(Appendix A)

Petition For Writ Of Habaes Corpus

UNITED STATES DISTRICT COURT EASTERN
DISTRICT OF MICHIGAN DIVISION

KYLE B. RICHARDS,

Petitioner,

Case No.

Honorable

KRIS TASKILA (Acting Warden),

Respondent.

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PETITION FOR WRIT OF HABEAS CORPUS

NOW COMES Petitioner **KYLE B. RICHARDS**, filing this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254 stating the following in support:

1. Petitioner Kyle B. Richards is incarcerated with the Michigan Department of Corrections at the Baraga Correctional Facility (AMF) in Baraga, Michigan. Following a one- day jury trial in the Ionia County Circuit Court, Petitioner was convicted of assaulting a prison employee, Mich. Comp. Laws § 750.197c.

2. On December 16, 2014, the court Sentenced Petitioner to a prison term of 4 years, 2 months to 40 years, to be served consecutively to the sentences Petitioner was serving at the time of his crime.

3. Petitioner filed a timely an Appeal of Right in the State Courts raising three grounds for relief, as follows:

I. PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION BY THE TRIAL COURT'S SUMMARY DENIAL OF [PETITIONER'S] TIMELY REQUEST TO GO PRO SE.

II. PETITIONER WAS DENIED HIS DUE PROCESS RIGHTS BY THE DESTRUCTION OF EVIDENCE IN BAD FAITH. THIS COURT MUST REVERSE HIS CONVICTION.

III. THE TRIAL COURT ERRED IN DENYING MR. RICHARDS MOTION FOR RESENTENCEING WHEN HE WAS SENTENCED BASED ON A "INACCURATE" GUIDELINE RANGES AND HIS SENTENCE IS UNREASONABLE.

4. Between the brief Petitioner filed with the assistance of appointed counsel he filed his Standard 4 pro per brief file On 10-19-15 raising 2 additional issues:

1. Petitioner is entitled to a remand due to the trial court' s "unconstitutional" retroactive enforcement of the "Lockridge" sentencing system.

2. Petitioner's due process rights were violated by the trial court and state prosecutor who failed to provide "timely" written notice of "habitual charges" in accordance with MCL 769.13(1).

Petitioner raised each of his habeas issues on direct appeal to the Michigan Court of Appeals.

5. The Michigan Court of Appeals rejected each of Petitioner's issues as raised (issue 3 was granted); however, the court ordered a remand, of the same type contemplated by *United States* v *Crosby*, 397 F.3d 103, 117-118 (2d Cir. 2005) and *People* v. *Lockridge*, 870 N.W.2d 502 (2015), for the trial court to assess the reasonableness of Petitioner's sentence and determine whether resentencing was necessary. The Michigan Court of Appeals determined that such a remand was the appropriate remedy for a criminal defendant in Petitioner's position under the authority of *People* v *Steanhouse*,880 N.W.2d 297, 326-327 (Mich. Ct. App. 2015), aff'd in part, rev 'd in part 902 N.W.2d 327 (Mich. 2017). *People* v. *Richards*, 891 N.W.2d 911, 923-925 (Mich. ct. App.,

2016).

6. Petitioner applied for leave to appeal to the Michigan Supreme Court, raising the same issues he had raised in the court of appeals and also challenging the remand remedy ordered by the court of appeals. At the time Petitioner filed his application, the court of appeals' decision in Steanhouse was pending on appeal in the Michigan Supreme Court. Because the relief ordered by the court of appeals in Petitioner's case depended upon the court of appeals' decision in Steanhouse, the Supreme Court held Petitioner's appeal in abeyance pending its decision in Steanhouse. People v. Richards, 889 N.W.2d 258 (Mich. 2017). On July 24, 2017, the Michigan Supreme Court issued its opinion in People v. Steanhouse, 902 N.W.2d 327 (Mich. 2017).

7. On November 29, 2017, the Michigan Supreme Court, in lieu of granting leave to appeal, reversed the court of appeals' remand decision and remanded Petitioner's case to the court of appeals for a plenary determination of sentence proportionality. People v. Richards, 903 N.W.2d 555 (Mich. 2017). In all other respects, however, the supreme court denied leave to appeal. Id.

8. On February 1, 2018, On remand, the Court of Appeals concluded that the trial court had abused its discretion by departing from the guidelines without adequate explanation. *People* v. *Richards*, No. 325192, 2018 WL 662241, at *4 (Mich. Ct. App. Feb. 1, 2018). Accordingly, the court of appeals vacated Petitioner's sentence and remanded the matter back to the trial court for resentencing. Id.

9. On May 1, 2018, the Trial Court Resentenced Petitioner to a term of imprisonment of 3 years, 10 months to 40 years.

10. On August 1, 2018 Petitioner directly appealed that judgment to the Michigan Court of Appeals. case no 344161. raising the following issues:

(1). THE TRIAL COURT FAILED TO IMPOSE A SENTENCE THAT IS PROPORTIONATE TO MR. RICHARD'S CIRCUMSTANCES AND THE CIRCUMSTANCES OF HIS OFFENSES AND IS THEREFORE ENTITLED TO RESENTENCING

(2). A SENTENCE NEAR THE TOP OF THE SENTENCING GUIDELINES RANGE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT FOR AN OFFENDER WITH SERIOUS MENTAL HEALTH PROBLEMS.

11. On January 25, 2019, Petitioner timely filed his habeas corpus petition raising four grounds for relief, as follows:

I. Petitioner was denied his due process rights by the destruction of evidence in bad faith.

II. Petitioner was deprived of his constitutional right to self-representation by the trial court's summary denial of [Petitioner's] timely request to go pro se.

III. Petitioner is entitled to a remand due to the trial court' s "unconstitutional" retroactive enforcement of the "Lockridge" sentencing system.

IV. Petitioner's due process rights were violated by the trial court and state prosecutor who failed to provide "timely" written notice of "habitual charges" in accordance with MCL 769.13(1).

12. On March 22, 2019 the U.S. District Court dismissed Petitioners Petition for Writ of Habeas Corpus without prejudice, based on, although Issues I, II, and IV are considered to be exhausted, issue 3 was not exhausted, declaring a mixed petition. The petition is still properly dismissed.

13. On July 23, 2019 the Michigan Court of appeals denied Petitioners application for leave to appeal.

14. On July 23, 2019 Petitioner filed an Application for leave to appeal to the Michigan Supreme Court, raising the same issues raised in the lower court.

15. On January 2, 2020 the Michigan Supreme Court issued the following order, in case

no: 160237:

On order of the Court, the application for leave to appeal the July 23, 2019 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

(Appendix B)

6TH Cir. U.S Court of Appeals
Opinion and Order

No. 20-1329

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KYLE BRANDON RICHARDS,

Petitioner-Appellant,

v.

KRISTOPHER TASKILA, Warden,

Respondent-Appellee.

ORDER

Before: NALBANDIAN, Circuit Judge.

Kyle B. Richards, a Michigan prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. He now moves for a certificate of appealability (COA) and other relief. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(2).

In 2014, a jury convicted Richards of assault of a prison employee, in violation of Michigan Compiled Laws § 750.197c. *See People v. Richards*, 891 N.W.2d 911 (Mich. Ct. App. 2016) (per curiam). The charge was a result of Richards spitting on a prison guard while being transferred to a segregation unit. He was sentenced as an habitual offender to imprisonment for fifty months to forty years, to be served consecutively to his existing sentences. The Michigan Court of Appeals affirmed Richards's conviction, *id.*, and the Michigan Supreme Court affirmed the conviction but remanded for review of whether his sentence was disproportionate under state law. *People v. Richards*, 903 N.W.2d 555 (Mich. 2017) (mem.). The Michigan Court of Appeals then remanded to the trial court for resentencing, *People v. Richards*, No. 325192, 2018 WL 662241 (Mich. Ct. App. Feb. 1, 2018) (per curiam) and, upon remand, Richards was sentenced to forty-six months to forty years in prison. *See People v. Richards*, No. 344161, 2019 WL 3315363 (Mich. Ct. App.

July 23, 2019) (per curiam). The state court of appeals affirmed, *id.*, and the Michigan Supreme Court denied leave to appeal. *People v. Richards*, 936 N.W.2d 465 (Mich. 2020) (mem.).

Richards filed a § 2254 habeas petition in February 2020, asserting the following: 1) he was deprived of his right to self-representation; 2) he was denied due process by the prison guards' destruction of evidence; 3) his due process rights were violated when the trial court and the prosecutor failed to provide Richards timely notice of the habitual offender charge pursuant to Michigan Compiled Laws § 769.13; 4) his sentence was disproportionate to his circumstances and his offense; 5) his sentence equated to cruel and unusual punishment; and 6) his sentence was cruel and unusual because he suffers from Asperger's syndrome and is unable to adapt in prison with this condition. The district court denied the petition on the merits and also denied a COA. *See* 28 U.S.C. § 2243.

A COA may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating 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, 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).

District Court's Reliance on the State Court's Findings

Richards challenges the district court's reliance on the state courts' findings of fact, arguing that the district court made no findings of its own regarding the evidence supporting his claims. Richards presents nothing that would rebut the state court's findings or demonstrate that the state court's decisions involved an unreasonable determination of the facts in light of the evidence

before the state court. *See* 28 U.S.C. § 2254(d). Reasonable jurists would thus not debate the district court's deference to the state court's findings of fact.

Sixth Amendment Right to Self-Representation

Richards claimed that his Sixth Amendment right to self-representation was violated when the trial court denied his request to represent himself at trial. As explained by the state court of appeals, Richards was appointed counsel, was granted two requests for new counsel, and had indicated to the court in June 2014 that he did not want to represent himself but wanted counsel that was "effective." *See Richards*, 891 N.W.2d at 916. On the morning of trial, Richards requested permission to represent himself. *Id.* at 916–17. The trial court denied Richards's request, stating that it was untimely and that Richards previously had "multiple opportunities to present this issue to the Court." *Id.* at 917.

To show that he had not waited until the day of trial to request self-representation, Richards points to counsel's statement at trial that counsel had raised this issue earlier in chambers. But this reference to an "earlier" discussion in chambers does not establish that Richards unequivocally requested counsel on some date prior to trial.

