No. 20-2074

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILSHAUN KING,

Petitioner-Appellant,

v.

MIKE BROWN, Acting Warden,

Respondent-Appellee.

ORDER

Before: DONALD, Circuit Judge.

Wilshaun King, a *pro se* Michigan prisoner, applies for a certificate of appealability ("COA") in his appeal from the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1)(A). King also moves to proceed in forma pauperis.

King's convictions stemmed from a series of fights, as a result of which he hit two men with his car, killing one of them, and hit a third in the head with a brick. A jury convicted him of first-degree premeditated murder, assault with intent to commit murder, and assault with intent to do great bodily harm less than murder. The trial court sentenced him to life imprisonment for the murder conviction, and concurrent prison terms of ten to fifty years and thirty-five months to ten years for the assault convictions, respectively. His direct appeal did not succeed. *People v. King*, No. 282533, 2010 WL 98693 (Mich. Ct. App. Jan. 12, 2010) (per curiam), *perm. app. denied*, 783 N.W.2d 513 (Mich. 2010).

In June 2011, King, through counsel, filed a § 2254 petition asserting that the trial court violated his rights under the Sixth Amendment's Confrontation Clause by allowing a medical examiner to testify about facts in an autopsy report and anatomical sketch that she did not author. In July 2013, King moved to hold the petition in abeyance so that he could exhaust the state-court remedies for a claim that his trial counsel was ineffective for failing to convey a plea offer to him.

The district court granted that abeyance motion, and King litigated this claim through the Michigan courts without success. *See People v. King*, 885 N.W.2d 297 (Mich. 2016) (mem.). In 2017, King filed a supplemental § 2254 petition raising his ineffective-assistance claim. The district court denied King's confrontation claim on the merits, denied his ineffective-assistance claim as untimely, and declined to issue a COA. *King v. Kowalski*, No. 2:11-CV-12836, 2020 WL 5768897 (E.D. Mich. Sept. 28, 2020). King seeks a COA on both claims.

A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or when "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court has denied the petition on procedural grounds, the petitioner must show that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

The Confrontation Clause prohibits the admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable and the defendant previously had the opportunity for cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). A statement is testimonial if its primary purpose is to prove past events that are potentially relevant to a later criminal trial. *See Ohio v. Clark*, 576 U.S. 237, 244-46 (2015). That general rule likewise prohibits the prosecution from introducing certain testimonial forensic or scientific reports through the in-court testimony of a witness who did not perform or observe the test or examination expressed in the report. *See Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009).

At King's trial, a medical examiner testified that the murder victim died from head injuries from being hit by a car. She relied in part on the results of an autopsy report that was created by a

different medical examiner, who had since left the position. King "did not contest the admissibility of the factual data in the autopsy report, but rather challenged only the admissibility of the 'opinions and any statements that seem to project opinions' of the examiner who performed the autopsy." *King*, 2010 WL 98693, at *1. The trial court permitted the testifying medical examiner to give her opinion about the cause of death but did not admit into evidence the autopsy report or any opinions or conclusions of its non-testifying author. *Id.* Because of those limitations, the Michigan Court of Appeals held that these rulings did not violate the Confrontation Clause. *Id.* at *6. King also argued on appeal that the testifying medical expert used an anatomical sketch of the victim's injuries that was made by the non-testifying expert. Because King did not raise that Confrontation Clause argument at trial, the Michigan Court of Appeals reviewed it for plain error and rejected it, noting that the testifying medical expert gave her own opinion about the accuracy of the sketch after independently reviewing it and comparing it to other evidence. *Id.*

The district court first held that the state court's decision was not unreasonable because it was not obvious that the Confrontation Clause was even implicated by the medical expert's testimony, given that it was "unclear whether autopsy reports are testimonial." *King*, 2020 WL 5768897, at *5. The district court noted that "autopsies are not prepared for the primary purpose of being used at a criminal trial and are often performed before it has even been established that a crime has been committed and before a criminal suspect is identified." *Id.* (citing *Mitchell v. Kelly*, 520 F. App'x 329, 331 (6th Cir. 2013) (per curiam) (holding that there was a "lack of Supreme Court precedent establishing that an autopsy report is testimonial.")).

Even so, the district court next held that the medical expert's testimony did not violate the Confrontation Clause because she merely used the autopsy report and sketch to reach her own conclusions. *Id.* The court cited the plurality opinion in *Williams v. Illinois*, 567 U.S. 50, 57-58 (2012), noting that, while it did not itself clearly establish that rule, the case showed that there was no clearly established law prohibiting an expert from testifying about her independent conclusions formed through reviewing a scientific report prepared by someone else. *King*, 2020 WL 5768897, at *5.

Finally, assuming the medical expert's testimony did violate the Confrontation Clause, the district court still held that any error was harmless. *See Bullcoming*, 564 U.S. at 668 n.11 (holding that harmless-error analysis applies to Confrontation Clause claims). The district court noted that King's defense was not that the victim did not die from being hit by a car; he argued that he was not the driver. Therefore, the district court held that the medical expert's testimony about the cause of the victim's death did not have a substantial or injurious effect on the jury. *King*, 2020 WL 5768897, at *6 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

In his § 2254 petition, King asserted that defense counsel did argue at trial that the murder victim may have died from something other than being hit by a car. Nevertheless, no reasonable jurist could debate the district court's denial of King's Confrontation Clause claim. As the district court held, neither the Supreme Court nor this Court has held that an autopsy report or an anatomical sketch is testimonial for Sixth Amendment purposes. *See Mitchell*, 520 F. App'x at 331. And neither the Supreme Court nor this Court has held that an expert may not testify about her own opinions if she reached them using an autopsy and related materials that she did not author. Therefore, King has not made a substantial showing that the medical examiner's testimony violated that Confrontation Clause.

King also claimed that his trial attorney was ineffective for not conveying to him a plea offer made by the State. The district court denied this claim as untimely, given that King filed it in a supplemental petition long after § 2254's one-year statute of limitations had expired and it did not relate back to his original petition. *King*, 2020 WL 5768897, at *6-7.

The limitations period for a § 2254 petition begins to run on the latest of: (A) "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"; (B) the date on which an impediment to filing a federal habeas petition is removed by the state; (C) the date on which a new constitutional right asserted is recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(A)-(D). The district court held that King's limitations period began under subsection (A), and King does not dispute the district

court's determination that, were that subsection operative, his claim would be untimely. Instead, King argues that the statute of limitations for his ineffective-assistance claim was timely because it began under either subsection (C) or (D).

King first argues that his claim was timely under § 2244(d)(1)(C), because it was based on two later Supreme Court cases about ineffective assistance of counsel concerning plea offers, *Missouri v. Frye*, 566 U.S. 134 (2012), and *Lafler v. Cooper*, 566 U.S. 156 (2012). But, as the district court held, *King*, 2020 WL 5768897, at *8, *Frye* and *Lafler* did not announce new, retroactively applicable constitutional rights or rules. *See Shoemaker v. Jones*, 600 F. App'x 979, 982 (6th Cir. 2015); *In re Liddell*, 722 F.3d 737, 738 (6th Cir. 2013) (per curiam). King responds that the Supreme Court clarified the retroactivity analysis in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). But he cites no case and has otherwise not made a substantial showing that *Montgomery* made *Frye* or *Lafler* retroactively applicable. Moreover, even if they were, King did not raise his supplemental claim within one year of those decisions.

King also asserts that his ineffective-assistance claim was timely under § 2244(d)(1)(D), because he did not know that his attorney failed to tell him about a plea offer until years after his direct appeal. The district court held that King knew or could have known of the factual predicate of his claim at the time of his direct appeal. *King*, 2020 WL 5768897, at *8. In his COA application, King does not detail when or how he learned of his counsel's alleged failure to convey the plea offer but asserts only that he had not been "intentionally dilatory." He has not, then, made a substantial showing that the district court's ruling was debatable.

