APPENDIX TO PETITION

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APPENDIX - 1

Michigan Court Of Appeals Judgement

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOVON CHARLES DAVIS,

Defendant-Appellant.

UNPUBLISHED
March 22, 2016

No. 320773
Berrien Circuit Court
LC No. 2013-000303-FC

Before: O'CONNELL, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; assault with intent to commit murder, MCL 750.83; felon-in-possession of a firearm, MCL 750.224f; carrying a concealed weapon, MCL 750.227; possession of a firearm during the commission of a felony, MCL 750.227b; and domestic assault third offense, MCL 750.81(4). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of imprisonment of 600 months to 100 years for the murder conviction, 300 to 900 months for the assault conviction, 76 to 240 months for the felon-in-possession and carrying a concealed weapon convictions, and 46 to 180 months for the domestic assault conviction, preceded by two years for the felony-firearm conviction. Defendant appeals by right. We affirm defendant's convictions but remand for correction of the judgment of sentence to reflect that the sentence for carrying a concealed weapon is concurrent with the felony-firearm sentence.

Defendant's convictions arise out of the murder of Gary Alilovich and the assault of Heather Britt on January 18, 2013, at the house of Crystal McKenzie in Benton Harbor.

Defendant first argues that the trial court either erred in allowing the late endorsement of Robert Jones, who testified about statements that defendant made to him after defendant was placed in the same jail block as he, or for refusing to grant a continuance so that he could have time to prepare to challenge Jones's testimony. The trial court denied defendant's request for an adjournment. Thus, the issue whether the trial court erred in not adjourning trial as a remedy for the late endorsement is preserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). But, because defendant never argued that the late endorsement was not supported by good cause, that issue is unpreserved. *Id.* We generally review a trial court's decision to permit the late endorsement of a witness for an abuse of discretion. *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003). A trial court abuses its discretion when its

decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). A trial court's decision on a motion for an adjournment is generally reviewed for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). We review unpreserved claims of error, however, for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At least 30 days before trial, the prosecutor must send to defendant or defense counsel a list of the witnesses that she intends to produce at trial. MCR 767.40a(3). The prosecutor may add or delete witnesses from this list "at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4).

The prosecutor did not learn about Jones and the possibility of his testifying until four days before trial. She sent a detective to interview Jones, and it was not until the day before trial that the prosecutor learned the details of Jones's proposed testimony. The late discovery of Jones provided good cause for the late endorsement. *People v Gadomski*, 232 Mich App 24, 37; 592 NW2d 75 (1998); *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992).

"Ordinarily, late endorsement should be permitted and a continuance granted to obviate potential prejudice that might result. All that is necessary is that the objecting party have time to interview the witness before he is called to testify, and to investigate facts bearing on his credibility, when appropriate." *People v Harrison*, 44 Mich App 578, 586; 205 NW2d 900 (1973) (internal citations omitted). The prosecutor agreed not to call Jones as a witness until the end of trial, and there was no dispute that trial would last several days. Accordingly, defendant had the opportunity to interview Jones. This opportunity obviated any potential prejudice that might result from the late endorsement. *Id.*; see also *People v Lino*, 213 Mich App 89, 92-93; 539 NW2d 545 (1995), overruled on other grounds *People v Carson*, 220 Mich App 662 (1996). The trial court's decision to deny an adjournment fell within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Defendant next argues that the trial court erred when it ordered that his sentence for carrying a concealed weapon run consecutively to his sentence for felony-firearm. The prosecutor concedes error, and we agree: A conviction for carrying a concealed weapon, MCL 750.227, will not support a felony-firearm conviction, and thus cannot be ordered served consecutively to a felony-firearm sentence. See MCL 750.227b(3); *People v Bonham*, 182 Mich App 130, 137; 451 NW2d 530 (1989). We remand for correction of the judgment of sentence.

In a Standard 4 brief and in a supplemental Standard 4 brief, defendant argues that the trial court improperly denied him copies of transcripts and court records. A trial court's obligation to provide an indigent defendant with transcripts and court documents depends on whether the transcripts and documents are desired to pursue an appeal of right, an appeal by leave, or other post-conviction relief. MCR 6.433; *People v Caston*, 228 Mich App 291, 294; 579 NW2d 368 (1998). The present case involves an appeal by right. Thus, MCR 6.433(A) applies, and it provides:

> An indigent defendant may file a written request with the sentencing court for specified court documents or transcripts, indicating that they are required to

pursue an appeal of right. The court must order the clerk to provide the defendant with copies of documents without cost to the defendant, and, unless the transcript has already been ordered as provided in MCR 6.425, must order the preparation of the transcript.

After he was sentenced, defendant filed an affidavit of indigency and requested the appointment of appellate counsel. The trial court appointed appellate counsel for defendant. An appointment order must direct the court reporter to prepare and file the trial transcripts, the sentencing transcript, and transcripts of other proceedings that the court directs or the parties request. MCR 6.425(G)(2). "If the appointed lawyer timely requests additional transcripts, the trial court shall order such transcripts within 14 days after receiving the request." *Id.* Taken together, MCR 6.425(G)(2) and MCR 6.433(A) indicate that once a transcript has been provided to appellate counsel, the defendant is not entitled to additional copies of the transcript.

Appellate counsel requested a copy of each transcript. There is no claim that appellate counsel's request was not fulfilled. Thus, under the court rules, defendant was not entitled to his own copy of the transcripts. Additionally, in the court record, there is no written request filed by defendant for documents that are in the court record. Absent such a request, the trial court had no duty to give copies of any court documents to defendant. See MCR 6.433(A). Defendant was not improperly denied access to transcripts and court records.

Also in his Standard 4 brief and supplemental Standard 4 brief, defendant argues that the trial court erred in denying his motion for an adjournment after he retained counsel and that the denial of the adjournment resulted in a violation of his right to be represented by counsel of his own choice. We review a trial court's decision on a motion for an adjournment for abuse of discretion, *Coy*, 258 Mich App at 17, and review constitutional issues de novo, *Callon*, 256 Mich App at 315.

An adjournment must be based on good cause. *Coy*, 258 Mich App at 18. Factors to consider whether good cause exists include " 'whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.' " *Id.* (citation omitted). The Sixth Amendment right to counsel guarantees a defendant, who does not require appointed counsel, the right to choose who will represent him. *United States v Gonzalez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006).

When a defendant seeks an adjournment to retain or replace counsel, a trial court must carefully balance the defendant's right to counsel of his own choice against the public's interest in the orderly administration of justice. *United States v Burton*, 584 F2d 485, 489 (DC Cir, 1978). A key consideration to the right of counsel is a reasonable opportunity to employ and consult with counsel. See *United States v Johnston*, 318 F2d 288, 291 (CA 6, 1963) ("But if a defendant in a criminal case desires to hire his own counsel, in order that the object of the Sixth Amendment be met, such defendant must have fair opportunity and reasonable time to employ counsel of his own choosing."). "Once a fair and reasonable initial opportunity to retain counsel has been provided, and adequate counsel obtained, the court, mindful of the accused's interest in having counsel in whom he has confidence, is free to deny a continuance to obtain additional

counsel if, upon evaluation of the totality of the circumstances, it reasonably concludes that the delay would be unreasonable in the context of the particular case." *Burton*, 584 F2d at 490.

> What is a reasonable delay necessarily depends on all the surrounding facts and circumstances. Some of the factors to be considered in the balance include: the length of the requested delay; whether other continuances have been requested and granted; the balanced convenience or inconvenience to the litigants, witnesses, counsel, and the court; whether the requested delay is for legitimate reasons, or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstances which gives rise to the request for a continuance; whether the defendant has other competent counsel prepared to try the case, including the consideration of whether the other counsel was retained as lead or associate counsel; whether denying the continuance will result in identifiable prejudice to defendant's case, and if so, whether this prejudice is of a material or substantial nature; the complexity of the case; and other relevant factors which may appear in the context of any particular case. [*Id.* at 490-491 (footnotes and citations omitted).]

The trial court's denial of defendant's request for an adjournment did not deny defendant a fair opportunity and reasonable time to retain counsel of his own choice. Defendant was arraigned on January 22, 2013, but he did not retain counsel until just before the trial that began January 14, 2014. Additionally, trial had already been adjourned twice. The second adjournment was because the trial court granted defendant's request to remove his first appointed counsel. Notably, defendant did not seek retained counsel after his first attorney withdrew. He waited seven weeks, until the eve of trial. Retained counsel then requested an adjournment of at least four months even though the case did not present any complex issues. While defendant did not want his appointed replacement defense counsel to represent him, he made no specific claim that this counsel was unprepared, incompetent to try the case, or that he and counsel had irreconcilable differences. Under these circumstances, the trial court's denial of an adjournment fell within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217. Defendant was not denied his Sixth Amendment right to be represented by an attorney of his choice.

Defendant argues in his Standard 4 brief that he was denied effective assistance of counsel because defense counsel only had "mere weeks" to prepare for trial. In *United States v Cronic*, 466 US 648, 658-662; 104 S Ct 2039; 80 L Ed 2d 657 (1984), the United States Supreme Court identified three "rare" situations in which counsel's performance is so deficient that prejudice is presumed. One of these situations is where counsel is called upon to render assistance under circumstances where competent counsel very likely could not. *People v Frazier*, 478 Mich 231, 243 n 10; 733 NW2d 713 (2007). Circumstances "may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate . . . ." *Cronic*, 466 US at 659.

Defense counsel represented defendant for at least seven weeks before trial began. In *Cronic*, 466 US at 663-665, the Supreme Court held that the defendant was not entitled to a presumption of prejudice where counsel represented the defendant for a shorter amount of time.

Additionally, defendant has not identified any circumstances that would likely have prohibited any attorney, even a fully competent one, from providing effective assistance of counsel. *Cronic*, 466 US at 658-662. Defendant's claim that he was denied effective assistance of counsel based on the length of defense counsel's representation is without merit.

Additionally, defendant argues in his Standard 4 brief that based on defense counsel's actual performance, he was denied effective assistance of counsel. To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

Defendant claims that defense counsel was ineffective because he failed to object to Jones's testimony as a violation of defendant's Sixth Amendment right to counsel. In *Massiah v United States*, 377 US 201, 206; 84 S Ct 1199; 12 L Ed 2d 246 (1964), the United States Supreme Court held that "once a defendant's Sixth Amendment right to counsel has attached, he is denied that right when federal agents deliberately elicit incriminating statements from him in the absence of his lawyer." *Kuhlmann v Wilson*, 477 US 436, 457; 106 S Ct 2616; 91 L Ed 2d 364 (1986). The concern of *Massiah* and a subsequent line of cases "is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Id.* at 459. "[A] defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Id.*

Jones testified that he came into contact with defendant after defendant was moved into the same jail block as he. There is no record evidence to indicate that the police purposely placed defendant in the same block as Jones or that the police and Jones had worked out a plan to gain incriminating statements from defendant. Nothing on the record refutes that Jones, on his own and without any instruction or encouragement from the police, brought defendant's statements to the attention of the prosecutor and police. So, an objection to Jones's testimony on the basis that it violated defendant's Sixth Amendment right to counsel would have been futile; failing to assert a futile objection is not ineffective assistance. *Unger*, 278 Mich App at 256.

Defendant also claims that defense counsel was ineffective because he failed to conduct an investigation, to impeach witnesses, to contact experts in self-defense and forensic pathology, to hire a private investigator, and to call character and alibi witnesses. These claims, to be successful, required a testimonial record. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Although the trial court held an evidentiary hearing on defendant's motion for a new trial, defendant wrote and submitted his Standard 4 brief before the hearing was held. In that brief, defendant leaves it to this Court to search for a factual basis to sustain his claims. As such,

the claims are abandoned. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008).[1] We have nevertheless reviewed them and find them to be without merit.

Defendant next argues in his Standard 4 brief that he was denied due process and a fair trial by misconduct of the police and the prosecutor. We review these unpreserved claims of error for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

There is no merit to defendant's claim that he was denied due process because the police and the prosecutor failed to conduct a gunpowder residue test or failed to interview witnesses who would have provided evidence that he was not the perpetrator. We have previously held that because the police are not required to seek and find exculpatory evidence, a defendant is not denied due process when the police fail to test the defendant's hands for gunpowder residue. *People v Miller*, 211 Mich App 30, 43; 535 NW2d 518 (1995). Moreover, defendant bore the burden of furnishing the Court with a record to verify the factual basis of any argument. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Nothing in the record indicates that any witness who had knowledge of the events on January 18, 2013, was not interviewed.

Defendant's next claim, that he was denied due process because the prosecutor failed to correct inconsistent or changed statements of witnesses, is abandoned. Defendant does not identify the alleged inconsistent or changed statements, nor does he state the witnesses who gave them. See *Petri*, 279 Mich App at 413 (holding an appellate court need not consider arguments unsupported by citations to the record). We additionally reject defendant's argument that he was denied due process because the prosecutor or the police coerced McKenzie into giving false testimony. There is no record evidence of any acts of intimidation by the police or the prosecutor. See *Elston*, 462 Mich at 762. We also reject defendant's argument that the prosecutor's use of other acts evidence denied him due process and a fair trial. No evidence of other acts by defendant was admitted at trial.[2]

Next, in his Standard 4 brief, defendant argues that he is entitled to a new trial because the trial court was biased against him. Because defendant never moved to disqualify the trial court from presiding over his trial, the issue is unpreserved. *People v Mixon*, 170 Mich App 508, 514; 429 NW2d 197 (1988), rev'd in part on other grounds 433 Mich 852 (1989). Our review is therefore limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Due process requires an unbiased and impartial decision-maker. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). A judge is not impartial when the

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[1] Because defendant fails to establish that defense counsel's performance, in any manner, was deficient, his claim that he is entitled to a new trial based on the cumulative effect of the deficiencies in counsel's performance is without merit. See *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

[2] Because defendant fails to establish any misconduct by the police or the prosecutor, defendant's claim that he is entitled to a new trial based on the cumulative effect of the misconduct is also without merit. See *Dobek*, 274 Mich App at 106.

judge is personally biased or prejudiced for or against a party. MCR 2.003(C)(1)(a); *Cain*, 451 Mich at 494-495. There is a heavy presumption of judicial impartiality. *Cain*, 451 Mich at 497.

We reject defendant's claim that the trial court was biased against him because it refused his requests for his own separate copy of the transcripts and court records. As discussed *supra*, defendant was not entitled to his own copy of the transcripts and he filed no written request for court documents. Because the trial court was under no duty to provide defendant with copies of the transcripts and court documents, the trial court's failure to provide defendant with transcripts and court documents is not evidence of bias.

We also reject defendant's claim that the trial court was biased against him because it made several prejudicial and erroneous rulings. The only ruling referenced by defendant is the trial court's decision to deny an adjournment on the first day of trial. The mere fact that a judge rules against a litigant, even if the ruling is later determined to be erroneous, is not sufficient to show bias. *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001) (quotation omitted). The trial court's ruling does not display a deep-seated antagonism against defendant. The trial court denied the motion to adjourn because the motion was made on the eve of trial, the case was almost a year old, and had already been adjourned twice. Nothing in the trial court's ruling indicates that it wanted defendant to be represented by counsel who was unfit and ill-prepared to try the case. Defendant has failed to overcome the strong presumption of judicial impartiality. *Cain*, 451 Mich at 497.

Defendant further argues in his Standard 4 brief that his convictions are not supported by sufficient evidence. We review de novo a challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.*

The elements of second-degree murder are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). Malice is the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). The elements of assault with intent to murder are (1) an assault, (2) with the actual intent to kill, and (3) that if death results, would make the killing murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). The elements of domestic assault are (1) the commission of an assault or an assault and battery and (2) the defendant and the victim are spouses or former spouses, are in or had a dating relationship, have a child in common, or are residents of the same household. MCL 750.81(2); *People v Cameron*, 291 Mich App 599, 614; 806 NW2d 371 (2011); *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996).

Britt testified that she and defendant had been dating "off and on" for six years and that they lived together. On January 18, 2013, Britt and Alilovich, whom Britt had previously dated,

were at McKenzie's house. McKenzie testified that after she and defendant arrived, defendant started to hit Britt in the face with his hands after she pushed him. Alilovich, using words only, tried to stop defendant. Defendant pushed Alilovich, and then started to hit Britt in the face with his fists. Alilovich tried to stop defendant again, telling defendant to "get the fuck back." McKenzie did not see Alilovich with a knife. According to McKenzie, while she was in the kitchen fighting with Ashley Davis, defendant's cousin, she heard a gunshot in a bedroom. She ran toward the bedroom, and saw defendant pointing a gun at Alilovich. Alilovich was on his knees and begging defendant not to shoot. McKenzie ran out of the bedroom after she saw defendant take a second shot at Alilovich. McKenzie heard a third gunshot when she was outside. Britt's young son, who was in another bedroom, testified that he heard two gunshots and then Alilovich say "please don't do this." He then heard two more gunshots. According to her son, Britt came into the bedroom; her left chest was bleeding. Defendant also came into the bedroom and started to hit Britt in the face. He then stomped on her face more than once.

