APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

DEFENDANTS COPY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILBERN WOODROW COOPER,

Defendant-Appellant.

UNPUBLISHED
May 21, 2013

No. 304610
Oakland Circuit Court
LC No. 2010-232149-FC

Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree felony murder, MCL 750.316(1)(b). Defendant was sentenced to life imprisonment without parole. We affirm.

I. FACTUAL BACKGROUND

The victim was murdered in September of 1978. His body was discovered by his roommate, Paul Jenkins, who was not home during the murder. The victim was lying in a pool of blood in his bedroom with his hands tied behind his back with an electrical cord. He was shot seven times in the head, and sustained an injury to his groin. A pillow was discovered next to the victim's body and was riddled with bullet holes, residue, burns, and blood.

While the police conducted an initial investigation in 1978, they did not discover any evidence of a forced entry or ransacking. The police interviewed Jenkins, who informed them that the victim was involved in a cult and was probably murdered for having sex with married women. Jenkins allegedly owed a debt to John Anderson, defendant's roommate, although Jenkins denied this at the time of trial. The police also interviewed Billy Lolley. Lolley had encountered the victim either the day of the murder or the day before, as the victim worked at a real estate agency owned by Jenkins, and the victim had shown Lolley a house. While the detectives pursued several leads, they cleared all of their suspects without discovering who killed the victim.

In November of 2006, however, Lolley contacted the Farmington Hills Police Department about the murder, seeking to clear his conscience. Lolley told the police that someone had offered defendant $3,000 to kill a man and defendant, in turn, offered Lolley $1,500 to be the driver. Lolley refused the offer, thinking that defendant may have been joking. Yet, after the murder, defendant told Lolley that he had killed the victim. Defendant explained

that he laid the victim down on the floor, put a pillow on his head, and shot him repeatedly in the head. Defendant confessed to Lolley that they had meant to kill Jenkins but had accidently killed the victim. Anderson warned Lolley to keep quiet or they would kill Lolley or his children.

The police interviewed defendant several times, and defendant's statements were admitted at trial. Defendant was convicted of first-degree felony-murder and was sentenced to life imprisonment. Defendant now appeals on several grounds.

II. CONFESSION

A. Standard of Review

Defendant argues that his statements to the police were inadmissible because he asserted his right to remain silent and his statements were involuntary.

"A trial court's findings of fact on a motion to suppress are reviewed for clear error, while the ultimate decision on the motion is reviewed de novo." *People v Brown*, 297 Mich App 670, 674; 825 NW2d 91 (2012) (quotation marks and citation omitted). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (quotation marks and citation omitted). "We review constitutional questions de novo." *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009).

B. Invocation of Right to Remain Silent

A defendant's invocation of his right to remain silent must be unequivocal and unambiguous. *Berghuis v Thompkins*, ____ US ____; 130 S Ct 2250, 2260; 176 L Ed 2d 1098 (2010). "[I]f a person chooses silence over speech . . . the police must scrupulously honor the right to remain silent." *People v Williams*, 275 Mich App 194, 198; 737 NW2d 797 (2007). "If the police continue to interrogate the defendant after he has invoked his right to remain silent, and the defendant confesses as a result of that interrogation, the confession is inadmissible." *People v White*, 493 Mich 187, 194; 828 NW2d 329 (2013) (quotation marks omitted).

Defendant first contends that he invoked his right to remain silent during the initial custodial interview with the police at Bay City in the afternoon of March 2, 2010, and any statements he made in the interview were inadmissible. Defendant does not dispute that he was read his *Miranda*[1] rights before the initial interrogation began. He highlights the following statement, however, near the end of the interview when he allegedly asserted his right to remain silent: "See, that's why I don't want to talk to you guys about this because who do I have to collaborate [sic] anything I have to say?" Defendant's statement was not an unequivocal and unambiguous invocation of his right to remain silent. While defendant indicated his preference was not to speak with the police unless someone could corroborate his statements, a preference is not an unequivocal or unambiguous assertion of the right to remain silent.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant, however, argues that he again asserted his right to remain silent in a subsequent interview and, hence, his statements in that interview also were inadmissible. After the March 2nd afternoon interview at Bay City, defendant was transported to the Farmington Hills Police Department. The police reminded him of his *Miranda* rights, but defendant continued to talk with them that evening. Approximately an hour into the interview, the officers asked if defendant and others had gone to the house to beat up someone and then one of the men accompanying defendant unexpectedly shot the victim. When asked if that is what happened, defendant stood up and stated: "No, we're done." He twice stated: "Take me back to my cell," and requested to go to the bathroom. While the police officers continued to question him and received limited responses, several minutes later defendant again indicated that he did not have anything further to say. The police continued to question defendant until he stated: "Thank you for your time, I'm not talking anymore."

During this interview, defendant unambiguously and unequivocally invoked his right to remain silent. Defendant stood up and clearly informed the police officers that he was done talking, thereby asserting his right to remain silent. *Berghuis*, 130 S Ct at 2260 (an accused invokes his right to silence when saying "that he wanted to remain silent or that he did not want to talk with the police."). Defendant did not qualify his statement or limit his refusal to speak to one topic in particular. Moreover, while there is no "blanket prohibition against further interrogation after a person cuts off questioning . . . [w]hether a custodial statement obtained after a person decides to remain silent is admissible depends on whether the right to cut off questioning was scrupulously honored by the police." *Williams*, 275 Mich App at 198. Relevant factors include whether there is a significant time lapse between the invocation of the right to remain silent and the restarting of questioning, and whether defendant was again advised of his *Miranda* rights. Here, the police officers, without pause, continued to interrogate defendant even after he repeatedly asserted that he was done talking and wished to be taken back to his cell.

However, the trial court's failure to suppress the statements from this interview was harmless beyond a reasonable doubt. This Court reviews "preserved issues of constitutional error to determine whether they are harmless beyond a reasonable doubt." *People v Dendel (On Remand)*, 289 Mich App 445, 475; 797 NW2d 645 (2010). "A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* (quotation marks, brackets, and citation omitted). Of significant importance here is that defendant did not make any further admissions after invoking his right to remain silent during this interview. In fact, defendant denied knowing the victim and denied shooting him.

There also was substantial evidence at trial from which a rational jury could find defendant guilty beyond a reasonable doubt absent the error. In an earlier interview in Bay City, defendant admitted to breaking into the house where the victim resided a few days before the murder with the intent to hurt Jenkins, and that he had taken an extension cord from a lamp with the plan of tying up Jenkins. He also admitted that he was on the porch the night of the murder. At trial, Lolley testified that defendant confessed to the killing, admitting that he tied the victim up and "laid him down on the floor[,] [p]ut a pillow on his head and shot him in the back of the head. Emptied the gun out." Considering this evidence, any error in admitting evidence of defendant's limited statements after he invoked his right to remain silent was harmless beyond a reasonable doubt.

Lastly, defendant challenges the admission of his statements from the final interview he gave to police on the morning of March 3, 2010.[2] This issue has been waived. Waiver is the intentional relinquishment of a known right that extinguishes any error and precludes appellate review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

In the direct examination of Detective Richard Wehby, the prosecution did not ask about the March 3rd interview. During cross-examination, however, defense counsel initiated a line of questioning regarding the detective's false representations to defendant about DNA evidence during the March 2nd interview at Bay City. The following colloquy ensued:

> *Q.* Okay. And you did that in order to try to get him to admit something that he didn't do.
>
> *A.* I was trying to get him to open up further about his involvement in the incident, yes.
>
> *Q.* He never did that, did he?
>
> *A. No, as a matter of fact he did.*
>
> *Q.* He never told you he was inside when you had this interview, did he?
>
> *A.* Did he ever tell me that he was inside?
>
> *Q.* No, I said during this interview did he tell you he was inside?
>
> *A.* No, sir not during that interview he didn't tell me. [Emphasis added.]

On redirect, the prosecution then asked if defendant ever indicated that he was inside the house, to which the detective replied: "Yes, he did." The prosecution asked if that admission occurred during the March 3rd interview, to which the detective replied in the affirmative and explained that it was in that interview that defendant changed his story, admitted to entering the house, and admitted to providing the extension cord to tie the victim up and helping to subdue the victim. Defense counsel then requested that the transcript of the March 3rd interview be provided to the jury and that all of the taped interviews be played for the jury.

Thus, it was defendant's questioning of Detective Wehby that resulted in the reference to the March 3rd interview and it was defendant who subsequently moved to admit that interview at trial. Defendant made a strategic choice when attempting to impeach Detective Wehby. Defendant then made a second strategic choice in introducing the videotape of this interview in

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[2] Defendant alleges that the interviews on March 2nd and the interview on March 3rd were really one continuous interview. Even if true, there was a significant time lapse and a reminder of defendant's *Miranda* rights before the March 3rd interview, and, thus, the police were entitled to speak with defendant again on the morning of March 3rd. *Williams*, 275 Mich App at 198.

an effort to show the jury the apparent coerciveness of the police. These strategic choices were ultimately unsuccessful, and defendant now objects to the admissibility of the March 3rd interview. Yet, "[a]ppellate review is precluded because when a party invites the error, he waives his right to seek appellate review, and any error is extinguished." *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003)

C. Voluntariness

Lastly, we reject defendant's argument that his statements were involuntary. "Use of an involuntary statement in a criminal trial violates due process." *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997). Moreover, "[t]he test of voluntariness is whether considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *Id.* (quotation marks and citation omitted). This Court has recognized that:

> In determining voluntariness, the court should consider all the circumstances, including: [1] the age of the accused; [2] his lack of education or his intelligence level; [3] the extent of his previous experience with the police; [4] the repeated and prolonged nature of the questioning; [5] the length of the detention of the accused before he gave the statement in question; [6] the lack of any advice to the accused of his constitutional rights; [7] whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; [8] whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; [9] whether the accused was deprived of food, sleep, or medical attention; [10] whether the accused was physically abused; and [11] whether the suspect was threatened with abuse. [*People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005) (quotation marks and citation omitted).]

No single factor is determinative and the ultimate inquiry is whether, under the totality of the circumstances, the confession was freely and voluntarily made. *Id.*

Defendant's statements were voluntary. Defendant was 49 years old at the time of the police interviews, he had a criminal background and experience with the criminal justice system, he boasted to the police that he was a self-professed fan of cold case television programming, and his actions indicated he was very familiar with DNA testing. At the beginning of the custodial Bay City interview, defendant was read his *Miranda* rights and explicitly waived those rights. There is no evidence that anyone threatened or abused defendant. While the interviews were not short, defendant does not claim that he was injured, intoxicated, drugged, or denied food, sleep, or medical attention. He did not display any behavior suggesting that he failed to comprehend the questions being asked of him. Therefore, under the totality of the circumstance, we find that the confession was freely and voluntarily made.

III. JURISDICTION

A. Standard of Review

In defendants' Standard 4 brief, he presents several challenges to the trial court's exercise of jurisdiction. Defendant challenges the trial court's exercise of personal jurisdiction over him, and we review unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). He also challenges the trial court's exercise of subject-matter jurisdiction, which we review de novo. *People v Gonzalez*, 256 Mich App 212, 234; 663 NW2d 499 (2003).

B. Subject-Matter Jurisdiction

Defendant first alleges that the trial court lacked subject-matter jurisdiction over the case. However, defendant was charged with a felony, and "Michigan circuit courts are courts of general jurisdiction and unquestionably have jurisdiction over felony cases." *People v Lown*, 488 Mich 242, 268; 794 NW2d 9 (2011). Thus, the circuit court properly exercised its subject-matter jurisdiction over the case.

C. Arrest Warrant & Felony Complaint

Defendant next challenges that the felony complaint and warrant were improper because they were signed by an assistant prosecutor rather than the prosecutor. Contrary to defendant's suggestion, an assistant prosecutor has the authority to sign the felony complaint and warrant. MCL 49.42 provides, in relevant part, that an "assistant prosecuting attorney shall . . . perform any and all duties pertaining to the office of prosecuting attorney at such time or times as he may be required so to do by the prosecuting attorney and during the absence or disability from any cause of the prosecuting attorney[.]" There was no error in the assistant prosecutor's actions.

Defendant also contends that the felony complaint and warrant were defective because they did not contain sufficient information to support an independent judgment that probable cause existed. Yet, the complaint alleged that defendant killed the victim on September 29 or September 30, 1978. Moreover, even if we agree that the felony complaint and warrant were defective, this would not justify setting aside defendant's conviction for lack of jurisdiction. "[A]n illegal arrest or arrest warrant issued on defective procedure will not divest a court of jurisdiction when the court has jurisdiction over the charged offense and the defendant appears before the court." *Porter v Porter*, 285 Mich App 450, 462; 776 NW2d 377 (2009); see also *People v Rice*, 192 Mich App 240, 244; 481 NW2d 10 (1991) ("[t]he invalidity of an arrest does not deprive a court of jurisdiction to try a defendant."). Thus, defendant has failed to establish that any defect in the felony complaint or warrant deprived the trial court of jurisdiction.