The state court of appeals recognized Richards's constitutional right to represent himself if he "clearly and unequivocally" requested it, *see Faretta v. California*, 422 U.S. 806, 835–36 (1975), but it also recognized that the request must be timely, citing *Hill v. Curtin*, 792 F.3d 670, 674 (6th Cir. 2015) (en banc). The state appellate court noted that, "[g]iven the general standard [for timeliness] in *Faretta*, 'a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.'" *Richards*, 891 N.W.2d at 919 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

A criminal defendant has the right to waive counsel and represent himself at trial, *see Faretta*, 422 U.S. at 807, but this right is not absolute and must be invoked in a timely and unequivocal manner. *Hill*, 792 F.3d at 677. "A trial judge may fairly infer on the day of trial . . . that a defendant's last-minute decision to represent himself would cause delay." *Id.* at 681. In light of *Faretta* and *Hill*, reasonable jurists would not debate the district court's conclusion that

the state court's rejection of Richards's Sixth Amendment claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d).

Destruction of Evidence

Richards accused the prison officials and guards of destroying relevant evidence by failing to take samples of the saliva that landed on the victim's arm and clothing for possible DNA testing. He also argued that the assaulted guard should have immediately placed the soiled clothing in a plastic evidence bag to preserve it. Richards claimed that this inaction equated to the destruction of relevant evidence in bad faith and that the evidence may have been exculpatory because further testing may have established that that the liquid on the officer's arm and clothing came from another source.

After the incident, the victim—correctional officer Christopher Balmes—immediately reported the assault to his supervisor, Officer Nicewicz, who took digital photos of the saliva on Balmes's arm and pant leg. The incident report and photos were admitted at trial. *Richards*, 891 N.W.2d at 915–16. After the photos were taken, Balmes washed his arm, and he washed his pants at home that evening. *Id.* at 916. Nicewicz testified that in such "spitting" incidents at the prison, officers are instructed to have photographs of the spit taken and to wash it off as soon as possible because of the potential for the spread of communicable disease, and that prison officials generally do not collect and save clothing with only small amounts of saliva on it. *Id.*

Addressing this claim, the trial court concluded that "it was not reasonable to expect the officer to wait until a forensic team came to collect this sample, if it was even collectible . . . particularly in light of the fact that there is evidence in the form of photographs." *See id.* at 922. Applying state law, *see People v. Hanks*, 740 N.W.2d 530, 533 (Mich. Ct. App. 2007) (per curiam), and the Supreme Court's holding in *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), the state appellate court determined that Richards had failed to meet his burden of showing bad faith on the part of the officers to establish a due process violation based on destruction of exculpatory evidence. *Richards*, 891 N.W.2d at 922. The appellate court also found that Richards failed to meet the additional burden of showing that the unpreserved evidence was exculpatory "as opposed

to *potentially* exculpatory" considering all of the other evidence, including eyewitness testimony by Balmes and another guard, supporting the criminal act and supporting the court's finding that the droplets on Balmes's body and clothing were saliva and not water. *Id.* (emphasis added).

The State violates a defendant's due process rights when it does not preserve materially exculpatory evidence. *California v. Trombetta*, 467 U.S. 479, 488–89 (1984). But the State does not have an absolute duty to retain and preserve all evidence that might be of conceivable significance. *Youngblood*, 488 U.S. at 58. To establish a due process violation for the failure to preserve "potentially useful" evidence, a defendant must show that: (1) the state acted in bad faith in failing to preserve the evidence; (2) the exculpatory value of the evidence was apparent before its destruction; and (3) the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other means. *Id.* at 57–58; *Monzo v. Edwards*, 281 F.3d 568, 580 (6th Cir. 2002).

Here, Richards could not show that the officers destroyed evidence in bad faith or that the exculpatory nature of the evidence was apparent before the guard washed his arm or pants. Reasonable jurists would not debate the district's court's rejection of this claim on the basis that the state court's decision was not an unreasonable application of federal law under *Trombetta*, *Youngblood*, and *Monzo*.

Habitual Offender Notice

Richards claimed that he was not given timely notice, pursuant to Michigan Compiled Laws § 769.13, that his sentence would be subject to enhancement as an habitual offender under § 769.12. The state appellate court interpreted the relevant statute and determined that the habitual offender notice was timely filed. *Richards*, 891 N.W.2d at 925.

Violations of state law are generally not cognizable in federal habeas corpus petitions. *Stuart v. Wilson*, 442 F.3d 506, 513 n.3 (6th Cir. 2006); *see also Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Rather, "it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam). An error in the application of state law will be reviewed "only if it were so

fundamentally unfair as to violate the petitioner's due process rights." *Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001). Reasonable jurists would not debate the district court's determination that this was a matter of state law not cognizable on habeas review. *See Estelle*, 502 U.S. at 67–68; *Galloway v. Howes*, 77 F. App'x 304, 305 (6th Cir. 2003).

The Due Process Clause requires the prosecution to give a defendant sufficient notice of the charges against him so that he can prepare an adequate defense. *See Russell v. United States*, 369 U.S. 749, 763–64 (1962); *Williams v. Haviland*, 467 F.3d 527, 535 (6th Cir. 2006). Reasonable jurists would not debate the district court's conclusion that no Fourteenth Amendment due process violation occurred because Richards received adequate notice of the habitual offender charge eight months prior to his trial, allowing sufficient time for him to prepare his defense.

Sentencing Claims

Richards claimed that his sentence is disproportionate to the offense and to his circumstances and that it also equates to cruel and unusual punishment. A claim regarding the calculation of a sentence under state law is typically not cognizable in a federal habeas corpus proceeding when the sentence falls within the limits prescribed by the state, as in this case, unless the petitioner can show that the sentence violated due process by being based upon "material 'misinformation of constitutional magnitude.'" *See Koras v. Robinson*, 123 F. App'x 207, 213 (6th Cir. 2005) (quoting *Roberts v. United States*, 445 U.S. 552, 556 (1980)); *see also Austin v. Jackson*, 213 F.3d 298, 301–02 (6th Cir. 2000). Reasonable jurists would agree that Richards's claim regarding the calculation of his sentence asserts only a matter of the application of state sentencing laws and is not cognizable on habeas review. *See Estelle*, 502 U.S. at 67–68.

The state appellate court determined that Richards's sentence did not violate the Eighth Amendment because it was within the state's guidelines range and thus presumptively proportionate, particularly in light of his "several assault-related offenses both in and out of prison and a history of major misconducts while in prison." *Richards*, 2019 WL 3315363, at *1. The court specifically mentioned Richards's mental conditions of Asperger's Syndrome and attention deficit disorder, which Richards asserts were not properly considered. The state courts also noted

Richards's completion of numerous educational classes while incarcerated. *Id.* The state appellate court determined that the trial court's sentence "reflected a reasonable balancing of the positive factors defendant identified with the sentencing offense and his significant history of assaultive behavior." *Id.*

Richards fails to identify any factual findings at sentencing that were based on materially false information. Regarding his proportionality claim, the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)). Because the contours of this "gross disproportionality" principle are "unclear," the principle is "applicable only in the 'exceedingly rare' and 'extreme' case." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Harmelin*, 501 U.S. at 1001). "[A] sentence within the statutory maximum set by statute generally does not constitute 'cruel and unusual punishment.'" *Austin*, 213 F.3d at 302 (quoting *United States v. Organek*, 65 F.3d 60, 62 (6th Cir. 1995)). Reasonable jurists would not debate the district court's conclusion that the state court's rejection of Richards's Eighth Amendment sentencing claims was not contrary to, and did not involve an unreasonable application of, clearly established federal law under *Harmelin*, *Andrade*, and *Austin*. 28 U.S.C. § 2254(d).

Tampering with the Habeas Petition and Legal Mail

In his COA motion, Richards accuses two correctional officers of opening his outgoing legal mail, removing his prepared habeas petition, and replacing certain pages with others that one of the officers had written himself. Richards states that he made the district court aware of this claim but that the court rejected his motions for an investigation of the matter.

Richards fails to specify what claims or arguments were removed from his petition. His COA motion and supplemental brief present all of the claims presented in his existing petition considered by the district court. Therefore, this claim is unsupported, particularly in light of the parallel claims in Richards's filed petition and his COA motion.

Motions for Clarification and for Declaratory Judgment

Richards has filed two motions asking this court to clarify whether the district court, by granting him leave to proceed on appeal in forma pauperis, effectively granted him a COA. The motions also express his concern that pages are missing from his petition because of tampering by prison officials and ask for a federal investigation. The motions are granted only insofar as to explain that a grant of permission to proceed in forma pauperis on appeal does not imply a grant of a COA, the standard for which is more difficult to meet.

Richards's motion for a declaratory judgment asks the court to "focus on" his first two issues relating to self-representation and the alleged destruction of evidence. This motion will be denied as moot because this court has duly considered these claims.

Accordingly, the application for a COA is **DENIED**, the motions for clarification are **GRANTED** in part, and the motion for declaratory judgment is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

(APPENDIX D)

MICHIGAN COURT OF APPEALS
OPINION AND ORDER

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2016
v	No. 325192 Ionia Circuit Court
KYLE BRANDON RICHARDS, Defendant-Appellant.	LC No. 2014-015993-FH

Before: SAAD, P.J., and BORRELLO and GADOLA, JJ.

PER CURIAM.

Following a jury trial, defendant Kyle Brandon Richards was convicted of assault of a prison employee, MCL 750.197c. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 50 months to 40 years' imprisonment. The sentence is to be served consecutively "to any other sentence currently being served." Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm defendant's conviction but remand for further proceedings.

I. BACKGROUND

This appeal arises from an incident that occurred while corrections officers transported defendant to the segregation unit at Bellamy Creek Correctional Facility. On January 3, 2013, corrections officers Christopher Balmes and Christopher Hudson escorted defendant to the segregation unit. Balmes, the victim in this case, testified that he had not previously dealt with, saw, or heard of defendant before January 3, 2013. According to the victim, defendant was handcuffed behind his back, and Hudson and the victim were each on one side of defendant holding one of his arms while escorting him. The victim testified that defendant was not yelling but that he seemed upset. Hudson testified that defendant made some statements directly to him during the escort. Hudson further testified that defendant made a comment that the officers would not be able to do anything if he assaulted them. The victim testified that they first took defendant to the shower because, before inmates go to the segregation unit, they are strip searched in the shower to make sure they do not have any contraband. Once they arrived at the shower cell, defendant was placed into the shower cell. The victim testified that the door closed behind defendant and automatically locked.

