charging document clearly accused Petitioner of murdering the victim during the perpetration of a larceny (and murder requires malice), it is appropriate to presume that Petitioner's attorneys informed him of the nature of the felony murder charge, including the malice element that had been established in Michigan for over thirty years. Petitioner made no allegation in the state courts—and he makes none here—that his counsel failed to inform him of the nature of the charges against him.

For the same reasons, Petitioner has failed to demonstrate that he was actually prejudiced by his counsel's failure to object to the felony information so as to excuse the procedural default of this claim.

Petitioner's second claim is both procedurally barred from review and without merit.

C. Visits to the Crime Scene

Petitioner's third claim raises his strongest challenge to the validity of his conviction. Petitioner asserts that several of his constitutional rights were violated during two trips to the crime scene. The first trip occurred without Petitioner being present, and the second trip occurred outside both Petitioner or his counsel's presence. Petitioner alleges that both visits violated his Sixth Amendment right to be personally present at all critical stages of the proceedings, that the first visit denied his Sixth Amendment right to face-to-face confrontation when one of the witnesses also attended the crime scene visit, and that the second visit

violated his Sixth Amendment right to counsel during a critical stage of the proceedings.

The Michigan Court of Appeals found in part that the claim was defaulted by Petitioner's failure to object to the visits:

> This brings us to the argument in Edwards's principal brief that the trial court twice improperly viewed the scene of the crime and denied him the right to confront Gaca when she accompanied the court to the scene. This issue first appears on the record during the second day of trial when the court indicated that the attorneys would accompany the court to the crime scene. Apparently, this was originally planned to occur without defendants present, for when defendants' attorneys subsequently indicated their clients' desire to attend this viewing, the court canceled the visit unless defendants "change[d] their mind." Subsequently, while delivering its factual findings, the trial court noted that there "was a[n] independent going to the scene of the crime with defense counsel and the officer-in-charge, but we were met with Ms. Gaca and to basically get the site of where she was and where the cars were [sic]." The court added that it "also went to the mall at approximately 10:30, 10:00, 10:30 p.m. at night to see what the night light looked like. And as I indicated earlier, you could see very well into the parking lot area. It was very well-lit."
>
> As a preliminary matter, Edwards has waived any claim concerning both the court's first viewing of the scene and confronting the

eyewitness there. His counsel was not only present during those events, but counsel additionally agreed on the two questions asked of Gaca, which pertained only to her vantage point during the shooting. Even more, Edwards's counsel stipulated that Gaca's testimony on this score be read into the record. See *People v. McPherson*, 263 Mich. App. 124, 139 (2004) (a party waives appellate review when the conduct of the party or his counsel "invit[es] the error and fails to object"), citing *People v. Carter*, 462 Mich. 206, 215-216 (2000); see also *People v. Riley*, 465 Mich. 442, 448 (2001). Regardless, even if the issue were not waived, our review would be for outcome determinative error since Edwards failed to object to either visit or the alleged testimony below. *Carines*, 460 Mich. at 764-765 (a claim of constitutional error requires a contemporaneous objection to preserve it for appeal); see also *People v. Broadnax*, 57 Mich. App. 621, 622-623 (1975) (defendant could not raise this issue for first time on appeal where, among other things, defense counsel participated in the judge's viewing of the scene and did not object).

With respect to the fact-finder's viewing of a crime scene, it is well established that when the fact-finder is the jury, the viewing constitutes a critical stage of a criminal proceeding which a criminal defendant has the right to attend with the assistance of counsel. *People v. Kurylczyk*, 443 Mich. 289, 296 (1993) (opinion by GRIFFIN, J.); People v. Kent, 157 Mich. App. 780, 793 (1987), citing *People v. Mallory*, 421 Mich. 229, 244-248 (1984). However, Ed-

wards has not cited—nor have we found—Michigan authority addressing the issue of a trial court's viewing of a crime scene in the absence of defendant or his counsel. Several federal courts have held, however, that the same principles apply. See, e.g., *United States v. Walls*, 443 F.2d 1220, 1222-1223 (6th Cir. 1971) ("The principles applicable to a view by a judge sitting without a jury are not substantially different [than those applicable to a jury]"); *Payne v. United States*, 697 A.2d 1229, 1235 (D.C. 1997), citing *Lillie v. United States*, 953 F.2d 1188, 1191 (10th Cir. 1992) (finding the court's viewing of the crime scene, although erroneous, was not prejudicial). Moreover, while the Confrontation Clause entitles a criminal defendant the right to a face-to-face meeting with witnesses appearing before the trier of fact, the right is not absolute, *People v. Staffney*, 187 Mich. App. 660, 663 (1990), and is not as broad in scope as the right to be present at trial, *Mallory*, 421 Mich. at 247.

Assuming the right to attend the viewing of the scene extends to bench trials, we find no error requiring reversal. In the first place, Edwards's counsel was present for the initial viewing by the court and Gaca. Moreover, counsel agreed to the two questions asked of Gaca and stipulated to her testimony. Those pertained to her location and whether she moved during the shooting. Her testimony that she only moved when the gunman ran towards the car, however, only damaged her credibility and helped Edwards. On this point, the trial court expressly found that Gaca stood

50 feet from the incident, rather than the 20 feet she claimed at trial. In view of this, Edwards's failure to raise this issue below smacks of harboring error as an appellate parachute. People v. Riley, 465 Mich. 442, 448 (2001). We will not tolerate such gamesmanship. But even if there were error, it certainly was not outcome determinative in light of the overwhelming evidence against Edwards. This included the evidence of Edwards's intent to rob the decedent, the forensic evidence linking Edwards's gun to the shooting, and the tether and surveillance video placing Edwards at the scene.

Likewise, even if the court's second viewing were improper, it did not violate Edwards's substantial rights. The court indicated that its only purpose was to confirm the lighting of the parking lot. That fact was of little consequence in light of the other incriminating evidence, especially the surveillance video, tether, and forensic evidence. Again, Edwards was not prejudiced, and, not surprisingly, he makes no claim that he was actually innocent or that this fundamentally affected the proceedings in an adverse way.

Before moving on, we note that Edwards relies on *United States v. Cronic*, 466 U.S. 648 (1984), among other cases, to suggest that any error was structural and requires automatic reversal. Edwards ignores, however, that "every federal circuit court of appeals has stated, post-*Cronic*, that an absence of counsel at a critical stage may, under some circumstances, be reviewed for harmless error." *People v. Murphy*, 481 Mich. 919, 923 (2008) (MARK-

> MAN, J., concurring), citing, among others, *Satterwhite v. Texas*, 486 U.S. 249 (1988), *Ellis v. United States*, 313 F.3d 636, 643 (1st Cir. 2002) (absence of counsel at critical stage would require presumption of prejudice only if "pervasive in nature, permeating the entire proceeding"), and *United States v. Lampton*, 158 F.3d 251, 255 (5th Cir. 1998) (applying harmless-error review when counsel was absent during adverse testimony). Our facts fall squarely in line with this authority and we see no compelling reason to deviate today. Reversal is not warranted.

Edwards, 2015 WL 1069275, *8-10 (footnotes omitted).

The record shows that neither Petitioner nor Royster objected to either visit on the grounds now asserted in the habeas petition. The prospect of a visit to the crime scene was first broached during the second day of trial. Dkt. 7-13, at 114. The court indicated that "[w]e had a trip planned on side bar tomorrow at lunch. The plan is to go to the crime scene just with the attorneys." *Id.* Both defense attorneys initially objected to the visit on the grounds that their clients requested to be present. Id. In view of the objection, the court stated, "[t]hen we're not going … If they change their mind, they change their mind." *Id.*

It is evident from the record that the defendants must have, in fact, changed their minds because two days later the court indicated that the trip had taken place. Dkt. 7-15, at 36. The court stated that it, along with the prosecutor, both defense attorneys, police officers, and prosecution witness Deborah Gaca, went the scene of the shooting. *Id.* The court further stated that the parties had agreed to ask Gaca where she had been

positioned during the shooting, and whether she moved at any point:

> [Prosecutor]: Yes, When asked where she stood, Ms. Gaca positioned herself between the pillars. And the Court saw where she was standing, so I don't need to put that on the record. When asked did you move at all while you were watching this incident going on, she said no, the only time she moved was when she saw the gunman running towards the car. She then physically backed up against the pole in front of all of us and showed us the position where she was after the shooting took place. Is that a correct and fair assessment of the statements made by Ms. Gaca?
>
> [Counsel for Royster]: That is, your Honor.
>
> [Counsel for Edwards]: Yes.
>
> [Prosecutor]: And I would stipulate to those statements. Would you stipulate to those statements as well?
>
> [Counsel for Royster]: Yes, that's what she said at the time, your Honor.
>
> [Counsel for Edwards]: That's correct.

Id. at 36-37.

The Court then indicated that it visited the scene on another occasion, and it essentially asked the parties whether they had any objection to the second visit:

> The Court: Anything else? And I will say that the night before I, myself, went out to just look at the lighting around the place. I went at approximately 10:00 p.m. to see what it looked like, the lighting was like at the mall from that

> area we were standing yesterday. Anything else to put on the record regarding that?
>
> [Prosecutor]: Not regarding that, your Honor.
>
> THE COURT: Okay.
>
> [Counsel for Royster]: No, your Honor.
>
> [Counsel for Edwards]: No.

Id. at 37-38.

Despite the defendants' initial demand to be personally present at any visit, the record demonstrates that two visits took place, and when the visits where discussed on the record, neither defendant objected on any basis. Accordingly, when the Michigan Court of Appeals reviewed the claims involving the visits, it found review was limited to the plain error standard due to the failure of the defendants to object. The Michigan Court of Appeals stated:

> [E]ven if the issue were not waived, our review would be for outcome determinative error since Edwards failed to object to either visit or the alleged testimony below. *Carines*, 460 Mich. at 764-765 (a claim of constitutional error requires a contemporaneous objection to preserve it for appeal); see also *People v. Broadnax*, 57 Mich. App. 621, 622-623 (1975) (defendant could not raise this issue for first time on appeal where, among other things, defense counsel participated in the judge's viewing of the scene and did not object).

Edwards, 2015 WL 1069275, *9.

Accordingly, as with Petitioner's previous claims, this claim is also procedurally defaulted. The decision of the Court of Appeals indicates that it actually en-

forced Michigan's contemporaneous objection rule by noting Petitioner's failure to assert his arguments in the trial court, and as discussed above, the rule is an adequate and independent state ground foreclosing review of Petitioner's constitutional claim.

The Court notes the importance of application of the procedural default rule to this claim. With respect two of Petitioner's legal arguments, the claims might have been resolved on the basis that there was otherwise strong evidence of Petitioner's guilt, and the limited information gleaned at the visits was not overly prejudicial to his defense. With respect to Petitioner's right to be personally present, the right "is not absolute, but exists only when his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *United States v. Henderson*, 626 F.3d 326, 343 (6th Cir. 2010) (quotation marks omitted)). "In other words, the defendant's presence is not guaranteed when it would be useless, but only to the extent that a fair and just hearing would be thwarted by his absence." *Id.* (quotation marks omitted). Petitioner has not indicated how his personal presence at either visit would have been useful and was required for a fair and just hearing.

Similarly with respect to the Confrontation Clause claim, any violation is subject to harmless error analysis. See *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). And here, Petitioner has not shown how his inability to cross-examine or confront Gaca regarding what she saw or said on either visit "had a substantial and injurious effect or influence in determining the [trial court's] verdict." *Fry v. Pliler*, 551 U.S. 112, 116 (2007). Indeed, as indicated below, Gaca's estimation of being only twenty feet from the scene of the shooting was revised in Petitioner's favor to about fifty feet af-

ter the visit. The visit benefitted Edwards defense in that it placed the lone eyewitness to the shooting further away than she thought.

It is reasonably debatable, however, whether the same analysis applies to Petitioner's right-to-counsel claim. The Supreme Court has clearly established that the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice. *United States v. Cronic*, 466 U.S. 648, 659 (1984). The existence of certain structural defects in a trial, such as the deprivation of the right to counsel, requires automatic reversal of the conviction because it infects the entire trial process. *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993). In *Penson v. Ohio*, 488 U.S. 75 (1988), the Supreme Court held that the right to counsel is "'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" *Id.* at 88, quoting *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967). Similarly, the Sixth Circuit, citing *Cronic*, held that "[h]armless error analysis is never appropriate when a criminal defendant is denied counsel during a critical stage of his trial, because prejudice is always presumed in such circumstances." *Hereford v. Warren*, 536 F.3d 523, 541 (6th Cir. 2008), citing *Cronic*, 466 U.S. at 658. The Michigan Supreme Court considers a fact-finder's viewing of the crime scene to be a critical stage of the proceeding. See, e.g., *People v. Mallory*, 421 Mich. 229, 247 (1984). Thus, counsel's absence at the trial court's second visit arguably would have required automatic reversal of Petitioner's convictions had a contemporaneous objection been made, and had the trial court then failed to correct the error.

On the other hand, Respondent asserts that the automatic-reversal rule does not apply to the unobjected to violation here. Support exists for this assertion a

well. In *Satterwhite v. Texas*, 486 U.S. 249, 257 (1988), the Supreme Court held that the automatic reversal rule for a denial of counsel during a critical stage does not apply to all cases. The Court stated that even where counsel is absent during a critical stage, harmless error analysis is nevertheless appropriate "where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial." *Id.* Here, not unlike *Satterwhite*, the absence of counsel was limited to the admission of the trial court's observations regarding the lighting conditions at the scene of the crime, an issue that did not have a substantial or injurious impact on the result of the trial.