Equitable tolling may apply to the limitations period when a petitioner can show: "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). And a petitioner who presents new evidence and shows that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence," may also escape the procedural bar of the limitations period. *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). The district court held that King did not make these showings, and he does not argue in

his COA application that equitable tolling should apply or that he is actually innocent. *King*, 2020 WL 5768897, at *9. Therefore, no reasonable jurist could debate the district court's denial of King's ineffective-assistance claim on timeliness grounds.

Accordingly, King's COA application is **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILSHAUN KING,

Petitioner,

Case No. 2:11-CV-12836
HONORABLE LINDA V. PARKER

v.

JACK KOWALSKI,[1]

Respondent.
_____/

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

Wilshaun King ("Petitioner"), confined at the Kincross Correctional Facility in Kincheloe, Michigan, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his application, filed by attorney Daniel J. Blank, Petitioner challenges his conviction for first-degree premeditated murder, Mich. Comp. Laws § 750.316(1)(a), assault with intent to commit murder, Mich. Comp. Laws § 750.83, and assault with intent to do great bodily harm less than murder, Mich. Comp. Laws § 750.84. (ECF No. 1 at Pg. ID 3.) For the reasons that follow, the Court denies the petition for a writ of habeas corpus.

[1] Wilshaun King is currently incarcerated at Kincross Correctional Facility, where Jack Kowalski is warden. Accordingly, the case caption is updated to read "*Wilshaun King v. Jack Kowalski.*"

BACKGROUND

This Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals, which are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1). *See Wagner v. Smith,* 581 F.3d 410, 413 (6th Cir. 2009):

> Defendant's convictions arise from a series of fights that led to the death of Tyree Jones, who allegedly was killed when he was struck by a motor vehicle that defendant was driving. Defendant was also convicted of assault with intent to commit murder for striking Frank Sanders, Jr., with his vehicle, and assault with intent to do great bodily harm less than murder for striking Marcellus Smith on the head with a brick. At trial, defendant admitted interceding in a fight between his cousin and Smith, and punching Smith one time to get him off his cousin, but denied ever striking Smith with a brick. Although several witnesses identified defendant as the driver of a Ford Explorer that later drove through a field and allegedly struck Jones and Sanders, defendant claimed that he left the area after the fight with Smith and went to Belle Isle with his son, and that he had no knowledge of the events that occurred afterward.

People v. King, No. 282533, 2010 WL 98693, at *1 (Mich. Ct. App. Jan. 12, 2010).

Petitioner was convicted by a jury in the Wayne County Circuit Court. (ECF No. 1 at Pg. ID 3.) Petitioner's conviction was affirmed. *People v. King*, 2010 WL 98693, *lv. den.* 783 N.W.2d 513 (Mich. 2010).

On June 30, 2011, Petitioner, through counsel, filed a petition for a writ of habeas corpus. (ECF No. 1.) Petitioner seeks relief on the following ground:

> Petitioner's Sixth Amendment [r]ight [to] confrontation was violated when the substitute medical examiner was permitted to testify concerning facts contained within an autopsy report and anatomical chart authored by another [medical examiner].

(*Id.* at Pg. ID 5.)

On July 30, 2013, Petitioner filed a motion to hold the petition in abeyance so that he could return to the state court to exhaust a claim that his trial counsel had been ineffective for failing to convey a plea bargain offer to him. (ECF No. 9.) This Court's predecessor, Judge Avern Cohn, held the petition in abeyance and administratively closed the case on August 2, 2013. (ECF No. 10.)

On September 28, 2013, Petitioner filed a post-conviction motion for relief from judgment with the Wayne County Circuit Court. (ECF No. 14-2.) Judge Megan Maher Brennan initially granted Petitioner's motion for an evidentiary hearing on Petitioner's ineffective assistance of counsel claim. *People v. King,* No. 06-00137164-01 (Third Cir. Ct., Jan. 3, 2014); (*see also* ECF No. 11 at Pg. ID 1317-22.)

The matter was sent back to the original trial judge, Judge Annette Berry, who subsequently set aside the order to grant an evidentiary hearing and denied Petitioner's post-conviction motion for relief from judgment. *People v. King,* No. 06-00137164-01 (Third Cir. Ct., Jan. 9, 2015); (*see also* ECF No. 14-3 at Pg. ID 1441-45.) The Michigan Court of Appeals denied Petitioner leave to appeal. *People v. King,* No. 327239 (Mich. Ct. App. Oct. 2, 2016); *lv. den.* 885 N.W.2d 297 (Mich. 2016); *reconsideration den.* 890 N.W.2d 866 (Mich. 2017).

On April 8, 2017, Petitioner filed a motion to add a supplemental memorandum of law to the original petition. (ECF No. 11.) Petitioner sought relief on the ground that the trial court erred when it denied Petitioner's request for an evidentiary hearing on the issue of ineffective assistance of counsel. (*Id.* at Pg. ID 1307-09.) Judge Cohn reopened the case and granted the motion. (ECF No. 12.)

On November 30, 2017, Petitioner filed a motion to amend the petition and to supplement the petition with the following issue: "Petitioner's Sixth Amendment right to effective assistance of counsel was violated when trial counsel failed to inform him of a plea offer during jury deliberations." (ECF No. 16 at Pg. ID 1567.) Judge Cohn granted the motion to amend the petition. (ECF No. 19.)

Petitioner seeks habeas relief on the claims that he raised in his original and amended petitions. Respondent has filed answers to the original and amended petitions. (ECF Nos. 5, 13, 20.) This case was reassigned to the undersigned on January 2, 2020 pursuant to Administrative Order 20-ao-003.

STANDARD OF REVIEW

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

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

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

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11. "[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In order to obtain habeas relief in federal court, a state prisoner is required to show that the state court's rejection of his claim "was so lacking in justification that there was an error well understood and

comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington,* 562 U.S. at 103. A habeas petitioner should be denied relief as long as it is within the "realm of possibility" that fairminded jurists could find the state court decision to be reasonable. *See Woods v. Etherton,* 136 S. Ct. 1149, 1152 (2016).

The Michigan Court of Appeals reviewed and rejected a portion of Petitioner's Confrontation Clause claim involving the anatomical sketch under a plain error standard because Petitioner failed to preserve a portion of his claim as a constitutional issue at the trial court level. (ECF No. 6-9 at Pg. ID 892.) AEDPA deference applies to any underlying plain-error analysis of a procedurally defaulted claim. *See Stewart v. Trierweiler*, 867 F.3d 633, 638 (6th Cir. 2017).[2]

DISCUSSION

A. Claim # 1. Sixth Amendment Right to Confront Witnesses

[2] Respondent urges this Court to deny this portion of the claim on the ground that it is procedurally defaulted because Petitioner failed to object at trial. "[F]ederal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003) (citing *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)). "Judicial economy might counsel giving the [other] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." *Lambrix*, 520 U.S. at 525. Petitioner's unpreserved Confrontation Clause claim is related to his preserved Confrontation Clause claim. Because the same legal analysis applies to both the preserved and unpreserved claims, it would be easier to simply address the merits of the unpreserved Confrontation Clause claim.

Petitioner argues that his Sixth Amendment right to confrontation was violated when a substitute medical examiner who had not performed the autopsy on the victim was permitted to testify at trial about the findings from the autopsy and testify to the cause of death. (ECF No. 1 at Pg. ID 5.)

The Wayne County Medical Examiner's Office received information from the police and had its own investigator, who went to the scene and reported his findings. (ECF No. 6-4 at Pg. ID 535.) Doctor Melissa Pasquale-Styles was the medical examiner who performed the autopsy in August of 2005. (ECF No. 6-3 at Pg. ID 510.) Dr. Pasquale-Styles left Wayne County to take a job in New York before Petitioner's 2007 trial. (ECF Nos. 6-3 at Pg. ID 510; 6-4 at Pg. ID 528, 532.)

