INDEX TO APPENDICES

2021 U.S. Appeals Lexis 14661

No. 20-2078

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 17, 2021
DEBORAH S. HUNT, Clerk

In re: CARLTON WEST II,

Movant.

ORDER

Before: NORRIS, DONALD, and THAPAR, Circuit Judges.

Carlton West II, a *pro se* Michigan prisoner, moves this Court for an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b).

In 1994, a Michigan jury convicted West of first-degree felony-murder and possession of a firearm during the commission of a felony. *People v. West*, No. 175678, 1996 WL 33358105 (Mich. Ct. App. Sept. 17, 1996) (per curiam). The trial court sentenced him to life imprisonment without parole on the murder conviction and a two-year term of imprisonment for the firearm conviction. He appealed, arguing that the prosecution shifted the burden of proof, the trial court erroneously admitted evidence, counsel performed ineffectively, the jury instructions were flawed, and he was erroneously sentenced. The Michigan Court of Appeals affirmed. *Id.* The Michigan Supreme Court denied leave to appeal. *People v. West*, 568 N.W.2d 87 (Mich. 1997) (table).

West filed his first § 2254 habeas petition in 1998. We note that documents from the 1998 proceeding do not appear in the electronic record and West has not submitted a copy of his § 2254 petition from 1998. He does explain, however, that he raised four of the same five claims he raised in his state court appeal. The district court denied the petition and West did not appeal.

In 2010, he filed a motion in this Court to file a second or successive § 2254 petition, arguing that his rights under the Fourth Amendment were violated when he was arrested, he was denied due process, his conviction was obtained without the proper waiver of certain constitutional

Appendix A.

rights, newly discovered evidence demonstrated that the trial court lacked jurisdiction to convict him, and other constitutional errors occurred at his trial. We denied his motion. *In re West*, No. 10-1320 (6th Cir. Aug. 11, 2011) (order).

In July 2020, West filed a pleading in the district court, titled as a Federal Rule of Civil Procedure 60(b) motion for relief from judgment. The motion claimed that trial counsel was ineffective for advising West to submit to a polygraph examination and then allowing the State to use the statements he made in the examination against him and that appellate counsel was ineffective for failing to raise the issue on appeal. These appear to have been new substantive claims, and West argued that appellate counsel's ineffective assistance excused his failure to previously raise his claim that trial counsel was ineffective, citing *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). The district court construed this pleading as a second or successive § 2254 habeas corpus petition and transferred it here for consideration. *See* 28 U.S.C. § 1631; *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam).

In his corrected motion filed in this Court, West raises the same claims he raised in his purported Rule 60(b) motion, and he again argues that, under *Martinez* and *Trevino*, appellate counsel's ineffective assistance excuses his failure to previously raise his claim that trial counsel was ineffective. As he notes, the Supreme Court held in those decisions that the ineffective assistance of postconviction counsel can excuse the failure to raise a claim of ineffective assistance of trial counsel when such a claim must be first raised in postconviction proceedings. *Martinez*, 566 U.S. at 9; *Trevino*, 569 U.S. at 423-24.

At the outset, we note that the district court properly transferred West's Rule 60(b) motion to this Court. A motion is subject to the gate-keeping requirements of second or successive petitions if it asserts, or reasserts, a basis for relief from a conviction, either by adding new grounds for relief or by attacking the district court's previous resolution of a claim on the merits. *See* *Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005); *see also* 28 U.S.C. § 2244(b). West's Rule 60(b) motion raised new ineffective-assistance-of-trial-counsel claims. Accordingly, his motion

presented a second or successive "claim" that could not be ruled on by the district court without our prior authorization. *See Gonzalez*, 545 U.S. at 532.

To raise a new ground for relief in a second or successive § 2254 petition under § 2244(b)(2), West must make a *prima facie* showing that his application presents either a claim that "relies on a new rule of constitutional law, made retroactive to cases on collateral reviewby the Supreme Court" or facts that "could not have been discovered previously" and would establish the petitioner's actual innocence by clear and convincing evidence. 28 U.S.C. § 2244(b)(2), (b)(3)(C). A *prima facie* showing requires only "sufficient allegations of fact together with some documentation that would 'warrant a fuller exploration in the district court.'" *In re McDonald*, 514 F.3d 539, 546 (6th Cir. 2008) (quoting *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004)); *see also Keith v. Bobby*, 551 F.3d 555, 557 (6th Cir. 2009).

West cannot make this showing. The Supreme Court cases on which he relies, *Martinez* and *Trevino*, did not announce new rules of constitutional law for purposes of § 2244(b)(2)(A), but equitable rulings concerning the procedural-default doctrine. *See Moreland v. Robinson*, 813 F.3d 315, 326 (6th Cir. 2016). Additionally, he has not alleged new facts that would establish his actual innocence.

For the foregoing reasons, we **DENY** West's motion for authorization.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARLTON WEST II, #237293, Petitioner,	
-v-	No. 1:98-cv-557
PAMELA WINSLOW, Respondent.	Honorable Paul L. Maloney

ORDER TRANSFERRING MOTIONS TO CIRCUIT COURT

Carlton West filed a motion for relief from judgment (ECF No. 49) and a motion to supplement (ECF No. 41). The Court will transfer the motions to the Sixth Circuit Court of Appeals for consideration as a motion for leave to file a second or consecutive § 2254 habeas application.

In 1994 in the Michigan courts, West was convicted and then sentenced for first-degree felony-murder and for possession of a firearm during the commission of a felony. *State v. West*, No. 175678, 1996 WL 33358105 (Mich. Ct. App. Sept. 17, 1996). The Michigan Court of Appeals affirmed the conviction and sentence, *id.*, and the Michigan Supreme Court denied leave to appeal, *State v. West*, 568 N.W.2d 87 (Mich. 1997) (unpublished table opinion).

In 1998, West filed a § 2254 application for federal habeas relief, which Judge Richard Enslen denied in 2001.

APPENDIX B.

Appendix B.

In 2010, West filed a motion in the Sixth Circuit Court of Appeals seeking leave to file a second or successive application for federal habeas relief under § 2254, which the circuit court denied on August 11, 2011. (ECF No. 48.)

Although West characterizes his motion as one seeking relief under Rule 60(b) of the Federal Rules of Civil Procedure, (ECF No. 49 PageID.39; ECF No. 49-1 PageID.51), the motion seeks habeas relief. West's reliance on Rule 60 does not resolve the matter. "Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly." *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005). As the basis for relief, West identifies errors that occurred during his state criminal proceedings. He does not allege any error, fraud, accident or mistake in the earlier habeas proceedings in this Court. *See Bocook v. Mohr*, No. 2:18cv1059, 2018 WL 5306738, at *2 (S.D. Ohio Oct. 26, 2018) (report and recommendation) *adopted* 2018 WL 5810318 (S.D. Ohio Nov. 6, 2018); *Causey v. Smith*, No. 96-71709, 2016 WL 922219, at *4-*5 (E.D. Mich. Mar. 9, 2016).

This Court lacks jurisdiction to consider West's motion. *See Burton v. Stewart*, 549 U.S. 147, 157 (2007). For second or successive § 2254 habeas applications, a defendant must first seek permission from the appropriate court of appeals for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3)(A). When a defendant files a second or successive petition in the district court, that court should transfer the petition to the appropriate circuit court. *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997).

Accordingly, the Court **TRANSFERS** West's Rule 60(b) motion (ECF No. 49) and his motion to supplement (ECF No. 51) to the Sixth Circuit Court of Appeals for consideration as an application for leave to file a second or successive § 2254 habeas application.

IT IS SO ORDERED.

Date: October 22, 2020

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARLTON WEST #237293, II,

Petitioner/ Plaintiff,

Case No. 1:98–cv–557

v.

Hon. Paul L. Maloney

PAMELA WITHROW,

Respondent/ Defendant.
_____/

ORDER REJECTING PLEADING

The Court has examined the following document(s) received November 4, 2020 and orders the Clerk to reject the Clarification and return the document(s) to Carlton West, II #237923 for the reason(s) noted below:

Pursuant to the Order entered March 19, 2001, this case is now closed.

IT IS SO ORDERED.

Dated: November 4, 2020

/s/ Ray Kent
RAY KENT
U.S. Magistrate Judge

APPENDIX C.

Appendix C.

No. 20-2078

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 01, 2021
DEBORAH S. HUNT, Clerk

IN RE: CARLTON WEST II,

Movant.

ORDER

BEFORE: NORRIS, DONALD, and THAPAR, Circuit Judges.

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix D.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

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

Filed: July 07, 2021

Mr. Carlton West II
Baraga Maximum Correctional Facility
13924 Wadaga Road
Baraga, MI 49908

Re: Case No. 20-2078, *In re: Carlton West, II*
Originating Case No. 1:98-cv-00557

Dear Mr. West,

The court denied your 28 U.S.C. § 2244 application by order filed May 17, 2021. The order was self-executing the day it was filed and a mandate does not issue.

The court's decision in In re King, 190 F.3d 479 (6th Cir. 1999), cert denied, 2000 WL 305924 (U.S. Mar 27, 2000)(No. 99-7952) prohibits the court from revisiting its decision no matter how such a request is styled. King held that under § 2244(b)(3) the grant or denial of an authorization to file a second or successive habeas corpus petition "shall not be appealable" nor "subject to a petition for rehearing or for a writ of certiorari." The reason for seeking rehearing or reconsideration does not matter.

In re King further instructed the clerk's office to return any party petitions seeking rehearing or rehearing en banc of the panel decision to grant or deny a request to file a second or successive writ of habeas corpus in the district court. All such petitions which have been received have been returned to the sender without the court taking any action. If there is anything new to which you want to bring the court's attention, you will need to file a new § 2244 application.

Sincerely yours,

s/Robin Baker
Case Management Specialist
Direct Dial No. 513-564-7014

cc: Ms. Andrea M. Christensen-Brown

Enclosure

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: August 18, 2021

Mr. Carlton West II
Baraga Maximum Correctional Facility
13924 Wadaga Road
Baraga, MI 49908

Re: Case No. 20-2078, *In re: Carlton West, II*
Originating Case No. : 1:98-cv-00557

Dear Mr. West,

The enclosed petition for rehearing en banc is being returned to you unfiled. The court denied your 28 U.S.C. § 2244 application by order filed May 17, 2021. The order was self-executing the day it was filed and a mandate does not issue.

The court's decision in In re King, 190 F.3d 479 (6th Cir. 1999), cert denied, 2000 WL 305924 (U.S. Mar 27, 2000)(No. 99-7952) prohibits the court from revisiting its decision no matter how such a request is styled. King held that under § 2244(b)(3) the grant or denial of an authorization to file a second or successive habeas corpus petition "shall not be appealable" nor "subject to a petition for rehearing or for a writ of certiorari." In re King further instructed the clerk's office to return any party petitions seeking rehearing or rehearing en banc of the panel decision to grant or deny a request to file a second or successive writ of habeas corpus in the district court. Such petitions have been returned to the sender without the court taking any action.

Sincerely yours,

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

cc: Ms. Andrea M. Christensen-Brown

Enclosure

No. 20-2078

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 24, 2021
DEBORAH S. HUNT, Clerk

In re: CARLTON WEST, II,

Movant.

ORDER

A three-judge panel previously denied West's motion under 28 U.S.C. § 2244 for Leave to file a Second or Successive Habeas Corpus Petition Under 28 U.S.C. § 2254 by a Person in State Custody. West subsequently sought to file a notice of appeal and an application for a certificate of appealability, which the clerk returned under *In re King*, 190 F.3d 479 (6th Cir. 1999). West then submitted a petition for rehearing en banc with a motion for extension to file out of time, which was again returned under *In re King*. West now moves for reconsideration of the clerk's actions.

Upon further review, at least one of West's claims on rehearing appears not subject to *In re King*'s bar. Accordingly, the motion to reconsider is **GRANTED** insofar as the tendered motion for leave to file an untimely petition and tendered petition for rehearing en banc will be submitted for further processing.

ENTERED PURSUANT TO RULE 45(a)
RULES OF THE SIXTH CIRCUIT

Deborah S. Hunt, Clerk

Neutral

As of: November 18, 2021 5:54 PM Z

PEOPLE v. WEST

Court of Appeals of Michigan

September 17, 1996, Decided

No. 175678

Reporter

1996 Mich. App. LEXIS 1809 *; 1996 WL 33358105

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v CARLTON WEST, Defendant-Appellant.

Notice: **[*1]** IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by *People v. West, 455 Mich. 872, 455 Mich. 873, 568 N.W.2d 87, 1997 Mich. LEXIS 1659 (July 25, 1997)*

Application denied by, Motion denied by *People v. West, 485 Mich. 1079, 777 N.W.2d 166, 2010 Mich. LEXIS 141 (Jan. 29, 2010)*

Habeas corpus proceeding at, Motion denied by *In re West, 2021 U.S. App. LEXIS 14661 (6th Cir., May 17, 2021)*

Prior History: LC No. 93-049579.

Disposition: Affirmed.

Core Terms

murder, photograph, trial court, first-degree, defendant argues, felony-murder, harmless, gang, fail to object, second-degree, graffiti, sentence, jurors, effective assistance of counsel, introduce evidence, manifest injustice, opening statement, bad act, imprisonment, convictions, apartment, depicted, message, Ghetto, felony, admit, Red

Case Summary

Procedural Posture

Defendant appealed his convictions in the trial court (Michigan) for first-degree murder and possession of a firearm during the commission of a felony.

Overview

On appeal, defendant argued that the prosecutor shifted the burden of proof in his opening statement. The court found that any such error was harmless given that the trial court twice instructed the jurors that the burden of proof remains on the prosecution at all times and that defendant was not required to prove anything. Defendant also contended that the trial court erroneously introduced evidence of defendant's gang participation. The court held that the evidence was properly admitted because it was used as evidence of defendant's guilt, not his character. Moreover, defendant failed to overcome the presumption of effective assistance of counsel and there was no error in failing to instruct the jury with two lesser included offenses of felony murder.

Outcome

The court affirmed defendant's convictions for first-

Appendix E.

degree murder and possession of a firearm during the commission of a felony.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Exceptions to Failure to Object

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > Trials > Opening Statements

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Jury Instructions

HN1[] **Preservation for Review, Exceptions to Failure to Object**

An opening statement is the appropriate time to state facts which will be proven at trial. Even where a prosecutor promises that evidence will be submitted to the jury and it is not, no reversal is warranted if the prosecution acted in good faith.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

HN2[] **Abuse of Discretion, Evidence**

A trial court's decision to admit bad acts evidence is reviewed for an abuse of discretion. Bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant to an issue of fact of consequence at trial; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > General Overview

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > General Overview

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

HN3[] **Sentencing, Corrections, Modifications & Reductions**

First-degree murder and first-degree felony-murder appear in the identical statute, *Mich. Comp. Laws § 750.316*. The statute provides for mandatory life sentences for each crime.

Judges: Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock, * JJ.

Opinion

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree felony-murder, *MCL 750.316*; MSA 28.548, and possession of a firearm during the commission of a felony, *MCL 750.227b*; MSA 28.424(2). The trial court sentenced defendant to terms of life imprisonment without parole and two years' imprisonment for his respective convictions. We affirm.

