UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JESSIE VORNELL LEWIS,

Petitioner,

Case No. 1:18-cv-535

v.

Honorable Gordon J. Quist

WILLIE SMITH,

Respondent.
_____/

REPORT AND RECOMMENDATION

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Petitioner Jessie Vornell Lewis is incarcerated with the Michigan Department of Corrections at the Ionia Correctional Facility (ICF) in Ionia County, Michigan. Following an eight-day jury trial in the Wayne County Circuit Court, Petitioner was convicted of second-degree murder, in violation of Mich. Comp. Laws § 750.317; armed robbery, in violation of Mich. Comp. Laws § 750.529; and possession of a firearm during the commission of a felony (felony-firearm), in violation of Mich. Comp. Laws § 750.227b.. On October 3, 2014, the court sentenced Petitioner as a third habitual offender, Mich. Comp. Laws § 769.11, to concurrent prison terms of 40 to 70 years for murder and 20 to 35 years for armed robbery. Those sentences were to be served consecutively to a 2-year sentence for felony-firearm.

Petitioner timely filed a habeas corpus petition raising four grounds for relief, as follows:

I. Petitioner is entitled to entry of a judgment of acquittal on all charges as there was insufficient evidence.

II. Petitioner is entitled to a new trial as the verdict was against the great weight of the evidence.

III. Petitioner is entitled to a new trial as he was denied effective assistance of counsel.

IV. Petitioner is entitled to be resentenced.

(Pet., ECF No. 1, PageID.5-9.) Respondent has filed an answer to the petition (ECF No. 8) stating that the grounds should be denied because they are meritless. Upon review and applying the standards of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA), I find that the grounds are meritless. Accordingly, I recommend that the petition be denied.

Discussion

I. Factual allegations

On April 7, 2014, police responded to a 911 call regarding a vehicle crash and gunshots. When police arrived at 13515 Maine Street in Wayne County, they found Curtis Robinson lying face down outside of his vehicle. Robinson had been shot twice. There were two cell phones on the ground near him. One of the phones belonged to Petitioner.

Petitioner's phone revealed text messages with Petitioner's co-defendant, Jarvis Glenn, that suggested the two planned to rob someone, presumably Curtis Robinson. A resident at 13515 Maine Street, who happened to be Petitioner's aunt, testified that she saw Petitioner in the area before the crash and shooting and saw him fleeing afterward. There was also testimony that Jarvis Glenn was seen in Curtis Robinson's vehicle before the crash and shooting and was seen fleeing the area after. Neither the aunt nor any other witness saw Petitioner with a gun or saw him rob or shoot Curtis Robinson.

The location information from the cellphones was consistent with Petitioner's and Glenn's participation in the crime. Additionally, police found ammunition in Petitioner's

residence that matched the caliber of the gun that shot Robinson. The gun used to shoot Robinson was never found.

Petitioner testified. He claimed the text exchange related to a robbery he committed an hour earlier. (Trial Tr. VI, ECF No. 9-9, PageID.1311.) To support his story, he noted that there was a one-hour difference between the texts as recreated by his cellphone service provider and the time of the crime. The prosecutor's expert explained the time discrepancy by noting that the data was provided by a company in the Central Time Zone. Petitioner testified that the expert was lying. (*Id.*, PageID.1315, 1332-1334.) Petitioner also testified that the person he was communicating with regarding the robbery an hour earlier was not Jarvis Glenn, but was instead Jarvis Glenn's brother. (*Id.*, PageID.1314-1315.) After Petitioner provided that testimony, Glenn, who had previously expressed his intention to testify (*Id.*, PageID.1289-1290), decided to simply rest (*Id.*, PageID1357-1358.).

Both Defendants were charged with felony-murder, armed robbery, and felony-firearm. The jurors deliberated for two days. They convicted Petitioner of the lesser-included offense of second-degree murder, armed robbery, and felony-firearm.[1] They convicted Glenn of armed robbery. The jurors were unable to reach a verdict on the other two charges against Glenn.

Petitioner, with the assistance of counsel, directly appealed his convictions and sentences to the Michigan Court of Appeals. In the brief that Petitioner filed with the assistance of counsel, Petitioner raised four issues—the same four issues he raises in his habeas petition. (Pet'r's Appeal Br., ECF No. 9-13, PageID.1507.) Petitioner also filed a *pro per* supplemental brief raising four additional issues. (Pet'r's Supp. Br., ECF No. 9-13, PageID.1565.) By

[1] The second-degree murder conviction appears to be a compromise verdict. Having found Petitioner committed, or at least attempted, the armed robbery of Craig Robinson and having found Petitioner responsible for killing Craig Robinson, a finding of guilt for first-degree felony murder would seem to necessarily follow. Mich. Comp. Laws § 750.316(1)(b).

unpublished opinion issued July 26, 2016, the Michigan Court of Appeals denied relief on all of Petitioner's claims. (Mich. Ct. App. Op., ECF No. 9-13, PageID.1480-1491.)

After the court of appeals denied relief, Petitioner filed a *pro per* application for leave to appeal in the Michigan Supreme Court. Petitioner raised the eight issues he raised in the Michigan Court of Appeals, plus three new issues. (Pet'r's Appl. for Leave to Appeal, ECF No. 9-14, PageID.1603-1618.) By order entered March 7, 2017, the Michigan Supreme Court denied leave to appeal. (Mich. Order, ECF No. 9-14, PageID.1602.) Petitioner then filed his habeas petition.

II. AEDPA standard

The AEDPA "prevents federal habeas 'retrials'" and ensures that state court convictions are given effect to the extent possible under the law. *Bell v. Cone*, 535 U.S. 685, 693-94 (2002). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). This standard is "intentionally difficult to meet." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (internal quotation omitted).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This Court may consider only the holdings, and not the dicta, of the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Williams*, 529 U.S. at 381-82; *Miller v. Straub*, 299

F.3d 570, 578-79 (6th Cir. 2002). Moreover, "clearly established Federal law" does not include decisions of the Supreme Court announced after the last adjudication of the merits in state court. *Greene v. Fisher*, 565 U.S. 34, 37-38 (2011). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time of the state-court adjudication on the merits. *Miller v. Stovall*, 742 F.3d 642, 644 (6th Cir. 2014) (citing *Greene*, 565 U.S. at 38).

A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in the Supreme Court's cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Bell*, 535 U.S. at 694 (citing *Williams*, 529 U.S. at 405-06). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods*, 575 U.S. at 316 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). In other words, "[w]here the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *White v. Woodall*, 572 U.S. 415, 424 (2014) (internal quotations omitted).

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

court. *See Sumner v. Mata*, 449 U.S. 539, 546 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989).

III. Discussion

A. Great weight of the evidence (habeas issue II)

Petitioner argues that his conviction is against the great weight of the evidence. The Michigan Court of Appeals concluded otherwise. (Mich. Ct. App. Op., ECF No. 9-13, PageID.1482-1483.)

The assertion that a conviction was against the great weight of the evidence does not state grounds for habeas corpus relief. The extraordinary remedy of habeas corpus lies only for a violation of the Constitution. 28 U.S.C. § 2254(a). The Michigan courts apply the great-weight-of-the-evidence standard to determine whether to grant a new trial. *See People v. Lemmon*, 576 N.W.2d 129, 137 (Mich. 1998). This question is distinct from the due-process guarantee offended by insufficient evidence and "does not implicate issues of a constitutional magnitude." *Id.* at 133 n.8. As a consequence, a "weight of the evidence claim" is purely a matter of state law and is not cognizable on habeas review. *See* 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) ("[I]t is only noncompliance with federal law that renders a state's criminal judgment susceptible to a collateral attack in the federal courts."); *Estelle v. McGuire*, 502 U.S. 62, 68 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *accord Chatman v. Warden Ross Corr. Inst.*, No. 2:10-cv-1091, 2013 WL 1663919, at *10 (S.D. Ohio Mar. 26, 2013); *Underwood v. Berghuis*, No. 1:08-cv-642, 2011 WL 693 8471, at *15 (W.D. Mich. Aug. 8, 2011) ("Since a 'weight of the evidence claim' is purely a matter of state law, it is not cognizable on habeas review."). Because this Court lacks authority to review a state court's application of its own law,

the state-court determination that the verdict was not against the great weight of the evidence is final.

B. Sufficiency of the evidence (habeas issue I)

Petitioner contends that there was insufficient evidence that "he caused the victim's death, . . . of a robbery, and . . . that he possessed a firearm, . . . to sustain the guilty verdict for Second Degree Murder, Armed Robbery or Felony Firearm." (Pet'r's Br., ECF No. 3, PageID.64.) A § 2254 challenge to the sufficiency of the evidence is governed by the standard set forth by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), which is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." This standard of review recognizes the trier of fact's responsibility to resolve reasonable conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* Issues of credibility may not be reviewed by the habeas court under this standard. *See Herrera v. Collins*, 506 U.S. 390, 401-02 (1993). Rather, the habeas court is required to examine the evidence supporting the conviction, in the light most favorable to the prosecution, with specific reference to the elements of the crime as established by state law. *Jackson*, 443 U.S. at 324 n.16; *Allen v. Redman*, 858 F.2d 1194, 1196-97 (6th Cir. 1988).