Furthermore, in *Woods v. Donald*, 135 S. Ct. 1372, 1375 (2015), the habeas petitioner claimed that he was entitled to habeas relief without a need for demonstrating prejudice where he was denied his right to counsel when witnesses testified at his trial regarding his co-defendant's guilt. The Supreme Court held that the Sixth Circuit erroneously granted relief because there was no clearly established Supreme Court law holding that the reception of evidence regarding co-defendants is a critical stage of the proceedings against the petitioner. *Id.* at 1377. The Court stated, "*Cronic* applies in 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" *Id.* at 1378. Here, the trial court's second view of the crime scene was performed "just [to] look at the lighting around the place." Dkt. 6-13, at 37-38. The visit was inconsequential enough that neither defense counsel opted to put anything on the record, and the trial court's findings of fact after trial did not rely on the lighting he observed as a reason to

find Petitioner guilty of the offense.[3] Under these circumstances, it would be reasonable to conclude that the trial court's second crime scene visit was not a critical stage of the proceedings requiring automatic reversal had an objection been made.

All of this is to say why the application of the contemporaneous objection rule to this claim is especially appropriate here. If, notwithstanding *Satterwhite* and *Woods*, the failure to have counsel present at the second visit was a structural error creating the possibility of automatic reversal, then the error could have been easily remedied by a timely objection after the trial court asked the parties if they had anything they wished to place on the record. Had an objection on the right-to-counsel grounds been made, the trial court could have simply disregarded any observations made during the second visit, thereby curing any error. Granting relief in the absence of an objection would, in effect, create a windfall for counsel's failure to voice an objection when he was invited to do so.

Accordingly, review of Petitioner's third claim is procedurally barred by his failure to object to the visits to the crime scene absent a showing of cause and prejudice. For the reasons stated, Petitioner's counsel was not ineffective for failing to object to the crime scene visit. It appears from the record that counsel wanted the visit to take place, and the observations made there benefitted him by placing Gaca further away from the scene than she estimated in her testimony.

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[3] In fact, Gaca testified that she was about twenty feet away from the victim's car at the time of the shooting, but after the crime scene visit, the Court determined that the distance was "more like fifty feet," a finding that benefitted the defense. Dkt. 6-14. at 55.

Moreover, Petitioner has failed to demonstrate that he was actually prejudiced by his counsel's failure to object because the evidence presented against him at trial was very strong. Aside from admitting to Deonte Smith that he committed the crime, the testimony and tether evidence that indicated he was at the mall at the time of the crime, and the eyewitness identification testimony of Gaca—there is the very damning evidence that the week after the murder Petitioner was seen throwing the murder weapon under a parked car when he fled from another mall and was then arrested at the scene. A successful objection to the crime scene visits would not, with reasonable probability, have resulted in a more favorable outcome for Petitioner. *Strickland*, 466 U.S. at 694. As such, he cannot demonstrate cause to excuse his procedural default.

Petitioner has failed to demonstrate entitlement to habeas relief with respect to his third claim.

D. Ineffective Assistance of Counsel

Petitioner's fourth claim asserts that his trial counsel failed to adequately conduct a pretrial investigation regarding prosecution witness Deonte Smith. Petitioner asserts that neither his nor his co-defendant's attorneys ever interviewed Smith prior to the preliminary examination or trial. Petitioner obtained a purported affidavit from Smith during his direct appeal in which Smith claims that his trial testimony was false. Specifically, the affidavit asserts that Smith never heard Edwards brag about being involved in the murder or that the murder occurred during the perpetration of a robbery. The document further claims that Smith refused to testify at trial because he knew that it would be in the public presence and people would know that it was false.

After reciting the controlling constitutional standard, the Michigan Court of Appeals rejected the claim as follows:

> Edwards initially argues in his principal brief that his trial counsel was ineffective for failing to interview Deonte before trial. See *People v. Grant*, 470 Mich. 477, 493; 684 N.W.2d 686 (2004) ("[t]he failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome."). Edwards bases this assertion on Deonte's affidavit-offered for the first time on appeal-disavowing his preliminary examination testimony incriminating Edwards. According to Edwards, had counsel interviewed Deonte, he could have exposed Deonte's lies to the court at trial. There are at least two problems with this argument.
>
> First, Deonte refused to testify at trial. Thus, Edwards's assumption, i.e., that the trial court would have "heard from Smith that he was lying," has no basis. Tellingly, Edwards offers no argument about how his counsel's investigation would have altered Deonte's decision not to testify. Second, even if Deonte would have recanted at trial, this would not erase his prior sworn testimony, which the prosecution would no doubt have presented as a prior inconsistent statement admissible for its substantive value. See MRE 801(d)(1)(A) (inconsistent prior statements made under oath and subject to the penalty of perjury are not hearsay); *People v. Malone*, 445 Mich. 369, 376-378; 518 N.W.2d 418 (1994) (statements that are not hearsay under MRE 801(d)(1) may be used

> as substantive evidence). It bears further emphasis that recantation testimony, like what Edwards proposes, is inherently "suspect and untrustworthy." *People v. Canter*, 197 Mich. App. 550, 559; 496 N.W.2d 336 (1992). Indeed "[t]here is no form of proof so unreliable as recanting testimony." *Id.* at 559-560 (citation omitted). In light of this, even if the failure to investigate Denote were unreasonable, our confidence in the trial's outcome remains firm.

Edwards, 2015 WL 1069275, *11 (footnote omitted).

To establish ineffective assistance of counsel, a defendant must show both that: (1) counsel's performance was deficient, i.e., "that counsel's representation fell below an objective standard of reasonableness"; and (2) the deficient performance resulted in prejudice to the defense. *Strickland* , 466 U.S. at 687-88. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. On habeas review, the question becomes "not whether counsel's actions were reasonable," but "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

The Michigan Court of Appeals did not unreasonably apply the *Strickland* standard when it denied relief with respect to this claim. Contrary to Petitioner's al-

legations, it is clear that his counsel was not unprepared for Deonte Smith's testimony. During the preliminary examination, counsel cross-examined Smith regarding the gap of more than a year that he waited to tell anyone about the event. Dkt. 7-3, at 125-26. The examination made it clear that counsel was familiar with Smith's statement to police. Petitioner has failed to demonstrate that Smith was open to speaking with counsel prior to the preliminary examination, as Smith's affidavit does not assert that he was willing to do so. Moreover, it is unclear how an interview would have changed anything that occurred at the preliminary examination or at trial. Smith may now say he testified falsely, but he does not claim that he would have "come clean" earlier had he only been interviewed by defense counsel.

Finally, even had counsel's investigation into Smith somehow aided his efforts in cross-examination, there is still not a reasonably probability that the result of the trial would have been different given the very strong case made against Petitioner. Further investigation of Smith would have done nothing to discredit Gaca, who watched Petitioner murder the victim. It would have done nothing to counter the testimony of the police officer who recovered the murder weapon Petitioner was seen throwing under a car. Nor would it have countered the tether data showing that Petitioner was at the murder scene. Accordingly, Petitioner has failed to show that he was prejudiced by his counsel's alleged failure to further investigate or interview Deonte Smith prior to trial.

As all of Petitioner's claims are procedurally barred from review or without merit, the petition will be denied.

IV. CERTIFICATE OF APPEALABILITY

Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability issued. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Courts must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997).

To receive a certificate of appealability, "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." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotes and citations omitted). Here, jurists of reason could debate the Court's conclusion that Petitioner is not entitled to habeas relief with respect to his third claim. A reasonable jurist might dispute this Court's conclusion that the claim is procedurally defaulted and whether the alleged violation of Petitioner's right to counsel at the second crime scene visit requires automatic reversal.

The Court finds that the resolution of Petitioner's remaining claims is not reasonably debatable, so a certificate of appealability will be denied with respect to them.

V. CONCLUSION

Accordingly, the Court 1) **DENIES WITH PREJUDICE** the petition for a writ of habeas corpus, 2)

GRANTS a certificate of appealability with respect to Petitioner's third claim, and 3) **DENIES** a certificate of appealability with respect to his remaining claims.

SO ORDERED.

Dated: July 17, 2018

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on July 17, 2018, by electronic and/or ordinary mail.

s/Marcia Beauchemin
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:17-cv-10101

BRYANT LAMONT ROYSTER,
Petitioner,

v.

TONY TRIERWEILER,
Respondent.

Filed July 17, 2018
Hon. George Caram Steeh

OPINION AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS, (2) GRANTING A CERTIFICATE OF APPEALABILITY WITH RESPECT TO PETITIONER'S THIRD CLAIM, AND (3) DENYING A CERTIFICATE OF APPEALABILITY WITH RESPECT TO PETITIONER'S REMAINING CLAIMS

This is a habeas case filed by a Michigan prisoner under 28 U.S.C. § 2254.[1] Petitioner Bryant Lamont

[1] Petitioner was tried with co-defendant Demetrius William Edwards, who was also convicted of first-degree murder. Edwards filed a petition under § 2254, raising the same claims raised by Petitioner. See *Edwards v. McCullick*, Eastern District of Michigan Case No. 2:17-cv-10103. That petition will be adjudicated in a separate opinion, though there is a substantial overlap between the two cases.

Royster was convicted after a bench trial in the Wayne Circuit Court of first-degree felony murder, MICH. COMP. LAWS § 750.316. Petitioner was sentenced to life imprisonment.

The petition raises four claims: (1) Petitioner's right to a public trial was violated when the courtroom was cleared of members of the public during his preliminary examination, (2) Petitioner was denied adequate notice of the charges because the felony information omitted the element of malice from the felony murder charge, (3) Petitioner's right to be personally present, his right to confront witnesses, and his right to counsel were violated during two mid-trial visits to the crime scene, and (4) Petitioner was denied the effective assistance of counsel by his attorney's failure to investigate prosecution witness Deonte Smith prior to trial.

The Court finds that Petitioner's claims are without merit or barred by his state court procedural defaults. Therefore, the petition will be denied. The Court will, however, grant a certificate of appealability with respect to Petitioner's third claim, but it will deny a certificate of appealability with respect to his other claims.

I. BACKGROUND

The Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals, which are presumed correct pursuant to 28 U.S.C. § 2254(e)(1). *See Wagner v. Smith*, 581 F.3d 410, 413 (6th Cir. 2009):

> This case is the latest and—with life sentences—now the last of these young defendants' routine disrespect for the rule of law. The facts of this case stretch back to the evening of September 24, 2010. On that day, Edwards

was free on a GPS tether to "settle [his] affairs," having been sentenced just the day before for a prior armed robbery conviction. Apparently, those affairs included a trip to the Eastland Mall with Royster and two acquaintances, Devante Smith and Jaisaun Holt.

Around 8:30 p.m., the decedent, Cedell Leverett, was sitting in the driver's seat of his Mercedes parked in the valet area of Eastland Mall. Another car was parked nearby. Deborah Gaca observed Edwards get out of the other car, and run towards the valet area in a crouched position. Edwards was holding a gun. Royster, who was standing outside the driver's side of the other car, yelled, "Pop him, pop that mother f***** good." Edwards then fired four shots into the Mercedes at close range, killing Leverett. Edwards ran back to the other car, which was backing out, and fled the scene. Police subsequently arrived and found over $3,000 in the decedent's pocket. Corroborating Edwards's and Royster's presence at the Eastland Mall during this time were a surveillance video and Edwards's tether records.

Holt confirmed in a police interview (which he later disavowed at trial) that Edwards intended "to get [the decedent's] glasses and he hit him," before Royster whisked them away in the car. Although Holt also elaborated that Edwards claimed to have shot the decedent after the decedent brandished a firearm, police found no weapons in or around the Mercedes or on the decedent's person during their investigation immediately after the shooting. De-

vante claimed the others left the Eastland Mall without him.

Deonte Smith, Devante's brother, provided further information regarding the shooting during a police interview. Deonte stated that he saw defendants, Holt, and his brother (Devante) at a high school football game sometime after the shooting. At the game, "they" told Deonte they had seen a man walking around the Eastland Mall with a diamond watch and $12,000 to $15,000 cash in his pocket. Holt kept tabs on this man and reported to Edwards by phone. Edwards "bragged" to Deonte that he tracked the man outside and tried to rob the man of his watch, but because the man was reaching for something, Edwards shot him. Others at the football game told Edwards he was stupid for not getting anything.

About a week after the shooting, a security officer at the Northland Mall in Southfield saw Edwards toss a gun under an SUV in the parking lot while fleeing a fight. Edwards was arrested at the scene. Royster was apparently arrested shortly thereafter. Subsequent tests of the gun revealed that this weapon had fired the shell casings and bullet fragments found in and around the Mercedes and inside the decedent at the Eastland Mall one week earlier. In addition, police interviewed another individual who had previously accompanied the decedent on the day of his death and whom the police found at the scene of the Eastland Mall after the shooting. That individual surrendered a diamond watch and sunglasses. Notably, the decedent's daughter saw the decedent wearing a

> diamond watch and sunglasses earlier that same day.
>
> The case subsequently proceeded to trial at the conclusion of which the court made its findings on the record. As noted, the court acquitted defendants of first-degree premeditated murder, but found them guilty of the offenses at issue. Defendants were sentenced, and this appeal followed.

People v. Royster, 2015 WL 1069275, at *1-2 (Mich. Ct. App. March 10, 2015).

Following his conviction and sentence, Petitioner filed an appeal of right. His appellate counsel filed a brief on appeal, raising three claims, the third of which forms part of his third habeas claim:

> I. The trial court's finding of guilty of felony murder must be reversed when defendant was merely present at the mall where the murder occurred.
>
> II. Defendant was denied due process to a fair trial when he was denied the effective assistance of counsel when trial counsel failed to subpoena exculpatory witnesses.
>
> III. Defendant was denied the right of confrontation and the right to a fair trial when the trial court observed the scene of the crime without the parties present and used information gathered from the scene to find defendant guilty.