Dr. Robert Clark, qualified as an expert in pathology, performed an autopsy on Alilovich. Clark testified that Alilovich had gunshot wounds to the back of his right elbow, the back of his right shoulder, and his head. Clark opined that the cause of death was exsanguination from a gunshot wound to the chest. Alilovich had no wounds that suggested he had been in a fight. Dr. Glen Hastings, qualified as an expert in general and trauma surgery, treated Britt in the emergency room. Hastings testified that Britt had a concussion, four or five fractured ribs on each side of her chest, fractures in the lumbar spine, a fracture of the right orbital bone, and five gunshot wounds, including one to her left breast.

Three bullets were recovered from Alilovich's body, and two were recovered from the bedroom where defendant had stomped on Britt's face. Lieutenant Jeff Crump, qualified as an expert in firearms and tool mark identification, testified that he compared the five bullets to test shots from the .32-caliber revolver that was found in the woods. Crump identified four of the five bullets as having been fired from the revolver, and he could not exclude the revolver as having fired the fifth bullet. The revolver was silver with a black handle, and Britt had previously seen defendant with a silver .32-caliber revolver with a black handle. In his interview, defendant told two detectives that he shot Alilovich two times. According to Jones, defendant said that after his family members arrived, he and Alilovich had more words. He then pulled out the gun and shot Alilovich twice and Britt once.

Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the prosecution proved the elements of second-degree murder, assault with intent to commit murder, and domestic assault beyond a reasonable doubt. *Cline*, 276 Mich App at 642. The convictions are supported by sufficient evidence.

The elements of felon-in-possession of a firearm (specified felony), MCL 750.224f(2), are (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a specified felony, (3) less than five years have passed since the defendant successfully completed probation or parole, completed a term of imprisonment, and paid all fines with regard to the underlying felony, and (4) the defendant's right to possess a firearm has not been restored. M Crim JI 11.38a. The parties stipulated that defendant had previously been convicted of possession with intent to deliver cocaine, which is a specified felony, see MCL 750.224f(10)(b), and that defendant was on parole on January 18, 2013. Viewing this evidence, as well as the

evidence previously summarized, in a light most favorable to the prosecution, a rational trier of fact could have found that the prosecutor proved the elements of felon-in-possession of a firearm beyond a reasonable doubt. [3] The conviction is supported by sufficient evidence.

The elements of carrying a concealed weapon are (1) the defendant knowingly carried a firearm and (2) the firearm was concealed on the person. M Crim JI 11.1. A firearm is concealed if there is "some kind of withdrawal from observation so as to hide or secrete an object." *People v Kincade*, 61 Mich App 498, 504; 233 NW2d 54 (1975). McKenzie testified that she went to Britt's house to buy cocaine and defendant was there. Jones testified that defendant said he had a gun with him when he opened the door for McKenzie. According to McKenzie, she went to a store with defendant. McKenzie testified that she did not see a gun until after she heard the gunshot while she was fighting with Ashley. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the prosecutor proved the elements of carrying a concealed weapon beyond a reasonable doubt *Cline*, 276 Mich App at 642. The conviction is supported by sufficient evidence.

The elements of felony-firearm are that "the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499; 597 NW2d 864 (1999); MCL 750.227b. Viewing the evidence that supports the convictions of second-degree murder, assault with intent to commit murder, domestic assault, and felon-in-possession of a firearm in a light most favorable the prosecution, a rational trier of fact could have found that the prosecutor proved the elements of felony-firearm beyond a reasonable doubt. *Cline*, 276 Mich App at 642. The conviction is supported by sufficient evidence.

Defendant next argues in his Standard 4 brief that he is entitled to a new trial because the cumulative effect of the errors identified in the brief that occurred during pretrial proceedings and at trial denied him a fair trial. "While it is possible that the cumulative effect of a number of errors may constitute error requiring reversal, only actual errors are aggregated to determine their cumulative effect." *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999) (quotation marks and citations omitted). Because defendant has not established any actual errors, no cumulative effect of errors denied defendant a fair trial. *Id.*

In his Standard 4 brief, defendant also argues that he was denied effective assistance of appellate counsel because appellate counsel failed to raise the issues that he asserts in his Standard 4 brief.[4] The test for ineffective assistance of appellate counsel is the same as the test

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[3] "The prosecutor must prove that the defendant's right to possess a firearm has not been restored only if the defendant produces some evidence that his right has been restored." *People v Perkins*, 262 Mich App 267, 271; 686 NW2d 237 (2004), aff'd 473 Mich 626 (2005), and clarified on other grounds *People v Smith-Anthony*, 494 Mich 669, 682 (2013). Defendant did not present any evidence that his right to possess a firearm had been restored.

[4] In his supplemental Standard 4 brief, defendant repeats the argument that appellate counsel was ineffective for failing to raise the issue that the trial court's refusal to adjourn trial after he retained counsel resulted in a violation of his right to be represented by counsel of his own choice.

applicable to a claim of ineffective assistance of trial counsel. *Uphaus (On Remand)*, 278 Mich App at 186. None of the issues raised in defendant's Standard 4 brief entitles defendant to relief. Consequently, appellate counsel's failure to raise those issues did not fall below objective standards of reasonableness or result in prejudice. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (stating that counsel is not required to advocate a meritless position).

In his supplemental Standard 4 brief, defendant argues that he was denied due process because the trial court sat as both the district court and the circuit court. We review this unpreserved claim of error for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

In 2003, pursuant to MCL 600.401, the Berrien County Trial Court adopted a plan of concurrent jurisdiction. See Administrative Order 2015-11 of the Berrien County trial court. Under this plan, each judge in the court is conferred with jurisdiction to act in all proceedings in which jurisdiction was in the circuit court, the probate court, or the district court. *Id.* Defendant has not provided any authority to suggest that this plan of concurrent jurisdiction violates a defendant's right to due process. Accordingly, defendant has failed to show plain error. *Carines*, 460 Mich at 763.

Defendant next argues in his supplemental Standard 4 brief that the trial court erred in refusing to recuse itself from proceedings regarding his motion for a new trial, which was based on claims of ineffective assistance of counsel. Although defendant provides law regarding disqualification, the issue is abandoned. In his argument, defendant does not articulate any ground for why the trial court was disqualified from presiding over further proceedings. He has left it to this Court to discover the factual basis and rationalize the legal basis for the claim. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . .").

Defendant also argues in his supplemental Standard 4 brief that the trial court erred in failing to address his request for substitute appellate counsel. In a November 2014 letter, defendant requested that he be appointed new appellate counsel. The trial court called a hearing, held on January 22, 2015, after it received a number of letters from defendant, in which defendant complained of appellate counsel's representation. At the hearing, the trial court recalled that one of defendant's complaints was that he did not have a copy of the transcripts. The trial court told defendant that it had asked its secretary to mail a copy of the transcripts to defendant. It then asked defendant if he had any other complaints. Defendant replied, "Basically that's really all." "It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). By stating that he had no other complaints regarding appellate counsel, defendant contributed to any error that

the trial court made in not addressing his request for substitute appellate counsel. Accordingly, defendant is not entitled to any relief for the alleged error.[5]

Finally, in his supplemental Standard 4 brief, defendant argues that he was denied the right to be tried by a jury drawn from a fair cross section of the community. We review this unpreserved claim of error for plain error affecting substantial rights, *Carines*, 460 Mich at 763.

The Sixth Amendment right to jury includes the right to an impartial jury drawn from a fair cross section of the community. *People v Bryant*, 491 Mich 575, 595; 822 NW2d 124 (2012). To establish a prima facie violation of the fair-cross-section requirement, a defendant must establish the following:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Defendant makes no argument that applies the three prongs of the *Duren* test to the present case. Accordingly, he fails to establish plain error. *Carines*, 460 Mich at 763.

We affirm defendant's convictions, but we remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Christopher M. Murray

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[5] Defendant argues that he was denied a fair trial by the cumulative effect of the trial court's errors in acting as both the district court and the circuit court, denying his motion to recuse itself from further proceedings, refusing to provide defendant with copies of the transcripts and court documents, failing to hear his motion for substitute appellate counsel, and denying an adjournment after he retained counsel. However, because defendant fails to establish that any error occurred, the argument is without merit. See *Dobek*, 274 Mich App at 106.

APPENDIX - 2

Michigan Supreme Court Judgement

APPENDIX - 3

United States District Court, In the Eastern District of Michigan Judgement

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOVON C. DAVIS,

Petitioner,

v.

WILLIS CHAPMAN,

Respondent.

Case No. 18-10391

Hon. Terrence G. Berg

JUDGMENT

In accordance with the opinion and order issued on this date, DENYING the Petition for a Writ of Habeas Corpus;

It is ORDERED AND ADJUDGED that the case be dismissed and judgment entered in favor of Respondent.

Dated at Detroit, Michigan: April 30, 2019

DAVID J. WEAVER
CLERK OF THE COURT

s/A. Chubb
Case Manager and Deputy Clerk

APPROVED:
s/Terrence G. Berg
HON. TERRENCE G. BERG
UNITED STATES DISTRICT JUDGE

APPENDIX - 4

United States Court of Appeals, For The Sixth Circuit Judgement

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: May 06, 2020

Jovon C. Davis
Thumb Correctional Facility
3225 John Conley Drive
Lapeer, MI 48446

Re: Case No. 19-1540, *Jovon Davis v. Willis Chapman*
Originating Case No.: 2:18-cv-10391

Dear Mr. Davis,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Linus Richard Banghart-Linn

Enclosure

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: December 04, 2019

Mr. Linus Richard Banghart-Linn
Office of the Attorney General
of Michigan
P.O. Box 30217
Lansing, MI 48116

Mr. Jovon C. Davis
Thumb Correctional Facility
3225 John Conley Drive
Lapeer, MI 48446

Re: Case No. 19-1540, *Jovon Davis v. Willis Chapman*
Originating Case No. : 2:18-cv-10391

Mr. Davis and Counsel,

The Court issued the enclosed order today in this case.

Sincerely yours,

s/Cheryl Borkowski
Case Manager
Direct Dial No. 513-564-7035

cc: Mr. David J. Weaver

Enclosure

No mandate to issue

No. 19-1540

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 04, 2019
DEBORAH S. HUNT, Clerk

JOVON C. DAVIS,

Petitioner-Appellant,

v.

WILLIS CHAPMAN, Warden,

Respondent-Appellee.

ORDER

Jovon C. Davis, a Michigan state prisoner, moves for a certificate of appealability and in forma pauperis status on appeal from a district court decision denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

In 2014, a jury convicted Davis of second-degree murder, assault with intent to murder, commission of a felony with a firearm, domestic violence, carrying a concealed weapon, and being a felon in possession of a firearm. He was sentenced to 52 to 102 years of imprisonment. His conviction was affirmed in the state courts.

In this petition for federal habeas corpus relief, Davis argued that the state court erred in failing to address his motion for substitution of appellate counsel, denying a continuance for him to retain an attorney of his choice, endorsing a witness the day before trial and denying a continuance on that ground, and refusing to recuse. He also raised numerous claims of ineffective assistance of counsel, complained that he was convicted by a jury containing no African Americans, and claimed that he had been denied transcripts to appeal. The district court examined each claim on the merits in a thorough opinion and denied the petition.

To obtain a certificate of appealability, Davis must show that reasonable jurists could debate whether the petition should have been resolved in a different manner. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Because the state court reviewed the claims on the merits, the district court reviewed that decision to determine whether it was contrary to or an unreasonable application of clearly established federal law. *See Renico v. Lett*, 559 U.S. 766, 773 (2010).

In his first claim, Davis argued that his motion for substitution of appellate counsel was not addressed. However, the record showed that the court held a hearing on the issue and determined that Davis would be satisfied if he was given a copy of the transcripts to file his own brief. Davis agreed with this resolution of the issue.

In his second claim, Davis argued that he was denied effective assistance of counsel when the trial court denied him a continuance to retain counsel of his choice. The district court found that the state court had properly applied pertinent factors in determining that the motion was correctly denied where it was made on the eve of trial, Davis and counsel had only differences of opinion and not a lack of communication, and he had previously received a continuance and a second appointed counsel. *See United States v. Sullivan*, 431 F.3d 976, 981-82 (6th Cir. 2005) (affirming denial where no conflict required substitution); *United States v. Trujillo*, 376 F.3d 593, 606-07 (6th Cir. 2004) (affirming denial of untimely motion). Moreover, the district court examined the record and determined that the second appointed attorney rendered effective assistance, and Davis therefore could not establish prejudice. *See United States v. Vasquez*, 560 F.3d 461, 468 (6th Cir. 2009).

The third claim was that the trial court should have granted an adjournment when the prosecutor learned of a new witness, a jail informant, four days before trial. The state court found that the parties resolved the matter by agreeing that the witness would not be called until the end of the several-day trial. The district court also reviewed the record and concluded that counsel effectively cross-examined the witness.

The fourth claim argued that the trial judge should have recused himself. However, the only arguments on this ground were that the judge ruled against Davis on several issues, so his claim did not represent the type of extreme case where disqualification would be constitutionally required. *See Getsy v. Mitchell*, 495 F.3d 295, 311 (6th Cir. 2007).

Several claims of ineffective assistance of counsel were raised, arguing that counsel failed to: 1) investigate issues such as the victim's expertise in martial arts and the jail informant's background; 2) present a complete defense by not consulting with Davis prior to trial and not investigating the witnesses; 3) call witnesses; 4) cross-examine witnesses; 5) object to testimony; 6) hire an investigator; and 7) object to the prosecutor's closing argument. Davis was required to show that counsel's performance was deficient and that the result of the trial was prejudiced. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The district court concluded that the state court's finding that counsel actively represented Davis at trial was not contrary to or an unreasonable application of clearly established law. Counsel filed a motion to suppress the statement Davis made to police, engaged in plea negotiations, moved for a continuance, argued self-defense, and moved for a directed verdict. Counsel did introduce evidence that the murder victim was a martial arts fighter. Davis did not show how additional consultation with counsel could have altered the outcome of the trial. *See Bowling v. Parker*, 344 F.3d 487, 506 (6th Cir. 2003). Davis provided no affidavits from character witnesses that he alleged counsel should have called. His claim that counsel should have conducted further cross-examination was purely speculative. The district court found that the state court reasonably found that trial counsel's strategy of not repeatedly objecting to evidence where the court had already ruled against him was not ineffective assistance. The claim that an investigator should have been hired was also speculative. Finally, the prosecutor's closing argument was based on inferences supported by the evidence and an objection would have been meritless. Reasonable jurists therefore could not disagree with the district court's conclusion that the state court reasonably rejected conclusory allegations of ineffective assistance lacking in any evidentiary support. *See Workman v. Bell*, 178 F.3d 759, 771 (6th Cir. 1998).

Next, Davis argued that there were no African Americans on his jury. Reasonable jurists could not disagree with the district court's acceptance of the state court's decision that Davis made no showing of systemic exclusion under *Duren v. Missouri*, 439 U.S. 357, 364 (1979). The absence of African Americans on this particular jury was insufficient to grant habeas relief.

Lastly, Davis argued that he was denied transcripts needed to prepare his pro se brief on appeal. Reasonable jurists could not disagree with the district court's acceptance of the state court's decision that Davis had no constitutional right to represent himself on direct appeal where he was already appointed counsel. *See Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 163 (2000); *McMeans v. Brigano*, 228 F.3d 674, 684 (6th Cir. 2000). Moreover, Davis did receive a copy of the transcripts.

On this record, reasonable jurists would not debate the district court's conclusion that the state court's factual determinations were not unreasonable and that its decision was not contrary to or an unreasonable application of clearly established Supreme Court precedent. *See Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *Robins v. Fortner*, 698 F.3d 317, 328 (6th Cir. 2012).

The motion for a certificate of appealability is therefore **DENIED**. The motion for in forma pauperis status is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOVON C. DAVIS,

Petitioner,

v.

WILLIS CHAPMAN,

Respondent.