The *Jackson v. Virginia* standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. Moreover, because both the *Jackson* standard and AEDPA apply to Petitioner's claims, "the law commands deference at two levels in this case: First, deference should be given to the trier-of-fact's verdict, as contemplated by *Jackson*; second, deference should be given to the Michigan Court of Appeals' consideration of the trier-of-fact's verdict, as dictated by AEDPA." *Tucker v. Palmer*, 541 F.3d

652, 656 (6th Cir. 2008). This standard erects "'a nearly insurmountable hurdle'" for petitioners who seek habeas relief on sufficiency-of-the-evidence grounds. *Davis v. Lafler*, 658 F.3d 525, 534 (6th Cir. 2008) (quoting *United States v. Oros*, 578 F.3d 703, 710 (7th Cir. 2009)).

Although the Michigan Court of Appeals relied on state-law authority for the sufficiency standard, that state-law authority ultimately derived from *Jackson v. Virginia*.[2] Moreover, the court of appeals applied the standard exactly as *Jackson v. Virginia* directs—it considered the evidence in a light that favored the prosecution against the elements of the offenses as established by state law:

> Defendant initially challenges the absence of any eyewitness testimony or other evidence suggesting his possession of a firearm or weapon at the scene of the crime. Defendant acknowledged that he was present at the crime scene when certain events transpired. Defendant's aunt, Norma Lyte, observed defendant at the scene immediately before hearing gunshots and the car crash and saw someone wearing the same clothing as defendant running from the scene. Norma indicated a high degree of certainty that the person running from the scene was defendant. Defendant's cellular telephone was recovered from the crime scene, near the victim's body. A search of defendant's residence resulted in the retrieval of the type of ammunition consistent with that used in shooting the victim and a cellular telephone box matching the telephone belonging to defendant and found at the crime scene. The actual weapon used was never recovered. An analysis of defendant's cellular telephone and records obtained from the carrier, place defendant at the crime scene at the relevant times and serve to substantiate his activities throughout the day leading up to the murder. Telephone calls and text messages were exchanged between defendant and his codefendant, Jarvis Glenn, who was known to have been with the victim during the day, suggesting the victim, Glenn and defendant were in the same general area before the shooting occurred. The content of the text messages exchanged between defendant and Glenn imply a plan to take the victim's cellular telephones and an element of planning. The cause of the victim's death was attributable to two gunshot wounds. While witnesses did not observe defendant with a gun at the scene, photographs of defendant on his cellular telephone demonstrate he had access to weapons.
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> "Circumstantial evidence and the reasonable inferences it permits are sufficient to support a conviction, provided the prosecution meets its constitutionally based burden of proof beyond a reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). "It is for the trier of fact, not the appellate court,

[2] The court of appeals cited *People v. Tombs*, 697 N.W.2d 494, 501 (Mich. 2005), which, in turn, cites *People v. Wolfe*, 489 N.W.2d 748, 751 (Mich. 1992) (citing *Jackson v. Virginia*).

to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Further, it is well established that evidence of flight will support an inference of a defendant's consciousness of guilt. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). The term "flight" has been applied to actions such as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape from custody. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). "[I]t is always for the jury to determine whether evidence of flight occurred under such circumstances as to indicate guilt." *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008).

Ample evidence was adduced at trial that placed defendant at the scene and then fleeing the area immediately after the vehicular crash and gunshots. Defendant's cellular telephone was recovered close to the victim's body, and an analysis of the cellular telephone and the carrier records associated with it confirm defendant's presence in the area and his communications with Glenn, who had been with the victim, immediately before the shooting and indicating a plan or communications pertaining to a theft involving the victim. Evidence of where the victim's wounds were incurred further suggests that the victim was shot by someone outside of the victim's vehicle. It was undisputed that the victim was a drug dealer. Witnesses testified that the victim had indicated problems with his business in the 24-hour period preceding his death and that defendant worked for the victim. Taking this evidence in the light most favorable to the prosecution, we conclude that sufficient evidence was adduced to sustain defendant's convictions.

Defendant also argues that there was no proof of an armed robbery because the victim's cellular telephones, which the prosecution contended were what the defendant intended to steal, were not removed from the victim or his vehicle. Contrary to defendant's argument, "a completed larceny is no longer necessary to sustain a conviction for the crime of robbery or armed robbery." *People v Williams*, 491 Mich 164, 166; 814 NW2d 270 (2012).

Defendant further asserts that he provided a reasonable, alternative explanation for his presence in the area and his text messages with Glenn. This Court is not permitted to interfere with the role of the trier of fact in determining the weight of the evidence or the credibility of witnesses. *Hardiman,* 466 Mich at 428; *Kanaan*, 278 Mich App at 619. Further, inconsistent witness testimony does not render the evidence insufficient because such issues were for the jury to resolve in determining the credibility of the witnesses. *People v Smith*, 205 Mich App 69, 72 n 1; 517 NW2d 255 (1994). Based on the requirements that this Court "draw all reasonable inferences and make credibility choices in support of the jury verdict," *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), defendant's challenges to the sufficiency of the evidence premised on the credibility of witnesses are without merit.

(Mich. Ct. App. Op., ECF No. 9-13, PageID.1482.)

Petitioner's continuing challenge to the sufficiency of the evidence does not address the evidence referenced by the court of appeals or the inferences the court identified that might support the verdicts. Instead, Petitioner merely reiterates the arguments he made to the court of appeals: no witness saw Petitioner with a gun; no witness saw Petitioner fire a gun; no gun was recovered, there was no evidence of gunshot residue on Petitioner's clothing, there was no evidence anything was stolen, and no testimony demonstrates that Petitioner intended to rob Mr. Robinson (because the texts related to a different robbery). (Pet'r's Br., ECF No. 3, PageID.65-66; Pet'r's Reply Br., ECF No 12, PageID1747.)

The jurors obviously inferred that Petitioner (and not Jarvis Glenn) possessed and fired the gun that killed Mr. Robinson. Moreover, the jurors obviously concluded that Petitioner's claim that the texts related to a different robbery were not credible and then inferred that the texts related, instead, to the planned robbery of Mr. Robinson.

Jackson holds that it is the jury's province to draw reasonable inferences from basic facts to ultimate facts. 443 U.S. at 319. In *Coleman v. Johnson*, 566 U.S. 650 (2012), the Supreme Court provided guidance "in determining what distinguishes a reasoned inference from 'mere speculation.'" *Id.* at 655. The Court described a reasonable inference as an inference that a rational jury could make from the facts. Certainly, the inferences identified by the court of appeals—that Petitioner was present and in close proximity to the crime, that Petitioner and Glenn were planning to rob Robinson, that Petitioner fled the crime scene and then the city, and that Petitioner had access to weapons and ammunition—rationally flow from the underlying facts. The inferences are not compelled by those facts. They are simply rational. *Id.* at 656. To succeed in his challenge, Petitioner must show that the identified inferences are irrational. He has not.

Instead of attacking the rationality of the inferences that support the verdict, Petitioner offers other evidence and inferences—evidence and inferences that favor him—that, if credited, support the conclusion that Petitioner was not guilty of the charged crimes. Petitioner's argument asks this Court to turn the *Jackson* standard on its head. This Court may not, under *Jackson*, invade the province of the jury to draw inferences and make credibility determinations that favor Petitioner. Petitioner has failed to show that the court of appeals' determination that the evidence was sufficient to convict him is contrary to, or an unreasonable application of, clearly established federal law. Accordingly, he is not entitled to habeas relief on his sufficiency claim.

C. Sentence errors (habeas issue IV)

Petitioner contends that three of the offense variables were improperly scored when determining the appropriate minimum sentence range under the Michigan sentencing guidelines. Claims concerning the improper application of sentencing guidelines are state-law claims and typically are not cognizable in habeas corpus proceedings. *See Hutto v. Davis*, 454 U.S. 370, 373-74 (1982) (federal courts normally do not review a sentence for a term of years that falls within the limits prescribed by the state legislature); *Austin v. Jackson*, 213 F.3d 298, 301-02 (6th Cir. 2000) (alleged violation of state law with respect to sentencing is not subject to federal habeas relief). There are circumstances that might render a guidelines scoring issue cognizable on habeas review. For example, a sentence may violate due process if it is based upon material "misinformation of constitutional magnitude." *Roberts v. United States,* 445 U.S. 552, 556 (1980); *see also United States v. Tucker,* 404 U.S. 443, 447 (1972); *Townsend v. Burke,* 334 U.S. 736, 741 (1948). Or, if a mandatory minimum sentence were determined based on "judge-found" facts the sentence could violate Sixth Amendment rights.