Defendant argues that the prosecutor shifted the burden of proof in his opening statement. We disagree. Because defendant failed to object, we review this issue only to prevent manifest injustice. *People v Stanaway, 446 Mich. 643, 687; 521 N.W.2d 557 (1994)*. When evaluated in context, the prosecutor's remarks were made to explain what prompted defendant's friend to testify. *HN1*[↑] An opening statement is the appropriate **[*2]** time to state facts which will be proven at trial. *People v Johnson, 187 Mich. App. 621, 626; 468 N.W.2d 307 (1991)*. Even where a prosecutor promises that evidence will be submitted to the jury and it is not, no reversal is warranted if the prosecution acted in good faith. *Id.* In addition, even assuming arguendo that error occurred, such error was harmless given that the trial court twice instructed the jurors that the burden of proof remains on the prosecution at all times and that defendant was not required to prove anything.

Defendant argues that the trial court erroneously introduced evidence of defendant's gang participation. We disagree. *HN2*[↑] A trial court's decision to admit bad acts evidence is reviewed for an abuse of discretion. *People v Catanzarite, 211 Mich. App. 573, 579; 536 N.W.2d 570 (1995)*. Bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant to an issue of fact of consequence at trial; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet, 444 Mich. 52, 74-75; **[*3]** 508 N.W.2d 114 (1993)*; *Catanzarite, 211 Mich. App. at 579*.

The prosecution introduced evidence of photographs taken inside defendant's apartment after the murder. One of the photographs depicted a gang symbol. A police witness testified that the message in this photograph stated, "you can always find me on the 9 block putting shells in your homey till my 5-7 stop," and that "5-7" is a street term for "357." A second photograph showed a gang sign reading, "folks down." Finally, a third photograph read, "me Glock bust nonstop for ghetto red, peace out, sincerely, son of drid."

Here, the graffiti evidence was not introduced to show defendant's character, but rather as substantive, albeit circumstantial, evidence that defendant shot the decedent. In addition, the evidence was relevant to the crime, and more probative than prejudicial. The message in the first photograph referred to the manner in which the murder was conducted, that is, the perpetrator fired at least six times before the shooting stopped. Defendant's friend testified to defendant's desire for decedent's gun, which was a Glock. An acquaintance of defendant testified that he stole a .357

* Former Circuit judge, sitting on the Court of Appeals by assignment.

from defendant's **[*4]** apartment prior to the murder. Defendant's rap group was named "Ghetto Red Enterprise." Accordingly, the trial court did not abuse its discretion in admitting the photographs into evidence. *VanderVliet, 444 Mich. at 74-75*; *Catanzarite, 211 Mich. App. at 579*. In any case, given defendant's admission that he belonged to a gang, and the fact that other photographs depicting similar graffiti were admitted without objection, any possible error should be regarded as harmless. *MCL 769.26*; MSA 28.1096; *People v Minor, 213 Mich. App. 682, 685; 541 N.W.2d 576 (1995)*.

Defendant argues that it was ineffective assistance counsel to fail to object to the above alleged errors. We disagree. Because no evidentiary hearing was held, our review is limited to errors apparent on the record. *People v Moseler, 202 Mich. App. 296, 299; 508 N.W.2d 192 (1993)*. The record shows that defense counsel objected vigorously to the admission of the graffiti during the prosecutor's case. Defendant has not overcome the presumption in favor of effective assistance of counsel. *Id.*; *People v Wilson, 180 Mich. App. 12, 17; **[*5]** 446 N.W.2d 571 (1989)*.

Defendant argues that it was error to sentence defendant to first-degree murder rather than felony-murder. *HN3*[↑] First-degree murder and first-degree felony-murder appear in the identical statute, *MCL 750.316*; MSA 28.548. The statute provides for mandatory life sentences for each crime. *Id.* In view of this, a remand to correct any alleged clerical error is unnecessary. See *People v Beneson, 192 Mich. App. 469, 471; 481 N.W.2d 799 (1992)*.

Finally, defendant argues that the trial court erred in failing to instruct the jury with two lesser included offenses of felony murder. Because defendant failed to object to the instructions, this issue will only be reviewed to avoid manifest injustice. *People v Van Dorsten, 441 Mich. 540, 544-545; 494 N.W.2d 737 (1993)*. The trial court instructed the jury as to first-degree murder, first-degree felony-murder, armed robbery, and second-degree murder. An instruction for voluntary manslaughter was neither requested nor supported by the evidence. Accordingly, that instruction was not required. *People v Etheridge, 196 Mich. App. 43, 55; **[*6]** 492 N.W.2d 490 (1992)*; *People v Coddington, 188 Mich. App. 584, 605; 470 N.W.2d 478 (1991)*. In any case, any error was harmless given the fact that the jurors rejected the charge of second-degree murder. *People v Mosko, 441 Mich. 496, 502, 504-505; 495 N.W.2d 534 (1992)*.

Similarly, defendant failed to request and the evidence did not support an instruction for assault with intent to murder. See *People v Moore, 189 Mich. App. 315, 319; 472 N.W.2d 1 (1991)*. In any case, given the jurors' rejection of the second-degree murder instruction, any error was harmless. *Mosko, 441 Mich. at 504-505*. Defendant's ancillary effective assistance of counsel claim was not properly preserved as it was not contained in the statement of questions presented. *People v Yarbrough, 183 Mich. App. 163, 165; 454 N.W.2d 419 (1990)*.

Affirmed.

/s/ Marilyn Kelly

/s/ Myron H. Wahls

/s/ M. Richard Knoblock

End of Document

Neutral

As of: November 18, 2021 5:55 PM Z

PEOPLE v. WEST

Supreme Court of Michigan

July 25, 1997, Decided

SC: 107723

Reporter

1997 Mich. LEXIS 1659 *; 455 Mich. 872; 568 N.W.2d 87

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v CARLTON WEST, Defendant-Appellant.

Subsequent History: Magistrate's recommendation at, Habeas corpus proceeding at *West v. Withrow, 2001 U.S. Dist. LEXIS 13531 (W.D. Mich., Jan. 31, 2001)*

Prior History: **[*1]** LC: 93-049579. COA: 175678.

People v. W., 1996 Mich. App. LEXIS 1809 (Mich. Ct. App., Sept. 17, 1996)

Judges: Kelly, J., not participating.

Opinion

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

Kelly, J., not participating.

End of Document

Appendix F.

Positive

As of: November 18, 2021 5:56 PM Z

West v. Withrow

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

January 31, 2001, Decided ; January 31, 2001, Filed

Case No. 1:98-cv-557

Reporter

2001 U.S. Dist. LEXIS 13531 *

CARLTON WEST, II, Petitioner, v. PAMELA WITHROW, Respondent.

Subsequent History: [*1] Adopting Order of March 19, 2001, Reported at: *2001 U.S. Dist. LEXIS 3804.*

Adopted by, Objection overruled by, Writ of habeas corpus denied *West v. Withrow, 2001 U.S. Dist. LEXIS 3804 (W.D. Mich., Mar. 19, 2001)*

Prior History: *People v. West, 455 Mich. 872, 455 Mich. 873, 568 N.W.2d 87, 1997 Mich. LEXIS 1659 (July 25, 1997)*

Disposition: Recommended that this habeas corpus petition be denied.

Core Terms

state court, court of appeals, murder, apartment, bullet, trial court, ineffective, photograph, defaulted, clearly established federal law, manifest injustice, contends, gang, habeas corpus, evidentiary, graffiti, gun, contemporaneous objection, assistance of counsel, grounds for relief, first-degree, recommend, shooting, guard, shots

Case Summary

Procedural Posture

Petitioner prisoner sought federal habeas relief pursuant to *28 U.S.C.S. § 2254* from his conviction and sentence in state court of first-degree felony murder and felony firearm possession. The matter was referred to a federal magistrate for a report and recommendation.

Overview

The federal magistrate concluded that the prisoner's claim that the prosecutor had shifted the burden of proof in opening argument was procedurally barred because there was an independent and adequate state grounds supported the conviction, namely that the prisoner had not contemporaneously objected to the prosecutor's opening statement. Since the prisoner had not made a colorable claim of innocence, he failed to show that a manifest injustice resulted from his conviction. The allegation that the trial court erroneously admitted evidence of graffiti did not raise an issue of constitutional dimension because the prisoner failed to show how his constitutional rights had been violated. Although the claim of ineffective assistance of counsel was not procedurally barred, the claim failed because the evidence showed that defense counsel had vigorously argued against the admission of the graffiti evidence. The allegation regarding a jury instruction on a lesser included offense was procedurally barred because the prisoner failed to make a contemporaneous

Appendix G.

objection to the instruction and failed to argue cause or prejudice to excuse the default.

Outcome

The federal magistrate recommended that the petition for federal habeas relief be denied.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN1[] **Review, Standards of Review**

Pursuant to the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), 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 United States Supreme Court, 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.S. § 2254(d)*.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Threshold Requirements

HN2[] **Review, Standards of Review**

The Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), limits the source of law to cases decided by the United States Supreme Court. *28 U.S.C.S. § 2254(d)*. The United States Court of Appeals for the Sixth Circuit emphasizes that this provision marks a "significant change" and prevents the district court from looking to lower federal court decisions in determining whether the state decision is contrary to, or an unreasonable application of, clearly established federal law. To justify a grant of habeas corpus relief under this provision of the AEDPA, a federal court must find a violation of law "clearly established" by holdings of the United States Supreme Court, as opposed to its dicta, as of the time of the relevant state court decision.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN3[] **Review, Standards of Review**

For purposes of federal habeas review, a decision of the state court is "contrary to" such clearly established federal law if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court (USSC) on a question of law or if the state court decides a case differently than the USSC has on a set of materially indistinguishable facts.

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

Criminal Law &

Procedure > ... > Jurisdiction > Cognizable Issues > Threshold Requirements

HN4[] **Review, Standards of Review**

For purposes of federal habeas review, a state court decision will be deemed an "unreasonable application" of clearly established federal law if the state court identifies the correct governing legal principle from the United States Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be "unreasonable." Further, the habeas court should not transform the inquiry into a subjective one by inquiring whether all reasonable jurists would agree that the application by the state court was unreasonable. Rather, the issue is whether the state court's application of clearly established federal law is objectively unreasonable.

Criminal Law & Procedure > ... > Review > Standards of Review > Presumption of Correctness

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN5[] **Standards of Review, Presumption of Correctness**

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), a determination of a factual issue made by a state court is presumed to be correct. *28 U.S.C.S. § 2254(e)(1)*. The petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. *28 U.S.C.S. § 2254(e)(1)*. The AEDPA requires heightened respect for state factual findings. The habeas corpus statute has long provided that the factual findings of the state courts, made after a hearing, are entitled to a presumption of correctness. This presumption has always been accorded to findings of state appellate courts, as well as the trial court.

Criminal Law & Procedure > Habeas Corpus > Independent & Adequate State Grounds > General Overview

HN6[] **Habeas Corpus, Independent & Adequate State Grounds**

It has long been established that a state court conviction resting on an adequate and independent state ground bars federal habeas corpus review where questions of that sort are either the only ones raised by a petitioner or are in themselves dispositive of the case. The adequate state ground doctrine bars federal habeas review when the state courts declined to address the federal issues because the petitioner failed to comply with state procedural requirements. The state procedural rule must have been firmly established and regularly followed at the time of the decision.

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > General Overview

HN7[] **Exceptions to Default, Cause & Prejudice Standard**

When a petitioner fails to comply with the state's independent and adequate state procedural rule, i.e., making a contemporaneous objection, which causes

him to default his claims in state court, review by the federal court is barred unless petitioner can show cause and prejudice.

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > General Overview

HN8[] **Exceptions to Default, Cause & Prejudice Standard**

When a federal habeas petitioner has not made a colorable claim of innocence, he has not shown that any constitutional error "probably" resulted in the conviction of one who was actually innocent.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Evidentiary Rulings

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Legal Issues

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > General Overview

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Questions of State Law

Criminal Law & Procedure > Habeas Corpus > Procedure > Court Rules

HN9[] **Jury Trials, Province of Court & Jury**

The extraordinary remedy of habeas corpus lies only for a violation of the United States Constitution. *28 U.S.C.S. § 2254(a)*. A habeas petition must state facts that point to a real possibility of constitutional error. An inquiry as to whether evidence was properly admitted or improperly excluded under state law is not part of the federal court's habeas review of a state conviction for it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. Rather, in conducting habeas review, a federal court is limited to deciding whether a conviction violated the United States Constitution, laws, or treaties of the United States. This approach accords the state courts wide latitude in ruling on evidentiary matters.

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Evidentiary Rulings

Criminal Law & Procedure > ... > Review > Standards of Review > General Overview

HN10[] **Cognizable Issues, Evidentiary Rulings**

Under the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), the court may only grant habeas relief on an issue regarding a trial court's evidentiary rulings if the petitioner is able to show that the state court's evidentiary rulings were in conflict with a decision reached by the United States Supreme Court on a question of law or if the state court decided the evidentiary issue differently than the United States Supreme Court did on a set of materially indistinguishable facts.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

HN11[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

To establish a claim of ineffective assistance of counsel, the 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. 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. The defendant bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. 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.

Criminal Law & Procedure > ... > Order & Timing of Petitions > Procedural Default > General Overview

Criminal Law & Procedure > Trials > Jury Instructions > Objections

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Jury Instructions

HN12[] **Order & Timing of Petitions, Procedural Default**

In the context of a federal habeas proceeding, the failure to make a contemporaneous objection causes an issue to be procedurally defaulted in the state courts. The contemporaneous objection rule is applied to allegedly erroneous jury instructions.

Counsel: CARLTON WEST, II, petitioner, Pro se, Ionia, MI.

For PAMELA WITHROW, respondent: Brad H. Beaver, Jennifer M. Granholm, Attorney General, Lansing, MI.

Judges: Hugh W. Brenneman, Jr., U.S. Magistrate Judge. Honorable Richard Alan Enslen.

Opinion by: Hugh W. Brenneman, Jr.

Opinion

REPORT AND RECOMMENDATION

This is a habeas corpus action brought by a state prisoner pursuant to *28 U.S.C. § 2254*. Petitioner filed his habeas application on July 23, 1998, and the Antiterrorism and Effective Death Penalty Act, PUB. L. 104-132, 110 STAT. 1214 ("AEDPA") applies to his action. *See Lindh v. Murphy, 521 U.S. 320, 336, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997)*; *Harpster v. Ohio, 128 F.3d 322, 326* (6th Cir.), *cert. denied, 522 U.S. 1112, 140 L. Ed. 2d 109, 118 S. Ct. 1044 (1998)*.

Petitioner is serving a term of nonparolable life, consecutively to a two-year term, imposed by the Genesee County Circuit Court on May 17, 1995, after a jury convicted petitioner of first-degree felony murder, *MICH. COMP. LAWS § 750.316*, and felony-firearm, *MICH. COMP. LAWS § 750.227b*. **[*2]** In his *pro se* petition, petitioner raises four grounds for relief, as follows:

1. Prosecutor shifted the burden of proof in his opening statement.
2. Trial court erroneously introduced evidence of defendant's gang participation.
3. Ineffective assistance of counsel.

