

APPENDIX A

No. 20-1010

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 05, 2020
DEBORAH S. HUNT, Clerk

SHAWN KRISTI DICKEN,

Petitioner-Appellant,

v.

SHAWN BREWER, Warden,

Respondent-Appellee.

ORDER

Before: DONALD, Circuit Judge.

Shawn Kristi Dicken, a pro se Michigan prisoner, appeals the district court's judgment denying her petition for a writ of habeas corpus under 28 U.S.C. § 2254. Dicken moves the court for a certificate of appealability (COA).

Dicken was a registered investment advisor for the Diversified Group. A jury convicted her of one count of conducting a criminal enterprise, seven counts of obtaining money by false pretenses, and one count of embezzlement of a vulnerable victim. Each of these convictions was related to a scheme to defraud in which Dicken made misleading statements to her clients about risky limited partnership investments and forged her clients' signatures on investment documents. The trial court sentenced Dicken to an aggregate term of 140 months to twenty years of imprisonment. The Michigan Court of Appeals affirmed, *People v. Dicken*, No. 322998, 2016 WL 146031 (Mich. Ct. App. Jan. 12, 2016) (per curiam), *rev'd in part mem.*, 902 N.W.2d 604 (Mich. 2017); *People v. Dicken*, No. 322998, 2018 WL 632986 (Mich. Ct. App. Jan. 30, 2018) (per curiam), and the Michigan Supreme Court denied leave to appeal, *People v. Dicken*, 913 N.W.2d 325 (Mich. 2018) (mem.).

In June 2019, proceeding through counsel, Dicken filed a § 2254 petition in the district court, claiming: (1) the trial court erred in denying her motions to compel production of certain evidence from the prosecution, thus violating her right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963); (2) the trial court erred in allowing the prosecution's expert witness to give legal conclusions during his testimony; (3) the trial court erred in excluding from evidence her testimony before a state investigative agency; and (4) the prosecution committed misconduct during opening statements and closing arguments. The district court denied each of Dicken's claims on the merits and declined to issue a COA. Dicken now appeals pro se. She has requested a COA on all of the claims raised in the district court.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented" to the state courts. 28 U.S.C. § 2254(d). Where the state courts adjudicated the petitioner's claims on the merits, the relevant question is whether the district court's application of § 2254(d) to those claims is debatable by jurists of reason. *See Miller-El*, 537 U.S. at 336.

Dicken's first claim was that her right to due process was violated under *Brady* because she was denied a fair opportunity to conduct discovery. Dicken filed motions in the trial court to compel the prosecution to produce evidence concerning "other Diversified Group employees, material obtained pursuant to a search warrant executed at a credit union for Triton Commercial Lending, and evidence pertaining to the operation of Diversified Group by a receiver." *See Dicken*,

2016 WL 146031, at *1. The trial court denied the motions to compel, essentially agreeing with the prosecution that it had given to Dicken all of the information required by the state rules of criminal procedure and that her requests for broader discovery amounted to a fishing expedition.

The Michigan Court of Appeals reviewed Dicken's claim that the prosecution failed to disclose exculpatory evidence in violation of *Brady* for plain error because she did not raise her discovery claim as a constitutional violation in the trial court. *See id.* at *1 n.2. The court then rejected this claim because Dicken "state[d] only that the requested materials might have contained evidence favorable to her" and her "mere contention that the requested materials might have contained favorable evidence" was insufficient to establish a *Brady* violation. *Id.* at *2. Forgoing a procedural-default analysis, the district court concluded that Dicken was not entitled to relief on this claim.

Under *Brady*, the prosecution has a duty to disclose exculpatory evidence that is material to the defendant's guilt or punishment. *See* 373 U.S. at 87; *Robinson v. Mills*, 592 F.3d 730, 735 (6th Cir. 2010). To establish a *Brady* violation, the petitioner must demonstrate that: (1) the evidence in question is favorable; (2) the prosecution suppressed the evidence; and (3) there is a reasonable probability that the result of her trial would have been different had the evidence been disclosed to the defense. *See Robinson*, 592 F.3d at 735.

There is no general due process right to discovery in a criminal case. *See LaMar v. Houk*, 798 F.3d 405, 430-31 (6th Cir. 2015). Consequently, to the extent that Dicken claimed generally that the trial court erred in denying her discovery requests because they likely would have led to the discovery of admissible evidence, reasonable jurists would not debate whether this claim deserves encouragement to proceed further. *Cf. Wogenstahl v. Mitchell*, 668 F.3d 307, 325 n.3 (6th Cir. 2012) (stating that under *Brady* the prosecution has a duty to disclose inadmissible evidence that would "lead directly" to admissible exculpatory evidence (quoting *Sawyer v. Hofbauer*, 299 F.3d 605, 614 (6th Cir. 2002))).

Regardless, reasonable jurists would not debate the district court's conclusion that Dicken failed to show that the prosecution failed to disclose material evidence. In her petition, Dicken

cited a broad range of materials that she argued the prosecution should have disclosed. But except for her claim that the prosecution failed to disclose an investigative report in which a witness stated that a Diversified Group employee named Scott Bartlett had forged clients' signatures on subscription agreements at the direction of the company president, Dicken failed to demonstrate that the evidence that she sought, but did not obtain, might reasonably have changed the outcome of her trial.¹

And the prosecution disclosed the investigative report to Dicken during the trial. Dicken's attorney cross-examined the investigating agent about the report, and the trial court instructed the jury that it could consider the prosecution's failure to disclose the report earlier in deciding whether it had proved that Dicken was guilty beyond a reasonable doubt. Dicken has not explained how the delayed disclosure of this report affected the outcome of her trial. *Cf. United States v. Spry*, 238 F. App'x 142, 146-47 (6th Cir. 2007) (holding that the delayed disclosure of exculpatory evidence warrants a mistrial only if the defendant was unable to use it effectively at trial).

Accordingly, reasonable jurists would not debate the district court's conclusion that Dicken was not entitled to relief on her *Brady* claim. *See Fleming v. Metrish*, 556 F.3d 520, 532 (6th Cir. 2009) (holding that a constitutional claim reviewed by the state court for plain error is entitled to deference under AEDPA).

Dicken next claimed that the trial court erred in allowing the prosecution's expert to give legal conclusions during his testimony. The Michigan Court of Appeals reviewed this claim for plain error because Dicken did not object to the expert's testimony on this ground and rejected it because he did not offer an opinion as to Dicken's guilt. *See Dicken*, 2016 WL 146031, at *4, n.5. The district court concluded that the state court's resolution of this claim was reasonable because no Supreme Court decision prohibits states from permitting an expert witness to offer an opinion that embraces an ultimate issue. Reasonable jurists would not debate that conclusion. *See United States v. Nixon*, 694 F.3d 623, 631 (6th Cir. 2012) (noting that federal district courts have discretion

¹ Dicken sought all witness statements and copies of records that investigators seized from her personal company, Triton Commercial Lending, but she did not provide any reason to believe that these materials contained exculpatory evidence.

to admit testimony that contains legal conclusions); *see also Briceno v. Scribner*, 555 F.3d 1069, 1077-78 (9th Cir. 2009).

To the extent that Dicken argued that the trial court violated state law by allowing the prosecution's expert to give legal conclusions and that the prosecution failed to comply with the state rules of criminal procedure concerning the disclosure of an expert's report and opinions, reasonable jurists could not disagree with the district court's conclusion Dicken failed to state claims for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Nor would reasonable jurists debate the district court's conclusion that the trial court's decision to allow the prosecution's expert to testify was not so egregious as to violate Dicken's right to a fair trial, particularly in view of the state court's determination that the expert did not offer an opinion as to Dicken's guilt. *See* 28 U.S.C. § 2254(e)(1); *Hutchison v. Bell*, 303 F.3d 720, 731 (6th Cir. 2002); *Dicken*, 2016 WL 146031, at *4.

Dicken next claimed that the trial court erred by prohibiting her from presenting her own testimony before the Michigan Financial Regulatory Authority (FINRA). She argued that this evidence would have shown that she was cooperative with the state investigatory authorities, which in turn would have shown that she lacked intent to defraud. The trial court found that Dicken's prior testimony was relevant, but the court excluded it under the state rules of evidence on the ground that its probative value was outweighed by its prejudicial effect and the risk of jury confusion. The Michigan Court of Appeals affirmed, concluding that the trial court's decision did not violate Dicken's constitutional right to present a defense because the case agent testified that Dicken was cooperative, and the court permitted Dicken to testify that she was cooperative. *See Dicken*, 2016 WL 146031, at *4. The district court concluded that Dicken was not entitled to relief on this claim.