Petitioner makes such a Sixth Amendment claim for the three offense variable scores. Petitioner bases his argument on the line of cases beginning with *Apprendi v. New Jersey*,

530 U.S. 466 (2000), and including *Blakely v. Washington*, 542 U.S. 296 (2004), *United States v. Booker*, 543 U.S. 220 (2005), and *Alleyne v. United States*, 570 U.S. 99 (2013). In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. *Apprendi* enunciated a new rule of Sixth Amendment jurisprudence.

In the subsequent case of *Blakely*, the Court applied the rule of *Apprendi* to a state sentencing-guideline scheme, under which the maximum penalty could be increased by judicial fact-finding. The *Blakely* Court held that the state guideline scheme violated the Sixth and Fourteenth Amendments, and reiterated the rule that any fact that increased the maximum sentence must be "admitted by the defendant or proved to a jury beyond a reasonable doubt." *See Booker*, 543 U.S. at 232 (citing *Blakely*, 542 U.S. at 303).

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court determined its conclusion with regard to the state sentencing guideline scheme in *Blakely* would also apply to the federal sentencing guidelines. One group of five justices concluded that the federal sentencing guidelines ran afoul of the Sixth Amendment. Another group of five justices determined the appropriate remedy was to make the guidelines discretionary.

Subsequently, in *Alleyne v. United States*, 570 U.S. 99 (2013), the Supreme Court held that the *Blakely* line of cases applies equally to mandatory minimum sentences. Petitioner was sentenced in Wayne County a little over one year after *Alleyne*.

At the time Petitioner was sentenced, however, the Michigan Court of Appeals had already concluded that *Alleyne* only prohibited judicial factfinding used to determine a mandatory minimum sentence; it had no impact on judicial factfinding in scoring the sentencing guidelines

producing a minimum range for an indeterminate sentence, the maximum of which is set by law. *See People v. Herron*, 845 N.W.2d 533, 539 (Mich. App. 2013). The Sixth Circuit also suggested that *Alleyne* did not decide the question whether judicial factfinding under Michigan's indeterminate sentencing scheme violated the Sixth Amendment and, as a consequence, the question was not a matter of clearly established Supreme Court precedent. *Kittka v. Franks*, 539 F. App'x 668, 673 (6th Cir. 2013); *see also Saccoccia v. Farley*, 573 F. App'x 483, 485 (6th Cir. 2014) ("But *Alleyne* held only that 'facts that increase a mandatory *statutory* minimum [are] part of the substantive offense.'. . . It said nothing about guidelines sentencing factors . . . .") (emphasis added). The Sixth Circuit has since clarified that "Michigan's sentencing regime violated *Alleyne*'s prohibition on the use of judge-found facts to increase mandatory minimum sentences." *Robinson v. Woods*, 901 F.3d 710, 716 (6th Cir. 2018).

While Petitioner's case was pending in the Michigan Court of Appeals, the Michigan Supreme Court granted leave to appeal on an application that raised the *Alleyne* issue. *People v. Lockridge*, 846 N.W.2d 925 (Mich. 2014). The Michigan Supreme Court decided the *Herron* decision was wrong, reasoning that, because the "guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range," they increase the "mandatory minimum" sentence under *Alleyne*. *People v. Lockridge*, 870 N.W.2d 502, 506 (Mich. 2015) (emphasis in original). As a consequence, the *Lockridge* court held that the mandatory application of Michigan's sentencing guidelines was unconstitutional. The Court's remedy, consistent with *Booker*, was to make the guidelines advisory only. *Id.* at 520-21.

The Michigan Supreme Court made its holding in *Lockridge* applicable to cases still "pending on direct review." *Id.* at 523. Petitioner's case was still pending on direct review at the time the *Lockridge* court reached its decision.

The *Lockridge* court identified a limited group of defendants that might demonstrate the potential for plain error sufficient to warrant a remand to the trial court: "defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure . . . ." *Id.* at 522 (footnote omitted). If a remand was appropriate, the supreme court called upon the trial court, on remand, to determine if it "would have imposed a materially different sentence but for the unconstitutional restraint . . . ." *Id.* at 524.

Petitioner moved the Michigan Court of Appeals to remand his case to the trial court for resentencing under *Lockridge*. The court of appeals denied the motion because Petitioner had failed to show that he was entitled to that relief. (Mich. Ct. App. Order, ECF No. 9-13, PageID.1584.) The court explained that determination in its opinion.

The court of appeals agreed with Petitioner that Offense Variable 5, regarding psychological injury to the victim's family, was scored using "judge-found" facts. (Mich. Ct. App. Op., ECF No. 9-13, PageID.1485-1487.) Similarly, Offense Variable 14, regarding Petitioner's role as a leader in the crime, was scored using "judge-found" facts. (*Id.*) The court concluded that Offense Variable 13, however, regarding whether Petitioner's felonious acts constituted a continuing pattern of criminal behavior, were scored using facts found by the jury or admitted by Petitioner when he testified. (*Id.*) Taking into account these changes, the court of appeals concluded that Petitioner's *Lockridge*-adjusted Offense Variable score was 105, not 130 as initially scored. (*Id.*) That score, however, would leave Petitioner in exactly the same cell in the relevant

sentencing guidelines grids. Mich. Comp. Laws §§ 777.61, 777.62. Thus, the court of appeals determined that Petitioner could not demonstrate that his guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and that any error was "harmless." (Mich. Ct. App. Op., ECF No. 9-13, PageID.1487-1488.)

"State courts' harmless-error determinations are adjudications on the merits, and therefore federal courts may grant habeas relief only where those determinations are objectively unreasonable." *O'Neal v. Balcarcel*, 933 F.3d 618, 624 (6th Cir. 2019) (citing *Davis v. Ayala*, 135 S. Ct. 2187, 2198-99 (2015)). In Petitioner's case, the court of appeals agreed with his argument that two of the offense variables were improperly scored using "judge-found" facts. The court of appeals disagreed regarding the third offense variable. With regard to that variable, the court reasoned as follows:

> "Under MCL 777.43, the trial court must score points under OV 13 on the basis of a defendant's felonious acts that constitute a continuing pattern of criminal behavior. If the sentencing offense was part of a pattern of felonious criminal activity involving three or more crimes against a person, the trial court must score OV 13 at 25 points." *People v Bemer*, 286 Mich App 26, 33; 777 NW2d 464 (2009). "When determining the appropriate points under this variable, 'all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.'" *Id.*, citing MCL 777.43(2)(a). With regard to the scoring of OV 13, defendant had a prior armed robbery conviction in 2010 in addition to his current convictions for second-degree murder and armed robbery. A pattern of criminal activity can be premised on multiple offenses arising from the same event or occurrence. *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). As such, the factual basis for the scoring of this variable comprised information admitted by defendant or found by the jury premised on the guilty verdict of two of the charged offenses and defendant's acknowledgment of his prior conviction. See *Jackson*, ___ Mich App at ___; slip op at 13 ("The United States Supreme Court has recognized that a defendant's admission of a prior conviction satisfies the requirement that a sentencing enhancement be based on facts admitted by a defendant or found by a jury."). Therefore, the scoring of OV 13 was supported by facts admitted by defendant and were properly considered in defendant's total OV score. *Id.*

(Mich. Ct. App. Op., ECF No. 9-13, PageID.1486.) The record supports the court's conclusion that the jury's verdict and Petitioner's admissions evidence his commission of the requisite number

of offenses. The court's further conclusion that the sentencing guidelines require scoring 25 points under the circumstances presented is a state court determination of state law that is binding on this Court. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983). The Sixth Circuit recognizes "'that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.'" *Stumpf v. Robinson*, 722 F.3d 739, 746 n.6 (6th Cir. 2013) (quoting *Bradshaw*, 546 U.S. at 76); *see also Thomas v. Stephenson*, 898 F.3d 693, 700 n.1 (6th Cir. 2018) (same).

The appellate court's determination that any error was harmless because the properly scored guidelines yield the same minimum sentence range is logically unassailable. Whether the trial court exercised its discretion to select a minimum sentence from a particular minimum sentence range based on an OV score of 130 points or 105 points simply does not matter. Therefore, the appellate court's determination of harmlessness is reasonable and forecloses habeas relief.

D. Ineffective assistance of trial counsel (habeas issue III)

Petitioner contends his trial counsel was ineffective. Counsel failed to "file certain motions, requests an evidentiary hearing, and pursue certain lines of questioning at trial . . . ." (Pet'r's Br., ECF No. 3, PageID.68.)

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-prong test by which to evaluate claims of ineffective assistance of counsel. To establish 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. *Id.* at 687. A court considering a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional

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

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

1. Counsel's failure to object to offense variable scoring

Petitioner contends that trial counsel was ineffective because he failed to object to the scoring of the three variables identified above. The Michigan Court of Appeals rejected that claim: "Notably, at the time of defendant's sentencing our Supreme Court had not issued its decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015)[; d]efense counsel cannot be required to be prescient or knowledgeable regarding rulings not yet made." (Mich. Ct. App.