At the beginning of trial, Petitioner's retained counsel filed a motion in limine, objecting to any opinions contained within the victim's autopsy report being admitted into evidence. (ECF No. 6-2 at Pg. ID 262-64.) As to the facts contained within the autopsy report, retained counsel had no objection to their admission because they were not testimonial. (*Id.* at Pg. ID 263.) The prosecutor responded that the substituted medical examiner, Wayne County's Chief Deputy Medical Examiner Dr. Cheryl Lowe, would testify about her opinion and that counsel would have the opportunity to cross-examine her. (*Id.* at Pg. ID 264). The judge then denied Petitioner's motion. (*Id.* at Pg. ID 265.)

At trial, Dr. Lowe testified that she reviewed the victim's autopsy report. (ECF No. 6-3 at Pg. ID 501-02.) The victim's injuries were documented in an anatomical sketch. (*Id.* at Pg. ID 503-04.) Dr. Lowe testified that the victim had no tire marks on his body or clothing. (*Id.* at Pg. ID 511-12; ECF No. 6-4 at Pg. ID 528, 530, 535.) The top right side of the victim's head had scrapes and contusions. (ECF Nos. 6-3 at Pg. ID 504; 6-4 at Pg. ID 526.) The victim had an abrasion on his right cheek and a fractured jawbone. (ECF Nos. 6-3 at Pg. ID 504; 6-4 at Pg. ID 524.) The victim's left arm also had bruises and abrasions. (ECF No. 6-3 at Pg. ID 505.) The victim's right wrist was broken and he had a scrape on the palm of his right hand. (*Id.* at Pg. ID 505, 513-14.) At the time that victim was discovered, he had no drugs or alcohol in his system and had been dead for several hours. (*Id.* at Pg. ID 507; ECF No. 6-4, at Pg. ID 529-30.)

Dr. Lowe testified that it was her opinion that the victim died from head and skull injuries after he was intentionally struck by a motor vehicle. (ECF No. 6-3 at Pg. ID 502, 506-09.) Underneath was a skull fracture, "described as being depressed or caved in and comminuted or shattered," that "could have been caused by a blunt force injury." (*Id.* at Pg. ID 504; ECF No. 6-4 at Pg. ID 523.) The victim's brain stem was torn, which Dr. Lowe opined resulted in nearly instantaneous death. (ECF No. 6-3 at Pg. ID 506.) Dr. Lowe testified that the victim's injuries were consistent with his body being propelled in the air, becoming "a projectile at some point and

str[iking] some hard object." (ECF No. 6-4 at Pg. ID 539.) She conceded that his head could have hit the utility pole in the field where he was found. (ECF Nos. 6-3 at Pg. ID 507-08, 512; 6-4 at Pg. ID 538-39.) The victim's left lower "leg bone was fractured and protruding out of a hole in the skin and his knee cap was also dislocated." (ECF No. 6-3 at Pg. ID 505.) Dr. Lowe testified that on the victim's legs was "the classic so-called bumper injury," which she opined confirmed that the victim was struck while standing. (*Id.* at Pg. ID 505-06, 511; ECF No. 6-4 at Pg. ID 537.) While the victim's injuries were also consistent with blunt force trauma, like that from a beating, Dr. Lowe testified there was no information from the police that the victim had been beaten, and Dr. Lowe believed that a substantial amount of force would have been required to inflict his numerous injuries. (ECF No. 6-4 at Pg. ID 530, 536-37.)

The Michigan Court of Appeals rejected Petitioner's claim, concluding that there was no violation of Petitioner's Sixth Amendment right to confrontation:

> Dr. Lowe testified regarding her *own* opinions and conclusions, and, although Dr. Lowe based her opinions in part on facts obtained during the autopsy performed by another doctor, defendant did not challenge the admissibility of those facts and specifically agreed that "pure facts" contained in the autopsy report could be offered at trial.

People v. King, 2010 WL 98693, at *3 (emphasis in original).

After citing a number of federal and state law cases in support of their decision, the Michigan Court of Appeals again explained:

> In this case, defendant did not contest the admissibility of the factual data from the autopsy report, and Dr. Lowe testified at trial about her own opinions and conclusions based on that data; the opinions and conclusions of the nontestifying examiner who conducted the autopsy were not admitted. Because defendant had the opportunity to confront Dr. Lowe and cross-examine her regarding her opinions, defendant's Sixth Amendment right of confrontation was not violated.

People v. King, 2010 WL 98693, at *6.

The Michigan Court of Appeals also rejected Petitioner's claim that Dr. Lowe's use of the anatomical sketch violated his right to confrontation:

> Dr. Lowe testified that she independently reviewed the sketch and compared it to other evidence from the autopsy, including photographs of the victim's injuries, and concluded that the diagram was an accurate representation of the victim's injuries. Because Dr. Lowe independently verified the accuracy of the sketch, and was present at trial and subject to cross-examination concerning the sketch, defendant has not established a plain error under the Confrontation Clause.

Id.

Out-of-court statements that are testimonial in nature are barred by the Sixth Amendment Confrontation Clause unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness, regardless of whether such statements are deemed reliable by the court. *See Crawford v. Washington,* 541 U.S. 36, 59, 63 (2004). However, the Confrontation Clause is not implicated, and does not need not be considered, when non-testimonial hearsay is at issue. *See Davis v. Washington*, 547 U. S. 813, 823-26 (2006). To be considered as "testimonial" for purposes of the Sixth Amendment, the evidence must have a

"primary purpose" to "establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822. In holding that the Sixth Amendment right to confrontation does not apply to non-testimonial statements, the Supreme Court stated:

> "The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused-in other words, those who 'bear testimony.' 1 N. Webster, An American Dictionary of the English Language (1828). 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."

Davis, 547 U.S. at 823-24 (quoting *Crawford,* 541 U.S. at 51).

The Supreme Court has held that scientific or laboratory reports which are admitted to prove a fact are testimonial statements, for purposes of the Sixth Amendment right to confrontation. *See Bullcoming v. New Mexico*, 564 U.S. 647, 665 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009). Because they are testimonial, the reports cannot be admitted into evidence unless the analysts who wrote them are subject to cross-examination. *Bullcoming*, 564 U.S. at 663; *Melendez-Diaz*, 557 U.S. at 311.

Notwithstanding the holdings in *Crawford, Melendez-Diaz*, and *Bullcoming,* it is unclear whether autopsy reports are testimonial in nature for purposes of the Sixth Amendment Confrontation Clause because autopsies are not prepared for the primary purpose of being used at a criminal trial and are often performed before it

has even been established that a crime has been committed and before a criminal suspect is identified. *See Williams v. Illinois*, 567 U.S. 50, 97-98 (2012) (Breyer, J., concurring) ("Autopsies are typically conducted soon after death . . . . when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial."); *United States v. James*, 712 F.3d 79, 97-99 (2nd Cir. 2013) (explaining that routine autopsy report was not testimonial because it was completed substantially before criminal investigation began and no criminal investigations are pursued in the cases of most autopsies); *but see United States v. Ignasiak*, 667 F.3d 1217, 1229-33 (11th Cir. 2012) (concluding that, under *Crawford*, *Melendez-Diaz*, and *Bullcoming*, autopsy reports from Florida's Medical Examiners Commission, part of the Department of Law Enforcement, were testimonial).

Several federal courts have concluded that there is no clearly established Supreme Court precedent regarding whether autopsy or coroner reports are testimonial in nature. *See Mitchell v. Kelly*, 520 F. App'x 329, 331 (6th Cir. 2013) ("[T]he decision . . . [that an autopsy report was admissible as a nontestimonial business record] was not an unreasonable application of *Crawford* given the lack of Supreme Court precedent establishing that an autopsy report is testimonial."); *see also Hensley v. Roden*, 755 F.3d 724, 735 (1st Cir. 2014) (concluding that neither *Crawford* nor *Melendez-Diaz* clearly establish that autopsy reports are testimonial

for purposes of the Sixth Amendment). "Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez–Diaz* and *Bullcoming*, and it is uncertain how the [Supreme] Court would resolve the question." *Nardi v. Pepe*, 662 F.3d 107, 111 (1st Cir. 2011). In the absence of any Supreme Court caselaw which clearly establishes that an autopsy report or anatomical sketch from the autopsy is testimonial, Petitioner is not entitled to relief on his claim.