D. Return from District Court

Moreover, contrary to defendant's assertions, the circuit court properly obtained personal jurisdiction over him. A circuit court obtains personal jurisdiction over a defendant once the district court files a return to circuit court. *People v Goecke*, 457 Mich 442, 458; 579 NW2d 868 (1998). The district court filed a return to circuit court after it found probable cause to bind

defendant over to the circuit court on the charge of open murder. Thus, the trial court properly exercised personal jurisdiction over defendant.

Furthermore, the late filing of the felony information did not deprive the circuit court of jurisdiction. While the prosecution concedes that the felony information was untimely filed, defendant acknowledged at the arraignment that he had received a copy and waived the formal reading. Moreover, "[h]aving once vested in the circuit court, personal jurisdiction is not lost even when a void or improper information is filed." *Goecke*, 457 Mich at 458-459. MCR 6.112(G) specifically states that, "[a]bsent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing[.]" Because defendant did not offer a timely objection or show prejudice, he is not entitled to relief.

E. Amendment to Information

Finally, defendant contends that the trial court erred in allowing the prosecution to add a second charge to the information. Defendant has mischaracterized this issue. In the general information, count 1 was listed as homicide, open murder, MCL 750.316. On the verdict form, two counts were listed, but they were merely a separation of the different types of first-degree murder, namely, premeditation or felony-murder. Thus, contrary to defendant's argument, there was no new felony charge added at any point in the proceedings. Defendant's judgment of sentence properly reflects that he was guilty of only one felony, first-degree felony-murder, MCL 750.316. We find no error requiring reversal.

IV. JURY INSTRUCTIONS

A. Standard of Review

Next, defendant argues in his Standard 4 brief that the trial court erred in failing to give complete preliminary and final jury instructions. We review unpreserved claims of instructional error for plain error affecting substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

B.

Contrary to defendant's assertions, the trial court gave complete preliminary instructions consistent with MCR 2.516(B)(1), the court rule in effect at the time of trial. The court explained about the presumption of innocence, reasonable doubt, trial procedures, relevant rules of evidence, and appropriate juror conduct. Furthermore, because defendant's trial occurred after the pilot program for Administrative Order 2008-2 and before the adoption of MCR 2.513(A), the trial court was not required to state the elements of the charged crimes during the preliminary jury instructions. Also, since the jury was properly instructed on the elements of the charged crime before final deliberations, we find no plain error affecting defendant's substantial rights.

In regard to the final jury instructions, defendant has waived this issue. Defendant affirmatively approved the instructions as well as the verdict form after they were read and given to the jury. Therefore, he has waived any challenges to the final jury instructions. See *People v*

Kowalski, 489 Mich 488, 504-505; 803 NW2d 200 (2011) (defendant waives jury instructional error when defense counsel expresses satisfaction with the jury instructions).

V. PROSECUTORIAL MISCONDUCT

Next, defendant argues in his Standard 4 brief that the prosecution committed misconduct when it created jurisdictional defects in the proceedings, failed to correct the incomplete jury instructions, and allowed the jury to convict defendant of a second charge that the prosecution did not bring. However, as discussed above, none of these claimed defects were errors. Thus, defendant has failed to establish any instances of prosecutorial misconduct.

Defendant also claims that the prosecution committed misconduct when it failed to inform him that he had the right to have counsel present at a polygraph exam. Defendant, however, has failed to explain how this denied him a fair trial or affected his substantial rights. Because defendant failed to explain his conclusory arguments, we decline to address them. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) ("[a]n appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.").

VI. JUDICIAL CONDUCT

A. Standard of Review

Next, defendant argues in his Standard 4 brief that the trial judge improperly allowed the prosecutor to control the trial. "We review unpreserved claims for plain error affecting a defendant's substantial rights." *People v Jackson*, 292 Mich App 583, 592; 808 NW2d 541 (2011).

B. Analysis

Defendant asserts that the trial court failed to control the proceedings and acquiesced control to the prosecution regarding the jurisdictional defects, omission of complete jury instructions, and the addition of a new felony charge. However, as discussed above, none of these claimed defects are errors.

Defendant also contends that he was denied a fair trial because the court used his trial as a platform for reelection. During the preliminary jury instructions, the trial court instructed the jurors that they were allowed to tell others that they were on a jury and "[i]f you want you can say you're before Judge Wendy Potts because I have to run for office in a couple years and so getting my name out wouldn't be bad." While defendant concludes that this comment created an impartial jury, he fails to explain how a singular, isolated comment about reelection rendered the jury impartial. The trial court also instructed the jury that its comments, rulings, questions, and instructions were not evidence. "[T]he jury is presumed to have followed its instructions." *People v Mahone*, 294 Mich App 208, 218; 816 NW2d 436 (2011). Thus, defendant has failed to show that the jury's impartiality was in reasonable doubt. *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008).

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

Finally, defendant argues in his Standard 4 brief that he was denied the effective assistance of counsel. Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a "trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). A trial court's factual findings are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

B. Analysis

In order to establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant must then demonstrate that "the deficient performance prejudiced the defense," which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial . . . ." *Id.* at 687. The Court has held that this second prong is asking whether "there was a reasonable probability that the outcome of the trial would have been different had defense counsel" adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

Defendant alleges that he was denied the effective assistance of counsel when his counsel failed to object to the multiple jurisdictional defects, the prosecutor's misconduct, the incomplete jury instructions, and the trial court's acquiescence of control. However, as repeatedly stated at this point, the trial court properly exercised jurisdiction in this case, the prosecutor did not commit misconduct, the jury instructions were full and complete, and the trial judge behaved properly. Thus, any objections based on these grounds would have been futile. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

We also reject defendant's argument that this is a case where defense counsel was so defective that we should presume prejudice. While generally counsel is presumed effective, there are "three rare situations in which the attorney's performance is so deficient that prejudice is presumed." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).[3] This presumption

[3] These three situations are: (1) a "complete denial of counsel, such as where the accused is denied counsel at a critical stage of the proceedings[;]" (2) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing;" and (3) "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." *Frazier*,

APPENDIX B

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0264p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILBERN WOODROW COOPER,

Petitioner-Appellant,

v.

WILLIS CHAPMAN, Warden,

Respondent-Appellee.

No. 18-1391

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:15-cv-10679—Sean F. Cox, District Judge.

Argued: April 16, 2020

Decided and Filed: August 17, 2020

Before: MOORE, KETHLEDGE, and BUSH, Circuit Judges.

COUNSEL

ARGUED: Amy C. Lishinski, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Appellant. John S. Pallas, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Amy C. Lishinski, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Appellant. John S. Pallas, Kathryn M. Dalzell, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. Wilbern Woodrow Cooper, Lapeer, Michigan, pro se.

BUSH, J., delivered the opinion of the court in which KETHLEDGE, J., joined. MOORE, J. (pp. 19–26), delivered a separate dissenting opinion.

OPINION

JOHN K. BUSH, Circuit Judge. Wilbern Woodrow Cooper petitioned for habeas corpus on the ground that his first-degree felony murder conviction in Michigan state court violated *Miranda v. Arizona*, 384 U.S. 436 (1966). He contends that a custodial confession he gave in 2010 to the 1978 murder of David McKillop should have been excluded from evidence. We hold that the district court properly denied habeas relief because the Michigan trial court's admission of the confession was not an error that rose to the level of actual prejudice. We therefore **AFFIRM** the district court's denial of Cooper's habeas petition.

I.

A. The Murder of David McKillop

In September 1978, twenty-two-year-old David McKillop was brutally murdered in Farmington Hills, Michigan. Officers discovered McKillop's body with his hands bound behind his back by an electrical cord and with seven gunshot wounds to his head.

For twenty-eight years McKillop's family had no answer as to who had murdered David. This changed in 2006, when Billy Joe Lolley, McKillop's former real estate agent and neighbor, came forward to the police with a valuable clue. Lolley believed he was terminally ill and wanted to clear his conscience.

Lolley had known Cooper in 1978 both as a neighbor and also through a mutual acquaintance, Donny McKitty. (R. 5.19; 5/9/12 Pros. Br. Mich. Ct. App.; Page ID 1186.) According to Lolley, Cooper was known by the nickname "Boo Boo" and was involved with a local gang-affiliated businessman, John Anderson. (*Id.*, Page ID 1186-87.) Lolley was not part of the gang, but "just liked to party" with them on occasion. (*Id.*, Page ID 1191.) Lolley also had known McKillop, who had been the real estate agent for Lolley and his wife. (*Id.*, Page ID 1220.) Most critically relevant, Lolley revealed that back in 1978 Cooper had approached him with a proposal. According to Lolley, Cooper said that he had been paid $3,000 to kill someone,

and he in turn offered Lolley $1,500 to be his driver when Cooper made the hit. (5/5/11 Tr., R. 5.13, Page ID 766-67, 769). Lolley told the officers that he had declined Cooper's offer because he thought Cooper was kidding. (*Id.*, Page ID 766, 774).

But it was no joke. Cooper later told Lolley that he had, in fact, killed someone. Cooper shared chilling details, according to Lolley, which included McKillop's being tied up, forced to lie on the floor with a pillow over his head, and then being shot six to nine times in the head. (*Id.*, Page ID 766-67, 769.). But it was all for naught. Lolley claimed that Cooper had said he had mistakenly killed the wrong person. The real target of the crime was not McKillop, but rather McKillop's roommate, Paul Jenkins, because he owed money to Anderson. (*Id.*, Page Id 768.). *Accord People v. Cooper*, No. 304620, 2013 Wl 2223896, at *1 (Mich. Ct. App. May 21, 2013). At the time, Jenkins's business, Landmark Realty, was struggling with debts. (R. 5-19; 5/9/12 Pros. Br. Mich. Ct. App.; Page ID 1186.) Jenkins knew Anderson. However, at trial, Mr. Jenkins denied that he had owed Anderson—or anybody—any money related to Landmark, and he denied that he had dealt drugs through or with Anderson. (*Id.*, n. 4., 5.) Jenkins also claimed that people who had rented property from him had owed him money. (*Id.*, n. 4) However, Ms. Frazer, another witness who knew Jenkins, contradicted his statements. She claimed that in September 1978, Jenkins was worried about paying money back to "a loan shark or something." But Jenkins denied that he had ever told Frazer that he owed somebody a lot of money, and he denied that he had dealt drugs through or with Anderson. (*Id.*, n. 5.)

B. Non-Custodial Interviews

1. December 2006 Interview

After Lolley came forward, police reopened the investigation of McKillop's death and reached out to Cooper in December 2006 for questioning. He agreed to be interviewed at the Bay City police station, where he met with Detectives Richard Wehby and Mark Haro. (5/5/11 Tr. R. 5.13, PageID 796.)

At the beginning of questioning, Wehby and Haro informed Cooper that he was not under arrest, and therefore he could leave at any time. (*Id.*, PageID 796-97; 5/6/11 R. 5.14, PageID 817). What the detectives did not reveal to Cooper, however, was the nature of the investigation.

Without these details on hand, Cooper was friendly and talkative. (5/5/11 Tr., R. 5.13, Page ID 797-98). He explained to the investigators that during the 1970s, he lived in Anderson's basement and that his landlord sold stolen property and facilitated narcotics transactions. (*Id.*) According to Cooper, he would "never refuse a request" from Anderson (*id.*, Page ID 801), whether it be to break into houses or do "whatever" he was asked to do. As Cooper explained, "he was trying to prove himself[.]" (*Id.*, Page ID 798-99, 801). However, as Cooper further explained, his behavior changed following several events in his life, which served as an "eye opener" that he would need to alter his lifestyle. (*Id.*, Page ID 799-800.) Cooper did so, he claimed, by joining the military and becoming "an assassin." (*Id.*, Page ID 799-800; 5/6/11 Tr. R. 5.14, Page ID 819.)

At this point in the interview, Detective Wehby asked Cooper directly if he had ever killed anyone. Suddenly, Cooper became far less talkative. He seemed evasive and answered tersely that he had not killed for money. (5/5/11 Tr., R. 5.13, Page ID 803; 5/6/11 Tr., R. 5.14, Page ID 819.) He added that he had never held anyone down to be beaten up or killed. (5/5/11 Tr., R. 5.13, Page ID 803.)

The detectives then referenced Jenkins and McKillop, and the interview took a sudden turn. Cooper's demeanor seemed to change, according to police testimony. He suddenly sat up in his chair. His skin now was flushed, and he appeared nervous. (*Id.*, Page ID 800). Detective Wehby informed Cooper that police had information that he was responsible for the homicide and had been paid to kill someone, but he had accidentally killed the wrong person. (*Id.*, Page ID 801, 803). According to Wehby's testimony, Cooper "never denied" these accusations, but rather simply "kept deflecting" the statements, saying "oh I don't recall that," and "I wouldn't have had anything to do with that." Based on these noticeable dodges, it appeared to the detectives as if Cooper was trying to change the subject. (*Id.*, Page ID 801). Then, for the first time in the interview, Cooper indicated he had had a "falling out" with Anderson and Anderson's affiliates. He also began to speak negatively about the group, seeming to imply that its members were trying to pin the murder on him. (*Id.*, Page ID 803).