Op., ECF No. 9-13, PageID.1486.) At the time of Petitioner's sentencing, the state of the law in Michigan was that "judge-found" facts could be used to score the sentencing guidelines. *Herron*, 845 N.W.2d at 539. Had counsel objected on the grounds Petitioner proposes, the objection would have been denied as meritless. "Omitting meritless arguments is neither professionally unreasonable nor prejudicial." *Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013).

Moreover, even if trial counsel's failure to object were professionally unreasonable, that failure was not prejudicial on another level. As explained above, any *Lockridge* error was harmless. The determination that any error was harmless necessarily means that it is not prejudicial under *Strickland*. *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (explaining that the *United States v. Agurs*, 427 U.S. 97 (1976), materiality standard, later adopted as the prejudice standard for ineffective assistance of counsel claims, requires the habeas petitioner to make a greater showing of harm than is necessary to overcome the harmless error test of *Brecht*); *see also Wright v. Burt*, 665 F. App'x 403, 410 (6th Cir. 2016) ("[O]ur previous analysis of *Strickland* prejudice applies to the assessment of whether the Confrontation Clause violation was harmless error under *Brecht*."); *Bell v. Hurley*, 97 F. App'x 11, 17 (6th Cir. 2004) ("Because we find the error to be harmless Bell cannot meet the prejudice requirement of *Strickland* . . . ."); *Kelly v. McKee*, No. 16-1572, 2017 WL 2831019 at *8 (6th Cir. Jan. 24, 2017) ("Because Kelly suffered harmless error at best, he cannot establish that he suffered prejudice [under *Strickland*].").

2. Counsel's failure to object to rebuttal testimony from the victim's brother

After Petitioner testified that he did not know the victim and had not sold drugs for the victim, the prosecutor put on rebuttal testimony from the victim's brother, Tyrone Thomas. Mr. Thomas testified that Petitioner worked for the victim, selling drugs. (Trial Tr. VI, ECF No. 9-9, PageID.1360-1363.) The trial court had ordered all witnesses to be sequestered until they

testified. (Trial Tr. I, ECF No. 9-4, PageID.329-331; Trial Tr. II, ECF No. 9-5, PageID.517.) Petitioner argued to the court of appeals that his counsel was ineffective because counsel "did not inquire whether this person had been in the Courtroom at all during the trial." (Pet'r's Appeal Br., ECF No. 9-13, PageID.1546.)

The court of appeals rejected Petitioner's claim because the witness's testimony was relevant and because Petitioner had failed to assert, much less show, that the witness "was present in the courtroom during the elicitation of other evidence or testimony . . . ." (Mich. Ct. App. Op., ECF No. 9-13, PageID.1485.) Petitioner does not respond to the court of appeals' determination in his petition or brief. Indeed, he does not address it at all; he merely repeats the argument from his appeal brief. Thus, Petitioner has offered no record support for the premise of this argument—that the witness violated the sequestration order.

Because Petitioner has not shown that the court of appeals determinations regarding the witness's presence during other testimony is unreasonable on the record, he cannot show that his counsel's actions were professionally unreasonable or that he suffered any prejudice. Therefore, Petitioner has failed to show that the court of appeals determination that this ineffective assistance claim has no merit is contrary to, or an unreasonable application of, *Strickland.* Accordingly, Petitioner has failed to establish an entitlement to habeas relief on this claim.

3. Counsel's failure to move for separate trials or juries

Petitioner complains that his counsel rendered ineffective assistance because counsel failed to move for separate trials, or at least separate juries. There is no decision of the United States Supreme Court clearly establishing a right under the Due Process Clause to separate trials or juries. Joint trials play a vital role in the criminal justice system. *Richardson v. Marsh,* 481 U.S. 200, 209 (1987). Joint trials generally serve the interests of justice by avoiding

inconsistent jury verdicts and facilitating the efficiency and fairness of the criminal justice system. *Id.* at 209-10.

The Supreme Court has delineated few constitutional rules in this area. The Court has held that separate trials are constitutionally required where the prosecution intends to introduce the confession of a co-defendant which incriminates another defendant. *See Bruton v. United States*, 391 U.S. 123, 137 (1968). The *Bruton* rule is designed to vindicate a defendant's right to confront his accusers, so separate trials are not necessary when the co-defendant is subject to cross-examination. There was no Confrontation Clause problem during Petitioner's trial because Jarvis Glenn's very brief statement to the police did not incriminate Petitioner.

Beyond the *Bruton* rule, the Supreme Court has left the matter of severance to state law and the trial judge's discretion. The Court remarked in *United States v. Lane*, 474 U.S. 438 (1986), that the denial of a motion for severance does not in and of itself implicate constitutional rights. Because there was no *Bruton* issue, it was not professionally unreasonable for Petitioner's counsel to forego a motion for separate trials or juries based on federal constitutional law. That leaves only the question of whether counsel erred when he failed to file such a motion based on state law.

The Michigan Court of Appeals rejected Petitioner's claim that separate trials or juries were appropriate under state law:

> Defendant next asserts trial counsel was ineffective for failing to obtain a separate trial or jury from his codefendant, contending their defenses were antagonistic. As discussed in *People v Bosca*, 310 Mich App 1, 44; 871 NW2d 307 (2015) (citations and quotation marks omitted):
>
> > There is no absolute right to separate trials, and in fact, a strong policy favors joint trials in the interest of justice, judicial economy, and administration. Severance should be granted when defenses are antagonistic. A defense is deemed antagonistic when it appears that a codefendant may testify to exculpate himself and to incriminate the defendant. Further, defenses must be not only inconsistent, but also

> mutually exclusive or irreconcilable. In other words, the tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other. Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice.
>
> It is difficult to comprehend defendant's contention that the defense Glenn asserted was antagonistic, particularly given the absence of any testimony by Glenn or witnesses called on his behalf. The evidence demonstrates that defendant and Glenn were in the same general area at the time of the relevant events. Evidence also established that Glenn was with the victim earlier in the day and that Glenn and defendant exchanged cellular telephone calls and text messages near the time of the events. Both defendant and Glenn asserted they were not perpetrators of the crime and did not accuse each other. Hence, the defenses were not antagonistic or irreconcilable necessitating severance of trials or a separate jury.
>
> Defendant also argues that the inability of the jury to reach a verdict with regard to certain charges against Glenn proves that separate juries or trials were necessary. Defendant suggests that the guilty verdicts the jury rendered on his charges serves as a means for the jury to "rationalize" their inability to render a verdict on the same charges with regard to Glenn. Defendant asserts that a separate jury or trial would have forced the jury to focus on the lack of evidence against defendant instead of obfuscating the issue of guilt caused by Glenn's finger-pointing. But contrary to defendant's theory, "it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *People v Hana*, 447 Mich 325, 350; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994), quoting *Zafiro v United States*, 506 US 534, 540; 113 S Ct 933; 122 L Ed 2d 317 (1993). Further, the trial court allayed any risk of prejudice by instructing the jury to consider each defendant separately. See *Hana*, 447 Mich at 351. Because defendant and Glenn did not present mutually exclusive defenses, the use of a joint trial and jury was not prejudicial, and the jury's ability to assess the guilt or innocence of each defendant separately was not hindered.

(Mich. Ct. App. Op., ECF No. 9-13, PageID.1484-1485.)[3] The court of appeals determination that, as a matter of state law, separate trial or juries were not warranted, is binding on this Court. Thus,

[3] The court of appeals relied on *Hana*, which quoted from *Zafiro v. United States*, 506 U.S. 534 (1993). The Sixth Circuit, however, recognizes that *Zafiro* is based on the Federal Rules of Criminal Procedure, not constitutional grounds. *See Phillips v. Million*, 374 F.3d 395, 398 (6th Cir. 2004). Although *Zafiro's* value as precedent in the habeas context is limited, the Court's analysis is instructive. In *Zafiro*, the joined co-defendants challenged the failure to sever because they offered conflicting defenses. The Supreme Court declined to adopt a "bright line" rule requiring severance whenever co-defendants have conflicting defenses. *Zafiro*, 506 U.S. at 538. "Mutually antagonistic defenses are not prejudicial *per se*. Moreover, Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." *Id.* at 538-39. The Supreme Court noted that "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Id.* As the Michigan Court of Appeals observed, such a limiting instruction was given by the trial court in Petitioner's case. (Trial Tr. VI, ECF No. 9-9, PageID.1421.)

a motion seeking separate trials or juries would not have been meritorious. As noted above, "[o]mitting meritless arguments is neither professionally unreasonable nor prejudicial." *Coley*, 706 F.3d at 752. Accordingly, Petitioner has failed to show that the court of appeals' rejection of this ineffective assistance claim is contrary to, or an unreasonable application of *Strickland*, and he is not entitled to relief on that claim.