Petitioner also filed a supplemental *pro se* brief raising an additional five claims:

I. Defendant Royster was deprived of his structural right to a public trial when the District Court judge expelled the members of the public in attendance at the preliminary examination at the end of business hours and proceeded to conduct the preliminary examination in the complete absence of the general public and ultimately secured testimony from Deonte Smith. This error seriously affected the fairness, integrity, and public reputation of the judicial proceedings because the preliminary examination testimony of Deonte Smith which was secured in violation of defendant Royster's Sixth Amendment right to a public trial was ultimately introduced at the trial itself and relied upon by the trier of fact to convict defendant Royster of felony murder.

II. Reversal is required where the trial court failed to comply with the requirements of MCR 6.402(B), to the extent that the trial court judge completely neglected to ascertain "by personally addressing the defendant, whether defendant Royster voluntarily chose to give up his Sixth Amendment right to trial by jury, and given the strong presumption against waiver of fundamental constitutional rights the waiver cannot be presumed to be voluntary from a silent record.

III. Reversal is required due to the violation of Defendant Royster's Sixth and Fourteenth Amendment right to adequate notice of charge, where defendant Royster was charged with felony murder, but the felony Information and the statute itself omitted the essential *mens rea* of malice element, leaving defendant

> Royster completely unaware of the prosecution's duty to prove this element which hindered his ability to prepare to disprove it.
>
> IV. Defendant Royster was deprived of his right to be present during all critical stages of the proceedings where he was excluded from the viewing of the alleged scene of the crime over his objection, without adequate justification for his exclusion, denied his right to confrontation when one of the star witnesses was permitted to attend the viewing of the alleged scene of the crime and permitted to provide additional testimony in defendant Royster's absence, completely deprived of his Sixth Amendment right to counsel during a critical stage of the proceedings when the trial court judge who was also the trier of fact reported to the alleged scene of the crime, for a second time, without defendant Royster, his attorney, or the prosecutor and relied on evidence that he gathered during his solo viewing to convict defendant Royster.
>
> V. Defendant Royster was deprived of his right to the effective assistance of counsel based on his attorney's failure to: (1) object to the admission of transcribed testimony which was secured in violation of the Sixth Amendment right to a public trial, (2) counsel failed to object to the trial court judge's failure to inquire into the voluntariness of the waiver of trial by jury, and (3) counsel's failure to object to the defective felony information.

Petitioner's first *pro se* claim now forms his first habeas claim. His third *pro se* claim is now his second

habeas claim. His fourth *pro se* claim makes up the rest of his third habeas claim. Finally, Petitioner's fourth habeas claim asserts a different factual—the failure to investigate Deonte Smith prior to trial—then the one presented to the Michigan Court of Appeals.

The Michigan Court of Appeals affirmed Petitioner's convictions in an unpublished opinion. *Royster*, 2015 WL 1069275. Petitioner subsequently filed an application for leave to appeal in the Michigan Supreme Court, raising the same claims that he raised in the Michigan Court of Appeals. The Michigan Supreme Court denied the application because it was not persuaded that the questions presented should be reviewed. *People v. Royster*, 870 N.W.2d 67 (Mich. Oct. 15, 2015)(Table).

II. STANDARD OF REVIEW

28 U.S.C. § 2254(d)(1) curtails a federal court's review of constitutional claims raised by a state prisoner in a habeas action if the claims were adjudicated on the merits by the state courts. Relief is barred under this section unless the state court adjudication was "contrary to" or resulted in an "unreasonable application of" clearly established Supreme Court law.

"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.

"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). "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." *Richter*, 562 U.S. at 103 (internal quotation omitted).

III. ANALYSIS

A. Public Trial

Petitioner's first claim asserts that his right to a public trial was violated when the state district judge cleared members of the public from the courtroom during the first day of the preliminary examination. Petitioner claims that the error was prejudicial because after the courtroom was cleared witness Deonte Smith provided what Petitioner claims is the only evidence that the murders were perpetrated during the course

of a robbery. Respondent asserts in part that the claim is procedurally defaulted because no contemporaneous objection was made to the closure of the courtroom.[2]

The Sixth Amendment to the United States Constitution guarantees that a criminal defendant, "shall enjoy the right to a … public trial." U.S. Const. Amend. VI. This right is made applicable to the States through the Fourteenth Amendment. *Presley v. Georgia*, 558 U.S. 209, 212 (2010) (citing *In re Oliver*, 333 U.S. 257 (1948)). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.*, at 270 n.25 (quotation marks and citation omitted). "In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

The *Waller* Court identified four factors a court must consider, and findings a court must make, before excluding members of the public from the courtroom: (I)"the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced," (ii) "the closure must be no broader than necessary to protect that interest," (iii) "the trial court must consider reasonable alternatives to closing the proceeding,"

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[2] Petitioner asserts that Respondent abandoned its procedural default defense because it conflates the concept of "forfeiture" and "waiver." See Dkt. 7, Reply Brief, at 18-19. Petitioner's assertion is incorrect. Respondent's Answer clearly asserts that review of this claim is barred by Petitioner's procedural default in addition to being waived. See Dkt. 5, Response, at 30-31.

and (iv) "it must make findings adequate to support the closure." *Id.* at 48.

Like many other constitutional rights held by the criminally accused, however, the right to a public trial may be forfeited or waived if not asserted. See *Levine v. United States*, 362 U.S. 610, 619 (1960) ("The continuing exclusion of the public in this case is not to be deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom at the final stage of the proceeding, thereby giving notice of the claim now made and affording the judge an opportunity to avoid reliance on it. This was not a case of the kind of secrecy that deprived petitioner of effective legal assistance and rendered irrelevant his failure to insist upon the claim he now makes. Counsel was present throughout, and it is not claimed that he was not fully aware of the exclusion of the general public.").

As the Sixth Circuit explained:

> While we agree that the right to a public trial is an important structural right, it is also one that can be waived when a defendant fails to object to the closure of the courtroom, assuming the justification for closure is sufficient to overcome the public and media's First Amendment right to an open and public trial proceeding. See *Freytag v. Commissioner*, 501 U.S. 868, 896 (1991) ("[T]he Sixth Amendment right to a trial that is 'public,' provide[s] benefits to the entire society more important than many structural guarantees; but if the litigant does not assert [it] in a timely fashion, he is foreclosed.") (collecting cases); see also *Peretz v. United States*, 501 U.S. 923, 936-37 (1991) (citing *Lev-*

> *ine v. United States*, 362 U.S. 610, 619 (1960)). Because [the habeas petitioner] failed to object to the closure, his claim is procedurally defaulted unless he can show cause and prejudice for the default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)."

Johnson v. Sherry, 586 F.3d 439, 444 (6th Cir. 2009).

Here, neither counsel for Petitioner nor counsel for his co-defendant objected to the removal of members of the public during the preliminary examination.

The record indicates that for about a half-hour during the first day of the preliminary examination, proceedings were interrupted by repeated disturbances by members of the public, prompting the court to remove members of the public from the hearing. In the midst of an otherwise unremarkable examination of a witness by the prosecutor during the preliminary examination, there appears an alarming entry in the record: "(At 3:54 p.m. to 3:55 p.m., riot in courtroom)." Dkt. 6-3, at 76. The next fifteen pages of the record describe the tumult in the courtroom and the court's efforts to retain control over the proceedings:

- The court warns anyone that is standing that they will be arrested. *Id.* at 76.
- A police officer orders an unidentified man out of the courtroom. *Id.*
- The court warns the people in the courtroom about the dangers of a mob mentality. *Id.* at 77.
- Two people leave the courtroom crying. *Id.*

• A member of the public accuses one of the defendants saying, "that's why that motherfucker dead." *Id.*

• A member of the public accuses one of the defendants of spitting on a girl in the courtroom. *Id.*

• The record indicates, "(At 3:59 p.m. to 4:00 p.m., another riot in courtroom and in hallway)." *Id.* at 78-79.

• The court orders one side of the gallery, apparently the side there in support of the defendants, to leave. *Id.* at 79.

• A woman is arrested after swearing. *Id.*

• The court orders that both "sides" will be removed and it will "hold court in private." *Id.* at 80.

• A man asks the court what happened to his wife, saying that "her head is swelled up this big. We're supposed to be protected in here." *Id.*

• The court indicates that police from seven jurisdictions are present. *Id.*

• A police chief asks for an additional ten minutes before removing the second half of the gallery, apparently those present in support of the victim. *Id.*

• The court indicates that it will attempt to "clear the area so you don't get jumped by anybody where we don't have security cameras, or anybody there to help you." *Id.* at 81.

- A police lieutenant indicates that the second side of courtroom will not be removed because "we assume the problem is gone." *Id.*

- A few minutes later, the court reverses course again and indicates that the second side will, in fact, be removed "[after] it's clear outside, these people will be released." *Id.* at 82.

- The court states: "This is very, very disturbing. I have never—I've been here thirty-five years, and I have never had anything close to anything like this. Nothing close." *Id.* at 83.

- The court warns defendant Edwards that if he stands up again he will be "banished from the rest of the proceedings." *Id.*

- A witness is brought in a scout car, "[b]ut we didn't want to bring him through. … With everything that's going on. … They'll be bringing him right through the side." *Id.* at 91.

- The court removes the rest of the public at 4:29, stating: "I'm going to now empty the courtroom. I'm advised that it should be safe for you. The police will be out there looking to make sure none of you are jumped, or anything. But I can't guarantee your safety." *Id.* at 100.

- After the courtroom is emptied, the examination of Deonte Smith continues until 5:59. *Id.* at 181.

At no point in the proceedings did either attorney for the defendants object to any of the actions of the court. On the next morning of the preliminary examination the court indicated that it had entered an order agreed upon by the parties limiting access of the public for the remainder of the preliminary examination:

The Court: I have created an Order that provides for limited seating. I asked defense counsel for the name of the witnesses that they would like to have present, and they gave me a list. The, and for the—not the Attorney General, the prosecuting office, for the victim's family. And we have, and I have entered an Order yesterday limiting it to these people that were agreed to … .

* * *

And so we are all satisfied at this point. I understand we're going to place on the record that between all the parties, we have no objections to proceeding with this reduced access to the public. We did provide that the public could be these witnesses, but also any other members of the press with credentials, and of course, what we call resources of police response.

So, Ms. Towns [the prosecutor], are we in agreement on that?

Ms. Towns: Yes, Judge. That's fine with the People.

The Court: And Mr. Glanda [counsel for Edwards]?

Mr. Glanda: Yes, Judge.

The Court: And Ms. Diallo [counsel for Royster]?

Ms. Diallo: No objection on behalf of Mr. Royster.

Dkt. 6-5, at 3-5.

"In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

A four-part test is used to determine whether a claim is procedurally defaulted: (1) there exists a state procedural rule that is applicable to the petitioner's claim and the petitioner failed to comply with the rule, (2) the state courts actually enforced the state procedural sanction, (3) the state procedural ground is an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim, and (4) the petitioner has not demonstrated cause for failing to follow the procedural rule and actual prejudice. *Stone v. Moore*, 644 F.3d 342, 346 (6th Cir. 2011).

The first inquiry is whether there exists a procedural rule applicable to Petitioner's claim, and whether Petitioner violated it. Michigan courts "have long recognized that, in general, an issue is not properly preserved for appeal if it is not raised before the trial court." *People v. Bauder*, 712 N.W.2d 506, 510 (Mich. Ct. App. 2005) (citing *People v. Grant*, 520 N.W.2d 123, 128 (Mich. 1994)). Petitioner's counsel did not comply with the procedural rule when she failed to object to the state district court's actions during the disruptions on the first day of the preliminary examination. When the matter was discussed the next morning, counsel agreed to the Court's order limiting access of the public to the remainder of the preliminary examination, and

she made no objection regarding the court's actions of the previous day. Accordingly, Petitioner failed to comply with Michigan's contemporaneous objection rule, and, therefore, the first prong of the procedural default test is met.

Next, the Michigan Court of Appeals enforced the procedural sanction. In determining whether state courts have relied on a procedural rule to bar review of a claim, a court looks to the last reasoned opinion of the state courts and presumes that higher state courts not rendering an explained decision enforced the bar as well. *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)). Furthermore, this court has recognized that "[p]lain error analysis … is not equivalent to a review of the merits," and plain error review enforces rather than waives procedural default rules. *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006); *Hinkle*, 271 F.3d at 244 (characterizing plain error review as the enforcement of a procedural default). The Michigan Court of Appeals, the last state court to issue a reasoned opinion reviewing co-defendant Edward's public trial claim, found that it was subject to plain error review, and later in the opinion noted that Royster's claim was subject to the same standard:

> "[A] defendant's right to a public trial is subject to the forfeiture rule articulated in *People v. Carines*, [460 Mich. 750; 597 N.W.2d 130 (1999)] . …" *People v. Vaughn*, 491 Mich. 642, 646; 821 N.W.2d 288 (2012). Thus, for [Petitioner] to prevail on this unpreserved issue, he must show plain error affecting his substantial rights, i.e., outcome determinative error.

* * *

> Royster lodged no objection on this novel theory (or on any other ground) below, and so we are looking for outcome determinative error that adversely affected the proceedings or resulted in the conviction of an innocent defendant. *Carines*, 460 Mich at 774.
>
> * * *
>
> Royster's failure to object yet again leaves us looking for plain error affecting substantial rights.

Royster, 2015 WL 1069275, *3, 14. The Michigan Supreme Court subsequently denied leave to appeal by unexplained order. Therefore, the state courts enforced the contemporaneous-objection procedural sanction.

Third, the Court must determine whether the procedural bar was an "adequate and independent" state ground foreclosing a merits review of Petitioner's claim. The adequate and independent state ground doctrine "applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman*, 501 U.S. at 729-30. "The adequacy of a state procedural bar turns on whether it is firmly established and regularly followed; a state rule is independent if the state court actually relies on it to preclude a merits review." *Biros v. Bagley*, 422 F.3d 379, 387 (6th Cir. 2005) (citing *Abela v. Martin*, 380 F.3d 915, 921 (6th Cir. 2004) (citation omitted)). The Sixth Circuit has recognized that Michigan's contemporaneous objection rule is regularly followed. *Simpson v. Jones*, 238 F.3d 399, 409 (6th Cir. 2000) (citing *Draper v. Adams*, No. 98-1616, 2000 WL 712376, at *9 (6th Cir. 2000) (unpublished table decision)).