While a criminal defendant has a federal constitutional right to an opportunity to present a complete defense, *see Fleming*, 556 F.3d at 534, that right does not guarantee that she will be able to "present any evidence [she] desires," *Alley v. Bell*, 307 F.3d 380, 396 (6th Cir. 2002). Consequently, a state court's evidentiary ruling will be the basis for federal habeas relief only if it


was so egregious that it rendered the petitioner's trial fundamentally unfair. *See Fleming*, 556 F.3d at 534. But here, given that Dicken was able to present other evidence that she cooperated with the investigation, including her own direct testimony, reasonable jurists would not debate whether the Michigan Court of Appeals unreasonably determined that the trial court's decision to exclude her FINRA testimony did not violate her constitutional right to present a defense. Reasonable jurists therefore would not debate the district court's resolution of this claim.

Dicken next claimed that the prosecutor committed misconduct during opening statements and closing arguments. Specifically, Dicken alleged that, as to the charge that she embezzled from a vulnerable victim, the prosecutor misrepresented to the jury that a power of attorney that the victim had given to a relative meant that the victim lacked capacity to make financial decisions, when that was not the victim's legal status under the state law. The Michigan Court of Appeals rejected this claim, finding that the prosecutor did not misrepresent the victim's legal status or authority to make financial decisions. *See Dicken*, 2016 WL 146031, at *5. The district court concluded that Dicken was not entitled to relief on this claim.

Prosecutorial misconduct is a basis for federal habeas relief only if the prosecutor's comments were so fundamentally unfair as to result in a denial of due process. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). But here, as the Michigan Court of Appeals found, the prosecutor never argued that the power of attorney rendered the victim incapable of making financial decisions. Instead, the prosecutor argued that Dicken approached the victim at a time when Dicken knew that the victim's attorney-in-fact would be out of town, thus suggesting that Dicken took advantage of the attorney-in-fact's absence to lure the victim into her fraudulent investment scheme. Reasonable jurists would not debate the district court's resolution of this claim.

Accordingly, the court **DENIES** Dicken's COA application.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHAWN KRISTI DICKEN,

Petitioner,

v.

Civil No. 2:19-CV-11676
HONORABLE DENISE PAGE HOOD
CHIEF UNITED STATES DISTRICT JUDGE

SHAWN BREWER,

Respondent.

JUDGMENT

The above entitled came before the Court on a Petition for Writ of Habeas Corpus, and in accordance with the Memorandum Opinion and Order entered on December 9, 2019:

- (1) The Petition for Writ of Habeas Corpus is DENIED WITH PREJUDICE.
- (2) A Certificate of Appealability is DENIED.

Dated at Detroit, Michigan, this 9th day of December, 2019.

DAVID J. WEAVER
CLERK OF THE COURT

APPROVED:

By: s/K.MacKay
DEPUTY CLERK

s/Denise Page Hood
HON. DENISE PAGE HOOD
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHAWN KRISTI DICKEN,

Petitioner,

v.

Civil No. 2:19-CV-11676

Hon. Denise Page Hood

Chief United States District Judge

SHAWN BREWER,

Respondent,

**OPINION AND ORDER DENYING THE PETITION FOR WRIT OF
HABEAS CORPUS AND DECLINING TO ISSUE
A CERTIFICATE OF APPEALABILITY**

Shawn Kristi Dicken, (“Petitioner”), confined at the Huron Valley Women’s Correctional Facility in Ypsilanti, Michigan, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 through her attorney F. Randall Karfonta. Petitioner challenges her conviction for conducting a criminal enterprise, Mich. Comp. Laws § 750.159i(1); embezzlement from a vulnerable adult, \$50,000 or more but less than \$100,000, Mich. Comp. Laws § 750.174a(6)(a); and seven counts of obtaining money by false pretenses, \$1,000 or more but less than \$20,000, Mich. Comp. Laws § 750.218(4)(a). Petitioner was sentenced to concurrent prison terms of 140 months to 20 years for the criminal enterprise conviction, 23 months to 5 years for each false pretenses conviction, and 71

months to 15 years for the embezzlement conviction. For the reasons that follow, the petition for writ of habeas corpus is **DENIED WITH PREJUDICE**.

I. Background

Petitioner was convicted following a jury trial in the Midland County Circuit Court. This Court recites verbatim the relevant facts regarding petitioner's conviction from the Michigan Court of Appeals' opinion affirming her conviction, since they are presumed correct on habeas review. *See Wagner v. Smith*, 581 F. 3d 410, 413 (6th Cir. 2009):

This case resulted from allegations that defendant, a registered representative or broker who worked for the Diversified Group, placed the funds of many clients into a risky limited partnership investment in which they lost substantial portions of their principal. The prosecutor asserted that defendant did so in order to obtain commissions and that, to convince her clients to enter into these risky investments, she misled them as to the risk to their principal and the liquidity of the investment. In addition, several of defendant's clients testified that their signatures on various documents had been forged.

People v. Dicken, No. 322998, 2016 WL 146031, at * 1 (Mich. Ct. App. Jan. 12, 2016).

The Michigan Court of Appeals affirmed petitioner's convictions and sentences for her embezzlement and false-pretenses convictions, but remanded to the trial court for further proceedings regarding the reasonableness of the above the guidelines sentence for the criminal-enterprise conviction. *Id.*

Petitioner filed an application for leave to appeal in the Michigan Supreme Court. The Michigan Supreme Court remanded the case back to the Court of

Appeals to consider the proportionality of petitioner's criminal-enterprise sentence, but otherwise denied the application. *People v. Dicken*, 501 Mich. 904, 902 N.W.2d 604 (2017).

On remand, the Michigan Court of Appeals affirmed petitioner's sentence for criminal enterprise, determining that it was proportionate based on the trial court's reasons for the departure from the sentencing guidelines. *People v. Dicken*, No. 322998, 2018 WL 632986 (Mich. Ct. App. Jan. 30, 2018); *lv. den.* 502 Mich. 904, 913 N. W. 2d 325 (2018).

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

I. In a fraud case where the issue was Defendant's disclosure to clients and unlawful and illegal intent, Defendant was denied fundamentally fair discovery of the investigation of the business entities in the case including a clearly intentionally and important *Brady v Maryland* violation.

II. Improper expert opinion as to evidence that "is not a defense" and opinion as to the meaning of federal statu[t]es and regulations is plain error[.]

III. Recordings of Shawn Dicken's testimony before the FINRA state investigative agency are required evidence showing her lack of intent to defraud.

IV. Where the charge is embezzlement from a vulnerable adult, prosecutorial arguments and evidence that the power of attorney in the case was the equivalent of legal incapacity denied Defendant a fair trial and due process of law.

II. Standard of Review

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

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A state court's decision is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the

relevant state-court decision applied clearly established federal law erroneously or incorrectly.” *Id.* at 410-11.

The Supreme Court explained that “[A] federal court’s collateral review of a state-court decision must be consistent with the respect due state courts in our federal system.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The “AEDPA thus imposes a ‘highly deferential standard for evaluating state-court rulings,’ and ‘demands that state-court decisions be given the benefit of the doubt.’” *Renico v. Lett*, 559 U.S. 766, 773 (2010)((quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997); *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002)(*per curiam*)). “[A] state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011)(citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). To obtain habeas relief in federal court, a state prisoner is required to show that the state court’s rejection of his or her claim “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington*, 562 U.S. at 103. A habeas petitioner should be denied relief as long as it is within the “realm of possibility” that fairminded jurists could find the state court decision to be reasonable. *See Woods v. Etherton*, 136 S. Ct. 1149, 1152 (2016).

