

No. 19-2189

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIAN DWIGHT PETERSON,

Petitioner-Appellant,

v.

RANDEE REWERTS,

Defendant-Appellee.

FILED
Jun 03, 2020
DEBORAH S. HUNT, Clerk

O R D E R

Before: READLER, Circuit Judge.

Brian Dwight Peterson, a Michigan prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Peterson has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

On October 21, 2012, Luke Vincent died after being struck multiple times in the head with a dumbbell. Peterson was ultimately charged with open murder in violation of Michigan Compiled Laws § 750.316.¹ In 2013, a Michigan jury convicted Peterson of second-degree murder, in violation of Michigan Compiled Laws § 750.317, and the trial court sentenced him as a second-offense habitual offender to 20-50 years' imprisonment. The Michigan Court of Appeals affirmed. *People v. Peterson*, No. 320079, 2015 WL 3448701, at *10 (Mich. Ct. App. May 28, 2015) (per curiam), *perm. app. denied*, 872 N.W.2d 468 (Mich. 2015).

¹ Under Michigan law, the charge of open murder gives a trial court jurisdiction to try a defendant on first- and second-degree murder charges. *See Taylor v. Withrow*, 288 F.3d 846, 849 (6th Cir. 2002); *see also Williams v. Jones*, 231 F. Supp. 2d 586, 589 (E.D. Mich. 2002) (citing Mich. Comp. Laws §§ 750.316, 750.318; then citing *People v. McKinney*, 237 N.W.2d 215, 218 (1975)).

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In August 2016, Peterson filed a § 2254 petition, which he later amended, arguing that: (1) the admission of Detective Sheila Goodell's irrelevant and highly prejudicial testimony violated his right to a fair trial; (2) the admission of gruesome autopsy and crime-scene photographs violated his right to a fair trial; and (3) trial counsel was ineffective for failing to: (a) challenge Detective Goodell's improper testimony, (b) object to the admission of the gruesome photographs, (c) move for a directed verdict on the charge of first-degree murder, (d) obtain a recording of Detective Goodell's interview of him, (e) cross-examine his girlfriend "about when she last paid counsel and about Goodell's threat that she could be charged with perjury and face life in prison," and (f) allow him to listen "to the 911 call" prior to trial. Over Peterson's objections, the district court adopted the magistrate judge's recommendation to deny the habeas petition on the merits and decline to issue a COA. This appeal followed.

Peterson now seeks a COA from this court with respect to each of his habeas claims. To the extent that Peterson advances new claims or arguments in his COA application that he did not raise in the district court—such as his claims that trial counsel did not comprehend the pertinent law of his case, provided him with inaccurate advice concerning the strength of his case, and conveyed to the prosecutor an unwillingness to engage in plea negotiations—they are not properly before this court. *See United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006).

In determining whether a COA should be granted on Peterson's remaining claims, this Court does not resolve his claims on the merits. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Rather, we consider whether Peterson has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do so, we assess the general quality of the Peterson's claims, granting a COA only if "jurists of reason could disagree with the district court's resolution of his constitutional claims" such that "the issues presented are adequate to deserve encouragement to proceed" on appeal. *Miller-El*, 537 U.S. at 336.

But we do not work from a clean slate in evaluating Peterson's claims. Because the Michigan Court of Appeals addressed on the merits each of the claims Peterson now raises on habeas review, the district court applied the stringent requirements of the Antiterrorism and

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Effective Death Penalty Act, or “AEDPA.” Before habeas relief may be granted to state prisoner, AEDPA requires that the prisoner show that the last state court decision affirming his sentence was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). That same standard governs our review in granting a COA. Peterson is thus entitled to proceed with his claims on appeal only if fair-minded jurists could find the Michigan decision affirming his sentence was objectively unreasonable (not just wrong). *Moody v. United States*, -- F.3d --, 2020 WL 2190766, at *2 (6th Cir. May 6, 2020).

Evidentiary Claims

State court errors concerning the admissibility of evidence are generally not cognizable on federal habeas review. *See Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001). But a state court evidentiary ruling may warrant habeas relief if it “is so egregious that it results in a denial of fundamental fairness”—i.e., where the ruling results in a due-process violation because it “offend[s] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003) (quoting *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000)). No fair-minded jurist could conclude that such a fundamental error occurred here. *Miller-El*, 537 U.S. at 336.