4. Error in failing to instruct the jury with two lesser offenses of murder.

Respondent has filed an answer to the petition (docket # 9) stating that the grounds should be denied because they are either noncognizable state law claims or procedurally barred. Upon review and applying the AEDPA standards, I find that grounds one and four are procedurally barred, and grounds two and three have no merit. Accordingly, I recommend that the petition be denied.

Procedural History

A. Trial Court Proceedings

The state prosecution arose from the shooting death of a security guard named Steven Becker on September 1, 1993, when he was sitting in his patrol car at the Regency Apartments in the City of Flint. Petitioner shot Becker to obtain his weapon, a semi-automatic Glock pistol. Petitioner was charged with open murder, first-degree felony murder, and felony-firearm. Following a preliminary **[*3]** examination held on November 4, 12, and 19, 1993, he was bound over as charged. (Preliminary Examination Transcript, Volume III, 166-67, docket # 26.) Petitioner was tried before a jury on April 12-15, 1994.

The victim, thirty-one-year-old Steven Becker, was employed by Hawk Security, which contracted with the Regency Apartments for security services. (Jury Trial -- Volume I of IV ("Tr. I"), 74-77, docket # 27.) Becker's father was visiting him that evening, after 11:00 p.m. (Jury Trial - Volume II of IV ("Tr. II"), 129, docket # 28.) For about fifteen minutes, they had been sitting in Becker's patrol car, near the apartment manager's office. (Tr. II, 130-31.) The driver's side window was down. (Tr. II, 109, 134.) In preparation to leave, Becker started the car and turned on the lights to leave. (Tr. II, 132.)

Suddenly, petitioner walked up and stood three feet from the side of the car. (Tr. II, 133.) Apparently, Becker reached for his weapon. (Tr. II, 150-51.) Petitioner said, "don't do it," and he opened fire. (Tr. II, 133.) He fired six times. (Tr. II, 135.) The last two shots went through the back window, and then petitioner took off running. (Tr. II, 136.) Becker picked up the **[*4]** radio and called for help. (Tr. II, 135.) After about ten seconds, Becker went limp. (Tr. II, 135.) Becker's father grabbed the radio and started screaming for help. (Tr. II, 137.) He had to take his son's foot off the accelerator and turn off the car. (Tr. II, 137.) He opened the door and ran around to Becker's side, and he held Becker as he died. (Tr. II, 137.)

The back driver's side window of Becker's car was shattered. (Tr. I, 80.) There were two bullet holes in the back door. (Tr. I, 80; Tr. II, 109-10.) There was also a bullet hole above the driver's side door handle. (Tr. I, 83; Tr. II, 109-10.) One bullet traveled through the driver's seat and the passenger seat before striking the opposite side of the car and falling within the interior. (Tr. II, 114.)

Becker was wearing a bulletproof vest. (Tr. I, 80.) One bullet was found stuck in the vest. (Tr. II, 115.) The fatal bullet had entered and exited Becker's left upper arm, then entered his body at the armpit. (Tr. II, 292-94.) The bullet went through Becker's left lung, heart, and liver, and exited his rib cage. (Tr. II, 295.) The bullet was found inside Becker's right lower back, causing an external bruise. (Tr. II, 292, **[*5]** 295.) The bullet caused Becker to bleed to death. (Tr. II, 296.) There was also a nonfatal bullet wound in Becker's left back, where the bullet entered and fractured a rib. (Tr. II, 294.)

Each of two witnesses who lived in different apartments, Patricia Flowers and Annette McEwen, testified that they heard gunshots and saw people running. Before the shots were fired, Flowers had seen three people

standing near the apartment manager's office. (Tr. II, 204.) Then, after the shots were fired, she saw one person, who had been standing six feet from Becker's car, running away, and the other two people ran to catch up to him. (Tr. II, 204-207.) McEwen heard gunshots and looked out her second-floor window. She saw three people running. (Tr. II, 325.)

The three people were petitioner, Deon Johnson and Darryl Lofton. Lofton was sixteen years old, Johnson was fourteen or fifteen, and petitioner was nineteen. (Jury Trial - Volume III of IV ("Tr. III"), 462, docket # 29.) Earlier that evening, petitioner and Lofton went to Johnson's apartment. (Tr. III, 377-78, 460-61.)) All three went out to the apartment manager's office. (Tr. III, 383, 465-66.) As they were walking there, petitioner told **[*6]** them that he wanted to get the security guard for his gun. (Tr. III, 463-64, 468.) He showed them his weapon. (Tr. III, 482.) They were standing behind the apartment manager's office, and petitioner went around the building by himself, with a gun. (Tr. III, 383, 387, 466-67.)

After about two minutes, Johnson and Lofton heard gunshots. (Tr. III, 383, 468.) Johnson and Lofton ran, and petitioner caught up to them. (Tr. III, 384, 469, 486-87.) They ran to a school, where petitioner told them that he thought Becker was going for his gun. (Tr. III, 470-71.) Then, they went to another apartment complex called the Atherton Terrace, and hung out in an area called "the logs." (Tr. III, 385-86, 471.) It was close to petitioner's apartment. (Tr. III, 471-72.)

Deon Johnson testified that three days after the shooting, he saw petitioner at the mall. Petitioner asked him if he was stressed out. (Tr. III, 415.) Johnson said he was not. Petitioner told him to keep quiet about the shooting. (Tr. III, 415-16.)

Petitioner left the State of Michigan. The police did not obtain his name until September 13, 1993. (Tr. III, 498.) Subsequently, on September 15, 1993, a warrant was issued for his arrest. **[*7]** (Tr. III, 497-98.) Petitioner was arrested in Miami, Florida, on October 12, 1993. (Tr. III, 495-96.)

Johnson testified that he and Mario Watson previously had a run-in with Becker, the security guard who was killed. Becker believed that Johnson and Watson did not live in the area and was yelling at them to leave. (Tr. III, 404-405.) It was after curfew. (Tr. III, 405-406.) Johnson repeatedly told Becker that he did live there. Becker pushed Johnson and Watson. (Tr. III, 407.) Becker grabbed Watson and maced him, and Becker tried to mace Johnson. (Tr. III, 405.) Darryl Lofton also testified that he previously had problems with the security guards at the Regency. (Tr. III, 479.)

There was also testimony that twice after the shooting, Deon Johnson claimed to be the shooter to some of his friends, who did not believe him. (Tr. III, 419-20, 428-29, 437-38, 447.) One friend, Mario Watson, testified that he did not believe a story that Johnson had told a year earlier. (Tr. III, 453). Johnson had said that he had killed someone who tried to jump him with a butterfly knife, but Johnson did not know who it was. (Tr. III, 450-51.)

Petitioner's theory of defense was alibi. Petitioner testified **[*8]** at trial. He denied having any contact with Deon Johnson or Darryl Lofton that evening. (Tr. III, 572.) Petitioner said that he had been living, on and off, at Maurice Anderson's home and with his mother at Atherton Terrace. (Tr. III, 542-43.) That evening, he had been with Anderson and his girlfriend, Colita Moore, "sitting in the car, talking, smoking weed, just talking." (Tr. III, 544.) They went to petitioner's apartment, and later, Jimmy Scruggs came over. (Tr. III, 544-45, 567.) They were talking and "smoking weed." (Tr. III, 567.) Then they went to Boo's house. (Tr. III, 567-68.) Then, petitioner went to Shanda Cooper's house. (Tr. III, 568.)

He was writing raps with her brother, Fred. (Tr. III, 568-69.) Then, Shanda came downstairs, and she and petitioner went upstairs together to her bedroom. (Tr. III, 569.) He was there for awhile and fell asleep. (Tr. III, 569-70.) Fred woke him up, and he left. (Tr. III, 570.) He flagged down Colita Moore's car, and she and Anderson took him to Anderson's house. (Tr. III, 570-71.) Petitioner stayed at Anderson's house until the next morning. (Tr. III, 571.)

Maurice Anderson and Colita Moore corroborated petitioner's testimony that they **[*9]** had picked him up and he stayed at Anderson's house. (Tr. III, 514-15, 531-33.) The next morning, Moore took him down to the Social Security Office so that he could see if he was still able to receive SSI. (Tr. III, 534, 571-72.) Petitioner said that he left for Florida because he found out that he could no longer receive SSI, and he needed money to pay Anderson's mother for living there. (Tr. III, 573-74.)

Petitioner admitted that he would have liked to own a Glock gun. (Tr. III, 592-93.) He also testified that he had possessed rifles, a .9 mm, a .38, a .357, and a .22. (Tr. III, 581.) Petitioner also admitted that he had a conversation with Lofton in which he told him that it would be a "nice lick" to get the security guard's gun. (Tr. III, 599.) "Nice lick" was street slang for achievement. (Tr. III, 599.)

At the conclusion of trial, on April 15, 1994, the jury found petitioner guilty of first-degree felony murder and felony-firearm. (Jury Trial-Volume IV, 705-707, docket # 30.) On May 17, 1994, petitioner was sentenced to a mandatory term of nonparolable life, consecutively to a two-year term for felony-firearm.

B. Direct Appeal

Petitioner appealed as of right to the **[*10]** Michigan Court of Appeals. His brief, which was filed by counsel on February 7, 1995, raised the same four issues as raised in this application for habeas corpus relief, as well as an additional issue related to sentencing. (*See* Def.-Appellant's Br. on Appeal, docket # 31.) By unpublished opinion issued on September 17, 1996, the Michigan Court of Appeals rejected all appellate arguments and affirmed petitioner's convictions and sentences. (*See* 9/17/96 Mich. Ct. App. Opinion ("MCOA Op."), docket # 31.)

Petitioner filed a delayed *pro per* application for leave to appeal to the Michigan Supreme Court. Petitioner raised the same five claims rejected by the Michigan Court of Appeals. By order entered July 25, 1997, the Michigan Supreme Court denied his application for leave to appeal because it was not persuaded that the questions presented should be reviewed. (*See* Mich. Ord., docket # 32.) This application for habeas relief followed.

Discussion

HN1[↑] Pursuant to the AEDPA, 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 **[*11]** 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).*

HN2[↑] The AEDPA limits the source of law to cases decided by the United States Supreme Court. *28 U.S.C. § 2254(d).* The Sixth Circuit has emphasized that this provision marks a "significant change" and prevents the

district court from looking to lower federal court decisions in determining whether the state decision is contrary to, or an unreasonable application of, clearly established federal law. *Harris v. Stovall, 212 F.3d 940, 943 (6th Cir. 2000)*; *Herbert v. Billy, 160 F.3d 1131, 1134 (6th Cir. 1998)*. To justify a grant of habeas corpus relief under this provision of the AEDPA, a federal court must find a violation of law "clearly established" by holdings of the Supreme Court, as opposed to its dicta, as of **[*12]** the time of the relevant state court decision. *Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000)*. *HN3*[↑] Recently, the Supreme Court held that a decision of the state court is "contrary to" such clearly established federal law "if the state court arrives at a conclusion opposite to 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." *Id.* *HN4*[↑] A state court decision will be deemed an "unreasonable application" of clearly established federal law "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." *Id.* A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *120 S. Ct. at 1522*. Rather, the application must also be "unreasonable." *Id.* Further, the habeas court should not transform the inquiry into a subjective one by inquiring **[*13]** whether all reasonable jurists would agree that the application by the state court was unreasonable. *Id. at 1522* (disavowing *Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996)*, *cert. denied, 520 U.S. 1107, 137 L. Ed. 2d 315, 117 S. Ct. 1114 (1997)*). Rather, the issue is whether the state court's application of clearly established federal law is "objectively unreasonable." *Williams, 120 S. Ct. at 1522*.

HN5[↑] Under the AEDPA, a determination of a factual issue made by a state court is presumed to be correct. *28 U.S.C. § 2254(e)(1)*. The petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. *28 U.S.C. § 2254(e)(1)*; *see also Warren v. Smith, 161 F.3d 358, 360-61 (6th Cir. 1998)*, *cert. denied, 527 U.S. 1040, 119 S. Ct. 2403, 144 L. Ed. 2d 802 (1999)*. The AEDPA requires heightened respect for state factual findings. *Herbert, 160 F.3d at 1134*. The habeas corpus statute has long provided that the factual findings of the state courts, made after a hearing, are entitled to a presumption of correctness. **[*14]** This presumption has always been accorded to findings of state appellate courts, as well as the trial court. *See Sumner v. Mata, 449 U.S. 539, 546, 66 L. Ed. 2d 722, 101 S. Ct. 764 (1981)*; *Smith v. Jago, 888 F.2d 399, 407 n.4 (6th Cir. 1989)*, *cert. denied, 495 U.S. 961 (1990)*. Applying the foregoing standards under the AEDPA, I find that petitioner is not entitled to relief.

I. Shifting burden of proof: Ground 1

In his first ground for relief, petitioner contends that the prosecutor shifted the burden of proof in opening argument by stating that petitioner had implicated Darryl Lofton, which implied that defendant was involved. Respondent correctly contends that this issue is procedurally barred.

When petitioner presented this claim to the Michigan Court of Appeals, that court ruled as follows:

> Defendant argues that the prosecutor shifted the burden of proof in his opening statement. We disagree. Because defendant failed to object, we review this issue only to prevent manifest injustice. *People v. Stanaway, 446 Mich. 643, 687*; *521 N.W.2d 557 (1994)*. When evaluated in context, the prosecutor's **[*15]** remarks were made to explain what prompted defendant's friend to testify. An

> opening statement is the appropriate time to state facts which will be proven at trial. *People v. Johnson, 187 Mich. App. 621, 626*; *468 N.W.2d 307 (1991)*. Even where a prosecutor promises that evidence will be submitted to the jury and it is not, no reversal is warranted if the prosecution acted in good faith. *Id.* In addition, even assuming arguendo that error occurred, such error was harmless given that the trial court twice instructed the jurors that the burden of proof remains on the prosecution at all times and that defendant was not required to prove anything.

(MCOA Op. at 1.) Thus, the court of appeals reviewed the issue only to determine whether a manifest justice had occurred.

HN6[↑] It has long been established that a state court conviction resting on an "adequate and independent state ground" bars federal habeas corpus review "where questions of that sort are either the only ones raised by a petitioner or are in themselves dispositive of [the] case." *Wainwright v. Sykes, 433 U.S. 72, 81, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977)*. The "adequate **[*16]** state ground" doctrine bars federal habeas review when the state courts declined to address the federal issues because the petitioner failed to comply with state procedural requirements. *Coleman v. Thompson, 501 U.S. 722, 729, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991)*; *see also Jones v. Toombs, 125 F.3d 945, 946* (6th Cir.) *cert. denied, 521 U.S. 1108, 138 L. Ed. 2d 997, 117 S. Ct. 2490 (1997)*. The state procedural rule must have been "firmly established" and "regularly followed" at the time of the decision. *Ford v. Georgia, 498 U.S. 411, 423-24, 112 L. Ed. 2d 935, 111 S. Ct. 850 (1991)*.