Following this exchange Cooper refused to provide a DNA sample, even though he had initially agreed to do so. (*Id.*, Page ID 801.). According to Detective Wehby, Cooper also

appeared to be taking deliberate measures to avoid leaving DNA evidence. He put his used cigarette stub in his shirt pocket after each smoke break. (*Id.*, Page ID 801-02.) He broke up his Styrofoam cup and placed the pieces in his pockets. (*Id.*) He also put into his pockets the paper towels he had used during bathroom breaks. (*Id.*)

As the interview ended Cooper informed Detective Wehby that if it was the wrong guy who got killed, Cooper felt truly and deeply sorry for the victim's family; however, Cooper added that if it was the right guy, then that guy got what he deserved. (*Id.*, 5/6/11 Tr., R. 5.14, Page ID 820.)

2. January 2010 Interview

In January 2010, Cooper agreed to take part in another interview with the police.[1] (5/5/11 Tr., R. 5.13, Page ID 804; 5/6/11 Tr., R. 5.14, Page ID 819-20.) During this questioning Cooper inquired about both the availability of immunity from prosecution in exchange for his cooperation and the application of the Sentencing Guidelines. (5/5/11 Tr., R. 5.13, Page ID 804.) He also told detectives: "I can't say anything right now because if I say anything right now I know you'll have to arrest me on the spot." (*Id.*) Later in the interview, the detectives told Cooper that they believed he had committed the murder. To this, Cooper responded, "hypothetically let's say [Anderson] . . . put me up to this. I broke into the house. I shoot the guy, is that what you're saying?" When Detective Wehby answered "[y]es," Cooper reportedly "just smiled." (*Id.*, Page ID 805). However, he did not make any denials of his involvement. Subsequently, though, Cooper asked the detective if they had identified a gun from the murder. When the detectives responded no, Cooper stated: "well then all you got is circumstantial evidence." (*Id.*, Page ID 805-06.)

Finally, Cooper informed police that he wished to end the interview, go home, and make preparations with his wife for what was coming, including transferring property into her name. (*Id.*, Page ID 806). However, because the detective now had a warrant, prior to Cooper leaving,

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[1]Detective Wehby testified that the three-year delay between the first and second custodial interviews was related to the detectives' information-gathering efforts and a change of administrations at the prosecutor's office. (5/9/11 TR., R. 5.15, Page ID 833).

they were able to collect a DNA sample from him. They also advised him that he would be arrested at their next encounter. (*Id.*; 5/6/11 Tr., R. 5.14, Page ID 820.)

C. Custodial Interviews

1. First March 2, 2010 Interview

On March 2, 2020, Cooper was arrested in Bay City. (5/5/11 TR., R. 5.13, Page ID 806; 5/6/11 Tr., R. 5.14, Page ID 820). Detectives Wehby and Scott Rzeppa began Cooper's first custodial interview at approximately 5:10 pm that day (3/2/10 Tr., R. 1.5, Page ID 119.).[2] They advised him of his constitutional rights, which he waived both verbally and in writing. (5/5/11 Tr., R. 5.13, Page ID 807; Appellee's Br. appendices A and B, R. 5.19, Page ID 1226, 1228). Thereafter, through the course of the interview, Cooper admitted to having gone with several other individuals on three occasions to the house where McKillop's murder had occurred. The murder, according to Cooper, took place on the third occasion. (3/2/10 Tr., R. 1.5, Page ID 123-24, 135, 143).

Cooper explained that the objective of the visits was to encourage Jenkins to repay the money he owed to Anderson. This was intended to be accomplished by tying Jenkins up and "maybe beat[ing] the shit out of him[.]" (*Id.*, Page ID 123-25). On the first two visits, Jenkins was not there.

Jenkins was not home during the third visit either, but unfortunately McKillop was. During the murder Cooper claimed that he had remained outside on the front porch, serving as a lookout as his peers entered the house. (*Id.*, Page ID 128). According to Cooper he never entered the house. He further claimed that, while on the porch, he had heard argument followed by gunfire from inside the home. (*Id.*, Page ID 128-29). A few days later, he learned that the victim had been the wrong person. (*Id.*, Page ID 133)

The detectives were skeptical that Cooper had told them everything. To "get him to admit his further involvement if he thought that we had some more information on him," the

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[2]Cooper's first custodial interview was recorded and played for the jury in full. (5/5/11 TR. R. 5.14, Page ID 806-07, 09; 5/6/1111 Tr. R. 5.14, Page ID 812, 820).

detectives raised the specter that Cooper's DNA may have been found on the victim. (5/6/11 Tr., R. 5.14, Page ID 821; 3/2/10 Tr., R. 1.5, Page ID 186-202). Cooper resisted this tactic, however, and insisted that he had stayed outside the house throughout the evening. (*Id.*) Approximately three hours into the interview, Cooper then expressed exasperation that the detectives did not believe his story: "See, that's why I don't want to talk to you guys about this because who do I have to collaborate [sic] anything I have to say?" (*Id.*, Page ID 193). Shortly afterwards, the interview ended.

2. Second March 2, 2010 Interview

Following the first interview on March 2, 2010, Cooper was transferred to the Farmington Hills Police Department, where at approximately 10:30 p.m. his second custodial interview began. The detectives started by asking if Cooper remembered the *Miranda* waiver form he had signed in Bay City, and advising him that it still covered their conversation. Cooper nodded affirmatively to both statements. (3/2/10 Tr., R. 5.18, Page ID 1032.) Then he was questioned, but he continued to deny shooting McKillop and reiterated the version of events that he had conveyed earlier in the day.

Approximately one hour into the interview, Detective Wehby once more referenced the topic of DNA, telling Cooper, "[l]et's get it out if we've go[t] to start giving explanations as to why those might be your hairs and those might be your DNA on the victim inside the house." (*Id.*, Page ID 1043.) Cooper pushed back against this line of questioning, though, and he continued to insist that he had not entered the house. (*Id.*, Page ID 1044).

Shifting tactics, Wehby then hypothesized that Cooper had been inside the house when someone else unexpectedly pulled a gun. Cooper shook his head no. (*Id.*, Page ID 1047.) "Is that what happened?" Wehby asked. "No," answered Cooper. The suspect stood up, but Detective Rzeppa quickly ordered him to sit back down. Cooper then asked to be taken back to his cell and said that he needed to use the restroom. Wehby responded that there was not a restroom nearby and that "[i]f you don't wanna talk to us fine, we're gonna stare at you all night." Relenting, Cooper resumed discussion with the detectives.

Wehby now explained to Cooper that the evidence would look unfavorable at trial, unless "we get ahead of the curve, and we can admit[/]explain why your DNA or hair may possibly be on the victim or that cord then we can explain it." (*Id.*, Page ID 1049-50). Wehby suggested that Cooper could potentially be portrayed as the "fall guy," who just happened to be at the scene of the crime when someone else shot McKillop. (Id., Page ID 1049-50). At that point, Cooper stated, "I have nothing further to say," (*id.*), and when the detectives posed additional questions, he emphasized his refusal to speak more by thanking the detectives for their time and reiterating that he was "[n]ot talking anymore." (*Id.*, PageID 1051.) But, Wehby tried again to get Cooper to confess: "One more question, Wil[bern]. And we'll go to your cell. Did you shoot and kill this guy?" Cooper replied, "no." (*Id.*, Page ID 1052).

The interviewed ended at approximately 11:53 p.m. (*Id.*) At no point during the entire interview did Cooper invoke his right to counsel.

3. March 3, 2010 Interview

At around 9 a.m. the next day, March 3, 2010, Cooper met with the detectives for his third custodial interview. (3/3/10 Tr. R. 1.6, Page ID 205, 205-07). Wehby again showed Cooper the *Miranda* form he had signed the previous day and asked if he remembered it. (*Id.*) Cooper responded affirmatively, and the detective said the form was "still in effect." (*Id.*)[3]

Wehby then pivoted to the main objective of the conversation: the investigators wanted to get Cooper's "story" a third time "to make sure that we got your story that you're sticking with. . . . OK? We want to make sure that we got, we got it down right. That we don't make any mistakes on your part . . . on your part or our part. Ok?" To this, Cooper replied: "Alright." (3/3/10 Tr., R. 1.6, Page ID 205-06). Then, after some small talk about the quality of the police department food, Cooper abruptly stated: "Alright, I guess I'm gonna try this." (*Id.*, Page ID 207.) At that point, he proceeded to discuss the McKillop murder with the detectives.

As Cooper launched into details of the story, he initially remained consistent in his explanation that he had stood on the front porch throughout the entirety of the shooting. (*Id.*,

[3]During trial, the prosecutor emphasized that the video footage from the third custodial interview reflects that Cooper looked at the form and nodded. (*See* Pros. Br., R. 5.19, Page ID 1214.)

Page ID 212.) But then, Wehby interrupted Cooper to explain the plausibility problems with that story. To this, Cooper replied: "I think I'm done talking at this time. I've got a lot to think about. I've gotta use the bathroom." ((*Id.*, Page ID 228.) Wehby responded, "that's fine and I understand that," though he reminded Cooper that his arraignment was in three hours. (*Id.*). Thereafter, the detectives asked Cooper what he wanted to do. (*Id.*) Cooper responded simply that he did not wish to "sit the rest of life in prison for something I didn't do." (*Id.*)

The conversation then took another shift, with discussion of Cooper's challenging upbringing and life circumstances, as well as the pain McKillop's family must have felt during the years when the investigation went cold. (*Id.*, Page ID 228-32). Cooper acknowledged this pain and lamented the situation. (*Id.*, Page ID 232). The discussion continued for a bit more, followed by a restroom break. (*Id.*, Page ID 236).

After questioning resumed the detectives told Cooper he could help himself and the victim's family by disclosing more about the crime. Cooper responded with, "I'm not saying anything," and "I'm not saying any more." (*Id.*, Page ID 245-48, 250.) But Wehby persisted, asking Cooper if he "want[ed] to talk about this anymore?" Cooper answered, "Not right now." (*Id.*, Page ID 245.) Wehby then reminded Cooper that time was running out, to which Cooper responded, "Yeah." (*Id.*) The questioning continued, with Cooper offering more answers to the officers. (*See id.*, Page ID 245-47.) However, when discussion veered back towards the events that took place on the night of McKillop's murder, Cooper again said, "I'm not saying anything." (*Id.*, Page ID 247-48).

Yet the meeting continued. Eventually Cooper admitted that he had witnessed McKillop's murder and that he knew who had tied him up and shot him, but denied that he was the one who had done it. (*Id.*, Page ID 248.) When asked who the murderer was, however, Cooper dodged the question, declaring: "I'm not saying no more." (*Id.*, Page ID 248, 250, 254.) Upon further discussion, Cooper suddenly appeared as if he had had enough of the interrogation. He accused the detectives of having already concluded that he was the murderer. (*Id.*, Page ID 258, 261). At that point, he made a number of declarations indicative of his desire to be arraigned. (*Id.*, Page ID 258, 261).

The questioning, however, still did not stop. Finally, Cooper admitted that he had, in fact, entered Jenkins' home on the night of the murder. Once he did, as Cooper further explained, he had thrown an extension cord to Mark Bollis in order to tie up McKillop. Together, he and Bollis forced McKillop to the floor, where Dennis McKiddie shot McKillop in the head. (AT Br., R. 9, Page ID 20; 5/6/11 TR., p. 44-48.)

D. Lower Court Proceedings

1. Michigan State Trial Court

Cooper was tried in Michigan state court. Prior to those proceedings he moved to suppress his statements made from the third interview, on March 3, 2010, but the trial court denied his motion. (*See* Opinion, R. 5.18, Page ID 886.) Notwithstanding, the prosecutor agreed not to use proof from the March 3 interview affirmatively. However, during his questioning of Detective Wehby, defense counsel referenced certain statements made by Cooper at the March 3 interview. (5/6/11 Tr., R. 5.14, Page ID 814, 821, 824-25.) Defense counsel then moved for the interview's admission into evidence. (*Id.*)

At the close of the proceedings, Cooper was convicted of first-degree felony murder and second-degree murder, though the latter count was subsequently vacated on double-jeopardy grounds. Cooper was sentenced to life in prison.

2. Proceedings on Direct Appeal

The Michigan Court of Appeals affirmed Cooper's judgment of conviction. (Opinion, R. 5.18, Page ID 877.) The court held that Cooper had not "unequivocal[ly] and unambiguous[ly] invoke[ed] [] his right to remain silent, during his first custodial interview on March 2, 2010," (*id.*, Page ID 878), but that he had properly invoked the right with respect to his second custodial interview on March 2, 2010. However, the appellate court concluded that even if the trial court had committed error in admitting Cooper's statements from the second custodial interview, the error was harmless beyond a reasonable doubt. (*Id.*, Page ID 879). The court also rejected Cooper's argument that his interview statements had been made involuntarily. (*Id.*, Page ID 881.)