Petitioner argues that enforcement of the contemporaneous objection rule does not provide an adequate basis to bar review of his public trial claim because the Supreme Court has enforced the right despite a lack of objection at trial. See Dkt. 7, Reply Brief, at 19-22 (citing *In re Oliver*, 333 U.S. 257, 272 (1948); *Gannet Co v. DePasquale*, 443 U.S. 368, 375 (1979); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 560 (1980); *Waller*, 467 U.S. at 42 n. 2; *Presley*, 130 S.Ct. at 724 ("The public has a right to be present whether or not any party has asserted the right.")). Most of the cases relied upon by Petitioner, however, do not concern application of the existent habeas corpus procedural-default doctrine to a public trial claim. The one case that does, *Waller*, undermines Petitioner's position. The footnote cited by Petitioner states that four of the five habeas petitioners had objected at trial, and that as to the petitioner that did not object, the case was remanded to determine whether his public trial claim was procedurally barred. Accordingly, the *Waller* court recognized that a contemporaneous objection rule is an adequate ground for defaulting a public trial claim. Moreover, the Court notes that under binding Sixth Circuit precedent the procedural default doctrine applies to public trial claims. See *Bickham v. Winn*, 888 F.3d 248, 251 (6th Cir. 2018); *Johnson*, 586 F.3d at 444 (6th Cir. 2009). Finally, the Court notes that the justification for closing the proceeding here—rioting and ensuring the physical safety of members of the public—was sufficient to overcome the public and media's First Amendment right to an open and public proceeding. The Court cannot conceive of a more appropriate reason for closing a proceeding.

Because Petitioner failed to comply with a state procedural rule constituting an adequate and independ-

ent state ground for the state court's decision, review of his public trial claim is barred unless he can "demonstrate … that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error." *Stone*, 644 F.3d at 346 (quoting *Maupin*, 785 F.2d at 138).

"[C]ause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Petitioner's reply brief does not attempt to assert cause to excuse his default, choosing instead to argue that Respondent waived the defense or that the defense does not apply to public trial claims. Accordingly, Petitioner has completely failed to demonstrate cause to excuse the procedural default of his public trial claim.

Nevertheless, it should be noted that Petitioner's supplemental pro se brief filed in the Michigan Court of Appeals argued that his counsel was ineffective for failing to object to the introduction of Deonte Smith's preliminary examination testimony at trial because it was elicited during the closed pretrial proceeding. See Defendant-Appellant's Standard 4 Brief, at 47 ff. When a petitioner claims ineffective assistance of counsel as cause for a procedural default, the allegation of ineffectiveness is a separate claim which must itself be exhausted in state court according to the normal procedures. *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000). The argument made by Petitioner to the Michigan Court of Appeals regarding his counsel's failure to object to the introduction of Smith's testimony is distinct from a claim that counsel was ineffective for failing to object to the closure itself at the preliminary examination. According to *Edwards*, the failure to exhaust the

ineffectiveness claim will itself constitute a procedural default of the cause argument and prevents a federal court from hearing it. 529 U.S. at 452. Petitioner never exhausted a claim that his trial counsel was ineffective for failing to contemporaneously object to the closure of the courtroom during the preliminary examination. Therefore, Petitioner may not argue here that the ineffectiveness of his counsel constitutes cause to excuse his procedural default.

In any event, ineffective assistance of counsel only suffices if the deficient performance purporting to provide cause for the default would be sufficient to merit its own independent constitutional claim. *Edwards*, 529 U.S. at 451. In order to prevail on a claim of ineffective assistance of counsel, Petitioner "must show both that his counsel's performance was deficient and that the deficient performance prejudiced the defense."

Hodges v. Colson, 711 F.3d 589, 613 (6th Cir. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). To show deficiency, Petitioner must establish that "counsel made errors so serious that [he] was not functioning as the 'counsel' guaranteed … by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Petitioner has failed to demonstrate that his counsel performed deficiently in failing to object to the closure of the courtroom. Specifically, nothing in the record suggests that the court would have been inclined to keep the courtroom open to the unruly mob present had an objection been made by counsel. Rather, it is reasonable to conclude that had defense counsel asserted Petitioner's right to a public proceeding and cited *Waller*, the court simply would have gone over the *Waller* factors and ruled that closure was nonetheless warranted.

Where, as here, a petitioner fails to show cause, the Court need not consider whether he has established prejudice. See *Smith v. Murray*, 477 U.S. 527, 533 (1986); *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982).

Finally, Petitioner has not established that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception to the procedural default rule 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) (citation omitted). "To be credible, [a claim of actual innocence] requires petitioner to support his 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. This claim, therefore, is procedurally defaulted.

B. Notice of Charges

Petitioner's second claim asserts that he had insufficient notice of the charges against him because the Felony Information failed to notify him of the requirement that first-degree felony murder requires that the accused acted with malice. Petitioner further asserts that, contrary to the decision of the Court of Appeals rejecting this claim, a defective charging instrument cannot be cured by the testimony offered at a preliminary examination or by the language contained in a different count of the charging document.

As it did with Petitioner's first claim, the Michigan Court of Appeals found that review of this claim was

limited to "plain error" because the claim was not preserved in the trial court. *Royster*, 2015 WL 1069275, *7, 14. Accordingly, for the same reasons outlined above, review of Petitioner's second claim is procedurally barred from review, and Petitioner has failed to demonstrate cause to excuse the default.

Nevertheless, the claim is without merit. The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to be informed of the nature and cause of the accusation." U.S. Const., amend. VI. The Sixth Circuit has explained this right, as applied to the States through the Fourteenth Amendment, as follows:

> The due process clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him to permit adequate preparation of his defense. *In re Ruffalo*, 390 U.S. 544 (1968); *Blake v. Morford*, 563 F.2d 248 (6th Cir. 1977); *Watson v. Jago*, 558 F.2d 330, 338 (6th Cir. 1977). This requires that the offense be described with some precision and certainty so as to apprise the accused of the crime with which he stands charged. Such definiteness and certainty are required as will enable a presumptively innocent man to prepare for trial. *Combs v. Tennessee*, 530 F.2d [695, 698 (6th Cir. 1976)].

Koontz v. Glossa, 731 F.2d 365, 369 (6th Cir. 1984).

After finding that the claim was defaulted, the Michigan Court of Appeals rejected Royster's claim for the reasons it rejected Edwards' claim:

The felony information coupled with the preliminary examination was constitutionally sufficient to dispel the ignorance that Edwards claims was plaguing him below. With respect to felony murder, the information alleged that Edwards "did while in the perpetration or attempted perpetration of a larceny, murder one [sic] Cedell Leverett; contrary to MCL 750.316(1)(b)," punishable by [l]ife without parole." This fairly apprised Edwards of the nature of the offense as required by court rule and statute. See MCR 6.112(D) (requiring the information to set forth the notice required by MCL 767.45, in addition to the substance of the accusation and the applicable penalty, among other things), and MCL 767.45(1)(a) (requiring the information to contain "[t]he nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged."). Moreover, the facts presented at the preliminary examination mirror those presented at trial. They showed Edwards approaching the decedent in a crouched position and holding a gun with the intent to rob him. "Malice may … be inferred from the use of a deadly weapon." *Carines*, 460 Mich. at 759. A gun is a dangerous weapon. See *People v. Parker*, 417 Mich. 556, 565 (1983). Accordingly, the felony information, framed with reference to this evidence, fairly apprised Edwards of the requisite intent of this offense.

Edward's argument that had he known that felony murder requires a malicious intent, he would have testified that he lacked malice when he shot the decedent, defies common

> sense. Although the information did not expressly contain a "malice" theory in support of the felony murder charge, the information for the first-degree premeditated murder charge explicitly alleged that Edwards acted "deliberately, with the intent to kill ... ." (Emphasis added.) Malice includes the intent to kill. *Smith*, 478 Mich. at 318-319. Even with this notice, Edwards elected not to testify.
>
> In light of this, Edwards was fully apprised of the nature of the charges against him and his ability to defend against them was certainly not prejudiced.
>
> * * *
>
> Royster's failure to object yet again leaves us looking for plain error affecting substantial rights.

Royster, 2015 WL 1069275, *8, 14.

This decision was not unreasonable. Petitioner's argument hinges on the premise that it is unreasonable to expect a lay person to understand that a charging document that alleged the accused "did while in the perpetration or attempted perpetration of a larceny, murder one [sic] Cedell Leverett; contrary to MCL 750.316(1)(b)," required the prosecutor to prove that he acted with malice. See, e.g., Dkt. 7, Petitioner's Reply, at 24 ("No fair-minded jurist would expect a non-lawyer criminal defendant to review a charging instrument and somehow recognize that a critical element was amiss from one of the charged offenses, then expect the same layman criminal defendant to look for the omitted element amongst another separate and distinct

charge and carry that element over to the defective charge.").

The argument completely ignores the fact that at all times during state court proceedings Petitioner was represented by presumptively competent counsel. The Supreme Court has stated that "'it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of [the offense charged].'" *Marshall v. Lonberger*, 459 U.S. 422, 436 (1983) (quoting *Henderson v. Morgan*, 426 U.S. 637, 647 (1976)). Here, the requirement to prove malice to support a charge of first-degree felony murder was established by the Michigan Supreme Court in 1980. See *People v. Aaron*, 409 Mich. 672 (1980). Aside from the fact that the charging document clearly accused Petitioner of murdering the victim during the perpetration of a larceny (and murder requires malice), it is appropriate to presume that Petitioner's attorneys informed him of the nature of the felony murder charge, including the malice element that had been established in Michigan for over thirty years. Petitioner made no allegation in the state courts—and he makes none here—that his counsel failed to inform him of the nature of the charges against him.

For the same reasons, Petitioner has failed to demonstrate that he was actually prejudiced by his counsel's failure to object to the felony information so as to excuse the procedural default of this claim. Petitioner's supplemental pro se brief filed in the Michigan Court of Appeals asserting that counsel was ineffective for failing to object to the felony information completely fails to develop this argument. See Defendant-Appellant's Standard 4 Brief, at 50.

Petitioner's second claim is both procedurally barred from review and without merit.

C. Visits to the Crime Scene

Petitioner's third claim raises his strongest challenge to the validity of his conviction. Petitioner asserts that several of his constitutional rights were violated during two trips to the crime scene. he first trip occurred without Petitioner being present, and the second trip occurred outside both Petitioner or his counsel's presence. Petitioner alleges that both visits violated his Sixth Amendment right to be personally present at all critical stages of the proceedings, that the first visit denied his Sixth Amendment right to face-to-face confrontation when one of the witnesses also attended the crime scene visit, and that the second visit violated his Sixth Amendment right to counsel during a critical stage of the proceedings and violated his right to confront witnesses.

The Michigan Court of Appeals, discussing co-defendant Edwards' similar claims first, rejected them as follows:

> This brings us to the argument in Edwards's principal brief that the trial court twice improperly viewed the scene of the crime and denied him the right to confront Gaca when she accompanied the court to the scene. This issue first appears on the record during the second day of trial when the court indicated that the attorneys would accompany the court to the crime scene. Apparently, this was originally planned to occur without defendants present, for when defendants' attorneys subsequently indicated their clients' desire to attend this viewing, the court canceled the visit unless de-

fendants "change[d] their mind." Subsequently, while delivering its factual findings, the trial court noted that there "was a[n] independent going to the scene of the crime with defense counsel and the officer-in-charge, but we were met with Ms. Gaca and to basically get the site of where she was and where the cars were [sic]." The court added that it "also went to the mall at approximately 10:30, 10:00, 10:30 p.m. at night to see what the night light looked like. And as I indicated earlier, you could see very well into the parking lot area. It was very well-lit."

As a preliminary matter, Edwards has waived any claim concerning both the court's first viewing of the scene and confronting the eyewitness there. His counsel was not only present during those events, but counsel additionally agreed on the two questions asked of Gaca, which pertained only to her vantage point during the shooting. Even more, Edwards's counsel stipulated that Gaca's testimony on this score be read into the record. See *People v. McPherson*, 263 Mich. App. 124, 139 (2004) (a party waives appellate review when the conduct of the party or his counsel "invit[es] the error and fails to object"), citing *People v. Carter*, 462 Mich. 206, 215-216 (2000); see also *People v. Riley*, 465 Mich. 442, 448 (2001). Regardless, even if the issue were not waived, our review would be for outcome determinative error since Edwards failed to object to either visit or the alleged testimony below. *Carines*, 460 Mich. at 764-765 (a claim of constitutional error requires a contemporane-

ous objection to preserve it for appeal); see also *People v. Broadnax*, 57 Mich. App. 621, 622-623 (1975) (defendant could not raise this issue for first time on appeal where, among other things, defense counsel participated in the judge's viewing of the scene and did not object).

With respect to the fact-finder's viewing of a crime scene, it is well established that when the fact-finder is the jury, the viewing constitutes a critical stage of a criminal proceeding which a criminal defendant has the right to attend with the assistance of counsel. *People v. Kurylczyk*, 443 Mich. 289, 296 (1993) (opinion by GRIFFIN, J.); *People v. Kent*, 157 Mich. App. 780, 793 (1987), citing *People v. Mallory*, 421 Mich. 229, 244-248 (1984). However, Edwards has not cited—nor have we found—Michigan authority addressing the issue of a trial court's viewing of a crime scene in the absence of defendant or his counsel. Several federal courts have held, however, that the same principles apply. See, e.g., *United States v. Walls*, 443 F.2d 1220, 1222-1223 (6th Cir. 1971) ("The principles applicable to a view by a judge sitting without a jury are not substantially different [than those applicable to a jury]"); *Payne v. United States*, 697 A.2d 1229, 1235 (D.C. 1997), citing *Lillie v. United States*, 953 F.2d 1188, 1191 (10th Cir. 1992) (finding the court's viewing of the crime scene, although erroneous, was not prejudicial). Moreover, while the Confrontation Clause entitles a criminal defendant the right to a face-to-face meeting with witnesses appearing before the trier of fact, the right is not absolute, *People v.*

Staffney, 187 Mich. App. 660, 663 (1990), and is not as broad in scope as the right to be present at trial, *Mallory*, 421 Mich. at 247.