According to the victim, he turned to walk away after defendant was placed in the shower cell, and defendant "crouched down next to an opening in the wall (known as a 'restraint slot') and spit through it, hitting [the victim] in the arm." Hudson testified that through his peripheral

vision he also saw defendant bend down, spit through the restraint slot, and hit the victim's arm with saliva. The victim, who was wearing a short-sleeved uniform, testified that the saliva landed on his right forearm and pant leg area and that the saliva "was basically a spit spray." The victim further testified that the saliva was "not a big wad," did not contain phlegm or blood, and hit a section of him rather than just one spot. According to the victim, it was not possible for the substance on his arm to be water or something else from the shower because he saw defendant spit on him and because there were no other inmates in the shower cell besides defendant.

The victim's supervisor, John Nicewicz, was standing in the vicinity when the incident happened. The victim testified that, as a reaction to being spit, he walked over and told his supervisor because the supervisor needed to know about misconduct. Nicewicz testified that he was turned away and did not see defendant spit on the victim but that the victim told him that "he just got spat on." According to Nicewicz, the saliva "was basically clear" and "kind of looked like a spray or a mist." Nicewicz further testified that he believed that the substance was spit because the shower was not on and because it did not look like water. The victim testified that he made a written report of the misconduct and that Nicewicz took pictures of the areas containing saliva. Using a digital camera, Nicewicz took pictures of the victim's arm and pant leg, which were admitted at trial. The victim testified that, after the pictures were taken, he washed his arm off with soap and water. The victim further testified that, after work, he washed his pants. With respect to spitting incidents, Nicewicz testified, "We train the officers and have them leave the saliva on their body and we try to photograph it and then obviously have them wash it off as soon as what we get what we think are good photographs." Nicewicz further testified that he had never collected clothing that had very small amounts of saliva on it—such as the victim's pants in this case—as evidence. Defendant was eventually charged with one count of assault of a prison employee.

During the pretrial phase, defendant filed numerous motions in propria persona and changed attorneys several times. Defendant also raised numerous other motions, including filing a "notice of change of plea and request for D.N.A and polygraph examination" that requested to change his plea, DNA testing of the victim's clothing, and a polygraph examination of all witnesses; a motion to remove and disqualify his current attorney, coupled with a request for reappointment of counsel; and a motion to quash and bar 4th habitual sentence enhancement upon constitutional challenge of habitual application. After a hearing on April 22, 2014, the trial court granted defendant's request for a new attorney.

The trial court heard yet another motion for new counsel on June 3, 2014. At this hearing, defendant's second appointed attorney stated that there was a breakdown in the attorney-client relationship. According to counsel, defendant told counsel not to visit him, and defendant refused to see counsel or listen to any of his advice. Appointed counsel further stated that he could not prepare for trial because of those reasons and that it was a hostile work environment for him because of "threats here of Judicial Tenure Commission [and] the Attorney Grievance Commission." In response, the prosecution noted that trial was scheduled for that week. After some dialogue between defendant and the trial court, the trial court asked defendant, "You wish to represent yourself in these proceedings?" Defendant responded, "No, I do not. [C]ounsel that is effective . . . I want an attorney who will do their job." Defendant [r]epeatedly threatened to seek legal reprimand by going to the Judicial Tenure Commission, the

Attorney Grievance Commission, the Civil Rights Commission, and to the Governor, "if [he] ha[d] to." Thereafter, the trial court granted the motion for new counsel. A third attorney was appointed as defendant's counsel. Not long thereafter, there was another motion for new counsel, and, on August 12, 2014, there was a hearing to address this motion wherein defense counsel withdrew his motion. At the hearing, defense counsel stated, "Your Honor, [defendant] and I had an opportunity to discuss the case and discuss our differing opinions. I respect him. I believe he respects me and now we will withdraw the motion." On October 20, 2014, voir dire began with defendant's third appointed counsel as defendant's attorney.

On the morning of the sole day of trial and right after the prospective jurors swore to truthfully answer the voir dire questions, defense counsel asked the trial court if he could approach. After the potential jurors exited the courtroom, defense counsel stated that defendant indicated that he now wanted to represent himself. Following argument from the prosecution, the trial court then allowed defendant an opportunity to speak, and he stated that he had questions for the jury and that he should be allowed to ask them because he was going to represent himself. In response, the trial court stated:

> [Defendant], I'm going to interrupt you because you are not representing yourself. We have had numerous pretrial motions in this matter and this is now the 3rd attorney who has been appointed to represent you. [Defense counsel] has worked very hard to accommodate your requests and to present those to the Court. The Court finds that your request to represent yourself is *untimely*. Again, you've had multiple opportunities to present this issue to the Court and so your request to represent yourself is denied here today.
>
> [Defendant], I'm not going to entertain this further at this point in time in light of the fact that [defense counsel] has presented to me a list of questions that you provided to him, that we have reviewed this morning and have found to be fair questions that the Court will be asking the jurors. But as the prosecutor argued, the Court Rules do provide the Court with the discretion and authority to conduct voir dire and this Court will be doing that. Very quickly. I'm not going to be leaving the jurors out in the hallway long. Was there something else you wanted to say? (emphasis added).

Defendant then stated that he wanted to call other prisoners as witnesses to discredit the testimony from the corrections officers. The trial court concluded the matter by stating that they were in the middle of voir dire, that the issue of witnesses could be addressed at a later time, and that defendant's request to represent himself was denied. After the prosecution's case-in-chief, defendant stated, "As stipulated to at the beginning before the jury came here, I did want to represent myself and there were things I would like to address with the Court. There were witnesses I wanted to bring. None of those things were allowed. So the least the Court could do is grant me the right to take the stand." Defendant then proceeded to testify against the advice of counsel. Subsequently, before closing arguments occurred, defendant placed an objection regarding his witnesses on the record. Specifically, he stated, "I want to let the Court know my dissatisfaction of not being allowed to call several prisoners as witnesses who would have been used to discredit the officers and prove they were engaging in perjury. . . ." He further stated that he was not able to call these witnesses because of the trial court's denial of his request to

represent himself and that the witnesses could testify that the officers routinely falsify statements. The trial court stated that the objections were noted but overruled because, "[a]s [it] underst[ood] the issue, there were no other inmates directly involved in this situation and [defendant] did not have any prior knowledge, particularly of [the victim] prior to this incident." The trial court concluded that attacking the "fabrication of reports" did not have an adequate basis in this case. The jury subsequently found defendant guilty of assaulting a prison employee and defendant was sentenced as noted above. He now appeals as of right.

II. RIGHT TO SELF-REPRESENTATION

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." *Martinez v Court of Appeal of California*, 528 US 152, 154; 120 S Ct 684, 687; 145 L Ed 2d 597 (2000). However, a "defendant also 'has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.'" *Id.*, quoting *Faretta v California*, 422 US 806, 807; 95 S Ct 2525, 2527; 45 L Ed 2d 562 (1975). See also *Faretta*, 422 US at 835-836 (holding that the defendant was denied the constitutional right to conduct his own defense when he clearly and unequivocally requested to do so "weeks before trial"). Further, "[a]lthough the right to proceed in propria persona is guaranteed by the United States Constitution, the Michigan Constitution, and state statute, this right is not absolute." *Ahumada*, 222 Mich App at 616. Generally, before a court may allow a defendant to proceed in propria persona,

> [the] court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. *Russell*, 471 Mich at 190.

Defendant argues, and we agree, that the right to self-representation is an established Federal and State Constitutional right. *Faretta*, 422 US at 807; Mich Const 1963, art. 1, sec. 13; *Ahumada*, 222 Mich App at 616. However, the right to self-representation is not without its limitations. Since *Faretta*, the consensus that has emerged from state and federal appellate courts is that a request for self-representation can only be denied for three reasons: (1) if it is untimely, ordinarily if made after trial has begun; or (2) if there is sufficient certainty of serious obstructionist misconduct, or (3) if no valid waiver can be accomplished. LaFave, Israel and King, 3 Criminal Procedure (2d ed.), § 11.5(d) at 582-584.

In *People v Hill*, 485 Mich 912; 773 NW2d 257 (2009), our Supreme Court held that the trial court's decision "denying [a] request for self-representation 'at this time' did not deny the defendant his constitutional right to self-representation where the defendant's request was *not timely* and granting the request at that moment would have disrupted, unduly inconvenienced, and burdened the administration of the court's business." (Emphasis added). As was the case here, the trial court in *Hill* simply denied the defendant's request and failed to make any

pertinent inquiry whether defendant's request to represent himself was unequivocal or whether he knowingly, intelligently, and voluntarily wished to waive his right. *People v Hill*, 282 Mich App 538, 551; 766 NW2d 17 (2009), vacated in part by *Hill*, 485 Mich at 912. Nonetheless, as previously noted, our Supreme Court found that the defendant's right to self-representation was not violated because the request was untimely. *Hill*, 485 Mich at 912.

Subsequently, the Sixth Circuit Court of Appeals analyzed the issue in further detail and denied Hill habeas corpus relief on the issue. *Hill*, 792 F3d at 674.[1] The Sixth Circuit explained that, on the first day of the defendant's trial, "as potential jurors were 'on their way up to the courtroom,'" defendant informed the trial court that he wanted to represent himself. *Hill*, 792 F3d at 674. The trial court denied the request and stated:

> No. The court is not going to allow that, especially at the last minute. Also, it's not going to be helpful. There is no early indication of this. We are ready to proceed with the trial at this time. To be prepared for that, and to inform the defendant and have him prepared for following the rules of asking questions and rules of evidence, the court is going to have to do that during the trial. So at this point it's not going to work.
>
> You may consult with your attorney. We are going to have you sitting right next to him. If you would like paper and pen to tell him what you would like, how you would like things, you can do that.
>
> We expect and want you to have all the participation you want. We also want you to have a legal representative to follow the rules of the courtroom. So at this time it is denied. *Id.*

With respect to the timeliness of asserting the right, the Sixth Circuit explained:

> However, "[a]s the *Faretta* opinion recognized, the right to self-representation is not absolute." *Martinez v Ct of Appeal of Cal, Fourth App Dist*, 528 U.S. 152, 161 (2000). First, a defendant may forfeit his self-representation right if he does not assert it "in a timely manner." *Id.* at 162. Such a limit reflects that "[e]ven at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id.* In other words, if the right is asserted in an untimely manner, it may be deemed forfeited as a threshold matter. *Id.* at 677.