Even if the autopsy report and anatomical sketch would have been testimonial for purposes of the Confrontation Clause, there still would be no violation of the Sixth Amendment because Dr. Lowe used them to reach her own opinion and conclusions concerning the victim's cause of death. In *Williams v. Illinois,* 567 U.S. 50, 57-58 (2012), a plurality of the Supreme Court held that out-of-court statements concerning DNA evidence that are referred to by an expert who testifies for the prosecution solely for the purpose of explaining that expert's own assumptions on which his own independent expert opinion is based are not offered for their truth of the matter asserted and therefore fall outside the scope of the Confrontation Clause. Although the holding in the plurality opinion in *Williams* might not qualify as clearly established federal law, it suggests that there is no clearly established federal law which holds that a defendant's right to confrontation is violated when an expert witness testifies to forming an independent opinion after reviewing a report prepared

by another expert who does not testify. *See Barbosa v. Mitchell*, 812 F.3d 62, 67 (1st Cir. 2016) (holding that *Williams* suggests that admitting an opinion "by an expert witness who has some connection to the scientific report prepared by another whom she supervised" does not violate the right to confrontation). "Indeed, by blessing the admission of almost identical testimony by a DNA expert, the [Supreme] Court's actual holding in *Williams* might well be read as telling [this Court] that [Petitioner] is not, with respect to this issue, being held 'in custody in violation of the Constitution,' 28 U.S.C. § 2254(a)." *Id.* at 67.

In light of existing Supreme Court precedent, the Michigan Court of Appeals did not unreasonably conclude that Petitioner's Sixth Amendment right to confrontation was not violated by the admission of Dr. Lowe's testimony.

Even assuming that the trial court erred in permitting Dr. Lowe to testify about the autopsy report, Petitioner would not be entitled to relief because any error was harmless. Confrontation Clause violations are subject to harmless error review. *See Bulls v. Jones,* 274 F.3d 329, 334 (6th Cir. 2001). In *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), the Supreme Court held that for purposes of determining whether federal habeas relief must be granted to a state prisoner on the ground of federal constitutional error, the appropriate harmless error standard to apply is whether the error had a substantial and injurious effect or influence in determining the jury's verdict. In determining whether a Confrontation Clause violation is

harmless under *Brecht*, a court should consider the following factors: "(1) the importance of the witness' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross examination otherwise permitted; and (5) the overall strength of the prosecution's case." *See Jensen v. Romanowski,* 590 F.3d 373, 379 (6th Cir. 2009) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

Petitioner did not contest that Jones had been struck by a vehicle or that Jones died as a result. Rather, Petitioner's defense at trial was that he did not drive the vehicle that struck Jones or Sanders, who survived. In light of Petitioner's defense, the admission of Dr. Lowe's testimony did not have a substantial or injurious effect or influence upon the jury. Petitioner is not entitled to relief on his first claim.

B. Claim # 2. Sixth Amendment Right to Effective Assistance of Counsel

Respondent contends that Petitioner's remaining claims, which he raised for the first time in his amended petitions for a writ of habeas corpus, are barred by the one year statute of limitations contained within 28 U.S.C. § 2244(d)(1) because the amended petitions were filed more than one year after Petitioner's conviction

became final and the additional claims do not relate back to the claims raised by Petitioner in his original habeas petition.[3]

In the statute of limitations context, "dismissal is appropriate only if a complaint clearly shows the claim is out of time." *Harris v. New York*, 186 F.3d 243, 250 (2d Cir. 1999); *see also Cooey v. Strickland,* 479 F.3d 412, 415-16 (6th Cir. 2007).

Under the AEDPA, a one year statute of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a state court. 28 U.S.C. § 2244(d)(1). The one year statute of limitation shall run from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

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[3] A statute of limitations defense to a habeas petition is not "jurisdictional," thus, courts "are under no obligation to raise the time bar *sua sponte*." *Day v. McDonough*, 547 U.S. 198, 205 (2006). The fact that Petitioner was granted permission to file his amended petitions does not preclude Respondent from raising a limitations defense to the claims raised in those petitions. *See Quatrine v. Berghuis*, No. 2:10–CV–11603, 2014 WL 793626, at *6 (E.D. Mich. Feb. 27, 2014); *Soule v. Palmer*, No. 08–cv–13655, 2013 WL 450980, at *1-3 (E.D. Mich. Feb. 5, 2013). Although Respondent could have filed an opposition to Petitioner's motions to amend his petition, Respondent was not required to do so under Federal Rule of Civil Procedure 8 until he filed answers to the amended petitions. *See Quatrine*, 2014 WL 293636, at *6.

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

Petitioner's direct appeal of his conviction ended when the Michigan Supreme Court denied Petitioner leave to appeal on July 2, 2010, following the affirmance of his conviction by the Michigan Court of Appeals on direct review. (ECF No. 6-10.) Under the AEDPA, a petitioner has 90 days to seek certiorari with the U.S. Supreme Court. *See Jimenez v. Quarterman*, 555 U.S. 113, 119-20 (2009). Petitioner's judgment therefore became final on September 30, 2010, when he failed to file a petition for a writ of certiorari with the U.S. Supreme Court. Petitioner thus had until September 30, 2011, to file his habeas petition in compliance with the one year limitations period.

Petitioner timely filed his original habeas petition on June 30, 2011. Petitioner did not, however, seek to amend his habeas petition to add his ineffective assistance of counsel claim until July 30, 2013, at the earliest, when he filed his

motion to stay the petition so that he could return to the state courts to exhaust this claim.[4] This was well after the limitations period had passed on September 30, 2011.

When a habeas petitioner files an original petition within the one-year deadline, and later presents new claims in an amended petition that is filed after the deadline passes, the new claims will relate back to the date of the original petition only if the new claims share a "common core of operative facts" with the original petition. *Mayle v. Felix*, 545 U.S. 644, 664 (2005). Petitioner's ineffective assistance of counsel claim based on trial counsel's failure to relay a plea offer does not share a "common core of operative facts" with the Confrontation Clause claim based on the substitution of the medical examiner. Thus the former claim is barred by the one year limitations period. *See Pinchon v. Myers,* 615 F.3d 631, 643 (6th Cir. 2010).

Petitioner cited to *Missouri v. Frye,* 566 U.S. 134 (2012) and *Lafler v. Cooper,* 566 U.S. 156 (2012) in support of his claim that his trial counsel was ineffective for failing to inform him that the prosecutor had allegedly offered a plea bargain while the jury deliberated. 28 U.S.C. § 2244(d)(1)(C) indicates that the one year limitations period can run from "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly

[4] This Court construes Petitioner's July 30, 2013 motion as both a motion to amend his habeas petition to add the ineffective assistance of trial counsel claim and a motion to stay. *See Murphy v. Elo,* 250 F. App'x 703, 704 (6th Cir. 2007).

recognized by the Supreme Court and made retroactively applicable to cases on collateral review." A federal district court has the ability to determine whether a newly recognized right has been made retroactively applicable to cases on collateral review, for purposes of this section or 28 U.S.C. § 2255 ¶ 6(3), the analogous provision of the statute of limitations for federal motions to vacate sentence. *See Wiegand v. United States,* 380 F.3d 890, 892-93 (6th Cir. 2004).