Assuming the right to attend the viewing of the scene extends to bench trials, we find no error requiring reversal. In the first place, Edwards's counsel was present for the initial viewing by the court and Gaca. Moreover, counsel agreed to the two questions asked of Gaca and stipulated to her testimony. Those pertained to her location and whether she moved during the shooting. Her testimony that she only moved when the gunman ran towards the car, however, only damaged her credibility and helped Edwards. On this point, the trial court expressly found that Gaca stood 50 feet from the incident, rather than the 20 feet she claimed at trial. In view of this, Edwards's failure to raise this issue below smacks of harboring error as an appellate parachute. *People v. Riley*, 465 Mich. 442, 448 (2001). We will not tolerate such gamesmanship. But even if there were error, it certainly was not outcome determinative in light of the overwhelming evidence against Edwards. This included the evidence of Edwards's intent to rob the decedent, the forensic evidence linking Edwards's gun to the shooting, and the tether and surveillance video placing Edwards at the scene.

Likewise, even if the court's second viewing were improper, it did not violate Edwards's substantial rights. The court indicated that its only purpose was to confirm the lighting of the parking lot. That fact was of little consequence in light of the other incriminating evidence, es-

> pecially the surveillance video, tether, and forensic evidence. Again, Edwards was not prejudiced, and, not surprisingly, he makes no claim that he was actually innocent or that this fundamentally affected the proceedings in an adverse way.

Before moving on, we note that Edwards relies on *United States v. Cronic*, 466 U.S. 648 (1984), among other cases, to suggest that any error was structural and requires automatic reversal. Edwards ignores, however, that "every federal circuit court of appeals has stated, post-*Cronic*, that an absence of counsel at a critical stage may, under some circumstances, be reviewed for harmless error." *People v. Murphy*, 481 Mich. 919, 923 (2008) (MARKMAN, J., concurring), citing, among others, *Satterwhite v. Texas*, 486 U.S. 249 (1988), *Ellis v. United States*, 313 F.3d 636, 643 (1st Cir. 2002) (absence of counsel at critical stage would require presumption of prejudice only if "pervasive in nature, permeating the entire proceeding"), and *United States v. Lampton*, 158 F.3d 251, 255 (5th Cir. 1998) (applying harmless-error review when counsel was absent during adverse testimony). Our facts fall squarely in line with this authority and we see no compelling reason to deviate today. Reversal is not warranted.

* * *

> Like Edwards, Royster also challenges the trial court's second viewing of the crime scene, with the added wrinkle of an alleged Confrontation Clause violation. This latter claim alleges in essence that the trial court functioned as a witness during its second viewing of the crime scene and should have been subject to cross examination. Royster lodged no objection on this

novel theory (or on any other ground) below, and so we are looking for outcome determinative error that adversely affected the proceedings or resulted in the conviction of an innocent defendant. *Carines*, 460 Mich. at 774. We see none. As we said before, a criminal defendant has the right to be present at every stage of a proceeding and to confront the witnesses against him. *Kurylczyk*, 445 Mich. at 296; *Staffney*, 187 Mich.App. at 663. At least on the former ground, the prosecution concedes error, and indeed, we agree that the trial court's second viewing of the crime scene was not only erroneous, but imprudent. But even assuming error on both grounds, Royster can't get around the mountain of incriminating evidence against him. On this score, besides our prior analysis, we would highlight again Royster's vulgar encouragement to Edwards, which eradicates any pretense of actual innocence especially considering that the trial court's second visit was to view the lighting in the parking lot. That is not enough to reverse.

* * *

Regarding the crime scene visits, we conclude that Royster waived any challenge to the first visit and to any testimony Gaca offered where his counsel attended the visit without objection and stipulated to the recitation of Gaca's testimony into the record. *Riley*, 465 Mich. at 448, citing, among others, *Carter*, 462 Mich. at 215-216. But even if there were error, Gaca's comments at the scene only harmed her credibility. Moreover, as we have repeatedly concluded, the evidence of Royster's guilt ab-

> sent these visits was clear and he is not actually innocent.

Royster, 2015 WL 1069275, *8-10, 14 (footnotes omitted).

The record shows that neither Petitioner nor Edwards objected to either visit on the grounds now asserted in the habeas petition. The prospect of a visit to the crime scene was first broached during the second day of trial. Dkt. 6-11, at 114. The court indicated that "[w]e had a trip planned on side bar tomorrow at lunch. The plan is to go to the crime scene just with the attorneys." *Id.* Both defense attorneys initially objected to the visit on the grounds that their clients requested to be present. *Id.* In view of the objection, the court stated, "[t]hen we're not going … If they change their mind, they change their mind." *Id.*

It is evident from the record that the defendants must have, in fact, changed their minds because two days later the court indicated that the trip had taken place. Dkt. 6-13, at 36. The court stated that it, along with the prosecutor, both defense attorneys, police officers, and prosecution witness Deborah Gaca, went the scene of the shooting. *Id.* The court further stated that the parties had agreed to ask Gaca where she had been positioned during the shooting, and whether she moved at any point:

> [Prosecutor]: Yes, When asked where she stood, Ms. Gaca positioned herself between the pillars. And the Court saw where she was standing, so I don't need to put that on the record. When asked did you move at all while you were watching this incident going on, she said no, the only time she moved was when she saw the gunman running towards the car. She then

> physically backed up against the pole in front of all of us and showed us the position where she was after the shooting took place. Is that a correct and fair assessment of the statements made by Ms. Gaca?
>
> [Counsel for Royster]: That is, your Honor.
>
> [Counsel for Edwards]: Yes.
>
> [Prosecutor]: And I would stipulate to those statements. Would you stipulate to those statements as well?
>
> [Counsel for Royster]: Yes, that's what she said at the time, your Honor.
>
> [Counsel for Edwards]: That's correct.

Id. at 36-37.

The Court then indicated that it visited the scene on another occasion, and it essentially asked the parties whether they had any objection to the second visit:

> The Court: Anything else? And I will say that the night before I, myself, went out to just look at the lighting around the place. I went at approximately 10:00 p.m. to see what it looked like, the lighting was like at the mall from that area we were standing yesterday. Anything else to put on the record regarding that?
>
> [Prosecutor]: Not regarding that, your Honor.
>
> THE COURT: Okay.
>
> [Counsel for Royster]: No, your Honor.
>
> [Counsel for Edwards]: No.

Id. at 37-38.

Despite the defendants' initial demand to be personally present at any visit, the record demonstrates that two visits took place, and when the visits where discussed on the record, neither defendant objected on any basis. Accordingly, when the Michigan Court of Appeals reviewed the claims involving the visits, it found review was limited to the plain error standard due to the failure of the defendants to object.

With respect to the first visit, the Michigan Court of Appeals stated: "[W]e conclude that Royster waived any challenge to the first visit and to any testimony Gaca offered where his counsel attended the visit without objection and stipulated to the recitation of Gaca's testimony into the record. *Riley*, 465 Mich at 448, citing, among others, *Carter*, 462 Mich at 215-216." *Royster*, 2015 WL 1069275, *14. With respect to the second visit, the Michigan Court of Appeals found: "Royster lodged no objection on [Confrontation Clause grounds] (or on any other ground) below, and so we are looking for outcome determinative error that adversely affected the proceedings or resulted in the conviction of an innocent defendant. *Carines*, 460 Mich. at 774." *Royster*, 2015 WL 1069275, *14 (footnotes omitted). The Court of Appeals did go on to note in the alternative that it agreed with the prosecutor that the second visit was erroneous, but it found that the "mountain of incriminating evidence against" Petitioner "eradicates any pretense of actual innocence." *Id.*

Accordingly, as with Petitioner's previous claims, this claim is also procedurally defaulted. The decision of the Court of Appeals indicates that it actually enforced Michigan's contemporaneous objection rule by noting Petitioner's failure to assert his arguments in the trial court, and as discussed above, the rule is an

adequate and independent state ground foreclosing review of Petitioner's constitutional claim.

The Court notes the importance of application of the procedural default rule to this claim. With respect two of Petitioner's legal arguments, the claims might have been resolved on the basis that there was otherwise strong evidence of Petitioner's guilt, and the limited information gleaned at the visits was not overly prejudicial to his defense. With respect to Petitioner's right to be personally present, the right "is not absolute, but exists only when his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *United States v. Henderson*, 626 F.3d 326, 343 (6th Cir. 2010) (quotation marks omitted)). "In other words, the defendant's presence is not guaranteed when it would be useless, but only to the extent that a fair and just hearing would be thwarted by his absence." *Id.* (quotation marks omitted). Petitioner has not indicated how his personal presence at either visit would have been useful and was required for a fair and just hearing.

Similarly with respect to the Confrontation Clause claim, any violation is subject to harmless error analysis. See *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). And here, Petitioner has not shown how his inability to cross-examine or confront the trial court or Gaca regarding what they saw or said on either visit "had a substantial and injurious effect or influence in determining the [trial court's] verdict." *Fry v. Pliler*, 551 U.S. 112, 116 (2007).

It is reasonably debatable, however, whether the same analysis applies to Petitioner's right-to-counsel claim. The Supreme Court has clearly established that the complete denial of counsel during a critical stage of

a judicial proceeding mandates a presumption of prejudice. *United States v. Cronic*, 466 U.S. 648, 659 (1984). The existence of certain structural defects in a trial, such as the deprivation of the right to counsel, requires automatic reversal of the conviction because it infects the entire trial process. *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993). In *Penson v. Ohio*, 488 U.S. 75 (1988), the Supreme Court held that the right to counsel is "'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" *Id.* at 88, quoting *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967). Similarly, the Sixth Circuit, citing *Cronic*, held that "[h]armless error analysis is never appropriate when a criminal defendant is denied counsel during a critical stage of his trial, because prejudice is always presumed in such circumstances." *Hereford v. Warren*, 536 F.3d 523, 541 (6th Cir. 2008), citing *Cronic*, 466 U.S. at 658. The Michigan Supreme Court considers a fact-finder's viewing of the crime scene to be a critical stage of the proceeding. See, e.g., *People v. Mallory*, 421 Mich. 229, 247 (1984). Thus, counsel's absence at the trial court's second visit arguably would have required automatic reversal of Petitioner's convictions had a contemporaneous objection been made, and had the trial court then failed to correct the error.

On the other hand, Respondent asserts that the automatic-reversal rule does not apply to the unobjected to violation here. Support exists for this assertion a well. In *Satterwhite v. Texas*, 486 U.S. 249, 257 (1988), the Supreme Court held that the automatic reversal rule for a denial of counsel during a critical stage does not apply to all cases. The Court stated that even where counsel is absent during a critical stage, harmless error analysis is nevertheless appropriate "where the evil caused by a Sixth Amendment violation is lim-

ited to the erroneous admission of particular evidence at trial." *Id.* Here, not unlike *Satterwhite*, the absence of counsel was limited to the admission of the trial court's observations regarding the lighting conditions at the scene of the crime, an issue that did not have a substantial or injurious impact on the result of the trial.

Furthermore, in *Woods v. Donald*, 135 S. Ct. 1372, 1375 (2015), the habeas petitioner claimed that he was entitled to habeas relief without a need for demonstrating prejudice where he was denied his right to counsel when witnesses testified at his trial regarding his co-defendant's guilt. The Supreme Court held that the Sixth Circuit erroneously granted relief because there was no clearly established Supreme Court law holding that the reception of evidence regarding co-defendants is a critical stage of the proceedings against the petitioner. *Id.* at 1377. The Court stated, "applies in 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" *Id.* at 1378. Here, the trial court's second view of the crime scene was performed "just [to] look at the lighting around the place." Dkt. 6-13, at 37-38. The visit was inconsequential enough that neither defense counsel opted to put anything on the record, and the trial court's findings of fact after trial did not rely on the lighting he observed as a reason to find Petitioner guilty of the offense.[3] Under these circumstances, it would be reasonable to conclude that the trial court's second crime scene visit was not a critical

[3] In fact, Gaca testified that she was about twenty feet away from the victim's car at the time of the shooting, but after the crime scene visit, the Court determined that the distance was "more like fifty feet," a finding that benefitted the defense. Dkt. 6-14. at 55.

stage of the proceedings requiring automatic reversal had an objection been made.

All of this is to say why the application of the contemporaneous objection rule to this claim is especially appropriate here. If, notwithstanding *Satterwhite* and *Woods*, the failure to have counsel present at the second visit was a structural error creating the possibility of automatic reversal, then the error could have been easily remedied by a timely objection after the trial court asked the parties if they had anything they wished to place on the record. Had an objection on the right-to-counsel grounds been made, the trial court could have simply disregarded any observations made during the second visit, thereby curing any error. Granting relief in the absence of an objection would, in effect, create a windfall for counsel's failure to voice an objection when she was invited to do so.

Accordingly, review of Petitioner's third claim is procedurally barred by his failure to object to the visits to the crime scene absent a showing of cause and prejudice. And as was the case with his previous claims, Petitioner failed to exhaust a claim that his counsel was ineffective for failing to object to the visits. As such, he cannot demonstrate cause to excuse his procedural default. *Edwards*, 529 U.S. at 452. In any event, Petitioner's counsel was not ineffective for failing to object to the crime scene visit. It appears from the record that counsel wanted the visit to take place, and the observations made there benefitted him by placing Gaca further away from the scene than she estimated in her testimony. Petitioner has therefore failed to demonstrate entitlement to habeas relief with respect to his third claim.