The Sixth Circuit further explained that "*Faretta* did not establish a bright-line rule for timeliness," that the defendant's request in *Faretta* occurred weeks before trial, and that "the Supreme Court has never defined the precise contours of *Faretta's* timing element." *Id.* at 678-679. However, "'most courts require [a defendant] to [assert his right] in a timely manner,'" *id.*

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[1] "Decisions of federal courts of appeals, while not binding on this Court, may be persuasive." *People v Bosca*, 310 Mich App 1, 76 n 25; 871 NW2d 307 (2015).

at 679, quoting *Martinez*, 528 US at 161-162; 120 S Ct 684, and "[g]iven the general standard articulated in *Faretta*, 'a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard,'" *Hill*, 792 F3d at 679, quoting *Knowles v Mirzayance*, 556 US 111, 123; 129 S Ct 1411; 173 L Ed 2d 251 (2009). "[T]o the extent that *Faretta* addresses timeliness, as a matter of clearly established law it can only be read to require a court to grant a self-representation request when the request *occurs weeks before trial.*" *Hill*, 792 F3d at 678 (emphasis added). In making its conclusion that the Michigan Supreme Court's holding (that the defendant was not denied his constitutional right to self-representation) was not unreasonable, the Sixth Circuit reasoned that "[a] trial judge may fairly infer on the day of trial—as the jurors are on their way to the courtroom—that a defendant's last-minute decision to represent himself would cause delay, whether or not the defendant requests a continuance." *Hill*, 792 F3d at 681.

The Sixth Circuit also addressed defendant's main argument on this appeal, namely that it was reversible error for the trial court not to have engaged in the findings set forth in MCR 6.005(D). In finding that case law imposes no such requirement, the Sixth Circuit opined:

> First, the U.S. Supreme Court has never held that a court must inquire into the basis of a defendant's request before denying it as untimely. In other words, the trial court's denial of Hill's motion was not at odds with clearly established law. Second, the Michigan Supreme Court's holding was not based on a determination that the trial court's inquiry was a *Faretta*-compliant. Rather, the Michigan Supreme Court held that the trial court did not violate Hill's Sixth Amendment right because his "request was not timely and granting the request at that moment would have disrupted, unduly inconvenienced, and burdened the administration of the court's business." *Hill*, 773 N.W.2d at 257. The Michigan Supreme Court's decision was not therefore contrary to or an unreasonable application of *Faretta's* requirement to inquire into whether Hill's request was knowing, intelligent, and voluntary.

We are in accord with the Sixth Circuit's holding. We do not glean from any case law presented or reviewed that a trial court *must* conduct a *Faretta* inquiry prior to denying a request as untimely. *Hill*, 792 F3d at 678; *Faretta*, 422 US at 835 because the underlying rationale for a trial court to conduct an inquiry pursuant to MCR 6.005(D) "is to inform the defendant of the hazards of self-representation, not to determine whether a request is timely." *Id.* The issue of whether defendant intelligently and voluntarily waived his right to self-representation was not at issue in *Hill*. Similarly, it is not an issue in this case. Rather, the dispositive issue in both cases was whether defendant asserted his right to self-representation in a timely manner. Therefore, it was unnecessary for the trial court to engage in an inquiry pursuant to MCR 6.005(D).

The difficulty in deciding whether a request for self-representation is timely lies in the fact that *Faretta* did not establish a bright-line rule for timeliness. Likewise, our Supreme Court has been reluctant to establish a bright-line rule for timeliness going so far as to hold:

> The people would have us announce a guideline which would preclude the assertion of the right to proceed without counsel if it is not made before the trial begins. We cannot accede to this request. Although the potential for delay and

> inconvenience to the court may be greater if the request is made during trial, that will not invariably be the case. *People v Anderson*, 398 Mich 361, 368; 247 NW2d 857 (1976).

Recognizing that *Anderson* precludes us from establishing a bright-line rule does not lead us to opine that we are forbidden from using the date of the request relative to the date of trial as *a factor* when considering the issue of timeliness. Clearly, timeliness is established, at least in part, by the date of trial relative to the date of the request. Indeed, to the extent the Supreme Court considered the issue of timeliness in *Farcetta*, they did so by correlating the date that defendant's request was made to the date of the trial, finding that defendant's request was made "[w]ell before the date of trial," and "weeks before trial." *Farcetta*, 422 US at 807; *Hill*, 792 F3d at 678.

Having decided the date of the request relative to the date of trial is a factor to be considered, we next turn to the entirety of the record to determine whether the request to self-representation was timely.

In this case, defendant brought numerous pre-trial motions. Importantly, defendant never made a request for self-representation. In fact, when specifically asked by the trial court if he wanted to represent himself defendant emphatically replied: "No." Rather than proceed in propria persona he told the trial judge he wanted an "effective" attorney. In direct response to his request, the trial court appointed a different attorney to represent defendant. Following that ruling, defendant continued to file motions with the trial court, (some of which are named above), but at no time did defendant make a request for self-representation. Then, approximately one week from the scheduled date of trial, defendant again requested that the trial court appoint a different attorney to represent him. Again, the trial court honored defendant's request. Shortly thereafter, defendant again resumed filing motions with the trial court. It was not until after the jury had been sworn that defendant, through counsel, made the request to proceed in proper personia. It was at that juncture that the trial court denied the request finding the request untimely.

Viewing the entirety of the record, we find that the defendant was not deprived of his constitutional right to self-representation. The trial court placated defendant's proclivity to request substitute counsel. By the date of trial, defendant had the benefit of three separate trial counsel. On these facts, we cannot find how defendant's constitutional right to counsel was denied. Rather, the record clearly reveals that defendant was afforded every opportunity to the effective assistance of counsel, including the right to represent himself. That he declined to affirmatively assert his right to counsel until the date of trial, coupled with all of the other factors outlined in this opinion, leads us to concur with the trial court's finding that defendant's request was untimely. Further, to the extent it may be necessary under our Supreme Court's decision in *Hill*, we also conclude from the record evidence that "granting the request at that moment would have disrupted, unduly inconvenienced, and burdened the administration of the court's business." *Hill*, 485 Mich 912. Consequently, the trial court's decision denying defendant's request to self-representation was well within the range of reasonable and principled outcomes and was not an abuse of discretion. *Hicks*, 259 Mich App at 521; *Ahumada*, 222 Mich App at 614. Accordingly, defendant is not entitled to relief.

III. DESTRUCTION OF EVIDENCE

Next, defendant argues that he was denied due process by the destruction of evidence. This Court reviews a defendant's constitutional due process claim de novo. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). To warrant reversal on a claimed due process violation involving the failure to preserve evidence, "a defendant must prove that the missing evidence *was exculpatory* or that law enforcement personnel acted in bad faith." *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007) (emphasis added). More specifically, as relevant here, when the evidence is only "potentially useful" failure to preserve the evidence does not amount to a due process violation unless bad faith can be shown. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333, 337; 102 L Ed 2d 281 (1988). A "[d]efendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

Before trial began, defendant filed a motion to dismiss the case based on the failure to preserve the victim's shirt, which defendant argued contained samples of the alleged saliva. In response, the prosecution argued that the victim was wearing a short-sleeved shirt and that the saliva landed on his forearm. Defendant then argued that the alleged saliva likely splattered onto the shirt. The trial court denied the motion because defendant's argument was speculative in nature and was based on what conceivably could have happened. At a subsequent motion hearing, defendant argued that the case should be dismissed based on the failure to preserve the saliva. Defendant argued that failing to preserve the saliva violated MDOC policy and that the substance could not be tested because it was not preserved. The trial court denied the motion stating that defendant was free to make the argument to the jury at trial. The trial court reasoned that "it was not reasonable to expect the officer to wait until a forensic team came to collect this sample, if it was even collectible, so to speak, particularly in light of the fact that there is evidence in the form of photographs."

Failing to preserve potentially useful evidence can amount to a due process violation in certain situations. In *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333, 337; 102 L Ed 2d 281 (1988), the Court stated:

> The Due Process Clause of the Fourteenth Amendment . . . makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said that it could have been subjected to tests, the results of which might have exonerated the defendant.

The Court then held, "We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id* at 58. Thus, to warrant reversal on a claimed due process violation involving the failure to preserve evidence, "a defendant must prove that the missing evidence was exculpatory or that law enforcement personnel acted in bad faith." *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007), lv den 480 Mich 1008 (2008). A "[d]efendant bears the burden of showing that the evidence was exculpatory or that the police

acted in bad faith." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992), lv den 442 Mich 931 (1993).

Here, defendant failed to demonstrate that the evidence was exculpatory as opposed to potentially exculpatory if subject to tests that yielded favorable results. Defendant argues that the substance on the victim's arm was exculpatory because, if the substance had been preserved, testing could have ruled out defendant as a source or shown that the substance was water instead of saliva. While defendant testified he did not spit at anyone and that water from the showerhead could have splattered off the floor and through the restraint slot, testimony from the corrections officers and police strongly supported that defendant spat on the victim. The victim testified that the substance on his arm was not water because he saw defendant spit on him. Hudson testified that the shower cell was a confined space; defendant was the only inmate in the shower cell; and that he saw defendant spit on the victim. Hudson testified that the shower was off. Further, according to Nicewicz, the victim reacted and said that "he just got spat on." In addition, there was testimony that the saliva was "spray spit" and was not a large "wad," and, as the trial court alluded to, the sample may not have been able to be collected. Thus, for these reasons, defendant has shown only that the evidence was potentially exculpatory. *Id.* Thus, defendant had to show bad faith with respect to the failure to preserve. *Hanks*, 276 Mich at 95.

With respect to bad faith, there is no indication on the record that the victim washed his arm off in bad faith. While defendant argues that the victim knowingly and intentionally destroyed the evidence and that not preserving evidence of misconduct violated the prison operating procedures, testimony was presented regarding what steps should be taken, in accordance with the operating procedures, to collect evidence in a case such as this one:

> We photograph it to maintain the evidence to show, in this case, in a courtroom what has happened and then we encourage the employee to clean quickly afterwards. Prisons have people with communicable diseases and there's a concern of getting it washed off as quickly as possible.

Further testimony revealed that the prison was not equipped to scrape saliva off one's arm and put it in a test tube for DNA purposes. The victim testified that he saw defendant spit on him, that he informed his supervisor, that he made a report of the misconduct, that he waited for his arm to be photographed, and that he washed his arm off with soap and water after the pictures were taken. The record simply does not support that the victim washed the saliva off his arm in bad faith. See *United States v Garza*, 435 F3d 73, 75 (CA 1, 2006) (explaining that conscious and deliberate actions were not enough to show bad faith and that "even if, as found by the district court, [the police's] actions were 'short-sighted and even negligent,' this does not satisfy the requirement of bad faith"). See also *Johnson*, 197 Mich App at 365 (explaining that "the routine destruction of taped police broadcasts, where the purpose is not to destroy evidence for a forthcoming trial, does not mandate reversal").