Case No. 18-10391
Hon. Terrence G. Berg

OPINION AND ORDER DENYING THE PETITION FOR A WRIT OF HABEAS CORPUS

Jovon C. Davis, ("Petitioner"), incarcerated at the Thumb Correctional Facility in Lapeer, Michigan, filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his convictions for second-degree murder, Mich. Comp. Laws § 750.317; assault with intent to commit murder, Mich. Comp. Laws § 750.83; felon in possession of a firearm, Mich. Comp. Laws § 750.224f; carrying a concealed weapon, Mich. Comp. Laws § 750.227; felony-firearm, Mich. Comp. Laws § 750.227b, and domestic violence, third-offense, Mich. Comp. Laws § 750.81(4). For the reasons stated below, the petition for a writ of habeas corpus is **DENIED**.

I. Background

Petitioner was convicted following a jury trial in the Berrien County Circuit Court.[1] This Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals, which are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1). *See Wagner v. Smith,* 581 F.3d 410, 413 (6th Cir. 2009):

> Defendant's convictions arise out of the murder of Gary Alilovich and the assault of Heather Britt on January 18, 2013, at the house of Crystal McKenzie in Benton Harbor.
> **********
> Britt testified that she and defendant had been dating "off and on" for six years and that they lived together. On January 18, 2013, Britt and Alilovich, whom Britt had previously dated, were at McKenzie's house. McKenzie testified that after she and defendant arrived, defendant started to hit Britt in the face with his hands after she pushed him. Alilovich, using words only, tried to stop defendant. Defendant pushed Alilovich, and then started to hit Britt in the face with his fists. Alilovich tried to stop defendant again, telling defendant to "get the fuck back." McKenzie did not see Alilovich with a knife. According to McKenzie, while she was in the kitchen fighting with Ashley Davis, defendant's cousin, she heard a gunshot in a bedroom. She ran toward the bedroom, and saw

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

defendant pointing a gun at Alilovich. Alilovich was on his knees and begging defendant not to shoot. McKenzie ran out of the bedroom after she saw defendant take a second shot at Alilovich. McKenzie heard a third gunshot when she was outside. Britt's young son, who was in another bedroom, testified that he heard two gunshots and then Alilovich say "please don't do this." He then heard two more gunshots. According to her son, Britt came into the bedroom; her left chest was bleeding. Defendant also came into the bedroom and started to hit Britt in the face. He then stomped on her face more than once.

Dr. Robert Clark, qualified as an expert in pathology, performed an autopsy on Alilovich. Clark testified that Alilovich had gunshot wounds to the back of his right elbow, the back of his right shoulder, and his head. Clark opined that the cause of death was exsanguination from a gunshot wound to the chest. Alilovich had no wounds that suggested he had been in a fight. Dr. Glen Hastings, qualified as an expert in general and trauma surgery, treated Britt in the emergency room. Hastings testified that Britt had a concussion, four or five fractured ribs on each side of her chest, fractures in the lumbar spine, a fracture of the right orbital bone, and five gunshot wounds, including one to her left breast.

Three bullets were recovered from Alilovich's body, and two were recovered from the bedroom where defendant had stomped on Britt's face. Lieutenant Jeff Crump, qualified as an expert in firearms and tool mark identification, testified that he compared the five bullets to test shots from the .32–caliber revolver that was found in the woods. Crump identified four of the five bullets as having been fired from the revolver, and he could not exclude the revolver as having fired the fifth bullet. The revolver was silver with a black handle, and Britt had previously seen defendant with a silver .32–caliber revolver with a black handle. In his interview, defendant told two detectives that he shot Alilovich two times. According to Jones, defendant said that after his family

> members arrived, he and Alilovich had more words. He then pulled out the gun and shot Alilovich twice and Britt once.

People v. Davis, No. 320773, 2016 WL 1125669, at *1, 8 (Mich. Ct. App. Mar. 22, 2016).

Petitioner's conviction was affirmed on appeal. *Id., reconsideration den.* No. 320773 (Mich. Ct. App. May 27, 2016); *lv. den.* 500 Mich. 933, 889 N.W.2d 490 (2017); *reconsideration den.* 500 Mich. 1004, 895 N.W.2d 519 (2017).

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

> I. Petitioner was denied his Sixth and Fourteenth Amendment rights guaranteed under the U.S. Constitution, and Michigan Constitution of 1963, Art I, §20; where the trial court abused its discretion by failing to hear Petitioner's motion for substitution of appellate counsel.
>
> II. Petitioner was denied his Sixth Amendment right under the U.S. Constitution where trial court refused to adjourn his case once new counsel was obtained.
>
> III. Petitioner was denied his Sixth and Fourteenth Amendment rights under the U.S. Constitution to a fair trial and due process where trial court abused its discretion when endorsing a late witness and denying petitioner adjournment to prepare an effective cross-examination.
>
> IV. Petitioner was denied his Fourth and Fourteenth Amendment rights, and Michigan Constitution of 1963 Art. I, §17, where the trial court abused its discretion in denying petitioner's motion for disqualification or recusal of the judge.
>
> V. Petitioner was denied his Sixth Amendment right guaranteed under the U.S. Constitution to effective

assistance of counsel where counsel failed to investigate several aspects of the case and instead relied on government's good faith, which is contrary to *Strickland v. Washington* and its progeny.

VI. Petitioner was denied his Sixth and Fourteenth rights guaranteed under the U.S. Constitution to effective assistance of counsel where counsel denied Petitioner a meaningful opportunity to present a complete defense.

VII. Petitioner was denied his Sixth Amendment right guaranteed under the U.S. Constitution to effective assistance of trial counsel where counsel of record failed to present a defense and properly investigate any potential witnesses for his defense.

VIII. Petitioner was denied his Sixth Amendment right guaranteed under the U.S. Constitution where he was denied a fair-cross section of jury selection at trial, thereby denying him due process and equal protection of law.

IX. Petitioner was denied his Sixth Amendment right guaranteed under the U.S. Constitution to effective assistance of counsel on appeal as of right where counsel denied Petitioner access to the courts and judicial review.

II. Standard of Review

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

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

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

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11.

The Supreme Court explained that "[A] federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010)

(quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997); *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (*per curiam*)). "[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Therefore, in order to obtain habeas relief in federal court, a state prisoner is required to show that the state court's rejection of his claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington,* 562 U.S. at 103. A habeas petitioner should be denied relief as long as it is within the "realm of possibility" that fairminded jurists could find the state court decision to be reasonable. *See Woods v. Etherton,* 136 S. Ct. 1149, 1152 (2016).

III. Discussion

A. Exhaustion and Procedural Default

Respondent argues in his answer that several of Petitioner's ineffective assistance of counsel sub-claims have not been exhausted in the state courts. Respondent further argues that petitioner's fourth and eighth claims are procedurally defaulted because he failed to preserve them at the state court level.

A habeas petitioner's failure to exhaust his state court remedies does not deprive a federal court of its jurisdiction to consider the merits of the habeas petition. *Granberry v. Greer*, 481 U.S. 129, 131 (1987). An unexhausted claim may be adjudicated by a federal court on habeas review if the unexhausted claim is without merit, such that addressing the claim would be efficient and would not offend the interest of federal-state comity. *Prather v. Rees,* 822 F.2d 1418, 1422 (6th Cir. 1987); *see also* 28 U.S.C. § 2254(b)(2) (habeas petition may be denied on the merits despite the failure to exhaust state court remedies).

Likewise, procedural default is not a jurisdictional bar to review of a habeas petition on the merits. *See Trest v. Cain*, 522 U.S. 87, 89 (1997). "[F]ederal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003) (citing *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)). "Judicial economy might counsel giving the [other] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." *Lambrix*, 520 U.S. at 525.

Petitioner's claims are meritless. Regardless of whether the claims have been properly exhausted and/or are procedurally defaulted, they fail on their own merit.

B. Claim 1: Substitution of Appellate Counsel

Petitioner first argues that the trial court judge abused his discretion by failing to conduct an adequate hearing on petitioner's motion to substitute appellate counsel.[2]

The Michigan Court of Appeals rejected petitioner's claim:

> Defendant also argues in his supplemental Standard 4 brief that the trial court erred in failing to address his request for substitute appellate counsel. In a November 2014 letter, defendant requested that he be appointed new appellate counsel. The trial court called a hearing, held on January 22, 2015, after it received a number of letters from defendant, in which defendant complained of appellate counsel's representation. At the hearing, the trial court recalled that one of defendant's complaints was that he did not have a copy of the transcripts. The trial court told defendant that it had asked its secretary to mail a copy of the transcripts to defendant. It then asked defendant if he had any other complaints. Defendant replied, "Basically that's really all." "It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v. LeGrow*, 258 Mich.App 175, 210; 670 NW2d 675 (2003). By stating that he had no other complaints regarding appellate counsel, defendant contributed to any error that the trial court made in not addressing his request for substitute appellate counsel. Accordingly, defendant is not entitled to any relief for the alleged error.

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[2] Petitioner raised this claim as well as most, if not all, of his claims in several *pro se* appellate briefs that he filed in addition to the brief filed by appellate counsel. Standard 4 of Administrative Order 2004-6, 471 Mich. cii (2004), "explicitly provides that a *pro se* brief may be filed within 84 days of the filing of the brief by the appellant's counsel, and may be filed with accompanying motions." *Ware v. Harry*, 636 F. Supp. 2d 574, 594, n. 6 (E.D. Mich. 2008).

People v. Davis, 2016 WL 1125669, at *11 (internal footnote omitted).

In reviewing a motion for substitution of counsel, a reviewing court should consider "the timeliness of the motion; the adequacy of the [trial] court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict)." *Martel v. Clair*, 565 U.S. 648, 663 (2012). "Because a trial court's decision on substitution is so fact-specific, it deserves deference; a reviewing court may overturn it only for an abuse of discretion." *Id.* at 663-64.

Although all of the federal circuit courts agree that a court "cannot properly resolve substitution motions without probing why a defendant wants a new lawyer[,]" *Martel,* 545 U.S. at 664, the Supreme Court in *Martel* did not require, as a matter of federal constitutional law, that a trial court must engage in an inquiry with a criminal defendant concerning the nature of his complaints against counsel before denying a motion for substitution. The Supreme Court in *Martel* held that a federal district court did not abuse its discretion in denying a habeas petitioner's motion for substitution of counsel without first conducting an inquiry into the nature of his complaints, where the motion was untimely and the court was ready to render a decision in that case. *Id.* at 664-66. Therefore, there is no clearly established federal law requiring an inquiry by the

trial judge into the nature of a defendant's dissatisfaction with his counsel prior to denying a motion for substitution of counsel. *See James v. Brigano*, 470 F.3d 636, 643 (6th Cir. 2006) (reversing a grant of relief because the inquiry requirement was not clearly established Federal law). In the absence of a showing that a habeas petitioner received the ineffective assistance of counsel at trial, a state trial judge's failure to inquire into a habeas petitioner's complaints against his counsel before denying a motion for substitution of counsel would not entitle the petitioner to habeas relief. *See Peterson v. Smith,* 510 F. App'x 356, 366-67 (6th Cir. 2013).

In the present case, the trial court judge conducted a hearing on petitioner's motion for substitute appellate counsel, with appellate counsel, petitioner, and the prosecutor present. Transcript, ECF 7-16 PageID.1554–56.[3] Appellate counsel indicated he was the second attorney appointed for petitioner after another attorney declined to accept the appointment. Appellate counsel informed the judge that he had filed the appellate brief with the Michigan Court of Appeals and was awaiting a response from the prosecutor. *Id.* at PageID.1553–54. The judge noted that he had received a number of letters from petitioner, but

[3] Although unclear, petitioner and appellate counsel may have been appearing at the hearing via teleconference and not in person. At one point, the judge asks petitioner "Are you still there?" suggesting that petitioner was participating in the hearing by telephone. PageID.1554. At another point, the judge refers to Daniel Rust, appellate counsel, as being on the phone. PageID.1557.

that petitioner's main complaint appeared to be that appellate counsel had not provided him with the trial transcripts. The judge explained that appellate counsel needed the transcripts to perfect the appeal, indicated that he would have his secretary provide petitioner with a copy of the transcripts, and noted that petitioner had wanted his appeal filed and wanted a copy of the transcripts. *Id.* at PageID.1555. The judge then asked: "Is there anything else we can help you with?" *Id.* Petitioner replied: "Basically that's really all. I mean minor things like—I don't know—I don't know how things go." *Id.* The trial court judge provided petitioner with an opportunity to address his issues concerning appellate counsel, Daniel Rust.

The judge extensively and thoroughly addressed petitioner's concerns regarding his appellate counsel. Petitioner indicated that his primary concern was obtaining the transcripts so that he could file his own *pro se* appellate brief. Petitioner did not indicate that he had any other complaints with appellate counsel. The Michigan Court of Appeals' conclusion that the trial judge's denial of petitioner's motion to substitute appellate counsel did not violate his Sixth Amendment rights was therefore not an unreasonable application of federal law. Petitioner is not entitled to federal habeas relief on his first claim. *See Henness v. Bagley*, 644 F.3d 308, 322 (6th Cir. 2011).

C. Claim 2: Denial of Counsel of Choice

Petitioner next alleges that he was denied his right to the counsel of his choice when the judge refused to adjourn his trial after petitioner had retained an attorney to replace his second court-appointed counsel.

The Michigan Court of Appeals rejected petitioner's claim:

> The trial court's denial of defendant's request for an adjournment did not deny defendant a fair opportunity and reasonable time to retain counsel of his own choice. Defendant was arraigned on January 22, 2013, but he did not retain counsel until just before the trial that began January 14, 2014. Additionally, trial had already been adjourned twice. The second adjournment was because the trial court granted defendant's request to remove his first appointed counsel. Notably, defendant did not seek retained counsel after his first attorney withdrew. He waited seven weeks, until the eve of trial. Retained counsel then requested an adjournment of at least four months even though the case did not present any complex issues. While defendant did not want his appointed replacement defense counsel to represent him, he made no specific claim that this counsel was unprepared, incompetent to try the case, or that he and counsel had irreconcilable differences. Under these circumstances, the trial court's denial of an adjournment fell within the range of reasonable and principled outcomes. Defendant was not denied his Sixth Amendment right to be represented by an attorney of his choice.

People v. Davis, 2016 WL 1125669, at *4.

The Sixth Amendment right to the assistance of counsel does not guarantee a criminal defendant that he will be represented by a

particular attorney. *Serra v. Michigan Department of Corrections*, 4 F.3d 1348, 1351 (6th Cir. 1993) (citing *Caplin & Drysdale v. United States,* 491 U.S. 617, 624 (1989)). A criminal defendant who has the desire and the financial means to retain his own counsel "should be afforded a fair opportunity to secure counsel of his own choice." *Id.* (quoting *Powell v. Alabama,* 287 U.S. 45, 53 (1932)). Indeed, "[t]he Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *U.S. v. Gonzalez-Lopez,* 548 U.S. 140, 144 (2006) (quoting *Caplin & Drysdale,* 491 U.S. at 624-25). However, while a criminal defendant who can afford his own attorney has a right to a chosen attorney, that right is a qualified right. *Serra,* 4 F.3d at 1348 (citing *Wheat v. United States,* 486 U.S. 153, 159 (1988)). Stated differently, the right to counsel of one's own choice is not absolute. *See Wilson v. Mintzes,* 761 F.2d 275, 280 (6th Cir. 1985). "Although a criminal defendant is entitled to a reasonable opportunity to obtain counsel of his choice, the exercise of this right must be balanced against the court's authority to control its docket." *Lockett v. Arn,* 740 F.2d 407, 413 (6th Cir. 1984); *see also Gonzalez-Lopez,* 548 U.S. at 151-52 ("Nothing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them . . . . We have recognized a trial

court's wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar.") (internal citations omitted). Finally, the right to counsel of choice may not be used to unreasonably delay a trial. *See Linton v. Perini,* 656 F.2d 207, 209 (6th Cir. 1981).

As previously discussed when addressing petitioner's first claim, *supra,* a court that has before it a motion to substitute counsel should consider "the timeliness of the motion; the adequacy of the [trial] court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict)." *Martel v. Clair*, 565 U.S. at 663.