The Michigan Court of Appeals expressly relied on Michigan's contemporaneous objection rule in denying petitioner's claim. It is clear that the contemporaneous objection rule was well established at the time of petitioner's trial. *See People v. Hoffman, 205 Mich. App. 1, 518 N.W.2d 817, 827 (Mich. Ct. App. 1994)*; *People v. Pennington, 113 Mich. App. 688, 318 N.W.2d 542, 544 (Mich Ct. App. 1982)*; *People v. Kendrick, 38 Mich. App. 272, 195 N.W.2d 896 (Mich. Ct. App. 1972)*. Further, even **[*17]** when the state court reviews the issue under a manifest injustice standard, petitioner's failure to object is still considered a procedural default. *See Paprocki v. Foltz, 869 F.2d 281, 284-85 (6th Cir. 1989)*; *see also Federico v. Yukins, 1994 U.S. App. LEXIS 30949*, No. 93-2424, 1994 WL 601408, at *3-4 (6th Cir. Nov. 2, 1994), *cert. denied, 514 U.S. 1038, 131 L. Ed. 2d 292, 115 S. Ct. 1406 (1995)*. *HN7*[↑] Petitioner's failure to comply with the state's independent and adequate state procedural rule, i.e., making a contemporaneous objection, caused him to default his claims in state court. *See Wainwright, 433 U.S. at 87-88*; *West v. Seabold, 73 F.3d 81, 84* (6th Cir.), *cert. denied, 518 U.S. 1027, 135 L. Ed. 2d 1086, 116 S. Ct. 2569 (1996)*. Accordingly, review by this court is barred unless petitioner can show cause and prejudice. *Coleman, 501 U.S. at 750*; *Murray v. Carrier, 477 U.S. 478, 485, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)*.

Petitioner has not attempted to argue cause or prejudice. Petitioner also has not demonstrated that manifest injustice would result. *HN8*[↑] Because he has not made **[*18]** a colorable claim of innocence; he has not shown that any constitutional error "probably" resulted in the conviction of one who was actually innocent. *Schlup v. Delo, 513 U.S. 298, 322, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995)* (citing *Murray, 477 U.S. at 495*). Accordingly, I conclude that petitioner's claim of prosecutorial misconduct is procedurally defaulted.

II. Evidence of gang participation: Ground 2

In his second ground for relief, petitioner contends that the trial court erroneously admitted evidence of graffiti found in petitioner's apartment, which damaged his character because the graffiti contained gang symbols. (*See, e.g.*, Tr. II, 168, 175; Tr. III, 392, 440.) Respondent correctly contends that this ground fails to raise an issue of constitutional dimension.

Petitioner presented this claim to the Michigan Court of Appeals, which ruled as follows:

> Defendant argues that the trial court erroneously introduced evidence of defendant's gang participation. We disagree. A trial court's decision to admit bad acts evidence is reviewed for an abuse of discretion. *People v. Catanzarite, 211 Mich. App. 573, 579*; **[*19]** *536 N.W.2d 570 (1995)*. Bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant to an issue of fact of consequence at trial; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v. VanderVliet, 444 Mich. 52, 74-75*; *508 N.W.2d 114 (1993)*; *Catanzarite, supra, 211 Mich. App. at 579*.
>
> The prosecution introduced evidence of photographs taken inside defendant's apartment after the murder. One of the photographs depicted a gang symbol. A police witness testified that the message in this photograph stated, "you can always find me on the 9 block putting shells in your homey till my 5-7 stop," and that "5-7" is a street term for "357." A second photograph showed a gang sign reading, "folks down." Finally, a third photograph read, "me Glock bust nonstop for ghetto red, peace out, sincerely, son of drid."
>
> Here, the graffiti evidence was not introduced to show defendant's character, but rather as substantive, albeit circumstantial, evidence that defendant shot the decedent. In addition, the evidence was relevant to the crime, **[*20]** and more probative than prejudicial. The message in the first photograph referred to the manner in which the murder was conducted, that is, the perpetrator fired at least six times before the shooting stopped. Defendant's friend testified to defendant's desire for decedent's gun, which was a Glock. An acquaintance of defendant testified that he stole a .357 from defendant's apartment prior to the murder. Defendant's rap group was named "Ghetto Red Enterprise." Accordingly, the trial court did not abuse its discretion in admitting the photographs into evidence. *VanderVliet, supra, 444 Mich. at 74-75*; *Catanzarite, supra, 211 Mich. App. at 579*. In any case, given defendant's admission that he belonged to a gang, and the fact that other photographs depicting similar graffiti were admitted without objection, any possible error should be regarded as harmless. *MCL 769.26*; MSA 28.1096; *People v. Minor, 213 Mich. App. 682, 685*; *541 N.W.2d 576 (1995)*.

(MCOA Op. at 1-2.) Thus, the court of appeals found that their was no abuse of discretion in the admission of the evidence.

Petitioner has not indicated how the admission of this evidence violated **[*21]** his constitutional rights. *HN9*[↑] The extraordinary remedy of habeas corpus lies only for a violation of the Constitution. *28 U.S.C. § 2254(a)*. A habeas petition must "state facts that point to a 'real possibility of constitutional error.'" *Blackledge v. Allison. 431 U.S. 63, 75 n.7, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977)* (quoting Advisory Committee Notes on Rule 4, RULES GOVERNING HABEAS CORPUS CASES). As the Supreme Court explained in *Estelle v. McGuire, 502 U.S. 62, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991)*, an inquiry as to whether evidence was properly admitted or

improperly excluded under state law "is no part of the federal court's habeas review of a state conviction [for] it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Id. at 67-68*. Rather, "in conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Id. at 68*. This approach accords the state courts wide latitude in ruling on evidentiary matters. *Seymour v. Walker, 224 F.3d 542, 2000 WL 1154017*, **[*22]** at *5 (6th Cir. 2000). *HN10*[↑] Further, under the AEDPA, the court may only grant habeas relief on an issue regarding a trial court's evidentiary rulings if the petitioner is able to show that the state court's evidentiary rulings were in conflict with a decision reached by the Supreme Court on a question of law or if the state court decided the evidentiary issue differently than the Supreme Court did on a set of materially indistinguishable facts. *Sanders v. Freeman, 221 F.3d 846 (6th Cir. 2000)*. Petitioner has failed to present an argument that even approaches this high standard. Consequently, he fails to state a claim for habeas relief.

III. Ineffective assistance of counsel: Ground 3

Petitioner's third ground for relief is not entirely clear, but it appears that he believes that counsel was ineffective regarding the admission of the graffiti evidence. Respondent incorrectly contends that this ground is procedurally defaulted because petitioner failed to make a record on the claim. The Michigan Court of Appeals reviewed the issue as it appeared on the record, as follows:

> Defendant argues that it was ineffective assistance [of] counsel to fail **[*23]** to object to the above alleged errors. We disagree. Because no evidentiary hearing was held, our review is limited to errors apparent on the record. *People v. Moseler, 202 Mich. App. 296, 299*; *508 N.W.2d 192 (1993)*. The record shows that defense counsel objected vigorously to the admission of the graffiti during the prosecutor's case. Defendant has not overcome the presumption in favor of effective assistance of counsel. *Id.*; *People v. Wilson, 180 Mich. App. 12, 17*; *446 N.W.2d 571 (1989)*.

(MCOA Op. at 2.) Thus, because the court of appeals reviewed the issue, albeit on a limited record, the issue is not procedurally defaulted. Rather, the court of appeals found that the record demonstrated that counsel was effective by vigorously objecting to the admission of the evidence.

In *Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*, the Supreme Court established a two-prong test by which to evaluate claims of ineffective assistance of counsel. *HN11*[↑] To establish a claim of ineffective assistance of counsel, the petitioner must prove: (1) that counsel's performance fell below **[*24]** an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. 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 687*. 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, 100 L. Ed. 83, 76 S. Ct. 158 (1955)*). 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*.

The Michigan Court of Appeals found that counsel was effective because he objected vigorously to the evidence. Petitioner has failed to show that this

determination was an unreasonable application of clearly established federal law as determined by the Supreme Court. The finding is supported in the record. Counsel **[*25]** argued that the evidence was not relevant and was only introduced to prejudice petitioner. *See* Tr. II, 168-174. The court determined that the evidence was probative. *See* Tr. II, 174. Although the court ruled against petitioner, counsel was not necessarily ineffective. Effectiveness of counsel obviously does not equate with counsel succeeding at every question of evidentiary admissibility. The record shows that counsel vigorously argued against the admission of the evidence. Consequently, petitioner fails to present a claim that warrants habeas relief.

IV. Jury instructions: Ground 4

In his fourth ground for relief, petitioner contends that the court should have sua sponte instructed the jury on lesser included offenses of manslaughter and assault with intent to murder. Respondent correctly contends that this issue is procedurally defaulted.

When petitioner raised this issue before the court of appeals, the court ruled as follows:

> Finally, defendant argues that the trial court erred in failing to instruct the jury with two lesser included offenses of felony murder. Because defendant failed to object to the instructions, this issue will only be reviewed to avoid **[*26]** manifest injustice. *People v. Van Dorsten, 441 Mich. 540, 544-545; 494 N.W.2d 737 (1993)*. The trial court instructed the jury as to first-degree murder, first-degree felony-murder, armed robbery, and second-degree murder. An instruction for voluntary manslaughter was neither requested nor supported by the evidence. Accordingly, that instruction was not required. *People v. Etheridge, 196 Mich. App. 43, 55; 492 N.W.2d 490 (1992); People v. Coddington, 188 Mich. App. 584, 605; 470 N.W.2d 478 (1991)*. In any case, any error was harmless given the fact that the jurors rejected the charge of second-degree murder. *People v. Mosko, 441 Mich. 496, 502, 504-505; 495 N.W.2d 534 (1992)*.
>
> Similarly, defendant failed to request and the evidence did not support an instruction for assault with intent to murder. See *People v. Moore, 189 Mich. App. 315, 319; 472 N.W.2d 1 (1991)*. In any case, given the jurors' rejection of the second-degree murder instruction, any error was harmless. *Mosko, supra, 441 Mich. at 504-505*. Defendant's ancillary effective **[*27]** assistance of counsel claim was not properly preserved as it was not contained in the statement of questions presented. *People v. Yarbrough, 183 Mich. App. 163, 165; 454 N.W.2d 419 (1990)*.

(MCOA Op. at 2-3.) Thus, the court of appeals found that petitioner has failed to object to the instructions, and thus, was entitled only to a review for manifest injustice. The court found no manifest injustice.

As stated in the foregoing section, *HN12*[↑] the failure to make a contemporaneous objection causes an issue to be procedurally defaulted in the state courts. The contemporaneous objection rule is applied to allegedly erroneous jury instructions. *See People v. Taylor, 159 Mich. App. 468, 406 N.W.2d 859, 869-70 (1987); People v. Jackson, 23 Mich. App. 553, 179 N.W.2d 211 (Mich. Ct. App. 1970)*. Even though the court of appeals reviewed the issue for manifest injustice, the claim is still considered barred. *See Paprocki, 869 F.2d at 284-85; see also Federico*, 1994 WL 601408, at *3-4. Further, petitioner has failed to argue cause or prejudice to excuse the default, nor has he argued actual innocence. **[*28]** *Schulp, 513 U.S. at 322*. Consequently, this claim fails to warrant habeas relief.

Recommended Disposition

For the foregoing reasons, I recommend that the habeas corpus petition be denied.

Dated: *1/31/01*

Hugh W. Brenneman, Jr.

U.S. Magistrate Judge

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within ten 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, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985).*

Neutral

As of: November 18, 2021 6:03 PM Z

West v. Withrow

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

March 19, 2001, Decided ; March 19, 2001, Filed

Case No. 1:98-cv-557

Reporter

2001 U.S. Dist. LEXIS 3804 *

CARLTON WEST II, Petitioner, v. PAMELA WITHROW, Respondent.

Prior History: [*1] Adopting Magistrate's Document of January 31, 2001, Reported at: *2001 U.S. Dist. LEXIS 13531*.

West v. Withrow, 2001 U.S. Dist. LEXIS 13531 (W.D. Mich., Jan. 31, 2001)

Disposition: Petitioner's Objections to Magistrate Judge's Report and Recommendation, filed February 12, 2001 (Dkt. # 36), DENIED. Magistrate Judge's Report and Recommendation, filed January 31, 2001 (Dkt. # 35), ADOPTED.

Core Terms

prejudicial, graffiti, objected, grounds, default

Case Summary

Procedural Posture

Petitioner filed a motion for writ of habeas corpus pursuant to *28 U.S.C.S. § 2254*. Petitioner raised four grounds for relief. The magistrate judge issued a report and recommendation denying petitioner's motion on all grounds. Petitioner filed his objections to the report and recommendation.

Overview

Petitioner first objected to the magistrate judge's finding that two of his grounds for relief were procedurally barred. The court found that because petitioner's procedural default was a "substantial basis" for the state court's decision, he was required to show cause and prejudice. Petitioner had not made such a showing. Petitioner next objected to the finding that his argument that the trial erroneously introduced evidence of his gang participation did not state a constitutional claim. The evidence in question, while potentially prejudicial, was relevant. Prior to the graffiti evidence's admission, the trial judge took into consideration its probative value and potential prejudicial effect. Therefore, petitioner's due process right to a fair trial was not violated. Lastly, petitioner objected to the finding that his counsel was effective. Despite petitioner's contention, the magistrate judge's review of the ineffective assistance of counsel claim did consider whether petitioner's counsel objected to the prejudicial nature of the graffiti evidence.

Outcome

Petitioner's objections to the magistrate judge's report and recommendation were denied. The magistrate judge's report and recommendation was adopted.

LexisNexis® Headnotes

Appendix H.

Civil Procedure > Judicial Officers > Magistrates > Objections

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Cause & Prejudice Standard

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > General Overview

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > Proof of Prejudice

HN1[] **Magistrates, Objections**

Where a habeas corpus petitioner did not abide by the contemporaneous objection rule, absent a showing of cause for the failure to object and actual prejudice flowing from the asserted error, habeas review is barred.

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > General Overview

HN2[] **Exceptions to Default, Cause & Prejudice Standard**

If the state court overlooks a procedural default, then a habeas corpus petitioner does not need to show cause and prejudice.

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > General Overview

HN3[] **Exceptions to Default, Cause & Prejudice Standard**

When a state court disposes of a claim by relying on a procedural default, but also discusses the merits of a claim in order determine if manifest injustice occurred, the cause and prejudice standard is not waived as long as the procedural default was at least a substantial basis for the decision.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Criminal Law & Procedure > ... > Cognizable Issues > Threshold Requirements > Due Process

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > General Overview

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Evidentiary Rulings

HN4[] **Fundamental Rights, Procedural Due Process**

A state court's evidentiary ruling is usually not questioned in a federal habeas corpus proceeding. Relief will only be granted if the trial judge's error resulted in the denial of fundamental fairness, thereby violating the Due Process Clause of the United States Constitution. The standard in determining whether the admission of prejudicial evidence constitutes a denial of fundamental fairness is whether the evidence is material in the sense of a crucial, critical, highly significant factor.