In sum, because defendant has not met his burden of establishing that "the evidence was exculpatory or that the police acted in bad faith," *id.*, defendant's due process claim based on the destruction of evidence is without merit, *Hanks*, 276 Mich App at 95; *Johnson*, 197 Mich App at 365. Accordingly, defendant is not entitled to relief.

IV. RESENTENCING

Next, defendant argues that he is entitled to resentencing because his sentence was based on inaccurate guidelines and was unreasonable under *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). "A sentence that departs from the applicable guidelines range [is] reviewed by an appellate court for reasonableness." *Id.* at 392. Recently, in *People v Steanhouse*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket No. 318329, issued October 22, 2015); slip op at 21-24, this Court held that the reasonableness of a sentence is determined by using the "principle of proportionality" standard set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Here, defendant raised a scoring challenge to Offense Variable (OV) 19 in a motion for resentencing. At the hearing on the motion, the prosecution agreed with the scoring change, which changed defendant's applicable guidelines range to 12 to 48 months—making his minimum sentence of 50 months outside the applicable guidelines range. The trial court stated that it considered the new sentencing guidelines range but, nonetheless, determined that the sentence was reasonable. However, the trial court's ruling on the issue occurred before the *Steanhouse* decision was issued. Therefore, "the trial court was unaware of and not expressly bound *by [the] reasonableness standard rooted in the Milbourn principle of proportionality* at the time of sentencing." *Steanhouse*, ___ Mich App at ___; slip op at 25 (emphasis added). See also *People v Shank*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket No. 321534, issued November 17, 2015); slip op at 3 (explaining that "the trial court did not have the benefit of our Supreme Court's decision in *Lockridge* or *this Court's decision in Steanhouse*") (emphasis added).

V. STANDARD 4 BRIEF

Next, defendant, in propria persona, argues that the retroactive application of *Lockridge* violates the Ex Post Facto Clause. However, defendant waived this issue. "[W]aiver is the intentional relinquishment or abandonment of a known right." *People v Vaughn*, 491 Mich 642, 663; 821 NW2d 288 (2012) (quotation marks and citation omitted). "A defendant who waives a right extinguishes the underlying error and may not seek appellate review of a claimed violation of that right." *Id.* Specifically, "[a] defendant should not be allowed to assign error on appeal to something his own counsel deemed proper" before the trial court. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). "To do so would allow a defendant to harbor error as an appellate parachute." *Id.* At the hearing on the motion for resentencing, defense counsel argued that the *Lockridge* decision was issued after her written motion and that *Lockridge* "made it so the guidelines are advisory but ordered that the Trial Courts consider the applicable guideline range in fashioning a sentence and then that sentence would be reviewed for reasonableness." Defense counsel further argued that, under *Lockridge*, defendant's sentence was unreasonable. Accordingly, by making this argument, defense counsel deemed the application of *Lockridge* to defendant's case proper at the trial court level. To allow defendant to assign error on appeal to the application of *Lockridge* would allow defendant harbor this alleged error as an appellate parachute. *Id.* Thus, this issue is waived, and the alleged error is extinguished. *Vaughn*, 491 Mich at 663.

Moreover, even if defendant had not waived the issue, he has not demonstrated plain error for this unpreserved argument. *People v Carines*, 460 Mich 750, 762-765; 597 NW2d 130

(1999). "The Ex Post Facto Clause, by its own terms, does not apply to courts." *Rogers v Tennessee*, 532 US 451, 460; 121 S Ct 1693, 1699; 149 L Ed 2d 697 (2001). The Clause "is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government." *Id.* at 456; 121 S Ct 1693, 1697. Defendant relies on cases that have found Ex Post Facto Clause violations when different versions of sentencing guidelines were applied. See eg, *Peugh v United States*, ___ US ___, ___; 133 S Ct 2072, 2082; 186 L Ed 2d 84 (2013) (explaining "that applying amended sentencing guidelines that increase a defendant's recommended sentence can violate the Ex Post Facto Clause"). However, these cases are distinguishable because an amended version of the sentencing guidelines was not applied to defendant's case. Defendant's case was pending on direct review when *Lockridge* was issued on July 29, 2015. Therefore, because defendant's case was pending on review, *Lockridge* applies retroactively. See *People v Lonsby*, 268 Mich App 375, 389; 707 NW2d 610 (2005) ("[I]t is well-established that a new rule for the conduct of criminal prosecutions that is grounded in the United States Constitution applies retroactively to all cases, state or federal, pending on direct review or not yet final.") See also *United States v Barton*, 455 F3d 649, 657 (CA 6, 2006) (explaining that the Court was "join[ing] *every other* circuit in holding that [retroactively applying] *Booker*[2] does not violate ex post facto-type due process rights of defendants") (emphasis added). Defendant failed to establish plain error, *Carines*, 460 Mich at 763, and as a consequence thereof, is not entitled to relief.

Lastly, defendant argues that his due process rights were violated because the prosecution failed to timely file its notice seeking to enhance defendant's sentence. The resolution of this issue involves the interpretation of a statute, which this Court reviews de novo. *People v Morales*, 240 Mich App 571, 575; 618 NW2d 10 (2000). MCL 769.13 governs the timing of when a prosecutor may seek to enhance a defendant's sentence under the habitual offender statutes and provides in pertinent part:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

Here, defendant did not waive his arraignment. Therefore, the applicable time period for measuring the 21-day period begins with the date of "defendant's *arraignment on the information* charging the underlying offense." MCL 769.13(1) (emphasis added). Contrary to defendant's argument on appeal, there is a distinction between an arraignment on the information and an arraignment on the warrant or complaint. Compare MCR 6.104 ("Arraignment on the Warrant or Complaint"), with MCR 6.113 ("The Arraignment on the Indictment or Information"). See also *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013) (referring to the arraignment on the information as the "circuit court arraignment"). Defendant was

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[2] *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).

arraigned on the information in circuit court on February 13, 2014. On that same day, the prosecution filed the first amended information, which contained a fourth offense habitual offender notice. Thus, the prosecution's notice came well within the 21-day period after defendant's arraignment on the information. MCL 769.13(1). Accordingly, defendant's due process argument premised upon the timing of the prosecution's notice fails.

Affirmed but remanded for further inquiry as to whether resentencing is required. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Stephen L. Borrello
/s/ Michael F. Gadola

(Appendix E)

U.S District Court
Opinion and Order

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KYLE B. RICHARDS,

Petitioner,

Case No. 2:20-cv-22

v.

Honorable Robert J. Jonker

KRIS TASKILA,

Respondent.
_____/

ORDER

In accordance with the opinion entered this day:

IT IS ORDERED that a certificate of appealability is **DENIED.**

Dated: March 31, 2020

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

Certified as a True Copy
By _____
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date 4/1/2020

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KYLE B. RICHARDS,

Petitioner,

v.

KRIS TASKILA,

Respondent.
_____/

Case No. 2:20-cv-22

Honorable Robert J. Jonker

ORDER

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. This matter is presently before the Court on Petitioner's motion for reconsideration (ECF No. 16) of the Court's March 31, 2020, opinion and judgment dismissing his habeas petition on preliminary review for failure to raise a meritorious federal claim. The Court construes Petitioner's motion as a motion to alter or amend judgment under Rule 59(e).

As the Sixth Circuit summarized in *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 833-34 (6th Cir. 1999), motions to alter or amend judgment under Rule 59(e) may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. *See also ACLU v. McCreary Cty.*, 607 F.3d 439, 450 (6th Cir. 2010). Petitioner argues the Court has not read his petition. Perhaps for that reason, he simply reiterates the arguments he raised in his 64-page petition. Petitioner's repetition of arguments the Court has already rejected does not suffice to identify a clear error of law, newly discovered evidence, an intervening change in law, or any manifest injustice. Petitioner has provided no ground to reconsider the Court's prior opinion and judgment

Accordingly,

IT IS HEREBY ORDERED that Petitioner's motion for reconsideration (ECF No. 16), construed as a motion to alter or amend judgment under Rule 59(e), is **DENIED**.

Dated: April 21, 2020

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

The Michigan Court of Appeals described the facts underlying Petitioner's offense as follows:

> On January 3, 2013, corrections officers Christopher Balmes and Christopher Hudson escorted defendant to the segregation unit. Balmes, the victim in this case, testified that he had not previously dealt with, seen, or heard of defendant before January 3, 2013. According to the victim, defendant was handcuffed behind his back, and Hudson and the victim were each on one side of defendant holding one of his arms while escorting him. The victim testified that defendant was not yelling but that he seemed upset. Hudson testified that defendant made some statements directly to him during the escort. Hudson further testified that defendant made a comment that the officers would not be able to do anything if he assaulted them. The victim testified that they first took defendant to the shower because, before inmates go to the segregation unit, they are strip-searched in the shower to make sure they do not have any contraband. Once they arrived at the shower cell, defendant was placed into the shower cell. The victim testified that the door closed behind defendant and automatically locked.
>
> According to the victim, he turned to walk away after defendant was placed in the shower cell, and defendant "crouched down next to an opening in the wall [known as a 'restraint slot'] and spit through it, hitting [the victim] in the arm." Hudson testified that through his peripheral vision he also saw defendant bend down, spit through the restraint slot, and hit the victim's arm with saliva. The victim, who was wearing a short-sleeved uniform, testified that the saliva landed on his right forearm and pant-leg area and that the saliva "was basically a spit spray." The victim further testified that the saliva was "[n]ot a big wad," did not contain phlegm or blood, and hit a section of him rather than just one spot. According to the victim, it was not possible for the substance on his arm to be water or something else from the shower because he saw defendant spit on him and because there were no other inmates in the shower cell besides defendant.
>
> The victim's supervisor, John Nicewicz, was standing in the vicinity when the incident happened. The victim testified that, as a reaction to being spat on, he walked over and told his supervisor because the supervisor needed to know about misconduct. Nicewicz testified that he was turned away and did not see defendant spit on the victim but that the victim told him that "he just got spat on." According to Nicewicz, the saliva "was basically clear" and "kind of looked like a spray or a mist." Nicewicz further testified that he believed that the substance was spit because the shower was not on and because it did not look like water. The victim testified that he made a written report of the misconduct and that Nicewicz took pictures of the areas containing saliva. Using a digital camera, Nicewicz took pictures of the victim's arm and pant leg, which were admitted at trial.