Petitioner is not entitled to relief for several reasons. First, Petitioner's request for a continuance to substitute in retained counsel was untimely because it was made on the eve of trial. Petitioner offered no reasons to the state courts or to this Court why he did not attempt to retain counsel earlier. The Sixth Circuit has noted that when "the granting of the defendant's request [for a continuance to obtain new counsel] would almost certainly necessitate a last-minute continuance, the trial judge's actions are entitled to extraordinary deference." *U.S. v. Whitfield*, 259 F. App'x 830, 834 (6th Cir. 2008) (quoting *United States v. Pierce*, 60 F.3d 886, 891 (1st Cir. 1995)). The Sixth Circuit has rejected similar requests for the replacement of counsel as being untimely. *See*

United States v. Trujillo, 376 F.3d 593, 606-07 (6th Cir. 2004) (motion for substitution of counsel was untimely, coming only three days prior to the start of the trial); *United States v. Jennings,* 83 F.3d 145, 148 (6th Cir. 1996) (motion to continue to obtain new counsel untimely when it was made the day before trial). In the present case, petitioner's request for a continuance to substitute in retained counsel on the day of trial was untimely, particularly where the petitioner had several opportunities prior to trial to bring his dissatisfaction with his second appointed counsel to the attention of the trial court. *See Whitfield,* 259 F. App'x at 834.

Moreover, this Court notes that petitioner had already discharged his first attorney and sought on the day of trial to discharge his second counsel and retain what would have been his third attorney. There had already been delays in the case due to petitioner's replacement of his first attorney. Permitting petitioner to discharge his second attorney in order to hire a third attorney would have led to even further delays, thus, the trial court did not err in denying petitioner's request to discharge his second attorney. *See, e.g., United States v. Ammons,* 419 F. App'x 550, 552 (6th Cir. 2011).

Petitioner has also failed to establish good cause for the substitution of counsel where he failed to show that the conflict between himself and his attorney was so great that it resulted in a total lack of

communication which prevented an adequate defense. *See Jennings*, 83 F.3d at 149.

Petitioner proceeded to trial with his second court-appointed attorney. Following trial, petitioner filed for a *Ginther* hearing[4] alleging that his trial counsel was ineffective and claiming that he was denied his right to the effective assistance of counsel. The trial court judge conducted a *Ginther* hearing and found petitioner's contentions to be meritless. In general, the trial court judge found that the length of the opening and closing arguments, witnesses and experts that were to be called, and whether to request a jury instruction on involuntary manslaughter were all within the realm of trial strategy. Transcripts, ECF No. 7-18, 7-19.

Petitioner was not entitled to substitute counsel because his complaints against counsel involved differences of opinion regarding trial strategy and what motions to file rather than any irreconcilable conflict or total lack of communication. *See e.g. Adams v. Smith*, 280 F. Supp. 2d 704, 720 (E.D. Mich. 2003). The record in this case does not demonstrate that the disagreements between Petitioner and his attorney rose to the level of a conflict sufficient to require the substitution of counsel. *See United States v. Sullivan*, 431 F.3d 976, 981 (6th Cir. 2005).

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[4] "When a defendant asserts that his assigned lawyer is not adequate or diligent . . . the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion." *People v. Ginther,* 212 N.W.2d 922, 924 (1973).

Finally, Petitioner is unable to show that he was prejudiced by the failure of the trial court to grant a continuance to allow Petitioner's privately-retained counsel to prepare for trial in light of the fact that he received effective assistance of counsel at trial. *See U.S. v. Vasquez*, 560 F.3d 461, 468 (6th Cir. 2009). "The strained relationship" between Petitioner and his attorney was not a "complete breakdown in communication" that prevented the petitioner from receiving an adequate defense. *Id.* Petitioner is not entitled to relief on his second claim.

D. Claim 3: Late Endorsement

Petitioner next argues that the judge erred in allowing the prosecutor to call Robert Jones, who was endorsed by the prosecutor as a witness four days before trial, in violation of Mich. Comp. Laws § 767.40a(3), which requires the prosecutor to send to defense counsel a list of all the witnesses he intends to call no less than 30 days before trial. Petitioner further argues that the judge erred in refusing to adjourn the trial so that counsel could have additional time to prepare for Jones' testimony. Jones was the jail inmate who testified about statements that petitioner made to him about the shooting after petitioner was placed in the same jail block as Jones.

It is well-settled that there is no general constitutional right to discovery in a criminal case. *See Weatherford v. Bursey*, 429 U.S. 545, 559

(1977) (denying due process claim of a defendant who was convicted with aid of surprise testimony from an accomplice who was an undercover agent); *United States v. Presser*, 844 F.2d 1275, 1281 (6th Cir.1988) (citing *Weatherford*). "It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably." *Weatherford v. Bursey*, 429 U.S. at 559. A claim that a prosecutor violates a state discovery rule requiring the state to disclose the names of witnesses it reasonably anticipates calling is not cognizable on federal habeas review, because it is not a constitutional violation. *See Lorraine v. Coyle*, 291 F.3d 416, 439-41 (6th Cir. 2001), *opinion corrected on denial of reh'g*, 307 F.3d 459 (6th Cir. 2002). Moreover, a decision regarding the endorsement of a witness generally constitutes a state law matter within the trial court's discretion. *See Hence v. Smith*, 37 F. Supp. 2d 970, 982 (E.D. Mich. 1999) (citing cases); *Whalen v. Johnson*, 438 F. Supp. 1198 (E.D. Mich. 1977) (it is not a fundamental error to permit a prosecutor to endorse a witness during trial even though the prosecutor had previously filed an affidavit stating that the witness was not material). Under Mich. Comp. Laws § 767.40(a)(4), a prosecutor is permitted to add or delete witnesses from a witness list "at any time upon leave of the court and for good cause shown or by stipulation of the parties."

The Michigan Court of Appeals found that there was good cause to allow the late endorsement of Jones:

> The prosecutor did not learn about Jones and the possibility of his testifying until four days before trial. She sent a detective to interview Jones, and it was not until the day before trial that the prosecutor learned the details of Jones's proposed testimony. The late discovery of Jones provided good cause for the late endorsement.

People v. Davis, 2016 WL 1125669, at *1.

The Michigan Court of Appeals further rejected petitioner's claim, by noting that "[t]he prosecutor agreed not to call Jones as a witness until the end of trial, and there was no dispute that trial would last several days. Accordingly, defendant had the opportunity to interview Jones." *People v. Davis*, 2016 WL 1125669, at *2. Moreover, although petitioner alleges that his trial counsel never actually interviewed Jones prior to him testifying, *see* ineffective assistance of counsel claims, *infra*, counsel did effectively cross-examine Jones. The late endorsement of Mr. Jones did not prejudice petitioner, because he had an ample opportunity to cross-examine Mr. Jones and bring out any inconsistencies in his testimony and his motivations for testifying. *See e.g. Warlick v. Romanowski*, 367 F. App'x 634, 644 (6th Cir. 2010). Petitioner is not entitled to relief on his third claim.

E. Claim 4: Judicial Disqualification

Petitioner next argues that the trial judge should have recused himself from Petitioner's case because of judicial bias.

The Due Process Clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or an interest in the outcome of the case. *See Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997). However, to state a claim that a judge is biased, a defendant must show either actual bias or the appearance of bias creating a conclusive presumption of actual bias. *United States v. Lowe*, 106 F.3d 1498, 1504 (6th Cir. 1997). "Under this standard, '[o]nly in the most extreme of cases would disqualification on the basis of bias and prejudice be constitutionally required.'" *Getsy v. Mitchell,* 495 F.3d 295, 311 (6th Cir. 2007) (quoting *Williams v. Anderson*, 460 F.3d 789, 814 (6th Cir. 2006)). A judge is required to recuse himself only where he has actual bias or "a predisposition 'so extreme as to display clear inability to render fair judgment.'" *Johnson v. Bagley*, 544 F.3d 592, 597 (6th Cir. 2008) (quoting *Liteky v. United States*, 510 U.S. 540, 551 (1994)). In reviewing a judicial bias claim, a federal habeas court should employ the initial presumption that the assigned trial judge properly discharged his official duties. *See Johnson v. Warren*, 344 F. Supp. 2d 1081, 1093 (E.D. Mich. 2004).

Petitioner merely points to unfavorable rulings by the judge in support of his judicial bias claim. The Supreme Court has indicated that

"judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky,* 510 U.S. at 555. "In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved." *Id.* Federal courts have denied habeas relief on judicial bias claims based solely on allegations that the judge had ruled adversely against the petitioner. *See Mason v. Burton,* 720 F. App'x 241, 242–43 (6th Cir. 2017); *Hardaway v. Burt,* No. 16-1666, 2017 WL 2831020, at *4 (6th Cir. Jan. 18, 2017); *Cunningham v. Stegall*, 13 F. App'x 286, 290 (6th Cir. 2001); *Vliet v. Renico,* 193 F. Supp. 2d 1010, 1016 (E.D. Mich. 2002); *Hence v. Smith*, 49 F. Supp. 2d 547, 549 (E.D. Mich. 1999). Petitioner is not entitled to relief on his judicial bias claim.

F. Claims 5, 6 and 7: Ineffective Assistance of Counsel

In his fifth, sixth, and seventh claims, petitioner alleges the ineffective assistance of trial counsel. Because many of his sub-claims overlap, the Court consolidates the three claims for analysis.

A defendant must satisfy a two-prong test to establish the denial of the effective assistance of counsel. First, the defendant must demonstrate that his attorney's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.* Stated differently, the defendant must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. *Strickland,* 466 U.S. at 689. Second, the defendant must show that such performance prejudiced his defense. *Id.* To demonstrate prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. The Supreme Court's holding in *Strickland* places the burden on the defendant who raises a claim of ineffective assistance of counsel, and not the state, to show a reasonable probability that the result of the proceeding would have been different but for counsel's allegedly deficient performance. *See Wong v. Belmontes*, 558 U.S. 15, 27 (2009).

On habeas review, "the question 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.'" *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard."

Harrington v. Richter, 562 U.S. at 101. Indeed, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles,* 556 U.S. at 123 (citing *Yarborough v. Alvarado*, 541 U.S. at 664). Pursuant to the § 2254(d)(1) standard, a "doubly deferential judicial review" applies to a *Strickland* claim brought by a habeas petitioner. *Id.* This means that on habeas review of a state court conviction, "[A] state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Harrington*, 562 U.S. at 101. "Surmounting *Strickland's* high bar is never an easy task." *Id.* at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

Petitioner initially argues that he was constructively denied the assistance of counsel because his trial counsel, who was appointed to replace petitioner's first court-appointed attorney, only had several weeks to prepare for petitioner's trial. The Supreme Court has recognized that in certain Sixth Amendment contexts, prejudice is presumed. *Strickland,* 466 U.S. at 692. The "actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance." *Id.*

Where defense counsel entirely fails to subject the prosecution's case to "meaningful adversarial testing," there has been a constructive denial of counsel, and a defendant need not make a showing of prejudice

to establish ineffective assistance of counsel. *Moss v. Hofbauer,* 286 F.3d 851, 860 (6th Cir. 2002) (quoting *United States v. Cronic,* 466 U.S. 648, 659 (1984)). However, in order for a presumption of prejudice to arise based on an attorney's failure to test the prosecutor's case, so that reversal based on ineffective assistance of counsel is warranted without any inquiry into prejudice, the attorney's failure to test the prosecutor's case "must be complete." *Bell v. Cone,* 535 U.S. 685, 697 (2002).

Petitioner's trial counsel filed and argued a motion to suppress petitioner's statement to the police. An evidentiary hearing was conducted on the motion to suppress, during which counsel questioned the witnesses and argued for the exclusion of petitioner's statement to the police on the ground that it was involuntary. Transcript, ECF No. 7-9. Prior to trial, the prosecutor made a plea bargain offer to defense counsel, in which petitioner would plead guilty to second-degree murder, in exchange for dismissal of a first-degree murder charge, as well as dismissal of the other charges. Counsel conveyed the plea to petitioner, who rejected the offer. Transcript, ECF No. 7-10 PageID.719–21. The judge, the prosecutor, and defense counsel then discussed various pieces of evidence that would be introduced at trial. *Id.* at PageID.722–32.

On the first day of trial, defense counsel moved for an adjournment of trial, because Petitioner's family had retained another attorney. Counsel also objected to the late endorsement of Mr. Jones or in the alternative requested a continuance so that he could prepare for Jones'

testimony. Transcript, ECF No. 7-11, PageID.744–47. Defense counsel participated in jury *voir dire,* including objecting to some of the prosecutor's questions of the prospective jurors, questioned the jurors himself, and requested the removal of several jurors. *Id.* at PageID.797, 800–01, 805, 810, 817–18, 821–22, 825, 830, 834, 837–38, 841–42. Defense counsel made an opening argument contending that petitioner acted in self-defense. *Id.* at PageID.883–84. Counsel cross-examined numerous witnesses. *Id.* at PageID.913–18, 945–52, 959–61; Transcript, ECF No. 7-12, PageID.1008–09, 1036–38, 1050–51, 1062, 1073, 1147–1150, 1170–72, 1194–96; Transcript, ECF No. 7-13 PageID.1260–61, 1273–75, 1325–1328, 1347, 1361–64, 1406–08; Transcript, ECF No. 7-14 PageID.1442–44. Counsel later moved for a directed verdict, arguing that there was insufficient evidence for the case to go to the jury on a first or second-degree murder charge. ECF No. 7-14 PageID.1458. Counsel asked for a jury instruction on self-defense, which was granted. *Id.* at PageID.1466–67. Defense counsel later made a closing argument, arguing that petitioner had acted in self-defense. *Id.* at PageID.1482–86.

In the present case, counsel's alleged errors did not rise to the level of the constructive denial of counsel, because counsel actively represented petitioner at his trial. *Moss,* 286 F.3d at 860–62. The *Cronic* presumption "applies only where defense counsel completely or entirely fails to oppose the prosecution throughout the guilt or penalty phase as a whole." *Benge v. Johnson*, 474 F.3d 236, 247 (6th Cir. 2007) (citing *Bell*,

535 U.S. at 697). Counsel's alleged failures do not amount to a complete failure to provide a defense. The presumption of prejudice therefore does not apply and petitioner would be required to show that he was actually prejudiced by counsel's alleged omissions in order to obtain habeas relief. *Id.*

Petitioner as part of his claim argues that counsel was ineffective because he only visited him twice in jail prior to trial. Petitioner is not entitled to habeas relief on this claim because he failed to show how he was prejudiced by counsel's failure to visit him more often in jail. *See Bowling v. Parker,* 344 F.3d 487, 506 (6th Cir. 2003) (trial attorneys' alleged failure to consult with defendant did not prejudice defendant in capital murder case, and thus could not amount to ineffective assistance, although attorneys allegedly met with defendant for less than one hour in preparing defense, where defendant failed to show how additional consultation with his attorneys could have altered outcome of trial).

Petitioner also alludes throughout his pleadings to the fact that his trial counsel had a drinking problem.[5] Petitioner suggests that counsel's problem with alcohol prevented him from adequately representing him at trial. In light of the fact that petitioner's counsel vigorously

[5] *See* ECF 1-1, Page.ID 186–87, 190, 213 (in this last reference, petitioner's post-trial attorney, Mr. Smith, in a letter to petitioner's appellate attorney Daniel Rust, mistakenly refers to Mr. White, petitioner's trial attorney, as Mr. Rust. It is obvious from the fact that Mr. Smith was writing to Mr. Rust that his allegation that trial counsel was suffering from alcoholism at the time of trial was a reference to trial counsel and not to Mr. Rust).

represented petitioner at trial in a lucid and alert manner, petitioner failed to show that counsel's alleged alcohol problem amounted to a *per se* denial of the effective assistance of counsel. *See Ivory v. Jackson*, 509 F.3d 284, 295 (6th Cir. 2007) (trial counsel's alleged shortcomings at defendant's murder trial were not sufficient to create *per se* prejudice, as to support defendant's ineffective assistance of counsel claim, despite trial counsel's alleged drug and alcohol abuse, where trial counsel was conscious throughout the proceedings, cross-examined state's witnesses, moved for judgment of acquittal, and made a coherent closing argument).

Petitioner next argues that trial counsel was ineffective for failing to argue that the murder victim was a professional mixed martial arts fighter to bolster his self-defense claim. Counsel did in fact extensively cross-examine Petitioner's father regarding the victim's martial arts background. Ricky Davis also testified that "[e]veryone knew [the victim]. Knew him from being a professional kick boxer." Transcript, ECF No. 7-13 PageID.1362.

Petitioner next argues that trial counsel was ineffective for failing to request a psychiatric evaluation to determine Petitioner's competency to stand trial. Counsel testified at the *Ginther* hearing that he had no good-faith basis to believe that there was any reason to believe that Petitioner was incompetent to stand trial. Transcript, ECF No. 7-18 PageID.1658. The judge, in rejecting the ineffective assistance of counsel claim, concluded that there was no basis to request an evaluation and no

deficiency from counsel's decision not to seek an evaluation. Transcript, ECF No. 7-19 PageID.1909–10.