4. Other failures

Petitioner made passing reference to other failures by counsel in his appellate briefs: counsel failed to file certain motions, counsel failed to request an evidentiary hearing, counsel failed to pursue certain lines of questioning at trial; and trial counsel failed to provide appellate counsel with copies of Petitioner's trial notes asking trial counsel to take certain actions. (Pet'r's Appeal Br., ECF No. 9-13, PageID.1544-1545.) Petitioner repeats that list in his habeas brief. (Pet'r's Br., ECF No. 3, PageID.67-68.) The Michigan Court of Appeals addressed these claims as follows:

> First, defendant contends that trial counsel was ineffective for not seeking an evidentiary hearing or pursuing certain lines of questioning that he had requested. Notably, defendant fails to provide any detail regarding these alleged omissions by his trial counsel or to elucidate their relevance. Defendant's failure to provide any authority or to identify evidence from the record to support his claim constitutes an abandonment of this aspect of the issue on appeal. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (an appellant cannot simply announce his position and leave it for this Court to discover and rationalize the basis for his claims).
>
> Similarly, the failure of trial counsel to turn over his file to appellate counsel does not serve to demonstrate that counsel was ineffective at trial. Defendant's claim is conspicuously deficient of any details regarding the line of questioning he wished counsel to pursue or the types of motions or documents he wished his attorney to file with the trial court. To prevail on an ineffective assistance of counsel claim, "a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Trakhtenberg*, 493 Mich at 52. Counsel's decisions as to whether to call or question witnesses and what evidence to present are presumed to be matters of trial strategy, which this Court will not second-guess

> with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

(Mich. Ct. App. Op., ECF No. 9-13, PageID.1484.)

Petitioner does not respond to the court of appeals' analysis in any way. He simply restates the argument he made to the court of appeals. Thus, Petitioner does not show how the court of appeals' analysis is contrary to *Strickland*, nor does he show how the appellate court's factual determinations regarding these claims is unreasonable on the record. And, critically, Petitioner does not identify the motions his counsel failed to file, the nature of the evidentiary hearing counsel failed to seek, or the lines of questioning counsel failed to pursue. Petitioner also fails to provide any explanatory detail in his reply brief. (Pet'r's Reply Br., ECF No. 12, PageID.1751-1756.) It is clear Petitioner believes that counsel did not investigate something and that Petitioner believes he was prejudiced as a result. Petitioner just fails to explain what counsel failed to investigate beyond the sentencing, sequestration, and separate trial issues, which are discussed above. Accordingly, Petitioner has failed to meet his burden under 28 U.S.C. § 2254(d) with regard to these issues and he is not entitled to habeas relief on these claims.

Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (per curiam). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, I have

examined each of Petitioner's claims under the *Slack* standard. Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of Petitioner's claims. *Id.*

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

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

Recommended Disposition

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

Dated: February 11, 2020

/s/ Ray Kent
United States Magistrate Judge

Neutral

As of: March 2, 2022 12:19 AM Z

Lewis v. Smith

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

January 27, 2021, Decided; January 27, 2021, Filed

Case No. 1:18-CV-535

Reporter

2021 U.S. Dist. LEXIS 14806 *; 2021 WL 266619

JESSIE VORNELL LEWIS, Petitioner, v. WILLIE SMITH, Respondent.

Prior History: *Lewis v. Smith, 2020 U.S. Dist. LEXIS 248719 (W.D. Mich., Feb. 11, 2020)*

Core Terms

magistrate judge, certificate, recommending, ineffective, argues

Counsel: **[*1]** Jessie Vornell Lewis #733348, petitioner, Pro se, Ionia, MI.

For Willie Smith, Warden, named as Willie O. Smith, respondent: John S. Pallas, MI Dept Attorney General (Appellate), Appellate Division, Lansing, MI.

Judges: HON. GORDON J. QUIST, UNITED STATES DISTRICT JUDGE.

Opinion by: GORDON J. QUIST

Opinion

ORDER ADOPTING REPORT AND RECOMMENDATION AND DENYING PETITIONER'S HABEAS PETITION

Petitioner, Jessie Vornell Lewis, has filed a habeas petition pursuant to *28 U.S.C. § 2254*. The matter was referred to U.S. Magistrate Judge Ray Kent, who issued a Report and Recommendation (R & R), recommending that the Court deny Lewis' petition, deny a certificate of appealability, and not certify that an appeal would not be taken in good faith. (ECF No. 13.) Lewis filed objections to the R & R. (ECF No. 16.) Upon receiving objections to an R & R, the district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *28 U.S.C. § 636(b)(1)*. This Court may accept, reject, or modify any or all of the magistrate judge's findings or recommendations. *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 72(b)*. After conducting a de novo review of the R & R, the objections, and the pertinent portions of the record, the Court concludes **[*2]** that the R & R should be adopted.

OBJECTIONS TO FACTUAL ALLEGATIONS

Lewis objects to several parts of the magistrate judge's recitation of the facts because the statements are based on "hypothetical assumptions." (ECF No. 16 at PageID.1794.) Lewis first takes issue with the magistrate judge's statement that Lewis' text messages suggested that he planned to rob someone. Lewis' testimony confirms the accuracy of the magistrate judge's statement—"Well, I seen something that I wanted that the individuals had in the house, which is a

cellphone and the computer. So at this time I text one of my friends and tell him about the situation but I wanted a ride to be there for when I take the phones and the computer . . . ." (ECF No. 9-9 at PageID.1311.)

Lewis next objects to the magistrate judge's statements regarding the cellphone found at the crime scene and the murder weapon. Lewis complains that the magistrate judge should have explained that the cell phone found at the crime scene could have been dropped by Lewis' co-defendant. He also contends: "This report correctly identifies that the police found ammunition in [Lewis'] residence that matched the caliber of the gun that shot [the victim], **[*3]** however, this sentence is an assumption, because the gun used to shoot [the victim] was never found, but more importantly, no weapon was found in the Petitioner's residence." (ECF No. 16 at PageID.1796.) The triers of fact, not the habeas corpus court, are tasked with resolving conflicting inferences from the evidence. *Moreland v. Bradshaw, 699 F.3d 908, 920 (6th Cir. 2012)*. Further, the magistrate judge stated that no witness saw Lewis with a firearm and that the murder weapon was never found.

In his final objection to the magistrate judge's factual recitation, Lewis argues that the magistrate judge should have included more of his trial testimony because his testimony is entitled to a presumption of correctness pursuant to *28 U.S.C. § 2254(e)(1)*. But the presumption of correctness under *§ 2254(e)(1)* does not apply to Lewis' testimony since it is not "a determination of a factual issue made by a State court." *Id.*

Accordingly, the Court finds that Lewis' objections to the magistrate judge's factual recitation do not demonstrate any factual or legal error in the R & R.

SUFFICIENCY OF THE EVIDENCE

Lewis argues that the magistrate judge erred in recommending that the Court conclude that Lewis is not entitled to relief on his sufficiency of the evidence claim. Lewis again makes **[*4]** the same argument that he raised in the state courts and before the magistrate judge—he argues that no witness testified to seeing Lewis with a firearm or firing the firearm during the robbery. As the magistrate judge noted, the Michigan Court of Appeals cited substantial evidence that supported each conviction. Lewis again fails to address any of the evidence cited by the Michigan Court of Appeals. The Court agrees with the magistrate judge's conclusion that the Michigan Court of Appeals' decision is not contrary to or an unreasonable application of clearly established federal law. Accordingly, Lewis is not entitled to habeas relief on his sufficiency of the evidence claim.

INEFFECTIVE ASSISTANCE OF COUNSEL

Lewis contends that the magistrate judge erred in recommending that the Court conclude that Lewis is not entitled to relief on his ineffective assistance of counsel claim. Lewis first argues that his attorney rendered ineffective assistance of counsel by failing to file a motion for a separate trial. He claims that the defense presented by his co-defendant was antagonistic to his defense.

"[I]t is well settled that defendants are not entitled to severance merely because they may have **[*5]** a better chance of acquittal in separate trials." *Zafiro v. United States, 506 U.S. 534, 540, 113 S. Ct. 933, 938, 122 L. Ed. 2d 317 (1993)*. As the magistrate judge noted, the United States Supreme Court has delineated few constitutional rules in this area. (ECF No. 13 at PageID.1778 citing *Bruton v. United States, 391 U.S. 123, 137, 88 S. Ct. 1620, 1628, 20 L. Ed. 2d 476 (1968)*.) None of those constitutional rules are

implicated in this case. The Michigan Court of Appeals found that separate trials or juries were not warranted as a matter of state law. Because Lewis was not entitled to a separate trial under state law, the Michigan Court of Appeals determined that Lewis did not suffer any prejudice. The Sixth Circuit repeatedly has recognized "'that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.'" *Stumpf v. Robinson, 722 F.3d 739, 746 n.6 (6th Cir. 2013)* (citation omitted). Lewis could not possibly have been prejudiced by the failure to raise an unmeritorious motion. Thus, the Michigan Court of Appeals' decision is not contrary to or an unreasonable application of clearly established federal law.