People v. Richards, 891 N.W.2d 911, 915-16 (Mich. Ct. App. 2016) *rev'd in part* 903 N.W.2d 555 (Mich. 2017). "The facts as recited by the Michigan Court of Appeals are presumed correct on

habeas review pursuant to 28 U.S.C. § 2254(e)(1)." *Shimel v. Warren*, 838 F.3d 685, 688 (6th Cir. 2016) (footnote omitted).

The Michigan Court of Appeals reports that Petitioner filed numerous motions *in pro per* and changed attorneys several times during the pretrial phase of the criminal proceedings. *People v. Richards*, 891 N.W.2d at 916. Petitioner rejected his first appointed counsel and his request for new counsel was granted on April 22, 2014. *Id.* The week scheduled for Petitioner's trial, Petitioner rejected his second counsel and, once again, sought new counsel. At the June 3, 2014 hearing, the trial court asked Petitioner if he wanted to represent himself; Petitioner responded, "No." *Id.* The trial court appointed new counsel.

Petitioner filed a motion to replace his third counsel. On August 12, 2014, the court conducted a hearing on the motion. At the hearing, counsel represented that he and Petitioner had discussed the matter further and that Petitioner was withdrawing the motion.

On October 20, 2014, the Ionia County Circuit Court commenced Petitioner's trial. During *voir dire*, defense counsel informed the court that Petitioner wanted to represent himself. The trial judge refused Petitioner's request:

> [Defendant], I'm going to interrupt you because you are not representing yourself. We have had numerous pretrial motions in this matter and this is now the 3rd attorney who has been appointed to represent you. [Defense counsel] has worked very hard to accommodate your requests and to present those to the Court. The Court finds that your request to represent yourself is untimely. Again, you've had multiple opportunities to present this issue to the Court and so your request to represent yourself is denied here today.

Id. at 917. The trial proceeded and the jury found Petitioner guilty of the charged offense.

The trial court initially sentenced Petitioner to a term of imprisonment of 4 years, 2 months to 40 years. The court selected Petitioner's minimum sentence from within the minimum sentence range provided by the Michigan sentencing guidelines. Petitioner appealed his conviction and sentence. During the pendency of that appeal, Petitioner filed a motion for resentencing in the

trial court based on a scoring error relating to one of the offense variables. The prosecutor conceded the error.

Correction of the error pushed the 4-year, 2-month minimum sentence outside of the guidelines minimum sentence range. The prosecutor, however, argued that the trial court should depart from the guidelines and maintain the 4-year, 2-month minimum. Such a departure was facilitated by intervening changes in the law.

Between the court's initial imposition of sentence and the decision on Petitioner's motion for resentencing, the Michigan Supreme Court issued its decision in *People v. Lockridge*, 870 N.W.2d 502 (2015). The *Lockridge* decision made the previously mandatory Michigan sentencing guidelines discretionary. The trial court judge acknowledged this change and, exercising his discretion, kept Petitioner's minimum sentence at 4 years, 2 months even though that determination represented a departure from the Michigan sentencing guidelines.

Petitioner, through the brief he filed with the assistance of counsel and his *pro per* supplemental brief, raised in the Michigan Court of Appeals the issues he raises in this Court as habeas issues I, II, and III. He also raised an issue regarding his sentence. By opinion issued initially on April 26, 2016, and then approved for publication on June 7, 2016, the Michigan Court of Appeals rejected Petitioner's challenges and affirmed the trial court. *People v. Richards*, 891 N.W.2d 911 (Mich. Ct. App. 2016).

Petitioner, again with the assistance of counsel, filed an application for leave to appeal in the Michigan Supreme Court apparently raising the same issues he had raised in the court of appeals. The supreme court held the application in abeyance pending its decision in two other appeals that might resolve the issues that Petitioner raised with regard to his sentence. *People v. Richards*, 889 N.W.2d 258 (Mich. 2017). After the other appeals were decided, the supreme court

reversed the decision of the court of appeals regarding Petitioner's sentence and remanded the case to the court of appeals for reconsideration in light of the intervening decisions. In all other respects, however, the supreme court denied leave to appeal. *People v. Richards*, 903 N.W.2d 555 (Mich. 2017).

On remand, the Michigan Court of Appeals concluded that the trial court had not adequately explained its reasoning for departing from the guidelines when it resentenced—or, more accurately, did not resentence—Petitioner. *People v. Richards*, No. 325192, 2018 WL 662241 (Mich. Ct. App. Feb. 1, 2018). Accordingly, the appellate court vacated Petitioner's sentence and remanded to the trial court for resentencing. *Id.* On remand, the trial court resentenced Petitioner, abandoning the departure from the guidelines, choosing instead to reduce Petitioner's minimum sentence to 3 years, 10 months, the maximum minimum sentence that still fell within the minimum sentence range provided by the Michigan sentencing guidelines.

Petitioner, with the assistance of counsel, appealed his new sentence in the Michigan Court of Appeals raising three issues, essentially the same issues he raises in his petition as habeas issues IV, V, and VI. While his appeal was pending in the court of appeals, after briefing, but before oral argument, on January 25, 2019, Petitioner filed a habeas petition that raised four of his present six grounds for relief. *Richards v. Lesatz*, No. 2:19-cv-34 (W.D. Mich.) (*Richards I*) (Pet., ECF No. 1, PageID.6-10, 19, 22, 25, 29.) The Court dismissed the petition without prejudice because Petitioner had not exhausted his state court remedies before seeking habeas relief. *Richards I* (Judgment, ECF No. 15, PageID.127.)

A few months after his first petition was dismissed, the court of appeals rejected Petitioner's challenges to his sentence in an unpublished opinion issued July 23, 2019. *People v. Richards*, No. 344161, 2019 WL 3315363 (Mich. Ct. App. Jul. 23, 2019). Petitioner then filed a

court. *See Sumner v. Mata*, 449 U.S. 539, 546 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989).

III. Discussion

A. Self-representation

The Sixth Amendment provides that a criminal defendant shall have the right to the assistance of counsel for his defense. U.S. Const. amend. VI. At issue here is a corollary to that right, the right to self-representation. *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942) ("The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms."). The clearly established federal law regarding self-representation is expressed in two Supreme Court cases: *Faretta v. California*, 422 U.S. 806 (1975), and *Martinez v. Ct. of Appeal of Cal.*, 528 U.S. 152 (2000).

In *Faretta*, the Court found support for the right of self-representation in the structure of the Sixth Amendment right to the assistance of counsel:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.
>
> The counsel provision supplements this design. It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many

> areas. . . . This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

Faretta, 422 U.S. at 819-821 (footnotes and citations omitted).

Although the Court recognized a criminal defendant's right to self-representation, it acknowledged that the right was a qualified one. The Constitutional mandate to provide counsel to a criminal defendant is premised upon the fact that "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Id.* at 834. Because a criminal defendant representing himself relinquishes that benefit, his waiver must be "'knowingly and intelligently'" made. *Id.* at 835. Moreover, the right to self-representation must yield to "'the dignity of the courtroom.'" Id. at 834 n.46. It is not a license to ignore the rules of procedure or engage in "obstructionist misconduct." *Id.*

In *Martinez*, 528 U.S. at 152, the Supreme Court concluded that the right of self-representation did not extend to appeals. In reaching its conclusion, the Supreme Court commented on the scope of the right of self-representation established in *Faretta*, stating:

> As the *Faretta* opinion recognized, the right to self-representation is not absolute. The defendant must "'voluntarily and intelligently'" elect to conduct his own defense, and most courts require him to do so in a timely manner. He must first be "made aware of the dangers and disadvantages of self-representation." A trial judge may also terminate self-representation or appoint "standby counsel"—even over the defendant's objection—if necessary. We have further held that standby counsel may participate in the trial proceedings, even without the express consent of the defendant, as long as that participation does not "seriously undermin[e]" the "appearance before the jury" that the defendant is representing himself. Additionally, the trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal "chores" for the defendant that counsel would normally carry out. Even at the trial level, therefore, the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.

Martinez, 528 U.S. at 161-162 (citations and footnote omitted).

The court of appeals specifically referenced *Faretta* and *Martinez* in evaluating the trial court's rejection of Petitioner's request to represent himself. Additionally, the appellate court relied on *People v. Russell*, 684 N.W.2d 745 (Mich. 2004). *Russell*, in turn, relied on *People v. Anderson*, 247 N.W.2d 857 (Mich. 1976). In *Anderson*, the Michigan Supreme Court established three requirements that must be met before a criminal defendant in Michigan can proceed *pro se*:

> First, the request must be unequivocal . . . . Second, once the defendant has unequivocally declared his desire to proceed Pro se the trial court must determine whether defendant is asserting his right knowingly, intelligently and voluntarily. . . . The third and final requirement is that the trial judge determine that the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business.

Anderson, 247 N.W.2d at 859-860. The *Anderson* court, however, drew its three requirements directly from the circumstances that swayed the *Faretta* court to recognize the right of self-representation. *Id.* at 859 ("[T]he [*Faretta*] Court carefully noted the circumstances under which Faretta was deprived of his constitutional right to conduct his own defense. The circumstances, affirmatively shown by the record, involved a clear and unequivocal request, weeks before trial, by a literate, competent, and understanding individual.") Thus, considering Petitioner's request for self-representation under *Russell* or *Anderson* is consistent with, and not contrary to, clearly established federal law.

The trial court concluded that the morning of trial was simply too late to accommodate Petitioner's request to represent himself. Accordingly, the trial court denied Petitioner's requests. The trial court's consideration of the timeliness of Petitioner's requests and concern regarding the delay that would follow from granting them is in no way contrary to clearly established federal law. In *Hill v. Curtin*, 792 F.3d 670 (2015) (*en banc*), the Sixth Circuit explained:

> *Faretta* did not establish a bright-line rule for timeliness. Its holding does, however, necessarily incorporate a loose timing element. The *Faretta* Court explicitly stated that the defendant's request was "[w]ell before the date of trial," and "weeks before trial." It then held, "[i]n forcing Faretta, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense." Thus, to the extent that *Faretta* addresses timeliness, as a matter of clearly established law it can only be read to require a court to grant a self-representation request when the request occurs weeks before trial.
>
> Beyond this loose limit, the *Faretta* Court did not address timeliness .... Although lower courts have since established rules regarding when a defendant must assert his right, ... the Supreme Court has never defined the precise contours of *Faretta*'s timing element. Nor did the Supreme Court announce any clearly established law on timeliness in *Martinez*. ... Given the general standard articulated in *Faretta*, "a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard."

Hill, 792 F.3d at 678-79 (citations omitted, emphasis in original).