A defendant is not prejudiced by counsel's failure to seek a competency examination, absent an actual basis to support a claim of incompetency at the time of the proceeding. *See Bair v. Phillips,* 106 F. Supp. 2d 934, 941 (E.D. Mich. 2000). Defense counsel's failure to challenge Petitioner's competency to stand trial did not amount to deficient performance in the absence of any evidence that Petitioner was acting abnormally at the time of his pre-trial or trial proceedings. *Id.* at 942.

Petitioner next claims that counsel "failed to make crucial objections." ECF No. 1 PageID.96. Counsel testified at the *Ginther* hearing that his decision not to repeat an objection he had already made unsuccessfully was a tactical decision, not a sign of incompetence. Transcript, ECF No. 7-18 PageID.1619–20.

The Supreme Court has observed that "[a]n objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review." *Douglas v. State of Ala.*, 380 U.S. 415, 422 (1965). Indeed, "[N]o legitimate state interest" is served "by requiring repetition of a patently futile objection," which has been rejected several times, "in a situation in which repeated objection might well affront the court or

prejudice the jury beyond repair." *Id.* In light of the fact that the trial court had already ruled against him, defense counsel may reasonably have concluded that further objection would have been fruitless. *See, e.g., Garrett v. United States,* 78 F.3d 1296, 1301–02 (8th Cir. 1996). "[I]neffective assistance should not be found under *Strickland* when counsel fails to perform those acts which clearly appear to be futile or fruitless at the time the decision must be made." *Id.*, at 1303 n.11.

Petitioner next contends that trial counsel was ineffective for admitting in his opening statement that Petitioner had a delivery of cocaine conviction. As the judge noted in rejecting Petitioner's ineffective assistance of counsel claim, the jury was going to learn that Petitioner had a prior felony conviction because that was one of the elements of the felon-in-possession of a firearm charge. The judge concluded that counsel's decision to inform the jurors of the nature of the prior conviction, rather than stipulating that petitioner had a prior unspecified conviction, may have been strategic, so that the jurors would not speculate that petitioner had a prior assaultive or weapons conviction. ECF No. 7-19 PageID.1901. Trial counsel was not ineffective for failing to stipulate that petitioner had a prior felony conviction, because it might have been sound strategy for counsel to allow Petitioner's prior conviction to be admitted to prevent the jurors from speculating about the crime Petitioner had been convicted of. *See, e.g., Bradley v. Birkett*, 192 F. App'x 468, 476 (6th Cir. 2006). Moreover, petitioner was not prejudiced by

counsel's failure to stipulate to the prior conviction, in light of the significant evidence of petitioner's guilt. *Id.*

Petitioner next contends that counsel was ineffective because he showed disinterest in his case, expressed contempt for Petitioner, thought that the questions that Petitioner wanted to have asked were stupid, and told Petitioner he thought he was guilty. ECF No. 1 Page.ID 96–97. The mere fact that an attorney dislikes or distrusts his client does not establish ineffective assistance of counsel or a conflict of interest, absent a showing of how this animosity affected counsel's performance. *See Hale v. Gibson,* 227 F.3d 1298, 1312–13 (10th Cir. 2000). Petitioner has made no such showing.

Petitioner next contends that counsel was ineffective for failing to call character witnesses or witnesses to support his self-defense claim.

Conclusory allegations of ineffective assistance of counsel, without any evidentiary support, do not provide a basis for habeas relief. *See Workman v. Bell,* 178 F.3d 759, 771 (6th Cir. 1998). Petitioner failed to attach any affidavits from these additional witnesses concerning their proposed testimony, nor did he provide any such affidavits either in the motion for a *Ginther* hearing filed by counsel Mr. Smith or the numerous *pro se* supplemental Standard 4 briefs and motions that petitioner filed with the Michigan Court of Appeals.[6]

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[6] *See* ECF No. 7-20 PageID.2078–89, ECF No. 7-21 PageID.2169–2261, ECF No. 7-22 PageID.2262–2311.

By failing to present any evidence to the state courts in support of his ineffective assistance of claim, petitioner is not entitled to an evidentiary hearing on his ineffective assistance of counsel claim with this Court. *See Cooey v. Coyle*, 289 F.3d 882, 893 (6th Cir. 2002) (citing 28 U.S.C. § 2254(e)(2)(A)(ii)). Petitioner has failed to attach any offer of proof or any affidavits sworn by the proposed witnesses. Petitioner has offered, neither to the Michigan courts nor to this Court, any evidence beyond his own assertions as to whether the witnesses would have been able to testify and what the content of these witnesses' testimony would have been. In the absence of such proof, Petitioner is unable to establish that he was prejudiced by counsel's failure to call these witnesses to testify at trial, so as to support the second prong of an ineffective assistance of counsel claim. *See Clark v. Waller,* 490 F.3d 551, 557 (6th Cir. 2007).

Petitioner further alleges that counsel lied to him by telling him his sister would not testify on his behalf. But counsel's testimony at the *Ginther* hearing does not substantiate Petitioner's claim. According to counsel, he and Petitioner discussed whether to call Ashley Davis to testify and decided that it would be better not to call her. ECF No. 7-18 PageID.1629. Petitioner failed to provide an affidavit from his sister, so this Court is unable to determine whether he was prejudiced by counsel's decision not to call her to testify.

Petitioner next claims that counsel was ineffective for failing to investigate certain witnesses. This claim fails for the same reason as Petitioner's claim above, namely, that he failed to provide this Court with affidavits from these witnesses concerning their proposed testimony and willingness to testify on Petitioner's behalf. Counsel testified at the *Ginther* hearing that he interviewed several witnesses and found that they would not be helpful. *Id.* at PageID.1602. In addition, counsel had the notes from Petitioner's first attorney regarding that attorney's interviews of other witnesses, and based on those notes made a reasonable decision that it was not necessary to interview those witnesses again. *Id.* at PageID.1602–04. The Sixth Circuit "has recognized that a defendant is not denied effective assistance of counsel even if his attorney conducts no independent investigation of his own but merely receives and relies upon a prior attorney's work product in going to trial." *Ray v. Rose*, 535 F.2d 966, 975 (6th Cir. 1976). Petitioner failed to show that counsel's decision to rely on the investigation of prior counsel was unreasonable.

Petitioner next alleges that trial counsel was ineffective for failing to interview Mr. Jones, the jailhouse informant, prior to him testifying. Petitioner argues that had counsel interviewed Mr. Jones, he would have discovered that Mr. Jones committed perjury. Petitioner also argues that if counsel had interviewed Jones, he would have discovered Jones received favorable treatment in exchange for his testimony. This

information was elicited at trial by the prosecution. Transcript, ECF No. 7-14 PageID.1433–34. Defense counsel cross-examined Jones about this plea deal on cross examination, *Id.* at PageID.1443, and used this plea deal to attack Jones' credibility in closing argument. *Id.* at PageID.1485. Petitioner has failed to show that he was prejudiced by counsel's failure to interview Jones prior to him testifying.

Petitioner also alleges that trial counsel was ineffective for failing to present videotape evidence from the Berrien County Jail which he claims would have shown that he and Mr. Jones never had any contact, in order to discredit Jones' testimony. Petitioner also claims that counsel should have obtained the surveillance tapes from a liquor store and a gas station in order to discredit several other witnesses. ECF No. 1-1 PageID.123.

The problem with this claim is that, like the others, Petitioner presented no evidence to this Court or to the state courts that such evidence exists or that it contains exculpatory or impeachment material. In the absence of such a showing, Petitioner is not entitled to relief on his claim.

Petitioner next contends that trial counsel was ineffective in his cross-examination of the witnesses.

"Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel." *Dell v. Straub,* 194 F. Supp. 2d 629, 651 (E.D. Mich. 2002). "Impeachment

strategy is a matter of trial tactics, and tactical decisions are not ineffective assistance of counsel simply because in retrospect better tactics may have been available." *Id.*

Defense counsel's performance did not constitute ineffective assistance of counsel where the record shows that defense counsel carefully cross-examined the prosecution witnesses and in his closing argument emphasized the inconsistencies and weaknesses in the testimony of the various witnesses, as well as their possible motivations for testifying falsely against petitioner. *See Krist v. Foltz,* 804 F.2d 944, 948-49 (6th Cir. 1986).

Although other attorneys might have reached a different conclusion about the value of cross-examining the witnesses in greater detail, counsel's strategic choice not to cross-examine these witnesses in greater detail was "'within the wide range of reasonable professional assistance.'" *See Moss v. Hofbauer,* 286 F.3d 851, 864 (6th Cir. 2002) (quoting *Strickland*, 466 U.S. at 689). Finally, Petitioner has failed to identify how additional impeachment of these witnesses would have affected the verdict. Defense counsel was not ineffective by not more forcefully cross-examining the witnesses, particularly when the effect of further probing is entirely speculative on Petitioner's part. *See Jackson v. Bradshaw,* 681 F.3d 753, 764–65 (6th Cir. 2012).

Petitioner next claims that defense counsel was ineffective because he failed to object to Jones' testimony as a violation of Petitioner's Sixth Amendment right to counsel.

The Michigan Court of Appeals rejected petitioner's claim:

> Jones testified that he came into contact with defendant after defendant was moved into the same jail block as he. There is no record evidence to indicate that the police purposely placed defendant in the same block as Jones or that the police and Jones had worked out a plan to gain incriminating statements from defendant. Nothing on the record refutes that Jones, on his own and without any instruction or encouragement from the police, brought defendant's statements to the attention of the prosecutor and police. So, an objection to Jones's testimony on the basis that it violated defendant's Sixth Amendment right to counsel would have been futile; failing to assert a futile objection is not ineffective assistance.

People v. Davis, 2016 WL 1125669, at *5.

Once a defendant's Sixth Amendment right to counsel has formally attached, a defendant is denied that right when law enforcement officials "deliberately elicit" incriminating statements from him in the absence of his lawyer. *Massiah v. United States,* 377 U.S. 201, 206 (1964). However, the Sixth Amendment does not forbid the admission of a criminal defendant's statements to a jailhouse informant who may be placed in close proximity to the defendant in jail but who makes no effort to initiate or to stimulate conversations about the crime with which the defendant is charged. *See Kuhlmann v. Wilson*, 477 U.S. 436, 456 (1986). A

defendant's Sixth Amendment right to counsel is "is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). A criminal defendant thus does not show a violation of his Sixth Amendment right to counsel merely by showing that an informant, either through a prior arrangement with the police or voluntarily, reported his incriminating statements to the police. *Kuhlmann,* 477 U.S. at 459. *Massiah* is concerned with secret interrogation by investigatory techniques which are considered the equivalent of direct police interrogation. A defendant must demonstrate that the police and their informant took some action, beyond merely listening, which was designed deliberately to elicit incriminating remarks from the defendant. *Id.*

Petitioner failed to show that Jones was acting as a government agent when petitioner made his incriminating remarks to him or that Jones undertook any action that was deliberately designed to elicit these incriminating remarks from Petitioner. Because the evidence establishes that Jones merely listened to Petitioner's confession without encouraging it or otherwise eliciting it, the use of Petitioner's confession to Jones did not violate defendant's right to counsel. *See Post v. Bradshaw,* 621 F.3d 406, 424–25 (6th Cir. 2010). Counsel was not ineffective for "failing to pursue a meritless *Massiah* motion." *Price v. Phelps*, 894 F. Supp. 2d 504, 523 (D. Del. 2012).

Petitioner next claims that trial counsel was ineffective for failing to hire a private investigator. Petitioner, however, has failed to show that counsel would have obtained beneficial information had he hired an investigator, thus, he failed to establish that he was prejudiced by counsel's failure to hire an investigator. *See Welsh v. Lafler*, 444 F. App'x 844, 851 (6th Cir. 2011) (defense counsel's failure to hire private investigator during prosecution for criminal sexual conduct did not prejudice defendant, and thus was not ineffective assistance; defendant failed to present sufficiently detailed and convincing account of what additional facts investigator could have discovered in support of defendant's innocence).

Petitioner finally argues that counsel was ineffective for failing to object to the prosecutor's argument that it was possible that someone planted a knife on the victim after he was killed in order to fabricate a self-defense claim.

It is improper for a prosecutor during closing arguments to bring to the jury any purported facts which have not been introduced into evidence and which are prejudicial; however, prosecutors must be given leeway to argue reasonable inferences from the evidence. *Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000). The prosecutor's suggestion that the knife could have been planted on the victim was a reasonable inference from the evidence that the victim's fingerprints were not found on the

knife and no one saw the victim carrying a knife that night. Transcript, ECF No. 7-14 PageID.1480.

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

G. Claim 8: Systematic Exclusion.

Petitioner next claims that he was denied a jury drawn from a fair cross-section of the community because he was tried by an all-white jury.

Although a defendant has no right to a jury composed in whole or in part of persons of his own race, he does have the right to be tried by a jury whose members are selected by non-discriminatory criteria. *Powers v. Ohio*, 499 U.S. 400, 404 (1991) (internal citations omitted). While states may prescribe relevant qualifications for their jurors, members of

a community may not be excluded from jury service on account of their race. *Id.*

A defendant, however, may not challenge the makeup of a jury merely because no members of his race are on a jury, but must prove that jurors of his race have been systematically excluded. *Apodoca v. Oregon*, 406 U.S. 404, 413 (1972). To establish a *prima facie* violation of the fair cross-section requirement, a defendant must show:

> (1) that the group alleged to have been excluded is a 'distinctive group' in the community;
> (2) that the representation of that group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
> (3) that the under-representation is due to the systematic exclusion of the group in the jury selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979).

"More than mere numbers must be provided to establish" that members of a particular ethnic or racial group are systematically under-represented in the jury venire. *United States v. Greene*, 971 F. Supp. 1117, 1128 (E.D. Mich. 1997). The strength of the evidence of under-representation of the group in the venire is only one factor to be considered in determining whether a *prima facie* violation of the fair cross-section requirement has been established. Factors such as the nature of the process by which jury lists are composed and the length of

time of under-representation, together with the strength of the evidence that purports to establish unfair and unreasonable representation also need to be examined. *Id.* (citing to *Ford v. Seabold*, 841 F.2d 677 (6th Cir. 1988)).

The only evidence that petitioner offers in support of his claim is the fact that a single African-American juror who had initially been called to sit on the jury panel had been excused. Petitioner does not identify this juror, nor does he offer any evidence concerning the number of African-American jurors who were in the entire jury pool. "'[A] one-time example of underrepresentation of a distinctive group wholly fails to meet the systematic exclusion element' to establish a prima facie violation of the Sixth Amendment's requirement that jurors in criminal cases be drawn from a fair cross-section of the community." *Gardner v. Kapture*, 261 F. Supp. 2d 793, 802 (E.D. Mich. 2003) (quoting *McGinnis v. Johnson*, 181 F.3d 686, 690 (5th Cir.1999)). Petitioner failed to show that African-Americans were systematically excluded from jury service in Berrien County at the time of his trial. Conclusory assertions of underrepresentation are insufficient to support a systematic exclusion claim. *See U.S. v. McCaskill*, 48 F. App'x 961, 962 (6th Cir. 2002). Petitioner's failure to point to any evidence supporting a *prima facie* violation of the fair cross-section requirement defeats this claim. *Id.*

H. Claim 9: Transcripts

Petitioner finally alleges that his due process rights were violated because he was not provided copies of the trial transcripts to assist him in preparing his *pro se* Standard 4 briefs that he filed on appeal in addition to the brief submitted by appellate counsel.

Petitioner's claim is without merit because the trial transcripts were provided to him by the trial court.

In any event, petitioner fails to state a claim upon which relief can be granted. A criminal defendant has no federal constitutional right to self-representation on direct appeal from a criminal conviction. *Martinez v. Court of Appeal of California,* 528 U.S. 152, 163 (2000). This is because the rights protected by the Sixth Amendment, including the right to self-representation, are rights that are available to prepare for trial and at the trial itself. However, the Sixth Amendment does not include any right to appeal. *Id.* at 160. The Supreme Court also rejected the idea that the right to self-representation on appeal could be grounded in the Due Process Clause [of the Fourteenth Amendment], because "[U]nder the practices that prevail in the Nation today, however, we are entirely unpersuaded that the risk of either disloyalty or suspicion of disloyalty is a sufficient concern to conclude that a constitutional right of self-representation is a necessary component of a fair appellate proceeding". *Martinez,* 528 U.S. at 161.