D. Ineffective Assistance of Counsel

Petitioner's fourth claim asserts that his trial counsel failed to adequately conduct a pretrial investigation regarding prosecution witness Deonte Smith. Petitioner asserts that neither his nor his co-defendant's attorneys ever interviewed Smith prior to the preliminary examination or trial. Petitioner obtained a purported affidavit from Smith during his direct appeal in which Smith claims that his trial testimony was false. Specifically, the affidavit asserts that Smith never heard Edwards brag about being involved in the murder or that the murder occurred during the perpetration of a robbery. The document further claims that Smith refused to testify at trial because he knew that it would be in the public presence and people would know that it was false.

Royster did not raise this particular allegation of ineffective assistance of counsel in the Michigan Court of Appeals. Co-defendant Edwards raised this claim, and the state appellate court rejected it on the merits, essentially finding that Edwards was not prejudiced because he had not shown how a pretrial investigation would have resulted in Smith recanting his preliminary examination testimony and because the purported affidavit was otherwise not credible. See *Royster*, 2015 WL 1069275, *11.

To establish ineffective assistance of counsel, a defendant must show both that: (1) counsel's performance was deficient, i.e., "that counsel's representation fell below an objective standard of reasonableness"; and (2) the deficient performance resulted in prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range

of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Here, the record makes clear that Petitioner suffered no prejudice by his counsel's alleged failure to interview Smith because the trial court did not consider Smith's testimony at all in its findings of fact regarding Petitioner:

> Deonte Smith testified through a prior—well he didn't testify, but his testimony was introduced through prior recorded testimony. The Court is indicating that as part of its ruling in terms of any statements that Deonte Smith used regarding what he heard defendant Edwards say, the Court is not using against defendant Royster.

Dkt. 6-14, at 56.

Accordingly, even assuming this claim was exhausted by Petitioner during his direct appeal, Petitioner has failed to demonstrate a reasonable probability that the result of his trial would have been more favorable had his counsel interviewed Smith prior to trial. Simply stated, the finder of fact did not consider Smith's prior testimony against Petitioner, and so further impeachment of Smith would not have benefitted his defense.

Indeed, the case against Petitioner was quite strong, and it rested on the testimony of two other witnesses. Deborah Gaca, an employee at Eastland Mall, saw Petitioner standing outside the driver's side door and yell to Edwards to "pop him, pop that motherfucker good," just before she saw Edwards shoot the victim. She then saw Petitioner drive Edwards away from the scene. Devante Smith, Deonte Smith's brother, testified that he was present at the mall with Petitioner, Edwards, and Jaisaun Holt on the date of the shooting. He identified Petitioner on videotape footage taken from the mall's security cameras. Devante had split up with the others while shopping, and when he later looked by himself for the car they arrived in—the one associated with the shooting—it was gone. The trial court did not consider Deonte Smith's testimony in its finding that Petitioner was guilty of first degree felony-murder as an aider and abettor. Dkt. 6-14, at 62-63.

Accordingly, Petitioner has failed to show that he was prejudiced by his counsel's alleged failure to further investigate or interview Deonte Smith prior to trial.

As all of Petitioner's claims are procedurally barred from review or without merit, the petition will be denied.

IV. CERTIFICATE OF APPEALABILITY

Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability issued. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Courts must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certif-

icate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997).

To receive a certificate of appealability, "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." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotes and citations omitted). Here, jurists of reason could debate the Court's conclusion that Petitioner is not entitled to habeas relief with respect to his third claim. A reasonable jurist might dispute this Court's conclusion that the claim is procedurally defaulted and whether the alleged violation of Petitioner's right to counsel at the second crime scene visit requires automatic reversal.

The Court finds that the resolution of Petitioner's remaining claims is not reasonably debatable, so a certificate of appealability will be denied with respect to them.

V. CONCLUSION

Accordingly, the Court 1) **DENIES WITH PREJUDICE** the petition for a writ of habeas corpus, 2) **GRANTS** a certificate of appealability with respect to Petitioner's third claim, and 3) **DENIES** a certificate of appealability with respect to his remaining claims.

SO ORDERED.

Dated: July 17, 2018

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on July 17, 2018, by electronic and/or ordinary mail.

s/Marcia Beauchemin
Deputy Clerk

APPENDIX D

MICHIGAN SUPREME COURT

SC: 151785
COA: 318000
Wayne CC: 13-000935-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.

DEMETRIUS WILLIAM EDWARDS,
Defendant-Appellant.

Filed October 15, 2015
Lansing, Michigan

ORDER

On order of the Court, the application for leave to appeal the March 10, 2015 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

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

October 15, 2015 signature
Clerk

APPENDIX E

MICHIGAN SUPREME COURT

SC: 151357
COA: 318025
Wayne CC: 13-000935-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.

BRYANT LAMONT ROYSTER,
Defendant-Appellant.

Filed October 15, 2015
Lansing, Michigan

ORDER

On order of the Court, the application for leave to appeal the March 10, 2015 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

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

October 15, 2015 signature
Clerk

APPENDIX F

UNPUBLISHED

STATE OF MICHIGAN COURT OF APPEALS

LC No. 13-000935-FC
Case Nos. 318000/318025
Wayne Circuit Court

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.

DEMETRIUS WILLIAM EDWARDS,
Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.

BRYANT LAMONT ROYSTER,
Defendant-Appellant.

Filed March 10, 2015

OPINION

Before: MARKEY, P.J., and MURRAY and BORRELLO, JJ.

PER CURIAM.

In these consolidated cases, defendants, Demetrius William Edwards and Bryant Lamont Royster, appeal their bench trial convictions arising out of their in-

volvement in a robbery and homicide at the Eastland Mall in Harper Woods. Both were convicted of first-degree felony murder, MCL 750.316(1)(b), with Edwards acting as the principal, and Royster as the aider and abetter.[1] Besides this, Edwards was also convicted of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Edwards faces prison terms of natural life without parole, two years, and one to five years, respectively, for his first-degree felony-murder, felony-firearm, and felon in possession convictions. Royster likewise received the mandatory prison sentence of natural life without parole for his first-degree felony murder conviction. Edwards appeals his convictions and sentences in Docket No. 318000, Royster appeals his in Docket No. 318025. Both appeals are by right, and in both cases we affirm.

I. BACKGROUND

This case is the latest and—with life sentences—now the last of these young defendants' routine disrespect for the rule of law.[2] The facts of this case stretch back to the evening of September 24, 2010. On that day, Edwards was free on a GPS tether to "settle [his] affairs," having been sentenced just the day before for a prior armed robbery conviction. Apparently, those

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[1] Defendants were also charged with and acquitted of first-degree premeditated murder, MCL 750.316(1)(a).

[2] Edwards's previous convictions include armed robbery, felony-firearm, and carrying a concealed weapon, MCL 750.227. Royster's previous convictions include: two counts of second-degree fleeing and eluding, MCL 257.602a(4)(a); intent to deliver less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(4); felony-firearm; and assault with intent to murder, MCL 750.83.

affairs included a trip to the Eastland Mall with Royster and two acquaintances, Devante Smith and Jaisaun Holt.

Around 8:30 p.m., the decedent, Cedell Leverett, was sitting in the driver's seat of his Mercedes parked in the valet area of Eastland Mall. Another car was parked nearby. Deborah Gaca observed Edwards get out of the other car, and run towards the valet area in a crouched position. Edwards was holding a gun. Royster, who was standing outside the driver's side of the other car, yelled, "Pop him, pop that mother f***** good." Edwards then fired four shots into the Mercedes at close range, killing Leverett. Edwards ran back to the other car, which was backing out, and fled the scene. Police subsequently arrived and found over $3,000 in the decedent's pocket. Corroborating Edwards's and Royster's presence at the Eastland Mall during this time were a surveillance video and Edwards's tether records.

Holt confirmed in a police interview (which he later disavowed at trial) that Edwards intended "to get [the decedent's] glasses and he hit him," before Royster whisked them away in the car. Although Holt also elaborated that Edwards claimed to have shot the decedent after the decedent brandished a firearm, police found no weapons in or around the Mercedes or on the decedent's person during their investigation immediately after the shooting. Devante claimed the others left the Eastland Mall without him.

Deonte Smith, Devante's brother, provided further information regarding the shooting during a police interview. Deonte stated that he saw defendants, Holt, and his brother (Devante) at a high school football game sometime after the shooting. At the game, "they"

told Deonte they had seen a man walking around the Eastland Mall with a diamond watch and $12,000 to $15,000 cash in his pocket. Holt kept tabs on this man and reported to Edwards by phone. Edwards "bragged" to Deonte that he tracked the man outside and tried to rob the man of his watch, but because the man was reaching for something, Edwards shot him. Others at the football game told Edwards he was stupid for not getting anything.[3]

About a week after the shooting, a security officer at the Northland Mall in Southfield saw Edwards toss a gun under an SUV in the parking lot while fleeing a fight. Edwards was arrested at the scene. Royster was apparently arrested shortly thereafter. Subsequent tests of the gun revealed that this weapon had fired the shell casings and bullet fragments found in and around the Mercedes and inside the decedent at the Eastland Mall one week earlier. In addition, police interviewed another individual who had previously accompanied the decedent on the day of his death and whom the police found at the scene of the Eastland Mall after the shooting. That individual surrendered a diamond watch and sunglasses. Notably, the decedent's daughter saw the decedent wearing a diamond watch and sunglasses earlier that same day.

The case subsequently proceeded to trial at the conclusion of which the court made its findings on the record. As noted, the court acquitted defendants of first-degree premeditated murder, but found them guilty of the offenses at issue. Defendants were sentenced, and this appeal followed.

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[3] Because Deonte invoked his Fifth Amendment privilege not to testify at trial, his preliminary examination testimony was provided at trial.

II. DOCKET NO. 318000 — EDWARDS

Edwards raises a myriad of issues and has also filed a Standard 4 brief, mirroring almost entirely the issues presented in his primary brief. For the reasons set forth below, none of Edwards's assignments of error merits reversal of his convictions.

A. RIGHT TO A PUBLIC TRIAL

In both his principal and Standard 4 briefs, Edwards claims for the first time that he was denied his right to a public trial when the trial court "arbitrarily evacuated" the courtroom during his preliminary examination. "[A] defendant's right to a public trial is subject to the forfeiture rule articulated in *People v Carines* [460 Mich 750; 597 NW2d 130 (1999)] ... ." *People v Vaughn*, 491 Mich 642, 646; 821 NW2d 288 (2012). Thus, for Edwards to prevail on this unpreserved issue, he must show plain error affecting his substantial rights, i.e., outcome determinative error. To warrant reversal, such error must result in the conviction of an actually innocent defendant or otherwise "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 646, citing *Carines*, 460 Mich at 774.

Both the United States and Michigan Constitutions guarantee a criminal defendant the right to a public trial. US Const, Am VI; 1963 Const, art 1, § 20. This right is neither absolute nor self-executing, however. *Vaughn*, 491 Mich at 648, 653; see also *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d 31 (1984). Indeed—contrary to Edwards's claim—absent an objection, a court is not required to consider alternatives

as *Waller* otherwise prescribes.[4] See *Vaughn*, 491 Mich at 663-664; see also *People v Bails*, 163 Mich App 209, 211; 413 NW2d 709 (1987) ("If an objection had been made, other alternatives could have been considered. Given the lack of an objection, the short period the courtroom doors were locked, and the court's motive for ordering the closure, this Court finds the defendant's Sixth Amendment right to a public trial was not violated.").

Regardless—assuming this right extends to preliminary examinations in Michigan[5]—the crux of Edwards's challenge is that Deonte changed his testimony to implicate Edwards only after the trial court cleared the courtroom. Edwards claims the court's ostensible reason for doing so, i.e., that it was closing time, was

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[4] *Waller* sets forth a four-part test to justify a courtroom closure *when a defendant objects*: (1) the party who wishes to close the proceedings must show an overriding interest which is likely to be prejudiced by a public trial, (2) the closure must be narrowly tailored to protect that interest, (3) alternatives to closure must be considered by the trial court, and (4) the court must make findings sufficient to support the closure. *Waller*, 467 US at 48.