The *Hill* court reasoned further that "[a] trial judge may fairly infer on the day of trial—as the jurors are on their way to the courtroom—that a defendant's last-minute decision to represent himself would cause delay, whether or not the defendant requests a continuance." *Hill*, 792 F.3d at 162; *see also Jones v. Bell*, 801 F.3d 556, 564-65 (6th Cir. 2015) ("'[A]s a matter of clearly established law[, *Faretta*] can only be read to require a court to grant a self-representation request when the request occurs *weeks before trial*'—not on the morning of trial. The trial court's decision here was therefore not 'contrary to' *Faretta*'s holding, because Jones's request was made on the *first day* of trial, as opposed to weeks before trial.") (emphasis in original, citations omitted); *Walter v. Kelly*, 653 F. App'x 378, 386 (6th Cir. 2016) ("Courts have consistently held that requests made during or on the eve of trial are not timely."); *Floyd v. Haas*, No. 17-1295, 2017 WL 4182096, at *2 (6th Cir. Sept. 13, 2017) ("'[A] trial judge may fairly infer on the day of trial ... that a defendant's last-minute decision to represent himself would cause delay,' and that such an inference is a reasonable basis on which to deny the request.") (citation omitted); *Hopson v. Gray*, No. 19-3709, 2019 WL 7757815, at *2 (6th Cir. Dec. 27, 2019) ("Hopson did

not . . . indicate any desire to proceed pro se until [the trial] began . . . . 'A trial judge may fairly infer on the day of trial . . . that a defendant's last-minute decision to represent himself would cause delay.'") (citation omitted).

In light of the latitude afforded to state courts in determining the timeliness of a self-representation request, denial of such a request on the morning of trial[1] is certainly not contrary to or an unreasonable application of clearly established federal law. Accordingly, Petitioner is not entitled to habeas relief on his claim that the trial court should have permitted Petitioner to represent himself.

B. Destruction of evidence

Petitioner next contends that his due process rights were violated by the destruction of evidence. Petitioner complains that after the alleged spitting incident the victim wiped off his arm with a rag, disposed of the rag, and eventually washed the clothing that might have included spittle. As a result, Petitioner was left with no physical evidence to test and disprove the victim's accusation.

The clearly established federal law governing Petitioner's claim is set forth *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988), where the Court stated:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady* [*v. Maryland*, 373 U.S. 83(1963)], makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in [*California v.*] *Trombetta, supra*, 467 U.S., at 486, that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents

[1] Petitioner contends that his request for self-representation was made known to the trial judge in chambers before trial. There is no support in the record for Petitioner's contention. Accordingly, the trial court's determination and the court of appeals' determination that Petitioner's request was presented for the first time at trial is reasonable on the record.

> are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause, *see Lisenba v. California*, 314 U.S. 219, 236 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Youngblood, 488 U.S. at 57-58. The Court explained the meaning of bad faith as well. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 56, n.*.

The Michigan Court of Appeals expressly applied the *Youngblood* standard in rejecting Petitioner's due process claim. The appellate court concluded that Petitioner had failed to show either that the evidence was exculpatory or that the victim acted in bad faith when he "destroyed" the evidence by cleaning himself and his clothes:

> In this case, defendant failed to demonstrate that the evidence was exculpatory, as opposed to potentially exculpatory. The evidence would only be exculpatory if subject to tests that yielded favorable results. Defendant argues that the substance on the victim's arm was exculpatory because, if the substance had been preserved, testing could have ruled out defendant as a source or shown that the substance was water instead of saliva. While defendant testified that he did not spit at anyone and that water from the showerhead could have splattered off the floor and through the restraint slot, testimony from the corrections officers and police strongly supported that defendant spat on the victim. The victim testified that the substance on his arm was not water because he saw defendant spit on him. Hudson testified that the shower cell was a confined space, that defendant was the only inmate in the shower cell, and that he saw defendant spit on the victim. Hudson testified that the shower was off. Further, according to Nicewicz, the victim reacted and said that "he just got spat on." In addition, there was testimony that the saliva was "spit spray" and was "[n]ot a big wad," and, as the trial court alluded to, the sample may not have been able to be collected. For these reasons, defendant has shown only that the evidence was potentially exculpatory. *Id.* Therefore, defendant had to show bad

faith with respect to the failure to preserve. *Hanks*, 276 Mich.App. at 95, 740 N.W.2d 530.

With respect to bad faith, there is no indication on the record that the victim washed his arm off in bad faith. While defendant argues that the victim knowingly and intentionally destroyed the evidence and that not preserving evidence of misconduct violated the prison operating procedures, testimony was presented regarding what steps should be taken, in accordance with the operating procedures, to collect evidence in a case such as this one:

> We photograph it to maintain the evidence to show, in this case, in a courtroom what has happened and then we encourage the employees to clean quickly afterwards. Prisons have people with communicable diseases and there's a concern of getting it washed off as quickly as possible.

Further testimony revealed that the prison was not equipped to scrape saliva off one's arm and put it in a test tube for DNA purposes. The victim testified that he saw defendant spit on him, that he informed his supervisor, that he made a report of the misconduct, that he waited for his arm to be photographed, and that he washed his arm off with soap and water after the pictures were taken. The record simply does not support the assertion that the victim washed the saliva off his arm in bad faith. See *United States v. Garza*, 435 F.3d 73, 75 (C.A.1, 2006) (explaining that "conscious and deliberate" actions were not enough to show bad faith and that "[e]ven if, as found by the district court, [the police officer's] actions were 'short-sighted and even negligent,' this does not satisfy the requirement of bad faith"). See also *Johnson*, 197 Mich.App. at 365, 494 N.W.2d 873 (explaining that "the routine destruction of taped police broadcasts, where the purpose is not to destroy evidence for a forthcoming trial, does not mandate reversal").

In sum, because defendant has not met his burden of establishing that "the evidence was exculpatory or that the police acted in bad faith," *id.*, defendant's due-process claim based on the destruction of evidence is without merit [citation omitted].

People v. Richards, 891 N.W.2d at 922-23.

Because the court of appeals relied expressly on the *Youngblood* standard, Petitioner cannot show that the court's decision was "contrary to" clearly established federal law. Moreover, Petitioner has failed to show that the court of appeals unreasonably applied the standard. He has not identified any federal authority, much less clearly established federal law, that reached a different result on materially indistinguishable facts.

The Michigan Court of Appeals application of the *Youngblood* standard was eminently reasonable. The record, even as it is described by Petitioner, simply does not support a determination that the victim, the police, or the prosecutor knew that the "potentially useful" evidence was exculpatory. Accordingly, Petitioner is not entitled to habeas relief on this claim.

C. Habitual offender enhancement

Petitioner next complains that the prosecutor failed to comply with the requirements for obtaining the habitual offender enhancement under Mich. Comp. Laws § 769.12. That enhancement was of particular significance because it increased Petitioner's maximum minimum sentence and increased his maximum sentence from 5 years to, potentially, life and actually, 40 years.

Petitioner notes that Mich. Comp. Laws § 769.13 governs the timing of notice of the prosecutor's intent to seek a habitual offender enhancement. He contends that the time for notice runs from arraignment. Petitioner claims that he did not receive the required notice until almost a year after he was arraigned. Petitioner cites state authorities for the proposition that violation of the statutory notice rules constitute a due process violation.

The Michigan Court of Appeals rejected Petitioner's claim. The appellate court explained that the arraignment that triggers the habitual offender enhancement notice is the "circuit court" arraignment—which in Petitioner's case occurred in February of 2014—not the arraignment on the warrant and complaint that occurred in April of 2013. Using the "circuit court" arraignment date, the appellate court determined that the prosecutor's habitual offender enhancement notice was timely.

"[A] federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'" *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (quoting 28 U.S.C. § 2254(a)). A habeas petition must "state facts

that point to a 'real possibility of constitutional error.'" *Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977) (quoting Advisory Committee Notes on Rule 4, Rules Governing Habeas Corpus Cases). The federal courts have no power to intervene on the basis of a perceived error of state law. *Wilson*, 562 U.S. at 5; *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Pulley v. Harris*, 465 U.S. 37, 41 (1984).

Petitioner's claim that he did not receive notice that complied with the Michigan habitual offender statute is a state-law claim. Moreover, it is a state-law claim that the state courts rejected. It is not the province of a federal habeas court to re-examine state-law determinations on state-law questions. *Bradshaw*, 546 U.S. at 76; *Estelle*, 502 U.S. at 68 (1991). The decision of the state courts on a state-law issue is binding on a federal court. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983). Therefore, the state court's rejection of Petitioner's claim as meritless—effectively a determination that the prosecutor's notice here complied with the statute—binds this Court.

Although the prosecutor's compliance with the Michigan statute, a state-law issue, is conclusively resolved, the issue of constitutionally adequate notice remains. The Due Process Clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him so as to provide him an adequate opportunity to prepare his defense. *See, e.g., In re Ruffalo*, 390 U.S. 544 (1968); *Blake v. Morford*, 563 F.2d 248 (6th Cir. 1977); *Watson v. Jago*, 558 F.2d 330, 338 (6th Cir. 1977). This requires that the offense be described with some precision and certainty so as to apprise the accused of the crime with which he stands charged. *Combs v. State of Tennessee*, 530 F.2d 695, 698 (6th Cir. 1976). Such definiteness and certainty are required as will enable a presumptively innocent man to prepare for trial. *Id.* "Beyond notice, a claimed deficiency in a state criminal indictment

is not cognizable on federal collateral review." *Roe v. Baker*, 316 F.3d 557, 570 (6th Cir. 2002) (quoting *Mira v. Marshall*, 806 F.2d 636, 639 (6th Cir. 1986)). "An indictment which fairly but imperfectly informs the accused of the offense for which he is to be tried does not give rise to a constitutional issue cognizable in habeas proceedings." *Mira*, 806 F.2d at 639. In other words, as long as "sufficient notice of the charges is given in some . . . manner" so that the accused may adequately prepare a defense, the Fourteenth Amendment's Due Process Clause is satisfied. *Koontz v. Glossa*, 731 F.2d 365, 369 (6th Cir. 1984); *Watson*, 558 F.2d at 338.

Petitioner cannot legitimately claim that he did not receive notice sufficient to permit him to defend against the habitual offender "charge" in this case. He acknowledges that he received the habitual offender notice in February of 2014, eight months before his trial. He does not contend that the notice was insufficient to permit him to adequately prepare a defense. Therefore, his claim does not implicate his due process notice rights.