Every circuit court that has considered the issue has ruled that "neither *Frye* nor *Cooper* created a 'new rule of constitutional law' made retroactive to cases on collateral review by the Supreme Court." *In re Liddell*, 722 F.3d 737, 738 (6th Cir. 2013) (holding that *Frye* and *Cooper* did not announce a new rule of constitutional law that would permit defendant to file a successive motion to vacate sentence). The Supreme Court in *Frye* "merely applied the Sixth Amendment right to effective assistance of counsel according to the test first articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), and established in the plea-bargaining context in *Hill v. Lockhart*, 474 U.S. 52 (1985)." *Hare v. U.S.*, 688 F. 3d 878, 879 (7th Cir. 2012).

This Court also recognizes that Petitioner in his reply argues that his ineffective assistance of counsel claim "did not materialize until approximately 3 years after the conclusion of his direct appeal." (ECF No. 15 at Pg. ID 1564.) Petitioner indicates that it was not until August of 2013 that he was able to obtain an

affidavit from trial counsel admitting to failing to advise Petitioner about the plea. (*Id.*) But according to affidavits filed by Petitioner and his father,[5] during jury deliberations, the prosecutor informed Petitioner's father about a plea offer that the prosecutor made. (ECF No. 14-4 at Pg. ID 1464, 1478, 1494.) According to Petitioner's father, trial counsel "neglected to inform [Petitioner] of the prosecutor's offer prior to the jury rendering its verdict. (*Id.* at Pg. ID 1475.)

Under 28 U.S.C.§ 2244(d)(1)(D), the AEDPA's one year limitations period will begin running from the date upon which the factual predicate for a claim becomes known or could have been discovered through due diligence by the habeas petitioner—not when it was actually discovered by a given petitioner. *See Ali v. Tennessee Board of Pardon and Paroles,* 431 F.3d 896, 898 (6th Cir. 2005); *Redmond v. Jackson,* 295 F. Supp 2d 767, 771 (E.D. Mich. 2003). Significantly, "§ 2244(d)(1)(D) does not convey a statutory right to an extended delay while a petitioner gathers every possible scrap of evidence . . . which supports the facts, including supporting affidavits." *Redmond*, 295 F. Supp. at 771-72. A habeas petitioner has the burden of proof in persuading a federal court that he exercised due diligence in searching for the factual predicate of the habeas claims. *See Stokes v. Leonard,* 36 F. App'x 801, 804 (6th Cir. 2002). Newly discovered information "that

[5] The affidavits were attached to motion to remand for an evidentiary hearing that Petitioner filed with his post-conviction appeal. (ECF No. 14-4 at Pg. ID 1469-70, 1474.)

merely supports or strengthens a claim that could have been properly stated without the discovery . . . is not a 'factual predicate' for purposes of triggering the statute of limitations under § 2244(d)(1)(D)." *See Jefferson v. U.S.*, 730 F.3d 537, 547 (6th Cir. 2013) (quoting *Rivas v. Fischer*, 687 F.3d 514, 535 (2nd Cir. 2012)). Petitioner was aware of the factual predicate of his ineffective assistance of trial counsel claim at the time of his direct appeal. Thus, the commencement of the running of the statute of limitations is not delayed pursuant to 28 U.S.C.§ 2244(d)(1)(D).

The AEDPA's statute of limitations "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). A habeas petitioner is entitled to equitable tolling "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way'" and prevented the timely filing of the habeas petition. *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The Sixth Circuit has observed that "the doctrine of equitable tolling is used sparingly by federal courts." *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010). The burden is on a habeas petitioner to show that he is entitled to the equitable tolling of the one year limitations period. *Id.* Here, Petitioner is not entitled to equitable tolling of the one year limitations period, because he failed to argue or show that the facts of his case support equitable tolling. *See Giles v. Wolfenbarger,* 239 F. App'x 145, 147 (6th Cir. 2007).

The one year statute of limitations may also be equitably tolled based upon a credible showing of actual innocence under the standard enunciated in *Schup v. Delo,* 513 U.S. 298 (1995). *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). For an actual innocence exception to be credible under *Schlup*, such a claim requires a habeas petitioner to support his 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's case falls outside of the actual innocence tolling exception, because he presented no new, reliable evidence to establish that he was actually innocent of the crimes charged. *See Ross v. Berghuis,* 417 F.3d 552, 556 (6th Cir. 2005).

Finally, the Court notes that it does not have the power to grant habeas relief on Petitioner's claim that the trial court denied his motion for an evidentiary hearing on his ineffective assistance of trail counsel claim. "The Sixth Circuit [has] consistently held that errors in post-conviction proceedings are outside the scope of federal habeas corpus review." *Cress v. Palmer,* 484 F.3d 844, 853 (6th Cir. 2007). This is because states have no constitutional obligation to provide post-conviction remedies. *See Greer v. Mitchell,* 264 F.3d 663, 681 (6th Cir. 2001) (citing *Pennsylvania v. Finley,* 481 U.S. 551, 557 (1987)). Because Petitioner sought an evidentiary hearing with respect to a claim that he raised in his post-conviction

motion, the failure by the state courts to grant him an evidentiary hearing on this claim does not entitle him to habeas relief.

Moreover, there is no clearly established Supreme Court law which recognizes a constitutional right to a state court evidentiary hearing to develop a claim of ineffective assistance of counsel even on direct appeal. *See Hayes v. Prelesnik,* 193 F. App'x 577, 584-85 (6th Cir. 2006).

CONCLUSION

For the reasons discussed above, the petition for a writ of habeas corpus is denied with prejudice.

When a district court rejects a habeas petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims to be debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Likewise, when a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a certificate of appealability should issue, and an appeal of the district court's order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

The Court denies Petitioner a certificate of appealability because he failed to make a showing of the denial of a federal constitutional right.

Accordingly,

IT IS ORDERED that the Petition for a Writ of Habeas Corpus (ECF No. 1) is **DENIED WITH PREJUDICE**.

IT IS FURTHER ORDERED that the Court **DECLINES** to issue a Certificate of Appealability.

IT IS SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: September 28, 2020

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILSHAUN KING,

Defendant-Appellant.

UNPUBLISHED
January 12, 2010

No. 282533
Wayne Circuit Court
LC No. 06-013764-FC

Before: Davis, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, and assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced to life imprisonment for the murder conviction, and concurrent prison terms of 10 to 50 years for the assault with intent to commit murder conviction and 35 months to 10 years for the assault with intent to do great bodily harm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from a series of fights that led to the death of Tyree Jones, who allegedly was killed when he was struck by a motor vehicle that defendant was driving. Defendant was also convicted of assault with intent to commit murder for striking Frank Sanders, Jr., with his vehicle, and assault with intent to do great bodily harm less than murder for striking Marcellus Smith on the head with a brick. At trial, defendant admitted interceding in a fight between his cousin and Smith, and punching Smith one time to get him off his cousin, but denied ever striking Smith with a brick. Although several witnesses identified defendant as the driver of a Ford Explorer that later drove through a field and allegedly struck Jones and Sanders, defendant claimed that he left the area after the fight with Smith and went to Belle Isle with his son, and that he had no knowledge of the events that occurred afterward.

I. Dr. Cheryl Lowe's Testimony

Defendant first argues that his Sixth Amendment right of confrontation was violated when Dr. Cheryl Lowe, a deputy medical examiner, was permitted to testify regarding the cause of Jones's death, relying in part on the results of an autopsy performed by a different medical examiner who was not available at trial and whom defendant did not have a prior opportunity to cross-examine.

The record discloses that defendant did not contest the admissibility of the factual data in the autopsy report, but rather challenged only the admissibility of the "opinions and any statements that seem to project opinions" of the examiner who performed the autopsy. The trial court did not allow the autopsy report or any of the opinions or conclusions of the author of the report to be admitted, but allowed Dr. Lowe to offer her own opinions and conclusions regarding the cause of Jones's death. Under these circumstances, we find no error requiring reversal.