Peterson first argued that Detective Goodell, who interviewed him about the events leading up to Vincent’s death, improperly testified that his demeanor during the interview was “defensive” and also that she had told him during the interview that he was lying. The Michigan Court of Appeals noted that “[d]efense counsel consented to the question about [Peterson’s] demeanor, and he asked Goodell whether she told [Peterson] he was lying.” *Peterson*, 2015 WL 3448701, at *1. It therefore declined to address those arguments because “[a] defendant may not assign error on appeal to something his own counsel deemed proper.” *Id.* Peterson also argued that Detective Goodell improperly commented on his guilt when she testified that his explanation of how Vincent sustained his fatal injuries—that a television fell on his head—“did not make sense,” and also that

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it was a “problem” that he did not offer who he thought had killed Vincent. The Michigan Court of Appeals rejected those arguments, concluding that neither statement was an opinion on Peterson’s guilt. *Id.* at *2. It noted that Detective Goodell never offered an opinion as to whether she thought Peterson’s explanation concerning how Vincent sustained his fatal injuries was a lie. Rather, she merely explained that Peterson’s nonsensical explanation caused her to ask him additional questions during the interview. *Id.* The Michigan Court of Appeals also noted that Detective Goodell never explained why she thought that it was a problem that Peterson never volunteered who he thought had killed Vincent. *Id.*

The district court adopted the magistrate judge’s determination that none of Detective Goodell’s challenged statements constituted an opinion on Peterson’s guilt. Specifically, the magistrate judge agreed with the state appellate court’s analysis of Detective Goodell’s statements concerning Peterson’s explanation of how Vincent died and Peterson’s failure to identify the killer. The magistrate judge also determined that Detective Goodell’s testimony that Peterson appeared “defensive” during the interview in no way constituted an opinion as to Peterson’s guilt or veracity. Finally, the magistrate judge determined, in part, that Detective Goodell’s testimony that she had insinuated to Peterson during the interview that he was being less than truthful did not violate his right to a fair trial, especially since defense counsel purposely elicited that testimony. Because Peterson has not identified a Supreme Court holding contradicting the Michigan appellate court’s decision, reasonable jurists could not debate the district court’s resolution of this claim. *Allen v. Mitchell*, 953 F.3d 858, 863 (6th Cir. 2020).

Peterson next argued that the admission of gruesome photographs of the crime scene and Vincent’s autopsy violated his right to a fair trial. In rejecting this claim, the Michigan Court of Appeals determined that because the autopsy photographs showed that Vincent had three injuries to his head, including a depressed skull fracture, they were relevant to proving that whoever struck Vincent probably did so with the intent to kill or cause great bodily harm. *Peterson*, 2015 WL 3448701, at *4. It also determined that the autopsy photographs (as well as replicas of two autopsy photographs) were relevant because they assisted the jury in determining the credibility of both

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the forensic pathologist who performed the autopsy on Vincent and testified about his injuries, and the crime laboratory technician who also testified about Vincent's injuries. *Id.* The Michigan Court of Appeals further determined that the crime-scene photographs were relevant because they "explained and corroborated witness testimony" and also "enabled the jury to see the crime scene, rather than having to rely solely on the testimony of witnesses." *Id.*

The district court adopted the magistrate judge's conclusion that the admission of relevant autopsy photographs or photographs depicting a murder victim does not deprive a criminal defendant of a fair trial. Given the state appellate court's determination that the photographs at issue were relevant to Peterson's case, reasonable jurists could not debate the district court's denial of this claim. *See, e.g., Franklin v. Bradshaw*, 695 F.3d 439, 456-57 (6th Cir. 2012); *Biros v. Bagley*, 422 F.3d 379, 391 (6th Cir. 2005).

Ineffective-Assistance-of-Counsel Claims

Peterson argued that trial counsel was ineffective for failing to: (a) challenge Detective Goodell's allegedly improper testimony, (b) object to the admission of the graphic photographs, (c) move for a directed verdict on the charge of first-degree murder, (d) obtain a recording of Detective Goodell's interview of him, (e) cross-examine his girlfriend "about when she last paid counsel and about [Detective] Goodell's threat that she could be charged with perjury and face life in prison," and (f) allow him to listen to the 9-1-1 call prior to trial. To establish ineffective assistance of counsel, a habeas petitioner must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. The prejudice inquiry requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