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

HN5[] **Preservation of Relevant Evidence, Exclusion & Preservation by Prosecutors**

The admission of likely prejudicial, and only distantly relevant, evidence does not violate due process.

Criminal Law & Procedure > Habeas Corpus > Appeals > Certificate of Appealability

Criminal Law & Procedure > Habeas Corpus > Appeals > General Overview

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Threshold Requirements

HN6[] **Appeals, Certificate of Appealability**

An appeal of the final order in a habeas corpus proceeding may not be taken unless the court issues a certificate of appealability. *28 U.S.C.S. § 2253(c)(1)*. A certificate of appealability may be issued only if defendant made a substantial showing of the denial of a constitutional right. *28 U.S.C.S. § 2253(c)(2)*.

Counsel: CARLTON WEST, II, petitioner, Pro se, Ionia, MI.

For PAMELA WITHROW, respondent: Brad H. Beaver, Jennifer M. Granholm, Attorney General, Lansing, MI.

Judges: RICHARD ALAN ENSLEN, Chief Judge.

Opinion by: RICHARD ALAN ENSLEN

Opinion

This matter is before the Court on Petitioner's Motion for Writ of Habeas Corpus pursuant to *28 U.S.C. § 2254*. For the reasons stated below, the Court denies Petitioner's Objections to the Magistrate Judge's Report and Recommendation and adopts the Magistrate Judge's Report and Recommendation.

I. Procedural History

Petitioner filed this habeas corpus action on July 23, 1998. Petitioner raises four grounds for relief, as follows:

1. Prosecutor shifted the burden of proof in his opening statement;
2. Trial court erroneously introduced evidence of petitioner's gang participation;
3. Ineffective assistance of counsel; and
4. Trial court erred in failing to instruct the jury with two lesser offenses of **[*2]** murder.

These are the same four grounds which were raised on direct appeal in the state courts. On January 31, 2001, the Magistrate Judge issued a Report and Recommendation denying Petitioner's Motion on all grounds. On February 12, 2001, Petitioner filed his objections to the Magistrate Judge's Report and Recommendation.

II. Analysis

Petitioner first objects to the Magistrate Judge's finding that grounds one and four are procedurally barred. The Magistrate Judge found that *HN1*[] Petitioner did not abide by the contemporaneous objection rule. Absent a showing of cause for the failure to object and actual prejudice flowing from the asserted error, habeas review is barred. *See Wainwright v. Sykes, 433 U.S. 72, 53 L.*

Ed. 2d 594, 97 S. Ct. 2497 (1977). The Magistrate Judge determined that Petitioner failed to meet the cause and prejudice standard.

Petitioner argues that the Michigan Court of Appeals decided these claims on their merits, ignoring the procedural bar issue. Therefore, Petitioner contends, the cause and prejudice standard does not apply. *HN2*[↑] If the Michigan Court of Appeals had indeed overlooked the procedural default, then Petitioner is correct **[*3]** in asserting that he would not need to show cause and prejudice. *See McBee v. Grant, 763 F.2d 811 (6th Cir. 1985)*.

However, *HN3*[↑] when a state court disposes of a claim by relying on the procedural default, but also discusses the merits in order determine if manifest injustice occurred, the cause and prejudice standard is not waived as long as the procedural default was at least a substantial basis for the decision. *See Federico v. Yukins, 39 F.3d 1181, 1994 WL 601408, at 3-4 (6th Cir. 1994)*; *Paprocki v. Foltz, 869 F.2d 281, 284-85 (6th Cir. 1989)*; *McBee v. Grant, 763 F.2d at 813*; *Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980)*.

The Michigan Court of Appeals denied these claims on the basis that Petitioner had procedurally defaulted by not abiding by Michigan's contemporaneous objection rule. In regards to ground one and four, the court held that because Petitioner failed to object, the issues were reviewed only to prevent manifest injustice. MCOA Op. at 1, 2. It is clear from the language used by the court of appeals that the procedural default was a "substantial basis" for their decision. **[*4]** Therefore, Petitioner is still required to show cause and prejudice. Petitioner has not made such a showing.

Petitioner next objects to the Magistrate Judge's finding that ground two does not state a constitutional claim. Petitioner asserts that his due process right to a fair trial was violated when the graffiti evidence was admitted. This argument is simply without merit.

HN4[↑] A state court's evidentiary ruling is usually not questioned in a federal habeas corpus proceeding. *Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988)*. Relief will only be granted if the trial judge's error resulted in the denial of fundamental fairness, thereby violating the Due Process Clause. *Id.* The standard in determining whether the admission of prejudicial evidence constitutes a denial of fundamental fairness is whether the evidence is material in the sense of a crucial, critical, highly significant factor. *Crown v. Caruso, 108 F.3d 1376, 1997 WL 124076*, *2 (6th Cir. Mar. 18, 1997) (citing *Leverett v. Spears, 877 F.2d 921, 925 (11th Cir. 1989))*.

In addition to the graffiti evidence, the government presented evidence from several eyewitnesses fingering **[*5]** Petitioner as the shooter, an individual who explained Petitioner's motive for the shooting, as well as evidence that Petitioner had obtained a gun several days prior to the shooting which was of the same caliber used in the shooting. The government presented sufficient evidence independent from the graffiti evidence to justify a jury verdict of guilty. Therefore, the admission of the graffiti evidence was not material.

Furthermore, the United States Supreme Court has found *HN5*[↑] the admission of likely prejudicial, and only distantly relevant, evidence does not violate due process. *Estelle v. McGuire, 502 U.S. 62, 69, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991)*. The evidence in question, while potentially prejudicial, was relevant. Prior to the graffiti evidence's admission, the trial judge took into consideration its probative value and potential prejudicial effect. (Jury Trial - Volume II of IV ("Tr. II"), 173-74, docket # 28.) He found that although the

evidence may be prejudicial to Petitioner, it was nonetheless sufficiently probative of Petitioner's interest in guns to warrant admission. (Tr. II, 173-74.) Therefore, Petitioner's due process right to a fair trial was **[*6]** not violated.

Lastly, in regards to ground three, Petitioner objects to the Magistrate Judge's finding that his counsel was effective. Petitioner contends the Magistrate Judge misunderstood Petitioner's argument. In Petitioner's Objections to Magistrate Judge's Report and Recommendation, he argues that the basis for his ineffective assistance of counsel claim is not that his attorney failed to object to the graffiti evidence on relevancy grounds, but that his attorney failed to (1) object to the evidence on the grounds that its prejudicial nature outweighed its probative value and (2) request a limiting instruction.

Despite Petitioner's contention, the Magistrate Judge's review of the ineffective assistance of counsel claim did consider whether Petitioner's counsel objected to the prejudicial nature of the graffiti evidence. The Magistrate Judge noted that Petitioner's counsel objected to the evidence with regards to its relevance *and* prejudicial nature. R. & R. at 14. The Magistrate Judge also correctly observed that the record shows Petitioner's counsel objected to the evidence on both of these grounds. (Tr. II, 169-74.) Furthermore, since the graffiti evidence was admitted **[*7]** for substantive purposes, a request for a limiting instruction would not have been appropriate.

Therefore, because the Court finds Petitioner's Objections to the Magistrate Judge's Report and Recommendation without merit, they are denied.

Furthermore, *HN6*[↑] an appeal of the final order in a habeas corpus proceeding may not be taken unless the Court issues a certificate of appealability. *28 U.S.C. § 2253(c)(1)*. A certificate of appealability may be issued only if Defendant made a "substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*. Defendant has not made such a showing.

DATED in Kalamazoo, MI

03-19-01

RICHARD ALAN ENSLEN

Chief Judge

FINAL ORDER

In accordance with the Court's Opinion of this date;

IT IS HEREBY ORDERED that Petitioner's Objections to Magistrate Judge's Report and Recommendation, filed February 12, 2001 (Dkt. # 36), are **DENIED.**

IT IS FURTHER ORDERED that the Magistrate Judge's Report and Recommendation, filed January 31, 2001 (Dkt. # 35), is **ADOPTED.**

IT IS FURTHER ORDERED that this Court does **NOT** certify that an appeal from this order would be taken **[*8]** in **GOOD FAITH.**

DATED in Kalamazoo, MI

March 19, 2001

RICHARD ALAN ENSLEN

Chief Judge

End of Document

No. 10-1320

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: CARLTON WEST II,

Movant.

ORDER

FILED
Aug 11, 2011
LEONARD GREEN, Clerk

Before: MOORE and GRIFFIN, Circuit Judges; ECONOMUS, District Judge.*

Carlton West, II, a Michigan prisoner proceeding pro se, moves this court for an order authorizing the district court to consider a second or successive application for habeas corpus relief under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b)(3).

In 1994, a jury convicted West of first-degree felony murder and possession of a firearm during the commission of a felony. The trial court sentenced West to a nonparolable life term for the felony murder conviction and a two-year consecutive term for the felony-firearm conviction. The Michigan Court of Appeals affirmed the convictions and sentences. The Michigan Supreme Court denied leave to appeal. In 1998, West filed his first § 2254 petition for habeas corpus relief. The district court dismissed the petition, concluding that the claims were procedurally defaulted or without merit.

Now, in his motion to file a second or successive § 2254 petition, West argues that newly discovered evidence that could not have been reasonably discovered at the time of his first petition demonstrates that the convicting trial court lacked jurisdiction over him. Additionally, West asserts that newly discovered evidence indicates that the trial court committed several other constitutional errors.

*The Honorable Peter C. Economus, United States District Judge for the Northern District of Ohio, sitting by designation.

Appendix I.

We may grant authorization to present a new claim in a second or successive habeas corpus application only if the applicant makes a prima facie showing that the claim relies on: (A) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"; or (B) new facts that could not have been discovered earlier through the exercise of reasonable diligence and which, if proven, "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *See* § 2244(b)(2) and (3)(C). For purposes of this provision, "'[p]rima facie' . . . means simply sufficient allegations of fact together with some documentation that would 'warrant a fuller exploration in the district court.'" *In re McDonald*, 514 F.3d 539, 544 (6th Cir. 2008) (quoting *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004)).

West asserts that the state courts committed several legal errors of constitutional magnitude, including violations of the Extradition Clause and the Fourth, Fifth, Sixth, Ninth, and Fourteenth Amendments. He does not assert any new rule of constitutional law made retroactive by the Supreme Court. Accordingly, West does not meet the first prong.

West asserts he recently discovered evidence to support his claims that could not have been discovered with reasonable diligence prior to filing his first § 2254 petition. West does not cite any specific evidence, but claims he was not allowed proper discovery to present such evidence. West, however, primarily challenges the trial court's jurisdiction, asserting that he was not properly extradited to Michigan. He does not contend that any of this evidence would prove that he is factually innocent of his convictions. *See Bousley v. United States*, 523 U.S. 614, 623 (1998). Instead his arguments challenge the legal sufficiency of his convictions. Accordingly, West's claims do not merit further exploration in the district court.

For the foregoing reasons, West's motion to file a second or successive § 2254 petition is denied.

ENTERED BY ORDER OF THE COURT

Clerk

STATE OF MICHIGAN

7TH JUDICIAL CIRCUIT COURT GENESEE COUNTY

900 S. SAGINAW STREET, FLINT,MI 48502

MARCH 19, 2008

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, Case#93-049579-FC

V/S Judge Geoffrey Neithercutt

CARLTON WEST II,

Defendant,

_____/

Please be advised that the court has entered the following order in denying your Post Conviction Motion For Relief From Judgement pursuant to M.C.R 6.500 et. seq, on this 19th day of March 19, 2008[2].

This court is not persuaded that defendant was denied effective assistance of counsel in trial or on appeal, defendent made no showing that counsels performances were unreasonably deficient as required by Strickland and Reed; Strickland v. Washington 466 U.S. 668 (1984) and People v. Reed 499 Mich. 375 (1995), thus, defendant has not satisfied this court that trial and appellate counsel were deficient in failing to raise claims now set forth in defendants current motion. This court also notes that in defendant's petition for a certificate of appellability (SP) he vaguely argues that he can show cause and prejudice because...the facts underlying this petition's claims, when proven and viewed in light of evidence...the evidence as a whole, will be sufficient to clearly and convincingly establish that but for these constitutional errors, no reasonable fact finder would have found this petitioner guilty of the claims charged. It's apparent to this court that defendant does not state a reason why he failed to raise the claims previously...defendant is simply assuming that the new claims are meritorious, then arguing that the denial of these

Appendix J.

meritorious issues would be a miscarriage of justice, such a circular argument must fail. One of the policy reasons behind M.C.R. 6.508 is to avoid taxing judicial resources, this procedure first compel's defendant to bring all known and reasonable issues in one motion, rather than in successive motions that could have been brought in earlier. This twofold procedure clearly avoids taxing judicial resources, defendants argument turns this procedure on it's head. According to defendant, a court would first make a determination on whether or not the issues are meritorious, the court would essentially be reviewing each motion on it's merit's , accordingly defendant's procedure would eliminate the good cause requirement of M.C.R 6.508 (D)(3)(a); and most importantly there would be no compulsion for a defendant to losing all of his or her known issues in one motion. It is clear to this court that defendant's procedure would severely tax judicial resources, furthermore, it appears that defendant is arguing pursuant to M.C.R 6.508 (D)(3) that since he has shown a significant possibility that he is innocent...this court should waive the good cause requirement of M.C.R 6.508 (D)(3)(a), however, in reviewing defendant's motion, the law, the transcripts, and the file, it's clear to this court that there is not a significant possibility that defendant is innocent. Facts previously available to him when he filed his appeal of right with the court of appeals. Defendant does not show cause for failure to raise his claims previously, accordingly this court will not review them at this late date. Motion for appointment of counsel, Motion to expand the record, and Motion for peremptory reversal, Denied.

HON. JUDGE GEFFORY L. NEITHERCUIT
3/19/09

[2] FOOTNOTE: this is a partial duplicate of the original order because the original was destroyed, see, West v/s Unknown, 2013 U.S. Dist Lexis#162205, (Attached as Appendix.-P.)

STATE OF MICHIGAN

7TH JUDICIAL CIRCUIT COURT GENESEE COUNTY

900 S. SAWINAW STREET, FLINT, MI 48502

MARCH 19, 2009

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

V/S

CARLTON WEST II,

Defendant,

/

Case#93-049579-FC

Judge Geoffey Neithercutt

Please be advised that the court has entered the following order in denying your Habeas Corpus to bring Prisoners to testify on for prosecution per M.C.R 3.304 et.al., on this 19th day of March 2009[2].