Thus, there is no constitutional entitlement to submit a *pro se* appellate brief on direct appeal from a criminal conviction in addition to a brief submitted by appellate counsel. *See McMeans v. Brigano,* 228 F.3d 674, 684 (6th Cir. 2000). By accepting the assistance of counsel, the criminal appellant waives his right to present *pro se* briefs on direct appeal. *Myers v. Johnson*, 76 F.3d 1330, 1335 (5th Cir. 1996); *see also Henderson v. Collins,* 101 F. Supp. 2d 866, 881 (S.D. Ohio 1999); *aff'd in part, vacated in part on other grounds*, 262 F.3d 615 (6th Cir. 2001) (defendant who was represented by counsel and also sought to submit *pro se* brief upon appeal did not have right to such hybrid representation).

Because Petitioner was represented by appellate counsel, any failure by the trial court or appellate counsel to provide Petitioner with the trial transcripts so that he could prepare his own *pro se* brief would not violate Petitioner's constitutional rights. *See U.S. v. Dierling*, 131 F.3d 722, 734 n. 7 (8th Cir. 1997); *Foss v. Racette*, No. 1:12-CV-0059, 2012 WL 5949463, at *4 (W.D.N.Y. Nov. 28, 2012); *see also Willis v. Lafler*, No. 05-74885, 2007 WL 3121542, at *18 (E.D. Mich. Oct. 24, 2007) (petitioner not entitled to habeas relief based upon trial court's failure to rule on petitioner's post-trial motion to compel copies of transcripts and videotapes when petitioner was represented by appellate counsel).

Petitioner also alleges that his appellate counsel was ineffective for failing to move for a *Ginther* hearing on his ineffective assistance of trial counsel claims. The Sixth Amendment guarantees a defendant the right

to the effective assistance of appellate counsel on an appeal of right, *see Evitts v. Lucey*, 469 U.S. 387, 396-397 (1985). In the present case, although Petitioner's original appellate counsel did not move for a *Ginther* hearing, Petitioner retained a second attorney, Mr. Shawn Patrick Smith, who successfully moved for a *Ginther* hearing, which was conducted on June 11 and 26, 2015. Petitioner was represented by this attorney at the *Ginther* hearing. "Since no other Supreme Court precedent has expanded the *Evitts* rule to require a forum for ineffective assistance of appellate counsel claims when the appellant's case was actually heard and decided," as was the case here, Petitioner is not entitled to habeas relief on his ninth claim. *Wilson v. Parker*, 515 F.3d 682, 708 (6th Cir. 2008), *as amended on denial of reh'g and reh'g en banc* (Feb. 25, 2009).

IV. Conclusion

The Court denies the petition for a writ of habeas corpus. The Court also denies a certificate of appealability to petitioner. In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further.

Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). When a district court rejects a habeas petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims to be debatable or wrong. *Id.* at 484. "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254.

For the reasons stated in this opinion, the Court denies Petitioner a certificate of appealability because he failed to make a substantial showing of the denial of a federal constitutional right. *See also Millender v. Adams,* 187 F. Supp. 2d 852, 880 (E.D. Mich. 2002). The Court also denies Petitioner leave to appeal *in forma pauperis*, because the appeal would be frivolous. *See Allen v. Stovall,* 156 F. Supp. 2d 791, 798 (E.D. Mich. 2001).

SO ORDERED.

Dated: April 30, 2019

s/Terrence G. Berg
TERRENCE G. BERG
UNITED STATES DISTRICT JUDGE

No. 19-1540

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 06, 2020
DEBORAH S. HUNT, Clerk

JOVON C. DAVIS,

Petitioner-Appellant,

v.

WILLIS CHAPMAN, WARDEN,

Respondent-Appellee.

ORDER

Before: SUTTON, McKEAGUE, and NALBANDIAN, Circuit Judges.

Jovon C. Davis petitions for rehearing en banc of this court's order entered on December 4, 2019, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX - 5

Attorney Grievance Commission (Complaint)

Detroit, MI 48226

REQUEST FOR INVESTIGATION (R/I) FOR

Please fill out the entire form in ink – sign at the bottom – and provide a copy of any relevant information. In order to expedite the processing of your complaint, please provide 2 copies of any supporting documents.

Attorney information:

Name (one attorney per R/I form): Daniel J. Rust		
Address (number and street): P.O. Box 40089		
City: Redford	State: Michigan	Zip Code: 48240
Area code and Telephone Number: 313 837 7734	Date attorney was hired/appointed: 4-7-14	
Type of case (divorce, criminal, estate, etc): Criminal		
Name of court: Berrien County		Case #: 2013-000303
Is this your first complaint to this office about this attorney? yes	Date of previous complaint (if applicable):	

STATEMENT OF FACTS

(Please provide details. You may attach additional pages.)

I am writing in regard to my appellate counsel, Daniel J. Rust(32856) The attorney is in violation of the Michigan Rules of Professional Conduct (MRPC). I asked Mr. Rust to obtain a number of transcripts to help adequately prepare the appellate brief. Also, he has not properly investigated my case which is contrary to (MRPC) rule 1.1(b)(c). There has been a lack of communication which may be the key to our destroyed relationship. When I requested to review Mr. Rust's briefs before he submit it, his response was, "Are you an Attorney?" The Failed communication violates (MRPC) 1.4(b). The attorney's failure to comply with my requests are contrary to (MRPC) rule 1.2(a) and rule 1.3. The attorney's performance makes me feel uneasy because I went through the same process with my trial counsel. Pursuant to (MRPC) rule 8.4(b), which states it is professional misconduct for the misrepresentation. I am in no way satisfied with Mr. Rust's performance. I humbly asked to be appointed a new counsel;

I request the Attorney Grievance Commission investigate the above attorney:

Your Name – print in ink: Jovon DAVIS	Mr☑ Mrs☐ Ms☐	
Your Signature – in ink: Jovon Davis		Date: 9-22-14
Address (number and street): 1342 West Main Street		
City: Ionia	State: Michigan	Zip Code: 48846
Area code and Telephone number:		

(AGC RI Form rev. May 31, 2011)

(00049917.DOC)

APPENDIX - 6

Attorney Grievance Commission (Response)

STATE OF MICHIGAN

ATTORNEY GRIEVANCE COMMISSION

BUHL BUILDING
535 GRISWOLD, SUITE 1700
DETROIT, MICHIGAN 48226
TELEPHONE (313) 961-6585
WWW.AGCMI.COM

October 28, 2014

PERSONAL AND CONFIDENTIAL

Mr. Jovon Davis #591753
Michigan Reformatory
1342 West Main Street
Ionia, MI 48846

RE: **Jovon Davis as to Daniel J. Rust**
AGC File No. 1920-14

Dear Mr. Davis:

This office received your Request for Investigation, however, the allegations in your complaint are insufficient to warrant review by the Commission. Accordingly, after careful review by the staff, this matter is being closed under the authority of the Grievance Administrator pursuant to Michigan Court Rule 9.112 (C)(1) (a).

The Attorney Grievance Commission has no authority to direct any attorney to take any action on your behalf. We also have no authority to remove an attorney from your case. If you are unable to resolve your differences by communicating directly with your attorney, you may consider asking the court to appoint a new attorney.

Mr. Rust has been provided with a copy of your Request for Investigation. If my staff or I can be of service to you in the future, please do not hesitate to contact us again.

Very truly yours,

Ruthann Stevens
Senior Associate Counsel

RS/bat
cc: Daniel J. Rust
Enclosure

{00244485.DOC}

APPENDIX- 7

Motion For Certificate Pursuant to Uniform Act TO Secure Attendence Of Witness, From Without State

STATE OF MICHIGAN

IN THE TRIAL COURT FOR THE COUNTY OF BERRIEN

THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

-vs-

JOVON CHARLES DAVIS

Defendant.

/

File No. 2013000303-FY

MOTION FOR CERTIFICATE PURSUANT TO UNIFORM ACT TO SECURE ATTENDANCE OF WITNESS FROM WITHOUT STATE

NOW COME the People of the State of Michigan by their Attorney, Patricia T Ceresa, Assistant Prosecuting Attorney, in and for the County of Berrien and move this Court for the issuance of a certificate to secure the attendance of one Charles Lee Marcus Davis Jr, believed to be a resident or working in the City of Plymouth, County of Hennepin, State of Minnesota.

The People further state:

1. That the State of Michigan has enacted the Uniform Act to Secure the Attendance of Witnesses from Without a State in criminal proceedings, being MCLA 767.91 et. seq.; MSA 28.1023(191) et. seq.

2. That the State of Minnesota has also enacted the Uniform Act to Secure Attendance of Witnesses from Without the State in criminal proceedings, being M.S.A. §§ 634.06 to 634.09.

3. That the above named defendant is charged in Berrien County Trial Court with the offense of 750.316-C, Hom-Opn Mrdr-Stat Sht Frm; 750.83, Assault WI To Murder; 750.224F, Poss Firearm by Felon; 750.227, WPN-Carrying Concealed; 750.227B-A, Weapons-Felony Firearms.

4. That the Preliminary Examination in the above matter has been set for the 25th day of April, 2013, at 8:30 am in the Berrien County Courthouse, St. Joseph, Michigan and is scheduled for 1 day(s) of testimony.

5. That the People of the State of Michigan are required to produce all material witnesses upon the trial of this cause.

6. That Charles Lee Marcus Davis Jr is a material witness to this particular offense in that he/she has knowledge and information necessary to properly resolve the above entitled matter.

7. That said witness is required to testify in the Berrien County Trial Court in the above entitled matter pursuant to Michigan law and is, therefore, a material and necessary witness to the prosecution in this matter.

8. That attendance and testifying in the prosecution of this matter will not cause undue hardship to the witness.

9. That pursuant to MCLA 767.94; MSA 28.1023(193) said Charles Lee Marcus Davis Jr shall not, while in this state, pursuant to such summons as may be issued by the Courts of Berrien County be subject to arrest or the service of civil or criminal process in connection with matters which arose before his/her entrance into this State under said summons.

10. That statutory witness fees are being forwarded to the Court in Hennepin County, for the named witness.

WHEREFORE, the People pray that this court issue a certificate and forms attached hereto pursuant to the authority of MCLA 767.92 et. seq.; MSA 28.1023(191) et. seq.

Respectfully submitted,

Patricia T Ceresa
Assistant Prosecuting Attorney
Berrien County, Michigan

APPENDIX - 8

Petition To Hold Material Witness To Bail Order

To Hold Material Witness To Bail After Hearing

STATE OF MICHIGAN
IN THE TRIAL COURT FOR THE COUNTY OF BERRIEN

THE PEOPLE OF THE
STATE OF MICHIGAN

Plaintiff,

-vs-

JOVON CHARLES DAVIS,

Defendant.
_____/

File No. 2013-000303-FY

Judge Gary J. Bruce

ORDER TO HOLD MATERIAL WITNESS TO BAIL AFTER HEARING

FILED
MAY 20 2013
BERRIEN COUNTY
TRIAL COURT

Patricia T. Ceresa (P40251)
Assistant Prosecuting Atty
811 Port Street
St. Joseph, MI 49085
(616) 983-7111 Ext. 8311
_____/

Richard Sammis (P43777)
Attorney for Defendant
606 Main Street
St. Joseph, Mi 49085
616 983-1803
_____/

A Petition having been filed in this case by the People of the State of Michigan by and through Patricia T. Ceresa, Assistant Prosecuting Attorney, setting forth that Charles Lee Marcus Davis Jr. (a black male born 04/01/84) is a necessary and material witness in a criminal case in a Court in said County, and that there is danger of the loss of Charles Lee Marcus Davis Jr's testimony in said cause, or in default of bail that Charles Lee Marcus Davis Jr. be committed to the County Jail until the conclusion of said case, and as attachment having been issued thereon, and the said material witness having been before this Court, and, after hearing the proofs presented, it satisfactorily appearing that said person is a material and necessary

witness in said cause, and that there is danger of the loss of Charles Lee Marcus Davis Jr. testimony unless they furnish bail or are committed in default of bail, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the said Charles Lee Marcus Davis Jr. furnish bail in the sum of 50,000 cash/surety conditioned upon his appearance in the Courts of this County, for all examinations, all hearings and trials in said cause, or, in default thereof, be committed to the custody of the Sheriff of this County until such bail be furnished, or until discharged by the further Order of this Court.

DATED: 5-17-13

Gary J. Bruce
Trial Court Judge

Attest:

Deputy Clerk

Bond - 50,000 d/s
No Contact w/ Jovon Davis

D1B

STATE OF MICHIGAN
IN THE TRIAL COURT FOR THE COUNTY OF BERRIEN

THE PEOPLE OF THE
STATE OF MICHIGAN

Plaintiff,

-vs-

JOVON CHARLES DAVIS,

Defendant.
_____/

File No. 2013-000303-FY

Judge Gary J. Bruce

PETITION TO HOLD MATERIAL WITNESS TO BAIL

ENTERED

PATRICIA T. CERESA (P40251)
Office of Prosecuting Attorney
811 Port Street
St. Joseph, MI 49085
(616) 983-7111 Ext. 8311
_____/

Richard Sammis (P43777)
Attorney for Defendant
606 Main Street
St. Joseph, Mi 49085
616 983-1803
_____/

STATE OF MICHIGAN)
)ss
COUNTY OF BERRIEN)

NOW COMES, the People of the State of Michigan by and through Patricia T. Ceresa, Assistant Prosecuting Attorney, and respectfully shows:

1. THAT there is a criminal case pending in the Trial Court for the County of Berrien, in which case the name of the Defendant is as shown above on this petition.

2. THAT Charles Lee Marcus Davis Jr. (a black male born 04/01/84) is a necessary and material witness in said criminal case, and there is danger of the loss of his/her testimony unless he be required to furnish bail or be committed in the event he fails to furnish such bail.

3. Charles Lee Marcus Davis Jr. served a subpoena on April 10, 2013 for a preliminary examination on April 25, 2013.

4. THAT Charles Lee Marcus Davis Jr. failed to appear on April 25, 2013, called the Assistant Prosecutor and was instructed come to the prosecutor's office on said date to discuss the case with the prosecutor

5. Charles Davis Jr. did not appear and the prosecutor has made numerous efforts to contact Charles Davis Jr. without success.

6. Police officers have attempted to locate Charles Davis Jr. to this date without success.

7. Charles Davis Jr. is an eye witness to the crime of murder and the shooting of Heather Poe and is material to the case.

WHEREFORE, your petitioner therefore prays that an attachment be issued pursuant to MCLA 767.35 (MSA 28.975) requiring said witness to be brought before this Court to show cause why Charles Lee Marcus Davis Jr. (a black male born 04/01/84) should not be required to enter into a recognizance to appear and give testimony in said cause.

DATED: May 17, 2013

Patricia T. Ceresa
Assistant Prosecuting Attorney

Subscribed and sworn to before me, a Notary Public in and for the County of Berrien, this 17th day of May, 2013.

Susanne Wagner, Notary Public
My Commission Expires: 7/22/2018

APPENDIX-9

Aurthur Jones Plea-Bargain

Berrien County Prosecutor's Office
Charge Change Authorization Worksheet

Case Number 2014004172

Defendant's Name Arthur Jones Person ID _____

The Berrien County Prosecutor's Office authorizes the following charge changes:
Must include PACC codes.

Ct. 1 ☑ Amended Larceny from the Person PACC 750.357
☐ Added
☐ Nolle

Ct. 2 ☐ Amended CSP Robbery - Armed PACC _____
☐ Added
☑ Nolle

Ct. 3 ☐ Amended Accessory After the Fact PACC _____
☐ Added
☑ Nolle

Ct. 4 ☐ Amended Weapons PACC _____
☐ Added
☑ Nolle

Ct. _____ ☐ Amended _____ PACC _____
☐ Added
☐ Nolle

Notes: _____

☑ Plea Agreement:
Upon A plea to Larceny from the Person as amended in count 1, as well as his agreement to testify against Lou Anderson, including testifying, the people agree to dismiss all other counts & to a 43 month cap on the min. and.

Authorizing Prosecutor's Bar Number P71590

Authorizing Prosecutor's Signature Accepted Date 4/10/14

White copy – Courts
Yellow copy – Prosecutor File

Effective. 06/30/2008

PA-0197 6/24/2008

APPENDIX - 10

Aurthur Jones Volunteering / Acting As An Agent Kite

2013016473

RECEIVED

NAME: _____ TO: ~~DEC 03 2013~~

RECEIVED
NOV 27 2013
Berrien County
Prosecutors Office

LOCATION: B_____ C_____ (or) Dorm _____ ~~Berrien County~~ Prosecutors Office

919 Port Street, St. Joseph, Michigan 49085

JAIL INFORMATION: (269) 982-8670 DATE: 11-26-13

I'm in the gym and 2 inmate Sims confessed to me about him and his co-defendant robbery, I was told by Sims to in the gym as well.