Lewis next argues that his attorney rendered ineffective assistance of counsel by failing to object to rebuttal testimony from the victim's brother. Lewis' argument on this issue is confusing but relates **[*6]** to whether the witness was properly sequestered. The Michigan Court of Appeals rejected the claim because Lewis had not shown that the witness was present in the courtroom during the trial. As the magistrate judge noted, Lewis has still not offered any record support for the premise that the witness violated the sequestration order. The Court agrees that Lewis has not shown that his counsel's actions were professionally unreasonable or that he suffered any prejudice. Accordingly, the Michigan Court of Appeals' decision is not contrary to or an unreasonable application of clearly established federal law.

Lewis finally contends that his attorney rendered ineffective assistance of counsel by failing to object to offense variable scoring. The Michigan Court of Appeals extensively addressed this issue. The court concluded that (1) defense counsel was not ineffective for failing to object based on *People v. Lockridge, 498 Mich. 358, 870 N.W.2d 502*; *498 Mich. 358, 870 N.W.2d 502 (2015)*, because the Michigan Supreme Court had not yet issued that ruling, and (2) any error was harmless because the corrections to the scoring variables did not alter Lewis' guideline range. As the magistrate judge points out, the state court's determination that any error was harmless necessarily **[*7]** means that it is not prejudicial under *Strickland*. (ECF No. 13 at PageID.1776.) Lewis has not shown otherwise. Thus, the Michigan Court of Appeals' decision is not contrary to or an unreasonable application of clearly established federal law.

CERTIFICATE OF APPEALABILITY

Pursuant to *28 U.S.C. § 2253(c)(2)*, the Court must also determine whether a certificate of appealability should be granted. A certificate should issue if Lewis has demonstrated a "substantial showing of a denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*. The Sixth Circuit has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio, 263 F.3d 466, 467 (6th Cir. 2001)*. Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id. at 467*. Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*; *Murphy, 263 F.3d at 467*. Therefore, the Court has considered Lewis' claim, including his objections, under the *Slack* standard.

Under *Slack, 529 U.S. at 484, 120 S. Ct. at 1604*, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." For the reasons stated above, the Court finds that reasonable jurists could not find that this **[*8]** Court's denial of Lewis' claim was debatable or wrong. Thus, the Court will deny Lewis a certificate of

appealability.

CONCLUSION

Having reviewed Lewis' objection and finding no basis for habeas relief,

IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 13) is adopted as the Opinion of this Court.

IT IS FURTHER ORDERED that Lewis' habeas corpus petition (ECF No. 1) is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED** by this Court.

A separate judgment will enter.

This case is **concluded**.

Dated: January 27, 2021

/s/ Gordon J. Quist

GORDON J. QUIST

UNITED STATES DISTRICT JUDGE

JUDGMENT

Judgment is hereby entered in favor of Respondent and against Petitioner.

Dated: January 27, 2021

/s/ Gordon J. Quist

GORDON J. QUIST

UNITED STATES DISTRICT JUDGE

Neutral

As of: March 2, 2022 12:21 AM Z

Lewis v. Davids

United States Court of Appeals for the Sixth Circuit

December 3, 2021, Filed

No. 21-1344

Reporter

2021 U.S. App. LEXIS 35834 *

JESSIE VORNELL LEWIS, Petitioner-Appellant, v. JOHN DAVIDS, Warden, Respondent-Appellee.

Prior History: *Lewis v. Smith, 2020 U.S. Dist. LEXIS 248719, 2020 WL 8474855 (W.D. Mich., Feb. 11, 2020)*

Core Terms

district court, fact-finding, trial counsel, score, jurists, state court of appeal, sentence, argues, robbery, sentencing guidelines, separate trial, armed robbery, cell phone, crash, insufficient evidence, court of appeals, separate jury, text message, state law, ineffective, convicted, variables, shooting, murder

Case Summary

Overview

HOLDINGS: [1]-Circumstantial evidence supported the jury's finding that defendant committed the crimes and held a gun while doing it where he admitted being at the crime scene and witnessed placed him at the scene; [2]-Finding defendant guilty of all three crimes did not fall below the threshold of bare rationality; [3]-The failure to move for separate trials or separate juries was neither professionally unreasonable nor prejudicial, and rejection of this subclaim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent; [4]-Defendant was properly assigned 25 points for OV 13, as there had been no judicial fact-finding, and the underlying facts had either been found by a jury or admitted by defendant; [5]-Defendant fell within the same guidelines range and if there was no prejudice, there was no ineffective assistance of counsel.

Outcome

COA denied.

LexisNexis® Headnotes

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

HN1[] **Appeals, Certificate of Appealability**

A COA shall issue if the applicant has made a substantial showing of the denial of a constitutional right, *28 U.S.C.S. § 2253(c)(2)*. If the district court denied the *28 U.S.C.S. § 2254* petition on the merits, the applicant must show that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. If the district court

denied the petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the applicant shows that jurists of reason would find debatable (a) whether the petition states a valid claim of the denial of a constitutional right and (b) whether the district court was correct in its procedural ruling.

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Evidence > Weight & Sufficiency

HN2 **Substantial Evidence, Sufficiency of Evidence**

Sufficiency is reviewed under the deferential standard set forth in Jackson v. Virginia: whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Elements

Criminal Law & Procedure > ... > Murder > Definitions > Malice

HN3 **First-Degree Murder, Elements**

In Michigan, the elements of second-degree murder are (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.

Criminal Law & Procedure > ... > Robbery > Armed Robbery > Elements

HN4 **Armed Robbery, Elements**

The elements of armed robbery are that (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon.

Criminal Law & Procedure > ... > Use of Weapons > Commission of Another Crime > Elements

HN5 **Commission of Another Crime, Elements**

The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.

Criminal Law & Procedure > Trials > Witnesses > Credibility

HN6 **Witnesses, Credibility**

Assessment of witness credibility is generally beyond the scope of Jackson review.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

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

HN7[] Criminal Process, Assistance of Counsel

To establish ineffective assistance, a defendant must show that (1) counsel's performance was deficient—objectively unreasonable under prevailing professional norms—and (2) it prejudiced the defense. Prejudice exists if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Examination of Witnesses > Admission of Codefendant Statements

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Criminal Law & Procedure > ... > Accusatory Instruments > Joinder & Severance > Joinder of Defendants

Criminal Law & Procedure > ... > Joinder & Severance > Defective Joinder & Severance > Motions for Severance

HN8[] Criminal Process, Right to Confrontation

A defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. Beyond the Burton rule, the Supreme Court has left the matter of severance to state law and the trial judge's discretion.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Sentencing > Ranges

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

Constitutional Law > Bill of Rights > State Application

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

HN9[] Criminal Process, Right to Jury Trial

The *Sixth Amendment*, as applied to the states through the *Fourteenth Amendment*, requires that each element of a crime be proved to a jury beyond a reasonable doubt. Something can be an element even if not so labeled. The relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict? Hence the Supreme Court laid down this rule: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. The statutory maximum for purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. The same rule applies to any facts that increase the mandatory minimum sentence. In short, any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime and, except for prior convictions, must be

found by a jury. If sentencing guidelines are merely advisory, their use does not implicate the *Sixth Amendment*, and judicial fact-finding is allowed.

Governments > Courts > Judicial Precedent

HN10[] **Courts, Judicial Precedent**

The court also made the rule retroactively applicable to all cases pending on direct review.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN11[] **Imposition of Sentence, Factors**

If the sentencing offense was part of a pattern of felonious criminal activity involving three or more crimes against a person, the trial court must score OV 13 at 25 points. This further rule applies: When determining the appropriate points under OV 13, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN12[] **Effective Assistance of Counsel, Trials**

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Counsel: **[*1]** JESSIE VORNELL LEWIS, Petitioner - Appellant, Pro se, Ionia, MI.

For JOHN DAVIDS, Warden, Respondent - Appellee: John S. Pallas, Office of the Attorney General, Lansing, MI.

Judges: Before: MOORE, Circuit Judge.

Opinion

ORDER

Jessie Vornell Lewis, a pro se Michigan prisoner, appeals a district court judgment denying his petition for a writ of habeas corpus. *See 28 U.S.C. § 2254*. His notice of appeal has been construed as an application for a certificate of appealability ("COA"). *See Fed. R. App. P. 22(b)*.

Evidence presented at trial showed that, on April 7, 2014, Lewis killed Curtis Robinson while trying to rob him. Lewis did not act alone, though. His partner in at least the robbery was Jarvis Glenn. Glenn had been with Robinson earlier in the day, had been a passenger in his car, was seen in that car, and was apparently in the car with Robinson when it crashed. At least, Glenn was seen fleeing the area afterwards. It is unclear why the car crashed. What is clear is that it crashed into the car of Lewis's aunt parked in front of her house.