Defendant Carlton West II (hereinafter defendant) has filed in this court an ex parte motion and brief to bring prisoner to testifying or for prosecution pursuant to M.C.R 3.304 et al, The defendant requests this court to conduct "Tucker and Ginther" hearings, and argues that his conviction and sentence for the above titled case be so voided. On April 15th 1994 defendant was convicted of open murder and felony firearm. On May 17th 1994 defendant was sentenced to L.W.O.P., defendant appealed both convictions to the Michigan court of appeals and the Michigan supreme court, both of which upheld the convictions. Defendant filed his first motion for relief from judgement with this court on March 20th 2008, it was denied by this court on the same day...as the this current motion request the review of his conviction and sentence, this court determines that regardless of the title attached to it by the defendant it must be treated as if it was filed under M.C.R. 6.501; M.C.R 6.501 (mandates) that a judgement of conviction and sentence not subject to appellate review may be reviewed only in accordance with the provisions of this subchapter,

Appendix K.

furthermore, as this is defendants second motion brought under M.C.R 6.500, this court has to determine whether the current motion is successive under M.C.R 6.502 (G); M.C.R. 6.502 (2) states that a defendant may file a subsequent motion based on a retroactive change in the law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. This court notes that defendant does not make any claim of new evidence or retroactive change in law that occurred after the first motion for relief from judgement. Based on the foregoing, this court determines that the current motion is successive under M.C.R 6.502(G) and that an initial consideration under M.C.R 6.504(B) will not be done by this court. This court has reviewed the file and the circumstances in this matter and now therefore, it's ordered that defendant Carlton West II Motion is DENIED. The court being convinced that defendant's motion is successive and it fails to meet the requirements of M.C.R. 6.502(G) for all the reasons stated above.-

HON. JUDGE GEOFFREY L. NEITHERCUIT

3/19/09

[2]FOOTNOTE: this is a partial duplicate of the original because the original order was destroyed. see, West II v. Unknown 2013 U.S. Dist Lexus #162205 (attached as Appendix- P.)

STATE OF MICHIGAN

MICHIGAN COURT OF APPEALS

(925 W. OTTAWA STREET, P.O. 30022, LANSING, MI, 48909

JUNE 23, 2009

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, Case#175678

V/S #290929

CARLTON WEST II, #93-049579-FC

Defendant,

_____/

Please be advised the court entered an order denying your Application For Leave To Appeal this 23rd day of June 2009[2].

Defendant has failed to meet the burden of establishing entitlement to relief under M.C.R. 6.508(D). The motion to waive fees is granted. The Motion for peremptory reversal is DENIED.

6/23/09

[2] FOOTNOTE: this is a partial duplicate of the oringinal because the original was destroyed, (see, Appendix P.) West v. Unknown 2013 U.S. #162205 at *8, *10, *30, *36.

Appendix L

STATE OF MICHIGAN

MICHIGAN SUPREME COURT

P.O. 30052 Lansing, MI 48909

January 29, 2010

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, Case#107723

V/S #139494

CARLTON WEST II, #93-049579-FC

Defendant,

_____/

Please be advised that the court has entered the following order in denying your Application For Leave To Appeal on this 29th day of January 2010[2].

The Michigan Supreme Court, on order of the court considered and denied the application for leave to appeal because defendant has failed to meet the burden of establishing entitlement to relief under M.C.R. 6.508(D). The Motion for peremptory reversal is DENIED.

Chief Justice Kelly not participating because she served on the court of appeals panel that affirmed defendants conviction on direct appeal.

1/29/10

[2] FOOTNOTE: this is a partial duplicate of the original order because the original was destroyed, see West v. Unknown 2013 U.S. Dist Lexus #162205 (Attached as Appendix- P.)

Appendix III

N.

Neutral

As of: November 18, 2021 6:07 PM Z

In re West

Supreme Court of the United States

March 19, 2018, Decided

No. 17-7818.

Reporter

2018 U.S. LEXIS 1644 *; 138 S. Ct. 1315; 200 L. Ed. 2d 506; 86 U.S.L.W. 3466; 2018 WL 1036177

In Re Carlton West, II, Petitioner.

Subsequent History: US Supreme Court rehearing denied by *In re West, 2019 U.S. LEXIS 2171 (U.S., Mar. 25, 2019)*

Judges: [*1] Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch.

Opinion

Petition for writ of habeas corpus denied.

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Appendix N.

O

Neutral

As of: November 18, 2021 6:05 PM Z

In re West

Supreme Court of the United States

March 25, 2019, Decided

No. 17-7818.

Reporter

2019 U.S. LEXIS 2171 *; 139 S. Ct. 1404; 203 L. Ed. 2d 631; 87 U.S.L.W. 3383

In Re Carlton West, II, Petitioner.

Prior History: *In re West, 138 S. Ct. 1315, 200 L. Ed. 2d 506, 2018 U.S. LEXIS 1644 (U.S., Mar. 19, 2018)*

Judges: **[*1]** Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh.

Opinion

Petition for rehearing denied.

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Appendix O.

P.

Cited

As of: November 18, 2021 6:09 PM Z

West v. Unknown

United States District Court for the Western District of Michigan, Northern Division

November 14, 2013, Decided; November 14, 2013, Filed

Case No. 2:13-cv-118

Reporter

2013 U.S. Dist. LEXIS 162205 *; 2013 WL 6047461

CARLTON WEST, Plaintiff, v. UNKNOWN PARTY #1, et al., Defendants.

Core Terms

deprivation, grievance, allegations, inmate, mail, harassment, prison, rights, medical care, incarceration, courts, x-rays, Appeals, habeas corpus petition, missing, deliberate indifference, post-deprivation, copying, verbal, staff, diet, food, tape, failure to state a claim, preliminary injunction, cause of action, prison official, confinement, assaulted, pain

Counsel: **[*1]** Carlton West, II, also known as Ras Damu Jahkido, plaintiff, Pro se, Baraga, MI.

Judges: Honorable R. Allan Edgar, United States District Judge.

Opinion by: R. Allan Edgar

Opinion

This is a civil rights action brought by a state prisoner pursuant to *42 U.S.C. § 1983*. The Court has granted Plaintiff leave to proceed *in forma pauperis*. Under the Prison Litigation Reform Act, *PUB. L. NO. 104-134, 110 STAT. 1321 (1996)*, the Court is required to dismiss any prisoner action brought under federal law if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. *28 U.S.C. §§ 1915(e)(2)*, *1915A*; *42 U.S.C. § 1997e(c)*. The Court must read Plaintiff's *pro se* complaint indulgently, *see Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)*, and accept Plaintiff's allegations as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez, 504 U.S. 25, 33, 112 S. Ct. 1728, 118 L. Ed. 2d 340 (1992)*. Applying these standards, the Court will dismiss Plaintiff's complaint for failure to state a claim against Defendants Unknown Parties ##1-11, Patrikus, Ahola, Barry, Bellenger, Bemis, Borgen, Bouchard, Warden Capello, Comfort, Curley, Delene, Corrections **[*2]** Officer [female] Dewar, Assistant Resident Unit Supervisor [male] Dewar, Dove, Dube, Etelamaki, Goodreau, Gransinger, Hammel, Heyns, Hieteko, Hill, Holma, Huthaa, Jacobson, Jondreau, Karppinen, Kulie, LaChance, LeClaire, Lake, Macintyre, McCann, Martin, Meyers, Morgan, Petajaa, Place, Perry, Rule, Sackett, Skytta, Snow, Tollefson, Snyder, Tribbley, Turner, Wealton, Walden, Wickstrom and Yankovich. The Court will serve the complaint against Defendants Truesdell, Koskinen, Dove, Erkkila, Brommenschenckle, Hapaala, Minnerick, and Joyal.

Discussion

Appendix P.

I. Factual allegations

Plaintiff Carlton West, a state prisoner currently confined at the Baraga Maximum Correctional Facility (AMF), filed this civil rights action pursuant to *42 U.S.C. § 1983* against Defendants Unknown Parties ##1-11, Corrections Officer Patrikus, Corrections Officer Ahola, Food Service Director Barry, Corrections Officer Bellenger, Corrections Officer Bemis, Corrections Officer Borgen, Corrections Officer Brommenschenckle, Librarian Bouchard, Warden Capello, Dr. Comfort, Warden Curley, Assistant Deputy Warden Delene, Corrections Officer [female] Dewar, Assistant Resident Unit Supervisor [male] Dewar, Librarian Dube, Assistant **[*3]** Resident Unit Supervisor Etelamaki, Corrections Officer Erkkila, Corrections Officer Goodreau, Sergeant Gransinger, Resident Unit Manager Hammel, Corrections Officer Hapaala, MDOC Director Daniel H. Heyns, Corrections Officer Hieteko, Corrections Officer Hill, Corrections Officer Holma, Corrections Officer Huthaa, Corrections Officer Jacobson, Assistant Deputy Warden Jondreau, Corrections Officer Joyal, Assistant Resident Unit Supervisor Karppinen, Sergeant Koskinen, Corrections Officer Kulie, Corrections Officer LaChance, Assistant Resident Unit Supervisor LeClaire, Corrections Officer Lake, Corrections Officer Macintyre, Captain McCann, Special Acts Director Bill Martin, Corrections Officer Meyers, Corrections Officer Minnerick, Corrections Officer Morgan, Inspector Petajaa, Warden Place, Lieutenant Perry, Corrections Officer Rule, Assistant Resident Unit Supervisor Sackett, Corrections Officer Skytta, Corrections Officer Snow, Corrections Officer Tollefson, Chaplain Snyder, Warden Tribbley, Corrections Officer Truesdell, Corrections Officer Turner, Corrections Officer Wealton, Corrections Officer Walden, Sergeant Wickstrom and Lieutenant Yankovich.

In his complaint, Plaintiff states **[*4]** that he was transferred from the Marquette Branch Prison (MBP) to the Baraga Maximum Correctional Facility (AMF), on April 8, 2010, after Plaintiff assaulted Corrections Officers at MBP. Much of Plaintiff's 137 page complaint, as well as the attached 57 pages of affidavits, details his complaints about the handling of his grievances, the failure to provide him with all the legal materials he requested from the law library, and the repeated harassment by prison staff. Plaintiff's complaint chronicles his experiences over the past three years in excruciating detail, including the claims asserted in each grievance filed, the responses to those grievances, every harassing statement or action by Defendants, and numerous minor ailments suffered by Plaintiff.

Plaintiff claims that when he arrived at AMF, he was assaulted by Defendant Truesdell and Unknown Party #3. Plaintiff states that Defendant Koskinen was present and insulted him, saying that Plaintiff was one of the "Black Power niggers." Defendant Koskinen forcibly cut his hair, which Plaintiff wore in long dreadlocks, falsely stating that Plaintiff had razors hidden in his hair.

After the assault, Defendant Delene refused to contact **[*5]** the Michigan State Police, despite Plaintiff's obvious injuries. Plaintiff was placed in segregation and Defendants Dove, Erkkila, Brommenschenkel, Hapaala, Minnerick and Joyal deprived Plaintiff of his meal trays until dinner on April 12, 2010. When Plaintiff did begin to receive trays, they were not compliant with his Rastafarian diet, so Plaintiff was only able to eat the side dishes. Each time Plaintiff requested help from Corrections Officers, they would simply say "Lindberg" [the staff member Plaintiff had assaulted at MBP] and walk away. Plaintiff states that the psychologist Tonia Wolock told him that she had seen the way Plaintiff was brought in, and that it was all on the cameras. During Plaintiff's 30 day evaluation by Wolock, she stated that Plaintiff had really been bucking and resisting staff, and that he should not have been doing that.

On April 12, 2010, Plaintiff was given his property and noticed that some was missing, including pleadings to be filed with the Sixth Circuit, legal books, a pending lawsuit, and child custody and support transcripts. Plaintiff was never given a change of clothes or shower shoes, and only had one bedroll. On April 13, 2010, Defendant Rule **[*6]** reviewed a Notice of Intent (NOI) with Plaintiff regarding his television, which had missing buttons and no picture. Defendant Rule also reviewed a second NOI with Plaintiff, which related to five books, twenty-two cassettes, one case, one pair of headphones, one coat, and one radio. Plaintiff told Defendant Rule that he had not been given a property receipt and Defendant Rule said he would check on it. Plaintiff was told that his typewriter had been sent to AMF separately and that it would arrive later. Plaintiff was subsequently informed by Defendant Sackett that his typewriter and television were both broken and that he could have them sent out for repairs at his expense. Plaintiff was also told that his tape player numbers had been altered, rendering it contraband, that the headphones were in numerous pieces, and that the winter jacket did not have Plaintiff's prisoner number on it. Plaintiff was given 30 days to order a new tape player before his cassette tapes would be destroyed. The five books were returned to Plaintiff. Plaintiff's grievance regarding the disposition of his property and the subsequent appeals were denied. On August 6, 2010, Plaintiff was notified by Defendants **[*7]** Rule and Kulie that he had abandoned property, including 22 cassette tapes, a tape case, a tape player, headphones and a winter jacket, which would be disposed of in accordance with MDOC policy. On October 10, 2010, Defendants Rule and Kulie informed Plaintiff that if he did not submit money to have his typewriter sent out for repairs within 10 days, it would be considered abandoned and would be subject to disposal.

On April 19, 2010, Defendant Brommenschenkel took a letter and health care request from Plaintiff's cell. Plaintiff claims that he never received a response from either item and asserts that Defendant Brommenschenkel must not have sent the items. On April 21, 2010, Defendant Hammel wrote "no pen, no paper" on the outside of Plaintiff's door. Defendant Minnerick subsequently wiped the message off of Plaintiff's door with a paper towel. Plaintiff asserts that he has been subjected to verbal threats and harassment by Defendants Turner, Huthaa, and Sackett, and that Defendant Turner has occasionally refused to allow Plaintiff yard time and failed to deliver the Plaintiff's entire "meal fruit option." Plaintiff states that each time he asked Defendants Ahola and Huthaa if he **[*8]** could have his property, they would mention Officer Lindberg and deny his requests.

On October 11, 2010, Plaintiff received the State Issued Quartermaster (clothing) as "catch-up property." Plaintiff asked Defendant Karppinen why he was not also receiving his legal property and was told to kite the property room. In responding to Plaintiff's kite, Defendant Kulie informed Plaintiff that he had received all the property that had been delivered to AMF. Plaintiff subsequently filed a grievance, which was denied at each level.

Plaintiff claims that with regard to a habeas case in this court, No. 1:98-cv-557, Defendant Karppinen refused to give him needed photocopies, which prejudiced his attempt to file a second and / or successive habeas corpus petition. Plaintiff also claims that his mail was being interfered with by Defendants. However, a review of this case shows that Plaintiff's motion to file a second or successive petition was denied because he failed to offer any evidence that would prove that he was factually innocent of the crime for which he was convicted. *West v. Withrow, No. 1:98-cv-557, 2001 U.S. Dist. LEXIS 13531 (W.D. Mich. 2001)* (docket #48).

Plaintiff claims that some of the missing material was necessary [*9] to show that he was entitled to file a second / successive habeas corpus petition for a conviction from the early 1990s. Plaintiff claims that he sought an extension of time to request permission to file a second / successive habeas corpus petition, which was granted by the Sixth Circuit Court of Appeals on April 19, 2010. Plaintiff was given until September 20, 2010, to file the requisite application. The Michigan Court of Appeals stated that the cost for copying Plaintiff's file in Appeal No. 175678 would be $29.50, and the cost for copying Appeal No. 290929 would be $144.00. The Michigan Supreme Court informed Plaintiff that the cost of copying his file in Case No. 139497 would be $44.50. On May 5, 2010, the Genessee County Clerk advised Plaintiff that the cost of copying his criminal record would be $1879.00. On May 10, 2010, the U.S. District Court for the Western District of Michigan advised Plaintiff that the cost of retrieving the record from archives in Case No. 1:98-cv-557 would be $45.00, and that there would be an additional cost for copying the record. Plaintiff states that he was unable to obtain information previously given to him by his niece, who had made a Freedom [*10] of Information Act (FOIA) request in order to obtain it despite many requests to numerous court and public officials. On August 11, 2011, the Sixth Circuit Court of Appeals issued an order denying Plaintiff's motion to file a second and / or successive habeas corpus petition.