The Michigan Court of Appeals reviewed and rejected a portion of petitioner's first and second claims and her fourth claim under a plain error standard on the ground that petitioner failed to preserve these claims as a constitutional issue at the trial court level. The AEDPA deference applies to any underlying plain-error analysis of a procedurally defaulted claim. *See Stewart v. Trierweiler*, 867 F.3d 633, 638(6th Cir. 2017).¹

III. DISCUSSION

A. Claim # 1. The discovery claim.

Petitioner first argues that she is entitled to habeas relief because the prosecutor violated M.C.R. 6.201(B) and *Brady v. Maryland*, 373 U.S. 83 (1963)

¹ Respondent urges this Court deny these claims on the ground that they are procedurally defaulted because petitioner failed to object at trial. Procedural default is not a jurisdictional bar to review of a habeas petition the merits. *See Trest v. Cain*, 522 U.S. 87, 89 (1997). "[F]ederal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson v. Jones*, 351 F. 3d 212, 215 (6th Cir. 2003)(citing *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)). "Judicial economy might counsel giving the [other] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." *Lambrix*, 520 U.S. at 525. The procedural bar issues here are complicated. Petitioner does appear to have attempted to preserve her first claim alleging a violation of *Brady v. Maryland* several times at the trial court level and also may have attempted to object to the prosecutorial misconduct issue raised in petitioner's fourth claim in a motion for judgment of acquittal. When a state court erroneously applies a procedural bar that has no foundation in either the record or under state law, a federal court need not honor that procedural bar. *See Walker v. Engle*, 703 F. 2d 959, 967 (6th Cir. 1983). Petitioner also argues that counsel was ineffective for failing to object to a portion of the second claim and for failing to properly preserve the fourth claim. Ineffective assistance of counsel may establish cause for procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). Given that the cause and prejudice inquiry for the procedural default issue merges with an analysis of the merits of petitioner's defaulted claims, it would be easier to consider the merits of the claims. *See Cameron v. Birkett*, 348 F. Supp. 2d 825, 836 (E.D. Mich. 2004).

by failing to turn over to the defense materials that the prosecutor had in its possession regarding other Diversified Group employees, material obtained pursuant to a search warrant executed at a credit union for Triton Commercial Lending, a separate company owned by petitioner, and evidence regarding the operation of Diversified Group by a receiver.

It is well-settled that there is no general constitutional right to discovery in a criminal case. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)(denying due process claim of a defendant who was convicted with aid of surprise testimony from an accomplice who was an undercover agent); *United States v. Presser*, 844 F. 2d 1275, 1281 (6th Cir.1988)(citing *Weatherford*). A claim that a prosecutor violated state discovery rules is not cognizable in federal habeas review, because it is not a constitutional violation. *See Lorraine v. Coyle*, 291 F. 3d 416, 441 (6th Cir. 2002). Petitioner would not be entitled to habeas relief because the prosecutor violated M.C.R. 6.201 or some other Michigan rules regarding discovery.

It is true that suppression by the prosecution of evidence favorable to the defendant upon request violates due process, where the evidence is material to either guilt or punishment of the defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Whether the prosecution acted in good or bad faith is not considered in the determination. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would

have been different. A “reasonable probability is a probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. 667, 683 (1985). In *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), the Supreme Court articulated three components or essential elements of a *Brady* claim: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. “Prejudice (or materiality) in the *Brady* context is a difficult test to meet.” *Jamison v. Collins*, 291 F. 3d 380, 388 (6th Cir. 2002).

The Michigan Court of Appeals rejected petitioner’s *Brady* claim:

Defendant states only that the requested materials might have contained evidence favorable to her. She gives no specific examples of information that was contained in these materials that might have assisted in her defense, nor did she request the trial court to conduct an in camera inspection. To be subject to discovery under *Brady*, evidence must be favorable to the defense and material. [*People v.*] *Chenault*, 495 Mich. [142] at 150, 845 N.W.2d 731 [2013]. “Evidence is favorable to the defense when it is either exculpatory or impeaching.” *Id.* Evidence is material if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The mere possibility that evidence might be helpful is not sufficient to establish materiality. *United States v. Agurs*, 427 U.S. 97, 109–110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Because defendant’s mere contention that the requested materials might have contained favorable evidence is insufficient to establish that the evidence she sought was material, defendant has not established a *Brady* violation.

People v. Dicken, 2016 WL 146031, at * 2.

Petitioner is not entitled to habeas relief because she failed to show that any of this material was exculpatory. A habeas petitioner bears the burden of showing the prosecution suppressed exculpatory evidence. *See Bell v. Howes*, 703 F.3d 848, 853 (6th Cir. 2012). Allegations that are merely conclusory or which are purely speculative cannot support a *Brady* claim. *Burns v. Lafler*, 328 F. Supp. 2d 711, 724 (E.D. Mich. 2004). “[M]ere speculation that a government file may contain *Brady* material is not sufficient” to prove a due-process violation. *United States v. Driscoll*, 970 F. 2d 1472, 1482 (6th Cir.1992), *abrogated on other grounds by Hampton v. United States*, 191 F.3d 695 (6th Cir.1999). Petitioner has failed to show that any of this evidence exculpated her of this crime. Petitioner is therefore not entitled to habeas relief on her *Brady* claim. *Burns*, 328 F. Supp. 2d at 724.

Petitioner is correct that “inadmissible material might nonetheless be considered ‘material under *Brady* if it would ‘lead directly’ to admissible evidence.” *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 465 (6th Cir. 2015). However, “A court’s determination that inadmissible evidence might lead to the discovery of evidence admissible at trial may not rest on ‘mere speculation.’” *United States v. Ekiyor*, 89 F. Supp. 3d 928, 932 (E.D. Mich. 2015)(citing *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995); *Wogenstahl v. Mitchell*, 668 F.3d 307, 325 n. 3 (6th Cir. 2012)). Petitioner only speculates that any of this

evidence would have lead to evidence that could have exculpated her of these crimes.

The only specific evidence that petitioner cites involves the alleged forging of signatures. Petitioner argues that Scott Bartlett was the person who forged signatures, not petitioner, based on interviews by Special Agent Peter Ackerly with Jessica Burch and Scott Bartlett.

Petitioner admits that defense counsel received a copy of the interview report after Ackerly's testimony, and the trial record reflects that. (Tr. Vol. 5, pp. 63-64)(ECF 6-6, PageID. 1538-39). Petitioner acknowledges that this statement made it clear that Scott Bartlett digitally placed forged signatures on various subscription agreements. Petitioner also acknowledges in her brief that Ackerly also made it clear that Mr. Bartlett was acting under the direction of Joel Wilson at the time. Petitioner further admits that Mr. Bartlett acknowledged later at trial that he in fact did apply the signatures to the Beverly Harry documents. The jury also received a curative instruction on the matter. (Tr. Vol. 8, pp. 139-40)(ECF 6-9, PageID. 2283-84).

Petitioner's *Brady* claim fails because the evidence concerning the signatures being forged by Mr. Bartlett was disclosed to petitioner during trial. *Brady* generally does not apply to the delayed disclosure of exculpatory information, but only to a complete failure by the prosecutor to disclose such

information. See *United States v. Davis*, 306 F. 3d 398, 421 (6th Cir. 2002)(internal citations omitted). If previously undisclosed evidence is disclosed during trial, no *Brady* violation occurs unless the defendant is prejudiced by its nondisclosure. *United States v. Word*, 806 F. 2d 658, 665 (6th Cir. 1986); See also *United States v. Bencs*, 28 F. 3d 555, 560-61 (6th Cir. 1994). The Sixth Circuit noted that “[T]he Supreme Court rejected the claim that the duty to disclose hinges on the usefulness of the material to pretrial preparation. Such a standard would ‘necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor’s entire case would always be useful in planning the defense.’” *Bencs*, 28 F. 3d at 560, n. 5 (quoting *Agurs*, 427 U.S. at 112, n. 20).

The mere fact that the defense theory may have been undermined by this new evidence would not entitle petitioner to relief. The Sixth Circuit has noted that “[t]here is no rule that evidence must be excluded or a mistrial granted on the basis that a defendant had committed himself to a theory which was undermined by new evidence.” *U.S. v. Atisha*, 804 F. 2d 920, 925 (6th Cir. 1986). “There is always a possibility that new evidence will be discovered, even if the defense was structured around assurances made by the government.” *Id.* In the present case, any claim that the late disclosure of these discovery materials may have precluded defense counsel from adequate trial preparation is non-cognizable pursuant to *Agurs*. See *Burns v. Lafler*, 328 F. Supp. 2d at 724 (citing *Bencs*, 28 F. 3d at 561).

Petitioner is not entitled to relief on her first claim since the forged signature issue was disclosed during trial and Petitioner so admitted.