Whether Dr. Lowe's testimony violated defendant's Sixth Amendment right of confrontation is a question of constitutional law that we review de novo. *People v Bryant,* 483 Mich 132, 138; 768 NW2d 65 (2008), cert pending. In *Crawford v Washington,* 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United states Supreme Court held that the Sixth Amendment Confrontation Clause bars the admission of testimonial statements of a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. Although the Court in *Crawford* left for further development what statements qualify as "testimonial," the Court later stated in *Davis v Washington,* 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006), that a statement is testimonial if the circumstances objectively indicate that there is no ongoing emergency and the primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution."

In *Melendez-Diaz v Massachusetts,* ___ US ___; 129 S Ct 2527, 2530-2531; 174 L Ed 2d 314 (2009), the United States Supreme Court addressed whether certificates of analysis prepared by state health department laboratory analysts to show that bags seized from the defendant contained cocaine were testimonial. The certificates were notarized statements from analysts, which the Court found were clearly affidavits that were offered in place of live testimony. *Id.* at 2531-2532. Under Massachusetts law, the sole purpose of the certificates was to provide prima facie evidence of the composition, weight, and quality of the analyzed substances. *Id.* The Court concluded that the certificates were testimonial statements from the analysts, who were witnesses for purposes of the Sixth Amendment. *Id.* The Court held that, under *Crawford,* the defendant was entitled to confront the analysts at trial, unless they were unavailable and he had a prior opportunity to cross-examine them. *Id.* Further, the Court clarified that the admissibility of a statement under the Confrontation Clause is not dependent on whether it qualifies under a particular hearsay exception, such as for business or public records, but rather whether it is testimonial. The Court concluded that regardless of whether the analysts' statements qualify as business or official records, they were prepared specifically for use at the defendant's trial and, therefore, they were testimony, and the analysts were subject to confrontation under the Sixth Amendment. *Id.* at 2539-2540. The Court suggested in its decision that its analysis would apply to "other types of forensic evidence commonly used in criminal prosecutions," including autopsy reports. *Id.* at 2538.

Since *Melendez-Diaz* was decided, other jurisdictions have applied it to bar the admission of autopsy reports where the defendant is not afforded an opportunity to cross-examine the preparer of the report. See *State v Locklear,* 363 NC 438; 681 SE2d 293, 304-305 (2009) (holding that references in *Melendez-Diaz* to autopsy examinations extends that decision to autopsy reports, but concluding that the error in admitting the opinion testimony of a nontestifying pathologist was harmless beyond a reasonable doubt); *Commonwealth v Avila,* 454 Mass 744, 761-763; 912 NE2d 1014 (2009) (while a medical examiner who did not conduct the autopsy could testify as an expert witness at trial about his own opinions, he could not testify

regarding any findings made by the examiner who conducted the autopsy and prepared the report because the report was inadmissible hearsay and admission of those findings violates the Confrontation Clause); *Wood v State,* ___ SW2d ___ (Tex App, decided October 7, 2009) (autopsy report was testimonial in nature and the use of the report through a witness other than the author of the report violated the defendant's right of confrontation, but the error was harmless beyond a reasonable doubt).

Despite the foregoing, we conclude that reversal is not required in this case because no opinions or conclusions of the preparer of the autopsy report were admitted at trial. Significantly, the certificates at issue in *Melendez-Diaz* were purely "bare-bones" conclusory statements that the substances were found to contain cocaine; they did not include any underlying information whatsoever from which that conclusion could be drawn. *Melendez-Diaz, supra* at 2537. The Court did not actually state that autopsy reports would necessarily violate the Confrontation Clause, and in context, we find it clear that the problem with "other types of forensic evidence commonly used in criminal prosecutions" was with any *conclusions* contained therein that could not be subjected to cross-examination as to how those conclusions were drawn. *Id.* at 2537-2538. In contrast, here Dr. Lowe testified regarding her *own* opinions and conclusions, and, although Dr. Lowe based her opinions in part on facts obtained during the autopsy performed by another doctor, defendant did not challenge the admissibility of those facts and specifically agreed that "pure facts" contained in the autopsy report could be offered at trial.

We find this case similar to *United States v Richardson,* 537 F3d 951 (CA 8, 2008), in which Alyssa Bance, a forensic scientist with the Minnesota Bureau of Criminal Apprehension, testified about DNA evidence linking the defendant to a firearm, relying in part on testing performed by another scientist, Jacquelyn Kuriger. *Id.* at 955. Although Bance had reviewed Kuriger's notes and test results, Bance also conducted her own peer review, which consisted of going through all of the notes and documentation to ensure that everything was done properly. She also performed a second independent analysis of the DNA data to compare it to Kuriger's review. *Id.* at 955-956. The court analyzed whether the admission of Bance's testimony describing the DNA tests and the results violated the Sixth Amendment Confrontation Clause. *Id.* at 959. The court stated:

> [T]he admission of Bance's testimony that Richardson's DNA evidence matched the DNA evidence found on the gun was not in error. Richardson argues that the tests and conclusions performed by Kuriger are testimonial; therefore Bance could not testify as to these without violating the Confrontation Clause. Bance, however, testified as to her own conclusions and was subject to cross-examination. Although she did not actually perform the tests, she had an independent responsibility to do the peer review. Her testimony concerned her independent conclusions derived from another scientist's tests results and did not violate the Confrontation Clause. *See Moon,* 512 F.3d at 362 (holding the reviewing scientist "was entitled to analyze the data that [the first scientist] had obtained"). "[T]he Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself." *Id.* Thus, Bance's testimony did not violate the Confrontation Clause. Because there was no error, the admission of the testimony was not plainly erroneous. *See Olano,* 507 U.S. at 732-33, 113 S.Ct. 1770. [*Richardson,* 537 F3d at 960.]

More on point with this case is *United States v De La Cruz,* 514 F3d 121, 132-134 (CA 1, 2008), in which the court held that even if *Crawford* was applicable to autopsy reports, it did not preclude a medical examiner from offering testimony based on reports prepared by others. The court explained:

> Defendant next contends that the district court abused its discretion when it allowed the government's medical examiner to give an expert opinion regarding the cause of Wallace's death based on toxicological and autopsy reports that were not prepared by the examiner. Relying on *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), Defendant maintains that he was denied his right of cross-examination. *Id.* at 42, 124 S.Ct. 1354 (holding that the Confrontation Clause prohibits the admission of out-of-court statements that are testimonial in nature unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant concerning the statements).
>
> Dr. Thomas A. Andrew, M.D. ("Dr. Andrew"), Chief Medical Examiner for the State of New Hampshire, testified as an expert regarding the cause of Wallace's death. Dr. Andrew did not himself perform the autopsy on Wallace's body or conduct any toxicological tests or investigate at the scene where Wallace's body was found. In forming his opinion as to the cause of death, Dr. Andrew instead relied on police reports, crime scene photographs, and autopsy and toxicology reports, all of which were prepared by other individuals. Dr. Andrew explained that such materials are routinely relied on by experts in his field. Dr. Andrew also explained that autopsies are required by law in cases involving sudden, unexpected, or violent deaths, that autopsy reports contain objective fact-only descriptions of the observations made by the examining physician at the time of the autopsy, and that autopsy reports are intended to provide a permanent record of findings relevant to the cause of death.
>
> Defendant objected to Dr. Andrew's testimony on Confrontation Clause grounds. Citing *Crawford,* Defendant argued that the autopsy report upon which Dr. Andrew relied constituted testimonial evidence prepared by someone whom Defendant could not cross-examine. The district court overruled Defendant's objection at trial, holding that Dr. Andrew's testimony was not based on testimonial hearsay but was, instead, properly based on his review of a record, the preparation of which was required by law. For the same reasons, the district court on remand found that Defendant's *Crawford* argument did not entitle him to a new trial.
>
> We review de novo a claim that evidence has been admitted in violation of the Confrontation Clause. *United States v. Walter,* 434 F.3d 30, 33 (1st Cir.2006); *United States v. Brito,* 427 F.3d 53, 59 (1st Cir.2005).
>
> In his appellate brief, Defendant's discussion of his Confrontation Clause claim is perfunctory at best. In essence, he argues that "[b]y allowing the medical examiner to testify concerning reports which he had no part in testing or producing, the defendant was denied his right of confrontation." Defendant's Br. at 13. Other than citing *Crawford* for the general proposition that the introduction

of testimonial hearsay runs afoul of the Confrontation Clause, Defendant cites no cases to support his argument. We reject Defendant's argument, in part because his claim is "unaccompanied by some effort at developed argumentation." *Casas,* 425 F.3d at 30 n. 2.