The aunt testified that she had been watching TV. Probably a couple of minutes before the crash, she had seen Lewis walking down the street talking on his cell phone. He had had what she called an "angry **[*2]** face." She had resumed watching TV, then heard the crash. Looking out the window, she saw that her car had been hit. Seconds later, she heard gunshots. She called 911, then went outside. She saw someone running down the street who had on the same outfit that Lewis had been wearing. She later told police she was 99% sure it was Lewis.

When the police arrived, they found Robinson lying face

down outside his car. He had been shot twice. The location of his wounds suggested that he had been shot by someone outside the car. Two cell phones were on the ground near the body. One belonged to Lewis. That phone and records obtained from the carrier showed that Lewis and Glenn had exchanged calls and text messages during the day and had communicated immediately before the shooting. The text messages implied that Lewis and Glenn had been planning to steal Robinson's cell phones. The murder weapon was never found. But police did find ammunition in Lewis's residence matching the caliber of the gun that shot Robinson.

Lewis and Glenn were tried together. Both were charged with felony-murder, armed robbery, and possession of a firearm during the commission of a felony ("felony-firearm"). The jurors **[*3]** convicted Glenn of armed robbery but deadlocked on the other two charges.

The jury convicted Lewis of second-degree murder (a lesser-included offense of felony-murder), armed robbery, and felony-firearm. The trial court sentenced him, as a third habitual offender, to imprisonment for 42-72 years. He appealed unsuccessfully, *People v. Lewis, No. 324267, 2016 Mich. App. LEXIS 1405, 2016 WL 4008383 (Mich. Ct. App. July 26, 2016), perm. app. denied, 500 Mich. 947, 890 N.W.2d 361 (Mich. 2017)*, then in 2018 timely filed his *§ 2254* petition pro se. It raised four claims: (1) the State presented insufficient evidence of guilt; (2) the verdict was against the great weight of the evidence; (3) trial counsel provided ineffective assistance; and (4) Lewis is entitled to be resentenced because the offense variables were scored based on judicial fact-finding. The magistrate judge recommended denying the petition and denying a COA. Lewis objected, but the district court adopted the magistrate judge's report and recommendation, denied the petition, and denied a COA. Lewis timely appealed.

HN1[↑] A COA shall issue "if the applicant has made a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*. If the district court denied the *§ 2254* petition on the merits, the applicant must show that "jurists of reason could disagree with the district court's resolution **[*4]** of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*. If the district court denied the petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the applicant shows that jurists of reason would find debatable (a) whether the petition states a valid claim of the denial of a constitutional right and (b) whether the district court was correct in its procedural ruling. *Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*.

Lewis fails to meet this standard.

In Claim 1, Lewis argues that the State presented insufficient evidence of second-degree murder, armed robbery, and felony-firearm. The state court of appeals held the claim meritless. *Lewis, 2016 Mich. App. LEXIS 1405, 2016 WL 4008383, at *1-3*. The district court held that this decision was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. *See 28 U.S.C. § 2254(d)(1)*.

HN2[↑] Sufficiency is reviewed under the deferential standard set forth in *Jackson v. Virginia*: "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*.

HN3[↑] In Michigan, the elements **[*5]** of second-

degree murder are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v. Reese, 491 Mich. 127, 815 N.W.2d 85, 94 (Mich. 2012)* (quoting *People v. Goecke, 457 Mich. 442, 579 N.W.2d 868, 878 (Mich. 1998)*).

HN4[↑] The elements of armed robbery are that

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon.

People v. Chambers, 277 Mich. App. 1, 742 N.W.2d 610, 614 (Mich. Ct. App. 2007) (footnote omitted).

HN5[↑] "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v. Avant, 235 Mich. App. 499, 597 N.W.2d 864, 869 (Mich. Ct. App. 1999)*.

Lewis argues that there is insufficient evidence that he committed these crimes, *see People v. Oliphant, 399 Mich. 472, 250 N.W.2d 443, 449 (Mich. 1976)* (holding that identity "is always an essential element in a criminal prosecution"), insufficient evidence of robbery, and insufficient evidence that he possessed a firearm.

The state court of appeals held that **[*6]** circumstantial evidence supported the jury's finding that Lewis committed these crimes and held a gun while doing it: First, he admitted being at the crime scene. Moreover, his aunt saw him there before the car crash and, after the shooting, saw someone wearing the same clothing running away. She "indicated a high degree of certainty" it was him. His cell phone was found near Robinson's body. And analysis of that phone and related records from the carrier place Lewis at the crime scene at the relevant times. Nor is that all. Lewis exchanged telephone calls and text messages with Glenn, who was known to have been with Robinson that day. Some of that communication occurred immediately before the shooting. The content of the text messages implied that Lewis and Glenn planned to steal Robinson's cell phones. Moreover, Robinson was shot by someone outside the car. Lewis had been outside the car. Ammunition consistent with the type used in the shooting was found in his residence. Finally, there was the already alluded-to evidence that Lewis fled, just after the shooting.

In response to the argument that there was no robbery, because Robinson's cell phones were not taken, the court pointed **[*7]** out that "a completed larceny is no longer necessary to sustain a conviction for the crime of robbery or armed robbery." *Lewis, 2016 Mich. App. LEXIS 1405, 2016 WL 4008383, at *3* (quoting *People v. Williams, 491 Mich. 164, 814 N.W.2d 270, 271 (Mich. 2012)*). To the argument that Lewis had testified that the text messages related to a robbery an hour earlier of a *different* person, not Robinson, the court responded that it was for the jury to determine the credibility of witnesses. *Id.*

Reasonable jurists could not disagree with the district court's conclusion that state-court rejection of this claim neither contradicted nor unreasonably applied clearly established Supreme Court precedent. *HN6*[↑] Assessment of witness credibility is generally beyond the scope of *Jackson* review. *Schlup v. Delo, 513 U.S. 298, 330, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)*. "The jury in this case was convinced, and the only

question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson, 566 U.S. 650, 656, 132 S. Ct. 2060, 182 L. Ed. 2d 978 (2012)*. Finding Lewis guilty of all three crimes did not fall below that threshold.

There is no need to reach Lewis's second claim (verdict against the great weight of the evidence). He concedes it is not cognizable on habeas review.

In Claim 3, Lewis argues that trial counsel was ineffective because he failed to (1) request separate trials or at least separate juries, (2) object **[*8]** to the rebuttal testimony from Robinson's brother, or (3) object to the trial court's using judicial fact-finding to score the offense variables. Lewis further complains that trial counsel failed to "file certain motions, request an evidentiary hearing, and pursue certain lines of questioning at trial." In a related complaint, Lewis argues that trial counsel failed to provide appellate counsel with the casefile. This prevented Lewis from fully explaining to appellate counsel what motions should have been filed, what questions should have been asked, and what the subject of the evidentiary hearing should have been.

The state court of appeals held this claim partly abandoned and wholly meritless. *Lewis, 2016 Mich. App. LEXIS 1405, 2016 WL 4008383, at *4-8*. The district court held that this decision was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent. Reasonable jurists could not disagree.

HN7[↑] To establish ineffective assistance, Lewis must show that (1) counsel's performance was deficient—objectively unreasonable under prevailing professional norms—and (2) it prejudiced the defense. *Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. Prejudice exists if there is a reasonable probability that, but for counsel's unprofessional errors, the result **[*9]** of the proceedings would have been different. *Id. at 694*.

Separate trials / separate juries. Lewis argues that, because he and Glenn had antagonistic defenses, trial counsel should have moved for separate trials or at least separate juries. But any such motion would have to have relied on federal or state law. Neither would have helped.

As the magistrate judge pointed out, "There is no decision of the United States Supreme Court clearly establishing a right under the *Due Process Clause* to separate trials or juries." *Lewis v. Smith, No. 1:18-cv-535, 2020 U.S. Dist. LEXIS 248719, 2020 WL 8474855, at *10 (W.D. Mich. Feb. 11, 2020)*. Of course, there is the rule established in *Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)*. *HN8*[↑] "[A] defendant is deprived of his rights under the *Confrontation Clause* when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." *Richardson v. Marsh, 481 U.S. 200, 201-02, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987)* (summarizing *Bruton*'s holding). But that does not apply here. Glenn did not accuse Lewis of anything. And as the magistrate judge noted, "Beyond the *Bruton* rule, the Supreme Court has left the matter of severance to state law and the trial judge's discretion." *Lewis, 2020 U.S. Dist. LEXIS 248719, 2020 WL 8474855, at 11*.