Petitioner's base claim that the prosecutor failed to comply with the state statutory notice requirements to obtain a habitual offender sentence enhancement is a state-law claim not cognizable on habeas review. Moreover, the state appellate court's determination that Petitioner's state-law claim is meritless binds this court. Petitioner acknowledges receiving the statutory notice many months before his trial and does not contend that the notice he received was inadequate to permit him to prepare a defense. Accordingly, Petitioner has failed to show that the appellate court's rejection of his claim is contrary to, or an unreasonable application of, clearly established federal law, and he is not entitled to habeas relief on this claim.

D. Petitioner's term of years sentence

Finally, Petitioner challenges his sentence of 3 years, 10 months to 40 years. He contends the sentence is not proportionate to the offense or the offender, that selecting the maximum possible minimum sentence is cruel and unusual for an offender with serious mental

health problems, and that selecting a 40-year maximum sentence is cruel and unusual for an offender with Asperger's syndrome.

Petitioner's argument regarding proportionality is based on the proportionality requirement set forth in *People v. Milbourn*, 461 N.W.2d 1 (Mich. 1990). Arguing that a sentence is disproportionate under *Milbourn*, 461 N.W.2d. 1, fails to raise a cognizable habeas claim. In *Milbourn*, the court held that a sentencing court must exercise its discretion within the bounds of Michigan's legislatively prescribed sentence range and pursuant to the intent of Michigan's legislative scheme of dispensing punishment according to the nature of the offense and the background of the offender. *Milbourn*, 461 N.W.2d at 9-10; *People v. Babcock*, 666 N.W.2d 231, 236 (Mich. 2003). It is plain that *Milbourn* was decided under state, not federal, principles. *See Lunsford v. Hofbauer*, No. 94-2128, 1995 WL 236677, at * 2 (6th Cir. Apr. 21, 1995); *Atkins v. Overton*, 843 F. Supp. 258, 260 (E.D. Mich. 1994). As previously discussed, a federal court may grant habeas relief solely on the basis of federal law and has no power to intervene on the basis of a perceived error of state law. *Bradshaw*, 546 U.S.at 76; *Pulley*, 465 U.S. at 41. Thus, Petitioner's claim based on *Milbourn* is not cognizable in a habeas corpus action.

The United States Constitution does not require strict proportionality between a crime and its punishment. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991); *United States v. Marks*, 209 F.3d 577, 583 (6th Cir. 2000). "Consequently, only an extreme disparity between crime and sentence offends the Eighth Amendment." *Marks*, 209 F.3d at 583; *see also Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (gross disproportionality principle applies only in the extraordinary case); *Ewing v. California*, 538 U.S. 11, 36 (2003) (principle applies only in "'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality'") (quoting *Rummel v. Estelle*, 445 U.S. 263, 285

(1980)). A sentence that falls within the maximum penalty authorized by statute "generally does not constitute 'cruel and unusual punishment.'" *Austin v. Jackson*, 213 F.3d 298, 302 (6th Cir. 2000) (quoting *United States v. Organek*, 65 F.3d 60, 62 (6th Cir. 1995)). Ordinarily, "[f]ederal courts will not engage in a proportionality analysis except in cases where the penalty imposed is death or life in prison without possibility of parole." *United States v. Thomas*, 49 F.3d 253, 261 (6th Cir. 1995).

Petitioner was not sentenced to death or life in prison without the possibility of parole, and his sentence falls within the maximum penalty under state law. Petitioner's sentence does not present the extraordinary case that runs afoul of the Eighth Amendment's ban of cruel and unusual punishment. The appellate court's rejection of Petitioner's claims regarding proportionality and cruel and unusual punishment, therefore, are neither contrary to, nor an unreasonable application of, clearly established federal law. Petitioner is not entitled to habeas relief on his claims regarding his sentence.

IV. Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (per curiam). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, this Court has examined each of Petitioner's claims under the *Slack* standard. Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, "[t]he petitioner must

demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating 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). In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of Petitioner's claims. *Id.*

The Court finds that reasonable jurists could not conclude that this Court's dismissal of Petitioner's claims was debatable or wrong. Therefore, the Court will deny Petitioner a certificate of appealability. Moreover, although Petitioner has failed to demonstrate that he is in custody in violation of the Constitution and has failed to make a substantial showing of the denial of a constitutional right, the Court does not conclude that any issue Petitioner might raise on appeal would be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

Conclusion

The Court will enter a judgment dismissing the petition and an order denying a certificate of appealability.

Dated: March 31, 2020

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

Certified as a True Copy
By D. Packard
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date 4/1/2020

(Appendix F)

Petitioner mental health reports,
Proof of Diagnostic History,
PTSD, Autism, PDD, ect...

HAVENWYCK HOSPITAL
1525 University Drive
Auburn Hills, Michigan 48326

Richards, Kyle
Ismail B. Sendi, MD
MR#: 020015
AD: 03/14/05
DD: 03/16/05

PROGNOSIS: Fair-to-guarded.

FINAL DIAGNOSES:

Axis I: Pervasive Developmental Disorder.
Psychosis NOS.
Cognitive Perceptual Sensory Motor Deficit.
Axis II: Deferred.
Axis III: Healthy.
Axis IV: Severe.
Axis V: GAF: On admission 25-30 and on discharge 42.

Ismail B. Sendi, M.D.

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DICTATION DATE AND TIME: 03/27/05 02:25 PM

TRANSCRIPTION DATE AND TIME: 03/28/05 06:30 AM

EXHIBIT A

HAVENWYCK HOSPITAL
1525 University Drive
Auburn Hills, Michigan 48326

Richards, Kyle
Mamoun Dabbagh, M.D.
MR#: 020015
AD: 03/03/05
DD: 03/08/05

The patient is alert and oriented, affect is brighter, and doing fair overall. Zoloft is changed to Effexor 37.5 mg q.d. and then increased to 37.5 mg b.i.d. There are no side effects noted from the medications. The patient is alert and oriented. Affect is brighter. He is more within normal limits in terms of his mood. He denies suicidal or homicidal ideation. There is no aggression.

RECOMMENDATIONS: The patient is discharged with the following recommendations: The patient will follow up with his primary care physician for all medical concerns and will be seen on an outpatient basis by Dr. Sendi and Dr. Bob Baringer for home based treatment.

DISCHARGE MEDICATIONS: Medications at the time of discharge are Adderall XR 30 mg q.a.m., Effexor XR 75 mg a.m., Lamictal 25 mg a.m. and h.s., and Abilify 20 mg h.s.

PROGNOSIS: Fair.

FINAL DIAGNOSES:

AXIS I: Major Depressive Disorder, Recurrent.
Attention Deficit Disorder.
Oppositional Defiant Disorder.
AXIS II: None.
AXIS III: None.
AXIS IV: Moderate.
AXIS V: GAF on Admission 25 and on Discharge 35.

Mamoun Dabbagh, M.D.

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DICTATION DATE AND TIME: 03/26/05 02:24 PM

TRANSCRIPTION DATE AND TIME: 03/27/05 06:20 AM

HAVENWYCK HOSPITAL
1525 University Drive
Auburn Hills, Michigan 48326

Richards, Kyle
Mamoun Dabbagh, M.D.
MR#: 020015
AD: 03/03/05
DD: 03/08/05

CASE SUMMARY

DISCHARGE SUMMARY AND AFTERCARE PLAN

RESULTS OF ASSESSMENTS AND SIGNIFICANT FINDINGS:

a. **History, Physical and Neurological Examination:** Performed by Dr. Kingsley Thomas. His impression is laceration to the left side of face. He recommends proper skin hygiene, psychotherapy, diet for age, participation in gym, and follow up with primary care physician.

b. **Psychological Testing:** Not indicated.

c. **Laboratory Testing:** Urine drug screen is positive for amphetamines. Blood chemistry profile and thyroid profile are within normal limits. A VDRL is nonreactive. Urinalysis shows moderate amount of calcium oxalate crystals. A complete blood count and differential shows a low white blood cell count of 4.0.

d. **Activities:** The patient is to attend individual and group psychotherapy, school classes, and other age-appropriate milieu activities.

CLINICAL COURSE: The patient is a 15-year-old white male brought to the hospital accompanied by his parents with anger outburst, extreme oppositionality, walk out the classroom at school and left, scratching himself until he bleeds, biting his wrist, punching his mother's truck, having difficulty sleeping at night, and refusing to go to school. He is in outpatient treatment on Lamictal, Abilify, and Adderall. For additional information, please refer to the admission note.

The patient was initially placed on Lamictal 25 mg q.d., Abilify 15 mg h.s., and Adderall XL 30 mg a.m. There are no side effects noted from the medications. He is overactive, hyperactive, agitated and irritable with mood swings. He was given Lamictal 25 mg a.m. and h.s. , Abilify 20 mg h.s., and Zoloft 25 mg a.m.

HAVENWYCK HOSPITAL
1525 University Drive
Auburn Hills, Michigan 48326

Richards, Kyle
Ismail B. Sendi, MD
MR#: 020015
AD: 03/14/05
DD: 03/16/05

CASE SUMMARY

DISCHARGE SUMMARY AND AFTERCARE PLAN

RESULTS OF ASSESSMENTS AND SIGNIFICANT FINDINGS:

a. **History, Physical and Neurological Examination:** Done in a previous admission. Please refer to the chart for details.

b. **Psychological Testing:** Not indicated.

c. **Laboratory Testing:** Urine drug screen is positive for amphetamines.

d. **Activities:** The patient is to attend individual and group psychotherapy, school classes, and other age-appropriate milieu activities.

CLINICAL COURSE: The patient is a 15-year-old male brought to the hospital after threatening to hurt himself with the knife and arguing with his father. He is very oppositional. The police had to be called. The patient is most recently on Adderall, Lamictal, and Abilify. For additional information, please refer to the admission note.

The patient was initially placed on Adderall XR 50 mg a.m. and increased dose of Lamictal to 50 mg b.i.d., and Abilify 5 mg b.i.d. On the unit the patient is very structured responsive. He is not a problem on the unit. There is no suicidal or homicidal ideation. There is no aggression. Social worker met with the patient and father. Confirmed the patient lack of participation and motivation for treatment. The patient is easily frustrated. The patient denies suicidal or homicidal ideation.

RECOMMENDATIONS: The patient is discharged with the following recommendations: The patient will follow up with primary care physician for all medical concerns. Continue with myself on an outpatient basis and Bob Baringer. He will also be referred to behavioral care management for in-home treatment.

MEDICATIONS ON DISCHARGE: Medications at the time of discharge are Abilify 5 mg b.i.d., Lamictal 50 mg b.i.d, Adderall XR 15 mg a.m.