Finally, the court ruled that Cooper had waived any challenge to the admission of his statements from the third custodial interview on March 3, 2010 under Michigan's invited-error doctrine. Namely, the court concluded that defense counsel had invited admission of the March 3 interview by asking questions that implicated the interview during his cross-examination of Detective Wehby, and then subsequently moving to admit the interview transcript and play all of the taped interviews for the jury. (*Id.*, Page ID 880-81). Because of its ruling on Cooper's procedural default, the court declined to reach the merits of Cooper's claim that the statements from the third custodial interview were admitted in violation of his right to remain silent. (*Id.*)

Thereafter, the Michigan Supreme Court denied Cooper's motion for leave to appeal. (Order, R. 5.20, Page ID 1337.)

3. Federal Habeas Proceedings

Cooper then filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254(d) in the United States District Court for the Eastern District of Michigan. The district court denied the petition. In doing so, the court made a number of determinations regarding the March 2 custodial interviews.

First, the district court held that the Michigan Court of Appeals reasonably concluded that Cooper's statement made during the first custodial interview on March 2 was not an unambiguous assertion of his Fifth Amendment right to remain silent. (*Id.*, Page ID 1660).

Second, the district court held that the Michigan Court of Appeals had reasonably concluded that Cooper had clearly and unambiguously invoked his right to remain silent during the second March 2 interview, meaning that the portion of the interview following his invocation should have been excluded. The district court also concluded that the state appellate court appropriately held that any error in the trial court's admission of the evidence was harmless, and therefore not contrary to, nor an unreasonable application of, Supreme Court precedent. The district court found that the state court had offered a reasonable basis for its harmless error conclusion, which included emphasizing the facts that (1) Cooper had not made any incriminating statements after invoking his right to remain silent, and (2) nothing he had stated

during that portion of the interview contradicted or supplemented his previous statements made before his *Miranda* rights were properly invoked.

Third, the district court held that it was not unreasonable for the Michigan Court of Appeals to apply a well-established procedural bar under Michigan state law—the invited-error doctrine—when holding that Cooper's challenge to the admission of statements made during the March 3 interview was procedurally defaulted. As the district court further explained, the basis for appellate court's application of this procedural bar was correct given that it had reasonably relied on the fact that defense counsel had first brought up the March 3 interview during cross-examination of Detective Wehby, and then had actually moved to have the entire interview admitted and played for the jury. In this regard as well, the district court emphasized that Cooper "ha[d] not alleged cause and prejudice to excuse the default, nor ha[d] he show[n] that failure to consider the claim would work a manifest injustice." (*Id.*, Page ID 1662.) Finally, the state court concluded that Cooper's statements were voluntary, and neither contrary to, nor an unreasonable application of, Supreme Court precedent.

Following entry of its order denying habeas relief, the district court granted Cooper a certificate of appealability limited to his challenge to the admissibility of his statements made during the March 3 interview. (*Id.*, Page ID 1669.) However, the court denied Cooper's request for a certificate of appealability with respect to his challenges related to both of the March 2 interviews, as well as his challenge regarding the voluntariness of all of his interview statements. (*Id.*)

This court denied Cooper's request for an expanded certificate of appealability relating to the March 2 interviews. Therefore, now, we evaluate solely Cooper's challenge to the admission of statements made during the third custodial interview, which took place on March 3, 2010.

II.

During oral argument, the government conceded that Cooper had "clearly and unequivocally" invoked his right to remain silent during the third custodial interview. Consequently, we will assume that the state trial court committed error in admitting statements from that interview that came after Cooper's invocation of his constitutional right. However, in

order to obtain habeas relief, Cooper still must prove that the admission of his statements had a "substantial and injurious effect or influence in determining the jury's verdict." *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015) (quotations and citations omitted). As explained below, we conclude the admission of Cooper's statements constituted harmless error because of the overwhelming evidence, apart from those statements, demonstrating his guilt of felony murder beyond a reasonable doubt. Therefore, we agree with the district court that there is no basis to grant habeas relief.[4]

A. Standard of Review

When a statement or confession of an accused party is admitted into evidence in violation of the Fifth Amendment, the admission constitutes a constitutional error that is subject to our harmless error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 310–11 (1991) (Rehnquist, C.J., delivering the opinion of the Court with respect to this issue). Furthermore, when a state court makes a harmless error determination, that finding is entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA). *Ayala*, 576 U.S. at 268.[5]

Here, the Michigan Court of Appeals determined that the trial court erred in admitting statements made by Cooper one hour into his second custodial interview on March 2, when he, as the court determined, properly invoked his Fifth Amendment right to silence. Notwithstanding, the appellate court ultimately determined that the trial court's error was harmless. However, the appellate court did not make a harmlessness determination with respect to the trial court's admission of Cooper's March 3 statements. (*See* Opinion, R. 5.18, Page ID 879–81 (holding that admission of Cooper's post-invocation statements in the March 2 interview was harmless beyond a reasonable doubt, but declining to review admission of the March 3 statements)).

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[4]Because our holding is determinative in affirming the denial of Cooper's habeas petition, we need not address the state court's ruling that Cooper procedurally defaulted his challenge to the admissibility of statements made during the March 3 interview under Michigan's invited-error doctrine. *See People v. McPherson*, 687 N.W.2d 370, 379 (Mich. Ct. App. 2004) (citing *People v. Jones*, 662 N.W.2d 376 (Mich. 2003)).

[5]This means that the accused—in this case, Cooper—must demonstrate that the state court's determination was objectively unreasonable.

The State argues that AEDPA and *Chapman v. California*, 386 U.S. 18 (1967), provide the proper standard of review for this case. Specifically, it requests AEDPA deference because it contends that the logic of the appellate court's harmless error determination in relation to Cooper's statements made on March 2 (as well as the government's evidence on which that analysis relies), should "appl[y] with equal force" to our court's habeas review of the question regarding whether any error in the trial court's admission of any part of the third custodial statement is harmless. Second Appellee Br. at 34. However, the state's argument is misplaced. Certainly, the evidence of Cooper's guilt derived from his admitted statements from the March 2 interview is relevant to our analysis of the possible "substantial and injurious effect" the trial court's admission of his statements made from the March 3 interview may have had on the jury's ultimate verdict. *See Brecht v. Abrahamson*, 507 U.S 619 (1993). However, to essentially infer or "pretend," as the State appears to be asking us to do, that the Michigan appellate court made a merits determination on Cooper's challenge to the admissibility of the statements from the March 3 interview, would be entirely improper. The appellate court avoided assessing the merits of Cooper's challenge of the March 3 statements by ruling instead that his challenge was procedurally defaulted under Michigan's invited-error doctrine. Because the state appellate court made no determination on the merits of Cooper's constitutional challenge to the March 3 interview, this court applies *de novo* review to the harmless error question presented on appeal here. *Hill v. Mitchell*, 400 F.3d 308, 314 (6th Cir. 2005); *O'Neal v. Balcarcel*, 933 F.3d 618, 624 (6th Cir. 2019); *see Pinchon v. Myers*, 615 F.3d 631, 638 (6th Cir. 2010).

Accordingly, "[i]n federal habeas proceedings, the *Brecht* standard governs and the federal court will not grant habeas relief unless the state error "resulted in 'actual prejudice.'" *O'Neal*, 933 F.3d at 624 (quoting *Ayala*, 576 U.S. at 267 (quoting *Brecht*, 507 U.S. at 637)). "[R]elief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Ayala*, 576 U.S. at 267–68 (quotations and citations omitted). "'[G]rave doubt' about whether the error was harmless means that 'the matter is so evenly balanced that [the court] feels [it]self in virtual equipoise as to the harmlessness of the error." *O'Neal*, 933 F.3d at 624 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)). Moreover, "'[t]here must be more than a 'reasonable possibility' that the error was harmful," *Ayala*, 576 U.S. at 268 (quoting *Brecht*, 507 U.S. at

637). The "State is not to be put to the arduous task of retrying a defendant based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." *Id.* (citation and quotations omitted).

As discussed below, we hold based on *Brecht* and *Ayala* that Cooper was not actually prejudiced by admission of statements from the third custodial interview. On this ground, we affirm the district court's denial of habeas relief.

B. Analysis

Cooper was convicted of first-degree felony murder under Mich. Comp. Laws § 750.316(1)(b). (Opinion, R. 5.18, Page ID 877.). A conviction under this provision requires that the government present proof demonstrating a "[m]urder committed in the perpetration of, or attempt to perpetrate" certain enumerated felonies, which include: robbery, breaking and entering, home invasion in the first or second degree, larceny, extortion, kidnapping, torture, and unlawful imprisonment. Mich. Comp. Laws § 750.316(1)(b).

Conviction for felony murder is not contingent on whether the defendant actually committed the murder himself, so long as (1) he knowingly participated in the common enterprise to commit one of the enumerated felonies listed in Mich. Comp. Laws § 750.316(1)(b); and (2) his participation in that enumerated felony foreseeably led to a murder. *See* Mich. Comp. Laws § 767.39; *see also People v. Robinson*, 715 N.W.2d 44, 50 (Mich. 2006) (aider and abettor to assault that resulted in homicide liable for homicide); *People v. Aaron*, 299 N.W.2d 304, 327 (Mich. 1980) ("A jury can properly infer malice [for purposes of felony murder] from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm."); *People v. Bryant*, 245 N.W.2d 716, 719 (Mich. Ct. App. 1976) ("[I]f the defendant aided and abetted [the principal] in the commission of what defendant thought would be an unarmed robbery, defendant could not be acquitted of felony murder simply because the robbery turned out to be armed instead of unarmed."). This means that regardless of whether Cooper actually entered the house and pulled the trigger that killed McKillop, he can still be convicted of felony murder based on his participation in a felony—which, in this case, was extortion.

To prove that Cooper committed extortion, the prosecution had to show that he (or anyone he aided) threatened to injure the victim, that he (or anyone he aided) made the threat willfully in order to obtain money or make the victim do something against his will, and that he (or anyone he aided) made the threat orally. Mich. Comp. Laws § 750.213. In light of the statute's elements, the Michigan Court of Appeals was accurate in its outlining of the relevant evidence established by the government to demonstrate that Cooper had participated in a common enterprise to commit the felony of extortion, which foreseeably led to the murder of McKillop. In so doing, the appellate court referenced Cooper's statements from his first custodial interview (all of which were admitted by the trial court without Cooper's dispute, given his acknowledgement that he had not yet allegedly invoked his *Miranda* rights), where he admitted "to breaking into the house where [McKillop] [had resided] a few days before the murder." (Opinion, R. 5.18, Page ID 879.) Through this break-in, as acknowledged by Cooper, he had an "intent to hurt Jenkins"; and to accomplish that mission, "he had taken an extension cord from a lamp with the plan of tying up Jenkins." (*Id.*) As the court further outlined, Cooper had even established explicitly that he was at the scene of the crime—"on the porch" of Jenkins's home during "the night of the murder." (*Id.*) And finally, Cooper explained that his specific purpose in undertaking these multiple visits to Jenkins's house was to encourage Jenkins to repay money he owed by tying him up and "maybe beat[ing] the shit out of him[.]" (3/2/10 Tr. R. 1.5, Page ID 123-25.) In fact, these statements from Cooper himself—all obtained from the first custodial interview—proved so powerful for the government's case that the prosecutor even claimed explicitly in his opening statement that this evidence alone made Cooper liable as an aider and abettor to felony murder. (5/3/11 Tr., R. 5.12, Page ID 709.) The prosecutor expanded upon these statements in his state court appellate brief by outlining all of the properly introduced evidence that the State obtained prior to Cooper's first invocation of his right to silence. We agree with the State, and find that this undisputed evidence is overwhelming and more than sufficient to render inconsequential to the verdict any of Cooper's statements made after he allegedly invoked his Fifth Amendment right.

Yet even with the powerful statements of guilt offered by Cooper during his first custodial interview, as noted by the state appellate court, the jury's guilty verdict could also have reasonably relied upon the testimony of Lolley, the individual who initially alerted police of

Cooper's involvement in McKillop's death. Despite Cooper's claims to the contrary, a jury could have deemed Lolley credible and given his testimony powerful weight in issuing its verdict, given, according to Lolley, prior to the murder, Cooper had confided in Lolley that he had been paid $3,000 to kill someone, and did in fact, kill someone, though it turned out to be the wrong person. (5/5/11 TR. R. 5.13, Page ID 766-67, 768-69, 774). Nonetheless, Cooper proceeded in sharing even more specific details of the crime to Lolley: namely, Cooper recounted that his conduct on the night of the murder included (1) tying up McKillop, (2) having him lie on the floor, (3) putting a pillow over his head, and (4) shooting him six to nine times. (*Id.*, Page ID 766-67, 769); *accord People v. Cooper*, No. 304610, 2013 WL 2223896, at *1 (Mich. Ct. App. May 21, 2013).[6]

Finally, as the Michigan Court of Appeals concluded, the jury could have reasonably relied on Cooper's suspicious actions during the first custodial interview, which to the court, seemed to suggest that Cooper feared his DNA had been found at the scene of the murder and could therefore still be linked to him now. Indicative of the reasonableness of this inference was the fact that at the end of the first custodial interview, Cooper put each used cigarette stub in his shirt pocket, broke his Styrofoam cup apart and placed the pieces in his pockets, and then placed all of his used paper towels in his pockets also. (5/5/11 Tr., R. 5.13, Page ID 801-02.) Yet most damningly, when asked directly by investigators if he had ever killed anyone, Cooper appeared evasive: instead of answering the question, he simply stated that he had not killed for money, nor had he ever held anyone down to be beaten or killed. (5/5/11 Tr., R. 5.13, Page ID 803; 5/6/11 Tr., R. 5.14, Page ID 819.) Collectively, these statements and actions create a reasonable inference that Cooper had played a role in the common enterprise of committing the felony of extortion, which foreseeably led to McKillop's murder.