That leaves the issue controlled by state law. Lewis comes up short there too. The state court of appeals held **[*10]** that, under the facts of this case, state law did not require separate trials or separate juries. *Lewis, 2016 Mich. App. LEXIS 1405, 2016 WL 4008383, at *5-6*. That state-court interpretation of state law binds this

court. *See Bradshaw v. Richey, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005).*

The district court held that the failure to move for separate trials or separate juries in this case was neither professionally unreasonable nor prejudicial. Hence, as the district court further held, state-court rejection of this subclaim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent. Reasonable jurists could not debate the point.

Rebuttal witness. Lewis contends that after he testified, "the Prosecutor offered the testimony of [Robinson's brother] as a rebuttal witness." Trial counsel did not ask whether he had been in the courtroom during the trial, although the trial court had issued a sequestration order. Lewis argues that the brother's testimony "could have been avoided" had trial counsel objected. But as pointed out by both the state court, *Lewis, 2016 Mich. App. LEXIS 1405, 2016 WL 4008383, at *6*, and the district court, Lewis fails to show that Robinson's brother *had* been in the courtroom during the trial. Hence Lewis fails to make a substantial showing that counsel's failure to object was either professionally **[*11]** unreasonable or prejudicial. The district court determined that the state court's rejection of this claim neither contradicted nor unreasonably applied clearly established Supreme Court precedent. Reasonable jurists could not disagree.

Offense-variable scoring. Lewis argues that trial counsel should have objected to the trial court's use of judicial fact-finding to score offense variables 5 (psychological injury to victim's family), 13 (continuing pattern of criminal behavior), and 14 (offender was a leader in the offense). Lewis adds that trial counsel should have objected to the scoring of offense variable ("OV") 14 on yet another basis: it was not supported by a preponderance of the evidence.

The state court of appeals held this subclaim meritless. *Lewis, 2016 Mich. App. LEXIS 1405, 2016 WL 4008383, at *7-8; see also 2016 Mich. App. LEXIS 1405, [WL] at *8-9.* The district court held that that decision neither contradicted nor unreasonably applied clearly established Supreme Court precedent. Among other reasons the district court held that that was so was this one: there was no prejudice.

HN9[↑] The *Sixth Amendment*, as applied to the states through the *Fourteenth Amendment*, "requires that each element of a crime be proved to a jury beyond a reasonable doubt." *Hurst v. Florida, 577 U.S. 92, 97, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016); see also Sullivan v. Louisiana, 508 U.S. 275, 277-78, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).* Something can be an element even if not so labeled. **[*12]** "[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi v. New Jersey, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).* Hence the Supreme Court laid down this rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id. at 490.* "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).* The same rule applies to any facts that increase the mandatory minimum sentence. *See Alleyne v. United States, 570 U.S. 99, 111-12, 116, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).* In short, any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime and, except for prior convictions, must be found by a jury. *Id.*

at 111-12 & n.1, 113 n.2. But this rule applies only to the prescribed range of penalties. If sentencing guidelines are merely advisory, their use does not implicate the *Sixth Amendment*, *United States v. Booker, 543 U.S. 220, 233, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)*, and judicial fact-finding is allowed. *See Alleyne, 570 U.S. at 116*.

At the time of Lewis's trial, the Michigan Court of Appeals had held that Michigan's sentencing guidelines did not **[*13]** provide a mandatory minimum sentence on the basis of any judicial fact-finding.

> While judicial fact-finding in scoring the sentencing guidelines produces a recommended range for the minimum sentence of an indeterminate sentence, the maximum of which is set by law, it does not establish a *mandatory minimum*, therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the *Sixth Amendment* right to a jury trial.

People v. Herron, 303 Mich. App. 392, 845 N.W.2d 533, 539 (Mich. Ct. App. 2013) (citation omitted), *rev'd in part, 498 Mich. 901, 870 N.W.2d 561 (Mich. 2015), and overruled by People v. Lockridge, 498 Mich. 358, 870 N.W.2d 502 (Mich. 2015)*. Hence the trial judge's fact-finding did not violate *Alleyne* (as Michigan caselaw then understood it), and trial counsel's objection to that fact-finding would have failed.

To be sure, it would have preserved the issue for appeal. But the claim would have failed even then. While Lewis's case was on direct appeal, the state supreme court overruled *Herron*. The supreme court held that the sentencing guidelines *were* unconstitutional because they *did* increase the mandatory minimum sentence based on judicial fact-finding. To remedy the problem, the court made the guidelines advisory. *See Lockridge, 870 N.W.2d at 506, 511-12, 514, 520-21, 524*. *HN10*[↑] The court also made the *Lockridge* rule retroactively applicable to all cases pending on direct **[*14]** review. *Id. at 522-24*.

Applying *Lockridge* to Lewis's case, the state court of appeals held that, under the circumstances, the trial judge had erred when finding facts neither admitted by Lewis nor found by the jury. Still, the court held, any error was harmless. *See Lewis, 2016 Mich. App. LEXIS 1405, 2016 WL 4008383, at *7-9*.

On OVs 5 and 14, the court of appeals agreed with Lewis that no judicial fact-finding should have been done and, hence, no points assigned. *Id.* That left OV 13. *HN11*[↑] "If the sentencing offense was part of a pattern of felonious criminal activity involving three or more crimes against a person, the trial court must score OV 13 at 25 points." *2016 Mich. App. LEXIS 1405, [WL] at *7* (quoting *People v. Bemer, 286 Mich. App. 26, 777 N.W.2d 464, 467 (Mich. Ct. App. 2009)*). With an exception not relevant here, *see Bemer, 777 N.W.2d at 467-68*, this further rule applies: "When determining the appropriate points under [OV 13], 'all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.'" *Lewis, 2016 Mich. App. LEXIS 1405, 2016 WL 4008383, at *7* (quoting *Bemer, 777 N.W.2d at 467*).

In this case, Lewis was convicted of second-degree murder and armed robbery—both found by the jury. That made two crimes against a person. And in 2010, Lewis had been convicted of armed robbery—as he admitted. That made the third conviction. Hence, the state court of appeals concluded, Lewis was properly assigned 25 **[*15]** points for OV 13. The Constitution had not been violated in assigning points for OV 13, for there had been no judicial fact-finding. The underlying facts had either been found by a jury or admitted by Lewis. *Id.; see also 2016 Mich. App. LEXIS 1405, [WL]*

*at *9*.

The court of appeals then considered prejudice. The trial judge had assigned Lewis an OV score of 130. This placed him in a sentencing guidelines range of 315 to 525 months on the applicable grid. The court of appeals subtracted 25 points: 15 for OV 5, ten for OV 14, reducing the OV score to 105. But Lewis still fell within the same guidelines range because he still fell in the same grid: 315 to 525 months. Thus, there had been no prejudice. *2016 Mich. App. LEXIS 1405, [WL] at *9*; *see also 2016 Mich. App. LEXIS 1405, [WL] at *8*. And as the district court pointed out, if there was no prejudice, there was no ineffective assistance of counsel.

Reasonable jurists could not disagree with the district court's determination that the state courts' rejection of this subclaim neither contradicted nor unreasonably applied clearly established Supreme Court precedent.

Miscellany. Lewis argues that trial counsel failed to "file certain motions, request an evidentiary hearing, and pursue certain lines of questioning at trial," and failed to provide appellate **[*16]** counsel with the casefile. The state court of appeals rejected this subclaim. As to the evidentiary-hearing and lines-of-questioning arguments: The state court of appeals noted that Lewis had not given any details regarding the alleged omissions or explained their relevance, then held that his "failure to provide any authority or to identify evidence from the record to support his claim constitutes an abandonment of this aspect of the issue on appeal." *Lewis, 2016 Mich. App. LEXIS 1405, 2016 WL 4008383, at *5*. Similarly—the court held—ineffectiveness of trial counsel was not shown by the failure to turn the file over to appellate counsel, because Lewis failed to detail what questions he wished trial counsel had asked or what motions should have been filed. Thus, Lewis failed to "overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Id.* (quoting *People v. Trakhtenberg, 493 Mich. 38, 826 N.W.2d 136, 143 (Mich. 2012)*). ***HN12***[↑] "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland, 466 U.S. at 690*.

Noting that Lewis "does not respond to the court of appeals' analysis in any way [but] simply restates the argument he made to the court of appeals," the district court held that he failed to overcome **[*17]** the *§ 2254(d)* barrier. Reasonable jurists could not disagree.

Finally, there is Claim 4: Lewis should be resentenced because the trial court scored the offense variables based on judicial fact-finding. But when the magistrate judge recommended denying relief, Lewis failed to object, thus failing to preserve the claim for appellate review. *See Wright v. Holbrook, 794 F.2d 1152, 1155 (6th Cir. 1986)*.

It is true that Lewis raised the ineffective-assistance version of the claim in his objections. But that preserved only the ineffectiveness argument, not the underlying claim. *See Lott v. Coyle, 261 F.3d 594, 612 (6th Cir. 2001)*. Reasonable jurists could not disagree.

Accordingly, Lewis's application for a certificate of appealability is **DENIED**.

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