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The district court adopted the magistrate judge's conclusion that Peterson failed to show that he was prejudiced by counsel's failure to move for a directed verdict on the charge of first-degree murder because the jury did not convict him of that charge. The district court also adopted the magistrate judge's conclusion that it was a matter of trial strategy for counsel to elicit Detective Goodell's testimony that she told Peterson during the interview that she thought that he was lying because that testimony gave the jury a nonincriminating explanation for Peterson's defensive demeanor. Peterson therefore failed to overcome the presumption that counsel's questioning of Detective Goodell was sound trial strategy. *See id.* at 690. Moreover, the magistrate judge—and the district court by extension—concluded that it would have been futile for counsel to have objected to Detective Goodell's other testimony, the graphic photographs, or the trial court's decision to submit the charge of first-degree murder to the jury because, as discussed above, those issues lacked merit. Finally, the district court adopted the magistrate judge's conclusion that Peterson failed to establish the factual predicates for his remaining ineffective-assistance-of-counsel claims and, therefore, failed to demonstrate that he was prejudiced by counsel's allegedly deficient performance. *See id.* at 694. Failing *Strickland* alone, Peterson necessarily could not satisfy the doubly deferential standard applicable to habeas review of *Strickland* claims adjudicated in state court. *See Harington v. Richter*, 562 U.S. 86, 105 (2011). Considering the foregoing, reasonable jurists could not debate the district court's denial of Peterson's ineffective-assistance-of-counsel claims.

Accordingly, Peterson's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

No. 19-2189

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**

Jul 15, 2020

DEBORAH S. HUNT, Clerk

BRIAN DWIGHT PETERSON,

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Petitioner-Appellant,

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v.

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RANDEE REWERTS,

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Respondent-Appellee.

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O R D E R

Before: CLAY, ROGERS, and MURPHY, Circuit Judges.

Brian Dwight Peterson petitions for rehearing en banc of this court's order entered on June 3, 2020, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court,* none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

_____
Deborah S. Hunt, Clerk

*Judge Larsen recused herself from participation in this ruling.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN DWIGHT PETERSON,

Petitioner,

Case No. 1:16-cv-1014

v.

HON. JANET T. NEFF

SHERMAN CAMPBELL,

Respondent.

OPINION AND ORDER

This is a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R & R), recommending that this Court deny the petition (Pet., ECF No. 1; R&R, ECF No. 19). The matter is presently before the Court on Petitioner's objections to the Report and Recommendation (ECF No. 22). In accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order. The Court will also issue a Judgment in this § 2254 proceeding. *See Gillis v. United States*, 729 F.3d 641, 643 (6th Cir. 2013) (requiring a separate judgment in habeas proceedings).

Petitioner raises six enumerated objections to the Magistrate Judge's Report and Recommendation. Petitioner subsequently filed a motion seeking leave to add missing language to the record and to amend or add to his objections (ECF No. 24). Petitioner has also filed a Pleading Submitting Rejected Documents containing a number of photographs, which the Court

construed as a motion to supplement the record (ECF No. 25). The Court separately addresses the objections and the motions.

1. Objections

First, Petitioner objects to the Magistrate Judge's finding that "because the 'grounds raised by [Petitioner] are meritless,' a detailed analysis of the procedural defaulted issues is unnecessary," (ECF No. 22 at PageID.2027). Petitioner provides no supporting argument or explanation for this objection, but merely cites "page 19-20" of the R&R. The purported quotation is not found on the cited pages. In any event, Petitioner's bare objection points to no error in the Magistrate Judge's rejection of Respondent's procedural default arguments, and the decision "to simply address Petitioner's claims on the merits" (ECF No. 19 at PageID.2006-2007). Therefore, the Court denies this objection.

Second, with regard to Petitioner's claims of ineffective assistance of counsel, Petitioner objects that his claims are meritorious, asserting that the Magistrate Judge "relied heavily on the Michigan Court of Appeals decision," rather than the Sixth Amendment or *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (ECF No. 22 at PageID.2027). However, the Magistrate Judge correctly applied the governing law, including the *Strickland* standard, noting that review is "doubly deferential" in the context of a habeas petition. The Magistrate Judge properly concluded that Petitioner's ineffective assistance claims raised no issue warranting habeas relief (ECF 19 at PageID.2016-2020). Therefore, Petitioner's second objection is denied. To the extent Petitioner raises this same ineffective-assistance-of-counsel argument again in his fifth objection, that portion of Petitioner's fifth objection is also denied (ECF No. 22 at PageID.2030).

Third, Petitioner objects that the Magistrate Judge erred by including "improper facts" in the Report and Recommendation. (ECF No. 22 at PageID.2027-2028). Petitioner asserts that the

Magistrate Judge erroneously attributed a statement made by Detective Goodell to Lindsey West (*id.*, citing 7/10/13 Trial Tr. at PageID.756-63). Petitioner makes the bare assertion that the R&R is therefore “contrary to clearly established federal law” (*id.* at PageID.2028). Petitioner does not demonstrate that the Magistrate Judge misattributed testimony in summarizing the testimony of witness West (ECF No.19 at PageID.1996). Neither does Petitioner show how such a nominal misattribution in the statement of facts, even if it did occur, warrants habeas relief. Petitioner’s third objection is denied.