Plaintiff claims that on various dates in 2010, money was taken out of his account for payment of filing fees, leaving him with only $5.00 for personal use, instead of the $10.00 he was supposed to have. Plaintiff filed a grievance, to no avail. Plaintiff also claims that in 2011, he had grievances and grievance appeals wrongly rejected as being untimely. Plaintiff claims that since being transferred to AMF, he has not received much of the mail sent to him by his family. Plaintiff states that at least one person informed him that she had received an envelope from Plaintiff with no letter or other content inside. Plaintiff filed a grievance regarding the interference with his mail. In the grievance response, Defendants Karppinen and LeClaire stated that Plaintiff's mail was properly sealed by prison staff and that once the mail leaves the prison, it is no longer the responsibility of the facility. Plaintiff's appeals [*11] were denied.

Plaintiff claims that he was concerned with his weight, despite the fact that his Body Mass Index was within the normal range. Plaintiff states that Nurse Hulkoff told him to eat everything on his plate, including the butter, and that he would be assured of receiving enough calories. Plaintiff further states that he was told by the dietitian that he had borderline high cholesterol and should reduce the amount of dietary fat he consumes in order to control his LDL levels. Plaintiff contends that if he ate everything on his plate, he would not be following the dietary instruction and would be risking high cholesterol.

On March 15, 2011, Plaintiff was escorted to health services to see Defendant Comfort, who told Plaintiff that he would be scheduled for x-rays and would be prescribed Naproxen. On April 1, 2011, Plaintiff was x-rayed while in chains and claims that while he was being taking to health services, Defendants Wheaton, Dove and Koskinen harassed Plaintiff regarding the haircut Defendant Koskinen had given Plaintiff on his arrival at the prison. Defendant Koskinen stated that he still had Plaintiff's hair. On April 6, 2011, Plaintiff questioned Defendant Comfort about [*12] the results of his x-rays. Defendant Comfort told Plaintiff that his shoulder problems were the result of a deformity he had been born with, and that if the Naproxen did not work, he could have a steroid injection. On April 7, 2011, Plaintiff requested a copy of his x-rays. Plaintiff received a copy of the x-ray reports, which indicated that the x-rays were of Plaintiff's spine and of his left shoulder.

Plaintiff's left shoulder appeared to have a "type III acromion which causes mild narrowing of the supraspinatus outlet and may give rise to mild impingement."

Plaintiff claims that on November 29, 2012, after sporadically seeing flashes of light "inside the top left side of his head," and suffering from sharp shooting pains in the corner of his left eye, he made a health care request. Plaintiff was subsequently examined by an optometrist, who found no damage to Plaintiff's eye.

Plaintiff claims that during his incarceration, Defendants Goodreau, Hill and Jacobson have verbally harassed him in an attempt to get him to lose his temper so that they could implement yard restrictions. Plaintiff further claims that Defendants Bemis, Lachance, Skytta, Holma, Leclaire, LaChance, Dove, Turner, **[*13]** Ahola, and Dewar each engaged in verbal harassment, as well as harassing behavior such as removing items from Plaintiff's tray, and placing pieces of plastic and metal in Plaintiff's food. Plaintiff claims that Defendants told him that they are seeking to have him removed from his vegetarian diet. Plaintiff also claims that Defendants stepped on his heels during transport to and from yard, and that at one point the water in his sink was stuck on for seven days and his law books were not being delivered. Plaintiff claims that library staff send the wrong materials.

Plaintiff states that he has been improperly designated as a member of a Security Threat Group (STG) II because his tattoos are not gang related, but are based on lyrics from songs, as well as from the Bible. Plaintiff further claims that he requested a "vital" **[*14]** (meaning natural) diet as part of his Rastafarian beliefs, but that his request was denied by Defendant Snyder on April 19, 2012. Plaintiff was told that the cost of feeding him in accordance with his faith would be to expensive. However, as noted above, Plaintiff stated earlier in his complaint that he is receiving a vegetarian diet as required by his religious beliefs.

Plaintiff states that Defendants' conduct violated his rights under the *First* and *Eighth Amendments* and seeks damages, as well as declaratory and injunctive relief.

II. Failure to state a claim

A complaint may be dismissed for failure to state a claim if it fails "'to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*). While a complaint need not contain detailed factual allegations, a plaintiff's allegations must include more than labels and conclusions. *Twombly, 550 U.S. at 555*; *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). The court must determine whether **[*15]** the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 679*. Although the plausibility standard is not equivalent to a "'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 556*). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'show[n]' - that the pleader is entitled to relief." *Iqbal, 556 U.S. at 679* (quoting *Fed. R. Civ. P. 8(a)(2)*); *see also Hill v. Lappin, 630 F.3d 468, 470-71 (6th Cir. 2010)* (holding that the *Twombly/Iqbal*

plausibility standard applies to dismissals of prisoner cases on initial review under *28 U.S.C. §§ 1915A(b)(1)* and *1915(e)(2)(B)(ii)*.

To state a claim under *42 U.S.C. § 1983*, a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must **[*16]** show that the deprivation was committed by a person acting under color of state law. *West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)*; *Street v. Corr. Corp. of Am., 102 F.3d 810, 814 (6th Cir. 1996)*. Because *§ 1983* is a method for vindicating federal rights, not a source of substantive rights itself, the first step in an action under *§ 1983* is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver, 510 U.S. 266, 271, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)*.

Plaintiff claims that Defendants Rule, Sackett, and Kulie deprived him of his property following his transfer to AMF. Plaintiff's due process claim is barred by the doctrine of *Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), overruled in part by Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)*. Under *Parratt*, a person deprived of property by a "random and unauthorized act" of a state employee has no federal due process claim unless the state fails to afford an adequate post-deprivation remedy. If an adequate post-deprivation remedy exists, the deprivation, although real, is not "without due process of law." *Parratt, 451 U.S. at 537*. This rule applies to both negligent and intentional deprivation of property, as long as the deprivation was not done pursuant to **[*17]** an established state procedure. *See Hudson v. Palmer, 468 U.S. 517, 530-36, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)*. Because Plaintiff's claim is premised upon allegedly unauthorized acts of a state official, he must plead and prove the inadequacy of state post-deprivation remedies. *See Copeland v. Machulis, 57 F.3d 476, 479-80 (6th Cir. 1995)*; *Gibbs v. Hopkins, 10 F.3d 373, 378 (6th Cir. 1993)*. Under settled Sixth Circuit authority, a prisoner's failure to sustain this burden requires dismissal of his *§ 1983* due-process action. *See Brooks v. Dutton, 751 F.2d 197 (6th Cir. 1985)*.

Plaintiff has not sustained his burden in this case. Plaintiff has not alleged that state post-deprivation remedies are inadequate. Moreover, numerous state post-deprivation remedies are available to him. First, a prisoner who incurs a loss through no fault of his own may petition the institution's Prisoner Benefit Fund for compensation. MICH. DEP'T OF CORR., Policy Directive 04.07.112, ¶ B (effective Jul. 9, 2012). Aggrieved prisoners may also submit claims for property loss of less than $1,000 to the State Administrative Board. *Mich. Comp. Laws § 600.6419*; Policy Directive, 04.07.112, ¶ B. Alternatively, Michigan law authorizes actions in **[*18]** the Court of Claims asserting tort or contract claims "against the state and any of its departments, commissions, boards, institutions, arms, or agencies." *Mich. Comp. Laws § 600.6419(1)(a)*. The Sixth Circuit specifically has held that Michigan provides adequate post-deprivation remedies for deprivation of property. *See Copeland, 57 F.3d at 480*. Plaintiff does not allege any reason why a state-court action would not afford him complete relief for the deprivation, either negligent or intentional, of his personal property. Accordingly, Plaintiff's claims against Defendants Rule, Kulie and Sackett for the loss of his property will be dismissed.

Plaintiff states that he was subjected to verbal harassment by Defendants Hammel, Turner, Huthaa, Sackett, Ahola, Goodreau, Hill, Jacobson, Bemis, Lachance, Skytta, Holma, LeClaire, LaChance, Dove, Wealton, Koskinen, and Dewar on various occasions, as well as to other harassment such as removing items

from Plaintiff's tray and placing pieces of plastic and metal in his food. Plaintiff further states that Defendants sometimes stepped on his heels during transport to and from the yard, and that one time the water in his sink was stuck on for seven **[*19]** days. The *Eighth Amendment* imposes a constitutional limitation on the power of the states to punish those convicted of crimes. Punishment may not be "barbarous" nor may it contravene society's "evolving standards of decency." *Rhodes v. Chapman, 452 U.S. 337, 345-46, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981)*. The Amendment, therefore, prohibits conduct by prison officials that involves the "unnecessary and wanton infliction of pain." *Ivey v. Wilson, 832 F.2d 950, 954 (6th Cir. 1987)* (per curiam) (quoting *Rhodes, 452 U.S. at 346*). The deprivation alleged must result in the denial of the "minimal civilized measure of life's necessities." *Rhodes, 452 U.S. at 347*; *see also Wilson v. Yaklich, 148 F.3d 596, 600-01 (6th Cir. 1998)*. The *Eighth Amendment* is only concerned with "deprivations of essential food, medical care, or sanitation" or "other conditions intolerable for prison confinement." *Rhodes, 452 U.S. at 348* (citation omitted). Moreover, "[n]ot every unpleasant experience a prisoner might endure while incarcerated constitutes cruel and unusual punishment within the meaning of the *Eighth Amendment*." *Ivey, 832 F.2d at 954*.

In order for a prisoner to prevail on an *Eighth Amendment* claim, he must show that he faced a sufficiently **[*20]** serious risk to his health or safety and that the defendant official acted with "'deliberate indifference' to [his] health or safety." *Mingus v. Butler, 591 F.3d 474, 479-80 (6th Cir. 2010)* (citing *Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)* (applying deliberate indifference standard to medical claims); *see also Helling v. McKinney, 509 U.S. 25, 35, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993)* (applying deliberate indifference standard to conditions of confinement claims)).

Allegations of verbal harassment or threats by prison officials toward an inmate do not constitute punishment within the meaning of the *Eighth Amendment*. *Ivey v. Wilson, 832 F.2d 950, 955 (6th Cir. 1987)*. Nor do allegations of verbal harassment rise to the level of unnecessary and wanton infliction of pain proscribed by the *Eighth Amendment*. *Id.* Even the occasional or sporadic use of racial slurs, although unprofessional and reprehensible, does not rise to a level of constitutional magnitude. *See Torres v. Oakland County, 758 F.2d 147, 152 (6th Cir. 1985)*. Moreover, Plaintiff's allegations that Defendants sometimes removed items from Plaintiff's tray and placed pieces of plastic and metal in Plaintiff's food, that they stepped on his heels during transport **[*21]** to and from the yard, and that one time the water in his sink was stuck on for seven days do not rise to the level of an *Eighth Amendment* violation. Therefore, Defendants Hammel, Turner, Huthaa, Sackett, Ahola, Goodreau, Hill, Jacobson, Bemis, Lachance, Skytta, Holma, Leclaire, LaChance, and Dewar are entitled to dismissal of these claims.

In addition, Plaintiff's allegations regarding his dietary concerns do not rise to the level of an *Eighth Amendment* violation, because despite the fact that Plaintiff was concerned with maintaining his weight, he concedes that his Body Mass Index was within the normal range. In addition, the fact that Nurse Hulkoff told him to eat everything on his plate, including the butter, even though Plaintiff's LDL levels were borderline, does not constitute an *Eighth Amendment* deprivation.

Plaintiff claims that his *Eighth Amendment* rights were violated by the inadequate health care he received. The *Eighth Amendment* obligates prison authorities to provide medical care to incarcerated individuals, as a failure to provide such care would be inconsistent with

contemporary standards of decency. *Estelle v. Gamble, 429 U.S. 97, 102, 103-04, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*. The *Eighth Amendment* is **[*22]** violated when a prison official is deliberately indifferent to the serious medical needs of a prisoner. *Id. at 104-05*; *Comstock v. McCrary, 273 F.3d 693, 702 (6th Cir. 2001)*.

A claim for the deprivation of adequate medical care has an objective and a subjective component. *Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)*. To satisfy the objective component, the plaintiff must allege that the medical need at issue is sufficiently serious. *Id.* In other words, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. *Id.* The objective component of the adequate medical care test is satisfied "[w]here the seriousness of a prisoner's need[ ] for medical care is obvious even to a lay person." *Blackmore v. Kalamazoo Cnty., 390 F.3d 890, 899 (6th Cir. 2004)*. If, however the need involves "minor maladies or non-obvious complaints of a serious need for medical care," *Blackmore, 390 F.3d at 898*, the inmate must "place verifying medical evidence in the record to establish the detrimental effect of the delay in medical treatment." *Napier v. Madison Cnty., 238 F.3d 739, 742 (6th Cir. 2001)*.

The subjective component requires an inmate to show that prison officials **[*23]** have "a sufficiently culpable state of mind in denying medical care." *Brown v. Bargery, 207 F.3d 863, 867 (6th Cir. 2000)* (citing *Farmer, 511 U.S. at 834*). Deliberate indifference "entails something more than mere negligence," *Farmer, 511 U.S. at 835*, but can be "satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id.* Under *Farmer*, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id. at 837*.

Not every claim by a prisoner that he has received inadequate medical treatment states a violation of the *Eighth Amendment*. *Estelle, 429 U.S. at 105*. As the Supreme Court explained:

> [A]n inadvertent failure to provide adequate medical care cannot be said to constitute an unnecessary and wanton infliction of pain or to be repugnant to the conscience of mankind. Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the *Eighth Amendment*. Medical malpractice does not become a constitutional violation merely **[*24]** because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.

Id. at 105-06 (quotations omitted). Thus, differences in judgment between an inmate and prison medical personnel regarding the appropriate medical diagnoses or treatment are not enough to state a deliberate indifference claim. *Sanderfer v. Nichols, 62 F.3d 151, 154-55 (6th Cir. 1995)*; *Ward v. Smith, No. 95-6666, 1996 U.S. App. LEXIS 28322, 1996 WL 627724, at *1 (6th Cir. Oct. 29, 1996)*. This is so even if the misdiagnosis results in an inadequate course of treatment and considerable suffering. *Gabehart v. Chapleau, No. 96-5050, 1997 U.S. App. LEXIS 6617, 1997 WL 160322, at *2 (6th Cir. Apr. 4, 1997)*.