We disagree with Cooper's characterization that the above evidence is "weak and entirely circumstantial." (Appellant's. Br. at 41). As an initial matter, a credible testimony, like that from

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[6]During Lolley's testimony at trial, he stated that Cooper had confessed to the killing, admitting that he tied Jenkins up, and "laid him down on the floor[,] [p]ut a pillow on his head and shot him in the back of the head. Emptied the gun out." (5/5/11 Tr., R. 5.13, Page ID 766.) The state appellate court found this testimony to be relevant in its harmless error analysis of the admission of Cooper's statements from the March 2 custodial interview. *People v. Cooper*, No. 304610, 2013 WL 2223896, at *3 (Mich. Ct. App. May 21, 2013) (per curiam).

Lolley, which includes statements recounting Cooper's murder confession, does not generally constitute "circumstantial" evidence in the criminal justice system. Yet even if the testimony were deemed "circumstantial," criminal cases—particularly those in which the crime at issue occurred over four decades ago now—necessarily rely on circumstantial evidence. And indeed, the Supreme Court has recognized that circumstantial evidence is entitled to equal weight as direct evidence; therefore, the prosecution may meet its burden entirely through circumstantial evidence. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003); *Holland v. United States*, 348 U.S. 121, 140 (1954).

In light of the above, there is no reasonable probability that any error in the state trial court's admission of Cooper's March 3 statements affected the jury's verdict, as required under *Brecht* and *Ayala*. Independent of the March 3 statements, the government had presented overwhelming and more than sufficient proof to demonstrate, beyond a reasonable doubt, that Cooper was guilty of felony murder. Consequently, Cooper cannot carry his burden of showing actual prejudice to his case. *Ayala*, 576 U.S. at 267. Accordingly, we **AFFIRM** the harmless error finding of the district court.

III.

To summarize, even with the government's concession that Cooper properly invoked his Fifth Amendment right to silence midway through the third custodial interview, meaning the trial court committed error in admitting any statements that were spoken thereafter, we still conclude that the trial court's admission of those statements constituted harmless error under *Brecht* and *Ayala*. Accordingly, we **AFFIRM** the district court's final order denying Cooper's petition for habeas corpus.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. David McKillop's murder case went cold for nearly thirty years before Petitioner-Appellant Wilbern Woodrow Cooper was arrested and later convicted for the murder. It is abundantly clear that local detectives elicited from Cooper a confession that he aided and abetted the murder of McKillop after Cooper plainly invoked his right to remain silent during the third custodial interview in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Yet the majority concludes that the admission of Cooper's full-throated confession did not have a substantial and injurious effect on the jury verdict as required by *Brecht v. Abrahamson*, 507 U.S. 619 (1993). The majority instead undertakes a sufficiency-of-the-evidence review. Moreover, the majority conspicuously fails to consider the nature of a full confession in relation the remaining, far from overwhelming, evidence against Cooper: testimony from a witness who suddenly came forward thirty years later (in exchange for the prosecution's assistance with drunk driving charges); Cooper's vague prior custodial statements about his mere presence on McKillop's porch, and Cooper's suspicious behavior during his custodial interviews. There was a complete dearth of other direct or physical evidence linking Cooper to McKillop's murder, such as eye-witness testimony, identification of the murder weapon, or even DNA evidence. Cooper's full confession that he helped overpower and tie up McKillop immediately prior to his death was by far the best evidence against Cooper. And it is obvious that the prosecution knew this—it emphasized Cooper's confession again and again in its closing argument. Against this backdrop, grave doubt exists as to whether the admission of Cooper's confession had a substantial and injurious effect on the jury's verdict. Cooper also did not procedurally default this claim on the basis of Michigan's invited-error doctrine. Therefore, I would grant habeas relief.

"[I]n order to grant habeas relief, the court must have at least 'grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict."'" *O'Neal v. Balcarcel*, 933 F.3d 618, 624 (6th Cir. 2019) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). When the court believes "that 'the matter is so evenly

balanced that [the court] feels [it]self in virtual equipoise as to the harmlessness of the error," the court has grave doubt. *Id.* (alterations in original) (quoting *O'Neal*, 513 U.S. at 435). "An 'uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict.'" *Hendrix v. Palmer*, 893 F.3d 906, 919 (6th Cir. 2018) (quoting *O'Neal*, 513 U.S. at 435); *see also Tolliver v. Sheets*, 594 F.3d 900, 924 (6th Cir. 2010). This standard from "'*Brecht* is always the test,'" "whether the state court evaluated harmlessness under *Chapman* [*v. California*, 386 U.S. 18 (1967)]," or whether the state court did not undertake a harmless-error analysis. *Reiner v. Woods*, 955 F.3d 549, 556 (6th Cir. 2020) (citations omitted); *see also Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) ("[A] prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by [the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)].").[1]

The majority opinion proceeds as if the *Brecht* test is synonymous with sufficiency-of-the-evidence review. Rather than analyzing the impact of Cooper's full confession upon the jury, which at the very least requires its comparison with the other evidence against Cooper, the majority simply recites the other evidence against Cooper as outlined by the state appellate court. Majority Op. at 16–17. But we are "prohibited from 'stripping the erroneous action from the whole and determining the sufficiency of what is left standing alone.'" *Hendrix*, 893 F.3d at 919 (quoting *Ferensic v. Birkett*, 501 F.3d 469, 483 (6th Cir. 2007)). The majority's harmless-error analysis is tantamount to such an approach. Considering the elements of the crimes of which Cooper was convicted, the nature of his confession, the otherwise thin evidence against him, and the value that the government assigned to his confession, it was not harmless error to admit Cooper's confession at trial.

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[1]The Warden argues that the state court's harmless-error analysis of the admission Cooper's statements from the second custodial interview should count as a harmless-error analysis of the admission of Cooper's confession from the third custodial interview, justifying the application of AEDPA/*Chapman*, as well as *Brecht*. Second Appellee Br. at 34–37. First, as the majority correctly points out, Majority Op. at 13–14, it would be inappropriate to apply the harmless-error analysis for Cooper's earlier statements to Cooper's later confession. There is no support for this approach, nor does it make sense given the qualitative difference between Cooper's earlier statements and his later confession. Second, we have consistently rejected the Warden's argument that a petitioner must satisfy AEDPA/*Chapman* and *Brecht*. *Davenport v. MacLaren*, 964 F.3d 448, 454–59 (6th Cir. 2020); *Reiner*, 955 F.3d at 557; *O'Neal*, 933 F.3d at 624–25.

Cooper was convicted of second-degree and felony murder.[2] The elements of second-degree murder in Michigan 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*, 731 N.W.2d 411, 414–15 (Mich. 2007). First-degree felony murder is "[m]urder committed in the perpetration of" certain enumerated felonies, including larceny and extortion. Mich. Comp. Laws § 750.316(1)(b). The jury was instructed on principal and aider-and-abettor theories of liability for both murder charges, as well as extortion and larceny as underlying felonies for felony murder. R. 5-16 (May 10, 2011 Trial Tr. at 79–88) (Page ID #857–59).[3] Therefore, Cooper could have been convicted for murder as a principal or as an aider and abettor. I address both possibilities.

I begin with principal liability. The single piece of evidence that Cooper committed the murder was Bill Lolley's testimony. Lolley testified that Cooper told him that Cooper was being paid to kill McKillop's roommate, Paul Jenkins, for $3,000 and that Cooper offered Lolley $1,500 to be his getaway driver. *People v. Cooper*, No. 304610, 2013 WL 2223896, at *1 (Mich. Ct. App. May 21, 2013) (per curiam). Lolley also testified that after the murder, Cooper told him "that [Cooper] laid the victim down on the floor, put a pillow on his head, and shot him repeatedly in the head." *Id.* Certainly, this testimony is relevant. But Lolley's testimony presented significant credibility issues. His testimony was thirty-years stale, raising questions about Lolley's memory; his testimony was thirty-years late, raising issues about his motives in coming forward now; and his testimony was given in exchange for the State's assistance with previous drunk driving charges, raising serious concerns about bias, R. 5-13 (May 5, 2011 Trial Tr. at 7) (Page ID #766). Lolley was thus significantly impeached, weakening the evidentiary value of his testimony. *See Eddleman v. McKee*, 471 F.3d 576, 587 (6th Cir. 2006) (concluding that the bias of witnesses receiving immunity from the prosecution and benefits in exchange for testifying contributed to error that was not harmless), *overruling on other grounds recognized by Vasquez v. Jones*, 496 F.3d 564, 575 (6th Cir. 2007). Cooper's confession bolstered Lolley's

[2]To avoid double-jeopardy issues, the state court vacated Cooper's second-degree murder conviction. *Cooper v. Berghuis*, No. 2:15-10679, 2018 WL 1203494, at *2 (E.D. Mich. Mar. 8, 2018); *see also* R. 5-18 (J.) (Page ID #899).

[3]Accessories in Michigan are subject to the same liability as the principal. Mich. Comp. Laws § 767.39.

testimony, mitigating any credibility issues. Like Cooper's confession, Lolley's testimony established that McKillop was tied up and that Cooper was physically inside the house. *See* R. 5-16 (May 10, 2011 Trial Tr. at 11) (Page ID #840). Cooper's confession was inconsistent with Lolley's testimony in terms of whether Cooper was the principal, the shooter, and whether the murder was premeditated based on his offer to pay Lolley. However, the admission of Cooper's confession could have tipped the scales for the jury in favor of believing Cooper's admission of guilt but crediting the details from Lolley's testimony. One cannot be "certain that the error [in admitting Cooper's confession] had no effect or only a small effect" on the jury's verdict to the extent that the jury relied on principal liability. *Hendrix*, 893 F.3d at 919.

Next, I address the possibility that the jury convicted Cooper as an aider and abettor for the murder. To prove that a defendant aided and abetted the commission of a crime, the prosecution must prove that "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." *People v. Robinson*, 715 N.W.2d 44, 47–48 (Mich. 2006) (alteration in original) (quoting *People v. Moore*, 679 N.W.2d 41, 49 (Mich. 2004)). The crux of this appeal falls upon the second element. Admitting Cooper's confession was not harmless because Cooper's confession during the third custodial interview was a full confession. Moreover, there was no other evidence that Cooper performed acts or gave encouragement that assisted in McKillop's murder for the second-degree murder charge or extortion or larceny for the felony murder charge, and the government overtly emphasized the confession.

There is simply no question that Cooper's confession that he was inside the home and helped tie up McKillop was the most compelling evidence against Cooper and the *only* evidence that he took actions to assist in the commission of any crime the night of McKillop's murder.

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury . . . ."

Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (alterations in original) (quoting *Bruton v. United States*, 391 U.S. 123, 139–40 (1968) (White, J., dissenting)). This is particularly so of "a full confession in which the defendant discloses the motive for and means of the crime." *Id.* Cooper's post-*Miranda* statements undoubtedly constitute a full confession to aiding and abetting second-degree and/or felony murder. He confessed to being inside of the house, helping wrestle McKillop to the ground, and throwing the extension cord to an associate to tie McKillop up. *See Eddleman*, 471 F.3d at 587 ("Like the defendant in *Fulminante*, Eddleman gave a full confession, including both a direct admission of guilt and detailed information about the crime . . . ."). Accordingly, the "tempt[ation of] the jury to rely upon that evidence alone in reaching its decision" cannot be discounted. *Id.* (quoting *Fulminante*, 499 U.S. at 296).