B. Claim # 2. The expert witness claim.

Petitioner next claims that the trial court erred in permitting Joseph Spiegel, an attorney and expert in the area of securities law, to testify as an expert witness because the prosecution's pre-trial summary of his proposed testimony was insufficient to meet the requirements for the admission of expert testimony under M.C.R. 6.201(A)(3). Petitioner also claims that Spiegel offered improper expert testimony concerning legal conclusions which went beyond the proper scope of expert testimony. Spiegel testified that a broker cannot make a material misrepresentation of facts or omit to state a material fact necessary for the facts to be stated to be true either orally or in writing. He further testified that it is not a defense where a broker raises a defense based solely upon a subscription agreement, without taking into consideration the oral or other representations the broker made to the client.

The Supreme Court has held that "federal habeas corpus review does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)(quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *See also Williams v. White*, 183 F. Supp. 2d 969, 977 (E.D. Mich. 2002). The Sixth Circuit has held that "[i]n a federal habeas corpus proceeding, it is not the province of a federal appellate court to review the

decision of the state's highest court on purely state law." *Long v. Smith*, 663 F.2d 18, 23 (6th Cir. 1981). Therefore, "[e]rrors by a state court in the admission of evidence are not cognizable in habeas corpus proceedings unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial." *Kelly v. Withrow*, 25 F.3d 363, 370 (6th Cir. 1994).

The admission of expert testimony in a state trial presents a question of state law which does not warrant federal habeas relief, unless the evidence violates due process or some other federal constitutional right. *See Keller v. Larkins*, 251 F.3d 408, 419 (3rd Cir. 2001). A federal district court cannot grant habeas relief on the admission of an expert witness' testimony in the absence of Supreme Court precedent which shows that the admission of that expert witness' testimony on a particular subject violates the federal constitution. *See Wilson v. Parker*, 515 F.3d 682, 705-06 (6th Cir. 2008).

To the extent that petitioner alleges that the prosecution's pre-trial summary of Spiegel's proposed testimony was inadequate to meet the requirements for the admission of expert testimony under M.C.R. 6.201(A)(3), this Court has already noted in Claim # 1, *infra*, that a prosecutor's violation of state discovery rules is non-cognizable in federal habeas review, because it is not a constitutional violation. *See Lorraine v. Coyle*, 291 F.3d at 441. In any event, the Michigan

Court of Appeals concluded that the prosecutor's written summary of Spiegel's proposed testimony sufficiently set out the substance of Mr. Spiegel's testimony, his opinion, and the bases for that opinion and thereby complied with the requirements of M.C.R. 6.201(A)(3). *People v. Dicken*, 2016 WL 146031, at * 3. Specifically, the Court of Appeals noted that Petitioner vigorously cross-examined Spiegel and that there is no indication that Petitioner was unable to question Spiegel because Spiegel did not understand the bases of Spiegel's opinion. *Id.* This Court must defer to the state appellate court's opinion that the pre-trial summary complied with Michigan law.

Petitioner also says that it was improper for Mr. Spiegel to testify concerning the meaning and scope of various federal and state statutes and regulations, because this amounted to improper opinion testimony on a conclusion of law.

Although the Federal Rules of Evidence prevents an expert witness from testifying that a defendant in a criminal case did or did not have the requisite mental state or condition which constitutes an element of the crime charged, see F.R.E. 704(b), there is no Supreme Court authority which precludes the admission of expert testimony on an ultimate issue as a matter of federal constitutional law. *See Hopp v. Burt*, No. 2007 WL 162248, * 9 (E.D. Mich. Jan. 16, 2007). "A state court does not violate federal law merely because it does not follow federal rules of procedure." *Scruggs v. Williams*, 903 F. 2d 1430, 1434 (11th Cir. 1990). The U.S.

Supreme Court's "authority to promulgate rules of procedure is limited to proceedings in federal court." *Id.* (citing to 18 U.S.C. §§ 3771, 3772). Any violation by the state trial court of F.R.E. 704(b) would not entitle petitioner to relief.

The Supreme Court has yet to hold that the federal constitution prohibits an expert from testifying about an ultimate issue to be resolved by the trier of fact. *Moses v. Payne*, 555 F.3d 742, 761 (9th Cir. 2009). In the absence of any Supreme Court caselaw to the contrary, the Michigan Court of Appeals' rejection of petitioner's claim that the expert improperly testified concerning the ultimate legal issues in this case would not entitle petitioner to habeas relief. *Id.*

Even if it was erroneous for the expert witness to testify as to the definitions of various federal and state statutes and regulations concerning securities law, any error would have been harmless, in light of the fact that the trial court gave the jury the proper instructions on the legal definitions of the crimes charged in this case both before and after trial. (Tr. Vol. 1, pp. 172-182, Tr. Vol. 8, pp. 129-39)(ECF 6-2, Page ID. 704-14, ECF 6-9, Page ID. 2273-83). *See U.S. v. Parris*, 243 F. 3d 286, 289 (6th Cir. 2001)(any error in permitting lay witnesses to give opinion testimony relating to the ultimate legal issue was harmless in prosecution for aiding or assisting in the preparation or presentation of false or fraudulent income tax returns; any prejudicial effect of testimony was overcome by accurate, thorough,

and clear instructions given to jury regarding the law); *Ware v. Wolfenbarger*, No. CIV. 2:07-CV-10964, 2008 WL 686265, at * 3 (E.D. Mich. Mar. 11, 2008)(any error to allow expert witnesses to testify as to the definitions of mental illness and insanity harmless where trial court gave the proper instructions on the legal definitions of insanity and mental illness).

Petitioner in the alternative argues that trial counsel was ineffective for failing to object to Mr. Spiegel offering testimony concerning the definitions of the various laws and regulations.

A criminal defendant must satisfy a two-part test to show that he or she was denied the effective assistance of counsel. First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In so doing, the defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.* In other words, petitioner must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. *Strickland*, 466 U.S. at 689. Second, the defendant must show that such performance prejudiced his or her defense. *Id.* To demonstrate prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different.” *Strickland*, 466 U.S. at 694. The Supreme Court’s holding in *Strickland* places the burden on the defendant who raises a claim of ineffective assistance of counsel, and not the state, to show a reasonable probability that the result of the proceeding would have been different, but for counsel’s allegedly deficient performance. *See Wong v. Belmontes*, 558 U.S. 15, 27 (2009).

The Michigan Court of Appeals concluded that Spiegel did not offer improper opinion testimony because he did not testify that petitioner was guilty of a crime, only that defendant acted negligently by failing to use due diligence on the limited partnership investment and by selling the investment to clients who could not afford the risk. *People v. Dicken*, 2016 WL 146031, at * 4.

The trial court and the Michigan Court of Appeals concluded that Spiegel’s testimony was admissible. Because petitioner has failed to show a reasonable probability that Mr. Spiegel’s expert testimony concerning the meaning and definitions of various statutes and laws would have been excluded had an objection been made, petitioner is not entitled to habeas relief on her ineffective assistance of counsel claim. *See Pillette v. Berghuis*, 630 F. Supp. 2d 791, 802 (E.D. Mich. 2009); *aff’d in part and rev’d in part on other grds*, 408 F. App’x. 873 (6th Cir. 2010); *cert. den.* 132 S. Ct. 125 (2011). Because the Michigan Court of Appeals considered and rejected petitioner’s expert testimony claim, albeit it

under a plain error standard, petitioner is unable to show that she was prejudiced by counsel's failure to object to the admission of Spiegel's testimony. *See Campbell v. United States*, 266 F. Supp. 2d 587, 589 (E.D. Mich. 2003).

Petitioner is not entitled to relief on her second claim.

C. Claim # 3. The right to present a defense claim.

Petitioner next contends that the trial judge violated her right to present a defense when he refused to allow defense counsel to play petitioner's entire seventy five minute tape recorded interview with state investigators with the Financial Industry Regulatory Authority [FINRA]. Petitioner claims that this tape recording would show that she cooperated with state investigators, so as to negate any criminal intent on her part. Petitioner also claims that the statements that she made during the interview showed that she did not have the intent to defraud her victims.

The Michigan Court of Appeals rejected petitioner's claim:

Relevant evidence is generally admissible. MRE 402. However, relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. Defendant sought to admit the 75-minute recording of her interview with state investigators during an investigator's testimony in order to show that she cooperated with investigators. She also asserted that the evidence could support a conclusion that she lacked the intent to commit a crime at the time the alleged offenses occurred. The trial court expressed concern about confusion of the issues, and on that basis, denied defendant's request to play the entire recording. Although the

trial court added that defendant could play portions of the recording for impeachment purposes, defendant made no attempt to do so.

We conclude that the trial court did not abuse its discretion by denying defendant's request to admit the entire recording. The trial court's MRE 403 concerns were legitimate. Defendant's sole stated purpose for seeking to admit the recording was to show that she cooperated with investigators. However, the investigator testified that defendant cooperated and provided written information upon request. Therefore, the trial court had a principled basis for its conclusion that the interview was not necessary to show that defendant cooperated, and that considerations of undue delay, waste of time, or needless presentation of cumulative evidence justified exclusion of the entire 75-minute recorded interview. The trial court permitted defendant to play portions of the recording for impeachment purposes, but she chose not to do so. Accordingly, the trial court did not abuse its discretion by denying defendant's request to play the entire recording.

People v. Dicken, 2016 WL 146031, at * 4.

Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he or she also has the right to present his or her own witnesses to establish a defense. This right is a fundamental element of the due process of law. *Washington v. Texas*, 388 U.S. 14, 19 (1967); *See also Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'") (internal citations omitted). However, an accused in a criminal case does not have an unfettered right to offer evidence that is incompetent, privileged,

or otherwise inadmissible under the standard rules of evidence. *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). The Supreme Court, in fact, has indicated its “traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts.” *Crane*, 476 U.S. at 689. The Supreme Court gives trial court judges “wide latitude” to exclude evidence that is repetitive, marginally relevant, or that poses a risk of harassment, prejudice, or confusion of the issues. *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

Under the standard of review for habeas cases as enunciated in § 2254(d)(1), it is not enough for a habeas petitioner to show that the state trial court’s decision to exclude potentially helpful evidence to the defense was erroneous or incorrect. Instead, a habeas petitioner must show that the state trial court’s decision to exclude the evidence was “an objectively unreasonable application of clearly established Supreme Court precedent.” *See Rockwell v. Yukins*, 341 F. 3d 507, 511-12 (6th Cir. 2003).

The Michigan Court of Appeals upheld the trial judge’s decision to deny petitioner’s request to play the entire taped interview because the judge believed that the tape would be more prejudicial than probative and could potentially confuse the issues. Although the federal constitution “prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established

rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.” *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006)(citing Fed. Rule Evid. 403; Uniform Rule of Evid. 45 (1953); ALI, Model Code of Evidence Rule 303 (1942); 3 J. Wigmore, Evidence §§ 1863, 1904 (1904)).

It was not unreasonable for the state trial court to exclude, as more prejudicial than probative, the playing of the entire 75-minute tape recording. The purpose of playing the entire tape recording was to show that petitioner was cooperative. Petitioner was not prevented from presenting evidence that she cooperated with the authorities and that she lacked the intent to defraud her victims. The investigator admitted at trial that petitioner had been cooperative during the interview and had provided a written statement. Petitioner testified on her own behalf at trial and denied intending to defraud the victims. The contents of petitioner’s tape recorded interview would have been cumulative to other evidence presented at trial that petitioner did not intend to defraud the victims and that she had cooperated with authorities; the exclusion of this evidence did not violate petitioner’s her right to present a defense. *See Washington v. Renico*, 455 F.3d 722, 728-29 (6th Cir. 2006).

Finally, the trial judge did not prevent the defense from playing portions of the taped interview for impeachment purposes, but defense counsel chose not to do so. Petitioner cannot convert a tactical decision not to introduce evidence into a constitutional violation of the right to present evidence generally. *See Rodriguez v. Zavaras*, 42 F. Supp. 2d 1059, 1150 (D. Colo. 1999); *See also State v. Flood*, 219 S.W. 3d 307, 318 (Tenn. 2007) (“Generally, the right to present a defense is not denied when a defendant does not pursue a line of questioning during cross-examination”).

To the extent that petitioner claims that counsel was ineffective for failing to introduce petitioner’s testimony from FINRA, she would not be entitled to relief. Petitioner’s testimony at FINRA was identical to her trial testimony, in which she denied any intent to defraud her victims. Petitioner was not prejudiced by counsel’s failure to introduce petitioner’s testimony from FINRA because it was cumulative of other evidence in support of petitioner’s claim that she did not intend to defraud the victims. *Wong v. Belmontes*, 558 U.S. at 22-23; *See also United States v. Pierce*, 62 F. 3d 818, 833 (6th Cir. 1995); *Johnson v. Hofbauer*, 159 F. Supp. 2d 582, 607 (E.D. Mich. 2001). Because the jury was “well acquainted” with evidence that would have supported petitioner’s claim that she did not intend to defraud the victims and that she had cooperated with the investigation, additional evidence in support of petitioner’s defense “would have offered an

insignificant benefit, if any at all.” *Wong*, 558 U.S. at 23. Accordingly, petitioner is not entitled to habeas relief on her third claim.

D. Claim # 4. The prosecutorial misconduct claim.

Petitioner finally alleges that the prosecutor committed misconduct in opening argument by misleading the jury into thinking that a durable power of attorney held by a relative of one of petitioner’s elderly victims was equivalent to a guardianship and implying that it was improper for petitioner to deal directly with the elderly victim.

Petitioner claims that the following remarks by the prosecutor were improper:

You’ll hear in this case an incident involving Beverly Harry. [the victim]. Ms. Harry was going to invest with Diversified and only agreed to do that. And then she gets into a car accident where she, after being hospitalized for 2 months, she’s in a nursing home.

That doesn’t deter Ms. Dicken.

Ms. Dicken knows that Ms. Harry has a Power of Attorney for her financial affairs. Ms. Dicken meets with Ms. Harry and the Power of Attorney to discuss this investment.

They’re not satisfied. Not sure. So they tell Ms. Dicken that they are going to be out of state back in December of 2011. They set up a meeting afterwards to make a final decision.

While the Power of Attorney is out of state, Ms. Dicken goes to the nursing home where Ms. Harry is and consummates the deal for \$54,000.

(Tr. Vol. 1, pp. 192-93)(ECF 6-2, PageID. 724-25).

The Michigan Court of Appeals rejected petitioner's claim:

The prosecutor did not misrepresent the relative's legal status or authority in these remarks. Rather, the prosecutor accurately represented that the relative had a power of attorney that gave him authority over the victim's financial affairs. The prosecutor's remarks did not indicate that the victim lacked the ability to act on her own behalf. Accordingly, there was no plain error.

Furthermore, defendant has not demonstrated a plain error associated with the relative's testimony. The scope of the relative's authority, as well as the victim's ability to act on her own behalf, was fully explored during the relative's testimony. The witness testified that he held a power of attorney for the victim, but he never asserted that he was the victim's guardian or that the victim lacked the authority or ability to make her own financial decisions. A fair reading of the witness's testimony as a whole reveals that the witness felt a responsibility toward his elderly cousin to look out for her best interests, but he never testified that she had been adjudged legally incapacitated or that he was required to make financial decisions for her. The prosecutor did not state or imply that the power of attorney prevented the victim from making her own financial decisions. Accordingly, we find no error, plain or otherwise, associated with either the witness's testimony or the prosecutor's arguments relating to that testimony. Further, an attorney who testified for defendant stated that he reviewed the power of attorney, and he determined that it did not stop the elderly victim from making her own financial decisions. The testimony of the defense witness further protected defendant's substantial rights in connection with this issue. Therefore, we reject this claim of error.

People v. Dicken, 2016 WL 146031, at * 5.

"Claims of prosecutorial misconduct are reviewed deferentially on habeas review." *Millender v. Adams*, 376 F.3d 520, 528 (6th Cir. 2004)(citing *Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir. 2003)). A prosecutor's improper comments

will be held to violate a criminal defendant's constitutional rights only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Prosecutorial misconduct will form the basis for habeas relief only if the conduct was so egregious as to render the entire trial fundamentally unfair based on the totality of the circumstances. *Donnelly v. DeChristoforo*, 416 U.S. at 643-45. To obtain habeas relief on a prosecutorial misconduct claim, a habeas petitioner must show that the state court's rejection of his or her prosecutorial misconduct claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Parker v. Matthews*, 567 U.S. 37, 48 (2012)(quoting *Harrington*, 562 U.S. at 103).

Misrepresenting facts in evidence by a prosecutor can amount to substantial error because doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations." *Washington v. Hofbauer*, 228 F. 3d 689, 700 (6th Cir. 2000)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974)). Likewise, it is improper for a prosecutor during opening or closing arguments to bring to the jury any purported facts which have not been, or will not be, introduced into evidence and which are prejudicial. *Byrd v. Collins*, 209 F. 3d 486,

535 (6th Cir. 2000). However, prosecutors must be given leeway to argue reasonable inferences from the evidence. *Id.*

In the present case, the prosecutor's remarks were not improper because they were based on reasonable inferences from the evidence presented at trial. The prosecutor did not suggest in his opening arguments that the victim was incapable of making her own decisions. Rather, the prosecutor accurately noted the relative's legal status or authority--that the relative had a power of attorney over the victim's financial affairs and that while the relative was out of town, petitioner went to the nursing home to finalize the deal.

Finally, any prosecutorial misconduct in attempting to inject facts that had not been introduced into evidence was also ameliorated by the trial court's instruction that the lawyers' comments and statements were not evidence. (Tr. Vol. 1, p. 183, Tr. Vol. 8, p. 141)(ECF 6-2, Page ID. 715, ECF 6-9, Page ID. 2285). *See Hamblin v. Mitchell*, 354 F. 3d 482, 495 (6th Cir. 2003).

In the alternative, petitioner argues that trial counsel was ineffective for failing to properly object to the alleged misconduct. It appears that trial counsel did move for a judgment of acquittal in the trial court based in part on the alleged misconduct, so counsel may have attempted to preserve this claim. In any event, assuming that counsel did not properly preserve petitioner's prosecutorial misconduct claim, she would nonetheless not be entitled to relief on any related

ineffective assistance of counsel claim. To show prejudice under *Strickland* for failing to object to prosecutorial misconduct, a habeas petitioner must show that but for the alleged error of his or her trial counsel in failing to object to the prosecutor's improper questions and arguments, there is a reasonable probability that the proceeding would have been different. *Hinkle v. Randle*, 271 F. 3d 239, 245 (6th Cir. 2001). The prosecutor's remarks did not deprive petitioner of a fundamentally fair trial; she cannot show that she was prejudiced by counsel's failure to object. *Slagle v. Bagley*, 457 F. 3d 501, 528 (6th Cir. 2006). Petitioner is not entitled to relief on her fourth claim.

IV. Conclusion

For the reasons discussed, state court adjudication of the petitioner's claims did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Nor did the state court adjudication result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This Court concludes that the petitioner is not entitled to federal habeas relief on the claims contained in his petition.

In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists

could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). When a district court rejects a habeas petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims to be debatable or wrong. *Id.* at 484. "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254.

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

V. ORDER

Based upon the foregoing, IT IS ORDERED that:

(1) the petition for a writ of habeas corpus is **DENIED WITH PREJUDICE**.

(2) A certificate of appealability is **DENIED**.

s/Denise Page Hood
DENISE PAGE HOOD
United States District Judge

Dated: December 9, 2019

APPENDIX B

Order

July 3, 2018

157283

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SHAWN KRISTI DICKEN,
Defendant-Appellant.

Michigan Supreme Court
Lansing, Michigan

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

SC: 157283
COA: 322998
Midland CC: 13-005531-FH

On order of the Court, the application for leave to appeal the January 30, 2018 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Wilder, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.



a0625

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.

July 3, 2018

Clerk

The trial court did not violate the principles of proportionality and reasonableness in imposing this sentence. It explained why the guidelines failed to account for significant factors relevant to sentencing in this case. It further undertook to define the degree to which it concluded departure was necessary given those factors and did so in detail and with reference to the evidence. Its analysis and conclusion were consistent with the principle of proportionality.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Amy Ronayne Krause

Order

Michigan Supreme Court
Lansing, Michigan

October 31, 2017

Stephen J. Markman,
Chief Justice

153242

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 153242
COA: 322998
Midland CC: 13-005531-FH

SHAWN KRISTI DICKEN,
Defendant-Appellant.

By order of September 29, 2016, the application for leave to appeal the January 12, 2016 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE that part of the judgment of the Court of Appeals remanding this case to the trial court for proportionality review and for a hearing pursuant to *People v Lockridge*, 498 Mich 358 (2015), and we REMAND this case to the Court of Appeals for plenary review of the defendant's claim that her sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

WILDER, J., did not participate because he was on the Court of Appeals panel.



a1023

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 31, 2017

Clerk

Order

September 29, 2016

153242

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SHAWN KRISTI DICKEN,
Defendant-Appellant.

SC: 153242
COA: 322998
Midland CC: 13-005531-FH

Michigan Supreme Court
Lansing, Michigan

Robert P. Young, Jr.,
Chief Justice

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

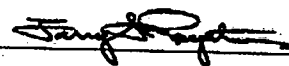
On order of the Court, the application for leave to appeal the January 12, 2016 judgment of the Court of Appeals is considered, and it appearing to this Court that the cases of *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8) are pending on appeal before this Court and that the decisions in those cases may resolve an issue raised in the present application for leave to appeal, we ORDER that the application be held in ABEYANCE pending the decisions in those cases.



a0922

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.

September 29, 2016


Clerk

APPENDIX C

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN KRISTI DICKEN,

Defendant-Appellant.

UNPUBLISHED

January 30 2018

No. 322998

Midland Circuit Court

LC No. 13-005531-FH

ON REMAND

Before: SHAPIRO, P.J., and O'CONNELL and Ronayne KRAUSE, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court, which has directed us to review the sentence imposed for proportionality. We have done so, guided by the principles set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990) and *People v Steanhouse (On Remand)*, ___ Mich App ___; ___ NW2d ___ (2017).

The sentencing guidelines recommended a minimum sentence of between 51 months and 85 months for the conviction of operating a criminal enterprise, MCL 750.159i(1). Defendant was, however, sentenced to a minimum term of 140 months for that offense. The trial court cited several reasons for its departure from the guidelines. First, the defendant's prior record score did not take into account that the defendant had previously engaged in similar activities when employed by Chemical Bank and although not prosecuted, she was terminated as a result. Second, the trial court noted several factors not taken into account, or not adequately taken into account, by the offense variables. The court observed that defendant's victims were clients who had placed their trust in her; defendant purposefully lied to them and stole from them despite having a direct and on-going relationship with them. In addition, defendant had abused the privileges provided by her professional license. The court also noted that the amount of money stolen was far beyond the amount used by the guidelines to score OV 14, which scores 10 points for property with value greater than \$20,000; the court, after a hearing, concluded that the total amount stolen by the defendant was nearly a half-million dollars. Finally, the court noted that several of the victims were elderly and had lost their life savings as a result of defendant's fraud, another factor not considered by the guidelines.

Court of Appeals, State of Michigan

ORDER

People of MI v Shawn Kristi Dicken

Docket No. 322998

LC No. 13-005531 FH

Douglas B. Shapiro
Presiding Judge

Peter D. O'Connell

Amy Ronayne Krause
Judges

The Court orders that the motion to file a supplemental brief is DENIED.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JAN 29 2018

Date

Chief Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v Shawn Kristi Dicken

Docket No. 322998

LC No. 13-005531 FH

Douglas B. Shapiro
Presiding Judge

Peter D. O'Connell

Amy Ronayne Krause
Judges

The Court orders that the motion to waive fees is GRANTED and fees are WAIVED for this case only.

The Motion Requesting This Court Address Issue V from Appellant's Prior Appellant Brief on Appeal is GRANTED. Having considered the issue, the court concludes that defendant is not entitled to relief because MCL 750.159i does not require a conspiracy and the proofs were sufficient to establish that defendant was "employed by, or associated with, an enterprise", namely Diversified Group.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JAN - 3 2018

Date

Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN KRISTI DICKEN,

Defendant-Appellant.

UNPUBLISHED

January 12, 2016

No. 322998

Midland Circuit Court

LC No. 13-005531-FH

Before: SHAPIRO, P.J., and O'CONNELL and WILDER, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*).

I concur with the majority opinion to affirm the defendant's convictions. For the reasons stated in my dissent in *People v Shank*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket No. 321534), I conclude it is unnecessary to remand this case to the trial court for further proceedings regarding the reasonableness of defendant's departure sentence. I would affirm the learned trial court's sentences in this matter.

/s/ Peter D. O'Connell

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN KRISTI DICKEN,

Defendant-Appellant.

UNPUBLISHED

January 12, 2016

No. 322998

Midland Circuit Court

LC No. 13-005531-FH

Before: SHAPIRO, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

A jury convicted defendant of one count of conducting a criminal enterprise, MCL 750.159i(1), seven counts of obtaining money by false pretenses in an amount of \$1,000 or more but less than \$20,000, MCL 750.218(4)(a), and one count of embezzlement of a vulnerable adult in an amount of \$50,000 or more but less than \$100,000, MCL 750.174a(6)(a). The trial court sentenced defendant to concurrent prison terms of 140 months to 20 years for the criminal enterprise conviction, 23 months to 5 years for each false pretenses conviction, and 71 months to 15 years for the embezzlement conviction. Defendant appeals as of right. We affirm defendant's convictions and her sentences for false pretenses and embezzlement, but remand for further proceedings regarding the reasonableness of defendant's departure sentence for the conducting a criminal enterprise conviction.

This case resulted from allegations that defendant, a registered representative or broker who worked for the Diversified Group, placed the funds of many clients into a risky limited partnership investment in which they lost substantial portions of their principal. The prosecutor asserted that defendant did so in order to obtain commissions and that, to convince her clients to enter into these risky investments, she misled them as to the risk to their principal and the liquidity of the investment. In addition, several of defendant's clients testified that their signatures on various documents had been forged.

On appeal, defendant first argues that she is entitled to a new trial because, contrary to MCR 6.201(B) and in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the prosecution failed to produce various documents and materials in its possession. Defendant contends that she was entitled to discovery of materials the prosecutor gathered pertaining to other Diversified Group employees, material obtained pursuant to a search warrant

executed at a credit union for Triton Commercial Lending,¹ and evidence pertaining to the operation of Diversified Group by a receiver.² We disagree.

“[D]iscovery in criminal cases is constrained by the limitations expressly set forth in the reciprocal criminal discovery rule promulgated by our Supreme Court, MCR 6.201.” *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 447; 722 NW2d 254 (2006). Material subject to discovery must be specified in the court rule, or the party seeking discovery must establish good cause for the trial court to order discovery. See *People v Phillips*, 468 Mich 583, 584, 593; 663 NW2d 463 (2003). MCR 6.201(B) provides:

(B) Discovery of Information Known to the Prosecuting Attorney.

Upon request, the prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;

(3) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

Defendant requested “a copy of the complete investigative file, including the reports involving the other employees and contractors at the Diversified Group.” Defendant acknowledges that some of the material to which she sought access pertained to a different investigation, i.e., that of Triton Commercial Lending. MCR 6.201(B)(2) clearly limits discovery of reports to reports concerning “the case[.]” Defendant cites no authority for her position that the requirement that the prosecution provide discovery extends to material from

¹ Defendant owned Triton Commercial Lending.

² Defendant moved in the trial court to compel discovery pursuant to MCR 6.201(B), thereby preserving the discovery issue. We review a trial court’s decision regarding discovery for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). However, defendant did not allege a *Brady* violation below. Accordingly, defendant’s claim premised on *Brady* is unpreserved, and our review of that issue is limited to plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

another case. Accordingly, the trial court did not abuse its discretion by denying defendant's request for further discovery under MCR 6.201(B)(2).

Defendant also argues that the prosecution's failure to produce the requested materials violates *Brady*, in which the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 US at 87. In *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014), our Supreme Court stated that the components of a *Brady* violation are that: "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." A defendant has the burden of proving the elements of a *Brady* violation. See *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007).

Defendant states only that the requested materials might have contained evidence favorable to her. She gives no specific examples of information that was contained in these materials that might have assisted in her defense, nor did she request the trial court to conduct an in camera inspection. To be subject to discovery under *Brady*, evidence must be favorable to the defense and material. *Chenault*, 495 Mich at 150. "Evidence is favorable to the defense when it is either exculpatory or impeaching." *Id.* Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoting *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985). The mere possibility that evidence might be helpful is not sufficient to establish materiality. *United States v Agurs*, 427 US 97, 109-110; 96 S Ct 2392; 49 L Ed 2d 342 (1976). Because defendant's mere contention that the requested materials might have contained favorable evidence is insufficient to establish that the evidence she sought was material, defendant has not established a *Brady* violation.

Next, defendant argues that the prosecution's expert, Joseph Spiegel, an attorney and expert in the area of securities law, should not have been allowed to testify because the prosecution's pretrial summary of his proposed testimony was insufficient to meet the requirements of MCR 6.201(A)(3).³ We disagree.

MCR 6.201(A)(3) states that upon request, a party must provide to other parties:

[T]he curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion[.]

³ Defendant preserved this issue by challenging the adequacy of the prosecution's pretrial summary of Spiegel's proposed testimony in a motion before trial, which the trial court denied. We review the trial court's decision on the motion for an abuse of discretion. *Davie (After Remand)*, 225 Mich App at 597-598.

Before trial, the prosecution provided the defense with a written summary of Spiegel's proposed testimony. The written summary stated:

The substance of this testimony will be to educate the jury regarding securities, primarily what a security is and how they are regulated. He will testify as to the various licenses issued to investment advisors, the duties owed by advisors to their clients and the rationales for those duties.

Mr. Spiegel will opine that your client breached a number of duties owed to her clients including making material misrepresentations of facts, omitting to disclose material facts, the suitability of the investments sold to clients, and her duty to employ due diligence in knowing the investments she was marketing.

The underlying bases for these opinions are Mr. Spiegel's knowledge of securities and a recitation to him of the accounts of [defendant's] victims, such as her not disclosing the risk of the investment, its lack of liquidity, her telling clients that there was no risk in the investment, her failure to conduct any investigation to the suitability of senior citizens investing substantial amounts of money in such a speculative and long term venture, and her failure to independently investigate the investment.

Defendant argues that the written summary did not "comply with the spirit of the rule," and she contends that a written summary "requires a level of precision which puts a person trained in the same industry as the expert to know the areas encompassed."⁴ We conclude that the trial court did not abuse its discretion in finding that the prosecution's summary of Spiegel's testimony was sufficient to satisfy MCR 6.201(A)(3). The written summary sets out the substance of Spiegel's testimony, his opinion, and the bases for that opinion. The trial court's statement of the matters to which Spiegel could testify indicates that Spiegel's testimony would relate to the specific facts of the alleged offenses and would rely on general securities law to opine that defendant breached various duties. Moreover, the record discloses that defendant vigorously cross-examined Spiegel, and there is no indication that defendant was unable to question Spiegel due to a lack of understanding of the bases of Spiegel's opinion. Defendant has made no showing that the lack of further information regarding Spiegel's testimony prevented her from countering Spiegel's testimony. Defendant has not demonstrated that the trial court

⁴ Defendant relies on patent cases that discuss 35 USC 112, a statute that requires a patent to "contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor or joint inventor of carrying out the invention." This reliance is misplaced. 35 USC 112 applies only to a specialized area of law, whereas MCR 6.201 applies to discovery in general.

abused its discretion in ruling that the written summary of Spiegel's proposed testimony complied with MCR 6.201(A)(3).

Defendant also argues that Spiegel offered improper testimony setting forth legal conclusions.⁵ Defendant, however, has not demonstrated a plain error associated with Spiegel's testimony. Spiegel did not testify that defendant was guilty of a crime. Instead, he testified that defendant acted negligently by failing to use due diligence on the limited partnership investment and by selling the investment to clients who could not afford the risk. Negligence is not sufficient to establish guilt of the charged crimes. The questions of intent and criminal responsibility were left solely to the jury. Accordingly, defendant has not satisfied her burden of demonstrating a plain error.

Next, defendant argues that the trial court abused its discretion by refusing to admit the entirety of defendant's 75-minute recorded interview with state investigators. Defendant asserts that the trial court's exclusion of this evidence prevented her from presenting a defense, and thus denied her due process.⁶ We disagree.

Relevant evidence is generally admissible. MRE 402. However, relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. Defendant sought to admit the 75-minute recording of her interview with state investigators during an investigator's testimony in order to show that she cooperated with investigators. She also asserted that the evidence could support a conclusion that she lacked the intent to commit a crime at the time the alleged offenses occurred. The trial court expressed concern about confusion of the issues, and on that basis, denied defendant's request to play the entire recording. Although the trial court added that defendant could play portions of the recording for impeachment purposes, defendant made no attempt to do so.

We conclude that the trial court did not abuse its discretion by denying defendant's request to admit the entire recording. The trial court's MRE 403 concerns were legitimate. Defendant's sole stated purpose for seeking to admit the recording was to show that she cooperated with investigators. However, the investigator testified that defendant cooperated and provided written information upon request. Therefore, the trial court had a principled basis for its conclusion that the interview was not necessary to show that defendant cooperated, and that considerations of undue delay, waste of time, or needless presentation of cumulative evidence

⁵ Defendant did not object below on the ground that Spiegel's proposed testimony sought to present inadmissible legal opinions, and she did not object at trial to Spiegel stating legal conclusions. Therefore, defendant's complaint regarding the scope of Spiegel's actual testimony is unpreserved and review is limited to plain error affecting substantial rights. *Carines*, 460 Mich 763-764.

⁶ "We review for abuse of discretion a trial court's decision to admit or exclude evidence." *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001).

justified exclusion of the entire 75-minute recorded interview. The trial court permitted defendant to play portions of the recording for impeachment purposes, but she chose not to do so. Accordingly, the trial court did not abuse its discretion by denying defendant's request to play the entire recording.

Moreover, the trial court's exclusion of this evidence did not violate her constitutional right to present a defense. Although a criminal defendant has a state and federal constitutional right to present a defense, Const 1963, art 1, § 13; US Const Ams VI, XIV; *People v Kurr*, 253 Mich App 317, 326; 654 NW2d 651 (2002), that right is not absolute. *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008). "It is well settled that the right to assert a defense may permissibly be limited by 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Defendant's purpose for seeking to admit the recording was to show that she cooperated with investigators. The trial court did not prevent defendant from presenting or eliciting evidence of her cooperation. The investigator who interviewed defendant admitted that defendant was cooperative. Defendant also testified that she cooperated with investigators. To the extent that the prosecution sought to present evidence suggesting otherwise, the trial court permitted defendant to introduce portions of the recorded interview for impeachment. Accordingly, defendant was not denied the opportunity to present a defense.

Next, defendant argues that the prosecutor committed misconduct by misleading the jury into believing that a durable power of attorney held by a relative of one of defendant's elderly victims was akin to a guardianship and by suggesting that it was improper for defendant to deal directly with the elderly victim.⁷ We disagree.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A durable power of attorney is defined as "a power of attorney by which a principal designates another as the principal's attorney in fact in a writing" that contains specific wording. MCL 700.5501(1). A guardian is appointed after a person has been found to be legally incapacitated. A guardian must be appointed in a court proceeding. MCL 700.5303.

The only remarks by the prosecutor that defendant directly challenges as improper are the following comments made during opening statement:

⁷ Because defendant did not object to the prosecutor's statements regarding the power of attorney, or to the relative's testimony on that subject, this issue is unpreserved. This Court generally reviews a claim of prosecutorial misconduct de novo, *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), but because this issue is unpreserved, review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

[Defendant] knows that [the victim] has a Power of Attorney for her financial affairs. [Defendant] meets with [the victim] and the Power of Attorney to discuss this investment.

They're not satisfied. Not sure. So they tell [defendant] that they are going to be out of state back in December of 2011. They set up a meeting afterwards to make a final decision.

While the Power of Attorney is out of state, [defendant] goes to the nursing home where [the victim] is and consummates the deal for \$54,000.

The prosecutor did not misrepresent the relative's legal status or authority in these remarks. Rather, the prosecutor accurately represented that the relative had a power of attorney that gave him authority over the victim's financial affairs. The prosecutor's remarks did not indicate that the victim lacked the ability to act on her own behalf. Accordingly, there was no plain error.

Furthermore, defendant has not demonstrated a plain error associated with the relative's testimony. The scope of the relative's authority, as well as the victim's ability to act on her own behalf, was fully explored during the relative's testimony. The witness testified that he held a power of attorney for the victim, but he never asserted that he was the victim's guardian or that the victim lacked the authority or ability to make her own financial decisions. A fair reading of the witness's testimony as a whole reveals that the witness felt a responsibility toward his elderly cousin to look out for her best interests, but he never testified that she had been adjudged legally incapacitated or that he was required to make financial decisions for her. The prosecutor did not state or imply that the power of attorney prevented the victim from making her own financial decisions. Accordingly, we find no error, plain or otherwise, associated with either the witness's testimony or the prosecutor's arguments relating to that testimony. Further, an attorney who testified for defendant stated that he reviewed the power of attorney, and he determined that it did not stop the elderly victim from making her own financial decisions. The testimony of the defense witness further protected defendant's substantial rights in connection with this issue. Therefore, we reject this claim of error.

Finally, defendant argues that the trial court abused its discretion by departing from the sentencing guidelines range of 51 to 85 months for her conviction of conducting a criminal enterprise, and imposing a sentence of 140 months to 20 years for that conviction.⁸ Defendant argues that the trial court erred in finding that substantial and compelling reasons supported a departure from the guidelines range.

At the time defendant was sentenced, MCL 769.34(3) authorized a trial court to depart from the appropriate range established under the sentencing guidelines "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." Recently, however, in *People v Lockridge*, 498 Mich 358, 373-374; 870 NW2d 502

⁸ Defendant does not challenge her other sentences.

(2015),⁹ our Supreme Court addressed the constitutionality of Michigan's sentencing guidelines and held that the guidelines violate the Sixth Amendment "to the extent that OV's scored on the basis of facts not admitted by the defendant or necessarily found by the jury verdict increase the floor of the guidelines range, i.e. the defendant's 'mandatory minimum' sentence[.]" The Court struck down the mandate in MCL 769.34(2) that a trial court impose a sentence within the guidelines range, and also struck down the requirement in MCL 769.34(3) that a trial court articulate substantial and compelling reasons for a sentence that departs from the guidelines range. *Id.* at 364-365. The Court held that "[a] sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *Id.* at 392.

The *Lockridge* Court did not specify the appropriate procedure for determining whether a departure sentence is reasonable. However, this Court recently addressed and decided this issue in *People v Steanhouse*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket No. 318329); slip op at 23-24, and held that the reasonableness of a sentence is to be determined by utilizing the "principle of proportionality" test set out in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), which requires a court to impose a sentence that is proportionate to the seriousness of the offense and the offender. Factors utilized in determining proportionality include: "(1) the seriousness of the offense; (2) factors not considered by the guidelines . . . ; and (3) factors that were inadequately considered by the guidelines in a particular case[.]" *Steanhouse*, ___ Mich App at ___; slip op at 24 (internal citations omitted).

This Court in *Steanhouse* also addressed the question of remedy in pre-*Lockridge* cases where, as here, the trial court imposed a departure sentence and "was unaware of and not expressly bound by a reasonableness standard rooted in the *Milbourn* principle of proportionality at the time of sentencing." *Steanhouse*, ___ Mich App at ___; slip op at 25. This Court held "that the procedure articulated in *Lockridge*, and modeled on that adopted in *United States v Crosby*, 397 F3d 103 (CA 2, 2005), should apply" in such cases. *Steanhouse*, ___ Mich App at ___; slip op at 25, citing *Lockridge*, 498 Mich at 394-399.¹⁰ See also *People v Shank*, ___ Mich

⁹ Defendant's brief contains a request to hold this appeal in abeyance pending the Supreme Court's decision in *Lockridge*. Because the Supreme Court has decided *Lockridge*, this request is now moot.

¹⁰ In *Lockridge*, the Supreme Court explained

[O]n a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law, if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the "circumstances existing at the time of the original sentence." [*Lockridge*, 498 Mich 398 (citation omitted).]

App ____; ____ NW2d ____ (2015) (Docket No. 321534); slip op at 3 (following *Steanhouse*). Therefore, in accordance with *Steanhouse*, we remand this case to the trial court for further proceedings regarding the reasonableness of defendant's departure sentence for conducting a criminal enterprise, consistent with the procedure prescribed in *Crosby* and adopted in *Lockridge*.

Defendant's convictions and her sentences for false pretenses and embezzlement are affirmed, but we remand for further proceedings regarding the reasonableness of defendant's departure sentence for conducting a criminal enterprise consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Kurtis T. Wilder