Petitioner’s fourth and fifth objections generally argue that error occurred with respect to evidence admitted against him at trial, including autopsy photographs and Detective Goodell’s testimony concerning her interview with Petitioner (ECF 22 at PageID.2028-2030). Petitioner also objects that Magistrate Judge faulted Petitioner for failing to submit the photographs at issue since they should have been included with the trial court record.

Petitioner fails to show any error warranting habeas relief. The Magistrate Judge noted that “Petitioner cannot simply argue that the trial court’s evidentiary ruling was incorrect”; instead, Petitioner has the burden of establishing that “the admission of the challenged photographs [evidence] denied him the right to a fair trial” (*id.* at PageID.2012). Although the Magistrate Judge noted that Petitioner failed to submit the photographs for proper consideration of this claim, the Magistrate Judge proceeded to address the general issue raised by Petitioner and properly concluded that Petitioner raised no claim upon which habeas relief may be granted (ECF No. 19 at PageID.2012-2014). Petitioner’s evidentiary objections fail to show otherwise. Petitioner’s fourth and fifth objections are denied.

Lastly, the Petitioner cursorily “strongly” objects to the Magistrate Judge’s recommendation that a certificate of appealability be denied. Petitioner provides no argument to support this bare objection; therefore, it is denied.

2. Motions

Petitioner has filed a motion to add missing language to the record or to amend or add to his objections (ECF No 24). In the motion, Petitioner requests that his filing be added as an amendment to his objections. He states: “in order for the Petitioner’s claims to be considered, the attached disk sent in by the Petitioner’s mother, certified mail on 11/28/18 and the missing language of the transcript and the added background and Affidavit. [sic] The interrogation tapes and ex[hibi]t photographs shown to the jury along with the 911 recordings must be considered” (ECF No. 24 at PageID.2045). Attached to Petitioner’s motion is a “Background,” a section titled “Ineffective Assistance of Counsel,” and an Affidavit (*id.* at PageID. 2047-2055).

The nature of Petitioner’s requests and his submission are not entirely clear. The Court will accept the filing as a supplement to his objections. However, the Court discerns nothing in this material that alters the outcome of the R&R. To the extent that Petitioner seeks to add missing language or material to the trial court record, the Court finds no proper basis for altering the record and declines to do so. Likewise, to the extent Petitioner advances new arguments not raised before the Magistrate Judge, such arguments are improper at this stage of the proceedings, and the Court declines to entertain them. *See Glidden Co. v. Kinsella*, 386 F. App’x 535, 544 n.2 (6th Cir. 2010) (stating that while the Sixth Circuit has not squarely addressed whether a party may raise new arguments before a district judge that were not presented to the magistrate judge, the Sixth Circuit has indicated that a party’s failure to raise an argument before the magistrate judge constitutes a waiver) (citing *Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000)).

Petitioner's second motion is merely the submission of autopsy photographs referenced above in Petitioner's objections. They do not change the foregoing analysis of any of Petitioner's objections.

Thus, the Court grants Petitioner's motions to the extent they seek to supplement his objections; the motions are otherwise denied.

3. Certificate of Appealability

Having determined Petitioner's objections lack merit, the Court must further determine pursuant to 28 U.S.C. § 2253(c) whether to grant a certificate of appealability as to the issues raised. *See RULES GOVERNING § 2254 CASES*, Rule 11 (requiring the district court to "issue or deny a certificate of appealability when it enters a final order"). The Court must review the issues individually. *Slack v. McDaniel*, 529 U.S. 473 (2000); *Murphy v. Ohio*, 263 F.3d 466, 466-67 (6th Cir. 2001).

"Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Upon review, this Court finds that reasonable jurists would not find the Court's assessment of Petitioner's claims debatable or wrong. In accordance with the Magistrate Judge's recommendation, a certificate of appealability will therefore be denied.

Accordingly:

IT IS HEREBY ORDERED that the Petitioner's Objections (ECF No. 22) are DENIED and the Report and Recommendation of the Magistrate Judge (ECF No. 19) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that the Petitioner's Motions (ECF No. 24; ECF No. 25) are GRANTED IN PART AND DENIED IN PART; the motions are granted to the extent they supplement his objections; they are otherwise denied.

IT IS FURTHER ORDERED that the petition for habeas corpus relief (ECF No. 1) is DENIED for the reasons stated in the Report and Recommendation.

IT IS FURTHER ORDERED that a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is DENIED as to each issue asserted.

Dated: September 27, 2019

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge