APPENDIX (A)

Springer v. Howard, 2021 U.S. App. LEXIS 16798, Order Denying Certificate of Appealability; at pg. 9-10.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: June 04, 2021

Ms. Andrea M. Christensen-Brown
Office of the Attorney General
of Michigan
P.O. Box 30217
Lansing, MI 48909

Ms. Marsha A. Springer
Huron Valley Complex - Women
3201 Bemis Road
Ypsilanti, MI 48197

Re: Case No. 21-1022, *Marsha Springer v. Jeremy Howard*
Originating Case No. : 1:17-cv-01080

Dear Ms. Springer and Counsel,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Roy G. Ford
Case Manager
Direct Dial No. 513-564-7016

cc: Mr. Thomas Dorwin

Enclosure

No mandate to issue

No. 21-1022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARSHA A. SPRINGER,

Petitioner-Appellant,

v.

JEREMY HOWARD, Warden,

Respondent-Appellee.

ORDER

Before: CLAY, Circuit Judge.

Marsha A. Springer, a Michigan prisoner proceeding pro se, appeals a district court judgment denying her petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Springer requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

Springer's 16-year-old daughter, Calista, "was secured to her bed by a dog choke chain around her waist that was attached to the bed frame with zip ties" when the Springers' home caught fire. *People v. Springer*, Nos. 298385/298386, 2012 WL 4039669, at *1 (Mich. Ct. App. Sept. 13, 2012) (per curiam). Calista died in the fire. *Id.* A jury found Springer guilty of torture and first-degree child abuse. She was sentenced to serve 225 months to fifty years in prison for torture, and 95 months to fifteen years in prison for child abuse, to run concurrently. The Michigan Court of Appeals affirmed Springer's convictions, and the Michigan Supreme Court denied leave to appeal.

Springer filed a motion for relief from judgment, which the trial court denied. The Michigan Supreme Court vacated that denial in part as to Springer's ineffective-assistance-of-counsel issues regarding entrapment by estoppel, remanded the case to the trial court for a hearing as to those issues, and otherwise denied leave to appeal. After conducting an evidentiary hearing, the trial court denied Springer's motion for relief from judgment as to the remanded issues. The Michigan appellate courts denied leave to appeal.

In this § 2254 habeas corpus petition, Springer claimed that: (1) she was denied effective assistance of trial counsel because counsel failed to investigate key witnesses before deciding against presenting an entrapment-by-estoppel defense; (2) she was denied effective assistance of appellate counsel because counsel failed to raise an effective-assistance-of-trial-counsel claim based on trial counsel's failure to present an entrapment-by-estoppel defense; (3) she was denied effective assistance of trial counsel because counsel failed to object when the trial court allowed jurors to discuss her case before deliberations and read an antagonistic question submitted by a juror, and failed to file a motion to remove a biased juror, and she was denied effective assistance of appellate counsel because counsel failed to raise an ineffective-assistance-of-trial-counsel claim based on trial counsel's failure to object to a biased juror; and (4) she was denied effective assistance of trial counsel because counsel "failed to object to the admission of the preliminary examination testimony of Gustavo Pop." A magistrate judge recommended denial of Springer's petition and a certificate of appealability. Springer objected to the magistrate judge's recommendation and moved to amend her petition to add an actual-innocence claim. The district court overruled Springer's objections, denied her motion to amend, and adopted the magistrate judge's report and recommendation.

A certificate of appealability may be issued only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A certificate of appealability analysis is not the same as "a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, the certificate of appealability analysis is limited "to a threshold inquiry into the underlying merit of [the] claims" and whether "the District Court's decision was debatable." *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 327, 348).

In her first claim, Springer claimed that trial counsel was ineffective for failing to investigate key witnesses before deciding not to present an entrapment-by-estoppel defense.

Springer pointed to trial testimony from Patricia Skelding, an investigator in the Children's Protective Services (CPS) division of the Department of Human Services (DHS), that DHS employees were aware that Calista was chained to her bed at night and that restraints were necessary for Calista's safety. She also pointed to statements by the trial court during a pre-trial motion hearing, which alluded to entrapment by estoppel, and argued that the trial court's statements should have alerted counsel to an entrapment-by-estoppel defense.

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice inquiry requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citations omitted).

Entrapment by estoppel precludes prosecution "[w]hen a citizen reasonably and in good faith relies on a government agent's representation that the conduct in question is legal, under circumstances where there is nothing to alert a reasonable citizen that the agent's statement is erroneous." *People v. Woods*, 616 N.W.2d 211, 213 (Mich. Ct. App. 2000). Under Michigan law, the

> entrapment by estoppel defense applies where the defendant establishes by a preponderance of the evidence that (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement.

Id. at 217-18 (quoting *United States v. W. Indies Transp., Inc.*, 127 F.3d 299, 313 (3d Cir. 1997)). The defendant must also establish (5) "that given the defendant's reliance, the prosecution would be unfair." *Id.* at 218 (quoting *United States v. Levin*, 973 F.2d 463, 468 (6th Cir. 1992)).

The trial court set forth the proper standard for an ineffective-assistance-of-counsel claim, discussed the elements that must be established for an entrapment-by-estoppel defense, and reviewed the evidence before determining that Springer's ineffective-assistance-of-trial-counsel claim lacked merit because the evidence did not support an entrapment-by-estoppel defense. The trial court concluded that the entrapment-by-estoppel elements were not met in Springer's case because she was never told by a DHS employee that the method of restraint employed at the time of Calista's death "would be legal and would be allowed and there's no reasonable person that could believe that it could be." The trial court acknowledged that DHS employees indicated that Calista should be restrained for her safety and that several methods were suggested such as "alarms, belts, [and] door alarms." But the trial court found that DHS employees "never said, yes, go ahead and chain your daughter to the bed to the point where she can't move, she can't get up if she needs to." The trial court also noted Springer's husband's testimony that the method of restraint used at the time of Calista's death had only been employed for three days prior to the fire, "so there was no way for the government to have been aware of it and condoned its use and indicated that it was legal." Because an entrapment-by-estoppel defense was not supported by the evidence and pursuit of such a defense would have been "fruitless," the trial court concluded that trial counsel was not ineffective for failing to present an entrapment-by-estoppel defense.

The district court determined that the state trial court's rejection of Springer's ineffective-assistance-of-trial-counsel claim based on counsel's failure to present an entrapment-by-estoppel defense was neither contrary to nor an unreasonable application of federal law. Reasonable jurists would not debate that determination. *See Miller-El*, 537 U.S. at 327. The state trial court analyzed Springer's ineffective-assistance-of-trial-counsel claim in accordance with clearly established federal law. *See Strickland*, 466 U.S. at 687. And its determination of the facts was not unreasonable. Skelding testified that she spoke to Springer about chaining Calista to her bed at night, that she did not tell Springer that it was acceptable to do so, and that she did not like the chaining restraint. Community Mental Health Home-Based Therapist Susan Geyer testified that she never told Springer to physically restrain Calista or chain Calista to her bed. CPS Supervisor

Cynthia Bare also testified that she never authorized Springer to chain Calista to her bed or lock Calista in her room at night. Springer's husband testified that Skelding told him that "she didn't like the idea" of restraining Calista but "didn't do anything about it," that other DHS employees told him to lock Calista's door at night and to use any "means necessary to protect" Calista, that he told Skelding that Calista was not chained to her bed at night, that he believed he had permission from DHS to restrain Calista although the permission was neither written nor oral, that DHS employees told him that they did not like the chain restraints, that he devised the restraint system used at the time of Calista's death a few days earlier because another restraint system had failed, and that the restraint system employed at the time of Calista's death had not been used previously.

Springer disputes the state court's determination that she failed to establish the elements of an entrapment-by-estoppel defense, but on habeas corpus review, a state court's interpretation of its own law is binding on a federal court. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam). Counsel is not ineffective for failing to raise a meritless defense or issue. *Sutton v. Bell*, 645 F.3d 752, 755 (6th Cir. 2011).

Springer challenges the district court's determination that the state court applied *Strickland* to her ineffective-assistance-of-counsel claim on remand from the Michigan Supreme Court. She argues that the trial court cited *Strickland* during the May 2016 evidentiary hearing, but because the trial court did not cite *Strickland* again when issuing its decision in September 2016, deference should not be afforded. However, the September 2016 decision was the culmination of Springer's motion for relief from judgment after remand from the Michigan Supreme Court, an evidentiary hearing, and post-hearing briefing. There is no indication that the trial court failed to apply *Strickland* when ruling on Springer's ineffective-assistance-of-counsel claim.

Springer also contends that a certificate of appealability is warranted as to her ineffective-assistance-of-trial-counsel claim based on counsel's failure to present an entrapment-by-estoppel defense because Michigan Supreme Court Justice Bernstein would have granted leave to appeal as to that claim, demonstrating disagreement among reasonable jurists. But the state court's standard for granting leave to appeal is different from the standard for granting a certificate of

appealability, so that alone does not support a determination that reasonable jurists could disagree with the district court's decision. *See Harrington*, 562 U.S. at 105.

Springer has abandoned her second through fourth claims because she does not request a certificate of appealability for them. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam). In addition, those claims are forfeited because she did not object to the magistrate judge's recommended disposition of them despite being advised to do so in order to properly preserve any objections for appeal. *See Thomas v. Arn*, 474 U.S. 140, 142, 155 (1985). Although such forfeiture may be excused "in the interests of justice," *id.* at 155, no basis for excusing the forfeiture is evident in this case. *See Javaherpour v. United States*, 315 F. App'x 505, 510 (6th Cir. 2009).

Springer challenges the denial of her motion to amend her habeas corpus petition to assert an actual-innocence claim based on counsel's failure to present alleged exculpatory evidence that, before the criminal charges were filed, DHS investigated complaints that Calista had been restrained to her bed with chains and determined that Calista suffered no harm. The district court denied Springer's motion to amend, concluding that an actual-innocence claim "is not a freestanding basis for habeas relief" and that it was not based on any new evidence.

Reasonable jurists would not debate the district court's denial of the motion to amend. *See Miller-El*, 537 U.S. at 327. The Supreme Court has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013); *see Herrera v. Collins*, 506 U.S. 390, 404-05 (1993). But even if cognizable, a credible actual-innocence claim must be supported with "new reliable evidence," such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Springer's actual-innocence claim was not based on any new evidence. *See id.*; *Souter v. Jones*, 395 F.3d 577, 589-90 (6th Cir. 2005). Rather, the DHS complaints referenced by Springer were made and investigated before her trial and were therefore available at that time.

Accordingly, the application for a certificate of appealability is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Springer v. Howard, 2021 U.S. App. LEXIS 16798

United States Court of Appeals for the Sixth Circuit

June 4, 2021, Filed

No. 21-1022

Reporter

2021 U.S. App. LEXIS 16798 *

MARSHA A. SPRINGER, Petitioner-Appellant, v. JEREMY HOWARD, Warden, Respondent-Appellee.

Core Terms

trial court, entrapment-by-estoppel, chain, certificate, bed, jurists, effective assistance, counsel's failure, trial counsel, ineffective-assistance-of-trial-counsel, actual-innocence, investigate, employees, restrain, amend, night

Counsel: **[*1]** For MARSHA A. SPRINGER, Petitioner - Appellant: Marsha A. Springer, Huron Valley Complex - Women, Ypsilanti, MI.

For JEREMY HOWARD, Warden, Respondent - Appellee: Andrea M. Christensen-Brown, Office of the Attorney General, Lansing, MI.

Judges: Before: CLAY, Circuit Judge.

Opinion

ORDER

Marsha A. Springer, a Michigan prisoner proceeding pro se, appeals a district court judgment denying her petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Springer requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

Springer's 16-year-old daughter, Calista, "was secured to her bed by a dog choke chain around her waist that was attached to the bed frame with zip ties" when the Springers' home caught fire. *People v. Springer*, Nos. 298385/298386, 2012 Mich. App. LEXIS 1740, 2012 WL 4039669, at *1 (Mich. Ct. App. Sept. 13, 2012) (per curiam). Calista died in the fire. *Id.* A jury found Springer guilty of torture and first-degree child abuse. She was sentenced to serve 225 months to fifty years in prison for torture, and 95 months to fifteen years in prison for child abuse, to run concurrently. The Michigan Court of Appeals affirmed Springer's convictions, and the Michigan Supreme Court denied leave to appeal.

Springer filed a motion for relief from judgment, which the trial court denied. The Michigan Supreme Court vacated that denial in part as to **[*2]** Springer's ineffective-assistance-of-counsel issues regarding entrapment by estoppel, remanded the case to the trial court for a hearing as to those issues, and otherwise denied leave to appeal. After conducting an evidentiary hearing, the trial court denied Springer's motion for relief from judgment as to the remanded issues. The Michigan appellate courts denied leave to appeal.

In this § 2254 habeas corpus petition, Springer claimed that: (1) she was denied effective assistance of trial counsel because counsel failed to investigate key witnesses before deciding against presenting an entrapment-by-estoppel defense; (2) she was denied effective assistance of appellate counsel because counsel failed to raise an effective-assistance-of-trial-counsel claim based on trial counsel's failure to present an entrapment-by-estoppel defense; (3) she was denied effective assistance of trial counsel because counsel failed to object when the trial court allowed jurors to discuss her case before deliberations and read an antagonistic question submitted by a juror, and failed to file a motion to remove a biased juror, and she was denied effective assistance of appellate counsel because counsel failed to **[*3]** raise an ineffective-assistance-of-trial-counsel claim based on trial counsel's failure to object to a biased juror; and (4) she was denied effective assistance of trial counsel because counsel "failed to object to the admission of the preliminary examination testimony of Gustavo Pop." A magistrate judge recommended denial of Springer's petition and a certificate of appealability. Springer objected to the magistrate judge's recommendation and moved to amend her petition to add an actual-innocence claim. The district court overruled Springer's objections, denied her motion to amend, and adopted the magistrate judge's report and recommendation.

A certificate of appealability may be issued only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). A certificate of appealability analysis is not the same as "a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017). Instead, the certificate of appealability analysis is limited **[*4]** "to a threshold inquiry into the underlying merit of [the] claims" and whether "the District Court's decision was debatable." *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 327, 348).

In her first claim, Springer claimed that trial counsel was ineffective for failing to investigate key witnesses before deciding not to present an entrapment-by-estoppel defense. Springer pointed to trial testimony from Patricia Skelding, an investigator in the Children's Protective Services (CPS) division of the Department of Human Services (DHS), that DHS employees were aware that Calista was chained to her bed at night and that restraints were necessary for Calista's safety. She also pointed to statements by the trial court during a pre-trial motion hearing, which alluded to entrapment by estoppel, and argued that the trial court's statements should have alerted counsel to an entrapment-by-estoppel defense.

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice inquiry requires the defendant to "show that there is a reasonable probability **[*5]** that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "The

standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (citations omitted).

Entrapment by estoppel precludes prosecution "[w]hen a citizen reasonably and in good faith relies on a government agent's representation that the conduct in question is legal, under circumstances where there is nothing to alert a reasonable citizen that the agent's statement is erroneous." *People v. Woods*, 241 Mich. App. 545, 616 N.W.2d 211, 213 (Mich. Ct. App. 2000). Under Michigan law, the

> entrapment by estoppel defense applies where the defendant establishes by a preponderance of the evidence that (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement.

Id. at 217-18 (quoting *United States v. W. Indies Transp., Inc.*, 127 F.3d 299, 313, 37 V.I. 579 (3d Cir. 1997)). The defendant must also establish (5) "that given the defendant's reliance, the prosecution would be unfair." *Id.* at 218 (quoting *United States v. Levin*, 973 F.2d 463, 468 (6th Cir. 1992)).

The trial court set **[*6]** forth the proper standard for an ineffective-assistance-of-counsel claim, discussed the elements that must be established for an entrapment-by-estoppel defense, and reviewed the evidence before determining that Springer's ineffective-assistance-of-trial-counsel claim lacked merit because the evidence did not support an entrapment-by-estoppel defense. The trial court concluded that the entrapment-by-estoppel elements were not met in Springer's case because she was never told by a DHS employee that the method of restraint employed at the time of Calista's death "would be legal and would be allowed and there's no reasonable person that could believe that it could be." The trial court acknowledged that DHS employees indicated that Calista should be restrained for her safety and that several methods were suggested such as "alarms, belts, [and] door alarms." But the trial court found that DHS employees "never said, yes, go ahead and chain your daughter to the bed to the point where she can't move, she can't get up if she needs to." The trial court also noted Springer's husband's testimony that the method of restraint used at the time of Calista's death had only been employed for three days **[*7]** prior to the fire, "so there was no way for the government to have been aware of it and condoned its use and indicated that it was legal." Because an entrapment-by-estoppel defense was not supported by the evidence and pursuit of such a defense would have been "fruitless," the trial court concluded that trial counsel was not ineffective for failing to present an entrapment-by-estoppel defense.

The district court determined that the state trial court's rejection of Springer's ineffective-assistance-of-trial-counsel claim based on counsel's failure to present an entrapment-by-estoppel defense was neither contrary to nor an unreasonable application of federal law. Reasonable jurists would not debate that determination. *See Miller-El*, 537 U.S. at 327. The state trial court analyzed Springer's ineffective-assistance-of-trial-counsel claim in accordance with clearly established federal law. *See Strickland*, 466 U.S. at 687. And its determination of the facts was not unreasonable. Skelding testified that she spoke to Springer about chaining Calista to her bed at night, that she did not tell Springer that it was acceptable to do so, and that she did not like the chaining restraint. Community Mental Health Home-Based Therapist Susan Geyer testified **[*8]** that she never told Springer to physically restrain Calista or chain Calista to her bed. CPS Supervisor Cynthia Bare also testified that she never authorized Springer to chain Calista to her bed or lock Calista in her room at night. Springer's husband testified that Skelding told him that "she didn't like the idea" of restraining Calista but "didn't do anything about it," that other DHS employees told him to lock Calista's door at night and to use any "means necessary to protect" Calista, that he told Skelding that Calista was not chained to her bed at night, that he believed he had permission from DHS to restrain Calista although the permission was neither written nor oral, that DHS employees told him that they did not like the chain restraints, that he devised the restraint system used at the time of Calista's death a few days earlier because another restraint system had failed, and that the restraint system employed at the time of Calista's death had not been used previously.

Springer disputes the state court's determination that she failed to establish the elements of an entrapment-by-estoppel defense, but on habeas corpus review, a state court's interpretation of its own law is **[*9]** binding on a federal court. *See Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S. Ct.

602, 163 L. Ed. 2d 407 (2005) (per curiam). Counsel is not ineffective for failing to raise a meritless defense or issue. *Sutton v. Bell*, 645 F.3d 752, 755 (6th Cir. 2011).

Springer challenges the district court's determination that the state court applied *Strickland* to her ineffective-assistance-of-counsel claim on remand from the Michigan Supreme Court. She argues that the trial court cited *Strickland* during the May 2016 evidentiary hearing, but because the trial court did not cite *Strickland* again when issuing its decision in September 2016, deference should not be afforded. However, the September 2016 decision was the culmination of Springer's motion for relief from judgment after remand from the Michigan Supreme Court, an evidentiary hearing, and post-hearing briefing. There is no indication that the trial court failed to apply *Strickland* when ruling on Springer's ineffective-assistance-of-counsel claim.

Springer also contends that a certificate of appealability is warranted as to her ineffective-assistance-of-trial-counsel claim based on counsel's failure to present an entrapment-by-estoppel defense because Michigan Supreme Court Justice Bernstein would have granted leave to appeal as to that claim, demonstrating disagreement **[*10]** among reasonable jurists. But the state court's standard for granting leave to appeal is different from the standard for granting a certificate of appealability, so that alone does not support a determination that reasonable jurists could disagree with the district court's decision. *See Harrington*, 562 U.S. at 105.

Springer has abandoned her second through fourth claims because she does not request a certificate of appealability for them. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam). In addition, those claims are forfeited because she did not object to the magistrate judge's recommended disposition of them despite being advised to do so in order to properly preserve any objections for appeal. *See Thomas v. Arn*, 474 U.S. 140, 142, 155, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). Although such forfeiture may be excused "in the interests of justice," *id.* at 155, no basis for excusing the forfeiture is evident in this case. *See Javaherpour v. United States*, 315 F. App'x 505, 510 (6th Cir. 2009).

Springer challenges the denial of her motion to amend her habeas corpus petition to assert an actual-innocence claim based on counsel's failure to present alleged exculpatory evidence that, before the criminal charges were filed, DHS investigated complaints that Calista had been restrained to her bed with chains and determined that Calista suffered no harm. The district court denied Springer's motion to **[*11]** amend, concluding that an actual-innocence claim "is not a freestanding basis for habeas relief" and that it was not based on any new evidence.

Reasonable jurists would not debate the district court's denial of the motion to amend. *See Miller-El*, 537 U.S. at 327. The Supreme Court has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013); *see Herrera v. Collins*, 506 U.S. 390, 404-05, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). But even if cognizable, a credible actual-innocence claim must be supported with "new reliable evidence," such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). Springer's actual-innocence claim was not based on any new evidence. *See id.*; *Souter v. Jones*, 395 F.3d 577, 589-90 (6th Cir. 2005). Rather, the DHS complaints referenced by Springer were made and investigated before her trial and were therefore available at that time.

Accordingly, the application for a certificate of appealability is **DENIED**.

APPENDIX (B)

Springer v. Brewer, 2020 U.S. Dist. LEXIS 235972, Order Denying Writ of Habeas Corpus and COA.

Springer v. Brewer, 2020 U . S . Dist. LEXIS 235972

Copy Citation

United States District Court for the Western **District** of Michigan, Southern Division

December 16, **2020**, Decided; December 16, **2020**, Filed

No. 1:17-cv-1080

Reporter

2020 U . S . Dist. LEXIS 235972 * | 2020 WL 7382282

MARSHA A. SPRINGER, Petitioner, -v- SHAWN BREWER, Respondent.

Prior History: Springer v. Brewer, **2020 U.S. Dist.** LEXIS 236125, **2020** WL 7699834 (W.D. Mich., Jan. 31, **2020**)

Core Terms

magistrate judge, entrapment, estoppel, argues

Counsel: **[*1]** Marsha A. Springer #760966, petitioner, Pro se, Ypsilanti, MI.

For Shawn Brewer, Warden, respondent: Andrea M. Christensen-Brown, John **S**. Pallas, MI Dept Attorney General (Appellate), Appellate Division, Lansing, MI.

Judges: HONORABLE Paul L. Maloney, **United States District** Judge.

Opinion by: Paul L. Maloney

APPENDIX (B)

ORDER

This is a habeas corpus action brought by state prisoner Marsha Springer under 22 **U.S.**C. §§ 2254. The matter is now before the Court on Springer's objection to a Report and Recommendation ("R&R") issued by Magistrate Judge Ray Kent (R&R ECF No. 12; Objection ECF No. 17). For the reasons to be stated, the Court will overrule the objection and adopt the R&R as the opinion of the Court.

Legal Framework

With respect to a dispositive issue, a magistrate judge issues a report and recommendation, rather than an order. After being served with an R&R issued by a magistrate judge, a party has fourteen days to file written objections to the proposed findings and recommendations. 28 **U.S.**C. §§ 636(b)(1); Fed. R. Civ. P. 72(b). A **district** court judge reviews de novo the portions of the R&R to which objections have been filed. 28 **U.S.**C. §§ 636(b)(1); Fed. R. Civ. P. 72(b).

Only those objections that are specific are entitled to a de novo review under the statute. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986) (per curiam) (holding that the **district** court need not **[*2]** provide de novo review where the objections are frivolous, conclusive, or too general because the burden is on the parties to "pinpoint those portions of the magistrate's report that the **district** court must specifically consider"). Failure to file an objection results in a waiver of the issue and the issue cannot be appealed. ***United States*** *v. Sullivan*, 431 F.3d 976, 984 (6th Cir. 2005); *see also Thomas v. Arn*, 474 **U.S.** 140, 155, 106 **S.** Ct. 466, 88 L. Ed. 2d 435 (1985) (upholding the Sixth Circuit's practice). The **district** court judge may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge. 28 **U.S.**C. §§ 636(b)(1); Fed. R. Civ. P. 72(b).

Analysis

Springer brings five objections to the R&R, which the Court will address in the order presented. First, she objects to the R&R's statement that Calista's death was caused by the "chain and zip tie restraint" (ECF No. 12 at PageID.4754). Springer argues that a more accurate statement would be that Calista died in an accidental house fire. The Court finds the difference immaterial. The combination of the restraints and the house fire meant that Calista could not escape, and she died in the fire. The Court finds no error in this sentence in the R&R, and this objection is overruled.

Second, Springer argues that there is clear and convincing evidence that Child Protective **[*3]** Services ("CPS") approved of the restraint system she placed on Calista. However, Springer has cherry-picked the evidence presented at trial: Springer quotes CPS representative Patricia Skelding's testimony that she was aware of the restraint system, but selectively ignores the testimony that she disapproved of the restraint system (*see, e.g.*, ECF No. 8-17 at PageID.2043, where Skelding testified that she "didn't like [the restraint system]"). Nor does Springer revisit her husband's testimony that the restraint system in use at the time of the fire was a new combination that the couple had been testing for only a few days (ECF No. 8-21 at PageID.3004-5). Accepting this testimony as true, there is no way that CPS approved the specific restraint system that was in use at the time of the fire. Springer's carefully curated presentation of evidence does not change this conclusion, and this objection is overruled.

Next, Springer objects to the R&R's conclusion that the state trial court's factfinding regarding her ineffective assistance of counsel claim is entitled to deference. As background: the state court

found that trial counsel's failure to raise an entrapment by estoppel defense was **[*4]** not ineffective assistance because an entrapment by estoppel defense would have been meritless. The trial court applied and evaluated counsel's performance under *Strickland*. 1 Thus, this Court is bound to apply the "doubly deferential" standard of *Harrington v. Richter*, 562 **U.S.** 86, 105, 131 **S**. Ct. 770, 178 L. Ed. 2d 624 (2011). Springer argues that her counsel's failure to present CPS's approval of the restraint system was ineffective assistance, but as just described, there is no evidence in the record to support this characterization of the evidence. The Court finds that there is no reasonable argument that counsel failed to satisfy *Strickland*'s requirements, and the R&R properly deferred to the state court's finding. This objection is overruled.

Fourth, Springer argues that the R&R erred when it considered the entrapment by estoppel issue under state law. In Springer's eyes, entrapment by estoppel is a defense enshrined in federal law. However, she was charged and convicted in a Michigan court, under Michigan law, with Michigan defenses at issue. The trial court (and by extension, the R&R) properly applied Michigan's definition of entrapment by estoppel. This objection is overruled.

Fifth, Springer argues that she should be granted a certificate of appealability **[*5]** because reasonable jurists could have come to a different conclusion than Magistrate Judge Kent did. She bases this argument on the fact that in 2017, when she appealed a decision of the Michigan Court of Appeals to the Michigan Supreme Court, the Michigan Supreme Court denied leave to appeal but Justice Bernstein would have granted leave to appeal. *See People v. Springer*, 901 N.W.2d 605 (Mem) (Mich. 2017). Because Justice Bernstein would have granted leave to appeal, Springer believes that reasonable jurists could disagree on the R&R's conclusions. However, the R&R presents a different posture and a different legal analysis than the case that was presented to the Michigan Supreme Court in 2017. The Court respectfully finds Justice Bernstein's 2017 opinion to be of no consequence here. Springer is not entitled to a certificate of appealability, and this objection is overruled.

Finally, Springer moves to amend her petition to add a "gateway-innocence" claim, alleging that she has new evidence of actual innocence: the fact that CPS never filed a petition to have Calista removed from her home. This request will be denied for two reasons. First, a claim of actual innocence is not a freestanding basis for habeas relief; instead, **[*6]** it is the "gateway" through which a habeas petitioner must pass to have an otherwise-barred constitutional claim considered on the merits. *Herrera v. Collins*, 506 **U.S.** 390, 404-05, 113 **S**. Ct. 853, 122 L. Ed. 2d 203 (1993). Springer's claims are not otherwise barred, so there is no need for her to raise an actual-innocence claim. And even if she needed to raise the actual-innocence claim, the evidence she presents is not new. At the time of trial, she could have presented the fact that CPS had never filed a removal petition. Accordingly, the motion to amend contained in the objection will be denied.

Conclusion

The Court finds no error in the R&R, and accordingly, all objections will be overruled the R&R will be adopted as the opinion of the Court, and Springer's motion to amend will be denied. Accordingly,

IT IS ORDERED that the January 31, **2020** R&R (ECF No. 12) is **ADOPTED** as the opinion of the Court.

IT IS FURTHER ORDERED that Petitioner's objection (ECF No. 17) is **OVERRULED**.

IT IS FURTHER ORDERED that Petitioner's request to amend her petition (ECF No. 17) is **DENIED**.

Judgment to follow.

IT IS SO ORDERED.

Date: December 16, **2020**

/**s**/ Paul L. Maloney

Paul L. Maloney

United States District Judge

JUDGMENT

In accordance with the opinion entered today (ECF No. 24), and pursuant to **[*7]** Fed. R. Civ. P. 58, **JUDGMENT** hereby enters.

THIS ACTION IS TERMINATED.

IT IS SO ORDERED.

Date: December 16, **2020**

/s/ Paul L. Maloney

Paul L. Maloney

United States District Judge

Footnotes

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1 *Strickland v. Washington*, 466 **U.S.** 668, 104 **S.** Ct. 2052, 80 L. Ed. 2d 674 (1984).

APPENDIX (C)

Springer v. Brewer, 2020 U.S. Dist. LEXIS 236125, Magistrate Judge's Report and Recommendation.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARSHA A. SPRINGER,

Petitioner,

v.

SHAWN BREWER,

Respondent.
/

Case No. 1:17-cv-1080

Honorable Paul L. Maloney

REPORT AND RECOMMENDATION

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Petitioner Marsha A. Springer is incarcerated with the Michigan Department of Corrections at the Women's Huron Valley Correctional Facility in Washtenaw County, Michigan. On February 23, 2010, following a nine-day jury trial and nine days of deliberation in the St. Joseph County Circuit Court,[1] Petitioner was convicted of torture, in violation of Mich. Comp. Laws § 750.85, and first-degree child abuse, in violation of Mich. Comp. Laws § 750.136b(2). The jury acquitted Petitioner of first-degree and second-degree murder. On April 16, 2010, the court sentenced Petitioner to concurrent prison terms of 225 months to 50 years for torture and 95 months to 15 years for child abuse.

Petitioner, with the assistance of appointed counsel, appealed her convictions to the Michigan Court of Appeals, raising four claims: (1) denial of due process by the admission of a

[1] The *voir dire*, arguments, all testimony, and the first four days of deliberation took place in the Kalamazoo County Circuit Court building. The last five days of deliberation took place in St. Joseph County. The jury was drawn from Kalamazoo County. The parties attempted to seat a jury from St. Joseph County during October of 2009; but were unable to do so because so many St. Joseph County residents were familiar with the case. (Jury *Voir Dire* I, Tr. II, ECF No. 8-12.) For that reason, by stipulation of the parties, the court transferred the venue to Kalamazoo County.

APPENDIX (C)

gruesome autopsy photograph; (2) denial of due process by the exclusion of an email message from the prosecutor's expert concerning the extreme need for supervision of the victim; (3) denial of due process when the jury was permitted to ask over 200 questions; and (4) denial of due process by allowing the jurors to discuss the evidence on breaks prior to deliberating on the verdict. (Pet'r's Appeal Br., Pet'r's Supp. Appeal Br., ECF No. 8-38, PageID.3722, 3954.) The court of appeals affirmed the convictions by opinion issued September 13, 2012. (Mich. Ct. App. Op., ECF No. 8-38, PageID.3707-3718.)

Petitioner, again with counsel's assistance, sought leave to appeal to the Michigan Supreme Court, raising the same four grounds. (Pet'r's Appl. for Leave to Appeal, ECF No. 8-39, PageID.4020.) The supreme court denied leave to appeal by order entered March 20, 2013. (Mich. Order, ECF No. 8-39, PageID.4018.)

Petitioner then returned to the trial court. On February 4, 2014, she filed a *pro per* motion for relief from judgment raising three issues: (1) ineffective assistance of counsel for failure to pursue a defense of entrapment by estoppel; (2) ineffective assistance of counsel for failure to object to the due process and confrontation violations that occurred when the preliminary examination testimony of witness Gustavo Pop was introduced at trial; and (3) the pre-deliberation jury discussion issue that Petitioner had already raised on direct appeal. (Pet'r's Mot. for Relief from J., ECF No. 8-32.) By opinion and order issued July 24, 2014, the trial court denied relief. (Op. & Order, ECF No. 8-33.)

Petitioner applied for leave to appeal in the Michigan Court of Appeals and then the Michigan Supreme Court. The court of appeals denied leave by order entered November 19, 2014. (ECF No. 8-40, PagegID.4156.) On September 30, 2015, the Michigan Supreme Court, in lieu of granting leave, vacated the trial court's denial of Petitioner's motion with respect to the

entrapment by estoppel issue, and remanded the case for a hearing on that matter. (Order, ECF No. 8-41, PageID.4236.) The supreme court denied leave to appeal with respect to the other issues. (*Id.*)

The trial court appointed counsel for Petitioner, conducted a hearing on the motion, and invited post-hearing briefs regarding the entrapment by estoppel defense. On September 8, 2016, the trial court denied Petitioner's motion for relief from judgment. (ECF Nos. 8-35, 8-36.) Petitioner then filed *pro per* applications for leave to appeal in the Michigan Court of Appeals and the Michigan Supreme Court. Those courts denied leave by orders entered May 9, 2017, and October 24, 2017, respectively. (Mich. Ct. App. Order, ECF No. 8-42, PageID.4323; Mich. Order, ECF No. 8-43, PageID.4376.)

On December 7, 2017, Petitioner timely filed her habeas corpus petition raising four grounds for relief, as follows:

> I. Was trial counsel ineffective for failing to perform an investigation of key DHS/CPS entrapment by estoppel witnesses before choosing not to present said pretrial defense? Did DHS/CPS employees testify at trial that the Springers had permission from community mental health to restrain their daughter at night with a homemade chain restraint? Did [a] DHS/CPS employee testify that said restraint was necessary and had been authorized? Was the state court's factual findings of counsel's failure to raise the defense of entrapment by estoppel objectively unreasonable determination of the facts because counsel did not first investigate witnesses before deciding not to pursue entrapment by estoppel defense? Was the state court's determination contrary to federal law for failing to adjudicate the claim under Strickland and its progeny?
>
> II. Did appellate counsel Randy Davidson perform ineffectively in failing to raise trial counsel's failure to implement the defense of entrapment by estoppel.
>
> III. [Were] trial and appellate counsel ineffective for failing to object to and raise the claim that the Michigan Supreme Court violated Petitioner's Fifth and Fourteenth Amendment due process guarantee to a fair and impartial jury by allowing jurors to discuss the case prior to its submission to them?

IV. Did trial counsel provide ineffective assistance by failing to object to the admission of preliminary examination testimony of Gustavo Pop? Did counsel's error deny Mrs. Springer of her Sixth Amendment right to confront the witnesses against her.

(Pet'r's Memo. of Law, ECF No. 2, PageID.29-30.)

Respondent has filed an answer to the petition (ECF No. 7) stating that the grounds should be denied because they are without merit. Upon review and applying the standards of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA), I find that the grounds are meritless. Accordingly, I recommend that the petition be denied.

Discussion

I. Factual allegations[2]

On February 27, 2008, police and firefighters responded to an emergency call reporting a house fire at Petitioner's home in Centreville, Michigan. Petitioner's daughter, Calista, died in that fire. She was chained to her bed and could not escape.

Petitioner and her husband, co-defendant Anthony Springer, restrained Calista to her bed, ostensibly for her own protection. Calista suffered from pervasive developmental disorder (PDD) and had been diagnosed with several other disorders. Calista required almost constant supervision and, at night, it appears to be undisputed that she needed to be restrained or monitored in some way. The Springers attempted different methods of restraint; but, just days before the fire, Calista had defeated the bed alarm system they were using. Pending a better solution, the Springers ran a chain, of the type typically used for a dog choke collar, around Calista's waist and then zip tied the chain to the bed frame.

[2]The pretrial proceedings, trial, appeals, and post-conviction motions, for Petitioner and her husband, co-defendant Anthony J. Springer, were handled together. Petitioner's husband's habeas petition is also before the Court. *Springer v. Berghuis*, 1:15-cv-808 (W.D. Mich.). The state court records in both habeas proceedings are substantially identical. There is also substantial overlap in the issues Mr. and Mrs. Springer have raised in their respective habeas petitions. The Court's analysis in resolving the petitions, therefore, is substantially the same in both cases.

The Springers contended that the chain and zip ties they used were necessary and, indeed, they used them with the knowledge and apparent blessing of the government agencies that were providing assistance or otherwise monitoring the Springers. That "blessing" purportedly occurred in 2004 when a Department of Human Services worker (DHS) investigated a claim that Calista's hair had been pulled out. At that time, Calista told the DHS worker that she was chained to the bed at night. At trial, Mr. Springer indicated that Calista was lying then. He insisted that the chain and zip ties were a recent innovation at the time of the fire. Mrs. Springer did not testify at trial; however, she testified at the post-conviction motion evidentiary hearing and indicated that the chain and zip tie solution may have been in use during 2004 when DHS was investigating. It is difficult to reconcile the Springers' different versions of what restraints were used and when they were used.

The defense argued that Petitioner and her husband were loving parents who did the best they could with an impossible situation. The prosecutor contended that the Springer's chaining of Calista to her bed was nothing short of torture.

The jurors plainly agonized over deciding the Springer's fate. They posed several questions during deliberations and suggested to the court several times that they were not likely to reach a verdict. The jurors even asked if they could convict the Springers of a lesser—but not lesser-included—charge. Eventually, the jurors acquitted the Springers of first-degree and second-degree murder charges, but convicted them of torture and child abuse.

II. AEDPA standard

This action is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA). The AEDPA "prevents federal habeas 'retrials'" and ensures that state court convictions are given effect to the extent possible under the law. *Bell*

v. Cone, 535 U.S. 685, 693-94 (2002). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(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 upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). This standard is "intentionally difficult to meet." *Woods v. Donald*, 575 U.S. __, 135 S. Ct. 1372, 1376 (2015) (internal quotation omitted).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This Court may consider only the holdings, and not the dicta, of the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Williams*, 529 U.S. at 381-82; *Miller v. Straub*, 299 F.3d 570, 578-79 (6th Cir. 2002). Moreover, "clearly established Federal law" does not include decisions of the Supreme Court announced after the last adjudication of the merits in state court. *Greene v. Fisher*, 565 U.S. 34, 37-38 (2011). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time of the state-court adjudication on the merits. *Miller v. Stovall*, 742 F.3d 642, 644 (6th Cir. 2014) (citing *Greene*, 565 U.S. at 38).

A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in the Supreme Court's cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Bell*, 535 U.S. at 694 (citing *Williams*, 529 U.S. at 405-06). "To satisfy

this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods*, 135 S. Ct. at 1376 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). In other words, "[w]here the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *White v. Woodall*, 572 U.S. 415, 424 (2014) (internal quotations omitted).

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue made by a state court is presumed to be correct, and the petitioner has the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir. 2011) (en banc); *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003); *Bailey*, 271 F.3d at 656. This presumption of correctness is accorded to findings of state appellate courts, as well as the trial court. *See Sumner v. Mata*, 449 U.S. 539, 546 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989).

III. Ineffective assistance

All of Petitioner's habeas issues include a claim of ineffective assistance from her trial or appellate counsel. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-prong test by which to evaluate claims of ineffective assistance of counsel. To establish an ineffective assistance of counsel claim, petitioner must prove: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. *Id.* at 687. A court considering a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance." *Id.* at 689. The defendant bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *see also Nagi v. United States*, 90 F.3d 130, 135 (6th Cir. 1996) (holding that counsel's strategic decisions were hard to attack). The court must determine whether, in light of the circumstances as they existed at the time of counsel's actions, "the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Even if a court determines that counsel's performance was outside that range, the defendant is not entitled to relief if counsel's error had no effect on the judgment. *Id.* at 691.

Moreover, as the Supreme Court repeatedly has recognized, when a federal court reviews a state court's application of *Strickland* under § 2254(d), the deferential standard of *Strickland* is "doubly" deferential. *Harrington*, 562 U.S. at 105 (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)); *see also Burt v. Titlow*, 571 U.S. 12, 13 (2013); *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011); *Premo v. Moore*, 562 U.S. 115, 122 (2011). In those circumstances, the question before the habeas court is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*; *Jackson v. Houk*, 687 F.3d 723, 740-41 (6th Cir. 2012) (stating that the "Supreme Court has recently again underlined the difficulty of prevailing on a *Strickland* claim in the context of habeas and AEDPA . . . .") (citing *Harrington*, 562 U.S. at 102).

A. Entrapment by estoppel (habeas issues I and II)

Petitioner claims that her trial counsel was ineffective for failing to raise entrapment by estoppel as a defense to the charges. The Michigan Court of Appeals described the entrapment by estoppel defense in *People v. Woods*, 616 N.W.2d 545 (Mich. Ct. App. 2000) as follows:

> Though Michigan appellate courts have not applied the doctrine of entrapment by estoppel, the federal courts have applied this defense where a citizen has reasonably relied on a government agent's erroneous representation that certain conduct was

> legal, such that prosecution would be unfair under the circumstances. *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959); *United States v. Levin*, 973 F.2d 463 (C.A.6, 1992). We recognize that entrapment by estoppel—which is really a variation on the conventional entrapment defense—may, in certain limited circumstances, preclude prosecution. When a citizen reasonably and in good faith relies on a government agent's representation that the conduct in question is legal, under circumstances where there is nothing to alert a reasonable citizen that the agent's statement is erroneous, basic principles of due process should preclude prosecution. However, when a citizen who should know better unreasonably relies on the agent's erroneous statement, or when the "statement" is not truly erroneous, but just vague or contradictory, the defense is not applicable.

Woods, 616 N.W.2d at 548-549. The *Woods* court articulated several elements of entrapment by estoppel: "The entrapment by estoppel defense applies where the defendant establishes by a preponderance of the evidence that (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement." *Id.* at 558 (quoting *United States v. West Indies Transport, Inc.*, 127 F.3d 299, 313 (3d Cir. 1997)). The *Woods* court borrowed a fifth element from a Sixth Circuit statement of the doctrine: "[and (5)] given the defendant's reliance, the prosecution would be unfair." *Id.* at 559 (citing *United States v. Levin*, 973 F.2d 463, 468 (6th Cir. 1992)).

The elements of the entrapment by estoppel are not fact questions for the jury; instead, an entrapment by estoppel defense presents questions of law for the trial court to decide. *Woods*, 616 N.W.2d at 554. The trial court must conduct a separate evidentiary hearing *Id.* At the hearing, the defendant bears the burden of proving entrapment by a preponderance of the evidence. *Id.*

Petitioner contends that the circumstances surrounding the resolution of the DHS investigation in 2004 plainly raise the possibility of an entrapment by estoppel defense. She claims

that the DHS worker then—and other workers before and after—were aware of the Springers' attempts to restrain Calista at night and condoned those practices.

Even if defense counsel had not independently considered the possibility of the defense, the trial judge pointed it out at a hearing on August 31, 2009:

> THE COURT: That's another interesting factor that's not been raised is that this was brought to the State's attention back in 2004, this allegation which has led to a charge of child abuse and torture. The State investigated it and did not do anything to stop it. So they were clearly aware of the claim in 2004. One of the questions I had was whether or not there's an argument that—to be—to be raised in that regard that the State's involvement condoning the use of the chain by not taking any action would raise any argument for the defense in terms of due process rights, but that's not been raised here.

(Mot. Hr'g Tr., ECF No. 8-7, PageID.755-756.) Petitioner claims that the court's statement should have, but did not, prompt action by Petitioner's counsel or her husband's counsel.

At the evidentiary hearing on Petitioner's motion for relief from judgment, counsel explained why they did not pursue the defense. Petitioner's counsel testified that the defense was not "well grounded." (Evidentiary Hr'g Tr., ECF No. 8-34, PageID.3621.) Counsel tried to find someone who "told [the Springers] to do this." (*Id.*, PageID.3624.) He could not. The closest counsel got was the conclusion that government employees may have been condoning the use of some level of restraint. (*Id.*) Indeed, when DHS worker Pat Skelding testified at trial, the validity of the entrapment defense looked even worse. Counsel recalled that Skelding testified she spoke with Petitioner and her husband and told them that she (Skelding) was not comfortable with the restraints—whatever they may have been at that time—because of the fire risk. (*Id.*, PageID.3622.)

The viability of the defense was undercut further by Petitioner's husband's testimony. He insisted that the combination of chain and zip tie to the bed frame had only been used for a few days at the time of the fire and had not been used before. Accepting as true Mr.

Springer's testimony, even if Skelding had approved the 2004 restraints, they would have been different restraints—and according to Mr. Springer less severe restraints—than the chain and zip tie restraint that resulted in Calista's death.

In resolving Petitioner's ineffective assistance claim, the trial court expressly applied the *Strickland* standard. (Mot. Hr'g Tr., ECF No. 8-34, PageID.3504-3505.) The trial court applied that standard to the facts mentioned above, concluding that Petitioner had failed to show that her counsel's failure to raise the claim was professionally unreasonable or that the failure prejudiced her:

> [T]he next question is would [the entrapment by estoppel defense] have applied; and I'm ruling that it wouldn't have. I don't find that sections one, two, or four were done. The government official never told them that chaining their daughter to a bed with a dog chain and zip ties to the extent where she couldn't lift her body up even a half inch would be legal and would be allowed and there's no reasonable person that could believe that it could be.
>
> When they received word that she was being restrained with dog chains, they went to her home and questioned the parents. The parents denied that that was the case, invited them to go up and look at the room, denied that they were chaining the child but that they were restraining her.
>
> It is true that they did indicate that she could be restrained-she should be restrained. They offered different methods of restraint: alarms, belts, door alarms, those types of things. They never said, yes, go ahead and chain your daughter to the bed to the point where she can't move, she can't get up if she needs to. If there's a fire, she can't get away.
>
> The state trooper that broke into the window to try and rescue her was able to grab her body; but, due to her confinement with the chains and the zip ties, he couldn't even lift her off the bed and had to leave the room as the fire was so intense at that point that he could not remove her.
>
> This was well after the family was up. Mrs. Springer was already doing housekeeping around the home, and the other people were already gone. So I don't know at what point they planned on ever removing her from that bed, if they did plan to.
>
> But there's no reasonable person to believe that they could restrain their child-no matter how mentally impaired or difficult she was-in that manner, no more than they could change her-cage her in a dog cage, chain her to the basement pillar, or

anything else that could have been done and they could rely on the statement that, yes, you can restrain her.

This was not what the government officials told them. It was four years from the time of the actual offense before the last time a government official had been there, and they denied that there was any dog chains or zip ties being used, even though later it was confirmed, coincidentally, that that was the exact same manner that they found her four years later after they denied that they were doing it.

In addition, Mr. Springer indicated he had only started using that method three days before, so there was no way for the government to have been aware of it and condoned its use and indicated that it was legal.

The use of the word restrain has been muddied here. The government may have said you can restrain your child in order for her safety. They provided methods to do so.

[The Springers] then removed their child from school so there was no more complaints from protective services and she wouldn't be bullied by her fellow classmates and she wouldn't have any other issues.

But this use of this method does not meet the requirements of entrapment by estoppel.

In passing, the federal court that reviewed the civil case, the other courts that reviewed the civil case, has all ruled the same, that the government officials did not knowingly allow this behavior to take place and found no liability on their part for this and dismissed all the cases against the DHS and the workers for similar issues. They found that it was not and is not a valid reason to do it.

For those reasons, I would indicate that, although it may have been ineffective to try, it was not ineffective to bring a fruitless motion that they knew from their investigation the elements weren't there. So, for those reasons, I'll deny the motions and indicate that the judgment stand.

And I would have denied the entrapment by estoppel by a preponderance of the evidence, having heard all the testimony at trial and having heard the evidence from the DHS workers, the parties, and the others that there was no evidence to support entrapment by estoppel on the government.

(Decision Tr., ECF No. 8-36, PageID.3664-3666.)[3]

[3] The federal civil case referenced in the trial court's analysis is *Langdon v. Skelding et al.*, 1:10-cv-985 (W.D. Mich.) Calista's grandmother filed a suit under 42 U.S.C. § 1983 against DHS and CPS workers for the harms caused to Calista. This Court granted the Defendants' motion to dismiss the complaint on September 30, 2011.

As set forth above, the trial court's determination that Petitioner's trial counsel was not ineffective is entitled to double deference from this Court. The trial court's determination that the entrapment by estoppel defense was meritless, however, is entitled to more than deference—it is binding on this Court.

It is the prerogative of the state to define the elements of the crime and that definition binds the federal courts. *See Johnson v. United States*, 559 U.S. 133, 138 (2010) ("We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements . . . ."); *Jackson*, 443 U.S. at 324 n.16 ("The respondents have suggested that this constitutional standard will invite intrusions upon the power of the States to define criminal offenses. Quite to the contrary, the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law."). Although Due Process Clause guarantees criminal defendants a meaningful opportunity to present a complete defense, *California v. Trombetta*, 467 U.S. 479, 485 (1984), it is also the prerogative of the state to define whether or not a defense applies to a particular crime. *See Foucha v. Louisiana*, 504 U.S. 71, 96 (1992) (acknowledging "the general rule that the definition of both crimes and defenses is a matter of state law . . . ."); *Gimotty v. Elo*, 40 F. App'x 29, 32 (6th Cir. 2002) ("States are free to define the elements of, and defenses to, crimes. . . . In determining whether a petitioner was entitled to a defense under state law, federal courts must defer to state-court interpretations of the state's laws . . . .").

Petitioner's ineffective assistance claim depends entirely on the viability of the entrapment by estoppel defense. The scope and viability of the defense are state-law issues. Even if the trial court reached the wrong conclusion on that issue, the federal courts have no power to intervene on the basis of a perceived error of state law. *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010);

Bradshaw v. Richey, 546 U.S. 74, 76 (2005); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Pulley v. Harris*, 465 U.S. 37, 41 (1984). The decision of the state courts on a state-law issue is binding on a federal court. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983). The trial court's determination that the entrapment by estoppel defense has no merit, therefore, conclusively resolves that issue.

Moreover, in conclusively resolving that state-law issue, the trial court necessarily resolved the ineffective assistance claim as well. "Omitting meritless arguments is neither professionally unreasonable nor prejudicial." *Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013). Therefore, if the entrapment by estoppel claim is meritless, any claim that counsel failed to raise the defense is necessarily meritless as well.

Petitioner has not shown that the trial court's resolution of this ineffective assistance claim is founded upon factual determinations that are unreasonable on this record. In fact, the trial court's factual determinations are eminently reasonable. Moreover, Petitioner has failed to show that the state court's determinations (1) that her trial counsel was not ineffective for failing to raise the entrapment by estoppel defense and (2) that her appellate counsel was not ineffective for failing to raise trial counsel's failure to raise the entrapment by estoppel defense, are contrary to, or an unreasonable application of clearly established federal law. Accordingly, Petitioner is not entitled to habeas relief on these claims.

B. Failure to object to pre-deliberation juror discussion (habeas issue III)

At the time of Petitioner's trial, the Michigan Supreme Court had adopted a pilot project to study the effects of certain jury reform proposals. One of the participant judges was St. Joseph County Circuit Court Judge Paul E. Stutesman, Petitioner's trial judge. The pilot program permitted jurors to pose questions to the witnesses and, when all of the jurors were present during

trial breaks, to discuss the evidence even before the close of proofs. Mich. Admin. Order 2008-2. Judge Stutesman employed both innovations during Petitioner's trial.[4]

Petitioner challenged the constitutionality of both practices on direct appeal. Nonetheless, in setting out her habeas claim she contests only the practice of permitting predeliberation discussion. Looking beyond the statement of her habeas issue to her argument, however, she also challenges the practice of permitting the jurors to pose questions to the witnesses. But, she does not challenge the constitutionality of the practices directly. Instead, she claims her trial counsel rendered ineffective assistance because he did not challenge the practices and, further, her appellate counsel rendered ineffective assistance because he did not challenge the practice of predeliberation discussion on direct appeal.[5]

Petitioner's claim that appellate counsel was ineffective for failing to raise the issue of predeliberation discussion is plainly frivolous. Appellate counsel challenged the practice in a supplemental brief on appeal. (Pet'r's Supp. Br., ECF No. 8-38, PageID.3953-3962.) Petitioner's claim that trial counsel did not challenge these practices, however, is accurate. Whether or not counsel's decision to forego those objections was professionally reasonable, Petitioner cannot show any prejudice from the decision.

The Michigan Court of Appeals considered, and rejected, both challenges. With regard to counsel's challenge to the practice of permitting the jurors to prepare questions for the witnesses, the court stated:

> Defendants' trial was conducted in accordance with Supreme Court Administrative Order No. 2008-2, which authorized several trial courts to implement a pilot project

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[4] It is noteworthy that the State of Michigan did not end up adopting all of the innovations. Although jurore predeliberation discussion was eventually adopted, it was adopted only for civil trials. (Mich. June 29, 2011, Order, ECF No. 8-38, PageID.3981-4001.)

[5] Appellate counsel challenged the practice of permitting jurors to ask questions of the witnesses in Petitioner's initial brief on appeal. (Pet'r's Appeal Br., ECF No. 8-38, PageID.3749-3751.)

to study the effects of a jury-reform proposal. One aspect of AO 2008-2 provided for juror questions:

> The court may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.

In addition, at the time of defendants' trial, MCR 6.414(E) permitted jurors to ask questions of witnesses.

Marsha recognizes our Supreme Court, in *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972), permitted trial courts, in their discretion, to allow jurors to ask questions of witnesses. But, relying on *State v Costello*, 646 NW2d 204 (Minn, 2002), where the Minnesota Supreme Court prohibited the practice of allowing jurors to question witnesses in a criminal trial, Marsha asserts that the practice of allowing jurors to submit questions to witnesses should stop. However, we are bound by our Supreme Court's statement in *Heard*, 388 Mich at 187-188, that the questioning of witnesses by jurors is within the sound discretion of the trial court. *See People v Metamora Water Serv, Inc*, 276 Mich App 376, 387-388; 741 NW2d 61 (2007) ("It is the duty of the Supreme Court to overrule or modify caselaw . . . and the Court of Appeals and the lower courts are bound by the precedent established by the Supreme Court until it takes such action."). Because Marsha does not claim that the trial court failed to utilize a procedure, as required by AO 2008-2, that ensured inappropriate questions would not be asked and because she does not claim that any question submitted by a juror and actually asked was improper, she has not established plain error affecting her substantial rights. *Carines*, 460 Mich at 763. Accordingly, we reject Marsha's claim that the trial court violated her due process right to a fair and impartial jury when it allowed the jurors to submit questions to be asked of witnesses.

(Mich. Ct. App. Op., ECF No. 8-38, PageID.3708) (footnote omitted). With regard to the practice of permitting predeliberation discussion of the evidence, the court stated:

> We acknowledge that the trial court's instruction to the jurors, pursuant to AO 2008-2, that they could discuss the evidence during trial recesses, was contrary to Michigan legal precedent. See *People v Hunter*, 370 Mich 262, 269; 121 NW2d 442 (1963) ("It seems to us clear beyond any doubt that jurors should not be encouraged to discuss evidence they have heard and seen during the course of trial until all of the evidence has been introduced, the arguments to the jury made and the jury charged by the court . . . ."). However, pursuant to AO 2008-2, the trial court was authorized to instruct the jury as it did.

> While the trial court instructed the jurors that they could discuss the evidence during trial recesses if they were all present, it also emphasized that such discussions were "to be considered tentative pending final presentation of all evidence, instructions, and arguments," and that the jurors were to keep "an open mind" and not to "decide the case until [they had] heard all the evidence, instructions of law, and arguments of Counsel." The trial court further instructed the jurors that defendants did not have to prove their innocence and that the prosecutor was required to prove the elements of the charged crimes beyond a reasonable doubt. Marsha claims that because the jurors submitted more than 200 questions to be asked of witnesses during trial, it is "highly likely" that the jurors failed to keep their pre-deliberation discussions tentative. However, jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and there is no indication on the record that the jurors failed to heed their instructions. Accordingly, we hold that the trial court's instructions were sufficient to protect Marsha's right to a fair and impartial jury. There was no plain error affecting Marsha's substantial rights. *Carines*, 460 Mich at 763.

(Mich. Ct. App. Op., ECF No. 8-38, PageID.3709.)

This Court must defer to the Michigan Court of Appeals resolution of Petitioner's constitutional challenges unless the state court's determinations are contrary to, or an unreasonable application of clearly established federal law. The Sixth Circuit has recognized that "[t]he Supreme Court has not entertained a case involving premature deliberations." *Middlebrook v. Napel*, 698 F.3d 906, 910 (6th Cir. 2012). Similarly, the Sixth Circuit has concluded that there are no "Supreme Court decision[s] . . . holding that juror questioning violates the Sixth or Fourteenth Amendments." *Slaughter v. Parker*, 450 F.3d 224, 236 (6th Cir. 2006). For that reason, allowing these practices in Petitioner's case could not be contrary to, or an unreasonable application of, clearly established federal law.

Where the Michigan Supreme Court had adopted a pilot program that included juror questions and permitted predeliberation juror discussion of evidence, where the trial judge had agreed to participate in that pilot program, and where the court of appeals ultimately concluded that those practices were constitutional, Petitioner cannot show that the result would have been any different if counsel had raised the constitutional objections. If counsel had objected to the

constitutionality of the practices, the objection would have been overruled as meritless. "Omitting meritless arguments is neither professionally unreasonable nor prejudicial." *Coley*, 706 F.3d at 752. Therefore, Petitioner has failed to show that her trial or appellate counsel rendered ineffective assistance by failing to challenge the constitutionality of juror questions or predeliberation juror discussion of the evidence and she is not entitled to habeas relief on this claim.

B. Confrontation of Gustavo Pop

Finally, Petitioner contends that her trial counsel rendered constitutionally ineffective assistance by failing to object to the presentation of Gustavo Pop's testimony by a DVD of his preliminary examination testimony. Although the DVD is not part of the record in this Court, the Respondent filed the preliminary examination transcript. (Prelim. Exam. Tr. I, ECF No. 8-2.) Fireman Pop's testimony was brief. (*Id.*, PageID.420-429.) Most of Pop's testimony was cross-examination by Petitioner's trial counsel. (*Id.*, PageID.423-429.) Pop and his partner attempted to enter Calista's bedroom, climbing a ladder to the second-floor window. Initially the room was too hot. They were able to cool it down sufficiently with a hose to enter. Visibility was limited. Pop located Calista by feel. He tried to remove her. He was able to get his hands underneath her, but could not lift her. At that time, Pop could not discern why he was unable to lift Calista; but, recognizing that Calista was already dead, she was left in the room for the investigation.

Petitioner contends the admission of Pop's testimony violated her rights under the Confrontation Clause. The Confrontation Clause of the Sixth Amendment gives the accused the right "to be confronted with the witnesses against him." U.S. Const., Am. VI; *Pointer v. Texas*, 380 U.S. 400, 403-05 (1965) (applying the guarantee to the states through the Fourteenth Amendment). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an

(Mich. Ct. App. Op., ECF No. 8-38, PageID.3715-3716.)

Petitioner raised the issue for the first time in her first motion for relief from judgment. (Mot. for Relief from J., ECF No. 8-32.) She basically copied the issue as her husband had raised it on direct appeal. Her husband had pointed out that his counsel did not cross-examine Pop at the preliminary examination. In repeating her husband's issue, Petitioner repeats that claim—asserting that her counsel did not cross-examine Pop. In Petitioner's case, however, that assertion is plainly false. Most of Pop's testimony was cross-examination by Petitioner's trial counsel. (Prelim. Exam. Tr. I, ECF No. 8-2, PageID.423-429)

The trial court refused to consider the issue because the issue had been raised on direct appeal and decided. The issue was raised by Petitioner's husband and decided against him—it was not decided against Petitioner. Nonetheless, the court of appeals and the supreme court upheld the trial court's rejection of the claim.

The best explanation of Pop's absence from the trial appears in the prosecutor's opening argument:

> Gustavo Pop. You see it says DVD. Gustavo Pop is a firefighter for the Centreville Fire Department. He was the first person inside of the house when the fire was happening.
>
> Unfortunately—He was able to testify at the preliminary examination when we had it. He's in the military, and he's stationed, I believe, in Texas; so he was not able to come. Had we brought him back here, the training that he's involved in would have—He would have had to stop and then go back and start it all over again.
>
> So Mr. Bland, Mr. Bush, and I talked about it, and they agreed we're just going to play the DVD of his testimony for you from the preliminary examination. So just because it's on a DVD doesn't mean that it's not the same evidence as if he were sitting right here today. It's just—That's why you're going to see a DVD.

(Trial Tr. II, ECF No. 8-15, PageID.1498.) Petitioner does not argue that the admission of Pop's preliminary examination testimony was improper because Pop was not unavailable. Instead, she focuses on preliminary examination testimony as not offering a sufficient opportunity for cross-

adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The Confrontation Clause therefore prohibits the admission of an out-of-court testimonial statement at a criminal trial unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

Petitioner did not raise this issue on direct appeal, but her husband did. The Michigan Court of Appeals resolved his claim as follows:

> Anthony argues that the admission of the preliminary examination testimony of Gustavo Pop, one of the firemen who responded to the fire, violated his right of confrontation because he never had an adequate opportunity to cross-examine Pop. Defense counsel, however, stipulated to the admission of Pop's preliminary examination testimony. A "[d]efendant may not assign error on appeal to something that his own counsel deemed proper at trial." *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Accordingly, Anthony is precluded from arguing on appeal that the admission of Pop's preliminary examination testimony violated his right of confrontation.
>
> However, Anthony claims that defense counsel was ineffective for stipulating to the admission of Pop's preliminary examination testimony. The Confrontation Clause bars the admission of testimonial statements of a witness who does not testify at trial unless the witness was unavailable to testify, and the defendant had a prior and adequate opportunity to cross-examine the witness. *Crawford*, 541 US at 57, 68. Testimonial statements include testimony given at a preliminary examination. *Id.* at 68. Anthony does not dispute that Pop was unavailable for trial and that he had an opportunity to cross-examine Pop at the preliminary examination. He claims that because the preliminary examination occurred more than one year before trial and because a different standard of proof is employed at a preliminary examination than at trial, he did not have an adequate opportunity to cross-examine Pop. The purpose of a preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed the crime. *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). Admittedly, the standard of proof at a preliminary examination is lower than the standard of proof at trial. See *id.* However, because the purpose of the preliminary examination was to establish whether there was evidence that Anthony committed the charged offenses, Anthony had an adequate opportunity to confront Pop at the preliminary examination. Accordingly, any objection by defense counsel to the preliminary examination testimony of Pop would have been futile. Counsel was not ineffective for failing to make a futile objection. *Fike*, 228 Mich App at 182. Defense counsel's performance in stipulating to the admission of Pop's preliminary examination testimony did not fall below objective standards of reasonableness.

examination to overcome the confrontation problem. The court of appeals disagreed, reasoning that Petitioner's husband "had an adequate opportunity to confront Pop at the preliminary examination. (Mich. Ct. App. Op., ECF No. 8-38, PageID.3716.) For that reason, the court of appeals concluded that any objection would have been futile.

The Sixth Circuit has noted that there exists "some question whether a preliminary hearing necessarily offers an adequate prior opportunity for cross-examination for Confrontation Clause purposes." *Al-Timimi v. Jackson*, 379 F. App'x 435, 437-38 (6th Cir. 2010) (citing, *inter alia, Vasquez v. Jones*, 496 F.3d 564, 577 (6th Cir. 2007) (doubting whether "the opportunity to question a witness at a preliminary examination hearing satisfies the pre-Crawford understanding of the Confrontation Clause's guarantee of an opportunity for effective cross-examination") (internal quotation marks omitted)). But the Supreme Court has never held that a defendant is denied his rights under the Confrontation Clause when a witness is unavailable at trial and the court admits the witness's preliminary examination testimony. *Id.*, at 438. As a result, in the context of a federal court sitting on habeas review, the Sixth Circuit has concluded that a state court's determination that testimony from the preliminary examination was properly admitted was not an unreasonable application of clearly established Supreme Court precedent. *Id.* at 438-40; *see also Williams v. Bauman*, 759 F.3d 630, 636 (6th Cir. 2014) (citing *Al-Timimi* with approval and upholding on habeas review the admission of testimony from the petitioner's own preliminary examination).

This Court must defer to the state court of appeals' determination that the admission of Pop's preliminary examination testimony did not violate confrontation rights because it is not contrary to, or an unreasonable application of, clearly established federal law. That reasonable application of *Crawford*, in turn, has precisely the effect the court of appeals identified: it renders

a confrontation objection to the admission of the preliminary examination testimony futile. Counsel's failure to raise a meritless issue does not constitute ineffective assistance. *See Sutton v. Bell*, 645 F.3d 752, 755 (6th Cir. 2011) ("Given the prejudice requirement, 'counsel cannot be ineffective for a failure to raise an issue that lacks merit.'"). Accordingly, Petitioner is not entitled to habeas relief on her final claim.

Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (per curiam). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, I have examined each of Petitioner's claims under the *Slack* standard. Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of Petitioner's claims. *Id.*

I find that reasonable jurists could not conclude that this Court's dismissal of Petitioner's claims would be debatable or wrong. Therefore, I recommend that the Court deny Petitioner a certificate of appealability.

Moreover, although I conclude that Petitioner has failed to demonstrate that he is in custody in violation of the constitution and has failed to make a substantial showing of a denial of a constitutional right, I would not conclude that any issue Petitioner might raise on appeal would be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

Recommended Disposition

For the foregoing reasons, I recommend that the habeas corpus petition be denied. I further recommend that a certificate of appealability be denied. Finally, I recommend that the Court not certify that an appeal would not be taken in good faith.

Dated: January 31, 2020

/s/ Ray Kent
Ray Kent
United States Magistrate Judge

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within 14 days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).

APPENDIX (D)

People v. Springer, 2017 Mich. LEXIS 2109, Michigan Supreme Court Justice BERNSTEIN dissenting indicating he would grant leave to appeal.

*2017 Mich. LEXIS 2109, **

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MARSHA ANNE SPRINGER, Defendant-Appellant.

SC: 155687

SUPREME COURT OF MICHIGAN

2017 Mich. LEXIS 2109

October 24, 2017, Decided

PRIOR HISTORY: [*1] COA: 335522. St. Joseph CC: 09-015639-FC.
People v. Springer, 2012 Mich. App. LEXIS 1740 (Mich. Ct. App., Sept. 13, 2012)

JUDGES: Stephen J. Markman, Chief Justice. Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, Joan L. Larsen, Kurtis T. Wilder, Justices. BERNSTEIN, J., would grant leave to appeal.

OPINION

Order

On order of the Court, the application for leave to appeal the March 9, 2017 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

BERNSTEIN, J., would grant leave to appeal.

APPENDIX (D)

APPENDIX (E)

Sept. 7, 2000, Email from DR. JEFFREY A. KAYLOR to MARSHA SPRINGER.

Marsha Springer

From: Jeffrey A. Kaylor <neurojeff@worldnet.att.net>
To: Marsha Springer <mspringer@voyager.net>
Sent: Thursday, September 07, 2000 10:25 PM
Attach: Autism-PDD Resources Network Main Page.url
Subject: Autism-PDD Resources Network Main Page

Marsha,

This is a well done site that you may find worthwhile. I believe Calista has PDD, because of the lead poisoning, maternal neglect, and probably her genetics as well.

Courtney and Heather are both perfect and normal children. Hair cutting is a young child's activity. Normal 9 1/2 year old girls are usually into (1) being lady's (at that age boys are "gross"), (2) horses, and (3) In Sync and Brittany.

Calista hates boredom, and she craves stimulation, action, and excitement. Although you and I would not like it, Calista would rather have someone screaming at her and spanking her than ignoring her and being calm and quiet.

The CNS stimulating medications (Ritalin, Cylert, Adderall, Dexedrine) are used to try to decrease this stimulation/thrill seeking behavior, but Calista is an unusual child in many ways, and obviously the CNS stimulating meds have not done the trick.

Unfortunately, Calista almost needs to be in an institution to provide the amount of supervision she needs to keep her from killing herself by bad judgment.

You make the fanciest e-mail I have ever seen. I'm impressed by how much you have learned in such a short time.

Jeff kaylor

APPENDIX (E)

9/ '00

APPENDIX (F)

August 31, 2009 MOTION TO QUASH and MOTION IN LIMINE.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ST. JOSEPH

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

VS.

ANTHONY JOHN SPRINGER,
Defendant.

Hon. Paul E. Stutesman

File No. 09-15638 FC

FILED
JUN 23 2009
PATTIE S. BENDER
ST. JOSEPH COUNTY CLERK

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MOTION TO QUASH FELONY MURDER CHARGE

Defendant, Anthony John Springer, by his Attorney moves this Court to dismiss the charge of Felony Murder for the following reasons:

1. On April 1, 2009, following a Preliminary Examination, Anthony John Springer was bound over on a Felony Murder charge.

2. Such a charge allows the jury to be instructed to consider Felony Murder. The evidence at the Preliminary Examination did not support the bind over on Felony Murder.

3. To establish Felony Murder, the Prosecutor must prove murder committed in the perpetration of, or attempt to perpetrate Arson, Criminal Sexual Conduct in the First, Second or Third Degree, Child Abuse in the Fir st Degree, major Controlled Substance Offenses Robbery, Carjacking, Breaking and Entering of a Dwelling,

Home Invasion in the First or Second Degree, Larceny of any Kind, Extortion, Kidnapping, Vulnerable Adult Abuse in the First and Second Degree under Section 145n, Torture under Section 85, or Aggravated Stalking under 411i. MCL 750.316(1)(b).

> The elements of Felony Murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e. Malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the Statute. People vs. Carines's 460 Mich 750, 598 N.W. 2d 130 (1999).

Since no evidence was not presented to establish all of the elements, the information must be quashed.

4. It is incumbent upon this Court to dismiss because there is no evidence which would support the charge of Felony Murder, the Defendant is exposed unnecessarily to the risk of a unfair compromise verdict as this matter involving the underlying felonies of Child Abuse and Torture.

5. The fact that Calista Springer was restrained, unhappy living with her parents, disciplined by her parents and exhibited unconventional behavior and eating habits does present factual questions for the jury on the underlying felonies of Child Abuse or Torture. There is simply no evidence that Calista Springer's death occurring as a result of a house fire occurred as a result of Defendant's intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result.

For these reasons, Anthony John Springer requests that the Court quash the Information charging Felony Murder.

Respectfully submitted,

Date: 6-23-09

John P. Bush, Attorney for Defendant

SPRINGERMOTQUASH.FEL

MR. MCDONOUGH: In this case, your Honor, I don't believe that Ms. Skelding even looked into the fact that—the chain to the bed. She didn't—You know, she, obviously, wasn't there.

She examined her head. There was testimony that there was a spot on her head that was missing hair.

Not being able to brush her teeth and being sent to bed without supper, obviously, you know, those—she cannot look into that. I mean, she could ask the Springers, but they're going to lie about it.

MR. BLAND: Well, I'm going to object. I'm going to object to that inference, your Honor.

THE COURT: I'll—I'll sustain that—that objection. That's—That's the whole reason hearsay is not allowed. You can't introduce—

MR. MCDONOUGH: But—

THE COURT: —one statement—

MR. MCDONOUGH: —you know, the fact of the matter is, your Honor, she was found chained to her bed. And I think right there is as much trustworthiness as we need to those statements. You know, the fact of the matter is, she was found chained to her bed with a dog chain with twist ties exactly how she described it to Ms. Skelding.

THE COURT: That's another interesting factor that's not been raised is that this was brought to the State's

attention back in 2004, this allegation which has led to a charge of child abuse and torture. The State investigated it and did not do anything to stop it. So they were clearly aware of the claim in 2004.

One of the questions I had was whether or not there's an argument that—to be—to be raised in that regard that the State's involvement condoning the use of the chain by not taking any action would raise any argument for the defense in terms of due process rights, but that's not been raised here.

But, clearly, it can be offered as both non-hearsay—that we received these complaints and this is the investigation we did—and an instruction can be given to the jury that they're not to take it as the truth; or it can be argued that there is a 804(b)(7). The problem is that for the—Verification has to be something other than what's contained in the case, some independent verification.

But I'm indicating that the statement can come in under the argument that there has to be an explanation as to what the State did and why they became involved. So the statement can come in. I'll decide at the time of trial—the evidence that's presented—as to what, if any, clarifying instruction needs to be given to the jury in regards to that evidence. It could be under either.

And since it wasn't really flushed out at the

APPENDIX (G)

Trial Testimony of PATRICIA SKELDING (DHS/CPS) agent; pgs. 997-1000.

THE COURT: It doesn't matter if you knew about it. You're not the witness that needs to testify about those. We would have to take that from some other source.

So unless you were involved in something, please don't testify—

THE WITNESS: I'm explaining why I made my decision during the investigation.

THE COURT: Okay. But, again, you just need to say what your investigation involved and what you did, not tell us everything else that somebody else told you.

THE WITNESS: Well, anyway, I believed and trusted the people in my office and Community Mental Health that they knew what they were doing when they diagnosed her and that the overall end to that was that she needed to be protected, she needed to be safe, and she needed to be restrained at night and that the parents couldn't be up 24 hours a day supervising her. So what I'm saying is it was accepted that everybody knew that.

And so during my investigation when my supervisor handed me the referral, she didn't say anything about the part of Calista being chained to her bed as if we already know that—we've already known that.

BY MR. MCDONOUGH:

Q Okay. Did you speak to the Springers about chaining their child to the bed?

A Correct. Yes, I did.
Q Did you tell them it was okay?
A No, I didn't like it.
Q Did you tell them not to do it?
A No.
Q Did you ever—
A 'Cause I believed it was necessary.
Q Did you believe it was necessary for her to be watched over—
A Yes.
Q —or did you believe it was necessary for her to have a chain around her waist attached to the bed?
A I believed it was necessary to restrain her at night in order to protect her and keep her safe and to keep the family safe.

Because when—When I got the referral, my supervisor did direct me to go speak to the other coworker, the one who knew the family better and had been involved from the beginning.

And that coworker told me Calista is being chained to her bed with permission from Community Mental Health. And she already knew that before I even got the assignment. So that told me that—I believed at the time that everybody knew that; that Community Mental Health knew that; that my supervisor knew that; that the coworker knew that. That was before I even actually started the investigation.

My supervisor explained to me that the part of the

investigation I was investigating was the part that there was an injury to her head caused by a parent pulling her hair. That was the part I was to substantiate or unsubstantiate.

Q And this is in 2004?

A Correct. That was the last investigation with her.

MR. MCDONOUGH: I have nothing further.

THE COURT: Mr. Bush?

CROSS-EXAMINATION

BY MR. BUSH:

Q I'm John Bush. We met before. I'm representing Tony Springer.

So we're really clear, when in 2004 did you actually make the investigation?

A I don't remember the exact day without my notes. I think it was October 2004, but I'm not sure of the month.

Q And, as a result of that, did--did you go to the Springer home?

A I first went to school and interviewed all three kids.

Q Did you go to the Springer home?

A Then I went to the Springer home, yes.

Q Did you talk to Mr. Springer?

A Mr. and Mrs. Springer were both there, but Mrs. Springer did all of the talking.

Q They were in the same room?

A In the same room.

Q So to speak, your interview for the Springers was that one

time in the room with Mr. and Mrs. Springer?

A And the children were present, too, yes.

Q Is that the only time you were in the Springer home?

A The last time.

Q Okay. In the 2004—

A Right. That was the—

Q —that was the one time?

A —only one time.

MR. BUSH: I have no further questions, your Honor.

THE COURT: Mr. Bland?

CROSS-EXAMINATION

BY MR. BLAND:

Q If I understand your testimony, then, you believe that the restraint or chaining to the bed had been authorized; is that correct?

A I believed that, yes.

Q All right. And, in fact, you believed it to be necessary yourself; is that correct?

A According to what they told me and what I believed, yes—

Q All right.

A —I believed it was necessary.

MR. BLAND: All right.

I don't have any further questions.

THE COURT: Mr. McDonough, any questions?

APPENDIX (H)

Trial Testimony of (DHS/CPS) supervisor CYNTHIA BARE; pgs. 1022-1028.

(At 10:53 a.m., proceedings reconvened)

THE COURT: All right. Let's go ahead and be seated.

MR. MCDONOUGH: . . . jury, your Honor, in regards to the next witness?

THE COURT: Sure.

MR. MCDONOUGH: In my opening, I gave you guys a roadmap as to who I expected to call on each day and in what order they would be.

Our next witness was not among the people that I listed to you. She was one of the people that we had subpoenaed and missed it as a witness. But we have decided to call her now. So our next witness will be Cindy Bare.

THE CLERK: Please stand and raise your right hand. Do you solemnly swear the testimony you're about to give in this case will be the truth, the whole truth, and nothing but the truth, so help you God?

MS. BARE: Yes.

THE CLERK: Thank you.

CYNTHIA BARE,

called at 10:53 a.m., and sworn by the clerk, testified:

DIRECT EXAMINATION

BY MR. MCDONOUGH:

Q Good morning.

A Good morning.

Q Could you please state your name and spell your first and last name for the record.

A It's Cynthia Bare—C-y-n-t-h-i-a; Bare—B-a-r-e. I go by Cindy—C-i-n-d-y.

Q And were you—Are you retired?

A Yes, I am.

Q And where did you retire from?

A From the Saint Joseph County Department of Human Services.

Q How long did you work there?

A Thirty-one—Well, I worked for the State for 31 years.

Q And, when you retired, what was your position?

A I was the Children's Protective Services supervisor.

Q And how long did you hold that position?

A Approximately—I had it since 1994, so that would have been 13 years.

Q So in 2004 you were at that position?

A That's correct.

Q And what were your duties as the supervisor?

A To review all referrals, assign the ones that were appropriate for field investigation, read reports, review petitions to the court for court jurisdiction.

I also sat on numerous boards, including the Wraparound team in Saint Joseph County.

Q Were you Pat Skelding's supervisor?

A That's correct, I was.

Q Were you aware of the Springer case?
A Yes, I was.
Q Did DHS, under your direction, ever authorize the Springer family to chain their child to the bed?
A Absolutely not.
Q Did they ever authorize the Springer family to restrain their child to the bed?
A The only thing that was ever authorized--And this came as a part of protec--being the protective services supervisor and a Wraparound team member.--was that we authorized the use of an alarm system so that she could--they could be aware if she got out of bed, left the room, whatever. And, in fact, we did that because there was concern that they would even lock her in the room, which was not appropriate.
Q And the buck stopped with you?
A Absolutely.
Q You were the boss?
A Yes.
Q As a part of your job did you review the reports written by your caseworkers?
A Yes, I did.
Q Did that include Pat Skelding's reports?
A Yes, it did.
Q Did you review the Springer cases?
A I did.

Q Did you review reports that indicated Calista was being chained to the bed?

A I—I reviewed the report that that was the allegation, yes.

Q And did you sign off on the nonsubstantiation of that?

A I did sign the report—This is not excuse whatsoever, but it was at the time that my son was injured in a wreck.—and I didn't really have a clear recollection when it came back to me that I had. But I did. I mean my name was there. I would not have signed it if I hadn't read it—or at least thought I read it thoroughly.

Q Was a mistake made?

A Absolutely.

Q In your 31 years with the Department of Human Services, was there ever a family authorized to chain their child to the bed?

A Absolutely not.

MR. MCDONOUGH: Thank you.

MR. BUSH: Mr. Bush?

CROSS-EXAMINATION

BY MR. BUSH:

Q Ms. Bare, I just have a few questions.

You're a supervisor so you're not out in the field; you're not personally talking to families, police officers, and any type of investigation?

A That's—A rare time a police officer will call me, but I don't,

as a rule, talk to people outside the—in the field, no.

Q And, in fact, you never talked to Calista Springer in this case?

A No, I did not.

Q And, equally, you never talked to Marsha Springer or to Tony Springer?

A No.

Q But on a certain day you signed a document that closed the investigation?

A I did.

Q Would have opening that investigation sent a message to the family that the Department of Human Services was not going to condone chaining?

A Yes.

Q In fact, that's what you told Mr. McDonough, I think, in hindsight you wish you would have done it differently?

A I wish I would have been more aware, yes, at the time.

MR. BUSH: Thank you. I have no further questions.

THE COURT: Mr. Bland?

CROSS-EXAMINATION

BY MR. BLAND:

Q Ms. Bare, you were getting reports about a child being restrained or, more specifically, Calista Springer being restrained over the years, were you not?

A At least once. As I reviewed the record, yes.

Q Okay. And the bottom line here is you were aware of that, correct?

A I was aware of the allegation, not that—

Q Okay.

A —they ever—

Q Don't play games. Were you aware of that allegation—

MR. MCDONOUGH: Asked—

BY MR. BLAND:

Q —yes or no?

MR. MCDONOUGH: —and answered, your Honor.

MR. BLAND: No, it's not asked or answered.

THE WITNESS: Yes, I was aware.

THE COURT: Everybody, we'll tone it tone for one thing.

Mr. Bland, you don't lecture the witness. If you have a problem, you ask for me to correct her. You don't correct her.

Mr. McDonough, you don't need to raise your voice. We're in a courtroom. This isn't *Jerry Springer*. This isn't something you see on TV, even though there's cameras here. Behave accordingly.

Now, ma'am, listen to his question that he's asking and answer his question, and then we'll proceed accordingly.

BY MR. BLAND:

Q You were aware of those allegations?

A I was aware of the allegation.

Q And the bottom line here is you did nothing about it, correct?

A That's correct, I didn't see that there was the evidence that—

MR. BLAND: All right. I have no further questions.

THE COURT: Mr. McDonough?

REDIRECT EXAMINATION

BY MR. MCDONOUGH:

Q By signing your name to that document, were you condoning the behavior?

A Absolutely not.

Q If Pat Skelding felt that the department had—had condoned chaining Calista to the bed, would she have been mistaken?

A Absolutely.

MR. MCDONOUGH: I have nothing further.

THE COURT: Mr. Bush?

MR. BUSH: Nothing, your Honor.

THE COURT: Mr. Bland?

RECROSS-EXAMINATION

BY MR. BLAND:

Q Ms. Bare, you tacitly condoned it because you did nothing; isn't that correct?

A I don't recall reading it at the time. If I would have read it, then the case would have been opened. It was a failure—because of where my head was at—that I missed it. I

APPENDIX (I)

People v. Springer, 498 Mich. 889 (2015) Michigan Supreme Court Order of Remand to the trial Court for hearing on Ineffective Assistance of Counsel pertaining to Entrapment By Estoppel.

APPENDIX (I)

*498 Mich. 889, *; 869 N.W.2d 616;*
*2015 Mich. LEXIS 2200, **

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MARSHA ANN SPRINGER, Defendant-Appellant.

SC: 150692

SUPREME COURT OF MICHIGAN

498 Mich. 889; 869 N.W.2d 616; 2015 Mich. LEXIS 2200

September 30, 2015, Decided

PRIOR HISTORY: **[**1]** COA: 323617. St Joseph CC: 09-015639-FC.
People v. Springer, 2012 Mich. App. LEXIS 1740 (Mich. Ct. App., Sept. 13, 2012)

JUDGES: Robert P. Young, Jr., Chief Justice. Stephen J. Markman, Mary Beth Kelly, Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, Justices.

OPINION

[*889] Order

On order of the Court, the application for leave to appeal the November 19, 2014 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE in part the St. Joseph Circuit Court order of July 24, 2014 denying the defendant's motion for relief from judgment. The issue of entrapment by estoppel was not addressed in the circuit court or by the Court of Appeals in the defendant's appeal of right. Therefore, MCR 6.508(D)(2) does not apply. We REMAND this case to the trial court to hold a hearing on the defendant's ineffective assistance of counsel arguments pertaining to the issue of entrapment by estoppel. We further ORDER the St. Joseph Circuit Court, in accord with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint **[*890]** counsel to represent the defendant at the hearing. In all other respects, leave to appeal is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief **[**2]** under MCR 6.508(D).

APPENDIX (J)

May 12, 2016 Ineffective Assistance of Counsel Hearing.

STATE OF MICHIGAN

45TH CIRCUIT COURT (ST. JOSEPH COUNTY)

THE PEOPLE OF THE
STATE OF MICHIGAN,

Appellee,

v File No. 09-15638 FC

ANTHONY JOHN SPRINGER,

Defendant-Appellant.
_____/

THE PEOPLE OF THE
STATE OF MICHIGAN

v File No. 09-15639 FC

MARSHA ANNE SPRINGER,

Defendant-Appellant.
_____/

Evidentiary Hearing
Before Honorable Paul E. Stutesman P46810, Circuit Judge
Centreville, Michigan – Thursday, May 12, 2016

APPEARANCES:

For the People:	Erin E. Harrington P71394 and John Lawrence McDonough P68576 Office of the Prosecuting Attorney 125 West Main Street, PO Box 250 Centreville, Michigan 49032-9623 (269) 467-5547
For Defendant Anthony Springer:	Mary Anna Owens P33896 124 Fulton Street E, Suite 100 Grand Rapids, Michigan 49503-3230 (616) 742-0431
For Defendant Marsha Springer:	Ronald D. Ambrose P45504 16818 Farmington Road Livonia, Michigan 48154-2947 (248) 890-1361

APPENDIX (J)

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Centreville, Michigan

Thursday, May 12, 2016 - 9:51 a.m.

THE COURT: This is People of the State of Michigan versus Anthony Springer in 09-5638 [*sic*] FC and People of the State of Michigan versus Marsha Springer, 09-15639.

Ms. Harrington is here on behalf of the prosecuting attorney.

In file 1-09-5638 [*sic*] FC on Anthony Springer, Mary Owens is here.

Good morning.

MS. OWENS: Good morning, your Honor.

THE COURT: And then, on the case of 09-15639-Marsha Anne Springer, Mr. Ambrose is here.

MR. AMBROSE: Yes, your Honor.

THE COURT: We're going to make a combined record for both cases. So there'll be one transcript for both.

But, in order to accommodate our seating, we're going to have Mr. Springer and Ms. Owens sit first at the table, conduct their examination; and then we'll have Mr. Ambrose come forward with his client and conduct an investigation [*sic*]-questioning. Both counsel will be allowed to question the witnesses as we proceed.

We're here today at direction of the supreme court. In Mr.-Ms. Springer's case, by way of history, I'll quote from Mr. Ambrose' brief. It indicates:

Defendant filed her motion for relief from judgment on February 7th, 2014. Within the motion, defendant raises an issue of entrapment by estoppel and ineffective assistance of counsel for failing to raise this issue.

Defendant states in motion that she explained to her trial counsel that the Michigan Department of Human Services, Children's Protective Service, and Community Mental Health advised that she restrain her daughter at night for her daughter's general welfare.

The court denied defendant's motion on July 24th, 2014, stating the issues raised in the motion were addressed in her prior appeal and, therefore, were denied pursuant to 6.508(D)(2).

Defendant's application for leave to appeal to the Michigan Court of Appeals was denied on November 19th–19th, 2014.

Defendant then filed an application with the supreme court, which was granted on September 30th, 2015.

In its order, the Michigan Supreme Court states the issue of entrapment by estoppel was not addressed in the circuit court or by the court of appeals in the defendant's appeal of right. Therefore, 6.508(D)(2) does not apply.

We are remanding this case to the trial court to hold a hearing on the defendant's ineffective assistance of counsel arguments pertaining to the issue of entrapment by

estoppel.

Appellate counsel was appointed for defendant on November 2nd, 2015.

A briefing schedule was set, and it's set for hearing today.

In Mr. Springer's case, it would indicate that, on July 24th, the Court denied the motion for relief from judgment.

Defendant appealed to the court of appeals, which denied the application because defendant had failed to meet the burden of entitlement to relief under 6.508(D).

Defendant then applied to the Michigan Supreme Court, and it was denied on July 28th, 2015, for the same reason.

And then, after the court had granted Mrs. Springer's request, they reviewed this case; and the supreme court, on its own motion, indicates:

We vacate our order of July 28th of 2015, which was the one that denied application for reconsider—or for leave to appeal.

On order of the court, the application for leave to appeal the October 27th, 2014, order of the court of appeals is again considered; and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate, in part, the Saint Joseph County Circuit Court order of July 24th, 2014,

denying the motions for relief from judgment.

The issue of entrapment by estoppel was not addressed in the circuit court or by the court of appeals in the defendant's appeal of right. Therefore, 6.508(D)(2) does not apply.

We are remanding this case to the trial court to hold a hearing on defendant's ineffective assistance of counsel arguments pertaining to the issue of entrapment by estoppel.

We further order the supreme—or the Saint Joseph County Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant at the hearing.

In all other respects, leave to appeal is denied because defendant has failed to meet the burden of establishing entitlement to relief under 6.508(D).

Counsel was appointed. Ms. Owens is here. Same briefing schedule was set, and they're both here.

In order to determine ineffective assistance of counsel—Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. To establish a claim of ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced

the defense, *Strickland* v *Washington*, 466 US 668, and *People* v *Pickens*, 446 Mich 298.

The defendant must show that it fell below an objective standard of reasonableness under the prevailing professional norms, *People* v *Taylor*, 275 Mich App 177.

The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. To demonstrate prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, the result of the previous seating would have been different, again, quoting *Strickland* and *Stanaway*.

The court must determine whether counsel made an error so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment, *People* v *Mitchell*, 454 Mich 145.

Decisions what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People* v *Davis*.

A defense is substantial if it might have made a difference in the outcome of the trial, *People* v *Kelly*, 186 Mich App 524.

Competent counsel can be expected to undertake a thorough investigation of law and facts relevant to plausible options for the defense, *Couch* v *Booker*, 632 F3d 241, out of California which quoted *Strickland*.

While this does not require counsel to investigate every conceivable defense, any limitation on counsel's investigation must be supported by a reasonable, professional judgment. A lawyer cannot make a protected strategic decision without investigating the potential bases for it, and it's particularly unreasonable to fail to track down readily available and likely useful evidence that a client himself or herself asks his or her client [*sic*] to—counsel to obtain.

In *Couch*, defense counsel was ineffective for failing to investigate a causation defense where he was aware of several facts that made a causation defense a plausible option when the defendant not only told him to pursue the defense but, also, told him to do so by obtaining a readily available report about the incident.

Defense counsel may not use trial strategy to insulate trial decisions if counsel cannot provide a reasonable basis for the chosen strategy, particularly where the strategy is chosen before conducting any reasonable investigation.

A defendant is entitled to have his or her attorney prepare and investigate all substantial defenses, *Kelly*, 186 Mich App 526.

The evidentiary hearing must be presented if counsel—if ineffective assistance of counsel is based on matters not of record.

It is well established that a defendant in a criminal case who asserts ineffective assistance of counsel waives, by doing so, the attorney-client privilege, *Virgil and Barbara Howe* v *Detroit Free Press*. 440 Mich 203.

A client's allegation that an attorney breached his or her duty to the client waives the attorney-client privilege with regard to all communications relevant—relevant to the alleged breach, *People* v *Houston*, 448 Mich 312.

The defendant—In terms of ineffective assistance on appeal, the defendant was provide—deprived of his appeal of right as a result of constitutional ineffective assistance of counsel where the failure to perfect an appeal of right was solely the fault of defendant's trial counsel who did not fulfil his promise in open court to file the necessary paperwork to begin the appellate process.

An appellate attorney may be ineffective for failing to raise the issue of defendant trial court's [*sic*] effectiveness.

And it goes on. So same standard as the other.

With those, let's bring the witnesses in. And we have both defendants' trial counsel and both defendants' appellate counsel here for the evidentiary examination.

MS. OWENS: Your Honor, I'm going to request that the witnesses be sequestered.

THE COURT: We'll explain that to them, too. They

are waiting in a general room together. I will instruct them that they're not to discuss the case and they're not to discuss it after they testify.

MS. OWENS: I'd like them not to hear their—each other's testimony.

THE COURT: They will not hear each—

MS. OWENS: Thank you.

THE COURT: —other's testimony.

You can stand right there, gentlemen—right by the podium.

Could you identify yourselves for the record.

MR. BLAND: May it please the Court, my name is Victor Bland.

MR. ROACH: Good morning, your Honor.

John Roach.

MR. BUSH: John Bush, your Honor.

MR. DAVIDSON: Good morning, your Honor.

Randy E. Davidson from the State Appellate Defender.

THE COURT: Good morning.

We're here today at the direction of the supreme court regarding the cases that you represented the defendants in.

And, rather than do this individually with each of you, we thought we'd just cover it with you together. And I'm sure you all understand it, but we're making a record.

So, with that, I'll, again, indicate that it is well established that a defendant in a criminal case who asserts ineffective assistance of counsel waives, by doing so, the attorney-client privilege. That's *Howe* v *Detroit Free Press*, 440 Mich 203.

A client's allegation that an attorney breached his or her duty to the client waives the attorney-client privilege with regard to all communications relevant to the alleged breach, *People* v *Houston*, 448 Mich 312.

Do you all understand that?

MR. BLAND: Yes, your Honor.

MR. ROACH: Yes, your Honor.

MR. BUSH: Yes, your Honor.

MR. DAVIDSON: Yes, your Honor.

THE COURT: And I assume that both of you have explained that to your clients, also.

MS. OWENS: Yes, your Honor.

MR. AMBROSE: Yes, your Honor.

THE COURT: All right. So, when we come back in, there should be no concern about you disclosing anything of attorney-client privilege in this case as there is an allegation of ineffective assistance of both appellate and trial counsel. So that issue is waived by their motions, and you are not bound by the privilege anymore.

You all understand that?

MR. BLAND: Yes, your Honor.

MR. ROACH: Yes, your Honor.

MR. BUSH: Yes, your Honor.

MR. DAVIDSON: Yes, your Honor.

THE COURT: All right. Now Counsel have also asked that you be sequestered. And you all understand what that means, but I will just indicate that that means you're not to discuss, while you're waiting to testify, anything about the case and that you're not to discuss your testimony after you testify with anybody else.

Also, as I instructed you, that, if you're going to wait in the attorneys' lounge, please do not turn that TV on 'cause you're not to listen to any of the conversa—any of the testimony that take place in the courtroom.

Do you all understand that?

MR. BLAND: I understand, your Honor.

MR. ROACH: Yes, Judge.

MR. BUSH: Fully understand, your Honor.

MR. DAVIDSON: Yes, your Honor.

THE COURT: Anything else then from either counsel?

MS. OWENS: No, your Honor, except I would ask—Our first witness is going to be Mr. Bush, so he might want to remain.

THE COURT: Okay. Mr. Ambrose?

MR. AMBROSE: Nothing further, your Honor.

THE COURT: All right. Thank you, gentlemen.

If you'd go ahead and go wait again, but just don't discuss anything about this case.

And you'll know what jurors feel like now as you wait.

Okay. All right. So the process that we're going to do is, again, we're going to question—you're going to call the witnesses. The burden's on you, so you will begin.

MS. OWENS: Thank you very much, your Honor.

THE COURT: I thought we had talked about Mr. Ambrose starting, but—

MS. OWENS: Your Honor, he and I talked; and we thought it might be more efficient if I go first—

THE COURT: Okay.

MS. OWENS: —if that's—

THE COURT: Fair enough.

MS. OWENS: —acceptable to you.

THE COURT: That's fine. I just wanted to be sure that—We—We had discussion in chambers as to what we were going to do today, and so that was different.

All right. So you're going to call Mr. Bush; is that correct?

MS. OWENS: Yes, your Honor.

THE COURT: Come on up, Mr. Bush.

Do you solemnly swear or affirm the testimony you

give will be the truth, the whole truth, and nothing but the truth?

MR. BUSH: I do.

THE COURT: All right. Go ahead and be seated.

The COURT: For the members of the audience that are here—I'm not sure how many of you are here for the trial or not. But this is a court proceeding. That means there is to be no electronic recording of any type to be done unless you have received permission from me.

So there should be no cellphones on. There should not be any recording of anything, and there should not be any discussion while the testimony is being held.

I don't have any court security here, but we have plenty of department of corrections officers. So—Not that they are going to do—need to do anything; but, you know, I don't want to have to hit the buzzer to call for security because we have an outburst.

So, again, please just witness what occurs in court and thank you for being here today.

With that, go ahead.

MS. OWENS: Thank you very much, your Honor.

JOHN P. BUSH,

called at 10:06 a.m., and sworn by the Court, testified:

DIRECT EXAMINATION

BY MS. OWENS:

Q Mr. Bush, my name is Mary Owens; and I'm here on behalf of the defendant Anthony Springer.

And you are John Bush, correct?

A That is correct.

Q And you were Mr. Springer's appointed counsel at trial?

A Yes.

Q Mr. Bush, would you please summarize for us your education and professional experience just briefly.

A I have a Bachelor's degree from DePauw University in political science. That was in 1977.

I received my JD degree from Thomas Cooley Law School in 1980.

I've been practicing in Saint Joseph County since that time doing—probably 50 percent of my practice has been criminal defense work.

Q And what does the other 50 percent consist of?

A A general practitioner. I do some estate planning, a fair amount of domestic relations, some real estate transactions.

Q And does your practice extend beyond Saint Joseph County?

A It rarely does. I have practiced in all of the surrounding counties historically, but I tend to focus mostly in

Saint Joseph County.

Q And you said 50 percent of your practice is criminal in nature, correct?

A Yes.

Q And does that include appointed cases as well as retained cases?

A Yes.

Q Do you have some sort of a contract or an arrangement with the county with regard to criminal appointments?

A I am now; and, during the time of the Springer case, I had a contract with Saint Joseph County doing court-appointed criminal defense work.

Q Misdemeanors or felonies?

A I do both.

Q And approximately how many cases—criminal cases would you say you handle in a given year?

A My best estimate is I probably take on between 70 and 75 new felony cases each year.

Q Just in Saint Joe County?

A Yes, ma'am.

Q Now, back at the time of the trial involving Mr. Springer, would you say your caseload was about the same, greater, lesser?

A I'd say it was the same.

Q And so, of those seven [*sic*] to 75 a year, how many are

capital cases?

A That's very rare. When I tried the Springer case, I know I had no pending other capital cases.

Q So the Springer case would have been your first capital case?

A Oh, no.

Q It was—It was not your first one?

A No, not at all.

Q In your career, how many capital cases would you say you—you've acted on?

A I would say Springer was probably my sixth or seventh murder trial.

Q Sixth or seventh murder trial?

A Yes, ma'am.

THE COURT: The question, though, is how many have you handled, not tried. So, total, how many—

MR. BUSH: I believe the number would be eight then, your Honor.

BY MS. OWENS:

Q Eight or nine—

A Yes.

Q —capital cases that you've handled?

A I have done some capital cases where I was just attorney through the preliminary examination.

Q What did you review in order to prepare for today's hearing?

A I reviewed pleadings filed by you, by the attorney for

Marsha Springer.

I reviewed the response prepared by the Saint Joe County prosecuting attorney's office.

I reviewed the transcript of Anthony Springer's testimony, and I reviewed the attachments, I believe, that were testimony of the DHS workers that were attached to the pleadings.

And I, also—And I, also, made a cursory review of my file.

Q You still have your file, correct?

A Yes, ma'am.

Q When did you first meet Mr. Springer?

A I can't give the exact date. It was within a week or so of the initial appointment. I believe there was a conflict of interest, and I was his second court-appointed attorney.

Q And I'm not interested in the exact date, but it was soon after you were appointed?

A Yes, ma'am.

Q Now you met him at your office?

A Yes.

Q What'd you talk about?

A We talked just about the basic—what was going to happen, what a preliminary examination was. At that point, I don't think I had much of the discovery yet. It tended to be volumes and volumes.

We talked about what he did, talked about what Marsha did in handling their daughter and their children.

Q Well, the first time you met with him a week after your appointment would have been sort of a—an introductory meeting—

A I would—

Q —wouldn't you—

A —call it—

Q —agree?

A —kind of a—kind of a get to know each other discussion.

Q You didn't have much of anything, probably, besides the—the charges, right?

A That's correct.

Q Okay. Now Mr. Springer remained on bond throughout these proceedings; isn't that true?

A That is correct.

Q So I'm assuming that you met with him off and on during the period of time that this case was pending?

A I reviewed my file this week. It appears that I met with him or talked to him on the phone between 18 and 19 times.

Q So there was not really any impediment to your meeting with him relatively frequently? I mean, you didn't have to go to the jail or anything. You could just pick up the phone and say I need to talk to you, right?

A That's correct.

Q And he was cooperative?

A Yes.
Q And did you have any difficulties between yourself and Mr. Springer personally?
A I would say it was a very cordial relationship the whole time.
Q And he was cooperative about explaining the situation that led to the charges, right?
A Yes.
Q Now what were your first actions as his counsel? What did you first do besides looking at the charging sheet?
A As I recall, he wasn't even charged with felony murder when the case first started. I think that came in an amended complaint, if my memory serves me. But it was to get a—kind of a lay of the land. It was kind of a complex situation. And I started reviewing police reports and documents prepared by the various investigators in the case that I was provided by Mr. McDonough's office.
Q Just out of curiosity, did Mr. Mr. McDonough's office send you discovery without your requesting it; or did you have to, you know, file for discovery requests or—
A To the best of my recollection, we had voluntary discovery.
Q So you didn't have any impediments from Mr. McDonough's office?
A No, ma'am.
THE COURT: Hit the button.
MS. HARRINGTON: Your Honor, I'd ask that the Court

clarify with the defendant. Mr. Fisher was in office first, and then Mr. McDonough took office. And I'd like if the attorney could be more specific in terms of discovery and when things were received by which prosecutor.

MS. OWENS: No problem, your Honor. I can rephrase that.

MS. HARRINGTON: Thank you.

BY MS. OWENS:

Q Did you have any difficulty in obtaining discovery materials from the prosecutor's office?

A I did not.

Q They were cooperative?

A Yes.

Q You believe you got all the police reports that you needed?

A I believe I did, yes.

Q And, presumably, the discovery continued throughout the case, right?

A Yes.

Q Now we know the allegations or the facts are that Calista Springer was—died as a result of a house fire, being chained to the bed, right?

A Yes.

Q And, presumably, you discussed that with Mr. Springer right at the outset?

A Yes.

Q What did he tell you?
A Essentially, what he told me was it was a series of efforts that he and his wife had made to protect themselves and protect Calista from injuring herself by ratcheting up, for lack of better terms, the restraints with Calista.
Q Now you're aware, of course, that the Department of Human Services and the Child Protective Services were involved in the Springer family for quite some time, right?
A Yes.
Q When did you become aware of that?
A I'm assuming initially. We had discussions with the attorneys that represented them in the abuse and neglect allegations.
Q So, right from the outset, you knew that there was involvement by DHS—
A Yes.
Q —with regard to Calista and the other two girls, right?
A Yes.
Q And I'm assuming that you got records from the DHS and the CPS?
A I believe I got the records from counsel that were representing Mr. and Mrs. Springer in the probate court.
Q Did you have all of the records from CPS and DHS?
A I don't know.
Q But you relied on counsel for the Springers to send you copies of what they had?

A I met with them.
Q You met with them—with those attorneys?
A Yes.
Q Do you remember their names?
A I think it was Attorney Michael Estelle.
Q And what did you learn specifically with regards to allegations of tethering or restraining Calista?
A That there was a history of dealing with Calista and her behaviors that were problematic to the Springer family; and, over time, they had increased the—their ability to restrain her, I guess, for lack of a better term.
Q You learned that from Springers' family court attorneys?
A I believe so. And, also, the Springers.
Q So when did you become aware that the CPS workers knew that Calista was being restrained?
A I can't say that specifically. I don't know.
Q Relatively soon in your representation?
A I would assume so.
Q If Mr. Springer says he told you—told you right at the beginning or, you know, very early on that the DHS knew that Calista was being restrained, would you deny that?
A I've always felt that DHS understood what the Springer family was doing.
Q Did Mr. Springer tell you that the DHS knew that she was being restrained?

A I don't know if he used those exact words, but I think the inference was—I don't think the Springers were hiding what they were doing.

Q And—And you knew that the Springers had not hidden that fact, right?

A I knew they had increased the restraints on Calista over a period of time. I believe Mr. Springer told me that Calista was only restrained for like two days with the dog chain, which was a trial issue.

Q Did you ever try to speak to any of the CPS or DHS workers yourself that had been involved with the Springer family?

A Not that I recall.

Q So, specifically, Pat Skelding and Cindy Bare, you never made any attempt to contact either of them before trial?

A I don't recall speaking with them.

Q Do you recall seeing any specific reports in which the restraining and/or chaining of Calista was discussed or written down—described—by the CPS workers involved?

A No, I don't.

Q Did Mr. Springer tell you that the DHS—

MS. OWENS: And, your Honor, I'm going to call it the DHS—Okay? We know what it is.—as to—to make it easier, avoid having to say it all.

BY MS. OWENS:

Q Did Mr. Springer tell you that the DHS had approved the use of

restraints?

A He did not.

THE COURT: I'm sorry. I couldn't hear you.

THE WITNESS: He did not.

BY MS. OWENS:

Q Did he tell you that they advised him to restrain Calista at night?

A He did not.

THE COURT: I need to get a clarification here.

And this is—I think is important. There's a history of restraint, and restraint has many different definitions. In the case, there was testimony about alarm systems that would restrain her to her bed that, if she got off the bed, they would go off.

There was different restraints that were used all the way to, at trial, the issue of the dog chains and the zip ties.

So, when you use the word restraint, I don't want there to be any gray area here as to what we're talking about, so—

You asked Counsel, did you know about any restraints.

When you say, Mr. Bush, you didn't know about any restraints, I don't presume that you're taking it to mean the dog chains and the zip ties. I'm talking about any—She's

talking about any restraints. So just so we're clear.

MS. OWENS: And, just for the record, your Honor, I'm not—I'm not conceding that we are limited to the issue of dog chains.

THE COURT: No, but—

MS. OWENS: I want to know exactly what he knew.

THE COURT: I don't want him to be thinking that, when you say restraints, you mean those; whereas, the record could show that it could mean anything.

MS. OWENS: I'm talking about being tied to the bed, restrained to the bed—Okay.

THE COURT: So what—

MS. OWENS: —whatever progressive form that takes.

THE COURT: Okay.

MS. OWENS: Okay.

THE COURT: All right.

BY MS. OWENS:

Q So that did not come out of Mr. Springer's mouth to you, right?

A Would you repeat the question, please.

Q Did Mr. Springer tell you that the DHS had approved restraining Calista?

A I never heard that.

Q But you were aware that the CPS was aware that Calista was being restrained?

A Yes.
Q So, when Mr. Springer tells you, oh, the DHS knows all about this, that was not a surprise to you because you knew that the DHS knew?
A Well, that's what he told me, yes.
Q Now I'd like to get into what strategy you developed as the case progressed. What was your defense strategy?
A The main strategy was that Mr. Springer acted reasonably under all the circumstances to control and discipline and protect his daughter and protect his family.
Q So it was that he acted reasonably and, presumably, that he did not have intent?
A And that's why we—specifically, at trial, I went through the steps that he took to try and control/restrain/tether—whatever term you want to use—Calista; and he discussed specifically why it worked and what it—why it didn't work and what he continued to do.
Q And, as a matter of fact, Mr. Bush, there were a series of defense witnesses presented; is that true?
A Yes.
THE COURT: I can't hear you.
BY MS. OWENS:
Q And I'm not asking you to name names; but, as I recall—
THE COURT: I couldn't hear his answer.
THE WITNESS: Yes.

BY MS. OWENS:

Q —you and Mr. Springer came up with a list of people that might have knowledge of his involvement with his family and what Calista was like and how Mr. Springer interacted with her.

A I would say that was a collaboration with Mr. Springer and Mrs. Springer and counsel for Mrs. Springer, also; but, yes, there was a—a list of defense witnesses that was created. By my memory, the defense witnesses were the same for both Mr. and Mrs. Springer.

Q Did you have meetings, incidentally, with both of the Springers?

A Yes.

Q And so, presumably, Mrs. Springer's attorney would also be there?

A Absolutely.

Q Would you say you prepared a joint defense?

A For lack of a better term. I mean, there were probably easily 25 to 30 hours that were spent collectively with Mr.—with counsel for Mrs. Springer and Mrs. Springer and Mr. Springer and myself.

Q Well, focusing on the issue of the DHS, what thought and consideration did you give to the fact that the DHS knew that Calista was being restrained at night?

A It was always my impression in my defense theory that we would use that to show that Mr. Springer was acting reasonably in

how he was disciplining and controlling his daughter.

Q Did you ever tell Mr. Springer something to the effect that ignorance of the law is no—no excuse?

A I don't remember saying that.

Q If he—If that's his recollection, do you—do you deny it?

A That's not a term I use. We—We spent so many hours talking, it's possible.

Q Mr. Bush, you would agree with me that the issue of whether the DHS condoned restraining Calista was a big issue, right?

A It was certainly something I think was very relevant to the trial, yes.

Q And, as a matter of fact, it came up quite often in the jury questions?

A I don't believe DHS ever condoned it. I do believe that they knew about it.

Q It's fair to state, too, Mr. Bush, that one of your defenses was going to be the defense of accident—that Calista died accidentally?

A Well, regarding the fire, yes. The felony murder allegation?

Q Right.

And, as a matter of fact, the defense of accident was given in the jury instructions. Do you remember that?

A I don't remember the specific jury instructions.

MS. OWENS: Your Honor, I need some exhibit stickers.

MR. MCDONOUGH: Your Honor, we don't have any copies of any exhibits.

MS. OWENS: And, your Honor, I've made copies for them.

THE COURT: Where are they?

MS. OWENS: I'm about to give them to them right now.

THE COURT: Okay. Good.

MR. MCDONOUGH: We haven't had an opportunity to review them either.

THE COURT: Okay. You'll have an opportunity.

(At 10:28 a.m., off record discussion between Ms. Owens and Ms. Harrington)

MS. OWENS: Just to—

THE COURT: Just for clarification, it's my understanding you're going to submit documents that have already been admitted in the trial record.

MS. OWENS: Your Honor, these are all part of the trial record. And so, if it's acceptable to your Honor, I'm not going to go through the motion of saying I offer and I'm showing you what's been marked, blah blah blah.

THE COURT: No. We agree that, just for clarification of the record, rather than referring back to the trial record, you would make additional copies and submit them as we proceeded.

MS. OWENS: Okay. Thank you very much.

THE COURT: All right. Thank you.

BY MS. OWENS:

Q Mr. Bush, exhibit A is a copy of your opening statement. And that's at trial transcript 467 through 474.

And I'd ask you to look at page 474 where the highlighting has come through. Do you see where it says Calista died as a result of a tragic accident in a fire, not the behavior of Tony Springer?

A Yes.

Q So the defense of accident was one of the principal defenses that you raised?

A Yes.

Q And, Mr. Bush, you recall filing—There were a variety of motions—motions *in limine*, and you filed a motion to quash. Do you recall that?

A There were a number of motions filed, yes.

Q Okay. And you filed a motion to quash the felony murder charge. Do you recall that?

A Yes.

Q And do you remember what the basis for your motion was?

A No, ma'am, I do not at this time.

Q There was a hearing on that motion and the motion *in limine* on August 31st, 2009. Do you remember that?

A Yes.

Q And do you recall the judge saying that it was some sort of a due process issue that the DHS knew about this restraining, tying to the bed, chaining, and did nothing about it?

A I don't specifically remember that at this time.

MS. OWENS: I did not make this as an exhibit, but I will refer it. It's the--It's the motion hearing of August 31st, 2009, pages 22 and 23.

THE COURT: It's attached to your motion?

MS. OWENS: It is, your Honor.

THE WITNESS: I remember seeing that in the motion, yes.

BY MS. OWENS:

Q And, at that hearing, Mr. Bush, the judge specifically says:

> That's another interesting factor that's--This was brought to the State's attention back in 2004. The State investigated it and did not do anything to stop it. So they were clearly aware of the claim in 2004.
>
> One of the questions I had was whether or not there's an argument to be raised in that regard that the State's involvement condoning the use of the chain by not taking any action would raise any argument for the defense in terms of due process rights, but that's not been raised here.
>
> Do you recall that?

A Yes, I read that.
Q Don't you agree, Mr. Bush, the judge is saying, look, this is—this is really an issue for me. The State's sort of condoning what went on. Isn't that what the judge appears to be saying?
A I never felt the State condoned what went on.
Q But the judge is saying this is—this might be a due process issue. Did—Did that occur—Did it occur to you to start looking into that?
A I never felt, nor was I ever told, that the State condoned what happened. They knew about it, but I never was aware of any express recommendation or permission or direction to the Springer family to restrain Calista.
Q Did you do any independent research of the law as to whether or not there might be any due process implications in the State not doing anything?
A I don't believe I researched that issue, no.
Q So it's fair to state, Mr. Bush, you didn't do any research on the issue of entrapment?
A I never felt that there was the issue raised to research it 'cause I never felt the State of Michigan or any of their agencies authorized or told the Springers to restrain Calista.
Q Have you ever heard of the doctrine of entrapment by estoppel?
A Yes, ma'am.
Q Had you heard of it back then?

A Yes, I had.
Q So, when the judge says, this might be a due process issue, you didn't do anything to investigate it?
A I didn't think there was anything to investigate at that time.
Q You didn't think that condonation could rise to the level of entrapment?
A At that time, I did not, no.
Q You did nothing to research it, though, correct?
A No.
Q So, when the judge brought it up, you just said, well, I don't think he's right, so I'm just not going to look into it.

MS. HARRINGTON: Objection, your Honor. This has been asked and answered.

THE COURT: No, it hasn't.

Go ahead.

BY MS. OWENS:

Q You didn't do anything, right?
A I did not do any extra research.
Q Mr. Bush, describe for me what the doctrine of entrap—entrapment by estoppel is.
A It's essentially where there are actions that are done by an individual that an agency or part of the State of Michigan has authorized them to do.
Q And what happens as a result of that?
A Excuse me?

Q What happens as a result of if you can show entrapment?
A That is a—an issue of law, as I understand it, that a judge can make a decision.
Q What would—What would have happened if you'd brought some sort of a motion to—you know, for entrapment by estoppel? If the issue had—had occurred to you, what would have happened?
A We would have had a hearing in front of the circuit judge.
Q In front of Judge Stutesman, right?
A Yes.
Q What kind of a hearing?
A I don't know the name of it. We would have had a hearing, and we would have—If we would have had the facts, we would have shown what—what we knew and what we learned; and the judge would have made the decision.
Q What—What would the decision have been—what the decision could have been?
A I believe there could have been dismissal.
Q So, if you had been able to show entrapment by estoppel, it could have resulted in outright dismissal of all the charges against Mr. Springer, right?
A I believe that's correct.
Q And, in your mind, though, the DHS had not condoned the use of the chain or restraints in any way?
A That's correct.
Q So that wasn't even an issue?

A It was not for me.

Q Would you agree that it would be a plausible defense?

A It's—It would have been a plausible defense if we would have had any facts that would have backed that up, yes.

Q Well, you did have facts, right? The DHS knew about it for years and did nothing to stop it.

MS. HARRINGTON: Objection, your Honor. I believe the attorney is leading the witness. It's her witness to start off with, and I think that should be rephrased differently.

THE COURT: Can you—

MS. OWENS: Your Honor, this is—He's—Obviously, this is—he's a hostile witness. I believe I'm entitled to question him by cross-examination.

THE COURT: I don't know that you've established he's a hostile witness. He's—

MS. OWENS: Well, I'm not even sure that that's a proper objection for this kind of hearing.

THE COURT: Well, you can rephrase it.

BY MS. OWENS:

Q Isn't it true that—that you knew that the DHS had done nothing for years to prevent Calista from being restrained?

A I don't think that's true.

Q Well, you admitted to me earlier on that you knew that very soon—very early in your representation that the DHS knew that

she was being restrained and did nothing to stop it.

A Well, I also believe that they intervened, talked to the family, became involved, tried to tell them the dangers of fires. I think they did a lot.

Q But they did nothing to prevent the tethering, right?

A They did not remove the child.

Q Isn't that condonation they took no action to remove the child?

A I did not—I don't interpret it that way.

Q There was a preliminary exam, correct?

A Yes, ma'am.

Q And you were there?

A Yes.

Q And there were two witnesses of the DHS who testified—Correct?—Cindy Bare and Pat Skelding?

A That's correct.

Q And Pat Skelding, as a matter of fact, was the child protective services worker who actually went into the home, right?

A Yes.

Q Do you recall that?

Mr. Bush, exhibit B is the preliminary exam testimony of Pat Skelding, pages 170 through 187.

And I would like you to turn to—first to page 172—I'm sorry.—174.

Ms. Skelding testifies:

The allegations were a few things: that she was being chained to her bed.

In 2004, did Calista describe to you she was being chained to her bed?

Yes, very detailed, she told me.

You were there, correct?

A Yes.

Q And that was—If it's true, then 2004 would have been four or five years before the fire, right?

A Excuse me?

Q Four or five years before the fire?

A Yes.

Q Okay. So Pat Skelding is explicitly saying, yes, we knew about it and we didn't do anything about it, correct?

A That's what she said.

Q Okay. Go to page 176 through 177.

And this is Mr. Bland's examination, not yours.

Question: Did you have a feeling that these other agencies had known about what I'm going to call the tethering, in the past, that they were made aware of this?

Answer: I was aware that other agencies knew that there was a problem with her and that the parents had done different things to confine her at

night, different methods to keep her supervised and what they considered safe from roaming the house or going out the door and getting into things.

You don't consider that that testimony explicitly raises the issue of condonation by the DHS?

A I did not believe that at that time, no.

Q Go to page 180.

As a matter of fact, Pat Skelding testified at—at the prelim and at trial that she was the worker who closed the case, right? Do you remember that?

A Yes, I do.

Q And she closed the case, having noted in the file that Calista was being chained, right?

A Yes.

Q And Pat Skelding says she made no recommendations about petitioning the case into the court system, right?

That's line 16 through 18.

A That's correct.

Q Incidentally, Mr. Bush, do you have any experience with child neglect and abuse cases?

A Yes, I have a practice in that area.

Q So you're familiar that, if there is a credible allegation of child abuse or neglect to the DHS or the CPS, they're required to take some sort of action?

A I believe they would be a required reporter.

Q Up to and including removing the child from the home, right?
A Certain occasions, yes.
Q Terminating the parents' rights, right?
A It can happen.
Q Okay. And, in your opinion, the DHS signing off and closing a case alleging—in which the child is being chained to the bed means that the DHS is okay with that?
A I don't think they're okay with it. I think the Springers were told not to do it.
Q They closed the case. They—They essentially condoned it, right?
A I don't believe they condoned it. I think the last thing they said was there's danger of a fire.
Q They closed the case, right?
A Yes.
Q They did nothing to petition to have Calista removed?
A To my knowledge, they didn't file a petition.
Q Ms. Skelding says she thinks everybody already knew that Calista was being chained to the bed, correct?

Look at page—at lines 20 to 21.

A She said that.
Q And, with that recommendation—or with that knowledge, she still recommended that the case be closed?
A Yes, she did.
Q And, in your mind, that doesn't raise a defense for

Mr. Springer having chained her to the bed, that everyone—all of the authorities with authority to remove Calista—did nothing, they signed off?

A They certainly signed off. I don't believe they've ever condoned it or recommended it to him.

Q But that's really not the issue. The issue right now is did you not recognize that that could be a defense for Mr. Springer?

A If the facts were there, I would have raised it, yes.

Q Well, the facts were there, weren't they?

A I guess that's a decision somebody else can make.

Q We've got Pat Skelding and Cindy Bare saying, yeah, I knew it, and I signed off. That doesn't qualify as the facts to you supporting that defense?

A It didn't at the time, and it doesn't now.

Q In order for there have been—to have been a plausible defense based on due process in your mind as you were representing Mr. Springer, what would you have had to have factually to support a defense that the DHS knew and approved?

A I think we were—we were looking—I say we collectively, counsel for both Mr. and Mrs. Springer—were looking for the document—the record that says we recommend that, under the circumstances, that Calista be restrained in her bed. I never saw that.

Q So that's what, in your mind, would have justified that kind

of a defense, a specific document or permission letter?

A Well, or some—somebody—we could hang our hat on something that somebody affirmatively said that we know what's going on and we think you should continue doing it, that it's okay. I never saw that.

Q You don't think that—that condonation by inaction would have qualified?

A I didn't believe that, no.

Q You didn't believe that that would have even been plausible?

A It was not enough for me to file the motion.

Q You did not believe it was enough even to bring the issue up before Judge Stutesman, even when he had brought it up himself?

A That's correct.

Q Mr. Bush, exhibit C is an excerpt from Cindy Bare's prelim testimony. That would be pages 150 through 169 of the preliminary exam transcript, although I've only taken a few pages out as an excerpt for you.

Turn to page 154, please.

A Excuse me?

Q One fifty-four through 155.

Ms. Bare says that she knows that, as of May 2000, there was a report that Calista was being locked in her room every night and even that she had been chained, correct?

A I'm looking for the reference to being chained.

Q I think it's on 155, line.
A Yes, I see that. That's correct.
Q Turn to page—
Do you have page 160 there in front of you?
A Yes, I do.
Q And this is—I'll give you a chance to just read that briefly. That's still Mrs.—Mrs. Bare's testimony.
A I've read it.
Q Okay. Mrs. Bare is saying:
Yeah, we knew about these allegations. They were very detailed. And, yes, I even signed off on the case. I agreed to close the case.
Right?
A She said that.
Q Now, Mr. Bush, you've probably dealt with a lot of contract issues in the course of your 35 years of practice, correct?
A I don't a lot, but certainly—
Q Okay.
A —deal with contracts.
Q But isn't it generally a principle of law—a doctrine of law that, if you sign something, you're presumed to have read it and agree to it?
A Yes.
Q And you don't think that a plausible argument could be made that, when Ms. Bare reads the reports and signs off on them

that she's agreeing to it?

A You could make that argument.

Q Pardon me?

A I guess that's a plausible argument.

Q Turn to page 166, lines 25—22 to the bottom and then continuing on 167. This is Mr. Bland's examination.

A I'm sorry. I don't have those pages.

Q Oh, you don't have those?

Have you read that?

A Yes.

Q And you see that Mr. Bland is asking Mr.—Ms. Bare:

Isn't there an argument to be made that you at least tacitly agreed to this?

That's what Mr. Bland says, right?

A Which line was that, ma'am?

Q Pardon me?

A Which line was that?

MS. HARRINGTON: Where is this in here?

MS. OWENS: That's not in your excerpt. I—

THE WITNESS: I'm sorry.

MS. OWENS: —didn't copy—

THE WITNESS: . . . (inaudible)

MS. OWENS: —that. I'm sorry.

THE COURT: It's in the trial—It's in her brief.

MS. HARRINGTON: What page are you referring?

MR. MCDONOUGH: One sixty-seven.

(At 10:52 a.m., off record discussion between Ms. Owens and Ms. Harrington)

BY MS. OWENS:

Q You'd agree with me, Mr. Bush, that Mr. Bland at least recognized that there was an argument to be made that the DHS had tacitly agreed to the restraints, right?

A He asked that question.

Q Okay. He asked the question. And you had multiple meetings with Mr. Bland and Marsha and Anthony about how this case was going to progress, right?

A Yes.

Q And, in fact, you said that there was some discussion of it being a joint defense?

A Yes.

Q And Mr. Bland at least recognized that there was an argument to be made of tacit condonation, right?

A At least that was his question.

Q But you did not recognize that?

A I never felt there was.

Q Did that discussion come up between you and Mr. Bland ever?

A We talked a lot about we wished we could have found—if you want to use the term—the smoking gun where there was some document or record where DHS or Community Mental Health told the Springers that they needed to restrain Kayla [*sic*] to the

bed, but we never found that.

Q Did--But my question is, as between you and the Springers and Mr. Bland, when you're preparing for your defense, doesn't the question ever come up in a brainstorming session, hey, listen, the DHS has tacitly agreed to this; they've condoned this?

A I don't believe we ever felt they condoned it.

Q But that wasn't my question. My question was didn't it ever occur to you that they tacitly agreed to it?

A I don't recall if we discussed that.

Q But you'd agree that Mr. Bland recognizes it?

A He asked the question.

Q And you, apparently, did not?

A I didn't ask the question.

Q Mr. Bush, exhibit D is your closing argument. And I'd like you to turn to page 2161, lines 20 to the bottom.

A Uhm-hmm.

Q And this is where--This is you talking.

> What I think is important is that you need to reflect on what Cindy Bare and Pat Skelding said in their testimony. Did the Department of Human Services send a message to Tony that restraining was inappropriate? I'm not trying to pass the buck. I'm not trying to blame anybody else. Did the Springers get the message that restraining their daughter was wrong?

Right? That's what you said.

THE WITNESS: I don't know that I have page 2162.

MS. HARRINGTON: It went 2161, 2161, and then—

THE WITNESS: Oh.

MS. HARRINGTON: —255.

(At 10:56 a.m., off record discussion between Ms. Owens and Ms. Harrington)

THE WITNESS: That is correct.

BY MS. OWENS:

Q There again, Mr. Bush, you're saying that the DHS knew about it and did nothing, right?

A Yes.

Q And that would reflect on the Springers'—on Mr. Springer's intent, right?

A That was trial—

Q And the fact—

A —trial tactics.

Q And the fact that he behaved reasonably, right?

A Yes, ma'am.

Q Don't you think that part of a reasonableness defense would include the fact that the authorities knew about what was going on and did nothing?

A I think that was partially argued.

Q I'm wondering why you wouldn't have brought that up in a motion before trial.

A Again, because I did not feel that they actually had permission to do it.

Q Do you know what the—what the—the burden of proof would have been at a motion hearing for entrapment?

A I don't recall that at this time, no.

Q If I told you that it was—that Mr. Springer had to establish only by a preponderance of the evidence the elements of entrapment, do you think that could have provided him with a reasonable—reasonable likelihood that the charges could have been dismissed?

A I didn't think so at the time.

Q You'd agree with me that preponderance of the evidence as a burden by the defense is the lowest of the standards of burden of proof, right?

A That's correct.

Q So all you'd have to do is establish by 51 to 49 that the DHS knew about all of this restraining and took no action and that Tony believed he was doing the right thing and you had a—a chance of getting the charges dismissed outright.

A Is that a question?

Q Well, I'm asking you to agree that that could have been the result.

A That could have been the result.

Q That would have been a great result for him, right?

A Yes, ma'am.

MS. OWENS: I have nothing else.

Thank you.

THE COURT: Ms. Harrington.

Wait. Let's—

MR. AMBROSE: I just have a—

THE COURT: Let's let Mr. Ambrose go and then have—

MR. AMBROSE: Yeah, it's quite brief, your Honor. Just a couple of questions.

CROSS-EXAMINATION

BY MR. AMBROSE:

Q Can you tell the Court the—Calista's medical conditions?

A Historically, there were problems related to the lead that she ingested when she was a toddler. I think that was the main medical condition. I think there were psychological issues.

Q Do you recall what the psychological issues were?

A There were a host of initials. She had a lot of them. She might have—I think it was pica—p-i-c-a. I'm trying to think back.

Q And what's your understanding of pica—pica?

A It's been many years. I don't remember.

Q Is that some sort of an eating disorder?

A I believe it had to do with impulse or eating, but I haven't looked at that since trial.

Q Okay. Now with regard to the meetings that you had with your client, there were also joint meetings with my client there,

as well as the trial?

A Some of them.

Q Okay. Now maybe—I think you testified that you didn't explicitly—explicitly state that ignorance of the law is no excuse; is that correct?

A I don't remember saying that.

Q Do you recall if Mr. Bland had mentioned something like that?

A No, I don't.

MR. AMBROSE: You don't recall that. Okay. I have nothing further, your Honor.

THE COURT: All right. Ms. Harrington.

CROSS-EXAMINATION

BY MS. HARRINGTON:

Q Good morning, Mr. Bush.

A Good morning.

Q During the motion to quash the felony murder and the Court's opinion when it was making the statements that Ms. Owens referred to in terms of the Court almost inviting some type of due process claim against state officials, knowing what happened, did the Court have—do you know if the Court had the entire Springer file or what discovery each party has?

A I would assume the Court only had what had been filed with the court.

Q So, if the Court brings up this issue at a motion, the Court doesn't have all of the information in front of it?

A That's correct.
Q So we hadn't even had the trial yet?
A This was a pretrial matter.
Q Okay. During the preliminary examination, did any CMH worker or DHS worker testify that they told the Springers that it was okay to chain Calista to the bed?
A No.
Q Did any one of those workers make any statements that it was okay to restrain Calista in any way?
A No.
Q And any of the reports you received from DHS, CMH, out of any of the discovery, did any of the reports indicate that they had told the Springers it was okay to restrain Calista in any way, shape, or form?
A I was looking for that, but I never found that.
Q So, in terms of the prelim—at the time of prelim, you didn't have any of those statements or any knowledge about any of that—
A I'm sorry. Which statements?
Q —or lack thereof, that none of the workers made any of those statements to the Springers? You didn't have any proof of that?
A That they were condoning the restraining?
Q They told them it was okay?
A No, I never—never found that at anytime.

Q Did Anthony ever tell you that any of those workers said it was okay to restrain Calista?

A No.

Q In fact, did Anthony ever say anything about that they discouraged him from doing it?

A I don't remember if he said that or I read that in their statements.

Q So—Did you get an opportunity to review Anthony Springer's affidavit that he filed for this motion?

A Yes, I did.

Q And, on page three of the affidavit—We'll start with the very bottom of page two.

Skelding then brought up that Calista allegedly had asked her if she would advocate for her to no longer have the restraints on if she slept on—so she could be trusted to stay on her bed and out of things.

Marsha said there was no way that was going to happen in the near future, which, in Skelding's opinion, was being cruel.

I told her that she didn't know was that two days before—

And then it goes on.

THE COURT: What page are you on?

You don't even have your client telling you—

MS. OWENS: Your Honor, I'm going to—

BY MS. HARRINGTON:

Q —any—

MS. OWENS: —object.

BY MS. HARRINGTON:

Q —of those statements.

MS. OWENS: This is argumentative questioning. Is there—

MS. HARRINGTON: I'm asking him.

MS. OWENS: Is there a question on the table?

THE COURT: No, there's no—

MS. HARRINGTON: And on cross.

THE COURT: There's no question. You're—You're making an argument. So go ahead and rephrase it.

MS. HARRINGTON: I don't need to do that.

BY MS. HARRINGTON:

Q And the defendant—Okay. The defendant relied on the government official's statements.

There was no statements that you know of, correct?

A Not that I'm aware of.

Q The defendant's reliance was in good faith and reasonable.

Did Mr. Springer—Was he aware of a fire concern?

A Yes. That was our argument that it was—it was the best he could do. It was his good faith, and that was the

reasonableness of his behavior that we argued—or I argued to the jury.

Q And was Mr. Springer aware that the workers didn't approve of him doing this?

A I believe he was.

Q So, while they might have known about it, he knew they didn't approve it?

A That's my understanding, yes.

Q So could you say that his reliance—There was no statements to rely on.—but there was any good faith in him saying—in chaining her up?

MS. OWENS: Objection. Argumentative.

MS. HARRINGTON: I'm asking him, and it's cross.

THE COURT: It's argumentative. You're just making your argument through him to agree with you.

But you can rephrase it. I think it's already been asked and answered that he didn't find anything—

MS. HARRINGTON: Okay.

THE COURT: —in the record.

BY MS. HARRINGTON:

Q Would it have been a frivolous motion for you had filed—to have filed the entrapment by estoppel defense since it's quite clear the two—two of the main elements weren't even there?

MS. OWENS: Objection. Whether it's frivolous calls—would be addressed to the Court. And the issue is

whether or not it would have been a plausible—

THE COURT: Well, we can ask what he—

MS. HARRINGTON: I'm asking him if it was his opinion, if he had filed, it would have been a frivolous motion.

MS. OWENS: That wasn't the question asked.

MS. HARRINGTON: Well, then that's what it is.

THE COURT: Okay. Fair enough.

MR. BUSH: Would you please restate the question.

MS. HARRINGTON: Sure.

BY MS. HARRINGTON:

Q Would it have been a frivolous motion if you had filed this entrapment by estoppel, in your opinion?

A I believe it would have been, yes.

MS. HARRINGTON: Okay. I don't have any further questions at this time.

THE COURT: Go ahead.

MS. OWENS: A few more, your Honor.

REDIRECT EXAMINATION

BY MS. OWENS:

Q As we know, Mr. Bush, you didn't even research the issue of entrapment by estoppel, right?

A I didn't do any specific research, no.

Q It's fair to state that you missed the issue, even after the judge mentioned it, right?

A I didn't feel that we had entrapment.
Q You didn't go over the—the four elements of entrapment and say, well, we've got this one, this one, but we're missing this one and this one? You didn't do that, right?
A I did not.
Q And since your defense was that Mr. Springer was behaving reasonably, that would, in fact, have met one of the elements of the doctrine of entrapment, correct?
A I believe it would have met one of the elements, yes.
Q The truth is, you just missed it, right?
A No.
Q The issue of condonation permeated the whole trial, didn't it?
A Pardon?
Q Didn't it permeate the whole trial whether the DHS condoned the behavior?
A Not the whole trial.
Q There was—Well, at least insofar as the DHS workers were concerned, right?
A Certainly, how they investigated the case was an issue that the jury had to look at.
Q As a matter of fact, the jury asked various questions with regard to Pat Skelding and whether she knew and approved; isn't that true?
A I don't specifically remember that. They asked many questions.

Q If--And I don't have a copy--I'm very sorry.--but I've got the trial transcript, so I want to make it clear. Page--Trial transcript 1,013, a jury question of Ms. Skelding--quote:

To your knowledge, is the practice of restraining a child with the use of a chain or any other means to have been condoned by any of the agencies to whom you've been employed?

That was a question by the jury. I'm telling you that 'cause I'm reading it from the record. You don't deny it?

A No, I'm doing that.

THE COURT: Was that question asked?

MS. OWENS: I can find that out.

It was not. It looks like it was not, your Honor. There's a whole discussion on it from pages 1013 through 1015. It was a discussion at the bench. Because I don't have copies, I don't know if I should continue to refer to it with Mr. Bush.

THE COURT: I'm just curious as to why it wasn't asked. Was it considered that it had already been asked and answered or what the reason--

MS. OWENS: Well, there was an argument asked and answered. Okay. It's also irrelevant.

Another jury question:

If CPS and you felt Calista had to be

restrained at night, is a dog collar and zip ties a standard restraint? Why wasn't a softer restraint suggested?

And you said that's—a similar question was already asked.

THE COURT: So there had—there had been already testimony regarding it?

MS. OWENS: Apparently.

THE COURT: Okay.

MS. OWENS: Mr. Bush says:

I don't think—She's already said she didn't make the recommendation, so I don't see how she could know what options there may have been in making it.

Mr. Bland said:

I'd vote for you asking the other one but not that one.

And the Court said:

All right. I think it's covered by the other one.

THE COURT: Okay. Sorry to interrupt.

MS. OWENS: And then later on the Court says:

Yeah, it goes to the chain being acceptable or not.

BY MS. OWENS:

Q The question is, Mr. Bush—my final question—the issue of condonation was percolating throughout the whole thing, right?

A Yes, ma'am.

Q You didn't raise it, did you?

A I did not raise it for the issue that you're asking about for entrapment; that is correct.

Q As a—As a defense attorney with 30 years of experience, 75 felonies a year, don't you think it's your obligation to raise plausible defenses for your clients?

A I thought it was frivolous, ma'am

MS. OWENS: I have nothing else.

THE COURT: Mr. Ambrose?

MR. AMBROSE: No questions.

THE COURT: Ms. Harrington?

MS. OWENS: Your Honor, I have nothing else for Mr. Bush.

THE COURT: I was just asking if Ms. Harrington did.

MS. HARRINGTON: I was just looking at something. I didn't answer.

MS. OWENS: Oh, I'm sorry. I'm sorry.

MS. HARRINGTON: I have nothing further, your Honor.

Thank you.

MS. OWENS: Your Honor, I have nothing else of Mr. Bush; and I guess—

THE COURT: All right.

MS. OWENS: —I would ask he could be dismissed.

THE COURT: I was just thinking if I had any questions.

In regards to your conversations with Mr. Springer, just—you indicated that he told you that the method that he had used had just begun two days before the fire?

THE WITNESS: That's correct. Two or three days. I don't know the specific number. Very recent.

THE COURT: And that included the use of the—the dog collar and the dog chains and the zip ties to the frame of the bed; is that correct?

THE WITNESS: Yes, your Honor.

THE COURT: And he told you that?

THE WITNESS: Excuse me?

THE COURT: He told you that?

THE WITNESS: Yes.

THE COURT: And he testified to that, also?

THE WITNESS: That is correct.

THE COURT: And you were aware of that at the time that I asked you the question about whether or not this issue raised any issues with you?

THE WITNESS: That's correct.

THE COURT: And you had—Although I hadn't had a copy of the reports, you had all the reports at the time that I asked that question; is that correct?

THE WITNESS: Yes.

THE COURT: And you understood what I was asking?

THE WITNESS: Yes.

THE COURT: So it wasn't a surprise to you? You didn't—It wasn't that you didn't understand what I was asking?

THE WITNESS: I understood it. I would have liked to have found something that I could have followed up with it.

THE COURT: So your answer is that you were aware of my question and did not find any basis for it in the materials that you had or in the statements of your own client?

THE WITNESS: That is correct.

THE COURT: But you had not specifically researched the issue of entrapment by estoppel?

THE WITNESS: That is correct.

THE COURT: Okay. Was it also your testimony that he had told you that he was aware that the State did not approve of chaining to the bed, or did you not say that?

THE WITNESS: I don't believe he specifically said that to me.

THE COURT: You didn't ask him that?

THE WITNESS: Based upon our discussions, the

actual chaining to the bed happened so recent to when the fire was, I don't believe he ever talked to anybody from the State of Michigan about the chaining to the bed.

THE COURT: But the lesser restraints that had been used that were of issue with the State were discussed with him and he was aware that they didn't approve of those?

THE WITNESS: That is correct.

THE COURT: And he told you that?

THE WITNESS: To the best of my knowledge, yes, he did.

THE COURT: Okay. Those were the questions I had in regards to what exactly Mr. Springer said to Mr. Bush, not what was testified to or in the record.

Follow-up to that by Ms. Owens and then Mr. Ambrose and then Ms. Harrington.

MS. OWENS: I have no questions, your Honor.

Thank you.

THE COURT: Mr. Ambrose?

MR. AMBROSE: . . . (inaudible)

THE COURT: Ms. Harrington?

RECROSS-EXAMINATION

BY MS. HARRINGTON:

Q Even though you didn't research entrapment by estoppel, you're aware of it?

A Yes.

Q And you knew the elements to it?
A I'm not sure I knew the elements; but I knew that, if we had the State of Michigan condoning his actions, we were going to be looking into an entrapment issue.
Q So Anthony told you that he only used the dog collar and zip ties two to three days prior to the fire?
A Yes.
Q Did he explain Ms. Skelding's testimony that, in 2004, Calista told her all about being dog-chained to the bed with zip ties and describes the ties to Ms. Skelding in 2004? Was he able to explain that to you?
A I don't think we ever had an answer to that. We didn't believe Calista would be my response.
Q So you didn't believe that Calista was telling the truth?
A I believe that's what Tony was saying 'cause he specifically told me they only used the restraints that he referred to just immediately prior to the fire.
Q Oh, he—so he was saying in 2004 Calista was lying about being dog-chained?
A Well, certainly, they weren't putting dog chains on then.

MS. HARRINGTON: Okay. We don't have anything further.

THE COURT: All right. Thank you.

Follow-up?

MS. OWENS: No, your Honor.

Thank you!

MR. AMBROSE: . . . (inaudible)

THE COURT: All right. Mr. Bush, you may step down.

Again, please do not discuss your testimony with anyone.

Is there any reason he needs to stick around?

MS. OWENS: No, your Honor.

MS. HARRINGTON: No, your Honor.

THE COURT: Thank you, Mr. Bush. You're free to go.

THE WITNESS: I'll conduct my business and leave. Thank you, your Honor.

THE COURT: Thank you.

. . . (inaudible) a short recess..

MS. OWENS: Thank you, your Honor.

(At 11:22 a.m., court recessed)

(At 11:32 a.m., proceedings reconvened)

THE COURT: We're on the record in the People versus Anthony Springer, 09-5638 [*sic*], and Marsha Springer, 09-15639. We took a short recess, and we're going to continue on with testimony.

And, at this point, you're going to call appellate counsel. So go ahead—

Raise your right hand. Do you solemnly swear or

affirm the testimony you give will be the truth, the whole truth, and nothing but the truth?

MR. ROACH: Yes, your Honor.

THE COURT: All right. Go ahead and be seated. Go ahead, Ms. Owens.

MS. OWENS: Thank you very much, your Honor.

JOHN ROACH,

called at 11:32 a.m., and sworn by the Court, testified:

DIRECT EXAMINATION

BY MS. OWENS:

Q Mr. Roach, I'm Mary Owens. I think—I know you and I have spoken. I don't know that we've ever actually met before.

But you're here to testify about your representation of Mr. Springer on direct appeal.

A That is correct.

Q Would you please give us just a brief summary of your professional education and training and experience.

A I graduated from the University of Detroit Mercy School of Law in 1995.

And, since I passed the bar in November of '95, I have done a couple hundred appellate cases. I'm on the MAACS roster—the Michigan Appellate Assigned Counsel roster—since, I believe, the fall of '96. And I am at level three on that roster, which doesn't mean much for most people, but I'm sure you, Ms. Owens, know what that means.

And I take cases from all over the state of Michigan, various counties. You know how the system works.

Q I do, Mr. Roach; but, in order to make the record, I'm going to ask you to answer a few of my questions.

A Of course.

Q Would you explain to the Court what MAACS is.

A The Michigan Appellate Assigned Counsel System handles the criminal appeals in the state of Michigan that aren't designated for the State Appellate Defender's Office. I guess that would be the best way to describe that. And it's all indigent appeals that are done on a county-by-county basis, but MAACS oversees everything.

And the attorneys on the MAACS roster get to choose which counties they are listed on for which they are appointed cases. And I—I'll say approximately I'm on a dozen counties.

Q Extending where?

A All over the state of Michigan from Bay County to Grand Traverse, Saint Joseph, of course, Berrien, Oakland. I'm on the Macomb pilot project now, though I wasn't at the time of this case 'cause that project didn't exist.

I was on Wayne County for about 15 years until I got off of that.

I've gotten on and off different counties, depending on the situations of the counties.

Q And the MAACS system means that you are qualified to accept

appellate appointments from each of the counties in which you enroll, correct?

A That is correct. MAACS starts at a level one system, which is generally pleas and probation violations.

Level two is trial work.

Level three is usually more in-depth trials or capital cases.

And I'm currently on level three.

Q So level three means that you are at the very top, right?

A I have a little too much humility to say yes to that question, but that's the theory, correct.

Q That's the theory that you have attained higher experience and are ready and able to accept appellate appointments from capital cases, including any sort of murder case, right?

A That is correct, overseen by the MAACS administration, who, essentially, determines if you're ready to move up to the next level. That's correct.

Q And, when you're enrolled in these counties, they're overseen, as I understand, by some sort of appointing authority, and you are appointed to a case on the basis of a random draw, right?

A That is my understanding of how it's done, yes.

Q So what happens is the defendant is convicted—Well, why don't you—You're the—You're the witness. Tell us how you get an appointment.

A Well, a defendant is convicted. They fill out the paperwork

requesting an appellate attorney. If they are indigent, they are appointed one by the court; and we are randomly pulled from a rolling roll of attorneys that are on the roster for that particular county.

Q And you happened to hit Mr. Springer—Right?

A That is correct.

Q —or he happened to hit you?

A However you want to say it.

Q Okay. And that would have been back in 2010?

A I think I was actually appointed at the end of '09—I could be wrong.—but I know my brief was filed in 2010.

Q Now walk me through your first—the first steps of your representation of Mr. Springer on direct appeal. Well, before I—before we do that, tell me how far you took Mr. Springer in the appellate process.

A To the Michigan Court of Appeals. I filed a brief on appeal on his direct appeal.

Q You didn't go to the Michigan Supreme Court then?

A I did not.

Q Okay. Now tell us what you first did in the early stages of your representation of Mr. Springer.

A Well, as required by MAACS, I sent an introductory letter to him; and I also sent letters to the Saint Joseph County Circuit Court and the probation department to obtain the lower court file, the probation department report, any transcripts

that were not already part of the order.

And, upon receiving those and reviewing them, I eventually conducted an attorney-client visit with Mr. Springer, although I cannot recall which prison facility that was at at this time.

And then—I don't know.—we exchanged some correspondence.

And then, eventually, I wrote the brief, which I sent a copy to him—which I'm required to do—and a copy of the response brief from the prosecutor's office.

And, at the conclusion of the case, I sent him the letter, which I'm sure you're familiar with, explaining to him his future appellate rights as far as appealing to the Michigan Supreme Court. I provided him the address of the Michigan Supreme Court, the date his application would be due, and, also, sent him the pro per packet for indigent defendants to file in the Michigan Supreme Court on their own with explanation of those.

And, at that time, I also sent him—as I am required by MAACS—all of his transcripts, the lower court file, the PSR—pretty much everything in the file that was sent to me by the court up to that point.

Q When you first met with Mr. Springer, is that after you had received all of the materials from the court, the presentence report, and the transcripts?

A I don't recall specifically, but that is my general preference so that we can actually have a meaningful conversation. Because, if I go to the prison to talk to a defendant and I haven't read the transcripts and lower court file, we could just talk about the weather at that point 'cause I have no basis for understanding of the case. So my general practice is to go after I've everything and reviewed it.

Q And that would have been probably several months after you received the order of appointment?

A That would be correct. As I know you're aware, the court reporters have the 91 days to file the transcript. So, right there, that's three months. And they generally—I don't want to belittle the court reporters; but they have a lot of work, and it takes them most of that time. So it would have been, at least, probably three months or longer until I went to see him.

Q And you've referenced prison facility. So your meeting with Mr. Springer would have been at an MDOC facility?

A I believe it was. I don't even believe SADO had the opportunity to use the videoconferencing system for MAACS attorneys at that time. I believe it was face to face.

Q Incidentally, how many face-to-face meetings did you have with Mr. Springer during the course of your representation?

A I believe it was just the one.

Q And how long was that, if you remember?

A I'm sorry, I don't remember, Ms. Owens.

Q Do you—Do you remember what you talked about at the meeting that you had with him?

A Specifically—

Q Yes.

A —no. My general practice is to begin the conversation with the appellate process, how the appellate process works, how long it's going to take, and what would take place during the next year to year and a half, depending on how long the case takes to resolve.

So I explained to him about the filing of briefs and the timing and that sort of thing and try to answer any questions that he might have regarding that.

I referenced my initial introductory letter to him, too, which also has a lot of that information already in there. But not all of my clients are literate, so sometimes it's important to re—reinforce that verbally with them, explaining the appellate process.

And then, once that's done and they have no questions regarding how the appeal process is handled, then we go to the facts of the specific case that I'm dealing with at that time and discuss possible issues and facts and things of that nature.

Q So, by the time you met with Mr. Springer, you would have, if your customary practice was followed—and no reason to believe

it wasn't—you would have already reviewed the transcripts and the court file and the presentence report, right?

A That's my practice. It doesn't always work that way, depending on the nature of the case. And I don't recall specifically with Mr. Springer if I had read the transcripts or not at that time; but, normally, that is my preferred method of meeting with my client so that we can have an informed conversation.

Q Incidentally, did you review any materials in preparation for your testimony today?

A I looked at my brief and the prosecutor's brief and—There's really nothing left in my file, 'cause, everything else, I mailed to Mr. Springer at the conclusion of my representation.

Q And, of course, I e-mailed you a copy of my memorandum of law, right?

A You did, maybe back in February when we—

Q Well, it have—

A —first talked.

Q You don't—You don't remember—You don't remember me e-mailing you a copy of what I filed in this court in preparation for this hearing?

A Not specifically, no.

Q Okay. Okay.

A I believe you sent it to me in February when we first had a conversation. So I might have reviewed it then, but I don't

recall specifically doing that.

Q That's probably true. February seems so long ago, so—

A It does.

Q How do you decide what issues to raise in a brief on appeal for an indigent defendant?

A I utilize my training and experience after reviewing the transcripts to see if there are specific issues that stand out to me that need to be raised. Some of those can be highlighted by attorneys' pretrial motions or objections at trial.

Sometimes the defendant has specific issues they want raised that may be viable.

As an appellate attorney, I sometimes find myself having to raise issues that a defendant wants that I might not think are particularly strong; but I do that because it is their request, and they are the ones doing the time.

Q Do you recall the issues that you raised on behalf of Mr. Springer?

A I raised five issues. I remember that from reading the brief last night. I think it was a 56, 57-page brief.

I raised an issue regarding the autopsy photos.

I believe I raised an issue regarding severance of the trials between Mr. Springer and Mrs. Springer.

I raised an issue regarding one of the witnesses who was unavailable, and they used preliminary examination

testimony.

I raised a sentencing issue.

And—I apologize.—I can't remember what the fifth issue was right now.

Q Did you discuss with Mr. Springer the issue of entrapment?

A I don't recall having that conversation; but, again, my memory of the actual attorney-client visit, specifically, I don't have any recollection of it.

Q If I represent to you that, at the preliminary exam, there had been a mention—Well, let's go back. Let's strike that.

What did you understand the factual scenario to be with regard to this case?

A That there had been a fire and that the Springers' daughter had perished in the fire.

Q And you understood that she was—she died while she was chained to her bed—

A Yes.

Q —in the fire?

And did you discuss that with Mr. Springer?

A I'm certain we did. That is a fundamental issue of the case. But, again, specifically, I don't remember. We're talking—I met with him, I'm assuming, somewhere in the neighborhood of six years ago; so I don't have specific memory of that.

Q Do you remember whether there was any issue of the CPS—Child Protective Services—or DHS—Department of

Human Services knowing or having some sort of knowledge that the child had been—or was being restrained at night?

A I believe that actually came out in the transcripts at trial from various witnesses.

Q Have you ever heard of the doctrine of estoppel by—entrapment by estoppel?

A I had heard of it. I had not actually delved into it until this case.

Q Does—As an appellate attorney, of course, you've got the obligation to be familiar with the law—reasonably familiar and up to date, right?

A Yes.

Q And you would agree with me that issues of entrapment arise regularly in appellate law?

A I don't know if I would say regularly, but they do arise, yes.

Q They're among the issues that a reasonable practitioner of appellate law would be expected to know about?

A They would stand out, certainly.

Q And they might actually be highlighted in some sort of a motion before the court—the trial court, right?

A I would guess so, sure.

Q Judge, the officer entrapped me into buying that heroin, right? That—That might be discussed or raised at a motion hearing, right?

A Sure.

Q At what point did you become aware that Mr. Springer was claiming that the DHS knew and condoned him restraining his daughter at night?
A I think he was making that statement all along.
Q So that was obvious to you from the transcripts?
A That was his claim, yes.
Q Do you recall reading in the preliminary exam that Judge Stutesman here said, well, that sounds to me like a due process issue; they knew about it—the DHS knew about it and didn't do anything to stop it? Do you remember that?
A I only remember it because I saw it in the brief that you sent me in your filing.
Q Did—When you—When you read that excerpt in my brief, did that jar your recollection at all?
A It reminded me of that fact that there were individuals who had knowledge of their daughter being chained up, yes.
Q When you read that excerpt from the judge, did that make you think to yourself, hey, yeah, this could really be a—a real issue?
A I did not because, at the time, my recollection of the case was that many of the people that knew about it also tried to do something about it.
Q What do you remember? What do you think you remember?
A I remember that the case—the daughter was first, I think, zip-tied—there were zip ties involved; then a belt, then a

chain. It was a progression. There was an eyehook on the door at one point.

But then I also remember the individuals—And I can't remember if—At the trial, it seemed like the CPS, Community Mental Health services—All the—FIA—All the acronyms thrown around, I couldn't tell you which one said what, but that several of them had attempted to explain to the Springers that that wasn't proper and that they had—Somebody had either purchased or tried to get an alarm system for the bedroom. And then there was another reference to a bed monitor—a bed alarm, I think, with regards to the situation.

Q But you—you acknowledge that—that, as an appellate practitioner, if a government agency takes no steps to remedy illegal behavior, there may be an issue that they are tacitly condoning it, correct?

A I agree, but I don't think that was the case here.

Q But you agree that that would be an issue that you would at least consider, right?

A Yes.

Q And did it occur to you that Mr. Springer's trial lawyer should have been more focused on that issue?

A No. And I guess I'll answer that from two points. I don't think so based on what I was reading; but, also, if I did at the time, I would have raised it as an ineffective assistance of trial counsel issue.

Q Let me ask you—

A I believe I—

I'm sorry. Go ahead.

Q Go on. I'm sorry. No, you go. You go ahead.

A I believe one of the issues I raised in the brief I submitted had an ineffective assistance—ineffective assistance of trial counsel issue prong to it. So I'm not averse to raising that issue on appeal.

Q And, just to clarify for the record, Mr. Roach, one of the principal issues that an appellate lawyer will look at is whether or not trial counsel has been ineffective—Right?

A Absolutely.

Q —whether they've performed deficiently, right?

A Absolutely.

Q And the ordinary way to raise that is by a motion for a new trial made in the trial court or a motion to remand in the court of appeals?

A It is. And I actually was telling the judge earlier, the last time I was here was to do a *Ginther* hearing where I was sitting where you are.

Q So you're familiar with the procedure?

A I am.

Q And, if you had felt that Mr. Bush—Mr. Springer's trial lawyer—had missed a big issue such that he was ineffective, you would ordinarily have raised it in a motion for a new

trial before Judge Stutesman?

A Correct, unless it was so plain and obvious on the record that I could just take it to the court of appeals or ask for a *Ginther* remand, yes.

Q Now did it occur to you that this issue of condonation by the DHS and the CPS sort of percolated through the whole trial?

A Their knowledge of it certainly percolated through the whole trial.

Q And when—when the judge says, look, this is a due process issue, did you run to your, you know, LexisNexis®, Westlaw, and say, yeah, condonation, due process, is there some issue of ineffective assistance of trial counsel here?

A I did not.

Q And is there a reason why you didn't?

A Because I didn't think, based on the facts that were presented, that, while the different departments had knowledge of what was going on, they had actually—several of them, at least—had tried to do something about it.

Q Did you do any research pertaining to the issue of entrapment?

A I don't recall. I don't recall.

Q Did you do any research pertaining to the issue of estoppel?

A Again, I don't recall. If I had done the research on it and thought the issue was viable, I would have raised it because, clearly, in this case, with the amount of time that Mr. Springer is doing, any meritorious issue should have been

raised.

Q. Would you agree that—

Well, let me ask you this. Did you, in fact, talk to Mr. Bush?

A I normally send trial counsel a letter asking them to contact me with any possible issues. That's part of my office policy; also, something that MAACS is suggestive of. I don't recall any specific conversation with him about the case.

Q I don't expect you to remember this, so I'm going to just ask that you bear with me.

If, at trial, Mr. Bush's co-counsel says, isn't there an issue that the DHS tacitly agreed to restraining her—chaining her up—wouldn't that, in your mind, raise an issue of why Mr. Bush didn't make more of that?

A Sure. And, whether he joined in an objection or an argument or not, I would have probably raised the issue.

Q Now the issues that you did raise—admission of the photos of Calista—the autopsy photos—that didn't go anywhere, right?

A I don't believe it did, no.

Q You said that was an abuse of discretion, right?

A You're looking at my brief, I guess. I don't have it in front of me. I don't know.

Q Well, I thought you said you remembered a few of those issues.

A I remember the issues themselves; but, as far as the standard of review on that—

Is that what you're asking—

Q Yeah.

A —the standard of review?

Q Well, you—you raised an issue of the autopsy photos—

A I did.

Q —right?

Then what was the other one that you raised?

A There was an issue regarding severance of the defendants.

Q Had they asked to be severed?

MS. HARRINGTON: Your Honor, I think we're getting outside the scope of the purpose for the hearing today.

THE COURT: . . . (inaudible)

MS. OWENS: I'll explain why it's relevant, your Honor.

THE COURT: Go ahead.

MS. OWENS: The standard of ineffective assistance of appellate counsel means that there were strong issues that were obvious; and, in lieu of raising a strong issue, he raised issues that were weak and doomed to fail.

So that is the relevance of my inquiry as to the issues he did raise.

THE COURT: Okay. But that doesn't go to the issue that we're here for. He says he recognized that this was an issue and, from the facts, didn't—didn't find it.

So the question's why didn't he raise this one. Is

it because he didn't realize it was an issue that he could raise, or did he—did he look—did he actually realize it and find no basis for it and, therefore, didn't raise it?

MS. OWENS: Your Honor, I will move on.

THE COURT: Okay.

MS. OWENS: But, just so the record is clear, what I was trying to do was to demonstrate that the—that the issues that he did raise were noticeably weaker than this issue.

THE COURT: Well, that's in your opinion, not in his opinion, maybe. So—

MS. OWENS: That's—Yes, but that's—

THE COURT: —the relevant question is why didn't he raise it. And it may be because he didn't find a basis for it or it may be because he didn't know about it or didn't think about it.

BY MS. OWENS:

Q Why didn't you raise the issue of entrapment by estoppel?

A Because I didn't think it was there. The various individuals that testified for the different government agencies, many of them tried to do something; and so it didn't show that they were condoning the behavior. They knew about it, but I didn't think they were condoning it.

Q You didn't think it was there—the issue was there, but you did not discuss it with Mr. Springer that you can recall, right?

A I don't recall discussing that issue with him.

Q You didn't do any research on it, right?
A Beyond my knowledge of entrapment, I—
Q General knowledge.
A —don't think I did. Again, we're going—
Q And you didn't—
A —back six years.
Q —discuss it with Mr. Bush?
A Again, I don't believe I did.

MS. OWENS: Thank you.

I have nothing else.

THE COURT: All right. Mr. Ambrose?

MR. AMBROSE: No questions, your Honor.

THE COURT: Ms. Harrington?

CROSS-EXAMINATION

BY MS. HARRINGTON:

Q You were aware of entrapment by estoppel when you reviewed the case—
A I was.
Q —and what it entails, the elements of it?
A Probably not the specific elements of it, but—
Q But you were aware of it, though?
A Entrapment specifically, sure.

MS. HARRINGTON: I don't have any further questions.

MS. OWENS: Nothing further, your Honor.

THE COURT: All right. Thank you, sir.

You may step down.

MR. ROACH: Thank you, your Honor.

THE COURT: You're free to go?

MS. OWENS: Thank you, John.

THE COURT: Thank you.

MR. ROACH: Do you need the subpoena, your Honor?

THE COURT: Pardon?

MR. ROACH: Do you need the subpoena back?

THE COURT: No.

Next?

MS. OWENS: Your Honor, my next and final witness will be Mr. Springer.

THE COURT: Okay.

MR. MCDONOUGH: We're going to do this through the lunch hour?

THE COURT: What is that?

MR. MCDONOUGH: We're going to keep going through the lunch hour?

THE COURT: Yeah. Then we're going to stop and do the next one after that. So you'll have a full hour to take a break.

The best you can, raise your right hand, Mr. Springer. Do you solemnly swear or affirm the testimony you give will be the truth, the whole truth, and nothing but

the truth?

DEFENDANT ANTHONY SPRINGER: Yes.

THE COURT: Go ahead and be seated.

ANTHONY JOHN SPRINGER,

Called at 11:57 a.m., and sworn by the Court, testified:

DIRECT EXAMINATION

BY MS. OWENS:

Q Hello, Mr. Springer.

A Hello.

Q You've been sitting beside me during the morning's proceedings, correct?

A Yes.

Q So we don't need any introduction—

A No.

Q —to what we're going to talk about, right?

When did you first meet with your attorney John Bush?

A I'd say about a month after the fire.

Q Let me clarify things. You—You were never in jail during the pretrial—

A We had a—

Q —proceedings, right? You were on bond?

A We had a PR bond, yes.

Q How many times would you say you met with Mr. Bush before you actually went to trial?

A At least monthly.
Q Monthly?
A Yes.
Q First time you met with him, it's a month after you were charged, right?
A Yeah.
Q And you had requested court-appointed counsel?
A Yes.
Q He was not retained?
A No.
Q Tell us what happened at your first meeting.
A I pretty much told him what I told the police at the investigation. We went from the beginning, and I told him what had happened up to the date of the fire and beyond the fire.
Q So you went over the factual scenario surrounding Calista's death, right?
A Yes.
Q You understand that here today we're focusing on the issue of entrapment?
A Yes.
Q So I'm not going to ask you questions pertaining to, you know, Calista's childhood and what she ate and what she'd wear and stuff like that.
A Correct.

Q I want to focus specifically on what you told Mr. Bush and Mr. Roach about DHS and CPS involvement. Okay? Understood?
A Yes.
Q Now, at some point, you told Mr. Bush that the CPS or DHS knew everything that was going on, right?
A Yes.
Q What did you tell him?
A I basically told him that, after—that they had been involved since Calista was about—I believe in '95, so that would have made her three or four.—with high lead levels and lead poisoning.

THE COURT: You said you're going to limit it to the issue that we're here for today?

MS. OWENS: Yes, I'm trying, your Honor.

THE COURT: Yeah. So why don't you just go ahead and ask the direct question of him—

MS. OWENS: Okay. Thank you.

THE COURT: —so—

BY MS. OWENS:

Q Did you—When did you tell Mr. Bush that the DHS knew all about Calista being restrained at night?
A When we brought up Dr. Kaylor and—
Q Dr. who?
A Dr. Kaylor.
Q Would that have been in the first meeting?

A Yes.
Q And what did you tell Mr. Bush?
A Well, after Dr. Kaylor diagnosed Calista through DHS's—asking, I guess, is the best way to say—They consulted him to ask him to do a diagnosis on her. And, at the end of that, he had discussed different—different things to do with her and DHS with her and the like; and that's when he had some recommendations on how to take care of her correctly.
Q Did any of those recommendations involve restraining her?
A At various times, yes. At the beginning, it started off with putting a lock on her door at night so she wouldn't be able to get out and get something to hurt herself or poison herself or hurt anybody else in the house.
Q And that would have been Dr. Kaylor telling you that it was okay to do that?
A He told DHS this, and DHS pretty much okayed it. I mean, they knew about it—

MR. MCDONOUGH: Your Honor, unless Dr. Kaylor told this to DHS in front of Mr. Springer, it's complete hearsay.

And none of this has been testified nor is in the records of any of the transcripts that have been used for this hearing.

MS. OWENS: Your Honor, I would just say this is background to cut to the quick of what we're going to be getting to very soon.

THE COURT: Well, let's cut to the—

MR. MCDONOUGH: It's absolutely not background, your Honor. It's telling—He's basically saying that Dr. Kaylor, who was not an agent of the State, is telling the State to do this; and that is absolutely hearsay, and it's not true.

THE WITNESS: How do you know it's not true?

MS. OWENS: Just—

THE WITNESS: Did you talk to him?

MS. OWENS: Mr. Springer, be quiet. Be quiet. Mr. Springer, the judge wants us to get right to the point.

BY MS. OWENS:

Q You had discussions with Mr. Bush that the DHS had approved your restraining Calista at night; is that true?

A Yes.

Q When did you first discuss that with him?

A On the first meeting.

Q What was the nature of that discussion?

A The discussion was that all along everybody in DHS knew that Calista was being restrained, they knew why, they knew how, and they okayed it.

Q And what did Mr.—What did Mr. Bush say to that?

A He said that there—apparently, there's a law against it and that ignorance of the law did not make any kind of defense.

Q He said there was a law against what?
A Restraining my child.
Q And you told Mr. Bush that from the very outset, right?
A Yes.
Q And did you discuss with him any specific conversations that you had with any DHS workers?
A The one conversation we had with DHS worker was Pat Skelding in 2004 about restraints, specifically.
Q You had a specific discussion with Pat Skelding about that?
A Yes.
Q And what did she tell you?
A She said she didn't like the idea.
Q Did she do anything to stop it?
A No.
Q And what did you tell Mr. Bush?
A That's what I told him. She came in to look at something that was totally unrelated. She said that she didn't like the idea of the restraint and that she didn't do anything about it, though.
Q Where did you get the idea, then, that the DHS was okay with it?
A Because we were told to lock her door, through the first DHS worker, during the evenings. And, later on, it became to take whatever means necessary to protect her from herself and to protect others from herself.

Q And you told that to Mr. Bush?
A Yes.
Q Where did you get that from that you were supposed to take any means necessary?
A Through Dr. Kaylor and DHS.
Q DHS, being whom?
A Department of Human Services.
Q I mean, which individuals, in particular.
A Oh, Sharon Gerger.
Q Pardon me?
A Sharon Gerger.
Q Sharon Gerger—
A Yes.
Q —said take any means necessary?
A Yes.
Q What about Cindy Bare—Did you ever meet Cindy Bare?
A No.
Q So you had no clue who she was until the trial?
A No.
Q How many times did you meet Pat Skelding?
A There was one time in '94, I believe, about lead poisoning; and the other time was in 2004.
Q You discussed the chain with Pat Skelding?
A She said that Calista had been chained and she heard she was chained; and I told her that was a lie, and I offered to take

her upstairs and prove it to her.

Q And I'm assuming you're meeting with Mr. Bush month, right?

A Yes.

Q How often did these discussions with the DHS come up in your conversations with Mr. Bush?

A Not very often. After the first couple of times, it veered around other things.

Q What did you understand your defense was going to be?

A That I had done what I thought was necessary, and through the DHS's knowledge, to take care of my daughter the best way I could.

Q So the DHS's involvement, as you understood it, was part and parcel of the defense that you—that Mr. Bush prepared?

A Yes.

Q Now, as part of formulating a defense, what did you do with Mr. Bush?

A A lot of it went through with what problems Calista had and why she needed to be restrained.

Q How frequently would you say you talked about the DHS involvement with Mr. Bush?

A Not very often.

Q Did you believe you had specific approval—

A Yes.

Q —for restraining her from the DHS?

A Yes. When DHS never did anything for those several years,

supposedly—I mean, I didn't know that there would be reports out on me—reports being filed. None of them were ever followed up. At the trial is the first time I had ever heard of complaints being filed.

Q You never—You never had a piece of paper saying we give you permission to restrain your child at night?

A No.

Q Never had a piece of paper that says, you can tie her up with a dog chain, right?

A No.

Q But, in your mind, the fact that they knew and did nothing meant that they approved?

A Yes.

Q Did you believe you were doing anything illegal?

A No.

Q And why is that?

A Because nobody ever came and told us to do otherwise.

Q Had the DHS ever talked to you about removing any of your children from the home?

A No.

Q Now, Mr. Springer, someone's going to say, oh, come on, you can't, in good faith, believe that chaining your daughter with a dog chain is reasonable. How would you respond?

A They weren't there.

Q When Pat Skelding was talking to you about restraining

Calista, was she horrified?

A No, she was irate, if anything.

Q Irate?

A Yes.

Q Did she say, you're a child abuser, I'm going to file a petition on you right now?

A No, she thought it was cruel; and then I explained to her why.

THE COURT: Can you clarify?

MS. OWENS: Pardon me?

THE COURT: He says that he denied that he restrained her with a dog chain when he was confronted by Ms. Skelding. So how can he then say that he explained why he did it? What is he talking about?

THE WITNESS: I'm explaining why she was restrained at that time with a leather belt and—

BY MS. OWENS:

Q And Pat Skelding said, well, that's cruel?

A Yes.

Q She didn't do anything?

A No. Pat Skelding said it was—it was cruel because we wouldn't take it off of her and give her a chance to kill herself.

Q To kill herself?

A Well, that's in our view, yes.

Q Once you explained it to Pat Skelding, did her attitude change?

A She just—basically, just stayed quiet, dropped it, and walked out the door.

Q She acquiesced?

A Yes.

Q After you were convicted, you requested appellate counsel, right?

A Yes.

Q And you saw Mr. Roach here?

A Yes.

Q You met with him in prison?

A Yes.

Q Do you recall what facility?

A Brooks.

Q That would be in Muskegon?

A Yes.

Q And how long did you meet with him?

A About an hour.

Q What did you talk with him about?

A Various things that concerned me on what I thought were issues with appealing.

Q Did you talk to him about the issue that the DHS knew all about what was going on?

A Yes.

Q What did you tell him?

A I asked him why is it that the second Pat Skelding got up on

the stand and said that DHS knew, DHS knew why, DHS knew how, and DHS okayed it, that my attorney didn't jump up there and ask for a mistrial or something.

Q You said that to Mr. Roach?

A Yes.

Q You believed that the DHS had approved of what you were doing?

A Yes.

Q And what did Mr. Roach say?

A He said he'd look into it.

Q Is that the last—last time you saw Mr. Roach?

A Yes.

Q Did you ever speak to him after that?

A No.

Q What was the next thing you heard or knew about your appeal?

A The brief that I'd gotten that it was denied.

Q Mr. Springer, I'd like to go over the time that Pat Skelding came to your home. She was at your home one time, right?

A Yes.

Q And there were a variety of allegations that she wanted to investigate, right?

A No, there was one.

Q Which was—Which was what?

A That Calis—Somebody at the school said they saw a patch of hair about the size of a quarter ripped out of Calista's scalp.

Q And what happened then?
A She came to look at it. I was upset with her. I said, you know, whoever told you that's full of it. We both looked at it, and we didn't find anything.
Q And did Ms. Skelding also tell you that she wanted to investigate that Calista was not allowed to brush her teeth?
MR. MCDONOUGH: Objection. Hearsay.
MS. OWENS: Your Honor, it goes to—Well, for one, this is—this all came out at the trial.
And, second, it's relevant to whether or not he had a good-faith belief in what the DHS worker told him—
THE COURT: Well, I think—
MS. OWENS: —or didn't.
THE COURT: —we've covered that already. I mean, you've already established what he did, what he said, what they did, and that he believed—he had a reasonable belief to do so.
So I think it's asked and answered already as to this.
BY MS. OWENS:
Q Mr.—Mr. Springer, you filed an affidavit in conjunction with your motion for relief from judgment, right?
A Yes.
Q And Ms. Skelding wanted to see the restraint, right?
A She asked about it. I offered to her, and she declined.

Q I'm quoting from your affidavit:

I offered her to go upstairs herself—

MR. MCDONOUGH: Could you tell me where—

BY MS. OWENS:

Q —and see it.

MR. MCDONOUGH: Could you tell me where you're quoting from?

MS. OWENS: Page two of seven.

MR. MCDONOUGH: Thanks.

BY MS. OWENS:

Q Ms. Skelding said she didn't need to since it had previously been okayed—

A Yes.

Q —nor was she there for that.

A Correct.

Q Was that Ms. Skelding's exact words to you—

A Yes.

Q —that it had been okayed?

A Uhm-hmm.

MS. OWENS: I have nothing else.

Thank you.

THE COURT: Mr. Ambrose?

MR. AMBROSE: No questions, your Honor.

THE COURT: Mr. McDonough?

THE WITNESS: Your Honor, may I ask a question?

THE COURT: You have an attorney here. If you want—

He wants to ask a question.

What's the question?

THE WITNESS: I was just wondering who am I being cross-examined by, the person that did all the paperwork or—

THE COURT: No, it's Mr. McDonough, like I said.

Go ahead, Mr. McDonough.

CROSS-EXAMINATION

BY MR. MCDONOUGH:

Q Good afternoon, Mr. Springer.

A 'noon.

Q I just want to clarify a couple of things.

The—It's your testimony, and it has been your testimony throughout, your statements to the police, then your testimony at the trial, as well as your affidavit, that the State didn't written or verbally tell you that it was okay to chain your daughter to the bed—

A No.

Q —or restrain your daughter to the bed?

A No.

Q In fact, they told you to the contrary that they did not like the fact that you were doing it?

A They—Persons. The persons did not like the fact, not the department. There is a difference.

Q The people who were working for the State told you they did not like the fact that you were doing that?
A Right, but they didn't—
Q Thank you.
That's—I just need a yes or no answer.
And you mentioned Dr. Kaylor.
A Yes.
Q Dr. Kaylor was referred by your doctor, correct?
A He wasn't our doctor, no. He was a doctor that DHS recommended and paid for.
Q That you took Calista to?
A Yes, because we thought they knew what they were doing.
Q It was your primary care physician?
A No.
Q Who was your primary care physician at that point in time then?
A Oh, Ann somebody or something.
Q Why didn't you take Calista there?
A Because DHS recommended that she go to Dr. Jones to find out what problems she was having.
Q Okay. And then, from Dr. Jones, it went to Dr. Kaylor?
A Yes.
Q And Dr. Jones referred you to Dr. Kaylor?
A Yes.
Q And, when you met with Dr. Kaylor, who was there?

MS. OWENS: Your Honor, I'm going to object, not because—Well, I'm going to object because I was not allowed to mention or discuss Dr. Kaylor at all.

THE COURT: Yeah—

MS. OWENS: The objection was sustained. So now this inquiry about Dr. Kaylor is beyond the scope—

MR. MCDONOUGH: This is—

MS. OWENS: —of what was allowed—

MR. MCDONOUGH: Your Honor, one of—

MS. OWENS: —on direct.

MR. MCDONOUGH: —one of the most important things is that the person who was supposedly entrapping them must be a state agent; and it's going to be our argument that Dr. Kaylor wasn't. I'm trying to clarify that.

THE COURT: Yeah, well, again, it doesn't matter, then, what he said or how he said it or what he—what he did say, it's how he got there. And, if he was referred by somebody that DHS had sent him to, there can be an argument that he's a state agent.

So what the person said to him doesn't really matter. The fact of the matter is it doesn't matter because Kaylor testified at the trial and said he didn't remember anything that he said to him and denied that he had said that they could restrain him and—and everything else.

So whether or not he's relying on Mr. Kaylor, the

evidence at trial did not support Dr. Kaylor saying those things.

So let's just move on to—

BY MR. MCDONOUGH:

Q Okay. The conversation that you said you had with Pat Skelding—

A Yes.

Q —isn't it true that you told Pat Skelding that, even though she didn't like it, you were going to continue to restrain her?

A Yes. Out of context.

Q Please stop just saying things—

A Well, I'm—

Q —unless you're—

A —not—

Q —specifically asked.

A —you're saying them.

Q And you said Sharon Gerger told you to put the eyehook on the door?

A Yes.

Q Did she ever tell you to restrain your daughter to her bed?

A Restraint in any way possible; how do you describe that?

Q She said that to you?

A What way do you describe restrain any way possible, any way necessary? How do you describe it?

Q I'm not asking that, Mr. Springer. I asked you specifically, did Sharon Gerger tell you to restrain Calista to her bed?
A Yes.
Q And by what means did she tell you to do that?
A By any means necessary.
Q Those were her specific words?
A Yes.
Q When was that?
A Back in '95, '96.
Q Did you tell your attorneys that?
A Yes.
Q Did you bring that up at trial?
A Yes, I brought it up at the closing.
Q You didn't give a closing argument, Mr. Springer.
A You wanna bet? Try reading.

MS. OWENS: I'm sorry? What did you say?

THE WITNESS: I did a closing argument at the time of sentencing.

MR. MCDONOUGH: That was at the time of sentencing, it wasn't during trial.

THE WITNESS: Well, it was closing, wasn't it?

THE COURT: No.

MR. MCDONOUGH: It was not, Mr. Springer.

THE WITNESS: My mistake then.

BY MR. MCDONOUGH:

Q So, during the trial when you were under oath, you did not bring up Sharon Gerger in 1995; is that correct?

A No.

THE COURT: Is that correct? No.

So is that correct you didn't bring her up, or is that correct that, no, you didn't bring her up?

THE WITNESS: No, it was not brought up or asked of me.

BY MR. MCDONOUGH:

Q Did you bring it up to the police?

A Yes.

Excuse me. I can't say that for sure or not. I don't recollect saying it, and I don't recollect not saying it to them. That was eight years ago.

Q So you don't know?

A No.

Q Over the years you had a number of people from DHS and CPS and other state agencies working with your family, correct?

A At various times, yes.

Q And your testimony today is that Sharon Gerger is the only one that told you to restrain her by any means necessary?

A Yes.

Q That everybody else understood what was happening, didn't like it but, in your opinion, didn't do anything to stop it?

A Did they stop it, no.

MR. MCDONOUGH: Nothing further.

THE COURT: Ms. Owens?

MS. OWENS: Just a couple of questions, Mr. Springer.

REDIRECT EXAMINATION

BY MS. OWENS:

Q Mr. McDonough interrupted you while you were trying to answer a question, wouldn't let you answer. You said that he—he had elicited an answer from you out of context with regard to Pat Skelding. She said she didn't like it and she wished you weren't going to do it; and you said, well, I'm going to do it anyways. And he wouldn't let you explain. What did you mean by that?

A Because three days before that, my daughter had tried to run away. When Pat Skelding came in from the school, she said, well, Calista would like for you to not restrain her at night and trust her. And I told her at that time that was not going to happen.

Q And you explained to her that she'd try to run away earlier?

A Yes.

Q Okay. And what was Pat Skelding's response?

A That is when she just dropped everything and left.

Q Were you asked about at trial whatever Sharon Gerger may have told you?

A No.

MS. OWENS: Nothing else.

Thank you.

THE COURT: Mr. Ambrose?

MR. AMBROSE: No questions.

THE COURT: Mr. McDonough?

MR. MCDONOUGH: None.

THE COURT: I've got a few questions, Mr. Springer. The contact with Ms. Skelding was in 2004?

THE WITNESS: Yes.

THE COURT: Did you have any contact with CPS after that?

THE WITNESS: No.

THE COURT: And the fire was in 2008?

THE WITNESS: Yes.

THE COURT: And you had removed your child from school when?

THE WITNESS: 2006, I believe.

THE COURT: And the complaint that Ms. Skelding was there for was a complaint that had come from the school—Is that right?—or—

THE WITNESS: Yes.

THE COURT: Okay. And, at the time that she saw you in 2004, she confronted you with this allegation that Calista was saying that she was being tied to the bed with

chains and zip ties; is that correct?

THE WITNESS: Yes.

THE COURT: And you denied that quite strenuously?

THE WITNESS: Yes.

THE COURT: You said that did not happen.

THE WITNESS: Correct.

THE COURT: And you even offered to let her go look—

THE WITNESS: Yes.

THE COURT: —'cause you understood that that was not proper?

THE WITNESS: No, because I don't like people accusing me of stuff I don't do.

THE COURT: But she made it clear that—You denied that and she didn't find any basis for that?

THE WITNESS: No.

THE COURT: You admitted that you were restraining her.

Now the issue with the restraints, I thought it came out that you were told not to have locks on the outside of the doors because of fire issues.

THE WITNESS: No.

THE COURT: No, that's not? Okay.

THE WITNESS: That was through another person. That wasn't a government employee.

THE COURT: But you were told not to have things to—to prevent her from being able to leave in case of a fire?

THE WITNESS: We were asked not to.

THE COURT: Okay. And did you tell your attorney that this—this restraint system that you devised where she was chained to the bed and tied with zip ties, that you had just begun that two days earlier or three days earlier because of a—of a problem with another restraint system that you had?

THE WITNESS: Yes.

THE COURT: So you had denied up until that that you had ever used that system?

THE WITNESS: Correct.

THE COURT: No state agency—state agency that had said that they confronted you on that, you denied that at that point; is that correct?

THE WITNESS: Nobody ever came to the door knocking.

THE COURT: No, 2004, that same system was alleged to have been used, and you denied that that was being used.

THE WITNESS: Correct.

THE COURT: And you got Mr. Roach's brief when he filed it; is that correct?

THE WITNESS: Yes.

THE COURT: Did you attempt to contact him and say what about this issue?

THE WITNESS: I did on a few issues, and he said they were irrelevant.

THE COURT: You said he looked at those. So he was aware that you wanted to raise those?

THE WITNESS: Yes.

THE COURT: And he told you there's no basis from the record for those?

THE WITNESS: Correct.

THE COURT: All right. Anything after that, Ms. Owens?

MS. OWENS: No, your Honor.

THE COURT: Mr. Ambrose?

MR. AMBROSE: . . . (inaudible)

THE COURT: Mr. McDonough?

MR. MCDONOUGH: No, your Honor.

THE COURT: All right. Thank you, Mr. Springer. You are excused.

And we will take an hour break.

(At 12:27 p.m., court recessed)

(At 1:33 p.m., proceedings reconvened)

THE COURT: This is People of the State of Michigan versus Marsha Springer, 09-15639; and, also, Anthony Springer, 09-15638.

We have—We're now ready for Mr. Ambrose's case.

MR. AMBROSE: Yes, your Honor. I'm going to be

calling Victor Bland.

THE COURT: Alrighty.

Do you solemnly swear or affirm the testimony you give will be the truth, the whole truth, and nothing but the truth?

MR. BLAND: I do.

THE COURT: Lucky you're not in Jeff's court chewing gum.

THE WITNESS: Sorry.

THE COURT: That's okay.

THE WITNESS: I didn't even think about it.

THE COURT: Go ahead.

VICTOR BLAND,

called at 1:34 p.m., and sworn by the Court, testified:

DIRECT EXAMINATION

BY MR. AMBROSE:

Q Please state your name.

A Victor Bland--B-l-a-n-d.

Q And your occupation is an attorney, correct?

A Yes.

Q You represented Marsha Springer?

A I did.

Q Okay. And this was regarding a homicide; is that correct?

A Homicide was one of the counts. I believe there was three.

Q All right. Were you appointed in this case or retained?

A I was retained.
Q Okay. And that was retained by Ms. Springer?
A Yes. I mean, technically, she had what I would call some supporters and folks that helped them.
Q Okay. Now, when you first became aware of the case, what types of documents did you receive?
A From Mrs. Springer?
Q Or from anywhere, from discovery on.
A I'm taking a moment 'cause, to me, there was massive amounts of documents; and I can't recall exactly how we got them all.

Mr. and Mrs. Springer gave us documents. I think we got—We had all the school records. And the prosecution gave us all the documents they had—I think, at one point, I was between ten and 20 notebooks of documents.—DHS investigations.

Q Okay. And that's one of the things I wanted to talk about was the DS—DHS investigations. Do you know what those investigations entailed?
A I'm sorry. I didn't quite understand what you said.
Q Do you know what those investigations entailed?
A It was sort of what I would call years of investigations. I think it started with the lead paint. Some of the children in the Springer household had high lead levels, and I think that's how the DHS first got involved. And, then, I think there was various calls about different things over the years.
Q Now the—the investigation with regard to the high lead levels,

was that one of the first investigations that you're aware of?

A From my recollection, yes.

Q All right. And was that when Calista was at a younger age?

A Yeah, I want to say she was around five, maybe, when the lead level matters were popping up.

Q Okay. And then what was your understanding of investigations thereafter?

A I don't know that I can accurately locate this for you. I know the one I can think of right away was Pat Skelding coming out for the pulling of the hair, that type of thing. I think there was a few others that might have done—had something to do with eating disorders and things like that.

Q What was your understanding of that eating disorder?

A Through the DHS investigation or just in general?

Q Both.

A My understanding was that Calista had, I think, pica. And that because—

MS. HARRINGTON: Your Honor, I'm going to object to this line of questioning. I think it's outside of the—outside of the scope of why we're here. So I think we need to tighten it up a bit.

THE WITNESS: Could you—

MR. AMBROSE: It just gives a general background as to what—why certain things were done.

THE COURT: All right. But, if you could move on

to the more pertinent issues. If you're just trying to get a background as to what his investigation was and what his knowledge level was, that's fine; but—but we don't need to go through each allegation 'cause there were years of them.

BY MR. AMBROSE:

Q Now, with regard to—Now through Pat—Patricia Skelding, she was a worker with the State Department of Human Services?

A Yes, sir.

Q And she had done an investigation in 2004. Is that one of the records that you recall?

A It was in that ballpark. I don't want to say I know 2004, but it was when, I believe, Calista was in elementary school.

Q Now do you recall what the issue was at that point?

A In terms of what Ms. Skelding was investigating?

Q Yes.

A My understanding is that she received a call that Marsha had yanked hair out of Calista's head.

It seems to me there was another part of it; but I know that she testified that she came out and investigated the hair pulling and, I think, went to the Springer household.

Q All right. And, certainly, at some point in time, was she aware of other issues within the household?

A Again, from my understanding of what she testified to—not so much the investigations—Okay?

Q Okay.

A —but, from what she testified to, she was—I think Calista made her aware that—of being restrained and asked her—I think the terminology was to negotiate for her.

Q All right. And what was your understanding with regard to what, if anything, Ms. Skelding had done with regard to that allegation?

A I believe her testimony was is that she talked with Mr. and Mrs. Springer about maybe seeing if Calista could be released for a certain point—part—for some time.

Q Released as to—

A Not being restrained to the bed at night.

Q Okay. And do you know what the results of that was?

A I believe Mr. and Mrs. Springer said they were not willing to do that.

Q Okay. And why was that? Did they ever tell you why?

A They were very concerned about Calista's safety. There were reports of her eating things—razor blades—her having access to knives. I think the pica was part of it. They didn't also want her getting into any more lead and things like that. So their position was that they could not allow her to not be restrained at night because she would ingest something.

Q As far as you know, was anything—was any type of child protective petition to terminate their rights ever filed against the—against the Springers?

A As far as I'm—Well, I mean it was when this case happened;

but, if you're talking prior to this, I'd say the answer is no.

Q All right. So your understanding is that the department had knowledge of the restraints?

A From what—I think the only person I really know that from is through Pat Skelding, who testified that she believed people at the department had a knowledge of that.

Q Okay. With regard to some pretrial hearings, did you file a motion to quash in this case?

A I believe we did.

Q All right. And you were present at that hearing?

A Yes.

Q Now do you recall that hearing in particular?

A To be honest with you, sir, no. I believe it had something to do with, maybe, lack of evidence adduced at the—at the prelim; but that's the best I can tell you.

Q Now did you ever explore the—Now you had met with—After these allegations had arose, you met with my client, correct?

A Mrs. Springer?

Q Yes.

A We met numerous occasions.

Q And they had always main—She had always maintained her innocence in this, correct?

A Yes.

Q What did she tell you as to why she thought she was innocent?

A Well, I think what I was talking about earlier. They were concerned that Calista had to be restrained in order that she wouldn't harm herself or the Springers during the night. And I believe that's—that's basically why she believed she was innocent. It was—She felt she had to do this.

Q Now are you familiar with the entrapment by estoppel?

A Yes.

Q All right. Was that something that you ever considered?

A Considered it because, you know, we were being told by Mr. and Mrs. Springer that people had—at least were aware that she was being chained and they didn't do anything about it.

Q All right. And did you ever file a motion on that basis?

A I did not.

Q And what—what would be the reason for not doing that?

A 'Cause I never felt that we had it. I never felt that we had—This isn't very good termi—I never felt we had the goods. I never felt we had one person who said, I told them to do this. They were always pretty clear that Dr. Kaylor had told them to do it, but Dr. Kaylor never testified to that, to my knowledge.

And I can't recall if they said that Pat Skelding told them to do it. I don't know about that. But—But Pat Skelding never really confirmed that she told them to do it.

Q But, at least, you had Mrs. Springer telling you that this

idea of a restraint was condoned?

A Yes.

Q All right. And you could have still filed a motion on that behalf, correct?

A I could have.

Q Can you tell us what your experience is as an attorney. How long have you been doing criminal law work?

A I was sworn in in 1985, so now—This is my 30th year of practice. I think probably, when I did Marsha's case, I probably was 25 years in the practice.

I've tried—I don't know exactly how many cases I've tried, but I've tried numerous cases.

Q And you've tried capital cases?

A Yes.

Q And murder cases, in particular, as well?

A Yes.

Q About how many prior to the Springer case?

A I'm going to say three murder cases.

Q Had you ever spoken to—Prior to trial, did you ever speak to Patricia Skelding?

A I don't believe I did, best—my best recollection. I know that I did review—She did an interview with the state police detective—And I don't recall his name.—who was kind of the lead investigator, and I watched the video of her interview with him. And then we had him here at the prelim—or I

mean—Pardon me.—we had Ms. Skelding at the prelim. I don't recall that I went and spoke to her directly about this, but I can't be a hundred percent sure.

Q How about over the phone?

A I don't mean to be not answering directly, but I don't remember that. I'm not saying it didn't happen, but I just don't remember it.

Q The same questions with regard to Cynthia—Cynthia Bare. Do you know who she is first?

A I know who she—I know she's one of the—the DHS people. I don't recall trying to interview her. If I had to say percentage-wise, I probably didn't; but I can't recall.

Q I asked you about prior to the trial motions that you had filed—You filed a motion to quash.

A Right.

Q And now you were aware—at least during the trial—Patricia Skelding's testimony indicated that at least the department was aware of the restraining; is that accurate?

A I believe I was more aware of that at the trial than, maybe, at prelim; but, yes.

Q All right. Did that give you any indication of maybe another line of argument?

A In the criminal trial?

Q Yes.

A I don't—I don't know—I don't recall what I argued in closing

argument. I do remember saying something along the lines of I thought that the DHS should have been a defendant in the case as well as Mrs. Springer and Mr. Springer. I said something along that line, but I don't know that I—

Again, I wasn't convinced in my mind that there was prior authorization for what they did. To me, the—the theory of the case was they had to do this. Given the challenges this child had, they had to do this. That, I think, was the theory I was mostly on.

Q Any thought cross your mind about filing a post-conviction motion for a new trial?

A No.

MR. AMBROSE: May I have one moment, your Honor?

THE COURT: Uhm-hmm.

(At 1:49 p.m., off record discussion between Mr. Ambrose and defendant Marsha Springer)

MR. AMBROSE: I have no further questions.

THE COURT: Ms. Harrington?

Oh, I'm sorry. Ms. Owens, do you have any questions?

MS. OWENS: No, your Honor.

THE COURT: Okay. No questions.

CROSS-EXAMINATION

BY MS. HARRINGTON:

Q Good afternoon, Mr. Bland.

A Good afternoon.
Q Did you ever come across any documents, reports, anything from the police that—that stated that anyone from DHS or CMH had given the Springers approval to restrain Calista—and restrain, very broad term—in any way, shape, or form?
A I'm going to say percentage-wise, no; but, as—Just to be candid, there was some talk somewhere about eyehooks on doors and bed alarms and that kind of stuff.
Q Uhm-hmm.
A And I think, for various reasons, the Springers kind of phased out of those things. But I think some of those were suggested by DHS. But, if the actual question is did any—did I ever see anything that said that DHS approved of her being restrained the way she was when the tragedy happened, I would say no.
Q Did Marsha Springer ever tell you that anyone from CMH or DHS told her to restrain Calista in the way that she was?
A You know, my main recollection on that is Dr. Kaylor. I don't—I'm not saying they didn't tell me that maybe Skelding told them that, but I don't recall that. The main was Dr. Kaylor. Dr. Kaylor, from what Marsha always told me, was he told me to do what I had to do to protect this child.
Q Did she ever specifically say restrain her to the bed or just do what you have to do?
A The terminology I recall is do what you have to do.
Q Okay. And did you believe that Dr. Kaylor worked for the

State or was contracted by the State in any way?

A I thought he was a private psychologist.

Q You didn't believe he was connected with the State in any way, shape, or form?

A As far as I knew, no. I don't know if he was ever paid by DHS to provide services; but, as far as I knew, he had a private psychologist letterhead, I think.

Q And did you ever try to go interview Dr. Kaylor at his home or by phone prior to trial?

A Yes, I did. I drove out there with a couple of Mrs. Springer's—I don't think it was Mrs. Springer, but I drove out to his home with, I believe, Mrs. Roberts and there might have been another person. And, forgive me, I don't remember that person's name.

He had a home in Schoolcraft, Michigan. And we went out there, and he was—he was raking the lawn or doing lawn work in the front lawn. And I wanted to ask him questions, and my recollection is he was not forthcoming. I don't remember exactly what he said, but he certainly didn't tell me anything.

And then—

Q So, specifically, did he ever tell you that he told the Springers that it was okay to chain Calista to the bed?

A No. No.

Q So we know he didn't do it on the stand, but he never said

anything privately to you differently than what he testified to at trial?

A No. No, and the interview at his house was relatively brief and kind of awkward because he wasn't expecting us, and I don't think he wanted to talk to me.

Q So you attempted to follow up on what Mrs. Springer had told you about so-and-so told me that it was okay, and you attempted to follow up on it but got nowhere?

A I wanted to find the person that told them this—

Q Okay.

A —and we just never did.

Q So you tried researching that avenue in terms of trying to find the smoking gun in terms of getting someone to say, yes, we instructed them to do it?

A I tried—Through their help. They were—You know, they were working right with us.

Q Uhm-hmm.

A We tried to find that person that said, go ahead and do this. I don't believe we ever did.

Q And you had admitted you could have filed a motion for entrapment by estoppel, but why didn't you?

A I just didn't see it. I didn't believe that Kaylor—I wasn't sure Kaylor was a government agent, and he certainly wasn't ever saying that he told them to do it.

And I viewed Pat Skelding as kind of saying I think

somebody else authorized it, but I didn't. I just—Honestly, I just didn't feel it was well grounded.

Q Did you feel—Would you have felt that the—if you had filed it, the motion would have been frivolous?

A I wouldn't say frivolous, but I think Judge would have denied it. I just didn't have the goods.

Q And, to your knowledge, in terms of the state workers—CMH, DHS—did the Springers ever tell you that they tried to get us to do other things than tie her up? In terms of did they discourage it to them but they thought, well, this is the only way I—we can handle her—This is what their thought process was.—but DHS, CMH, other agencies tried to get them to do other things? Did they admit that to you?

A Yes. But, to me, this was sort of like a culmination of things. You know, they had started off with the eyehooks, I believe; and the eyehooks, I think, were not good for the other girls 'cause they were sharing a room. And somebody at DHS may have mentioned that.

And then there was bed alarms. And I think, from what I recall about the bed alarms, that Calista would defeat them so that she would be out and not trigger the bed alarm.

And so it finally kind of culminated as sort of nowhere else to go but the restraint.

Q And do you think that's in their minds or by what DHS was recommending or approving?

A I don't—I don't necessarily want to say that I know what DHS was recommending or approving. Certainly, that culmination, I think it's pretty much what Tony and Marsha always told me. And I think at various times DHS had suggested some of those lesser things, the bed alarms and—and I don't know if the eye hooks. But some of those things DHS had suggested.

Q Did they ever tell you—And I say they because it's from my understanding you met with both of them at the same time. But I know Marsha was your client, so—

Did either one of the defendants ever tell you a specific person told us not to do this?

A I'm going to say no.

Q Did they talk to you about the risk of fire at all?

A Well, the only thing that comes to my mind is the Pat Skelding testimony where I think she said that she discussed it with Marsha and Tony and—and was not—was not comfortable because of the fire risk. But, again, as I was saying in response to Counsel's questions, that was during the hair-pulling investigation from what I recall.

Q Did Marsha ever tell you how long Calista was restrained to the bed with a dog chain?

A I'm going to say I'm sure she did, but I—I'm not sure I could tell you what she told me.

Q 'Cause there's been conflicting testimony in terms of Tony testifying that it had only been for two days prior to the

fire; and, when Pat Skelding went out in 2004 for her investigation, and Calista very clearly described for her the dog chain and the zip ties.

So, you know, we've got Calista describing it back in 2004 and Tony saying two days prior. And I'm just wondering if anything jogs your memory in terms of what Marsha told you about when it started.

A You know, I think I'm speculating at this point. I'm sure we discussed it, but I don't—I don't want to say that I know. I could—I'd be guessing.

Q Okay. Do you recall how many hours you put into preparing for this case?

A Again, I can't give you an exact hour. I would say this: I think, before and since, it's the case I put the most effort in preparing on in any case I've ever handled.

We met, I want to say, three or four times at Mrs. Roberts' house. And we interviewed witnesses at Mrs. Roberts' house. Mrs. Roberts would bring lunch in for us. And I know we did that two or three times, if not three or four.

And then Tony and Marsha were—would—they were at my office, I—I want to say, at least ten times, if not more. We met often 'cause there was just a huge amount of data to process, you know, and to talk with them and stuff.

I don't recall meeting, maybe, necessarily with

Marsha necessarily by herself. I think it was usually Marsha and Tony. We met often—a lot—in my book.

Q And I just wanted to clarify. During the motion to quash hearing where, you know, the Court brought up—The Court didn't say entrapment by estoppel but brought up due process and the State's knowing about it. Did you understand what—where the Court was coming from with that line—with that statement?

A Yes.

Q Okay. So you thought about it. Did you look into it?

A Yeah, I think that was sort of the process of trying to find somebody who would say they told them to do this.

Q So you—you proactively—

A I think—

Q —followed up on that and you just didn't find anything with it?

A Right. I mean, actually, to some degree, what Pat Skelding said at trial was surprising to me, so—

Q And, at trial, do you think by her testimony that you had anything to raise the entrapment by estoppel at that point after she testified?

A I didn't consider it at that point. To me, it was—it was more like they were condoning it, I guess.

Q And—

(At 2:02 p.m., off record discussion between Ms. Harrington and Mr. McDonough)

MS. HARRINGTON: I don't have any further questions.

Thank you.

THE COURT: . . . (inaudible)

Mr. Ambrose?

MR. AMBROSE: I have no further questions.

THE COURT: Ms. Owens?

MS. OWENS: No questions, your Honor.

THE COURT: May the witness step down?

MR. AMBROSE: Yes.

THE COURT: Thank you, Mr. Bland.

THE WITNESS: Am I released from my subpoena?

THE COURT: You sure are.

THE WITNESS: Thank you.

THE COURT: Do you solemnly swear or affirm the testimony you give will be the truth, the whole truth, and nothing but the truth?

MR. DAVIDSON: I do.

THE COURT: Go ahead and be seated.

RANDY EDWARD DAVIDSON,

called at 2:03 p.m., and sworn by the Court, testified:

DIRECT EXAMINATION

BY MR. AMBROSE:

Q Please state your name.

A Randy Edward Davidson.

Q And, Mr. Davidson, what's your occupation?
A I'm an attorney.
Q And you work for State Appellate Defender's Office?
A Yes.
Q And how long have you been in that position?
A Twenty-four years.
Q And that is—You work primarily with appellate work; is that correct?
A Exclusively.
Q Exclusively.

And, at one point, your client was Marsha Springer?

A Correct.
Q Can you recall when you first met with Ms. Springer?
A The exact date, no; but I recall meeting with her.
Q All right. Do you recall—Can you tell us about that first meeting.
A Yes, I visited her in person at the Huron Valley Women's Facility.
Q And do you recall if that first meeting with her—Was it just one meeting that you had with her, or did you have multiple meetings with her?
A I had one meeting with her.
Q All right. Do you recall was that prior to having the transcripts, or was it after you had already received the transcripts?

A It was after I had received the transcripts.
Q All right. Is it your practice to copy the transcripts and provide them to your clients or not necessarily?
A Generally speaking, if a client requests them, we provide copies. There was a point in time when we charged—the office charged for copies because we only had a single copy that we had to work with.
Q Do you know if you had ever—I know Ms. Springer has limitations—Correct?—her eyesight?
A Yes.
Q All right. But she is given assistance within the department; is that your understanding?
A That was my understanding.
Q Had you ever—Do you recall if you sent the transcripts to Ms. Springer?
A Sitting here today, I don't recall one way or the other.
Q All right. Do you recall your conversation with Ms. Springer at that meeting?
A In a general way I do, yes.
Q And what was—Can you inform us what that was involving.
A I basically started off by going through her institutional adjustment, whether she was working in the prison, whether she had any tickets, whether she had any visitors.

Then I got her story as to what happened, the general circumstances of the case.

And, following that, we discussed a number of potential issues in the appeal.

Q Do you recall what she had stated as to—

You know the general allegations in this case—Correct?

A Yes.

Q All right.—and that Calista was restrained with a chain, correct?

A Yes.

Q Did you obtain from her as to why that was done?

A Again, I'm relying on my memory because I didn't bring any notes or anything with me. I wasn't asked to. But, generally, from my memory, what she told me was consistent with the defense that her counsel argued at trial, which was that she felt that they had no choice but to restrain Calista in order to prevent her from getting up and getting through the house and either injuring herself or someone else in the residence. That was the general information that Mrs. Springer gave me.

Q You were aware that there were a number of referrals made to Child Protective Services and DHS?

A Yes.

Q And do you recall what those involved?

A In a general way, they involved—As I recall, there was some injuries that were observed on the child. There were

allegations—I think at one point there was some question whether Calista had lead poisoning. Again, I'm just going on my memory.

And then there were other allegations later on that had to do with Calista being mistreated and tied to her bed or restrained in some way or not being fed, that type of thing.

Q Now was it—After reading the transcripts and so forth, it was your understanding that the department had knowledge that she was being restrained to the bed or chained to the bed?

A I recall the testimony of at least one witness at trial to that effect.

Q Had you ever pursued the issue of entrapment by estoppel?

A You mean, in general, or are you asking me in this case?

Q I guess both, in general and in this case.

A I was familiar with the concept. I had not, for various reasons, raised it in a case.

Q And what—what would that—or those reasons be?

A Do you want me to tell you in general or just as it relates to—

Q As it—

A —Springer?

Q —relates to this case.

A My understanding of the elements of government estoppel from the case law—There's, basically, four factors.

One, there has to be a representation that comes

from a government official as opposed to just a private person.

Secondly, the representation has to be specifically that it's okay to do something which it turns out would be a crime. But the government official has to affirmatively tell the defendant that a specific course of conduct is legal.

The third element is a subjective one. The defendant has to actually rely on the advice.

And, number four, which is an objective component, the reliance has to be objectively reasonable under all the circumstances of the case, which include the authority of the person giving the advice on behalf of the government and how they give it.

It's my considered opinion that, in Ms. Springer's case, she could not meet elements two and four; and, therefore, likewise, defense coun—trial counsel's failure to raise it would not be ineffective assistance because it wouldn't be deficient performance.

Specifically, I did not see any evidence that a government official specifically told the Springers that it was legal to restrain Calista to her bed with a dog collar and a choke chain.

Q But you knew that they were aware of that, correct?

A There was testimony that the government was aware. And I'll be very specific. In my mind, I do not see that as the same

thing. Being—And I understand that's the issue in the case; and, obviously, the Court has to make the decision whether I called it right or I didn't. But, as I saw it, the government being aware of something and not saying, don't do that, is not the same thing under Michigan law as specifically telling somebody it's okay to do that. It's not the same thing.

And then the other element that I did not think would be satisfied would be any reliance being reasonable. I don't think that—And, again, I'm just calling it the way I saw it. I don't think any reasonable citizen could think that it would be okay, even if somebody told them to, to restrain a child night after night to a bed with a dog collar and a choke chain.

So, as the appellate counsel, I had to make a decision which issues to raise in the case and to weed out those issues that I felt didn't have a reasonable chance of success and raise those issues that I thought did.

And, sitting here today, I can tell you I just don't see that the Springers, with all due respect, had a claim, under Michigan law as it existed at the time, that the failure to tell them, don't do it, would amount to estoppel by government conduct—

Q Well—

A —not under the case law as it existed. 'Cause nobody actually specifically told them, I hereby give you permission to do

this. I saw no evidence of that.

Q Now you had spoken to my client, though—Correct?—your client—

A Yes.

Q —as well—Ms. Springer. And did she ever state to you that she was told that this was a—an appropriate way to handle Calis—Calista?

A As I recall sitting here today, I don't think she ever told me that somebody specifically gave her permission and told her to do it, no.

Q All right. And that's based upon your recollection?

A Yes, sir.

Q All right. And that was just that one meeting that you had with her?

A That was the one meeting that I had in person with her—

Q All right.

A —yes, sir.

Q Now were you aware of Calista's medical issues?

A Yes.

Q And what was your understanding of those?

A From reading the discovery, my understanding of her medical issues included the fact that she would eat objects that were not appropriate to consume, such as metal objects, that type of thing. She would put things in her mouth.

Q And wouldn't you agree that during the—Well, what would be an appropriate way to prevent that from happening?

MS. HARRINGTON: Objection, your Honor. I think we're getting outside the scope of things a little bit.

THE COURT: What's your theory there?

MR. AMBROSE: Well, he's saying that, under the fourth element as described in *Woods*, that no reasonable person could understand why the restraint was put into place; and I'm trying to explore that.

THE COURT: All right. So—Well, ask him that then.

What, in light of this—What was it that he felt was unreasonable, I guess, is the question.

You're not—So you're not getting into the argument as to whether or not they had a defense that they had no other choice and they had to do it. It's under these four factors—under the fourth factor—with this history of the child, why did he not believe that that was reasonable?

MR. AMBROSE: Yeah, in essence.

THE WITNESS: Well, several things. If a child is putting things in her mouth, then she can be placed in a room that doesn't have these items in the room. And the room can have a door, and the door can have a lock, and the lock can be operated from the outside so that she could knock on the door or bang on the door but she couldn't get up and walk out of the room. That would prevent her from accessing other areas of the house where there could be dangerous objects.

I just felt then—and I still feel now, with all due

respect to my client—that an appellate court looking at this case would not think it was reasonable to restrain somebody night after night to their bed with a dog collar and a choke chain.

If you look at what people do in mental hospitals or what people do with geriatric patients who have Alzheimer's or who are unable to avoid injuring themselves because they're confused—

I mean, I've visited people from time to time in the hospital, just in the course of my—my private life, and I've never seen anybody restrained like that. There's just many other ways to prevent somebody from hurting themselves or accessing objects that—

Q But you under—

A —don't involve that.

Q You understand that this wasn't the first option that they had used, correct?

A Yes, I understand that that's what the testimony was.

Q All right. And there was—You're understanding that there was some sort of a progression to the chain; is that accurate?

A Yes.

Q All right. And what was your understanding—Was it to protect Calista as well as the family members?

A Yes.

Q And you were aware that it was—at least by reading the

transcript, Patricia Skelding said pretty much that it was common knowledge within the department that Calista was being chained?

A As I recall the testimony, she said something to the effect that one worker or coworker or someone told her that Calista was being restrained with the knowledge of Community Mental Health—something to that effect, I think, was the actual quote.

Q And your understanding that there was never a petition filed to terminate the parents' parental rights with regard to Calista being chained?

A I don't recall, again, sitting here right now; but I would not dispute that there wasn't.

MR. AMBROSE: Can I have a moment, your Honor?

THE COURT: Uhm-hmm.

(At 2:19 p.m., off record discussion between Mr. Ambrose and defendant Marsha Springer)

MR. AMBROSE: No further questions, your Honor.

THE COURT: Ms. Owens, no questions?

MS. OWENS: No questions, your Honor.

THE COURT: All right. Mrs. Harrington?

CROSS-EXAMINATION

BY MS. HARRINGTON:

Q Did Marsha tell you that anyone tried to discourage her from chaining Calista to the bed?

A I don't recall specifically her telling me that during a visit. I recall reading testimony to that effect in the trial transcript, though.

Q And you said you met with Marsha Springer once face to face. Did you correspond with her in other ways?

A Yes, I did.

Q What would that be?

A After the meeting, which lasted probably at least two hours, I sent her a letter confirming the issues that I was going to raise in the case. And then, periodically, from time to time, I would send her copies of the prosecutor brief, notices from the court of appeals, and, of course, I sent her a copy of the opinion of the court of appeals.

And I also filed an application for leave to appeal in the state supreme court and sent her a copy of my brief and corresponded with her all the way through the decision of the state supreme court not to hear the appeal.

Q In any of her correspondence--I mean, she might not have known the word entrapment by estoppel or the phrase. But did she ever try to ask you to push the issue of government knowledge?

A Without having the whole file in front of me, I can't tell you a hundred percent; but, sitting here right now, I don't recall that she did.

MS. HARRINGTON: I don't have any further questions.

Thank you.

MR. AMBROSE: I have no further questions.

MS. OWENS: No further questions, your Honor.

THE COURT: Was there oral argument in the court of appeals on this case?

THE WITNESS: Yes.

THE COURT: Did any of the judges question anything along these lines?

THE WITNESS: No.

THE COURT: Okay. Any follow-up to that?

MR. AMBROSE: No.

THE COURT: No?

MS. OWENS: No.

THE COURT: Okay. May he be excused?

MR. AMBROSE: Yes.

THE COURT: All right. Thank you, sir.

THE WITNESS: All right. Thank you.

Am I excused from my subpoena?

THE COURT: Yes, you are.

THE WITNESS: All right. Thank you.

MR. AMBROSE: And I would like to call Marsha Springer.

THE COURT: In order to make it easier for her—if there's no objection—she can stay seated there.

DEFENDANT MARSHA SPRINGER: Thank you, sir.

THE COURT: Is that all right?

MR. MCDONOUGH: Okay.

DEFENDANT MARSHA SPRINGER: Thank you, sir.

THE COURT: No objection? All right.

DEFENDANT MARSHA SPRINGER: No objection.

THE COURT: Just raise your hand, ma'am, if you would—your right hand. Do you solemnly swear or affirm the testimony you give will be the truth, the whole truth, and nothing but the truth?

DEFENDANT MARSHA SPRINGER: Yes.

THE COURT: Anita, if you could lock the camera onto the defendant's table.

There we go.

Okay. In order to not inconvenience Ms. Springer, whose vision is impaired, and have her try and walk to the—to the witness stand, we'll have her testify from the defense table without objection from prosecution.

MR. AMBROSE: Thank you, your Honor.

THE COURT: Go ahead, Mr. Ambrose.

MR. AMBROSE: Appreciate that.

MARSHA ANNE SPRINGER,

called at 2:23 p.m., and sworn by the Court, testified:

DIRECT EXAMINATION

BY MR. AMBROSE:

Q Please state your name.

A Marsha Anne Springer.
Q And, Ms. Springer, you're the defendant in this case—a defendant, correct?
A Yes.
Q Your dau—one of your daughters is Calista?
A Yes.
Q And she—You adopted Calista when?
A When she was about five years old.
Q All right. At the point that you adopted her, what was her conditions?
A A lot. She had blood poisoning, and it builded up until she had chelation at probably six or seven years old; but she's had it ever since she was about two—two and a half years old.
Q Okay.
A 'Cause I—I had her since she was one.
Q Okay. And did that cause her some issues with regard to her behavior?
A I want to say yes. I feel that it damaged her frontal lobe, and so did Dr. Kaylor.

We first seen a Dr. Jones. He didn't want anything to do with her because she had so many issues.

Q Okay. And can you describe to the Court what some of those issues were.
A Well, the way they were described to me is she has pica, which—

MR. MCDONOUGH: Your Honor—

THE WITNESS: —she puts any and everything in her mouth.

MR. MCDONOUGH: —first of all, it's hearsay if it was coming from another source described to her.

Secondly, this is way outside of the scope of why we're here.

THE COURT: Okay. What about that, Mr. Ambrose?

MR. AMBROSE: Well, again, it goes to the point of why she took the action that she took.

MS. HARRINGTON: But that's not the scope.

THE COURT: Okay. Well, again, it's not a subjective, it's an objective finding as to whether or not it's reasonable. It's not her belief that it's reasonable in that regard.

But I sat through three weeks of trial and two weeks—I know the condition of Calista, and the record's replete with all the testimony from everyone as to what her conditions were and what she suffered from, what the Springers attempted to do, the involvement of CPS, DHS, mental health, Wraparound, caseworkers, et cetera, as to the services provided to the family. So that's all in the record.

MR. AMBROSE: Okay.

THE COURT: Okay?

MR. AMBROSE: I can more or less streamline it from

here then.

THE COURT: Okay.

BY MR. AMBROSE:

Q Now did you inform your trial attorney Mr. Bland as to why you took certain actions?

A Yes, I did.

Q And what did you tell him?

A I told him due to all of her diagnosis and how it had been explained to me through Dr. Kaylor and others.

Q Dr. Kaylor. Who were the others?

A Well, like Dr. Burke, her lead specialist. He explained how severe lead damages the brain, the organs, the bones.

Q All right. So did you tell your trial attorney why you took certain actions?

A Yes, I did.

Q And what—Again, what did you tell him?

A When she was about five, six years old—I can't remember if she was going through chelation at the time or not.—she was caught trying to drink gasoline.

Other times, she's been caught with razor blades into her mouth.

She constantly loves chewing on windowsills. And I don't care how much you paint them and how much contact paper you put over them, when someone that's got pica keeps gnawing and gnawing, it still gets into her body and in her system.

MR. MCDONOUGH: Your Honor, again, this is getting way outside the scope.

THE COURT: Yeah, again—

MR. MCDONOUGH: I have no objection—

THE COURT: To leading?

MR. MCDONOUGH: —if Counsel wants to lead.

MR. AMBROSE: All right.

THE COURT: Ms. Springer, yeah, we remember all those issues. He's trying to ask you a specific question.

BY MR. AMBROSE:

Q Did you tell your trial attorney that some government officials had come to your house?

A Yes.

Q And, with regard to that, what did these officials tell you and what did you tell your trial attorney?

A I told my trial attorney it was absolutely told to me—You will never find anything in a document or paper.—but it was told that it was okay for us to restrain her.

Q All right. And did they say how to restrain her?

A They didn't specifically say at that time, no; but I had asked for them to help buy a restraint that they use in psych wards. Glenda Sealey (phonetic) circled one, folded over the page so I could show Sharon Gerger.

Sharon Gerger said—It ran $1500.—they didn't want to have to pay for it, that we were doing a fine job, keep up the

good work, do whatever we needed to do.

Q And Sharon Gerger is—

A CPS—

Q —who was she with?

A —DHS.

Q Okay. Had you ever spoken to Pat Skelding?

A I remember Pat Skelding being at our house at a couple of different times, once when Calista was real young; and the last time—And I think it was in 2004.—yes.

Q All right. And she knew about the chaining?

A Yep.

Q And did she do anything about that?

A Absolutely not. She was offered to go upstairs and take a look at the improvised restraint.

And she says, I am not here for that, I don't want to see it. We all know about it. I'm here for the hair pulling, and it's unfounded. And she left.

Q Okay. So what was—So did you explain all this to your trial attorney?

A Yes.

Q And you felt that you needed to do these actions?

A I did feel that these actions needed to be taken for her own safety and ours.

Q We just heard from Mr. Robinson [*sic*]—or—I'm sorry.—Randy Davidson, correct?

A Right.
Q Did you inform Mr. Davidson of these—of your concerns with regard to how your trial was handled?
A Yes, I did. He asked me why I spoke to the detective; and I said, because I had nothing to hide. I've never had anything to hide. I've always been open and honest. And CPS could have came into our home any day of the week. I don't—I mean, there's nothing to hide. They all knew.
Q All right. And did they ever file—Did CPS ever file a parental rights—
A No.
Q —termination case . . . (inaudible)
A They actually pushed my adoption on her.
Q So the way of you handling—the way of you handling Calista was deemed acceptable in your understanding?
A She was absolutely acceptable to me. I loved her, since the day Tony and her entered my life, as my own.
Q Now getting back to Mr. Davidson. Did you explain to him that—what you had told your trial attorney?
A I believe I did.
Q All right. Was this an issue that you thought could be pursued, like this entrapment type of an issue?
A To be quite honest, when he came to see me in the prison, he had the same outlook as what he had in here. And, yes, I did; but you couldn't just get anything through to him because he

already had his mind set.

MR. AMBROSE: Okay. Can I just briefly have a moment with my client? I just want to—

THE COURT: I've never heard of that during—

MR. AMBROSE: I know. It's just—

THE COURT: —a direct exam.

MR. AMBROSE: That's okay, your Honor.

THE COURT: Okay.

MR. AMBROSE: You know, quite frankly, I don't have any further questions.

And this is based upon—I had a thought process of how I was going to go about it, but I think, because we short-circuited and we kind of got through the medical issues and the Court has an understanding of that—It's all part of the record.—I don't think I have any further questions.

THE COURT: Okay. Thank you, Mr. Ambrose.

Ms. Owens?

MS. OWENS: No questions, your Honor.

THE COURT: Ms. Harrington?

MR. MCDONOUGH: Me.

THE COURT: Mr. McDonough.

CROSS-EXAMINATION

BY MR. MCDONOUGH:

Q Good afternoon, Mrs. Springer.

A Good afternoon.

Q Just a few questions.

So is it your testimony that you were never specifically told not to restrain Calista?

A We was never specifically told not to restrain her.

Q Were you ever told specifically to secure her to her bed with a dog collar?

A For one, we've never used a dog collar as that. It was just the chain, you know, a choker chain.

Q Okay. I'll rephrase my question.

A Thank you.

Q Were—Did they tell you to use a choker chain to restrain her?

A If I remember right—

Q It's yes or no.

A Then I'm going to say yes.

Q And, in 2004, when Pat Skelding came to your house, she was aware that you were using the choker chain?

A I do believe at that time that the bed alarm had broken once before and we may have improvised a chain restraint at that time, if I remember correctly. But then, when she defeated this bed alarm, there was absolutely no way we could ever buy another one and use it again because she had it defeated.

Q And that was the bed alarm that the state police—

A Yes.

Q —confiscated that, in fact, worked?

A It didn't work because she defeated it. There was no way to

hook her up to it anymore.

Q Were you present when Pat Skelding came and spoke to your husband in 2004?

A Yes.

Q And did she describe the chain as being cruel?

A I don't remember her saying that; but I could have also been in the living room checking on my mom, who happened to have a stroke. I wanted to make sure she wasn't having a seizure.

Q That's—

A And I know I stepped in there twice while Pat Skelding was at my home, so I could have missed that part.

Q Okay. And did you—Did you hear Pat Skelding say that she didn't approve of that type of restraint?

A I can't say for sure. I know none of us—none of us liked the idea of thinking that we—it had to be done, but we all felt that it was necessary.

We never would have—

Q Just a second. Just a second.

Do you recall being in agreeance with Tony that you weren't going to stop restraining her when Pat asked you not to?

A At that time, yes, I was, because she had been manipulated into running away from home.

MR. MCDONOUGH: I have nothing further.

MR. AMBROSE: Just—

REDIRECT EXAMINATION

BY MR. AMBROSE:

Q When you say manipulated from running away from home, what do you mean by that?

A Children at the school—One, Calista was easily manipulated; but she was also an easy manipulator. But people younger than her influenced her to do things she should not be doing and told her to go home with them and not walk home with her sisters one day.

Q All right. And that's what—She ran away from home?

A Yes.

MR. AMBROSE: I have no further questions, your Honor.

THE COURT: Ms. Owens?

MS. OWENS: No questions, your Honor.

THE COURT: Mr. McDonough? No questions. You're nodding, but—

MR. MCDONOUGH: No questions, your Honor.

THE COURT: Okay. I just have a question then. On the date that Ms. Skelding in 2004, are you saying that you were using the chain and the other items on that date?

THE WITNESS: We could have been at that time because I know the bed alarm—We've bought two of them, because the first one broke and no longer even went off when she could get off of it. And I know we may have improvised a chaining

restraint then. I don't recall exactly when that occurred.

But then we bought this other bed alarm, and we used that all the way up until she defeated it.

THE COURT: So were you there when your husband denied to her that you were using it?

THE WITNESS: I don't remember that. I don't remember—

THE COURT: So you don't—

THE WITNESS: —so I have—

THE COURT: —remember him—

THE WITNESS: — . . . (inaudible)

THE COURT: —saying that?

THE WITNESS: —with my mom.

THE COURT: All right. So do you—

THE WITNESS: But I do remember her being offered to see the restraint, and she said they all know about it and they weren't there to see the restraint or even how it was set up.

THE COURT: What about the testimony that you actually just started using this method two days before the fire from your husband? Is that—

THE WITNESS: It could—

THE COURT: —inaccurate then?

THE WITNESS: —have been two or three days before that; but, like I said, we could have—I know that we may have

improvised a chain restraint back around Pat Skelding's time. I just—I wish my memory was more clear.

THE COURT: Okay.

THE WITNESS: It's been so long ago.

THE COURT: All right.

THE WITNESS: We had to do something until we could get to Walmart and get another bed alarm.

THE COURT: Okay. All right. Those were my questions.

Any follow-up to those?

MR. AMBROSE: Yes.

FURTHER REDIRECT EXAMINATION

BY MR. AMBROSE:

Q When this—You said this new method was done a couple days prior to the fire; is that accurate?

A Uhm-hmm.

Q What was done—What was the method—

(At 2:38 p.m., tissue handed to defendant Marsha Springer)

DEFENDANT MARSHA SPRINGER: Thank you.

BY MR. AMBROSE:

Q —previous to that?

A We were still—After we got the second bed alarm, we were using that again. But then she took and broke it where we couldn't even hook her up anymore to make sure that she couldn't get to

the windowsills or anything. She took off--It was like a little keychain thing at the end of it. And we could hook whatever up to the end of that, and she could move all over the bed; and, when it would pull off, it'd set off this really loud alarm. But yet, once she got that little key ring off of there and defeated it, it doesn't matter, she's already mastered it. If we get another one, she's going to do it over and over and over. There was--It just didn't work no more.

MR. AMBROSE: No further questions, your Honor.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MS. OWENS:

Q Mrs. Springer, this is Mary Owens talking. I'm Tony's lawyer. You said that a lady by the name of Sharon Gerger--

A Yep.

Q Was she--You spoke to her, right?

A Yes.

Q And she worked for who?

A CPS.

Q And you asked her for CPS to pay for psychiatric hospital restraints?

A Yes, I did.

Q And she refused?

A Yes, she did.

Q She said, you'll never see this in any document but keep on

doing what you're doing?

THE COURT: No.

BY MS. OWENS:

Q What did she say?

A Her—Her and Kaylor both said, you'll find nothing in the documents. She even gave Dr. Kaylor a psychological report . . . (inaudible) to try to help Kaylor help us with our daughter.

And I said, well, can you tell me what it says.

He says, no, I was told to destroy it once I read it.

BY MS. OWENS:

Q They said—

MR. MCDONOUGH: Your Honor, we're getting way out of the scope. We're getting into doctor-patient—

THE WITNESS: But the point is—

MR. MCDONOUGH: —privilege things—

THE WITNESS: —is a lot of these CPS—

MR. MCDONOUGH: Mrs. Springer—

THE WITNESS: —workers—

MR. MCDONOUGH: —I—

THE WITNESS: —and stuff—

THE COURT: You're talking—

THE WITNESS: —were my friends.

THE COURT: —when there's an interruption being

done.

All right.

MS. OWENS: I have nothing else, your Honor.

THE COURT: We're limited to the record, so let's stick with the record.

Anything else, Ms. Owens?

MS. OWENS: Nothing else, your Honor.

MR. AMBROSE: No, your Honor.

THE COURT: Mr. McDonough?

MR. MCDONOUGH: Just—Just to clarify your testimony, Mrs. Springer.

RECROSS-EXAMINATION

BY MR. MCDONOUGH:

Q So in be—You would try a bed alarm and, when Calista, in your words, would defeat the alarm, you would then go to the modified choker chain method. And then, once you were able to get another alarm, you would take the chain away; and then she defeated that second alarm, and that's when you went back to the chain method?

A If I remember right, yes. The first time the alarm itself no longer worked as in letting off that loud siren sound. This time it was the little key thing that she managed to get off of there.

Q And so, in 2004, it's possible that that was one of the times you were using a choker collar?

A Very well possible. I just don't remember very clearly, so I can't say for certain that that is when.

Q And, if—

A But it was in between the two bed alarms.

Q And, if Calista was describing to Mrs. Skelding the specific restraint that was found on her four years later, would you say that Calista was being honest with Mrs. Skelding at that point if she remembered that happening right at that point in time?

A I would say yes.

MR. MCDONOUGH: Okay. Thank you.

Nothing further.

THE COURT: I think it's you again.

Mr. Ambrose, any follow-up?

MR. AMBROSE: No, your Honor.

THE COURT: There you are. Anything?

MS. OWENS: No follow-up, your Honor.

THE COURT: All right.

MS. OWENS: Thank you.

THE COURT: Rest?

MR. AMBROSE: Yes.

THE COURT: All right. Thank you.

MS. OWENS: I rest as well.

THE COURT: Thank you.

Do you have any witnesses to present?

MS. HARRINGTON: We have no witnesses, your Honor.

THE COURT: All right. Okay. As I said in chambers before we started, I would ask for you now to prepare briefs with your arguments in this regard.

MR. MCDONOUGH: May we first have transcripts prepared before—

THE COURT: Sure.

MR. MCDONOUGH: —briefing, your Honor?

MS. HARRINGTON: And, your Honor, we—we would be filing a responsive brief, so they—Do you want to set up a briefing schedule—

THE COURT: Yeah, that's what I was just going to say.

All right. So I think it's best, though, that we just set the schedule once we get the transcripts. No sense setting a schedule now without knowing when the transcripts are going to be done. Okay?

MS. OWENS: Your Honor, should I give the Court the exhibits? Remember I had A through—

THE COURT: Yeah, that would be good. Yep, give us the exhibits, and we'll make those part of this record.

MR. AMBROSE: Do we have to make a specific request for the transcripts, or is that—

THE COURT: No, we'll order them for you.

MR. MCDONOUGH: We—Just for the record, we have no

THE COURT: All right. Thank you very much, everyone.

(At 2:45 p.m., proceedings concluded)

* * * * *

STATE OF MICHIGAN)
)
COUNTY OF KALAMAZOO)

I certify that this transcript, consisting of 162 pages, is a complete, true, and correct transcript of the proceedings and testimony taken in this case on Thursday, May 12, 2016.

May 17, 2016

Brenda K. Foley CER4956
Certified Electronic Recorder
8165 Valleywood Lane
Portage, Michigan 49024
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APPENDIX (K)

Habeas Judges Finding that Michigan Supreme Court Justices that Would Have Granted Leave to Appeal Shows Jurists of Reason Could Decide the Issues Deserve Encouragement to Proceed Further; McGuire v. Ludwick, 2009 U.S. Dist. LEXIS 69983, at pg. *29-30; Farley v. Lafler, 2005 U.S. Dist. LEXIS 30266, at pg. *5; Jones v. Renico, 2004 U.S. Dist. LEXIS 33022, at pg. *48-49; Robinson v. Stegall, 2001 U.S. Dist. LEXIS 11655, at pg. *58.

McGuire v. Ludwick

United States District Court for the Eastern District of Michigan, Southern Division

August 11, 2009, Decided; August 11, 2009, Filed

CASE NO. 2:07-CV-15399

Reporter
2009 U.S. Dist. LEXIS 69983 *; 2009 WL 2476452

RODERICK ANDRE McGUIRE, Petitioner, v. NICK LUDWICK, Respondent.

Subsequent History: Request denied by *McGuire v. Ludwick, 2014 U.S. Dist. LEXIS 16715 (E.D. Mich., Feb. 11, 2014)*

Prior History: *People v. McGuire, 477 Mich. 978, 725 N.W.2d 54, 2006 Mich. LEXIS 3141 (2006)*

Core Terms

felony murder, armed robbery, Certificate, pre-charge, gun, great bodily harm, charges, malice, instructions, murder, tactical advantage, habeas corpus, witnesses, killed, aiding and abetting, federal law, state court, pre-indictment, indictment, convict, commission of a crime, habeas relief, due process, reasons, arrest, substantial prejudice, writ petition, encouragement, prosecute, contends

Counsel: **[*1]** Roderick McGuire, Petitioner, Pro se, ST. LOUIS, MI.

For Nick J Ludwick, Warden, Respondent: Jerrold E. Schrotenboer, Jackson County Prosecutor's Office, Jackson, MI.

Judges: HONORABLE VICTORIA A. ROBERTS, UNITED STATES DISTRICT JUDGE.

Opinion by: VICTORIA A. ROBERTS

Opinion

OPINION AND ORDER DENYING THE PETITION FOR WRIT OF HABEAS CORPUS

Roderick Andre McGuire, ("Petitioner"), confined at the St. Louis Correctional Facility in St. Louis, Michigan, filed a petition for writ of habeas corpus pursuant to *28 U.S.C. § 2254*. In his *pro se* application, Petitioner challenges his conviction for first-degree felony murder, *M.C.L.A. 750.316*.

The petition for writ of habeas corpus is **DENIED.**

I. Background

Petitioner was convicted in 2004, following a jury trial in the Jackson County Circuit Court. Petitioner provided a detailed statement of facts from his brief on appeal in the Michigan Court of Appeals, which he has attached to his petition for writ of habeas corpus. [1] Respondent has not disputed these facts in its answer. Accordingly, the Court will accept the factual allegations contained in the habeas petition insofar as they are consistent with the record. *See Dickens v. Jones, 203 F. Supp. 2d 354, 360 (E.D. Mich. 2002)*. The **[*2]** Court recites verbatim the facts regarding Petitioner's conviction from the Michigan Court of Appeals' opinion affirming his conviction, which are presumed correct on habeas review. *See Dittrich v. Woods, 602 F. Supp. 2d 802, 803 (E.D. Mich. 2009)*:

> This case arises out of the shooting death of James Crowley in 1980. Defendant drove his brother, who (sic) he knew to be armed, to a certain neighborhood so his brother could commit an armed robbery. Defendant dropped his brother off, then waited for him near a stop sign. During the course of the attempted robbery, Mr. Crowley was shot and killed. Defendant was charged on or about April 4, 2004 with armed robbery and felony murder

[1] See Petitioner's Attachment C. This Court is willing to incorporate the issues and arguments raised in the state appellate court brief that Petitioner has attached to his petition as being part of the application for writ of habeas corpus. *See e.g. Burns v. Lafler, 328 F. Supp. 2d 711, 717, n. 2 (E.D. Mich. 2004)*.

in connection with the shooting. The armed robbery charge was dismissed but the felony murder charge proceeded to jury trial, at the conclusion of which defendant was found guilty.

*People v. McGuire, No. 260421, 2006 Mich. App. LEXIS 2308, *1 (Mich.Ct.App. July 25, 2006)*.

[*3] Petitioner's conviction was affirmed on appeal. *Id., lv. den. 477 Mich. 978, 725 N.W.2d 54 (2006)*(Kelly J., dissenting).

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

I. Mr. McGuire's felony murder conviction must be vacated because the evidence presented at trial was not sufficient to permit a reasonable jury to find that every element of that offense had been established beyond a reasonable doubt.

II. The trial court gave, over objection, [an] erroneous and misleading instruction on the elements of felony murder and accomplice liability which reversibly prejudiced Mr. McGuire and denied him his due process right to a fair trial.

III. Should this Court find that Mr. McGuire's challenge to the felony murder and aiding instruction was not preserved for appellate review, it must also find that defense counsel's failure to object denied Mr. McGuire his *Sixth Amendment* right to the effective assistance of counsel at trial.

IV. Excessive pre-trial delay denied Mr. McGuire his due process right to a fair trial.

II. Standard of Review

28 U.S.C. § 2254(d) imposes the following standard of review for habeas cases:

> An application for a writ **[*4]** 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, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (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 **[*5]** judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id. at 410-11*.

III. Discussion

A. Claim # 1. The sufficiency of evidence claim.

Petitioner first contends that there was insufficient evidence to show that he intended to kill or to do great bodily harm to the victim or that he intended to set into motion a force that was likely to cause the victim death or great bodily harm, so as to establish the malice element required for a felony murder conviction.

In rejecting this claim, the Michigan Court of Appeals held that there was sufficient evidence to support a finding of malice, in light of Petitioner' admission that he drove his brother, the principal offender, to an armed robbery, knowing that his brother had a gun. The Michigan Court of Appeals concluded that these facts alone were sufficient to establish malice, given that participation in an armed robbery -- where a defendant is aware that one of his co-defendants is armed with a deadly weapon -- allows for an inference of malice, because it involves participation in an act where there is a "wanton and willful disregard of the possibility that death or great bodily harm **[*6]** would result." *McGuire, 2006 Mich. App. LEXIS 2308 at *5* (internal citation omitted). The Michigan Court of Appeals concluded further that it was immaterial that Petitioner claimed that his brother told him that the gun did not function properly, because the jury was free to disbelieve Petitioner's claimed belief about the functioning of the gun and there was no evidence that the gun was completely inoperative. *2006 Mich. App. LEXIS 2308 at *6*.

A habeas court reviews claims that the evidence at trial was insufficient for a conviction by asking whether, after

viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Scott v. Mitchell, 209 F. 3d 854, 885 (6th Cir. 2000)(citing to Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Because a claim of insufficiency of the evidence presents a mixed question of law and fact, this Court must determine whether the state court's application of the *Jackson* standard was reasonable. *See* Malcum v. Burt, 276 F. Supp. 2d 664, 686 (E.D. Mich. 2003). Finally, in making a determination whether the state court's application of the *Jackson* standard in resolving Petitioner's sufficiency **[*7]** of evidence claim was contrary to, or an unreasonable application of, Supreme Court precedent, this Court must afford the state court's findings of facts a presumption of correctness unless Petitioner can establish by clear and convincing evidence that the state court's factual determination was erroneous. *See* Williams v. White, 183 F. Supp. 2d 969, 974 (E.D. Mich. 2002)(internal citations omitted).

Under Michigan law, the elements of first-degree felony murder are:

> (1) the killing of a human being;
> (2) with an intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm is the probable result (i.e., malice);
> (3) while committing, attempting to commit, or assisting in the commission of one of the felonies enumerated in the felony murder statute.

Matthews v. Abramajtys, 319 F. 3d 780, 789 (6th Cir. 2003)(citing to People v. Carines, 460 Mich. 750, 759, 597 N.W.2d 130; 460 Mich. 750, 597 N.W. 2d 130 (1999)).

To support a finding under Michigan law that a defendant aided and abetted in the commission of a crime, the prosecutor must show that:

> 1. the crime charged was committed by the defendant or some other person;
>
> 2. the defendant performed **[*8]** 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 he gave aid and encouragement.

Long v. Stovall, 450 F. Supp. 2d 746, 753 (E.D. Mich. 2006)(citing Carines, 460 Mich. at 757-58).

Under Michigan law, to convict a defendant of felony murder under an aiding and abetting theory, the prosecutor must show that someone killed the victim during the underlying predicate felony, that the defendant assisted that person in killing the victim, and that the defendant either intended to commit the crime or he knew when he gave the assistance that the other person intended to commit the crime. *See* Meade v. Lavigne, 265 F. Supp. 2d 849, 858 (E.D. Mich. 2003)(citing People v. Smielewski, 235 Mich. App. 196, 207, 596 N.W.2d 636; 235 Mich. App. 196, 596 N.W. 2d 636, 642 (1999)).

The Michigan Court of Appeals' rejection of Petitioner's sufficiency of evidence claim was not an unreasonable application of clearly established federal law. The evidence established that Petitioner agreed to participate in an armed robbery with his brother. Petitioner knew that his brother was armed with a gun when he **[*9]** drove him to commit the armed robbery. There was also evidence presented that Petitioner and his brother had committed armed robberies in the past together. A number of cases have held that a defendant's participation in an armed robbery, while either he or his codefendants were armed with a loaded firearm, manifested a wanton and reckless disregard that death or serious bodily injury could occur. This could support a finding that the defendant acted with malice aforethought, thereby supporting a conviction for felony-murder on an aiding and abetting theory. *See* Hill v. Hofbauer, 337 F. 3d 706, 719-20 (6th Cir. 2003)(intent for felony murder "can be inferred from the aider and abettor's knowledge that his cohort possesses a weapon."); *See also* Harris v. Stovall, 22 F. Supp. 2d 659, 667 (E.D. Mich. 1998); People v. Turner, 213 Mich. App. 558, 572-73, 540 N.W.2d 728; 213 Mich. App. 558, 540 N. W. 2d 728 (1995); *overruled in part on other grounds* People v. Mass, 464 Mich. 615, 628 N.W.2d 540; 464 Mich. 615, 628 N.W. 2d 540 (2001); People v. Hart, 161 Mich. App. 630, 635, 411 N.W.2d 803; 161 Mich. App. 630, 411 N.W. 2d 803 (1987); Meade, 265 F. Supp. 2d at 858-59; Redmond v. Jackson, 295 F. Supp. 2d 767, 774 (E.D. Mich. 2003)(petitioner not entitled to tolling of the AEDPA's statute of **[*10]** limitations on a claim that he was actually innocent of felony-murder, finding that petitioner's act of providing a firearm to be used in an armed robbery demonstrated a wanton and wilful disregard of the fact that a person could be killed or suffer great bodily harm during the course of the robbery).

The mere fact that Petitioner was told by his brother that the gun was not working properly would not defeat a finding of malice on Petitioner's part. Kenneth Phillipi testified that he gave the gun to Petitioner's brother, but denied telling him that the gun did not work. Petitioner did not tell the police in any of his statements that the gun was inoperable, only that it did not work "right" or that it did not "work properly." Most importantly, Petitioner admitted to the police that when "somebody has a gun something bad is going to happen." Because there was no evidence that this gun was inoperable, the jury did not err in concluding that Petitioner acted with the requisite malice to support his conviction.

Finally, Petitioner appears to argue that there was insufficient evidence to convict him of felony murder, in light of the fact that his brother was acquitted of felony murder and **[*11]** armed robbery. [2] Under Michigan law, a conviction of a principal is not a prerequisite to a valid conviction of being an aider and abettor. *See* People v. Paige, 131 Mich. App. 34, 39, 345 N.W.2d 639; 131 Mich. App. 34, 345 N.W.2d 639 (1983). Petitioner could, therefore, be convicted as aider and abettor in the killing, even though the principal defendant was acquitted, so long as the testimony clearly indicated that a murder had been committed and that there was sufficient evidence to conclude that Petitioner aided and abetted in the crime. *See* People v. Youngblood, 165 Mich.App. 381, 389, 418 N.W.2d 472; 165 Mich. App. 381, 418 N.W.2d 472 (1988). Federal law is in accord on this point. *See* Standefer v. United States, 447 U.S. 10, 20, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980); U.S. v. Price, 258 F. 3d 539, 546 (6th Cir. 2001). Petitioner is not entitled to habeas relief on his first claim.

B. Claims # 2 and # 3. The jury instruction/ineffective assistance of counsel claims.

The Court will discuss Petitioner's second and third claims **[*12]** together because they are interrelated. In his second claim, Petitioner contends that the trial judge gave an erroneous and misleading instruction on the elements of felony murder and accomplice liability. In his third claim, Petitioner contends that his trial counsel was ineffective for failing to object to the incorrect instruction.

[2] Petitioner's brother was acquitted of felony murder at a first trial. Because the jury in that case could not reach a verdict on the armed robbery charge, a second trial was conducted, at which time, Petitioner's brother was acquitted of the armed robbery charge.

Taking Petitioner's third claim first, the record establishes that trial counsel objected to the trial court's instruction on felony murder and accomplice liability. Because counsel did, in fact, object to the trial court's instruction, Petitioner's ineffective assistance of counsel claim is without merit. *See e.g.* Durr v. Mitchell, 487 F.3d 423, 440 (6th Cir. 2007).

In his second claim, Petitioner contends that the trial court judge impermissibly blended the instructions on felony murder and aiding and abetting, and in doing so, failed to instruct the jury that they had to find that Petitioner knew that his brother acted with malice at the time that he provided aid and assistance to his brother.

The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack upon the constitutional validity of a state **[*13]** court conviction is even greater than the showing required in a direct appeal. The question in such a collateral proceeding is whether the ailing instruction so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even "universally condemned," and an omission or incomplete instruction is less likely to be prejudicial than a misstatement of the law. Henderson v. Kibbe, 431 U.S. 145, 154-55, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977). The challenged instruction may not be judged in artificial isolation but must be considered in the context of the instructions as a whole and the trial court record. Grant v. Rivers, 920 F. Supp. 769, 784 (E.D. Mich. 1996). To warrant habeas relief, the jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair. Scott v. Mitchell, 209 F. 3d 854, 882 (6th Cir. 2000). Allegations of trial error raised in challenges to jury instructions are reviewed for harmless error by determining whether they had a substantial and injurious effect or influence on the verdict. *Id.* Finally, federal habeas courts do not grant relief, **[*14]** as might a state appellate court, simply because a jury instruction may have been deficient in comparison to a model state instruction. *See* Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

In rejecting Petitioner's claim, the Michigan Court of Appeals noted that the trial court judge gave the correct aiding and abetting and felony murder instructions, even if they were essentially blended together. McGuire, 2006 Mich. App. LEXIS 2308 at *7. Because the Michigan Court of Appeals found that the instructions given by the trial court accurately reflected Michigan law regarding

the elements of felony murder and aiding abetting, this Court must defer to that determination and cannot question it. *See* Seymour v. Walker, 224 F. 3d 542, 558 (6th Cir. 2000).

Moreover, the instructions in their entirety adequately instructed the jurors on the intent necessary to convict Petitioner of aiding and abetting in a felony murder. The trial court judge instructed the jurors that in order to convict Petitioner of aiding and abetting, they would have to find that he "intended the commission of the crime alleged or must have known the other person intended its commission at the time of giving of the assistance." (Tr. 12/9/2004, **[*15]** pp. 128-29). Later, when instructing the jurors on the elements of felony murder, the judge instructed the jurors that they would have to find that Petitioner's "brother had one of these two states of mind. He intended to do great bodily harm to James Crowley, or he knowingly created a very high risk of death or great bodily harm, knowing that death or great bodily harm would be the likely result of his actions." (*Id.* at p. 129). Because the instructions, when viewed in their entirety, properly instructed the jurors on the elements necessary for establishing that Petitioner had the requisite malice necessary for aiding and abetting in a felony murder that was committed in the course of a robbery, Petitioner is not entitled to habeas relief on this claim. *See* Nash v. McKune, 44 Fed. Appx. 378, 379 (10th Cir. 2002).

C. Claim # 4. The pre-charge delay claim.

In his final claim, Petitioner contends that his right to due process was violated by the twenty four year delay in charging him with this crime.

The Michigan Court of Appeals rejected this claim, primarily because it concluded that there was no evidence on the record that the prosecution intentionally delayed bringing this case to gain **[*16]** tactical advantage. It also found that Petitioner had failed to even allege intentional delay. McGuire, 2006 Mich. App. LEXIS 2308 at *10. The Michigan Court of Appeals concluded that Petitioner's allegations involving possible difficulties with witness' memories due to the passage of time "are generally insufficient to establish actual and substantial prejudice." *Id.* (internal quotation omitted). Moreover, although noting that two key witnesses were dead and no longer available for trial, the Michigan Court of Appeals found that Petitioner did not specify exactly what these witnesses would have said that would have exonerated him. *Id.* Finally, the Michigan Court of Appeals observed that the transcripts of these witnesses' testimony from Petitioner's brother's trial were available and could have been used by Petitioner, but he declined to do so. The Michigan Court of Appeals concluded that Petitioner failed to show that his right to due process was violated by pre-arrest delay. *Id.*

As an initial matter, Petitioner has neither alleged nor established a violation of his Sixth Amendment right to a speedy trial, because he was not actually arrested or charged with this crime until 2004. The Supreme Court **[*17]** has noted that it is "[e]ither a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." United States v. Marion, 404 U.S. 307, 320, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). Therefore, although the invocation of the Speedy Trial Clause of the Sixth Amendment need not await indictment, information or other formal charge, the provision of the Speedy Trial Clause does not reach to the period prior to arrest. *Id.*

The Due Process Clause, however, provides a limited role in protecting criminal defendants against "oppressive" pre-arrest or pre-indictment delay. U. S. v. Lovasco, 431 U.S. 783, 789, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977). Proof of prejudice is generally a necessary but not sufficient element of a due process claim involving pre-indictment delay, and the due process inquiry must consider the reasons for the delay as well as prejudice to the accused. *Id. at 790.*

The Sixth Circuit has consistently read Lovasco to hold that dismissal for pre-indictment indictment delay is warranted only when the defendant shows: (1) substantial prejudice to his right to a fair trial; and (2) that the delay **[*18]** was an intentional device by the government to gain a tactical advantage. United States v. Brown, 959 F. 2d 63, 66 (6th Cir. 1992). The Sixth Circuit has repeatedly held that where the pre-indictment delay is caused merely by negligence on the part of prosecutors or police, no due process violation exists. U.S. v. Rogers, 118 F. 3d 466, 476 (6th Cir. 1997) (rejecting the argument that "reckless or negligent disregard of a potentially prejudicial circumstance violates the Fifth Amendment guarantee of due process"); *See also* U.S. v. Banks, 27 Fed. Appx. 354, 357 (6th Cir. 2001)("Our Circuit has recognized that where delay is due to simple negligence and not a concerted effort by the government to gain an advantage, no due process violation exists"). Finally, where a habeas petitioner fails to show that the prosecutor delayed the prosecution for illegitimate

reasons, it is unnecessary for a court to determine whether the petitioner satisfies the "substantial prejudice" requirement. *See* Wolfe v. Bock, 253 Fed. Appx. 526, 532 (6th Cir. 2007)(petitioner failed to establish that 15-year delay between murder and his arrest was for illegitimate reasons, as was required to support claim that **[*19]** delay violated petitioner's due process right to a fair trial).

The twenty four year delay in prosecuting Petitioner raises obvious concerns to this Court. However, the main problem with Petitioner's claim is that he has failed to establish that this delay, while excessive, was done intentionally by the prosecutor for the purpose of obtaining a tactical advantage. Indeed, Petitioner's counsel spent almost his entire time at pre-trial hearings conducted on September 10 and October 8, 2004 arguing that Petitioner had been prejudiced by the delay, without offering any argument or evidence that the delay had been done in bad faith.

Petitioner did not even allege that the prosecutor intentionally delayed filing charges to gain a tactical advantage, until he filed his application for leave to appeal to the Michigan Supreme Court. At that point, Petitioner contended that the prosecution's reason for the delay in filing charges was "dissatisfaction with the available evidence and a desire to develop additional evidence." [3] To the extent that the prosecutor delayed prosecution to obtain additional evidence, Petitioner would be unable to establish that the delay was improper. The Supreme Court **[*20]** in *Lovasco* recognized "that the interests of the suspect and society are better served if, absent bad faith or extreme prejudice to the defendant, the prosecutor is allowed sufficient time to weigh and sift evidence to ensure an indictment is well-founded." United States v. Eight Thousand, Eight Hundred and Fifty Dollars ($ 8,850) in U.S. Currency, 461 U.S. 555, 563, 103 S. Ct. 2005, 76 L. Ed. 2d 143 (1982). To prosecute a defendant following an investigative delay does not deprive him of due process, even if his defense is somewhat prejudiced by the lapse of time. Lovasco, 431 U.S. at 796.

Although Petitioner did not argue before the Michigan Court of Appeals that the delay was intentional, in his statement of facts in his brief on appeal to the Michigan Court of Appeals, Petitioner mentioned that the prosecutor had argued, in response to Petitioner's motion to dismiss, that there was an adequate reason for the delay, "because the current prosecutor disagreed with the prior prosecutor's assessment as to whether the evidence was sufficient to sustain a murder conviction." [4] In the body of his application for leave to appeal to the Michigan Supreme Court, **[*21]** Petitioner notes that there was "a disagreement among people in the prosecutor's office as to whether or not Mr. McGuire's statements to the police provided sufficient evidence to sustain a felony murder prosecution." [5]

Disagreements between a former prosecutor and his or her successor over whether there is sufficient evidence to prosecute a defendant for a crime is a legitimate reason for a delay in filing charges. *See* State v. Kuri, 846 S. W. 2d 459, 469-70 (Tex. App. 1993)(Drug defendant claiming that due process rights were violated by one-year delay from withdrawal of indictment to filing of new indictment did not establish that prosecution sought to gain tactical advantage over defendant; delay was occasioned by reassignment of case within prosecutor's office, from attorney who did not believe it was strong enough to be pursued to another attorney who did); *See also* Tanner v. Yukins, 2005 U.S. Dist. LEXIS 44495, 2005 WL 2994353, * 1, 17 (E.D. Mich. November 7, 2005)(petitioner failed to show that five year delay in bringing prosecution was intended to cause a tactical advantage, **[*22]** when initial prosecutor declined to issue arrest warrants in the fall of 1995 on the ground that there was insufficient evidence to charge petitioner, but arrest warrant was issued in 2000 after a new prosecutor had taken office in 1997). A trial court is not permitted under the Due Process Clause to terminate a criminal prosecution simply because it disagrees with the prosecutors' decisions as to when to seek an indictment. Lovasco, 431 U.S. at 790. Prosecutors are under no duty to file charges before they are satisfied that they will be able to establish the defendant's guilt beyond a reasonable doubt. *Id.*

In reviewing the preliminary examination and trial transcripts, it appears as though Petitioner had been in prison off and on since 1980. When Petitioner was paroled in 2004, Melvin Hartman, an investigator with the Jackson County Prosecutor's Office and a member of their Cold Case Unit, and a former Jackson Police

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[3] *See* Application for Leave to Appeal, p. 5[This Court's Dkt. # 7-2].

[4] *See* Brief on Appeal, p. 2, Petitioner's Attachment C.

[5] *See* Application for Leave to Appeal, p. 27 [This Court's Dkt. # 7-2].

Officer who had been involved in the original murder case, received a notification from the Michigan Parole Board that Petitioner had been paroled. Hartman testified that the cold case unit deals with unresolved homicides which involves "suspicious deaths" and re-investigates **[*23]** those cases. The notification from the Parole Board about Petitioner's release from prison apparently jogged Hartman's memory about the murder case, which remained unsolved. (Preliminary Exam. Tr., Vol. I, pp. 41-42, 48, Trial Tr., 12/6/2004, p. 6). Hartman spoke with Hank Zavislak, the Jackson County Prosecutor, about the case. Zavislak asked Hartman to go speak with Petitioner about the case, in an attempt to "close out the Crowley case." Specifically, Mr. Zavislak wanted to know what happened that particular night, because "there was still a gap within that case as to what actually transpired that night." The prosecutor also wanted to learn more about the circumstances surrounding Petitioner's brother's death in 1990.(Preliminary Exam. Tr., Vol. I, p. 48; Preliminary Examination Tr., Vol. II, pp. 5-6). Hartman went to Muskegon to speak with Petitioner in the presence of his parole officer. Petitioner was offered immunity in exchange for his willingness to talk about the crime, but Petitioner refused to speak with Hartman.(Preliminary Exam. Tr., Vol. I, pp. 49-50). Petitioner was formally charged with the crime.

Courts have considered the bringing of criminal charges after a case **[*24]** has been reviewed by a "cold case unit" and a determination has been made by that unit to go forward with a criminal prosecution to be an acceptable explanation for pre-indictment delay. *See Bierenbaum v. Graham, 2008 U.S. Dist. LEXIS 14199, 2008 WL 515035, * 22 (S.D.N.Y. February 25, 2008)*.

In addition, on the second and third days of trial, the prosecutor made a record that there were legitimate reasons for the delay in prosecution, based upon the fact that Petitioner had been offered a deal to testify against his brother at the time of his brother's trial, but later backed out of the deal. At the time, Petitioner was being held on CCW [carrying a concealed weapon], armed robbery, and possession of cocaine charges. After Petitioner's brother was acquitted, a decision was made not to prosecute Petitioner because he was going to serve prison time for other convictions, coupled with the fact that the prosecutor's office did not want to put the victim's family through the ordeal of another trial.(Tr. 12/7/2004, pp. 6-7; Tr. 12/8/2004, pp. 6-8). As the First Circuit noted, "ongoing investigations are not the only constitutionally acceptable explanations for pre-indictment delays." *U.S. v. DeCologero, 530 F. 3d 36, 78 (1st Cir. 2008)*; **[*25]** *cert. den. 129 S. Ct. 615, 172 L. Ed. 2d 469 (2008)*. Considerations for a victim or her family are valid reasons for a pre-charging delay. *See State v. Gonzales, 156 P. 3d 407, 415 (Alaska 2007)*. In addition, the prosecution's decision to forego charging Petitioner because he was already serving a prison sentence on other charges was a valid reason for pre-charging delay. *See e.g. Arnold v. McCarthy, 566 F. 2d 1377, 1385 (9th Cir. 1978)*.

Petitioner is not entitled to habeas relief on his pre-charging delay claim; he has failed to establish that the prosecutor intentionally delayed filing charges to gain a tactical advantage. Because Petitioner has failed to show that the prosecutor delayed the prosecution for invalid reasons, it is unnecessary for this Court to determine whether Petitioner can establish that he was substantially prejudiced by the delay. *Wolfe v. Bock, 253 Fed. Appx. at 532*.

Nonetheless, Petitioner is unable to establish prejudice in prosecuting his case. The Sixth Circuit observed that: "[T]he standard for pre-indictment delay is nearly insurmountable, especially because proof of actual prejudice is always speculative." *Rogers, 118 F. 3d at 477, n. 10*.

Petitioner first claims that because **[*26]** of the passage of time, many of the original documents from the police investigative file have been destroyed, witnesses cannot be located, and the memories of the available witnesses have diminished. However, "a vague assertion that memories have diminished, witnesses have been lost, and documents have been misplaced does not establish actual prejudice from a pre-charge delay." *Randle v. Jackson, 544 F. Supp. 2d 619, 631 (E.D. Mich. 2008)*(citing *United States v. Beszborn, 21 F. 3d 62, 67 (5th Cir. 1994)*; *United States v. Mask, 154 F. Supp. 2d 1344, 1348 (W.D. Tenn. 2001)*).

Other than in conclusory fashion, Petitioner failed to show with any specificity how any information contained within the police file would have assisted his case, nor has he shown how any of the witnesses who did testify at his trial had any significant memory problems. Petitioner does allege that he was unable to present an alibi defense, because his alibi witnesses, namely his brother and sister-in-law, were now deceased. However, as the Michigan Court of Appeals noted in its opinion, the transcripts from Petitioner's brother's trial or trials were available. At these trials, Petitioner's brother and sister-in-law **[*27]** testified that Petitioner was with them at the time of the crime and that none of them was

involved in the murder. The fact that Petitioner could have presented an alibi defense by using the prior transcribed testimony of these witnesses defeats any claim of prejudice from the delay. *See e.g.* Cousart v. Hammock, 745 F. 2d 776, 778 (2nd Cir. 1984).

Finally, Petitioner confessed his involvement in this crime to at least three different police officers. In light of this, Petitioner failed to show that he was substantially prejudiced by the delay in prosecution. *See* U.S. v. Bartlett, 794 F. 2d 1285, 1292-93 (8th Cir. 1986).

The Michigan Court of Appeals rejected Petitioner's claim, ruling that Petitioner failed to show an intent by the prosecutor to gain a tactical advantage and that he had not shown prejudiced. Because these findings are supported by the record, this Court concludes that the Michigan Court of Appeals' resolution of Petitioner's pre-charging delay claim was neither contrary to, nor an unreasonable application of federal law. Petitioner is not entitled to habeas relief on his pre-charging delay claim. Randle, 544 F. Supp. 2d at 631.

IV. Conclusion

The Court denies the Petition **[*28]** for Writ of Habeas Corpus. The Court will, however, grant Petitioner a Certificate of Appealability with respect to his fourth claim involving pre-charge delay. In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 U.S. 473, 483-484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). When a district court rejects a habeas petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims to be debatable or wrong. Id. at 484. A federal district court may grant or deny a certificate of appealability when the court issues a ruling on the habeas petition. Castro v. United States, 310 F. 3d 900, 901 (6th Cir. 2002).

Although the Court believes that its decision in denying Petitioner habeas relief on his fourth claim was correct, **[*29]** it will nonetheless grant Petitioner a Certificate of Appealability on his pre-charge delay claim for the following reason. Justice Kelly dissented from the Michigan Supreme Court's decision to deny Petitioner leave to appeal and indicated that she would have granted Petitioner's application for leave to appeal with the Michigan Supreme Court as to his pre-charge delay claim. *People v. McGuire, 477 Mich. at 978.* In light of the fact that Justice Kelly dissented from the decision to deny leave to appeal and would have granted leave to appeal with regard to this claim, Petitioner has shown that jurists of reason could decide this issue differently or that the issue deserves encouragement to proceed further. *See* Robinson v. Stegall, 157 F. Supp. 2d 802, 820, n. 7 & 824 (E.D. Mich. 2001)(habeas petitioner entitled to certificate of appealability from district court's determination that state appellate court reasonably applied federal law in determining that any Confrontation Clause error was harmless, where one judge on the Michigan Court of Appeals dissented and indicated that he would have reversed petitioner's conviction; dissent showed that a reasonable jurist found that the issue **[*30]** should have been decided differently); *See also* Tankleff v. Senkowski, 135 F. 3d 235, 242 (2nd Cir. 1998)(pre-AEDPA habeas petitioner entitled to certificate of probable cause to appeal, where intermediate state appellate court split three to two on the *Miranda* issue and the propriety of the prosecutor's summation); *Palmariello v. Superintendent, M.C.I. Norfolk*, No. 1988 WL 42393, * 2 (D. Mass. April 11, 1988)(habeas petitioner entitled to certificate of probable cause where the Massachusetts Supreme Judicial Court's affirmance of his conviction was non-unanimous; certificate would be issued "[I]n light of the dissenting opinion filed by a member of the Commonwealth's highest appellate court"). The Court will therefore grant a Certificate of Appealability to Petitioner with respect to his fourth claim involving pre-charge delay.

For the reasons stated in this opinion, the Court denies Petitioner a Certificate of Appealability with respect to his first, second, and third claims; jurists of reason would not find this Court's resolution these claims to be debatable or that they should receive encouragement to proceed further. Siebert v. Jackson, 205 F. Supp. 2d 727, 735 (E.D. Mich. 2002).

The **[*31]** Court also grants Petitioner leave to appeal *in forma pauperis* (IFP). A court may grant IFP status if it finds that an appeal is taken in good faith. *See* 28 U.S.C. § 1915(a)(3); *Fed. R.App.24 (a)*; Foster v. Ludwick, 208 F. Supp. 2d 750, 765 (E.D. Mich. 2002). Good faith requires a showing that the issues raised are not frivolous; it does not require a showing of probable

success on the merits. *Id.* Because this Court grants a Certificate of Appealability to Petitioner on his fourth claim, this Court also finds that any appeal by Petitioner would be undertaken in good faith, and leave is granted to appeal *in forma pauperis*. *See* Brown v. United States, 187 F. Supp. 2d 887, 893 (E.D. Mich. 2002).

V. ORDER

The Petition for a Writ of Habeas Corpus is **DISMISSED WITH PREJUDICE.**

A Certificate of Appealability is **GRANTED** with respect to Petitioner's fourth claim and **DENIED** with respect to his first, second, and third claims.

Petitioner is **GRANTED** leave to appeal *in forma pauperis*.

IT IS ORDERED.

/s/ Victoria A. Roberts

Victoria A. Roberts

United States District Judge

Dated: August 11, 2009

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Farley v. Lafler, 2005 U.S. Dist. LEXIS 30266

Copy Citation

United States District Court for the Eastern District of Michigan, Southern Division

November 17, 2005, Decided ; November 17, 2005, Filed

Civil No. 04-CV-72222-DT

Reporter

2005 U.S. Dist. LEXIS 30266 * | 2005 WL 3088347

DAVID KEITH FARLEY, Petitioner, v. BLAINE C. LAFLER, Respondent,

Prior History: Farley v. Lafler, 2005 U.S. Dist. LEXIS 27523 (E.D. Mich., Oct. 24, 2005)

Core Terms

certificate, jurists, habeas petitioner, habeas corpus, district court, certificate of probable cause, application for a writ, application for leave, state appellate court, constitutional claim, district court judge, habeas petition, order to obtain, federal law, encouragement, affirmance, prevail, sexual

Case Summary

Procedural Posture

Petitioner inmate sought a writ of habeas corpus pursuant to 28 U.S.C.S. § 2254. The court denied the inmate's petition. The inmate moved for a certificate of appealability pursuant to 28 U.S.C.S. § 2253.

Overview

The inmate asserted three claims in his 28 U.S.C.S. § 2254 petition. He argued that he had been

denied his Sixth Amendment right to confrontation, that the evidence was legally insufficient to support his conviction for first-degree criminal sexual conduct, and that inadequate jury instructions denied him due process. Previously, the court held that the state courts did unreasonably apply federal law, as announced by the United States Supreme Court, when they rejected those arguments. The court remained convinced of that it properly denied the inmate relief; however, the court would grant the inmate a certificate of appealability pursuant to 28 U.S.C.S. § 2253. Two justices of the Michigan Supreme Court indicated that they would have granted the inmate leave to appeal following the affirmance of his conviction by the Michigan Court of Appeals. Their stated perspective that review was warranted indicated that jurists of reason could decide the issues raised in the inmate's habeas petition differently or that the issues deserve encouragement to proceed further.

Outcome

The court granted the inmate's motion for a certificate of appealability.

LexisNexis® Headnotes

Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview

Criminal Law & Procedure > Habeas Corpus > Appeals > General Overview

HN1 **Habeas Corpus, Procedure**

28 U.S.C.S. § 2253(c)(1)(A) and Fed. R. App. P. 22(b) state that an appeal from a federal district court's denial of a writ of habeas corpus may not be taken unless a certificate of appealability is issued either by a circuit court or district court judge. If an appeal is taken by an applicant for a writ of habeas corpus, the district court judge shall either issue a certificate of appealability or state the reasons why a certificate of appealability shall not issue. Fed. R. App. P. 22(b). A district court is to set forth in its order all of the issues that the petitioner raised in the habeas action and identify those issues, if any, that the district court is certifying for appeal. More like this Headnote

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Criminal Law & Procedure > Habeas Corpus > Appeals > General Overview

HN2 **Habeas Corpus, Appeals**

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

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HN3 **Habeas Corpus, Appeals**
In order to obtain a certificate of appealability, a habeas petitioner need not show that his or her appeal will succeed. It is consistent with 28 U.S.C.S. § 2253 that a certificate of appealability (COA) will issue in some instances where there is no certainty of ultimate relief. A habeas petitioner is not required to prove, before obtaining a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.
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Counsel: **[*1]** For David Farley, Petitioner: David A. Dodge ▾, Dodge & Dodge ▾ (Grand Rapids), Grand Rapids, MI.

Judges: HONORABLE GEORGE CARAM STEEH ▾, UNITED STATES DISTRICT JUDGE.

Opinion by: GEORGE CARAM ▾ STEEH

Opinion

OPINION AND ORDER GRANTING A CERTIFICATE OF APPEALABILITY

On October 24, 2005, this Court issued an opinion and order denying petitioner's application for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. *Farley v. Lafler,* 2005 U.S. Dist. LEXIS 27523, 2005 WL 2769001 (E.D. Mich. October 24, 2005). Petitioner has now filed a motion for a certificate of appealability. For the reasons stated below, the motion for a certificate of appealability will be granted.

HN1 28 U.S.C. § 2253(c)(1)(A) and F.R.A.P. 22(b) state that an appeal from the district court's denial of a writ of habeas corpus may not be taken unless a certificate of appealability (COA) is issued either by a circuit court or district court judge. If an appeal is taken by an applicant for a writ of habeas corpus, the district court judge shall either issue a certificate of appealability or state the reasons why a certificate of appealability shall not **[*2]** issue. F.R.A.P. 22(b). A district court is to set forth in its order all of the issues that the petitioner raised in the habeas action and identify those issues, if any, that the district court is certifying for appeal. *In Re Certificates of Appealability,* 106 F. 3d 1306, 1307 (6th Cir. 1997).

HN2 In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel,* 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). When a district court rejects a habeas petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims to be debatable or wrong. *Id.*

HN3 In order to obtain a certificate of appealability, a habeas petitioner need **[*3]** not show that his or her appeal will succeed. *Miller-El v. Cockrell,* 537 U.S. 322, 337, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). The Supreme Court's holding in *Slack v. McDaniel* "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or

she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Id.* A habeas petitioner is not required to prove, before obtaining a COA, that some jurists would grant the petition for habeas corpus. *Id.* at 338. "Indeed, a claim can be debatable

even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*

Petitioner raised the following three claims in his habeas petition:

> I. Petitioner was deprived of his Sixth Amendment right of confrontation.
>
> II. The evidence at trial was legally insufficient to convict petitioner of first-degree criminal sexual conduct.
>
> III. Petitioner's due process rights were violated when the jury instructions did not inform the jury **[*4]** that they had to make a unanimous factual finding as to each sexual act alleged.

This Court rejected petitioner's application for writ of habeas corpus, on the ground that petitioner failed to show that the Michigan courts' decisions in this case were contrary to, or involved an unreasonable application of, clearly established federal law or involved an unreasonable determination of the facts.

Although the Court believes that its decision in denying petitioner habeas relief was correct, it will nonetheless grant petitioner a certificate of appealability on his three claims for the following reason. As noted by this Court in the opinion and order denying the petition for writ of habeas corpus, Justices Cavanagh and Kelly of the Michigan Supreme Court indicated that they would have granted petitioner's application for leave to appeal with the Michigan Supreme Court. *People v. Farley,* 469 Mich. 975, 671 N.W.2d 884 (2003).

The fact that two Michigan Supreme Court justices would have granted petitioner's application for leave to appeal following the affirmance of his conviction by the Michigan Court of Appeals shows that jurists of reason could decide **[*5]** the issues raised in this petition differently or that the issues deserve encouragement to proceed further. *See Robinson v. Stegall,* 157 F. Supp. 2d 802, 820, n. 7 & 824 (E.D. Mich. 2001)(habeas petitioner entitled to certificate of appealability from district court's determination that state appellate court reasonably applied federal law in determining that any Confrontation Clause error was harmless, where one judge on the Michigan Court of Appeals dissented and indicated that he would have reversed petitioner's conviction; dissent showed that a reasonable jurist found that the issue should have been decided differently); *See also Tankleff v. Senkowski,* 135 F. 3d 235, 242 (2nd Cir. 1998)(pre-AEDPA habeas petitioner entitled to certificate of probable cause to appeal, where intermediate state appellate court split three to two on the *Miranda* issue and the propriety of the prosecutor's summation); *Palmariello v. Superintendent, M.C.I. Norfolk,* 1988 U.S. Dist. LEXIS 15663, 1988 WL 42393, * 2 (D. Mass. April 11, 1988) (habeas petitioner entitled to certificate of probable cause where the Massachusetts Supreme Judicial Court's affirmance of his conviction was **[*6]** non-unanimous; certificate would be issued "In light of the dissenting opinion filed by a member of the Commonwealth's highest appellate court"). The Court will therefore grant a certificate of appealability to petitioner on his three claims. [1]

ORDER

IT IS HEREBY ORDERED that a certificate of appealability shall be issued with respect to petitioner's three claims.

s/George Caram Steeh

GEORGE CARAM STEEH

UNITED STATES DISTRICT JUDGE

Dated: November 17, 2005

Footnotes

---

[1]

The court is aware that the Sixth Circuit disfavors issuing a blanket certificate of appealability without making an individualized determination as to each claim. *See Frazier v. Huffman*, 343 F.3d 780, 788 (6th Cir. 2003). However, in the absence of an indication from either Justice Cavanagh or Justice Kelly as to which of Petitioner's claims they wanted to grant leave on, the court is unable to make a more individualized determination.

Jones v. Renico

United States District Court for the Eastern District of Michigan, Southern Division

April 22, 2004, Decided; April 22, 2004, Filed

Civil No. 03-CV-73246-DT

Reporter
2004 U.S. Dist. LEXIS 33022 *

DEANGELO T. JONES, Petitioner, v. PAUL RENICO, Respondent,

Prior History: *People v. Hughes, 1998 Mich. App. LEXIS 1799 (Mich. Ct. App., June 26, 1998)*

Core Terms

sentence, state court, co-defendant, appellate counsel, armed, felony murder, Appeals, trial court, certificate, ineffective assistance, aiding and abetting, ineffective, assault with intent, convicted, exhaust, trial counsel, commission of a crime, contends, procedural default, underlying felony, habeas relief, mere presence, defaulted, kitchen, merits, shot, encouragement, pizza, lesser included offense, habeas corpus

Counsel: [*1] Deangelo Jones, Petitioner, Pro se, St. Louis , MI USA.

For Paul Renico Warden, Respondent: Brenda E. Turner, LEAD ATTORNEY, Michigan Department of Attorney General, Lansing , MI USA.

Judges: HONORABLE JOHN CORBETT O'MEARA, UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN CORBETT O'MEARA

Opinion

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

DeAngelo T. Jones, ("Petitioner"), presently confined at the St. Louis Correctional Facility in St. Louis, Michigan, seeks the issuance of a writ of habeas corpus pursuant to *28 U.S.C. § 2254*. In his application, filed *pro se*, petitioner challenges his conviction and sentence on one count of assault with intent to rob while armed, *M.C.L.A. 750.89*; M.S.A. 28.284. For the reasons stated below, the application for writ of habeas corpus is **DENIED**.

I. BACKGROUND

Petitioner was originally charged with first-degree felony murder and assault with intent to rob while armed. Petitioner and co-defendant Larry Hughes were tried jointly before a jury in the Detroit Recorder's Court. Petitioner and Hughes were found not guilty of first-degree felony murder and guilty of assault with intent to rob while armed. A third co-defendant, Steven Cory Cojocar, was tried separately and convicted of first-degree felony murder, [*2] assault with intent to rob while armed, and felony-firearm. A fourth defendant, Chris Branscum, was acquitted of all charges at a separate trial.

On March 31, 1994, Herman Gardula and his wife Irene Gardula were at home in Detroit, Michigan when someone knocked on the door and rang the door bell. Herman Gardula asked the person what address he was looking for. Irene Gardula heard the person mention something about a pizza, to which her husband indicated that they hadn't ordered one. Irene Gardula heard the front door open and heard a gunshot. She ran to the living room and discovered her husband on the floor with a wound to the chest. (T. I., pp. 55-68).

Christine Domanski testified that she was at her house on Hickory Street in Detroit, Michigan on March 30, 1994. Domanski lived there with Catrina Sanchez. Domanski knew petitioner as "Dee". Around 9:00 p.m. that evening, petitioner, Cojocar, Branscum and Hughes arrived at her house. Earlier in the evening, Domanski's house had been shot at, which was why everyone had come to her house. (T. I, pp. 117, 120-125). Later in the evening, Domanski observed persons sitting in the kitchen. Domanski specifically recalled seeing Branscum in the [*3] kitchen but could not recall if she

observed the other three defendants in the kitchen. Domanski was in the kitchen sweeping up broken glass when she overheard "bits and pieces" of a conversation. Domanski overheard someone talk about committing a robbery, but she was unable to see who was talking. She also heard someone mention using a pizza box during the robbery. Domanski was unable to identify which defendant spoke about using a pizza box, but she did observe Chris Branscum holding one. (*Id.* at pp. 125-26). Earlier in the evening, Domanski had observed Steve Cojocar with a .45 semi-automatic handgun in the basement, although she did not see the handgun in the kitchen while the conversation was taking place. Domanski could not recall who was in the basement when Cojocar had displayed his handgun. Domanski indicated that Steve Cojocar was not the person who brought up the idea of committing a robbery. (*Id.* at 130-32). Upon further questioning, Domanski clarified that it was Branscum, or the man who had been holding the pizza box, who had brought up the idea of committing a robbery. Within fifteen minutes of Branscum making this comment, all of the men had left the house. (*Id.* at 133-34).

Domanski was unsure whether Hughes **[*4]** or petitioner was in the kitchen when the conversation took place. However, to the best of her recollection, there were three or four other persons in the kitchen when Branscum discussed committing a robbery. (*Id.* at pp. 138-39).

Kelly Callaghan testified that she knew a person by the name of "Dee", but was unable to identify petitioner as being this person. (T. I., pp . 209-10). In late March of 1994, she and her friends were at her house at night when "Chubby", "Dee", Hughes, Cojocar, and Branscum came to her house. Chris, Steve, and Dee left at some point, but Hughes stayed behind. Hughes told Callaghan and her friends that Steve had shot someone, explaining that Steve had put a gun in a pizza box and when the victim had come to the door, he shot him. (*Id.* at pp. 211-212, 215-16).

Catrina Sanchez was living with Christine Domanski on Hickory Street in Detroit, Michigan in late March of 1994. On the evening of March 30, 1994, she had seen petitioner, Hughes, Cojocar, and another person whom she had never seen before at her house. Steve and Larry had come to the house about fifteen minutes after it had been shot up. Petitioner and the unidentified white man had arrived at the house about thirty to forty minutes later. (T. I., **[*5]** pp. 223-28). At some point, Cojocar, Hughes, petitioner, and this fourth man were in the kitchen. Cojocar talked about robbing someone. The other three men were in the kitchen when Cojocar made these remarks. Sanchez indicated that Steve had a .45 handgun when he first came to the house. According to Sanchez, the unidentified white man had a pizza box in his hands. None of the other men had any weapons. Sanchez did not hear any of the other men say anything about committing a robbery because she was "in and out" of the kitchen. All four men were in the kitchen, however, while the robbery was being discussed. At some point later, all four men left the house. (*Id.* at pp. 229-31; 233-34).

Detective William Brantley of the Detroit Police Department obtained statements from petitioner and Larry Hughes after the men were arrested. Hughes told Brantley that he and Steve had gone over to Christine's house after it had been shot up. A short while later, Chris and Deangelo arrived. After being there for a while, Steve said "I know a house we can hit", to which Hughes replied "bet I want to go." All of the men got into Steve's car and drove to the victim's house. Hughes went to the side of the house with Chris. **[*6]** Petitioner went to the back of the house. Steve took a pizza box that he had obtained from Christine's house and went and rang the doorbell. When the victim asked who it was, Steve said that it was the pizza man. Hughes then heard one gunshot. All four men then got into Steve's car and drove to his house. The next morning, Hughes discovered that the victim was dead. Hughes told Brantley that Steve had indicated that there might be some guns at the victim's house. Hughes also indicated that Steve was the only person to go up to the victim's porch. He also indicated that Steve was the only one who had a gun. (T. II., pp. 18-22).

Petitioner's statement was also read into evidence. Petitioner informed Detective Brantley that on the night of the shooting, he went over to Christine's house with his friend Chris Briscum (sic) after it had been shot up. Petitioner indicated that Hughes and Cojocar were already at the house. At some point, Steve said: "I'm going to shoot somebody, you all coming?" Petitioner indicated that he had been drinking, so he asked Steve to drop him off first. Petitioner indicated that all four men got into Chris' car, but with Steve driving. Steve drove down the street, **[*7]** parked the car, and told everyone to get out. Steve asked the other men to wait for him on the side of the house, which they did. Steve had a pizza box in one hand and a gun in the other. Steve went to the door and knocked on the door and rang the doorbell. The victim answered the door and Steve shot him. Petitioner was at the rear of the house when the

shooting happened. When Steve shot the victim, all four men ran and got into Chris' car. Steve drove the car from the scene, dropping Hughes off at State Fair and Hickory Streets. Petitioner went with Chris and Steve to Cojocar's house. Petitioner didn't know why Steve had shot the victim. When asked why he went with Steve when he said he was going to shoot somebody, petitioner indicated that he was getting a ride home, but that Steve told the others that "everybody was coming with him". (T. II, pp. 28-33).

Petitioner's conviction was affirmed on appeal. *People v. Jones, 196142 (Mich.Ct.App. June 26, 1998); lv. den. 459 Mich. 1001, 595 N.W.2d 854; 459 Mich. 1001, 595 N.W.2d 854(1999); reconsideration den. 459 Mich. 1001; 461 Mich. 859, 602 N.W.2d 388 (1999)*(Cavanagh, J. would grant reconsideration and on reconsideration, would grant leave to appeal). Petitioner's post-conviction motion for relief from judgment was denied by the trial court. **[*8]** *Peoplev. Jones*, 94-05655 (Third Judicial Circuit Court, January 17, 2001).[1] The Michigan appellate courts denied leave to appeal. *People v. Jones, 238367 (Mich.Ct.App. April 26, 2002); lv. den. 468 Mich. 884; 661 N.W. 2d 233 (2003)*(Cavanagh and Kelly, JJ. would remand to the Wayne County Circuit Court for further proceedings); *reconsideration den. 468 Mich. 884; 661 N. W. 2d 672 (2003)*(Kelly, J. would grant reconsideration and on reconsideration, would grant leave to appeal). Petitioner now seeks the issuance of a writ of habeas corpus on the following grounds:

> I. Petitioner was denied due process of *Fifth Amendment* rights by being placed twice in jeopardy for the same offense.
>
> II. Petitioner was denied due process of law *Fifth Amendment* rights by prosecutions (sic) overcharging with both the greater and lesser included offenses of a single crime as separate counts.
>
> III. Petitioner was denied his right to due process of law by prosecution's introduction of insufficient evidence in which to sustain a conviction.
>
> IV. Petitioner was denied his right to due process of law by the trial court's failure to properly instruct and re-instruct the jury on aiding and abetting and petitioner's theory of defense to the case.
>
> V. Petitioner was denied due process of law by the trial court's failure to instruct **[*9]** the jury on the requested lesser included offense where the evidence of the crime supported such.
>
> VI. Petitioner contends that he was denied due process of law *Sixth Amendment* right to effective assistance of counsel.
>
> VII. Petitioner was denied due process of law by trial court's abuse of discretion in excessive sentencing of petitioner.
>
> VIII. Petitioner was denied the effective assistance of appellate counsel for appellate counsel's failure to raise the verdict against the great weight of the evidence.
>
> IX. Petitioner was denied the effective assistance of appellate counsel for appellate counsel's failure to raise ineffective assistance of trial counsel's cumulative errors.
>
> X. Petitioner was denied due process of law *Fifth Amendment* right by the prosecutions (sic) overcharging with both the greater and lesser included offenses of felony murder causing a jurisdictional defect.
>
> XI. Petitioner was denied due process of law *Sixth Amendment* rights by trial counsel's absence at a critical stage of trial and trial counsel's refusal to object at critical stage and appellate counsel's failure to raise this viable issue on petitioner's direct appeal of right.

II. STANDARD OF REVIEW

28 U.S.C. § 2254(d) imposes the following standard of review for habeas cases: **[*10]**

> 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

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[1] In 1996, the Michigan Legislature abolished the Detroit Recorder's Court and merged its functions with the Wayne County Circuit Court [the Third Judicial Circuit.] *See Anthony v. Michigan, 35 F. Supp. 2d 989, 996997 (E.D. Mich. 1999)*.

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, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (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 **[*11]** state-court decision applied clearly established federal law erroneously or incorrectly." Id. at 410-11.

III. DISCUSSION

A. The procedurally defaulted claims (Claims # V and # XI).

Respondent contends that several of petitioner's claims are procedurally defaulted, because they were not exhausted with the state courts and petitioner no longer has any available state court remedies with which to exhaust these claims. The Court agrees in part with respondent's argument.

Petitioner's fifth claim involving the trial court's failure to instruct the jury on lesser included offenses was not raised on his appeal of right before the Michigan Court of Appeals, but was raised only for the first time in his application for leave to appeal with the Michigan Supreme Court following the affirmance of his conviction by the Michigan Court of Appeals. Likewise, petitioner's eleventh claim that he was deprived of trial counsel at a critical stage of the prosecution was neither raised on his direct appeal, nor was it was raised in his post-conviction motion for relief from judgment or in his application for leave to appeal the denial of his post-conviction motion with the Michigan Court of Appeals. Instead, petitioner **[*12]** raised this claim for the first time in his application for leave to appeal the denial of his post-conviction motion with the Michigan Supreme Court.

When an appellant fails to appeal an issue to the Michigan Court of Appeals, the issue is considered waived before the Michigan Supreme Court. Lawrence v. Will Darrah & Associates, Inc., 445 Mich. 1, 4, fn. 2, 516 N.W.2d 43; 445 Mich. 1, 516 N.W. 2d 43 (1994); Butcher v. Treasury Dep't., 425 Mich. 262, 276, 389 N.W.2d 412; 425 Mich. 262, 389 N.W. 2d 412 (1986). Petitioner's failure to raise these claims in his appeals to the Michigan Court of Appeals precluded the Michigan Supreme Court from considering the issues in his application for leave to appeal. Moreover, raising a claim for the first time before the state courts on discretionary review does not amount to a "fair presentation" of the claim to the state courts for exhaustion purposes. See Castille v. Peoples, 489 U.S. 346, 351, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989). Because petitioner failed to present these claims in either of his appeals with the Michigan Court of Appeals, his subsequent presentation of these claims to the Michigan Supreme Court did not satisfy the exhaustion requirement for habeas purposes. See Schroeder v. Renico, 156 F. Supp. 2d 838, 844, fn. 5 (E.D. Mich. 2001); Winegar v. Corrections Department, 435 F. Supp. 285, 288-89 (W.D. Mich. 1977).

A state prisoner seeking federal habeas relief must first exhaust his or her available state court remedies before raising a claim in federal court. 28 U.S.C. § 2254(b) and(c); Picard v. Connor, 404 U. S. 270, 275-78, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). Federal courts will not review a habeas corpus petition when a state prisoner has not first presented **[*13]** his or her claims to the state courts and exhausted all state court remedies available to him or to her. Rogers v. Howes, 144 F. 3d 990, 992 (6th Cir. 1998). A prisoner confined pursuant to a Michigan conviction must raise each habeas issue in both the Michigan Court of Appeals and in the Michigan Supreme Court before seeking federal habeas corpus relief. Grant v. Rivers, 920 F. Supp. 769, 779 (E.D. Mich. 1996).

Petitioner has therefore failed to properly exhaust these claims with the state courts. Unfortunately, petitioner no longer has any available state court remedies with which to exhaust these claims. Under M.C.R. 6.502(G)(1), a criminal defendant in Michigan is only permitted to file one post-conviction motion for relief from judgment. Hudson v. Martin, 68 F. Supp. 2d 798, 800 (E.D. Mich. 1999). Petitioner therefore has no remaining state court remedies with which to exhaust these claims. If a prisoner fails to present his claims to the state courts and he is now barred from pursuing relief there, his petition should not be dismissed for lack of exhaustion because there are simply no remedies

available for him to exhaust. However, the prisoner will not be allowed to present claims never before presented in the state courts unless he can show cause to excuse his failure to present the claims in the state courts and actual prejudice to his defense at trial or **[*14]** on appeal. Hannah v. Conley, 49 F. 3d 1193, 1195-96 (6th Cir. 1995). A claim of actual innocence will excuse this "cause and prejudice" requirement. Id. at 1196, fn. 3.

When the state courts clearly and expressly rely on a valid state procedural bar, federal habeas review is also barred unless petitioner can demonstrate "cause" for the default and actual prejudice as a result of the alleged constitutional violation, or can demonstrate that failure to consider the claim will result in a "fundamental miscarriage of justice". Coleman v. Thompson, 501 U.S. 722, 750-751, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). If petitioner fails to show cause for his procedural default, it is unnecessary for the court to reach the prejudice issue. Smith v. Murray, 477 U.S. 527, 533, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986). However, in an extraordinary case, where a constitutional error has probably resulted in the conviction of one who is actually innocent, a federal court may consider the constitutional claims presented even in the absence of a showing of cause for procedural default. Murray v. Carrier, 477 U.S. 478, 479-80, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). However, to be credible, such a claim of innocence requires a petitioner to support the allegations of constitutional error with new reliable evidence that was not presented at trial. Schlup v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). Actual innocence, which would permit collateral review of a procedurally defaulted claim, means factual innocence, not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998).

In the present case, **[*15]** petitioner has offered no reasons why he failed to properly exhaust these claims with the Michigan appellate courts. Petitioner appears to argue that this procedural default should be excused because appellate counsel did not raise these claims in petitioner's appeal of right before the Michigan Court of Appeals. In the present case, appellate counsel's failure to raise these claims on petitioner's appeal of right is immaterial, because petitioner could still have exhausted both claims properly in his state post-conviction motion. *See Carpenter v. Vaughn*, 888 F. Supp . 635, 654 (M.D. Pa. 1994). In addition, the fact that petitioner represented himself *pro se* on his state postconviction motion is not sufficient cause for the procedural default either, because there is no constitutional right to counsel in post-conviction proceedings. *See* Harris v. McAdory, 334 F. 3d 665, 668 (7th Cir. 2003); *cert. den. 124 S. Ct. 2022; 2004 WL 827791 (U.S. 2004); Williams v. Grayson; 977 F.2d 584, 1992 WL 266822 (6th Cir. 1992).* Because petitioner has not demonstrated any cause for his procedural default, it is unnecessary for this Court to reach the prejudice issue. Smith v. Murray, 477 U.S. at 533; Bell v. Smith, 114 F. Sup p . 2d 633, 638 (E.D. Mich. 2000). Additionally, petitioner has not presented any new reliable evidence to support any assertion of innocence which would allow this Court to consider his claims as a ground for a writ of habeas corpus in spite of the procedural **[*16]** default. Petitioner's sufficiency of evidence claim (Claim # III) is insufficient to invoke the actual innocence exception to the procedural default doctrine. *See* Anthony v. Schuppel, 86 F. Sup p. 2d 531, 538 (D. Md. 2000). Because petitioner has not presented any new reliable evidence that he is innocent of these crimes, a miscarriage of justice will not occur if the Court declined to review these claims on the merits. Welch v. Burke, 49 F. Supp. 2d 992, 1007 (E.D. Mich. 1999).

Assuming that petitioner had established cause for his default, he would be unable to satisfy the prejudice prong of the exception to the procedural default rule, because his claims would not entitle him to relief. The cause and prejudice exception is conjunctive, requiring proof of both cause and prejudice. Terry v. Bock, 208 F. Supp. 2d 780, 793 (E.D. Mich. 2002); *aff'd* 79 Fed. Appx. 128 (6th Cir. 2003).

Another judge in this district has noted that the United States Supreme Court has declined to determine whether the Due Process Clause requires that a state trial court instruct a jury on a lesser included offense in a non-capital case. Adams v. Smith, 280 F. Supp. 2d 704, 717 (E.D. Mich. 2003)(*citing to* Beck v. Alabama, 447 U.S. 625, 638, n. 4, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)). Thus, a state trial court's failure to give the jury an instruction on a lesser included offense in a non-capital case is not contrary to, or an unreasonable application of, clearly established federal law as required for federal habeas relief. *Id. Beck* has been **[*17]** interpreted by the Sixth Circuit to mean that "the [federal] Constitution does not require a lesser-included offense instruction in non-capital cases." Campbell v. Coyle, 260 F. 3d 531, 541 (6th Cir. 2001). Thus, the failure of a state trial court to instruct a jury on a lesser included offense in a non-capital case is not an error cognizable in federal habeas review. Bagby v.

Sowders, 894 F. 2d 792, 797 (6th Cir. 1990). Therefore, petitioner is not entitled to habeas relief on his fifth claim.

With respect to his eleventh claim, petitioner claims that he was deprived of the assistance of counsel during a critical stage of the proceedings, namely, during jury deliberations and the taking of the verdict. During deliberations, the jury foreperson sent a note to the trial court judge, informing her that one of the jurors had gone by the crime scene. The judge indicated that she immediately sent a note to the foreperson stating that this was not a proper course of action and that the matter should not be discussed by or amongst the jurors. The judge also spoke to petitioner's counsel by telephone, who indicated that he was satisfied with the court's action and did not believe that this would make any impression one way or another. The prosecutor and co-defendant's counsel agreed with the trial **[*18]** court judge's actions. (T. III, pp. 151-52).

The proper standard for determining prejudice resulting from counsel's absence during jury deliberations and the return of a verdict is whether the error was harmless beyond a reasonable doubt. Siverson v. O'Leary, 764 F. 2d 1208, 1217 (7th Cir. 1985). Counsel's availability for consultation by telephone at a number that is given to the trial court is an adequate substitute for the physical presence of counsel if counsel has taken steps to insure that he or she will be contacted by the court should an important issue arise. Id. at 1214. In the present case, defense counsel's absence from the court during jury deliberations was not a *per se* violation of petitioner's Sixth Amendment right to counsel, because counsel provided the trial court with a telephone number to contact him if an issue arose, and the trial court did, in fact, do so. *See* United States v. Evans, 62 Fed. Appx. 229, 232 (10th Cir. 2003). Accordingly, petitioner was not deprived of the assistance of counsel at a critical stage in the criminal proceedings. Because petitioner was not deprived of the assistance of counsel at a critical stage of the prosecution, the failure to raise this issue on appeal by appellate counsel did not amount to ineffective appellate representation. *See* Meyer v. Sargent, 854 F.2d 1110, 1115-16 (8th Cir. 1988).

With respect to respondent's contention **[*19]** that some of petitioner's ineffective assistance of appellate counsel claims have never been raised with the Michigan courts, this argument appears to be without merit. A review of petitioner's post-conviction pleadings shows that these claims were raised in his post-conviction application for relief with the state courts. Moreover, petitioner's ineffective assistance of appellate counsel claims cannot be considered procedurally defaulted because of petitioner's failure to raise them in his appeal of right, because these claims could not have realistically been raised in his appeal of right. A claim of ineffective assistance of appellate counsel in a post-conviction proceeding "technically...is a first-time claim which cannot be procedurally barred." Scoggin v. Kaiser, 186 F. 3d 1203, 1205 (10th Cir. 1999)(*quoting* English v. Cody, 146 F. 3d 1257, 1262 (10th Cir. 1998)). Because an ineffective assistance of appellate counsel claim cannot be raised on direct appeal, it is appropriate to raise such a claim for the first time on post-conviction review. *See* United States ex. rel. Hoard v. Gilmore, 1999 U.S. Dist. LEXIS 973, 1999 WL 51794, * 3 (N.D. Ill. January 30, 1999). Because petitioner's ineffective assistance of appellate counsel claims could not have been raised in his appeal of right, this Court declines to find this claim to be procedurally defaulted. *See* United States v. Pappert, 45 F. Supp. 2d 1231, 1234 (D. Kan. 1999).

Finally, respondent contends that petitioner's **[*20]** claim that trial counsel failed to cross-examine a key prosecution witness and the issue of trial counsel's cumulative errors were never exhausted in the state courts. While it appears that these ineffective assistance of trial counsel claims were not raised as independent claims, these claims were mentioned as part of petitioner's claim that appellate counsel was ineffective for failing to raise the issue of trial counsel's cumulative errors. It is unclear whether petitioner's presentation of these ineffective assistance of trial counsel claims as part of his ineffective assistance of appellate counsel claim would be a sufficient presentation of the ineffective assistance of trial counsel claims to the state courts. Morover, in order to address the merits of petitioner's ineffective assistance of appellate counsel claim, the Court will be required to assess the merits of the underlying ineffective assistance of trial counsel claims. Although the issue of whether a claim is procedurally barred should ordinarily be resolved first, "judicial economy sometimes dictates reaching the merits [of a claim or claims] if the merits are easily resolvable against a petitioner while the procedural **[*21]** bar issues are complicated." Barrett v. Acevedo, 169 F. 3d 1155, 1162 (8th Cir. 1999)(internal citations omitted). In this case, because "the procedural default issue raises more questions than the case on the merits", this Court will assume, for the sake of resolving the claims, that there is no procedural default by petitioner and will decide the merits of these claims. Falkiewicz v. Grayson, 271 F. Supp. 2d 942, 948 (E.D.

Mich. 2003)(quoting Binder v. Stegall, 198 F. 3d 177, 178 (6th Cir. 1999).

B. The merits of petitioner's remaining claims.

1. Claims # I, II, and X. The Double Jeopardy/prosecutorial charging decision claims.

In his first, second, and tenth claims, petitioner contends that the prosecutor violated his Fifth Amendment right against double jeopardy by charging him with both first-degree felony murder and the underlying felony of assault with intent to rob while armed. Petitioner also contends that the prosecutor's decision to charge him with both crimes constituted an abuse of prosecutorial discretion which violated his due process rights. Finally, petitioner contends that the jury's decision to find him not guilty of the felony-murder charge somehow constitutes an implied acquittal on the underlying felony of assault with intent to rob while armed.

The Double Jeopardy Clause serves the function of preventing both successive punishments and successive prosecutions. United States v. Ursery, 518 U.S. 267, 273, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996). The protection **[*22]** against multiple punishments prohibits the government from "punishing twice or attempting a second time to punish criminally for the same offense." Witte v. United States, 515 U.S. 389, 396, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995)(quoting Helvering v. Mitchell, 303 U.S. 391, 399, 58 S. Ct. 630, 82 L. Ed. 917, 1938-1 C.B. 317 (1938)). However, although the Double Jeopardy Clause protects a defendant against cumulative punishments for convictions on the same offense, the clause does not prohibit the state from prosecuting a defendant for such multiple offenses in a single prosecution. *See* Ohio v. Johnson, 467 U.S. 493, 500, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984). "It is well settled that a single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause." Albernaz v. United States, 450 U.S. 333, 344, n. 3, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981). The prosecution is not precluded from prosecuting both the greater and lesser included offenses in one trial. *See* United States v. Schuster, 769 F. 2d 337, 342 (6th Cir. 1985).

In this case, prosecuting petitioner for both first-degree felony murder and the underlying felony of assault with intent to rob while armed in a single trial did not violate the Double Jeopardy Clause because the two offenses were separate and distinct offenses. *See* Thompson v. State of Mo., 724 F. 2d 1314, 1319 (8th Cir. 1984). In a felony murder prosecution where the underlying felony is a lesser included offense of felony murder, a defendant cannot be convicted and sentenced for both offenses. *See* Wiman v. Lockhart, 797 F. 2d 666, 668 (8th Cir. 1986). However, even though a defendant may not be convicted and sentenced for both felony murder and the underlying felony, "it does not **[*23]** logically follow" that the Double Jeopardy Clause is violated when a defendant is acquitted of felony murder, as was the case here, but convicted and sentenced for the underlying felony in one trial. *See* Griffin v. State, 717 N.E. 2d 73, 81 (Ind. 1999).[2] Because petitioner was convicted of only one crime here, the assault with intent to rob while armed charge, there was no violation of the Double Jeopardy Clause. *See e.g.* Ragland v. Hundley, 79 F. 3d 702, 704 (8th Cir. 1996)(habeas petitioner's felony-murder conviction, in which the underlying felony, wilful injury, was an integral part of the homicide, did not violate the Double Jeopardy Clause, where petitioner was convicted of only one crime, the felony-murder). In addition, since petitioner was convicted of only one crime, there is no statutory merger issue here. Id. at 705.

Petitioner's second claim that the prosecutor overcharged him is likewise without merit. The Supreme Court "has long recognized" that when a criminal act violates more than one criminal statute, the Government may prosecute under either statute so long as it does not discriminate against any class of defendants. United States v. Batchelder, 442 U.S. 114, 123-24, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979). Prosecutors therefore enjoy considerable discretion in determining what criminal charges to bring. *Id.*; *Grant v. Rivers*, 920 F. Sup p . at 787. Prosecutors may be influenced by the penalties available on conviction in **[*24]** making a charging decision. This fact, in and of itself, does not give rise to a constitutional violation. Batchelder, 442 U.S. at 125. A criminal defendant has no constitutional right to elect which of two crimes will be the basis for a criminal information, nor is he entitled to chose the penalty scheme under which he will be sentenced. *Id.* It was therefore not improper to try petitioner for both felony-murder and assault with intent to rob while armed.

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[2] When there is paucity of federal law on a subject, state decisions interpreting the Federal Constitution, while not binding on a federal court, are persuasive. *See* Millender v. Adams, 187 F. Supp. 2d 852, 874, fn. 6 (E.D. Mich. 2002).

Petitioner lastly claims that the jury's decision to acquit him of the felony-murder charge constituted an implied acquittal on the underlying assault with intent to rob while armed charge. The Court rejects this claim, because the offenses of felony murder and assault with intent to rob while armed are distinct offenses which each have separate elements. The elements of first-degree felony murder are:

(1) the killing of a human being;

(2) with an intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm is the probable result (i.e., malice);

(3) while committing, attempting to commit, or assisting in the commission of one of the felonies enumerated in the felony murder statute. **[*25]**

Terry v. Bock, 208 F. Supp. 2d at 794 (citing to People v. Carines, 460 Mich. 750, 759, 597 N.W.2d 130; 460 Mich. 750, 597 N.W. 2d 130 (1999)).

The elements of assault with intent to rob while armed are:

(1) an assault with force and violence;

(2) an intent to rob and steal; and,

(3) the defendant being armed [with a weapon].

People v. Smith, 152 Mich. App. 756, 761, 394 N.W.2d 94; 152 Mich. App. 756, 394 N. W. 2d 94 (1986).

In People v. Jones, 209 Mich. App. 212, 214-15, 530 N.W.2d 128; 209 Mich. App. 212, 530 N.W. 2d 128 (1995), the Michigan Court of Appeals held that the merger doctrine does not apply to merge the offense of felony-murder with the underlying felony, even where the underlying felony was committed with the same assaultive intent as the homicide, because Michigan's felony murder statute requires proof of malice aforethought as an additional *mens rea* besides the intent to commit the underlying felony, and was not meant to deter negligent or accidental killings.

In the present case, the jury's verdict of not guilty of felony murder but guilty of assault with intent to rob while armed was not inconsistent under Michigan law, because the not guilty verdict on the felony-murder count was not a finding that some element of assault with intent to rob while armed had not been proven, but only a finding that the elements of felony murder had not been proven with respect to petitioner. *Cf.* United States ex. rel. Cathey v. Cox, 203 F. Supp. 2d 949, 951-52 (N.D. Ill. 2002); *See also* Thompson v. State of Mo., 724 F. 2d at 1319 (rejecting claim that jury could not have constitutionally found petitioner guilty of armed robbery at **[*26]** the same time that it found him not guilty of felony murder).

If anything, the jury's decision to acquit petitioner of first-degree felony murder in this case suggests that the jury was "exercis[ing] its historic power of lenity." United States ex. rel. Cathey, 203 F. Supp. 2d at 952 (internal quotation omitted). In the present case, the evidence, when viewed in a light most favorable to the prosecution, establishes that petitioner went with his co-defendants with the knowledge that an armed robbery was going to be committed and that one of the co-defendants was armed with a firearm. In People v. Hart, 161 Mich. App. 630, 411 N.W.2d 803; 161 Mich. App. 630, 411 N.W. 2d 803 (1987), the Michigan Court of Appeals affirmed a defendant's conviction as an aider and abettor to first-degree felony murder, where the underlying felony was armed robbery. The Court of Appeals found that the defendant's involvement in a robbery, where a gun was involved, showed wanton and wilful disregard of the likelihood that the natural tendency of his behavior would cause death or serious bodily injury. Id. at 635. Other cases have reached the same result. *See e.g.* People v. Turner, 213 Mich. App. 558, 572-73, 540 N.W.2d 728; 213 Mich. App. 558, 540 N. W. 2d 728 (1995)(evidence supported finding of malice sufficient to support conviction for aiding and abetting first-degree felony murder; defendant knew that the co-defendant was armed during the commission of the **[*27]** armed robbery in which the co-defendant killed the victim and, thus, defendant knew of the co-defendant's intent to at least cause great bodily harm); Harris v. Stovall, 22 F. Supp. 2d 659, 667 (E.D. Mich. 1998)(habeas petitioner's participation in armed robbery, involving a loaded firearm, manifested a wanton and reckless disregard that death or serious bodily injury could occur, thus, petitioner could be found guilty of felony murder, regardless of whether he shot the victim or participated in the robbery in another capacity). Petitioner is therefore not entitled to habeas relief on his first, second, or tenth claims.

2. Claim # III. The sufficiency of evidence claim.

Petitioner next contends that there was insufficient evidence to convict him as an aider and abettor to the crime of assault with intent to rob while armed. The Michigan Court of Appeals rejected this claim, finding that a rational jury could find that petitioner possessed the requisite intent to aid and abet an assault with intent to rob while armed and that he engaged in acts which

supported, encouraged, and incited [Steve] Cojocar's commission of the assault upon the victim. *People v. Jones, Slip. Op. at * 5-6.*

A habeas court reviews claims that the evidence at trial was insufficient for a conviction **[*28]** by asking whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Scott v. Mitchell, 209 F. 3d 854, 885 (6th Cir. 2000)*(citing to *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*). Because a claim of insufficiency of the evidence presents a mixed question of law and fact, this Court must determine whether the state court's application of the *Jackson* standard was reasonable. *Dell v. Straub, 194 F. Supp. 2d 629, 647 (E.D. Mich. 2002)*. *Section 2254(d)* "mandates that federal court s give deferential review to state court decisions on sufficiency of evidence claims." *David v. Lavinge, 190 F. Supp. 2d 974, 985 (E.D. Mich. 2002)*(internal citations omitted). The scope of review in a federal habeas proceeding to the sufficiency of evidence in a state criminal prosecution "is extremely limited and a habeas court must presume that the trier of fact resolved all conflicting inferences in the record in favor of the state and defer to that resolution." *Terry v. Bock, 208 F. Supp. 2d at 794*. A conviction may rest on circumstantial evidence and a federal habeas court reviewing the sufficiency of evidence to support a conviction need not rule out all possible interpretations of the circumstantial evidence. *Dell v. Straub, 194 F. Supp. 2d at 647*. A conviction may be based upon circumstantial evidence as well as inferences based upon the evidence. *Id.* Finally, a habeas court **[*29]** does not substitute its own judgment for that of the finder of fact. *See Dillard v. Prelesnik, 156 F. Supp. 2d 798, 805 (E.D. Mich. 2001)*.

To support a finding that a defendant aided and abetted in the commission of a crime, the prosecutor must show 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 he gave aid and encouragement.

People v. Carines, 460 Mich. at 757-58.

In order to be guilty of aiding and abetting under Michigan law, the accused must take some conscious action designed to make the criminal venture succeed. *Fuller v. Anderson, 662 F. 2d 420, 424 (6th Cir. 1981)*. Aiding and abetting describes all forms of assistance rendered to the perpetrator of the crime and comprehends all words or deeds which might support, encourage, or incite the commission of the crime. *People v. Turner, 213 Mich. App. at 568*. The quantum or amount of aid, advice, encouragement, or counsel rendered, or the time of rendering, is not material if it had the effect of inducing the commission of the crime. *People v. Lawton; 196 Mich. App. 341, 352, 492 N.W.2d 810; 196 Mich. App. 341, 492 N. W. 2d 810 (1992)*.

To be convicted of aiding and abetting, the defendant must either possess the required intent to commit the crime or have participated while **[*30]** knowing that the principal had the requisite intent; such intent may be inferred from circumstantial evidence. *People v. Wilson, 196 Mich. App. 604, 614, 493 N.W.2d 471; 196 Mich. App. 604, 493 N. W. 2d 471 (1992)*. The intent of an aider and abettor is satisfied by proof that he knew the principal's intent when he gave aid or assistance to the principal. *People v. McCray, 210 Mich. App. 9, 14, 533 N.W.2d 359; 210 Mich. App. 9, 533 N. W. 2d 359 (1995)*. An aider and abettor's state of mind may be inferred from all of the facts and circumstances, including close association between the defendant and the principal, the defendant's participation in the planning and execution of the crime, and evidence of flight after the crime. *People v. Turner, 213 Mich. App. at 568-69*.

In the present case, petitioner contends that the evidence establishes at best that he was merely present when the shooting occurred. Petitioner is correct that mere presence, even with knowledge that a crime is being committed, is insufficient to establish that a defendant aided and abetted in the commission of the offense. *People v . Norris, 236 Mich. App. 411, 419-20, 600 N.W.2d 658; 236 Mich. App. 411, 600 N. W. 2d 658 (1999); Fuller v. Anderson, 662 F. 2d at 424*. However, a claim of mere presence is not a "catch-all excuse" to defeat an inference of guilt beyond a reasonable doubt. In evaluating a "mere presence" defense, a factfinder must distinguish, based upon the totality of the circumstances, between one who is merely present at the scene and one who is present with criminal culpability. **[*31]** *Duran v. Pepe, 899 F. Supp. 839, 843 (D. Mass. 1995)*. An aider and abettor who is

intentionally present during the commission of a crime may be silent during the crime's commission, "but by his demeanor, or through behavior and acts not directly related to the crime, provide 'moral support' that is recognizable to, and relied upon by, the principal. Such acts may be silent and may not be overt but may still amount to more than 'mere' presence". Sanford v. Yukins, 288 F. 3d 855, 862 (6th Cir. 2002). Michigan's "broad definition" of aiding and abetting "easily encompasses situations where the alleged aider and abettor, although silent and not committing acts directly related to the crime, was not 'merely' present, but providing emotional encouragement and support." Id.

In the present case, the evidence, when viewed in a light most favorable to the prosecution, could enable a rational trier of fact to conclude that petitioner aided and abetted the assault with intent to rob while armed charge (as well as the original felony murder charge, *See infra*). The evidence established that petitioner arrived at Christine Domanski's house with Chris Branscum. According to Domanski, it was Branscum's idea to commit an armed robbery. Branscum was the person who removed the pizza box that was used during **[*32]** the robbery from a garbage can. According to Catrina Sanchez, petitioner was present when the other co-defendants discussed committing an armed robbery. Petitioner left with the other men and went to the house, remaining there while Cojocar went up to the house to commit the robbery. By his own admission, petitioner went to the back of the house, from which a rational trier of fact could infer that petitioner was acting as a lookout or otherwise involved in the crime. Petitioner fled the crime scene with the other three co-defendants after the shooting and went with Cojocar and Branscum to their house. Under the circumstances, a rational trier of fact could conclude that petitioner went with the other co-defendants to give them, at a minimum, emotional support and encouragement during the robbery.

To the extent that petitioner is attacking the credibility of the witnesses to claim that the evidence is legally insufficient, petitioner would not be entitled to habeas relief. Attacks on witness credibility are simply challenges to the quality of the prosecution's evidence, and not to the sufficiency of the evidence. Martin v. Mitchell, 280 F. 3d 594, 618 (6th Cir. 2002)(internal citation omitted). An assessment of the credibility of witnesses **[*33]** is generally beyond the scope of federal habeas review of sufficiency of evidence claims. Gall v. Parker, 231 F. 3d 265, 286 (6th Cir. 2000). The mere existence of sufficient evidence to convict therefore defeats a petitioner's claim. *Id.* In examining a claim of insufficiency of evidence in habeas corpus, a federal court must presume that the factfinder's findings in evaluating the credibility of the witnesses is correct and may ignore the testimony only when it finds it to be " inherently incredible". Malcum v. Burt, 276 F. Supp. 2d 664, 686 (E.D. Mich. 2003). Such a finding may be made only where the testimony is 'unbelievable on its face'; i.e. testimony as to facts that the witness physically could not possibly have observed or events that could not have occurred under the laws of nature. *Id.* Inconsistencies in a witness' testimony, however, do not render that witness' testimony to be inherently incredible. *Id.* Petitioner is therefore not entitled to habeas relief on his third claim.

3. Claim # IV. The jury instruction claim.

Petitioner next contends that the trial court gave an incomplete instruction on aiding and abetting to the jury which would have permitted them to convict petitioner on the basis of his intent alone. Petitioner further contends that the trial court erred by rereading **[*34]** the jury instruction on the elements required for aiding and abetting, without re-instructing the jury on the defense of mere presence.

The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack upon the constitutional validity of a state court conviction is even greater than the showing required in a direct appeal. The question in such a collateral proceeding is whether the ailing instruction so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even "universally condemned", and an omission or incomplete instruction is less likely to be prejudicial than a misstatement of the law. Henderson v. Kibbee, 431 U.S. 145, 154-55, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977). The challenged instruction may not be judged in artificial isolation but must be considered in the context of the instruct ions as a whole and the trial court record. Grant v. Rivers, 920 F. Supp. at 784. To warrant habeas relief, the jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair. Scott v. Mitchell, 209 F. 3d at 882. Allegations of trial error raised in challenges to jury instructions are reviewed for harmless error by determining **[*35]** whether they had a substantial and injurious effect or influence on the verdict. *Id.* A habeas petitioner's burden of showing prejudice is especially

heavy when a petitioner claims that a jury instruction was incomplete, because an omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law. *Terry v. Bock, 208 F. Supp. 2d at 793*.

In the original jury instructions, the trial court gave the jury the following instruction on aiding and abetting:

> "Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it, and can be convicted of that crime as an aider and abettor.
>
> To prove this charge, the People must prove each of the following elements beyond a reasonable doubt:
>
> First, that the crime alleged was actually committed either by the defendant or one of them or someone else. And it doesn't matter whether anyone else has been convicted of the crime.
>
> Second, the People must prove that before or during the crime, the defendants did something to aid, assist, or encourage in the commission of the crime.
>
> Third, the People would have to prove that when the defendant gave his aid or encouragement or assistance, that he intended to help someone **[*36]** else commit the crime.
>
> And under the law of course, it doesn't matter how much help or inducement or encouragement you give, so long as you specifically mean to go along on the mission and to help assist in accomplishment." (T. III, p. 96).

The trial court further instructed the jury that a defendant's mere presence at the scene of a crime was insufficient to prove that he or she was an aider and abettor. (*Id.*. at 97). The jury later sent the trial court a note stating : "It will not take much longer. It might make more sense to just go over the jury instructions as a whole once more, rather than single out one point. May be the aiding and abetting details could be skipped for speed since we already have that in writing." (*Id.* at p. 125). The trial court told the jury that it would omit the aiding and abetting instruction and simply re-instruct on the elements of the charges. (*Id.* at p. 134). However, the trial court did re-read the aiding and abetting instruction without re-reading the mere presence instruction. (*Id.* at p. 137). Codefendant's counsel objected to the omission of the mere presence instruction, but the trial court declined to re-read it. (*Id.* at pp. 149-50).

The Michigan Court of Appeals rejected petitioner's claim that the trial court's **[*37]** instruction on aiding and abetting allowed the jury to convict him on his intent alone, finding that the instructions as a whole adequately instructed the jury that petitioner and his co-defendant had to do something to aid, assist, or encourage the commission of the crime.

*People v. Jones, Slip op at * 4.* Because the Michigan Court of Appeals found that the instruction given by the trial court accurately reflected Michigan law on the elements of aiding and abetting, this Court must defer to that determination and cannot question it. *Seymour v. Walker, 224 F. 3d 542, 558 (6th Cir. 2000)*; *Howell v . Smith, 2001 U.S. Dist. LEXIS 6773, 2001 WL 561203, * 4 (E.D. Mich. April 26, 2001)*.

The Michigan Court of Appeals further ruled that the trial court did not err in failing to re-read the mere presence instruction, because the jury had not specifically requested it. *Id. at * 3*.

Where a jury, desiring additional instructions, makes explicit its difficulties, a trial judge should clear them away with concrete accuracy. *Bollenbach v. United States, 326 U.S. 607, 612-613, 66 S. Ct. 402, 90 L. Ed. 350 (1946)*. However, although a trial court should "give special care" in giving a supplemental instruction to a jury, the fact that an error was made in the supplemental instruction given "does not automatically mean that the jury has been unduly influenced by it ." *Martini v. Hendricks, 188 F. Supp. 2d 505, 530 (D.N.J. 2002)*(*quoting Rock v. Coombe, 694 F.2d 908, 915 (2nd Cir. 1982)*).

The trial court's supplemental jury instruction, viewed as a whole in the context **[*38]** of the entire jury charge was not, as a matter of law, erroneous. Even if the supplemental charge was incomplete, in light of the correct original charge containing the additional instruction which indicated that petitioner's mere presence at the scene of the crime was insufficient to prove that he aided and abetted in its commission, there is no indication that the supplemental instruction so infected the entire proceeding as to result in a denial of due process. *See Lugo v . Kuhlmann, 68 F. Supp. 2d 347, 374 (S.D.N.Y. 1999)*. Petitioner is not entitled to habeas relief on his fourth claim.

4. Claims # VI, VIII, and IX. The ineffective assistance of counsel claims.

The Court will consolidate petitioner's ineffective assistance of counsel claims for the purpose of judicial clarity. In his sixth, eighth, and ninth claims, petitioner alleges that he was deprived of the effective assistance of trial and appellate counsel.

A. *Standard of Review*

To show that he was denied the effective assistance of counsel under federal constitutional standards, a defendant must satisfy a two prong test. First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as **[*39]** the "counsel" guaranteed by the *Sixth Amendment*. *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. In so doing, the defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.* In other words, petitioner must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. *Strickland, 466 U.S. at 689*. Second, the defendant must show that such performance prejudiced his defense. *Id.* The *Strickland* standard applies to claims of ineffective assistance of appellate counsel. *See Bowen v. Foltz, 763 F. 2d 191, 194, fn. 3 (6th Cir. 1985)*.

B. *The individual claims.*

I. The ineffective assistance of trial counsel claims.

a. Claim # 6(A). Trial counsel's failure to object to the admission of his nontestifying co-defendant's statement.

In his sixth claim, petitioner contends that his trial counsel was ineffective for failing to object to the admission of co-defendant Larry Hughes' statement to the police into evidence at his trial, claiming that this violated his right of confrontation under the *Sixth Amendment*, because Hughes did not testify at trial.

Where a co-defendant's incriminating confession is admitted at a joint trial and the co-defendant does not take the stand, a defendant is denied the constitutional right of confrontation, **[*40]** even if the jury is instructed to consider the confession only against the co-defendant. *Bruton v. United States, 391 U.S. 123, 127-28, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)*. This rule has been extended even to cases in which the defendant's own interlocking confession was admitted against him at trial. *Cruz v. New York, 481 U.S. 186, 193, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987)*. However, a defendant's own confession may be considered on review of a conviction in assessing whether any *confrontation clause* violation was harmless error. *Id. at 193-94*; *Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969)*.

In assessing the injurious effect of erroneously admitting a nontestifying co-defendant's statement, for purposes of harmless error analysis, the court must consider the nature and content of the defendant's own statement, in particular, to see whether it satisfactorily explains his part in the crime without reference to the co-defendant's statements. *Samuels v. Mann, 13 F. 3d 522, 526-27 (2nd Cir. 1993)*(internal citations omitted.) Also relevant is the extent to which the defendant's statement is corroborated or contradicted by other objective evidence. *Id. at 527*.

In the present case, petitioner admitted in his own statement to the police that he knew that Steve Cojocar was planning on shooting someone and that he had nonetheless accompanied Cojocar to the shooting. Petitioner admitted getting out of the car at the crime scene and going to the rear of the house. Petitioner admitted fleeing **[*41]** the crime scene with the other defendants. Hughes' statement essentially mirrored petitioner's statement concerning petitioner's involvement in the crime. In addition, both Catrina Sanchez and Christine Domanski indicated that either Steve Cojocar or Chris Branscum had discussed committing a robbery. Any error in admitting Hughes' statement into evidence was harmless, because his statement was either substantiated by petitioner's own statement or by other evidence submitted at trial. *Miller v. Miller, 784 F. Supp. 390, 398 (E.D. Mich. 1992)*.

The prejudice question, for purposes of an ineffective assistance of counsel claim, "is essentially the same inquiry as made in a harmless-error analysis." *Arnold v. Evatt, 113 F. 3d 1352, 1362 (4th Cir. 1997)*. Because Hughes' statement to the police was not incriminating against petitioner beyond petitioner's own statement and did not contradict petitioner's own statement, counsel's failure to object to the admission of Hughes' statement to the police was not prejudicial to petitioner and therefore does not amount to the ineffective assistance of counsel. *See Galvin v. Kelly, 79 F. Supp. 2d 265, 280 (W.D.N.Y. 2000)*.

b. Claim # 6(B). Failure to cross-examine a prosecution witness.

Petitioner next claims that his counsel was ineffective for failing to cross-examine Kelly Callaghan.

The failure by trial counsel to **[*42]** cross-examine a prosecution witness can constitute ineffective assistance of counsel. Hence v. Smith, 37 F. Supp. 2d 970, 983 (E.D. Mich. 1999). However, "[C]ourts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel." Dell v. Straub, 194 F. Supp. 2d at 651. " Impeachment strategy is a matter of trial tactics, and tactical decisions are not ineffective assistance of counsel simply because in retrospect better tactics may have been available." *Id.*

In the present case, petitioner has failed to show that counsel was deficient for failing to cross-examine Callaghan or that he was prejudiced by this failure. Although Callaghan testified that a man named Dee came to her house with the other three co-defendants, she was unable to identify petitioner as being t his person. Callaghan had not been present at Domanski's house where the discussion took place about the robbery, so she could not have offered testimony regarding the extent of petitioner's participation in the planning of the robbery. Moreover, although co-defendant Hughes told her that Steve Cojocar had shot someone, Hughes did not incriminate petitioner in the crime. In short, Callaghan did not offer any testimony that would have inculpated petitioner **[*43]** in regards to his involvement in this crime. Petitioner's ineffective assistance of counsel claim must fail, because even if counsel was deficient in failing to cross-examine Callaghan, petitioner has failed to demonstrate any reasonable probability that the cross-examination of this witness by defense counsel would have affected the result of the proceeding. Moss v. Hofbauer, 286 F. 3d 851, 866 (6th Cir. 2002).

c. Claim # 6(C). Trial counsel's failure to object to the faulty supplemental jury instruction.

Petitioner next claims that his defense counsel was ineffective for failing to object to the trial court's supplemental jury instruction which omitted the mere presence instruction.

Unless petitioner can demonstrate that the jury instructions given by the trial court in this case violated his due process rights, he cannot show that defense counsel was ineffective for failing to object to the jury instructions. *Klvana v. State of Cal., 911 F. Supp. 1288, 1296 (C.D. Cal. 1995).* Because he has failed to make such a showing (*See* Claim # IV, *infra*), petitioner's ineffective assistance of counsel claim must fail also.

II. The ineffective assistance of appellate counsel claims.

The Sixth Amendment guarantees a defendant the right to the effective assistance of counsel on the first appeal by right. Evitts v. Lucey, 469 U.S. 387, 396-397, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). However, court appointed **[*44]** counsel does not have a constitutional duty to raise every nonfrivolous issue requested by a defendant. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); *See also* Siebert v. Jackson, 205 F. Supp. 2d 727, 735 (E.D. Mich. 2002). Strategic and tactical choices regarding which issues to pursue on appeal are "properly left to the sound professional judgment of counsel." United States v. Perry, 908 F. 2d 56, 59 (6th Cir. 1990). "Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of appellate counsel be overcome." Monzo v. Edwards, 281 F. 3d 568, 579 (6th Cir. 2002)(internal quotations omitted). In fact, winnowing out weaker issues on appeal is actually "the hallmark of effective appellate advocacy." *Id. (quoting* Smith v. Murray, 477 U.S. at 536).

a. Claim # 8. Failure to raise a claim that the verdict went against the great weight of the evidence.

Petitioner first claims that appellate counsel was ineffective for failing to raise a claim that the verdict went against the great weight of the evidence. Appellate counsel did challenge the legal sufficiency of the evidence on petitioner's appeal of right, but t his claim was rejected by the Michigan Court of Appeals. (*See* Claim # III, *infra*).

Petitioner claims that the verdict went against the great weight of the evidence because there was a dispute or conflict about whether petitioner knew that an attempted armed robbery **[*45]** was going to take place. Because conflicting testimony is an insufficient ground for granting a new trial under Michigan law, appellate counsel was not ineffective for failing to raise the great weight of the evidence claim on petitioner's appeal of right. *See* Burns v. Jackson, 2002 U.S. Dist. LEXIS 25411, 2002 WL 31962612, * 7 (E.D. Mich. December 19, 2002)(*citing to* People v. Lemmon, 456 Mich. 625, 576 N.W.2d 129; 456 Mich. 625, 576 N.W. 2d 129 (1998)).

b. Claim # 9. Failure to raise the trial counsel's cumulative errors claim.

Petitioner lastly claims that appellate counsel was ineffective for failing to raise the cumulative nature of

the errors allegedly committed by trial counsel. Because the individual claims of ineffective assistance of trial counsel alleged by petitioner are all essentially meritless or were of slight importance, petitioner cannot show that the cumulative errors of his counsel amounted to ineffective assistance of counsel. Seymour v. Walker, 224 F. 3d at 557; Alder v. Burt, 240 F. Supp. 2d 651, 655 (E.D. Mich. 2003). Because petitioner has failed to show that his trial counsel was ineffective, petitioner is unable to establish that appellate counsel was ineffective for failing to raise these ineffective assistance of trial counsel claims on his appeal of right. See Johnson v. Smith, 219 F. Supp. 2d 871, 883 (E.D. Mich. 2002).

5. Claim # 7. The excessive sentencing claim.

Petitioner lastly contends that his sentence of forty to sixty years in prison was excessive and disproportionate.

Petitioner's **[*46]** sentence of forty to sixty years was within the statutory maximum set under Michigan's assault with intent to rob while armed statute. A sentence imposed within the statutory limits is not generally subject to habeas review. Townsend v. Burke, 334 U.S. 736, 741, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948); Cook v. Stegall, 56 F. Supp. 2d 788, 797 (E.D. Mich. 1999). A sentence within the statutory maximum set by statute does not normally constitute cruel and unusual punishment. Austin v. Jackson, 213 F. 3d 298, 302 (6th Cir. 2000). Generally, federal habeas review of a state court sentence ends once the court makes a determination that the sentence is within the limitation set by statute. Allen v. Stovall, 156 F. Supp. 2d 791, 795 (E.D. Mich. 2001). Claims which arise out of a state trial court's sentencing decision are not normally cognizable on federal habeas review, unless the habeas petitioner can show that the sentence imposed exceeded the statutory limits or is wholly unauthorized by law. Lucey v. Lavigne, 185 F. Supp. 2d 741, 745 (E.D. Mich. 2001).

The U.S. Constitution does not require that sentences be proportionate. In Harmelin v. Michigan, 501 U.S. 957, 965, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), a plurality of the U.S. Supreme Court concluded that the Eighth Amendment does not contain a requirement of strict proportionality between the crime and sentence. The Eighth Amendment forbids only extreme sentences that are grossly disproportionate to the crime. Harmelin, 501 U.S. at 1001. Successful challenges to the proportionality of a particular sentence in non-capital cases are "exceedingly rare". Rummel v. Estelle, 445 U.S. 263, 272, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). Federal courts will **[*47]** therefore not engage in a proportionality analysis except where the sentence imposed is death or life imprisonment without parole. See Seeger v. Straub, 29 F. Supp. 2d 385, 392 (E.D. Mich. 1998). A claim that a sentence is imposed in violation of Michigan's sentencing law does not state a claim for relief in a habeas proceeding where there is no claim that the sentence violates the cruel and unusual punishment clause of the Eighth Amendment. Hanks v. Jackson, 123 F. Supp. 2d 1061, 1075 (E.D. Mich. 2000). Petitioner's claim that his sentence is disproportionate under Michigan law thus would not state a claim upon which habeas relief can be granted. Whitfield v. Martin, 157 F. Supp. 2d 758, 761 (E.D. Mich. 2001). To the extent that petitioner is claiming that his sentence violates the Michigan state sentencing guidelines, his claim is not cognizable in a habeas proceeding because it is a state law claim. Robinson v. Stegall, 157 F. Supp. 2d 802, 823 (E.D. Mich. 2001). Petitioner's related claim that the trial court improperly departed above the sentencing guidelines range would therefore not entitle him to habeas relief. Welch v. Burke, 49 F. Supp. 2d at 1009; See also Drew v. Tessmer, 195 F. Supp. 2d 887, 889-90 (E.D. Mich. 2001).

IV. CONCLUSION

The Court will deny the petition for writ of habeas corpus. The Court will, however, grant petitioner a certificate of appealability with respect to his first, second, third, sixth, eighth, ninth, and tenth claims. In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional **[*48]** right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). When a district court rejects a habeas petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims to be debatable or wrong. Id. at 484. A federal district court may grant or deny a certificate of appealability when the court issues a ruling on the habeas petition. Castro v. United States, 310 F.

3d 900, 901 (6th Cir. 2002).

Although the Court believes that its decision in denying petitioner habeas relief on these claims was correct, it will nonetheless grant petitioner a certificate of appealability on his first, second, third, sixth, eighth, ninth, and tenth claims for the following reason. Justice Cavanagh indicated that he would have granted petitioner's application for leave to appeal with the Michigan Supreme Court on his direct appeal. Both Justices Cavanagh and Kelly initially indicated on petitioner's post-conviction appeal with the Michigan Supreme **[*49]** Court that they would remand the matter to the Wayne County Circuit Court for further proceedings. On petitioner's motion for reconsideration, Justice Kelly indicated that she would have granted petitioner's application for leave to appeal. In light of the fact that these Michigan Supreme Court justices would have granted petitioner's application for leave to appeal from his appeal of right or his post-conviction appeal, petitioner has shown that jurists of reason could decide these issues differently or that the issues deserve encouragement to proceed further. *See* Robinson v. Stegall, 157 F. Supp. 2d at 820, fn. 7 & 824 (habeas petitioner entitled to certificate of appealability from district court's determination that state appellate court reasonably applied federal law in determining that any Confrontation Clause error was harmless, where one judge on the Michigan Court of Appeals dissented and indicated that he would have reversed petitioner's conviction; dissent showed that a reasonable jurist found that the issue should have been decided differently); *See also* Tankleff v. Senkowski, 135 F. 3d 235, 242 (2nd Cir. 1998)(pre-AEDPA habeas petitioner entitled to certificate of probable cause to appeal, where intermediate state appellate court split three to two on the *Miranda* issue and the propriety **[*50]** of the p rosecutor's summation); Palmariello v. Superintendent, M.C.I. Norfolk, 1988 U.S. Dist. LEXIS 15663, 1988 WL 42393, * 2 (D. Mass. April 11, 1988)(habeas petitioner entitled to certificate of probable cause where the Massachusetts Supreme Judicial Court's affirmance of his conviction was non-unanimous; certificate would be issued "[I]n light of the dissenting opinion filed by a member of the Commonwealth's highest appellate court").[3] The Court will therefore grant a certificate of appealability to petitioner with respect to these claims.

The Court declines to grant petitioner a certificate of appealability on his fourth claim involving instructional error, because the issue is not constitutionally cognizable. *See e.g.* Knowles v. Hines, 9 Fed. Appx. 890, 892 (10th Cir. 2001). Petitioner is not entitled to the issuance of a certificate of appealability on this claim because he has failed to show that it is more likely than not that no reasonable juror would have found him guilty if given what he claims would be the correct instructions. Ward v. Cain, 53 F. 3d 106, 108 (5th Cir. 1995).

The Court likewise declines to grant petitioner a certificate of appealability on his fifth and eleventh claims, because they are procedurally defaulted. When underlying claims have been procedurally defaulted, the question for purposes of an application for a certificate of appealability is whether the habeas petitioner **[*51]** has made a substantial showing of cause and prejudice to overcome the default. Farmer v. Iowa, 153 F. Supp. 2d 1034, 1043 (N.D. Iowa 2001). As indicated in greater detail in the Court's opinion and order, petitioner failed to make a substantial showing of cause and prejudice to overcome the procedural default. Constitutional issues on which a habeas petitioner has procedurally defaulted are not valid claims, and thus provide no basis for a certificate of appealability. Davis v. Welborn, 149 F. Supp. 2d 975, 978 (N.D. Ill. 2001).

Petitioner is also not entitled to a certificate of appealability on his seventh claim involving his sentence. Because petitioner has failed to show that his sentence amounts to cruel and unusual punishment, a certificate of appealability should not be granted. *See* United States ex. rel. Williams v. State of Delaware, 341 F. Supp. 190, 192 (D. Del. 1972).

The Court will also grant petitioner leave to appeal *in forma pauperis* (IFP). A court may grant IFP status if the court finds that an appeal is being taken in good faith. *See* 28 U.S.C. § 1915(a)(3); Fed. R.App.24 (a); Foster v. Ludwick, 208 F. Supp. 2d 750, 765 (E.D. Mich. 2002). Good faith requires a showing that the issues raised are not frivolous; it does not require a showing of probable

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[3] The Court is aware that the Sixth Circuit disfavors issuing a blanket certificate of appealability without making an individualized determination as to each claim. *See* Frazier v. Huffman, 343 F. 3d 780, 788 (6th Cir. 2003). However, in the absence of any indication from either Justice Cavanagh or Justice Kelly as to which of petitioner's claims they wanted to grant leave on or to remand to the Wayne County Circuit Court, this Court is unable to make a more individualized determination. Moreover, in denying petitioner a certificate of appealability on his defaulted or noncognizable claims, the Court has attempted to make such an individualized determination.

success on the merits. *Id.* Because this Court is granting a certificate of appealability to petitioner on several of his claims, this Court will find that any appeal by petitioner would be undertaken in good faith and will **[*52]** grant him leave to appeal *in forma pauperis*. *See* *Brown v. United States, 187 F. Supp. 2d 887, 893 (E.D. Mich. 2002)*.

V. ORDER

Based upon the foregoing, IT IS ORDERED that the Petition for a Writ of Habeas Corpus is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED That a Certificate of Appealability is **GRANTED** with respect to Petitioner's first, second, third, sixth, eighth, ninth, and tenth claims and **DENIED** with respect to his fourth, fifth, seventh, and eleventh claims.

IT IS FURTHER ORDERED that petitioner will be **GRANTED** leave to appeal *in forma pauperis*.

/s/ John Corbett O'Meara

HON. JOHN CORBETT O'MEARA

UNITED STATES DISTRICT COURT

DATED: April 22, 2004

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Robinson v. Stegall

United States District Court for the Eastern District of Michigan, Southern Division

August 6, 2001, Decided ; August 6, 2001, Filed

CIVIL ACTION NO. 98-CV-72752-DT

Reporter
157 F. Supp. 2d 802 *; 2001 U.S. Dist. LEXIS 11655 **

LAMONT D. ROBINSON, # 232275, Petitioner, v. JIMMY STEGALL, Respondent.

Subsequent History: *Affirmed by Robinson v. Stegall, 48 Fed. Appx. 111, 2002 U.S. App. LEXIS 19194 (2002)*

Prior History: *People v. Robinson, 456 Mich. 932, 575 N.W.2d 549, 1998 Mich. LEXIS 234 (1998)*

Disposition: **[**1]** Petition for a writ of habeas corpus DENIED WITH PREJUDICE. Certificate of appealability with regard to Petitioner's claim challenging the trial court's restriction of defense cross-examination granted.

Core Terms

rights, sentence, cross-examination, injuries, interrogation, questions, state court, chest, baby, credibility, waived, confession, intelligence, bruises, hitting, make a statement, habeas corpus, coercion, breathing, harmless, replied, banana, killed, lungs, statement to police, confrontation, corpus, felony, murder, blunt

Case Summary

Procedural Posture

Petitioner filed a petition for a writ of habeas corpus pursuant to *28 U.S.C.S. § 2254*.

Overview
Petitioner was convicted by a jury of involuntary manslaughter, and then plead guilty to being a fourth felony habitual offender and was sentenced to life imprisonment. After exhaustion of his state court appeals, the petitioner filed his writ of habeas corpus petition, alleging violations of his constitutional rights for both his conviction and sentence. The district court denied the petition because the petitioner's claims lacked merit and did not entitle him to federal habeas relief. The conviction and sentence did not involve a judgment which was an unreasonable application of clearly established constitutional law. The court granted a certificate of appealability for the trial court's restrictions on the defense's cross-examination of certain police witnesses, but denied the certificate for all other claims.

Outcome
The petition was denied with prejudice. A certificate of appealability was granted.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN1 **Appeals, Standards of Review**

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, altered the standard of review that a federal court must use when reviewing applications for writs of habeas corpus.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN2 **Review, Standards of Review**

See 28 U.S.C.S. § 2254(d).

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN3 Review, Standards of Review

In sum, 28 U.S.C.S. § 2254(d)(1) places a constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied, the state-court adjudication results in a decision that is contrary to established federal law, or involves an unreasonable application of established federal law. Under the contrary to clause, a district court may grant the writ if the state court arrives at a conclusion opposite that reached by the district court on a question of law or if the state court decides a case differently than the district court has on a set of materially indistinguishable facts. Under the unreasonable application clause, a district court may grant the writ if the state court identifies the correct governing legal principle from the district court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN4 Review, Standards of Review

A federal habeas court making the unreasonable application inquiry should ask whether the state court's application of clearly established federal law is objectively unreasonable. The reviewing court must be aware that an unreasonable application of federal law is different from an incorrect application of federal law.

Criminal Law & Procedure > ... > Review > Standards of Review > Harmless Errors

Governments > Courts > Judicial Precedent

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN5 Standards of Review, Harmless Errors

Where constitutional trial error is shown and the federal habeas court concludes that the error has a substantial and injurious effect or influence in determining the jury's verdict, a state court ruling finding such error harmless beyond a reasonable doubt is outside the realm of plausible, credible outcomes and the petitioner is entitled to habeas relief. A state court's application of federal law is unreasonable and a writ may issue only if reasonable jurists will find it so arbitrary, unsupported or offensive to existing precedent as to fall outside the realm of plausible, credible outcomes. When a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief. Only if a federal habeas court can say with certainty that a trial error has little or no impact on the judgment, should the judgment stand.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

Evidence > ... > Presumptions > Particular Presumptions > Regularity

HN6 Review, Standards of Review

The federal court reviewing a habeas petition must apply the presumption of correctness to evidence-supported factual determinations made by a state court. This presumption may only be overcome by the presentation of clear and convincing evidence by the petitioner. 28 U.S.C.S. § 2254(e)(1).

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

Evidence > Privileges > Self-Incrimination Privilege > Waiver

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General

Overview

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > General Overview

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Evidence > Privileges > Self-Incrimination Privilege > General Overview

HN7[↓] Procedural Due Process, Self-Incrimination Privilege

A statement made during custodial interrogation is admissible against the defendant only if the statement is made voluntarily after a knowing waiver of the *Fifth Amendment* right against self incrimination. To prove a valid waiver of Miranda rights, the government must show: (1) that the waiver is voluntary, and (2) that defendant has a full awareness of the right being waived and of the consequences of waiving that right. Thus, a finding of a valid waiver requires both a comprehension of the rights waived and an absence of coercion, a knowing component and a voluntary component.

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

HN8[↓] Miranda Rights, Voluntary Waiver

A knowing relinquishment of Miranda rights can be found even where a defendant has only limited intellectual capacity. Thus, even a defendant who is classified as mildly retarded or having learning disabilities may waive his rights if he can comprehend sufficiently the particular rights set forth in Miranda. The issue is whether defendant is so incompetent that he was not aware of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Miranda Warnings

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > General Overview

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN9[↓] Arrests, Miranda Warnings

A voluntary relinquishment of Miranda rights is the product of a free and deliberate choice rather than intimidation, coercion, or deception. The relevant test is whether defendant's statement is obtained by physical or psychological coercion or by improper inducement so that a defendant's will is overborne. A claim that a statement is given in the absence of a valid waiver is evaluated under a totality of the circumstances approach. Factors to be considered include the type and length of questioning, the defendant's physical and mental capabilities, and the governing method of interrogation. Only if the totality of the circumstances reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights are waived.

Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview

Evidence > ... > Presumptions > Particular Presumptions > Regularity

HN10[↓] Habeas Corpus, Procedure

Where a state court adjudicates the merits of a habeas corpus petitioner's claim, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, states that relief may not be granted unless: the state court decision is contrary

to, or involves an unreasonable application of, clearly established federal law or the state court decision is based on an unreasonable determination of the facts in light of the evidence presented. *28 U.S.C.S. § 2254(d)*. The AEDPA recognizes the presumption of correctness to be applied to state court findings of fact. *28 U.S.C.S. § 2254(e)(1)*. However, the AEDPA adds a burden to the habeas petitioner, requiring clear and convincing evidence to effectively rebut the presumption of correctness. *28 U.S.C.S. § 2254(e)(1)*. The touchstone for a reasonable determination is whether the determination is minimally consistent with the facts and circumstances of the case. Habeas corpus relief may not be granted unless the state court's decision is objectively unreasonable.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

HN11 **Self-Incrimination Privilege, Custodial Interrogation**

In the context of a Miranda analysis, like intellectual capacity, age is only one factor to consider in the totality of the circumstances inquiry. Confessions obtained from young individuals are upheld under a totality of the circumstances review.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

HN12 **Self-Incrimination Privilege, Right to Counsel During Questioning**

A suspect who expresses his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel is made available to him, unless the accused himself initiates further communications, exchanges or conversations with the police. This prophylactic rule applies when a police-initiated interrogation following a suspect's request for counsel occurs in the context of an unrelated criminal investigation.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > General Overview

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN13 **Self-Incrimination Privilege, Custodial Interrogation**

The determination as to whether an accused invokes his or her *Fifth Amendment* right to counsel should not rest upon whether or not, or how clearly, he or she articulates the reasons for which counsel is desired. The average person is unaware that there exists both a *Fifth Amendment* right to counsel at custodial interrogation, as created by Miranda and a *Sixth Amendment* guarantee of the assistance of counsel during adversary proceedings. An accused may not know or contemplate that different rights might be invoked based on the wording of the request, or based on the fact that the request is made to a judge as opposed to the police.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > General Overview

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

Criminal Law & Procedure > Preliminary Proceedings > Arraignments > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Arraignments > Rights of Defendants

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN14 **Self-Incrimination Privilege, Custodial Interrogation**

A request for counsel is an assertion by an accused that he or she needs help in any further dealings with the authorities, including custodial interrogation. Any such request, whether before a judge or the police, is considered as a per se invocation of *Fifth Amendment* rights. To hold otherwise, based on factors which an accused cannot reasonably contemplate, deprives the accused of the fullest extent of constitutional protection. An accused is under no obligation to state precisely why he wants a lawyer. If the courts distinguish cases based on the wording of an accused's request, the value of the right to counsel will be substantially diminished. An accused's request for an attorney is per se an invocation of his *Fifth Amendment* rights, requiring that all interrogation cease.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

HN15 **Self-Incrimination Privilege, Right to Counsel During Questioning**

When an accused requests an attorney before a police officer, all interrogation must cease. The simple fact that defendant requests an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries single-handedly.

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview

HN16 **Examination of Witnesses, Cross-Examination**

The jury is entitled to evaluate the weight, credibility, and reliability of a legally voluntary confession or statement. Cross-examining police interrogators about the nature of the interrogation producing the confession may be an essential part of challenging the credibility and reliability of a confession.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN17 **Criminal Process, Right to Confrontation**

The *Sixth Amendment to the United States Constitution* guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. *U.S. Const. amend. VI*. This fundamental right of confrontation is secured for those defendants tried in state as well as federal criminal proceedings. A primary interest secured by (the *confrontation clause*) is the right of cross-examination. Indeed, the right of cross-examination is part and parcel of confrontation, and the latter is meaningless without the former.

Criminal Law & Procedure > Trials > Witnesses > Criminal Records

Evidence > Types of Evidence > Testimony > General Overview

Criminal Law & Procedure > Trials > Direct Examinations

Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > Trials > Witnesses > General Overview

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > General Overview

Evidence > ... > Credibility of Witnesses > Impeachment > General Overview

Evidence > ... > Credibility of Witnesses > Impeachment > Bias, Motive & Prejudice

Evidence > ... > Impeachment > Convictions & Other Criminal Process > General Overview

HN18 **Witnesses, Criminal Records**

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. The cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner is allowed to impeach or discredit, the witness. The courts distinguish between general and particular attacks on a witness's credibility. One way to attack a witness's credibility is to introduce evidence of prior convictions. The proponent of such evidence seeks to provide the jury a basis for inferring that the witness is less credible than the average citizen, or a witness who has no prior criminal record. The introduction of evidence of a prior crime is a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Evidence > ... > Examination > Cross-Examinations > General Overview

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Tests for Juror Bias & Prejudice

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview

Criminal Law & Procedure > Trials > Witnesses > General Overview

Evidence > Types of Evidence > Testimony > General Overview

HN19 **Examination of Witnesses, Cross-Examination**

The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination. A criminal defendant states a violation of the *Confrontation Clause* by showing that he is prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness. A limitation on cross-examination which prevents a person charged with a crime from placing before the jury facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred constitutes denial of the right of confrontation guaranteed by the *Sixth Amendment*. The *Sixth Amendment* compels cross-examination if that examination aims to reveal the motive, bias, or prejudice of a witness/accuser.

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview

Criminal Law & Procedure > Trials > Witnesses > General Overview

HN20 **Examination of Witnesses, Cross-**

Examination

It is exclusively the jury's province to make credibility determinations. However, a habeas corpus petitioner is allowed to effectively explore the nature of his interrogation by the police, including the length of the questioning, the role that different officers play, and the fact that the officers may use information gained in one interview while conducting a later interview. A petitioner is not prevented from cross-examining any witness concerning facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN21 **Criminal Process, Right to Confrontation**

The *Confrontation Clause* does not require that the defense be completely unrestricted in its cross-examination of prosecution witnesses.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Criminal Law & Procedure > ... > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

Criminal Law & Procedure > ... > Review > Standards of Review > Harmless Errors

HN22 **Harmless & Invited Error, Constitutional Rights**

The violation of a defendant's right of confrontation is subject to harmless error analysis. In a habeas corpus case, where a petitioner challenges his conviction collaterally, an error is harmless unless it has a substantial and injurious effect on the jury's verdict. Thus, when a court considers a *Confrontation Clause* violation in a habeas corpus proceeding, the relevant harmless-error inquiry is whether, assuming that the damaging potential of the cross-examination are fully realized, a reviewing court might nonetheless say that the error has a substantial and injurious effect on the jury's verdict. The harmless error standard announced in Brecht applies even if a federal habeas court is the first to review for harmless error.

Criminal Law & Procedure > Habeas Corpus > Independent & Adequate State Grounds > General Overview

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Sentences

HN23 **Habeas Corpus, Independent & Adequate State Grounds**

A federal writ of habeas corpus reaches only convictions and sentences obtained in violation of some provision of the United States Constitution. Federal habeas corpus relief does not lie for errors of state law. A violation of state law is not cognizable in federal habeas corpus proceedings.

Criminal Law & Procedure > Sentencing > Appeals > General Overview

HN24 **Sentencing, Appeals**

In the context of a habeas corpus petition, in order to prevail on a claim that a trial court relied on inaccurate information at sentencing, a habeas petitioner must demonstrate that the sentencing court relies upon this information and that it is materially false.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel &

Unusual Punishment

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Three Strikes

Criminal Law & Procedure > Habeas Corpus > Independent & Adequate State Grounds > General Overview

HN25 **Fundamental Rights, Cruel & Unusual Punishment**

A claim that a sentence is imposed in violation of a state's sentencing laws does not state a claim for relief in a habeas proceeding where there is no allegation that the sentence violates the *cruel and unusual punishment clause of the Eighth Amendment to the U.S. Constitution*.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Sentences

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Three Strikes

Criminal Law & Procedure > Sentencing > Proportionality

Criminal Law & Procedure > Habeas Corpus > Independent & Adequate State Grounds > General Overview

HN26 **Fundamental Rights, Cruel & Unusual Punishment**

A sentence imposed within the state's statutory limits is not generally subject to habeas review. Successful challenges to the proportionality of particular sentences in non-capital cases are exceedingly rare. Federal courts will not engage in a proportionality analysis except in cases where the penalty imposed is death or life in prison without the possibility of parole.

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

Criminal Law & Procedure > ... > Murder > Felony Murder > Penalties

Criminal Law & Procedure > ... > Murder > First-Degree Murder > General Overview

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Penalties

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

Criminal Law & Procedure > Sentencing > General Overview

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Three Strikes

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN27 **First-Degree Murder, Elements**

Under Michigan law, a prisoner convicted as an habitual offender and sentenced to life imprisonment is eligible for parole after the expiration of ten calendar year, unless the minimum term for the underlying felony fixed by the sentencing judge at the time of sentence is longer than ten years. Offenses that require a nonparoleable life sentence in Michigan include first-degree premeditated murder and first-degree felony murder, *Mich. Comp. Laws § 750.316*, certain drug offenses over 650 grams, treason, *Mich. Comp. Laws §*

750.544, placing explosives with intent to destroy which causes injury to a person, Mich. Comp. Laws § 750.207, and certain repeat drug offenses. A sentence of life imprisonment is mandatory for conspiracy to commit first-degree murder. However, the life term for conspiracy to commit first-degree murder is paroleable.

Counsel: LAMONT ROBINSON, petitioner, Pro se, New Haven, MI.

For JIMMY STEGALL, respondent: Janet Van Cleve, Michigan Department of Attorney General, Lansing, MI.

Judges: PAUL D. BORMAN, UNITED STATES DISTRICT JUDGE.

Opinion by: PAUL D. BORMAN

Opinion

[*806] OPINION AND ORDER (1) DENYING HABEAS CORPUS PETITION, AND (2) INDICATING A WILLINGNESS TO GRANT A CERTIFICATE OF APPEALABILITY AS TO PETITIONER'S CLAIM CHALLENGING THE TRIAL COURT'S RESTRICTION OF CROSS-EXAMINATION

I. Introduction

Petitioner, Lamont D. Robinson ("petitioner"), has filed this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging that he has been convicted and sentenced in violation of his constitutional rights. Petitioner challenges his conviction after a jury trial of involuntary manslaughter, M.C.L. § 750.321. Petitioner then pleaded guilty to being a fourth felony habitual offender, M.C.L. § 769.12. Petitioner was sentenced to life imprisonment for this offense. **[**2]** [1] For the reasons set forth below, the petition shall be denied.

II. Factual Background

This action **[**3]** arises out of the death of a seventeen month old infant child named Lorenzo Merriweather. Petitioner was the mother's boyfriend. The child died on May 29, 1992, and was examined by a medical examiner the next day. The medical examiner gave detailed testimony concerning injuries suffered by the child. The infant had at least four separate bruises on his forehead. The infant also bruises on the top and back of the head and a large abrasion, or scraping of the skin, covering about one and a half inches. There was also a linear abrasion on the back of the head. Transcript Volume IV ("Tr. Vol. IV") at 60-64.

The child had bite marks on the back of his left shoulder which had been made by an adult human. There was a large bruise on the lower right abdomen above the pubic bone and bruises on the upper portion of the front of the chest over the sternum, or breastbone. There were linear marks and abrasions on the front of the child's legs which may have been made with a comb. *Id.* at 64-69.

Examination of the bruises on the child's head showed sufficient bleeding in the bruised areas to indicate that, while the injuries were fresh (less than twelve hours old) the child had lived for a **[**4]** considerable time after they were inflicted. If the child had died immediately after the trauma to the head, there would not have been time for blood flow into the area to cause the bruising present. *Id.* 69-74.

[*807] Internal examination revealed that the child suffered from an incomplete fracture of the base of the skull near the ears. There was marked swelling of the brain and bruises inside the brain due to external trauma blunt force injury. The doctor opined that the injuries to the child's head were too numerous to have been caused by a fall down a flight of stairs. *Id.* at 75. The skull fracture, brain bruises, and swelling of the brain were caused by a heavy type of blunt force. Another child could not have caused such injuries. These injuries could have been caused by an adult striking the child with his or her hand. *Id.* at 75-77.

The child's second and third cervical vertebrae were separated, an injury which would only be caused by a

[1] Petitioner states in his habeas application that he was sentenced to twenty years imprisonment. However, review of the sentencing transcript shows that he was sentenced to ten to fifteen years for involuntary manslaughter and life as a fourth felony habitual offender. Sentencing Transcript ("Tr.") dated April 5, 1994, at 30-31; 40. After imposing the habitual offender life sentence, the trial judge vacated Petitioner's ten to fifteen year sentence for involuntary manslaughter. Sentencing Tr. at 41. The sentencing transcript indicates that Petitioner had committed four prior felonies, including another homicide. *Id.* at 33; 37-38. The Michigan Court of Appeals opinion affirming Petitioner's conviction and sentence also states that Petitioner "was sentenced to life imprisonment as an habitual offender." *People v. Robinson*, Michigan Court of Appeals Docket No. 175929 (January 17, 1997) at 1.

force injury to the head. This injury to the cervical spine could have been caused by a blow to the head from a hand, or from the child falling on his head. In conjunction with the child's other head injuries, the doctor opined that the **[**5]** cervical spine injuries were caused by blunt force injuries or blows to the head. *Id.* 78-80.

Internally, the chest cavity showed severe lacerations of the lungs. Force so severe had been applied to the chest that the child's lungs were torn at their roots of attachment to the body cavity. Massive blunt trauma would be required to cause these injuries. These injuries to the roots of the lungs were not consistent with injuries caused by performing cardiopulmonary resuscitation ("CPR"). The injuries to the surface of the child's chest could have been caused by CPR. However, internal injuries caused by CPR generally involve fractures of the ribs and may involve injuries to the outer portions of the lungs and/or heart, not tears of the lungs' roots. In this case, there were no injuries to the outer portions of the child's lungs and/or heart, but the lungs' roots were torn. The doctor therefore opined that the internal injuries to the child's lungs were consistent with heavy blunt trauma to the chest, but not consistent with CPR. *Id.* at 80-83.

There were lacerations or tears to the liver and injuries to the bowel and the mesentery, the attachment of the bowel to the body wall. **[**6]** These injuries would only result from intended blunt force injuries to the abdominal region; they would not result from a fall. *Id.* at 83. There were also injuries to both kidneys. These were deep body injuries involving tearing of the urethra where it attaches to the kidneys. There was also an external tear to the right kidney.

The internal injuries to the child were fresh injuries which occurred less than twelve hours before his death. The last injury the doctor described was a collection of blood in the child's scrotal sac and an injury to the left testicle, indicating that the testicle and scrotum had been struck with a direct blunt force injury.

The doctor concluded his direct testimony by opining that Lorenzo Merriweather "died of multiple inflicted blunt force injuries, and these injuries included the head, chest, and abdomen." *Id.* at 87.

Marjorie Merriweather testified that she was the mother of Lorenzo Merriweather's mother. Marjorie Merriweather testified that Petitioner was her daughter's boyfriend, but was not Lorenzo's father. Marjorie Merriweather, testified that she last saw the child alive on May 12, 1992. The child appeared to be in good health on that date. **[**7]** The next time she saw the child he was dead. [2] Tr. Vol. II at 178-83.

Laverne Robinson, Petitioner's sister, testified that Petitioner and the baby Lorenzo **[*808]** Merriweather were at her house on the night of May 29, 1992, when Lorenzo died. Petitioner was staying at her house in the basement. On the evening of May 28, Petitioner and the baby were watching television alone. The baby had a cold and had a runny nose. The baby did not appear to have any visible bruises or other injuries at that time. Petitioner asked her if she had any cold medicine. Ms. Robinson did not see recall seeing Petitioner give **[**8]** any medicine to the baby.

The next time Ms. Robinson saw Petitioner was the early morning hours of May 29, 1992. At 3:56 a.m., Petitioner came to Ms. Robinson's bedroom door and asked for a diaper. Petitioner came into her bedroom, got a diaper, and left. Shortly thereafter, she heard the basement door open and close. About fifteen or twenty minutes later, Petitioner came upstairs and went into the bathroom. After Petitioner came out of the bathroom, he went into the dining room with the baby. Later that same morning, Petitioner knocked on Ms. Robinson's door again and said he thought that the baby's heart had stopped. When Ms. Robinson went into the dining room and observed the baby, he was still breathing. Ms. Robinson told Petitioner to call 911. Petitioner replied that he already had done so. Petitioner Tr. Vol. III at 4-23.

On cross-examination, Ms. Robinson testified that she had never seen Petitioner abuse or hurt the baby. On the contrary, she had seen Petitioner play with, feed, and dress the child. Petitioner appeared to be upset while waiting for the ambulance to arrive. Ms. Robinson did not hear the child cry or observe any other evidence of it being hurt in the evening **[**9]** or night before Petitioner told her he thought the child had stopped breathing and called for emergency assistance. Tr. Vol. III at 23-40.

Charles William Prather testified that he was working as

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[2] Respondent contends that Marjorie Merriweather testified that she saw the child "earlier in the evening" and that he appeared to be "fine and healthy," implying that this witness saw the infant on the day of his death before he was killed. Respondent's Brief at 6. Review of the transcript shows that the last day Marjorie Merriweather saw the infant Lorenzo Merriweather alive was May 12, 1992. Tr. Vol. II at 180-83.

On cross-examination, defense counsel asked Ellerbrake if he had talked to a Sergeant Herrera about what Petitioner may have told Herrera earlier. The trial **[*810]** judge sustained the prosecutor's objection to questioning Ellerbrake about Herrera's state of mind. Defense **[**13]** counsel asked Ellerbrake whether he had used Petitioner's grief against him and whether Ellerbrake had told Petitioner he had killed the Lorenzo before Petitioner had said he did so. Ellerbrake replied in the negative to both of these questions.

A tape recording of Petitioner's statement to the police was played for the jury. The recording indicates that Detective Dan Herrera of the River Rouge Police, Detective Sergeant William Cooper, and Petitioner were present when the recording was made. Initially, when informed that he had the right to have an attorney present, Petitioner replied that he did not. When Petitioner's right to have an attorney was reiterated, Petitioner asked, "Can I get a lawyer in here right now?" Tr. Vol. VI at 80. Detective Herrera replied, "If you want." *Id.*

Immediately after Herrera said this, the following exchange was recorded:

> Mr. Robinson: And I have to wait for him to come right here, or we'll have to presume [sic] this tomorrow?
>
> Mr. Herrera: No, if you want to make a statement, and you want a lawyer present, no questions will be asked of you. You have to afford your own attorney. If you cannot afford your own attorney, one will be **[**14]** appointed for you, without cost, by the court, prior to any questioning. Do you understand that?
>
> Mr. Robinson: Yes.
>
> Mr. Herrera: Okay. Do you want an attorney present, or do you want to go ahead and make a statement?
>
> Mr. Robinson: I'll make a statement.
>
> Mr. Herrera: Now you also understand that at any given time, you can exercise your rights not to answer any questions or make any statements. Do you understand that?
>
> Mr. Robinson: Yes.
>
> Mr. Herrera: Because you have understood these rights and under the law, you have not been threatened or promised anything, is that true?
>
> Mr. Robinson: Yes.
>
> Mr. Herrera: --and that you now desire and agree to answer any questions that are put to you or make any statements?
>
> Mr. Robinson: Yes. And I have the right to stop talking--
>
> Mr. Herrera: Pardon me?
>
> Mr. Robinson: I have the right to stop talking when I want to?
>
> Mr. Herrera: You have the right to stop talking any time you want to.

Tr. Vol. VI at 80-81.

The explanation and reiteration of Petitioner's rights continued. Petitioner stated that he understood all of his constitutional rights and that he wanted to make a statement.

In his **[**15]** statement, Petitioner admitted hitting Lorenzo with a closed hand, like a fist, because he thought his heart had stopped after he gave him some food and he thought he was choking. Later, he pressed on his chest, attempting CPR. Finally, he hit him with a comb, slapped and shook him, grabbed and shook his Adam's apple, and bit him on the shoulder, trying to wake him up, but Lorenzo did not respond, so he called 911. Petitioner claimed that Lorenzo became alert and tried to get up in the ambulance, but the attendant held him down and told him he could not get up. Petitioner stated that he did not intend to harm or kill Lorenzo and he probably injured him because he did not know how to perform CPR properly. Tr. Vol. VI at 85-111.

Petitioner testified on his own behalf. Petitioner was twenty-one years old at the time of his trial. Lorenzo Merriweather died almost two years before Petitioner's trial. Petitioner was living with his grandmother **[*811]** at the time of the child's death. Petitioner was watching Lorenzo for his girlfriend, Yvette Merriweather. Lorenzo was sick and could not breathe through his nose. Petitioner loved Lorenzo and felt like he was his natural son. Petitioner and Lorenzo **[**16]** were sleeping in the basement, because it was cooler there. Petitioner changed Lorenzo's diaper at about midnight. Lorenzo threw up some food he had eaten earlier. Lorenzo started gasping for air. Petitioner tapped Lorenzo--not hard-- in the chest to help him spit up. Petitioner then laid Lorenzo on his back and began softly pressing his chest. Petitioner denied shaking Lorenzo. Petitioner put water on Lorenzo's face to try to arouse him. Petitioner called 911, because he thought Lorenzo's heart had stopped beating. Petitioner nudged Lorenzo's chin back and forth to try to revive him, because he was not moving. Everything Petitioner did, he did because he was trying to save Lorenzo's life, not to hurt him. Petitioner hit Lorenzo with a comb trying to revive him. Later, Petitioner pressed on Lorenzo's chest, trying to

a River Rouge firefighter and EMS technician on May 29, 1992. He and his partner answered a call for assistance received at about 4:23 a.m. The call indicated that a small child was having difficulty breathing. When Prather and his partner arrived, Petitioner was standing in front of his sister's house, holding the child. The child was breathing rapidly and had a bleeding welt or bruise at the base of its skull. The child also had some small puncture wounds on his leg. The child was lethargic and moved very slowly. He would close his eyes and keep them closed for a long time. Petitioner said that the child had stopped breathing and he had shaken it to wake it up. Petitioner told Prather that the baby had gotten the bump on its head by falling down the stairs two days before. However, the bump was still bleeding and did not appear to be two days old. It appeared to be very fresh, perhaps still swelling. Tr. Vol. III at 78-126.

Detective-sergeant William Ellerbrake ("Ellerbrake") of the Dearborn **[**10]** Police Department testified about his interrogation of Petitioner on June 2, 1992, at about 4:30 or 5:00 p.m. and the statement Petitioner made to him. Ellerbrake read Petitioner his *Miranda* warnings when he came into contact with him. [3] Petitioner was born on **[*809]** July 14, 1972, and was nineteen years old at the time of his interrogation. Petitioner was fed just before his interrogation began. Ellerbrake gave Petitioner a written copy of the rights he would read to him, so Petitioner could follow along. After reading Petitioner his rights, Ellerbrake asked Petitioner if he understood each of his rights. Petitioner replied that he did. Ellerbrake asked if Petitioner was willing to give up his rights and make a statement. Petitioner replied that wanted to make a statement. Petitioner signed and dated a form indicating that he understood his rights. Tr. Vol. IV at 114-19.

[11]** Ellerbrake informed Petitioner that he was being questioned about the death of Lorenzo Merriweather. Ellerbrake informed Petitioner of the nature of the child's injuries and asked him if he could explain how they may have occurred. Petitioner first said that he did not know how the child was injured. Next, Petitioner said that in May of 1992, he had hit the child with a pillow and that he had fallen to the ground possibly accounting for the injuries. Petitioner also said that on the Memorial Day weekend he tackled the boy on a carpeted basement floor with cement underneath, possibly explaining the injuries.

Ellerbrake told Petitioner that a forensic specialist could tell how old the child's injuries were by examining his wounds. Petitioner then offered another explanation. This time, Petitioner said that the child had a cold and was sleepy. Petitioner woke him up to feed him a banana. The boy choked on the banana. Petitioner then struck the child very hard in the stomach area to dislodge the banana. Petitioner did not reply when asked why he would awaken a sick, sleeping child in the middle of the night to feed him a banana. Ellerbrake said the it was good Petitioner mentioned this **[**12]** because the autopsy would discover any partially chewed banana that was present. Petitioner then said he thought the boy had spit out the banana. When told that any spit-out banana should be found in the area, Petitioner said that maybe there had not been any banana.

Petitioner then said that the child had become woozy and he tried to perform CPR on him, hitting him on the chest. Petitioner also said that he shook the boy, bit him hard several times, and poked him with a metal comb to try to arouse him. Petitioner made two phone calls while in custody. Tr. Vol. IV 114-130. Finally, Petitioner said, "'I killed Lorenzo because I didn't know how to care for a kid.. Lorenzo would still be alive if someone else had been watching him.'" Tr. Vol. IV at 130. It took Petitioner about an hour and a half to make his statement, taking the time away for making two phone calls, using the bathroom, and getting a drink of water into account.

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[3] Law enforcement officers must give "Miranda warnings" before interrogating individuals in custody. *See* Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In *Miranda*, the Supreme Court held that an individual in police custody may not be interrogated until and unless he is first advised that he has the right to remain silent; that anything he says may be used against him; that he has the right to an attorney; and that an attorney will be appointed for him if he cannot retain one. These warnings are an "absolute prerequisite to interrogation," said the court, 384 U.S. at 467, 86 S. Ct. 1624, and without the warnings, the fruits of a custodial interrogation are inadmissible at trial. The Supreme Court held that: "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege.... But unless and until such warnings are demonstrated ..., no evidence obtained as a result of interrogation can be used against him. 384 U.S. at 478-479, 86 S. Ct. at 1630 (footnote omitted).

Miranda, then, creates procedural safeguards to secure the Fifth Amendment privilege against self-incrimination.

perform CPR. He did not press hard. Tr. Vol. VII at 129-160. Lorenzo's eyes had rolled up in his head. Petitioner eventually bit Lorenzo several times, trying to revive him. This caused Lorenzo's eyes to "come out his head." Tr. Vol. VII at 161. Shortly thereafter, the ambulance arrived. Petitioner denied that Lorenzo had a bump on his head at this time, testifying that **[**17]** he only had a carpet burn. Petitioner acknowledged telling an EMS worker that Lorenzo had fallen down some steps.

Petitioner testified that he was confused when he was arrested on a charge of open murder for the death of Lorenzo Merriweather. Petitioner said he did not understand why he was being arrested. Petitioner acknowledged that he was read his rights before he was interrogated. Tr. Vol. VIII at 7. Petitioner said that he "understood the rights," except the part "about my lawyer." Tr. Vol. VIII at 29. Petitioner denied telling Ellerbrake that he hit Lorenzo in the stomach. Petitioner did demonstrate how he pressed on Lorenzo's chest. Petitioner said that Ellerbrake repeatedly told him that he had killed Lorenzo, until eventually, he (Petitioner) believed it. Petitioner was tired, upset, and had been crying before stating that he had killed Lorenzo. Petitioner denied hitting Lorenzo on the head, denied pounding him on the chest, and denied hitting him hard anywhere, including the groin area. Petitioner denied trying to hurt Lorenzo in any way,. Tr. Vol. VIII at 15-49.

On cross-examination, Petitioner admitted that he had not wanted to take Lorenzo and watch him for Yvette Merriweather **[**18]** on Thursday, the day before he died. Petitioner testified that he first declined to watch Lorenzo, but after Yvette said that he "'just want to 'f' some 'B,'" he agreed to watch him. Tr. Vol. VIII at 57. Petitioner testified that Lorenzo did not simply have a cold as his sister had thought, was very sick, and was having trouble breathing due to illness. However, he did not seek medical attention for him to treat this illness, because he was not the baby's natural father and Lorenzo's mother told him if he took the baby to the hospital, "they going to try to take him from her." Tr. Vol. VIII at 65. Petitioner said that, about midnight, he first fed Lorenzo barbeque, beans, and corn and that he threw this up. Petitioner testified that he then fed Lorenzo a banana which he thought may have caused his to gasp for breath. Petitioner was initially unresponsive when asked why he would wake up a seventeen month old baby he thought was very sick to feed him at about midnight. Petitioner then testified that he did so because he did not know if the baby had eaten, Petitioner said that the EMS technicians who testified that he gave no explanation of why Lorenzo had stopped breathing were lying. **[**19]** *Id.* at 74.

[*812] Petitioner denied having any knowledge of how Lorenzo sustained the severe internal injuries he suffered. Petitioner acknowledged having said that he killed Lorenzo because he did not know how to take care of him. Petitioner said that he believed this because of what Ellerbrake told him. Petitioner acknowledged that biting Lorenzo, hitting him with a comb, throwing water on his face, and pressing gently on his chest would not have caused his death. Petitioner further testified that Ellerbrake had convinced him that he caused the fatal injuries by pushing too hard, despite his recollection that he did not touch him very hard.

Petitioner acknowledged that, in his statement to the police, he made no mention of not understanding his right to a lawyer and no request for a lawyer, in his comments at the end of his statement, or anywhere else. Petitioner admitted being told that, if he wanted a lawyer, he could "get one right then and there." *Id. at 207, 211*; Tr. Vol. IX at 19.

Petitioner called Dr. Hampton E. Walker, Jr., a psychologist, as an expert witness. Dr. Walker testified that Petitioner was of below average intelligence, with an IQ of about 80. Dr. Walker further **[**20]** testified that Petitioner had compromised judgment and was very suggestible. Dr. Walker opined that, because of Petitioner's mental characteristics, the stress of Lorenzo's death combined with the stress of the interrogation, made him highly susceptible to suggestions by the police that he had caused Lorenzo's death. Dr. Walker questioned the "reliability and accuracy" of Petitioner's statements to the police. Tr. Vol. VI at 151-52. Further, Dr. Walker opined that it was "probable" that Petitioner's confession that he killed Lorenzo was a product of police suggestion, rather than a reflection of the facts, particularly since Petitioner had been exposed to nine hours of questioning. *Id. at 159-60*. Dr. Walker testified that he thought Petitioner understood his *Miranda* rights, but was too fatigued to voluntarily waive them by the end of his interrogation. *Id. at 165-66*.

Defense counsel argued that Petitioner's statement was a product of police suggestion, intimidation, and manipulation of a person with substantially subnormal intelligence and that any injuries Petitioner inflicted upon Lorenzo Merriweather occurred accidentally when he tried to save the boy's life. The jury **[**21]** was instructed to consider charges of second degree murder

and involuntary manslaughter. The jury convicted Petitioner of involuntary manslaughter. Petitioner pleaded guilty to being a fourth felony habitual offender and was sentenced life imprisonment as a habitual offender. M.C.L. § 750.321; M.C.L. § 769.12. [4]

III. Procedural history

Petitioner filed a direct appeal as of right, presenting the following claims:

> I. The trial court erred in finding that Petitioner voluntarily waived his *Miranda* rights, where Petitioner was incompetent to waive his rights and was subjected to lengthy interrogation which overbore his will.
>
> II. The trial court violated Petitioner's right to confrontation by improperly restricting **[**22]** his cross-examination of police officers concerning aspects of Petitioner's interrogation.
>
> III. Police officers' failure to stop questioning Petitioner after he demanded to see an attorney violated his constitutional **[*813]** rights as established by *Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1999)*.
>
> IV. Petitioner's offense variables were improperly scored under Michigan state law.

The Michigan Court of Appeals affirmed petitioner's convictions in an unpublished opinion. *People v. Robinson*, Michigan Court of Appeals No. 175929 (January 17, 1997). [5] The Michigan Supreme Court denied Petitioner's delayed application for leave to appeal because it was "not persuaded that the questions presented should be reviewed by this Court." *People v. Robinson*, Michigan Supreme Court No. 108840 (February 3, 1998).

[23]** Thereafter, on or about July 2, 1998, Petitioner filed the instant petition for a writ of habeas corpus presenting the same four claims raised in his direct appeal.

IV. Standard of Review

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996)("AEDPA" or "the Act"), govern this case because petitioner filed her habeas corpus petition after the effective date of the Act. *Lindh v. Murphy, 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997)*.

HN1[↑] The AEDPA altered the standard of review that a federal court must use when reviewing applications for writs of habeas corpus.

As amended, *28 U.S.C. § 2254(d)* provides that:

> ***HN2***[↑] (d) 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 **[**24]** in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The United States Supreme Court has recently addressed the question of the proper interpretation of the amendments to the habeas corpus statute concerning entitlement to relief. The Supreme Court has stated that "***HN3***[↑] in sum, *§ 2254(d)(1)* places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas

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[4] Manslaughter is punishable in Michigan as a first offense for up to fifteen years imprisonment. A person convicted of a fourth felony and sentenced as an habitual offender may be sentenced to life imprisonment for felonies punishable by five years or more as a first offense.

[5] Judge Myron H. Wahls issued a written dissent. In his dissent, Judge Wahls set forth his view that Petitioner's "confession was one of, if not *the* most crucial piece of evidence which the prosecution presented" and that the trial judge had invaded the province of the jury by finding that Officer Herrera was at a polygraph examination only for security purposes. Judge Wahls disagreed that any error in restricting cross-examination was harmless beyond a reasonable doubt and would have reversed Petitioner's conviction and remanded the case to the trial court for a new trial. *People v. Robinson*, Michigan Court of Appeals No. 175929 (Wahls, J., dissenting) at 1-2.

corpus with respect to claims adjudicated on the merits in state court." *Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000)*. The Supreme Court summarized the standard of review as follows:

> Under *§ 2254(d)(1)*, the writ may issue only if one of the following two conditions is satisfied--the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of **[*814]** the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a **[**25]** federal habeas court may grant the writ if the state court arrives at a conclusion opposite that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 120 S. Ct. at 1523.

"[*HN4*] A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams, 120 S. Ct. at 1521*. The reviewing court must be aware that "an unreasonable application of federal law is different from an incorrect application of federal law." *Williams, 120 S. Ct. at 1522*.

HN5] Where constitutional trial error has been shown and the reviewing court concludes that the error had a substantial and injurious effect or influence in determining the jury's verdict, a state court ruling **[**26]** finding such error harmless beyond a reasonable doubt is outside the realm of plausible, credible outcomes and the petitioner is entitled to habeas relief. *Barker v. Yukins, 199 F.3d 867 (6th Cir. 1999), cert. denied, 530 U.S. 1229, 120 S. Ct. 2658, 147 L. Ed. 2d 273 (2000)*. "[A] state court's application of federal law is unreasonable and a writ may issue only if reasonable jurists would find it so arbitrary, unsupported or offensive to existing precedent as to fall outside the realm of plausible, credible outcomes." *Barker, 199 F.3d at 871*. "When a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief." *O'Neal v. McAninch, 513 U.S. 432, 445, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995)*. "Only if a federal habeas court can say with certainty that a trial error had little or no impact on the judgment, should the judgment stand." *Barker, 199 F.3d at 873*.

HN6] The federal court reviewing a habeas petition must apply the presumption of correctness to evidence-supported factual determinations made by a state court. *West v. Seabold, 73 F.3d 81, 83 (6th Cir. 1996)*; **[**27]** *cert den. 518 U.S. 1027, 135 L. Ed. 2d 1086, 116 S. Ct. 2569 (1996)*; *Lundy v. Campbell, 888 F.2d 467, 469 (6th Cir. 1989), cert. denied, 495 U.S. 950, 109 L. Ed. 2d 538, 110 S. Ct. 2212 (1990)*. This presumption may only be overcome by the presentation of clear and convincing evidence by the petitioner. *28 U.S.C. § 2254(e)(1)*.

V. Analysis

A. Claim I-Waiver of Miranda rights

Petitioner claims that his *Miranda* rights waiver was unknowing and involuntary. Petitioner claims that his waiver was unknowing, because he was incompetent to waive his rights due to his subnormal intelligence. He claims that his waiver was involuntary and his confession unreliable, because extended interrogation while he was grief-stricken over Lorenzo's death overbore his will and rendered his confession a product of police suggestion, not a reflection of his actual deeds. [6]

[28]** [*815]** It is undisputed that Petitioner was given *Miranda* warnings before every interrogation. *HN7*] A statement made during custodial interrogation is admissible against the defendant only if the statement was made voluntarily after a knowing waiver of the *Fifth Amendment* right against self incrimination. *Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*. To prove a valid waiver of *Miranda* rights, the government must show: (1) that the waiver was voluntary, and (2) that defendant had a "full awareness of the right being waived and of the consequences of

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[6] The United States Supreme Court has recently declined to overrule the *Miranda* decision. *See Dickerson v. United States, 530 U.S. 428, 432, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000)*. Characterizing *Miranda* as a "constitutional decision," moreover, the Court held in *Dickerson* that *Miranda* and its Supreme Court progeny "govern the admissibility of statements made during custodial interrogation in both state and federal courts." *Id.*

waiving that right." United States v. Male Juvenile, 121 F.3d 34, 39-40 (2d Cir.1997). Thus, a finding of a valid waiver requires both a comprehension of the rights waived and an absence of coercion--a "knowing" component and a "voluntary" component. Id. at 40.

HN8[↑] A knowing relinquishment of *Miranda* rights can be found even where a defendant has only limited intellectual capacity. Thus, even a defendant who is classified as "mildly retarded" or having learning disabilities may waive his rights if he can comprehend sufficiently the particular rights set forth **[**29]** in *Miranda*. *Male Juvenile*, 121 F.3d at 40, (quoting Toste v. Lopes, 701 F. Supp. 306, 313-14 (D.Conn.1987), aff'd, 861 F.2d 782, 783 (2d Cir.1988)). The issue is whether defendant is "so incompetent that he was not aware of 'both the nature of the right being abandoned and the consequences of the decision to abandon it.'" Male Juvenile, 121 F.3d at 40, (quoting Colorado v. Spring, 479 U.S. 564, 573, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987)).

HN9[↑] A voluntary relinquishment of Miranda rights is the "product of a free and deliberate choice rather than intimidation, coercion, or deception." Male Juvenile, 121 F.3d at 41; Smith v. Sullivan, 1 F. Supp. 2d 206, 213 (W.D.N.Y.1998). The relevant test is whether defendant's statement was obtained "by physical or psychological coercion or by improper inducement so that [defendant's] will was overborne." Smith, 1 F. Supp. 2d at 213 (quoting Derrick v. Peterson, 924 F.2d 813, 817 (9th Cir.1990), cert. denied, 502 U.S. 853, 112 S. Ct. 161, 116 L. Ed. 2d 126 (1991). A claim that a statement **[**30]** was given in the absence of a valid waiver is evaluated under a "totality of the circumstances" approach. Diaz v. Senkowski, 76 F.3d 61, 65 (2d Cir.1996). Factors to be considered include "the type and length of questioning, the defendant's physical and mental capabilities, and the governing method of interrogation." *Id.*, quoting, United States v. Okwumabua, 828 F.2d 950, 953 (2d Cir.1987). "Only if the totality of the circumstances 'reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.'" Male Juvenile, 121 F.3d at 40 (quoting Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)).

HN10[↑] Where, as here, a state court has adjudicated the merits of Petitioner's claim, the federal habeas corpus statute, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") states that relief may not be granted unless: (1) the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law ..." or (2) the state court decision that "was based **[**31]** on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Both AEDPA and its predecessor statue recognize the presumption of correctness to be applied to state court findings of fact. See 28 U.S.C. § 2254(e)(1); Whitaker v. Meachum, 123 F.3d 714, 715 n. 1 (2d Cir.1997). AEDPA, however, adds an additional burden to the habeas petitioner, requiring "clear and **[*816]** convincing" evidence to effectively rebut the presumption of correctness. 28 U.S.C. § 2254(e)(1); see Smith v. Sullivan, 1 F. Supp. 2d 206, 210 (W.D.N.Y.1998). "The touchstone for a reasonable determination is 'whether the determination is at least minimally consistent with the facts and circumstances of the case." Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir.), cert, denied, 522 U.S. 819, 118 S. Ct. 72, 139 L. Ed. 2d 32 (1997). Habeas corpus relief may not be granted unless the state court's decision is objectively unreasonable.

Here, as noted, Petitioner takes issue with both the knowing and voluntary nature of **[**32]** the waiver of his *Miranda* rights. The totality of the circumstances, as revealed in the state court record, supports neither argument. Petitioner contends that his intelligence test scores indicate that he is of subnormal intelligence, and therefore, was incompetent to understand and waive his rights. This claim is belied by a number of factors evidenced in the record. First, at a trial court evidentiary hearing addressing the voluntariness of Petitioner's statements to the police, a clinical examiner for the trial court's psychiatric clinic testified that Petitioner "was functioning much higher than the score actually indicated because he chose or rather he chose not to perform as he should have performed on the test." Evidentiary Hearing Vol. II at 10. Second, Petitioner's psychological expert, Dr. Hampton Walker, testified at trial that he believed Petitioner was competent to understand and waive his *Miranda* warnings. Tr. Vol. VI at 165-66. Third, review of Petitioner's dialogue with his police interrogators indicates that he understood his *Miranda* warnings. While being given his warnings, Petitioner asked intelligent questions about whether he could obtain an attorney **[**33]** immediately and received answers which he said he understood. Petitioner repeatedly replied that he understood his rights when so asked. Fourth, at trial Petitioner gave extensive testimony on direct and cross-examination. Nothing in the trial record indicates that Petitioner was of subnormal intelligence, or would have been

incompetent to understand his *Miranda* warnings. On the contrary, Petitioner's trial testimony shows that he was quite intelligent and fully capable of understanding difficult questions and answering them in a manner calculated to try to advance his cause. Fifth, Petitioner's address to the court at his sentencing also indicates that he is of at least normal intelligence. Sentencing Tr. dated April 5, 1994 at 26-30.

Thus, upon consideration of the state court record, this Court cannot say that the state court decision that was based on an unreasonable determination of the facts, *28 U.S.C. § 2254(d)*, or that the presumption of the correctness of state court factual findings has been rebutted by the introduction of "clear and convincing" evidence. *28 U.S.C. § 2254(e)(1)*. This Court also is persuaded of the objective **[**34]** reasonableness of the state courts' holdings that Petitioner's voluntarily and intelligently waived his rights. With respect to the "knowing" aspect of the waiver, Petitioner relies here, as he did in state court, on his alleged subnormal intelligence. Petitioner does not deny having been read his rights, having signed a written document indicating that he understood his rights, and having verbally told the police he understood his rights. While there was some evidence that Petitioner had a subnormal IQ, the credibility of this evidence was refuted by expert testimony that Petitioner had produced this result intentionally and by his in court and out of court statements. There is no evidence that "that [Petitioner] could not comprehend the rights that were explained and read to him." *Male Juvenile, 121 F.3d at 40*. In short, this court agrees with the holding **[*817]** that Petitioner knowingly waived his *Miranda* rights and finds that Petitioner has come forward with no real rebuttal of any factual findings underpinning that decision.

Petitioner's argument that his statements to the police were products of coercion, suggestion, and his grief over the death of Lorenzo Merriweather **[**35]** are unconvincing. Evidence of coercion is lacking from both the state court record and the record before this court. Indeed, the only "evidence" of coercion is Petitioner's unsupported argument that such coercion existed. As the Michigan Court of Appeals noted, while Petitioner was detained for nine hours, it was between the hours of 1:00 p.m. and 10:00 p.m. These are normal waking hours. Petitioner was not kept up and questioned through the night. Petitioner was not physically harmed. He was not deprived of food or water or access to bathroom facilities. While Petitioner may have been upset over the death of the baby, this could not preclude the police from conducting their investigation; such a policy would hamstring homicide investigations whenever a family member or close friend of the victim was a suspect, certainly not a rare or unusual situation. Further, that Petitioner may have been grieving over the baby's death does not in itself show that his confession was coerced. In sum, there is no evidence that the type and length of questioning or the method of interrogation created an environment where it can be said that Petitioner's statement was the product of coercion, rather **[**36]** than the product of free choice.

Petitioner was allowed to make telephone calls. Nor does Petitioner's age render his statement obtained through coercion. ***HN11***[↑] Like intellectual capacity, age is only one factor to consider in the "totality of the circumstances" inquiry. While Petitioner was fairly young, he was not a juvenile and had substantial prior experience with the criminal justice system. *See Smith, 1 F. Supp. 2d at 215*. There is no evidence that Petitioner was of such a tender age as to render his statement obtained by coercion. Indeed, confessions obtained from much younger individuals have been upheld under a totality of the circumstances review. *See Smith, 1 F. Supp. 2d at 215* (upholding confession of a thirteen year old defendant). In sum, this court finds no evidence tending to show that Petitioner's statement was the product of coercion and agrees with the state court that his statements given to the police were given voluntarily as well as knowingly.

Upon review of the warnings provided to Petitioner, the Court holds that his *Miranda* rights were adequately conveyed. The Court further holds that Petitioner knowingly and voluntarily waived **[**37]** his *Miranda* rights and that his statements to the police were lawfully admitted against him at trial. The Michigan state courts' decisions rejecting his claim that his *Miranda* waiver was unknowing and involuntary are reasonable applications of federal constitutional law. Accordingly, Petitioner's claim attacking his waiver of his *Miranda* rights is denied.

B. Claim II--Claim that Petitioner's right to counsel was violated after a request for counsel

Petitioner contends that he made a request for counsel which the police did not honor, thereby rendering his subsequent statements unconstitutional under *Miranda* and *Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988)*. The Michigan Court of Appeals rejected this claim, finding that Petitioner did not make a unequivocal invocation of his right to

counsel.

HN12[↑] A suspect who has "expressed his desire to deal with the police only through counsel [] is not subject to further interrogation by the authorities until counsel has **[*818]** been made available to him, unless the accused himself initiates further communications, exchanges or conversations with the police." *Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981)*. **[**38]** In *Roberson, supra*, the Supreme Court held that this prophylactic rule applies when a police-initiated interrogation following a suspect's request for counsel occurs in the context of an unrelated criminal investigation. *108 S. Ct. at 2096*.

HN13[↑] The determination as to whether an accused has invoked his or her *Fifth Amendment* right to counsel should not rest upon whether or not, or how clearly, he or she has articulated the reasons for which counsel is desired. The average person is unaware that there exists both a *Fifth Amendment* right to counsel at custodial interrogation, as created by *Miranda* and a *Sixth Amendment* guarantee of the assistance of counsel during adversary proceedings. *United States v. Gouveia, 467 U.S. 180, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984)*. An accused may not know or contemplate that different rights might be invoked based on the wording of the request, or based on the fact that the request is made to a judge as opposed to the police. HN14[↑] A request for counsel is an assertion by an accused that he or she needs help in any further dealings with the authorities, including custodial interrogation. Any such request, whether **[**39]** before a judge or the police, should be considered as a per se invocation of *Fifth Amendment* rights. To hold otherwise, based on factors which an accused cannot reasonably contemplate, would deprive the accused of the fullest extent of constitutional protection. As Justice Marshall commented regarding the applicability of *Edwards* and the *Fifth Amendment* implications of a request for counsel at arraignment: "An accused is under no obligation to state precisely why he wants a lawyer. If we were to distinguish cases based on the wording of an accused's request, the value of the right to counsel would be substantially diminished. As we stated in *Fare v. Michael C., 442 U.S. 707, 719, 99 S. Ct. 2560, 2568, 61 L. Ed. 2d 197 (1979)*, "'an accused's request for an attorney is per se an invocation of his *Fifth Amendment* rights, requiring that all interrogation cease.'"

HN15[↑] When an accused requests an attorney before a police officer, all interrogation must cease. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly. *People v. Bladel, 421 Mich. 39, 63-64, 365 N.W.2d 56 (1984)*. **[**40]**

However, the suspect must make an unequivocal assertion of his right to counsel, that is, a unequivocal request for a lawyer, before interrogation must cease. In the present case, Petitioner asked, "can I get a lawyer in here right now?" after being informed that he had the right to have an attorney present before and during the time he made any statement. The police responded to this question by stating "if you want." Before asking Petitioner any further questions, the police informed him that he had the right to have an attorney present at the court's expense and that he had the right to not answer any questions or make any statements. Finally, before any further substantive questions were asked, Petitioner was if he wanted an attorney, or if he wanted to make a statement. Petitioner replied that he would make a statement. Tr. Vol. VI at 80-81.

Under these circumstances, this Court agrees that Petitioner did not make an unequivocal request for an attorney. Petitioner did not say, "I want a lawyer," or "I want a lawyer in here right now." He simply *asked* if he could get a lawyer "right now." When he was told that he **[*819]** could, and asked if he wanted an attorney, or wanted to make **[**41]** a statement, he said he wanted to make a statement. Petitioner did not invoke his right to have interrogation stop upon a request for an attorney, because he did not request an attorney. The Michigan Court of Appeals decision denying this claim was an objectively reasonable application of federal constitutional law. Therefore, this claim is denied.

C. Claim III-Right of confrontation and trial judge's refusal to allow inquiry about police officers' motivations for questioning him as they did

Petitioner contends that his right of confrontation was violated when the trial judge refused to allow defense counsel to cross-examine police officers about their motivations for interrogating him for as much as nine hours.

HN16[↑] The jury is entitled to evaluate the weight, credibility, and reliability of a legally voluntary confession or statement. *People v. Walker, 374 Mich. 331, 337-38, 132 N.W.2d 87 (1965)*. Cross-examining police interrogators about the nature of the interrogation producing the confession may be an essential part of

challenging the credibility and reliability of a confession.

HN17[↑] The *Sixth Amendment to the United States Constitution* guarantees the right **[**42]** of an accused in a criminal prosecution "to be confronted with the witnesses against him." U.S. Const. amend. VI. This fundamental right of confrontation is secured for those defendants tried in state as well as federal criminal proceedings. *Pointer v. Texas, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965)*. The United States Supreme Court has held that "a primary interest secured by (the *confrontation clause*) is the right of cross-examination." *Douglas v. Alabama, 380 U.S. 415, 418, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965)*. Indeed, the right of cross-examination is part and parcel of confrontation, and the latter is meaningless without the former.

In *Davis v. Alaska, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974)*, the Court reiterated much of the above and stated:***HN18***[↑]

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, **[**43]** but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

The courts have distinguished between general and particular attacks on a witness's credibility. One way to attack a witness's credibility is to introduce evidence of prior convictions. The proponent of such evidence seeks to provide the jury a basis for inferring that the witness is less credible than the average citizen, or a witness who has no prior criminal record. "The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis, 415 U.S. at 316*.

The Supreme Court has emphasized that "***HN19***[↑] 'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination.'" *Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S. Ct. 1431, 89 L Ed. 2d 674* (quoting *Davis, 415 U.S. at 316-17, 94 S. Ct. 1105, 39 L. Ed. 2d 347*). **[**44]** It then elaborated that "a criminal defendant states a violation of the *Confrontation Clause* by showing that he **[*820]** was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Delaware v. Van Arsdall, 475 U.S. at 680*.

Following *Davis*, the Sixth Circuit has held that "a limitation on cross-examination which prevents a person charged with a crime from placing before the jury facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred constitutes denial of the right of confrontation guaranteed by the *Sixth Amendment*." *United States v. Garrett, 542 F.2d 23, 25 (6th Cir. 1976)*. As the Sixth Circuit has recently stated, the *Sixth Amendment* "compels cross-examination if that examination aims to reveal the motive, bias, or prejudice of a witness/accuser." *Boggs v. Collins, 226 F.3d 728, 740 (6th Cir. 2000)*. *See also, Isaac v. Grider, 211 F.3d 1269, 2000 WL 571959* (6th Cir. (Ky.))(unpublished order) at *8 (holding that trial judge's refusal to allowing questioning about fact that witness **[**45]** was incarcerated at the time he testified constituted an unreasonable application of federal law as enunciated in *Davis v. Alaska*).

In the instant case, the defense inquired on cross-examination whether the police had tried to manipulate Petitioner's grief over Lorenzo's death to suggest to him that he had killed the boy. The defense questioned the police about the nature and length of Petitioner's interrogation. The Michigan Court of Appeals summarized Petitioner's cross-examination of the police interrogators and its view of that cross as follows:

> The jury was presented with evidence concerning the times, lengths, and locations of defendant's interviews, as well as evidence that Herrera was present at the location of Ellerbrake's interview with defendant, that Herrera spoke with Ellerbrake following the interview, that Ellerbrake gave Herrera a synopsis of the interview (including the fact that defendant told Ellerbrake that he [defendant] was responsible for the death), and that the taped statement came after the interview and after Herrera spoke with Ellerbrake. Herrera was asked on both direct and cross-examination whether he coerced, threatened, or tricked the **[**46]** taped statement out of defendant, and was even asked on cross-examination if he used what Ellerbrake told him to "make [defendant] feel responsible" for the

> death. With this evidence, it was possible for defense counsel to make the argument to the jury and create the inference he offered to the trial court, i.e., that Herrera used the statement made to Ellerbrake to coerce the taped statement from defendant. We do not consider this to be a case where the limitation placed on the scope of cross-examination effectively deprived the defendant of his defense.

People v. Robinson, Michigan Court of Appeals No. 175929 at 3-4.

Therefore, the Michigan Court of Appeals found that any error the trial court made in restricting the scope of cross-examination was harmless. [7]

[47]** ***HN20***[↑]

It is exclusively the jury's province to make credibility determinations. *United States v. Schultz, 855 F.2d 1217, 1221 (6th* ***[*821]*** *Cir. 1988)*; *Barker v. Yukins, 199 F.3d at 874*. However, Petitioner was allowed to effectively explore the nature of his interrogation by the police, including the length of the questioning, the role that different officers played, and the fact that the officers may have used information gained in one interview while conducting a later interview. Petitioner was not prevented from cross-examining any witness concerning facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred. *United States v. Garrett, 542 F.2d at 25*.

Petitioner's confession was certainly substantial evidence of his guilt. Petitioner stated that "I killed Lorenzo because I didn't know how to care for a kid. Lorenzo would be alive if someone else had been watching him." Tr. Vol. IV at 130. This statement was powerful evidence that Petitioner had committed acts which caused Lorenzo's death. However, admission of this evidence did not prevent Petitioner from arguing that he had been factually mistaken about **[**48]** the cause of Lorenzo's death and his role in it. Further the defense was able to argue that Petitioner's admission was not an admission of any criminal wrongdoing, but rather of mere ignorance and negligence at worst.

This Court concludes that the Michigan Court of Appeals finding that any improper restriction of Petitioner's cross-examination was harmless error was a reasonable application of federal law for two closely related reasons. First, Petitioner was allowed to effectively attack the reliability, credibility, and weight to be given his statements to the police. ***HN21***[↑] The *Confrontation Clause* does not require that the defense be completely unrestricted in its cross-examination of prosecution witnesses. The restrictions in the present case did not prevent Petitioner from presenting a defense, or placing before the jury its theory that Petitioner's confession was an unreliable product of police manipulation and suggestion of a mentally weak, overwrought, and grief-stricken defendant. The jury simply did not believe it.

The second reason this Court concurs that any error was harmless is that Petitioner's conviction was supported by other extremely strong evidence, in addition to Petitioner's **[**49]** statements. Physical evidence and expert opinion was presented in great detail which established that Lorenzo Merriweather died from multiple heavy traumatic blows to the head, chest, and mid-section which caused skull fractures, tore his lungs from his body at their roots, and tore his liver and kidneys. Medical evidence showed that these injuries would not have resulted from falling down stairs or from honest but improper attempts to perform CPR. Medical evidence also showed that Lorenzo did not fall down any stairs when Petitioner claimed he did. Furthermore, Petitioner's trial testimony as a whole was completely inconsistent with the injuries suffered by the dead child. Petitioner denied hitting the child hard on the chest or stomach, denied hitting the child on the head, and said that the child fell down stairs days before it was established that his head injuries had occurred. It was undisputed that Petitioner was the last person with Lorenzo before his injuries occurred and the last person other than medical personnel who was with Lorenzo while he was still alive. Additionally, Petitioner changed his story multiple times during the police investigation. Thus, Petitioner's denial **[**50]** of guilt were not credible and the evidence of his guilt apart from his confession was extremely strong, if not overwhelming.

Even were this Court to assume arguendo that the state trial court had erred by limiting Petitioner's cross-

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[7] As noted, the late Judge Myron Wahls dissented on this issue and would have reversed Petitioner's conviction upon a finding that "there is a reasonable possibility that the trial court's erroneous ruling [restricting cross-examination] might have contributed to defendant's conviction." *People v. Robinson*, Michigan Court of Appeals Docket No. 175929 (Wahls, J., dissenting) at 2. Consequently, a reasonable jurist has found that Petitioner *Confrontation Clause* issue should have been decided differently. Therefore, Petitioner is entitled to a certificate of appealability on this issue.

examination of his police interrogators regarding their interrogation methods, this Court would nevertheless conclude that **[*822]** such error was harmless. ***HN22***[↑] The violation of a defendant's right of confrontation is subject to harmless error analysis. *Delaware v. Van Arsdall, 475 U.S. 673, 684, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1988)*. In a habeas corpus case, where a petitioner challenges his conviction collaterally, an error is harmless unless it "had a substantial and injurious effect on the jury's verdict." *Brecht v. Abrahamson, 507 U.S. 619, 638, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)*. Thus, when a court considers a *Confrontation Clause* violation in a habeas corpus proceeding, the relevant harmless-error inquiry is "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error," *Van Arsdall, 475 U.S. at 684*, "had a substantial **[**51]** and injurious effect on the jury's verdict," *Brecht, 507 U.S. at 638*. [8]

Under the *Brecht* standard, even if this Court assumes for the sake of argument that *Confrontation Clause* error occurred, this Court holds that any error did not have a "harmful or injurious effect" on the fundamental fairness of the trial. As the government points out, the other evidence (besides Petitioner's statements to the police) was extremely strong. Further, the restriction on his ability **[**52]** to cross-examine his police interrogators was at most minimal. Given these facts, any error was harmless. Petitioner's *Confrontation Clause* claim is therefore denied.

D. Claim IV--Challenge to state law errors concerning Petitioner's offense variables

Petitioner contends that the trial court incorrectly scored his offense variables. This claim does not entitle Petitioner to relief for several reasons. First, it is a matter of state law, and claims of errors of state law alone are not cognizable in habeas corpus. ***HN23***[↑] A federal writ of habeas corpus reaches only convictions and sentences obtained in violation of some provision of the United States Constitution. *Smith v. Phillips, 455 U.S. 209, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982)*. "'Federal habeas corpus relief does not lie for errors of state law.'" *Estelle v. McGuire, 502 U.S. 62, 67, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991)*(quoting *Lewis v. Jeffers, 497 U.S. 764, 780, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990)*. *See also, Pulley v. Harris, 465 U.S. 37, 41, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984)* and *Floyd v. Alexander, 148 F.3d 615, 619* (6th **[**53]** Cir.)(concluding that violation of state law is not cognizable in federal habeas corpus proceedings), *cert. denied, 525 U.S. 1025, 142 L. Ed. 2d 464, 119 S. Ct. 557 (1998)*.

Second, ***HN24***[↑] in order to prevail on a claim that a trial court relied on inaccurate information at sentencing, a habeas petitioner must demonstrate that the sentencing court relied upon this information and that it was materially false. *Collins v. Buchkoe, 493 F.2d 343, 345-346 (6th Cir.1974)*; *Welch v. Burke, 49 F. Supp. 2d 992, 1007 (E.D.Mich.1999)*(Cleland, J.). Petitioner's claim regarding his offense variables may be liberally construed as a claim that he was sentenced on mistaken information. However, the evidence in this case showed that Petitioner caused the death of a seventeenth month old child in his exclusive care by striking him repeated traumatic blows to the head, chest, and mid-section. Petitioner had four prior felonies. **[*823]** His sentence was not based on mistaken information. Because Petitioner has failed to demonstrate in his petition that the sentencing court relied upon materially false information in imposing sentence, this claim is without merit. *Thomas v. Foltz, 654 F. Supp. 105, 108 (E.D.Mich.1987)* **[**54]** (Cohn, J.).

Moreover, to the extent that petitioner is claiming that his sentence violates the Michigan state sentencing guidelines, his claim is not cognizable in a habeas proceeding because it is a state law claim. *Id.; See also Johnson v. Abramajtys, 951 F.2d 349, 1991 WL 270829*, *9 (6th Cir. 1991)(Michigan Sentencing Guidelines are not mandatory, do not create substantive rights, and are merely a tool used to assist the sentencing judge in the exercise of discretion). ***HN25***[↑] A claim that a sentence is imposed in violation of Michigan's sentencing laws does not state a claim for relief in a habeas proceeding where there is no allegation that the sentence violates the *cruel and unusual punishment clause of the Eighth Amendment to the U.S. Constitution*. *See Atkins v. Overton, 843 F. Supp. 258, 260 (E.D.Mich.1994)*(Gadola, J.). Further, even under Michigan law, the sentencing guidelines did

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[8] The Sixth Circuit has recently applied Brecht harmless error analysis to a *Confrontation Clause* challenge despite the fact that it does not appear that the state court engaged in harmless error analysis. *See Norris v. Schotten, 146 F.3d 314, 330 (6th Cir.1998)*. The Sixth Circuit has more recently held that the harmless error standard announced in *Brecht* applies even if a federal habeas court is the first to review for harmless error. *Gilliam v. Mitchell, 179 F.3d 990, 995 (6th Cir. 1999)*.

not apply, because Petitioner was sentenced as a habitual offender. *People v. Dixon, 217 Mich. App. 400, 411, 552 N.W.2d 663 (1996)*.

In the present case, Petitioner's sentence of life imprisonment for involuntary manslaughter as a fourth felony **[**55]** habitual offender within the statutory limits. ***HN26***[↑] A sentence imposed within the statutory limits is not generally subject to habeas review. *Townsend v. Burke, 334 U.S. 736, 741, 92 L. Ed. 1690, 68 S. Ct. 1252 (1948)*; *Cook v. Stegall, 56 F. Supp. 2d 788, 797 (E.D.Mich. 1999)*(Gadola, J.). Because petitioner's sentence falls within the statutory limits, petitioner is not entitled to habeas relief. Because petitioner does not claim that the sentence imposed violates the *cruel and unusual punishment clause of the Eighth Amendment*, he has failed to state a claim upon which habeas relief can be granted. Further, even if Petitioner claimed his sentence was cruel and unusual punishment, this claim would fail, because a life sentence for manslaughter as a fourth felony habitual offender is not grossly disproportionate to the crime and the offender. The United States Supreme Court has observed, successful challenges to the proportionality of particular sentences in non-capital cases are "exceedingly rare." *Rummel v. Estelle, 445 U.S. 263, 272, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)*; *see also Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)* **[**56]** (mandatory term of life imprisonment without possibility of parole for possession of more than 650 grams of cocaine does not constitute cruel and unusual punishment). The Sixth Circuit Court of Appeals has stated that "federal courts will not engage in a proportionality analysis except in cases where the penalty imposed is death or *life in prison without the possibility of parole." United States v. Thomas, 49 F.3d 253, 260-61 (6th Cir.1995)*(emphasis added).

HN27[↑] Under Michigan law, a prisoner "convicted as an habitual offender and sentenced to life imprisonment" is "eligible for parole after the expiration of ten calendar year," unless the minimum term for the underlying felony fixed by the sentencing judge at the time of sentence was longer than ten years. *Manuel v. Department of Corrections, 140 Mich. App. 356, 358, 364 N.W.2d 334 (1985)*. Offenses that require a nonparoleable life sentence in Michigan include first-degree premeditated murder and first-degree felony murder, *M.C.L. § 750.316*, certain drug offenses over 650 grams, treason, *M.C.L. § 750.544*, placing explosives with intent to destroy which causes injury to a person, *M.C.L. 750.207*, **[*824]** and **[**57]** certain repeat drug offenses. *People v. Edgett, 220 Mich. App. 686, 689 n. 3, 560 N.W.2d 360 (1996)*; *People v. Poole, 218 Mich. App. 702, 705, n. 7, 555 N.W.2d 485 (1996)*. A sentence of life imprisonment is mandatory for conspiracy to commit first-degree murder. *People v. Fernandez, 427 Mich. 321, 398 N.W.2d 311 (1986)*. However, the life term for conspiracy to commit first-degree murder is paroleable. *People v. Jahner, 433 Mich. 490, 446 N.W.2d 151 (1989)*. Petitioner's underlying felony in this case was involuntary manslaughter, not murder or conspiracy to murder. The trial judge sentenced Petitioner to "life," not life without the possibility of parole. Sentencing Tr. at 40. Given this authority and the facts of Petitioner's case, it is clear that Petitioner cannot show that his sentence violates the *Eighth Amendment*.

VI. Conclusion

The court concludes that Petitioner's claims lack merit and do not entitle him to federal habeas relief. His conviction and sentence do not involve a judgment which is an unreasonable application of clearly established federal constitutional law. Therefore, Petitioner is not **[**58]** entitled to habeas corpus relief. A reasonable Michigan Court of Appeals jurist wrote in dissent that he would have reversed Petitioner's conviction and granted him a new trial on the basis of the trial court's restriction of the defense's cross-examination of certain police witnesses. Therefore, this Court concludes that it would be disposed to grant Petitioner to a certificate of appealability on his cross-examination issue. *28 U.S.C. § 2253*; *Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595, 1603-04, 146 L. Ed. 2d 542 (2000)*. This Court would decline to issue a certificate of appealability concerning Petitioner's other issues, because the Court is not persuaded that reasonable jurists would find the Court's denial of these claims debatable.

Accordingly,

IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **DENIED WITH PREJUDICE.**

Additionally, the Court notes that it would be disposed to granting a certificate of appealability with regard to Petitioner's claim challenging the trial court's restriction of defense cross-examination.

PAUL D. BORMAN

UNITED STATES DISTRICT JUDGE

DATED: AUG - 6 2001 **[**59]**

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