In addition, we reject Defendant's argument on the merits. An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of *Crawford. See Crawford,* 541 U.S. at 56, 124 S.Ct. 1354 (noting that business records are not testimonial by nature); *see also id.* at 76, 124 S.Ct. 1354 (Rehnquist, C.J., concurring) (praising the Court's exclusion of business records from the definition of testimonial evidence falling within the ambit of the Confrontation Clause); *United States v. Feliz,* 467 F.3d 227, 236-37 (2d Cir.2006) (noting that autopsy reports are kept in the course of a regularly conducted business activity and are nontestimonial under *Crawford*); *Manocchio v. Moran,* 919 F.2d 770, 778 (1st Cir.1990) (recognizing that autopsy reports are business records akin to medical records, prepared routinely and contemporaneously according to "statutorily regularized procedures and established medical standards" and "in a laboratory environment by trained individuals with specialized qualifications").

In *People v. Durio,* 7 Misc.3d 729, 794 N.Y.S.2d 863 (N.Y.Sup.Ct.2005), the court held that the admission of both the routine findings recited in an autopsy report as well as the accompanying testimony of an assistant medical examiner who neither conducted the autopsy nor prepared the report was proper under *Crawford.* Concluding that the autopsy report was a nontestimonial business record, the *Durio* court described the practical implications that would follow from treating autopsy reports as inadmissible testimonial hearsay under *Crawford*:

"Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the autopsy report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case."

Id. at 869.

Like the court in *Durio,* we are unpersuaded that a medical examiner is precluded under *Crawford* from either (1) testifying about the facts contained in an autopsy report prepared by another, or (2) expressing an opinion about the cause of death based on factual reports-particularly an autopsy report-prepared by

another.[5] Because, in this case, we find that Dr. Andrew's testimony was proper under *Crawford,* we find no error in the district court's decisions (at trial and on remand) regarding Dr. Andrew's opinion as to the cause of Wallace's death.

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[5] We add that, as a matter of expert opinion testimony, a physician's reliance on reports prepared by other medical professionals is "plainly justified in light of the custom and practice of the medical profession. Doctors routinely rely on observations reported by other doctors, and it is unrealistic to expect a physician, as a condition precedent to offering opinion testimony . . . , to have performed every test, procedure, and examination himself." *Crowe v. Marchand,* 506 F.3d 13, 17-18 (1st Cir.2007) (internal citations omitted).

In this case, defendant did not contest the admissibility of the factual data from the autopsy report, and Dr. Lowe testified at trial about her own opinions and conclusions based on that data; the opinions and conclusions of the nontestifying examiner who conducted the autopsy were not admitted. Because defendant had the opportunity to confront Dr. Lowe and cross-examine her regarding her opinions, defendant's Sixth Amendment right of confrontation was not violated.

This case is also distinguishable from *People v Lonsby,* 268 Mich App 375; 707 NW2d 610 (2005), because here Dr. Lowe testified that she independently reviewed the case file and she was examined about her own opinions and conclusions, not those of the medical examiner who performed the autopsy.

Defendant also argues that Dr. Lowe's use of an anatomical sketch that was prepared by the nontestifying medical examiner to document Jones's injuries violated defendant's Sixth Amendment right of confrontation. Because defendant did not object to the use of this sketch at trial, this issue is not preserved. Therefore, defendant has the burden of demonstrating a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Dr. Lowe testified that she independently reviewed the sketch and compared it to other evidence from the autopsy, including photographs of the victim's injuries, and concluded that the diagram was an accurate representation of the victim's injuries. Because Dr. Lowe independently verified the accuracy of the sketch, and was present at trial and subject to cross-examination concerning the sketch, defendant has not established a plain error under the Confrontation Clause.

II. Effective Assistance of Counsel

Defendant next argues that he is entitled to a new trial because trial counsel was ineffective. Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002). Any findings of fact made by the trial court are reviewed for clear error, and whether those findings establish a claim of ineffective assistance of counsel is reviewed de novo as a question of law. *Id.* In this case, the trial court denied defendant's motion for a new trial on this issue, but declined defendant's request for an evidentiary hearing. Therefore, the trial court did

not make any findings of fact. Accordingly, we review this issue de novo based on the existing record.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr,* 451 Mich 115, 124; 545 NW2d 637 (1996).

First, we find no merit to defendant's argument that defense counsel was ineffective for failing to call Shante Lunsford to testify. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Marcus Davis,* 250 Mich App 357, 368; 649 NW2d 94 (2002). In this case, defendant has not overcome the presumption that counsel did not call Lunsford as a matter of trial strategy, nor has he shown that he was prejudiced by the absence of her testimony. Defendant argues that Lunsford should have been called as a witness because she indicated in her police statement that she saw a man driving a Ford Explorer, whom she described as bald, whereas witnesses described defendant's hair as short. However, Lunsford's statement indicated that she saw the driver between 8:00 and 8:30 a.m., whereas the trial testimony established that the offenses occurred after 10:00 a.m. Thus, even if Lunsford had testified consistently with her police statement, her testimony would not have been helpful in refuting defendant's identity as the driver of the Explorer at the time of the offenses. The failure to call Lunsford did not deprive defendant of a substantial defense.

We also disagree with defendant's claim that defense counsel was ineffective for not filing a notice of alibi or requesting an alibi defense jury instruction. Defendant was able to fully present his claim that he was not present when the charged offenses were committed. Further, the trial court's jury instructions made it clear that the jury could not convict defendant of the charged crimes unless his identification as the perpetrator of the crimes was proven beyond a reasonable doubt. Under the court's instructions, the jury would have been required to find defendant not guilty if it believed his testimony that he was not present when the charged crimes were committed. The court's instructions were sufficient to protect defendant's rights. Accordingly, defendant has not shown that he was prejudiced by defense counsel's failure to further request an instruction on alibi.

Defendant lastly argues that defense counsel was ineffective for not objecting to a witness's testimony that she had received threats from defendant's family members. First, contrary to what a defendant argues, evidence of a defendant's threats against a witness is generally admissible because it can demonstrate consciousness of guilt. *People v Sholl,* 453 Mich 730, 740; 556 NW2d 851 (1996). Evidence of threats is also relevant to the credibility of a witness's testimony. See CJI2d 3.6(3)(f) (in judging the credibility of a witness, the jury may consider whether there were any promises, threats, suggestions, or other influences that affected how the witness testified). In this case, defense counsel reasonably may have declined to object or further pursue the matter because he realized that such evidence was generally admissible, and

because the witness admitted that the threats were not directly made by defendant, thereby minimizing the potential for prejudice. Counsel also may have realized that, had this issue been pursued or an objection made, a record might have been developed that would have either highlighted the testimony or established a more direct connection to defendant. Accordingly, defendant has not shown that counsel's decision not to object was objectively unreasonable.

Furthermore, because defendant has not offered any reasons why further development of the record may support his arguments, we reject his request to remand this case for an evidentiary hearing on this issue.

III. Cause of Death

Defendant next argues that the trial court's jury instructions were deficient because they did not inform the jury that the prosecution was required to prove beyond a reasonable doubt that he deliberately drove his motor vehicle into Jones, and thereby caused Jones's fatal injuries. Not only was there no objection to the trial court's jury instructions, but defense counsel affirmatively approved the instructions as given. Therefore, this alleged error has been waived. *People v Matuszak,* 263 Mich App 42, 57; 687 NW2d 342 (2004); *People v Lueth,* 253 Mich App 670, 688; 660 NW2d 322 (2002).

Even if we were to consider this issue under the plain error standard applicable to unpreserved issues, *People v Gonzalez,* 468 Mich 636, 643; 664 NW2d 159 (2003), reversal would not be warranted. The trial court's instructions informed the jury that in order to convict defendant of first-degree premeditated murder, it was required to find that defendant caused Jones's death, that defendant intended to kill Jones, and that the intent to kill was premeditated. Although defendant observes that there was evidence that Jones was involved in fights with others before he was struck by a motor vehicle, under the trial court's instructions as given, the jury could not convict defendant of first-degree murder unless it found beyond a reasonable doubt that it was defendant who caused Jones's death. Accordingly, there was no plain error.

IV. Motion for Mistrial

After jury selection, but before opening statements, codefendant Jermaine King entered a guilty plea. Defendant now argues that the trial court erred in denying his motion for a mistrial. Defendant argues that a mistrial was required because his jury was likely to view codefendant King's absence in a "negative light" and it most likely attributed his absence to a guilty plea.

The grant or denial of a motion for a mistrial is within the sound discretion of the trial court. There must a showing of prejudice to the defendant's rights in order for there to be error requiring reversal. The trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994).

To be entitled to relief for this issue, defendant must show that his codefendant's absence resulted in actual prejudice that deprived him of a fair trial. *People v Kenneth Smith,* 63 Mich App 35, 36; 233 NW2d 883 (1975). Defendant has not made this necessary showing. After codefendant King pleaded guilty, the trial court appropriately instructed the jury that it would be considering only the case as it relates to defendant, and that it was "not to read anything into any

other thing, other than you're going to base your decision solely on the evidence that's being presented here." The court's instruction reinforced that the jury was not to consider codefendant Kings's absence from trial, or possible reasons for that absence, and instead was to consider defendant's case solely on the basis of the evidence admitted at trial. This instruction was sufficient to cure any possible prejudice arising from codefendant King's absence. *Id.*; see also *United State v Earley,* 482 F2d 53, 58 (CA 10, 1973).

We also reject defendant's argument that his Sixth Amendment right to a jury trial was compromised because, before codefendant King pleaded guilty, he had peremptorily excused three jurors, whom defendant may have wished to remain on the jury panel. Defendant does not claim that the jury actually chosen was unfair, or that King was not entitled to exercise the peremptory challenges when he did. Accordingly, he has not established actual prejudice. See *People v Coles*, 79 Mich App 255, 264; 261 NW2d 280 (1977), aff'd and remanded on other grounds 417 Mich 523, 553 (1983).

For these reasons, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

V. Transferred Intent

Next, defendant argues that the trial court erred in instructing the jury on transferred intent, consistent with CJI2d 16.22. Defendant argues that the instruction should not have been given because it relieved the prosecution of its duty to prove that Jones's death resulted from a premeditated and deliberate intent to kill. We disagree.

An instruction on transferred intent is appropriate if a defendant intended to kill one person, but by mistake or accident killed another person. The doctrine recognizes that "[i]t is only necessary that the state of mind exist, not that it be directed at a particular person." *People v Lovett,* 90 Mich App 169, 172; 283 NW2d 357 (1979). In this case, it was the prosecution's theory that defendant drove his vehicle after Frank Sanders, intending to kill him, but lost control of the vehicle and struck Jones instead. If defendant acted with a premeditated intent to kill Sanders, but by mistake or accident killed Jones instead, he properly could be convicted of first-degree murder under a theory of transferred intent. The court's instruction did not lessen the prosecution's burden of proving the elements of first-degree murder because the prosecution was still required to prove that defendant possessed the requisite intent for first-degree premeditated murder when he directed his conduct at Sanders. Accordingly, there was no error.

VI. Right to Present a Defense

Defendant argues that the trial court denied him his constitutional right to present a defense when it sustained the prosecutor's objection to defense counsel's cross-examination of a witness regarding the height of another man who had been involved in an earlier fight with Jones. This Court reviews de novo whether a defendant was deprived of his constitutional right to present a defense. *People v Steele,* 283 Mich App 472, 480; 769 NW2d 256 (2009).

In *People v Unger,* 278 Mich App 210, 249-251; 749 NW2d 272 (2008), this Court explained:

Few rights are more fundamental than that of an accused to present evidence in his or her own defense. *Chambers v Mississippi,* 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v South Carolina,* 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (internal quotation marks and citations omitted). This Court has similarly recognized that "[a] criminal defendant has a state and federal constitutional right to present a defense." *Kurr, supra* at 326.

However, an accused's right to present evidence in his defense is not absolute. *United States v Scheffer,* 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998); *Crane v Kentucky,* 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). "A defendant's interest in presenting . . . evidence may thus '"bow to accommodate other legitimate interests in the criminal trial process."'" *Scheffer, supra* at 308 (citations omitted). States have been traditionally afforded the power under the constitution to establish and implement their own criminal trial rules and procedures. *Chambers, supra* at 302-303.

Like other states, Michigan has a legitimate interest in promulgating and implementing its own rules concerning the conduct of trials. Our state has "broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer, supra* at 308, quoting *Rock v Arkansas,* 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987). MRE 703, which requires expert witnesses to base their opinions on facts in evidence, does not infringe on a criminal defendant's right to present a full defense. Instead, it merely serves to ensure that the expert opinions presented in the courts of this state are relevant and reliable. Nor is a criminal defendant's constitutional right to present a defense infringed by MRE 402, which simply bars the admission of irrelevant evidence. These rules of evidence help to ensure the integrity of criminal trials and are neither "arbitrary" nor "disproportionate to the purposes they are designed to serve."

In this case, the trial court did not preclude defendant from presenting his defense theory that the man who was involved in the earlier fight with Jones may have caused Jones's death. The witness testified regarding the roles of the other man in the earlier fight with Jones, and defendant's role in later driving the SUV into the field. The witness did not express confusion regarding the respective roles of each man in the case. Any uncertainty the witness may have had about the first man's height was not relevant to discredit her testimony that defendant was the person who drove the SUV that struck the victims. MRE 401. The trial court's ruling did not deprive defendant of his right to present his defense theory that the other man who initially fought with Jones caused his death.

VII. Supplemental Jury Instructions

Defendant lastly argues that the trial court erroneously responded to the jury's request to review certain testimony. Defense counsel's expression of satisfaction with the trial court's supplemental instruction waived any claim of error. *Matuszak,* 263 Mich App at 57; *Lueth,* 253 Mich App at 688. Even if this issue was not waived, we would find no error. The trial court advised the jury that a transcript was not available and that the jurors should rely on their collective memories of the witnesses' testimony. The court did not foreclose the possibility of having the testimony reviewed at a later time. Indeed, the court advised the jury that the testimony was available on audiotape, and that if the jury was unable to come to a consensus, one alternative would be "to do a read back." Accordingly, there was no error. *People v John L Davis, Jr,* 216 Mich App 47, 56-57; 549 NW2d 1 (1996).

We also reject defendant's argument that it was improper for the trial court to provide the jury with a written copy of its instructions concerning the elements of the charged offenses when responding to the jury's request to review certain testimony. At trial, when instructing the jury on the elements of the offenses, the trial court stated:

> *I don't want you writing anything down at this point. We're going to give you the substantive instructions that the Court's about ready to give you.* I want your undivided attention because if you're writing you're not going to be able to comprehend exactly what the Court's saying, okay.
>
> If at any time you don't understand what the Court is saying, please do not be embarrassed. Just raise your hands and the Court will give you the instruction again. So I'm going to give you these instructions in written format, okay, ladies and gentlemen, so don't be too terribly concerned, okay.

When the trial court was responding to the jury's request to review certain testimony, it realized that it had neglected to provide the written instructions it previously promised. It was not improper for the trial court to provide those instructions in accordance with its earlier promise.

Affirmed.

/s/ Alton T. Davis
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto

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