[5] Whether this right extends to preliminary examinations in Michigan is unclear. See *In re Midland Publishing Co, Inc*, 420 Mich 148, 172-173; 362 NW2d 580 (1984) (holding that the public right of access to criminal trials conferred by the *First Amendment* "does not extend to preliminary examinations"), but see *Press-Enterprise Co v Superior Court*, 478 US 1, 10; 106 S Ct 2735; 92 L Ed 2d 1 (1986) (concluding "that the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings *as they are conducted in California*") (emphasis added) and *Presley v Georgia*, 558 US 209, 213; 130 S Ct 721; 175 L Ed 2d 675 (2010) (suggesting without deciding the First and Sixth Amendment rights to a public trial may be coextensive). Nevertheless, it is unnecessary to settle this question today given both Edwards's failure to object and the clear threat to courtroom security posed in this case.

constitutionally insufficient. This misrepresents what happened. Indeed, the trial court emptied the courtroom because "I'm advised that it should be safe … ." Our review of the record confirms that safety was of paramount concern. For starters, "a large police presence" was necessary at the preliminary examination in anticipation of "trouble." As it turns out, this was a prescient decision as several riots broke out in the courtroom during that examination. During these riots, spectators shouted profanity, police arrested at least one person and threatened jail time to others, and Edwards was accused of spitting on someone and exclaiming, "That's why the mother f***** is dead." It was for this reason that the trial court cleared the courtroom in two phases, waiting 10 to 15 minutes between each evacuation. Given the court's explanation before the second phase that "[w]e're going to try to clear the area so you don't get jumped by anybody where we don't have security cameras, or anybody there to help you," it is clear the court restricted access to the remainder of the preliminary examination not because of the lateness of the day, but based on advice "that it was safe" to do so.[6]

It is difficult to conceive of a more appropriate reason to restrict public access to a courtroom than this. To be sure, courts have properly restricted public access to a trial under far less demanding circumstances. See, e.g., *United States v Brazel*, 102 F3d 1120, 1155-1156 (CA 11, 1997) (holding that the trial court's screening procedures did not violate the defendant's right to a public trial where spectators used "fix[ed] stares" to

[6] In light of this, the court sufficiently complied with MCR 8.116(D)(1) (permitting a court to restrict access to court proceedings, *sua sponte*, provided no less restrictive means are available and the court explains its decision on the record).

intimidate the witnesses); *United States ex rel Bruno v Herold*, 408 F2d 125, 127-128 (CA 2, 1969) (holding that where the trial court excluded spectators who "leaned forward and grinned and grimaced" at the witness, there was no Sixth Amendment violation because "there is no constitutional right to the presence of all public spectators who might desire to be present—or to the presence of such element as might be detrimental to an orderly trial uninfluenced by deterrents to truthful testimony."). This is because a trial court's close familiarity with the nature of the threats requires that appellate courts show great deference to the trial court's security procedures. See *United States v DeLuca*, 137 F3d 24, 34 (CA 1, 1998) ("prophylactic procedures of an entirely different nature may be required to safeguard against attempts to intimidate … witnesses in the performance of their courtroom responsibilities"), citing, among others, *United States v Childress*, 313 US App DC 133, 145; 58 F3d 693 (1995) ("[T]he trial court's choice of courtroom security procedures requires a subtle reading of the immediate atmosphere and a prediction of potential risks—judgments nearly impossible for appellate courts to second-guess after the fact."). Our deference is no great feat under these facts, especially considering that Edwards expressly approved of the court's decision to partially close the proceedings to the public the following day based on what had previously transpired. The trial court articulated sufficient justification to close the courtroom to the public. *Vaughn*, 491 Mich at 663-665. No error lies here.[7]

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[7] Because Edwards's right to a public trial was not violated, there is no structural error requiring automatic reversal. *Vaughn*, 491 Mich at 665-666.

B. VOLUNTARY WAIVER OF JURY TRIAL

Next, Edwards claims in his principal brief that the trial court failed to ascertain whether he voluntarily waived his right to a jury trial in accordance with MCR 6.402(B). We review this unpreserved issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763. "In order for a jury trial waiver to be valid … it must be both knowingly and voluntarily made." *People v Cook*, 285 Mich App 420, 422; 776 NW2d 164 (2009). A defendant's waiver is presumptively valid if the trial court has complied with MCR 6.402(B). *People v Mosly*, 259 Mich App 90, 96; 672 NW2d 897 (2003). That rule requires the trial court first to advise the defendant in open court of his right to a jury trial, and second to ascertain "by addressing the defendant personally" that the defendant understands that right and is relinquishing it voluntarily. MCR 6.402(B)

Here, after Edwards's counsel informed the court that his client wished to waive his right to trial by jury, the trial court asked Edwards directly whether he understood this right and "wish[ed]" to relinquish it. This is nearly identical to the trial court's colloquy in *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993), which this Court deemed sufficient to secure a voluntary waiver.

Edwards's claim that he mistakenly believed his rights were somehow contingent on his co-defendant's plea changes nothing where he not only signed a jury waiver form, but his affidavit contradicts his colloquy with the trial court and nothing in the record otherwise supports his claim. See *People v Gist*, 188 Mich App 610, 612; 470 NW2d 475 (1991) (declining to consider an affidavit contesting the voluntariness of a jury trial waiver that was "contrary to what happened in open

court"). Besides, he did not offer this proof below. *People v Shively*, 230 Mich App 626, 628 n 1; 584 NW2d 740 (1998) ("The affidavit attached to defendant's appellate brief will not be considered by this panel to resolve this issue because it was not part of the lower court record."). His claim is meritless.[8]

C. INCONSISTENT VERDICT

We likewise reject Edwards's claim—made in both briefs—that the trial court's verdict on his felony murder charge was inconsistent with its factual findings. Because Edwards failed to raise this issue below, it is unpreserved and he must therefore show plain error affecting his substantial rights to prevail. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006); *Carines*, 750 Mich at 774.

Inconsistent verdicts, although permissible in jury trials, are problematic in bench trials. *People v Ellis*, 468 Mich 25, 26; 658 NW2d 142 (2003). Put simply, they're not allowed because trial courts are "not afforded the same lenience" as juries. *Id.* Thus, if there is a factual inconsistency between the trial court's factual findings and its verdict, reversal is required. *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998).

We conclude the trial court's verdict was perfectly consistent with its factual findings. As stated earlier, Edwards was acquitted of first-degree premeditated murder, but convicted of first-degree felony murder. Although similar, the requisite intent of those offenses

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[8] Edwards's reliance on *Cook* is inapposite, considering that the defendant's attorney in that case went against his client's wishes in waiving the right to a public trial. *Cook*, 285 Mich App at 423.

is not necessarily identical. *People v Dykhouse*, 418 Mich 488, 496; 345 NW2d 150 (1984). First-degree premeditated murder requires premeditation and deliberation. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). First-degree felony murder, however, requires malice, which broadly includes the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007).

In rendering its verdict on the murder charges, the court explained:

> The Court finds both defendants not guilty of first-degree homicide premeditated murder.
>
> As to felony murder, Edwards, the Court finds Edwards guilty of felony murder for the following reasons: [h]is admission both to Deonte Smith of his attempt to rob the victim of his expensive watch and glasses. The Court finds that by not direct and circumstantial evidence [sic]. The Court credits against the testimony of Ms. Gaca that she saw and identified Mr. Edwards go up to the side of the car and fire four shots.
>
> The Court doesn't find that he went there to—his intent—I don't believe the he *initially* intended to kill him. I think that's just what happened during the circumstances.
>
> The evidence corroborates this by the tether. The shooting was fired at close range. The still photos, the murder weapon which he

> had in his possession just a short time later, nine days later in Southfield.
>
> The Court thinks that when you look *at the totality of all of the evidence through the testimony of all the witnesses and the expert testimony* that the People have met their burden for felony murder beyond a reasonable doubt. [Emphasis added.]

The finding that Edwards did not possess the intent to kill at first does not mean Edwards never had malice. To the contrary—in addition to the tether, the proximity of Edwards to the decedent during the shooting, and the surveillance photographs—the court expressly referenced the remaining evidence in finding the elements of felony murder satisfied, to wit: Deonte's statement of Edwards's intent to rob the decedent, the eyewitness's description of events and identification of Edwards as the assailant, testimony that the decedent was wearing an expensive watch and glasses on the day in question, and the forensic evidence related to the gun. All of this the trial court found credible, and we are in no position to upset that determination. MCR 2.613(C); *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

In light of this, the court's characterization of the planned robbery as "creat[ing] a very high risk of death" is well supported and easily satisfies the requisite intent for first-degree felony murder. That the trial court found no initial premeditation or deliberation is not inconsistent with its verdict, and therefore offers Edwards no refuge.

D. RIGHT TO NOTICE OF THE CHARGES

We next address Edwards's claim that his due process right to adequate notice was violated because the felony information did not disclose the requisite intent underlying the felony murder charge. While Edwards raises this issue in both briefs, he failed to raise it below thereby limiting our review to plain error affecting his substantial rights. *Carines*, 750 Mich at 774.[9]

"A defendant's right to adequate notice of the charges against [him] stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). "An information is presumed to be framed with reference to the facts disclosed at the preliminary examination." *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987).

The felony information coupled with the preliminary examination was constitutionally sufficient to dispel the ignorance that Edwards claims was plaguing him below. With respect to felony murder, the information alleged that Edwards "did while in the perpetration or attempted perpetration of a larceny, murder one [sic] Cedell Leverett; contrary to MCL 750.316(1)(b)," punishable by [l]ife without parole." This fairly apprised Edwards of the nature of the offense as required by court rule and statute. See MCR 6.112(D) (requiring the information to set forth the no-

[9] Edwards's Standard 4 Brief misconstrues federal case law in contesting the preservation requirement of this issue. See *United States v Davis*, 306 F3d 398, 411 (CA 6, 2002) ("*unless the defendant can show prejudice*, a conviction will not be reversed where the indictment is challenged only after conviction … .") (Emphasis added.) This is no different than the *Carines* standard.

tice required by MCL 767.45, in addition to the substance of the accusation and the applicable penalty, among other things), and MCL 767.45(1)(a) (requiring the information to contain "[t]he nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged."). Moreover, the facts presented at the preliminary examination mirror those presented at trial. They showed Edwards approaching the decedent in a crouched position and holding a gun with the intent to rob him. "Malice may … be inferred from the use of a deadly weapon." *Carines*, 460 Mich at 759. A gun is a dangerous weapon. See *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983). Accordingly, the felony information, framed with reference to this evidence, fairly apprised Edwards of the requisite intent of this offense.

Edward's argument that had he known that felony murder requires a malicious intent, he would have testified that he lacked malice when he shot the decedent, defies common sense. Although the information did not expressly contain a "malice" theory in support of the felony murder charge, the information for the first-degree premeditated murder charge explicitly alleged that Edwards acted "deliberately, *with the intent to kill* … ." (Emphasis added.) Malice includes the intent to kill. *Smith*, 478 Mich at 318-319. Even with this notice, Edwards elected not to testify.

In light of this, Edwards was fully apprised of the nature of the charges against him and his ability to defend against them was certainly not prejudiced.[10]

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[10] Edwards states conclusively that the absence of "malice" from the charging document undermined the judicial process. But his failure to provide any argument on this score renders this issue

E. VIEWING THE CRIME SCENE

This brings us to the argument in Edwards's principal brief that the trial court twice improperly viewed the scene of the crime and denied him the right to confront Gaca when she accompanied the court to the scene. This issue first appears on the record during the second day of trial when the court indicated that the attorneys would accompany the court to the crime scene. Apparently, this was originally planned to occur without defendants present, for when defendants' attorneys subsequently indicated their clients' desire to attend this viewing, the court canceled the visit unless defendants "change[d] their mind." Subsequently, while delivering its factual findings, the trial court noted that there "was a[n] independent going to the scene of the crime with defense counsel and the officer-in-charge, but we were met with Ms. Gaca and to basically get the site of where she was and where the cars were [sic]." The court added that it "also went to the mall at approximately 10:30, 10:00, 10:30 p.m. at night to see what the night light looked like. And as I indicated earlier, you could see very well into the parking lot area. It was very well-lit."

As a preliminary matter, Edwards has waived any claim concerning both the court's first viewing of the scene and confronting the eyewitness there. His counsel was not only present during those events, but counsel additionally *agreed* on the two questions asked of Gaca, which pertained only to her vantage point during the shooting. Even more, Edwards's counsel *stipulated* that Gaca's testimony on this score be read into the record. See *People v McPherson*, 263 Mich App 124,

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abandoned. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (a party abandons an issue by failing to brief it).

139; 687 NW2d 370 (2004) (a party waives appellate review when the conduct of the party or his counsel "invit[es] the error and fails to object"), citing *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); see also *People v Riley*, 465 Mich 442, 448; 636 NW2d 514 (2001). Regardless, even if the issue were not waived, our review would be for outcome determinative error since Edwards failed to object to either visit or the alleged testimony below.[11] *Carines*, 460 Mich at 764-765 (a claim of constitutional error requires a contemporaneous objection to preserve it for appeal); see also *People v Broadnax*, 57 Mich App 621, 622-623; 226 NW2d 589 (1975) (defendant could not raise this issue for first time on appeal where, among other things, defense counsel participated in the judge's viewing of the scene and did not object).

With respect to the fact-finder's viewing of a crime scene, it is well established that when the fact-finder is the jury, the viewing constitutes a critical stage of a criminal proceeding which a criminal defendant has the right to attend with the assistance of counsel. *People v*

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[11] Edwards claims *for the first time on appeal* that his counsel "went behind [his] back" in accompanying the court to the scene. Edwards offers nothing in his affidavit—let alone any offer of proof—to substantiate this charge, which is tantamount to accusing his lawyer of violating the Rules of Professional Conduct. See MRPC 1.4. Nor are we blind to the fact that while Edwards raises a myriad of ineffective assistance claims both in his principal and Standard 4 briefs (addressed later in this opinion), not one accuses defense counsel of misrepresenting his decision on this issue. Edwards did not even raise this point in his motion for new trial. This is not surprising considering that the day after the first visit, the court explained the trip to the scene in detail and counsel additionally stipulated in Edwards's presence to Gaca's testimony. Edwards uttered not a word. Absent more, then, we will not consider this reckless accusation further. *Kevorkian*, 248 Mich App at 389.

Kurylczyk, 443 Mich 289, 296; 505 NW2d 528 (1993) (opinion by GRIFFIN, J.); *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987), citing *People v Mallory*, 421 Mich 229, 244-248; 365 NW2d 673 (1984). However, Edwards has not cited—nor have we found—Michigan authority addressing the issue of a trial court's viewing of a crime scene in the absence of defendant or his counsel. Several federal courts have held, however, that the same principles apply. See, e.g., *United States v Walls*, 443 F2d 1220, 1222-1223 (CA 6, 1971) ("The principles applicable to a view by a judge sitting without a jury are not substantially different [than those applicable to a jury]"); *Payne v United States*, 697 A2d 1229, 1235 (DC, 1997), citing *Lillie v United States*, 953 F2d 1188, 1191 (CA 10, 1992) (finding the court's viewing of the crime scene, although erroneous, was not prejudicial). Moreover, while the Confrontation Clause entitles a criminal defendant the right to a face-to-face meeting with witnesses appearing before the trier of fact, the right is not absolute, *People v Staffney*, 187 Mich App 660, 663; 468 NW2d 238 (1990), and is not as broad in scope as the right to be present at trial, *Mallory*, 421 Mich at 247.