The grievous impact of Cooper's full confession is apparent when compared to the only other evidence against him—his statements from the first and second custodial interviews about his presence on McKillop's front porch, Lolley's testimony, and Cooper's behavior during the custodial interviews. The majority argues that Cooper's first and second custodial interviews demonstrated that Cooper was "on the porch" during the murder. Majority Op. at 16. But Cooper's statement that he was on the porch is not tantamount to a confession of aiding and abetting because under Michigan law the "[m]ere presence, even with knowledge that an offense is about to committed, or is being committed is not enough to make a person an aider or abettor." *People v. Burrel*, 235 N.W. 170, 171 (Mich. 1931) (citation omitted); *see also People v. Worth-McBride*, 929 N.W.2d 285, 286 (Mich. 2019) (citing *Burrel* for this proposition). In any case, Cooper's statements from the custodial interviews that he was on the porch were impeached significantly. On defense counsel's direct examination of Detective Wehby, Detective Wehby confirmed that a photograph of Jenkins's house demonstrated that the house did not have a porch. R. 5-12 (May 3, 2011 Trial Tr. at 42) (Page ID #715). True enough, the majority discusses evidence demonstrating that Cooper had the requisite intent to aid and abet, but it fails to show that Cooper performed acts or gave encouragement that assisted in the commission of the crime.[7]

[7]Cooper does not otherwise confess to performing acts or giving encouragement that assisted the commission of the crime. For example, he did not admit to taking the extension cord from the first visit to the

Lolley's testimony and Cooper's behavior during the custodial interviews offer little support for Cooper's conviction without the admission of the later confession to bolster them. As set forth above, without Cooper's later full confession to being inside of the home and participating in the events leading up to the murder, Lolley's testimony lacked credibility. In any case, Lolley's testimony had no import upon Cooper's culpability as an aider and abettor because Lolley's testimony put Cooper behind the gun as the principal. Nor did Lolley's testimony address Cooper's involvement in any extortion or larceny. And though Cooper's conduct during the interviews was suspicious, such behavior during a custodial interview is weak circumstantial evidence at best that Cooper was involved in McKillop's murder. Suspicious behavior could reflect guilt of another crime or general apprehension of law enforcement. There is grave doubt whether the admission of Cooper's confession caused the jury to consider more seriously Cooper's suspicious behavior during the interview. In short, the remaining evidence against Cooper was weak and thus benefitted from the admission of Cooper's confession, compounding the effects of the confession's admission.

Ultimately, Cooper's confession was the only direct evidence that he acted to encourage the crimes, giving it substantial probative value in comparison to the other evidence against him. *Cf. Franklin v. Bradshaw*, 545 F.3d 409, 415 (6th Cir. 2008) (noting that a defendant's prior "videotaped statements were cumulative of his prior written statements," mitigating the effect of the admission of the videotaped statements under *Brecht*). There was no other direct or physical evidence implicating Cooper. *See Moore v. Berghuis*, 700 F.3d 882, 889–90 (6th Cir. 2012) (concluding that a lack of direct evidence under the circumstances was indicative of error under *Brecht*); *Bachynski v. Stewart*, 813 F.3d 241, 250 (6th Cir. 2015) (highlighting extensive physical evidence linking the petitioner to the murder, including fingerprints, bloody clothing found in the petitioner's possession, and the fact that the victim's body was found in the trunk of the victim's car that the petitioner was driving). There were no eye-witness accounts, and the State declined to run a DNA analysis between Cooper's DNA sample and the only physical evidence, hair, that

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house, nor did he confess to supplying the extension cord the night of the murder. R. 5-19 (First Custodial Interview at 23, 76) (Page ID #1233, 1246). Nor did Cooper admit to driving the car to the house the night of the murder. R. 5-19 (Second Custodial Interview at 7) (Page ID #1257) ("I was just there to ride along with them.").

it had from the scene of the crime. R. 5-13 (May 5, 2011 Trial Tr. at 82–84) (Page ID #784–85). Thus, Cooper's confession was crucial evidence against him.

Finally, the prosecution placed immense value on Cooper's full confession for the overall case and to prove the second element of aiding and abetting, performing acts to assist in the underlying crime. Cooper's confession to helping restrain and tie up McKillop was the backbone of the prosecution's case against him. From the outset of its closing argument, the prosecution argued that Cooper was the "shooter" or an "active participant," an aider and abettor, based on his confession that Cooper "burst in," "rushed [McKillop]," and "tied [McKillop] up," R. 5-16 (May 10, 2011 Trial Tr. at 8–9) (Page ID #839), all information that came from Cooper's confession. Later, the prosecution pointed to the confession to demonstrate that Cooper "did something to assist in the commission" of the crimes. *Id.* at 22, 24–25 (Page ID #842–43). But the pièce de résistance of the prosecution's closing argument was its line-by-line narration of Cooper's full confession from his third custodial interview. *Id.* at 29–34 (Page ID #844–45). The prosecutor emphasized the confession in detail while providing his own commentary for more than five pages of the transcript. *Id.* The prosecution spent the most effort "go[ing] through" Cooper's complete confession "just to tie that into the aiding and abetting statute." *Id.* at 24 (Page ID #843).

The prosecution's treatment during closing arguments of the other evidence demonstrates the importance of Cooper's confession to aiding and abetting felony murder and second-degree murder. The prosecutor pointed to Lolley's testimony, but only in support of the first-degree murder charge. *Id.* at 11, 16 (Page ID #840–41). Notably, Cooper was not convicted of first-degree murder. The prosecutor once briefly pointed to statements from Cooper's first and second custodial interviews and his behavior during the custodial interviews. *Id.* at 19–20, 25 (Page ID #842–43). But the "the centerpiece of this case" turned on Cooper's confession that he helped subdue McKillop and tie him up prior to his murder. *Eddleman*, 471 F.3d at 587 (quoting *Fulminante*, 499 U.S. at 297).

In *Brecht*, the error was harmless because there was "weighty" evidence against the defendant and the prosecution's mentions of the statements after the defendant invoked his *Miranda* rights were "infrequent." 507 U.S. at 639. Here, however, there was no "weighty"

evidence against Cooper. The State's case otherwise turned on weak circumstantial evidence: Lolley's incredible testimony, Cooper's impeached statements that he was simply on the porch, and Cooper's suspicious behavior during the interviews. And once Cooper's full confession was admitted, it was clear that the prosecution relied on his confession, especially during closing arguments. At the least, "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise as to the harmlessness of the error," satisfying *Brecht*. *Hendrix*, 893 F.3d at 919 (quoting *O'Neal*, 513 U.S. at 436). Accordingly, the erroneous admission of Cooper's confession was not harmless.

For these reasons, Cooper is entitled to habeas relief. Therefore, I dissent.

APPENDIX C

No. 18-1391

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 13, 2020
DEBORAH S. HUNT, Clerk

WILBERN WOODROW COOPER,

Petitioner-Appellant,

v.

WILLIS CHAPMAN, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: MOORE, KETHLEDGE, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-1391

WILBERN WOODROW COOPER,

Petitioner - Appellant,

v.

WILLIS CHAPMAN, Warden,

Respondent - Appellee.

FILED
Aug 17, 2020
DEBORAH S. HUNT, Clerk

Before: MOORE, KETHLEDGE, and BUSH, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of Wilbern Woodrow Cooper's petition for a writ of habeas corpus is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 18-1391

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 07, 2018
DEBORAH S. HUNT, Clerk

WILBERN WOODROW COOPER,

Petitioner-Appellant,

v.

WILLIS CHAPMAN, Warden,

Respondent-Appellee.

ORDER

Wilbern Woodrow Cooper, a Michigan prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The respondent has requested oral argument. In light of the respondent's request and the issues presented in this appeal, the court finds that the interests of justice require appointment of counsel to represent Cooper. *See* 18 U.S.C. § 3006A(a)(2)(B).

Accordingly, the clerk's office is **DIRECTED** to appoint counsel for Cooper and, after counsel is appointed, issue a new briefing schedule.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILBERN COOPER,

Petitioner,

Case Number: 2:15-10679
HONORABLE SEAN F. COX

v.

MARY BERGHUIS,

Respondent.
_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND GRANTING CERTIFICATE OF APPEALABILITY, IN PART

Petitioner Wilbern Cooper seeks habeas corpus relief under 28 U.S.C. § 2254. Petitioner is a state prisoner in the custody of the Michigan Department of Corrections pursuant to a felony-murder conviction. He seeks relief on the ground that his Fifth Amendment rights were violated by the admission of his custodial statements. Respondent argues that Petitioner's challenge to the admission of one of his custodial statements is procedurally defaulted and that all of the custodial statements were properly admitted. For the reasons set forth below, the Court denies the petition and grants a certificate of appealability, in part.

I. Background

Petitioner's conviction arises from the murder of David McKillop. McKillop was shot multiple times in a home he shared with Paul Robert Jenkins. It was the prosecutor's theory that Jenkins was the intended target and that Petitioner had gone to Jenkins' home at the

direction of Petitioner's roommate, John Anderson. Jenkins purportedly owed a large sum of money to Anderson for drugs and Petitioner and some associates were directed to go to Jenkins' home to encourage him to repay the debt. The Michigan Court of Appeals provided this overview of the circumstances leading to Petitioner's conviction:

> The victim was murdered in September of 1978. His body was discovered by his roommate, Paul Jenkins, who was not home during the murder. The victim was lying in a pool of blood in his bedroom with his hands tied behind his back with an electrical cord. He was shot seven times in the head, and sustained an injury to his groin. A pillow was discovered next to the victim's body and was riddled with bullet holes, residue, burns, and blood.
>
> While the police conducted an initial investigation in 1978, they did not discover any evidence of a forced entry or ransacking. The police interviewed Jenkins, who informed them that the victim was involved in a cult and was probably murdered for having sex with married women. Jenkins allegedly owed a debt to John Anderson, defendant's roommate, although Jenkins denied this at the time of trial. The police also interviewed Billy Lolley. Lolley had encountered the victim either the day of the murder or the day before, as the victim worked at a real estate agency owned by Jenkins, and the victim had shown Lolley a house. While the detectives pursued several leads, they cleared all of their suspects without discovering who killed the victim.
>
> In November of 2006, however, Lolley contacted the Farmington Hills Police Department about the murder, seeking to clear his conscience. Lolley told the police that someone had offered defendant $3,000 to kill a man and defendant, in turn, offered Lolley $1,500 to be the driver. Lolley refused the offer, thinking that defendant may have been joking. Yet, after the murder, defendant told Lolley that he had killed the victim. Defendant explained that he laid the victim down on the floor, put a pillow on his head, and shot him repeatedly in the head. Defendant confessed to Lolley that they had meant to kill Jenkins but had accidently killed the victim. Anderson warned Lolley to keep quiet or they would kill Lolley or his children.
>
> The police interviewed defendant several times, and defendant's statements were admitted at trial.

People v. Cooper, No. 304610, 2013 WL 2223896 (Mich. Ct. App. May 21, 2013).

Following a jury trial in Oakland County Circuit Court, Petitioner was convicted of first-degree felony murder and second-degree murder. The second-degree murder count was vacated on double jeopardy grounds. On June 1, 2011, he was sentenced to life imprisonment for felony murder. Petitioner filed an appeal of right in the Michigan Court of Appeals, raising several claims, including the claim raised in this petition. The Michigan Court of Appeals affirmed Petitioner's conviction. *Id.* The Michigan Supreme Court denied Petitioner's subsequent application for leave to appeal. *People v. Cooper*, 495 Mich. 900 (2013).

Petitioner then filed the pending habeas corpus petition through counsel. He raises this claim:

> The trial court violated Mr. Cooper's constitutional rights by admitting into evidence statements obtained where police questioned appellant after he unambiguously invoked his Fifth Amendment right to remain silent; any statements made thereafter were involuntary and should have been suppressed.

Respondent has filed an answer in opposition, arguing that portions of this claim are procedurally defaulted and that the entire claim is without merit.

II. Standard

Review of this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under the AEDPA, a state prisoner is entitled to a writ of habeas corpus only if he can show that the state court's adjudication of his claims –

> (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.

28 U.S.C. § 2254(d).

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 (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 408. "[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 411.

The Supreme Court has 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. Visciotti*, 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).

The Supreme Court has emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102. Furthermore, pursuant to § 2254(d), "a habeas court must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of th[e Supreme] Court." *Id.*

Although 28 U.S.C. § 2254(d), as amended by the AEDPA, does not completely bar federal courts from relitigating claims that have previously been rejected in the state courts, it preserves the authority for a federal court to grant habeas relief only "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" Supreme Court precedent. *Id.* Indeed, "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n. 5 (1979)) (Stevens, J., concurring)). 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." *Id.* at 103.

Additionally, a state court's factual determinations are entitled to a presumption of correctness on federal habeas review. *See* 28 U.S.C. § 2254(e)(1). A petitioner may rebut this presumption with clear and convincing evidence. *See Warren v. Smith*, 161 F.3d 358,

360-61 (6th Cir. 1998). Moreover, habeas review is "limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

III. Discussion

Over 32 years after David McKillop's murder, Petitioner was convicted of first-degree felony murder and sentenced to life imprisonment. Petitioner argues that his custodial statements were improperly admitted because his assertion of his right to silence was not scrupulously honored. Alternatively, he argues that his custodial statements were not voluntarily made. Petitioner further contends that the admission of these statements was not harmless error.