Arthur Sims
500263 89
Location Gym

From: **Samantha Henderson** <shenderson@berriencounty.org>
Date: Fri, Sep 27, 2019 at 9:43 AM
Subject: FOIA Request RE: Jovon Davis
To: <matt@humanityforprisoners.org>

Mr. Tjapkes,

The Berrien County Prosecutor's Office is in receipt of your Freedom of Information Act request, dated November 9, 2018, which you submitted to the Berrien County Corporate Counsel in reference to prosecutor's file, People v Jovon Davis. Our office did not receive this request until September 23, 2019. You request is for a copy of "all available documents regarding a plea deal that was given to Arthur B. Jones for his testimony in the case of Jovon Davis, case number 2013-000303-FC."

Per your request, our office reviewed file 2013000303-FC, *People v Jovon Davis*. The prosecutor's file for this case contains the following specified documents related to your request: a copy of supplement #44 of the Benton Harbor Department of Public Safety's Police report dated January 18, 2014 (2 pages) and pages 19 through 33 of volume IV the jury trial transcript for *People v Jovon Davis* where Arthur Jones testified. I am only including the transcript portion where Arthur Jones testified. Should you need the rest of the trial transcript, you'll need to make a separate request.

Our office also reviewed file 2013016473-FC, *People v Arthur B. Jones*. The prosecutor's file for this case contains the following specified documents related to your request: the Charge Change Authorization Worksheet and a copy of a letter from Arthur Jones.

These 4 documents (total of 19 pages) are attached to this email. For this particular request, the fee is waived.

You may submit to the Prosecutor a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the disclosure denial, or seek judicial review of the denial under MCL 15.240. You also have the right to receive attorneys' fees and damages as provided in MCL 15.240 if, after judicial review, the circuit court determines that the public body has not complied with this section and orders disclosure of all or a portion of a public record.

Sincerely,

Samantha Henderson
Legal Assistant / LEIN TAC / Extraditions
Berrien County Prosecutor's Office
811 Port Street | St. Joseph, MI 49085
P: 269-983-7111 x8326 | F: 269-983-5757
Email: shenderson@berriencounty.org

APPENDIX - II

Petitioner's Motion For Production Of Records and Judges Order Granting Petitioners Motion

STATE OF MICHIGAN

IN THE 2nd CIRCUIT COURT FOR THE COUNTY OF BERRIEN

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Clr. Ct. No.: 13-000303-FC

-vs-

JOVON CHARLES DAVIS,
Defendant-Appellant,

Honorable Gary J. Bruce

/

Arthur J. Cotter
Berrien County Prosecutor
Attorney for Plaintiff
811 Port Street
St. Joseph, MICHIGAN 49085

Jovon C. Davis #591753
MICHIGAN REFORMATORY
1342 West Main Street
Ionia, MICHIGAN, 48846

/

MOTION FOR THE PRODUCTION OF TRANSCRIPTS
AND COURT RECORDS

NOW COMES, Jovon Charles Davis, hereafter appellant, with express reservation of all inalienable rights under State and Federal Constitutions, coming forth with a request for the production of transcripts and court records file in relation to the above entitled cause. This request is made in accord MCR 6.433(C)(2), and Griffin v Illinois, 351 US12; 76 S.Ct. 585; 100 L.Ed.2d 891.

TAKE NOTICE: MCL 440.1201(25)(26)(27), to wit: Any breach of fiduciary duty by the denial of this request for the production of transcripts and court records, will be construed as a denial of constitutionally protected rights by the judicial officer of this Court, acting at all times under the "color of law," and such a denial will require reversal upon appellate review. Appellant says the following to wit:

1. Appellant was convicted by way of a verdict of guilty after a jury trial on January 17, 2014, before the Honorable Gary J. Bruce of the 2nd Judicial Circuit Court.
2. Petitioner was found guilty of one count of second-degree murder, MCL 750.317; one count of assault with intent to commit murder, MCL 750.83; one count felon-in-possession of a firearm, MCL 750.224f; one count of carrying a concealed weapon, MCL 750.227; one count of possession of a firearm during the commission of a felony, MCL 750.227b; and one count of domestic assault third ofense, MCL 750.81(4).
3. Appellant was sentence on February 26, 2015, before the Honorable Gary J. Bruce of the 2nd Judicial Circuit Court.
4. Appellant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of incarceration of 600 months to 100 years for the murder conviction, 300 to 900 months for the assault conviction, 76 to 240 months for the felon-in-possession and carrying a concealed weapon convictions, and 46 to 180 months for the domestic assault conviction, with a consecutive sentence of two yeas for

the felony firearm conviction.

5. Appellant is currently being housed within the MICHIGAN DEPARTMENT OF CORRECTIONS at the MICHIGAN REFORMATORY CORRECTIONAL FACILITY, located at 1342 West Main Street, in Ionia, MICHIGAN.

6. Appellant filed within the 2nd Judicial Circuit Court his Claim of Appeal on February 26, 2014.

7. Appellant filed within the Michigan Court of Appeals a Appeal of Right, MCR 7.204, on December 09, 2014.

8. The Michigan Court of Appeals affirmed appellant's convictions in a Unpublished Opinion on March 22, 2015.

9. On December 21, 2014, Appellant requested documents and transcripts from this Honorable Court, with no response given.(See Attached Exhibit A)

10. On march 05, 2015, Appellant again made a formal request for the production of documents by way of a "MOTION FOR PREPARATION OF TRANSCRIPT AT PUBLIC EXPENSE" for the listed transcripts and court records he is seeking infra.(See Attached Exhibit B).

11. On September 11, 2015, appellant filed within this Honorable Court a "MOTION TO COMPEL" for the requested documents.(see Attached Exhibit C).

12. On September 17, 2015, appellant filed within the 2nd Judicial Circuit Court a "Motion for Substitution of Appellate Counsel" due to counsels refusal to appropriately assist in the retrieval of relevant documents for appellate review as well as conflict of interest. (See Attached Exhibit D).

13. To the best of appellant's knowledge several of the requested transcripts have not to date been transcribed, and said transcripts are integral to appellant's appellate review.

14. Appellant intends to raise several issues in his subsequent post-conviction motions that were not raised in his Appeal of Right, as he was not proficient in acquiring the necessary transcripts and court documents that were in fact previously requested by him.

15. Appellant further contends that the requsted documents are required to perfect a Motion for Relief From Judgment, pursuant to MCR 6.500.

16. The specific transcripts and court documents appellant is seeking to obtain include the following:

    a. Transcripts of appellant's Preliminary Examination, held on January 31, 2013, in the 5th District Court for the City of St. Joseph.

    b. Transcripts of appellant's Preliminary Examination, held on May 23, 2013, in the 5th Distric Court for the City of St. Joseph.

    c. Transcripts of the pretrial conference hearing, held on August 06, 2013, in the 2nd Judicial Circuit Court.

    d. Transcripts of the pretrial conference hearing, held on August 14, 2013, in the 3rd Judicial Circuit Court.

    e. Transcripts of the pretrial conference hearing, held on November 19, 2013, in the 2nd Judicial Circuit Court.

    f. Transcripts of the pretrial conference hearing, held

on November 25, 2013, i the 2nd Judicial Circuit Court.

g. Transcripts of the pretrial conference hearing, held on December 13, 2013, in the 2nd Judicial Circuit Court.

h. Transcripts of the pretrial conference hearing, held on December 16, 2013, in the 2nd Judicial Circuit Court.

i. Transcripts of the pretrial conference hearing, held on December 23, 2013, in the 2nd Judicial Circuit Court.

j. Transcripts of the pretrial conference hearing, held on January 06, 2014, in the 2nd Judicial Circuit Court.

k. A complete copy of the above entitled court file, including but not limited to, Judicial Dispositions, Motions, Response Motions, Bind Over pleadings and Certification of Bind Over, Appointment of Counsel Orders, and the like.

17. Appellant contends that he has shown good cause under the definition of MCR 6.433(C)(3), for the transcription of additional proceedings not previously transcribed, on the basis that said requested transcripts of the above referenced proceedings are necessary for him to perfect post-conviction appellate remedies by way of a Motion For relief From Judgment, pursuant to MCR 6.500.

18. Appellant is a indigent within the meaning of the law and cannot pay the cost for copies of the transcripts and court documents he is requesting.

19. As such, appellant believes that he is entitled to a free copy of these transcripts and court records at state expense pursuant to MCR 6.433 (C)(2),(3).

20. Appellant refers this Court to his attached Affidavits and Brief In Support of this motion and would include and incorportate them by reference.

WHEREFORE, FOR THE FORGOING RESONS, Appellant requests that this Honorable Court GRANT this motion and issue an ORDER requiring the Clerk to provide the Appellant with copies of the transcripts and court documents requestee, and, If necessary, ORDER the transcription of any additional proceedings were not previously transcribed and filed within this Court, without cost pursuant to MCR 6.433 (C)(2).

Respectfully Submitted

April 01, 2016

Jovon C. Davis

Jovon Charles Davis #591753
Appellant, In Pro Per
MICHIGAN REFORMATORY
1342 West Main Street
Ionia, MICHIGAN 48846

STATE OF MICHIGAN

IN THE 2nd CIRCUIT COURT FOR THE COUNTY OF BERRIEN

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee, Cir. Ct. No.: 13-000303-FC

-vs-

JOVON CHARLES DAVIS, Honorable Gary J. Bruce
Defendant-Appellant,
_____/

AFFIDAVIT IN SUPPORT OF MOTION FOR THE PRODUCTION OF TRANSCRIPTS AND COURT RECORDS

STATE OF MICHIGAN)
)Ss.
County of Berrien)

I, Jovon Charles Davis, as affiant in the instant cause, hereby depose and state the following in support the attached MOTION FOR THE PRODUCTION OF TRANSCRIPTS AND COURT RECORDS:

1. I am currently a inmate within the MICHIGAN DEPARTMENT OF CORRECTIONS.
2. I am currently being housed at the MICHIGAN REFORMATORY CORRECTIONAL FACILITY, located at 1342 West Main Street in Ionia, MICHIGAN.
3. If sworn as a witness, I can competently testify to the facts as set forth herein.
4. I was convicted by way of a guilty verdict after a jury trial on January 17, 2013, before the Honorable Gary J. Bruce of the 2nd Judicial Circuit Court.

5. I was found guilty of one count of second-degree murder, MCL 750.317; one count of assault with intent to commit murder, MCL 750.83; one count of felon-in-possession of a firearm, MCL 750.224f; one count of carrying a concealed weapon, MCL 750.227; one count of possession of a firearm during the commission of a felony, MCL 750.227b; and one count of domestic assault third offense, MCL 750.81(4).

6. I was sentence before the Honorable Gary J. Bruce, in the 2nd Judicial Circuit Court, as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of incarceration of 600 months to 100 years for the murder conviction, 300 to 900 months for the assault conviction, 76 to 240 months for the felon-in-possession and carrying a concealed weapon convictions, and 46 to 180 months for the domestic assault conviction, with a consecutive sentence of two yeas for the felony firearm conviction.

7. I filed within the 2nd Judicial Circuit Court my Claim of Appeal on February 26, 2014.

8. I filed within the Michigan Court of Appeals a Appeal of Right, pursuant to MCR 7.204 et seq, on December 08, 2014.

9. The Michigan Court of Appeals affirmed my convictions in a Unpublished Opinion on March 22, 2015.

10. On December 21, 2014, I requested documents and transcripts from this Honorable Court, with no response given.(See Attached Exhibit A)

11. On march 05, 2015, I again made a formal request for the production of documents by way of a "MOTION FOR PREPARATION

OF TRANSCRIPT AT PUBLIC EXPENSE" for the listed transcripts and court records.(See Attached Exhibit B).

12. On September 11, 2015, I filed within this Honorable Court a "MOTION TO COMPEL" for the requested documents.(See Attached Exhibit C).

13. On September 17, 2015, I filed within the 2nd Judicial Circuit Court a "Motion for Substitution of Appellate Counsel" due to counsels refusal to appropriately assist in the retrieval of relevant documents for appellate review conflict of interest. (See Attached Exhibl D).

14. I filed a complaint within the Attorney Grievance Commission for the misconduct and ineffective assistance of appellate counsel. (See Attached Exhibit E)

15. I intend to raise several issues in my subsequent post-conviction motions that were not raised in his Appeal of Right, as I was not proficient in acquiring the necessary transcripts and court documents that were in fact previously requested by me.

16. I further states that the requsted documents are required to perfect post-conviction pleadings, including but not limited to a Motion for Relief From Judgment, pursuant to MCR 6.500 et seq.

17. The specific transcripts and court documents I am seeking to obtain are:

    a. Transcripts of my Preliminary Examination, held on January 31, 2013, in the 5th District-Southern Division Court for the City of St. Joseph.

b. Transcripts of my Preliminary Examination, held on May 23, 2013, in the 5th District-Southern Division Court for the City of St. Joseph.

c. Transcripts of the pretrial conference hearing, held on August 06, 2013, in the 2nd Judicial Circuit Court.

d. Transcripts of the pretrial conference hearing, held on August 14, 2013, in the 3rd Judicial Circuit Court.

e. Transcripts of the pretrial conference hearing, held on November 19, 2013, in the 2nd Judicial Circuit Court.

f. Transcripts of the pretrial conference hearing, held on November 25, 2013, in the 2nd Judicial Circuit Court.

g. Transcripts of the pretrial conference hearing, held on December 13, 2013, in the 2nd Judicial Circuit Court.

h. Transcripts of the pretrial conference hearing, held on December 16, 2013, in the 2nd Judicial Circuit Court.

i. Transcripts of the pretrial conference hearing, held on December 23, 2013, in the 2nd Judicial Circuit Court.

j. Transcripts of the pretrial conference hearing, held on January 06, 2014, in the 2nd Judicial Circuit Court.

k. A complete copy of the above entitled court file, including but not limited to, Judicial Dispositions, Motions, Response Motions, Bind Over pleadings and Certification of Bind Over, Appointment of Counsel Orders, and the like.

18. I am a indigent within the meaning of the law and cannot pay the cost for copies of the transcripts and court documents I am requesting.

19. I intend to raise the following issues for post-conviction relief:

a. Prosecutorial Misconduct:

b. Ineffective Assistance of Counsel;

c. Abuse of Discretion; and

d. Ineffective Assistance of Appellate Counsel.

20. To the best of my knowledge, my appellate counsel never attempted to secure the production of these transcripts.

21. I cannot present the above listed issues for appellate review unless I can obtain a copy of the transcripts and court records I am seeking.

I declare under the penalty of perjury that the forgoing is true to the best of my knowledge, information nd belief.

Executed on April 01, 2016

Jovon C. Davis #591753
Jovon Charles Davis #591753
Defendant-Appellant/Affiant

Subscribed and sworn before me
on this 1st day of April, 2016

Dee V Lemke
notary Public, Ionia, MICHIGAN

My Commission Expires 5-7-2020

DEE V. LEMKE
NOTARY PUBLIC, STATE OF MI
COUNTY OF IONIA
MY COMMISSION EXPIRES May 7, 2020
ACTING IN COUNTY OF Ionia

STATE OF MICHIGAN

IN THE 2nd CIRCUIT COURT FOR THE COUNTY OF BERRIEN

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee, Cir. Ct. No.: 13-000303-FC

-vs-

JOVON CHARLES DAVIS, Honorable Gary J. Bruce
Defendant-Appellant,
_____/

BRIEF IN SUPPORT OF MOTION FOR THE PRODUCTION OF TRANSCRIPTS AND COURT RECORDS

The appellant, Jovon Charles Davis, is currently serving a term of imprisonment in the MICHIGAN DEPARTMENT OF CORRECTIONS after being found guilty by way of a jury trial of second-degree murder, MCL 750.317; assault with intent to commit murder, MCL 750.83; felon-in-possession of a firearm, MCL 750.224f; carrying a concealed weapon, MCL 750.227; possession of a firearm during the commission of a felony, MCL 750.227b; and domestic assault third offense, MCL 750.81(4).

Appellant was sentenced before the Honorable Gary J. Bruce, as a fourth-offense habitual offender, MCL 769.12, to serve concurrent terms of imprisonment of 600 months to 100 years for the murder conviction, 300 to 900 months for the assault conviction, 76 to 240 months for the felon-in-possession and carrying a concealed weapon convictions, and 46 to 180 months for the domestic assault conviction, preceded by two years for the felony firearm conviction.

Appellant appealed his convictions in the Michigan Court of Appeals. His convictions were affirmed in a unpublished opinion by the Court of Appeals on March 22, 2016, with a remand for correction of judgment of sentence, to the 2nd Judicial Circuit Court for resentencing.