Assuming the right to attend the viewing of the scene extends to bench trials, we find no error requiring reversal. In the first place, Edwards's counsel was present for the initial viewing by the court and Gaca. Moreover, counsel agreed to the two questions asked of Gaca and stipulated to her testimony. Those pertained to her location and whether she moved during the shooting. Her testimony that she only moved when the gunman ran towards the car, however, only damaged her credibility and helped Edwards. On this point, the trial court expressly found that Gaca stood 50 feet from the incident, rather than the 20 feet she claimed at trial.

In view of this, Edwards's failure to raise this issue below smacks of harboring error as an appellate parachute. *People v Riley*, 465 Mich 442, 448; 636 NW2d 514 (2001). We will not tolerate such gamesmanship. But even if there were error, it certainly was not outcome determinative in light of the overwhelming evidence against Edwards. This included the evidence of Edwards's intent to rob the decedent, the forensic evidence linking Edwards's gun to the shooting, and the tether and surveillance video placing Edwards at the scene.

Likewise, even if the court's second viewing were improper, it did not violate Edwards's substantial rights. The court indicated that its only purpose was to confirm the lighting of the parking lot. That fact was of little consequence in light of the other incriminating evidence, especially the surveillance video, tether, and forensic evidence. Again, Edwards was not prejudiced, and, not surprisingly, he makes no claim that he was actually innocent or that this fundamentally affected the proceedings in an adverse way.

Before moving on, we note that Edwards relies on *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), among other cases, to suggest that any error was structural and requires automatic reversal. Edwards ignores, however, that "every federal circuit court of appeals has stated, post-*Cronic*, that an absence of counsel at a critical stage may, under some circumstances, be reviewed for harmless error." *People v Murphy*, 481 Mich 919, 923; 750 NW2d 582 (2008) (MARKMAN, J., concurring), citing, among others, *Satterwhite v Texas*, 486 US 249; 108 S Ct 1792; 100 L Ed 2d 284 (1988), *Ellis v United States*, 313 F3d 636, 643 (CA 1, 2002) (absence of counsel at critical stage would require presumption of prejudice only if "pervasive in

nature, permeating the entire proceeding"), and *United States v Lampton*, 158 F3d 251, 255 (CA 5, 1998) (applying harmless-error review when counsel was absent during adverse testimony). Our facts fall squarely in line with this authority and we see no compelling reason to deviate today. Reversal is not warranted.[12]

F. INEFFECTIVE ASSISTANCE OF COUNSEL

We next address Edwards's host of ineffective assistance of counsel arguments. Because we previously denied Edwards's motions to remand for a *Ginther* hearing,[13] our factual review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). We review the ultimate question of constitutionality de novo, however. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To prevail, Edwards must show that his counsel's performance was objectively unreasonable and that counsel's deficiency was outcome determinative. *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994).

Edwards initially argues in his principal brief that his trial counsel was ineffective for failing to interview Deonte before trial. See *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004) ("[t]he failure to make an ad-

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[12] Equally meritless is Edwards's pro se assertion that the case against him is "void" because the complaint was not recorded in the register of actions. The complaint appears in the lower court file and contains no deficiency. It is dated and signed by the magistrate, assistant prosecutor, and the complaining witness. Edwards does not claim any prejudice resulted, and, in any event, is not actually innocent as we have already explained. Any error was harmless. MCL 769.26; *People v Houthoofd*, 487 Mich 568, 591 n 38; 790 NW2d 315 (2010).

[13] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

equate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome."). Edwards bases this assertion on Deonte's affidavit—offered for the first time on appeal—disavowing his preliminary examination testimony incriminating Edwards. According to Edwards, had counsel interviewed Deonte, he could have exposed Deonte's lies to the court at trial. There are at least two problems with this argument.

First, Deonte refused to testify at trial. Thus, Edwards's assumption, i.e., that the trial court would have "heard from Smith that he was lying," has no basis. Tellingly, Edwards offers no argument about how his counsel's investigation would have altered Deonte's decision not to testify.[14] Second, even if Deonte would have recanted at trial, this would not erase his prior sworn testimony, which the prosecution would no doubt have presented as a prior inconsistent statement admissible for its *substantive* value. See MRE 801(d)(1)(A) (inconsistent prior statements made under oath and subject to the penalty of perjury are not hearsay); *People v Malone*, 445 Mich 369, 376-378; 518 NW2d 418 (1994) (statements that are not hearsay under MRE 801(d)(1) may be used as substantive evidence). It bears further emphasis that recantation testimony, like what Edwards proposes, is inherently "suspect and untrustworthy." *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). Indeed "[t]here is no form of proof so unreliable as recanting

[14] Although defense counsel cross examined Deonte at the preliminary examination, this does not necessarily tip the balance against Edwards. See, e.g., *Bryant v Scott*, 28 F3d 1411, 1419 (CA 5, 1994) ("assuming that Moore's cross examination was effective, that is not to say it could not have been improved by prior investigation.").

testimony." *Id.* at 559-560 (citation omitted). In light of this, even if the failure to investigate Denote were unreasonable, our confidence in the trial's outcome remains firm.

Edwards presents the remainder of his ineffective assistance arguments in his Standard 4 brief. This laundry list accuses defense counsel of failing to object to: (1) the felony information, (2) the closure of the courtroom during the preliminary examination, (3) the trial court's purported failure to comply with MCR 6.402(B), and (4) the trial court's second visit to the crime scene. As for the first three, we have already determined that each is devoid of merit. Any objection would therefore have been futile. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (defense counsel is not required to make objections destined to lose). And as for the fourth claim, even if there were error, it was not outcome determinative for the reasons already stated. Edwards therefore cannot establish ineffective assistance on any of these grounds.

All of his convictions stand.

III. DOCKET NO. 318025 – ROYSTER

Like his codefendant, Royster also filed a principal and Standard 4 brief. Our review of both yields nothing to aid his cause.

A. SUFFICIENCY OF THE EVIDENCE

First, Royster asserts that his mere presence at the Eastland Mall was insufficient to convict him of felony murder under an aiding and abetting theory. We review a challenge to the sufficiency of the evidence in a bench trial de novo. *People v Lanzo Const Co*, 272 Mich App 470, 473-474; 726 NW2d 746 (2006). "When

reviewing a challenge of the sufficiency of the evidence in a bench trial, the reviewing court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008). A court's factual findings in a bench trial will not be set aside absent clear error. MCR 2.613(C).

Felony murder consists of three elements: (1) the killing of a human being, (2) with malice, and (3) while committing *or attempting to commit* a robbery, among other offenses listed in MCL 750.316(1)(b). *Smith*, 478 Mich at 318-319. A defendant is guilty of aiding and abetting a felony murder when he has the requisite malice, which need not be identical to the principal's. *People v Robinson*, 475 Mich 1, 14; 715 NW2d 44 (2006). Mere presence at the scene of the crime, even with knowledge of the principal's plan, is not enough to prove malice. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999). Thus, Royster would be guilty of felony murder under an aiding and abetting theory if he:

> (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).]

Gaca's testimony easily satisfies the first two elements. She testified that Royster stood outside the driver's door of the vehicle from which Edwards emerged, holding a gun. As Edwards approached the decedent in a crouched position, Gaca heard Royster encourage Edwards to "Pop him, pop that motherf***** good," before Edwards accosted the decedent and fired four shots, killing him. Royster then drove the getaway car. This testimony shows both Royster's encouragement of Edwards and his malicious intent, especially since only minimal circumstantial evidence is required to prove the latter. *Kanaan*, 278 Mich App at 622; see also *Carines*, 460 Mich at 761 (actions after the incident, including flight, may be considered when determining intent). And, while Royster urges us to discount Gaca's testimony as unreliable, that is a determination left solely to the trial court, which we will not—and cannot—revisit here. *Kanaan*, 278 Mich App at 619. Royster was not the mere innocent bystander he portrays himself to have been.

As for the third element, Royster ignores that while there was no evidence that neither he nor Edwards knew the decedent previously, evidence showed they had selected him as their target, i.e, an individual wearing an expensive watch and glasses in the driver's seat of an expensive car. This circumstantial evidence, in conjunction with Edwards's covert approach to the decedent and Royster's encouragement, must be construed in the light most favorable to the prosecution, and as such, is sufficient to prove their *attempt* to commit the underlying felony of robbery.

But even if this weren't enough, Deonte's incriminating testimony—which the trial court did not even consider in determining Royster's guilt—shows robbery was defendants' aim. Indeed, the primary pur-

pose of Edwards's statement to Deonte was not to establish prior events potentially relevant to a later prosecution; it was to brag. There is no question that Edwards's hubris ran contrary to his penal interest. Accordingly, the statement was nontestimonial and admissible against Royster as a codefendant. See *People v Taylor*, 482 Mich 368, 378-379; 759 NW2d 361 (2008) (statements whose primary purpose are not to establish past events potentially relevant to a later prosecution fall outside the Confrontation Clause, are governed by MRE 804(b)(3) (certain statements subjecting a party to criminal liability are not excluded by the hearsay rule), and are admissible against a codefendant). Royster's conviction is well supported.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Royster's next argument is that counsel was ineffective for failing to subpoena exculpatory witnesses. We have already set forth the standard for ineffective assistance and will not revisit it here, except to note that because Royster's motion to remand in this Court was also denied, we must again confine our review to mistakes apparent on the record. *Snider*, 239 Mich App at 423.

Royster identifies only one instance in the record to substantiate his claim, specifically at sentencing when he noted a breakdown in communication with counsel that allegedly resulted in his counsel failing to do "a lot of things," including call witnesses. However, Royster specified none of the "things" counsel failed to do and identified no witnesses. Further, while Royster identifies only one witness on appeal, he offers no explanation, let alone offer of proof, as to how that witness would exculpate him. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (a defendant must establish a factual

predicate to support a claim of ineffective assistance). In fact, the *only* information Royster provides about this putative witness is that he is in federal prison somewhere. It is certainly not our responsibility to flesh out this argument, *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), especially where Royster makes no effort to explain how not calling a federal inmate affected the trial's outcome, *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013) (the decision to call witnesses is a matter of trial strategy constituting ineffective assistance only if it deprives a defendant of a substantial defense affecting the proceeding's outcome).

C. SECOND VIEW OF THE CRIME SCENE

Like Edwards, Royster also challenges the trial court's second viewing of the crime scene, with the added wrinkle of an alleged Confrontation Clause violation. This latter claim alleges in essence that the trial court functioned as a witness during its second viewing of the crime scene and should have been subject to cross examination. Royster lodged no objection on this novel theory (or on any other ground) below, and so we are looking for outcome determinative error that adversely affected the proceedings or resulted in the conviction of an innocent defendant. *Carines*, 460 Mich at 774. We see none.

As we said before, a criminal defendant has the right to be present at every stage of a proceeding and to confront the witnesses against him. *Kurylczyk*, 445 Mich at 296; *Staffney*, 187 Mich App at 663. At least on the former ground, the prosecution concedes error, and indeed, we agree that the trial court's second viewing of the crime scene was not only erroneous, but imprudent. But even assuming error on both grounds,

Royster can't get around the mountain of incriminating evidence against him. On this score, besides our prior analysis, we would highlight again Royster's vulgar encouragement to Edwards, which eradicates any pretense of actual innocence especially considering that the trial court's second visit was to view the lighting in the parking lot. That is not enough to reverse.

D. ROYSTER'S STANDARD 4 BRIEF

Royster's Standard 4 brief is a near carbon-copy subset of the issues his codefendant presents on appeal. These challenges include: (1) the violation of his right to a public trial; (2) the court's noncompliance with MCR 6.402(B); (3) the felony information's lack of proper notice; and (4) the two crime scene visits. As for the first three, Royster's failure to object yet again leaves us looking for plain error affecting substantial rights. For all the reasons explained previously, we can't find any. To the second point, we add that the court secured Royster's jury trial waiver in a colloquy substantively identical to the one with Edwards, and that we otherwise decline to consider Royster's affidavit for the same reasons we reject Edwards's. Accordingly, there is no ground for reversal where the court properly closed the courtroom during the preliminary examination, secured a voluntary waiver, and Royster's "complete[]" ignorance of the charges was dispelled by the felony information and preliminary examination. In addition, Royster's assertion that he would have testified but for this alleged error is at best dubious given that the *mens rea* was provided in the premeditated murder charge.

Regarding the crime scene visits, we conclude that Royster waived any challenge to the first visit and to any testimony Gaca offered where his counsel attended

the visit without objection and stipulated to the recitation of Gaca's testimony into the record. *Riley*, 465 Mich at 448, citing, among others, *Carter*, 462 Mich at 215-216. But even if there were error, Gaca's comments at the scene only harmed her credibility. Moreover, as we have repeatedly concluded, the evidence of Royster's guilt absent these visits was clear and he is not actually innocent.

Finally, Royster tacks on an ineffective assistance of counsel claim, arguing that his lawyer should have objected to: (1) the transcription of Deonte's preliminary examination testimony at trial; (2) the court's noncompliance with MCR 6.402(B); and (3) the "defective" felony information. Because none of these amounts to error, no objection was necessary. *Ericksen*, 288 Mich App at 201. Moreover, the trial court expressly declined to consider Deonte's testimony against Royster. What counsel was supposed to object to, then, is beyond us.

Affirmed.

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Stephen L. Borrello

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

19-1302
19-1304

DEMETRIUS WILLIAM EDWARDS,
Petitioner-Appellant,
v.

SHERRY BURT, WARDEN,
Respondent-Appellee.,

BRYANT LAMONT ROYSTER,
Petitioner-Appellant,
v.

KEVIN LINDSEY, WARDEN,
Respondent-Appellee.

Filed September 30, 2020

O R D E R

BEFORE: GUY, SUTTON, and GRIFFIN, Circuit Judges.

The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. The petitions then

were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT

signature
Deborah S. Hunt, Clerk