Police interviewed Petitioner twice before his arrest, once in December 2006, and once in January 2010. Police interviewed Petitioner three times after arresting him on March 2, 2010. Two of these interviews occurred on March 2, 2010, and one occurred the following day, March 3, 2010. Petitioner challenges the admission of the second March 2nd interview and the March 3rd interview. The Court finds that Petitioner clearly and unambiguously invoked his right to remain silent during the second March 2nd interview and that admission of the portion of the interview following invocation of this right violated Petitioner's constitutional right to remain silent. The state court's finding that this error was harmless is not contrary to or an unreasonable application of Supreme Court precedent. The Court further finds that Petitioner's challenge to the March 3rd interview is procedurally defaulted.

A. Non-Custodial Interviews

1. December 2006 Interview

In 2006, Farmington Hills Police Department detective Richard Wehby and his partner, Detective Scott Rzeppa, were working with the department's cold case team, when they received a call from Bill Lolley regarding a murder which occurred in 1978. Lolley identified the killer as Petitioner. The detectives determined that Lolley was referring to the murder of David McKillop. Detective Wehby and another detective interviewed Petitioner in December 2006. Petitioner was not under arrest at the time. Detective Wehby characterized Petitioner as cooperative and talkative. Petitioner described his relationship with John Anderson, a drug dealer who allowed Petitioner to live in his basement when Petitioner was 17-years old. Anderson was like a father-figure to Petitioner, but also allowed Petitioner to be a fall guy when police investigated Anderson's illegal activities. Petitioner knew Lolley from the neighborhood. He and Petitioner would occasionally socialize. Detective Wehby testified that when he asked Petitioner about Robert Jenkins, Petitioner seemed nervous and his face flushed. Detective Wehby informed Petitioner that police had information that Petitioner had been paid to kill someone, but that he killed the wrong person. In response, Petitioner changed the subject. Petitioner ultimately denied ever killing anyone for money, but did not deny having killed someone.

During the interview, Petitioner agreed to provide a DNA sample, but, by the end of the interview, he declined to do so. Detective Wehby also testified that Petitioner took measures during the interview which Detective Wehby interpreted as Petitioner avoiding leaving behind any traces of DNA evidence. For example, Petitioner smoked five cigarettes during the course of the interview, stepping outside with detectives each time to do so.

Petitioner never discarded his cigarettes in the receptacles outside the police station. He instead placed the paper and filter into his pocket. When he was finished drinking his coffee, he broke the styrofoam cup into pieces and placed the pieces in his pocket. Also, instead of discarding his chewing gum into a garbage can, he placed the gum into a piece of the styrofoam cup and placed the garbage in his pocket. When Petitioner advised the detectives that he wanted to end the interview, the detectives ended the interview.

2. January 26, 2010 Interview

Approximately three years later, on January 26, 2010, Detectives Wehby and Rzeppa interviewed Petitioner at the car dealership where Petitioner worked. Detective Wehby testified that the three-year interval between the two interviews was attributable to the continuing investigation, a change in leadership for the prosecutor's office, and "a lot of confusion" regarding caseloads. 5/9/11 Tr. at 12, ECF No. 5-15, Pg. ID 833. The detectives interviewed Petitioner in the manager's office of the car dealership. They advised Petitioner that he could leave at anytime. Detective Wehby told Petitioner that they believed he was McKillop's shooter, but that they believed others were involved as well. Petitioner told Detective Wehby that, if he talked, he would need protection and a grant of immunity from the prosecutor. He also asked Detective Wehby about sentencing guidelines. Petitioner stated that he needed to talk to his wife and prepare her for what was coming, including transferring some properties into her name. Petitioner asked if he could ask the detectives a hypothetical question. While pointing to a picture of John Anderson, Petitioner asked: "[L]et's say John ... put me up to this. I broke into the house. I shoot the guy, is that what

you're saying?" 5/5/11 Tr. at 164, ECF No. 5-13, Pg. ID 805. Detective Wehby responded yes, and Petitioner just smiled at him. Detective Wehby also testified that, as he did in his first interview, Petitioner deposited his coffee cup in his pocket and took his cigarette stub with him. At the end of the interview, Detective Wehby presented Petitioner with a warrant for his DNA. Petitioner questioned the authenticity of the warrant, but submitted to the collection of a sample.

B. Custodial Interviews

1. March 2, 2010, First Interview

Petitioner was arrested by Bay City Police on March 2, 2010, pursuant to a warrant charging him with open murder. Detectives Wehby and Rzeppa interviewed Petitioner at the Bay City Police Department. After being advised of his constitutional rights, Petitioner waived his right to remain silent. His interview with the detectives was recorded and the DVD played for the jury. Petitioner admitted that he knew some things about the murder, but denied that he was the shooter. He told the detectives that there were two "incidents" involved and that the second "incident" was the shooting. The first incident occurred several days before the murder. Petitioner, Donnie McKinney, and Mark Bollis went to Jenkins' home at the direction of John Anderson to convince Jenkins to pay a debt owed to Anderson. No one was home when they arrived, but they entered the home anyway. Petitioner could not recall whether they picked the lock to enter the home, if the door had been unlocked, or they entered another way. The men sat in the home's living room for approximately an hour and a half. As they waited, they discussed a plan to tie Jenkins up, beat him, and deliver the

message that he needed to repay the money he owed. Petitioner found an extension cord in the living room and held onto it so he would be prepared when Jenkins arrived home. He told the detectives that he grabbed the extension cord and "I figured I'd tie him up in a chair ... and then totally beat the shit out of somebody when they can't defend themselves being tied up in a chair." ECF No. 1-5, Pg. ID 141. After waiting for an hour and a half for Jenkins to arrive, the men gave up and left the home.

A few days later, Anderson directed the men to try to speak to Jenkins again. This time, Petitioner, McKinney, Bollis, and a fourth male, whose name Petitioner did not know, went to the home. They sat outside the home for approximately half an hour when a car pulled up. A man exited the car and entered the home. The four men exited the vehicle. McKinney, Bollis, and the unidentified male entered Jenkins' home. Petitioner stated that he waited outside the home on the front porch for a while. He heard arguing from inside the home and then gunfire. Petitioner stated that he left, walking on foot to his home, which was about ten miles away. Petitioner maintained that he did not learn that someone had been killed that night until a couple of years later, but also stated that a few days after the murder, he overheard a conversation between Terry Beck and Anderson, during which he Beck told Anderson that they had gotten the wrong guy. Petitioner claimed not to have known that anyone had a weapon when they pulled up outside Jenkins' home. Almost three hours into the interview, Petitioner made the following statement: "See, that's why I don't want to talk to you guys about this because who do I have to collaborate anything I have to say?" ECF No. 1-5, Pg. ID 193. Detectives continued to question Petitioner for a short time after this

statement.

2. March 2, 2010, Second Interview

Petitioner was transported to the Farmington Hills Police Department and again interviewed by Detectives Wehby and Rzeppa.[1] The interview commenced at approximately 10:30 p.m. Detective Wehby reminded Petitioner that the *Miranda* form Petitioner signed earlier was still in effect. Petitioner continued to deny that he shot McKillop. He repeated his earlier statement that several days before the murder, he, McKinney, and Bollis went to Jenkins' home to talk to Jenkins about money he owed to Anderson. He also stated that on the night of the murder, he, McKinney, Bollis, and a fourth man went to Jenkins' home. The other three men entered the home when a man they thought was Jenkins arrived home. Petitioner waited outside on the front porch. After a minute, he heard yelling and then several gunshots. Petitioner left the front porch and began a ten-mile trek home. He tried to stay out of sight because he did not want McKinney, Bollis and the third man to see him as they were leaving the home.

Approximately one hour after the interview commenced (at 11:35 p.m.), Petitioner stood up and said, "No, we're done." ECF No. 5-18, Pg. Id 1047. He also twice asked to be taken back to his cell. *Id.* Detective Wehby said, "If you don't wanna talk to us fine, we're

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[1] Petitioner states that the transcript of the second March 2, 2010 interview is attached as Exhibit E to his petition. It appears to have been omitted from the Court filing. A transcript of the March 2, 2010, interview at the Farmington Hills Police Department was attached as an exhibit to Petitioner's brief on direct appeal to the Michigan Court of Appeals. The Court has reviewed that transcript in place of Exhibit E as it is clear this is the transcript intended as Exhibit E.

gonna stare at you all night." *Id.* Police continued to question him. Ten minutes later, Petitioner said, "I have nothing further to say." *Id.* at Pg. ID 1050 At 11:53 p.m., Petitioner said, "Thank you for your time, I'm not talking anymore." *Id.* at 1051. Police disregarded Petitioner's statement and asked whether he shot and killed McKinnon. Petitioner replied, "No." *Id.* at 1052. Questioning stopped and Petitioner was returned to his cell at approximately 11:54 p.m.

During both of the March 2nd interviews, Detective Wehby referenced DNA evidence. He implied that the DNA evidence might reveal that Petitioner had actually entered the home, rather than waited outside on the front porch as he claim. Detective Wehby testified at trial that they had no DNA evidence linking Petitioner to the crime and that Petitioner's DNA sample was never tested to determine whether it could be linked to a hair that was found at the crime scene.

3. March 3, 2010 Interview[2]

Detectives Wehby and Rzeppa interviewed Petitioner again the following morning, March 3, 2010, at approximately 9:00 a.m. Before questioning began, the detectives informed Petitioner that he was still entitled to the rights listed on the *Miranda* form that he signed the previous day. Petitioner initially reiterated his story that he remained on the front

[2] Pages 60-62 of this interview transcript are omitted from Petitioner's Appendix F. They are also omitted from the appendix to Petitioner's brief in the Michigan Court of Appeals. These omitted pages are attached to the State's brief on appeal in the Michigan Court of Appeals and the Court has reviewed these pages. *See* ECF No. 5-19, Pg. ID 1270-71.

porch on the night of the shooting. As the interrogation progressed, Petitioner admitted that he entered the house and that he sat on the couch while McKillop struggled with Bollis and an unknown black male. He admitted that he threw Bollis an extension cord to help McKinney tie up McKillop. McKinney pulled a gun out of his jacket. Petitioner told the detectives that McKinney shot McKillop in the head. After a pause, McKinney shot McKillop several more times. Petitioner said he fled after the first few shots were fired.

C. Assertion of Right to Remain Silent

The Fifth Amendment provides that "[n]o person shall be . . . .compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that, to protect a suspect's Fifth Amendment rights, an individual who has been taken into custody or otherwise deprived of his freedom and is questioned must be advised, prior to any questioning, "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him." *Id.* at 478-79. The Supreme Court has held that if a suspect "indicates in any manner, at any time prior to or during questioning, that he [or she] wishes to remain silent, the interrogation must cease." *Id.* at 473-74. An individual must invoke his right to remain silent unambiguously. *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010) (holding that individual who did not say that "he wanted to remain silent or that he did not want to talk with the police," failed to invoke his right to cut off police questioning). "The admissibility of statements obtained after an individual has invoked his right to remain silent

depends on whether the police 'scrupulously honored' the 'right to cut off questioning.'" *Tremble v. Burt*, 497 Fed. App'x 536, 544 (6th Cir. 2012) (quoting *Michigan v. Mosley*, 423 U.S. 96, 104-05 (1975)).

Petitioner claims that he asserted his Fifth Amendment right to remain silent during both of his March 2nd interviews and during his March 3rd interview, that police did not "scrupulously honor[]" his right to cut off questioning, and that statements from all three interviews should have been excluded.

1. The First March 2nd Interview

Petitioner was arrested on March 2, 2010 in Bay City, pursuant to a warrant charging him with open murder. After being advised of his *Miranda* rights, Petitioner was questioned by Detectives Wehby and Rzeppa. More than three-quarters into this interview, the following exchange occurred:

Det. Wehby:	We don't have a weapon. I'm telling ya we don't have a weapon. The only way I can prove who shot and killed him is if somebody tells me they shot and killed him.
Petitioner:	See, that's why I don't want to talk to you guys about this because who do I have to collaborate anything I have to say?

ECF No. 1-5, Pg. ID 193.

Petitioner argues that this statement amounted to an unambiguous assertion of his right to remain silent. The Michigan Court of Appeals rejected this argument. After citing the correct constitutional standard, the state court held: "While defendant indicated his preference was not to speak with the police unless someone could corroborate his statements,

a preference is not an unequivocal or unambiguous assertion of the right to remain silent." *Cooper*, 2013 WL 2223896 at *2. Petitioner's statement did not clearly indicate a desire to cease questioning. The state court's conclusion, therefore, is not an unreasonable application of Supreme Court precedent.

2. The Second March 2nd Interview

Detectives Wehby and Rezzpa interviewed Petitioner a second time on March 2nd. This interview occurred after Petitioner was transported from the Bay City Police Department to the Farmington Hills Police Department. Petitioner maintains that, during this interview, he also invoked his right to remain silent. Approximately one hour after the interview commenced, Petitioner stood up and said, "No, we're done." (ECF No. 5-18, Pg. Id 1047). Detective continued to question him for approximately eighteen more minutes, during which time Petitioner twice asked to be returned to his cell and twice stated he had nothing further to say. The Michigan Court of Appeals held that Petitioner "unambiguously and unequivocally invoked his right to remain silent." *Cooper*, 2013 WL 2223896 at *2. The Court agrees with the Michigan Court of Appeals' holding that Petitioner's statements constituted a clear and unambiguous assertion of Petitioner's right to remain silent. The Michigan Court of Appeals, however, declined to reverse Petitioner's conviction on this basis because the court held the trial court's failure to suppress the statements from this interview to be harmless beyond a reasonable doubt. *Id.* at *3. The state court reasoned:

> Of significant importance here is that defendant did not make any further admissions after invoking his right to remain silent during this interview. In fact, defendant denied knowing the victim and denied shooting him.