The Sixth Circuit distinguishes "between cases where the complaint alleges a complete denial of medical care and those cases where the claim is that a prisoner received inadequate medical treatment." *Westlake v. Lucas, 537 F.2d 857, 860 n.5 (6th Cir. 1976)*. In this

case, Plaintiff claims that Defendant Comfort had him x-rayed while in chains, so that the results were not as clear as they could have been. Plaintiff also claims that when he questioned **[*25]** Defendant Comfort about the results of his x-rays, she told him that he had a shoulder deformity and that if Naproxen did not work, he could have a steroid injection. Plaintiff was given a copy of his x-rays, which showed a "type III acromion which causes mild narrowing of the supraspinatus outlet and may give rise to mild impingement." Plaintiff was also examined by an optometrist for complaints of eye pain and visual flashes. The optometrist examined Plaintiff and found no damage to his eyes. Where, as here, "a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law." *Id.; see also Perez v. Oakland County, 466 F.3d 416, 434 (6th Cir. 2006); Kellerman v. Simpson, 258 F. App'x 720, 727 (6th Cir. 2007); McFarland v. Austin, 196 F. App'x 410 (6th Cir. 2006); Edmonds v. Horton, 113 F. App'x 62, 65 (6th Cir. 2004); Brock v. Crall, 8 F. App'x 439, 440 (6th Cir. 2001); Berryman v. Rieger, 150 F.3d 561, 566 (6th Cir. 1998).*

Plaintiff claims that his due process rights were violated when he was improperly designated **[*26]** as a STG II member because his tattoos were wrongly found to be gang related. Plaintiff contends that the tattoos were actually based on song lyrics, as well as on verses from the Bible. However, the Sixth Circuit has held that:

> "an increase in security classification, such as being classified as a[n] STG member", does not constitute an "atypical and significant' hardship in relation to the ordinary incidents of prison life because a prisoner has no constitutional right to remain incarcerated in a particular prison or to be held in a specific security classification." *See Moody, 429 U.S. at 88 n. 9, 97 S.Ct. 274* (rejecting a prisoner's argument that a pending warrant and detainer adversely affected his prison classification and qualification for institutional programs because not "every state action carrying adverse consequences for prison inmates automatically activates a due process right"); *Meachum v. Fano, 427 U.S. 215, 225, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976)* (holding that "[n]either, in our view, does the *Due Process Clause* in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system," and noting that the fact **[*27]** "[t]hat life in one prison is much more disagreeable than in another does not in itself signify that a *Fourteenth Amendment* liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules"); *but see Wilkinson v. Austin, 545 U.S. 209, 125 S.Ct. 2384, 2389, 2394, 162 L.Ed.2d 174 (2005)* (holding that transfer to a "supermax" prison "imposes an atypical and significant hardship under any plausible baseline" because "[conditions] at [the prison] are more restrictive than any other form of incarceration in Ohio").

Harbin-Bey v. Rutter, 420 F.3d 571, 577 -578 (6th Cir. 2005).

Finally, Plaintiff states that as a Rastafarian, he requires a "natural" diet. Defendant Snyder told him that the cost of feeding him in accordance with his faith would be too expensive. However, Plaintiff also alleged that he was receiving a vegetarian diet as required by his religious beliefs. While a complaint need not contain detailed factual allegations, a plaintiff's allegations must include more than labels and conclusions. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).* The court must determine whether the complaint contains "enough facts to state a claim to relief **[*28]** that is plausible on its face." *Twombly, 550*

U.S. at 570. The court need not accept "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . ." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. at 678 (quoting Twombly, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'show[n]' - that the pleader is entitled to relief." Id. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). The court concludes that this claim is entirely conclusory and is properly dismissed.

Plaintiff claims that on April 19, 2010, Defendant Brommenschenkel took a letter and health care request from Plaintiff's cell. Plaintiff claims that he never received a response from either item and asserts that Defendant Brommenschenkel must not have sent the items. Plaintiff also claims that while confined at AMF, he has not received much of the mail sent to him by his family. Plaintiff also states that one person **[*29]** told him that she had received an empty envelope from Plaintiff. Plaintiff concludes that prison officials must have been interfering with his mail.

A prisoner retains those First Amendment freedoms which are "not inconsistent with his status as a prisoner or with legitimate penological objectives of the corrections system [ ]." Martin v. Kelley, 803 F.2d 236, 240 n.7 (6th Cir.1986) (quoting Pell v. Procunier, 417 U.S. 817, 822, 94 S. Ct. 2800, 41 L. Ed. 2d 495); see Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). It is well established that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266, 285, 68 S. Ct. 1049, 92 L. Ed. 1356 (1948). The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives-including deterrence of crime, rehabilitation of prisoners, and institutional security. O'Lone v. Estate of Shabazz, 482 U.S. 342, 348, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987) (citing Pell, 417 U.S. at 822-823; Procunier v. Martinez, 416 U.S. 396, 412, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974)).

In this case, Plaintiff filed a grievance regarding the alleged interference with his mail. In response to **[*30]** that grievance, Defendants Karppinen and LeClaire stated that Plaintiff's mail had been properly sealed by prison staff and that once it left the prison, it was no longer the responsibility of the facility. As noted above, Plaintiff's contention regarding his mail is based solely on the fact that he did not receive responses to his mail on certain occasions and that one person stated that she received an empty envelope from him. Plaintiff fails to allege any specific facts supporting a finding that any particular named Defendant actually interfered with his mail. The court concludes that Plaintiff's claims regarding his outgoing mail are purely speculative and conclusory. Therefore, the court will dismiss those claims.

Plaintiff claims that Defendants violated his right of access to the courts. In Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), the Supreme Court recognized a prisoner's fundamental right of access to the courts. While the right of access to the courts does not allow a State to prevent an inmate from bringing a grievance to court, it also does not require the State to enable a prisoner to discover grievances or litigate effectively. Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). Thus, *Bounds* **[*31]** did not create an abstract, free-standing right to a law library, litigation tools, or legal assistance. Id. at 351 (1996). Further, the right may be limited by legitimate penological goals, such as maintaining security and

preventing fire or sanitation hazards. *See Acord v. Brown, No. 91-1865, 1992 U.S. App. LEXIS 6293, 1992 WL 58975 (6th Cir. March 26, 1992); Hadix v. Johnson, 842 F.2d 331, 1988 WL 24204 (6th Cir. 1988); Wagner v. Rees, 780 F.2d 1024, 1985 WL 14025 (6th Cir. 1985).*

To state a claim, an inmate must show that any shortcomings in the library, litigation tools, or legal assistance caused actual injury in his pursuit of a legal claim. *Lewis, 518 U.S. at 351; Talley-Bey, 168 F.3d at 886; Kensu v. Haigh, 87 F.3d 172, 175 (6th Cir. 1996); Pilgrim v. Littlefield, 92 F.3d 413, 416 (6th Cir. 1996); Walker v. Mintzes, 771 F.2d 920, 932 (6th Cir. 1985).* An inmate must make a specific claim that he was adversely affected or that the litigation was prejudiced. *Vandiver v. Niemi, No. 94-1642, 1994 U.S. App. LEXIS 34257, 1994 WL 677685, at *1 (6th Cir. Dec. 2, 1994).* Particularly, an inmate cannot show injury when he still has access to his legal materials by request, *Kensu, 87 F.3d at 175*, when he fails to state how he **[*32]** is unable to replicate the confiscated documents, *Vandiver, 1994 U.S. App. LEXIS 34257, 1994 WL 677685, at *1*, or when he could have received the material by complying with the limits on property, e.g., where he had the opportunity to select the items that he wanted to keep in his cell, or when he had an opportunity to purchase a new footlocker that could hold the property. *Carlton v. Fassbender, No. 93-1116, 1993 U.S. App. LEXIS 17654, 1993 WL 241459, at *2 (6th Cir. July 1, 1993).*

Further, in order to state a viable claim for interference with his access to the courts, a plaintiff must show "actual injury." *Lewis v. Casey, 518 U.S. 343, 349, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996); see also Talley-Bey v. Knebl, 168 F.3d 884, 886 (6th Cir. 1999).* The Supreme Court has strictly limited the types of cases for which there may be an actual injury:

> *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply **[*33]** one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

Lewis, 518 U.S. at 355. "Thus, a prisoner's right to access the courts extends to direct appeals, habeas corpus applications, and civil rights claims only." *Thaddeus-X v. Blatter, 175 F.3d 378, 391 (6th Cir. 1999)* (en banc). Moreover, the underlying action must have asserted a non-frivolous claim. *Lewis, 518 U.S. at 353; accord Hadix v. Johnson, 182 F.3d 400, 405 (6th Cir. 1999)* (*Lewis* changed actual injury to include requirement that action be non-frivolous).

In addition, the Supreme Court squarely has held that "the underlying cause of action . . . is an element that must be described in the complaint, just as much as allegations must describe the official acts frustrating the litigation." *Christopher v. Harbury, 536 U.S. 403, 415, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)* (citing *Lewis, 518 U.S. at 353 & n.3*). Where, as here, "the access claim . . . looks backward, [1] the complaint must identify

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[1] Backward-looking claims "do not look forward to a class of future litigation, but backward to a time when specific litigation ended poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable. The ultimate object of these sorts of access claims . . . is not the judgment in a further lawsuit, but simply the judgment in the access claim itself, in providing relief obtainable in no other suit in the future." *Christopher, 536 U.S. at 414* (footnotes omitted). In contrast, the "essence"of a forward-looking claim "is that

a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought." *Id. at 415*. "Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed **[*34]** by allegations in the complaint sufficient to give fair notice to a defendant." *Id. at 416*.

In this case, Plaintiff claims that Defendant Karppinen refused to give him needed photocopies in habeas case No. 1:98-cv-557, which prejudiced his attempt to file a second and / or **[*35]** successive habeas corpus petition. However, as noted above, Plaintiff's motion to file a second and / or successive petition was actually denied because Plaintiff failed to offer any evidence that would prove that he was factually innocent of the crime for which he was convicted. *West v. Withrow, No. 1:98-cv-557, 2001 U.S. Dist. LEXIS 13531 (W.D. Mich. 2001)* (docket #48). Therefore, Plaintiff was not prejudiced by Defendant Karppinen's conduct.

Plaintiff also claims that some of the legal materials that came up missing after his transfer were necessary to show that he was entitled to file a second / successive habeas corpus petition for a conviction in the early 1990s. Plaintiff claims that the Sixth Circuit Court of Appeals granted him an extension of time to request permission to file a second / successive habeas corpus petition. Plaintiff was given until September 20, 2010, to file the requisite application. Plaintiff states that the cost of obtaining new copies of his record in the underlying case amounted to more than $2000.00, which he could not afford and Plaintiff's motion to file a second / successive petition was denied on August 11, 2011. However, Plaintiff fails to allege the details of his planned **[*36]** motion to file a second / successive petition, or to explain why the missing materials were required to file the motion. Therefore, Plaintiff has failed to describe "the underlying cause of action," as required by the Supreme Court in order to show the requisite prejudice from an alleged denial of access to the courts. *Christopher, 536 U.S. at 415* (citing *Lewis, 518 U.S. at 353 & n.3*).

Finally, the court notes that Plaintiff's claim that upon his transfer into AMF, he was assaulted by Defendants Truesdell and Koskinen [2], and was deprived food by Defendants Dove, Erkkila, Brommenschenkel, Hapaala, Minnerick, and Joyal for a period of nearly four days are non-frivolous and may not be dismissed on initial screening.

Motion for Preliminary Injunction

The court notes that Plaintiff is also seeking an preliminary injunction requiring the MDOC to pay the copy fees to various courts in order to replace Plaintiff's missing legal documents, as well as an order releasing Plaintiff to the general population. The Sixth Circuit has explained that a court confronted with a request for injunctive **[*37]** relief must consider and balance four factors:

1. Whether the movant has shown a strong or substantial likelihood or probability of success on the merits.
2. Whether the movant has shown irreparable injury.
3. Whether the preliminary injunction could harm third parties.

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official action is presently denying an opportunity to litigate for a class of potential plaintiffs. The opportunity has not been lost for all time, however, but only in the short term; the object of the denial-of-access suit . . . is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed." *Id. at 413*.

[2] Because "Unknown Party #3" cannot be identified or served, this individual is not properly a party to this action.

4. Whether the public interest would be served by issuing a preliminary injunction.

Mason County Medical Ass'n. v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977). See also, Frisch's Restaurant Inc. v. Shoney's, 759 F.2d 1261,1263 (6th Cir. 1985); Ardister v. Mansour, 627 F.Supp. 641 (W.D. Mich. 1986).

Moreover, where a prison inmate seeks an order enjoining state prison officials, this court is required to proceed with the utmost care and must recognize the unique nature of the prison setting. *See Kendrickv. Bland, 740 F.2d 432 at 438,n.3, (6th3 Cir. 1984). See also Harris v. Wilters, 596 F.2d 678 (5th Cir. 1979).* It has also been remarked that a party seeking injunctive relief bears a heavy burden of establishing that the extraordinary and drastic remedy sought is appropriate under the circumstances. *See Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2nd Cir. 1969), cert. denied, 394 U.S. 999, 89 S. Ct. 1595, 22 L. Ed. 2d 777 (1969). See also O'Lone v. Estate of Shabazz, 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1986).*

As **[*38]** noted above, Plaintiff's access to courts claims and due process claims regarding his missing legal property are properly dismissed for failure to state a claim. In addition, Plaintiff has no right to a particular security classification. Because Plaintiff has failed to meet the heavy burden establishing the need for injunctive relief, Plaintiff's motion for a temporary restraining order and preliminary injunction will be denied.

Conclusion

Having conducted the review required by the Prison Litigation Reform Act, the Court determines that Defendants Unknown Parties ##1-11, Patrikus, Ahola, Barry, Bellenger, Bemis, Borgen, Bouchard, Warden Capello, Comfort, Curley, Delene, Corrections Officer [female] Dewar, Assistant Resident Unit Supervisor [male] Dewar, Dube, Etelamaki, Goodreau, Gransinger, Hammel, Heyns, Hieteko, Hill, Holma, Huthaa, Jacobson, Jondreau, Karppinen, Kulie, LaChance, LeClaire, Lake, Macintyre, McCann, Martin, Meyers, Morgan, Petajaa, Place, Perry, Rule, Sackett, Skytta, Snow, Tollefson, Snyder, Tribbley, Turner, Wealton, Walden, Wickstrom and Yankovich will be dismissed for failure to state a claim pursuant to *28 U.S.C. §§ 1915(e)(2)* and *1915A(b)*, and *42 U.S.C. § 1997e(c)*. **[*39]** The Court will serve the complaint against Defendants Truesdell, Koskinen, Dove, Erkkila, Brommenschenkel, Hapaala, Minnerick, and Joyal.

An Order consistent with this Opinion will be entered.

Dated: 11/14/2013

/s/ R. Allan Edgar

R. Allan Edgar

United States District Judge

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Q.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

October 22, 2021

Carlton West II
#A-237293
BCF, 13924 Wadaga Road
Baraga, MI 49908

Dear Mr. West II:

The notice of appeal received October 22, 2021 is herewith returned.

The denial of authorization by a court of appeals to file a second or successive petition for writ of habeas corpus may not be reviewed on certiorari. See 28 USC Section 2244(b)(3)(E).

Sincerely,
Scott S. Harris, Clerk
By:
Jacob Levitan
(202) 479-3392

Enclosures

Appendix Q.