Appellant is now before this Court seeking the court file and transcriptions of specific hearings within the court so that he can perfect collateral post-conviction remedies by way of a Motion for Reconsideration in the Court of Appeal, pursuant to MCR 7.215(I), as well as a Motion for Relief From Judgment in the 2nd Judicial Circuit Court, pursuant to MCR 6.500.

Appellant comes as an indigent, as is evidenced by his Affidavit of Indigency, and cannot afford to purchase the transcripts and court documents that he is seeking.

Moreover, without these transcripts and court records, appellant cannot possibly present the issues for which he is seeking relief in any viable and/or meaningful way in his post-conviction proceedings.

In Griffin supra, the Supreme Court held that a State with an appellate system which made available trial transcripts to those who could afford them was constitutionally required to provide a "means of affording adequate and effective appellate review to indigent defendants." Id., at 352 US at 19; Lane v Brown, 372 US 477; 83 S.Ct. 768; 9 L.Ed. 2d 892, 897 (1963).

As such, the general rule is that the State must provide court records and transcripts to indigent criminal defendants who cannot afford them. It is simply the only way to assure an

adequate and effective appeal. Evitts v Lucy, 469 US 387; 105 S.Ct. 830; 83 L.Ed. 2d 821, 828 (1985); Eskridge v Washington State Parole Board and Prison Terms and Paroles, 357 US 214, 215; 78 S.Ct. 1061; 21 L.Ed. 2d 1269 (1958); Burns v Ohio, 360 US 252; 79 S.Ct. 1164; 3 L.Ed.2d 1209 (1959); LANE, supra; Draper v Washington, 372 US 487; 83 S.Ct. 774; 9 L.Ed. 2d 899 (1963).

As the Supreme Court itself has stated, "[b]ecause we recognize that adequate and effective appellate review is impossible without trial transcripts or adequate substitutes we held that the State must provide trial records to inmates unable to buy them." Griffin, supra, 351 US at 20; Bounds v Smith, 430 US 817; 97 S.Ct. 1491; 52 L.Ed. 2d 72, 79 (1977).

Thus, to arbitrarily deny the criminal defendant the transcripts and court records that they need to effectuate post-conviction remedies violates the First and Fourteenth Amendments to the United States Constitution and would result in a substantive evil. The Supreme Court has stated that First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" (see NAACP v BUTTEN, 371 US 415, 444; 83 S.Ct. 328; 9 L.Ed. 2d 405, 424) which the legislature has the power to control. California v Trucking Unlimited, 404 US 508; 92 S.Ct. 609; 30 L.Ed. 2d 642, 649 (1972).

In the instant case, Defendant is seeking his transcripts and court records for the purpose of perfecting a motion for Relief From Judgment pursuant to MCR 6.500. Requests for transcripts and court records needed for this type of proceeding are governed by MCR 6.433(C) which states:

> (C) Other postconviction Proceedings. An indigent defendant who is not eligible to file an appeal of right or an application for leave to appeal may obtain records and documents as provided in this subrule.
>
> (1) The defendant must make a written request to the sentencing court for specific court documents or transcripts indicating that the materials are required to pursue postconviction remedies in a state or federal court and are not otherwise available to the defendant.
>
> (2) If the documents or transcripts have been filed with the court and not provided previously to the defendant, the clerk must provide the defendant with copies of such materials without cost to the defendant. If the requested materials have been provided previously to the defendant, on defendant's showing of good cause to the court, the clerk must provide the defendant with another copy.
>
> (3) The court may order the transcription of additional proceedings if it finds that there is good cause for doing so. After such a transcript has been prepared, the clerk must provide a copy to the defendant.
>
> (4) Nothing in this rule precludes the court from ordering materials to be supplied to the defendant in a proceeding under this subchapter 6.500.

Specifically, Defendant is seeking to obtain a copy of the transcripts and court records as outlined in this motion, pursuant to MCR 6.433(C)(2),(3), on the basis that he can show good cause why they are needed. First, Defendant attest that he never received a copy of said transcripts and records.(See attached Affidavit in Support of Motion). As such, he is entitled to a copy of any such transcripts and court documents that have been filed with this court free of cost in accord MCR 6.433(C)(2).

In addition to this, appellant can show good cause on the basis that these documents are essetial for him to perfect viable and meaningful issues in his 6.500 Relief From Judgment motion. Appellant is specifically seeking the following transcripts and court records:

a. Transcripts of Appellent's Preliminary Examination, held on January 31, 2013, in the 3rd Judicial Disctrict Court, for the City of St. Joseph.

b. Transcripts of Appellant's Preliminary Examination, held on May 23, 2013, in the 3rd Judicial District Court for the City of St. Joseph.

c. Transcripts of the pretrial conference hearing, held on August 06, 2013, in the 2nd Judicial Circuit Court.

d. Transcripts of the pretrial conference hearing, held on August 14, 2013, in the 2nd Judicial Circuit Court.

e. Transcripts of the pretrial conference hearing, held on November 19, 2013, in the 2nd Judicial Circuit Court, where the appointed counsel of record Mr. Sammis was excused as Appellant's trial counsel.

f. Transcripts of pretrial conference hearing, held on November 25, 2013, in the 2nd Judicial Circuit Court, where substitute counsel of record, Earnest White was appointed as new counsel.

g. Transcripts of the pretrial conference hearing, held on December 13, 2013, in the 2nd Judicial Circuit Court.

h. Transcripts of the pretrial conference hearing, held on December 16, 2013, in the 2nd Judicial Circuit Court.

i. Transcripts of the pretrial conference hearing, held on December 23, 2013, in the 2nd Judicial Circuit Court.

j. Transcripts of the pretrial conference hearing, held on January 6, 2014, in the 2nd Judicial Ircuit Court.

k. A complete copy of the above listed court file, including but not limited to, judicial dispositions, motions, response motions, Bind Over pleadings and certifications, appointment of counsel forms, ect.

Appellant states that he has not been provided with copies of the requested documents that he is seeking, as they may have not been previously transcribed and filed within the court. Regardless, the specific transcripts and court records that Appellant is requesting should be provided because they are necessary for him to perfect post-conviction remedies in this case and are not otherwise available to him. See MCR 6.433(C)(1).

Appellant states that he is requesting a copy of these documents at state expense because he is a indigent, as shown by his Affidavit of Indigency, with no available assets to pay for said copies. Any financial assistance that he does receive is a personal loan from friends and family that must be repaid upon his release from incarceration. As such circumstances exist, appellant has no other means of retaing a copy of the necessary transcripts and documentation except through this Honorable Court.

Appellant further states that he is clearly entitled to a free copy of the court records and transcripts that are within the court file as they have been previously transcribed and are required to perfect defendant's post-conviction motions.

Likewise, this Court should order the transcription of any of the other proceedings that he is seeking and order the clerk to provide him with a free copy of the same because he can show good cause for them to be transcribed in this case. See MCR 6.433(C)(3); People v Caston, 228 Mich App.291, 293 (1998).

As stated supra, Appellant is in the process of initiating post-conviction proceedings by filing a Motion for Relief From Judgment, pursuant to MCR 6.500. Appellant intends to raise several issues including:

ISSUE I

APPELLANT WAS DENIED DUE PROCESS OF LAW, WHEREAS THE PROSECUTOR COMMITTED SEVERAL ISSUES OF MISCONDUCT, INCLUDING THE USE OF UNCONTESTED PERJURED TESTIMONY AT TRIAL.

ISSUE II

APPELLANT WAS DENIED DUE PROCESS OF LAW WHERE TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO INVESTIGATE PRIOR INCONSISTANT STATEMENTS BY PROSECUTION WITNESSES THEREBY DENYING HIM A PROPER DEFENSE AT TRIAL.

ISSUE III

APPELLANT WAS DENIED DUE PROCESS OF LAW WHERE THE JUDICIARY OFFICER GARY J. BRUCE ABUSED HIS DISCRETION IN DENYING APPELLANT TO PRESENT A PROPER DEFENSE AND THEREBY DENYING HIM A FAIR AND IMPARTIAL TRIAL.

ISSUE IV

APPELANT WAS DENID HIS CONSTITUTIONAL RIGHT TO APPEAL WHERE HIS APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO ORDER THE RELEVANT TRANSCRIPTS NECESSARY TO SUPPORT HIS CLAIMS FOR APPELLATE REVIEW.

With respect to the prosecutorial misconduct issue, the requested transcripts will support appellant's claims that the prosecutor engaged in numerous instances of misconduct, including witness intimidation violations. The requested transcripts will support appellant's claim that the prosecution used tactics of intimidation to gain a verdict of guilty. The existing record is crucial in the detemination of whether appellant's due process rights were in fact violated by the prosecutions conduct. See People v Canter, 197 Mich App 550, (1992), and the use of intimidation of a witness to gain favorable testimony is improper. See People v Layher, 238 Mich App 573 (1999), Aff'd on other grds 464 Mich 756 (2001).

Not only is intimidation discouraged, but so is the induction of personal opinion without a basis either in the record or verifiable with factual evidence, and said actions should be avoided. See People v Smith, 158 Mich App 220 (1987), just as it is a long-standing rule of law that an officer of the court may not argue or refer to facts not of the record. People v Brocato, 17 Mich App 277 (1969); People v McCain, 84 Mich App 210 (1978); People v Knolton 85 Mich App 424 (1978); People v Viaene, 119 Mich App 690 (1982).

As the representive of THE PEOPLE, the prosecutor must see that the defendant has a fair trial, and protect the people, who are as concerned with protecting the innocent as convicting the guilty. Brocato, supra. Also as a officer of the court the prosecutor has the obligated duty to see that the trial court does not commit reversible error, even if it favors the People's case. People v Denny, 56 Mich App 40 (1978).

414, 425; 440 NW. 2d 14 (1989)(Counsel ineffective for failing to prepare for trial).

With respect to the abuse of discretion issue, appellant states that the requested documents will support his claims that during pretrial proceedings appellant informed the judiciary of the issues between himself and appointed counsel of record Mr. White.

Issues of such poor performance that appellant was forced to aquire a personal loan in order to retain counsel for his trial proceedings. After retaining substitute counsel. Judge Bruce then abused his discretion in refusing a adjournment for substitute counsel to properly prepare for trial, thereby forcing appellant to proceed to trial with the ineffective assistance of court appointed counsel Mr. White.

The requested transcripts of the pretrial conference hearings as listed supra are necessary to support appellant's claim that he did in fact, several occasions, placed upon the record before judge Bruce in the pretrial proceedings, his concerns with counsels ineffective assistance in his defense.

Appellant further states that the denial of this motion for transcripts and court records will further support his claim of a abuse of discretion by this judicial officer.

Finally, with respect to the last issue, appellant intends to raise in his post-conviction proceedings a claim of ineffective assistance of appellate counsel. The law indicates that both State and Federal Constitutions require that a criminal defendant receive effective assistance of counsel to perfect his appeal

Am VI, XIV, Evitts, supra. Likewise, counsel has been found to be ineffective for failing to properly prepare by procuring the necessary transcripts. Blackburn, supra.

Ineffective assistance of appellate counsel has long been recognized as constituting good cause for a delayed appeal or collateral attack on a criminal conviction. People v Wolf, 156 Mich App 225, 228; 401 NW. 2d 283 (1986), lv den, 428 Mich 899 (1987); People v Pauli, 138 Mich App 530, 534; 361 NW. 2d 283 (1984). See also People v Reed, 449 Mich 375; 535 NW. 2d 496 (1995)(Court found ineffective assistance of appellate counsel overcomes procedural bar of MCR 6.508(D)(3)).

As our own constitution states, "[I]n every criminal prosecution, the accused shall have the right...to have the assistance of counsel for his defense; to have an appeal as a matter of right; and as provided by law, when the trial court orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal." Const 1963, art 1 § 20.

When a court has found a defendant to be indigent, "a defendant is entitled to the preparation of a transcript at public expense where there is no change in defendant's financial condition. People v Arquette, 202 Mich App 227 (1993).

A court has "the duty to provide transcripts to criminal defendants seeking review of their convictions," Tennessee v Lane, 541 US 509, 533; 124 S.Ct. 1978, 1994; 158 L.Ed. 2d 820 (2004), and the inability to obtain transcripts of a criminal proceeding may so impede a defendant's right to appeal that a new trial must be ordered. People v Horton, (after remand) 105 Mich App 329 (1981).

The prosecuting officer represents the public interest, and as such his objective like that of the court should be simply justice. The prosecutor has no right to sacrifice this to any pride of professional success, and however strong may be his or her belief in the prisoner's guilt, the prosecutor must remember that, though unfair means may happen to result in doing justice to the prisoner in this case, "justice so attained is unjust and dangerous to the community." People v Skowronski, 61 Mich App 71 (1975).

With respect to the ineffective assistance of counsel issue, appellant intends to raise in post-conviction proceedings the issue of ineffective assistance of trial counsel. The law clearly indicates that a criminal defendant has the right under federal and state constitutions to the effective assistance of counsel. US Const., Am VI; Const. 1963, art 1, § 20. See also Strickland v Washington, 466 US 668; 104 S.Ct. 2052; 80 L.Ed. 2d 674 (1984): People v Pickens, 446 Mich 298; 521 NW. 2d 797 (1994).

Likewise, an attorney's failure to discover exculpatory evidence constitutes ineffective assistance of counsel. Kimmelman v Morrisson, 477 US 365, 383; 106 S.Ct. 2d 2574; 91 L.Ed. 2d 305 (1986); Cave v Singletary, 971 F.2d 1513 (CA 11, 1992); People v Delessandro, 165 Mich App 569, 574; 419 NW. 2d 609 (1988).

See also: Workman v Tate, 957 F.2d 1339, 1345 (CA 6, 1992)(Counsel ineffective for failing to prepare by contacting potential witness; Blackburn v Foltz, 828 F2d 1177,1184 (CA 6, (1987)(Counsel ineffective for failing to prepare by procuring transcript to impeach witness); People v Storch, 176 Mich App

Because appellant intends to challenge the above issues, a complete transcript of the requested proceedings in this case are necessary. See People v Cross, 30 Mich App 326, 344; 186 NW. 2d 398 (1971), aff'd, 386 Mich 237; 191 NW 2d 321 (1971).

A complete record is the appellate advocate's most valuable tool and an absolute prerequisite to rendering a effective defense on appeal. Harris v Rees, 794 F2d 1168 (CA 6, 1986); Hardy v United States, 375 US 275, 288; 84 S.Ct. 424; 11 L.Ed. 2d 331 (1964).

Conclusion and Relief Requested

WHEREFORE, for the foregoing reasons, Defendant requests that this Court GRANT this motion and issue an ORDER requiring the clerk of court provide the Defendant with copies of the transcripts and court documents requested, and if necessary, order the transcription of additional proceedings that were not previously transcribed, without cost pursuant to MCR 6.433(C)(2).

Respectfully submitted

April 01, 2015

Jovon C. Davis #591753

Jovon Charles Davis #591753
Appellant, In Pro Per
MICHIGAN REFORMATORY
1342 West Main Street
Ionia, MICHIGAN 48846

STATE OF MICHIGAN

IN THE BERRIEN COUNTY TRIAL COURT - CRIMINAL DIVISION

THE PEOPLE OF
THE STATE OF MICHIGAN,
Plaintiff

File No. 2013-000303-FC

v
JOVAN CHARLES DAVIS,
Defendant

Hon. Scott Schofield

ORDER GRANTING DEFENDANT'S MOTION FOR PREPARATION OF TRANSCRIPTS AND COURT RECORDS

At a session of the Court at the Berrien County Courthouse in St. Joseph, Michigan, on April 20, 2016

PRESENT: Hon. Scott Schofield, Trial Judge

Defendant was convicted of various felonies including murder. His convictions were affirmed on appeal and he now wishes to pursue post-appeal remedies. He filed a motion asking that the court provide him with transcripts of court proceedings in this case, as well as all filed documents. The court considered the motion.

THE COURT ORDERS that defendant's motion is granted.

THE COURT FURTHER ORDERS that pursuant to MCR 6.433 the County Clerk shall with all deliberate speed and at public expense:

1. Provide defendant with a copy of all documents in the court file,
2. Provide defendant with a copy of any transcript that has been previously prepared,
3. Prepare and provide defendant with a transcript of any court proceeding that has not previously been prepared, including all proceedings listed in ¶16 of defendant's motion.

Dated: April 20, 2016

SCOTT SCHOFIELD
Trial Judge

A TRUE COPY
S Rut
DEPUTY CLERK

Additional material from this filing is available in the Clerk's Office.