> There also was substantial evidence at trial from which a rational jury could find defendant guilty beyond a reasonable doubt absent the error. In an earlier interview in Bay City, defendant admitted to breaking into the house where the victim resided a few days before the murder with the intent to hurt Jenkins, and that he had taken an extension cord from a lamp with the plan of tying up Jenkins. He also admitted that he was on the porch the night of the murder. At trial, Lolley testified that defendant confessed to the killing, admitting that he tied the victim up and "laid him down on the floor[,][p]ut a pillow on his head and shot him in the back of the head. Emptied the gun out." Considering this evidence, any error in admitting evidence of defendant's limited statements after he invoked his right to remain silent was harmless beyond a reasonable doubt.

Id.

On federal habeas review, relief may not be granted "based on trial error unless [a petitioner] can establish that it resulted in 'actual prejudice.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)). Under this test, relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). Courts on collateral review must "give a heightened degree of deference to the state court's review of a harmless error decision." *Langford v. Warden*, 665 Fed. App'x 388, 389 (6th Cir. 2016) (citing *Davis v. Ayala*, 576 U.S. —, 135 S. Ct. 2187, 2197 (2015)).

Although detectives continued to question Petitioner for 18 minutes after he invoked his right to remain silent during the second March 2nd interview, the Michigan Court of Appeals accurately concluded that Petitioner said little of substance after invoking his right to remain silent. Petitioner did not give an incriminating statement after invoking his right

to remain silent and nothing he said contradicted or supplemented any of his previous statements. Thus, the admission of the portion of the second March 2nd interview following Petitioner's assertion of his right to remain silent did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623.

3. The March 3rd Interview

Finally, Petitioner challenges the trial court's failure to suppress his March 3rd interview. Respondent argues that Petitioner's challenge to the admissibility of this statement is procedurally defaulted. The Court finds that the claim is procedurally defaulted and that Petitioner has not alleged cause and prejudice to excuse the default, nor has he shown that failure to consider the claim would work a manifest injustice.

Federal habeas relief is precluded on claims that were not presented to the state courts in accordance with the state's procedural rules. *See Wainwright v. Sykes*, 433 U.S. 72, 85-87, (1977). The doctrine of procedural default is applicable when a petitioner fails to comply with a state procedural rule, the rule is actually relied upon by the state courts, and the procedural rule is "independent of the federal question and adequate to support the judgment." *Walker v. Martin*, 562 U.S. 307, 315 (2011) (internal quotations omitted). Federal courts on habeas review must decide whether a state procedural bar is adequate. That is, the "'adequacy of state procedural bars' ... is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.'" *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Douglas v. Alabama,* 380 U.S. 415, 422 (1965)). "[O]rdinarily, violation of 'firmly established and regularly followed' state rules ... will be adequate to

foreclose review of a federal claim," but there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Id.* at 376.

The Michigan Court of Appeals expressly relied on the invited-error doctrine in declining to review the admission of Petitioner's March 3rd interview:

> This issue has been waived. Waiver is the intentional relinquishment of a known right that extinguishes any error and precludes appellate review. *People v. Carter*, 462 Mich. 206, 215; 612 N.W.2d 144 (2000).
>
> In the direct examination of Detective Richard Wehby, the prosecution did not ask about the March 3rd interview. During cross-examination, however, defense counsel initiated a line of questioning regarding the detective's false representations to defendant about DNA evidence during the March 2nd interview at Bay City. The following colloquy ensued:
>
> Q. Okay. And you did that in order to try to get him to admit something that he didn't do.
>
> A. I was trying to get him to open up further about his involvement in the incident, yes.
>
> Q. He never did that, did he?
>
> A. *No, as a matter of fact he did.*
>
> Q. He never told you he was inside when you had this interview, did he?
>
> A. Did he ever tell me that he was inside?
>
> Q. No, I said during this interview did he tell you he was inside?
>
> A. No, sir not during that interview he didn't tell me. [Emphasis supplied by Michigan Court of Appeals.]

> On redirect, the prosecution then asked if defendant ever indicated that he was inside the house, to which the detective replied: "Yes, he did." The prosecution asked if that admission occurred during the March 3rd interview, to which the detective replied in the affirmative and explained that it was in that interview that defendant changed his story, admitted to entering the house, and admitted to providing the extension cord to tie the victim up and helping to subdue the victim. Defense counsel then requested that the transcript of the March 3rd interview be provided to the jury and that all of the taped interviews be played for the jury.
>
> Thus, it was defendant's questioning of Detective Wehby that resulted in the reference to the March 3rd interview and it was defendant who subsequently moved to admit that interview at trial. Defendant made a strategic choice when attempting to impeach Detective Wehby. Defendant then made a second strategic choice in introducing the videotape of this interview in an effort to show the jury the apparent coerciveness of the police. These strategic choices were ultimately unsuccessful, and defendant now objects to the admissibility of the March 3rd interview. Yet, "[a]ppellate review is precluded because when a party invites the error, he waives his right to seek appellate review, and any error is extinguished." *People v. Jones*, 468 Mich. 345, 352 n. 6; 662 NW2d 376 (2003).

Cooper, 2013 WL 2223896 at *3.

Under the doctrine of invited error, a party waives the right to seek appellate review when the party's own conduct directly caused the error. *People v. McPherson*, 263 Mich. App. 124, 139 (Mich. Ct. App. July 20, 2004) (*citing People v. Jones*, 468 Mich. 345, 352 (Mich. 2003)). The Sixth Circuit in *Fields v. Bagley*, 275 F.3d 478 (6th Cir. 2001) explained invited error as "a branch of the doctrine of waiver in which courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside." *Id.* at 485-86 (citing *Harvis v. Roadway Express, Inc.*, 923 F.2d 59, 61 (6th Cir. 1991)). Further, "[w]hen a petitioner invites an error in the trial court, he is precluded from seeking habeas corpus relief for that error." *Id.* at 486 (citing *Leverett v.*

Spears, 877 F.2d 921, 924 (11th Cir. 1989)); *Draughn v. Jabe*, 803 F.Supp. 70, 75 (E.D. Mich. 1992). This doctrine has been found to be long-established and regularly followed in Michigan. *Pattereson v. Curtin*, No. 1:13-cv-503, 2016 WL 4150730, *15 (W.D. Mich. Aug. 4, 2016); *see also Antoine v. Mackie*, No. 14-14933, 2015 WL 6671570, *5, n.2 (E.D. Mich. Nov. 2, 2015) (finding that Michigan Court of Appeals' reliance on invited error doctrine constituted procedural default of claim); *People v. Whetstone*, 326 N.W.2d 552, 554 (Mich. Ct. App. Sept. 21, 1981) (finding that under the invited error doctrine a party waives review of the issue on appeal).

Prior to defense counsel's cross-examination of Detective Wehby, a discussion was held outside the presence of the jury regarding the March 3rd interview. The prosecutor clearly indicated his intention was to introduce portions of the March 3rd interview *only* as necessary to impeach Petitioner if he testified. Petitioner argues that counsel's questions to Detective Wehby regarding whether Petitioner ever admitted to being inside the house during the first March 2nd interview were narrowly crafted to address only Detective Wehby's statements regarding (non-existent) incriminating DNA evidence. The Michigan Court of Appeals held that the questions were not narrowly tailored to this specific topic. The Court finds that this is a reasonable interpretation of the record. The Michigan Court of Appeals' reliance on invited error to bar consideration of Petitioner's challenge to the March 3rd interview was not an exorbitant application of the rule. It was, instead, enforcement of a firmly established and regularly followed procedural rule.

Petitioner's challenge to the March 3rd interview is thus procedurally defaulted unless

Petitioner shows cause for the default and actual prejudice that resulted from the alleged violation of federal law or that there will be a fundamental miscarriage of justice if the claims are not considered. *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991). Petitioner neither alleges nor establishes cause to excuse his default. The Court need not address the issue of prejudice when a petitioner fails to establish cause to excuse a procedural default. *See Smith v. Murray*, 477 U.S. 527, 533 (1986); *Long v. McKeen*, 722 F.2d 286, 289 (6th Cir. 1983).

Additionally, Petitioner has not established that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception requires a showing that a constitutional violation probably resulted in the conviction of one who is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 624 (1998). "To be credible, [a claim of actual innocence] requires petitioner to support his [or her] allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. Petitioner has made no such showing. This claim, therefore, is procedurally defaulted.

D. Voluntariness of Statements

Finally, Petitioner argues that his custodial statements were involuntary because his will was overborne by the conduct of the police. The Michigan Court of Appeals held the statements, under the totality of the circumstances, were voluntarily made:

Defendant's statements were voluntary. Defendant was 49 years old at the

> time of the police interviews, he had a criminal background and experience with the criminal justice system, he boasted to the police that he was a self-professed fan of cold case television programming, and his actions indicated he was very familiar with DNA testing. At the beginning of the custodial Bay City interview, defendant was read his Miranda rights and explicitly waived those rights. There is no evidence that anyone threatened or abused defendant. While the interviews were not short, defendant does not claim that he was injured, intoxicated, drugged, or denied food, sleep, or medical attention. He did not display any behavior suggesting that he failed to comprehend the questions being asked of him. Therefore, under the totality of the circumstance, we find that the confession was freely and voluntarily made.

Cooper, 2013 WL 2223896 at *4.

The Fifth Amendment privilege against compulsory self-incrimination bars the admission of involuntary confessions. *Colorado v. Connelly*, 479 U.S. 157, 163-64 (1986). A confession is considered involuntary if: (1) the police extorted the confession by means of coercive activity; (2) the coercion in question was sufficient to overbear the will of the accused; and (3) the will of the accused was in fact overborne "because of the coercive police activity in question." *McCall v. Dutton*, 863 F.2d 454, 459 (6th Cir.1988). In determining whether a confession is voluntary, the ultimate question is "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." *Miller v. Fenton*, 474 U.S. 104, 112 (1985). Without coercive police activity, however, a confession should not be deemed involuntary. *Connelly*, 479 U.S. at 167 ("coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause"). The burden of proving that a confession was given involuntarily rests with the petitioner. *Boles v. Foltz*,

816 F.2d 1132, 1136 (6th Cir. 1987). Voluntariness need only be established by a preponderance of the evidence. *Id.* On federal habeas review, a federal court must presume that the state court's factual finding that a defendant fully understood what was being said and asked of him was correct, unless the petitioner shows otherwise by clear and convincing evidence. *Williams v. Jones*, 117 Fed. App'x 406, 412 (6th Cir. 2004).

The Michigan Court of Appeals applied a totality of the circumstances approach when evaluating Petitioner's claim, and, in so doing, it did not fail to adequately consider relevant factors. Based upon the totality of the circumstances in this case, it was objectively reasonable for the Michigan Court of Appeals to hold that Petitioner's confession was voluntary. *See McCalvin v. Yukins*, 444 F.3d 713, 720 (6th Cir. 2006). Accordingly, the Court denies this claim.

IV. Certificate of Appealability

In order to appeal the Court's decision, Petitioner must obtain a certificate of appealability. To obtain a certificate of appealability, Petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, Petitioner must show that reasonable jurists could debate whether 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). Courts must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. §

2253(c)(3); Fed. R. App. P. 22(b); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997). Here, jurists of reason could debate the Court's holding regarding Petitioner's challenge to the admissibility of the March 3, 2010 interview. Therefore, the Court grants Petitioner a certificate of appealability limited to that issue. The Court finds that reasonable jurists would not debate the Court's conclusions with respect to the challenges to the admission of both of the March 2, 2010 interviews and denies a certificate of appealability as to the remaining claims.

V. Conclusion

For the reasons stated above, the Court DENIES the petition for a writ of habeas corpus. The Court GRANTS a certificate of appealability limited to Petitioner's challenge to the March 3, 2010 interview and DENIES a certificate of appealability with respect to the remaining claims.

s/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: March 8, 2018

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 8, 2018, by electronic and/or ordinary mail.

s/Jennifer McCoy
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILBERN COOPER,

Petitioner,

Case Number: 2:15-CV-10679
HONORABLE SEAN F. COX

v.

MARY BERGHUIS,

Respondent.
_____/

JUDGMENT

IT IS ORDERED AND ADJUDGED that pursuant to this Court's Order dated March 8, 2018, this cause of action is DISMISSED.

s/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: March 8, 2018

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 8, 2018, by electronic and/or ordinary mail.

s/Jennifer McCoy
Case Manager